On Their Best Behaviour:  
Foreign Plaintiffs in Chinese Administrative Litigation  

John Wagner Givens  
Doctoral Candidate  
Department of Politics, University of Oxford  
J.W.Givens@Gmail.com  

全力以赴：
中国行政诉讼机制中的外国原告  

葛明威  
博士候选人  
政治系，牛津大学  

Contributed to the RCCPB’s Initiative on China and Global Governance.  
Abstract

Representatives of multinational companies routinely bring suits against the Chinese state in the form of the patent or trademark bureau in Beijing’s First Intermediate Court. While some foreign litigants still complain about delays and the quality of some proceedings, litigation runs at something approaching an international standard. Yet in any given year, outside of this single chamber in a single court in a single city in a country of over a billion people, only a small handful of foreign litigants will directly challenge the Chinese state in court. Instead, disagreements between foreign multinationals and other parts of the Chinese state will most likely be settled in direct meetings with officials.

This paper argues that this discrepancy is part of a compromise between the Chinese state and multinationals operating in China. The “groping for stones to cross the river” approach that has been a hallmark of China’s reform era government means that instead of using a foreign presence to motivate reform and improve the administrative legal system, the state creates an effective but ad hoc solution to fix problems affecting foreigners. I demonstrate that although foreign firms may have difficulty litigating against the Chinese government, it is on balance no more difficult for them than most other classes of plaintiffs. I conclude that while the reluctance of multinationals to engage the Chinese state in litigation is understandable, multinationals’ reluctance to make use of administrative courts and a preference for extra-legal special treatment severely limits their potential contribution to China’s rule of law.

摘要

跨国公司代表可以例行向北京市第一中级人民法院对中国政府——专利或商标局提起诉讼。尽管仍有外国诉讼人抱怨诉讼程序的拖延及实施的质量，诉讼正在以接近国际化的标准得以履行。然而任何年份里，在这样一个人口超过十亿的国家的任一城市的任一法庭，只有少数外国诉讼参与人当庭直接挑战中国政府。相反，跨国公司与中国机构间的争议往往通过与中国官员的直接谈判处理解。维持与地方政府的良好关系对于外国公司而言至关重要，地方官员亦期望通过鼓励外商投资完成经济增长定额，取悦上级官员并获得升迁。

本文认为这种脱节根源于中国政府与在华跨国公司之间的妥协与默契。“摸着石头过河”方式作为改革时代的中国政府标志，意味着政府制造了一种有效但特别的方式解决涉外问题，而非借力外方存在促进改革并完善行政司法体系。我相信虽然外国公司在起诉中国政府上可能面临诸多障碍，但总体而言，不会比其他类型的原告难度更大。结论是，跨国公司不愿将中国政府诉诸法律的态度固然可以理解，但其不愿行使行政司法权利而偏好院外特殊解决方式的行为极大地削弱了他们对中国法制建设的潜在贡献作用。
Since multinational corporations began entering China in the 1980s, the trickle has grown to a torrent, and today nearly every CEO is required to have a strategy for their company’s involvement in China. The combination of China’s participation in the world economy, accession to the World Trade Organization (WTO), and the growing presence of foreign companies in China was supposed to help bring China into line with international standards of governance, including rule of law and eventually human rights. In some sectors progress is clearly visible. Representatives of multinationals frequently bring suits against the Chinese state in the form of the patent or trademark bureau in Beijing’s First Intermediate Court. Such cases have become routine, and while some foreign litigants still complain about delays and the quality of some proceedings, litigation runs at something approaching an international standard. Yet in any given year, outside of this single chamber in a single court in a single city in a country of over a billion people, only a small handful of foreign litigants will directly challenge the Chinese state in court.

Instead, disagreements between foreign multinationals and other parts of the Chinese state will most likely be settled in direct meetings with officials. Foreign companies are anxious to not endanger vital relationships with local governments and local officials are usually eager to encourage international investment to help them meet development quotas, impress their superiors and receive promotions. In general, companies prefer to avoid litigation, but in China even if a dispute proves difficult to resolve, multinationals may turn to other resources and tactics, and rarely, if ever, consider litigating against the state. Indeed, foreign lawyers in China who would willingly recommend litigation against China’s Trademark and Patent Bureaus frequently looked horrified when I asked about suing local governments.

This paper argues that this discrepancy is part of a compromise between the Chinese state and multinationals operating in China. The “groping for stones to cross the river” approach that has been a hallmark of China’s Reform-era government means that instead of using a foreign presence to motivate reform and improve the administrative legal system, the state creates an effective but ad hoc solution to fix problems affecting foreigners. For their part, multinationals are given the incredible opportunity of access to the People’s Republic of China

---

1 Interviews: WG01-FL, BJ07-PA, SH04-PA.
2 Although, this paper is focused on multinational corporations, many of its insights may also hold true for domestic Chinese companies.
(PRC), both as a market and as a production site. Additionally, they are given a venue for Intellectual Property (IP) disputes with the state, and the reasonable expectation of favorable treatment by local governments, especially outside the largest and most developed coastal cities. In return, the Chinese state receives foreign investments that include intellectual property because foreign firms are at least minimally comfortable that their intellectual property will be protected and that there will be reasonable recourse if it is not. The Chinese state can therefore continue to enjoy this foreign investment without significant foreign pressure to make costly reforms granting independence to its justice system.

Specifically, this paper addresses the following points. I first consider the theoretical implications for legal convergence, authoritarian resilience and the relationship between rule of law and development. After addressing my data sources, I turn my attention to the Intellectual Property Chamber of Beijing’s First Intermediate Court, the exception to the rule that multinationals do not sue the Chinese state. I then show that although administrative litigation has become an imperfect but still viable mechanism for both individuals and firms to resolve problems with the state, multinationals rarely resort to suing the Chinese state. I demonstrate that although foreign firms may have difficulty litigating against the Chinese government; and using an example, I show that it is on balance no more difficult for them than most other classes of plaintiffs. I consider the following reasons that multinationals shy from litigation: 1) Their perceptions of administrative litigation in China are founded on a received wisdom based on a familiar criticism of Chinese rule of law rather than on empirical reality or experience; 2) Their activities are sometimes of dubious legality; and 3) They often have a wealth of extra-legal alternatives. Finally, I conclude that while the reluctance of multinationals to engage the Chinese state in litigation is understandable, multinationals’ reluctance to make use of administrative courts and preference for extra-legal special treatment severely limits their potential contribution to China’s rule of law.

Theory

This paper is a careful, empirical, close to the ground study in an area generally dominated by theorizing, multi-country studies, sweeping generalizations and analyses of black

---

3 While this paper focuses on administrative litigation, the IP chamber of Beijing’s First Intermediate Court also offers a reasonably impartial venue for settling some civil IP cases.
letter law. It adds much needed data to several important theoretical debates including: legal convergence, authoritarian resilience, and the relationship between rule of law and development. As a careful empirical study, however, it does not come up with easy or definitive answers. Nevertheless, I will briefly cover some of the relevant theoretical issues in this section.

An important theoretical issue touched on by this research is the relationship between rule of law and development. Rule of law is frequently seen as a precondition for economic development because it enforces contracts and property rights, creating certainty, and thereby encouraging investment.\textsuperscript{4} China is sometimes cited as an outlier or exception by achieving spectacular growth without establishing rule of law.\textsuperscript{5} The case for Chinese exceptionalism is often overstated, as China’s legal system is not particularly weak for its level of \textit{per capita} income.\textsuperscript{6} Nevertheless, it is still worth asking how and why foreign investors and capital have continued to flood into China over the last three decades if rule of law was insufficient to protect investments?

There are a variety of possible answers to this question, but the one that most closely jibes with my findings is that “appropriate institutions”\textsuperscript{7}, “second best institutions”\textsuperscript{8}, or “transitional institutions”\textsuperscript{9} are able to provide sufficient, if not perfect, guarantees and certainty to investors. These institutions may “take into account context-specific market and government failures that cannot be removed in short order”\textsuperscript{10} but “often diverge greatly from best practice”\textsuperscript{11} institutions. Others have already argued that these types of institutions explain how China was


\textsuperscript{6} China, for example, is ranked more highly in the World Bank’s rule of law index than several other countries with higher \textit{per capita} incomes, such as Mexico, Russia, and the Philippines. See: Kaufmann, Kraay, and Mastruzzi, \textit{Governance Matters VI}.


\textsuperscript{10} Rodrik, \textit{Second-Best Institutions}, 0.

\textsuperscript{11} Ibid.
able to achieve such high levels of development with weak rule of law.\textsuperscript{12} What this study adds is that transitional institutions can be hybrids, a patchwork of second best institutions, like the special treatment foreign firms sometimes receive from Chinese local governments, and best practice institutions, such as the IP chamber in Beijing.

This issue also contributes to our understanding of authoritarian resilience. Authoritarian resilience is a concept created by Andrew Nathan in an attempt to explain the continued vigor and success of the Chinese Communist Party (CCP) despite numerous and ongoing predictions of its collapse or weakness.\textsuperscript{13} This question is made all the more relevant in the context of the Arab Spring, in which a number of non-democratic regimes at levels of per capita development similar to, or lower than China’s, erupted in anti-regime protest that in some cases led to armed conflict and/or violent repression and in others toppled longstanding authoritarian regimes. This concept is given a full treatment in the theory chapter of my dissertation, where I elaborate upon Nathan’s concept by suggesting that decentralized authoritarianism,\textsuperscript{14} economic growth and the institutional reforms that have made it possible are also a vital part of authoritarian resilience. I also propose that the most theoretically interesting part of the concept of authoritarian resilience is not how China has managed to develop institutions that promote resilience, such as differentiated and functionally specialized institutions (as stressed by Nathan), but how it has managed to keep an authoritarian hold on them and not let them too far out of the control of the CCP.

The study of administrative litigation in China provides excellent examples of this careful balancing act. Central government leaders believed they needed to attract foreign investment in order to maintain the economic growth that is so essential to its legitimacy and stability. Yet setting up a system of truly independent courts would have meant allowing substantial checks on its power, something the Chinese Communist Party (CCP) is loath to do. Additionally, it would have been costly and difficult, probably to the point of impossibility for a state as underdeveloped, large and lacking in legal infrastructure as China. The average quality of the

\textsuperscript{12} Qian, “How Reform Worked in China.”
Chinese judiciary is still relatively low, corruption is common, and Chinese leaders have serious concerns about giving free rein to such an institution. As we shall see, the solution was two-fold. The Chinese state was willing to significantly relax political control over a special court that dealt with national-level IP disputes and in large developed coastal cities where the quality of the judiciary tended to be higher. Probably unwilling and unable to do the same in courts throughout the country, but still anxious to see foreign investment flourish, foreign firms are given preferential treatment by parts of the state as an alternative to effective, independent, and impartial courts. Additionally, growing global stature and business allies abroad help contribute to the PRC’s legitimacy. Multinationals, for their part, were glad for reasonably effective courts in a few coastal cities and for a venue to protect their IP rights, and were not put off by less than independent Chinese courts in other areas as long as they were treated preferentially.

Theories of legal convergence suggest that “‘western’ business and legal practices are becoming universal as a consequence either of the globalization of capital or the diffusion of professional training and norms.” Dezalay and Garth, two advocates of legal convergence, believe that the process is underway in China and see multinational law firms and foreign lawyers in China as “moral entrepreneurs,” and the increasing presence of which are “key engines of legal transformation.” A broader but parallel view holds that “[i]nvestment by U.S. firms [in countries where human rights are less well defended] may well help move human rights in a positive direction.” This view is also relevant here because administrative litigation in China is not simply a means to solving business disputes, but is (to a limited extent), could and should be an important venue for protecting the rights of individuals against an overzealous state. Should multinationals and their law firms be contributing to the development and convergence of

---

16 Foreign commercial interests in China are sometimes able to reduce criticism of China’s human rights record. For example, during Clinton’s de-coupling of China’s Most Favored Nation Status with its human rights record in 1994.
19 Ibid., 257.
China’s administrative law system, it then follows that that they would also be contributing to the protection of human rights in China.

The aim of this paper is not to argue that legal convergence is not occurring in China. That argument is both overly simplistic and has been made before.\(^{21}\) Instead, I find that legal convergence is evident in a few of China’s most developed coastal cities, and particularly the Intellectual Property Chamber of Beijing’s First Intermediate Court. But it also shows that multinationals and their foreign legal council are not making the contribution to legal convergence that is hypothesized by Dezalay and Garth. In some cases, this foreign presence may contribute to legal convergence, but in many others, multinationals are loath to contribute to legal development if it means risking upsetting government officials; they are more than happy to benefit from extra-legal favorable treatment made available to them by parts of the Chinese state.

**Data Sources**

The data for this article is drawn primarily from interviews and e-mail interactions conducted by the author from 2010-11. Most importantly, in spring of 2011 I conducted 23 semi-structured interviews in Shanghai and Beijing with lawyers and other business support staff at foreign law firms that have a presence in China and with high profile Chinese law and intellectual property firms\(^{22}\). In Shanghai and Beijing foreign law firms and the high status Chinese law and intellectual property firms that tend to have more foreign clients are both generally clustered in a handful of prestigious addresses and areas where I solicited interviews. My informants were selected more or less randomly, from among these big-name firms, depending on who was available and willing to give me an interview. I conducted an additional five interviews with other lawyers who were recommended to me as having had some experience with foreign involved administrative litigation in China. I also sent e-mails seeking information to at least one lawyer at each of 50 foreign law firms in Hong Kong that deal with PRC law. I received 13 responses, none of which, however, implied significant experience with administrative litigation and was judged therefore to warrant an interview.


\(^{22}\) Intellectual property firms in China specialize in assisting clients with intellectual property issues such as patent registration and may also represent clients in IP-related litigation. They employ both lawyers and non-lawyer patent agents, both of which may represent their clients in IP-related litigation.
As part of the larger project on administrative litigation, I conducted semi-structured interviews with 126 lawyers from randomly selected law firms in Beijing, Shanghai, Ningbo, Changsha, Guilin and a prefecture in rural Hunan. At four of the sites, twenty firms were chosen at random from official registers of all local law firms in the area. In Beijing thirty firms were chosen, and in rural Hunan every firm was included in the sample since there were fewer than twenty law firms in the entire prefecture. To increase efficiency, if a sampled firm shared a building with other firms, additional interviews were sought with up to three of those firms, chosen randomly if more than three were present. The inclusion of these firms had the additional advantage of capturing at least one firm that was too new to be on the official register,\(^\text{23}\) though these registers were never more than a year and a half old. The overall response rate was a respectable 68.5%. Finally, these interviews were supplemented by an additional 19 interviews with former government officials, former judges, legal scholars, legal workers, and actual, as well as potential, plaintiffs. While these interviews provided a wealth of knowledge about administrative litigation in China and an important point of comparison, the vast majority of Chinese law firms never interact with foreign parties and my random sample of firms therefore yielded little direct information about foreign involved administrative litigation.

Interviews ranged in length from 20 minutes to 4 hours depending on the experience and availability of the informant. With the exception of foreign lawyers, all interviews were conducted in Mandarin. To facilitate more honest conversation and to protect the anonymity of informants, no audio recordings were made of any of these interviews.

While most sections of this paper rest on data gathered through these interviews, in one section I also use official PRC data from national and provincial legal yearbooks to test the common wisdom expressed in interviews that multinationals rarely sue the state. Official data published by the Chinese government are justifiably treated with skepticism, and data on litigation is no exception. Empirical research has suggested that courts exaggerate the true number of cases they hear to make themselves look more productive and this is primarily true of less busy courts in poorer areas.\(^\text{24}\) For our purposes in this analysis, however, there is no reason

\(^{23}\) Interview: B\text{J}03N.

to believe that statistics have been falsified in such a way as to support my findings that foreign firms engage in less administrative litigation than civil litigation or than their domestic counterparts. Additionally, since my sources come from national as well as provincial yearbooks from Guangdong and Hubei and cover a span of over twenty years, any bias would have to be both systematic and long lasting to seriously affect my findings. I therefore proceed with the understanding that, while they are surely less than perfect, there is no reason to believe that these particular statistical records are biased in favor of my conclusions.

The Exception that Seals the Deal

This section briefly considers the intellectual property chamber of Beijing’s First Intermediate Court, the one place in which multinationals frequently involve themselves in administrative litigation and where legal convergence is most evident. Understanding this chamber and the work it does is important not only because it is the only place where we see foreign involved administrative litigation, but also because it serves as an example of how legal convergence can result from concerted foreign involvement and pressure. While the specifics of how this court operates and the details of administrative IP litigation need not detain us, two important points help connect this argument. First, a reasonably effective and impartial court for protecting IP rights, including litigation against patent and trademark departments, has been set up in which multinationals feel reasonably comfortable suing the Chinese state and do so relatively frequently. Second, this has come to pass “as a result of external pressures and internal economic objectives.”

Since 2001, when the current system was put in place, suing China’s Patent Reexamination Board (PRB) and Trademark Review and Adjudication Board (TRAB) have become relatively commonplace. The departments were set up to review decisions of China’s trademark and patent authorities, and litigation arises when plaintiffs are not satisfied with the reviews that they conduct. Both their frequency and professionalism set such cases apart from other types of administrative litigation to the point that many of the lawyers to whom I spoke did

---

not generally consider such cases to be administrative litigation at all.\textsuperscript{26} They have a point; the cases are heard in a specialist Intellectual Property Chamber of the court that hears both civil and administrative litigation instead of the generalist administrative chambers that would hear the vast majority of administrative cases. From the perspective of Chinese lawyers, administrative IP cases for foreign companies are fairly profitable which is also in stark contrast to the spectacularly unprofitable cases that are typical of administrative litigation.\textsuperscript{27} Some lawyers and patent agents actually do more administrative IP litigation than civil IP litigation, which can be far more difficult since it often involves going to courts in less developed areas where the infringement is actually occurring.\textsuperscript{28} One informant went as far as to suggest that registering patents with the Chinese state is the cleanest (least corrupt) business in the country.\textsuperscript{29}

One of the most important reasons multinationals feel comfortable litigating against TRAB and PRB is that these departments are accustomed to being litigated against. As we shall see, the chief concern that makes multinationals reluctant to sue a government department is not the fear that they will lose, but the fear this will hurt their future relationship with the department they are suing. Additionally, officials of these bodies do actually show up in court to defend their decision,\textsuperscript{30} whereas with other departments “the legal representative of administrative organs showing up in court is as rare as phoenix feathers and unicorn horns [但作为行政机关的法定代表人出庭应诉的案件可谓凤毛麟角]”.\textsuperscript{31} This casts light on the difficulty of reforming administrative litigation in China. Making courts and their decisions more impartial would be difficult, but ensuring that other administrative organs become as responsible and professional as TRAB and PRB may be impossible in the medium term.

Why representatives of the Chinese state make any decision is always a tricky question to answer definitively. This study focuses on and derives from the perspectives and actions of plaintiffs in administrative litigation. My sources could offer no particular insight into the logic of Chinese officials. The general consensus, however, was that foreign pressure and

\textsuperscript{26} Interview: BJ15-FL.
\textsuperscript{27} Interviews: SH01-L, BJ10-PA.
\textsuperscript{28} Interview: BJ07-PA.
\textsuperscript{29} Interview: SH04-PA.
\textsuperscript{30} Interview: BJ06-L.
involvement, including pressure from foreign investors, the WTO, and foreign embassies and governments have been, at least partially responsible for creating a specific institutional structure that allows for reasonably impartial IP administrative litigation.\footnote{Cox and Sepetys, “Intellectual Property Rights Protection in China,” 11.403.} Further evidence comes from a similar IP chamber in the well-developed northern port city of Qingdao. While Qingdao’s chamber has more or less the same institutional structure as Beijing’s, a prolific IP litigator suggested to me that it was actually less professional because far fewer foreigners used it; “…the government wanted to put its best face on for foreigners who are usually suing in Beijing, but that was not really a concern in Qingdao.”\footnote{Interview: BJ09-L.}

The IP chamber in Beijing could certainly provide a model for other relatively specialized kinds of administrative cases. For example, specialist environmental courts already exist in China and might be improved along these lines to a point where they attract more environmental administrative cases, the current number of which remains pitifully low. Whether Beijing’s specialist IP chamber can serve as an example or a starting point for improving administrative litigation more broadly, however, is unclear. Intellectual property, as opposed to more common types of administrative litigation related to land and policing, is essentially unrelated to protecting the rights of average Chinese. Foreigners have; therefore, made only a limited contribution by influencing China to vastly improve its intellectual property litigation.

**Non-Litigiousness**

One of the central conceits of this paper is that aside from cases in Beijing’s intellectual property court, foreign firms generally do not sue the Chinese state. This assertion is not controversial and, in foreign business and legal circles in China, it is in fact the received wisdom. As the experienced head counsel of a large foreign multinational with a long history in China put it “as a matter of principle, we would not think about resorting to administrative litigation.”\footnote{Interview: WG02-FL.} As with so much received wisdom, however, no one has as yet gone to the trouble to make a systematic and convincing empirical case that foreign firms rarely resort to administrative litigation, and since this is the starting point of my analysis I will do so here.
First and most importantly, my interviews with both foreign lawyers who have experience in China, and with Chinese lawyers who regularly represent foreign clients confirm the fact that foreign companies are extremely unlikely to involve themselves in administrative litigation in China. Indeed in all of my interviews and e-mail exchanges, only two informants were found to have had direct experience with a non-IP foreign involved administrative case.

Unfortunately, statistical data that would help us establish the frequency of foreign involvement in administrative litigation in China is relatively difficult to acquire. Some official data is available in legal yearbooks published at the national and sometimes at the provincial levels. While such data lacks both consistency and specificity, it still does show that multinationals engage in very little administrative litigation, and in less civil and administrative litigation than their domestic peers.

As can clearly be seen in Table 1, foreign firms rarely sue the Chinese government. If anything, Table 1 actually overstates the involvement of multinationals in administrative litigation for several reasons. Both Tables 1 and 2 fail to include many categories of administrative litigation for which there was not a foreign-related case in all the years for which I have data, including technology supervision, social security, finance, commodity prices, foreign exchange, international trade, traffic and many others. Additionally, while cases litigated against the Commerce, Customs or Patent departments are very likely to have firms as plaintiffs, some of the these cases could have been litigated by foreign individuals rather than companies. This paper is almost exclusively about when, why and how foreign companies sue the Chinese state and what alternative means to seek redress for their grievances they use when they choose not to sue. Foreign citizens in China can and do, however, sue the state. Indeed, in one of my first interviews, a lawyer, misunderstanding my meaning asked me (an obvious foreigner) what department I wanted to sue and indicated willingness to consider representing me in such a case before I managed to correct the misunderstanding. While such cases are not the focus of this paper, they nevertheless may have been included in the official statistics reproduced in Tables 1 and 2.

---

35 Interview: LZ02-L.
Table 1: Total and Foreign Involved Administrative Cases by Category, 1987-1998

<table>
<thead>
<tr>
<th>Year</th>
<th>'87</th>
<th>'88</th>
<th>'89</th>
<th>'90</th>
<th>'91</th>
<th>'92</th>
<th>'93</th>
<th>'94</th>
<th>'95</th>
<th>'96</th>
<th>'97</th>
<th>'98</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Admin (in thousands)</td>
<td>5.2</td>
<td>8.5</td>
<td>9.9</td>
<td>13.0</td>
<td>25.6</td>
<td>27.1</td>
<td>27.9</td>
<td>35.0</td>
<td>52.5</td>
<td>79.9</td>
<td>90.5</td>
<td>96.0</td>
<td>471.6</td>
</tr>
<tr>
<td>Prostitution</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Customs</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>Rights Infringement</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Land</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>13</td>
<td></td>
</tr>
<tr>
<td>Public Order</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>11</td>
</tr>
<tr>
<td>Re-education Through Labor</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Public Security</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Business Registration</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Advertising</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Commerce</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>6</td>
<td>12</td>
</tr>
<tr>
<td>Tax</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Health</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Patent</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Trademark</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Audit</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Medicine</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Tobacco Monopoly</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Forestry</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>City Construction</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Environmental Protection</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>8</td>
<td>10</td>
</tr>
<tr>
<td>Border Authority</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>6</td>
<td>2</td>
<td>5</td>
<td>4</td>
<td>9</td>
<td>61</td>
<td>87</td>
</tr>
<tr>
<td>Total Foreign Admin</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>5</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>2</td>
<td>12</td>
<td>15</td>
<td>21</td>
<td>83</td>
</tr>
</tbody>
</table>

Source: 中国律师年检编辑委员会 (China Lawyers Yearbook Editorial Committee), ed., Zhongguo Lvshinianjian (China Lawyers Yearbook) Various Years (Beijing: Renminfayuan Chubanshe 人民法院出版社).

Finally, when considering administrative litigation, and especially when evaluating statistics on foreign involvement, it is important to take third party participation into account. By definition, a private party, such as a multinational, cannot be a defendant in an administrative lawsuit. However, companies are frequently third parties to administrative litigation in China. This means that they have sufficient interest in an administrative suit to be represented in court and are essentially on the side of the defendant. A common example of multinationals’ third party involvement would be the case of a Chinese company suing the government in response to patent or trademark enforcement in which the relevant IP is owned by a multinational. The
multinational in this case would be represented in court in order to support the state’s assertion that it is the rightful owner of the intellectual property. Third party involvement may actually account for the majority of cases of foreign involvement in administrative litigation in China. One Beijing patent lawyer, for example, reported that representing foreign companies as third parties in administrative litigation made up a majority of the cases he took in 2009.Obviously, standing on the side of the government in administrative litigation is dramatically different than litigating against it. Indeed, one Beijing patent lawyer described such work as “very relaxed [轻松很多].”

While the sudden uptick in administrative litigation cases with foreigners involved in 1998 looks encouraging, Table 2 suggests that it might be an anomaly rather than the beginning of a dramatic upward trend. In the one overlapping year of Tables 1 and 2, 1998, Guangdong alone appears to be responsible for just over a quarter of all foreign involved administrative cases. Unfortunately, I am not aware of any national level statistics after 1998 that shed light on foreign involvement in administrative litigation. We shall now examine the provincial level statistics from Guangdong.

Table 2 seems to corroborate the same basic story as Table 1. Not only does this data from Guangdong suffer from the same drawbacks as Table 1, it may further downplay the true lack of foreign participation in administrative litigation. Guangdong in the past twelve years is certainly a “most likely” case. That is, considering the tremendous presence and history of foreign firms and capital in Guangdong and the province’s relatively high level of development, it is undoubtedly one the areas in which we could expect to find more foreign-related litigation. As well shall see, however, these figures compare poorly to foreign involvement in civil litigation in Guangdong in the same period.

---

36 Interview: BJ07-PA.
37 Interview: BJ07-PA.
Table 2: Total and Foreign-Related Administrative Cases in Guangdong, 1998-2009

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Admin</th>
<th>Total Foreign</th>
<th>Public</th>
<th>Resources</th>
<th>Commerce</th>
<th>City Const.</th>
<th>Customs</th>
<th>Patents</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998</td>
<td>1923</td>
<td>23</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>23</td>
</tr>
<tr>
<td>1999</td>
<td>3244</td>
<td>12</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td>7692</td>
<td>14</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>11</td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td>8348</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>3812</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>2003</td>
<td>4171</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>2004</td>
<td>4674</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>2005</td>
<td>4966</td>
<td>6</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>2006</td>
<td>5703</td>
<td>16</td>
<td>2</td>
<td>4</td>
<td>0</td>
<td>8</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>2007</td>
<td>5590</td>
<td>7</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>2008</td>
<td>6412</td>
<td>24</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>6</td>
<td>0</td>
<td>0</td>
<td>17</td>
</tr>
<tr>
<td>Total</td>
<td>56535</td>
<td>114</td>
<td>5</td>
<td>6</td>
<td>3</td>
<td>27</td>
<td>2</td>
<td>3</td>
<td>67</td>
</tr>
</tbody>
</table>

Source: 广东省高级人民法院编 (Guangdong People's High Court Editor), 广东法院年鉴 (Guangdong Court Yearbook) (广东人民出版社 (Guangdong People's Press)).

The case of Guangdong demonstrates that even in China’s most developed coastal areas with the largest foreign presence, multinationals rarely involve themselves in administrative litigation. Drawing conclusions from this is tricky, however. Both legal practitioners\(^{39}\) and international experts\(^{40}\) acknowledge that rule of law is far better developed in these metropolises,\(^{41}\) and lawyers see their local governments as less prone to let administrative litigation affect their relationship with a plaintiff.\(^{42}\) This could be taken as evidence that multinationals are unwilling to use even well-developed courts to litigate against more professional local governments even though retaliation seems unlikely. However, it was more common in my interviews with lawyers, especially Chinese lawyers, to hear that multinationals

\(^{38}\) Foreign cases include any case with involving a foreign party (but excluding parties from Hong Kong and Taiwan).

\(^{39}\) Interview: SH05-L.


\(^{41}\) Interview: SH05-L. When I refer to more developed coastal cities with better rule of law, I generally mean Shenzhen, Guangzhou, Shanghai and Beijing, but a number of other secondary cities such as Ningbo, Qingdao and Hangzhou could also be included.

\(^{42}\) Interview: SH03-L.
in Shanghai or Beijing rarely sued these jurisdictions because they seldom had problems with these more sophisticated and rule-abiding local governments.

Foreign firms in China are generally reluctant to litigate even in civil cases, but the following statistical tests using data from Guangdong show that they are statistically significantly more likely to engage in civil litigation than administrative litigation. I use an independent group T-test to compare the mean percentage of foreign involved administrative cases and the mean percentage of foreign involved tort and contract cases. The results in Table 3 show that foreign parties were involved in over twice the percentage of tort and contract cases, although the percentage of overall cases is tiny.

**Table 3: Foreign Involvement in Administrative vs. Tort and Contract Cases**

<table>
<thead>
<tr>
<th># of Observations</th>
<th>Mean</th>
<th>Standard Error</th>
<th>Standard Deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage of Tort and Contract Cases Involving Foreign Parties</td>
<td>18</td>
<td>0.40%</td>
<td>0.06</td>
</tr>
<tr>
<td>Percentage of Administrative Cases Involving Foreign Parties</td>
<td>11</td>
<td>0.17%</td>
<td>0.04</td>
</tr>
<tr>
<td>Difference</td>
<td></td>
<td>0.23%</td>
<td>0.08</td>
</tr>
</tbody>
</table>

### Assuming Equal Variance

<table>
<thead>
<tr>
<th>P Value</th>
<th>0.01</th>
<th>Assuming Unequal Variance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Degrees of Freedom</td>
<td>26</td>
<td>25.99*</td>
</tr>
</tbody>
</table>

*Satterthwaite's degrees of freedom test

Table 4 is similar to Table 3 except that it compares administrative cases exclusively to contract cases. Again, we see that although foreign parties make up only a tiny percentage of both types of litigation in China, foreign parties still make up a statistically significantly larger share of civil litigation.

**Table 4: Foreign Involvement in Administrative vs. Contract Cases**

<table>
<thead>
<tr>
<th># of Observations</th>
<th>Mean</th>
<th>Standard Error</th>
<th>Standard Deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage of Contract Cases Litigated by Foreign Firms</td>
<td>10</td>
<td>0.32%</td>
<td>0.06</td>
</tr>
<tr>
<td>Percentage of Administrative Cases Litigated by Foreign Firms</td>
<td>10</td>
<td>0.17%</td>
<td>0.04</td>
</tr>
<tr>
<td>Difference</td>
<td></td>
<td>0.25%</td>
<td>0.07</td>
</tr>
</tbody>
</table>

### Assuming Equal Variance

<table>
<thead>
<tr>
<th>P Value</th>
<th>0.02</th>
<th>Assuming Unequal Variance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Degrees of Freedom</td>
<td>18</td>
<td>16.13*</td>
</tr>
</tbody>
</table>

*Satterthwaite's degrees of freedom test
An important further question remains to be considered, however. Are foreign firms in China much less willing to litigate against the state than their domestic counterparts? In general, both foreign and domestic firms are relatively reluctant to sue the state. Firms in both categories prefer to rely on connections with local governments and officials to resolve problems. Yet lawyers who represent domestic companies do not express the same degree of reservation about pursuing administrative litigation as do foreign lawyers who advise multinationals in China.

Turning again to a provincial statistical yearbook, this time from Hebei Province, it appears that while companies do not make up a majority of cases brought against the state, they do make up a large percentage. As Graph 1 shows, litigation brought by legal persons, as opposed to individuals, makes up a reasonably large and apparently increasing percentage of administrative cases.43 This data from Hebei suffers from two drawbacks, however. First, it only represents the subset of administrative cases in which the defendant actually mounted a legal defense (应诉). This happened in approximately 28% of cases in this sample. The sample may be biased therefore, depending on whether Hebei government departments are more likely to mount a defense when sued by legal persons rather than citizens.44 Second, there are types of legal persons other than companies that may be included in this category. Although this may be less of a concern for the general argument being made here since non-governmental organizations (NGOs) and other non-commercial organizations famously have trouble getting legal status in China and even when they do, they still often have difficulty having their standing recognized in administrative courts.45 It should be kept in mind that “99 percent of total registered enterprises”46 in China are small and medium enterprises which may not have achieved legal person status and, therefore, some administrative litigation undertaken by citizens in China today may be on behalf of relatively small firms.

43 Other sources have corroborated this data’s suggestion that companies make-up a large share of plaintiffs in administrative litigation. See: Peerenboom, China’s Long March, 478.
44 I have no particular reason to believe that this is the case.
45 Peerenboom, China’s Long March, 420.
While much of the quantitative data used in this section is perforce less than ideal, it does serve to corroborate the claim, already supported by received wisdom and my interviews, that foreign firms in China engage in relatively little administrative litigation.

**An Example**

To better understand why foreign companies and the Chinese and foreign law firms that represent them are reluctant to recommend litigation against the state, it is instructive to examine more closely one of the few examples of a non-IP foreign involved administrative case.

In the early 2000s, a foreign company’s joint venture with a Chinese firm had run into trouble with the customs department in a large Chinese port. A few million US dollars worth of product that the company had imported had gone missing in the port and was then sold on the local market. The joint venture requested an administrative review of the local customs agent’s

---

47 My data on this case is drawn from two separate interviews with lawyers who worked on the case. Interviews: HK01-FL, HK02-L.

48 The name of the firm, the nature of the product, the name of the city and the law firms are all intentionally omitted to protect the anonymity of my informants.
action which was conducted by the national customs agency since the port city’s customs was directly under their supervision.\(^{49}\) When the results of the review did not prove satisfactory, the joint venture approached the large multinational law firm that was its Hong Kong based counsel. The firm recommended three potential Chinese law firms in the port city to represent them in the matter and the joint venture chose the largest local law firm. Assisted by its Hong Kong counsel and represented in China by the local firm, the joint venture took the national customs department to administrative court.

Despite having devoted significant funds to legal fees, especially for the foreign law firm, the joint venture ultimately lost, both in the first instance and on appeal. As sometimes happens in Chinese administrative cases, the judge explained the political situation that would not allow him to rule for the plaintiff, “we cannot let you win this case, because this is linked to… [a large smuggling] case.”\(^{50}\) The officials in question in the administrative suit appeared to also be defendants in a large criminal smuggling case and apparently this made the joint venture’s lawsuit simply too hot for the administrative courts to handle. Additionally, since the case had already gone through the administrative review process and the decision was confirmed by national level customs, if the court found for the plaintiff it would be ruling against a national level department, something Chinese administrative courts are loath to do.

Something of a compromise was made. The joint-venture agreed not to pursue the case any further, and the customs department agreed not to take any action against the company in an apparently unrelated issue that was pending against the joint venture. This case displays many of the problems that are common among all kinds of administrative litigation in China. It also demonstrates that the problems faced by multinationals in China are not necessarily any different than those of any administrative plaintiff described in my dissertation. It seems unlikely that any domestic firm would have fared any better under the same circumstances.

**Helping or Hurting? Foreign Involvement**

Despite the admittedly numerous flaws in the operations of China’s administrative courts it is not immediately apparent just why multinationals engage in less administrative than civil litigation or why they engage in less administrative litigation than their domestic counterparts. In

\(^{49}\) For more on the administrative review system see: Peerenboom, *China’s Long March*, 417–9.

\(^{50}\) Interview: HK02-L.
this section, the goal is to show that multinationals, if anything, are in a stronger position in regard to administrative litigation than are their domestic counterparts.

The issue of how multinationals behave in China is made all the more complicated by the fact that many of them are not technically multinationals. In the early stages of China’s reform era, many foreign firms could only get access to China by setting up joint ventures with Chinese partners. By 1997 wholly-foreign-owned enterprises (WFOEs) had become the investment format of choice and more and more foreign investment has taken this form.\(^{51}\) New difficulties arise, however, from the Variable Interest Entity (VIE) or “Sina structure” that “has been used for years primarily to circumvent China’s rules that ban foreigners from investing in certain sectors such as internet and telecommunication.”\(^ {52}\) How joint ventures or VIEs deal with problems with the Chinese state may depend heavily on how their Chinese partners approach the problem.

For the most part, both foreign and domestic plaintiffs face the same problems that plague administrative litigation generally in China. Judges may be reluctant to take administrative cases because they are likely to be more difficult, controversial and time consuming.\(^ {53}\) The Supreme People’s Court (SPC) has in some instances issued decisions requiring lower courts not to hear certain kinds of cases.\(^ {54}\) The CCP, its representatives and actions may not be challenged in court. This is especially problematic because it can be difficult to differentiate party from state, and officials use this ambiguity to their advantage.\(^ {55}\) Only concrete government actions, not abstract decisions, may be pursued in the administrative legal system.\(^ {56}\) Furthermore, courts sometimes undermine plaintiffs’ right to sue by questioning

---


\(^ {53}\) Peerenboom, *China’s Long March*.


\(^ {55}\) O’Brien and Li, “Suing the Local State.”

whether they constitute “directly affected parties”\textsuperscript{57}. Even if a case is accepted, courts can be reluctant to upset the local governments that control their budgets or the local People’s Congresses that are largely responsible for appointing and dismissing judges.\textsuperscript{58} Legal consciousness among officials is low and many do not believe that they can or should be held responsible by courts. Consequently, they may refuse to show up in court and hide or destroy evidence.\textsuperscript{59} While the State Compensation Law has recently been amended to broaden standards for compensation, awards in the past have often been ridiculously small\textsuperscript{60} and the vast majority of administrative cases involve no compensation, not even to cover the victorious plaintiff’s legal fees.\textsuperscript{61} While the enforcement of administrative verdicts is probably substantially better than the enforcement of civil verdicts,\textsuperscript{62} receiving compensation or ensuring that the state complies with an administrative court’s verdict can sometimes prove problematic.\textsuperscript{63}

Despite these widely recognized problems with administrative litigation in China, the success rates, at least for cases accepted by courts\textsuperscript{64}, are reasonably good.\textsuperscript{65} I consider the success


\textsuperscript{58}Stanley B. Lubman, \textit{Bird in a Cage: Legal Reform in China After Mao} (Stanford, CA: Stanford University Press, 1999).

\textsuperscript{59}O’Brien and Li, “Suing the Local State.”

\textsuperscript{60}A amendment to the State Compensation law allowed compensation for mental anguish and suffering: Xinhua, “China Adopts Amended State Liability Compensation Law”, 2010, http://news.xinhuanet.com/english2010/china/2010-04/29/c_13272905.htm. This was prompted in part by a well-publicized example of how small awards can be: “Ma Dandan, from Jingyang county in Shaanxi province, demanded 5 million yuan (HK$5.68 million) in compensation after she was locked up for 15 days in January 2001 for "prostitution" - an ensuing check-up showed that the 19-year-old woman was still a virgin. Later, she was given 74.66 yuan [about $10] as compensation, but her claim for mental distress was rejected by a district court, triggering a national outcry over the disregard for the law.” Raymond Li, “State May Pay for Causing Distress,” \textit{South China Morning Post}, October 24, 2008, sec. News.

\textsuperscript{61}广东省高级人民法院编（Guangdong People’s High Court Editor），广东法院年鉴 (Guangdong Court Yearbook) (广东人民出版社. Guangdong People’s Press).

\textsuperscript{62}This was a point of agreement among almost all of my informants.


\textsuperscript{64}Since Chinese courts do not accept some cases, this biases the success rate by only considering stronger cases. Statistics on cases that are never accepted do not seem to be recorded, but a former administrative judge estimated these cases at around 10%. Interview: TJ04-P/J.

rates of administrative litigation extensively in the third chapter of my dissertation and estimate that they peaked at just under 45% in 1996, but have since fallen into the teens. While this may not sound inspiring, they still signal a reasonable chance of success, especially considering they are probably better than the odds of winning a suit against the governments of the United States, Taiwan or Japan.\(^{66}\)

There may be, however, areas in which foreign firms face advantages or disadvantages in administrative litigation. Indeed, even the simple involvement of a foreigner in any litigation in China already makes a case more sensitive. The added sensitivity of foreign participation may sometimes result in an otherwise banal case being rejected simply because judges may fear it is too sensitive to handle.\(^{67}\) Unlike judges in more independent judicial systems, Chinese judges may be penalized for what their superiors consider an “incorrect ruling” and the more sensitive or important the case, the more damaging the potential consequences for a judge. As we saw in the example of the customs case, suing a higher level of government can also increase the level of sensitivity. Multinationals are probably more likely to have disputes with higher-level administrative agencies than their domestic counterparts, and may therefore find administrative litigation to be more challenging for that reason.

On the other hand, multinationals do appear to have some advantages over their domestic counterparts. Foreign involved cases start one level higher up the judicial system than totally domestic litigation. For example, first instance cases that would normally be heard in a lower level court will start in an intermediate court. Because higher-level judges are usually better qualified and less prone to corruption and local protectionism, this can help foreign companies. Some informants suggested that courts would be more conscientious in cases involving foreign parties, perhaps being more polite and patient.\(^{68}\) Another suggested that they might receive favorable treatment in courts outside Beijing and Shanghai where foreign presence is rarer.\(^{69}\)

Multinationals should not be reluctant to litigate because they lack sufficient grounds for litigation. Because it is common for every department at every level to have different sets of regulations, lawyers experienced with administrative litigation are generally able to find

\(^{66}\) Peerenboom, *China’s Long March*, 400.
\(^{67}\) Interview: SH15S.
\(^{68}\) Interview BJ14-L, SH03-L.
\(^{69}\) Interview: SH05-L.
regulations on the basis of which to challenge dubious, or even typical, administrative actions. Additionally, this situation was improved by a regulation issued by the Supreme People’s Court (SPC) in 2002 that “allows parties, including foreign investors, to institute litigation in the courts to request judicial review of any "concrete" act of a government authority in connection with a WTO-related matter.” This should mean that multinationals in China have more of a basis from which to challenge administrative decisions.

Further assisting foreign parties in administrative litigation is the use of diplomatic pressure to resolve a dispute with the Chinese government. Embassies, chambers of commerce and other institutions from home countries can sometimes be mobilized to put pressure on the parts of the Chinese state, especially in bigger cases. This option can be utilized in conjunction with administrative litigation, although it is generally used as part of an alternative strategy of direct negotiation. While pressure through EU or American channels can be very effective, mobilizing the resources of a smaller ‘less-important’ country may not have much of an impact.

Ultimately, however, whether a party is foreign or domestic, much more likely to have an impact on a case are variables such as the professionalism of the relevant court and defendant department, the quality of the legal case, the quality of legal counsel, the sensitivity of the issue and the connections and stature of the two parties. As one Chinese lawyer put it: “why would the courts treat Chinese and foreign parties differently, because the color of their hair is different?”

Conceptions, Misconceptions and Missed Conceptions

As we have seen, Chinese administrative litigation is problematic at the best of times. Yet, the disadvantages suffered by foreign parties are probably more or less balanced by advantages. Why then are foreign firms still so reluctant to litigate? First, to a large extent the problem is simply one of perception. Foreigners generally see administrative litigation as hopeless, costly and dangerous to their relationship with the state. This perception is certainly not without basis, but it is in large part a product of the constant criticism leveled against the Chinese

---

70 Interview: NB09S.
72 Interview: SH03-L.
73 Interview: BJ15-FL.
74 Interview: SH08-L.
legal system. Since almost no foreign businessmen or lawyers have any actual experience with administrative litigation in China and they have little reason to doubt the received wisdom that administrative litigation is not worth considering.

A variety of voices from developed countries, especially politicians, the legal establishment and industry groups, frequently and loudly complain about insufficient rule of law in China. For example, the US Congressional-Executive Commission (CECC) on the People's Republic of China has the dual mission of monitoring human rights and rule of law in China, and publishes annual reports detailing its progress, regress and continuing deficiencies. Many, especially Chinese, authors have suggested that such points of view are far too normative and do not take into account cultural and other differences. Yet as I will show, this kind of rhetoric is problematic for two other reasons. First, constant criticism of the legal system and the prevailing wisdom that administrative litigation is a non-option dissuades multinationals from contributing to the PRC’s administrative legal system by engaging in it. Second, criticism of Chinese courts is at least somewhat hypocritical when it is used by multinationals and foreign law firms that not only would prefer to rely on extra-legal means to resolve problems but in many cases are also intentionally ignoring, skirting, or violating Chinese law, at least in spirit if not always in practice.

Even in civil disputes, multinationals tend to prefer arbitration over litigation, and this further dilutes their experience with, and perhaps appetite for, any type of litigation in China. Yet, what foreign firms are most concerned with in administrative cases is that a relatively direct and confrontational tactic such as litigation will be likely to sour their relationship with specific offices or units of the Chinese state that they can expect to encounter time and time again as they conduct business in China. Even if they were to win, both plaintiffs and lawyers fear that government departments would take revenge on them in another time and in another way. As we can see from the customs example, however, this is not necessarily the case. In that example, despite winning in both the first and second instance, the customs department still made an effort to bury the hatchet with the plaintiff.

One foreign lawyer with tremendous experience in China summed up his understanding of the prevailing view of administrative litigation in China as follows:

75 Interview: SH05-L.
76 Interviews: SH09-FL, SH14-L, SH06-FL, HK02-L, SH01-L.
“I’m afraid we all have the common wisdom of not challenging the administration unless there is a good combination of the elements below:
(1) The client is a very strong company which is willing to suffer heavy expenses and potential losses;
(2) The government organ is not very powerful (e.g. local government, marginal ministry not related to the business of the company, etc.);
(3) You have strong political backing of the home country government, trade organizations, etc.;
(4) You are supported by another competing Chinese government organ.
Even more important, if you have a case that could support an administrative lawsuit, then you are well advised to start by carrying out discreet negotiations with the relevant government organ. But be careful not to make the dispute public. The moment it becomes public, the government is likely to become less willing to give up.”77

Additionally, of the 13 lawyers at foreign firms in Hong Kong who responded to my e-mail inquiries, none were familiar with even a single case of their firm being involved in administrative litigation in the PRC; those who elaborated at all echoed the received wisdom that not only are companies unlikely to win, but that administrative litigation risks damaging a plaintiff’s relationship with the government.

Foreign executives, when dealing with the Chinese state, are unlikely to receive advice from individuals with experience in administrative litigation. Large multinationals often hire and receive their advice on dealing with the local state from government relations personnel, who are often former government officials. These “Local Government Relations staff will always want to resolve such disputes by negotiation. Even if higher up in the company others want to seek a review this will generally be rejected.”78 Even when multinationals do turn to lawyers for advice on dealing with local governments, they are unlikely to consult lawyers with experience in administrative litigation. As I show in Chapter 4 of my dissertation, the most successful and prolific administrative lawyers are those with close connections to the state. By contrast, lawyers who take significant numbers of economic cases and tend to represent large companies are actually less likely to have experience with administrative litigation than an average Chinese lawyer. Lawyers who do international commercial law and/or work at foreign law firms, and are therefore more likely to come in contact with foreign companies, do not see the need to cultivate

77 From an e-mail from informant BJ15-FL; some small changes have been made.
78 From an e-mail from informant HK03-L.
relationships with government officials which is the most distinguishing feature of active administrative litigators. This means that even though foreign companies would probably have little trouble finding the type of lawyer who might help them litigate administrative cases, they most probably would receive preliminary advice from a lawyer who may be skeptical or simply ignorant of the process of administrative litigation. These lawyers frequently mentioned their concern about the impact of administrative litigation on multinationals’ relationships with the state, whereas most frequent administrative litigators never mentioned such concerns.

**Alternatives to Litigation**

While multinationals and their legal representation tend to lack experience with and have misconceptions about, administrative litigation, they do have prodigious resources that can be mobilized to solve their disputes with the state by extra-legal means. In many cases foreign firms prefer to rely on their connections and/or to negotiate directly with the state because they expect, and often receive, special treatment that is at best informal and extralegal and at worst a violation of Chinese law.

One reason that foreign companies do not sue is that they have recourse to other means that would not be available to ordinary Chinese small or medium domestic enterprises, or in some cases even to large Chinese companies. Local government officials gunning for promotions not only want the investment that often comes with multinationals, but the prestige that accompanies a foreign presence. A Shanghai lawyer describes how she is able to negotiate with government departments on behalf of her clients. Generally, litigation never comes up, instead she suggests that “this company pays so much tax in your district, if you don’t fix this we will move.” This has worked because her clients tend to be large companies and it works even better if they are foreign ones. Another recourse that is available to foreign parties is to use diplomatic pressure to resolve a dispute with the Chinese government. Large multinationals may use their connections with high level officials in China and at home to further drum up personal and institutional support. Additionally, multinational institutions like the WTO may add further

---

79 Interviews: BJ14-L, SH03-L.
80 Interviews: SH01-L, SH05-L, SH09-FL, SH14-L, SH06-L, HK02-L, SH01-L.
81 Interviews: CS24S, BJ28S, NB01-L.
82 Interview: SH21S.
83 Interviews: WG02-FL, SH03-L.
support.\textsuperscript{84} Academics, lawyers,\textsuperscript{85} and business people sometimes argue that relying on connections, networks and relationships is an adaptation to a local culture of “\textit{guanxi [关系]}”, preferring informal relationships to a reliance on rules and formal institutions.\textsuperscript{86} Whatever truth there might be to these claims, it is exactly the kind of behavior that theories of legal convergence would expect foreign lawyers and business people to change rather than adopt.

Another alternative to litigation is to find a “business way” to work around problems with the state. For example, by cooperating with a Chinese company and using their license to enter into activities or areas for which official approval was not granted.\textsuperscript{87} These types of solutions, however, are sometimes of dubious legality. The structure of VIEs, for example, is intended as a method of circumventing Chinese regulations. While the Chinese state has yet to come after VIEs directly, if problems arise litigation is unlikely to be a good option “because those contracts [that make up a VIE] carry little legal weight, if any, in China.”\textsuperscript{88} Indeed, in some cases, foreign companies simply ignore Chinese law, and when a dispute arises they must resort to alternatives to litigation as they simply do not have a legal leg to stand on. While those that skirt them often perceive these laws as unfair, this behavior can hardly be considered to be contributing to the development of rule of law in China.

When multinationals are pursuing a strategy that is not particularly legal, they may not have any grounds for administrative litigation, but may find their clout nevertheless earns them ready solutions to such problems. In an admittedly extreme example, Carrefour, the world’s second-largest retailer, “opened 27 stores [in China] between 1996 and 2000, many of them technically illegal, since they were joint ventures with units of local governments that were not approved by the central government, as the law required. Opposition from domestic retailers was so fierce that the State Council, in early 2001, was forced to order the company to stop opening

\textsuperscript{84} Interview: BJ15-FL.
\textsuperscript{85} Interview: SH14-L.
\textsuperscript{87} Interview: BJ15-FL.
\textsuperscript{88} Shaw, Chow, and Wang, “China VIE Structure May Hold Hidden Risks.”
new outlets.”⁸⁹ After six months and a personal apology from the company’s Chief Executive, however, Carrefour received permission to open 5 new purchasing centers⁹⁰ and opened 8 new stores in 2002.⁹¹ When foreign firms receive such preferential treatment it is little wonder they do not resort to China’s flawed legal system.

**Conclusion**

Multinationals are not having the positive impact on China’s legal system that they could because they prefer extra-legal solutions that they regard as less risky. I do not wish to suggest these individuals, be they lawyers, businessmen, or others, are negligent or dishonest when they decline to sue the Chinese state. They are following the common wisdom that is shared by their colleagues and taking the action they think is in the best interest of their clients or shareholders. Nor would it be fair to conclude that foreign participation in China’s legal system and markets has resulted in no progress towards legal convergence or the development of rule of law in China. The example of Beijing’s IP chamber shows that multinationals are willing to sue the Chinese state when they are comfortable that the system is sufficiently developed and they do not fear reprisals. If the Chinese state devoted more resources towards improving its courts and allowing them greater independence, multinationals would almost certainly be more willing to use them. At the same time, however, it is clear that foreign firms and governments, and multilateral institutions have not put the same pressure behind reforming other parts of the Chinese legal system.

My findings suggest the unsurprising conclusion that economic engagement is not a panacea when it comes to building the rule of law in an environment not very favorable to it. As with the IP Chamber of Beijing’s court, a combination of diplomatic pressure, multinational organizations and foreign firms can contribute to legal convergence. Yet, multinationals will only contribute to the development of best practice institutions when they follow best practices. The PRC has made this difficult by putting up barriers against the participation of foreign enterprises in many areas and then allowing extra-legal methods of subverting them. Multinationals and the law firms that advise and represent them are profit-driven entities and

---

⁹⁰ Mark O’Neill, “Punished Carrefour Forgiven,” *South China Morning Post* (Hong Kong, October 27, 2001).
⁹¹ O’Neill, “Retailers Under Siege with ‘Wolves’ at the Door.”
there is no reason they should act as “moral entrepreneurs” if the more profitable route is to take advantage of the system. If the developed world did become more serious about promoting rule of law in China, especially if multinationals shrugged off advice from Local Government Relations personnel and became willing to take the risk of suing the Chinese state, it might have a dramatic impact. The funds available to foreign NGOs promoting the rule of law in China, such as the Ford Foundation and the American Bar Foundation, pale in comparison to the legal budgets of multinationals. The resources that multinationals deploy so successfully in extra-legal channels could push China to improve its legal system.

Multinationals’ willingness to opt for extra-legal solutions plays into the hands of China’s authoritarian resilience. The PRC is able to build and maintain its legitimacy through investment that keeps its economy growing, and gives it greater status on the world stage and foreign acceptance. Even a few large administrative cases could help change this. Local Chinese governments turn thousands out of their homes with insufficient compensation and administrative courts are often unable to provide sufficient remedy. Yet Walmart and Carrefour could not be dismissed so easily and it might prove increasingly difficult to deny ordinary Chinese the same impartial justice that multinationals expect and receive in the intellectual property chamber of Beijing’s First Intermediate Court.
### Interviews in Order Cited

<table>
<thead>
<tr>
<th>Interview Code</th>
<th>Location</th>
<th>Time of Interview</th>
<th>Position</th>
<th>Random Sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>WG01-FL</td>
<td>Outside China</td>
<td>March 2011</td>
<td>Foreign lawyer at firm outside China but specializing in China IP</td>
<td>Yes</td>
</tr>
<tr>
<td>BJ07-PA</td>
<td>Beijing</td>
<td>March 2011</td>
<td>Patent agent at Chinese IP firm</td>
<td>No</td>
</tr>
<tr>
<td>SH04-PA</td>
<td>Shanghai</td>
<td>March 2011</td>
<td>Patent agent at Chinese IP firm</td>
<td>No</td>
</tr>
<tr>
<td>BJ03N</td>
<td>Beijing</td>
<td>July 2010</td>
<td>Chinese solo-practice lawyer</td>
<td>Yes</td>
</tr>
<tr>
<td>BJ15-FL</td>
<td>Beijing</td>
<td>March 2011</td>
<td>Foreign lawyer at Chinese firm</td>
<td>No</td>
</tr>
<tr>
<td>SH01-FL</td>
<td>Shanghai</td>
<td>March 2011</td>
<td>Chinese lawyer at Chinese firm</td>
<td>No</td>
</tr>
<tr>
<td>BJ10-PA</td>
<td>Beijing</td>
<td>March 2011</td>
<td>Patent agent (partner) at Chinese IP firm</td>
<td>No</td>
</tr>
<tr>
<td>SH04-PA</td>
<td>Shanghai</td>
<td>March 2011</td>
<td>Patent agent at Hong Kong IP firm</td>
<td>No</td>
</tr>
<tr>
<td>BJ06-L</td>
<td>Beijing</td>
<td>March 2011</td>
<td>Chinese lawyer at Chinese law firm specializing in IP</td>
<td>No</td>
</tr>
<tr>
<td>BJ09-L</td>
<td>Beijing</td>
<td>March 2011</td>
<td>Chinese “of counsel” lawyer at Chinese firm</td>
<td>No</td>
</tr>
<tr>
<td>WG02-FL</td>
<td>Outside China</td>
<td>August 2011</td>
<td>In-house Counsel for the Chinese branch of a large Multinational</td>
<td>No</td>
</tr>
<tr>
<td>LZ02-L</td>
<td>Lanzhou, Gansu</td>
<td>April 2010</td>
<td>Chinese lawyer at Chinese firm</td>
<td>No</td>
</tr>
<tr>
<td>SH05-L</td>
<td>Shanghai</td>
<td>March 2011</td>
<td>Chinese lawyer at foreign firm</td>
<td>No</td>
</tr>
<tr>
<td>SH03-L</td>
<td>Shanghai</td>
<td>March 2011</td>
<td>Chinese lawyer at Hong Kong IP firm</td>
<td>No</td>
</tr>
<tr>
<td>HK01-FL</td>
<td>Hong Kong</td>
<td>January 2011</td>
<td>Foreign lawyer at foreign firm</td>
<td>No</td>
</tr>
<tr>
<td>HK02-L</td>
<td>Hong Kong</td>
<td>June 2011</td>
<td>Chinese lawyer at foreign firm</td>
<td>No</td>
</tr>
<tr>
<td>BJ14-L</td>
<td>Beijing</td>
<td>March 2011</td>
<td>Chinese Lawyer at Chinese IP firm</td>
<td>No</td>
</tr>
<tr>
<td>SH15S</td>
<td>Shanghai</td>
<td>October 2010</td>
<td>Chinese partner at Chinese firm</td>
<td>Yes</td>
</tr>
<tr>
<td>NB09S</td>
<td>Ningbo, Zhejiang</td>
<td>August 2010</td>
<td>Chinese partner at Chinese firm</td>
<td>Yes</td>
</tr>
<tr>
<td>SH08-L</td>
<td>Shanghai</td>
<td>March 2011</td>
<td>Chinese partner at a Chinese firm.</td>
<td>No</td>
</tr>
<tr>
<td>HK03-L</td>
<td>Hong Kong</td>
<td>December 2011</td>
<td>Foreign lawyer previously at foreign firms on the mainland</td>
<td>No</td>
</tr>
<tr>
<td>SH09-FL</td>
<td>Shanghai</td>
<td>March 2011</td>
<td>Hong Kong lawyer at foreign firm</td>
<td>No</td>
</tr>
<tr>
<td>SH14-L</td>
<td>Shanghai</td>
<td>March 2011</td>
<td>Chinese Lawyer at foreign firm</td>
<td>No</td>
</tr>
<tr>
<td>SH06-FL</td>
<td>Shanghai</td>
<td>March 2011</td>
<td>Foreign lawyer at foreign firm</td>
<td>No</td>
</tr>
<tr>
<td>CS24S</td>
<td>Changsha, Hunan</td>
<td>December 2010</td>
<td>Director/partner at Chinese firm</td>
<td>Yes</td>
</tr>
<tr>
<td>NB01-L</td>
<td>Ningbo, Zhejiang</td>
<td>August 2010</td>
<td>Partner at Chinese firm</td>
<td>No</td>
</tr>
<tr>
<td>BJ28S</td>
<td>Beijing</td>
<td>October 2010</td>
<td>Law firm director / partner</td>
<td>Yes</td>
</tr>
<tr>
<td>SH21S</td>
<td>Shanghai</td>
<td>October 2010</td>
<td>Chinese Lawyer at Chinese firm</td>
<td>Yes</td>
</tr>
</tbody>
</table>

---

*92 Exact dates of interviews are omitted to better protect the anonymity of informants.*
Works Cited


Hebei Legal System Year Book Editorial Committee. 河北法制年鉴 (Hebei Legal System Year Book) Various Years. 中国法制出版社 (China Legal Publishing House).


广东省高级人民法院编 (Guangdong People’s High Court Editor). *广东法院年鉴* (Guangdong Court Yearbook). 广东人民出版社 (Guangdong People’s Press).