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# UNCONVENTIONAL REMEDIES: THE FEASIBILITY OF A PRIVATE RECALL REMEDY IN THE PEOPLE'S REPUBLIC OF CHINA

## INTRODUCTION

In August of 2010, the People's Republic of China ("PRC" or "China") outpaced Japan to become the second largest economy in the world.<sup>1</sup> In 2009, China eclipsed Germany as the world's largest exporter of goods and surpassed the United States as the largest market for automobiles.<sup>2</sup> Though the United States' economy remains the world's largest for the time being, some commentators believe that China may outrank the United States as world's largest economy as early as 2030.<sup>3</sup> Since the 1980s, exports from China's rapidly expanding economy continue to inundate the international marketplace.<sup>4</sup> As the availability of Chinese goods increase, so do reports of defective, contaminated, and unsafe products manufactured in China.<sup>5</sup>

Due to the media attention directed at China's growing economy, global awareness is growing about the prevalence of defective and dangerous products among Chinese exports. In order to maintain its foothold in the international market, China must strive to create an image of safety associated with its products and combat the damage left in the wake of numerous recent scandals involving the substitution or addition of poisonous chemicals, such as melamine or lead, in an effort to reduce manufacturing costs.<sup>6</sup> For example, in 2008, baby formula contaminated with

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1. David Barboza, *China Overtakes Japan to Become Number Two Global Economic Power*, N.Y. TIMES, Aug. 16, 2010, at B1.

2. *Id.* Chinese living standards have drastically improved due to the country's rapid economic growth. WAYNE M. MORRISON, CONG. RESEARCH SERV., RL 33534, CHINA'S ECONOMIC CONDITIONS 1 (2009), available at [http://assets.opencrs.com/rpts/RL33534\\_20091211.pdf](http://assets.opencrs.com/rpts/RL33534_20091211.pdf). Over the course of the past decade, China's legal system has experienced a spike in tort-related litigation, with courts hearing more than one million cases per year. Paul Nash, *The Chinese Legal System Faces a Tort Conundrum*, TAIPEI TIMES, July 13, 2010, at 8.

3. Barboza, *supra* note 1, at B1.

4. See Stephen C. Thomas, *China's Economic Development from 1860 to the Present*, F. ON PUB. POL'Y ONLINE, Winter 2007, at 25–27, available at <http://forumonpublicpolicy.com/archive07/thomas.pdf>; see also Sara Bongiorno, *My Year Without "Made in China"*, BOS. GLOBE, July 19, 2010, at A11; Sara Bongiorno, *Call for Chinese-Toys Ban is Ridiculous*, DESERET NEWS (Utah), Sept. 30, 2007, at G04.

5. See generally John Schmid, *Product Recalls Rise: Analysts Recommend Better Relations with China*, MILWAUKEE J. SENTINEL, July 25, 2008, at D2.

6. See generally World Health Organization [WHO] Expert Meeting, Ottawa, Can., Dec. 1–4, 2008, *Toxicological and Health Aspects of Melamine and Cyanuric Acid*, at vi

melamine<sup>7</sup> caused approximately 300,000 infants in China to become ill; nearly 50,000 of these infants required hospitalization and six died.<sup>8</sup> To cut down on manufacturing costs,<sup>9</sup> Chinese factory workers watered down milk used in baby formula and intentionally added melamine to the concoction.<sup>10</sup> The melamine concealed the fact that the milk had been diluted by making the milk's protein content appear higher and thus masking the lower nutritional value of the watered-down milk.<sup>11</sup> Just a year earlier, approximately 8,500 pets in the United States died from kidney failure after eating pet food made with melamine-contaminated wheat gluten and rice protein exported from China.<sup>12</sup> Also in 2007,<sup>13</sup>

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(2009) [hereinafter WHO, *Melamine*], available at [www.who.int/foodsafety/publications/chem/Melamine\\_report09.pdf](http://www.who.int/foodsafety/publications/chem/Melamine_report09.pdf); Meghan Josephine Carmody, *The Price of Cheap Goods: International Trade with China and the Need for Stringent Enforcement of Manufacturing Regulations*, 34 N.C. J. INT'L L. & COM. REG. 655, 686 (2008–2009) (explaining that Chinese manufactures often ignore safety standards to cut costs); Joel Slawotsky, *Liability for Defective Chinese Products under the Alien Tort Claims Act*, 7 WASH. U. GLOB. STUD. L. REV. 519, 525–26 (2008).

7. Melamine is a nitrogen based chemical commonly used in plastics, adhesives, laminates, countertops, and fertilizer. See *Questions and Answers on Melamine*, WHO, <http://www.who.int/csr/media/faq/QAmelamine/en> (last visited Oct. 13, 2011) [hereinafter WHO, *Q&A*]; WHO, *Melamine*, *supra* note 6, at vi; Nikhil Swaminathan, *Why is Melamine in Baby Formula, Your Food and Your Pets' Meals?*, SCI. AM. NEWS BLOG (Sept. 24, 2008, 6:07 PM), <http://www.scientificamerican.com/blog/post.cfm?id=why-is-melamine-in-baby-formula-you-2008-09-24>. Melamine contains sixty-six percent nitrogen and is often illegally added to food products to boost the apparent protein content of the food. Jizan Boy, *Effect of Melamine on Milk Products*, HUB PAGES, <http://hubpages.com/hub/Effect-of-Melamine-on-Milk-Products> (last visited Oct. 13, 2011); WHO, *Q&A*, *supra*. Prior to the melamine scandal, common methods used for measuring protein content in food measured nitrogen levels rather than actual protein levels because protein is generally the sole nitrogen source in food. See WHO, *Melamine*, *supra* note 6, at 4; Swaminathan, *supra*. The introduction of melamine to the food product results in an incorrectly high protein measurement creating the appearance that a low protein food is rich with protein and more nutritious. WHO, *Q&A*, *supra*. Chronic exposure to melamine has caused bladder or kidney stones, bladder cancer and acute kidney failure in animals. *Id.*

8. WHO, *Melamine*, *supra* note 6, at vi; *Report on: New 2010 "Tort Law of the People's Republic of China,"* PAS ADVISORS CO. LTD. (Apr. 24, 2010), [http://pasadvisors.com/docu/Tort\\_Law.pdf](http://pasadvisors.com/docu/Tort_Law.pdf) [hereinafter *Tort Law of PRC*].

9. See generally WHO, *Melamine*, *supra* note 6, at vi; Carmody, *supra* note 6, at 686 (explaining that Chinese manufactures often ignore safety standards to cut costs); Slawotsky, *supra* note 6, 525–26.

10. WHO, *Melamine*, *supra* note 6, at vi; Boy, *supra* note 7; WHO, *Q&A*, *supra* note 7.

11. WHO, *Melamine*, *supra* note 6, at 4; Boy, *supra* note 7; WHO, *Q&A*, *supra* note 7.

12. Boy, *supra* note 7; Swaminathan, *supra* note 7; WHO, *Q&A*, *supra* note 7.

Mattel, Inc. recalled over twenty million toys manufactured in China and sold in the United States.<sup>14</sup> The Chinese manufacturer in this case substituted a lead-based paint for the non-lead based paint required by Mattel's product specifications.<sup>15</sup> Economically attractive but harmful shortcuts continue to mar the reputation of China's manufacturing sector. If China wishes to remain the world's largest exporter, it must win the confidence of its domestic and international customers.<sup>16</sup> A cohesive legal system that effectively regulates manufacturers and protects consumers is essential to establishing a positive reputation and gaining consumer trust. Without improving the reputation of its products and allowing for critical product recalls when necessary, China will see its long-term prosperity threatened.<sup>17</sup>

To address this issue, the Standing Committee of the National People's Congress enacted the PRC Tort Liability Law on December 26, 2009.<sup>18</sup>

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13. 2007 was an especially bad year for products exported from China and the consumers who purchased them. From flammable lamps to poisonous toothpaste, and an abundance of children's toys covered in lead, industry insiders estimate that approximately half of all product recalls in 2007 (240 out of 473) were for products manufactured in China. Schmid, *supra* note 5, at D2; Bob Weaver, *Enjoy the Poison! - Just Pretend, It's All Okay*, HUR HERALD (Aug. 16, 2007), [http://www.hurherald.com/cgi-bin/db\\_scripts/articles?Action=user\\_view&db=hurheral\\_articles&id=24652](http://www.hurherald.com/cgi-bin/db_scripts/articles?Action=user_view&db=hurheral_articles&id=24652).

14. Joseph Ogando, *Mattel Recall Was Made in China*, DESIGN NEWS, Sept. 24, 2007, at 31.

15. *Id.* According to Randall Goodden, a products liability consultant, Chinese manufacturers are not at fault for more than half of Chinese products recalled in the United States which result from defective product design or engineering. Schmid, *supra* note 5, at D2. However, manufacturers in China are faulted for recalls resulting from the manufacturer's deviation from product plans. *Id.*

16. *See generally* Carmody, *supra* note 6, at 694 (stating that China's economic growth relies on consumer driven countries such as the United States and European Union).

17. The author acknowledges that allegations of widespread government corruption exist within the Chinese court system. *See* Ling Li, The "Production" of Corruption in China's Courts 2-4 (July 5, 2011) (unpublished manuscript), *available at* <http://www.usasialaw.org/wp-content/uploads/2011/07/The-production-of-corruption-in-Chinas-courts.pdf>. While corruption within the Chinese legal system poses a major obstacle to the effectiveness of a private recall remedy, this Note does not address corruption directly because the problem is not unique its focus. Corruption notwithstanding, the structure of China's legal system may provide a friendly environment for private recall remedies.

18. Zhonghua Renmin Gongheguo qin quan ze ren fa (中华人民共和国侵权责任法) [The People's Republic of China Tort Liability Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) (China), *translated in* World Intellectual Prop. Org. [WIPO], *Tort Law of the People's Republic of China*, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=182630](http://www.wipo.int/wipolex/en/text.jsp?file_id=182630) (last visited Oct. 13, 2011) [hereinafter PRC Tort Liability Law]; Tiecheng Yang et al., *PRC Tort Liability Law:*

The law, effective July 1, 2010, attempts to promote “social harmony” by protecting personal and property rights while preventing and punishing civil misconduct.<sup>19</sup> By imposing a duty to recall hazardous products upon responsible parties and providing private parties with remedies similar to a product recall,<sup>20</sup> the Tort Liability Law illustrates China’s desire to improve the reputation of its manufacturing sector within the international community.

This Note explores the feasibility of a private right of action for product recalls in China under Article 45 of the PRC’s Tort Liability Law. Part I of this Note traces the evolution of China’s product liability regime through the PRC Tort Liability Law. Part II examines the Tort Liability law’s contribution to China’s product liability jurisprudence and the law’s attempt to promote corporate responsibility and personal safety. In Part III, this Note addresses the feasibility of a private right of action for product recalls in China, using the United States’ recall regime as a benchmark. While it is unclear whether or not China’s interpretation of Article 45 will provide a private remedy for product recalls, if such a right is recognized, China’s civil law system faces fewer implementation challenges than the United States’ common law legal system.

#### I. THE EMERGENCE OF PRODUCT LIABILITY LAW IN THE PRC

Prior to 1978, China’s tort law was limited to rules and regulations enacted by the Ministry of Railways and the Ministry of Transport pertaining to railroad and maritime accident compensation.<sup>21</sup> Wang Weiguo, a professor at China University of Political Science and Law, remembers teaching at Southwest University of Political Science and Law in 1979 where “almost no one there knew what tort law was.”<sup>22</sup> Since 1978, China’s tort law has developed through the enactment of various pieces of legislation.

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*Another Milestone in the PRC Civil Law System*, CLIFFORD CHANCE, LLP (June 2010), [http://www.cliffordchance.com/publicationviews/publications/2010/06/prc\\_tort\\_liability\\_law\\_another\\_milestone\\_in\\_the\\_prc.html](http://www.cliffordchance.com/publicationviews/publications/2010/06/prc_tort_liability_law_another_milestone_in_the_prc.html) (follow “Download Full Report” hyperlink) [hereinafter *Another Milestone in the PRC*]; Michael Turnbull, *A Clearer Page of Tort Liability: Recent Legislation Changes to Civil Tort Liability*, DEACONS (July 2010), [http://www.deaconslaw.com/eng/knowledge/knowledge\\_378.htm](http://www.deaconslaw.com/eng/knowledge/knowledge_378.htm).

19. PRC Tort Liability Law, ch. I, art. 1 (China).

20. See *infra* Part II.A; see also PRC Tort Liability Law, ch. V, arts. 45–46 (China).

21. Wang Hairong, *Making It Right*, BEIJING REV., Jan. 14, 2010, at 16, available at [http://www.bjreview.com/print/txt/2010-01/08/content\\_239117.htm](http://www.bjreview.com/print/txt/2010-01/08/content_239117.htm); Ye Lin, *The Tort System in China*, 52 LAW & CONTEMP. PROBS. 143, 148 (Li Xiaoming & Henry Pitney trans., 1989).

22. Hairong, *supra* note 21, at 16.

Early Chinese tort law began with the promulgation of the General Principles of the Civil Law of the PRC (the “General Principles”) in 1986,<sup>23</sup> which still apply today. The content of the General Principles is rather broad and abstract.<sup>24</sup> Initially, the legislature intended to implement a civil code to augment the General Principles; however, the Standing Committee never enacted additional legislation.<sup>25</sup> To satisfy the need for more specific guidelines, the Supreme People’s Court adopted the Opinion on the General Principles of Civil Law (the “Opinion”) in 1988. The Opinion is a judicial interpretation of the General Principles based on a proposed civil code draft.<sup>26</sup>

Finally, in 1993, the Product Quality Law and the Consumer Rights and Interests Protection Law were enacted, providing more detailed regulation of consumer products and consumer rights.<sup>27</sup> The Product Quality Law, which contains significantly more detail than the General Principles,<sup>28</sup> categorizes product deficiencies as “flaws” or “defects.” Accordingly, liability varies depending on the classification of the deficiency.<sup>29</sup>

A product flaw occurs where a product fails to perform as intended or where a product’s quality fails to meet the standards outlined on the

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23. Andrew J. Green, *Tort Reform with Chinese Characteristics: Towards a “Harmonious Society” in the People’s Republic of China*, 10 SAN DIEGO INT’L L.J. 121, 126, 130 (2008); Lin, *supra* note 21, at 148–50 (explaining that the establishment of tort law in China began with the enactment of the General Principles which aimed to protect the “lawful civil rights and interests of citizens and legal persons”); Julius Melnitzer, *Delineating Liability: China’s New Tort Law Raises Questions in an Uncertain Civil Landscape*, INSIDECOUNSEL, June 1, 2010, at 36. Under the General Principles, an act or omission leading to an unlawful invasion of the personal or property right of another constitutes a tort. Lin, *supra* note 21, at 151–53. It is important to recognize that tortious conduct only arises where the conduct is unlawful. *Id.* The actor assumes no liability where lawful conduct results in personal injury or property damage. *Id.*

24. Feng Chen, *The New Era of Chinese Contract Law: History, Development and a Comparative Analysis*, 27 BROOK. J. INT’L L. 153, 157 (2001).

25. Green, *supra* note 23, at 127. The General Principles of the Civil Law was designed to serve as a framework for civil law interpretation, providing a general basis for Chinese tort law; however the General Principles of the Civil Law does not include guidelines for judicial interpretation. *Id.* at 126.

26. *Id.* at 127.

27. *Id.* at 130. The PRC also enacted the Advertisement Law and the Contract Law to strengthen the protection of China’s consumers. Brooke Overby, *Consumer Protection in China after Accession to the WTO*, 33 SYRACUSE J. INT’L L. & COM. 347, 352 (2005–2006).

28. Green, *supra* note 23, at 129.

29. Peter Neumann & Calvin Ding, *China’s New Tort Law: Dawn of the Product Liability Era*, CHINA BUS. REV., Mar.–Apr. 2010, at 28–30 [hereinafter Neumann & Ding, *China’s New Tort Law*].

product or its packaging.<sup>30</sup> Under the Product Quality Law, the seller of a flawed product is responsible for compensating injured parties for their losses.<sup>31</sup> Even where a flaw results from a manufacturing error, the seller remains liable to the consumer.<sup>32</sup> Nevertheless, in such circumstances, the seller may seek to recuperate losses from the product's manufacturer.<sup>33</sup>

A product defect, on the other hand, occurs where a product contains an unreasonable hazard that threatens a person's health, safety, or property.<sup>34</sup> Additionally, a product that fails to meet national or industry health and safety standards qualifies as a defect.<sup>35</sup> Unlike with a product flaw, in a product defect the manufacturer assumes liability for resulting injuries, death or property damage.<sup>36</sup> However, the Product Quality Law does not provide an aggrieved party with uninhibited access to China's court system, and therefore is not always a sufficient remedy.<sup>37</sup>

Additionally, the Consumer Rights and Interests Protection Law<sup>38</sup> expands the Product Quality Law by regulating business services, product merchandising, and improper uses of business licenses.<sup>39</sup> The law provides consumers with rights to personal safety, freedom from property damage, information regarding goods and services offered for sale, and the ability to demand compensation for personal injury or property dam-

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Green, *supra* note 23, at 129. Green suggests the law instead protects manufacturers from products liability litigation by strictly enforcing arbitration clauses even when included in adhesion contracts or contracts that are otherwise unfair. *Id.*

38. The Consumer Rights and Interests Protection Law acts to "protect[] . . . the legitimate rights and interests of consumers, maint[ain] . . . the socio-economic order and promot[e] . . . the healthy development of [China's] socialist market economy." Zhonghua Renmin Gongheguo xiao fei zhe quan yi bao hu fa (中 华 人 民 共 和 国 消 费 者 益 保 法) [Law of the People's Republic of China on the Protection of Consumer Rights and Interests] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994), ch. I, art. 1 (China), translated in WIPO, *Law of the People's Republic of China on Protection of Consumer Rights and Interests*, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=209069](http://www.wipo.int/wipolex/en/text.jsp?file_id=209069) (last visited Oct. 15, 2011).

39. Green, *supra* note 23, at 130; Jeffrey Yang, *Consumer Protection Policies for MNCs in China*, CHINA L. & PRAC., June 2005, available at <http://www.chinalawandpractice.com/Article/1692457/Channel/9930/Consumer-Protection-Policies-for-MNCs-in-China.html>.

age resulting from product defects.<sup>40</sup> Furthermore, the Consumer Rights and Interests Protection Law requires manufacturers, including government manufacturers, to comply with the Product Quality Law; produce products and services in accordance with personal and product safety standards; and guarantee the quality, usage, and function of products and services.<sup>41</sup> Under the Consumer Rights and Interests Protection Law, where personal injury results from a product defect, the business operator is liable to recuperate the injured party for medical and other expenses pertaining to the injury.<sup>42</sup>

Analyzing the true effect and reach of China's tort law can be cumbersome because the law is strewn across numerous pieces of legislation that are often incomplete or in conflict with other laws.<sup>43</sup> While the Opinion, the Product Quality Law, and the Consumer Rights and Interests Protection Law supplement the General Principles, these statutes are very general and often provide insufficient explanations of China's legal doctrine.<sup>44</sup> Du Wanhua, Presiding Judge of the Supreme People's Court's No. 1 Civil Trials Tribunal, expressed concern for the complexity and volume of China's tort cases and the judiciary's need for a comprehensive tort law.<sup>45</sup> According to Richard Goetz, leader of Dykema Gossett PLLP's international practice group, "in China, finding the law is half the battle."<sup>46</sup>

On top of this, the volume of tort litigation in China's court system has risen tremendously over the past decade.<sup>47</sup> This increase in litigation has intensified pressure for a unified and comprehensive tort regime.<sup>48</sup> In response, the Standing Committee issued the PRC Tort Liability Law.<sup>49</sup>

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40. Yang, *supra* note 39; Overby, *supra* note 27, at 353.

41. Overby, *supra* note 27, at 353–54.

42. *Id.* at 354.

43. Nash, *supra* note 2, at 8; John V. Grobowski & Yiqiang Li, *Tort Liability Law of the People's Republic of China*, FAEGRE & BENSON LLP (Feb. 1, 2010), <http://www.faegre.com/10911> (explaining how the PRC Tort Liability Law consolidates tort principals "scattered among different Chinese laws, regulations and court opinions").

44. Green, *supra* note 23, at 130.

45. Hairong, *supra* note 21, at 16.

46. Melnitzer, *supra* note 23, at 36. Prior to Goetz's employment with Dykema Gossett PLLC, Goetz served as Associate General Counsel-International at Ford Motor Company where he played an instrumental role in establishing Ford's operations in China. Biography for *Richard G. Goetz*, DYKEMA GOSSETT PLLC, <http://www.dykema.com/bio/display.asp?emplID=574> (last visited Oct. 25, 2011).

47. Nash, *supra* note 2, at 8 (stating that "China has experienced a rapid increase in the number of tort-related cases over the past decade, with courts now hearing more than one million each year").

48. Neumann & Ding, *China's New Tort Law*, *supra* note 29, at 28–30.

49. Turnbull, *supra* note 18.



The Tort Liability Law integrates legal issues covered in pre-existing laws into a unified framework for tort law regulation.<sup>50</sup> The new tort law exemplifies China's willingness to adapt the rights and protections of China's population along with the evolution of China's social and economic climate.<sup>51</sup> Such willingness is illustrated in the tort law's expansion of individual rights, including, for the first time ever, the recognition of individual privacy rights.<sup>52</sup> Many commentators view the law as "a further step in the path towards the protection of individual rights"<sup>53</sup> because the law provides remedies for injured parties and fosters a conscientious attitude amongst corporate and private actors.<sup>54</sup>

## II. CHAPTER FIVE OF THE PRC'S TORT LIABILITY LAW

Chapter V of the Tort Liability Law outlines the framework for products liability law in China.<sup>55</sup> Contained in only seven articles,<sup>56</sup> Chapter V consolidates the Product Quality Law and the Consumer Rights and Interests Protection Law into one authoritative source for product liability law.<sup>57</sup> While Chapter V lacks guidance for enforcement, it introduces new grounds for liability, expands remedies available to injured parties,

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50. *Tort Law of PRC*, *supra* note 8.

51. *See id.*; Hairong, *supra* note 21, at 16.

52. Vincent Zhang, *Right to Privacy Established Under Tort Liability Law*, LINKLATERS LLP (Jan. 18, 2010), <http://www.linklaters.com/Publications/Publication1403Newsletter/20100118/Pages/TortLaw.aspx>.

53. *Tort Law of PRC*, *supra* note 8.

54. *Id.*; Wenfei Attorneys-At-Law Ltd., *China Legal Briefing 210* (Mar. 8–14, 2010), [http://www.wenfei.com/fileadmin/archives/clb/CHINA\\_LEGAL\\_BRIEFING\\_210.pdf](http://www.wenfei.com/fileadmin/archives/clb/CHINA_LEGAL_BRIEFING_210.pdf) [hereinafter *China Legal Briefing*]; *see* Hairong, *supra* note 21, at 16 (quoting Wang Liming) ("The new tort law is people-oriented, and shows that lawmakers have put human lives and health first."). Article 17 of the new tort law exemplifies China's effort to advance civil rights. Prior law provided unequal compensation for the tortious deaths of rural and urban victims. Hairong, *supra* note 21, at 16. China's judiciary reasoned that lost wages must be accounted for when computing compensation awards for death. *Id.* The large disparity in earnings for urban workers and rural workers required the court to utilize different formulas when computing compensation awards for urban victims and rural victims, resulting in significantly larger awards for urban victims. Nash, *supra* note 2, at 8. Article 17 of the new tort law rectifies the problem of unequal compensation awards by entitling urban victims and rural victims to equal compensation awards for deaths caused by the same tort. PRC Tort Liability Law, ch. II, art. 17 (China).

55. *Id.* ch. V.

56. *Id.* ch. V, arts. 41–47.

57. *See infra* text accompanying notes 59–68.

and remains in line with the Tort Liability Law's spirit of enhancing social welfare.<sup>58</sup>

Chapter V of the Tort Liability Law enforces the same general rules as the Product Quality Law.<sup>59</sup> However, the tort liability law disposes of the Product Quality Law's distinction between product flaws and defects.<sup>60</sup> Instead, the Tort Liability Law only refers to defective<sup>61</sup> products, distinguishing between defects caused by the product's manufacturer, the product's seller, and third parties.<sup>62</sup> Unlike the Product Quality Law, where the party liable depends on whether a product flaw or defect is present, the new tort law allows the injured party to pursue a damage award from either the product's manufacturer or seller.<sup>63</sup> Furthermore, the Tort Liability Law provides that where the defect is the fault of the manufacturer and the seller has assumed liability, the seller is entitled to reimbursement by the manufacturer.<sup>64</sup> Likewise, where the defect is the fault of the seller and the manufacturer has assumed liability, the manufacturer has the right to reimbursement from the seller.<sup>65</sup> Finally, the Tort Liability Law also provides that where the defect is the result of a third party<sup>66</sup> and an injured party is awarded damages from either the manufacturer or the seller, the party assuming liability may be reimbursed by

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58. See PRC Tort Liability Law, ch. I, art. 1 & ch. V (China).

59. Peter Neumann & Calvin Ding, *China Passes Tort Law: A Brave New World of Punitive Damages?*, GREENBERG TRAURIG, LLP (Dec. 30, 2009), <http://www.gtlaw.com/portalresource/lookup/wosid/contentpilot-core-401-15002/pdfCopy.pdf?view=attachment> [hereinafter Neumann & Ding, *A Brave New World*]; Turnbull, *supra* note 18.

60. PRC Tort Liability Law, ch. V (China).

61. The Tort Liability Law does not redefine the term "defect." *Id.*; Lu Yunguang & Margalit Faden, *The New Tort Law and Product Liability*, WANG JING & CO. (Jan. 13, 2011), [http://www.wjnco.com/eng/articles\\_show.asp?Articles\\_id=196](http://www.wjnco.com/eng/articles_show.asp?Articles_id=196).

62. PRC Tort Liability Law, ch. V (China).

63. *Id.* ch. V, art. 43. Additionally, to protect injured parties, the tort law provides that where a single tortious act requires the tortfeasor to compensate an injured party and subjects the tortfeasor to administrative liability or criminal liability, if the tortfeasor's assets are not sufficient to make all required payments, the tortfeasor must first compensate the injured party. *Id.* ch. 1, art. 4; see *China Legal Briefing*, *supra* note 54.

64. PRC Tort Liability Law, ch. V, art. 43 (China).

65. *Id.*

66. The Tort Liability Law explicitly names warehousemen and carriers as examples of third parties who may be responsible for product defects. *Id.* ch. V, art. 44. Nevertheless, the language of the law implies that for the purposes of identifying third parties, the scope is not in any way limited to warehousemen and carriers. See *id.* Other third parties who come in contact with products prior to the sale to the buyer can be the cause of a product defect and therefore responsible for reimbursing the seller or manufacturer. *Id.*

the third party.<sup>67</sup> An injured party, however, is not entitled to recover damages directly from the third party.<sup>68</sup>

In addition to providing compensation for damages,<sup>69</sup> the Tort Liability Law also introduces a limited punitive damages remedy.<sup>70</sup> Under the new tort law, punitive damages are only available where a manufacturer or seller is aware of a product defect and nonetheless continues to manufacture or sell the product.<sup>71</sup> Furthermore, the defect must cause death or serious injury.<sup>72</sup> This is the first time Chinese law has provided punitive damages as a remedy<sup>73</sup> and appears to be a response to recent scandals that have caused an abundance of worldwide recalls of Chinese products.<sup>74</sup> Similar to many of China's regulations, Article 47 provides punitive damages as a remedy without providing guidance as to the judiciary's implementation of such punitive damages awards.<sup>75</sup> Some commentators predict that standards will be clarified through judicial interpretation, while others feel that China's courts may be hesitant to impose punitive damages without guidelines from the government.<sup>76</sup> Nonethe-

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67. *Id.*

68. *Another Milestone in the PRC*, *supra* note 18.

69. The PRC's Tort Liability Law maximizes the damage awards an injured party is entitled to receive. Previously, Article 119 of the General Principles limited compensation for personal injuries to medical expenses, loss of income from work, and expenses arising out of living as a disabled person. Lin, *supra* note 21, at 160. Furthermore, Article 119 limited damages for death to funeral expenses and maintenance payments for the decedent's surviving dependents. *Id.* Article 119 also provided compensation for medical expenses and loss of income from work if the decedent's death occurred during medical treatment. *Id.*

70. PRC Tort Liability Law, ch. V, art. 47 (China).

71. *Id.*

72. *Id.* The PRC Tort Liability Law does not specify what constitutes serious injury. *See id.* ch. V, art. 47.

73. David Dai & Alex An, *New Tort Liability Law: Ramifications for Companies Doing Business in China*, MWE CHINA LAW OFFICES, <http://www.mwechinalaw.com/news/2010/chinalawalert0110a.htm> (last visited Oct. 25, 2011) [hereinafter Dai & An]. In a very rare exception, China enacted The Consumer Rights Protection Law and The Food Safety Law in response to an incident where contaminated milk was sold to consumers. *Id.* The laws allow injured parties limited recovery of punitive damages in cases of fraud against consumers or violations of food safety regulations. *Id.* However, punitive damages in these instances are limited. *Id.* The Consumer Rights Protection Law allows an injured party to recover only the purchase price of a product and the Food Safety Law limits an injured party's punitive damages award to ten times the purchase price of a product. *Id.* The new tort law, however, is the first piece of Chinese legislation to actually use the term punitive damages. *Id.*

74. Neumann & Ding, *A Brave New World*, *supra* note 59.

75. PRC Tort Liability Law, ch. V, art. 47 (China).

76. *See* Dai & An, *supra* note 73; Nash, *supra* note 2, at 8.

less, most observers do agree that if any punitive damages are awarded, they will not be excessive.<sup>77</sup>

Where a manufacturer or seller learns of a product defect after the product enters the market, the manufacturer or seller must warn the public of a defect or recall the product in question to avoid liability.<sup>78</sup> A product recall is another form of remedy where a manufacturer or seller of a defective or unsafe product requests that purchasers of the product return it.<sup>79</sup> The goal of a product recall is “to limit liability for corporate negligence (which can cause costly legal penalties) and to improve or avoid damage to publicity.”<sup>80</sup> Executing a product recall is often expensive because the recall may require that the responsible party pay to replace or repair the defective product or reimburse purchasers for the price of the product.<sup>81</sup> While the cost of executing a product recall may be high, it is generally believed that recalls are less expensive than the cost of damages and the subsequent harm to a brand’s reputation.<sup>82</sup>

#### *A. Article 46 Provides for Recalls; Article 45 Creates Questions*

Article 46 of the Tort Liability Law creates a duty for manufacturers and sellers to warn consumers and recall products when the manufacturer or seller knows of a defective product in the stream of commerce.<sup>83</sup> Prior to the enactment of the PRC Tort Liability Law, China’s product recall rules included provisions aimed at specific products<sup>84</sup> rather than at de-

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77. Dai & An, *supra* note 73 (explaining that because the Chinese judicial system does not include jury trials, the excessive punitive damages awards often issued by juries will not be seen in China); Nash, *supra* note 2, at 8 (stating that observers do not believe that Chinese courts will award massive punitive damages awards in the near future).

78. PRC Tort Liability Law, ch. V, art. 46 (China).

79. BLACK’S LAW DICTIONARY 1295 (8th ed. 2004).

80. Brett Bumeter, *Definition of Product Recall*, DISTRIB. BUS. ARTICLES (Aug. 21, 2007, 4:12 PM), <http://distributionbusinessarticles.blogspot.com/2007/08/definition-of-product-recall.html>.

81. *Id.*; Jeffrey A. Lamken, Note, *Efficient Accident Prevention as a Continuing Obligation: The Duty to Recall Defective Products*, 42 STAN. L. REV. 103, 104 (1989–1990).

82. Bumeter, *supra* note 79.

83. PRC Tort Liability Law, ch. V, art. 46 (China).

84. Prior to the PRC’s Tort Liability Law, Chinese law provided recall rules with respect to automobiles, food, and toys. Mark Schaub, *New PRC Defective Product Recall System: Implementation*, KING & WOOD (Apr. 30, 2009), <http://www.chinalawinsight.com/2009/04/articles/corporate/new-prc-defective-product-recall-system-implementation>. China’s legislature promulgated the initial recall regime in response to emergency situations. *Id.* For example, in 2004 China instituted recall regulations for defective automobiles in response to foreign car manufacturers depriving Chinese consumers rights allotted to consumers in other jurisdictions (mainly the United States and European countries). *Id.*

fective products in general.<sup>85</sup> However, Article 46 of the PRC Tort Liability Law applies to all defective products,<sup>86</sup> providing that where a product defect is discovered after the product has entered the stream of commerce,<sup>87</sup> the manufacturer or seller must take remedial measures such as issuing a warning or recall in a timely manner.<sup>88</sup> Any manufacturer or seller who fails to take remedial measures or “sufficient and effective” action in a timely manner is liable for any harm caused by the defective product.<sup>89</sup> This provision establishes a post-sale duty to warn or recall for manufacturers and sellers who become aware of a defect after the product has entered the marketplace.<sup>90</sup>

In addition to compelling manufacturers and sellers to initiate recalls, Article 45 of the tort law allows injured parties to require a manufacturer or seller of a defective product that threatens personal or property safety to eradicate the threat.<sup>91</sup> The law states that “where the defect of a product endangers the personal or property safety of another person, the victim shall be entitled to require the manufacturer or seller to assume the tort liabilities by removing the obstruction or eliminating the danger.”<sup>92</sup> The language of Article 45 suggests that any victim of harm from a faulty product, whether person or property, can demand in court that the product’s manufacturer or seller take action to “eliminate the danger.”<sup>93</sup> This interpretation creates a mechanism for a court to issue decrees for mandatory recalls and gives standing to private individuals to demand

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85. *Id.*

86. Due to the large number of claims regarding defective products both internationally and in China, the need for China to expand its recall regime to cover a larger scope of products increased. *Another Milestone in the PRC*, *supra* note 18. The new tort law’s expansion of products for which manufacturers and sellers may be required to institute a recall is seemingly China’s attempt to address the recent scandals among China’s manufacturers producing and selling defective and hazardous products. Neumann & Ding, *A Brave New World*, *supra* note 59.

87. See *supra* text accompanying notes 69–77 for product defects discovered before the product entered the stream of commerce. Article 47 of the Tort Liability Law addresses manufacturers and sellers who, aware of a product’s defect, continues to sell or produce the defective product. PRC Tort Liability Law, ch. V, art. 47 (China). Where the defective product causes death or otherwise serious damage to the health of another person, the injured party has a right to punitive damages. *Id.*

88. *Id.* ch. V, art. 46.

89. *Id.*

90. See generally M. Stuart Madden, *The Quiet Revolution in Post-Sale Duties*, 2004 A.B.A. PROD. LIAB. COMM. REP. 8–37.

91. PRC Tort Liability Law, ch. V, art. 45 (China).

92. *Id.*

93. *Id.*

that manufacturers or sellers eliminate danger resulting from harmful products.<sup>94</sup>

Once a product has entered the stream of commerce, no actions can fully “eliminat[e] the danger” of the defect. A manufacturer or seller can notify consumers and purchasers of the product’s defect and its resulting hazards,<sup>95</sup> but a warning does not entirely eliminate the danger posed by the defect because the defective product remains in stores and in the possession of customers.<sup>96</sup> In addition to warning consumers of danger, manufacturers and sellers can cease production and sale of a defective product.<sup>97</sup> Preventing additional defective products from entering the marketplace helps limit future injuries; however, defective products already in the marketplace continue to threaten public safety.<sup>98</sup> The Tort Liability Law’s requirement to eliminate the danger of a defect therefore imposes more than a manufacturer or seller’s post-sale duty to warn or a duty to cease production and sale of a defective product.<sup>99</sup>

To truly eliminate the danger posed by a defective product, action taken by manufacturers and sellers must address the defective products already in possession of consumers.<sup>100</sup> Replacing a defective product with a non-defective one or repairing a defect would sufficiently eliminate danger by removing the defect from the public. Furthermore, refunding the purchaser for the price of the product could adequately eliminate the danger by providing an incentive for the purchaser to return the defective product or dispose of the defective product. If the Chinese court system adopts a literal interpretation of “eliminating the danger,” Article 45 will

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94. While Article 46 uses mandatory language (“the manufacturer or seller *shall* take such remedial measures”), Article 46 actually gives the manufacturer or seller discretion to decide between issuing a product recall and assuming the tort, and possibly punitive liability. *Id.* ch. V, art. 46 (emphasis added). A judgment under Article 45 would mandate that a manufacturer or seller *must* eliminate the danger rather than allowing the manufacturer or seller to exercise its discretion. *Id.* ch. V, art. 45 (emphasis added).

95. See U.S. FOOD & DRUG ADMIN., REGULATORY PROCEDURES MANUAL §§ 7-2, 7-3 (Mar. 2010), <http://www.fda.gov/downloads/ICECI/ComplianceManuals/RegulatoryProceduresManual/UCM074312.pdf> [hereinafter FDA MANUAL]; Madden, *supra* note 90, at 8–37.

96. See Kenneth Ross, *Avoiding Future Problems: The Increased Duty to Take Post-Sale Remedial Action*, 2004 A.B.A. PROD. LIAB. COMM. REP. 38–51.

97. See FDA MANUAL, *supra* note 95, §§ 7-2, 7-3. Failure to cease the manufacture or sale of a product that is known to have a defect which causes death or serious bodily harm exposes the manufacture or seller to liability for punitive damages to injured parties. PRC Tort Liability Law, ch. V, art. 47 (China).

98. See Ross, *supra* note 96, at 38–51.

99. See Madden, *supra* note 90, at 38.

100. See FDA MANUAL, *supra* note 95, §§ 7-2, 7-3; Madden, *supra* note 90, at 8–37.

provide an injured party with a remedy akin to a product recall.<sup>101</sup> Furthermore, many commentators support the view that Article 45 of the PRC Tort Liability Law creates a private right of action for product recalls.<sup>102</sup>

### III. THE FEASIBILITY OF A PRIVATE RECALL REMEDY IN THE PRC

In the United States, a private party does not have standing to demand a manufacturer or seller recall a defective product.<sup>103</sup> A recall can only be issued voluntarily<sup>104</sup> by the manufacturer or seller, or requested by certain government agencies<sup>105</sup> pursuant to a statute or regulation.<sup>106</sup> Private

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101. Compare FDA MANUAL, *supra* note 95, §§ 7-2, 7-3 (explaining the purpose of product recalls and outlining product recall procedures and requirements) with PRC Tort Liability Law, ch. V, art. 45 (China).

102. See, e.g., *Another Milestone in the PRC*, *supra* note 18; Neumann & Ding, *A Brave New World*, *supra* note 59 (explaining that Article 45 may lead to mandatory product recalls, warning labels, or other corrective action); Fai Hung Cheung et al., *PRC Tort Liability Law*, ALLEN & OVERY (Jan. 13, 2010), <http://www.allenoverly.com/AOWEB/Knowledge/Editorial.aspx?contentTypeID=1&contentSubTypeID=7944&itemID=54378&prefLangID=410> (stating that Article 45 may allow injured parties a legal remedy for the recall of defective products).

103. Richard C. Warmer, *Judges as Regulators: Using Injunctive Relief to Recall Products*, 68 DEF. COUNSEL J. 299, 299 (2001). However, the Consumer Product Safety Improvement Act of 2008 which amends the Consumer Product Safety Act, provides State attorneys with standing to bring lawsuits on behalf of the residents of their state in certain circumstances. See Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 218, 122 Stat. 3016, 3060, available at <http://www.cpsc.gov/cpsia.pdf>.

104. Under United States law, a manufacturer is not under a duty to recall defective products. S. Patrick McKey & Nicola Fiordalisi, *An Overview of United States Product Recall Law*, GARDNER CARTON & DOUGLAS (Aug. 2002), <http://www.drinkerbiddle.com/files/Publication/06752439-cd0c-4492-83d8-a013b37041b0/Presentation/>

PublicationAttachment/9cefaa61-3daa-46e2-9299-93022932ef78/ProductsRecallLaw.pdf. However, if a manufacturer voluntarily recalls a defective product, the manufacturer has a duty to exercise reasonable care in carrying out the recall. *Id.* The duty of reasonable care is required in a voluntary recall because voluntary recalls are generally carried out in anticipation of a recall directed by a governmental agency. *Id.* If a manufacturer is aware of a hazardous product defect, the manufacturer is under a duty to warn consumers of the hazard. *Id.* Therefore, even where there is no duty to undertake a voluntary recall, once the manufacture is aware of the defect, he is under a duty to warn consumers. *Id.*

105. Governmental agencies authorized to request a product recall include the Consumer Product Safety Commission, National Highway Traffic Safety Administration, Food and Drug Administration, United States Coast Guard, Environmental Protection Agency, and the Federal Aviation Administration. Consumer Product Safety Improvement Act § 214; Warmer, *supra* note 103, at 299. However, with the exception of recent legislation, many governmental agencies do not have authority to require a mandatory recall. Brian Giannini, *FDA Food Safety Modernization Act*, EXPERT RECALL (Apr. 12,

remedies do not include product recalls because recalls are burdensome and costly<sup>107</sup> for manufacturers.<sup>108</sup> Furthermore, since a product recall may seriously undermine the reputation of the company issuing the recall,<sup>109</sup> a thorough investigation into the product defect and its resulting harm is necessary prior to mandating a recall.<sup>110</sup> In the United States, authorities believe government agencies, rather than the court system, are better positioned to execute recall investigations because government agencies possess the proper technical, engineering, and empirical expertise to conduct thorough investigations and address technical arguments made by manufacturers.<sup>111</sup> For this reason, in addition to avoiding inconsistent judicial rulings, specialized governmental agencies, rather than private individuals, have standing to order the recall of a defective product.<sup>112</sup>

While most authorities agree that the United States court system is ill-equipped to serve the interests necessary for the implementation of effective product recalls, China's court system differs from the United States'

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2010), <http://www.expertrecall.com/fda-food-safety-modernization-act>. The agencies serve a reactionary function, locating a problem after receiving injury reports and asking manufacturers to voluntarily recall products. Consumer Product Safety Improvement Act § 214; Giannini, *supra*. Recent legislation including the FDA Food Safety Modernization Act, the Consumer Product Safety Improvement Act of 2009, and a draft proposal entitled the Product Recall, Information and Safety Modernization Act work to provide authority for government agencies to enforce preventative measures aimed at keeping dangerous products from entering the stream of commerce. Consumer Product Safety Improvement Act § 214; *Product Recall, Information and Safety Modernization ("PRISM") Act* (Consumer Prod. Safety Comm'n, Working Paper, 2007), available at <http://www.cpsc.gov/PR/PRISM.pdf>; Giannini, *supra*.

106. Warmer, *supra* note 103, at 299.

107. When a corporation recalls a defective product it incurs the actual costs of repair, notifying consumers and prospective consumers, and recovering the product. Lamken, *supra* note 81, at 109. While the actual costs of a product recall are high, damage to a company's brand and goodwill is often the most costly loss associated with a product recall. Marialuisa Gallozzi & Seth A. Tucker, *Exploring the Option of Product Recall Insurance*, INS. COVERAGE L. BULL. (Oct. 11, 2007), available at <http://www.law.com/jsp/article.jsp?id=900005493312>. On average, a product recall will cost a company "a full quarter of profits for the recalled product, marketing to repair long term brand damage, spillover negativity that reduces sales of other products, product liability claims and the cost of restoring status within distribution channels." Craig Gunther, *The High Cost of Product Recall*, VIGILISTICS, INC. (Sept. 2010), available at <http://www.vigilistics.com/pdf/The%20Cost%20of%20Product%20Recall.pdf>.

108. See Warmer, *supra* note 103, at 300.

109. Gunther, *supra* note 107.

110. See Warmer, *supra* note 103, at 299.

111. See *id.*

112. *Id.*



judiciary in a number of significant ways. These differences allow China's courts to function in a similar manner to United States federal agencies and less like the U.S. courts.

*A. The Doctrine of Primary Jurisdiction*

The United States federal courts have consistently held that a private right of action compelling a product recall or invoking a manufacturer or seller's post-sale duty to warn does not comport with the doctrine of primary jurisdiction.<sup>113</sup> The doctrine of primary jurisdiction allocates authority to regulate federal statutes between the United States federal courts and federal regulatory agencies.<sup>114</sup> The United States Supreme Court created the doctrine of primary jurisdiction to reconcile decision-making authority between courts and federal agencies<sup>115</sup> where the adjudicative authority of regulatory agencies and judicial jurisdiction converge.<sup>116</sup> The rationale employed by the United States Supreme Court for denying a private right of action for product recall remedies can be ascertained through understanding the three interests served by the doctrine of primary jurisdiction: comparative competence between federal agencies

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113. See *United States v. W. Pac. R.R., Co.*, 352 U.S. 59, 63–64 (1956).

Primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

*Id.* (citing *Gen. Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940)); *In re Human Tissue Prods. Liab. Litig.*, 488 F. Supp. 2d 430, 433 (D.N.J. 2007) (explaining that the federal courts should defer to the FDA because the courts do not possess sufficient expertise to determine issues regarding the extent of remedial action for product defects. Congress granted regulatory authority to the FDA to investigate and manage product recalls as the FDA possesses the requisite expertise to make the proper determinations regarding necessary protective measures in each particular situation. Additionally, even in a situation where a court issued an order for a corporation to invoke its duty to warn or initiate a product recall, the FDA would not be precluded from requiring alternative or additional action from the corporation, creating the potential for conflict and confusion.).

114. Paula K. Knippa, Note, *Primary Jurisdiction Doctrine and the Circumforaneous Litigant*, 85 TEX. L. REV. 1289, 1290 (2006–2007).

115. *W. Pac. R.R., Co.*, 352 U.S. at 63 (“The doctrine of primary jurisdiction . . . is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.”).

116. Knippa, *supra* note 114, at 1290.

and courts, uniformity of judgments, and flexibility.<sup>117</sup> Furthermore, policies regarding the issuance of equitable remedies are also a factor.<sup>118</sup>

### 1. Comparative Competence between Federal Agencies and Courts

Courts invoke the doctrine of primary jurisdiction when litigation issues fall under the scope of federal regulatory agencies. The doctrine reflects the courts' determination that federal agencies are better suited than courts to address particular issues.<sup>119</sup> First, Congress acknowledged that specific issues—such as when a product recall is necessary—require thorough investigations into often scientific or technical subject matter.<sup>120</sup> To address this need for elevated information, Congress has given regulatory agencies limited but pertinent investigative and adjudicative authority.<sup>121</sup> The regulatory agencies employ technical and scientific experts to create standards and carry out investigations.<sup>122</sup> The agencies' staff also work within the regulated industry on a regular basis and eventually become experts in the substantive areas they regulate, positioning them as superior fact-finders than courts.<sup>123</sup>

Courts, on the other hand, are generalists.<sup>124</sup> In litigation regarding highly complex issues, without the aid of institutional expertise that regulatory agencies rely on, courts often lack adequate resources to un-

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117. For an overview of the interests served by the doctrine of primary jurisdiction see Catherine T. Struve, *Greater and Lesser Powers of Tort Reform: The Primary Jurisdiction Doctrine and State-Law Claims Concerning FDA-Approved Products*, 93 CORNELL L. REV. 1039, 1044 (2008) or Bryson Santaguida, Comment, *The Primary Jurisdiction Two-Step*, 74 U. CHI. L. REV. 1517, 1526–27 (2007).

118. See *infra* text accompanying notes 172–81.

119. Knippa, *supra* note 114, at 1295; Santaguida, *supra* note 117, at 1518.

120. See Santaguida, *supra* note 117, at 1526.

121. See *id.*

122. *Id.*

123. *Id.*; Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255, 258 (1988).

124. *Metro. Bd. of Pub. Educ. v. Guest*, 193 F.3d 457, 462 (6th Cir. 1999) (quoting *Crocker v. Tenn. Secondary Sch. Athletic Assoc.*, 873 F.2d 933, 935 (6th Cir. 1989)) (explaining that federal courts are generalists with no specialized knowledge regarding the educational needs of handicapped children, and therefore fact-finding should be left to the expertise of state agencies created for that purpose); Hon. Guido Calabresi, Owen J. Roberts Memorial Lecture at the University of Pennsylvania Law School: *The Current, Subtle—and Not So Subtle—Rejection of an Independent Judiciary*, (Jan. 31, 2002), in 4 U. PA. J. CONST. L. 637, 639 (2002) (“Judges are generalists who deal with a variety of matters and there are very good reasons why they should do so. But breadth inhibits depth, so the idea that judges should defer to experts is a perfectly sensible one.”); JAMES G. APPLE & ROBERT P. DEYLING, *A PRIMER ON THE CIVIL-LAW SYSTEM* 35–38 (1995) available at [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf).

derstand core issues and are therefore unable to properly balance considerations necessary for decision-making.<sup>125</sup> Courts, therefore, invoke the doctrine of primary jurisdiction, giving discretion to regulatory agencies in instances where a “better informed” and more “uniform” ruling can be produced by utilizing the agency’s “specialized knowledge, expertise, and central position within a regulatory regime.”<sup>126</sup>

In authorizing federal agencies to regulate product recalls, Congress acknowledges that the fact-finding required in determining the necessity of a product recall exceeds the level of fact-finding that courts ordinarily conduct in litigation.<sup>127</sup> An adjudicative body must be able to weigh the benefits and costs of a product recall in light of this highly technical or scientific information.<sup>128</sup> Congress believes that regulatory agencies are better suited to address the complex issue of product recalls, as courts’ limited resources would be quickly drained by the extreme level of fact-finding necessary for a private recall remedy.<sup>129</sup> For these reasons, the doctrine of primary jurisdiction has evolved as a mechanism that allows courts to defer to Congressional intent in such instances and allow the wisdom of federal agencies to govern.

The idea that the United States court system is not properly situated to conduct the level of research necessary to permit product recalls is not shared by China’s civil law system.<sup>130</sup> The United States’ court system, similar to most common-law court systems, typically relies on courts of general jurisdiction to hear cases with diverse subject matter.<sup>131</sup> China’s court system, on the other hand, utilizes numerous specialized courts with jurisdiction limited to specific issues.<sup>132</sup> China favors specialty courts in order to ease the burdens<sup>133</sup> of the country’s large and scattered legislative framework.<sup>134</sup> While a specialty court for product recalls has not been established, the number of specialized courts continues to rise

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125. Santaguída, *supra* note 117, at 1526.

126. *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673 (2003).

127. *See supra* note 94.

128. *See supra* note 96 regarding the negative costs associated with initiating a recall.

129. Such extensive discovery would also create massive expenses for litigants.

130. *See supra* text accompanying notes 118–28.

131. APPLE & DEYLING, *supra* note 124, at 35–38.

132. Jiang Huiling, *Judicial Reform, in CHINA’S JOURNEY TOWARDS THE RULE OF LAW* 199, 216 (Cai Dingjian & Wang Chenguang eds., 2010).

133. *See supra* text accompanying notes 42–45.

134. APPLE & DEYLING, *supra* note 124, at 35–38 (explaining that civil-law countries often utilize a compartmentalized court system where courts are limited to hearing cases dealing with one type of law).

as the variety of cases handled by China's courts increases.<sup>135</sup> These specialty courts have the advantage of allowing judges to become experts in the area of law covered by the court they preside over, resulting in consistent rulings in the particular field of the court.<sup>136</sup> United States Federal judges, on the other hand, do not have the opportunity to become specialists in fields that require specialized knowledge.<sup>137</sup> The potential for China's judiciary to establish a specialty court to provide private product recall remedies makes China a favorable forum. In common-law countries, lawyers present cases on behalf of their clients and judges serve as referees.<sup>138</sup> In contrast, the inquisitorial nature of China's civil law court system heightens the role of the presiding judge.<sup>139</sup> A judge in China's court system acts as the principle investigator, responsible for investigating claims on both sides of a case.<sup>140</sup> Over time, the Chinese court has adopted aspects of the common-law justice system,<sup>141</sup> however, civil law's inquisitorial method of adjudication remains the dominant system in China.<sup>142</sup> This inquisitorial judicial system furthers the Chinese court's ability to develop expertise in the field of product recalls. Similar to the United States' regulatory agencies, judges in a Chinese specialty court

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135. Huiling, *supra* note 132, at 216–17 (stating that the Supreme People's Court includes five specialized criminal courts, four specialized civil courts, one specialized court to deal with case filings, a specialized administrative law court, and a specialized adjudication supervision court). Chinese courts of special jurisdiction include the Military Court of China, the Railway Transport Court of China, the Maritime Court of China, the forestry court, the agricultural reclamation court, and the petroleum court. *The National Court Organizations*, CHINA.ORG.CN (May 20, 2003), [http://www.china.org.cn/features/state\\_structure/2003-05/20/content\\_1065040.htm](http://www.china.org.cn/features/state_structure/2003-05/20/content_1065040.htm). In addition to creating courts of specialized jurisdiction, a 2008 amendment to the Civil Procedure Law provides that lower courts and intermediate courts may establish enforcement bodies for the purpose of enforcing judicial judgments made by the court. Huiling, *supra* note 132, at 217. The ability of each specialized court to create mechanisms to enforce their judgments strengthens the court's reach by diminishing the problem of unenforced judgments. *Id.*

136. Michael Williams, *Do We Need More Federal Specialty Courts?*, VIEW FROM LL2 (Sept. 17, 2010), <http://viewfromll2.com/2010/09/17/do-we-need-more-federal-specialty-courts>.

137. *Id.*

138. APPLE & DEYLING, *supra* note 124, at 35–38.

139. *Id.*; Huiling, *supra* note 132, at 206.

140. Huiling, *supra* note 132, at 233.

141. Chinese judges have begun to limit their influence on trial litigation to focus on the parties' perception of the case. *Id.* Courts have also begun to place the burden of production on the party making a legal claim rather than relying on the presiding judge solely for the production of information. *Id.* These changes have allowed parties to have more influence on the outcome of the case. *Id.*

142. *Id.*

will deal with product recall issues exclusively and on a regular basis, becoming experts in the field of product recalls.<sup>143</sup> By functioning more like a United States regulatory agency than a generalist United States federal court, the Chinese judicial system is better tailored to provide a private recall remedy than is the United States judicial system. Comparatively speaking, the competence of China's court system in this area is more analogous to the competence of United States regulatory agencies on this topic than to the United States federal judicial system.

## 2. Uniformity of Judgments

In addition to the notion that regulatory agencies have access to better information to make decisions, a second justification for the doctrine of primary jurisdiction is the need for uniform decision-making with respect to issues falling under federal regulation.<sup>144</sup> By restricting the adjudicative authority to a centralized body, the opportunity for conflicting judgments is reduced.<sup>145</sup> For this reason, the United States limits its federal court's regulation of product recalls, providing federal regulatory agencies with regulation powers.<sup>146</sup> Allowing federal courts to adjudicate these issues introduces the chance that district courts, situated throughout the country, may project geographical biases in their fact-finding and decision-making,<sup>147</sup> resulting in varied disclosure procedures across jurisdictions for the same recall. Lack of uniformity in standards for product recalls can be detrimental to a recall's effectiveness<sup>148</sup> because recall campaigns would have to meet each jurisdiction's unique standards.<sup>149</sup> Having multiple recall campaigns for the same product would also create confusion among the public, because information released would not be consistent nationwide. Since federal agencies regulate a manufacturer or seller's duty to warn of a potential hazard, the agencies have created consistent standards regarding the information that is required to be disclosed during a product recall.<sup>150</sup> This ensures that in the case of a na-

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143. *Id.* at 216.

144. Knippa, *supra* note 114, at 1293.

145. *Id.* at 1297.

146. Warmer, *supra* note 103, at 304.

147. Santaguida, *supra* note 117, at 1526–27 (quoting Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1117 (1987)).

148. *Frequently Asked Questions*, U.S. CONSUMER PROD. SAFETY COMM'N, <http://www.cpsc.gov/about/faq.html> (last visited Oct. 25, 2011) (noting that the CPSC seeks to “save lives and keep families safe by reducing the risk of injuries and deaths associated with consumer products” through educating and informing consumers).

149. *See id.*

150. *See* Warmer, *supra* note 103, at 304.

tional product recall, the company responsible for implementing the recall will have a uniform approach to its recall throughout the country. The release of consistent information regarding a product recall campaign ultimately contributes to the recall's overall effectiveness.<sup>151</sup>

China's civil law legal system does not present the same challenges as found in the United States with respect to inconsistent judgments resulting from a court mandated recall. Judicial decisions in civil law systems do not create law.<sup>152</sup> Instead, civil law judges resolve disputes by applying legislation rather than looking to prior case law<sup>153</sup> because past court decisions do not bind a civil law court in the same manner that precedent binds a common-law court.<sup>154</sup> Binding precedent becomes problematic in the United States because of the country's many judicial districts. With each district developing its own case law, a recall suit brought in one district could result in a different judicial decision than the same recall suit brought in another district. In contrast, due to the civil law nature of China's legal system—specifically the fact that Chinese courts do not create law—China will not encounter the problem of inconsistent judgments, as the law applies uniformly over the entire country.<sup>155</sup> Another important distinction between China's court system and the United States' court system is the court's role in interpreting statutes. The function of the Chinese judiciary is to apply statutes that have been interpreted by the Chinese government.<sup>156</sup> Alternatively, in the United States, courts are free to interpret how a statute should be applied within the court's jurisdiction. While the application and interpretation of a statute may vary from jurisdiction to jurisdiction in the United States, the Chinese government determines how to interpret and apply Chinese statutes, and all courts in China are obligated to abide by that interpretation and application.<sup>157</sup> China's system eliminates any variation in the application

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151. DELOITTE CONSULTING LLP, RECALL EXECUTION EFFECTIVENESS: COLLABORATIVE APPROACHES TO IMPROVING CONSUMER SAFETY AND CONFIDENCE 36–37 (2010), available at [http://www.deloitte.com/assets/Dcom-United-States/Local%20Assets/Documents/Consumer%20Business/US\\_CP\\_Joint%20Industry%20Recall%20Execution%20Effectiveness%20Report\\_052810.pdf](http://www.deloitte.com/assets/Dcom-United-States/Local%20Assets/Documents/Consumer%20Business/US_CP_Joint%20Industry%20Recall%20Execution%20Effectiveness%20Report_052810.pdf).

152. APPLE & DEYLING, *supra* note 124, at 35–38.

153. *Id.*

154. *Id.*

155. Huiling, *supra* note 132, at 201 (explaining that the role of China's legislature is to enact uniform standards and the role of the judiciary is to enforce the legislature's standards).

156. *Id.*

157. *China-US Judicial Review*, MONDORO NEWSL. (Mondoro Comp. Ltd., Kowloon, H.K.) June 2010, available at <http://www.mondoro.com/newsletters.asp?Display=127>.

of its laws, which would lead to uniform product recall standards throughout the country.

To further aid the consistency of judicial decisions, chief justices within China's judicial system attend conferences to periodically discuss issues challenging the legal system.<sup>158</sup> The conferences provide a forum for judges to discuss challenging legal issues encountered in practice, establish standards for consistent judicial decisions, and address cases that may serve to guide future decisions.<sup>159</sup> As a result of these conferences, the Supreme People's Court implemented a system of "typical cases" meant to guide the judiciary.<sup>160</sup> The typical cases system provides a body of case law to guide judicial application in hopes of further ensuring uniform standards.<sup>161</sup> Despite the similarities between binding precedent and China's typical cases system, these typical cases are not binding<sup>162</sup> and the Supreme People's Court does not plan to adopt the binding precedent system utilized by common law countries.<sup>163</sup>

As uniformity is essential to effective product recalls, Chinese-granted remedies to private parties will not create inconsistency because all courts in China are bound to the government's interpretations of the law, which is then enforced in an identical manner.

### 3. Flexibility

A third justification for the doctrine of primary jurisdiction is agency flexibility.<sup>164</sup> In order to properly implement product recalls, changes to procedures and interpretations of regulatory statutes may be necessary from time to time to accommodate technological or industrial innovations.<sup>165</sup> Agencies are free to alter their procedures and interpretations of the federal statutes under their power.<sup>166</sup> In contrast, the United States federal court system does not enjoy the same level flexibility as the regulatory agencies enjoy<sup>167</sup> because courts are bound by precedent and once a court interprets a statute, it is unlikely that it will alter its initial inter-

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158. Huiling, *supra* note 132, at 237.

159. *Id.*

160. *Id.* at 236–37.

161. *Id.*

162. *Id.*

163. *Id.*

164. Santaguida, *supra* note 117, at 1527.

165. See Byse, *supra* note 123, at 259; Santaguida, *supra* note 117, at 1527.

166. See Byse, *supra* note 123, at 259; Santaguida, *supra* note 117, at 1527.

167. See Byse, *supra* note 123, at 259; Santaguida, *supra* note 117, at 1527.

pretation.<sup>168</sup> Furthermore, courts are often slow or unwilling to accommodate technological or industrial developments.<sup>169</sup>

Flexibility may also pose a challenge for Chinese product recalls; however, the flexibility challenges faced by the Chinese government are more analogous to the challenges faced by a United States regulatory agency than to the challenges faced by the United States federal court system. While the Chinese government may be slow to adapt recall procedures to changes in technology or safety specifications, this potential barrier to flexibility would be attributable to the political implications of any proposed policy change. United States federal agencies also must make policy considerations before adapting any recall procedures, thus raising the agencies' sensitivity to industry changes. Nevertheless, the flexibility problem viewed in the United States as prohibiting private actions for product recalls is not a problem with federal agencies but instead a flexibility issue facing the federal court system.<sup>170</sup> The specific barriers to flexibility faced by the United States federal court system are not shared by the Chinese courts because judges are obligated to interpret statutes as the government directs.<sup>171</sup> Unlike its counterpart in the United States, China's judiciary is not bound by precedent, and therefore, is more amenable to evolution.<sup>172</sup>

### *B. The Private Right of Action and Equitable Remedies*

In the United States, recognizing a private right of action to demand a product recall would require the federal court system<sup>173</sup> to issue injunctions barring the manufacture or sale of a defective product.<sup>174</sup> The court would have to issue an order compelling the responsible party to notify the public of the defect, and initiate a program to reimburse, repair or replace the product.<sup>175</sup> Courts often invoke the doctrine of primary jurisdiction where a party's request for injunctive relief requires the court to

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168. See Byse, *supra* note 123, at 259.

169. *Id.* The issue of flexibility also implicates a uniformity problem because as some jurisdictions adapt their decisions to reflect changes in technology; others may not be as flexible, resulting in differing standards and procedures for product recalls. See *supra* text accompanying notes 143–62.

170. See *supra* text accompanying notes 163–68.

171. See *supra* text accompanying notes 155–56.

172. See *supra* text accompanying notes 151–53.

173. Federal legislation bestows authority on numerous agencies to request or mandate a product recall, and provide regulations for companies engaging in a voluntary product recall. Lamken, *supra* note 81, at 111.

174. Warmer, *supra* note 103, at 302–05.

175. See Warmer, *supra* note 103, at 301; Lamken, *supra* note 81, at 104–09.



utilize its discretion,<sup>176</sup> as would be the case in a private recall action. Injunctions are common-law equitable remedies developed to provide relief where legal remedies are otherwise unavailable or where available remedies do not serve the interest of fairness and justice.<sup>177</sup> Courts in the United States only grant equitable remedies in situations where damages insufficiently provide relief.<sup>178</sup> Under this system, parties injured by product defects should not be entitled to equitable relief because they may recover compensatory damages and even punitive damages. The United States legal system therefore eliminates the need for awarding an injured party the equitable remedy of a recall.

Equitable remedies are even less prevalent in China, as well as in other civil law countries, because a separate system of equitable relief does not exist in the civil law system.<sup>179</sup> To address the problem of relief where legal remedies are insufficient, lawmakers in civil law jurisdictions often provide for equitable remedies in legislation.<sup>180</sup> Article 45 of the Tort Liability Law is an example of an equitable remedy built into the structure of civil-law legislation.<sup>181</sup> If the Chinese government interprets Article 45 as granting private parties remedies to obtain court orders mandat-

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176. Struve, *supra* note 117, at 1046.

177. APPLE & DEYLING, *supra* note 124, at 35–38.

178. Warmer, *supra* note 103, at 302–04; *see also* DAN B. DOBBS, LAW OF REMEDIES § 2.9(2) (2d ed. 1993) (explaining that injunctions are often more intrusive than traditional legal remedies and erroneous injunctions may be especially harmful to a defendant; therefore, courts should deny injunctive relief in cases where an erroneous injunction may be especially harmful to a defendant so long as other legal remedies are available to the plaintiff).

179. APPLE & DEYLING, *supra* note 124, at 35–38.

180. *Id.* The Chinese legal system only issues preliminary injunctions pursuant to a statute or regulation. Jerry Yulin Zhang, *Preliminary Injunctions*, CHINA L. & PRAC., May 2005, available at <http://www.chinalawandpractice.com/Article/1692488/Preliminary-Injunctions.html>. Currently, the preliminary injunction remedy is only available in intellectual property cases and is provided as a remedy in the PRC Patent Law, the PRC Copyright Law, the PRC Trademark Law, the Computer Software Protection Regulations, and the Integrated Circuit Layout Design Protection Regulations. *Id.* When injunctions are issued under one of the aforementioned regulations, the defendant is enjoined from manufacturing, selling, or importing the alleged infringing products. *Id.* The injunctions are carried out immediately by an “action team” created by the judiciary. *Id.*

181. Article 45 of the PRC Tort Liability Law provides that, “[w]here the defect of a product endangers the personal or property safety of another person, the victim shall be entitled to require the manufacturer or seller to assume the tort liabilities by removing the obstruction or eliminating the danger.” PRC Tort Liability Law, ch. V, art. 45 (China). Equitable remedies include court orders compelling or forbidding parties to act in a certain manner. Article 45 is an example of an equitable remedy because the provision allows the court to compel a manufacturer or seller to remove an obstruction or eliminate danger.

ing product recalls, China would effectively be providing equitable relief to injured parties where legal remedies such as money damages exist. The common-law policy against awarding equitable remedies where damages serve as an adequate remedy does not undermine the implementation of a private recall remedy in China's civil law system because Article 45 provides for the equitable recall remedy.<sup>182</sup>

#### CONCLUSION

To combat the reputational damage China's products have experienced over the past few years, China must take action to show the world it is serious about improving the quality of its exports. The enactment of the PRC Tort Liability Law is a positive first step. Nonetheless, China must continue to follow through and enforce the laws it has enacted rigorously and consistently. By enforcing the tort law's recall remedies, China will show the world that it values the safety of its consumers and is focused on improvement. Furthermore, the availability of private recall remedies will force manufacturers and sellers to reevaluate their business practices in China by tightening their quality control procedures in order to avoid tort liability.

Exactly how the Chinese government will interpret Article 45 is still unclear; however, what is clear is that China's civil-law judicial foundation, coupled with its specialized courts system, creates a favorable environment for private recall remedies. The recognition of private recall remedies will not only improve the safety and quality of China's exports, but also will help secure China's position in the global marketplace and provide the country's citizens with a more prosperous economy and thus, a higher quality of life.

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182. APPLE & DEYLING, *supra* note 124, at 35–38.

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