

2009

Strengthening China's Regulatory Regime: How the United States Can Engage

Herbert Claiborne Pell

Follow this and additional works at: <https://scholarcommons.sc.edu/scjilb>



Part of the [International Law Commons](#)

Recommended Citation

Pell, Herbert Claiborne (2009) "Strengthening China's Regulatory Regime: How the United States Can Engage," *South Carolina Journal of International Law and Business*: Vol. 6 : Iss. 1 , Article 3.

Available at: <https://scholarcommons.sc.edu/scjilb/vol6/iss1/3>

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Journal of International Law and Business by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

STRENGTHENING CHINA'S REGULATORY REGIME: HOW THE UNITED STATES CAN ENGAGE

*Herbert Claiborne Pell**

ABSTRACT

This article considers how the United States can constructively contribute to the development of a more effective regulatory regime in the People's Republic of China (PRC). It opens with a review of the history and issues associated with China's regulatory regime. It then surveys ongoing challenges and responses to these challenges. Finally, it considers the national interests of the United States and China in regulatory reform and proposes modest strategic initiatives for the United States to pursue in light of these analyses of need and common interest. The article's argument crosses the disciplinary boundaries of law, political science, sociology, economics, and negotiation.

INTRODUCTION: A CONSENSUS?

Rarely a day passes without major U.S. papers reporting product defects in imports from the People's Republic of China.¹ U.S.

* The author received his J.D. from Georgetown University Law Center, his A.B. from Harvard University and is admitted to practice in Massachusetts and Rhode Island. He studied at Beijing University School of Law and has worked with various governmental agencies and international law firms. Opinions and assertions herein reflect the views of the author alone.

¹ See, e.g., David Barboza, *Reform Stalls in Chinese Factories: In Chinese Factories, Lost Fingers and Low Pay*, N.Y. TIMES, Jan. 5, 2008, available at <http://www.nytimes.com/2008/01/05/business/worldbusiness/05sweatshop.html?>; David Barboza, *China's Seafood Industry: Dirty Water, Dangerous Fish*, N.Y. TIMES, Dec. 15, 2007, available at <http://www.nytimes.com/2007/12/15/world/asia/15fish.html>; David Barboza, *Virus Spreading Alarm and Pig Disease in China*, N.Y. TIMES, Aug. 16, 2007, available at <http://www.nytimes.com/2007/08/16/business/worldbusiness/16pigs.html?scp=237&sq=china+safety&st=nyt>; Walt Bogdanich, *Chinese Chemicals Flow Unchecked Onto World Drug Market*, N.Y. TIMES, Oct. 31, 2007, available at <http://www.nytimes.com/2007/10/31/world/asia/31chemical.html?scp=148&sq=china+safety&st=nyt>; Keith Bradsher, *China Confirms Poison Was on Toy Beads*, N.Y. TIMES, Nov. 11, 2007, available at <http://www.nytimes.com/2007/11/11/world/asia/11china.html?scp=131&sq=china+safety&st=nyt>; China, *Unregulated*, N.Y. TIMES, Aug. 15, 2007, available

producers, consumers, and policymakers have achieved rare unity in loudly advocating that China adhere to international product safety, labor, and environmental standards.²

The People's Republic of China has promulgated an explosion of new regulations, reorganized administrative agencies, and experimented with rule-making methods since the inception of its 1989

at <http://www.nytimes.com/2007/08/15/opinion/15wed1.html>; Martin Fackler, *Insecticide-Tainted Dumplings from China Sicken 175 in Japan*, N.Y. TIMES, Feb. 2, 2008, available at <http://www.nytimes.com/2008/02/02/world/asia/02japan.html>; Gardiner Harris & Walt Bogdanich, *Blood Thinner Linked to China Had Contaminant, F.D.A. Says*, N.Y. TIMES, Mar. 6, 2008, available at <http://www.nytimes.com/2008/03/06/health/06heparin.html>; Gardiner Harris & Walt Bogdanich, *F.D.A. Broke Its Rules by Not Inspecting Chinese Plant With Problem Drug*, N.Y. TIMES, Feb. 15, 2008, available at <http://www.nytimes.com/2008/02/15/washington/15fda.html>; Jane Hooker & Walt Bogdanich, *Tainted Drugs Tied to Maker of Abortion Pill*, N.Y. TIMES, Jan. 31, 2008, available at <http://www.nytimes.com/2008/01/31/world/asia/31pharma.html>; Joseph Kahn & Jim Yardley, *As China Roars, Pollution Reaches Deadly Extremes*, N.Y. TIMES, Aug. 26, 2007, available at <http://www.nytimes.com/2007/08/26/world/asia/26china.html?scp=220&sq=china+safety&st=nyt>; *The Price of Food Safety*, N.Y. TIMES, Dec. 22, 2007, <http://www.nytimes.com/2007/12/22/opinion/22sat2.html>; Andrew Adam Newman, *For Pet Owners, Too, Toys a Reason for Concern*, N.Y. TIMES, Dec. 22, 2007, available at <http://www.nytimes.com/2007/12/22/business/22pettoys.html>; Louise Story & David Barboza, *Mattel Recalls 19 Million Toys Sent From China*, N.Y. TIMES, Aug. 15, 2007, available at <http://www.nytimes.com/2007/08/15/business/worldbusiness/15imports.html?scp=239&sq=china+safety&st=nyt>. Rule 16.5, 18.2.2

² See, e.g., Michael Falcone, *Policy Points: Chinese Toy Redux*, N.Y. TIMES, Dec. 21, 2007, available at <http://query.nytimes.com/gst/fullpage.html?res=950CE2DD153BF932A15751C1A9619C8B63&scp=82&sq=china+safety&st=nyt>; *Barack Obama and Joe Biden's Plan to Secure America and Restore Our Standing*, BarackObama.com, http://www.barackobama.com/issues/foreign_policy/index_campaign.php (declaring a goal "work to ensure that China plays by international rules"); Eric Lipton & Louise Story, *Toy Makers Seek Standards for U.S. Safety*, N.Y. TIMES, Sept. 7, 2007, available at <http://www.nytimes.com/2007/09/07/business/07toys.html?scp=208&sq=china+safety&st=nyt>; *The Need for Regulation: For All of the Nation's Imports*, N.Y. TIMES, Sept. 16, 2007, available at <http://www.nytimes.com/2007/09/16/opinion/16sun1.html?scp=192&sq=china+safety&st=nyt>; *Reform and Consumer Safety*, N.Y. TIMES, Nov. 19, 2007, available at <http://www.nytimes.com/2007/11/19/opinion/19mon4.html?scp=121&sq=china+safety&st=nyt>; Steven R. Weisman, *U.S. to Pressure China on Food and Product Safety at Coming Trade Talks*, N.Y. TIMES, Dec. 7, 2007, available at <http://www.nytimes.com/2007/12/07/business/07trade.html?scp=108&sq=china+safety&st=nyt>.

Administrative Litigation Law.³ The U.S. and other nations have worked with China on product deficiency issues in the past and continue to do so by sending training delegations, practitioners, and experts; by increasingly dispatching its own inspectors; and by raising concerns in bilateral and multilateral meetings with the Chinese government.⁴

These common efforts and concerns give the promising appearance that China and the United States can work together to establish a more effective regulatory regime in China. They might even indicate that each party's interests are so closely aligned that both sides could cooperate to achieve a major policy victory without making significant tradeoffs. Indeed, effective regulation of Chinese imports to the United States should protect U.S. consumers, producers, and workers, in part because compliance with high standards will increase the Chinese costs of production and make other countries (including the United States) more competitive. But the Chinese would also win: Chinese consumers would benefit from consumer and environmental protections, Chinese workers would receive basic protections, Chinese industry would further integrate international best practices, and the Chinese government would continue its projects of increased

³ See discussion *infra* Section II, Brief Review of the Growth of Administrative Law in China; see also David Barboza, *China Says Its Seafood Is Now Safer and Better*, N.Y. TIMES, Jan. 18, 2008, available at <http://www.nytimes.com/2008/01/18/business/worldbusiness/18fish.html>; *China Agrees to Raise Its Product Standards*, N.Y. TIMES, Aug. 27, 2007, available at <http://www.nytimes.com/2007/08/27/world/asia/27china.html?scp=219&sq=china+safety&st=nyt>; chinadaily.net, Mar. 11, 2008, http://www.chinadaily.com.cn/china/2008npc/2008-03/11/content_6527183.htm.

⁴ Interview with David Vladeck (Feb. 11, 2008). See, e.g., Interview by National Public Radio "All Things Considered" with Marcia Cross, Director for Health Care, Government Accountability Office (April 22, 2008); John Feffer, *China What's the Big Mystery?*, FOREIGN POLICY IN FOCUS, Dec. 4, 2006, <http://www.fpif.org/fpiftxt/3752>; The US-China Legal Cooperation Fund, <http://www.uschinalegalcoop.org/>; Kathryn McConnell, *U.S. Food Safety Agencies, Industry Seek More Import Regulation*, America.gov, Oct. 2, 2007, <http://www.america.gov/st/washfile-english/2007/October/20071002152124AKllennoCcm0.4573633.html>; Andrzej Zwanecki, *U.S. Food Safety Agencies, Industry Seek More Import Regulation*, America.gov, July 10, 2007, <http://www.america.gov/st/washfile-english/2007/July/20070710163214saikceinawz0.1669275.html>; Elizabeth Denomy, *China's Environmental Movement*, Council on Foreign Relations, Feb. 7, 2005, <http://www.cfr.org/publication/7770>; An Lu, *China & Philippines Sign Minutes of Meeting on Import and Export Food Safety*, CHINA VIEW, Oct. 28, 2007, http://news.xinhuanet.com/english/2007-10/28/content_6963788.htm.

effectiveness and legitimacy through rule of law and technocratic decision-making.

Yet this rose-colored scenario is also unlikely; it is premised on false assumptions and is perpetually fixated upon as a pretense for avoiding tough decisions on either side of the Pacific.⁵ Structural challenges – political, constitutional, and social – obstruct China from effectively regulating its products, environment, and labor standards. Even if China agrees or attempts to make strides in these directions, does it have the political will to follow through if the cost is its own competitiveness or continuity of rule? Is it naïve to think that the United States will be driven by interests other than protectionism or containment of China? What is required and realistic for China to improve its regulatory system, and where can and ought the United States lend a helping hand?

I. WHAT IS AN EFFECTIVE REGULATORY REGIME? WHAT IS ITS
RELATIONSHIP WITH RULE OF LAW GENERALLY? WHAT IS THE
RELATIONSHIP WITH ADMINISTRATIVE LAW?

All societies struggle to balance the competing interests of their constituents, a task that is central to government. The administrative or regulatory regime is *not* essentially concerned with establishing what the appropriate balance of interests should be. That is a question of basic sovereignty and the responsibility of a society's most powerful decision-makers, whether those decision-makers are the National People's Congress (NPC) in China's unitary system, or the Congress, President, and Supreme Court, who at different times have the final say in the U.S. system of separated powers.⁶

⁵ Steven Wiesman, *Politeness of China Talks Can't Disguise the Discord*, N.Y. TIMES, Dec. 15, 2007, available at <http://www.nytimes.com/2007/12/15/world/asia/15china.html>; Steven Wiesman, *U.S.-China Trade Talks Conclude With Modest Deals and Mutual Wariness*, THE N.Y. TIMES, Dec. 14, 2007, available at <http://www.nytimes.com/2007/12/14/business/worldbusiness/14trade.html>; Steven Weisman, *U.S. and Chinese Officials Duel on Economic Issues*, Dec. 13, 2007, N.Y. TIMES, available at <http://www.nytimes.com/2007/12/13/business/worldbusiness/13trades.html?scp=96&sq=china+safety&st=nyt>.

⁶ The reality of both systems is naturally more complex. For example, the NPC may issue a law to appease a group or international lobby without a real desire or expectation that the law will be enforced. In a society where the government speaks through more than law, how is a regulatory agency to be effective? How are we to measure whether the agency is listening effectively? In addition, the notion of comparing the goals and progress of administrative

A regulatory regime is concerned with the implementation of government dictates – making sure that envisioned balance of interests is maintained as government actors write implementing regulations and take enforcement action. An effective regulatory regime, then, turns government policy into reality, ensuring that interests do not interfere in the regulatory process to overcome the political process (however imperfect that political process may have been).⁷ Regulatory authority and processes have expanded dramatically as governments have increasingly felt that expediency and more technocratic decision-making (leaving the government to articulate the broad balance of interests) requires specialized agencies to respond to an increasingly complex web of social, political, and economic relations.

Justice Frankfurter defined administrative law as “the field of legal control exercised by law-administering agencies other than courts, and the field of control exercised by courts over such agencies.”⁸ Administrative law has historically been divided into three parts: (1) the statutes endowing agencies with powers and establishing rules of substantive law relating to those powers; (2) the body of agency-made law, consisting of administrative rules, regulations, reports, opinions

law in China and the United States suffers from the very different starting points of the two systems of government: Whereas the U.S. began with an arguably more *laissez faire* approach, China's post-1949 model was command and control production. Although there has been some convergence, the structural challenges of each legacy are quite different.

⁷ As a result, an effective regulatory regime is closely interrelated with the concept of rule of law – or, at least, rule by law. However vague the term “rule of law” has become, its hallmark is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with due process. In theory, there should be no deviation between rule of law and an effective regulatory regime. But an appeal to fundamental rights or justice is also claimed in the rule of law, at least in the West. The extent to which a government deviates from theories of justice might mean the separation between rule of law and effective regulatory control. However, the extent to which the government has decreed (constitutionally or otherwise) that these fundamental rights / interest groups be considered or preferred, then rule of law and effective regulatory control should again converge. Although an effective regulatory mechanism requires enforcing the government's dictate, the complexity of modern states means that the government's dictate may be confusing. This paper cannot seek to solve the conflicts of constitutional interpretation. Rather, this paper proceeds with the simpler goal of ensuring effective control when the NPC has released a clear law with clear purpose.

⁸ Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 615 (1927).

containing findings of fact, and orders; and (3) the legal principles governing the acts of public agents when those acts conflict with private rights.⁹

This paper focuses on the rule-making and enforcement mechanisms of independent agencies as they relate to China's regulatory regime.¹⁰ A difficult challenge in discussing the effectiveness of this regime in China is the diversity of agencies, types of possible regulation,¹¹ and fundamental challenges to administrative law itself.¹² This paper opts to avoid these universal discussions in

⁹ Administrative law, BLACK'S LAW DICTIONARY (8th ed. 2004).

¹⁰ This also tends to be the principal focus of academic study of administrative law in the United States. Research on administrative law in the People's Republic of China often focuses on its unique administrative detention system, which this paper does not discuss. *See, e.g.,* Sarah Biddulph, *Review of Police Powers of Administrative Detention in the People's Republic of China*, 39 CRIME & DELINQ 337 (1993).

¹¹ Even when there is agreement on the end goal, there may be much disagreement about how to get there. Theories of effective regulation span market-based approaches, independent certification bodies, civil liability systems, permit and inspection programs, and fines for violations. Most countries have a mix of these approaches depending on baseline market and government ideologies, local concerns, and the different needs of the various regulated industries: careful pre-certification for drug design, regular inspections for drug production, simple tort liability or, perhaps, no liability at all for certain government action.

¹² These challenges include whether standardization of any kind is possible, the ability to construct coherent regulations, and whether administrative law is inherently anti-democratic. Legislatures typically turn to independent agencies to carry out this regulation for three principal reasons: the lack of time and resources for the legislature to deal exhaustively with every case, the perceived "scientific" results that a body of experts might yield, and, less frequently, an inability to reach political consensus. In the United States, increased government regulation has come under scrutiny as being anti-democratic - either by taking decisions away from the legislature and the political process or by becoming "captured" by the ruling administration or the regulated industry. *See, e.g.,* STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* (Little, Brown & Co. 1979) (describing the shortcomings and dysfunctions of administrative law in the United States). The anti-democratic arguments weaken in the Chinese context. With a less democratic legislature, it is hard to see how independent rule-making threatens democracy except perhaps by strengthening the legitimacy and effectiveness of the underlying political system. Indeed, handing off these decisions to a scientific group may be preferable - even to the government, which seeks "scientific development" and decisions less marred by corruption and political dysfunction. In addition, administrative rulemaking fits well with

favor of reviewing two critical elements that all effective regulatory mechanisms include: agency adherence to government priorities as stated by the substantive law, particularly in the face of non-legal pressures, and a record of effective compliance by the regulated.

II. BRIEF REVIEW OF THE GROWTH OF ADMINISTRATIVE LAW IN CHINA

Chinese administrative law is expansive, recently developed, and relatively understudied.¹³ The breadth and significance of administrative law is particularly great in China, where a unitary government grants neither effective supervision to the courts nor meaningful separation from the legislature, and where agencies thereby become largely unassailable in addition to possessing unique court-like punishment powers.¹⁴ Because China exercises much of its significant power through administrative action, its field of administrative law is extremely broad. Finally, because of effective government immunity and an underlying political and social command and control framework, the burden for enforcing regulations is placed even more heavily on administrative agencies in China than in other countries.¹⁵

Possibly as a result of its sheer breadth, there has not been a comprehensive description of administrative law in China.¹⁶ A

traditional Chinese rule of law notions that focus more on principles of rule by law and seek to enhance the power of the unitary state and guide society with a more scientific or enlightened rationality than the proletariat possess at this point in their development.

¹³ This paper uses the terms "administrative law" and "regulatory law" interchangeably. See also Xixin Wang, *Administrative Procedure Reforms in China's Rule of Law Context*, 12 COLUM. J. ASIAN L. 251, 251-52 (1998) (observing that "while the law reforms have focused mostly on the construction of a substantive legal system, the legal procedure, which traditionally has long been the weakest part of China's legal system, has not received enough attention from either legal scholars or the Chinese leaders").

¹⁴ China follows a unitary model that allocates power to agencies. PRC courts do not have the authority to review an agency decision's compliance with the PRC Constitution and therefore rarely intervene. The PRC Constitution grants the NPC the power to review the constitutionality of regulations, but this power has not been used. Indeed, the lawmaking and rule-making process are often indistinguishable. Chinese agencies can exercise administrative detention, a significant punishment that operates outside the judicial criminal system.

¹⁵ Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China*, 30 FORDHAM INT'L L.J. 1050, 1062 (2006).

¹⁶ Interview with Xixin Wang in Beijing (Nov. 2007).

comprehensive description would include the principal administrative organs, forms of action, rulemaking procedures, decision-making and punishment powers and procedures, enforcement mechanisms, controls over agency action, and remedies for violations of individual rights, among other subjects.

This section does not aim to achieve a detailed and comprehensive review of Chinese administrative law. Rather, the principal intent is to review the remarkable breadth of Chinese administrative law and the rapidity of recent reforms to support the proposition that the Chinese government has devoted significant energy to creating a strong rule-making and enforcement process, particularly with regard to labor and environmental concerns. It does not discuss the administrative punishment or detention systems, nor does it deal with any subject in more than cursory detail.¹⁷

China formally adheres to “democratic centralism,”¹⁸ so a description of the country’s regulatory regime with predictive resonance might best begin by evaluating that regime in the context of the current goals and doctrine of the Chinese Communist Party (CCP).

¹⁷ Substantial treatment has been given to China’s system of administrative punishment, which includes the substantive law and procedures relating to punishment, such as administrative detention, education through labor, and suspension of license. See Biddulph, *supra* note 10.

¹⁸ Cooney, *supra* note 15, at 1084. Article 3 of the Constitution of the People’s Republic of China states that “the state organs of the People’s Republic of China apply the principle of democratic centralism.” Article 3 explains: “All administrative, judicial and procuratorial organs of the state are created by the people’s congresses to which they are responsible and under whose supervision they operate. The division of functions and powers between the central and local state organs is guided by the principle of giving full play to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities.” “Democratic centralism” seeks to resolve natural tension between local and national government authorities and national authorities. Article 3 recognizes the “initiative and enthusiasm” of local authorities but strongly suggests that disputes are to be resolved in favor of “central authorities.” This lack of clarity (i.e., not firmly stating that the central authorities trump local authorities) is itself an example of democratic centralism: one government issuing consistent leadership and rather than publicly airing disputes among government authorities. Indeed, Article 3 asserts the “unified leadership of the central authorities,” which demonstrates China’s lack of explicit separations of power and power sharing provisions, precisely because unified leadership is envisioned. This assumption of unified leadership – whether premised on a desire to present the people with a unified front or a sincere belief in a particular direction forward – helps explain why China has not established a system of separation of competing powers.

Now enshrined in the CCP's guiding ideology is President Hu Jintao's "scientific development concept" of creating a "harmonious society."¹⁹ President Hu's "characteristics of a harmonious society" include, among others, "democracy and rule of law" and "harmony between man and nature."²⁰ These ideals are to be served in accordance with and as a result of "scientific decision-making," which includes a substantial dose of rule of law, rule-making, and rule-enforcing reforms.²¹ In other words, the hallmarks of administrative law -- technocratic decision-making and rule of law -- stand at the core of the CCP's contemporary goals.

At the broadest legal level, the system of administrative law is guided by the constitution, fundamentally reintroduced in 1982, that authorizes the NPC and its Standing Committee to issue statutes and the State Council to issue administrative regulations.²² This administrative power extends to ministries and commissions under the

¹⁹ "Scientific Development Concept and Harmonious Society," 17th Nat'l People's Cong., <http://www.china.org.cn/english/congress/227029.htm>.

²⁰ *Id.*

²¹ *China To Set Up Five New "Super Ministries,"* CHINA DAILY, Mar. 11, 2008, http://www.chinadaily.com.cn/china/2008npc/2008-03/11/content_6527183.htm (reporting that President Hu Jintao vowed to accelerate the reform of the administrative system and build a service-oriented government at the 17th National Congress and declared: "[w]e must lose no time in working out a master plan for it." In addition, Premier Wen Jiabao described reform of the administrative system as "an important link in deepening reform, an important part of the reform of political institutions, and an essential step in improving the socialist market economy."). See also "Scientific Development Concept and Harmonious Society," 17th Nat'l People's Cong., <http://www.china.org.cn/english/congress/227029.htm> (calling for "[i]n-depth reform and opening up. We shall continue in the direction of reform to develop the socialist market economy. In order to meet the requirements for economic and social development, we shall promote economic, political, cultural and social restructuring and innovation. We shall open wider to the outside world, make the reform decisions more scientific and the reform measures more coordinate so as to establish more dynamic, more efficient and more open systems and mechanisms. Democracy and the rule of law. We should build socialist democracy and implement the fundamental principle of administering the country according to law. We shall build a socialist country under the rule of law, enhance the legal awareness of the whole society and promote the legalization and standardization of national economy, politics, culture and social life so as to gradually constitute the social justice guaranteeing system and to promote social justice.").

²² Constitution of the People's Republic of China. In practice, the State Council and the Standing Committee effectively issue regulations.

State Council, provincial governments, and provincial capital governments.²³

The NPC has promulgated a series of general laws that establish the procedures for administrative rulemaking and enforcement. These include the Administrative Litigation Law (also translated as the Administrative Procedure Law) (1989),²⁴ the Administrative Reconsideration Law (1999),²⁵ the State Compensation Law (1994),²⁶ the Administrative Punishment Law (1996),²⁷ the Administrative Supervision Law (1997),²⁸ the Administrative Licensing Law (2003),²⁹ and the Administrative Penalties Law,³⁰ among others. These procedures for administrative rulemaking have at times been experimental, either as stated in the formal text of the relevant legislation (e.g., the Law on Legislation (2000) calls for public participation) or in the execution of the law (e.g., the Labor Law (2007) was formulated on the basis of unprecedented notice and comment periods).³¹

²³ Constitution of the People's Republic of China, Article 89.

²⁴ <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/administration/administrative-procedure-law-of-the-peoples-republic-of-china-1990.html>.

²⁵ <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/administration/administrative-reconsideration-law-of-the-peoples-republic-of-china-1999.html>.

²⁶ <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/state-compensation-law-of-the-peoples-republic-of-china-1994.html>.

²⁷ <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/administration/administrative-punishment-law-of-the-peoples-republic-of-china-1996.html>.

²⁸ <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/administration/administrative-supervision-law-of-the-peoples-republic-of-china-1997.html>.

²⁹ <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/administration/administrative-license-law-of-the-peoples-republic-of-china-2003.html>.

³⁰ <http://www.asianlii.org/cn/legis/cen/laws/apl269/>

³¹ Li fa fa [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) LAW INFO CHINA, available at <http://www.lawinfochina.com/law/display.asp?db=1&id=386&keyword=legislation%20law> (last visited Sep. 9, 2009) (P.R.C.); Law on Employment Contracts (promulgated by the Standing Comm. Nat'l People's Cong. June 29, 2007, effective January 1, 2008) translated at <http://www.chinalawblog.com/PRC%20Workers%20Law.pdf>; see also *Labor Laws Bolstered in China*, INT'L HERALD TRIB., Jan. 2, 2008, available at <http://www.iht.com/articles/2008/01/01/business/chilabor.php>.

The next layer of the Chinese regulatory system consists of substantive laws promulgated for nationwide application by the NPC. These may overlap and tend not to be mutually exclusive or collectively exhaustive. These laws may be enforced by a multiplicity of national and even local agencies that in turn may issue their own implementing regulations. The overlapping authorities and command-and-control enforcement mechanisms they are granted contribute to dysfunction in the system.

A final element in the Chinese regulatory regime includes influences from foreign government agencies, international certification bodies, and multinational corporations. These institutions do not form part of the Chinese legal framework, but their influence tends to affect product safety and quality assurance. Their concerns may also expand into environmental, labor, and other practices. Export-oriented production may be subject to inspection by agencies of foreign governments including the United States Department of Agriculture and the Food and Drug Administration. Many local and international firms operating in China have been ISO-certified for best management, environmental, or other practices.³² Finally, many international firms monitor the practices of their subsidiaries or suppliers in China to maintain international standards or to respond to international concerns of environmental and labor abuse.³³

Recent developments in Chinese regulatory law include two major experiments, one now complete and one just announced. With great fanfare, China experimented with independent rule-making in drafting the new Labor Contract Law (2007).³⁴ The Labor Law aims to guarantee basic conditions to workers while also meeting business needs.³⁵ The Standing Committee³⁶ attempted this balancing of interests through an extraordinary American-style notice and comment

³² See, e.g., Mary Lynne Calkins, *Make Friends First, Certify Later: China and ISO 14000*, 9 GEO. INT'L ENVTL. L. REV. 609, 640 (1997). See also <http://www.sac.gov.cn/templet/english/ShowArticle.jsp?id=3313>; See generally <http://www.sac.gov.cn/templet/default/>.

³³ See, e.g., Keiko Tanaka & Lawrence Busch, *Standardization as a Means for Globalizing a Commodity: The Case of Rapeseed in China*, 68.1 RURAL SOC. 25 (2003).

³⁴ http://www.inthesetimes.com/article/3017/fights_over_chinese_labor_reform; see generally Edward Cody, *China Enacts Stronger Labor Law: New Rules to Protect Abused Migrant Workers*, Wash. Post For. Serv., Wash. Post; Jun 30, 2007, at D1.

³⁵ *Id.*

³⁶ *Id.*

period that attracted input from hundreds of thousands of citizens and organizations.³⁷ However, the Standing Committee struggled with evaluating this input, and the law ultimately did not achieve the buy-in of important business interests and many of the rules remained unclear.³⁸ In response to the Labor Law, household brand Huawei apparently fired 80% of its workers,³⁹ and Olympus decided to move a factory to Vietnam.⁴⁰ Finally, the enormous number of violations, resulting from the expansiveness and lack of clarity in the law, combined with few resources to prosecute those violations has meant a dramatic failing in the enforcement of the law and its original goals.⁴¹ The subsequent economic challenges gave further pause to the effect of the labor law.⁴²

In March 2008, the NPC announced the establishment of five new “super ministries”: the ministry of industry and information, the ministry of human resources and social security, the ministry of environmental protection, the ministry of housing and urban-rural construction, and the ministry of transport.⁴³ Two areas in which rule-making and enforcement mechanisms were frequently criticized – energy policy and food and drug safety – were also given much clearer authority structures. With regard to energy, the national energy commission was designed to be a “high-level inter-ministerial coordinator” with a national bureau of energy to be set up as its working office under the National Development and Reform Commission (NDRC). With regard to food and drug safety, the Ministry of Health was designed to oversee the nine agencies already charged with food and drug safety-related duties and having overlapping jurisdiction.⁴⁴

³⁷ *Id.*

³⁸ *Labor Laws Bolstered in China*, INT’L HERALD TRIB., Jan. 2, 2008.

³⁹ See also <http://www.china.org.cn/english/news/230662.htm>.

⁴⁰ *New Chinese Labor Law Causes Olympus to Flee to Vietnam*, ChinaCSR.com, Nov. 13, 2007, <http://www.chinacsr.com/2007/11/13/1849-new-chinese-labor-law-causes-olympus-to-flee-to-vietnam>.

⁴¹ Jude Blanchett, *Key Issue For China’s New Labor Law: Enforcement*, CHRISTIAN SCI. MONITOR, July 2, 2007, at 11, available at <http://www.csmonitor.com/2007/0702/p11s02-woap.html>.

⁴² <http://online.wsj.com/article/SB123215043508192065.html>.

⁴³ Jim Yardley, *China Retools its Government in Efficiency Push*, N.Y. TIMES, Mar. 12, 2008, at A12, available at <http://www.nytimes.com/2008/03/12/world/asia/12china.html?scp=2&sq=china+safety&st=nyt>; *China To Set Up Five New “Super Ministries,” supra* note 21.

⁴⁴ Yardley, *supra* note 43.

III. ONGOING CHALLENGES

Commentators frequently observe that China has many rules but most are seldom enforced.⁴⁵ One representative report noted that “[p]assing the law was only the first step: the biggest challenge that China faced, and continues to face, is the effective enforcement of environmental protection laws.”⁴⁶ In addition, Ira Belkin, the China Rule of Law Program Officer at the Ford Foundation, concludes that “[g]iven the general ineffectiveness of the Chinese litigation system . . . and the vulnerability of the regulatory system to corruption, incompetence, lack of enforcement resources and local protectionism, you have a formula for the kind of product safety problems we have seen coming out of China.”⁴⁷

To be sure, significant challenges plague Chinese rulemaking and enforcement, frequently leaving the structures and words of administrative law as lifeless forms. This article discusses several of the contributing factors, including constitutional/political structure, social structure/civil society, political will/capital, regulatory structure/style, and resistance to exogenous influence. China admits many of these shortcomings, emphasizing some special difficulties in enforcement (the challenges of local agencies and corruption) and rulemaking, if not in its fundamental system of government.⁴⁸ Despite recent reforms, the challenges persist because they reinforce each other in a vicious and evermore entrenched dialectic. The central strategic question facing those who seek a more effective regulatory regime is

⁴⁵ See, e.g., Clissold, Tom, Mr. China, (noting “I was dealing with a society that had no rules; or more accurately, plenty of rules but they were seldom enforced. China appeared to be run by masterful showmen: appearances mattered more than substance, rules were there to be distorted and success came through outfacing an opponent.”

⁴⁶ Meixian Li, *China's Compliance with WTO Requirements Will Improve the Efficiency and Effective Implementation of Environmental Laws in China*, 18 TEMP. INT'L & COMP. L.J. 155, 156.

⁴⁷ E-mail Interview with Ira Belkin, Law and Rights Program Officer for the China Region, Ford Foundation (Apr. 2008).

⁴⁸ Admitting shortcomings is a tradition at CPC meetings, when the government will vow to redouble its efforts on the work at hand. But these admissions are still real. See, e.g., *China To Set Up Five New “Super Ministries,”* *supra* note 21 (detailing State Councilor and Cabinet Secretary Hua Jianmin’s report on the necessity of reform, which observed that with public administration and public services were still weak, the structure of government institutions was irrational, and that “[p]owers in some regards were too concentrated and lack[ed] due oversight and checks.”).

then how to address these multi-polar problems and begin to turn a vicious cycle into a virtuous one.

A. CONSTITUTIONAL / POLITICAL STRUCTURE

China's unitary constitutional and political structure presents the most fundamental challenge to effective rulemaking and enforcement.⁴⁹ Although many of the challenges discussed in this section could encumber other government systems, they become particularly pernicious in China. The political ideology accepted by China, confirmed in its Constitution and hardened by practice, rejects a separation of powers.⁵⁰ In government systems like that of the United States, separation of powers is ultimately the force behind regulatory enforcement.⁵¹

China's being a unitary state may, therefore, explain in part why, despite the existence of an established judiciary and the Supreme People's Procuratorate,⁵² these bodies do not effectively hold the government or other actors accountable for many violations of regulatory law. This is not to say the Chinese system rejects a division of labor, as evidenced by the flourishing plethora of enforcement bodies and agencies,⁵³ including the judiciary and Procuratorate. However, these actors are not independent or independently accountable, and their guiding concern appears in many cases to be not to ruffle feathers or slow economic growth.⁵⁴ The unitary structure

⁴⁹ See discussion on "democratic centralism" *supra* note 18.

⁵⁰ *Id.* (discussing the "democratic centralism" of Art. 3 of the Constitution).

⁵¹ Interview with David Vladeck (Feb. 11, 2008).

⁵² Section 7 of the Constitution of the People's Republic of China, available at <http://english.people.com.cn/constitution/constitution.html> (establishing the People's Courts and the People's Procuratorates).

⁵³ See, e.g., Michael Wines, *Chinese Agencies Struggle Over Video Game*, N.Y. TIMES, Nov. 6, 2009, available at http://www.nytimes.com/2009/11/07/world/asia/07china.html?_r=1&scp=1&sq=Chinese%20Agencies%20Struggle%20Over%20Video%20Game,&st=cse (discussing the dispute between two different government agencies asserting competing authority to regulate video games).

⁵⁴ Much has been made of the success of Singapore and other authoritarian states' exemplary rule of law and regulatory enforcement. This may result from an unquestioned commitment to compliance and getting things right—even if it disrupts powerful interests—as well as the small size and relative simplicity of Singapore. In any event, this paper does not aim to rewrite a theme on the old and hackneyed debate "Can China be Singapore?"

leads to confusion through overlapping mandates and substantial inertia.

More specifically, the claim to unitary rule in a complex state leads to contradictions that undermine the legitimacy of the rule of law efforts. On the plane of constitutional structure, the unitary model leads to a "local-central dichotomy," where local governments may claim to adhere to national mandates but either ignore or flaunt them in practice.⁵⁵ That a local-central dichotomy might arise in such a large, diverse country with different needs and political pressures is understandable, but the unitary state does not permit substantial variation or federalism.

Unitary rule emasculates enforcement agencies by co-opting what should be independent actors into state agents who may be somewhat reminiscent of the royal functionaries in *The Emperor's New Clothes*.⁵⁶ In other words, centralism contradicts the separation of powers that is inherent in administrative law (i.e., one body limiting the actions of another with rules). For example, lawyers in China have great difficulty escaping the logic of the unitary state:

The article draws the ironic conclusion that legal practice in China reveals at least as much about the enduring salience of socialist institutions as it does about incipient capitalist and "rule of law" institutions. Lawyers' dependence on state actors both inside and outside the judicial system preserves the value of political connections inside the very institutions that some sociologists have argued are responsible for obviating the need for such *guanxi*.⁵⁷

which asks whether the unitary authority, trading prowess, and technical flair of the CCP can overcome the diverse and expansive Chinese state to deliver a Singapore-like rule of law and standard of living.

⁵⁵ Interview with Wang Xixin in Beijing (Nov. 2007). See also Constitution of the People's Republic of China, art. 3, *supra* note 18.

⁵⁶ Hans Christian Anderson, *The Emperor's New Clothes*, tells the story of an emperor whose weavers promise a resplendent new outfit that cannot be seen by anyone unfit for their positions. Consequently, no one admits, even the emperor himself, that they see no clothes. In the end, only a child on a parade route dares scream out that the emperor has no clothes.

⁵⁷ Ethan Michelson, *Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism*, 113 No. 2 AM. J. SOC. 352, 352 (Sept. 2007).

In essence, an effective regulatory regime cannot paper over fundamental contradictions and weaknesses. Although the administrative law system has been used in cases where political consensus is difficult to establish, it is very difficult to imagine a truly effective administrative law system to the extent that there is political dysfunction in balancing society's interest groups – whether regional, class, or political.

B. SOCIAL STRUCTURE / CIVIL SOCIETY

Because governments have limited resources for enforcing a vast array of regulations, an effective regulatory system usually requires a substantial level of self-enforcement. This self-enforcement can be facilitated in at least two ways: the buy-in of organized interests in the rule-making process so that the interest holders understand and know the rules, and the imposition of punishments sufficient to deter non-compliance.⁵⁸ Both interest-group inclusion and fear of punishment require civil society. Interest groups must organize and effectively represent various groups of society so that they can negotiate with agencies to create realistic rules. Equally fundamental is a developed “whistleblower society” that empowers citizens to make real complaints and force compliance. Although a whistleblower society may not require Western democracy, it does require sufficient human rights protections and legal causes of action that would enable aggrieved persons to raise concerns and be heard by the government in an orderly fashion.

Unfortunately, however, democratic centralism expresses itself in the foment of a “mass society” and the suppression of a “civil society.” In this model, the vanguard leadership of the Party guides the people at large.⁵⁹ In practice, this has meant the suppression of truly representative and divergent interest groups and the squashing of

⁵⁸ Naturally, there are many other factors, including the clarity of and access to the regulation.

⁵⁹ “Vanguardism” is a Marxist-Leninist doctrine that asserts the need for a “vanguard” of intellectuals (e.g., the Communist Party) to lead the masses (who have lower awareness or “consciousness”). The doctrine is associated most closely with Vladimir Lenin, whose 1902 “What Is to be Done?” concluded that “through their own powers alone, the working-class can develop only a trade-union consciousness.” In the Chinese context, preamble to the Chinese Constitution recites “the leadership of the Communist Party of China and the guidance of Marxism- Leninism and Mao Zedong Thought.” This is consistent with why the CCP today remains selective, membership-only, and can argue the people should defer to its dictates.

whistle blowers and whistle blower mentality.⁶⁰ Instead of real expression of interests, there are faux interest groups or individuals who either fear raising concerns or find the whole process so troublesome that they do not bother.⁶¹ Apparently, the weakness of China's civil society is attributable to "the absence of strong, autonomous, civil society organizations and the lack of independent vehicles for diffusing and critiquing information," and "low education and literacy levels," among other factors.⁶² Cooney describes how these factors have paralleled a deficiency in responding to potential regulatory issues regarding working conditions:

Moreover, as has been shown, the lawful worker organizations have, at least until very recently, done very little to give voice to migrant workers—the socially and economically marginalized people whom Chinese labor law is most deficient in assisting. Migrant workers' low educational levels and social status often leave them unwilling and unable to articulate their concerns; unless they receive institutional support, they will not be able to contribute to local regulatory processes.⁶³

The result is an enforcement system that at times prefers fear to whistle-blowing, a system in which such self-enforcement might only be a sure thing in the rare and extreme cases that reach national attention in a chaotic way and that ultimately require political rather than regulatory intervention. This failure is compounded by a "Wild West" trend wherein actors may not care about the public sphere or third parties because selfish interests are not checked and there is "widespread intolerance of diverse viewpoints, inhibiting reasoned deliberation."⁶⁴

⁶⁰ For example, the National People's Congress exists as a democratic organ and includes representation from many minority groups. However, the CCP holds almost all seats in the NPC.

⁶¹ Cooney, *supra* note 15, at 1084 (asserting that "[t]he civil society organizations most relevant to more participatory forms of workplace regulation—organizations of working people—are either subordinate to the party-State, top-driven and frequently aligned with management, or actively suppressed").

⁶² *Id.* (citing RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD THE RULE OF LAW 428-31 (2002)).

⁶³ *Id.*

⁶⁴ *Id.*

C. POLITICAL WILL / CAPITAL

A perceived void of political will or capital of the leadership to make difficult decisions obstructs the regulatory regime from continuous and aggressive enforcement. First, the expansive and sclerotic regulatory regime is rigged with inertia that likely only significant political investment can overcome. Randy Peerenboom observes both “the likely hostility of the bureaucracy to alternative approaches [and] the likely resistance of local government institutions to requirements of information disclosure and external monitoring and evaluation (vital to the effectiveness of those approaches).”⁶⁵ This inertia and regulatory capture is often cemented by corruption, and reports suggest that the judiciary, the newly-formed Anti-Corruption and Bribery Bureau, and the Central Disciplinary Committee do not have the political will or independence to pursue senior-level corruption without explicit superior permission.⁶⁶

Second, the Chinese government does not want to risk slowing development or creating a whistleblower society—at least not too quickly—lest it develop effective opposition groups. As a result, enforcement may take place only when there has been a possibility of severe embarrassment, generating a practice of saving face and appearances rather than generating a culture of self-enforcement, particularly on smaller violations that would be unlikely to generate extreme embarrassment.

Third, Chinese commitments to enforcement in the past—whether commitments made purely voluntarily or in exchange for international negotiations—have often not been carried through. For example, China courted ISO 14000 certification for environmental management and agreed to pursue many global standards (particularly in banking but also in an array of industries) in exchange for membership in the WTO.⁶⁷ Yet years later, reports declare that “China

⁶⁵ *Id.*

⁶⁶ *Id.*; *Anti-Corruption in China: The Key Findings*, GlobalIntegrity.org, Jan. 31, 2008, <http://commons.globalintegrity.org/2008/01/china-key-findings-part-2-of-3.html>.

⁶⁷ Li fa fa, *supra* note 31, at 156. It has been argued that Zhu Rongji strongly pursued admission to the WTO in order to provide external forces of modernization, fearing that the domestic economic and the domestic political regime needed to be augmented if China’s financial and other industrial practices were to develop to meet global standards.

should strive to adopt the ISO 14000 not only in word, but also in deed.”⁶⁸

D. REGULATORY STRUCTURE / STYLE

Both clear rule-making and effective implementation in China's regulatory system suffer from challenges posed by its organizational structure and style. First, organizational challenges include overlapping and unclear authority. For example, “[n]ine government authorities and agencies have major responsibilities for managing various facets of the PRC's food safety system, while [another eight] have secondary roles.”⁶⁹ The recent responses discussed at the end of Part II do not appear to have reduced the plethora of agencies that must cooperate to develop and enforce rules on food and drug development and production.⁷⁰ Second, with regard to deficiencies in the style of enforcement and rule-making, Cooney notes “[a] failure to clarify key norms, a bureaucratic ‘command and control’ approach to inspection and dispute resolution, and a narrow and ineffective range of tools for inducing compliance.”⁷¹ A tradition of ambiguous, informal, and inaccessible Chinese legislation, regulations, and court decisions further compounds the ineffectiveness of this style of enforcement and rule-making. The recent controversy over tainted heparin presents a case in point. The State Food and Drug Administration, China's national drug agency, initially contended that “ensuring the quality of exported chemicals like heparin was the responsibility of importers and importing countries.” Then, in the face of international concern over the safety of heparin, the Administration posted a declaration on its website “that requires heparin producers to obtain the raw chemicals used to make the drug from registered suppliers” and to “improve their management and tests on their products.”⁷²

E. RESISTANCE TO EXOGENOUS INFLUENCE

Despite the international clamor for Chinese compliance with product safety, labor, and environmental standards, the Chinese system

⁶⁸ Calkins, *supra* note 32, at 640.

⁶⁹ <http://www.adb.org/documents/produced-under-ta/37599/os-food-safety-en.pdf>.

⁷⁰ See discussion *supra* at notes 43-44.

⁷¹ Cooney, *supra* note 15, at 1051.

⁷² Elaine Kurtenbach, *China Orders Tighter Controls on Heparin*, BOSTON GLOBE, Mar. 21, 2008, available at http://www.boston.com/news/health/articles/2008/03/21/china_orders_tighter_controls_on_heparin/.

has been resistant to external interference.⁷³ This is a result of many of the structural challenges discussed above. No one party, domestic or international, has the full power to resolve China's many social challenges and, as in so many other areas, China moves at its own rhythm. Insistence on sovereignty over its own affairs, a desire to display international independence, and conflicting domestic concerns buttress China's insulation and contribute to its wait-and-see moderation.⁷⁴ Current efforts by foreign governments to inspect or

⁷³ Of course, most countries resist external influence. For an interesting comparison to the United States' experience in resisting international calls for standardization, see Steven Mihm, *A Nation of Outlaws: A Century Ago, That Wasn't China – It Was Us*, BOSTON GLOBE, Aug. 26, 2007, available at http://www.boston.com/news/education/higher/articles/2007/08/26/a_nation_of_outlaws/?page=4 (asserting that "[t]he rogue industries of the United States eventually responded to stiff international economic pressure. Beginning in the 1880s, the European meat boycotts spurred Congress to pass a raft of federal legislation aimed at imposing some inspection controls on the exports of meat. In response, European countries opened their doors to American meat again. And in 1891, Congress finally bowed to decades of angry lobbying and passed an international copyright law that protected foreign authors.").

⁷⁴ A good example is the history of the ISO 14000 relating to environmental management. See Keith Hand, *ISO 14000 Implementation in the People's Republic of China*, ENVIRONMENT INTERNATIONAL LTD., 1997, at 3, available at <http://www.eiltd.net/publications/ISOChina.pdf> ("[S]upportive statements by Chinese officials, a flurry of activity in China related to ISO 14000, and enthusiasm in the PRC for ISO 9000 suggest that China has significant interest in ISO 14000 and that the integration of these standards into China's environmental regulatory regime is likely."). Yet, Calkins, *supra* note 32, reported some years later that "[i]mplementation will swim against a current of underlying mismanagement, and certain aspects of ISO 14000 may tempt China to revert to its patterns of deception. In his preface to *The Bad Earth*, which documents China's environmental decline and which cites solely Chinese sources, Vaclav Smil noted the naiveté of foreign enthusiasts who had admired China's apparent Communist 'miracle' and whose hopes were dashed when truth about its failures came to light. An analogy may be drawn to the international business community today, which marvels at China's apparent economic miracle and drools over the prospect of tapping its gigantic consumer market. While China's attempted participation in ISO 14000 will be better than nothing, the international community should be wary of China's claims of proper certification and effective environmental measures." See also Di Chang-Xing, *ISO 14001: The Severe Challenge of China. An Overview on the Problems China Faced in the Implementation and Certification of ISO 14001*, in GROWING PAINS: ENVIRONMENTAL MANAGEMENT IN DEVELOPING COUNTRIES 101, 101-119 (Walter Wehrmeyer & Yacob Mulugetta eds., Greenleaf Publ'g 1999).

negotiate appear to fall short because of language barriers, lack of resources, and lack of global reach.⁷⁵

IV. RESPONSES

Responding to the structural weaknesses of the Chinese regulatory regime is extraordinarily complex because of both the multiplicity and interlinking of challenges and the absolute policy of the Chinese government to maintain its unitary system. Recognizing the overwhelming nature of these challenges and the nearly continuous criticisms of the Chinese state, some have complained that "criticism is frequently unaccompanied by specific reform proposals that are feasible in the Chinese context."⁷⁶ Nonetheless, a series of suggestions have been proposed to breathe life into the Chinese regulatory regime, ranging from relatively discreet and practical to wholesale revisions of the Chinese political system. In the interest of pragmatism, this paper does not include those options expressly aimed at fundamentally redrawing the Chinese political system.

A. DO NOTHING

The option of doing nothing is something of a misnomer because, as noted earlier, the status quo involves significant experimentation with regulatory reform. The approach is not based on a lack of interest by the U.S. or China; rather, it premises an understanding that China's regulatory system will continue to develop for the better if left to its current momentum. Stephen Mihm, of the University of Georgia, looks to the history of the United States in arguing that "[a]t a certain point, some of the push for change can come from within. As a capitalist system evolves, there can come a time when some players in the economy prefer to be held to more stringent standards, even ones that impose additional costs."⁷⁷ Mihm argues that just as "[i]n the scandal-racked American food business [when] several industry leaders converted to the cause of regulation in no small part because there was money to be made," so will China's "own entrepreneurs and industries . . . recognize that to get rich while bowing

⁷⁵ See *The F.D.A. in Crisis*, N.Y. TIMES, Feb. 3, 2008, available at <http://www.nytimes.com/2008/02/03/opinion/03sun1.html?scp=31&sq=china+safety&st=nyt>; see also Gardiner Harris, *For F.D.A., a Major Backlog Overseas*, N.Y. TIMES, Jan. 8 2008, available at <http://www.nytimes.com/2008/01/29/washington/29fda.html?scp=39&sq=china+safety&st=nyt>.

⁷⁶ Cooney, *supra* note 15, at 1052.

⁷⁷ Mihm, *supra* note 73.

to international standards may be equally glorious -- and even more profitable.”⁷⁸

However appealing, the “do nothing” approach still assumes that better regulation will be required at some point but leaves us to trust that it will come about naturally. The approach does not articulate how to develop better regulation most effectively or efficiently or respond to the very real imperative for effective regulation today. Finally, significant differences may exist in the ability of these concerns to rise to the surface in China, given its unique brand of centralism and suppression of voices.

B. CONSTITUTIONAL/POLITICAL

Absent fundamental changes in China’s constitutional/political system, there are relatively few direct responses to the basic central/local and centralism/judicial review contradictions. Nonetheless, increasing claims of action and permitting greater regulatory diversity across the country would enable more effective regulatory mechanisms without directly undermining unitary rule. For example, the U.N. Committee on Economic, Social and Cultural Rights concluded that despite “the sizeable population in the vast expanse of Chinese territory,” China had the capacity to “effectively implement the [International Covenant on Economic, Social and Cultural Rights (ICESCR)].”⁷⁹ In essence, the ICESCR urges China “to ensure that legal and judicial training takes full account of the justiciability of the rights contained in the Covenant and promotes the use of the Covenant as a source of law in domestic courts.”⁸⁰ Although the ICESCR recognizes “[t]he translation of international law to a domestic level is not an easy task,” its broad calls to fundamental reform appear idealistic and abstract.⁸¹

⁷⁸ *Id.*

⁷⁹ Leila Choukroune, *Justiciability of Economic, Social, and Cultural Rights: The UN Committee on Economic, Social and Cultural Rights’ Review of China’s First Periodic Report on the Implementation of the International Covenant on Economic, Social, and Cultural Rights*, 19 COLUM. J. ASIAN L. 30, 41 (2005) (quoting *Consideration of Reports Submitted by State Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: People’s Republic of China (Including Hong Kong and Macao)*, U.N. ESCOR, 34th Sess., U.N. Doc. E/C.12/1/Add.107 (May 13, 2005)).

⁸⁰ *Id.* at 42.

⁸¹ *Id.* at 49.

C. SOCIAL STRUCTURE/CIVIL SOCIETY

Efforts to build interest groups and encourage a “whistleblower” society are critical. These efforts may be pursued through interest group reform and support and expanded access to the justice system:

[A] regulatory system, by itself, cannot adequately police a free market. You need a more effective free market legal system as well. Victims and their lawyers need to be empowered to take on companies that produce unsafe products and those companies need to have so much at stake that they are motivated to do everything they can to institute rigorous product safety regimes.⁸²

Similarly, in the context of labor regulation, Cooney proposes improvements to the legal system and to the ability to make legal claims.⁸³ One simple means of increasing access to courts is to abolish the requirement that arbitration precede litigation and to permit agencies to grant interim relief and entertain disputes between independent contractors under certain circumstances. Several international jurisdictions take this approach pursuant to “unfair contract” legislation.⁸⁴ Other ways to improve interest in labor regulation include ensuring that the labor bureau employ better-trained personnel, adhere to specific procedures for different kinds of disputes (rights/interest and collective/individual), provide support to workers left without income during disputes, and include labor dispute resolution for sub-contractors who may not technically be employees.⁸⁵

In addition, the establishment of representative trade unions in China might permit an increased inclusion of interest groups in rule-making and might permit groups to hold employers and governments accountable. Even if China does not observe International Labor Organization (ILO) conventions on the rights to organize and bargain collectively, Cooney articulates several ways in which trade unions might “at least become more effective compliance agencies.”⁸⁶

Finally, the Chinese media has increasingly focused on rule-breakers in its “Law Weekly” program and has made other attempts to

⁸² E-mail Interview with Ira Belkin, Law and Rights Program Officer for the China Region, Ford Foundation (Apr. 2008).

⁸³ Cooney, *supra* note 15, at 1086.

⁸⁴ *Id.* at 1088.

⁸⁵ *Id.* at 1089.

⁸⁶ *Id.*

build favor by responding to the outrage of common citizens. Increased legal and social programming that includes critiques and means of responding to regulatory issues will foster general social awareness and courage in building a democratic rule of law.

D. POLITICAL WILL/CAPITAL

China has devoted enormous energy to its regulatory regime and has called administrative reform “imperative”⁸⁷ and “high on the agenda.”⁸⁸ However, the best means of ensuring China’s seriousness is to increase the consequences of not following through or by decreasing the roadblocks to following through, which turn out to be the flip side of the same issue. That is to say, any options that alter the calculus of the relationship between economic growth, prosecutorial resources, legitimacy, inertia, and international relationships vis-à-vis effective regulatory enforcement may increase the political will and capital of the government. It is important to remember, too, that political will may vary: what is relatively easy to obtain for export-oriented products may be far more elusive for environmental or labor issues. Finally, it may be that, once a vicious cycle transforms into a virtuous one, greater supervision, momentum, and reduced corruption will work together to promote broad regulatory enforcement.⁸⁹

E. REGULATORY STRUCTURE / STYLE

A wide array of measures, both simple and profound, has been proposed to improve the structure and style of regulatory rulemaking and enforcement. These measures include clarification of norms, more effective and appropriate punishments, innovative styles to foment self-implementation, and streamlined bureaucracies.

More effective sanctions would include a wider range of penalties and penalties designed with the goal of encouraging compliance. Currently, many bureaucracies have no intermediate sanction between “a mere fine (in case of the labor department)” and

⁸⁷ *Administrative Reform ‘Imperative,’* XINHUA NEWS AGENCY, Mar. 5, 2008, http://www.china.org.cn/government/NPC_CPPCC_sessions2008/2008-03/05/content_11593009.htm.

⁸⁸ *Political Reform High on Agenda,* CHINA DAILY, Feb. 28, 2008, http://www.chinadaily.com.cn/china/2008-02/28/content_6490601.htm.

⁸⁹ *Effective Supervision Will Cure China’s Corruption Woes,* CHINA DAILY, Feb. 9, 2008, http://www.chinadaily.com.cn/china/2007-02/09/content_806239.htm.

"imprisonment (in case of the police)."⁹⁰ An intermediate punishment might be suspension of a business license until an offender complies. With regard to encouraging compliance, punishments must be designed as part of a comprehensive and effective enforcement strategy. For example, Ayres and Braithwaite propose an "enforcement period" of persuasion, warning, and sanctions.⁹¹

More effective rules and enforcement policies could also be designed through reference to human and business psychology and through a recognition of the obsolescence of the command-and-control model, which emphasizes State-based standard setting and imposition of sanctions.⁹² Indeed, "responsive," "reflexive," or "decentered" rulemaking models have proved preferable to the "command and control" model.⁹³ Although Cooney asserts that it is "doubtful how far [alternative regulatory approaches] can be applied in the Chinese context,"⁹⁴ he later acknowledges "evidence of emerging regulatory innovation and sophistication that may lead to a much more effective legal response."⁹⁵ Cooney further observes "some scope for regulatory experimentation and decentralization" in that China has "frequently taken an incremental, localized, and experimental approach to economic and social reform [and] . . . [t]here have been rolling improvements in legal norms and enforcement strategies."⁹⁶ These mainly consist of a series of commands coupled with punishments, although they try to prompt firms to build internal compliance systems.⁹⁷

F. RESISTANCE TO EXOGENOUS INFLUENCE

Globalization is the strongest factor strengthening external influence on the Chinese regulatory regime. Arguably the strongest of these are multinational corporations, which import global standards and even corporate responsibility initiatives to their own operations and sometimes to those of their subcontractors.⁹⁸ Yet even corporations'

⁹⁰ Cooney, *supra* note 15, at 1088 (paralleling the lack of range in criminal law, where extremely light or heavy punishments are the only availabilities for crimes (e.g., death penalty or one year in prison)).

⁹¹ *Id.*

⁹² *See Id.* at 1052.

⁹³ *See Id.* at 1082-85 nn.195-206.

⁹⁴ *Id.* at 1084.

⁹⁵ *Id.* at 1051, 1060.

⁹⁶ *Id.* at 1085.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1085 n.209, 1091.

successes have been mixed, with successes in the Ethical Trade Initiative or SA8000, but otherwise “perfunctory and disingenuous” performance or monitoring.⁹⁹

A second external means of improving regulatory compliance is through international standards organizations. An extensive array of literature debates the effectiveness of ISO and other certifications, frequently as a substitute for effective government regulation in developing economies.¹⁰⁰

V. U.S. AND CHINESE INTERESTS IMPLICATED BY CHINA’S REGULATORY REGIME

Cooperation in building a more effective regulatory regime in China requires common interests. Given that many of the international calls for greater regulation derive at least in part from protectionist xenophobia, it is not immediately clear that China would or should welcome U.S. assistance.¹⁰¹ Similarly, given that a stronger regulatory regime may strengthen a non-democratic government and its punishment systems, some Americans may take pause in cooperating at all. This section analyzes the interests that the United States and China have at stake and the extent to which these interests can yield common ground.

The analysis begins with a listing of the interests at stake in the dialogue, as advised in Fisher and Ury’s seminal book Getting to Yes.¹⁰² These interests are not positions (e.g., the United States requires that all products be processed in complete accordance with ISO 14000), but fundamental concerns (e.g., protect citizens from unsafe foods) that drive any number of possible positions. The benefit

⁹⁹ *Id.* at 1091.

¹⁰⁰ See generally Tanaka & Busch, *supra* note 33; Calkins, *supra* note 32, at 613; Maki Hatanaka, *Third-Party Certification as a Governance Tool: From the Perspective of the Actors in the Global South*, INT’L SYMP. ON CERTIFICATION & TRACEABILITY FOR FOOD SAFETY & QUALITY, Oct. 18, 2007.

¹⁰¹ Belkin, *supra* note 82; see also *France Tries To Limit Olympics Fallout*, N.Y. TIMES, Apr. 22, 2008, <http://www.nytimes.com/2008/04/22/world/europe/22france.html?hp> (quoting a *Le Figaro* editorial: “Under the noble defense of our ‘universal values,’ sometimes a racist stench hides that is quite contrary to the principles we pretend to incarnate . . . [The pro-Tibetan mobilization] is that much stronger because it is fed by a fear of ‘Made in China’”).

¹⁰² ROGER FISHER & WILLIAM URY, *GETTING TO YES* 50 (Penguin Books 1991).

Establishing the list of interests is challenging because it is difficult to disaggregate many concerns into mutually exclusive yet comprehensively exhaustive interests. The discussions over Chinese regulatory measures are particularly difficult because of the political valence of the description of any particular interest (e.g., “maintaining a U.S. position of influence” or “containing China” may sound equivalent to one party but sound completely different to another). It is also important to remember that issues of psyche (e.g., China’s feeling of having been “oppressed” or feelings of the U.S. about the justice of spreading liberty and democracy) are as real and valid for nations as for individuals.¹⁰⁴

The following table lists the essential interests the United States believes are at stake for each party. The table is listed first for orientation, with discussion of the interests – how arrived at and their complementarities – following. Chinese interests are set forth first out of respect.

¹⁰⁴ See, e.g., FISHER & URY, *supra* note 102, at 49.

**Important Interests at Stake in China's Developing Effective
Regulatory Regime¹⁰⁵**

	P.R. China Government	United States Government
Convergent	<ul style="list-style-type: none"> • Protect Chinese consumers, workers, environment • Protect/attract foreign investment in China • Maintain working relationship 	<ul style="list-style-type: none"> • Protect U.S. consumers, workers, environment • Protect foreign investment in China • Maintain working relationship
Unclear	<ul style="list-style-type: none"> • Burnish image 	<ul style="list-style-type: none"> • Burnish image
Divergent	<ul style="list-style-type: none"> • Consolidate CCP power & legitimacy • Protect Chinese industry/exports • Sovereignty/rising influence 	<ul style="list-style-type: none"> • Promote democratic/civil society • Protect U.S. industry • Maintain U.S. position of influence

Making a side-by-side list forces the consideration of which interests converge and diverge. The first insight from the table is that significant interests coincide. Maintaining a working relationship is in each side's interests for stability and the ability to work together to solve problems, including the many other issues that might arise in the relationship. Protecting foreign investments is also an interest shared by both sides. Finally, each side has an interest in protecting its own consumers, workers, and environment. While this final concern may not align perfectly, as there may be tradeoffs between these subgroups and across countries, it does seem to present more likelihood of common ground than opposition.

¹⁰⁵ The complexity of the issues and parties involved make the creation of an objectively exhaustive list difficult. Nonetheless, this table aims to summarize concisely the driving interests at stake for each party.

China similarly has criticized the U.S. for interfering in the sovereignty of other nations.¹⁰⁶ This criticism may be based on other interests, spreading democracy or maintaining core interests, discussed below. Yet it may be possible to envision a moment when both sides burnish their image by cooperating to achieve results, or, if politically attractive, by promoting that they are working together.

The potentially divergent interests are significantly more complex, both because of their divergence and their more psychological and indeterminate nature. The first of these interests for the Chinese is to consolidate power and establish legitimacy. This interest is extraordinarily broad and could conceivably be satisfied, or undermined, by a range of policy options, creating both great possibility for a workable solution and for peril. The Chinese government appears to understand the construction of an effective regulatory regime to be part of establishing legitimacy and consolidating power; of course, such a regime must not establish or strengthen opposition groups or somehow reflect negatively on the performance of the Chinese government.¹⁰⁷

What is extremely challenging is that the goal of effective regulation shared by the United States may also support the consolidation of Chinese power and contravene U.S. interests in promoting democracy and maintaining influence. This dynamic presents challenges to the United States interests: Does cooperation on effective governance entrench and legitimize the Chinese Communist Party and its political system? And if so—Does this not conflict with the strongly held interest of the U.S. in promoting democracy around the world?

Naturally, a second strong, potentially divergent and overlapping interest is China's interest in firmly guarding its sovereignty and expanding its sphere of influence.¹⁰⁸ China has perceived itself as the victim of foreign intervention in encounters ranging from the Opium Wars to the Japanese occupation to modern interventions in Taiwan

¹⁰⁶ Edward Cody, *China, Others Criticize U.S. Report on Rights*, WASH. POST, Mar. 5, 2005, at A14, available at <http://www.washingtonpost.com/wp-dyn/articles/A3840-2005Mar3.html>.

¹⁰⁷ See discussion *supra* Section II describing how an effective regulatory regime fits into the current goals of the CCP.

¹⁰⁸ Shao Da, *Peaceful Rise of China a Hot Topic*, China.org, Apr. 22, 2005, <http://china.org.cn/english/2005/Apr/126696.htm> (China asserts its right to rise and formally calls its doctrine of expanding influence "the peaceful rise").

and Tibet and even to its hosting the Olympics. Thus, China's declarations that "[y]ou have no right to interfere in our interior affairs" are common.¹⁰⁹ The Chinese government and people are extremely sensitive to questions of sovereignty and are "infuriated by . . . attacks on the country's image."¹¹⁰ One student explains: "China used to be known as the sick man of Asia. . . . We were separated like sand. . . . After 5,000 years, we're not so soft anymore."¹¹¹ Sovereignty concerns may be even more sensitive to Chinese citizens than to the government; international backlash against China's Olympic torch ceremonies in 2008 provoked on the Chinese people's part "a popular backlash against Western support for Tibet that has unnerved foreign investors and Western diplomats and, increasingly, the ruling Communist Party."¹¹² This sensitivity both to foreign interference and China's quick rise as a world power could potentially conflict with *any* involvement of the U.S. in China's regulatory mechanisms, let alone those involvements that would come as a result of U.S. interests in maintaining presence and expanding democracy.

Finally, protectionism poses divergent interests with regard to the Chinese regulatory system insofar as stricter regulatory enforcement would drive up costs and make U.S. products more competitive. This protectionist sentiment is probably an important driver of the prominence that the Chinese regulatory debate has assumed in the United States:

[w]ith the advent of the WTO, trade protectionism has moved from the arena of tariffs to non-tariff barriers, especially standards. Under the guise of setting standards, a country can favor its domestic products over imports and thus protect its domestic producers from competition. In the context of trade relation discussions, most of the discussion is about competing interests and not loftier goals.¹¹³

Despite these divergent interests, however, it is likely that cooperation is more advantageous to both sides than the alternative. In the absence of a negotiated agreement, China might continue its media

¹⁰⁹ Andrew Jacobs & Jimmy Wang, *Chinese Urge Anti-West Boycott Over Tibet Stance*, N.Y. TIMES, Apr. 20, 2008, available at <http://www.nytimes.com/2008/04/20/world/asia/20china.html?hp>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Belkin, *supra* note 82.

bashing of foreign interference and might claim to have stood up to the United States. The Sino-U.S. trading relationship would also not be immediately or dramatically imperiled given existing trade relationships and WTO and other legal protocols.¹¹⁴ Finally, the effect of not working together on consolidation of power is at best unclear: On the one hand, construction of an effective regulatory regime might involve the establishment of more causes of action, a more sophisticated organized civil society, and "whistleblowers" who might challenge the government; on the other hand, a more effective regulatory state would mean more power, less corruption, and greater compliance with the rules and laws established by the Chinese government.

More starkly for China, walking away from cooperation with the U.S. would mean turning down assistance, including expertise, possibly monetary support, and international commitments, and continuing to struggle with developing an effective regulatory regime by itself. China would also lose the ability to pre-commit to an international partner, which might provide an important stimulus to making otherwise difficult reforms.¹¹⁵ Most importantly, China would likely not make as much or as expeditious progress with respect to its significant interests in establishing an international presence, burnishing its image internationally, or, at least for now, protecting its consumers, workers, and environment. Finally, walking away would risk signaling that China is not serious about establishing rule of law, which could undermine its legitimacy with its own citizens.

For the United States, walking away from a negotiated agreement would permit more bashing of China and possibly—though unlikely because of WTO and other restrictions—result in increased trade barriers. That is to say that a breakdown in talks would not significantly benefit U.S. industry or protectionism. However, a breakdown in talks would also mean loss of influence with the Chinese government and a decreased likelihood of future cooperation because of the increased loss of face resulting from acute changes of

¹¹⁴ See, e.g., *China Trade Surplus Up Nearly 50%, Despite Safety Fears*, N.Y. TIMES, Jan. 11, 2008, available at <http://www.nytimes.com/2008/01/11/business/worldbusiness/11trade.html>.

¹¹⁵ Former Premier Zhu Rongji was famously supportive of joining the WTO precisely because it would require the government to make economic reforms that the country's government alone may not have had the political will or capital to achieve without international oversight and involvement. Dwight Perkins, Director of the Harvard University Asia Center, Lecture, Harvard University, 2004.

course. Most importantly, walking away would mean losing the ability to monitor imports with any cost-effectiveness or cooperation, as well as the ability to influence environmental and labor regulations in China at any level.

Finally, both China and the United States require an effective relationship for resolution of many other issues, ranging from defense to international crises to other citizen services that could be imperiled by unpredictable or divisive sensitivities resulting from the current trade disputes. In other words, neither side can afford to imperil the currently constructive bilateral relationship.

Now we have seen that convergent interests include options to protect U.S. and Chinese consumers, workers, foreign investment, and projects that build a constructive relationship. Divergent interests, however, may also find convergence through prioritization and framing. With regard to prioritization, the United States' highest priority may be protecting U.S. industry, then U.S. influence, and finally spreading democracy, whereas the China's highest priority might be consolidating power, protecting Chinese industry, and rising. Depending on the ordering, *both sides could maintain their top interest* although divergent with an interest of the other side. One challenge the U.S. must resolve is whether it is willing to help China in order to help itself. The answer is probably "yes," given the importance of success on a multiplicity of issues and the unpredictability of success in taking a hard stance on one issue—say democratic reforms—particularly when such a stark failure would severely cripple any other elements of the relationship.

Reframing interests or studiously avoiding digging into deeply felt frames might also reduce the conflict between China and the United States' divergent interests. For example, although some options for regulatory reform involve giving causes of action to aggrieved workers or developing stronger interest groups, the United States might make these proposals based on the shared interest of rule of law, effectiveness, and protecting Chinese and U.S. consumers alike.

VI. OPPORTUNITIES FOR U.S. INVOLVEMENT

There are three layers in which the United States Government might effectively work with China to establish a more effective regulatory regime. As an initial matter, assuming adequate resources exist, the U.S. can effectively monitor Chinese exports to the United States (as it already largely does). Secondly, and more difficult yet feasible with adequate resources and commitment from both sides,

would be increased cooperation in developing standards and mechanisms of administrative law. The third layer---addressing cultural/political/rule of law issues---would be the most difficult to perform successfully. All of these options must carefully avoid adding costs, violating WTO and other trade protocols, and undermining Chinese interests. Nevertheless, moving forward on the basis of shared interests first and a desire to generate a constructive relationship, significant cooperation may be feasible.

A. FIRST LAYER: UNILATERAL U.S. ACTIONS INCLUDING MONITORING OF EXPORTS

With additional resources, the U.S. can increasingly monitor Chinese exports to the United States (as it already largely does). Many agree that the United States must send more personnel to China to inspect factories and test goods before they are shipped.¹¹⁶ Currently, the FDA has no permanent staff of overseas inspectors,¹¹⁷ and any overseas duty is on a voluntary basis. Even when inspectors travel overseas, there are no translators on staff. Inspectors depend on translators from the local producer, and FDA staff members have complained that the translators may answer questions rather than the staff to which the questions are directed. In addition, overseas visits are not unannounced as government permissions, visas, and scheduling are required. Although the FDA currently spends \$11 million on overseas inspections, it estimates it would require \$70 million to visit each facility every two years as it does domestically.¹¹⁸ This would not only apply to the FDA but to a range of agencies including the Consumer Product Safety Commission, the Department of Agriculture, and others.¹¹⁹

In addition, the United States could adjust its own legal regime to force the private sector to take greater scrutiny in the sources and conditions of production of imported food, drugs, and other products with safety concerns: “If a U.S. company imports products from China, it should assume responsibility of the product’s safety. This will force the market to respond. ABC company will either have to undertake

¹¹⁶ *China, Unregulated*, *supra* note 1.

117 *Id.*

¹¹⁸ Marcia Cross, *supra* note 4; *China, Unregulated*, *supra* note 1.

¹¹⁹ *Scrutiny for Imports*, BLOOMBERG NEWS, Jan. 8, 2008, <http://www.nytimes.com/2008/01/08/business/worldbusiness/08safety.html>.

stricter scrutiny of Chinese factories or move its operations elsewhere.”¹²⁰

Unilateral monitoring could apply to the scope of regulated activity: homeland security, environmental protection, food safety, and work conditions, among so many others. The danger of unilateral monitoring is that it might not improve the PRC capabilities, might not promote cooperation, and could lead to suspicion and misunderstanding over the intent of this monitoring.

B. SECOND LAYER: SHARE EXPERTISE

More difficult yet feasible with adequate resources and commitment from both sides would be increased cooperation in developing standards and mechanisms of administrative law. The United States would actively engage in sharing expertise as it has in other nations,¹²¹ making possible in other critical areas more cooperation pacts like the China-U.S. Food Safety Pact. This middle-level approach would maintain a good working relationship and keep progress moving in the right direction. However, it might not achieve a great deal in practical results.

C. THIRD LAYER: STRUCTURAL SUPPORT

The United States could offer the Chinese government an honest appraisal of what is lacking in the Chinese legal system and an offer of long term technical assistance to fix any issues.¹²² Belkin notes that success would also require a substantial commitment on China's part:

¹²⁰ Belkin, *supra* note 82, Marcia Cross, *supra* note 4

¹²¹ Gardiner Harris, *F.D.A. Plans to Post Inspectors Overseas*, N.Y. TIMES, Jan. 25, 2008, available at <http://www.nytimes.com/2008/01/25/business/25fda.html> (noting that “[t]he agency has long helped to train foreign food and drug inspectors and even advise in the writing of legislation to empower foreign versions of the F.D.A.”); Jake Hooker & Walt Bogdanich, *Agreement with China to Regulate Some Drugs*, N.Y. TIMES, Dec. 12, 2007, available at <http://www.nytimes.com/2007/12/12/business/worldbusiness/12safety.html?scp=98&sq=china+safety&st=nyt>; *U.S.-China Food Safety Pact*, N.Y. TIMES, Dec. 12, 2007, available at <http://query.nytimes.com/gst/fullpage.html?res=9B0CE6DA1030F931A25751C1A9619C8B63&scp=100&sq=china+safety&st=nyt> (noting that China and the United States signed an agreement calling for a greater American role in certifying and inspecting Chinese food products).

¹²² Belkin, *supra* note 82.

[Success] would require the negotiation of a commitment on the part of the Chinese government to make some fundamental reforms that would ultimately be good for China and for the rest of the world community: independent judges, effective enforcement of judgments, empowerment of lawyers, access to the legal system by anyone who has any legal claim, greater transparency in the courts' handling of cases.¹²³

Carrots could include funding, expertise, and other valuables while sticks could include harsher inspections or trade rules to the extent permitted by the WTO and other trade protocols. Such commitment would be extremely difficult to negotiate and secure but would set a new standard for cooperation on common interests in Sino-U.S. relations.

VII. CONCLUSION

The regulatory regime can be a tool of extraordinary power. It is a means by which governments manage complex societies. The successful regulatory regime protects the people against all sorts of public threats, whether to the individual's security, product safety, work conditions, human rights, or the environment. Section II specified two principal measures of an effective regulatory regime: agency adherence to government priorities as stated by the substantive law and a record of effective compliance by the regulated. The article's analysis of the effective regulatory regime expressly excludes the moral or normative value of the government priorities. Yet a "successful" or "good" regulatory regime is not exactly the same as an effective one. A regulatory regime so effective in realizing political goals may nonetheless fail when the fundamental rights of the people have been violated. The good regulatory regime is not only a tool of state power but also a limit.

Now this line is difficult and dangerous to draw. If the regulatory regime's entire authority derives from political power, how can it disobey that power? If the regulatory regime is to be effective, how can it get caught up in determining when it can proceed?

The regulatory regime has discretion, first by virtue of limited resources and extensive government mandate. Second, although an apparatus of political power, regulatory agencies are called to act

¹²³ *Id.*

within the bounds of justice. Where a strong constitution applies, the regulatory regime must stop when it determines that its task crosses into the unconstitutional. Where the constitution is not firmly in place, regulatory agencies have an added responsibility to commit to aspirational constitutional protections even in absence of external controls. This obligation derives from agencies' essential identity as actors of rule of law more than politics. Rule of law is not merely acting according to the letter of the law but accomplishing the spirit of justice as well. As a reference to U.S. constitutional law, "rule of law" can be seen as having a substantive and procedural due process ethos. To violate this essential duty to justice – no matter how effectively that breach is carried out – would be to contradict the essence of the rule of law. Despite the enormous growth of China's regulatory regime, China has not yet established a categorically effective or good regulatory regime. On the first measure of effectiveness, agencies diverge from substantive law and government priorities, principally as a consequence of unclear mandates, regulatory capture, and weak judicial accountability. On the second measure of effectiveness, the regulated rarely self-regulate. On the question of a "good" regulatory system, the failure of a Chinese regulatory regime stems from an ineffective system rather than from concerted administrative commitment to human rights in the face of political pressure from above. The steps that will lead to an effective regulatory regime are those that will enable a good regime as well: judicial accountability, commitment to the spirit of rule of law, and courage.

The PRC and United States governments share mutual interests in strengthening the Chinese regulatory regime. The security of each partner's citizens is the paramount factor. Protection of trade and the diplomatic imperative for areas of common effort supplement this shared interest. The U.S. has three principal options for assisting China establish a more effective regulatory regime: expanded unilateral monitoring, shared expertise and efforts on specific projects, and efforts aimed at deep structural change in Chinese rule of law. As is often the case in Chinese philosophy, the ripest route may be the middle one. Shared expertise, personnel, training, and standardized laws and law enforcement – helps China build its own capabilities without the paternalism or suspicion the other roads could imply. Indeed, shared expertise permits both sides to achieve their fundamental security goals to their citizens without abandoning their own political commitments and sensitivities. It serves both sides equally well and enables each nation to continue – in all sincerity – its own vision for a just system of rule of law.