

China's Food Safety Law: Administrative Innovation and Institutional Design in Comparative Perspective

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INTRODUCTION

Chinese¹ food safety is, to say the least, a pressing issue for the Chinese people and for the rest of the world. The growth of China's food manufacturing sector and China's growth as a food exporter mean that it is increasingly important for authorities there to be able to regulate food production, manufacturing, and supply chains. As of 2008, China was the

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¹ A note on translations and sources: All translations of Chinese herein are those of the Author, unless otherwise noted. All laws and cases cited herein are available through the database at www.chinlawinfo.com, unless otherwise noted.

third largest source of imported food and aquatic products in the U.S.,² and it is a significant exporter of those products around the world generally.³ China's consumption of a number of food products has grown hugely over the last two decades, from dairy products to salt, to liquor, and to processed foods. Yet SARS,⁴ the contaminated baby formula scandals, and the Chinese pet food scandals over the past decade have left an indelible mark on the consciousness of global and Chinese domestic constituencies that are concerned with the public health consequences of the label "made in China."

As foreign scrutiny of its markets increases, China feels the pressure to conform to international standards.⁵ For example, under the recently enacted U.S. Food Safety Modernization Act, there are heightened requirements for food importers. Importers must, in addition to other information required, verify the safety of imports from foreign suppliers.⁶ The U.S. Food and Drug Administration ("FDA") may require certification of the safety of certain high-risk products brought into the U.S. from abroad.⁷ Additionally, the FDA must establish foreign offices abroad in at least five countries, review the food safety measures of countries exporting to the U.S., and inspect facilities overseas.⁸ The FDA now maintains three offices in the People's Republic of China ("PRC") – Beijing, Shanghai, and Guangzhou – in order to ensure the worthiness of the food production operations there.⁹

In response to these concerns and to a growing number of

² Geoffrey S. Becker, *Food and Agricultural Imports from China*, in CONG. RESEARCH SERV., Sept. 26, 2009, at 1-3.

³ David Acheson, *Food and Food Safety Imports from China*, available at <http://www.fda.gov/NewsEvents/Testimony/ucm110667.htm> (last visited Aug. 1, 2011).

⁴ See CHENGLIN LIU, CHINESE LAW ON SARS xiii-xiv (2004) [hereinafter LIU, SARS].

⁵ U.S. FOOD AND DRUG ADMINISTRATION, PATHWAY TO GLOBAL PRODUCT SAFETY & QUALITY 19-22 (2011).

⁶ FDA Food Safety Modernization Act, Pub. L. No. 111-353, §§ 305-308, 124 Stat. 3885 (2011), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ353/pdf/PLAW-111publ353.pdf> (covering the transnational aspects of food safety including imported food, inspection of foreign facilities, foreign government capacity, and smuggled food).

⁷ *Id.* § 304 (2011).

⁸ See *The New Food Safety Modernization Act*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/food/foodsafety/fsma/default.htm> (last visited Aug. 1, 2011); *Food Safety Act: 18 Changes to Food Safety the New Law Will Bring*, HUFFINGTON POST, Dec. 27, 2010 (reviewing the changes brought about by the Food Safety Modernization Act).

⁹ *FDA Opens Offices in China*, GLOBAL HEALTH, <http://www.globalhealth.gov/news/photo/111808photos.html> (last visited Aug. 1, 2011).

grotesque food poisoning incidents domestically, China enacted a new Food Safety Law (“FSL”) in 2009. The FSL was in the drafting process for approximately five years, during which it was vetted by a number of regulators and experts from inside and outside of China.¹⁰ At times it was a contentious legislative process because, in order to improve supervision, the Law threatened to reshuffle powerful bureaucratic interests concerning regulatory jurisdiction over production, circulation, and retail of food products.¹¹ Ultimately, China’s National People’s Congress (“NPC”) felt pressure to enact the Law because of certain public health disasters that caused great public outcry in China. The most high profile of these incidents are the tainted infant formula incidents that occurred, under surprisingly similar circumstances, in both 2004 and 2008. During the latter incident, the Standing Committee of the National People’s Congress (“SCNPC”) was still reviewing the FSL, and the severity of the milk incident appeared to prompt it into action.¹² In a way, one could say that China’s leaders had accountability to the people for these incidents on their minds when they enacted the Law. Despite this promise, the Law’s passage seemed to inspire little press attention, and not much legal academic work has accumulated on its implementation since.¹³ Perhaps this is because many are unsure of how much significance to give a new

¹⁰ Guowuyuan guanyu jinyibu jiaqiang shipin anquan gongzuo jue ding [State Council Decision on Strengthening Food Safety Work] No. 23, 9 (2004) [hereinafter *State Council Decision*] (text on file with author). MURRAY SCOTT TANNER, *THE POLITICS OF LAWMAKING IN THE PEOPLE’S REPUBLIC OF CHINA: INSTITUTIONS, PROCESSES, AND PROSPECTS FOR DEMOCRACY* 2-11 (1999) (discussing how certain laws can take over ten years to pass).

¹¹ See generally Gao Qinwei, *Fensan huo hebing – lun shipin anquan jianguan jigou de shezhi* [Separate or Merged – Discussion of the Establishment of the Regulatory Structure for Food Safety], Rong Hualin, 1 GUIZHI YANJIU [REGULATORY RESEARCH], 53-78 (2008) [hereinafter Gao, *Separate or Merged*] (discussing the debate over regulatory consolidation leading up to the Food Safety Law).

¹² Gao Qinwei, *Zhongguo shipin anquan fa yanjiu xianzhuang zongshu* [Research into the Current State of Chinese Food Safety Law], CHINA FOOD SAFETY LAW (Dec. 8, 2011), <http://www.foodlaw.cn/lawhtml/ywjy/3494.shtml>.

¹³ This is compared with a huge amount of media attention paid to food safety after the pet food and toothpaste scandals in 2007. See, e.g., Kate Paulman, *See Spot Eat, See Spot Die*, 15 ANIMAL L. 113, 123-126 (2008) (noting attention paid to pet food issue); see also Mark R. Shulman & Lachmi Singh, *China’s Implementation of the UN Sales Convention Through Arbitral Tribunals*, 48 COLUM. J. TRANSNAT’L L. 242, 246 (2010) (“The Chinese government has responded to the . . . backlash from foreign importers by declaring a ‘special battle’ against poor product quality. Vice-Premier Wu Yi, head of a Cabinet-level panel on food safety and quality, stated, ‘[t]his is a special battle to protect the safety and interests of the general public, as well as a war to safeguard the made-in-China label . . . ’ The Chinese government has taken a strong stand when it comes to punishing those responsible for producing tainted or unsafe products.”).

Chinese law.¹⁴

This Article takes the position that the enactment of the FSL was significant in a number of ways, and it is important to watch and engage in its implementation. The FSL updated China's outdated "Food Hygiene Law"¹⁵ and set the groundwork for a more internationally compatible food safety regulatory system in China.¹⁶ The Law contains a number of measures aimed at both preventing and resolving future safety problems, such as fake infant formula, dyed bread buns, and poisoned pork.¹⁷ All of this means that legal academics, policymakers, and practitioners in China and – given the continued globalization of food supply, particularly the significant influx of products from China – the U.S. need to find a lens through which to view and evaluate Chinese food safety law and regulation as it develops. This Article makes an argument about how that evaluation should proceed.

Going forward, observers of the FSL and its implementation must determine the potential for progress given China's institutional constraints. For example, China is beset by corruption and local protectionism;¹⁸ its judicial system is, objectively speaking, weaker than the other political branches of government;¹⁹ and the enforcement of laws is often limited by

¹⁴ See *China's New Food Safety Law, An Early Report*, CHINALAWBLOG (Dec. 16, 2009), www.chinalawblog.com ("Food safety standards function only when there is an effective system of private civil litigation that allows injured parties to take action independent of the government."); Sharon LaFraniere, *In China, Fear of Fake Eggs and 'Recycled' Buns*, N.Y. TIMES, May 8, 2011, <http://www.nytimes.com/2011/05/08/world/asia/08food.html?scp=1&sq=china%20food&st=cse>; see also Huifeng He, *Food Safety Laws are no more than words on paper*, SOUTH CHINA MORNING POST, Mar. 9, 2010, at 4.

¹⁵ Zhonghua renmin gonghe guo shipin weisheng fa [P.R.C. Food Hygiene Law] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 30, 1995, terminated June 1, 2009) CHINALAWINFO, <http://chinalawinfo.com>.

¹⁶ See *infra* Section II, text and accompanying notes.

¹⁷ *Local Governments Fight Against Illegal Food Additives*, CHINA.ORG, May 15, 2011, http://www.china.org.cn/china/2011-05/15/content_22566696.htm; *Chinese Experts Blame Supervisory Agencies for Food Safety Problems*, XINHUA, Apr. 19, 2011, http://news.xinhuanet.com/english2010/indepth/2011-04/19/c_13836207_2.htm; *Three Arrested over Shanghai Steamed Bun Scandal*, XINHUA, May 17, 2011, http://news.xinhuanet.com/english2010/china/2011-05/17/c_13879588.htm.

¹⁸ MELANIE MANION, CORRUPTION BY DESIGN: BUILDING CLEAN GOVERNMENT IN THE MAINLAND AND HONG KONG 156-57 (2004) (discussing corruption in the PRC); Andrew C. Mertha, *China's "Soft" Centralization: Shifting Tiao/Kuai Authority Relations*, CHINA QUARTERLY 184, 792-95 (Dec. 2005).

¹⁹ Benjamin L. Liebman, *China's Courts: Restricted Reform*, in CHINA'S LEGAL SYSTEM NEW DEVELOPMENTS & CHALLENGES 66 (Donald Clarke ed., 2008) [hereinafter *CHINA'S LEGAL SYSTEM*].

conflicting government and Communist Party policies.²⁰ These policies regularly put economic growth and domestic stability before social justice and public health issues.²¹

In the almost three years since the passage of the FSL, the Law is primarily engaging with China's "limited" legal institutions in three respects: (1) as a tool for citizens to achieve some modest compensation for food safety accidents;²² (2) as a set of norms that is generating some small-scale, extra-judicial social activism;²³ and (3) as a starting point for a new regulatory scheme governing food safety, employing such tools as specialized standards, increased inspections by more highly competent institutions, mandatory recalls, and risk-based determinations regarding foodborne illness threats.²⁴

These three dimensions of the Law can be more succinctly described by the institution (or institutions) they involve, that is: (1) the judicial dimension, (2) the societal dimension, and (3) the administrative and regulatory dimension. As the discussion below will illustrate, breaking a Chinese law down into these three dimensions and comparing them is an important initial step in analyzing the Law's implementation. This Article concludes that, while the FSL's implementation may fall short of the desires of some domestic Chinese and international human rights and legal reform advocates in a number of ways, the administrative and regulatory innovations under the Law are still significant. While litigation and public protest may have some relevance in the area of food safety, the institutional innovations in administrative governance under the Law are greater in number, more concrete, and less politically sensitive in most cases.

But can the relevant Chinese agencies be successful in implementing the innovative policy they make through regulations? Success must include accountability to their constituencies in such a way that these agencies set and meet targets, thereby producing measureable improvement in enforcement. As Professor Dorit Rubenstein Reiss states in her study on agency accountability in the United States,

[a]gencies are not always the enemies of accountability.
Nor are they always helpless, passive pawns, crushed under

²⁰ *Id.*

²¹ Chenglin Liu, *The Obstacles of Outsourcing Imported Food Safety to China*, 43 CORNELL INT'L L. J. 249, 289 (2010) [hereinafter Liu, *Obstacles*] ("Seeking economic miracles, the central government has emphasized higher gross domestic production (GDP) disproportionately to food safety.").

²² See *infra* Section III text and accompanying notes.

²³ See *infra* Section IV text and accompanying notes.

²⁴ See *infra* Sections II and V text and accompanying notes.

the oppressive weight of accountability. Agencies can also be autonomous and important actors in the accountability game, creating new forms of accountability, or accepting and adapting pre-existing forms. They often willingly join in and strive to be accountable. They may well invest substantial efforts in increasing their accountability.²⁵

In China, many of the accountability-generating mechanisms that exist in the U.S. for agencies – a powerful threat of judicial review, strong Congressional oversight, and strong, consistent channels of public criticism – are still developing or in a nascent stage. Yet, in China administrative agencies have the most political space to develop and enforce food safety law. Therefore, this Article argues that future scholarship should focus on how accountable to public needs, reactive to problems, and effective in food safety law enforcement agencies can be without these outside accountability mechanisms. Put differently, how can Chinese agencies be the drivers of their own accountability? This Article contributes a framework for that future analysis.

Herein also lies the unlikely significance of the FSL for Chinese legal studies generally. The FSL, which the Chinese government has every incentive to implement, is not changing the fact that China's judiciary is neither a check on the power of other governmental institutions nor the neutral and independent dispute resolving institution for which some may be searching. And the FSL is not creating an environment in which citizens are freely able to advocate for its robust implementation from outside of the government. But top-down innovation in the administrative realm continues in food safety and other areas. As these innovations are internalized by bureaucrats and the scientific and other experts they work with, scholarship should focus more in this area for all Chinese laws that generate such agency innovation.

This Article will be divided into five additional parts. Part two discusses the legal environment in which the FSL was enacted and the laws and systems that it updated. It then proceeds to discuss some of the macro-challenges confronting the implementation of law generally in China, and public health law in particular. It concludes with an analysis of the key reforms that the drafters of the FSL were able to push through the political and legislative process into that Law. Parts three through five analyze the significance of the above-described dimensions in the following order: the judicial, the societal, and the administrative regulatory. Finally, part six, the conclusion, offers additional analysis on

²⁵ Dorit Rubenstein Reiss analyzes the question of how agencies acting as “autonomous actors that can create and contribute to their accountability environment.” Dorit Rubenstein Reiss, *Account Me In: Agencies in Quest of Accountability*, 19 J. L. & POL'Y 611, 627 (2009).

the significance of the administrative regulatory dimension. The Article concludes with more general thoughts about observing the development of the Chinese legal system and the extent to which, and how, we should take into account the regulatory system when doing so.

I. THE ORIGINS OF THE FOOD SAFETY LAW

A. *The Pre-FSL System*

The FSL was enacted in a political and legal system that presented undeniable challenges and obstacles, but which also contained a legal infrastructure that provided a meaningful foundation for a number of concepts in the FSL.

The system already contained general laws governing civil liability²⁶ and the fairness of administrative processes.²⁷ The FSL was also born into a system containing a specific product quality law,²⁸ a consumer protection law,²⁹ and a law governing truth and fairness in advertising.³⁰ The important point is that the government had crystallized the concepts of consumer protection and product quality and safety in other legislative acts well before the FSL's enactment.

Substantive food law and regulation had been developing as well. For example, the Food Hygiene Law had been in existence in some form since 1982.³¹ The Food Hygiene Law ("FHL") set forth prohibited acts

²⁶ See generally, *Zhonghua renmin gonghe guo minfa tongze* [P.R.C. General Principles of Civil Law] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) [hereinafter *General Principles of Civil Law*].

²⁷ See generally, e.g., *Zhonghua renmin gonghe guo xingzheng susong fa* [P.R.C. Administrative Litigation Law] (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective October 1, 1990) [hereinafter *Administrative Litigation Law*]; *Zhonghua renmin gonghe guo xingzheng chengxu fa* [P.R.C. Administrative Licensing Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2003, effective July 1, 2004) [hereinafter *Administrative Licensing Law*]; *Zhonghua gonghe guo xingzheng fuyi fa* [Administrative Reconsideration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 1, 1999, effective Oct. 1, 1999).

²⁸ See generally, *Zhonghua renmin gonghe guo chanpin zhiliang fa* [P.R.C. Product Quality Law] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 2, 1993, as amended July 8, 2000) [hereinafter *Product Quality Law*].

²⁹ See generally, *Zhonghua renmin gonghe guo xiaofeizhe quanyi baohu fa* [P.R.C. Consumer Protection Law] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994) [hereinafter *Consumer Protection Law*].

³⁰ See generally, *Zhonghua renmin gonghe guo guanggao fa* [P.R.C. Advertisement Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 1994, effective Feb. 1, 1995) [hereinafter *Advertisement Law*].

³¹ *Zhonghua renmin gonghe guo shipin weisheng fa (shixing)* [P.R.C. Food Hygiene Law (Tentative)] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 19, 1982, terminated July 1, 1993) [hereinafter *Food Hygiene Law*].

with respect to food processing or production and circulation, but it did not govern raw agricultural production, which is primarily supervised by the Ministry of Agriculture (“MOA”),³² pursuant to the Agriculture Law. The Agricultural Product Quality and Safety Law enacted in 2006 also gives the MOA substantial power in this respect.³³ Other substantive laws and regulations included those governing the slaughter of livestock,³⁴ the harvesting of aquatic products,³⁵ and the control of imported and exported products and ingredients. Therefore, most of the basic structure for food regulation was in place prior to the enactment of the FSL.

The enforcement mechanisms that the above legislation employed were primarily administrative and civil.³⁶ The regulatory organs of government were charged with mandatory or coercive enforcement, such as assessing the capacity of institutions through the licensing process,³⁷ inspecting them to ensure compliance,³⁸ and seizing defective products or shutting facilities down in the event of a potential or occurring outbreak.³⁹ The body of administrative law at the time permitted individuals and entities to sue agencies in court to correct arbitrary official action that directly affected them.⁴⁰ The concept of corporate responsibility for putting in place practices and internal rules that prevented unsafe conditions and resulting health disasters also emerged.⁴¹ The judiciary was

³² See *Zhonghua renmin gonghe guo nongye fa* [P.R.C. Agriculture Law], art. 15 (promulgated by Nat’l People’s Cong., July 2, 1993, amended by the Standing Comm. Nat’l People’s Cong., Dec. 28, 2002).

³³ *Zhonghua renmin gonghe guo nongye chanpin anquan zhiliang fa* [P.R.C. Agricultural Product Quality and Safety Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 29, 2006, effective Nov. 1, 2006).

³⁴ *Zhonghua renmin gonghe guo xumu fa* [P.R.C. Animal Husbandry Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 2005, effective July 1, 2006).

³⁵ *Shui chanping weisheng guanli banfa* [Aquatic Product Hygiene Regulations] (promulgated by the Ministry of Health, Nov. 20, 1990, terminated Dec. 28, 2010).

³⁶ See, e.g., Product Quality Law, arts. 40-44 (granting a right of compensation for a faulty product); Consumer Protection Law, arts. 40-41 (granting a right of compensation).

³⁷ Administrative Licensing Law, arts. 4-5.

³⁸ Food Hygiene Law, ch. VII.

³⁹ Food Hygiene Law, art. 37.

⁴⁰ Administrative Litigation Law, arts. 1-4; see also RANDALL PERENBOOM, CHINA’S LONG MARCH TOWARD THE RULE OF LAW 421 (2002) (describing administrative lawsuits).

⁴¹ *Zhonghua renmin gonghe guo anquan shengchan fa* [P.R.C. Safe Production Law] Ch. III (promulgated by the Standing Comm. Nat’l Cong., June 29, 2002, effective Nov. 1, 2002) (calling for above described procedures).

charged with enforcing provisions in these laws that permitted citizens to sue corporations for compensation in court in the event that their product caused an individual citizen to suffer bodily or financial harm.⁴²

Despite this basic infrastructure, these laws and policies appeared to be largely unhelpful.⁴³ They set out the most basic of procedures relating to health and safety, but there were large holes in their coverage of the food processing and circulation processes.⁴⁴ In product liability suits, citizens utilized the consumer protection and product quality-related laws when they sought compensation for harm caused by defective products, but the number of plaintiffs and damage awards associated with those suits were not significant enough to act as a motivator for corporations to improve their practices.⁴⁵ The more significant cases on food safety were administrative cases – delineating, for example, the powers of agencies to enforce in certain areas⁴⁶ – but even those court rulings did not seem to streamline enforcement.⁴⁷

Put simply, none of the regulatory systems or the civil remedies in place resulted in public confidence and trust in the safety of food products, either domestically within China or internationally.⁴⁸ Chinese food products were viewed as shoddy and Chinese corporations as irresponsible.⁴⁹ China was viewed as a place where the government did not have the capacity (or, at times, the will) to set and enforce the necessary public health laws and regulations.⁵⁰

The failings of the law and legal institutions themselves were only part of the problem. A non-exhaustive list of some of the structural, systemic problems contributing to the precarious state of China's food

⁴² Consumer Protection Law, arts. 40-41.

⁴³ State Council Decision, *supra* note 10, at 4-5.

⁴⁴ *Id.*

⁴⁵ Liu, *Obstacles*, *supra* note 21, at 279. There were, however, several administrative cases that came to the Supreme Court regarding the limits of various agencies' enforcement power. SHIPIN YAOPIN ANQUAN XINGZHENG SUSONG [FOOD AND DRUG SAFETY ADMINISTRATIVE LITIGATION] 1-6 (Zhu Lushang ed., 2004) (describing legal issues facing the courts). Despite those cases, there remains considerable confusion about the jurisdiction of the various agencies in this area, which has led to over and under-enforcement. Gao, *Separate or Merged*, *supra* note 11 at 55.

⁴⁶ Gao, *Separate or Merged*, *supra* note 11, at 55.

⁴⁷ Interview by author, Shanghai (2010). The Author conducted all interviews cited herein. The identity of the interviewees is confidential, and the notes and materials associated with these interviews are on file with the Author.

⁴⁸ Liu, *Obstacles*, *supra* note 21, at 280.

⁴⁹ *Id.*

⁵⁰ *Id.* See also LIU, SARS, *supra* note 4, at 10-15.

supply consists of the following:⁵¹

- Transparency
Government officials are afraid to communicate with one another and with the public for fear of inciting panic or criticism of their work.⁵² Many food safety issues are reported by the media through TV or in print/online,⁵³ and even then, the media can be effectively silenced by central or local government forces.⁵⁴ As a result, typically inadequate information is available to the public concerning the food products and additives that may harm them and the companies responsible for those products.
- A policy of putting economic development first
The government has shown both officials and the public that the economic development of the country is among the most important goals, if not *the* most important.⁵⁵ At times, environmental and public health laws and regulations are seen to interfere with that economic development. Officials have, therefore, much less incentive to enforce safety measures and are susceptible to a number of corruptive forces or incentives. First, they may want to seek money from local corporate interests (whether corruptly or quasi-legitimately) – interests that regulatory or civil enforcement of food safety law might ostensibly damage.⁵⁶ Second,

⁵¹ See also CHARLES R. MCELWEE, ENVIRONMENTAL LAW IN CHINA: MITIGATING RISK AND ENSURING COMPLIANCE 3-9 (2011) (discussing similar obstacles to the implementation of environmental law).

⁵² LIU, SARS, *supra* note 4, at 20. See also Jamie P. Horsley, *Toward a More Open China?*, in THE RIGHT TO KNOW, TRANSPARENCY FOR AN OPEN WORLD (Ann Florini ed., 2007).

⁵³ See Ye Zi, *Why Blame Consumers for Food Safety Problems*, CHINA MEDIA PROJECT, May 26, 2011 (on file with author).

⁵⁴ See, e.g., Benjamin L. Liebman, *Watchdog or Demagogue: The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 6 (2005) (“Over the past decade, media commercialization and increased media editorial discretion have combined with a rising attention to social and legal problems. This results in powerful incentives for the media to expand their traditional roles. China’s media have become increasingly critical in their news coverage, exposing alleged wrongdoing, criticizing officials for failure to address injustice, and influencing both the outcome of individual disputes and the interpretation of existing legislation.”).

⁵⁵ RICHARD MCGREGOR, THE PARTY: THE SECRET WORLD OF CHINA’S COMMUNIST RULERS 141 (2010); DAVID SHAMBAUGH, CHINA’S COMMUNIST PARTY: ATROPHY AND ADAPTATION 124-25 (2009).

⁵⁶ LU XIAOBO, CADRES AND CORRUPTION: THE ORGANIZATIONAL INVOLUTION OF THE CHINESE COMMUNIST PARTY (2002).

economic growth also leads to official promotion, and if safety incidents are permitted to close down local corporations, then there is less chance of vigorous local growth.⁵⁷ The same can be said of corporations and individual entrepreneurs – they put profit above safety and cultivate protective relationships with local officials instead of pursuing compliance with regulation.⁵⁸ High profile criminal prosecutions and other disciplinary sanctions do not appear to be an adequate deterrent.⁵⁹

- Maintenance of social stability

Under President Hu Jintao, the Party and the government have concentrated heavily on promotion of a harmonious society (*hexie shehui*).⁶⁰ Responding to a number of large protests that have arisen throughout China on hot-button issues during the end of the Twentieth Century and the beginning of the Twenty-First, the regime has endeavored to cover up or suppress, sometimes through more coercive means, anything that raises the national temperature.⁶¹ Food safety can be one such issue.

- Infrastructure and education

Food safety depends on certain basic infrastructure and the existence of sufficient education and expertise amongst different actors in the system. For example, some note that China lacks the necessary components to make circulation of fresh food products safe and to avoid contamination in transport.⁶² Other experts note that insufficient organizational time, personnel, and funding are devoted to standard enactment.⁶³ This necessary infrastructure in

⁵⁷ KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 317-18 (2004) (discussing the promotion system of the Communist Party).

⁵⁸ Chenglin Liu, *Profits Above the Law: China's Melamine Tainted Milk Incident*, 79 *MISS L. J.* 371, 372-73 (2009); MCGREGOR, *supra*, note 55, at 141-169.

⁵⁹ See MCGREGOR, *supra* note 55, at 141-169.

⁶⁰ Maureen Fan, *China's Party Leadership Declares New Priority: 'Harmonious Society'*, *WASH. POST*, Oct. 12, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR2006101101610.html>.

⁶¹ Elizabeth C. Economy, *Roots of Protest and the Party Response*, *COUNCIL ON FOREIGN RELATIONS* (2011), <http://www.cfr.org/china/roots-protest-party-response-china/p24216> (last visited Aug. 15, 2011).

⁶² PAUL FRENCH, *FAT CHINA: HOW EXPANDING WAISTLINES ARE CHANGING A NATION* 99-105 (2010).

⁶³ Song Hualin, *Xueyan shijian jizhong zhongguo shipin jianguan jiaozhu*, [Edible Birds Nest Attacks Food Safety Regulation in China] (Aug. 18, 2011),

China is emerging, and the number and capacity of professionals and professional schools, including public health schools and pharmacy schools, are increasing in the PRC.⁶⁴ In addition, the consciousness of the public as to issues of food safety, quality, and health is growing. But, the growth of this infrastructure and the increase in expertise to analyze technical issues related to food safety is an ongoing development, as is the ability of the public to make good choices not only about what they feed themselves and their families but also about how their actions influence the safety of food for others. These processes will need to continue for some time in order to make significant progress.⁶⁵ This developmental issue is not a legal problem. As these resources accumulate – assuming they do – they will help regulators ameliorate serious food safety problems; for example, it may help to control the addition of poisonous additives to food.⁶⁶

A more comprehensive discussion of these issues is beyond the scope of this Article. Other scholarship has covered them in depth and is more useful for understanding their contours.⁶⁷ Nevertheless, these problems are the macro-issues, which even the enactment of a well-drafted law and a cooperative set of legal actors and institutions cannot necessarily solve. As this Article continues into a more concrete discussion of the FSL and its implementation, it is important to remember that law in China may only have a limited impact on food safety problems in large part because law is relegated to a limited role in Chinese society. Therefore, this Article aims, to the extent possible, to judge the success of

GUANGDONG SHENG SHIPIN ANQUAN WANG [GUANGDONG FOOD SAFETY SITE], <http://www.gdfs.gov.cn/xwzx/ShowArticle.asp?ArticleID=71887>.

⁶⁴ See, e.g., *Ministry of Health Statistics on Health Care in China*, MINISTRY OF HEALTH, <http://www.moh.gov.cn/publicfiles/business/cmsresources/mohbgt/cmsrsdocument/doc12294.pdf> (last visited Aug. 20, 2011) (noting increases in healthcare personnel and institutions).

⁶⁵ Interview by Author, Shanghai (2006).

⁶⁶ See, e.g., Walt Bogdanich & Jake Hooker, *From China to Panama, a Trail of Poisoned Medicine*, N.Y. TIMES, May 6, 2007, at 1 (“Wang Guiping, a tailor with a ninth-grade education and access to a chemistry book, found it easy to enter the pharmaceutical supply business as a middleman. He quickly discovered what others had before him: that counterfeiting was a simple way to increase profits.”).

⁶⁷ See, e.g., MINXIN PEI, CHINA’S TRAPPED TRANSITION: THE LIMITS OF DEVELOPMENTAL AUTOCRACY 4-16 (2006); STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 11-39 (1999)

the law in the box into which the Communist Party and the macro-issues described above have put it. There is no sign that the government will permit its various branches and agencies to put food safety policy over economic growth or social stability if food safety comes into conflict with these goals.⁶⁸ Law may have only a moderate impact simply because that is what the coercive forces in China will permit.⁶⁹ The question is what is it reasonable to expect given these limitations?

B. *The 2009 Food Safety Law*

In some ways, the FSL was the result of a process that took nearly thirty years to complete because it is a full-scale amendment of the FHL, which was an amendment to the “Trial” or “Experimental” Food Hygiene Law that was enacted in 1982.⁷⁰ The FSL built upon the basic guidelines originally established by the FHL on the cleanliness and purity of food. It also set more specific requirements regarding the government’s and industry’s roles in managing and supervising inspection and remediating food safety accidents. Like the FHL, the FSL is a law that engages the administrative regulatory organs of government. In other words, it directs central and local agencies as to the work they are required to carry out in, for example, licensing and inspecting food processing or manufacturing and circulation/retail entities.⁷¹ An important innovation in the FSL with respect to these processes is that the FSL attempts to raise the level of transparency in internal administrative processes, i.e., provisions on improving the flow of information,⁷² and external processes, i.e., more and clearer communication with the public.⁷³

In addition, the FSL includes more tripartism (involvement of non-governmental third parties, such as private entities authorized to test samples) in enforcement.⁷⁴ The FSL encourages consumers to play a role

⁶⁸ See *infra* Sections II.b and III.b, text and accompanying notes.

⁶⁹ Donald C. Clarke, *Introduction: The Chinese Legal System Since 1995: Steady Development and Striking Continuities*, in CHINA’S LEGAL SYSTEM, *supra* note 19, at 2.

⁷⁰ See State Council Decision, *supra* note 10.

⁷¹ See, e.g., Zhonghua renmin gonghe guo shipin anquan fa [P.R.C. Food Safety Law], arts. 4, 11, 31 (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 28, 2009, effective June 1, 2009) [hereinafter *Food Safety Law*]. See also generally Zhonghua renmin gonghe guo shipin anquan fa shishi xize [P.R.C. Food Safety Law Implementation Provisions] (promulgated by the State Council, July 20, 2009) [hereinafter *Food Safety Law Implementation Provisions*] (noting throughout the different roles of the administrative agencies in inspection and enforcement activities).

⁷² Food Safety Law, arts. 82-83.

⁷³ *Id.* ch. II.

⁷⁴ *Id.* arts. 7-11.

in enforcement in terms of making informed choices and reporting on the discovery of bad practices; it encourages industry and consumer organizations to help their members to self-supervise;⁷⁵ and it encourages, to a limited extent, corporations and industry associations to self-regulate and create high internal standards. It creates positive incentives for compliance.⁷⁶ And, it grants the courts the power to award enhanced damages when the failure to follow safety rules in the FSL results in physical and financial loss.⁷⁷

The FSL redefines the aspirational scope of food safety regulation, both along the supply chain and within the environments where food is handled. The focus on comprehensive management of the food system is common to modern food safety legislation – i.e., from “farm to fork.”⁷⁸ In the food processing factories and supermarkets, and even in collective markets, the Law requires increased attention to the sterility of the facilities and points of contact between machines and employees and food products. Entities have a responsibility to ensure the safety of the food products and materials that they receive;⁷⁹ ensure the safety of the process by which they handle food;⁸⁰ and ensure the safety of the final product as well as the process by which they export it.⁸¹ In addition, the FSL contains more defined terms, as compared with the FHL.⁸² In this way, the FSL may not always broaden the scope of these concepts as much as possible, but it improves understanding of terms of art and sets a standard for debate about their meaning. These definitions will be, at the very least, useful in the future to refining the scope of food safety law.

Another change that the drafters attempted in the FSL was the creation of mechanisms to centralize and consolidate the management of food safety by the government. For example, it creates a high level Food Safety Commission under the State Council as an overarching, supra-ministry food safety watchdog.⁸³ The Commission is comprised of some elite level leaders with the goal of resolving standoffs between agencies

⁷⁵ *Id.* art. 10.

⁷⁶ *Id.* arts. 8-9.

⁷⁷ *Id.* art. 96.

⁷⁸ *Id.* arts. 2-4. *Cf.* General Principles of European Union Food Safety Law, available at http://ec.europa.eu/food/food/foodlaw/principles/index_en.htm (last visited Aug. 2, 2011).

⁷⁹ *Id.* art. 36.

⁸⁰ *Id.* art. 27.

⁸¹ *Id.* chs. 4-6.

⁸² *Id.* art. 99.

⁸³ *Id.* art. 4.

with overlapping mandates, but divergent interests. In addition, the drafters of the FSL seem to have placed as much authority as possible in the Ministry of Health, which oversees the Food and Drug Administration. After much debate, the functions of other ministries (for example, the State Administration for Industry and Commerce and the Administration for Quality Inspection, Supervision and Quarantine) were preserved, but adequate communication and coordination is stressed where responsibilities may overlap in order to avoid problems of over or under regulation.⁸⁴ Also supporting the theme of centralization, under the FSL, localities may only enact standards if no central standards on the same subject matter exist.⁸⁵

The FSL introduces more technically rigorous processes – both scientifically technical and procedurally technical. In several ways the FSL creates more finely drawn procedures for processes that were introduced in the FHL, such as inspection and testing, supervision of food additives, and the imposition of fines and other administrative punishments (termination of licensure, cessation of production, and the seizure of contaminated products or facilities). Although this is a positive development insofar as the FSL fills holes where the FHL may have been too general, increased control over a process is not necessarily a good thing. Tighter control may be unrealistic because of scarce resources or because it may create potential for more opportunistic official behavior.⁸⁶ In other words, it may create more points along a process for officials to demand illicit benefits from stakeholders in order to advance their interests. The greater innovation is the addition of mechanisms or processes by which scientific or medical expertise may be introduced to more bureaucratic regulatory tools.

It should be noted that while the FSL has administrative (regulatory requirements) and civil (compensation remedies) elements, it does not have a criminal dimension.⁸⁷ The Criminal Code was amended in 2010 to include punishments for producing toxic food.⁸⁸ Criminal cases in

⁸⁴ *Id.* arts. 2-5.

⁸⁵ *Id.* art. 24. Standards, which in the U.S. would be a type of regulation are not deemed as such by relevant PRC legislation, such as the Legislation Law which sets forth the hierarchy of legislative sources, law (*falu*), regulation (*xingzheng fagui*), rules (*guizhang*). Thus, any document termed a “standard” (*biaozhun*) might occupy a vague place in relation to other sources of law. *See Zhonghua renmin gonghe guo lifa fa* [P.R.C. Legislation Law] Ch. 3 (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000).

⁸⁶ Paul H. Breitzke, *The Politics of Legal Reform*, 3 WASH. U. GLOBAL. STUD. L. REV. 1, 28 (2004).

⁸⁷ *See* Food Safety Law, art. 98.

⁸⁸ *Zhonghua renmin gonghe guo xingfa* [P.R.C. Criminal Code] arts. 142-144 (promulgated by the Nat’l People’s Cong., Mar. 14, 1997, amended by Standing Comm.

the food safety area will be handled under the Criminal Code. It remains to be seen whether these prosecutions will serve as a consistent deterrent of perverse conduct, rather than a mere way to set an example of severe consequences. As in all corruption cases, swift and heavy handed, but at times inconsistent, punishment has been employed in numerous contexts to set an example.⁸⁹ However, it is questionable as to whether the odds of being one of these examples, when compared to the economic benefits to the official of corrupt behavior, prevents the targeted conduct.⁹⁰

II. JUDICIAL DIMENSION OF THE FOOD SAFETY LAW

This assessment of the Chinese judiciary's involvement in the enforcement of the FSL comes at a time when these courts are looked upon by American and Chinese scholars as disappointing. They lack independence from political forces within the Communist Party, are saturated with propaganda and Party rhetoric, and are bullied by other branches of the government and even aggressive petitioners and protest mobs on occasion.⁹¹ The courts lack the power to enforce their judgments effectively, and for that reason, sometimes avoid making decisions.⁹² They strong-arm parties into mediating suits, when the law calls for mediation and settlement to be voluntary.⁹³

The size of the contribution that courts in China make to the development of the substantive content of Chinese law and its enforcement is much smaller than in the U.S.⁹⁴ This is partially because the courts are technically forbidden to interpret the law or strike down inconsistent legislation,⁹⁵ even though they do engage in interpretation of laws in some instances in order to attempt to fill holes left by inadequate

Nat'l People's Cong., Feb. 25, 2011).

⁸⁹ *Former SFDA Chief Executed For Corruption*, CHINA DAILY, July 10, 2007, http://www.chinadaily.com.cn/china/2007-07/10/content_5424937.htm.

⁹⁰ *See id.*; *see also* MCGREGOR, *supra* note 55, at 137-38.

⁹¹ Benjamin L. Liebman, *The Populist Threat to Chinese Courts*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN POST-REFORM CHINA 269, 269-73 (Mary Gallagher & Margaret Woo eds. 2011) [hereinafter *CHINESE JUSTICE*].

⁹² *Id.* at 16.

⁹³ Carl F. Minzner, *China's Turn Against Law*, 59 AM J. COMP. L. 935, 940-46 (2011).

⁹⁴ *See, e.g.*, TANG YINGMAO, FAYUAN ZHIXING WEI SHENME NAN [THE CHALLENGES OF ENFORCING COURT JUDGMENTS] 3-9 (2009).

⁹⁵ The Chinese constitution grants legal interpretation powers officially only to the Standing Committee of the National People's Congress. XIANFA [CONSTITUTION] art. 67(4) (1982).

or incomplete law and regulation.⁹⁶ Pockets of legal innovation by courts do exist through thoughtful adjudication of cases within politically acceptable limits.⁹⁷ Perhaps the most notable exceptions to the illusive prohibition on legal interpretation by the courts are the “judicial explanations” by the Supreme People’s Court, which do add substance to the provisions of national laws and guide the judiciary in the handling of cases.⁹⁸ In any event, courts in China are not free to be the architects of long-standing, game-changing precedent that judges in the U.S., who have presided over impactful public interest litigation, have been. Additionally, Chinese courts rarely develop conventions of broad applicability.⁹⁹ When they do engage in legal innovation, there can be consequences for those involved, such as professional discipline.¹⁰⁰

Recent scholarship asserts that, despite political limitations, courts in authoritarian regimes have a number of utilities. They can help leaders adjudicate disputes with political opponents (however unfairly); they can shore up legitimacy; they can render a regime internationally credible for purposes of economic development; and they can discipline an otherwise wayward administrative bureaucracy when ideology fails.¹⁰¹ Courts in authoritarian regimes can also become a forum for a conversation between the state and an increasingly autonomous civil society, even though they are not necessarily the place where one can expect regularized, formal

⁹⁶ Liebman, *Restricted Reform*, *supra* note 19, at 20.

⁹⁷ The case of Qi Yuling, for example, in which a Chinese court based a judgment on a constitutional provision ensuring education for Chinese citizens, which sparked great scholarly debate over whether the Constitution could then be used to support a judgment. The judgment of the Court was later revoked. *See* Jihong Mo, *Constitutional Law of the People’s Republic of China and Its Development*, 23 COLUM. J. ASIAN L. 137, 176 (2009) (describing the case and the subsequent revocation of the court’s opinion years after it was issued).

⁹⁸ These sources of interpretation binding on the people’s courts have been allowed to continue. *See, e.g.*, Zuigao renmin fayuan guanyu zhixing zhonghua renmin gonghe guo xingzheng susong fa ruogan wenti de jieshi [Interpretation of the Supreme People’s Court on the Several Questions Regarding the Implementation of the Administrative Litigation Law] (promulgated by Sup. People’s Ct., Mar. 8, 2000) (last visited Aug. 10, 2011).

⁹⁹ Liebman, *Restricted Reform*, *supra* note 19, at 19 (“Some judicial innovation is a consequence of the wide discretion Chinese judges have in resolving cases. Unclear legal standards mean that courts must frequently fill gaps.”).

¹⁰⁰ Carl Minzner, *Judicial Disciplinary Systems for Incorrectly Decided Cases: The Imperial Chinese Heritage Lives On*, in CHINESE JUSTICE, *supra* note 93, at 58-62.

¹⁰¹ Tom Ginsburg and Tamir Moustafa, *Introduction: The Functions of Courts in Authoritarian Politics*, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 1, 2-11 (Ginsburg and Moustafa eds., 2009) [hereinafter *RULE BY LAW*].

legal process.¹⁰² Much of this is true with respect to how Chinese courts are useful to individual members of society. Chinese courts support economic development; correct some forms of abusive official behavior; and serve as a *part* of larger public interest advocacy.¹⁰³ For example, in the late 1980s, the Chinese government set in place administrative litigation to correct official abuses and misfeasance.¹⁰⁴ However, there is little evidence that Chinese courts, at least in the food safety context, help litigants to obtain individualized justice consistently, either through single suits or class actions, nor is there evidence that litigation can be used as a means of promoting more structural reform.¹⁰⁵

A. *Civil Tort Litigation*

Like the FHL,¹⁰⁶ the FSL includes a mechanism for individuals harmed by defective food products to apply to the courts for compensation.¹⁰⁷ It is not altogether apparent why the drafters choose to include what one could appropriately call a food-tort provision in the FSL, when 2009 also saw the enactment of a long-anticipated general Tort Law.¹⁰⁸ Although the Tort Law provides that when more specific tort liability standards exist in another law, those more specific standards shall

¹⁰² See Tom Ginsburg, *Administrative Law and Judicial Control of Agents*, in *RULE BY LAW*, *supra* note 101, at 67-72.

¹⁰³ See Liebman, *Restricted Reform*, *supra* note 19, at 66.

¹⁰⁴ See Minxin Pei, *Citizens versus Mandarins: Administrative Litigation in China*, 152 *CHINA QUARTERLY* 832-62 (Dec. 1997).

¹⁰⁵ To say a bit more about these two ideas: Litigation in the food safety context might be said to serve two functions, individualized justice and structural reform. Neither of these functions or purposes is mutually exclusive. Individualized justice means that the individual who the company or state has harmed gets compensated and (subjectively) achieves a sense of satisfaction that the wrong that they have suffered has been appropriately acknowledged and condemned. Serving a structural reform purpose means that the litigation changes the system and influences behavior. Here it means that the officers/proprietors of companies, small and large, think twice about their behavior because of the threat and the ensuing financial burden and public embarrassment associated with a lawsuit.

¹⁰⁶ Food Hygiene Law, art. 48 (“Whoever in violation of the provisions of this Law is responsible for a food poisoning accident or transmission of a disease caused by food-borne bacteria, or commits other acts in violation of this Law, which results in harm to others, shall assume civil responsibility for compensation in accordance with the law.”), *translation available at* <http://asianlii.org.cn/legis/cen/lawsfhlproc392> (last visited Mar. 20, 2012).

¹⁰⁷ Food Safety Law, art. 96.

¹⁰⁸ *Zhonghua renmin gonghe guo qinquan zeren fa* [P.R.C. Tort Law] ch. V (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 26, 2011, effective July 1, 2010) (discussing product liability) [hereinafter *Tort Law*].

take precedence over its general provisions,¹⁰⁹ there is evidence that suits for compensation for defective food products are also covered by the provisions on product liability in the Tort Law.¹¹⁰ What few opinions are available in electronic databases under the FSL show that the FSL is now being cited in conjunction with the Tort Law as essentially providing for the same remedy. Although duplicative, it is not uncommon for similar provisions to appear in several different laws reflecting different policies. For example, the FHL, the Consumer Protection Law, and the Product Quality Law all contained provisions under which private litigants could bring food tort actions.¹¹¹ The opinions in civil cases for food torts prior to the FSL reflect that parties were citing to more than one of these laws when bringing a suit, and courts were often relying on multiple laws in their reasoning without explaining the specific differences in the language of those laws and its significance, nor explaining differences in policy or in the nature of the type of claim each law provided.¹¹²

Despite questions about the necessity of these provisions given other laws, the FSL expands the civil food tort remedy offered in the FHL. First, the FSL contains a punitive damages provision.¹¹³ The punitive sum is ten times the purchase price of the food.¹¹⁴ The primary food tort provision in the FSL is Article 96, which states:

When a violation of this Law causes bodily harm, injury to property or other loss, then the offending entity shall assume civil liability for compensation in accordance with law. If the entity processes food products that are non-compliant with food safety standards or sells food products

¹⁰⁹ *Id.* art. 5.

¹¹⁰ *See, e.g.*, Zhao yingmei su Beijing yike long lianxiao chaoshi youxian zeren gongsi [Zhao Ying Mei v. Beijing Yike Long Supermarket] (Beijing Fengtai Dist. Ct. 2011); Guangzhou baijia chaojishichang youxian zeren gongsi baoli fenghuayuan fendian yu li zhaoyuan [Guangzhou Baijia Supermarket v. Li Zhaoyuan] (Guangzhou Interm. Ct. 2010); Guangzhou jiaguang chaoshi youxian zeren gongsi yuancun dian yu meng jian [Guangzhou Jiaguang Supermarket v. Mengjian] (Guangzhou Interm. Ct. 2010) (interpreting the punitive damages provisions in the FSL and the Tort Law in harmony but concluding that punitive damages were not applicable because there was no evidence of bodily or financial harm).

¹¹¹ Consumer Protection Law, art. 34; Product Quality Law, art. 41; Food Hygiene Law, art. 48

¹¹² *See, e.g.*, Lu haili deng su Jiaozuo shi sanwei shangye guangchang youxian zeren gongsi qinyang fen gongsi [Lu Haili et al. v. Jiaozuo City Sanwei Commercial Co., Ltd.] (Luo Yang Dist. Ct. 2010).

¹¹³ Food Safety Law, art. 96

¹¹⁴ *See, e.g.*, Lu Haili et al. v. Jiaozuo City Sanwei Commercial Co., Ltd., (Luo Yang Dist. Ct. 2010).

that it clearly knows to be non-compliant with food safety standards, then in addition to seeking compensation for loss, the consumer may seek ten times the price from the processor or seller in compensation.¹¹⁵

In addition to Article 96, in order to strengthen the ability of a consumer to receive some compensation, a company is obligated to pay civil damages before paying any criminal or administrative fines.¹¹⁶

Like the FSL, the Tort Law contains a provision calling for civil compensation to be paid before administrative and criminal penalties.¹¹⁷ While mainly providing for compensatory damages, the Tort Law provides for a punitive compensatory sum in product liability cases when the manufacturer continues to produce a product with a defect known to cause harm to human health, but it does not put a ten-times-the-price limit on the punitive award.¹¹⁸ No case reviewed thus far shows that the Tort Law's text has caused a court to increase or decrease the punitive sum available in food tort cases. Because the language of Article 96 seems to indicate that *any* violation of the FSL that results in loss is actionable, it would seem that a violation of the FSL would be negligence per se under the Tort Law's product liability provisions.¹¹⁹ An open question is, perhaps, whether compliance with the FSL means that there cannot be an action under the Tort Law.

Another innovation in the FSL is that it expands the range of actors along a supply chain that a consumer can hold accountable for damages.¹²⁰ Professor Xu Haiyan argues that the FSL's provisions strengthen the standards and expand the range of actors that must assume civil liability when compared with both the Consumer Rights Law and the Advertisement Law.¹²¹ For example, the FSL heightens liability for the different parties involving collective markets. These markets, which are often outdoors and contain transient vendors with sometimes questionable license credentials, are a source of significant concern because vendors

¹¹⁵ Food Safety Law, art. 96.

¹¹⁶ Food Safety Law, art. 97.

¹¹⁸ Tort Law, art. 47.

¹¹⁹ For example, under the medical malpractice provisions of the Tort Law, violation of law or regulation is constructive fault. Tort Law, art. 58.

¹²⁰ Cf. Denis W. Stearns, *On (C)redibility: Why Food in the United States May Never Be Safe*, 21 STAN. L. & POL'Y REV. 245, 269-70 (2010).

¹²¹ Xu Haiyan, *Lun shipin anquan fa zhong de xinxing minshi zeren* [Discussing Civil Responsibility Under the Food Safety Law], SHIPIN ANQUAN FAZHI [FOOD SAFETY LAW] No. 2, 36-50 (2010), available at <http://foodlaw.cn/item/Print.asp?m=1&ID=1365>.

may utilize less sophisticated hygiene measures than the managers of major supermarkets and because they make it difficult to trace the origins and circulation of harmful products when accidents occur. Before the FSL, under the Consumer Protection Law, when a merchant of food products rents a stall in a collective market, if a consumer of that merchant's food products is injured after the lease has expired, then the lessor of the stall or the manager of the particular commodities fair or sales exhibition (*zhanxiao hui*) at which the food product was sold may bear liability.¹²² Both of these parties retain a right of indemnification against the vendor.¹²³ The Consumer Protection Law does not make the manager of the collective market liable.¹²⁴

The FSL now provides that the manager of the market, the manager of the fair, and the lessor all have a duty to inspect the credentials of the vendors at the market.¹²⁵ They also have a duty to inspect the stalls periodically. If they fail to execute that duty, then they must assume legal responsibility for the error.¹²⁶ In this way the FSL expands the scope of consumer protection litigation because it gives the managers and lessors in markets their own responsibilities, instead of merely requiring that they assume liability after the vendor has failed to appear.¹²⁷ On the basis of the FSL, therefore, the consumer may join the managers and lessors to their suit against the actual vendor of the harmful food products.

Another innovation is that the FSL makes advertisement spokespersons liable for false food advertisements that they are involved in promoting.¹²⁸ The FSL provides: "If social organizations or other organizations or individuals recommend food products to consumers through the use of a false advertisement, and in doing so, they damage the legal rights and interests of the consumers, then they shall assume joint liability with the food processor and circulator."¹²⁹ The Advertisement Law only permits suits against the company itself for misrepresentations.¹³⁰

Although Article 96 is arguably an improvement on the FHL's food

¹²² *Id.*

¹²³ Consumer Protection Law, art. 38

¹²⁴ See Xu, *supra* note 121.

¹²⁵ *Id.* at 38-40.

¹²⁶ Food Safety Law, art. 90.

¹²⁷ See Xu, *supra* note 121, at 42.

¹²⁸ *Id.* at 44-48.

¹²⁹ Food Safety Law, art. 52.

¹³⁰ Advertisement Law, art. 38.

tort remedy,¹³¹ there is little evidence that Article 96 has generated cases in which litigants, either individually or as a class, consistently receive adequate compensation for serious food poisoning incidents. The few available opinions under the FSL reveal that the cases that were accepted and produced opinions involved decidedly non-controversial facts in which the injuries were minor, if not nominal.¹³² Several facets of these cases are notable. First, none of them involve death or serious injury. Plaintiffs got sick from the food products, or noticed that they were defective without becoming ill, but there is a general absence of any emotionally charged cases wherein highly negligent food manufacturing or circulation techniques resulted in high profile consequences.¹³³ Second, a number of disputes were dismissed for lack of simple evidence, such as inability to trace a product back to its origin or to indicate its specific defects.¹³⁴ Despite general discovery provisions in the Civil Procedure Law, litigants do not seem to be permitted to engage in vigorous discovery which, at least in the U.S., could compel paperwork from the defendant calculated to lead to proof that defective products were purchased there.¹³⁵ In addition, consumer groups complain that they do not have the power to bring suit on behalf of individuals involved in mass incidents, who often do not have the resources to conduct suits effectively.¹³⁶ This is

¹³¹ Chen Changxiong, *Bu anquan shipin qinquan yanjiu* [Research on Unsafe Food Torts], SHIPIN YAOPIN LANPI SHU [BLUE BOOK OF FOOD AND DRUG] 15, 20-21 (2010).

¹³² Interview by Author, Shanghai (2011).

¹³³ See, e.g., *Limouxue su Shenzhen shi yongmousheng gongmao youxian gongsi* [Li X Xue v. Shenzhen X Sheng Trading Co.] (Shenzhen Baoan Dist. Ct. 2010) (case dismissed because plaintiff failed to provide evidence that the food products fell below standards and caused bodily harm or financial loss); *Xudajiang su Guangzhou baijia chaoji shichang youxian gongsi zhengjia guangchang fendian deng* [Xu Dajiang v. Guangzhou Baijia Supermarket] (Guangzhou Tianhe Dist. Ct. 2010) (dismissed for lack of evidence, plaintiff failed to meet burden); *Yang zhiqiang yu guangzhou baijia chaoji shichang youxian gongsi deng* [Yang Zhiqiang v. Guangzhou Baijia Supermarket], (Guangzhou Interm. Dist. Ct. 2010) (case dismissed because plaintiff failed to prove a connection between the product and the retailer); *Guangzhou Baijian Supermarket v. Li Zhao Yuan* (Guangzhou Interm. Dist. Ct. 2010) (punitive damages dismissed for failure to provide evidence of any physical or financial harm); *Shanghai lianjia chaoshi youxian gongsi yu xumou* [Shanghai Lianjia Supermarket v. Xu Mou] (Shanghai Interm. Ct. 2010) (dismissed in part because plaintiff failed to prove that products fell below food safety standards); *Wangmou su Shanghai mou gengli youxian gongsi deng* [Wang Mo v. Shanghai Mo Libian Co.] (Shanghai Putuo Dist. Ct. 2010) (dismissed in part because plaintiff failed to prove evidence of harm).

¹³⁴ See *supra* note 133.

¹³⁵ Liebman, *Populist Threat*, *supra* note 91, at 281-82.

¹³⁶ *22 jia chengshi xiaofei weiquan danwei huyu fuyu qi daibiao xiaofeizhe quanyi susong quan* [22 Municipal consumer groups call for the right to represent

problematic because the cases appear to place nearly the entire evidentiary burden on the plaintiff in FSL cases. The plaintiff bears the burden to show that he purchased the food product from, for example, the retail store that he is suing; that the store failed to conform to food safety standards; and that the defective product caused the plaintiff loss.¹³⁷ If the plaintiff is able to show at least that the product was deficient, he may win, at times, the nominal sum of the purchase price.¹³⁸ However, if the plaintiff cannot show causation and additional physical or pecuniary harm, then the decuple (10x) punitive damages sum will not be awarded. In none of the cases surveyed has there been an award of punitive damages.¹³⁹

Also, likely because of the lack of access to evidence or in depth discovery procedures, reported cases are usually against retailers of food products. It is fairly easy to sue the known-source of the product, and the FSL permits such suits where the retailer sold clearly substandard products, but the prevalence of labels lacking manufacturer information and small-scale producers that might even close down after making a certain profit on substandard products are also problems.

This survey of cases does not show the number of cases that are mediated or settled, and therefore produce no formal opinion.¹⁴⁰ Given the known preference of Chinese courts for mediation, the absence of sensitive or emotional cases in which the injuries are severe or a large number of people were wronged may indicate that, where there has been a serious injury, the companies may be more willing to settle, or the courts may play a more active role in pushing the parties to settle.¹⁴¹ Indeed, this method may not be entirely to the disadvantage of the plaintiffs because courts may encourage the defendant to pay more when going through less public settlement procedures than through formal process.

In sum, while information regarding cases may be lacking or incomplete, the cases available for this examination seem to indicate that high profile public interest litigation, for example, in the form of class actions, has not emerged in the courts under the FSL.¹⁴² Instead, the

consumers in litigation], XINHUA, Dec. 12, 2011, http://news.xinhuanet.com/legal/2011-12/12/c_111237649.htm.

¹³⁷ Yinian xianjian shibei peichang anli, shipin anquan chongdian nanxing [*Difficulties in Revamping Food Safety, Decuple Compensation Cases Rarely Seen*], TECH-FOOD (Apr. 22, 2011), <http://www.tech-food.com/news/2011-4-22/n0521871.htm>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Cf.* Minzner, *supra* note 93, at 944-45 (discussing how rates of mediation have risen in the PRC pursuant to new political limitations on the courts).

¹⁴¹ *Id.*

¹⁴² Yungsuk Karen Yoo, Note, *Tainted Milk: What Kind of Justice for Victims' Families in China?*, 33 HASTINGS INT'L COMP. L. REV. 555, 570-71 (2010) (discussing

government prefers to handle the higher profile mass cases administratively through mass compensation funds,¹⁴³ and attempts at litigation in sensitive cases, such as the defective infant formula cases that have resulted in illness or death, have been either delayed or thwarted entirely.¹⁴⁴

The typical low-profile case under the FSL seems to proceed as follows. Two citizens Lu and Pan purchased twenty boxes of fine quality moon cakes at the Sanwei Supermarket in Qinyang City, which they planned to give as presents to their close relatives and friends.¹⁴⁵ In total, they paid 3230 RMB for the moon cakes, or approximately \$538.00.¹⁴⁶ When they returned home and tasted the moon cakes, they discovered a funny, “gritty” taste.¹⁴⁷ Wanting to get in touch with the manufacturer of the cakes, they looked on the box, but found almost no information at all: no name, make, quantity, expiration date, or ingredient or nutrition content information.¹⁴⁸ They also could not find the address, licensing credentials or other manufacturer related information required under Chinese law.¹⁴⁹

Lu and Pan first went to the local branch of the State Administration for Industry and Commerce (“SAIC”) in Qinyang city.¹⁵⁰ The Qinyang SAIC investigated and issued a mandatory recall, forcing the defendant to remove the illegal product from the shelves.¹⁵¹ The parties were given sixty days to apply for reconsideration of the Qinyang SAIC’s order to either the Jiaozuo City SAIC or the Qinyang People’s Government, both higher authorities with the power under the Administrative Reconsideration Law to reverse the Qinyang SAIC’s decision, but it appears that they did not do so.¹⁵² They were also given the

failure of class actions in the tainted milk cases).

¹⁴³ See Sun Jin & Wang Jing, *Lun woguo shipin anquan shigu buchang jijin jiqi zhidu jiangou* [On the Establishment of a Compensation Fund System in China’s Food Safety Accidents], SHIPIN ANQUAN FAZHI [FOOD SAFETY LAW] No. 1, 35, 37-40 (2011), available at <http://info.food.hc360.com/2011/06/200312520232.shtml>.

¹⁴⁴ Yoo, *supra* note 142, at 568-69.

¹⁴⁵ Lu Haili et al. v. Jiaozuo City Sanwei Commercial Co., Ltd., (Luo Yang Dist. Ct. 2010).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* Recalls are mandatory under the FSL. Food Safety Law, art. 53.

¹⁵² Lu Haili et al. v. Jiaozuo City Sanwei Commercial Co., Ltd., (Luo Yang Dist. Ct. 2010).

opportunity to bring the case to a people's court within three months of the decision.¹⁵³

Lu and Pan brought suit against the supermarket arguing that it had openly sold food products that violated food safety standards, exhibiting complete irresponsibility for the health and safety of consumers. Lu and Pan sought the return of the purchase price, ten times that sum in punitive damages, and litigation costs and attorneys' fees.¹⁵⁴ The legal bases for the suit were a number of similar provisions in different laws: Article 122 of the General Principles of Civil Law,¹⁵⁵ Article 11 of the Consumer Protection Law, Articles 41 and 42 of the Product Quality Law, and Article 96 of the FSL.¹⁵⁶

The court concluded that the plaintiffs had in fact purchased twenty boxes of moon cakes from the defendants for a total of RMB 3230.¹⁵⁷ The ability to provide evidence led the court to order the defendant to return the purchase price to the plaintiffs.¹⁵⁸ However, the court concluded that the evidence that the plaintiffs submitted to the court could not prove that the defective food products had caused bodily harm, property loss or any other type of damage, so no punitive damage award was required under the facts of the case.¹⁵⁹ The court did not award litigation expenses because it was clear that the plaintiffs had not been honest about certain expenses they had incurred in discovering and reporting the defect.¹⁶⁰

The other cases publicly available in which the court relies on the provisions of the FSL are similar – there is no death or serious physical harm; the verdict is evenhanded; and, insofar as one can ascertain, there is not much publicity associated with the cases. Perhaps one reason for this is that a recent food safety incident, which occurred before the passage of the FSL, generated public outcry, embarrassed the government

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ General Principles of Civil Law, art. 122.

¹⁵⁶ *Id.* The Tort Law had not been implemented when the suit was initiated on December 1, 2009. *Id.* See also Tort Law, art. 92.

¹⁵⁷ The court briefly resolved the standing issue in favor of the plaintiffs. As the direct purchaser of the products that the defendant was selling, the case had a direct advantageous/disadvantageous relationship with the plaintiffs and therefore allowed them to sue under Article 108 of the Civil Procedure Law. Lu haili deng su Jiaozuo shi sanwei shangye guangchang youxian zeren gongsi qinyang fen gongsi [Lu Haili et al. v. Jiaozuo City Sanwei Commercial Co., Ltd.] (Luo Yang Dist. Ct. 2010).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

domestically and internationally, and resulted in a crackdown on food safety lawyers and activists. This occurred when Chinese public interest lawyer Li Fangping attempted to bring suit on behalf of the parents whose children were either killed or injured when toxic amounts of melamine appeared in the baby formula that they fed their children.¹⁶¹ The melamine, which is an industrial plastic used to thicken and increase the quantity of milk, caused kidney stones in the children. Before anyone stopped this practice, melamine contaminated milk, which was distributed in part by the huge dairy company Sanlu, had killed six children and left another 300,000 injured throughout 2007-2008.¹⁶² The children with injuries, which included children adopted by U.S. families from Chinese orphanages where the toxic formula was used, may have lingering health effects for the rest of their lives.¹⁶³

When the problems began to emerge in the press just after the 2008 Olympics, Li Fangping was optimistic that the government might allow suits, perhaps even against the milk giant Sanlu, which was at the heart of the scandal.¹⁶⁴ Li said that, despite the fact that no such suits for compensation had occurred when a similar infant formula scandal left children in Anhui province with enlarged heads due to malnutrition in 2004, he thought the parents would be able to sue for compensation this time.¹⁶⁵ Li and other public interest lawyers began counseling the families about their options.¹⁶⁶ The government began to pledge that it would give the infants free medical care, but reports around the country came out that parents were being charged at hospitals.¹⁶⁷ Sanlu's first response was merely to offer a refund for the product the parents had purchased.¹⁶⁸

Despite Li's optimism, courts refused to accept lawsuits by

¹⁶¹ See An Ning, *The Tainted Milk Powder Incident: Hope in the Midst of Despair*, CHINA RIGHTS FORUM NO. 4 (2010), available at <http://www.hrichina.org/content/4957> (last visited Feb. 29, 2012).

¹⁶² Priscilla Jiao & Fanny W.Y. Fung, *Milk Activist Zhao in Beijing Hospital on Medical Parole*, SOUTH CHINA MORNING POST, Jan. 1, 2011, at 5.

¹⁶³ Deanna Martin, *Adoptive Parents Seek Answers on Melamine Crisis*, VIRGINIAN PILOT, Jan. 3, 2009, at A7.

¹⁶⁴ Ng Tze-Wei, *Ample Opportunities for Public to Sue for Damages*, SOUTH CHINA MORNING POST, Sept. 18, 2008, at 4.

¹⁶⁵ *Id.* ("Despite the lack of legal precedents from the milk powder crisis in 2004 that left babies with enlarged heads, Mr. Li [Fangping] was confident that consumers could sue for compensation this time round, 'provided that the judicial system does not clamp down on these claims.'").

¹⁶⁶ *Id.*

¹⁶⁷ Peter Ford, *What China's Tainted Milk May Not Bring: Lawsuits*, CHRISTIAN SCIENCE MONITOR, Sept. 22, 2008, at 1.

¹⁶⁸ *Id.*

affected families for compensation. The courts were either waiting to see whether the government and the dairy industry would pay compensation, thus delaying the suits, or the suits were rejected outright.¹⁶⁹ A lawsuit involving 63 plaintiffs that sought fourteen million RMB in compensation was rejected in Shijiazhuang.¹⁷⁰ Another case was rejected in Lanzhou City, Gansu province for 1 million RMB, which was filed on behalf of the parents of a six-month-old boy who died of kidney failure after consuming contaminated Sanlu milk.¹⁷¹ The court stated that it could not accept the case until it knew whether higher-level authorities would issue guidelines to deal with this sensitive issue.¹⁷² Lawyers like Li Fangping, who volunteered their time and advice, or wanted to, were threatened and harassed by local leaders to stay away from these cases.¹⁷³ The guilty corporations ultimately did pay compensation into an administrative fund.¹⁷⁴ The courts did not play a role by adjudicating suits brought by private lawyers independent of the universal compensation plan. Although some promises were made that such suits would ultimately be permitted, they seem to have amounted to nothing so far.

The attempted contaminated milk litigation pre-dates the enactment of the FSL, but there is little to indicate that the Law would change anything now. Indeed, Li Fangping and another parent activist, Zhao Lianhai, are still being persecuted as a result of their involvement in that case. As described above, the concepts underlying Article 96, such as product liability and corporate responsibility, were already present in other laws that could have served as the basis to obtain compensation in the kind of lawsuit that Li Fangping wanted to bring. The former case, brought by Lu and Pan, seems to be more indicative of what the government and the judiciary will tolerate under the FSL.

¹⁶⁹ *Chinese Court Put Lawsuit Against Dairy Giant Sanlu on Hold*, BBC PAC. MONITORING, Oct. 16, 2008; Ng Tze-Wei, *Sanlu Court Action Put on Hold; Judge Refuses to Accept Lawsuit Until Guidelines Are Issued from Top*, SOUTH CHINA MORNING POST, Oct. 16, 2008, at 13.

¹⁷⁰ Henry Sanderson, *China Court Refuses to Accept Tainted Milk Lawsuit*, ASSOC. PRESS, Dec. 8, 2008.

¹⁷¹ Edward Wong, *Uphill Slog for Justice in Chinese Milk Cases; Beijing Nearly Always Sides With Producers, Discouraging Lawsuits*, INT'L HERALD TRIB., Oct. 18, 2008, at 1.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See Fu Wen, *What Happened to Compensation Fund, Milk Victims Wonder*, GLOBAL TIMES, May 17, 2011, <http://china/globaltimes.cn/society/2011-05/655811.html>.

B. *Administrative Litigation*

Courts in China are permitted to review specific official actions for legality when the citizens or entities that bring suit have standing because they are directly affected by those actions under the Administrative Litigation Law (“ALL”).¹⁷⁵ A court’s decision not to enforce an administrative decision because the agency official acted without authority will, at most, invalidate the action itself, but never the applicable administrative regulation on which the legal action was based. This review is in addition to methods by which citizens can apply to the administrative agencies that perpetrated the action for “reconsideration” under a system called administrative reconsideration and a parallel petitioning system that works similarly called “Letters and Visits.”¹⁷⁶

In addition to reviewing administrative actions for legality in response to complaints by citizens or entities, many administrative agencies must also go to court to enforce their coercive sanctions. Evidence shows that they have been doing this for a while, but the Administrative Coercive Measures Law, enacted in 2011, now spells out expressly that unless they possess the power to enforce their administrative sanctions directly, agencies must go to court to seek enforcement.¹⁷⁷ The court reviews the proposed administrative action to ensure that it is not arbitrary or contrary to facts in evidence.¹⁷⁸

As noted above, the FSL gives agencies a number of new standards to enforce against food producers and retailers. These standards create the potential for courts to have to review the legality of administrative action as part of an enforcement action. Research into available case databases and interviews shows that there have been no significant cases in which parties cite the FSL in this respect. There has, however, been other litigation involving the government’s actions with respect to food manufacturing entities. Consider the following case.

Company A came under investigation by a local Bureau of Industry

¹⁷⁵ Administrative Litigation Law, art. 89. There is currently some discussion now over the expansion of the scope of review of administration action to include more “abstract” actions – i.e., the normative basis for administrative action. Zhang Yinan, *Draft May Expand Suits Against Government*, CHINA DAILY, Aug. 10, 2011, http://www.chinadaily.com.cn/china/2011-08/10/content_13081491.htm.

¹⁷⁶ Although these systems involve adjudicatory practices, they are not carried out the by judicial organs of government. Therefore, they are not considered in this section.

¹⁷⁷ *Zhonghua renmin gonghe guo xingzheng qiangzhi fa* [P.R.C. Administrative Coercive Measures Law art. 46] (promulgated by the Standing Comm. Nat’l People’s Cong., June 30, 2011, effective Jan. 1, 2012).

¹⁷⁸ *Shanghai shipin yaopin jiandu guanli ju mou fenju yu mou xiaoxue* [Shanghai FDA v. X Elementary School,] (Shanghai Fengming Dist. Ct. 2009).

and Commerce (“the Bureau”) for selling lamb chops with duck meat mixed into them.¹⁷⁹ The Bureau conducted a spot inspection and then asked the vice-manager of Company A to come down to their offices and provide relevant materials, including their license and other registration, financial, and tax information.¹⁸⁰ Ultimately the Bureau concluded that Company A’s behavior amounted to a violation of the Product Quality Law, and it ordered Company A to pay a fine of approximately \$75,000.¹⁸¹ The Bureau also ordered Company A to cease production of that product and pull what it had produced from the shelves.¹⁸²

Company A applied for administrative reconsideration, requesting review of the Bureau’s ruling by the administrative authorities.¹⁸³ When that application was rejected, Company A filed suit in a people’s court alleging that the Bureau had made its decision against the weight of the evidence.¹⁸⁴ The lower court rejected the application, concluding that the facts were “clear,” the process was “fair,” and the application of the law was “accurate.”¹⁸⁵ For these reasons it refused to vacate the order of the Bureau.¹⁸⁶

On appeal, Company A again argued that the order was based on unclear and even falsified evidence.¹⁸⁷ Company A presented the product’s label, which showed “duck meat” as an ingredient, and it stated that there was no regulation prohibiting the two from being mixed together.¹⁸⁸ Company A argued that the Bureau had created its own record of facts regarding its questioning of Company A’s employees.¹⁸⁹ It also argued that the fine was unfairly calculated. The Bureau refuted these allegations.¹⁹⁰

The court ultimately accepted the Bureau’s version of the facts, noting that, although Company A had presented a label, it had presented

¹⁷⁹ Dalian shi mou shipin youxian gongsi yu Dalian shi gongshang xingzheng guanli ju [Dalian City X Food Product Company v. State Administration for Industry and Commerce,] (Dalian Interm. Ct. 2010).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

no evidence to show that the label was indeed affixed to products sold to consumers.¹⁹¹ It was reasonable to conclude that Company A's behavior had violated the provisions of the Product Quality Law against the pollution and falsification of food products, but the court presented no discussion of how it had pieced regulatory provisions together to come to this conclusion.¹⁹² For these reasons, the Bureau's order and decision were enforced.¹⁹³ The court did not discuss the meaning of the law and regulation and their application to the present facts in depth. Instead the court pointed to minor evidentiary errors that mandated dismissal of the appeal.¹⁹⁴

Another case involved the local government's curtailment of a local corporation's right to do business by ordering inspection authorities in the county not to inspect the plaintiff's meat products.¹⁹⁵ A government official had issued a directive via telephone to this effect.¹⁹⁶ After a lengthy review of the arguments of the parties and the hard evidence in the case, which clearly showed an animus towards this specific company, an appellate court ultimately reversed the trial court's order dismissing the company's complaint and ordered reconsideration of the validity of the government's action, deciding that the telephone order was a reviewable administrative action.¹⁹⁷ It is unclear how the matter was ultimately resolved.

A survey of approximately seven hundred cases brought under the ALL related to food products since the ALL's enactment shows that the majority of cases were trademark cases involving a food company.¹⁹⁸ However, the Supreme People's Court did release a compilation of the major administrative cases it had handled related to food and drug law, most of which related to the legal basis and/or jurisdiction of various agencies to levy fines or other penalties at corporations.¹⁹⁹ In short, based on this limited data, administrative litigation in this area appears to be

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *See Id.*

¹⁹⁵ Jianming shipin youxian zeren gongsi su Sihong xian renmin zhenfu [Jianming Food Company v. Order of Sihong County People's Government,], (Jiangsu High Ct. 2005).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Search conducted on CHINALAWINFO, <http://www.chinalawinfo.com> Chinese case databases on June 15, 2011. Results on file with the Author.

¹⁹⁹ FOOD AND DRUG SAFETY ADMINISTRATIVE LITIGATION, *supra* note 45, at 5-6.

aimed at policing the market for anticompetitive behavior and curbing predatory government action towards food and drug manufacturers. No cases could be located in which the enforcement of food law was called into question on a sensitive issue relating to, for example, the failure of an agency to enforce in a situation which resulted in death or bodily harm to one or more citizens.

C. *The Relevance of the Courts*

As the cases above show, the ordinary citizen may have modest success at obtaining compensation through the courts. Chinese consumers are not shy litigants when they believe they have been cheated or harmed by a company.²⁰⁰ And, although savvy public interest lawyers know that class actions are difficult, if not impossible, and the formal legal process may be less than promising, they know they can succeed in raising education and awareness by launching a court case and holding repeated press conferences to discuss their progress.²⁰¹ When their complaints are rejected, citizens can sometimes launch protests or submit a complaint against the courts through the same administrative petition system that they would use to question the action of an administrative agency.²⁰² Under pressure to avoid protests or high numbers of citizen petitions, the courts will often rehear the case, and sometimes may even change their verdict in order to avoid unwanted media or high-ranking official attention.²⁰³ At times, carefully making an issue bigger gets the government to reconsider a specific policy.²⁰⁴

Still, there is currently little evidence of judicial innovation under the FSL, and given that the Chinese judiciary's traditional role in law enforcement is generally limited, there seems to be a low probability that judges will contribute to the substantive development of food safety law. Nor does the threat of a court order or judgment appear to be growing into a significant avenue for ensuring government or corporate accountability. As Chenglin Liu has argued, the courts could prove to be valuable at generating change if they were permitted to accept civil suits, either in the form of individual suits or class actions, which hold corporations

²⁰⁰ PAUL FRENCH, *supra* note 62, at 17-23 (noting the consumer protection litigation culture).

²⁰¹ Interview by author, Beijing (2010).

²⁰² Liebman, *Populist Threat*, *supra* note 91, at 286-91.

²⁰³ *Id.*

²⁰⁴ Keith Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China*, 45 COLUM. J. TRANSNAT'L L. 114 (2007) (discussing policy reforms related to custody without repatriation after advocacy by scholars following a police abuse incident in which a student was killed).

accountable for manufacturing truly dangerous food products.²⁰⁵ However, as an unfortunate result of the constraints of the current system, desperate plaintiffs sometimes receive little to no compensation and it is difficult to achieve structural reform through litigation.

III. SOCIAL PROTEST & ENFORCEMENT

Another question is whether society has been or could be successful at shaping the enforcement of food safety provisions through advocacy. This has been covered to some extent when discussing lawsuits in the courts, which have turned out to bring only minimal to moderate progress, and it will also be covered below in the context of citizens' participation in the agency rulemaking process or in reporting on wrongdoing (whistleblowing). However, in many areas, the law has empowered individual citizens or emerging non-governmental groups in China to seek out relief or push for the law's implementation on behalf of themselves or on behalf of a greater group or class of citizens adversely affected by a particular phenomenon.²⁰⁶ In other words, citizens in China sometimes use the provisions of laws to generate protest movements of varying scale, which may be un-tethered or tangential to formal government or court process, in order to pressure the government to change its policy through a combination of shaming and threatening highly-valued social stability.

Some groups or scholars in universities have also sought to assess the implementation of the law, to research and critique its effectiveness, and to advocate for broader reform in the form of legislative or regulatory amendments. For example, a graduate student at Fudan University in Shanghai recently established a website that collects and indexes news articles related to food safety accidents that harm individuals. That effort

²⁰⁵ Chenglin Liu, *Profits Above the Law: China's Melamine Tainted Milk Incident*, 79 *MISS L. J.* 371, 416 (2009) [hereinafter Liu, *Profits Above the Law*] ("Without the possibility of consumer litigation to address food safety issues there is little incentive for milk processors to correct their problems, given their close governmental ties. Despite the judicial system's present inability to adequately address compensation issues, the ability of injured persons to file lawsuits could offer an effective mechanism for providing redress for harm caused by dangerous products and deter misguided production processes. Moreover, trial proceedings would shed light on processors' hidden but dangerous practices. Private litigation would also force milk processors 'to examine harmful practices that might otherwise receive inadequate attention.' In essence, litigation would compel milk producers to internalize the costs of doing business and take precautions long before problems arise.").

²⁰⁶ KEVIN J. O'BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* 5 (2006) (tracing "what can happen when villagers frame their claims around Communist Party Policies, state laws, and official values; solicit assistance from influential allies; and combine legal tactics with collective action to defend their 'lawful right and interests.'").

was widely reported in the Chinese press, and the website seems not to have offended the government, which engages in comparable efforts.²⁰⁷

The extent to which the government embraces or permits this type of advocacy may seem arbitrary, but it can be thought about in terms of a number of factors, *inter alia*, (1) the issue area, e.g., environmental,²⁰⁸ public health, and labor rights; (2) the track record of the group of individuals or attorneys bringing the suits; (3) the government agencies that the suit might affect, e.g., Public Security, Ministry of Health, and Ministry of the Environment; and (4) the affect on a particular locality, e.g., perceived damage to local official reputation, to local companies (economics), and to local social stability.²⁰⁹ When social popular advocacy crosses a line and becomes a threat, the government may take action to limit that advocacy. That threat of government intervention has become a limit on the implementation of the law more generally. The examples discussed in this Section illustrate that measured protests may have some success provided that the government does not view the protests as so threatening that it “cracks down” or represses the protest by violent or other coercive means. The first scenario is an example of how the enactment of a law generates the consciousness of a right amongst members of the general public and motivates them to enforce that right on their own, rather than going through government institutions. The second scenario is an example of how advocacy can cross a line and generate a response from government to curb those individuals who are seeking to enforce their rights under the law.

In April of 2010, approximately one year after the FSL was enacted, an activist group posted the following story on its website. Two men, Mr. Zhang and Mr. Ma went into a Walmart in front of the Xiamen

²⁰⁷ *Fudan yanjiu sheng gongbu zhongguo shipin anquan baogao tongyi shuju chumu jingxin* [Fudan Graduate Student Releases Food Safety Report, Statistics and Data are Profound], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], available at http://news.xinhuanet.com/local/2011-06/20/c_121556153.htm (last visited Dec. 19, 2011).

²⁰⁸ HUMAN RIGHTS DICTIONARY: INTERNATIONAL, MAINLAND CHINA, HONG KONG & TAIWAN 241 (Huang Mo, et al. eds., 2007) (“Although the Chinese government exerts strict control over non-governmental organizational activities, between around 1995 and 2005 the government was increasingly lenient toward a small number of environmental organizations.”).

²⁰⁹ In his book *Water Warriors*, Andrew Mertha explores three case studies in which popular activism was applied to hydraulic dam issues in China. He argues that the “fragmentation” of the policy process in the PRC has allowed for additional political space to emerge for scholars and NGO activists. ANDREW C. MERTHA, *CHINA’S WATER WARRIORS: CITIZEN ACTION AND POLICY CHANGE* 1-11 (2008). While any in-depth discussion of the factors that make up the political space for pluralism in China are beyond the scope of this Article, and the list above is certainly not meant to be exhaustive, but prior issues have shown that what is acceptable is very context specific.

train station. While shopping, by chance,²¹⁰ they bought a carton of tea that appeared to be a “Three Without Product,” meaning that the tea was not labeled with the manufacturing company’s name, its address, or its phone number.²¹¹ This practice is prohibited by Article 42 of the FSL.²¹² Upon purchasing and opening the product, they discovered that the inner bag was labeled in a way that was also clearly barred by the Advertisement Law – the product was advertised with “absolutist” language about its perfection.²¹³ Proceeding to the local bureau of Industry and Commerce, Mr. Zhang and Mr. Ma requested that the agency initiate an investigation of these products.²¹⁴ After speaking to people there, they convinced the inspectors to look into the Walmart products.²¹⁵ The inspectors did so, and ultimately seized the products. The story documents this with pictures of the seized goods.²¹⁶

The next day, the two men phoned Walmart and demanded a refund for the defective product as well as ten times the price of what they paid in punitive damages according to Article 96 of the FSL.²¹⁷ When the Walmart executive that they spoke to refused, they made signs and banners and staged a protest in front of the Walmart indicating that it sold “Three Without Products,” or substandard food products.²¹⁸ Although Walmart refused to compensate the individuals in this case, it would not be out of the realm of possibility for a company or a government agency to do so. In other cases unrelated to food safety, protest has produced

²¹⁰ *Walmart Sells Three “Without Products” and Refuses Apology and Compensation*, CT 315, <http://www.ct315.com/Article/ShowArticle.asp?ArticleID854> (last visited July 17, 2011).

²¹¹ *Id.*

²¹² *Id.* See also Food Safety Law, art. 42 (“Article Forty-Two: The outside of prepackaged food products shall have a label. The label shall contain the following items: (1) The name of the product, the specifications, the finished content, and the date of processing or production; (2) A listing of the ingredients or mixed materials; (3) the name of the processor, its address, and its contact information; (4) the expiration date; (5) the standard number for the product; (6) the storage conditions; (7) the common names of all additives used in accordance with national standards (8) the license number of the processor; (9) other information required by law, regulations or food safety standards.”)

²¹³ Advertisement Law, art. 7. *Wall Mart Sells Three “Without Products” and Refuses Apology and Compensation*, *supra* note 210.

²¹⁴ *Walmart Sells Three “Without Products” and Refuses Apology and Compensation*, *supra* note 210.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

results.²¹⁹ It also appears that no police action was taken against the men to stop their protest. While Zhang and Ma's behavior did not result from any failure of the government itself, and might even be viewed by some as opportunistic, the use of protest and reputational shaming in order to enforce legal rights is becoming an increasingly common phenomenon in the PRC.²²⁰ The practice has been observed in Western legal circles as a failure of formalistic legal processes in the courts, but it has also been touted as a success of the law itself as a tool for the restraint of corporate and government interests.²²¹

Xi Chen similarly observed the emergence of opportunistic protests or troublemaking in China in order to achieve demands.²²² In utilizing this technique, disaffected groups attempt to lobby the government or obtain resources by combining protest (through, for example, the peaceful visits of a group of petitioners to government offices) with elements of moderation, such as a legal basis or some message that the discontented group does not wish to subvert or severely challenge the government.²²³ Although Zhang and Ma were not seeking resources from the government, their protest may be characterized as opportunistic in the way that Chen Xi describes it.²²⁴ They combined elements of moderation – their legal basis, their report to the government, and their phone call to management – with elements of agitation.²²⁵ The provisions of the FSL have the potential to shape the expectation of the treatment that citizens should be receiving from the government and from corporations, and therefore may continue to serve as the basis for opportunistic protests.

Protests entail great risks and costs, as exemplified by the story of the food safety activist Zhao Lianhai. Zhao was an advertising executive and “former editor of a newspaper specializing in food and product

²¹⁹ See, e.g., Benjamin Liebman & Curtis Milhaupt, *Reputational Sanctions in China's Securities Markets*, 108 COLUM. L. REV. 928, 931-35 (2008).

²²⁰ Xi Chen, *Between Defiance and Obedience: Protest Opportunism in China*, in GRASSROOTS POLITICAL REFORM IN CHINA 253, 256-57 (Elizabeth J. Perry & Merle Goldman, eds. 2007).

²²¹ Cf. ELIZABETH ECONOMY, *THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA'S FUTURE* 132 (2004) (quoting an unnamed scholar, “The Party knows from its own experience that it is possible to start a mass movement capable of overthrowing a government from just a small group of about a dozen people. As such, control is vital.”)

²²² Xi Chen, *supra* note 220, at 220, 276-281.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

safety.”²²⁶ Shortly after he quit that job, however, his young son was the victim of the tainted baby formula. After drinking the milk contaminated with melamine, Zhao’s little boy developed kidney stones, at age three.²²⁷ Beginning with some brief inquiries online Zhao ultimately established a website for the *jieshi baobao*, or the “Stone Babies.” Zhao originally convinced parents who wanted to petition the government to remain calm.²²⁸ Keeping victims calm and focused was part of the impetus for starting his website.²²⁹ Thousands of parents signed up for the site, and his online endeavor grew into more formalized advocacy – e.g., seeking heavier sentences for those involved with the milk scandals and protesting the decision of the authorities to bar concerned parents from attending the criminal trials of the Sanlu milk company executives.²³⁰ Zhao also advocated for adequate compensation for the parents through the courts.²³¹

Ironically, for someone who began by urging parents not to officially challenge the government through a petition, the police nevertheless arrested and imprisoned Zhao on charges of subversive activities, specifically provoking quarrels and making trouble.²³² After being convicted and sentenced to two and a half years in prison,²³³ he began a hunger strike in jail, which he intended to continue until the verdict was overturned.²³⁴ However, in a reversal which some argued was based on the threats of authorities against his family, Zhao fired, or was successfully coerced into firing, his attorneys, and he quieted down.²³⁵ He relinquished his right of appeal and was sent home on medical parole, where he continued to be watched.²³⁶ Zhao’s efforts seemed to be outside

²²⁶ Josephine Ma, *Dream of Court Turns Sour for Milk Activist*, SOUTH CHINA MORNING POST, Apr. 1, 2010, at 2.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Ariana Eunjung Cha, *Grieving Parents Gain Clout in China; Party Steps Lightly in Wake of Disasters*, WASH. POST, Mar. 28, 2009, at A01.

²³¹ *Id.* See also *Parents’ Fury Over Melamine Sentences*, SOUTH CHINA MORNING POST, Jan. 23, 2009.

²³² Priscilla Jiao & Fanny W.Y. Fung, *Milk Activist Zhao in Beijing Hospital on Medical Parole*, SOUTH CHINA MORNING POST, Jan. 11, 2011, at 5.

²³³ Isabel Hilton, *Under This Kafkaesque ‘Rule by Law’ Ai Weiwei Is Guilty: A Surreal Distortion of the Judiciary Means Those Who Seek to Protect Their Fellow Citizens Are Now Most at Risk in China*, THE GUARDIAN, Apr. 8, 2011, at p. 36.

²³⁴ Minnie Chan, *Activist Firm on Hunger Strike, Lawyer Says*, SOUTH CHINA MORNING POST, Nov. 13, 2010, at 7.

²³⁵ *Id.*

²³⁶ *Id.*

the zone of tolerance that the government has for these activities.²³⁷ Other lawyers or parents who looked into compensation for this scandal, met with similar threats from the government.²³⁸

Part of the issue with Zhao's activities was that he was demanding lawsuits when the government wanted to deal with the crisis – a very public crisis of significant size and severity – administratively. The government required that Sanlu and other dairy companies at fault pay money into a compensation fund that came to be managed by the China Life Insurance Company.²³⁹ This mechanism for compensating the victims of natural and public health disasters has gained popularity amongst PRC academics and governmental officials. Indeed, more literature has appeared advocating for further use of such administrative compensation funds for food safety disasters in the future.²⁴⁰

According to news reports, the families of the children affected by the melamine tainted milk received an initial payment to cover their child's medical expenses and the remainder of 200 million RMB was deposited into the current fund to compensate them for additional problems that their children may encounter as they grow.²⁴¹ For the initial payout, parents whose children did not have to undergo surgery received 2000 RMB in compensation, and parents whose children did have to undergo surgery received 30,000 RMB in compensation.²⁴² Many of the parents dispute the claim that the initial fund have been generous enough to dispense with all of the medical costs of their young children, as well as doubt that there would be funds sufficient to cover their expenses in the future.²⁴³ At one point a high official in the Chinese government noted publicly that parents unhappy with the settlement with the dairy companies could seek compensation through the court system, but it is

²³⁷ Keith Richburg, *China Jails Man for Activism After the Tainted Milk Scandal*, WASH. POST, Nov. 11, 2010, at A10 (“Zhao’s attorneys and others said the sentence appeared to indicate that China’s ruling Communist Party remains intolerant of critics – including AIDS activists, environmentalists, and others well outside the political realm – and that it will be particularly tough on those who use the Internet to organize others around a cause.”).

²³⁸ Ariana Eunjung Cha, *supra* note 230. See also Barbara Demick, *Parents’ Voice Stifled in China Milk Issue*, L.A. TIMES, Jan. 3, 2009, at 3.

²³⁹ *For Chinese, Tainted Milk Compensation Remains Elusive*, NBC NEWS, June 2, 2011, http://behindthewall.msnbc.msn.com/_news/2011/06/02/6753805-for-chinese-tainted-milk-compensation-remains-elusive.

²⁴⁰ Sun & Wang, *supra* note 143, at 16.

²⁴¹ Liu Linlin and Zhang Han, *Melamine Victims Doubt Aid Figures*, GLOBAL TIMES, June 9, 2011, <http://business.globaltimes.cn/industries/2011-06/663274.html>.

²⁴² Ma, *supra* note 226.

²⁴³ Liu, *Profits Above the Law*, *supra* note 205.

unclear whether the courts accepted many suits, much less produced significant additional compensation.²⁴⁴

This negative reaction to Zhao's work may also be in part due to the government's own actions or omissions in exacerbating the milk scandal. It has been revealed that the media was ordered to keep quiet in 2008 about the milk issues in order not to dampen the Olympic mood.²⁴⁵ Moreover, the scandal deepened when, in 2009, it was revealed that melamine tainted milk was back because companies had been recycling and selling the recalled tainted milk from 2008.²⁴⁶

Zhao Lianhai's case illustrates the existence of a boundary of how far the government will let non-governmental figures and organizations go in advocating for the enforcement of the law and holding corporations accountable for creating defective food products. Mr. Zhao arguably crossed two boundaries: first, accumulating such a large group of followers and rallying them around a common cause as he did touches on the regime's sensitivities about social stability;²⁴⁷ and second, the government's concerns that public health incidents can have rippling economic effects gargantuan enough to destroy a large company like Sanlu if it is pelted with compensation demands and bad press.²⁴⁸

IV. REGULATORY INNOVATION

Although the courts play some role in adjudicating the food tort and administrative law cases, the FSL does not represent a significant innovation in their role, particularly when compared with the innovations related to the administrative agencies involved in this area. Unlike the courts and society, the bureaucracy develops new institutions, new theories, new definitions, and new tools of enforcement with less resistance from the Party. Agencies are given greater political latitude to interpret the law and be creative in enforcement. This Section is not concerned with the question of "why" agencies receive more political space, rather it analyzes one of the regulatory innovations under the FSL with the goal of determining some of the ways in which effective implementation might occur despite the macro constraints on the rule of law described in Section II.

²⁴⁴ Vivian Wu, *Top Court's Official's Vow Gives Hope to Families of Milk Scandal Victims*, SOUTH CHINA MORNING POST, Mar. 4, 2009, at 7. *See also*, *First Lawsuit in China Milk Scandal Delayed*, AFP, Dec. 8, 2009.

²⁴⁵ Tina Wang, *Olympics Led to Milk Scandal Hush-Up Some Say*, FORBES, Sept. 17, 2008, http://www.forbes.com/2008/09/17/china-milk-scandal-markets-equity-cx_tw_0917markets03.html.

²⁴⁶ Frank Ching, *Victims Two Ways in China*, THE GLOBE, Feb. 17, 2010, at A21.

²⁴⁷ ECONOMY, *supra* note 221, at 121.

²⁴⁸ *See* Liu, *Profits above the Law*, *supra* note 205, at 3-5.

Tracing the history of administrative agencies²⁴⁹ in China since the establishment of the PRC reveals three trends relevant to the issues addressed here. First, the agencies have gone from a set of organizations once governed heavily by Communist ideology and, often internal, Party policy to ones that are now governed to a much greater extent by publicly available laws, regulations, and other rules. Second, there has been an evolution from a large number of agencies, like the Ministry of Electricity and the Ministry of Railways, that controlled major sectors of the economy to a much smaller number that regulate sectors with private actors, or private-acting entities.²⁵⁰ Third, a more recent trend has been the change from reliance on the typical techniques of coercive enforcement and monetary penalties to a newer reliance on softer regulatory measures, such as privatization and private sector monitoring, risk analysis, public participation in rulemaking,²⁵¹ transparency measures, and whistleblower incentives.²⁵²

Related to the first trend, in stark contrast to the limits placed on judicial interpretation of law, administrative agencies in China are a rarely acknowledged source of abundant legal interpretation of national laws.²⁵³ The agencies issue a great deal of administrative rules, some made through formal procedures, including notice and comment, and decisional documents (of less formal rank) typically referred to as “normative

²⁴⁹ A concise discussion of the administrative and regulatory dimension of a law like the FSL in China is a challenge because the administrative bureaucracy, from central to local, includes such a complex web of relationships and institutions, some that date back to the founding of the PRC and some farther back than that. Bureaucratic politics in China is an illuminating field of study for those who wish to truly understand the opportunity structure in which China’s agency officials operate. *See, e.g.*, KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* chs. 6-7 (2004) (discussing the view from the outside, the “organization of political power and its consequences” and the “view from the inside” regarding the Party’s control over the government.); *see also* KENNETH LIEBERTHAL & MICHAEL OKSENBURG, *POLICYMAKING IN CHINA: LEADERS, STRUCTURES, AND PROCESSES* 63-74 (1988). This Section discusses the ultra-outside view of the interaction between bureaucrats and the laws they must follow and the administrative rules and documents they make to implement those laws.

²⁵⁰ Randall Peerenboom, *More Law, Less Courts: Legalized Governance, Judicialization, and Dejudicialization in China*, in *ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES* 175-85 (Tom Ginsburg & Albert H.Y. Chen, eds., 2008) (discussing the legalization of governance and limited deregulation and privatization of government functions).

²⁵¹ Jamie P. Horsley, *Public Participation in the People’s Republic of China*, available at http://www.law.yale.edu/documents/pdf/Intellectual_Life/CL-PP-PP_in_the_PRC_FINAL_91609.pdf (last visited Aug. 19, 2011).

²⁵² *See* Ching, *supra* note 246.

²⁵³ *See* Jerry Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U. TORONTO L. J. 497, 498-502 (2005).

documents.” The rules and normative documents can define terms undefined in the law, allocate responsibility where the law does not, and structure implementation systems.²⁵⁴ Despite the existence of judicial interpretations by the Supreme People’s Court, administrative regulations are perhaps the greatest source of analogies to help interpret and decipher vague terms and concepts in new laws and regulations. Finally, new cutting-edge policies can emerge through experimentation by the provinces, with different local agencies taking more liberal or conservative approaches to an issue, which the central government ultimately resolves through regulations of its own.²⁵⁵ As noted above, the Chinese state has not developed a meaningful channel of judicial review for these administrative regulations and rules, nor is there another strong and consistent outside check on agency power, whether in the form of another government institution or citizen watchdog group.

Unfortunately, comprehensive studies on how Chinese administrative agencies interpret the law and how they approach its implementation are not yet prominent. For this reason, it sometimes seems that in studying Chinese law scholars forget that the administrative bureaucracy through rulemaking has a chance to interpret the law, learn new regulatory techniques and internalize them, and seek consultation with outside experts.

Related to the third trend of implementing new theories of public management, those reforming the bureaucracy in China have studied movements in administrative reforms in the U.S. and other countries.²⁵⁶ For example, agencies have explored customer-service oriented techniques as well as those that improve the quality and value of services provided to the public. Shenzhen and Hunan are two provincial-level units that have instituted major efforts to improve the quality of government services.²⁵⁷ The Chinese government has also expressed interest in public management techniques, such as “the New Public Management,” “Reinventing Government” and networked government, in which the government relies upon and manages its relationship with private sector

²⁵⁴ See LIEBERTHAL & OKSENBERG, *supra* note 249, at 63-74 (discussing implementation systems with respect to environmental law).

²⁵⁵ See Douglas B. Grob, *Legalizing the Local State: Administrative “Legality” at China’s Grassroots*, in CHINESE JUSTICE CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 91-100 (2011).

²⁵⁶ Ma Yingjuan, ZHENGFU JIANGUAN JIGOU YANJIU [ON GOVERNMENT REGULATORY AGENCIES] 79 (2006) (citing sources from Western Europe and the U.S.)

²⁵⁷ See, e.g., Hunan sheng zhengfu fuwu guiding [Hunan Provisions on Government Services] (promulgated by the Hunan People’s Government) LAWBOOK.COM (last visited Dec. 12, 2011).

organizations and companies in order to accomplish public goals.²⁵⁸

Finally, agencies have started to incorporate regulatory techniques, which place a greater emphasis on problem solving as opposed to designing and following one-size-fits-all procedures.²⁵⁹ In his book, *The Regulatory Craft*,²⁶⁰ Malcolm Sparrow emphasizes three key elements of progressive regulatory reform in the U.S.: a “focus on results,” “adoption of a problem solving approach,” and “investing in collaborative partnerships.”²⁶¹ The second element – problem solving – includes using risk-assessing strategies in order to allocate key resources and devise a “tailor-made” solution for a problem.²⁶² Sparrow cites Herman Goldstein’s work on *Problem-Oriented Policing* and applies it to the work of administrative agencies. Goldstein examines examples of local policing in which the police did not attempt to design “procedurally correct” solutions, but instead looked for patterns of activity and planned solutions for each situation accordingly.²⁶³ Professor Goldstein states that:

[t]he approach calls for the police to take greater initiative in attempting to deal with problems rather than resign themselves to living with them. It calls for tapping police expertise. It calls for the police to be more aggressive partners with other public agencies. Focusing on problems, because it is a practical and concrete approach, is attractive to both citizens and the police. By contrast, some of the most frequent proposals for improving police operations, because they do not produce immediate and specifically identifiable results, have no such attraction. A problem-oriented approach, with its greater appeal, has the potential for becoming a vehicle through which long-sought organizational change might be more effectively and more rapidly achieved.²⁶⁴

²⁵⁸ Interview by author, Shanghai (2011).

²⁵⁹ See *infra* Section IV.A text and accompanying notes.

²⁶⁰ MALCOLM K. SPARROW, *THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE* 89 (2000) (discussing regulatory innovations in which various federal and state agencies created “dynamic systems or mechanisms for identifying high-risk areas, quantifying them, comparing them, selecting focus areas, and then managing them on a continuing basis”).

²⁶¹ *Id.* at 100.

²⁶² *Id.*

²⁶³ *Id.* at 71-73.

²⁶⁴ Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, in 25 *CRIME & DELINQUENCY* 236, 257-58 (1979).

Sparrow notes that one way to achieve better regulatory enforcement is to create a process and an infrastructure that allows bureaucrats to apply problem-solving methodologies.²⁶⁵ Sparrow focuses in particular on problem-oriented solutions in federal and local agencies in the form of risk control or risk management.²⁶⁶ The introduction of this type of problem-solving methodology into Chinese food safety regulation, in part in the form of risk-based determinations, would be a positive development, and it could be a departure from typically less effective methods in China.²⁶⁷

To put this into the Chinese context, in earlier eras of Chinese regulatory development and up to the present day, it has consistently been the case that agencies often make procedural refinements to more general provisions in law, creating additional layers concerning who does what, where, when, and how.²⁶⁸ These procedures were and are intended, to some extent, as a vehicle to maintain discipline amongst government officials where ideology has disappeared and left behind a dangerous vacuum.²⁶⁹ However, the practice of adding procedures and rules to an area has not served the bureaucracy in China well, at least not in the area of food safety, wherein the bureaucracy has consistently failed to prevent the spread of food borne illness issues or to resolve those situations quickly. It is widely agreed in China that the officials have not done enough to correct food safety problems.²⁷⁰ A departure from this procedural rigidity to more flexible practices of understanding, communicating and creatively managing public health problems are, therefore, worthy of future observation.

²⁶⁵ *Id.*

²⁶⁶ SPARROW, *supra* note 260, at 214-15.

²⁶⁷ The third element, forming key partnerships, also has potential under the FSL, as it encourages the development of industry associations, some forms of consumer participation, and contracting out to private laboratories. Sparrow articulates the first element as a focus on results, which is a rejection of traditional measures of outputs and productivity and a search for more meaningful indicators of progress, particularly measurable effects in specific problem-areas, but has yet to emerge in China in a recognizable form. SPARROW, *supra* note 260, at 90.

²⁶⁸ Zhonghua renmin gonghe guo shipin anquan fa shishi xize [P.R.C. Food Safety Law Implementation Provisions] (promulgated by the State Council, July 20, 2009).

²⁶⁹ LU, *supra* note 56, at 15 (showing discontent with official action on food safety in China).

²⁷⁰ *Chinese Experts Blame Supervisory Agencies for Food Safety Problems*, *supra* note 17 (showing that officials have not done enough to correct the food safety problem).

A. *The Promise of Risk Assessment*

The FSL has generated a considerable number of administrative rules and regulations in just two short years of existence.²⁷¹ One of the great number of regulatory undertakings under the FSL is the use of risk-based analysis²⁷² to track problems and make decisions regarding the size and imminence of threats. Experts around the world acknowledge that risk analysis has a number of utilities.²⁷³ It helps the government set standards to decide the maximum daily tolerance for certain food additives, and it can assist with assessing the threats associated with microbial pathogens and chemicals. Once the severity of a threat has been assessed, it can be compared with the magnitude of other threats in order to allocate scarce resources and resolve problems.²⁷⁴ The World Health Organization

²⁷¹ In addition to other regulations cited in section V and throughout this paper that have emerged since the FSL was enacted in the winter of 2009, there have been other major legislative undertakings. *See, e.g.*, Chukou shipin shengchan qiye beian guanli guiding [Food Export Production Enterprises Registration Regulations] (promulgated by Admin. Quality Inspection Supervision and Quarantine 2011); Shipin anquan xinxi gongbu guanli banfa [Food Safety Information Publication Regulations] (promulgated by Ministry of Health 2011); Shipin jianyan jigou zizhi rending guanli banfa [Accreditation Regulations for Food Inspection Institutions] (promulgated by Admin. Quality Inspection, Supervision and Quarantine, 2010); Shipin shengchan xuke shencha tongze [Food Production Licensing Investigation Principles] (promulgated by Ministry of Health, 2010); Tielu yunying shipin anquan guanli banfa [Measures on Food Safety Shipping Via Rail] (promulgated by State Administration for Industry and Commerce, 2010). Food Safety Law Implementation Provisions, arts. 1-15. These add little to the provisions in the FSL and will likely be revised soon. Interview by author, Shanghai (2011). *See also* William P. Alford & Benjamin L. Liebman, *Clean Air, Clear Processes? The Struggle Over Air Pollution Law in the People's Republic of China*, 52 HASTINGS L. J. 703, 727 (2001) (noting how implementing regulations and other specific regulations issued after an NPC law can create opportunities to revisit issues struggled with during the law's drafting).

²⁷² Risk assessment is not a brand new concept in Chinese law. The term has been employed in other contexts, such as public security and finance for approximately five or six years. In the public health realm, it was employed in the Animal Quarantine Law, the Disaster Remediation Law, and, more importantly for these purposes, the Agricultural Product Quality and Safety Law, which was enacted in 2006. The Regulations enacted under the Food Safety Law, however, appear to be among the first comprehensive, formal statements about what risk assessment in the public health context, substantively, should mean. *Cf.* dongwu weisheng fengxian pinggu zhuanjia weiyuanhui changzhang [Bylaws of the Animal Hygiene Risk Assessment Expert Commission] (promulgated by Ministry of Agriculture 2009) (setting forth procedures but not articulating the technical principles according to which risk assessment is to be conducted).

²⁷³ Michael R. Taylor & Sandra A. Hoffman, *Redesigning Food Safety: Using Risk Analysis to Build a Better Food Safety System* (2001), available at <http://www.rff.org/documents/RFF-DP-01-24.pdf> (last visited October 28, 2011).

²⁷⁴ *Id.*

(“WHO”) notes: “When used to establish food standards and other food control measures, risk analysis fosters comprehensive scientific evaluation, wide stakeholder participation, transparency of process, consistent treatment of different hazards and systematic decision-making by risk managers.”²⁷⁵ And risk analysis may prompt the adoption of more formal procedures related to the technique of cost-benefit analysis for public health agencies managing food safety in China. This would allow those agencies to focus not only on the harm of foodborne illness, but also on balance between the costs of enforcement and the benefits to be gained from it.²⁷⁶

The WHO calls this risk-based technique “food safety risk analysis.”²⁷⁷ Typically, food safety risk analysis consists of three stages – risk assessment, risk communication, and risk management.²⁷⁸ The 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.²⁷⁹ In the Chinese system, however, the government employs the concept of “risk” in two food safety-related processes: risk monitoring and risk assessment. Risk monitoring appears to be a more long-term tracking of data on a wide variety of foodborne contaminants. Risk monitoring is not defined in the FSL,²⁸⁰ but in its Food Safety Risk

²⁷⁵ WORLD HEALTH ORG., FOOD SAFETY RISK ANALYSIS: A GUIDE FOR NATIONAL FOOD SAFETY AUTHORITIES (2006).

²⁷⁶ David M. Driesen, *Distributing the Costs of Environmental, Health & Safety Protection: The Feasibility Principle, Cost-Benefit Analysis and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1, 48 (2005) (“Cost-benefit analysis is a form of analysis. Most scholars recommending CBA [cost-benefit analysis] for environmental, health, and safety regulation argue that agencies should “consider” CBA. They generally say little or nothing about how precisely CBA should influence outcomes under technology-based provisions (or any other statutory provisions). A mandate to consider CBA does not provide any guidance about the content of decisions. An agency can, in principle, consider CBA, and conclude that the duty to protect public health is paramount and the costs should be ignored. Conversely, it could conclude that the existence of any cost at all should wholly defeat any environmental regulation.”). Cost benefit analysis is alive and well in China. A search for articles in a database for the term cost-benefit analysis (*chengben xiaoyi fenxi*) reveals 47 pages of results.

²⁷⁷ *Compare Risk Analysis at the FDA*, U.S. FOOD AND DRUG ADMIN., <http://www.fda.gov/Food/ScienceResearch/ResearchAreas/RiskAssessmentSafetyAssessment/ucm243439.htm> (last updated Aug. 9, 2011).

²⁷⁸ *Id.*

²⁷⁹ SPARROW, *supra* note 260, at 6.

²⁸⁰ The FSL requires that risk monitoring and risk assessment be employed in making regulatory determinations regarding prevention and remediation of food safety issues. The FSL gives some general guidance on how both techniques are to be incorporated into the regulatory process, but it does not define these terms conceptually or procedurally. On a basic level it requires that the government utilize scientific experts

Monitoring Administrative Provisions (Trial) (“Risk Monitoring Regulations”) the Ministry of Health (“MOH”) has defined the term as “the systematic and sustained gathering of monitoring data and related information regarding food borne illness, food pollution, and harmful contaminants in food products and the implementation of integrated analysis and immediate reporting activities.”²⁸¹ In order to implement the concept defined here, the Risk Monitoring Regulations require that the local branches of public health agencies develop plans to enforce against contaminants that threaten to cause food poisoning incidents.²⁸² There is limited information available about these plans and how they are compiled on the basis of data, whether they are amended, and whether they have been evaluated post-hoc to test their effectiveness in preventing food safety disasters.

In addition, the Risk Monitoring Regulations are complimented by the Food Safety Risk Assessment Administrative Provisions (Trial) (“Risk Assessment Regulations”) that are meant to cover contaminants that present a more specific problem.²⁸³ Although these regulations do not comprehensively define the concept of risk assessment, they do introduce and define the concepts of “hazard,” “hazard identification,” “hazard characterization,” “exposure assessment,” and “risk characterization.”²⁸⁴ These are the principles and definitions according to which risk assessment is to be conducted. The Risk Assessment Regulations state:

Hazard: Refers to microbes, chemicals, physical elements existing in food products or food states that have the potential to negatively impact human health.

Hazard identification: According to scientific data and literature such as from epidemiological studies, animal testing, in vitro testing, and structure-activity relationships, confirming that human exposure leads to adverse health consequences, the likelihood for adverse health consequences, and the group of humans or specific sector at

and communicate effectively the results of an assessment that reveal a food product to be unsafe. Agencies are required to report this to each other and to the public. Food Safety Law, ch. II.

²⁸¹ Shipin anquan fengxian jiance guanli guiding (shixing) [Food Safety Risk Monitoring Administrative Provisions (Trial)] art. 2 (promulgated by Ministry of Health, Nov. 2, 2010).

²⁸² *Id.* arts. 4, 16.

²⁸³ Shipin anquan fengxian pinggu guanli guiding (shixing) [Risk Assessment Administrative Regulations (Trial)] arts. 3-5 (promulgated by Ministry of Health, Sept. 9, 2010) [hereinafter *Risk Assessment Regulations*].

²⁸⁴ *Id.* art. 19.

risk.

Hazard characterization: The description of instances of adverse health effects or of quantitative data, on the basis of animal testing, clinical research, and epidemiological research that confirms the relationship between the dose of the hazard and the adverse reaction and the mechanisms of the affects. If possible for toxic hazards, a safe tolerance level for human ingestion should be established.

Exposure assessment: The description of the path through which the hazard enters the human body, estimating the ingestion level that different groups of people will have of the hazard. According to the level of the hazard present in food and the amount of the food purchased, the first step is estimating the total intake level from meals, while at the same time considering non-edible paths by which the hazard could enter the body, comparing the overall intake level into the human body with the safe intake level.

Risk characterization: On the basis of the hazard identification, the hazard characterization, and the exposure assessment, conducting an overall analysis of the risk of the adverse consequences to human health produced by the harm and the degree of those consequences, describing and explaining uncertainties in the course of the risk assessment process.²⁸⁵

The government has formulated a Risk Assessment Expert Commission (“Commission”) to carry out these stages of analysis.²⁸⁶ It is striking that, although the Risk Assessment Regulations do allocate considerable power to the MOH, they grant a fairly substantial amount of responsibility to the Commission.²⁸⁷ The Commission consists of scientists from prestigious public health schools from around China and official representatives from sections of the government, such as the MOH,²⁸⁸ and emerging local risk assessment commissions in localities

²⁸⁵ *Id.* art. 19.

²⁸⁶ *Id.* arts. 4-5.

²⁸⁷ *Id.* art. 3.

²⁸⁸ *Ministry of Health Notice on the First Food Safety Risk Assessment Expert Commission*, MINISTRY OF HEALTH (Nov. 24, 2009), <http://www.moh.gov.cn/publicfiles/business/htmlfiles/mohwsjdj/s3594/200911/44735.htm>.

that are doing sophisticated food safety work have similar membership.²⁸⁹ Thus, the Risk Assessment Regulations explore a way to bring technical competencies into contact with bureaucratic interests in a way that encourages a more scientific analysis of food safety issues by the authorities.

Although general procedures for “risk communication” or “risk management” have not yet emerged, the determinations of the Commission assist in other regulatory processes. For example, the MOH has enacted regulations that require that a risk assessment be performed before new food additives are approved or old food additives are approved for new uses.²⁹⁰

Risk assessments play a role generally in the enactment of national food safety standards.²⁹¹ The National Food Safety Standards Administrative Provisions (“Standards Regulations”) call for more consultation with experts in the administrative process.²⁹² A specialized organ – the National Standards Review Commission (“Standards Commission”) – is charged with reviewing and enacting standards.²⁹³ The Standards Commission, which is composed of experts in relevant fields, is required to take into account risk assessments and risk monitoring results, and other scientific data when enacting standards.²⁹⁴ In addition, these administrative measures encourage more public participation by scientific experts and by the general public in the standard making process.²⁹⁵ The Standards Regulations give any citizen, juristic person, or organization the power to put forth a proposal for a food safety standard.²⁹⁶ This means that scientists, academics, and other emerging civil society organizations could conceivably provide important technical input where the government lacks

²⁸⁹ See Taylor & Hoffman, *supra* note 273.

²⁹⁰ Shipin tianjiqi xinpinzhong guanli banfa [Food Additive New Product Administrative Regulations], art. 3 (promulgated by Ministry of Health, 2010).

²⁹¹ Shipin anquan guojia biao zhun guanli banfa [Food Safety National Standards Administrative Provisions], art. 9 (promulgated by Ministry of Health, 2010) [hereinafter *Standards Regulations*].

²⁹² *Id.* arts. 1-10.

²⁹³ *Id.* arts. 8-9.

²⁹⁴ *Id.* Cf. Biaozhun huafa shishi xize [Implementing Provisions of the Standardization Law], art. 19 (promulgated by State Council 1990) (Aug. 10, 2011) (giving trade associations and academic and research institutions a role in the formulation of standards).

²⁹⁵ See generally Zhonghua renmin gonghe guo biao zhun huafa [P.R.C. Standardization Law] (promulgated by the Standing Comm. Nat’l People’s Congress, Dec. 29, 1988, effective Apr. 1, 1989).

²⁹⁶ Standards Regulations, art. 9.

it.²⁹⁷ Newer drafts of the general Standardization Law, which governs all standard-making in China and is scheduled for revision shortly, add public input requirements into standard-making procedures in other subject areas as well.²⁹⁸

The risk-based processes of “risk assessment” and “risk monitoring” under the FSL represent an innovation and a step forward for regulatory governance on several fronts. First, as noted, these risk-based processes are typical of Chinese regulation in that they set forth a procedure, but they are arguably atypical in that the procedure is meant to support or at least encourage a problem-solving process. The Risk Assessment Expert Commission makes a determination based on data as to the imminence of the threat, which relevant officials could then use in prioritizing goals and allocating resources. This is a departure from some of the more rigid administrative decision-making and enforcement processes in China that focus on a one-size-fits-all solution.

Risk assessment and its use in China represent something else about the development of regulation and public management as well – the idea of dealing in terms of risk means employing a flexible standard to make a determination and an acknowledgment that the system will have to endure and live with some degree of danger; this is a far cry from the modes of thinking that characterized governance in the earlier days of control by the Communist regime, which assumed that problems could be cleanly and absolutely resolved.²⁹⁹ Chinese law was often more black and white back then, calling for clear lines of right and wrong. The notion of allocating resources to the highest risk areas means that there is some degree of “wrong” that the government and society should be comfortable with. To paraphrase one administrative law scholar, China has entered an industrial era where public health risk is inevitable, but the question now is what degree of risk society can be comfortable with.³⁰⁰ While this flexibility may not be as absent from other areas of law as it used to be, it is still notable that this kind of realism is finding its way into an area of law and governance that needs help as badly as food safety.

²⁹⁷ MOH Solicits Comments on Four State Standards on Food Safety, http://www.lexiscn.com/latest_message.php?id=49432 (last visited Aug. 3, 2011).

²⁹⁸ Biao zhun hua fa (cao'an) [Standardization Law (Draft)] (2011) (text on file with author).

²⁹⁹ See Li Qiugao, *Fengxian kongzhi fazhigua yanjiu* [Research about Legislating Risk Control], 8 FAXUE ZAZHI [LAW SCIENCE MAGAZINE] 32, 34 (2011) (discussing the challenge of the nature of uncertain brought about by the need for risk control in legislation for a modern market economy, when previously law had been based on degrees of certainty).

³⁰⁰ Shen Kui, *Fengxian pinggu de xingzheng fazhi wenti* [Administrative Rule of Law Questions on Risk Assessment], CHINA FOOD SAFETY LAW (Aug. 24, 2011), <http://foodlaw.cn/lawhtml/spaqfzzz/wqh/2849.shtml>.

Risk-based food safety regulation also provides a means of strengthening the relationship between science and administrative governance. This fits with the trend of looking for better expertise and specialization in the performance of government functions or services. One of the future challenges for China will be creating the requisite degree of capacity and specialization within the bureaucracy in order to adequately manage this growing scientific expertise. In this respect, food and drug agencies are certainly not devoid of expertise in China.³⁰¹ For example, the Shanghai FDA (“ShFDA”) has managed to raise its technical competency, and engage technical, academic, and other skilled personnel without difficulty. The ShFDA is the publisher of China’s annual Blue Book on Food and Drug Safety, which collects data and articles. It sends its personnel abroad to various institutions to research the issues confronting them.³⁰² As a result of these and other programs, that organ has earned a good reputation both internationally and domestically.³⁰³ Of its personnel, 14.98 percent have a master’s degree, 1.15 percent have a PhD, and 74.98 percent have university degrees.³⁰⁴ These qualities make the agency better at understanding the complex problems that arise in the food and drug areas and, provided that other procedures are sound, better at dealing with those problems.³⁰⁵ More attention should be paid to the developing capacity and expertise in the bureaucracy to manage food safety issues.

Agencies must ensure that the risk analysis process is designed to guarantee that expert participants are ethical, neutral, and reasonable in

³⁰¹ STEPHEN GOLDSMITH & WILLIAM E. EGGERS, GOVERNING BY NETWORK: THE NEW SHAPE OF THE PUBLIC SECTOR 157-58 (2004).

³⁰² See, e.g., SHANGHAI SHI SHIPIN YAOPIN ANQUAN YANJIU ZHONGXIN [SHANGHAI FOOD AND DRUG SAFETY CENTER], SHIPIN YAOPIN YU JIANGUAN ZHENGCE YANJIU BAOGAO [REPORT ON FOOD AND DRUG SAFETY AND REGULATORY POLICIES] (2010).

³⁰³ See *Food Safety a Priority as Shanghai Officials Get Ready for Expo*, PEOPLE’S DAILY, Dec. 25, 2009, <http://english.people.com.cn/90001/90782/90872/6852527.html>.

³⁰⁴ See SHANGHAI SHI SHIPIN YAOPIN JIANDU GUANLI JU NIANBAO 5-9 (2009 NIANDU) [2009 ANNUAL REPORT OF SHANGHAI MUNICIPAL FOOD AND DRUG ADMINISTRATION] (Mar. 2010) (discussing plans for World Expo food safety) [hereinafter *SHANGHAI ANNUAL REPORT*].

³⁰⁵ Shanghai is currently in the process of forming its own risk assessment commission. *Guanyu dui 2011 nian shanghai shi shipin anquan fengxian pinggu ni lixiang xiangmu jinxing gongshi de tongzhi* [Public Notice of the Establishment of a Risk Assessment Project in Shanghai], SHANGHAI.GOV (July 5, 2011), <http://www.shanghai.gov.cn/shanghai/node2314/node2319/node12344/u26ai28086.html> (listing the names of the risk assessment expert commission members, who come from academia, the ShFDA’s research institute and the various divisions of the ShFDA itself).

their determinations. But officials should respect the autonomy of the scientific process and accept its results, despite the fact that these results might be perceived as damaging an agency's reputation. It is not easy to be an apolitical scientist or public health expert in China. Jiang Yanyong, the doctor who reported on SARS to the government, discovered this when he ultimately found himself under house arrest.³⁰⁶ Another example of this phenomenon can be seen in the measures regulating pharmaceutical drugs or the healthcare profession, which place limits on the professional judgment of doctors.³⁰⁷ There is a lack of trust in the ethical behavior of doctors in China, partly because doctors have been known to prescribe medicine recklessly in order to earn extra money.³⁰⁸ Abuses of power by doctors have caused regulators to crack down on medical ethics by increasingly tailoring laws to alter the financial incentives that lead Chinese physicians astray.³⁰⁹ There may at times be a similar reason for distrust in the food regulation area, particularly when scientists have ties to companies.³¹⁰

Science and the scientific process have limits,³¹¹ but scientific expertise and bureaucratic management processes arguably have the potential to balance each other's weaknesses if the government can design the correct framework for interaction. Donald Elliott articulates the relationship between science and the administrative process:

[w]hen the system works properly, good science is a chorus
of independent expert voices that come together with

³⁰⁶ Melinda Liu, *Woes of a Do-Goooder*, NEWSWEEK, Oct. 18, 2004, at 49 ("In April 2003 Dr. Jiang Yanyong became a Chinese folk hero after disclosing the true extent of Beijing's SARS epidemic and exposing a government cover-up. The retired Army surgeon, who is one of China's best-known antigovernment critics, surely saved lives with his alert; indeed, his name was even bandied about this month as a contender for the Nobel Peace Prize. But Jiang, 73, wasn't exactly rewarded for his effort. After a seven-week detention this summer, the whistle-blower remains under a loose form of house arrest – unable to leave his residential compound without permission. Three weeks ago Jiang was permitted to leave home and enjoy a meal in public with relatives and friends. It was his second outing in a matter of days.").

³⁰⁷ Jiangxi sheng yiliao jigou chuanglin heli yongyao guanli banfa (shixing) [Jiangxi Province Interim Administrative Measures on Reasonable Pharmaceutical Drug Use at Medical Treatment Clinics] (promulgated by the Health Bureau of Jiangxi Province 2005).

³⁰⁸ Interview by author, Beijing (2011).

³⁰⁹ Ryan Leonard, *The Working Lives of Chinese Physicians*, 2009-2010 PENN HUMANITIES FORUM ON CONNECTIONS, at 102-03 (Apr. 1, 2010), available at http://repository.upenn.edu/cgi/viewcontent.cgi?article=1010&context=uhf_2010.

³¹⁰ See Shen Kui, *supra* note 300.

³¹¹ See *Id.*.

sufficient coherence and force to constrain policy, structure debate, and influence policy. Rarely does science dictate a unique policy outcome; more often, it structures a policy dialogue among different disciplines and constituencies by defining a problem and a range of options, but it may also figure in the decision of which options to adopt.³¹²

Ultimately, Professor Elliott concludes that the system should work to ensure that “scientists and politicians work together to produce policies that are better than either would produce on their own.”³¹³ If China can put into place a system that allows science to play a role in shaping internal policy debates and administrative decisions, better food safety-related decisions and enforcement could develop.³¹⁴ The design of a risk analysis system can also become more effective by taking advantage of broader trends in administrative reform, such as a commitment to increased transparency, capitalizing on public input into rule- and standard-making, and the development and maintenance of a more professionalized bureaucratic culture in China.³¹⁵ China’s rising culture of freedom of information, or as it is referred to in the Chinese context, “open government information,” could enhance the development of more transparent risk assessment and management processes, as well as risk communication. The beginning of such an enhancement already exists in the Risk Assessment Regulations, which require that the results of risk assessments are made available to the public.³¹⁶ Public participation has also been an important accountability-generating mechanism that has found its way into more facets of administrative governance in China. Depending on the model of public participation that the relevant agencies adopt in implementing risk analysis and standard making processes, distrust of scientific experts can be ameliorated by a public that includes other scientists and experts to conduct peer review.³¹⁷ And, as these food safety specific processes develop, they will be influenced by larger efforts to improve administrative governance overall, such as efforts to reduce corruption.

³¹² Donald Elliott, *Science in the Regulatory Process: Strengthening Science’s Voice at the EPA*, 66 L. CONTEMP. PROB. 45, 46 (2003).

³¹³ *Id.* at 49.

³¹⁴ See Thomas O. McGarity, *Public Participation in Risk Regulation*, 1 RISK 103 (1990), available at www.law.unh.edu/risk/vol1/spring/mcgarity.htm.

³¹⁵ *Id.*

³¹⁶ Risk Assessment Regulations, arts. 5,18.

³¹⁷ McGarity, *supra* note 314.

B. *Other Innovations*

Food safety regulatory innovation is not limited to the risk-based tools above. It bears repeating that the FSL provides a basis for other innovation as well. For example, following the Law's passage, the General Administration for Quality Inspection, Supervision, and Quarantine ("AQISQ") enacted new regulations to strengthen labeling requirements, setting forth a more detailed set of regulations to clarify the information required and its placement.³¹⁸ In addition, the AQISQ took action to strengthen accreditation requirements for private laboratories that agencies can rely on to conduct tests on questionable food products.³¹⁹ The MOH, in conjunction with other agencies, has enacted "food safety transparency measures" to facilitate the flow of information generally in food safety control processes.³²⁰ Finally, the State Council and different provinces have enacted guidelines regarding rewards to whistleblowers that report food safety problems to the authorities.³²¹ Some rewards can go as high as 20,000 RMB or over 3000 USD, which provides some incentive to report food safety law violations.³²² The number of new systems and techniques that the bureaucracy is employing to deal with this problem far outweighs what the courts have done in the food safety area.

C. *A Long Road Ahead*

The effectiveness of these regulatory innovations remains to be seen, but, more importantly, their degree of success is sometimes difficult to decipher. The opaqueness of China's agencies makes it difficult to see what targets, if any, have been set to understand whether new regulatory tools are working. What internal benchmark will agencies use to assess whether risk assessment and risk monitoring are being employed in the

³¹⁸ Shipin biaoshi guanli guiding [Food Labeling Regulations] (promulgated by General Administration for Quality Inspection, Supervision and Quarantine, Oct. 22, 2009).

³¹⁹ Shipin jianyan jigou zizhi rending guanli banfa [Accreditation Regulations for Food Inspection and Testing Organizations] (promulgated by the General Administration for Quality Inspection, Supervision and Quarantine Aug. 5, 2010).

³²⁰ Shipin anquan xinxi gongkai guanli banfa [Food Safety Transparency Measures] (promulgated by the Ministry of Health, the Ministry of Agriculture, and the Ministry of Commerce, Nov. 3, 2010).

³²¹ *Duodi shipin anquan jubao jiangjin sheshang xian bei zhi qiantuo* [Limits on Food Safety Reporting Awards in Various Localities May be Inappropriate], FAZHI RIBAO [LEGAL DAILY], Nov. 7, 2011, http://www.legaldaily.com.cn/index_article/content/2011-11/07/content_3080067.htm?node=5955. See also Shipin yaopin tousu jubao guanli banfa (shixing) [Measures Regarding Complaints and Reports on Food and Drug Products (Trial Implementation)] (promulgated by the State Food and Drug Administration, Dec. 29, 2011).

³²² *Id.*

right way and producing the desired result? In addition, how is the public to evaluate the process? For example, the MOH website has several pages devoted to the food safety risk assessment commission, but the agendas and minutes of their meetings are not public, although the MOH has begun to put the actual risk assessments online.³²³

Despite the clear improvement of general regulations on government transparency, the transparency efforts of Chinese agencies are still incomplete.³²⁴ It is a step forward that all of the provincial-level FDAs have websites that publish at least some information, if only abstract information, about enforcement initiatives or the development of food safety law and policy.³²⁵ With the exception of a few, most provinces also have separate food safety nets, which are government webpages devoted exclusively to food safety reporting.³²⁶ However, these local FDAs put less than comprehensive information online and sometimes are reluctant to embarrass local corporations publicly for legal infractions. At times an online posting will reveal the infraction but not the name of the business or entities involved.³²⁷ A review of the websites³²⁸ of the provincial branches of the FDA shows that they do not consistently release important information, such as which companies fail inspection, are fined, or are involved in foodborne illness outbreaks.³²⁹ Efforts and results do vary

³²³ The Ministry of Health has approximately six risk assessments available online. See *Fengxian Pinggu [Risk Assessment]*, SHIPIN ANQUAN ZONGHE XINXI WANG [COMPREHENSIVE FOOD SAFETY INFORMATION NET], <http://www.nfsiw.gov.cn/business/htmlfiles/foodaqxw/s60/index.html> (last visited October 25, 2011).

³²⁴ See Peerenboom, *More Law, Less Courts*, *supra* 250 at 180.

³²⁵ See HEBEI FOOD SAFETY NET, <http://www.hebfs.gov.cn/CL0001/index.html> (last visited Mar. 23, 2012).

³²⁶ See, e.g., JILIN PROVINCE FOOD SAFETY NET, <http://www.jlfs.gov.cn/>; HEILONGJIAN PROVINCE FOOD SAFETY INFORMATION SERVICE NETWORK, <http://www.hljfs.gov.cn/>; JIANGSU FOOD SAFETY NET, <http://www.jsfoodsafety.gov.cn/>; ZHEJIANG FOOD SAFETY INFORMATION NET, <http://www.zjfs.gov.cn/>; FUJIAN FOOD SAFETY SERVICE NET, <http://www.fujian-foodsafe.gov.cn/>; JIANGXI FOOD SAFETY INFORMATION NET, <http://www.jxfs.gov.cn/>; HENAN FOOD SAFETY AND QUALITY NET, <http://qs.haqi.gov.cn/>; GUANGDONG FOOD SAFETY NET, <http://www.gdfs.gov.cn/>; GUANGXI FOOD SAFETY NET, <http://www.gxfns.gov.cn/CL0215/>; CHONGQING FOOD SAFETY PROMOTION ASSOCIATION, <http://www.cqfs.org.cn/fs/>; SICHUAN FOOD SAFETY NETWORK, <http://www.scfoods.gov.cn/CL0002/>; SHANXI FOOD SAFETY NETWORK, <http://www.sxfs.gov.cn/> (last visited Mar. 6, 2012).

³²⁷ Interview by author, Shanghai (2011).

³²⁸ Collection of websites and results on file with author.

³²⁹ See *Administrative Penalty Information Bulletin*, SHANGHAI FOOD AND DRUG ADMINISTRATION, <http://www.shfda.gov.cn/gb/node2/node3/node4/node2505/node2518/index.html> (last

from locality to locality and from agency to agency, of course. For example the Shanghai FDA releases more detailed information than most local food safety-related agencies regarding illegal food and drug advertisements, including the name of the product being advertised and the basis for illegality.³³⁰ The Beijing FDA also releases information about contaminated food incidents in order to warn the public to stay away from those products.³³¹ There are some numbers available on how many companies the central government closes for food safety violations, but no other data about the specifics of those closures and little comparing them with closures from other years.³³²

Even if there is improvement, can the use of different, more complex regulatory tools (and the internal capacity they generate), increased transparency, greater reliance on outside expertise, and stronger, expanded avenues for public input result in better food safety enforcement, when there is no strong governmental or public accountability check on the agencies? The Party may provide some degree of discipline, but it is not designed to ensure the effective implementation of food safety on a consistent basis. The leadership of the agencies will have to create a culture that encourages adherence to substantive goals and combats corruption, secrecy, and perverse incentives (that emphasize economic growth over safety) in order to negotiate their way to fulfilling their mandate for protecting food safety.³³³ For example, the pressure to prioritize local economic development and avoidance of scandal to maximize promotion opportunities are two, at times overlapping, interests that cause bureaucrats to lose their way in China.³³⁴ Officials may want to supplement their meager salary with rents from local corporations – and the Party's seemingly vigorous anti-corruption campaigns have not been a deterrent. They will also wish to avoid costly safety measures hindering economic development and thus lowering their standing in their locality or their chance of a promotion, which may be tied to the level of economic development they achieve. Officials will also want to cover up scandals

visited October 26, 2011).

³³⁰ See *Illegal Advertising Information Bulletins*, SHANGHAI FOOD AND DRUG ADMINISTRATION, <http://www.shfda.gov.cn/gb/node2/node3/node4/node2505/node2515/node2516/index.html> (last visited October 25, 2011).

³³¹ *Food Safety Information*, BEIJING FOOD SAFETY ADMINISTRATION (Nov. 23, 2011), <http://www.bfa.gov.cn/detail.jsp?cmArticleID=13221268060001&keycode=11>.

³³² See *id.*

³³³ See Drew Thompson and Hu Ying, *Food Safety In China*, 1 GLOBAL HEALTH & GOVERNANCE 5 (2007).

³³⁴ LIEBERTHAL & OKSENBERG, *supra* note 249, at 123.

that embarrass them.³³⁵ The latest report to the National People's Congress on the implementation of the FSL gives a negative account of local monitoring and indicates that the localities must do more to increase supervision and enforcement.³³⁶ In response to this issue, local governments in Beijing, Shanghai, and Guangzhou have announced that they will institute a policy of tying official performance evaluation to the success of food safety work.³³⁷ This is a step in the right direction, but the answer to the question posed above seems yet unknown.

Some would argue that increased enforcement measures in the FSL have already been somewhat successful. Officials point to an overall decline in the number of large-scale food safety outbreaks in 2010.³³⁸ The authorities managed to keep the Olympics and the World Expo in Shanghai relatively food safety disaster free,³³⁹ indicating that at least in cities like Beijing and Shanghai, effective administrative enforcement is possible, even if on a small scale. However, specific data helping to promote an understanding of what methods work in what circumstances is conspicuously absent.

Given all of the factors discussed above, future scholarship should focus on the following in evaluating the implementation of the FSL (and possibly other laws that may follow its pattern):

- General questions on the processes through which agencies approach the implementation of the law. In this respect, we need a greater understanding of how agencies interpret the law and regulations made by higher levels of government, and how they approach and subsequently assess implementation. Some of these issues scholars can assess from the outside, by conducting a thorough evaluation of agency rules and documents, as well as an analysis of the private institutions and actors on which agencies are starting to rely for some of their

³³⁵ MCGREGOR, *supra* note 55, at 120.

³³⁶ QUANGUO RENDA CHANGWEIHUI ZHIFA JIANCHA ZU GUANYU JIANCHAN SHIPIN ANQUAN FA SHISHI QINGKUANG DE BAOGAO [REPORT OF THE IMPLEMENTATION INVESTIGATION GROUP OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS ON THE IMPLEMENTATION INVESTIGATION OF THE FOOD SAFETY LAW] (2011).

³³⁷ Li Yao, *Officials to be Graded on How Well They Protect People's Food*, CHINA DAILY, May 16, 2011, <http://english.people.com.cn/90001/90776/90882/7380832.html>.

³³⁸ Shan Juan, *Food Safety Will Occupy a Higher Place on the Agenda*, CHINA DAILY, Mar. 2, 2011, http://www.chinadaily.com.cn/china/2011-03/02/content_12099510.htm.

³³⁹ Interview by author, Shanghai (2010). *See also* SHANGHAI ANNUAL REPORT, *supra* note 304, at 5.

work. But much more can be gained if agencies make public information about their internal processes and their structures.

- Scholarship should continue to observe the extent to which Chinese regulators are focusing on problems, as opposed to procedures, in the food safety context. In other words, to what extent (and how well) are bureaucrats focusing on the realities of large scale food safety problems and then working within the constraints of their agencies and the overall administrative system to resolve parts of those problems? Are those problems getting resolved in a way that benefits the public?
- Related to the point above, are greater transparency and the resulting fear of public scorn, pushing the bureaucracy and industry to do better, or simply to hide their activities better? Is public input into rulemaking processes truly informing bureaucrats about where they could go, or went wrong? Can solicited input from scientific experts be a check on official abuses?
- More attention must be paid to legal structures that enhance scientific ethics and professional autonomy, as well as the interaction between scientists and the bureaucratic processes. Scholars should ask which non-governmental processes and institutions are ensuring that scientific judgments have integrity, and where should (and *can*) Chinese agencies fill holes left by private ethics structures?
- Can technology reduce human error and corruption, and increase effectiveness in the Chinese bureaucracy?
- Finally, are there other forces driving bureaucrats to do better? For example: do they see the potentially deleterious effects of food safety issues on their own lives and family? Are they driven by the integrity or leadership skills of agency heads or vice-heads?³⁴⁰ Does national image (when considering food exports) and/or agency image³⁴¹ drive them to ensure that laws and policies address the pressing issues of toxic food?

Given the proliferation of new regulations and regulatory techniques over the last three years with regard to food safety, it will be important to improve academic understanding of how the mechanics of legal innovation in the administrative bureaucracy work.

³⁴⁰ Professor Reiss discusses how these factors and circumstances have contributed to agency accountability in the U.S. Reiss, *supra* note 25, at 631-68.

³⁴¹ *Id.*

CONCLUSION

The FSL exists in a system where political forces at times suspend the law's operation and development. However, the FSL is a law that covers daily necessities. Public health and environmental regulations are necessary to guarantee certain essential infrastructure for a nation that aims to achieve consistent economic and technological growth.³⁴² In a recent work report to the National People's Congress, Premier Wen Jiabao noted that food safety problems are "significant" and the government and people must "work tirelessly and painstakingly" to resolve them.³⁴³ After all, the Chinese government gains nothing by the deaths and illness of its citizens, and, if it fails to prevent those occurrences, it risks seriously undermining a certain platform of legitimacy that it has developed as being the protector of wealth and happiness. At the same time, it is the involvement of such an essential item of everyday life that also makes food safety that much more of a sensitive topic between the government and society, as some of the well-publicized cases indicate. If a government tries and fails at providing and protecting the basic necessities, then how legitimate can it be?

In order to avoid public sensitivity and protest as well as avoid harm to economic growth, preventative administrative enforcement currently appears to be the most cultivated and innovative area of implementation. In contrast, civil or administrative suits in court serve to provide constrained amounts of compensation or some limited relief from administrative action. In the case of large-scale disasters, the government seems to be more interested in compensation funds set up and administered by the bureaucracy.³⁴⁴ The use of legal provisions as a basis for other forms of citizen organization and enforcement appears to be permitted by the government within an arbitrarily limited set of circumstances.³⁴⁵

Although regulatory agencies may be constrained by corruptive forces and political pressure, the use of regulation to develop the law appears to be less politically sensitive, and is permitted to develop more freely, than the use of adjudication to develop the content or enforcement

³⁴² See BARRY NAUGHTON, *THE CHINESE ECONOMY: TRANSITIONS AND GROWTH* 488 (2007) (discussing environmental concerns associated with growth).

³⁴³ WEN JIABAO, *REPORT ON THE WORK OF THE GOVERNMENT 9* (Xinhua Trans. 2011); *Food Safety to Become Priority of Ministry*, *PEOPLE'S DAILY*, Feb. 16, 2011, at 5 ("In the next five years, China's top health authority plans to make ensuring food safety into one its 'major health service projects,' in a change meant to better protect the public from occasional foods safety hazards.").

³⁴⁴ Sun & Wang, *supra* note 143, at 37.

³⁴⁵ See *supra* Section III.

of the law. This Article has argued that regulatory edicts in this area are evidence that more substantive conversations are taking place in the bureaucracy concerning the reality of what food is bad, unhealthy, and dangerous, and under what circumstances. If these issues remain a real part of the internal debate, there may be greater attention to and competence in handling food safety.

Development of the law and its enforcement by the administrative agencies – even when it involves experimental regulatory techniques that are non-coercive and involve non-governmental forces – will probably not present the same type of threat to the government that bottom-up protest and litigation generate. Moreover, interpretation of national laws by the bureaucracy in the form of regulation made through a formal process or more informal regulatory guidance may not generate the same threatening force that an independent judiciary does – for example, a judiciary that freely interprets the law and acts as a check on other forms of government. For many leaders in China, the judiciary in that mold becomes a euphemism for long-feared and vehemently rejected ideological imperialism. For food safety, which is becoming primarily a regulatory area, the question now is whether new regulatory tools and better regulation generally have the potential to be built up to a point at which regulation effects *some* overall change, even if other avenues of accountability do not develop at the same rate.

Although this is a specific area – public health – its discussion has larger utility for the study of Chinese law. First, law cannot be ignored because it is the most developed language of policy in important areas. The FSL is not so vague or general as to be entirely subverted by conflicting policies, and it is taken seriously by governmental actors and valued by citizens. Second, although many view neutral and independent courts as fundamental to the rule of law, the FSL demonstrates that Chinese courts have utility and are relevant even when they do not always embody these values.

Most importantly for this discussion, the administrative bureaucracy has the potential to be a force in developing the law in a positive direction, perhaps even without forces such as consistently independent judges, a high degree of press freedom, and freely organized private organizations. Scholarship should continue to focus on the progress that the bureaucracy can make with the types of regulatory innovations discussed above. This Article has indicated a number of issues on which this might occur. There is, in short, a good deal of analysis yet to be done on the complex bureaucracy in China, which makes up a large part of the implementation effort of the FSL and other significant laws.