

ChAFTA, Trade, and Food Safety

When the Rubber Hits the Road*

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Abstract

Over the past decade, food safety has evolved into a compelling issue in China. The Chinese government has been committed to strengthening the regulatory framework. A series of laws and regulations ensuring the quality and safety of food in the interests of public health have been promulgated. However, a fairly comprehensive set of laws, along with harsh punishments, does not substantially deter food safety violations. Rather, foodborne illnesses continue to occur on a daily basis. How to improve food safety has become China's national priority; it is also the main focus of this research. This article determines that one of the main obstacles to food safety is poor implementation of laws. It identifies the external and internal impediments to food safety governance in China. It further proposes an evolving series of potential solutions. Externally, weak enforcement undermines the credibility of the food safety laws. Internally, food manufacturers and distributors in China lack the sense of corporate social responsibility (CSR). To effectively reduce or even remove the external impediment, it is imperative to improve the overall governance in various sectors. As for the internal impediment, incorporating CSR principles into business operations is vital for food safety governance. In fact, the enforcement of many regional trade agreements, in particular, the enforcement of China–Australia FTA (ChAFTA) will largely increase market share of Australian food products in China. Undoubtedly, Chinese food businesses will face unprecedented competition. The pressure to gain competitive advantages in food markets yields an enormous change in motivation for Chinese food businesses. Chinese food companies will ultimately be forced to 'voluntarily' integrate CSR principles into their business operations. A significant change in the food sector is expected to be seen within the next decade. The article concludes that better practice in food safety governance in China requires two essential elements: a comprehensive regu-

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latory and cooperative framework with essential rules and institutions, and an effective implementation mechanism involving both the public and private sectors.

Keywords: food safety laws in China and implementation issues, China-Australia Free Trade Agreement (ChAFTA), agricultural trade, corporate social responsibility, collaborative governance.

A Introduction

After 10 years of marathon negotiations,¹ the China–Australia Free Trade Agreement (ChAFTA) was signed on 17 June 2015. Details of the deal were subsequently released to the public,² bringing exciting news to Chinese and Australian businesses alike. Interestingly, another group of people are even more excited about the signing of the agreement – the ‘ordinary’ Chinese. ChAFTA news dominated the headlines in China for months in 2015. It was also shared and commented on by millions of Chinese on WeChat (a Chinese version of mobile Facebook).³ This raises a question why the ordinary people are overwhelmingly excited about a trade agreement.

The strong feeling of excitement is a natural reaction of Chinese consumers who have been suffering from foodborne illnesses. Over the past decade, food safety has evolved into a compelling issue in China. Endless scandals have resulted in a loss of confidence by Chinese consumers in the quality and safety of local food products. Especially after the notorious melamine-tainted milk scandal in 2008,⁴ concerns over food safety have tripled in China.⁵ In response to enormous pressure from Chinese consumers demanding safe food, the Chinese government has been committed to strengthening the regulatory framework. A series of laws

1 Ministry of Commerce People’s Republic of China, ‘Interpretation for the China-Australia Free Trade Agreement’, 19 June 2015, available at: <<http://english.mofcom.gov.cn/article/policyrelease/Cocoon/201510/20151001144954.shtml>>. (Noting that China and Australia have conducted 21 rounds of negotiations for a bilateral free trade agreement since May 2005.)

2 *Id.*

3 Statista, ‘Number of Monthly Active WeChat Users from 2nd Quarter 2010 to 4th Quarter 2015 (in Millions)’, available at: <<https://www.statista.com/statistics/255778/number-of-active-wechat-messenger-accounts/>> (last accessed 27 October 2016). (Noting that WeChat is a Chinese version of mobile Facebook. It provides text messaging, voice messaging, video conferencing, sharing of photos, videos, and articles, and many other services. According to Statista, WeChat has 697 million monthly active users, and the number is still growing.)

4 C. Liu, ‘Profits above the Law: China’s Melamine Tainted Milk Incident’, *Miss. L.J.*, Vol. 79, 2009, p. 371, at 372. (In 2008, some Chinese milk suppliers were found to “deliberately [a]dd melamine to diluted milk in order to deceive quality control review”. As a result, six babies had died; hundreds of babies were hospitalized; nearly 300,000 children were sickened from drinking the tainted milk powder.)

5 R. Wike, ‘What Chinese Are Worried About, Pew Research Global Attitudes Project’, available at: <www.pewglobal.org/2013/03/13/what-chinese-are-worried-about/> (last accessed 21 April 2016). (According to the report by the Pew Research Center, “[i]n 2008, only 12 percent said food safety was a very big problem, but by 2012 that proportion more than tripled, to 41 percent”.)

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and regulations ensuring the quality and safety of food in the interests of public health have been promulgated. However, a fairly comprehensive set of laws, along with harsh punishments, does not substantially deter food safety violations. Rather, foodborne illnesses continue to occur on a daily basis.⁶ It is not a surprise that the Chinese are thrilled to hear about ChAFTA as the enforcement means a large quantity of safe and affordable Australian food imports will be available on the Chinese market in the near future.

How to improve food safety has become a national priority for the Chinese government; it is also the main focus of this research. The article is divided into six sections. Section B addresses the growing concerns over food quality and safety in China. Section C details the regulatory approaches and recent steps taken by the Chinese government to tackle the problems. Despite these efforts, China has not seen a decline in food safety scandals. Section D assesses the ongoing issue and determines that one of the main obstacles to food safety in China is poor implementation of food safety laws and regulations. Section E identifies the external and internal impediments to food safety governance in China. It further proposes an evolving series of potential solutions. Externally, weak enforcement undermines the credibility of the food safety laws. Internally, food manufacturers and distributors in China lack the sense of corporate social responsibility (CSR).⁷ To effectively reduce or even remove the external impediment, it is imperative to improve the overall governance in various sectors. As for the internal impediment, incorporating CSR principles into business operations is vital for food safety governance. In fact, the enforcement of ChAFTA will largely increase market share of Australian food products in China. Undoubtedly, Chinese food businesses will face unprecedented competition. Thus, the pressure to gain competitive advantages in food markets yields an enormous change in motivation for Chinese food businesses. Chinese food businesses will ultimately be forced to 'voluntarily' integrate CSR principles into their business operations. A significant change in the food sector is expected to be seen within the next decade. Section F concludes that better practice in food safety governance in China requires two essential elements: a comprehensive regulatory and cooperative framework with essential rules and institutions, and an effective implementation mechanism involving both the public and private sectors. At the end, the article calls for further discussion of a global concern over food safety considering that food safety crises can and do traverse national boundaries.

6 J.J. Czarnecki, Y. Lin & C.F. Field, 'Global Environmental Law: Food Safety & China', *Geo. Int'l Envtl. L. Rev.*, Vol. 25, 2013, p. 261, at 265. (Noting that "China continues to face daunting food safety concerns".)

7 B.D. Beal, *Corporate Social Responsibility – Definition, Core Issues, and Recent Developments*, Thousand Oaks, CA, Sage, 2014, p. 4. (B.D. Beal defines corporate social responsibility as "the moral and practical obligation of market participants to consider the effect of their actions on collective or system-level outcomes and to then regulate their behavior in order to contribute to bringing those outcomes into congruence with societal expectations".)

B Growing Food Safety Concerns in China

China has an egregious poor track record with regard to food safety.⁸ The Chinese have been experiencing horrifying food safety problems since the early 2000s, from the poisonous Jinhua ham in 2003,⁹ to the deadly counterfeit alcoholic drinks in 2004,¹⁰ to the Sudan I red dye incident in 2005,¹¹ to contaminated turbot fish in 2006,¹² to sewage used in tofu manufacturing in 2007.¹³ The food safety crisis does not stop here; instead, it has become widespread, even involving commonly eaten foods such as rice, noodles, vegetables, and meat, putting the health and safety of the Chinese at risk.¹⁴

Nevertheless, it was not until 2008 when the melamine-tainted milk scandal hit the headlines that food safety issues were officially brought to the attention of the Chinese government. In 2008, at least 22 milk suppliers,¹⁵ including major

- 8 I. Pentchoukov, 'Schumer Calls for Strict Oversight of Chinese Chicken Imports', *Epoch Times*, 15 September 2013, available at <www.theepochtimes.com/n3/288539-schumer-calls-for-strict-oversight-of-chinese-chicken-imports>. See also K. Shanahan, 'Poultry from China: Is the United States Valuing Trade Interests over Public Health?', *Drake J. Agric. L.*, Vol. 20, 2015, p. 291, at 293-294.
- 9 Q. Zhang & L. Carmody, *Food Safety in China – A Briefing for Responsible Investors*, Responsible Research, 2009, p. 5. (Noting that two dry-cured ham producers in Jinhua, Zhejiang, soaked the hams in the pesticides containing the toxic compound Dichlorvos (DDVP) to prevent spoilage and insect infestation. DDVP is a hazardous organophosphate insecticide used for fumigation. It is known to cause significant illness to humans, such as acute neurotoxicity and carcinogenicity.) See also E. Reuter & J. Men, 'Food Safety: A Challenge for EU-China Cooperation', in *China-EU: Green Cooperation*, 2015, p. 139, at 141.
- 10 Xinhua, 'Toxic Liquor Kills at Least 9 in Guangdong', *China Daily*, 16 May 2004, available at: <www.chinadaily.com.cn/english/doc/2004-05/16/content_331124.htm>. (The toxic liquor was a blend of toxic industrial alcohol and rice wine. According to China Daily, "[n]ine people have died from drinking toxic liquor by Sunday in this capital city of south China's Guangdong Province, with another 33 people sickened by formaldehyde in the problematic alcohol".)
- 11 H. Yan, 'A "Food for Thought" for Chinese', *China Daily*, 31 March 2005, available at: <www.chinadaily.com.cn/english/doc/2005-03/31/content_429921.htm>. (Noting that Sudan I red dye is a cancer-causing food colouring, China has banned the use of Sudan I red dye since 1996. However, food companies in China had been illegally using Sudan I red dye for years. In 2005, the British Food Standard Agency announced a list of 459 foods contaminated by Sudan I red dye. The illegal use of Sudan dye quickly garnered worldwide attention. In the meantime, the Chinese central government launched a campaign requiring local inspectors to check food products that may have had been contaminated by the dye. The Heinz Company in Beijing was found to add Sudan I to chili sauce. Kentucky Fried Chicken [KFC] used the dye in two popular products in its 1,200 restaurants across China.) See also Reuter & Men, 2015.
- 12 Xinhua News Agency, 'Sales of Contaminated Turbot Banned in Beijing', *Xinhua News*, 21 November 2016, available at: <www.china.org.cn/english/MATERIAL/189705.htm>. (In 2006, excessive amounts of residues including carcinogenic nitrofurans and chloromycetin were detected in turbot. Nitrofurans and chloromycetin are cancer-causing chemicals. Farmers are believed to have knowingly fed prohibited drugs to the fish.)
- 13 Reuter & Men, 2015. (Noting that a large number of stinky tofu manufacturers in Guangdong were found to add certain types of sewage to accelerate production. Stinky tofu is a popular snack food in China made of fermented tofu.)
- 14 Shanahan, 2015, p. 293.
- 15 C. Liu, 'Escaping Liability Via Forum Non Conveniens: Conocophillips's Oil Spill in China', *U. Pa. J.L. & Soc. Change*, Vol. 17, 2014, p. 137, at 171.

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dairy companies in China, deliberately added melamine, a hazardous nitrogen-rich chemical widely used for making plastics, dishware, adhesives, fertilizers, and other industrial products, to diluted milk in order to achieve deceptively high protein content,¹⁶ and therefore, to pass the government-required quality check.¹⁷ However, the addition of melamine into milk products has been found to cause crystalluria that may give rise to kidney stones, and even acute kidney failure.¹⁸ It is particularly dangerous for infants who are more vulnerable to toxic chemicals. As a result of the intentional adulteration, at least six infants died, hundreds of babies were hospitalized, and nearly 300,000 children were sickened from drinking the contaminated milk powder.¹⁹ The scope and severity of the 2008 melamine-tainted milk scandal was appalling. It deeply shook Chinese consumers' confidence and trust in China's food supply.²⁰ However, on a positive note, this scandal has attracted the most attention, and finally raised national concerns over food safety issues.

C The Chinese Government's Attempts to Solve Food Safety Problems – Regulatory Reform

In response to the notorious melamine-tainted milk scandal, the Chinese government quickly went into action, launching a series of campaigns of “milk inspections, milk crackdowns, milk sackings, and milk arrests”.²¹ In October 2008, the

- 16 Czarnecki *et al.*, 2015, p. 266. *See also* C. Liu, ‘The Obstacles of Outsourcing Imported Food Safety to China’, *Cornell Int'l L.J.*, Vol. 43, 2010, p. 249, at 292. (Noting that “melamine artificially boosts nitrogen levels, which buyers see as a higher level of protein in the milk, resulting in a better price for the producer”.)
- 17 J.R. Ingelfinger, ‘Melamine and the Global Implications of Food Contamination’, *New England Journal of Medicine*, Vol. 359, 2008, p. 2745, at 2745-2746. (Noting that quality control inspectors only test the nitrogen levels of milk. By adding melamine into raw milk and powdered infant formula, it can easily pass the test.) *See also* C.-F. Lin, ‘Global Food Safety: Exploring Key Elements for an International Regulatory Strategy’, *Va. J. Int'l L.*, Vol. 51, 2011, p. 637, at 645. (Noting that “[t]his form of adulteration occurred because commonly used methods for protein analysis are unable to determine whether the presence of nitrogen in milk is from protein sources or from non-protein sources”.)
- 18 World Health Organization (Hereinafter WHO), ‘Emergencies Preparedness, Response, Questions and Answers on Melamine’, available at: <www.who.int/csr/media/faq/QAmelamine/en/> (last accessed 16 May 2016).
- 19 Y.K. Yoo, ‘Tainted Milk: What Kind of Justice for Victims’ Families in China?’, *Hastings Int'l & Comp. L. Rev.*, Vol. 33, 2010, p. 555, at 555. (Noting that at least 294,000 infants suffered health problems from drinking the tainted milk powder.) *See also* Lin, 2011, p. 646. (Noting that the adverse health consequences caused by melamine-tainted milk powder include “kidney stones, kidney failure, and, in some cases, death”.)
- 20 Shanahan, 2015, pp. 293-294. (Noting that the ongoing food safety crisis “has become so severe that consumers smuggle infant milk formula from foreign countries into China in order to avoid buying potentially dangerous Chinese dairy products”.)
- 21 *See* ‘Milk Scandal Tests China to Limits in Post-Olympic Era’, *Herald Scotland*, 20 September 2008, available at: <www.heraldscotland.com/news/12768231.Milk_scandal_tests_China_to_limits_in_post_Olympic_era/>.

Ministry of Health also announced new protein standards²² as well as restrictions on the use of melamine in “infant formulas, liquid milk, milk powder, and food products”.²³ Most importantly, the melamine-tainted milk scandal in 2008 also placed the food safety law proposal on a fast track, accelerating its passage in 2009.²⁴

Despite all these remedial efforts promptly made by the Chinese government, questions may still arise: was there a law regulating food safety in place back in 2008? If there was, why did it not prevent the milk scandal or the continuing occurrence of food safety incidents? To understand China’s food safety problems, it is necessary to review the regulatory history. In fact, China’s regulatory history on general food-related issues is relatively short, let alone specific regulations on food safety.

I Before 2008

After the founding of the People’s Republic of China (PRC) in 1949, the new government faced a huge challenge of feeding millions of people. Food security was PRC’s highest priority.²⁵ With the enormous support from the government, China achieved great success in increasing per capita food production. It was not until the 1960s that the Chinese government slowly realized the importance of food hygiene, although food security has never been taken off the national agenda. China’s first trial regulation on food hygiene was eventually promulgated in 1965.²⁶ Since then, China’s food system had witnessed regulatory reforms from *the 1965 Trial Regulations on the Administration of Food Hygiene*, to the first *Food Hygiene Law* in 1982, to the amended *Food Hygiene Law* in 1995.²⁷ These laws established a basic infrastructure and guidelines on “the cleanliness and purity of food”.²⁸ Obviously, China’s primary focus from the late 1960s to 1990s was on food hygiene.

22 M.T. Roberts, ‘A Perspective on Emerging Law, Consumer Trust and Social Responsibility in China’s Food Sector: The “Bleaching” Case Study’, *Food & Drug L.J.*, Vol. 66, 2011, p. 405, at 407. (Noting that “[p]rotein standards were lowered to diffuse the market for melamine-infused milk”.)

23 M.A. Pagnattaro & E.R. Peirce, ‘From China to Your Plate: An Analysis of New Regulatory Efforts and Stakeholder Responsibility to Ensure Food Safety’, *Geo. Wash. Int’l L. Rev.*, Vol. 42, 2010, p. 1, at 7. See also E. Wong, ‘China Announces Stricter Testing because of Milk Scandal’, *N.Y. Times*, 9 October 2008, p. A10.

24 Roberts, 2011, p. 407. (Noting that “[a] pattern of food product safety scandals led the Chinese government in 2007 to address food and drug safety and quality in a Five-Year plan issued by the State Council. In the same year, China published the White Paper on Food Quality and Safety, describing the government’s efforts to improve food safety”.)

25 Y. Han, ‘A Legislative Reform for the Food Safety System of China: A Regulatory Paradigm Shift and Collaborative Governance’, *Food & Drug L.J.*, Vol. 70, 2015, p. 453, at 456.

26 *Id.*

27 *Id.*

28 J. Balzano, ‘China’s Food Safety Law: Administrative Innovation and Institutional Design in Comparative Perspective’, *Asian-Pac. L. & Pol’y J.*, Vol. 13, 2012, p. 23, at 35.

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II Food Safety Law of 2009

Since the 2000s, horrendous food safety breaches have been frequently occurring in China. In particular with the infamous melamine-tainted milk scandal as a catalyst, the Chinese government was forced to quickly shift its focus to the improvement of food safety governance, setting the protection of public health as a high priority on its national legislative agenda.²⁹ As a consequence, the 2009 Food Safety Law was adopted, superseding the 1995 Food Hygiene Law.³⁰

With the enactment of the 2009 Food Safety Law and its accompanying regulation, China finally had a regulatory framework in place to oversee food safety issues.³¹ The 2009 Food Safety Law was full-scale amendment to the previous food laws. First of all, the primary purpose of the law moved away from food hygiene. As stated in Article 1, the 2009 Food Safety Law was “[to] ensure the food safety and guarantee the safety of the lives and health of the general public”.³² Secondly, the law defined the roles of food producers,³³ government departments,³⁴ food industry associations,³⁵ social groups,³⁶ and individual consumers,³⁷ providing an administration guideline on food safety supervision and administration.³⁸ Thirdly, to protect the Chinese from unsafe food, the law set out the requirements for risk monitoring and assessment.³⁹ It also developed the most basic procedures on how to manage and supervise inspection and how to remediate in case of food safety hazards.⁴⁰ Other main features of the 2009 Food

29 Pagnattaro & Peirce, 2010, p. 9. (Noting that “[e]ven before these two incidents, the Chinese government identified the need to address food and drug quality, as evidenced by the Five-Year Plan issued by the State Council in 2007”. In addition, the development of food safety legislation was also driven by China’s international obligation. China became a World Trade Organization (WTO) member in 2001. As part of the deal, China needs to reform its legal system in order to comply with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) which regulates food safety issues in international trade.)

30 Roberts, 2011, p. 407. (2009 Food Safety Law was passed on February 28, 2009. It became effective on June 1, 2009. Roberts argues that “Chinese food law is fundamentally shaped by a deeply entrenched cynicism arising from a series of food safety disasters”. It is an incident-driven regulatory reform.)

31 Czarnezki *et al.*, 2013, p. 275. *See also* Balzano, 2012, p. 25.

32 ‘Zhonghua Renmin Gongheguo Shipin Anquan Fa [Food Safety Law of the People’s Republic of China]’, 2009 (adopted at the 7th Session of the Standing Committee of the 11th National People’s Congress of the People’s Republic of China on 28 February 2009), available at: <www.lawinfochina.com/display.aspx?lib=law&id=7344&CGid> [Hereinafter 2009 Food Safety Law]. *See* Art. 1.

33 *Id.*, Art. 3. *See also* Han, 2015, p. 460. (Noting that “[f]ood producers and traders have the legal and social responsibility to ensure food safety, and they are encouraged to comply with voluntary regulation and to adopt advanced food safety technology”.)

34 2009 Food Safety Law, *supra* note 32, Arts. 4-6.

35 *Id.*, Art. 7. (Stating that food industry associations should strengthen the self-discipline of food producers and traders in their industries.)

36 *Id.*, Art. 8.

37 *Id.*, Art. 10.

38 *Id.*, Arts. 57-61, 76-83. (Arts. 57-61 govern food inspection and related matters. Arts. 76-83 regulate food safety supervision.)

39 *Id.*, Arts. 11-17. (Arts. 11-17 govern the monitoring and assessment of food safety risks.)

40 *Id.*, Arts. 70-75. (Arts. 70-75 regulate food safety risk management.)

Safety Law include calling for the establishment of food safety standards,⁴¹ setting out labelling requirements,⁴² creating recall and notification systems,⁴³ and imposing civil liability on violators.⁴⁴

The 2009 Food Safety Law, as the first law regulating food safety practices, was a landmark in China's food law history. It established the general principles for China to work through the food safety issues, laying a foundation for future development.⁴⁵ However, the infrastructure under the 2009 Food Safety Law was still too basic, and did not adequately address food safety problems in China. There were significant gaps in the overall coverage of food safety-related matters.⁴⁶ For example, the roles of government departments were defined but remained ambiguous. Also, emerging issues such as the supervision of genetically modified foods, food e-commerce, baby foods, and dairy products were not considered in the law. Thus, it was not a surprise that the 2009 Food Safety Law did not fundamentally change the food safety situation in China. Rather, unsafe food is still everywhere on the market, and China continues to experience a growing number of grotesque food poisoning incidents.⁴⁷ Food safety problems have unfortunately evolved into a food safety crisis and a public health disaster. Chinese consumers' concerns over food safety are escalating. They are getting extremely angry with the government for its incapability in food safety supervision and management. There is an urgent need to address the inadequacy of the 2009 Food Safety Law and fill the regulatory gaps.

III Food Safety Law of 2015

Recognizing the increasing public outrage over the nationwide on-going food safety crisis, the Chinese government felt the pressure to develop a more comprehensive and stricter food safety law.⁴⁸ With the goal to substantially enhance food safety systems and protect public health, a new food safety law was promul-

41 *Id.*, Arts. 18-26. (Arts. 18-26 provide general principles on establishing food safety standards. According to Art. 21, the Ministry of Health [MOH] is responsible for establishing food safety standards; the Ministry of Agriculture [MA] regulates pesticide residue levels.). See Czarnezki *et al.*, 2013, p. 275. (Noting that as of 2011, the MOH promulgated 187 new food safety standards including "new standards for dairy products, 122 mycotoxins, pesticide and veterinary medicine residue, use of food additives, nutrition labeling, and frozen pastry and rice products".)

42 2009 Food Safety Law, *supra* note 32, Arts. 47-49.

43 *Id.*, Chapter IV (Arts. 27-56). (Arts. 27-56 regulate specific requirements for food production and business operation. Art. 53 is about the establishment of recall system.)

44 *Id.*, Arts. 84-98.

45 Balzano, 2012, p. 26.

46 *Id.*, p. 31.

47 Shanahan, 2015, pp. 293-294. (Noting that the regulatory attempts made by the Chinese government "were ill-met and considered, in retrospect, a historic step backwards, further validating how deeply rooted and difficult to resolve the food issues are in China".)

48 Pagnattaro & Peirce, 2010, p. 5. (Noting that "China's developing legal and regulatory framework governing food and drug safety is the direct result of problems with products sold in China and in the global marketplace".)

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gated by the National People's Congress on 24 April 2015, and came into force on 1 October 2015.⁴⁹ The 2009 Food Safety Law was replaced.

The 2015 Food Safety Law introduces a considerable number of new regulatory requirements. It contains 154 articles, as compared to 104 articles in the previous 2009 version.⁵⁰ These regulatory reforms cover a wide range of areas with respect to food safety, presenting the Chinese government's commitment to win the food safety battle. Also, the 2015 Food Safety Law is considered China's most stringent food safety law to date.⁵¹ It mandates "the most precise standards, the strictest administration, the harshest accountability system, and the gravest punishment"⁵² to govern food safety practices in China. Important amendments are made in the new law.

First of all, one major update in the 2015 Food Safety Law is the refinement and the improvement of the responsibilities and functions of different government departments in food safety governance. The Food Safety Committee of the State Council (Food Safety Committee) oversees food safety issues in all aspects.⁵³ Under the leadership of the Food Safety Committee, the China Food and Drug Administration (CFDA) becomes the primary implementation authority.⁵⁴ Other responsible authorities include the health departments, agricultural departments, inspection and quarantine departments, and quality supervision departments at both the national and local levels.⁵⁵ Different departments manage respective aspects of food safety matters.⁵⁶ They coordinate and share information. Clear roles and responsibilities under the new law largely reduce fragmentation, overlap, and duplication in government. This is a significant step forward compared to the 2009 Food Safety Law.

49 'Zhonghua Renmin Gongheguo Shipin Anquan Fa [Food Safety Law of the People's Republic of China]', (2015) (The 2015 Food Safety Law was adopted at the 14th session of the Standing Committee of the Twelfth National People's Congress of the People's Republic of China on 24 April 2015, and came into force on 1 October 2015.), available at: <<http://lawinfochina.com/display.aspx?id=19934&dib=law>>, [Hereinafter 2015 Food Safety Law]. See also 2015 Food Safety Law, translated by United States Department of Agriculture (USDA) Foreign Agricultural Service, available at: <www.fas.usda.gov/data/china-china-s-food-safety-law-2015> (last accessed 26 October 2016).

50 Keller and Heckman LLP, 'China Passes Sweeping Amendment to Food Safety Law: The Most Stringent To Date', *LexisNexis Legal News Room*, 16 July 2015, available at: <<https://www.lexisnexis.com/legalnewsroom/public-policy/b/public-policy-law-blog/archive/2015/07/16/china-passes-sweeping-amendment-to-food-safety-law-the-most-stringent-to-date.aspx?Redirected=true>>.

51 M. Zhang, 'International Franchising: Food Safety and Vicarious Liability in China', *Franchise L.J.*, Vol. 35, 2015, p. 93, at 94.

52 Keller and Heckman LLP, 2015, *supra* note 50.

53 State Council, 'Notice of the State Council on Establishing the Food Safety Committee of the State Council', 2010, available at: <www.lawinfochina.com/display.aspx?lib=law&id=11452>. (The State Council issued the notice in 2010. In the notice, it reads "[t]he Food Safety Committee of the State Council has been established as a high-level deliberation and coordination institution for the food safety work of the State Council".)

54 2015 Food Safety Law, *supra* note 49, Art. 5.

55 *Id.*, Arts. 5-6.

56 *Id.*

Secondly, the 2015 Food Safety Law encourages the general public to participate in food safety supervision and management. As required by law, members of food industry associations and consumer associations are now included in the decision-making process, serving as members of the National Food Safety Standard Evaluation Committee.⁵⁷ Furthermore, a food safety reporting rewards system is established.⁵⁸ In accordance with Article 115, any individual or group has the right to report food safety violations to local food and drug administration. A cash reward will be granted to the whistle-blower, provided that the case is verified to be true. Law also protects the identity of whistle-blower.⁵⁹ The engagement of the general public in food safety supervision helps raise consumer awareness. Basic economic theory postulates that market is driven by demand. With increased consumer awareness of food safety, food businesses will eventually be forced to change their practices to meet the market demand for safe food and to remain competitive.

Thirdly, a detailed protocol for food safety risk assessment, monitoring, and management is incorporated into the new law.⁶⁰ The circumstances where a risk assessment needs to be initiated are clearly specified.⁶¹ To make the assessment more enforceable, the law also mandates that no fees are associated with the assessment for potentially hazardous food or food-related products.⁶² The authority that conducts the assessment is responsible for all the associated costs; market price must be paid for the samples the authority obtains.⁶³ If the assessment result is negative, the production of the food or food-related product must be ceased immediately.⁶⁴

Fourthly, considering that contamination and poisoning can occur at any stage before the food reaches consumers, the 2015 Food Safety Law extends its regulatory scope to oversee business practices from paddock to plate.⁶⁵ One of

57 *Id.*, Art. 28.

58 *Id.*, Art. 115.

59 *Id.*

60 *Id.*, Art. 14. (Art. 14 specifies a detailed procedure for food safety assessment and management that involves different government agencies at both national and local levels.)

61 *Id.*, Art. 18. According to Article 18, the circumstances where a risk assessment needs to be initiated include the following: "(1) Through food safety risk monitoring or after receipt of a report, it is discovered that there may be any potential food safety hazards in food, food additives, or food-related products. (2) A risk assessment is needed to provide a scientific basis for developing or revising national food safety standards. (3) A risk assessment is needed to determine the key fields and key varieties in supervision and administration. (4) Any new factor that may harm food safety is discovered. (5) A judgment needs to be made on whether a factor posts a potential food safety hazard. (6) Any other circumstance under which the health administrative department of the State Council deems a risk assessment needed."

62 *Id.*, Arts. 15, 17 & 87.

63 *Id.*

64 *Id.*, Art. 21.

65 J. Huang, 'Selected Highlights of the Amended PRC Food Safety Law', 29 April 2015, available at: <www.chinalawinsight.com/2015/04/articles/healthcare/selected-highlights-of-the-amended-prc-food-safety-law/>. (Noting that "[t]he 2015 Food Safety Law establishes a mechanism that oversees food safety from 'field to table' which refers to the entire life cycle of a food product from production through consumption".)

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the highlights within the enlarged regulatory scope is that the new law calls for the establishment of an efficient food safety traceability mechanism in both the public and private sectors. This mechanism is developed to facilitate product safety recalls. In the public sector, the CFDA and the Ministry of Agriculture are responsible for developing a national food safety traceability system.⁶⁶ Meanwhile, in the private sector, food producers and distributors are required to create food safety self-examination systems and their own traceability systems.⁶⁷ In line with the traceability mechanism, the law also strengthens the existing recall system by lowering the threshold of “recall”.⁶⁸ Previously, only the food product that did not meet food safety standards could be recalled.⁶⁹ Under the 2015 Food Safety Law, a recall can be initiated as long as there is evidence to prove that the food is potentially hazardous to human health.⁷⁰ The traceability mechanism in both the public and private sectors, along with an enhanced recall system, is expected to prevent the occurrence of large-scale food safety incidents.

Fifthly, the new law imposes more severe fines for intentional adulteration. Under the 2009 Food Safety Law, same violations could only result in a fine of up to RMB 50,000 for commodities valued at under RMB 10,000; or a fine of between 5 and 10 times the total value of the commodities (for the commodities exceeding RMB 10,000).⁷¹ Under the 2015 Food Safety Law, the fines are increased to up to RMB 150,000 for violative commodities valued at under RMB 10,000. For the commodities valued at over RMB 10,000, violators are subject to a fine of between fifteen to thirty times the total value of the commodities.⁷² Moreover, under the new law, the use of expired raw materials or additives in food production is explicitly prohibited. This is the first time in China’s food law history. Violators are subject to a fine of up to twenty times the total value of the violative commodities, or even a license revocation.⁷³ Criminal liabilities may also be imposed on individuals who participate in illegal food production and distribution.⁷⁴ Furthermore, as compared to the 2009 Food Safety Law, administrative liabilities under the new law have extended from warning, correction order, suspension of operations, and license revocation,⁷⁵ to further disqualifying food safety violators from engaging in food-related business for a number of years, or

66 *Id.*

67 2015 Food Safety Law, *supra* note 49, Art. 42.

68 Keller and Heckman LLP, *supra* note 50.

69 2009 Food Safety Law, *supra* note 32, Art. 53.

70 2015 Food Safety Law, *supra* note 49, Art. 63.

71 2009 Food Safety Law, *supra* note 32, Art. 84.

72 2015 Food Safety Law, *supra* note 49, Art. 123.

73 *Id.*, Art. 124(2).

74 *Id.*, Art. 149.

75 2009 Food Safety Law, *supra* note 32, Art. 87. (Under the 2009 Food Safety Law, administrative liabilities only included warning, correction order, suspension of operations, and license revocation.)

even for life.⁷⁶ Through harsh punishments, the Chinese government is hoping that food businesses would be deterred from irresponsible practices.

As for consumers, according to the new law, they are entitled to seek compensation from either food manufacturers or distributors for the damage caused by consuming the food that fails to meet the safety standards.⁷⁷ In addition, consumers may also claim punitive damages equal to 10 times the amount paid for the food or three times the actual loss with a minimum sum of RMB 1,000, provided that the food manufacturer or distributor knowingly violates the law.⁷⁸

Sixthly, food and beverages have rapidly pushed into e-commerce in China. Online food trading has become extremely trendy.⁷⁹ In response to this emerging development in food distribution, the 2015 Food Safety Law establishes an institutional framework to regulate food e-commerce. Pursuant to Article 62, providers of third-party online food trading platforms are responsible for food safety supervision and management, including (1) conducting real-name registration of online food vendors and distributors; (2) ensuring all relevant licenses or permits required by law have been obtained; (3) ceasing the sale of any health hazardous products and reporting to local food and drug administration; and (4) terminating online trading services for serious violations.⁸⁰ Under Article 131, if third-party platform providers fail to perform the above responsibilities, and cause harm to the health of consumers, they are held liable for the food sold on their online platforms, along with online food vendors and distributors.⁸¹ The inclusion of online platform providers within the regulatory framework enhances food safety supervision in the private sector. It also ensures that consumers receive timely compensation in case of any practical difficulties to hold online food vendors or distributors liable for damages.

Seventhly, the 2015 Food Safety Law (Arts. 74-83) stipulates significant changes to special foods, including health foods and baby foods. Genetically modified foods (GM foods) are also subject to regulation and supervision.

According to the new law, a catalogue that details the raw materials and permitted functional claims of each individual health food is to be published by relevant government departments.⁸² Registration or record filing of health foods with the CFDA is mandatory, although the specific requirements vary depending

76 2015 Food Safety Law, *supra* note 49, Art. 135. (Art. 135 states that for those whose license has been revoked, the food producer and the legal representative [including executive and manager], and other responsible personnel will be disqualified from engaging in food business for five years after the date of revocation. They will be prohibited from applying for another license, or engaging in food production, food management, or food trading. Those who have been imposed a sentence of imprisonment for committing food safety crimes are banned from engaging in food-related business for life.)

77 2015 Food Safety Law, *supra* note 49, Art. 148.

78 *Id.*

79 For example, Taobao is a popular online marketplace used by millions of Chinese.

80 2015 Food Safety Law, *supra* note 49, Art. 62.

81 *Id.*, Art. 131.

82 *Id.*, Art. 75.

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on the type of product.⁸³ In addition, Articles 78 and 79 set forth the labelling and advertising requirements for health foods, mandating that the statement of “this health food cannot substitute for drugs” be included on the label and advertisement.⁸⁴

Melamine-tainted milk products have resurfaced twice in a large scale since the 2008 scandal, triggering widespread public dissatisfaction.⁸⁵ The new law sets out more intensified and detailed rules for infant food products to ease public unrest. According to the 2015 Food Safety Law, baby food manufacturers must ensure that the raw materials and additives comply with safety standards.⁸⁶ They are also obligated to file with local food and drug administration their product information, including raw materials, additives, product recipes, and labelling.⁸⁷ Strict quality control and inspection measures must be implemented, from the time when raw materials enter the manufacturing facilities to the time when final products exit the factories.⁸⁸ As for baby formula, recipes must be registered with the CFDA. Sub-contracting and sub-packaging of baby formulas are strictly prohibited for quality control purposes.⁸⁹

GM foods were only briefly mentioned in the 2009 Food Safety Law.⁹⁰ However, the 2015 Food Safety Law has moved one step forward requiring genetically modified foods to be clearly labelled.⁹¹ If manufacturers or distributors fail to add proper labels, in accordance with Article 125, they are subject to penalties, such as confiscation of profits and products, fines, suspension of business, or even license revocation.⁹²

Before the 2015 Food Safety Law, special foods were in a grey area such that no specific law governed its production and distribution. It was difficult for consumers to attain proper legal remedies for the harm caused by special foods. The new law brings health foods, infant formula, GMOs, and other special foods under the discipline of food safety, which largely protects consumer rights.

The 2015 Food Safety Law features other innovative designs. (1) The introduction of food safety liability insurance. Food producers and traders are encouraged to purchase liability insurance to ensure timely compensation for damage

83 K. Wright & Dezan Shira & Associates, ‘China Releases Harshes Food Safety Law in History’, *China Briefing*, 13 May 2015, available at: <www.china-briefing.com/news/2015/05/13/china-releases-harshes-food-safety-law-in-history.html>. (Depending on the health food’s ingredients and whether such food has already been imported to China, the law may require the product to be either registered with the CFDA or file a record with the CFDA.)

84 2015 Food Safety Law, *supra* note 49, Arts. 78 & 79.

85 Roberts, 2011, p. 407.

86 2015 Food Safety Law, *supra* note 49, Art. 81.

87 *Id.*

88 *Id.*

89 *Id.*

90 2009 Food Safety Law, *supra* note 32, Art. 101. (It simply states “[g]enetically modified foods, along with other food products such as dairy products, wines and salt, were subject to this Law (2009). When there is separate regulations, such regulations shall apply”.)

91 2015 Food Safety Law, *supra* note 49, Art. 69.

92 *Id.*, Art. 125.

caused by food safety violations.⁹³ However, some scholars have expressed concern that such insurance is “no more than a concept” given that it lacks implementation rules and guidance at this stage.⁹⁴ (2) Strict regulation on the use of pesticides.⁹⁵ The use of highly toxic pesticides is prohibited by law.⁹⁶ Violations will result in civil and administrative penalties or even criminal liabilities.⁹⁷ The intensified regulation on the use of pesticides brings meaningful results to the crops, the environment, as well as the health of Chinese consumers. (3) Regulation of other food-related products. The law extends its regulatory scope to other high-risk food-related products such as packaging materials in direct contact with food.⁹⁸ Manufacturers of high-risk food-related products are required to obtain production permits.⁹⁹ By incorporating the regulation of other food-related products, the new Food Safety Law provides more comprehensive protection for consumers.

The 2015 Food Safety Law creates a more refined food safety regulatory framework, giving regulators and implementers much broader and clearer powers. These promising updates in the new law confirm the Chinese government’s determination and commitment to the further improvement of China’s food system. As what Kimberly Wright said in *China Releases Harshes Food Safety Law in History*, the 2015 Food Safety Law “is sure to have an effect on food business practices in China”.¹⁰⁰ However, it remains questionable as to how significant the impact will be.

D When the Rubber Hits the Road

There is no doubt that the Chinese government has been working hard to make regulatory reforms on food safety, notably from the 2009 Food Safety Law to the updated 2015 Food Safety Law. Meanwhile, the punishments for food safety violations are becoming harsh. For example, in 2008, the melamine-tainted milk scandal resulted in a number of criminal convictions. Twenty-one people, including executives and managers of China’s major milk suppliers, producers, and distributors, were convicted for their roles in the production and sale of melamine-tainted milk products.¹⁰¹ The punishments were severe, ranging from death sentences to long jail terms. Two milk dealers and middlemen, Zhang Yujun and Geng Jinpin, were sentenced to death for endangering public safety by dangerous

93 *Id.*, Art. 43.

94 Han, 2015, p. 454.

95 2015 Food Safety Law, *supra* note 49, Arts. 11, 49 & 123.

96 *Id.*, Art. 49.

97 *Id.*, Art. 123.

98 *Id.*, Art. 41.

99 *Id.*

100 Wright & Dezan Shira & Associates, 2015, *supra* note 83.

101 Pagnattaro & Peirce, 2010, p. 6.

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means and for producing and selling toxic food, respectively.¹⁰² The former CEO of the Sanlu Milk Corporation, Tian Wenhua, pled guilty to “producing and selling fake or substandard milk”,¹⁰³ and was sentenced to life imprisonment.¹⁰⁴ Eighteen other people were sentenced to long jail terms for making and distributing toxic melamine-tainted milk products.¹⁰⁵ A large number of local officials involved in covering up the incident were forced to resign or discharged by the government.¹⁰⁶ Despite the regulatory effort made by the government and the harsh punishments imposed on the violators, China’s food businesses are not deterred from further violations. High-profile incidents continue to occur, demonstrating “the seriousness and prevalence of food safety issues”,¹⁰⁷ which in fact directly leads to the promulgation of a much stricter and more comprehensive 2015 Food Safety Law. China’s worsening food safety crisis raises a practical question: extensive regulations and harsh punishments under the previous food laws did not improve China’s food system. Will the new law make a difference?

At this point, we all look forward to seeing what the 2015 Food Safety Law could bring to China’s food system. To be fair, despite the promulgation of the new law, it still takes time for the government to make supporting implementation regulations, rules, and guidance. It takes much longer to put them into practice and to assess if they really improve food safety in China. The 2015 Food Safety Law cannot have an immediate effect.¹⁰⁸ Thus, we will have to wait and see the actual impact it could have on China’s food system. But we cannot deny that from the past experience, when the rubber hits the road, enforcement and compliance of the law is always a big headache for the government. Poor enforcement has been a huge challenge in China’s legal history; there is always a discrepancy between the law on paper and the actual implementation. In practice, poor law enforcement has created numerous undesirable consequences in China. These incidents are not isolated, and can be seen in various regulatory fields.¹⁰⁹ Therefore, it is meaningful to avoid the same mistakes other laws have made. Improv-

102 M. Bristow, ‘China Executes Two over Tainted Milk Powder Scandal’, *BBC News*, 24, November 2009, available at: <<http://news.bbc.co.uk/2/hi/asia-pacific/8375638.stm>>. (Noting that Geng, the manager of a milk production centre, supplied milk containing melamine to the Sanlu Milk Corporation, one of China’s major dairy companies, and other dairies.)

103 *Id.*

104 See ‘Chinese Milk Scam Duo Face Death’, *BBC News*, 22 January 2009, available at: <<http://news.bbc.co.uk/2/hi/7843972.stm>>.

105 C. Liu, ‘Is “USDA Organic” A Seal of Deceit?: The Pitfalls of USDA Certified Organics Produced in the United States, China and Beyond’, *Stan. J. Int’l L.*, Vol. 47, 2011, p. 333, at 364.

106 Pagnattaro & Peirce, 2010, p. 56.

107 Lin, 2011, p. 639.

108 Czarnezki *et al.*, 2013, p. 265.

109 For example, China had comprehensive laws to protect women’s reproductive rights, from the Constitution to the Law on the Protection of Women’s rights; however, forced abortion and sterilization still existed under the One-Child Policy. See Y. Chen, ‘China’s One-Child Policy and Its Violations of Women’s and Children’s Rights’, *N.Y. Int’l L. Rev.*, Vol. 22, 2009, p. 1, at 1-146. Please note that the Two-Child Policy replaced the One-Child Policy in 2015. For example, there are more than 100 environmental laws and regulations in China, but they are often ignored, and therefore, not enforced by local governments. See J. Liu & J. Diamond, ‘Science and Government: Revolutionizing China’s Environmental Protection’, *Science*, Vol. 319, 2008, p. 37, at 37-38.

ing the implementation is the key to enhancing the efficiency of the 2015 Food Safety Law, and is critical for improving China's food system. Meanwhile, as previously mentioned, it is imperative that food businesses have the incentives to obey the law and to commit to CSR compliance. Internal desire is the key dominant of behaviour change. Thus, two main impediments to the effective implementation of laws are to be examined, *i.e.* (1) weak enforcement and compliance of the laws; (2) lack of incentives from food businesses themselves. Potential solutions will also be proposed.

E How to Improve Food Safety in China

To improve food safety, it is crucial to identify what issues China must deal with and thereby, to further propose enforceable solutions. There are two major impediments that undermine food safety governance in China. Externally, weak enforcement damages the credibility of the food safety law. Therefore, effective law enforcement in the food sector should be a high priority for the Chinese government. Internally, food manufacturers and distributors lack the sense of corporate social responsibility, which is a root cause for food safety problems in China. Improving CSR in the food sector is imperative as it can fundamentally change the way food companies think and behave. Having said that, a major change in CSR practice is expected to be seen within the next decade. The Chinese government has recently signed a number of regional free trade agreements, including agreements with ASEAN,¹¹⁰ Pakistan,¹¹¹ Chile,¹¹² New Zealand,¹¹³ Singapore,¹¹⁴

110 China FTA Network, 'China-ASEAN FTA', available at: <<http://fta.mofcom.gov.cn/topic/chinaasean.shtml>> (last accessed 26 October 2016). (Noting that the agreement was signed in November 2002.)

111 China FTA Network, 'China-Pakistan FTA', available at: <<http://fta.mofcom.gov.cn/topic/enpakistan.shtml>> (last accessed 26 October 2016). (Noting that the two countries reached an agreement in November 2006.)

112 China FTA Network, 'China-Chile FTA', available at: <<http://fta.mofcom.gov.cn/topic/enchile.shtml>> (last accessed 26 October 2016). (Noting that the agreement was signed in November 2005.)

113 China FTA Network, 'China-New Zealand FTA', available at: <<http://fta.mofcom.gov.cn/topic/ennewzealand.shtml>> (last accessed 26 October 2016). (Noting that the two countries signed the agreement in April 2008.)

114 China FTA Network, 'China-Singapore FTA', available at: <<http://fta.mofcom.gov.cn/topic/ensingapore.shtml>> (last accessed 26 October 2016). (Noting that the two countries signed the agreement in October 2008.)

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Peru,¹¹⁵ Costa Rica,¹¹⁶ Iceland,¹¹⁷ Switzerland,¹¹⁸ Korea,¹¹⁹ and Australia.¹²⁰ The signing of these agreements means a large quantity of safe and healthy food imports with no or minimal tariffs imposed will enter the Chinese market soon. Inevitably, this will bring unprecedented competition to local food businesses. With the fear of suffering large sales losses to foreign competitors, Chinese food companies will eventually be forced to operate businesses in a more socially and environmentally responsible manner, providing safe food to the people.

I Weak Enforcement and Compliance of the Laws

As stated above, the gap between the law on paper and the law in action is wide, and the problem of law enforcement is serious in China. There is an urgent need for the Chinese government to develop a comprehensive framework to solve the implementation issues associated with food safety.¹²¹ Poor enforcement in the food sector is a result of various factors, of which the key challenges include insufficient capacity in making and implementing food safety standards as required by law, an ineffective risk monitoring and assessment system, and a food safety reporting rewards mechanism existing in name only. These issues may still exist under the 2015 Food Safety Law and therefore, should be addressed. Furthermore, poor governance is another major obstacle that the Chinese government must deal with. Not only does poor governance bring negative energy into food safety management, but also affects all aspects of social, economic, and political development. Therefore, improving governance is fundamental to ease the emerging strains related to food safety. Most importantly, it also ensures the sustainability of China's overall development path.¹²²

115 China FTA Network, 'China-Peru FTA', available at: <<http://fta.mofcom.gov.cn/topic/enperu.shtml>> (last accessed 26 October 2016). (Noting that the two countries signed the agreement in April 2009.)

116 China FTA Network, 'China-Costa Rica FTA', available at: <http://fta.mofcom.gov.cn/enarticle/encosta/encostanews/201108/7440_1.html> (last accessed 26 October 2016). (Noting that China-Costa Rica Free Trade Agreement entered into force on 1 August 2011.)

117 China FTA Network, 'China-Iceland FTA', available at: <http://fta.mofcom.gov.cn/enarticle/eniceland/enicelandnews/201411/18859_1.html> (last accessed 26 October 2016). (Noting that China-Iceland FTA came into effect on 1 July 2014.)

118 China FTA Network, 'China-Switzerland FTA', available at: <http://fta.mofcom.gov.cn/enarticle/chinaswisen/chinaswissennews/201405/15656_1.html> (last accessed 26 October 2016). (The China-Switzerland FTA came into effect on 1 July 2014.)

119 China FTA Network, 'News Release: China-ROK, China-Australia FTA to take effect on December 20', 11 December 2015, available at: <http://fta.mofcom.gov.cn/enarticle/enkorea/enkoreanews/201601/30417_1.html>. (The China-Korea FTA took effect on 20 December 2015.)

120 *Id.* (Noting that the China-Australia Free Trade Agreement entered into force on 20 December 2015.)

121 Lin, 2011, p. 640.

122 Organization for Economic Co-operation and Development (Hereinafter OECD), 'China in the Global Economy-Governance in China', 2005, available at: <www.chinability.com/Governance%20in%20China.pdf>.

1 *Insufficient Capacity in Making and Implementing Food Safety Standards*

Pursuant to Article 27 of the 2015 Food Safety Law, the Ministry of Health, together with the CFDA, is in charge of making national food safety standards; the Ministry of Health, the Ministry of Agriculture, and the CFDA share the responsibility of regulating the limits of pesticide use as well as veterinary drug residues in food; the Ministry of Agriculture and the Ministry of Health formulate the inspection procedures with respect to the slaughter of animals.¹²³ Government departments are assigned with respective responsibilities in making and implementing food safety standards. The allocation of roles is much clearer than any previous food laws in China. However, at this stage, China still lacks an adequate capacity of basic infrastructure to establish a comprehensive preventive mechanism that would reduce the production and distribution of hazardous foods in China.¹²⁴ There remain some practical challenges for the Chinese government to overcome, and it is not an easy task.

a) Making the Standards

Before the 2015 Food Safety Law, it was a common practice that the Chinese government published a food safety incident announcement on the government website after the incident had happened. Most of the time, piecemeal standards associated with the particular incident were created shortly after. This form of food safety governance is problematic. Standards are fragmentary as they could only be developed after the event; when a terrible food safety incident had actually happened. It may prevent the occurrence of similar food safety incidents in the future but does not help much with other food safety issues. Thus, a more proactive approach, also as what the 2015 Food Safety Law mandates, calls for the establishment of a comprehensive set of standards to regulate all aspects of food safety. It is important that these standards are scientifically based, and should be “harmonized with or (preferably) more protective than international standards”.¹²⁵ This is the first challenge that the Chinese government is facing, and is also the first step in a thousand-mile march towards effective food safety governance.

Developing food safety standards may be relatively easy if compared to the actual implementation given that there are various established international food safety standards that China could possibly refer to. For example, one of the most influential international institutions that create harmonized international food

123 2015 Food Safety Law, *supra* note 49, Art. 27.

124 Lin, 2011, p. 660. (Noting that China and many other developing countries share the same challenge in food safety management. They all lack basic infrastructure of “sufficiently trained personnel, and of technical expertise”.)

125 *Id.*, p. 685.

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standards¹²⁶ and promote global food safety is Codex Alimentarius.¹²⁷ Codex may be of particular importance for China due to its close relation with the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures (the 'SPS Agreement'). The SPS Agreement adopts Codex standards as the guidelines and recommendations concerning food hygiene, food contaminants, the use of food additives, pesticide residues, veterinary-drug residues, labelling and certification systems, and many other matters associated with food safety.¹²⁸ Although Codex itself is not legally binding in nature, "the presumption of conformity set out by the SPS Agreement has elevated Codex to a position of quasi-legislator".¹²⁹ It is "de facto binding".¹³⁰ As a member of the WTO, China shall comply with its international obligations. Therefore, the Codex standards suggested by the WTO's SPS Agreement should be respected and implemented in China.

b) Implementing the Standards

Although the Chinese government has been working hard to reform its national legislation for international compliance since its entry to the WTO in 2001, and food law is a high priority on its legislative reform agenda, the problems that remain unsolved are how to incorporate the Codex food safety standards into China's food safety governance mechanism, and, most importantly, how to make it locally adaptive. To solve these problems, it requires advanced food science and technology, as well as technical and professional expertise. Unfortunately, this is China's weakness; significant investment in related fields is imperative.

If a particular food product does not comply with the standards or is proven to be unsafe, the government must take actions immediately to stop the production and distribution.¹³¹ For the regulatory authority to come to such a decision, it needs to provide convincing scientific proof to support the ban.¹³² However, when the science is ambiguous, what the government can do, in order to protect the health and safety of the general public, is to "act preemptively where there is

126 *Id.*, p. 669. (Noting that Codex has "formulated international standards for a wide range of food products and specific requirements covering pesticide residues, food additives, veterinary-drug residues, hygiene, food contaminants, and labeling and certification systems".)

127 WHO, 'International food standards (Codex Alimentarius)', available at: <www.who.int/foodsafety/areas_work/food-standard/en/> (last accessed 11 October 2016). (Noting that "[t]he Codex Alimentarius Commission is a joint intergovernmental body" of the Food and Agriculture Organization of the United Nations [FAO] and WHO with 186 Member States and one Member Organization [EU]. Codex has worked since 1963 to create harmonized international food standards to protect the health of consumers and ensure fair trade practices. WHO works on the provision of independent international scientific advice on microbiological and chemical hazards. Scientific advice is the basis for the development of international Food Standards by Codex".)

128 WTO, 'The WTO and the FAO/WHO Codex Alimentarius', available at: <https://www.wto.org/english/thewto_e/coher_e/wto_codex_e.htm> (last accessed 27 October 2016). *See also* Lin, 2011, p. 669.

129 Lin, 2011, p. 670.

130 *Id.*, pp. 670-672. (Noting that the SPS Agreement requires SPS measures on food products to comply with Codex standards, guidelines, or recommendations. The SPS Agreement tries to achieve a higher level of food safety protection.)

131 2015 Food Safety Law, *supra* note 49, Art. 21.

132 *Id.*

reason to believe that there is a risk to human, animal, or plant life or health".¹³³ Taking into account available scientific evidence, this ban may only be placed on a temporary basis until the scientific uncertainty is solved.¹³⁴ Regardless, an effective implementation system should be established on the basis of proven scientific evidence. The Chinese government needs to strengthen its overall technical infrastructure in order to provide scientific evidence and thereby, to carry out the enforcement. The whole process involves various scientific requirements, such as inspection, sampling and testing methods, quarantine or other treatment, and notification mechanisms.¹³⁵ Trained personnel on food science are also indispensable.

It is undeniable that food science and technology, as well as technical and professional expertise, play a significant role in improving China's capacity in making and implementing food safety standards. However, this does not come cheap. Instead, tremendous financial and technical resources are critical.¹³⁶ The costs are high but fortunately, it may not be a major obstacle considering that fast economic growth in the past few decades enables the Chinese government to build adequate technical infrastructure as it wishes. But what China lacks the most is the experience on how to train qualified personnel, how to set up and run food labs, how to conduct scientific research that is locally adaptive, and how to overcome numerous other technical obstacles along the way to establish an effective food safety governance mechanism. Thus, technical assistance from the developed countries would be of great value to China.¹³⁷ Various forms of technical assistance can be provided, for example, food safety education, specialized training for inspection personnel, assistance in increasing China's lab capabilities, collaborative research, and many other technical assistance projects addressing

133 P. Martin, 'Sovereignty and Food Safety in A NAFTA Context', *Can.-U.S. L.J.*, Vol. 24, 1998, p. 369, at 373-375.

134 *Id.* (Noting that "[t]he corollary in WTO Article 5.7 and in NAFTA Article 715.4 is that if a government is acting in the absence of science, it should do so on a temporary basis while the scientific uncertainty is being resolved, and then it should act in a way consistent with the science".)

135 O. Aginam, 'Food Safety, South-North Asymmetries, and the Clash of Regulatory Regimes', *Vand. J. Transnat'l L.*, Vol. 40, 2007, p. 1099, at 1106. (Aginam discusses risk assessment under the SPS agreement, emphasizing the importance of scientific evidence in assessing food safety-related risks.)

136 Lin, 2011, p. 687. (Noting that the establishment of technical infrastructure will incur tremendous costs.)

137 P. Gao, 'China, the U.S., and Food Safety Under the WTO Regime', *Currents: Int'l Trade L.J.* Vol. 16, 2008, p. 13, at 25-26. (Noting that providing financial and technical assistance is "the responsibility of the developed countries under the SPS Agreement".)

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China's specific needs.¹³⁸ Nevertheless, a more comprehensive discussion on how technical assistance can be provided is beyond the scope of this article, and will not be discussed in more detail. Rather, it is an important issue that deserves further discussion by the scientists.

2 *Ineffective Risk Monitoring and Assessment System*

The 2015 Food Safety Law contains a full chapter (Arts. 14-23) regulating risk monitoring and assessment of food safety in China. It is a great improvement in a number of ways, if compared to the previous food laws.

a) Improvement 1: Clearer Allocation of Roles

In the 2009 Food Safety Law, it was not clear who had the responsibility and the authority to monitor food safety in China.¹³⁹ Chinese legislators identified this regulatory loophole and filled in the gap in the updated 2015 version. Under the 2015 Food Safety Law, different authorities are assigned clear responsibilities in conducting food safety risk monitoring and assessment. Pursuant to Article 14, at the national level, the Ministry of Health, the CFDA, and Quality Inspection Administration are responsible for (1) making the monitoring plans, and (2) implementing and supervising food safety monitoring programs.¹⁴⁰ At the local level, the responsibility is shared by local food and drug administrations and local quality inspection administrators.¹⁴¹ Furthermore, responsible technical institutions are required to comply with the risk monitoring plans for food safety surveillance.¹⁴² They should also "ensure the authenticity and accuracy of monitored data, and submit the monitored data and analysis results".¹⁴³

b) Improvement 2: Public Participation in Food Safety Risk Monitoring and Assessment

The Chinese government's limited human and financial resources constrain its functions in various aspects. There is only so much that the government can do in terms of monitoring food production and distribution. By understanding and acknowledging its own limitations, the Chinese government has started drawing on the expertise of non-governmental stakeholders in food safety monitoring. Under the 2015 Food Safety Law, food industry associations, the media, and indi-

138 United States Department of Agriculture Office of Communication, 'USDA Announces \$4.7 Million Available in Grants for Food Safety Training, Outreach and Technical Assistance', 18 April 2016, available at: <www.usda.gov/wps/portal/usda/usdahome?contentid=2016/04/0091.xml&contentidonly=true>. See also D. Thompson & Y. Hu, 'Food Safety in China: New Strategies', available at: <www.ghgi.org/Thompson_Food%20Safety%20in%20China.doc> (last accessed 14 June 2016). (Thompson and Hu detail the technical assistance that the U.S. could potentially provide to China, including "fostering and encouraging exchanges between universities, industry associations and even encourage Chinese corporations to join certain U.S. associations, enabling them to better understand the benefits and services that representative associations provide".)

139 Pagnattaro & Peirce, 2010, p. 10.

140 2015 Food Safety Law, *supra* note 49, Art. 14.

141 *Id.*

142 *Id.*, Art. 15.

143 *Id.*

vidual consumers are strongly encouraged to contribute to monitoring the safety of the food supply. Food industry associations are encouraged to conduct food safety research and mandate self-regulation policies. The media is of great importance in providing food safety education and exposing food safety issues to the general public. By doing this, consumer awareness will be largely increased. Also, China is committed to establishing a national food safety reporting rewards system. With this reward, individual consumers are expected to be even more motivated to participate in food safety risk monitoring.

c) Other Improvements

In the meantime, the 2015 Food Safety Law also mandates the establishment of a risk assessment system,¹⁴⁴ regulating various aspects of food safety risk analysis, such as further investigation of possible risk of food safety,¹⁴⁵ the circumstances where a risk assessment should be conducted,¹⁴⁶ information exchange on food safety risk assessment,¹⁴⁷ and proper actions the government needs to take in the event of undesirable risk assessment results.¹⁴⁸

d) Issues

The risk monitoring and assessment mechanism under the 2015 Food Safety Law appears to be more enforceable than its predecessors. However, in practice, it does not seem as effective as expected, and there are some practical challenges that cannot be ignored. In fact, a few main obstacles may hinder its enforcement.

As discussed above, a lack of technical infrastructure is one of the major impediments for the implementation of food safety standards in China. In fact, it is an issue for food safety governance in general. The risk monitoring and assessment system is no exception. Pursuant to the 2015 Food Safety Law, all the food, food additives, and food-related products are subject to risk monitoring and assessment,¹⁴⁹ which means a wide array of aggressive food safety tests need to be carried out. It can be a significant burden if China does not have the capacity to run these tests. Indeed, China lacks adequate testing facilities and qualified inspection personnel to monitor the safety of the food supply and to conduct risk assessment. Besides, the absence of affordable and standardized testing protocols further undermines the implementation.¹⁵⁰ These are the pressing technical issues that need to be addressed and solved. It cannot be achieved without the support from the government. Financial assistance and policy support are particularly important. Financial assistance provides the budget for necessary capacity building, ensuring the overall improvement of technical infrastructure. Meanwhile, supportive government policies are instrumental in introducing good prac-

144 *Id.*, Art. 17.

145 *Id.*, Art. 16.

146 *Id.*, Art. 18.

147 *Id.*, Arts. 20 & 23.

148 *Id.*, Arts. 21 & 22.

149 *Id.*, Art. 17.

150 H.-M. Lam *et al.*, 'Food Supply and Food Safety Issues in China', *Lancet*, Vol. 381, 2013, available at: <www.ncbi.nlm.nih.gov/pmc/articles/PMC3888022/> (last accessed 14 July 2016).

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tices, obtaining technical assistance from the developed countries, and encouraging food science research.

Furthermore, bad governance, for example, corruption, lack of transparency, and poor local management (including local protectionism), is another key factor that fundamentally undermines the effectiveness of China's risk monitoring and assessment system for food safety. The adverse impact of poor governance extends to all aspects of food safety law implementation in China. This article will examine poor governance and related issues in more detail in Section E.I.4.

3 *Food Safety Reporting Rewards System May Exist in Name Only*

Under the food safety reporting mechanism of the United States Department of Agriculture (USDA), individual consumers can report a food problem by filling out an electronic complaint form, or by calling a hotline.¹⁵¹ Similar to the USDA model, the CFDA also sets up a food safety reporting system. Realizing the power of online methods in "enhancing the capacity of the public to participate in collaborative governance",¹⁵² the Chinese government provides an electronic platform via the CFDA official website, which enables the general public to submit online complaints.¹⁵³ Slightly different from the USDA's food safety reporting mechanism, cash rewards are associated with the Chinese model.¹⁵⁴ As previously discussed, any individual or group can report a food safety violation. Whistle-blower will receive a cash reward, provided that the violation is verified to be true.¹⁵⁵ It seems that the Chinese model provides more incentives for individual consumers to participate in collaborative governance in food safety.

Again, when it comes to enforcement, issues arise. The CFDA website contains a link where individuals can report food safety-related matters.¹⁵⁶ By clicking on the link, individuals are directed to the page where they are given the options to either file a complaint regarding food and drug safety violation, or to report a government official for corruption, abuse of power, or misconduct in

151 USDA, 'Report a Problem with Food', available at: <www.fsis.usda.gov/wps/portal/fsis/topics/recalls-and-public-health-alerts/report-a-problem-with-food> (last accessed 27 October 2016). (Noting that "[s]eparate government agencies are responsible for protecting different segments of the food supply". If a consumer has experienced a problem with a food product, they can contact USDA Meat and Poultry Hotline or report the complaint online for help with meat, poultry, and processed egg products; they can call or write to the Food and Drug Administration (FDA) for help with non-meat food products; they can also contact local health department for help with restaurant food problems. Contact details and information required for investigation are clearly listed on the website.)

152 Han, 2015, p. 478.

153 The CFDA online reporting system can be accessed via its main page: available at: <www.sda.gov.cn/WS01/CL0001/> (last accessed 27 October 2016). The author has verified the link. By clicking on the 'report' button, the link directs to the page where an individual can either file a complaint regarding food and drug safety or report a government official for corruption, abuse of power, or misconduct in relation to food and drug safety.

154 2015 Food Safety Law, *supra* note 49, Art. 115.

155 *Id.*

156 Link for the CFDA website, available at: <www.sda.gov.cn/WS01/CL0001/> (last accessed 27 October 2016). Online complaint submission is on the left hand side of the page.

relation to food and drug safety.¹⁵⁷ By choosing either option, individuals are further taken to the next page where they are provided with a list of jurisdictions.¹⁵⁸ Depending on where the violations occur, individuals have to file the complaints to the corresponding local government departments. In other words, it is local governments that actually review the complaints. Local governments are fully responsible for local food safety management. The CFDA only supervises the enforcement carried out by local governments.

Although the websites of local governments all contain links for public participation in food safety governance, the fact is, in practice, each individual local government handles the complaints differently. Some scholars have already expressed their concerns over this form of public participation. For example, in *A Legislative Reform for the Food Safety System of China: A Regulatory Paradigm Shift and Collaborative Governance*, Prof. Yonghong Han states that most of the links for reporting food safety matters are not conspicuous or active, making the so-called “interaction activities” one-way communications.¹⁵⁹ Government agencies collect the information; however, most of them provide little or no feedback to the individual who reports the incident, not alone promised cash rewards if the alleged violation is proven to be true.¹⁶⁰ Food safety reporting rewards system may exist in name only. This is an undesirable result caused by two main factors: (1) corruption and local protectionism, and (2) unmotivated government employees and bureaucracy.

Corruption and local protectionism are the key obstacles to the effective enforcement of the food safety reporting rewards system. Local government is not willing to offend local food manufacturers and distributors because they may have some sort of relationship with them for various reasons. Among all these reasons, corruption often performs a major role in establishing the ‘relationship’.

Moreover, government employees in China are generally criticized for being unmotivated. Providing feedback to the complainants creates more workload. Local government employees lack the willingness to enforce the law, and they tend to ignore the information collected via online platforms. Senior government officials usually turn a blind eye to such administrative inaction. Often it is only when the incident is exposed by the media, attracting significant public attention, that local government initiates an investigation and holds the responsible government officials liable for non-performance or non-compliance.

In fact, corruption, local protectionism, unmotivated government employees, and bureaucracy are not isolated factors that result in the weak enforcement of

157 Link for the two options, available at: <www.sda.gov.cn/WS01/CL1573/> (last accessed 11 October 2016).

158 Link for filing a complaint regarding food and drug safety violation, available at: <www.12331.org.cn/> (last accessed 11 October 2016). Link for reporting a government official for corruption, abuse of power, or misconduct in relation to food and drug safety, available at: <www.sda.gov.cn/WS01/CL0023/> (last accessed 11 October 2016).

159 Han, 2015, p. 478.

160 *Id.*, pp. 478-479. (Noting that “[p]roper feedback is important in maintaining incentives for public participation and developing trust in collaborative governance”. But the Chinese government provides little or no feedback to the individual who reports the incident.)

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the reporting rewards system. Together, they are the indicators of poor governance. Thus, how to improve governance is the priority that the Chinese government should focus on.

4 Poor Governance

Governance is defined by the United Nations as “the process of decision-making and the process by which decisions are implemented (not implemented)”.¹⁶¹ Good governance generates effective policies and supporting implementation mechanisms.¹⁶² While poor governance, according to the World Bank, is often associated with “corruption, distortion of government budgets, inequitable growth, social exclusion, [and] lack of trust in authorities”.¹⁶³ Poor governance adversely affects all aspects of social, economic, and political developments.¹⁶⁴ China’s national food law regime suffers from poor governance, notably corruption, lack of transparency, and poor local management.

a) Corruption

Corruption exists in almost every single country in the world.¹⁶⁵ China is no exception.¹⁶⁶ It is not a surprise that corruption is a major concern for food safety governance in China. In 2007, Zheng Xiaoyu, former head of the State Food and Drug Administration (SFDA) was executed for corruption and misconduct associated with food and drug safety.¹⁶⁷ He accepted RMB ¥ 6.5 million in bribes.¹⁶⁸ One of Zheng’s former deputies, Cao Wenzhuang was given a death sentence with two years’ probation for the same charges: corruption and misconduct. Cao accepted cash and gifts worth over RMB ¥ 2 million.¹⁶⁹ However, these harsh punishments do not deter government officials from taking bribes. Rather, corruption associated with food safety continues. A research by Chenglin Liu shows that forty government officials from the General Administration of Quality Supervision, Inspection, and Quarantine (AQSIQ) were charged for corruption in the year of 2009 alone.¹⁷⁰ From January 2014 to June 2015, 652 government officials

161 UN Econ. & Soc. Comm’n for Asia & Pacific, ‘What Is Good Governance’, available at: <www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.pdf> (last accessed 11 October 2016).

162 Y. Chen, *Trade, Food Security, and Human Rights – The Rules for International Trade in Agricultural Products and the Evolving World Food Crisis*, Farnham Ashgate Publishing, 2014, p. 37.

163 The World Bank Group, ‘Corruption and Governance’, available at: <<http://inweb90.worldbank.org/eca/eca.nsf/Sectors/ECSPE/E9AC26BAE82D37D685256A940073F4E9?OpenDocument>> (last accessed 16 July 2016).

164 Chen, 2014, p. 39.

165 *Id.*, p. 38.

166 Liu, 2010, p. 294. (Noting that China ranked 72nd for its “general corruption perceptions” out of 180 countries.)

167 *Id.*, p. 296.

168 *See*, ‘Former SFDA Chief Executed for Corruption’, *China Daily*, 10 July 2007, available at: <www.chinadaily.com.cn/china/2007-07/10/content_5424937.htm>.

169 *See*, ‘China Drug Official Given Death Sentence’, *China Daily*, 6 July 2007, available at: <www.chinadaily.com.cn/china/2007-07/06/content_912242.htm>.

170 Liu, 2010, p. 298.

faced criminal charges for food safety-related misconduct, and corruption was involved in most of these cases.¹⁷¹

Looking at these serious criminal convictions, it is obvious that China has been working hard to establish an enforceable regulatory framework to improve food safety governance. However, if government officials choose to, or to be more specific, if they are 'influenced' to choose to disregard the food safety laws, unethical food practices will continue to occur.¹⁷² How could it be possible that government officials are 'influenced' to make a decision that would put consumers' health at risk? The answer is relatively simple: money talks. Some government officials receive bribes from food producers or distributors; some even solicit bribes. Regardless of the forms, government officials take bribes so that they turn a blind eye during quality control. Further, in the event of food safety incidents, rather than perform their duties with honesty and in the best interests of the general public, corrupt officials may attempt to abuse their power to cover things up.

For example, during the melamine-tainted milk scandal in 2008, at the local level, milk suppliers and dairy manufacturers bribed local officials trying to cover up the scandal.¹⁷³ It is undeniable that local officials also had personal interests involved. Due to the seriousness of the incident, local officials were afraid that they would lose their jobs if the incident was reported to the central government or was unfolded to the public.¹⁷⁴ Therefore, they tried to suppress the truth. But this does not mean that the central government knew nothing about it. In fact, the central government turned a blind eye on the scandal because the Olympic clock was ticking. The last thing that the government wanted to see was a scandal of this nature. With this fear, the central government sent out an order that "nothing was to negatively affect the Olympics".¹⁷⁵ It is difficult to find related information online due to Internet censorship. However, the scandal is the unspoken truth.

The timeline of the melamine-tainted milk scandal indirectly verifies the 'unspoken truth'. In March 2008, the Chinese media first reported the complaints that Sanlu baby formula had made babies sick.¹⁷⁶ Public complaints were made to the AQSIQ as early as June in the same year.¹⁷⁷ Sanlu's New Zealand shareholder

171 See 'Food Safety-related Misconduct, 600 Investigations, What's behind? – Corruption and Bribe', *Sohu News*, 6 August 2015, available at: <<http://news.sohu.com/20150806/n418254659.shtml>>.

172 B. van Rooij, 'The People's Regulation, Citizen and Implementation of Law in China', *Colum. J. Asian L.*, Vol. 25, 2012, p. 116.

173 Public Opinion Monitor Network, 'New Zealand Shareholder was Aware of the Sanlu Contamination in August and Requested for Recall', 15 September 2008, available at: <www.yulun919.com/article/2810.html>.

174 *Id.*

175 P. Mooney, 'The Story Behind China's Tainted Milk Scandal', *US News*, 9 October 2008, available at: <www.usnews.com/news/world/articles/2008/10/09/the-story-behind-chinas-tainted-milk-scandal>.

176 Z. Hong, 'Watering Down the Truth', *The Guardian*, 19 September 2008, available at: <<https://www.theguardian.com/commentisfree/2008/sep/18/china>>.

177 *Id.*

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Fonterra also warned Sanlu of the risks in early August.¹⁷⁸ But no official investigation was conducted, and no recall notice was issued to the public.¹⁷⁹ It was not until September when New Zealand's ambassador contacted senior Chinese officials that the Chinese government had to start taking actions.¹⁸⁰ In the same month, several dairy farmers who supplied milk to Sanlu were finally arrested for alleged food safety violations.¹⁸¹

Certainly, the cover-up of the melamine-tainted milk scandal in 2008 resulted from a combination of factors. It is undeniable that bribery and corruption also played a significant role, in particular, at the local level of the government. As what Jason J. Czarnezki, Yanmei Lin, and Cameron F. Field said in *Global Environmental Law: Food Safety & China*, the failure to unfold the scandal by local authorities "presents an interrelated hurdle to effective food safety regulation in China: corruption".¹⁸² Thus, the fight against corruption in all aspects is critical to improve food safety governance in China.

A 'one size fits all' anti-corruption strategy is not realistic. In fact, there are various anti-corruption approaches that the government may adopt, depending on an individual country's own problems. However, the key to anti-corruption does not vary much: promoting transparency and accountability is crucial to reduce corruption. Chinese President Jinping Xi has launched a far-reaching anti-corruption campaign since the beginning of his term in 2012. Hundreds of high-ranking officials were convicted for corruption. The Chinese justice system has been doing a much better job in reducing corruption. However, it still is not enough. In the case of China, greater transparency in government revenue and spending is particularly important. It helps the public monitor how the government manages public resources and if the resources are being used in the public interest.¹⁸³

b) Lack of Transparency

Transparency is one of the core components of good governance.¹⁸⁴ For effective public oversight, citizens must be entitled access to government documents and proceedings. In particular, transparency requires governments to provide accurate and timely information regarding how public affairs are conducted and how public resources are managed.¹⁸⁵ By upholding the principles of transparency, governments show a strong interest in listening to the public and in responding to the people's needs and concerns.¹⁸⁶

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 Czarnezki *et al.*, 2013, pp. 266-267.

183 United Nations Millennium Declaration, G.A. Res. 55.2, UN Doc. A/RES/55/2, 18 September 2000.

184 Czarnezki *et al.*, 2013, p. 283.

185 Chen, 2014, pp. 40-41.

186 *Id.*

China promulgated its first regulation on open government in 2007.¹⁸⁷ Sadly, despite the enactment of the *Open Government Information Regulations*, the lack of transparency and accountability continues to be one of the major obstacles to the efficiency of government. As for food safety governance, the disclosure of relevant information remains inadequate.¹⁸⁸ For example, as mentioned in the 2008 melamine-tainted milk scandal, initially, the Chinese government had no intention to either announce the health risks caused by the contaminated milk products or issue a product recall. Information regarding the scandal was not available to the public until the Chinese government was forced to reveal the truth due to the pressure coming from a foreign government – New Zealand, in this case. The cover-up of the melamine-tainted milk scandal is not an isolated incident. Rather, it is quite common in China.¹⁸⁹

Nevertheless, making food safety-related information immediately available to the public is meaningful in two ways. On the one hand, greater transparency improves consumer awareness and enables the general public to take preventive actions at the individual level in the event of a food safety incident.¹⁹⁰ On the other hand, it encourages civic participation in public affairs and gives society the power to take an active role in ensuring the accountability of the government.¹⁹¹

In order to improve transparency in the area of food safety governance, information concerning food safety laws, regulations, and actions taken by the government needs to be made accessible to the public in a timely manner. New technologies, notably Internet, offer great opportunities for information sharing, and should be widely used to “enable people to both understand what their governments do and to influence decisions”.¹⁹² To be more specific, first of all, food safety standards must be provided in great detail, including product specifications and requirements. Secondly, to assure consumers that the food products they purchase are safe, transparency in quality control processes, including food safety risk monitoring, assessment, and management, should be made available for public scrutiny. Thirdly, consumers are entitled to know their rights, including what actions they can take if their health is at risk. The media can perform a key role in raising much-needed consumer awareness.

Further, in the event of a food safety incident, making the responsible officials and dishonest food suppliers accountable under the law is the key to upholding the principle of the rule of law. Meanwhile, through routinely disclosing these

187 ‘Zhonghua Renmin Gongheguo Zhengfu Xinxi Gongkai Tiaoli [Regulation of the People’s Republic of China on the Disclosure of Government Information]’, 2008 (adopted at the 165th executive meeting of the State Council on 17 January 2007, and came into force as of 1 May 2008.), available at: <www.lawinfochina.com/display.aspx?lib=law&id=6011&CGid=> (last accessed 19 July 2016).

188 Czarnezki *et al.*, 2013, p. 283.

189 Balzano, 2012, p. 32. (Noting that “[m]any food safety issues are reported by the media through TV or in print/online, and even then, the media can be effectively silenced by central or local government forces”.)

190 Czarnezki *et al.*, 2013, p. 283.

191 Han, 2015, pp. 470-471.

192 Open Government Partnership, ‘Open Government Declaration’, September 2011, available at: <www.opengovpartnership.org/about/open-government-declaration>.

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enforcement activities, unethical government officials and food suppliers are more likely to be deterred from further violations. Consumer confidence will gradually increase in the meantime.¹⁹³ In summary, transparency is a critical factor for the long-term success of food safety governance.

c) Poor Local Management

In China, the CFDA is responsible for the comprehensive overseeing of food safety matters; while local governments enforce the law under the direct guidance and supervision of the CFDA. The coordination between the central and local governments enables progress to be made towards the establishment of a functional food safety implementation mechanism. This model of management appears to be enforceable. However, it has its own restrictions.

From an institutional perspective, this local management model creates a high dependence of the central government on local authorities.¹⁹⁴ Much work needs to be done by the central government before the local management system can operate in an accountable and transparent way. How to enhance the efficiency of food safety supervision is critical, requiring significant effort from the central government.¹⁹⁵ These efforts include, but are not restricted to, for example, creating detailed supervision procedures and practices, promoting institutional designs to change the behaviour of local governments and local officials, and making and applying administrative or even criminal penalties for non-compliance.

As for local governments, they are responsible for revealing food safety issues, not only to the central government, but also to the general public for scrutiny. Most importantly, local governments carry out the duties to monitor, assess, and manage food safety risks. Therefore, an operative implementation mechanism at the local level is imperative; it ensures that only safe food products can enter the market. Then, how to improve the actual implementation at the local level is an urgent issue and needs immediate attention from both the central and local governments. In fact, local food safety management has been problematic.

Local governments lack the willingness to comply with orders from the central government.¹⁹⁶ The Chinese government has acknowledged the negative effects brought by local non-compliance, and publicly addressed the importance of local engagement, in particular, the willingness of local governments to enforce the Food Safety Law.¹⁹⁷ For example, Wu Yi, the former chairwoman of China's Interagency Product Safety Committee, said in one of the meetings she chaired,

193 Czarnezki *et al.*, 2013, p. 286.

194 L. Wu & D. Zhu, *Food Safety in China: A Comprehensive Review*, Boca Raton, CRC Press, 2015, p. 213.

195 *Id.*

196 Thompson & Hu, *supra* note 138. (Noting that “[t]he lack of local government willingness to enforce central government dictates is a problem in multiple sectors and attributable to the lack of progress achieved in various government initiatives”.)

197 *Id.* (Noting that local governments and local officials shall “not evade responsibility for product safety or protect illegal or sub-standard enterprises”.)

According to the “who is in charge and who is responsible” principle, the detection and elimination of potential safety problems is the assigned responsibility of each department, each region, each county, each township, every street, every community, every business and shop. We must strictly assure accountability in the system.¹⁹⁸

Local protectionism often affects ‘the willingness’ of local governments to comply with the laws and regulations. Local protectionism has already led to numerous cover-ups of food safety issues across the country, and is another factor that contributes to the failure of China’s food safety governance.¹⁹⁹ Successful enforcement of food safety law requires active local engagement. Local protectionism must be substantially reduced.²⁰⁰

Another issue with local management is the inconsistency of law implementation. Different offices or even different officials in the same office may have different interpretations on the same matter in relation to food safety.²⁰¹ This inconsistency can be caused by various reasons. It is true that different officers may have different views on the same issue, without the influence of others. However, other factors may also affect the way an individual officer performs his/her duties, for example, pressure from the higher level of government officials, corruption, or personal interests. The lack of accountability also encourages the inconsistency in implementation.

Thus, an effective food safety management mechanism requires coordinated efforts made by both the central and local governments.²⁰² Improving local government engagement and accountability is important. It plays a major role in the establishment of an effective food and product safety regime that ultimately protects the health and safety of the general public.²⁰³

5 Summary

The existing food law enforcement in China leaves much room for further improvement. Strengthening the technical infrastructure and promoting key principles of good governance are the viable solutions to the problem.²⁰⁴ In particular, the improvement of governance is the priority task for the Chinese government. It is one of the main forces that remove the roots for implementation failure of China’s Food Safety Law. The Chinese government must make significant effort to progressively increase responsiveness, transparency, effectiveness, accountability, and the implementation of the rule of law.

198 *Id.*

199 F. Snyder, *Food Safety Law in China: Making Transnational Law*, Leiden, Brill, 2015, p. 54.

200 *Id.*

201 Lin, 2011, p. 657.

202 *Id.*, p. 685.

203 Thompson & Hu, *supra* note 138.

204 Czarnezki *et al.*, 2013, p. 283.

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II *Lack of the Sense of Corporate Social Responsibility (CSR) in the Food Sector*

Effective regulatory enforcement is imperative for the improvement of food safety in China. However, laws, regulations, and actions taken by the government only impose external pressure on food businesses.²⁰⁵ Government interventions do not fundamentally change the way food producers and distributors think and behave. Reducing the cost of food production and pursuing maximum economic profits are always the ultimate goals for business operators. If business operators were given the opportunity to choose freely between CSR and economic profits, the majority would prefer the latter.

To be fair, despite the existence of a well-drafted food safety law and a relatively functional enforcement mechanism, China will not see a substantial improvement in food safety governance unless business operators have a strong desire to make a change. Intrinsic motivation is as important, if not more, than external pressure imposed by the government. In fact, intrinsic motivation and government interventions are complementary. Together, they improve China's food system.

Chinese food business operators may feel the 'desire' within the next few years, if they have not yet. This 'desire' to make a change is a result of a combination of factors, firstly, the change of food consumption trends in China; secondly, unprecedented competition coming from foreign imports in the food sector; and thirdly, heightened international scrutiny for China's food exports.

1 *The Growing 'Desire' to Comply with CSR Principles in the Food Sector*

a) *The Change of Food Consumption Trends in China*

China has experienced remarkable economic growth since the 1978 reforms. Economic success has led to a steady and significant increase in the average per capita income, improving the lives of millions.²⁰⁶ Rather than struggling to feed themselves and their families, the Chinese now have more money to spend on food. Substantial changes are seen in food consumption. For one thing, the consumption of meat and dairy products has dramatically increased.²⁰⁷ For another, the Chinese are gradually concerned about the quality of the foods they consume.²⁰⁸

The traditional Chinese diet features more starches such as rice, noodles, steamed buns, and dumplings, accompanied by vegetables and fruits. Meat, sea-

205 Balzano, 2012, p. 34. (Noting that "even the enactment of a well-drafted law and a cooperative set of legal actors and institutions" cannot necessarily solve the problems.). *See also* Czarnezki *et al.*, 2013, p. 278. (Noting that "despite the existence of a basic legal infrastructure, these laws, regulations, civil remedies, and food safety control authorities do not adequately address China's food safety problems".)

206 Z. Zhou *et al.*, 'Food Consumption Trends in China, Report submitted to the Australian Government Department of Agriculture, Fisheries and Forestry', April 2012, available at: <www.agriculture.gov.au/SiteCollectionDocuments/agriculture-food/food/publications/food-consumption-trends-in-china/food-consumption-trends-in-china-v2.pdf>.

207 F. Dong & F.H. Fuller, 'Dietary Change in China's Cities: Empirical Fact or Urban Legend?', *Iowa Ag Review*, Vol. 13, No. 1, 2007 (Online), available at: <www.card.iastate.edu/iowa_ag_review/winter_07/article2.aspx>.

208 Roberts, 2011, pp. 414-415.

food, and dairy products are part of the traditional Chinese diet, but are served in much smaller amounts. Traditional Chinese diet determines that the traditional agriculture in China focuses on the cultivation and production of fruits, vegetables, and grain-based foods. In recent years, the Chinese diet has changed towards increased consumption of energy-dense foods, such as meat and dairy products, which has inevitably changed China's agricultural structure. Animal agriculture is developing rapidly. However, it still does not provide enough meat and dairy products for Chinese consumers. China has two choices in responding to the dilemma of high demand and insufficient supply. On the one hand, it directly encourages meat and dairy products imports, primarily from Australia, New Zealand, the U.S., and many European countries, which will ultimately bring China into an era of food interdependence.²⁰⁹ On the other hand, meat and dairy industries in China are motivated to look for solutions on how to increase output with limited resources. Unfortunately, in practice, the solutions to improve output are shocking, for example, diluting milk with water and then increasing the protein content with melamine (e.g. the melamine-tainted milk scandal in 2008), and feeding cattle and other livestock excessive amounts of antibiotics and hormones to increase their growth rate.

In the meantime, Chinese consumers are gradually concerned about the quality of the food they consume, not only meat and dairy products, but food in general. As noted in the report by the USDA's Economic Report Service, "increasing affluent Chinese consumers purchase better food and look for food products with purported health benefits and desirable attributes".²¹⁰ This trend is spreading quickly in China. There is no doubt that the Chinese expect more from the food system rather than settle with contaminated dairy products, meat infused with chemicals and hormones, or other unsafe food products.²¹¹

From a business perspective, growing demand from consumers creates potential market opportunities.²¹² In a country full of unsafe foods, when the whole society is questioning the unethical practices in the food sector, business operators need to rethink what they can do to improve their competitive advantages. It is more likely those that supply safe and high-quality food will soon win the hearts and minds of Chinese consumers, and thereby stand out in the crowd. Socially and environmentally responsible practices in the food sector may incur high costs due to greater labour inputs per unit of output and additional procedures for processing and transportation. But with steadily increasing income and the change of attitude towards food, more and more Chinese consumers are able to and willing to pay higher prices for high-quality, healthy food.

209 F. Cheng, 'The Nutrition Transition and Obesity in China', available at: <<http://cip.cornell.edu/dns.gfs/1200428159>> (last accessed 24 July 2016).

210 Roberts, 2011, p. 410.

211 *Id.*

212 *Id.*

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b) Unprecedented Competition Coming from Foreign Imports in the Food Sector

As a general principle, trade agreements significantly reduce or even completely remove trade barriers, opening the door for the participatory parties to have access to each other's market. China and its business partners have been working hard to negotiate further trade liberalization in the areas of goods and services. China has two primary goals in international trade. Firstly, China pursues sustainable access to natural resources to support its fast growing economy.²¹³ Secondly, China's economic growth has been heavily driven by exports.²¹⁴ As a leading exporter of manufactured goods, China continues to look for market opportunities overseas.²¹⁵ Meanwhile, China's business partners have also seen the enormous opportunities of doing businesses with China. In addition to trade in fuels and mining products and trade in services, agricultural trade has also been a high priority for many of China's business partners.²¹⁶ As a result of mutual interest, a number of agreements have been concluded. As discussed at the beginning of Section E, China has signed free trade agreements with New Zealand, Costa Rica, South Korea, and Australia, and many other countries.

With the signature and conclusion of these trade agreements, China is progressively gaining greater access to foreign natural resources as well as overseas markets for manufactured goods. In the meantime, large quantities of foreign imports including agricultural products are gradually entering the Chinese market; a growing number of foreign services are available in China as well. There is no doubt that affordable foreign imports and services will bring competition to local businesses.

In the food sector, the competition is expected to be particularly intense, and Chinese food businesses may suffer large sales losses to foreign competitors sooner or later, provided they do not get their act together. Chinese food businesses should be afraid of the potential import surges.

It is true that there are numerous strategies that a company can employ in order to enhance the competitiveness of their products on the market.²¹⁷ For

213 Y. Chen, 'China's Investment and Trade in Africa: Neo-Colonialism or Mutual Benefit?', *Cardozo J. Int'l & Comp. L.*, Vol. 24, 2016, p. 511, at 526-527.

214 *Id.*, p. 528. (Noting that "Chinese economic growth has been spectacular since its opening-up reform in 1978. Both domestic consumption and exports have been significantly expanded. However, the rapid economic growth has been heavily driven by exports. Thus, China needs to find new markets to sustain its economic development".)

215 D. Horton & L. McNamee, 'China: Prospects for Export-driven Growth', *Economic Roundup*, No. 4, 2012, available at: <www.treasury.gov.au/PublicationsAndMedia/Publications/2012/Economic-Roundup-Issue-4/HTML/article4>.

216 WTO, 'China', September 2015, available at: <<http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Country=CN>>.

217 R.E. Bartkus, 'Innovation Competition: Beyond Telex v. IBM', *Stan. L. Rev.* Vol. 28, 1976, p. 285, at 288.

example, incorporating new ideas into existing products,²¹⁸ adding additional desirable traits through innovation,²¹⁹ product differentiation,²²⁰ supply chain innovation to reduce the costs at the supplier level,²²¹ and many others. Consumers in general are attracted to certain features of a product for various reasons. Chinese consumers are no exception. However, the major challenge for Chinese food businesses goes beyond merely developing creative marketing strategies. Rather, the fact is Chinese consumers have little or even no confidence in domestic food products.²²² Endless food safety disasters have driven Chinese consumers away from local food products. Chinese consumers' market preference has been swiftly shifted towards foreign branded and imported food products.²²³

For Chinese food companies, re-building consumer trust is not easy.²²⁴ Even worse, when more and more affordable food imports are available on the Chinese market, what Chinese consumers would choose is not difficult to predict. With the motivation to gain competitive advantages, Chinese food businesses will ultimately be forced to engage in ethical practices, providing safe and high-quality food to consumers. Increased food imports play a significant role in reshaping China's food system, notably, in the area of food safety. This article will explore the regional free trade agreements, specifically the ChAFTA, and the impact on China's food system in further detail.

c) Heightened International Scrutiny of China's Food Exports

China is also an exporter of a number of agricultural products,²²⁵ primarily farm-raised seafood,²²⁶ vegetables,²²⁷ and processed foods.²²⁸ Following a series of food

218 T.A. DeKryger, 'Food Safety Standards as Corporate Social Responsibility: A Case Study of Infant Food Companies', 2008, p. 48, also available at: <<http://sunzi.lib.hku.hk/ER/detail/hkul/4359007>>. (Noting that "[b]y incorporating new ideas into existing products, a company creates a potential hurdle for its competitor, which causes the competitor to become less competitive".)

219 *Id.* (Noting that "[w]hen a company changes a product by adding additional desirable traits, that company may increase customer expectations for an existing product to a point where the competition cannot follow".)

220 *Id.* (Noting that "[b]y creating products with a perceived 'value-add,' a company can differentiate its products from the rest of the competition".)

221 *Id.* (Noting that "[s]upply chain innovation provides opportunities to increase a company's competitive advantage through cost savings and efficiencies at the supplier level".)

222 Roberts, 2011, p. 408.

223 *Id.*

224 Czarnezki *et al.*, 2013, p. 278.

225 Liu, 2010, p. 250. (Noting that "China was the third largest food exporter to the United States, after Canada and Mexico" in 2007.)

226 *Id.*, pp. 250-251. (Noting that "China is the largest exporter of seafood to the United States, and made up 21% of the total imported seafood coming into the United States in 2007".) *See also* Food & Water Watch, 'Import Alert: Government Fails Consumers, Falls Short on Seafood Inspections', 2007, available at: <<http://documents.foodandwaterwatch.org/ImportAlertJuly2007-1.pdf>>.

227 Liu, 2010, p. 303.

228 Lin, 2011, p. 639. (Noting that China also exports processed food, for example, dumplings, and crackers.)

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safety scandals in China,²²⁹ the international market, very much like Chinese consumers, are concerned about the safety of Chinese food products.²³⁰ They call for intense scrutiny of China's food exports. Heightened international scrutiny may bring positive energy to China's food system. It creates an internal desire for Chinese food companies to act in a more socially and environmentally responsible way, and to supply food that conforms to international standards. If the food products do not meet the standards, they will not be able to reach the international market. Heightened international scrutiny for Chinese food exports is an important topic that deserves further examination. This article will only focus on what regional trade agreements, in particular, the ChAFTA, can bring to China's food system.

2 *Agricultural Trade under the ChAFTA and Its Impact on China's Food System*

a) *Agricultural Protectionism*

Food is the most basic human need.²³¹ Without sufficient food, human survival and development are at risk.²³² A stable food supply guarantees a nation of food security. In turn, food security ensures all levels of social, economic, cultural, and political life.²³³ Agriculture is directly associated with the production of food crops, and therefore, is vital for protecting food security. Furthermore, agriculture also plays a critical role in providing job opportunities worldwide.²³⁴ Agriculture has been on the highest list of policy priorities in most countries for decades or even centuries.²³⁵ Unsurprisingly, in the area of international trade, agriculture has also been the most sensitive subject and the most protected sector.²³⁶ Agricultural protectionism is a common practice in the international community, evidenced by enormous subsidies and other support provided by governments.²³⁷

229 G.S. Becker, 'CRS Report for Congress, Food and Agricultural Imports from China', 26, September 2008, Order Code RL34080, available at: <<https://www.fas.org/sgp/crs/row/RL34080.pdf>>. (Noting that a series of incidents have raised public concerns about the safety of the Chinese products. In 2007, the U.S. Food and Drug Administration announced that the imports of farm-raised seafood from China may contain unapproved drug residues.) See also Lin, 2011, p. 646. (Noting that "Chinese-made dumplings tainted with harmful pesticides caused over 700 people to fall ill in Japan" in 2008.). See also C.M.-E. Gossner *et al.*, 'Commentary, The Melamine Incident: Implications for International Food and Feed Safety', *Environmental Health Perspectives*, Vol. 117, 2009, p. 1803, at 1804-1805. (Noting that "[m]elamine-contaminated products – ranging from infant formula to cookies – found their way to all corners of the world, affecting not only China, but also forty-six other countries".)

230 Lin, 2011, pp. 641-642. (Lin states that "[f]ood products contain raw materials from multiple regions and travel across many national borders for consumption or further processing". He is concerned that "food safety incidents in one state can pose substantial risk to other states".)

231 Chen, 2014, p. 11.

232 *Id.*

233 D. Moyo, 'The Future of Food: Elements of Integrated Food Security Strategy for South Africa and Food Security Status in Africa', *Am. Soc'y Int'l Proc.*, Vol. 101, 2007, p. 102, at 104.

234 Chen, 2014, p. 74.

235 *Id.*

236 *Id.*

237 *Id.*, pp. 74, 181.

For example, farm bills in the U.S. since the 1930s and the Common Agricultural Policy in Europe since the 1950s are to ensure food security by providing enormous support for farmers.²³⁸ Likewise, agriculture is equally important in China considering that, firstly, it is not an easy task to feed 1.4 billion people; secondly, the majority of the Chinese population is engaged in agricultural industry and related sectors. For the reasons above, the Chinese government holds conservative views on opening up its domestic market to agricultural imports.

b) Agricultural Trade Liberalization in China

Despite the desire to protect the most sensitive sector, the Chinese government has made some noticeable progress in further liberalizing trade in agriculture. Notably, the trade agreements China has recently signed grant its trade partners massive market access, opening China's agriculture to foreign competition. This dramatic change is driven by two main factors. On the one hand, since China's entry into the WTO in the early 2000s, the government has been making efforts to fulfil its international obligations. As part of the deal, China is required to reduce tariffs and other non-tariff barriers within a certain period of time so that foreign products can obtain greater access to the Chinese market.²³⁹ This general rule also applies to agricultural trade. On the other hand, fast economic growth and urbanization in China have resulted in the conversion of farmland for non-agricultural uses.²⁴⁰ Large amounts of farmland have been lost due to "residential, commercial, industrial, and transportation pressure that attend metropolitan expansion".²⁴¹ The amount of farmland per capita is significantly decreasing.²⁴² Coupled with changing food consumption preference, inevitably, China is not able to "satisfy the quantity and diversity of the food demands of [i]ts populations".²⁴³ Although the Chinese government places a high priority on self-sufficiency in food and would still like to protect its agricultural economy as well as the Chinese farmers, the dilemma of insufficient supply and growing demand has placed China in a difficult situation. To accommodate the country's increased demand, China has been adjusting its strategies in relation to agricultural imports.

238 *Id.*, pp. 153-181. (Chapter 8 discusses agricultural policies in the European Union and the U.S. and their impact on international agricultural trade.)

239 Detailed tariff schedule can be found on the WTO website. See WTO, 'Tariffs', available at: <https://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm> (last accessed 28 July 2016).

240 Chen, 2014, p. 59.

241 W.L. Church, 'Farmland Conversion: The View from 1986', *U. Ill. L. Reve.*, Vol. 1986, 1968, p. 521, at 536.

242 Czarnezki *et al.*, 2013, pp. 265-266. (Noting that "China's agricultural productivity has declined in recent years due to urban expansion and degraded land quality".)

243 FAO, 'World Food Summit, Food Import Dependence', November 1996, available at: <www.fao.org/docrep/003/w2612e/w2612eMap15-e.pdf>.

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In fact, China's agricultural imports have increased dramatically in recent years, making the country a major agricultural importer.²⁴⁴ Data shows China's agricultural imports increased from US \$11 billion to US \$57 billion from 2002 to 2008.²⁴⁵ The number continues to grow. For the years of 2012-2013, the total agricultural imports value reached US \$109 billion.²⁴⁶ The USDA and several other sources anticipated "continued growth in Chinese agricultural imports through 2023".²⁴⁷

For all the reasons stated above, as expected, China has to gradually open up its domestic market. Trade agreements with main suppliers of agricultural products play a significant role in meeting China's increased demand for food. Increased agricultural imports also bring significant competition to local businesses.

In the long term, a large quantity of food imports may result in a high level of dependence, potentially undermining a country's food security. Therefore, dependence is an unavoidable topic when it comes to the question of food imports. In China, it is likely that the dependence will grow as the demand increases. China's food security may be conditioned by the availability of food on the world market as well as the capacity to obtain imported food.²⁴⁸ Indeed, potential food import dependence is a main concern for the Chinese government. However, it can be largely mitigated if the Chinese government carefully manages its domestic agricultural policies and international trade policies.

c) Why ChAFTA Is Particularly Important in Re-Shaping China's Food System

ChAFTA is particularly important in re-shaping China's food system, if compared to multilateral agreements such as the WTO and regional free trade agreements such as China–New Zealand FTA.

i) Regional Free Trade Agreements vs. WTO

Stepping back to see a bigger picture, regional trade agreements have more advantages in trade liberalization because the deals can be "concluded relatively quickly".²⁴⁹ It takes too long for the WTO to make a deal due to the unwillingness of some of the State members. The failure of the most recent round of WTO negotiations has confirmed the negative side of multilateral discussion.²⁵⁰ Fur-

244 USDA, 'China's Growing Demand for Agricultural Imports, Economic Research Service, Economic Information Bulletin', No. 136, February 2015, available at: <www.ers.usda.gov/media/1784488/eib136.pdf>. (Noting that China has become a net importer of grains. Meanwhile, meat and dairy products imports have also surged.)

245 Czarnetzki *et al.*, 2013, p. 269.

246 USDA, 2015, *supra* note 244. See Table 2.

247 *Id.*

248 FAO, 1996, *supra* note 243.

249 A. Willems & N. Theodorakis, 'The China-Australia Free Trade Agreement: FTAs as the New Way to Liberalize Trade', *Int. T.L.R.*, Vol. 21, No. 3, 2015, pp. 70-73.

250 The Editorial Board, 'Global Trade After the Failure of the Doha Round', *New York Times*, 1 January 2016, available at: <www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doha-round.html?_r=0>.

ther, regional trade agreements “offer significant financial benefits and they are strategic”.²⁵¹ They better address the specific needs of the parties. More and more countries prefer forming regional trade partnerships through regional agreements.²⁵²

ii) Regional Trade Agreements: ChAFTA vs. China–New Zealand FTA

ChAFTA stands out, particularly in the area of agricultural trade. According to a USDA report, China’s main suppliers of agricultural imports include the U.S., Brazil, Australia, Canada, New Zealand, and Argentina.²⁵³ Among these suppliers, until now, China has only signed regional free trade agreements with New Zealand²⁵⁴ and Australia,²⁵⁵ creating additional benefits for the two countries. To be fair, agricultural export to China is one of the most beneficial sectors for New Zealand and Australia.

It is true that at this stage, agricultural trade volume between New Zealand and China is still larger given that the China–New Zealand FTA was signed in 2008 and significant tariff reductions have already been implemented. Nevertheless, it is positive that Australia will overtake New Zealand in the area of agricultural trade within the next few years. Before 2015, the absence of a bilateral FTA put Australian producers and exports in a less competitive position. Food products from New Zealand were much more popular among Chinese consumers because of the low prices under the China–New Zealand FTA. With the enforcement of ChAFTA, high tariffs imposed on Australian agricultural products will be gradually removed, putting Australia on a level playing field with New Zealand.²⁵⁶ Therefore, the potential trade volume in agricultural products between China and Australia will be significantly increased.

251 Willems & Theodorakis, 2015. (Noting that “[a] statistical analysis of several FTAs concluded in recent decades found that an FTA between two countries will, on average, increase those countries’ trade about 86 per cent after 15 years of implementation”).

252 *Id.* (Noting that “FTAs have been gaining momentum as more and more countries aspire to conclude them. As of 8 January 2015, the GATT/WTO had received 604 notifications of FTAs [counting goods, services and accessions separately], out of which 398 were in force. Several of them are currently under negotiation”).

253 USDA, *supra* note 244. (Noting that China has been importing a large amount of agricultural products from the countries richly endowed with land resources.)

254 Ministry of Foreign Affairs & Trade of P.R. China, ‘Free Trade Agreement Between The Government of New Zealand And The Government of the People’s Republic of China’, available at: <https://www.mfat.govt.nz/assets/_securedfiles/FTAs-agreements-in-force/China-FTA/NZ-ChinaFTA-Agreement-text.pdf> (last accessed 27 October 2016).

255 China FTA Network, *supra* note 119.

256 Australian Department of Foreign Affairs and Trade, ‘China-Australia Free Trade Agreement, Factsheet: Agriculture and Processed Food’, available at: <<http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Documents/fact-sheet-agriculture-and-processed-food.pdf>> (last accessed 29 July 2016).

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Moreover, in terms of the variety of products, New Zealand's primary agricultural exports to China include milk powder, butter, cheese, and meat;²⁵⁷ while agricultural exports from Australia extend to almost all foods in the Chinese diet, including beef and beef products, various dairy products (*i.e.* infant formula, milk powders, liquid milk, cheese, butter and yogurt, ice cream, lactose, casein, and milk albumins), sheep and goat meat, pork, wine and other alcoholic beverages and spirits, macadamia nuts, almonds, walnuts, pistachios and all other nuts, oranges, mandarins, lemons, all other fruits, all fresh vegetables, barley, sorghum, and other grains, seafood, and processed foods.²⁵⁸

Thus, a large variety of inexpensive but high-quality Australian agricultural imports will be available on the Chinese market soon, bringing enormous competition to local food businesses.²⁵⁹ To determine how intense the competition could possibly be, two elements will be examined in detail, *i.e.* the variety of commodities subject to tariff reduction, and the rates and schedules for individual commodities. Table 1 shows the information on both elements.

As illustrated in Table 1, overall, the breadth and impact of ChAFTA in relation to tariff elimination are remarkable. Currently, agricultural imports from Australia are subject to tariffs of up to 65%.²⁶⁰ With the conclusion of ChAFTA, China has agreed to remove the tariffs imposed on a wide range of Australian food imports, including meat, vegetables, fruits, dairy products, grains, seafood, nuts, wine, and other alcoholic beverages and spirits.²⁶¹ The elimination process will be completed either immediately or within a few years. Most of the Chinese tariffs will be entirely removed by 2024, with the exception of milk powder by 2026. A wide variety of food imports subject to tariff elimination will undoubtedly widely affect China's local food businesses.

Furthermore, tariff elimination on agricultural imports from Australia, as demonstrated in Table 1, also address some of the sensitive food issues in China.

257 New Zealand Ministry of Foreign Affairs and Trade, 'NZ-China Free Trade Agreement, Facts and Figures', available at: <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/china-fta/#facts>> (last accessed 11 October 2016).

258 Australian Department of Foreign Affairs and Trade, *supra* note 256.

259 *Id.* (Tariffs on barley, sorghum, oats, buckwheat, millet, and quinoa have already been eliminated in late 2015. Tariffs on other agricultural products are scheduled to be removed by 2026.).

260 *Id.* (Current Chinese tariffs on alcoholic beverages and spirits are up to 65%).

261 *Id.*

Table 1. Tariff Reduction Rates and Schedules for Australian Agricultural Commodities (Excluding Hides, Skins, Leather, and Wool)

Name of Product	Old Tariffs (%)	New Tariffs (under ChAFTA)	Timeframe
Beef ²⁶² and beef offal ²⁶³	12-25	None ²⁶⁴	By 1 January 2024
Dairy products (including infant formula, ²⁶⁵ milk powders, ²⁶⁶ liquid milk, ²⁶⁷ cheese, butter and yogurt, ²⁶⁸ ice cream, lactose, casein, and milk albumins. ²⁶⁹)	10-19	None	By 1 January 2026
Sheep ²⁷⁰ and goat meat ²⁷¹ (including frozen sheep meat ²⁷²)	12-23	None	By 1 January 2023
Pork ²⁷³	Up to 20	None	By 1 January 2019
Wine ²⁷⁴	14-20	None	By 1 January 2019
Other alcoholic beverages and spirits ²⁷⁵	Up to 65	None	By 1 January 2019
Macadamia nuts, almonds, walnuts, pistachios and all other nuts ²⁷⁶	10-25	None	By 1 January 2019
Oranges, mandarins, lemons, all other citrus fruits ²⁷⁷	11-30	None	By 1 January 2023
All other fruits ²⁷⁸	10-30	None	By 1 January 2019

262 *Id.* (Tariffs on beef imports [currently ranging from 12% to 25%] will be eliminated by 1 January 2024.).

263 *Id.* (Noting that the 12 per cent tariff on beef offal will be eliminated by 1 January 2022.).

264 *Id.* (According to the factsheet, China has retained the right “to apply a discretionary safeguard on beef [excluding offal] if imports exceed a set annual ‘safeguard’ trigger volume”.)

265 *Id.* (The current tariff rate for infant formula is 15%. Under ChAFTA, the 15% tariff on infant formula is to be eliminated by 1 January 2019.)

266 *Id.* (The current tariff rate for milk powders is 10%. Under ChAFTA, the 10% tariff on milk powders is to be eliminated by 1 January 2026.)

267 *Id.* (The current tariff rate for liquid milk is 15%. Under ChAFTA, the 15% tariff on liquid milk is to be eliminated by 1 January 2024.)

268 *Id.* (Noting that the 10%-15% tariff on cheese, butter, and yogurt shall be eliminated by 1 January 2024.).

269 *Id.* (Noting that the 10%-19% tariff on ice cream, lactose, casein, and milk albumins are to be eliminated by 1 January 2019.).

270 *Id.* (Elimination of the tariffs on sheep meat [currently ranging from 12% to 23%] must be done by 1 January 2023.)

271 *Id.* (The 20% tariff on goat meat will be eliminated by 1 January 2023.)

272 *Id.* (The 18% tariff on frozen sheep meat offal will be eliminated by 1 January 2022.).

273 *Id.* (Tariffs of up to 20% on pork will be eliminated by 1 January 2019.)

274 *Id.* (Noting that “tariffs of 14 to 20 per cent on Australian wine imports will be eliminated by January 2019”.)

275 *Id.* (Noting that “[t]ariffs of up to 65 per cent on other alcoholic beverages and spirits will be eliminated by January 2019”.)

276 *Id.* (The 10%-25% tariff on macadamia nuts, almonds, walnuts, pistachios and all other nuts will be eliminated by 1 January 2019.).

277 *Id.* (The 11%-30% tariff on oranges, mandarins, lemons and all other citrus fruits will be eliminated by 1 January 2023.)

278 *Id.* (The 10%-30% tariff on all other fruits will be eliminated by 1 January 2019.).

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Table 1. (continued)

Name of Product	Old Tariffs (%)	New Tariffs (under ChAFTA)	Timeframe
All fresh vegetables ²⁷⁹	10-13	None	By 1 January 2019
Barley, ²⁸⁰ sorghum, ²⁸¹ and other grains ²⁸²	2-15	None	By 1 January 2019
Seafood ²⁸³	8-15	None	By 1 January 2019
Processed foods ²⁸⁴	7.5-30	None	By 1 January 2022
Live animals ²⁸⁵	Varies	None	By 1 January 2019

iii) Dairy Products

On the one hand, some of the commodities, for example dairy products, are what China has encountered safety problems with. The current tariff rates for Australian dairy products range from 10% to 19%. By 2026, Australia's dairy industry will "no longer face Chinese tariffs".²⁸⁶ Chinese consumers are overwhelmingly excited about the sustainable and affordable access to dairy products imported from Australia, in particular infant formula and milk powders.

iv) Meat and Seafood

On the other hand, products such as meat (including beef, pork, sheep meat, and goat meat) and seafood are in high demand due to the growing dietary change in

279 *Id.* (The 10%-13% tariff on all fresh vegetables will be eliminated by 1 January 2019.)

280 *Id.* (The 3% tariff on barley and 2% tariff on barley and sorghum were eliminated on 20 December 2015.)

281 *Id.*

282 *Id.* (The 2% tariff on oats, buckwheat, millet and quinoa were eliminated on 20 December 2015. The 15% tariff on cottonseeds will be eliminated by 1 January 2019. The 10% tariff on malt and wheat gluten will be eliminated by 1 January 2019. The tariffs of up to 7% on pulses will be eliminated by 1 January 2019.)

283 *Id.* (As for seafood exports, key outcomes under ChAFTA include the following: "(1) Elimination of the 10 to 14 per cent tariff on abalone by 1 January 2019; (2) Elimination of the 15 per cent tariff on rock lobster by 1 January 2019; (3) Elimination of the 12 per cent tariff on southern bluefin tuna, salmon, trout, and swordfish by 1 January 2019; (4) Elimination of the 14 per cent tariff on crabs, oysters, scallops, and mussels by 1 January 2019; (5) Elimination of the up-to-8 per cent tariffs on prawns by 1 January 2019.")

284 *Id.* (Timeframes for the elimination of tariffs in the processed sector are as following: "(1) Elimination of the 7.5 to 30 per cent tariff on orange juice by 1 January 2022, and elimination of tariffs of up to 30 per cent on other fruit juices by 1 January 2019; (2) elimination of the 15 per cent tariff on natural honey, and the up-to-20 per cent tariff on honey-related products, by 1 January 2019; (3) elimination of the 15 per cent tariff on pasta by 1 January 2019; (4) elimination of the 8 to 10 per cent tariff on chocolate by 1 January 2019; (5) elimination of the 15 to 25 per cent tariff on canned tomatoes, peaches, pears and apricots by 1 January 2019; (6) elimination of the 15 to 20 per cent tariff on biscuits and cakes by 1 January 2019.")

285 *Id.* (All tariffs on live animal exports will be eliminated by 1 January 2019. This also includes the 10 per cent tariff on live cattle.)

286 Willems & Theodorakis, 2015.

China.²⁸⁷ In the beef sector, although China currently imposes 12% to 25% tariffs, Australia still is “China’s key imported beef supplier with 40 per cent of the import market,”²⁸⁸ according to *ChAFTA’s Factsheet for Agriculture and Processed Food*. With the implementation of ChAFTA, Australia’s beef industry will face zero tariffs by 1 January 2024.²⁸⁹ It is indisputable that beef export to China will continue to grow. Similarly, Chinese tariffs on Australia’s sheep meat and goat meat (currently ranging from 12% to 23%) will be removed by January 2023;²⁹⁰ tariffs on pork (currently up to 20%) and seafood (currently up to 15%) will be removed by January 2019.²⁹¹ With more and more high-quality Australian meat and seafood entering the Chinese market, local meat and seafood industries must do something to prevent further loss of market share. It would not be a surprise that fake meat or meat that does not meet the required food safety standards will be forced out of the market.

v) Other Food Commodities

In addition, China has already enforced the immediate removal of the tariff on barley (currently at 3%), oats, buckwheat, millet, and quinoa (currently at 2%) since December 2015.²⁹² The removal of tariffs across various processed foods (currently up to 30%) is scheduled to be completed by January 2022. Also, China’s market for imported wine and spirits is growing rapidly due to a rise in disposable incomes.²⁹³ Under the ChAFTA, tariffs for Australian wines (currently ranging from 14% to 20%), alcoholic beverages, and spirits (currently up to 65%) will be removed by January 2019. Meanwhile, Chinese consumers will also see tariff elimination on fruits, vegetables, and horticultural products imported from Australia, and the elimination process will be completed by 2023.

China has already become Australia’s largest export market for agricultural products, with a total trade value of \$9 billion in 2014-2015.²⁹⁴ As a result of the ChAFTA, almost all Australian agricultural exports into China will enjoy tariff-free treatment within the next few years. Trade volume in agriculture will inevitably grow in a much more aggressive way, which in turn will create a highly competitive market in China. In a competitive market, large numbers of Chinese and non-Chinese food producers and distributors compete with each other to satisfy the needs of Chinese consumers. Chinese food businesses will no longer solely determine the prices or the quality of the food products sold on the Chinese mar-

287 Balzano, 2012, p. 24.

288 Australian Department of Foreign Affairs and Trade, *supra* note 256.

289 *Id.*

290 *Id.*

291 *Id.*

292 *Id.*

293 B. Worthington, ‘Growth in China Drives Australian Wine Exports to Highest Value in almost a Decade’, *ABC News*, 21 January 2016, available at: <www.abc.net.au/news/2016-01-21/australian-wine-exports-2015/7104022>.

294 Australian Department of Foreign Affairs and Trade, *supra* note 256. (According to ChAFTA Factsheet: Agriculture and Processed Food, “China is Australia’s largest agriculture, forestry and fisheries export market, worth \$9 billion in 2014-2015, up from \$5 billion in 2010-2011.”)

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ket. It is true that how competitive the market could be is conditioned by the actual implementation of the ChAFTA, which requires a strong commitment from the leadership of both countries. But there is no doubt that massive agricultural imports from Australia will generate enormous motivation for Chinese food businesses to incorporate CSR principles into their business operations, and to supply safe, healthy, and high-quality food to meet Chinese consumers' demand. This is the change that Chinese food companies have to make in order to win a competitive advantage on the market. China's food system will ultimately be re-shaped.

3 *Incorporate Principles of Corporate Social Responsibility into China's Food Business Operations*

From an international perspective, promoting a vision of business accountability is an emerging trend around the world, not only in the food sector, but also in all other industries.²⁹⁵ A growing number of companies, in particular the Fortune Global 500, undertake CSR activities. Many companies nowadays have CSR officers or special departments monitoring "human rights and other social and environmental risks throughout their global value chain".²⁹⁶ They often address CSR issues and CSR compliance in their annual reports.²⁹⁷ As a matter of fact, globally, CSR has become an integral part of business strategies in emerging economies; it is a sensible response to the rising societal demand.²⁹⁸

From a national perspective, ethical lapses in the food sector are the major obstacles to the improvement of food safety governance in China. Chinese food businesses often choose economic profits over ethical behaviours at the cost of public health, resulting in endless food safety scandals.²⁹⁹ However, as previously discussed, the motivation coming from the anticipated surge in high-quality food imports will ultimately change the way Chinese food businesses think and behave. To meet Chinese consumers' demand and to gain a trading advantage among competitors, Chinese companies will have to operate their business in a more socially and environmentally responsible way.

Ethical business practice has become an inevitable trend at both the international and national levels. Chinese food industries must recognize the value of CSR, and further incorporate the principles of ethical practices into their daily business operations.³⁰⁰ Food safety can be significantly improved through CSR.

295 C.A. Williams & J.M. Conley, 'Is There an Emerging Fiduciary Duty to Consider Human Rights?', *U. Cin. L. Rev.*, Vol. 74, 2005, p. 75, at 81. (Noting that "[t]he shifting social context has caused many global companies to pay closer attention today to their social license to operate".)

296 *Id.*

297 *Id.*

298 M. Hartmann, 'Corporate Social Responsibility in the Food Sector', *Euro. Rev. of Agri. Econ.*, Vol. 38, No. 3, 2011, p. 297, at 297. (Noting that "CSR has developed to one of the top priorities of businesses over the last decade having been ranked in 2011 as the number one focus of managers in the global retail and consumer goods sector".)

299 Lam *et al.*, 2013. (Noting that "maximising profits and seeking quick returns might at times supersede social responsibility"). See also Czarnezki *et al.*, 2013, p. 263. (Noting that food producers face strong competition and they try to reduce their costs to make profits. Often, "[s]afety is often sacrificed to lower expenses".)

300 Roberts, 2011, pp. 411, 415.

“The presumable outcome of this ethical behavior is fewer food safety scandals and a growing measure of trust”³⁰¹ for the Chinese food system. Then, the next questions to be answered are: how to incorporate CSR principles into China’s food business practices, and how to maximize efficiency?

Government only has limited resources to promote CSR and to improve China’s food system. Government actions alone are not a sufficient step to solve the food safety problem at its root.³⁰² On the contrary, various non-governmental stakeholders, such as food industry associations, individual food companies, the media, and consumers,³⁰³ have the necessary resources (for example, finance, information, and knowledge) that the government needs for CSR implementation and problem solving in the area of food safety.³⁰⁴ Non-governmental stakeholders have the capacity to make considerable contributions to improving China’s food system.³⁰⁵ Thus, it is important that the Chinese government promotes collaborative governance, and combines the strengths of the State, the civil society actors, and the markets.³⁰⁶ Both the government and non-governmental stakeholders should work together to improve CSR performance in the food sector, and to keep the food value chain safe.³⁰⁷

a) The Role of the Government

In addition to being the rule-maker and enforcer,³⁰⁸ the Chinese government should also serve as a coordinator, facilitator, and monitor in promoting CSR in the food sector.³⁰⁹

i) Role as the Rule-Maker and Enforcer

The government performs an important role in developing a comprehensive set of CSR principles in the area of food safety. Although the Chinese government had been trying to promote the general ideas of CSR for decades, the term of CSR was not explicitly recognized in legal documents until 2006.³¹⁰ In 2006, amended

301 *Id.*, p. 409.

302 Pagnattaro & Peirce, 2010, p. 53. (Noting that “additional steps outside the regulatory arena are needed”). See also Lin, 2011, p. 660. (Noting that “[w]hen addressing public health issues, collective action is necessary”.)

303 Han, 2015, p. 473.

304 *Id.*, p. 472.

305 Lin, 2011, p. 692. (Noting that “[g]overnment can benefit considerably from a mechanism that stimulates the formation of creative public-private partnerships (‘PPPs’) and engages with civil society stakeholders”.)

306 *Id.*, pp. 691-692.

307 Pagnattaro & Peirce, 2010, pp. 51, 53-54.

308 Han, 2015, p. 474.

309 *Id.*

310 For more details regarding China’s CSR history, see Y. Chen, ‘Corporate Social Responsibility from the Chinese Perspective’, *Ind. Int’l & Comp. L. Rev.*, Vol. 21, 2011, p. 419, at 419-433.

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Company Law³¹¹ came into force, requiring all companies in China to operate business in “a socially and environmentally responsible manner”.³¹² Article 5 explicitly states that “[w]hen conducting business operations, a company shall comply with the laws and administrative regulations, social morality, and business morality. It shall act in good faith, accept the supervision of the government and general public, and bear social responsibilities”.³¹³ The 2006 Company Law provides a statutory basis for the enforcement of CSR principles.³¹⁴ However, how CSR principles can be incorporated into a company’s business practices and how they can be implemented are not detailed.

Similarly, the 2015 Food Safety Law also mandates that food producers and distributors shall take social responsibilities³¹⁵ to “ensure food safety and protect the physical health and life safety of the public”.³¹⁶ Nevertheless, very much like the 2006 Company Law, the 2015 Food Safety Law does not have much to offer with respect to the specific CSR standards food businesses should implement, leaving a considerable regulatory gap for the Chinese rule-maker to address.

“Comprehensive strategies to make corporations in food industry behave in a socially responsible way” is critical.³¹⁷ A complete set of CSR standards in the food sector will provide important guidelines to Chinese companies in understanding what social and environmental responsibilities they should take and how they should engage in ethical practices. Furthermore, the Chinese government should also play its role as an enforcer, ensuring that Chinese food companies actually comply with the required standards.

ii) Role as a Coordinator and Facilitator

To improve collaborative governance in the area of food safety, the Chinese government should also strengthen its role as a coordinator and facilitator. An important way of involving non-governmental stakeholders into the process is to “empower them to participate in rule-making and rule-implementation”.³¹⁸ This is meaningful in two ways. On the one hand, the traditional top-bottom

311 ‘Zhonghua Renmin Gongheguo Gongsifa [Company Law of the People’s Republic of China]’, 2005 (The Company Law of the People’s Republic of China was amended and adopted at the 18th session of the Standing Committee of the Tenth National People’s Congress of the People’s Republic of China on October 27, 2005. It came into force on 1 January 2006.), available at: <www.lawinfochina.com/display.aspx?id=4685&dib=law> [Hereinafter 2005 Company Law].

312 Chen, 2011, pp. 421-422.

313 2005 Company Law, *supra* note 311, Art. 5.

314 Chen, 2010, p. 422.

315 2015 Food Safety Law, *supra* note 49, Art. 4. (Art. 4 states that “[f]ood producers and traders shall be responsible for the safety of the food which they produce or deal in. Food producers and traders shall engage in production and trade in accordance with laws, regulations, and food safety standards, ensure food safety, have integrity and self-discipline, take responsibility to the society and the public, accept supervision from the society, and assume social responsibilities”.)

316 *Id.*, Art. 1.

317 R. Dellios, X. Yang & N.K. Yilmaz, ‘Food Safety and the Role of the Government: Implications for CSR Policies in China’, *SciRes*, Vol. 1, 2009, p. 75, at 84, available at: <www.scirp.org/journalib>. See also Roberts, 2011, p. 409.

318 Han, 2015, p. 474.

approach is replaced by active public participation. Under the supervision of the general public, Chinese food companies are more likely to comply with CSR principles, which will ultimately improve food safety in China. On the other hand, inclusiveness is a key factor in good governance. Collaborative governance in food safety will essentially enhance the overall democracy and the rule of law in China.³¹⁹ There is no doubt that the implementation of collaborative governance requires a lot of coordination and facilitation. The Chinese government should take the responsibility because only the government has “the legitimacy to exercise governance authority in the public realm”.³²⁰

In fact, China has already realized the importance of public engagement in monitoring and regulating the behaviours of food companies. During the drafting stage of the 2015 Food Safety Law, the Chinese government invited the general public to make comments. Notably, the Chinese government valued the opinions from food industry associations and from the scholars and scientists in related fields. Moreover, the 2015 Food Safety Law explicitly encourages non-governmental stakeholders to actively participate in the monitoring and reporting of any potential food safety violations. Engaging non-governmental stakeholders in China’s food safety governance is a significant improvement towards a more democratic society. China should further promote collaborative governance in the food sector, and provide necessary guidance and support.

iii) Role as a Monitor

In the meantime, the Chinese government needs to play its role as a monitor, overseeing the overall compliance of CSR standards and the implementation of the Food Safety Law. In the event of violations, immediate actions must be taken to prevent any further damage. Both the government and non-governmental stakeholders share regulatory knowledge and carry implementation responsibilities in improving China’s food system.³²¹

b) The Role of Food Industry Associations

Food industry associations often have the essential resources that the Chinese government lacks in food safety governance.³²² In particular, thanks to their professional expertise, food industry associations are in a better position to address the industry-specific ethical issues, and to collaborate with individual companies to improve the compliance of CSR standards as well as the Food Safety Law.³²³ The involvement of industry associations in food safety governance maximizes the utilization of their skills and assets for the benefits of the whole society.³²⁴

319 *Id.*, see also L. Xue & K.T. Liou, ‘Government Reform in China: Concepts and Reform Cases’, *Rev. Pub. Personnel Admin.*, Vol. 32, No. 2, 2012, p. 115, at 126.

320 Lin, 2011, p. 663.

321 Han, 2015, pp. 472-473.

322 Williams & Conley, 2005, p. 78.

323 *Id.*

324 Thompson & Hu, *supra* note 138.

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Generally speaking, the primary goal of an industry association is to promote industry excellence. It is of great importance that food industry associations continue to provide professional services to ensure that their members stay abreast of any updates in the industry and remain competitive in the global market. These professional services include, but are not restricted to, for example, updating their members with the latest industry news and developments, including regulatory updates and change of market demand, providing regulatory support and technical advice when necessary, and organizing industry-networking events so that the members and other sectors involved can have the opportunities to communicate with each other for better practices and larger market share.

In addition, food industry associations should also tighten self-regulation and strengthen their role in addressing CSR issues associated with food safety. It is critical that individual food industry associations develop their own sets of industry-specific CSR guidelines.³²⁵ The said self-regulatory guidelines should be more detailed than the general standards established by the government. The drafting process should focus on two aspects, (1) the industry-specific CSR standards setting; (2) the compliance of the industry-specific CSR standards.

The establishment of industry-specific CSR standards requires enormous research and interdisciplinary studies.³²⁶ Fortunately, as previously mentioned, food industry associations often have the necessary industry knowledge and information to make this happen.³²⁷ CSR guidelines developed by individual food industry associations officially address the common ethical concerns shared by the members. The ‘concerns’ could include those that members have deliberately ignored for a long time. By ‘officially’ addressing the concerns, members will have to give it a serious consideration, which may lead to further discussions, and hopefully, potential resolutions. This is the first step that food industry associations should take in order to promote CSR compliance associated with food safety.

As for the enforcement, food industry associations need to develop coherent strategies to help their members understand the importance of ethical practices, and further to encourage them to perform CSR standards.³²⁸ However, the reality is, different from the public standards, the CSR guidelines developed by individual food industry associations may only provide advisory opinions, which means they do not create any legal binding effect. Therefore, by law, members are not obligated to comply. Under such circumstances, some practical incentives may be particularly helpful to promote industry-specific CSR compliance. For example,

325 OECD, *Peer Review: An OECD Tool for Co-operation and Change*, New York, OECD, 2003, p. 48.

326 Lin, 2011, p. 691.

327 *Id.*, pp. 662, 691. (Noting that private actors, including food industry associations, have advantages in improving food safety governance in China. One of the advantages is the possession of advanced food technology. Lin continues to give an example, stating that “genetically modified crops, meat products from cloned animals, and other kinds of novel foods are normally beyond the traditional expertise of the government agencies that are charged with administering health and safety issues”. On the contrary, private sectors, in particular those multinational corporations, may have the scientific and technical expertise to solve the problems.)

328 Thompson & Hu, *supra* note 138.

reputational incentives may encourage food industries to take actions to improve the compliance.³²⁹ Furthermore, peer pressure within the industry is often regarded as a more effective way in influencing a company's behaviours.³³⁰ Some research even suggests that "private rather than public standards should become the predominant drivers of agrifood systems".³³¹ Thus, food industry associations may consider taking advantage of peer pressure to motivate their members to comply with industry-specific CSR standards.

c) The Role of Individual Food Producers and Distributors

Food producers and distributors provide the daily necessities to millions of people in China. They are the key players in the food system. Whether they engage in ethical practices directly determines the efficiency of the Food Safety Law.³³² Without their commitment, it is difficult to improve food safety in China. However, CSR performance in the food sector can be quite complicated as it involves numerous processes and individuals before the final food product actually reaches the consumer's plate. No matter how ethical a food company is, if any other part of the food value chain does not perform the respective duties, the whole chain is contaminated. In fact, food safety issues can happen at any stage from paddock to plate. Due to the complexity of food production and distribution, CSR practices in the food sector should encompass the entire food value chain, including (1) sourcing and supply management; (2) production process; and (3) transportation and distribution process.³³³

i) CSR in Sourcing and Supply Management

Food production starts from the sourcing of raw materials. To ensure the quality and safety of the food, it is crucial to manage preventable risks from the very beginning. Thus, Chinese food companies should consider establishing a strategic sourcing and supply management system with CSR concepts incorporated.

To begin with, companies should develop their own standardized protocols (inclusive of requirements for ethical practices) to regulate the entire supply chain. Certainly, the minimum requirement is that the standardized protocols must be in compliance with relevant laws, regulations, and public standards. Beyond that, the standardized protocols should also include, but are not restricted to, "the selection and evaluation of suppliers, routine procurement, materials inspection, and supplier's guidance".³³⁴ Such self-regulatory policies provide

329 Lin, 2011, p. 691.

330 S. Henson & N.H. Hooker, 'Private Sector Management of Food Safety: Public Regulation and the Role of Private Controls', *Int'l Food & Agribusiness Mgmt. Rev.*, Vol. 4, 2001, p. 7, at. 8.

331 *Id.*

332 Hartmann, 2011, p. 298. (Emphasizing the importance of CSR in the food sector, noting that "CSR is of high relevance for food companies as this sector has a strong impact and a high dependence on the economy, the environment and on society".)

333 *Id.*, p. 311. (Emphasizing that CSR should encompass the entire food value chain, shifting from the single-firm level to including both supply chains and networks.)

334 China Agri-Industries Holding Limited, 'Food Safety', available at: <www.chinaagri.com/en/Sustainable/1644.html> (last accessed 7 August 2016).

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guidelines for both the companies themselves and their supply chain partners on how to ensure best practices in various areas of business operations. Beyond that, a highly functional food safety risk monitoring and assessment mechanism that oversees all aspects of the supply chain is particularly important. On the one hand, deficiencies can be identified immediately; on the other hand, rectification can be made accordingly to prevent any further disastrous consequences.³³⁵

Next, how to improve the efficiency of standardized protocols is another issue that food companies need to think about. A contractual relationship between food companies and their supplier partners is an effective approach to ensure the compliance of both CSR standards and the Food Safety Law. Marisa Anne Pagnattaro and Ellen R. Peirce have made the same suggestion. They emphasized that “[c]ompanies would be well served to require all vendors to enter into contractual agreements to comply with these standards, as well as all applicable laws”.³³⁶ Moreover, as part of the contractual agreements, proper penalties for non-compliance should also be stipulated.³³⁷ In a contractual relationship, if a supply chain partner fails to meet the standards agreed by both parties, this would amount to a breach of contract. The partner will have to face certain legal consequences, such as damages.³³⁸ Contractual agreements may deter suppliers of raw materials from engaging in unethical practices, preventing risks at an early stage.

However, large companies and small companies often have different views and approaches to CSR.³³⁹ This is because the public usually have different expectations for them. The public demands more from large companies, in particular, in the area of social and environmental responsibilities, creating enormous pressure for those companies.³⁴⁰ In turn, public pressure ‘motivates’ large companies to actively get involved in CSR initiatives. Unethical practices can severely damage their reputation, and adversely affect their economic profits. On the contrary, the public do not expect as much from small companies. Therefore, small companies most likely face less public pressure to comply with CSR standards. As a consequence, the difference “implies potential conflicts regarding CSR involvement in the food supply chain”.³⁴¹ How food companies bridge the existing gaps and bring the CSR perspectives to the same level can be quite challenging.

ii) CSR in Production Process

Moving to the next point in the food value chain, production initiatives should also reflect CSR perspectives. This requires food companies to incorporate social responsibility programs into production process. There are several priorities that

335 Pagnattaro & Peirce, 2010, p. 54.

336 *Id.*

337 *Id.*

338 *Id.*

339 Hartmann, 2011, p. 298.

340 *Id.*, p. 311.

341 *Id.*, p. 298.

food companies should focus on while strengthening CSR in the production process.

First of all, a Code of Conduct is the starting point for CSR implementation; it provides a framework for corporate decisions and actions in relation to ethical practices.³⁴² However, companies should not adopt the Code merely to pay lip service to a trend. Rather, they should use the Code as general principles to regulate business behaviours, and to develop a sense of social responsibility among all employees of the companies. A company usually consists of various departments. Each individual department is composed of individuals that contribute to the overall mission and goals of the company. Therefore, to ensure best practices, it is of great importance to regulate the behaviours of individuals with the guidance of the Code of Conduct. In particular, those who hold senior management roles need to perform their respective duties in a more socially and environmentally responsible way.

Secondly, it is critical to establish internal food safety management systems that are subjected to regular audits against accredited standards under the Chinese Food Safety Law. Companies must “undertake their own due diligence at all junctures” to ensure that their foods are safe for consumption.³⁴³ Hence, monitoring and inspection mechanisms need to be reinforced, covering the period from the production process to when the final products leave the facility for distribution. A series of systematic approaches can be implemented within the company, for example, offering professional training seminars (inclusive of CSR sessions),³⁴⁴ allocating clear responsibility to the specific person, implementing standardized protocols for routine inspections and audits,³⁴⁵ strengthening risk analysis, communication, and management,³⁴⁶ and establishing proper internal reward and punishment procedures for compliance/non-compliance.³⁴⁷

iii) CSR in Transportation and Distribution Process

As previously noted, food safety risks can be introduced or exacerbated at any point in the food value chain, including during the process of transportation and

342 K. Day & L. Tansey, ‘Business Ethics in China’, *Ethikos*, Vol. 11, 1998, p. 8. (Noting that a survey disclosed that the Chinese businessmen were dissatisfied with the “ethical climate” in their own businesses, and they agreed that it is urgent to have “corporate codes of ethics or a set of ethical norms for business”.)

343 Pagnattaro & Peirce, 2010, p. 56. (Noting that it is important to provide various professional trainings to improve the employees’ industry knowledge. Beyond that, moral training for key employees in the food industry is equally important.)

344 Roberts, 2011, pp. 409-410.

345 Lin, 2011, p. 664. (Noting that “experts’ official inspection of production facilities and end products” is important to ensure the quality and safety of the food products.)

346 Balzano, 2012, p. 66. (Balzano argues that “food safety risk analysis consists of three stages – risk assessment, risk communication, and risk management”. Companies need to ensure that “[t]he severity of the threat is assessed, the assessment is communicated to relevant actors in the system, and the actors implement a solution that counteracts the threat”.)

347 China Agri-Industries Holding Limited, *supra* note 334.

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distribution.³⁴⁸ This is an issue often overlooked by food companies. In China, most companies believe that once the final food products are out of the manufacturing facilities, it is difficult to monitor the transportation and distribution (including storage) services provided by individual distributors. Therefore, they tend to be less strict with risk management at this stage.³⁴⁹ But this does not mean a grey area should be left in the food value chain. It is important to protect food from contamination and other potential safety risks by keeping it covered at all times. Food companies need to confirm that their distribution partners also comply with the applicable laws, regulations, safety standards, and ethical standards, ensuring the safety of the food during the process of transportation and market distribution. One of the effective approaches, similar to the CSR implementation in sourcing and supply management, is to enter into contracts with individual distributors. A contractual relationship imposes legal obligations on the distributors; any violations may incur legal liability or consequences.³⁵⁰

Before the food reaches the consumer's plate, there is one more element in the food value chain: sales and purchase. A question which remains unanswered is: when a food safety issue is identified at the sales stage, either at the trade level or consumer level,³⁵¹ and if this specific food product may "pose a health or safety risk from distribution, sale and consumption",³⁵² what can we do? The answer is relatively simple. To protect public health, unsafe or potentially hazardous food products must be immediately removed from the marketplace. If the foods are in the possession of consumers, they must be recovered as well. However, there is no easy answer with regard to how this can be done in a more timely and efficient way. As a general principle, a well-established recall system is critical. It requires effective communication and coordination between food businesses and distributors (including wholesalers and retailers). When everyone involved in the food value chain responds to food-related health risks with positive business ethics, undesirable consequences can be significantly mitigated.

348 Food Standards Australia New Zealand, 'Transporting Food', available at: <www.foodstandards.gov.au/consumer/safety/faqsafety/pages/foodsafetyfactsheets/charitiesandcommunityorganisationsfactsheets/transportingfoodmay21480.aspx> (last accessed 12 August 2016).

349 Another opinion is that China lacks a basic infrastructure to "make circulation of fresh food products safe and to avoid contamination in transport". See P. French, *Fat China: How Expanding Waistlines Are Changing a Nation*, London, Anthem Press, 2010, pp. 99-105. See also Balzano, 2012, p. 33.

350 China Agri-Industries Holding Limited, *supra* note 334.

351 Food Standards Australia New Zealand, 'What is a Food Recall', available at: <www.foodstandards.gov.au/industry/foodrecalls/recalls/pages/whatisafoodrecall.aspx> (last accessed 13 August 2016). (Noting that recalls "can be conducted at either the trade or consumer level". A trade recall "is conducted when the food has not been sold directly to consumers. It involves recovery of the product from distribution centers and wholesalers". A consumer recall "involves recovery of the food product from all points in the production and distribution chain including recovery of product in the possession of consumers".)

352 Food Standards Australia New Zealand, 'Food Recalls', December 2014, available at: <www.foodstandards.gov.au/industry/foodrecalls/pages/default.aspx>.

d) The Role of the Media and Consumers Ethically Conscious Decision

More and more Chinese consumers refuse to tolerate foods that do not meet the required standards.³⁵³ Rather, they want “safe, high-quality, and truthfully represented food products”.³⁵⁴ A growing number of Chinese consumers demand sustainability and make ethically conscious decisions. The emerging consumer preference wields strong enforcement power for Chinese food companies to commit to attaining high standards of social and environmental responsibility.³⁵⁵

Furthermore, consumers (including consumers’ associations), together with the media, play a significant role in monitoring, reporting, and exposing food safety issues so that any further damage caused by unsafe foods can be prevented or at least mitigated.³⁵⁶ As discussed previously, under the 2015 Food Safety Law, a food safety reporting rewards system is established, indicating the Chinese government’s strong commitment and efforts in engaging the general public in law enforcement. However, its efficiency is yet to be seen. Moreover, in recent years, the media have drawn enormous attention to their roles by exposing food safety issues in China. On the one hand, the media have significantly increased consumer awareness.³⁵⁷ On the other hand, they have “[a]ccelerated maturation of an ethical consciousness that better ensures regulatory compliance” in the food sector.³⁵⁸ The media and consumers have the potential to make substantive contributions to the improvement of food safety in China.

e) Summary

Food safety can be significantly improved through CSR practices. To incorporate ethical standards into business operations, collaborative governance between the private and public sectors is needed.³⁵⁹ In the private sector, food industry associations play an important role in tightening self-regulation and addressing CSR issues. Meanwhile, food companies are the key players to perform CSR standards and to improve food safety. It is imperative to ensure that ethical practices cover the full food value chain system, from sourcing, to production, to transportation

353 Roberts, 2011, pp. 411, 415.

354 *Id.*, p. 415.

355 Williams & Conley, 2005, p. 104. (Williams and Conley hold a conservative opinion. They argue that theoretically, consumers can refuse to buy. But in practice, only time will tell whether consumer’s enforcement power can be effective on changing the situation.)

356 Han, 2015, pp. 458-460. (Noting that under the 2015 Food Safety Law, Chinese consumers are encouraged to “play a role in the law enforcement by making informed choices, reporting the illegal practices, and seeking punitive damages through private litigation”.)

357 Roberts, 2011, pp. 407-408. (Noting that “[the] media’s role in publicizing food safety laws as well as regulations and standards, and to provide public oversight on acts by producers and traders violating the law also encourages greater transparency”.)

358 *Id.*, p. 415.

359 Lin, 2011, p. 664. (Noting that “both public and private approaches to regulation appear to be necessary for an effective food safety regime”.) See also Han, 2015, pp. 472, 479-480. (Han argues that in addition to improving the efficiency of food safety law, developing collaborative governance can also “create opportunities, influences, and dynamics for overall social governance in China”. Han continues to argue, “collaborative governance for food safety can be a pilot program for innovating social governance in other areas. The experience gained from this pilot program may shed new light on developing collaborative governance in other areas”.)

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and distribution, and to sales. In the public sector, government oversees the overall food safety in China. Its role as a rule-maker, enforcer, coordinator, facilitator, and monitor is irreplaceable. The government has better administrative competences “in the implementation and enforcement of relevant rules, intersectoral and transnational cooperation among government agencies, financial backing by states, and so on”,³⁶⁰ which is what the private sector lacks. Therefore, the use of public governance mechanisms can mitigate the weaknesses of self-regulation in the private sector.³⁶¹ Private and public governance are inseparable and complementary.³⁶² Beyond that, the Chinese government should also take advantage of the enormous power of the media and consumers, and broaden their capacity to collaborate in governance.³⁶³ As a conclusion, the Chinese government, food industry associations, food companies, the media, and individual consumers should work together to promote ethical business practices, and thereby, make substantial progress in improving food safety in China.

F Conclusion

In China, the human toll and suffering caused by foodborne diseases is sickening and obscene. Food safety has becoming a compelling issue, and is of such intense public interest.³⁶⁴ As a consequence, the Chinese government sets food safety as a high priority on its national agenda.³⁶⁵ In recent years, China has made remarkable progress in seeking resolutions to improve food safety.³⁶⁶ Notably, a comprehensive regulatory and cooperative framework with essential rules and institutions has been established.

However, there is still a long way to go before China can ensure the safety and quality of the food products provided to its people. The lack of an effective implementation mechanism is a major challenge for China’s food safety management. Better law enforcement is required in order to substantially improve the efficiency of the Chinese Food Safety Law.

On the one hand, the gap between the law on paper and the law in action must be reduced or ideally, closed. This can be achieved by enhancing governance in all its aspects. In fact, good governance also stimulates “accountability, trans-

360 Lin, 2011, p. 665. See also S. Henson & J. Caswell, ‘Food Safety Regulation: An Overview of Contemporary Issues’, *Food Pol’y*, Vol. 24, 1999, p. 589, at 589-603.

361 J.M. Antle, *Choice and Efficiency in Food Safety Policy*, Washington, DC, American Enterprise Institute, 1995, pp. 2-4.

362 Lin, 2011, p. 664. (Noting that “[w]hen developing a regulatory strategy, however, it is important to regard private and public forms of governance as complementary rather than as conflicting and to take advantage of both approaches”.)

363 Han, 2015, p. 478.

364 Roberts, 2011, p. 415. (Noting that there is “both a national and international need to guarantee a class of quality and safe food products”.)

365 Czarnetzki *et al.*, 2013, p. 275. (Noting that “improving food safety is a critical national task”.)

366 Han, 2015, p. 464. (Noting that “China has made tremendous efforts to reform and update its food safety system”.)

parency, efficiency, and rule of law in public institutions at all levels”,³⁶⁷ and is essential to the sustainability of China’s development path.

On the other hand, law enforcement carried out by the public sector alone does not improve the performance of the food safety management system in China.³⁶⁸ Rather, Chinese companies themselves must feel the need to make a change in food production. With the implementation of the ChAFTA, a large volume of high-quality and reasonably priced Australian agricultural imports are expected to enter the Chinese market within the next few years. To remain competitive, Chinese companies will have to abide by both the safety and ethical standards in the food sector. Food safety governance can be improved through CSR practices. Therefore, CSR principles must be integrated into business practices. Further, CSR in the area of food safety has “evolved beyond a legal task into more of an economic, political, and social task”.³⁶⁹ The Chinese government should take affirmative steps to promote collaborative governance between the public and private sectors. Both the government and civil society stakeholders must work jointly for an effective food safety system.³⁷⁰ However, to be fair, this is not an easy task. How to create a proper balance between public and private governance remains unanswered. Further examination is recommended.

Moreover, from an international perspective, food safety has become a global concern. Food safety problems in one country frequently travel across national borders as a result of emerging economies in global trade.³⁷¹ The failure of food safety governance in one country has much wider spillover effects, posing serious health and safety risks to consumers in other countries.³⁷² Therefore, moving beyond national boundaries, the international community should also work collaboratively to reduce food safety disasters and to safeguard public health. As suggested by Ching-Fu Lin, a wide range of approaches at the international level should be based on a multitude of norms. “Domestic legislation and regulation, international advisory health standards and guidelines, and binding international trade rules”³⁷³ are the essential components for international food safety mechanism. Again, this is another issue to be explored.

In conclusion, public health is essential to guarantee basic infrastructure for a nation.³⁷⁴ Improving the performance of food safety governance can positively change people’s lives and a nation’s future. It is urgent that the Chinese government improves the food system, and “[d]elivers safe, high-quality and truthfully

367 S. Morita & D. Zaelke, ‘Rule of Law, Good Governance, and Sustainable Development’, available at: <www.inece.org/conference/7/vol1/05_Sachiko_Zaelke.pdf> (last accessed 16 August 2016).

368 Han, 2015, p. 464. (Noting that “a domestic food system with comprehensive regulation does not ensure the safety of food products”.)

369 *Id.*

370 Pagnattaro & Peirce, 2010, p. 55.

371 Lin, 2011, p. 650.

372 *Id.* (Noting that “[i]n the context of globalized food trade, problems caused by the above evils in one country have spillover effects, inevitably posing significant health risks to many other countries. Regulatory failures of one state in the management of food safety can have worldwide implications”.)

373 Lin, 2011, pp. 649-650.

374 Balzano, 2012, p. 79.

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represented food products”.³⁷⁵ Meanwhile, the international community should also be aware that food safety crises can and do traverse national boundaries. Necessary preventive measures must be taken in order to protect people from foodborne illnesses.

375 Roberts, 2011, p. 405.