

Winning Impossible Games?
**– Empirical Analysis on Administrative Litigation between Overseas Enterprises and
Administrative Agencies in China in 2014**

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Abstract

This thesis project examines the features of overseas enterprises that may influence the win rate of litigations against administrative agencies in China. Through empirical analysis of all administrative litigation judgments openly published on *China Judgment Online* in the year 2014, I illustrate the predicament of challenging administrative malfeasance facing overseas investors doing business in China, reassess the influence of ownership structure, government connections, and cultural aspects on the litigant's performance at the court, and offer explanations for those patterns deriving from the analysis of textual data.

Introduction

A series of reform and opening-up initiatives and policies launched since the year 1978 has transformed China from an underdeveloped country to the world's second largest economy within merely four decades. Broadly speaking, swarming of overseas businesses and foreign capitals into the huge market catering to 1.4 billion potential customers has now been proved win-win for both the businesses and the hosting country as well. In the surveys distributed to the enterprises from the United States and the European Union that operate in China, 67 percent of the U.S. corporates reported that they prioritized producing or sourcing unique goods or services for the China market, implying a “in China for China strategy” (American Chamber of Commerce in Shanghai 2015); 61 percent of the European respondents ranked mainland China as the Top 3 destinations (21 percent ranked China as the Top 1 destination in which they are interested) (European Chamber of Commerce 2015). Despite China's soft-landing of its national economy and exogenous obstacles in the recent years, including but not limited to the Trade War and the COVID-19 crisis, its market performance is still satisfactory, in the sense that the decrease in Foreign Direct Investment (FDI) flows to developing economies in 2020 was less than what has been previously anticipated, due mainly to “resilient investment in China”¹.

At the same time, the hosting state has benefitted unprecedentedly from the inflow of overseas capitals, as is reflected on the country's sheer economic expansion as well as on the increase of its manufacturing capacity and revenue growth: 15 percent (in the year 2014) of industrial firms in China are overseas invested², contributing 45% of the export (National Bureau of Statistics of China 2016). In addition, around 20 percent of the nation's industrial and

¹ “Global Foreign Direct Investment Falls 49% in First Half of 2020.” *The United Nations Conference on Trade and Development*. October 27, 2020. <https://unctad.org/news/global-foreign-direct-investment-falls-49-first-half-2020>.

² Industrial enterprises with an annual income over 20 million RMB (approximately 3 million USD).

commerce revenue come from overseas investors, among which 98 percent are overseas enterprises (Ministry of Commerce 2015). What's more, those local authorities are largely incentivized to seek for more foreign investment as previous studies have shown a positive relationship between promotion and the amount of foreign capitals invested locally (Zhou 2004). Hence all of the aforementioned factors may explain why state-/local-government-led introduction of foreign capitals, technology and export (*zhaoshang yinzi*) becomes prevalent in China in post-1994 fiscal decentralization.

With that being said, the relationship between China's state actors and overseas enterprises should have been mutually beneficial, yet this has not been the case. The Chinese government has committed to curate a better business environment for FDI and joint ventures by officially promoting legal transparency, protection of intellectual property rights and fair opportunities among all businesses when it comes to the competition for government procurement, and has kept its promise by annually truncating the list of *Special Administrative Measures for Foreign Investment* (also known as the "Negative List" of sensitive industries banned from investment from outside) and expanding the *Catalogue of Encouraged Industries for Foreign Investment* ("Encouraged Industries Catalogue").

However, such attempts are still far from satisfactory from the perspective of overseas investors. Even for those global winners would admit that doing business in China can be really challenging (see Qualcomm, Amazon, etc.), if not frustrating. Aside from tailoring preferences for the 1.4 billion people or coping with unfamiliar procedures to gain market access, enterprises from overseas still find themselves most struggling with laws and regulations and with the seemingly vigilant government and subtle bureaucratic system³, despite considerable amount of

³ "Top 10 challenges of doing business in China." TMF group. See <https://www.tmf-group.com/en/news-insights/business-culture/top-challenges-china/>.

efforts made by the state administration. In the report published by the European Chamber, “ambiguity of rules and regulations”, “unpredictable legislative environment”, “discretionary law enforcement” and “administrative issues” have continuously topped the list of “regulatory obstacles faced by European enterprises” from 2014 to 2020 (European Chamber of Commerce 2020). Similarly, in the case of U.S. enterprises, “strengthened legal institutions” are also considered as one of the top three reforms that may influence foreign investor’s decision to open up or resume their business in China (American Chamber of Commerce in Shanghai 2020). Why are these efforts dedicated to judicial fairness less effective than expected? What does the government-business relationship look like when the private investors from abroad feel their rights being infringed by the administration? What are the tensions underlying such relationship?

Economic booming buttressed by marketization, changes in the ownership form and participation of new actors, however, have not only aggravated some of the existing tensions but also triggered a wide range of new conflicts in the authoritarian regime. Tensions in contemporary China are mostly caused by conflicting economic interests among various groups of people or institutions, which are further complicated by the roles that different levels of government and courts have respectively played in the process. In many cases, however, these supposedly economic conflicts are actually addressed politically, which Xiang (2016) referred to as a “structural chasm”, a mismatch between how the problem is generated and how it is eventually settled. Administrative disputes between businesses and state actors are inevitably more political than civil or economic disputes. Cases as such are political not only because of explicit and direct participation of government actors, but also because the dominant debate in China’s economic reform is “foreign versus Chinese” rather than just “public versus private” – “those coming from the outside” are making such disputes more sensitive (Gallagher 2002;

Wang 2013).

Hence in this paper, in order to set up a dialogue with previous studies that explore the interactions between court, government and overseas enterprises in China, I will focus on how foreign-invested firms fare in administrative litigation through an empirical analysis of all judgments (*xingzheng susong panjue*) openly published on “China Judgment Online” (*zhongguo caipan wenshu wang*) in the year 2014. The study will analyze the status quo of administrative litigation facing overseas enterprises and then discuss those corporate features that influence the outcome of litigation.

This paper will proceed in the following way. Section II will delineate the legal-historical context of administrative litigation in China and will also review theories and methodologies that frame and illustrate empirical studies on court judgment. In Section III, I will introduce the dataset and methodologies I use for this study. Section IV will report the results and Section V will be an in-depth discussion of the results. Section VI will be the conclusion.

Literature Review

Foreign Actors under Administrative Litigation in China

The Law on Sino-Foreign Equity Joint Ventures was passed on July 1, 1979, showing that the People's Republic of China has officially started to embrace investment from abroad. Following a series of economic restructuring and legislative activities, China's entry into the World Trade Organization (WTO) in 2001 has finally marked the country's new chapter in global trade. The booming of cross-border business activities, however, is largely accompanied by various kinds of disputes that were once oblivious in a purely domestic environment.

Whether foreign entities are operating in an "separate legal regime" or if there is really a substantive turn from "ruling by Chinese law" to "joint ruling by domestic and international laws" has remained a hot topic in the studies of China's legal system (Clarke et al. 2008). Administrative litigation, which is a critical component of public law in China that coordinates the relationship between state actors and individual citizens or groups, is an arena where both domestic and overseas players - regardless of their features - play against the state, as technically they are expected to resort to the same set of laws, regulations and legal procedures.

One may ask why in this case, are the domestic investors and foreign investors operating in the same regime? For investors coming from abroad, in theory they can go to those courts at the supra-national level, which is a reasonable and possible response to inappropriate administrative acts occurring in the hosting country that is unavailable to those domestic business owners facing a similar situation. As a matter of fact, the limited number of cases⁴ filed at International Centre for Settlement of Investment Disputes (ICSID) reflects that international treaties and supra-national platforms where administrative misconducts are discussed are by no means useful to

⁴ Only 5/828 cases published online involves Chinese state organs as the respondent by 2020. See <https://icsid.worldbank.org/cases/case-database>.

regulate or correct administrative actions happening at a sub-national level, primarily due to difficulty in actual enforcement, for the overall process is actually facilitated by local courts. In fact, in most of the cases filed at the international court, the respondents are national-level (central) bureaucratic agencies (e.g. Treaty and Law Department), rather than lower-level ones. Therefore, local remedies turn out much more plausible for investors who look for efficient and convenient solutions when they encounter administrative misconducts.

Administrative review and administrative litigation are two formalized and institutionalized remedies for administrative malfeasance in China. Administrative review (which is usually called administrative reconsideration in China, *xingzhengfuyi*) and judicial remedies (administrative litigation, *xingzhengsusong*) are both considered as “local remedies” expected to be exhausted before any single case escalates to a supranational-level court, as has been written in the “Draft Articles on Diplomatic Protection” (United Nations 2006). Although it was not yet a requirement for the case to be accepted and processed at the international level, scholars have previously shown that failure in looking for local remedies beforehand may “deprive arbitral tribunal of jurisdiction over the dispute” (Chi and Li 2021).

The Law of the People’s Republic of China on Administrative Reconsideration (*xingzheng fuyi*) was adopted in 1999, with its implementation directive later passed in 2007, which allows its citizens to seek for administrative review. The review is conducted by people’s government at the same level or to the competent department at a higher level if they refuse to accept a specific administrative act⁵ (Art. 12). The administrative review process technically deals with concrete administrative actions that target at a specific person or entity by a specific state actor.⁶ But

⁵ Zhonghua renmin gongheguo xingzheng fuyi fa (中华人民共和国行政复议法) [Administrative Reconsideration Law] (1999).

⁶ For official description of abstract administrative actions and concrete administrative actions in Chinese, see http://www.npc.gov.cn/zgrdw/npc/flsyywd/flwd/2002-04/18/content_293208.htm.

since the division between concrete and abstract administrative actions (that are not re a specific person or entity and usually appears in the form of norm) remain more or less unclear⁷, it is believed that administrative review de facto deals with both kinds of cases (Chi and Li 2021:9).

The adjudicator of an administrative review is “an administrative agency, not an external court” constituting both full-time members (people who are holding long-term bureaucratic positions in the agency) and part-time members (legal specialists who offer professional advice) (Yang 2018: 117). The administrative review process is a “simplified” version of administrative litigation: one shall file the case to reviewing body within 60 days after the administrative act is given, and the respondent has 10 days before it submits a defense; hearing is not very common and decision from the reviewing agency will be offered within 60 days. There are generally three types of decisions made by the adjudicator: affirmation of the respondent’s act, annulation of the respondent’s act and enforcing the government to perform a statutory duty (ARL, Art. 28).

The administrative Reconsideration Law “shall apply to foreign nationals, stateless persons and foreign entities who apply for administrative reconsideration” (ARL, Art. 41). The subject of interest in our study, foreign investors and the entities in which they invest, are hence eligible to apply for administrative review if they wish. In addition, as Chi and Li (2021) have pointed out, as local companies in China are considered “entities of Chinese nationality”, foreign investors are also allowed to conduct administrative review in the name of Chinese entities to which they associate. The administrative review process, however, is not perfect for it lacks “public confidence in fairness and neutrality”⁸. The overall process is heavily criticized for it is in itself “a part of the machinery of administration” (Yang 2018:126). Nevertheless, compared to

⁷ “Review of Administrative Decisions of Government by Chinese Courts.” Justice Bixin Jiang, Vice President of Supreme People’s Court of P.R.China. <https://www.aihja.org/images/users/1/files/china.en.0.pdf>.

⁸ “Administrative Enforcement in China.” Su Lin Han, Paul Tsai China Center. December 2017. <https://law.yale.edu/china-center/resources/administrative-enforcement-china>.

administrative litigation, the administrative review process by design deals with a broader range of cases (Yang 2018:110).

Often seen as the escalated form of administrative review, litigation is another form of remedies applied by those who are unsatisfied with administrative acts. China's Administrative Litigation Law has undergone three amendments since its promulgation in the year 1989 (revisions were passed in 2014 and 2017). The main goal of administrative litigation is examination of legality (*hefaxing*; rather than reasonableness, *helixing*) of the government agency's act (He 2016:39). The possible outcomes of administrative litigation are confirmation (of the legality of administrative action), modification (of illegitimate administrative actions) and no decision (when the case is not accepted into the judicial process).

Entering the court with administrative cases accepted and tried is no easy task, as the relationship between administrative review and litigation is very intricate. While administrative reconsideration is officially encouraged, the state's attitude towards administrative litigation is more or less reserved, if not discouraging. In the revised Administrative Litigation Law in 2015, it is formally stipulated that the plaintiffs will have to sue the administrative agency together with the reviewing agency (both of which become defendants at the court)⁹, which introduces new power struggles into the court procedure. Meanwhile, empirical results have shown that administrative reconsideration can serve as “a control mechanism that allows internal self-correction by administrative agencies”¹⁰ (Yang 2018:127) or a “diverting mechanism” through which only cases at lower stakes (e.g. involving weaker government institutions) will be

⁹ Liu Jianzi 刘建梓. “Xingzheng fuyi zhong ying zhuyi de chengxu wenti yi renmin fayuan shenli xingzheng fuyi lei xingzheng anjian wei shijiao 行政复议中应注意的程序问题——以人民法院审理行政复议类行政案件为视角” [Procedural Issues to be Noticed in Administrative Reconsideration – From the Perspective of the People's Court]. January 10, 2018. <https://www.chinacourt.org/article/detail/2018/01/id/3152447.shtml>.

¹⁰ Yang Jingyu 杨景宇. “Guanyu Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa (Cao'an) de Shuoming 关于中华人民共和国行政复议法(草案)的说明” [Explanation on Draft Administrative Reconsideration Law of People's Republic of China], NAT'L PEOPLE'S CONGRESS, October 27, 1998, http://www.npc.gov.cn/wxzl/gongbao/2000-12/06/content_5007101.htm.

allocated to the courts (He 2014).

Some scholars view the nature of administrative litigation under an authoritarian regime as an concrete instance of a bottom-up principal-agent problem, where local bureaucrats are supervised under the central control (Ginsburg 2008); some others focus on the dynamics between the plaintiff and the officials or authorities being sued (and the political power structure in general), calling for disaggregation of Chinese state actors, as both the litigants and the courts at different levels have been tried to work out their own territories despite the potential political pressure stipulated by the branch-and-lump system (O'Brien and Li 2004). These two perspectives not only apply to domestic cases, but also illustrate the nature of an overseas enterprise's litigation against local government agencies. For one, as the "China versus foreign" debate rises while the saliency of public-private ownership debate goes down (Gallagher 2002), the way in which the government treats the overseas investors may attract more attention from the central government considering the increasing political significance and sensitivity of foreign activities. At the same time, these foreign enterprises enjoy a high degree of flexibility, for (1) they can always choose to exit for new markets (2) theoretically speaking, investors are offered protection by the local government (and the court can be co-opted as well) as for those local bureaucrats, overseas investments are difficult to attract (Wang 2013).

Given that domestic and overseas investors are expected to follow the same set of laws, regulations and procedures of administrative litigation, are there any challenges that only those overseas investors will encounter, which make them reluctant to litigate in administrative cases? The following types of business entities are available to foreign investors: Wholly foreign-owned enterprises, Joint Ventures (equity or cooperative), company limited by shares with foreign investment; holding companies; branch offices and representative offices. Although it seems that

local government agencies have no incentive to act against foreign investors, regulatory obstacles are by no means uncommon. Although different types of enterprises may vary in the level of preference for litigation, going to court is generally not desirable for enterprises doing business in China regardless of ownership forms, let alone suing against government agencies or bureaucracies (Wang 2014:94). Instead, improving informal relationship with both national and subnational-level government agencies are prioritized by the foreign enterprises that are running business in China. According to the interviews conducted by US-China Business Council (USCBC) in the year 2011, government affairs (GA) professionals are expected to take charge of “supporting negotiations” and should carry out a series of internal trouble-shooting procedures with deliberation before escalating the issues to a higher-level government authority (usually in the way of administrative reconsideration) (USCBC 2012).¹¹ Challenging the government for inappropriate administrative actions through a formal court procedure is henceforth a last resort for many business investors from abroad.

Interestingly, the decent number of lawsuits officially published on China Judgment Online (for instance, in the 2014 dataset used for this paper, there are altogether 635 cases in which overseas investors become the plaintiffs) shows that administrative litigation is still a legitimate and plausible way for foreign investors to protest against misfeasance in the public office despite all those drawbacks and concerns mentioned above - the outcomes of such “last resort” are thus worth exploring.

The power relationship between the court and the government

In China, court is a relatively weak institutional player. Courts in China receive funding

¹¹ Christina Nelson. “Improving Local Government Affairs.” *China Business Review*. April 1, 2012. <https://www.chinabusinessreview.com/improving-local-government-affairs/>

(lack of which may corrode judicial fairness and affects transparency) and material benefits from the central state's transfer payment (*zhuan yi zhifu*), but mostly from the local government's revenue (at the same administrative level) prior to the Judicial Reform starting in 2013 (Wang 2013). Therefore, appointment of personnel and funding distribution by the local government, plus fiscal decentralization and the tradition of cultural provincialism have altogether cultivated local protectionism deeply-rooted in the judicial practices, which eventually leads to localization of judicial power that undermines judicial independence. Hence comes the question: Is the court able to declare a government's administrative action *ultra vires* when the latter offers fiscal support to the former? Does the court even have an incentive to do so?

It was not until the Third Plenum of the 18th Chinese Communist Party Congress (2013) that "uniform management of court funding at the provincial level" (*sheng ji tongguan*) was proposed and cross-jurisdiction was incrementally implemented, starting from 2015. Although evidence (Peerenboom 2008) has shown that, depending on the regions, courts have enjoyed various degrees of internal independence (from interferences by senior judges) and external independence (from interferences by the local government or people's congresses) even when the judicial reform was not yet started, it is clear that the court is not as a strong "institutional insider" as it is supposed to be. The court is comparatively marginalized for it is captured by the local administration.

Political embeddedness is a more ambiguous factor that influences the court's position in a power relationship with other administrative branches under China's system. The concept of embeddedness, initially coined and pioneered by the economic historian Karl Polanyi, was later widely applied to explain how associations with the state actors can yield extra benefits. A considerable amount of previous literature on political embeddedness in China has been

dedicated to the study of government-court relationship and state-enterprise relationship, which are two critical pieces of lens through which administrative litigation between enterprise and government agency is analyzed.

“Political embeddedness” in China’s legal context is reflected in “the advantages that accrue from being embedded in social networks that bridge institutional outsiders (e.g. lawyers) together with institutional insiders (e.g. *gongjianfa*, meaning civil servants working in tripartite system of police, prosecution, and judiciary in China)”, which essentially forms “a source of protection” (Michelson 2007; Liu, Halliday 2011). The fact that judges depend on the party-state for appointment and promotion has concretized such political connections at the individual level (Ginsburg 2010).

Despite the fact that the court is a relatively weak institutional player in the political regime and thus may not be an optimal source of political connection, it is a platform where the authority of administrative agencies is not only demonstrated but also challenged (Weller 1998). Political connection has been proved effective at multiple stages in the judicial process for all different kinds of plaintiffs. In the first place, political connection is positively related to an individual’s expression of complaints about public agencies (Tsai, Xu 2018) and people having powerful allies in the local state are also more likely to sue the administration, as they are “immune to extra-judicial retaliation” outside the court (Li 2014). Meanwhile, politically connected domestic enterprises are more likely to use courts, rather than taking advantage of their informal networks to settle disputes (Ang and Jia 2014). In addition, better court outcomes in lawsuits are associated with more political connections attached to the corporates, which applies to both domestic enterprises and multi-national enterprises (Firth et al. 2011; Lu, Pan, Zhang 2015; Xu 2020; Chen and Xu 2020). These findings show that litigations between foreign

investors and the Chinese government agencies are somewhat addressed yet not very well explored in previous literatures, and this study aims to offer a detailed analysis on this topic.

Doing business in China: Political connections and local knowledge

Political embeddedness in the context of state-business relationship is often treated as the firm's social embeddedness with political actors at either interpersonal level or at the institutional level (Sun, Mellahi and Thun, 2010). Accordingly, indicators of a corporate's political embeddedness applied by the researchers tend to feature managerial associations and organizational associations. In previous studies, network influence of "knowing-who" is often used to measure an enterprise's public relationship with the government in the Chinese context as such connections are believed to bring extra substantial benefits to the firm (Ang, Jia 2014; Firth et al. 2011; Javeline et al. 2007). Given that China's "ties with state bureaucrats can reduce uncertainty" of the market condition, explicit government appointment of managerial role in a firm and the money spent on the interactions with people holding important positions at administrative agencies can indicate the level of intimacy with the government (Wang 2014: 98).

There are also more latent ways of measuring political associations in empirical studies. Some scholars code the construct of a firm's "political connection" or "political embeddedness" as a binary variable, the criterion of which can either be "at least one of the board members, top management, or major stockholders has a relationship with someone in government"(Firth et al. 2011) or whether the firm owners or executives have once served as former government officials (at a directorate rank or higher) or as the delegates of People's Congress or Political Consultative Conference (Ang, Jia, 2014; Haveman et. al, 2017). An example of ordinal-scale indicator is the number of "insiders on board" (Okhmatovskiy, 2010). A ratio-scale measurement of the

information available to the judge is “Corporate Political Information”, which is the proportion of board members who have had aforementioned political connections (Xu 2020).

Information on political connection established through interpersonal relationship is technically more difficult to find when the subject of interest becomes the group of overseas investors. For practical reasons, this study will concentrate on features that may influence “know-how” or information available to overseas enterprises when they go to court for administrative litigation. The three key features that will be discussed later are company ownership, investment from state entities, as well as cultural similarity. These three features are useful indicators of political connections and knowledge about the local environment. As were shown in previous studies, organizational associations implying a firm’s level of political connection are usually reflected explicitly by ownership type, or by more implicit ways such as ties to state organs or state-owned institutions (e.g. SOE, see Okhmatovskiy, 2010; with one or multiple government departments, see Sally, 1994) or the enterprise’s participation in government-led programs (e.g. government contracts, see Welch 2002).

Yet even enterprises of the same ownership structure, which technically indicate a similar level of institutional political associations, can still show difference in their capability to influence government agency and the court as well. This is where cultural factors may play an important role. In terms of the relationship between the amount of foreign investment and jurisdiction, the proportion of foreign direct investment from non-China-circle countries is positively associated with the increase in the funds allocated by the local government to the courts and better judicial performance in adjudicating civil and economic cases, while an increased proportion of investment from China-circle regions has a negative effect on government budget allocated to the local courts (Chapter 7, Wang 2014). In such a sense, will

cultural or geographical connection to “China” influence the outcome of administrative litigation? If local protectionism is ingrained in the court-government relationship, the court may have an incentive to favor those overseas investors who can directly or indirectly bring more revenue that later turns into court funding. If that is the case, there will be two consequences: (1) the court is going to treat the enterprises distinctively based on their corporate features (2) and certain enterprises of a particular kind, informed that they are going to be favored, are more likely to use courts when they find their rights infringed by the government. This study will address both of these consequences by testing three hypothesis that can reflect the relationship between the plaintiff’s win rate in administrative litigation and corporate features.

Data and Methods

Dataset: China Judgment Online

“China Judgments Online” officially went public in July 2013, which is one of the state’s key initiatives in China’s Judicial Reform that aim to promote judicial transparency. By December 2020, about 100 million cases have been filed and uploaded to the website, within which around 3 million are administrative cases, offering great opportunities to scholars to dive deep into legal studies of China. This structured text dataset helps researchers to better illustrate and explain the classic transformation from perceived/unperceived injurious experiences (“naming”) to grievances (“blaming”) and finally to filed disputes (“claiming”) in China (Felstiner, Abel and Surat 1980).

Despite the large quantity and the wide coverage of cases, some China observers have pointed out that due to comparatively higher political sensitivity underlying legal cases, specifically those administrative ones involving government agencies, courts may have avoided revealing cases that are deemed politically sensitive (e.g. arousing controversies) or only disclosing “terse summation of claims and outcomes” of such cases (Liebman et al. 2013), which could lead to potential documenting bias underlying an unrepresentative sample.

Given the aforementioned pros and cons, court decisions published on “China Judgment Online” are still the best data available to illustrate the subject of interest – overseas enterprises as plaintiffs – for this project. Cases regarding national defense and foreign affairs are not accepted in administrative litigation, which means these sensitive issues will not even go through a litigation procedure. Under such an assumption, this dataset is useful to answer the following research questions: Is plaintiff’s win rate in administrative litigation relevant to the following corporate features - the enterprise’s ownership structure, the stakeholder’s connection to the state

entities, and the country of origin?

Here I choose to use the dataset from the year 2014 because it is the second year since China Judgment Online Database was established (2013). I expect that after a year's operation, implementation of online publication of court decisions will cover a wider range of areas in China. For another thing, the revised administrative litigation law is officially enacted in the year 2015 and since then various pilot programs are conducted in designated regions, which may introduce considerable variances and inconsistency.

The original dataset used in this project constitutes all openly-published administrative litigation judgments in 2014. Detailed business information used in the matching procedure is extracted from Qichacha, a platform that delivers raw data and business analysis on enterprises based in China to its customers.¹² For those enterprises that are not listed on Qichacha (most of which are wholly foreign-owned enterprises), I consult Bloomberg and Orbis databases. I make a distinction between wholly foreign-invested enterprises and joint-ventures (incorporating various kinds of JVs) when I create the dummy variable for ownership structure. In terms of coding the corporate investor's country of origin, I choose to include companies that are registered in renowned free ports such as British Virgin Islands and Cayman Islands in the "foreign" category, to keep in accordance with the official statistics and reports on FDI in China. Joint ventures are coded as "related to the state actors" and "unrelated to the state actors" based on whether these enterprises have shareholders that are state-owned enterprises or local government agencies.

In addition, I define the dummy variable of "judgment" as follows. I code "plaintiff's win" when administrative decisions are revoked by the court, and "plaintiff's lose" when administrative decisions are affirmed by the court. In some of the cases where only part of the

¹² See "Qichacha", <https://www.qcc.com/>.

plaintiff's appeal is satisfied, I follow the convention that the party that pays the litigation fee is coded "(partly) lose" (Chen, Xu 2020). Although some scholars have raised doubts about the validity of using win rate as a dependent variable, saying that "plaintiff win rates [...] by themselves do little to answer questions about whether the judiciary tends to side with the government, or whether the legal standard in a given area of dispute is otherwise too favorable to the government"¹³ (Cui 2017), it is helpful for researchers to understand administrative litigation from the plaintiff's perspective (rather than on the government side), which is the focus of this project. In other words, despite that the plaintiff's win rate in administrative litigation does not necessarily imply the court's preference for either the plaintiff or the defendant, it can reflect shared or distinctive patterns within the plaintiff's group: (1) the kind of enterprises that are more or less likely to win an administrative litigation in China (2) the kind of information about litigation available to firms, based on which they can make their decision on whether they shall go to court or not.

Some other variables include: type of cases; type of defendant; the level of court where judicial decisions are made; location of the court at a provincial level; whether the case is a first-instance case or else.

¹³ For details on this part, see George L. Priest and Benjamin Klein, "The Selection of Disputes for Litigation", *13 J. LEGAL STUD.* 1, 4 (1984).

Data Analysis

There are altogether 635 cases included in the ultimate dataset after data-cleaning process, including 609 cases in which the defendant (administrative agencies) prevails and 26 cases in which the plaintiff (overseas enterprise) prevails in the year 2014. 290 out of 635 cases (ranked the first in the type of cases going to court) are about the disputes over employee's provident fund (*gongjijin*), which is a critical component of China's social security system. The second most frequently filed type of cases is work injury (211 out of 635). Other cases are relevant to environmental protection, administration for industry and commerce, land expropriation and land registration, quality management and tax. Although intellectual property or patent litigations often involve questioning the local or the national Intellectual Property Administration for administrative misconduct, the laws and regulations applicable to such cases are very different from non-IP/patent related cases, which explains why they are singled out on the annual reports published on the *Law Yearbook of China* (*zhongguo falv nianjian*). In year 2014, there were altogether 130,964 cases closed in the first instance, 47,818 in the second and 1,381 in the last (China Law Society 2015). Hence it is clear that administrative litigations between overseas enterprises and local government agencies consist only a very small portion of all administrative cases despite their substantial significance.

In what follows, I will discuss patterns of administrative litigations between overseas enterprises and local government agencies in China at both regional-level and national-level.

1. Regional-level

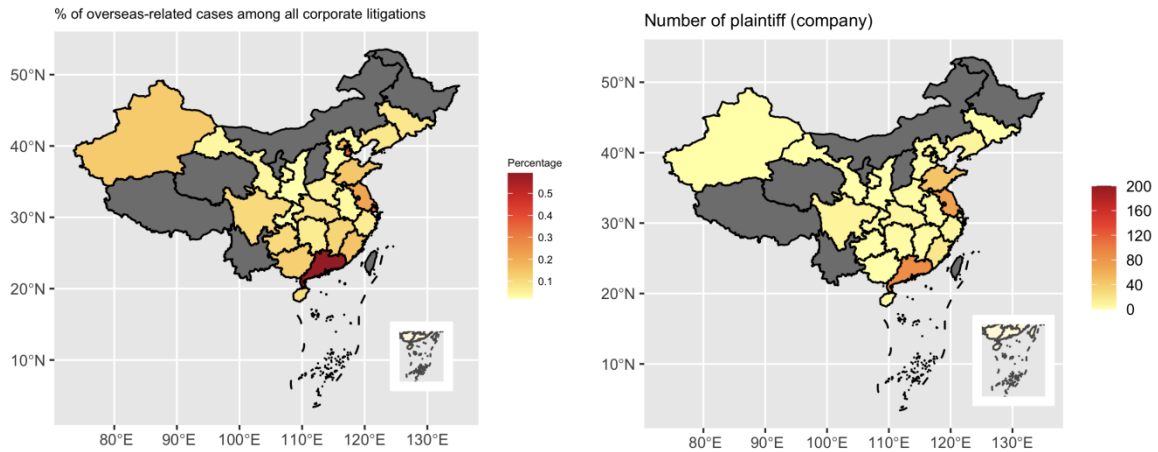


Figure 1. (1a Left) Percentage of Overseas-related Cases among All Corporate Administrative Litigations in 2014;
(1b right) the Number of Overseas Enterprises Suing Administrative Agencies in 2014

Figure 1 shows the way in which administrative cases and plaintiffs are distributed regionally. In the figure on the left, I calculate the proportion of overseas-related cases among all administrative cases between enterprises and government agencies in each province. Some scholars have identified courts in “Beijing” and “Shandong” are two outliers to which researchers shall pay special attention, for Beijing enjoys disproportionately high level of legal resources (e.g. number of lawyers), while Shandong is over-inclusive when categorizing administrative cases (Wang 2007; Li 2013). Proportion is a better indicator to show regional pattern of court use for administrative misconducts than the absolute count of cases, as the former controls the differences in local culture and court norm. Figure 1a shows that the percentage of administrative litigations involving overseas enterprises is relatively high in Guangdong, Shanghai and Tianjin. In figure 1b on the right, Guangdong, Jiangsu and Shandong top the list of the number of overseas enterprises looking for formal means when encountering administrative misconducts. Although it is widely believed that compared to the inland area, the

business environment in China's coastal area is freer and more favorable to overseas investors, my data does not show very substantial differences in litigation behavior between overseas enterprises doing business in the coastal area and those operating in the inland area. In addition, the variance within units belonging to the same group (coastal area/inland area) is notable, which further questions the traditional dichotomous classification based primarily on geographical location when analyzing regions in China.

2. National-level

(1) Which administrative agencies are sued by overseas enterprises?

Defendant	Number of cases	Percentage
Administration of Housing Provident Fund	290	45.67%
Bureau of Human Resources and Social Security	233	36.69%
Administration for Industry and Commerce	32	5.04%
Administration of State Land, Resources and Housing	23	3.62%
People's Government	11	1.73%
Bureau of Environmental Protection	8	1.26%
Administration of Quality Supervision	7	1.10%
Bureau of Housing and Urban-Rural Development	7	1.10%
Bureau of Urban Management and Law Enforcement	6	0.94%
Bureau of Public Security	3	0.47%
Administration for Market Regulation	3	0.47%
Office of the China Securities Regulatory Commission	3	0.47%
Justice Bureau	2	0.31%
Tax Bureau	2	0.31%
Commission of Development and Reform	1	0.16%
Customs	1	0.16%
Department of Science and Technology	1	0.16%

Bureau of Forestry	1	0.16%
Price Bureau	1	0.16%
sum	635	100.00%

Table 1 Number of Cases by Defendant Type

In 2014, over 80% of administrative litigations nationwide are filed against the Administration of Housing Provident Fund (zhufang gongjijin guanli zhongxin) and the Bureau of Human Resources and Social Security (renli ziyuan yu shehui baozhang ju). In addition, disputes over business norms (e.g. firm registration) and property ownership (e.g. land and housing) are also frequently seen in the judgment dataset. In such a sense, the legal option has turned out to be a plausible way for overseas enterprises to challenge administrative acts over labor and property.

(2) Feasibility of Aggregating the Cases

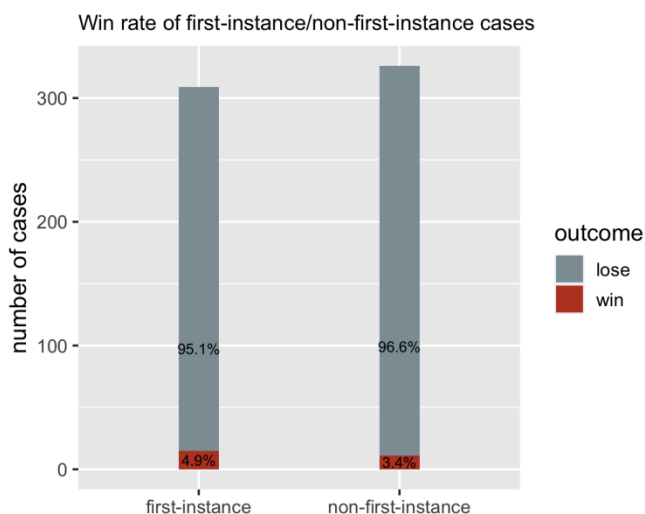


Figure 2. Plaintiff's Win Rate in First-instance/Non-first-instance Cases

I compare plaintiff's win rate between cases in the first instance and cases in the second/last instance. Figure 1 shows that only 4.9% of the plaintiffs win their case in the first instance. This is disproportionately low compared to 9.9%, which is the annual average win rate of first-instance administrative cases from 2010 to 2016.¹⁴ Hence at the national level, overseas enterprises are less likely to win administrative litigation in the first instance than other kinds of plaintiffs. In addition, although previous studies (Zhu 2013) have shown that apparently the defendants (administrative agencies) are still more likely to prevail in the second instance, they become less advantageous than they were at the first-instance stage. Such pattern is not observed here (fisher's exact test: p-value = 0.426). Yet this does not necessarily mean overseas enterprises have lost plaintiff's "comparative advantage" in the non-first-instance, for other factors such as the level of court where the case is decided may also affect the win rate, as it is usually regarded as a source of "heterogeneity in lawsuits" (Firth et al. 2011:581).

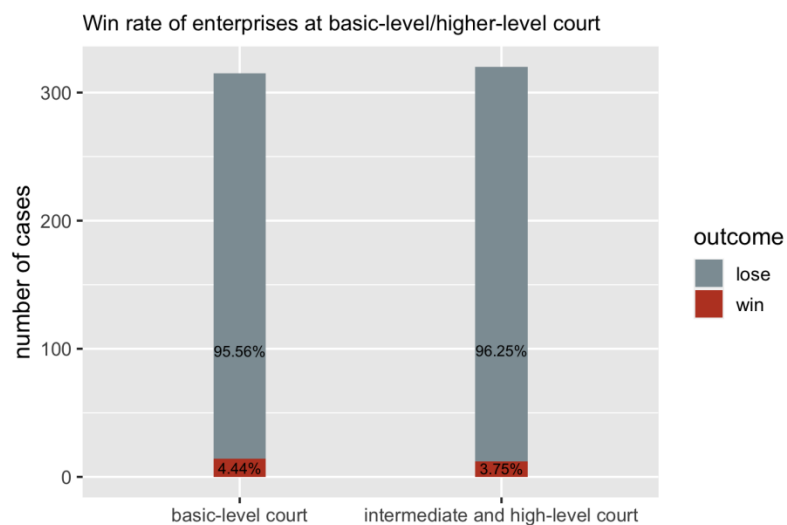


Figure 3. Plaintiff's Win Rate in Cases at the Basic-level/Higher-level Court

¹⁴ Liu, Yungang 刘云刚. "dashuju xia 1991-2007 niandu quanguo shuiwu xingzheng susong anjian shizheng fenxi 大数据下 1991-2017 年度全国税务行政诉讼案件实证分析" [Big data empirical analysis of tax administrative litigation from 1991 - 2017], *Allbright Law*, December 12, 2018. <https://www.allbrightlaw.com/CN/10475/4c1a54b8dd1c3544.aspx>.

Next, I compare the win-rate between cases processed at the basic people's court (*jiceng renmin fayuan*) and intermediate people's court (*zhongji renmin fayuan*) and high people's court (*gaoji renmin fayuan*). I code the level of court into a dummy variable (basic-level vs upper-level) instead because basic-level court is usually regarded as being substantially different from the other two. In the first place, basic-level court is underfunded compared to the courts at a higher level and therefore, it is more likely to be captured by economic interests, something that enterprises are able to offer (Wang 2013:44). Lower-level courts and higher-level courts also vary in the range of duty, as the latter often engage in a longstanding practice of responding to inquiries from lower courts for advice regarding legal issues in particular cases currently before the lower court (Peerenboom 2008). On the other hand, the effect of political connection, which is positively related to the win rate of lawsuits in general, is found mostly intense at basic people's court (Xu 2020). This is also relevant to the study of local protectionism, whereby domestic non-SOEs enjoy more "home-field advantage" at basic people's court (Wang 2018), while upper-level courts or "appeal courts play the role of rectifying judicial local protectionism that plagues lower-level courts" (Long and Wang 2015).

To summarize, in figure 3 I do not see the win rate varies a lot across cases processed at lower-level courts and those processed at upper-level courts. Yet it is not sufficient to reach the conclusion that overseas enterprises are treated in the similar way at different levels of courts only with the result showed here. Rather, what I try to justify with figure 1 and figure 2 is why it is reasonable to aggregate cases together (regardless of instance and court level) when evaluating the factors that influence the win rate.

(3) Does ownership matter: Jointly-invested enterprises versus wholly foreign-invested

enterprises?

The first feature of interest that may affect the plaintiff's win rate is the ownership structure of the enterprise. Hence the null hypothesis is:

H0: Whether the company is wholly foreign-invested or jointly-invested does not make a difference to plaintiff's win rate.

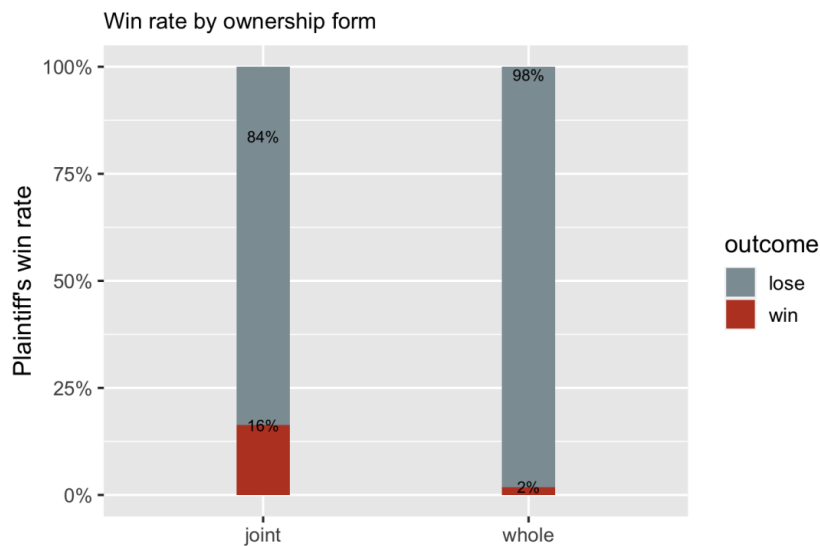


Figure 4. Plaintiff's Win Rate by Company Ownership

I look at plaintiff's win rate in administrative litigation across two typical kinds of foreign invested enterprises – jointly-invested enterprises and wholly foreign-invested enterprises. The data (figure 3) shows that the jointly-invested enterprises have won 16% of all administrative litigations in 2014, which is considerably higher than the overall corporate win rate of 4.1%. On the other hand, in terms of cases having wholly-foreign invested enterprises as plaintiffs, only in 2% of the cases are the plaintiff's appeals supported by the court. The difference between the

two means are statistically significant ($p\text{-value} = 4.784e\text{-}08$) and I reject the null hypothesis.

Hence the analysis shows that jointly-invested enterprises are in general more likely to win an administrative litigation than those wholly foreign-invested enterprises.

(4) Does investment from state-affiliated entities matter?

Investment from state-owned entities (government or state-invested/state-owned-enterprises) is one indicator of explicit connections with the state or the local government. I categorize those joint ventures that have either government agencies (e.g. Administration of Sport) or state-owned enterprises (or enterprises partly owned by the state) as their stakeholders “state-invested”, otherwise “non-state-invested”. Hence the second hypothesis I would like to test is whether the plaintiff’s association with state actors will increase the chance of prevailing in administrative litigation:

H0: Whether the JV has a state-owned enterprise or government agency as their stakeholder does not affect plaintiff’s win rate.

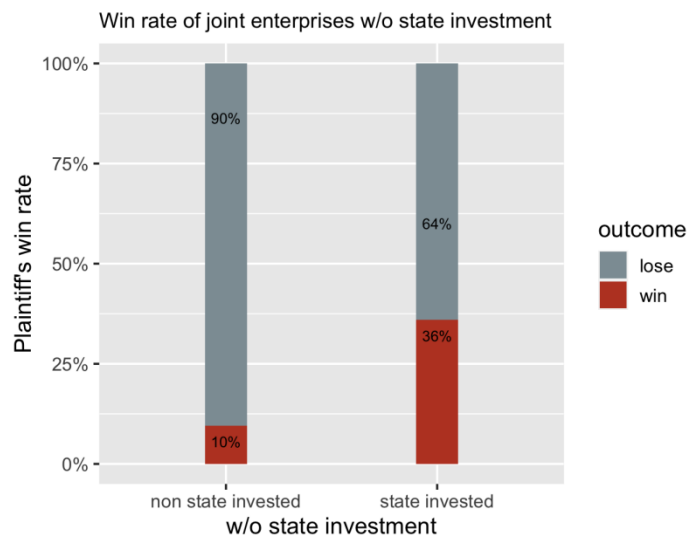


Figure 5. Win rate of JVs w/o state investment

Figure 5 shows that for non-state-invested JVs, only 10% of the plaintiff's appeals are supported by the court, while the rate rises to 36% when it comes to state-invested enterprises. I would reject the null hypothesis and argue that enterprises receiving state support are in general more likely to win administrative litigation than those who are not supported by government-related entities. At the same time, considering the small sample size of state-invested joint ventures included in the dataset and a critical value near the threshold ($p = 0.004176$), more evidence is needed to evaluate the effect of state-affiliated investment on plaintiff's win rate.

(5) Does cultural factors matter? – plaintiff's win rate of enterprises receiving investment from China-circle regions/from non-China-circle regions

Is the enterprise's country of origin (defined by its stakeholder's country of origin) related to the plaintiff's win rate? I follow the norm in previous studies to categorize enterprises as being "China-Circle" or "non-China-Circle" (Beamish 1993; Wang 2014). "China-circle" enterprises refer to those firms invested by stakeholders from Hong Kong, Macau and Taiwan; "non-China-circle" enterprises include the rest. Note that if an enterprise is invested by stakeholders from both China-circle and non-China-circle regions, it is still coded as a "China-circle" enterprise, which assumes its ethnic or cultural connection with the mainland. Therefore, I put forward the following null hypothesis:

H0: Whether an enterprise is a China-circle one or a non-China-circle one does not affect plaintiff's win rate.

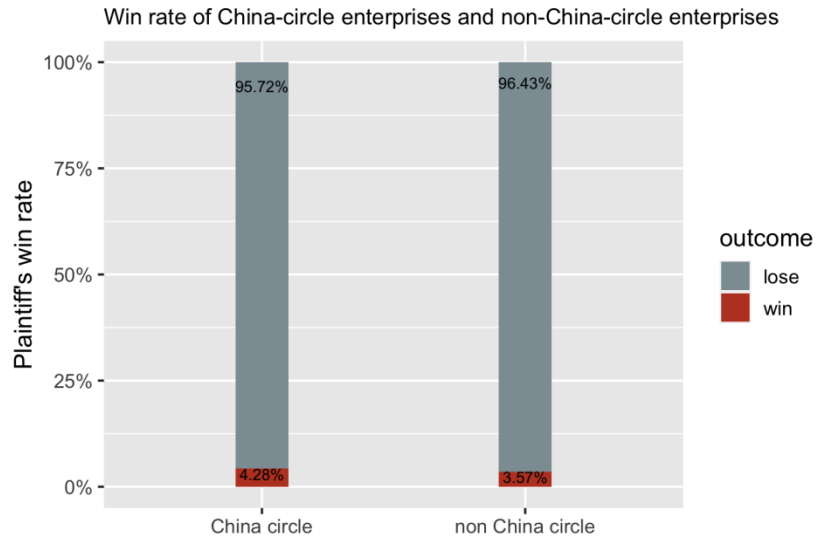


Figure 6 Win rate between China-circle enterprises and non-China-circle enterprises

Figure 6 shows that China-circle firms enjoy a slightly higher win rate than their non-China-circle counterpart, yet this is not a significant difference across group means and I will accept the null hypothesis ($p\text{-value} = 0.8225$).

Discussion

In the previous section, I have shown a couple of descriptive tables, figures as well as three tests that illustrate the status quo of administrative litigation between overseas enterprises and government agencies in 2014. In this section, I will offer more in-depth analysis of the results presented above.

Regional distribution (figure 1) of administrative litigations between overseas enterprises and government agencies has showed that the traditional dichotomy of coastal area and inland area in depicting China's socioeconomic landscape is not sufficient to explain the relatively large internal variances across units within the same group, nor the similarity between units across different groups. In the future researchers can delve more into patterns at the sub-national level patterns or look at specific regional features (e.g. major trade partners of each province).

Categorization of cases by defendant (administrative institutions) type (table 1) not only reflects the plaintiff's choice of their potential rival, but also implies the state's guidance. Enterprises will not choose to go to the court if they know that they are going to lose, as the judicial process takes each of the involved parties a long time to go through. Hence this list of those defendants being sued in administrative litigation potentially reflects the plaintiff's understanding of "over whom they are more likely to win in the judicial procedure". For those administrative agencies that are not frequently sued, it can either be that a certain type of dispute is less likely to occur than the others, or that the plaintiffs know well these agencies are strong institutional players in the power structure (and thus the plaintiffs are very unlikely to win). One concrete example is tax dispute with the tax bureau, which is one of the most critical challenges overseas enterprises have been facing since China's reform and opening-up.

Although tax disputes are very prevalent in China, the amount of domestic tax

administrative litigations is generally very low¹⁵. Despite the fact that pre-litigation procedures for tax disputes are distinctive relative to other areas of disputes with Chinese government agencies, they do not seem to explain the low volume of tax litigation (Cui 2017:20). In addition, there is “no clear provision requiring the government to compensate for interest on tax refunded after AR [administrative review] or litigation” (Cui 2017:18), all of which have indicated a high level of institutional and formal power held by tax agencies in China. The same situation applies to overseas taxpayers - although many reciprocal tax treaties are signed between China and its trade partners in the past several decades and the court has started to deal with tax administrative litigation between a foreign enterprise and China’s tax administration as early as in the year 1993 (*PanAm SAT International Systems, Inc. v. Beijing State Tax Bureau*)¹⁶, tax disputes with tax administration are generally not settled formally via the court given the plaintiff’s weak status. In our dataset, only 3 out of 635 cases are related to tax, and only two of them are cases against the tax bureau (the other one against the customs), which again justifies the aforementioned point that the plaintiffs do not believe they can win over the tax agency via legal means. Interestingly however, in the list of “10 selected model trials openly published by the Supreme People’s court in China” (zuigao renmin fayuan xingzheng shenpan shida dianxing anli) in 2017, the only administrative litigation of which the plaintiff is a non-resident is *The Children’s Investment Master Fund v. State Taxation Bureau of Xihu District, Hangzhou, the People’s Republic of China* (2003). According to the associate chief judge of the Supreme People’s court, the ten cases representing “judicial fairness” are chosen from over a range of 2,500 cases, which not only covers litigations over common administrative misconducts such as building expropriation,

¹⁵ See footnote 14.

¹⁶ For a detailed analysis of this case, see Li, Jinyan. “The Great Fiscal Wall of China: Tax Treaties and Their Role in Defining and Defending China’s Tax Base.” *Comparative Research in Law & Political Economy*, January 1, 2012. <https://digitalcommons.osgoode.yorku.ca/clpe/36>.

but also take types of cases that are more influential (though very uncommonly seen, e.g. tax, transportations) into account.¹⁷ Formalization of this tax litigation judgment into the “model 10” has several symbolic meanings: (1) tax litigation is a key focus among all administrative cases that may affect the overseas investor’s sense of a fair judicial environment (2) on the other hand, tax issues have high political stakes and can represent state sovereignty, which judges at all levels shall defend when there are disputes between domestic and overseas entities. Therefore, by comparing the empirical results and interpretation of the model case selected by SPC that matches the question of interest in this project, I try to illustrate that the absolute number of cases by defendant type not only reflects the plaintiff’s belief in the probability of winning over against a certain type of government institution, but also implies the state’s implicit guidance in shaping those kinds of beliefs.

Then I present some testing results that indicate the relationship between the outcome of administrative litigation and features of the overseas firms. In general, I conclude that overseas enterprises stay in a comparatively less advantageous position when facing local administrative malpractices, compared to other types of individual or corporate plaintiffs, for the plaintiff’s win rate under this condition is much lower than the national average. In the first place, the result shows that jointly-invested enterprises enjoy a higher win rate compared to those wholly foreign-invested counterparts, which has thus offered new evidence for discussions over whether overseas enterprises will be treated differently if they vary in ownership structure. What are the implications of mainland capitals in investment and why would it make a difference? From a historical perspective, the first Joint Ventures in early post-reform PRC “are frequently used,

¹⁷ Tang, Qi 汤琪. “zuigaofa tongbao mingaoguan anjian Shenli qingkuang xingzheng jiguan baisulv shenggao 最高法通报民告官案件审理情况 行政机关败诉率升高” [The Supreme Court announced litigation between citizens and the government - the defendant's win rate goes down] *Chinanews*. June 13, 2017. <http://www.chinanews.com/gn/2017/06-13/8249332.shtml>.

created due to government pressure and with government partners, and often formed with partners from ethnically related countries” and are known for their high managerial stability in the uncertain market, which singles out China from other developing countries at a similar level of socio-economic status (Beamish 1993). Hence jointly-invested firms in China not only have economic relationships with local investors but are also embedded in explicit or implicit political connections with government entities.

Next, investment from state entities (government and state-owned enterprises) indicates that familiarity with domestic business environment and political connections contribute to a higher plaintiff’s win rate, despite years-long efforts made to build up a more foreigner-friendly judicial environment for newcomers from abroad. This, however, may not necessarily imply that wholly-foreign invested enterprises and firms that do not receive state investment are discriminated against in administrative litigation. To see whether there is invidious discrimination in the litigation process, it is necessary to compare similar cases in which the plaintiffs only differ in one or two features.

Previous studies have shown China-circle investors and foreign investors vary in their preference for resorting to legal institutions when encountering disputes. Foreign enterprises prefer judicial empowerment because (1) they are not as well-networked as the China-circle firms that have a better knowledge of the market and the embedded relationship (2) they are not allowed to use informal mechanisms due to the laws and regulations in their home country (Wang 2014: 34-35). In such a case, China-circle enterprises will bring cases to the court only when they have collected or are given the information that they are likely to win the case, as they have more options than non-China-circle enterprises have. If this assumption holds, we shall expect that China-circle enterprises perform better in litigation than those non-China-circle

enterprises. Yet seeing from figure 5, there is no evidence showing that China-circle enterprises are more likely to prevail in administrative litigation than non-China-circle enterprises at the national level. This finding indicates that cultural similarity at the corporate level is not a key factor that influences how well a firm performs in administrative litigation.

Conclusion

In this paper, I build up a legal text dataset with all judgments of administrative litigations between overseas-invested enterprises and government entities published on China Judgment Online in 2014. Descriptive statistics and the testing results show that administrative litigation involving foreign interests is still politically embedded: The administrative agencies against which the overseas enterprises sue are carefully chosen based on the information available to them; and the outcome of the litigation is relevant to the firm's political associations underlying ownership form and cooperation with state actors.

This project also has some limitations that hopefully will be addressed in future studies. In this study, I follow dichotomized way of coding the corporate-level variables (ownership, state investment and cultural similarity). Although this way of coding has been commonly used in empirical studies, in reality, these features of enterprises that bear overseas interests are often more nuanced (e.g. a more complex way of ownership coding is to look at characteristics of legal persons). Researchers shall look for some more nuanced ways to operationalize the constructs. Another area of future research is to conduct similar tests at the sub-national level. Given that the traditional dichotomy of coastal and in-land area is not sufficient to illustrate how administrative litigations are distributed regionally in China, one possible direction is to look at patterns of litigation between a province's major trade partner and local administration (e.g. investors from Hong Kong vis-à-vis local government agencies in Guangdong province).

To sum up, this study aims to offer some new insights on the relationship between overseas investors and state actors in China through the lens of administrative litigation, which is a critical area that is not yet well explored.

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