

The Readiness of the Class Action as an Anti-monopoly Enforcement Device in China*

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Abstract

Private anti-monopoly enforcement combined with public enforcement has long been alleged to be an effective institutional design to make anti-monopoly or antitrust laws meaningful. In the same vein, anti-monopoly class action could facilitate the actualization of private enforcement, in particular with regard to small claim actions. The American experience indicates that the crucial role played by class action has been attributed to its underpinning structural determinants, like locus standi, follow-on cases, and prerequisites of class action in addition to the well-know treble damage and fee-shifting mechanisms. Thus, private enforcement of anti-monopoly law in China, where one can also file class action litigation, raises questions regarding how the structural determinants of the Chinese legal system prepares class action for implementing anti-monopoly laws in China.

I. Introduction

Notwithstanding its awful ambiguity,¹ Article 50 of the Anti-monopoly Law of the

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¹ Article 50 of AML provides that: where the monopolistic conduct of an undertaking has caused losses to another person, it shall bear civil liabilities according to law” without modest clarification about how to implement. For more discussion, see 易有禄: ‘《反垄断法》第 50 条之司法适用与立法完善’, 载《甘肃政法学院学报》, 2009 年 5 月(Yi Youlu, ‘The Judicial Application and Legislative Improvement of Article 50 of Anti-monopoly Law’, in *Journal of Gansu Institute of Political Science and Law*, May, 2009).

People's Republic of China (hereinafter "AML")² has cast a beam of sunshine on private enforcement of this so-called "economic constitution."³ The private enforcement of antitrust law⁴ through ex post cause of action, which stands beside public enforcement through ex ante regulation and ex post public cause of action, and the use of class action as an effective private enforcement device has already been thoroughly discussed.⁵ Here I elaborate on relevant issues in the Chinese context concerning the structural and institutional readiness of class action as an anti-monopoly private enforcement device for animating AML.

Function and context are key to Ernst Rabel's modern reflections on how comparative methodology enters into legal research.⁶ Inspired by the two concepts, this article first briefly introduces the basic concept regarding class action; then undertakes a retrospective review of the use of class action in the United States, the most active user of this device in private antitrust enforcement; the third section sketches the characteristics of the existing Chinese class action mechanism and critically analyses its competence in actualizing the goals of AML; and finally concludes that the class action device in the Chinese legal system is not lacking when confronted with the task of

² Anti-Monopoly Law of the People's Republic of China, order of the President of the People's Republic of China (No. 68) (promulgated on Aug. 30, 2007; effective as of Aug. 1, 2008) (an English-language translation supplied by the People's Daily English-language newspaper is on file with the authors and its accuracy vis-à-vis the Chinese original has been verified by Prof. Meng, a native speaker of Mandarin Chinese), see Anti-Monopoly Law of the People's Republic of China, available at <http://english.peopledaily.com.cn/90001/90776/90785/6466798.html> (English trans.).

³ *China's anti-monopoly law commission in force*, Xinhua News Agency, July 16, 2008, available at http://news.xinhuanet.com/english/2008-07/16/content_8553183.htm.

⁴ For a comparative analysis, see among others Clifford A. Jones, *Private Enforcement of Antitrust Law in the EU, UK, and USA* (OUP, 1999). For empirical analysis, see among others Segal, Ilya R. and Whinston, Michael D., "Public vs. Private Enforcement of Antitrust Law: A Survey" (December 15, 2006). Stanford Law and Economics Olin Working Paper No. 335. Available at SSRN: <http://ssrn.com/abstract=952067>. For an economic analysis, see among others McAfee, R. Preston, Mialon, Hugo M. and Mialon, Sue H., "Private v. Public Antitrust Enforcement: A Strategic Analysis," *Journal of Public Economics*, Forthcoming; Emory Law and Economics Research Paper No. 05-20; Emory Public Law Research Paper No. 06-4. Available at SSRN: <http://ssrn.com/abstract=775245>.

⁵ See Antonio Gidi, "Class Actions in Brazil: A Model for Civil Law Countries," *51 Am. J. Comp. L.* 311, (2003).

⁶ see Glendon, Carozza and Picker, *Comparative Legal Traditions* (WEST, 1999), at 9.

facilitating private enforcement of anti-monopoly laws. However, there are still areas that require improvement due to its own insufficiency and the shortage of special guidelines in AML.

It is too soon at this point to draw any conclusions, which will have to wait until further empirical research is done.

II. The Concept of class action

Although nowadays class action litigation has reached its most extensive use in the highly competitive U.S. legal market,⁷ the history of it can be traced to the early Bill of Peace which was created by the English Chancery in the seventeenth century for representative action.⁸ Before the appearance of the Bill of Peace, only when the jointed parties were joint obligor or obligee,⁹ joinder of parties was permitted by the then stubborn common law; otherwise, the joinder had to institute individual suits despite the salient presence of common issues of law and fact.¹⁰ Furthermore, the loss of the first few suits may discourage later litigation in a couple of ways¹¹ merely because the first few cases were filed by or against those who had the weakest cases, the least able counsel, and/or the least resources to draw upon.¹² The Bill of Peace, despite the skepticism of

⁷ Thomas S. Ulen, *An Introduction to the Law and Economics of Class Action Litigation*, at Juergen Backhaus, Alberto Cassone and Giovanni B. Ramello (ed; 2011 forthcoming), *Class Actions for Europe: Law and Economics Perspectives*, Edward Elgar, Cheltenham, UK-Northampton, USA.

⁸ Homberger, *State Class Action and The Federal Rule*, 71 COLUM. L. REV. 609, 611 (1971).

⁹ See Z. CHAFEE, *SOME PROBLEMS OF EQUITY* 200-01 (1950).

¹⁰ Z. CHAFEE, *supra* note 7, at 153.

¹¹ If a few of the Multitude lost their individual suits, others would be discouraged from defending or prosecuting such suits, other juries might hear and act upon such prior results despite rules of evidence and instructions to the contrary and, although *res judicata* would not apply, a common issue of law decided by a reviewing court would, by virtue of *stare decisis*, become precedent for later cases. An example of similarity of the consequences *res judicata* of and *stare decisis* on the Multitude is *City of London v. Perkins*, 1 Eng. Rep. 1524 (H.L. 1734). See among others William Weiner & Delphine Szyndrowski, *Class Action, from the English Bill of Peace to Federal Rule of Civil Procedure 23: Is There a Common Thread?*, 8 Whittier L. Rev. 935 (1986-1987).

¹² Z. CHAFEE, *supra* note 7, at 153.

some judges, disentangled the problems by permitting equity to take jurisdiction of the whole dispute and all the parties, even though the individual members of the Multitude were not joint obligors.¹³ After decades of years' evolution marked by landmark cases,¹⁴ the characteristics of class action were summarized as follows: ¹⁵

- (1). All members of the Multitude could not be conveniently or practically jointed;
- (2). An injustice, i.e. no redress, would occur without the availability of the class device;
- (3). A general right was involved which depended upon the status of the individual members of the Multitude or their right to share or contribute to a single fund;
- (4). There existed common questions of law and/or fact concerning the common rights; and
- (5). The representative(s) had the same interests as the Multitude and (a) the Multitude consented or implicitly consented to representation by the representative, or (b) the representative could be said to fairly and adequately represent the interest of the Multitude.

When class actions were originally introduced to the United States in the 18th century, there was little modification of its British ancestor. The contemporary class action device of the United States was established after the enactment of the Federal

¹³ William Weiner & Delphine Szyndrowski, *supra* note 9, at 937.

¹⁴ See Manor case (*Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676)), Business Group case (*Chancey v. May*, 24 Eng. Rep. 265 (Ch. 1722)), Privateer case (*Leigh v. Thomas*, 28 Eng. Rep. 201 (Ch. 1751)).

¹⁵ William Weiner & Delphine Szyndrowski, *supra* note 9, at 954. Z. CHAFEE, *supra* note 7, at 204-11.

Rules of Civil Procedure (hereinafter “FRCP”) 23, 1938.¹⁶ However, contrary to the wishes of the legislature, the rule turned out to be cumbersome and restrained the full utility of class action for dispute resolution due to its vaguely defined categories, uncertainty about *res judicata*, and failure to secure procedural fairness.¹⁷ The incompetence of the original device of class action rule eventually led to the amendment of Rule 23 by Congress in 1966.

This new rule made class action more manageable. It explicitly set out the necessary requirements for certifying a class action¹⁸ and additionally introduced practical factors based on which judges could justify the application of the class action device.¹⁹ Although there are salient differences between the original British device and its American descendant,²⁰ a common thread comprised of two rationales existed and justified this judicial device: (1) scale of economies; (2) enhancement of access to justice in particular for small claim plaintiffs.²¹

When walking through the evolvement of class action, we may extract the basic characteristics of the class action device. Nevertheless, there are rarely any express definitions regarding class action in American legal literature, not to mention uniform ones. Professor Gidi, a law professor from civil-law Brazil, contributed his definition: “a class action is the action brought by a representative plaintiff (collective standing), in the protection of a right that belongs to a group of people (object of the suit), which

¹⁶ FED. R. CIV. P., 308 U.S. 689 (1938), 28 U.S.C. Rule 23 (1950).

¹⁷ FED. R. CIV. P. 23 advisory committee’s notes to the 1966 Amendments.

¹⁸ (1) numerosity of parties; (2) common questions of law or fact; (3) claims typical of the members; and (4) adequacy of representation. See 39 F.R.D. at 99.

¹⁹ *Id.* at 96.

²⁰ In the UK, class action is called representative action.

²¹ William Weiner & Delphine Szyndrowski, *supra* note 9, at 935.

judgment will bind the group as a whole (*res judicata*).”²² We may find a quasi-definition—a description—of class action device among others in Professor Ulen’s paper: . . . facilitating and regulating the consolidation of numerous similar lawsuits into a single action. . . .²³

While talking about class action, it is necessary to allude to such related concepts as *parens patriae* action and organizational or association action. Largely speaking, “class action” is referred to those suits lodged by members of the class;²⁴ “*parens patriae*” are filed by government officials,²⁵ and “organizational actions” are filed by private associations.²⁶ However, I hold similar ideas with Professor Gidi that the type of plaintiffs’ representative is only an item of policy choice and incidental to its qualification as a class action. The essence of class action relative to individual action is its application to protect a group right.

III. The American Usage of the Class Action as an Antitrust Enforcement Device

1. Enforcement pluralism

The United States owns a decentralized antitrust enforcement system, and accordingly responsibility for enforcement is apportioned to both public and private parties.

²² See Antonio Gidi, *Coisa Julgada e Litispendencia em Acoes Coletivas* 16 (1995). For English version see Antonio Gidi, *Class Actions in Brazil: A Model for Civil Law Countries*, *The American Journal of Comparative Law*, Vol. 51, No. 2 (Spring, 2003), p. 334.

²³ Ulen, *supra* note 7.

²⁴ In this case, the plaintiffs perform two distinguished yet related roles: a member of the class and a representative of the rest of the members. It is typical in civil procedure laws of the United States and China.

²⁵ For more discussion concerning *parens patriae*, see Milton Handler & Michael D. Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach*, *The Yale Law Journal*, Vol. 85, No. 5 (Apr., 1976), pp. 626-676.

²⁶ See, Mauro Cappelletti, “Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study,” *Michigan Law Review*, Vol. 73, No. 5 (Apr., 1975), pp. 793-884. Organizational actions now are most popular in Germany.

Amongst the public enforcers, at federal level, the Antitrust Division of the Department of Justice (hereinafter “DOJ”) and the Federal Trade Commission (hereinafter “FTC”) are the two players. The DOJ technically has the jurisdiction to enforce the Sherman Act²⁷ and alone investigates and prosecutes criminal antitrust violations. FTC is charged to enforce Clayton Act 7 and 7A (mergers) and FTC second 5 dealing with unfair trade practices. At the state level, the Attorney General in a given state, as a counterparty of the Attorney General of the federal government, is responsible for enforcing state antitrust laws. In addition, the state, authorized by Congress in 1976, can bring *parens patriae* actions seeking treble damages on behalf of natural persons resident in the state under the Sherman Act.²⁸

Private antitrust enforcement is one of many unique aspects of the American legal system. In the United States, private antitrust actions constitute at least 90 per cent of all Federal antitrust cases are filed by private parties despite great fluctuation in annual numbers.²⁹ The attractiveness to private attorney generals comes mainly from the double lure of awards of treble damages³⁰ and attorneys’ fees, which is also known as “one-way fee-shifting.”³¹ Furthermore, to those small-claim plaintiffs, the class action device in addition to treble damages and one-way fee shifting justifies the total risk of litigations.³²

²⁷ The FTC Act § 5 has been held to prohibit any actions prohibited by the Sherman Act, plus some practices not caught by the Sherman Act: *FTC v. Cement Institute*, 333 US 683, 694, 68 S Ct. 793, 800 (1948).

²⁸ 15 USC § 15 c-h.

²⁹ The number of private antitrust action pending was fluctuating from 1400 in the late 1970 to 750 in the mid to late 1980s. See S. Salop and L. White, ‘Private Antitrust Litigation: An Introduction and Framework,’ in L. White (ed.), *Private Antitrust Litigation: New Evidence, New Learning* (Cambridge, Mass., 1988), 3.

³⁰ The private treble damage action has been repeatedly recognized by the courts to be a bulwark of antitrust enforcement. E.g.: *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138-9 (1968); *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317-18 (1965). For the reflective analysis on the real value of treble damages award conditioned on the American procedural context, see Jones, *supra* note 3, at 229.

³¹ For a critical analysis of fee-shifting, see Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, 78 *N. Y. U. L. Rev.* 1887, 1898–1899 (2003).

³² The costs to the members of the small claim class of organizing themselves so as to recover from the violators

2. *Locus standi*

In the United States, the standing to sue (*locus standi*) in an antitrust class action is only granted to members of the class who have met the general requirement in Article III of the Constitution and the court. Article III requires that a party show particularized injury or otherwise have a sufficient stake in the outcome of the dispute.³³ The courts expect to find a close relationship between the plaintiff's injury and the alleged antitrust violation.³⁴

However, the exploration to define the extent to which the so-called close relationship is appropriate is far from easy and clear. The American circuit courts have contributed greatly in this regard. During their persistent endeavor, the American circuit courts walked through 1) the "direct injury" test which was introduced by the Third Circuit and focused on whether the victim and the antitrust violator are separated by intermediate tiers of victim;³⁵ 2) the target area test which was introduced by the Ninth Circuit and required the plaintiff to 'show that he was within that area of the economy which was endangered by a breakdown of competitive conditions in a particular industry'³⁶, so a person incidentally injured lacked standing to file an antitrust action; 3) the zone of interest test which was introduced by the Sixth Circuit and inquired whether

are prohibitively high, but the assistance of law to organize a class would enable the plaintiffs to proceed against the defendants and thus realize a significant personal and social benefit. For more discussion, see e.g.: Ulen, *supra* note 7.

³³ See *Warth v. Seldin*, 422 US 490, 504 (1975).

³⁴ See *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F 2d 1486, 1493 (11th Cir. 1985).

³⁵ The "direct injury" test was first articulated in the Third Circuit's decision in the seminal case *Loeb v. Eastman Kodak Co.*, 183 F 704 (3rd Cir. 1910). Although the Supreme Court decision in *Blue Shield of Virginia v. McCready* (457 US 465 (1982)) and *Associated General Contractors of California, Inc. v. California State Council of Carpenter*, (459 US 519 (1983)), have superseded the direct injury test as such, the doctrine is believed to repay some attention with historical interest and perhaps some remaining scope for application. See Jones, *supra* note 3, at 160. Also American Bar Association Antitrust Section, *Antitrust Law Developments* (2nd edn., Chicago, Ill., 1984), 395 and notes 92-4.

³⁶ The Ninth Circuit court formulated and applied "target area" test in *Conference of Studio Unions v. Loew's, Inc.* (193 F 2d 51, 54 (9th Cir. 1951), cert. denied, 342 US 919 (1952)).

the plaintiff had properly alleged that the defendant caused his injury in fact and ‘whether the interest sought to be protected by the complaint was within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question;’³⁷ 4) the factual matrix test which was introduced by the Third Circuit and utilized a balancing test comprised of many constant and variable factors in resolving Section 4 standing problem;³⁸ 5) and eventually the multi-factor test which was introduced by the Supreme Court³⁹ and was believed to suggest that standing was denied only when there was a lack of causal nexus between the plaintiff’s antitrust violation and the plaintiff’s harm, or when the derivative nature of plaintiff’s injury threatens duplicative recovery.⁴⁰

3. Follow-on cases

The American statutory scheme blesses private plaintiffs who file lawsuits after the defendants are convicted or plea guilty. Consecutive or concurrent action by the government and private parties is envisioned by the prima facie and tooling provisions of the Section 5 (a) of the Clayton Act.⁴¹ To illustrate, if a defendant loses an antitrust case lodged by the government, he can not defend the follow-on civil actions by requiring the private plaintiffs to prove the case on the merits. In addition to the evidentiary issue,

³⁷ The zone of interest test was introduced by the Sixth Circuit court in *Malamud v. Sinclair Oil Corp.* (521 F 2d 1142 (6th Cir. 1975)) inspired by the Federal Administrative Procedure Act concept of standing as applied by the Supreme Court in *Data Processing (Association of Data Processing Sev. Organizations v. Camp*, 397 US 150, 153 (1970)). It is regarded as the most expensive approach to standing. For discussion see Jones, *supra* note 3, at 165.

³⁸ The factual matrix test was established in *Bravman (Bravman v. Bassett Furn., Inc, 552 F 2d 90, 99 (3rd Cir, 1977), cert. denied 434 US 823 (1977))* but built on Circuit Judge Garth’s judgment in *Cromar’ case (Cromar Co. v. Nuclear Material & Equipment Ccorp., 543 F 2d 501 (3rd Cir. 1976))*.

³⁹ The Supreme Court finally put finger on the formulation of standing rules in decisions of *McCready* and *AGC* rendered within eight month.

⁴⁰ B. Killeman, *Private Antitrust Litigation* (Chicago, Ill., 1986) at 393.

⁴¹ 15 U.S.C. § 16 (a) (2000). Under the Clayton Act a judgment or decree against the defendant in a litigated civil or criminal proceeding brought by the government or a guilty plea in a criminal case is prima facie evidence against the defendant in a treble damage suit.

Section 5 (a) specially preserved the ability of private antitrust plaintiffs to use common law principles of collateral estoppel in certain circumstances to preclude the defendant from contesting issues resolved by the judgment entered upon its guilty plea as a matter of law.

Moreover, the plaintiff can reap all the benefits at almost no cost. The statute of limitations for private treble damages actions (typically four years) is tolled during the duration of a government antitrust suit. Actually the first recorded antitrust class action was filed before the Rule 23 amendment in 1966 and was exactly a follow-on case. It brought together as a single class a group of municipalities that had sued the manufacturers of the electrical equipment after the DOJ indicted them in Philadelphia in 1960 for engaging in a massive nationwide conspiracy to fix prices. These class actions resulted in massive treble damage recoveries.

4. Prerequisites of class action

How to deal with of the prerequisites for class certification also burdened the stumbling evolution of class action in the United States. The Supreme Court in *General Telephone Co. of the Southwest v. Falcone*⁴² held that a class should be certified only “if the trial court is satisfied, after a rigorous analysis of Rule 23 is met.”⁴³ However, it seemed like that the lower courts had been long misled by the Supreme Court’s seemingly conflicting language in *Eisen v. Carlisle & Jacquelin*⁴⁴ that Rule 23 does not “give [] a court

⁴² 457 U.S. 147 (1982).

⁴³ *Id.* at 161. See also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (explaining that the Rule 23(b)(3) requirements demand a “close look”); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (stating that “the class determination generally involves considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiff’s cause of action’” (quoting *Mercantile Nat’l Bank v. Langdeau*, 371 U.S. 555, 558 (1963))). See generally William Kolasky & Kevin Stemp, “Antitrust Class Actions: More Rigor, Fewer Shortcuts,” *Class Action Report* Vol. 30, No. 6 (2009).

⁴⁴ 417 U.S. 156 (1974).

authority to conduct a preliminary inquiry into the merits.”⁴⁵ Accordingly, for a relatively long time the lower courts paid only lip service to the instruction given in *General Telephone* case.

The entailed shortcut together with other factors worsened the concern for strategic use of class action litigation for blackmail settlements. Judge Posner quotes Judge Henry Friendly as saying, “settlements induced by a small probability of an immense judgment in a class action [are] ‘blackmail settlements.’”⁴⁶

Actually in recent decades, the United States has witnessed change afoot in antitrust class action. Class counsel challenged business conduct under the antitrust laws even in the absence of a successful government criminal prosecution.⁴⁷ Similarly, we are seeing plaintiffs filing class actions following proceedings at the Federal Trade Commission.⁴⁸ Class counsel now routinely file actions after an antitrust defendant loses a civil antitrust case even when the plaintiff is a private party and not the government, and even before post-trial motions and appeals are lodged.⁴⁹ It is undeniable that these class action plaintiffs also have the benefit of preventing the defendant from re-litigating the merits of the case it lost, relying on principles of offensive collateral estoppel. However, we can also see class actions being filed against defendants who merely settled.

⁴⁵ *Id.* at 177.

⁴⁶ *Rhone-Poulenc Rorer*, at 1298, citing HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

⁴⁷ Hundreds of antitrust class actions followed the government’s successful prosecutions of MasterCard and Visa for civil antitrust violations.

⁴⁸ FTC’s initiative in examining—and condemning—patent settlements between brand name prescription drug manufacturers and their rival manufacturers of generic drugs have each spawned multiple class action clusters.

⁴⁹ E.g.: *Bradburn Parent/Teachers Store Inc v. 3M*, No. 02-7676, 2004 U.S. Dist. LEXIS 16193 (E.D. Pa. Aug. 17, 2004) (certifying a class of retailers that purchased transparent tape). *Keystone Tobacco Co v. United States Tobacco Co*, 238 F. Supp. 2d 151 (D.D.C. 2002) (putative class of distributors suing after their supplier lost a \$1 billion jury verdict to a competitor).

IV. The assessment of class action in China

Representative action, interpreted straightforwardly, was formally established since the passage of China's 1991 Civil Procedure Law (hereinafter "CPL").⁵⁰ Article 54 and 55 of CPL stipulate two typical representative actions in China, namely the class action with a large but fixed number of plaintiffs⁵¹ and the class action with a large and unfixed number of plaintiffs.⁵² Since the passage of CPL, China has been alleged to be one of the few legal systems apart from the United States that permits class action⁵³ and, as a civil law nation, China is even more outstanding in this regard. The explanation behind the compliment is that on the one hand although a number of countries have adopted procedures by which a representative may litigate on behalf of individuals with the same interests,⁵⁴ few of them other than the United States permit such actions for large or

⁵⁰ English version of this law is available at

http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=50905.

⁵¹ Article 54 of CPL provides that "[i]f the persons comprising a party to a joint action is large in number, the party may elect representatives from among themselves to act for them in the litigation. The acts of such representatives in the litigation shall be valid for the party they represent. However, modification or waiver of claims or admission of the claims of the other party or pursuing a compromise with the other party by the representatives shall be subject to the consent of the party they represent."

⁵² Article 55 of CPL provides that:

Where the object of action is of the same category and the persons comprising one of the parties is large but uncertain in number at the commencement of the action, the people's court may issue a public notice, stating the particulars and claims of the case and informing those entitled to participate in the action to register their rights with the people's court within a fixed period of time. Those who have registered their rights with the people's court may elect representatives from among themselves to proceed with the litigation; if the election fails its purpose, such representatives may be determined by the people's court through consultation with those who have registered their rights with the court. The acts of such representative in the litigation shall be valid for the party they represent; however, modification or waiver of claims or admission of the claims of the other party or pursuing a compromise with the other party by the representatives shall be subject to the consent of the party they represent. The judgments or written orders rendered by the people's court shall be valid for all those who have registered their rights with the court. Such judgments or written orders shall apply to those who have not registered their rights but have instituted legal proceedings during period of limitation of the action.

⁵³ Cf H. Patrick Glenn, *The Dilemma of Class Action Reform*, 6 *OXFORD J. LEGAL STUD.* 262, 262 (1986) (noting that "class actions have been a marginal phenomenon, limited to a single judicial tradition - that of the common law"). For critical analysis see 江伟, 肖建国: 《关于代表人诉讼的几个问题》, 载《法学家》, 1994年第3期。(Jiang Wei & Xiao Jianguo, *Guanyu Daibiaoren Susong De Jige Wenti* [Some Issues Regarding Representative Litigation], 1994 *FAXUEJIA* [JURISTS' REVIEW], No. 3, at 3, 3-4.)

⁵⁴ See generally Bryant G. Garth, *Group Actions in Civil Procedure: Class Actions, Public Actions, Parens Patriae and Organization Actions*, in *GENERAL REPORTS TO THE XIIIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW* 205, 216-21 (International Academy of Comparative Law ed., 1990) (summarizing recent developments in group actions).

unidentified plaintiffs;⁵⁵ on the other hand, the notion of class action has been often deemed by civil law nations as incompatible with the traditional individualistic standards laid out by the European jurists of the 19th century who worked under the influence of the Napoleonic codes.⁵⁶ In any event, it is the truth that collective disputes resolutions are not alien to China.⁵⁷ There has been an impressive increase in the number of collective action and complaints in recent years in the course of economic development.⁵⁸

It is alleged that China's decision to provide courts with procedures for handling group disputes appears to have been spurred both by a willingness to experiment and by functional concerns regarding the ability of the judiciary to handle an increasing number of multiparty disputes.⁵⁹ But I would say that the emergence of class action is more likely to be attributed by the rise of collective disputes accompanying transitional China. We all know social stability is conventionally regarded as the core value of the Chinese central government. In addition, I would even go so far as to express concern over how the underfunded, understaffed and inexperienced courts would deal with an increasing number of class actions, when they are entangled with complex and fractious

⁵⁵ See John G. Fleming, *Mass Torts*, 42 *AM. J. COMP. L.* 507, 523 (1994), at 520-21 (stating that only the United States, Canada, and Australia have introduced formal class action proceedings)

⁵⁶ See generally Cappalli & Consolo, "Class Actions for Continental Europe? A Preliminary Inquiry," 6 *Temp. Int'l & Comp. L.J.* 217, 289-90 (1992) (arguing that the greatest obstacle to class action in Italy is the "continuing centrality . . . of the injured person's role as the personal holder and proponent of rights, not as figurehead."); Gidi, *supra* note 4, at 345.

⁵⁷ See Lester Ross, *The Changing Profile of Dispute Resolution in Rural China: The Case of Zouping County, Shandong*, 26 *STAN. J. INT'L L.* 15, 15 (1990).

⁵⁸ See Lianjiang Li & Kevin J. O'Brien, *Villagers and Popular Resistance in Contemporary China*, 22 *MOD. CHINA* 28, 28-29 (1996); Despite the lack of formal procedures, some Chinese courts adjudicating multiparty disputes prior to 1991 used procedures resembling those later included in the CPL. See 江伟, 贾长存: 《论集团诉讼(下)》, 载《中国法学》, 1989年第1期(Jiang Wei & Jia Changcun, *Lun Jituan Susong (Xia)* [A Discussion of Class Action Litigation (Part II)], 1989 *Zhongguo Faxue* [Chinese Legal Studies], No. 1, at 103); 王红岩: 《试论推选代表人制度》, 载《政法论坛》, 1989年第3期(Wang Hongyan, *Shilun Tuixuan Daibiaoren Zhidu* [Preliminary Study on the System of Election of Representatives], 1989 *Zhengfa Luntan* [Legal Forum], No. 3.

⁵⁹ See *Class Action Litigation in China*, *Harvard Law Review*, Vol. 111, No. 6 (Apr., 1998), p1525.

anti-monopoly issues.

In the following part, I will go through three important issues percolating from envisioned anti-monopoly class action in China. However, it is noteworthy that issues in this regard are not limited to the three topics, but as different determinants are likely to be mutually associated, I may incorporate other related issues within the three topics.

1. *Locus standi* and its effect on incentives to sue

China' representative action, similar to its American counterparty, also requires the plaintiff to be a member of the class and exclude other more competent entities from filing lawsuits to protect private rights and deter future legal violations. For lack of guidelines of AML with more details regarding private enforcement, and landmark cases by the Supreme People's Court,⁶⁰ it can be just assumed that the private antitrust class action would follow the ordinary massive torts actions.

However, the institutional incompetence is likely to put China's class action device in an awkward situation.

In the United States, supplemented by one-way fee-shifting, contingency fee, treble damages and *parens patriae*, the limits on *locus standi* does not significantly affect the goals of antitrust law. While in China, losers pay the litigation cost and plaintiffs and defendants are responsible for their attorney's fees respectively;⁶¹ contingency fees are allowed but unavailable to some categories of litigation including group actions;⁶² only

⁶⁰ It does not imply that case law is the primary legal authority in China as in common law nations, but that the Supreme People's Court often publish on its official gazettes some typically cases adjudicated by the Supreme People's Court itself or provincial high courts to furnish reference for lower courts.

⁶¹ See Article 29 of Measures on the Payment of Litigation Costs, Chinese version is available http://www.gov.cn/zwggk/2006-12/29/content_483407.htm.

⁶² See Article 12 of Measures for the Administration lawyer fees, Chinese version is available http://www.gov.cn/zwggk/2006-04/19/content_257940.htm.

punitive damages are allowed in Chinese law but narrowly applicable in product liability cases.⁶³ There is no such concept or practice regarding *parens patriae*.

As we may see, the stimulus to file antitrust class action is not warranted in China as in the United States. In the case of small claimants, the logic behind is apparent, given that litigation cost is expected to be unacceptably higher than received benefits. Even in the case of large claimants, they would have little incentives to ally with small claimants either, because first there would be large communication cost involved; second, the group decision-making rule of CPL is so rigorous that it subjects the considerable stake of the large claimants to the unstable attitudes of small dissenters who are likely to be bough off by defendants; thirdly, the “limited fund” issue would discourage large claimants from making an alliance with others, which might finally result in under-compensation.

Considering industrial associations own more human and material resources relative to individual businesses, and the maintaining a sound competition settings is consonant with the by-laws of the industrial associations, some Chinese scholars advocate granting industrial associations the standing to file antitrust litigation to complement limited government prosecution resources on the one hand, and facilitate access to legal relief by private parties on the other hand. Yet concern remains to be seen due to a large number

⁶³ Article 49 of Law of the People's Republic of China on the Protection of Consumer Rights and Interests provides that “Article 49 Business operators engaged in fraudulent activities in supplying commodities or services shall, on the demand of the consumers, increase the compensations for victims' losses; the increased amount of the compensations shall be two times the costs that the consumers paid for the commodities purchased or services received.” English version is available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=50869. Article 47 of Tort Liability Law of the People's Republic of China provided that “In the event of death or serious damage to health arising from a product that is manufactured or sold when it is known to be defective, the infringer shall be entitled to claim corresponding punitive compensation.” Chinese version is available at the official website of the central government of China, http://www.gov.cn/flfg/2009-12/26/content_1497435.htm.

of influential industrial associations' undeniable relation with the government.⁶⁴ In any sense, in the case of consumers' challenge against businesses' anti-competitive behavior, consumer associations are expected to play more profound roles.

2. *Res judicata*

An outstanding characteristic of *res judicata* of class action in China is that the rulings made in class action not only binds all the litigants before the bar but all the following actions filed within the statute of limitations by those victims who did not enroll in class action in the first place. This is the so-called extensive effect of rulings. The extensive effect of ruling could entail three issues.

First, the large claimants would not only like to sue individually but also as early as possible. Otherwise, they would have to tolerate the prolonged decision making within group, or accept the ruling made in preceding class action and pick up the leftovers of class plaintiffs, if any. Furthermore, according to Article 53 of CPL, to merge cases with the same or similar cause of action, courts have to receive the consent of litigants. Thus, since even multiple cases with the same or similar cause of action are filed at almost the same time, individual plaintiffs need not worry about mandatory merge, for their suits can still retain their individual statuses. The two factors would jointly incur litigation race amongst large claims. It would eventually benefit large claimants and harm the small ones who are indeed in more urgent need of justice.

Second, free-rider issue may be a barrier of class action device. Article 6 of Measures on the Payment of Litigation Costs of China provides that the litigants shall

⁶⁴ For more discussion see 孟雁北: 反垄断法视野中的行业协会, 云南大学学报, 2004 年第 17 卷, 第 3 期, 总第 74 期(Meng Yanbei, Industrial Association on the view of the antitrust-Monopoly law, *Journal of Yunnan University Law Edition*, Vol. 17, No. 3 (2004), p 22).

pay acceptance fees, application fees and reimbursements for witnesses, experts, translators and accountants. Article 14 1-3 of this administrative regulation further stipulates that the present plaintiffs who could have been members of preceding class action but did not enroll in the class, is allowed to pay just the application fee and be exempted acceptance fee and reimbursements. Although some judicial interpretation provides that acceptance fee is allowed to be temporarily waived for plaintiffs when they file representative action defined by Article 55 of CPL,⁶⁵ and finally paid by the losers after the conclusion of the action, the sizable application fee and reimbursements are still formidable. Under such circumstances where there is no large discrepancy among victims, free-rider concern can erode class action device because each member of the class wants others to bear the costs of filing a class action and generate a leading ruling, then each of them will hang back waiting for someone else to undertake the litigating function. Some Chinese scholars suggested awards to class plaintiffs be two times higher than their extra cost invested in class action, and correspondingly two times the amount of any additional costs of class plaintiffs be deducted from the awards to plaintiffs who did not enroll in preceding class action and file their individual lawsuit later. Theoretically it is a reasonable design but the question of how to calculate the “extra cost” merits more deliberation.

Third, the extensive effect enables class action to capture not only victims in the class but all who file lawsuits after the preceding class action. It to some degree threatens

⁶⁵ See Article 129 of *Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Minshi Susongfa" Ruogan Wenti De Yijian* [Interpretation of the Supreme People's Court on Questions Concerning the Implementation of the "Civil Procedure Law of the People's Republic of China"]. Chinese version is available at <http://vip.chinalawinfo.com/Newlaw2002/SLC/slc.asp?db=chl&gid=5840>.

the claim of legitimate rights of those who do not go to the bar in person. Moreover, the opt-in mechanism deepened this concern. Unlike the American counterparty which takes an opt-out policy, the Chinese CPL requires those who want to be class members to register first. This mechanism would further increase the litigation cost with no substantial increase of the net benefit, because 1) notice to the class is usually posed on People's Court Newspaper, which is a professional medium with a relatively small range of circulation, thus timely notice could not be readily warranted; 2) victims have to personally go to the forum to enroll, which would incur large expenditures from widely-spread antitrust class members in such a large country.

3. The availability of information about public enforcement for follow-on case

The convenience and expedience of follow-on cases relative to stand alone cases are heavily dependent on the knowledge of public enforcement and the availability of relevant documents from government agencies. Information regarding antitrust litigations and investigations, in line with the transparency principle in the United States, can be traced on the official websites of DOJ and FTC.⁶⁶

The existing government information disclosure in China is still not sufficiently supportive of private enforcement. Government information disclosure was not within the logic of a planned economy. Even after the commencement of the reforms and opening policy in 1978, the Regulation on Government Information Disclosure came into effect thirty years later.⁶⁷ Furthermore, the late-born regulation is often impeded by

⁶⁶ See <http://www.ftc.gov/os/actions.shtm>, and <http://www.justice.gov/atr/public/appellate/appellate.htm> .

⁶⁷ Chinese version of this law is available at the official website of central government of China

the upper-level laws like the People's Republic of China State Secrets Law and the People's Republic of China Law on Archives.⁶⁸ Implementation of the awkward regulation is also discounted by government agencies.⁶⁹ This situation can be illustrated by the fragmentary enforcement information that is available at the official website of Antimonopoly and Anti-unfair Competition Enforcement Bureau. According to Regulation on Government Information Disclosure, private parties are allowed to apply for information disclosure, and there are clear time limits with regard to the administrative procedures, but the prerequisites are to some degree demanding, which require the description of the content of the information. This vague requirement may result in a death spiral because the purpose of knowing the content is the incentive to file the application, without having to expect the applicant to describe the content beforehand.

More empirical study needs to be done to test the effect of availability of public enforcement information on private enforcement including class action.

4. Class action against administrative monopoly

AML was hailed to be the economic constitution, but it lost its teeth in the face of administrative monopoly. Article 8 of AML provides that “[a]dministrative departments or organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to eliminate or

http://www.gov.cn/zwqk/2007-04/24/content_592937.htm.

⁶⁸ For more discussion see 陈林：面向社会的政府信息公开，观察与思考，2009年第16期 (Chen Lin, Government Information Disclosure Facing the Society, *Observation & Reflection*, No. 16 (2009), p 33-36).

⁶⁹ For more discussion see 陈建华，楚迤斐，魏成龙：政府信息公开制度实施中存在的问题与对策研究，当代财经，2009年第8期 (Chen Jianhua, Chu Yifei, Wei Chenglong, A Study of the Problems in Implementing the Government Information System and the Countermeasures, *Contemporary Finance & Economics*, No. 8 (2009), p 30-34).

restrict competition”; Article 51 of it further provides that “[w]here an administrative development or an organization authorized by laws or regulations to perform the function of administering public affairs abuses its administrative power to eliminate or restrict competition, the department at a higher level shall instruct it to rectify; the leading person directly in charge and the other persons directly responsible shall be given administrative sanctions in accordance with law. The authority for enforcement of the Anti-monopoly Law may submit a proposal to the relevant department at a higher level for handling the matter according to law.”

Ironically, administrative monopoly is regarded as one of the most important hotbeds of anticompetitive behavior.⁷⁰ We can have a flavor of the tension between administrative monopoly and the weak legal relief system in the so-called “first anti-monopoly case in China,”⁷¹ though it was not filed in the fashion of class action. Lacking in direct support from AML, class action against administrative monopoly can merely reply on alternatives within the existing legal framework.

Before the promulgation of the Administrative Procedure Law of China (hereinafter “APL”),⁷² the administrative cases were adjudicated procedurally according to CPL. Even after the promulgation, relevant judicial interpretation still stipulates that the courts can refer to CPL when adjudicating cases, provided that there are no pertinent provisions in APL.⁷³ Accordingly, whenever administrative monopoly incurs damages, class action

⁷⁰ See generally Yong Guo & Angang Hu, The administrative monopoly in China’s economic transition; *Communist and Post-Communist Studies*; Volume 37, Issue 2 (2004), at 265-280.

⁷¹ See at Bai Guixiu, Xingzheng Longduan De Benzhi Jiqi Jiuji: You “Zhongguo Fanlongduan Diyi An” Suo Yinfa De Sikao [The Essence of Administrative Monopoly and Its Relief: Deliberation on the “First Anti-Monopoly Case” of China]. Chinese version is available at http://www.legaldaily.com.cn/government/content/2010-02/08/content_2053129.htm?node=21494.

⁷² English version is available at <http://en.chinacourt.org/public/detail.php?id=2695>.

⁷³ See Article 114 of the of Zuigao Renmin Fayuan Guanyu Guanche Zhixing "Zhonghua Renmin Gongheguo

filed by victims is a plausible approach to secure relief.

Besides, some evidentiary requirements in APL are indeed favorable to plaintiffs. Article 32 of APL provides that “[t]he defendant shall have the burden of proof for the specific administrative act he has undertaken and shall provide the evidence and regulatory documents in accordance with which the act has been undertaken.” Judicial interpretation further detailed this requirement, further blessing plaintiffs.⁷⁴

The temporary borrowing of representative action from CPL to fight against administrative monopolies is clearly not ideal for private anti-monopoly enforcement. According to CPL, targeted administrative behavior is limited to concrete administrative behavior excluding abstract action. This deadly restrictive provision would tremendously affect the strength of class action, because it cannot capture those administrative regulations resulting in wide-spread damages.

V. Conclusion

Class action device has long been an important policy issue in the evolvement of private antitrust enforcement in the United States. And with the issuance of Green Paper on damages, EU has launched intensive research about class action including learning from the United States.

China has accumulated great experience in representative action. However, when stepping on this bridge to approach the goals of AML, China, like any new starters, is

Xingzheng Susongfa" Ruogan Wenti De Yijian [Opinions on the Supreme People's Court on Questions Concerning the Implementation of the "Administrative Procedure Law of the People's Republic of China"]. Chinese version is available at http://www.legalinfo.gov.cn/zt/2004-06/10/content_105970.htm.

⁷⁴ See Article 26 of the of Zuigao Renmin Fayuan Zhixing "Zhonghua Renmin Gongheguo Xingzheng Susongfa" Ruogan Wenti De Jieshi [Interpretation of the Supreme People's Court on Questions Concerning the Implementation of the "Administrative Procedure Law of the People's Republic of China"]. Chinese version is available at http://www.saic.gov.cn/zcfg/fl/199606/t19960611_45775.htm.

inevitably undergoing uncomfortable adaption. It is not simply a matter of design of legal techniques, but more about profound institutional transition.