

INTRODUCTION

After decades of exponential growth, China has transformed from a stagnant, impoverished autarky to the world's second largest economy highly integrated in global supply chains, and numerous Chinese firms have embarked on an overseas business expansion of an unprecedented scale. Against that backdrop, many Chinese investors have ventured into the highly competitive, strategically important US market. Prior to the onset of the US–China trade war, the United States stood out as the largest national recipient of Chinese outbound foreign direct investment (FDI).¹ Though ensuing confrontation between the two countries has hampered the investment flow, most of the largest Chinese investors have been hesitant to withdraw from the US market, and some have even doubled down, further expanding their US operations despite the escalating US–China geopolitical rivalry.²

With business presence comes extensive exposure to the US legal system, which is notorious for its complexity and peculiarity. The multifaceted system comprises different levels of courts, each with its own set of rules, procedures, and requirements. The sheer volume of laws, regulations, and legal precedents is immense and, depending on the subject matter areas, substantive laws may vary significantly across different states. Additionally, social, political, and policy concerns may factor into

¹ Ji Li, *THE CLASH OF CAPITALISMS? CHINESE COMPANIES IN THE UNITED STATES* 42 (2018).

² 2022 Annual Business Survey Report on Chinese Enterprises in the United States 22 (June 2022), www.cgccusa.org/wp-content/uploads/2022/07/%E3%80%90FINAL%E3%80%91CGCC-2022-Annual-Report-interactive.pdf.

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judicial decision-making process, adding another layer of complexity. As a result, legal disputes can take years to resolve, and the outcome is not always predictable, even for experts in the field. In brief, managing US legal risks is a daunting task even for highly sophisticated American companies, let alone Chinese investors that have survived and thrived in a home-state institutional environment where law often assumes a secondary role in business transactions and dispute resolution. However, those firms that have learned to navigate the system may leverage the complex legal framework to gain a competitive edge over rivals.³ More importantly, Chinese investors facing an increasingly hostile regulatory environment in the United States may find litigation the only effective means to protect their investment from unfair US government treatment.⁴ One question naturally follows: How do they negotiate the omnipresent and consequential US legal risks and opportunities?⁵

As the US–China rivalry escalates, Chinese companies operating in the United States have captured a great deal of public attention, so there is abundant media coverage when they show up in US courts. Lawsuits filed by or against Huawei and TikTok, for instance, regularly make the front pages of major international news outlets.⁶ But what appear to the public as stories that stimulate their curiosity are often matters of life and death for the Chinese companies. When the federal government took action to exclude Huawei from the US market, the company sought legal remedy, and its loss in court resulted in substantial downsizing of the company's expansive

³ Bruce C. Rudy & Stephanie L. Black, *Attack or Defend? The Role of Institutional Context on Patent Litigation Strategies*, 44 J. MNGT. 1226, 1227 (2018).

⁴ See Chapter 6 for more discussion.

⁵ Note that, for the purposes of this book, “Chinese companies” refers to companies owned by Chinese investors that operate within the United States.

⁶ See, e.g., Cecilia Kang, *Indiana Sues TikTok for Security and Child Safety Violations*, N.Y. TIMES (December 7, 2022), www.nytimes.com/2022/12/07/technology/tiktok-lawsuit.html; Paul Mozur & Austin Ramzy, *Huawei Sues U.S. Government Over What It Calls an Unfair Ban*, N.Y. TIMES (March 6, 2019), www.nytimes.com/2019/03/06/business/huawei-united-states-trade-lawsuit.html; Dan Strumpf, *Huawei Sues the U.S., Says Congress Acted as “Judge, Jury and Executioner,”* WALL STREET J. (March 6, 2019), www.wsj.com/articles/huawei-sues-the-u-s-challenging-a-law-signed-by-president-trump-11551924208; Joseph De Avila, *Parents of Two Children Sue TikTok After Alleging They Died from Doing “Blackout Challenge,”* WALL STREET J. (July 7, 2022), www.wsj.com/articles/parents-of-two-children-sue-tiktok-after-alleging-they-died-from-doing-blackout-challenge-11657212025; Demetri Sevastopulo, *Huawei Challenges Its Designation as a Threat to U.S. Security*, FINANCIAL TIMES (February 9, 2021), www.ft.com/content/b7c2294d-9207-4fae-8fed-d63a80c99618.

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US operations.⁷ TikTok also sued after US President Trump issued an executive order to ban the app, and its legal success allowed the Chinese-owned company to continue to grow.⁸ More recently, the state government of Montana took the lead in issuing a total ban of TikTok, and the company immediately filed a lawsuit challenging its constitutionality.⁹ The litigation behavior and preferences of Chinese companies in the United States have direct impacts not only on their global operations but also on intricate US–China relations.¹⁰

US lawsuits involving Chinese-invested firms also raise novel and important legal issues. Never has the United States been so connected economically with a foreign country it so profoundly distrusts. The tensions between the economic integration of the two superpowers and their soaring geopolitical contests spawn difficult issues for courts, as the former determines that a vast number of Chinese parties maintain a normal presence in the United States and carry on routine commercial transactions. Yet because of the geopolitical rivalry, they are easy targets of suspicion, discrimination, and outright hostility, which is further aggravated by the lack of knowledge about China and the enormous institutional gaps between the two countries. To illustrate, consider the lawsuit *Ralls v. The Committee on Foreign Investment in the United States (CFIUS)*. As will be detailed later in this book, the plaintiff in this case, a US firm owned by a large Chinese company, made an otherwise mundane investment in Oregon. Because the property it acquired is adjacent to a military facility, CFIUS deemed it a threat to national security and ordered immediate divestment. Throughout the process, however, the agency gave no explanation to the Chinese investor, and due to the onerous restraints over the compelled divestment, the investor stood to incur substantial losses.¹¹ Hence the lawsuit, the first one against the powerful US government agency since its creation decades before. Much to the surprise of those familiar with US law governing foreign investment review national security screening, the Chinese investor eventually prevailed.¹² The federal appellate court ruled that foreign investors are

⁷ See more details about the cases filed by Huawei in Chapter 6.

⁸ See Chapter 6 for more detailed analysis of the lawsuits.

⁹ David McCabe & Sapna Maheshwari, *TikTok Sues Montana, Calling State Ban Unconstitutional*, N.Y. TIMES (May 22, 2023), www.nytimes.com/2023/05/22/technology/tiktok-montana-ban-lawsuit.html.

¹⁰ See more details about the cases filed by Huawei in Chapter 6.

¹¹ Ji Li, *Investing Near the National Security Black Hole*, 14 BERKELEY BUS. L.J. 1, 8 (2017).

¹² *Id.*, at 26.

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entitled to the same constitutional protection as domestic parties and CFIOUS must follow due process in depriving them of their property rights.¹³ The unprecedented ruling put legal boundaries on the hitherto nearly unlimited discretion of the powerful federal agency. As will be elaborated, a growing number of Chinese companies have been litigating in US courts, and new legal issues abound. The United States being a common law country, court judgments generally bind future cases.¹⁴ Therefore the lawsuits involving Chinese companies have been reshaping the contours of substantive US laws in various subject matter areas such as conflict of laws, comity, sovereign immunity, and national security review of foreign investment.¹⁵

Moreover, the US legal experiences of Chinese companies have become integral to the intricate and consequential bilateral relations. Facing an increasingly adverse investment environment, some of the companies have turned to their home government for assistance.¹⁶ However, with limited human resources, the Chinese government has urged Chinese investors to exhaust available legal remedies before seeking diplomatic help.¹⁷ Therefore, the investors' pursuit of legal action in the United States partially determines the timing, scope, and manner of possible intervention by the Chinese government. As vividly illustrated by the extradition case for Meng Wanzhou (i.e., Huawei's CFO),¹⁸ as well as the constitutional cases against Trump's TikTok ban,¹⁹ legal strategies figure prominently in the political dynamics of the intensifying superpower rivalry.

Furthermore, how Chinese companies negotiate US legal risks also raise important theoretical questions. By definition, multinational companies (MNCs) straddle at least two different institutional settings. If the home state and the host state share similar values, norms, and legal systems, smooth adaptation is generally expected. Canadian companies, for instance, make substantial direct investments in the

¹³ *Id.*, at 8.

¹⁴ Judges sometimes make decisions that they intend not to bind future cases. Such decisions are usually not published.

¹⁵ See more discussion of the cases in Chapter 6.

¹⁶ Ji Li, *In Pursuit of Fairness: How Chinese Multinational Companies React to U.S. Government Bias*, 62 HARV. INT'L L.J. 375, 397 (2021).

¹⁷ *Id.*, at 398.

¹⁸ Drew Hinshaw, et al., *Inside the Secret Prisoner Swap That Splintered the U.S. and China*, WALL STREET J. (October 27, 2022), www.wsj.com/articles/huawei-china-meng-kovrig-spavor-prisoner-swap-11666877779.

¹⁹ See more details of the TikTok cases in Chapter 6.

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United States, yet most of them are largely indistinguishable from local investors. However, if a stark contrast exists between an MNC's home and host states, as is the case for Chinese companies operating in the United States, the MNC's reactions to the institutional heterogeneity are both uncertain and under-explored. Of particular interest for socio-legal scholars is how differences in the companies' dual operational environments implicate their preferences and behavior as they interact with the US legal system. In addition, state-owned enterprises dominate Chinese outbound investment. Does the peculiar ownership structure, a defining feature of China's state capitalism that distinguishes Chinese companies from those based in Europe, Japan, and most other countries, have any notable effect on the way Chinese companies negotiate US legal risks? If so, how?

In summary, questions about the experiences of Chinese companies with the US legal system are of practical, policy, and theoretical importance, yet they have evaded academic attention. One may attribute the neglect to the lack of empirical evidence. After all, Chinese companies did not make substantial direct investments in the United States until around 2014 (see Figure 1.2 in Chapter 1), when data collection for this book began. For the same reason, scholars have not yet formulated an analytical framework suitable for exploring Chinese investors' management of host-state legal risks. Of course, the complexity of the topic is also a factor, as it spans multiple subject areas traditionally associated with different disciplines, thwarting any effort to devise a unified analytical framework.

Adopting an interdisciplinary approach, this book narrows the gaps by formulating a model of institutional duality and then applying it to analyze a rich body of empirical evidence including multiyear survey data of Chinese companies doing business in the United States, 176 interviews with in-house counsel, lawyers, managers, and other professionals who have served them, and many legal archives and secondary materials. To look ahead to Chapter 1, let me briefly sketch the dual institutional model. It has been well recognized that foreign companies operating in the United States are under constant isomorphic pressure from its formal rules and informal norms, thus their preferences and behaviors tend to converge with what is expected of local US companies.²⁰ Simply put, foreign investors generally heed the proverb

²⁰ See Chapter 1 for more discussion.

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“When in Rome, do as the Romans do.” Less studied, however, is the influence of MNCs’ home-state institutions. A variety of mechanisms, ranging from intra-organizational personnel control to extraterritorial application of formal rules, may amplify the home-state institutional influence of Chinese investors and channel it to their US operations. The dual institutional pulls from the host and the home states, which converge in some areas and diverge in others, will modify how Chinese companies interact with other key actors in the US legal system.

Applying the dual institutional model, this book explores how Chinese companies negotiate US legal risks and opportunities – a broad question that spans several subject areas and research disciplines – by making four interrelated inquiries about: (1) the internal legal capacity of Chinese companies in the United States; (2) their selection of US lawyers and consumption of US legal services; (3) litigation by Chinese companies in US courts, and (4) their legal strategies for coping with government mistreatment in the United States. Each of the inquiries begins with a comparative analysis of relevant dual institutional environment, with a focus on the under-explored home-state institutions of Chinese companies. Thereafter it examines pertinent empirical evidence, interrogates key findings from prior research, and investigates new questions of theoretical and policy interest, especially those concerning the effects of state ownership and home-state normative influence on the companies when they navigate the complex, stringent US legal system. Before proceeding, a clarification of the terms will be helpful. By “Chinese companies,” I mean companies that operate mainly in the United States and are owned by Chinese investors. By this definition, TikTok is considered a Chinese company, though its global headquarters is in Los Angeles and the United States is at the center of its business and the dominant source of its revenue. Wherever necessary, this book distinguishes “Chinese companies” from Chinese MNCs, which refers to China-based global business enterprises, most of which also have established US-based operations.

This book proceeds as follows. Chapter 1 provides readers with the necessary background knowledge to understand Chinese companies in the United States and the questions concerning their host-state legal experiences. It begins by surveying Chinese direct investments in the United States and their major attributes. Using descriptive survey data, the chapter then elaborates on the legal hazards Chinese investors must traverse in order to conduct business in the highly complex US institutional environment. Next, the chapter briefly reviews the cumulative

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knowledge and highlights its inadequacy. As noted, Chinese companies in the United States raise novel and under-researched questions, including questions about state-owned firms that tend to downplay profit-maximization and those concerning the influence of the home-state normative institutions. Chapter 1 closes by outlining a new analytical framework, which encompasses diverse corporate ownership structures and dual institutional influences, for researching how Chinese companies cope with US legal risks. This framework will be applied to all the substantive chapters to follow.

Chapter 2 delves into the in-house legal capacity of Chinese companies operating in the United States. As just noted, the US legal and regulatory regime can be confusing and cumbersome even for American companies, let alone investors from a developing country known for its relatively feeble judicial system. This chapter explores whether Chinese companies operating in the United States choose to develop internal legal capacity or instead rely on external lawyers to navigate the complex US legal landscape. It also investigates key characteristics of the in-house legal managers, such as their career bases and professional qualifications. As will be demonstrated, Chinese companies differ in their approaches to developing in-house legal capacities, and the chapter will examine possible factors that may explain such variations, with a focus on the state ownership of the companies and the cultural differences they experience in the United States.

Chapter 3 explores Chinese companies' use of US legal services. "When in trouble, find a lawyer," commented an executive of a Chinese company on succeeding in the United States.²¹ Needless to say, lawyers play a crucial role in assisting Chinese companies, even those equipped with in-house legal counsel, as they cope with the US legal system. Chapter 3 studies how Chinese companies select their US lawyers and consume US legal services. The US legal market, the world's largest and most sophisticated, boasts more than 1.3 million lawyers.²² How do Chinese investors choose their legal counsel? What lawyer attributes do they consider important: practice experience, fee rate, Chinese background, credentials, government connection, or others? Additionally, Chapter 3 will examine the quantity of US legal services purchased by Chinese companies, which determines their bargaining

²¹ LI, *supra* note 1, at 106.

²² ABA PROFILE OF THE LEGAL PROFESSION 22 (2022), www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf.

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power and the extent to which their lawyer selection preferences will have an impact on the US legal market. Additionally, within the dual institutional framework, the chapter assesses how their lawyer selection preferences and legal service consumption may be associated with the ownership structure of the Chinese investors and other variables of interest.

Chapter 4 explores the US litigation experiences of Chinese companies. It begins with a summary description of the data about their dispute resolution in the United States and demonstrate that a small fraction of the disputes end up in US courts. The chapter then looks at the companies' comparative litigation preferences: Are they more inclined to sue in the United States than in China? As will be shown, the empirical evidence is mixed. Though most of them regard the US judiciary as impartial, only a minority are more willing to litigate in the United States.²³ And the relative reluctance to sue reflects both cost consideration and the home-state normative influence. Next, Chapter 4 examines the decision-making power regarding US litigation decisions. Among the key players (i.e., US lawyers, in-house counsel, local managers, and the Chinese headquarters), most Chinese companies would delegate the decision to US lawyers, but a significant minority defer to their headquarters. The chapter further explores the varying roles of US lawyers and the Chinese headquarters, and the analysis focuses on state ownership, cultural differences, and other variables derived from the dual institutional model. Additionally, this chapter statistically examines the US litigation experiences of Chinese companies.

Chapter 5 continues the inquiry about litigation by Chinese companies in the United States, from two different angles. First, it presents detailed comparative case studies of three prominent Chinese companies with disparate ownership structures, from different sectors, and having different US investment experiences: Lenovo, Huawei, and Fuyao Glass. The comparison concentrates on three key aspects: the US lawyers and law firms representing the three companies in courts, their in-house counsel, and the number and types of federal lawsuits they have litigated in US courts. The case studies tie together the empirical findings from prior chapters and illuminate them in the context of the companies' US litigation. Second, the chapter analyzes hand-collected data of all federal lawsuits involving a large sample

²³ Li, *supra* note 1, at 72.

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of Chinese companies. Breaking down the dataset by the role of the companies (as defendant versus as plaintiff), the chapter investigates possible associations between various institutional and firm-specific variables of interest (e.g., ownership structure, cultural challenges, and size of US investment), and the number of lawsuits they litigate in federal courts.

Chapter 6 turns to a specific type of legal action – Chinese companies suing US government entities. The US–China geopolitical tensions have led to an increasingly hostile business environment for Chinese investors. With US governments at various levels enacting rules and policies aimed at punishing, containing, or outcompeting China, Chinese investors now face an amplified risk of government mistreatment. The chapter will investigate the role of litigation as a mitigating strategy for Chinese investors. It presents detailed case studies of legal resistance by four prominent Chinese companies – Sany, Huawei, TikTok, and China Telecom – against the US government. The chapter then examines survey data about the coping measures Chinese companies would consider in response to perceived host-government mistreatment, with a particular focus on institutional and corporate factors that may modify their inclination to seek legal recourse. The analysis suggests that in this subject area the formidable coercive pressure of the host state obscures the influence of home-state institutions. Moreover, the chapter examines recent survey data on legal actions taken by Chinese companies against the US government. The final chapter is the Conclusion, which outlines the policy and theoretical contributions of this book and raises questions for future research.

CHAPTER ONE

OVERVIEW OF CHINESE COMPANIES IN THE US LEGAL SYSTEM

We invest in the US for its rule of law, yet the biggest challenge for us is also its rule of law.

—Manager of a Chinese company in the United States

In the late 1970s, China emerged from the shadows of the Cultural Revolution as an autarky steeped in extreme poverty, leaving few Chinese businesses with the means or desire to invest abroad. Fast forward to today and that once impoverished nation has since evolved into the world's second largest economy.¹ Chinese companies have channeled billions of dollars into overseas investments,² igniting intense debates across the globe. While some have welcomed this new influx of capital, there is a growing concern among others that these Chinese investors might export unethical business practices, show disregard for local cultures, breach host-state laws, and clandestinely manipulate host-state politics to align with the interests of the Chinese government.³ Consequently, an extensive body of literature has emerged that analyzes the impacts of China's global economic expansion. However, no one has so far explored how Chinese

¹ World Bank, Gross Domestic Product 2022, World Development Indicators database, https://databankfiles.worldbank.org/public/ddpext_download/GDP.pdf.

² In 2015, Chinese investors invested in 6,532 overseas companies, an increase of 14.7 percent from 2014. *Summary Statistics of Chinese Outbound Direct Investment (Non-banking) 2015*, Ministry of Commerce of the People's Republic of China, at <http://hzs.mofcom.gov.cn/article/date/201601/20160101239873.shtml>.

³ Ji Li, *THE CLASH OF CAPITALISMS? CHINESE COMPANIES IN THE UNITED STATES* 18–19 (2018).