

Case Study 2.3

TikTok versus United States

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1 Overview

This case study provides a comprehensive analysis of the intricate political risks faced by TikTok, the Chinese social media giant, within the complex US political landscape. Beginning with an exploration of the security concerns articulated by the US government, including during President Trump's administration, the discussion centers on TikTok's data collection practices and their perceived impact on US national security.

The narrative unfolds by elucidating the multifaceted strategies employed by TikTok and its parent company, ByteDance, to address these challenges, including litigation, endeavors toward Americanization, and technological adaptations. It also examines the evolution in the US government's stance as the Biden administration assumes leadership as well as TikTok's adaptive strategies aimed at sustaining and expanding its presence in the US market.

The study depicts the responses of the Chinese government to US policies, unraveling the broader implications of these developments on the global political-economic landscape, exploring the intricate dynamics involved in US-China relations, and providing readers with a deeper understanding of the complexities inherent in such interactions.

Finally, this case study invites readers from the fields of law, business, and policy to engage in contemplation on the broader themes of political risks faced by multinational corporations, the challenges inherent in navigating global legal frontiers, and the intricate nature of US-China relations, understanding how multinational corporations adapt to the complexities of international political environments.

2 Introduction

In August 2020, former US president Donald Trump issued two executive orders to effectively ban TikTok, one of the most popular social media apps owned by a Chinese company ByteDance, from the US market, drawing TikTok into the middle of the US-China geopolitical rivalry. Since then, the Chinese-owned company has been confronting increasing political risk in the United

States, and to mitigate this risk it has taken a variety of coping measures. This case study examines these measures and their institutional contexts, shedding light on how other China-based multinationals with substantial outbound foreign investment react to ever-growing political risks in their host countries.

2.1 ByteDance and TikTok

TikTok's parent company, the Beijing ByteDance Technology Co., Ltd. (hereinafter "ByteDance"), is a privately owned, multinational technology company incorporated in the Cayman Islands and based in Beijing, China. The multinational company has opened offices in the United States, the United Kingdom, Singapore, and other countries. Founded by Chinese entrepreneur Zhang Yiming in March 2012 and owned by Zhang and major global institutional investors, some of which are based in the United States, ByteDance owns a set of popular social media products such as Toutiao (one of the most famous Chinese online news platforms), Douyin (one of the most popular video-sharing apps in China), its overseas version TikTok, and Watermelon Video, among other apps.

ByteDance has achieved great business success within a relatively short period. By 2018, ByteDance's mobile apps had more than 1 billion monthly users and was valued at US\$75 billion, surpassing Uber to become the world's most valuable startup.¹ Among Chinese high-tech social media startups, ByteDance is the first one that did not seek commercial protection or financing from one of the few established internet powerhouses such as Alibaba, Tencent, or Baidu. Rather, ByteDance emerged as their fierce competitor. As of March 2020, ByteDance's 2019 revenue was estimated at RMB 104 billion to RMB 140 billion, more than Uber, Snapchat, and Twitter combined.²

With success in China, ByteDance began to pursue an expansive global strategy in 2016, when it released TikTok, the overseas version of Douyin. In just a few years, ByteDance has become one of the most successful, internationalized Chinese tech companies, generating vast user bases in the United States, Southeast Asia, Japan, and other places. As of July 2019, ByteDance's products and services have spread across 150 countries and regions in 75 languages and have been ranked at the top of app store lists in more than 40 countries and regions.³ Notably, ByteDance has been more successful than Alibaba, Baidu,

¹ Lulu Yilun Chen and Mark Bergen, 'The Unknown 35-Year-Old behind the World's Most Valuable Startup' *The Sydney Morning Herald* (1 October 2018) www.smh.com.au/business/companies/104b-goliath-the-unknown-35-year-old-behind-the-world-s-most-valuable-startup-20181001-p5072r.html.

² 'ByteDance Is Going from Strength to Strength' *The Economist* (18 April 2020) www.economist.com/business/2020/04/18/bytedance-is-going-from-strength-to-strength.

³ 'About ByteDance' <https://web.archive.org/web/20190721021507/www.bytedance.com/zh/about>.

and Tencent in terms of overseas businesses. It excels in attracting younger audiences abroad. *The Economist* labeled ByteDance the first global Chinese tech giant.⁴

The most successful app ByteDance owns and operates outside China is TikTok, an application that provides an online platform for users to create and share short-form videos.⁵ Like its Chinese version Douyin, TikTok was an immediate business success. In November 2018, it ranked first in the number of app downloads and installs in the US market and topped the overall charts of App Store or Google Play many times in Japan, Thailand, Indonesia, Germany, France, and Russia.⁶ By September 2021, TikTok's global monthly active users had reached 1 billion.⁷

As in other countries, TikTok gained popularity in the United States, especially after 2018 when it purchased [Musical.ly](https://www.musical.ly), a Chinese social media company based in Shanghai with millions of US users. In October 2018, TikTok became the most downloaded and installed app on a monthly basis in the United States,⁸ putting a great deal of pressure on established US social media platforms such as YouTube and Instagram.⁹ In terms of corporate structure, TikTok is owned and operated by ByteDance's subsidiary TikTok Inc., an American company incorporated in California and headquartered in Los Angeles with a US-based management team. Its key executives responsible for the operation of TikTok in the United States, including its CEO, global chief security officer, and general counsel, were, at one time, all Americans.

3 The Case

3.1 Trump's TikTok Ban: Background and Facts

3.1.1 Background

An old Chinese proverb says, "tall trees catch much wind." The business success of TikTok in the United States has triggered many concerns and controversies. TikTok's overseas expansion largely coincided with the deterioration of US-China relations. And given its investors' Chinese ownership and its business nature, TikTok has been caught in the crossfire of US-China rivalry. Its collection, storage, and use of US user data have been regarded as a threat to US national security. For example, in May 2019, the White House issued an

⁴ 'ByteDance' (n 2).

⁵ *TikTok Inc. v Donald J Trump*, Case No 20-cv-02658 (CJN) (US Dist Ct for the Dist of Columbia) 'Reply Memorandum in Support of Plaintiffs' Renewed Motion for Preliminary Injunction Against Commerce Department Prohibitions' 2.

⁶ 'News: TikTok Becomes Most Downloaded App in US' *Pedaily* ('快讯|TikTok成为美国下载量最高应用' 投资界) (6 November 2018) <https://news.pedaily.cn/201811/437459.shtml>.

⁷ 'TikTok Announces 1 Billion Monthly Active Users Worldwide' *Sina* ('TikTok宣布全球月活跃用户突破10亿' 新浪网) (27 September 2021) <https://finance.sina.com.cn/tech/2021-09-27/doc-iktzscyx6711337.shtml>.

⁸ 'News: TikTok' (n 6). ⁹ 'ByteDance' (n 2).

executive order declaring a national state of emergency related to information and national security: “foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology and services, which store and communicate vast amounts of sensitive information, facilitate the digital economy, and support critical infrastructure and vital emergency services, in order to commit malicious cyber-enabled actions, including economic and industrial espionage against the United States and its people.”¹⁰ The first among the “foreign adversaries” was China.¹¹ Large-scale use of foreign information and communications technology and devices was thought to constitute an “unusual and extraordinary threat to the national security, foreign policy and economy of the United States.”¹² Naturally, TikTok caught the spotlight. On 11 January 2019, the Peterson Institute for International Economics issued a report describing TikTok as a major threat to national security in the United States and the West.¹³ On 23 October 2019, Republican Senator Tom Cotton and then Democratic Senate Minority Leader Chuck Schumer jointly called on then acting Director of National Intelligence to keep a watchful eye on the potential risks of censorship and data security of TikTok.¹⁴

TikTok soon responded directly to the allegations. On 25 October 2019, TikTok issued a public statement on its official website, stating: “We store all TikTok US user data in the United States, with backup redundancy in Singapore. Our data centers are located entirely outside of China, and none of our data is subject to Chinese law.”¹⁵ Besides, TikTok stated: “TikTok does not remove content based on sensitivities related to China. We have never been asked by the Chinese government to remove any content and we would not do so if asked. Period.”¹⁶

But TikTok’s statement failed to ease the national security concerns of the US government. On 17 December 2019, the US Navy banned the use of TikTok on government mobile devices, deeming the app a cybersecurity threat. Users who had installed TikTok software on government mobile devices were not allowed to access the internal network of the US Marine Corps or use TikTok while in

¹⁰ See White House, ‘Executive Order on Securing the Information and Communications Technology and Services Supply Chain’ (15 May 2019) www.whitehouse.gov/presidential-actions/executive-order-securing-information-communications-technology-services-supply-chain/.

¹¹ *ibid.* ¹² *ibid.*

¹³ Claudia Biancotti, ‘The Growing Popularity of Chinese Social Media Outside China Poses New Risks in the West’ (*PIIE*, 11 January 2019) www.piie.com/blogs/china-economic-watch/growing-popularity-chinese-social-media-outside-china-poses-new-risks archived 12 February 2019.

¹⁴ Haley Samsel, ‘Senators Ask U.S. Intelligence to Investigate Potential Security Risks of TikTok and Chinese-Owned Companies’ (*Security Today*, 28 October 2019) <https://securitytoday.com/articles/2019/10/28/senators-tik-tok-security.aspx> archived 18 August 2022.

¹⁵ ‘Statement on TikTok’s Content Moderation and Data Security Practices’ <https://newsroom.tiktok.com/en-us/statement-on-tiktoks-content-moderation-and-data-security-practices>.

¹⁶ *ibid.*

uniform.¹⁷ In January 2020, the US Army also announced it was banning TikTok on government-distributed phones.¹⁸ In February 2020, the US Transportation Security Administration (TSA) barred employees from using TikTok to create videos on their personal devices for use in TSA's social media outreach.¹⁹

Meanwhile, a more threatening political risk was looming. In October 2019, Senator Marco Rubio asked the Committee on Foreign Investment in the United States (CFIUS) to investigate TikTok and ByteDance for its threat to US national security.²⁰ In November 2019, CFIUS began to review ByteDance's acquisition of *Musical.ly* in 2017.²¹ In July 2020, the United States Treasury Secretary Steve Mnuchin confirmed that TikTok was under a national security review by CFIUS.²² If a national security threat is found, the agency has the authority to order a foreign investor to divest its US investment.

As one of the most popular social media apps in the United States, TikTok could not stay away from American politics, especially in the year leading up to the 2020 presidential election. Since mid 2020, TikTok users had amassed millions of posts about American politics. Many videos shared on TikTok mocked and satirized Donald Trump. For example, the comedienne Sarah Cooper used Trump's own words to ridicule him in her videos, which attracted millions of followers. Moreover, many American anti-Trump politicians used TikTok, like Governor Michael DeWine of Ohio, Senator Ed Markey of Massachusetts, and Governor Gavin Newsom of California. This led to President Trump's reelection campaign putting out Facebook advertisements asking his supporters to sign a petition to ban TikTok.²³

In June 2020, some TikTok users coordinated mass ticket reservations for Trump's reelection campaign rally in Tulsa, which caused a huge embarrassment for the president's campaign, because fewer than expected participants appeared at the Trump rally.²⁴ On 31 July 2020, a furious Trump declared his

¹⁷ M. B. Pell and Echo Wang, 'U.S. Navy Bans TikTok from Government-Issued Mobile Devices' *Reuters* (20 December 2019) www.reuters.com/article/us-usa-tiktok-navy-idUSKBN1YO2HU.

¹⁸ Neil Vigdor, 'U.S. Military Branches Block Access to TikTok App amid Pentagon Warning' *New York Times* (4 January 2020) www.nytimes.com/2020/01/04/us/tiktok-pentagon-military-ban.html.

¹⁹ 'TSA Halts Employees from Using TikTok for Social Media Posts' (*Associated Press*; archived from the original on 26 February 2020) <https://apnews.com/tsa-halts-employees-from-using-tiktok-for-social-media-posts-aafc69bc4dfdbff93168df118e30ef8f>.

²⁰ 'Marco Rubio Seeks U.S. Government Probe of TikTok over Chinese Censorship Concerns' *The Washington Post* (9 October 2019) www.washingtonpost.com/technology/2019/10/09/sen-rubio-us-government-should-probe-tiktok-over-chinese-censorship-concerns/.

²¹ 'U.S. Government Investigating TikTok over National Security Concerns' *The Washington Post* (1 November 2019) www.washingtonpost.com/technology/2019/11/01/us-government-investigating-tiktok-over-national-security-concerns/.

²² 'US Treasury to Make Recommendation on TikTok to Trump This Week: Mnuchin' *Reuters* (29 July 2020) www.reuters.com/article/us-usa-china-tiktok-treasury-idUSKCN24U288/.

²³ *TikTok Inc. v Donald J Trump*, Case No 20-cv-02658 (CJN) (US Dist Ct for the Dist. of Columbia) 'Reply Memorandum in Support of Plaintiffs' Renewed Motion for Preliminary Injunction Against Commerce Department Prohibitions' 6.

²⁴ *ibid.*

intention to ban TikTok: “As far as TikTok is concerned, we’re banning them from the United States.”²⁵ Trump’s ire, even if not the sole determinative factor, greatly contributed to TikTok’s political troubles in the United States.

3.1.2 Trump’s TikTok Ban

On 6 August 2020, invoking presidential powers granted by the International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act, Trump issued the Executive Order on Addressing the Threat Posted by TikTok (hereinafter “the first order”).²⁶ The order banned “any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with Byte Dance Ltd. ... or its subsidiaries,” and it would become effective within forty-five days (i.e., 20 September 2020).²⁷ Although the order did not directly prohibit the use and operation of TikTok in the United States, the ban on any transaction by any company, like Apple and Google, would make the TikTok app effectively dysfunctional in the United States.²⁸

The Chinese background of TikTok’s parent is the stated cause of the national security concern. According to the first order, “TikTok automatically captures vast swaths of information from its users, including Internet and other network activity information such as location data and browsing and search histories.”²⁹ That would allow the Chinese authorities to gain access to American’s personal and proprietary information and potentially track the locations of US employees and contractors. Moreover, the US government argued that TikTok could censor what Chinese authorities deem as sensitive information.³⁰

On 14 August 2020, Trump issued a second executive order concerning ByteDance’s acquisition of *Musical.ly*, which closed in 2018.³¹ Following CFIUS’s national security retroactive review of that acquisition, this second order compelled ByteDance to divest its US investment by selling or spinning off TikTok within ninety days (i.e., before 12 November 2020). Trump stated in

²⁵ Ellen Nakashima, Rachel Lerman, and Jeanne Whalen, “Trump Says He Plans to Bar TikTok from Operating in the US” *The Washington Post* (31 July 2020) www.washingtonpost.com/technology/2020/07/31/tiktok-trump-divestiture/.

²⁶ See ‘Exec Order No 13942’ (6 August 2020) 85 Federal Register 48637. ²⁷ *ibid* § 1(a).

²⁸ ‘Commerce Department Prohibits WeChat and TikTok Transactions to Protect the National Security of the United States’ US Department of Commerce (18 September 2020) <https://2017-2021.commerce.gov/news/press-releases/2020/09/commerce-department-prohibits-wechat-and-tiktok-transactions-protect.html>.

²⁹ ‘Executive Order on Addressing the Threat Posed by TikTok’ *The White House* (6 August 2020) <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-addressing-threat-posed-tiktok/>.

³⁰ Some countries, like India, have already banned the use of Chinese mobile applications in their domestic country. India’s Ministry of Electronics and Information Technology asserted that Chinese mobile application producers stole and transmitted users’ data in an unauthorized manner to the servers outside. ‘India Bans Nearly 60 Chinese Apps, Including TikTok and WeChat’ *New York Times* (29 June 2020) www.nytimes.com/2020/06/29/world/asia/tik-tok-banned-india-china.html.

³¹ See ‘Presidential Order Regarding the Acquisition of *Musical.ly* by ByteDance Ltd.’ (85 Fed. Reg. 51297, 14 August 2020).

this order that “credible evidence” had made him believe that ByteDance constituted a great threat to US national security.³² All in all, the message sent to ByteDance was clear: sell TikTok to American companies or be banned.

3.2 TikTok’s Coping Strategies

3.2.1 Americanization

On 2 August 2020, shortly after Trump’s announcement that he was going to ban TikTok, Microsoft declared in a statement that it was discussing with ByteDance about a potential purchase. While Microsoft initially only considered a minority investment in TikTok, Trump’s declaration to ban TikTok encouraged Microsoft to contemplate a total acquisition. As Microsoft announced: “Following a conversation between Microsoft CEO Satya Nadella and President Donald J. Trump, Microsoft is prepared to continue discussions to explore a purchase of TikTok in the United States.”³³

Yet, after the second executive order, Trump announced that Oracle was his acceptable choice of the company acquiring TikTok.³⁴ Meanwhile, SoftBank, a Japanese company, came up with an acquisition plan with Walmart and Google that would make Walmart a majority shareholder and SoftBank and Alphabet (Google’s parent company) minority shareholders.³⁵ Trump, however, rejected that plan. On 27 August 2020, Walmart declared that it would try to purchase TikTok with Oracle. On 14 September 2020, Oracle confirmed a US Department of Treasury’s announcement that Oracle was a party to the proposed transaction involving TikTok.³⁶ Trump said he was satisfied with that plan.

However, disagreements over the concrete terms of the deal quickly transpired. Reacting to the Oracle plan, ByteDance said it would own 80% of TikTok Global, a new US-based company to be set up to facilitate the transfer of TikTok ownership.³⁷ That meant ByteDance would continue to own TikTok. However, Oracle responded that ByteDance would not have any stake

³² *ibid.*

³³ Clare Duffy, ‘Microsoft Says It Is Still Talking with Trump About Buying TikTok from Its Chinese Owner’ *CNN Business* (3 August 2020) www.cnn.com/2020/08/02/tech/microsoft-tiktok/index.html archived 25 August 2022.

³⁴ David McCabe, ‘Trump Says Oracle Could “Handle” Owning TikTok’ *New York Times* (19 August 2020) www.nytimes.com/2020/08/19/technology/trump-oracle-tiktok.html archived 25 August 2022.

³⁵ See Tyler Sonnemaker, ‘Walmart Reportedly Tried to Become TikTok’s Majority Owner by Teaming Up with Alphabet and SoftBank before the Trump Administration Nixed the Idea’ *Business Insider* (27 August 2020) www.businessinsider.com/walmart-alphabet-softbank-tiktok-deal-talks-before-microsoft-government-rejected-2020-8 archived 25 August 2022.

³⁶ Stan Choe, ‘Trump Backs Proposed Deal to Keep TikTok Operating in US’ *The Washington Post* (19 September 2020) www.washingtonpost.com/business/technology/trump-backs-proposed-deal-to-keep-tiktok-operating-in-us/2020/09/19/08cc901a-fadf-11ea-85f7-5941188a98cd_story.html archived 25 August 2022.

³⁷ Georgia Wells and Alex Leary, ‘TikTok and Oracle Spar over Ownership, Threatening Deal’ *Wall Street Journal* (21 September 2020) www.wsj.com/articles/tiktok-and-oracle-spar-over-ownership-threatening-deal-11600702185 archived 25 August 2022.

in TikTok Global. ByteDance explained that, despite its continuous ownership, TikTok Global would remain under American control, as ByteDance itself was about 40% owned by US investors.³⁸

Yet some politicians opposed that proposed solution. On 14 September 2020, Senator Josh Hawley criticized the deal with Oracle and urged CFIUS to block it. He argued that the plan would fall short of fully implementing the president's second order because it would still allow Chinese forces to influence the United States.³⁹ Four days later, the US Department of Commerce issued a rule to implement the first TikTok executive order.⁴⁰ Under this rule, from 27 September 2020, app stores in the United States would not support or distribute the TikTok app, and, from 12 November 2020, all other transactions vital to TikTok's operation, such as storing data, would be prohibited.⁴¹

3.2.2 Litigation

The plan to divest TikTok through a sale was met with strong resistance in both the United States and China, so the company soon resorted to legal means. On 24 August 2020, TikTok Inc. filed a complaint in the federal court for the Central District of California, where the company was based, challenging the Trump ban.⁴² TikTok argued that the ban was motivated by Trump's personal goal of reelection, and it violated the Fifth Amendment of the US Constitution by denying due process rights of TikTok and other companies. On 20 September 2020, TikTok voluntarily withdrew the case,⁴³ as it filed lawsuits in other courts. Meanwhile, Patrick Ryan, a TikTok employee, sued Trump as well as the Secretary of Commerce and sought an injunction to prevent the enforcement of the executive orders banning TikTok.⁴⁴ Ryan contended that Trump's ban would cause US employees of TikTok to lose their salaries, thus violating the Fifth Amendment by denying their right to due process and taking property without just compensation. He also claimed that the ban was motivated by Trump's personal reasons and anti-China bias.

³⁸ *ibid.*

³⁹ 'Senator Hawley Calls for CFIUS to Reject TikTok Partnership, Violates President's Executive Order' (Josh Hawley, 14 September 2020) www.hawley.sen-ate.gov/senator-hawley-calls-cfius-reject-tiktok-partnership-violates-presidents-executive-order archived 25 August 2022.

⁴⁰ 'Identification of Prohibited Transactions to Implement Executive Order 13942' (85 Fed. Reg. 60061, 24 September 2020) (15 C.F.R. ch VII).

⁴¹ See Satish M. Kini et al., 'U.S. Commerce Department Announces "Prohibited Transactions" Related to Tik-Tok, WeChat Mobile Apps' (Debevoise & Plimpton, 24 September 2020) www.debevoise.com/insights/publications/2020/09/us-commerce-department-announces archived 26 August 2022.

⁴² Complaint, 'TikTok, Inc. v. U.S. Dep't of Commerce' No. 2:2020-cv-07672 (C.D. Cal., 24 August 2020).

⁴³ Notice of Voluntary Dismissal, 'TikTok, Inc. v. U.S. Dep't of Commerce' No. 2:2020-cv-07672 (C.D. Cal., 20 September 2020).

⁴⁴ Notice of Motion and Motion for Preliminary Injunction, 'Ryan v. Trump & Ross, JR.' No. 3:20-cv-05948 (C.D. Cal., 3 September 2020).

On 23 September 2020, a group of US users of WeChat, a China-based “super app” used by many in the United States to communicate with families and friends in China and owned by a separate Chinese company from ByteDance, won a case against Trump’s executive ban of WeChat.⁴⁵ The WeChat ban parallels the TikTok ban and the two evoke the same set of legal authorities and have similar constitutional implications. Therefore, shortly after the court decision in favor of the WeChat users, TikTok Inc. sued the Trump administration in the federal court for the District of Columbia, seeking to enjoin the enforcement of the order prohibiting US companies from supplying services to TikTok. TikTok contended that the ban went beyond the president’s emergency powers under IEEPA because no emergency or grave threat to national security exists in the TikTok case. Moreover, it argued that IEEPA forbids the president from regulating or prohibiting the importation or exportation of “information or informational materials,” which qualifies as an exception to the emergency powers.⁴⁶

Four days later, just before the deadline for the TikTok ban, Judge Carl Nichols, a federal judge nominated by Trump, enjoined part of the Department of Commerce’s order implementing Trump’s executive order. Judge Nichols supported the argument of TikTok that the information and informational materials exception applies to the TikTok case and Trump’s executive order was *ultra vires*.⁴⁷ On 7 December 2020, Judge Nichols granted a preliminary injunction against the ban on other transactions.⁴⁸

TikTok also mobilized its users to join the litigation efforts.⁴⁹ Parallel to TikTok’s suit, three TikTok creators, who described themselves as comedians, fashion creators, and musicians with millions of fans on TikTok, sued Trump in the US District Court for the Eastern District of Pennsylvania.⁵⁰ Their complaint was that Trump’s ban on TikTok violates their right to free speech and deprives them of “professional opportunities afforded by TikTok” since the TikTok platform is unique and irreplaceable; they also argued that the ban was *ultra vires*.⁵¹ On 30 October 2020, Judge Wendy Beetlestone sided with these TikTok creators and ruled that the executive order barring new downloads of

⁴⁵ ‘U.S. WeChat Users All. v. Trump’ (2020) 488 F. Supp. 3d 912 (N.D. Cal.).

⁴⁶ 50 U.S.C. § 1702(b)(3).

⁴⁷ Memorandum Opinion (Signed by Judge Carl J. Nichols on 27 September 2020), ‘TikTok Inc. et al v. Trump et al’ No. 1:2020cv02658, Document 30 (D.D.C. 2020) <https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2020cv02658/222257/30/> archived 27 January 2023.

⁴⁸ ‘TikTok Inc. v. Trump’ (2020) 507 F. Supp. 3d 92, 106 (D.D.C.), appeal dismissed sub nom.

‘TikTok Inc. v. Biden’ No. 20-5381, [2021] WL 3082803 (D.C. Cir.).

⁴⁹ ‘TikTok to Challenge Trump Administration over Executive Order’ *New York Times* (22 August 2020) www.nytimes.com/2020/08/22/technology/tiktok-lawsuit-trump-executive-order.html.

⁵⁰ Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction at 1, ‘Marland v. Trump’ 498 F. Supp. 3d 624 (E.D. Pa. 2020) (No. 2:20-cv-04597) [2020] WL 8613435.

⁵¹ Complaint for Injunctive and Declaratory Relief at 18, para 61, ‘Marland v. Trump’ 498 F. Supp. 3d 624 (E.D. Pa. 2020) (No. 2:20-cv-04597) [2020] WL 8613435.

the TikTok app violated the informational materials exception under IEEPA and would result in the TikTok creators' loss of connections to millions of followers as well as related brand sponsorship.⁵² Therefore, a preliminary injunction was granted, blocking the implementation of the TikTok ban by the US Department of Commerce. Notably, Judge Beetlestone did not touch upon the free speech argument, because the plaintiffs' *ultra vires* argument was enough to buttress the preliminary injunction.⁵³

Shortly after the above cases, TikTok, as well as ByteDance, began to challenge CFIUS in the federal bench. On 10 November 2020, they sued CFIUS in the US Court of Appeals for the D.C. Circuit.⁵⁴ They made four main arguments. First, the CFIUS order was *ultra vires*; second, it violated their due process rights; third, it violated the Administrative Procedure Act since the order was arbitrary; and fourth, the compelled divestment of TikTok to a US government-supported company violated the Fifth Amendment of the US Constitution since it constituted a taking without just compensation.

Before the court issued an injunction against the CFIUS order, the federal government extended the deadline of implementing the order several times as the negotiation of ByteDance's divestiture continued. On 12 November 2020, CFIUS extended the deadline from 12 November 2020 to 27 November 2020.⁵⁵ On 25 November 2020, CFIUS granted another one-week extension, that is, from 27 November 2020 to 4 December 2020.⁵⁶ As 4 December 2020 approached, the Department of Treasury refused to extend it further, but it also stated it would not compel transaction.⁵⁷ CFIUS scrutiny of TikTok survived the Trump administration, and the agency demanded in March 2023 that its Chinese owners sell their shares.⁵⁸

3.2.3 Coping Strategies in the Biden Era

The United States in 2021 under the Biden administration amended its policies on TikTok. On 19 February 2021, Biden moved the D.C. Circuit court to hold the CFIUS case in abeyance, pending a review, and the court subsequently dismissed the case following a joint stipulation of both parties.⁵⁹ On 9 June 2021, the US

⁵² 'Marland v. Trump' (2020) 498 F. Supp. 3d 624, 641 (E.D. Pa.). ⁵³ *ibid* 642 n.8.

⁵⁴ 'TikTok Inc., et al v. Committee on Foreign Investment, et al' Docket No. 20-01444 (D.C. Cir., 10 November 2020).

⁵⁵ See Plaintiffs' Notice of Extension in CFIUS Matter at 1, 'TikTok, Inc. v. Trump' No. 20-cv-02658 (D.D.C., 25 November 2020).

⁵⁶ 'TikTok Inc. v. Trump' (2020) 507 F. Supp. 3d 92, 101 (D.D.C.).

⁵⁷ Jay Greene, 'TikTok Sale Deadline Will Pass, Though Regulators Will Hold Off on Enforcing Divestiture' *The Washington Post* (4 December 2020) www.washingtonpost.com/technology/2020/12/04/tiktok-sale-deadline/ archived 24 August 2022.

⁵⁸ Echo Wang and David Shephardson, 'TikTok Says US Threatens Ban If Chinese Owners Don't Sell Stakes' *Reuters* (16 March 2023) www.reuters.com/technology/us-threatens-tiktok-ban-if-chinese-owners-dont-sell-stake-wsj-2023-03-15/.

⁵⁹ 'TikTok Inc. v. Committee on Foreign Investment' Docket No. 20-01444 (D.C. Cir., 19 February 2021).

government withdrew the two executive orders of Trump and its appeal of the TikTok case. On 4 July 2021, the D.C. Circuit granted the Biden administration's motion to dismiss the appeal. On 20 July 2021, the case was dismissed.⁶⁰

In place of Trump's two executive orders, the Biden administration issued a new order about TikTok, commanding the Secretary of Commerce to review the TikTok app for national security concerns and emphasizing that the review must be based upon "rigorous, evidence-based analysis" while scrutinizing and addressing the risks of national security, economic interest, and core values of the United States.⁶¹ Notably, the Biden administration did not fully change the CFIUS order. That meant that TikTok still needed to be divested from its Chinese mother company, but the timetable was voided.⁶²

Though some consider the Biden administration's approach to have "importantly depoliticized the treatment of TikTok,"⁶³ the ease of the political pressure proved ephemeral. Given the intensifying US-China rivalry, TikTok's status in the United States remains highly precarious. Legally speaking, it is still under CFIUS review. TikTok also faces spreading bans at the state level and a partial ban at the federal level. On 2 December 2022, Chris Wray, Director of the Federal Bureau of Investigation, raised national security concerns about TikTok, warning that the popular video-sharing app was "in the hands of a government that doesn't share our values, and that has a mission that's very much at odds with what's in the best interests of the United States."⁶⁴ Then some Republican-controlled states barred the use of TikTok on government electronic devices.⁶⁵ Starting from late 2022, many public universities have restricted or banned the use of TikTok on school computers, mobile phones, and other devices, following the orders of those states,⁶⁶ with students questioning those decisions.⁶⁷ Congress also passed a law to forbid the use of TikTok on federal devices.⁶⁸

⁶⁰ See 'TikTok Inc. v. Biden' No. 20-5381, [2021] WL 3082803, at *1 (D.C. Cir., 14 July 2021); 'TikTok Inc. v. Biden' No. 20-5302, [2021] WL 3713550, at *1 (D.C. Cir., 20 July 2021).

⁶¹ Executive Order No. 14,034, 86 Fed. Reg. 31,423 (9 June 2021).

⁶² Wang and Shepardson (n 58).

⁶³ Anupam Chander, 'Trump v. TikTok' (2022) 55 *Vanderbilt Journal of Transnational Law* 1145, 1173.

⁶⁴ 'FBI Director Raises National Security Concerns about TikTok' *AP News* (2 December 2022) <https://apnews.com/article/technology-china-united-states-national-security-government-and-politics-ac5c29cfaa1fc6bee990ed7e1fe5afc>.

⁶⁵ William Melhado, 'Gov. Greg Abbott Bans TikTok on State Phones and Computers, Citing Cybersecurity Risks' *The Texas Tribune* (7 December 2022); Shawna Chen, 'Texas Is Latest State Banning TikTok on Government Devices amid National Security Concerns' (*Axios*, 7 December 2022) www.axios.com/2022/12/07/tiktok-national-security-republican-governors archived 25 August 2022.

⁶⁶ 'These Are All the Public Universities That Have Instituted TikTok Bans' *NBC News* (18 January 2023) www.nbcnews.com/tech/tiktok-bans-public-universities-list-rcna66185.

⁶⁷ 'Their Colleges Banned TikTok over Security Fears: These Students Vow It Won't Stop Them from Scrolling' *NBC News* (28 December 2022) www.nbcnews.com/tech/students-question-tiktok-bans-public-universities-rcna62801.

⁶⁸ Clare Foran and Kristin Wilson, 'House Passes \$1.7 Trillion Government Spending Bill as Funding Deadline Looms' *CNN Politics* (23 December 2022).

In 2022, a news wave targeting TikTok for data and national security reasons emerged. In June 2022, the American digital media BuzzFeed News issued a report about TikTok.⁶⁹ Citing leaked audios from more than eighty internal meetings of TikTok, it said that ByteDance employees in China could get access to US data, especially the personal information of American users. TikTok responded to the report in an official statement that all the US users' traffic had subsequently been routed to US-based servers of Oracle Cloud and all US users' data was to be deleted from TikTok's own data centers.⁷⁰ On 28 January 2023, it was reported that ByteDance's general counsel was no longer overseeing US government relations for TikTok. The change was part of a shake-up to improve TikTok's standing facing stringent national security review in the United States.⁷¹

3.3 Reactions from ByteDance and the Chinese Government

The Chinese government opposed the US government's ban on TikTok. As soon as Trump issued the two executive orders, the Chinese government denounced his multiple actions against TikTok as a "smash and grab" and "an officially sanctioned 'steal' of Chinese technology."⁷² In addition, it made an appeal to the United States that it should "earnestly maintain fair and transparent international rules and order."⁷³ The Chinese Ministry of Foreign Affairs proposed the Global Initiative on Data Security on 8 September 2020, emphasizing that: "States should handle data security in a comprehensive, objective and evidence-based manner, and maintain an open, secure and stable supply chain of global ICT products and services."⁷⁴

The initiative was a countermeasure to the Clean Network Program of the US government, "which would exclude Chinese telecommunications firms, apps, cloud providers and undersea cables from internet infrastructure used by the US and other countries."⁷⁵ On 17 September 2020, during the regular press

⁶⁹ 'Leaked Audio From 80 Internal TikTok Meetings Shows That US User Data Has Been Repeatedly Accessed from China' *BuzzFeed News* (17 June 2022) www.buzzfeednews.com/article/emilybakerwhite/tiktok-tapes-us-user-data-china-bytedance-access.

⁷⁰ Albert Calamug, 'Delivering on Our US Data Governance' TikTok Newsroom (17 June 2022) <https://newsroom.tiktok.com/en-us/delivering-on-our-us-data-governance>.

⁷¹ 'TikTok General Counsel No Longer Oversees US Relations' *Bloomberg* (27 January 2023) www.bloomberg.com/news/articles/2023-01-27/tiktok-general-counsel-no-longer-oversees-us-relations.

⁷² 'US Administration's Smash and Grab of TikTok Will Not Be Taken Lying Down: China Daily Editorial' *China Daily* (3 August 2020) www.chinadaily.com.cn/a/202008/03/WS5f2810e3a31083481725de72.html archived 25 August 2022.

⁷³ 'China Attacks US "Bullying" over Ban on Tiktok and WeChat' *The Guardian* (19 September 2020) www.theguardian.com/technology/2020/sep/19/stay-calm-us-tik-tok-users-prepare-for-world-without-newly-banned-app archived 25 August 2022.

⁷⁴ '全球数据安全倡议 (全文) (Full text: Global Initiative on Data Security)' (*China.org.cn*, 15 September 2020) www.china.org.cn/chinese/2020-09/15/content_76704524.htm.

⁷⁵ Chun Han Wong, 'China Launches Initiative to Set Global Data-Security Rules' *Wall Street Journal* (8 September 2020) www.wsj.com/articles/china-to-launch-initiative-to-set-global-data-security-rules-11599502974.

conference of the Chinese Ministry of Foreign Affairs, responding to a reporter's question about the TikTok issue, the spokesperson of the Ministry of Foreign Affairs Wang Wenbin said: "We urge the US side to respect the market economy and the principles of fair competition, abide by international economic and trade rules, stop politicizing normal economic and trade cooperation, and provide an open, fair, just and non-discriminatory business environment for foreign enterprises to invest and operate in the US."⁷⁶ After Biden issued the new executive order about TikTok, Gao Feng, spokesman for China's Ministry of Commerce, said the reversal of the previous administration's executive order on TikTok and other apps was "a positive step in the right direction."⁷⁷

The Chinese government changed relevant policies in the meantime to respond to Trump's plan of selling TikTok to American companies. On 28 August 2020, the Chinese Ministry of Commerce and the Ministry of Science and Technology expanded restrictions on technology exports, now covering "computing and data-processing technologies as text analysis, content recommendation, speech modeling and voice-recognition."⁷⁸ Although not explicitly pointing to the TikTok issue, in effect, under the new rule, if ByteDance sought to transfer its proprietary algorithms to Oracle or other foreign companies, it would need to get approval from the Chinese central government.⁷⁹ As noted, this new rule created a high regulatory hurdle that precluded any planned sale of TikTok to a US buyer, which has not been publicly discussed since the amended Chinese export control regulation.

After Trump's ban, China passed a series of laws related to the TikTok issue. First, on 17 October 2020, the Standing Committee of the National People's Congress of China (NPCSC) passed the Export Control Law (formally implemented on 1 December 2020), tightening the export control system and providing an underlying legislative basis for relevant lower-level rules like the restrictions on technology exports.

Second, starting from June 2020, the NPCSC began to review the draft of China's Data Security Law, which was passed on 10 June 2021 and came into force on 1 September 2021. In particular, Article 26 of that law stipulates: "When any country or region adopts discriminatory prohibitions, restrictions,

⁷⁶ 'The Latest: Bytedance Said the TikTok Deal Needs Approval from China and the US, the Foreign Ministry Responded' *National Business Daily* ('最新! 字节跳动称TikTok交易需中美两国批准, 外交部回应《每日经济新闻》') (17 September 2020) www.nbd.com.cn/articles/2020-09-17/1507496.html.

⁷⁷ 'Biden Administration Reverses Ban on TikTok and WeChat, China Commerce Ministry Responds' ('拜登政府撤销对TikTok和微信禁令, 中国商务部回应') *Forbes China* (11 June 2021) www.forbeschina.com/billionaires/55793.

⁷⁸ 'Announcement No. 38 of 2020 by the Ministry of Science and Technology of the Ministry of Commerce on Adjusting and Publishing the Catalogue of China's Prohibited and Restricted Export Technologies' ('商务部 科技部公告2020年第38号 关于调整发布《中国禁止出口限制出口技术目录》的公告') (28 August 2020) www.mofcom.gov.cn/article/zcfb/zcfwmy/202008/20200802996641.shtml.

⁷⁹ 'The Latest: Bytedance' (n 76).

or other similar measures against the PRC relevant to investment, trade, etc., in data, data development and use technology, etc., the PRC may take reciprocal measures against that country or region based on the actual circumstances.” This gives the Chinese government another tool to respond to US restrictions or bans on Chinese telecommunications and internet companies operating in America. China has not taken any action against US measures on Chinese companies like Huawei and ZTE during the Trump administration, but after the implementation of the Data Security Law, China can take reciprocal action against American companies in China when the United States takes action against Chinese companies on a case-by-case basis. The Data Security Law poses a threat to any future action that the Biden administration or Congress might take against Chinese companies operating in the United States.

Third, on 10 June 2021, the NPCSC passed the Anti-Foreign Sanctions Law and it came into force on the date of promulgation. Article 3 of the Anti-Foreign Sanctions Law stipulates: “Where foreign nations violate international law and basic norms of international relations to contain or suppress our nation under any kind of pretext or based on the laws of those nations to employ discriminatory restrictive measures against our nation’s citizens or organizations or interfere with our nation’s internal affairs, our nation has the right to employ corresponding countermeasures.” This article, together with others in that law, adds to a toolkit of measures available to the Chinese government when responding to foreign sanctions or restrictions on Chinese companies doing business overseas.

3.4 The Battle Escalates: 2024 House Bill to Ban TikTok

Just as TikTok management thought the darkest moment had passed and they had effectively managed US political risks,⁸⁰ the House of Representatives surprised them by passing a bill that would either ban TikTok or compel ByteDance’s divestiture.⁸¹ The bill received unanimous support from the Committee on Energy and Commerce (50–0), and the vast majority of the House Representatives (352–65).⁸² Moreover, President Biden publicly announced that he would sign it into law if it has passed both chambers of Congress.⁸³ While it is still uncertain whether the Senate will deliberate on the bill and pass it,

⁸⁰ Stu Woo, Georgia Wells, and Raffaele Huang, ‘How TikTok Was Blindsided by U.S. Bill That Could Ban It’ *Wall Street Journal* (12 March 2024) www.wsj.com/tech/how-tiktok-was-blindsided-by-a-u-s-bill-that-could-ban-it-7201ac8b.

⁸¹ Protecting Americans from Foreign Adversary Controlled Applications Act, H.R. 7521 (14 March 2024) www.congress.gov/bill/118th-congress/house-bill/7521/text.

⁸² Bill history, H.R.7521 – Protecting Americans from Foreign Adversary Controlled Applications Act 118th Congress (2023–2024) www.congress.gov/bill/118th-congress/house-bill/7521/all-actions.

⁸³ Sapna Maheshwari, David McCabe, and Annie Karni, ‘Houses Passes Bill to Force TikTok Sale from Chinese Owner or Ban the App’ *New York Times* (13 March 2024) www.nytimes.com/2024/03/13/technology/tiktok-ban-house-vote.html.

especially given the fact that Trump has surprisingly voiced his objection to banning TikTok,⁸⁴ the potential risk is material. While powerholders on Wall Street have jumped at this opportunity and started to work on a possible acquisition of TikTok,⁸⁵ one can expect other key stakeholders to react in ways similar to what we have described in this case study. First, the Chinese government has “reiterated common criticisms of US policy as unfair to China,” and the amended export control regulation requires government approval for any sale of TikTok to a US buyer.⁸⁶ Second, TikTok will for sure double down on its lobbying efforts at the Senate level. Third, had the bill passed the Senate and became law, TikTok would most likely challenge its constitutionality in court. Unlike previous cases, however, this time the court will be forced to make the difficult balance between the constitutional mandate for the protection of free speech and due process on the one hand and congressional authority on the other. The saga continues to unfold, and given the complexity of the geopolitical rivalry between China and the United States, only time will tell how it will end.

4 Conclusion

Caught in the US-China geopolitical rivalry, TikTok faces constant political challenges at both the federal and the state level. In response, the firm has adopted an array of coping measures, including litigation, lobbying, and seeking diplomatic assistance. Other Chinese multinationals with substantial US investment have made similar efforts in managing an increasingly hostile host-state regulatory environment.⁸⁷ These measures in turn are shaping US-China relations. The story of TikTok in the United States goes on, yet its ending remains unknown.

5 Discussion Questions and Comments

5.1 For Law School Audiences

5.1.1 Navigating Global Legal Frontiers

The political challenges TikTok faces also manifest at the state level, as exemplified by the fact that, as of the time of this writing, more than thirty state governments have prohibited the use of TikTok by government employees on

⁸⁴ David McCabe and Sapna Maheshwari, ‘TikTok Bill’s Progress Slows in the Senate’ *New York Times* (15 March 2024) www.nytimes.com/2024/03/15/technology/tiktok-ban-bill-senate.html.

⁸⁵ Rachel Louise Ensign and Gareth Vipers, ‘Steven Mnuchin Says He Is Putting Together A Group to Buy TikTok’ *Wall Street Journal* (14 March 2024) www.wsj.com/tech/steven-mnuchin-says-he-is-putting-together-a-group-to-buy-tiktok-3aac4a33.

⁸⁶ Meaghan Tobin and Siyi Zhao, ‘What China Is Saying About the TikTok Furor in Washington’ *New York Times* (15 March 2024) www.nytimes.com/2024/03/15/business/china-tiktok-house-bill.html.

⁸⁷ Ji Li, ‘In Pursuit of Fairness: How Chinese Multinational Companies React to U.S. Government Bias’ (2021) 62 *Harvard International Law Journal* 375.

government-owned devices. While the federal government ban has been stalled by legal actions, the state government of Montana has taken the lead in excluding TikTok from the state. On 17 May 2023, the governor of Montana, Greg Gianforte, signed a bill banning TikTok in the state. The ban “imposes a 10,000 dollar penalty for each ‘discrete violation,’ defined as any time an individual in Montana accesses TikTok, is offered the ability to access TikTok, or is offered the ability to download TikTok.”

In response to the accusations, TikTok claimed that it does not share user information with the Chinese government and that it stores all US TikTok data with Oracle, a prominent US public company. In addition, TikTok’s Community Guidelines restrict nudity, sexual content, and anything else deemed harmful. TikTok uses technology and human moderators to remove any content that violates the Community Guidelines. Additionally, “for U.S. users under thirteen, TikTok provides a different, age-appropriate experience, with stringent safeguards and privacy protections designed specifically for this age group.” Parents with children under thirteen can link their accounts to their child’s account in order to set specific parental controls. TikTok also does not require users to use their real names when registering and does not collect GPS information from US users.⁸⁸

TikTok sued Montana, arguing that the ban violates the First Amendment of the US Constitution, along with federal preemption, the Commerce Clause, and the bill of attainder. TikTok claims that the ban violates the First Amendment’s guarantee of freedom of speech by shutting down a forum for free speech. Moreover, TikTok argues that the Constitution vests the authority for foreign affairs and national security in the federal government rather than in the state governments. Because Montana cites the Chinese government possibly having access to US users’ data as one of the reasons for the ban, this is an issue of national security that the federal government should handle. TikTok contends that the ban interferes with the congressional process for addressing national security concerns. Congress is currently considering “the Restricting the Emergence of Security Threats that Risk Information and Technology Act, or ‘RESTRICT Act,’ which according to the federal Executive Branch would provide the federal government with ‘new mechanisms to mitigate the national security risks posed by high-risk technology businesses operating in the United States’”⁸⁹ In addition, TikTok and CFIUS had negotiated for three years on how to restructure the app to address national security concerns, and the Montana ban is interfering with this process. Furthermore, TikTok argues that the Commerce Clause does not allow states to interfere with interstate commerce. Since the ban applies to everyone in the state of Montana, regardless of whether they are residents or visitors, it violates the Commerce Clause. Also, TikTok argues that the ban constitutes an unconstitutional bill of attainder, as

⁸⁸ TikTok Inc. v. Knudsen, 9:23-cv-00061(D. Mont., 22 May 2023). ⁸⁹ *ibid.*

it applies to only one firm.⁹⁰ The Montana Tiktok ban was blocked by a federal judge in late 2023 and has subsequently become embroiled in legislation.

Given the above, discuss the following questions:

1. What are the legal merits of these claims? Are there any other claims TikTok could have made?
2. Compare your answers to (1) to the court's decision rendered on 30 November 2023.⁹¹ How will the judicial decision implicate US law in these subject matter areas?
3. What are the main differences between the legal actions and lawsuits at the federal versus state levels?
4. TikTok has been subject to regulatory oversight and lawsuits in a number of other regions and countries around the world, including the EU, India, and Pakistan.⁹² To your knowledge, how do these actions (both on the side of the host-state regulator and on TikTok) differ from the US experience? In other words, is the United States an outlier in foreign investment screening?

5.2 For Policy School Audiences

5.2.1 Policymaking Dilemmas in Geopolitical Tensions

The TikTok case underlines multiple policy issues. First, how to balance national security concerns with maintaining an open economy and the rule of law? How should national security be defined? Does it include speculated risk of foreign government influence? When the Trump government issued the executive order to ban WeChat, it cited national security threat as the primary reason. Yet, as the lawsuit against the ban has revealed, the claim was largely based on speculative evidence.⁹³ Overly broad or arbitrary interpretation of national security threat risks undermining the rule of law and disrupting market order.⁹⁴ On the other hand, the rising influence of China does pose legitimate challenges to the US-led global order. What alternative policy frameworks may better guide policymakers in addressing national security concerns in the current global geopolitical context?

Second, the TikTok case demonstrates the dynamic and triadic interactions between multinational firms and the world's two superpowers. Whether and

⁹⁰ *ibid.*

⁹¹ *TikTok Inc. v. Knudsen*, 9:23-cv-00061(D. Mont., 30 November 2023) https://s3.documentcloud.org/documents/24180112/tiktok_injunction.pdf.

⁹² On the case of Pakistan, see Matthew S. Erie and Thomas Streinz, 'The Beijing Effect: China's "Digital Silk Road" as Transnational Data Governance' (2021) 54 *New York University Journal of International Law and Politics* 1–92.

⁹³ Judy Tzu-Chun Wu and Ji Li, 'Chinese Immigrant Legal Mobilization in the United States: The 2020 Executive Ban on WeChat and Civil Rights in a Digital Age' (2023) 30 *Asian American Law Journal* 51.

⁹⁴ Matthew S. Erie, 'Property as National Security' (2024) 1 *Wisconsin Law Review* 255; Mark Jia, 'American Law in the New Global Conflict' (2024) 99 *NYU Law Review* 636.

how should US policymakers factor the preferences and interests of Chinese non-state actors into the making of foreign policies? Where are US-China relations, arguably the most important bilateral relationship in the next decade or two, headed? TikTok represents a large group of China-affiliated actors that constitute what, in Karl Polanyi terms, could be called the “peace interest,” constituencies heavily invested in preserving inter-state collaboration in trade and investment. How should US policies address the “peace interest,” the power and influence of which arguably will have profound implications on the future of the global economic, legal, and political orders?

5.3 For Business School Audiences

5.3.1 Multinational Companies in the Headwinds of Globalization

The TikTok case reveals two major risks confronting multinational companies, especially those based in countries that are not US allies, in the current global political environment: growing political risk and compliance risk. In coping with political risks, TikTok has actively employed legal strategies, which have proven to be effective so far. Are there other coping measures multinationals may adopt to address host-state political risk? For instance, TikTok has engaged in active lobbying in the United States and mobilized TikTok users to pressure policymakers. Are these better tools than litigation? What are the trade-offs between these different tools? Among all the potential means to mitigate host-state political risk, how should multinational firms make the selection?⁹⁵ How may they effectively be used in concert or in parallel?

Additionally, multinational firms also face a compliance dilemma, as evidenced by the TikTok case. To comply with Trump’s executive order, TikTok’s Chinese owners initially contemplated a sale to US investors. Yet, as the negotiation was ongoing, the Chinese government amended its export regulation to prohibit any sale of proprietary advanced intellectual property to non-Chinese parties without government approval. As the US law and the Chinese law directly conflict, TikTok simply could not comply with both simultaneously. It therefore had to pursue other solutions. Multinational firms increasingly face such a compliance dilemma, as intensified US-China geopolitical rivalry spawns a proliferation of conflicting laws between the two countries. How do firms with extensive exposure to both jurisdictions address the growing compliance risk? What options do they have? Is exiting from one of the markets the optimal solution? How do coping strategies adopted by multinational firms fit in the broader picture of US-China economic decoupling?⁹⁶ Can “forum-shopping” in terms of entering other and diverse markets suffice as an alternative strategy?

⁹⁵ For a recent study about how Chinese multinational firms cope with US political risk, see Li (n 87).

⁹⁶ Ji Li, ‘Superpower Legal Rivalry and the Global Compliance Dilemma’ (2024) 45 University of Pennsylvania Journal of International Law 891.