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**The aftermath of the Milk Scandal of 2008 -- The  
Challenges of Chinese Systemic Governance and Food  
Safety Regulation**

**By**

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A thesis submitted in partial fulfilment of the  
Requirement for Degree of Doctor of Philosophy in Law

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Special thanks to Lesley Wang for helping me with the format.

## **Declaration**

I, Yanjie Li, declare that this thesis is my own work and has not been submitted for a degree at another university.

## **Abstract**

Food safety problems set an enormous challenge to China's sustainable economic development. The Milk Scandal of 2008 brought public attention to the poor regulation and ineffective administration of the food industry. This highlighted the fact that food safety is relevant to the public health and the brand 'Made in China' in the international trading. It also shows how food safety law and better environmental protection has arisen out of a crisis. The milk scandal brought an influx of foreign products into China and opened up the Chinese market to international influence and food standards that would not have been possible before the crisis began. Sustaining China's environmental future is a work-in-progress with uncertain outcomes but there is an admission that without solving the food safety problem, China cannot achieve its sustainable economic development. This thesis examines China's current food safety legislation in the aftermath of the milk scandal of 2008. The thesis raises the question of how China deals with its food safety crisis and regulates its food industry to cope with its sustainable economic development. It also considers how best for the Chinese and the rest of the world may be able to learn from the Chinese experience. In the aftermath of the Chinese food crisis, China found itself subject to imports from abroad. This had a two- fold effect. It brought international regulatory practices into Chinese life; the second effect was to awaken China to the demands of international trade and the need to conform to best practice. It also showed how China had to meet expectations that were informed by international experience, which China sadly lacked. A deeper analysis is that China was exposed to the dilemma of profit driven organisations failing to appreciate the role of regulation and the safety of ordinary people. The scandal exposed many institutional and organisational shortcomings while the lessons were clear for anyone who looked. Placing profits over the preservation of social order and stability resulted in short-term gains with few long term benefits.

This research provides a comprehensive analysis and offers a perspective of the Chinese food safety problem from the legal, social and economic context of the problem. The causes of the food safety problem in China are complex. The food safety problem is not only caused by the defect of the food safety legislation itself. Other factors, such as environmental challenges and the irresponsible business activities, all contribute to the ineffectiveness of the food safety regulatory system. The thesis starts with the Milk Scandal of 2008 to examine the current food safety regulatory system in China. It addresses the main systemic problem, which leads to the weak implementation and ineffective administrations, and it also finds out that apart from the systemic defects, the environmental problem and the failure of the private sector all have an impact on the food safety regulatory system.

Furthermore, the thesis also explores the new innovations in the 2014 Environmental Protection Law, which may potentially contribute to the food safety law in the future. The private sector has also been examined. The fact is found that Chinese companies are operated in an irresponsible way, which causes the consecutive food scandals in China. The role of corporate social responsibility is also considered to guide the business activities in practice. The interests of the stakeholders, such as consumers, need to be



addressed in the decision-making.

The final conclusion is China still has a long way to go to achieve its sustainable economic development. The legislation system needs to be completed and unified. The effectiveness of the administration needs to be improved and independent judiciary needs to be built up. Besides the systemic problem, the improvement of the environment and the responsible business operation also contribute to re-shaping an effective food safety regulatory system. The innovation in the Environmental Law of 2014 can also be introduced to the food safety system. The citizen-driven approach can be used as an important supplement to China's traditional state-centred approach, to overcome the systemic weakness in the implementation of the food safety law. Many disasters in the world are discussed in terms of the experiences countries may gain from bad events. Bhopal and Chernobyl are two examples. The Chinese Milk Scandal stands in a line of disasters such as BSE in Britain that have re-oriented the regulatory map. Stakeholders and citizens have much to gain from learning the lessons of the milk scandal.

## Abbreviations

APEC	Asia-Pacific Economic Cooperation
AQSIAQ	General Administration of Quality Supervision, Inspection and Quarantine
CCP	Chinese Communist Party
CFDA	China Food and Drug Administration
CMC	China's Central Military Commission
CSC9000T	China Social Compliance 9000 for Textile and Apparel Industry
CSR	Corporate Social Responsibility
EIA	Environmental Impact Assessment
EPA	Environmental Protection Administrations
FAO	Food Standard Commission
FDA	U.S. Food and Drug Administration
FSC	Food Safety Commission
FSL	Food Safety Law
GDP	Gross Domestic Production
GMP	Good Manufacturing Practice
HACCP	Hazard Analysis and Critical Control Points
IRSWR	Internal Renewable Surface Water Resources
ISO	International Organisation for Standardisation
MIIT	The Ministry of Industry and Information of Technology
MOFCAOM	The Ministry of Commerce
MOH	The Ministry of Health

NGO	Non-Government Organisation
NPC	National People's Congress
SA8000	Social Accountability 8000
SAIC	State Industrial and Commercial Administration
SASAC	State-Owned Assets Supervision and Administration Commission
SEPA	State Environmental Protection Administration
SFDA	State Food and Drug Administration
SME	Small and Medium Sized Enterprises
SOE	State Owned Enterprise
SPS	The Sanitary and Phytosanitary Agreement
SRI	Socially Responsible Investing
UNDP	United Nations Development and Environment Program
WHO	World Health Organisation
WTO	World Trade Organisation

# Chapter 1 Introduction<sup>1</sup>

## I. Background

China has experienced great economic reform, from planned economy to market economy, and it has achieved rapid and unprecedented economic growth, especially in the past two decades. China's economic success, however, has been achieved at a huge environmental cost. One of the symptoms of a growing environmental crisis is the degradation of the environment in terms of food safety problems. This has been highlighted in 2008 by the now, notorious milk scandal. The subject of the thesis is the milk scandal and how it reflects on the absence of regulatory controls; corruption amongst officials and administrators; weak implementation and poor administration also together harm the food safety in China. Even today public confidence towards the food industry in China is still open to doubt. The immediate implications of the Milk Scandal of 2008<sup>2</sup> caused approximately 300,000 babies to be ill and six infants died from kidney stones and other

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<sup>1</sup> This thesis was written before 2015 Chinese Food Safety Law took into effect. The latest version of the food safety law in China during the time of writing this thesis was 2009 Food Safety Law. Thus, the analysis of Chinese food safety law made in this thesis was on the base of 2009 Chinese Food Safety Law and the 2014 Draft of Food Safety Law, which started to take into effect in 2015. The author is delighted to see the institutional reform made in 2014 Draft of Food Safety Law is included in 2015 new law and some of the suggestions this thesis made have also been adopted in this 2015 Food Safety Law. In this context, this thesis provides a valuable perspective of examining Chinese food safety system and contributes to its further reform.

<sup>2</sup> The 2008 China milk scandal was a food safety incident from dairy companies, which involved melamine contaminated milk, infant formula, milk powder for adults, and other food materials and components. The incident caused approximated 300,000 babies hospitalised and six babies died. 'Tests Find Melamine in 31 Chinese Milk Batche's, Xinhua News, available at [http://news.xinhuanet.com/english/2008-10/02/content\\_10141287.htm](http://news.xinhuanet.com/english/2008-10/02/content_10141287.htm)

kidney damage. The public's confidence towards food safety in China collapsed. Even after seven years has passed, the shadow of the Milk Scandal of 2008 still remains. Chinese parents prefer to spend more money on the foreign-brand infant formula, rather than the domestic ones, which caused the shortage of milk powder in the other counties, such as the UK<sup>3</sup> and New Zealand.<sup>4</sup> Unprecedented foreign import of food products entered China with significant results in terms of changing Chinese perceptions about food standards. Since 2000, New Zealand had been a large supplier to China, but due to unseasonal droughts in New Zealand, the price of food products increased and this contributed to increasing prices that stimulated the Chinese. This has made China's position awkward towards international trade and the need to compete has driven regulatory change. However, the Milk Scandal of 2008 is not a single food incident throughout China. 'Liquor made with industrial alcohol (five dead); pork adulterated with clenbuterol; melamine-laced infant formula; toxic gelation for medicine capsules'<sup>5</sup>, and other food scandals, like 'Sudan I Red Dye<sup>6</sup>, 'Plasticizer in drinks', 'Trench oil in dining

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3 The Independent, 'Supermarkets decide to limit sales of baby milk to stop bulk buying to feed China market', <http://www.independent.co.uk/news/uk/home-news/supermarkets-decide-to-limit-sales-of-baby-milk-to-stop-bulk-buying-to-feed-china-market-8565052.html>

4 'New Zealand and Dragon Baby- Has Kiwis Caught on Yet?', <http://bevchuang.wordpress.com/2012/01/28/10/>; also Lin, Li-Wen, 'Corporate Social Responsibility in China: Window Dressing or Structural Change?', *Berkeley Journal of International Law* 65, 65, 2010

5 Triplett, William C, II, Subcommittee on Europe, Eurasia and Emerging Threats, 'The Threat of China's Unsafe Consumables', available at [http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&cad=rja&ved=0CDsQFjAB&url=http://per cent3A per cent2F per cent2Fdocs.house.gov per cent2Fmeetings per cent2FFA per cent2FFA14 per cent2F20130508 per cent2FHHRG-113-FA14-Wstate-TriplettIIW-20130508.pdf&ei=4XmIUafuF43y0gW9joGwDg&usg=AFQjCNHb\\_qEc8mg8rmL9ZdoGRbt4nZ6muw&sig2=LUWI\\_YO1vOCleyPPGKsx5w](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&cad=rja&ved=0CDsQFjAB&url=http://per cent3A per cent2F per cent2Fdocs.house.gov per cent2Fmeetings per cent2FFA per cent2FFA14 per cent2F20130508 per cent2FHHRG-113-FA14-Wstate-TriplettIIW-20130508.pdf&ei=4XmIUafuF43y0gW9joGwDg&usg=AFQjCNHb_qEc8mg8rmL9ZdoGRbt4nZ6muw&sig2=LUWI_YO1vOCleyPPGKsx5w)

6 Sudan dyes are a group of industrial dye consisting of a number of red colours. The use of Sudan dyes as colouring matters in food is not permitted in Hong Kong under the Colouring Matter in Food Regulations (Cap.132H), nor the food legislation in Mainland China and in other countries including members of the European Union (EU), Australia and Canada. See Ms. Joey KWOK and Mr. Arthur YAU, 'Food Safety Focus (5th Issue, December 2006) – Incident in Focus: Sudan Dyes in Food'. Available at

tables'<sup>7</sup>, also emerged in the news afterwards. Food safety raises the national concern and ensuring food safety becomes the crucial task for the Chinese government.

This thesis discusses the question of how China is addressing its food safety crisis and how best to regulate its food industry to cope with China's sustainable economic development. The Milk Scandal of 2008 was a food safety crisis, which brought social disorder and public discontent. However, it also drove the development of China's food safety law. Without this crisis, the food safety law in China would very likely have remained the same. At the first glance, the change of the food safety law is the change involving the legal system reform. However, after a deep analysis, the thesis finds out the key question of solving China's food safety crisis is not to copy a single model from EU or USA to reform China's legal system. In fact, the key to solving the food crisis in China is how to make the administration system work effectively. Thus, 2014 Environmental Protection Law provides a new approach, the citizen-driven approach, as an important supplement to China's traditional state-centred approach, to overcome the weakness of the administration system.

It is clear that the food safety issue is a great challenge to China's sustainable economic development. First of all, feeding its own people has created a viable agricultural industry and a vibrant export industry in food with potential for global market share and reliable income streams for the Chinese economy. Therefore, food safety is an issue relevant to the public health domestically. Secondly, food safety also involves international trading

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[http://www.cfs.gov.hk/english/multimedia/multimedia\\_pub/multimedia\\_pub\\_fsf\\_05\\_01.html](http://www.cfs.gov.hk/english/multimedia/multimedia_pub/multimedia_pub_fsf_05_01.html)

7 Shao, Y, 'Rethinking Food Safety Problems in China', *Acta Alimentaria*, Vol. 42 (1), pp124-132 (2013)

standards. Due to international trade, the trading links between China and other countries are particularly intense and competitive. Food products, which are exports from China to other countries, must meet the requirements of products' safety standards. Therefore, ensuring food safety is also the demand of international trading standards. Due to the international trade between China and other countries, China's food safety problem has become an international problem, which reflects China's influence on global market.

Table 1 below shows that China's trade link with the world is getting closer and closer every year.<sup>8</sup>

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<sup>8</sup> All the statistics is from 'The USA-China Business Council'

**Table 1: China's Trade with the World, 2001-10 (\$ billion)<sup>9</sup>**

Notes: \*Calculated by USCBC. PRC exports reported on a free-on-board basis; imports on a cost, insurance, and freight

basis.

Source: PRC National Bureau of Statistics

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Exports	266.1	325.6	438.2	593.3	762.0	968.9	1,217.8	1,430.7	1,201.6	1,577.9
per cent										
change*	6.8	22.4	34.6	35.4	28.4	27.2	25.7	17.5	-16.0	31.3
Imports	243.6	295.2	412.8	561.2	660.0	791.5	956.0	1,132.6	1,005.9	1,394.8
per cent										
change*	8.2	21.2	39.8	35.9	17.6	19.9	20.8	18.5	-11.2	38.7
Total	509.7	620.8	851.0	1,154.6	1,421.9	1,760.4	2,173.7	2,563.3	2,207.5	2,972.8
per cent										
change*	7.5	21.8	37.1	35.7	23.2	23.8	23.5	17.9	-13.9	34.7
Balance	22.6	30.4	25.5	32.1	102.0	177.5	261.8	298.1	195.7	183.1

In Table 1, it is clear that the volume of China's trade with the world has increased dramatically in the past decade and China's trading link with the world is significant.<sup>10</sup>

Table 2 below shows the trade volume between China and USA also has been increasing

<sup>9</sup> Table 1 is from 'The USA-China Business Council', available at <https://www.uschina.org/statistics/tradetable.html>

<sup>10</sup> According to the statistics from USA-China Business Council, USA was China's top trade partner and the trade volume was \$385.3 billion. Japan followed USA, ranking 2<sup>nd</sup> with the trade volume \$297.8 billion in 2010. Available at <https://www.uschina.org/statistics/tradetable.html>



every year.<sup>11</sup> The customs statistics from USA shows that the annual value for food shipments from China rose from about \$1 billion in 1999 to \$5.2 billion in 2008, which made China become the third-largest supplier to the USA.<sup>12</sup>

**Table 2: China's Trade with the United States, 2001-11 (\$ billion) <sup>13</sup>**

Notes: \*Calculated by USCBC. US exports reported on a free-alongside-ship basis; imports on a general customs-value basis.

Source: US Department of Commerce; US International Trade Commission (ITC)

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
US exports	19.2	22.1	28.4	34.7	41.8	55.2	65.2	71.5	69.6	91.9	103.9
per cent											
change*	18.3	14.7	28.9	22.2	20.5	32.0	18.1	9.5	-2.6	32.1	13.1
US imports	102.3	125.2	152.4	196.7	243.5	287.8	321.5	337.8	296.4	364.9	399.3
per cent											
change*	2.2	22.4	21.7	29.1	23.8	18.2	11.7	5.1	-12.3	23.1	9.4
US balance	-83.0	-103.1	-124.0	-162.0	-201.6	-232.5	-256.3	-266.3	-226.8	-273.1	-295.5

Take the agricultural and poultry imports from China to USA as an example, the link of

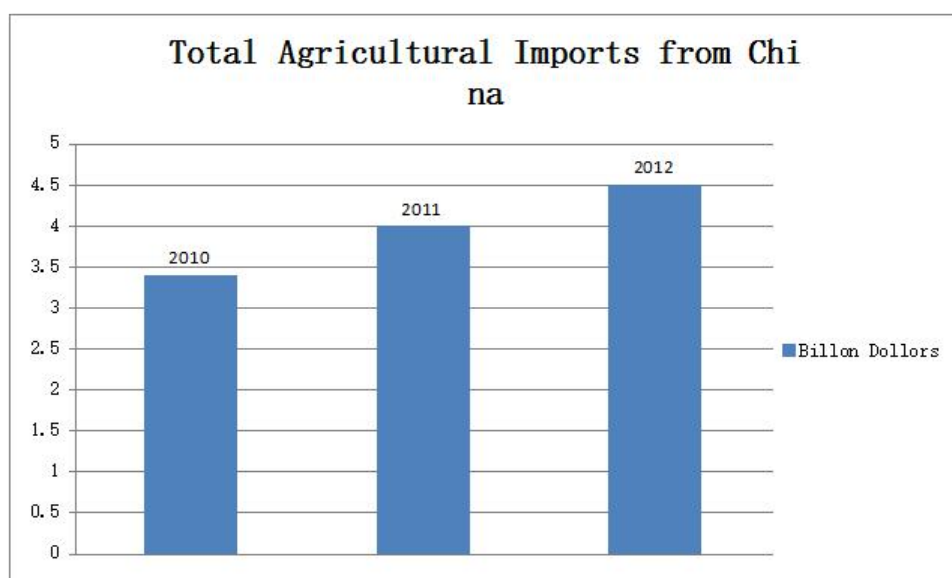
<sup>11</sup> Table 2 shows this growing trend. It clearly shows the trade volume between China and USA increases every year.

<sup>12</sup> Gale, Fred and Buzby, Jean C., 'Imports from China and Food Safety Issues', United States Department of Agriculture, Economic Information Bulletin Number 52, July 2009, P5

<sup>13</sup> Available at <https://www.uschina.org/statistics/tradetable.html>

food trade between two countries is becoming more intense. Table 3 and Table 4 below show the growing figures of agricultural and poultry imports from China to USA from 2010 to 2012 respectively.<sup>14</sup>

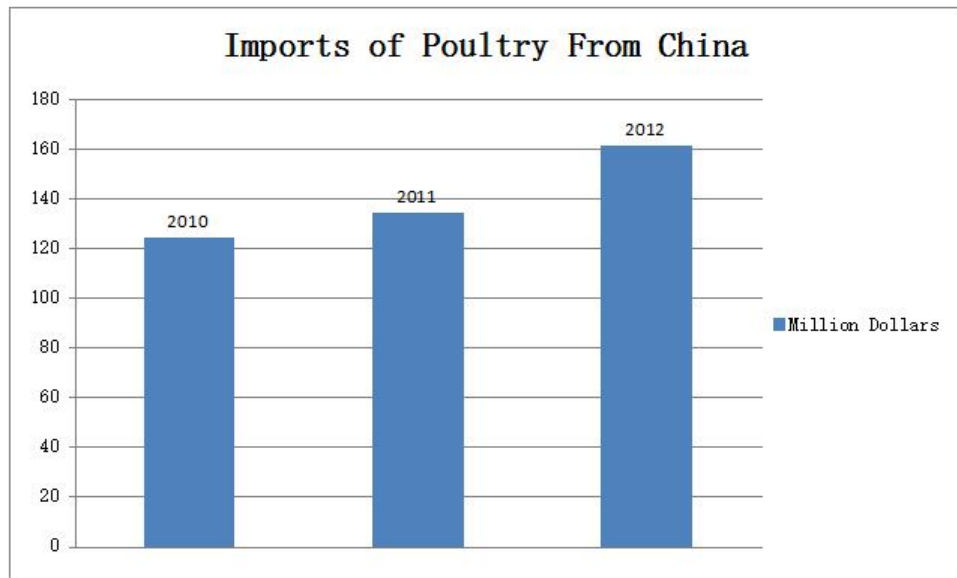
**Table 3: Total Agricultural Imports to the USA from China<sup>15</sup>**



<sup>14</sup> Figures are from William C. Triplett, II, Subcommittee on Europe, Eurasia and Emerging Threats, ‘The Threat of China’s Unsafe Consumables’, available at [http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&cad=rja&ved=0CDsQFjAB&url=http%2F%2Fdocs.house.gov%2Fmeetings%2FFA%2FFA14%2F20130508%2F100807%2FHHRG-113-FA14-Wstate-TriplettIIW-20130508.pdf&ei=4XmIUafuF43y0gW9joGwDg&usg=AFQjCNHb\\_qEc8mg8rmL9ZdoGRbt4nZ6muw&sig2=LUWI\\_YO1vOCleyPPGKsx5w](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&cad=rja&ved=0CDsQFjAB&url=http%2F%2Fdocs.house.gov%2Fmeetings%2FFA%2FFA14%2F20130508%2F100807%2FHHRG-113-FA14-Wstate-TriplettIIW-20130508.pdf&ei=4XmIUafuF43y0gW9joGwDg&usg=AFQjCNHb_qEc8mg8rmL9ZdoGRbt4nZ6muw&sig2=LUWI_YO1vOCleyPPGKsx5w)

<sup>15</sup> Triplett, William C., II, Subcommittee on Europe, Eurasia and Emerging Threats, ‘The Threat of China’s Unsafe Consumables’, available at [http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&cad=rja&ved=0CDsQFjAB&url=http%2F%2Fdocs.house.gov%2Fmeetings%2FFA%2FFA14%2F20130508%2F100807%2FHHRG-113-FA14-Wstate-TriplettIIW-20130508.pdf&ei=4XmIUafuF43y0gW9joGwDg&usg=AFQjCNHb\\_qEc8mg8rmL9ZdoGRbt4nZ6muw&sig2=LUWI\\_YO1vOCleyPPGKsx5w](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&cad=rja&ved=0CDsQFjAB&url=http%2F%2Fdocs.house.gov%2Fmeetings%2FFA%2FFA14%2F20130508%2F100807%2FHHRG-113-FA14-Wstate-TriplettIIW-20130508.pdf&ei=4XmIUafuF43y0gW9joGwDg&usg=AFQjCNHb_qEc8mg8rmL9ZdoGRbt4nZ6muw&sig2=LUWI_YO1vOCleyPPGKsx5w)

**Table 4: Imports of Poultry to the USA from China<sup>16</sup>**



It is clear that food exports are important in China's relationship with the rest of the world. The exports have been increasing every year. This has an impact on the quality of the food product that has to be competitive in order to secure market share. Ensuring food quality and making it safe and accountable, is not only a domestic issue, but also an international issue, because it is the task involving both public health as well as international trade standards.

This raises issue about sustainability as it is not possible for China to develop as a successful trading country without a successful food safety and quality control system. If China fails to ensure its food safety, the economic development in the long-term would not

<sup>16</sup> Triplett, William C., II, Subcommittee on Europe, Eurasia and Emerging Threats, 'The Threat of China's Unsafe Consumables', available at [http://www.google.co.uk/url?sa=t&ret=j&q=&esrc=s&frm=1&source=web&cd=2&cad=rja&ved=0CDsQFjAB&url=http://per cent3A per cent2F per cent2Fdocs.house.gov per cent2Fmeetings per cent2FFA per cent2FFA14 per cent2F20130508 per cent2F100807 per cent2FHHRG-113-FA14-Wstate-TriplettIIW-20130508.pdf&ei=4XmIUafuF43y0gW9joGwDg&usg=AFQjCNHb\\_qEc8mg8rmL9ZdoGRbt4nZ6muw&sig2=LUWI\\_YO1vOCleyPPGKsx5w](http://www.google.co.uk/url?sa=t&ret=j&q=&esrc=s&frm=1&source=web&cd=2&cad=rja&ved=0CDsQFjAB&url=http://per cent3A per cent2F per cent2Fdocs.house.gov per cent2Fmeetings per cent2FFA per cent2FFA14 per cent2F20130508 per cent2F100807 per cent2FHHRG-113-FA14-Wstate-TriplettIIW-20130508.pdf&ei=4XmIUafuF43y0gW9joGwDg&usg=AFQjCNHb_qEc8mg8rmL9ZdoGRbt4nZ6muw&sig2=LUWI_YO1vOCleyPPGKsx5w)

be achieved as well. In addition, sustainable economic development envisages growth but also addresses common problems and concerns that protect future generations. Therefore, the food safety problem is not only an issue involving China's economic development, but also an issue involving the protection of future generations. There is no way for China to achieve its sustainable economic development without solving the problem of food safety.

Overall, ensuring food safety and building up public confidence towards the food industry is critical task for Chinese government to achieve the goal of the sustainable economic development. This thesis addresses the question of how China deals with its food safety crisis to ensure its sustainable economic development. The thesis uses the 2008 Chinese Milk Scandal as the case study, which will be discussed in the Chapter 2, to examine the current Chinese legal system, define the problems and seek for the answer of how to cope with Chinese food safety crisis.

## **II. The Current Literature**

There has been considerable specialist literature in journals and media attention in newspapers on the Chinese food safety problem. In depth legal analysis is, however, rather lacking. The thesis considers the various causes of regulatory failure and the reasons for the food safety crisis in China. The causes of the food safety problem in China are complex. It not only involves the food regulation itself, it also involve the impact of the economic transition, and China's unique culture and legal system. In fact, food safety problems are also indicative of China's more general environmental problems and also the

nature of Chinese corporations. Currently, there are lots of scholars, such as Prof. Bian Yongmin<sup>17</sup>, Y Shao<sup>18</sup>, Zhang Fang<sup>19</sup>, etc., who do research on the food safety issues in China. Other scholars, such as Jerome A. Cohen<sup>20</sup>, R. Randle Edwards<sup>21</sup>, Stanley Lubman<sup>22</sup>, Victor H. Li<sup>23</sup> and Albert Chen<sup>24</sup> have shown great interests in the Chinese legal system. In the perspective of Chinese corporate governance and corporate social responsibility, there are also a lot of scholars, such as Jingchen Zhao<sup>25</sup>, Jiangyu Wang<sup>26</sup>, Yong Kang, Lu Shi, Elizabeth D. Brown<sup>27</sup>, etc., who have shown their enthusiasm. In addition, there have been a lot of studies on the topic of the Chinese environmental problem carried out by many scholars, such as Alex Wang.<sup>28</sup> However, no one has considered the Chinese food safety problem with all these perspectives. The research for

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17 Bian, Yongmin, 'The Challenges for Food Safety in China-Current Legislation is Unable to Protect Consumers from the Consequences of Unscrupulous Food Production', available at <http://www.cefc.com.hk/pccpa.php?aid=1936>

18 Shao, Y, 'Rethinking Food Safety Problems in China', *Acta Alimentaria*, Vol. 42 (1), pp124-132 (2013)

19 Zhang, Fang, 'The Development and Improvement of China's Modern Legal Framework on Food Safety', 5 *Zhengzhi Yu Falu* [J. Politics & L.] 18, 18 (June)

20 Jerome A.Cohen is a professor of law at New York University School of Law, an expert in Chinese law, a senior fellow for Asia Studies at the Council on Foreign Relations, and serves as "of counsel" at the international law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP.

21 R. Randle Edwards is a Walter Gellhorn Professor Emeritus of Columbia Law School.

22 Stanley Lubman is a Senior Fellow of Berkeley Law, who has specialized on China as a scholar and as a practising lawyer for more than 40 years.

23 Victor H. Li was a professor and scholar who worked to devise a framework for normalized diplomatic relations with China. He passed away on September 18, 2013, at the age of 72.

24 Albert HY Chen is the professor of the University of Hongkong

25 Zhao, Jingchen, 'The Regulation and Steering of Corporate Social Responsibility in China: Stories after the Enforcement of Chinese Company Law 2006', *I.C.C.L.R.*, 2011

26 Wang, Jingyu, 'An Overview of China's Corporate Law Regime', 13th August 2008, available at <https://www.google.co.uk/#psj=1&q=company+law+in+china+wang+jiangyu>

27 Kang, Yong; Shi, Lu and Brown,Elizabeth D, 'Chinese Corporate Governance--History and Institutional Framework', available at

[http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CDQQFjAA&url=http%3A%2F%2Fwww.rand.org%2Fpubs%2Ftechnical\\_reports%2F2008\\_per cent2FRAND\\_TR618.pdf&ei=dhcUumeDO-X0QXk1oDAAg&usg=AFQjCNEcCgFcBMN8P5jYAYxBGODRjEYTGg&sig2=g7v8Zyw8gsMFtmuM4sk6Wg&bvm=bv.53899372,d.d2k](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CDQQFjAA&url=http%3A%2F%2Fwww.rand.org%2Fpubs%2Ftechnical_reports%2F2008_per cent2FRAND_TR618.pdf&ei=dhcUumeDO-X0QXk1oDAAg&usg=AFQjCNEcCgFcBMN8P5jYAYxBGODRjEYTGg&sig2=g7v8Zyw8gsMFtmuM4sk6Wg&bvm=bv.53899372,d.d2k)

28 Alex Wang is a faculty member at the UCLA School of Law. He has published many paper on the Chinese environmental legislations, for example, *The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China*

the thesis provides a legal, economic and social understanding of the food safety problem in China and an analysis considering cultural and corporate perspectives on the subject. China has been experiencing an economic transition, from the planned economy to the market economy, since the opening and reform policy. China's agriculture economy is being rapidly transformed by rapid economic growth and unprecedented industrialisation. According to the data from the World Bank, China's average GDP growth in the past decade is over 8 per cent.<sup>29</sup> China's economic transformation has also brought social change, urbanisation. The rate of urbanisation reached 52.5 per cent by 2012 and it is still rising.<sup>30</sup> The Chinese government forecast its urbanization rate is expected to hit 60 percent by 2018 at the current rate of urbanization.<sup>31</sup> However, the impact of change in the economy has not been evenly distributed throughout China. According to 2013 GDP per capital figures, Shanghai, one of the biggest cities in China, achieved US\$14,547 per capital, while Gansu, a city in North China, had US\$3,923 per capital. The various economic development levels bring difficulties to regulating these various areas under the same regulatory system.

In addition, tensions between small companies and large corporations require the method of regulation to be different for each. As we shall see, an important aspect of the crisis is the development of large scale production through monopoly dealing within small companies in China. This means that various milk stations wholly owned by a monopoly milk supplier exercised a distorted influence over milk products including adding water

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<sup>29</sup> See the World Bank, <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?page=1>

<sup>30</sup> National Bureaus of Statistics China, 2012. The urbanisation rate is expressed as a percentage of the population.

<sup>31</sup> 'China's urbanization rate to hit 60 per cent by 2018', China Daily, [http://www.chinadaily.com.cn/china/2013-12/27/content\\_17199551.htm](http://www.chinadaily.com.cn/china/2013-12/27/content_17199551.htm)

and melamine to milk with dire consequences for consumers. There are lot of multinationals in China, especially in big cities. Meanwhile, approximately 90 per cent of the food processing firms in China are small-and-medium-sized enterprises (SMEs), among more than 0.4 million food processing firms which exist in China nowadays.<sup>32</sup> 72 per cent of food processing firm employ fewer than 10 workers.<sup>33</sup> According to a SFDA survey of 450,000 food firms, 29 per cent of them did not have any production standards.<sup>34</sup> In addition, 60 per cent did not conduct quality checks of food products nor were they even capable of conducting self-inspections.<sup>35</sup> Approximately 50 per cent of the firms lacked sanitation certificates or production licenses.<sup>36</sup> The small food processing firms obtain their supplies from hundreds of millions of even smaller family-based farms, many of which are 'no larger than a basketball court.'<sup>37</sup> These family-based farms compose the bottom of supply chain for the food industry. It is very difficult to regulate these small companies with the same method which is adopted in the large corporations. The fact that 'industrialisation' processes became embedded in the agricultural sector left many aspects of milk production vulnerable to unsafe practices.

Food safety also has to be placed in the overall context of China's major environmental problems. China's rapid economic development comes at a high cost of environmental degradation, which has already become an obstacle of ensuring the Chinese food safety.

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<sup>32</sup> Zhang, S.(2011), 'Establish an Effective Long-Term Food Safety System', China Fd Additive, 3, 49-53

<sup>33</sup> Ying, Feihu, 'Improvement of China's Information Exchange on Food Safety'. 5 Zhengzhi Yu Falu [J.POL.& L.] 24, 26 (2007)

<sup>34</sup> Miao, Junjie; Zhang, Yanran; and Wang, Yujuan, 'China's Food Safety Management Focuses on Food Supply', Liaowang, 23<sup>rd</sup> May 2007, available at <http://helath.sohu.com/20070522/n250158568.shtml>.

<sup>35</sup> Ibid

<sup>36</sup> Ibid

<sup>37</sup> Subcomm.on Oversight and Investigations, 110<sup>th</sup> Cong., Staff Trip Report: 'Food from China: Can we Import Safely?' 7 n. 10 (2007), available at [http://energycommerce.house.gov/Press\\_110/110-rpt.100407.ChinaTripReport.pdf](http://energycommerce.house.gov/Press_110/110-rpt.100407.ChinaTripReport.pdf), at 2

Apart from its large food exports to the world, China also has to feed its big population, which is likely to undermine the basis of China's agriculture and put in doubt the sustainability of its farming industry. 'Polluting first and controlling later' becomes a common practice in some areas of China.<sup>38</sup> Enjoying the fruit of 'the factory of the world', China is suffering severe pollution problems. Only air pollution alone is estimated to cost China up to \$US300 billion a year.<sup>39</sup> The ignorance of environmental degradation causes large number of 'cancer villages' in China.<sup>40</sup> Moreover, Outdoor pollution has led to approximately 300,000 and 400,000 premature deaths every year in China.<sup>41</sup>

Water pollution is another big challenge to China's environment. Pesticides, fertilisers, antibiotics, industrial waste and veterinary drugs are discharged into rivers, lakes and sea directly without properly treated. <sup>42</sup> As a report from the Chinese government found, 'only five per cent of household sewage and seventeen per cent of industrial waste are properly treated prior to discharge.'<sup>43</sup> The high level of water pollution has already become a big threaten to the public health. Currently due to the high level of pollution, 80 per cent of 200 lake in China do not fit for drinking anymore.<sup>44</sup>

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<sup>38</sup> Zhao, Yuhong, 'Trade and Environment: Challenges After China's WTO Accession, 32 COLUM.J.ENVTL.L.41, 48-49 (2007)

<sup>39</sup> 'Air Pollution costs China \$US300b a year', available at <http://www.sbs.com.au/news/article/2014/03/25/air-pollution-costs-china-us300b-year>

<sup>40</sup> Cheng,Yu, 'Cancer Villages Emerged Along Coastal Regions', Nanfang Dushi Bao, Nov. 5, 2007, available at <http://news.163.com/07/1105/16/3SI4DUL600011SM9.html>.

<sup>41</sup> Kristof, Nicholas D. Op-Ed., Where Breathing is Deadly, N.Y. TIMES, May 25, 2008, available at <http://www.nytimes.com/2008/05/25/opinion/25kristof.html>.

<sup>42</sup> Sitaraman,Srini , 'Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China', 18 COLO. J. INT'L ENVTL. L. & POL'Y 267, 335 (2007), p280

<sup>43</sup> Sitaraman,Srini , 'Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China', 18 COLO. J. INT'L ENVTL. L. & POL'Y 267, 335 (2007),p280

<sup>44</sup> Li, Jing, 'Eutrophication Threatens Ecological Condition of Lakes in China', CHINA DAILY, March, 31, 2009, available at [http://www.chinadaily.com.cn/zgzx/2009-03/31/content\\_7635373.htm](http://www.chinadaily.com.cn/zgzx/2009-03/31/content_7635373.htm).



Water pollution not only causes the shortage of water resource in China, but also causes the crisis of China's export business with other countries. As the third largest exporter of seafood into the USA,<sup>45</sup> China contributes approximately 21 per cent of the total imported seafood into the United States.<sup>46</sup> However, a report from FDA showed during October 2006 to May 2007 excessive drug residues had been found in 22 of 89 samples of fish and shrimp from China, a rejection rate of 25 per cent.<sup>47</sup> Apart from aquaculture sea food, vegetable and protein products are also affected by environmental degradation or taint. A report from FDA found, in 2007 44 per cent of wheat gluten samples and 32 per cent of rice protein concentrate samples from China tested positive for melamine.<sup>48</sup>

The degradation of environment has already become a severe threaten to the public health. It also has become a big challenge to China's sustainable development. All these details will be discussed in Chapter 5.

Apart from environmental problem, China's weak implementation and ineffective administrations also challenge Chinese food safety. At the first glance, China's legal system needs to be reformed, since the weak implementation and ineffective

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<sup>45</sup> U.S. Food and Drug Admin. (FDA), Import Alert No. 16-131, FDA Import Alerts (2010), available at [http://www.accessdata.fda.gov/cms\\_ia/importalert\\_33.html](http://www.accessdata.fda.gov/cms_ia/importalert_33.html).

<sup>46</sup> Food & Water Watch, 'Import Alert: Government Fails Consumers, Falls Short on Seafood Inspections' (2007), available at <http://documents.foodandwaterwatch.org/ImportAlertJuly2007-1.pdf>, P2

<sup>47</sup> U.S. Food and Drug Administration, 'Detention Without Physical Examination of Aquacultured Catfish, Basa, Shrimp, Dace, and Eel Products from the People's Republic of China Due to the Presence of New Drugs and/or Unsafe Food Additives,' Import Alert 16-131, 8<sup>th</sup> August, 2007a, available at [http://www.FDA.gov/ora/fiars/ora\\_import\\_ia16131.html](http://www.FDA.gov/ora/fiars/ora_import_ia16131.html).

<sup>48</sup> U.S. Food and Drug Administration, 'Detention Without Physical Examination of all Vegetable Protein Products From China for Animal or Human Food Use Due to the Presence of Melamine and/or Melamine Analogs,' Import Alert 99-29, 31<sup>st</sup> July, 2007b, available at [http://www.FDA.gov/ora/fiars/ora\\_import\\_ia9929.html](http://www.FDA.gov/ora/fiars/ora_import_ia9929.html)

administrations are caused by the systemic defects. However, it is unlikely to have a political reform under the present arrangements. Systemic weaknesses in China's governance without major political and social reform frustrate any legal reforms towards the food industry in China. Thus, the key to ensure the food safety in China is not to start a legal reform to build up a complete new food safety legal system, but how to make the administration system works effectively and efficiently. It is the failure of administration system, which results in the failure of food safety in China.<sup>49</sup> Therefore, the reform of the current administration system becomes necessary. The new administration system needs to involve governments, companies and the public together to boost the implementation of food safety law and make it more effective in practice.<sup>50</sup>

Therefore, this thesis provides a unique journey to link all these aspects above together, to provide a comprehensive and broad analysis of the Chinese food safety problem. It draws extensive perspectives in pursuing adequate understanding of food safety problem in China and its possible solutions.

### **III. The Main Research Question**

This main research question of this thesis is how China is addressing its food safety crisis and how best to regulate its food industry to cope with China's sustainable economic

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<sup>49</sup> Wei, Yuwa, 'Food Safety and Human Rights - China's Lost Eden' (2015). *Interdisciplinary Journal of Human Rights*, 2014-2015, Vol 8, No. 1. Available at SSRN: <https://ssrn.com/abstract=2723695>

<sup>50</sup> Ni, Hong-Gang & Zeng, Hui, 'Law Enforcement is Key to China's Food Safety', in 'Environmental Pollution', Volume 157, issue 7, July 2009, P1900-1902, Shenzhen Graduate School, Peking University, China, also can be available at [https://www.researchgate.net/publication/24180238\\_Law\\_enforcement\\_is\\_key\\_to\\_China's\\_food\\_safety](https://www.researchgate.net/publication/24180238_Law_enforcement_is_key_to_China's_food_safety)

development.

This thesis starts from the Milk Scandal of 2008, which caused public discontent to the government and also drew public attention to the poor regulation and ineffective administration in the food industry. This scandal resulted in the dramatic loss of public confidence in current food safety regulatory system. Without this food safety crisis, the change of Chinese food safety law would hardly have happened. Chapter 2 introduces the Milk Scandal of 2008 and it elaborates on the problems the food safety crisis revealed of the current regulatory system.

Chapter 3 focuses on the current food safety regulatory system in China. It explains how the food safety regulations develop in China and also it introduces the new food safety law after the Milk Scandal of 2008.

Chapter 4 analyses the major problems, which lead to the ineffective implementation of food safety regulatory system and it also finds apart from the main systemic defects of the regulatory system, the environmental problem and the failure of the private sector also affect the effectiveness of food safety regulation.

Thus, Chapter 5 shifts focus from food safety regulation itself to the environmental law in China. It explores the new innovations in the Environmental Protection Law of 2014, which may potentially contribute to the food safety law in the future.

Chapter 6 focuses on the private sector. It finds out the fact that Chinese companies are operated in an irresponsible way, which causes the consecutive food scandals in China. The role of corporate social responsibility is worthy to be considered to guide the business activities in practice. The interests of the stakeholders, such as consumers, need to be addressed in the decision-making.

Chapter 7 is a final conclusion chapter. It analyses the main obstacles and the challenges to Chinese food safety system, which includes but not limited to the ambiguous, inconsistent and incomplete legislation; the weak implementation and ineffective administration; the absence of the independent and effective judicial system; the environmental degradation and pollution problem; the unethical and irresponsible business practice and the insufficient public participation. It also gives the suggestions on how to build up a more effective food implementation system in China. The regulation itself needs to be completed and unified. The effective administration system and the independent judiciary need to be built up. Besides the systemic defects, the environmental protection and the responsible business operation also contribute to re-shaping an effective food safety regulatory system. Increasing the transparency of relevant food safety information and enhancing public participation can be used as a tool to make up for the systemic weakness in the implementation of the food safety law.

## **Chapter 2 Milk Scandal of 2008-A Case Study of the Weakness of the Food Safety System in China**

### **I. Introduction**

The food safety crisis in China was largely precipitated by the notorious food scandal in 2008. This chapter focuses on the Milk Scandal of 2008 and provides an analysis of the dramatic consequences it caused to both the Chinese economy and the food safety regulatory system.

China is a major consumer of its own food and is ranked as at least the third largest source of food and aquatic products in the USA.<sup>1</sup> Tackling food safety is a matter of national pride as well as an economic necessity that is closely linked to consumer safety. National pride was also a major inhibitor in spotting the problem earlier and taking remedial steps quickly. The starting point of this chapter is to set out the overall social and economic context relevant to the food scandal.

China's rapid economic growth in recent decades has been remarkable in giving China a global role. In 2010, China overtook Japan as the world's second biggest economy.<sup>2</sup>

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<sup>1</sup> Balzano, John, 'China's Food Safety Law: Administrative Innovation and Institutional design in Comparative Perspective', 13(2) Asian Pacific law and Policy Journal 24

<sup>2</sup> Japan's economy was \$ 5.474 trillion at the end of 2010. Meanwhile, China's economy was closer to \$5.8 trillion in the same period. 'China overtakes Japan as world's second-biggest economy',

Analysts predict that China, at its current rate of growth, might replace the U.S as the ‘number one’ economy in the near future.<sup>3</sup> Meanwhile, the question arises of how long China can keep its exceptional economic growth. It is doubted whether China’s economic model is unsustainable. Behind the positive economic data, the various corporate collapses and food safety scandals never stop, which affect public confidence in the product safety and the growth of the Chinese’s economy.<sup>4</sup> Rapid economic growth has been achieved at the cost of the standards and safety of products, environment, health and safety of employees, etc. However, this is not a sustainable economic development, and it might only bring the prosperity to China in the short term. Among all these problems, food safety is the most serious one, because the food safety problem affects public health, not only of this generation, but also the next generation. Furthermore, the food safety problem is also relevant to international trade standards, which play an important role in China’s economic growth.

Among all the food safety incidents, the Milk Scandal of 2008s undoubtedly drew the

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<http://www.bbc.co.uk/news/business-12427321>

<sup>3</sup> China’s GDP is predicted to rocket to \$8 trillion to \$19 trillion in 2016. The US GDP will grow to \$18.8 trillion. One year after, the gap is forecast to widen, ‘The ‘Americian Age’ to End in 2016?’, <http://business.blogs.cnn.com/2011/04/27/the-american-age-ends-in-2016>

<sup>4</sup> Recently Lipton tea was reported to have toxic pesticide residue in its green tea, jasmine tea, Iron Buddha tea and black tea on 24th April 2012 by Greenpeace. See ‘Lipton Tea Laced with Toxic Pesticide Residue’, <http://www.greenpeace.org/eastasia/news/blog/lipton-tea-laced-with-toxic-pesticide-residue/blog/40093/>, and also ‘Greenpeace: Banned Pesticides Found in Lipton and Domestic Brands’, <http://shanghaiist.com/2012/04/25/greenpeace-lipton-tea-pesticides.php>. Meanwhile, in the same month another product safety scandal also drew the public’s attention - more than 77 million capsules for medical use were tainted with chromium. Long-term exposure to chromium can cause serious organ damage. See ‘China detains dozens in poison drug capsule scandal’, <http://www.mb.com.ph/articles/357790/china-detains-dozens-poison-drug-capsule-scandal>

most attention. Firstly, it involved almost all the famous dairy companies in China, thus revealing that the safety problem did not only exist in the individual company, but in the whole industry, and was even widespread in China. One scholar argued that the milk scandal, as one of the various Chinese corporations' scandals, 'has again reminded of the shocking fact that many Chinese companies are unscrupulous about making money at the expenses of human rights and even human life'.<sup>5</sup>

Secondly, due to the great social impact, the Milk Scandal of 2008 is the biggest food scandal in the history of Chinese manufactured products. It caused around 300,000 babies to be sick and six babies died, which harmed public health and also completely destroyed the public confidence in the Chinese dairy industry. Nowadays even after seven years have passed, the shadow of the milk scandal still remains. Consumer confidence still has not yet recovered. Many Chinese consumers have changed their loyalty to the foreign brands over domestic brands. Chinese parents are willing to spend more money on foreign-brand infant formula, rather than domestic ones. The huge demand from China for infant milk powder has created a new form of entrepreneur in the form of a milk powder purchasing agent, who helps Chinese parents to purchase milk powder from other developed countries, like Australia, the UK, New Zealand, and post them to China. In addition, this dramatic enthusiasm for foreign-brand products recently caused a shortage of milk powder and great inconvenience to parents in these countries. Parents there suddenly found there was insufficient supply of the milk powder for their babies in the local market. The great demand for milk powder from China forced retailers in the UK to make the decision to

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<sup>5</sup> Zhao, Jingchen, 'The Regulation and Steering of Corporate Social Responsibility in China: Stories after the Enforcement of Chinese Company Law 2006', I.C.C.L.R., 2011

ration sales of powdered baby milk.<sup>6</sup> Supermarkets, such as Asda, Sainsbury's, Tesco and Morrison, have to limit two units per customer per day for the purchase of certain brands to ensure the supply to local babies.<sup>7</sup> Many other countries, such as Australia, are also forced to restrict sales of infant formula.<sup>8</sup>

Thirdly, the Milk Scandal of 2008 exposed the companies' unethical practice in their lax approach to regulating food standards, and also the ineffective external administrations. Extremely unethical and irresponsible business practices are widespread in Chinese dairy corporations and their supply chain. Food safety standard were sacrificed for business profits, which was a reflection of the unethical and irresponsible business activities. The Milk Scandal of 2008 took place after the promulgation of China's new Company Law 2006, which advocates the principles of social corporate responsibility. The milk scandal challenges not only the effectiveness of the food safety system in China, but also the effectiveness of China's new Company Law 2006.<sup>9</sup> In this crisis, both the self-discipline and internal control system on the part of companies, and the external supervision from the administrations, failed to uphold food safety standards. In particular, the form of external regulatory system appears to be weak and far from satisfactory. The food safety scandal reflects the weak enforcement and poor compliance in the Chinese regulatory system.

The Milk Scandal of 2008 offers an important case study to examine the whole food safety

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<sup>6</sup>Baby milk rationed in UK over China export fear, BBC News, available at <http://www.bbc.co.uk/news/business-22066243>

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> Lin, Li-Wen, 'Corporate Social Responsibility in China: Window Dressing or Structural Change?', *Berkeley Journal of International Law* 65, 65, 2010



system in China. This chapter explains the Milk Scandal of 2008, which revealed the weakness of the Chinese food safety system, as well as defects in the entire legal system. The defects in the legal system, such as the incomplete and conflicting legislation, ineffective administration, the absence of an independent judiciary, the local protectionism and the corruption problem lead to the ineffectiveness of the implementation of food safety law in China. The food crisis led to public outrage, which potentially threatens the goal of harmonious society and social stability. The 2014 new draft amendment of the food safety law provides some reforms in the administration and legislation, which will be discussed in Chapter 3 and Chapter 4. Apart from the defects of in legal system, other factors, such as environmental pollution and degradation, as well as the failure of the private sector, also contribute to the food crisis in China. The environmental problem pollutes the bottom of the food supply chain and the failure of the private sector leads to the unethical and irresponsible business activities, which sacrifice the standard and safety of the products for the sake of economic profits. The environmental problems will be discussed in Chapter 5 and corporate social responsibility will be explained in Chapter 6.

## **II. A Case Study of the 2008 Chinese Milk Scandal**

### **1. Milk Scandal of 2008**

Among all the collapses and scandals relating to food safety in China, none has drawn as much attention as the 2008 China milk scandal did. It involved almost all large to medium-sized Chinese dairy companies, and the contamination of milk products affected

nearly 300,000 infants with six dead. The 2008 China milk scandal is regarded as a great industrial tragedy comparable perhaps to the famous Chisso-Minamata disease in Japan<sup>10</sup> and the Bhopal disaster in India.<sup>11</sup>

The 2008 China milk scandal was a food safety incident issuing from dairy companies, involving milk and infant formula, milk powder for adults, and other food materials and components, contaminated with melamine.<sup>12</sup> According to the World Health Organisation (WHO), melamine, as an industrial chemical normally used in manufacturing of dishes, plastic resin, flame-retardant fibers, dyes, laminates and fertilizers,<sup>13</sup> has side effects for humans. Melamine may cause kidney stones and renal failure if it is consumed over a long period by human beings and animals.<sup>14</sup> The scientist from the U.S. Food and Drug Administration (FDA) explained that when melamine and cyanuric acid are absorbed into the bloodstream, they concentrate and interact in the urine-filled renal microtubules, then crystallize and form large numbers of round, yellow crystals, which in turn block and

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<sup>10</sup> Chisso-Minamata disease is a neurological syndrome caused by severe mercury poisoning. It was caused by the release of methylmercury in the industrial wastewater from the Chisso Corporation's chemical factory, involving near 12,600 victims, 1,784 of whom have died. See 'Minamata Disease: The History and Measures', <http://www.env.go.jp/en/chemi/hs/minamata2002/ch2.html>, and also 'Agreement reached to settle Minamata suit', Asahi Shimbun news, <http://www.asahi.com/english/TKY201003300438.html>

<sup>11</sup> The Bhopal disaster was a gas leak incident, occurring on the night of 2nd-3rd December, 1984 at the Union Carbide India Limited (UCIL) pesticide plant in Bhopal, India. It caused 2,259 immediate death and a government affidavit in 2006 states the gas leak caused 558,125 injuries including 38,478 temporary partial and approximately 3,900 severely and permanently disabling injuries. See <http://www.mp.gov.in/bgtrrdmp/profile.htm>, and also 'Bhopal trial: Eight convicted over India gas disaster', [http://news.bbc.co.uk/1/hi/world/south\\_asia/8725140.stm](http://news.bbc.co.uk/1/hi/world/south_asia/8725140.stm)

<sup>12</sup> Tests Find Melamine in 31 Chinese Milk Batches, Xinhua New, available at [http://news.xinhuanet.com/english/2008-10/02/content\\_10141287.htm](http://news.xinhuanet.com/english/2008-10/02/content_10141287.htm)

<sup>13</sup> World Health Organization, Melamine and Cyanuric Acid: Toxicity, Preliminary Risk Assessment and Guidance on Levels in Food, updated 30 October 2008, [http://www.who.int/foodsafety/fs\\_management/Melamine.pdf](http://www.who.int/foodsafety/fs_management/Melamine.pdf)

<sup>14</sup> World Health Organisation, Melamine-contaminated Powdered Infant Formula in China - Update 2, [http://www.who.int/csr/don/2008\\_09\\_29a/en/](http://www.who.int/csr/don/2008_09_29a/en/)

damage the renal cells that line the tubes, causing the kidneys to malfunction.<sup>15</sup> Melamine has never been approved by the FAO/ WHO Codex Alimentarius (Food Standard Commission) or any other national authorities as a food additive.<sup>16</sup> However, melamine, as a food additive, was incorporated into dairy products in China. The 2008 milk incident was not the first time that melamine was found to be added to Chinese food products. Adding melamine to food products could be traced back to April 2005 in Hebei Province,<sup>17</sup> three years earlier than the exposure leading to the Milk Scandal of 2008. In addition, melamine was also found in wheat gluten and rice protein concentrate exported from China and used in the manufacture of pet food in the United States in 2007. This caused the deaths of a large number of dogs and cats due to kidney failure.<sup>18</sup>

It is difficult to identify the precise source of the additive in the milk scandal, although the milk stations are normally regarded as the source of the contamination. Melamine was added as ‘protein powder’ to increase the nitrogen content to help the companies to pass through the test measuring nitrogen, after water has been added to raw milk to increase its volume.<sup>19</sup> In practice, the milk station operators normally added the melamine to raw milk,

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<sup>15</sup> Weise, Elizabeth, ‘Poison Pet Food Woes Seems to Hit Cats Harder’,  
[http://www.usatoday.com/tech/science/2007-05-07-poison-pet-food-science\\_N.htm](http://www.usatoday.com/tech/science/2007-05-07-poison-pet-food-science_N.htm)

<sup>16</sup> World Health Organization, Questions and Answers on Melamine, <http://www.who.int/csr/media/faq/QAmelamine/en/>

<sup>17</sup> Deputy-Governor of Hebei: Law Offenders Started to Add Melamine to Raw Milk From Two Years Ago (in Chinese), 21<sup>st</sup> Century Economy Report news story, China Finance Online, available at <http://news.cnfol.com/080918/101,1280,4781164,00.shtml>

<sup>18</sup> World Health Organization, ‘Questions and Answers on Melamine’,  
<http://www.who.int/csr/media/faq/QAmelamine/en/>

<sup>19</sup> Standard tests, such as the Kjeldahl and Dumas tests, test protein levels by measuring the nitrogen content. They can not distinguish between nitrogen in melamine and naturally occurring in amino acids, which allow the protein levels to be falsified. Added into milk, melamine can help conceal its fraudulent dilution with water. See Chen, Stephen, ‘Melamine – an industry staple’. South China Morning Post (Hong Kong) (18 September 2008), P A2.

which was diluted by water, to artificially raise its protein level.<sup>20</sup> The contaminated product would be used to produce further products, such as milk powder. Although adding melamine to raw milk to raise the milk's protein levels was illegal, it was still regarded as a common practice before the exposure of the milk scandal, at least in Hebei Province in China.<sup>21</sup> Relatively small scale food companies engaged in food production created severe regulatory challenges, especially when they were located in remote localities.

The Milk Scandal of 2008 first began with Sanlu,<sup>22</sup> the largest infant formula producer in China.<sup>23</sup> After further investigation, it was discovered that 21 other Chinese companies, including Yili, Mengniu, Guangming and Yashili, were involved in contaminated milk products.<sup>24</sup>

The multinational companies produced quick responses to the food incident. Mengniu was replaced in Starbucks when the coffee retailer eschewed milk in favour of soya milk in its China operations.<sup>25</sup> KFC also suspended selling Mengniu milk in order to reduce its customers' anxieties about their products. On 29th September, British confectionery group

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<sup>20</sup> Survivor leads China's milk industry, [http://news.xinhuanet.com/english/2008-11/15/content\\_10361534\\_3.htm](http://news.xinhuanet.com/english/2008-11/15/content_10361534_3.htm)

<sup>21</sup> Tracing Source of Melamine, *Caijing Magazine*, Issue No. 221  
<http://magazine.caijing.com.cn/2008-09-28/110056390.html>

<sup>22</sup> The Chinese dairy industry has been dominated by four main companies, namely Yili, Mengniu, Sanlu and Guangming. All of them have been involved in the 2008 Chinese milk scandal. Sanlu is a privately-owned company, which is 43 percent owned by New Zealand dairy company Fonterra

<sup>23</sup> Global Voice, China Poisonous Milk Scandal 2008, <http://globalvoicesonline.org/specialcoverage/2008-special-coverage/poisonous-milk-scandal-2008/>

<sup>24</sup> China seizes 22 companies with contaminated baby milk powder, Xinhua News, available at [http://news.xinhuanet.com/english/2008-09/17/content\\_10046949.htm](http://news.xinhuanet.com/english/2008-09/17/content_10046949.htm)

<sup>25</sup> Soy: Starbucks in China Opts for Milk Substitutes, available at <http://www.chinacsr.com/en/2008/09/26/3229-starbucks-in-china-opts-for-milk-substitutes/>

Cadbury was forced to withdraw its 11 chocolate products in China on suspicion of melamine contamination, which caused it to close down its three factories in China. Heinz responded by recalling its baby cereal in Hong Kong.<sup>26</sup> On 30th September, Unilever recalled its Lipton milk tea powder after the company's internal checks found traces of melamine in the Chinese milk powder used as an ingredient.<sup>27</sup> The recall affected the mainland China markets, as well as Taiwan, Hong Kong and Australia.<sup>28</sup> A Hong Kong laboratory also found excessive amounts of the industrial chemical melamine in two types of Cadbury Plc chocolate made in China, which were also recalled as a precaution.<sup>29</sup> Furthermore, the Milk Scandal of 2008 also adversely affected China's economy and exports. After the scandal was exposed, at least 11 countries stopped all imports of mainland Chinese dairy products. Overall, the sheer cost and scale of the Milk Scandal of 2008 is difficult to calculate.

The main reason for the incident was ineffective administrations on the part of both companies and the government, as will be discussed below.

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<sup>26</sup> Heinz to stop using Chinese milk in its products,

<http://www.bizjournals.com/albuquerque/stories/2008/09/29/daily13.html>. And also see 'Heinz stops buying Chinese milk products', <http://afp.google.com/article/ALeqM5jKovOtOFykh1iHvH3ZZcFIknRsQ>

<sup>27</sup>Lipton milk tea powder recalled in Hong Kong, [http://www.usatoday.com/money/industries/food/2008-09-30-lipton-tea-hongkong\\_N.htm?csp=34](http://www.usatoday.com/money/industries/food/2008-09-30-lipton-tea-hongkong_N.htm?csp=34)

<sup>28</sup>Cadbury Withdraws China Chocolate on Melamine Concern, <http://web.archive.org/web/20080930193316/http://www.flex-news-food.com/pages/19402/China/Chocolate/Food-Safety/Milk/cadbury-withdraws-china-chocolate-melamine-concern.html>. And also see 'Cadbury Choc Scare in China', <http://www.thesun.co.uk/sol/homepage/news/article1749704.ece>

<sup>29</sup>Hong Kong Finds Melamine in Two Cadbury Products, <http://www.reuters.com/article/2008/10/06/china-milk-hongkong-idUSHKG30923320081006>

## **2. The Causes of the Milk Scandal**

There were many complex factors that caused the milk scandal. The main factors may be considered from the perspective of the company and the government.

### **2.1 From the Company's Perspective – Take Sanlu Company as the Case Study**

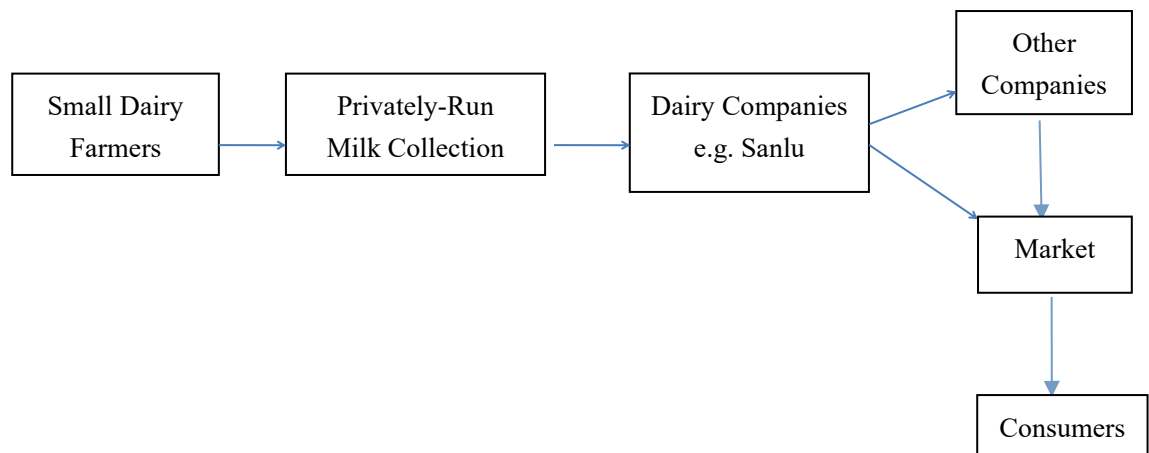
Traditionally Chinese dairy companies relied on self-sufficient farms to obtain the source of milk. In these self-sufficient farms, the quality of the raw milk was under control and it was not a major concern. The cooperation between the companies and the farms were close and tight. However, this relationship between the producers and companies changed radically due to the expansion of the dairy market. The Chinese dairy market expanded rapidly after 2000. Its average annual growth reach 23 per cent and total sales of dairy achieved 23.5 per cent of the entire food sector in 2006.<sup>30</sup> To the large dairy companies, such as Sanlu, battling over milk supply became a crucial task. Compared to the traditional method, relying on the self-sufficient small farms, the cost of the new method, collecting raw milk from dairy farms, was much lower. In order to reduce the cost of raw milk, more dairy companies turned to purchase raw milk from the small dairy farms or privately-run milk collection station, rather than developing their own dairy farm, which was the easier way for them to control the quality of the milk source. The dairy companies loosened their

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<sup>30</sup> China Dairy Industry Policy Released, China Economy Net News Story, available at [http://finance.ce.cn/macro/gdxw/200806/17/t20080617\\_13226765.shtml](http://finance.ce.cn/macro/gdxw/200806/17/t20080617_13226765.shtml)

quality standard to reduce the cost and grab more milk supply from small dairy farms or privately-run milk collection station, which caused the failure of the quality control.

The supply chain of the dairy products can be easily drawn as follow:



Generally speaking, the milk collection stations, acting as agencies between the dairy companies and dairy farm, were pivotal in ensuring supply standards. They were blamed for the failures of quality standards in the supply chain because they did not identify the contamination at the first stage. In addition, they were also suspected to dilute raw milk by water and add the melamine to increase the nitrogen content in order to pass the nitrogen measuring test. However, the adulteration of the milk might occur in the farms as well, since the dairy farmers had the same motivation of adding melamine. It is difficult to identify at which stage the adulteration of the milk took place.

However, it is also clear that the dairy companies must share the blame for their loose and ineffective internal control systems. Sometimes the dairy companies even deliberately

maintained lax internal controls so that they could get more milk supply. A Chinese newspaper questioned the Sanlu's internal system in the following terms:

*The testing and quality check personnel can't have been completely ignorant or innocent. An explanation is that the milk company's rapidly expanding business scales led to a shortage of milk sources, which forces them to collect milk loosely, turning a blind eye to poor quality raw milk.* <sup>31</sup>

The Milk Scandal of 2008 revealed the loose and inadequate internal control of the dairy companies, which directly caused the food incident. It also exposed the unethical and irresponsible business practices from Chinese companies. Sanlu was a typical case of outright disregard for corporate social responsibility.

In addition, the Milk Scandal of 2008 also revealed the poor corporate governance in Sanlu Company. The scandal was officially exposed to the public in September 2008. However, the later trial of the executives of Sanlu revealed the fact that the company actually knew the food safety problem at an earlier time. Since December 2007, Sanlu Company had already received complaints that some babies were sick because of their infant formula. The first case of kidney failure was reported to the company in March 2008. Although Sanlu knew the melamine contamination in 2007, the management tried all the methods to cover up the scandal to protect its business, instead of recalling the product. They sent representatives around the country to console victims, and bought out

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<sup>31</sup> Surviving Company Leads China's Milk Industry,  
[http://www.china.org.cn/business/2008-11/15/content\\_16771148\\_2.htm](http://www.china.org.cn/business/2008-11/15/content_16771148_2.htm)



adverse media publicity about the company. Sanlu neither recalled its products nor reported the matter to Shijiazhuang city government to comply with a State Council Regulation, which requires major food safety accidents to be reported to government authorities within two hours.<sup>32</sup> The New Zealand dairy cooperative Fonterra, owned a 43 per cent shares in Sanlu and it also appointed three of the seven directors to Sanlu board. However, as a shareholder and also a business operator, Fonterra claimed they were ‘only told about the melamine contamination on 2nd August’, on the same day when the Shijiazhuang city government was also informed of the incident.<sup>33</sup> Furthermore, Fonterra claimed at the same time they had tried to push hard for a full public recall. However, the local administrators refused an official recall, despite the immediate trade recall had been made already. It seems that the Sanlu’s board was very dysfunctional. Only the Chairwoman and CEO in the company were kept updated on the latest information, whereas the other executives of major business operations still remained in the darkness.

The poor corporate governance and the unethical business practice is not only an individual case in China. In fact, it exists commonly in Chinese companies. The companies are operated in an unethical and irresponsible way for the maximum of the shareholders’ profits. The interests of the stakeholders, such as employees, consumers, suppliers etc, are neglected. The directors fail to fulfil the duty of good faith to promote the company as a whole in a long term. Therefore, the failure of the private sector also contributes to the Chinese food safety crisis. The corporate social responsibility and the ethical business

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<sup>32</sup> Truth of Sanlu Incident Revealed, China Youth Daily News, available at [http://news.xinhuanet.com/politics/2009-01/01/content\\_1058757.htm](http://news.xinhuanet.com/politics/2009-01/01/content_1058757.htm)

<sup>33</sup> China Milk Scandal Threatens Giant Dairy Firm, Telegraphy New, 24<sup>th</sup> September 2008, available at <http://www.telegraph.co.uk/news/worldnews/asia/china/3073998/China-milk-scandal-threatens-giant-dairy-firm.html>

operation as well as the role of Company Law will be discussed in the Chapter 6.

## **2.2 From the Government's Perspective- Ineffective Regulatory System**

The 2008 China milk scandal also exposed the weaknesses and failures in the legal system. The scandal revealed the fact that China's enforcement regime is notoriously weak and food safety law is ineffective in China. As with the defects of the Chinese legal system, the local protectionism, incomplete legislation, ineffective administration and weak enforcement, the absence of the independent judiciary<sup>34</sup>, all contribute to the ineffectiveness of food safety law in China.

Firstly, the local protectionism and the ambiguity in the relationship between the companies and the government contributed to the milk incident. Sanlu Company was not a state-controlled company, although the ownership of Sanlu was among the questions raised after the milk scandal. Sanlu was a company limited by share. Fonterra of New Zealand held 43 per cent of shares in Sanlu; Sanlu Limited held 56 per cent of shares; and the rest 1 per cent of shares were held by a few small shareholders.<sup>35</sup> Sanlu Limited was owned by Sanlu's management and employees. Neither the central nor the local Shijiazhuang city government owns any shares in Sanlu.<sup>36</sup> Although Sanlu was not a state-controlled company, its intimate relationship with local authorities was important to

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<sup>34</sup> More details of these systemic problem is discussed in the chapter 2 'An Overview of Chinese Legal System'.

<sup>35</sup> Zhang, Xu, A review of SanLu's history (in Chinese), available at <http://finance.jrj.com.cn/2008/09/2000072101769.shtml>

<sup>36</sup> Ibid

its role and operation. At the local authority level, Shijiazhuang government made every effort to cover up the scandal and make a big delay to report the contamination to the Hebei provincial government. According to the regulation<sup>37</sup> from the State Council, the incident should have been reported to the next higher level government within two hours, however, the Shijiazhuang government made a massive delay, spending thirty eight days to report Sanlu's milk incident to its next higher level government, Hebei provincial government. When the milk incident was reported to the central government, it was 9<sup>th</sup> September, which was nine months after the first emerging case of melamine contamination.<sup>38</sup>

In fact, it was international pressure, rather than pressure from Chinese government itself, which led to the disclosure of this milk incident to the public. Fonterra of New Zealand, Sanlu's partner, tried to raise the alarm to the local authority- Shijiazhuang government, after Fonterra was informed of the contamination on 2<sup>nd</sup> August 2008. After being ignored by the local authority, Fonterra reported the matter to the New Zealand Foreign Affairs Department on 22<sup>nd</sup> August. Then the former New Zealand Prime Minister raised the issue to Chinese central government on 9<sup>th</sup> September, which finally brought the milk incident to the central government.<sup>39</sup>

However, in either edition of the story, the local authority, the Shijiazhuang government

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<sup>37</sup> The national emergency preplans for major food safety accidents, Article 3.22. Available at [http://www.gov.cn/yjgl/2006-02/27/content\\_21274.htm](http://www.gov.cn/yjgl/2006-02/27/content_21274.htm)

<sup>38</sup> The Central Party Committee and the State Council Handle Persons Involved in the Sanlu Milk Scandal Seriously (in Chinese), the PRC Central People's Government website, [http://www.gov.cn/jrzq/2008-09/22/content\\_1102256.htm](http://www.gov.cn/jrzq/2008-09/22/content_1102256.htm).

<sup>39</sup> Spencer, Richard and Foster, Peter, 'China milk scandal threatens giant dairy firm', available at <http://www.telegraph.co.uk/news/worldnews/asia/china/3073998/China-milk-scandal-threatens-giant-dairy-firm.html>

did not fulfil its duty to report the melamine contamination in time. The explanation of the massive delay from the Shijiazhuang government was the consideration of supporting the local business, when the public questioned the local authority why it took the Shijiazhuang government thirty eight days to report.<sup>40</sup> A letter from Sanlu to the Shijiazhuang government was disclosed to the public some time later. The letter pleaded to the government to ‘increase control and coordination of the media, to create a good environment for the recall of the company's problem products....to avoid whipping up the issue and creating a negative influence in society’.<sup>41</sup> The intimate relationship between Sanlu and Shijiazhuang city government even convinced Fonterra of New Zealand, the business partner holding 43 per cent of shares in Sanlu, to ‘work within the system’ to effect an official product recall when it was finally informed of the melamine contamination.<sup>42</sup>

It is clear that local protectionism created an intimate relationship between Sanlu and Shijiazhuang, the city government. Local protectionism does not only exist in Shijiazhuang city; on the contrary, it can be seen everywhere in China. The current tax regime and the promotion system for the local officials contribute to the local protectionism. Corporate tax is shared between central and local government under the current Chinese tax regime. With the rapid growth of the private sector, many of the large

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<sup>40</sup> Spokesperson of the Shijiazhuang City Government: We have Undeniable Responsibility in the Sanlu Incident (in Chinese), Xinhua news, 30th September 2008, available at [http://news.xinhuanet.com/newscenter/2008-09/30/content\\_10136125.htm](http://news.xinhuanet.com/newscenter/2008-09/30/content_10136125.htm)

<sup>41</sup> ‘China Dairy 'Asked for Cover-up, BBC news, <http://news.bbc.co.uk/2/hi/asia-pacific/7646512.stm>. Also see Why Reporting of Sanlu Incident was delayed (in Chinese), People Net news, available at [http://paper.people.com.cn/rmrb/html/2008-10/01/content\\_112000.htm](http://paper.people.com.cn/rmrb/html/2008-10/01/content_112000.htm)

<sup>42</sup> Fu, Jenny, ‘The 2008 China Milk Scandal and the Role of the Government in Corporate Governance in China’, <http://www.clta.edu.au/professional/papers/conference2009/FuCLTA09.pdf>

private companies have become a major source of revenue for local governments.<sup>43</sup> In addition, in China, government officials are not elected by the votes from the local people. Each higher level government officials appoint the officials at the lower level directly. In this case, the local officials are not accountable to the local people, but accountable to the officials at higher level.<sup>44</sup> In the past few decades, aiming to create China's economic miracle, GDP was the only criterion for assessing the local officials' performance.<sup>45</sup> Thus the officials, who had a better performance on the local GDP, would have a better opportunity of promotion. Local GDP was the priority, while other issues such as food safety or environmental protection could be put aside.

In Sanlu's case, Sanlu, as a great tax contributor in the city of Shijiazhuang, contributed 330 million yuan (US\$48.5 million) in tax revenue to the local government in 2007.<sup>46</sup> Tax revenue is the crucial factor to link Sanlu with the Shijiazhuang government, driving the Shijiazhuang government to overstep its role to be a conspirator with business, rather than a regulator. Sanlu was a star in the city of Shijiazhuang. Sanlu Company was on the list of 'the key enterprises supported by the Shijiazhuang city and Hebei Province'<sup>47</sup>. Moreover, Sanlu's Chairperson and CEO, Ms. Tian Wenhua was given 'more than 100' national and local honorary titles including representative to the National People's Political

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<sup>43</sup> Shenzhen Stock Exchange Research Institute, *An Empirical Study on the Development of China's Private Sector Listed Companies*, January 2008, <http://www.szse.cn/main/files/2008/02/25/091811911155.pdf>. At the end of 2005, accounting for more than 57 per cent of all enterprises in China, the private sector contributed to 65 per cent of China's GDP, and absorbed more than 75 per cent of the urban employment.

<sup>44</sup> Constitution of the People's Republic of China (1982), Article 101

<sup>45</sup> Huang, Hao 'Maximizing Chinese Imports' Compliance with United States Safety and Quality Standards: Carrot and Stick from Whom?', 18 S. CAL. INTERDISC.L.J.131, (2008), P141

<sup>46</sup> Lam, Willy, 'Milk Scandal Sours China's 'Soft Power'', <http://www.atimes.com/atimes/China/JJ10Ad02.html>.

<sup>47</sup> Fu, Jenny, 'The 2008 China Milk Scandal and the Role of the Government in Corporate Governance in China', <http://www.clta.edu.au/professional/papers/conference2009/FuCLTA09.pdf>

Consultative Conference and the Hebei Provincial People's Congress.<sup>48</sup> If not for the exposure of the milk scandal, Sanlu could even have soon been listed on the Shanghai Stock Exchange.<sup>49</sup>

Secondly, the incomplete and the conflicting legislation also contributes to the consecutive food safety scandals. In China, there are state regulations, local regulations, industrial regulations, and the regulations from different department, commissions, and bureaux under the State Council. They are really overlapping in some matters, whereas in the other matters they may be lax. Like too many spoons stirring in one soup, China is short of one co-ordinator to unify the regulations and standards and co-operate the enforcement. As the WHO pointed out after the Milk Scandal of 2008, in China 'safety enforcement is dispersed among too many agencies' ranging from health, agriculture, quality inspection to industrial and commercial authority at 'different levels of government,' but with no one agency holding the bottom line.<sup>50</sup> The Minister of Agriculture also admitted the regulatory vacuum regarding the regulation of milk source after the exposure of the milk scandal.<sup>51</sup> Thus, the fragmentary, incomplete and conflicting legislation causes the ineffectiveness of the implementation of food safety law, which will be discussed in details in Chapter 4.

Thirdly, the ineffective administration and weak implementation also adversely affect food safety in China. The General Administration of Quality Supervision, Inspection and

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<sup>48</sup> Four Former Sanlu Senior Executives including Chairwoman Tian Wenhua Stood for trial in Shijiazhuang Today (in Chinese ), [http://news.xinhuanet.com/legal/2008-12/31/content\\_10583852.htm](http://news.xinhuanet.com/legal/2008-12/31/content_10583852.htm).

<sup>49</sup> Application submitted, Sanlu hopeful of getting listed in A Share Market in 2008' (in Chinese), 21 Century Economic Report, available at <http://news.hexun.com/2008-09-17/108945053.html>

<sup>50</sup> U.N. Responds to Recent China Food Safety Scandal , <http://www.newsinferno.com/archives/4069>

<sup>51</sup> Minister of Agriculture Recognises Control Vacuum on Milk Collection Stations' (in Chinese), Caijing Magazine news, 23rd September 2008, available at <http://www.caijing.com.cn/2008-09-23/110015188.html>

Quarantine in China (AQSIQ), as the safety watchdog, did not fulfil its role of supervision. AQSIQ's part function is to provide businesses with important marketing tools through activities, such as granting food quality inspection exemption qualifications and sponsoring brands and products.<sup>52</sup> In 2008, AQSIQ introduced a new system, called quality inspection exemption, which granted companies that met some certain standards a privilege of being exempted from the quality inspection for three years. AQSIQ claimed the implementation of this new system was to 'ease the burden for companies that otherwise would undergo repeated inspections'.<sup>53</sup> Most of 'China's famous brands'<sup>54</sup> companies had gained this privilege of exemption. This quality inspection exemption system was cancelled after the exposure of the Milk Scandal of 2008. However, before the cancellation, it had ready granted more than 1,500 companies the status of inspection exemption. Sanlu, with other 47 dairy companies, such as Mengnui and Yili, were awarded the quality inspection exemption. The irony is that Sanlu, Mengnui and Yili were all involved in the Milk Scandal of 2008. In fact, the alarm of the contaminated milk had been raised before the exposure of the Milk Scandal of 2008. China Daily reported a separate incident caused approximate ten babies death by defective infant formula in the Fuyang city of Anhui Province in 2004.<sup>55</sup> However, although the defect of the inspection free system emerged before 2008, AQSIQ did not pay any attention to the alarms. It was clearly that in order to 'ease the burden for companies', AQSIQ descended its standards for business compliance and sacrificed the products' standards and the safety.

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<sup>52</sup> Fu, Jenny, 'The 2008 China Milk Scandal and the Role of the Government in Corporate Governance in China', <http://www.clta.edu.au/professional/papers/conference2009/FuCLTA09.pdf>

<sup>53</sup> Food Product Inspection Waivers Revoked, *Caijing Magazine*, available at <http://ebgkugsc.cauhubg.cin.cb/2008-09-18/110013644.html>

<sup>54</sup> China's famous brands are the brands that have been recognized by the State Bureau of Industry and Commerce.

<sup>55</sup> Milk powders kill babies in Anhui province, *China Daily news*, 20th April 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-04/20/content\\_324727.htm](http://www.chinadaily.com.cn/english/doc/2004-04/20/content_324727.htm)

Fourthly, the case of the Milk Scandal of 2008 also revealed the fact that the independent judicial system is absent in China. The absence of the judiciary also contributed to the ineffectiveness of the food safety law in China. The dependent financial and personnel structure of the court lead to the absence of a truly independent judiciary in China,<sup>56</sup> which will be discussed in details in Chapter 4. According to China's Organic Law of the People's Courts 2006, presidents of local people's courts at various levels are elected by the local people's congresses at corresponding level, and their vice-president, chief judges as well as associate chief judges of divisions are appointed and removed by the standing committees of the local people's congresses at corresponding levels.<sup>57</sup> That means the courts in China are short of any independence in the composition of personnel. In addition, the financial structure of the courts also relies on the local government at the corresponding level. The courts system has not been located a budget of its own fund by law. In practice, the funding of the courts is from the budget of the local administration. That means the local administration has the power to cut the spending on courts. Courts in China have to rely on the local administrations at the corresponding level for the financial support. In summary, the pressure from the personnel and the financial structure deprives the courts of the independence. The courts sometimes have to make the judgment favouring the local government. In some cases, the victims have to seek the redress from the government, rather than the courts, to resolve the dispute. After the exposure of the 2008 food milk scandal, nine families of the victims sued the Sanlu Company in the court in the city of Shijiazhuang. However, the court refused to file the case, because the

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<sup>56</sup> The absence of an independent judiciary in China will be discussed in details in Chapter 4

<sup>57</sup> Organic Law of the People's Courts of the People's Republic of China 2006, Article 35



incident had a wide impact and the court needed to await a compensation plan from the government first.<sup>58</sup> The courts in other provinces also refused to hear the collective action for the compensation.<sup>59</sup> Although according to the Protection of Consumer Protection Law<sup>60</sup> and the Tort Law on the Product Quality Liability<sup>61</sup>, the courts should file the case for the application for the compensation, in practice the compensation was settled by the government. The compensation plan made by the government, rather than the courts, revealed not only the absence of an independent judicial system, but also the Chinese traditional legal culture: avoiding the court redress for settling the dispute. A complete legal system requires not only the independent judiciary but also the suitable legal culture. In China, the independent judiciary system needs to be established, as well as the citizen's attitude toward the law needs to be changed to complete the construction of Chinese legal system. It seems China still has a long way to go to build up a state rule of law.

Overall, the failure from the public sector and the private sector caused the Milk Scandal of 2008. The defects of the legal system contribute to the failure of the public sector in China. The local protectionism, incomplete legislation, ineffective administration and weak implementation, the absence of the independent judiciary, all together contributed to the ineffectiveness and inefficiency of the food safety regulatory system. From the government's perspective, the Shijiazhuang city government and AQSIQ both played a culpable role in the Milk Scandal of 2008. They overemphasised rapid economic growth

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<sup>58</sup> Compensation Claims Against Sanlu Suspended: Who to Compensate the Victims?, China News, 11st November 2008, available at <http://www.chinanews.com/cn/cj/xfsh/news/2008/11-11/1445254.shtml>

<sup>59</sup> Court Compound Pain of Chinese Tainted Milk, New York Times, 17<sup>th</sup> October 2008, available at <http://www.nytimes.com/2008/10/17/world/asia/17milk.html?fta=y>

<sup>60</sup> PRC Consumer Protection Law 1994, Article 35. The law was amended in 2013, which is the latest version.

<sup>61</sup> PRC Tort Law 2010, Article 43

figure, regardless of food safety and sustainability in the long term. The priority of economic growth resulted in the disaster consequence. The regulatory authority pursued the economic growth at the cost of the basic businesses' compliance. In the name of protecting the growth of business, the government, directly or indirectly, contributed to the Milk Scandal of 2008. After receiving the report of the melamine contamination product, Shijiazhuang city government still tried to cover up the scandal and no legal action was taken against Sanlu Company. The close link between the local authority and the business clearly reflected the continuing government intervention in business in the interest of economic growth. It is doubtless that the local government failed to fulfil its role of administration in the case of the Milk Scandal of 2008. The next two chapters, chapter 3 and chapter 4, will discuss the challenges to the Chinese food safety regulatory system, as well as the new changes the Chinese government made in responding to the food crisis brought by the Milk Scandal of 2008.

Meanwhile, the irresponsible and unethical business activities caused the failure of the private sector. The intense competition among the dairy companies led to the companies' lax internal controls. Food safety was sacrificed on the altar of pursuing endless profits. Take Sanlu as an example. Through the trial of Sanlu executives, a report revealed that Sanlu continued accepting melamine contaminated raw milk to produce dairy product during the 38 days even after it had already reported the incident to the Shijiazhuang government. Sanlu executives explained that because the 'the company could not afford to lose its milk source to its competitors'.<sup>62</sup> Irresponsible business activities have created the

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<sup>62</sup> Truth of Sanlu Incident revealed, China Youth Daily, available at [http://news.xinhuanet.com/politics/2009-01/01/content\\_10587575.htm](http://news.xinhuanet.com/politics/2009-01/01/content_10587575.htm)

consecutive food scandals in China. Operating business in a responsible and sustainable method, with the consideration of the interests of all the stakeholders, such as consumers, suppliers, environment and the community, is not only needed by the company itself, but also needed by the society. Therefore, corporate social responsibility and the ethical business will be discussed in the Chapter 6.

### **III. Conclusions**

The causes of the milk scandal have passed into detailed retrospective analysis. Identifying the reasons has always had an element of being wise after the event. A broad institutional approach to the events surrounding the milk scandal point to failures in government at local and central levels. The absence of candour is also clear. Perhaps the overriding consideration to protect the state and prevent public unrest or disquiet is also clear. This made it difficult for early intervention. There are also theories based on the exceptional circumstances of a bad company or bad leadership. Corruption and inefficiency in corrupt controls are also plausible explanations. Large companies and corporate systems often appear 'too big to fail' leaving the government and stakeholders fearful of any intrusive investigation or analysis. It is also clear that the absence of national standards left room for discretion and loopholes that could be exploited. The intertwining of party politics and administrative decision-making left it impossible to address corporate issues in an appropriate way.

The 2008 China milk scandal was considered by the World Health Organisation as one of

the largest food safety events it has dealt with in the recent years. However, the Milk Scandal of 2008 appears to be only the tip of the iceberg of Chinese food safety problem. Ensuring food safety and making it compatible with the fast economic growth is a crucial task for Chinese government, since the food safety problem is not only relevant to the public health, it is also relevant to the trading standards.

However, China's current food safety system is still weak and vulnerable. The reason for the ineffective food safety system are complex. It involves the defects of Chinese legal system, such as incomplete and conflicting legislation, the weak implementation and the ineffective administration, and local protectionism. The Milk Scandal of 2008 revealed the weakness of the food safety regulatory system in China. In responding to the food crisis, Chinese government has made some reforms in the food safety regulations. Therefore, the next two chapters will discuss the challenges in the current food safety regulatory system and the new changes brought by China's new food safety law to cope with its food crisis.

Apart from the systemic reason, the degradation of environment also adversely affects the food safety in China. China's current economic miracle is based on the great cost of environment. Air pollution, water shortage etc., all restrain the economic development in the future. Due to the decreasing amount of arable land, the massive amount of fertiliser and pesticide are used to increase the agricultural productivity. However, the massive usage of fertiliser and pesticide contributes to the degradation of environment, and also contaminates the agricultural product. The environmental pollution and the environmental degradation threaten China's food safety from the bottom of the food supply chain.

Therefore, Chapter 5 will discuss the environmental regulations and its impact on the food safety in China.

Apart from the failure of the public sector, the private sector in China also fails to uphold the safety standard of the products. The unethical and irresponsible business activities contribute to the consecutive food scandals. Operating company in an ethical way and calling for the corporate social responsibility can help to ease the food crisis from the perspective of the company. Meanwhile, corporate social responsibility can also help to achieve the goal of harmonious society and the sustainable economic development. Thus, corporate social responsibility and the ethical business will be briefly addressed in the Chapter 6.

## **Chapter 3 Food Safety Regulation in China**

### **I. Introduction**

In the last chapter we saw how the Milk Scandal of 2008 had such devastating results in China and on China's international reputation. The Chinese food crisis has a great implication on public health and international trading. The milk scandal also exposed systemic weaknesses in the regulatory system in China more generally. The aftermath of the milk scandal saw that greater priority was given to food safety through legislative and legal reforms. This also coincided with the development of important legal reforms that addressed broader environmental problems that are the result of rapid and unprecedented economic growth that has huge environmental cost that China is beginning to acknowledge has serious repercussions. Environmental costs are likely to undermine the basis of China's agriculture and put in doubt the sustainability of its farming industry. Industrialisation on such a large scale might well impact on China's capacity to feed its large population. Feeding its own people has created a viable agricultural industry and a vibrant export industry in food with potential for global market share and reliable income streams for the Chinese economy. Therefore, ensuring food safety to feed its own people safely and building up the public's confidence towards the food industry is a crucial task for Chinese government to achieve its sustainable development. The main focus of this chapter is to show how the 2009 Food Safety Law came to be adopted in China.

As outlined in the previous chapters, the cause of the food safety crisis in China is complex. Apart from the environmental problem and the failure of holding the safety standards from the private sector, the defects of the legal system also contribute to the ineffectiveness of the food regulatory system in China. Incomplete legislation, the weak implementation and the ineffective administration, the local protectionism and the absence of the independent judiciary, all restrains the effectiveness from the food safety regulatory system in China. The Milk Scandal of 2008 exposed the irresponsible business activities of Chinese companies, it also revealed the ineffectiveness of the Chinese food safety regulatory system.<sup>1</sup> This chapter explains how the Chinese regulatory system addresses the food safety problem and the reforms made in the 2009 Food Safety Law in responding to the Milk Scandal of 2008. Then the next chapter will discuss the challenges to build up an effective food safety regulatory system in China.

## **II. Food Safety and Sustainable Development in China**

The number of Chinese food safety incidents has been increasing in these years. As Zhou and Liang pointed out, over the last decade great attention has been paid to food safety and quality control. Increasing numbers of cases concerning poisoned food or food have led to serious illness and disease in China.<sup>2</sup> The increasing food safety incidents not only cause economic and social consequences, but also cause the loss of life. Meanwhile, the

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<sup>1</sup> Balzano J. 'China's Food Safety Law: Administrative Innovation and Institutional Design in Comparative Perspective', [J]. APLPJ, 2011, 13: 23.

<sup>2</sup> Zhou, J.H., Helen, J.H. & Liang, J. (2011), 'Implementation of Food Safety and Quality Standards: A Case Study of Vegetable Processing Industry in Zhejiang, China', Social Sci.J.,48,543-552

increasing food safety incidents also create the distrust in the Chinese food system nationally and internationally.<sup>3</sup>

China's food safety problem is not only well known in the domestic, but also infamous in the international society. China's food safety problem has been singled out in Triplett's report to the US congress. He stressed, Chinese food exports are vulnerable to health scares, and even the Chinese government has admitted the notoriety of such cases: 'Liquor made with industrial alcohol (five dead); pork adulterated with clenbuterol; melamine-laced infant formula (six dead and 300,000 injured); toxic gelation for medicine capsules.'<sup>4</sup> Other cases like 'Sudan I Red Dye<sup>5</sup>, 'Plasticizer in drinks', 'Trench oil in dining tables'<sup>6</sup>, also emerged in the news.

However, the exact extent and scale of the food safety problem in China is still unknown. As Bian pointed out that the result of any risk assessment of food safety in China is rated as 'very serious'.<sup>7</sup> The Chinese government identifies the current food safety risks as

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<sup>3</sup> Ortega, D.L., Wang, H.H., Wu, L. & Olynk, N.J. (2011), 'Modelling Heterogeneity in Consumer Preferences to Select Food Safety Attributes in China', *Food Policy*, 36, 318-324

<sup>4</sup> Triplett, William C., II, Subcommittee on Europe, Eurasia and Emerging Threats, 'The Threat of China's Unsafe Consumables', available at [http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&cad=rja&ved=0CDsQFjAB&url=http%2Fdocs.house.gov%2Fmeetings%2FFFA14%2F20130508%2F100807%2FHHRG-113-FA14-Wstate-TriplettIIW-20130508.pdf&ei=4XmUafuF43y0gW9joGwDg&usg=AFQjCNHb\\_qEc8mg8rmL9ZdoGRbt4nZ6muw&sig2=LUWI\\_YO1vOCleyPPGKsx5w](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&cad=rja&ved=0CDsQFjAB&url=http%2Fdocs.house.gov%2Fmeetings%2FFFA14%2F20130508%2F100807%2FHHRG-113-FA14-Wstate-TriplettIIW-20130508.pdf&ei=4XmUafuF43y0gW9joGwDg&usg=AFQjCNHb_qEc8mg8rmL9ZdoGRbt4nZ6muw&sig2=LUWI_YO1vOCleyPPGKsx5w)

<sup>5</sup> Sudan dyes are a group of industrial dye consisting of a number of red colours. The use of Sudan dyes as colouring matters in food is not permitted in Hong Kong under the Colouring Matter in Food Regulations (Cap.132H), nor the food legislations in Mainland China and in other countries including members of the European Union (EU), Australia and Canada. See Kwok, Joey and Yau, Arthur, 'Food Safety Focus (5th Issue, December 2006) – Incident in Focus: Sudan Dyes in Food'. Available at [http://www.cfs.gov.hk/english/multimedia/multimedia\\_pub/multimedia\\_pub\\_fsf\\_05\\_01.html](http://www.cfs.gov.hk/english/multimedia/multimedia_pub/multimedia_pub_fsf_05_01.html)

<sup>6</sup> Shao, Y, 'Rethinking Food Safety Problems in China', *Acta Alimentaria*, Vol. 42 (1), pp124-132 (2013)

<sup>7</sup> Bian, Yongmin, 'The Challenges for Food Safety in China-Current Legislation is Unable to Protect Consumers from



including: '1) Food-induced illnesses remain the supreme danger for public health; 2) New biological and chemical pollutants in food; 3) New food technologies and materials (such as transgenic food) raise new challenges; 4) The capacity for self-management among food producers is weak; 5) Food terrorism; 6) Slow/ insufficient food safety supervision by government organs.'<sup>8</sup>

The food safety problem is a big challenge to China's sustainable economic development. Firstly of all, the food safety crisis has a great implication on trade. The bird flu in 2013 cost China's poultry industry US\$65 billion.<sup>9</sup> In addition, due to the international trade between China and other countries, China's food safety problem is not only a domestic problem, but it is also an international problem.

Secondly, the food safety problem also affects consumers' confidence towards the brand of 'Made in China'. As discussed in the Chapter 2, the Milk Scandal of 2008 is a good example of how the food safety incidents destroy the consumers' confidence. Even after seven years, the shadow still remains. The Chinese customers still do not have a confidence in the domestic dairy products. They are willing to spend more money on the foreign-brand infant formula, rather than the domestic ones. This massive demand of the infant formula has caused the shortage of milk powder in the other country, like the UK<sup>10</sup>

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the Consequences of Unscrupulous Food Production', available at <http://www.cefc.com.hk/pccpa.php?aid=1936>

<sup>8</sup> Bian, Yongmin, 'The Challenges for Food Safety in China-Current Legislation is Unable to Protect Consumers from the Consequences of Unscrupulous Food Production', available at <http://www.cefc.com.hk/pccpa.php?aid=1936>

<sup>9</sup> Li Xirong, head of the National Animal Husbandry Service confirmed that the sector has been losing an average of one billion yuan a day since the end of March 2013. Available at <http://www.scmp.com/business/economy/article/1241867/bird-flu-costs-china-industry-us65b-state-media>

<sup>10</sup> The Independent, 'Supermarkets decide to limit sales of baby milk to stop bulk buying to feed China market', <http://www.independent.co.uk/news/uk/home-news/supermarkets-decide-to-limit-sales-of-baby-milk-to-stop-bulk-buyin>

and the New Zealand.<sup>11</sup>

Overall, this raises issues about sustainability, as it is not possible for China to develop as a successful trading country without a successful food safety and quality control system. If China fails to ensure its food safety, the economic development in the long-term would not be achieved as well. In addition, sustainable economic development envisages growth but also addresses common problems and concerns that protect future generations. Therefore, the food safety issue is an issue involving both the development of the economy and the protection of future generations. There is no way for China to achieve its sustainable economic development without solving the problem of food safety.

The Milk Scandal of 2008 revealed the weakness of the food safety regulatory system. Therefore, in the following context, the main issue of how China adopted food safety law to address the problems raised by the Milk Scandal crisis will be discussed.

### **III. An Overview of Chinese Food Safety Law in the Context of the Global Economy**

#### **1.The Influences of Food Safety Law Overseas**

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g-to-feed-china-market-8565052.html

<sup>11</sup> 'New Zealand and Dragon Baby- Has Kiwis Caught on Yet?', <http://bevchuang.wordpress.com/2012/01/28/10>; also Lin, Li-Wen, 'Corporate Social Responsibility in China: Window Dressing or Structural Change?', *Berkeley Journal of International Law* 65, 65, 2010

Food safety is recognisable in every country in the world. Even advanced democracies have had to address food problems in their history. Sinclair observed in the 20<sup>th</sup> century western food safety policy was driven by scandals in the meat packing and food processing industry.<sup>12</sup> This goes back to the early part of the 19<sup>th</sup> century regulations that were passed to address such problems. The type of ‘command and control’ form of safety regulation was in vogue.<sup>13</sup> This relied on ‘industrial management practices such as continuous line inspection, visual product inspection, and detailed specification of approved hygiene practices.’<sup>14</sup> The new generation of food safety regulation, which is emerging today, however, is also a reaction to the scandals and a crisis of trust. The essence of the new generation regulation is ‘an emerging global consensus on the need for a preventive, public health focused policy that fosters integrated management of foodborne hazards from farm-to-fork’.<sup>15</sup> This new approach is based on risk management, with broader public health goals and objectives, beyond the mere purpose of disease control.

Globalization brings great challenges to food safety, as evidenced in the difficulties experienced to manage infectious and non-infectious foodborne hazards. Globalization increases the spread of foodborne disease.<sup>16</sup> Poor sanitary conditions in developing countries might cause food contamination, which might be exported to the developed countries.<sup>17</sup> However, the foodborne pathogens can also spread among developed

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<sup>12</sup> Sinclair, U., ‘The Jungle’, New York: Doubleday, Jabber and Company, 1906

<sup>13</sup> Hoffmann, Sandra, ‘Food Safety Policy and Economics: A Review of the Literature’, July 2010, available at [www.rff.org/documents/RFF-DP-10-36.pdf](http://www.rff.org/documents/RFF-DP-10-36.pdf)

<sup>14</sup> Ibid

<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> The outbreak of *Cylospora* in the US associated in 1996 was associated with Guatemalan raspberries. See Calvin, L., Flores, L., and Foster, W., ‘Case Study Guatemalan Raspberries and *Cyclospora*’, 2020 Vision Briefs 10 No. 7.

countries through the trade.<sup>18</sup> In addition, globalization also contributes to industrialization and urbanization, which can strain capacity for adequate sanitation and safe food handling.<sup>19</sup>

Therefore, apart from the efforts from industrial countries, international institutions also contribute their efforts in developing food safety regulations. The World Trade Organization (WTO) achieved the Sanitary and Phytosanitary (SPS) agreement<sup>20</sup> to provide a 'legitimate from protectionist use of safety and phytosanitary laws'.<sup>21</sup>

Besides the World Health Organization (WHO) and United Nation's Food and Agriculture Organization (FAO), the Codex Alimentarius Commission is also an important international institution to contribute in food safety regulations. The Codex Alimentarius Commission was established in 1963 by the United Nations' Food and Agriculture Organization (FAO) and World Health Organization (WHO) in the purpose of providing 'a forum for international technical collaboration on the development of food safety and quality standards.'<sup>22</sup> Membership in Codex is open to all the members or associate members of the WHO and FAO. 175 countries, representing 98 per cent of the world's

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Washington, DC: International Food Policy Research Institute.

<sup>18</sup> BSE from Britain spread to Japan in 2001. See McCluskey, J. J., Grimsrud, K.M., Ouchi, H., and Wahl. T.I., 'Bovine Spongiform Encephalopathy in Japan: Consumers' Food Safety Perceptions and Willingness to Pay for Tested Beef', 2005, Australian Journal of Agricultural and Resource Economics, 49: 197-209

<sup>19</sup> WHO, 'WHO Global Strategy for Food Safety', Geneva: World Health Organization

<sup>20</sup> The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), available at [http://www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm)

<sup>21</sup> WHO, 'Food Safety and Globalization of Trade in Food: A Challenge to the Public Health Sector', 1997, WHO/FSF/FOS 97.8 Rev.1. Geneva: World Health Organisation

<sup>22</sup> Josling, T., D. Roberts, and Orden, D., 'Food Regulation and Trade: Toward a Safe and Open Global System', 2004, Washington, DC: Institute for International Economics.

population, have participated in the Codex Commission.<sup>23</sup>

The Codex Commission also works tightly with its regional subcommittees. So far the Codex has put a lot of efforts in to producing model standards, aiming at ‘preventing consuming fraud, quantitative standards for food additives, and quantitative tolerances for contaminants such as pesticides and veterinary drugs.’<sup>24</sup> The Codex has also created the guidelines for the HACCP system (Hazard analysis and critical control points)<sup>25</sup> and international food hygiene code.<sup>26</sup> Furthermore, the Codex has produced ‘guidelines for microbial risk assessment, biotechnology risk assessment, microbial risk management, validation of safety control measures, and principles for traceability and risk analysis.’ Overall, the Codex has made its great contribution to develop the model standards in the world.

The role of the US should not be under estimated in the overseas influence. The international trade between China and the US is huge and it has kept increasing every year. If China could not ensure its food safety, it might provide the next food safety scare in the US.<sup>27</sup> In order to increase food safety in China, the agreement of continuing cooperation

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<sup>23</sup> Van der Meulen, B., and M. van der Velde, ‘European Food Law Handbook’, 2008, Wageningen: Wageningen Academic Publishers

<sup>24</sup> Hoffmann, Sandra, ‘Food Safety Policy and Economics: A Review of the Literature’, July 2010, available at [www.rff.org/documents/RFF-DP-10-36.pdf](http://www.rff.org/documents/RFF-DP-10-36.pdf)

<sup>25</sup> CAC (Codex Alimentarius Commission), ‘Hazard Analysis and Critical Control Point (HACCP) System and Guidelines for Its Application’, 1997, Annex to CAC/RCP 1-1969, Rev. 3. (1997). Rome: WHO/FAO

<sup>26</sup> CAC (Codex Alimentarius Commission), ‘Recommended International Code of Practice General Principles of Food Hygiene’, CAC/RCP 1-1969, Rev. 3 (1997), Amended 1999. Rome: WHO/FAO

<sup>27</sup> ‘Potentially Unsafe Food Entering U.S. from China’, available at <http://www.tradereform.org/2011/06/potentially-unsafe-food-entering-u-s-from-china/>

on food safety between China and US was made in 2012.<sup>28</sup> According to the agreement, FDA opened offices in Beijing, Shanghai and Guangzhou. These offices were intended to enhance public health protection by strengthening FDA's relationship with Chinese food safety authorities, performing inspections, conducting outreach to Chinese industry representatives regarding FDA requirements, and gathering information on trends and events that affect the safety of food exported from China to the United States. The aim of the collaboration between the two countries was to ease inspections of facilities that process and produce food. Since 2007, FDA has made significant progresses in numerous areas with Chinese food safety authorities.<sup>29</sup>

## **2. A Brief Outline of Early Developments in Food Safety Law in China**

Food safety law has a short history in China, especially compared with the United States, which had its Federal Food, Drug & Cosmetic Act originally adopted in 1938.<sup>30</sup> As Asian countries normally like to work from a model, from which to learn the experience, and also due to the strong link of the international trade link, China has been doing a lot of research on the food safety regulations in the USA to build up its own food safety system.

The latest Food Safety Law in China came into force on 1<sup>st</sup> June 2009.<sup>31</sup> The 2008

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<sup>28</sup> 'U.S., China Agree to Continue Cooperation on Food Safety', <http://www.fda.gov/Food/NewsEvents/ConstituentUpdates/ucm331518.htm>

<sup>29</sup> Ibid

<sup>30</sup> Zhang, Fang, 'The Development and Improvement of China's Modern Legal Framework on Food Safety', 5 Zhengzhi Yu Falu [J. Politics & L.] 18, 18 (June)

<sup>31</sup> The Food Safety Law 2009 will be amended soon. The revised draft of Food Safety Law was published for the public opinion in 2014.

Chinese milk scandal is one of the important factors driving the enforcement of food safety law in China.<sup>32</sup> Before the 2009 food safety law, the food safety system in China was covered in the General Principles of Civil Law<sup>33</sup>, Administrative Litigation Law<sup>34</sup>, Product Quality Law,<sup>35</sup> Consumer Protection Law,<sup>36</sup> and Advertisement Law<sup>37</sup>, Food Hygiene Law (Tentative)<sup>38</sup>, Food Hygiene Law 1995,<sup>39</sup> Agriculture Product Quality and Safety Law,<sup>40</sup> Agriculture Law,<sup>41</sup> Animal Husbandry Law,<sup>42</sup> and Aquatic Product Hygiene Regulations.<sup>43</sup> These laws and regulations together built up the basic structure for the food safety regulatory system before the enactment of 2009 Food Safety Law.

The first major Chinese law involving the food safety issue was the ‘Regulations on the

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<sup>32</sup> Areddy, James T., ‘Dairy Probe Began Almost 11 Months before Being Disclosed’, WALL ST. J., Jan. 8, 2010, A7 (discussing the scandal).

<sup>33</sup> P.R.C. General Principles of Civil Law, promulgated by the National People’s Congress, 12<sup>th</sup> April 1986, effective 1<sup>st</sup> January 1987

<sup>34</sup> P.R.C. Administrative Litigation Law, promulgated by the National People’s Congress 4<sup>th</sup> April 1986, effective 1<sup>st</sup> October 1990

<sup>35</sup> P.R.C. Product Quality Law, promulgated by the Standing Committee, National People’s Congress, 2<sup>nd</sup> February 1993, amended 8<sup>th</sup> July 2000

<sup>36</sup> P.R.C. Consumer Protection Law, promulgated by Standing Committee, National People’s Congress, 31<sup>st</sup> October 1993, effective 1<sup>st</sup> January 1994

<sup>37</sup> P.R.C. Advertisement Law, promulgated by the Standing Committee, National People’s Congress, 27<sup>th</sup> October 1994, effective 1<sup>st</sup> February 1995

<sup>38</sup> P.R.C. Food Hygiene Law (Tentative), promulgated by the Standing Committee, National People’s Congress, 19<sup>th</sup> November 1982, terminated 1<sup>st</sup> July 1993

<sup>39</sup> Food Hygiene Law of the People’s Republic of China, promulgated by the Standing Committee, National People’s Congress, 30<sup>th</sup> October 1995, effective Oct. 30, 1995

<sup>40</sup> P.R.C. Agriculture Product Quality and Safety Law, promulgated by the Standing Committee, National People’s Congress, 29<sup>th</sup> April 2006, effective 1<sup>st</sup> November 2006

<sup>41</sup> P.R.C. Agriculture Law, promulgated by National People’s Congress 2<sup>nd</sup> July 1993, amended by the Standing Committee, National People’s Congress 28<sup>th</sup> December 2002

<sup>42</sup> P.R.C. Animal Husbandry Law, promulgated by the Standing Committee, National People’s Congress, 29<sup>th</sup> December 2005, effective 1<sup>st</sup> July 2006

<sup>43</sup> Aquatic Product Hygiene Regulations, promulgated by the Ministry of Health, 20<sup>th</sup> November 1990, terminated 28<sup>th</sup> December 2010

Administration of Food Hygiene (Trial Implementation)’<sup>44</sup>, which were issued by the State Council in 1965. As the state gradually took over privately owned food enterprises and transformed them into state owned enterprises (SOEs),<sup>45</sup> this Regulation mainly referred to the state owned enterprises (SOEs). It mainly dealt with the unsanitary conditions in which food products were stored, manufactured and transported.<sup>46</sup> Since China was recovering from the famine between 1960 and 1962, which caused approximately thirty million people to die of malnutrition, this regulation did not lay down the requirement for food content.<sup>47</sup> The main concern for the Chinese government at that time was how to maintain a sufficient food supply.<sup>48</sup> The State Council also stressed that the government should be flexible in enforcing the regulation in the promulgation circular. In addition, the promulgation circular also states that the government had the obligation to help the food manufacturers sort out the economic difficulties, if they were not able to comply with the Food Sanitation Regulation due to the high cost.<sup>49</sup>

In 1979, based on the 1965 Regulations, the Regulations on the Administration of Food Hygiene were drafted. However, the new version of this code did not come into force immediately. It was officially issued three years later, in 1982, and it came into force in 1983. This law was an attempt to regulate the growing number of privately owned food

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<sup>44</sup> Food Sanitation Regulation (For Trial Implementation), promulgated by the State Council on 17th August, 1965), [http://new.xinhuanet.com/ziliao/2005-02/02/content\\_2538913.htm](http://new.xinhuanet.com/ziliao/2005-02/02/content_2538913.htm).

<sup>45</sup> Chris Bramall, *Chinese Economic Development* 119-21 (2009)

<sup>46</sup> Bian, Yongming, ‘The Challenges for Food Safety in China’, 53 *CHINA PERSP.*, available at <http://chinaperspectives.revues.org/document819.html>.

<sup>47</sup> Bramall, Chris, ‘Chinese Economic Development’ 119-21 (2009)

<sup>48</sup> *Ibid*, 134-135

<sup>49</sup> The State Council Notice on Promulgation of the Food Sanitary Regulation, 17<sup>th</sup> August 1965, available at [http://news.xinhuanet.com/ziliao/2005-02/02/content\\_2538913.htm](http://news.xinhuanet.com/ziliao/2005-02/02/content_2538913.htm).



manufacturers and vendors emerging after the economic reforms.<sup>50</sup> Compared to the 1965 edition, the 1982 Food Hygiene Law broadened its scope. It had a set of the regulations in terms of food content, additives, containers, manufacturing conditions and equipment.<sup>51</sup> The Food Hygiene Law required food vendors to register with local industrial and commercial administrations.<sup>52</sup> The law also had penalties, which ranged from fines to criminal prosecution,<sup>53</sup> for violations of the Food Hygiene Law.<sup>54</sup>

The new Food Sanitation Law was promulgated by the National People's Congress in 1995, to replace the 1982 Food Hygiene Law.<sup>55</sup> It covers general principles, food hygiene, food additives, packaged and containers of food, the enactment of regulations and hygiene standards on food, the administration of food hygiene, the supervision of food hygiene, penalties, and miscellaneous clauses, including definitions.<sup>56</sup> It clarified the Ministry of Health as the primary enforcement agency of the law.<sup>57</sup> However, the 1995 Food Sanitation Law does not take the 'from land to table' approach<sup>58</sup> and its enforcement was

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<sup>50</sup> Food Sanitation Law of The People's Republic of China (trial version), promulgated by the Standing Committee National People's Congress, 19th November 1982, effective 1st July 1983, repealed 1995, available at [http://www.hflib.gov.cn/law/law/falvfagui2/XZF/FLF G/YYWS/1180.htm](http://www.hflib.gov.cn/law/law/falvfagui2/XZF/FLF%20G/YYWS/1180.htm)

<sup>51</sup> Ibid, article 3

<sup>52</sup> Ibid, article 26

<sup>53</sup> It is arguable that whether it is too harsh to use criminal law in terms of food hygiene. However, Legalism, one of the most influential Chinese philosophies, like Confucianism, emphasizes strict obedience to the law system. Legalist believes harsh punishment to those who dare to break law, is one of the most efficient tool to ensure the implementation of the law

<sup>54</sup> Food Hygiene Law, article 37-41

<sup>55</sup> Food Sanitation Law of the People's Republic of China, promulgated by the Standing Committee, National People's Congress, 30<sup>th</sup> October 1995, effective Oct. 30, 1995, available at [http://www.chinacourt.org/flwk/show.php?file\\_id=23857](http://www.chinacourt.org/flwk/show.php?file_id=23857).

<sup>56</sup> Bian Yongming, 'The Challenges for Food Safety in China', 53 CHINA PERSP., available at <http://chinapersonpectives.revues.org/document819.html>.

<sup>57</sup> 1995 Food Hygiene Law, article 3, available at [http://www.chinacourt.org/flwk/show.php?file\\_id=23857](http://www.chinacourt.org/flwk/show.php?file_id=23857)

<sup>58</sup> Bian, Yongming, 'The Challenges for Food Safety in China', 53 CHINA PERSP., available at <http://chinapersonpectives.revues.org/document819.html>.

very weak. It only covered very basic practices.<sup>59</sup> Only the ingredients which affect the nutrition or hygiene of the food can be regarded as illegal under this Law.<sup>60</sup> Bian argues that ‘the 1995 Food Hygiene Law did not establish a system to deal with major food safety incidents, such as the outbreak of bird flu in China in the spring of 2004.’<sup>61</sup>

### **3. Chinese Food Safety Legislation after Milk Scandal of 2008**

#### **3.1 The Innovations in the Food Safety Law 2009**

The latest food safety law in China is the Food Safety Law 2009, which was enacted in response to the food crisis which started with the Milk Scandal of 2008. Before the exposure of the Milk Scandal of 2008, the law was still under review by the Standing Committee of the National’s People’s Congress. Scholars, such as Balzano<sup>62</sup> and Areddy<sup>63</sup>, believe it was the Milk Scandal of 2008 which prompted the new food safety law into action.

In order to address the problems raised by the Milk Scandal of 2008, the Food Safety Law

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<sup>59</sup> For example, Article 8 (4) states that ready-to-eat food should be packed with materials that are clean and safe for use. But no mention is made of the packaging use for ready-to-eat food.

<sup>60</sup> Bian, Yongming, ‘The Challenges for Food Safety in China’, 53 CHINA PERSP., available at <http://chinaperspectives.revues.org/document819.html>.

<sup>61</sup> Ibid

<sup>62</sup> Balzano J, ‘China’s Food Safety Law: Administrative Innovation and Institutional Design in Comparative Perspective’, [J]. APLPJ, 2011, 13: 23.

<sup>63</sup> Areddy, James T., ‘Dairy Probe Began Almost 11 Months Before Being Disclosed’, WALL ST. J., Jan. 8, 2010, A7 (discussing the scandal)

2009 introduced some changes and made some innovations in the legislation.

Firstly of all, the Food Safety Law 2009 adopted the new approach-from farm to fork, in the management the food system. The food processing company is required to ensure the safety of the food products and materials they receive<sup>64</sup>, the safety of the food process by which they process the food product<sup>65</sup>, as well as the safety of the final food product they produce.<sup>66</sup> In the Milk Scandal of 2008, the source of the contamination was not capable of being tracked. However, in responding to the food crisis, the 2009 Food Safety Law adopted the new approach, from farm to fork, to help to identify and trace the food hazard.

Secondly, the 2009 Chinese Food Safety Law also adopted the precautionary principle, which original from German environmental law.<sup>67</sup> The Chinese Ministry of Health is designated as the responsible government department for the assessment of food safety risks, formulation of food safety standards, release of food safety information, development of the certification conditions for qualification of the food inspection and testing agencies and organisation of the investigation and handling of major food safety accidents.<sup>68</sup> Other relevant departments<sup>69</sup> are required to promptly notify the Ministry of Health, if they obtain information about food safety risks. After verifying the information jointly with other relevant departments, the Ministry of Health shall adjust the food safety

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<sup>64</sup> P.R.C. Food Safety Law 2009, Article 36

<sup>65</sup> Ibid, article 27

<sup>66</sup> Ibid

<sup>67</sup> Cazala, Julien, 'Food Safety and the Precautionary Principle: the Legitimate Moderation of Community Courts', *European Law Journal*, Vol. 10, No. 5, September 2004, pp. 539–554.

<sup>68</sup> Food Safety Law, article 4

<sup>69</sup> The relevant departments normally include the agriculture administrative department, quality supervision department, industry and commerce administrative department, state food and drug administrative department.

risk monitoring plan in a time fashion.<sup>70</sup>

Thirdly, the food safety risk monitoring system has been established to monitor the food-borne diseases, food contamination and harmful factors in food.<sup>71</sup> Furthermore, a food safety risk assessment system has also been established to conduct risk assessment on the biological, chemical and physical hazards in food and food additives.<sup>72</sup> The Ministry of Health shall immediately organize an inspection and a food safety risk assessment if it finds any hidden food safety risk through food safety risk monitoring or through a tip-off it receives.<sup>73</sup> The Ministry of Health is also required to make a comprehensive analysis on the status of food safety in light of the food safety risk assessment result and the food safety supervision and administration information jointly with other relevant departments of the State Council. The Ministry of Health shall give a timely warning of food safety risk and make an announcement if it shows a possible high safety risk based on the comprehensive analysis.<sup>74</sup>

Fourthly, the new food safety law also increased transparency and enhanced public participation. It encourages the social organisations, autonomous mass organisations to popularise the knowledge of the food safety standards and encourage the consumer and the public to play a role in the supervision.<sup>75</sup>

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<sup>70</sup> 2009 Food Safety Law, article 12

<sup>71</sup> Ibid, article 11

<sup>72</sup> Ibid, article 13

<sup>73</sup> Ibid, article 14

<sup>74</sup> Ibid, article 17

<sup>75</sup> Ibid, article 8-10

In summary, to cope with the food crisis and responding to the Milk Scandal of 2008, the 2009 Food Safety Law introduced the new approach, from farm to fork, to the food management system; adopted the precautionary principle; established the food safety risk monitoring system and the food safety risk assessment system; as well as increased transparency and enhanced public participation.

### **3.2 Regulatory Enforcement Tools under the Food Safety Law 2009**

The Chinese 2009 Food Safety Law has two measures of enforcement: outcome-based and production-based enforcement tools, which follow the model of the Federal Food, Drug & Cosmetic Act 1938 in the United States.<sup>76</sup>

These include the following elements:

#### **a) Outcome-based Approach**

The 2009 Food Safety Law requires the departments of quality control, industrial and commercial, food and drug and the local government conduct the sampling inspection at fixed or unfixed intervals.<sup>77</sup> Article 77 states the measures of these inspections include site

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<sup>76</sup> Liu, Chenglin, 'The Obstacles of Outsourcing Imported Food Safety to China', available at <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.lawschool.cornell.edu%2Fresearch%2Fijl%2Fupload%2Fliu.pdf&ei=uAhZVKmENreMsQSG44K4Ag&usg=AFQjCNFBaAFASHh1gJD8tTK3li19Rbzw&bvm=bv.78677474,d.cWc>

<sup>77</sup> Ibid, Article 60

visits, sampling, auditing of relevant contracts and review of instruments, account books and other relevant materials.<sup>78</sup> The relevant departments are authorised to seal up the food product, food raw materials, food additives and food-related products for illegal use, as well as the utensils and equipment that are used for illegal production and business operation or that have been contaminated, if there is a violation of Food Safety Law.<sup>79</sup> The relevant departments also have the power to close down the food manufacturer if they believe it is necessary. According to the 2009 Food Safety Law, the local governments shall increase the frequency of supervision and inspection on food producers and business operators having bad credit records.<sup>80</sup> A criminal investigation will also be involved if the violation of the Food Safety Law constitutes a crime.<sup>81</sup> The relevant food safety inspection departments have the legal obligation to report the violation case to the public security department.<sup>82</sup>

The 2009 Food Safety Law also sets up administrative penalties for inspectors violating the law in order to achieve the impartial inspections and certifications. Where a food inspection agency or food inspector violates the Food Safety Law due to issuing any false inspection report, the competent department or institution, which granted it the qualification, shall revoke its inspection qualification and shall, according to law, impose on the directly responsible person-in-charge and the food inspector a sanction of removal or dismissal. In addition, the person who is subject to a criminal punishment or sanction of

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<sup>78</sup> Ibid, Article 77

<sup>79</sup> Ibid, Article 77

<sup>80</sup> Ibid, article 79

<sup>81</sup> Criminal Law of the People's Republic of China, promulgated by the Standing Committee National People's Congress, 1st July 1979, effective 1st January 1980, amended 14th March 1997, , Article 104, 143 and 144, available at <http://www.cecc.gov/pages/newLaws/criminalLawENG.php>

<sup>82</sup> 2009 Food Safety Law, Article 81

dismissal because of his violation of the Food Safety Law shall not engage in food inspection work within 10 years.<sup>83</sup>

The recall system<sup>84</sup> of the poor quality product, which is widely used in western regulating systems, is also set up as an enforcement tool in the 2009 Food Safety Law.<sup>85</sup> If a food producer or business operator finds that any food it produces/operates does not conform to the food safety standards, it shall promptly stop the production, recall all the food that has already been placed on market for sale, notify the related producers, business operators and consumers, and record the recall and notification information. The relevant departments of the local government should also be informed. The appropriate actions should be taken to prevent the food from re-entering the market. If the food producer or business operator refuses to recall the products, which fail to meet the food safety standards, the quality supervision department, industry and commerce administrative department or food and drug supervision and administration department at or above the county level may order it to recall the food or stop the business.

#### b) Production-based Tools

The new Food Safety Law encourages food manufacturers to adopt good manufacturing practice (GMP) and to implement a hazard analysis and critical control point system

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<sup>83</sup> Ibid, article 93

<sup>84</sup> In the USA, recall is an effective method of removing or correcting consumer products that are in violation of law. O'Reilly, James T. , 'Food and Drug Administration', Clark Boardman Callaghan, 3rd ed. 2007, §21:1

<sup>85</sup> Food Safety Law, article 53

(HACCP) to prove food safety management level.<sup>86</sup> It sets the tasks for the government's accreditation agency to issue certificates to qualified enterprises and conduct follow-up audits of these accredited manufacturers. If the certificated enterprise no longer meets the requirements of GMP or HACCP, the agency should revoke the certification and inform the relevant local department. The agency must make the announcement to the public.<sup>87</sup>

In addition, the new Food Safety Law also requires food manufacturers to keep records regarding the supply of raw food materials, food additives, and other food ingredients, to ensure their traceability.<sup>88</sup> Manufacturers are legally required to keep these records for at least two years.<sup>89</sup> Furthermore, manufacturers also have a duty to check the quality of raw materials and verify supplier certifications.<sup>90</sup> The manufacturers must keep records for internal quality checks. All these records shall be true and shall be kept for at least 2 years.<sup>91</sup> Failure to maintain the required records will cause a fine of not more than 20,000 Yuan if it is a minor violation.<sup>92</sup> As to the serious violations, the license of the manufacturers would be revoked.<sup>93</sup>

### **3.3 Criminal Penalties and Food Safety Law**

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<sup>86</sup> Ibid, article 33

<sup>87</sup> Ibid

<sup>88</sup> Ibid, article 36

<sup>89</sup> Ibid

<sup>90</sup> Ibid, article 39

<sup>91</sup> Ibid, article 37

<sup>92</sup> Ibid, article 87

<sup>93</sup> Ibid



Instead of setting up any new criminal penalties, the 2009 Food Safety Law applies the Chinese Criminal Law directly for serious food safety violation.<sup>94</sup> The Criminal Law imposes severe criminal sanctions on producers and sellers who produce counterfeits or substandard products that cause serious bodily injury or death.<sup>95</sup> In the Milk Scandal of 2008, a number of criminal prosecutions occurred, with two people being executed, another given a suspended death penalty, three others received life imprisonment, and two received 15-year jail terms.<sup>96</sup>

The punishment to the violators, who produce adulterated products, comes under Article 140 of Chinese Criminal Law. Article 140 of the Chinese Criminal Law prohibits the production of adulterated products and the sale of counterfeits as genuine products, substandard products as good products, or unqualified products as qualified ones.<sup>97</sup> If the sale amount exceeds two million Yuan, Article 140 mandates a sentence of a fifteen-year, fixed-term imprisonment or life time imprisonment for the violator.<sup>98</sup> Furthermore, the violator would also be issued a fine of 50 per cent to 200 per cent of the sale amount or a confiscation of the total amount of the illegal proceeds.<sup>99</sup>

Article 140 and Article 143 also impose criminal sanctions on producers and sellers of

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<sup>94</sup> Food Safety Law, article 98

<sup>95</sup> Liu, Chenglin, 'Profit above the Law: China's Melamine Tainted Milk Scandal', 79 MISS. L.J.371 (2009) (examining melamine-tainted milk scandal in China)

<sup>96</sup> Two get death in tainted milk case, [http://www.chinadaily.com.cn/china/2009-01/23/content\\_7422983.htm](http://www.chinadaily.com.cn/china/2009-01/23/content_7422983.htm)

<sup>97</sup> Criminal Law of the People's Republic of China, promulgated by the Standing Committee National People's Congress, 1<sup>st</sup> July 1979, effective 1<sup>st</sup> January 1980, amended 14<sup>th</sup> March 1997, available at <http://www.cecc.gov/pages/newLaws/criminalLawENG.php>. Article 140

<sup>98</sup> Ibid

<sup>99</sup> Ibid

foods that do not conform to hygienic standards.<sup>100</sup> The producers or sellers, who are responsible for substandard products that cause food poisoning accidents or other severe foodborne diseases, would face mandatory sentences ranging from several years of fixed-term imprisonment to life imprisonment, depending on the severity of the circumstances.<sup>101</sup> In addition, violators may be fined not less than half but not more than two times the amount of earnings from sales.<sup>102</sup>

In addition, Article 144 sets the most severe criminal punishment for producing adulterated foods.<sup>103</sup> Under this provision, the producer or a seller, who produce or sell foods mixed with poisonous or harmful non-food materials, would face a sentence of not more than five years of fixed-term imprisonment. If the violation results in a serious harm to human health, the sentence must not be less than five years and up to ten years. However, if the violation causes serious bodily harm or death, the violator might face a death penalty.<sup>104</sup>

It is still arguable whether it is too harsh to apply death penalty to the violation of food safety. It is concerned that penal/ criminal penalties including the death penalty in China may be counterproductive. The fear and tough sanctions may make regulation less effective as detection becomes more difficult as issues go undetected. However, the harsh criminal penalties in China is beyond the argument in this thesis. The details will not be discussed in this research.

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<sup>100</sup> Ibid, article 143

<sup>101</sup> Ibid

<sup>102</sup> Ibid

<sup>103</sup> Ibid, article 144

<sup>104</sup> Ibid, articles 141, 144

### 3.4 The shortcoming of the 2009 Food Safety Law

The main shortcoming of the Food Safety 2009 is that it has not sorted out the problem of the multi-layered implementation and the overlapping standards. The current food safety mechanism is multi-layered and it is implemented by different departments at national, provincial and local level, which cause the ineffective administration. However, the new 2009 Food Safety Law has not provided the solution to settle the conflicts between different regulations and administrations.

At the central level, the new Food Safety Law requires that the State Council establish a Food Safety Commission (FSC) to administer its provisions.<sup>105</sup> As a Commission, the FSC needs to be ranked as a ministry. However, currently there is no Law or Regulation to define the scope of the FSC and its jurisdiction, which makes the prospective relationship between the FSC and other Ministries unclear.<sup>106</sup>

As to the standards and regulations, the Food Safety Law 2009 requires the Ministry of Health in Beijing to be in charge of determining and promulgating food safety standards apart from the level of pesticide, which is within the responsibility of the Ministry of Agriculture.<sup>107</sup> The State Council and other relevant Ministries are also required to set the standards regarding the safety for meat and poultry by the new law.<sup>108</sup> Both the Ministry

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<sup>105</sup> Food Safety Law 2009, Article 4

<sup>106</sup> Liu, Chenglin, ‘The Obstacles of Outsourcing Imported Food Safety to China’, available at [www.lawschool.cornell.edu/research/ilj/upload/liu.pdf](http://www.lawschool.cornell.edu/research/ilj/upload/liu.pdf)

<sup>107</sup> 2009 Food Safety Law, Article 21

<sup>108</sup> Ibid

of Health and the Ministry of Agriculture are charged by the State Council, which means the regulations made by the Ministry of Health and the Ministry of Agriculture have the same legal effects. However, the 2009 Food Safety Law does not clarify which regulation should be applied first if the conflicts occur.

As to the administration, apart from the Food Safety Commission (FSC), other departments, including the Ministry of Health (MOH), the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), the State Administration for Industry and Commerce (SAIC), the State Food and Drug Administration (SFDA), the State Administration of Grain, the Ministry of Agriculture, the Ministry of Industry and Information Technology (MIIT) and the Ministry of Commerce (MOFCOM), are all required to coordinate and supervise food safety in China.<sup>109</sup> The functions and responsibilities are not clearly divided among these departments.

Therefore, the 2009 Food Safety Law has not resolved the problem of multi-layered implementation and the overlapping standards. However, this shortcoming has been noticed in the new revised draft of the Food Safety Law 2014. The draft is still in the stage of consultation, and not in force yet.<sup>110</sup> There are some new changes have been made in this draft, which will be discussed in the next chapter -- the implementation challenges to

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<sup>109</sup> Sun, Xi, 'China's Food Safety in 2012-Assessing the Increased Risks', August 2012, Sustainalytics, available at [http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CC8QFjAA&url=http%2F%2Fwww.sustainalytics.com%2Fsites%2Fdefault%2Ffiles%2Fchinasfoodsafety\\_august2012\\_0.pdf&ei=R76uUYG4JuiS0QW5yIHQCA&usg=AFQjCNEFt6KdYQ7lv5Ugr9mbd8FiS8ZIOg&sig2=JzG9-qOtNUk8wyVZl7STow&bvm=bv.47244034,bs.1,d.d2k](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CC8QFjAA&url=http%2F%2Fwww.sustainalytics.com%2Fsites%2Fdefault%2Ffiles%2Fchinasfoodsafety_august2012_0.pdf&ei=R76uUYG4JuiS0QW5yIHQCA&usg=AFQjCNEFt6KdYQ7lv5Ugr9mbd8FiS8ZIOg&sig2=JzG9-qOtNUk8wyVZl7STow&bvm=bv.47244034,bs.1,d.d2k)

<sup>110</sup> As mentioned above, during the period of writing up this thesis, the 2014 draft was still not valid. However, the changes it made has been taken into the 2015 Food Safety Law, which has taken into effect already. That means all those changes, which will be discussed in the next chapter, are the part of current law already.

the food safety regulatory system in China. Thus, the changes and the reforms in Chinese food safety legislation are still ongoing.

#### **IV. Conclusion**

China's food safety problem is an open secret. The food safety problem not only harms people's health, but also causes direct economic losses. China cannot achieve sustainable economic development without solving its food safety problem.

The pressures, which the Chinese government is facing for its weak administration on food safety are both domestic and international. From the domestic side, citizens doubt the safety of the food in their daily life. The government is facing the confidence crisis of the safety of the 'Made in China' brand. After the exposure of the milk powder scandal, parents in China do not trust the quality of domestic brand any more. Although the government claims that the milk powder is safe enough for babies, parents still tend to pay a higher price to buy foreign brands.<sup>111</sup> The Chinese government is facing a battle of confidence crisis. On the other side, the Chinese government is also facing international pressures in terms of an export market in food.

The food crisis started with the Milk Scandal of 2008 is a serious challenge to Chinese government. The Milk Scandal of 2008 revealed the weakness of the ineffective food

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<sup>111</sup> 'China Focus: Chinese parents purchase foreign milk powder amid confidence crisis', available at [http://news.xinhuanet.com/english/china/2013-04/13/c\\_132305943.htm](http://news.xinhuanet.com/english/china/2013-04/13/c_132305943.htm)

safety regulatory system in China. In responding the food crisis, China reformed its food safety legislation and adopted a new Food Safety Law in 2009.

The new Food Safety Law takes some positive steps to reform the food regulatory system in China. It introduced the new management approach: from farm to fork, the precautionary principle, adopted the precautionary principle, established the food safety risk assessment system and the food safety risk monitoring system; as well as increased transparency and enhanced public participation. In addition, the new law also embraces the new regulatory enforcement tools.

However, whether the 2009 Food Safety Law can re-shape the food safety regulatory system and increase its effectiveness is still under doubt, since 2009 Food Safety Law does not overcome the defects from Chinese legal system and it also does not provide the resolution to the multi-layered implementation and the overlapping standards, which cause the ineffective administration in food safety regulatory system.

Although the new 2009 Food Safety Law, as a legal instrument of regulation, has the potential to radically change the way food safety is approached, there are still a number of potential problems in Chinese food safety regulatory system. In many ways the adoption of the Food Safety Law in China in 2009 is similar to the enactment by the EU of a Food Safety Law in 2002 as a result of the BSE crisis.<sup>112</sup> In this context, the new Chinese Food Safety Law, as the EU 2002 food safety law, was the result from the food safety crisis.<sup>113</sup>

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<sup>112</sup> Snyder, Francis, 'Food Safety Law in China: Making Transnational Law', p175-176, Brill Nijhoff, Boston, 2015

<sup>113</sup> Ibid, p5

The Chinese administration mimicked the EU approach at the level of the highest organs of the State to pass laws to address the problem caused by producers who were not tightly enough regulated. The Chinese law addresses administrative inertia and seeks to strengthen the role of administrative regulatory authorities including how the different parts of the government are expected to work more closely together. This is a break with past practice by focusing on food safety rather than standardising quality standards.

It is clear that for the future the government will further revise the Food Safety Law to improve the effectiveness of the implementation of food safety legislation in China. Therefore, the exploration of the obstacles and challenges to the current food safety regulatory system is necessary. An important spin off from the milk scandal is the creation of links between Chinese regulatory authorities and international organisation such as the WHO. As Snyder has pointed out ‘there are closer ties’ between international organisations, the Chinese government and corporations<sup>114</sup> after SARS crisis. The WTO Trade Policy Review Mechanism paid more and more attention to the food safety regulations in China.<sup>115</sup> Furthermore, both the EU<sup>116</sup> and USA<sup>117</sup> governments started to build a closer cooperation relationship with China in the field of food safety. None of these important achievements has addressed the sense of public disquiet and distrust that the crisis left

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<sup>114</sup> Ibid, p178

<sup>115</sup> Ibid

<sup>116</sup> EU-China cooperation, the 2006 Memorandum of Understanding on Administrative Cooperation Arrangements between the European Commission’s Directorate General for Health and Consumer Protection (DG-SANGO) and The General Administration of Quality Supervision, Inspection and Quarantine of the People’s Republic of China (AQSIQ), available at [http://ec.europa.eu/consumers/archive/cons\\_safe/prod\\_safe/memorandum\\_china.pdf](http://ec.europa.eu/consumers/archive/cons_safe/prod_safe/memorandum_china.pdf)

<sup>117</sup> US-China cooperation, the 2007 Agreement between the Department of Health and Human Services of the United States of America and the General Administration of Quality Supervision, Inspection and Quarantine of the People’s Republic of China on the Safety of Food and Feed, available at <http://www.fda.gov/InternationalPrograms/Agreements/MemorandaofUnderstanding/ucm107557.htm>

many families in China wondering about food safety. Managing public expectations is likely to be problematic if there are further food safety failures.

The next chapter will explain the implementation challenges in China and the further reform to improve the effectiveness of the food safety law will be discussed as well.



## **Chapter 4 Problems with Implementation of Food Safety Regulation in China**

### **I. Introduction**

The reform of the food safety regulatory system, coping with the food crisis started by the Milk Scandal of 2008, is important and crucial to achieve the sustainable economic development. In responding to the Milk Scandal of 2008, China adopted a new Food Safety Law in 2009. Although this new law brought some changes and reforms to China's food safety regulatory system, the implementation of Chinese food safety law seems to be still ineffective. This chapter will explore the main challenges of ensuring food safety in China and discuss the possible reforms to improve the effectiveness of the implementation of Chinese food safety law.

### **II. Evaluating the Main Challenges of Ensuring Food Safety in China**

Although the new Food Safety Law has set the high standards for food processes and embraced some new innovations, the implementation of the food safety law in practice is still facing series obstacles and challenges. Therefore, the following context will start by examining the major challenges of ensuring food safety in China.

## 1. State Owned to Privatisation and Global Food Markets

Before 1980s, China's economy was a centrally planned economy, which was strictly controlled by the state. Food companies were owned and controlled by the state. Although some food safety incidents occurred sometimes, it did not explode or damage the overall image of food production in China. People were still confident in the food manufacturing at that time. Bian argues that this is because 'most food was produced using traditional methods without heavy use of chemical fertilisers, pesticides and additives. Profits are not the aim of food producers because the entire food production chain, from the materials, equipment and technologies, to distribution and sale, were centrally planned and controlled by the state.'<sup>1</sup>

After China's economic reform, especially in the 1990s, food production factories are no longer state owned enterprise (SOEs) only. Lots of private owned enterprise emerged in the market, which made the market become a hybrid market. As Zhang points out, currently approximately 90 per cent of the food processing firms in China are small-and-medium-sized enterprises (SMEs), within a total of more than 0.4 million food processing firms exist in China nowadays.<sup>2</sup> 72 per cent of food processing firms employ fewer than 10 workers.<sup>3</sup> According to a SFDA survey of 450,000 food firms, 29 per cent of them did not have any production standards.<sup>4</sup> In addition, 60 per cent did not conduct

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<sup>1</sup> Bian, Yongmin, 'The Challenges for Food Safety in China-Current Legislation is Unable to Protect Consumers from the Consequences of Unscrupulous Food Production', available at <http://www.cefc.com.hk/pccpa.php?aid=1936>

<sup>2</sup> Zhang, S.(2011), 'Establish an Effective Long-Term Food Safety System', *China Fd Additive*, 3, 49-53

<sup>3</sup> Ying, Feihu, 'Improvement of China's Information Exchange on Food Safety'. 5 *Zhengzhi Yu Falu [J.POL.& L.]* 24, 26 (2007)

<sup>4</sup> Miao, Junjie, Zhang, Yanran, and Wang, Yujuan, 'China's Food Safety Management Focuses on Food Supply',

quality checks of food products nor were they even capable of conducting self-inspections.<sup>5</sup> Approximately 50 per cent of the firms lacked sanitation certificates or production licenses.<sup>6</sup> The small food processing firms obtain supplies from hundreds of millions of even smaller family-based farms, many of which are ‘no larger than a basketball court.’<sup>7</sup> Many small food processing enterprises frequently changed locations to evade inspections.<sup>8</sup> Furthermore, as Shao points, many illegal enterprises operate without production and operation license and ‘they can be clamped down quickly but be rebuilt easily.’<sup>9</sup> It is difficult for local governments to monitor and maintain food safety standards for such small food processing enterprises.

## **2. The Impact of Industrialisation and Urbanisation on Food Safety**

Industrialisation and urbanisation also contribute to the food safety problem in China. On the one hand, China has 1.3 billion people, but it has only 122 million hectares of arable land, or 0.27 hectares per capita, which is 40 per cent less than the world average, or 12.5 per cent of the U.S. level.<sup>10</sup> On the other hand, farmers are losing their land because of industrialisation and urbanisation. Arable land is sharply declining in China. As Shao argues, the available arable land in China is less than 10 per cent of the world’s arable land,

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Liaowang, 23<sup>rd</sup> May 2007, available at <http://helath.sohu.com/20070522/n250158568.shtml>.

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> Subcomm.on Oversight and Investigations, 110<sup>th</sup> Cong., Staff Trip Report: ‘Food from China: Can we Import Safely?’ 7 n. 10 (2007), available at [http://energycommerce.house.gov/Press\\_110/110-rpt.100407.ChinaTripReport.pdf](http://energycommerce.house.gov/Press_110/110-rpt.100407.ChinaTripReport.pdf), at 2

<sup>8</sup> Ibid

<sup>9</sup> Shao, Y, ‘Rethinking Food Safety Problems in China’, *Acta Alimentaria*, Vol. 42 (1), pp124-132 (2013)

<sup>10</sup> Liu, Yingling, ‘Shrinking Arable Lands Jeopardizing China’s Food Security’, *WorldWatch Inst.*, Apr. 18, 2006, available at <http://www.worldwatch.org/node/3912>.

meanwhile the population of China accounts for almost 20 per cent of the world's population.<sup>11</sup> Industrialization and urban expansion have not only caused significant shrinkage of China's arable land, but have also degraded land quality.<sup>12</sup> As a result, China has seen a rapid decline in agricultural production in recent years.<sup>13</sup> To ensure higher yields from limited farmland, a large amount of fertilizer, pesticide and animal drugs including antibiotics and growth hormones are used in agriculture in order to increase the harvest of crops and more productive livestock.

The large scale explosion of food safety problems is derived in part from the industrialisation and urbanisation through the creation of large towns and cities. Cities have expanded dramatically due to the process of urbanisation. However, as Bian argued, 'the governance by the municipal administration has not yet expanded according to the boundary of cities'<sup>14</sup>, while 'the governance of village is rapidly declining as farmers are losing their land'.<sup>15</sup> Thus, the areas between rural and urban become grey areas, where the governance from both sides is very weak. Many small food processing enterprises are located in these grey areas and a large amount of unsafe and tainted food is produced in these special areas.

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<sup>11</sup> Shao, Y, 'Rethinking Food Safety Problems in China', *Acta Alimentaria*, Vol. 42 (1), pp124-132 (2013)

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Bian, Yongmin, 'The Challenges for Food Safety in China-Current Legislation is Unable to Protect Consumers from the Consequences of Unscrupulous Food Production', available at <http://www.cefc.com.hk/pccpa.php?aid=1936>

<sup>15</sup> Ibid

### 3. The Impact of Environmental Degradation on Food Safety

Another adverse factor to food safety is environmental degradation. China achieved rapid economic development in the past three decades at the huge cost to the environment. As Zhao pointed out, some local authorities in China adopted a ‘pollute first, control later’ policy.<sup>16</sup> The local authorities pursue the GDP figure, no matter how much cost it needs to pay. Large number of ‘cancer villages’ have emerged because China’s energy excessively depends on coal.<sup>17</sup> In 2007, China became the world’s biggest emitter of carbon dioxide, overtaking the United States.<sup>18</sup> Outdoor pollution has led to approximately 300,000 and 400,000 premature deaths every year in China.<sup>19</sup> Sitaraman claims that air pollution alone has cost \$25 billion in health and loss of productivity costs.<sup>20</sup> In Shaanxi Province, more than 600 children, who lived near a metal smelter house, were found to have high levels of heavy metals in their blood and over one hundred children needed hospitalisation.<sup>21</sup>

In addition, China’s water system also has a severe pollution problem. A joint study conducted by the United Nations Development and Environment Program (UNDP) and the

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<sup>16</sup> Zhao, Yuhong, ‘Trade and Environment: Challenges After China’s WTO Accession’, 32 COLUM.J.ENVTL.L.41, 48-49 (2007)

<sup>17</sup> Cheng, Yu, ‘Cancer Villages Emerged Along Coastal Regions’, Nanfang Dushi Bao, Nov. 5, 2007, available at <http://news.163.com/07/1105/16/3SI4DUL600011SM9.html>.

<sup>18</sup> Rosenthal, Elisabeth, ‘China Increases Lead as Biggest Carbon Dioxide Emitter’, N.Y. TIMES, June 14, 2008, available at <http://www.nytimes.com/2008/06/14/world/asia/14china.html>.

<sup>19</sup> Kristof, Nicholas D., Op-Ed., Where Breathing is Deadly, N.Y. TIMES, May 25, 2008, available at <http://www.nytimes.com/2008/05/25/opinion/25kristof.html>.

<sup>20</sup> Sitaraman, Srin, ‘Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China’, 18 COLO. J. INT’L ENVTL. L. & POL’Y 267, 335 (2007),p277

<sup>21</sup> Protesters Storm Plant After Children Are Poisoned, Aug. 17, 2009, available at <http://www.france24.com/en/20090817-protesters-storm-plant-after-children-arepoisoned-china-lead-school-dongling-shaanxi>.

Chinese government showed that ‘only five per cent of household sewage and seventeen per cent of industrial waste are properly treated prior to discharge.’<sup>22</sup> Other industrial waste and sewage are discharged directly into rivers, lakes and sea.<sup>23</sup> One report of the Chinese Environmental Science Academy showed that 80 per cent of 200 lakes, which it surveyed, are no longer suitable for drinking due to the industrial pollution.<sup>24</sup>

The water pollution contaminating the seafood adversely affected the international exports. Fish and shellfish are the largest and fastest growing category of foods exported from China to the USA.<sup>25</sup> China is the third largest exporter of seafood into the USA,<sup>26</sup> and contributes approximately 21 per cent of the total imported seafood into the United States.<sup>27</sup> However, FDA reports that its tests of fish and shrimp during October 2006 to May 2007 found excessive drug residues in 22 of 89 samples of fish and shrimp from China, a rejection rate of 25 per cent.<sup>28</sup> The report in Food and Water Watch claims that the condition for aquaculture sea food in China is deplorable, as ‘[P]roducers tightly cram thousands of finfish and shellfish into their facilities to maximise production. This generates large amounts of waste, contaminates the water, and spreads disease, which can

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<sup>22</sup> Sitaraman, Srin, ‘Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China’, 18 COLO. J. INT’L ENVTL. L. & POL’Y 267, 335 (2007),p280

<sup>23</sup> Food & Water Watch, Import Alert: Government Fails Consumers, Falls Short on Seafood Inspections (2007), available at <http://documents.foodandwaterwatch.org/ImportAlertJuly2007-1.pdf>, P5

<sup>24</sup> Li, Jing, ‘Eutrophication Threatens Ecological Condition of Lakes in China’, CHINA DAILY, March, 31, 2009, available at [http://www.chinadaily.com.cn/zgzz/2009-03/31/content\\_7635373.htm](http://www.chinadaily.com.cn/zgzz/2009-03/31/content_7635373.htm).

<sup>25</sup> Gale, Fred and Buzby, Jean C., ‘Imports from China and Food Safety Issues’, United States Department of Agriculture, Economic Information Bulletin Number 52, July 2009, P6

<sup>26</sup> U.S. Food and Drug Admin. (FDA), Import Alert No. 16-131, FDA Import Alerts (2010), available at [http://www.accessdata.fda.gov/cms\\_ia/importalert\\_33.html](http://www.accessdata.fda.gov/cms_ia/importalert_33.html).

<sup>27</sup> Food & Water Watch, ‘Import Alert: Government Fails Consumers, Falls Short on Seafood Inspections’ (2007), available at <http://documents.foodandwaterwatch.org/ImportAlertJuly2007-1.pdf>, P2

<sup>28</sup> U.S. Food and Drug Administration, ‘Detention Without Physical Examination of Aquacultured Catfish, Basa, Shrimp, Dace, and Eel Products from the People’s Republic of China Due to the Presence of New Drugs and/or Unsafe Food Additives,’ Import Alert 16-131, 8<sup>th</sup> August, 2007a, available at [http://www.FDA.gov/ora/fiars/ora\\_import\\_ia16131.html](http://www.FDA.gov/ora/fiars/ora_import_ia16131.html).

kill off entire crops of fish if left untreated. Even if a disease does not kill off all the fish in an aquaculture facility, remaining bacteria, such as *Vibrio*, *Listeria*, or *Salmonella*, can sicken people who eat the fish.’<sup>29</sup>

Not only in the case of aquaculture sea food, but also in the case of vegetable and protein products there is environmental degradation or taint. In FDA’s 2007 report, 44 per cent of wheat gluten samples and 32 per cent of rice protein concentrate samples from China tested positive for melamine.<sup>30</sup>

The environmental pollution and environmental degradation threaten the China’s food safety from the bottom of the food supply chain. As Liu points out, China’s serious environmental problems make ensuring the safety of the food supply from polluted farms extremely difficult.<sup>31</sup> However, the details of the environmental challenge to food safety will be discussed in the Chapter 5.

#### **4. The Local Protectionism and GDP**

No matter how well the legislation is designed, the local government is always the key to the implementation in practice. China is a large country with the various development

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<sup>29</sup> Food & Water Watch, ‘Import Alert: Government Fails Consumers, Falls Short on Seafood Inspections’ (2007), available at <http://documents.foodandwaterwatch.org/ImportAlertJuly2007-1.pdf>, P5

<sup>30</sup> U.S. Food and Drug Administration, ‘Detention Without Physical Examination of all Vegetable Protein Products From China for Animal or Human Food Use Due to the Presence of Melamine and/or Melamine Analogs,’ Import Alert 99-29, 31<sup>st</sup> July, 2007b, available at [http://www.FDA.gov/ora/fiars/ora\\_import\\_ia9929.html](http://www.FDA.gov/ora/fiars/ora_import_ia9929.html).

<sup>31</sup> Liu, Chenglin, ‘The Obstacles of Outsourcing Imported Food Safety to China’, available at [www.lawschool.cornell.edu/research/ilj/upload/liu.pdf](http://www.lawschool.cornell.edu/research/ilj/upload/liu.pdf)

levels from region to region, especially as between Northern and Southern China. The conflicts between different regions, as well as the conflicts between the region and central government are not rare to be seen. Thus, the main challenge for the implementation of Food Safety Law is the local protectionism and poor administrative implementation, which are also the defects in the Chinese legal system as a whole.

After China's economic reform in the 1980s, the main task for the government had been changed from class struggle to ensuring economic growth.<sup>32</sup> The local authority is regarded as having the primary role in developing local economies.<sup>33</sup> Chinese government officials are not elected by the votes from local people. Each higher level government officials appoint the officials at the lower level directly. Therefore, the officials at the lower level are only accountable to the officials at higher level,<sup>34</sup> instead of being accountable to the local people. The important criterion for assessing the local officials' performance is gross domestic production (GDP).<sup>35</sup> In order to having the better opportunities to be promoted or re-appointed, the local officials seek for every chance to increase the local GDP to create economic miracles. Local GDP is the priority for them, while other issues such as food safety or environmental protection could be put aside. They make every effort to create and maintain the high economic growth, even at the cost of food safety or environment. After all, GDP is everything. It is the important criterion, which they can show to the official at the next higher level, to earn the opportunity for

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<sup>32</sup> Lubman, Stanley, 'Bird in a Cage: Chinese Law Reform After Twenty Years', 20 NW. J. INT'L L. & BUS. 383, 395 (2000).

<sup>33</sup> Liu, Chenglin, 'The Obstacles of Outsourcing Imported Food Safety to China', available at [www.lawschool.cornell.edu/research/ilj/upload/liu.pdf](http://www.lawschool.cornell.edu/research/ilj/upload/liu.pdf)

<sup>34</sup> Constitution of the People's Republic of China 2004, Article 101

<sup>35</sup> Huang, Hao, 'Maximizing Chinese Imports' Compliance with United States Safety and Quality Standards: Carrot and Stick from Whom?', 18 S. CAL. INTERDISC.L.J.131, (2008), P141



their promotions or re-appointments.

In practice, local officials have a very tight link with local industries, on which they rely to grow the local economy. In return, local officials give special favours, such as the loose inspections of safety and quality, to these local industries. Corruption is not rare to be seen between the link with local officials and enterprises. The officials also take the benefit from the local industries. As Xinhua News reported, a number of mine safety charge officers in Shanxi Province even held significant stakes in local mines.<sup>36</sup>

The 2008 melamine tainted milk scandal<sup>37</sup> is a good example to illustrate this special link between local officials and enterprises. In fact, the milk powder producer, Sanlu Dairy Company, did report the unusual high level of melamine in its dairy products to the local authority one month before the exposure of the scandal.<sup>38</sup> However, the Shijiazhuang government, where the Sanlu Dairy Company is based, tried every effort to cover up the information for fear of damaging the local economy.<sup>39</sup> It took Shijiazhuang government thirty-eight days, instead of two hours as required by the State Council's Regulation, to report Sanlu's melamine contamination to the provincial government. The central government was not informed of the matter until 9th September, which was nine months

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<sup>36</sup> Ge, Zhong, 'Some Officials Still Secretly Hold Shares in Coal Mines', Xinhua News, Oct. 28, 2005, available at <http://gov.people.com.cn/GB/46728/54337/54340/3808708.html>.

<sup>37</sup> In 2008, around 300,000 babies were ill, with six infants dying from kidney stones and other kidney damage, because of the consumption of the melamine tainted milk powder. The scandal first exploded in Sanlu Dairy Company. Later almost all the famous dairy companies, like Mengniu, Yili, were involved in the scandal as well.

<sup>38</sup> Ye, Tieqiao, 'Sanlu's Cover-Up Caused Poisonous Milk to Enter the Market', ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Jan. 1, 2009, available at <http://news.sina.com.cn/c/2009-01-01/050616959786.shtml>.

<sup>39</sup> Ibid

after the first sign of melamine contamination emerged.<sup>40</sup>

In the later public apology, the Shijiazhuang government stated the major consideration of the extensive delay in reporting was ‘support for local business’, when it was asked about the reason for delay more than one month to report the scandal to the provincial government.<sup>41</sup> The local government also admitted that its concern of the job loss result from such a revelation,<sup>42</sup> because Sanlu was an important source of local revenue.<sup>43</sup>

Tax revenue is the crucial factor to link Sanlu with the Shijiazhuang government, which made the Shijiazhuang government overstepped its role as a regulator to a conspirator with business. Corporate tax is shared between central and local government under the current Chinese tax regime. With the rapid growth of the private sector, many of the large private companies have become a major source of revenue for local governments.<sup>44</sup> Local economic growth, as a very important figure of the performance which is assessed by the higher authorities, consists of GDP growth and tax revenue.<sup>45</sup> Sanlu alone contributed 330

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40 The Central Party Committee and the State Council Handle Persons Involved in the Sanlu Milk Scandal Seriously (in Chinese), from the PRC Central People’s Government website, [http://www.gov.cn/jrzq/2008-09/22/content\\_1102256.htm](http://www.gov.cn/jrzq/2008-09/22/content_1102256.htm).

41 Xinhua Net news story, Spokesperson of the Shijiazhuang City Government: We have Undeniable Responsibility in the Sanlu Incident (in Chinese), 30 September 2008, [http://news.xinhuanet.com/newcenter/2008-09/30/content\\_10136125.htm](http://news.xinhuanet.com/newcenter/2008-09/30/content_10136125.htm)

42 Dong, Zhiyong, ‘Shijiazhuang Municipality: We Are Responsible for the Milk Scandal’, Econ. DAILY, 4<sup>th</sup> October 2008, available at [http://news.xinhuanet.com/newcenter/2008-9/30/content\\_10136125.htm](http://news.xinhuanet.com/newcenter/2008-9/30/content_10136125.htm).

43 Zhang, Qianfan, ‘Sanlu as an Example: Media Reporting is Indispensable for Ensuring Food Safety’, Nanfan Ribao, 7<sup>th</sup> October 2008, available at [http://news.xinhuanet.com/newmedia/2008-10/07/content\\_10159399.htm](http://news.xinhuanet.com/newmedia/2008-10/07/content_10159399.htm).

44 Shenzhen Stock Exchange Research Institute, ‘An Empirical Study on the Development of China’s Private Sector Listed Companies’, January 2008, <http://www.szse.cn/main/files/2008/02/25/091811911155.pdf>. At the end of 2005, accounting for more than 57 per cent of all enterprises in China, the private sector contributed to 65 per cent of China’s GDP, and absorbed more than 75 per cent of the urban employment.

45 ‘Member of the Standing Committee of the National People’s Congress Criticising Distortional Government Performance View: Local GDP Figures Shall be Disregarded’ (In Chinese),

million yuan in tax revenue to the municipal government in 2007.<sup>46</sup> It was also one of the top 500 enterprises in China. Thus, the company has remained on the list of ‘the key enterprises supported by the Shijiazhuang city and Hebei Province’. Sanlu’s Chairperson and CEO, Ms. Tian Wenhua was awarded ‘more than 100’ national and local honorary titles including the Representative to the National People’s Political Consultative Conference and to the Hebei Provincial People’s Congress.<sup>47</sup> As Zhang pointed out, Sanlu contributed not only to local revenue but also to the local political legacy.<sup>48</sup>

As discussed above, we can see the pursuit of GDP makes the local officials focus on the economic growth in the short term only, without the emphasis on the sustainable economic development. The local protectionism also prevents the local authority from being an effective monitor of food safety and quality. As Liu pointed out, ‘depending upon governments to enforce high safety standards is illogical when those governments are willing to conceal scandals for local industries.’<sup>49</sup>

The local protectionism greatly challenges the implementation of the law in China. Professor Lubman pointed out that local protectionism is so strong that ‘it is practically impossible for the leadership in Beijing to maintain sustained and systematic monitoring across China, with the possible exception of a handful of key issues, because enforcement

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[http://news.xinhuanet.com/fortune/2008-12/29/content\\_10572701.htm](http://news.xinhuanet.com/fortune/2008-12/29/content_10572701.htm)

<sup>46</sup> Lam, Willy, ‘Milk Scandal Sours China’s ‘Soft Power’’, <http://www.atimes.com/atimes/China/JJ10Ad02.html>.

<sup>47</sup> ‘Four Former Sanlu Senior Executives including Chairwoman Tian Wenhua Stood for trial in Shijiazhuang Today’ (in Chinese ), [http://news.xinhuanet.com/legal/2008-12/31/content\\_10583852.htm](http://news.xinhuanet.com/legal/2008-12/31/content_10583852.htm).

<sup>48</sup> Zhang, Qianfan, ‘Sanlu as an Example: Media Reporting is Indispensable for Ensuring Food Safety’, Nanfan Ribao, 7<sup>th</sup> October 2008, available at [http://news.xinhuanet.com/newmedia/2008-10/07/content\\_10159399.htm](http://news.xinhuanet.com/newmedia/2008-10/07/content_10159399.htm).

<sup>49</sup> Liu, Chenglin, ‘ The Obstacles of Outsourcing Imported Food Safety to China’, available at [www.lawschool.cornell.edu/research/ilj/upload/liu.pdf](http://www.lawschool.cornell.edu/research/ilj/upload/liu.pdf)

costs are prohibitive.<sup>50</sup> Professors Liebman and Milhaupt also shared a similar view, claiming that '[l]ocal protectionism is perhaps the single biggest problem undermining China's efforts to strengthen its legal system, and the combination of devolved authority and local protectionism frequently leads to under enforcement.'<sup>51</sup>

The local protectionism is the defect of the Chinese legal system. It harms the effectiveness of the implementation of food safety law, as well as other law. However, it is difficult to overcome the systemic defects without a political reform. Therefore, the local protectionism, as the corruption problem, may still exist in China for a long time.

## **5. The Absence of the Independent Judiciary System**

In China, the National People's Congress is the legislative body; the State Council plays the role of administrative body, while the People's courts have the exclusive adjudicative power.<sup>52</sup> The people's procurators are state organs for legal supervision.<sup>53</sup> The National People's Congress exercises the power to elect the President of the Supreme People's Court and the Procurator-General of the Supreme People's Procuratorate. In addition, the adjudicative organs, the People's courts, as well as the procuratorial organs, the People's

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<sup>50</sup> Lubman, Stanley, 'Looking for Law in China', 20 COLUM. J. ASIAN L. 1, 77 (2006).

<sup>51</sup> Liebman, Benjamin L. & Milhaupt, Curtis J., 'Reputational Sanctions in China's Securities Market', 108 COLUM. L. REV. 929, 982 (2008); see also Eric Priest, 'The Future of Music and Film Piracy in China', 21 BERKELEY TECH. L.J. 795, 822 (2006) ("Local protectionism probably constitutes the largest obstacle to cracking down on piracy in China."); Sitaraman, Srinivasan, 'Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China', 18 COLO. J. INT'L ENVTL. L. & POL'Y 267, 335 (2007) (arguing that "[t]he lack of strong centralized environmental administration and a deep-seated political unwillingness to disrupt economic growth, combined with corruption and local protectionism, has precluded China from fully complying with its international treaty obligations and enforcing its domestic environmental laws.").

<sup>52</sup> PRC Constitution law, Article 123

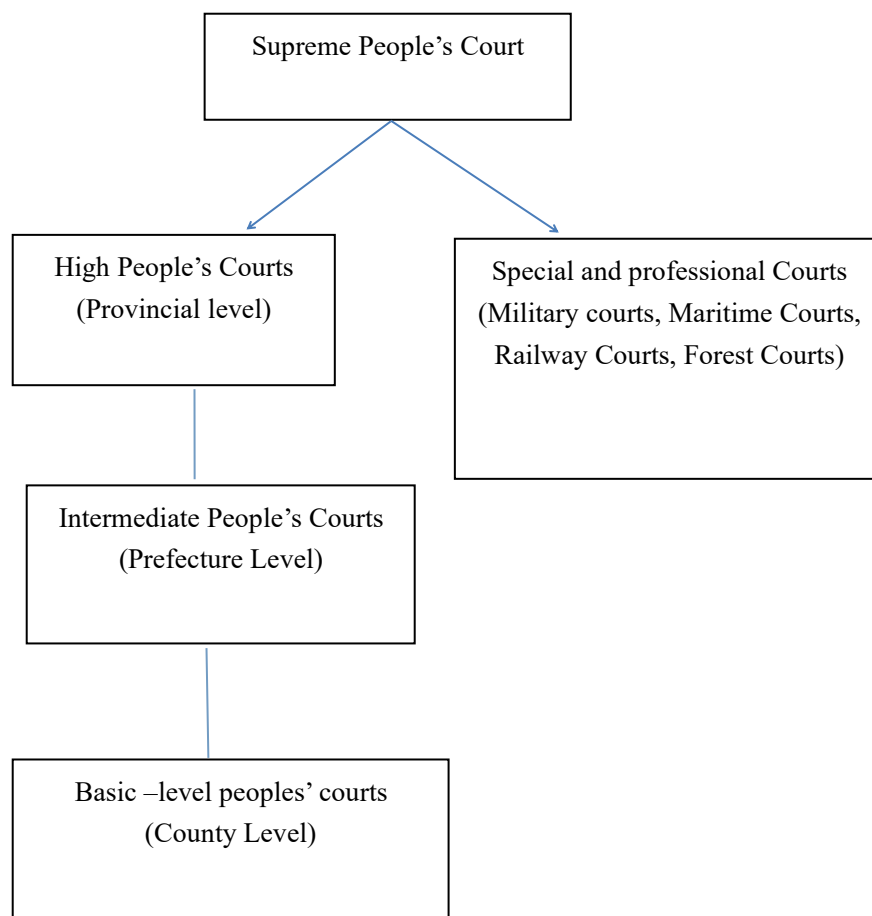
<sup>53</sup> Ibid, Article 129

Procurators, are both responsible to the National People's Congress and its Standing Committee.<sup>54</sup>

The court system in China is built on the basis of 'four levels of courts and at most two trials to conclude a case' principle. One trial is at first instance and the other trial is on appeal. The four levels of courts are set up at the central level (Supreme People's Court), at the provincial level (High People's Courts), at the prefecture level (Intermediate People's Courts) and at the county level (Basic-level Peoples' Courts). Four specialist courts, military courts, railway courts, maritime courts and forest courts, are set up separately.

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<sup>54</sup> Ibid, Article 128



Generally speaking, four divisions, the criminal, civil, economic as well as administrative division compose the court. These divisions deal with the corresponding types of case.

The courts at the basic-level deal with the majority case at first instance. The intermediate people's courts play two roles. On the one side, they hear appeals from the basic-level courts; on the other side, they also deal with first instance cases, which involve life imprisonment and the death penalty, criminal cases involving foreigners, and 'important' foreign-related civil cases. The High People's Courts have the same function. They are the appellate jurisdiction over the intermediate courts and they deal with the first instance

<sup>55</sup> PRC Constitution law 2004 and PRC Organic Law of the People's Court 2006

cases, which are considered important cases at the provincial level. The Supreme People's Court has the appellate jurisdiction over the High People's Courts and it also has its original jurisdiction in important cases at the national level. In addition, the Supreme People's Courts can also promulgate judicial interpretations, which have the binding effect on lower court in practice.

A collegiate bench will normally be appointed, unless it is a minor criminal case or a simple civil case.<sup>56</sup> People's assessors may participate in the collegiate bench at first instance and they have the same rights as the adjudicators in the same case. However, appeal cases do not include the participation of the People's assessors. The president of the court and the adjudicative committee of the court also play an important role in the decision-making process of the judgment. The president of the court or a chief judge of a division of the court needs to sign the judgment before it comes valid. The adjudicative committee is set up in each court. The adjudicative committee is comprised of the president of the court and some adjudicators appointed on the recommendation of the president by the standing committee of the relevant people's congress. The important and difficult cases must be heard by the adjudicative committee before the judgment is announced to the public.<sup>57</sup> The decision of the adjudicative committee must be implemented by the collegiate bench. The typical judicial decision in Chinese court is short and it does not included any dissenting judgment, which is excluded under the coordination of the adjudicative committee.

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<sup>56</sup> Organic Law of the People's Courts of the People's Republic of China 2006, Article 10

<sup>57</sup> Ibid, Article 11

Under this circumstance, it is clear that the judge himself/herself does not have the power of making the judgment independently. In China, independent adjudicative power does not belong to individual judge or the collegiate bench, because they have to take orders or instructions from the adjudicative committee. The judge or the collegiate bench actually do not make an independent judicial decision, although the Organic Law of the People's Courts of the People's Republic of China 2006 has a clear provision that 'the people's courts shall exercise judicial power independently, in accordance with the provisions of the law, and shall not be subject to interference by any administrative organ, public organization or individual.'<sup>58</sup> The Chinese government explain that the independent judicial power in China does exist. It belongs to the court as a collective entity, rather than the individual adjudicators or of a collegiate bench. However, it is still arguable whether a Chinese court, as a collective entity, has independent judicial power in the practice.

The doubts about the judicial independence in China have existed for a long time. Actually in practice, it is very difficult for the courts to be independent from the interference from the administrative organ due to its financial and personnel structure. In China, the courts' personnel and financial structure are not independent. The financial structure of the courts relies on the local government at the corresponding level. The courts system has not been located a budget of its own fund by law. In practice, the funding of the courts comes from the budget of the local administration. That means the local administration has the power to cut the spending on courts. The extremely dependence on local administration's financial support makes the courts not willing to challenge the local authority. Furthermore, as the integral parts of local government, Upham notes that Chinese judges 'are fully

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<sup>58</sup> Ibid, Article 4



integrated into local personnel structures.’<sup>59</sup> According to China’s Organic Law of the People’s Courts 2006, presidents of local people’s courts at various levels are elected by the local people’s congresses at corresponding levels. The vice-presidents, chief judges, associate chief judges of divisions as well as the common judges are appointed and removed by the standing committees of the local people’s congresses at corresponding levels.<sup>60</sup> The term of the presidents of people’s courts at all levels is the same as the term of people’s congresses at corresponding levels.<sup>61</sup> The pressure for the personnel structure forces the courts to make the judicial judgment favouring their local government. The dependence on both financial and personnel structure has an extremely negative impact on the judicial independence in China.

Local government tend to obtain the favourable judicial decisions to protect the local development. As discussed above, the local courts cannot keep judicial independence in judicial practice, due to the financial and personnel system. Under the pressure of the local government, the local court will make the judicial decision favouring the local government’s decision. This causes a common phenomenon that the courts in China are like a football game-- there is a difference between the home ground and the away ground. The same case would receive a completely different judicial decision, if the trial was in a different local court. It is not surprising to see a judgment made by court in Beijing is different with the one made in Shanghai.

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<sup>59</sup> Upham, Frank K., ‘Reflections on the Rule of Law in China’, National Taiwan University Law Review, March 2011, Volume 6, Number 1, P261

<sup>60</sup> Organic Law of the People’s Courts of the People’s Republic of China 2006, Article 34

<sup>61</sup> Ibid, Article 36

Especially, in a case involving the big local company, the local government tend to support their local company win the case and normally the local government will pressure the court to make the favourable judgment to achieve it, because these big companies make great contributions to the local tax revenue, which can be partly retained by the local government under the current tax system in China. In addition, big companies also contribute greatly to local gross domestic production (GDP), which is the main criterion for assessing the local official's performance. As is known to all, the local government officials are appointed by the higher level directly, rather than election. The good GDP figure can bring more opportunities of promotion. Therefore, the local officials seek for every chance to increase the local GDP to create economic miracles. Tax revenue and the GDP figure contribute to the local protectionism, which causes the interference from the local government to the local courts. The local protectionism harms the consistency of the legislation in China, and also caused the weak implementation of food safety law, which has been examined in the Milk Scandal of 2008 in the Chapter 2.

In addition, the political factor is another important factor to interfere with judicial independence. As Upham pointed out, Chinese courts are embedded in Chinese Communist Party.<sup>62</sup> Political departments are set up in Chinese courts and the judges are supposed to follow the Chinese Communist Party's leadership. Under this circumstance, political stability is the priority. Even though the judge makes his/her own judicial decision, the judgment still needs to be endorsed by the president of the court or a chief judge of a division of the court first to get them to sign the judgment. Otherwise, the judgment will

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<sup>62</sup> Upham, Frank K., 'Reflections on the Rule of Law in China', *National Taiwan University Law Review*, March 2011, Volume 6, Number 1, P262.

not be valid. Furthermore, the adjudicative committee may interfere with the decision-making process by giving an instruction, if the adjudicative committee thinks it is an important or difficult case. Sometimes, when the case is sensitive, like a case regarding human rights, the courts may refuse to file the case.

In addition, political factors also affect the consistency of the legislation. China is one of the communist countries, led by the Chinese Communist Party (CCP). This leadership has even been mentioned in Chinese Constitution law.<sup>63</sup> Meanwhile, China's present construction of democracy and legal system is far from perfect and it is still not the state rule of law. It is not rare to see the phenomenon of 'the party above the law' everywhere. Political factors are common to be seen and play a crucial role in all state organs. Party branches are required to be set up in all state organs at all levels, even in the court, which is supposed to be an independent organ. Furthermore, besides the party branch, the political departments mentioned above are also set up in the courts. In China, the legislative, administrative organs, and judicial organs are all expected to follow the leadership of the CCP. This means the policy of the CCP has more effectiveness than the law in practice. Policies above the law interfere with the consistency of the law. The best example is the 'Strike Hard' policy. This policy was initiated in 1983. It is an anti-crime campaign, believing that criminals should be dealt with 'severely, heavily and with no delay'. When the 'Strike Hard' campaign is going, the same crime would receive a more severe punishment than normal. This is only one example of the 'policy prior to the law'. In practice, this kind of priority policy can be found at any level of the government, on any subject, like crime, tax, education, food safety and economics. To establish a state-wide

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<sup>63</sup> PRC Constitution Law 2004

rule of law, the legislation must be kept consistent and the CCP's policy cannot be prior to the law under any circumstance. However, China still has a long way to go to achieve this goal.

The relative lack of an independent judicial system restrains the effectiveness of the implementation of the law, including food safety law in China. In the case of the Milk Scandal of 2008, nine victims' families took a class action to the local court. However, the local court in Shijiangzhuang refused to file the lawsuit for the reason of 'waiting for a compensation plan to be issued by the government', because the incident had a wide impact.<sup>64</sup> Meanwhile, the courts in the other provinces responded in the same way.<sup>65</sup> It reveals the fact that China's dependent judiciary restrains the effectiveness of the implementation of law and a case with a great social impact still relies on the government rather than court redress for settling the dispute.

Apart from lacking judicial independence, the poor level of legal education and professional standards of the judges has also been criticised a lot.<sup>66</sup> In China, judges did not have to obtain a law degree before 1995. Many retired military officers could be recruited as a judge directly. The poor professional levels hamper the development of the courts system. However, Chinese government noticed this obstacle and required that all the applicants for the judgeship after 2002 would need to pass the national bar examination.

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<sup>64</sup> Compensation Claims Against Sanlu Suspended: Who to Compensate the Victims?, China News, 11st November 2008, available at <http://www.chinanews.com/cn/cj/xfsh/news/2008/11-11/1445254.shtml>

<sup>65</sup> Court Compound Pain of Chinese Tainted Milk, New York Times, 17th October 2008, available at <http://www.nytimes.com/2008/10/17/world/asia/17milk.html?fta=y>

<sup>66</sup> Lubman, Stanley, 'Looking for Law in China', Columbia Journal of Asian Law, Vol. 20, No. 1, pp. 1-92, Fall 2006. Available at SSRN: <http://ssrn.com/abstract=982009>

This mandatory requirement for becoming a judge has greatly improved the legal professional levels, and it has a positive impact on the reform of Chinese courts system.

## **6. Corruption Problems in China**

China is suffering from the serious corruption problem. Transparency International released a 'corruption index' on 5<sup>th</sup> December 2012. A score of 100 is considered to be very clean, 0 is regarded as highly corrupt. China scored 39, ranked 80 among 176 comparison of countries and regions; Hong Kong got 77 points, ranking 14<sup>th</sup> of the world and Taiwan 61, ranked 37<sup>th</sup> in the world.<sup>67</sup> In the survey of Transparency International 2008, China ranked 72 among 180 countries surveyed for general corruption perceptions.<sup>68</sup> On the base of this survey, it seems the corruption problem is getting worse in China. The corruption problem is already a very serious problem in China. Corruption exists in economic activities, administrative organs, judicial organs etc. The harm of the corruption is obvious. Although central government has launched several campaigns against corruption, the corruption problem still has not been rooted out so far.

As Triplett pointed out, in China the system is 'just too corrupt to institute any real reform that would impact the Chinese people.'<sup>69</sup> The Ministry of Public Security in China

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<sup>67</sup> Transparency International, 'Corruption Index', 5<sup>th</sup> December 2012

<sup>68</sup>Transparency International 2008 Corruption Perceptions Index, [http://www.transparency.org/news\\_room/in\\_focus/2008/cpi2008/cpi\\_2008\\_table](http://www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table).

<sup>69</sup> Triplett, William C., II, Subcommittee on Europe, Eurasia and Emerging Threats, 'The Threat of China's Unsafe Consumables', available at <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&cad=rja&ved=0CDsQFjAB&url=http://www.house.gov/committees/europe/europe.htm>

estimated that in 2004 about 500 officials, taking about \$8,000,000 state assets, had fled away abroad.<sup>70</sup> In the recent closing session of the 18th National Congress of the Communist Party of China, China's Communist Party (CCP) itself admitted that the corruption problem is a big problem to China. In the first five months of 2014, Chinese authorities investigated 26,523 officials, including seven at the ministerial level, for crimes related to their job duties.<sup>71</sup>

Mr Xiaoyu Zheng's case is a good example to illustrate how corruption has ruined the Chinese food safety. Mr. Zheng was the director of the State Food and Drug Administration (SFDA).<sup>72</sup> In 2007, the People's Court convicted Mr. Zheng on charges of bribery and dereliction of duty. The combined sentences resulted in an order for his immediate execution.<sup>73</sup> His case revealed the serious problem of China's food and drug safety system.

Furthermore, it also revealed the problems in SFDA. The SFDA did not have any standard procedures for reviewing and approving new drug application. Moreover, the SFDA is also short of a specific plan to deal with the massive amount of applications for new drugs. It is

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mg8rmL9ZdoGRbt4nZ6muw&sig2=LUWI\_YO1vOCleyPPGKsx5w

<sup>70</sup> Liu, Chenglin, 'Informal Rules, Transaction Costs, and the Failure of the "Takings" Law in China', 29 HASTINGS INT'L & COMP. L. REV. 1, 14 (2005).

<sup>71</sup> 'China's Communist Party Admits It Has a Big Corruption Problem', available at <http://www.businessweek.com/articles/2014-07-10/nepotism-corruption-rampant-in-selecting-cadres-says-chinas-communist-party>

<sup>72</sup> 'Mr. Zheng Xiaoyu: A Typical Case of Corruption the Ruined the Whole Food and Drug Industry', Zhongguo Xinwen Zhoukan, 9<sup>th</sup> March 2007, available at [http://cn.chinareviewnews.com/doc/1003/2/4/0/100324072\\_5.html?coluid=7&kindid=0&docid=100324072](http://cn.chinareviewnews.com/doc/1003/2/4/0/100324072_5.html?coluid=7&kindid=0&docid=100324072)

<sup>73</sup> 'Former Drug Head Sentenced to Death', China Daily, 29<sup>th</sup> May 2007, available at [http://www.chinadaily.com.cn/china/2007-05/29/content\\_882475.htm](http://www.chinadaily.com.cn/china/2007-05/29/content_882475.htm).

reported that the SFDA received applications from over 6,000 pharmaceutical companies across the nation.<sup>74</sup> At its peak, one SFDA officer had to review over 30 applications per day.<sup>75</sup> Whereas, the U.S. FDA only approved 148 new drugs applications in 2004, while the Chinese SFDA approved 10,009 new drugs,<sup>76</sup> which is 66 times more than the applications approved by U.S. FDA in the same year. And it also means that it on average only took 12 minutes for SFDA in China to approve an application. At this super fast speed, SFDA approved 150,000 new drugs during Mr. Zheng's eight-year tenure.<sup>77</sup> It is hard to see any way to ensure the authenticity of the application at this pace.<sup>78</sup> At least six fake drugs causing seriously injured and death were identified as approved by SFDA during this period.<sup>79</sup>

In addition, during Mr. Zheng's eight-year tenure, he tried to push the GMP standards<sup>80</sup> in order to ensure drug safety and quality.<sup>81</sup> Although GMP standards is an important production enforcement tool to ensuring food safety, the SFDA and drug industry were not fully prepared to accept the change. Fully ensuring GMP standards in China in 2004 was

<sup>74</sup> 'Mr. Zheng Xiaoyu: A Typical Case of Corruption the Ruined the Whole Food and Drug Industry', Zhongguo Xinwen Zhoukan, 9<sup>th</sup> March 2007, available at [http://cn.chinareviewnews.com/doc/1003/2/4/0/100324072\\_5.html?coluid=7&kindid=0&docid=100324072](http://cn.chinareviewnews.com/doc/1003/2/4/0/100324072_5.html?coluid=7&kindid=0&docid=100324072)

<sup>75</sup> Young, Dali L., 'Regulatory Learning and Its Discontents in China: Promise and Tragedy at the State Food and Drug Administration', p10, available at [http://www.daliyang.com/files/0\\_1\\_Yang\\_SFDA\\_regulatory\\_learning\\_and\\_its\\_discontent.pdf](http://www.daliyang.com/files/0_1_Yang_SFDA_regulatory_learning_and_its_discontent.pdf)

<sup>76</sup> 'Mr. Zheng Xiaoyu: A Typical Case of Corruption the Ruined the Whole Food and Drug Industry', Zhongguo Xinwen Zhoukan, 9<sup>th</sup> March 2007, available at [http://cn.chinareviewnews.com/doc/1003/2/4/0/100324072\\_5.html?coluid=7&kindid=0&docid=100324072](http://cn.chinareviewnews.com/doc/1003/2/4/0/100324072_5.html?coluid=7&kindid=0&docid=100324072)

<sup>77</sup> Barboza, David, 'A Chinese Reformer Betrays His Cause, and Pays', N.Y. Times, 13rd July 2007, A1.

<sup>78</sup> Zheng, Xiaoyu, 'Mr. Zheng Xiaoyu: Disaster of Drugs' (CCTV Weekly television broadcast Jan. 29, 2007), transcript available at <http://news.cctv.com/china/20070129/108011.shtml>.

<sup>79</sup> Barboza, David, 'A Chinese Reformer Betrays His Cause, and Pays', N.Y. Times, 13rd July 2007, A1.

<sup>80</sup> A good manufacturing practice (GMP) is a production and testing practice that helps to ensure a quality product. GMPs are enforced in the United States by the US FDA, under Section 501(B) of the 1938 Food, Drug, and Cosmetic Act (21 USCS § 351).

<sup>81</sup> Ibid

virtually impossible. China's drug industry lagged behind in developed countries, much antiquated equipment being still used in practice. However, if the producers failed to meet the GMP standards by 2004, they would lose their production license.<sup>82</sup> For small and mid-sized drug makers, GMP standards were an unrealistic goal.<sup>83</sup> In order to meet Mr Zheng's standards, these enterprises tried to bribe Mr Zheng and his family. Court documents showed that Mr. Zheng took more than \$850,000 in bribes from pharmaceutical companies.<sup>84</sup>

To Mr Zheng, GMP is only a commercial tool. No rigorous test or audit was executed on the enterprises offering bribe to Mr Zheng. Sanlu and other dairy firms, which were involved in the melamine tainted milk scandal, were all GMP certified enterprises.

Despite Zheng's execution, corruption still poisons the administrative system in China. During 2003 to 2008, 829 officials were administratively disciplined and 199 of them were charged for corruption.<sup>85</sup> In 2009, there were still 105 officials disciplined, and 40 of them were charged for corruption.<sup>86</sup> In April 2010, Mr. Wei Liang and four other SFDA high officials were arrested for corruption.<sup>87</sup>

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<sup>82</sup> Ibid

<sup>83</sup> Liu, Chenglin, 'The Obstacles of Outsourcing Imported Food Safety to China', available at [www.lawschool.cornell.edu/research/ilj/upload/liu.pdf](http://www.lawschool.cornell.edu/research/ilj/upload/liu.pdf)

<sup>84</sup> Barboza, David, 'A Chinese Reformer Betrays His Cause, and Pays', N.Y. Times, 13rd July 2007, A1.

<sup>85</sup> Wang, Yong, Dir., AQSIQ, Speech at the AQSIQ Annual Anti-Corruption Conference in Beijing: 'Improving the Communist Party's Work Ethics and Building a Clean Government in the Quality Inspection System, (Feb. 18, 2009)

<sup>86</sup> Wang, Yong, Dir., AQSIQ, Speech at the AQSIQ Annual Anti-Corruption Conference in Beijing: 'Improving the Communist Party's Work Ethics and Building a Clean Government in the Quality Inspection System'(Jan. 28, 2010), transcript available at [http://www.ccic.com/web/static/articles/catalog\\_63100/2010-03-25/article\\_ff8080812760adee012793fa13520069/ff8080812760adee012793fa13520069.html](http://www.ccic.com/web/static/articles/catalog_63100/2010-03-25/article_ff8080812760adee012793fa13520069/ff8080812760adee012793fa13520069.html).

<sup>87</sup> Hou, Yijun, 'Upon Pharmaceutical Companies Complaints, Five SFDA Officials were Arrested on Corruption



A recent New York Times article commented:

*Industry analysts say Beijing will have to do a great deal more to solve the country's food and drug safety problems. "If the head of the drug agency is corrupt," said James J. Shen, a long time industry analyst in Beijing and the publisher of Pharma China, 'you can imagine how corrupt the whole system is.'*<sup>88</sup>

Hereby, the corruption problem is a great challenge to the effective implementation of the food safety law in China. Recently, Mr Xi, the president of China, has launched the new campaign against corruption. Several senior officials have been arrested, while more and more high level officials have been involved in investigations. Bo Xilai, the former rising star of the CCP, was sentenced to life imprisonment in 2013.<sup>89</sup> Xu Caihou, the former vice chairman of China's Central Military Commission (CMC), confessed to taking bribes, and has been prosecuted last year.<sup>90</sup> All these show Mr Xi's determination for anti-corruption. His anti-corruption campaign has won the massive support from the public and the campaign is regarded as the start of the Chinese dream.

Corruption has a long history in China and it exists almost everywhere. It is impossible to root out corruption in China in a short time. Mr Xi's anti-corruption campaign has been a

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Charges', Beijing Youth Daily, 19<sup>th</sup> April 2010, available at <http://bjyouth.ynet.com/article.jsp?oid=64955945>

<sup>88</sup> Barboza, David, 'A Chinese Reformer Betrays His Cause, and Pays', N.Y. Times, 13rd July 2007, A1.

<sup>89</sup>Jiang, Steven, 'Bo Xilai found guilty on all charges, sentenced to life in prison', CNN news, available at <http://edition.cnn.com/2013/09/21/world/asia/china-bo-xilai-verdict/>

<sup>90</sup> 'Xu Caihou confesses to taking bribe' Xinhua News, available at [http://news.xinhuanet.com/english/china/2014-10/28/c\\_133748901.htm](http://news.xinhuanet.com/english/china/2014-10/28/c_133748901.htm)

deterrent to corruption and had a positive effect in a short period of time. It is still too early to estimate the change brought by the anti-corruption campaign in the long term. The corruption is a systemic problem. China is short of democratic systems and the independent judiciary is also absent from the contemporary legal system. Under the current leadership of CCP, there is no other party which plays the role of supervision. It is very difficult to achieve the victory of the anti-corruption campaign only under the internal supervision from the Chinese Communist party itself. Media might play a supplementary role of supervision, if CCP is willing to release the control of media. Overall, there is still a long way for China to fight with corruption and it is very difficult to win the victory if China does not make any systemic change. Although, the Chinese Communist Party has launched its anti-corruption campaign, it is still under doubt how much achievement it can make, without the external supervision. How to overcome the corruption problem is beyond the argument in this thesis. Hereby, it will not be discussed in further details.

## **7. The Multi-Layered Implementation and the Overlapping Standards**

In order to have a better understanding of the enforcement mechanism of the new Food Safety Law, a brief survey of China's government structure and legislative process will be set out below first.

China is not a federal country as the United States. Instead, China has a centralized administrative system, which consists of the central government in Beijing and local

governments of diverse level across the country.<sup>91</sup> According to the Constitution, local governments are subordinate to the central government.<sup>92</sup> At the central level, the NPC is the legislature, which is supreme in the state structure.<sup>93</sup> The National People's Congress (NPC) is the supreme legislative body in China, established under the Constitutional Law.<sup>94</sup> State legislative power is exercised by the NPC and Standing Committee.<sup>95</sup> Only the NPC can amend the Constitution. Moreover, all the basic law (基本法律), such as criminal law, civil law and other laws, which are relevant to the organisation of state organs, can only be enacted and amended by the NPC.<sup>96</sup> The NPC has set up a Standing Committee, which has the power to enact and amend all the Laws, apart from the laws which are mentioned above<sup>97</sup>. Only the legislation enacted by the NPC or its Standing Committee<sup>98</sup> can be designated as 'law' (法律). Other legislation enacted by other departments can only be called regulations or rules in China.

Below the NPC is the State Council, which operates as the central administration for China.<sup>99</sup> The State Council has the power to adopt administrative measures and enact

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<sup>91</sup> Constitution of the People's Republic of China, articles 95, 138 (1982)

(P.R.C.) translated at <http://english.people.com.cn/constitution/constitution.html>.

<sup>92</sup> Ibid, Article 100

<sup>93</sup> Ibid, Article 2, 57-58

<sup>94</sup> PRC Constitution Law, Article 58, 62

<sup>95</sup> PRC Legislation Law 2000, Article 7

<sup>96</sup> Ibid, Article 62

<sup>97</sup> Ibid, Article 67

<sup>98</sup> For example, Company Law of the PRC (Adopted by the Standing Committee of the NPC on 29 December 1993; first revision on 25 December 1999; second revision on 28 August 2004; third and current revision on 27 October 2005, effective on 1 January 2006); Securities Law of the PRC (Adopted by the Standing Committee of the NPC on 29 December 1998; first revision on 28 August 2004; second and current revision on 27 October 2005, effective on 1 January 2006); General Principles of Civil Law of the PRC (adopted by the NPC on 12 April 1986, effective on 1 January 1987); Property Law of the PRC (adopted by the NPC on 16 March 2007); Criminal Law of the PRC (Adopted by the NPC on 1 July 1979; substantially revised on 14 March 1997; several amendments have been added since then)

<sup>99</sup> Ibid, articles. 85, 92. Along with the State Council, three other institutions are under the NPC: the Central Military

administrative rules and regulations<sup>100</sup> (行政法規) as well as issue decisions and orders, in accordance with the Constitution and the statutes.<sup>101</sup> Only the legislation enacted by the State Council can be designated as ‘administrative regulations’ or ‘regulations’ (abbreviated form). In the Chinese language, the designation of the legislation made by the State Council is normally ‘Tiaoli’(條例), ‘Guiding’(規定) or ‘Banfa’(辦法), which depends on the scope of subject matter. Under the Legislation Law, the central government may formulate administrative regulations in the following situations: (a) when it is necessary to enact regulations to implement provisions of law; (b) when it is necessary to enact regulations to govern matters within the administrative functions and powers of the State Council as stipulated in the PRC Constitution; and (c) when the State Council is delegated the law-making power by the NPC or its Standing Committee to enact regulations for matters originally within the national legislature’s exclusive legislative jurisdiction.<sup>102</sup>

In the State Council, the Premier is the head of the cabinet. The cabinet consists of Ministries, Commissions, and Administrations.<sup>103</sup> The State Council and other institutions

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Commission (CMC), the Supreme People’s Court, and the Supreme People’s Procuratorate. See id. art. 62, & 6–8. The President is the head of the state. See id. arts. 79–80. The President nominates the State Council’s Premier as well as all other Ministers. See id. art. 62, & 5. The State Council is China’s Central Government. See id. art. 85. Therefore, the State President and the Premier of the State Council are the most influential figures in China’s politics

<sup>100</sup> For example, Administrative Regulations of the PRC on Company Registration (Promulgated by the State Council on 24 June 1994; revised on 18 December 2005, effective as of 1 January 2006); Provisional Regulations on the Administration of the Issuing and Trading of Shares (Promulgated by the State Council on, and effective as of, 22 April 1993); Implementing Rules of the Sino-Foreign Equity Joint Venture Law [Promulgated by the State Council on 20 September 1983; revised on 15 January 1986, 21 December 1987, and 22 July 2001]

<sup>101</sup> PRC Constitution Law, Article 89; PRC Legislation Law 2000, Article 56

<sup>102</sup> PRC. Legislation Law, Article 56

<sup>103</sup> Ibid, Article 86

are subject to the NPC's supervision.<sup>104</sup> The various ministries, commissions, the People's Bank of China, the Auditing Agency, and a body directly under the State Council exercising regulatory function, may enact administrative rules<sup>105</sup> (部门规章) within the scope of their authority in accordance with national law, and administrative regulations, as well as decisions and orders of the State Council.<sup>106</sup> The NPC has the legal authority to approve legislative proposals the State Council submits.<sup>107</sup> The State Council proposed the new Food Safety Law in 2004. However, the National People's Congress spent five years to ultimately adopt the new law after the Milk Scandal of 2008.

At the local level, a hierarchy of four levels of government (in descending order exists): provinces, counties, cities and townships.<sup>108</sup> Each level reports to the next higher level.<sup>109</sup>

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<sup>104</sup> Ibid, Article. 67, 73, 92

<sup>105</sup> For example, the following are examples of departmental rules: Measures on the Registration of Registered Capital of Companies (Promulgated by the State Administration of Industry and Commerce on 27 December 2005, effective as of 1 January 2006); Opinions on Several Issues concerning Law Application in the Examination and Approval, and Registration of Companies with Foreign Investment (Promulgated on 24 April 2006 by the State Administration of Industry and Commerce, Ministry of Commerce, General Administration of Customs, and State Administration of Foreign Exchange); Guidelines on Articles of Association for Listed Companies (Promulgated by the China Securities Regulatory Commission on 16 March 2006); Guidelines for Introducing Independent Directors to the Board of Directors of Listed Companies (Promulgated by the China Securities Regulatory Commission on 16 August 2001); Code of Corporate Governance for Listed Companies (Promulgated by the China Securities Regulatory Commission on 1 January 2001); Rules on the General Shareholders' Meeting of Listed Companies (Promulgated by the China Securities Regulatory Commission on 20 March 2006); Measures for the Administration of Initial Public Offering and Listing of Shares (Promulgated by the China Securities Regulatory Commission on 17 May 2006); Measures on Information Disclosure by Listed Companies (Promulgated by the China Securities Regulatory Commission on 30 January 2007); Measures on Administration of Takeover of Listed Companies (Promulgated by the China Securities Regulatory Commission on 31 July 2006);- Measures Governing the Acquisition of Domestic Enterprises by Foreign Investors (promulgated on 8 August 2006 by the Ministry of Commerce, State-owned Assets Supervision and Administration Commission, State Tax Administration, China Securities Regulatory Commission, and State Administration of Foreign Exchange)

<sup>106</sup> PRC. Legislation Law, Article 71

<sup>107</sup> Ibid, articles 89, 2

<sup>108</sup> Ibid, Articles 95-111

<sup>109</sup> Ibid

Provinces report directly to the State Council.<sup>110</sup> Even though Provinces are of the same bureaucratic level as Ministries in Beijing, they are local government according to the Constitution.<sup>111</sup> Like the structure of the State Council, each of the four levels of local government has various departments as well.<sup>112</sup> The composition of local government is similar to the central government. The People's Congress at provincial level or municipalities (Beijing, Shanghai, Tianjin and Chongqing) and autonomous regions, together with their standing committees, may enact local decrees(地方性法规), in light of the specific situations and actual needs of the jurisdiction. However, the local decrees shall not contravene any provision of the Constitution, national law and administrative regulations.<sup>113</sup> The People's Government of a province, autonomous region, municipality directly under the central government or a major city may enact local rules (地方规章) in accordance with national law, administrative regulations and local decrees of the province, autonomous region, or municipality directly under the central government.<sup>114</sup>

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<sup>110</sup> Ibid

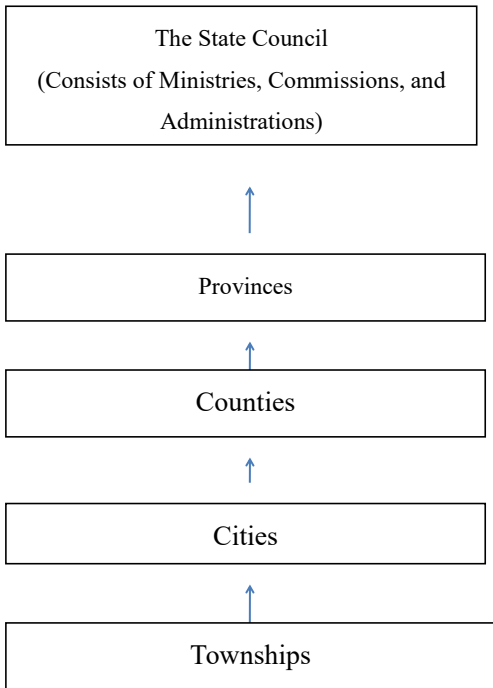
<sup>111</sup> Ibid, article 95

<sup>112</sup> Ibid, articles 95-111

<sup>113</sup> PRC Legislation Law 2000, Article 63

<sup>114</sup> Ibid, Article 73.

**The structure of the government in China <sup>115</sup>**

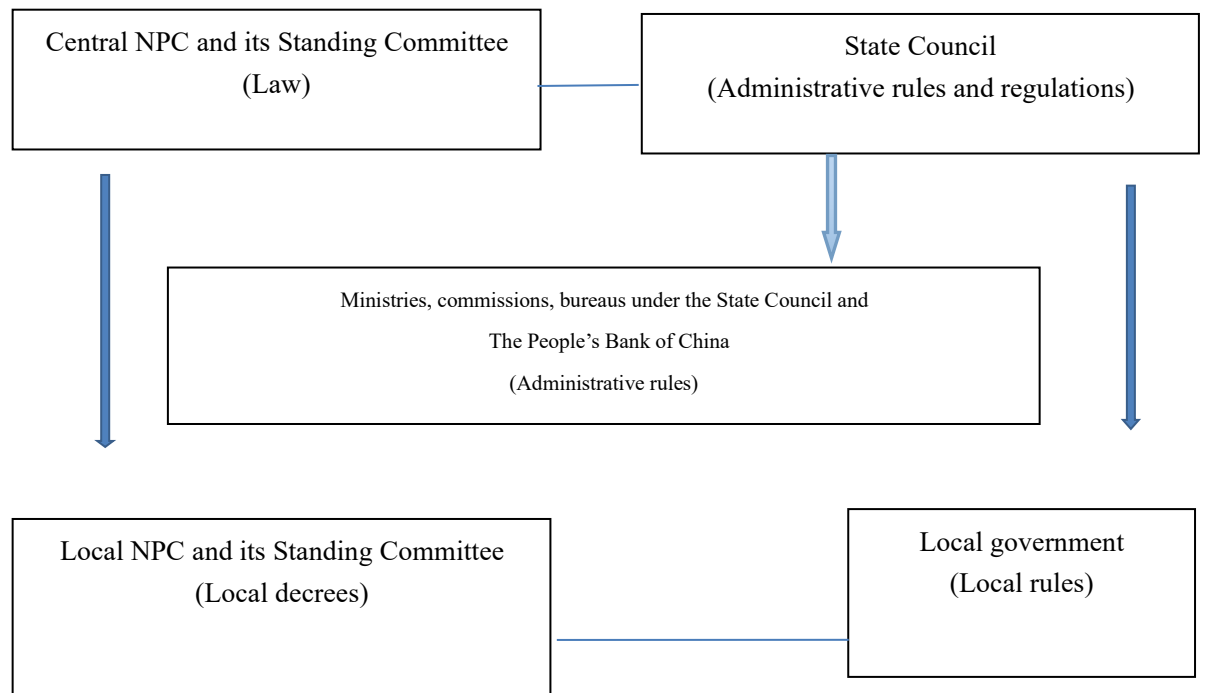


In short, in the central government, the NPC and its Standing Committee have the state legislative power and can promulgate ‘Law’. The State Council and its ministries, commissions, etc. have the powers to enact administrative rules and regulations. Local authorities have a similar composition. The local NPC and its Standing Committee enact the local decrees, while local government enacts local rules. The law-making organs in China are illustrated and set out as follows:

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<sup>115</sup> This hierarchy can be referred to the articles mentioned above in PRC Constitution Law

## The Law-making Organs in China <sup>116</sup>



As explained above, China has a comprehensive law-making system. Multiple organisations have the power to enact laws and regulations. The hierarchy of legislation in China is very important, because the hierarchy determines the level of the legislation. The higher level legislation with the higher legal effects should be applied first when there is a conflict between different ones, especially when there is more than one law/regulation regarding the same subject. According to the Constitution Law and the Legislation Law, the principles of the hierarchy are as follows:

1. The Constitution has the highest legal authority, and no national law, administrative regulation, local decree, autonomous decree and special decree, or administrative or local

<sup>116</sup> These Law-making Organs are according to PRC Constitution Law 2004 and PRC Legislation Law 2000



rule may contravene the Constitution.<sup>117</sup>

2. National law has higher legal authority than administrative regulations, local decrees and administrative or local rules.<sup>118</sup>

3. Administrative regulations have higher legal authority than local decrees and administrative or local rules.<sup>119</sup>

4. A local decree has higher legal authority than local rules issued by governments at the same level and lower level.<sup>120</sup>

5. Administrative rules and local rules have the same legal authority and are implemented within their respective scope of authority.<sup>121</sup>

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<sup>117</sup> PRC Legislation Law 2000, Article 78

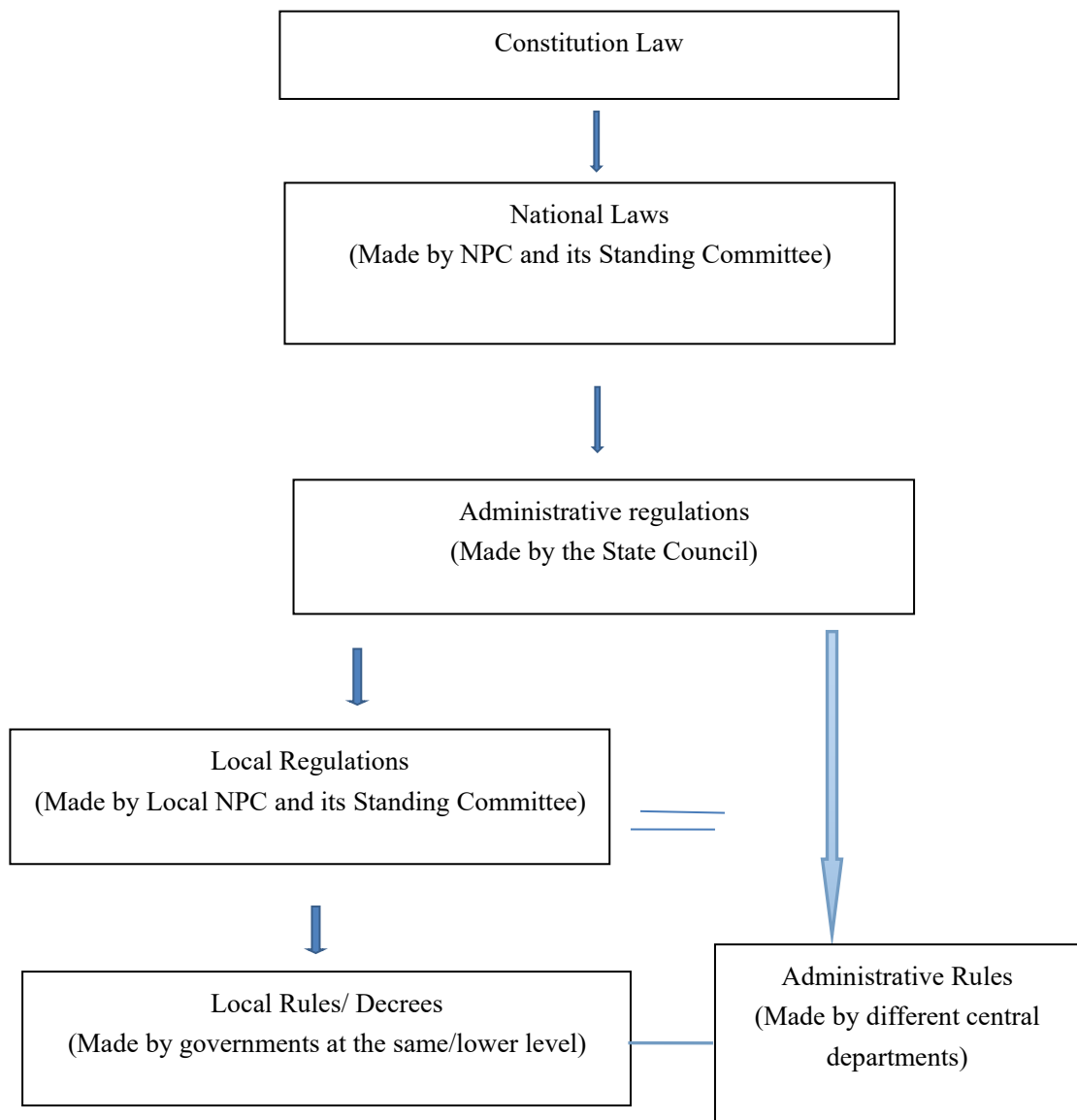
<sup>118</sup> Ibid, Article 79

<sup>119</sup> Ibid

<sup>120</sup> Ibid, Article 80

<sup>121</sup> Ibid, Article 82

## The Hierarchy of Chinese Legislation <sup>122</sup>



From the diagram above, it is not difficult to find there are too many law/regulation-making organs in China, which results in the overlapping and conflicting legislation. From the vertical structure, the central department may already have standards to apply. Meanwhile, the local authorities may have their own local rules or regulations on the same matter. From the horizontal level, different departments, Ministries, commissions, offices under the State Council have different standards. For example, the Ministry of

<sup>122</sup> PRC Legislation Law 2000

Agriculture, Ministry of Health and State Administration for Industry & Commerce may all have their own rules/standards on some food product. In the local levels, the standards and the rules might also be different from region to region, because the wealth of the economic development has not been distributed evenly. There is a huge gap between the rich and the poor, especially between Northern and Southern China. Some products may be subject to different local standards in Shanghai or in Tibet. The overlapping and conflicting legislation in China leads to the ineffective implementation of law in practice.

Moreover, another problem for the hierarchy of Chinese legislation is that there is no rule to settle the conflicts between the local regulations/ rules and the administrative rules made by ministries, commissions, bureau under the State Council, when inconsistency occurs. Article 82 only clarifies that the administrative rules made by central departments have the same legal authority as the local rules made by local government and they should be implemented within their respective scope of authority. However, it does not clarify which legislation should be applied first, if they are inconsistent on the same subject. Furthermore, the Legislation Law does not clarify the relationship between local regulations made by local NPC and its Standing Committee, and administrative rules made by central ministries, commissions, bureau under the State Council. When local regulations conflict with the administrative rules, which one has the higher legal effect and which one should be applied first? Article 86 of the Legislation Law only states, ‘in the case of difference between local decree and administrative rule in respect of the same matter, and applicable provision cannot be decided, the State Council shall give its opinion, and where the State Council deems that the local decree should apply, then the local decree

shall be applied in the local jurisdiction; where the State Council deems that the administrative rule should apply, it shall request the Standing Committee of National People's Congress to make a ruling'.<sup>123</sup> However, this procedure is a really time-consuming procedure. There is no rule of how long is permitted for the decision to be made by the State Council. If the State Council decides to apply the administrative rules made by central departments, the case then needs to be submitted to the NPC Standing Committee to make a ruling. In addition, there is no rule of how long is permitted for the NPC Standing Committee to reach a decision. The whole procedure is very time consuming and it does not effectively help the courts in practice. After all, the courts need to deal with cases and settle the disputes on a daily basis.<sup>124</sup>

As to the Chinese food safety regulatory system, it has the same defects, which belong to the entire legal system in China. The current food safety mechanism is multi-layered and it is implemented by different departments at national, provincial and local level, which cause the ineffective administration. As Broughton and Walker argue, this complex administrative system brings problems for efficient collaboration and coordination between the agencies.<sup>125</sup>

At the central level, the new Food Safety Law requires the State Council to establish a Food Safety Commission (FSC) to administer its provisions.<sup>126</sup> However, the role of the FSC is not clear. As a Commission, the FSC needs to be ranked as a ministry. As discussed

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<sup>123</sup> Ibid, Article 86

<sup>124</sup> Wang, JiangYu , 'An Overview of China's Corporate Law Regime' (August, 13 2008). Available at SSRN: <http://ssrn.com/abstract=1222061> or <http://dx.doi.org/10.2139/ssrn.1222061>

<sup>125</sup> Broughton,E,I,&Walker, D.G., 'Policies and Practices for Aquaculture Food Safety in China', *Fd Policy*, 35, 471-478

<sup>126</sup> Food Safety Law 2009, article 4

in the Chapter 3, there is still no law or regulation to define the scope of the FSC and its jurisdiction, which makes the prospective relationship between the FSC and other Ministries unclear.<sup>127</sup>

The role of the standard-making body is also ambiguous. The Ministry of Health (MOH) is designated by the 2009 Food Safety Law as the primary agency that is in charge of setting food safety standards, evaluating food safety risks, issuing public notices on food safety, investigating major food safety incidents,<sup>128</sup> as well as setting standards for food certification agencies.<sup>129</sup> Meanwhile, the new Food Safety Law also grants the authorities to the AQSIQ, the State Industrial and Commercial Administration (SAIC), and the State Food and Drug Administration (SFDA) to supervise the food manufacturing, distribution, and catering services.<sup>130</sup> All of them have their own standards in their own fields, which may conflict with the standards made by MOH.

Furthermore, apart from the Food Safety Commission (FSC), other departments, including the Ministry of Health (MOH), the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), the State Administration for Industry and Commerce (SAIC), the State Food and Drug Administration (SFDA), the State Administration of Grain, the Ministry of Agriculture, the Ministry of Industry and Information of Technology (MIIT) and the Ministry of Commerce (MOFCOM), coordinate and supervise food safety

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<sup>127</sup> Liu, Chenglin, ‘The Obstacles of Outsourcing Imported Food Safety to China’, available at [www.lawschool.cornell.edu/research/ilj/upload/liu.pdf](http://www.lawschool.cornell.edu/research/ilj/upload/liu.pdf)

<sup>128</sup> Food Safety Law 2009, article 4

<sup>129</sup> Ibid

<sup>130</sup> Ibid

in China.<sup>131</sup> Overall, functions and responsibilities are not clearly divided among these departments.

At local level, the new Food Safety Law grants authority to the governments at the county level and above to be in charge of food safety administration in their respective jurisdictions.<sup>132</sup> Within each level of local government, the Food Safety Law also requires the departments of health, agriculture, quality control, industrial and commercial, and food and drug to coordinate with each other to enforce its provisions.<sup>133</sup> The status of the administrations at the local level is as overlapping as the status in the central level.

As it is impossible for the central government to inspect nearly four million food processing firms throughout the country in practice, the main participator of food inspection is the local government. It is the local government that determines the success of ensuring the food safety and quality. However, as discussed above, the local protectionism also restrains the effectiveness from the implementation of the Food Safety Law. The local governments sometimes are not so competent to monitor the local enterprises due to the local tax revenue and GDP contribution.

Apart from the overlapping administrative system, the standards of food safety in China are also overlapping and conflicting. As Sun observes, currently the Laws, and Regulations

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<sup>131</sup> Sun, Xi, 'China's Food Safety in 2012-Assessing the Increased Risks', August 2012, Sustainalytics, available at [http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.sustainalytics.com%2Fsites%2Fdefault%2Ffiles%2Fchinasfoodsafety\\_august2012\\_0.pdf&ei=R76uUYG4JuiS0QW5yIHQCA&usg=AFQjCNEFt6KdYQ7lv5Ugr9mbd8FiS8ZIOg&sig2=JzG9-qOtNUk8wyVZl7STow&bvm=bv.47244034,bs.1,d.d2k](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.sustainalytics.com%2Fsites%2Fdefault%2Ffiles%2Fchinasfoodsafety_august2012_0.pdf&ei=R76uUYG4JuiS0QW5yIHQCA&usg=AFQjCNEFt6KdYQ7lv5Ugr9mbd8FiS8ZIOg&sig2=JzG9-qOtNUk8wyVZl7STow&bvm=bv.47244034,bs.1,d.d2k)

<sup>132</sup> Food Safety Law 2009, article 5

<sup>133</sup> Food Safety Law 2009, article 6

of food, food additives and food-related safety standards in China comprise a core of some 1,900 national food safety standards and over 3,100 industry standards, as well as more than 1,200 local standards.<sup>134</sup> The Chinese food safety standards can be roughly divided into national standards, industry-specific standards, the provincial standards and the enterprise standards.<sup>135</sup> The food quality standards and the food hygiene standards consist of national standards. The Ministry of Health and the Ministry of Agriculture and various industrial sectors are in charge of the food quality standards and food hygiene standards respectively.<sup>136</sup> As the MOFCOM states in its reports, ‘the disunion of standards increase the difficulty of detection of problems, food safety standards also have been identified as one of the major barriers to China’s agricultural exports by policy makers.’<sup>137</sup>

Therefore, China’s current food safety regulation system is very complex and it is suffering from an incomplete and conflicting legislation system and ineffective administration, which is caused by the defects of the legal system. It is very difficult to coordinate the administrations, when so many departments are involved.

### **III. Ensuring the Food Safety in China- A Long Way to Go**

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<sup>134</sup> Sun, Xi, ‘China’s Food Safety in 2012-Assessing the Increased Risks’, August 2012, Sustainalytics, available at [http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.sustainalytics.com%2Fsites%2Fdefault%2Ffiles%2Fchinasfoodsafety\\_august2012\\_0.pdf&ei=R76uUYG4JuiS0QW5yIHQCA&usg=AFQjCNEFt6KdYQ7lv5Ugr9mbd8FiS8ZIOg&sig2=JzG9-qOtNUk8wyVZl7STow&bvm=bv.47244034,bs.1,d.d2k](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.sustainalytics.com%2Fsites%2Fdefault%2Ffiles%2Fchinasfoodsafety_august2012_0.pdf&ei=R76uUYG4JuiS0QW5yIHQCA&usg=AFQjCNEFt6KdYQ7lv5Ugr9mbd8FiS8ZIOg&sig2=JzG9-qOtNUk8wyVZl7STow&bvm=bv.47244034,bs.1,d.d2k)

<sup>135</sup> Shao, Y, ‘Rethinking Food Safety Problems in China’, *Acta Alimentaria*, Vol. 42 (1), pp124-132 (2013)

<sup>136</sup> Ma, S., ‘Reflection and Construction of the Laws of the Food Safety Regulatory System,’ *Gansu Soc,Sci*, 6, 187-190

<sup>137</sup> MOFCOM, ‘Reports of Chinese Agricultural Exports’, Ministry of Commerce of People’s Republic of China, Beijing, P111-124

## 1. The Reform of the Food Safety Legal System <sup>138</sup>

Since the overlapping administration and standards under the 2009 Food Safety Law have been criticised for a long time, the reform of the administrative system and alignment of the overlapping standards of the food safety legal system in China has been advocated. The Chinese central government realised these problems under the 2009 Food Safety Law and it released a detailed reorganisation plan of the China Food and Drug Administration ('CFDA') in March 2013.<sup>139</sup> The main points of this Plan were also included in the latest version of the revised draft of the Food Safety Law in 2014 <sup>140</sup>

Under this new plan, the China Food and Drug Administration (CFDA) would replace the current large number of overlapping regulators, to oversee food safety and regulation in China. As has been mentioned, the Chinese food safety system used to be governed by health, agriculture, quality supervision, industry and commerce administration, and food and drug supervision. Insufficient communication and coordination among these agencies were regarded as the main cause of ineffective administration. Now the CFDA would replace these overlapping regulators with an entity similar to the Food and Drug

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<sup>138</sup> This thesis was written before the enactment of 2015 Chinese Food Safety Law, which is the latest version of food safety law in China. However, the new changes, which were made in 2013 and 2014 drafts of the Food Safety Law are adopted in 2015 Chinese Food Safety Law. All the institutional changes, which are elaborated on below, have been carried into effect now.

<sup>139</sup> 'China to elevate food, drug agency to general administration', Xinhua News, available at [http://news.xinhuanet.com/english/china/2013-03/10/c\\_132221729.htm](http://news.xinhuanet.com/english/china/2013-03/10/c_132221729.htm)

<sup>140</sup> The latest the version of the revised draft, when the author wrote this thesis, was the second version food safety law (revised draft) 2014. The 2014 revised draft of the Food Safety Law was not valid at that time. It currently at the stage of consultation. However, it indicated the new changes and reforms that would be made in the future food safety law, which is 2015 Chinese Food Safety Law.



Administration of the United States. The CFDA would also be elevated to the ministerial level to report directly to the State Council.<sup>141</sup>

The CFDA is supposed to combine the function of the existing State Council's Food Safety Office, China's State Food and Drug Administration (SFDA) and the other food supervisions, such as the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) and the State Administration for Industry and Commerce (SAIC). The CFDA will be in charge of the food and drug safety throughout the food chain, from production to consumption.<sup>142</sup>

Under the plan, the CFDA's responsibilities were described as to supervise and regulate drugs, medical devices, food and cosmetics. In addition, it also has the responsibilities as follows: <sup>143</sup>

- a) The development of the provisions for food administrative licensing and the supervision of its implementation;
- b) The establishment of a safety and supervision reporting system;
- c) The development of the provisions for cosmetic supervision and the supervision of its implementation.

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<sup>141</sup> Beckett, Nick and Pountney, David, 'Consolidation of the China Food and Drug Administration', available at <http://www.lexology.com/library/detail.aspx?g=20a4e134-7414-4f4d-88d5-d7dd36d800a7>

<sup>142</sup> Ibid

<sup>143</sup> Ibid

This reform was regarded as a solution to overlapping supervision and standards. It is a big step for Chinese food safety system. As Chen Xiaohong, Vice-minister of Health and a member of the Chinese People's Political Consultative Conference commented, 'the restructuring will better facilitate the enforcement of the food safety laws and regulations and improve the safety of the nation's food and drugs.'<sup>144</sup>

In addition, China released a new revised draft of the food safety law on the National Peoples's Congress website, asking for public comments until 31 July 2014.<sup>145</sup> The final version of the revised draft was the second version food safety law in 2014. The deadline for public views on the second version of the revised draft was 19<sup>th</sup> January 2015.

The revised drafts clarified that CFDA is the main agency to control of food safety matters relevant to production, distribution and consumption of food. MOH (Ministry of Health) is in charge of the risk assessment and establishing national food safety standards. AQSIQ (The Administration of Quality Supervision Inspection and Quarantine) is responsible for the supervision of the food imports and exports. These changes made evident the responsibilities among the different departments and help to reduce the multi-layered implementation and the overlapping standards.

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<sup>144</sup> Ibid

<sup>145</sup> China's New Food Safety Law Draft [http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2014-06/30/content\\_1869695.htm](http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2014-06/30/content_1869695.htm). As mentioned above, the new 2015 Chinese Food Safety law, which is on the base of 2014 draft has already been enacted and took into effect now.

## 2. Switching from Traditional GDP to Green GDP

China has ambitious plans to address environmental issues. At the local government level, Green GDP should be considered to replace the traditional GDP to examine the local officials' performance. The failure of the traditional GDP is that it only represents the economic development without considering any other factors, such as the environment.<sup>146</sup> China is in the transit period of industrialisation and its economic growth highly relies on resource exploitation. The high rate of inefficient natural resource consumption and the high rate of the pollution discharge undoubtedly obstruct sustainable economic development.

Unlike the traditional GDP, green GDP is designed to calculate by deducting the cost of natural resource extraction and ecological damage from the traditional GDP.<sup>147</sup> Under the Green GDP scheme, the local government is not only responsible for economic development, but also responsible for the environmental protection.<sup>148</sup> Environmental figures should be counted together with economic figures to ensure the sustainable economic development. If the Green GDP becomes the figure to determine the promotion of local officials, the problem of local protection would be sorted out to some extent.

After fully realising the problem brought by traditional GDP approach, the Chinese

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<sup>146</sup> China's Fan Network, 'Misunderstanding and Analysis of the Green GDP, available at <http://www.ylji.cn/kxfzg/91233.html>

<sup>147</sup> Sino-Italian Cooperation Program for Env'tl. Prot., 'China to Establish a Green GDP System', <http://www.sinoitaenvironment.org/ReadNews.asp?NewsID=710>

<sup>148</sup> Yangchow City Statistics Bureau, 'GDP and Green GDP: A Synopsis', [http://www.yzstats.gov.cn/zbjs/zbjs\\_GDP.htm](http://www.yzstats.gov.cn/zbjs/zbjs_GDP.htm)

government launched a research programme about the green GDP.<sup>149</sup> The green GDP calculation, which would deduct resource and environmental costs from the traditional GDP model, might be accomplished in the future.<sup>150</sup> If China can establish a green GDP system as a key factor to assess the local officials' achievements, the degradation of environment can also be improved to some extent.

The new revised draft of the Food Safety Law also supports the green GDP scheme, proposing to count food safety in the local GDP and social development plan, as well as give responsibility for the annual financial budget for food safety to the provincial, municipal and county level government.<sup>151</sup> Overall, it is a big positive step to switching from a GDP only approach to a Green GDP scheme. The details of the environmental problem and Chinese environmental law will be addressed in the next chapter.

### **3. The Enhancement of Public Participation**

Wide public participation can also be considered as a good method to ensure the food safety in China. Public awareness and understanding of food safety should be increased. Traditional Chinese society was short of the atmosphere of public participation. Traditional Chinese people were influenced by Confucianism deeply and they were non-litigiousness, short of enthusiasm for participating in public affairs. Although Confucianism does not

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<sup>149</sup> State Env'tl Prot. Admin., 'China Green National Accounting Study Report 2004', (2006), available at [http://english.sepa.gov.cn/zwxx/xwfb/200609/t20060908\\_92580.htm](http://english.sepa.gov.cn/zwxx/xwfb/200609/t20060908_92580.htm)

<sup>150</sup> Ding, Weiping, 'Jiangsu Province Taizhou Statistics Bureau, 'Developing A Scientific Approach to 'Green GDP', available at <http://www.zztjj.gov.cn/tjzs/tjzm/200411/2235.htm>

<sup>151</sup> The revised draft of Chinese food safety law (Second Version) 2014, article 8

affect modern Chinese legislation directly, its values have shaped Chinese culture and affects the Chinese people's daily life. As Schwartz found, Confucianism claimed that, 'in a society dominated by law, the people as a whole will all develop the peculiar talents of the shyster lawyer and the sense of shame will suffer.'<sup>152</sup> Confucians regarded the ideal society as a society free from litigation. Formal law, in their eyes, only brings in the manipulation of laws and regulations. So traditional Chinese believed that litigation would ultimately end in disaster. 'Win a lawsuit and lose a friend', 'Better to be vexed to death than bring a lawsuit' became the golden rules in daily life. Chinese people prefer mediation, rather than litigation, to settle conflicts. In this atmosphere, traditional Chinese people tended to avoid being involved in the litigation and tried to eliminate themselves from the public affairs.

However, in the modern society, contemporary Chinese citizen's attitude towards law is evolving. The economic reform has brought more and more disputes as part of business and trade. Also the increasing contact with other western countries has re-shaped Chinese people's attitude towards law and the court. More citizens begin to be aware of their legal rights and the importance of participation in the public affairs. Consumers should be encouraged to protect themselves. As Shao argued, 'a mechanism should be constructed with consumer participation'.<sup>153</sup> The government shall help the public increase their knowledge of environment and food safety. The public should be encouraged to participate in the policy/decision-making process and to bring a lawsuit when their rights are

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<sup>152</sup> Schwartz, BI, 'On Attitudes Toward Law in China', in M Katz (ed), 'Government Under Law and the Individual', (1957), Washington, DC: American Council of Learned Societies), p33

<sup>153</sup> Shao, Y, 'Rethinking Food Safety Problems in China', *Acta Alimentaria*, Vol. 42 (1), pp124-132 (2013)

infringed.<sup>154</sup> In addition, NGOs play an important role in public participation. However, the role of NGOs is still very limited in the contemporary China, especially in the field of human rights and political rights.

Chinese government fears the citizen movement will bring instability and threaten economic development. However, it seems the field of environment is an exception to Chinese government. After realising the limit of the old regulatory approach to the environment problem, the Chinese government introduced a new approach, citizen-driven approach, helping to overcome the systemic defects from the old state-centred approach. Although it is only a new experiment under environmental law, the new approach can still be considered a model to be adopted in the food safety regulatory system, if it can be proved to increase the effectiveness of the implementation of the law. Therefore, the innovation of the new citizen-driven approach, as a new experiment in the Environmental Protection Law 2014, and the important role of the public participation will be addressed in the next chapter.

#### **4. From ‘Inspection-Punishment’ model to ‘Multi-Approach’ Administrative System**

In China’s current food safety system, the main administrative method is relatively simple: inspecting first, and then punishing the violator. A set of punishments including fines, licences revoked, etc., have been stipulated in the Food Safety Law. However, providing

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<sup>154</sup> ‘Interim Procedures for Public Participation in Environmental Impact Assessment’, <http://www.china.org.cn/chinese/PI-c/1131735.htm>

the sufficient education or assistance to comply with the sanitary rules is missing in the food safety law. As discussed before, small and medium-size enterprises account for a major part of the food processing enterprises in the contemporary China. Approximately 90 per cent of the food processing enterprises are small-and-medium-sized enterprises (SMEs).<sup>155</sup> Some of the SMEs are in really small scales, employing fewer than 10 workers.<sup>156</sup> The survey of 450,000 food firms in 2007 showed that 29 per cent of these small food processing firm did not have any production standards.<sup>157</sup> In addition, 60 per cent did not conduct quality checks of food products nor were they even capable of conducting self-inspections.<sup>158</sup> However, these SMEs play an import role in Chinese food safety problem, since they are at the bottom of the food supply chain, supplying food product to the big food processing companies or even directly to the wholesale market. Thus, observance of safety standards by these SMEs is crucial to ensure the food safety in China.

However, in the contemporary China, many of these small enterprises are still short of knowledge of sanitation or lack sufficient funds/ proper equipment to maintain sanitary standards, due to the limit of their capability. It would be more efficient to provide them with the education of sanitation, and the funds/ equipment to comply with the sanitary rules, rather than inspecting them and punishing afterwards. The 2009 Food Safety Law sets up a series of punishment, from fining to revoking the license; however, the part of

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<sup>155</sup> Zhang, S.(2011), 'Establish an Effective Long-Term Food Safety System', *China Fd Additive*, 3, 49-53

<sup>156</sup> Ying, Feihu, 'Improvement of China's Information Exchange on Food Safety'. 5 *Zhengzhi Yu Falu [J.POL.& L.]* 24, 26 (2007)

<sup>157</sup> Miao, Junjie, Zhang, Yanran, and Wang Yujuan, 'China's Food Safety Management Focuses on Food Supply', *Liaowang*, 23<sup>rd</sup> Mary 2007, available at <http://helath.sohu.com/20070522/n250158568.shtml>.

<sup>158</sup> *Ibid*

education and assistance is still missing. The new method, replacing the ‘inspection-punishment’ model by a multi-faceted approach, is worth being considered of in practice.

#### **IV. Conclusions**

As a legal instrument of regulation, the new Food Safety Law has the potential to radically change the way food safety is approached. However, there are still a number of implementation challenges, caused by the economic transition, the failure to uphold safety standards in the private sector, the environmental problem, the defects of the current legal system and also the political will, which all adversely affect the Chinese food safety regulatory system.

The economic transition from the planned economy to the market economy caused privatisation, industrialisation and urbanisation in China, which contributes to environmental stress and the food safety problem. Meanwhile, the success in economic development also brought the boom of the enterprises in the private sector. Upholding the safety standards by companies is an important task to ensure the food safety in China. However, the Chinese food safety regulatory system is still weak. The systemic defects, such as local protectionism, the corruption problem, ineffective administration and the overlapping regulations, all contribute to the ineffectiveness of the current regulatory system.



The 2009 Food Safety Law has brought some changes in the food safety regulatory system in China. However, there are a number of potential problems, in terms of political will and administrative inefficiency, which still exist. Public opinion may be too optimistic about what can be achieved and therefore disappointed by the results. The question of the effectiveness of regulatory implementation is considered in Chapter 5. The new approach, a citizen-driven approach, in the 2014 Environmental Protection Law, will be discussed in the next chapter as a potential tool to increase the effectiveness of food safety regulatory implementation.

# **Chapter 5 Environmental Protection as a Possible Model for Reform in China**

## **I. Introduction**

In this chapter, the possible options for addressing China's environmental problems are considered. The international trading community, including the EU has a role to play in building governance and infrastructure in China. In the last three decades, China has enjoyed the fruit of the exceptional economic growth. However, the rapid economic growth comes with the great environmental cost that was largely unpredicted. The boom of the economy and the rapid urbanisation stimulate China's demand for natural resources, water, lands and minerals. The excessive exploitation of natural resources causes the environmental problem, including but not limited to flooding, loss of biodiversity and deforestation.<sup>1</sup> As The Economist reported, in 2013 China had consumed around 45 per cent of the coal, steel, copper, nickel, aluminium and zinc in the world<sup>2</sup> and it still demanded more for its economic growth. The pressure of the huge population, the degradation of the environment, the inefficient exploitation and over-exploitation of natural resources become the great challenges for China.

Meanwhile, as will be discussed more fully in this chapter, the environmental problem,

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<sup>1</sup> Xue, Hanqin, 'Chinses Contemporary perspectives on International Law; History, Culture and International Law', (2011) Recoil Des Cours 355 P47-233

<sup>2</sup> The Economist 10<sup>th</sup> August 2013.

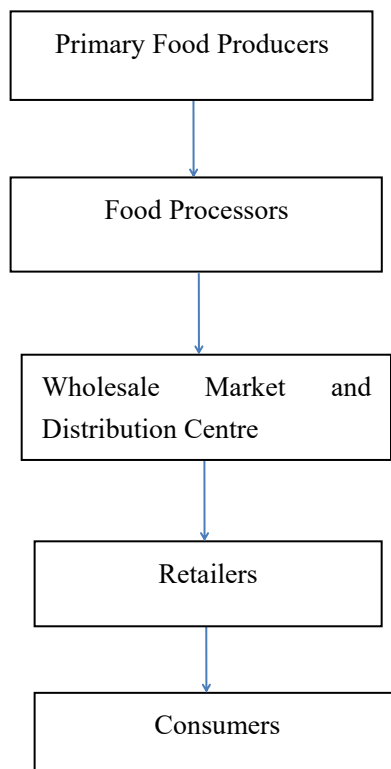
affecting the food supply chain in China, has a great impact on the Chinese food safety problem. This chapter examines the environmental problem in China, which is also one of the big challenges to ensuring the food safety and sustainable economic growth in China. It also provides an overview of the current environmental law and regulations in China. Although in the past, numerous reforms on environmental law have been undertaken in China, limited success in terms of implementation has been achieved. The weak implementation and the poor compliance with the environmental legislation does not help to solve the serious environmental problems in China. In order to improve the effectiveness of the current environmental legal framework, China adopted a new Environmental Protection Law in April 2014, which is much tougher in penalties than any other previous Environmental Protection Law. Although the new 2014 Environmental Protection Law was only implemented from 1<sup>st</sup> January 2015, and it is still too early to estimate whether it works effectively or not, it still draws the interest of the scholars. The 2014 Environmental Protection Law introduces several innovations. For example it creates a new penalty regime which may accumulate on a daily basis; increases the liabilities for the administrative officials; increases the transparency of information; and launches a new approach to the environmental protection in China: from the state-centred approach to the citizen-driven approach. This new approach is a great innovation for China's environmental regulatory system. It may help to increase the effectiveness of the implementation of the legislation, including food safety law in China. This chapter will elaborate on the new approach introduced in the 2014 Environmental Protection Law, which might potentially change the regulatory implementation in China. At the time of writing, China has updated its food safety law in line with international expectations. This

is a clear sign of the increasing importance of international influence.

## **II. The Environmental Problem and the Food Safety in China**

It is important to identify the main problems and challenges facing China in terms of the general environment and specifically food safety. Regulating food safety is complicated by the supply chain that operates in China. The environmental problem has a great impact on the food supply chain. In the typical food supply chain, the primary food producers provide the agricultural crops for the processors. Afterwards, the food products are sent to the wholesale markets and distribution centres. Later on, the food products are distributed to the different retailers before purchase by consumers. The typical food supply chain is as follows:

### Typical Food Supply Chain <sup>3</sup>



As shown above, the environmental problem affects the bottom of the food supply chain directly, which is one of the big challenges to the food safety problem in China. Currently, the deteriorating environmental problem in China fails the mission of providing safe agricultural crops at the bottom of the supply chain. As Liu pointed out, the urban expansion and degraded land quality caused the decline of China's agricultural productivity.<sup>4</sup> The degrading of the environment and the over-exploitation of the natural resources reduce agricultural productivity. In order to increase agricultural productivity and feed its own people, the land has to be used more intensely in China. The massive use of pesticides, antibiotics and fertilisers in Chinese agriculture result in the further degrading of the environment. As it has been reported, China now produces 40 per cent of

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<sup>3</sup> Zhou, Jiehong & Jin, Shaosheng, 'Food Safety Management in China: A Perspective from Food Quality Control System', Zhejiang University Press, China, 2013, P15

<sup>4</sup> Liu, Chenglin, 'The Obstacles of Outsourcing Imported Food Safety to China', 43 Cornell Int'l L.J., 2010, P299

the world's fertiliser.<sup>5</sup> However, the high usage of the fertiliser degrades the soil and pollutes the waterway. It is reported that in China, particularly in the Northern area, 40 percent more fertilisers has been used than the agricultural crops actually need.<sup>6</sup> Every year around 10 million tons of fertiliser is discharged into waterway, causing the water pollution. Although not many people have been aware of this, agriculture has become the largest polluter in China.<sup>7</sup> The great amount of usage of pesticides and fertiliser has caused the degrading of the environment, which reduces agricultural productivity. In order to increase agricultural productivity, more pesticides and fertilisers have been employed in the agricultural practice. Thus, the vicious circle has been created. The polluted environment, in which the food is produced, has contributed to the food safety problem in China.

### **III. The Great Challenge to China's Environment and Nature Resource: Water and Air Pollution**

After the economic reform in the past three decades, China has become the 'factory of the world'. Walmart began to source its first 'Made in China' product in 1993. After two decades, China already makes 33 per cent of the shoes in the world, 70 percent of the toys in the world, 33 per cent of the computers and the refrigerators, as well as 50 per cent of the televisions and the digital cameras in the world.<sup>8</sup> China also contributes 45 per cent of

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<sup>5</sup> Gong, Peng et al., 'China Must Reduce FERTILISER Use Too', 473 Nature 284, 19<sup>th</sup> May 2011.

<sup>6</sup> Niu, Shuping, 'China Needs to Cut Use of Chemical Fertilisers: Research', available at <http://www.reuters.com/article/2010/01/14/us-china-agriculture-fertiliser-idUSTRE60D20T20100114>

<sup>7</sup> Ibid

<sup>8</sup>Institute of Public and Environmental Affairs, 'The Green Choice Alliance for Responsible Supply Chain

the steel,<sup>9</sup> and 42 per cent of the lead<sup>10</sup> in the world. However, apart from the economic boom, the role of ‘the factory of the world’ also contributes to the environmental problem in China. The dyeing of fabric causes massive water pollution; meanwhile, the production of lead and steel also creates an environmental impact, because many Chinese factories are still using the out-dated technologies to produce these products. Wang notes that the developed countries have gradually shifted its environmental impact to China along with its industry.<sup>11</sup> These significant impacts on the environment in China include but are not limited to the problems of water, air and soil; such as the water shortage, desertification and soil erosion and loss of biodiversity and habitat.<sup>12</sup> Meanwhile, China’s environmental problems also contribute to global issues, like climate change, ozone depletion and trans-boundary air and water pollution.<sup>13</sup>

China has suffered a severe environmental consequence, which causes massive economic loss and also threatens public health. Sixteen Chinese cities have been listed in the top twenty-five most polluted cities in the world.<sup>14</sup> Just the air pollution is estimated to cost up to \$US300 billion a year, due to the health problems and the high mortality which are

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Management’, 2<sup>nd</sup> August 2008, Available at <http://www.ipe.org.cn/Upload//2010-08/7b2d7a8c07f1400a993cb555760714eb.pdf>

<sup>9</sup> ‘Global steel output surges by 29 percent: trade body’, China Post, 23<sup>rd</sup> June 2010, can be available at <http://www.chinapost.com.tw/business/global-markets/2010/06/23/261844/Global-steel.htm>

<sup>10</sup> ‘Emerging Economies Driving Global Lead Market’, Doe Run Company, <http://www.doerun.com/media-center/news-releases/article/articletype/articleview/articleid/50/emerging-economies-driving-global-lead-market>

<sup>11</sup> Wang, Alex, ‘China's Environmental Tipping Point?’, (2012). CHINA IN AND BEYOND THE HEADLINES, Timothy Weston, Lionel Jensen, eds., Rowman and Littlefield Publishers, 2012. Available at SSRN: <http://ssrn.com/abstract=2130452>

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Xinhua News, ‘Sulphur Dioxide: China’s Sulphur dioxide discharge tops world List’, 3<sup>rd</sup> August 2006, <http://www.china.org.cn/english/2006/Aug/176872.htm>.

caused by air pollution.<sup>15</sup> According to the speech given by Mr Chen, China's former health minister, the disastrous air pollution in China has caused between 350,000 and 500,000 Chinese to die prematurely each year.<sup>16</sup> Smog is not rare in China. It was reported that in 2012 more than 70 percent of people in China are exposed to pollution level higher than China's healthy air benchmark, which was 35 micrograms per cubic metre.<sup>17</sup> The air pollution in China not only contributes to smog, it also leads to acid rain. Carbon based energy, in addition, contributes to global warming as well.

Water pollution is another big challenge to China's environment. Industrial waste, pesticides, fertilisers, antibiotics and veterinary drugs are discharged into the waterways, where aquaculture production takes place.<sup>18</sup> Sometimes, even the farmers themselves also add the chemicals to the water to keep their aquaculture stock alive. The carcinogenic chemical can be retained in the aquaculture products to threaten food safety.<sup>19</sup> Moreover, the water in these waterways is reused by the other farmers to irrigate their agricultural crops. The chemicals, dyes, antibiotics in the water adversely affect the food safety in China. The high level of pollution of the water has already become a big concern to the public health. Due to this high level of pollution, at least one third of the Yellow River, which is known as the mother river to Chinese, was reported to be unfit for drinking or

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<sup>15</sup> 'Air pollution costs China \$US300b a year', available at <http://www.sbs.com.au/news/article/2014/03/25/air-pollution-costs-china-us300b-year>

<sup>16</sup> 'China's 'airpocalypse' kills 350,000 to 500,000 each year', available at <http://www.telegraph.co.uk/news/worldnews/asia/china/10555816/Chinas-airpocalypse-kills-350000-to-500000-each-year.html>

<sup>17</sup> Li, Jing, '670,000 smog-related deaths a year: the cost of China's reliance on coal', available at <http://www.scmp.com/news/china/article/1632163/670000-deaths-year-cost-chinas-reliance-coal?page=all>

<sup>18</sup> David Barboza, 'In China, Farming Fish in Toxic Waters', available at [http://www.nytimes.com/2007/12/15/world/asia/15fish.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/12/15/world/asia/15fish.html?pagewanted=all&_r=0)

<sup>19</sup> Liu, Chenglin, 'The Obstacles of Outsourcing Imported Food Safety to China', 43 Cornell Int'l L.J., 2010, P302-303



agriculture.<sup>20</sup>

Water shortage is also a big challenge to China. A large engineering project is in progress to transport water from the South to the North area in China. It aims to transport 44.8 billion cubic meters of fresh water from the Yangtze River in southern China to the north area.<sup>21</sup> The project, which is one of the most expensive engineering projects in the world, had already cost more than \$79 billion by 2014. <sup>22</sup>

Environmental problem has become the big challenge to the Chinese government. It threatens public health, adversely affects the food safety and it also challenges the sustainable development in China. An effective environmental protection method needs to be explored to avoid the further deterioration of air, water and other natural resources.

## **1. Air pollution in China**

China's demand for oil and coal has been increasing every year to meet its increasing energy demand.<sup>23</sup> Especially coal, as a relative cheap and abundant resource in China, is the major means of electricity production. The usage of coal accounted for nearly 70 per

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<sup>20</sup> 'One-third of China's Yellow river 'unfit for drinking or agriculture', available at <http://www.theguardian.com/environment/2008/nov/25/water-china>

<sup>21</sup> 'South-North Water Transfer Project', ( 南水北调工程 ), (in Chinese), Xinhua new, available at [http://news.xinhuanet.com/ziliao/2002-12/27/content\\_672194.htm](http://news.xinhuanet.com/ziliao/2002-12/27/content_672194.htm)

<sup>22</sup> Gordon G. Chang, 'China's Water Crisis Made Worse by Policy Failures', available at <http://www.worldaffairsjournal.org/blog/gordon-g-chang/china-per-centE2-per-cent80-per-cent99s-water-crisis-made-worse-policy-failures>

<sup>23</sup> Qiu, Xin & Li, Honglin, 'Energy Regulation and Legislation in China', Environmental Law Reporter, 2012, 10678-10693

cent of energy generation,<sup>24</sup> compare with less than 30 per cent for Europe and 44.9 per cent in the USA in 2010.<sup>25</sup> However, coal is not a clean energy. The massive usage of the coal-fired power is the major contributor to the air pollution, because coal burning causes heavy metal pollution and it also contributes to the nitrogen oxides (NO<sub>x</sub>) and sulphur oxides (SO<sub>x</sub>) emissions. In addition, the high dependency on coal is also responsible for the emissions of CO<sub>2</sub>, which is the primary greenhouse gas causing global warming.<sup>26</sup> Coal is the main cause of the China's air pollution problem. China, as the world's largest consumer of coal, accounts for around half the world's coal consumption,<sup>27</sup> and it has become the world's leading emitter of the greenhouse gasses.<sup>28</sup> The emission of carbon dioxide (CO<sub>2</sub>) in China increased dramatically from 2 billion tonnes a year to 9 billion a year since 1990. Currently China contributes to around 30 per cent of the total CO<sub>2</sub> emissions in the world.<sup>29</sup>

Apart from the wasteful and inefficient energy generation, the pollution from the transport also contributes to the air pollution.

The chart below shows the total Carbon Dioxide Emissions from the Consumption of

<sup>24</sup> McEldowney, John, 'The Role of Law in Economy and in Regulating Natural Resources and Environmental Protection in China', unpublished paper.

<sup>25</sup> Bergston, C. Fred, et al., 'China's Rise: Challenges and Opportunities', Washington, DC: Peter G. Peterson Institute for International Economic Center for Strategic and International Studies, 2008, 152; U.S. Energy Information Administration, 'Electric Power Monthly, March 2011,' 1, <http://www.eia.doe.gov/cneaf/electricity/epm/02261103.pdf>; U.S. Energy Information Administration, 'International Energy Outlook 2010', <http://www.eia.doe.gov/oiaf/ieo/electricity.html>.

<sup>26</sup> USA EPA, 'Overview of Greenhouse Gases', available at <http://www.epa.gov/climatechange/ghgemissions/gases/co2.html>

<sup>27</sup> Duggan, Jennifer, 'China's coal emissions responsible for 'quarter of a million premature deaths'', available at <http://www.theguardian.com/environment/2013/dec/12/china-coal-emissions-smog-deaths>

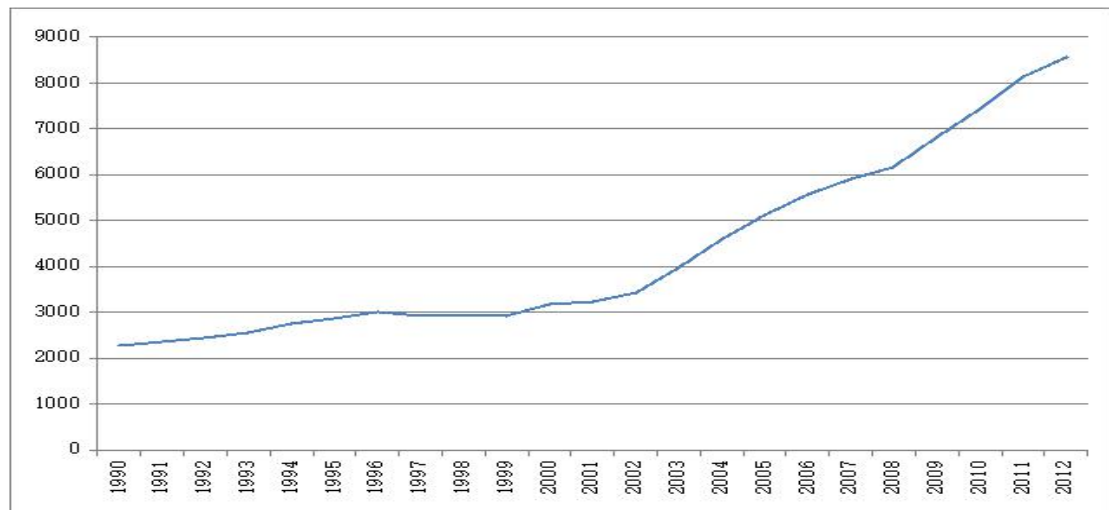
<sup>28</sup> International Energy Agency, World Energy Outlook 2007 Paris: International Energy Agency, 2007, 313

<sup>29</sup> The Economist, 10<sup>th</sup> August 2013, P10

Energy (Million Metric Tons) from 1990 to 2012 in China.

### The total CO<sub>2</sub> Emissions from the Consumption of Energy (Million Metric Tons) in

China from 1990 to 2012 <sup>30</sup>



China's air pollution problem is not only its own domestic problem, but it also affects the rest of the world. Apart from the global warming problem, China's air pollution has an impact on other countries in a future way. The polluted air travels from China to its neighbouring countries, Japan and Korea.<sup>31</sup> Even California, Washington State and Western Canada could detect the polluted air from China.<sup>32</sup>

The harmful air harms the public health and also has an impact on economic growth. It is

<sup>30</sup> All the statistics are from USA Energy Information Administration (EIA), available at <http://www.eia.gov/cfapps/ipdbproject/iedindex3.cfm?tid=90&pid=44&aid=8&cid=r7,&syid=1990&eyid=2012&unit=M> MTCD

<sup>31</sup> 'Tokyo Air Pollution Climbs, Approaches Government Alert Levels', can be available at <http://www.bloomberg.com/news/2014-02-27/tokyo-air-pollution-climbs-approaches-government-alert-levels.html>

<sup>32</sup> Shapiro, Judith, 'China's Environmental Challenges', Polity Press, Cambridge 2012, P3

estimated air pollution costs up to \$US300 billion a year<sup>33</sup> and around 350,000 and 500,000 Chinese die prematurely each year.<sup>34</sup>

The dangerously high level of air pollution has drawn the Chinese government's attention to the public health. Various steps have been taken or are under consideration to ameliorate the air pollution. Recently the Beijing municipal government is considering the possibility to permanently ban vehicles from the roads on alternating days based on their number plates, whether odd or even.<sup>35</sup> This method has already been proved effective and it helped to ease the traffic and to bring down the air pollution during the Asia-Pacific Economic Cooperation (APEC) Summit.<sup>36</sup> The Renewable Energy Promotion Law<sup>37</sup> was also amended in 2009 to develop and support renewable energy. Numerous steps have been taken to encourage the sustainable energy generation, such as transaction cost reduction for the prevention of pollution and the introduction of a special electricity rate for different bands of renewable energy.<sup>38</sup>

However, the legal system in China, the regulatory structure and the administrative system

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<sup>33</sup> 'Air pollution costs China \$US300b a year', available at <http://www.sbs.com.au/news/article/2014/03/25/air-pollution-costs-china-us300b-year>

<sup>34</sup> 'China's 'airpocalypse' kills 350,000 to 500,000 each year', available at <http://www.telegraph.co.uk/news/worldnews/asia/china/10555816/Chinas-airpocalypse-kills-350000-to-500000-each-year.html>

<sup>35</sup> Luo, Chris, 'Beijing considers permanent odd-even ban on vehicles after success of 'Apec blue'', available at <http://www.scmp.com/news/china-insider/article/1649348/beijing-considers-permanent-odd-even-ban-vehicles-after-success>

<sup>36</sup> Asia-Pacific Economic Cooperation (APEC) is a forum for 21 Pacific Rim member economies looking for promoting free trade and economic cooperation throughout the Asia-Pacific region. The APEC CEO Summit 2014 was held from 8<sup>th</sup> to 10<sup>th</sup> November 2014, in Beijing, China.

<sup>37</sup> R.R.C. The Renewable Energy Promotion Law 2009, English version can be available at <http://english.mofcom.gov.cn/article/policyrelease/questions/201312/20131200432160.shtml>

<sup>38</sup> McEldowney, John, 'The Role of Law in Economy and in Regulating Natural Resources and Environmental Protection in China', unpublished paper.

are still weak, which restrains success in the implementation of the regulations. The current environmental laws in China are often ambiguous and sometimes even unrealistic.<sup>39</sup> The poor co-ordination between different departments and ministries also has a negative effect on enforcement.<sup>40</sup> The weak implementation and the poor application of the environmental norms is a major shortcoming in Chinese environmental protection. The current environmental legislation framework will be discussed in detail and the new Environmental Protection Law 2014 will be elaborated on in the following context.

## **2. The Water Crisis in China**

The water crisis in China can be concluded as water quantity and water quality issues. In China, there is sufficient water resource in theory. China has the world's fifth largest resource of fresh water; however, by per-capita standards, China only has 2,000 cubic meters per person annually while compared to a global average of approximately 6,200 cubic meters per person annually.<sup>41</sup> Moreover, the water resource is not distributed evenly in China. The South area has 80 percent of the total average annual internal renewable

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<sup>39</sup> A good example is the PRC. Prevention and Control of Environmental Pollution by Solid Waste Law 2006. According to the National People's Congress Standing Committee report, most counties and towns disposed of the wastes without any treatment in practice. The report can be available at <http://www.law-lib.com/fzdt/newshtml/22/200508222332224.htm>

<sup>40</sup> Various ministries are involved in the energy policy of the remit and contribution.. The Ministry of Land Use and Resources makes the policy and technology; The Ministry of Commerce conducts the natural gas and oil production including policies and implementation; The Ministry of Housing and Urban Development conducts overview of feasibility studies and economic indices; The Ministry of Environmental Protection deals with environmental policy and supervision the environment and The State Bureau of Tax collects oil and natural gas revenue and related taxes. More details can be seen in McEldowney, John, 'The Role of Law in Economy and in Regulating Natural Resources and Environmental Protection in China', unpublished paper.

<sup>41</sup> World Bank, 'Renewable internal fresh water resources per capita (cubic meters)', 2012, available at <http://data.worldbank.org/indicator/ER.H2O.INTR.PC>

surface water resources (ISRWR) in China.<sup>42</sup> The people living in the southwest enjoy approximately 25,000 cubic meters of freshwater per person annually, while others living in the arid north have less than 500.<sup>43</sup> The uneven distribution of water resources also threatens agriculture. According to the report from Food and Agriculture Organization of the United Nations (FAO), 65 per cent of the water demand is for agricultural purposes.<sup>44</sup> The North area has two thirds of the farmland and half the population in China; however, it only has 20 percent of the ISRWR. The water resource is a big challenge to China's sustainable development. As Naughton pointed out, 'China's greatest development challenges...are in the areas where a dense population pushes up against the limits of water and what the land can provide.'<sup>45</sup> The imbalance of water storage between the North and South makes China's economic growth vulnerable. Large dams have been set along the main rivers, like the Yangtze and Yellow Rivers, to increase the water storage capacity. However, the large dam project is still controversial due to its great environmental impact. Although the impact brought by the South-North diversion project on the ecosystems is still controversial, the large engineering project has still been launched to transport fresh water from the South to the North to increase the water storage and ease the tension on water shortage in the North area.

In addition, pollution also contributes to the water shortage. Agricultural and industrial wastes are poured into waterways directly. There were around 50,000 rivers with

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<sup>42</sup> 'China Profile', Food and Agriculture Organisation of the United Nations, available at [http://www.fao.org/nr/water/aquastat/countries\\_regions/china/index.stm](http://www.fao.org/nr/water/aquastat/countries_regions/china/index.stm)

<sup>43</sup> UN Food and Agriculture Organization, "China," 2010, available at [http://www.fao.org/nr/water/aquastat/countries\\_regions/china/index.stm](http://www.fao.org/nr/water/aquastat/countries_regions/china/index.stm)

<sup>44</sup> Ibid

<sup>45</sup> Naughton, Barry, 'The Chinese Economy: Transitions and Growth', Cambridge, MA: MIT Press, 2007, P30.

catchment areas of 100 square kilometres or more in China in the 1950s. However, the figure drops to 23,000 now. Almost half rivers have been lost because of the over-exploitation by farms or factories.<sup>46</sup> Moreover, the high level of the pollution has made one-third of the water in the Yellow River, which is known as the mother river to Chinese, unfit for drinking or even agricultural purpose.<sup>47</sup> The World Bank estimated the water crisis cost China around 2.3 per cent of GDP in 2009.<sup>48</sup>

The shortage of the water is a severe challenge to this country; however, China's efficiency of water use is still far from satisfactory. The recycling of industrially used water is quite low. It even does not reach 40 percent of European recycling levels. The huge demand of coal fired power makes the water problem worse, since abundant water is needed to clean the coal before its burnt. Although the coal is not a clean energy and it consumes too much water to produce energy, it is very difficult for China to completely switch its energy structure in a short time, because of the cheap price of the coal. However, change is in progress. The 2009 Renewable Energy Promotion Law encourages and supports the use of renewable energy to improve the infra-structure.<sup>49</sup> Non-fossil energies, such as wind energy, solar energy, hydro-energy, bio-energy, geothermal energy and ocean energy, etc are encouraged to be used to replace the coal gradually.

The large dam projects are in progress in order to ease the tension of water shortage and

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<sup>46</sup> The Economist 12<sup>th</sup> October 2013, P66

<sup>47</sup> 'One-third of China's Yellow river 'unfit for drinking or agriculture', available at <http://www.theguardian.com/environment/2008/nov/25/water-china>

<sup>48</sup> The Economist 12<sup>th</sup> October 2013, P66

<sup>49</sup> 2009 Renewable Energy Promotion Law, Article 1 'This Law is enacted for the purpose of promoting the development and utilization of renewable energy, increasing the supply of energy, improving the structure of energy, safeguarding the safety of energy, protecting environment and realizing a sustainable economic and social development'.

provide hydro-electric power. The hydro-electric schemes have been launched, aiming to achieve a target of 15 percent of energy from clean or renewable sources by 2020.<sup>50</sup>

#### **IV China's Environmental Tipping Point**

The air pollution and water crisis are only two aspects of the China's environmental problem. They, together with other problems, such as the loss of biodiversity and habitat, desertification and soil erosion, soil pollution etc, challenge China's sustainable development. Apart from the economy, environmental problems also harms public health directly, through air and water, as well as indirectly, through entering the food supply chain. The Milk Scandal of 2008 is a good example of how the chemical contamination in food chain harms the public health. As mentioned before, the melamine contaminated milk caused over 7,000 infants sick and at least three infants dead. The scandal damaged China's reputation in international trade; however, it also heightened the public awareness of pollutants entering the food chain and its potential harm to the public health. According to Alex Wang's research<sup>51</sup>, in 2009 there were 12 heavy metal incidents which took place in China, which caused approximately 4,005 people to have excessively high blood pressure due to the chemical poisoning; 182 people had high cadmium levels of poisoning. In Hengjiang Country, a manganese smelter caused more than 1,300 children living near to have high levels of manganese in their blood. In Fengxiang County, a lead-zinc smelter caused more than 600 children living near to have high levels of lead in their blood. All

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<sup>50</sup> The Economist 21<sup>st</sup> September 2013, p59

<sup>51</sup> Wang, Alex, 'The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China', 37 Harvard Environmental Law Review p367-439



these scandals kept challenging the public's bottom line. Public unrest and demonstrations never stop in recent years. Public discontent heightened the tension between the citizen and the government. Environmental pollution issues are not only a challenge to public health, but also challenge the economy and social stability.

In addition, the increasing public awareness of environmental problems requires a more effective environmental protection legislation. Due to smog and consecutive food safety scandals, the public started to be concerned about the importance of the environmental protection issues. Especially the installation of a PM2.5 monitor, which was set up by the U.S Embassy in Beijing to monitor the air pollution, was a trigger to draw the public concern and the media attention on the air pollution problem. The U.S Embassy posts the result of the monitor on Twitter every hour.<sup>52</sup> The published air pollution data drew public concern and media attention always immediately. In response, the Chinese government set the standards for PM2.5 and started to disclose the monitoring data to the public as well. However, the monitoring data published by the U.S Embassy and the Chinese government sometimes are disparate, which still remains a controversy.<sup>53</sup> The disparity between the

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<sup>52</sup> Twitter at the address: <http://twitter.com/beijingair>.

<sup>53</sup> For example, the U.S Embassy's data showed PM2.5 level was 'beyond index', which was even worse than 'hazardous' on 9<sup>th</sup> October 2011. However, on the same day, according to Chinese authority's data, the air pollution level was only slightly polluted. See Beijing Air Pollution 'Hazardous': U.S. Embassy, AGENCE FRANCE PRESSE, Oct. 30, 2011,

<http://www.google.com/hostednews/afp/article/ALeqM5iJTkt3-cVITDVI6xipFX4aAYjpw?docId=CNG.d957d0999e1088b0ce61729ec5b6c9f1.5f1>. Alex Wang pointed out in his paper 'The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China', that reason for the controversy is that Chinese data could be misleading in three ways, (i) For the same concentration of pollution, the description in the Chinese system was more euphemistic. For example, a U.S. Air Quality Index ('AQI') rating of 151 to 200 is described as 'Unhealthy.' A score of 151 to 200 in the Chinese system is described as 'Lightly Polluted.' (ii) A given score in the Chinese AQI might constitute a significantly greater level of pollution than the equivalent score on the U.S. AQI, reflecting less stringent ambient air quality standards in China. The scores in the two countries are not comparable without conversion. (iii) Moreover, public and government concern about Chinese data manipulation is widespread.' See Wang, Alex, The Search for Sustainable Legitimacy:

two different published data caused public unease, and the Chinese government had to promise to increase the effectiveness of the monitoring.

In summary, the increasing public concern and media attention on the environmental problem pressured the Chinese government to make a change. Environmental problems threaten the public health as well as challenge China's sustainable development. The consecutive public protests and public discontent passed a clear message to the Chinese government that the Chinese environmental problem is approaching a tipping point now.

Chinese authorities have already been aware of the importance of the environmental protection. The Chinese government introduced a high-priority, quantitative pollution reduction and energy efficiency targets in the 11<sup>th</sup> five-year plan. It required all the authorities at each level to save energy and reduced the emissions, aiming for a 10 percent reduction in sulphur dioxide and chemical oxygen demand releases and a 20 percent reduction in energy intensity.<sup>54</sup> It is the first time local officials found themselves needing to be responsible for binding energy targets in their annual evaluations.<sup>55</sup> It is also the first time environmental protection policy was stressed in the national five-year plan, which is usually reserved for only the most important national policy, such as the one-child policy, economic growth and social stability policy. This can be regarded as a mile stone for environmental protection in China.

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Environmental Law and Bureaucracy in China', 37 Harvard Environmental Law Review p408

<sup>54</sup> Wang, Alex, 'The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China', 37 Harvard Environmental Law Review p368-369

<sup>55</sup> Stern, Rachel E., 'The Political Logic of China's New Environmental Courts,' The China Journal (July 2014), pp. 53-74. Available at SSRN: <http://ssrn.com/abstract=2466534>

In China's current 12<sup>th</sup> five-year plan (2011-2015), which is called the greenest five-year plan in Chinese history,<sup>56</sup> the state continues its commitment to environmental protection policy and the development of clean energy, as well as the pollution and climate targets. The state set the target to reduce fossil energy consumption, promote low-carbon energy sources, and restructure China's economy. A carbon trade market is aimed to be established gradually. Some key targets were set: 16 percent reduction in energy intensity; increasing non-fossil energy to 11.4 percent of total energy use; and 17 percent reduction in carbon intensity.<sup>57</sup> The Chinese government is committed to providing investment and policy to support the 'strategic emerging industries' in the new energy and environmental protection area. It was reported that 4 trillion yuan (\$600 billion) would be given to provide financial support to these industries.<sup>58</sup> The increasing investment and the supporting policies on environmental protection and energy efficiency is a good sign that Chinese government is already fully aware of the importance of the environmental protection.

The second mile stone in China's environmental protection history is the U.S.-China Joint Announcement on Climate Change and Clean Energy Cooperation, which was announced on 11st November 2014. Present Obama called this Joint Announcement a major milestone in US-China relations, because it showed the possibility for U.S and China to work

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<sup>56</sup> Wang, Alex, 'China's Environmental Tipping Point?', (2012). CHINA IN AND BEYOND THE HEADLINES, Timothy Weston, Lionel Jensen, eds., Rowman and Littlefield Publishers, 2012. Available at SSRN: <http://ssrn.com/abstract=2130452>

<sup>57</sup> China's 12<sup>th</sup> Five-Year Plan, English edition can be downloaded from China- British Business Council <http://www.britishchamber.cn/content/chinas-twelfth-five-year-plan-2011-2015-full-english-version>

<sup>58</sup> Li, Woke, , 'Spotlight Shines on New Energy Section', 20<sup>th</sup> October 2010, Global Times, available at <http://www.globaltimes.cn/content/583723.shtml>

together on an urgent global challenge.<sup>59</sup> U.S and China, as the world's two largest economies and greatest emitters of greenhouse gases together, are responsible for over one third of global greenhouse gas emissions. This Joint Agreement shows China and the U.S government both have already realised their special responsibility to lead the global effort against climate change and the two countries have achieved an agreement to make a positive step towards to reducing carbon emissions. The U.S government agreed to cut net greenhouse gas emissions 26-28 percent below 2005 levels by 2025. Meanwhile, the Chinese government committed to the target of peak CO<sub>2</sub> emissions around 2030, with the intention to try to peak early, and to increase the non-fossil fuel share of all energy to around 20 percent by 2030.<sup>60</sup> The two countries are going to reinforce the programs of cooperation and conduct more dialogues. Technical work on clean energy and low greenhouse gas emissions will be communicated to achieve the target. This is a positive step showing the U.S and China have strengthened their cooperation beyond the economic to the climate and clean energy. It also a positive sign showing Chinese government's determination on environmental protection after the Kyoto agreement in 1997<sup>61</sup> and Copenhagen conference in 2007.<sup>62</sup> Especially after the Copenhagen conference, China

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<sup>59</sup> 'US and China strike deal on carbon cuts in push for global climate change pact', The Guardian, can be available at <http://www.theguardian.com/environment/2014/nov/12/china-and-us-make-carbon-pledge>

<sup>60</sup> 'FACT SHEET: U.S.-China Joint Announcement on Climate Change and Clean Energy Cooperation', The White House, can be available at <https://www.whitehouse.gov/the-press-office/2014/11/11/fact-sheet-us-china-joint-announcement-climate-change-and-clean-energy-c>

<sup>61</sup> The Kyoto Agreement was adopted in Kyoto, Japan, on 11st December 1997 and entered into force on 16 February 2005. The agreement is tend to fight global warming by reducing greenhouse gas. It is based on the principle of common but differentiated responsibilities: it puts the obligation to reduce current emissions on developed countries on the basis that they are historically responsible for the current levels of greenhouse gases in the atmosphere.

<sup>62</sup> The Copenhagen Conference exposed some fault lines in China's approaches to international agreement. China is the second largest economic power in the world, meanwhile, it is also a developing country. As a major contributory to greenhouse gas emission, China was criticized for not undertaking international obligation which corresponded with its economic power.

was in an ongoing dilemma of embracing its environmental obligations effectively and keeping the development of its industries.<sup>63</sup> This U.S and China Joint Agreement reveals that China, as a developing country, starts to actively undertake its international obligations and participate in the international community. It is a mile stone in China's environmental protection history.

In addition, China's new Environmental Protection Law, which entered into force in 1<sup>st</sup> January 2015, shows the determination of the Chinese government to build an effective environmental legislation and improve environment in China. It took over two years to deliberate and draft the Environmental Protection Law 2014, which reviewed existing environmental law in the past twenty five years. The new 2014 Environmental Law adopts some new approaches and introduces some innovations. First of all, the most important change is the 2014 Environmental Protection Law introduces a new approach: shifting from authorities controlled enforcement to a citizen-driven approach. It allows NGOs to file a lawsuit in public interest litigation, which has never appeared in the previous environmental legislation. Secondly, the new Environmental Protection Law greatly enhances public participation and increases transparency. It encourages more citizen actions to be taken. Thirdly, it also introduces a new regime of fines that may accumulate on a daily basis for the polluters. Fourthly, the new Act also places new responsibilities on the state and administrator to ensure they fully fulfil their duties on environment protection.

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<sup>63</sup>A good example is China refused to take EU aviation rules being adjusted to take account of climate change for the reason of not favouring its own aviation industry. See McEldowney, John, 'The Role of Law in Economy and in Regulating Natural Resources and Environmental Protection in China', unpublished paper.

In order to achieve a better understanding of the weaknesses of China's current environmental regulatory system and the innovation that the new Environmental Law brings, the following part will start from the current environmental legislation as well as the challenges to the enforcement and compliance; then the details of the 2014 new Environmental Law will be discussed.

## **V. Environmental Legislation in China**

### **1. Prior to Environmental Protection Act 2014**

China's first environmental legislation was passed in 1979, which was the Environmental Protection Law (Trial). Before that time, as Bryan argues, the laws only addressed a few environmental interests, such as the regulation on mineral resources and factory safety and the provisions on water pollution prevention and waste disposal, rather than providing a legal framework for China.<sup>64</sup> After Deng's openness and economic reform policy, the awareness of environmental protection started to emerge. It was not until 1979 that China issued its first Environmental Protection Law, which was regarded as a landmark of China's environmental legislation.<sup>65</sup> This Environmental Protection Law (Trial) was designed to meet the increasingly serious environmental pollution problems in China.

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<sup>64</sup> Bachner, Bryan, 'Regulating Pollution in the People's Republic of China: An Analysis of the Enforcement of Environmental Law', 6 Colorado JIELP (1995), 377

<sup>65</sup> Wang, J, 'Thirty Years Rule of Environmental Law in China: Retrospect and Reassessment', J. China University. Geo-Sci. (Soc.Sci.Ed.0 2009, 9, p3

After that, a series environmental laws were adopted, such as the Marine Environmental Protection Law in 1982, and the Water Pollution Prevention and Control Law in 1984.

Besides the growing awareness of environmental issues domestically, some scholars argue that international motivation is another trigger for the development of the environmental legislation in China.<sup>66</sup> The United Nations Conference on the Human Environment in 1972 was regarded to have a great influence on the Environmental Protection Law (Trial) 1979. Since this Conference, China started to build its legal system for environmental protection. After the 1992 United Nations Conference on Environment and Development, which aimed to fill the legislative gap and improve the existing legal system, China began to focus on revising existing environment laws and regulations, rather than adopting new legislation only.<sup>67</sup> Currently, China has already passed thirty laws on environmental protection and the conservation of resources.<sup>68</sup> These laws together shape the Chinese environmental legal framework.

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<sup>66</sup> Mu, Zhilin; Bu, Shuchun and Xue, Bing, 'Environmental Legislation in China: Achievements, Challenges and Trends.' 2014 Sustainability 6, no. 12: 8967-8979

<sup>67</sup> Li, Q.J., 'Environmental Legislation Assessment: Sustainable Development and Innovation.' China Popul. Resour. Environ. 2001, 11 p23

<sup>68</sup> The latest edition of these environmental protection and resource conservation laws include Environmental Protection Law 2014, Marine Environment Protection Law 1999, Law on Prevention and Control of Water Pollution 2008, Forestry Law 1998, Grassland Law 2002, Fisheries Law 2000, Mineral Resources Law 1996, Land Administration Law 2004, Law on Prevention and Control of Atmospheric Pollution 2000, Water Law 2002, Law on the Protection of Wildlife 1988, Law on Urban and Rural Planning 2007, Law on Water on Soil Conservation 2010, Surveying and Mapping Law 2002, Law on Prevention and Control of Environmental Pollution by Solid Waste 2004, Electric Power Law 1995, Law on the Coal Industry 2011, Law on Prevention and Control of Environmental Noise Pollution 1996, Flood Control Law 1997, Law on Energy Conservation 2007, Law on Protecting Against and Mitigating Earthquake Disasters 2008, Meteorology Law 1999, Law on Prevention and Control of Desertification 2001, Law on the Administration of the Use of Sea Areas 2001, Law on Promotion of Cleaner Production 2012, Law on Evaluation of Environmental Effects 2002, Law on Prevention and Control of Radioactive Pollution 2003, Renewable Energy Law 2009, Law on Promotion of Circular Economy 2008 and Law on the Protection offshore Islands 2009. More details can be found from Mu, Zhilin; Bu, Shuchun and Xue, Bing, 'Environmental Legislation in China: Achievements, Challenges and Trends.' 2014 Sustainability 6, no. 12: 8967-8979

Although China has already built up its legal framework for environmental protection and resource conservation, the current environmental pollution controls in China are still ineffective. The absence of effective implementation and poor compliance adversely affects China's sustainable development and harms public health. China can not keep its unprecedented rapid economic growth without successful environmental enforcement strategies.

## **2. The Obstacles and Challenges to the Environmental Regulatory Framework**

The obstacles restraining the effective environmental pollution controls system are complicated. The environmental legal framework is mainly criticised for the vague and broad statutory provisions. In addition, weak implementation and poor compliance, as well as the lack of public participation, together contribute to the ineffectiveness of environmental protection in China.

### **2.1 The Statutory Deficiencies**

The language used in environmental legislation in China is often criticised as too vague and broad. Beyer argues there are too many encouraging words, like 'should', rather than required actions, like the stronger term 'shall' or 'must' used in the environmental statutory



provisions. Sufficient guidance is also absent on the procedures in practice.<sup>69</sup> For example, the Law on Prevention and Control of Atmospheric Pollution 2000 Article 10 states that ‘the local governments should redouble their efforts in afforestation, grass-planting, urban and rural greening and take effective measures to do well the work pollution and sand control.’<sup>70</sup> The Law on Prevention and Control of Desertification 2002 Article 20 lays down that ‘farmers and herders located in protected desertified areas should be resettled’<sup>71</sup>; and Article 22 adds that ‘new cultivations on desert margins should not be permitted.’<sup>72</sup> Even in the 2014 new Environmental Protection Law, some articles are still vague and too broad, which might cause potential overlap and uncertainty in the enforcement. For example, 2014 Environmental Protection Law Article 6 requires that all local people’s governments at various levels, enterprises, public institutions, any other producers/business operators as well as individuals have the obligations to protect the environment. The vagueness in the statutory provisions lead to lax enforcement and difficulties over implementation. The environmental laws in China sometimes are short of detailed provisions. They are too general and broad, more like a catchword. The absence of relevant framework legislation leads to the difficulties in implementation and compliance in the practice.<sup>73</sup>

In addition, the immature design of the environmental legal framework causes the overlap of the provisions in some fields, whereas in some other fields the provisions are absent.

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<sup>69</sup> Beyer, Stefanie. ‘Environmental law and policy in the People’s Republic of China.’ *Chinese Journal of International Law* 5.1 (2006): 185-211.

<sup>70</sup> P.R. Law on Prevention and Control of Atmospheric Pollution Article 10

<sup>71</sup> P.R. Law on Prevention and Control of Desertification 2002 Article 20

<sup>72</sup> Ibid, Article 22

<sup>73</sup> Sun, Y.H. ‘Research on Improving the Quality of Environmental Legislation’, *J. Environ. Prot.* 2004,8, 3-11

Before the revision of the 2014 Environmental Protection Law, Mu observes that 31 articles out of the total 47 articles in the old version of the old Environmental Protection Law<sup>74</sup> were also repeated in other environmental pollution control law. The repetition rate was 66 per cent, which showed the overlap of the environmental legal statutory provisions. However, in some other fields, such as soil pollution control, toxic chemical management, nuclear safety, bio-security nature conservation, environmental damage compensation and some environmental technical specification and standards, the relevant provisions are still absent<sup>75</sup>.

Furthermore, some provisions are not updated and lack implementing regulations. As Beyer notes, China's environmental law normally gives little guidance on implementation<sup>76</sup>. The little detailed legislation requires the fulfilment of the relevant regulations or rules to guide the different government departments to fulfil their duties in the practice. Wang points out, some environmental statutory provisions still lack the means of implementation, even though they have been approved for many years.<sup>77</sup> A good example is that the Law on Prevention and Control of Environmental Noise Pollution 1996 still has no relevant implementing regulations, which causes lax enforcement. Without the effective implementation, these provisions are more like a catchword.

Overall, as a part of Chinese legal system, the environmental legislation is also suffering

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<sup>74</sup> P.R. Environmental Protection Law 1989

<sup>75</sup> Mu, Zhilin; Bu, Shuchun and Xue, Bing, 'Environmental Legislation in China: Achievements, Challenges and Trends.' 2014 Sustainability 6, no. 12: 8967-8979

<sup>76</sup> Beyer, Stefanie. 'Environmental law and policy in the People's Republic of China.' Chinese Journal of International Law 5.1 (2006): 185-211.

<sup>77</sup> Wang, Canfa, 'Chinese environmental law enforcement: current deficiencies and suggested reforms.' Vt. J. Envtl. L. 8 (2006): 159.

from the systemic defects. The incomplete, ambiguous and conflicting legislation leads to the difficulties in implementation. China's environmental legal framework is still fragmentary and ambiguous. There is a long way to go to reform the Chinese environmental legal system. The revision of the 2014 Environmental Protection Law can be regarded as a positive step towards the reform.

## **2.2 . Weak Implementation and Poor Compliance**

Besides the statutory deficiencies, weak implementation and poor compliance is also a main challenge to the effective environmental legal system in China. Weak implementation and compliance makes China's legislation look like 'no big mistakes but also no obvious effects.'<sup>78</sup>

The success or failure of law depends whether the law could be implemented effectively in the practice. The lax administration and weak compliance should be blamed for the failure to fully implement environmental law in China. However, the weak implementation is contributed by the systemic problems, which is difficult to overcome in a short term.

First of all, local protectionism contributes to the weak implementation. Since national policy needs to be implemented at the local level, the environmental protection agencies also need to co-ordinate with the local governments; the local enforcement becomes the

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<sup>78</sup> Wang, J. 'Thirty Years Rule of Environmental Law in China: Retrospect and Reassessment', J. China Univ. Geo-Sci. (Soc.SCI.ED.)2009,9,P3-9

key to the effective implementation. However, guided by the principle of economic first, local officials will potentially choose to sacrifice the local environmental protection to achieve the economic development, especially in some industries, which are energy intensive but have high fiscal returns.<sup>79</sup> Tax revenue and economic development causes the local protectionism in the practice. Since in China the government officials are not elected by the votes, each higher level government official appoints the officials at the lower level directly,<sup>80</sup> which leads to the officials at a lower level being only accountable to the officials at higher level, instead of being accountable to the local people. High tax revenue and rapid economic development means the promotion for personal career. ‘Economic interests above all’ and ‘pollution first, treatment later’ are still typical leading ideology for many local officials. The concept of sustainable development has not truly been regarded as an important guiding principle in the practice, especially at the local level. The goal of the central government, environmental protection and sustainable development, is not compatible with the goal of the local government, economic development and high tax revenue. When the two goals conflict, the environment is normally considered to be the cost to be paid for economic development. In China’s traditional officials’ cadre evaluation system, economic, social stability and one child policy have been always at the top of the list. This is why local officials tend to choose economic, rather than environment.

However, the severe environmental pollution has already caused public discontent and unrest, which is considered to be a potential harm to the social stability. Consecutive public protests clearly show the public attitude towards on the environmental pollution

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<sup>79</sup> Xu, Yan, ‘China’s Stir Fry’ of Environmentally Related Taxes and Charges: Too Many Cooks at Work’, *Journal of environmental law* 23.2 (2011): 255-283.

<sup>80</sup> P.R.China Constitution law2004, Article 101

issues. The Chinese government has already realised the importance of the environmental protection and has paid unprecedented attention to the environmental issues. Faced with the severe public discontent and the consecutive public protest, the Chinese government responded by adding the environmental protection target to the traditional cadre evaluation system. Local officials at each level are asked to be accountable for binding energy targets in the annual evaluations.<sup>81</sup> The high-priority, quantitative pollution reduction and energy efficiency targets were also introduced in the 11<sup>th</sup> five-year plan.<sup>82</sup> It is the first time the environmental protection policy was stressed in the national five-year plan, in which only prior policies, such as economic growth, social stability and one-child policy had been mentioned before. Environmental and energy targets are used as a tool to minimising the social unrest and to achieve social harmony.

Since the environmental target was newly introduced to the officials' cadre evaluation system, compared to the other traditional targets, such as the economic growth, it is still too early to fully estimate the change it brings. In practice, it has not yet completely prevented the local protectionism. However, it, at least, shows great concern from central government and it leads economic development in a right and sustainable direction.

## **2.3 Corruption Problem**

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<sup>81</sup> Wang, Alex, 'The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China', 37 Harvard Environmental Law Review p368-369

<sup>82</sup> These high-priority, quantitative pollution reduction and energy efficiency targets required all the authorities at each level to save energy and reduce the emissions, aiming to achieving 10 percent reduction in sulphur dioxide and chemical oxygen demand releases and a 20 percent reduction in energy intensity.

As has been discussed in the previous chapter, China's corruption problem severely affects the effectiveness of the implementation of legislation in China. The environmental legislation is not an exception from the harm of the corruption problem. It is not rare to see the phenomenon of rent-seeking in practice. The licenses or the permissions are issued to the unqualified industries after the officials take bribes. Severe fines can be avoided or replaced by a small fine when the industries are acting unlawfully, after the officials receive the financial benefits from these industries. There is no doubt that the corruption problem has seriously affected the implementation of environmental legislation in practice. Chinese government has already realised the importance and urgency of solving the corruption problem. Several campaigns against corruption have been launched already. Especially, the new campaign launched by China's new leader, President Xi Jinping, is regarded as a most severe battle against corruption. Apart from Bo Xilai, the former rising star of the CCP, was sentenced to life imprisonment in 2013<sup>83</sup> and Xu Caihou, the former vice chairman of China's Central Military Commission, who confessed to taking bribes, has been prosecuted last year,<sup>84</sup> the ex-security chief Zhou Yongkang, the most senior Chinese official, was also arrested for the corruption investigation and he was expelled from the Communist Party as well in December 2014.<sup>85</sup> In April 2015, Zhou Yongkang was charged with bribery, abuse of power and the intentional disclosure of state secrets.<sup>86</sup> All these show Mr Xi's determination to anti-corruption. However, as it has been argued in

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<sup>83</sup> Jiang, Steven, 'Bo Xilai found guilty on all charges, sentenced to life in prison', CNN news, available at <http://edition.cnn.com/2013/09/21/world/asia/china-bo-xilai-verdict/>

<sup>84</sup> 'Xu Caihou confesses to taking bribe' Xinhua News, available at [http://news.xinhuanet.com/english/china/2014-10/28/c\\_133748901.htm](http://news.xinhuanet.com/english/china/2014-10/28/c_133748901.htm)

<sup>85</sup> 'China arrests ex-security chief Zhou Yongkang', BBC News, available at <http://www.bbc.co.uk/news/world-asia-china-30352458>

<sup>86</sup> 'China ex-security chief Zhou Yongkang charged', BBC News, available at <http://www.bbc.co.uk/news/world-asia-china-32172600>

Chapter 4, under the sole leadership of the communist party without any external supervision, as well as the absence of a democratic system and independent judicial system, it is impossible to root out corruption in China in a short time. Although Mr Xi's anti-corruption campaign has proved a deterrent to corruption and has a positive influence, it is still not clear how long this influence will last.

## **2.4 The Absence of Independent Environmental Administration and Judicial System**

Under current environmental legislation, the Ministry of Environmental Protection is responsible for developing a national environmental protection plan in accordance with national economy and social development. Meanwhile, the Ministry of Environmental Protection and its local organs co-ordinate with the local authorities to enforce the environmental statutory provisions.<sup>87</sup> However, the local environmental protection administrations (EPA) are not independent organs. They rely on local authorities for funding and enforcement power. Furthermore, the local authorities are also in charge of a local EPA's personnel structure. All these harm the independence of the EPA. As Beyer notes, although local EPAs are the sub-national administrative department of the Ministry of Environmental Protection, in practice they tend to look to the local authority at its own level, rather than to the central authorities.<sup>88</sup> In this case, since local EPAs tend to make their decision favouring the local authorities, local protectionism is still very common in China. Besides the interference of local protectionism, EPAs still struggle to implement

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<sup>87</sup> P.R China 2014 Environmental Protection Law, Article 13

<sup>88</sup> Beyer, Stefanie. 'Environmental law and policy in the People's Republic of China.' *Chinese Journal of International Law* 5.1 (2006): 185-211

environmental law due to the lack of sufficient funding, staff, and autonomy.<sup>89</sup>

The court system is similar to EPAs. As it has been discussed above, the absence of judicial independence in China has existed for a long time. Like EPA, the courts' personnel and financial structure in China are not independent either. The financial structure of the courts relies on the local government at the corresponding level. The courts system has not been granted its own budget by law. In practice, the funding of the courts is from the budget of the local administration. That means the local administration has the power to cut the spending on courts. The high dependence on local administration's financial support makes the courts unwilling to challenge the local authority. The personnel structure of the court is not independent either. The pressure on personnel and financial structures deprives the courts of independence, which makes them inclined to issue a judicial judgment favouring the local authorities.

Although China has instituted a number of environmental courts dealing with the environmental lawsuits, the role of the environmental tribunals and various environmental panels and circuit courts are still limited without the independent judicial system.<sup>90</sup>

Overall, the absence of the independent EPA and courts restrains the effective implementation of the environmental legislation in practice. They both challenge environmental enforcement. It is thus unlikely that it will be possible to overcome the

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<sup>89</sup> Rooij B, Stern R E, Fürst K. 'The authoritarian logic of regulatory pluralism: Understanding China's new environmental actors' [J]. *Regulation & Governance*, 2014

<sup>90</sup> Wang A, Gao J, 'Environmental courts and the development of environmental public interest litigation in China', [J]. *Journal of Court Innovation*, 2010, 3: 37.



deficiencies in the very near future, since it involves the systemic change, which is difficult to take place under the current political system.

## **2.5 Insufficient Public Participation and Transparency**

In the contemporary Chinese environmental legal framework, the scope of public participation is not well developed. The role of citizens are underestimated. Wang argues that public participation plays an important role for social growth, and helps keep balance between economic interests and environmental protection.<sup>91</sup> However, due to the fear of bringing broader systemic reform, the citizen role is always restrained and public participation is usually not encouraged in China.

Non-Government Organisations (NGOs) usually play an active role in environmental protection, due to their capacity of finance and specialised knowledge. However, the role of NGO is restricted in China. In the environmental litigation, NGOs were not allowed to file lawsuits to the court.<sup>92</sup> According to China's General Principle of Civil Law 1986 and Civil Procedure Law 2012, only a citizen or an organization with a direct interest can file a lawsuits to sue for redress. Since normally an NGO does not have a direct interest in the environmental litigation, it was not allowed to file a lawsuit in the court, until granted a new role of litigation in public interest by 2014 Environmental Protection Law.

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<sup>91</sup> Wang, Canfa, 'Chinese environmental law enforcement: current deficiencies and suggested reforms.' *Vt. J. Envtl. L.* 8 (2006): 159.

<sup>92</sup> NGO was not allowed to file a case until 2014 Environmental Protection Law, which was implemented on 1<sup>st</sup> January 2015.

In addition, the administration-led approach also restrains the role of public participation. The administrative departments lead the legislative work under the current legislative framework. In the past 20 years, 75 per cent to 85 per cent of the bills were proposed by the administrative departments of the State Council.<sup>93</sup> The relevant departments lead the legislation. The public, however, has a very limited opportunity to participate in the legislation. Apart from consultation on proposed legislation, the relevant data and information are still not open to common people. The lack of transparency further restrains the role of public participation.

Public participation can be regarded as a useful tool to increase the effectiveness of the environmental regulatory implementation. Weak administration contributes to the ineffectiveness of the implementation of the environmental law. China's traditional regulatory system is led by the states. However, due to the systemic defects, which were discussed in the Chapter 4, it is unlikely to increase the effectiveness of the state-centred administrative system without a political reform, since under current legal and political system, the systemic defects cannot be overcome. China is not a democratic country and the leadership of the Chinese Communist Party will not be changed in the near future. Without a political reform, it is very difficult to increase the effectiveness of the regulatory system under the state-centred approach, which has already been proved ineffective. Under this circumstance, introducing a new approach to the regulatory system without a political reform is an option which can be accepted by Chinese government. Increasing the

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<sup>93</sup> Mu, Zhilin; Bu, Shuchun and Xue, Bing, 'Environmental Legislation in China: Achievements, Challenges and Trends,' 2014 Sustainability 6, no. 12: 8967-8979

transparency, encouraging more public participation and enhancing the role of NGO can help to build up the new citizen-driven approach, which can potentially increase the effectiveness of the regulatory system without the political reform. This new approach, as the most important innovation of the 2014 Environmental Protection Law, will be discussed in the following context.

### **3. The 2014 Environment Protection Law and China's Sustaining Economic Future**

Under great public pressure and disquiet, the Chinese government adopted its new Environmental Protection Law in 2014, aiming to addressing a new approach to environmental protection and increasing the effectiveness of the current environmental legislation. It took two years of deliberation and drafting this new law. After full review of the existing environmental legislation, the 2014 Environmental Protection Law introduced some innovations. It embraces the concept of sustainable development and grants the priority to the environmental protection, requiring a balance between economic development and environmental protection.<sup>94</sup>

First of all, the most important change the 2014 Environmental Protection Law brings is to highlight the role of public participation and shift the state-centred implementation to citizen-driven implementation. The causes leading to weak administration and poor compliance are complicated. Local protectionism, corruption problem, the absence of

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<sup>94</sup> Wang, Alex, 'The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China', 37 Harvard Environmental Law Review p367-439

independent administrative authorities and the absence of the independent judicial system, statutory deficiencies etc. all contribute to the ineffectiveness of the current environmental legislation. However, the systemic defects, which caused the failure of environmental legislation in China, can not be overcome in a short term, because China, led by the Chinese Communist Party, is not a democratic country, like other Western countries. China has its own political and legal system, which will not be changed in the near future. China's new leader, President Xi Jinping, stressed the importance of rule of law and promised to achieve the goal of a modern socialist country that is prosperous, democratic, culturally advanced and harmonious by the middle of the century; however, he has also made it clear that Western-style democracy is not for China.<sup>95</sup> In order to overcome the shortcomings caused by the systemic problems, China explores a new approach in its new 2014 Environmental Protection Law, shifting from state-centred implementation to citizen-driven implementation.

The citizen is at the heart of the new Environmental Protection Law, in which great citizen participation is encouraged. Article 57 of the 2014 Environmental Protection Law gives the citizen whistle blowing rights. Any citizen, legal person or other organization are entitled the right to report environmental pollution or ecological damage caused by any institution or individual; or the failure of any environmental regulatory body to perform its legal duties. The authorities receiving the report shall keep confidential the relevant information of the informant, and protect the legitimate rights and interests of the

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<sup>95</sup> 'What China means by "democracy"?', 25<sup>th</sup> November 2014, Economist, available at <http://www.economist.com/blogs/economist-explains/2014/11/economist-explains-21>

informant.<sup>96</sup> The citizen, as well as the qualified NGOs, are empowered to take to court environmental litigation, regarding environmental pollution, ecological damage, and public interest harm, although qualified NGOs which are ‘registered at the municipal or higher government level and have engaged in environmental activities for at least five years are provided standing to bring cases regarding’.<sup>97</sup> However, the public litigation is still limited in China, no definition having yet been given to the term of ‘public interest harm’, and in practice the court might refuse to file the case due to the different interpretation of this term. Even so, it is still a big step in the innovation of environmental legislation in China. After all, it is the first time NGOs can bring lawsuits to the court to sue for redress, even they do not have a direct interest in the claim. The new Environmental Protection Law launched a new experience to enhance the citizen participation and increase the greater public awareness of the environment. Great public participation and the new role of NGOs will help to enhance the supervision and the implementation of the environmental law, as well as strengthening citizen’s rights.

Secondly, the 2014 Environmental Protection Law increases transparency. Articles 53 and 54 entitle the citizens, legal persons and other organizations to have the rights to access the information on environmental quality, environmental monitoring, environmental incidents, administrative licensing and penalties relating to the environment, and the collection and use of pollutant discharge fees from the enterprises and local government authorities.<sup>98</sup> As to the heavy polluting enterprises, the names of the principal pollutants discharged, the method of discharge, the discharge concentration and total amount, information on

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<sup>96</sup> P.R. China Environmental Protection Law 2015, Article 57

<sup>97</sup> Ibid, Article 58

<sup>98</sup> Ibid, Article 53 and 54

discharge which exceed standards, and information on the construction and operation of pollution control facilities are required to be publicly disclosed.<sup>99</sup> Furthermore, Article 56 requires the disclosure of the environmental impact assessment (EIA) documents and the conduct of a consultation from the project owner of a construction project. The competent department that is responsible for the examination and approval of EIA documents for the construction project shall make public the full text of environmental impact reports on the construction project upon receipt thereof with exception of commercial secrets and confidential circumstances as specified by the State.<sup>100</sup> This Article is considered to bring a magnificent change to the provision of transparent information, because it not only requires the construction project with environmental implications should only proceed when account has been taken of public opinion, but also exposes the officials who approved the EIA documents to scrutiny over whether they have fulfilled their duties properly. The access to these information would make it easier to spot unjustified decision of approving the EIA report for the projects with the potential harm to the environment.<sup>101</sup> To some extent, it could help to reduce the officials' rent-seeking behaviour in practice.

Thirdly, the 2014 Environmental Protection Law increases the liabilities for the polluters. The new law introduces a new regime of fines, which may accumulate fines for the polluters on a daily basis.<sup>102</sup> The information on the violations is required to be open to

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<sup>99</sup> Ibid, Article 55

<sup>100</sup> Ibid, Article 56

<sup>101</sup> Cheng, Philip; Fogarty, Daniel; McGinty, Andrew, Wei, Jun and Zou, Roy G. Zou, ' Clearing the Air on China's New Environmental Protection Law ', Hogan Lovells , 15 May 2014, can be available at [http://www.hoganlovells.com/files/Uploads/Documents/Client\\_Alert\\_Clearing\\_the\\_Air\\_on\\_China's\\_New\\_Environmental\\_Protection.pdf](http://www.hoganlovells.com/files/Uploads/Documents/Client_Alert_Clearing_the_Air_on_China's_New_Environmental_Protection.pdf)

<sup>102</sup> P.R. China Environmental Protection Law 2015, Article 59

the public.<sup>103</sup> The new law is much severer to the polluters than the previous environmental protection law. Under the non-compliance regime, the responsible persons of a non-compliant enterprise, even for the first time, may face detention for up to 15 days where the enterprise commits certain violations, such as failing to obtain EIA approval or a pollutant discharge permit or refusing to suspend the violating act, illegally discharging pollutants, or refusing to cease production, or use, of a banned pesticide.<sup>104</sup> These articles increase scrutiny of the enterprise and non-compliant behaviour will result in more severe penalties and economic consequences than before. Under this circumstance, the enterprise is more likely to reconcile the goal of environmental protection with the economic interest in the operation.

Fourthly, the 2014 Environmental Protection Law also increases liabilities for the state and administrators to ensure they fulfil their environmental duties properly. The attainment of environmental protection targets will be taken into account in the local government departments and officials' performance evaluations, which will be open to the public.<sup>105</sup> Furthermore, the government officials, who commit unlawful acts such as granting permits where criteria are not met, covering up violations, failing to issue an order to suspend or cease operations in accordance with the law, or failing to disclose environmental information that are subject to public disclosure, will have a heavier penalties, such as demerits, demotions, dismissal, and criminal prosecution.<sup>106</sup> In China, whether the implementation of the law is effective or not usually depends on the role of local

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<sup>103</sup> Ibid, Article 53 and 62

<sup>104</sup> Ibid, Article 63

<sup>105</sup> Ibid, Article 26

<sup>106</sup> Ibid, Article 68

government departments and officials. If the local government department and officials are effective, the implementation of the law is also likely to be effective. The new Environmental Protection Law requires public disclosure of officials' performance evaluations, which include the attainment of environmental protection, thus the government officials are likely to be more effective to implement the environment law since they are under supervision of the public to see whether they fulfil their environmental duties or not. In addition, in this way, the role of the public is enhanced as well.

Overall, the 2014 Environmental Protection Law is a innovation and experiment of the new approach to the environmental protection. It increases liabilities for enterprises to ensure they pursue their economic interests in a manner compatible with the environmental goal. The new law also increases the liabilities on the government officials to ensure their effectiveness in fulfilling the environmental duties. In addition, the new law also reinforces the role of citizen by increasing transparency and encouraging public participation. It has made the first step to entitle NGOs to file lawsuits in order to sue for redress. This is an innovation in the current Chinese legal system. The 2014 Environmental Protection Law is an experiment of the new approach to the environmental implementation, shifting from state-centred approach to citizen-driven approach. The 2014 Environmental Protection Law attempts to create a more effective environmental legal system to ensure China keeps in balance environmental protection and economic development so that China can achieve its social harmony and sustainable economic development. Since the new law was only implemented from 1<sup>st</sup> January 2015, it is still too early to predict whether the law works or



not in practice. However, this new law sets a new direction for China's environmental legislation and launches the new approach, citizen-driven approach, to encourage greater public participation. These innovations can be regarded as a positive step Chinese government has made towards to the effective environmental protection framework. It also provides a template for the possible reform of Food Safety Law in the future.

## **VI. Conclusion**

Environmental problems, which threaten the bottom of the food supply chain, are a big challenge to the food safety in China. The Milk Scandal of 2008 provides a good example of how the pollutants entered into the food chain and threatened the public health. Meanwhile, the water crisis and air pollution also have severe implications for agriculture. Since agriculture is on at bottom of the food supply chain, unsafe agricultural products will eventually enter the food supply chain to threaten food safety in China. Thus, the goal of food safety can not be achieved alone, without dealing with the environmental problem. This is the reason why this chapter discusses the environmental problem and analyses China's environmental legal framework.

The environmental problem has already caused great public discontent in China. Facing the consecutive public protest, Chinese government has already been fully aware of the importance of the environmental problem and has attempted to solve the environmental problem by any means. However, because of the ineffectiveness of the current regulatory system, it seems the influence of these attempts is still very limited so far.

China's environmental regulatory system is suffering from the general defects of the Chinese legal system. The fragmentary, ambiguous and conflicting legislation contributes to the weak implementation and poor compliance in practice. However, besides the statutory deficiencies, the weak implementation and poor compliance are also caused by the systemic problems under China's current political and legal system, such as the corruption problem, and the absence of independent environmental administration and judicial system. The lack of public participation and transparency also restrains the effectiveness of the environmental protection framework.

In order to improve the current environment and increase the effectiveness, the Chinese government adopted a new environmental law, the 2014 Environmental Protection Law. The new environmental protection law is much tougher than any other previous environmental Law. It increases the liabilities for both polluters and administrative officials, introduces a new regime of fines which may accumulate on a daily basis, and also enhances the transparency and encourages greater public participation. An NGO is for the first time entitled to file lawsuits in public interest in order to sue for redress.

Overall, the 2014 Environmental Protection Law is a new experiment. The innovation of the new approach to the environmental implementation, shifting from state-centred approach to the citizen-driven approach, is an exceptional experiment. The overarching obstacles restraining the effectiveness of environmental implementation are the systemic weakness of a one party-state. Although China's policy makers have started to embrace the

rule of law and respect legality and associated legal rights, the systemic weakness will still not be easy to be overcome in the near future, especially without political reform.

Under this circumstance, the 2014 new Environmental Protection Law sets a new direction of the implementation. Unlike the traditional approach, the citizen is greatly encouraged to participate in the pollution control and they are empowered to take responsibilities for monitoring the environmental pollution control as well. It creates a new path for compliance under China's current political and legal system. Shifting from traditional reliance on the state and administrators, it moves the agenda to enhancing the citizen role. NGOs and pressure groups are empowered to participate in the public litigation. Although it is still too early to predict whether the 2014 new Environmental Protection Law works effectively or not in practice; at least, it is a positive move to the right direction, which shows the government's determination of integrating environmental protection and sustainable development into the economic growth.

China's new leaders have already reached the consensus that China's economic future depends on China's capability of sustainable development. Thus the effectiveness of environmental protection is one of the keys to China's sustainable development. Without solving its environmental crises, China cannot ensure public health as well as food safety and achieve its social harmony. China cannot afford to maintain its economic growth at a high environmental cost anymore. Under this circumstance, the Chinese government conducted a new experiment of a citizen-driven approach to improve the effectiveness of environmental protection framework.

If this experiment proved to be successful in practice, the innovation can also provide a new thinking and a path to the effective legal implementation in China, not only to environmental law, but also to food safety law. As is discussed in the previous chapters, the implementation of the food safety law is not effective in China. Although the 2009 Food Safety Law has brought some changes to the food safety regulatory system, however, due to the systemic defects from which the environmental law was also suffering, the food safety regulatory system is still ineffective in China. The main impediments to its success is the ineffective implementation, which is led by the traditional approach, state-centred approach. The 2014 Environmental Protection Law provides an important innovation to the regulatory system. If the citizen-driven approach increases the effectiveness of the environmental regulatory system, it also can be adopted in new food safety law in the future to improve the effectiveness of the implementation of food safety law. Therefore, this new innovation is a big contribution from the 2014 Environmental Protection Law to food safety law in the future.

## **Chapter 6 Ethical Practice-Corporate Social Responsibility, Social Harmony and ‘Citizen-driven’ Governance in China**

### **I. Introduction**

The Milk Scandal of 2008 is not only the failure of the regulatory system from the public sector, it is also a failure in upholding the safety standards of the products by the private sector. As discussed in Chapter 2 and Chapter 4, the role of companies is pivotal to ensure food safety in China. Operating business in an ethical way and upholding the safety standards of the product is one of the challenges, which were discussed in Chapter 4, to ensuring food safety in China. It is clear that public unease about food safety is one of the main drivers of change. The importance of improvement in co-ordination between different departments, government agencies and the state is also a key element of any effective reform.

The Milk Scandal of 2008 was a case that the Chinese dairy companies failed to operate in an ethical and responsible way. In order to achieve financial success and maximise the profit, they sacrificed the interest of some stakeholders and produced the products which were not fit for use. Therefore, the Milk Scandal of 2008 is a result of the failure of both administrative control and private sector. Chinese companies failed to fulfil their social responsibility through unethical and irresponsible business practice.

Moreover, the Milk Scandal of 2008 was not just a food incident in the dairy field only, it also challenged the image of 'Made-in China' brand and left the public in doubt whether Chinese companies are able to be operated in an ethical and responsible way to produce safe products for consumers. The pursuit of short-term profits with irresponsible practices has already caused a series of company scandals in China. Even the giants of the fast food industry, KFC and McDonald's in China, have been involved in the scandals as well. In 2014, they were both reported by a Shanghai television station for using expired beef and chicken from their supplier.<sup>1</sup>

These consecutive food incidents are normally link to 'low price, inferior quality of products and degraded social morality and business ethics', which was called 'cheap capitalism' by Cheng.<sup>2</sup> Such unethical practice raises the public awareness of corporate social responsibility (CSR). Reliance on corporate governance strategies is regarded by many commentators as an effective way of addressing food standards and enhancing effective implementation. This analysis stems from failings in the legal system and formal law identified in Chapter 2, 4 and 5.

This chapter provides a view on the role of corporate social responsibility in Chinese Company Law in the context of food safety. It begins with the development of CSR in China and explains the role CSR plays in contemporary China. Then a discussion of whether CSR is sufficiently robust to provide a regulatory system that improves food

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<sup>1</sup> 'McDonald's, KFC in China face new food scandal', available at <http://finance.yahoo.com/news/mcdonalds-kfc-china-face-food-scandal-035715659.html>

<sup>2</sup> Cheng H. 'Cheap Capitalism A Sociological Study of Food Crime in China', [J]. British Journal of Criminology, 2012, 52(2): 254-273.

safety in China will be elaborated on. The change of approach to the implementation of CSR, shifting from stated-led to citizen-driven approach, to improve the CSR performance in practice, will be discussed as well. The Conclusion is reached that, although corporate social responsibility does not appear to have created more effective regulatory systems,<sup>3</sup> it still appears to help to create a healthy and responsible business environment for ensuring food safety in China.

## **II. Company Law and Corporate Social Responsibility in China's Economic Transition**

### **1.The Development of Economic Law and Companies in China's Economic Transition**

The development of Chinese corporations reflects China's economic reform. Before 1979, the main task for Chinese government was ideological controls and class struggles, rather than the development of the economy. The only forms of ownership, which were recognised by the government, were State-owned enterprises and collective enterprises. The independent economic nature of the company was absent in that period and the companies' activities were guided by the state's plan, which was called planned economy. There was no need of company law until Deng Xiaoping took over Mao's position and launched his economic reforms. The reform and opening policy was adopted and China's

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<sup>3</sup> Zhao, Jingchen, 'Corporate Social Responsibility in Contemporary China', Edward Elgar, 2014

economy was converted from a planned economic system to a socialist market economy. China started to recognise the diverse forms of ownership and adopt various new laws to meet its increasing demand of foreign trade and investment. A Sino-foreign joint venture law was released in 1979 to regulate foreign invested limited liability companies in China.<sup>4</sup> Afterwards, various laws<sup>5</sup> were adopted to assist China's economic transformation.<sup>6</sup> Especially the Company Law,<sup>7</sup> which plays a significant role in China's economic legislation, is a remarkable symbol that diverse forms of ownership, including private ownership, have been recognised by Chinese government and integrated into China's socialist market economy.

The Company Law provides the bedrock for the development of the corporations in China, while the boom of Chinese companies also promotes the development of Chinese economy. According to the statistics from the State Administration for Industry and Commerce, apart from state-owned companies, the number of individually owned businesses and private

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<sup>4</sup> P.R China Law on Sino- Foreign Equity Joint Ventures 1979

<sup>5</sup> Various laws were passed to support the economic reform. For example, Trademark Law 1982, Economic Contract Law 1982, Patent Law w1984, Foreign Economic Contract Law 1985, Wholly Foreign- Owned Enterprises Law 1986, Enterprise Bankruptcy Law 1986, Provisional Regulations on the Administration of Urban and Township Individual Industrial and Commercial Households 1987, Sino-Foreign Cooperative Joint Ventures Law 1988, Industrial Enterprises Owned by the Whole People Law 1988, Provisional Regulations on Private Enterprises 1988, Copyright Law 1990, Normative Opinion on Joint-Stock Companies 1992, Normative Opinion on Limited Liability Companies 1992, Provisional Regulations on the Administration of Issuance and Trading of Stock 1993, Law against Unfair Competition 1993, Economic Contract Law 1993, Company Law 1993, Foreign Trade Law 1994, Negotiable instruments Law 1995, Security Law 1995, Partnership Law 1997, Anti-dumping and Anti-subsidy Regulations 1997, Securities Law 1998, Contract Law 1999, Individual Wholly Owned Enterprises Law 1999, Trust aw 2001, Anti-dumpling Regulations and Anti-subsidy Regulation 2001, Company Law 2006 and Company Law 2014 and etc. More details of the link with the laws and China's economic development can be available from Clarke D C, Murrell P, Whiting S H. The role of law in China's economic development[J]. China's Great Economic Transformation (Cambridge University Press, 2008), 2008: 375-428.

<sup>6</sup> Han A M. China's Company Law: Practicing Capitalism in a Transitional Economy[J]. Pac. Rim L. & Pol'y J., 1995, 5: 457.

<sup>7</sup> The first edition of the Company Law was adopted in 1993 and came into force in 1994. It was amended in 2006 and 2013. The current Company Law was amended in 2013 and entered into force in 2014.



companies in China exceeded 40.6 million, providing jobs for about 80 million people and contributing two trillion yuan (\$321 billion) in capital in 2013.<sup>8</sup>

## **2. Weak Corporate Social Performance in China**

However, the boom of the companies in China does not come with a good reputation. Chinese companies are always criticised for unaccountable and irresponsible social behaviour and they are infamous for sweatshops, environmental problems, and substandard products. Especially the consecutive scandals of substandard product, including unsafe food products, such as melamine contaminated milk, have already caused public concern over the accountability of Chinese companies. The company is blamed for seeking profits, regardless of its legal, ethical and philanthropic responsibilities. The failure of holding the company accountable is regarded as a private sector factor contributing to China's food safety problem. Under this circumstance, corporate social responsibility (CSR), as a concept of operating business in an ethical and accountable way, is put forward as one of the solutions to the food safety problem in China.

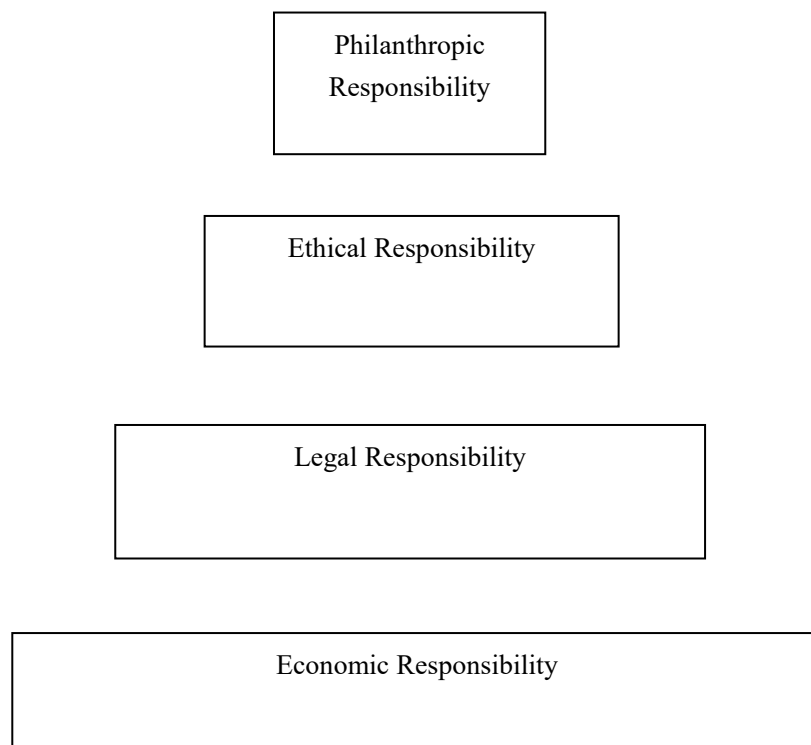
As an economic unit, it is natural for the company to pursue maximum profits. However, due to its great social influence, the company also needs to take its social responsibility into account. Corporate social responsibility is aimed at ensuring the company considers promoting the interests of society as a whole in the long-term, while the company pursues

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<sup>8</sup> 'China has 40.6 million private businesses', MarketWatch, available at <http://www.marketwatch.com/story/china-has-406-million-private-businesses-2013-02-10>

financial success.<sup>9</sup> The company is required to take account of people, social and environmental issues along with profits, which can be simply expressed in the term of ‘profit, people and planet’.<sup>10</sup> CSR suggests that a company should conduct business beyond the interest of shareholders. The interests of other stakeholders, such as consumers, community and employees, also need to be considered in a company’s activities. According to Carroll’s pyramid theory, the company has economic, legal, ethical and philanthropic responsibilities when it engages in economic activities.<sup>11</sup>

### **Carroll’s Pyramid of Corporate Social Responsibility <sup>12</sup>**



<sup>9</sup> M. Orlitzky, ‘Corporate Social Performance and Financial Performance: A Research Synthesis’, in A. CRANE, A. McWilliams, D. Matten, J. Moon and D. Siegel (eds), ‘The Oxford Handbook of CSR’, Oxford: Oxford University Press 2008, P 113

<sup>10</sup> S. Urip, ‘CSR Strategies: Corporate Social Responsibility for a Competitive Edge in Emerging Market’, Sussex: John Wiley & Sons, 2010, P5

<sup>11</sup> Carroll, A.B, ‘The Pyramid of Corporate Social Responsibility; Toward the Moral Management of Organizational Stakeholders’, 1991, 34 Business Horizons P39-41

<sup>12</sup> Ibid

In the case of Milk Scandal of 2008, the dairy companies did not fulfil their social responsibilities. First of all, the economic component of Carroll's corporate social responsibility pyramid implies the nature of the company is to establish a economic success. The melamine contaminated dairy products brought profits to companies in a short term. However, it led to the loss of market and consumer's confidence in the Chinese dairy industry. Even after seven years have passed, the shadow of the milk scandal still remains. The consumers' confidence still has not been recovered yet. The Chinese parents are willing to spend more money on foreign-brand infant formula, rather than domestic ones. The Chinese dairy companies lost their market share and have to take the economic loss in the long term. Secondly, the legal framework requires companies to comply with laws and regulations to provide products which meet legal requirements. However, adding melamine to dairy products to harm public health is not a legal practice in China. The dairy companies did not fulfil their legal responsibility either. Thirdly, the higher level of CSR, ethical responsibility, requires the companies to perform in a manner meeting the 'expectation of social mores and ethical norms'; and philanthropic responsibility suggests the company acts like a good citizen to promote human welfare and goodwill.<sup>13</sup> It is clear that the companies which produced melamine contaminated products failed these two responsibilities. Overall, the Milk Scandal of 2008 exposed the fact that Chinese companies did not undertake CSR in their business practice. The business ethics and integrity were ignored in companies' activities. That is the reason why CSR, from the perspective of the private sector, is proposed as one of the solutions to the food safety problem.

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<sup>13</sup> Ibid

### **3. The Chinese Society and Corporate Social Responsibility**

#### **3.1 CSR and Chinese Traditional Culture**

Although CSR, as a new concept in the modern company law, originally emerged in the developed countries, it naturally fits in with Chinese society. First of all, it can be perfectly combined with the Confucian philosophy, which advocates Ren (仁) and Li (礼). Ren reflects benevolence, philanthropy and humaneness and Li expresses the decent and proper behaviour which can be accepted by the society. The norms of Ren and Li naturally embrace the ethical and philanthropic element, requiring the company to integrate the interests of stakeholders into its business strategy, considering product safety, environmental protection, community development etc. Apart from Confucian philosophy, traditional Chinese business was also influenced by Buddhism and Daoism, which advocated the culture of diligence, honesty and charity. In the sixteenth and eighteenth centuries, which was the period of Ming and Qing Dynasties in Chinese history, a large number of businessmen donated large portions of their wealth to build bridges and roads, established schools for the community and built the shelters for the poor people, which were part of local governments' social functions.<sup>14</sup> Thus, the concept of CSR is perfectly compatible with Chinese history and business tradition.<sup>15</sup>

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<sup>14</sup> Lin, Li-Wen, 'Corporate social responsibility in China: Window dressing or structural change.' *Berkeley J. Int'l L.* 28 (2010): 64.

<sup>15</sup> Anthony M. 'The new China: big brother, brave new world or harmonious society?' [J]. *Journal of Futures Studies*,

### 3.2 CSR and Political Policy

In addition, CSR is also compatible with contemporary Chinese society, which is in the transition period. In order to achieve the sustainable development, Chinese society is shifting from the economic oriented society to a more balanced society- harmonious society. Chinese government began to address more social concerns, such as food safety, environmental pollution, the gap between poor and rich etc, along with maintaining economic growth. This tendency is similar to the change of a company's role, from maximising shareholders' interests, which is an economic orientated approach, to promoting the success of the company as a whole, which is a more balanced approach requiring the consideration of the stakeholders' interests together with the shareholders' profits. To some extent, Chinese society can be regarded as a bigger version of a company. The Chinese government is also shifting its policy from the priority of economic development to a harmonious society. Under this circumstance, harmonious society was firstly put forward by previous President Hu Jintao in the Party academy in 2006 to cope with the 'thorny domestic issues, as well as a complicated and volatile international situation.'<sup>16</sup> Building a socialist harmonious society was officially declared in the Sixth General Meeting of the Sixteenth Central Commission of the Chinese Communist Party in October 2006. The General Meeting declared that building a harmonious society is the long term goal of the Chinese socialism.<sup>17</sup> Many social problems are considered to

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2007, 11(4): 15-40.

<sup>16</sup> 'Building Harmonious Society Crucial for China's Progress: Hu', People's Daily, 27<sup>th</sup> June 2006.

<sup>17</sup> The Sixth General Meeting of the Sixteenth Central Commission of the Chinese Communist Party, 'Several Important

potentially cause conflicts and harm social harmony. These social problems and conflicts include but are not limited to: ‘inequality in regional development, population pressure and environmental pollution, unemployment, income inequality, low accessibility and quality of health care and security’.<sup>18</sup> The General Meeting also approved the ‘Resolution on a number of major issues for Chinese Communist Party Central Committee regarding the building of a harmonious socialist society’, which clarified the current chief mission for the Chinese Communist Party was to solve existing social problems to build a socialist harmonious society by 2010. This Resolution stressed the

*‘importance, guidelines, goals and principles of building a socialist harmonious society: coordinated development; social equity and justice; cultural harmony and the ideological and ethical foundations of social harmony; and the need to improve public administration to build a vigorous and orderly society.’<sup>19</sup>*

This political statement officially affirmed that building a harmonious society would be a official mission of the Chinese Communist Party and it is also regarded as a important symbol for advancing CSR in China.<sup>20</sup>

CSR implies a good practice in an ethical way, which requests the directors of the companies to consider economic profits along with social norms and business ethics, when

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Resolutions on the Construction of Socialist Harmonious Society by the Central Commission of the Chinese Communist party’, 11st October 2006, can be available at [http://news.xinhuanet.com/politics/2006-10/18/content\\_5218639.htm](http://news.xinhuanet.com/politics/2006-10/18/content_5218639.htm).

<sup>18</sup> Ibid

<sup>19</sup> ‘China Publishes Its Resolution on Building a Harmonious Society’, China News and Report, available at <http://www.china.org.cn/english/report/189591.htm>

<sup>20</sup> Lin, Li-Wen, ‘Corporate social responsibility in China: Window dressing or structural change.’ Berkeley J. Int’l L. 28 (2010): 64.

they make a business decision. The company needs to fulfil its social role, as well as its economic role. CSR requests to promote the success of the company as a whole to achieve the company's economic goal in a sustainable way. The company is supposed to respect people and local community and protect the environment, which is compatible with the theme of a harmonious society. As the Sixth Plenum of the Sixteenth Central Committee of the Communist Party laid down the disharmonious elements, which should be overcome to achieve the harmonious society by 2020, as including 'people's rights and interests to be granted concrete respect and guarantees, the need for improvement in environmental management and the need to foster a sound moral atmosphere and harmonious interpersonal relationships.'<sup>21</sup> These elements reflect the company's primary stakeholders, including employees, local community, consumers and the environment. Thus, promoting CSR is compatible with creating harmonious society. The company will contribute greatly to building a harmonious society if the company is able to fulfil its social responsibility to consumer, the environment, local community, employees. Overall, the policy of 'harmonious society' can be regarded as a symbol of Chinese government which embraces CSR in the political perspective, and CSR can also be used as a tool to promote a harmonious society in China. <sup>22</sup>

Recently, the new government replaced the term of 'building a harmonious society' by 'realising the Chinese dream', which was put forward by China's new leader, President Xi Jinping in 2013. The Chinese dream incorporates the term harmonious society and it

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<sup>21</sup> 'Communique of the Sixth Plenum of the Sixteenth CPC Central Committee', People's Daily, available at [http://english.peopledaily.com.cn/200610/12/eng20061012\\_310923.html](http://english.peopledaily.com.cn/200610/12/eng20061012_310923.html)

<sup>22</sup> Karlsson, D, 'Corporate Social Responsibility : A Tool for Creating a Harmonious Society in China,' Brussels, European Institute for Asian Studies, 2011

normally refers to the need to ‘realise national rejuvenation, improve people’s livelihoods, construct a better society and achieve prosperity.’<sup>23</sup> The core aim of the ‘Chinese dream’ also can be summarised as ‘two one hundred’, namely: by the 100th anniversary of the founding of the Communist Party of China in 2021 and the 100th anniversary of the founding of the People's Republic of China in 2049, China will gradually and ultimately achieve the great rejuvenation of the Chinese nation, which refers to the manifestation, rejuvenation, people's happiness; as well as a wealthy and powerful country. China will adhere to the socialism system with Chinese characteristics and continue to the integration construction of political, economic, cultural, social, and ecological civilization to achieve the Chinese dream.<sup>24</sup> The Chinese dream embraces the goal of improving people’s livelihoods and achieving manifestation, rejuvenation, people's happiness; as well as a wealthy and powerful country, which integrates the concept of harmonious society. Therefore, CSR is also compatible with the term of ‘Chinese dream’ and can be used as a tool to realise Chinese dream.

### **3.3 CSR and China’s Economic Transition**

Apart from the political demand, CSR is also demanded by the economic transition. Chinese companies have being criticised for their irresponsible behaviour for a long time.

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<sup>23</sup> ‘Xi Jinping’s vision: Chasing the Chinese dream’, The Economist, 4<sup>th</sup> May 2013, available at <http://www.economist.com/news/briefing/21577063-chinas-new-leader-has-been-quick-consolidate-his-power-what-does-he-now-want-his>

<sup>24</sup> ‘Making ‘Chinese dream’ a reality’, China Daily, available at [http://www.chinadaily.com.cn/china/2013-12/08/content\\_17160305.htm](http://www.chinadaily.com.cn/china/2013-12/08/content_17160305.htm); also can be available from BBC News, ‘What does Xi Jinping's China Dream mean?’, <http://www.bbc.co.uk/news/world-asia-china-22726375>



They enjoyed financial success, without thinking of the social and environmental cost. A Chinese company, like a mini version of Chinese government, had its root ‘in the political ambience in the initial stage of economic development.’<sup>25</sup> After paying the great social and environmental cost, the Chinese government began to realise the economic development should be maintained in a sustainable way, rather than a boom in a short period. The central government changed its priority from economic growth to the sustainable economic development. Meanwhile, the government also realised the success of the economic transition cannot be achieved without the success of private sector. The Chinese government initially started to encourage state-owned enterprises (SOEs) to undertake social responsibility in 1997.<sup>26</sup> After the 2006 revision of the Company Law, all the companies, including private-owned companies, are legally required to operate in a ethical way and take their social responsibility.

### **3.4. CSR, Market Share and Consumers’ Choice**

Furthermore, the market and consumers choice require companies to behave in a responsible way as well. Due to globalisation, China is involved in global supply chains and has become the factory of the world. The campaigns of the global anti-sweatshop movement and environmental movement range press the multinational companies to adopt social and environmental standards and select their suppliers carefully.<sup>27</sup> The standards are

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<sup>25</sup> Lin, Li-Wen. "Corporate social responsibility in China: Window dressing or structural change." *Berkeley J. Int'l L.* 28 (2010): 64.

<sup>26</sup> Clarke, Donald C., Peter Murrell, and Susan H. Whiting. ‘The role of law in China's economic development.’, *China's Great Economic Transformation*, (Cambridge University Press, 2008) (2008): 375-428.

<sup>27</sup> Murphy, Sean D., *Taking Multinational Corporate Codes of Conduct to the Next Level*. *Columbia Journal of* 174

derived either internally by multinational companies, such as Nike's Code of Conduct <sup>28</sup> and Wal-Mart Standards for Vendor Partners;<sup>29</sup> or from the external non-governmental organisations (NGOs), such as Social Accountability International's SA8000 <sup>30</sup>, International Organisation for Standardisation's ISO 14001,<sup>31</sup> ISO 22000 <sup>32</sup> and Worldwide Responsible Apparel Production's Apparel Certification Program.<sup>33</sup> Although all these standards are voluntary codes, in order to gain the business from multinational companies and respond to the CSR request from the international market, Chinese companies still have to meet these social and environmental standards, which become an incentive to spread CSR in China. <sup>34</sup>

Apart from the voluntary standards, there are also some mandatory standards. International trade is given credit for China's exceptional economic growth. China plays an active role to integrate with the global economy. Especially after joining the WTO, the trading link between China and rest of the world has been increasing. The USA and EU are the two most important trading partners for China. As developed countries, they usually have higher standards of social and environmental standards for their products. In order to be integrated into the USA and EU market, China has to prove that it meets social and

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Transnational Law, Vol. 43, No. 2, 2005. Available at SSRN: <http://ssrn.com/abstract=627608>

<sup>28</sup> Nike's Code of Conduct, can be available at [http://www.nikeresponsibility.com/report/uploads/files/Nike\\_Code\\_of\\_Conduct.pdf](http://www.nikeresponsibility.com/report/uploads/files/Nike_Code_of_Conduct.pdf)

<sup>29</sup> Wal-Mart Standards for Vendor Partners, can be available at <https://www1.umn.edu/humanrts/links/walmart.html>

<sup>30</sup> SA8000, can be available at <http://sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937>

<sup>31</sup> ISO 14000 is a standard for environmental management, more details can be available at <http://www.iso.org/iso/home/standards/management-standards/iso14000.htm>

<sup>32</sup> ISO 22000 is a standard for Food safety management, more details can be available at <http://www.iso.org/iso/home/standards/management-standards/iso22000.htm>

<sup>33</sup> More details of Worldwide Responsible Apparel Production's Apparel Certification Program. can be available at <http://www.uscib.org/index.asp?documentID=2589>

<sup>34</sup> Lin, Li-Wen, 'Corporate social responsibility in China: Window dressing or structural change.' *Berkeley J. Int'l L.* 28 (2010): 64.

environmental standards from the USA and EU.

In addition, the pressures from consumers overseas also requires Chinese companies to have a better record for their corporate social responsibility. Compared to the consumers from developing countries, the consumers from developed countries normally have more awareness of companies' social performance and they tend to choose the products made in a more social and environmental friendly way. Chinese companies have to meet the consumers' preference to win more market share overseas.

Besides the pressure from the global market, there are also some demands for better CSR performance from the domestic market. The consecutive company scandals increased public awareness of companies' social performance and the demand of ethical business. Especially the scandals on environment and food safety, which caused harm to the community and public health, make people realise that the unethical companies' performance has a direct implication for their daily life. Everyone could be the victim of the companies' irresponsible and unethical social performance. The increasing public awareness of CSR re-shapes the consumers' choice. After three decades' economic development, a portion of the population in China has become wealthy already, especially in Eastern China, which is wealthier than Western China. The consumers from a wealthier area tend to pay more attention to companies' social performance, because of the financial ability they have and the knowledge they receive from better education. The price is not the only determinant for these consumers to make a purchase. Other factors, such as better quality of the product and the service, the reputation of the company, the experience of

after-sale service etc, all affect the consumers' choice. They also have increasing concerns on the quality of the products and service, as well as other factors, such as fair trade and environmental friendly production processes. A good CSR performance normally means a good reputation, which can attract more customers. Thus, the good reputation of socially responsible performance can benefit the company's finance in a long term. The consumers' concern and choice re-shape the companies' business activities and make them operate business in a more responsible way.

Concern over companies' social and environmental performance from the public were fully embodied in the legislative process of China's new 2006 Company Law. Although the legislative process in China is still short of transparency, scholars and officials who participated in the legislative process compiled and published a research report describing the legislative process, from which the public can observe the debate and the discussion during that process.<sup>35</sup> The delegates of the National People's Congress (NPC) from Shanghai suggested that the new company law should clearly state 'companies must protect and improve the interests of other stakeholders in addition to shareholders' and they also suggested to integrating CSR into the new company law.<sup>36</sup> The delegates from Guangdong province also suggested that the new company law should have some provisions defining the relationship between a company and its stakeholders.<sup>37</sup> All these proposals showed the increasing concern over CSR performance from the public, especially from the wealthier area in China.

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<sup>35</sup> Cao, Kongtai (eds), 'A Research Report on the Amendments to Company Law', 2005, China Legal Publishing House

<sup>36</sup> Ibid

<sup>37</sup> Ibid

From one side, the consecutive companies' scandals exposed the weakness of Chinese companies' social performance. However, from the other side, these scandals also increased the demand of ethical business from the public and shape the consumers' preference, which become a motivation for a Chinese company to achieve a better social performance.

All the factors mentioned above, from the perspectives of Chinese tradition and culture, economic transition, political concern and policy as well as trading and market, together drive the development of CSR in China.

## **5. Corporate Social Responsibility in Chinese Company Legislation**

Corporate social responsibility was first introduced to Chinese Company Law in 2006. Although some scholars, like Lin, argue the initial CSR performance request could be found in Company Law 1994.<sup>38</sup> The Company Law 1994 had some provisions regarding the rights of employees and introduced the employees' role into the corporate governance structure. For example, the law required limited liability companies set up by two or more state-owned enterprises (SOEs) to have employee representatives, who are selected by employees, on the board of directors.<sup>39</sup> In addition, limited liability companies and joint-stock companies were required to have employee representatives on the board of

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<sup>38</sup> Lin, Li-Wen, 'Corporate social responsibility in China: Window dressing or structural change.' *Berkeley J. Int'l L.* 28 (2010): 64.

<sup>39</sup> P.R. China Company Law 1994, Article 45 and 68.

supervisors.<sup>40</sup> However, the Company Law of 1994 did not explicitly refer to companies' social responsibility and it only had the provisions on the employees' rights, which is one aspect of CSR. It did not include all the stakeholders. Therefore, the 2006 Chinese Company Law is normally regarded as the first to embrace CSR.

Article 5 of 2006 Chinese Company Law states that 'a company must, when engaging in business activities, abide by the laws and administrative regulations, observe social morals and business ethics, be in integrity and good faith, accept regulation of the government and the public, and undertake social responsibilities.'<sup>41</sup> This article defines the social responsibilities that the company should undertake, which is compatible with Carroll's pyramid theory of CSR.<sup>42</sup> Article 5 implies that, apart from the normal business activities the company engages in (economic responsibility), a company also needs to abide by the laws and administrative regulations (legal responsibility), take social morals and business ethics into account (ethical responsibility) and operate in integrity and good faith (philanthropic responsibility). Therefore, the company is not only responsible to its shareholders; it is also legally required to be responsible to other stakeholders, such as suppliers, employees, consumers, the environment as well as the local community. The company should embrace its economic success with the integration of legal, ethical and philanthropic responsibilities.

In the case of Milk Scandal of 2008, the production of melamine contaminated dairy

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<sup>40</sup> Ibid, Article 52 and Article 124

<sup>41</sup> P.R China Company Law 2006

<sup>42</sup> Carroll, A.B, 'The Pyramid of Corporate Social Responsibility; Toward the Moral Management of Organizational Stakeholders', 1991, 34 Business Horizons pp39-41

products is not only a violation of food safety law, it also a company's failure to undertake its social responsibility, which is legally required by company law. The unsafe products did not meet the basic legal requirements and also harmed the public health, which breached the company's ethical responsibility as well. Similar to the unsafe food products, the environmental pollution activities during the company's operation is a breach of the relevant environmental law as well as corporate social responsibility. All these irresponsible activities harm companies' interests as a whole in the long term, as well as threaten the harmonious society and the sustainable economic development.

As to the directors of the company, the new Company Law states they have the duty of loyalty in good faith and a duty of care to the company. The directors, supervisors and senior managers are legally obliged to be faithful and diligent to the company.<sup>43</sup> Therefore, the directors have to be faithful to the company, looking after company's interest as a whole in a reasonable degree.<sup>44</sup> This duty of good faith requires the directors to handle companies business carefully and faithfully and they are also required to actively act in the interests of the company.<sup>45</sup> The directors' duty is to promote the company's interest as whole, rather than the duty to maximise the shareholders' interest only. Therefore, this duty of good faith also requires the directors to consider the interests of stakeholders, such as consumer, the environment, the community and suppliers, as a whole, rather than the maximisation of shareholders' interests only. The directors need to look after companies' business in a long term when they make a business decision. Thus, violations during the

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<sup>43</sup> P.R. China Company Law 2006, Article 148. This article is changed to be Article 147 in Company Law 2014

<sup>44</sup> Wei, Y., 'Directors' Duties under Chinese Law: A Comparative Review', (2006) 3, University of New England Law Journal

<sup>45</sup> Zhou, H, 'Directors' Duty of Good Faith', in Jiang, P and Yang, Z (eds), 'Civil Law and Commercial Law Forum', Beijing, China Legal Publishing House, p437

business operation do not only breach the relevant law, such as contract law, food safety law, environmental law; the directors of these companies also breach the directors' duty of good faith, which is legally required by Company Law.

However, in the case of Milk Scandal of 2008, the director of Sanlu group, Ms. Tian was sentenced to life imprisonment for producing, and selling fake or defective products,<sup>46</sup> rather than being charged for breach of directors' duty under company law, which is still controversial.<sup>47</sup> Sanlu group lacked the adequate internal control for the raw milk causing the food milk incident. However, it did receive the complaints about the sickness from consuming the contaminated milk in 2007, which was approximately one year earlier than the eruption of the scandal in the public domain. The management of the company chose to cover up the scandal instead of recalling the faulty product and increasing its internal control.<sup>48</sup> Therefore, Ms Tian did breach the duty of director, the duty of good faith, and ignored the interests of the stakeholder. It is disputed as to why she was not charged with breach of directors' duty under company law. Nevertheless, scholars still believe it is a positive legislative step for the new company law to include stakeholders' interests in the directors' duty of good faith. <sup>49</sup>

In summary, Article 5 has a deep and important impact on China's company law history. It puts the legal obligation on the company to observe social, moral and business ethics and

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<sup>46</sup> 'The Central Party Committee and the State Council Handles Persons Involved in the Sanlu Milk Scandal Seriously', available at [http://www.gov.cn/jrzq/2008-09/22/content\\_1102256.htm](http://www.gov.cn/jrzq/2008-09/22/content_1102256.htm)

<sup>47</sup> Fu, Jenny, 'The 2008 China Milk Scandal and the Role of the Government in Corporate Governance in China,' available at <http://www.clta.edu.au/professional/papers/conference2009/FuCLTA09.pdf>

<sup>48</sup> The details of Milk Scandal of 2008 may be found in Chapter 2, which discusses the details of this food incident.

<sup>49</sup> Zhao, Jingchen. 'The regulation and steering of corporate social responsibility in China: stories after the enforcement of chinese company law 2006.' *International Company and Commercial Law Review* 22.12 (2011).



undertake its social responsibilities, apart from the traditional concept of ‘maximising the shareholders’ interest’. This Article explores a way to achieve the balance between the economic profits and the interest of stakeholders, so that the company can develop in a more balanced and sustainable way in a long term. In addition, Article 5 also implies the need of harmonious society in China and it is also compatible with the change of the priority of Chinese government, shifting from the model of pure economic development to the model of sustainable economic development.

The latest version of Chinese Company Law was amended in 2013 and effective in 2014. The 2014 Chinese Company Law retains the Article 5 regarding corporate social responsibility and it also added the term of ‘accepting the supervision by the government and the public’. It stated that ‘When engaging in business activities, a company shall abide by laws and administrative regulations, observe social morality and business ethics, act in good faith, accept supervision by the government and the public, and bear social responsibilities’.<sup>50</sup> This new change can be regarded as the response to the failure of private sector for its consecutive scandals. In the Company Law of 2006, the company was already legally required to be operated in an ethical method and undertake its social responsibility. However, due to the weak implementation and poor compliance in China, the state-led administrative approach does not work effectively in China. Consecutive corporate scandals, especially the Milk Scandal of 2008, greatly challenged the public confidence in the safety of ‘Made in China’ products and Chinese companies’ commercial reputation. The call for holding a company accountable has been increasing. However, as discussed in the previous chapters, without a reform of the political framework and legal

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<sup>50</sup> P.R. China Company Law 2014, Article 5

system, it is very difficult to overcome the weak implementation and poor compliance caused by the systemic defects. Since it is unlikely to see the political reform or the legal system reform happen in the very near future, the 2014 new company law, adopting the perspective of environmental legislation, introduces the new approach, citizen-driven approach, to overcome the weak administration, which prevents the effective implementation of the provisions on corporate social responsibility. The new approach, citizen-driven approach, was added as a supplement into the 2014 New Company Law, aiming to working with the traditional state-led approach together to supervise the operation of the company. Therefore, Article 5 of the Company Law of 2014 made this change on the basis of the Company Law of 2006. The new citizen-driven approach will be discussed in detail in the following context.

As the provisions on corporate social responsibility in Chinese Company Law is very general, the State-Owned Assets Supervision and Administration Commission of the State Council (SASAC) adopted the Guide Opinion on the Social Responsibility Implementation for the State-Owned Enterprises Controlled by the Central Government.<sup>51</sup> Although it is only effective in the central government controlled state-owned enterprises (SOEs), it provides general principles of corporate social responsibility in practice as a point of reference for other companies. The Guide Opinion states the major contents of CSR including: ‘(1) complying with the law and honestly conducting business; (2) increasing profitability; (3) improving product and service quality; (4) upgrading resources efficiency and environmental protection; (5) improving innovation and technology; (6)

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<sup>51</sup> SASAC, ‘The Guide Opinion on the Social Responsibility Implementation by the Central-Government-Controlled Stated-Owned Enterprises’, can be available at <http://www.sasac.gov.cn/n1180/n1566/n259760/n264851/3621925.html>

assuring production safety; (7) protecting employees' legal rights; and (8) actively engaging in charity.<sup>52</sup> This Guide Opinion covers the company's economic responsibility- increasing profitability; legal responsibility- complying with the law; ethical responsibility- conducting business honestly, environmental protection, production safety for consumers' right and employees' right; as well as the philanthropic responsibility- actively engaging in charity. It is a explicit expression of the attitude from Chinese government towards CSR and it also embodies corporate social responsibilities in business practice. The production safety is mentioned as a major element of CSR, which obviously includes foods safety.

## **5. Corporate Social Responsibility and NGOs' Standards and Guidelines**

Apart from the statutory provisions from the authorities, some international non-governmental organisations (NGOs) also play an important role to promote CSR in China. The most famous NGO standard for food safety is ISO 22000,<sup>53</sup> which is established by the International Organization for Standardisation. It also established the standard for environmental management, ISO 14000.<sup>54</sup> The most effective NGO standards for corporate social responsibility in China is Social Accountability 8000 International Standard (SA 8000)<sup>55</sup>, which was established by the Council on Economic Priority Accreditation Agency. This standard is about ethical sourcing of goods and service. In

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<sup>52</sup> Ibid

<sup>53</sup> ISO 22000 for food safety, available at <http://www.iso.org/iso/home/standards/management-standards/iso22000.htm>

<sup>54</sup> ISO 14000 for environmental management, available at <http://www.iso.org/iso/home/standards/management-standards/iso14000.htm>

<sup>55</sup> SA 8000, available at <http://sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937>

China, there were 339 companies out of 2,330 which had been granted the certificate of SA 8000 by 2010.<sup>56</sup> Although these standards from NGOS are voluntary standards, a large amount of Chinese companies still choose to meet these standards to build up their reputation in order to win more market share, especially in global markets.

Apart from the standards from international NGOs, China also develops its own NGO standards. The best example is the CSC9000T (China Social Compliance 9000 for Textile and Apparel Industry), which was published by the China National and Textile and Apparel Council and other representatives of Chinese corporations.<sup>57</sup> In addition, the Social Responsibility Guide of the China Industrial Companies and Industrial Association<sup>58</sup> was published in 2008 to guide industrial companies to undertake social responsibility. However, compared to the standards from international NGOs or multinational enterprises based in the developed countries, these domestic standards still have their own shortcomings, which makes them have less influence than the former standards. CSC9000T is regarded as a much softer approach than the certifiable standards and it sets long-term goals, rather than the immediately required standards.<sup>59</sup> The Industrial Guide is too comprehensive to be implemented in practice.<sup>60</sup> Despite these shortcomings, it is still a very positive sign for Chinese domestic NGOs to create their own

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<sup>56</sup> Zhao J. 'The regulation and steering of corporate social responsibility in China: stories after the enforcement of chinese company law 2006', [J]. International Company and Commercial Law Review, 2011, 22(12).

<sup>57</sup> CSC9000T, available at <http://www.csc9000.org.cn>

<sup>58</sup> The Social Responsibility Guide of the China Industrial Companies and Industrial Association 2008 was jointly published by eleven industrial associations, which include coal, mechanics, petroleum and chemical, light industry, non-ferrous metals, and etc. More details can be found 'The Social Responsibility Guide of the China Industrial Companies and Industrial Association', China industry News, 16<sup>th</sup> April, <http://www.cinn.cn/show.asp?ClassID=33&id=44792>

<sup>59</sup> Lin, Li-Wen, 'Corporate social responsibility in China: Window dressing or structural change.' Berkeley J. Int'l L. 28 (2010): 64.

<sup>60</sup> Ibid

Standards. After all, it is the first step for them to guide corporate social performance themselves, rather than merely copy and follow standards from others. It shows consensus for achieving social harmony through responsible corporate activities has been increasingly accepted by society.

## **6. Corporate Social Responsibility and the Information Disclosure**

The disclosure of corporate social performance plays an important role in the implementation of CSR. The disclosure of CSR allows public to monitor the companies' performance on social responsibilities. In some developed countries, the company is obliged to provide a review on its social performance to the public. For example, the UK Companies Act 2006 requests the directors to provide 'a fair review of the company's business and a description of the principal risks and uncertainties facing the company'<sup>61</sup> to help the member of the company 'access how the directors have performed their duty under Section 172<sup>62</sup>'.<sup>63</sup> In China, apart from the voluntary business review, Chinese government also launched some CSR disclosure initiatives.

In 2007, the State Environmental Protection Administration (SEPA)<sup>64</sup> released the Regulation on Environmental Information Disclosure, which requests the environmental

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<sup>61</sup> UK Company Act 2006, Section 417 (3)

<sup>62</sup> Ibid, Section 172 is about the directors' duty to promote the success of the company as a whole, which requests the directors to create value for shareholders and also take care of the interests of the stakeholders.

<sup>63</sup> Ibid Section 417 (2)

<sup>64</sup> The State Environmental Protection Administration has already been changed to the Ministry of Environmental Protection of China now.

agencies and heavy-polluting companies to disclose certain environmental information to the public.<sup>65</sup>

The two stock Exchanges in China, the Shanghai Stock Exchanges and the Shenzhen Stock Exchanges also respectively released their guides on listed companies' corporate social responsibility. The Shenzhen Stock Exchanges released its Guide in 2006 first to meet the 'purposes of achieving scientific development, building a harmonious society, advancing toward economic and social sustainable development, and promoting corporate social responsibility.'<sup>66</sup> Later, the Shanghai Stock Exchange also released its 'Guide on Environmental Information Disclosure for Companies Listed on the Shanghai Stock Exchange' and 'Notice on Strengthening Social Reprehensibility of Listed Companies ' in 2008 to require certain public companies to report their environmental performance to the public and encourage all the companies to add a CSR report into their annual financial reports.<sup>67</sup> In the fiscal year of 2008, there were 290 listed companies publishing their CSR reports in the Shanghai Stock Exchange.

All these CSR disclosure initiatives shows the attitude of the administrations. CSR is used as a tool to build up a harmonious society and the disclosure of CSR performance is a good method for the public and the government to monitor the companies social performance. The disclosure enhances the transparency of companies' social performance

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<sup>65</sup> P.R China Regulation on Environmental Information Disclosure 2007. The Regulation states two kinds of disclosure: the voluntary disclosure and the mandatory disclosure. All companies are encouraged to voluntarily disclose the information on their social performance on environment, however, the environmental agencies and heavy-polluting companies are mandated to disclose their environmental social performance.

<sup>66</sup> The Shenzhen Guide on Listed Companies' Social Responsibility 2006, Article 1

<sup>67</sup> The Shanghai Stock Exchange Guide on Environmental Information Disclosure for Companies Listed on the Shanghai Stock Exchange 2008 and Notice on Strengthening Social Reprehensibility of Listed Companies 2008

and it also helps to increase public participation to make a better supervision.

### **III. Corporate Social Performance and Chinese Food Industry's Practice**

#### **1.The Enforcement of CSR in China**

Although CSR has been advocated for few years in China, the performance of Chinese companies on social responsibilities is still far from satisfactory. The consecutive scandals on environmental problems and food safety issues, especially the Milk Scandal of 2008, reveal the bad practices of Chinese companies on socially responsible performance. In 2006, which was before the milk incident, research was conducted by China Customers Association showing the public's intense concern on the food safety issues. In the sample of 38,733 customers, 64.8 percent of customers worried about food safety problems in China, especially in relation to children's food, meat product and bean products.<sup>68</sup> It is undoubted that the eruption of the Milk Scandal of 2008 gave a fatal blow to China's food manufacturing, especially to dairy products manufacturing. Chinese customers tend to pay a higher price to buy a foreign brand infant milk, rather than the domestic brand. Consumers' confidence on China's dairy products manufacturing has been completely destroyed. It still remains a question when and how to rebuild customers' trust. After all, ethical value has not completely integrated into business value. CSR is a bolt on to the

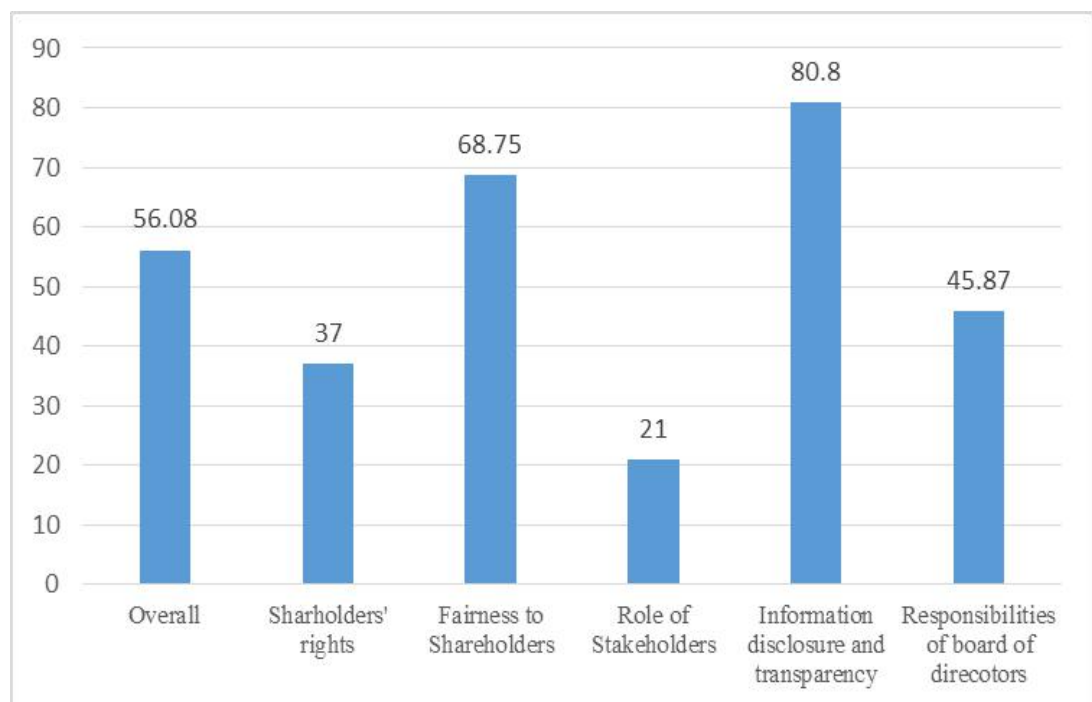
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<sup>68</sup> 'Public Perception on Food Safety', China Customers Association 2006, Beijing

business activities, rather than built into the business strategy in Chinese companies.<sup>69</sup>

Research on corporate governance assessment in respect of the top 100 Chinese listed companies was conducted by scholars to find out the companies' corporate governance performance in various section.<sup>70</sup> The performance in various sections is as follows:

**The score of companies corporate governance performance in the various sections <sup>71</sup>**



From the chart above, it is clear that the best performance is in the section of information disclosure and transparency, which has mandatory regulations to require company to comply. In other sections regarding the shareholders' interest, fairness to shareholders and shareholders' right, companies still have a fair performance. The worst performance

<sup>69</sup> Cheng, Hongming. 'Cheap Capitalism A Sociological Study of Food Crime in China', *British Journal of Criminology* 52.2 (2012): 254-273.

<sup>70</sup> Tong, Lu, Zhong Jiyin, and Kong Jie. 'Corporate Governance Assessment on the Top 100 Chinese Listed Companies'. No. 22023. East Asian Bureau of Economic Research, 2006.

<sup>71</sup> Ibid



section, role of stakeholders, reveals the fact that in practice a large portion of Chinese companies still take corporate social responsibility as a ‘flag’ bolted onto the business, rather than a built-in business strategy.

In Cheng’s research on the factors influencing food crime, the highest scored factor influencing food crime are ‘social culture, morals and values’; ‘lack of adequate enforcement’ and ‘everybody is doing it in the industry.’<sup>72</sup> It clearly shows the atmosphere of ethical and responsible behaviour is still absent in Chinese companies. Business values, such as profitability and efficiency, has not merged with ethical value, such as honesty, integrity, fairness and transparency. The business value is still prior to ethical value. In this kind of atmosphere, the company tends to choose irresponsible behaviour to gain the profits in the short time, because of the reasons that ‘everybody is doing it in the industry’ and ‘the lack of adequate enforcement of social responsible behaviour’. Therefore, it is clear to see Chinese companies have a poor social responsible performance in practice. There is still a long way to go to create the culture of ethical value and make it fully integrated into the business strategy in Chinese companies’ business activities.

## **2. Corporate Social Responsibility and Food Safety Industry in China**

Apart from the failure of the regulation, the consecutive food safety scandals in China are also the result of the private sector’s failure. The unethical and irresponsible business

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<sup>72</sup> Cheng, Hongming. ‘Cheap Capitalism A Sociological Study of Food Crime in China’, *British Journal of Criminology* 52.2 (2012): 254-273.

activities, leading the company to focus on the interest in a short term, rather than promote the interest of the company as a whole in a long term, sacrifice the stakeholders' interest and operate the company in an unsustainable way. Although CSR was put forward as a solution to the food safety problem in China, in practice, CSR is unlikely to work alone to solve the food safety problem. As discussed in the previous chapter, Chinese food safety is a comprehensive problem which involves social and economic factors, industrialisation, urbanisation as well as the economic transition; the environmental problem, environmental pollution and degradation; the legislative problem, lax and overlapping legislation, the systemic problem, weak implementation and poor compliance, as well as the irresponsible business activities. The failure of the private sector contributes to the food safety crises in China; however, it is not the only cause. Promoting CSR can help to reduce irresponsible and unethical business activities, so that it can ease the food safety problem to some extent. Nevertheless, it is not the only solution to Chinese food safety problems and CSR will not work alone without the public administration.

The contribution of promoting CSR in China is to guide Chinese companies toward to a responsible and sustainable way to achieve financial success in the long term. It also helps to ease the food safety problem and re-build the consumers' confidence in 'Made in China' brand, as well as to provide the support to harmonious society and sustainable economic development from the private sector.

## **IV. The Obstacles and Challenges to the Implementation of Corporate Social Responsible Performance in China**

Chinese companies still have a weak social responsible performance, although CSR is advocated by political policy and has been incorporated into the new company law. There are several main challenges to the implementation of CSR in practice.

### **1.The Obstacles and Challenges from the Company**

The first challenge is from company itself. Narrow corporate social responsibility, excluding company's economic and legal responsibilities, can be regarded as a voluntary behaviour. However, Chinese companies have not fully integrated ethical value into business value; when the two values conflict, the voluntary ethical value is likely to be sacrificed.

In addition, the limited capacity of small and medium enterprises also restrains the development of CSR. The number of small and medium enterprises (SMEs) increases dramatically in China. The statistics shows that by the end of 2011, there were more than 40 million SMEs, which accounted for more than 99.6 per cent of the total number of enterprises in China. The SMEs contributed 59 per cent of GDP and have already become an important role in the private sector in China.<sup>73</sup> However, some of SMEs are of very

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<sup>73</sup> Zhang, S.(2011), 'Establish an Effective Long-Term Food Safety System', China Food Additive, 3, 49-53

small scale, which are short of sufficient knowledge and essential technology for socially responsible performance. As Ying pointed out in his research, currently 72 per cent of food processing firm employ fewer than 10 workers.<sup>74</sup> Furthermore, a survey of 450,000 food producing companies found out that 29 per cent of these food producing companies did not have any production standards.<sup>75</sup> 60 per cent of them did not conduct quality checks of food products nor were they even capable of conducting self-inspections.<sup>76</sup> In Chinese food manufacturing, these SMEs account for the lion's share at the bottom of the food supply chain. The irresponsible behaviour and the unsafe products from the SMEs threaten the whole food industry and affect large companies directly. How to hold the SMEs accountable is crucial to the food safety problem in China. However, it is not a easy task to be fulfilled in this big country. There are two possible methods which are worth considering.

From the government's side, the local authority can consider enhancing education of CSR to help SMEs to improve their social performance. Adequate education helping SMEs to get sufficient knowledge is necessary to achieve the task of promoting CSR. In addition, the government can also consider launching a program of CSR investment, aiming to encourage more investors to invest funds in a company with a better CSR performance. This will help to build a bridge between the investors and the SMEs. The investors can have more opportunities to invest their money in a company with the potential of long-term growth, while SMEs can gain more financial support to develop their equipment

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<sup>74</sup> Ying, Feihu, 'Improvement of China's Information Exchange on Food Safety'. 5 Zhengzhi Yu Falu [J.POL.& L.] 24, 26 (2007)

<sup>75</sup> Miao, Junjie, Zhang, Yanran, and Wang, Yujuan, 'China's Food Safety Management Focuses on Food Supply', Liaowang, 23<sup>rd</sup> May 2007, available at <http://helath.sohu.com/20070522/n250158568.shtml>.

<sup>76</sup> Ibid

and technology to improve CSR performance. In the developed countries, socially responsible investing (SRI) has been developing very fast in the recent years. SRI assets increased from \$639 billion in 1995 to \$2.71 trillion in 2007 in the USA.<sup>77</sup> Meanwhile the SRI assets also increased fast in Europe, from 360 billion EUR in 2003 to 1.033 trillion EUR in 2005.<sup>78</sup> In this way, the investors become an important factor to press the company to engage in a better CSR performance. The Chinese government can learn a lesson from SRI to launch its own program of CSR investment to help SMEs to achieve success in a sustainable and responsible way. On the other hand, better CSR performance from SMEs can also help the government to achieve the goal of harmonious society. This is a win-win strategy for both the government and SMEs.

From the other side, the large company should be encouraged to build up its own safe and stable supply chain. The big company normally has sufficient funding and knowledge for achieving a better socially responsible performance. It can build up its own safe and stable supply chain by providing the supporting technology, knowledge as well as finance to the SMEs. In the Milk Scandal of 2008, the main cause of the melamine contaminated product for Sanlu group was lack of a sufficient supply of raw milk. The lack of a safe and stable supply chain forced the Sanlu company to reduce its standards and even turn a blind eye in order to get the sufficient supply of raw milk to maintain its normal manufacturing process. Therefore, building a safe and stable supply chain also benefits the large company. The large companies need to be encouraged to provide sufficient knowledge, equipment or

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<sup>77</sup> Executive Summary of 2007 Report on Socially Responsible Investing Trends in the United States, Social Investment Forum, can be available at [http://www.ussif.org/files/Publications/07\\_Trends\\_per cent20Report.pdf](http://www.ussif.org/files/Publications/07_Trends_per cent20Report.pdf)

<sup>78</sup> European SRI Study 2006, European Sustainable and Responsible Investment Forum, can be available at <http://www.eurosif.org/publication/european-sri-study-2006/>

technology to help SMEs, which are part of their supply chain. A fair trade price is also encouraged to support the sustainable development of SMEs. For large companies, the interest of supplier, as one of the stakeholder interests, needs to be considered, when they conduct the business. In the short term, building up a safe and stable supply chain might cost extra to large companies; however, it will be beneficial in a long term. After all, CSR is not about the profits in the short term; it is about the balanced and sustainable interests in the long term.

## **2. The Obstacle of the Ambiguous Legislation and Policy**

The vagueness in legislation and the political policy also contribute to the difficulties in the implementation of CSR. Although the political policy and company law both advocate corporate social responsibility, the language of company law and policy is very broad and general, which is short of enforcement in practice. CSR has already been incorporated into the Chinese legal system; however, the ambiguity and vagueness of the provisions lead to the gap between the legislation and the implementation. Which kind of CSR needs to be undertaken and what is the consequence if the company does not fulfil its social responsibility? Whether Article 5 of the Company Law is a legally binding provision or only an advisory provision? Some scholars consider it to be a mandatory provision while the others regard it as an exhortatory provision.<sup>79</sup> Even the directors are legally required to have the duty of good faith to consider of the interests of stakeholders when they make a

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<sup>79</sup> Lin, Li-Wen. 'Corporate social responsibility in China: Window dressing or structural change.' *Berkeley J. Int'l L.* 28 (2010): 64.

decision; however, in practice, there has been few reported cases that the directors are purely charged with breach of director's duties under current Company Law in the court.<sup>80</sup> Since the definition of the duty of good faith is still unclear and vague in Chinese legislation, it makes the provision very difficult to be adopted in the court in practice. All this uncertainty and vagueness of the legislation and political policy cause the difficulties in the implementation of CSR.

Nevertheless, the companies have a much better performance with regard to information disclosure and transparency in the listed companies, because the Shenzhen Guide 2006,<sup>81</sup> Shanghai Guide 2008<sup>82</sup> as well as the Notice on Strengthening Social Responsibilities of Listed Companies<sup>83</sup> give a very clear instruction on such information disclosure.<sup>84</sup>

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<sup>80</sup> Fu, Jenny, 'The 2008 China Milk Scandal and the Role of the Government in Corporate Governance in China,' available at <http://www.clta.edu.au/professional/papers/conference2009/FuCLTA09.pdf>

<sup>81</sup> The Guide on Listed Companies' Social Responsibility, Shenzhen Stock Exchange 2006

<sup>82</sup> Guide on Environmental Information Disclosure for Companies Listed on the Shanghai Stock Exchange 2008

<sup>83</sup> The Notice on Strengthening Social Responsibilities of Listed Companies, Shanghai Exchange Stock

<sup>84</sup> Under the scheme of the Shanghai Guide and the Notice, there are three kinds of disclosure: real-time disclosure of significant environmental events, special disclosure by blacklisted companies, and CSR annual reports. The former two are a mandatory request. The real-time disclosure of significant environmental events is to require a listed company to disclose the the information within two days when any of the following environmental events occur: significant investments in projects that have material environmental impact, significant investigations or punishments by the government because of environmental law violations, material litigations concerning environmental problems, being blacklisted by environmental agencies, announcement of a new environmental law or regulation that may have material impact on corporate operation, and any other events that may have significant impact on stock prices. The special disclosure by blacklisted companies is to require companies blacklisted by environmental agencies to disclose the information within two days of the announcement of the blacklist. The information disclosure needs to including the kinds, density, and quantity of pollutants, condition concerning environmental protection facilities, environmental emergency plans, and preventive measures concerning emission reduction. The CSR annual reports are encouraged to publish with companies' annual financial reports on the Shanghai Stock Exchange's website, which provides the suggestions about what to disclose, including the following information: environmental protection policies, annual goals, and performance; annual consumption of resources and energy; environmental investment and environmental technology development; the kinds, quantity, density and whereabouts of the pollutants; condition of environmental protection facilities; waste recycling; voluntary agreements on environmental improvement with environmental agencies; awards granted by environmental agencies; and other environmental information voluntarily disclosed. Social contribution per share, which comes from the idea of earnings per share, is also encouraged to disclose in the listed companies' annual

Therefore, the Chinese companies are able to achieve a better performance if they are given an explicit guide. In this case, the clear administrative regulations or guides on the CSR practice will help to reduce the vagueness in legislation and improve the implementation of CSR in practice.

### **3. The Weak Administration and Poor Compliance**

Furthermore, weak administration and poor compliance restrain the implementation of CSR in China as well. As discussed in the previous chapters, weak administration and poor compliance cause the ineffectiveness of the whole legal system in China. It is still very difficult to overcome the systemic weakness if there is no political and legal reform in China. However, it is very unlikely to see political reform in the near future in China. As a systemic problem, the ineffectiveness of the regulatory system will still remain. It means a new approach, instead of state-led approach, needs to be explored and adopted.

### **4. The Insufficient Public Participation and the Challenge of Shifting to a Citizen-driven Approach to CSR**

Last but not the least, insufficient public participation is also a challenge to the

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CSR report. More details about the request of CSR report can be found in '2008 Guide on Environmental Information Disclosure for Companies Listed on the Shanghai Stock Exchange' and 'The Notice on Strengthening Social Responsibilities of Listed Companies' from Shanghai Exchange Stock. Also see Lin, Li-Wen. 'Corporate social responsibility in China: Window dressing or structural change.' *Berkeley J. Int'l L.* 28 (2010): 64.



implementation of CSR. China does not have a deep tradition of civil society. Even in contemporary China, civil society is only emerging in the recent years. The influence of civil society is much weaker, compared to China's administration-oriented tradition.

However, the consumers, as an important stakeholders to companies, have a increasing impact on the market in these years in China. Especially the consumers from Eastern China, they start to have increasing demands in relation to the value of the products and service, as well as increasing concern on the companies' social performance and reputation. They are willing to spend more money over the product made in a social and environmental friendly manner, instead of buying cheap products from an infamous company. The consumers' choice can have a strong impact on the market and re-shape the companies' business behaviour. However, the consumers' power in the domestic market is still underestimated and public participation is also insufficient in China. Since the consumers' rights is a new concept to them, the consumers' awareness still needs to be increased.

Apart from consumers' power, the influence of NGOs has also been underestimated in China. The NGOs are still not allowed to file a lawsuit against companies' irresponsible behaviour due to the legal barrier from Article 108 of the Civil Procedure Law, 'the plaintiff must be a citizen, legal person, or an organisation having a direct interest with the case.'<sup>85</sup> Although the new 2014 Environmental Protection Law has make an innovation to allow NGOs to file a case on the environmental issues in the interests of the public, this innovation is still under experiment. In the other areas, for example the food safety issue,

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<sup>85</sup> P.R China Civil Procedure Law 2012, Article 108

the Chinese government does not give sufficient tolerance to allow NGOs to file a lawsuit in the court. Whether the innovation of NGOs' new role in litigation will be adopted beyond environmental protection or not is still uncertain.

In summary, public awareness of and participation in the implementation of CSR still needs to be enhanced in China. The current approach, the state-led approach, to the implementation of CSR has not achieved success in practice. The consecutive companies' scandals keep challenging the ethical value and socially responsible performance. It is time to establish a new approach which is driven by consumers and the public participation. The media, especially the emerging social media, can play an important role in increasing public awareness of CSR. Consumers' decisions can be used as an effective tool to guide the corporate social performance and re-shape companies' business activities. In order to achieve the goal of harmonious society and sustainable economic development, the government should encourage more public participation in the implementation of CSR, which would include the enhancement of NGOs' power. If the innovation of NGOs' new role in litigation is proved successful in environmental protection, the government can consider entitling NGOs to file a lawsuit in more areas against irresponsible corporate performance. The new citizen-driven approach can help to overcome the weak implementation under the current state-led approach to some extent and foster a boom of CSR performance in China.

## **V. Conclusion**

China has embraced some of the main elements of corporate social responsibility as a means of marketization and modernization of Chinese corporate bodies. This chapter has shown how only limited success has been achieved. Poor corporate social performance contributes to the consecutive companies' scandal and also has an impact on the food safety problem in China. However, on the other hand, the poor corporate social performance also becomes one of the factors accelerating the development of CSR in China. The consensus on ethical business value and responsible social performance has been achieved in China. The government switches the goal from purely economic growth to the harmonious society and sustainable economic development. The implementation of CSR is compatible with the government's new goal and can be used as a tool to achieve the harmonious society. Apart from the political factor, CSR also fits Chinese tradition and culture. Meanwhile, the pressure of market share and consumers' decisions, from both the international market and domestic market, contribute to the development of CSR in China as well.

The Chinese government embraces the concept of CSR and has incorporated CSR into the new company law. Moreover, the directors of the company are also legally required to fulfil the duty of good faith, considering the interests of the shareholders in decision-making, and promoting the success of the company as a whole in the long term.

However, the practice of CSR has not led to any profound changes to the culture of Chinese companies, since Chinese companies have still not completely integrated the concept of CSR into their business activities. The unethical and irresponsible business

operation is not rare in China. CSR is still treated as a bolt-on flag, rather than a built-in business strategy. CSR performance in practice is still far from satisfactory. In fact, CSR is too weak to change the culture of a company in China, because the implementation of CSR is too weak and fragmentary to be effective.

Current main obstacles to the implementation of CSR include the ambiguous legislation, weak administration, the difficulties of promoting CSR from the SMEs and the insufficient public participation and awareness. It is suggested to clarify the uncertainty and vagueness of the legislation to improve the implementation of CSR. The large companies are also encouraged to build a safe and stable supply chain by helping SMEs to conduct a responsible business operation. In addition, increasing public awareness and enhancing the public participation can largely improve the effectiveness of the implementation of CSR. Both consumers and NGOs can play an important role of re-shaping companies social performance. Although the citizen-driven approach will have a positive impact on the implementation of CSR, the current implementation of CSR still relies on state-driven regulation.

Overall, CSR is expected to provide a solution to address food standards and enhance effective implementation; however, corporate social responsibility does not appear to have created more effectiveness of food regulatory systems, due to its own weak implementation. The weak implementation of CSR limited its success in the food safety regulatory system. Therefore, CSR alone will not bring a profound change to the food safety problem in China. External administrative control is still necessary for upholding

the food safety standards. However, CSR is compatible with the goal of harmonious society and it provides a new model of the corporate governance, which can potentially change the culture of Chinese company in the future. Therefore, CSR still appears to help to create a healthy and responsible business environment for ensuring food safety in China. Working with external administrative control, CSR can help to ease the Chinese food safety problem to some extent.

## **Chapter 7 Conclusion**

### **I. Introduction**

The milk scandal in China is one of the most significant events in Chinese history in contemporary times. The analysis offered in the thesis has pursued a number of lines of inquiry. First, there is a clear link between the milk scandal and decisions at the highest levels of the state to reform and improve food safety. It is argued that this has come about because of international pressure and the growth in foreign imports into China with higher food safety and reliability than the Chinese market might provide. The thesis has shown how China has been enjoying the benefits of exceptional economic development for the past three decades. Its economic achievement is remarkable; however, the economic growth also comes with a lot of social problems. In Chapter 1, the introduction part of the thesis, it was shown that the food safety problem is one of the social problems that may act as a restraint on future economic development from a sustainable way, because of the public unease and disquiet about the reliability of food products. Especially the 2008 food safety scandal revealed the fragility of the Chinese food safety regulatory system, increasing the public awareness of the importance of food safety. Unsafe food products not only threaten the public health, but also adversely affect trading, both in the domestic and international market. Thus, for the sake of the public health and maintaining its economic growth in a sustainable way, ensuring food safety becomes a critical task for Chinese government nowadays. In the face of public disquiet it is possible to see that safety standards had profound political consequences for the stability of the state if left

unreformed. As Snyder has observed, the loss of public trust in regulation was serious.<sup>1</sup>

The Milk Scandal of 2008 provides an important case study of China's current food regulatory system. It raised public attention to the food safety crisis, and it also revealed the weakness of the food regulatory system in China. The Milk Scandal of 2008 engages the public sector, such as the legislation system, administration system and the judiciary system and revealed the fragmentary, ambiguous and conflicting legislation; the ineffective administration, the corruption problem as well as the relative absence of the judiciary system, all contribute to the failure of food regulation in China. It also examines the food safety problem in the context of social, economic and the environment and found that insufficient public participation, the failure of the private sector and environmental problems all have an impact on the food safety problem.

Therefore, the main findings of the thesis are set out below.

## **II. The Main Obstacles and Challenges facing the Chinese Food Safety System**

In Chapters 2 and 4 some of the main reasons causing the food safety problem are the ambiguous and incomplete legislation, the weak implementation and ineffective administration, the dependent and ineffective judiciary system, environmental degradation, unethical business practice and insufficient public participation. There is a growing awareness that China has begun to come to terms with environmental pollution and there is

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<sup>1</sup> Snyder, Francis, 'Food Safety Law in China: Making Transnational Law', p476-477, Brill Nijhoff, Boston, 2015

a growing crisis over the lack of effective environmental laws. The food crisis identified in 2008 was one of the first signs that China had to address public health issues.

### **1.Ambiguous, Inconsistent and Incomplete Legislation**

In Chapter 4, it was discussed that China's law-making organs are very complicated and not well designed, which causes the inconsistency and vagueness in the legislation. Under the vertical structure, the central departments may already have standards to apply. Meanwhile, at the local level the local authorities may have their own local rules or regulations to cover the same issue. From the horizontal level, different departments, Ministries, commissions, offices under the State Council have different standards.

In Chapters 3 and 4, we find that in the Chinese legislation on food safety, the Ministry of Agriculture, Ministry of Health and State Administration for Industry & Commerce may all have their own rules/standards on some food product. Different local rules/standards may also be applied in the different regions, due to the different levels of economic development. China's wealth from economic development has not been distributed evenly, which makes for a huge gap between rich and poor; north and south. Therefore, the local authorities are allowed to adopt and enact their own local rules or regulations according to their real region circumstances in practice. Sun points out in his research that the core of the current Laws, Regulations on food, food additives and food-related safety standards in China is composed of approximately 1,900 national food safety standards and over 3,100



industry standards, as well as more than 1,200 local standards,<sup>2</sup> which causes conflict in the implementation of food safety legislation and also brings difficulties in enforcement.

Furthermore, in Chapter 4, there was discussion of in China's current legal system, where the local regulations/ rules and the administrative rules made by ministries, commissions, bureaux under the State Council are inconsistent on the same matter, and there is still no rule regarding the application of conflicting rules and regulations. Such conflicts need to be brought to the State Council to decide. However, if the State Council deems the priority of the administrative rules, the Standing Committee of National People's Congress needs to be involved further. It makes the whole procedure really time-consuming.

In addition, Chapter 4 explained that political factors also affect the consistency of the legislation. China is not a democratic country according to Western values of the rule of law. According to China's Constitution, China is a communist country, led by the Chinese Communist Party (CCP).<sup>3</sup> It is not rare to see the phenomenon of 'the party above the law' everywhere. Political factors are commonly seen and play a crucial role in all state organs. Party branches are required to be instituted in all state organs at all levels, even in the court, which is supposed to be an independent organ. The legislative, administrative organs, judicial organs are all supposed to follow the leadership of the CCP. This means the policy of the CCP has more effectiveness than the law in practice. Policies above the law interfere

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<sup>2</sup> Sun, Xi, 'China's Food Safety in 2012-Assessing the Increased Risks', August 2012, Sustainalytics, available at [http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CC8QFjAA&url=http%2F%2Fwww.sustainalytics.com%2Fsites%2Fdefault%2Ffiles%2Fchinasfoodsafety\\_august2012\\_0.pdf&ei=R76uUYG4JuiS0QW5yIHQCA&usg=AFQjCNEFt6KdYQ7lv5Ugr9mbd8FiS8ZIOg&sig2=JzG9-qOtNUk8wyVZl7STow&bvm=bv.47244034,bs.1,d.d2k](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CC8QFjAA&url=http%2F%2Fwww.sustainalytics.com%2Fsites%2Fdefault%2Ffiles%2Fchinasfoodsafety_august2012_0.pdf&ei=R76uUYG4JuiS0QW5yIHQCA&usg=AFQjCNEFt6KdYQ7lv5Ugr9mbd8FiS8ZIOg&sig2=JzG9-qOtNUk8wyVZl7STow&bvm=bv.47244034,bs.1,d.d2k)

<sup>3</sup> PRC Constitution Law 2004

with the consistency of the law.<sup>4</sup> In practice, this kind of priority policy can be found at any level of the government, and on any subjects, such as food safety, environment and economics. To build a national rule of law, law must be kept consistent and no party's policy can be prior to the law. However, to achieve this, China still has a long way to go.

## **2. The Weak Implementation and Ineffective Administration**

Chapters 3 and 4 explained the reasons for weak implementation and ineffective administration. This is due to several factors. First of all, China's food safety administrations are very complex and overlapping. China has a centralized administrative system, which consists of the central government in Beijing and local governments at diverse level across the country.<sup>5</sup> In the central administrative system, the State Council consists of Ministries, Commissions, and Administrations.<sup>6</sup> The State Council and other institutions are subject to supervision from the NPC (National People's Congress).<sup>7</sup> Local governments are subordinate to the central government.<sup>8</sup> At local level, a hierarchy of four levels of government (in descending order exists): provinces, counties, cities and townships.<sup>9</sup> Each level reports to the next higher level.<sup>10</sup> Provinces report directly to the

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<sup>4</sup> The best example for 'policy prior to the law' is the 'Strike Hard' policy. This policy was initiated in 1983. It is an anti-crime campaign, believing that criminals should be dealt with 'severely, heavily and with no delay'. When the 'Strike Hard' campaign is operative, the same crime would receive a more severe punishment than normal.

<sup>5</sup> P.R.C Constitution Law 2004, Articles 95

<sup>6</sup> Ibid, Article 86

<sup>7</sup> Ibid, Articles. 67, 73, 92

<sup>8</sup> Ibid, Article 100

<sup>9</sup> Ibid, Articles 95-111

<sup>10</sup> Ibid

State Council.<sup>11</sup> Even though Provinces are of the same bureaucratic level as Ministries in Beijing, they are local governments according to the Constitution.<sup>12</sup> Like the structure of the State Council, each of the four levels of local government has various departments as well.<sup>13</sup>

As explained in Chapters 3 and 4, the current food safety mechanism is multi-layered and it is enforced by different departments at national, provincial and local level. In the central administration, State Food and Drug Administration (SFDA), the Ministry of Health (MOH), General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), the State Industrial and Commercial Administration (SAIC), the State Administration of Grain, the Ministry of Agriculture, the Ministry of Industry and information of Technology (MIIT) and the Ministry of Commerce (MOFCOM) together coordinate and supervise the food safety in China.<sup>14</sup>

At local level, the new Food Safety Law grants authority to the governments at county level and above to be in charge of food safety administration in their respective jurisdictions.<sup>15</sup> Within each level of local government, the Food Safety Law also requires the departments of health, agriculture, quality control, industry and commerce, and food

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<sup>11</sup> Ibid

<sup>12</sup> Ibid, article 95

<sup>13</sup> Ibid, articles 95-111

<sup>14</sup> Sun, Xi, 'China's Food Safety in 2012-Assessing the Increased Risks', August 2012, Sustainalytics, available at [http://www.google.co.uk/url?sa=t&ret=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CC8QFjAA&url=http%2F%2Fwww.sustainalytics.com%2Fsites%2Fdefault%2Ffiles%2Fchinasfoodsafety\\_august2012\\_0.pdf&ei=R76uUYG4JuiS0QW5yIHQCA&usg=AFQjCNEFt6KdYQ7lv5Ugr9mbd8FiS8ZIOg&sig2=JzG9-qOtNUk8wyVZl7STow&bvm=bv.47244034,bs.1,d.d2k](http://www.google.co.uk/url?sa=t&ret=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CC8QFjAA&url=http%2F%2Fwww.sustainalytics.com%2Fsites%2Fdefault%2Ffiles%2Fchinasfoodsafety_august2012_0.pdf&ei=R76uUYG4JuiS0QW5yIHQCA&usg=AFQjCNEFt6KdYQ7lv5Ugr9mbd8FiS8ZIOg&sig2=JzG9-qOtNUk8wyVZl7STow&bvm=bv.47244034,bs.1,d.d2k)

<sup>15</sup> Food Safety Law 2009, article 5

and drugs to coordinate with each other to enforce its provisions.<sup>16</sup>

So many administrative supervisions with ambiguous and inconsistent standards and rules cause the overlap and ineffectiveness of the administration.

Secondly, Chapter 2 and 4 discussed the fact that local protectionism also threatens the effectiveness of the food safety legislation in China. As it is impossible for the central government to inspect nearly four million food processing firms throughout the country in practice, the main participator in food inspection is local government. It is the local government that determines the success of ensuring food safety and quality. However, local governments sometimes are not so competent in monitoring the local enterprises, due to local protectionism and pursuit of GDP. The local authority is regarded as having the primary role of developing local economies after China's open and reform policy.<sup>17</sup> Then local government always tends to support its local companies to protect the local economy and gain more tax revenue. Especially in a case involving a big local company, the local government sometimes even is blind to their small violations, because the big companies make great contributions to the local tax revenue as well as the local GDP, which is the main criterion for assessing the local official's performance. The local government officials are appointed by the higher level directly, rather than election. Good GDP figure can bring more opportunities of promotion. Thus, the local officials seek for every chance to increase the local GDP to create economic miracles. Tax revenue, together with GDP figure, lead to the local protectionism, which adversely affects the effectiveness of the

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<sup>16</sup> Food Safety Law 2009, article 6

<sup>17</sup> Liu, Chenglin, 'The Obstacles of Outsourcing Imported Food Safety to China', available at [www.lawschool.cornell.edu/research/ilj/upload/liu.pdf](http://www.lawschool.cornell.edu/research/ilj/upload/liu.pdf)

administration.

Thirdly Chapter 2 and 4 also discussed the corruption problem, which restrains the Chinese food safety administrative system from effectiveness. The role of Mr Xiaoyu Zheng, the former director of the State Food and Drug Administration (SFDA), illustrated how corruption ruins the food safety administrative system in China. However, corruption is a systemic problem in China, with a very long history. China is short of a democratic system and no other party has a supervising role under the sole leadership of the Chinese Communist Party. It is very difficult to root out corruption from China: only internal supervision from the Chinese Communist party itself would be ineffective. Although President Xi Jinping's anti-corruption campaign has deterred to corruption and has a positive effect in a short period of time; in the long term, however, it is still not clear how long this influence will last.

### **3. The Absence of the Independent and Effective Judiciary System**

Chapter 4 and 5 discussed the absence of the independent and effective judiciary system in contemporary China.

First of all, due to the financial and personnel structures, the court in China has a tight link with the administrations. The court has to rely on the local government for finance. Under the current system, the court has not been allocated a budget from its own funds. In practice, the funding of the courts is from the budget of the local administration. That

means the local administration has the power to cut the spending on courts. The extreme dependence on local administration's financial support makes the courts not willing to challenge the local authority.

Furthermore, as creatures of local government, Upham argues that Chinese judges 'are fully integrated into local personnel structures.'<sup>18</sup> According to China's Organic Law of the People's Courts 2006, presidents of local people's courts at various levels are elected by the local people's congresses at corresponding levels, and their vice-presidents, chief judges and associate chief judges of divisions, as well as the common judges, are appointed and removed by the standing committees of the local people's congresses at corresponding levels.<sup>19</sup> The term of office of presidents of people's courts at all levels is the same as that of people's congresses at corresponding levels.<sup>20</sup> The pressure from the personnel structure forces the courts to make judicial judgments favouring their local government.

The dependence on both this financial and personnel structure is extremely damaging to judicial independence. In practice, sometimes the court has to make a judicial decision favouring the local authority, which does not help to restrain local protectionism and also harms the enforcement of foods safety legislation.

Secondly, apart from the financial and personnel factor, the political factor is another

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<sup>18</sup> Upham, Frank K., 'Reflections on the Rule of Law in China', *National Taiwan University Law Review*, March 2011, Volume 6, Number 1, P261

<sup>19</sup> Organic Law of the People's Courts of the People's Republic of China 2006, Article 35

<sup>20</sup> Ibid, Article 36

important one to interfere with judicial independence. As a communist country, the court is also under the leadership of Chinese Communist Party. Political departments are set up in the courts in China and the judges are supposed to follow the Chinese Community Party's political policy. Political stability is regarded as the priority. The judge is required to consider social stability prior to the statutory provisions when they make a judicial decision. Although in some rare cases, the judge, regardless of the political policy, makes his/her own judicial decision, the judgment still needs to be endorsed by the president of the court or a chief judge of a division of the court first and then must receive their signature to the judgment. Otherwise, the judgment will not be valid. Furthermore, the adjudicative committee may interfere with the decision-making process, when the adjudicative committee thinks it is an important or difficult case. Sometimes, when the case is considered to be sensitive, the courts even refuse to file the case. In the Milk Scandal of 2008, a number of courts refused to file a lawsuit for the reason of 'waiting for the political instruction'.

Thirdly, lack of proper legal education for judges and professional standards in courts also contributes to the ineffectiveness of China's judiciary system. Obtaining a law degree was not a compulsory requirement for judges in China before 1995. Many retired military officers could be recruited as a judge directly. These poor professional standards hamper the development of the courts system. However, this defect has already been detected and all applications to be judges after 2002 need to pass the national bar examination. This compulsory condition for qualifying as a judge has greatly improved the legal professional levels, and it has a positive impact on the reform of Chinese courts system.

Apart from the systemic defects mentioned above, the Milk Scandal of 2008 also explores the food safety problem in the environmental, social and economic context and reveals the environmental problems, and insufficient public participation, as well as the failure of the private sector. All these have an impact on the food safety problem.

#### **4. Environmental Degradation and Pollution Problems**

Chapter 5 discussed the environmental problem in China in so far as it presents serious challenges for China's food supply chain and sustainable economic development. The degrading of the environment and the over-exploitation of natural resources reduce agricultural productivity. In order to increase agricultural productivity and feed its own people, land in China has to be used more intensely. The massive use of pesticides, antibiotics and fertilisers in agriculture in China has resulted in the further degrading of the environment. Therefore, the deteriorating environment threatens China's food safety system directly, since as the bottom of the food supply chain, agriculture fails in its mission of providing safe agricultural products for further processing. In addition, it is estimated that air pollution costs up to \$US300 billion a year<sup>21</sup> and has caused around 350,000 and 500,000 Chinese to die prematurely each year.<sup>22</sup> The high level of the water pollution has made one-third of the water in the Yellow River, which is known as the

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<sup>21</sup> 'Air pollution costs China \$US300b a year', available at <http://www.sbs.com.au/news/article/2014/03/25/air-pollution-costs-china-us300b-year>

<sup>22</sup> 'China's 'airpocalypse' kills 350,000 to 500,000 each year', available at <http://www.telegraph.co.uk/news/worldnews/asia/china/10555816/Chinas-airpocalypse-kills-350000-to-500000-each-year.html>



mother river to Chinese, unfit for drinking or even agricultural purpose.<sup>23</sup> The water crisis was estimated by the World Bank to cost China around 2.3 per cent of GDP in 2009.<sup>24</sup> Therefore, the environmental problem, threatening food safety and harming the public health, has already become the big challenge to China's sustainable economic development. China is facing a tipping point in its environmental problem.

The current environmental legislation in China suffers the same systemic difficulties as the food safety legislation. The legislation is ambiguous and incomplete; there is an absence of the independent judiciary system; and there is also the weak implementation and ineffective administration.

The language used in the environmental statutes in China is often criticised as being too vague and broad. The ambiguous statutory provisions lead to lax enforcement and difficulties over implementation. In addition, sufficient guidance is also absent on the procedures in practice.<sup>25</sup> The lack of relevant supporting procedural requirements leads to difficulties in implementation and compliance in practice.<sup>26</sup> A good example is the Law on Prevention and Control of Environmental Noise Pollution 1996 which still has no relevant implementing regulations, so causing lax enforcement. Without effective implementation, these provisions are more like a catchword.

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<sup>23</sup> 'One-third of China's Yellow river 'unfit for drinking or agriculture'', available at <http://www.theguardian.com/environment/2008/nov/25/water-china>

<sup>24</sup> The Economist 12th October 2013, P66

<sup>25</sup> Beyer, Stefanie. 'Environmental law and policy in the People's Republic of China.' Chinese Journal of International Law 5.1 (2006): 185-211.

<sup>26</sup> Sun, Y.H. 'Research on Improving the Quality of Environmental Legislation', J. Environ. Prot. 2004,8, 3-11

Moreover, the immature design of the environmental legal framework causes the overlap of provisions in some fields, whereas in some other fields the provisions are absent. As Mu points out, in the old version of the old Environmental Protection Law<sup>27</sup>, 31 articles out of the total 47 articles were also repeated in other environmental pollution control laws. The repetition rate was 66 per cent, which showed the extensive overlap of the environmental legal statutory provisions. However, in some other fields, such as soil pollution control, toxic chemical management, nuclear safety, bio-security nature conservation, environmental damage compensation and some environmental technical specification and standards, the relevant provisions are still absent. <sup>28</sup>

Overall, the deficiencies of the statutory provisions lead to difficulties in implementation. China's environmental legal framework is still not yet complete. There is still a long way to go for the reform of the environmental legal system in China.

Besides the statutory deficiencies, weak implementation and poor compliance is also a main challenge to the effective environmental legal system in China. Weak implementation and compliance makes China's legislation look like 'no big mistakes but also no obvious effects.'<sup>29</sup> The lax administration and weak implementation should be blamed on the failure to fully implement environmental law in China. However, like the food safety legislation, the weak implementation is a systemic problem in China. The local protectionism, ineffective and overlapping administrative systems, as well as the

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<sup>27</sup> P.R. Environmental Protection Law 1989

<sup>28</sup> Mu, Zhilin; Bu, Shuchun and Xue, Bing, 'Environmental Legislation in China: Achievements, Challenges and Trends.' 2014 Sustainability 6, no. 12: 8967-8979

<sup>29</sup> Wang, J. 'Thirty Years Rule of Environmental Law in China: Retrospect and Reassessment', J. China Univ. Geo-Sci. (Soc.SCI.ED.)2009,9,P3-9

corruption problem, all contribute to the weak implementation and poor compliance. The dependent and ineffective judiciary system also restrains the environmental legislation from effectiveness.

## **5. The Unethical and Irresponsible Business Practice**

Chapter 6 finds that, apart from the failure of public administrative and control systems, food safety is also a failure of the private sector. The Chinese companies' unethical and irresponsible business activities cause the consecutive food safety scandals, which fail to fulfil companies' social responsibility and also fail to promote the company as a whole in the long term. China is under economic transition. Rapid economic growth brings with it intensive privatization, industrialization and urbanization. Business values, such as profitability, and efficiency, have not fully embraced ethical value, such as integrity, and fairness, in the business operation. Profits become the company's priority. According to a survey of 450,000 food firms, 29 per cent of them did not have any production standards.<sup>30</sup> In addition, 60 per cent did not conduct quality checks of food products nor were they even capable of conducting self-inspections.<sup>31</sup> Approximately 50 per cent of the firms lacked sanitation certificates or production licenses.<sup>32</sup> Many small food processing enterprises frequently changed locations to evade inspections.<sup>33</sup> Such irresponsible and unethical operation contributes to the consecutive food scandals in China and it also leads

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<sup>30</sup> Miao, Junjie, Zhang, Yanran, and Wang, Yujuan, 'China's Food Safety Management Focuses on Food Supply', Liaowang, 23<sup>rd</sup> May 2007, available at <http://helath.sohu.com/20070522/n250158568.shtml>.

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> Ibid

to Chinese companies being labeled as representing ‘low price, inferior quality of products and degraded social morality and business ethics’, which is regarded as ‘cheap capitalism’.<sup>34</sup>

## **6. Inadequate Citizen Participation**

Chapter 4 and 6 discuss that in the contemporary Chinese food safety legislation framework, the scope of public participation is not well developed. The role of citizens is underestimated. The influence of civil society is still much weaker, compared to China’s administration-oriented tradition. In fact, the consumers’ choice can be used as an effective tool to ensure food safety. However, the consumers’ power in the domestic market is still underestimated and public participation is also insufficient in China. Since consumers’ rights are a new concept to them, consumers’ awareness still needs to be increased.

Furthermore, the influence of NGO has also been underestimated in China. Non-Government Organisations (NGOs) can play an active role in food safety problems, due to their capacity of finance and specialized knowledge. However, the role of Chinese NGOs in addressing the food safety problem has been restricted in China. An NGO is not allowed to file a lawsuit against companies’ irresponsible behavior due to the legal barrier from Article 108 of the Civil Procedure Law-‘the plaintiff must be a citizen, legal person, or an organisation having a direct interest with the case’.<sup>35</sup>

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<sup>34</sup> Cheng H. ‘Cheap Capitalism A Sociological Study of Food Crime in China’, [J]. British Journal of Criminology, 2012, 52(2): 254-273.

<sup>35</sup> P.R China Civil Procedure Law 2012, Article 108

In addition, the administration-led approach also restrains the role of public participation. The administrative departments lead the legislative work under the current legislative framework. In the past 20 years, 75 per cent-85 per cent of the bills were proposed by the administrative departments of the State Council.<sup>36</sup> The relevant departments lead the legislation. The public, however, has a very limited opportunity to participate in the legislation. Apart from consultation on legislation, the relevant data and information are still not open to common people. The lack of transparency further restrains the role of public participation.

In summary, public awareness and participation, including NGOs, still need to be enhanced in China.

### **III. The Way forward to a More Effective Food Safety Implementation System in China**

#### **1. Legislation and Administration**

Chapter 4 discusses that there are too many law-making organs and administrations in China. The overlapping regulations cause ineffectiveness in administration. The reform of the overlapping standards and multi-layered administration of food safety has been advocated for a long time. China's revised draft of a new food safety law was released on

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<sup>36</sup> Mu, Zhilin; Bu, Shuchun and Xue, Bing, 'Environmental Legislation in China: Achievements, Challenges and Trends.' 2014 Sustainability 6, no. 12: 8967-8979

the National Peoples's Congress website, asking for public comments until 31 July 2014.<sup>37</sup>

The Chinese central government has launched a new scheme to improve the effectiveness of the food safety legislation.

Under this new scheme, the China Food and Drug Administration (CFDA) would replace the current large number of overlapping regulators, to oversee food safety and regulation in China. It will replace the old food safety administrative system, which used to be under the supervision of the Departments of health, agriculture, quality supervision, industry and commerce administration. Now the CFDA would take over the role of these overlapping regulators with an entity similar to the Food and Drug Administration of the United States. The CFDA would also be elevated to ministerial level to report directly to the State Council.<sup>38</sup> The CFDA is supposed to combine the function of the existing State Council's Food Safety Office, China's State Food and Drug Administration (SFDA) and the other food supervisory bodies, such as the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) and the State Administration for Industry and Commerce (SAIC). The CFDA will in charge of all aspects of the food and drug safety, from production to consumption.<sup>39</sup>

Moreover, the revised draft also clarified that the CFDA will be the main agency to control food safety matters relevant to production, distribution and consumption of food. The Ministry of Health (MOH) is in charge of risk assessment and establishing national food

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<sup>37</sup> China's New Food Safety Law Draft [http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2014-06/30/content\\_1869695.htm](http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2014-06/30/content_1869695.htm)

<sup>38</sup> Beckett, Nick and Pountney, David, 'Consolidation of the China Food and Drug Administration', available at <http://www.lexology.com/library/detail.aspx?g=20a4e134-7414-4f4d-88d5-d7dd36d800a7>

<sup>39</sup> Ibid

safety standards. The AQSIQ is responsible for the supervision of the food imports and exports. These changes clarified the responsibilities among the different departments and help to reduce the multi-layered administration and overlapping standards.

This reform was regarded as a solution to the overlapped supervision and standards. It is a big step for the reform of Chinese food safety system.

## **2. Local Protectionism**

Chapter 2 and 4 discussed the fact that local protectionism restrains the effectiveness in the implementation of the food safety law. Since in China local government officials are appointed by the higher level directly, rather than election. It is unlikely to see them change their behaviour pattern to sacrifice the local revenue and GDP figure so as to be responsible to the local community and sustainable development, as long as the current cadre evaluation system remains. After all, a good GDP figure and more tax revenue means better opportunities of promotion. However, this unsustainable economic development brings a lot of social problems and threatens social stability. On becoming fully aware of the public discontent and unrest caused by the current model, the Chinese government began to switch its goal from the economic priority to sustainable economic development. The harmonious society, mentioned in chapter 6, has been put forward as a tool to keep the balance between the economic development and the social problems.

Chapter 5 explains that in order to switch the behaviour model of local officials, the Chinese government has added an environmental protection target to the traditional cadre evaluation system. Local officials at each level are asked to be accountable for binding energy targets in the annual evaluations.<sup>40</sup> It is the first time the environmental protection policy has been stressed in the national five-year plan, in which only priority policies, such as economic growth, social stability and one-child policy had been mentioned before. The environmental and energy target is used as a tool to minimise social unrest and to achieve social harmony.

However, at this stage, food safety has not yet been added as an index in official's annual evaluations. The environmental target, at least, provides a precedent and a new thinking in the implementation of food safety law. The index of food safety could be considered to be added as Green GDP, mentioned in chapter 4, to the officials' cadre evaluation in the future, if the environmental target works.

### **3. Judiciary**

An independent judiciary system is necessary to the rule of law in any country. However, chapter 4 found that under current financial and personnel structures in China, the court is constrained by its corresponding local administrative organs due to its financial and personnel structure. The court is forced to make the administrative organ's preferred judgment, rather than reaching the judgment independently. As independent judiciary

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<sup>40</sup> Wang, Alex, 'The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China', 37 Harvard Environmental Law Review p368-369



system can not be established, without the independent financial and personnel structures. A feasible reform is to free court from the control of the administrative organ. Separate budgets for the court need to be set up and 'life-long term' tenure needs to be introduced.

As to the influence from politics, it is unlikely that this will be completely rooted out from the judiciary system in the near future, unless the Chinese Communist Party is willing to launch a political reform to change the whole system.

#### **4. Environmental Protection**

Chapter 5 discusses that under the great public pressure and disquiet the Chinese government adopted its new Environmental Protection Law in 2014, aiming to address a new approach to environmental protection and increase the effectiveness of the current environmental legislation. The 2014 Environmental Protection Law introduced some innovations. It embraces the concept of sustainable development and grants priority to the environmental protection, requiring a balance between economic development and environmental protection.<sup>41</sup> First of all, the most important change the 2014 Environmental Protection Law brings is to highlight the role of public participation and shift the state-centred approach to the citizen-driven approach, to overcome systemic problems, such as weak implementation and poor compliance. It has made the first step to entitle NGOs to file lawsuits in order to sue for redress. This is an innovation in the current

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<sup>41</sup> Wang, Alex, 'The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China', 37 Harvard Environmental Law Review p367-439

Chinese legal system. Secondly, the 2014 Environmental Protection Law increases transparency, regulating information disclosure to the public. Thirdly, the 2014 Environmental Protection Law increases the liabilities for the polluters. The new law introduces a new regime of fines, which may accumulate fines for the polluters on a daily basis.<sup>42</sup> Fourthly, the 2014 Environmental Protection Law also increases liabilities for the state and administrators to ensure they fulfil their environmental duties properly. The attainment of environmental protection targets will be taken into account in the local government departments and officials' performance evaluations, which will be open to the public.<sup>43</sup>

The 2014 Environmental Protection Law attempts to create a more effective environmental legal system to allow China to balance environmental protection and economic development so that China can achieve its social harmony and sustainable development. Since the new law was only implemented from 1<sup>st</sup> January 2015, it is still too early to predict whether the law works or not in practice. However, this new law sets a new direction for China's environmental legislation and launches the new approach, citizen-driven approach, to encourage greater public participation. These innovations can be regarded as a positive step that the Chinese government has made towards an effective environmental protection framework.

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<sup>42</sup> P.R. China Environmental Protection Law 2015, Article 59

<sup>43</sup> Ibid, Article 26

## **5.Ethical and Responsible Business Operation**

In Chapter 6, it was seen that unethical and irresponsible business operation challenges public confidence in ‘Made in China’ products; however, on the other hand, the consecutive company scandals also raise public awareness of the importance of corporate social responsibility (CSR). The company is expected to consider the interests of the different stakeholders, such as consumers, suppliers, environment and the community, rather than the maximisation of the shareholders’ interest only. CSR also can be used as an important tool to achieve the harmonious society and provide the support to sustainable economic development from the private sector.

Unethical and irresponsible business activities, leading the company to focus on short-term interests, rather than promote the interest of the company as a whole in the long term, sacrifice the stakeholders’ interests and operate the company in an unsustainable way. Since China’s food safety problem is a comprehensive problem, CSR is unlikely to work alone to solve it; however, promoting CSR can help to reduce irresponsible and unethical business activities, so that it can ease the food safety problem to some extent. The contribution of CSR is that it requires the company to consider the interests of the stakeholders. Promoting CSR in China can help to guide the Chinese companies towards a responsible and sustainable way to achieve financial success in the long term. From this perspective, CSR can contribute to ease the food safety problem and re-build the consumers’ confidence in the ‘Made in China’ brand, as well as to provide support to the harmonious society and sustainable economic development from the private sector.

## **6. Transparency and Public Participation**

Chapter 5 and 6 found that public awareness and participation in the implementation of food safety still need to be enhanced in China. The current approach, the state-led approach, to the implementation of food safety has not achieved success in practice. It is time to build up a new approach which is driven by intensive citizen participation. The media, especially the emerging social media, can play an important role in increasing public awareness. Consumers' power can be used as an effective tool to achieve the success of the food safety system in China. In order to achieve the goal of harmonious society and sustainable economic development, the government should encourage more public participation and also enhance the power of NGOs. If the innovation of NGOs' new role in litigation is proved successful in environmental protection, the government can consider entitling NGOs to file a lawsuit in the more areas, such as the food safety area. The new citizen-driven approach can help to overcome the systemic weakness under the current state-led approach to some extent, and establish a successful food safety framework in China.

Lifting the legal barrier to litigation, enhancing the transparency of information and encouraging wider public participation, to build a citizen-driven approach is what food safety law can learn from the 2014 new Environmental Protection Law.

There have also been important administrative/governance reforms that include, in 2009,

the establishment of a Food Safety Risk assessment Expert Commission, a year later the Food Safety Committee (FSC) and a joint endeavour by the various Ministry of Health and Agriculture departments known as AQSIQ, as well as the Ministry of Commerce SAIC and the State Food and Drug Administration. These are welcome developments, especially around the categorisation of risk, and the experience of risk assessment has become an important feature of the new arrangements. In 2011 China established the National Center for Food Safety and Risk Assessment. Two years later at the National Peoples Congress a new China Food and Drugs Administration was established known as CFDA, acting as an overall co-ordinator. In 2014 after much consultation China moved to a new Food Safety Law which was adopted on 24th April 2015 and the new law came into effect in October 2015. Overall under the guidance of Risk Assessments, the Ministry of Health is going to play a leading role with the CFDA. Although centralised reforms may struggle at a local provincial level , the provisions of the new law are expected to apply at provincial level but subject to oversight by central government. Despite real grounds for optimism there are some potentially intractable challenges.

Changes in business attitudes will take some time. Also cultural changes need time to adjust to legal rules and their adjustment. All this takes time. China's sense of pride and importance will ultimately drive forward standards and create better food safety.

Finally, and in summary, as the thesis has shown, ensuring food safety is a crucial task for the Chinese government. It is also a key to achieving the harmonious society and sustainable economic development. There will be various challenges to accomplishing this

task. It is still a long way to go for China to realise its 'Chinese dream'.

The lessons of the food safety scandal are clear for all to see. Public disquiet over a failure in regulatory systems was not sufficient on its own to achieve rapid and effective government action. It was the pressure from international organisations and corporate engagement with international companies that contributed to more effective outcomes. Perhaps this analysis has the greatest significance in terms of settling future engagement between China and the international community.

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