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# **GREATER UNIFORMITY AND CENTRALIZATION: THE REGULATORY DEVELOPMENT OF CHINESE FOOD AND PRODUCT SAFETY UNDER THE WTO**

**Nga Kit ‘Christy’ Tang\***

*Abstract:* The WTO Agreements emphasize free trade, which links with diversity, deregulation, and decentralization. China, on the other hand, emphasizes uniformity and centralization, especially regarding the political control and the one-party system of “democratic dictatorship.” China’s joining the WTO, therefore, may be considered as a development that changes the regulatory structure to become more diverse, deregulated, and decentralized. This paper, however, finds the opposite. Under the WTO law, China is encouraged to move towards greater uniformity and centralization with its decentralized and non-uniform settings under the market policy. Moreover, the WTO’s uniform and centralized encouragements can be integrated into the rule-by-man framework to increase the administrative and economic power of the Party. It is thus unclear whether China’s food and product safety problem can be solved.

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## **I. INTRODUCTION**

The World Trade Organization (WTO) promotes free trade, which is often considered as enhancing diversity, deregulation, and decentralization. China, on the other hand, emphasizes the one-party system embracing uniformity and centralization, particularly with regards to political control over words, thoughts, and action, as well as economic control under communist-capitalist, or bureaucratic-capitalist, policies.<sup>1</sup> When China became a WTO member in 2001, it appeared to be part of a liberalization process that would lead the country to be more diverse, deregulated, and decentralized. This paper, however, finds the opposite, particularly concerning the Chinese government administration’s role in the food and product safety system.

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<sup>1</sup> Maurice Meisner, *THE DENG XIAOPING ERA: AN INQUIRY INTO THE FATE OF CHINESE SOCIALISM, 1978–94 passim* (1996).

In light of the one-party system of political uniformity and centralization, Communist China has ironically relied on a flexible and decentralized market policy to pursue economic growth.<sup>2</sup> In the context of food and product safety, this flexibility and decentralization presents in different forms in terms of standardization, administrative, and legal measures, which mainly rely on ex post remedies of private law. This governance structure can also be viewed as a self-regulated laissez-faire system that is monitored by nearly three thousand local governments at the county levels through rulemakers, regulators, and economic developers that are closely connected with the industry in various regions.<sup>3</sup>

By contrast, as a WTO Member, China is encouraged—or obliged—to develop a regulatory system that is more uniform and centralized. Uniformity arises in two facets. One direction is the transparency principle that requires a “uniform, impartial and reasonable” application of rules under the General Agreement on Tariffs and Trade (GATT)<sup>4</sup> and “uniform administration” under the Protocol on the Accession of the People’s Republic of China (China Protocol).<sup>5</sup> These uniformities, however, can be based on unwritten concepts, such as reasonableness and fairness, as well as written definitions regarding administrative action.

Another uniformity direction concerns the international harmonization of safety standards. These standards provide written substantive rules that are closely related to scientific evidence directed and supported by recognized experts and authorities.<sup>6</sup> Both uniformity directions under transparency and harmonization require centralized settings, which rely on the central roles of the WTO’s dispute mechanism and designated organizations at the international level, as well as the central government at the national level to ensure conformity.

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<sup>2</sup> Nga Kit ‘Christy’ Tang, *China v. China: The Paradox in Regulating Food and Product Safety* 211–306 (May 9, 2014) (S.J.D. dissertation, American University) (on file with Pence Library, American University), available at: <https://auislandora.wrlc.org/islandora/object/thesesdissertations:336> [hereinafter Tang, *China v. China*].

<sup>3</sup> *Id.*

<sup>4</sup> General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

<sup>5</sup> Accession of the People’s Republic of China, Nov. 10, 2001, WT/L/432 [hereinafter China Protocol].

<sup>6</sup> Sam F. Halabi, *The Codex Alimentarius Commission, Corporate Influence, and International Trade: A Perspective on FDA’s Global Role*, 41 AM. J.L. & MED. 406, 417 (2015) [hereinafter Halabi]; THE ROLE OF ‘EXPERTS’ IN INTERNATIONAL AND EUROPEAN DECISION MAKING PROCESSES: ADVISORS, DECISION MAKERS OR IRRELEVANT ACTORS? 194 (Monika Ambrus et al. eds., 2014).

The WTO's uniformity and centralization goals seem to stem from the Western rule of law tradition to pursue certainty, consistency, and predictability. Considering the function of WTO law, uniformity in the forms of harmonization and transparency can be a means to eliminate unnecessary trade barriers, as well as arbitrary and unjustifiable discrimination, with the goal to promote free trade that encourages equality and fairness. When this view of equality, or non-discrimination, combines with the preventive approach that enhances the role of governments to protect people from harmful food and products, national administrations can be encouraged, or obliged, to regulate, direct, or supervise economic activities.

In China, this safety and free trade development regarding uniformity and centralization may strengthen the economic role of the central government. Besides the political control, the Communist Party can be encouraged, or obliged, to have regulatory and economic power centralized and uniform when supervising food and merchandise production. Without a rule of law, the Chinese food and product safety development can ironically be a domestic deliberalization process under the WTO's international liberalization. Moreover, it is unclear if the safety problems can be solved.

This paper aims to examine the impact of the WTO's pursuit of uniform and centralized regulations on China. The study is divided into five sections. After this introductory section, the second section reviews the WTO's uniformity and centralization provisions under the principles of transparency and harmonization.<sup>7</sup> The third section examines how the Chinese food and product safety regulatory system rely on flexibility, decentralization, and self-regulation. The fourth section discusses Chinese developments in uniformity and centralization that embrace greater administrative, information, and economic control by the central government. The fifth section concludes that the international free trade development under WTO law can be used to strengthen the "full process control" of the Party in China.

## II. THE WTO'S CENTRALIZED UNIFORMITY

The WTO Agreements—generally referred to as the Final Act—are a

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<sup>7</sup> As discussed in Part I, Section C and D, the "encouragements" under the SPS and TBT Agreements may refer to voluntary standards that can be transformed to be mandatory obligations in practice. Thus, the word of "encouragement" might only be half-accurate. The use of this word "encouragements" follows the WTO's official website such as *Understanding the WTO Agreements on Sanitary and Phytosanitary Measures*, WTO (May 1998), [https://www.wto.org/english/tratop\\_e/sps\\_e/spsund\\_e.htm](https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm).

series of rules that were agreed to at resulting the 1986–1994 Uruguay Round of multilateral trade negotiations.<sup>8</sup> These agreements are legal texts that spell out the principles of liberalization.<sup>9</sup> The aim, as provided by the WTO, is to combat discrimination and unnecessary obstacles to trade, as well as to create a predictable trading environment.<sup>10</sup> Applying this framework to international food and product safety, however, can actually lead to greater uniformity and centralization of deliberalization.<sup>11</sup>

These uniform and centralized characteristics are presented in various forms. This section, in particular, focuses on four WTO Agreements. First, the GATT, which provides the fundamental principles regarding “uniform, impartial and reasonable manner.”<sup>12</sup> Second, the China Protocol, which lays down specific obligations requiring “uniform administration.”<sup>13</sup> Third and fourth are the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), which both concern substantive safety standards.

A. *GATT’s “Uniform, Impartial and Reasonable Manner” of Rule Application*

WTO law requires uniform application of trade measures, which mainly concerns administrative action regarding how government officials should apply substantive rule. In particular, under the transparency principle, Article X:3(a) of the GATT states that “each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.”<sup>14</sup>

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<sup>8</sup> WTO, *Legal Texts: The WTO Agreements*, WTO, [https://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](https://www.wto.org/english/docs_e/legal_e/final_e.htm) (last visited Nov. 28, 2018); WTO, *Overview: A Navigational Guide*, WTO, [hereinafter WTO, A Navigational Guide], [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm) (last visited Nov. 28, 2018).

<sup>9</sup> WTO, A Navigational Guide, *supra* note 8.

<sup>10</sup> Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120, [hereinafter TBT], [https://www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf).

<sup>11</sup> Robert L. Howse et al., *Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products*, 48 GEO. WASH. INT’L L. REV. 81, 135 (2015) [hereinafter *Pluralism in Practice*]; Halabi, *supra* note 6, at 407. Uniformity may refer to the application of trade measures under the transparency principle and the encouragement of domestic measures to be based on international standards under harmonization. Centralization functions as a means to unify such applications and standards through the central government at the national level and the WTO at the international level.

<sup>12</sup> GATT 1994, *supra* note 4, art. X:3(a).

<sup>13</sup> China Protocol, *supra* note 5, pt. I § 2(A).

<sup>14</sup> GATT 1994, *supra* note 4, art. X:3(a).

Paragraph 1, Article X:1 of the GATT, provides details regarding the scope of those trade measures that shall be applied in a “uniform, impartial and reasonable manner,” which include:

Laws, regulations, judicial decisions and administrative rulings of *general application*, made effective by any contracting party, pertaining to the classification or the valuation of products of customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use . . . [as well as] [a]greements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party . . . .<sup>15</sup>

Such trade measures include: (1) statutes written by the legislature, (2) regulations written by agencies, (3) judicial decisions written by judges, and (4) administrative rulings written by administrative courts regarding customs, imports and exports, and transfer of payments, as well as (5) any policies determined by executive functions that may affect movement of goods. Thus, both legal rules and policies in the forms of trade or domestic measures that directly or indirectly affect international trade shall be applied in a “uniform, impartial and reasonable manner.”

Although the scope of trade measures is broad, Article X only focuses on their publication and application, not the substantive content of rules regarding trade conduct.<sup>16</sup> In other words, there are two types of rules—one providing substantive rules regulating the activities of traders, the other providing procedural or administrative rules regulating the activities of agencies.

To determine whether a rule is administrative, the panel in *Argentina – Hides and Leather* considered that administrative rules merely provide for a

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<sup>15</sup> GATT 1994, *supra* note 4, art. X:1 (emphasis added).

<sup>16</sup> WTO, WTO ANALYTICAL INDEX: GATT 1994 – ARTICLE X (JURISPRUDENCE) 16 [hereinafter WTO, ANALYTICAL INDEX (ART. X)], [https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gatt1994\\_art10\\_jur.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art10_jur.pdf) (the Appellate Body in *EC – Poultry* explicitly stated that the substantive content of the rules themselves falls outside the scope).

means, or a certain manner, for assisting officials to apply and enforce substantive rules.<sup>17</sup> In line with this principle, the panel in *US – Corrosion-Resistant Steel Sunset Review* provided that the United States’ sunset review laws, which contain different reviewing requirements from the Anti-Dumping Agreement, refer to the substance rather than their administration.<sup>18</sup> Thus, the measures in question are outside the scope of Article X:3(a) of the GATT.<sup>19</sup> However, if substantive content regulates the administration, application, or implementation of a legal instrument, it is within the scope and must be uniform, impartial, and reasonable.<sup>20</sup>

In accordance with the Appellate Body in *EC – Selected Customs Matters*, “uniform administration” refers to the “general application” of laws that have a “significant impact on overall administration,”<sup>21</sup> but not the “administrative process” for a series of steps or the impact on a single case.<sup>22</sup> The uniformity of rule application, therefore, can be referring to those rules regarding administrative “definition, guidelines or standards.”<sup>23</sup>

These written rules regarding general application in the forms of definition, guidelines or standards, however, may be applied differently based on unwritten concepts, impartiality, and reasonableness, in accordance with particular circumstances. For instance, in order to pursue nondiscriminatory and equal treatment, the panel in *US – Stainless Steel (Korea)* emphasized “uniformity of treatment” of traders and provided that “uniform

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<sup>17</sup> *Id.* at 16. In this case, the measure in question does not create the classification requirements, provide for export refunds, or impose export duties, therefore, is not covered by Article X:3(a) of the GATT 1994.

<sup>18</sup> In *US – Corrosion-Resistant Steel Sunset Review*, Japan argued that the evidentiary requirements for self-initiation under the US’ sunset review laws were “administrative in nature.” Moreover, the U.S. application of its sunset reviews was not uniform because it has different approach from Article 11.3 of Anti-dumping Agreement (AD) sunset reviews. The panel, however, ruled that the sunset reviews under Article 11.3 of AD “is not subject to the evidentiary requirements” as the United States’ sunset reviews. Thus, the difference between AD’s and United States’ sunset reviews “is related to the substance rather than the administration . . .” *Id.* at 17.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 17–18 (the Appellate Body in *EC – Selected Customs Matters* provided that Article X:3(a) of the GATT 1994 does not require uniform “administrative process” that “may be understood as a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision . . .”).

<sup>22</sup> “Administration” emphasizes “significant impact on the overall administration . . . and not simply on the outcome of the single case in question.” *Id.* at 17. The Appellate Body in *EC – Selected Customs Matters* defined “application” as “putting into practical effect, or applying, a legal instrument.” *Id.* at 21.

<sup>23</sup> *Id.* In line with this view, the panel in *China – Raw Materials* found that a foreign trade system that allocates export quotas operated by thirty-two local departments without any guidelines or standards constituted non-uniform administration. In this case, the panel considered that “there is a very real risk” that similar exporters may be treated differently by thirty-two dispersed local offices. *Id.*

administration” of laws and regulations “must be understood to mean uniformity of treatment in respect of persons similarly situated,” and not to require “identical results where relevant facts differ.”<sup>24</sup>

Uniform administration also aims to ensure due process, which pertains to different subject matters and can be interpreted differently based on actual circumstances.<sup>25</sup> For instance, in *EC – Selected Customs Matters*, due process referred to the ability of a trader to have an adverse administrative decision reviewed.<sup>26</sup> To the panel in this case, the due process objective suggested “prompt review and correction” in a “quick and effective manner and without delay.”<sup>27</sup> The meaning of “quick” or “performed without delay,” nevertheless, “depends on the context and particular circumstances” and “the nature of the specific administrative action,” and “thus cannot be determined in the abstract.”<sup>28</sup>

Consequently, the true extent of GATT’s uniformity is not well-defined and can be of unwritten nature.<sup>29</sup> Whether an application of trade measures or administrative rules is “uniform, impartial and reasonable” depends on the interpretation of the WTO’s dispute mechanism. The WTO, therefore, has the centralized power to determine and unify the manner of rule application regarding domestic trade measures of its Members.

In addition, the GATT expects Members’ central governments to ensure national uniformity. Article X(3)(b) of the GATT, which concerns publication and administration of trade measures, requires Members to establish independent judicial, arbitral, or administrative tribunals for reviewing and correcting administration action.<sup>30</sup> Thus, the central government may ensure that trade measures are published and applied in a unified way. Law publication, therefore, can also be a means to uniform and centralized rule application at the national level.<sup>31</sup>

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<sup>24</sup> *Id.* at 20.

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 16–17

<sup>30</sup> GATT 1994, *supra* note 4, art. X(3)(b).

<sup>31</sup> Padideh Ala’i & Matthew D’Orsi, *Transparency in International Economic Relations and the Role of the WTO*, in RESEARCH HANDBOOK ON TRANSPARENCY 368, 369 (Padideh Ala’i & Robert Vaughn eds., 2014).

### B. *China's Uniform and Centralized Obligations*

The China Protocol requires uniformity and centralization beyond the GATT. In addition to including a rule application manner and a review mechanism, Part I, Section 2(A) emphasizes “uniform administration” regarding (1) the entire customs territory of China, and (2) the compliance of local rules.<sup>32</sup> These obligations involve a governing framework covering not only administrative rules but also substantive trade measures. Moreover, the central government shall ensure this framework through its judiciary that is under the executive function in practice.<sup>33</sup>

Section 2(A)(1) of the China Protocol provides, “the provisions of the WTO Agreement and this Protocol shall apply to the entire customs territory of China.”<sup>34</sup> This territory includes “special economic areas” such as “border trade regions and minority autonomous areas, Special Economic Zones, open coastal cities, economic and technical development zones[,] and other areas where special regimes for tariffs, taxes, and regulations are established.”<sup>35</sup> As such, this provision requires that the substantive rules of the WTO Agreement to be uniformly implemented throughout the country.<sup>36</sup>

In addition, the China Protocol specifically requires local measures to comply with the WTO Agreement.<sup>37</sup> These local rules include “local regulations, rules, and other measures of local governments at the sub-national level.”<sup>38</sup> The international obligations under the WTO Agreement, therefore, are transformed into national and local obligations in terms of substance. In other words, the substantive trade measures in China can be expected to be uniform at a higher level following WTO law.<sup>39</sup>

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<sup>32</sup> China Protocol, *supra* note 5, pt. I, §§ 2(A)(1)–(4).

<sup>33</sup> Feng Lin, *The Future of Judicial Independence in China 5* (City Univ. of H.K., May Working Paper No. 2, 2016), [http://www6.cityu.edu.hk/cjer/lib/doc/paper/WK2\\_The\\_Future\\_of\\_Judicial\\_Independence\\_in\\_China.pdf](http://www6.cityu.edu.hk/cjer/lib/doc/paper/WK2_The_Future_of_Judicial_Independence_in_China.pdf). The judiciary in China is not considered to be independent, because it is within the executive function. The Chinese review mechanism, therefore, can be a tool of the central or local governments to enhance political and economic supervision.

<sup>34</sup> China Protocol, *supra* note 5, pt. I, § 2(A)(1).

<sup>35</sup> *Id.*

<sup>36</sup> Jeffrey L. Gertler, *What China's WTO Accession Is All About*, in *CHINA AND THE WTO: ACCESSION, POLICY REFORM, AND POVERTY REDUCTION STRATEGIES* 27–28 (Deepak Bhattasali et al. eds., 2004).

<sup>37</sup> China Protocol, *supra* note 5, pt. I, § 2(A)(3). This provision states, “China’s local regulations, rules and other measures of local governments at the sub-national level shall conform to the obligations undertaken in the WTO Agreement and this Protocol.”

<sup>38</sup> *Id.*

<sup>39</sup> Jerome Cohen, *China's Troubled Path to WTO*, 20 INT'L FIN. L. REV. 71, 72 (2001).

Besides substantive rules affecting traders, similar to the GATT, Part I, Section 2(A)(2) of the China Protocol requires uniform rule application by Chinese officials:<sup>40</sup>

China shall apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub-national level . . . pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights (“TRIPS”) or the control of foreign exchange.<sup>41</sup>

If this provision is interpreted in accordance with Article X of the GATT, Chinese administrative conduct shall be “uniform, impartial and reasonable.” This uniform obligation may be satisfied by written administrative definition, guidelines, or standards provided by the central government.<sup>42</sup> Moreover, the unwritten abstract elements, impartiality, and reasonableness can be based on the interpretation of central authorities, as well as the interpretation of WTO law.<sup>43</sup> As such, both substantive trade measures and their applications can be centralized to a more significant level in Beijing and at the WTO.

Greater uniformity and centralization may also be enhanced by transparency as a means to ensure conformity. For instance, the transparency principle requires that China’s trade measures be shared with the WTO as an information center for other Members at the international level, and that they are published by an official journal with an enquiry point established by the central government at the national level.<sup>44</sup> These transparency requirements serve a supporting role as secondary rules to ensure that external parties, such as “any individual, enterprise or WTO Member,” can access substantive measures as primary rules at the center to establish greater uniformity.<sup>45</sup>

Similar to the GATT, this greater uniformity and centralization can be strengthened by the national review obligation. Part I, Section 2(A)(4) of the

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<sup>40</sup> China Protocol, *supra* note, 5, pt. I, § 2(A).

<sup>41</sup> *Id.* pt. I, § 2(A)(2).

<sup>42</sup> WTO, ANALYTICAL INDEX (ART. X), *supra* note 16, at 10–11.

<sup>43</sup> The terms “impartial” and “reasonable” are unwritten abstract concepts because their meanings can be changed in accordance with different facts and actual circumstances.

<sup>44</sup> China Protocol, *supra* note 5, pt. I, §§ 2(B)(1), 2(C)(2)–(3).

<sup>45</sup> *Id.* pt. I, § 2(C).

China Protocol requires the country to “establish a mechanism under which individuals and enterprises can bring to the attention of the national authorities cases of non-uniform application of the trade regime.”<sup>46</sup> This mechanism, moreover, relies on “tribunals . . . for the prompt review of all administrative actions.”<sup>47</sup> As such, under the Protocol, China’s trade measures and their applications are expected to be examined independently to ensure conformity.<sup>48</sup>

These national review settings can also be considered as secondary rules as a means to ensure the compliance with trade measures as primary rules. Rather than being substantive rules to provide what officials or traders shall or shall not do, these secondary rules provide a means, in the form of independent review mechanisms, for external checks and balances to ensure uniformity of administrative conduct and treatment. However, since China does not have separation of powers under its democratic dictatorship, the Chinese judiciary is still, in reality, within the executive function.<sup>49</sup> The Chinese administrative and judicial review mechanisms, therefore, may not be as independent or as impartial and reasonable as expected.<sup>50</sup>

### *C. Greater Uniformity and Centralization Under the TBT Agreement*

The TBT Agreement was established in 1979.<sup>51</sup> Considering international standards and systems can improve the efficiency of production, facilitate international trade, and transfer technology, the Agreement encourages greater uniformity.<sup>52</sup> Such uniformity, moreover, shall be based

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<sup>46</sup> *Id.* at pt. I, § 2(A)(4).

<sup>47</sup> *Id.* at pt. I, § 2(D)(1).

<sup>48</sup> More details regarding how the Chinese review mechanism will be discussed in Part III can be found at Nga Kit ‘Christy’ Tang, *The WTO’s Impact on China: A Battle of Administrative Review Settings between Internal and External Regulatory Frameworks*, 10 VIENNA J. INT’L. CONST. L. 251, 265–70 (2016) [hereinafter Tang, *The WTO’s Impact on China*].

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 265.

<sup>51</sup> TBT, *supra* note 10, annex A(2).

<sup>52</sup> *Id.*, pmb1.; *Technical Information on Technical Barriers to Trade*, WTO [hereinafter WTO, *Technical Information*], [http://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_info\\_e.htm](http://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm) (last visited Nov. 28, 2018); RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE 153 (Tracy Epps & Michael J. Trebilcock eds., 2013); THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 373, 392 (Patrick F. J. Macrory et al. eds., 2005).

on science that may be centralized by recognized experts and institutions.<sup>53</sup> This regulatory process is promoted as harmonization.

The TBT Agreement focuses on three subject matters: (1) technical standards, (2) technical regulations, and (3) conformity assessment systems.<sup>54</sup> Standards are defined as voluntary while regulations are mandatory.<sup>55</sup> Regulations and standards are “technical” when the rules “set out specific characteristics of a product—such as its size, shape, design, functions and performance, or the way it is labeled or packaged before it is put on sale.”<sup>56</sup> In certain circumstances, the meaning of “technical” may extend to cover “the way a product is produced” such as “a product’s process and production methods” (PPMs) that affect products’ characteristics.<sup>57</sup> As such, technical standards and regulations can be considered as primary substantive rules regarding producers’ conduct in the form of what technical products should or shall be. Moreover, these rules may govern not only producers within the territories of regulating Members, but also the conduct of foreign exporting producers outside their territories.<sup>58</sup>

In contrast, rather than producer action, “conformity assessment procedures” refer to “any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.”<sup>59</sup> These rules, then, focus on administrative conduct and regulatory settings of

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<sup>53</sup> TBT, *supra* note 10, pmb.; *Technical Information on Technical Barriers to Trade*, WTO [hereinafter WTO, *Technical Information*], [http://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_info\\_e.htm](http://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm) (last visited Nov. 28, 2018); RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE 153 (Tracy Epps & Michael J. Trebilcock eds., 2013); THE WORLD TRADE ORGANIZATION: LEGAL ECONOMIC AND POLITICAL ANALYSIS 373 & 392 (Patrick F. J. Macrory et al. eds., 2005).

<sup>54</sup> TBT, *supra* note 10, art. 1.6.

<sup>55</sup> *Id.*, annex 1, ¶¶ 1–2; WTO, *Technical Information*, *supra* note 53.

<sup>56</sup> TBT, *supra* note 10, annex 1, ¶¶ 1–2; WTO, *Technical Information*, *supra* note 53.

<sup>57</sup> TBT, *supra* note 10, annex 1, ¶¶ 1–2; WTO, *Technical Information*, *supra* note 53; CHRISTINE R. CONRAD, PROCESSES AND PRODUCTION METHODS (PPMS) IN WTO LAW: INTERFACTING TRADE AND SOCIAL GOALS 381 (2011).

<sup>58</sup> When certain PPMs (product’s process and production methods) are required under an importing countries’ regulations, these rules require how and what foreign producers shall do during the production process in exporting countries. An example is the WTO Shrimp – Turtle case, Section 609 of U.S. Public Law 101–102 requires shrimp to be harvested using certain technology to protect sea turtles. This rule governs the conduct of shrimp harvesters in India, Malaysia, Pakistan, and Thailand who export their shrimp products to the United States. In other words, although the shrimp harvest activities are not conducted within U.S. territory, those activities can be governed by U.S. law, as long as their products are exported to the United States. *India etc versus US: ‘shrimp-turtle’*, WTO, [https://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm) (last visited Nov. 28, 2018) (summarizing the case).

<sup>59</sup> TBT, *supra* note 10, annex 1, 3.

governments, non-governmental bodies, and assessment organizations.<sup>60</sup> Moreover, these administrative and procedural rules can be viewed as secondary rules as a means to ensure the conformity of primary rules regarding implementation.<sup>61</sup>

Under the Preamble of the TBT Agreement, Members have a right to take measures necessary at the level they consider appropriate to ensure export quality; to protect life, health, and the environment; and to prevent deception, as long as such measures do not create unnecessary obstacles in international trade and are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination.<sup>62</sup>

Article 2.4 of the TBT Agreement, however, also states, “[w]here technical regulations are required and relevant international standards exist or their completion is imminent, Members *shall* use them . . . *as a basis for* their [domestic] technical regulations.”<sup>63</sup> In *EC – Sardines*, the Appellate Body considered the meaning of “as a basis for” which may require “a very strong and very close relationship” between national regulations and international standards.<sup>64</sup> As such, voluntary international standards are considered to have “automatic legal force” in the WTO that can be automatically and uniformly transformed to be mandatory domestic regulations, unless exceptions apply.<sup>65</sup>

In accordance with Article 2.4 of the TBT Agreement, exceptions present “when such international standards or relevant parts would be an *ineffective or inappropriate means* for the fulfilment of the *legitimate objectives* pursued” regarding climatic, geographic, and technical issues of regulating Members.<sup>66</sup> In the view of the Appellate Body in *EC – Sardines*,

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<sup>60</sup> *Id.* arts. 5, 6, 7.

<sup>61</sup> *Id.* art. 5.1

<sup>62</sup> *Id.* pmb1.

<sup>63</sup> *Id.* art. 2.4 [emphasis added].

<sup>64</sup> Robert Howse, *Regulatory Cooperation, Regional Trade Agreements, and World Trade Law: Conflict or Complementarity?*, 78 *LAW & CONTEMP. PROBS.* 137, 144–45 (2015) [hereinafter Howse, *Regulatory Cooperation*].

<sup>65</sup> Robert Howse & Philip I. Levy, *The TBT Panels: US – Cloves, US – Tuna, US – Cool*, 12 *WORLD TRADE REV.* 327, 349–51 (2013).

<sup>66</sup> TBT, *supra* note 10, art. 2.4 (emphasis added).

Members must define regulating objectives.<sup>67</sup> However, the burden of proof regarding when the relevant international standards would be an effective and appropriate means is allocated to complainants—the regulated, mainly exporting Members whose “trade interests are significantly affected.”<sup>68</sup> Although some scholars have pointed out difficulties in practice, these international standards have succeeded in creating greater uniformity among Members’ technical regulations.<sup>69</sup>

Besides, international standards can be centralized in a few “relevant international standardizing bodies.”<sup>70</sup> Under the TBT Agreement, “international body and system” refers to those institutions “whose membership is open to the relevant bodies of at least all Members.”<sup>71</sup> This can mainly be associated with the International Organization for Standardization (ISO) and International Electrotechnical Commission (IEC),<sup>72</sup> as well as the United Nations system that provides general terms for substantive standardization and procedures for assessment of conformity.<sup>73</sup>

Theoretically, the legitimacy of these international bodies is based on the openness of transparency, participation, and impartiality of all interested Members at all stages of standards development.<sup>74</sup> In practice, the international standards development process within international bodies are often considered to be biased and closed.<sup>75</sup> The performance of experts in technical committees is also questionable considering the conflict of interest among their expertises, national identities, and relations with private sectors.<sup>76</sup>

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<sup>67</sup> See Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶¶ 276–79, WTO Doc. WT/DS231/AB/R (adopted July 29, 2003); Petros C. Mavroids, *Driftin’ Too Far from Shore—Why the Test for Compliance with the TBT Agreement Developed by The WTO Appellate Body Is Wrong, and What Should the AB Have Done Instead*, 12 *WORLD TRADE REV.* 509, 514 (2013); Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶¶ 276–79, WT/DS231/AB/R (Sept. 26, 2002).

<sup>68</sup> TBT, *supra* note 10, art. 14.4; *see also* Mavroids, *supra* note 67, at 523; Joanne Scott, *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO*, 15 *EUR. J. INT’L. L.* 307, 326–27 (2004); TBT, *supra* note 10, art. 14.4.

<sup>69</sup> *See* Mavroids, *supra* note 67, at 523; Scott, *supra* note 68, at 328.

<sup>70</sup> TBT, *supra* note 10, annex 1, ¶ 2.3(G).

<sup>71</sup> *Id.* annex 1, ¶ 4.

<sup>72</sup> *Id.* arts. 1–2.

<sup>73</sup> *Id.* art. 1.1.

<sup>74</sup> *See* Erik Wijkstorm & Devin McDaniels, *Improving Regulatory Governance: International Standards and the WTO TBT Agreement*, 47 *J. WORLD TRADE* 1013, 1029, 1035, 1038, 1040 (Oct. 2013); HUMBERTO Z. SCHRODER, *HARMONIZATION, EQUIVALENCE AND MUTUAL RECOGNITION OF STANDARDS IN WTO LAW* 81–82 (2011).

<sup>75</sup> *See* Wijkstorm & McDaniels, *supra* note 74, at 1038, 1040.

<sup>76</sup> *See* SCHRODER, *supra* note 74, at 78.

Despite these challenges, the development of international technical standards has been centralized at those organizations to enhance uniformity.<sup>77</sup>

This international centralization, moreover, requires greater domestic centralization and uniformity as well. Article 7.5 of the TBT Agreement, in particular, obliges Members' central governments to take full responsibility for formulating and implementing "positive measures and mechanisms" in supporting other regulatory bodies within their territories.<sup>78</sup> Those positive measures are described as "reasonable measures" to "ensure compliance" of local governments and non-governmental bodies,<sup>79</sup> such as notifying local governments of the TBT requirements, and not "tak[ing] measures which require or encourage local government bodies and non-government bodies . . . to act in a manner inconsistent" with the TBT provisions.<sup>80</sup> As such, national centralization frameworks are established to ensure that voluntary international standards are implemented at the local level in the form of mandatory measures.<sup>81</sup>

Centralization also comes with preemption.<sup>82</sup> Article 4.1 of the TBT Agreement requires Members' central government standardizing bodies to "accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards (Code of Good Practice, CGP) in Annex 3[.]" which states that standardizing bodies "shall make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies."<sup>83</sup> In other words, if certain technical standards have been set by TBT's recognized international or regional bodies, national standardizing bodies may not establish another set of standards on the same subject matter. International standards, therefore, may restrain Members from

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<sup>77</sup> See Jonathan Carlone, *An Added Exception to the TBT Agreement After Clove, Yuna II, and Cool*, 37 B.C. INT'L & COMP. L. REV. 103, 107 (2014); Howse, *Regulatory Cooperation*, *supra* note 64, at 144–45; *Pluralism in Practice*, *supra* note 11, at 135.

<sup>78</sup> TBT, *supra* note 10, art. 7.5.

<sup>79</sup> *Id.* arts. 3.5, 4.1, 5.1 5.4.; *see also Pluralism in Practice*, *supra* note 11, at 135.

<sup>80</sup> TBT, *supra* note 10, art. 3.2, 3.4.

<sup>81</sup> See Scott, *supra* note 68, at 310 (suggesting governance to be premised upon coordination not centralization, cooperation not uniformity, shared governance not pre-emptive); *Pluralism in Practice*, *supra* note 11, at 135; James Bacchus, *A Common Gauge: Harmonization and International Law*, 37 B. C. INT'L 7 COMP. L. REV. 1, 9 (2014).

<sup>82</sup> See Henrik Horn et al., *In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees*, 47 J. WORLD TRADE 729, 730 (2013).

<sup>83</sup> TBT, *supra* note 10, art. 4.1, annex 3, ¶ (H).

regulating technical products.<sup>84</sup> The regulatory power that brings economic power is further centralized at the international standardization bodies and central governments.

In addition to the direct path above, the TBT Agreement provides indirect paths, such as “equivalent regulations” and “mutual recognition,” to harmonize technical measures among members towards greater uniformity. For instance, Article 2.7 of the TBT Agreement requires Members to “give positive consideration” to *equivalent* technical regulations of other Members, provided that “they are satisfied that these regulations adequately fulfill the *objectives* of their own regulations.”<sup>85</sup>

Considering the “objectives” provided, Article 2.7 of the TBT Agreement refers to “legitimate objectives” regarding the right of Members to adopt “appropriate levels of protection.”<sup>86</sup> These “legitimate objectives” and “appropriate levels of protection,” as stated in Article 2.2 of the TBT Agreement, nevertheless, “shall not be more trade-restrictive than *necessary*” and have to take account of “the *risks* non-fulfillment would create.”<sup>87</sup> In assessing such risks, relevant elements include “available scientific and technical information, related processing technology or intended end-uses of products.”<sup>88</sup>

The TBT Agreement does not provide further detail regarding what is “necessary.” The WTO panel in *EC – Asbestos*, however, observed that provisions of the TBT Agreement are very similar to those in Article XX of the GATT.<sup>89</sup> Accordingly, in proving a measure is “necessary,” Members may “rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion.”<sup>90</sup> Moreover, with respect to health policy, Members do not have to follow “a majority scientific

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<sup>84</sup> *Id.* art. 13.3.

<sup>85</sup> *Id.* art. 2.7.

<sup>86</sup> *Id.* art. 2.2.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> WTO, WTO ANALYTICAL INDEX: GATT 1994 – ARTICLE XX (JURISPRUDENCE) 26 [WTO, WTO ANALYTICAL INDEX (ART. XX)], [https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gatt1994\\_art20\\_jur.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_jur.pdf); see also Mavroids, *supra* note 67, at 515–16; GATT 1994, *supra* note 4, arts. XX–XX(b).

<sup>90</sup> WTO, ANALYTICAL INDEX (ART. XX), *supra* note 89, at 26.

opinion.”<sup>91</sup> Whether a TBT Agreement measure is appropriate, therefore, depends on qualitative, instead of quantitative scientific information.

What does “qualitative scientific information” mean? The TBT Agreement states that a panel “may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts.”<sup>92</sup> Moreover, these experts are restricted to “persons of professional standing and experience in the field in question.”<sup>93</sup> Thus, although equivalent requirements seem to accept different technical regulations, the scope of these measures are subject to the views of recognized experts who are often affiliated with international standardizing bodies that are mainly located in developed countries.<sup>94</sup>

With respect to less developed countries, the TBT Agreement requires Members to provide “differential and more favorable treatment” to developing country Members (DCMs) and to ensure that their technical regulations, standards, and conformity assessment procedures “do not create unnecessary obstacles to exports” from those Members.<sup>95</sup> The TBT Agreement also recognizes that DCMs “should not be expected to use international standards as a basis for their [domestic] technical regulations or standards.”<sup>96</sup>

Under these recognitions, DCMs may adopt technical standards with lower protection, which may open greater market access for developed countries. In addition, although the WTO mechanism does not penalize lower protection standards that do not constitute barriers to trade, DCMs’ lower domestic standards harm their export capabilities in practice. For instance, lower standard products made in DCMs may not be able to meet higher technical requirements in developed countries, thereby preventing their export. In order to lessen the harm caused by this lower standard export limitation, corporations located in DCMs may still have to adopt international technical standards issued by international standardizing bodies. On the other hand, developed countries may not adopt higher technical standards with greater protection comparing with international technical standards, which may

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<sup>91</sup> *Id.*

<sup>92</sup> TBT, *supra* note 10, art. 14.

<sup>93</sup> *Id.* annex 2, art. 2.

<sup>94</sup> Nicholas A. Ashford, *Letter to the Editor: “Trade Policy”*, ISSUES SCI. TECH., Winter 2014, at 14–16; Petros C. Mavroidis & Robert Wolfe, *Private Standards and the WTO: Reclusive No More*, 16 WORLD TRADE REV. 1, 5 (2017).

<sup>95</sup> TBT, *supra* note 10, arts. 12.1–12.3.

<sup>96</sup> *Id.* art. 12.4.

constitute barriers to trade. As such, the scope of technical measures of both developed and developing countries would lead to greater uniformity by the central role of international standards and bodies.

Similar to “equivalent regulations,” the TBT Agreement offers “mutual recognition” to allow Members to accept different conformity assessment procedures from their own, “provided that they are satisfied those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures.”<sup>97</sup> This mutually satisfactory understanding, however, shall be based on prior consultations regarding the “technical competence” of assessment bodies in exporting Members, which require *verified compliance* with “relevant guides or recommendations issued by international standardizing bodies.”<sup>98</sup> In other words, although the TBT Agreement accepts different assessment procedures, these procedures are still governed by the guidance of international standardization bodies. Thus, alternate assessment procedures are also directed by the same group of experts at the same organizations.

#### *D. Greater Uniformity and Centralization Under the SPS Agreement*

Concerning international food safety and animal and plant health, the WTO passed the SPS Agreement on January 1, 1995.<sup>99</sup> This Agreement provides administrative rules for Members’ domestic sanitary and phytosanitary (SPS) measures, which cover “all relevant laws, decrees, regulations, requirements and procedures” including “end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments . . . and packaging and labelling requirements directly related to food safety.”<sup>100</sup>

Similar to the TBT Agreement, the SPS Agreement emphasizes that Members have the right to set their own standards.<sup>101</sup> Members should not be prevented from “adopting or enforcing measures *necessary* to protect human,

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<sup>97</sup> *Id.* art. 6.1.

<sup>98</sup> *Id.*

<sup>99</sup> WTO, WTO AGREEMENTS SERIES: SANITARY AND PHYTOSANITARY MEASURES 27–44 (1995) [hereinafter SPS MEASURES], [https://www.wto.org/english/res\\_e/booksp\\_e/agrmntseries4\\_sps\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/agrmntseries4_sps_e.pdf) (containing introductory explanations and the body of the legal text).

<sup>100</sup> *Id.* 37.

<sup>101</sup> *Id.* pmb. at 9, art. 2.1.

animal or plant life or health.”<sup>102</sup> However, domestic SPS measures, especially those that introduce a higher level of protection, are subject to certain “harmonized” and centralized conditions.<sup>103</sup>

In the words of the SPS Agreement, domestic SPS measures shall be “based on the relevant international standards, guidelines[,] or recommendations,”<sup>104</sup> “scientific principles with sufficient scientific evidence,”<sup>105</sup> and “applied only to the extent necessary to protect human, animal or plant life or health.”<sup>106</sup> In particular, those SPS measures conforming to international standards, guidelines and recommendations (ISGRs) “shall be deemed to be necessary.”<sup>107</sup>

In addition, those relevant ISGRs shall be recognized by “relevant international organizations” (RIOs), which explicitly refer to the Codex Alimentarius Commission relating to food safety;<sup>108</sup> the International Office of Epizootics relating to animal health and zoonoses;<sup>109</sup> and the Secretariat and regional organizations operating within the framework of International Plant Protection Convention regarding plant health.<sup>110</sup> If matters are not covered by these RIOs, appropriate standards, guidelines and recommendations may be promulgated by other RIOs identified by the WTO Committee on the SPS (the SPS Committee).<sup>111</sup>

Other than the international and appropriate standards provided, recognized, or identified by relevant RIOs or the SPS Committee, the SPS Agreement accepts “equivalent” standards.<sup>112</sup> To the SPS Committee, “equivalence” does not require “duplication and sameness” of measures, but focuses on an importing Member’s “appropriate level of protection.”<sup>113</sup> As a basic principle, Members’ adopted levels are presumed to be appropriate.<sup>114</sup>

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<sup>102</sup> *Id.* art. 2.1.

<sup>103</sup> Howse, *Regulatory Cooperation*, *supra* note 64, at 139.

<sup>104</sup> SPS MEASURES, *supra* note 99, arts. 3.1, 3.3.

<sup>105</sup> *Id.* art. 2.2.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* art. 3.2.

<sup>108</sup> *Id.* annex A, ¶ 3(a).

<sup>109</sup> *Id.* annex A, ¶ 3(b).

<sup>110</sup> *Id.* art. 3.4, annex A, ¶¶ 2–3.

<sup>111</sup> *Id.* annex A, ¶ 3(d).

<sup>112</sup> *Id.* art. 4.

<sup>113</sup> Committee on Sanitary and Phytosanitary Measures, *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Doc. G/SPS/19 (Oct. 24, 2001).

<sup>114</sup> *See* SPS MEASURES, *supra* note 99, art. 4.

However, whether a protection level is considered consistent with the WTO law is mainly subject to risk assessment.<sup>115</sup>

Under the SPS Agreement, “risk assessment” is defined as an evaluation of the likelihood of potential harm or damage, such as the spread of diseases, biological and economic consequences, or the adverse effects on animal and human health, that is associated with SPS measures in importing countries.<sup>116</sup> This evaluation, in particular, must take into account available and relevant scientific and environmental evidence, as well as economic factors.<sup>117</sup> Moreover, the “likelihood” and “potential” or “probability” of harm is primarily based on qualitative methodologies.<sup>118</sup>

This risk assessment that determines the appropriateness of Member adopted levels of protection also depends on RIOs.<sup>119</sup> Article 5.1 SPS requires that domestic SPS measures to be based on appropriate assessments of the risks to human, animal, or plant life or health by “taking into account risk assessment techniques developed by the relevant international organizations.”<sup>120</sup> In other words, Members’ appropriate levels of protection shall be based on appropriate risk assessment, which shall be based on the techniques developed by the same international organizations.

Other than sufficient scientific evidence based on RIOs, domestic SPS measures may be provisionally adopted “on the basis of available pertinent information” from the RIOs and SPS measures adopted by other Members, but it is subject to “the additional information necessary for a *more objective assessment* of risk and review” within a reasonable period.<sup>121</sup> Similar to appropriate levels of protection, although Members may adopt the same SPS

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<sup>115</sup> See *id.* art. 5.1, annex A, ¶ 4; Howse, *Regulatory Cooperation*, *supra* note 64, at 149; Jeffrey Atik, *On the Efficiency of Health Measures and the ‘Appropriate Level of Protection’*, in RES. HANDBOOK ON ENV’T, HEALTH & WTO 14, 116, 129 (Geert V. Calster & Denise Prévost eds., 2014).

<sup>116</sup> SPS MEASURES, *supra* note 99, annex A, ¶ 4.

<sup>117</sup> *Id.* arts. 5.2–5.3.

<sup>118</sup> WTO, WTO ANALYTICAL INDEX: SANITARY AND PHYTOSANITARY MEASURES – ARTICLE V (JURISPRUDENCE), [https://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/sps\\_03\\_e.htm#annAA4](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_03_e.htm#annAA4).

<sup>119</sup> SPS MEASURES, *supra* note 99, art. 5.1; Alexia Herwig, *Health Risks, Experts and Decision Making Within the SPS Agreement and the Codex Alimentarius*, in THE ROLE OF ‘EXPERTS’ IN INTERNATIONAL AND EUROPEAN DECISION MAKING PROCESSES: ADVISORS, DECISION MAKERS OR IRRELEVANT ACTORS? 195 (Monika Ambrus et al. eds., 2014).

<sup>120</sup> SPS MEASURES, *supra* note 99, arts. 5.2–5.3.

<sup>121</sup> *Id.* art. 5.7.

measures as other Members, these measures are still subject to “objective risk assessment” that is based on the techniques developed by RIOs.

Moreover, if a Member has “reason to believe” that a domestic SPS measure “is constraining, or has the potential to constrain, its exports,” the regulated Member may request an explanation of the reasons that shall be provided by the regulating Member.<sup>122</sup> Likewise, whether an explanation is reasonable is very likely to be determined by the WTO, which relies on scientific and technical experts who can be related to the same recognized international organizations.<sup>123</sup>

As Article 11.2 of the SPS suggests, WTO panels should seek advice from experts chosen by the panel and the parties.<sup>124</sup> In addition, the panel may “establish an advisory technical experts group” or consult the RIOs.<sup>125</sup> As such, the RIOs and related experts may set “international standards, guidelines, recommendations” that are deemed necessary, determine whether domestic SPS measures are “based on” such standards, whether the protection levels of such measures are equivalent or appropriate, and whether explanations regarding SPS measures are reasonable.<sup>126</sup> Under this scientific approach, international SPS measures can be, or are encouraged to be, uniform and centralized by several recognized international organizations and experts.<sup>127</sup>

This uniformity and centralization also extends to the domestic level. Similar to the TBT Agreement, Members are required to support the SPS Agreement by formulating and implementing “positive measures and mechanisms.”<sup>128</sup> Central governments must take reasonable measures to ensure the compliance of regional bodies and non-governmental entities.<sup>129</sup> Hence, domestic SPS measures shall be harmonized, towards greater uniformity, with a more centralized framework.

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<sup>122</sup> *Id.* art. 5.8; Joost Pauwelyn, *The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes: EC – Hormones, Australia – Salmon and Japan – Varietals*, 2 J. INT'L ECON. L. 641, 661 (1999).

<sup>123</sup> Herwig, *supra* note 119, at 194–95; Pauwelyn, *supra* note 122, at 661.

<sup>124</sup> SPS MEASURES, *supra* note 99, art. 11.2.

<sup>125</sup> *Id.*

<sup>126</sup> Herwig, *supra* note 119, at 194–95.

<sup>127</sup> Ryan D. Thomas, *Where's the Beef? Mad Cows and the Blight of the SPS Agreement*, 32 VAND. J. TRANSNAT'L L. 487, 491, 517 (1999); *Pluralism in Practice*, *supra* note 11, at 135; Halabi, *supra* note 6, at 407.

<sup>128</sup> SPS MEASURES, *supra* note 99, art. 13.

<sup>129</sup> *Id.*

This harmonization also covers the least developed or developing country Members (DCMs). The SPS Agreement requires Members to provide technical assistance, and the SPS Committee may grant DCMs “longer time-frames for compliance” and “time-limited exceptions.” DCMs, however, shall still adopt the SPS measures issued by RIOs.<sup>130</sup> Considering the SPS Committee functions to keep “close contact” with RIOs and to further international harmonization,<sup>131</sup> those provisions of technical assistance and time exceptions for DCMs can also be a centralized means of creating greater uniformity.

To briefly summarize, domestic measures shall be uniform and governed by the WTO and central authorities. The GATT begins with the “uniform, impartial and reasonable manner” for rule application, focusing on administrative conduct and procedures. Then, the China Protocol covers “uniform administration,” which extends to substantive trade measures. When food and product safety is concerned, the TBT and SPS Agreements further transform substantive international voluntary standards into domestic mandatory regulations. In light of the WTO law, Chinese food and product safety rules, therefore, can be expected to be uniform under a centralized framework.

### III. CHINA’S DECENTRALIZED FLEXIBILITY

In contrast to the WTO’s uniformity and centralization, the Chinese food and product safety system relies on decentralization and flexibility, which may not be as transparent and unified as the WTO expects. Although China adopts the one-party “democratic dictatorship” that requires politically unifying views and thoughts,<sup>132</sup> the Chinese regulatory system has decentralized standards and administrative structures. This system can be viewed as self-regulatory, but also laissez-faire, which has led to rapid economic growth, but also severe abuses. Take, for instance, a 2007 incident where nearly a million toys that China exported to the United States were recalled when the United States discovered lead paint had been used, or the

<sup>130</sup> *Id.* arts. 9.1–9.2, 10.1–10.3.

<sup>131</sup> *Id.* arts. 12.3–12.4; Thomas, *supra* note 127, at 491–92, 517; Halabi, *supra* note 6, at 407–08.

<sup>132</sup> Zhonghua renmin gongheguo xianfa xiuzheng an (中华人民共和国宪法修正案) [Amendment to the Constitution of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., Mar. 29, 1993, effective Mar. 29, 1993), CLI.1.6183(EN) (Lawinfochina) (adding amendments 3–11); *Yong shi jiu da jing shen tong yi si xiang tong yi xing* (用十九大精神统一思想统一行动) [Using the Spirit of the 19th CPC National Congress to Unify Thought], CPC PEOPLE (Oct. 26, 2017), <http://cpc.people.com.cn/19th/n1/2017/1026/c414305-29610301.html>.

melamine dairy crisis, which killed six infants and caused 300,000 people in China to fall ill.<sup>133</sup>

### A. *Decentralized Standards*

Chinese food and product standards are governed by the Standardization Law, which was enacted in 1988 and came into effect in 1989.<sup>134</sup> Under this statute, technical standards pertain to quality, testing methods, technical terms, and the process of producing industrial and agricultural products, environment protection, and construction projects.<sup>135</sup>

In light of the Standardization Law, the state is required to “encourage the active adoption of international standards”<sup>136</sup> and to unify technical requirements.<sup>137</sup> This unified administration, however, is governed by various departments at different levels: (1) Standardization Administration (SA) and “competent administrative authorities” (CAAs) under the State Council at the national level;<sup>138</sup> (2) the SAs of provinces, autonomous regions and municipalities (PAMs) directly under the central government, and CAAs under those departments of PAMs; and (3) the SAs and the CAAs at the city and county levels.<sup>139</sup> Since the statute does not define the term CAAs, the governing power is, therefore, fragmented by both identified and unidentified administrations, departments, and authorities at different levels in terms of vertical administrative structure and horizontal geographical regions.

In addition, these identified and unidentified administrations, authorities, and sectors may formulate their own standards. Under the Standardization Law, there are four types of standards: (1) *National standards*, which shall be unified nationwide and formulated by the SA under the State Council; (2) *Trade standards*, which are formulated by CAAs, in the absence

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<sup>133</sup> Louise Story, *Lead Paint Prompts Mattel to Recall 967,000 Toys*, N.Y. TIMES: BUS. DAY (Aug. 2, 2007), <https://www.nytimes.com/2007/08/02/business/02toy.html>; *China Dairy Products Found Tainted With Melamine*, BBC (July 9, 2010), <https://www.bbc.com/news/10565838>.

<sup>134</sup> Biaozhunhua fa (标准化法) [Standardization Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1988, effective Apr. 1, 1989) [hereinafter Standardization Law], CLI.1.4165(EN) (Lawinfochina).

<sup>135</sup> *Id.* arts. 2(1)–(5); *China Considers Draft Law Revision to Standardization Law*, XINHUA (Apr. 24, 2017), [http://www.chinadaily.com.cn/china/2017-04/24/content\\_29062072.htm](http://www.chinadaily.com.cn/china/2017-04/24/content_29062072.htm).

<sup>136</sup> Standardization Law, *supra* note 134, art. 4.

<sup>137</sup> *Id.* art. 2.

<sup>138</sup> The Standardization Law does not define “competent administrative authorities,” thus this term may refer to any authorities under the State Council at the national level.

<sup>139</sup> Standardization Law, *supra* note 134, art. 5.

of national standards; (3) *Local standards*, which are formulated by SAs of PAMs and shall be “unified within a PAM directly under the Central government,” in the absence of national and trade standards; and (4) *Industrial standards*, which shall be formulated by enterprises for the products they manufacture, in the absence of both national and trade standards.<sup>140</sup> As such, different standards can be formulated by officials at different departments and levels, as well as corporations of different sectors.

Following the Standardization Law, the Product Quality Law (PQL) was enacted in 1993 and amended in 2000.<sup>141</sup> The PQL requires the state to encourage “enterprises to make their product quality reach and surpass their respective [sectorial] standards, national standards and international standards.”<sup>142</sup> Moreover, industries may establish their own standards through government approval based on a voluntary principle.<sup>143</sup> In other words, enterprises do not have legal obligations to adopt international standards.<sup>144</sup>

Hence, although international standards are encouraged at the central level, agencies, local administrations, and enterprises may formulate their own standards, especially when the upper levels are silent.<sup>145</sup> This structure simultaneously encourages national unification and centralization, but also allows varied standards in different regions and sectors. Centralizing and unifying standards refers to the national standards that must be applied in the entire country. Varied standards, however, may fill in the gap and can be encouraged to reach or surpass the standards at upper levels. The food and

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<sup>140</sup> *Id.* art. 6. The term “industrial standards” is also translated as “enterprise standards” or “sector standards.”

<sup>141</sup> Chanpin zhiliangfa (产品质量法) [Product Quality Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 22, 1993, effective Sept. 1, 1993; amended July 8, 2000, effective Sept. 1, 2000), CLI.1.29404(EN) (Lawinfochina).

<sup>142</sup> *Id.* art. 6.

<sup>143</sup> *Id.* art. 14.

<sup>144</sup> *Id.* (although the PQL also requires the state to establish a certifying system based on international standards, this requirement may not be implemented due to many instances such as conflicts with the policy of non-interference and the contractual safety principle); Tang, *China v. China*, *supra* note 2, at 230, ch. 5 (*Political Dictatorship Versus Laissez-Faire Administration: Law As Written Action*).

<sup>145</sup> Standardization Law, *supra* note 141, art. 6.

product standards applied in China, therefore, may not be as unified and centralized as WTO law expects.<sup>146</sup>

### B. *Decentralized Administrations*

Unlike the uniform and centralized administration envisioned by WTO law, Chinese food and product safety is administered by a large number of disparate governmental institutions. For instance, under the Food Safety Law (FSL), which was enacted in 2009 and amended in 2015, national food standards shall be administered by different agencies, such as: (1) the health administrative department; (2) standardization authorities; (3) health and agricultural authorities; and (4) “competent authorities” under the State Council.<sup>147</sup> At the local level, the food safety shall be administered by “departments for health, agriculture, quality supervision, industry and commerce[,] and the FDAs [Food and Drug Administrations] at the county level or above.”<sup>148</sup> Since China has more than 2,800 governments at the county-level and each county has their own agencies, the Chinese food safety administration is fragmented and decentralized to more than 10 thousand central and local departments at the different levels and regions.<sup>149</sup>

Under the Chinese vertical administrative hierarchy, local administrations are governed, directly or indirectly, by upper level administrations.<sup>150</sup> However, in accordance with the Law on Legislation, enacted in 2000 and amended in 2015, local governments have open rulemaking power to formulate their own rules and regulations that can differ

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<sup>146</sup> TBT, *supra* note 10, annex 3, ¶ F (under the TBT Agreement, Members’ standardizing bodies only oblige to use international standards “as a basis for the standards it develops,” where “international standards exist or their completion is imminent”); SPS MEASURES, *supra* note 99, annex 96, art. 3, ¶ F. (under the SPS Agreement, “Members shall base their sanitary and phytosanitary measures on interenational standards, guidelines or recommendations, where they exist . . .”).

<sup>147</sup> Shipin anquan fa (食品安全法) [Food Safety Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 28, 2009, effective June 1, 2009; amended Apr. 24, 2015, effective Oct. 1, 2015) art. 21 [hereinafter FSL], CLI.1.247403(EN) (Lawinfochina).

<sup>148</sup> *Id.* art. 31.

<sup>149</sup> These agencies’ duties and administrative scopes can be overlapped and conflict with each others. *Improving Quality of China’s Products*, GOV.CN (Apr. 14, 2015), [http://english.gov.cn/policies/latest\\_releases/2015/04/14/content\\_281475088749550.htm](http://english.gov.cn/policies/latest_releases/2015/04/14/content_281475088749550.htm) (besides the central and local agencies, China also has an undisclosed numbers of non-governmental institutions, such as trade and industrial associations, that may issue industrial standards).

<sup>150</sup> Tang, *China v. China*, *supra* note 2, ch. 3 (Centralization Versus Open Rulemaking Power).

from the law at the central level.<sup>151</sup> These local measures, moreover, are mainly interpreted by local lawmakers,<sup>152</sup> as Chinese judges do not interpret law—as common law judges would—but instead apply law as interpreted by lawmakers.<sup>153</sup> As such, even if local trade measures are published in a timely manner under the WTO’s transparency principle, it might not necessarily mean that those measures would be implemented or applied in the same way or in a “uniform, impartial and reasonable manner.”

Under the WTO Agreements, the central government is obliged to ensure the compliance of local institutions. This obligation raises another consistent challenge regarding the information gap between the central and local governments in China. In light of the hierarchical administrative system, local administrations are responsible for reporting and seeking instruction from the central government.<sup>154</sup> In practice, in order to secure their positions, local officials may not be willing to expose the shortcomings and mistakes they encounter.<sup>155</sup> The central authority, moreover, often does not have sufficient resources with an effective management system for gathering updated information regarding actual local circumstances.<sup>156</sup>

One way for the central administration to receive local information is through petitions.<sup>157</sup> The Chinese petition system creates a direct communication channel between national citizens and the central

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<sup>151</sup> *Id.* ch. 2 (this rulemaking power is subject to certain principles, such as based on “actual needs,” “specific administration,” and “local affairs”); Laney Zhang, *China: Law on Legislation Amended*, LIBRARY OF CONGRESS, (July 8, 2015), <http://www.loc.gov/law/foreign-news/article/china-law-on-legislation-amended/>.

<sup>152</sup> Tang, *China v. China*, *supra* note 2, at 126.

<sup>153</sup> Fa guan fa (法官法) [Judges Law] (promulgated by Order No. 38 of the President of the People’s Republic of China on Feb. 28, 1995, effective Feb. 28, 1995, amended on June 30, 2001), CLI.1.35754(EN) (Lawinfochina) (under the Chinese legal system, judges shall “perform their functions and duties according to law,” but not make law).

<sup>154</sup> Lifa fa (立法法) [Law on Legislation] (adopted by the third Session of the Ninth Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000), art. 87, CLI.1.26942(EN) (Lawinfochina); Tang, *China v. China*, *supra* note 2, at 127.

<sup>155</sup> Poor food safety performance of provincial officials can lead to disqualification of awards and honorary titles which affect their promotions and evaluations in the administrative system. *See China to Grade Provincial Governments’ Food Safety Performance*, CHINA DAILY (Aug. 30, 2016), [http://www.chinadaily.com.cn/business/2016-08/30/content\\_26640404.htm](http://www.chinadaily.com.cn/business/2016-08/30/content_26640404.htm).

<sup>156</sup> *Guanyuan taishang jiang lixiang taixia fubai* (官員台上講理想台下腐敗) [Officials Speak of Idealism on Stage Corrupt in Action], H.K. ECON J. (Mar. 9, 2013), [http://www.hkej.com/template/dailynews/jsp/detail.jsp?dnews\\_id=3651&title\\_id=582923](http://www.hkej.com/template/dailynews/jsp/detail.jsp?dnews_id=3651&title_id=582923).

<sup>157</sup> The term “petitions” is also translated as “letters and visits.” *State Bureau for Letters and Visits*, WWW.GOV.CN (Sep. 12, 2014), [http://english.gov.cn/state\\_council/2014/10/01/content\\_281474991089774.htm](http://english.gov.cn/state_council/2014/10/01/content_281474991089774.htm).

government.<sup>158</sup> However, due to the numerous cases and limited resources, this system requires filing at the local level before filing with Beijing.<sup>159</sup> As such, even if a central petition system exists, the central government often relies on local administrations to investigate and provide resolutions. This centralized petition system, therefore, is also based on a decentralized setting, which often leads to local retaliation against petitioners.<sup>160</sup>

In 2013, the State Bureau for Letters and Visits (SBLV) at Beijing created a national network to accept online petitions directly from local citizens. The aim is to establish a centralized and “unified data interface standard” to collect complaints and share information with provincial officials.<sup>161</sup> This centralized and unified setting, however, can be corrupted. Recently, two leading officials and their subordinates at the SBLV were found to have been bribed by local officials to remove complaint files that showed their wrongdoings.<sup>162</sup> Under the current performance evaluation system, officials are required to have low numbers of petitions.<sup>163</sup> In order to secure their positions and avoid punishment, provincial officials who should assist petitioners often detain petitioners in “black jails,” force petitioners to leave Beijing, and “openly use funds to bribe” the central officials at SBLV.<sup>164</sup> The effectiveness of this communication channel is, therefore, dubious.

Another alternative way for receiving local information is through the media. However, the CPC Constitution requires unifying views of members,

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<sup>158</sup> *Id.*

<sup>159</sup> Guowuyuan xinfang tiaoli (国务院信访条例) [Regulation on Complaint Letters and Visits] (promulgated by the State Council, May 1, 2005, effective May 1, 2005), CLI.2.56635(EN) (Lawinfochina); Loretta Chao, *Beijing Moves to End Tradition of Petitions*, WALL ST. J. (Aug. 22, 2009), <http://online.wsj.com/article/SB125090460008351021.html>.

<sup>160</sup> Xujun Gao & Jie Long, *On the Petition System in China*, 12 U. ST. THOMAS L.J. 34, 46 (2015).

<sup>161</sup> Xinhua, *China to Build National Online Petitioning System*, CHINA DAILY (Apr. 11, 2014), [http://www.chinadaily.com.cn/china/2014-04/11/content\\_17428952.htm](http://www.chinadaily.com.cn/china/2014-04/11/content_17428952.htm).

<sup>162</sup> *Guo jia xin fang ju wo an: shou bai ming di fang xin fang gan bu hui kuan yin man shang fang bu bao* (国家信访局窝案：收百名地方信访干部贿款 隐瞒上访不报) [*Cases Harboring at the State Bureau of Letters and Calls: Receiving Bribes from A Hundred of Local Officials, Hiding Petitions Without Reports*], GUANCHANG, (Apr. 10, 2017), [http://www.guancha.cn/FaZhi/2017\\_04\\_10\\_402798.shtml](http://www.guancha.cn/FaZhi/2017_04_10_402798.shtml).

<sup>163</sup> *Corruption at Top Rung of China's Ancient Petition System Sparks Calls for Reform*, SCMP, (Apr. 11, 2017), <https://www.scmp.com/news/china/policies-politics/article/2086741/corruption-top-rung-chinas-ancient-petition-system>; An Bajie, *New Regulation to Improve How Govt Handles Petitions*, CHINA DAILY (Apr. 25, 2017), [http://www.chinadaily.com.cn/china/201404/25/content\\_17463507.htm](http://www.chinadaily.com.cn/china/201404/25/content_17463507.htm).

<sup>164</sup> *Id.*

and the Party considers censorship a core policy.<sup>165</sup> President Xi Jinping, in particular, requires all news media “to strictly follow the Party’s leadership and focus on ‘positive reporting.’”<sup>166</sup> In 2017, a centralized online verification team was also set up to analyze “online rumors.”<sup>167</sup> Informal food safety reports can be viewed to be “harmful information” that induce severe punishment.<sup>168</sup> Shortcomings and non-compliance of administrations can be “sensitive matters” that should not be discussed.<sup>169</sup> The transparency at the local level, therefore, can be distant from what WTO law requires.

### C. *Flexible Standards Under Private Law*

Besides decentralized standards and administrative settings, Chinese export product safety is primarily based on the agreed-upon standards between foreign buyers and local sellers, notwithstanding the existence of international, national, trade, local, or industrial standards. This contractual safety standard requirement is established in the Standardization Law.<sup>170</sup> Article 16 provides, “Technical requirements for export products shall comply with agreements contained in the contracts.”<sup>171</sup> As such, export product standards are based on contracts related to private law, which can be differentiated from domestic or international standards relying on administrative supervision related to public law.<sup>172</sup>

The Chinese contract-based private law approach is also a flexible approach. Contractual parties bear the principal responsibility for food and product safety. Standards adopted may vary depending on buyers in different

<sup>165</sup> Xinhua, *Full Text Of Resolution On Amendment To CPC Constitution*, CHINA DAILY (Oct. 24, 2017), [http://www.chinadaily.com.cn/china/19thpcnationalcongress/2017-10/24/content\\_33656521\\_3.htm](http://www.chinadaily.com.cn/china/19thpcnationalcongress/2017-10/24/content_33656521_3.htm); *China’s Xi Underscores CPC’s Leadership in News Reporting*, XINHUA (Feb. 19, 2016), [http://news.xinhuanet.com/english/2016-02/19/c\\_135114305.htm](http://news.xinhuanet.com/english/2016-02/19/c_135114305.htm); Yu Hua, *Censorship’s Many Faces*, N.Y. TIMES (Feb. 27, 2013), <http://www.nytimes.com/2013/02/28/opinion/you-censorships-manyfaces.html>.

<sup>166</sup> *Xi’s Speech Sparked Reflection*, CHINA DAILY (Feb. 21, 2017), [http://www.chinadaily.com.cn/china/2017-02/21/content\\_28279094.htm](http://www.chinadaily.com.cn/china/2017-02/21/content_28279094.htm).

<sup>167</sup> Cao Yin, *Most Fake Postings Relate to Health, Food*, CHINA DAILY (Apr. 20, 2017), [http://www.chinadaily.com.cn/china/2017-04/20/content\\_29005038.htm](http://www.chinadaily.com.cn/china/2017-04/20/content_29005038.htm).

<sup>168</sup> *Id.*; *China to Boost Development of Online Media*, CHINA DAILY (May 7, 2017), [http://www.chinadaily.com.cn/china/2017-05/07/content\\_29238613.htm](http://www.chinadaily.com.cn/china/2017-05/07/content_29238613.htm).

<sup>169</sup> See He Weifang, *Rule of Law in China: Prospects and Challenges*, BROOKINGS (Nov. 28, 2012), <http://www.brookings.edu/events/2012/11/28-china-law> (Some scholars argue that China applies a “destroying from the beginning” strategy, which means that no “sensitive discussion” should be commenced and developed. In the view of the Party, words are like fire, and this expressive fire should be destroyed before it spreads).

<sup>170</sup> Standardization Law, *supra* note 134, art. 16.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* art. 4.

countries and circumstances. For instance, buyers for the American market are assumed to require products that satisfy the U.S. safety standard; buyers for the European market are assumed to require products that satisfy the E.U. safety standards; and the same for foreign buyers from Japan, Africa, Latin America, and others.<sup>173</sup> Chinese export product standards, therefore, can be open and negotiable.

Another reason for the adoption of contractual standards under private law is prices. Varied standards involve varied costs. Materials, workmanship, and production processes have different grades based on value, and each market and buyer has different budgets and requirements. These budgets and requirements control the safety standards applied. Particularly when most manufacturers in China are original equipment manufacturers that do not have their own brands and designs, the quality applied relies on buyers' budgets and instructions.<sup>174</sup>

This flexible approach is also linked with the market policy.<sup>175</sup> Since the open-door policy was adopted in 1979, Deng Xiaoping emphasized a market-oriented economic system that is shifting from planning to open economic settings.<sup>176</sup> Contractual parties, such as manufacturers in China and foreign importers, can be comparatively free to negotiate and determine prices and the safety standards involved. This freedom comes from the belief that the market is able to adjust safety standards in a way that benefits not only both parties, but society as a whole. Substandard products can be screened out

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<sup>173</sup> This approach assumes that satisfying the safety standards for each export markets is in the best interest of foreign buyers and Chinese manufacturers.

<sup>174</sup> This reliance also explains why Chinese manufacturers often ask for buyers' samples and budgets before negotiation and confirmation of orders. These samples provided indicate the level of quality standard and cost structure. A problem in the quality differences between samples and final products often is due to price negotiation. In the view of some Chinese manufacturers, although the production sample has a higher quality, the quality level of the finished product can be adjusted by the low price agreed to by the parties. For example, in the book *Poorly Made in China*, a buyer successfully bargained to the low price he asked for. The price was so low that both the buyer and the author could not figure out how such a price was possible. This deal turned out to be a disaster, since the product quality was much lower than what the buyer expected. PAUL MIDLER, *POORLY MADE IN CHINA: AN INSIDER'S ACCOUNT OF THE TACTICS BEHIND CHINA'S PRODUCTION GAME* 16–25 (2009).

<sup>175</sup> The market policy is endorsed by both the Constitution of the PRC and the Party. For instance, the PRC Constitution views developing "the socialist market economy" as a main task of the modernization process. At the same time, the CPC Constitution emphasizes that the Party must implement the economic reform, opening up, and improving the "socialist market economy." XIANFA pmbl. (1982) (China).

<sup>176</sup> This policy can be interpreted by Deng's statement, "crossing the river by feeling the stones," a shift from a planning to open approach, which can be risky, uncertain, and subject to change.

from the market through competition; only good quality products accepted by the market survive.

This open and flexible approach is, moreover, based on the reality and feasibility that Chinese officials may not have better product and safety knowledge than private industries or foreign investors. In non-private sectors, such as state-owned enterprises, Chinese administrative agencies may not intervene because these businesses are governed and controlled by government officials already. This Chinese private law approach with little administrative supervision, therefore, is a *laissez-faire* one<sup>177</sup> contrasting with the WTO's public law approach, which expects administrative supervision directing more significant uniformity with centralized settings.

#### *D. Reliance on Ex Post Remedies*

The differences between China's private law and WTO's public law approaches have led to different administrative roles when it comes to the timing of the application of laws and extent of control. WTO law tends to focus on an *ex ante* preventive approach relying on administrative supervision before incidents occur. China, however, tends to adopt an *ex post* responsibility approach to self-regulation relying on administrative and legal responsibilities after product safety incidents.

The Chinese *ex post* responsibility approach emphasizes remedies. These remedies can be administrative, criminal, civil, and others. For instance, in the Mattel case concerning toxic lead paint toys in 2007, the Ministry of Commerce (MOFCOM) promised to "investigate and take tough measures," and the General Administration of Quality Supervision, Inspection and Quarantine (GAQSIQ) banned exports from suspect toymakers after the incident.<sup>178</sup>

Although recall systems and new regulations were introduced, these new requirements still focus on the responsibilities and remedies after the fact, such as requiring manufacturers to terminate production and sales, notify vendors and customers, and report to authorities when safety incidents

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<sup>177</sup> Tang, *China v. China*, *supra* note 2, ch. 5 (*Political Dictatorship Versus Laissez-Faire Administration: Law As Written Action*).

<sup>178</sup> Bernice Chan, *Investigation Aims to Ensure Toy Safety*, CHINA DAILY (Aug. 17, 2007), [language.chinadaily.com.cn/2007-08/17/content\\_6031901](http://language.chinadaily.com.cn/2007-08/17/content_6031901).

occur.<sup>179</sup> Producers are subject to fines and are responsible for taking all necessary measures, for instance, to replace, refund, and mitigate damages.<sup>180</sup> A similar approach is also emphasized in the new amendment of the FSL adopted in 2015 by increasing civil, criminal, and administrative penalties.<sup>181</sup>

This “ex post remedies” approach also links with the self-regulatory approach related to the Chinese tradition.<sup>182</sup> Instead of relying on administrative supervision, manufacturers themselves are responsible for taking preventive actions. For instance, in the Mattel case, although there were Chinese national standard limits for lead levels in toys, Chinese regulators very likely did not conduct the inspection and instead relied on self-regulation of manufacturers.<sup>183</sup> Thus, in practice, factories may use the paint they want.<sup>184</sup> Only after millions of foreign recalls, did the MOFCOM promise that “toy producers’ *self-regulatory* mechanisms will . . . be improved to ensure quality.”<sup>185</sup> The GAQSIQ also stated that the agency will “train the manufacturers to raise their *self-discipline*.”<sup>186</sup>

This self-regulatory approach is also laid down by food and product safety laws. For instance, the FSL explicitly requires food producers and distributors to “ensure food safety, be credible and *self-disciplined*”<sup>187</sup> and “establish a *self-inspection* system . . . on a regular basis,”<sup>188</sup> as well as food industry associations to “strengthen industry *self-discipline*”<sup>189</sup> and consumers’ “awareness of . . . *self-protection*.”<sup>190</sup>

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<sup>179</sup> Xinhua, *China Unveils Recall Systems for Unsafe Food, Toys*, CHINA DAILY (Aug. 31, 2007), [http://www.chinadaily.com.cn/china/2007-08/31/content\\_6072181.htm](http://www.chinadaily.com.cn/china/2007-08/31/content_6072181.htm).

<sup>180</sup> *Id.*

<sup>181</sup> *China Serves Up New Food Safety Penalties*, NPC (June 24, 2014), [http://www.npc.gov.cn/englishnpc/news/Legislation/2014-06/24/content\\_1868145.htm](http://www.npc.gov.cn/englishnpc/news/Legislation/2014-06/24/content_1868145.htm); *State Council Rolls Out Rules on Regulating Food Safety*, WWW.GOV.CN (May 11, 2016), [http://english.gov.cn/policies/latest\\_releases/2016/05/11/content\\_281475346788726.htm](http://english.gov.cn/policies/latest_releases/2016/05/11/content_281475346788726.htm).

<sup>182</sup> Self-regulation, in particular, is related to original Confucianism. Tang, *China v. China*, *supra* note 2, ch. 2 (*Written Versus Unwritten Rules*).

<sup>183</sup> David Barboza, *Why Lead in Toy Paint? It's Cheaper*, N.Y. TIMES (Sept. 11, 2007), <http://www.nytimes.com/2007/09/11/business/worldbusiness/11lead.html>.

<sup>184</sup> *Id.*

<sup>185</sup> Chan, *supra* note 178.

<sup>186</sup> *Id.*

<sup>187</sup> FSL, *supra* note 147, art. 4.

<sup>188</sup> *Id.* art. 47.

<sup>189</sup> *Id.* art. 9.

<sup>190</sup> *Id.* art. 10.

Under this self-regulatory approach, producers are, therefore, primarily responsible for preventing and eliminating unsafe food and toys.<sup>191</sup> Quality inspections by provincial agencies should be conducted only when it is necessary.<sup>192</sup> In the words of Chinese official media, “*when necessary*, the quality watchdog [GAQSIQ] at and above the provincial levels should supervise,” and “the government took all measures *after* the safety of China-made products became a major concern.”<sup>193</sup>

This self-regulatory approach, moreover, is generally adopted by the Chinese administration. For instance, in 2016 the MOFCOM announced plans to optimize “the *self-discipline* mechanism” in the catering industry.<sup>194</sup> Also, in the Work Report of the Government (2016), Premier of the State Council Li Keqiang required officials “to be strict with oneself in practicing *self-cultivation*, using power, and exercising *self-discipline*.”<sup>195</sup> Thus, in contrast with the WTO’s preventive approach that relies on external administrative supervision, China’s preventive approach is at the opposite end of the spectrum, relying on internal self-regulation reinforced with *ex post* sanctions.<sup>196</sup>

In summary, considering the decentralized flexibility embraced by the Chinese food and product safety’s regulatory system, this section discussed the standardization and administrative measures that can be formulated, administered, and interpreted by more than ten thousand identified and unidentified authorities at the central and local levels. Moreover, due to the ineffective management system and the control of media, the central government may not be notified of the actual circumstances.

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<sup>191</sup> Xinhua, *China Unveils Recall Systems for Unsafe Food, Toys*, *supra* note 179.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Regular Press Conference of the Ministry of Commerce on March 2, 2016*, MOFCOM (Mar. 4, 2016), <http://english.mofcom.gov.cn/article/newsrelease/press/201603/20160301272238.shtml>.

<sup>195</sup> *Full Text: Report on the Work of the Government (2016)*, www.NPC.GOV.cn (Mar. 18, 2016), <http://www.npc.gov.cn/englishnpc/Speeches/2016-03/18/content1985677.htm> (This self-regulatory approach is shown in different terms, such as “self-policing,” self-inspection,” “self-auditing,” among others, which rely on corporations to ensure their products are safe.); *China Food Law: Year in Review 2016 – Out with the Monkey, In with the Rooster: A Look Back and a Look Ahead on China’s Food Safety System*, KH LAW (Feb. 24, 2017), <https://www.khlaw.com/China-Food-Law-Year-in-Review-2016>; *CFDA To Strengthen Regulation on Overseas Pharmaceutical Products, The Market Pattern to Change*, CPHI (Mar. 21, 2016), <https://www.cphi.com/china/visit/news-and-updates/cfda-strengthen-regulation-overseas-pharmaceutical-products-market-pattern>.

<sup>196</sup> Tang, *The WTO’s Impact on China*, *supra* note 48 (discussing the differences between internal and external regulatory settings).

The standards adopted for export products can be varied and based on contracts agreed to by foreign buyers and Chinese enterprises. Instead of the WTO's preventive approach that emphasizes administrative supervision to prevent harm, China's approach embraces private law and highlights self-regulation and ex post remedies. Thus, the Chinese regulatory system, while rightly assumed to be highly centralized and authoritarian, is, in many aspects, a laissez-faire one based on decentralization and flexibility in practice. While this flexibility may have caused rapid economic growth, it has also enabled food and product safety crises.

#### IV. CHINA'S UNIFORMITY AND CENTRALIZATION DEVELOPMENT

After joining the WTO and becoming subject to its laws, and with consideration for the importance of the food and product safety issue, the Chinese administration has begun instituting the international approach by requiring greater administrative supervision regarding centralization and uniformity. This centralized and uniform development is visible in statutes and regulations, as well as the governing structure.

This section examines this development trend towards (1) higher centralization concerning the roles of experts, agencies, and the State Council; (2) uniform and unified information regarding food safety issues; (3) uniformity by imposing collective responsibility on third parties, as "related entities," to require a higher level of peer surveillance; and (4) more uniform standards adopted voluntarily to increase competitiveness.

##### A. *Greater Centralization of Administrative Control*

Although the FSL laid down a decentralized administrative structure, it required a system with greater centralization than existed at the time.<sup>197</sup> Following the WTO law, this centralized development underscores administrative control with the international terms such as "risk," "prevention," and "scientific supervision," among others. For instance, Article 3 of the FSL requires that "food safety shall first be subject to prevention, risk management,

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<sup>197</sup> FSL, *supra* note 147, art. 56 (requiring that "local governments at and above county level shall take overall responsibility for lead, organize and coordinate the supervision and management of food safety in their jurisdiction," and "define the responsibilities of the administrative departments for health, agriculture, quality supervision, industry and commerce and FDA for supervision and management of food safety").

and *full process control* . . . to establish a set of scientific and stringent supervision and administration system.”<sup>198</sup>

In line with the “full process control” and scientific directions above, the FSL requires the Chinese food safety supervision to be centralized at the State Council.<sup>199</sup> The central government “shall govern the Food Safety Committee,”<sup>200</sup> which consists of fifty-one experts<sup>201</sup> and functions to coordinate, integrate, supervise, organize, manage, and promote the food safety system involving the implementation of different departments at the central and local levels.<sup>202</sup> Additionally, the FSL establishes other committees consisting of experts and representatives from “relevant departments” under the central government.<sup>203</sup> These committees include the National Expert Committee Food Safety Risk Assessment of forty-two members, which carries out risk assessments;<sup>204</sup> and the National Food Safety Standard Review Committee, which formulates national food safety standards.<sup>205</sup> As such, the food safety administration shall be supervised and monitored by those experts under the central authority.

In addition, the FSL clarifies the duties of different departments under the State Council to enhance supervision with a more centralized framework.<sup>206</sup> These agencies include the China Food and Drug Administration (CFDA) that shall “supervise . . . food production and distribution”;<sup>207</sup> the National Health and Family Planning Commission that

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<sup>198</sup> *Id.* art. 3.

<sup>199</sup> *Id.* art. 5.

<sup>200</sup> *Id.* art. 4.

<sup>201</sup> Shan Juan, *Branch Established for Food Safety Risk Communication*, CHINA DAILY (Apr. 21, 2014), [http://www.chinadaily.com.cn/china/2014-04/21/content\\_17451611.htm](http://www.chinadaily.com.cn/china/2014-04/21/content_17451611.htm).

<sup>202</sup> Feng, Chaozhuo (冯超卓), *Guan yu guo wu yuan shi pin an quan wei yuan hui ban gong shi ji gou she zhi di tong zhi* (关于国务院食品安全委员会办公室机构设置的通知) [*State Council Food Safety Committee Administrative Structure and Setting*], SCOPSR (Dec. 6, 2017), [http://scopsr.gov.cn/bbyw/qwfb/201306/t20130619\\_226675.html](http://scopsr.gov.cn/bbyw/qwfb/201306/t20130619_226675.html).

<sup>203</sup> FSL, *supra* note 147, art. 29.

<sup>204</sup> *Id.* art. 17; see also *Guo jia shi pin an quan feng xian ping gu zhuan jia wei yuan hui jian jie* (国家食品安全风险评估专家委员会简介) [*Introduction of State Food Safety Risk Assessment Expert Committee*], CFSA (CHINA NATIONAL CENTER FOR FOOD SAFETY RISK ASSESSMENT), <http://www.cfsa.net.cn/Article/Singel.aspx?channelcode=2A9E075016B733825769FBA04017804BB9AC0726D523E5B9&code=53C3DF92DF3DDF3E556C44268F65BDDEE4718189A36613B6> (last visited Dec. 1, 2018).

<sup>205</sup> FSL, *supra* note 147, art. 23.

<sup>206</sup> Andrew Sim & Yilan Yang, *China: An Overview of the New Food Safety Law*, FOOD SAFETY MAG. (Apr. 19, 2016), <http://www.foodsafetymagazine.com/enewsletter/china-an-overview-of-the-new-food-safety-law/>.

<sup>207</sup> FSL, *supra* note 147, art. 4.

shall “organize the risk-monitoring and assessment,” “formulate and issue national food safety standards” with the CFDA,<sup>208</sup> and “formulate and implement national risk monitoring plans” with the CFDA and GAQSIQ;<sup>209</sup> the Standardization Administration of China that shall “provide national standard information”;<sup>210</sup> and the Ministry of Agriculture that shall “exchange risk monitoring information about the safety of food and Edible Agricultural Products.”<sup>211</sup> The Chinese food safety system, therefore, is centralized by the State Council by products and functions.

The FSL also requires “centralized manner” and “centralized markets” at the local level. Centralized manner, in particular, refers to “full-process supervision and administration” that “shall lead, organize, and coordinate” to “establish and improve the working and information-sharing mechanisms” at different local regions.<sup>212</sup> In light of this full-process supervisory order, local administrations shall “encourage and support” small food workshops and vendors “to . . . operate in fixed locations such as centralized markets or shops . . . during a specified . . . period.”<sup>213</sup> These requirements, thus, lead to greater centralization at the local level as well.

Since 2009, regulations have been adopted regarding import and export of toys, food, seafood, meat, and other products. An example is the Measures for the Inspection, Supervision and Administration of Import and Export of Toys (MIET), formulated by the GAQSIQ.<sup>214</sup> Under this measure, the GAQSIQ supervises and administers toy exporters, toy enterprises involving high-risk materials, as well as toy laboratories and recall systems.<sup>215</sup> Under the MIET, declaration statements from exporters are required to ensure that the exported toys comply with the standards of importing countries.<sup>216</sup> Similar department regulations regarding import and export of seafood, meat, and

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.* art. 14.

<sup>210</sup> *Id.* art. 21.

<sup>211</sup> *Id.* art. 20.

<sup>212</sup> *Id.* art. 6.

<sup>213</sup> *Id.* art. 36.

<sup>214</sup> Jinchukou wanju jianyan jiandu guanli banfa (进出口玩具检验监督管理办法) [Measures for the Inspection, Supervision and Administration of Import and Export Toys] [hereinafter MIET] (promulgated by the GAQSIQ, Mar. 2, 2009, effective Sept. 15, 2009), CLI.4.269953(EN) (Lawinfochina).

<sup>215</sup> *Id.* arts. 23–26.

<sup>216</sup> *Id.* art. 12.

other food were also formulated in 2011.<sup>217</sup> These regulations emphasize the role of agencies under public law, instead of merely relying on contracts under private law.<sup>218</sup>

In line with this public law's approach, the numbers of manufacturers can be controlled and directed by agencies. For instance, in order to "restore customer confidence and fend off foreign competition," the Ministry of Industry and Information Technology may reduce small domestic manufacturers and nurture a few large Chinese dairy entities.<sup>219</sup> Agencies may also help large entities to increase market share, such as setting a goal to achieve seventy percent in five years, to "seize control of the market and scoop up smaller players."<sup>220</sup> In light of this safety development, food and merchandise production may be centralized in fewer enterprises, which can be controlled and supervised by governments.

### B. *Uniform and Unified Information*

With respect to centralized information required by the TBT and SPS Agreements, China has established WTO/TBT and WTO/SPS National Enquiry Points (NEPs) located in the GAQSIQ.<sup>221</sup> These NEPs provide a website, named WTO/TBT-SPS Notification and Enquiry of China, [www.tbtsps.com](http://www.tbtsps.com), which functions to answer enquiries regarding related measures.<sup>222</sup> These NEPs allow the Chinese administration, associations, enterprises, and individuals to communicate with WTO Members.<sup>223</sup>

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<sup>217</sup> These regulations include: (1) Jinchukou shuichan chanpin jianyan jianyi jiandu guanli banfa (进出口水产品检验检疫监督管理办法) [Measures for Supervision and Administration of Inspection and Quarantine of Imported and Exported Aquatic Products] [hereinafter MIEAP] (promulgated by GAQSIQ, Oct. 18, 2002, effective Dec. 10, 2002), CLI.4.144566(EN) (Lawinfochina); and (2) Jinchukou roulei chanpin jianyan jianyi jiandu guanli banfa (进出口肉类产品检验检疫监督管理办法) [Measures for the Supervision and Administration of the Inspection and Quarantine of Imported and Exported Meat Products] [hereinafter MIEMP] (promulgated by GAQSIQ, Mar. 10, 2010, effective June 1, 2011), CLI.4.144567 (Lawinfochina). Exported product qualities must satisfy the standards of destination countries. MIEAP, art. 24. The administrative supervision shall be in line with risk assessment and management. *Id.* art. 45.

<sup>218</sup> MIEAP, *supra* note 217, art. 23.

<sup>219</sup> He Wei, *Dairy Product Imports 'To Witness Sharp Rise'*, CHINA DAILY (Mar. 5, 2014), [http://usa.chinadaily.com.cn/epaper/2014-03/05/content\\_17324891.htm](http://usa.chinadaily.com.cn/epaper/2014-03/05/content_17324891.htm).

<sup>220</sup> *Id.*

<sup>221</sup> *Mission*, AQSIQ, <http://english.aqsiq.gov.cn/AboutAQSIQ/Mission/> (last visited Dec. 1, 2018).

<sup>222</sup> WTO/TBT Zhong xin jie shao (WTO/TBT 中心介绍) [Introduction of WTO/TBT Center], GASQIS, <http://www.tbt-sps.gov.cn/page/cwto/aboutus.action> (last visited Dec. 1, 2018).

<sup>223</sup> *Id.*

Although the aim is to increase transparency regarding trade measures, this development centralizes and unifies information at the national level.

In addition, the FSL explicitly obliges “unified manner,” “unified planning,” “unified information,” and “unified publication.”<sup>224</sup> Unlike the “uniform, impartial and reasonable manner” mandates in the WTO law, this unification does not mention impartiality and reasonableness. Moreover, “unified manner” shall be determined by the State Council, which applies to catering service, cafeteria management, and the publication of food safety information.<sup>225</sup>

The FSL also requires the State, the central government, to “establish a unified information platform . . . and implement the unified publication system of food safety information.”<sup>226</sup> The “unified information” concerned, in particular, involves “the national overall food safety, risk warning . . . major food incidents and their investigation and handling, as well as other information.”<sup>227</sup> Thus, no such information may be published without the State Council’s authorization.<sup>228</sup>

What local departments, such as food and drug, quality supervision, and agricultural administrations, may publish is mainly their routine supervision and administrative matters.<sup>229</sup> The FSL prohibits any organization or individual to “fabricate or disseminate false food safety information.”<sup>230</sup> In other words, until information is verified and authorized by the central government, food safety issues may not be discussed, disclosed, or distributed by local governments, organizations, and individuals. As such, food safety information can be unified at both the local and central levels, under the control of agencies and the Party.

### C. *Greater Uniformity by Collective Responsibility*

While WTO law emphasizes the preventive approach based on public administrative regulations, China imposes collective responsibility on third parties, as “related entities,” to establish a preventive system based on social

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<sup>224</sup> FSL, *supra* note 147, arts. 36, 56–57, 118–19.

<sup>225</sup> *Id.*; FSL, *supra* note 147, arts. 56–57, 118.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* art. 48.

surveillance.<sup>231</sup> Under the FSL, those potentially culpable entities include “anyone who provides production or distribution premises or other conditions for those engaging in the illegal acts.”<sup>232</sup> In cases where consumers’ rights and interests are damaged, these related entities, such as property owners, “shall, together with producers and distributors . . . be held jointly and severally liable.”<sup>233</sup> The FSL, moreover, does not require these related entities to know the illegal acts in question and does not define the term “other conditions.”<sup>234</sup> As such, the boundary of related “third-party providers” may be extended to ingredient and other suppliers, for instance, who may merely provide salt to unsafe food producers. These suppliers can be held strictly and collectively liable for the illegal acts committed by others.

Some related entities, such as consolidated trading market operators, stall leasers, trade fair organizers, and online platform providers for food trade, have explicitly imposed food safety responsibilities.<sup>235</sup> These responsibilities include reviewing food distributors’ licenses, specifying their management responsibilities, and regularly inspecting their distribution environment and conditions.<sup>236</sup> The online platform providers are specifically required to implement real-name registration, as well as to stop illegal activities and report to the food and drug administration at the county level.<sup>237</sup>

Collective responsibilities were firstly formulated in local regions, such as Chongqing, in 2011.<sup>238</sup> By Chongqing’s local rules, related entities can be industries, regions, distributors, and products that “relate” to food safety incidents.<sup>239</sup> Industrial collective responsibility can be imposed on a whole supply chain including ingredient suppliers, producers, distributors, retailers,

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<sup>231</sup> Some scholars, however, believe that this collective responsibility system is imported from the United States and Japan. See Zheng Fengtian (郑风田), *Shipin anquan yingxiang Meiri xuexi “lianzuozi”* (食品安全应向美日学习“连坐制”) [Food Safety “Collective Responsibilities” Learning from the US and Japan], OPINION CHINA (Apr. 2, 2011), [http://opinion.china.com.cn/opinion\\_1\\_13901.html](http://opinion.china.com.cn/opinion_1_13901.html).

<sup>232</sup> FSL, *supra* note 147, art. 122.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* arts. 122, 130–31.

<sup>235</sup> *Id.* arts 61–62.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* art 62.

<sup>238</sup> Chongqingshi zhiliang jishu jianduju shipin shengchanjiagong huanjie shipin shengchan jiagong weifa xingwei lianzuozi zanxing guiding (重庆市质量技术监督局食品生产加工环节食品生产加工违法行为连坐制暂行规定) [Chongqing City Quality & Technology Supervision Bureau Food Production Illegal Process Collective Responsibility Temporary Order] (promulgated by the Chongqing City Quality & Tech. Supervision Bureau, effective Dec. 1, 2011), CQZJGOV (Apr. 27, 2012), <http://www.cqzj.gov.cn/Page/content.aspx?newsid=46443>.

<sup>239</sup> *Id.* art. 16.

users, and services providers who knowingly supply storage, transportation, or other facilities.<sup>240</sup> Similar to the FSL, “related entities” are not necessarily those that have committed violations. Merely having a connection to safety incidents or violators may sufficiently lead to regulatory responsibilities and sanctions.

By official reports, collective responsibility aims to promote self-regulation and self-governance.<sup>241</sup> Through the joint liability imposed on related entities, the collective responsibility approach establishes a peer-surveillance mechanism with the aim to monitor and direct the food industry to self-regulate their production. Some also consider collective responsibility as promoting “collective governance.”<sup>242</sup> Instead of solely relying on administrations, food safety is governed by related sectors outside the food industry.<sup>243</sup> This collective responsibility system, therefore, may also be viewed as a preventive approach based on peer-surveillance to ensure compliance and pursue uniformity.

#### D. *More Uniform Standards*

Under the market economy and WTO law, increasing uniform standards can be a competitive strategy in attracting foreign investment and enhancing economic growth. The unifying development for international, national, local, and private standards can be established through voluntary measures, joint-ventured enterprises, and other commercial activities.

With respect to voluntary standards, 5,575 Chinese food enterprises obtained International Organization for Standardization (ISO) certificates in 2011, which accounts for almost a third of the total number awarded in that

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<sup>240</sup> *Chongqing tuichu shengchan jiagong huanjie shipin anquan “lianzuozhi”* (重庆推出生产加工环节食品安全“连坐制”) [Chongqing Launches Food Safety Collective Responsibility System], XINHUA (Dec. 16, 2011), [http://news.xinhuanet.com/2011-12/06/c\\_111221383.htm](http://news.xinhuanet.com/2011-12/06/c_111221383.htm).

<sup>241</sup> *Chongqing tui shipin anquan lianzuozhi woerma biaoshi jiang tonggai qianfei* (重庆推食品安全连坐制 沃尔玛表示将痛改前非) [Chongqing Formulated Food Safety Collective Responsibility System Walmart Promised to Correction], CHINA DAILY (Oct. 14, 2011), [http://www.chinadaily.com.cn/hqcj/zxqxb/2011-10-14/content\\_4059501.html](http://www.chinadaily.com.cn/hqcj/zxqxb/2011-10-14/content_4059501.html).

<sup>242</sup> *“Shi shang zui yan” sha an fa 10 yue 1 ri qi shi shi , shou du ti chu “shou fu ze ren zhi” mai dao wen ti shi pin, ke rang chao shi xian pei chang* (“史上最严” 食安法 10 月 1 日起实施, 首度提出“首负责任制” 买到问题食品, 可让超市先赔偿) [“The Strictest in the History” Implementing FSL from Oct. 1, Initiating “First Responsibility” Purchasing Questionable Food Products, Compensating by Grocery Stores First], SHFDA (SHANGHAI MUNICIPAL FOOD AND DRUG ADMINISTRATION) (June 17, 2015), <http://www.shfda.gov.cn/gb/node2/yjj/xwzx/mtbd/u1ai45316.html>.

<sup>243</sup> *Id.*

year.<sup>244</sup> Some reports show that China has the most ISO 9001 certificates of management standard and ISO 14,001 certificates of environmental management standard.<sup>245</sup>

In China, ISO certificates are issued by certification bodies that are accredited by the China National Accreditation Service for Conformity Assessment (CNAS).<sup>246</sup> The CNAS was founded in 2006 as “the national accreditation body of China unitarily responsible for the accreditation bodies, laboratories[,] and inspection bodies.”<sup>247</sup> Established and authorized by the Certification and Accreditation Administration, the mission of CNAS is to “establish and operate the national accreditation system for conformity assessment bodies.”<sup>248</sup> As of April 2015, CNAS has created 135 certification bodies, which have rendered over 840,000 certificates.<sup>249</sup>

Besides voluntary standards, different business models are established to achieve international standards. One example is a wholesale supply model to ensure food safety “from farm to fork” by METRO Cash & Carry China (METRO China).<sup>250</sup> A store providing wholesale and retail services, METRO China assists farmers and food producers in improving production, processing, packaging, and logistics management to comply with varied international food safety standards such as the Global Good Agricultural Practice, International Featured Standards,<sup>251</sup> ISO 22000 standards,<sup>252</sup> and the Hazard Analysis and Critical Control Points system.<sup>253</sup> This wholesale model helps to

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<sup>244</sup> Mark Astley, *China ISO Food Safety Certificates Double in 12 Months*, FOOD PROD. DAILY (Dec. 5, 2011), <https://www.foodqualitynews.com/Article/2011/12/05/China-ISO-food-safety-certifications-double-in-12-months>.

<sup>245</sup> REGULATIONS AND INTERNATIONAL TRADE: NEW SUSTAINABILITY CHALLENGES FOR EAST ASIA 260 (Etsuyo Michida et al. eds., 2017).

<sup>246</sup> *CNAS Introduction*, CNAS (CHINA NAT’L ACCREDITATION SERVICE) (Oct. 27, 2016), <https://www.cnas.org.cn/english/index.shtml>.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Li Fusheng, *Industry Special: METRO China Ensuring Food Safety ‘From Farm to Fork’*, CHINA DAILY (Oct. 11, 2012), [http://www.chinadaily.com.cn/cndy/2012-10/11/content\\_15808832.htm](http://www.chinadaily.com.cn/cndy/2012-10/11/content_15808832.htm).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*; ISO 22000 - Food Safety Management, ISO, <http://www.iso.org/iso/home/standards/management-standards/iso22000.htm> (last visited Dec. 1, 2018).

<sup>253</sup> Li Fusheng, *supra* note 250; FRANK L. BRYAN, WHO, HAZARD ANALYSIS CRITICAL CONTROL POINT EVALUATIONS (1992), [http://apps.who.int/iris/bitstream/handle/10665/37314/9241544333\\_eng.pdf](http://apps.who.int/iris/bitstream/handle/10665/37314/9241544333_eng.pdf).

increase the competitiveness of small and medium-sized retailers.<sup>254</sup> Along with this process, international standards are being adopted through connected operation between farmers, processors, wholesalers, and retailers. This model seems to be growing in China.<sup>255</sup>

In addition, there is a trend of importing not only foreign products but also corporations through joint ventures and integration. For instance, due to the melamine-tainted milk scandal and growing domestic demand, imported dairy products increased from 120,000 tons in 2008 to 600,000 tons in 2009, is estimated to reach 14.2 million metric tons in 2017, and expected to exceed 19 million metric tons in 2026.<sup>256</sup> To improve the quality, dairy companies set up their own farms instead of collecting raw milk from small farmers.<sup>257</sup> Moreover, joint venture enterprises were established with foreign dairy corporations from France, New Zealand, and Switzerland, among others.<sup>258</sup> As a result, international production and management standards were adopted to achieve greater uniformity.

Uniform standards can also be achieved by quality training conducted by foreign administrations and corporations. After the toy safety crisis, Chinese agencies sponsored training courses for manufacturers and regulators

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<sup>254</sup> Li Fusheng, *supra* note 250. A Trader Support Solutions program was launched in 2011 aiming to assist two million independent retailers that are facing intense competition. The support provided includes analyzing strengths, locating target customers, suggesting products, and supplying quality products at competitive prices. Statistics show that this support solution increases smaller retailers' sales by 40%. *Id.*

<sup>255</sup> Adil Husain & Chenni Xu, *Domestic Firms Shouldn't Wait for Beijing to Act On Food Safety*, CHINA ECON. REV. (July 8, 2013), <http://www.chinaeconomicreview.com/food-safety-metro-group-star-farm-gmp-gfsi-kerchin>.

<sup>256</sup> Qiu Bo, *Imported Dairy Dominates China's Market*, CHINA DAILY (Mar. 10, 2011), [http://www.chinadaily.com.cn/china/2011npc/2011-03/10/content\\_12146180.htm](http://www.chinadaily.com.cn/china/2011npc/2011-03/10/content_12146180.htm) (providing that foreign infant formula has accounted for nearly 90% of the domestic market); Wang Xiaodong, *Report: Dairy Imports Will Continue to Rise*, CHINA DAILY (Apr. 21, 2017), [http://www.chinadaily.com.cn/china/2017-04/21/content\\_29023297.htm](http://www.chinadaily.com.cn/china/2017-04/21/content_29023297.htm); Xu Wei, *Huge Growth Forecast in Dairy Imports*, CHINA DAILY (Apr. 22, 2016), [http://www.chinadaily.com.cn/china/2016-04/22/content\\_24755688.htm](http://www.chinadaily.com.cn/china/2016-04/22/content_24755688.htm).

<sup>257</sup> See Chen Limin, *Mengniu to Reduce Costs, Broaden Product Range*, SINA (Mar. 28, 2012), <http://english.sina.com/business/p/2012/0328/453138.html>; *Chinese Dairy Mengniu to Phase Out Small Suppliers*, REUTERS (June 14, 2012), <http://www.reuters.com/article/2012/06/14/china-dairy-idUSL3E8HE2P520120614>.

<sup>258</sup> Wang Ying, *Pengxin Completes New Zealand Dairy Farms Purchase*, CHINA DAILY (Dec. 4, 2012), [http://www.chinadaily.com.cn/bizchina/2012-12/04/content\\_15983681.htm](http://www.chinadaily.com.cn/bizchina/2012-12/04/content_15983681.htm); *Fonterra Invests \$30m in Hebei Dairy Farm*, CHINA DAILY (Oct. 21, 2010), [http://www.chinadaily.com.cn/bizchina/2010-10/21/content\\_11440527.htm](http://www.chinadaily.com.cn/bizchina/2010-10/21/content_11440527.htm); Lu Chang, *Milking It: Farmers Tap into Area's Dairy Advantage as More Joint Ventures Are Established*, CHINA DAILY (Jan. 17, 2011), [http://europe.chinadaily.com.cn/epaper/2011-06/03/content\\_12637036.htm](http://europe.chinadaily.com.cn/epaper/2011-06/03/content_12637036.htm); Jasper Moiseiwitch, *Foreign Dairy Firms Step Up Push into China*, SCMP (Feb. 21, 2014), <http://www.scmp.com/business/china-business/article/1432178/foreign-dairy-firms-step-push-china>.

led by American and European experts, who are representatives from private sector companies, such as Mattel, as well as foreign administrations, such as the U.S. Food and Drug Administration (U.S. FDA).<sup>259</sup> For instance, under the U.S. FDA – AQSIQ China, Agreement on the Safety of Food and Feed, the U.S. FDA may conduct inspections of covered food products in China without providing notice in advance.<sup>260</sup> Chinese manufacturers, therefore, are not only subject to the unified supervision of the Chinese administration but also foreign authorities.

Reviewing the food and product safety development, China is moving towards greater uniformity and centralization under the “full process control.” As discussed, this control involves strengthening the administrative and supervisory power of the central government, unifying information, imposing collective responsibility, as well as adopting more international standards voluntarily as a market strategy to increase competitiveness. This process, however, seems to be enhancing the economic power of the communist administration, and it is unclear if the food and product safety problem can be solved.

Considering the administrative and supervisory power of the Chinese governance, food and product safety statutes require a more centralized framework within an internal system.<sup>261</sup> In the name of safety, the State Council supervises and monitors food and product production at both the central and local levels. The rules applied, moreover, are not bound by a rule of law framework that emphasizes external checks and balances, impartiality, and reasonableness.<sup>262</sup> This greater administrative power to monitor economic activities, therefore, can also be a move backward, as it enhances the control of the Party.<sup>263</sup>

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<sup>259</sup> *FDA's China Offices Focus on Product Safety*, IFT (INSTITUTE OF FOOD TECHNOLOGIES) (Apr. 4, 2012), <http://www.ift.org/food-technology/daily-news/2012/april/10/fdas-china-offices-focus-on-product-safety.aspx>.

<sup>260</sup> FDA – AQSIQ China, Agreement on the Safety of Food and Feed, China-U.S., Dec. 11, 2007, at art. V(4), <https://www.fda.gov/InternationalPrograms/Agreements/MemorandaofUnderstanding/ucm107557.htm>.

<sup>261</sup> Tang, *The WTO's Impact on China*, *supra* note 48, at 265–72 (discussing the Chinese internal regulatory scheme).

<sup>262</sup> *Id.* at 269–72.

<sup>263</sup> *See id.* at 252 (discussing the one-party self-regulating system).

As stated, this internal regulatory framework does not have independent media of a public reporting system.<sup>264</sup> Together with the “strictest” control of food safety, the central government shall supervise and determine the “unified manner,” “unified planning,” “unified information,” and “unified publication.” What the public is more likely to see are those reports providing unified positive views, such as showing: “96.8 percent of [food] samples met standards in 2015,” “fake baby formula met national safety standards,”<sup>265</sup> and “authorities across China received 1.03 million reports regarding food and drug safety from the public” to announce the administration is working hard, and Chinese food and products are safe.<sup>266</sup> People might not know whether these positive stories are true. A CFDA survey in 2015 showed that “nearly seventy-five percent of respondents did not have any or enough confidence in domestic food safety.”<sup>267</sup> “Online rumors,” therefore, spread continuously.<sup>268</sup>

In light of this internal system, the preventive approach relying on collective responsibility can also be ineffective, especially when wrongdoers can be related to governing administrations. For instance, Sanlu, the formula maker that caused the food safety crisis, was a state-owned enterprise governed by officials.<sup>269</sup> Under the market policy, Chinese officials are legislators, law interpreters, administrators, regulators, as well as business developers with the duty to achieve economic growth.<sup>270</sup> Significant enterprises, directly or indirectly, associate with governments or the Party.<sup>271</sup>

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<sup>264</sup> Xinhua, *Xi's Speech Sparked Reflection*, CHINA DAILY (Feb. 21, 2017), [http://usa.chinadaily.com.cn/epaper/2017-02/21/content\\_28289481.htm](http://usa.chinadaily.com.cn/epaper/2017-02/21/content_28289481.htm).

<sup>265</sup> Kalum Chen, *Fake Baby Formula “Met National Safety Standards”*, SAID CHINA FDA, UNIV. OF H.K. (Feb. 28, 2017), <https://jmsc.hku.hk/2017/02/fake-baby-formula-met-national-safety-standards-said-china-fda/>.

<sup>266</sup> Wang Xiaodong, *Xi Insists on ‘Strictest’ Controls in Food Safety*, CHINA DAILY (Jan. 14, 2017), [http://www.chinadaily.com.cn/china/2017-01/04/content\\_27854810.htm](http://www.chinadaily.com.cn/china/2017-01/04/content_27854810.htm); Wang Xiaodong, *Food and Drug Authorities Receive 1.03 Million Reports in 2016*, CHINA DAILY (Mar. 31, 2017), [http://www.chinadaily.com.cn/china/2017-03/31/content\\_28760162.htm](http://www.chinadaily.com.cn/china/2017-03/31/content_28760162.htm).

<sup>267</sup> Shan Juan, *Checks on Imported Food to Get Tougher*, CHINA DAILY (June 16, 2015), [http://www.chinadaily.com.cn/china/2015-06/16/content\\_21014275.htm](http://www.chinadaily.com.cn/china/2015-06/16/content_21014275.htm).

<sup>268</sup> See *Scaremongering About Food Safety Constitutes a Crime*, CHINA DAILY (Apr. 20, 2017), [http://m.chinadaily.com.cn/en/2017-04/20/content\\_29004287.htm](http://m.chinadaily.com.cn/en/2017-04/20/content_29004287.htm).

<sup>269</sup> Yan Yiqi, *New Sanlu Seeks to Shake Off Image Tainted by Scandal*, CHINA DAILY (Dec. 14, 2013), <http://www.chinadaily.com.cn/china/2013-12/14/content17174145.htm>.

<sup>270</sup> See generally Tang, *China v. China*, *supra* note 2.

<sup>271</sup> For instance, the baby formula maker, Sanlu, that caused the food safety crisis was a state-owned enterprise based in Shijiazhuang, Hebei, China. Yan Yiqi, *New Sanlu Seeks to Shake Off Image Tainted by Scandal*, CHINA DAILY (Dec. 14, 2013), [http://www.chinadaily.com.cn/business/2013-12/14/content\\_17174342.htm](http://www.chinadaily.com.cn/business/2013-12/14/content_17174342.htm); Louis Augustine-Jean & Lei Xie, *Food Safety Standards and Market Regulations as Elements of Competition—Case Studies From China’s International Trade*, 11 ASIAN J. WTO & INT’L HEALTH L. POL’Y 289, 309 n.72 (2016).

The Chinese preventive approach, therefore, still emphasizes self-regulation and self-governance, which is not subject to any independent or external scrutiny.

This self-governing safety development, moreover, is not necessarily driven by mandatory regulations nor consistent with the WTO law. Although China has adopted more international standards, this improvement can be made voluntarily to attract foreign investment and to improve market access. Besides, those adopted standards may cover stricter standards required by private international corporations.<sup>272</sup> Considering that the WTO law aims to avoid unnecessary trade barriers among Members, the “international standards” adopted by China’s enterprises can still be controlled by private corporations and supervised by the Party to secure their economic power.<sup>273</sup>

## V. CONCLUSION

This paper examines the impact of the WTO law on China’s food and product safety development regarding uniformity and centralization. This study observes that although the WTO Agreements emphasize free trade to pursue non-discriminatory treatment and to eliminate trade barriers, the transparency and harmonization process can be used and directed to an opposite end: the enhancement of the economic power of the Party.

Considering the transparency principle, the GATT highlights the “uniform, impartial and reasonable manner” of rule application, and the China Protocol underscores “uniform administration” regarding trade measures. When international food and product safety is involved, the TBT and SPS Agreements extend further to preempt and harmonize substantive regulations. In light of these agreements, a vertical governing structure with centralized settings has been established, and is expected to create greater uniformity.

This uniformity and centralization, nevertheless, seems to be inconsistent with the Chinese regulatory system. This system has a highly decentralized, non-uniform structure depending on private law and ex post remedies. Without the rule of law framework, the new development mainly embraces a unified and centralized manner regarding information, and a preventive approach encouraging peer-surveillance. Although more international standards can be adopted voluntarily, this framework trusts and

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<sup>272</sup> Halabi, *supra* note 6, at 408; *see also* Wijkstorm & McDaniels, *supra* note 74, at 1034–36.

<sup>273</sup> *See* Halabi, *supra* note 6, at 407; *see also* Wijkstorm & McDaniels, *supra* note 74, at 1033–36.

promotes internal self-regulation. Media shall be controlled. Safety reports shall be positive. No one shall speak up without authorization.

Thus, although the WTO law aims to encourage free trade and fair treatment to pursue greater consistency, predictability, and certainty of the rule of law, China's embrace of the WTO can instead be used to consolidate their internal governance control. In association with international corporations, exported Chinese food and product safety may still be ensured by the assessments conducted by importing countries. Domestic Chinese food and product safety, however, must be overseen by the Party. This leader, the Party, has the "full process control" over political, economic, judicial, and administrative powers over thoughts and expression. A unifying voice from the central government and echoed by local administrations: Chinese food and products are safe.