

In Pursuit of Fairness: How Chinese Multinational Companies React to U.S. Government Bias

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Rising nationalism and geopolitical tensions between the United States and China threaten to disintegrate the international economic order. Against this backdrop, Chinese multinational companies ("MNCs") with investments in the United States confront an increasingly adverse host-country legal and political environment, as exemplified by the draconian TikTok and WeChat bans imposed by the Trump administration. How do Chinese MNCs, relatively new to the intricate game of foreign direct investment, cope with unfair government treatment in the United States where a wide variety of institutions are available to potentially mitigate and remedy the political risk? Also, do state-owned MNCs, figuring prominently in outbound investment from China, exhibit any distinct institutional preferences? Existing research on the relevant topics, being fragmented and West-centric, offer few clues. To narrow the gaps, this Article takes a firm-oriented comparative institutional approach to empirically examine the multiple coping strategies, formal or informal, international or domestic, that Chinese MNCs may contemplate to address government bias in the United States. By analyzing 152 interviews and a unique set of survey data, this study uncovers significant cross-institutional and inter-company variations. Mistreated Chinese MNCs are more inclined to consider diplomatic assistance, judicial and administrative review, and support from business associations than other available risk-coping institutions such as investment arbitration and lobbying. In addition, state-owned Chinese MNCs are more likely than their privately owned counterparts to resort to diplomatic assistance and lobbying, and less likely to seek administrative appeals in addressing U.S. official bias. The findings contribute to several ongoing debates about, among others, the international legal and economic order in a polarized world, political risk management by emerging market MNCs, and the deterioration of U.S.-China relations.

INTRODUCTION

The global economic order is undergoing two tectonic shifts. One follows the exponential growth of China and the subsequent surge of its outbound investment,¹ and the other the recent resurrection of economic and political nationalism, which imperils decades-long liberalization of trade and invest-

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1. See generally Ji Li, THE CLASH OF CAPITALISMS?: CHINESE COMPANIES IN THE UNITED STATES 23 (2018); Changfeng Tu, *Chinese Outbound Investments*, in CHINESE FDI IN THE EU AND THE US 1, 4 (Tim Wennig & Walter Lohman eds., 2019).

ment policies around the world.² The confluence of these two transformations raises an important yet under-explored question: how do Chinese multinational companies (“MNC”) respond to increasingly adverse investment conditions in developed host countries, such as the United States, that were, until quite recently, widely regarded as safe havens for foreign investors?³ This Article begins to answer the question by empirically examining contemplated reactions of Chinese MNCs to unfair government treatment in the United States.

Prior to the onset of the trade war, the world’s two largest economies were deeply integrated,⁴ and for decades, both China-based and U.S.-based MNCs have been zealous advocates for and key beneficiaries of globalization.⁵ The sudden deterioration of U.S.-China relations caught Chinese MNCs in the United States by surprise, as most of them made long-term investments in anticipation of a stable and welcoming business environment.⁶ Many have voiced their frustration, and new Chinese investment in the U.S. market dropped precipitously.⁷ To be sure, discontent of MNC executives with host-country bureaucratic overreach or malfeasance is nothing new. For years, U.S. companies doing business in China have complained about rampant official prejudice, and their complaints, rising in volume over time, partially fueled the spiraling trade war.⁸ Unexpected, however, is the increasingly hostile political and regulatory environment confronting China-based MNCs in the United States. According to a recent survey, most Chinese MNCs operating in the United States consider the enforcement of the host-country laws and policies to be unfair.⁹ As the geo-economic collision

2. See generally Monica De Bolle & Jeromin Zettelmeyer, *Measuring the Rise of Economic Nationalism* (Peterson Inst. for Int’l Econ., Working Paper No. 19-15, 2019); Italo Colantone & Piero Stanig, *The Surge of Economic Nationalism in Western Europe*, 33 J. ECON. PERSPS. 128 (2019); Christopher M. Dent, *Brexit, Trump and Trade: Back to a Late 19th Century Future?*, 24 COMPETITION & CHANGE 338 (2020).

3. A ranking of country political risk is available at *Political Risk, Short-Term: Country Rankings*, GLOB. ECON., https://www.theglobaleconomy.com/rankings/political_risk_short_term [<https://perma.cc/R8FN-Q8NG>] (last visited Feb. 27, 2021). The United States, Japan, Switzerland, Germany, France, and the United Kingdom belong to the group of countries with the lowest short-term political risk.

4. See generally THILO HANEMANN ET AL., RHODIUM GRP., *TWO-WAY STREET: 2019 UPDATE: US-CHINA DIRECT INVESTMENT TRENDS* (2019).

5. See generally MICHAEL C. DREILING & DEREK Y. DARVES, *AGENTS OF NEOLIBERAL GLOBALIZATION: CORPORATE NETWORKS, STATE STRUCTURES, AND TRADE POLICY* 163–64 (2016); Mike W. Peng, *The Global Strategy of Emerging Multinationals from China*, 2 GLOB. STRATEGY J. 97, 100 (2012); Eunsuk Hong & Laixiang Sun, *Dynamics of Internationalization and Outward Investment: Chinese Corporations’ Strategies*, 187 CHINA Q. 610, 623-25 (2006).

6. Li, *supra* note 1, at 40.

7. Alan Rappeport, *Chinese Money in the U.S. Dries Up as Trade War Drags On*, N.Y. TIMES (July 21, 2019), <https://www.nytimes.com/2019/07/21/us/politics/china-investment-trade-war.html> [<https://perma.cc/87FQ-WCV9>].

8. Zach Coleman, *US Companies in China Complain of Official Bias*, NIKKEI ASIAN REV. (Feb. 26, 2019), <https://asia.nikkei.com/Economy/Trade-war/US-companies-in-China-complain-of-official-bias> [<https://perma.cc/FK6W-7U83>].

9. In the 2019 survey conducted by the China General Chamber of Commerce, fifty-nine percent of survey subjects responded “poor” or “very poor” to the question regarding the fairness of law and policy enforcement toward Chinese companies in the United States. For more information about the survey, see *infra* Part II.B.

accelerates, even more Chinese MNCs will perceive or experience discriminatory treatment by the U.S. government, and they will inevitably respond with mitigating and remedial measures. Huawei is an instructive example. Under unrelenting U.S. government pressure, this China-based MNC hired lobbyists,¹⁰ initiated a media campaign,¹¹ sought diplomatic assistance,¹² and even filed lawsuits against the federal government in U.S. courts.¹³ Recently ByteDance, the Chinese MNC that owns TikTok, was also caught in the tense geopolitical crossfire and has adopted similar strategies to cope with the “coercion” of the Trump Administration.¹⁴ As will be elaborated, there exist still other types of institutional resources available for Chinese MNCs to tackle purported host-government bias. Which of the coping strategies do Chinese investors prefer? And what determines their varying institutional choices? Moreover, do state-owned MNCs, which figure prominently in China’s outbound investment, react to host government mistreatment in ways different from their privately owned counterparts?

These novel and important questions straddle multiple areas of academic inquiry ranging from litigation in domestic courts to investor-state arbitration. However, as will be demonstrated, the existing scholarship is fragmented and centered on Western firms, obscuring a complete view of all the major institutional alternatives available for Chinese MNCs to alleviate host-state political risks.¹⁵ This Article will narrow that gap. To be more concrete, this Article will analyze the cross-institutional and inter-company variations in how Chinese MNCs cope with unfair government treatment in the United States. Before proceeding, I would like to emphasize that “fairness” discussed herein is essentially a subjective concept. What is viewed as “unfair” by a Chinese MNC manager, such as unreasonable and unexplained delay in license approval or selective denial of market access, may well be neutral, lawful, and justifiable actions from the perspective of the U.S. government or in the eyes of independent third parties. This Article does *not*

10. Ben Brody, *Huawei Lobbying Spend Hits Record with Hire of Trump Fundraiser*, BLOOMBERG (Oct. 21, 2019), <https://www.bloomberg.com/news/articles/2019-10-22/huawei-lobbying-spend-hits-record-with-hire-of-trump-fundraiser> [https://perma.cc/SHD7-733R].

11. Janhvi Bhojwani, *Huawei Broadens its Campaign to Win Over American Public and Media*, NPR (Mar. 1, 2019), <https://www.npr.org/2019/03/01/699307312/huawei-broadens-its-campaign-to-win-over-american-public-and-media>.

12. Dan Strumpf, *Huawei Warns US of Retaliation by Beijing: Profit Growth Slows*, WALL ST. J. (Mar. 31, 2020), <https://www.wsj.com/articles/huawei-warns-u-s-of-retaliation-by-beijing-profit-growth-slows-11585658329>.

13. Paul Mozur & Austin Ramzy, *Huawei Sues US Government Over What It Calls an Unfair Ban*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/business/huawei-united-states-trade-lawsuit.html>.

14. On the report about TikTok’s lobbying, see, e.g., Cecilia Kang, *TikTok Enlists Army of Lobbyists as Suspicions Over China Ties Grow*, N.Y. TIMES (July 15, 2020), <https://www.nytimes.com/2020/07/15/technology/tiktok-washington-lobbyist.html>; on its litigation threat, see, e.g., Naomi Xu Elegant, *TikTok Threatens Legal Action in Response to Trump’s Executive Order Banning the App*, FORTUNE (Aug. 7, 2020), <https://fortune.com/2020/08/07/tiktok-ban-trump-executive-order-lawsuit-legal-action-response/>.

15. Xiaohui Liu et al., *Environmental Risks, Localization and the Overseas Subsidiary Performance of MNEs from an Emerging Economy*, 51 J. WORLD BUS. 356, 356 (2016).

judge whether the U.S. government indeed treats Chinese investors unfairly. Rather, it focuses solely on how the investors may react to *perceived* discriminatory treatment. After all, it is the managers' first-person perception that initiates MNC reactions. Hence, unless otherwise noted, the terms "fairness," "prejudice," "discrimination," and "bias" are all used throughout this Article to describe perceptions of Chinese MNC managers.

The remainder of the Article proceeds as follows. Part I reviews relevant literatures and underscores their disciplinary balkanization and confined empirical scope. Part II proposes a firm-oriented comparative institutionalist approach to analyzing all major non-commercial strategies Chinese MNCs may consider adopting to alleviate the risk and damage of host-country government bias. Thereafter, the Part presents and analyzes in-depth interviews and a unique set of survey data about contemplated reactions of Chinese MNCs to unfair U.S. government treatment. In doing so it focuses on the significant *cross-institutional* variations. Why, for instance, do more Chinese MNCs consider litigation than lobbying? Next, Part III rotates the analytical angle and explores the significant *inter-company* variations in the institutional preferences. The inter-company analysis concentrates on the state ownership of Chinese investors, an attribute that distinguishes Chinese outbound investment from that of most other countries and is at the heart of multiple ongoing theoretical and policy debates.¹⁶ Part IV enumerates the contributions of the Article and raises several important questions for further research. The Article then concludes with future trajectories.

I. EXISTING LITERATURES ON FOREIGN INVESTORS AND "UNFAIR" HOST-GOVERNMENT TREATMENT

Unfair host-state treatment, long considered by foreign investors as a major risk, has spawned research on a variety of related topics including, *inter alia*, economic diplomacy,¹⁷ investor-state arbitration,¹⁸ and political risk management.¹⁹ This section reviews the diverse bodies of scholarship. As will soon become evident, the extant studies have generally focused on the experiences and preferences of Western firms, especially those headquartered

16. Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261, 264 (2016).

17. See, e.g., Geoffrey Gertz, *Commercial Diplomacy and Political Risk*, 62 INT'L STUD. Q. 94 (2018); Jing-Lin Duanmu, *State-owned MNCs and Host Country Expropriation Risk: The Role of Home State Soft Power and Economic Gunboat Diplomacy*, 45 J. INT'L BUS. STUD. 1044 (2014).

18. See, e.g., ALEC STONE SWEET & FLORIAN GRISEL, *THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY* (2017); Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT'L L. 1147 (2014).

19. See, e.g., Jiann-jong Guo et al., *Do China's Outward Direct Investors Prefer Countries with High Political Risk? An International and Empirical Comparison*, 6 CHINA & WORLD ECON. 22 (2014); 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 (2010).

in the United States, and largely neglected the reactions of emerging market MNCs operating in developed host countries. Two factors probably explain the omission. First, until about a decade ago, firms headquartered in the United States, Europe, and Japan had dominated global investment, leaving little to explore for those interested in developing-country MNCs.²⁰ Second, political risks such as unfair and inequitable government treatment targeted at foreign investors have traditionally been associated with countries lacking robust institutions.²¹ In the United States and other post-industrial countries, domestic and foreign investors operate on a level playing ground, the assumption goes, so few scholars have bothered studying a risk that was deemed nonsystematic or insubstantial.

Apart from the neglect of emerging market MNCs, the existing scholarship is compartmentalized as researchers have examined only one or a limited set of institutional alternatives. For instance, research about corporate political activities has paid scant attention to MNCs' use of legal recourse in host countries,²² which is largely attributable to the scholarly focus on MNCs investing in low-income countries lacking robust formal institutions to safeguard outsiders from governmental mistreatment.²³ However, emerging market MNCs doing business in the United States may rely on various informal and formal host-state institutions (for example, domestic courts) for protection and remedy. The multiplicity of available institutional remedies raises novel and important questions that the extant literatures, due to their curtailed geographic and subject matter concentrations, fail to adequately address. To be fair, there exists a sizable literature on comparative institutional analysis that examines how various market, political, and judicial decision processes stack up against each other in resolving disputes and allocating resources.²⁴ However, as will be elaborated in Part II, scholars of that camp generally study institutional design and selection from public policy perspectives such as equity or efficiency-based social welfare maximization, and their research takes institutions, not firms, as the unit of analysis.

20. Bala Ramasamy et al., *China's Outward Foreign Direct Investment: Location Choice and Firm Ownership*, 47 J. WORLD BUS. 17, 18 (2012).

21. Gertz, *supra* note 17, at 94.

22. For a review of the literature on corporate responses to political risk, see Stephen J. Kobrin, *Political Risk: A Review and Reconsideration*, 10 J. INT'L BUS. STUD. 67 (1979).

23. See generally Jennifer L. Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, 6 REV. INT'L ORGS. 1, 2 (2011); Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 L. & SOC'Y REV. 805, 807 (2008).

24. See, e.g., Gregory Shaffer, *Comparative Institutional Analysis and a New Legal Realism*, 2013 WIS. L. REV. 607, 617 (2013); NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 3 (1994); Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361 (2018).

Another important albeit under-explored question bears on the prominence of state-owned MNCs in outbound investments from China.²⁵ While academic and policy interest in state-owned enterprises (“SOE”) has been growing,²⁶ only a few researchers have analyzed the effect of ownership structure on how MNCs manage host-country political risks.²⁷

This Article begins to fill these gaps by examining the contemplated reactions of Chinese investors to unfair U.S. government treatment. Before proceeding to the substantive analysis, the rest of this Part reviews the extant scholarship. As noted, Chinese investors in the United States may choose from a variety of coping strategies, several of which have spawned sizable bodies of research. To facilitate the review and the analysis thereafter, I typologize all the major non-commercial institutional choices on two dimensions—formal versus informal and domestic versus international (See Table 1 below). An institutional choice is formal if its implementation follows specified rules and procedures. By comparison, informal institutional choices comprise mostly actions of flexible forms and processes.

TABLE 1: POTENTIAL REACTIONS TO UNFAIR HOST-COUNTRY GOVERNMENT TREATMENT

	<i>Informal</i>	<i>Formal</i>
<i>International</i>	I diplomatic assistance	II investment arbitration
<i>Domestic</i>	III lobby media business associations personal connections	IV litigation administrative appeals

One may quibble with the specific categorization of certain institutional choices. For instance, administrative appeals may proceed with less formality than litigation, as “the purpose of the appeals process has been ‘to give the public an informal avenue for review and resolution of disputed agency deci-

25. 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, 265 (2012).

26. For purposes of this study, SOEs are broadly defined as firms with at least ten percent government ownership.

27. For the few studies on the topic, as of the publication of this paper, see generally Duanmu, *supra* note 17; Jing Han et al., *China’s ODI Motivations, Political Risk, Institutional Distance and Location Choice*, 4 THEORETICAL ECON. LETTERS 540 (2014); Diego Quer et al., *The Influence of Political Risk, Inertia and Imitative Behavior on the Location Choice of Chinese Multinational Enterprises: Does State Ownership Matter?*, 13 INT’L J. EMERGING MARKETS 518 (2018).

sions without the necessity of litigation.’”²⁸ Yet the main goal of the typology is organizational, not to generate predictions. So, regrouping the coping strategies (for example, moving “administrative appeals” to Quadrant III) will not by itself alter the empirical examination in Parts III and IV. Also, readers should note that this typology is an analytic one: the listed institutional choices may overlap or interact simultaneously or sequentially, as illustrated in Parts III and IV below.²⁹ That said, as the rest of this review section shows, distinct literature has accumulated for each of the institutional options.

A. International-Informal

A foreign investor suffering discriminatory host-state treatment may try to leverage the diplomatic resources of its home-country government.³⁰ Implicating at least two sovereigns, foreign investment has always been an integral part of diplomacy.³¹ To protect their commercial interests in other countries, powerful states would deploy a variety of tactics.³² For instance, U.S. government officials “regularly pushed” officials of other countries to resolve disputes concerning U.S. multinationals’ foreign investment property.³³ Research in this topic area, however, has largely neglected how developing-country governments protect their business interests abroad.³⁴ The oversight, which may be attributable to limited investment outflow from

28. Elise S. Jones & Cameron P. Taylor, *Litigating Agency Change: The Impact of the Courts and Administrative Appeals Process on the Forest Service*, 23 POL’Y STUD. J. 310, 313 (1995) (citation omitted).

29. This Article does not focus on commercial strategies companies may adopt to mitigate political risks or their damages. For instance, companies may purchase investment insurance, or invest via joint ventures with powerful local companies. See Gertz, *supra* note 17, at 94. Or, in the extreme scenario, they might simply attempt to exit the foreign market, as exemplified by TikTok’s negotiated sale to a U.S. company. See Aaron Tilley, *With Potential TikTok Deal, Microsoft CEO Satya Nadella Looks to Expand Audience*, WALL ST. J. (Aug. 4, 2020), <https://www.wsj.com/articles/with-potential-tiktok-deal-microsoft-ceo-satya-nadella-looks-to-expand-audience-11596490576> [https://perma.cc/P59H-FEYN]. Note also that there are other ways to label and categorize strategies adopted by corporations to manage political risks. For instance, depending on the research topic, method, and discipline, one may categorize the strategies by their various forms: “compliance, avoidance, circumvention, conflict, and partnership.” Jean J. Bodewyn & Thomas L. Brewer, *International-Business Political Behavior: New Theoretical Directions*, 19 ACAD. MGMT. REV. 119, 128 (1994). Or, alternatively, by assessing the different levels of cooperation and assertiveness, “accommodative, collaborative, and compromise.” Jeffrey D. Simon, *A Theoretical Perspective on Political Risk*, 15 J. INT’L BUS. STUD. 123, 125–26 (1984) (parentheticals omitted).

30. See Gertz, *supra* note 17, at 94; Jing Li et al., *Diplomatic and Corporate Networks: Bridges to Foreign Locations*, 49 J. INT’L BUS. STUD. 659, 660 (2018).

31. RODRIGO POLANCO, *THE RETURN OF THE HOME STATE TO INVESTOR-STATE DISPUTES: BRINGING BACK DIPLOMATIC PROTECTION?* 11–12 (2019).

32. *Id.* at 13.

33. Geoffrey Gertz et al., *Legalization, Diplomacy, and Development: Do Investment Treaties De-politicize Investment Disputes?*, 107 WORLD DEV. 239, 240 (2018).

34. See, e.g., *id.* at 240–42; Evan H. Potter, *Branding Canada: The Renaissance of Canada’s Commercial Diplomacy*, 5 INT’L STUD. PERSPS. 55 (2004); Donna Lee, *The Growing Influence of Business in U.K. Diplomacy*, 5 INT’L STUD. PERSPS. 50 (2004).

developing countries,³⁵ is no longer justifiable now that emerging market MNCs contribute a much larger share of global investment.³⁶

Also under-explored in this line of research is the effect of MNCs' ownership structure on their recourse to diplomatic protection. SOEs play an essential role in Chinese outbound investment.³⁷ While ownership enables the Chinese government to exert direct control over the overseas operations of Chinese SOEs,³⁸ it also causes concerns and doubt about their motives and the long-term benefits to local stakeholders.³⁹ Naturally, state-owned Chinese MNCs are prime targets for unfair host-state treatment. Yet, on the other hand, "firms with strong ties to home governments are more likely to leverage diplomatic networks for benefits in overseas investments."⁴⁰ Among all types of state-business ties, equity ownership constitutes a highly discernible and robust organizational linkage.⁴¹ Are state-owned MNCs more inclined to seek diplomatic assistance in addressing post-investment mistreatment by host states? The question, despite its theoretical and policy importance, has received scant scholarly treatment.

B. *International-Formal*

Compared to diplomatic assistance, which is political, informal, and unpredictable, international investment arbitration offers a much more institutionalized remedial measure for foreign investors mistreated by their host states. Thanks to the collective efforts of the traditional capital-exporting countries, a sophisticated investment arbitration regime took shape in the past few decades out of a plethora of bilateral and regional investment treaties.⁴² Conceptualized as an international commitment device,⁴³ investment treaties typically contain clauses prohibiting signatory states from unfairly treating foreign investors and expropriating their investments except "for a public purpose, in a non-discriminatory manner, on payment of prompt, adequate, and effective compensation, and in accordance with due process of law."⁴⁴ Most of the treaties contain provisions that enable aggrieved foreign investors to arbitrate their claims against host governments at the Interna-

35. A notable exception is Duanmu, *supra* note 17.

36. Ramasamy, *supra* note 20, at 18.

37. Quer, *supra* note 27, at 518.

38. Li, *supra* note 1, at 100–01.

39. Dirk Holtbruegge, *Political Strategies of Chinese Firms in Germany: An Institutional Perspective*, 13 INT'L J. EMERGING MARKETS 1438, 1439 (2018).

40. Li, *supra* note 30, at 660.

41. *Id.*

42. Puig & Shaffer, *supra* note 24, at 363–64.

43. Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107, 108 (2005). Recent research documented plural motives behind investment treaty making. Lauge N. Skovgaard Poulsen, *Beyond Credible Commitments: (Investment) Treaties as Focal Points*, 64 INT'L STUD. Q. 26, 26 (2020).

44. See, e.g., Article 6, Paragraph 1, 2012 U.S. Model Bilateral Investment Treaty, <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [<https://perma.cc/W9PV-QXLQ>]. For a discussion of the major investment treaty protections, see Section III of Alan Sykes, *The Economic*

tional Centre for Settlement of Investment Disputes (“ICSID”), a part of the World Bank, pursuant to the ICSID Convention and Rules.⁴⁵

While this investor-state arbitration regime continues to evolve and the Chinese government has been an enthusiastic participant,⁴⁶ China has not yet signed a bilateral investment treaty with the United States.⁴⁷ Nor are the two countries both members of any regional investment agreements. Nonetheless, Chinese investors with professional assistance can structure cross-border investments through third countries, typically low-tax jurisdictions, to avail themselves of major investment treaty benefits, including the arbitration provision.⁴⁸ But have they?

Scholars in this area have spent years constructing, analyzing, and critiquing the investment arbitration regime, and a nascent literature has begun to explore some of its empirical aspects.⁴⁹ One of the studies found that, despite the alleged efficacy of investment arbitration, executives of MNCs have neglected it when arranging their cross-border transactions.⁵⁰ As a result, they are unable to take advantage of this formal international institution to ameliorate “unfair and inequitable” host-government treatment.⁵¹ Can we generalize the finding to emerging market MNCs? Also, are state-owned MNCs distinguishable in terms of their awareness and use of investment arbitration? The extant literature on this topic is silent as it has largely neglected MNCs from developing countries such as China, especially those MNCs of state ownership.⁵² Moreover, we know little about investment arbitration in relation to the other institutional choices available to Chinese MNCs. For instance, in response to unfair U.S. government treatment, are Chinese MNC executives more likely to seek home-state diplomatic assistance or delegate the matter to a panel of professional arbitrators? Without a

Structure of International Investment Agreements with Implications for Treaty Interpretation and Design, 113 AM. J. INT’L L. 482, 515–34 (2019).

45. SWEET & GRISEL, *supra* note 18, at 68.

46. Donglin Han et al., *To Sign or Not to Sign: Explaining the Formation of China’s Bilateral Investment Treaties*, 20 INT’L RELS. ASIA-PACIFIC 345, 347 (2020).

47. Betsy Bourassa, *U.S. and China Breakthrough Announcement on the Bilateral Investment Treaty Negotiations*, TREASURY NOTES (July 15, 2013), <https://www.treasury.gov/connect/blog/Pages/U.S.-and-China-Breakthrough-Announcement.aspx> [<https://perma.cc/ND93-DJQU>] (last visited May 15, 2020).

48. The extent to which one may engage in such treaty shopping is still being debated. *See, e.g.*, Robert Wisner & Nick Gallus, *Nationality Requirements in Investor-State Arbitration*, 5 J. WORLD INV. & TRADE 927 (2004).

49. *See generally* Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007); Schultz & Dupont, *supra* note 18; Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L. J. 211 (2012).

50. Yackee, *supra* note 23, at 810.

51. For more detailed discussion about the investment law standard, *see, for example*, Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357 (2005).

52. *See, e.g.*, Mark Feldman, *State-Owned Enterprises as Claimants in International Investment Arbitration*, 31 ICSID REV. 24 (2016); Paul Blyschak, *State-Owned Enterprises and International Investment Treaties: When Are State-Owned Entities and Their Investments Protected?*, 6 J. INT’L L. & INT’L RELATIONS 1 (2011); Ji Li, *State-Owned Enterprises in the Current Regime of Investor-State Arbitration*, in 3 THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION 380 (Shaheza Lalani & Rodrigo Polanco Lazo eds., 2014).

cross-institutional comparative analysis, our answer will inevitably be speculative and incomplete.⁵³

C. Domestic-Informal

Apart from diplomacy and investment arbitration, MNCs may access a variety of host-state institutional resources to attenuate official bias. This subsection surveys the informal alternatives. A sizable literature has examined corporate political activities (“CPA”) for managing policy and regulatory risks.⁵⁴ Broadly defined, CPA encompasses “behavior that manages the relations with non-market stakeholders that may positively or negatively affect the firms’ operations.”⁵⁵ Scholars have categorized the behavior into information strategies (for example, lobbying), financial incentive strategies (for example, donating to political parties), and constituency-building strategies (for example, forming business associations).⁵⁶ Because the CPA literature focuses on firms’ policy-shaping activities, not ad hoc reactions to be examined in this Article, some of the strategies (for example, political donation) are irrelevant here. Setting those aside, the main domestic informal coping measures to be investigated herein include lobbying, seeking media support, exploiting personal connections, and acquiring assistance from business associations.

Corporate lobbying has a venerable lineage in U.S. politics,⁵⁷ and this ubiquitous form of state-business relations has generated a plethora of research.⁵⁸ However, apart from some studies on business lobbying in foreign settings,⁵⁹ few scholars have empirically analyzed lobbying by emerging

53. Puig & Shaffer, *supra* note 24, at 361. The authors are mainly concerned with comparing the institutional choices in terms of achieving public policy goals, but the underlying argument applies equally to firm-centered comparative institutional analysis.

54. For a review of the literature, see Thomas Lawton et al., *Corporate Political Activity: A Literature Review and Research Agenda*, 15 INT’L J. MGMT. REV. 86 (2013).

55. Holtbruegge, *supra* note 39, at 1439.

56. Amy J. Hillman & Michael A. Hitt, *Corporate Political Strategy Formulation: A Model of Approach, Participation, and Strategy Decisions*, 24 ACADEMY MGMT. REV. 825, 833–34 (1999).

57. LEE JARED DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: THE EXPANSION OF CORPORATE POLITICAL ACTIVITY AND THE FUTURE OF AMERICAN PLURALISM 49 (2010).

58. See, e.g., Matilde Bombardini, *Firm Heterogeneity and Lobby Participation*, 75 J. INT’L ECON. 329 (2008); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006); Jeannine E. Rely & Carol B. Schwalbe, *How Business Lobby Networks Shaped the U.S. Freedom of Information Act: An Examination of 60 Years of Congressional Testimony*, 33 GOV’T INFO. Q. 404 (2016); Geeyoung Min & Hye Young You, *Active Firms and Active Shareholders: Corporate Political Activity and Shareholder Proposals*, 48 J. LEGAL STUD. 81 (2019); Wendy L. Hansen & Neil J. Mitchell, *Disaggregating and Explaining Corporate Political Activity: Domestic and Foreign Corporations in National Politics*, 94 AM. POL. SCI. REV. 891 (2000); DRUTMAN, *supra* note 57; FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY (2009).

59. For examples of the literature, see SCOTT KENNEDY, THE BUSINESS OF LOBBYING IN CHINA (2009); Stanley A. Kochanek, *Liberalisation and Business Lobbying in India*, 34 J. COMMONWEALTH & COMPAR. POL. 155 (1996); Ulrike Schaeede, *The “Old Boy” Network and Government-Business Relationships in Japan*, 21 J. JAPANESE STUD. 293 (1995).

market MNCs in developed host countries.⁶⁰ The omission is surprising given that MNCs, according to the CPA literature, have strong incentives to fill information gaps by lobbying host-state officials. Moreover, little prior research has considered the ownership structure of MNCs and how it might affect their lobbying in host states.⁶¹

MNCs may also cope with host-government mistreatment by seeking help from local media. Media-savvy companies can respond to adverse political and regulatory environments by spreading favorable information, which may put pressure on regulators and policymakers to change course. In China, popular media has assumed an increasingly important role in resolving disputes and addressing official injustice.⁶² However, we do not know whether Chinese MNCs may rely on this type of institutional resource to cope with infringing host-country officials, though anecdotal reports suggest that some Chinese MNCs regard talking to the U.S. media as “anathema.”⁶³

Moreover, MNCs may cultivate personal connections with powerholders to manage host-country political risks.⁶⁴ Such an informal strategy should appeal to investors from emerging economies, where formal institutions are often viewed as fragile and fluid. Within China’s domestic setting, business owners ill-treated by government agents routinely solicit help from well-connected individuals.⁶⁵ This type of institutional resource, however, may not be transportable to foreign countries, especially those that are culturally distant and feature robust legal systems.

Furthermore, MNCs can leverage the power of business associations to protect their investment interests.⁶⁶ Such institutions preserve collective memory and serve either as a source or a forum for exchanging valuable information. Also, the use of such institutions to lobby host governments may be important for foreign investors subject to heightened political or regulatory scrutiny. Additionally, participation in the “associational process, via social learning and interaction, can enhance awareness and sensitivity of

60. A few studies have examined foreign lobbying in the United States by Israel, the Arabic world, and Russia. See, e.g., Sergey Sergeevich Kostyaev, *Russian Lobbying in the United States: Stages of Evolution*, 12 J. PUB. AFF. 279 (2012).

61. For a notable exception that explores Chinese MNCs’ political activities in Germany, see Holtbruegge, *supra* note 39.

62. Benjamin L Liebman, *Watchdog or Demagogue—The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 6–7 (2005).

63. WILLIAM PLUMMER, HUIDU: INSIDE HUAWEI 9 (2018).

64. See, e.g., Hongying Wang, *Informal Institutions and Foreign Investment in China*, 13 PAC. REV., 525, 534–35 (2000); Chris Marquis & Mia Raynard, *Institutional Strategies in Emerging Markets*, 9 ACADEMY OF MANAGEMENT ANNALS 291, 304–05 (2015).

65. See generally Peng Wang, *Extra-legal Protection in China: How Guanxi Distorts China’s Legal System and Facilitates the Rise of Unlawful Protectors*, 54 BRITISH J. CRIMINOLOGY 809 (2014); Eric WK Tsang, *Can Guanxi be a Source of Sustained Competitive Advantage for Doing Business in China?*, 12 ACAD. MGMT. PERSP. 64 (1998).

66. See, e.g., Yanlong Zhang et al., *Institutional Duality and Political Strategies of Foreign-invested Firms in An Emerging Economy*, 51 J. WORLD BUS. 451 (2016).

CPS.”⁶⁷ Chinese MNCs in the United States have established their own business associations, and many have joined trade organizations in their primary sectors. For instance, major Chinese banks with established U.S. operations have acquired memberships in the Institute of International Bankers, whose stated mission is to “ensure that federal and state banking laws and regulations provide international banks operating in the United States with the same competitive opportunities as domestic banking organizations.”⁶⁸ To what extent would Chinese MNCs encountering official bias in the United States resort to such institutional resources? Again, the existing literature offers few clues.

To summarize this subsection, a sizable CPA literature has investigated various domestic informal institutions that may enable corporations to alleviate undue policy and regulatory pressure. Among them, four pertain to the instant study. However, like diplomacy, all four institutional choices produce “unsure outcomes.”⁶⁹ Hence, MNCs may prefer formal institutional alternatives to address host-country governmental bias. As detailed below, such institutions are readily available in the United States.

D. Domestic-Formal

MNCs claiming unfair U.S. government dealings may resort to two formal remedial institutions long established in the host country: judicial review and administrative appeals mechanisms embedded in or associated with most government agencies. The two institutions do not operate on parallel tracks, as decisions rendered by an administrative review body may be subject to further judicial scrutiny. As a matter of fact, for judicial review of some agency activities, exhaustion of available administrative remedies is generally required.⁷⁰ Thus, claimants, government agents, and reviewers should have factored the procedural expectation into the administrative complaint process, or even the earlier stage of agency action,⁷¹ locking the two institutions in a dynamic interaction. That being said, two distinct literatures have accumulated on judicial scrutiny of administrative actions⁷²

67. *Id.* at 455.

68. *Membership: About the IIB and How We Operate*, INST. INT’L BANKERS, <https://www.iib.org/page/Membership> [https://perma.cc/NQP7-2LXE]. For a list of IIB members, see *Members of the IIB*, INST. INT’L BANKERS, <https://www.iib.org/page/MembersoftheIIB> [https://perma.cc/XG34-HGLN].

69. Phillip C. Nell et al., *Strictly Limited Choice or Agency? Institutional Duality, Legitimacy, and Subsidiaries’ Political Strategies*, 50 J. WORLD BUS. 302, 305 (2015).

70. Jones & Taylor, *supra* note 28, at 312.

71. For discussion about the interactions between courts and administrative agencies, see, for example, Brandice Canes-Wrone, *Bureaucratic Decisions and the Composition of the Lower Courts*, 47 AM. J. POL. SCI. 205 (2003); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-institutional Policy-making*, 12 J. L. ECON. & ORG. 119 (1996).

72. For a list of notable works on judicial review of administrative actions, see David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975); Eduardo Jordão & Susan Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, 66 ADMIN. L. REV. 1 (2014); Martha Anne Humphries &

and internal review of agency conduct.⁷³ But again, the prior research has largely neglected the use of litigation or administrative petitions by foreign investors in the United States,⁷⁴ and the possible MNC ownership effects. This Article will narrow the gap by analyzing whether and how MNCs from China make use of the formal domestic institutions in the United States to address the risk of official bias.

To summarize, the scholarship pertinent to MNCs' reactions to unfair host-government treatment is fragmented and largely inattentive to non-Western firms, leaving us in the dark as to their preferences regarding the wide range of available bias-mitigating and remedial institutions, formal and informal, domestic and international.⁷⁵ To move the field forward, I will conduct two sets of comparative analyses. First, I apply a firm-centered comparative institutional approach and simultaneously compare all the institutional choices listed in Table 1. This *cross-institutional* comparison will reveal the preferences of Chinese MNCs as a group in mitigating official bias in the United States. Second, I rotate the analytical angle and explore the *inter-company* variations in the preferences for the more popular institutional choices, and in doing so I focus on possible effects of state ownership, a key corporate attribute that distinguishes Chinese MNCs from those of most other countries.

II. CROSS-INSTITUTIONAL VARIATIONS IN CHINESE MNCs' REACTIONS TO "UNFAIR" U.S. GOVERNMENT TREATMENT

When mistreated by host states, aggrieved MNCs may adopt a variety of coping strategies. As the preceding section has shown, research on the use of these strategies is fragmented and incomplete, offering few clues as to the institutional choices of developing-country MNCs, especially those owned by their home-state governments. To narrow the knowledge gaps, this Part takes a firm-oriented comparative institutional approach to examine the multiple coping strategies Chinese MNCs may contemplate to tackle perceived official bias in the United States. As will be detailed, the analysis

Donald R. Songer, *Law and Politics in Judicial Oversight of Federal Administrative Agencies*, 61 J. POL. 207 (1999).

73. For a list of articles on administrative appeals mechanisms in different agencies, see Vicki Lens, *Contesting the Bureaucracy: Examining Administrative Appeals*, 20 SOC. & LEGAL STUD. 421 (2011); Patricia A. Butler, *Medicare Appeals Procedures: A Constitutional Analysis*, 70 NW. U. L. REV. 139 (1975); Jerome Smith, *Social Security Appeals in Disability Cases*, ADMIN. L. REV. 13 (1976).

74. There is a sizable literature about foreign parties litigating civil cases in U.S. courts. See, e.g., Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 4811 (2011); Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism"*, 73 WASH. & LEE L. REV. 653 (2016); Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497 (2002); Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in US Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441 (2007); William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205 (2017).

75. A notable recent effort to examine the multiple institutions in a holistic approach is Matthew S. Erie, *Chinese Law and Development*, 62 HARV. INT'L L. J. (forthcoming 2021).

reveals clear evidence of *cross-institutional* variations in the MNCs' expressed preferences. To be more concrete, Chinese MNCs unfairly treated by U.S. officials are more inclined to seek diplomatic assistance, judicial and administrative review, and support from business associations, as these formal and informal institutional resources provide either low-cost access or effective remedy for unfair agency conduct. Investment arbitration evokes lukewarm interest among Chinese MNCs due to its high information cost. And only a small percentage of the MNCs would contemplate the use of personal connections, lobbying, or public media for either high costs or uncertain outcomes.

A. Analytical Framework

Before proceeding, some unpacking of the analytical framework is in order. For social scientists, the question of the MNCs' preferred coping strategies is essentially an inquiry about institutional choice. Institutions, despite their theoretical significance, lack a unified definition.⁷⁶ Some scholars recognize exclusively formal "rules of the game" such as statutes and regulations.⁷⁷ Others embrace informal institutions such as social norms.⁷⁸ Still others consider organizations as institutions.⁷⁹ More encompassing definitions equate institution to "a system of humanmade, nonphysical elements—norms, beliefs, organizations, and rules—exogenous to each individual whose behavior it influences that generates behavioral regularities."⁸⁰ Briefly, the concept of institutions is so inclusive and malleable that it "can be defined and aggregated in any number of ways depending on the focus for study."⁸¹

For the purposes of this Article, I adopt two distinct definitions of institutions. First, following scholars of comparative institutional analysis, I define institutions as processes for rendering decisions and mobilizing and allocating resources.⁸² For instance, if a Chinese MNC mistreated by a U.S.

76. GEOFFREY M HODGSON, *ECONOMICS AND INSTITUTIONS* 1 (1988).

77. See, e.g., Rafael La Porta et al., *Law and Finance*, 106 J. POLITICAL ECON. 1113 (1998); Barnard S. Black & Vikramaditya S. Khanna, *Can Corporate Governance Reforms Increase Firm Market Values? Event Study Evidence from India*, 4 J. EMPIRICAL L. STUD. 749 (2007); Robert H. Sitkoff & Max M. Schanzbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L. J. 356 (2005).

78. There is a vast literature on how norms and cultures regulate behavior. A few seminal works include ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

79. Research in multiple disciplines that studies organizations and treats individuals as the unit of analysis often explicitly or implicitly adopts this definition. For a discussion about organizations as special institutions, see, for example, Geoffrey M Hodgson, *What Are Institutions?*, 40 J. ECON. ISSUES 1 (2006).

80. Avner Greif & David D. Laitin, *A Theory of Endogenous Institutional Change*, 98 AM. POL. SCI. REV. 633, 635 (2004).

81. Komesar, *supra* note 24.

82. *Id.* at 3.

government body decides to litigate, it has chosen, out of all the major alternatives, the judicial institution, which, if finding in the MNC's favor, will reallocate resources to compensate for its loss. The rest of this section will explore the preferred institutional choices of Chinese MNCs in mitigating and remedying official bias in the United States. The choice, however, is not made in a social vacuum. Rather, the MNCs' analysis is embedded in and shaped by their broad institutional context.⁸³ Accounting for the effects of the contextual institutions necessitates a different definition. Borrowing from North, I define the contextual institutions as the "rules of the game" that shape the preferences and behaviors of rational actors by modifying their expectations and cost benefit analysis.⁸⁴

Obviously, the two definitions of institutions are not mutually exclusive. Depending on the focus and purpose of one's research, the first definition (institutions as processes) in application may overlap extensively with the second one (institutions as the "rules of the game"). To illustrate, consider litigation. If an MNC has already initiated a legal proceeding, then the directly relevant and binding rules of the game (for example, procedural rules and evidentiary rules) form a key component of the decision process. Also, some choices of the risk-coping institutions implicate multiple contextual institutions. The choice of lobbying, for instance, is shaped by the contextual institution of the service market as well as regulated by formal rules such as the federal statutes prescribing the registration of lobbying activities,⁸⁵ particularly those on behalf of foreign parties.⁸⁶ Despite the potential overlaps, much will be learned from theoretically bifurcating the concept of institutions and at the same time analytically synthesizing their applications. To avoid confusion, I will label the process institutions as risk-coping institutions (or institutional choices) and the "rules of the game" institutions as contextual institutions (or background institutions).

The rest of this Article will compare the Chinese MNCs' preferences for the risk-coping institutions within their contextual institutions. As just noted, there exists a sizable literature on comparative institutional analysis,⁸⁷ which, as a subfield of rational choice institutionalism, recognizes that multiple decisionmaking processes (for example, market, legislature, and court) may perform, in equally imperfect ways, the same social functions, such as

83. Anna John & Thomas C. Lawton, *International Political Risk Management: Perspectives, Approaches and Emerging Agendas*, 20 INT'L J. MGMT. REV. 847, 857 (2018).

84. Douglass C. North, *Institutions and Credible Commitment*, 149 J. INST. & THEOR. ECON. 11, 12 (1993).

85. See, e.g., Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601–14.

86. See, e.g., Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611. For a discussion about the history and background of the Act, see Hyo Young You, *Foreign Agents Registration Act: A User's Guide*, 9 INT. GRPS. & ADVOC. 302, 304–05 (2020).

87. See, e.g., KOMESAR, *supra* note 24; Puig & Shaffer, *supra* note 24; Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. PENN. L. REV. 411 (2015).

dispute resolution and resource allocation.⁸⁸ Therefore, research and policy debates confined to only one institution remain incomplete, as the alternative ones, due to their inherent complementarity, may not fare better in achieving the desired policy objective, be it efficiency or equity.⁸⁹ Essentially, comparative institutional performance turns on participation, which is in turn a function of the number of participants and the subject matter complexity.⁹⁰ So far, however, scholars have applied the theory of comparative institutional analysis mainly to policy debates concerning institutional design and competence.⁹¹ Therefore, rigorous empirical studies are in short supply, and few such studies conduct institutional comparisons from the participants' vantage point.

That being said, numerous scholars of various topical areas have engaged in participant-centered comparative institutional analysis without describing it as such. For instance, much of the research about the choice of dispute-resolution method involves comparing the adjudicatory institution to the alternatives regarding their relative pros and cons for the disputants or the society.⁹² Also, the sizable literature on strategic "forum shopping" explores litigants' choice among multiple possible tribunals with heterogeneous expected judicial behavior regarding the claims and ultimate outcomes.⁹³ Likewise, studies about "treaty shopping" examine how individuals and firms compare varying benefits from different treaties and pursue strategies such as corporate relocation or organizational restructuring to obtain desirable treaty benefits.⁹⁴ This long line of research has illustrated that MNCs constantly assess multiple institutional choices and pursue the ones that best achieve various corporate goals. In addition, such "institutional shopping" is bounded by the actors' limited will, information, and cognitive capacity, and subject to transaction and agency cost.⁹⁵ To expand the neo-institution-

88. See KOMESAR, *supra* note 24, at 5.

89. See generally Shaffer, *supra* note 24.

90. See KOMESAR, *supra* note 24, at 8.

91. See, e.g., Chilton & Whytock, *supra* note 87; Puig & Shaffer, *supra* note 24.

92. See, e.g., Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982); Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986); Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986). For a concise comparative description of the myriad dispute resolution methods, see Carrie Menkel-Meadow, *Mediation, Arbitration, and Alternative Dispute Resolution (ADR)*, in 15 INT'L ENCYCL. SOC. & BEHAV. SCIS. 70 (2d ed. 2015).

93. See, e.g., Whytock, *supra* note 74; Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT'L ORG. 735 (2007); Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11 (1991).

94. See, e.g., Vincent Arel-Bundock, *The Unintended Consequences of Bilateralism: Treaty Shopping and International Tax Policy*, 71 INT'L ORG. 349 (2017); JORUN BAUMGARTNER, *TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW* (2016); Alejandro Faya Rodriguez, *Most-Favored-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping*, 25 J. INT'L ARB. 89 (2008).

95. For a comprehensive review of rational choice institutionalism, see, for example, Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LITER. 595 (2000);

alist research in a new direction, this Article empirically examines Chinese MNCs' contemplated institutional choices in their efforts to alleviate political risks, such as unfair government treatment in the United States.

The institutional shopping takes place within the setting of broad heterogeneous contextual institutions of both the MNCs' host and home countries.⁹⁶ While the host-state institutional influence is obvious, the effects of home-state contextual institutions merit a brief explanation. First, culturally grounded informal contextual institutions, resistant to rapid changes,⁹⁷ may shape the information source and perception of MNC executives, who are often expatriates, while they compare and select risk-coping institutions in the United States.⁹⁸ Second, formal contextual institutions of the home state sometimes have extraterritorial impacts.⁹⁹ Third, corporate governance may channel the influence of home-state contextual institutions to MNCs' foreign affiliates. The headquarters typically design internal rules to align employees' conduct with the collective corporate goals. Such rules, inevitably echoing the MNCs' home-state contexts, should modify the behavior of all their employees including those located in developed host countries.

Given the potential home-state institutional influence, I start the analysis with a synopsis of how Chinese companies cope with unfair treatment of a government agency in China. In a country undergoing profound and uneven social and economic transformations, Chinese companies' strategies to mitigate political risks vary both regionally and temporally. However, as the authoritarian nature of the Party-State and the subordination of the judiciary have remained intact,¹⁰⁰ Chinese companies mistreated by government officials in the domestic setting tend to avoid formal remedial institutions.¹⁰¹ Instead, they tap into informal risk-coping institutions such as social connections and business associations to fend off predatory state officials and ameliorate discriminatory government policies.¹⁰² Moreover, for most Chi-

Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 636 (1996).

96. See generally Schon Beechler & John Zhuang Yang, *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 HUM. RES. MGMT. J. 19 (1997); Saul Estrin et al., *Home Country Institutions and the Internationalization of State Owned Enterprises: A Cross-Country Analysis*, 51 J. WORLD BUS. 294 (2016); Raymond Fisman & Edward Miguel, *Corruption, Norms, and Legal Enforcement: Evidence from Diplomatic Parking Tickets*, 115 J. POL. ECON. 1020 (2007).

97. See generally Williamson, *supra* note 95.

98. See generally Holburn & Zelner, *supra* note 19; see also 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).

99. Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. INT'L BUS. STUD. 634, 635 (2008).

100. See generally Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMPAR. L. 935 (2011).

101. See generally Ji Li, *Suing the Leviathan: An Empirical Analysis of the Changing Rate of Administrative Litigation in China*, 10 J. EMPIR. LEGAL STUD. 815 (2013).

102. See, e.g., Yuen Yuen Ang & Nan Jia, *Perverse Complementarity: Political Connections and the Use of Courts among Private Firms in China*, 76 J. POLITICS 318 (2014); SCOTT KENNEDY, *THE BUSINESS OF LOBBYING IN CHINA* (2009).

nese firms with only domestic operations, the international institutions for political risk management are either out of reach (for example, investment arbitration) or irrelevant (for example, diplomatic assistance).

From this baseline, and within the host-country institutional context, Chinese MNCs in the United States seek a coping strategy that optimally mitigates and remedies the risk of unfair government treatment. The institutional choice should generate high expected benefit at low cost. For the purposes of this Article, I define the cost of an institutional choice as comprising mainly the cost of information and the cost of organization.¹⁰³ Information cost, which plays a central role in rational choice institutionalism,¹⁰⁴ factors prominently in the Chinese MNCs' comparative decision process. Accessing some types of institutional resources requires knowledge about complex procedural and substantive rules (for example, litigation and investor-state arbitration). Selecting such institutions would therefore entail significant information cost (for example, fees paid to specialists possessing such knowledge). By contrast, the information cost of accessing certain risk-coping institutions such as commercial diplomacy is comparatively low. All it takes to request diplomatic assistance is for a Chinese MNC to make a phone call or submit a written memo to the consulate. However, as will be shown in a moment, the cost of organization may be very high in such cases.

Organization cost is the cost of mobilizing the owners or controllers of the institutional resources associated with a risk-coping strategy. A key determinant of this cost is interest alignment: the extent to which the interests of the MNCs, in this study the mitigation or remedy of official bias in the United States, is aligned with the interests of those owning or controlling the relevant institutional resources. In the rare case of perfect interest alignment, it will be less costly for a Chinese MNC to mobilize the resources of a chosen institution; if the interests diverge, the cost of organization can be substantial. While none of the institutional alternatives studied herein exists solely to serve the narrow goal of addressing Chinese MNCs' grievances against alleged U.S. government wrongdoers, some of their core institutional objectives may overlap with the protection of foreign investors. And the degree of interest alignment determines the extent to which a Chinese MNC expects its plea for assistance will successfully mobilize the institutional resources. For instance, business associations in the United States, whose *raison d'être* is to serve the collective interests of their members, are expectedly responsive to the needs of fee-paying Chinese MNCs. By comparison, judicial review may perform the function of checking and rectifying official malfeasance,¹⁰⁵ but the key institutional objectives of the judiciary clearly exclude advocating the cases of MNC complainants against U.S. gov-

103. KOMESAR, *supra* note 24, at 8.

104. *Id.*

105. Cass R Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 525 (1989).

ernment actors. Still other institutions have more diverse goals. U.S. media, for instance, serves both commercial and social purposes, which only occasionally overlap with publicizing the complaints of Chinese MNCs.

On the benefit side, the objective of an institutional choice for a Chinese MNC is rather well-defined and straightforward in this study—the expected effect of alleviating the risk and damage of discriminatory government treatment, which vary significantly. Some of the risk-coping institutions have the power or authority to dictate modifications in the disputed official conduct or to provide adequate remedy. Take, as an example, the U.S. judiciary. Thanks to the setup of the U.S. political system and the entrenched judicial authority, an aggrieved party who prevails in court against a government agency may reasonably expect compliance and/or relief in the form of an injunction, rectified government conduct, or compensation. Likewise, an MNC winning an investment arbitration may reasonably anticipate compensation, though it is possible for a non-compliant U.S. government to stall the MNC's enforcement efforts.¹⁰⁶ By comparison, some of the institutional choices lead to more uncertain outcomes. Lobbying, for instance, has indirect and uncertain behavioral effects that may be measurable only in the long run.¹⁰⁷

“Comparative institutional analysis is very difficult.”¹⁰⁸ To enable the comparison in an “acceptable, understandable, and useable fashion,”¹⁰⁹ I convert the analysis into one about the varying interactions of the costs and benefits of the institutional alternatives. Litigation in a U.S. court, for instance, entails high information cost and relatively low organization cost, and it has direct effects on official bias if the MNC plaintiff prevails. By contrast, media campaigns require low information cost but high organization cost, yet the strategy has uncertain expected effects. Theoretically, it is hard to predict how Chinese MNCs would sum up and compare all the costs and benefits and express unambivalent preferences for certain institutional alternatives over others. I contend that scholars get the most mileage out of comparative institutional analysis by applying it to conceptualizing and formulating research questions, and then collecting and deciphering otherwise complex and seemingly unconnected empirical evidence.

To summarize, Chinese MNCs as a group should exhibit varying preferences for the available risk-coping institutions, given the different interactions of their costs and benefits, in dealing with host-government bias in the United States. The rest of this Part will empirically examine the cross-institutional variations. It merits mentioning that the institutional choices ex-

106. Countries usually comply voluntarily with investment arbitral awards. In cases where they refuse to do so, foreign investors may face significant hurdles in enforcing the awards. Olga Gerlich, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: the Achilles' Heel of the Investor-State Arbitration System?*, 26 AM. REV. INT'L ARB. 47, 48 (2015).

107. BAUMGARTNER ET AL., *supra* note 58, at 237.

108. KOMESAR, *supra* note 24, at 7.

109. *Id.* at 7.

amined herein are not exhaustive. Foreign investors, for instance, may consider combining investment arbitration with mediation in resolving disputes with host-state governments.¹¹⁰ That said, this study covers the major non-commercial risk-coping institutions that Chinese MNCs usually contemplate. Also, the institutional choices are not mutually exclusive.¹¹¹ For instance, companies choosing to access the resources of business associations may have in mind the benefit of their collective lobbying power.¹¹² Yet, as Table 8 shows, the correlations among the institutional preferences are limited. More detailed analysis will follow the methodological description below.

B. Methodology

To recapitulate, this Article explores (1) the cross-institutional variations in the contemplated reactions of Chinese MNCs to official bias in the United States, and (2) the inter-company variations in the major institutional preferences, with a focus on the effects of the MNCs' state ownership. In doing so, I employ both quantitative and qualitative methods. The former relies primarily on data collected from surveying Chinese firms operating in the United States. The surveys were conducted in 2014, 2015, 2016, 2017, and 2019 in collaboration with the China General Chamber of Commerce USA ("CGCC"), by far the largest business association of Chinese companies in the United States.¹¹³ As Chinese investors grew in number over this period, so did the membership of CGCC and the sample for the survey. In 2017, for instance, the questionnaires were sent to about 600 CGCC members, and 213 responded (a response rate of approximately 35.5%). Over the period, however, the survey response rate remained relatively stable. Comparisons between the responding and non-responding companies revealed no significant differences in their major aspects such as size and ownership structure. In addition, according to mean-comparison t-tests between the sample of CGCC member firms and Chinese firms with direct U.S. investments registered with the Ministry of Commerce of China,¹¹⁴ large and state-owned enterprises are over-represented in the

110. James M. Claxton, *Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?*, 20 PEPP. DISP. RESOL. L.J. 78, 79 (2020).

111. Rather, some of them are partial substitutes and others complementary. For instance, investor-state arbitration is intended to depoliticize investment disputes. So, at least in theory, investment arbitration and commercial diplomacy are substitutes for each other. Gertz, *supra* note 33, at 239.

112. DRUTMAN, *supra* note 57, at 98–99.

113. Besides Chinese-invested companies, the CGCC also offers associate membership to fee-paying U.S. companies that have "already established or are planning to establish business relationships in China or with Chinese enterprises." FAQ: *What Kind of Companies/Organizations Join CGCC?*, CHINA GEN. CHAMBER OF COMM., <https://www.cgccusa.org/en/about-us/> [<https://perma.cc/RU9K-7YCN>] (last visited Apr. 4, 2021). The associate members are excluded from the survey sampling.

114. The 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. Can Ouyang et al., *Overcoming Liabilities of*

CGCC sample.¹¹⁵ This serves well the purposes of this study, as some of the risk-coping institutions (e.g., international investment arbitration and lobbying) are well beyond the reach of small Chinese investors. The survey questionnaires from 2014 to 2017 contained a multiple-choice question inquiring about the reactions they would contemplate *if* treated unfairly by a government body in the United States. The selections correspond to the risk-coping strategies listed in Table 1.¹¹⁶ The same question with a truncated list of selections was included in the 2019 survey. For reasons to be elaborated, I will use the 2019 data primarily for robust tests in the next section.

The multiple-choice survey question was framed as a generic hypothetical, for only a fraction of the Chinese companies have in fact experienced any unfair government treatment in the United States.¹¹⁷ Also, actual government bias manifests in myriad forms, adding complex variations to the investors' institutional choices. Posing the question as a simple hypothetical avoids the complexity that is unnecessary for the purposes of this study. Granted, contemplated reactions usually deviate from the observed ones. Considering a lawsuit against a biased agency need not unfold into the filing of a complaint, let alone going through the entire court proceedings.¹¹⁸ And there is no denying that the implemented institutional strategies of Chinese MNCs are of considerable theoretical and policy interest and importance. Yet even research of that topic must begin by understanding the contem-

Origin: Human Resource Management Localization of Chinese Multinational Corporations in Developed Markets, 58 HUM. RESOURCE MGMT. 543, 550 (2019).

115. The issue of bias, inherent in all survey research, may affect the data and its interpretation. First, one may suspect survival bias—Chinese companies that have withdrawn from the U.S. market after the realization of certain political risks are not observed. Chinese companies began to invest substantially in the U.S. market only in the past few years, so nearly all were in the expansion mode at the time of the survey, before the onset of the trade war and the rising hostility towards Chinese MNCs. A thorough search of public sources has not found any sizable Chinese companies that quit the U.S. market by 2017. Second, the CGCC annual survey has been conducted for four years, with different sets of questions. Tests run on the 2014 data show no significant evidence of non-response bias. I will discuss this bias in more detail in footnote 146. Third, the single responder bias is mitigated by using multi-year data as well as the supplementation of interviews.

116. The choices are the following: 1. *Seeking help from the Chinese government*; 2. *Seeking help from business associations*; 3. *Seeking help from American media*; 4. *Petitioning to relevant U.S. government body*; 6. *Litigating in a U.S. court*; 5. *Filing for investment arbitration if possible*; 6. *Hiring professional lobbyists to lobby relevant government officials*; 7. *Seeking help from well-connected friends and acquaintances*; 8. *Lumping it if the damage is not substantial*; 9. *Others*. Two other choices, *Seeking advice from lawyers* and *Purchasing investment insurance*, were included in the question to test hypotheses in other research projects.

117. According to the survey conducted by CGCC in 2020, close to the nadir of U.S.-China relations in the past four decades, only forty percent of Chinese MNCs experienced unfair government treatment in the United States.

118. Two lines of research made this point clear. One in sociology highlights the decaying process of naming, blaming, and claiming. See, e.g., William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & SOC'Y REV. 631 (1980). The other line of inquiry falls in economics and points out the selection bias throughout the litigation. See, e.g., George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

plated institutional responses of Chinese investors when they first perceive government mistreatment in the United States.¹¹⁹

Supplementing the survey data is qualitative evidence derived from 152 interviews with business executives, in-house counsel, lawyers, and consultants employed by Chinese companies in the United States.¹²⁰ The interviews were collected via multi-core snowball sampling. One group of the interview subjects comprises personal acquaintances with prior experiences of working for Chinese MNCs in the United States.¹²¹ They shared valuable insights and introduced me to more interview candidates. Another cohort comprises CGCC members, some of whom also tapped into their personal and business networks to recruit interviewees for this project. Additionally, I conducted some interviews at various panels, workshops, and conferences on law and foreign investment.¹²² The multi-core snowball method generated a sample of professionals with diverse backgrounds (see Table 7 in Appendix for more details).

C. *Analysis of the Cross-Institutional Variations*

As shown in Figure 1, the survey data reveal significant variations in the preferred risk-coping institutions and a relatively stable distribution over the four years. There appears to be an overall shift away from the baseline preferences of Chinese companies described earlier, which tilt towards informal institutions. In other words, compared to their preferences in China, the MNC managers in the United States exhibit a stronger inclination to consider the use of formal domestic measures—litigation and administrative appeals—to mitigate and remedy host-country official bias. Meanwhile, they appear to shun the informal institutional resources. Upon closer examination, however, one easily detects nuanced cross-institutional variations beyond the plain dichotomization. The rest of this subsection will analyze the variations by examining the different cost-benefit interactions of the institutional choices within the MNCs' contextual institutions.

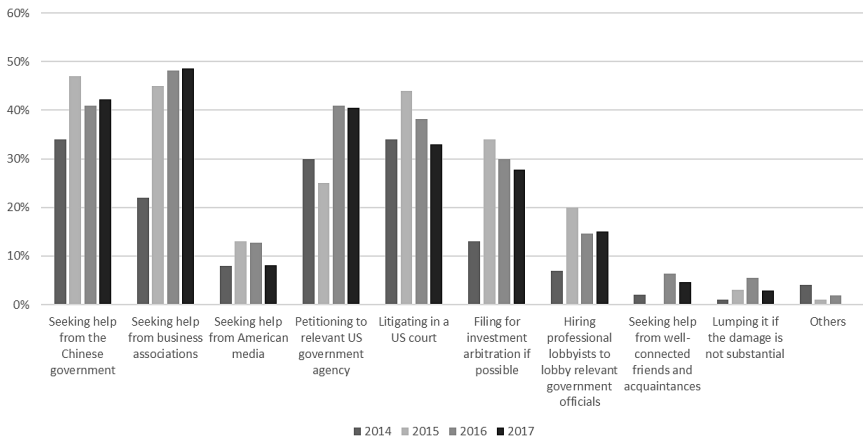
119. For instance, the preferences for the low-cost measures will likely materialize into actions.

120. The semi-structured interviews were conducted over many years for a large project exploring Chinese MNCs' adaptation to various U.S. institutions. Some of the interviews only tangentially relate to the topic of this Article. That said, they provide important background information.

121. The sampling method produces a group of informants serving sizable Chinese MNCs in the United States. As noted elsewhere, that generally serves the purposes of this study, as some of the major risk-coping institutions (for example, investment arbitration) are inaccessible to small Chinese investors.

122. An example of such events is the annual Practicing Law Institute program on Doing Business in and with Emerging Markets. See more details at *Doing Business in and with Emerging Markets 2021*, PRACTICING L. INST., <https://www.pli.edu/programs/doing-business-in-and-with-emerging-markets> [<https://perma.cc/T9ZR-HTHE>] (last visited Feb. 27, 2021).

FIGURE 1: ACTIONS TO TAKE IF TREATED UNFAIRLY BY A GOVERNMENT BODY IN THE UNITED STATES



Note: 70 responses to the question in the 2014 survey; 89 responses to the question in the 2015 survey; 110 responses to the question in the 2016 survey; 173 responses to the question in the 2017 survey.

1. International-Informal

As discussed in Part II.A, prior research about commercial diplomacy emphasized its importance for addressing inequitable host-state treatment in cross-border investment.¹²³ Consistent with this conventional view, seeking diplomatic assistance ranks as the second most preferred risk-coping institution for Chinese MNCs (more than forty percent) purportedly mistreated by a U.S. government body. Low cost may be a major explanation for the expressed preference. Close and intricate state-business relationships have long characterized the Chinese economy, and the Party-State under Xi’s leadership has become more proactive and conspicuous in projecting power abroad.¹²⁴ As a result, multiple diplomatic channels allow Chinese overseas businesses to report grievances against the U.S. government. Consular officials periodically meet with Chinese MNC executives in the United States.¹²⁵ In addition, prior to the onset of the trade war, the two governments convened regular meetings of senior officials in trade and investment. Before each meeting, the Chinese delegates would collect issues and con-

123. See *supra* note 29.

124. Nien-chung Chang-Liao, *China’s New Foreign Policy Under Xi Jinping*, 12 ASIAN SEC. 82, 83 (2016).

125. For a list of past meetings between the commercial and business counselor stationed at the New York Consulate of China and Chinese companies in the United States, see 对外活动 (Duiwài huódòng) [“External Activities”], MIN. OF COMM.: ECON. & COMM. OFF. OF THE CONSULATE GEN. OF THE PEOPLE’S REPUBLIC OF CHINA IN NEW YORK, <http://newyork.mofcom.gov.cn/article/dwhd/> [https://perma.cc/QT22-8P2D] (last visited Dec. 11, 2020).

cerns of Chinese MNCs, which would then be processed and conveyed to their U.S. counterparts.¹²⁶ Briefly, Chinese MNCs may access home-state diplomatic assistance at relatively low cost.

Yet a plea for help does not necessarily bring about meaningful assistance, and the cost of mobilizing the Chinese diplomatic resources can be enormous due to interest misalignment. Chinese investors' commercial interests in the United States, though substantial, constitute merely an insignificant part of the strategically important, multifaceted relations between the hegemon and the contending power. And due to the adverse host-country political environment, rising demand from Chinese MNCs for diplomatic assistance has already strained the human resources of the Chinese government and forced the Foreign Ministry to turn down most requests.¹²⁷

Even if the Chinese government decides to mobilize its diplomatic resources on behalf of a mistreated Chinese MNC, the effects on the U.S. agency will be uncertain and indirect, especially in the current geopolitical climate. Nonetheless, success stories have been circulating in the Chinese MNC community. A Chinese MNC executive offered an example illustrating the efficacy of diplomatic support. His employer, which operates in the financial sector, had applied for a license to expand business in the United States but had experienced unreasonable and unexplained delay. They then solicited help from the home-state government. Immediately after a high-level diplomatic visit during which the matter was raised, the company got the approval.¹²⁸ A more recent case in point is Xi's personal call to Trump that saved ZTE from bankruptcy.¹²⁹ In summary, the empirical evidence reveals a strong and steady preference for the institutional choice of diplomacy to tackle host-state official bias.

2. *International-Formal*

Approximately thirty percent of Chinese investors would consider investment arbitration. As previously discussed, the investment arbitration regime protects foreign investors from unfair and inequitable host-state treatments and other political risks such as expropriation.¹³⁰ Sovereigns found by an arbitral tribunal to have violated their substantive treaty obligations usually comply by compensating the aggrieved foreign investors. In other words, Chinese investors should expect this risk-coping institution, if available, to effectively remedy the loss due to unfair government treatment in the

126. Interview with the former director of a Chinese business association (May 15, 2014).

127. Interview with a Chinese government official (May 8, 2019).

128. Interview with a senior executive of the U.S. affiliate of a large state-owned Chinese MNC (June 26, 2012).

129. Dan Strumpf & John D. McKinnon, *Trump Extends Lifeline to Sanctioned Tech Company ZTE*, WALL ST. J. (May 13, 2018, 7:41 PM), <https://www.wsj.com/articles/trump-in-tweet-says-working-with-chinese-president-xi-to-keep-zte-in-business-1526225831> [<https://perma.cc/5VZR-SF6Q>].

130. Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRIT. YEARBOOK INT'L L. 99, 128 (2000).

United States, given the award enforcement mechanism built into the system,¹³¹ and the reputational pressure on states to comply with the judgments.¹³²

In addition, foreign investors should anticipate moderate organization cost for this institutional choice, as the main policy goals of the system include the protection of foreign investors' business interests and depoliticizing investment dispute resolution.¹³³ And the key participants in this system, the arbitrators, tend to be profit-driven repeat players incentivized to adjudicate cases in favor of MNCs.¹³⁴ Such interest alignment reduces the cost of mobilizing the institutional resources for Chinese MNCs.

The information cost, however, remains high for Chinese MNCs. Investor-state arbitration, generally unavailable within the home-state institutional context as a viable means to resolve disputes with government officials, is mostly a mystery for Chinese managers. Also, China and the United States have not concluded a bilateral investment treaty, nor are they co-participants in any international agreement containing investment arbitration provisions. Hence, Chinese MNCs hoping to take advantage of the institutional benefit generally have to invest through a third country. Engaging in such sophisticated "treaty shopping" requires Chinese MNCs to overcome a formidable knowledge barrier in multiple legal and business areas ranging from investment arbitration to international tax planning.¹³⁵ Even seasoned transactional lawyers may not have acquired the knowledge and skills to adequately advise their Chinese clients on this institutional choice. A U.S. lawyer having spent years counseling Chinese MNCs readily confessed that he knew little about investment arbitration and had never before discussed the issue with his clients.¹³⁶ And to the best of his knowledge, the market practice does not touch on the subject.¹³⁷ One may ascribe the neglect to the generally-held conviction among Chinese investors that the United States was a low-risk investment destination, prior to the unexpected, abrupt deterioration of bilateral relations with China.¹³⁸ "This is a country with the rule of law," commented a Chinese manager whose company, though operating in a sensitive sector in the United States, has failed

131. As discussed earlier, the enforcement mechanism is not without defects. Gerlich, *supra* note 106, at 48.

132. Recent research, however, suggests that government officials may have entered such BITs without fully anticipating the consequences. See, e.g., Lauge N. Skovgaard Poulsen, *Bounded Rationality and the Diffusion of Modern Investment Treaties*, 58 INT'L STUD. Q. 1 (2014).

133. POLANCO, *supra* note 31, at 36.

134. Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration*, 53 OSGOODE HALL L. J. 540, 543 (2016).

135. For an illustration of the complexity of "treaty shopping," see Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 HASTINGS BUS. L. J. 225, 253 (2015).

136. Interview with a U.S. lawyer (May 8, 2020).

137. *Id.*

138. LI, *supra* note 1, at 72.

to thoroughly explore the available risk-coping institutions.¹³⁹ Another interviewee, a former executive of a Chinese MNC, concurred, “when Chinese companies make a due diligence checklist for outbound investment, the presence or absence of bilateral investment treaty (the typical legal basis for investment arbitration) is not even on the list.”¹⁴⁰

Meanwhile, investment arbitration has become ever more complex, driving up the information cost even further. With sovereign interests at stake, “arbitration of international investment disputes has turned out to be costly, affected by the same cumbersome procedures as litigation, rather slow, and with tribunals constituted mainly of lawyers who are not industry experts.”¹⁴¹ Also, lack of knowledge begets skepticism about the efficacy of the institution. As just noted, investors should theoretically expect the institutional remedy to work. Yet in practice the high information cost for Chinese MNCs distorts that expectation. For instance, an interviewee who directs a large Chinese MNC’s U.S. operations acknowledged that he had never heard about investment arbitration, although the company operates in a sensitive sector and relies extensively on U.S. lawyers to advise on compliance and legal matters. And upon hearing my concise explanation about the basic institutional mechanism, the director expressed disbelief that arbitral awards against the U.S. government could ever be enforced.¹⁴² In summary, only about thirty percent of Chinese investors would consider arbitrating disputes with the U.S. government, which is in line with a prior study finding that investment arbitration “remains an ‘often overlooked tool’ in the legal arsenal of multinational corporations.”¹⁴³

3. *Domestic-Informal*

Notably, about half of the managers would consider seeking support from business associations, rendering it the most preferred institutional choice.¹⁴⁴ The United States features a dynamic civil society, and business associations

139. Interview with CEO of the U.S. subsidiary of a large state-owned Chinese MNC (May 29, 2019).

140. Interview with former executive of a large privately-owned Chinese MNC (March 23, 2020).

141. L.T. Wells & Chieko Tsuchiya, *Japanese Multinationals in Foreign Disputes: Do They Behave Differently, and Does it Matter for Host Countries?*, 8 *TRANSNAT’L DISPUTE MGMT* 717, 717 (2011).

142. Interview, *supra* note 140.

143. Webb Yackee, *supra* note 23, at 810.

144. A note on bias is warranted here. Readers should be aware that the percentage is probably higher than what may reflect the preference of the universe of Chinese investors due to two types of bias. First, membership bias. Presumably, Chinese investors who believe in the value of business associations are relatively more likely to join CGCC, and hence such MNCs are more likely to appear in the sample, and their view is disproportionately reflected in the data. Second, response/nonresponse bias. It is likely that among CGCC members, those more supportive of the association’s work are more likely to respond to the survey, and therefore their view is overrepresented. Despite the qualification, the data nonetheless shows the strong preference of Chinese investors for leveraging the institutional resources of business organizations.

play a crucial role in shaping government policies.¹⁴⁵ Even in China's domestic setting, where business associations tend to be semi-governmental organizations aimed partially at social control,¹⁴⁶ firms increasingly turn to the institution for protection against bureaucratic overreach.¹⁴⁷ In the United States, business associations exist solely to serve the collective interests of their members.¹⁴⁸ Hence, the interest of the Chinese MNCs and the institutional interest are well aligned, lowering the cost of mobilizing the institutional resources. Also, given the informality of the institution, its access entails low information cost. In short, from the perspective of the Chinese MNCs, business associations present a familiar, cost-effective, and low-profile risk-coping institutional choice. Moreover, the Chinese MNCs benefit from the institutional memory business associations accumulate over time, as the majority of the MNCs have not actually experienced official bias.¹⁴⁹ Business associations also provide platforms for information exchange. In the words of a Chinese executive, communicating regularly with fellow investors enables him "to avoid the mistakes others have made."¹⁵⁰ Take CGCC as an example. Funded by membership fees and money raised through charitable events, this business association periodically organizes workshops, seminars, and informal gatherings of its members. For instance, soon after the Trump Administration announced its *China Initiative* (a concerted effort by multiple agencies to intensify law enforcement against China-related parties),¹⁵¹ CGCC invited a U.S. attorney to give a presentation on compliance with U.S. law and relayed to him the concerns of its members.¹⁵² Over time, CGCC has built connections with the U.S. ruling elite. Ambassadors, governors, and Cabinet members routinely attend major events organized by the association, though the trade war has markedly chilled their enthusiasm to participate.¹⁵³ In sum, for the low cost of informa-

145. For a synthesis of studies on this subject, see, for example, Stephen R. Barley, *Building an Institutional Field to Corral a Government: A Case to Set an Agenda for Organization Studies*, 31 *ORG. STUD.* 777 (2010).

146. Margaret M. Pearson, *The Janus Face of Business Associations in China: Socialist Corporatism in Foreign Enterprises*, 31 *AUSTRALIAN J. CHINESE AFFS.* 25, 35 (1994).

147. See Gunter Schubert & Thomas Heberer, *Private Entrepreneurs as a "Strategic Group" in the Chinese Polity*, 17 *CHINA REV.* 95, 109 (2017); see also Guosheng Deng & Scott Kennedy, *Big Business and Industry Association Lobbying in China: the Paradox of Contrasting Styles*, 63 *CHINA J.* 101 (2010).

148. The political activism of business associations varies according to the level of concentration of the industries. See generally Jeffrey M. Drope & Wendy L. Hansen, *New Evidence for the Theory of Groups: Trade Association Lobbying in Washington, DC*, 62 *POL. RSCH Q.* 303 (2009).

149. See *supra* note 120.

150. Interview with the CEO of the U.S. subsidiary of a Chinese MNC (Jan. 9, 2020).

151. For more details about the Attorney General's initiative, see *China Initiative Fact Sheet*, U.S. DEPARTMENT OF JUSTICE, <https://www.justice.gov/opa/speech/file/1107256/download> [https://perma.cc/TL68-ZZKE] (last visited May 15, 2020).

152. Detailed information about the event can be found on the website of the organization. *CGCC Legal & Policy Series: The Recent Surge in U.S. Law Enforcement Against Chinese Companies*, CHINA GEN. CHAMBER COM., <https://www.cgccusa.org/en/event/cgcc-legal-policy-series-the-recent-surge-in-u-s-law-enforcement-against-chinese-companies/> [https://perma.cc/VQ4C-UWLU] (last visited May 15, 2020).

153. For a list of events organized by CGCC, see *CGCC Programs*, CHINA GEN. CHAMBER COM., <https://www.cgccusa.org/en/programs/> [https://perma.cc/63JH-X9N8] (last visited Feb. 27, 2021).

tion and organization, and the various expected benefits, business associations stand out as the most favored institutional choice for the Chinese MNCs unfairly treated by a U.S. government body.

By comparison, about fifteen percent of the Chinese MNCs would consider hiring professional lobbyists in response to U.S. government mistreatment. Some prominent Chinese MNCs and China-associated organizations have spent enormous amounts on lobbying the U.S. Congress and key White House staff.¹⁵⁴ Nonetheless, the survey data indicates a general lack of interest among the Chinese MNCs in this institutional choice. Lobbying is costly,¹⁵⁵ and its effect is often speculative.¹⁵⁶ Prior research has demonstrated that lobbying has merely marginal effects when the underlining issues have drawn public scrutiny or the politicians have already formed their opinions.¹⁵⁷ As commented by a Chinese executive in charge of his company's U.S. government relations, "the fact does not matter; you cannot wake up a person faking sleep."¹⁵⁸ In other words, lobbying can barely make any difference when a politician has already taken a position towards China or Chinese companies and has begun to filter the information intake. As a result, it is hard to convince the headquarters in China of the efficacy of this costly institutional choice, and "the local team would certainly not invest in it without clear instructions from the top."¹⁵⁹ Nonetheless, some Chinese companies continue to lobby the U.S. government, mainly to fill wide information gaps by explaining the company's business, organization, and governance. "Just in case we want to do a deal one day, the U.S. government won't see us as a monster out of nowhere."¹⁶⁰ Sometimes the choice amounts to an act of desperation, as exemplified by the frantic lobbying by TikTok and WeChat before the executive orders banning their use in the United States came into effect.¹⁶¹ In short, due to its high information cost and uncertain effects, lobbying attracts inadequate attention from Chinese MNCs hoping to mitigate the political risk of official bias.

154. According to a preliminary analysis the author conducted of all the filings under the Lobbying Disclosure Act of 1995, Chinese firms and organizations have spent more than \$16 million on lobbying the U.S. government.

155. Paul Sullivan, *What the Small Player Can Expect When Using a Lobbyist*, N.Y. TIMES (Jan. 25, 2013), <https://www.nytimes.com/2013/01/26/your-money/what-the-small-player-can-expect-when-using-a-lobbyist.html> [<https://perma.cc/C5VR-WUGK>].

156. DRUTMAN, *supra* note 57, at 47.

157. Richard L. Hasen, *Lobbying, Rent-seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012).

158. Interview with U.S. PR director of a large, state-owned Chinese MNC (June 1, 2019).

159. Interview with PR director of the U.S. subsidiary of a large Chinese MNC (Jan. 9, 2020).

160. Interview, *supra* note 158.

161. Cecilia Kang et al., *TikTok Enlists Army of Lobbyists as Suspicions Over China Ties Grow*, N.Y. TIMES (July 15, 2020), <https://www.nytimes.com/2020/07/15/technology/tiktok-washington-lobbyist.html> [<https://perma.cc/CU8H-K7HU>]; Jacob Fromer, *Tencent Hires Former US Congressman and National Security Hawk Ed Royce as Lobbyist*, S. CHINA MORNING POST (Sept. 9, 2020), <https://www.scmp.com/news/china/article/3100772/tencent-hires-former-us-congressman-and-national-security-hawk-ed-royce> [<https://perma.cc/HKL3-U5GM>].

Only a small fraction of Chinese investors would consider using media influence to address official bias in the United States. This finding is not entirely surprising, given the high organization cost and uncertain effect. Contrary to business associations, the core institutional goals of reputable U.S. media outlets have nothing to do with serving the commercial interests of Chinese MNCs. As a matter of fact, they often contradict each other. “We have a target on our back,” observed a PR manager of a Chinese MNC in the United States, “The media here gives whatever we do a negative spin. It will be great if we get objective coverage. I will actually consider it a success if the reports are fifty percent negative and fifty percent positive.”¹⁶² The manager attributed the company’s under-investment in public relations to the mindset of the top management in China, “[the idea is] to keep a low profile and focus on making money. Previously a manager who spoke to the media was scolded and had to write a self-criticism.”¹⁶³ In most cases, the alleged official bias is probably not newsworthy. Even if it manages to appear on a major media platform, the content of the story is beyond the MNCs’ control and largely immutable to ad hoc crisis management tactics. “Media relations in the United States is like dating,” noted a PR manager of a Chinese MNC, “it is based on long-term communication.”¹⁶⁴ Yet the majority of Chinese MNCs only recently entered the U.S. market. Moreover, media reports of alleged governmental mistreatment may escalate the conflicts with the regulating agency. Given their wide discretion, maintaining cooperative relationships with the agencies is crucial to the long-term success of Chinese investments in the United States. “U.S. regulators are fierce, and they have demands not clearly stipulated in law. Chinese clients need to keep open communication channels.”¹⁶⁵ Going public with a complaint against the government might jeopardize that long-term relationship. Such would have been the belief of most Chinese executives accustomed to state-business relations in the home-state institutional context.¹⁶⁶ In a nutshell, leveraging U.S. media power is costly for Chinese MNCs, and its efficacy is far from certain, hence the lack of interest in this institutional alternative.

Even fewer Chinese investors would seek help from well-connected friends and acquaintances, which may surprise readers familiar with the role of personal connections in business-government relations in China.¹⁶⁷ How-

162. Interview with the director of public relations at the U.S. subsidiary of a large privately-owned Chinese MNC (Jan. 8, 2020).

163. *Id.*

164. Interview with the director of public relations at the U.S. subsidiary of a large state-owned Chinese MNC (Jan. 9, 2020).

165. Interview with a U.S. lawyer (Feb. 21, 2019).

166. The recent sanction of Ant by the Chinese Party-State would remind companies doing business in China of the dire consequences of violating this norm governing state-business relations. Raymond Zhong, *In Halting Ant’s I.P.O., China Sends a Warning to Business*, N.Y. TIMES (Nov. 6, 2020), <https://www.nytimes.com/2020/11/06/technology/china-ant-group-ipo.html> [<https://perma.cc/EEC8-P5PU>].

167. There is a sizable literature on the importance of social connections in China for providing economic order. See, e.g., Katherine R. Xin & Jone L. Pearce, *Guanxi: Connections as Substitutes for Formal*

ever, certain institutional resources such as social connections are not transportable, especially to countries culturally distant from the home state. Chinese executives encounter enormous cultural and social gaps in the United States, and poor language skills often hamper their desire and efforts to immerse themselves in local communities.¹⁶⁸ Moreover, apart from events organized by prominent business associations, Chinese executives have few opportunities to interact socially with U.S. government agents, much less cement close interpersonal ties. As a Chinese in-house counsel once observed, “The government agents are very careful. When they came to audit us, they even bought their own lunch.”¹⁶⁹ Contrast that with the trust-building methods commonly adopted by companies within the Chinese contextual institutions, such as “hosting banquets” with government officials.¹⁷⁰ The lack of immersion of Chinese executives results in high information and organization cost for using personal connections to alleviate official bias in the United States, so this type of institutional resource, regardless of its perceived efficacy, is inaccessible to most Chinese MNCs. Moreover, the means for building personal connections with government officials (for example, lavish meals and paid vacations), while effective in China, are often illegal or trigger onerous disclosure requirements in the United States. Yet legalized channels for the exchange of power and money within the U.S. institutional context, such as “non quid pro quo” campaign contributions or “gifts from close friends,”¹⁷¹ are mostly inaccessible to Chinese MNCs. Additionally, personal connections with powerholders in the United States are more commoditized and transparent than those in China.¹⁷² So, some Chinese MNC managers may still believe in the power of *guanxi*, but instead of building it from scratch at enormous cost and legal risk, they would rather purchase the services of well-connected lobbyists.

4. *Domestic-Formal*

According to the survey data, a rather high percentage of Chinese MNCs would contemplate the formal domestic institutional alternatives for invest-

Institutional Support, 39 ACADEMY MGMT. J. 1641 (1996); Seung Ho Park & Yadong Luo, *Guanxi and 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 31 (2000). On the importance of personal relations in MNC-government relations, see Yadong Luo, *Toward a Cooperative View of MNC-Host Government Relations: Building Blocks and Performance Implications*, 32 J. INT'L BUS. STUD. 401, 406 (2001).

168. Li, *supra* note 1, at 4.

169. Interview with a senior executive of the U.S. subsidiary of a large state-owned Chinese MNC (June 9, 2012).

170. Guosheng, *supra* note 147, at 110.

171. Christopher D. Robertson et al., *The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375, 377 (2016). For a general economic modeling of gifts and bribes, see Susan Rose-Ackerman, *Bribes and Gifts*, in ECONOMICS, VALUES, AND ORG. 298–99 (2000).

172. See, e.g., Joshua McCrain, *Revolving Door Lobbyists and the Value of Congressional Staff Connections*, 80 J. POL. 1369 (2018).

ment protection or remedy. First, between thirty and forty percent of the Chinese investors would consider administrative appeals. Government agencies in the United States have established procedures and mechanisms for administrative review of agency actions, which are generally accessible, at no or nominal cost, to aggrieved parties.¹⁷³ The review follows certain procedures, and a complainant is usually better off represented by professionals. But overall, the information cost and the cost of mobilizing the institutional resources are moderate. Additionally, administrative appeals that overturn agency decisions normally have immediate and direct effect. Both the low cost and the expected efficacy explain the Chinese MNCs' expressed preference for this institutional alternative.

About the same percentage of Chinese investors would contemplate litigation in response to official bias in the United States. U.S. courts are generally accessible to parties with a properly pleaded, justiciable claim, and guarding against the abuse of governmental power counts as one of their primary institutional functions. Thus, Chinese MNCs, by following set procedures, can resort to U.S. legal actions to allay host-state official bias. While the organization cost is relatively low, Chinese MNCs typically incur high information cost by pursuing this coping strategy due to the complexity of U.S. procedural and substantive rules. Nonetheless, the judiciary is expected to deliver. Despite considerable judicial deference to agencies in their exercise of discretion,¹⁷⁴ the Chinese MNCs prevailing in a U.S. court should reasonably expect compliance by the government defendants. According to a recent study, Chinese business elites think highly of the key U.S. institutions enabling free market capitalism, including the judiciary.¹⁷⁵ To be more specific, most of the Chinese MNC managers deem U.S. courts to be independent and neutral.¹⁷⁶ Recall the Chinese executive whose company operates in a sensitive sector and who failed to adequately prepare for political risks in the United States. Right before our interview, he had consulted a U.S. lawyer about an imminent decision by a federal agency that would likely jeopardize the company's entire U.S. business. The executive concluded that litigation was an option, since "the U.S. is a country with the rule of law."¹⁷⁷ The accessibility and the perceived efficacy and independence of the U.S. judiciary explain why so many Chinese investors, who are typically reluctant to sue government officials in their home-state setting, would consider taking U.S. government agents to court.¹⁷⁸

173. See, e.g., Lens, *supra* note 73, at 421; Linda M. Bolduan, *The Hatfield Riders: Eliminating the Role of the Courts in Environmental Decision Making*, 20 ENVTL. L. 329 (1990); Janet A. Gilboy, *Administrative Review in a System of Conflicting Values*, 13 L. & SOC. INQUIRY 515 (1988).

174. Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431 (1995).

175. Li, *supra* note 1, at 70.

176. *Id.* at 73.

177. Interview, *supra* note 140.

178. See generally Li, *supra* note 101.

Lastly, only a few Chinese investors would opt for no action in response to official bias in the United States. Most Chinese MNCs are probably unprepared for any significant loss due to U.S. official mistreatment. As noted by a Chinese executive, “we did not think there would be political risks. America has a mature legal system. We moved our businesses here because of its sound institutions and safety.”¹⁷⁹ It is therefore understandable that the Chinese MNCs are reluctant to write off a substantial loss that was not factored into their investment decisions. Also, since the under-appreciation of the political risks evinces the managers’ faith in U.S. institutions, those who are resigned to unfair treatment by a U.S. government body may have made failed attempts to obtain remedy. For instance, an executive supervising the U.S. business of a large Chinese state-owned conglomerate complained in private about the arbitrariness of actions taken by the U.S. Customs and Border Protection (“CBP”). Yet, despite repeated losses inflicted by the agency, his company no longer pursues formal recourse against CBP, as prior efforts have failed at both the administrative appeals and review court levels.¹⁸⁰ Note that forbearance is probably more prevalent among Chinese investors than the data indicates here, given the overrepresentation of sizable companies in the sample.

To summarize this cross-institutional analysis, Chinese MNCs unfairly treated by U.S. officials are inclined to consider diplomatic assistance, judicial and administrative review, and support from business associations. These formal and informal risk-coping institutions provide either low-cost access to Chinese MNCs or effective remedy for unfair agency conduct. Investment arbitration, the formal international institution established to protect foreign investors from inequitable host-state treatment, evokes lukewarm interest among Chinese MNCs due to its high information cost. By comparison, only a small fraction of Chinese MNCs would contemplate the use of personal connections, lobbying, or local media for their high costs or uncertain outcomes. And very few appear willing to endure government mistreatment without resistance.

III. STATE OWNERSHIP AND THE INTER-COMPANY VARIATIONS IN THE INSTITUTIONAL RESPONSES TO U.S. GOVERNMENT BIAS

The preceding Part compared the multiple institutional choices of Chinese MNCs in reaction to government mistreatment in the United States. As shown in Figure 1, several of the preferences are uniformly distributed among all the Chinese investors: very few would consider reaching out to U.S. media or seeking assistance from well-connected acquaintances, and even fewer would opt for inaction. The attitudes towards the other six insti-

179. Interview, *supra* note 140.

180. Interview with a senior executive of the U.S. subsidiary of a large Chinese MNC (Jun. 20, 2018).

tutional alternatives, however, exhibit considerable inter-company variations. What explains these variations? For instance, why would forty percent of the Chinese MNCs consider seeking diplomatic assistance, whereas the other sixty percent would not? Unlike the preceding section, which treated the Chinese MNCs as a group in the comparative institutional analysis, this section recognizes and empirically investigates the remarkable inter-company variations, and in doing so, it focuses on the Chinese MNCs' ownership structure, an under-researched variable at the heart of heated policy and academic debates.¹⁸¹ Before proceeding to the statistical analysis, a brief review of the relevant literature is in order.

SOEs, with their worldwide resurrection in the past two decades, have rekindled scholarly interest and spurred a sizable literature on the various aspects of the "hybrid" business entity that, in the mainstream view, should have long "disappear[ed] from the economic landscape of the world."¹⁸² A strand of the research has examined SOE performance and reached incompatible conclusions. Some concurred with the conventional wisdom that SOEs are inefficient and of inferior profitability,¹⁸³ others identified no empirical evidence of SOE underperformance relative to privately owned firms.¹⁸⁴ Another camp of scholars, focusing on China, have studied state control and discovered a variety of legal, political, and social tools employed by the Chinese government to ensure its dominance over SOEs.¹⁸⁵ Still another line of inquiry explored the social and economic functions that might have justified SOEs' continued existence.¹⁸⁶ Moreover, a nascent literature examined SOEs in foreign investments from two diverging angles: one concentrated on the

181. See generally Garry D. Bruton et al., *State-owned Enterprises around the World as Hybrid Organizations*, 29 ACAD. MGMT. PERSP. 92 (2015); Jonathan G.S. Koppell, *Political Control for China's State-Owned Enterprises: Lessons from America's Experience with Hybrid Organizations*, 20 GOVERNANCE 255 (2007); Ian Bremmer, *State Capitalism Comes of Age: The End of the Free Market?*, 88 FOR. AFF. 40 (2009); JOSHUA KURLANTZICK, STATE CAPITALISM: HOW THE RETURN OF STATISM IS TRANSFORMING THE WORLD (2016).

182. Mike W. Peng et al., *Theories of the (State-Owned) Firm*, 33 ASIA PAC. J. MGMT. 293, 293 (2016).

183. Shimin Chen et al., *Government Intervention and Investment Efficiency: Evidence from China*, 17 J. CORP. FIN. 259, 260 (2011); Kathryn L. Dewenter & Paul H. Malatesta, *State-Owned and Privately Owned Firms: An Empirical Analysis of Profitability, Leverage, and Labor Intensity*, 91 AM. ECON. REV. 320, 321 (2001).

184. For a summary of the literature, see Anthony E. Boardman & Aidan R. Vining, *Ownership and Performance in Competitive Environments: A Comparison of the Performance of Private, Mixed, and State-owned Enterprises*, 32 J. L. & ECON. 1 (1989).

185. See, e.g., Wendy Leutert, *Firm Control: Governing the State-Owned Economy Under Xi Jinping*, 1 CHINA PERSP. 27 (2018); Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697 (2013); Jiangyu Wang, *The Political Logic of Corporate Governance in China's State-Owned Enterprises*, 47 CORNELL INT'L L. J. 631 (2014).

186. See, e.g., Chong-En Bai et al., *A Multitask Theory of State Enterprise Reform*, 28 J. COMP. ECON. 716 (2000); James Si Zeng, *State Ownership and Regulatory Costs: A Law and Economic Explanation for the Prevalence of State-Owned Enterprises in China*, 31 COLUM. J. ASIAN L. 1 (2017).

internal organizational factors and incentives,¹⁸⁷ and the other on the institutional contexts that shape the behavior of Chinese SOEs.¹⁸⁸

While the debates continue, a converging view recognizes that Chinese SOEs differ from private Chinese companies in their institutional resources and contexts. And this difference might manifest in their reactions to official bias in the United States. As will be demonstrated, the ownership type of Chinese investors is associated with the inter-company variations observed in three of the six contemplated coping strategies: diplomacy, lobbying, and administrative appeals. For the other three institutional alternatives, however, the empirical linkage to the investors' ownership structure is more obscure.

A. *Hypotheses of the State Ownership Effect*

As a crucial component of the state apparatus,¹⁸⁹ Chinese SOEs have abundant resources at their disposal.¹⁹⁰ State-owned banks, for instance, readily supply low-cost capital to Chinese SOEs to aid their foreign investment.¹⁹¹ Arguably, this intricate supply-demand relationship should also extend to intangible forms of home-government resources. Indeed, recent empirical research identified a positive correlation between a company's ties to home-state government and the company's ability to access and leverage the government's diplomatic resources.¹⁹² In light of this finding, one may assume that state-owned Chinese MNCs would be more inclined than privately owned Chinese MNCs to seek diplomatic assistance in mitigating political risks in the United States.¹⁹³ To illustrate, recall the earlier example in which a state-owned Chinese MNC sought help from the home government when it encountered unreasonable and unexplained bureaucratic delay in the United States, and a subsequent visit by senior Chinese government officials immediately resolved the issue.¹⁹⁴ An executive of a state-owned Chinese MNC further described the ownership effect:

We regularly communicate with the embassy . . . if there is unfair U.S. government treatment, we may seek help from the embassy . . . privately owned enterprises (POEs) may have been used to

187. Hao Liang et al., *An Anatomy of State Control in the Globalization of State-Owned Enterprises*, 46 J. INT'L BUS. STUD. 223 (2015).

188. Lin Cui & Fuming Jiang, *FDI Entry Mode Choice of Chinese Firms: A Strategic Behavior Perspective*, 44 J. WORLD BUS. 434 (2009); Cui & Jiang, *supra* note 25, at 264.

189. Wang, *supra* note 185, at 63.

190. Liu et al., *supra* note 15, at 356.

191. Randall Morck et al., *Perspectives on China's Outward Foreign Direct Investment*, 39 J. INT'L BUS. STUD. 337 (2008); Yadong Luo et al., *How Emerging Market Governments Promote Outward FDI: Experience from China*, 45 J. WORLD BUS. 68 (2010).

192. Li et al., *supra* note 30, at 660.

193. Duanmu, *supra* note 17, at 1044.

194. Interview, *supra* note 128.

self-reliance. Also, ordinary POEs may not get the attention of the embassy.¹⁹⁵

Another interviewee, a former executive of a large privately owned Chinese MNC, agreed. His firm, compared to the SOEs, “has less need for diplomatic assistance, as the top management generally deems it ‘a good thing to be far from the emperor.’”¹⁹⁶ In dire situations, however, POEs may overcome the barrier and seek home-government assistance, as illustrated by the reactions of TikTok’s founder to Trump’s executive order banning it from the U.S. market.¹⁹⁷ In a nutshell, due to their close ties with the home state, Chinese state-owned investors might exhibit a stronger inclination to request diplomatic assistance than non-SOEs. Hence the following hypothesis:

Hypothesis 1: All else being equal, Chinese investors with state ownership should be more inclined to seek assistance from the Chinese government in response to perceived unfair government treatments in the United States.

While state-owned MNCs enjoy considerable institutional benefits—tangible and intangible support from the home government—state ownership also engenders significant liability in the host countries. The “liability of state ownership” is defined herein as costs arising from the fact that the host-country government and public lack knowledge and trust in investors controlled wholly or partially by a foreign government. Since both the resurrection of state capitalism and the global expansion of SOEs occurred recently, scholars have paid inadequate attention to this type of ownership-based liability and its implications.

Host countries harbor deep suspicions about the motives of state-owned MNCs, so “Chinese MNCs with strong state influence will react on these concerns with detailed information and transparency about their investment motives and decisions.”¹⁹⁸ In other words, to mitigate the liability of state ownership, SOEs should employ information strategies such as lobbying to boost trust and to narrow the knowledge gap. As noted by the director of an SOE’s government relations department in Washington, D.C., part of his work was to educate U.S. policymakers so that the company would not be seen as a “monster.”¹⁹⁹ In addition, given their access to vast home-state resources, SOEs are better positioned to bear the cost of institutional choices

195. Interview, *supra* note 158.

196. Interview, *supra* note 140.

197. Yingzhi Yang et al., *TikTok Troubles Narrow Gap Between Beijing and ByteDance Founder Zhang Yiming*, REUTERS (Sept. 5, 2020), <https://www.reuters.com/article/us-usa-tiktok-bytedance-insight/tiktok-troubles-narrow-gap-between-beijing-and-bytedance-founder-zhang-yiming-idINKBN25W0EM> [<https://perma.cc/94L7-4PBQ>].

198. Holtbruegge, *supra* note 39, at 1440.

199. Interview, *supra* note 158.

that produce uncertain outcomes.²⁰⁰ Private companies, by contrast, usually seek immediate positive returns on their investments.²⁰¹ The U.S. PR manager of a private Chinese company commented that the headquarters wanted to see instant measurable results, such as “how many members of the Congress I manage to invite to China to speak with our executives and observe our operations.”²⁰² While SOEs also demand results from money spent on lobbying,²⁰³ they may permit a longer time frame than their privately owned counterparts. One of my interviewees, the director of a Chinese SOE’s U.S. government relations program, had worked in D.C. for more than a decade before being recalled back to his company’s headquarters, and only after the trade war had precluded any potential investment in the United States.²⁰⁴ Hence the following hypothesis:

Hypothesis 2: All else being equal, state-owned Chinese investors are more inclined to hire lobbyists in response to perceived official bias in the United States.

In addition, the liability of state ownership may steer Chinese state-owned investors away from administrative appeals. The decisionmaker in an administrative process may be the head of an agency, an administrative judge, or another agency official,²⁰⁵ who is not insulated from potential political biases by various institutional designs such as life tenure. Also, procedurally, the administrative appeals processes tend to be simpler and more streamlined than litigation.²⁰⁶ But what the institution gains in efficiency, it may lose in equity. In a political environment that is increasingly hostile towards the Chinese government, state-owned Chinese MNCs may reasonably doubt the neutrality of an appeals mechanism embedded in or closely tied to a U.S. government body whose biased action is the cause of the complaint. Also, administrative appeals usually provide fewer monetary awards to private parties and the awards available are “generally smaller” than those from litigating in federal courts.²⁰⁷ Additionally, evidence abounds that administrative adjudication is significantly more inconsistent than federal judicial decisions.²⁰⁸ For all these reasons, state-owned Chinese MNCs may well expect higher costs of mobilizing the institutional resources of the administrative appeals mechanism as well as uncertain and less

200. Yizhe Dong et al., *Ownership Structure and Risk-Taking: Comparative Evidence from Private and State-controlled Banks in China*, 36 INT’L REV. FIN. ANALYSIS 120, 120 (2014).

201. DRUTMAN, *supra* note 57, at 7.

202. Interview, *supra* note 162.

203. Interview, *supra* note 158.

204. *Id.*

205. Michael Sant’Ambrogio, *Private Enforcement in Administrative Courts*, 72 VAND. L. REV. 425, 444 (2019).

206. Jones & Taylor, *supra* note 28, at 313.

207. Sant’Ambrogio, *supra* note 205, at 483.

208. See, e.g., David Hausman, *The Failure of Immigration Appeals*, 164 U. PENN. L. REV. 1177, 1179 (2016).

favorable outcomes thereof, though the institutional choice may be equally accessible to all Chinese firms regardless of their ownership type. Hence the following hypothesis:

Hypothesis 3: All else being equal, state-owned Chinese investors are less inclined to rely on administrative complaints to address unfair government treatment in the United States.

Theoretically indeterminate is the relationship between state ownership of Chinese investors and the inclination to contemplate U.S. litigation. On the one hand, the existing literature on U.S. judicial bias has been silent on the association between the two. Scholars have debated about general xenophobia in U.S. courts, yet no one has contended that U.S. judges are systematically biased against state-owned corporate litigants.²⁰⁹ And latest empirical research indicates that Chinese investors, regardless of their ownership type, have confidence in the U.S. judiciary.²¹⁰ Nor is there any theory that ties state ownership of Chinese investors to the information cost of accessing U.S. courts or the cost of mobilizing judicial resources. No evidence shows that U.S. lawyers charge SOEs and POEs at different rates, and according to a recent empirical study, Chinese MNCs' U.S. legal expenses do not vary because of their ownership structure.²¹¹ On the other hand, certain attributes of state-owned Chinese investors arguably have effects on the litigation propensity. As noted earlier, firms of state ownership enjoy more resources and are subject to soft budget restraints, both of which may induce the contemplation of costly dispute resolution methods. Hence, one may hypothesize a positive association between the two variables.

Some other features of Chinese state-owned firms, however, suggest an opposite connection. Corporations intending to avoid negative publicity often prefer settlement to litigation. It may especially be the case for state-owned Chinese MNCs given the bleak U.S. public opinion towards the Chinese government. A U.S. lawyer offered an illustrative example. In a dispute between his client, a U.S. subsidiary of a state-owned Chinese firm, and a U.S. party, he proposed a litigation strategy that would require the disclosure of the ownership lineage. His client rejected the proposal for nothing but the fear of drawing public attention to its Chinese government ownership.²¹² Moreover, Chinese state-owned MNCs tend to assert tight control

209. See, e.g., Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497 (2002); Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in US Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441 (2007). Yet the lack of theoretical discussion about investor ownership type and U.S. judicial bias may again be attributable to the novelty of the topic. After all, only recently did Chinese MNCs begin to enter the U.S. market in mass.

210. Li, *supra* note 1, at 97.

211. Ji Li, *Meeting Law's Demand: Chinese Multinationals' U.S. Legal Expenses*, YALE J. INT'L L. ONLINE (forthcoming 2021).

212. Interview with a U.S. lawyer (Sept. 16, 2020).

over the U.S. subunits.²¹³ Decisionmakers at the headquarters, lacking local and professional knowledge and efficient communication, may refrain from litigating official bias in the United States. To test these conflicting possible effects of state ownership, I adopt the following working hypothesis:

Hypothesis 4: All else being equal, state-owned Chinese investors are less likely to contemplate litigating disputes with biased U.S. government bodies.

As noted in Part I, the literature on investment arbitration has barely taken into account possible effects of state ownership on foreign investors.²¹⁴ Unlike courts, the institution of investment arbitration ensures its neutrality not by keeping the decisionmaker independent from the disputants, but through the mechanism for selecting arbitrators.²¹⁵ Such procedure-based neutrality is insensitive to a claimant's ownership type. Also, an investor's ownership type does not by itself change the cost of information (fees for legal professionals) or the cost of organization (fees for forming an arbitration panel and moving the case forward). Therefore, one could argue that state-owned Chinese investors are not distinguishable from their privately-owned counterparts in the propensity to arbitrate inequitable U.S. government treatment. On the other hand, state-owned MNCs, with their abundant governmental resources, might be more inclined to resort to this expensive institutional remedy than their privately owned counterparts. Hence, I propose the following working hypothesis:

Hypothesis 5: All else being equal, state-owned Chinese investors are more inclined to contemplate arbitrating disputes with biased U.S. government bodies.

As noted in the literature review section, scholars have largely neglected possible corporate ownership effects in their research about business associations in the United States, which presumably do not apply distinct rules favoring corporate members of Chinese government ownership. However, state-owned Chinese MNCs, faced with an antagonistic host-country environment, may be more eager to keep a low profile and respond to official bias in the United States through business associations. Additionally, some state-owned Chinese MNCs, given their size and early entrance in the U.S. market, may play a pivotal role in business associations comprising primarily Chinese MNCs in the United States, which might lower their cost of

213. Li, *supra* note 1, at 103.

214. See, e.g., Feldman, *supra* note 52; Paul Blyschak, *State-Owned Enterprises and International Investment Treaties: When Are State-Owned Entities and Their Investments Protected?*, 6 J. INT'L L. & INT'L REL. 1 (2011); Li, *supra* note 52, at 380.

215. For details about the selection of arbitrators, see, for example, *Selection and Appointment of Tribunal Members*, INT'L CTR. FOR SETTLEMENT OF INVESTMENT DISPUTES, <https://icsid.worldbank.org/services/arbitration/convention/process/selection-appointment> [<https://perma.cc/VD25-AVXC>] (last visited Feb. 27, 2021).

mobilizing the institutional resources. Thus, I formulate the following working hypothesis:

Hypothesis 6: All else being equal, state-owned Chinese investors are more inclined to contemplate seeking assistance from business associations to address unfair government treatment in the United States.

B. Variables for Statistical Analysis

To test these six hypotheses, I created a number of variables from the 2017 survey data.²¹⁶ The dependent variables are dummies that codify the six institutional alternatives in the multiple-choice question: seeking help from the Chinese government (Hypothesis 1); hiring professional lobbyists (Hypothesis 2); petitioning relevant government bodies (Hypothesis 3); litigating in a U.S. court (Hypothesis 4); arbitrating a dispute (Hypothesis 5); and seeking assistance from business associations (Hypothesis 6). Each of the dummy variables takes on the value of one if the pertinent selection was made, and the value of zero if otherwise. Apart from these dependent dummy variables, I constructed a list of independent and control variables: state ownership, size of U.S. investment, Chinese investors' listing status, regulatory intensity of the sectors in which Chinese MNCs operate, and investment duration. A description of these variables follows.

State ownership. In the analysis of the inter-company variations, the independent variable of interest is state ownership in a Chinese investor. To evaluate its hypothetical effects, I relied on measures that have been adopted in established research, created a dummy variable from the survey data, and assigned to it the value of one if a Chinese government entity owns more than fifty percent of a Chinese investor's equity interest, and zero if otherwise.²¹⁷ Majority equity ownership enables legal control over the MNC's actions in the United States, yet it may not be a necessary condition for forging close ties with the home-state government.²¹⁸ Thus, I created an alternative dummy variable to capture any non-trivial quantum of home-state control via ownership; this variable equals one if the Chinese government owns more than ten percent of the investor, and zero if otherwise.

Size of U.S. investment. The size of a Chinese firm's U.S. investment may correlate with the firm's ownership structure and have independent effects on the institutional preferences. The Chinese government retained control over SOEs in all critical industries after the market reform in the late

216. The regression is limited to the 2017 survey data as the questionnaire for that year included more relevant variables (such as internal legal capacity) than those of prior years.

217. Holtbruegge, *supra* note 39, at 1448.

218. Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 668 (2015).

1990s,²¹⁹ and some of the SOEs have since transformed into global conglomerates.²²⁰ Apart from the correlation with the ownership variable, U.S. business size might also modify the preferred choice of the risk-coping institutions. For instance, smaller companies are probably more hesitant to engage lobbyists because of the high costs and uncertain outcomes associated with lobbying. To measure investment size, I used the U.S. business revenue reported by the Chinese companies in the survey. When filling out the questionnaire, the subjects chose one among five levels of annual U.S. revenue, with the lowest level being “below one million U.S. dollars” and the highest level “above 100 million U.S. dollars.”

Duration of U.S. investment. Investment duration, measured by the number of years a Chinese MNC had been operating in the United States at the time of the survey, is included in the tests as another control variable. Prior research about MNCs investing in China found investment duration to have a moderating effect on the firms’ political activities.²²¹ The same may hold when investment flows in the opposite direction. The variable might relate to Chinese MNCs’ preferred institutional choice. For instance, a Chinese firm that entered the U.S. market several decades ago might have fully localized and, with reduced information costs for some of the institutional choices, would cope with official bias in ways different from recent entrants. At the same time, SOEs are more responsive to home-state policies,²²² so U.S. investments by Chinese SOEs may track some temporal pattern (for example, clustering around the implementation of the “Going Out” policy).²²³ Adding the investment duration variable helps control for this possible covariance.

Regulatory intensity. I included regulatory intensity of the sector in which Chinese investors operate as another control. Regulation varies in degree across different industries. Chinese firms operating in heavily regulated sectors interact more frequently with government officials and may differ in their perceptions of agency fairness and their preferred institutional choices.²²⁴ Meanwhile, state-owned Chinese investors may occupy different sectors from those that are privately owned.²²⁵ To address these potential correlations, I employed two alternative variables. First, I created a dummy variable that measures the regulatory intensity of a Chinese investor’s pri-

219. Hong Yu, *The Ascendancy of State-owned Enterprises in China: Development, Controversy and Problems*, 23 J. CONTEMP. CHINA 161, 164–67 (2014).

220. See Ilan Alon et al., *Chinese State-owned Enterprises Go Global*, 35 J. BUS. STRATEGY 3, 5 (2014).

221. See Yadong Luo & Hong Xin Zhao, *Doing Business in A Transitional Society: Economic Environment and Relational Political Strategy for Multinationals*, 52 BUS. & SOC’Y 515, 537 (2013).

222. Li, *supra* note 1, at 91.

223. Xiaohua Lin, *State Versus Private MNCs from China: Initial Conceptualizations*, 27 INT’L MKTG. REV. 366, 370 (2010).

224. Xia Han et al., *Chinese Multinational Enterprises in Europe and Africa: How Do They Perceive Political Risk?*, 58 MGMT. INT’L REV. 121, 144 (2018).

225. Seung-Wook Baek, *Does China Follow “the East Asian Development Model”?*, 35 J. CONTEMP. ASIA 485, 488 (2005).

mary sector in the United States. A 2017 survey question inquired about the respondents' primary sectors of business. Of the nineteen sectors listed in the question, I treated the following eight as being heavily regulated at the federal level, state, or local levels: mining, utilities, construction, information, finance and insurance, real estate development and rental, health care, and public goods and services.²²⁶ The dummy variable takes the value of one if a Chinese company operates primarily in one of the heavily regulated sectors, and zero otherwise. Alternatively, one may measure regulatory intensity indirectly with the company's internal legal capacity as a proxy. I constructed a dummy variable from the survey data that equals one if a Chinese firm has a full-time in-house legal manager licensed to practice U.S. law, and zero if otherwise.

Listing status. I included a Chinese investor's listing status as a variable. Chinese companies with shares traded on a major exchange are subject to additional market and regulatory oversight, so it is possible that their reactions to official bias in the United States may show a distinct pattern. Meanwhile, the variable of listing status may correlate with Chinese investors' ownership structure, as the securities markets have played a crucial part in commercializing and corporatizing Chinese SOEs.²²⁷ Moreover, listing status serves as a proxy of the overall size of a Chinese investor, and those with greater global business revenue should be able to deploy more resources to tackle host-country political risks. To test these possible effects, I created a dummy variable that equals one if a surveyed company is affiliated with a Chinese investor listed on at least one major securities exchange, and zero if otherwise.

226. Some may not consider real estate and rental industry as heavily regulated. I create an alternative dummy that excludes that sector and rerun all the tests using the alternative dummy. All the regression results remain largely the same. The list of all the choices and their corresponding two-digit NAICS codes is as follows: 1. Agriculture, Forestry, Fishing and Hunting [11]; 2. Mining, Quarrying, and Oil and Gas Extraction [21]; 3. Utilities [22]; 4. Construction [23]; 5. Manufacturing [31-33]; 6. Wholesale Trade [47]; 7. Transportation and Warehousing [48-49]; 8. Information [51]; 9. Finance and Insurance [52]; 10. Real Estate and Rental and Leasing [53]; 11. Professional, Scientific, and Technical Service [54]; 12. Management of Companies and Enterprises [55]; 13. Administrative and Support and Waste Management and Remediation Services [56]; 14. Educational Services [61]; 15. Health Care and Social Assistance [62]; 16. Arts, Entertainment, and Recreation [71]; 17. Accommodation and Food Services [72]; 18. Public Administration [92]; 19. Other Services [81].

227. Stephen Bell & Hui Feng, *Reforming China's Stock Market: Institutional Change Chinese Style*, 57 POL. STUD. 117, 117 (2009).

TABLE 2: SUMMARY STATISTICS

Variable	Mean	Std. Dev.	Min	Max	Number of observations
U.S. revenue	2.452	1.610	1	5	188
State ownership (50%)	0.393	0.490	0	1	191
State ownership (10%)	0.429	0.496	0	1	191
Listing status	0.484	0.501	0	1	184
Sectoral regulation	0.381	0.487	0	1	210
In-house legal staff	0.284	0.452	0	1	190
Years of U.S. investment	9.239	9.114	0	36	201

Source: 2017 CGCC Survey

C. Test Results

Because the dependent variables are all binary, I ran a series of logistic regressions. First, the test results (see Table 3 below) affirm Hypothesis 1. State ownership is positively and significantly associated with the inclination to seek home-state diplomatic assistance in response to official bias in the United States, and the finding is robust across all the model specifications. Take Model (3)'s results as an example. Holding the other variables constant, a state-owned Chinese MNC is 3.64 times more likely than a private Chinese MNC to contemplate a request for home-state diplomatic assistance in the event of U.S. government mistreatment. As previously discussed, being an integral component of the Party-State, Chinese state-owned MNCs have easier and lower-cost access to the diplomatic resources of the home state. A Chinese diplomat observed that companies with the term "state" in their names ("*guozitou*") felt entitled to governmental help.²²⁸ Whereas, "ordinary POEs don't get the attention of the embassy,"²²⁹ or they have developed a sense of "self-reliance."²³⁰ Either way, they refrain from seeking home-state government assistance. The test result echoes recent empirical research uncovering SOEs' tendency to lean on home-state diplomatic resources to advance their business interests in host countries.²³¹

228. Interview, *supra* note 127.

229. Interview, *supra* note 158.

230. *Id.*

231. Duanmu, *supra* note 17, at 1045; Li et al., *supra* note 30, at 660.

TABLE 3: REGRESSION RESULTS (DV: CONSIDERING SEEKING ASSISTANCE FROM THE CHINESE GOVERNMENT)

	(1)	(2)	(3)	(4)	(5)	(6)
State ownership (50%)	5.252****	4.706***	4.635***			
State ownership (10%)				3.698***	3.261***	3.133***
Years of U.S. investment	1.009	1.014	1.019	1.019	1.024	1.028
U.S. revenue	.589****	.572****	.541****	.614****	.592****	.566****
Listing status		1.212	1.140		1.263	1.218
Sectoral regulation			1.095			1.050
In-house legal staff			1.651			1.521
Constant	1.243	1.252	1.226	1.124	1.138	1.131
N	151	147	145	151	147	145

Note: logistic tests, odds ratio reported; data from CGCC 2017 Survey;
 * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$; **** $p < 0.001$

In addition, U.S. investment size is highly significant, and the test result is robust across all the models. The odds ratio is lower than one, suggesting that, the other variables held constant, Chinese investors with smaller U.S. operations are more likely to consider diplomatic assistance if treated unfairly by a government body in the United States. One plausible explanation is that smaller Chinese investors stand to benefit more from leveraging the diplomatic resources of their home government. More likely, low information cost and easy access render this institutional choice appealing to small Chinese investors. For advice and possibly assistance, all they need to do is call the consular officials, who have built personal ties with the Chinese business community in the United States and projected an image of support. For instance, the U.S. manager of a China-based company commented that she would seek help from the Chinese consulate if ever treated unfairly by a host-state official as “the consular has shown us support by attending one of the events we organized,” though by the time of the interview “it had not provided any material support or service.”²³² By comparison, large Chinese MNCs can afford costly coping strategies expected to be more effective, such as litigation in U.S. courts. Dovetailing with this interpretation is the test result (shown in Table 6) suggesting that listing status, a proxy of a Chinese MNC’s size, is positively and significantly associated with the propensity to consider litigating official bias in U.S. courts. In short, this test result echoes

232. Interview with the manager of the U.S. subsidiary of a Chinese company (April 28, 2012).

Schattschneider's proposition that "the underdogs often appeal for government intervention in their disputes with more powerful rivals."²³³ Only here, the underdogs (i.e., smaller Chinese investors) seek Chinese government intervention, and the powerful rivals are allegedly biased U.S. officials. None of the other variables are significant.²³⁴

TABLE 4: REGRESSION RESULTS (DV: CONSIDERING HIRING PROFESSIONAL LOBBYISTS)

	(1)	(2)	(3)	(4)	(5)	(6)
State ownership (50%)	3.663**	3.029*	2.964*			
State ownership (10%)				3.947**	3.262**	3.179*
Years of U.S. investment	.9998	1.003	1.010	1.002	1.005	1.012
U.S. revenue	1.308*	1.237	1.171	1.321*	1.252	1.192
Listing status		1.770	1.765		1.690	1.713
Sectoral regulation			.800			.752
In-house legal staff			1.541			1.469
Constant	.036****	.033****	.035****	.031****	.029****	.032****
N	151	147	145	151	147	145

Note: logistic tests, odds ratio reported; data from CGCC 2017 Survey; * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$; **** $p < 0.001$

Hypothesis 2 receives some preliminary support from the test results presented in Table 4. State ownership in Chinese investors is positively and significantly associated with the likelihood of considering hiring professional lobbyists in response to official bias in the United States. The finding is robust across all the model specifications. Again, take the Model (3) results as an example. With the other variables held constant, the odds of contemplating the lobbying option for state-owned Chinese MNCs is 2.96 times that for privately owned Chinese MNCs. As discussed, Chinese government-owned MNCs suffer the liability of state ownership in the United States. To allay the mistrust and information asymmetry, SOEs are more inclined to engage third parties with close ties to government officials as intermediaries. As alluded to earlier, the "revolving door" nature of most public service jobs ensures that an army of lobbyists readily trade their con-

233. BAUMGARTNER ET AL., *supra* note 58, at 48.

234. Yet given the limited sample size, readers should refrain from drawing definitive conclusions of non-effect.

nections and insider knowledge for remuneration.²³⁵ Also, SOEs, under less revenue pressure, can afford long-term investment in risk-coping strategies expected to produce uncertain outcomes.

In two of the models, the size of a Chinese MNC's U.S. investment is weakly significant and positively associated with the inclination to consider lobbying. Put another way, mistreated Chinese firms with larger U.S. businesses are more likely to consider hiring professional lobbyists. The finding is intuitive considering the high cost of this institutional choice and the uncertainties of its effect. "We don't have enough stake here," so explained a Chinese manager about why his firm had not taken on lobbying in the United States.²³⁶ Only MNCs with substantial and long-term U.S. businesses would consider the costly investment to improve their regulatory and policy environment. The test result, however, is not robust, so its validity awaits further research. None of the other variables is significant, yet definitive conclusions from the lack of significance should be postponed until further empirical analysis is conducted using larger samples.

TABLE 5: REGRESSION RESULTS (DV: CONSIDERING ADMINISTRATIVE REVIEW)

	(1)	(2)	(3)	(4)	(5)	(6)
State ownership (50%)	.584	.451*	.437*			
State ownership (10%)				.838	.682	.678
Years of U.S. investment	1.033	1.043*	1.044*	1.025	1.032	1.033
U.S. revenue	1.028	.957	.975	1.017	.960	.972
Listing status		2.081*	2.309**		1.851	2.015*
Sectoral regulation			.642			.653
In-house legal staff			1.004			1.039
Constant	.579*	.494**	.541	.560*	.491**	.538*
N	151	147	145	151	147	145

Note: logistic tests, odds ratio reported; data from CGCC 2017 Survey; * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$; **** $p < 0.001$

The tests of Hypothesis 3 returned mixed results. As shown in Table 5, state ownership (measured by majority government ownership) is weakly significant in two of the three model specifications. The odds ratio is smaller

235. Jordi Blanes i Vidal et al., *Revolving Door Lobbyists*, 102 AM. ECON. REV. 3731, 3731 (2012).

236. Interview with the in-house counsel of the U.S. subsidiary of a Chinese MNC (April 5, 2013).

than one, suggesting that, other things being equal, majority state-owned Chinese MNCs are less likely to consider administrative complaints if treated unfairly by a government body in the United States. As discussed, SOEs suffer the liability of state ownership in host countries, so appealing to a reviewer embedded in the same state apparatus may, in the eyes of state-owned Chinese investors, have no more than a cosmetic effect. The finding, however, is not robust, so a more definitive conclusion awaits further investigation.

Additionally, investment duration is weakly significant in two of the six model specifications. The odds ratio, being slightly larger than one, suggests that early entrants to the U.S. market are more likely to contemplate petitioning for administrative review. Having operated in the United States for a longer period, such Chinese MNCs may hold more confidence in the efficacy of administrative review mechanisms. Moreover, the listing status of a Chinese investor is significant in three of the four models that include the variable. The odds ratio is larger than one, indicating that sizable Chinese investors with shares traded on a major exchange are more inclined to consider this institutional choice in coping with host-state political risks.²³⁷

The tests of Hypotheses 4 to 6 failed to identify a significant association between state ownership and any of the three institutional preferences: litigation, arbitration, and assistance from business association. Table 6 presents the combined test results, and the analysis follows.

237. To further test the robustness of the results for Hypotheses 1 and 2, I run a set of logit tests on data derived from the 2019 CGCC survey. Unlike the prior years, the 2019 questionnaire presents the subjects with only the informal institutions to choose from. The data show similar inter-company variations in the institutional preferences. And the test results generally support the two hypotheses. With other variables held constant, Chinese investors that are majority-owned by the government are more inclined to seek diplomatic assistance in reaction to U.S. official bias. The result is not significant when state ownership is broadened to include ten percent and more equity interest. My interpretation is that due to the deterioration of US-China relations, diplomatic intervention may backfire, so companies with less state ownership may be reluctant to seek it. Regarding the inclination to engage in lobbying, the test results suggest that majority-state-owned Chinese investors are not more likely to hire professional lobbyists. But when the term includes minority state shareholding, it becomes significant. The finding makes sense considering the current tension between the two countries. Investors with some Chinese investment ownership should have strong incentives to mitigate mistrust and narrow information gaps, so that U.S. government agencies will distinguish them from the conventional Chinese SOEs.

TABLE 6: REGRESSION RESULTS

	(1)	(2)	(3)	(4)	(5)	(6)
	Litigation in U.S. Courts		Investment Arbitration		Seeking Help from Business Associations	
State ownership (50%)	.968		1.355		1.606	
State ownership (10%)		1.148		1.757		1.286
Years of U.S. investment	1.032	1.029	1.044*	1.040*	1.007	1.012
U.S. revenue	1.037	1.040	1.035	1.046	.931	.934
Listing status	2.434**	2.307**	3.647***	3.371***	.967	1.026
Sectoral regulation	.679	.671	.928	.899	.928	.927
In-house legal staff	1.067	1.065	1.036	1.016	.704	.697
Constant	.235****	.229****	.095****	.086****	1.068	1.070
N	145	145	145	145	145	145

Note: logistic tests, odds ratio reported; data from CGCC 2017 Survey;
* $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$; **** $p < 0.001$

First, state ownership of a Chinese investor is not significantly associated with the likelihood of considering litigation in U.S. courts. Meanwhile, listing status is significant, and the odds ratio is larger than one, suggesting that Chinese investors listed on a major stock exchange are more likely to contemplate suing the U.S. government over perceived unfairness. As just noted, Chinese MNCs with greater global revenue can afford costly risk-coping institutions such as U.S. litigation. Second, state ownership of Chinese investors is not significantly tied to the inclination to arbitrate. And again, listed Chinese MNCs are more likely to contemplate investor-state arbitration when unfairly treated by a U.S. government body. Consistent with the finding on the propensity to sue, larger Chinese MNCs, with more disposable resources, are prone to arbitrating disputes over U.S. government bias. Also, investment duration is weakly significant, indicating that early entrants of the U.S. market are more likely to consider investment arbitration. Such Chinese firms may have operated in an international setting long enough to have accumulated basic knowledge about this institutional choice. Third, state ownership is not significantly associated with the propensity to seek assistance from business associations. Nor is any other varia-

ble significant, indicating a high degree of idiosyncrasy in the inter-company variation of this institutional preference.²³⁸

To summarize, the ownership type of Chinese MNCs demonstrates uneven effects on their institutional preferences in coping with U.S. government bias. In comparison to privately owned Chinese MNCs, the state-owned ones are more likely to consider soliciting diplomatic assistance and engaging professional lobbyists but are less interested in administrative appeals. Meanwhile, state ownership does not seem to have any significant effect on the likelihood of contemplating litigation, investment arbitration, or eliciting support from business associations. However, due to limited sample size, more definitive conclusions from these findings of non-significance await further empirical research.

IV. CONTRIBUTIONS AND SUGGESTIONS FOR FUTURE RESEARCH

This Article contributes to multiple theoretical and policy debates. First, rising investment from developing countries, especially China, has stimulated a large body of literature. However, scholars interested in the subject only just began to examine the intricate relationships between emerging market investors and their host-country governments.²³⁹ This Article narrows the knowledge gap by crafting a firm-oriented comparative institutional approach to analyze a wide range of institutional alternatives available for managing host-country political risks. Future research may employ this analytical framework to examine the institutional choices of MNCs headquartered elsewhere.

Second, the findings of this Article add to the nascent scholarship on state-owned MNCs.²⁴⁰ While state-owned Chinese investors enjoy low-cost access to home-state diplomatic resources, they also suffer the “liability of state ownership” in the United States. To overcome the liability, state-owned Chinese MNCs are more likely to consider hiring professional lobbyists. While inconclusive, the test found no significant association between state ownership of Chinese investors and their propensity to arbitrate or litigate disputes over unfair host-government treatment. The concept of “liability of state ownership” and the findings herein shed light on future research, theoretical or empirical, about foreign investment by state-owned MNCs, irrespective of their state of origin and destination.

Third, this study contributes to the literature on investor-state arbitration, particularly the expanding but limited body of empirical research on

238. It merits emphasizing that, due to the sample size, the findings of non-significance discussed in this paragraph are inconclusive and suggestive of directions for future research.

239. For a review of the sizable literature that explores international business-government relations, see, for example, Jean J. Boddeyn, *International Business—Government Relations Research 1945–2015: Concepts, Typologies, Theories and Methodologies*, 51 *J. WORLD BUS.* 10 (2016).

240. Quer et al., *supra* note 27, at 518.

the subject.²⁴¹ Two debates have drawn the most attention. One concerns the institution's functional benefits and deficiencies: does investment arbitration provide a cost-effective, expedient, and apolitical means for resolving disputes between foreign investors and host governments?²⁴² The other revolves around normative questions such as whether the investment arbitration system has over-empowered MNCs and restrained legitimate policy space of host-state governments.²⁴³ Essential to both debates is whether and how developing country MNCs utilize this institution. According to the findings herein, most Chinese MNCs would not contemplate investment arbitration if unfairly treated by a government body in the United States. They must overcome daunting information barriers and incur considerable transaction costs in order to access the institutional resources of investor-state arbitration, which partially explains why so few investment arbitration cases have involved Chinese parties as claimants, despite the large number of investment treaties the Chinese government has ratified.²⁴⁴

Fourth, this study has major policy implications. The escalating confrontation between the world's two largest economies has profoundly altered the macro-environment for U.S. and Chinese investors. Knowledge about their reactions to unfair government treatment, and more broadly, their management of host-country political risks, is crucial to understanding how the U.S.-China rivalry will unfold and its global ramifications. For instance, the revealed propensity to litigate disputes with the U.S. government foreshadows more frequent judicial interventions in matters implicating U.S.-China relations, and both the U.S. and the Chinese governments should take that into account when designing and implementing their foreign policies. TikTok offers an illustrative example. Its lawsuits challenging the legality of Trump's executive order successfully blocked its enforcement. If the Trump Administration truly believed that TikTok posed grave national security threat and therefore must be excluded from the U.S. market, it should have anticipated the legal challenges and fine-tuned the executive order to ensure it would pass judicial muster.

Fifth, this Article provides valuable information for Chinese MNCs attempting to optimize their risk management. As noted earlier, Chinese MNCs had long regarded the United States as an investment destination with minimal political risk, but the Trump Administration's policies markedly altered that perception. Chinese MNCs believe that they "can never

241. See, e.g., Franck, *supra* note 49, at 1; Schultz & Dupont, *supra* note 18, at 1147; Tobin & Rose-Ackerman, *supra* note 23, at 1.

242. See, e.g., Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L. J. 67 (2005).

243. For a brief summary of the debate, see Schulz & Dupont, *supra* note 18, at 1147–48. For a discussion of the normative goals of international investment law, see Puig & Shaffer, *supra* note 24, at 368–79.

244. Shen Wei, *Guarding the Great Wall?: Jurisprudential Review of Treaty Interpretative Tools in Chinese BIT-Based Arbitration Cases*, ARB. INT'L 1, 2 (2020).

really trust the US again,” and “[t]hat’s got [them] thinking what they need to do to protect their interests.”²⁴⁵ Knowledge about the institutional preferences of the Chinese MNCs having already made substantial U.S. investments supplies both useful guidance and valuable lessons.

Despite its multiple contributions, this study leaves several important questions open. First, the variable of state ownership, tested herein at two levels (that is, majority state ownership and significant minority state ownership), contains still more facets. Some Chinese SOEs are owned by the central government, while others by provincial or municipal governments.²⁴⁶ Even those owned and administered at the central level may assume disparate bureaucratic ranks.²⁴⁷ Future research should investigate how these more nuanced ownership dimensions may influence the reactions of the Chinese investors to political risks in the United States and other developed host countries.²⁴⁸ Second, future analysis of the inter-company variations should incorporate more independent variables, such as major personal traits of MNC managers. Also, due to lack of variance, this study skipped the inter-firm analysis of the less preferred institutional choices (for example, the use of media or personal connections). If larger samples become available, researchers should examine more rigorously how MNCs from China and other emerging economies may vary in the use of these other risk coping strategies. Third, not all contemplated reactions to official bias will transpire exactly as anticipated. Future studies should investigate the strategies implemented by the MNCs and why they deviate from the expressed preferences. Fourth, this Article treated both the institutional choices and the contextual institutions as exogenous and relatively static. Yet keen observers have already detected preliminary signs of incremental institutional changes driven by the risk coping measures of Chinese MNCs. For instance, *Ralls Corp. v. Comm. on Foreign Inv. In U.S.*, a lawsuit filed by a Chinese MNC’s U.S. affiliate challenging the legality of certain CFIUS decisions concerning its U.S. investment, not only clarified the pertinent law and enriched the jurisprudence, but also temporarily altered the course of the regulatory development in this area.²⁴⁹ Going forward, scholars should pay more attention to how the MNCs’ reactions may in the long run reshape their institutional choices and contexts. Fifth, future research should compare the

245. Karishma Vaswani, *Trump or Biden? China Expects No Favours Either Way*, BBC (Aug. 28, 2020), <https://www.bbc.com/news/business-53928783> [<https://perma.cc/64QG-G9Y9>].

246. Ming Hua Li et al., *Varieties in State Capitalism: Outward FDI Strategies of Central and Local State-Owned Enterprises from Emerging Economy Countries*, in STATE-OWNED MULTINATIONALS 182 (Alvaro Cuervo-Cazurra ed., 2018).

247. Sarah Eaton & Genia Kostka, *Central Protectionism in China: The “Central SOE Problem” in Environmental Governance*, 231 CHINA Q. 685, 693 (2017).

248. Recent empirical research has found a link between the rank of SOEs and their business internationalization. See, e.g., Sergio Mariotti & Riccardo Marzano, *Varieties of Capitalism and the Internationalization of State-Owned Enterprises*, 50 J. INT’L BUS. STUD. 669, 669 (2019).

249. See, e.g., Ji Li, *Investing Near the National Security Black Hole*, 14 BERKELEY BUS. L.J. 1, 7-9 (2017).

findings of this Article to the institutional preferences of Chinese MNCs in developing host countries.²⁵⁰ Sixth, scholars may consider integrating the findings herein with the vast literature on the organizational and commercial means to forestall host-country political hazards, such as strategically selecting investment location²⁵¹ and forming joint ventures with host-country companies.²⁵²

CONCLUSION

A transformation of the global economic and legal order is underway. Among all the driving forces, two stand out: (1) the rise of China and (2) its growing tensions with the status quo powers, in particular the United States. During this tectonic shift, numerous Chinese MNCs with U.S. investments find themselves precariously situated on major fault lines, confronting an increasingly hostile and volatile host-state political environment. Political risks, once shrugged off as insignificant or inconsequential for investing in the United States, have come to haunt Chinese MNCs. How will they respond?

This Article attempted to answer the question by formulating a firm-centered comparative institutional framework and applying it to an empirical analysis of Chinese MNCs' contemplated strategies to cope with perceived U.S. government bias. It found significant variations both across the multiple institutional choices and among different Chinese MNCs, and state ownership of Chinese investors constitutes both a vital resource and a main liability. When mistreated by a U.S. government body, state-owned Chinese MNCs are more inclined to seek diplomatic assistance and employ professional lobbyists but are hesitant about administrative appeals. This Article contributes to several ongoing academic debates, including those on emerging market foreign investment, state-business relations, political risk management, and investment arbitration. It also sheds light on policymaking regarding the rising tensions between China and the United States and the global economic reordering. Its findings lay the groundwork for future research on related topics such as the gaps and differences between the contemplated institutional strategies and the executed ones, other aspects of

250. For a notable empirical study of risk management by Chinese MNCs in developing countries, see Matthew S. Erie, *Chinese Law and Development*, 62 HARV. INT'L L.J. (forthcoming 2021).

251. Peter J. Buckley et al., *The Institutional Influence on the Location Strategies of Multinational Enterprises from Emerging Economies: Evidence from China's Cross-Border Mergers and Acquisitions*, 12 MGMT & ORG. REV. 425, 425 (2016); Hongquan Chen et al., *Does State Capitalism Matter in Firm Internationalization? Pace, Rhythm, Location Choice, and Product Diversity*, 54 MGMT DECISION 1320, 1320 (2016).

252. Witold J. Henisz, *The Institutional Environment for Multinational Investment*, 16 J.L. ECON. & ORG. 334, 334 (2000); Cui & Jiang, *supra* note 188, at 434; Liu et al., *supra* note 15, at 356. Also, such research should also explore whether Chinese MNCs use political risk insurance to protect their U.S. investment, and how companies selling such insurance policies may regulate the MNCs' risk coping behavior. Shauhin A. Talesh, *Insurance Companies as Corporate Regulators: The Good, the Bad, and the Ugly*, 66 DEPAUL L. REV. 463, 464 (2017).

MNC state ownership and their possible effects, the comparison of MNCs' commercial and non-commercial risk coping measures, and the recursive relationships between the executed political risk strategies and the MNCs' institutional choices, as well as their contextual institutions.

APPENDIX

TABLE 7: BACKGROUND OF INTERVIEWEES

Managers	In-house counsel	Lawyers	Consultants	Others
70	17	48	13	4

TABLE 8: CORRELATIONS BETWEEN THE TESTED SELECTIONS

	Seeking help from the Chinese government	Hiring professional lobbyists to lobby relevant government officials	Petitioning to relevant U.S. government body	Litigating in a U.S. court	Filing for investment arbitration	Seeking help from business associations
Seeking help from the Chinese government	1					
Hiring professional lobbyists to lobby relevant government officials	0.127	1				
Petitioning to relevant U.S. government body	0.073	0.214	1			
Litigating in a U.S. court	0.065	0.084	0.449	1		
Filing for investment arbitration	0.091	0.245	0.278	0.307	1	
Seeking help from business associations	0.306	0.174	0.260	0.008	0.199	1

