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Abstract

Despite its teeming population, the rise of consumerism in contemporary China has lagged behind the West. In seeking to explain this phenomenon, it is plausible to hypothesise that a necessary precondition for the growth of any movement advocating greater protection for the rights of consumers is a market in which the interests of traders and consumers compete. Modern China — founded on the basis of a planned economy — initially allowed no role for the concept and function of a free market. Yet, over time, political change in China has led to economic and legal reform. In particular, China has restructured its legal framework by embracing western principles, albeit modified with Chinese characteristics, in order to enhance economic growth and international trade. In the result, the position and influence of Chinese consumers has strengthened, and specific legal safeguards are now afforded to them. Viewed through the lens of a legislative enactment that is critically important to consumer interests in China, the Product Quality Law, this paper examines the social, economic, political and legal factors driving this change, and considers whether the promotion of consumer rights is the underlying objective of this law or simply a derivative benefit.

Keywords

China, consumer protection, product quality laws

EVOLUTION OF CHINESE CONSUMER PROTECTION: THROUGH THE LENS OF PRODUCT QUALITY LAWS

MARY IP* AND BRENDA MARSHALL**

ABSTRACT

Despite its teeming population, the rise of consumerism in contemporary China has lagged behind the West. In seeking to explain this phenomenon, it is plausible to hypothesise that a necessary precondition for the growth of any movement advocating greater protection for the rights of consumers is a market in which the interests of traders and consumers compete. Modern China — founded on the basis of a planned economy — initially allowed no role for the concept and function of a free market. Yet, over time, political change in China has led to economic and legal reform. In particular, China has restructured its legal framework by embracing western principles, albeit modified with Chinese characteristics, in order to enhance economic growth and international trade. In the result, the position and influence of Chinese consumers has strengthened, and specific legal safeguards are now afforded to them. Viewed through the lens of a legislative enactment that is critically important to consumer interests in China, the Product Quality Law, this paper examines the social, economic, political and legal factors driving this change, and considers whether the promotion of consumer rights is the underlying objective of this law or simply a derivative benefit.

I INTRODUCTION

Consumerism is generally described as a movement advocating greater safeguards for the rights and interests of consumers in the marketplace.¹ Social, economic, political and legal issues combine to provide the basic momentum behind consumerism. While the rise of consumerism can be traced to the 1930s in Europe and North America, its development in contemporary China is a much more recent phenomenon, despite the fact that China is a populous country of 1.3 billion people, all of whom are potential consumers. A plausible explanation for this may be that a necessary precondition for the growth of any consumer rights movement is a market in which the interests of traders and consumers compete. However, modern China — the People's Republic of China ('PRC') — was established on the basis of a planned economy, which gave no role to the concept and function of a competitive market.

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¹ James Mann and Peter Thornton, 'Consumerism in Perspective' (1978) 12(4) *European Journal of Marketing* 253, 253.

With the passage of time, political change in China has led to correlative reform of its economic structure — hence the migration from a planned economy to a socialist market. This economic development has given rise to a group of significant market players called consumers.

In tandem with these changes, China has restructured its legal framework by embracing western principles, albeit modified with Chinese characteristics, in order to enhance economic growth and international trade for the country. In the result, specific legal safeguards have been made available to Chinese consumers, commencing with a series of ground-breaking laws passed in the 1990s, such as the *Anti-Unfair Competition Law*,² *Product Quality Law*³ and *Consumer Law*.⁴ This was followed by a period of relative inactivity, but the enactment of legislation supportive of consumer interests has since reignited, with the *Anti-Monopoly Law*,⁵ *Food Safety Law*,⁶ *Tortious Liability Law*⁷ and the revision of the *Consumer Law* all promulgated in recent years. It would be interesting to navigate this entire suite of legislation, and to consider whether the underlying objective of these laws is to safeguard Chinese consumer rights, or whether this is simply a derivative benefit for consumers, but this would be impractical in a single article. As such, this article focuses solely on product quality laws.

One rationale for focusing on this particular area of law lies in the fact that the *Product Quality Law* — one of the earliest enactments at the national level to provide protection to Chinese consumers — was specifically introduced not only to regulate the behaviour of business operators in production and sales, but also to safeguard consumer rights and interests. Whether the *Product Quality Law* has fulfilled the latter goal, or whether its legislative duty to safeguard consumer rights has been eclipsed by an overarching mission to regulate market conduct to maintain market order, are questions best answered by examining its legislative history and development.

Another reason for focussing on the *Product Quality Law* is that, despite the existence of this law, concerns continue to be expressed as to the quality of Chinese products. While this quality has improved in recent years, it is still of concern to consumers, especially those in the Chinese market. Continued research in this area increases awareness of the issue and may spur the ongoing improvement of product quality in China.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

The approach of this paper is as follows. In part II, the return of consumerism in China is discussed in order to underscore the need for legislative protection of consumers, and, against this background, the path to the promulgation of the *Product Quality Law* is examined. In part III, the provisions of the *Product Quality Law* and its 2000 amendment,⁸ as well as various other recent enactments related to product quality,⁹ are assessed in the context of the consumer welfare concerns that these laws aim to address. The paper concludes that economic and social factors are the driving force behind the product quality regime, noting that these factors can serve to promote or impede the development of a consumer protection legal regime in China.

II RISE OF CONSUMERISM IN CHINA

Despite the fact that China was inhabited by 541.7 million people in 1949,¹⁰ the concept of 'consumer' did not exist during the early stages of the foundation of the PRC. This is mainly due to the economic structure that China had adopted after the Communist Party came to power in 1949. Under the command economy of that era, all social resources were allocated according to mandatory planning, with no exception for consumer goods.

In addition, a complicated ration system was introduced in the mid-1950s, which continued until the 1990s.¹¹ One function of this system was to control commodity distribution, in that the government would buy consumer goods from producers and then allot the goods back to producers as users with a quota arrangement.¹² However, the rationed price was usually lower than the market price, often compromising the quality of the products available.¹³ Otherwise, if not banned by the government, commodities could be sold on the open market, typically at a higher price. Such resource allocation not only limited market activity, it also rendered the market inaccessible to low-income groups, which made up the majority of the population in those days. Of course, given the scarcity of supply, quality was not the paramount concern for users. Moreover, there was a lack of infrastructure for users to launch their complaints or to seek redress for substandard goods. Thus, under China's command

⁸ Tiejun Cheng and Mark Selden, 'The Origins and Social Consequences of China's Hukou System' (1994) 139 *China Quarterly* 644.

⁹ Recent enactments include the *Food Safety Law* and the *Tortious Liability Law*.

¹⁰ John A. Jowett, 'The Growth of China's Population, 1949–1982 (With Special Reference to the Demographic Disaster of 1960–61)' (1984) 150(2) *Geographical Journal* 155, 156.

¹¹ Cheng and Selden, above n 8.

¹² Wen Chern and Guijing Wang, 'The Engel Function and Complete Food Demand System for Chinese Urban Households' (1994) 5(1) *China Economic Review* 35.

¹³ *Ibid* 38.

economy, producers in fact acted as 'sellers' and 'users' of the commodities, and 'consumers', as such, did not exist within the system.

The restructuring of the Chinese economy in the late 1970s was the catalyst for the return of consumerism. As reform measures were adopted, such as the contract responsibility system, which linked output with remuneration,¹⁴ household income increased significantly. A consequential impact of the rise in disposable income was a noticeable boost in consumption. Furthermore, economic reform revived the open market and increased the availability of consumer goods. This became even more apparent when Deng Xiaoping introduced his renowned theory of the 'socialist market economy', which fast-tracked China's economic transition toward a market model with socialist characteristics. The gradual accumulation and assembly of market elements eventually allowed 'consumers' to return to the marketplace, along with the need to protect the rights and interests of this emerging group.

The demand for consumer protection is demonstrated by the history of the establishment of consumer associations in China. The economic reforms of the late 1970s had not only returned consumers to the market forum, but also market misconduct. In a market situation, clashes between consumers and unscrupulous producers can flare into conflict and dispute. However, the introduction of relevant regulations or the establishment of a special court for consumers was not the first preference for resolving consumer disputes. This was probably due to the 'thin litigation culture'¹⁵ and the low awareness of consumer rights,¹⁶ which stemmed from the command economy that was in operation for more than four decades (1949–1992) in China. Rather, local authorities chose to establish associations to safeguard citizens' interests. This is what the Bureau of Trade and Commerce in Xinle County at Hebei Province did in 1983.¹⁷ The Xinle County model was a huge success and was emulated by other local authorities in Fujian Province, Guangzhou City, the Xinjiang autonomous region, and elsewhere. Shortly thereafter, in 1984, the State Council

¹⁴ Scott Wilson, 'The Political Consequences of China's Agricultural Reforms' in Christopher Hudson (ed), *The China Handbook* (Routledge, 1997) 137, 139.

¹⁵ Pitman Potter, 'Legal Reform in China: Institutions, Culture, and Selective Adaptation' (2004) 29(2) *Law & Social Inquiry* 465, 471. The term 'thin litigation culture' is intended to encapsulate the reality that, culturally, court action is not the preferred means of dispute resolution in China. Chinese people are not used to taking their disputes to court and often have little awareness of the litigation process.

¹⁶ Beverley Hooper, 'The Consumer Citizen in Contemporary China' (Working Paper No 12, Centre for East & South-East Asian Studies, 2005) <<http://www.lunduniversity.lu.se/lup/publication/951451>>.

¹⁷ Jiang Shan, 'Formation of first Chinese consumer association', *Xinhua* (online), 2002 <http://news3.xinhuanet.com/zhengfu/2002-03/13/content_721958.htm>.

authorised the establishment of a consumer association at the national level, namely the China Consumers' Association.¹⁸ However, at that point in time, the institutional protection afforded by the China Consumers' Association did not have a statutory base. Indeed, this was only retrospectively rectified by art 31 of the *Consumer Law* when it was passed in 1993. Before 1993, the closest thing to a national consumer protection law was the *Civil Law*.¹⁹ However, the legislative goals of the *Civil Law* were not consumer-oriented.²⁰

The consequences of failing to provide effective protections to consumers are well illustrated by the so-called 'pickled vegetable' case. In 1987, a widely publicised food safety incident occurred in Fujian Province, when a disreputable manufacturer was found preparing pickled vegetables with industrial salt in an abandoned sewage site.²¹ Due to the lack of relevant laws at that time, consumers were left with no recourse after the incident, and the China Consumers' Association was proved powerless. In the end, the manufacturer was merely fined RMB 2000 under the *Food Hygiene Law (Trial Implementation)*.²²

The pickled vegetable case prompted the Fujian provincial government to pass the first consumer protection regulation in China, namely the *Fujian Province Regulation on Protection of Consumers' Rights and Interests*.²³ At the same time, the pickled vegetable case sent a clear signal to the central government that consumer associations were largely ineffective in the absence of enforcement powers, a reality exacerbated by the fact that the number of product quality cases was increasing at the same pace as the consumption rate. According to relevant statistics, the number of complaints handled by all consumer associations in the country reached 28 million in 1990,²⁴ not to mention the cases that had not utilised the assistance of the association. However, despite the

¹⁸ Ibid.

¹⁹ «中华人民共和国民法通则» [General Principles of the Civil Law of the People's Republic of China] (People's Republic of China) National People's Congress, 12 April 1986 ('*Civil Law*').

²⁰ By virtue of article 1 of this legislation; 'promulgation of the Civil Law is for the purpose of protecting the lawful civil rights and interests of citizens and legal persons and correctly adjusting civil relations, so as to meet the needs of the developing socialist modernization'.

²¹ (吕勇 [Lu Yong], 中国消费者协会网 [China Consumers' Association Website] 消费者协会的成立前前后后 [Formation of China's Consumer Association — Events before and after] (hardcopy on file with author).

²² Ibid; «中华人民共和国食品卫生法 (试行)» [Food Hygiene Law of the People's Republic of China (For Trial Implementation)] (People's Republic of China) National People's Congress, 19 November 1982 ('*Food Hygiene Law*').

²³ «福建省消费者权益保护条例» [Fujian Province Consumer Regulations] Fujian Provincial People's Congress, 4 September 1987.

²⁴ Yu Wei Min and Liang Xiao Yin, *Cases and Commentaries — Law for Protection of Consumer's Rights and Interests* (People's Publisher of Hunan, 2nd ed, 1999) 6.

urgent need for legal protection for Chinese consumers, the first specific laws related to consumer protection and product quality were not passed until February 1993.²⁵

One common explanation for the central government's slowness to enact a national *Consumer Law* is that, as a matter of general practice, the National People's Congress typically tests the viability of new laws at the provincial or county level before taking legislative action itself. However, a more compelling explanation is that there was a lack of political backing for such laws until Deng Xiaoping's economic push was endorsed in the 1993 amendments to the *Chinese Constitution*. The Amended *Constitution* explicitly stated that 'the State will carry out the socialist market economy'²⁶ and that 'the State shall consolidate legislation on the economy'.²⁷

The Chinese government was aware of the fact that simply opening up the country's market without first having a robust legal system in place would discourage foreign investors from trading with China. Perhaps for this reason, the Eighth National People's Congress approved 85 laws within five years (1993–1998), around 50 per cent of which were enacted for the purpose of facilitating the construction of a socialist market.²⁸ Among the wave of commercial legislation promulgated were the *Food Hygiene Law*, the *Advertising Law*,²⁹ the amended *Trademark Law*,³⁰ the *Consumer Law*, the *Anti-Unfair Competition Law* and the *Product Quality Law*, all of which shared the common purpose of standardising and regulating market conduct.³¹ Arguably, the provision of consumer protection was secondary to the predominant role of this wave of legislation — to serve China's economic policy interests.

III PRODUCT QUALITY REGIME

A Product Quality Law of the People's Republic of China 1993

As previously discussed, product quality was an issue in China well before the designated Law was enacted in 1993. Prior to 1993, laws pertinent to product quality matters at the national level were scattered among a number of legislative

²⁵ That is, the *Consumer Law* and the *Product Quality Law*.

²⁶ «中华人民共和国宪法修正案» [Amendment to the Constitution of the People's Republic of China] (People's Republic of China) National People's Congress, 29 March 1993, art 7.

²⁷ Ibid.

²⁸ Li Ning, 'Eighth NPC Legislation in Review' (1998) 4 *Beijing Review* 14, 14.

²⁹ «中华人民共和国广告法» [Advertising Law of the People's Republic of China] (People's Republic of China) National People's Congress, 27 October 1994.

³⁰ «中华人民共和国商标法» [Trade Mark Law of the People's Republic of China] (People's Republic of China) National People's Congress, 23 August 1982.

³¹ Li Ning, above n 29.

enactments,³² such as the *Civil Law*,³³ art 122 of which specifies a cause of action for consumers or users in respect of defective or substandard products. Further, art 60 of the *Law of Industrial Enterprises Owned by the Whole People* made any enterprise, which produces and sells substandard products, liable for compensation to consumers and users who have suffered property damage or physical harm as a result.³⁴ The *Product Quality Law* served to consolidate the relevant fragmented provisions and to provide a comprehensive base for establishing liability for defective or substandard products in China.

According to art 1 of the *Product Quality Law*, its main objects are to strengthen the supervision and control of product quality, to establish the scope of liability for product quality, to safeguard the lawful rights and interests of consumers, and to protect the social and economic order. Therefore the *Product Quality Law* is specifically directed to the protection of consumers. Furthermore, it details the obligations of producers and sellers towards consumers in supplying goods.

However, the remedial regime of the *Product Quality Law* compares poorly with the *Consumer Law*, which was promulgated in the same year. As Yang Shukun of the China Consumers' Association noted, the *Product Quality Law* failed to provide a basis for claims of mental harm, even though psychological injury was recognised as compensable.³⁵ In addition, the scope of damages under the *Product Quality Law* turned out to be narrower than under the *Consumer Law*.

³² Asa Jansson and Mary Riley, 'Product Liability in China' (1999) 10(4) *International Company And Commercial Law Review* 129.

³³ «中华人民共和国民法通则» [General Principles of the Civil Law of the People's Republic of China] (People's Republic of China) National People's Congress, 12 April 1986 ('*Civil Law*').

³⁴ «中华人民共和国全民所有制工业企业法» [Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People] (People's Republic of China) National People's Congress, 13 April 1988.

³⁵ Gary Zhao, 'Chinese Product Liability Law: Can China Build Another Great Wall To Protect Its Consumers?' (2002) 1 *Washington University Global Studies Law Review* 581, 595.

For example, the *Consumer Law* permits the recovery of 'nursing expenses during treatment'³⁶, but the *Product Quality Law* does not provide for this. Furthermore, the *Consumer Law* allows for the recovery of 'living and other expenses necessary for dependants of the victim' when the victim suffered disability or death,³⁷ whereas the *Product Quality Law* restricts this form of recompense to cases involving death.³⁸ Liu has recommended that consumers and users pursue their claims under arts 41 and 42 of the *Consumer Law*, rather than rely on art 32 of the *Product Quality Law*, as the former provisions support a broader base of compensation than the latter.³⁹ Needless to say, opening up the grounds of compensation for consumers would have significant financial ramifications for business operators in breach of the *Product Quality Law*.

Given that China's socialist market economy was at an early stage of development when the *Product Quality Law* was introduced, it is not surprising that the central government prioritised the preservation of stability for the business sector over consumer protection. This proposition is reinforced by the fact that, even though the *Product Quality Law* is charged with protecting the rights and interests of consumers,

³⁶ Article 41 of the *Consumer Law* provides that a business operator that causes bodily injuries to a consumer or other party in providing a commodity or a service must pay expenses such as medical treatment expenses and nursing expenses during treatment period and income lost due to absence from work. Where physical disability is caused, expenses such as assistance expenses for the tools of disabled people, living subsidies, disability compensation funds and living plus other expenses necessary for the dependants of the disabled must also be paid. Further, art 42 of the *Consumer Law* provides that where a criminal offence is constituted, criminal liability shall be pursued in accordance with the Law.

³⁷ *Ibid*; Article 42 of the *Consumer Law* states that a 'business operator that caused the death of a consumer or other party in providing a commodity or a service shall pay expenses such as funeral costs, death compensation funds and the living plus other expenses necessary for the persons that depended on the victim while alive. Where a criminal offence is constituted, criminal liability shall be pursued in accordance with the Law'.

³⁸ Article 32 of the *Product Quality Law* states that if a defect in a product causes physical injury to the injured party, the injuring party shall compensate for such expenses as medical expenses, loss of income due to absence from work, the disabled person's living allowance, etc. If a defect in a product causes the death of the injured party, the injuring party shall additionally pay such expenses as the funeral expenses, pension to the family of the deceased, living and other expenses of the dependants of the deceased, etc. If a defect in a product causes damage to the property of the injured party, the injuring party shall restore the property to its original state or pay compensation at the market price. If the injured party suffers other major losses as a result thereof, the injuring party shall compensate for such losses.

³⁹ 刘文琦 [Liu Man Kay], «产品责任法律制度比较研究» [Comparative Studies of Product Liability Regime], (法律出版社 [Law Press,] 1997) 1, 30.

only 6 out of 51 provisions make any reference to 'consumer'. In other words, it is far from explicit that consumers are the intended beneficiary of the Law.

Burgeoning economic development in China, which saw the emergence of new forms of unethical business practices, further eroded the efficacy of the *Product Quality Law*. Apart from the enduring problem of poor quality goods, counterfeit products emerged as a new issue for lawmakers, the magnitude of which was demonstrated by the sheer volume of counterfeit goods seized by the Chinese government. In 1999, for instance, authorities confiscated more than US\$30 million worth of bogus products.⁴⁰ Nevertheless, stringent legal measures to tackle counterfeiting were not implemented for economic and social reasons.

From an economic perspective, the manufacture of counterfeit or substandard goods underpinned the 'black economy' of some localities, such as Yiwu City in Zhejiang Province.⁴¹ The deleterious financial consequences of a widespread crackdown on such practices were a major concern to local governments.

From a social perspective, the factories involved in the manufacture of counterfeit goods provided jobs for local people who had a vested interest in the continuing operation of those factories. Furthermore, not every consumer in China was opposed to the availability of substandard and counterfeit products. In particular, consumers with limited disposable income were prepared to compromise on the quality of products in exchange for lower, more affordable prices. In fact, as Cui, the former Chief of the Investigation Department of the Shanghai Municipal Industry and Commerce Administration, has commented, some counterfeit goods were of sound, functional quality even though they had violated intellectual property rights.⁴² As such, counterfeit goods could still appeal to non-affluent consumers in the black market. Hence, in a sense, the slow development of consumer legal protection was unwittingly caused by consumers themselves.

⁴⁰ Ibid.

⁴¹ Daniel Chow, 'Counterfeiting in the People's Republic of China' (2000) 78(1) *Washington University Law Quarterly* 1, 17, 19-21.

⁴² 刘文琦 [Liu Man Kay], «产品责任法律制度比较研究» [Comparative Studies of Product Liability Regime], (法律出版社 [Law Press,] 1997) 1, 30.

B Product Quality Law of the People's Republic of China, 2000 Amendment (‘Amended Product Quality Law’)

The expansion of Chinese foreign trade enabled counterfeit and substandard products to find their way into overseas markets. The economic and social concerns mentioned above did not exist in foreign marketplaces. Without such constraints, the complaints of overseas consumers were heeded, prompting their governments to take action. In 1998, the US Customs Service seized US\$28 million worth of counterfeit goods from China,⁴³ and the European Union (‘EU’) ranked China as the fourth largest source of counterfeit goods to all EU countries.⁴⁴

The production of counterfeit goods damaged the economic interests of China on two fronts; it not only caused China to suffer from financial loss due to foreign bans on substandard and counterfeit goods, it also potentially undermined China’s negotiation for accession to the World Trade Organisation (‘WTO’). To gain accession, it was essential for China to present to the WTO a case that Chinese products were reliable for global consumers by enacting stringent laws to curb the production of shoddy goods. As the former Chinese premier, Zhu Rongji, pointed out, product ‘quality is a strategic issue of economic development. Product quality represents a country’s image’.⁴⁵

Consequently, the *Product Quality Law* was amended on 8 July 2000. The amended legislation introduced changes in three main areas. First, to demonstrate China’s commitment to addressing the issue of product quality, the enforcement regime has been strengthened so as to curb corruption and counteract local protectionism. A reward system has been set up for whistle-blowers and the penalty has been increased for officials who are found to be in dereliction of duty. Second, to rebuild the image of Chinese products, supervision of product quality has been tightened. Mandatory spot-checking of product quality has been introduced, and producers and sellers are now required to put in place a management system. Third, in order to restore the confidence of both overseas and local consumers in Chinese products, punishment of offenders has been augmented, so that more of the parties involved in the course of a transaction may now potentially be held liable. Generally speaking, the *Amended Product Quality*

⁴³ Andrew Lowenstein, *Chinese Fake-Out* (18 November 2009) Foreign Policy <http://www.foreignpolicy.com/articles/2001/03/01/chinese_fake_out>.

⁴⁴ United Nations Office on Drugs and Crime, *The Globalisation of Crime: A Transnational Organised Crime Threat Assessment* (2010), 176 <http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf>.

⁴⁵ «关于新修改的《产品质量法》知识介绍» [Introduction of the newly amended Product Quality Law] (4 September 2000)《人民日报》 [People's Daily] <<http://www.people.com.cn/zgrdxw/news/200009/04/90402.html>>.

Law is consumer-friendly, but again the interests of local consumers might not have been at the forefront of the Chinese legislators' minds when drafting these amendments; according to Zhang Jiaming, the assistant secretary of the Shanghai Consumer Association, the amended legislation failed to address a number of long-standing issues, such as the widespread infringement of consumer rights in the service sectors.⁴⁶ Zhang's view was endorsed by a China Consumers' Association's survey which indicated that, between 1997 and 1998, the number of complaints doubled against various service sectors, including telecommunications, medical services, restaurants, renovation services⁴⁷ and educational services. For instance, ETS mistakenly invalidated a student's GRE result for failing to pay the required fee.⁴⁸ Consequently, the student missed the opportunity to study in America but received no compensation from ETS.⁴⁹ Surprisingly, the amended law is still applicable to products only (art 2). Only one provision, art 62, touches upon services, and then only indirectly; it imposes a penalty on any business operator using prohibited products in the course of services delivery. However, art 62 does not envisage compensation for a consumer who suffers injury from the prohibited use of a product. That the amended law was not expanded to cover the services sector may well reflect political awareness of the ramifications of increasing the financial burdens on business as a result of legal liability, especially when the Chinese insurance industry was not primed for business to diversify their legal risk.⁵⁰

Neither has the amended law broadened the definition of 'product'. Pursuant to art 2, 'product' only refers to manufactured and processed goods. However, farming products, such as bad seeds and poor breeding stock, were among the top subjects of complaint by rural consumers.⁵¹ Such a narrow definition of 'product' allowed unprocessed, agricultural goods to slip beneath the radar of the regulatory regime and was a latent cause of the subsequent food safety crisis, as discussed below.

⁴⁶ Todd Crowell and David Hsieh, *People Power* (18 October 1996) Asia Week <<http://www-cgi.cnn.com/ASIANOW/asiaweek/96/1018/cs1.html>>.

⁴⁷ Dan Su, 'Consumers: Products' quality not good enough', *China Daily*, (People's Republic of China), 15 March 1999.

⁴⁸ ETS is a private non-profit organisation devoted to educational measurement and research, primarily through testing including the TOEFL®, GRE and GMAT, which are well known in China.

⁴⁹ Editorial, 'How Chinese consumer interests are protected against foreign product or service providers', *China Youth Daily* (People's Republic of China), 14 March 2001.

⁵⁰ 汪強林 [Wang Qiang Lin], «我国产品质量法評析» 'Analysis of China Product Quality Law', «現代法學» (2000) 22(3) *Modern Law Science* 119, 119.

⁵¹ Dan Su, 'Fake seeds top rising complaints from farmers', *China Daily*, 15 March 1999.

China's 'open door' policy to foreign goods has given rise to new challenges for Chinese consumers. The issue of poor quality is not exclusive to Chinese products; there have been a significant number of instances where Chinese citizens were either physically injured by, or suffered financial loss as a result of, defective foreign products. For example, a patient discovered cracks in the conduction coils of an artificial cardiac pacemaker after installation,⁵² and a Motorola mobile phone only developed intermittent reception signal after two months of operation.⁵³

While the *Amended Product Quality Law* sets out the liability of local manufacturers and sellers, this provides very limited protection for Chinese consumers against shoddy imported goods. By virtue of art 2, production and sales activities must occur within China before the *Amended Product Quality Law* applies; thus, foreign manufacturers or exporters who have no physical presence in China are clearly not covered. Even though art 61 has extended the range of offenders to include transporters and warehouse owners or custodians, importers are not included.

Furthermore, it is unclear whether a 'supplier' — a category of business operator close to importer — can be held liable to consumers directly. According to art 40, a seller has a right of indemnity against a supplier for liability towards consumers, while art 42 specifies that a seller is directly liability towards consumers if the seller fails to identify the supplier. These two provisions have made sellers the principal defendant for paying compensation, which consequently allows foreign manufacturers, importers or suppliers to avoid liability by hiding behind the seller. At the same time, the practicality of Chinese consumers gaining redress for injury from defective foreign goods depends on the financial means of the seller to satisfy the consumer's claim. Therefore, in the absence of any further reasonable explanation, it is submitted that the *Amended Product Liability Law* is geared towards supporting foreign trade rather than protecting consumers in China.

Whether the Chinese government struck the right balance of interests among all key stakeholders with the *Amended Product Quality Law* is a matter of ongoing debate, but it is an indisputable fact that the product quality problem remains serious in the country and has worsened in the food safety area. Ip has highlighted some food safety

⁵² «心脏起搏器产品质量案» [A case of quality issue of an artificial cardiac pacemaker] (2000) *中外商业论坛网* [Chinatrack] (on file with authors)

⁵³ «购手机后使用不足两个月无法使用消费者要求退货或更换» [Mobile phone handset fails to work after two months of usage, consumers demand for return and replace] (2001) [ISSUE] *维权前沿* [Pioneer in Rights Defender] (on file with authors).

incidents such as the 'big head baby case' in 2004, the 'Sudan 1 red dye case' in 2005, and the 'Malachite green case' in 2006.⁵⁴

The Chinese government responded to this series of incidents by passing the *Agricultural Product Quality Safety Law of the People's Republic of China* ('AQPSL') in 2006.⁵⁵ Art 2 states that the AQPSL applies to primary products sourced from agriculture, such as plants, animals and microbes, and products obtained from agricultural activities. It follows that the AQPSL would apply to cases like the Malachite green case, where prohibited chemicals (malachite green and nitrofurans) were used to boost seafood production. However, other cases, such as the big head baby case (where babies developed abnormally big heads due to the consumption of counterfeit baby formula) and the Sudan 1 red dye case (where a banned chemical was used to doctor the colour of egg yolk so as to improve its appearance of freshness) would not fall within the ambit of the AQPSL. Thus, it appears that the legislators decided to selectively address some issues but not all. The practice of piecemeal law making in China is not uncommon,⁵⁶ and speaks to the prevalence of various underlying economic, social and political issues and realities.

C Food Safety Law of the People's Republic of China 2009

Insofar as food safety is concerned, China's piecemeal legal approach in relation to product quality has proved to be a failure, as the cases involving melamine amply demonstrate. Certain pet foods were contaminated with melamine in 2007, and various adulterated milk-related products, including baby formula, were contaminated with melamine in 2008.⁵⁷ Among other legislative measures, the *Food Safety Law* was passed in 2009. As Bath and Ip have pointed out,⁵⁸ while the melamine milk case may have been the catalyst for the promulgation of the *Food Safety Law*, the real impetus for enacting this law was economic rather than social. Although the focal product in the

⁵⁴ Mary Ip, 'Chinese Consumers – Law and Current Issues' in Patricia Blazey & Kay Wah Chan (eds), *The Chinese Commercial Legal System* (Lawbook, 2008) 349.

⁵⁵ «中华人民共和国农产品质量安全法» [Law of the People's Republic of China on Quality and Safety of Agricultural Products] (People's Republic of China) National People's Congress, 29 April 2006.

⁵⁶ Benjamin van Rooij, *Regulating Land and Pollution in China: Lawmaking, Compliance, and Enforcement; Theory and Cases* (Thesis, The University of Leiden, 2006) 45–48 <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/5433/Thesis.pdf?sequence=1>>.

⁵⁷ Jiang Yuxia, 'China to destroy 10,000 tons of tainted baby formula', *Xinhua Net* (online) 15 September 2008 <http://news.xinhuanet.com/english/2008-09/15/content_10008205.htm>.

⁵⁸ Vivienne Bath and Mary Ip, 'Wealth and loss in changing economic times – Reforms in bankruptcy and consumer protection laws' in John Garrick (ed), *Law, Wealth And Power in China – Commercial Law Reforms In Context* (Routledge, 2010) 231.

melamine scandal was baby formula, the prohibited chemicals were also found in a wide range of foods, including chocolates,⁵⁹ biscuits and candies,⁶⁰ which were available in overseas shops. In responding to the fear of contamination, foreign governments took emergency action to issue import bans and pull the problem foods off the shelves,⁶¹ which, in turn, posed a threat to China's US\$31 billion food export industry.⁶²

Although the *Food Safety Law* is in line with international standards,⁶³ it does not focus on small to medium businesses, which accounted for 90.05% of the total food operators in 2011,⁶⁴ and which have been at the root of food safety problems for the domestic market.⁶⁵ That the *Food Safety Law* focuses primarily on larger businesses is evidenced by the fact that the requirements to set up a check and verification system (arts 36-41) and to engage professional staff for food safety for food operations (art 27(3)) appear to target larger Chinese food exporters (because compliance with such requirements is not financially feasible for small to medium business).⁶⁶ This legislative focus suggests that the *Food Safety Law* was introduced to address the concerns of overseas consumers as opposed to the needs of Chinese consumers. Moreover, the remedial regime is particularly disappointing for consumers in China. It is true that art 96 of the *Food Safety Law* has increased punitive damages up to a sum 10 times the purchase price of the foodstuff and that, in comparison, punitive compensation under art 49 of the *Consumer Law* is limited to a sum of up to 2 times the foodstuff's price. However, the practical effect of the increase under the *Food Safety Law* is minimal given that the price of foodstuffs is generally a small sum.

⁵⁹ 'Melamine found in Cadbury goods', *Asia Pacific, BBC News* (online), 29 September 2008 <<http://news.bbc.co.uk/2/hi/asia-pacific/7641317.stm>>.

⁶⁰ *Ibid.*

⁶¹ 'More countries ban China dairy', *Taipei Times* (online), 4 October 2008 <<http://www.taipeitimes.com/News/world/archives/2008/10/04/2003424991>>; 'Chinese biscuits pulled off UK shop shelves because of melamine contamination', *Daily Mail* (online), 2 October 2008 <<http://www.dailymail.co.uk/news/article-1066293/Chinese-biscuits-pulled-UK-shop-shelves-melamine-contamination.html#ixzz3KLmj9boe>>.

⁶² Lu Wencong and Søren Kjeldsen-Kragh, 'International Food Safety Standards: Catalysts for Increased Chinese Food Quality?' (2008) 26(1) *The Copenhagen Journal of Asian Studies* 70, 71.

⁶³ Bath and Ip, above n 61, 245.

⁶⁴ Linhai Wu and Dian Zhu, *Food Safety in China: A Comprehensive Review* (CRC Press, 2014) 85.

⁶⁵ *Ibid.*

⁶⁶ Bath and Ip, above n 61, 245.

From a consumer's perspective, the insufficiency of art 96 is well illustrated by the melamine milk case,⁶⁷ where thousands of babies were diagnosed with kidney stone illness and a considerable amount of money is needed for their long-term medical treatment.⁶⁸ On the other hand, thousands of small to medium size food operators existed at that point in time. Raising the level of liability would place such food operators at risk of financial collapse. Thus, art 96 has inclined towards the interests of food operators rather than consumers.

D Tortious Liability Law of the People's Republic of China 2009

A silver lining is found in the *Tortious Liability Law*, in which a specific chapter has been designated for product quality issues. Despite some setbacks,⁶⁹ the *Tortious Liability Law* offers excellent examples of how social issues stemming from the melamine milk scandal (in particular consumer welfare) have shaped the development of the law.

First, as consumers are usually not well placed to collect evidence for their lawsuits, the *Tortious Liability Law* has adopted the concept of assumption of responsibility by the manufacturer under art 41 of the *Product Quality Law* and extended it to anyone who cannot rebut the presumption (art 6). This reversal of the onus of proof is likely to increase the chances of a successful action.

Second, art 17 has standardised the amount of compensation that can be granted for deaths resulting from the same tortious act, without regard to the habitual residence of the deceased. As mentioned above, the melamine milk crisis caused thousands of casualties. However arts 29 and 30 of the *Interpretation of the Supreme People's Court of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury*⁷⁰ (the 'Supreme Court Interpretation') stipulated some discriminatory factors, such as the victim's age or region of residency, for determining the quantum of compensation. In order words, a kidney stone sufferer who resides in the affluent

⁶⁷ Although the melamine incident occurred before both the enactment of the *Food Safety Law* (28 February 2009) and the date the Law took effect (1 June 2009), the Law has not restricted its application to cases occurring before its date of effectiveness.

⁶⁸ 'China: 6 babies likely died from toxic milk: 300,000 infants sicked after drinking tainted formula, ministry claims', *Associated Press* (online), 2 December 2008 <http://www.msnbc.msn.com/id/28004966/ns/health-food_safety>.

⁶⁹ Mary Ip, 'Recent Development in Chinese Consumer Law — The Three Represents' in Patricia Blazey and Kay Wah Chan (eds), *Commercial Law of the People's Republic Of China* (Thomson Reuters, 2012) 181.

⁷⁰ «最高人民法院于审理人身损害赔偿案件适用法律若干问题的解释» [Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in Trying Cases Involving Compensation for Personal Damage] (People's Republic of China) Supreme People's Court Interpretation No 20, 26 December 2003.

coastal areas could receive greater recompense than those living in the inner-west rural parts of China. Needless to say, the discriminatory factors presented in the Supreme Court Interpretation would result in many melamine milk victims being treated unfairly and prejudicially in terms of compensation payments. Therefore, art 17 is a provision tailor-made for the kidney stone victims and has successfully rectified this inequitable situation in cases of death by discarding any discriminatory elements in the computation of damages.

Third, for the first time in the Chinese legal system, serious mental harm has been recognised and is eligible for compensation under art 22. In the melamine milk case, some kidney stone sufferers required substantial medical treatment for a considerable period of time. No doubt, undergoing medical treatment over an extended period would subject those sufferers to a significant degree of mental distress. Stipulating serious mental distress as a class of suffering that qualifies for compensation enables sufferers to receive appropriate and adequate redress in such circumstances.

Fourth, China has taken an interesting legal stance with respect to punitive damages — that is, accepting the concept on one hand, but restricting its operation on the other hand, by placing a cap on the damages recoverable under art 49 of the *Consumer Law* and art 96 of the *Food Safety Law*. Although there may be economic reasons behind this hybrid approach, putting a restriction on punitive damages and basing the calculation on the purchase price of the defective product/food has proved impractical and unfair to victims, such as those in the melamine milk case, especially in situations whereby the manufacturer and seller knowingly made and sold an unsafe product. However, the *Tortious Liability Law* lifts this restriction and allows victims to make their own case for punitive compensation for serious injury or death caused by products whose defect is known to manufacturers or sellers (art 47). Since art 47 is found within the specific chapter on product liability, it provides consumers with a better avenue for seeking redress for defective goods than the *Consumer Law* or *Food Safety Law*. This provision allows for more meaningful and equitable recompense to victims in future cases and exerts real deterrence on tortfeasors. In sum, arts 6, 17, 22 and 47 of the *Tortious Liability Law* respond to the particular facts of the melamine milk case and are more societally oriented than previous laws.

Finally, to the extent that tortious conduct may harm a large number of consumers (or other parties) the possibility of actions brought by or on behalf of multiple plaintiffs becomes a consideration. At present, the *Civil Procedure Law* of the PRC permits joint actions where two or more plaintiffs represent themselves in an action, representative actions where a certain number of plaintiffs appoint several representatives to represent them in an action, and class actions where an unknown number of plaintiffs

appoint several representatives to represent them in an action.⁷¹ Accordingly, in the light of the discussion above, a consumer organisation should be able to initiate a meaningful class action under the *Tortious Liability Law*, on behalf of and for the benefit of its members, on an opt-out basis.

IV CONCLUSION

China's economic performance over recent decades has been nothing short of remarkable. Gross Domestic Product growth in China has averaged 10 percent per annum, and 500 million people have been lifted out of poverty. China is now the world's largest exporter and manufacturer, and one of its largest economies (second only to the United States, or third, if the EU is considered one economy). If China continues on this trajectory, the World Bank predicts that it will become a 'high-income' society before the year 2030.⁷²

Notably, China is the first country to achieve high levels of economic development with an authoritarian, communist government at the helm. To date, extraordinary economic gains have been realised without any diminution in political control by the Communist Party. The government maintains a tight grip on the economy and is not averse to making decisions, even for purely political reasons, to advance its agenda.

While economic progress is important to China, it comes with a price. This is because legal, social, economic and political factors interact in many ways in the country. Inevitably, in some situations, the interaction of these factors will create winners and losers among relevant stakeholders. Tracing the evolution of the product quality legal regime has demonstrated that economic factors played a dominant role in the enactment and subsequent amendment of that legislation (with the business sector as the winner), while social factors attracted government attention only after consumers paid a high price in serious product quality incidents.

As China transitions from a developing to a developed economy and the country's economic ideology continues to shift, consumers are improving their position, relative to other interests, in competing for the government's support. This is evident in the most recent enactment relevant to the product quality regime, namely the *Food Safety Law*. Although the provisions relating to product liability and consumer compensation

⁷¹ «中华人民共和国民事诉讼法» [Civil Procedure Law of the People's Republic of China] (People's Republic of China) National People's Congress, 31 August, 2012, art 54.

⁷² The World Bank and the Development Research Centre of the State Council, the People's Republic of China, 'China 2030: Building a Modern, Harmonious, and Creative Society', The World Bank (2013) <<http://www.worldbank.org/content/dam/Worldbank/Document/China-2030-complete.pdf>>.

in the *Food Safety Law* require further improvement, they are measures tailor-made to address some consumer issues arising from the melamine milk crisis.

A prominent example of the Chinese government's increased attention to social matters (namely consumer rights and interests) is the passing of the *Tortious Liability Law*. While consumers are not explicitly specified as the key stakeholder of this legislation, the Chinese government's focus on social matters is manifest throughout the provisions of this law. Thus, it is submitted that consumer welfare is a positive by-product of the *Tortious Liability Law*, even though it may be a subsidiary goal.

How, precisely, the Chinese government should balance the political, economic, social and legal factors that bear upon the development of consumer law is always debatable. Perhaps the only certainty here is that ongoing interaction among these factors will continue to impact the growth of Chinese consumerism and legal protection. Nevertheless, by navigating the path to enactment and exploring the content of the product quality legal regime, this article has endeavoured to shed light on past developments as a basis for guiding future initiatives in protecting the legal rights and interests of consumers in China.