

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).

companies maneuver within the sophisticated legal institutions of developed host nations, such as the United States.

Chinese investors obviously face mounting challenges in navigating the US legal system. As will be detailed shortly, corporate management and business transactions in China often relegate the legal system to a more peripheral role. Having thrived in such a home-state environment, Chinese companies encounter formidable institutional obstacles when operating in developed countries with robust, strict, and complex legal systems. Obviously, nowhere else are the hurdles as high as in the United States. How then do Chinese investors negotiate the omnipresent legal risks? Will they persist in treating law as an inconsequential or purely cosmetic aspect of their operations (inertia), adapt to mirror the behavior of US companies (isomorphism), or display mixed responses shaped by both home- and host-state institutions (dualism)? This book sets out to answer these questions by exploring a range of interconnected topics.

This chapter begins with an overview of China's outbound direct investment, particularly emphasizing Chinese foreign direct investment (FDI) in the United States. It then introduces a variety of research questions, ranging from the role of in-house legal counsel in Chinese companies to their legal responses when confronted with unfair treatment by the US government. Next, this chapter selectively summarizes and critically reviews the existing literature pertinent to the interactions between multinational companies (MNCs) and the complex US legal system. Subsequently, it formulates a comprehensive theoretical framework predicated on dual institutional influence, which will be applied consistently throughout the book. The chapter concludes with a description of the research methodology.

1.1 CHINESE DIRECT INVESTMENT IN THE UNITED STATES

Despite the scrutiny it has received, outbound investment from China is a rather recent phenomenon. In the post-Cultural Revolution decade, the Chinese government strictly limited outward capital flow due to a dire shortage of foreign exchange reserves.⁴ Even after the initial restrictions were loosened,⁵ Chinese outbound FDI remained at a low

⁴ Yadong Luo, et al., *How Emerging Market Governments Promote Outward FDI: Experience from China*, 45 J. WORLD BUS. 68, 73 (2010).

⁵ DAVID SHAMBAUGH, *CHINA GOES GLOBAL: THE PARTIAL POWER* 177 (2013).

level of around \$1.2 billion.⁶ A series of embezzlement scandals and investment failures subsequently led the State Council to conclude that China was “unprepared for large-scale foreign investment,”⁷ resulting in tighter controls and a 20 percent annual decrease in outward investment proposals from 1992 to 1996.

However, China’s continuous economic growth, fueled in part by increasing inbound investment and a thriving international trade, boosted its foreign exchange reserves. Some government officials started advocating for less restrictive policies and encouraged “competitive” state-owned enterprises (SOEs) to invest abroad.⁸ In 2000, a Politburo meeting developed a “Going Out” strategy to promote China’s outbound FDI, which the Chinese Communist Party (CCP) National Congress promptly endorsed as a strategic national policy for fostering economic development.⁹ Against this backdrop, the central government set up institutions to facilitate investment and ratified dozens of investor-friendly bilateral investment treaties.¹⁰ The government also streamlined and decentralized reviews for outbound investment proposals and supplied Chinese investors with low-cost capital. For example, state-owned banks created overseas loan programs,¹¹ and the State Administration of Foreign Exchange simplified procedures and reduced thresholds for Chinese firms to obtain foreign currencies for overseas investments.¹² In the early 2010s, as foreign exchange reserves continued to multiply, the Chinese government replaced the investment approval regime with a reporting system.¹³

As the government policies evolved, so too did the characteristics of China’s outbound investment. Due to earlier restrictions and the initial composition of the Chinese economy, state-owned conglomerates had been the dominant players, responsible for 75 percent of the total

⁶ *Id.*

⁷ Opinions on Strengthening the Management of Overseas Investment Projects (关于加强海外投资项目管理意见 1991).

⁸ SHAMBAUGH, *supra* note 5, at 175.

⁹ Luo, et al., *supra* note 4, 74–75.

¹⁰ Karl P. Sauvant & Michael D. Nolan, *China’s Outward Foreign Direct Investment and International Investment Law*, 18 J. INT’L ECON. L. 893, 933 (2015).

¹¹ Yuan, et al., *Zhongguo Yinhangye “Zhou Chu Qu” Yinlai Kuaisu Fazhanqi* [Chinese Banking Industry “Going Global” Entering a Period of Fast Growth], PEOPLE’S DAILY 3 (August 4, 2016), <http://finance.people.com.cn/n1/2016/0804/c1004-28609135.html>.

¹² Guo Song, “Zou Chu Qu” Waihui Zhengce Zhichi Tixi [“Going Global” Foreign Exchange Policy Support System], ZHONG GUO JIN RONG [CHINA FINANCE] 31 (2015).

¹³ Section 6, Chapter 2, Jingwai Touzi Guanli Banfa [Overseas Investment Management Measures], Order of the Ministry of Commerce No. 3 (2014), www.mofcom.gov.cn/article/b/c/201409/20140900723361.shtml.

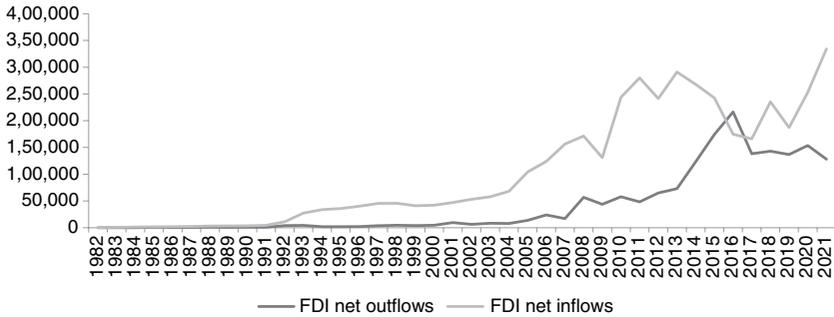


Figure 1.1 FDI inflows and outflows, China 1982–2021 (millions of US dollars)
 Source: World Bank: World Development Indicators, <https://databank.worldbank.org/source/world-development-indicators> (most recent is 2021 data, last checked on March 31, 2023).

amount of Chinese outbound investment until 2010.¹⁴ The majority of these investments were concentrated in a few strategic sectors such as energy and transportation.¹⁵ In the following decade, however, private Chinese investors from various industries significantly increased their acquisitions of foreign assets and surpassed the SOEs as the primary driving force behind China’s investment outflow.¹⁶

However, the growth of China’s outward FDI reached its peak around 2016 (see Figure 1.1), as the central government, alarmed by a precipitous drop in its foreign exchange reserves and concerned about capital flight, reinstalled certain approval requirements for major outbound investment deals.¹⁷ Meanwhile, an abrupt deterioration of US–China relations following the election of Donald Trump dimmed the prospects for the Chinese economy and alerted Chinese investors to geopolitical risks and uncertainties associated with overseas investments, causing a sharp drop in China’s outbound FDI.

Chinese FDI in the United States follows a similar trajectory (see Figure 1.2). Before the trade war began, the United States had been

¹⁴ SHAMBAUGH, *supra* note 5, at 178.
¹⁵ Shannon Tiezzi, *China Urges Companies to “Go Global,”* THE DIPLOMAT (December 25, 2014), <http://thediplomat.com/2014/12/china-urges-companies-to-go-global/>.
¹⁶ Zhang Xiaohu, *Minying Qiye Duiwai Touzi Chaoyue Guoqi Zhuanjia Zhizhao Bi Xianjing [Private Enterprises Invest More Overseas Than State-Owned Enterprises; Experts Offer Tips to Avoid Pitfalls]*, REN MIN WANG (June 20, 2016), <http://finance.people.com.cn/n1/2016/0620/c1004-28463387.html>.
¹⁷ Gabriel Wildau, et al., *China to Clamp Down on Outbound M&A in War on Capital Flight*, FINANCIAL TIMES (November 29, 2016), www.ft.com/content/2511fa56-b5f8-11e6-ba85-95d1533d9a62.

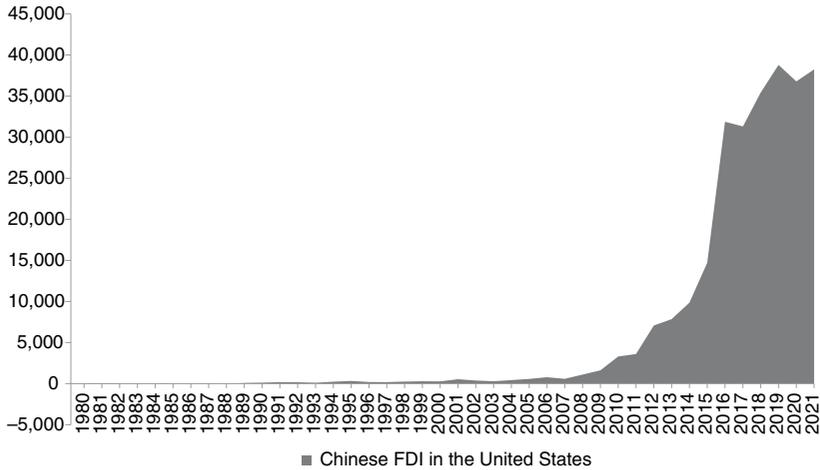


Figure 1.2 Chinese FDI in the United States 1980–2021 (direct investment position on a historical-cost basis; millions of US dollars)
 Source: Bureau of Economic Analysis, US Department of Commerce, www.bea.gov/data/intl-trade-investment/direct-investment-country-and-industry.

the largest national recipient of China’s outward investment.¹⁸ In contrast to those in resource-rich developing countries, Chinese investments in the United States span various sectors, including real estate, automotive, biotech, and entertainment.¹⁹ Initially, the vast majority of the Chinese investors had embraced long-term business plans and intended to reinvest most or all of their US profits.²⁰ However, Trump’s anti-China policies and the ensuing bipartisan consensus on China as the “most consequential strategic threat” aggravated the already challenging legal and regulatory environment for Chinese investors.²¹ New FDI from China dropped significantly, and some investors opted to downsize or even shut down their US operations. Nonetheless, most Chinese investors with substantial US businesses have been reluctant to exit this large, strategically important market.²²

¹⁸ Cassie Gao & Thilo Hanemann, *Chinese FDI in the US: Tripling Down on America* RHODIUM GROUP (July 22, 2016), <http://rhg.com/notes/chinese-fdi-in-the-us-tripling-down-on-america>.

¹⁹ *Id.*

²⁰ LI, *supra* note 3, at 40.

²¹ National Security Strategy 11 (October 2022), www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf.

²² 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.

TikTok's experience in the United States serves as a fitting example. ByteDance, the Chinese owner of TikTok, was founded in 2012 by a twenty-nine-year-old Chinese entrepreneur with an engineering background. After establishing a successful business model in China, ByteDance entered the US market by acquiring Musical.ly in November 2017 and rebranding it as TikTok, a platform for sharing user-generated shortform videos through multifunctional mobile apps.²³ Its proprietary algorithm proved highly effective at retaining users, and in March 2023, TikTok reported as many as 150 million monthly active users in the United States.²⁴

With US investment comes litigation. Between the acquisition of Musical.ly and December 2020, TikTok was involved in forty-three lawsuits. Initially, the company had minimal interactions with the US legal system, with only one suit filed against TikTok in 2017 and no litigation in 2018. In 2019, just four lawsuits involved TikTok, a negligible number considering its rapidly growing US operations. However, in 2020, the company participated in thirty-eight US lawsuits. TikTok dealt with a wide variety of cases, not uncommon for a company of its size. Of the total forty-three cases, thirty-nine were filed against TikTok, and among the four lawsuits initiated by TikTok, three named the US government as the defendant.²⁵ These three high-profile lawsuits warrant detailed analysis, which readers will find in Chapter 6.

The US legal experiences of TikTok are not unique. From Huawei to Bank of China, Chinese companies with operations in the United States increasingly appear in court, often as defendants. But from time to time, Chinese companies take the initiative and “raise the legal weapon” to protect their US interests. However, given the vast institutional differences between China and the United States, the ways in which Chinese companies navigate the US legal system remain an important yet unexplored question.

²³ Musical.ly is a Shanghai-based company with a substantial user base in the United States. See, Liza Lin & Rolfe Winkler, *Social-Media App Musical.Ly Is Acquired for as Much as \$1 Billion*, WALL STREET J. (November 9, 2017), www.wsj.com/articles/lip-syncing-app-musical-ly-is-acquired-for-as-much-as-1-billion-1510278123?mod=article_inline.

²⁴ David Shepardson, *TikTok Hits 150 Mln U.S. Monthly Users, up from 100 Million in 2020*, REUTERS (March 20, 2023), www.reuters.com/technology/tiktok-tell-congress-it-has-150-million-monthly-active-us-users-2023-03-20/.

²⁵ All the data for this paragraph were collected from Bloomberg Law, www.bloomberglaw.com.

1.2 LITERATURE ON MNCs' INTERACTIONS WITH THE US LEGAL SYSTEM

While Chinese companies may not have received as much attention from socio-legal scholars, the broader debate about how MNCs negotiate US legal risks and opportunities has generated several streams of insightful literature. One stream focuses on the idea of American legal exceptionalism. This theme stems from a comparison of the US approach to legal ordering, termed “adversarial legalism,” and the systems found in other economically advanced democracies. The distinct “American way of law,” characterized by “formal legal contestation” and “litigation activism,”²⁶ builds on a network of interconnected institutions:

An adversarial, lawyer-driven system of litigation shaped by the right to trial by jury; politically-selected, policy-minded judiciaries; a large, entrepreneurial and creative legal profession, armed with powerful tools of pretrial discovery; and a legal culture still pervaded by the idea that law and courts are or should be instruments for effectively protecting individual rights, improving governance, and controlling the exercise of political and economic power.²⁷

To substantiate the notion of American legal exceptionalism, researchers have examined the legal and regulatory experiences of MNCs in the United States.²⁸ The empirical findings suggest that MNCs operating in the US market face additional burdens in the form of onerous legal service expenses and considerable opportunity and compliance costs, which, “while difficult to quantify,” are “both salient and troublesome.”²⁹ Without denying some benefits of lawyer-dominated contestation in dispute resolution and government regulation,³⁰ Kagan and colleagues argue that the US system has “demonstrable, counterproductive consequences,” as it pushes foreign investors “toward a more defensive, legalistic relationship with American regulatory officials, consumers, and employees than with their counterparts in other countries.”³¹ The insightful research, however, focuses only on MNCs headquartered in

²⁶ ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 11 (2019).

²⁷ *Id.*, at 263–64.

²⁸ LEE AXELRAD & ROBERT A. KAGAN, *REGULATORY ENCOUNTERS: MULTINATIONAL CORPORATIONS AND AMERICAN ADVERSARIAL LEGALISM* 17 (2000).

²⁹ *Id.*, at 23.

³⁰ *Id.*

³¹ *Id.*

Japan, Canada, Germany, and other post-industrial nations considered to be US allies,³² and includes only a few case studies from each country, raising questions about the generalizability of the findings.³³

Another branch of literature, primarily developed by international business scholars, examines the “liability of foreignness” that non-US based MNCs bear when navigating the US legal system. A notable empirical study in this area discovered that foreign-headquartered MNCs are sued more often in the United States than their US counterparts.³⁴ Once again, the study only considered MNCs from developed countries, likely due to the historical absence of MNCs from developing countries in cross-border investment. Moreover, the existing research has overlooked important topics pertinent to US litigation, such as foreign MNCs’ interactions with US lawyers and their development of internal US legal capacity.

Two additional research streams have indirectly explored foreign-based MNCs within the US legal context. First, scholars have debated potential biases against foreign parties in US courts, with one side contending that foreigners and domestic parties receive equal judicial treatment,³⁵ and the other presenting empirical evidence of systematic bias.³⁶ Despite these opposing viewpoints, a recent study has found indirect evidence of fair treatment – most Chinese companies with US investments have expressed a positive view of the host-country judiciary.³⁷ Second, some legal scholars have studied “forum shopping” by foreign parties seeking access to the US judiciary.³⁸ Although much of this research concentrates on individual rightholders attempting to sue foreign firms in US courts,³⁹

³² KAGAN, *supra* note 26, at 9.

³³ AXELRAD & KAGAN, *supra* note 28, at 17.

³⁴ John M. Mezas, *Identifying Liabilities of Foreignness and Strategies to Minimize Their Effects: The Case of Labor Lawsuit Judgments in the United States*, 23 STRATEGIC MGMT J. 229, 241 (2002).

³⁵ Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996); Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in US Courts? Before and after 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441 (2007).

³⁶ Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497 (2002).

³⁷ LI, *supra* note 3.

³⁸ Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2010); Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995 (2014); Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579 (2016).

³⁹ Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L. J. 709 (2011); Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753 (2012).

and the evolution of relevant US jurisprudence and its policy implications,⁴⁰ the literature underscores the agency of transnational litigants (particularly their US lawyers) and the complexity of the US legal institutions, both of which are common themes in the chapters that follow.

In summary, while multiple lines of research have delved into the experiences of MNCs within the US legal system, there remains a conspicuous absence of systematic investigation into how MNCs from developing countries, particularly China, negotiate US legal risks. This book endeavors to address this gap by examining a series of interrelated topics, from the internal legal capacity of Chinese companies in the United States to their preferences and behavior regarding litigation. Besides the literature surveyed in this section, subsequent chapters will leverage insights from research in relevant subject areas. For example, although few scholars have studied the in-house legal capacities of Chinese MNCs – a central theme in Chapter 2 – a sizable body of theoretical and empirical research exists on a closely related topic – the global “in-house counsel movement.”⁴¹ Chapter 2 will engage with this scholarship. Likewise, while scant research exists on Chinese companies’ litigation in US courts, prior research on trial selection,⁴² dispute

⁴⁰ Donald Earl Childress III, *When Erie Goes International*, 105 Nw. U. L. REV. 1531 (2011); Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015).

⁴¹ Steven L. Schwarcz, *To Make or to Buy: In-House Lawyering and Value Creation*, 33 J. CORP. L. 497 (2007); Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77 (2011); Jonathan C. Lipson, *Who’s in the House? The Changing Role and Nature of In-House and General Counsel*, 2012 WIS. L. REV. 237; Sida Liu, *Palace Wars over Professional Regulation: In-House Counsel in Chinese State-Owned Enterprises*, 2012 WIS. L. REV. 549; David B. Wilkins, *Is the In-House Counsel Movement Going Global – A Preliminary Assessment of the Role of Internal Counsel in Emerging Economies*, 2012 WIS. L. REV. 251; David B. Wilkins & Vikramaditya S. Khanna, *Globalization and the Rise of the In-House Counsel Movement in India*, in *THE INDIAN LEGAL PROFESSION IN THE AGE OF GLOBALIZATION: THE RISE OF THE CORPORATE LEGAL SECTOR AND ITS IMPACT ON LAWYERS AND SOCIETY* (David B. Wilkins et al. eds., 2017); Fabiana Luci de Oliveira & Luciana Ramos, *In-House Counsels in Brazil*, in *THE BRAZILIAN LEGAL PROFESSION IN THE AGE OF GLOBALIZATION: THE RISE OF THE CORPORATE LEGAL SECTOR AND ITS IMPACT ON LAWYERS AND SOCIETY* (Luciana Gross Cunha ed., 2018).

⁴² George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187 (1993); Peter Siegelman & John J. Donohue III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. LEGAL STUD. 427 (1995); Daniel Kessler, et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233 (1996); Leandra Lederman, *Which Cases Go to Trial?* 49 CASE W. RES. L. REV. 315 (1999).

resolution,⁴³ and other relevant topics provide invaluable analytical building blocks for Chapters 4–6. As will be demonstrated throughout this book, examining Chinese companies' experiences within the US legal system both contributes to, and benefits from, these diverse bodies of literature. Despite the seemingly eclectic theoretical mix, this book consistently applies a unifying theoretical framework of institutional duality, effectively linking all subsequent topical analyses in the remaining chapters.

1.3 THEORETICAL FRAMEWORK OF INSTITUTIONAL DUALITY

This book employs a unified framework of institutional duality to dissect the multifaceted interactions between Chinese companies and the complex, rigorous US legal system. An abundance of research on MNCs has explored the influence of institutional environments on crossborder investments, management, and transactions. Despite its subject matter diversity, this body of research draws its intellectual lineage from two theoretical branches, rational choice institutionalism and sociological institutionalism. As these two strains of neoinstitutionalism have already been extensively reviewed and critiqued, and their overlaps and differences well documented elsewhere,⁴⁴ a succinct overview of each will suffice for the purposes of this book.

Research grounded in rational choice institutionalism implicitly or explicitly portrays human actors as solving optimization problems,⁴⁵ with their choices and preferences constrained by exogenous, behavior-regulating institutions defined variably to suit specific research objectives.⁴⁶ In an analytical review of the literature, Williamson aptly

⁴³ Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996); Carrie Menkel-Meadow, *Mediation, Arbitration, and Alternative Dispute Resolution (ADR)*, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 70 (James D. Wright ed., 2nd ed. 2015).

⁴⁴ See, e.g., Thomas A. Koelble, *The New Institutionalism in Political Science and Sociology*, 27 COMPAR. POL. 231 (1995); Peter A. Hall & Rosemary C. R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936 (1996); Junko Kato, *Institutions and Rationality in Politics – Three Varieties of Neo-Institutionalists*, 26 BRIT. J. POL. SCI. 553 (1996).

⁴⁵ Dani Rodrik, *When Ideas Trump Interests: Preferences, Worldviews, and Policy Innovations*, 28 J. ECON. PERSP. 190 (2014).

⁴⁶ DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3 (1990).

categorizes institutions into four levels, with higher-level institutions “imposing restraints on the level immediately below.”⁴⁷ At the top of this hierarchy are “institutions of embeddedness,” which refers to “norms, customs, mores, and traditions.”⁴⁸ Although leading rational choice scholars acknowledge the significance of high-level informal institutions in shaping individual preferences and behavior,⁴⁹ much of the research in this area is focused on the two levels below – formal institutions safeguarding property rights and governance institutions regulating broadly defined contractual relations – and how these institutions address agency and transaction cost problems.⁵⁰

The collective overlooking of the higher level “institutions of embeddedness” may be attributable to their relative stability.⁵¹ In much of the research adopting this theoretical perspective, informal institutions like social norms tend to remain static, which justifies their analytical exclusion. However, to explore the topics of this book, informal institutions must be taken into account, as they significantly vary between the world’s two largest economies, and the ensuing institutional tensions and conflicts characterize the transnational organizational environment for Chinese companies operating in the United States.⁵²

In contrast, sociological institutionalism places greater emphasis on “institutions of embeddedness” and accentuates the role of institutions as both conferring meaning to human actions and defining their boundaries. Institutions are not merely restrictive; they also engender agency.⁵³ Sociological institutionalists, rather than treating “tastes”

⁴⁷ Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LIT. 595, 596 (2000).

⁴⁸ *Id.*, at 597.

⁴⁹ NORTH, *supra* note 46; John Groenewegen, et al., *On Integrating New and Old Institutionalism: Douglass North Building Bridges*, 29 J. ECON. ISSUES, 467 (1995).

⁵⁰ Williamson, *supra* note 47, at 599.

⁵¹ *Id.*

⁵² While this book adopts the dichotomy of institutions as formal and informal institutions to be consistent with how the questions of interest herein are approached in major socio-legal debates, scholars in other fields such as organizational behavior have divided them into regulative, normative, and cognitive (or cultural-cognitive). See, e.g., Jennifer Palthe, *Regulative, Normative, and Cognitive Elements of Organizations: Implications for Managing Change*, 1 MGMT. & ORG. STUD. 59 (2014). Different typologies, however, should not affect the analytical validity or power of the framework.

⁵³ Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology’s Institutionalism*, 50 INT’L ORG. 325, 343 (1996).

or “preferences” as exogenous or static,⁵⁴ investigate how institutions enable human actors to “construct” their interests and define the set of choices available for “rational” selection. Moreover, they highlight actions that are spurred by concerns for legitimacy or social appropriateness,⁵⁵ or actions that are simply taken for granted,⁵⁶ rather than deliberative, utility-maximizing calculations. Empirically, sociological institutionalists underscore corporate isomorphism in their organizational fields, as opposed to the behavioral and preferential heterogeneity often predicted by rational choice institutionalists.⁵⁷ Additionally, sociological institutionalism often “over-socialize[s]” human actions, downplaying the role of agency as an exogeneous variable.⁵⁸ Under this framework, MNCs tend to be seen as “institutional dopes blindly following the institutionalized scripts and cues around them.”⁵⁹ However, given the multitude and complexity of “institutional pressures from the metaglobal field, the MNC internally, and the idiosyncratic institutional environment of each particular MNC unit,”⁶⁰ as well as the ample space for agency resulting from myriad institutional voids, ambiguities, tensions, and contradictions,⁶¹ the analytical approach

⁵⁴ Rational choice institutionalists also recognize that preferences are not entirely exogenous, but in their studies preference formation tends to be secondary or assumed away. Groenewegen, et al., *supra* note 49, at 470–71.

⁵⁵ As noted by Powell and DiMaggio, this emphasis on legitimacy and social appropriateness does not necessary conflict with the rational choice theory as actors may pursue those ends for their functional values: THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, 33 (Walter W. Powell & Paul J. DiMaggio eds., 2012). See Victor Nee & Richard Swedberg, *Economic Sociology and New Institutional Economics*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 798 (Claude Ménard & Mary M. Shirley eds., 2005).

⁵⁶ W. Richard Scott, *Unpacking Institutional Arguments*, THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 55, at 179.

⁵⁷ Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 1983 AM. SOCIO. REV. 147, 148–49; Tatiana Kostova, et al., *Institutional Theory in the Study of Multinational Corporations: A Critique and New Directions*, 33 ACAD. MGMT. REV. 1001 (2008).

⁵⁸ Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOCIO. 481 (1985).

⁵⁹ John L. Campbell, *Institutional Analysis and the Role of Ideas in Political Economy*, 27 THEORY AND SOCIETY 377, 382 (1998).

⁶⁰ Kostova, et al., *supra* note 57, at 999.

⁶¹ Kostova, et al., *supra* note 57, at 1001. Because of the heterogeneity of their institutional environment, MNCs exhibit greater diversity and complexity than domestic

of sociological institutionalists falls short in explaining MNCs' preferences and behavior in their transnational field.

Incorporating insights from both theoretical approaches,⁶² I devise a dual institutional framework to examine how Chinese companies operating in the United States engage with key components of the host-state legal system. As transnational entities “exposed to two or more cultures, social structures, or sets of routines, one in the home country, and one or more in the host countries in which they operate,”⁶³ MNCs constantly face disparate and sometimes conflicting institutional pressures⁶⁴ that influence their strategies and preferences.⁶⁵ Likewise, any national subsidiary of an MNC encounters “dual institutional pressures originating from its home and host countries.”⁶⁶ When these institutions diverge significantly, as is the case between China and the United States, “competing institutional forces provide different cognitive knowledge, social norms, and regulative policies, which prescribe diverse role models and scripts” for MNC subsidiaries.⁶⁷ Hence, inquiries into how Chinese companies navigate the US legal system must account for the institutional differences and possibly diverging “isomorphic pulls”⁶⁸ from both the home and the host states.⁶⁹ This dual institutional framework extends the rational choice

firms. Martin Kilduff, *The Reproduction of Inertia in Multinational Corporations*, in ORGANIZATION THEORY AND THE MULTINATIONAL CORPORATION 259 (Sumantra Ghoshal & D. Eleanor Westney eds., 1993).

⁶² Koelble, *supra* note 44, at 235.

⁶³ Mauro F. Guillén & Sandra L. Suárez, *The Institutional Context of Multinational Activity*, in ORGANIZATION THEORY AND THE MULTINATIONAL CORPORATION 124–25 (Sumantra Ghoshal & D. Eleanor Westney eds., 2nd ed., 2005).

⁶⁴ Tatiana Kostova & Kendall Roth, *Adoption of an Organizational Practice by Subsidiaries of Multinational Corporations: Institutional and Relational Effects*, 45 ACAD. MGMT. J., 215 (2002).

⁶⁵ Gerhard Schnyder & Dorottya Sallai, *Between a Rock and a Hard Place: Internal and External Institutional Fit of MNE Subsidiary Political Strategy in Contexts of Institutional Upheaval*, 26 J. INT'L MGMT 1, 2 (2020).

⁶⁶ Yanlong Zhang, et al., *Institutional Duality and Political Strategies of Foreign-Invested Firms in an Emerging Economy*, 51 J. WORLD BUS. 451, 453 (2016).

⁶⁷ *Id.*

⁶⁸ D. Eleanor Westney, *Institutionalization Theory and the Multinational Corporation*, 53 ORGANIZATION THEORY AND THE MULTINATIONAL CORPORATION *supra* note 63.

⁶⁹ Kostova, et al., *supra* note 57, at 999; Anne Ngoc Vo & Chris Rowley, *The Internationalization of Industrial Relations? Japanese and US Multinational Companies in Vietnam*, 16 ASIA PACIFIC BUS. REV., 222 (2010); Lin Cui & Fuming Jiang, *State Ownership Effect on Firms' FDI Ownership Decisions Under Institutional Pressure: A Study of Chinese Outward-Investing Firms*, 43 J. INT'L BUS. STUD. 264, 266–67 (2012).

institutionalist approach by emphasizing the effects of heterogeneous *informal* institutions and, by underscoring the agency of MNCs and the institutional tensions they face, sets itself apart from sociological institutionalism. Further details of the framework are provided in the sections that follow.⁷⁰

1.3.1 Host-State Institutions of Chinese Companies in the United States

At the risk of stating the obvious, the US institutional contexts in which Chinese companies operate directly modify their managerial behavior and preferences.⁷¹ First, these Chinese companies, now domiciled in the United States, are obligated to comply with US laws and regulations and subject to the general jurisdiction of US courts. In this environment, Chinese companies may adapt individually to an extent that rational choice scholars deem optimal (where the marginal investment in mitigating US legal risks equals the marginal return) or collectively display what sociological institutionalists term “coercive isomorphism.”⁷² Second, Chinese companies operating in the United States engage continually with local nonstate actors such as customers and suppliers. Steeped in this network of US cultural and normative carriers, these companies are subject to pervasive influence of US “institutions of embeddedness.” US norms and values may alter their behavior either by adjusting the payoffs of their strategies, as rational choice institutionalists suggest, or by reformulating their views on the appropriateness or legitimacy of available strategies, as sociological institutionalists propose. Despite the diverging views regarding the causal mechanism, both theoretical approaches predict conforming behavior – Chinese companies behaving similarly to their local counterparts. In summary, to understand how Chinese companies navigate the US legal system, it is essential to consider their host-state institutional environment and its impact on their preferences and behavior. Although this part of the dual institutional framework might seem trivial, its importance should not be understated.

⁷⁰ There is also a sizable literature of legal pluralism, which examines “overlapping normative orders within societies”: Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 245 (2009). While the broad concept of legal pluralism overlaps with the dual institutional framework, the bulk of the existing research has been conducted by legal anthropologists and sociologists, which is mainly ethnographic and descriptive. For a summary of the literature, see Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 225 (2009).

⁷¹ Cui & Jiang, *supra* note 69, at 266–67.

⁷² DiMaggio & Powell, *supra* note 57.

1.3.2 Home-State Institutions of Chinese Companies in the United States

While it is well documented that MNCs often carry features of their home-state institutions “with them when expanding abroad,”⁷³ few studies have explored their impacts on MNCs’ adaptation, or lack thereof, to host-state *legal* environments. Filling that gap, the dual institutional framework developed here pays special attention to the influence of home-state formal institutions, such as laws and regulations, and informal institutions, such as social and cultural norms governing compliance and litigation.⁷⁴ To simplify, I classify the home-state institutional influence into direct and indirect effects.

Both formal and informal home-state institutions can directly influence Chinese companies operating in the United States.⁷⁵ Certain Chinese laws and regulations apply extraterritorially to Chinese businesses overseas. The long arm of Chinese laws has been extending as a result of China’s growing economy and sprawling worldwide interests,⁷⁶ and, in certain instances, as countermeasures to the extraterritorial application of US laws.⁷⁷ Moreover, most senior executives at Chinese companies in the United States, especially those of state ownership, remain Chinese citizens.⁷⁸ These expatriates, most of whom reasonably

⁷³ Guillén & Suárez, *supra* note 63, at 123.

⁷⁴ See, e.g., Schon Beechler & Zhuang Yang John, *The Transfer of Japanese-Style Management to American Subsidiaries: Contingencies, Constraints, and Competencies*, 25 J. INT’L BUS. STUD. 467 (1994); Anthony Ferner, *Country of Origin Effects and HRM in Multinational Companies*, 7 HUMAN RES. MGMT. J. 19 (1997); Raymond Fisman & Edward Miguel, *Corruption, Norms, and Legal Enforcement: Evidence from Diplomatic Parking Tickets*, 115 J. POL. ECON. 1020 (2007); Saul Estrin, et al., *Home Country Institutions and the Internationalization of State Owned Enterprises: A Cross-Country Analysis*, 51 J. WORLD BUS. 294 (2016).

⁷⁵ Sociological and organizational research about the home-state institutional influence uses the term “imprinting” to describe the continuous effects of the institutional features reflected in the corporate routines and habits at the founding of MNCs: Guillén & Suárez, *supra* 124–25. For the purposes of this book, however, the concept is too vague and narrow. For instance, formal Chinese institutions impose extraterritorial restraints over Chinese MNCs’ foreign subunits, which is specific to and beyond the typically defined institutional “imprinting effects.”

⁷⁶ Guillén & Suárez, *supra* note 63, 124–25; Zhengxin Huo & Man Yip, *Extraterritoriality of Chinese Law: Myths, Realities and the Future*, 2021 CHINESE J. COMPAR. L. 328.

⁷⁷ See, e.g. Huo & Yip, *supra* note 76, at 352; Ji Li, *Superpower Legal Rivalry and the Global Compliance Dilemma*, 45 U. PA. J. INT’L L. (forthcoming, 2024).

⁷⁸ Li, *supra* note 3.

anticipate returning to China, are theoretically subject to the jurisdiction of Chinese laws based on their citizenship.

Meanwhile, informal Chinese institutions (i.e., “institutions of embeddedness” such as social norms and cultural values) can also directly affect Chinese companies in the United States.⁷⁹ These institutions,⁸⁰ often regarded as preserving stability amid fluctuations in domestic settings,⁸¹ exert two distinct influences on transnational actors’ behavior and preferences: cognitive effects and normative effects.⁸² Cognitive components of an informal institution, often taken for granted and “virtually invisible to the actors themselves,”⁸³ provide descriptions, theories, schemata, and scripts that “specify cause-and-effect relationships”⁸⁴ and “influence the way a particular phenomenon is categorized and interpreted.”⁸⁵ On the other hand, normative components relate to values and attitudes toward objectives, choices, and actions.⁸⁶ These cognitive and normative influences shape the perspectives, values, and interpretations of top managers at Chinese companies operating in the United States, who are often expatriates and “carriers of institutions,”⁸⁷ as they navigate the US legal landscape.⁸⁸ Confronted

⁷⁹ Christopher Marquis & András Tilcsik, *Imprinting: Toward a Multilevel Theory*, 7 *ACAD. MGMT. ANNALS* 204 (2013).

⁸⁰ Culture is notoriously difficult to define and has been assigned a wide range of meanings such as the “underlying codes of meaning and conduct.” John Van Maanen, *Mickey on the Move: Observations on the Flow of Culture in the Multinational Corporation*, in *ORGANIZATIONAL THEORY AND THE MULTINATIONAL CORPORATION* (2005), *supra* note 63, at 255; and “collective programming of the mind,” or “norms, values, shared meanings, and cognitive structures.” Guillén & Suárez, *supra* note 63, at 131. This book adopts the broad enumerative definition of culture but breaks it down into two parts based on its effects on the preferences and behavior of MNC actors.

⁸¹ Williamson, *supra* note 47, at, 597; Guillén & Suárez, *supra* note 63, at, 123–24.

⁸² Campbell, *supra* note 59, at, 378.

⁸³ *Id.*, at 381; Westney, *supra* note 69, at 49–50.

⁸⁴ Campbell, *supra* note 59, at 378–384.

⁸⁵ Kostova & Roth, *supra* note 65, at, 217.

⁸⁶ Campbell, *supra* note 59, at 384.

⁸⁷ Kostova & Roth, *supra* note 65, 218.

⁸⁸ Guy L. F. Holburn & Bennet A. Zelner, *Political Capabilities, Policy Risk, and International Investment Strategy: Evidence from the Global Electric Power Generation Industry*, 31 *STRATEGIC MGMT J.* 1290, 1292–93 (2010); Klaus E. Meyer & Htwe Htwe Thein, *Business Under Adverse Home Country Institutions: The Case of International Sanctions Against Myanmar*, 49 *J. WORLD BUS.* 156, 158 (2014).

with normative and cognitive discrepancies in a heterogenous environment, middle-aged Chinese executives naturally resist significant changes that “threaten individuals’ sense of security, increase the cost of information processing, and disrupt routines.”⁸⁹ Additionally, rapid technological progress since the 2010s has made cross-country socialization more accessible and virtually cost-free, reinforcing the norms and scripts internalized by expatriates before their overseas assignments and influencing their law-related preferences and behaviors in the United States.⁹⁰ In summary, both formal laws and informal norms may directly affect the US operations of Chinese MNCs.

Home-state institutions can also indirectly influence Chinese companies operating in the United States through their headquarters.⁹¹ As legal entities based in China, the parent companies must, at least in theory, ensure that their overseas operations comply with relevant Chinese laws. For instance, as will be detailed shortly, Chinese regulations governing SOEs mandate timely reporting of material foreign legal risks, which may alter the way state-owned Chinese companies approach US litigation. Moreover, informal home-state institutions may also indirectly affect foreign operations through their headquarters, as the norms and values shape how executives at the helm of a global business empire interact with staff at foreign subsidiaries by interpreting or evaluating the behavior of local managers.

Additionally, MNCs’ internal organizational structures often facilitate the transmission of home-state institutional pressure to foreign affiliates.⁹² To reduce agency problems and transaction costs,⁹³ headquarters typically design and disseminate corporate rules and practices to subsidiaries.⁹⁴ Even without deliberate top-down diffusion of corporate routines, rules, and structures, local managers may engage in internal mimetic isomorphism, copying the actions and organizational structures of the headquarters when dealing with unfamiliar

⁸⁹ Powell, *Expanding the Scope of Institutional Analysis*, THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 55, 194.

⁹⁰ Sumantra Ghoshal & Christopher A. Bartlett, *The Multinational Corporation as an Interorganizational Network*, 15 *ACAD. MGMT. REV.* 606 (1990).

⁹¹ Kostova, et al., *supra* note 57, at 998; Kostova & Roth, *supra* note 65, at, 218–19.

⁹² Kostova, et al., *supra* note 57, at 999.

⁹³ Such measures are compelled by the strong demand for efficiency within MNEs as profit-driven business associations competing for survival in a globalized economy. Ghoshal & Bartlett, *supra* note 90, at 612.

⁹⁴ Kostova & Roth, *supra* note 65, at 218.

complex situations in the host country.⁹⁵ Moreover, the internal organizational dynamics both mediate and reflect the institutional effects, rendering them less deterministic.⁹⁶ Thus, the relationship between a Chinese MNC's headquarters and its US operations, previously studied under the framework of agency theory or transaction cost theory,⁹⁷ remains an important variable to consider, especially in research about intra-organizational personnel arrangement such as the appointment of in-house legal managers in the United States.⁹⁸

1.3.3 Dual Institutional Influences

The two preceding subsections have succinctly highlighted the dual institutional influence that Chinese companies endure while traversing the US legal environment. The ensuing chapters will empirically explore the manifestation of the influence. Topics include the development of internal legal capacities, the selection of US lawyers and consumption of legal services, and their litigation experiences within US courts. Yet, this book does more than merely presenting a special case of transnational legal pluralism.⁹⁹ It takes a major step further by theorizing and investigating how the dual institutional influence varies across firms and its effects on these companies' interactions with and impacts on the US legal system.

The starting point of the theoretical construction is an inquiry about institutional difference. As alluded to earlier, when an MNC's home and host-state institutional contexts align, the force of inertia is likely to dominate,¹⁰⁰ leading the MNC to organize and manage its foreign affiliate akin to a domestic subsidiary.¹⁰¹ The inertia will meet little

⁹⁵ See, e.g., Westney, *supra* note 69, at 58; Philip M. Rosenzweig & Jitendra V. Singh, *Organizational Environments and the Multinational Enterprise*, 16 *ACAD. MGMT. REV.* 340 (1991).

⁹⁶ Kostova, et al., *supra* note 57, at 999.

⁹⁷ The principal-agent structure characterizes the headquarters-subsidiary relationship in MNCs. Yaping Gong, *Subsidiary Staffing in Multinational Enterprises: Agency, Resources, and Performance*, 46 *ACAD. MGMT. J.* 729.

⁹⁸ Kostova & Roth, *supra* note 65, at, 218.

⁹⁹ For a review of the literature on legal pluralism in the global context, see Michaels, *supra* note 70.

¹⁰⁰ Jacques Delacroix, *Ecological Analysis of MNCs*, in *ORGANIZATION THEORY AND THE MULTINATIONAL CORPORATION*, *supra* note 57, at 95.

¹⁰¹ Michael T. Hannan & John Freeman, *Structural Inertia and Organizational Change*, 49 *AM. SOCIO. REV.* 149 (1984). By comparison, some argue that organizational inertia at MNCs is "achieved only at great effort and cost." Kilduff, *supra* note 61, at 241.

resistance. Canadian companies, for instance, can probably transpose their management preferences and practices onto their US subsidiaries, which likely dovetail with local expectations. However, when the institutional environments diverge significantly, host-state institutional pressure can disrupt and modify the inertial structures, preferences, and behaviors.¹⁰² The wider the institutional chasm, the more substantial the hurdles and costs the MNC confronts in adapting to the host-state environment.

Notably, the institutional gaps vary at the firm level, reflecting differences in both formal and informal institutional contexts for Chinese companies operating in the United States. Regarding the formal dual institutional context, Chinese companies differ systematically based on their ownership type. As will be elaborated shortly, state-owned Chinese companies must navigate a unique set of formal rules and regulatory mechanism designed to incentivize their staff toward achieving multiple, fluid, and often ambiguous goals.¹⁰³ This unique, ownership-specific institutional environment can exacerbate agency problems and increase transaction costs significantly as these companies engage with market players and regulatory bodies in the United States.¹⁰⁴ And the distinct institutional effect may surface in various legal dimensions. For instance, to address enhanced agency and transaction costs, state-owned Chinese investors may lean toward expatriating home-state managers, who are trusted, well acquainted with the home-state institutions, and privy to firm-specific information, to oversee US legal matters. The same institutional influence may also modify the way in which state-owned Chinese companies select US lawyers or litigate US disputes.

In addition to formal institutional disparities, Chinese companies must grapple with variable informal institutional gaps between their home and host states. The variations are determined by numerous factors such as a firm's embeddedness in the home-state environment, corporate decision-makers' education, age, and exposure to diverse

¹⁰² Kilduff, *supra* note 61, at 241.

¹⁰³ For a summary of the research on the agency costs plaguing SOEs, see Alvaro Cuervo-Cazurra & Cheng Li, *State Ownership and Internationalization: The Advantage and Disadvantage of Stateness*, 56 J. WORLD BUS. 1, 10 (2021).

¹⁰⁴ Meanwhile, certain US institutions also differentiate foreign SOEs, especially those owned by a non-allied governments, for enhanced scrutiny or restriction. Such institutions (e.g., national security review of foreign investment), however, are limited in number, and will be discussed when necessary in the following chapters.

cultures, and intra-enterprise decision-making dynamics.¹⁰⁵ Broad disparities in norms and values can result in miscommunication, mistrust, and conflicting beliefs and expectations, which generally give rise to high transaction costs and disputes. The gaps may also impact how Chinese companies navigate the US legal landscape. Those facing significant cultural hurdles in the United States, for instance, may prefer local lawyers with Chinese backgrounds, who can more effectively bridge these gaps. Moreover, companies facing large normative discrepancies may struggle to defuse disputes, consequently becoming more susceptible to US lawsuits.

The manner in which Chinese companies respond to differences in the dual institutional environment, formal as well as informal, also hinges on the equilibrium of the divergent and competing institutional pulls. Specifically, the preferences and behaviors of a Chinese company operating in the United States may vary according to the balance of the institutional pressures – “which side of these institutional pressures (often channeled through organizational linkages with the environments) is more potent and exerts a stronger impact.”¹⁰⁶ At the same time, the companies, while pulled away from their habitual systems of cognition, internalized norms, routines and actions, may resist or strategically implement nonconforming responses.¹⁰⁷ These interactions determine not only the manner, velocity and extent of the companies’ host-state adaptation, but also their impacts on the host-state institutional environment. Scholars have long recognized that “multinational practices influence local environment,”¹⁰⁸ and the extent of the influence depends largely on their relationships with the constituents of the organizational field, such as suppliers, customers, and US regulatory agencies.¹⁰⁹ If the companies have more leverage over these local actors, part of the host-state institutional pressure may be diminished

¹⁰⁵ Martin Owusu Ansah & Lynette Louw, *The Influence of National Culture on Organizational Culture of Multinational Companies*, 5 *COGENT SOC. SCI.* 1 (2019); Susan C. Schneider, *National vs. Corporate Culture: Implications for Human Resource Management*, 27 *HUMAN RES. MGMT.* 231 (1988).

¹⁰⁶ Zhang, et al., *supra* note 66, at 453.

¹⁰⁷ Patrick Regnér & Jesper Edman, *MNE Institutional Advantage: How Subunits Shape, Transpose and Evade Host Country Institutions*, 45 *J. INT’L BUS. STUD.* 275.

¹⁰⁸ Jean-François Hennart, *Control in Multinational Firms: The Role of Price and Hierarchy*, in *ORGANIZATION THEORY AND THE MULTINATIONAL CORPORATION*, *supra* note 63, at 119.

¹⁰⁹ Westney, *supra* note 61, at 49–50; Hennart, *supra* note 108, at 119.

or offset.¹¹⁰ Otherwise, we shall observe adaptation and assimilation,¹¹¹ with the host-state institutional influence eclipsing that of the company's home state.¹¹²

To illustrate the point, consider the impacts of Western MNCs on Chinese institutions. Up until quite recently, foreign-invested firms in China wielded considerable leverage over their local suppliers, customers, and even regulators.¹¹³ Consequently, investors from the United States and other developed countries, while adjusting to the Chinese environment in myriad ways, managed to maintain many of their home-state practices, and by doing so significantly transformed their organizational fields in China. For instance, recent empirical research suggests that Chinese regions with concentrated direct investments from the United States and Europe developed better courts.¹¹⁴ In stark contrast, the remainder of this book will show that Chinese MNCs, typically lacking leverage over key US market and state actors, have made no more than marginal impacts on the host-state legal institutions.

Figure 1.3 illustrates the different sets of home and host-state institutions that will guide the analysis of the interconnected topics in Chapters 2–6: the internal legal capacity of Chinese companies in the United States; their selection of US lawyers and consumption of US legal services; and their dispute resolution and litigation in US courts. Note that the dual institutional environment varies across these different subject areas.¹¹⁵ For instance, the dual institutions governing the production and purchase of legal services are related to, yet distinct from, those regulating dispute resolution. Therefore, within the dual institutional framework, the analysis of each subject will commence with a detailed issue-specific institutional comparison.

In summary, this book constructs an analytical model of dual institutional influence and employs it to explore how Chinese companies navigate the complex US legal system. It investigates formal and informal

¹¹⁰ An actor has more leverage if it possesses more resources, defined as “activity, service, or commodity” valued by the other parties in the field. Ghoshal & Bartlett, *supra* note 90, at, 607.

¹¹¹ Westney, *supra* note 61, at 51.

¹¹² *Id.*, at 49.

¹¹³ For the purposes of this book, leverage is regarded as a manifestation of power, which correlates with resource dependence. For a thorough review of the concept and the resource dependence theory, see Amy J. Hillman, et al., *Resource Dependence Theory: A Review*, 35 J. MGMT. 1404 (2009).

¹¹⁴ YUHUA WANG, TYING THE AUTOCRAT'S HANDS 15 (2015).

¹¹⁵ Kostova & Roth, *supra* note 65, at, 217.

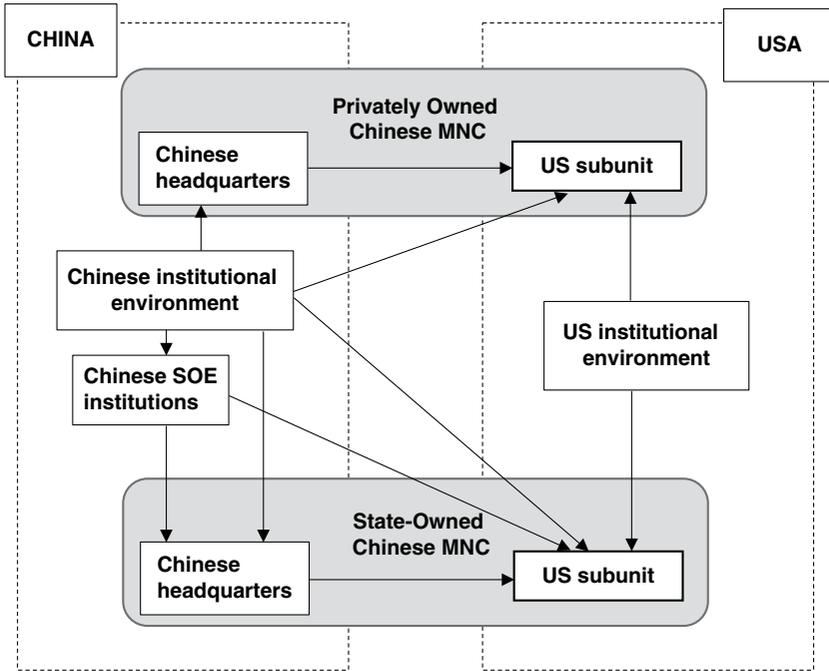


Figure 1.3 Dual institutional influence on Chinese companies operating in the United States

institutions of both the home and the host states while accounting for inter-company variations.¹¹⁶ Among the multiple factors that differentiate the Chinese institutional environment from that of the United States, this book pays particular attention to a unique institutional feature: the state ownership of certain Chinese investors. Before proceeding, Section 1.4 below sketches the main characteristics of the broad institutional environment of China, particularly the SOE institutions, to provide readers with the necessary background knowledge and avoid repetition in subsequent topical analyses.

1.4 HOME-STATE INSTITUTIONAL ENVIRONMENT AND INSTITUTIONS FOR SOEs

The post-Cultural Revolution era witnessed the metamorphosis of China from an impoverished hermit state to the world’s second-largest

¹¹⁶ Mainstream studies of FDI have rarely applied a comparative approach. Hennart *supra* note 108, at 111.

economy with a relatively open and dynamic market. In this transformative process, business organizations evolved in sync with their legal and regulatory environments. Prior to the economic liberalization, the Chinese government owned and micro-managed most business enterprises,¹¹⁷ which suffered inefficiency and incurred continuous losses.¹¹⁸ The government experimented with various performance enhancement schemes, yet almost all of them failed.¹¹⁹ At the same time, businesses with alternative ownership structures sprouted and, without the organizational weaknesses of the SOEs, proved highly competitive.¹²⁰ Their success enabled the reformers to make the case for a radical reform.¹²¹

In the mid-1990s, the reformers began the massive privatization of the SOEs,¹²² with the goal of establishing a “socialist market economy.”¹²³ A policy of “grabbing the big and letting go [of] the small” was implemented, resulting in the privatization of most small and medium-sized SOEs. The government, however, retained ownership over large SOEs in key strategic sectors.¹²⁴ When the dust settled, a sui generis economic system took shape. A defining feature of the system is a cohort of “modernized” SOEs,¹²⁵ which underwent corporatization and adopted organizational structures resembling contemporary Western firms.¹²⁶

¹¹⁷ Sujian Guo, *The Ownership Reform in China: What Direction and How Far?*, 12 *JOURNAL OF CONTEMPORARY CHINA* 553, 556 (2003).

¹¹⁸ Xiaobo Hu, *The State, Enterprises, and Society in Post-Deng China: Impact of the New Round of SOE Reform*, 40 *ASIAN SURVEY* 641 (2000); Yongnian Zheng & Minjia Chen, *China's State-Owned Enterprise Reform and Its Discontents*, 56 *PROBLEMS OF POST-COMMUNISM* 36 (2009).

¹¹⁹ Guo, *supra* note 117, at 556–57.

¹²⁰ Barry Naughton, *Chinese Institutional Innovation and Privatization from Below*, 84 *AM. ECON. REV.* 266, 268 (1994).

¹²¹ Hongbin Cai & Daniel Treisman, *Did Government Decentralization Cause China's Economic Miracle?* 58 *WORLD POLIT.* 505 (2006); YUEN YUEN ANG, *HOW CHINA ESCAPED THE POVERTY TRAP* (2016).

¹²² Ross Garnaut, et al., *Impact and Significance of State-Owned Enterprise Restructuring in China*, 2006 *CHINA J.* 37.

¹²³ Gary Sigley, *Chinese Governmentalities: Government, Governance and the Socialist Market Economy*, 35 *ECON. & SOC'Y* 487 (2006).

¹²⁴ Zheng & Chen, *supra* note 118, at 37.

¹²⁵ Chi-Wen Jevons Lee, *Financial Restructuring of State Owned Enterprises in China: The Case of Shanghai Sunve Pharmaceutical Corporation*, 26 *ACCOUNTING, ORG. & SOC'Y* 673, 681 (2001).

¹²⁶ Scott Waldron, et al., *State Sector Reform and Agriculture in China*, 186 *CHINA Q.* 290 (2006). Formally, the corporate governance structure of Chinese corporations bears more resemblance to German companies than US companies.

Over time, many of the SOEs have listed their stocks on major securities exchanges in China and abroad.¹²⁷

The Chinese government also adjusted its mode of control over these “modernized” SOEs. First, it consolidated the supervision of the largest national SOEs and delegated it to a newly established agency under the State Council – the State-Owned Assets Supervision and Administration Commission (SASAC). The SASAC functions as both the nominal controlling shareholder and the primary regulator of the national SOEs. Instead of engaging in micro-management,¹²⁸ the SASAC periodically reviews important corporate matters, evaluates senior corporate officers, and makes long-term strategic business plans for the SOEs under its supervision.¹²⁹ The agency is also responsible for implementing rules and regulations concerning the preservation of state assets.¹³⁰ Modeled after the national agency, the provincial and municipal SASACs supervise Chinese SOEs of their corresponding levels in all business sectors.¹³¹

¹²⁷ Laixiang Sun & Damian Tobin, *International Listing as a Mechanism of Commitment to More Credible Corporate Governance Practices: The Case of the Bank of China (Hong Kong)*, 13 *CORP. GOVERNANCE* 81, 82 (2005).

¹²⁸ Jonathan G. S. Koppell, *Political Control for China’s State-Owned Enterprises: Lessons from America’s Experience with Hybrid Organizations*, 20 *GOVERNANCE* 255, 265–66 (2007).

¹²⁹ Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanism of State Capitalism in China*, 65 *STAN. L. REV.* 697, 738–43 (2013).

¹³⁰ While the SOEs under the nominal management of the SASAC are clearly among the largest in China, there are many sizable centrally controlled SOEs that, for historical reasons, remain outside SASAC’s jurisdiction. Currently about 6,000 such SOEs exist and are controlled by approximately 80 central government agencies. Unirule Institute of Economics, *The Nature, Performance, and Reform of the State-Owned Enterprises* (April 12, 2011), 34, at www.unirule.org.cn/xiazai/2011/20110412.pdf. For these SOEs, the Ministry of Finance exercises “ownership rights” on behalf of the central government. Moreover, state agencies traditionally in charge of propaganda still hold control over assets such as most television stations, mass media publishers, and movie producers.

¹³¹ The government of Beijing, for instance, supervises SOEs in areas such as real estate, utilities, public transportation, steel making, pharmaceuticals, construction, insurance, and commercial retailing. See official webpage of the SASAC of Beijing Municipal Government, accessed February 25, 2014, www.bjgzw.gov.cn/QtCommonAction.do?method=xxcx&type=0000006010&flag_qt=6.

A sophisticated nomenklatura system enables the state to realize its effective control over the SOEs,¹³² with the central government making personnel decisions over officials of the vice-ministerial or vice-provincial level and above.¹³³ Promotion of SOE staff to positions at this level is overseen by the Central Organization Department of the CCP, with the Political Bureau having the final say.¹³⁴ In this process, the SASAC, as the regulating government agency, plays an extensive role.¹³⁵ Apart from the SASAC, other party and state agencies may also assert control over Chinese SOEs either directly pursuant to special rules,¹³⁶ or indirectly through their supervision over SOE employees who are CCP members.¹³⁷

Though transformational in myriad ways,¹³⁸ the SOE reform and the contraction of the state sector are by no means a linear process. The global financial crisis and its aftermath greatly empowered Chinese SOEs,¹³⁹ and the central government has been sending contradictory signals ever since about the intended role of SOEs in the economy. While some top officials insisted on further deepening the market reform,¹⁴⁰ others charged the SOEs to grow “larger and stronger.”¹⁴¹

¹³² Wendy Leutert, *The Political Mobility of China's Central State-Owned Enterprise Leaders*, 233 CHINA Q. 1–2 (2018).

¹³³ PIERRE F. LANDRY, *DECENTRALIZED AUTHORITARIANISM IN CHINA: THE COMMUNIST PARTY'S CONTROL OF LOCAL ELITES IN THE POST-MAO ERA* (2008).

¹³⁴ Chen Li, *Holding "China Inc."* Together: The CCP and the Rise of China's Yangqi, 228 CHINA Q. 927, 937 (2016).

¹³⁵ Ruilong Yang, et al., *Zhونغguó Yángqí Jìzhì: Lǎi Zhòngguó Yángqí de Zhèngjū* (“Promotion Mechanism for Quasi-officials: Evidence from Chinese Centrally-Controlled Enterprises”), *MGMT. WORLD*, 4 (2013).

¹³⁶ For instance, state-owned banks in China are under direct control of the Ministry of Finance, not the SASAC.

¹³⁷ Chen Li, *supra* note 134, at, 939.

¹³⁸ EDWARD S. STEINFELD, *PLAYING OUR GAME: WHY CHINA'S RISE DOESN'T THREATEN THE WEST* (2010).

¹³⁹ By the end of 2011 there were totally 144,715 Chinese SOEs in total. See WEIBING QIAO, *CHINA'S STATE-OWNED ASSETS SUPERVISION AND ADMINISTRATION YEARBOOK 735* (2012).

¹⁴⁰ Cary Huang, *Party's Third Plenum Pledges "Decisive Role" for Markets in China's Economy*, *SOUTH CHINA MORNING POST* (November 12, 2013), at www.scmp.com/news/china/article/1354411/chinas-leadership-approves-key-reform-package-close-third-plenum.

¹⁴¹ Xiaoyi Shao & Matthew Miller, *China Aims to Make State-owned Firms "Stronger, Better, Larger,"* *REUTERS* (September 13, 2015), at www.reuters.com/article/china-soe-reform-idUSB9N11D01920150914.

Meanwhile, the CCP has reasserted its absolute reign over SOEs,¹⁴² marking a sharp reversal of the previous policy to “separate management from politics”¹⁴³ and further blurring the boundary of the state.¹⁴⁴

As the Chinese market expanded, non-state-owned business enterprises also grew in number and scale. Though they initially lacked state support and institutional legitimacy, the market reform improved their macro-environment, and some have since managed to achieve global competitiveness, especially in sectors traditionally unoccupied by powerful central level SOEs. Also, an increasing number of privately owned Chinese firms have gone public, enabling state investors to purchase significant equity interest in such firms.¹⁴⁵

In brief, the market reform of the last few decades gave rise to a distinct economic system, often labeled as state capitalism with Chinese characteristics.¹⁴⁶ It features government dominance over strategic and important industries with direct ownership control over corporatized SOEs or through policy and regulatory intervention, and an expanding, dynamic market highly integrated in the global economy.¹⁴⁷

To facilitate the “socialist market economy,” the central government enacted a comprehensive set of new laws and regulations that borrowed extensively from the existing laws and legal principles of the United States and other developed countries.¹⁴⁸ Despite the convergence in formal laws and legal principles, the laws in action are vastly different between China and the United States. Since the end of the Cultural Revolution, Chinese courts have been undergoing rapid changes. Historically designated as a state instrument for class oppression, the Chinese judiciary had been staffed by loyal veterans without any formal

¹⁴² John Zhuang Liu & Angela Huyue Zhang, *Ownership and Political Control: Evidence from Charter Amendments*, 60 INT’L REV. L. & ECON. 1, 3 (2019).

¹⁴³ Emily Feng, *Xi Jinping Reminds China’s State Companies of Who’s the Boss*, NY TIMES (October 13, 2016), at www.nytimes.com/2016/10/14/world/asia/china-soe-state-owned-enterprises.html.

¹⁴⁴ Cui & Jiang, *supra* note 69, at 265.

¹⁴⁵ Curtis Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 672 (2015).

¹⁴⁶ BARRY NAUGHTON & KELLE S. TSAI, *STATE CAPITALISM, INSTITUTIONAL ADAPTATION, AND THE CHINESE MIRACLE* (2015).

¹⁴⁷ *Id.*

¹⁴⁸ Gao Hongjun, *The Globalization of American Law: Typical Examples and Jurisprudential Reflections*, 1 CHINA LEGAL SCI. 003 (2011).

legal education until 1998, when the *Law on Judges* took effect, requiring candidates for the judiciary to obtain a college degree and pass the national judicial examination.¹⁴⁹ Concurrent with the professionalization of the judiciary, the number of first instance cases rose dramatically from 906,051 in 1981 to 30,805,000 in 2020.¹⁵⁰ Meanwhile, the Chinese bar expanded from near non-existence toward the end of the Cultural Revolution to an association of 574,800 practicing lawyers in 2021.¹⁵¹ Legal education also bloomed, with tens of thousands of students graduating each year from more than six hundred law programs.¹⁵² The remarkable progress notwithstanding, the Chinese judiciary remains subordinated to the CCP, and personal connections or the power distribution of litigants, rather than relevant statutes, often determine how lawsuits of political, social, and economic significance transpire.¹⁵³

For much of the reform period, Chinese laws and regulations lagged behind the fast-changing economy and society. To a certain extent, the Chinese experience exemplifies an institutional version of Schumpeterian creative destruction. Risk-taking entrepreneurs pushed porous institutional boundaries with unsolicited and implicit support from the reformers among the ruling elites, who then selectively legitimated and formalized the incremental changes, which motivated further grassroots entrepreneurial experiments. The incessant recursive process gave rise to more market friendly institutions that gradually replaced the rigid Soviet-style planned economy.¹⁵⁴ However, among the downsides of this institutional creative destruction is an entrenched culture of disrespect for formal rules and procedures and legal uncertainties for social and economic transactions. Embedded in such an institutional

¹⁴⁹ Benjamin L. Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1, 13 (2007).

¹⁵⁰ 2020 Report of Supreme People's Court (March 15, 2021), at www.gov.cn/xinwen/2021-03/15/content_5593012.htm.

¹⁵¹ Statistical Analysis of Lawyers and Grassroots Legal Services in 2021, Ministry of Justice Government website, www.moj.gov.cn/pub/sfbgw/zwxgk/fdzdgknr/fdzdgknrtjxx/202208/t20220815_461680.html.

¹⁵² Carl F. Minzner, *The Rise and Fall of Chinese Legal Education*, 36 FORDHAM INT'L L.J. 334, 349 (2013).

¹⁵³ Ji Li, *The Power Logic of Justice in China*, 65 AM. J. COMPAR. L. 95 (2017); Xin He & Kwai Hang Ng, "It Must Be Rock Strong!" *Guanxi's Impact on Judicial Decision Making in China*, 65 AM. J. COMPAR. L. 841 (2017); Yuen Yuen Ang & Nan Jia, *Perverse Complementarity: Political Connections and the Use of Courts among Private Firms in China*, 76 J. POL. 318 (2014).

¹⁵⁴ Naughton, *supra* note 120, at 266; ANG, *supra* note 121.

environment, Chinese managers often under-appreciate legal and regulatory risks or deal with them in a highly opportunistic manner.¹⁵⁵

Within this transitional Chinese social setting, actions invoking the application of formal law (e.g., litigation) have acquired ingrained and contextualized extra-judicial meanings. For instance, as just noted, the judiciary's subordination to political power and the incremental legal reform marginalized the role of Chinese courts in private ordering. Long regarded as an ineffective means of resolving high-stakes disputes, litigation in such an institutional context can be viewed as a sign of incompetence or lack of political resources.¹⁵⁶ Firms striving to avoid sending such a signal would be reluctant to litigate. Additionally, due to the relatively peripheral role of law, many business transactions in China have relied on relational contracts impervious to formalistic judicial intervention.¹⁵⁷ In short, depending on the specific context, litigation or the threat thereof contains a variety of socially constructed meanings such as incompetence, hostility, desperation, vindication, or an intent to end a cooperative relationship.

How do firms interact with such a legal system? First, Chinese SOEs may differ from privately owned enterprises (POEs) in this regard. As the Chinese party-state continues to rely on SOEs to implement its policies, raise revenues, and maintain social control,¹⁵⁸ profit maximization is rarely the primary, or even a prioritized, goal for SOE managers.¹⁵⁹ The multitasking of Chinese SOEs complicates their management of risks, including legal risks. Moreover, government ownership spawns an acute multiagency problem.¹⁶⁰ While the separation of ownership and control

¹⁵⁵ LI, *supra* note 3, at 66.

¹⁵⁶ ALENA V. LEDENEVA, CAN RUSSIA MODERNISE?: SISTEMA, POWER NETWORKS AND INFORMAL GOVERNANCE 161 (2013).

¹⁵⁷ For an explanation of the concept, see, e.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 1963 AM. SOCIO. REV. 55; Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 359 (1992).

¹⁵⁸ NAUGHTON & TSAI, *supra* note 146, at 9–10 (2015).

¹⁵⁹ See, e.g., Chong-En Bai, et al., *The Multitask Theory of State Enterprise Reform: Empirical Evidence from China*, 96 AM. ECON. REV. 353 (2006); Estrin, et al., *supra* note 74.

¹⁶⁰ See, e.g., Zhou Mi & Xiaoming Wang, *Agency Cost and the Crisis of China's SOE*, 11 CHINA ECON. REV. 297 (2001); Garry D. Bruton, et al., *State-Owned Enterprises around the World as Hybrid Organizations*, 29 ACAD. MGMT. PERSP. 92 (2015); Mike W. Peng, et al., *Theories of the (State-Owned) Firm*, 33 ASIA PACIFIC J. MGMT. 293 (2016).

has long been the hallmark of modern corporations, the misalignment of interests is more severe in Chinese SOEs, as their managers answer to multiple layers of supervising bodies, and none possesses a genuine ownership interest.¹⁶¹ The complex agency problem begets suboptimal responses to corporate legal risks. On the one hand, SOE managers heavily discount losses from the companies' illegal acts and therefore may under-invest in diagnostic and preventive measures such as employing competent in-house counsel. On the other hand, SOE managers may over-invest in mitigating legal risks as cost savings generate no immediate personal benefits, whereas conspicuous breaches of law may reach the public domain and jeopardize their careers. Despite the predictive ambivalence, Chinese SOEs historically under-invested in the management of legal risks,¹⁶² as their political influence begets favorable adjudicatory bias, providing a layer of protection for the directors and managers.¹⁶³ However, as will be detailed in Chapter 2, the SASAC has taken the management of overseas legal risks more seriously, so how state-owned Chinese MNCs navigates the US legal system remains an open empirical question.

Unlike SOEs, private Chinese companies must maintain a delicate relationship with the state.¹⁶⁴ Without the political status of SOEs, private companies approach legal risks with an eye on minimizing state intervention and the expenditure of precious social capital. Sizable private firms in China cultivate personal connections with powerful officials, in exchange for protection and favors.¹⁶⁵ The system builds

¹⁶¹ Bruton, et al., *supra* note 160.

¹⁶² Wilkins, *supra* note 41, at 286; Liu, *supra* note 41, at 565.

¹⁶³ See, e.g., Xin He & Yang Su, *Do the "Haves" Come Out Ahead in Shanghai Courts?*, 10 J. EMPIRICAL LEGAL STUD. 120 (2013); Ning Jia, et al., *Political Connections and Directors' and Officers' Liability Insurance—Evidence from China*, J. CORP. FIN. 353 (2019); Li, *supra* note 153.

¹⁶⁴ YUE HOU, *THE PRIVATE SECTOR IN PUBLIC OFFICE* (2019); K. S. Tsai, *Capitalists without a Class: Political Diversity among Private Entrepreneurs in China*, 38 COMPAR. POL. STUD. 1130 (2005); BRUCE J. DICKSON, *WEALTH INTO POWER: THE COMMUNIST PARTY'S EMBRACE OF CHINA'S PRIVATE SECTOR* (2008).

¹⁶⁵ Seung Ho Park & Yadong Luo, *Guanxi and Organizational Dynamics: Organizational Dynamics: Organizational Networking in Chinese Firms*, 22 STRATEGIC MGMT. J. 455 (2001); John A. Pearce II & Richard B. Robinson Jr, *Cultivating Guanxi as a Foreign Investor Strategy*, 43 BUS. HORIZONS 223 (2000); Peng Wang, *Extra-Legal Protection in China: How Guanxi Distorts China's Legal System and Facilitates the Rise of Unlawful Protectors*, 54 BRIT. J. CRIMINOLOGY 809 (2014); Katherine R. Xin & Jone L. Pearce, *Guanxi: Connections as Substitutes for Formal Institutional Support*, 39 ACAD. MGMT. J. 1641 (1996).

on the fundamental social principle of reciprocity, so once a favor has been returned, additional investment must be made to replenish the *guanxi* capital. Thus, savvy business owners would refrain from seeking the intervention of powerful officials in routine legal matters.¹⁶⁶ Investing in legal risk management enables a business owner to avoid drawing on precious *guanxi* capital. Hence, demand for legal services has increased, though “know who” ultimately trumps “know how.”¹⁶⁷ Moreover, managers of privately owned Chinese companies, whose interests are better aligned with corporate profits, take a more pragmatic and efficient approach toward litigation. The efficiency, however, must be understood in the firms’ normative context. Without state ownership, private businesses often need to signal to the market about their adequate resources, status, credibility, and trustworthiness. In a society where informal institutions have assigned complex meanings to litigation, managers of POEs would typically avoid it unless certain socially constructed interpretations are intended, or the costs associated with the interpretations are clearly outweighed by the expected benefits.¹⁶⁸

To summarize, the institutional environment for Chinese firms has undergone a profound transformation in the past four decades, giving rise to a *sui generis* model of state capitalism.¹⁶⁹ In the process, Chinese courts have become relatively more professional, the legal profession has expanded, and the number of lawsuits has surged. Nonetheless, the judiciary remains subordinate to powerful state actors and their affiliates; formal law continues to play a secondary role in business transactions, therefore quality legal services are generally undervalued. All these, coupled with circumscribed authority of the courts, reinforce the culture of legal pragmatism and opportunism, and entrench the social norms attaching complex non-legal meanings to litigation.

Juxtaposing with this is the legal environment in the United States. Relatively speaking, formal laws in the United States assume a more

¹⁶⁶ LI, *supra* note 3, at 65.

¹⁶⁷ Ang & Jia, *supra* note 153.

¹⁶⁸ Ji Li, *Interactions between Domestic Social Norms and International Law over Trade Dispute Resolution*, in *THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE* (Machiko Kanetake & André Nollkaemper eds., 2015).

¹⁶⁹ Mark Wu, *The “China, Inc.” Challenge to Global Trade Governance*, 57 HARV. INT’L L.J. 261 (2016).

important role in corporate management and business transactions.¹⁷⁰ US courts, especially those at the federal level, enjoy considerably more independence and authority than Chinese courts. Kagan characterizes the US legal environment as comprising both the “day-to-day practice of adversarial legal contestation,” and “the structures of adversarial legalism,” defined as “a complex of legal institutions, mechanisms, rights, and rules that facilitate or encourage adversarial, party-dominated legal contestation.”¹⁷¹ Compared with other economically advanced democracies, not only the “fear of litigation is greater in the United States, but also that litigation really is more common in the United States than in parallel policy areas in the other countries.”¹⁷² The institutional hallmarks that are part and parcel of the allegedly “unique” lawyer-driven US adversarial system include “ready access to the courts, contingency fees, class actions, large money damages, broad judicial authority to reverse governmental decisions, a politically appointed judiciary, and relatively higher levels of legal malleability and uncertainty.”¹⁷³

The debate has not yet settled on whether adversarial legalism accurately describes the “style” of dispute resolution and regulatory enforcement in the United States, or whether the United States is “exceptional” in that regard.¹⁷⁴ Recent evidence suggests that the “conservative legal movement” might have alleviated litigation risk for US businesses.¹⁷⁵ Meanwhile, some evidence indicates that other countries have Americanized in the sense that participatory formal contestations figure more prominently in policy implementation and dispute resolution.¹⁷⁶ As a matter of fact, one may even consider China as a case in point, where

¹⁷⁰ Scholars have documented some industries and sectors where businesses operate on norms, not formal law. See, e.g., Bernstein, *supra* note 157; Macaulay, *supra* note 157.

¹⁷¹ Robert A. Kagan, *On SURVEYING THE WHOLE LEGAL FOREST* 28 *LAW & SOC. INQUIRY* 833, 837 (2003).

¹⁷² *Id.*, at 839.

¹⁷³ *Id.*

¹⁷⁴ Charles R. Epp, *The Judge over Your Shoulder: Is Adversarial Legalism Exceptionally American?* 28 *LAW & SOC. INQUIRY* 744 (2003). Some contend that US “litigiousness” is a myth created by corporations to serve their interests in reforming the adjudicatory system and raising litigation cost. DAVID M. ENGEL, *THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON’T SUE* (2016).

¹⁷⁵ Kagan, *supra* note 171, at 837.

¹⁷⁶ R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law*, 58 *INT’L ORG.* 103 (2004); R. Daniel Kelemen & Eric C. Sibbitt, *The Americanization*

many market-enabling laws contain US legal transplants or neoliberal principles, and Chinese citizens litigate significantly more cases than before.¹⁷⁷ Nonetheless, as the major institutions undergirding the US judicial system are absent in China, I believe few scholars would seriously contest the claim that legal encounters in the United States are generally more formalistic, adversarial, complex, costly, and lawyer-driven than those in China.¹⁷⁸ Are Chinese companies able to surmount the vast institutional divide and navigate the complex, unfamiliar host-country legal terrain? The rest of this book will attempt some answers.

1.5 METHODOLOGY

This book employs both quantitative and qualitative methods. The primary quantitative evidence comprises two large datasets: a unique set of multiyear survey data about Chinese companies operating in the United States and a set of hand-collected federal litigation data involving a large sample of Chinese companies. Since 2014, I have been collecting annual survey data from Chinese MNCs' US subunits in collaboration with the China General Chamber of Commerce USA (CGCC), by far the largest association of Chinese-invested businesses in the United States.¹⁷⁹ Its membership moved roughly in proportion with the number of Chinese companies in the United States during the surveyed period, so did the size of the survey sample. In 2017, for example, the questionnaires were sent to about 600 CGCC members, and 213 responded (a response rate of approximately 35.5 percent).

of Japanese Law, 23 U. PA. J. INT'L ECON. L. 269 (2002); Rosa Kim, *The Americanization of Legal Education in South Korea: Challenges and Opportunities*, 38 BROOK. J. INT'L L. 49 (2012); Frans Van Waarden, *Power to the Legal Professionals: Is There an Americanization of European Law?*, 3 REGUL. & GOVERNANCE 197 (2009); Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMPAR. L. 229 (1991).

¹⁷⁷ Ji Li, *The Evolving "Rule of Law with Chinese Characteristics" and Its Impacts on the International Legal Order*, 8 UC IRVINE J. INT'L, TRANSNAT'L & COMPAR. L. 151, 156 (2023).

¹⁷⁸ Notably, empirical evidence affirms the comparative differences. Based on a 2016 survey, 74 percent of Chinese MNC managers considered US legal and compliance costs to be higher than the costs they incur at home.

¹⁷⁹ Besides Chinese-invested companies, the membership also includes fee-paying US companies. that do not have the right to vote. The US firms are excluded from the survey sampling.

From 2014 to 2019, the survey response rate remained relatively stable. Due to COVID-19 and the deterioration of US–China relations, the response rates dropped to about 27 percent for the 2022 survey. The sample size also shrank as some Chinese companies have chosen to exit the US market. Comparisons between the responding and non-responding companies revealed no significant differences in major aspects of the firms such as business size and ownership structure. Meanwhile, a comparison with US-investing Chinese firms registered with the Ministry of Commerce of China suggests that large businesses and SOEs are over-represented in the CGCC sample.¹⁸⁰ This serves well the purposes of this book, as state ownership is a key variable of interest and some of the topics such as in-house legal capacity are pertinent only to sizable Chinese investors. The job titles of the respondents vary, with the vast majority being CEOs, CFOs, general managers, presidents, and representatives.

Each of the survey questionnaires contained a wide range of questions, a portion of which were repeated every year (e.g., location, year of entry, investment plan) to gauge key aspects of the Chinese companies, others were included in only one or two surveys due to shifting preference and focus of the CGCC and its board members.¹⁸¹ Hence, most of the in-depth analyses in the following chapters rely on data from selected years. To be more specific, Chapter 2 analyzes the 2019 and 2022 data to

¹⁸⁰ The detailed comparison was conducted by a member of a separate research team working on the CGCC survey and was with the Ministry of Commerce data for 2014. A few more words about the possible issues of bias: first, survival bias, i.e., Chinese companies that have withdrawn from the US market after the realization of certain legal risks are not observed. Chinese companies were all expanding in the United States before the onset of the trade war. A thorough search of public sources has not identified any sizable Chinese corporate members of CGCC that had entirely withdrawn from the US market by 2019. Wherever data from later surveys are used, readers will be cautioned about the effect of biases. Second, common method bias. Though it is a potential methodological issue for survey research, in this paper common method bias is of less concern because most of the variables are simple and specific objective attributes, e.g., employment of full-time legal managers, legal fees, and so on. Also, different questions were asked in each year. Moreover, the questions generating the data were placed far apart in the survey, with no indication of any implicit theories connecting them. Philip M Podsakoff, et al., *Common Method Biases in Behavioral Research: A Critical Review of the Literature and Recommended Remedies*, 88 J. APP. PSYCH. 879, 883–85 (2003). Furthermore, the survey data are supplemented by data derived from the interviews or retested with objective data (e.g., Chapter 5).

¹⁸¹ The survey subjects were unaware of the hypotheses to be tested using the survey data. Also, the questions are typically dispersed in different sections of the survey questionnaires.

TABLE 1.1 Background of interviewees

Managers	In-house counsel	Lawyers	Consultants	Others	Total
73	21	65	13	4	176

understand the in-house US legal management at the Chinese companies, and statistically tests the 2019 data to investigate the inter-company variations. Chapter 3 examines the 2017 data for lawyer selection preferences, and the 2019 and 2022 data for legal service purchases. Chapter 4 investigates the 2014, 2017, and 2018 survey data for insights about the companies' litigation preferences and their US litigation experiences. Chapter 5 studies the dataset of federal lawsuits involving all Chinese companies that had responded to the 2019 CGCC survey. More details about the hand-collected litigation data can be found in that chapter. Last, Chapter 6 investigates the firms' contemplation of litigating against perceived mistreatment by the US government by analyzing relevant data from the 2014, 2015, 2016, and 2017 surveys, and examines their actual coping measures with data from the most recent 2022 survey.

In addition to the quantitative evidence, this book draws upon a wealth of qualitative data to analyze how Chinese companies navigate legal challenges in the United States. The qualitative evidence includes 176 interviews with knowledgeable informants, such as business executives, in-house counsel, lawyers, and consultants employed by Chinese companies. These interviews were collected using a multi-source snowball sampling method, which generated a sizable sample of professionals with diverse backgrounds (see Table 1.1 for more details). Personal acquaintances, who are professionals working for Chinese businesses in the United States, comprised one core group of the interview subjects. They shared valuable insights and introduced more interview candidates. Another cohort consists of CGCC members, some of whom also tapped into their personal and business networks to recruit potential interviewees for this project. In addition, interviews were conducted at various panels, workshops, and conferences on law and foreign investment.¹⁸² Together, the interviews substantiate the varying dual institutional influence as manifested in different subject areas to be explored in this book, assist in

¹⁸² An example of such events is the annual Practising Law Institute program on Doing Business in and with Emerging Markets, see more details at www.pli.edu/programs/doing-business-in-and-with-emerging-markets.

the generation of testable hypotheses, and make sense of the statistical findings. To supplement the interviews, I also collected and analyzed a large number of legal archives, media reports, corporate filings, publicly available personal profile information, and other secondary materials. In summary, research based on the combined quantitative and qualitative data enables a comprehensive and nuanced understanding of how Chinese companies address legal challenges and navigate the complex legal landscape when operating in the United States.

1.6 CONCLUSION

Numerous Chinese companies have established a significant foothold in the United States, immersing themselves in its complex, rigorous, and adversarial US legal system. The ways in which they negotiate the omnipresent, consequential legal risks, however, remain underexplored. To begin to address this deficiency, this chapter constructed an overarching theoretical framework of dual institutional influence and canvassed the relevant institutional contexts of both China and the United States, underscoring their stark contrasts.

Within the dual institutional framework, the following chapters will sequentially investigate four interrelated topics: (i) the internal legal capacity of Chinese companies in the United States; (ii) their selection of US lawyers and acquisition of US legal services; (iii) their dispute resolution and litigation experiences in US courts; and (iv) their legal reactions to perceived discriminatory practices by US government agencies. Each chapter will begin with an in-depth examination of both the home-state and host-state institutions pertaining to the relevant subject area. Following the institutional comparison, it will analyze the survey and interview data to discern how the dual institutional influence impacts Chinese companies operating in the United States as they navigate the intricate US legal system. Further, each chapter will perform statistical tests to elucidate inter-company variations and to identify potential correlations between key institutional factors (e.g., state ownership and cultural difference) and the preferences and actions of these Chinese companies. As one experienced US lawyer observed about the seemingly irrational legal strategies of his Chinese clients, “these clients are not stupid. They choose what they think is the best solution within the U.S. and the Chinese contexts.”¹⁸³

¹⁸³ Interview with a partner of a large US law firm (June 8, 2020).