Symposium: China and the International Legal Order

The Forms and Architects of China's International Legal Order *

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Conflict of laws, including choice of law, is conventionally understood as judges or lawyers choosing the governing law in a multijurisdictional matter. In this Article, we turn this notion on its head to ask whether the rules may also choose the legal experts. Drawing on legal anthropology and sociology, we argue that the *legal forms* of Chinese outbound investment, namely, the heterogeneous nature of contracts and different jurisdictions for Chinese capital, generate a specific *ecology* of legal expertise. In particular, the legal form is generated by rules from both the home state (i.e., China) and the host states of Chinese capital. While choice of law is often subject to parties' bargaining, and China, as capital-exporter, may occupy a dominant bargaining position vis-à-vis the host state, the territorial sovereignty and mandatory norms of the latter frequently require local law. Consequently, whereas the legal form produces an ecology of legal professionals, including lawyers in Chinese law firms, regional financial centers, U.K. and U.S. law firms, and local firms, it is often the local lawyers who play a pivotal role in generating and sustaining China's cross-border deals. This Article finds that China's "rise" may not reproduce familiar forms of law and globalization—at least not initially. From the perspective of private international law, China itself appears unlikely to overturn the existing international legal order, even if that order is currently undergoing a severe test and China may wish to reform the order to occupy a central role. Rather, our analysis suggests that top-down perspectives on international legal orders must be mirrored and contested by bottom-up ones; such a holistic view spotlights the highly contingent nature of Chinese outbound capital.

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INTRODUCTION

Whereas only a decade ago, it was commonplace to describe international legal orders in terms of "global law" and "transnational law,"[1] writing in 2021, one recalls the words of legal scholar Carole Silver: "law, today, remains stubbornly local."[2] Recent years have seen a sharp turn against globalization and, in particular, a U.S.-led legal and economic order. Rather, the world has witnessed trade barriers and protectionism, anti-immigrant sentiment and blockades, and entrenched nationalism and sovereigntism. National policies and law, often weaponized against foreign competitors and trade partners alike, are, along with international instruments and institutions, challenging the international legal order that has reigned since the second half of the twentieth century. The COVID-19 pandemic has introduced further precarity into a system that appears to be eroding.

China's rise occurs against this backdrop. Many economic and political measures that the U.S. and its allies have erected recently are specifically aimed at the People's Republic of China (PRC). Hence, China's growing profile in the international economic and legal orders takes place against vastly different conditions than those that characterized that of the U.S.: trade war, global pandemic, and Sinophobia. Yet despite these significant obstacles, the

1. *See generally*, Terence C. Halliday & Pavel Osinsky, *Globalization of Law*, 32 ANN. REV. SOC. 447 (2006); Terence C. Halliday & Gregory Shaffer, TRANSNATIONAL LEGAL ORDERS (Cambridge University Press 2015); Paul Schiff Berman, *Conflict of Laws, Globalization, and Cosmopolitan Pluralism*, 51 WAYNE L. REV. 1105 (2005); GUNTHER TEUBNER, GLOBAL BUKOWINA: LEGAL PLURALISM IN THE WORLD SOCIETY (Dartmouth. 1997); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).

2. Carole Silver, *Local Matters: Internationalizing Strategies for U.S. Law Firms*, 14 IND. J. GLOBAL LEGAL STUD. 67, 68 (2007).

cross-border circulation of Chinese goods, labor, services, and capital continues apace, even if at more modest volumes than several years ago. This article begins at this inflection point and asks: what forms will China's emerging international legal order take and who is building this legal order?

Established theory suggests that, just as Anglo-American lawyers promoted English law and U.S. law in globalizations of yesteryear,[3] so too would Chinese lawyers champion the "globalization of Chinese law" as a precondition for China's trade and foreign investment regimes. It is a type of globalization that would eventually see the export of Chinese law overseas. Yet there are many factors endogenous and exogenous to the Chinese legal system that frustrate the viability of PRC law as the governing law for international transactions and the concomitant role of Chinese lawyers to supply that law.[4] Rather than assuming China's ascension is predicated on increased use of PRC law in cross-border contracts globally, as promoted by Chinese lawyers, this article argues that the *legal forms* of Chinese outbound investment, namely, the heterogeneous nature of contracts and different destination jurisdictions for Chinese capital, generates a certain *ecology* of legal expertise. This legal ecology includes not only Chinese lawyers, but also U.K. and U.S. lawyers, lawyers in regional financial centers, and, perhaps most remarkably, lawyers in local host states. Just as the legal forms of cross-border Chinese transactions generate this ecology, so, too does the ecology of legal expertise reproduce the forms of Chinese globalization, however contingent and contested they may be.

I. LEGAL FORMS AND THE ECOLOGY OF LEGAL EXPERTISE

A. From Globalization to Deglobalization

For roughly the last half century, the predominant manner used to describe law beyond the state was legal globalization based on the U.S. model,[5] yet this analysis appears to have reached its date of expiration. Since the 1970s, the U.S. promoted an international economic system with low trade barriers. Concurrently, it led the construction of a global governance system, including multilateral financial and security institutions, such as the World Bank, International Monetary Fund, and United Nations. Supported by its allies, the

3. *See supra* note 1 and *infra* note 5.

4. *See* William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's Republic of China*, *in* EAST ASIAN LAW AND DEVELOPMENT: UNIVERSAL NORMS AND LOCAL CULTURE 182, 189 (Lucie Cheng et al., eds. 2003) (explaining why many Americans misperceive the role of lawyers in the PRC); Matthew S. Erie & Ha Hai Do, *Law and Development Minus Legal Transplants: The Example of China in Vietnam*, 8 ASIAN J. L. & SOC. (forthcoming, 2021) (providing factors as to the limits of PRC law as a model for developing countries).

5. Yves Dezalay, *The Big Bang and the Law: The Internationalization and Restructuration of the Legal Field*, *in* GLOBAL CULTURE: NATIONALISM, GLOBALIZATION AND MODERNITY 279, 281 (Mike Featherstone ed. 1990); Duncan Kennedy, *Three Globalizations of Law and Legal Thought, 1850-2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL REAPPRAISAL 19, 69 (David M. Trubek & Alvaro Santos eds., 2006) (noting the role of the U.S. and Europe in promoting the "third globalization").

U.S. further created a framework of bilateral and multilateral treaties coupled with prescriptive law and policy measures for much of the developing world in what has been labelled the "Washington Consensus." However, the building of the international legal order by the U.S. and its allies was also marked by the U.S.'s ambivalent attitude toward that order.[6] Nevertheless, throughout this period, whose end was foreshadowed by the 2008 global financial crisis and signaled abruptly by the 2016 U.S. presidential election, the familiar trope became the "Americanization of international law."[7] It was understood as a process of diffusion and homogenization: U.S. legal transplants were exported to reform domestic legal systems[8] and U.S. law was uploaded into international public law through the predominant role of the U.S. in the multilateral governance institutions it has helped establish.[9]

The architects of this process were U.S. lawyers who provided legal services to U.S. multinational corporations. As American multinationals penetrated markets worldwide, U.S. law firms grew in scope and complexity to engineer cross-border deals.[10] Not only were U.S. lawyers promoters of New York law in commercial contracts, but they also innovated capital market transactions and commandeered international commercial arbitration.[11] U.S. lawyers were technicians on the ground drafting commercial contracts and they also held senior positions in the U.S. government. As part of the "foreign policy establishment,"[12] U.S. lawyers could knit together the interests of the U.S. government, investment banks, and corporate law firms. As a result, one precondition to economic liberalization in many countries was the entry of U.S. law firms into those markets for legal services, law firms that brought with them American legal practices (e.g., multijurisdictional litigation, lobbying, and contract drafting).[13] To sum, U.S. lawyers and internationalizing U.S. law firms overseas promoted U.S. law as the governing law of contracts, the model for developing economies, and the blueprint for public and private international

6. *See generally*, Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1481 (2003); PHILIPPE SANDS, LAWLESS WORLD: MAKING AND BREAKING GLOBAL RULES (2006).

7. Laura Nader, *The Americanization of International Law*, *in* MOBILE PEOPLE, MOBILE LAW: EXPANDING LEGAL RELATIONS IN A CONTRACTING WORLD 199 (Franz von Benda-Beckmann, et al. eds., 2016).

8. *See e.g*., Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 95 (1995).

9. Jacques deLisle, *Lex Americana? United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179, 201 (1999).

10. *See generally* Sigrid Quack, *Recombining National Variety: Internationalisation Strategies of American and European Law Firms*. 5 J. STRATEGY MGMT. 154 (2012).

11. Carole Silver, *Globalization and the U.S. Market in Legal Services: Shifting Identities*, 31 L. & POL'Y IN INT'L BUS. 1093, 1099 (2000); Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. DISP. RESOL. 69, 72 (2003); YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 41-9 (1996).

12. Bryant G. Garth, *The Globalization of the Law*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 245, 249 (Keith E. Whittington, et al. eds., 2010).

13. R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law* 58 INT'L ORG. 103, 111 (2004).

law.

As of 2020, however, legal globalization as homogenization and particularly Americanization appears unlikely; rather, the world seems to have entered a stage of deglobalization. Two trends militate against the continued viability of the metaphor of globalization as homogeneity. The first is arguably the retreat of the U.S., under the Trump administration, from its commitments to supplying global governance. Under Trump, the U.S. has lost much of its luster as the "model for" other countries or international institutions. While the Biden administration will likely seek to return the U.S. to its previous stature internationally, a return to "status quo" seems fraught given that nearly half of the U.S. electorate supported Trump. The second trend is the concomitant rise of China. Not only has China increased its visibility in global commerce by becoming a major exporter of goods and a global investor, it has also raised its profile in international institutions, and elaborated a number of international economic law instruments under such efforts as the "Belt & Road Initiative" (BRI).

Chinese lawyers are certainly playing an important role in the globalization of "China Inc."[14] PRC law firms have grown exponentially not only in mainland China over the past decade but also in such jurisdictions as Hong Kong and beyond, by setting up offices in North America and Europe.[15] Much of the literature on Chinese lawyers extends the analysis established by Anglo-American precedents, that is, internationalizing PRC law firms promote Chinese globalization.[16] Our research presents a strikingly different picture from homogenization or diffusion. A period of Chinese internationalization during general deglobalization calls for rethinking the relationships between law, states, and cross-border capital. In addition to the role of lawyers in various destinations of Chinese capital, we draw attention to the particular legal forms of Chinese outbound investment that produce an emergent ecology of legal expertise and one which, in turn, reproduces Chinese capital's global legal forms.

B. Legal Forms: Technicality and Spatiality of Chinese Globalization

A key theoretical concept that informs our understanding of China's legal globalization is *legal form*.[17] While an emerging literature on legal form

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

15. *See generally* Sida Liu & Hongqi Wu, *The Ecology of Organizational Growth: Chinese Law Firms in the Age of Globalization*, 122 AM. J. SOC. 798 (2016); Sida Liu & Anson Au, *The Gateway to Global China: Hong Kong and the Future of Chinese Law Firms*, 37 WISC. INT'L L.J. 310 (2020).

16. *See generally* Jing Li, *All Roads Lead to Rome: Internationalization Strategies of Chinese Law Firms*, 6 J. PROF'S & ORG. 156 (2019); Tommi Yu, *China's 'One Belt, One Road Initiative': What's in It for Law Firms and Lawyers?*, 5 CHINESE J. COMP. L. 1 (2017); Roderick O'Brien, *The One Belt One Road Initiative and China's Lawyers: A Work in Progress*, INT'L J. LEGAL PROF. (2020).

17. We distinguish legal form from legal formalism, the jurisprudential theory that privileges

provides a number of different approaches to and definitions of the concept,[18] in our use, legal form refers to the technical, procedural, and spatial aspects of law that structures Chinese outbound capital, rather than the substantive law. Our use of legal form is informed by Professor Annelise Riles' notion of the "*agency of technical legal form*," which refers to both the internal heuristics of law and the theories to explain legal doctrine, both of which can serve as "tools" by legal practitioners and academics.[19] Whereas Professor Riles focuses mainly on the latter, the ways in which legal scholars develop theoretical models of the law as a tool,[20] our focus is on the former: how rule—based on contract, domestic law, and private international law—give shape to law's practice (and whom may practice it). Seen from this perspective, our approach builds on a number of studies by anthropologists and sociologists who have studied law cross-culturally as an "explicit formulation of rules and categories; and these set standards for behaviour and provide discursive resources . . ."[21] In their usage, these scholars have shown how legal devices, rhetorical strategies, methods of argumentation, or whole systems fulfill certain functions in legal processes.[22]

Following these approaches, Chinese outbound investment assumes for us both a particular form, through its diverse conflict of laws rules, and an aggregate one, as a heterogenous assemblage of multi-jurisdictional contracts. While in past approaches, legal form is contrasted with power dynamics or the social practices that surround or generate law,[23] in our usage, form is not wholly divorced from power. Legal forms do not just reflect power relations or inequalities of the substantive law but each "exercises structural and processual

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the use of deductive logic to derive the outcome of a case from authoritative sources. *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution* 37 CASE WESTERN RES. L. REV. 179, 1818 (1986).

18. *See e.g.*, Matthew C. Canfield, *The Anthropology of Legal Form: Ethnographic Contributions to the Study of Transnational Law*, L. & SOCIAL INQUIRY (forthcoming, on file with the authors) (surveying four different approaches to legal form).

19. Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973, 976 (2005); *see also* Alain Pottage, *Law after Anthropology: Object and Technique in Roman Law*, 32 THEORY, CULTURE & SOC. 147 (2014).

20. Id., at 984 (identifying the primary object of her study as the "theories, the models, the arguments, the techniques [of conflict of laws scholars]."

21. FERNANDA PIRIE, THE ANTHROPOLOGY OF LAW 14 (2013) (defining "legalism" as one type of legal form).

22. Examples include Karl Llewellyn and Edward Hoebel's analysis of Cheyenne legal fictions as gap-filling rituals or formulas, Rebecca French's metaphor of medieval Tibetan law as "a cosmology, a kaleidoscopic patterning of relations," that orders social and spiritual life, Sally Engle Merry's process of "vernacularization" by which international human rights law is made sense of within the contours of language and thought by actors on the ground, and Jeffrey Kahn's ethnography of liberal constitutionalism's contradictions as shaping new cartographic jurisdictions on the borders of U.S. immigration law. *See* KARL NICKERSON LLEWELLYN & EDWARD AMDSON HOEBEL, THE CHEYENNE WAY 319 (1941); REBECCA REDWOOD FRENCH, THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET 13 (2002); SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL 134, 219 (2009); JEFFREY S. KAHN, ISLANDS OF SOVEREIGNTY: HAITIAN MIGRATION AND THE BORDERS OF EMPIRE (2019).

23. *See e.g.*, Riles *supra* note 19 at 979.

constraints on the system's power dynamics."[24] We spotlight the *technical* and *spatial* aspects of Chinese outbound investment while also observing how legal forms interact with power. Within the context of outbound Chinese capital, legal forms evolve from conflict of laws,[25] and specifically *choice of law*. These rules are a result of both party autonomy and state sovereignty, including the home state (i.e., China) and host states. Specifically, the parties to a contract bargain for preferences in contractual provisions, including governing law and forum of dispute resolution.[26] A typical Chinese-invested infrastructure project features an array of parties, including Chinese investors and shareholders in an investment vehicle, local contractors, local or Chinese labor, additional construction contracts, the lender, and often a public partner from the host government. Each set of contracting relations may feature asymmetrical bargaining power and, consequently, a different choice of law.

Furthermore, the settlement of a specific legal form in these asymmetrical power relations is bounded by geography and legal jurisdictions. Sovereignty is specifically exercised in conflict of laws when a local court decides the applicable law.[27] The laws of cities and states that host or channel Chinese outbound investment have *spatial configurations* that constrain contractual actions, prerogatives, and outcomes. To explain the legal form of Chinese cross-border transactions, we begin with the home state rules in terms of domestic governance of Chinese outbound investment[28] and then analyze the different types of host states as destinations of Chinese capital, which each have their drivers for or constraints on Chinese investment.[29]

II. CHOICES OF LAW IN CHINA'S CROSS-BORDER TRANSACTIONS

A. Law and Governance of Chinese Outbound Investment

To describe the legal forms of Chinese outbound investment and their relationship with the lawyers who buttress the nascent international legal order underlying such investments, it is necessary to first understand the overlapping law and governance regimes that guide Chinese outbound capital. These regimes include that of the PRC, that of the host state, and, secondarily and intersecting with the foregoing, that of international law. These regimes shape choice of law options and ultimately choice of lawyer options.

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24. Sida Liu, *Law's Social Forms: A Powerless Approach to the Sociology of Law*, 40 L. & SOC. INQUIRY 1, 8 (2015).

25. *See* Riles *supra* note 19.

26. *See generally* Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455 (2014); Pamela Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579 (2016).

27. *See generally* MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION OF THE CONCEPT OF SOVEREIGNTY (1995); Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631 (2009); John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 632 (2017).

28. *See infra* § IIA.

29. *See infra* § IIC.

Since the early 2000s, when the Chinese government first started promoting the "going out" policy to encourage Chinese outbound investment, it has gradually developed rules around such activities, including *inter alia* (i) an approval system, (ii) financial support system, (iii) a state-owned assets administration, and (iv) an overseas investment supervision system. In regards to approval for outbound investment, the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) have been the chief regulators for the setting up of enterprises overseas and making investments overseas.[30] MOFCOM established an "Overseas Investment Management System" that requires filing and approval to obtain certification in advance of overseas projects.[31] In terms of financing, the NDRC and the development banks, namely, the China Development Bank and the Export-Import Bank of China, provide financing for overseas projects in certain industries.[32] Financial institutions may issue investment guidelines as part of their credit provision, including industry-specific social and environmental guidelines.[33]

Many of the major Chinese-backed infrastructure projects feature financing from both Chinese development banks and multilateral institutions like the World Bank and the International Finance Corporation, and in such cases, the standards of the latter will apply to those investments.[34] There is a distinct regime for regulating state-owned enterprises' (SOE) outbound investments under the State-Owned Assets Supervision and Administration Commission (SASAC).[35] Following the implementation of an overseas project, Chinese enterprises are subject to on-going monitoring and inspection by MOFCOM in terms of their compliance with overseas-investment-related regulations.[36]

In addition to the complex regulatory frameworks of Chinese governmental bodies, the listing of Chinese companies on stock exchanges may

30. *See e.g.*, Jingwai touzi guanli banfa [Measures for the Administration of Overseas Investment], issued by MOFCOM on Sept. 6, 2014, and implemented Oct. 6, 2014; Vision and Proposed Actions Outlined on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, issued by NDRC, MFA, and MOFCOM, issued March 28, 2015.

31. *See* Measures for the Administration of Overseas Investment, *supra* note 30 ch. 2.

32. *See e.g.*, Guanyu dui guojia guli de jingwai touzi zhongdian xiangmu jiyu xindai zhichi zhengce de tongzhi [Notice Concerning Providing Credit Support to Key Overseas Investment Projects Encouraged by the State, jointly] issued by the NDRC and the Export-Import Bank of China and effective on Oct. 27, 2004.

33. Yuan Wang et al., *Sustainability Impacts of Chinese Outward Direct Investment: A Review of the Literature*. International Institute for Sustainable Development 52 (2012).

34. *Id*.

35. *See e.g.*, Zhongyang qiye jingwai touzi jiandu guanli zhanxing banfa [Interim Measures for the Supervision and Administration of Overseas Investment of Central Enterprises], issued by the State Council on March 18, 2012, and effective May 1, 2012.

36. *See e.g.*, Jingwai touzi lianhe nian jian zhanxing banfa [Interim Measures for the Joint Annual Inspection of Overseas Investment], issued by the former Ministry of Foreign Trade and Economic Cooperation (re-organized as MOFCOM) and the State Foreign Exchange Administration, Oct. 31, 2002.

introduce corporate governance requirements. For example, listing on the Hong Kong Stock Exchange (HKEX) features a Corporate Governance Code.[37] Also, the Shanghai and Shenzhen Stock Exchanges require listed companies to carry out corporate governance guidelines, including various disclosures, and to practice corporate social responsibility.[38] The China Securities Regulatory Commission has issued a Code of Corporate Governance that sets standards for the articles of association and related foundational documents for Chinese companies and, importantly, provides for enforcement mechanisms.[39]

The PRC regulations on outbound investment require not only compliance with PRC law but also compliance with host state law. For instance, in the area of environmental and social governance (ESG), Chinese private enterprises should carry out environmental impact assessments for their projects overseas,[40] and they should "know and abide by the provisions of the host country's laws and regulations related to environmental protection."[41] A number of regulations issued by the MOFCOM and the NDRC require Chinese enterprises engaged in business overseas to abide by local laws and norms, albeit some of these requirements are not binding law.[42]

An additional layer of governance is afforded by investment treaties between the PRC and host states. Compliance with local law is incorporated through, for example, the definition of investment "in accordance with the laws and regulations [of the host state]" and protection of investment "in accordance with [host state] laws and regulations."[43] Thus, the Chinese state contributes to the formation of international law that also binds Chinese enterprises to follow local law. Yet the governance system for Chinese outbound capital is still

37. *See* Checklist on HKEX's compliance with the Corporate Governance Code, https://www.hkexgroup.com/-/media/HKEX-Group-Site/ssd/Corporate-Governance/Documents/compliance_checklist.pdf (last visited Sept. 28, 2020).

38. Kathlyn Collins & Joyce Li, *Corporate Governance in China: Progress and Participation in Profits* (Dec. 2, 2019), https://us.matthewsasia.com/perspectives-on-asia/market-updates/matthews-asia-perspectives-view/article-1671/Corporate-Governance-in-China-Progress-and-Participation-in-Profits.fs (last visited Sept. 28, 2020).

39. Shangshi gongsi Zhili zhunze [Corporate Governance for Listed Companies], issued by the China Securities Regulatory Commission, Sept. 30, 2018, arts. 2 and 6, http://www.gov.cn/gongbao/content/2019/content_5363087.htm

40. Ben Boer, *Greening China's Belt and Road: Challenges for Environmental Law* (July 16, 2019), Sydney Law School Research paper, Available at SSRN: https://ssrn.com/abstract=3420544, 7 (citing the Code of Conduct for Overseas Investment Operations of Private Enterprises, issued by the NDRC, Dec. 2017, art. 27).

41. *Id*. at 5-6 (citing "Foreign Investment Cooperation Environmental Protection Guide" issued by MOFCOM and the Ministry of Environmental Protection, Feb. 18, 2013).

42. *See* Measures for the Administration of Overseas Investment *supra* note 30, art. 20 (requiring Chinese investors to "abide by the laws and regulations of the investment destination"); Qiye jingwai touzi guanli banfa [Measures on the Management of Enterprises' Overseas Investment], issued by the NDRC on March 1, 2018, and implemented on March 1, 2018, art. 41.

43. *See e.g*., Agreement Between the Government of the PRC and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments, signed April 19, 2011 and entered into force Sept. 1, 2011, art. 1; Agreement Between the Government of the PRC and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investment, signed March 24, 2013 and entered into force April 17, 2014, art. 2(1).

nascent and insufficient to the task.[44] In response to international criticism of poor governance of its overseas projects particularly in BRI countries, China has sought to tighten its control of such projects.[45]

B. Implications for Choice of Law

China's nascent governance regime for outbound capital has consequences for choice of law in the relevant contracts for such deals. Since Chinese cross-border transactions are complex international deals, they invite a number of choice of law issues. Although choice of law is generally determined by the parties' negotiation, it is a negotiation that takes place in the context of the governance regimes outlined above, including PRC law, host state law, and requirements imposed by financial institutions, stock exchanges, and treaties.

The sectors in which Chinese enterprises are most active in their outbound investment include infrastructure, construction, mining, and energy. A typical infrastructure project, for example, features a constellation of contracts governed by different national laws. At the core of the transaction, the Chinese investor will provide the equity to establish a project company, incorporated in the host state with its *articles of association* regulated by local law, to perform the work.[46] The project company may be a joint venture (JV) as per the requirements of the host state, which may impose restrictions on foreign ownership of companies in selected industries. There may also be tax reasons for why the Chinese investor requires an onshore presence. As the Chinese investor is the majority shareholder, the *shareholder agreement* may use PRC law.

This project company will then form several contracts. First, depending on whether there was a tendering process, there may be a *master agreement* with the host state government as the public partner on the project.[47] This

44. Susan Finder, *The International Fraud and Corruption Sanctioning System: The Case of Chinese SOEs*, *in* CHINA'S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY 397, 397 (Julien Chaisse ed. 2019) (arguing that while Chinese SOEs are going global, internal company controls and Chinese legislation fails to keep up); Zhang Jingjing & Wawa Wang, *China's Energy Law Could Help Address the Belt and Road's Climate Impact*, CHINA DIALOGUE (June 22, 2020), https://chinadialogue.net/en/energy/chinas-energy-law-could-help-address-the-belt-and-roads-climate-impact/ (finding that although China's draft energy law makes significant progress, political and economic exigencies will likely result in a number of procedural safeguards being circumvented).

45. *See e.g.*, Cujin duiwai chengbao gongcheng gao zhiliang fazhan de zhidao yijian [Guiding opinion on Promoting the High-Quality Development of Foreign-Contracted Projects], issued 2019 by MOFCOM, art. 19 (requiring Chinese enterprises engaged in foreign-contracted projects to "strictly abide by PRC laws and regulations, the [laws of the] country where the project is located, and relevant international rules and standards in key processes such as project bidding, contract performance, labor rights protection, and environmental protection).

46. The Chinese investors may, as an intermediary step, establish an investment vehicle in Hong Kong or Singapore, for a variety of reasons, including circumventing the various approvals imposed by Chinese regulators on using foreign exchange.

47. Telephonic interview with partner of a "Red Circle" PRC law firm, Beijing, July 14, 2020

master agreement is normally governed by the local law of the host state. Next, the project company may form a *loan agreement* with a Chinese lender, which oftentimes applies PRC law. Subsequently, the project company will sign contracts with the operators (i.e., *operation and maintenance agreements* or *O&M agreements*), contractors (i.e., *construction contracts*), and additional companies that fulfill specific functions for the project. The O&M agreement may apply local law, PRC law, or the law of a third jurisdiction. Even though the project is carried out in a foreign country, PRC law may apply to these construction contracts if Chinese companies are required to be the sub-contractors to perform the actual construction.[48] Lastly, the project company may sign *sales agreements* with private parties, some of whom may be based in China.

Closely related to choice of law, as most projects are exposed to significant risks during the project lifecycle (political change, environmental catastrophe, public health crisis, etc.), the Chinese parties must also consider the relevant dispute resolution mechanisms for each of these contracts. In the example above, the master agreement may use international arbitration according to United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, the loan agreement a PRC court, and the sales agreements international commercial arbitration according to China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules.[49] Hence, depending on the nature of the investment vehicle, there are many possible permutations of choice of law and choice of forum for dispute resolution in the relevant contracts for one infrastructure project.

Whereas for some of contracts in a typical infrastructure deal, the governing law is a given, for many, both the choice of law and the forum for dispute resolution result from party negotiation. For example, for the labor contracts that are formed as part of the infrastructure project, to the extent that the workers are nationals of the host state, host state law governs as a matter of that state's territorial jurisdiction.[50] However, outside such mandatory principles, for many contracts there is significant latitude for the parties to negotiate. Chinese parties will generally seek to push PRC law as the governing law of these contracts. For instance, after a Chinese company invests in an energy project in a host state, the subsequent electricity agreements between the Chinese company and the end user, often a local public partner, usually apply local host state law. Yet Chinese investors may argue for PRC law to apply.[51]

[hereinafter "Red Circle lawyer"] and with lawyer based in Yangon, Myanmar, September 24, 2020.

48. *See* Red Circle lawyer *supra* note 47. *See also* Erie *supra* note 55.

49. *See* Red Circle lawyer *supra* note 47.

50. Email correspondence with Chinese labor lawyer and partner at "Red Circle" law firm, Beijing, Sept. 7, 2020. Note that if the labor is Chinese workers, then the contracts may be signed in the PRC and governed by Chinese law even if the work takes place outside of the PRC.

51. *See* Red Circle lawyer *supra* note 47.

The dispute resolution clause is an area where Chinese investors differ in their preferences for forums for dispute resolution depending on such factors as to whether they are an SOE or privately-owned, their experience with overseas investment, and their sector and nature of investment. Many Chinese companies, especially those with experience in cross-border transactions, prefer to arbitrate their disputes in third-party jurisdictions like Hong Kong and Singapore.[52] Either the onshoring of disputes within the PRC or the preference for third-party jurisdictions is an example of China's reliance on transnational law, that is, the law of cross-border transactions that effectively "removes" disputes arising under such agreements to either the home state (i.e., China) or gateway jurisdictions that serve as "safe harbors" for Chinese capital.[53] The degree to which the legal form of Chinese outbound capital can be localized or transnationalized depends not only on home state governance but also on that of the host state. In the section that follows, we situate the legal forms of cross-border transactions in four different types of destinations of Chinese capital.

C. Spatialized Legal Forms: A Typology of Host States

Given the volatile dynamics of current world politics, the sovereigntist origin of power has become particularly influential in shaping the legal forms of Chinese capital. Destinations of Chinese capital may shape its legal form in many ways, including but not limited to supplying law for contracts, choosing law pursuant to conflicts rules when a contract is silent on its choice of law, enforcing law in courts, and arbitral awards. To make sense of how China's outbound investment and development projects are implemented in various destinations, in this section we present a thumbnail framework of four major types of jurisdictions in China's global legal expedition, namely: *frontiers*, *gateways*, *strategic partners*, and *forbidden palaces.*

The basic rationale of our typology is to use these spatial metaphors to help understand how different host jurisdictions shape China's outbound development strategies. Ours is not a geographic classification like marking locations on a world map, but an ecological perspective for making sense of how the Chinese state, its enterprises, and their lawyers relate to the various types of jurisdictions for their projects across the world. Arguably, not all jurisdictions that receive Chinese capital can be classified into this typology, and a jurisdiction may change from one category to another over time, but it provides a conceptual basis for understanding the spatial origin of the legal forms of Chinese capital and the ecology of lawyers "in action" for constructing China's international legal order.

52. Matthew S. Erie, *New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT'L L. 225, § VI(B) (2020).

53. *Id.*

a) Frontiers

Frontiers are jurisdictions that feature natural resource reserves and often an infrastructural deficit, thus making them appealing destinations for Chinese investment. However, their legal systems may feature underdeveloped courts and overdeveloped bureaucracies, making the use of the judiciary and national law risky and unpredictable from a foreign investor standpoint.[54] These frontiers are not necessarily the so-called "frontier markets" as commonly used in the vocabulary of international finance. Rather, they include a variety of jurisdictions in which the large-scale entrance of Chinese capital and related development projects is a relatively recent phenomenon.

In a frontier jurisdiction, the predominant areas of legal work in frontiers are Foreign Direct Investment (FDI) and Mergers and Acquisitions (M&A), such as the acquisition of a local mine or plant by a Chinese SOE or the investment of a Chinese bank in an infrastructure project. The governing law for contracts, agreements, and most other legal documents is usually local law or English/New York law. PRC law is only applied in these projects for bank loans, contracts involving Chinese contractors, or transactions between Chinese companies. There has been little legal transplant from China to frontier jurisdictions.[55]

While such frontiers are all over the world, some prominent examples can be found in Southeast Asia and Africa. Vietnam and Myanmar, for instance, are both neighboring countries of China and have received substantial amounts of Chinese investments because of their low labor costs and the BRI.[56] However, the appropriation of special economic zones and other elements of the Chinese model of economic development has not brought PRC law or lawyers to these frontiers.[57] FDI and other corporate transactions are dominated by law firms from regional financial centers like Hong Kong and Singapore, as well as major US and UK firms.

b) Gateways

Whereas frontiers highlight the role of local law, gateways foster transnational law. Frontiers cannot function properly without a small number of gateway jurisdictions. These are investor-friendly "legal hubs" through which Chinese capital meets international financial institutions and PRC lawyers meet

54. Kimberly Kay Hoang, *Risky Investments: How Local and Foreign Investors Finesse Corruption-rife Emerging Markets*, 83 AM. SOCIO. REV. 657, 658 (2018).

55. Samuli Seppänen, *Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism?*, 51 VAND. J. TRANSNAT'L L. 101, 156 (2018). *But see* Erie and Do *supra* note 4 (providing an example of a failed transplant). *See also* Matthew S. Erie, *Chinese Law and Development*, HARV. INT'L L. J. (forthcoming) (explaining Chinese approaches to cross-border ordering excepting transplants).

56. *See* Hoang *supra* note 54.

57. *See* Erie and Do *supra* note 4 (showing how Chinese have tried to export their SEZs abroad).

global law firms.[58] They are also major sites for dispute resolution, primarily through international commercial arbitration. Most gateways are common law jurisdictions and, as such, they may also be suppliers of law in cross-border transactions. Gateways are key sites in which Chinese capital is legally transformed into global capital. Besides global financial centers like London, Dubai, or Singapore, offshore jurisdictions such as the British Virgin Islands (BVI) and Cayman Islands also play critical roles in converting and channelling Chinese capital.

As Chinese capital flows through the gateways, it is often converted into more global forms of capital. For instance, a Chinese investor may set up a shell company in Hong Kong or Singapore and then use this company to invest in Southeast Asian jurisdictions. Lenovo, one of the most prominent Chinese companies, was incorporated in Hong Kong as early as 1988 and then publicly listed in the HKEX in 1994.[59] From 1997 to 2019, the IPOs of mainland Chinese companies had raised $335 billion in the HKEX, which accounted for 80% of the total offshore value of Chinese IPOs ($419 billion) and generated a substantial amount of legal work for law firms in Hong Kong.[60] Traditionally, IPO work was dominated by the Magic Circle firms and major Hong Kong firms, but the massive entrance of Chinese companies also attracted some elite U.S. firms to Hong Kong. In the 2010s, PRC law firms began to expand in Hong Kong and actively recruit from both local and Anglo-American law firms to build up their expertise in Hong Kong law and cross-border transactions.[61]

PRC law firms, especially the elite "Red Circle" firms[62], are actively building offices and expertise in gateway jurisdictions like Hong Kong. Arguably, such expansion is driven by business and client demands, but this is far from the whole story. Their expansion in Hong Kong and other gateways, such as Singapore and London, is also driven by the anticipation of future business needs and for symbolic reasons like becoming "global" law firms.[63] With the rising flow of outbound Chinese capital through the gateways, it would be intriguing to observe whether this ongoing expansion would threaten the dominance of elite local or Anglo-American law firms and change the nature of legal forms.

c) Strategic Partners

In addition to frontiers, strategic partners may also foreground the

58. See Erie *supra* note 52.

59. YASHENG HUANG, CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE 3 (2008).

60. Natasha Khan and Yasufumi Saito, *All About Money: Why Hong Kong Matters So Much to China*, WALL STREET JOURNAL (Oct. 22, 2019).

61. *See* Liu & Au *supra* note 15.

62. Jingqi Zhu et al., *Inside the "Red Circle": The Production of China's Corporate Legal Elite*, 7 J. PROFS. & ORGS. 87, 91 (2020).

63. *See* Liu & Wu *supra* note 15.

importance of local law. Among the destinations for Chinese capital, some countries are distinctive from frontiers because of their strategic geopolitical relations with China. These strategic partners seek alliance with China not only for its economic benefits but also for political gains, such as military assistance or geopolitical alliance. Likewise, China pours investments into its strategic partners primarily to strengthen its geopolitical and military ties with those jurisdictions. Some infrastructural or financial projects may turn out to be profitable to Chinese investors, but not necessarily so. It would be more appropriate to consider them parts of a larger national strategy to win international support for China. Hence, commercial logic does not always apply when analyzing legal services for Chinese investment in strategic partners. In comparison to frontiers, strategic partners often receive more favorable terms in their transactions with Chinese companies and banks.

The prime example of strategic partners is Pakistan, an "all-weather and time-tested" ally of China. Launched in 2015, the China-Pakistan Economic Corridor (CPEC), a large and ambitious set of infrastructural projects with an estimated $62 billion in total funding, is not only an exemplary component of the BRI but also a key geopolitical project for China's military and security interests in South and Central Asia.[64] Pakistan has inherited a common law system from Britain, its former colonizer, but it has also inherited a postcolonial bureaucratic state, which renders the judicial system inefficient. [65] Pakistani legislation is often rooted in the British Raj and thus dangerously outdated.[66] For these reasons, the legal system affords uncertain protection to foreign investors, Chinese or otherwise. Consequently, the Chinese have sought a close government-to-government alliance, and, above all, a supra-governmental alliance with the Pakistani military, a powerful actor in the country.

Other strategic partners provide ports (e.g., Greece and Malta) and military bases (e.g., Djibouti) for China, and some offer access to major trade and geopolitical blocs such as the European Union. For instance, as part of the BRI, the Mozura Wind Park, a green power plant in Montenegro, was built in 2019 through a China-Malta joint venture.[67] It gave Shanghai Electric Power Company (SEPC), a major energy firm in China, access to the European energy market as it will run the wind park together with its Maltese partner for 20 years. The Montenegro deal was made possible after SEPC made an investment of €300 million in Malta's energy sector since 2014, advised by a Maltese law

64. *See* the official website of CPEC, http://cpec.gov.pk/ (last visited Sept. 28, 2020)

65. OSAMA SIDDIQUE, PAKISTAN'S EXPERIENCE WITH FORMAL LAW: AN ALIEN JUSTICE 3-4, 9-11, 31 (2013).

66. Kashif Mahmood Tariq, *Impact of Anglo-American Jurisprudence on the Pakistan's Legal System*, 17 PAK. J. ISLAMIC RES. 127, 130-31 (2016).

67. Xinhua, *BRI Wind Farm Inaugurated in Montenegro*, CHINA DAILY (Nov. 19, 2019) https://global.chinadaily.com.cn/a/201911/19/WS5dd35633a310cf3e355785af.html.

firm.[68] It shows the importance of a small but critically located strategic partner for China's global economic expansion.

d) Forbidden Palaces

Whereas China's outbound investments are welcomed or even embraced by many countries and regions, especially in the developing world, an increasing number of governments have grown wary of China's global ambition. Accordingly, they have set legal and policy barriers specifically targeting Chinese capital and technologies and thus made their jurisdictions "forbidden palaces" for Chinese investors. These barriers include legal restrictions such as prohibitive investment screening, economic policies like tariffs and FDI restrictions, and political actions like intelligence investigations, technological and patent restrictions, and travel bans. In this way, local law and policy become obstacles to Chinese capital. Although there are market considerations in such policies, political concerns over China's rising power and the potential threat it poses to the jurisdiction prevail in their making and enforcement. As a result, large China-funded development projects commonly observed in strategic partners and frontiers are rarely seen in forbidden palaces.

A prominent example of forbidden palaces is Taiwan. Unlike many other Asian jurisdictions where Chinese capital is prevalent, Taiwan has perhaps the most restrictive policies toward Chinese investment owing to its political tensions with mainland China. Whereas investments from other jurisdictions into Taiwan are subjected to few restrictions, mainland Chinese companies can only invest in a limited list of industries specified and approved by the Ministry of Economic Affairs.[69] In practice, a small number of corporate law firms in Taipei monopolize most legal work related to inbound Chinese investment.

As U.S.-China relations took a toxic turn in recent years, the United States have become another notable forbidden palace for Chinese capital. While Chinese investments in the U.S. skyrocketed in the mid-2010s, the total amount has declined substantially during the Trump administration with the ongoing trade war, the ban on Chinese tech firms, the threat of delisting Chinese companies in U.S. stock exchanges, and the increasingly unpredictable immigration rules.[70] Although forbidden palaces are the least friendly to Chinese capital and the list of such jurisdictions is getting longer as China's global expansion generates backlashes, it would be mistaken to assume that

68. Chetcuti Cauchi, *China Power Invest. Corp. in Largest Foreign Direct Investment in Malta* https://www.ccmalta.com/news/china-power-investcorp-in-largest-fdi-in-malta?lang=fa-IR (last visited Sept. 28, 2020).

69. The Ministry of Economic Affairs, *Investment From Mainland China* https://www.moeaic.gov.tw/businessPub.view?lang=en&op_id_one=3 (last visited Sept. 28, 2020).

70. Thilo Hanemann & Daniel H. Rosen, *Chinese Investments in the United States: Recent Trends and the Policy Agenda*, Report prepared for the U.S.-China Economic & Security Review Commission (Dec. 8, 2016) https://www.uscc.gov/research/chinese-investment-united-states; Paul Wiseman, *Chinese Investment in US Drops to Lowest Level since 2009*, THE ASSOCIATED PRESS (May 11, 2020) https://apnews.com/article/30a6679b0f29dd0d49b4865c75390647.

they are economically decoupled from China. On the contrary, both the United States and Taiwan are major trade partners with China and the political hostility only adds to the legal risks and complexity of cross-border deals. Accordingly, Chinese companies strongly prefer to use local law firms in forbidden palaces to avoid suspicion and reduce risks.[71]

* * *

The legal forms of Chinese outbound capital are therefore heterogeneous, contingent, and shaped by the balance of power between the parties and the destination of the investment. In other words, contrary to much legal globalization theory, the diverse legal forms are the opposite of a homogenous levelling by or domination of Chinese law. Although Chinese parties show a preference for applying PRC law, they face constraints in doing so, and local law is often the prevailing norm. Chinese parties may also opt for relocating disputes beyond the host state and thus avoid local courts and related bureaucracies. This transnational law may exist alongside local law. Depending on the specific nature of legal services (e.g., *ex-ante* transactional or *ex-post* disputational), the specific strand of legal forms may show preferences for different types of lawyers. We draw particular attention to an emergent ecology of legal expertise, centered around lawyers in host states and gateway jurisdictions, including those stemming from transnational law.

III. THE ECOLOGY OF LEGAL EXPERTISE FOR CHINA'S OUTBOUND INVESTMENT

A. Law Firms, Etc.

The legal forms of Chinese capital, as reflected in relevant contracts, are shaped by the law and legal systems of different jurisdictions. Whereas national courts may apply conflicts rules to determine the governing law at the *ex-post* stage, territorial jurisdiction and mandatory provisions may require the use of national law in cross-border contracts; consequently, a state's bar, solicitors, or advocates may inform choice of law at the *ex-ante* stage. In contrast to U.S. multinational companies' strong reliance upon U.S. law firms, Chinese SOEs and private companies draw on the expertise of a large variety of legal service providers, including PRC law firms, in-house counsel for Chinese companies, local law firms in host states, Anglo-American law firms, as well as law firms in gateway jurisdictions.

To provide a conceptual framework for understanding the relations and interactions among these various types of legal service providers, we build on the ecological theory of professions, which has been used to study legal professions in China and also adapted recently to study international

71. Ji Li, THE CLASH OF CAPITALISMS: CHINESE COMPANIES IN THE UNITED STATES 78, 106 (2018).

organizations and global lawmaking.[72] Whereas the literature on legal form has used the concept of network,[73] we prefer ecology as a relational social space consisting of lawyers and law firms. The basic assumption of this ecological approach is that lawyers and law firms coexist and interact in their work. Law firms in the same ecology often compete, but they also cooperate and exchange capital and resources. This is particularly important for cross-border transactions, which require the collaboration of a variety of legal expertise in different jurisdictions.

There are at least four different types of providers in the ecology of legal expertise for Chinese outbound capital. First, PRC law firms usually are the first point of contact in the ecology for most Chinese companies seeking to invest abroad. Some larger companies also depend on their in-house counsel or legal departments to find law firms and coordinate their work. Although the expertise of these PRC lawyers is largely restricted to Chinese law, they serve the important functions of connecting the clients with foreign law firms.

Second, major U.S. and U.K. law firms with a global presence, such as the Magic Circle firms, play critical roles in cross-border transactions. Chinese companies that are experienced in outbound investment and can afford higher prices of legal service would sometimes bypass PRC law firms and directly retain these "global" law firms for their expertise and traditional authority in such transactions.[74] Ironically, while some of these firms are headquartered in forbidden palaces (e.g., the U.S.), the use of their legal services may not necessarily run afoul of investment blockades.[75]

Third, law firms in gateways (e.g., London, Hong Kong, and Singapore) and tax havens (e.g., BVI or Cayman Islands) are important facilitators for cross-border transactions. Hong Kong and Singapore are particularly critical for channeling Chinese capital. Although many transactions are handled by the regional offices of U.S., U.K., or PRC law firms, local law firms in these jurisdictions are also frequently involved in designing and structuring the architecture of cross-border M&As, banking and finance, and other corporate projects.

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72. *See generally* ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR (1988); Liu & Wu *supra* note 15; SUSAN BLOCK-LIEB & TERENCE C. HALLIDAY, GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS IN THE CRAFTING OF WORLD MARKETS (2017).

73. *See* Riles *supra* note 19 at 987. *See also* BRUNO LATOUR, REASSEMBLING THE SOCIAL: AN INTRODUCTION TO ACTOR-NETWORK THEORY 128 (2005).

74. *See* John Flood, *Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions*, 14 IND. J. GLOB. LEGAL STUD. 35, 51 (2007) (discussing "global law firms" as a general concept).

75. While Chinese companies continue to use major U.S. law firms, pursuant to the U.S.-China trade war, we have heard cases whereby Chinese companies no longer used second-tier U.S. law firms with offices in China. The companies preferred PRC law firms that would then contract specific work out to U.S. firms.

Finally, perhaps the most important yet overlooked legal service providers are local law firms in frontiers and strategic partner states. Just like the role PRC law firms play in inbound investment into China, lawyers in such host states possess valuable localized expertise for implementing the deals on the ground.

Taken together, the four types of law firms and lawyers constitute the major actors in the ecology of legal expertise for China's outbound investment, and, as such, they are the local architects of China's international legal order. Each of them occupies a different position in the ecology, and the relations among them vary from deal to deal. The division of labor and interactions between law firms reflect the legal form of a particular transaction. Not all four types of law firms are necessary for every deal, yet most deals involve the cooperation of multiple firms, often after a competitive bidding process that involve a larger number of firms. In what follows, we provide some examples on how this bonding process between legal form and legal service providers works in different jurisdictions and social contexts.

B. From Governing Law to Governing Lawyers

Whereas conflict of laws is conventionally understood as judges or lawyers choosing the governing law in a multijurisdictional matter, the rules may also choose the legal expert. The relationship between governing law and the lawyers who draft the contract or provide counsel in the course of dispute resolution is a complex one in the context of multijurisdictional commercial transactions. The evolution of global law firms over the past several decades shows precisely how the firm internalizes transaction costs that arise from cross-border deals by employing lawyers who are licensed to practice law in each jurisdiction.[76] While the internationalization of PRC law firms and the enduring importance of Anglo-American firms are part of the story of Chinese outbound capital, an under-appreciated dimension is that of local lawyers in host states. This seemingly global ecology of legal expertise is grounded in local lawyering.

The prevalence of multijurisdictional transactions in the twenty-first century has significantly complicated the scope of work a corporate lawyer engages in.[77] While state bars enforce disciplinary rules prohibiting lawyers from the unauthorized practice of law, in reality, a corporate law firm today in New York City, London, Hong Kong, or Beijing likely includes lawyers who are licensed outside of those cities' respective jurisdictions. As a result, a client does not necessarily need to hire a lawyer who is licensed in every jurisdiction with which the deal in question has a particular nexus. For example, two

76. John Flood, *Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practices*, 3 INT'L J. LEGAL PROF. 169, 188-90 (1996).

77. John Flood, *Institutional Bridging: How Large Law Firms Engage in Globalization*, 54 B.C. L. REV. 1, 2 (2013).

Chinese companies may form a JV in Singapore, which is then used as an investment vehicle in a hydropower project in Vietnam.[78] Under this arrangement, the cooperative agreement and articles of association for the JV are governed by Singaporean law, supplementary agreements for the JV may follow PRC law, and the sales and purchase agreement, concessional agreement, and power purchase agreement would all be governed by Vietnamese law.[79] So how has the ecology of legal expertise adapted to the legal forms generated by such transactions in the course of Chinese outbound investment?

In terms of the key players in providing legal services to Chinese companies "going out," the options are truly global.[80] As a historical data-point, many Chinese SOEs who first started investing overseas in the late 1990s and early 2000s used U.K. or U.S. firms.[81] A 2019 survey of SOEs conducted by the Shanghai Municipal Bar Association confirmed that SOEs have depended largely on non-PRC law firms.[82] However, much of the focus in the literature on the role of lawyering in Chinese outbound investment and the BRI focuses specifically and narrowly on PRC law firms.[83]

It is true that PRC law firms are key players in providing legal services for Chinese companies that are conducting business overseas. Their efforts have received support from the Chinese government. Beginning in 2016, the All-China Lawyers Association (ACLA) and the Ministry of Justice (MOJ) began compiling guidebooks for Chinese lawyers on cross-border business.[84] The ACLA has also established training rules for "Leading Talent Group for Lawyers Dealing with Foreign Matters" to train lawyers who work on foreign-related commercial matters with the goal of establishing a "talent bank" that will become part of a "national team." In 2019, the ACLA launched a "Belt and Road International Lawyers Association" (BRILA) to promote legal cooperation between Chinese and foreign lawyers. The BRILA has 85 founding members from 36 countries. BRILA's activities include conferences, training, legal services provision, and improving regional trade rules. Such

78. This hypothetical was given on the basis of an actual deal handled by a boutique law firm in Shanghai. Interview with law firm partner, Shanghai, Apr. 20, 2018.

79. *Id*.

80. *See infra* text accompany notes 69-72.

81. Interview with Chinese lawyer and member of the Shanghai Municipal Bar Association, Shanghai, April 22, 2019.

82. *Id*.

83. *See generally* Jing Li, *All Roads Lead to Rome: Internationalization Strategies of Chinese Law Firms*, 6 J. PROF'S & ORG. 156 (2019); Tommi Yu, *China's 'One Belt, One Road Initiative': What's in It for Law Firms and Lawyers?*, 5 CHINESE J. COMP. L. 1 (2017); Roderick O'Brien, *The One Belt One Road Initiative and China's Lawyers: A Work in Progress*, INT'L J. LEGAL PROF. (2020).

84. *See e.g.*, ACLA, YIDAIYILU YANXIAN GUOJIA FALÜ HUANJING GUOJIA BAOGAO [REPORT ON 'BELT AND ROAD' COUNTRIES' LEGAL ENVIRONMENTS] (2017); BEIJINGSHI LÜSHI XIEHUI (BEIJING MUNICIPAL BAR ASSOC.) 'YIDAIYILU' YANXIAN LIUSHIWU GE GUOJIA ZHONGGUO QIYE HAIWAI TOUZI FALÜ HUANJING FENXI BAOGAO HUIBIAN JI WAIGUO TOUZI FALÜ ZHIDU FENXI BAOGAO HUIBIAN [COMPILATION OF ANALYTICAL REPORTS ON THE LEGAL ENVIRONMENT OF SIXTY-FIVE COUNTRIES ALONG THE 'BELT AND ROAD' IN WHICH CHINESE ENTERPRISES' HAVE INVESTED] (2018)

efforts work alongside similar initiatives by the China Law Society and the Supreme People's Court to increase cooperation and exchange between Chinese lawyers and judges, on the one hand, and those of host states, on the other.

Building on these state-driven efforts, PRC law firms have sought to increase their presence overseas. Some firms build out or reorganize existing practice groups to include cross-border work. For example, Grandall established a "BRI Legal Service Center" in 2015. Other firms form an association with a non-PRC law firm either on a per project basis or for longer-term work. Another strategy is to work with an existing law firm membership organization (e.g., Interlex, Alfa International, or ASEAN Plus) to identify foreign law firm partners. King & Wood Mallesons, for instance, established a Belt and Road Center for International Cooperation and Facilitation in 2019.[85] Merging with foreign firms is also an option adopted by some large PRC firms, most notably King Wood Mallesons and Dacheng (Dentons). Smaller firms have also sought to form partnerships in countries like India, Pakistan, and Myanmar.[86] The riskiest and most costly option is to set up a foreign office. By 2019, PRC law firms had established 154 offices abroad.[87] As of 2017, six PRC law firms have set up seven branch offices in BRI states.[88] Most of these offices remain small and symbolic to date.

Whereas American globalization proceeded in step with the internationalization of U.S. law firms,[89] there is no evidence yet that BRI deals and access to Chinese capital mandate the use of PRC law firms. The division of labor between PRC and non-PRC lawyers reflects the plurality of choice of law issues in the legal forms of Chinese outbound investment. Importantly, the form of law that results from different lawyers licensed in different jurisdictions is animated by a subtle power distribution between lawyers and firms. To give one example, a PRC law firm, when bidding to serve as lead counsel to a Chinese company entering a M&A deal overseas, will start their bid by learning from the client the scope and nature of work. If the mandate involves multiple jurisdictions, then they will seek to involve foreign lawyers. The requirement to work with local counsel is a result of the need for the transactional documents to comply with local law, a necessity that has been

85. Huang Jingwen et al., *KWM Belt and Road Center for International Cooperation and Facilitation and Belt and Road Initiative*, https://www.kwm.com/en/knowledge/hubs/belt-and-road/belt-and-road-centre (last visited Sept. 28, 2020).

86. *See* Yu *supra* note 83 at 12.

87. MOJ, *2019 niandu lüshi, jicheng falü fuwu gongzuo tongji fenxi [Statistical Analysis of Lawyers and Grassroots Legal Services in 2019*] http://www.moj.gov.cn/government_public/content/2020-06/22/634_3251200.html (last visited Sept. 28, 2020).

88. Bai Yang & Zou Xi, *Zhongguo xiehui yu 'yidaiyilu' yanxian duoguo dajian falü fuwu hezuo wang [China Lawyers Association and Multiple Countries Along the 'Belt and Road' Establish a Legal Service Cooperation Network]*, XINHUA (June 24, 2017), http://www.xinhuanet.com//world/2017-06/24/c_1121203227.htm.

89. *See supra* text accompanying note 13.

codified in PRC law.[90] They identify reliable local law firms through several sources, including existing law firm membership organizations and networks sanctioned by the Chinese government or initiated by PRC law firms. The PRC law firm will discuss with candidate law firms the nature of the work, obtain quotes from the law firms, and assemble a proposal as part of their bid. After negotiating the unified quote with the client, and obtaining the work, the PRC law firm will then outsource assignments to the local lawyers and may oversee their work.[91]

However, on occasion, it is the local law firm that leads the PRC firm in structuring the deal. As a variant of the above situation, the PRC law firm will allow the local counsel to draft the sale and purchase agreement and the shareholders' agreement in order to comply with local law. Language may be another advantage of local counsel. For instance, in Mexico, all contracts in connection with the government will be in Spanish. The Mexican government will not sign a contract in any other language, meaning that all documents are drafted by Mexican lawyers or notaries and PRC lawyers will review the English translation made by a translation service company.[92] Outside of the top tiers of PRC law firms, many PRC lawyers do not even have sufficient English language ability, English being the default language in many common law jurisdictions across Asia and Africa. Here again, local counsel may have the edge in drafting documents, leaving the PRC firm to generate a Chinese version that the PRC firm then uses to explain the deal to their client.[93] Hence, the requirements of local law, local documentary forms and practices, language, and time pressure may tip the scale in favor of the local law firm in structuring a deal.[94] As a result, PRC law firms are not necessarily "sanctifiers" for Chinese capital abroad, while they do serve a complex set of roles as dealmakers, facilitators, and cultural translators.[95]

It is clear from recorded deals that local lawyers are essential to a Chinese-invested transaction. A handbook for Chinese lawyers' cross-border transactions drives this point home.[96] In 2006, Huayou Cobalt Co., Ltd. (hereinafter, "Huayou Cobalt"), which produces some 70% of cobalt parts for

90. *See e.g.*, Shangshi gongsi zhongda zichan zhongzu guanli banfa [Administrative Measures for the Restructuring of Listed Companies' Major Assets], 2020 amended version, art. 22 (specifying that a listed company must disclose *inter alia* a legal opinion, [which addresses the legal issues of the relevant jurisdiction, as endorsed by an authorized law firm,] on the next working day after the board of directors makes a major asset reorganization).

91. Telephonic interview with Shanghai-based corporate lawyer, July 6, 2020.

92. Email correspondence with Shanghai-based lawyer at top-tier PRC law firm, Sept. 23, 2020.

93. Email correspondence with Shanghai-based lawyer at top-tier PRC law firm, Aug. 26, 2020.

94. Email correspondence with Hangzhou-based partner of a PRC law firm, August 26, 2020.

95. *See* Flood *supra* note 74; Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, 42 L. & SOC'Y REV. 771 (2008).

96. Zhejiang qiye kuaguo binggou shili fenxi yu pingshu (chugao) [(Draft) Analysis and Commentary on Examples of Cross-Border M&A of Zhejiang Enterprises] (2017), on file with authors.

batteries in the global marketplace, sought to acquire mining rights for a project in the Democratic Republic of Congo ("DRC"). Huayou Cobalt did so by purchasing the rights from the Congolese National Mining Co. ("CNM"), a state-owned company. Huayou Cobalt first established a wholly-owned subsidiary and built a project team for the acquisition, including a local law firm familiar with the mining industry. The local firm conducted the due diligence on the mining rights area and issued a legal opinion on the due diligence for the project. From this report, a number of assessments were made, including the asset evaluation (valued at $52 million) and feasibility study report. Ultimately, the project was approved.

In this case, the handbook observes that the due diligence for a natural resource M&A project is key, particularly in a high-risk country like the DRC. The local lawyers were able to ascertain any restrictions on the mining rights, analyse the regulations on the transfer of mining resources, and obtain relevant license qualifications. DRC laws, including administrative law, mining law, environmental law, and investment laws, were governing over relevant transfer agreements.

The lesson of the Huayou Cobalt deal was made more explicitly in the example of Zhejiang Jingxin Pharmaceutical Co. that acquired an Israeli company in 2017 specifically to obtain an innovative chemical compound used to treat patients with Parkinson's Disease for $5 million. In assessing that deal, the handbook noted the importance in hiring local Israeli lawyers and that there are many examples of overseas investment projects that fail because they did not hire local lawyers.

Preliminary fieldwork being conducted in several countries on the question of legal services for Chinese companies investing in frontier jurisdictions and strategic partners supports the above anecdotes. Across the different countries, the fieldwork shows the near total absence of PRC lawyers in such jurisdictions. Rather than Chinese lawyers "flying in" as has been the practice of Anglo-American lawyers retained by multinationals conducting business in such countries, the view from these host states is one dominated by local lawyers. Local lawyers are transactional polymaths who not only draft contracts in compliance with local law, but also identify business partners for Chinese clients, navigate governmental bureaucracies, and intervene in problem-solving throughout the investment process.

In Vietnam, for example, almost all Chinese companies are represented by Vietnamese law firms. To date, only two Chinese law firms have been incorporated in Vietnam, which are staffed almost exclusively by Vietnamese lawyers. In addition to referrals from Chinese law firms, Vietnamese lawyers may also mobilize connections with Chinese business associations or personal relationships with Chinese entrepreneurs.

In Pakistan, where Chinese companies are investing in CPEC, some law firms in Karachi have developed whole practice groups to service Chinese clients, including associates who have obtained a law degree from a Chinese university and present bilingual English-Chinese business cards. A few Chinese law firms have developed projects for CPEC, but none have set up a local office. The faces of Chinese companies in the district courts in Lahore are distinctly Punjabi.

Similarly, in Ethiopia's booming construction sector, Chinese companies employ Ethiopian lawyers for both litigation and transactional work. Given the ethnic and political diversity of the country, Chinese clients search to find lawyers native to the specific region where a project is being conducted or where a trial is being held. The Ethiopian market shows perhaps an even more aggressive form of localization with Ethiopian lawyers monopolizing the market, working without referrals from Chinese lawyers who are crowded out.

In each of the three examples above, Chinese-invested projects are governed by the local law of the respective host state. As such, local lawyers predominate and transnational networks are, to varying degrees, emerging. While Chinese globalization has strong top-down or outbound components, we find that the bottom-up or local dimensions may be equally important.

CONCLUSION

Theories of global lawyering have followed the internationalization trajectory of Anglo-American law firms. Until the recent rise of China, this trajectory was largely a story of homogenization and diffusion. As U.S. and U.K. law firms expanded their footprints around the world, common law became the dominant legal form in cross-border transactions. Local laws, by contrast, often retreated to a complementary role. This hegemonic international legal order served its purposes effectively in the late twentieth century, in which countries were differentiated into the "core" and the "periphery" [97] and legal institutions into "global" and "local" ones.[98] With the rise of emerging markets and the rapidly changing landscape of the global legal services market in the early twenty-first century, however, the boundaries between the global and the local have become blurry and contested.

As Chinese capital flows into a large variety of frontiers, gateways, strategic partners, and forbidden palaces, the interactions in the ecology of legal expertise, namely among local lawyers, PRC lawyers, in-house counsel,

97. IMMANUEL WALLERSTEIN, WORLD-SYSTEMS ANALYSIS: AN INTRODUCTION 28-29 (2004).

98. *See e.g.*, YVES DEZALAY AND BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 7 (2002); TOBIAS BERGER, GLOBAL NORMS & LOCAL COURTS: TRANSLATING 'THE RULE OF LAW' IN BANGLADESH 3, 6 (2017).

and other legal professionals, result in many different legal forms. The global rise of populism and protectionism, the recent U.S.-China trade war, and the COVID-19 pandemic have added even more uncertainties to the power asymmetries and perceptions between China and the recipients of its capital. To make sense of this complex, unfolding, and highly fluid story, we have presented an analysis of how legal forms are both structured by and structuring the ecology of legal expertise in multiple destinations of Chinese investment.

In contrast to the common wisdom that China is replicating the imperialistic path to legal globalization that the U.S. and the U.K. championed in the twentieth century, the outbound investments of Chinese companies produce a multiform ecology of legal expertise, and one that is not dominated by PRC law firms. Although the Chinese government has made many efforts to boost the global status and influence of its law firms, and we believe this trend will continue, PRC lawyers are not (yet) the main architects of this new and precarious international legal order. This matters as the legal technician, through choice of law, and dependant on the instant jurisdiction, may supply the law in cross-border or transnational contracts. Rules and standards, judicial tests, substantive legal interpretations, and procedures may follow where one or more jurisdictions' laws and dispute resolution mechanisms govern such contracts.

Whereas China may be expanding its influence on the international legal order through increased participation in international organizations and multilateral treaties, the view from private international law shows two countervailing forms neither of which is necessarily reducible to unilateral diffusion. First, Chinese-invested transactions evince legal localization to comply with local law. Second, in regards to cross-border dispute resolution, lawyers who service Chinese companies may promote the building of transnational law to avoid the legal systems of host states. Whereas the former may bring Chinese investors into closer contact with host-state stakeholders, potentially influencing local elites or perhaps opening "backdoors" to local palace wars, the latter would have China's own legal architects join the global legal elite through, for example, international arbitration. To summarize, as legal form structures power, specifically by either constraining or facilitating, in this case, Chinese outbound capital, further attention to the evolving nature of the legal forms of Chinese globalization will shed light on the effects of this stage of globalization, its governance and relationship to the existing international order, and likely trajectories for modification.