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PROFITS ABOVE THE LAW: CHINA'S MELAMINE TAINTED MILK INCIDENT

*Chenglin Liu**

INTRODUCTION

On May 1, 2008, Yi Kaixuan, a five-month-old boy, died in the Gansu Province of China.¹ His mother collapsed in grief several times and suffered insomnia and rapid weight loss. His father, to avoid being reminded of the sudden loss, burned almost every trace of baby Kaixuan's existence, from photos to clothes to birth footprints.² The child's family agonized without knowing what actually caused Kaixuan's death until four months later. From the news, the family learned that Sanlu baby formula, which the family had fed Kaixuan since his birth, had been tainted with melamine. It was melamine, an industrial substance used for making plastics, which caused Kaixuan to suffer serious kidney stones leading to his painful death.³

The melamine contamination was by no means an accident. The World Health Organization (WHO) confirmed reports from China that milk suppliers deliberately added melamine to di-

* Assistant Professor of Law, St. Mary's University School of Law. I would like to thank Colin Marks, Dorie Klein and the faculty enrichment program at St. Mary's University School of Law for providing me a forum to present this paper to the faculty. I greatly benefited from colleagues' feedback. I would also like to thank Bernie Kray, Melissa Stewart and Allen Lowe for their research and editorial assistance. Finally, I want to express my appreciation to Catie Ashburn, Steven Woodliff and the editing staff of the *Mississippi Law Journal* for their superb assistance.

¹ There are several reports about Yi Kaixuan's death both in China and abroad. See, e.g., Edward Wong, *Courts Compound Pain of China's Tainted Milk*, N.Y. TIMES, Oct. 17, 2008, at A1; Edward Wong, *China Recalls More Milk Items for Testing*, N. Y. TIMES, Oct. 15, 2008, at A8; Ng Tze-wei, *Frustration Over Lawsuits in Milk Scandal, Courts Slow to Respond to Cases*, S. CHINA MORNING POST, Oct. 14, 2008, at 8; Cara Anna, *China's Milk Scandal Leads Family to Sorrow and a Rare Lawsuit*, THE VIRGINIAN-PILOT & LEDGER-STAR, Oct. 14, 2008, at A3; Chen Zhong and Xiao Lu, *Quanguo Shouli Sanlu Naifen Zhisi Yinger Jiashu Suopei Baiwan [Parents Filed a Lawsuit Seeking One Million Yuan in Damages for the Death of Their Son]*, CAIJING [CAIJING MAGAZINE], Oct. 15, 2008.

² Edward Wong, *Courts Compound Pain of China's Tainted Milk*, N.Y. TIMES, Oct. 17, 2008, at A1.

³ *Id.*

luted milk in order to deceive quality control review.⁴ In further production, milk processors only checked protein levels by measuring nitrogen concentration. As a nitrogen-rich crystalline compound, the addition of melamine increased the nitrogen content and made the adulterated milk appear rich in protein.⁵ To make matters worse, some reports alleged that milk processors also added melamine to already contaminated milk in order to cut costs and increase revenue.⁶

According to official estimates, at least six babies had died and nearly 300,000 were sickened from drinking the tainted milk.⁷ As of January 12, 2009, "more than 300 children remained hospitalized for treatment."⁸ Even worse, for the children who recovered from kidney damage, doctors are unsure whether they will suffer further complications when they grow older.⁹

As the world's largest exporter of consumer goods, the volume of Chinese exports exceeds \$1 trillion annually.¹⁰ The im-

⁴ World Health Organization, Questions and Answers on Melamine, available at <http://www.who.int/csr/media/faq/QAmelamine/en/print.html> (last visited Aug. 29, 2009).

⁵ *Id.*

⁶ See David Barboza, *Squeezed by Milk Scandal, China's Dairy Farmers Say They are Victims*, N.Y. TIMES, Oct. 4, 2008, at A5; see also Julie R. Ingelfinger, *Melamine and the Global Implications of Food Contamination*, NEW ENG. J. MED., Dec. 25, 2008, at 2746 ("Before the current melamine disaster, the marked dilution of infant formula in China had resulted in marasmus in some infants, which led to government directives to increase the protein content of such preparations or risk severe penalties. Thus, it is possible that the adulteration was conceived in response to a well-intentioned government directive.").

⁷ *Weishengbu: Woguo Gong 29 Wan Yinger Miniao Xitong Yin Shi Wenti Naifen Chuxian Yichang* [The Ministry of Health: Over 290,000 Infants Suffered Urinary Abnormalities from Drinking the Tainted Milk], XINHUA NET, Dec. 1, 2008; see also Will Clem & Lilian Zhang, *Tainted Milk Feared to Have Killed Another Baby*, S. CHINA MORNING POST, Jan. 9, 2009, at 5.

⁸ Loretta Chao, *Victims of Tainted Milk File Lawsuit in China's High Court*, WALL ST. J., Jan. 20, 2009, at A10.

⁹ Ingelfinger, *supra* note 6, at 2748 ("The bottom line, however, is that nobody knows the true extent of the present epidemic or the risks to come. No more deaths have been reported since the Chinese government and the international public health community became aware of the problem. Yet the long-term health effects remain unknown.").

¹⁰ Joseph Kahn, *China Quick To Execute Drug Official*, N.Y. TIMES, July 10, 2007, at C1; see also David Barboza, *Big Recalls Don't Slow Exports from China*, N.Y. TIMES, Oct. 13, 2007, at C1.

pact of the milk scandal went far beyond mainland China.¹¹ The scandal prompted a number of Asian countries¹² and the European Union to ban food products from China.¹³ The U.S. Food and Drug Administration recalled products containing ingredients made in China.¹⁴ The milk scandal further demonstrated the Chinese government's continued failure to adequately regulate its food and drug industry even after previous scandals involving lead-tainted toys, toxic toothpaste, and melamine-laced pet foods.¹⁵ These commercial disasters have resulted in a serious loss of confidence in Chinese-made products worldwide.

The tainted milk scandal should not have been a surprise to either the Chinese government or the public because similar product safety scandals had occurred several times before. In 2004, more than 200 infants in China suffered so called "big head" syndrome due to malnutrition, and at least twelve died, after consuming formula that contained no nutrients.¹⁶ In response, the Chinese government repeatedly expressed concerns about food safety and took action to dismiss responsible officials and overhaul its antiquated food safety regulatory regime. The government sought quality control measures not only due to enormous public pressure but also to restore the shattered public image of Chinese exports, an image critical to China's economic growth which depends heavily upon international trade. To show the world its sincerity about improving the safety of

¹¹ *Du Naifen Fengbo Fanwai Kuoda Wushi Duo Guo Ji Jinkou Huo Shouhui Han Shanju Qingan Zhongguo Zhi Shipin* [The Milk Scandal Widened, Over Fifty Countries Imposed Import Ban or Recalled Chinese Made Food Products], SING. MORNING NEWS, Oct. 5, 2008. Two weeks after the news broke, Hong Kong health authorities confirmed that a three-year-old baby girl was treated for kidney stones after drinking Yili, a famous baby formula brand from China. *Id.* A lingering fear of contamination led a number of Asian countries, including Indonesia, the Philippines, Japan and Korea, to either step up inspection or ban dairy products from China. *Id.*

¹² *Id.*

¹³ *EU Bans Baby Food with Chinese Milk*, ST. LOUIS POST-DISPATCH, Sept. 26, 2008, at A11.

¹⁴ Larry Smith, *Chinese Candy Tainted with Melamine Found in Connecticut*, THE VIRGINIAN-PILOT & LEDGER-STAR, Oct. 2, 2008, at A5.

¹⁵ David Barboza, *China Moves to Refurbish a Damaged Global Image*, N.Y. TIMES, July 29, 2007, at A6.

¹⁶ Jim Yardley, *Infants in Chinese City Starve on Protein-Short Formula*, N.Y. TIMES, May 5, 2004, at A3; see also *Fuyang Naifen Shijian Jiben Chaqing* [Preliminary Report on Fuyang Milk Scandal], RENMIN RIBO HAIWAI BAN [PEOPLE'S DAILY, OVERSEAS ED.], May 17, 2004 at 1.

Chinese made products, the People's Court executed Mr. Zheng Xiaoyu, the former Food and Drug Administration chief in 2007, for taking bribes to approve untested medicine known to have caused death.¹⁷ In August 2008, Mr. Wu, the head of food production supervision at the General Administration of Quality Supervision, Inspection and Quarantine, committed suicide after prosecutors questioned him about his large sum of unexplainable assets.¹⁸ It appeared that the Chinese government had made genuine efforts to fix the scandal-ridden quality control regime. The outbreak of tainted milk, however, proved that these efforts were less than fully effective.

This paper considers China's food safety regulatory regime and the fundamental flaws that permeate both its supervision system and governing laws. Part I examines the market structure in the dairy industry and how the government failed to regulate the chaotic market that forced competitors to externalize costs and resulted in the inevitable milk scandal. Part II addresses how the Sanlu Group and local government concealed the scandal for fear of bad publicity and loss of profits. Part III examines the measures that the Chinese government took in response to this scandal and previous crises. The paper argues that the government should search for a new direction—both in law and policy, because its traditional, paternalistic, top-down style of supervision has failed repeatedly. The paper also argues that the present system does little to prevent the dairy industry from pursuing profits at the expense of consumer welfare, and that the government should regulate the market towards inducing milk processors to internalize the cost of doing business. Furthermore, much could be achieved by consumer participation in product safety issues through private litigation.

¹⁷ David Barboza, *Questions Swirl After Death of China's Food Safety Chief*, N.Y. TIMES, Aug. 14, 2008, at C4.

¹⁸ *Zhijian Zhongju Shipinsi Sizhang Shexian Jingji An Zisha* [Quality Supervision Bureau Food Department Director Committed Suicide], MEIRI JINGJI XINWEN [THE DAILY ECON. NEWS], Oct. 13, 2008.

I. MARKET STRUCTURE, COMPETITION AND PRODUCT QUALITY

With increasing domestic demand for milk products, China's dairy industry grew rapidly in the mid 2000's. Approximately 1600 dairy processing firms emerged, 95% of which were small or medium-sized companies.¹⁹ Even though China's dairy industry became highly fragmented,²⁰ six large milk processors dominated the majority of distribution. According to Babcock Research Institute, the companies Mengniu, Yili, and Bright Dairy accounted for about 42% of China's dairy product sales in 2005. Combined with Sanlu and two other firms, the Big 6 accounted for over 50% of the fresh milk market in China.²¹ The competition among the Big 6 was fierce.²² Yet, the news reported that melamine had been found in dairy products from twenty-two milk processors, the worst offender being Sanlu. Thus the scandal was not just about a particular milk processor, it reflected a serious quality problem deeply entrenched in China's entire dairy industry.

In theory, market competition serves as a vital force to motivate enterprises towards enhancing consumer welfare.²³ This concept, however, has seemingly had little positive impact on the Chinese milk market. While the milk industry market grew to be highly competitive after the conversion from government to private control in the 1990's, the scandal revealed that, in fact, competition delivered lower quality products to Chinese consumers. Contrary to popular wisdom, some scholars have attributed the scandal to the furious competition in the unregu-

¹⁹ William D. Dobson, *Drivers of Change in China's Dairy Industry—Implications for the U.S. and World Dairy Industries*, BABCOCK INSTITUTE DISCUSSION PAPER NO. 2006-4 14 (2006).

²⁰ Wang Zhigang et al., *Chinese Consumer Demand for Food Safety Attributes in Milk Products*, 33 *FOOD POLICY* 27, 28 (2008).

²¹ Dobson, *supra* note 19, at 14.

²² *Id.*

²³ LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 12 (Thomson West 2d ed. 2006) ("If there is universal agreement on one antitrust goal, it is that antitrust should strive for the *efficient allocation of society's available goods and services*. One of the costs of monopoly is the loss to consumers that would have purchased the monopolized product or service at a competitive price," but forego the purchase because of monopoly surcharge. (emphasis added)).

lated milk industry.²⁴ To better understand the problem, it is necessary to consider how China's dairy industry and market developed.

A. Demand and Supply of Dairy Products in China

1. Growing Demand

Traditionally, most people in China did not include milk in their diet. Even today, "China has one of the lowest annual per capita consumption rates [of milk] in the world."²⁵ The lack of milk consumption persists primarily because of "low income in rural areas, lack of familiarity with dairy products, and lactose intolerance."²⁶ Yet, milk consumption has dramatically increased over time.²⁷

As the economy in China rapidly grew, the government looked for ways to stimulate domestic consumption because experts warned that China must vitalize domestic markets in order to achieve sustainable growth.²⁸ With increasing income and awareness of the nutritional aspects of food, many ordinary Chinese gradually changed their lifestyle to incorporate dairy products into their diet. Seizing the opportunity, both the central and local governments have vigorously promoted milk consumption. During his tour of a dairy factory, Premier Wen Jiabao famously proclaimed, "I have a dream that every Chinese, especially children, could drink one *jin* [two cups] of milk a day."²⁹ Towards this goal, and drawing on experience from Japan and Korea, the Chinese government instituted a school milk program. Despite the program's intended coverage of only 1% of

²⁴ Gong Qing, *Diaocha Hebei Naiyuan Luanxiang* [Investigation Report on the Chaotic Raw Milk Market in Hebei], CAIJING [CAIJING MAGAZINE], Sept. 21, 2008.

²⁵ Dobson, *supra* note 19, at 2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Chen Zhiwu, *Zhongguo Jingji Moshi Zhuaxing de Tiaozhan* [Challenges for the Transition of the Chinese Economic Model], Investor Participation Network, July 7, 2009, available at http://www.aordo.org/html/social_impact/2009-7/21/20090721201332.html. (last visited Jan. 9, 2010).

²⁹ Wen Jiabao, "Rang Meige Haizi Meitian Neng He Shang Yijin Nai." [Premier Wen Jiabao, "I have a dream that every child in China would drink a pound of milk each day.], CHONGQING CHENBAO, Apr. 25, 2006.

the 240 million elementary and middle school students,³⁰ it tremendously expanded milk consumption. By focusing on the young generation, the government's expectation has been to in-grain this lifestyle choice at an early age so that into adulthood ordinary Chinese will likely regard dairy products as indispensable.

Urbanization has also contributed to the increase of dairy product consumption. As economic growth expanded, supermarket chains such as French-based Carrefour extended their presence into midsized and small cities in China.³¹ Domestic national supermarkets followed suit. Unlike traditional convenience stores, the supermarket chains invested heavily in refrigeration systems that made it possible to market fresh milk on a regular basis. Additionally, the appetite for fresh milk grew rapidly because an increasing number of consumers owned refrigerators at home.³² More consumers in remote regions were also able to enjoy milk because of Ultra High Temperature (UHT) processing technology that has extended milk shelf life up to nine months.³³

Branded milk advertising has also had an impact. Just a few months before the scandal broke, Sanlu secured a high profile advertising agreement with the China Space Program, in which Sanlu became the sole milk provider for Taikonauts (Chinese astronauts).³⁴ Like Sanlu, other milk producers heavily invested in television commercials that featured athletes, pop stars, scholars, physicians, and government officials who promoted their respective dairy products. According to a survey conducted in 2001, "93% of the sample reported seeing television advertisements for milk products and 73% had seen billboards

³⁰ Dong Jun, *Xuesheng Nai Yuan Shengji Jihua Qidong, Rang Haizi He Zuihao de Niunai* [School Milk Plan Launched to Ensure Children Drink High Quality Milk], XINHUA NEWS, May 26, 2005.

³¹ David Barboza, *The Bold Struggle For China's Belly*, N.Y. TIMES, Mar. 6, 2003, at C1.

³² Frank Fuller et al., *Got Milk? The Rapid Rise of China's Dairy Sector and its Future Prospects*, 31 FOOD POLICY 201, 204-05 (2006).

³³ *Id.*

³⁴ *Sanlu Zhu Zhongguo Hangtian Yuan Taikong Aoxiang* [Sanlu Milk Helps Taikonauts Fly in Space], Sina Caijing [SINA FINANCE], Aug. 1, 2008. The deal was widely ridiculed by internet commentators. *Id.*

with dairy ads.”³⁵ The milk propaganda was effective especially among young generations who were more prone to the influence of commercials and likely to adopt a western-style diet.³⁶

2. The Sanlu Model and the Supply of Dairy Products

Prior to its debacle, Sanlu was a prominent publicly held company whose annual sales exceeded RMB 10 billion Yuan (U.S. \$1.4 billion).³⁷ Based in Shijiazhuang City, Hebei Province, Sanlu originally developed as a collectively-owned enterprise from a small dairy farm with only a few dairy cattle.³⁸ During the economic reform in the 1990's, Sanlu was transformed into a separate entity, even though the local government retained the power to appoint the CEO and fill other important posts in the corporation.³⁹ In time, Sanlu became the undisputed leader in China's dairy processing industry, especially after the Fonterra Group of New Zealand, one of the world's biggest dairy exporters, purchased a 43% stake in it.⁴⁰ For fourteen years up to the scandal, Sanlu was the largest producer of milk powder, the second largest producer of yogurt, and the fourth largest producer of fresh milk. Sanlu won numerous prestigious awards for best quality.⁴¹ Sanlu was not only one of the most trusted brands, in terms of safety, but was also perceived as a socially responsible enterprise. Shortly after the earthquake in Sichuan Province in May 2008, Sanlu donated RMB 8.8 million Yuan (U.S. \$1.2 million) worth of baby formula

³⁵ Fuller, *supra* note 32, at 204.

³⁶ *Id.*

³⁷ Zhang Dongdong, *Wei Fei Lixing Chengzhang Fuchu Chenzhong Daijia Zhongguo Ruye Tong Ding Si Tong* [Serious Consequences of Irrational Growth, Lessons Learned from the Milk Scandal], IFENG FIN. NEWS, Oct. 17, 2008.

³⁸ For the development of the Sanlu Group, see Tian Wenhua, *Sanlu Jituan Ziben Yunzuo de Shijian yu Renshi* [On Sanlu's Operation], 2 ZHONGGUO GONGXIAO SHANGYE RUYE DAOKAN [CHINA RETAIL J.-DAIRY INDUSTRY ED.] (2006).

³⁹ For more information regarding the relationship between local government and enterprises in China, see section C.2 below.

⁴⁰ Yao Xiaochen, *Shijie Yuye Jutou Heng Tian Ran Cangu Sanlu Ruye* [Fonterra Invested 800 Million Yuan in Sanlu], RENMIN WANG [PEOPLE'S DAILY NET], Dec. 1, 2005.

⁴¹ *Id.*

to quake victims.⁴² Most notably, Sanlu's business model had a great influence on other milk processors.

In contrast to the dairy industry in western countries, milk processors in China have not maintained large dairy farms for their milk supply. Scholars characterized China's milk industry as "milk processors + milk collecting stations + family based dairy farms."⁴³ In other words, milk processors have heavily relied on small family-run dairy farms to provide raw milk collected by independent milk stations. The three players transacted only on an ambiguous contractual basis, providing each the means to easily default on their obligations to the others.⁴⁴ In fact, China's milk processors functioned as a huge middleman between family farmers and consumers. The separation of milk processors and milk providers directly resulted from economic reforms by the government, which promoted separation of ownership and management.⁴⁵

Sanlu was the first milk processor to implement the separation model, often referred to as the Sanlu model (i.e. "sending cows to villages and bringing milk back to town"). In 1987, Ms. Tian, the former Chairwoman and General Manager of Sanlu, put 2000 dairy cows up for sale or rent. Through outsourcing its dairy farms, Sanlu saved 100 million Yuan (\$70 million) annually in feed costs. The customary practice evolved whereby individual farmers raised cows in their backyards and milked them at so-called "milk collecting stations" maintained by independent operators. These operators in turn transported raw milk back to Sanlu for processing. This method seemed to work well by enabling local farmers to increase their income, through raising and milking cows, and local governments to consequently increase tax revenues from the dairy farmers. Ms. Tian touted

⁴² *Sanlu Xiang Wenchuan Dizhen Zaiqu Zhaijuan 880 Wan Yuan Yinger Naifen* [Sanlu Once Again Donated 88 Million Yuan Worth of Baby Formula], XINLONG CAIJING, May 19, 2008.

⁴³ DOU MING MASTER ET AL., THE RESEARCH REPORT ON THE DEVELOPMENT OF THE DAIRY INDUSTRY IN CHINA § 5.1 (Beijing Orient Dairy Consultants 2006) (for Albert R. Mann Library of Cornell University).

⁴⁴ Qing, *supra* note 24.

⁴⁵ Zhou Yubo, *Guoyou Qiye Gaige Lifa Huigu Yu Zhanwang* [Review of the Reform on Legislation Regarding State Owned Enterprise], XUEXI SHIBAO [STUDY TIMES], July 14, 2008.

that the Sanlu model completely revolutionized the milk industry, benefiting both local farmers and governments while at the same time dramatically reducing production costs for processors.⁴⁶

Competitors across the country quickly copied the Sanlu model and outsourced their respective dairy bases.⁴⁷ The China Dairy Statistical Yearbook 2003 revealed family-based dairy farms raised roughly 75% of the 86.87 million dairy cows across China.⁴⁸ As a result, on average, a dairy farm owned only 3-5 cows in 2003,⁴⁹ despite the fact that the major dairy processors had promised to establish a concentrated milk supply.⁵⁰ By the time the Sanlu scandal broke out, more than 80% of raw milk for processing came from individual farmers.⁵¹ The Sanlu model contributed to further fragmentation of milk supply sources.

In a sheer accounting sense, the Sanlu model was indeed efficient because it externalized the costs which otherwise would have been born by the processors.⁵² The model, however, posed serious challenges for milk safety, because milk processors had no control over the quality of animal feed, health problems of dairy cattle, or hygiene conditions in the milk stations.⁵³ Unfortunately, these problems, including the addition of melamine to boost protein counts, eventually led to the demise of Sanlu. Prior to 2005, Sanlu held a monopoly in Hebei Province,⁵⁴ so both dairy farmers and milk stations had no choice but to follow Sanlu's guidelines on milk quality. Yet, even though the quality checks would not have revealed the overuse of antibiotics or ex-

⁴⁶ Baidu Baike, *Sanlu Jianjie* [Brief Introduction to Sanlu Co.], available at <http://baike.baidu.com/view/182041.htm> (last visited Dec. 14, 2009).

⁴⁷ *Id.*

⁴⁸ Jing Yang, T. Gordon MacAulay, and Wenhua Shen, *The Dairy Industry in China: An Analysis of Supply, Demand and Policy Issues*, at 10, 48th Annual Conference of the Australian Agriculture and Resource Economic Society, Feb. 11-13, 2004, Melbourne, Australia, available at http://www.aares.info/files/2004_yang.pdf (last visited Dec. 16, 2009). "According to the Chinese Dairy Statistical Yearbook 2003, there were 6.87 million head of dairy cows by the end of 2002. The dairy cows raised by farm households accounted for 75 percent of the total, with each having 3-5 animals on average." *Id.*

⁴⁹ *Id.*

⁵⁰ Qing, *supra* note 24.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

cessive growth hormone, they did for a time prevent farmers from adding fatal chemical substances to raw milk.⁵⁵

B. "Racing to the Bottom": Competition and Quality

1. Competition for Raw Milk

In 2005, Big 6 milk processors made substantial investments in upgrading processing equipment, either through foreign investors or subsidies from local governments.⁵⁶ The increased milk processing capacity made the firms desperate to find additional milk supplies. While the big milk processors clearly knew that the real solution to inadequate supply was to maintain large scale dairy farms of their own, none of them wanted to incur the cost of doing so for fear of being undercut by other firms. Without effective state regulation to check the quality of milk, all the big firms were courting milk providers by lowering quality standards.⁵⁷ Consequently, big firms entered the Hebei raw milk market. As a result, Sanlu could no longer leverage a monopoly over dairy farmers and milk stations that had supplied Sanlu for about a decade. Because the contractual relationships between Sanlu and raw milk providers were not strictly enforced, the suppliers frequently switched to other processing firms that promised higher prices and less rigid quality checks.⁵⁸ The competition for milk supplies was so furious that big processors knowingly collected substandard raw milk. Mr. Wang Yuliang, a Sanlu marketing manager testified at trial that Sanlu could not afford to refuse substandard raw milk even though it knew the milk was laced with melamine.⁵⁹ The reason, according to Mr. Wang was that if Sanlu had refused the tainted milk, it would have certainly lost sources of supply permanently, because other firms would take the milk anyway.⁶⁰

⁵⁵ *Id.*

⁵⁶ Fuller, *supra* note 32, at 211.

⁵⁷ Qing, *supra* note 24.

⁵⁸ *Id.*

⁵⁹ Ye Tieqiao, *Gongsu Jiguan Pihu Sanlu Yinman Shishi Zhi Dunai Wailiu* [Sanlu's Cover-Up Caused Poisonous Milk to Enter the Market], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Jan. 1, 2009.

⁶⁰ *Id.*

2. Quality Exemption, Inferior Products and the "Prisoner's Dilemma"

Inferior milk quality can also be attributed to lack of government oversight.⁶¹ In 1999, the government established a quality exemption system in the *Decision of the State Council Concerning Several Issues on Further Strengthening Product Quality Work*.⁶² Critics blamed the exemption system for the milk scandal.⁶³ According to Article 16 of the decision, the government would grant quality exemption status to three kinds of products: (1) products with stable quality for a long time and a high market share rate; (2) products measuring up to or exceeding relevant state standards, and (3) products qualified in three consecutive selective inspections conducted by the quality and technical supervision department.⁶⁴ Products that bore inspection-exempted marks were not subject to any regional inspections.⁶⁵

Even though the government claimed that the exemption system was to ensure product safety, its real purpose was to promote a national market and curb problems with local protectionism.⁶⁶ At the time the exemption system was contemplated, regional rivals that produced the same products divided markets along provincial border lines.⁶⁷ In order to protect regional markets, local governments enacted various rules to make non-local goods more expensive.⁶⁸ Regional quality checks were among the measures to fend off competitors. The government believed that the exemption system would facilitate free flow of

⁶¹ *Id.*

⁶² Guowuyuan Guanyu Jin Yibu Jiaqiang Chanpin Zhilian Gongzuo Ruogan Wenti de Juding [Decision of the State Council Concerning Several Issues on Further Strengthening Product Quality Work], Guowuyuan Wenjian Guofa 24 [State Council Document No. 24], (1999), Art. 16. Notice of the General Office of the State Council on Abolishing the Food Quality Inspection-Free Provisions, State Council Document Guofa 110 (2008).

⁶³ Xiao Tong, *Quxiao Mianjian Zhidu Shifou Shifao Hui Fuhuo Difangbaohu* [The Repeal of Quality Inspection System is Feared to Revive Local Protectionism], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Oct. 10, 2008.

⁶⁴ See Guowuyuan *supra* note 62.

⁶⁵ *Id.*

⁶⁶ See Xiao, *supra* note 63.

⁶⁷ *Id.*

⁶⁸ *Id.*

goods across provincial borders and eliminate local measures to set up trade barriers.⁶⁹

The exemption system contributed to reducing costs for large enterprises, however, it inevitably left a loophole for quality control.⁷⁰ Taking quality standards into their own hands, large firms repeatedly lowered quality standards in order to improve cost efficiency.⁷¹ Article 16 also subjected firms who failed to comply with state standards to serious punishment, a provision rarely invoked before the milk scandal.⁷² The irony was that with a firm being granted exemption status, who would bother to conduct inspections? As long as consumers did not suffer immediate serious injuries, the exempted firms would enjoy their preferential status for an indefinite period of time.⁷³

Studies have shown that “[a]s [new] firms enter the market, they reduce the incentives of existing firms to produce high quality goods and also are more likely to introduce low quality goods.”⁷⁴ The predicament of the Big 6 milk processors in the Chinese dairy market was, in effect, a live version of the classic “prisoner’s dilemma.”⁷⁵ While knowing that maintaining its own dairy farm was the only way to increase milk safety, no processor was willing to be the first one to incur that cost. Realistically, whoever first invested in building dairy farms would be

⁶⁹ *Id.*

⁷⁰ Yu Mansheng, *Sanlu Shijian “Kaowen” Guojia Shipin Mianjian Zhidu [Sanlu Scandal Tested the Quality Inspection Exemption System]*, NANFANG DAILY NET, Sept. 17, 2008.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Yu Mensheng, *Mianjian Zhidu Feichu Youzhi Mingpai Chanpin Buneng Yilao Yongyi, [The Abolition of Quality Inspection Exemption System Ends the Limitless Privilege Enjoyed by Famous Brands]*, XIHUA NEWS, Mar. 6, 2009.

⁷⁴ Limor Golan, Christine A. Parlour & Uday Rajan, *Racing to the Bottom: Competition and Quality* 17 (Nov. 7, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028375 (last visited Jan. 9, 2010).

⁷⁵ JEFFREY L. HARRISON, *LAW AND ECONOMICS IN A NUTSHELL* 40-41 (Thomson West 4th ed. 2007) (“The problem involves two prisoners who are being held apart from each other after being arrested in connection with a crime. Separately they are questioned. If both prisoners confess they will receive sentences of five years. If neither confesses they will receive sentences of two years. Finally, if one confesses and the other does not, the confessor will be given a one year sentence and the prisoner choosing not to confess will be sentenced to 10 years. Without cooperation, each party will assume that the other will act selfishly and try to save his own skin. The result will be that each will confess and receive a sentence of five years.”).

undercut by the competitors who invested proceeds in other critical necessities, such as upgrading processing equipment, courting individual raw milk providers and expanding distribution chains. Since the government granted all of the six processors quality exemption status,⁷⁶ no one had any incentive to enforce rigorous quality control when they collected raw milk from individual dairy farmers through milk stations.⁷⁷ In other words, milk processors who strived to increase raw milk quality would likely lose ground in the raw milk market to other competitors. As a result, consumers who had limited knowledge and control in the milk market were the victims of furious competition. In such an unregulated market, the milk scandal was inevitable.⁷⁸

II. THE SANLU GROUP AND THE TAINTED MILK SCANDAL

A. *Sanlu's Cover-up*

On September 17, 2008, the police arrested Sanlu's former Board Chairwoman and general manager, Ms. Tian Wenhua, and other managers in response to the scandal.⁷⁹ The criminal trial of Ms. Tian and her associates received immense attention from the media both at home and abroad. Through testimony at trial, the story of how Sanlu concealed information about the tainted milk gradually came to light.⁸⁰

As early as December 2007, Sanlu had received a number of consumer complaints from parents who found a red substance in their babies' urine, after feeding them Sanlu formula, and about some babies who were hospitalized.⁸¹ Sanlu apparently gave no serious attention to the problem until March 2008, when a flood of consumer complaints claimed that its formula had caused

⁷⁶ Qing, *supra* note 24.

⁷⁷ *Id.*

⁷⁸ Zhang, *supra* note 37.

⁷⁹ Yang Shouyong & Dong Zhiyong, *Sanlu Jituan Dongshi Zhang Tian Wanhua Bei Xingshi Juliu* [Ms. Tian Wenhua, the Chairwoman of the Sanlu Group Arrested], XINHUA NEWS, Sept. 17, 2008.

⁸⁰ Ye, *supra* note 59. To date, this article is the most detailed report on Sanlu's cover up.

⁸¹ *Id.*

babies to suffer urinary and kidney diseases.⁸² Ms. Tian then ordered a special inspection team to look into the matter. A month later, the inspection team confirmed that Sanlu baby formula contained high levels of “non-protein nitrogen,” up to six times that of competing products. Ms. Tian began to suspect that the so-called “non-protein nitrogen” stemmed from melamine, the same chemical involved in the 2007 pet food scandal in the United States.⁸³

Realizing the seriousness of the situation, Ms. Tian and other managers decided to send samples of formula to several outside agencies for further inspection.⁸⁴ On July 24, 2008, Sanlu sent sixteen batches of baby formula to the Hebei Frontier Inspection and Quarantine Bureau (HFIQB).⁸⁵ All of the samples were submitted under fake brand names in order to conceal their true identity. The level of melamine found in fifteen samples shocked HFIQB officers, who later testified that the tainted milk would cause serious health problems even in animals.⁸⁶

By the time the HFIQB’s findings confirmed Ms. Tian’s suspicion, further complaints had overwhelmed Sanlu.⁸⁷ A great number of children had been hospitalized and there was one reported death. On the night of August 1, 2008, Ms. Tian called for an urgent executive meeting, which included marketing managers. Board directors from New Zealand’s Fonterra Group proposed issuing an instant recall of the products, but many Sanlu managers refused because they believed that a recall would seriously damage Sanlu’s reputation.⁸⁸ During the meeting, the managers passed two resolutions:⁸⁹ first, Sanlu would quietly replace the tainted formula with new product, instead of

⁸² *Id.*; see also *Bannian Qian Jiuyou Tousu Sanlu Yinman Bubao* [Sanlu Covered Up Consumer Complaints Filed Six Months Before the Scandal Broke Out], CHENGDU SHANGBAO, Sept. 14, 2008.

⁸³ Ye, *supra* note 59.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*; see also David Barboza, *Former Executive Pleads Guilty in China Milk Scandal*, N.Y. TIMES, Jan. 1, 2009, at A10.

⁸⁹ Ye, *supra* note 59.

issuing an open recall; and second, all participants would strictly keep the information secret, to avoid a leak of embarrassing information during the imminent Beijing Olympics (held August 8–24, 2008). Furthermore, at the meeting it was decided that references to melamine would be coded as “Substance A” in order to ensure secrecy.⁹⁰

In hindsight, not issuing a recall had devastating consequences. However, even if Sanlu had successfully carried out its quiet replacement plan, it would have still saved many children from sickness and several others from dying. Unfortunately, this plan did not succeed. In the beginning, Sanlu did take some potentially beneficial actions. For example, Mr. Hang, a department manager, sent contaminated raw milk to another Sanlu department to make yogurt, probably because they believed that most yogurt consumers were adults who might not be as vulnerable as infants to the damage of melamine.⁹¹ A few days after the urgent meeting, however, Sanlu found it impossible to replace all the tainted formula with qualified products, especially with the dramatically increased demand for milk on the eve of the Mid-Autumn festival and the National Holiday. Sanlu simply did not have enough appropriate substitutes.⁹²

On August 13, 2008, Ms. Tian called another urgent meeting to discuss whether Sanlu should continue to sell the baby formula, which all of the managers clearly knew contained a high level of melamine.⁹³ Referencing a European standard that allegedly allowed up to twenty milligrams of melamine per kilogram in food products, the managers decided to release the products with a relatively lower level of melamine under a self-imposed standard of fifteen milligrams.⁹⁴ Even then, Sanlu could not enforce its self-imposed standard because of the record high demand for its products. From August 2 to September 12, 2008, Sanlu produced 904 tons of baby formula tainted with

⁹⁰ *Id.* Mr. Wang, a department manager, later testified that melamine was referred to as “Substance A” in all of the internal documents after the urgent meeting. *Id.*

⁹¹ *Id.*

⁹² See Wang Huishi, *Sanlu Yinman Zhenxiang Dongshi Zhang Bei Mianzhi* [Sanlu Covered Up the Tainted Milk, the Chairwoman of the Board Dismissed], SING. LIANHE ZHAOBAO, Sept. 17, 2008.

⁹³ Ye, *supra* note 59.

⁹⁴ *Id.*

high levels of melamine in 72 batches, and sold 69 batches, representing a total of 813 tons for 47,560,000 Yuan (U.S \$6.8 million). According to the *New York Times*, "in September, some Sanlu products were found to have over 2,000 milligrams of melamine per kilogram."⁹⁵

When the police detained Ms. Tian and three other managers on September 17, 2008, they were charged with producing and selling fake or substandard products and producing and selling poisonous food in violation of the Criminal Law of China.⁹⁶ At trial, however, the public prosecutor dropped the latter charge, which carried the possibility of the death penalty. Experts believed that the prosecutor did so because pursuing the death penalty would require meeting a higher burden of proof. Disappointed with the prosecutor's move, some commentators insisted that the managers should be executed.⁹⁷

At trial Ms. Tian admitted that she and other Sanlu managers deliberately concealed information about the melamine tainted products.⁹⁸ Faced with mounting evidence, the defense lawyers nevertheless made the following arguments in support of Ms. Tian: First, the relevant laws and regulations did not prohibit the use of melamine, therefore, Sanlu did not have an obligation to check melamine content.⁹⁹ Second, Sanlu did not have the requisite intent to add melamine to its milk products because the milk collectors and raw milk producers were the

⁹⁵ David Barboza, *Former Executive Pleads Guilty in China Milk Scandal*, N.Y. TIMES, Jan. 1, 2009, at A10.

⁹⁶ Zhonghua Renming Gonghe Guo Xing Fa [The Criminal Law of the People's Republic of China] (promulgated by the Nat'l People's Cong. Mar. 14, 1997, effective Oct. 1, 1997), translated in LAWINFOCHINA (last visited Aug. 29, 2009) (P.R.C.); see also Nanfang Baoye, *Sanlu Baoguang Qian Shiyue Jiemi, Cengxiang Jiance Jiguo Yinman Dunai Laiyuan* [Sanlu Covered the Sources of Tainted Milk Ten Months Before the Scandal Came to Light], NANFANG RIBAO, [NANFANG DAILY], Jan. 8, 2009.

⁹⁷ Yinggai Pan Tian Wanhua Sixing [Ms. Tian Wenhua Should be Executed], available at <http://www.newweekly.com.cn/BBS/showthread.php?t=819> (last visited Aug. 29, 2009) (stating that the public would not be satisfied if Tian were to be charged under Article 140 of the Criminal law, which did not carry the death penalty); see also posting of Qixiniao, *Sanlu Qian Dongshi Zhang Tian Wenhua Ruguo Beipan Sixing* [If Ms. Tian were Executed], <http://blog.huanqiu.com/?uid-52122-action-viewspace-itemid-50123> (Dec. 27, 2008, 21:09) (arguing that execution of Tian would mark the end of the flawed food safety system).

⁹⁸ Barboza, *supra* note 95.

⁹⁹ See Ye, *supra* note 59.

ones who introduced the chemical to deceive quality control. Third, after learning the milk contained melamine, Sanlu planned to take all measures necessary to find the source and implemented a series of measures to contain the spread of tainted milk (albeit steps that were not successfully carried out); and finally, Ms. Tian made two reports, on August 2 and August 29, 2008, to the local government, and the local government failed to take any action to deal with the crisis. On January 1, 2009, the trial court sentenced Ms. Tian to life imprisonment and the other managers to fixed terms of imprisonment.

B. Laws Disregarded

Based on what has been disclosed, Ms. Tian clearly did not consider the legal consequences of her decision to conceal the milk contamination. Indeed, legal counsel was not even present at Sanlu's emergency meetings. One might wonder if any laws obligated Ms. Tian to make the contamination public and issue an instant recall or should have at least compelled the local government to make a public announcement of the tainted products. As a matter of fact, China has a body of laws imposing serious legal penalties on both manufacturers that produce tainted foods and government officials who conceal information about poisonous food products.

1. The Criminal Law of the People's Republic of China (as amended in 2006)¹⁰⁰

The Criminal Law has several provisions that impose severe criminal sanctions on producers and sellers that produce counterfeits or substandard products causing serious bodily injuries or death. For example, Article 140 prohibits the production of adulterated products as well as the sale of counterfeits as genuine products, substandard products as good products, or unqualified products as qualified ones. For producers who violate this law, with sale amounts exceeding 2 million Yuan (U.S. \$ 280,000), it mandates sentences of fifteen years of fixed-term

¹⁰⁰ See Criminal Law, *supra* note 96.

imprisonment or life imprisonment. In addition, it imposes a fine of either fifty percent to twice the sale amount or a confiscation of total illegal proceeds.¹⁰¹

Similarly, Article 143 imposes criminal sanctions on producers and sellers of foods that do not conform to hygienic standards. For substandard products that cause food poisoning accidents or other severe food-borne diseases, the responsible parties face mandatory sentences ranging from several years of fixed-term imprisonment up to life imprisonment, depending on the severity of the circumstances. They may additionally face a fine of up to twice the sale amount.¹⁰²

Finally, Article 144 prescribes the most severe criminal punishment for producing adulterated foods. It applies to pro-

¹⁰¹ See *id.* art. 140

Any producer or seller who mixes up or adulterates products, sells counterfeits as genuine products, sells substandard products as good products, or sells unqualified products as qualified ones, with a sale amount of not less than 50,000 yuan and not more than 200,000 yuan, is to be sentenced to not more than two years of fixed-term imprisonment or criminal detention and may in addition or independently be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when the sale amount is not less than 200,000 yuan and not more than 500,000 yuan, is to be sentenced to not less than two years and not more than seven years of fixed-term imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when the sale amount is not less than 500,000 yuan and not more than 2 million yuan, is to be sentenced to not less than seven years and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when the sale amount is not less than two million yuan, is to be sentenced to 15 years of fixed-term imprisonment or life imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the same amount or confiscation of property.

¹⁰² See *id.* art. 143

Whoever produces or sells food that does not conform with hygienic standards, which sufficiently gives rise to food poisoning accidents or other severe food-borne diseases, is to be sentenced to not more than three years of fixed-term imprisonment and may in addition or exclusively be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when causing serious harm to human health, the sentence is to be not less than three years and not more than seven years of fixed-term imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when the circumstances are particularly serious, to be sentenced to not less than seven years of fixed-term imprisonment or life imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount or confiscation of property.

ducers and sellers of foods mixed with poisonous or harmful non-food materials. Under this article, committing the act itself calls for a sentence of not more than five years of fixed-term imprisonment. If the act gives rise to serious harm to human health, the sentence must be no less than five years and no more than ten years. If the adulterated products cause serious bodily harm or death, however, the sentence can be the *death penalty*.¹⁰³

2. The Product Quality Law of the People's Republic of China (Amended as 2000)¹⁰⁴

The Product Quality Law also includes provisions for criminal sanctions as well as administrative fines and victim compensation. Article 32 prohibits the production or sale of adulterated products, counterfeits, shoddy products, or substandard products.¹⁰⁵ Article 33 mandates that sellers inspect products

¹⁰³ See *id.* art. 144

Whoever produces or sells food that is mixed with poisonous or harmful non-food materials, or knowingly sells such things, is to be sentenced to not more than five years of fixed-term imprisonment or criminal detention and may in addition or exclusively be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when causing serious food poisoning accidents or other serious food-borne diseases and giving rise to serious harm to human health, the sentence is to be not less than five years and not more than ten years of fixed-term imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when causing death or particular harm to human health, is to be punished in accordance with article 141 of the law.

See also art. 141

Whoever produces or sells fake medicines which are sufficiently able to seriously endanger human health . . . causing death or particular harm to human health, is to be sentenced to not less than ten years of fixed-term imprisonment, life imprisonment, or death penalty and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount or confiscation of property.

¹⁰⁴ Zhonghua Renmin Gonghe Guo Chanpin Zhiliang Fa [The Product Quality Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 8, 2000) translated in LAWINFOCHINA (last visited Aug. 30, 2009) (as literally translated in LAWINFOCHINA database it means "products liability law").

¹⁰⁵ See *id.* art. 32 ("Producers shall not adulterate their products or pose fake products as genuine or shoddy products as good or substandard products as standard.").

and verify product quality.¹⁰⁶ As penalties for producing adulterated products, Articles 49 and 50 require a stop of production and confiscation of illegal proceeds. In addition, fines may be imposed for more than fifty percent of but less than three times the sale amount and, for serious circumstances, the revocation of the producer's business license. For cases serious enough to constitute a crime, these articles require criminal investigation.¹⁰⁷

With regard to compensation, Article 44 provides that, when defective products cause bodily injury, the producer is liable for medical care expenses and lost earnings due to absence from work. Mandated compensation also includes living expenses for the injured party's dependants, if the defective product left the victim disabled, and funeral and living expenses of the decedent's surviving dependants, if the defective product caused death.¹⁰⁸

¹⁰⁶ See *id.* art. 33 ("Sellers shall implement the system of examination and acceptance of goods procured, verifying the product quality certificates and other marks.").

¹⁰⁷ See *id.* art. 50

If a producer or a seller is found adulterating their products or posing fake ones as genuine, inferior ones as superior, or sub-standard ones as standard, it shall be ordered to stop production or sale; the products illegally produced or sold shall be confiscated and a fine of more than 50% of but less than three times the value of the products illegally produced or sold shall be imposed; where there are illegal proceeds, such proceeds shall be confiscated; if the circumstances are serious, the business license shall be revoked; if the case is serious enough to constitute a crime, criminal responsibility shall be investigated.

see also art. 49

An enterprise producing products that do not conform to the state standard or the specific trade standard for ensuring physical health and the safety of the human body and property shall be ordered to stop production and sale; the products illegally produced and sold shall be confiscated; a fine less than three times the value of the products illegally produced or sold shall be imposed upon the producer or seller; where there are illegal proceeds, such proceeds shall be confiscated; if the circumstances are serious, the business license shall be revoked; If the case is serious enough to constitute a crime, criminal responsibility shall be investigated.

¹⁰⁸ See *id.* art. 44

If bodily injury is caused by the defect of products, the party responsible shall pay for medical expenses and nursing expenses during medical treatment and the lost income due to absence from work; if the bodily injury has resulted in disability, the party responsible shall also be responsible for the expenses for self-supporting equipment, living allowances, compensation of the disabled

3. Provisions on the Administration of Food Recall of 2007

In recent years, China has been plagued with massive food poisoning incidents. For example, on March 19, 2003, in Haicheng City, 2556 elementary students became ill after drinking the school district's designated soy milk. Over 100 students were hospitalized and one died. Local officials did not report the incident to the central government, as the law required, until parents contacted the media twenty-six days later.¹⁰⁹ Despite the government's pledge to improve food safety, there has been no sign of improvement. In 2006, the Ministry of Health reported nearly 200 incidents of school food poisoning, which sickened 6613 students and caused one death.¹¹⁰ Against this backdrop, the General Administration of Quality Supervision, Inspection and Quarantine (the QSIQ) issued the *Provisions on the Administration of Food Recall* (hereafter the *Recall Provisions*) on August 27, 2007.¹¹¹

According to the *Recall Provisions*, a food producer must keep a complete record of its food production process. Once the food producer knows or has reason to know that its products may pose a health hazard to consumers, it must promptly assess food safety and submit a report to the local QSIQ.¹¹² The food producer is required to report safety issues for its products to

person and the living expenses necessary for those under the support of the disabled person; if death has resulted, the party responsible shall pay for the funeral expenses, compensation, and the living expenses necessary for those supported by the dead; if the defect of product causes losses in property of the victims, the party shall be responsible for restoring or compensating for it; if the victims sustain other major losses, the party responsible shall compensate for the losses.

¹⁰⁹ Chen Lei, *Haicheng Dounai Shijian Zhongdu Xuesheng Jiazhang Lianhe Jinxing Qianren Susong* [Affected Parents of the Haicheng Food Poison Incident Brought a Class Action], WAITAN HUABAO, Feb. 3, 2004.

¹¹⁰ *Weisheng Bu Guanyu 2006 Nian Quanguo Shiwu Zhongdu Baogao Qingkuang de Tongbao2007[77hao]* [The Ministry of Health's Annual Report on Food Poisoning Incidents for 2006, The Ministry of Health Report 2007-No. 77], May 16, 2007, available at <http://61.49.18.102/newshtml/18966.htm> (last visited Jan. 9, 2010).

¹¹¹ Shipin Zhaohui Guanli Tiaoli [The Provisions on the Administration of Food Recall](promulgated by State Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), Aug. 27, 2007, effective Aug. 27, 2007), translated in LAWINFOCHINA (last visited Aug. 30, 2009).

¹¹² See *id.* art. 13-14.

the local QSIQ, including consumer complaints.¹¹³ The food producer must cooperate with the local QSIQ's investigation and assessment. The assessment must be made as to one of three categories of food product recall: (1) a category I recall when the suspected products may cause serious bodily injuries or even death, or otherwise involve incidents with a large social impact; (2) a category II recall when the suspected products may cause a health hazard but with a moderate social impact; or (3) a category III recall when the suspected products may cause a moderate health hazard.¹¹⁴ The food producer may opt to voluntarily perform a recall by stopping production on the same day it reports the food contamination, and by making a public announcement. For a voluntary recall, the producer must report a detailed plan to the local QSIQ within three days. Alternatively, the State QSIQ will order a mandatory recall.¹¹⁵ Notably, the *Recall Provisions* set forth various sanctions for producers who refuse to issue a recall or conceal information about unsafe products.¹¹⁶

4. Laws on Public Health Emergencies

In addition to product safety laws, China has developed a series of laws that impose penalties on government officials for contributing to the creation of a public health emergency by providing false information to the government or concealing information from the government.

The Chinese legal and regulatory regime requiring information reporting related to public health risks took shape after China experienced several disastrous events. The first event that prompted the government to revamp its antiquated public emergency laws was the SARS (Severe Acute Respiratory Syndrome) epidemic in 2003.¹¹⁷ This epidemic started in a small town in Southern China in November 2002. Since the SARS vi-

¹¹³ See *id.* art. 9.

¹¹⁴ See *id.* art. 18.

¹¹⁵ See *id.* art. 25.

¹¹⁶ See *id.* ch. 4.

¹¹⁷ See generally Chenglin Liu, *Regulating SARS in China: Law as an Antidote?* 4 WASH. GLOBAL STUD. L. REV. 82 (2005).

rus was extremely contagious and had no cure, the best way to combat the disease was through quarantine and isolation.¹¹⁸ Unfortunately, the government initially concealed the relevant information for fear of damaging China's reputation and trade opportunities. As a result, the epidemic quickly gained momentum and erupted into an international health threat. The Chinese government was widely accused of covering up the outbreak.¹¹⁹

In April 2003, a new administration led by Mr. Hu Jintao took a transparent approach and openly launched a national campaign against the SARS epidemic.¹²⁰ As part of this campaign, both the Minister of Health and the Vice Mayor of Beijing were dismissed for covering up the outbreak.¹²¹ The government also enacted a series of new laws. *The Regulations on Dealing with the Outbreak of Public Health Emergencies* (hereafter the *Health Regulations*) played a pivotal role in establishing an effective communications system during the SARS epidemic.¹²² The *Health Regulations*, which remain in effect, provided a framework for the development of public emergency laws.

Major provisions of the *Health Regulations* define the reporting requirements. Article 19 provides that, if a public health emergency occurs, a provincial government that receives information of an epidemic has one hour to report it to the Health Ministry, which shall make a report to the State Council when it is of significant danger to the public. Article 22 prohibits any person from concealing, delaying, or falsifying a report of emergency information, or directing others to do so. Article 45 sets forth sanctions for any reporting violation, requiring the head of the department involved to take full responsibility for a failure to report. The penalties range from demotion to a lower administrative rank to outright dismissal, depending on the seriousness of the concealment. The article also leaves the door open

¹¹⁸ *Id.* at 83.

¹¹⁹ *Id.* at 89.

¹²⁰ *Id.* at 93.

¹²¹ *Id.* at 89.

¹²² Tufa Gonggong Weisheng Shijian Yingji Tiaoli [The Regulation on the Urgent Handling of Public Health Emergencies] (promulgated by the State Council, May 9, 2003, effective May 9, 2003), translated in CHENGLIN LIU, CHINESE LAW ON SARS (2004).

for criminal charges to be filed against the head of a department, if late reporting exacerbates the emergency.¹²³

The second event that contributed to the development of public emergency reporting laws was a widespread practice of falsely reporting mining accidents in order to avoid investigation and suspension of operations.¹²⁴ In a well-publicized accident, one of the shafts in the Fanzhi Mine exploded and killed thirty-eight workers. The owner forced victims' families not to disclose the real number of deaths and bribed a large number of local officials and eleven journalists to conceal information. After disposing of the bodies of the fallen workers in a remote region, the owner made an official report stating that there were only two casualties in the accident.¹²⁵ A local worker finally disclosed the scandal to the media several months later. Mine accidents are a major problem in China. In 2005, nearly 6000 miners died in various accidents related to flooding, fire, and explosions.¹²⁶ To prevent mining accidents, the government issued *The Regulations on the Reporting, Investigation and Disposition of Production Safety Accidents*.¹²⁷ Article 4 provides, "The accident reporting shall be timely, accurate and complete, and any entity or individual shall not delay, omit, falsify or conceal the reporting."¹²⁸

In addition, the People's Congress passed the sixth amendment to *The Criminal Law of China*.¹²⁹ In order to impose sanc-

¹²³ See Liu, *supra* note 117, at 95.

¹²⁴ Jiang Peng, *Kuangnan Fengkoufei An Jielu Zhe Cheng Meikuang Laoban Reng Yinman Zhenxiang* [Hush-Money Whistle Blower Claimed that Coal Mine Owners Still Concealed the Truth], XINWEN CHENBAO, Nov. 4, 2008.

¹²⁵ Liu Zheng, *Fanzhi Kuangnan Shuiluo Shichu Shigu Guocheng Zhenxiang Daba* [Fanzhi Coal Mine Accident Investigation Report], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Sept. 15, 2002.

¹²⁶ *Zai Kuangnan Zhong Shiwang de Renman* [Remembering Those Who Died in Coal Mine Accidents], CHINACITY.NET, Mar. 20, 2008, available at <http://www.chinacity.net/8168/8781/8787/253982.htm> (last visited Jan. 9, 2010).

¹²⁷ Shengchan Anquan Shigu Baogao He Diaocha Chuli Tiaoli [The Regulations on the Reporting, Investigation and Disposition of Production Safety Accidents] (promulgated by the State Council, Apr. 9, 2007, effective June 1, 2007), translated in LAWINFOCHINA (last visited Aug. 30, 2009).

¹²⁸ *Id.*

¹²⁹ *Zhonghua Renmin Gonghe Guo Xing Fa Xiuzheng An (Liu)* [Amendment to the Criminal Law of the People's Republic of China (VI)] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2006, effective June 29, 2006), translated in LAWINFOCHINA (last visited Aug. 30, 2009).

tions on officials who fail to report or make a false report of a public emergency, a new clause was added to Article 139, which provides:

Where, after any safety accident occurs, if the person who is obligated to report fails to do so or makes a false report, so that the rescue of the accident is affected, if the circumstances are severe, shall be sentenced to fixed-term imprisonment of not more than three years of detention. If the circumstances are extremely severe, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.

In sum, China has sophisticated legal provisions that punish both food producers for making adulterated foods and government officials for concealing vital information that cause public health emergencies. The milk scandal demonstrated, however, that these laws were largely disregarded.

C. Profits above the Law: Reasons for Cover-up

China's rich body of laws, imposing penalties on those who cause or exacerbate public emergencies by covering up vital information, have often been ignored for various reasons, sometimes with disastrous consequences. The tainted milk scandal is a case in point. As a result of Sanlu's cover up, numerous families suffered unbearable pain that will continue indefinitely. How could Sanlu not issue a recall? What choice of values or priorities made Sanlu put profits ahead of consumers' lives? Why did the local government knowingly conceal Sanlu's transgressions?

1. Sanlu's Cover-up

In contemporary China, the pursuit of a robust gross domestic product (GDP), above all else, trumps laws that hinder economic growth.¹³⁰ After learning about the contamination, Ms. Tian had two possible options: either tell the truth or conceal it.

¹³⁰ See Chenglin Liu, *Informal Rules, Transaction Costs, and the Failure of the "Takings" Law in China*, 29 HASTINGS INT'L & COMP. L. REV. 1, 25 (2005).

Telling the truth, she clearly understood, would precipitate disastrous consequences for Sanlu. She did not have the courage to do that on the eve of the Beijing Olympics, a historical event that allowed no room for bad publicity. In addition, telling the truth would probably have doomed not only her political future but also Sanlu's reputation. Moreover, even if Ms. Tian's conscience had compelled her to reveal the information relating to the tainted milk, the government would most likely not have allowed her to do so. To a large extent, Ms. Tian just did what the government expected her to do.¹³¹ When the executives from the Fonterra Group proposed a recall, both Ms. Tian and other Chinese board of directors and managers vigorously opposed it. So Ms. Tian opted for the second option of concealing the problem and quietly dealing with victims. In time, she may have reasoned, other events would likely distract the public's view and leave Sanlu unscathed. With her forty years of experience in the milk industry, Ms. Tian predicted that the odds of Sanlu surviving were great, as there was virtually no government oversight. In an environment where all corporations are judged solely by the standard of GDP, any other manager in Ms. Tian's position would have made the same decision. Indeed, Sanlu's debacle was not a surprise to the public in China. In the frequent and frantic pursuit of economic miracles, Sanlu was just another example of corporate greed producing unwanted consequences in China's chaotic marketplace. After all, many other industries had already been caught in similar scandals.¹³²

2. Local Government's Cover-up

To an outside observer, it may be surprising that a local government in China would be eager to cover up a scandal caused by a private enterprise. This paradox cannot be fully understood without examining the relationship between govern-

¹³¹ Anthony Kuhn, *Parents Question Chinese Milk Compensation Plan*, NPR.ORG, Jan. 5, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=99002599> (last visited Jan. 9, 2010) ("Anne-Marie Brady is an expert on Chinese politics at the University of Canterbury in Christchurch, New Zealand. She says Tian was just following orders.").

¹³² For more information regarding similar scandals in other industries, see *supra* Part III.A.

ment and business enterprises in China. Even though a market economy replaced a planned economy during the economic reforms of the 1980's, the influence of the socialist economic model has persisted.¹³³ While the government has withdrawn from oversight of the day-to-day operation of local industries, it still exerts a strong influence on them. In fact, the government has maintained various departments, corresponding to respective industries, with vice mayors or department chiefs tasked to provide guidance to their respective enterprises.

*The ties between local government and enterprises have become mutually beneficial.*¹³⁴ Enterprises depend on government for various advantages in areas such as land acquisition, infrastructure improvement, financial assistance, and favorable tax policies.¹³⁵ For example, to revitalize the milk industry after the milk scandal, local governments provided substantial financial aid to the milk producers.¹³⁶ In return for such support, local governments expect and rely upon local enterprises to increase local GDP. Since officials are judged by their ability to grow their local economies, the government takes all necessary measures to ensure the success of big enterprises. In some cases, local governments have instructed local courts not to enforce judgments from other provinces for the protection of local enterprises. The ties between enterprises and government officials have often been tainted with corruption. In Shanxi Province, for example, a number of local leaders, who were in charge of mine safety, actually held significant financial stakes in local mines with notorious safety records.¹³⁷

Under China's centralized system, officials at each level of government are appointed by officials at the next highest level.¹³⁸ In theory, the Chinese Communist Party (CCP) nominates one candidate for each key post in the government and an

¹³³ See Liu, *supra* note 130, at 7.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Huang Shuhui, *Neimenggu 1 Yi Yuan "Zhengfu" fei Jiu Yili Mengniu Wendong Naiyuan Jidi* [Inner Mongolia Government Bailed Out Mengniu and Yili with 100 million to Stabilize Raw Milk Supply], *Dongfang Zhaobao*, Sept. 26, 2008.

¹³⁷ *Meikuang Guangu Chezi "Anliu" Xongyong Yixie Guanyuan Mingche Anchi* [Some Officials Still Secretly Hold Shares in Coal Mines], *XINHUA NEWS*, Oct. 28, 2005.

¹³⁸ Liu, *supra* note 122, at ch. 3.

election is held in the People's Congress. In practice, except at the village level, all the elections are uncontested and the CCP's nominees are always confirmed. In fact, the Central Government has constantly changed provincial governors with no more than notification to the local People's Congress. As a result, local officials are only accountable to superiors at the next highest level of government instead of the local people. With local GDP, the overwhelming standard for assessing the performance of local officials, local governments focus only on economic growth.¹³⁹ To the local government in Shijiazhuang City, Sanlu was one of the largest sources of revenue. Therefore, local officials did whatever it took to protect local business. Furthermore, without a separate and independent entity to ensure compliance with the laws on transparency, the officials had every incentive to conceal the information.

The most effective way to have controlled and minimized the impact of the poison baby formula would have been to initiate an instant recall and truthfully relay accurate information to the public. Any delay was bound to cause further damage not only to the victims but also to Sanlu and the local government. Therefore, time was of the essence in containing the public health emergency. Like Sanlu, however, the local government took every measure to do just the opposite: conceal relevant information.

As stated, Sanlu twice reported the contamination to the local government in August 2008, but the government neither released the information to the public nor reported it to the central government until the scandal broke. While the internal communications between Sanlu and the local government remain a mystery, a post-scandal public apology was quite revealing. On September 30, 2008, Mr. Wang Jianguo, a government spokesman, issued a rare public apology to the victims and further explained the reasons for the failure to immediately report the problem to the central government.¹⁴⁰ First, Mr. Wang at-

¹³⁹ See Liu, *supra* note 130, at 7.

¹⁴⁰ Dong Zhiyong, *Shijiazhuang Zhengfu: Sanlu Naifen Shijian Women You Buke Tuixie de Zeren* [*Shijiazhuang Municipality: We are Responsible for the Milk Scandal*], JINGJI RIBAO [THE ECONOMIC DAILY], Oct. 4, 2008.

tributed the failure to a lack of political sensitivity and a lack of consideration of people's health and safety.¹⁴¹ Second, Mr. Wang said that the government was responsible for failing to fully appreciate the serious political consequences of a scandal and was not able to recognize the social and economic costs of the tainted milk.¹⁴² On this point the government believed that, as long as Sanlu could improve quality, it could eventually restore the shattered image and regain public trust. Third, the local government believed in the paramount importance of Sanlu's high reputation in the national dairy industry and the large number of employment opportunities it provided to the city. Mr. Wang regretted that, because of the delay, the central government missed the opportunity to control the negative impact of the scandal.¹⁴³

The apology, far from achieving its intended result, instantly drew immense public criticism. As pointed out by Zhang Qianfan, a prominent constitutional law expert at Beijing University, Sanlu was not only an important source of local revenue but also local political legacy.¹⁴⁴ The apology revealed that the local government's first reaction was how to help Sanlu avoid bad publicity and eliminate the negative impact of a scandal. If the government had made the information public when it was known in August, it could have protected the health of numerous babies. The government, however, was not willing to confront the reality. With all the means in its power, the government tried its best to conceal the news and deal with the victims in private. Another commentator, Mr. Shao, discerned that the apology was not actually directed to the victims but to the central government itself.¹⁴⁵ The real purpose of the apology was to beg forgiveness from those high officials with the authority to determine the political futures of local leaders.¹⁴⁶

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Zhang Qianfan, *Yi Sanlu Naifen Shijian Weili: Shipin Anquan Libukai Meiti Jiandu* [Sanlu as an Example: Media Reporting is Indispensable for Ensuring Food Safety], NANFAN RIBAO, Oct. 7, 2008.

¹⁴⁵ Shao Jian, *Shijiazhuang Shi Zhengfu Jiuqing Gai Xiang Shui Daoqian?* [Whom did Shijiazhuang Government Owe an Apology?], ZHUJIANG WANBAO, Oct. 3, 2008.

¹⁴⁶ *Id.*

3. Lack of Media Supervision

The compulsion for cover up can also be attributed to a lack of an independent media capable of playing the role of corporate and government "watchdog." Commenting on the Sanlu scandal, Professor Zhang Qianfan called for strong media supervision to force milk producers to attend to their social responsibilities.¹⁴⁷ The media in China, however, is unlikely to live up to this high expectation. According to a recent public survey published in the *China Youth Daily*, nearly fifty percent of those interviewed were not satisfied with the state media's coverage of the milk scandal and only about twenty percent had confidence in the media's ability to disclose accurate information and prevent cover ups.¹⁴⁸ A commentator observed that the state media seemed to do a better job in covering natural disasters, such as the Sichuan earthquake than in covering man-made disasters, such as the Sanlu scandal. Although it is true that Sanlu collapsed because of a news report that identified Sanlu as the primary source of the tainted milk, nevertheless the news came too late to prevent harm to the public.¹⁴⁹ According to many experts, numerous children could have been saved if the media had reported on this major health threat several months earlier, during or before the Beijing Olympics. As early as July 2008, Mr. He Feng, a journalist of *Nanfang Daily*, interviewed a large number of families whose children were injured by the tainted milk and the doctors who treated them. He confirmed that all of the products were from Sanlu. Unfortunately, Mr. He was not permitted to release the report because of a high order from the government's Central Propaganda Department.¹⁵⁰

Many examples illustrate how local governments frequently pressure the media to not report critical information. In a well publicized case, a *Legal Daily* news report criticized a county government for its decision to take private property and hand it

¹⁴⁷ See Zhang, *supra* note 144.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

over to another private owner.¹⁵¹ Irritated by the report, Mr. Zhang, secretary of the CCP committee of Xifeng County, Liaoning Province, sent the County Propaganda director to the *Legal Daily's* office in Beijing demanding that the *Legal Daily* retract the report because it damaged the county's image. After being refused, Mr. Zhang sent several local police officers with an arrest warrant to the *Legal Daily*, intending to arrest the journalist who produced the report.

In China, corruption has tainted the journalism profession as much as the troubled industries on which they should be reporting. Historically, corporations commonly manipulated news reports with "hush money." In the mine accident cases, mine owners customarily bribed journalists not to speak out. Shortly after the Ganhe Coal accident, the mine owner handed out stacks of cash to both journalists and local officials during fallen workers' funerals. Allegedly, Sanlu paid RMB 3 million Yuan (U.S. \$430,000) to Baidu.com, the most popular search engine in China, to delete negative reports about Sanlu's products. If the allegation proves to be true, it was certainly a reprehensible move to stifle the media.¹⁵²

III. THE GOVERNMENT'S HANDLING OF THE CRISIS, COMPENSATION AND LITIGATION

The Chinese Government has faced several catastrophic events in recent years and gained great experience in dealing with crises. Soon after the tainted milk scandal came to light, the State Council called an urgent meeting in which Premier Wen Jiabao set forth a series of measures to deal with the public

¹⁵¹ Liu Wanyong, *Fumian Baodao Sheji Xianwei Shuji Liaoning Xifeng Gongan Jinjing Zhua Jizhe* [County Communist Party Chief Ordered Local Police to Arrest the Journalist in Beijing Who Produced a Negative Report on Him], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Jan. 7, 2008.

¹⁵² See, Shai Oster and Loretta Chao, *China Arrests 2 in Milk Scandal as Number of Sick Infants Rises*, WALL ST. J. Sept. 16, 2008, at A16; Joe McDonald, *China's Baidu.com Fights to Rescue Reputation*, BUSINESS NEWS, Nov. 20, 2008. See also, *Baidu's Role in Tainted Milk Scandal*, PEOPLE TO PEOPLE NEWS, Sept. 23, 2008, available at <http://p2pnet.multibox.be/story/17091> (last visited Dec. 14, 2009); *Leaked Memo Alleges Milk 'Cover-up'*, SUNDAY STAR TIMES, Sept. 27, 2008, available at <http://www.stuff.co.nz/national/648766> (last visited Dec. 14, 2009).

emergency.¹⁵³ In sum, these measures had a two-fold purpose: (1) to remove the local leader and the quality control chief under the newly developed principle—"Resignation upon Taking the Responsibility"—in the hope of restoring public trust; and (2) to provide assistance to affected families and institute a government-controlled compensation scheme in order to maintain social stability.

A. *Resignation upon Taking the Responsibility*

Since the SARS epidemic in 2003, the Central Government has instituted a policy called "Resignation upon Taking the Responsibility" (*yin jiu ci zhi*), to hold high officials accountable for major public emergencies. Most of the measures related to this policy have been subsequently codified in laws and regulations with the intent of creating a transparent and accountable government.¹⁵⁴ For example, Article 82 of the Civil Servant Law of the People's Republic of China provides:

Where a leading member causes any serious damage or social impact due to his severe mistakes in work or breach of duty or bears the leading responsibility for any serious accident, he shall take the blame and resign his leading post.

¹⁵³ *Guowu Yuan Huiyi Jueding Quanmian Jiancha Naizhi Pin, Zhengdun Naizhi Pin Hangye* [The State Council Pledged to Step Up Dairy Product Inspections and Overhaul the Dairy Industry], XINHUA NEWS, Sept. 17, 2008. The State Council mandated responsibility for handling the crisis on the heads of the governments at all levels. *Id.* It required all local governments to provide free medical services to affected children. *Id.* It charged the Ministry of Health to provide guidance in diagnosing and treating children sickened by the tainted milk. *Id.* It ordered the Quality Control Department to conduct a thorough inspection of all milk products on the market and to recall unqualified products. *Id.* The government promised to overhaul the entire milk industry and provide subsidies to dairy farmers to ensure an adequate milk supply. *Id.* In addition, it aimed to ensure milk quality and impose controls to prevent price gouging. *Id.* For accountability, it called for action to punish those who were responsible for the crisis and initiate a criminal probe into the scandal. *Id.* Additionally, it sought to provide guidance to news media to ensure accurate and prompt reporting and to probe the scandal. *Id.* Furthermore, it required all local governments to take necessary measures for maintaining social stability. *Id.*

¹⁵⁴ Xingzheng Jiguan Gongwuyan Chufen Tiaoli [Regulation on the Punishment of Civil Servants of Administrative Organs] (promulgated by the State Council, Apr. 22, 2007, effective June 1, 2007), translated in LAWINFOCHINA (last visited Aug. 30, 2009).

Where any leading member shall take the blame and resign his post or is no longer suitable for a present leadership post but fails to apply for resignation by himself, he shall be ordered to resign the leading post.¹⁵⁵

In the beginning, the public welcomed the government's apparent determination to clean up the scandal-laden bureaucratic system. Yet, when some resigned officials were later reappointed to high offices at different locations, the public rightly questioned the genuine purpose of the resignation system.¹⁵⁶ Internet bloggers sarcastically called it a system of "vacation with pay," referring to the full-fledged benefits that officials still enjoyed after resigning.¹⁵⁷ To the officials, a scandal was just a spell of bad luck after which they would make a comeback when the time was right. Critics also questioned the effectiveness of the resignation system and pointed out that it did not serve as a deterrent to prevent similar mistakes from occurring. Other critics pointed out that the current system focused disproportionately on the short-term sobering effect of the resignation at the time of crisis, rather than on long-term investigation, correction and prevention of bad practices.¹⁵⁸

Officials who resigned in the wake of a public emergency have rarely been investigated for their wrongdoing. A scholar argued that the government had a responsibility not only to conduct a thorough, objective investigation, but also to make its findings available to the public.¹⁵⁹

In practice, an official's resignation during a public emergency serves two pragmatic, but not necessarily noble,

¹⁵⁵ *Id.*

¹⁵⁶ Zhang Zhixin, *Guanyuan Wenze Jiongjing Daijie* [Unanswered Questions About the System of "Take the Responsibility and Resign"], BAN YUE TAN, Oct. 15, 2008; see also Qing Feng, *Sanlu Shijian Fangfan Sheng Yu Wenze* [Prevention is Superior to the System of "Take the Responsibility and Resign"], THE CHINESE CIVIL AND COMMERCIAL LAW NET, Oct. 7, 2008, available at <http://www.civillaw.com.cn/Article/default.asp?id=41153> (last visited Jan. 9, 2010).

¹⁵⁷ See Zhang, *supra* note 156.

¹⁵⁸ *Id.*

¹⁵⁹ Ji Weidong, "Wenze" Yu Xingzheng Luocheng Touming Hua ["Take the Responsibility and Resign" Principle and Administrative Transparency], THE CHINESE CIVIL AND COMMERCIAL LAW NET, June 5, 2008, available at <http://www.civillaw.com.cn/article/default.asp?id=39101> (last visited Jan. 9, 2010).

purposes. First, it may quell demands for public inquiries that could implicate other officials connected to the scandal. In effect, the resignation provides temporary relief from public resentment and directs public attention to other issues, while tending to insulate the remaining officials from scrutiny. Second, resignation diminishes the potential for internal opposition to corrective measures that may be implemented by the current administration to address the crisis. However, although resigning officials no longer have an official voice in the debate, they often continue to receive full employment benefits and may even continue to work for the government elsewhere. On several occasions, resigned officials have later moved up the ladder in a different part of the bureaucratic system.¹⁶⁰

Commenting on the Sanlu trial, some critics were surprised that the government conducted no legal investigation of the Shijiazhuang City Mayor who resigned during the scandal. Critics maintained that the officials who covered up the scandal should be prosecuted according to Article 397 of the Criminal Law of China, which provides:

State personnel who abuse their power or neglect their duties, causing great losses to public property and the state's and people's interests, shall be sentenced to not more than three years of fixed-term imprisonment or criminal detention; and when the circumstances are exceptionally serious, not less than three years and not more than seven years of fixed-term imprisonment.¹⁶¹

Just four months before the Sanlu scandal, the public had high praise for Premier Wen Jiabao's quick action and great relief efforts in response to the devastating earthquake in Sichuan Province. They, however, had a far different opinion of

¹⁶⁰ *Id.*

¹⁶¹ See Zuigao Renmin Jiancha Yuan Guanyu Duzhi Qianquan Fanzui An Li'an Biaozhun de Guiding [The Supreme People's Procuratorate Rules Regarding Admission Standards for Official Dereliction Cases] art. 1 cl. 7 (promulgated by the Supreme People's Procuratorate, Dec. 29, 2005, effective Dec. 29, 2005) *translated* by the author ("the prosecutors shall initiate a criminal investigation if an official abused his power and caused one or more deaths by concealing information, making a false report or directing others to do so.").

the government's role in dealing with the milk scandal. Because the tainted milk was purely a man-made disaster, many believed it could have been prevented if the government had increased supervision.

Despite the critics' strong call for a criminal investigation of the removed officials who concealed the information, the public can expect staunch government unwillingness to bring charges under the new amendment to the Criminal Law of China. Similarly, the local People's Congress will not likely conduct a public hearing and formal inquiry. The reason is that further investigation might implicate more officials and irrevocably jeopardize the public's already precarious trust in the government. Some commentators have criticized the State Council's measures on the ground that they only temporarily dealt with the crisis and did not provide the type of long-term solution needed to restore public confidence in the government. Professor Zhang Qianfan responded with breath-taking criticism:

Today is not the age of the planned economy. Who believes that the average Joes are still dependent upon the government for living? No, they can depend on themselves. Why on earth do the average Joes need a government? . . . [I]f the government is incapable of assuming the responsibility for safeguarding food quality . . . China will face a crisis that could jeopardize the country's very existence. . . . We are heartbroken at Sanlu's greed, but we cannot forget to ask: where was the government before the scandal? Why did it only come to surface after the scandal erupted into a nationwide catastrophe?¹⁶²

B. Litigation, Compensation and Social Stability

After the scandal, many affected parents filed law suits with the local People's Courts seeking compensation. The courts declined to hear their cases. More than 100 lawyers offered free legal advice to affected parents, but local officials put pressure

¹⁶² Zhang Qianfan, *Zhengfu Bixu Baozhang Shipin Anquan [The Government Must Ensure Food Safety]* NANFANG DAILY, Sept. 27, 2008.

on them not to take on any cases involving the tainted milk. As a result, some lawyers withdrew their commitment.¹⁶³

1. Government Controlled Compensation Scheme

In the United States, many lawyers would line up to provide representation to the victims of this type of disaster on a contingent fee basis. Suits would inevitably go forward, either individually or by way of class-action litigation. In contrast, in China, civil litigation has never been an option in mass tort cases.¹⁶⁴ For example, in 2004, a state owned fertilizer plant discharged synthetic ammonia and nitrogen into the Tuojiang River, a fresh water resource for several densely populated cities in Sichuan Province. The pollution not only left one million people without fresh water for nearly a month, but also caused serious damage to the fish farms along the river, which lost over one hundred million Yuan (U.S. \$12 million) worth of fish. Similar to the Sanlu case, the top official in the fertilizer disaster took the blame and resigned. Two other lower level officials were criminally detained.¹⁶⁵

For compensation, the government offered a one-time payment to the affected farmers, many of whom deemed the payment too small to accept. In order to prevent private litigation, the Justice Bureau of Ziyang City issued an order requiring all law firms not to represent clients seeking compensation for the losses due to the pollution. In another related case, the government directly instructed the court not to take the cases.¹⁶⁶ In 2003, the Guangxi High People's Court issued an internal circular which required local courts not to hear sensi-

¹⁶³ Edward Wong, *Courts Compound Pains of China's Tainted Milk*, N.Y. TIMES, Oct. 17, 2008, at A1.

¹⁶⁴ Wang Liming, Dean of the Renmin Univ. Sch. of Law, *Zhongguo Renming Daxue Faxue Yuan Ju Xing Sanlu Wenti Zhuanjia Yantao Hui* [Remarks at the People's University School of Law Special Conference on the Sanlu Scandal] (Oct. 10, 2008) (transcript available at <http://blog.ce.cn/html/77/101277-225052.html>).

¹⁶⁵ Lei Xiangpo, *Ziyang Sifaju Chu Hongtou Wenjian Buzhun Lushi Jie Tuojiang Wurang Guangsi* [Ziyang Legal Department Issued Red Tape Preventing Lawyers from Taking Cases Involving Tuojiang River Pollution], TIANFU ZHAOBAO, Sept. 24, 2004, available at

<http://www.people.com.cn/GB/shehui/1063/2805729.html> (last visited Jan. 9, 2010).

¹⁶⁶ *Id.*

tive cases. The circular listed thirteen types of undesirable cases that the government believed could cause class actions and social instability.¹⁶⁷

Instead of allowing civil litigation in response to the tainted milk scandal, the government again took a paternalistic approach by setting up a one-time compensation package totaling 1.1 billion Yuan (U.S. \$160 million). Under the plan, families of children who died from drinking the tainted milk would receive 200,000 Yuan (U.S. \$29,000). Those who suffered kidney stones would receive 2000 (U.S. \$292); sicker children would be paid 30,000 Yuan (U.S. \$4400). The compensation package would be paid by the twenty-two companies whose products were found tainted with melamine. A remainder of 200 million Yuan (U.S. \$29 million) would be used for future health problems that the afflicted children might develop.¹⁶⁸

Like the fish farmers, the affected parents were excluded from the decision process, and many of them considered the compensation too low to accept. A group of parents set up a website—*jishibaobao.com*—to organize parents not to sign the compensation deal with the companies. Unsurprisingly, the concerted efforts caused the government to take precautions. On January 2, 2009, when the web creator and some other parents planned to give a press conference in the hope of soliciting support from the media, the police detained them.¹⁶⁹

2. Social Stability Concern

The government did not allow civil litigation based on grave concerns over social unrest that an unfair judgment could spark. Those concerns were not unfounded. A report indicates that the number of public protests in China increased nearly ten

¹⁶⁷ Liu, *supra* note 130, at 23-24.

¹⁶⁸ Zhu Zhe and Cui Xiaohuo, *22 Dairy Firms to Pay \$160m in Compensation*, CHINA DAILY, Dec. 30, 2008, available at http://www.chinadaily.com.cn/bizchina/2008-12/30/content_7351824.htm (last visited Dec. 16, 2009).

¹⁶⁹ The Associated Press, *China: Parents in Milk Case Released*, N.Y. TIMES, Jan. 3, 2009, at A6.

times between 1993 and 2004.¹⁷⁰ Some public protests involved violent clashes between protesters and local police.¹⁷¹

Just six weeks before the Beijing Olympics, thousands of people, including middle school students, took to the streets in Weng'an County in southwest China.¹⁷² They protested the official handling of the death of a local teenage girl, whose relatives blamed the local police for a shoddy investigation and possible corruption.¹⁷³ The angry protesters burnt government buildings and overturned cars. The government did not admit wrongdoing, however, the county governor resigned shortly after the riot.¹⁷⁴ In November 2008, residents of Longnan City in Gansu Province angrily protested a demolition and relocation order issued by the local government. The protesters burned buildings and cars. The incidents in Weng'an and Longnan triggered more protests elsewhere. Taxi drivers in several provinces went on strike demanding that the government take tougher action against illegal taxis. In the recent issue of *Liaowang Magazine*, three prominent reporters warned that China was likely to face more social unrest in 2009.¹⁷⁵ The article cautioned that any mishandling of sensitive issues could lead to massive social disturbance.¹⁷⁶

While scholars understood the government's concerns for social stability, they were also concerned about the downstream effect of the government's actions. On the government's com-

¹⁷⁰ Li Chaohai, *Nong Mingong Jiti Xingdong Weiquan Yu Canjia Jiti Xingdong Pinlu de Yingxiang Yinsu Fenxi* [An Analysis of Factors Affecting Rural Migrant Workers' Collective Action] (unpublished Ph.D. dissertation, State University of New York), available at

<http://mumford.albany.edu/chinanet/events/guangzhou09/paper/An%20Analysis%20of%20Factors%20Affecting%20Rural%20Migrant%20Workers%20Collective%20Action.pdf> (last visited Jan. 9, 2010). Li's dissertation is the most comprehensive source of statistics about the occurrence of collective actions in China.

¹⁷¹ *Id.*

¹⁷² Luo Changping, *Guanfang Tongbao Weng'an Shijian Guocheng* [Official Report on the Weng'an Incident], CAIJING, July 1, 2008.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Zhu Suzhen, *2009 Nian Keneng Chengwei Qunti Shijian Gaofa Nian* [China is More Likely to Face More Social Unrest in 2009], REUTERS NEWS, Jan. 6, 2009, available at <http://cn.reuters.com/article/wtNews/idCNChina-3345820090106> (last visited Jan. 9, 2010).

¹⁷⁶ *Id.*

pensation package, Professor Wang Liming, Dean of the School of Law at Renming University, commented:

[In dealing with massive torts], the government always takes all responsibility to compensate the victims. There are some advantages to this method, because it is efficient, especially when the situation is complicated and a large number of people are affected. Another advantage is that it could probably prevent even greater social conflicts. As a result, it might be conducive to social stability. However, [excluding individual affected families] might not be a good idea. By taking the responsibility for compensation, the government essentially uses taxpayer's money to redeem the enterprise's illegal behavior, which is debatable. . . . we have to find a legal solution.¹⁷⁷

3. Technical Hurdles in Private Litigation

Even if the courts had been allowed to hear the tainted milk cases, many of the affected parents would not have relied on litigation. In fact, over 90% of the parents opted for government compensation and waived legal rights to sue the milk producers, despite considering the compensation inadequate.¹⁷⁸ The parents were reluctant to seek adequate compensation through litigation for several reasons.

First, the courts generally do not grant more compensation than the government because the courts exist as an integral part of the government, rather than as an independent branch.¹⁷⁹ Like other government officials, judges serve appointed five-year terms. In theory, the local congress appoints judges, but in practice the leader of the local government has the final say about reappointing or promoting judges. In addition, the government sets the courts' budgets and provides

¹⁷⁷ See Wang, *supra* note 164.

¹⁷⁸ Reuters, *90pc of families take toxic milk deal, China says*, ABC News, Jan. 24, 2009, available at <http://www.abc.net.au/news/stories/2009/01/24/2473662.htm> (last visited Dec. 15, 2009).

¹⁷⁹ DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* 198 (Thomson West, 2d ed. 2009) ("Article 123 of the PRC Constitution provides that the people's courts are the judicial organs of the state and are vested with the state's adjudicative powers. Unlike the US legal system in which the judicial branch is a co-equal branch of government, the people's courts are subordinate to the people's congresses at each level.").

logistical support. To rule against the government plan would not only result in inconsistent treatment of victims of the same conduct, but also would jeopardize the judges' political futures.¹⁸⁰

Second, even if the parents received impartial treatment by the courts, tort law in China would fail to meet their expectations. Judicial compensation standards are extremely low.¹⁸¹ Additionally, Chinese tort law has long avoided embracing the idea of punitive damages.

Critics have called for, or seriously considered, the adoption of punitive damages in the Chinese tort system. Indeed, some proponents have argued that the Chinese legal system already embraces a type of punitive damages in the area of consumer protection¹⁸² and under other laws.¹⁸³ Article 49 of the Chinese

¹⁸⁰ *Id.* at 197 ("In sum, judges are beholden to the people's congresses or governments for funding, staffing and have no security of tenure.").

¹⁸¹ Yang Tao, *Guanzhu: Qiche Peichang Guodi 10% de Peichang Dengyu "Zhuangle Baizhuang"* [Inadequate Compensation in Auto Accidents Resulted in Reckless Driving], XINKUAI BAO, Nov. 5, 2007, available at <http://auto.anhuinews.com/system/2007/11/05/001884611.shtml>; see also Posting of Hao Zhijun, Peichang Biaoazhun Guodi Nanbao Anquan Shengchan [Work Safety Concerns Because of Inadequate Compensation], Jan. 19, 2008, <http://blog.cqnews.net/?43879/viewspace-48558> (last visited Jan. 9, 2010).

¹⁸² Zhong Hua Ren Min Gong He Guo Xiao Fei Zhe Quan Yi Bao Hu Fa [The Law of the People's Republic of China on the Protection of Consumers' Rights and Interests] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994), translated in LAWINFOCHINA (last visited Aug. 30, 2009) (hereinafter "Chinese Consumer Protection Law").

¹⁸³ The Interpretation of the Supreme People's Court on the Relevant Issues concerning the Application of Law for Trying Cases on Dispute over Contract for the Sale of Commodity Houses art. 8 (2003)

In case of any of the following circumstances, which causes the purpose of a contract for the sale of commodity houses to be unable to be realized, the buyer who is unable to obtain the house may request the rescission of the contract, refund of the already paid money for purchase of the house and the interest thereof, as well as the compensation for losses, and may also request that the seller should bear the liability for compensating no more than one time of the already paid money for purchase of the house: (a) after the contract for the sale of commodity houses is concluded, the seller mortgages the house to a third person without notifying the buyer; (b) after the contract for the sale of commodity houses is concluded, the seller sells the house to a third person.

id. art. 9

If, when concluding a contract for the sale of commodity houses, the seller is under any of the following circumstances which causes the contract to be invalid or cancelled or rescinded, the buyer may request the refund of the already

Consumer Protection Law provides, "Business operators found to have committed fraud in providing goods or services shall, as demanded, compensate the consumer with a sum doubling what the consumers have paid for such commodity or services."¹⁸⁴

In many important respects, Article 49 differs significantly from the concept of punitive damages in the United States legal system. Article 49 bases the double payment on what the plaintiff paid for goods or services, not on the compensatory damages caused by the defendant. In the milk scandal, even if the affected families were allowed to recover double damages under Article 49, they could only be paid twice the amount they paid for milk powder, not twice the amount of their actual injuries. Thus, the so-called double damages provision does very little to punish wrongful conduct. In the United States, juries generally can award punitive damages "in cases involving egregious conduct to punish or make an example of the defendant."¹⁸⁵ Unlike compensatory damages, punitive damages operate as "private fines" intended to punish the defendant and to deter future wrongdoing.¹⁸⁶ Whereas compensatory damages redress the concrete loss caused by the defendant's wrongful conduct, punitive damages express the jurors' moral condemnation of such conduct.¹⁸⁷

Taking advantage of Article 49, Mr. Wang Hai waged a private war against producers of shoddy and substandard products. He set up his own lab to inspect suspect products and employed other quality agencies to do so at his expense. Once he

paid money for purchase of the house and the interest thereof, as well as the compensation for losses, and may also request that the seller should bear the liability for compensating no more than one time of the already paid money for purchase of houses: (a) the seller intentionally conceals the fact of not having obtained the certificate on permit of advance sale of commodity houses or provides false certificate on permit of advance sale of commodity houses; (b) the seller intentionally conceals the fact that the sold house has been mortgaged; (c) the seller intentionally conceals the fact that the sold house has been sold to a third person or is the house for compensation and resettlement due to demolition.

¹⁸⁴ Chinese Consumer Protection Law, *supra* note 182.

¹⁸⁵ VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 213 (Carolina Academic Press 4th ed. 2009).

¹⁸⁶ See *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 432 (2001) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

¹⁸⁷ *Id.*

obtained crucial evidence of a fraudulent product, Mr. Wang would file a lawsuit against its maker seeking the double payment award. In many instances, Mr. Wang bought products that he clearly already knew were counterfeit and filed subsequent lawsuits against the producers. While many scholars supported Mr. Wang's practices, some were disturbed. They claimed that the only goal of Mr. Wang's efforts was personal enrichment, and some were convinced that Mr. Wang himself had engaged in fraudulent practices for which he should be prosecuted. Mr. Wang's self-imposed role as private prosecutor was well received by the public, but not by the government because he encroached upon their authority and caused public mistrust of the government. Consequently, Mr. Wang soon found that courts would no longer hear his cases.¹⁸⁸

In light of the tainted milk scandal, critics once again raised the issue of whether punitive damages should be imposed on sellers of defective products. Opponents, however, argued that punitive damages are not suitable in the Chinese legal system.¹⁸⁹ They maintained that the primary purpose of tort law is to compensate the victim, not to punish the perpetrator; that punitive damages fall within the realm of criminal law, not tort law; and that, because of a difference in the burden of proof applicable in civil and criminal cases, the civil legal system lacked procedures needed to protect defendants' rights. Opponents were also concerned that punitive damages would impose an undue burden on business operators, thus hindering economic development. Additionally, if punitive damages were imposed, they believed that producers would rely upon insurance to pass the costs of punitive damages back to consumers. Finally, they theorized that a system allowing punitive damages could spawn frivolous lawsuits, waste judicial resources, create moral hazards, and result in unjust

¹⁸⁸ See Cui Guangping, *Lun <<Xiaofeizhe Quanyi Baohu Fa>> de Jiazhi he "Wang-hai" Xianxiang de Falu Shiyong* [Comments on the Value of the Consumer Protection Law and Its Application in the "Wang Hai" Case], available at <http://www.lunwentianxia.com/product.free.7825967.1/> (last visited Jan. 9, 2010).

¹⁸⁹ Zhou Bin, "Huang Jing An" Yifa Xiaofeize Weiquan Sikao, *Chengfaxing Peichang You Duo Yuan* [A Valuable Lesson Learned from the Huangjing Case: Is the Chinese Tort System Likely to Embrace Punitive Damages?], FAZHI RIBAO [THE LEGAL DAILY], Dec. 11, 2008.

enrichment of consumers. For these reasons, it remains unlikely that the government will incorporate the concept of punitive damages into Chinese law any time soon.

Instead of allowing for private litigation with punitive damages, the government would prefer to set up a fine-only system.¹⁹⁰ Shortly after the milk scandal, the State Council issued the Regulation on the Supervision and Administration of the Quality and Safety of Dairy Products.¹⁹¹ Article 57 stipulates that a dairy product seller in violation of the regulation, that does not stop selling or does not recall substandard dairy products which may harm human health and safety, or the growth of infants, would be subject to a fine of up to fifteen to thirty times the value of the illegal dairy products and have its license revoked.¹⁹²

Professor Wang has pointed out that administrative fines would not likely achieve the same level of deterrence as punitive damages.¹⁹³ Moreover, local governments know that the shattering of economic enterprises that would be caused by heavy fines and license revocation would directly reduce tax revenues and impede local economic development. Realistically, given the close ties between the local milk companies and local governments, administrative fines might not be imposed for fear of damaging the reputation of local industry, regardless of whether the law was violated.

CONCLUSION

The milk scandal centered on melamine additives because that chemical quickly injured or killed infants. On record, melamine tainted milk has sickened nearly 300,000 infants and children, six of whom died. So far, there have been no reported cases of illness or death involving adults, but that does not mean that milk tainted with high doses of melamine is safe for

¹⁹⁰ See Wang, *supra* note 164.

¹⁹¹ Guowuyuan: Ruye Zhiliang Anquan Jiandu Guanli Tiaoli [State Council: Regulation on the Supervision and Administration of the Quality and Safety of Dairy Products] (promulgated by the St. Council, Oct. 6, 2008, effective, Oct. 6, 2008).

¹⁹² *Id.*

¹⁹³ See Wang, *supra* note 164.

adults. Compared with infants, the food intake of adults is much more diverse; therefore, it is considerably more difficult for adult consumers to prove a causal link between their illnesses and melamine, even if they suffered kidney problems. For this precise reason, the government-controlled compensation plan specifically excludes adults.

Problems other than melamine adulteration continue to plague the dairy industry in China. One commentator cautioned, "melamine is just the tip of the iceberg."¹⁹⁴ Milk processors have routinely used numerous questionable additives, both legal and illegal alike, including excessive antibiotics, growth hormones, pesticide residues, preservatives, and color agents. Unlike melamine, no one has scrutinized these substances because their detrimental effects have not been as instantly destructive. As a result of the milk scandal, a number of consumers have given up consumption of dairy products altogether. A survey indicated that 8% of consumers refuse to allow their children to drink milk. As a precaution, many consumers have switched to dairy substitutes.¹⁹⁵ Under the same regulatory regime, however, who can be sure that the substitutes are safer than milk? And what about similar implications in the larger food safety context? Dairy product processing only accounts for a small fraction of the food industries in China. Yet, as long as massive illnesses are not associated with a single brand, food industries will continue to conduct "business as usual." Unless the government conducts a complete overhaul of the food supervision system, chances are the same type of scandal will strike again.

Objectively, a tragedy like this one offers a rare opportunity for the government to examine its regulatory regime and make necessary changes. The government's measures during the crisis, however, fell far short of public expectation. First, the so-called "take the responsibility and resign" principle lost its credibility because the government did not initiate criminal

¹⁹⁴ Susan Thixton, *Melamine May Be Just the Tip of the Iceberg*, NATURALNEWS.COM, available at <http://www.naturalnews.com/025017.html> (last visited Jan. 9, 2010).

¹⁹⁵ Zheng Xue, *Qicheng Ren Jianyi QuxiaoWenti Naifen Qiye Chimin Shangbiao Chenghao* [Seventy Percent of Consumers Surveyed Called for Abolition of So-Called "Well-Known Trademarks"] HENAN SHANBAO, Sept. 25, 2008.

investigations against the removed officials and the public felt deceived when the disgraced officials were quietly reappointed to other government posts. Second, the government-controlled compensation plan drew heavy criticism by not considering the affected families' expectations. Most of the families found the compensation amounts unacceptably low and disproportionate to the harm they suffered. Since the government instructed courts not to take cases involving victims of the milk scandal, the families were left with no adequate remedy for justice. Thirdly, to revitalize the milk industry after the scandal, the government generously injected capital to save the local firms. In the public's eye, this action sent the completely wrong signal to the entire industry. The fall of the milk industry was entirely its own fault; therefore, the government's financial assistance could only serve to embolden the industry's disregard for people's health and safety.

In theory, the government should be able to rely on market forces to induce milk processors to internalize the cost of doing business in order to provide quality goods. Yet, as stated in Part I, competition does not necessarily ensure product safety. To the contrary, competition in the unregulated milk market actually caused a relaxation of quality controls with costs passed on to consumers. Without properly structured and enforced regulation in place, a milk processor has no incentive to incur costs in building its own dairy farms while competitors undercut its market by processing milk from individual dairy farms at a lower cost. To solve the problem in the long run, the government should require that a high percentage of raw milk must come from milk processors' own dairy farms. In essence, the government should raise the bar for the milk processing industry across the board. If milk processors bear the costs for operating and maintaining dairy farms as a requirement of staying in the market, it would provide an infrastructure for enabling significant improvement in the control of milk quality and safety. Only in such a regulated market will competition among milk processors truly benefit consumers.

To further ensure milk quality, the government should realize that private litigation can complement regulatory supervision and remedy loopholes in the government's

regulations. Without the possibility of consumer litigation to address food safety issues, there is little incentive for milk processors to correct their problems, given their close governmental ties. Despite the judicial system's present inability to adequately address compensation issues, the ability of injured persons to file lawsuits could offer an effective mechanism for providing redress for harm caused by dangerous products and deter misguided production processes. Moreover, trial proceedings would shed light on processors' hidden but dangerous practices. Private litigation would also force milk processors "to examine harmful practices that might otherwise receive inadequate attention."¹⁹⁶ In essence, litigation would compel milk producers to internalize the costs of doing business and take precautions long before problems arise.

Understandably, in China, government concerns about social stability underlie fears relating to private litigation. However, these fears are largely misplaced. Contrary to the government's belief, private litigation is a social safety valve, enabling aggrieved consumers to redress their wrongs in a civilized manner.¹⁹⁷ Without litigation, victims of injuries caused by tortious acts are prone to resort to violence.¹⁹⁸ In reality, private litigation can actually reduce pressure on the government by providing a structured mechanism for airing grievances, obtaining compensation, and holding malefactors responsible for injurious practices. Litigation is not a threat to social stability, but rather an orderly process for avoiding the types of institutional unaccountability that threaten to generate challenges to social order. The government should also realize that the availability of remedies through private litigation can be conducive to social stability.

¹⁹⁶ Vincent R. Johnson, *Standardized Tests, Erroneous Scores, and Tort Liability*, 38 RUTGERS L. J. 655, 671 (2007).

¹⁹⁷ See *id.* at 671.

¹⁹⁸ *Id.*