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CLASS ACTION MECHANISMS IN CHINESE AND TAIWANESE CONTEXTS—A MIXTURE OF PRIVATE AND PUBLIC LAW

*Jing-Huey Shao**

ABSTRACT

This Article provides an overview of the class action mechanisms of China and Taiwan, including an analysis of the legal and court systems and other institutions involved in the implementation. By examining representative cases and empirical evidence, this Article marks transitions between the introduction of a class action mechanism and its later transition.

There have been different approaches and attitudes toward class disputes in Chinese, Taiwanese, and Western legal systems due to the differences in governmental control and preferences for how such disputes should be solved. The melamine milk powder case is one of the best examples to illustrate the Chinese approach. This Article attempts to prove that there is another set of rules adopted by the Chinese government, which differs from those established by statute. On the other hand, Taiwan's novel attempt to use government-sanctioned organizations ("GSOs") as class action initiators is also comparatively new to the world. Even though GSOs have litigating advantages conferred by law, the effectiveness of GSOs is still limited due to a lack of resources and incentives exacerbated by insufficient funding. While they may have deficiencies in regard to rules or design, new approaches stemming from these two jurisdictions suggest other possibilities of addressing class disputes not only for civil law countries but also for common law countries.

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INTRODUCTION

Class actions originated from Anglo-American equity practice.¹ However, with the increase in collective disputes and mass torts in modern, industrialized China and Taiwan, these two jurisdictions have adopted class action mechanisms to deal with the pressing need for class dispute resolution. Due to China's status as one of the greatest economic entities in the world, its political and legal system has been a focal point for scholars of comparative law and politics. On the other hand, Taiwan, with its complicated political history with China and distinct democratic government, is an excellent comparator for how class action mechanisms function in a civil law country with a different political system. Studying the class action mechanisms of China and Taiwan provides an illustrative example of how different civil law states implement class action mechanisms, but commentators may question whether traditional civil law theories are suitable foundations for newly evolved class disputes. While the United States has been well-known for its numerous class action lawsuits associated with huge punitive damages,² different approaches have been applied in both China and Taiwan due to various factors.

This Article will first introduce representative cases in each jurisdiction, followed by a discussion of their respective class action mechanisms, including the legal system and other institutions involved in their implementation, from both substantive and procedural perspectives. Second, the actual practices and transitions of class action mechanisms will be reviewed, as well as their implications. By comparing cases in these jurisdictions, this Article aims to probe into the rationale behind differences and convergences in the general practice of class action mechanisms.

I. CHINA

China is one of the few jurisdictions to embrace class action mechanisms outside of the United States.³ By incorporating Article 55 into its Civil Procedure Law ("CPL") and stipulating the judicial procedures for class actions, China formally adopted a class action mechanism in 1991.⁴ There have

¹ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832–33 (1999).

² See generally Francis E. McGovern, *Punitive Damages and Class Actions*, 70 LA. L. REV. 435 (2010).

³ Shai Oster, *Major Lawsuit Won by Workers in Zhejiang*, CHINA LAB. BULL. (July 9, 2001), <http://www.china-labour.org.hk/en/node/2968>.

⁴ Zhonghua Renmin Gongheguo Minshi Susong Fa [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, art. 55), reprinted in THE CIVIL PROCEDURE LAW AND COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA 54 (Wei Luo ed., 2006)

been both Chinese and international scholarly works concerning the class action mechanism and its implementation in China.⁵ However, due to the lack of both overall statistical data and transparency in empirical information about the operation of the legal system, most of the literature has only analyzed this issue through the scattered cases that are available.⁶ This situation has presented difficulties in drawing a clear overview of the real practice of class actions mechanisms in China.

An unexpected nationwide tainted milk case after the Beijing Olympics in 2008 offered the best objective test of how class action mechanisms function in China. This case drew the world's attention because a number of infants died or became ill after consuming the products manufactured by the largest corporate milk powder group in China.⁷ Because the tragedy involved the health of their beloved babies, angry parents pursued every means available to fight for their children.⁸ Combining the tainted milk case with other class disputes, this Article discusses whether the tainted milk scandal was an exceptional Chinese case or whether it actually reflects the common practice of the class action mechanism in China.

("Where the subject matters of an action is under the same category and one of the parties has numerous litigants but the exact number of the litigants is uncertain when the lawsuit is filed, the people's court may issue a public notice to explain the nature of the case and the claims of the litigation and informing those interested persons who are entitled to the claim to register their rights with the people's court within a fixed period of time."). There were two amendments to the CPL in 2007 and 2012; the article number was changed to 54 in 2012. See *Civil Procedure Law of the People's Republic of China*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=6033> (last visited Mar. 1, 2014). For the purpose of precision, this Article refers to the version and CPL article number that each case applied or should have applied. However, the article number for the current version will be provided at the end of the footnote if it is not the most recent.

⁵ See generally Feng Chen & Xin Xu, "Active Judiciary": *Judicial Dismantling of Workers' Collective Action in China*, 67 CHINA J. 88 (2012); Note, *Class Action Litigation in China*, 111 HARV. L. REV. 1523 (1998).

⁶ See, e.g., *Class Action Litigation in China*, *supra* note 5, at 1523–24.

⁷ *Chinese Brand Sanlu, Tainted by Milk Scandal, Brings 7.3 Mln Yuan at Auction*, XINHUA: WINDOW OF CHINA (May 12, 2009, 6:49 PM), http://news.xinhuanet.com/english/2009-05/12/content_11360451.htm.

⁸ See Fang Yang, *China Court Accepts First Lawsuit over Melamine Tainted Milk*, XINHUA: WINDOW OF CHINA (Mar. 25, 2009, 7:48 PM), http://news.xinhuanet.com/english/2009-03/25/content_11072195.htm.

A. *Tainted Milk Case*

1. *Overview*

A five-month-old Chinese baby died after suffering from kidney failure caused by contaminated milk.⁹ He was believed to be the first casualty associated with consuming formula tainted with the industrial chemical melamine.¹⁰ In Guizhou Province, a mother said that her eighteen month-old baby was diagnosed as having double kidney stones.¹¹ The doctor simply told her that the baby “should drink more water.”¹² However, at the time of her interview, her baby was still sick.¹³ These two babies both consumed milk powder from the Sanlu Group in China.¹⁴ Before the melamine scandal broke out in September 2008, Sanlu had been a leading company in China’s milk powder industry.¹⁵

The tainted milk powder caused six deaths, and 300,000 children contracted diseases, including kidney stones and kidney failure.¹⁶ Sanlu and twenty-one other dairy companies contributed one million yuan¹⁷ to a compensation fund by borrowing 902 million yuan.¹⁸ The fund offered 200,000 yuan to families whose children died and 30,000 yuan for serious illnesses such as kidney stones and acute kidney failure; 2,000 yuan was offered for victims in less severe cases.¹⁹ Another 200 million yuan went to a foundation intended to cover the future medical expenses of victims.²⁰

⁹ Wang Guanqun, *Parents of Dead Child Accept Compensation After China Tainted Milk Scandal*, XINHUA: WINDOW OF CHINA (Jan. 16, 2009, 1:18 PM), http://news.xinhuanet.com/english/2009-01/16/content_10668505.htm (last visited Jan. 13, 2014).

¹⁰ *Id.*

¹¹ Liu Chin-tu & Lin Ying, *Parents of Tainted Milk Victims Refuse Compensation*, HK MING BAO [HK NEWSPAPER], (Jan. 26, 2009), available at World News Connection.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁵ *Chinese Brand Sanlu, Tainted by Milk Scandal, Brings 7.3 Mln Yuan at Auction*, *supra* note 7.

¹⁶ *Id.*; Guanqun, *supra* note 9.

¹⁷ At the time of this writing, the average exchange rate was 6.1 yuan to 1 USD. See *Official Exchange Rate (LCU per US\$ Period Average)*, WORLD BANK, <http://data.worldbank.org/indicator/PA.NUS.FCRF> (last visited Sept. 12, 2013) for continually updated data on official exchange rates.

¹⁸ Sun Yunlong, *Chinese Court to Sentence 21 Defendants over Tainted Milk Powder Scandal*, XINHUA: WINDOW OF CHINA (Jan. 22, 2009, 9:24 AM), http://news.xinhuanet.com/english/2009-01/22/content_10700333.htm.

¹⁹ Yang, *supra* note 8.

²⁰ See Lan Xinzhen, *Questioning Compensation: Transparent Management and Open Information Needed for the Fund Set Up to Compensate Victims of the 2008 Sanlu Milk Scandal*, XINHUA: WINDOW OF CHINA (June 27, 2011), http://www.bjreview.com.cn/health/txt/2011-06/27/content_371892.htm#.

According to the China Dairy Industry Association, around ninety percent of the victims' families have accepted this arrangement and been compensated.²¹ This includes the families of six dead children and 891 other infants who became seriously ill.²² Because of the tainted milk scandal, Sanlu filed a bankruptcy petition in the face of a 1.1 billion yuan debt in September 2008,²³ which was accepted by the bankruptcy court in December 2008.²⁴ In March 2009, Sanlu was declared insolvent.²⁵

2. *Legal and Political Efforts to Seek Justice*

For such a serious food safety and product liability case, why was there no initial lawsuit? In fact, cases were filed by the parents, but they were not accepted by the court until March 2009.²⁶ Soon after the scandal broke out in September 2008, parents in Guangdong Province filed a lawsuit against Sanlu and the China Dairy Industry Association with the Guangzhou Intermediate People's Court.²⁷ Also, the father of the first child who died after drinking tainted formula sued Sanlu in a Gansu court.²⁸ However, neither of the cases were accepted. Court officials declared, "too many children were affected nationwide in the scandal. Conditions were not ripe to accept the cases. We need more time to think it over."²⁹

Some lawyers organized a group providing pro bono services for the families of infants who consumed Sanlu's products.³⁰ At one time, the group contained 124 lawyers from twenty-two provinces.³¹ They primarily offered legal counseling for the victimized families and passed messages between the families and the government.³² However, some lawyers indicated that several

²¹ *China Dairy Association: 90% of Tainted Milk Victims Compensated*, XINHUA: WINDOW OF CHINA (Jan. 24, 2009, 12:50 AM), http://news.xinhuanet.com/english/2009-01/24/content_10710906.htm.

²² *Id.*

²³ Sun, *supra* note 18.

²⁴ *Court Says China Firm in Milk Scare Files for Bankruptcy*, BAY LEDGER NEWS ZONE (Dec. 23, 2008, 7:00 PM), http://www.blz.com/news/2008/12/24/Court_says_China_firm_milk_5853.html.

²⁵ See Yang, *supra* note 8.

²⁶ *Id.*

²⁷ Wang, *supra* note 9.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Xie Chuanjiao, *First Suit Filed Against Sanlu*, CHINA DAILY (Oct. 7, 2008, 7:40AM), http://www.chinadaily.com.cn/cndy/2008-10/07/content_7081446.htm.

³¹ *Id.*

³² *Id.*

officials from the judicial department pressured them to leave the pro bono service group.³³

Five parents of children sickened by the tainted milk even attempted to hold a press conference in January 2009, but were detained by the Chinese police to prevent them from doing so.³⁴ Several representatives of the victims' parents submitted a joint complaint letter signed by more than 600 parents to the Ministry of Health, the State Letters and Complaints Bureau, the China Dairy Products Association, and the China Consumer Council in the same month.³⁵ They expressed their refusal of the compensation proposal, demanding that authorities enhance scientific research on melamine and continue monitoring the health of the victims suffering from kidney stones.³⁶ The parents' representatives said that they would not take further action during the Chinese New Year, but hoped that the relevant government department would appropriately handle the parents' complaint.³⁷

Some parents were reluctant to accept the compensation package at the beginning, but have since been persuaded and changed their minds.³⁸ If they accepted, they were entitled to free medical treatment but had to give up suing Sanlu.³⁹ A lawyer working for a couple whose child was affected said that "legal procedures are too complicated for them, which made them decide to take the money."⁴⁰ The head of the Commercial Law Institute at Renmin University of China also commented that accepting compensation was a

³³ Chris Buckley, *China Milk Victim Lawyers Say Pressed to Quit*, REUTERS (Sept. 28, 2008, 5:02 AM), <http://www.reuters.com/article/2008/09/28/us-china-milk-law-idUSTRE48R0ZK20080928?sp=true>; *Hebei jin luishi zhu shouhaizhe suo chang, Beijing zu dunafen baodao* [Hebei Authorities Refrain Lawyers from Assisting Victim for Seeking Compensation; Beijing Authorities Blocked the News of Tainted Milk Powder], BOXUN (citing PINGGUO RIBAO [APPLE DAILY]), Sept. 24, 2008, <http://boxun.com/news/gb/china/2008/09/200809241208.shtml> (last visited Sept. 12, 2013).

³⁴ *See Parents of China Milk Scandal Victims Detained*, REUTERS (Jan. 2, 2009, 5:59 PM), <http://in.reuters.com/article/2009/01/02/idINIndia-37259720090102>. *China releases parents of melamine children: lawyer*, AFP, Jan. 2, 2009, http://www.google.com/hostednews/afp/article/ALeqM5iFjHMZ19ZyNyTKY_-QgFNpwBOPPA?hl=en (last visited Sept. 12, 2013); *Dunai shouhai jia shu beikouliu huohuoshi* [The Victimized Family Members Detained Were Released], SINCHOW WAN [SINCHOW NET] (Jan. 3, 2009), <http://news.sinchew.com.my/topic/node/66757> (last visited Sept. 12, 2013).

³⁵ Liu & Lin, *supra* note 11.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Wang, *supra* note 9.

³⁹ *Id.* Ng Tze-wei, *Pain Lingers from Melamine-Tainted Milk Scandal*, S. CHINA MORNING POST, Sept. 6, 2009, <http://www.scmp.com/article/691689/pain-lingers-melamine-tainted-milk-scandal> (last visited Sept. 10, 2013).

⁴⁰ Wang, *supra* note 9.

practical option for parents because it enabled quick payment to victims and avoided the high costs of legal procedures.⁴¹

After the work to compensate children suffering from melamine-tainted Sanlu milk powder had concluded in March 2009,⁴² Hebei Province finally accepted the first compensation lawsuit.⁴³ At the time of the report, only five cases were remaining that were accepted by the court.⁴⁴ Also, in late November 2009, the Shijiazhuang Intermediate Court ruled that the bankruptcy proceeding had ended.⁴⁵ This means that even if the families win the lawsuits, they will not obtain any compensation from Sanlu.⁴⁶

B. The Class Action Mechanism in China

1. The Governing Law and Relevant Interpretations of Class Action in China

Article 55 of the CPL provides the legal basis for Chinese class actions. It stipulates that when a case has numerous litigants, and the subject matter of an action is under the same category, the court may issue a public notice for interested persons to register their rights with the People's Court.⁴⁷ Before a case can qualify as a class action, it must be filed in conformity with the provisions of Article 108 of the CPL, which specifies the general requirements for filing a case.⁴⁸ When a People's Court receives a written motion of

⁴¹ *Id.*

⁴² *Compensation Work for China's Tainted Milk Victims Concluded*, XINHUA: WINDOW OF CHINA, (March 2, 2009), http://news.xinhuanet.com/english/2009-03/02/content_10930243.htm.

⁴³ *China Court Accepts First Lawsuit over Melamine Tainted Milk*, XINHUA: WINDOW OF CHINA (Mar. 25, 2009), http://news.xinhuanet.com/english/2009-03/25/content_11072195.htm.

⁴⁴ Chang Yi Li, *Salu Pochan Huaner Huopeiwuwan Baiyu Lushi Zu Tuan Yuanzhu* [Sanlu Victimized Infants Have no Hope in Obtaining Compensation, More Than 100 Lawyers Will to Assistance], NFDAILY.CN (Dec. 3, 2009), http://china.nfdaily.cn/content/2009-12/03/content_6751774.htm.

⁴⁵ *Sanlu Pochanchengxu Zhongjie, Jinghou Jiang Buzai Peichang Huanzhe* [Sanlu's Bankruptcy Proceeding Ended. Sanlu Will Not Compensate the Victims Thereafter], SINA (Nov. 30, 2009), <http://news.sina.com/102-101-101-101/2009-11-30/0103631168.html>.

⁴⁶ *Id.*

⁴⁷ *See* Civil Procedure Law, art. 55 (1991) (China).

⁴⁸ The following conditions must be met before a lawsuit is filed: (1) The plaintiff must be a citizen, legal person, or an organization having a direct interest with the case. (2) There must be a specific defendant. (3) There must be a concrete claim, a factual basis, and a cause for the lawsuit. (4) The lawsuit must be within the scope of civil lawsuits to be accepted by the People's Courts and within the jurisdiction of the People's Court to which the lawsuit is filed." *Id.* art. 119; "A motion of complaint shall clearly state the following items: (1) The name, sex, age, ethnicity, occupation, working unit, and address of parties or, if the parties are legal persons or organizations, their names and addresses and the names and positions of their legal representatives or principal leading personnel; (2)

complaint or an oral complaint that meets the requirements of a civil lawsuit, the court shall accept the case within seven days and notify the parties involved.⁴⁹ If the complaint does not meet the requirements, the court shall make a ruling to reject the complaint within seven days.⁵⁰ The rules for judicial mediation are also stipulated in the CPL, in which a mediation agreement must be based on consent of both parties without compulsion.⁵¹

In the *Tainted Milk Case*, the victims' parents, on behalf of their children, did try to assert their rights under the law.⁵² Some anxious parents even tried to file compensation claims individually.⁵³ However, none of these attempts were accepted by the courts or the government.⁵⁴ Instead, China adopted a different approach to handle this mass dispute. The authorities first rejected any form of lawsuits.⁵⁵ After coming up with a compensation plan, they persuaded most of the victims to accept the settlement.⁵⁶ It was not until seven months after the tainted milk case broke out that the courts accepted the first lawsuit.⁵⁷ It may not be surprising that gaps exist between the law and real practice in China,⁵⁸ and the extensive influence of the tainted milk case could be an excuse for the Chinese government to reject claimants utilizing a class action mechanism. However, if most other class disputes have actually followed a similar pattern, it implies that there might be some hurdles in applying class action mechanisms in the Chinese context, or even raises the question of whether the class action mechanism is compatible with the Chinese legal system.

The claims of the lawsuit and the facts and grounds on which the lawsuit is based; and (3) Evidence and its source, as well as the names and addresses of witnesses." *Id.* art. 121.

⁴⁹ "When a people's court receives a motion of complaint or an oral complaint and finds the complaint meets the requirements of a civil lawsuit after reviewing the complaint, the court shall accept the case within seven days and notify the parties involved; if the complaint does not meet the requirements of a civil lawsuit, the court shall, within seven days, make a ruling to reject the complaint. If the plaintiff does not agree with the ruling, he may appeal on the ruling." *Id.* art. 123.

⁵⁰ *Id.*

⁵¹ A "mediation agreement must be based on voluntariness of both parties, and shall not be reached through compulsion. The content of the mediation agreement may not contravene the law." *Id.* art. 96.

⁵² Wang, *supra* note 9.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Traci Daffer, *I Am Fighting for the Right to Eat, and I Will Keep Fighting. The Truth Is on Our Side*: *Class Action Litigation as a Means of Enacting Social Change in China*, 75 UMKC L.REV. 227(2006) (citing Wenhai Cai, *Private Securities Litigation in China: Of Prominence and Problems*, 13 COLUM. J. ASIAN L. 135, 150 (1999)).

C. Early Cases

Before the class action mechanism was officially implemented in China, there were several class disputes addressed in an approach similar to class actions.⁵⁹ The reason for adopting the class action-like approach was the government's attention after such cases were publicized and the need to handle them as soon as possible.⁶⁰ One of the most representative cases was about farmers suing the local seeds company in Sichuan for breach of contracts in 1983.

The 1569 rice-seed farmers, represented by eight farmers, sued the seeds company of Anyue in Sichuan for breach of seeds contracts and its unlawful change of the purchase price of seeds via administrative decree on behalf of the county government.⁶¹ Mass publicity by the media drew the attention of both the central and the local governments.⁶² Even though China's civil procedure law did not allow for such group suits at that time due to fear of unrest, the government supported local courts in handling the cases efficiently by trying them together rather than individually.⁶³ The case was eventually resolved via the court's mediation, with farmers being awarded with compensation.⁶⁴ In the following years, the courts across the nation continued to hear some class dispute cases.⁶⁵ Some cases even involved local governments bringing suits on behalf of the harmed parties.⁶⁶ These experiences, coupled with academics' advocacy, resulted in China formally incorporating class-action suits in the CPL in 1991.

⁵⁹ Xue Yonghui, *Qunti jiufen yu qunti susong yanjiu* [Research on Group Disputes and Group Actions] 197 (2009).

⁶⁰ *Id.*

⁶¹ *Anlexian Yuanbaxiang Nulixiang Yiqian Wu Bai Liushijiu Hu Daozhong Jingyinghu Yu Anlexian Zhong Zi Gongsu Shuidao Zhizhong Gouxiao Hetong Jiufen An* [Case of Dispute over Contract of Sale of Rice Seeds Between 1569 Rice-seeds Growing Farmers in the Villages of Yuanba and Nule, Anyue County and the Seeds Company of Anyue County] (Anyue Cnty. People's Ct. 1985) (China Law Info).

⁶² Xue, *supra* note 59, at 198.

⁶³ *See id.*

⁶⁴ *Anlexian Yuanbaxiang Nulixiang Yiqian Wu Bai Liushijiu Hu Daozhong Jingyinghu Yu Anlexian Zhong Zi Gongsu Shuidao Zhizhong Gouxiao Hetong Jiufen An*, *supra* note 61.

⁶⁵ Xue, *supra* note 59, at 198.

⁶⁶ *Class Action Litigation in China*, *supra* note 5, at 1526 n.21.

D. Recent Cases

After the 1990s, class disputes increased in number⁶⁷ and complexity.⁶⁸ Courts in different areas have different concentrations of class disputes. For example, the Haiko Intermediate Court has heard class action cases related to securities, real estate, eminent domain, labor disputes, and tour services.⁶⁹ On the other hand, the cases filed with Hebei courts have mostly been about rural land contracting, eminent domain, rural collective economy distribution, labor disputes, and environmental cases.⁷⁰ Most of the cases introduced in this Article qualified as class action suits in theory. However, many of them were eventually rejected by the courts, settled, or mediated before any class action procedures were applied. In some situations, the claimants were asked to file claims separately. At most, some fortunate cases may have been considered as joinder claims, but still, they have not been treated as class action suits.

E. Mass Tort Class Action Cases

Besides the tainted milk cases, there have been some mass tort cases in China that are qualified as class actions and could have utilized class action mechanisms. For example, 1721 residents in Xiping, Fujian Province, sued a chemical factory for pollution.⁷¹ The courts did not accept the case as a class action, but as a joinder claim.⁷² Through the support of the Center for Legal Assistance to Pollution Victims, the residents won the preliminary case against the chemical factory, in which the court only ruled that the defendants should cease from polluting but did not address the compensation issue.⁷³ Another case involved 120 patients in Guangzhou suing a hospital for malpractice by its medical professionals.⁷⁴ This case was also accepted as a joinder claim and not as a class action case.⁷⁵ The lawsuit is allegedly under hearing,⁷⁶ but no further information is available as of this writing.

⁶⁷ See *id.* at 1531.

⁶⁸ See Xue, *supra* note 59, at 166.

⁶⁹ *Id.* at 151.

⁷⁰ *Id.*

⁷¹ See Shai Oster & Mei Fong, *In Booming China, a Doctor Battles a Polluting Factory*, PULITZER (June 19, 2006), <http://www.pulitzer.org/archives/7144>; see also Li Yucheng, *Li Yun: In Order to Clear Streams and Protests in Media*, HK (Mar. 3, 2008), <http://www.inmediahk.net/node/100131>.

⁷² Oster & Fong, *supra* note 71.

⁷³ *Id.*

⁷⁴ *Guangdongshen Gongbu Duochi Wuran Xiaofezhe Shijian* [*Toxic Consumer Release More Pollution in Guangdong Province*], XINHUA: WINDOW OF CHINA (Mar. 13, 2001), <http://www.people.com.cn/BIG5/huanbao/56/20010313/416248.html>.

⁷⁵ *Id.*

F. Securities Class Disputes

Securities class disputes are often addressed in a special law regime in many countries in the world. China is no exception. The Chinese government has paid extra attention to this area because the nature of the cases usually involves a large number of investors and often relates to foreign investments. The Supreme People's Court ("SPC") has issued several notices or provisions instructing lower courts on how to handle this type of case. These instructions provide another example of China's attitude toward solving consumer class disputes and how it addresses this type of issue.

In 2001, for the first time, the SPC addressed the issue of securities disputes.⁷⁷ The SPC not only recognized that many problems, such as insider trading and frauds, have emerged in China's developing capital market, but also admitted that limitations in legislative and judicial conditions have made it inappropriate to accept or to try relevant cases.⁷⁸ Therefore, the Notice of the Supreme People's Court on Refusing to Accept Civil Compensation Cases Involving Securities for the Time Being ("RAC") specified that civil compensation cases caused by the acts mentioned above shall be denied temporarily.⁷⁹ The stated reason was that safe and healthy development of the capital market should be normalized step by step.⁸⁰

This situation did not change until the SPC issued another notice in 2002—the Notice of the Supreme People's Court on the Relevant Issues concerning the Acceptance of Cases of Disputes over Civil Tort Arising from False

⁷⁶ *Id.*

⁷⁷ Michael Palmer & Chao Xi, *China*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 270, 275 (2009).

⁷⁸ The capital market of our country has been in the phase of normalization and development and many problems have emerged, such as insider trading, frauds, rigging the market and other acts. These acts have damaged the fairness of the securities exchanges, infringed upon the legal rights and interests of the investors, affected the safe and healthy development of the capital market, and shall be normalized step by step. At the present, these new situations and new problems that deserve attention and study have emerged in the courtroom, but due to the limitation of the legislative and judicial conditions of the present time, it is not high time to accept and try this kind of cases. So it is decided after deliberation, the civil compensation cases caused by the acts mentioned above shall be denied temporarily.

Notice of the Supreme People's Court on Refusing to Accept Civil Compensation Cases Involving Securities for the Time Being (promulgated by the Supreme People's Court, Sept. 21, 2001) [hereinafter RAC].

⁷⁹ *Id.*

⁸⁰ *Id.*

Statement in the Securities Market (“RIA”).⁸¹ The notice allowed initiating a securities fraud case only when the cases have been investigated by the China Securities Regulatory Commission.⁸² The RIA also clearly prohibited the initiation of class actions,⁸³ and specified that Intermediate People’s Courts shall report to the SPC whenever they accept this type of case as a single or joint lawsuit.⁸⁴

In 2003, the SPC promulgated another Provision—Some Provisions of the Supreme People’s Court on Trying Cases of Civil Compensation Arising from False Statement in Securities Market (“FSS”).⁸⁵ Instead of loosening the restriction on the class actions, FSS now clearly stipulates that plaintiffs may file separate lawsuits or joinder claims,⁸⁶ and “the number of plaintiffs in a joint lawsuit shall be determined before the hearing.”⁸⁷ If the claims under the same factual basis have been filed separately, the courts can either inform the plaintiff who has filed an individual claim to participate in the joinder claim, or combine these separate claims into one joinder claim.⁸⁸ In short, the class action mechanism is still inhibited in securities fraud cases, since the most significant feature of the Chinese class action mechanism, the function of public notice by the court, was seized. The current practice reflects the fact that courts do not accept securities fraud cases as class actions due to the concern

⁸¹ Disputes over Civil Tort Arising from False Statement in the Securities Market (promulgated by the Supreme People’s Court, Jan. 15, 2002) (“In a case of civil compensation arising from false statement, which is accepted by the people’s court, the false statement must have been investigated by China Securities Regulatory Commission or its dispatched office, and an effective penalty decision shall have been made by it. Only when the party concerned files a civil lawsuit by deeming the investigation result as the factual basis may the people’s court accept this case in accordance with the law”) [hereinafter RIA].

⁸² *Id.*

⁸³ *Id.* (“With respect to a case of civil compensation arising from false statement, the people’s court shall accept it in the form of a single or joint lawsuit, not in the form of class action.”)

⁸⁴ *Id.* art. 6 (“A relevant intermediate People’s Court shall, within 3 days after receipt of such a case, report the information on the acceptance level by level to the Supreme People’s Court.”).

⁸⁵ Some Provisions of the Supreme People’s Court on Trying Cases of Civil Compensation Arising from False Statement in Securities Market, SUP. PEOPLE’S CT. (Feb. 1, 2003).

⁸⁶ *Id.* art. 13 (“Where more than one plaintiff bring lawsuits regarding the same false statement and against the same defendant, and there are separate lawsuit(s) and joint lawsuit, the People’s Court may notify the plaintiffs bringing separate lawsuit(s) to participate in the joint lawsuit. Where more than one plaintiff bring two or more joint lawsuits regarding the same false statement and against the same defendant, the People’s Court may combine them into one joint lawsuit.”).

⁸⁷ *Id.* art. 14 (“The number of plaintiffs in a joint lawsuit shall be determined before the opening of the court. If the number of plaintiffs is large, two to five litigation representatives may be selected, and each litigation representative may entrust one or two agents ad litem.”).

⁸⁸ *Id.* arts. 13–14.

that that the Chinese court system is not yet well developed to handle such large mass disputes.⁸⁹

The largest case in terms of the number of the plaintiffs and the claim amount was the Dongfang Electronics Corporation case filed with the Qingdao Intermediate People's Court in 2004.⁹⁰ This case involved 6989 investors, with a claim amount of 4.42 million yuan.⁹¹ Most of the investors settled via judicial mediation.⁹² The vice president of the SPC praised the Qingdao Intermediate Court's work: "This case involved nearly 7000 investors and [a] large amount of claims. The Qingdao Intermediate Court did a good job to end this case by judicial mediation. . . . This will not only protect the investors' interests, but will also ensure the stability and development of the state-owned company."⁹³

G. Consumer Class Actions

For consumer class disputes, in contrast to mass tort cases, it may not be economically rational to file a claim in which the expenses will exceed the recoverable compensation, except via class action mechanisms. However, a case that likely involves a large number of potential plaintiffs, with political or social sensitivity, is usually difficult to initiate as a class action suit, since it may go beyond the court's control.⁹⁴ The two cases filed against China Telecom⁹⁵ and other telecommunication companies provide the best examples of the class action mechanism applying. The first case was filed by Qinghua University students against China Telecom, Beijing Telecom, and Hubei Telecom in 1997 for twenty-three days of service disconnection without any advance notice. The twenty-two students, with the aid of the Beijing University

⁸⁹ RAC, *supra* note 78.

⁹⁰ *Gufenyouxiangongsi zhongda susong shijian jingzhan gonggao* [The Important Public Notice of Litigations], YanTai Dongfang DianZiXinXiChanYe [Dongfang Electronics Corporation] (May 21, 2009), <http://www.cninfo.com.cn/finalpage/2009-05-26/52849572.PDF> [hereinafter Dongfang Elec. Corp. Public Notice of Litigation].

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Zuigaofayuan fuyuanzhang Xi Xiao Ming dui Qingdao zhong yuan gong zuo zuo chu pi shi* [The Deputy of SPC Commented on Qingdao Intermediate Court's Work], QINGDAO FAYUAN WANG, May 22, 2009, <http://qdfy.chinacourt.org/public/detail.php?id=1651> (last visited Sept. 5, 2013).

⁹⁴ Xue Yonghui, *Qunti jiufen yu qunti susong yanjiu* [Research on Group Disputes and Group Actions] 227 (2009).

⁹⁵ *About Us*, CHINA TELECOM, <http://en.chinatelecom.com.cn/> (last visited Sept. 10, 2013) ("China Telecommunications Corporation (China Telecom) is an extra-large State-owned telecom operator in China, Global Partner of World Expo 2010 Shanghai, and was selected into the Top 500 Global Corporations for many consecutive years. China Telecom mainly provides the integrated information services including the fixed-line telephone, mobile service, Internet connection and applications services.").

pro bono legal service, filed the claim against the defendants.⁹⁶ The Beijing West District Court accepted the case under Article 55 of the CPL.⁹⁷ One of the claims raised by the plaintiffs was that the court should issue a public notice for potential plaintiffs to join the suit, so that the future judgment could be binding on those who register their rights with the court.⁹⁸ The defendants argued that: (1) this case should not apply the class action mechanism and it would be difficult to confirm the identity of each claimant who wished to register his or her right and to join the lawsuit;⁹⁹ and (2) using the class action mechanism in this case would cause chaos and impair social stability.¹⁰⁰ The court conducted a judicial mediation, but no consensus was reached by the parties.¹⁰¹ Thereafter, for over a year, the court postponed and did not hear the case for unknown reasons. Eventually, in April 1999, the final hearing ended with the defendants presenting their final argument: “China Telecom is the enterprise of the Chinese people.”¹⁰² The court neither addressed the plaintiffs’ claim about issuing a notice for potential plaintiffs to join the lawsuit, nor did it respond to this issue in any form.¹⁰³

The second case was filed by eighty-five consumers against China Telecom for the voidance of phone cards.¹⁰⁴ The Beijing First Intermediate People’s Court rejected this case as a class action based on the large number of plaintiffs, and the potential for every claim to involve different facts.¹⁰⁵ The court indicated that it would be difficult to determine the facts of every claim

⁹⁶ Wu Fei, *Cong Qinghua 200 ka anjian kan Zhongguo jituan su song* [Viewing Chinese Class Actions From the Qinghua 200 Card Case], 73 FASHANG YANJIU (LAW & COMMERCE RESEARCH) (1999).

⁹⁷ *Id.* The plaintiffs claimed that: (1) The defendants should guarantee their phone cards would function in all cities, and no more similar incidents would occur thereafter; (2) the defendants should explain to the consumers the reasons for this disconnection and apologize to the consumers for this error; (3) the defendants should reimburse plaintiffs for costs and expenses; and (4) the court should issue a public notice to let other potential plaintiffs register and join this class action so that the judgment of this case could apply to those who register their rights with the court. *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Wang Xiu Quan & Liu Wan Yong, *Qinghua xuesheng su Zhongguodianxin an 21 ri kaiting* [The Hearing of Qinghua Students Suing China Telecom Case on 21], BBS SHUI MU QING HUA ZHAN [Qinghua University Bulletin Board System] (Apr. 23, 1999), <http://www.newsmth.net/bbsanc.php?path=%2Fgroups%2Fliteral.faq%2FLaw%2Fold%2Fcase%2Fxsqsqgdx%2Fdianxin>.

¹⁰³ See Wu Fei, *supra* note 96.

¹⁰⁴ *Jituan susong zeng zhi 301 ren fayuan wei he bu shou li ci ka susong* [The Number of Claimants in the Phone-Card Class Action Has Gone to 301; Why the Court Did Not Accept the Case], ZHONG HUA WANG [ZHONG HUA NET] (Aug. 15, 2001, 9:25 AM), http://news.china.com/zh_cn/domestic/945/20010815/10080261.html.

¹⁰⁵ *Id.*

and hear the case on a timely basis.¹⁰⁶ Also, additional claims could be raised that would further complicate the case.¹⁰⁷ Therefore, the court held that this type of case should be divided and filed separately.¹⁰⁸ The plaintiffs appealed the Intermediate People's Court decision to the Beijing High People's Court.¹⁰⁹ Interestingly, while waiting for the Beijing High People's Court's decision, some of the plaintiffs decided to file separate claims with the Beijing West District Court.¹¹⁰ The attorney for the plaintiffs said, "We adopted this strategy because we've learned from repeated failures. By filing the cases separately, the court would have no reason to reject us again."¹¹¹ He also noted, "Dividing a case under the same factual basis and filing the suits separately with the courts will increase the court's work load by 200 times [many times]. However, we are still happy to do so, because this is the only way to protect the plaintiffs' rights according to the court's reasoning in rejecting class actions."¹¹²

At first, the Beijing High People's Court rejected the plaintiffs' appeal.¹¹³ However, due to pressure from media and the general public, after consulting with China Telecom, the High People's Court ruled that the Intermediate People's Court should not accept this case as a class action case.¹¹⁴ With no agreement reached in the mediation,¹¹⁵ the court ruled in favor of the defendant,¹¹⁶ and the eighty-five plaintiffs represented by Qing Tin, who had bought 4,660,000 yuan worth of phone cards, should bear the court fees.¹¹⁷

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Cika yonghu shi zhan dao di Zhongguodianxin jiang bei gao ji bai hui* [Consumers Determined to Continue Fight For Their Rights; China Telecom Will Be Sued Hundreds of Times], HE XUN WANG (Sept. 6, 2001, 10:59 AM), <http://www.liaohai.com.cn/liaohai/chinese/04/show.asp?i=219>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Cika yonghu zhuang gao Zhongguodianxin Gaoyuan zhong cai bu yu shouli* [Phone Card Users Sued China Telecom; the High Court Rejected the Appeal], ZHONG HUA WANG (Oct. 8, 2001, 5:00 PM), http://tech.china.com/zh_cn/news/tel/896/20011008/10121778.html.

¹¹⁴ *Id.*

¹¹⁵ Ma Dao, *Dianhua cika yonghu zhuang gao Zhongguodianxin Fayuan diaojie shibai* [Phone Card Users Sued China Telecom; The Judicial Mediation Failed], XINHUA: WINDOW OF CHINA (Mar. 21, 2002, 8:09 AM), http://news.xinhuanet.com/it/2002-03/21/content_325354.htm.

¹¹⁶ Li Xu & Niu Ai Min, *Zhongguo cika dianhua yonghu zhuang gao Zhongguodianxin baixu* [The Plaintiff Who Bought 466 Wan Yuan Phone Card Sued China Telecom and Lost], XINHUA: WINDOW OF CHINA (March 29, 2002, 6:20 PM), http://news.xinhuanet.com/newscenter/2002-03/29/content_337151.htm.

¹¹⁷ *Id.*

Another example was the case about the highway users suing the Northeast Expressway Corporation Heilongjiang Subsidiary for poor road conditions on the Hada Expressway (“Expressway”) and the unauthorized collection of toll fees.¹¹⁸ The attorney representing the highway users said that they filed the claim of 172 plaintiffs joining the lawsuit in August 2007.¹¹⁹ This case involved the rights of millions of highway users who use the Expressway.¹²⁰ However, according to the representative attorney, this case was not heard until ten months after filing, resulting in most plaintiffs giving up and withdrawing their claims.¹²¹ Only thirty-eight plaintiffs remained in the lawsuit, and thirty of them were lawyers.¹²² The publicity generated by this case drew the attention of Gai Ruyin, who served as the standing committee member of Heilongjiang Province and the secretary of the Daqing City Committee.¹²³ In a press conference held in May 2008, the vice president of the transportation department indicated that the Expressway was important infrastructure, and Gai Ruyin demanded that Expressway construction should be completed as soon as possible with guaranteed quality.¹²⁴ Eventually, both parties signed a settlement agreement through the mediation held by the Songbei Court.¹²⁵

Many other cases similar to the aforementioned ones¹²⁶ encountered court rejection for the reason of unsuitability for hearing as class actions.¹²⁷ The

¹¹⁸ *Zhiyi shoufeiquan 172 ming shiyongzhe zhuang gao Hadagaosu guanlizhe* [Questioning the Unauthorized Collection of Toll Fee, 172 Highway Users Sued the Business That Managed Hada Expressway], ZHONG GUO FA YUAN WANG [CHINA COURT WEB] (Sept. 3, 2007, 9:17 AM), http://www.chinacourt.org/public/detail.php?id=262742&k_title=哈大高速&k_content=哈大高速&k_author= Sep 3, 2007.

¹¹⁹ *Id.*

¹²⁰ Wang Song Yan, *Hadagaosu an susonglushi: Gai an guan hu bai wan xiaofeizhe quanyi* [The Attorney of Hada Expressway Case: This Is a Case Involving The Benefit of Millions of Users], DONGBEI WANG—HEILONGJIANG CHENBAO [DONGBEI NET—HEILONGJIANG MORNING POST] (Sept. 3, 2007, 5:53 AM), <http://heilongjiang.big5.dbw.cn/system/2007/09/03/050957862.shtml>.

¹²¹ Li Hai Tao & Qi Shu Xin, *38ming shimin yin zhiyi Hadagaosu shoufeiquan zhuang gao qi zhiguanjitan* [Thirty-Eight Citizens Who Questioned the Legality of Toll Fee of Hada Expressway Sued the Authorities], ZHONG GUO QING NIAN BAO [CHINA YOUTH DAILY] (Oct 10, 2008, 4:47 AM), <http://news.sina.com.cn/c/1/2008-10-10/044716427651.shtml>.

¹²² *Id.*

¹²³ *Hada Gaosugonglu zuori da xiu wan bi* [Hada Expressway Finished Recondition], DA QING WANG [DA QING NET] (July 21, 2009, 7:05 AM), http://www.dqdaily.com/dqw/xwzx/szxw/2009-07/21/content_136261.htm.

¹²⁴ *Id.*

¹²⁵ *Id.* The detail of the settlement is unavailable.

¹²⁶ Dai Duen Fong, *Gaoerbao Shi Jian Sho Hai Je Wei Chuan Jian Nan* [The Victims of Gaoerbao Case Are Having a Hard Time Asserting Their Rights], NANFANG ZHOUMO [NANFANG WEEKEND] (June 10, 2004), available at <http://bbs.703804.com/thread-1618-1-1.html> [hereinafter Case 1].

court rejected all the foregoing cases as class actions, except for the Qinghua students suing China Telecom. Although the court did accept the case under Article 55 of the CPL,¹²⁸ it did not utilize the court-approved public notice under Article 55.¹²⁹ Therefore, this case was essentially a joinder claim, where the number of the plaintiffs was ascertained before filing the lawsuit, given that the court issued no public notice, and no other potential plaintiffs joined the lawsuit.

H. The Underlying Rules of Chinese Class Actions

In addition to statutory law, another set of rules could be applied in the above-mentioned cases. Generally, resolving class disputes in China has entailed either the plaintiffs seeking justice through the courts or resorting to government or party organizations after disputes occur.¹³⁰ Plaintiffs continued

In this Article, Case 1 refers to when 1354 consumers sued a health food corporation for the ineffective product. *Id.* The court considered the “Gaoerbao case” to be unsuitable for acceptance as a joinder claim. *Id.* However, it was impractical for more than 1300 plaintiffs to file claims separately. *Id.* The victims had a hard time asserting their rights. *Id.*

Case 2 refers to when in August 1995, 580 consumers in Nanjing City sued a retailer for breach of contract. Zhu Yu Sheng & Zhang Ming Sheng, *Nanjing 580 ren jituan susong an shimo* [A Class Action Case Involving 580 People in Nanjing], ZHENG FU FA ZHI [GOVERNMENT LAW] 24, available at <http://www.cnki.net/> (China Academic Journals 中国期刊全文数据库 (CAJ)) [hereinafter Case 2].

Case 3 refers to the 1998 case where 1018 consumers sued a gas company for contract fraud in Nanjing. Teng Xiao Yang, *Guoneiz zuida de yichi jituan susongan* [The Largest Class Action Cases Nationwide], ZHENG FU FA ZHI [GOVERNMENT LAW] 17, available at <http://www.cnki.net/> (China Academic Journals 中国期刊全文数据库 (CAJ)) [hereinafter Case 3].

Case 4 refers to when in September 1995, 478 consumers in Nantong City, Jiangsu Province sued a motorcycle manufacturer and several retailers for their false advertisements and contract fraud. Shi Kai, *478 ming Xiaofeizhe zhuang gao 14 ge shangjia* [478 Consumers Sued 14 Businesses], CHINA MARKET 15, available at <http://www.cnki.net/> (China Academic Journals 中国期刊全文数据库 (CAJ)) [hereinafter Case 4].

Case 5 refers to the July 2006 case that People’s Court in Huanghua City accepted where 155 consumers sued a real estate developer for breach of contracts. Ding Jing Rei, *Woyuan shouli yiqi she fangdichan jituan susongan* [The Court Accepted a Class Action Involving Real Estate], PEOPLE’S COURT HUANGHUA CITY, <http://www.hhfy.gov.cn/detail/00000716/> (last visited Sept. 10, 2013) [hereinafter Case 5].

¹²⁷ *Id.*

¹²⁸ Wu Fei, *supra* note 96.

¹²⁹ *Id.*

¹³⁰ Oster, *supra* note 3; see also *Workers in PRC’s Zhejiang Province Seeks Compensation for Lung Disease*, XINHUA: WINDOW OF CHINA (May 8, 2001), available at <http://wnc.dialog.com/>. Victims and their families in the silicon dioxide workers’ compensation case visited the authorities of the city, province, and the central government. *Id.* Hence, the authorities put special notice on this case. *Id.* A group of twenty workers took their plea for justice to Beijing—the traditional final resort for peasants seeking justice. Police detained them for causing a disturbance, although officers took their petition and passed it on. *Id.* Eventually, the court heard the case and the chief judge of the Wenzhou Intermediate People’s Court in east China’s Zhejiang

to petition or visit higher authorities until they received some response to their requests.¹³¹ Publicity has been another way of drawing attention.¹³² After learning about a petition, the authorities may express a certain attitude about how to handle the matter.¹³³ If the government supports the use of a class action mechanism or some similar method, the courts will accept and hear the case.¹³⁴ The courts will report to the relevant authorities about the progress during the handling of the case,¹³⁵ sometimes even getting involved in the enforcement proceedings, for example by distributing compensation to the plaintiffs after the cases are decided.¹³⁶

Cases that would not harm “social stability” were more likely to be accepted as class actions. The term “social stability” has been extensively used by the Chinese Party-state as a requirement for a “harmonious society,” which the Party-state considers to be the nature of Chinese socialism.¹³⁷ Preserving social stability has also been emphasized as the first priority when the Chinese courts handle cases.¹³⁸ Therefore, the term “social stability” has usually been drawn from the courts’ reasoning when they reject a case as a class action.¹³⁹ Although there has been no further official or judicial explanation as to the

Province ruled that other farmers who did not join the lawsuit but were diagnosed with silicosis while working for the same employers were also eligible for compensation. *Id.*

¹³¹ Song Xiang Guo, *Dui yi jian 800 duo ming nongmin jituan susongan de sikao* [A Review of a Class Action Case of 800 Peasants], ZHENGFU FAZHI [GOVERNMENT LAW] 18, available at <http://www.cnki.net/> (China Academic Journals 中国期刊全文数据库 (CAJ)). In 1994, 800 peasants sued the county government and town committee for imposing taxes without a legal basis. *Id.* When their first attempt failed and they told the court officials that they rented several cars planning to visit Beijing, the court dissuaded the peasants from doing so and promised them the court would handle their case. *Id.*

¹³² Most of the cases in this paper were publicized through media to seek the attention of the relevant authorities and the public.

¹³³ See Dou Shi Chang et al., *Quanguo zueida de jituan Susongan shenzhishi mo* [The Course of the Largest Class Action Case in China], SHANDONG SHENPAN 43–45 (1996), available at <http://www.cnki.net/> (China Academic Journals 中国期刊全文数据库 (CAJ)). In June of 1996, 4707 peasants in Lingyi, Shandong Province sued an individual enterprise for breach of contract. *Id.* After the county committee and relevant leaders learned of this situation, they urged the court to accept the case as a class action. *Id.*

¹³⁴ *Id.*

¹³⁵ Wang Song Yan, *supra* note 120.

¹³⁶ Dou Shi Chang et al., *supra* note 133.

¹³⁷ *Zhong Gong Zhong Yang Guan Yu Jia Chiang Dang Zhi Zheng Nueng Li Jian Xe De Jue Ding* [The Decision of Central Authority About Enhancing the Ruling Party's Power], 4th Plenary Session of the 16th Central Committee of the Communist Party of China, RENMIN WAN [PEOPLE'S DAILY ONLINE] (Nov. 17, 2004, 6:56 PM), available at <http://www.people.com.cn/GB/40531/40746/2994977.html>.

¹³⁸ Xiao Yang, Supreme Court President, Address at the Second Plenary Session of the Ninth National People's Congress (Mar. 10, 1999), available at http://news.xinhuanet.com/ziliao/2004-10/20/content_2115434.htm.

¹³⁹ See *Jituan susong zeng zhi 301 ren fayuan wei he bu shou li ci ka susong* [The Number of Claimants in the Phone-Card Class Action Has Gone to 301: Why the Court Do Not Accept the Case], *supra* note 104.

meaning of social stability, based on the observation of the relevant cases, social stability seems to be highly related to the court's or the government's ability to control a case. Usually, a local case within a certain geographical area is more likely to be recognized as a class action suit, because the court or the government can exercise control over the potential claimants and have the capacity to deal with the case. There have been several types of cases handled as class actions, including breach of contracts,¹⁴⁰ contract frauds,¹⁴¹ workers' compensation,¹⁴² and rural disputes.¹⁴³ Most of these cases were addressed in the 1990s or early 2000s. After the 2000s, fewer benchmark cases have been handled by class action.¹⁴⁴

I. The Courts' Attitudes Toward Class Actions

While class disputes handled by class action mechanisms mostly existed in the 1990s,¹⁴⁵ more recent class disputes have not been treated the same. These disputes, such as securities fraud cases that the SPC prohibits the lower courts from accepting as class actions, or other types of cases with no class action instructions, have not been heard as class actions. This fact corresponds to some Chinese scholars' opinions about the significant change in court attitudes since the 1990s.¹⁴⁶ Most class actions in recent years have not been encouraged. The courts have either rejected the cases or asked the claimants to file claims separately due to the cases' "unsuitability" for the class action mechanism.¹⁴⁷ This reason mainly arose from the concern that too many plaintiffs joining the lawsuit would increase the complexity of the case and lead to possible delays.¹⁴⁸ Ironically, the courts have rejected the cases based on the very reason that the class action mechanism was established in the first place: "social stability."

The attitude of the Chinese courts is not difficult to surmise. One of the reasons is that the increase in the number of class disputes exceeds the courts'

¹⁴⁰ See Case 2, *supra* note 126.

¹⁴¹ *Id.*

¹⁴² See *Workers in PRC's Zhejiang Province Seeks Compensation for Lung Disease*, *supra* note 130.

¹⁴³ See Dou Shi Chang et al., *supra* note 133.

¹⁴⁴ See generally Xue, *supra* note 59.

¹⁴⁵ See generally *Id.*

¹⁴⁶ Dou Shi Chang et al., *supra* note 133, at 210.

¹⁴⁷ See *supra* notes 122–30 and accompanying text.

¹⁴⁸ See Fong, *supra* note 126.

capacity.¹⁴⁹ In a highly populated country such as China, disputes can often involve a large number of plaintiffs. According to some statistics, the number of lawsuits in China has increased in recent years.¹⁵⁰ Some Chinese judges and court clerks have admitted being worried that if they accept a certain case as a class action, other potential claimants will likely ask the court to apply the same mechanism as well.¹⁵¹ With limited resources, the courts prefer not to utilize class action mechanisms to avoid opening the door to all potential claimants. While Chinese courts sometimes accept cases that satisfy the requirements for joinder claims¹⁵² (where the number of the plaintiffs is determined), the courts prevent the use of the class action mechanism under Article 55 of the CPL, under which the requirement of public notice might bring more potential plaintiffs into the case. The judges' limited knowledge and experience is another reason for their reluctance to accept class action cases.¹⁵³ Some judges indicated that they have never handled class actions, nor have they heard of their colleagues having decided this type of case.¹⁵⁴

The most fundamental reason might be that the courts do not have the confidence and power to make important decisions. Class disputes usually involve a great number of individuals or public interests. With the Chinese people's growing rights-consciousness¹⁵⁵ and China's promotion of judicial reforms,¹⁵⁶ the Chinese have learned that the courts could potentially be another platform to assert people's rights. However, when deciding gigantic cases, the courts are under pressure from the authorities that control the

¹⁴⁹ *Class Action Litigation in China*, *supra* note 5, at 1525.

¹⁵⁰ *Id.* at 1531.

¹⁵¹ Xue, *supra* note 59, at 227.

¹⁵² Zhonghua Renmin Gongheguo Minshi Susong Fa [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, art. 54), *reprinted in* THE CIVIL PROCEDURE LAW AND COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA 54 (Wei Luo ed., 2006) ("A joint litigation in which one party has numerous litigants may be brought by the representatives elected by the litigants of the party. The act of litigation taken by these representatives shall bind all litigants of the party whom they represent. However, any substitution of representatives, relinquishing claims, acceptance of claims of the opposing party, or negotiating settlement shall be approved by the litigants of the party."). There were two amendments to the CPL in 2007 and 2012; the article number was changed to 53 in 2012. *See Civil Procedure Law of the People's Republic of China*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=6033> (last visited Mar. 1, 2014). (The article number was changed to 53 in 2012.).

¹⁵³ Stanley B. Lubman, *Dispute Resolution in China After Deng Xiaoping: "Mao and Mediation"* *Revisited*, 11 COLUM. J. ASIAN L. 229, 311 (1997).

¹⁵⁴ *Id.* at 311–13.

¹⁵⁵ Xue Yonghui, *supra* note 59, at 216.

¹⁵⁶ *Renmin Fayuan Dierge Wunian Gaige Gangyao* [*The Third Five-Year Reform Plan of the People's Courts (2009-2013)*], XINHUA: WINDOW OF CHINA (March 26, 2009), *available at* http://news.xinhuanet.com/legal/2009-03/26/content_11074127.htm.

finances and appointment of judges, as well as from media reports and popular protests.¹⁵⁷ To avoid this pressure, embarrassment, and responsibility, courts that lack actual independence tend to reject class action cases. They would prefer to leave the decisions to other party-state departments.¹⁵⁸

Another internal court document more vividly illustrates the courts' attitude toward class actions. Geigaofa Notice No. 180, issued by the Guangxi Autonomous Area High People's Court in 2003, specified thirteen types of cases that the court should not accept and hear.¹⁵⁹ The cases included collective financing disputes, direct marketing contract disputes, real estate disputes resulting from the government's administrative decisions, workers' compensation, securities cases, etc., which would most likely become class disputes.¹⁶⁰ This internal document was sharply criticized and opposed by many legal professionals and scholars after it was disclosed by the media.¹⁶¹ They believed that the court was avoiding risks and transferring potential conflicts to other government agencies, thereby depriving people of their litigation rights.¹⁶² Some scholars even pointed out that this type of "internal document" is actually the product of judicial institutions being transformed into administrative agencies.¹⁶³

The preface of Notice No. 180 explained the reason for its issuance. The court believed that these types of cases are extensive, sensitive, and highly publicized, and hence should be handled by the government or other agencies.¹⁶⁴ If these cases are accepted by the court, they may be postponed for a long time, resulting in the impairment of social stability and the image of the court's capability to enforce laws.¹⁶⁵ Some of the cases may even result in mass disturbances if the plaintiffs' claims cannot be fulfilled.¹⁶⁶ The Guangxi High Court judge who drafted the document indicated that it was done in

¹⁵⁷ Benjamin L. Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1 (2007).

¹⁵⁸ *See id.* at 28.

¹⁵⁹ Lou Chang Ping, *Guangxi fayuan weihe bushuuli 13lei an jian* (广西法院为何不受理 13 类案件) [Why Guang Xi Court Did Not Accept Thirteen Types of Cases], RENMIN WAN [PEOPLE DAILY ONLINE] (Aug. 12, 2004, 4:07 AM), <http://www.people.com.cn/GB/shehui/2702836.html>.

¹⁶⁰ *Id.*

¹⁶¹ Ge Mao Fei, *Neibo wenjian shi fayuan xinahenghua de chanwu* [Internal Document Is the Product of Courts Turning Administrative], RENMIN WAN [PEOPLE'S ONLINE DAILY] (Aug. 17, 2004, 1:12 PM), <http://www.people.com.cn/GB/guandian/1034/2716965.html>.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *See generally id.*

¹⁶⁵ *Id.*

¹⁶⁶ Ge Mao Fei, *supra* note 161.

accordance with relevant laws, the SPC's interpretations, and the spirit of the SPC's instructions with adjustment to account for the Guangxi area's special condition, but he could not provide the exact content of the laws or interpretations.¹⁶⁷ The vice president of the court also explained that the purpose of Notice No. 180 was to preserve social stability and protect the parties' interests.¹⁶⁸

Although the SPC's interpretations and instructions for this document are not available, a general idea can be inferred from similar documents. For example, an interpretation of the SPC in 1991 gave instructions as to whether the People's Court should accept cases involving collective financing disputes.¹⁶⁹ The SPC specified, "For this type of case, because the government and the relevant authorities have already exercised a great amount of effort, it would be unfavorable to the parties involved and inefficient to transfer the case to the courts to solve the problem."¹⁷⁰

It is again evident from these instructions that the Chinese courts do not welcome class actions. Chinese scholars have concluded that "the policy"¹⁷¹ of the courts to handle class disputes is that: "(1) They tend to reject cases if possible; (2) if there appears no proper reason to reject, they ask plaintiffs to file claims separately."¹⁷² Delay is sometimes another approach that courts adopt, because plaintiffs may give up suing. Claims that are eventually accepted or heard, such as joinder claims or class actions, are almost always so due to the support of the government party or agencies.¹⁷³ Therefore, rather than saying that the success of the class actions depends on the courts' attitude, it would be more accurate to conclude that the government's attitude takes priority.

¹⁶⁷ Luo, *supra* note 159.

¹⁶⁸ *See id.* ("It would be more favorable for these thirteen types of cases to be handled by the government or by the Communist Party. Because some of these cases have no governing laws, the courts would have difficulty in enforcing the judgments after the decisions were made, which might negatively impact social stability.").

¹⁶⁹ ECON. DIV., SUP. PEOPLE'S CT., ZUIGAO RENMIN FAYUAN JINGJI SHENPANTING GUANYU DUI NAN NING SHI JINLONG CHELIANG PEIJIANCHANG JI ZI JUFEN SHIFOU YOU RENMIN FAYUAN SHOULI WENTI DE DAFU (最高人民法院经济审判庭关于对南宁市金龙车辆配件厂集资纠纷是否由人民法院受理问题的答复) [THE REPLY FROM SUP. PEOPLE'S CT. TO NAN NING CITY ABOUT THE WHETHER PEOPLE'S COURT SHOULD HANDLE JINGLUNG FUND RAISING CLASS DISPUTES], reprinted in 新编中华人民共和国常用司法解释全书 [NEW JUDICIAL INTERPRETATION OF THE BOOK COMMON PEOPLE] 250 (China Legal Publ'g H., 5th Ed. 2004).

¹⁷⁰ *Id.*

¹⁷¹ Although they used the term "policy," there is no official documentary clearly establishing this point.

¹⁷² Xue, *supra* note 59, at 219.

¹⁷³ Liebman, *supra* note 157, at 39.

J. The Roles of Legal Professions and Nonprofit Institutions

The role of the courts in China is different from that in Western countries.¹⁷⁴ It has been considered inappropriate to “equat[e] Chinese courts with their Western counterparts.”¹⁷⁵ Due to their lack of independence, the courts have been minor actors in the Chinese state.¹⁷⁶ This viewpoint is well-demonstrated by class disputes. Just as Notice No. 180 indicated that class disputes should be handled by the government and other agencies,¹⁷⁷ it is apparent that the courts have avoided deciding on cases that involve large stakes, such as class disputes.

The role of Chinese courts in class actions does not come into play until they obtain support or instructions from the party-state. They hear class action cases depending on the party-state’s opinion; they ask for instruction.¹⁷⁸ As Liebman noted, Chinese courts are more similar to “a number of state bureaucracies with the power to resolve disputes.”¹⁷⁹ The purpose of the courts in hearing the case is to resolve a dispute as soon as possible,¹⁸⁰ instead of ensuring that every claimant’s right is fulfilled. They would prefer mediation or settlement that can avoid the appeal process or any further judicial proceedings. Hence, usually before or during the proceedings, the courts will either formally or informally invite the parties to join a mediation held by the court or encourage the parties to settle.¹⁸¹ After the court decides a case, the judges are often involved in the enforcement of the judgment¹⁸² to demonstrate their efforts in ending the dispute and to be praised by higher courts or government agencies.¹⁸³

Compared to the conservative and cautious attitude of the courts in utilizing the class action mechanism, Chinese lawyers have played a more creative role than expected in promoting class actions in China. They have helped their clients file class actions. If the cases are not accepted as class actions, their role

¹⁷⁴ *Id.* at 3.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 3–4.

¹⁷⁷ See Luo, *supra* note 159.

¹⁷⁸ See generally Liebman, *supra* note 157, at 1532.

¹⁷⁹ See *id.* at 3–4.

¹⁸⁰ *Id.* at 24.

¹⁸¹ See generally Dongfang Elec. Corp. Public Notice of Litigation, *supra* note 90.

¹⁸² See Dou, *supra* note 133.

¹⁸³ *Zuigaofayuan fuyuanzhang Xi Xiao Ming dui Qingdao zhong yuan gong zuo zuo chu pi shi* [The Deputy of SPC Commented on Qingdao Intermediate Court’s Work], *supra* note 93.

transforms into creatively helping the claimants file joinder claims,¹⁸⁴ such as replacing the role of courts by issuing public notices for potential claimants to join the suits before filing claims.¹⁸⁵ Even though it is still a “joinder claim” in theory, it has a similar feature and spirit to class actions, because potential plaintiffs informed by a lawyer-issued notice have an opportunity to join such lawsuits. In other situations, where the courts have indicated that only separate claims would be accepted, some lawyers have also filed separate claims in an attempt to seek justice for their clients.¹⁸⁶ In cases involving massive public interest, such as pollution cases, several nonprofit organizations or institutions have also provided legal aid to assist plaintiffs in asserting their rights.¹⁸⁷

K. Conclusions: China

The approach used by the Chinese government and the Chinese courts to handle the tainted milk case may have confused the world, especially because the country has the class action mechanism specified in its statutory framework. China apparently adopted another approach instead of applying the class action mechanism in the CPL. This Article attempts to explain why this phenomenon exists by describing the general actual practice of resolving class disputes in China.

China has experimented with its legal and judicial systems.¹⁸⁸ However, the class action mechanism seems to be incompatible. It has been a question of whether Chinese courts can play an effective role in a nondemocratic government system.¹⁸⁹ This question becomes more critical when taking class disputes into consideration. Having such a different approach and attitude toward class disputes may arise from the Chinese government’s desire for control, or it may be based on the goal of preserving social stability under Chinese socialism. No matter what the underlying reason, the purpose of the class action mechanism in China is actually more of a way of defusing potential unrest to avoid social disorder, rather than a legal mechanism generally accessible to the Chinese people to call for individual justice. As a commentator suggested, “[P]ermitting grievances to be raised through class

¹⁸⁴ See generally Dongfang Elec. Corp. Public Notice of Litigation, *supra* note 90.

¹⁸⁵ *Id.*

¹⁸⁶ *Cika yonghu shi zhan dao di Zhongguodianxin jiang bei gao ji bai hui* [Consumers Determined to Continue Fight For Their Rights; China Telecom Will Be Sued Hundreds of Times], *supra* note 109.

¹⁸⁷ See Oster & Fong, *supra* note 71.

¹⁸⁸ Liebman, *supra* note 157, at 31.

¹⁸⁹ *Id.* at 2.

actions . . . may be preferable to such complaints not being heard at all—or being raised on the streets.”¹⁹⁰ The introduction of the class action mechanism was originally intended to solve class disputes efficiently and counteract possible social disorder. When the Chinese people realized that this mechanism could also be used as a means to assert their rights, the Chinese government became concerned about the application of this mechanism, for fear of creating another source of disturbance.¹⁹¹ Therefore, while the class action mechanism was once open to Chinese people, it is no longer the same at present.

The use of the Chinese class action mechanism is more an exception rather than a generally accessible legal action. A comment from a Chinese law professor illustrates this phenomenon: “After learning [that] so many class dispute cases were rejected or divided into separate claims, I had no confidence in telling students whether the class action mechanism specified in the CPL actually functions or not.”¹⁹² Unless they obtain support from relevant authorities, the courts do not accept claims as class actions, even if the claims satisfy relevant requirements. The claimants’ claims have either been rejected or have had to be realized by being filed separately, which has not been economically rational. There appears to be substantial gaps between the statutory framework and the real practice of the Chinese class action mechanism.

However, with fundamental changes in Chinese society and the emerging “rights consciousness” of the Chinese people,¹⁹³ it may be questionable to what extent they can stand being enjoined from their rights to access the courts. Even though Chinese courts have modestly applied the class action mechanism, the Chinese people have unrelentingly tried to push its boundaries. Although sometimes they knew that their protests would be in vain, they still continued to fight for their rights. What the Qinghua University students demonstrated in the case against China Telecom offers the best illustration: “We did not take the settlement offer because we wanted China Telecom to examine their service and attitudes toward consumers.”¹⁹⁴ Their efforts might not have gained the result they desired in their case. However, they

¹⁹⁰ *Id.* at 39.

¹⁹¹ *Id.*

¹⁹² *Id.* at 214 (citing Fu Yu Lin, *Quntixing jiufen de sifajiuji* [The Judicial Relief for Class Disputes], available at <http://www.civillaw.com.cn/article/default.asp?id=19634> (last visited Sept. 11, 2013)).

¹⁹³ Lubman, *supra* note 153, at 297.

¹⁹⁴ See *Qinghua xuesheng su Zhongguodianxin an 21 ri kaiting* [The Hearing of Qinghua Students Suing China Telecom Case on 21], *supra* note 102.

successfully made their case heard by the government, the media, and legal professionals, focusing attention to their case and the class action mechanism in practice.

II. INTRODUCTION: TAIWAN

With certain similarities in early Chinese culture and history but distinctions in embracing democratic political systems, and the influence of Japanese colonization, Taiwan offers an excellent comparison of how class action mechanisms can evolve in different environments. Taiwan started applying class action mechanisms in several special law areas, such as consumer protection and investor protection in 1994. The general introduction of the class action mechanism was not incorporated into the Taiwan Code of Civil Procedure (“TCCP”) until 2001. Even though class action mechanisms are available to the public by statute, the number of class actions has been low.¹⁹⁵ By analyzing the law and empirical cases, this Article hopes to examine the reasons why class action mechanisms in Taiwan have not been substantially utilized.

A. *RCA Pollution and Occupational Injury Case by the LAF*

The Radio Corporation of America (“RCA”) case is one of the mass tort cases that best illustrate the features of class action practice in Taiwan. This case was about whether RCA had illegally disposed of toxic waste.¹⁹⁶ One former employee of the RCA factory recalled experiences: “No wonder those foreign supervisors all drank bottled water. Only we silly workers drank toxic water every day. We lived and ate inside the factory. Even the water for showers was poisonous.”¹⁹⁷ In 1960, RCA established factories in Taiwan as foreign investments flourished.¹⁹⁸ The company was allegedly pouring toxic waste and organic solvents that were internationally considered possible cancer-inducing toxins into illegally dug wells, polluting land and water resources.¹⁹⁹ Over 30,000 RCA ex-employees suffered from toxic chemical

¹⁹⁵ Liebman, *supra* note 157, at 34.

¹⁹⁶ Self-help Ass’n for RCA Emp. Suffering from Cancer & Taiwan Ass’n for Victims of Occupational Accidents & Diseases, *RCA—The Unacceptable Face of Capitalism in Taiwan*, 39 ASIAN LABOR UPDATE (Apr.–June 2001), available at http://www.amrc.org.hk/alu_article/occupational_health_and_safety/rca_the_unacceptable_face_of_capitalism_in_taiwan (last visited Jan. 26, 2014).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

poisoning as a result of drinking polluted underground water or inhaling the evaporated toxic gas.²⁰⁰ By mid-2001, 1059 people were suffering from cancer, 216 people had died from the disease, and 102 people had various kinds of tumors.²⁰¹ None of them had ever received any compensation for these occupationally related illnesses.²⁰²

The Self-help Association for RCA Employees Suffering from Cancer (“SHA”) was established in 1998.²⁰³ After numerous futile protests by the ex-employees, the SHA tried to bring a lawsuit against RCA and relevant companies.²⁰⁴ However, due to its lack of legal knowledge and experience, the SHA encountered various difficulties, one of which was the procedural hurdle of standing to sue. Because the SHA is not a legal person, it did not qualify as a plaintiff according to the old TCCP.²⁰⁵ After repeated failures, the SHA eventually sought help from the Legal Aid Foundation (“LAF”). The LAF organized a team of attorneys and a consulting team of specialists in different fields,²⁰⁶ representing the former RCA employees with a claim of NTD \$2.4 billion²⁰⁷ against RCA and related companies, including General Electric and Thomson.²⁰⁸ The litigation is still in progress as of this writing.²⁰⁹

The LAF was established to provide accessible legal services for disadvantaged groups.²¹⁰ Funded by the Judicial Yuan, the LAF began operations in 2004²¹¹ and currently has twenty-one branch offices throughout

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² FAFU NIANBAO [LAF’S ANNUAL REPORT OF YEAR 2008], <http://www.laf.org.tw/upload/20090714155839.pdf> (last visited May 1, 2014).

²⁰³ Self-help Ass’n, *supra* note 196.

²⁰⁴ *Id.*

²⁰⁵ See Injury Ass’n, *RCA shouhaizhe sifa diyizhan! Li ai gongren shoudu chutingzuo zheng* (RCA 受害者司法第一戰！罹癌工人首度出庭作證 RCA 毒害工人，受害者司法第一戰！) [The First Hearing of the RCA Case, The Ex-employee Who Suffered Cancer Testifies], Nov. 10, 2009, KU LAO WANG [SUFFERING EMPLOYEE’S NET] available at <http://www.cooloud.org.tw/node/48273> (last visited May 1, 2014).

²⁰⁶ *Id.*

²⁰⁷ The currency exchange rate as of January 26, 2014 was 30.25 New Taiwan Dollars to 1 USD.

²⁰⁸ Injury Ass’n., *supra* note 205.

²⁰⁹ *Id.*

²¹⁰ *About Us: Who We Are*, LEGAL AID FOUND., http://www.laf.org.tw/en/a1_1.php (last visited May 1, 2014).

²¹¹ *Id.* There were three organizations that promoted the formation of the LAF—the Judicial Reform Foundation, the Taipei Bar Association, and the Taiwan Association for Human Rights. *Id.* With the community efforts and the support of the Judicial Yuan, the Legal Aid Act was passed on December 23, 2003 and promulgated on January 7, 2004. *Id.*

Taiwan.²¹² The LAF's major mission is providing systematic assistance to those in need of professional legal assistance who have no ability to pay the court and legal fees.²¹³ One of the criteria for legal aid is that the applicant's monthly income is below the stipulated threshold,²¹⁴ which covers most socially and financially disadvantaged groups, such as blue-collar laborers, women, children, and indigenous people.²¹⁵

By providing extensive and diversified litigation services,²¹⁶ such as consultation, drafting, and representation for mediation and settlement,²¹⁷ ranging from civil and criminal to administrative cases, the LAF has a strong image of promoting the public interest.²¹⁸ As a semi-government association, the LAF participates in various official and unofficial projects²¹⁹ and accepts legal aid cases assigned by government agencies.²²⁰ All the coverage and regulations of legal aid have been specified in the Legal Aid Act (LAA).²²¹ For cases outside the LAF's scope but requiring legal aid just the same, the examining committee can approve aid through a resolution.²²² While the LAF has covered both litigation and nonlitigation, the expansion of services beyond the original scope has indicated the need for adjustments to the LAF's operational flow to fulfill all the tasks.

²¹² *Id.* There are branch offices in Taipei, Taichung, Tainan, Kaohsiung, Hualian, Taoyuan, Hsinchu, Changhua, Yilan, Taitung, Keelung, Miaoli, Nantou, Yunlin, Chiayi, Pingtung, Penghu, Kinman, Matsu, Banciao, and Shihlin. *Id.*

²¹³ *Id.* The provision of legal aid helps people in upholding their constitutionally protected right to access the court system. *See id.*

²¹⁴ Falu fuzhu fa [Legal Aids Act] (promulgated by Legislative Yuan, Jan. 7, 2004, effective June 20, 2004), art. 3 (Taiwan), reprinted in Legal Aids Act (Taiwan, 2004), <http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=A0030157> (last visited May 1, 2014) ("In this Act, . . . indigent persons refer to persons who qualify as being low-income household under the Social Assistance Act or whose monthly disposable income and assets are below the prescribed standard. The Foundation is responsible for issuing Resolutions to define the standard stated in this Article.").

²¹⁵ *About Us: Who We Are*, *supra* note 210.

²¹⁶ *About Us: Mission and Vision*, LEGAL AID FOUND., http://www.laf.org.tw/en/a1_2.php (last visited Sept. 12, 2013).

²¹⁷ *FAFU NIANBAO* [LAF's Annual Report of Year 2008], *supra* note 202.

²¹⁸ *See About Us: Mission and Vision*, *supra* note 216.

²¹⁹ *See FAFU NIANBAO* [LAF's Annual Report of Year 2008], *supra* note 202.

²²⁰ *See* Legal Aids Act, art. 5 ("[The LAF] handles the projects of legal aids commissioned by the governmental agencies or other groups").

²²¹ *Id.*

²²² *See* Legal Aids Act, art. 2 ("The term 'legal aids' as used in this Law refers to the following matters . . . other resolutions reached by the Foundation.").

B. *Civil Procedure Law in Taiwan*

Two types of mechanisms are closest to class actions in Taiwan. The first is that multiple claimants whose claims have “arisen from the same public nuisance, traffic accident, product defect, or the same transaction or occurrence of any kind,” which can appoint one or more representatives among themselves.²²³ With the motion or consent by the claimants and the court’s approval,²²⁴ the court can issue a public notice for potential claimants to join the action,²²⁵ as well as appoint an attorney as a representative.²²⁶ It is an opt-in design, which simplifies the filing procedure, since the claimants will not automatically be included in the lawsuit but will need further actions to join it. Except for the stated feature, this type of class action mechanism does not significantly differ from traditional joinder or intervention claims used for solving multiple-party disputes.²²⁷

The second type is that charitable associations or government-sanctioned organizations (“GSOs”) can bring lawsuits on behalf of their members or the general public.²²⁸ The inception of the implementation of this type of class

²²³ Taiwan Code of Civil Procedure, art. 44-2, JUDICIAL YUAN REPUBLIC OF CHINA (Jun. 25, 2003), available at <http://jirs.judicial.gov.tw/eng/FLAW/FLAWDAT0201.asp> (“When multiple parties, whose common interests have arisen from the same public nuisance, traffic accident, product defect, or the same transaction or occurrence of any kind, appoint one or more persons from themselves in accordance with the provision of Art. 41 to sue for the same category of legal claims, the court may, with the consent of the appointed party, or upon the original appointed party’s motion which the court considers appropriate, publish a notice to the effect that other persons with the same common interests may join the action by filing a pleading within a designated period of time Those persons so joining shall be deemed to have made the same appointment in accordance with the provisions of Art. 41.”).

²²⁴ *Id.*

²²⁵ *Id.* By filing a pleading within a designated period of time, those persons so joining are deemed to agree with the appointment of the representative. *Id.*

²²⁶ *See id.* art. 44-4. “When the court or the presiding judge has duly appointed an attorney to act as the special representative or advocate for a party, the compensation to be paid to such appointed attorney shall be determined in the discretion of the court or the presiding judge.” *Id.* art. 77-25 (. “[The compensation] shall be included as part of litigation expenses.”) *Id.*

²²⁷ *See* Taiwan Code of Civil Procedure, art. 44-2.

²²⁸ *See id.* art. 44-1 (“Multiple parties with common interests who are members of the same incorporated charitable association may, to the extent permitted by said association’s purpose as prescribed in its bylaws, appoint such association as an appointed party to sue on behalf of them.”); *see also* Consumer Protection Law (promulgated by Taiwan, Jan. 11, 1994, effective Jan. 13, 1994) art. 50, available at <http://law.moj.gov.tw/Eng/LawClass/LawSearchNo.aspx?PC=J0170001&DF=&SNo=50> (“Where numerous consumers are injured as the result of the same incident, a consumer protection group may take assignment of the rights of claims from 20 or more consumers and bring litigation in its own name. Consumers may revoke such assignment of the rights of claims before the close of oral arguments, in which case they shall notify the court.”); Securities Investor and Futures Trader Protection Act (promulgated by Taiwan, Jan. 17, 2002, effective Jan. 17, 2002) art. 28, available at <http://eng.selow.com.tw/FLAWDOC01.asp?lsid=FL007109&lno=34> (“For protection of

action was derived from specific areas of law, such as the Consumer Protection Act (“CPA”) and the Securities Investor and Futures Trader Protection Act (“IPA”). These GSOs usually provide efficient ways for potential plaintiffs to opt in to the class action. They also usually enjoy some advantages, such as discounts on court fees for bringing class actions and the security-free provisional seizure.²²⁹ With the introduction of the class action mechanism into the TCCP in 2003, the general guidelines of class action mechanisms have become broadly available, rather than being limited to special areas of law. However, cases initiated under the TCCP are still scarce.²³⁰

Being one of the civil law countries, Taiwanese law shows the influence of German and Japanese law.²³¹ When disputes occur, standing is the first issue that needs to be settled. Similar to the rules in most civil law countries, there are several types of standing that need to be strictly complied with to initiate a lawsuit. The typical requirement to sue on behalf of others is to acquire consent from the “real interested party,” unless otherwise specified.²³² The purpose of such rigorous control over the standing to sue is due to the concerns over the binding effect of *res judicata*, which is especially important when the judgment will bind other claimants who do not actually participate in the proceedings. The function of the screening of the standing at the beginning is to ensure the justifiable binding effect on the right parties.

the public interest, within the scope of this Act and its articles of incorporation, the protection institution may submit a matter to arbitration or institute an action in its own name with respect to a securities or futures matter arising from a single cause that is injurious to multiple securities investors or futures traders, after having been so empowered by not less than 20 securities investors or futures traders.”).

²²⁹ See Taiwan Code of Civil Procedure, *supra* note 222, art. 77-22 (“The appointed party who initiated an action in accordance with the provision of Art. 44-2 may temporarily be exempted from paying the portion of the court costs in excess of NTD 600,000 if the amount of court costs taxed is more than NTD 600,000. No court cost will be taxed on an action initiated in accordance with the provision of Art. 44-3.”); see also Securities Investor and Futures Trader Protection Act, art. 34, *supra* note 227 (“A court may rule that the protection institution’s application as referred to in the preceding paragraph be exempted from the requirement for provision of security.”).

²³⁰ Kuo-Chang Huang, *Collaborative Case Study Project on Global Class Action & Group Litigation*, Appendix III (2011).

²³¹ Kaun-Ling Shen & Alex, Yueh-Ping Yang, *Multi-Party Proceedings in Taiwan: Representatives and Group Actions*, GLOBAL CLASS ACTIONS EXCHANGE 4 (2007), globalclassactions.stanford.edu/content/multi-party-proceedings-taiwan-representative-and-group-actions (“Taiwan is a civil law system country, which may be observed from the facts that both the Taiwan Code of Civil Procedure and the Civil Code show the influence of German law”).

²³² This spirit is close to the idea of “adequate representation” in American legal theory. See FED. R. CIV. P. 23(a)(4) (“One or more members of a class may sue or be sued as representative parties on behalf of all members only if the representative parties will fairly and adequately protect the interests of the class.”).

C. Mass Tort Cases

Prior to the RCA case, a few mass tort cases also utilized class action mechanisms under special laws before the general mechanism became available. One such case involved the collapse of Doctor's Home. On September 21, 1999, a 7.6-Mw earthquake occurred in Jiji, Nantou County, Taiwan.²³³ The "921 earthquake," also known as the Jiji earthquake, caused 2405 deaths and 10,713 injured, and damage amounting to USD \$38 billion.²³⁴ Public anger began to mount over shoddy construction practices that were later proven to be responsible for the high number of casualties,²³⁵ including the actions of the architects and construction companies involved in the collapse of the residential community, Doctor's Home. The Consumer's Foundation, Chinese Taipei ("CFCT"), assisted by the bar association, was the GSO that represented the victims to negotiate with said parties, but no consensus was reached.²³⁶ After class actions were filed on behalf of the victims who resided in the collapsed buildings,²³⁷ negotiations resumed. The construction companies finally agreed to pay compensation for the deaths or personal injuries from the collapse of the buildings, but the parties still could not agree on property damage.²³⁸ In January 2002, the district court held that the construction companies and related parties should pay compensation and punitive damage three times the amount of the actual damages awarded.²³⁹ Due to the urgent financial needs of the victims, the CFCT again negotiated with the defendants and finally reached a settlement.²⁴⁰

Founded in 1980, CFCT is the oldest independent, nonprofit GSO that promotes and supports the consumer movement.²⁴¹ Because CFCT is less aligned with the government, it has been mostly funded by donations from the

²³³ *Devastating Earthquake Strikes Greece and Taiwan in September*, EARTHQUAKE ENGINEERING RES. INST. (Oct., 1999), available at https://www.eeri.org/lfe/pdf/Taiwan_ChiChi_Article_Oct99.pdf.

²³⁴ *Natural Disasters and Poor Countries: Jiji Earthquake (1999)*, ABC-CLIO: HISTORY AND THE HEADLINES, <http://www.historyandtheheadlines.abc-clio.com/ContentPages/ContentPage.aspx?entryId=1474192¤tSection=1473215&productid=29/> (last visited Jan. 16, 2014).

²³⁵ *Building Firms Under Investigation*, TAIPEI TIMES, (Sept. 26, 1999), <http://www.taipetimes.com/News/front/archives/1999/09/26/4034>.

²³⁶ "Boshi dejia" *Tuantisusong Yuanmanluomu* [Court Opinion of Doctor's Home], CONSUMERS' FOUND., CHINESE TAIPEI (Jan. 1, 1993), <http://www.consumers.org.tw/unit412.aspx?id=83>.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* The damage amount was: actual damage of NTD \$219,914,966 and a punitive damage of NTD \$659,744,898, which was NTD \$870,659,864 in total. *Id.*

²⁴⁰ *Id.* A settlement was reached among the all the parties by the amount of NTD \$281,733,450.

²⁴¹ *About Consumer's Foundation, Chinese Taipei*, CONSUMER'S FOUND., CHINESE TAIPEI, <http://www.consumers.org.tw/unit130.aspx> (last visited Sept. 12, 2013).

society at large.²⁴² According to the CPA, only GSOs can initiate class actions.²⁴³ Being the only one that has the ability to initiate lawsuits among accredited consumer protection organizations,²⁴⁴ CFCT surprisingly has no staff attorney of its own due to limited funding and has to resort to pro bono attorneys on a case-by-case basis.²⁴⁵ To respond to public expectations, the CFCT has to handle class actions in accordance with the following criteria, given such limited resources: whether a case (1) has serious deaths or injuries; (2) involves public interests; (3) arouses society's expectations; and (4) is feasible for filing a lawsuit.²⁴⁶

Mass tort cases can also be taken care of when government agencies get involved. The residents living in Mailiao having their rights supported by the local government is one example. Formosa Petrochemical Corporation's (FPC)²⁴⁷ Mailiao oil refinery's No. 6 Naphtha Cracking Project ("6-NCP") was Asia's fifth largest and Taiwan's largest refinery.²⁴⁸ After a massive series of

²⁴² See *Consumers Foundation Chinese Taipei*, CONSUMERSINTERNATIONAL.ORG (available at <http://www.consumersinternational.org/our-members/member-directory/Consumers%20Foundation%20Chinese%20Taipei>) (last visited Feb. 12, 2014) ("Consumers' Foundation, Chinese Taipei (CFCT) was founded in 1980. CFCT is an independent, non-profit organization. It is not aligned with or supported by any political party or industry."); Email from Ou Yang Li, Executive Secretary, CFCT, to Jing-Huey Shao (May 7, 2010, 4:32 PM) (on file with author).

²⁴³ Consumer Protection Law, *supra* note 228, art. 49 ("A consumers protection group, which has been established for more than 3 years after its approval, has obtained upon application a rating of excellence by the Consumer Protection Commission, maintains a special staff dealing with consumer protection, and meeting any of the following requirements, may, with the approval of the consumer ombudsman, bring in its own name an action for damages to consumers in accordance with Article 50.") Implicitly, only such consumer protection groups can bring class action lawsuits under the Act.

²⁴⁴ *Id.*

²⁴⁵ *Id.* ("If a consumer protection group brings litigation in accordance with the preceding paragraph, it shall retain a lawyer to litigate on its behalf. The engaged lawyer may request the reimbursement of any necessary expenses but not claim any compensation for such litigation."). Implicitly, if the Act allows consumer protection groups to hire lawyers on a case-by-case basis but does not provide that the CFCT will provide its full-time lawyers, it follows that it will only provide for pro-bono lawyers on a case by case basis. See also Shelly Shan, *Crisis-hit CFCT Receives NT\$210 Million in Donations*, CHINAPOST, Sept. 3, 2005, available at <http://www.chinapost.com.tw/business/asia/2005/09/03/67988/Crisis-hit-CFCT.html> (last visited Feb. 12, 2014) ("According to a CFCT statement, the foundation needs an estimated NT\$288.8 million to pay for overhead, including the costs of inspections, investigations, press conferences, educational activities and other administrative expenses. Lawyers doing pro-bono work and volunteers have helped CFCT save over NT\$400 million in overhead, the statement showed.")

²⁴⁶ *Id.*

²⁴⁷ *The Inception of the No. 6 Naphtha Cracking Project and Its Final Settlement in Mailiao*, FORMOSA PETROCHEMICAL CORP., <http://www.fpcc.com.tw/English/No.6/project%20inception.htm> (last visited Sept. 12, 2013).

²⁴⁸ *Taiwan*, MARCON INT'L, available at <http://www.marcon.com/index.cfm?SectionListsID=49&PageID=1723> (last visited Feb. 12, 2014) ("In 2007, Taiwan was the world's fifth-largest importer of liquefied

fires in the 6-NCP in July 2010,²⁴⁹ the FPC shut down the 6-NCP in Mailiao. However, the series of massive fires in a month in the Formosa facilities drew angry protests from local residents²⁵⁰ due to concern over suspected toxic fumes.²⁵¹ Although no injuries occurred in the incident, the smoldering 6-NCP produced a considerable amount of ashes, and moisture in the air was filled with chemicals produced by burning heavy oil.²⁵² The pollution may have impacted the aquaculture products grown by fish farmers in Yunlin, likely resulting in tremendous personal injuries and financial losses.²⁵³

The Yunlin county government has been supportive in this matter, establishing an information platform immediately after the 6-NCP accident and fully disclosing the handling process.²⁵⁴ In response to the resentment and diversified opinions among local residents, several mediation sessions were scheduled and township chiefs and representatives of the fishermen's and farmers' associations were invited to discuss the damage and proper claims.²⁵⁵ Additionally, a public dispute resolution procedure was held for urgent relief.²⁵⁶ After these efforts, the FPC agreed to pay NTD \$500 million to compensate local residents.²⁵⁷ Responding to the demands from the Yunlin county government, the FPC also paid for employment consultancy and cooperative programs to increase available jobs for local residents.²⁵⁸

natural gas."); Alex Pevzner, *Fire Shuts Formosa Petrochemical Refinery*, WALL ST. J., July 26, 2010, <http://online.wsj.com/article/SB10001424052748703995104575390310223268720.html> (last visited Sept. 12, 2013).

²⁴⁹ No. 6 Naphtha Cracking Project and Economic Development, INT'L ZINC ASS'N, (Apr. 2004) available at http://www.npc.com.tw/images_new_1/images_2013/No_6_Naphtha_Cracking_Project_Briefing_E.pdf.

²⁵⁰ Jonathan Standing & Rachel Lee, *Another Plant Fire Hits Taiwan's Formosa Petrochem*, REUTERS (OCT. 3, 2010), <http://www.reuters.com/article/2010/10/03/formosa-idUSTOE69200N20101003>.

²⁵¹ Grace Kuo, *Formosa Plastics Reaches Mailiao Settlement*, TAIWAN REV. (Sept 3, 2010), <http://taiwanreview.nat.gov.tw/ct.asp?xitem=116409&ctnode=205&mp=1>.

²⁵² Cai, Ying-Wen *Consoled Southern Aquaculture Farmers Suffered from the Sixth Naphtha Cracker Plant Fire; Magistrate Su Instructed to Assist Damage Claims*, SAFETY ISSUE FOR THE FORMOSA PLASTICS' PETROCHEMICAL CORP. (JULY 28, 2010), <http://fpcc.yunlin.gov.tw/eng/news/Details.aspx?Parser=9,14,25,,,97,,,2>.

²⁵³ *Id.*

²⁵⁴ *County Strives to Mediate 6-NCP Accident*, SAFETY ISSUE FOR THE FORMOSA PLASTICS' PETROCHEMICAL CORP. (Aug. 19, 2010), <http://fpcc.yunlin.gov.tw/eng/news/Details.aspx?Parser=9,14,25,,,115,,,1>.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *See id.*

²⁵⁸ *See Kuo, supra note 251.*

D. Securities Class Actions

Devising special arrangements for securities cases is especially necessary in Taiwan since its securities markets are dominated by individual investors who are usually economically and informationally inferior to securities firms or issuers.²⁵⁹ By offering consultation and mediation services regarding regular securities and futures trading disputes,²⁶⁰ the Investor Protection Center (“IPC”) is the most vibrant and powerful GSO in filing class actions in Taiwan. Numerous cases initiated by the IPC are available on record from its professional litigation team.²⁶¹ The IPC’s operation is funded by the Investor Compensation Fund (“ICF”), which is designed to compensate investors if a securities or commodities firm is unable to repay due to financial difficulties.²⁶² Donors include exchange companies and certain securities companies, some of which are required by the IPA to contribute each month to the fund.²⁶³

The Procomp Informatics (“Procomp”) case is one of the most well-known ones handled by the IPC. The chairperson and managers embellished the company’s financial statements to strengthen its listing application.²⁶⁴ After a successful listing, Procomp continued to fabricate and rationalize its financial statements by inappropriately allocating company funds, inventing sales records, and writing off Procomp’s account receivables.²⁶⁵ After this scandal broke out in 2004, 10,038 investors authorized the IPC to file a class action lawsuit for civil compensation, with a total claim amount of over NTD \$5.5

²⁵⁹ *Class-Action Litigation or Arbitration: Introduction*, SEC. & FUTURES INVESTORS PROT. CTR., <http://www.sfipc.org.tw/english/service/03-1.asp> (last visited Sept. 12, 2013).

²⁶⁰ Securities Investor and Futures Trader Protection Act, art. 22 (“When a civil dispute occurs between a securities investor or a futures trader and an issuer, a securities firm, a securities service enterprise, a futures commission merchant, the Stock Exchange, the GreTai Securities Market, a clearing institution or another interested party, where the dispute arises out of offerings, issuance, trading, futures transactions, or other securities-related matters, the securities investor or futures trader may apply to the protection institution for mediation. The protection institution may establish a mediation committee comprising 7 to 15 committee members to perform mediation. Regulations governing organization of the committee and mediation procedures shall be prescribed by the competent authority.”).

²⁶¹ *Winning Class Action Cases- Responsibilities of Board Members and Supervisors, Pamphlets*, SEC. & FUTURES INVESTORS PROT. CTR., http://www.sfipc.org.tw/english/ad_other_other/index.asp (last visited Sept. 12, 2013).

²⁶² *Id.*

²⁶³ *Id.*; see also Securities Investor and Futures Trader Protection Act, *supra* note 259, art. 18.

²⁶⁴ Shihlin District Court, Chin-No. 3, 2004, available at <http://jirs.judicial.gov.tw/Index.htm> (last visited Sept. 12, 2013).

²⁶⁵ *Id.* at 1; *Winning Cases: Class-Action Litigation or Arbitration*, SEC. & FUTURES INVESTORS PROT. CTR., <http://www.sfipc.org.tw/english/service/03-4.asp> (last visited May 1, 2014).

billion.²⁶⁶ The IPC even applied for provisional seizure of the Procomp shareholders' two office buildings, worth NTD \$20 billion, with no security required by the law.²⁶⁷ Eventually, the court held that Procomp, the chairperson, managers, board of directors, and supervisors should compensate the investors who suffered losses due to trading Procomp's stocks from its false financial reports from 1999 to 2004.²⁶⁸

E. Consumer Class Disputes

Consumer class actions usually do not capture as much attention as mass tort cases or securities class disputes. However, small claims filed on a large scale can aggregate and turn into a huge case. The major problem for the consumer class case is that individuals have no incentives to file separate claims when the costs are higher than the potential compensation. Except for securities cases that can be litigated by the IPC, consumer class cases often go to the CFCT. However, as aforementioned, not every class dispute will be handled by the CFCT due to its limited resources. The Alexander Health Club Group case was one of the few consumer class actions that have been handled by CFCT with support from government agencies. Once the leading Taiwanese chain of health clubs, founded in 1982, Alexander Health Club Group abruptly announced a suspension of operations in 2007²⁶⁹ due to a precipitous slide in annual revenues.²⁷⁰ The news stunned thousands of Alexander Health Club members and the public.²⁷¹

The day after Alexander's announcement, the Consumer Protection Commission ("CPC") invited officials and representatives of the Alexander Health Club Group,²⁷² as well as relevant agencies and financial institutions—

²⁶⁶ *Winning Cases: Class-Action Litigation or Arbitration*, *supra* note 265.

²⁶⁷ Securities Investor and Futures Trader Protection Act, *supra* note 228, art. 34. The provisional seizure was later appealed. See Joyce Huang, *CTV Appeals over Seizure*, TAIPEI TIMES (Nov. 17, 2004), <http://www.taipetimes.com/News/biz/archives/2004/11/17/2003211463>.

²⁶⁸ *Winning Class Action Cases- Responsibilities of Board Members and Supervisors*, *supra* note 261.

²⁶⁹ *The Startling Closure of Alexander Health Clubs*, TAIWAN PANORAMA (Jan. 2008), http://www.sino.gov.tw/en/show_issue.php?id=2008019701069E.TXT&table=2&cur_page=4&distype=text (last visited Sept. 12, 2013).

²⁷⁰ *Alexander Health Club Chain Shuts Down*, CHINA POST (Dec. 11, 2007), <http://www.chinapost.com.tw/news/2007/12/11/134370/Alexander-Health.htm>.

²⁷¹ *The Startling Closure of Alexander Health Clubs*, *supra* note 269.

²⁷² Alexander Health Club Group was absent in the meeting. *Agreement Reached on a Temporary Listing of Disputed Funds in Billing Related to the Alexander Health Clubs Case*, CONSUMER PROT. COMM'N (Dec. 13, 2007), http://www.cpc.ey.gov.tw/cpc_en/News_Content.aspx?n=F66FD3CFB8AED49D&sms=D5B062E5C3E2CFD2&s=9D94DB3CF4735CF0.

the Banking Bureau of the Financial Supervisory Commission (“FSC”), the Sports Affairs Council, the Ministry of Justice, the Investigation Bureau of the Ministry of Justice, the Bankers Association of the Republic of China, credit card-issuing banks, and billing banks—to discuss how to protect consumers’ rights in Alexander’s abrupt shut-down.²⁷³ Card-issuing banks and billing banks agreed to list the membership fees as disputed funds, which meant that the consumers were not required to pay.²⁷⁴ Consumers who applied for loans to join the Alexander Health Club could also ask for suspension of payment on the loans.²⁷⁵

In response to members’ requests for help to claim the fees they already paid, the CFCT filed a class action suit with help from pro bono outside counsels, the CPC, and the Taipei city government.²⁷⁶ The litigation is still in progress as of this writing.²⁷⁷

Compared to the consumers from the Alexander Health Club, Dell’s customers received comparatively less help in a series of mispricing incidents.²⁷⁸ The case was about Dell refusing to honor an online deal due to mispricing on its website. Dell sent out an email to all 26,000 of its customers, stating that it would only provide a “reasonable discount” for those who still liked its products.²⁷⁹ However, the consumers did not consider that Dell proposed the discount in good faith and hence complained to CPC.²⁸⁰

The CPC invited the CFCT, the Ministry of Economic Affairs and relevant government agencies, and academics to discuss the case.²⁸¹ They concluded

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ Xiaojihui, Xiaobaohui yu Taipei Shizhengfu Zhengshi Wei “Yalishanda” Shouhaizhe Tichu Tuantisong [CFCT, CPC and Taipei City Government Officially Filed Class Action Lawsuit for Victims of Alexander Case], CFCT, <http://www.consumers.org.tw/unit412.aspx?id=983> (last visited Sept. 12, 2013).

²⁷⁷ Yalishanda Tuantisong Jindu [The Progress of the Alexander Case], CFCT (July 29, 2010), <http://www.consumers.org.tw/unit211.aspx?id=199>; Lushi:Tuantisong Jiao Youli [The Lawyer Asserts that Group Litigations Are Favorable], UDN (Sept. 5, 2013), <http://udn.com/NEWS/SOCIETY/SOC6/8144210.shtml>. The case is still currently in the first instance in Taipei District Court. *Id.*

²⁷⁸ Jose Vilches, *Dell Accidentally Sells 19-Inch Monitors for \$15 in Taiwan*, TECHSPOT (July 1, 2009), <http://www.techspot.com/news/35297-dell-accidentally-sells-19-inch-monitors-for-15-in-taiwan.html>. Dell Taiwan posted a NTD \$4800 19-inch LCD monitor for NTD \$500. *Id.* Before Dell corrected the price, more than 26,000 people had ordered 140,000 monitors over eight hours. *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* Daier Cuobiaojiage Yinfa Baogou Shihjian [Dell Mispriced Incidents Causes Rush Buy], Executive Yuan, July 2, 2009, http://www.ey.gov.tw/News_Content4.aspx?n=E7E343F6009EC241&sms=E452EBB48FCCFD71&s=A9643F4822B1D1D6.

that pursuant to the CPA,²⁸² Dell should be responsible for these online orders. Therefore, the CPC demanded that Dell honor the mispriced products in a specified proportionate method²⁸³ and also suggested that the CFCT provide legal assistance to the consumers who purchased Dell products.²⁸⁴ Dell did not follow the CPC's advice; instead, it only offered coupons for consumers to purchase the products on its official website.²⁸⁵ Dell's mispricing snafu did not end there. Only three days after the notice on its official website about offering coupons for the mispriced products, another pricing error occurred.²⁸⁶ The Taipei City Government demanded that Dell should make improvements regarding this serious error, according to the CPA.²⁸⁷

Instead of filing class actions on behalf of consumers as in the Alexander case, here the CFCT only offered a template of the complaint pleading available on its website, free for customers to use, but did not represent the consumers.²⁸⁸ Several lawsuits by consumers were initiated.²⁸⁹ However, among the thirteen cases so far being decided and available on record, only

²⁸² *Id.* "Business operators shall ensure the accuracy of the contents of advertisements and their obligations to consumers shall not be less than what is stated in the advertisements." Consumer Protection Law, *supra* note 228, art. 22.

²⁸³ Su Wenbin, *Xiaobaohui: Daier Meibi Dingdan Yingyi Biaojia Chuhuo yi Tai* [CPC: Dell Should Honor One Item per Order], ITHOME (June 30, 2009), <http://www.ithome.com.tw/itadm/article.php?c=55759> (CPC's proposal was that the price should be adjusted according to the order sequence, e.g., the first order is eligible for the most discounted price and the last order should follow the original list price.).

²⁸⁴ *Daier Cuobiaojiage Yinfa Baogou Shihjian* [Dell Mispriced Incidents Causes Rush Buy], EXECUTIVE YUAN, July 2, 2009, http://www.ey.gov.tw/News_Content4.aspx?n=E7E343F6009EC241&sms=E452EBB48FCCFD71&s=A9643F4822B1D1D6.

²⁸⁵ *Daier Gongsì Shengminggao* [Announcement from Dell Corp.], DELL (July 3, 2009), [http://www.ap.dell.com/content/topics/topic.aspx/ap/topics/popup/zhtw/online_statement?c=tw&l=zh&cs=tw&hs1\(NTD\\$1000couponforthemonitorsandNTD\\$3000couponsforthelaptops\)](http://www.ap.dell.com/content/topics/topic.aspx/ap/topics/popup/zhtw/online_statement?c=tw&l=zh&cs=tw&hs1(NTD$1000couponforthemonitorsandNTD$3000couponsforthelaptops)).

²⁸⁶ Michele Masterson, *Dell's Double Doh! Mispriced Products Online—Again*, CRN (June 6, 2009), <http://www.crn.com/news/components-peripherals/218400506/dells-double-doh-mispriced-products-online-again.htm> (Dell's Latitude E4300 laptop that normally costs NTD \$60,900 displayed a slashed price of NTD \$18,500 for eight hours, netting orders for over 40,000 devices.).

²⁸⁷ See Hu Hua Tai, *Xiaofei Ding Xing Hua qi yue Tiao Kuan zhi Hang Zheng Gui Zhi* [The Administrative Approach for Consumer Form Contracts], 17 XIAOFEIZHE BAOHU YANJIU [Consumer Protection Research] 97, *supra* note 72, available at <http://www.cpc.ey.gov.tw/Upload/RelFile/1651/701854/bd660906-8f9f-46e1-9a29-60c7acfe089d.pdf> (last visited Sept. 12, 2013).

²⁸⁸ *Mei Shang Daier Gufen Youxiangongsi Xiaofeizhe Qing Zhu Yi* [A Notice to Consumers Who Purchased Dell's Products], CONSUMER'S FOUND., CHINESE TAIPEI, <http://www.consumers.org.tw/unit211.aspx?id=161> (last visited Sept. 12, 2013); *Mei Shang Daier Gufen Youxiangongsi Xiaofeizhe Qing Zhu Yi (Di er Bo)* [A Notice to Consumers Who Purchased Dell's Products (Second Notice)], CONSUMER'S FOUND., CHINESE TAIPEI, <http://www.consumers.org.tw/unit211.aspx?id=162> (last visited May 1, 2014).

²⁸⁹ *Law and Regulation Retrieving System*, JUDICIAL YUAN OF THE REPUBLIC OF CHINA, <http://jirs.judicial.gov.tw/Index.htm> (last visited May 1, 2014).

two have ruled in favor of the consumers, due to the controversies over whether the purchase order was a contract.²⁹⁰

F. Conclusions: Taiwan

Although normative laws regarding class action mechanisms have been carefully devised in Taiwan, there have been few class action cases on record, except for the IPC cases. The major reason is the lack of incentives. First, attorney-fee arrangements are generally restricted by bar associations in Taiwan,²⁹¹ which offers little incentive to handle large cases such as class actions. Second, the opt-in mechanism requires consent or authorization from claimants, resulting in a low aggregation and petty claim size, unless it is a mass tort claim that involves more substantial stakes.²⁹² Another factor limiting class actions is the compensation amount. Compensation in Taiwan is modest, because its legal system does not apply punitive damages unless specified by law. In civil cases, compensation is the major goal rather than deterrence. Even if punitive damage is stipulated by law, the amount of damages awarded is generally capped at two or three times the amount of actual damages.²⁹³ The overall design of the legal system does not provide private parties, such as lawyers, a chip in class disputes.

Where private parties and lawyers are given few incentives to file class actions, the involvement of GSOs becomes critical in the implementation of Taiwanese class actions. By creating special procedural rights attributed to the groups by the legislature, GSOs, having specific “standing to sue,” give scholars and judges the comfort of a familiar, conceptualized approach.²⁹⁴ The

²⁹⁰ *Id.*

²⁹¹ *E.g.* Taipei Bar Association, Taipei Lu Shi Gong Hui Zhang Cheng [The Charter of Taipei Bar Association], art. 29. Take Taipei Bar Association for example: Even though contingency fee arrangements are allowed in most civil cases, according to the *Taipei Bar Association Professional Legal Ethics [Lu Shi Luen Li Gui Fan]*, the Taipei Bar Association capped the total fees that attorneys can charge per case, which substantially limits the revenue of attorneys who represent class actions. *Id.* For example, for a claimed amount under NTD \$5 million, attorney fees may not exceed NTD \$500,000; for an amount over NTD \$5 million, the article suggests that attorneys increase the fees by no more than three percent of the claimed amount.

²⁹² Michael Palmer & Chao Xi, *China, The Globalization of Class Actions*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 270–79 (2009).

²⁹³ For example, art. 51 of the CPA states: “In a litigation brought in accordance with this law, the required consumer may claim for punitive damages up to 3 times the amount of actual damages as a result of injuries caused by the willful act of misconduct of business operators; however, if such injuries are caused by negligence, a punitive damage up to one time the amount of the actual damages may be claimed.” Consumer Protection Law, *supra* note 228, art. 51.

²⁹⁴ Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 334, 348 (2003).

establishment of the IPC offers the best example of devising standing in the field of securities law. The IPC was established with the goal of utilizing securities class actions, and hence the overall design is to confer it with the power and funds to systematically process these types of cases.²⁹⁵ By filing class actions on behalf of diffuse investors, the IPC claims compensation for investors and corrects wrongdoings in the securities market, contributing to a sound securities market and the stability of the financial environment. However, besides securities law, the class action mechanism is too little utilized to safeguard people's rights in other legal areas. Even though most GSOs have been relied on in the legal areas where society desires certain issues to be addressed, such as investor protection or consumer protection, most of them were originally established for charitable purposes rather than litigation,²⁹⁶ and hence are not equipped with adequate resources to handle class actions. This is obvious in that CFCT can only focus on certain benchmark mass tort cases and barely has resources for consumer class actions. The LAF is another example of a charitable organization turning into a class action initiator. As it is sufficiently funded by the Judicial Yuan, with its own staff attorneys and in-house lawyers, the LAF has a comparative advantage over CFCT and has been able to participate in some huge class action cases requiring more resources.

Both the CFCT and LAF are close to "catch-all" organizations and have begun dealing with class actions due to social expectations whenever the potential claimants have nowhere else to seek help or legal assistance. Neither of them was originally designed to process class claims. Therefore, assistance from government agencies in handling class actions is critical. However, if the operation of the class action mechanisms is still to some extent contingent upon the government's involvement, it is not purely a sound private law mechanism. The lack of incentives and limited capabilities of class action initiators also explain the low utilization of class action mechanisms in Taiwan.

²⁹⁵ *Tuanti susong anjian huizongbiao* [Class Action Cases Summary Charts], SFIPC, <http://www.sfipc.org.tw/main.asp> (last visited Jan. 28, 2014). As of January 2014, there have been seventy-five cases successfully filed by the IPC. It has represented 83,345 investors and has claimed NTD \$34,159,293,000 for the investors. *Id.*

²⁹⁶ *About Consumer's Foundation, Chinese Taipei*, *supra* note 241.

III. CHINA AND TAIWAN

Legal systems evolve in tandem with the development of societies as prevailing trends and cultural heritage shape the features of the laws.²⁹⁷ By analyzing representative cases, this Article intends to analyze how the legal systems and beyond in these two jurisdictions address class disputes, with implications behind practice. To explore this topic, this Section examines the messages that lie in the differences between the two legal systems from cultural and historical perspectives.

Historically, law in China is “first and foremost a political tool, operating in a vertical direction, with its primary concern being state interests, rather than on a horizontal plane between individuals.”²⁹⁸ The fundamental features of the laws in traditional China are political, administrative, and secondary.²⁹⁹ The Chinese legal tradition exhibits a lack of the “notion of private ordering by law.”³⁰⁰ Confucianism and legalism both focus on “determining and maintaining a desired social order.”³⁰¹

Modern legal reform, started by the Qing Dynasty and continued by the Nationalist government, brought in new systems to replace the traditional institutions and structures that had existed for centuries.³⁰² Confucianism and all other legal traditions may have faded for a period of time after May 4, 1919, and the traditional conceptions of law may not have the strong influence they used to have.³⁰³ However, they have not totally disappeared with the breakdown of the traditional institutions and structures, but have continued to have an effect on the contemporary development of law in another form.³⁰⁴ Legal developments in post-Mao China have moved away from the domination of Soviet law.³⁰⁵ Lawmakers in China have been searching for ideas and models from Western countries and adjacent East Asian countries since the 1990s.³⁰⁶ Due to the lack of the legislative history on record, there has been

²⁹⁷ JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 5 (2008).

²⁹⁸ *Id.* at 20.

²⁹⁹ HUANG YUAN-SHENG, THE INTRODUCTION OF THE LEGAL HISTORY OF CHINA 101 (2012).

³⁰⁰ MERRYMAN, CLARK & HALEY, THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND EAST ASIA, CASES AND MATERIALS 406 (2000).

³⁰¹ *See* CHEN, *supra* note 297 at 20.

³⁰² *See id.* at 36.

³⁰³ KENNETH G. LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 68 (2d ed. 2004); ALAN LAWRENCE, CHINA UNDER COMMUNISM 1–2 (1998).

³⁰⁴ *See* CHEN, *supra* note 297, at 38.

³⁰⁵ *See* LIBERTHAL, *supra* note 303 at 127–28.

³⁰⁶ *See* CHEN, *supra* note 297, at 75.

little direct evidence about which legal systems have served as models. However, incidental evidence, such as Chinese scholarly works and the structure of the provisions in the laws, gives clues that lead to the conclusion that modern Chinese law has mostly assimilated civil law tradition. For example, the structures of the provisions of the General Principle of Civil Law closely follow the German model.³⁰⁷ Additionally, the use of mass legislation rather than case trials to build up the Chinese legal system quickly also reflects features of civil law tradition, which places more emphasis on statutes than on cases. It is reasonable to categorize China as a civil law country.

On the other hand, Taiwan's legal tradition has been a more complicated mixture. Due to its colonial history in the late 19th and early 20th century, Taiwan has been influenced by the Chinese, Japanese, and westernized Japanese legal traditions.³⁰⁸ Being a "frontier settler society with a traditional Chinese legacy,"³⁰⁹ Taiwan was exposed to Western law as selected by a colonial government, Japan.³¹⁰ With its experience of the Meiji legal reforms, Japan began to "modernize" the laws in Taiwanese society.³¹¹ After the 1920s, westernized Japanese civil substantive and procedural laws were applied to Taiwanese cases.³¹² Western law was introduced to Taiwan through mainland Japanese laws, which were modeled after Western laws.³¹³ Hence, these reforms reduced the influence of Western colonial law and Chinese imperial law on Taiwan's legal system and made Japanese mainland law the dominant law of colonial Taiwan.³¹⁴

Scholars have concluded that the Taiwanese gradually learned to use Western-style laws and judicial systems to replace traditional-style mediation via government promotion, urbanization, and colonial modern education.³¹⁵ The Japanese legal reform was maintained by the incoming Republic of China

³⁰⁷ Compare General Principles of the Civil Law of the People's Republic of China (promulgated by the president of the People's Republic of China, Apr. 12, 1986, effective Jan. 1, 1987), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=1165&CGid=> with BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], AUG. 18, 1896, REICHSGESETZBLATT [RGL] 195, as amended (Ger.), available at http://www.gesetze-im-internet.de/englisch_bgb/index.html.

³⁰⁸ TAY-SHENG WANG, LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE 191 (1992).

³⁰⁹ *Id.* at 4.

³¹⁰ *Id.* at 4.

³¹¹ TAY-SHENG WANG, JURISPRUDENCE WITH HISTORICAL THINKING: COMBINATION OF TAIWANESE SOCIAL HISTORY OF LAW AND LEGAL REASONING 53 (2010).

³¹² *Id.* at 52, 57.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ See WANG, *supra* note 308, at 232–33.

(ROC) regime after the war and when the Japanese left Taiwan in 1945.³¹⁶ The change of political authority did not interrupt Taiwan's reception of Western laws, and the ROC codes were also modeled according to the Japanese codes.³¹⁷ However, because this legal reform was selected by the colonial government, the Taiwanese people have not yet generally known "the fundamental spirit" of modern Western law.³¹⁸

A. *The Origin and Evolution of the Civil Law Tradition*

Nourished with these cultures and histories, both China and Taiwan have assimilated the civil law tradition. The civil law tradition has influenced how these jurisdictions apply class action mechanisms in several respects. The first is the rigorous application of the opt-in procedure. In the civil law tradition, "the law is applied through abstractions" by using legal principles and concepts to apply the law to the facts.³¹⁹ The reason for the law being applied through general principles is closely related to the emergence of European universities in the late 11th and 12th centuries, which contributed to the formation of modern Western legal systems.³²⁰ The law was taught as "a distinct and systematized body of knowledge, a science," in which knowledge was studied and explained in terms of "general principles and truths basic to the system as a whole."³²¹ This type of legal science training has been applied by successive generations of university graduates who later served in all types of legal professions, such as counselors, judges, advocates, administrators, or legislative draftsmen.³²² They gave structure and coherence to legal norms, which contributed to formation of new legal systems.³²³

One such abstraction is the concept of "subjective right," which may be defined as "a right that belongs to someone."³²⁴ This type of right is twofold: one is substantive, such as contract rights or property rights; and the other is procedural, which is closer to the concept of "standing to sue" or "party in

³¹⁶ See *id.* at 429.

³¹⁷ See *id.* at 366.

³¹⁸ *Id.*

³¹⁹ See Gidi, *supra* note 294, at 344.

³²⁰ See HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 120–21 (1983).

³²¹ *Id.* at 120.

³²² *Id.*

³²³ *Id.*

³²⁴ See Gidi, *supra* note 294, at 344.

interest.”³²⁵ When a plaintiff wants to file a claim asserting his or her rights in most civil law countries, he or she must demonstrate that he or she legitimately holds both rights.³²⁶ However, in certain situations, these two rights might be separate and held by different individuals or entities.³²⁷ In such cases, the individuals or entities would need to demonstrate the reason for, and the authorization of, a procedural right according to agreements or laws.³²⁸ Such a rigid application of laws is due to civil legal systems operating through statutes. Civil law procedure is a formalistic system with elaborate, detailed written rules and limited room for judicial discretion.³²⁹ Court decisions must strictly conform to written rules, while policy and other considerations are left to the legislature.³³⁰

Such features in the civil law tradition make it difficult to transplant class action mechanisms with an Anglo-American legacy that contradicts the spirit of civil law, such as the relaxation of the obligation to acquire procedural rights via the opt-out design. Due to the stated concerns, most of the civil law countries tend to avoid controversies and adopt the opt-in design in class actions by requiring every potential plaintiff to join the class action through affirmative conduct. This shows that civil law countries still feel uncomfortable about binding parties without clear authorization. Compared to the default inclusion in the opt-out design, the opt-in design curtails the power of the class actions in aggregating claims. Hence, the sizes of the claims are usually substantially smaller than those of the claims under the opt-out design.

In addition to the civil law legacy and surrounding mechanisms that shaped the normative rules, some factors other than legal tradition also contributed to the actual practice. As for China, although it has adopted class action mechanisms through statutory laws, the actual implementation is still contingent upon the government’s attitude toward cases. For mass tort class actions, there is no room for lawyers when the case is too sensitive, because the government does not like lawyers to intervene in its control of incidents. This phenomenon is especially obvious in mass tort cases, since this type of

³²⁵ Concluded from the generally accepted civil procedural theories in Taiwan. *See, e.g.*, Chiu Lien-Gung, *The Theory of Choice of Procedure* [Cheng Xu Xuan Zhe Chen Lun], NAT’L TAIWAN U. (2000); Kuo-Chang Huang, *Su Song Cian Yu Ji Dai Biao Su Song* [Participation in Lawsuits and Class Actions], *Min Shi Su Song Li Luen Zhi Xin Kai Zhan* [An New Era of Civil Procedural Law] (2005).

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *See* Gidi, *supra* note 294, at 318.

³³⁰ *Id.*

case usually involves huge public interest. Moreover, consumer class actions on a large scale are not welcomed if the actions alert the government's radar. These observations imply that the Chinese class action mechanism is actually not for the Chinese people to seek their rights, but an administrative tool to settle potential social disorders via judicial institutions.

The class action mechanism in Taiwan is a novel attempt. Due to the lack of incentives, the class action mechanisms have been little utilized by private parties. Devising the GSOs to bring class action lawsuits has been the choice of the Taiwanese legislature, which to some extent shows the preference for institutions with a public legal figure to deal with cases involving public interest. However, most GSOs are not equipped with sufficient resources, which still results in selective justice, depending on government involvement. Interestingly, although China and Taiwan have different types of legal systems and distinct political systems, the key factors for succeeding in class disputes in both countries lie in whether these cases have been supported, or to some extent backed, by the government or government-related institutions.

B. Private Law versus Public Law

Another observation that can be drawn is that the evolution and implementation of class action mechanisms seem to have blurred the boundary between public and private law. Haley defined both public and private law enforcement as follows:³³¹ Public law enforcement is the process of “prosecutorial discretion and control” by those who exercise political authority and power, as well as their agents,³³² and cannot be ended only by parties’ withdrawing the complaint or reaching a settlement with the offender.³³³ Private law enforcement is the process of enforcing legal rules via empowering private parties, which indicates that rulers “give up control” or recognize “their inability to control.”³³⁴

Although civil law systems have been known as inquisitorial, the role of civil courts seems to be far more limited and not as active and powerful as that of U.S. courts with respect to class actions. However, in some situations, the court needs to decide whether there is a “common interest” in order to issue a

³³¹ John O. Haley, *Law and Culture in China and Japan: A Framework for Analysis*, 27 MICH. J. INT'L L. 895, 900 (2006).

³³² *Id.* at 902.

³³³ *Id.*

³³⁴ *Id.* at 900, 902.

public notice for other potential plaintiffs to join the class action. To some extent, this influences the initiation of private enforcement. Furthermore, in some legal systems as aforementioned, only qualified organizations (e.g., GSOs) can bring class actions, essentially holding the prosecutorial discretion and control over the initiation of class actions. The Chinese and Taiwanese class action mechanisms rely considerably on certain institutions with a public legal figure, which suggests the incorporation of public characteristics into private law adjudication.

Even for the US, which is well-known for its class actions and advocacy characteristics in private law enforcement, the intervention in the proceedings by an adjudicator (judge) in class actions also diminishes the strength of private law enforcement. If we consider the court to be the politically and legally authorized state actor or its agent, its authority to certify the class indicates its control over the initiation of a class action. Additionally, judicial review of settlements by the courts also means that the parties can no longer simply end the process by withdrawing their complaint or reaching a settlement with one another.

All these features of different class action mechanisms imply the same thing: Class action mechanisms carry the features of both private and public law enforcement and no longer stay in the pure private law regime. The practice of class action mechanisms eventually moves from one end of the spectrum, where the private law regime settles, to somewhere in between the private and public law regimes.

CONCLUSION

Class action mechanisms in China and Taiwan are still in the developmental stage. Even though there have been hurdles for countries with civil law traditions to adopt class action mechanisms that were originally foreign to them, they seem to have found ways to assimilate these mechanisms into their legal systems, such as by creating GSOs as the initiators of class actions and incorporating government involvement. Creative implementation by these two jurisdictions suggests other possibilities of addressing class disputes. By analyzing different approaches to handling mass tort cases, it is hoped that this Article will evoke an exchange of ideas and inspire diverse thinking beyond the boundaries of the different legal systems.