

NOTES

MAXIMIZING CHINESE IMPORTS' COMPLIANCE WITH UNITED STATES SAFETY AND QUALITY STANDARDS: CARROT AND STICK FROM WHOM?

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All parties (federal, state, and local governments, foreign governments, foreign producers, foreign exporters and the importing community) involved in the import life cycle need to work together to prevent unsafe products from entering the United States[.]

—Interagency
Working Group on Import Safety¹

I. INTRODUCTION

The year of 2007 witnessed massive recalls of Chinese-made products in the United States (“U.S.”). High-profile recalls involved toys containing excessive or high levels of lead,² defective tires,³ melamine-tainted pet foods,⁴ toothpaste containing diethylene glycol (a poisonous chemical),⁵ and contaminated fish.⁶ Over 47 million product units of Chinese imports

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¹ INTERAGENCY WORKING GROUP ON IMP. SAFETY, ACTION PLAN FOR IMPORT SAFETY: A ROADMAP FOR CONTINUAL IMPROVEMENT 7 (2007), <http://www.importsafety.gov/report/actionplan.pdf> [hereinafter IMP. SAFETY GROUP, ACTION PLAN].

² Consumer Product Safety Commission (CPSC) recalled over 22 million Chinese product units due to excessive or high levels of lead (e.g., toys, children’s jewelry, cartoon character address books and journals). See CPSC, RECALLS AND PRODUCT SAFETY NEWS, <http://www.cpsc.gov/cpscpub/prerel/prerel.html>.

³ In June, the National Highway Traffic Safety Administration (NHTSA) ordered Foreign Tire Sales, Inc., an importer, to recall up to 450,000 tires (later reduced to 255,000 tires) made in China that may have had insufficient or missing gum strips. Associated Press, *Importer Recalls 255,000 Chinese-Made Tires*, USA TODAY, Aug. 9, 2007, available at http://www.usatoday.com/money/autos/2007-08-09-tire-recall_N.htm.

⁴ In March 2007, the Food and Drug Administration (FDA) issued warnings on certain tainted pet foods from China that sickened and killed many cats and dogs in the United States. FDA, PET FOOD RECALL (MELAMINE)/TAINTED ANIMAL FEED (updated Feb. 6, 2008), <http://www.fda.gov/oc/opacom/hottopics/petfood.html>.

⁵ FDA, IMPORTED TOOTHPASTE (updated Oct. 9, 2007), <http://www.fda.gov/oc/opacom/hottopics/toothpaste.html>.

⁶ In August 2007, FDA issued an alert, detaining farm-raised catfish, basa, shrimp, dace, and eel products from China because of the discovery of unapproved drug residues and food additives. FDA, IMPORT ALERT #16-131, "DETENTION WITHOUT PHYSICAL EXAMINATION OF AQUACULTURED CATFISH, BASA (PANGASIU SP), SHRIMP, DACE, AND EEL PRODUCTS FROM THE PEOPLE’S REPUBLIC

were recalled by the Consumer Product Safety Commission (“CPSC”), accounting for over 42.7% of the 110 million product units recalled in the U.S. in 2007.⁷

The alarming spate of recalls triggered an unprecedented crisis of consumer confidence with regard to “made-in-China” products.⁸ These recalls have also raised concerns about the quality control and supply chain management practices of the U.S. importing community, and the effectiveness of the U.S. import safety system.⁹ Consumer advocacy groups and industry groups are pushing for tighter and uniform regulations for import safety.¹⁰ For example, the Toy Industry Association proposed a new industry-wide toy safety assurance program that includes manufacturer/designer product hazard analysis and/or risk assessment, third-party process control audits using standardized testing procedures, and third-party certification using standardized laboratory criteria.¹¹ U.S. politicians and regulators responded by calling for tighter safety standards,¹² increased penalties for violators of food and product safety

OF CHINA DUE TO THE PRESENCE OF NEW ANIMAL DRUGS AND/OR UNSAFE FOOD ADDITIVES” (Aug. 3, 2007), http://www.fda.gov/ora/fiars/ora_import_ia16131.html.

⁷ Over sixty percent of the 472 voluntary consumer product recalls obtained by CPSC in 2007 involved imports from China. See CPSC, 2007 PERFORMANCE AND ACCOUNTABILITY REPORT 3, 11 (2007), <http://www.cpsc.gov/2007par.pdf>; see also CPSC, RECALLS AND PRODUCT SAFETY NEWS, *supra* note 2 (follow “Country of Manufacture” hyperlink, and then follow “China” to see recent results).

⁸ Dali L. Yang, *Total Recall*, 94 NAT’L INT. 42, 42–49 (2008), available at <http://www.nationalinterest.org/Article.aspx?id=16996>.

⁹ INTERAGENCY WORKING GROUP ON IMP. SAFETY, PROTECTING AMERICAN CONSUMERS EVERY STEP OF THE WAY: A STRATEGIC FRAMEWORK FOR CONTINUAL IMPROVEMENT IN IMPORT SAFETY 6–8, available at <http://www.importsafety.gov/report/report.pdf> [hereinafter IMP. SAFETY GROUP, STRATEGIC FRAMEWORK].

¹⁰ The Grocery Manufacturers Association, the food industry’s largest trade group, proposed tighter federal oversight of imported foods and ingredients. Jane Zhang, *Food Makers Get Appetite for Regulation*, WALL ST. J., Sept. 17, 2007, at A2.

¹¹ The process control audit of a factory covers its quality management system, the factory facilities, resource management, incoming material control (including supplier management, material specifications, and incoming inspections), process and production control, testing and reporting, and certification. AM. NAT’L STANDARDS INST. & TOY INDUS. ASS’N, TOY SAFETY COORDINATION INITIATIVE: DRAFT PROGRAM RECOMMENDATIONS 6–12 (2008), available at <http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Links%20Within%20Stories/Toy%20Safety%20Coordination%20Initiative/Toy%20Safety%20Coordination%20Initiative%20DR AFT%20Program%20Recommendations.pdf>.

¹² Three bills, titled “Safe Toys for Kids Act” (H.R. 3477) and “Children’s Product Safety Act of 2007” (H.R. 3499 and S. 1833), call for mandatory third-party pre-market testing, and certification that children’s products conform to safety standards promulgated by the Consumer Product Safety Commission. H.R. 3477, 110th Cong. (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3477ih.txt.pdf; H.R. 3499, 110th Cong. (2007), available at

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3499ih.txt.pdf; S. 1833, 110th Cong. (2007), available at

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s1833is.txt.pdf.

A bill titled “Lead Free Toys Act of 2007” calls for a ban on children’s products containing more than trace amounts of lead, which is only applicable to products marketed for use by children under six. S. 1306, 110th Cong. (2007), available at

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s1306is.txt.pdf.

Another bill calls for a ban on products marketed for use by children under seven that contain lead exceeding a proscribed amount. S. 2038, 110th Cong. (2007), available at

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s2038is.txt.pdf.

laws, and increased funding for inspecting imports,¹³ as well as an overhaul of the current U.S. import safety system.¹⁴

Many U.S. importers responded by requiring their Chinese exporters to improve their inspections. U.S. importers have also been taking measures to strengthen their own supply chain quality management.¹⁵ For example, Mattel, Inc. implemented a three-stage lead paint safety check,¹⁶ restructured its quality management system by adding a new function of Product Integrity Policy & Audit, and created a corporate responsibility group that reports directly to its Chairman and CEO.¹⁷

Furthermore, in reaction to the cooperation and capacity building initiatives by U.S. regulatory agencies, their Chinese counterpart agencies agreed to implement new requirements aimed at enhancing the safety and quality of products intended for export to the U.S., to assist and facilitate U.S. agencies' inspection of facilities of Chinese exporters, and to engage in greater and more timely sharing of information related to product safety, recalls, and public health risks.¹⁸

The public and private corrective and preventive measures are encouraging and might enhance the safety and quality of imports from China. However, none of the measures mentioned above address the fundamental question of why some Chinese exporters fail to comply with applicable U.S. safety and quality regulations, including both government regulations and voluntary consensus standards, while other Chinese exporters do comply. Understanding the sources of Chinese exporters' compliance and noncompliance is essential to the mission of minimizing and potentially eliminating unsafe imports from China into the U.S. An understanding of Chinese compliance and noncompliance will help identify key players who can foster Chinese exporters' compliance, as well as identify effective and sustainable measures to improve compliance, and will provide a theoretical framework for evaluating the effectiveness of the various measures proposed. Understanding the sources of Chinese exporters' compliance and noncompliance is also an important contribution

¹³ The bill titled "Import Safety Act of 2007" calls for raising the civil and criminal penalties for violators of food and toy safety laws and raising the funding for inspecting imported food and toys by amending the Federal Food, Drug, and Cosmetic Act and the Consumer Product Safety Act. H.R. 3100, 110th Cong. (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3100ih.txt.pdf.

¹⁴ The Interagency Working Group on Import Safety recommended shifting to a life-cycle, risk-based approach to import safety that stresses prevention and verification. IMP. SAFETY GROUP, STRATEGIC FRAMEWORK, *supra* note 9, at 11.

¹⁵ In this Note, the term "importer" includes importers, retailers, distributors, and private labelers, unless otherwise indicated. In this Note, the term "Chinese exporters" refers to manufacturers and suppliers located in China that export, unless otherwise indicated.

¹⁶ Under the three-stage check, (1) "every batch of paint must be purchased only from a certified paint supplier" and retested before it is used, (2) "paint on samples of finished product from every production run must be tested for lead by either Mattel's own laboratories or by laboratories certified by Mattel" and (3) "[Mattel has] increased the frequency of random, unannounced inspections of vendors and subcontractors for compliance with these new procedures." *Hearing Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce*, 110th Cong. 12 (2007) (testimony of Robert A. Eckert, CEO, Mattel, Inc.), available at http://energycommerce.house.gov/cmte_mtg/110-ctcp-hrg.091907.Eckert-testimony.pdf.

¹⁷ Press Release, Mattel Inc., Mattel Creates Corporate Responsibility Group (Sept. 10, 2007), available at <http://www.shareholder.com/mattel/news/20070910-263377.cfm>.

¹⁸ IMP. SAFETY GROUP, ACTION PLAN, *supra* note 1, at 9, 49–55.

to regulatory compliance literature, by exploring the issue of regulatory compliance in the context of global supply chain management.

Part II provides a brief overview of China's export safety and quality control system, focusing on its weaknesses. Drawing on regulatory compliance literature, Part III analyzes factors that foster and hinder Chinese exporters' compliance with applicable U.S. safety and quality standards. Part IV argues that U.S. importers can and will more effectively foster compliance when given the right support from the U.S. government. To conclude, Part V stresses that rewarding compliance is as important, if not more important, than penalizing noncompliance in winning the battle against unsafe Chinese imports.

II. CHINA'S EXPORT SAFETY AND QUALITY CONTROL SYSTEM

China's export safety and quality control system is still in its early stage of development,¹⁹ and is widely believed to be rather weak.²⁰ Certain products (e.g., pharmaceutical ingredients produced by chemical manufacturers) have been exported without being inspected and tested by Chinese regulators because they fell into a regulatory void.²¹

China's system of product standards remains underdeveloped.²² Many food and product safety and quality standards are outdated and less stringent than international standards.²³ Regulatory authority for a single product can be diffused among many agencies, and the lack of interagency cooperation often results in duplicative and inconsistent standards.²⁴ The quality of safety and hygiene regulations varies greatly among China's provinces²⁵ because local governments create local standards in the absence of state and industrial standards.²⁶

Chinese regulators have failed to vigorously enforce the laws and regulations against code violators at the local level.²⁷ Such lax enforcement

¹⁹ See Aleda V. Roth et al., *Unraveling the Food Supply Chain: Strategic Insights from China and the 2007 Recalls*, 44 J. SUPPLY CHAIN MGMT. 22, 30–31 (2008); INFO. OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, CHINA'S FOOD QUALITY AND SAFETY (Aug. 17, 2007) [hereinafter INFO. OFFICE, CHINA'S FOOD QUALITY AND SAFETY]; Yang, *supra* note 8.

²⁰ See WAYNE M. MORRISON, HEALTH AND SAFETY CONCERNS OVER U.S. IMPORTS OF CHINESE PRODUCTS: AN OVERVIEW 2 (2007), available at http://assets.opencrs.com/rpts/RS22713_20070828.pdf; Yang, *supra* note 8.

²¹ David Barboza & Walt Bogdanich, *Twists in Chain of Raw Supplies for Blood Drug*, N.Y. TIMES, Feb. 28, 2008, at A1.

²² Roth et al., *supra* note 19, at 30–31; see Yang, *supra* note 8.

²³ Roth et al., *supra* note 19, at 30–31; Fengxia Dong & Helen H. Jensen, *Challenges for China's Agricultural Exports: Compliance with Sanitary and Phytosanitary Measures*, 22 CHOICES 19, 20 (2007).

²⁴ Roth et al., *supra* note 19, at 30–31; Dong & Jensen, *supra* note 23, at 20–21; Yang, *supra* note 8, at 45.

²⁵ *Diminished Capacity: Can the FDA Assure the Safety and Security of the Nation's Food Supply?: Hearings Before the Oversight and Investigations Subcomm. of the H. Energy & Commerce Comm.*, 110th Cong. (2007) [hereinafter FDA Hearings] (testimony of David Nelson, Senior Investigator for the H. Energy & Commerce Comm.).

²⁶ JIANGSHENG LI, LAW ON PRODUCT QUALITY CONTROL AND PRODUCT LIABILITY IN CHINA 69 (William S. Hein & Co., Inc. 2006); Standardization Law of the P.R.C. (promulgated by Order No. 11 of the President of the P.R.C., Dec. 29, 1988, effective Apr. 1, 1989), art. 6 (P.R.C.).

²⁷ See FDA Hearings, *supra* note 25 (testimony of David Nelson, Senior Investigator for the H. Energy & Commerce Comm.).

has encouraged many businesses to cheat the system in their pursuit of profits in China's ultra-competitive business environment.²⁸ For example, there are many unlicensed importers and exporters who evade government inspection by using falsified export documents.²⁹ Such lax enforcement has also led to the proliferation of unsafe, fake, and defective goods and ingredients for export.³⁰ Rampant government corruption, lack of accountability, local protectionism, and dependent local regulatory agencies have contributed to this lax enforcement.³¹

The following is a brief introduction to China's major export safety and quality regulatory agencies, and China's major laws and regulations on export safety and quality. Following that is a discussion of the problems plaguing China's export safety and quality control system.

A. EXPORT SAFETY AND QUALITY CONTROL IN CHINA

China's principal state regulatory agencies responsible for providing foreign consumers protection from unsafe, sub-standard, or fake exports from China are the General Administration of Quality Supervision, Inspection, and Quarantine ("AQSIQ"), the State Food and Drug Administration ("SFDA"), the Ministry of Health ("MOH"), and the Ministry of Agriculture ("MOA").³² AQSIQ is responsible for ensuring the safety and quality of ordinary and special exports (such as food, measurement equipment, boilers, and other high-pressure vessels in the production stage), and for quarantining people, animals, and plants that cross the border of China.³³ SFDA's primary role is to ensure safe and quality export medicines, medical equipment, and medical materials in areas not regulated by MOA.³⁴ MOH's mission is to protect against unsafe and inaccurately labeled export cosmetics.³⁵ MOA is charged with supervising the production of primary agricultural exports such as seeds, pesticides, and veterinary medicines.³⁶

Major Chinese product quality and food safety statutes concerning exports include the Law on Import and Export Commodity Inspection (2002), the Law on Animal and Plant Entry and Exit Quarantine (1992), the Product Quality Law (enacted in 1993 and revised in 2000), the Law on the Quality and Safety of Agricultural Products (2006), the Food Hygiene Law (1995), the Drug Administration Law (2001), and the Frontier Health and Quarantine Law (1986).³⁷ A food safety law draft was approved by the State Council in October 2007, and was submitted for review by the Standing Committee of the National People's Congress.³⁸ The draft law

²⁸ See Roth et al., *supra* note 19, at 29.

²⁹ MORRISON, *supra* note 20, at 3.

³⁰ *Id.*

³¹ *Id.*

³² LI, *supra* note 26, at 59–67.

³³ AQSIQ also shoulders responsibility for quality assurance of imports. *Id.* at 60–66.

³⁴ See *id.* at 100–101.

³⁵ See *id.* at 100.

³⁶ See *id.* at 101.

³⁷ See INFO. OFFICE, CHINA'S FOOD QUALITY AND SAFETY, *supra* note 19.

³⁸ Zhu Zhe, *Draft Food Safety Law Approved*, CHINA DAILY, Nov. 1, 2007, available at http://www.chinadaily.com.cn/china/2007-11/01/content_6221398.htm.

purportedly requires the creation of a food safety risk analysis and monitoring system, greater scrutiny of food imports and exports, better health risk communication, and increased penalties for errant firms and officials who act irresponsibly.³⁹

Major Chinese administrative regulations concerning exports include the Regulations for the Implementation of the Law on Import and Export Commodity Inspection (2005), the Special Regulations of the State Council on Strengthening Safety Supervision and Administration of Food and Other Products (2007), the Regulations on the Administration of Production Licenses for Industrial Products (2005), the Regulations on Certification and Accreditation (2003), the Regulations for the Implementation of the Law on Animal and Plant Entry and Exit Quarantine (1996) and others.⁴⁰

The Chinese food and product export regulatory system relies heavily on inspectors from AQSIQ, thirty-five provincial-level Chinese inspection and quarantine (“CIQ”) agencies directly under AQSIQ, local CIQ offices, and inspection bodies recognized, designated or accredited by AQSIQ.⁴¹ Mandatory inspections are required of exports that are included in the List of Import-Export Commodities Subject to Inspection and Quarantine (“the List”) that is published by AQSIQ, and of exports that are required to undergo mandatory inspections by other laws or administrative regulations.⁴² Export inspectors also conduct sampling tests over non-listed commodities, focusing on those with safety, hygiene, or environmental risks, those with quality complaints from consumers, those with a relatively high return volume, those with relatively big quality incidents, and those subject to new technical standards.⁴³

Allegedly, every lot of commodities for export is sampled and then tested in a local CIQ lab or a CIQ-recognized lab against Chinese standards and the standards of the importing country.⁴⁴ If the sampled lot meets the applicable standards, an export certificate is granted and that information is then transferred electronically to the proposed port of exit to ensure the physical goods correspond to the export certificate before being cleared by the customs.⁴⁵ If the sampled lot fails the applicable standards, the exporters are allowed to process the lot under the supervision of the CIQ

³⁹ *Id.*

⁴⁰ See Gen. Admin. of Quality Supervision, Inspection & Quarantine of the P.R.C., Mission, <http://english.aqsic.gov.cn/AboutAQSIQ/Mission/> [hereinafter AQSIQ Mission]. See also INFO. OFFICE, CHINA’S FOOD QUALITY AND SAFETY, *supra* note 19, for a detailed list of administrative regulations and departmental rules related to food quality and safety.

⁴¹ FDA Hearings, *supra* note 25 (testimony of David Nelson, Senior Investigator for the H. Energy & Commerce Comm.); AQSIQ Mission, *supra* note 40; Zhonghua Renmin Gongheguo jin chu kou shang pin jian ye fa shi shi tiao li di yi zhang die r tiao [Regulations for the Implementation of the Law of the P.R.C. on Imp. & Exp. Commodity Inspection] (promulgated by the Executive Comm. State Council, Aug. 31, 2005, effective Dec. 1, 2005), art. 2 (P.R.C.) [hereinafter Imp. & Exp. Inspection Regulations].

⁴² Imp. & Exp. Inspection Regulations, arts. 3–4; AQSIQ Mission, *supra* note 40.

⁴³ AQSIQ Mission, *supra* note 40; Jin chu kou shang pin chou cha jian yan guan li ba fa di yi zhang di san tiao [Measures for Random Inspections of Imp. & Exp. Commodities] (promulgated by the Executive Comm. AQSIQ, Dec. 31, 2002, effective Feb. 1, 2003), art. 3 (P.R.C.).

⁴⁴ FDA Hearings, *supra* note 25 (testimony of David Nelson, Senior Investigator for the H. Energy & Commerce Comm.).

⁴⁵ Imp. & Exp. Inspection Regulations, arts. 25–27. See also FDA Hearings, *supra* note 25 (testimony of David Nelson, Senior Investigator for the H. Energy & Commerce Comm.).

inspectors and to re-submit it for testing.⁴⁶ If it still fails the testing, the product is banned from being exported.⁴⁷ As of September 1, 2007, all Chinese food products certified for export shall bear a “CIQ” mark on their exterior sales packages unless they fall under any regulatory exceptions.⁴⁸

If necessary, entry-exit inspection and quarantine agencies may conduct on-site quality assurance checks on enterprises that manufacture exports included on the List, and may implement a mandatory registration management system for major high-risk exports.⁴⁹ For example, China has adopted a mandatory sanitation registration system for all enterprises manufacturing, processing, and distributing food and cosmetics for export.⁵⁰ The food enterprise must pass the on-site inspection by a review team from provincial and local CIQs in order to be registered and approved for exporting.⁵¹ Only enterprises that are registered and approved may process or manufacture food destined for export and apply to the provincial or local CIQs for an export certificate.⁵² Moreover, resident inspectors may be sent to large enterprises that produce high-risk export foods when needed.⁵³

For exporters who export goods without applying for and undergoing the mandatory inspection or those who export sub-standard goods that fail the mandatory or sample inspection, (a) their proceeds from the exports shall be confiscated; (b) they shall receive a fine that is over five percent of but less than twenty percent of the value of the exports; and (c) those exporters who violate the criminal code shall be criminally prosecuted.⁵⁴ For exporters who export adulterated, fake or sub-standard products, (a) they shall be ordered to suspend their exporting activities; (b) their proceeds from the exports shall be confiscated; (c) they shall receive a fine that is over fifty percent of, but less than 300 percent of the value of the exports; and (d) those exporters who violate the criminal code shall be criminally prosecuted.⁵⁵ For exporters who export food and cosmetics without the required hygiene registration, (a) their export operations shall

⁴⁶ Imp. & Exp. Inspection Regulations, arts. 25–27.

⁴⁷ *Id.*

⁴⁸ No CIQ label is required for export foods in bulk or for export foods packaged in bamboo baskets or gunny bags for transportation purpose where it is impractical to attach the label. Announcement No.85, 2007, AQSIQ, Stamping the Inspection and Quarantine Marks on Export Food Stuff (June 1, 2007), available at

<http://english.mofcom.gov.cn/aarticle/policyrelease/gazettee/200709/20070905091948.html>. However, it should be noted that the export food certification by AQSIQ is not recognized in the U.S. FDA Hearings, *supra* note 25 (testimony of Richard A. Wilfong, Investigator for the H. Energy & Commerce Comm.).

⁴⁹ Imp. & Exp. Inspection Regulations, art. 31.

⁵⁰ *Id.* arts. 32–33.

⁵¹ *Id.* art. 32; AQSIQ, Chu kou shi pin sheng chan qi ye wei sheng zhu ce deng ji guan li gui di [Bulletin on the Sanitation Registration for Export-Oriented Food Manufacturing, Processing, and Distribution Enterprises], Bull. No. 2002-20, available at <http://crijy.lishui.gov.cn/rzrk/wszcdj/P020070909832801738033.doc>.

⁵² Imp. & Exp. Inspection Regulations, arts. 2–3.

⁵³ INFO. OFFICE, CHINA'S FOOD QUALITY AND SAFETY, *supra* note 19.

⁵⁴ Imp. & Exp. Inspection Regulations, art. 46; Zhonghua Renmin Gongheguo jin chu kou shang pin jian ye fa di san zhang di san shi san tiao [Law on Imp. & Exp. Commodity Inspection] (promulgated by the Standing Comm. Nat'l People's Cong., April 28, 2002, effective Oct. 1, 2002), art. 33 (P.R.C.) [hereinafter Imp. & Exp. Commodity Inspection Law].

⁵⁵ Imp. & Exp. Commodity Inspection Law, art. 35.

be suspended, (b) their proceeds from the illegal exports shall be confiscated, and (c) they shall receive a fine that is over ten percent of, but less than fifty percent of the value of the exports.⁵⁶

The AQSIQ or provincial and local CIQs will first give the enterprise a specified time period to bring the products up to standard if exporters, who have obtained the required hygiene registration, fail the inspection.⁵⁷ If the exporters fail the second inspection at the end of the specified period, their hygiene registration shall be revoked.⁵⁸

Moreover, China has adopted a red list (list of sound enterprises) and a black list (list of unlawful enterprises) of enterprises producing exports.⁵⁹ Included on the red list are export enterprises with an effective risk control system and those with a good quality reputation in their importing countries.⁶⁰ Those red list enterprises that produce export food and agricultural products are exempt from mandatory exit inspection and quarantine for a specified time period.⁶¹ So far, seventeen food export enterprises made the red list.⁶² Included on the black list are food export enterprises that either evaded inspection or cheated the inspection and quarantine authorities, or who were reported by importing countries or regions to have serious quality problems.⁶³ As of October 6, 2008, a total of ninety-nine food exporters were placed on the black list.⁶⁴

The Chinese government claims that it has also adopted an export-food safety management framework, including:

[T]he archiving management system for the inspection and quarantine of planting and breeding bases, the epidemic disease monitoring system, . . . the supervisory system for pesticide and veterinary medicine residue[,] . . . the classified management system for [food export] enterprises, . . . the system of quality tracing and substandard products recalling, and the early risk warning and quick response system.⁶⁵

B. LAX ENFORCEMENT AND CAUSES

1. Rampant Corruption and Lack of Accountability

Corrupt Chinese quality and safety regulators and inspectors have been blamed for the weak enforcement of quality and safety laws and

⁵⁶ Imp. and Exp. Inspection Regulations, art. 52.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ INFO. OFFICE, CHINA'S FOOD QUALITY AND SAFETY, *supra* note 19.

⁶⁰ *Id.*

⁶¹ AQSIQ, Guan yu dui chu kou shi pin nong chan pin shi xin mian ya zhi du de gong gao [Bulletin on the Trial System for Exempting Export Food and Agricultural Products], Bull. No. 2006-150 (Oct. 9, 2006), available at http://www.aqsiq.gov.cn/ztlm/jckspylqymd/200706/t20070629_32898.htm.

⁶² AQSIQ, Guan yu gong bu shou pi mian yan chu kou shi pin nong chan pin de gong gao [Notice on the First Group of Exempt Export Foods and Agricultural Products], Bull. No. 2006-156, (Oct. 24, 2006), available at http://www.aqsiq.gov.cn/ztlm/jckspylqymd/200706/t20070629_32901.htm.

⁶³ INFO. OFFICE, CHINA'S FOOD QUALITY AND SAFETY, *supra* note 19.

⁶⁴ AQSIQ, Chu kou shi pin wei gui qi ye mi dan [Black List of Food Exporters] (updated Oct. 6, 2008), available at http://www.aqsiq.gov.cn/ztlm/jckspwgqymd/200706/t20070630_32919.htm.

⁶⁵ INFO. OFFICE, CHINA'S FOOD QUALITY AND SAFETY, *supra* note 19.

regulations.⁶⁶ Li Changjiang, the former head of the AQSIQ, admitted that corruption and dereliction of duty was still a deep-rooted problem in some local CIQs.⁶⁷ Many front-line inspectors and high-level officials were said to be willing to bend the rules for personal economic benefits.⁶⁸

Corruption among officials remains rampant in China, despite the Chinese government's intensified efforts to combat corruption.⁶⁹ On a scale of zero (highly corrupt) to ten (highly clean),⁷⁰ China scored 3.5 on its 2007 Corruption Perceptions Index ("CPI") (72nd out of 180 countries).⁷¹ China's CPI score was 3.3 (70th out of 163 countries) in 2006,⁷² 3.2 (72nd out of 159 countries) in 2005,⁷³ 3.4 (71st out of 146 countries) in 2004,⁷⁴ and 3.4 (66th out of 133 countries) in 2003.⁷⁵ Although China's raw score increased slightly by 0.1 in 2007, the scores remained roughly the same over the past five years. In 2006, China scored -0.58 on the Control of Corruption Indicator, and its percentile rank was 35.4%, meaning 35.4% of the 212 countries surveyed scored lower in this indicator than China.⁷⁶ China

⁶⁶ AFX News, *Corrupt Officials the Root Cause of China's Product Quality Crisis*, Sep. 13, 2007, available at <http://www.abcmoney.co.uk/news/132007133948.htm>.

⁶⁷ Li Changjiang tong zhi zai quan guo zhi jian xi tong dang feng lian zheng jian she gong zuo hui yi shang de jianghua [Speech by Li Changjiang at the 2007 National Conference for Improving Party's Work Style and Building a Clean Administration in the Quality Supervision, Inspection, and Quarantine System], available at http://www.aqsiq.gov.cn/ldzz/lcj/zyjh/200701/t20070126_27317.htm.

⁶⁸ *Id.*

⁶⁹ Ting Gong, *Forms and Characteristics of China's Corruption in the 1990s: Change with Continuity*, 30 COMMUNIST & POST-COMMUNIST STUD. 277, 286 (1997); Zengke He, *Corruption and Anti-Corruption in Reform China*, 33 COMMUNIST & POST-COMMUNIST STUD. 243, 243–48 (2000); Ting Gong, *Dangerous Collusion: Corruption as a Collective Venture in Contemporary China*, 35 COMMUNIST & POST-COMMUNIST STUD. 85, 101 (2002). Cf. Andrew Wedeman, *Great Disorder under Heaven: Endemic Corruption and Rapid Growth in Contemporary China*, 4 THE CHINA REV. 1, 1, 20–21 (2004) (acknowledging that corruption in China is serious and much worse than before China's economic reform, but arguing that corruption in China has not reached "at risk" levels that would significantly depress economic growth. The author stresses that other countries such as Japan, the United States and Great Britain also experienced a surge in corruption during the early stage of their respective economic takeoffs.) Chinese courts handled 23,733 cases of embezzlement, bribery and dereliction of duty in 2006, "sentencing 825 convicted government officials above the county level, including 9 provincial- and ministerial-level officials." Xinhua, 9 *Senior Officials Convicted for Corruption in 2006*, CHINA DAILY, Mar. 13, 2007, available at http://www.chinadaily.com.cn/china/2007-03/13/content_826696.htm. "Official statistics show that from 1992 to 1997, a total of 669,300 CPC members were punished for corruption, and the number rose to 846,150 in 1998–2002." Xinhua, 6 *Corrupt Senior Officials Sentenced in 2003*, PLA DAILY, Mar. 10, 2004, available at <http://english.pladaily.com.cn/special/e2004lh/zyxw/31.htm>.

⁷⁰ "The Transparency International Corruption Perceptions Index ranks countries in terms of the degree to which corruption is perceived to exist among public officials and politicians. It is a composite index, a poll of polls, drawing on corruption-related data from expert and business surveys carried out by a variety of independent and reputable institutions." Transparency International, *Corruption Perceptions Index 2007: Frequently Asked Questions*,

http://www.transparency.org/policy_research/surveys_indices/cpi/2007/faq.

⁷¹ Transparency International, *Corruption Perceptions Index 2007*, http://www.transparency.org/policy_research/surveys_indices/cpi/2007.

⁷² Transparency International, *Corruption Perceptions Index 2006*, http://www.transparency.org/policy_research/surveys_indices/cpi/2006.

⁷³ Transparency International, *Corruption Perceptions Index 2005*, http://www.transparency.org/policy_research/surveys_indices/cpi/2005.

⁷⁴ Transparency International, *Corruption Perceptions Index 2004*, http://www.transparency.org/policy_research/surveys_indices/cpi/2004.

⁷⁵ Transparency International, *Corruption Perceptions Index 2003*, http://www.transparency.org/policy_research/surveys_indices/cpi/2003.

⁷⁶ Worldwide Governance Indicators (WGI), 1996–2007, All Indicators for One Country: China (table), http://info.worldbank.org/governance/wgi/sc_country.asp (select country "China", then click on the table to see percentages). See also WGI, 1996–2007, Country Data Report for CHINA, 1996–2007,

scored -0.70 (31.1%) in 2005, -0.61(32.5%) in 2004, -0.43 (43.2%) in 2003, -0.48 (39.8%) in 2002, -0.28 (47.6%) in 2000, -0.38 (41.7%) in 1998, and -0.15 (52.4%) in 1996.⁷⁷ These statistics suggested that China's control of corruption has worsened from 1996 to 2005, and improved slightly in 2006.

Corrupt officials often receive milder communist party disciplinary action and/or administrative penalties rather than criminal punishment under the current dual-track anti-corruption enforcement system.⁷⁸ Party disciplinary actions include a warning, a serious warning, removal from Party posts, probation within the Party, and expulsion from the Party.⁷⁹ Administrative penalties include a warning, a demerit, a serious demerit, demotion, removal from one's position, and termination.⁸⁰ From 1983 to 1988, only 6.6% of party officials who were disciplined for corruption received any criminal punishment.⁸¹ From October 1997 to September 2002, only 37,790 out of 846,150 party officials who were disciplined for corruption received criminal penalties (about 4.5%).⁸² From December 2002 to June 2007, a total of 518,484 party officials received party disciplinary action for corruption.⁸³

The selective under-prosecution of corruption fails to provide officials with sufficient deterrence from engaging in corrupt practices. Despite the Communist Party's "tough words on corruption, and occasional high

<http://info.worldbank.org/governance/wgi/pdf/c42.pdf>. The Control of Corruption Indicator is one of the six indicators of governance that is collected by the Worldwide Governance Indicators (WGI) project. It measures "the extent to which public power is exercised for private gain, including petty and grand forms of corruption, as well as "capture" of the state by elites and private interests." WGI, 1996–2007, FAQ, <http://info.worldbank.org/governance/wgi/faq.htm>. The measurement of this indicator follows a normal distribution, "virtually all scores lie between -2.5 and 2.5, with higher scores corresponding to better outcomes." Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators, 1996–2006* 13 (World Bank Policy Research Working Paper No. 4280, 2007), available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2007/07/10/000016406_20070710125923/Rendered/PDF/wps4280.pdf.

⁷⁷ WGI, 1996–2007, All Indicators for One Country: China (table), *supra* note 76.

⁷⁸ Chengze Simon Fan & Herschel I. Grossman, *Entrepreneurial Graft in China*, THE PROVIDENCE J., May 3, 2001, at B5, available at

http://www.econ.brown.edu/fac/Herschel_Grossman/papers/pdfs/chinaop.pdf.

⁷⁹ Zhongguo Gongchandang Xian Fa [Constitution of Communist Party of China], art. 39 (1982) (P.R.C.), available at http://news.xinhuanet.com/english/2007-10/25/content_6944738_7.htm.

⁸⁰ Xing zheng ji guan gong wu yuan chu fen tiao li [Regulation on the Punishment of Civil Servants of Administrative Organs] (P.R.C.), available at http://www.gov.cn/ziliao/flfg/2007-04/29/content_601241.htm.

⁸¹ *Something Rotten in the State of China; Systemic Corruption*, THE ECONOMIST, Feb. 16, 2002 (citing the estimate made by Hu Angang and Guo Yong of Beijing's Qinghua University) [hereinafter *Something Rotten*].

⁸² Xinhua, Zhong Yan Ji Lv Jian Chan Wei Yuan Hui Xiang Dang De Di Shi Liu Ci Quan Guo Dai Biao Da Hui De Gong Zuo Bao Gao [Work Report of the Central Commission for Discipline Inspection at the 16th National Congress of the Communist Party of China] (Nov. 19, 2002), available at <http://cpc.people.com.cn/GB/64162/64168/64569/65444/4429113.html>.

⁸³ Xinhua, Zhong Yan Ji Lv Jian Chan Wei Yuan Hui Xiang Dang De Di Shi Qi Ci Quan Guo Dai Biao Da Hui De Gong Zuo Bao Gao [Work Report of the Central Commission for Discipline Inspection at the 17th National Congress of the Communist Party of China] (Oct. 26, 2007), available at http://news.xinhuanet.com/newscenter/2007-10/26/content_6953648.htm.

profile sentencing and even executions, in the minds of many officials the potential gains from corruption still far outweigh the risks.”⁸⁴

2. Local Protectionism

Local government officials report to the local Communist Party, rather than to the central government in Beijing, and “economic growth is the first priority of the Party.”⁸⁵ According to Kenneth G. Lieberthal, a leading Sinologist, local GDP growth accounts for about seventy percent of a typical official’s annual performance review.⁸⁶ Therefore, it is not surprising that many local government officials, especially those at or below the county level, end up favoring economic growth at the price of product quality and food safety.⁸⁷ Some officials, particularly those in poorer areas, have tolerated businesses that have not complied with quality and safety standards because of the economic benefits, such as government revenue and employment opportunities as well as personal political capital resulting from this toleration.⁸⁸

3. Dependent and Over-Extended Local Regulatory Agencies

Administrative agencies that supervise local export quality and safety depend heavily on their local governments at the corresponding level for resources and selection of high-ranking personnel. About sixty percent of the revenue of China’s quality supervision agencies or institutions came from government funding in 2006.⁸⁹ Institutionally weak local regulatory agencies are vulnerable to intervention from local government officials particularly because there is evidence that many local regulatory agencies are under-staffed and under-funded.⁹⁰ According to official estimates, a total of over 30,000 inspectors are employed in thirty-five CIQs directly under AQSIQ and about 500 local CIQ offices in China.⁹¹ From December 2006 to November 2007, inspectors from these agencies inspected approximately 1.68 million lots of import and export commodities that were worth \$1.256 billion.⁹²

⁸⁴ *Something Rotten*, *supra* note 81 (discussing the perceptions of officials about the benefits of corruption in China).

⁸⁵ SUBCOMM. ON OVERSIGHT & INVESTIGATIONS, STAFF TRIP REPORT, FOOD FROM CHINA: CAN WE IMPORT SAFETY? 3 (Oct. 4, 2007), available at http://energycommerce.house.gov/Press_110/110-rpt.100407.ChinaTripReport.pdf.

⁸⁶ Peter Engardio et al., *Broken China*, BUS. WK., July 23, 2007, at 38.

⁸⁷ Waikeng Tam & Dali Yang, *Food Safety and the Development of Regulatory Institutions in China*, 29 ASIAN PERSP. 5, 17 (2005), available at http://www.daliyang.com/files/Tam_and_Yang_Food_Safety_and_the_Development_of_Regulatory_Institutions_in_China.pdf.

⁸⁸ See John K. Bush, “Sorry” Seems to Be Neither the Hardest nor Last Word for Chinese Product Recalls, in INSTANT AWARENESS: AN IMMEDIATE LOOK AT THE LEGAL, GOVERNMENTAL, AND ECONOMIC RAMIFICATIONS OF THE MATTEL TOY RECALLS (Aspatore Books 2007).

⁸⁹ The total revenue for China’s national quality and technology supervision system amounted to 1,983,408 RMB yuan in 2006. AQSIQ, 2006 Nian zhi liang jian du tong ji [Quality Supervision Statistics 2006], available at http://www.aqsiq.gov.cn/zwgk/tjsj/200705/t20070525_31201.htm.

⁹⁰ MORRISON, *supra* note 20, at 3.

⁹¹ AQSIQ, Zong jiu jie shao [Info about AQSIQ], available at <http://www.aqsiq.gov.cn/zwgk/zjjs/>.

⁹² See AQSIQ, Tong ji shu ju [Statistics], available at <http://www.aqsiq.gov.cn/zwgk/tjsj/>.

III. TOWARD UNDERSTANDING CHINESE EXPORTERS' COMPLIANCE AND NONCOMPLIANCE WITH AMERICAN SAFETY AND QUALITY STANDARDS

The past decade saw the rise of global sourcing of goods and services to developing countries from the developed countries, including the U.S.⁹³ Global sourcing helps reduce costs for businesses, which in turn translates into lower prices for consumers.⁹⁴ However, lower costs may come at a high price for businesses that source overseas.⁹⁵ The large number of safety incidents involving imports from China in 2007 highlights the quality risks associated with global sourcing.⁹⁶

In 2007, China became the largest source of U.S. imports: imports from China totaled \$321.5 billion, accounting for 16.5% of total U.S. imports.⁹⁷ In 2006, China was the largest supplier of toys, dolls, games, fish and other marine products, and tires for the U.S.⁹⁸ China was also a major supplier of animal food products, toothpaste, pharmaceuticals, and medicine.⁹⁹ Given the increasingly large volume of imports from China, particularly those posing great health risks, it is critical to the American public that Chinese imports comply with applicable U.S. safety standards and regulations. Understanding the sources of Chinese exporters' noncompliance or compliance with applicable U.S. safety standards and regulations is a prerequisite to the achievement of this vital goal.

A. WHO ARE THE EXPORTERS FROM CHINA?

Foreign-invested enterprises ("FIEs") have dominated China's exports since 2000.¹⁰⁰ From January to November 2007, exports by FIEs totaled \$629.82 billion, accounting for 57.07% of China's total exports.¹⁰¹ Private enterprises are also playing an increasing role in China's exports.¹⁰² From

⁹³ Andrew Millington, Markus Eberhardt & Barry Wilkinson, *Supplier Performance and Selection in China*, 26 INT'L J. OPERATIONS & PRODUCTION MGMT. 185, 185 (2006).

⁹⁴ Michael A. Levine, *CSR and Sustainability: Local Impacts of Global Supply Chains*, THE METRO. CORP. COUNS., Oct. 2007, at 15, available at <http://www.metrocorp.counsel.com/pdf/2007/October/15.pdf>.

⁹⁵ Global sourcing creates numerous product safety, environmental, human rights, and other legal problems for businesses. *Id.*

⁹⁶ Roth et al., *supra* note 19, at 22.

⁹⁷ U.S. Census Bureau, Foreign Trade Statistics: Top Trading Partners—Total Trade, Exports, Imports, Year-to-Date December 2007, available at <http://www.census.gov/foreign-trade/statistics/highlights/top/top0712.html#imports>.

⁹⁸ In 2006, toys, dolls, and games imported from China totaled \$14.6 billion, accounting for 86% of all U.S. imports. Fish and other marine products imported from China totaled nearly \$1.7 billion, accounting for 19.8% of all U.S. imports in 2006. Tires imported from China totaled \$1.9 billion in 2006, accounting for 22% of all U.S. imports. MORRISON, *supra* note 20, at 3.

⁹⁹ "China was the 2nd largest foreign supplier of animal food products at \$135 million, or 23.8% of total. China was the 6th largest supplier of U.S. toothpaste at \$3.3 million, or 3.5% of total. Finally, China was the 16th largest source of U.S. imports pharmaceuticals and medicines (at \$698 million) or 1.1% of total imports." *Id.* at 2.

¹⁰⁰ JIANG XIAOJUAN, FDI IN CHINA: CONTRIBUTING TO GROWTH, RESTRUCTURING AND COMPETITIVENESS 66 (Nova Sci. Publishers, Inc. 2004).

¹⁰¹ MINISTRY OF COMMERCE (MOC), P.R.C., EXPORT BY TYPE OF ENTERPRISES (TABLE) (2007), available at <http://english.mofcom.gov.cn/aarticle/statistic/ie/200801/20080105322225.html> [hereinafter MOC, EXPORT 2007].

¹⁰² *Foreign Firms Dominate China's Exports*, ASIA TIMES, June 30, 2006.

January to November 2007, exports by private enterprises totaled \$223.63 billion, accounting for 20.64% of China's total exports.¹⁰³ State-owned enterprises come in third place, exporting \$204.36 billion worth of goods during the January through November period.¹⁰⁴ Collective enterprises exported \$42.75 billion worth of goods during this same period.¹⁰⁵

Table 1. Export by Type of Enterprises¹⁰⁶
(Unit: U.S. \$100 million)

Type of Enterprise	Jan. – Nov. 2007		Jan. 2008		Feb. 2008	
	Value	% in total	Value	% in total	Value	% in total
Total Value	11,036		1,096.4		873.5	
State-owned Enterprises	2,043.6	18.52%	207.9	18.96%	154.8	17.72%
Foreign-invested Enterprises	6,298.2	57.07%	598.7	54.6%	516.9	59.18%
Other Enterprises	2,694.2	24.41%	289.9	26.44%	201.9	23.1%
Collective-owned Enterprises	427.5	3.87%	45	4.1%		
Private-owned Chinese Enterprises	2,236.3	20.64%	242.7	22.34%		

In 2005, the top 200 exporters accounted for 29.1% of China's total exports.¹⁰⁷ Among the top 200 exporters, there were 148 FIEs, thirty-nine state-owned enterprises ("SOEs"), nine collectively owned enterprises, and four private firms.¹⁰⁸

B. COMPLIANCE LITERATURE

Many models have been proposed to explain firms' compliance or noncompliance with regulations, including but not limited to the deterrence-based model, the normative-based model, and the organizational-routine model.¹⁰⁹ Under the deterrence-based model, firms are seen as rational profit-maximizers who do not comply with the law

http://www.atimes.com/atimes/China_Business/HF30Cb02.html [hereinafter *Foreign Firms*].

¹⁰³ MOC, EXPORT 2007, *supra* note 101.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; MINISTRY OF COMMERCE, P.R.C., EXPORT BY TYPE OF ENTERPRISES (TABLE) (2008), available at <http://english.mofcom.gov.cn/aarticle/statistic/ie/200803/20080305439922.html>.

¹⁰⁷ SINA, Er li li wu zhong guo wai mao er bai qiang [2005 List of China's Top 200 Enterprises in Foreign Trade], available at <http://finance.sina.com.cn/hy/20060421/14392520218.shtml>.

¹⁰⁸ *Foreign Firms*, *supra* note 102.

¹⁰⁹ See Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 TEMP. L. REV. 451, 461–492 (2003), for a review of the corporate compliance literature.

when the perceived benefits of noncompliance exceed the anticipated costs of it.¹¹⁰ Costs of noncompliance typically refer to legal sanctions (civil or/and criminal penalties), but may include other costs such as reputation loss, litigation costs, and the risk of private lawsuits.

The likelihood of detection and resulting sanctions as well as the severity of potential sanctions are believed to influence a firm's compliance decision under the deterrence model.¹¹¹ The empirical findings on the relative roles of these factors in inducing compliance are mixed.¹¹² Some empirical studies have found that the perceived likelihood of detection plays a greater role in inducing compliance than the likelihood and severity of sanctions.¹¹³ John Braithwaite and Toni Makkai's study of regulatory compliance by Australian nursing home managers found little support for the deterrent effect because of certainty of detection or certainty of severe penalties.¹¹⁴ K. Kuperan and Jon G. Sutinen's study of Malaysian fisheries' regulations suggested that increasing the probability of detection and sanctions could reduce the number of violations by those violators, but would not likely decrease the number of violators.¹¹⁵

Under the normative-based model, firms are seen as good faith actors who comply with the law out of a sense of moral or civil obligation that is grounded in the belief that legitimate authorities are worthy of obedience and agreement with the value of a given regulation.¹¹⁶ Legal authorities are perceived legitimate when the enacting and implementing of the regulations follow a fair process characterized by representation, impartiality, and ethicality.¹¹⁷ Regulated firms are likely to comply when they are given the chance to participate meaningfully in the decision making process, when the regulator acts honestly and impartially, and when they are treated with respect and dignity.¹¹⁸ The illegitimacy of the regulatory authorities, the complexity of the regulations, and the perceived unreasonableness of the rules are said to explain firms' noncompliance with the regulations.¹¹⁹

It has been further suggested that individuals weigh potential social sanctions (e.g., ostracism) or psychological sanctions (e.g., guilt or reduced

¹¹⁰ E.g., Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1186-89 (1998); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170 (1968); Raymond J. Burby & Robert G. Paterson, *Improving Compliance with State Environmental Regulations*, 12 J. POL'Y ANALYSIS & MGMT. 753, 755-56 (1993).

¹¹¹ Malloy, *supra* note 109, at 462.

¹¹² Soren C. Winter & Peter J. May, *Motivation for Compliance with Environmental Regulations*, 20 J. POL'Y ANALYSIS & MGMT. 675, 676-77 (2001).

¹¹³ See Burby & Paterson, *supra* note 110.

¹¹⁴ John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 LAW & SOC'Y REV. 7, 35 (1991).

¹¹⁵ K. Kuperan & Jon G. Sutinen, *Blue Water Crime: Deterrence, Legitimacy, and Compliance in Fisheries*, 32 LAW & SOC'Y REV. 309, 328-29 (1998).

¹¹⁶ E.g., Winter & May, *supra* note 112, at 677-78; David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CAL. L. REV. 917, 966-67 (2001); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3-4 (Yale Univ. Press 1990).

¹¹⁷ See, e.g., Malloy, *supra* note 109, at 467-68; TYLER, *supra* note 116, at 118-23, 137-38.

¹¹⁸ See sources cited *supra* note 117.

¹¹⁹ See, e.g., Malloy, *supra* note 109, at 467-68; Winter & May, *supra* note 112, at 677-78.

self-esteem) associated with disobeying the norm against the costs of obeying the social compliance norm.¹²⁰

Both the deterrence model and the normative model only partly explain a firm's compliance behavior and present an over-simplified view of firms and their employees.¹²¹ Ian Ayres and Braithwaite advocated for a multi-dimensional view of the firm, suggesting that "all corporate actors are bundles of contradictory commitments to values of economic rationality, law abiding-ness, and business responsibility. Business executives have profit-maximizing selves and law-abiding selves; at different moments, in different contexts, their different selves prevail."¹²² Economic rationality, as well as normative and social concerns, influences a firm's compliance decisions to different degrees under different circumstances.¹²³ Soren C. Winter and Peter J. May's study of Danish farmers' compliance with agro-environmental regulations found that normative and social considerations play an important role in farmers' compliance decisions in addition to deterrence-based considerations.¹²⁴

The organizational-routine-based model focuses on the internal environment of a firm, and sees a firm as a "system for allocating and managing resources necessary to achieve the owner's goals."¹²⁵ Because in most cases many specialized units within an organization participate in the compliance efforts, adequate mechanisms must be in place to properly channel the information flows and to allocate resources, responsibility, and authority among the units.¹²⁶ Under the organizational-routine model, deficient organizational routines in these coordination functions can undermine an organization's ability to comply with the regulations, thus leading to "routine noncompliance," even though individual members within the organization share a commitment to compliance.¹²⁷ Winter and May further found that farmers' knowledge of the agro-environmental regulations was positively related to their compliance.¹²⁸

To sum up, the literature suggests that an entity's compliance with a given regulation is influenced by its deterrence-based, normative and social considerations and the adequacy and effectiveness of its coordination routines.

¹²⁰ *E.g.*, Malloy, *supra* note 109, at 471.

¹²¹ Winter & May, *supra* note 112, at 676; Malloy, *supra* note 109, at 456 (summarizing scholars' attempts to integrate the deterrence model and the normative model).

¹²² IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 31 (Oxford Univ. Press 1992).

¹²³ Malloy, *supra* note 109, at 456.

¹²⁴ Winter & May, *supra* note 112, at 692.

¹²⁵ Malloy, *supra* note 109, at 458.

¹²⁶ *Id.* at 478–96.

¹²⁷ *Id.* at 475–76.

¹²⁸ For their study of Danish farmers' compliance with agro-environmental regulations, see Winter & May, *supra* note 112, at 679–80.

C. SOURCES OF COMPLIANCE AND NONCOMPLIANCE

1. *Benefits of Noncompliance (Costs of Compliance)*

The economic benefits associated with noncompliance to a China's exporter include money saved from not having made the otherwise necessary expenditures to comply with the applicable U.S. safety and quality standards. Noncompliance is seen by some of China's manufacturers and suppliers as a way to increase their decreasingly lower profit margins.¹²⁹ Because most indigenous Chinese manufacturers and suppliers are in labor-intensive industries, which are typically buyer-driven commodity chains,¹³⁰ they have little leverage when it comes to price bargaining with U.S. buyers.¹³¹

Anecdotal evidence suggests that less than ten percent of what American customers pay for the end product actually ends up with Chinese suppliers.¹³² Lower costs resulting from not complying or partially complying with the U.S. standards and regulations (e.g., substituting cheaper noncompliant materials for safe but more expensive materials, conducting fewer testing, etc.) enable Chinese suppliers to get a leg up over other suppliers who comply with the standards and regulations in China's ultracompetitive business environment.¹³³

2. *Costs of Noncompliance*

As discussed earlier, the literature on compliance with social and environmental regulations suggests that firms comply with regulations "either because they fear detection of violations and subsequent punishment, feel a duty to comply, or feel social pressure to comply."¹³⁴

a. *Economic Sanctions*

Chinese exporters may face economic sanctions from U.S. importers when the latter detects that the former failed to comply with applicable safety standards and regulations. U.S. importers may threaten to stop

¹²⁹ Roth et al., *supra* note 19, at 29.

¹³⁰ "Profits in buyer-driven chains derive . . . from unique combinations of high-value research, design, sales, marketing and financial services that allow the retailers, branded marketers and branded manufacturers to act as strategic brokers in linking overseas factories with evolving product niches in the main consumer markets." Gary Gereffi, *International Trade and Industrial Upgrading in the Apparel Commodity Chain*, 48 J. INT'L ECON. 37, 43 (1999).

¹³¹ Li-Wen Lin, *Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China*, 15 CARDOZO J. INT'L & COMP. L. 321, 334-35.

¹³² The low profits retained by Chinese suppliers are captured by their position in the middle stage of the "smiley curve," compared to their United States buyers who are at the high profitability ends of the "smiley curve" (branding and product concept at one end and retail and servicing at the other end). James Fallows, *China Makes, the World Takes*, THE ATLANTIC, July/Aug. 2007, at 48, 48-72, available at <http://www.theatlantic.com/doc/200707/shenzhen>. See also Richard McCormack, *Who Benefits Most from the iPod Being Made Overseas? Apple and Its Knowledge Workers*, MFG. & TECH. NEWS, July 1, 2007, available at <http://www.manufacturingnews.com/news/07/0731/art1.html> (reporting that Apple earned \$80 in gross profit on a 30-gigabyte video iPod that retails for \$299 and wholesales for \$224, whereas "the value added to the product through assembly in China is probably a few dollars at most").

¹³³ Roth et al., *supra* note 19, at 29.

¹³⁴ Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 LAW & SOC'Y REV. 41, 41-42 (2004); accord Winter & May, *supra* note 112, at 675.

purchasing products from the noncompliant exporters. The strength of such “market accountability” varies with the purchasing power of the American importers.¹³⁵ Large American importers, like Wal-Mart, can impose huge economic sanctions on noncompliant Chinese suppliers.¹³⁶

The probability that violations will be detected varies. Importers with strict quality control procedures are more likely to detect such violations than importers with less strict quality control procedures.

However, it should be observed that not all American importers reward Chinese exporters for compliance with applicable safety standards, even though they very likely will penalize those who fail to comply.¹³⁷ Empirical research suggests that low cost dominates many supply managers' outsourcing decisions.¹³⁸ It has been observed that the cheapest supplier is often the one who gets the contract from importers, and that “the supplier who quotes low and quietly cuts corners on quality is the one who wins.”¹³⁹

Moreover, for those Chinese exporters with a short-term business mindset, the threat to discontinue purchases may carry little weight because it is customary for Chinese suppliers to collect full payment from buyers up front.¹⁴⁰

b. *Claims by American Importers*

American importers may bring a third-party indemnification or contribution claim against Chinese exporters in U.S. courts after being sued by American consumers injured by defective imports.¹⁴¹ If the contract between a Chinese exporter and an American importer contains product specification provisions and the Chinese exporter's noncompliance or partial compliance with applicable standards violates any such provision, the American importer has a breach of contract claim against the Chinese exporters.

i. *Arbitration and Award Enforcement*

Many contracts between Chinese exporters and U.S. importers contain arbitration clauses, mandating any disputes arising “under or in connection

¹³⁵ MICHAEL P. VANDENBERGH, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 961 (2007).

¹³⁶ In 2004 Wal-Mart was China's sixth largest export partner, just behind Germany, purchasing eighteen billion worth of products. Dorinda Elliott & Bill Powell, *Wal-Mart Nation*, TIME, June 27, 2005, at 36.

¹³⁷ FDA Hearings, *supra* note 25 (testimony of James Rice, Vice President & Country Manager, Tyson Foods, Inc.).

¹³⁸ Roth et al., *supra* note 19, at 29 (citing J.V. Gray, A.V. Roth & B. Tomlin, *Antecedents of Decisions to Outsource Production: A Manufacturing Strategy Perspective* (Ohio State University Working Paper, 2007)).

¹³⁹ *Id.* (quoting P. Midler, “Quality Fade”: *China's Great Business Challenge*, KNOWLEDGE@WHARTON, July 25, 2007, available at <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1776>).

¹⁴⁰ *Id.*

¹⁴¹ McDermott Will & Emery, *Defective Chinese Goods: Legal Risks and Protective Measures*, MCDERMOTT NEWSL., July 19, 2007, available at http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/e6a6094d-ee63-486e-b8f1-c22c0a476e04.cfm [hereinafter *Defective Chinese Goods*].

with” the contract be solved exclusively through international arbitration.¹⁴² This is particularly true when the exporters are FIEs located in China, because arbitration by Chinese arbitration institutions is almost always opted for over the only alternative (i.e., litigation in Chinese courts).¹⁴³ In such cases, the indemnification/contribution claims and breach of contract claims must be pursued through arbitration unless the arbitration clauses are found invalid.¹⁴⁴

If the exporter is a non-FIE, then parties may arbitrate outside China.¹⁴⁵ Both the U.S. and China are signatory countries to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“Convention”).¹⁴⁶ It is generally believed that foreign arbitral awards from a signatory to the Convention and foreign-related arbitral awards—awards issued by Chinese arbitration institutions like the China International Economic and Trade Arbitration Commission involving a non-Chinese party—are more likely to be recognized and enforced in China than Chinese court judgments, because these awards are more insulated from local protectionist interference.¹⁴⁷ First, a Chinese court’s decision to refuse to recognize or enforce Convention or foreign-related arbitral awards will ultimately have to be approved by the Supreme People’s Court (“SPC”) under a 1995 SPC Notice.¹⁴⁸ Second, the jurisdiction of such awards is limited to specific Intermediate People’s Courts (“IPCs”) in capital cities of provinces and special economic zones under a 2002 SPC directive.¹⁴⁹ However, obstacles to enforcement of Convention or foreign-related awards still abound: the institutionally weak, dependent and corrupt judiciary, incompetent judges, low status of enforcement officers, corruption and bribery in the Chinese arbitration institutions, lack of an asset-tracking system and other provisions curbing debtor fraud, and local protectionism.¹⁵⁰

China’s judiciary lacks sufficient institutional power and adequate resources to enforce arbitral awards over the objections of local

¹⁴² *Id.*

¹⁴³ *E.g.*, William Heye, *Forum Selection for International Dispute Resolution in China—Chinese Courts vs. CIETAC*, 27 HASTINGS INT’L & COMP. L. REV. 535, 535–36. Foreign arbitration commissions are still banned from arbitrating within China. Fiona D’Souza, *The Recognition and Enforcement of Commercial Arbitral Awards in the People’s Republic of China*, 30 FORDHAM INT’L L.J. 1318, 1328 (2007); Kim Rooney, *Legal View: Hong Kong May Harbor Solution*, FIN. TIMES (London, Eng.), Dec. 5, 2006.

¹⁴⁴ *Defective Chinese Goods*, *supra* note 141.

¹⁴⁵ *See, e.g.*, Heye, *supra* note 143, at 535–36; D’Souza, *supra* note 143, at 1325.

¹⁴⁶ China became a member of the New York Convention in 1987. D’Souza, *supra* note 143, at 1325.

¹⁴⁷ *Id.* at 1331–34; Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT’L & COMP. L. REV. 59, 87–90 (2002).

¹⁴⁸ D’Souza, *supra* note 143, at 1331; Notice of the Sup. People’s Ct. on Several Issues Regarding the Handling by the People’s Ct. on Certain Issues Pertaining to Foreign-Related Arb. & Foreign Arb. (issued by the Sup. People’s Ct., Aug. 28, 1995, effective Aug. 28 1995), *translated in* ARBITRATION LAW AND PRACTICE IN CHINA 308 (Jingzhao Tao trans., Kluwer Law Int’l 2004).

¹⁴⁹ Sup. People’s Ct.’s Rules on the Several Issues Regarding the Jurisdictions of Civil and Commercial Litig. Cases Involving Foreign Elements (promulgated by the Sup. People’s Ct., Dec. 25, 2001, effective Mar. 1, 2002), *translated in* THE CIVIL PROCEDURE LAW AND COURT RULES OF THE PEOPLE’S REPUBLIC OF CHINA 269 (Wei Luo trans., William S. Hein & Co., Inc. 2006).

¹⁵⁰ D’Souza, *supra* note 143, at 1337–46; Jason Pien, *Creditor Rights and Enforcement of International Commercial Arbitral Awards in China*, 45 COLUM. J. TRANSNAT’L L. 586, 597–603 (2007).

government and party officials.¹⁵¹ China's judiciary is structurally dependent, subject both to the Communist Party of China's ("Party") ideological oversight and to the administrative intervention of Party and government institutions.¹⁵² Party and government officials at the province or lower levels exercise practical control over the financial and personnel decisions of courts at the corresponding level because of their control of the judicial and congressional funding, even though in theory the people's courts are responsible to the people's congresses at corresponding level.¹⁵³ Chinese judges have no tenure and can be replaced or removed by the local people's congress.¹⁵⁴ The Ministry of Justice has "the *de facto* power to transfer or discharge judges who have decided cases contrary to party dictates."¹⁵⁵

China follows the civil law inquisitorial model of evidence gathering whereby the court conducts active and independent inquiry.¹⁵⁶ Lack of clear guidance on the type of ex parte party contact with judges permitted leaves the procedure vulnerable to abuse by corrupt judges.¹⁵⁷ Moreover, the lack of institutionalized judicial accountability in China and the hierarchical model of the judicial system fuels judicial corruption.¹⁵⁸

The actual collection often proves very difficult even if the arbitral award is upheld by the Chinese court.¹⁵⁹ China does not have a credit-

¹⁵¹ Ting Gong, *Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China*, 4 THE CHINA REV. 33, 40 (2004); Melissa S. Hung, *Obstacles to Self-Actualization in Chinese Legal Practice*, 48 SANTA CLARA L. REV. 213, 235–38 (2008).

¹⁵² "[C]ourts and procurators are required to report to the Political-Legal Secretary of the local Party Committee (*zhengfa shuji*), while court presidents and vice presidents who chair the adjudication committees are expected to demonstrate political loyalty to the party as they are usually party members. . . . The court often makes reports to the local Party Committee and solicits opinions for solution. When contradictions arise among different judicial organs, the party's political-legal committee or the political-legal secretary steps forward to coordinate, as the party's leading role is supposed to be reflected in the handling of important and difficult cases." Gong, *supra* note 151, at 42.

¹⁵³ *Id.*; Zhang, *supra* note 147, at 93–94; Hung, *supra* note 151, at 237; Veron Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 AM. J. COMP. L. 77, 96–97 (2004); Patricia Pattison & Daniel Herron, *The Mountains Are High and the Emperor Is Far Away: Sanctity of Contract in China*, 40 AM. BUS. L.J. 459, 504 (2003); Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 255, 295–96 (2003). In 2006, sub-national governments provided a total of 207.55 billion RMB for public security agencies, procuratorial agencies, and court of justices, whereas the central government provided only 9.868 billion RMB. CHINA STATISTICS YEARBOOK 2007 (CD-ROM). In 2003, funding from provincial and governments for public security agencies, procuratorial agencies, and court of justices accounted for 25.4% and 69.1% respectively of total government funding for these agencies and courts, while the central government funding only accounted for 5.4%. Baoyun Qiao & Anwar Shah, *Zhongguo difang zhengfu de zhuzhi ji caizheng* [Local Gov't Org. & Finance in China], 1, 18, available at <http://info.worldbank.org/etools/docs/library/233802/1BaoYunAnwarShah.pdf>.

¹⁵⁴ Gong, *supra* note 151, at 42; Mei-Ying Hung, *supra* note 153, at 97; Zhang, *supra* note 147, at 94.

¹⁵⁵ Gong, *supra* note 151, at 42.

¹⁵⁶ Heye, *supra* note 143, at 550–52; Zhang, *supra* note 147, at 71.

¹⁵⁷ Margaret Y. K. Woo, *Law and Discretion in the Contemporary Chinese Courts*, 8 PAC. RIM L. & POL'Y J. 581, 599 (1999); Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement Arbitral Awards in the P.R.C.*, 49 AM. J. COMP. L. 249, 303 (2001).

¹⁵⁸ Gong, *supra* note 151, at 44–45.

¹⁵⁹ Peerenboom, *supra* note 157, at 300–01; Pien, *supra* note 150, at 598. Enforcement officers may compel satisfaction of a recognized judgment by freezing and transferring debtor's bank deposits, withholding and withdrawing the debtors' income, seizing, selling, and auctioning off debtors' property (excluding some basic personal property). *Zhonghua Renmin Gongheguo Minshi Susong Fa* [Civil Procedure Law of the P.R.C.] (Apr. 9, 1991), available at

checking and asset-tracking system.¹⁶⁰ Often judgment creditors find themselves facing insolvent judgment debtors who are nowhere to be found, with all their assets being transferred to an undisclosed location.¹⁶¹ This is problematic because there are very few legal remedies for fraudulent transfers and piercing the corporate veil in China.¹⁶² In China, a SOE “may not sell or be forced to sell its assets to satisfy a court judgment.”¹⁶³

Provincial and local government budgets rely heavily on “the financial health and cashflow of local enterprises” under China’s current fiscal system.¹⁶⁴ Local government officials have a strong incentive to discourage enforcement of awards that would render a local respondent bankrupt, and might help local companies by tipping them off about the enforcement application.¹⁶⁵ There are some instances where banks assist judgment debtors transfer money out of their bank accounts by postponing the freezing their accounts.¹⁶⁶

Moreover, members of enforcement divisions of people’s courts often do not have adequate resources to compel satisfaction of enforcement against award debtors who refuse to pay the awards through both legal and illegal means.¹⁶⁷ There are some reports of court enforcement officers being threatened or physically harmed by judgment debtors and their employees.¹⁶⁸ The lower status of judges of court enforcement divisions and their perceived incompetence are also said to exacerbate the enforcement of arbitral awards.¹⁶⁹

ii. Claim Adjudication and Judgment Enforcement

American importers may pursue indemnification/contribution claims or breaches of contract claims in American or Chinese courts if there are no contract provisions mandating arbitration. However, for claims brought in American courts, because of personal jurisdiction and judgment enforcement problems, it is not likely that most Chinese exporters will be actually paying out damages to American importers. First, it is very likely that American courts have no personal jurisdiction over most non-FIE Chinese exporters, particularly those indigenous private-owned enterprises, because most of them are small¹⁷⁰ and probably have no “minimum

<http://en.chinacourt.org/public/detail.php?id=eol>2694> (last visited Mar. 23, 2008); Zhang, *supra* note 147, at 85.

¹⁶⁰ Zhang, *supra* note 147, at 91.

¹⁶¹ Peerenboom, *supra* note 157, at 308; Pien, *supra* note 150, at 603–04.

¹⁶² D’Souza, *supra* note 143, at 1344; Peerenboom, *supra* note 157, at 308. *Cf.* Pien, *supra* note 150, at 604–11 (arguing that applying for property preservation could be a successful or effective means for award creditors to secure property for enforcement in China).

¹⁶³ Zhang, *supra* note 147, at 91.

¹⁶⁴ Christine P. W. Wong, *Fiscal Dualism in China: Gradualist Reform and the Growth of Off-Budget Finance*, in *TAXATION IN MODERN CHINA* 187, 187 (Donald J.S. Brean ed., Routledge 1998).

¹⁶⁵ Peerenboom, *supra* note 157, at 278.

¹⁶⁶ *Id.* See also Donald Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 *COLUM. J. ASIAN L.* 1, 43 (1996).

¹⁶⁷ Pien, *supra* note 150, at 598.

¹⁶⁸ Peerenboom, *supra* note 157, at 300.

¹⁶⁹ Zhang, *supra* note 147, at 91.

¹⁷⁰ Fallows, *supra* note 132.

contacts” with the U.S.¹⁷¹ Second, even assuming the American courts have personal jurisdiction over the Chinese exporters, it is difficult, time-consuming, and possibly very expensive for American importers to prosecute the Chinese defendants.¹⁷² Third, assuming that American importers obtain a judgment in their favor, it is difficult for them to enforce the judgment in the U.S. if the Chinese exporter has no assets located in the U.S. that can be attached to satisfy the judgment, which is a common scenario.¹⁷³ Fourth, it is very difficult to enforce a foreign judgment, including a U.S. judgment in China, because of local protectionism, government interference favoring SOEs, dependent and corrupt judiciary, lack of adequate judicial enforcement resources, and inadequate legal provisions curbing debtor fraud and facilitating judgment collection.¹⁷⁴

China has not signed any treaty with the U.S. offering judicial reciprocity enforcement of a damages judgment from a U.S. court in China.¹⁷⁵ Chinese courts have greater discretion in refusing to recognize and enforce foreign judgments than foreign Convention or foreign-related arbitral awards.¹⁷⁶ Chinese law on the enforcement of foreign judgments is said to be “often sketchy, skeletal, and replete with ambiguity.”¹⁷⁷ The lack of specific guidelines on the standard of review to be used by the lower people’s courts with regard to foreign judgments could result in arbitrary and inconsistent decisions.¹⁷⁸

It is very unlikely that American importers will bring their indemnification/contribution and breach of contract claims against the Chinese exporters in the Chinese courts because litigating in the unfamiliar Chinese legal system is widely believed to be much more risky than litigating in the American legal system.¹⁷⁹ Foreign parties, including American importers, are extremely skeptical about litigating in Chinese

¹⁷¹ David G. Klaber, *Determining Liability in a Global Economy*, in INSTANT AWARENESS: AN IMMEDIATE LOOK AT THE LEGAL, GOVERNMENTAL, AND ECONOMIC RAMIFICATIONS OF THE MATTEL TOY RECALLS, *supra* note 88.

¹⁷² The safe method for American plaintiffs to serve process on the Chinese defendants is via the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, to which both China and the United States are signatories. However, with the language and distance problems, it can be very time-consuming and costly. It is not advisable for American counsels to take voluntary depositions in China without first obtaining permission from Chinese authorities, which is, however, not often granted. Letters of request sent to Chinese authorities to compel production of evidence in China also may take a long time to be executed. See Fang Shen, *Are You Prepared for This Legal Maze? How to Serve Legal Documents, Obtain Evidence, and Enforce Judgments in China*, 72 UMKC L. REV. 215, 215, 220–36 (2003).

¹⁷³ Klaber, *supra* note 171.

¹⁷⁴ Zhang, *supra* note 147, at 87–92; Arthur Anyuan Yuan, *Enforcing and Collecting Money Judgments in China from a U.S. Judgment Creditor's Perspective*, 36 GEO. WASH. INT'L L. REV. 757, 757–760 (2004); David M. Albert, *Addressing Abuse of the Corporate Entity in the People's Republic of China: New Thoughts on China's Need for a Defined Veil Piercing Doctrine*, 23 U. PA. J. INT'L ECON. L. 873, 873–76 (2002).

¹⁷⁵ Shen, *supra* note 172, at 220.

¹⁷⁶ See Zhang, *supra* note 147, at 87–89, for a list of grounds on which a Chinese court may refuse to enforce a foreign judgment. See also Pien, *supra* note 150, at 593–97, for discussion of grounds on which a Chinese court may refuse to enforce a foreign-related arbitral award and a Convention award.

¹⁷⁷ Yuan, *supra* note 174, at 763. See Zhang, *supra* note 147, at 87–90, for a brief discussion of the processes whereby foreign judgments are enforced in China.

¹⁷⁸ Yuan, *supra* note 174, at 766–67.

¹⁷⁹ Heye, *supra* note 143, at 535.

courts.¹⁸⁰ Anecdotal evidence suggests that many American lawyers believe that indemnity litigation in China would be “pointless.”¹⁸¹ The overwhelming number of foreign parties opting for arbitration over litigation in Chinese courts disputes involving FIEs also reflects the popular distrust in the Chinese legal system.¹⁸² China’s legal system has been portrayed to be underdeveloped, lacking in transparency, judicial independence and impartiality, corrupt, incompetent, and unpredictable.¹⁸³ It is widely believed that the remote chance of receiving a favorable ruling in a Chinese trial court that is in turn successfully enforced is not worth pursuing given the huge costs and the language and cultural barriers involved.¹⁸⁴ Therefore, it is also not likely that Chinese exporters will end up paying damages to American importers.

c. Private Claims by American Consumers

It is unlikely that Chinese exporters will be actually exposed to product liability claims by American plaintiffs in Chinese courts because it is currently expensive and difficult to sue Chinese exporters in Chinese courts,¹⁸⁵ and because American plaintiffs have the less risky alternative of suing American manufacturers, distributors, importers, and retailers in American courts.¹⁸⁶

The probability that penalties will be imposed on most Chinese exporters resulting from product liability claims filed by American consumers in American courts¹⁸⁷ is also not high, for roughly the same personal jurisdiction, cost (time, money, and effort), and enforcement problems as mentioned earlier for suits brought by American importers in American courts.¹⁸⁸

d. Sanctions by the United States Regulators and the United States Federal Government

Chinese exporters might face civil penalties from U.S. regulatory agencies,¹⁸⁹ injunction and seizure,¹⁹⁰ and even criminal prosecution initiated by U.S. regulatory agencies if their noncompliance with U.S.

¹⁸⁰ *Id.*; Zhang, *supra* note 147, at 63; James Hugo Friend, *The Rocky Road Toward the Rule of Law in China: 1979–2000*, 20 NW. J. INT’L L. & BUS. 369, 379–80 (2000); Roy F. Grow, *Resolving Commercial Disputes in China: Foreign Firms and the Role of Contract Law*, 14 NW. J. INT’L L. & BUS. 161, 182 (1993).

¹⁸¹ Klaber, *supra* note 171.

¹⁸² Heye, *supra* note 143.

¹⁸³ See, e.g., *id.* at 546–52; Zhang, *supra* note 147, at 92–96. See Randall Peerenboom, *The X-Files: Past and Present Portrayals of China’s Alien “Legal System”*, 2 WASH. U. GLOBAL STUD. L. REV. 37, 37–96 (2003), for an overview of the academic debate over whether China has achieved some form of rule of law.

¹⁸⁴ Klaber, *supra* note 171. Cf. Heye, *supra* note 143, at 535–36 (arguing that litigation in Chinese courts might be a better option than arbitration as long as foreign parties are willing to play by the informal rules of the game and tailor a strategy to influence the judges).

¹⁸⁵ Zhang, *supra* note 147, at 87–92; Klaber, *supra* note 171.

¹⁸⁶ See sources cited *supra* note 185.

¹⁸⁷ E.g., 15 U.S.C. § 2072 (2000).

¹⁸⁸ *Id.*

¹⁸⁹ E.g., 21 U.S.C. § 335(b) (2000); 15 U.S.C. § 2069 (2000).

¹⁹⁰ E.g., 21 U.S.C. §§332, 334 (2000); 15 U.S.C. § 2071 (2000).

safety standards and regulations is detected.¹⁹¹ However, the probability of the imposition of such penalties is currently not high because of the lax enforcement by competent U.S. regulatory agencies, most of which are under-funded and under-staffed.¹⁹²

For example, the U.S. Food and Drug Administration (“FDA”) may take regulatory actions against Chinese exporters whose exports are subject to its jurisdiction if it suspects that the imported foodstuffs, drugs or cosmetics may not meet American safety standards.¹⁹³ The FDA may deny importation of the suspected products or require them to be ‘reconditioned’ or even impose mandatory testing requirements before admitting them for entry into the U.S.¹⁹⁴ The FDA may also initiate criminal proceedings against Chinese exporters if the consequences of their noncompliance of the applicable standards are severe.¹⁹⁵ For example, in February 2008, two Chinese companies, their officials, and an American importer involved in the melamine-tainted pet food incident were indicted by a U.S. federal prosecutor in Kansas City, Missouri.¹⁹⁶

However, the probability that noncompliance of Chinese exporters will be actually detected by the FDA is low because the FDA inspects only about one percent of the imported food over which it has jurisdiction, and samples only a fraction of it.¹⁹⁷ For example, the FDA inspected only fifty-two Chinese plants between January 1998 and September 2005.¹⁹⁸

Most Chinese exporters are exposed to few actual risks of legal sanctions by the U.S. government, because the latter most often has no personal jurisdiction over them.¹⁹⁹ Even if the latter has personal jurisdiction and obtains judgments against Chinese exporters, it is doubtful that such judgments will be successfully enforced in China.²⁰⁰ It is unlikely, for instance, that officials of the Chinese companies involved in the melamine-tainted pet food case can be brought to justice in the U.S. because of the lack of an extradition treaty between China and the U.S.²⁰¹

¹⁹¹ *E.g.*, 21 U.S.C. § 333 (2000); 15 U.S.C. § 2070 (2000).

¹⁹² The number of FDA inspectors decreased since 2003 despite the rising volume of imports subject to its jurisdiction. Marian Burros, *FDA Inspections Lax, Congress Is Told*, N.Y. TIMES, July 18, 2007, at C3. The number of CPSC employees decreased from 1,000 in 1981 to over 600 in 2005, and then to about 400 in 200. *Hearings Before the Subcomm. on Commerce, Trade & Consumer Protection of the H. Energy & Commerce Comm.*, 110th Cong. (2007) (statement of Rep. Cliff Stearns, Member, H. Energy & Commerce Comm.).

¹⁹³ *Defective Chinese Goods*, *supra* note 141.

¹⁹⁴ *Id.*

¹⁹⁵ 21 U.S.C. § 333 (2000).

¹⁹⁶ David Barboza, *U.S. Indicts 2 Chinese Companies in Pet-Food Poisoning*, INT'L HERALD TRIB., Feb. 8, 2008, at 11 (Finance); Editorial, *The Case of the Poisoned Pet Food*, N.Y. TIMES, Feb. 9, 2008, at A14; Press Release, U.S. Food & Drug Admin., FDA Investigation Leads to Several Indictments for Importing Contaminated Ingredients Used in Pet Food: Contaminated Pet Food Caused Pet Illnesses and Deaths Last Year (Feb. 6, 2008), <http://www.fda.gov/bbs/topics/NEWS/2008/NEW01792.html>.

¹⁹⁷ Burros, *supra* note 192.

¹⁹⁸ Roth et al., *supra* note 19, at 27.

¹⁹⁹ See *Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products, Hearings Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Pamela Gilbert, former Executive Dir. of U.S. CPSC).

²⁰⁰ *See id.*

²⁰¹ 18 U.S.C. § 3181 (1996).

e. *Sanctions by Chinese Regulators and the Chinese Government*

It is not likely that most Chinese exporters will be exposed to penalties and criminal prosecution under the Chinese law for not complying with U.S. safety and quality standards and regulations, unless the applicable U.S. safety and quality standards are adopted by relevant Chinese regulatory agencies as the controlling standards, or unless Chinese exporters and U.S. importers choose the Chinese law to govern their contracts.²⁰² Theoretically speaking, Chinese exporters shall face fines and/or criminal penalties imposed by the Chinese regulators and the Chinese government.²⁰³ However, the probability that their violation will be detected and the penalties imposed is not very high because of local protectionism, corrupt and dependent judiciary, lack of adequate judicial enforcement resources, under-funded and under-staffed regulatory agencies, and extensive government corruption and lack of accountability, especially at the local government level.²⁰⁴

f. *Reputation Loss*

Chinese exporters may also face reputation loss after their noncompliance with the safety standards is detected and publicized. However, most American importers withhold the identity of their suppliers, partly to protect themselves against competitors who may steal their qualified suppliers.²⁰⁵ As mentioned earlier, the Chinese food export enterprises that were reported by importing countries to have serious quality problems will be placed on the blacklist, which is published on AQSIQ's website.²⁰⁶ The expected value of the reputation loss varies with exporters: exporters with a short-term business mindset may attach a low value to the reputation loss, and those with a long-term business mindset may attach a higher value to it. The reputation loss is probably higher for wholly-owned foreign enterprises ("WOFEs") whose parent companies often have larger assets and market shares than for private Chinese enterprises ("PCEs"), most of which are small in scale and have less at stake.

3. *Normative Motivation*

The large gap in safety and quality standards between the U.S. and China, certain views about food hygiene and safety held by some Chinese suppliers and their employees, and perceived inequity in profit distribution may undermine perceived legitimacy of the U.S. safety standards and regulations.²⁰⁷ Some Chinese suppliers and their employees might view the U.S. standards and regulations to be unnecessarily strict when they directly conflict with the Chinese standards or their personal beliefs. For example,

²⁰² See *supra* Part II.A.

²⁰³ See *supra* Part II.B.

²⁰⁴ *Id.*

²⁰⁵ Roth et al., *supra* note 19, at 29.

²⁰⁶ See *supra* Part II.A.

²⁰⁷ See Roth et al., *supra* note 19, at 29.

diethylene glycol is banned as toothpaste ingredient in the U.S. but used to be permitted as a toothpaste ingredient in China.²⁰⁸ China's adoption of the U.S. standard is expected to improve the perceived reasonableness of the standard.

Moreover, it has been suggested that the acceptable food hygiene level of the average employee of Chinese export-oriented food producers, most of who grew up in poor rural areas, is lower than that of the typical Western, and that they may not appreciate the importance of such standards as traceability or transparency.²⁰⁹

Perceived inequities in the distribution of profits between Chinese suppliers and their U.S. buyers might have weakened some Chinese suppliers' sense of obligation to comply with American standards.²¹⁰ One popular sentiment is that you need to pay a higher price if you want to get quality products.²¹¹ Take Tyson Foods for example: it pays a premium of about twenty to thirty percent when it buys from thirty-five Japanese-certified poultry suppliers as compared to other uncertified poultry suppliers.²¹² Some suppliers might justify cutting corners on products on the belief that you get what you pay for.²¹³

China has seen the rise of a "post-communist personality" among its people, characterized by "a frantic scramble for individual wealth and pleasure" unrestrained by self-imposed scruples.²¹⁴ This "make-quick-money" mentality has led more and more individuals and businesses to use deceit or even to break the rules if necessary in their pursuit of wealth and profit.²¹⁵ This get-rich-quick mentality has also given rise to the "quality fade" phenomenon, whereby suppliers quietly start cutting corners on quality in pursuit of higher profits once a long-term supply relationship has been established with a foreign buyer, figuring no short-term consequences.²¹⁶

4. *Deficient Organizational Routines*

The quality management and supplier management capabilities vary across exporters in China.²¹⁷ Anecdotal evidence suggests that WOFEs implement the same quality control mechanisms and other quality

²⁰⁸ Chinese government banned the use of diethylene glycol "in an act of regulatory harmonization." Yang, *supra* note 8, at 45.

²⁰⁹ Roth et al., *supra* note 19, at 29–30.

²¹⁰ *Id.* at 29.

²¹¹ See Millington, Eberhardt & Wilkinson, *supra* note 93, at 192.

²¹² FDA Hearings, *supra* note 25 (testimony of James Rice, Vice President & Country Manager, Tyson Foods, Inc.).

²¹³ Roth et al., *supra* note 19, at 29.

²¹⁴ Xiaoying Wang, *The Post-Communist Personality: The Spectre of China's Capitalist Market Reforms*, 47 THE CHINA J. 1, 13 (2002).

²¹⁵ *Id.* at 14; Roth et al., *supra* note 19, at 29.

²¹⁶ Roth et al., *supra* note 19, at 29 (citing P. Midler, "Quality Fade": China's Great Business Challenge, KNOWLEDGE@WHARTON, July 25, 2007, available at <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1776>).

²¹⁷ Xiande Zhao, Barbara B. Flynn & Aleda V. Roth, *Decision Sciences Research in China: Current Status, Opportunities, and Propositions for Research in Supply Chain Management, Logistics, and Quality Management*, 38 DECISION SCI. 39, 52–54 (2007).

management practices as that used in their parent company.²¹⁸ WOFEs are widely believed to have the highest quality management and supply chain management capabilities among Chinese exporters.²¹⁹ This belief has found some empirical support. Andrew Millington, Markus Eberhardt, and Barry Wilkinson's study of seventy-five FIEs with manufacturing operations in China found that WOFE suppliers performed better than SOEs and international joint ventures ("IJVs") in criteria of quality and adherence to specification.²²⁰

The quality management and supplier management capabilities of PCEs have greatly improved, partly thanks to the training, support, and investment of FIEs that adopted PCEs as their suppliers.²²¹ Xiaojuan Jiang found that fifty-one out of the seventy-four FIEs studied provided their Chinese indigenous suppliers with technical assistance and helped them set up and improve their quality management system.²²² Such investment led to greater buyer control over suppliers' quality practices, including selecting suppliers' sub-suppliers.²²³ Because PCE suppliers are cheaper and more responsive to the demands of buyers than FIE suppliers, many foreign-invested manufacturing firms prefer PCEs over FIEs and SOEs.²²⁴

The findings on IJVs and PCEs are mixed. Jin-Hai Li, Alistair R. Anderson and Richard T. Harrison's study of quality management practices among 428 firms in northern China found that joint ventures scored the highest in quality practices, followed by PCEs and SOEs in descending order.²²⁵ However, Millington, Eberhardt, and Wilkinson's study showed that PCE suppliers performed much better than SOEs and IJVs in terms of quality and adherence to specification, and on average performed equally well, if not better, than WOFE suppliers.²²⁶

Moreover, it has been suggested that a larger number of small Chinese manufacturers may not appreciate the requirements of the U.S. system; their noncompliance with the applicable U.S. safety standards is "to some extent at least" due to the "lack of understanding or information, rather than a desire to circumvent the standards."²²⁷ The failure of many American importers to include quality specifications and quality control provisions in their contracts with Chinese exporters is to be blamed for the resulting ignorance on the part of Chinese exporters.²²⁸

To sum up, the following factors could influence Chinese exporters' willingness and ability to comply: (a) perceived benefits of noncompliance,

²¹⁸ Tyson Foods, Inc. uses the same manufacturing processes (e.g., quality control mechanisms, and the same HACCP programs) in its Chinese productions. FDA Hearings, *supra* note 25 (testimony of James Rice, Vice President & Country Manager, Tyson Foods, Inc.). See XIAOJUAN, *supra* note 100, at 32–34.

²¹⁹ See *id.*; Millington, Eberhardt & Wilkinson, *supra* note 93, at 191.

²²⁰ Millington, Eberhardt & Wilkinson, *supra* note 93, at 196–97.

²²¹ XIAOJUAN, *supra* note 100, at 29–34.

²²² *Id.* at 20.

²²³ Millington, Eberhardt & Wilkinson, *supra* note 93, at 197.

²²⁴ *Id.* at 191.

²²⁵ Jin-Hai Li, Alistair R. Anderson & Richard T. Harrison, *Total Quality Management Principles and Practices in China*, 20 INT'L J. QUALITY & RELIABILITY MGMT. 1026, 1026 (2003).

²²⁶ Millington, Eberhardt & Wilkinson, *supra* note 93, at 196–97.

²²⁷ Klaber, *supra* note 171.

²²⁸ *Defective Chinese Goods*, *supra* note 141.

(b) potential economic sanctions by American importers, (c) potential indemnification/contribution and/or breach of contract claims by American importers, (d) potential private claims by American consumers, (e) potential sanctions by U.S. regulatory agencies and U.S. federal government, (f) potential sanctions by Chinese regulators and the Chinese government, (g) reputation loss, (h) Chinese exporters' sense of moral duty to comply and the perceived reasonableness of the regulations, and (i) Chinese exporters' quality management and supply chain management capabilities.

IV. WHO IS THE ONE HOLDING THE POTENT CARROT AND STICK?

Based on the previous analysis of the major factors that hinder or induce compliance from Chinese exporters, I argue that U.S. importers can and will more effectively foster compliance when given the right support and push from the U.S. government.

A. IMPORTERS' INCENTIVES TO MAXIMIZE COMPLIANCE

U.S. importers have great incentives in maximizing compliance from Chinese exporters because of the potentially huge legal liabilities, significant recall-related costs, and reputation loss associated with noncompliant imports. As discussed earlier in Part III, U.S. importers are exposed to enormous tort liability in the U.S. for their defective imports, because American consumers who are harmed by these defective imports almost always turn to American importers for recovery of their damages. The price tag of these private lawsuits can be huge when the defective products affect a large class of consumers.²²⁹

Moreover, most U.S. importers will have to pay for product recalls and consumer damage claims because a vast majority of Chinese manufacturers do not have product liability coverage.²³⁰ "It has been estimated that perhaps only four percent of Chinese manufacturers have some sort of product liability coverage in place"²³¹ U.S. importers, who fail to recall defective products promptly after they become aware of the deficiency, are also subject to governmental actions seeking a fine or criminal penalty.²³² Further, the negative publicity associated with unsafe, defective products may lead to numerous negative consequences for the U.S. importer, such as decreased consumer trust, reduced sales, new regulatory requirements, investors who are unwilling to buy its shares, and reduced employee morale.²³³

²²⁹ Klaber, *supra* note 171.

²³⁰ Bush, *supra* note 88.

²³¹ *Id.*

²³² *Id.*

²³³ *See id.*

B. CARROT

Both U.S. importers and Chinese regulators can penalize Chinese exporters for their noncompliance with U.S. safety and quality standards and regulations. However, U.S. importers are the only ones who can meaningfully reward Chinese exporters for their compliance by paying a premium for such compliance. When properly used, this ability to reward can be a very powerful way to induce compliance.²³⁴ It is reasonable to expect that rational Chinese manufacturers would step up their efforts to comply with the applicable U.S. safety laws when they understand that safer, better quality products translate into bigger sales.

Despite the negative coverage, many Chinese exporters have demonstrated the capability of producing products that meet the safety and quality standards of their foreign buyers. However, many of these good faith exporters are effectively punished for such compliance when U.S. importers award contracts to those exporters who quote low and reduce quality correspondingly.²³⁵ This situation needs to be fixed, and the U.S. importers are the only ones who can fix it.

The U.S. importer can educate their Chinese suppliers on good quality management practices and help them find ways to cut costs without sacrificing product quality.²³⁶ U.S. importers can also help reduce the compliance costs for Chinese suppliers by educating them on the applicable safety standards and providing clarifications and explanations as needed. U.S. importers can more effectively and efficiently communicate applicable U.S. safety standards than the Chinese governments and the U.S. government, since they interact with their Chinese manufacturers on an ongoing basis.

Some U.S. federal agencies, such as the Consumer Product Safety Commission and Food and Drug Administration/Center for Food Safety and Applied Nutrition, are starting to publish certain safety documents in Mandarin on their websites.²³⁷ It is a good start, but many applicable standards are still not available in Mandarin. Some Chinese agencies, such as AQSIQ, publish certain foreign laws and regulations, on their websites.²³⁸ However, these publications are merely one-way communication. Clarifications and other feedbacks are not available to Chinese manufacturers. Moreover, it would not be cost-effective for Chinese manufacturers to obtain needed information this way.

Further, U.S. importers may enlist the help from Chinese regulators in their reward contests. The select poultry supplier model used by Japan in

²³⁴ FDA Hearings, *supra* note 25 (testimony of James Rice, Vice President & Country Manager, Tyson Foods, Inc.).

²³⁵ Roth et al., *supra* note 19, at 29.

²³⁶ See XIAOJUAN, *supra* note 100, at 29–33.

²³⁷ E.g., CPSC now carries the Handbook for Manufacturing Safer Consumer Products in Chinese on its website (<http://www.cpsc.gov/businfo/intl/handbookchineseaug05.pdf>). U.S. Food and Drug Administration/Center for Food Safety and Applied Nutrition also publishes many documents in Chinese (<http://www.cfsan.fda.gov/%7Emow/internat.html>).

²³⁸ E.g., AQSIQ publishes many foreign laws and regulations on its website (<http://jckspaaj.aqsiq.gov.cn/zcfg/gwflfgbz/>).

China is a good example.²³⁹ Japan only imports poultry from thirty-five Chinese poultry exporters certified by the Japanese Ministry of Agriculture, Forestry, and Fisheries (“MAFF”).²⁴⁰ These exporters are first selected by AQSIQ, and then visited and certified by MAFF.²⁴¹ MAFF inspects these exporters annually, but AQSIQ also shoulders the responsibility to ensure that these exporters comply with both Japan’s import regulation and China’s export regulation.²⁴² It is reasonable to expect willing assistance from AQSIQ given China’s vital interest in improving the safety of its exports and the small number of exporters to inspect.

C. STICK

As demonstrated earlier, under today’s status quo, the remote threat of indemnification/contribution claims and breach of contract claims by U.S. importers probably will not deter those Chinese exporters who are bent on fattening their profit margins by cutting corners on product quality.²⁴³ U.S. importers can increase the price tag for those Chinese exporters by requiring them to “obtain and maintain sufficient product and general liability insurance, with a reputable U.S. or international insurance carrier.”²⁴⁴ The U.S. government can help by negotiating with the Chinese government to maximize the chances that the U.S. importers can hold their Chinese exporters legally accountable. For example, the U.S. government could push the Chinese government for their cooperation in enforcing foreign arbitration awards and civil judgments. The U.S. government could sign an extradition treaty with China so that those exporters who are liable can be brought to justice in the U.S.

V. CONCLUSION

Maximizing Chinese imports’ compliance with the U.S. safety and quality standards and regulations is not possible without an understanding of the factors that hinder and foster Chinese exporters’ compliance. This Note contributes to the current discussion on ensuring import safety by exploring the compliance issue from the perspective of Chinese exporters. This Note argues that U.S. importers can and will more effectively foster compliance when given the right support and push from the U.S. government. It is important to remember that rewarding compliance is just as important as penalizing noncompliance. Increasing the benefits of compliance and helping Chinese exporters reduce compliance costs can go a long way in winning this fight against unsafe imports from China. Aligning Chinese exporters’ profit interest with the quality goal should induce compliance. U.S. importers need to take a real hard look at the incentive structure they create for their Chinese exporters to eliminate the

²³⁹ FDA Hearings, *supra* note 25 (testimony of James Rice, Vice President & Country Manager, Tyson Foods, Inc.).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ See *supra* Part III.C.2.b.

²⁴⁴ *Defective Chinese Goods*, *supra* note 141.

unintended rewards for noncompliance. Paying a premium for quality imports might not be such a bad choice for U.S. importers after all.