

**SPS-PLUS AND BILATERAL TREATY NETWORK: A
“GLOBAL” SOLUTION TO THE GLOBAL FOOD-SAFETY
PROBLEM?**

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ABSTRACT

Global food safety is a pressing and complex issue in the terrain of global governance and institutional design. However, the role of international law in food safety has not been satisfactorily appreciated by relevant international institutions and states at the multilateral level. The lack of scientific consensus, bottlenecks in WTO negotiations, and the WHO's reluctance to further engage in international food-safety lawmaking have arguably discouraged states from seeking multilateral solutions at this stage. When facing increasing public pressure in recent years, some states have gradually shifted to bilateral approaches pragmatic enough to address their imminent needs. This article examines bilateral agreements as such between China, the United States, the European Union, and Japan, and argues that “SPS-plus” elements have emerged as a common feature of such bilateral arrangements. This article further discusses the respective roles of multilateralism and bilateralism in tackling the global food-safety problem. Rather than provide an ultimate solution, the conclusion offers some recommendations and caveats on the search for optimal institutional designs for global food safety.

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I. INTRODUCTION

In recent years, food-borne hazards and illnesses have become a serious problem of international concern.¹ Global food safety, consequently, has turned into a pressing yet long-neglected issue in the terrain of global governance. Responsible organizations, such as the World Health Organization (WHO), the World Trade Organization (WTO), and the Codex Alimentarius Commission (Codex), leave considerable regulatory gaps in this area, another problem in response to which no serious remedial efforts have been made.²

In designing possible legal solutions to regulatory problems as such, policymakers, lawyers, and scholars can adopt various approaches—mandatory or voluntary norms,³ bilateral or multilateral treaty arrangements,⁴ command-and-control or market-based regulations,⁵ *ex ante* prevention or *ex post* liability measures,⁶ and the

¹ See generally Praveen Gangahar, *Food Safety and Management System*, in FOOD SAFETY, QUALITY ASSURANCE AND GLOBAL TRADE: CONCERNS AND STRATEGIES 25 (S.P. Singh et al. eds., 2009); World Health Organization [WHO], WHO GLOBAL STRATEGY FOR FOOD SAFETY: SAFER FOOD FOR BETTER HEALTH, at 5–6 (2002), available at <http://whqlibdoc.who.int/publications/9241545747.pdf>; see also F. Käferstein & M. Abdussalam, *Food Safety in the 21st Century*, 77 BULL. WORLD HEALTH ORG. 347, 349 (1999); F.K. Käferstein et al., *Foodborne Disease Control: A Transnational Challenge*, 3 EMERGING INFECTIOUS DISEASES 503 (1997); Y. Motarjemi et al., *Future Challenges in Global Harmonization of Food Safety Legislation*, 12 FOOD CONTROL 339, 340 (2001).

² Ching-Fu Lin, *Global Food Safety: Exploring Key Elements for an International Regulatory Strategy*, 51 VA. J. INT'L L. 637, 665–84 (2011).

³ See, e.g., Marian Garcia Martinez et al., *Co-Regulation as a Possible Model for Food Safety Governance: Opportunities for Public–Private Partnerships*, 32 FOOD POL'Y 299, 304 (2007).

⁴ Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 354 (2008).

⁵ See, e.g., MOVING TO MARKETS IN ENVIRONMENTAL REGULATION: LESSONS FROM TWENTY YEARS OF EXPERIENCE (Jody Freeman & Charles D. Kolstad eds., 2007).

like. When facing such a global problem in an interdependent world, scholars usually assume that a universal and uniform legal system would be an ideal approach to achieving collective goals and to alleviating global evils for states in an interdependent world.⁷ Just as war expands geographically, law must broaden its scope; climate-change dangers require real collective actions by the entire global community;⁸ and infectious diseases respect no national boundaries and cannot be sufficiently tackled without international efforts.⁹ For such problems, multilateral regimes are usually assumed to be the ideal solution and the preferred strategy for regulating global risks.¹⁰ Global food safety is no exception.

A global solution is needed to address global food-safety crises. Yet this type of solution does not necessarily require a multilateral legal regime that has uniform rules and gathers most of the states in a single pact to make food-safety governance work. There are multiple solutions to this problem. Blum challenges the intuitive and categorical assumption of multilateral treaties' superiority over bilateral treaties, arguing that the overall effectiveness of multilateral and bilateral treaties in fact varies significantly in different issue areas.¹¹ Blum offers a well-rounded view of the architecture of international lawmaking discussing in depth both

⁶ See, e.g., Kenneth A. Bamberger & Andrew T. Guzman, *Importers as Regulators: Product Safety in a Globalized World*, in *IMPORT SAFETY: REGULATORY GOVERNANCE IN THE GLOBAL ECONOMY* 193, 194 (Cary Coglianese et al., eds., 2009).

⁷ See generally PHILIP ALLOTT, *TOWARDS THE INTERNATIONAL RULE OF LAW: ESSAYS IN INTEGRATED CONSTITUTIONAL THEORY* 453–63 (2005); see generally PHILIP ALLOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* 94–95 (2002); see generally Lawrence O. Gostin, *Meeting Basic Survival Needs of the World's Least Healthy People: Toward a Framework of Global Health*, 96 *GEO. L.J.* 331, 334 (2008).

⁸ See generally Blum, *supra* note 4, at 348.

⁹ See Lawrence O. Gostin, *Global Health Law Governance*, 22 *EMORY INT'L L. REV.* 35, 38 (2008); Lawrence O. Gostin & David P. Fidler, *Biosecurity Under the Rule of Law*, 38 *CASE W. RES. J. INT'L L.* 437, 445 (2007).

¹⁰ See, e.g., James Chyau, *Casting a Global Safety Net—A Framework for Food Safety in the Age of Globalization*, 64 *FOOD & DRUG L.J.* 313 (2009) (arguing for the establishment of an international agency—International Food Safety and Inspection Organization—a central entity responsible for the enforcement of food inspection and certification in accordance with a set of universally accepted standards); Gostin, *supra* note 7, at 333–34.

¹¹ “The supposed benefits of multilateral treaties are often not as great as advertised or expected, and the effects of bilateral treaties are not necessarily as limited as universalists fear or unilateralists hope.” Blum, *supra* note 4, at 325. Multilateral treaties do not necessarily perform better in terms of probable compliance with obligations, efficiency of bargaining and negotiation, and effectiveness of their operation. *Id.* at 354–62. Rather, one has to consider the workings of multilateral and bilateral treaties in different issue settings—for example, if the parties are playing the coordination game or cooperation game, collaborating on issues of common goods or club goods, and regulating areas with positive or negative externalities. *Id.*

multilateral and bilateral structures of engagement in various subject matters.¹²

Here this article endeavors to provide a thorough analysis specifically regarding global food-safety issues so as to inform the choices for optimal institutional designs with respect to multilateral or bilateral international lawmaking. Depending on different contexts, bilateralism and multilateralism have respective pros and cons in terms of regulating cross-border risks. In some cases, such as the allocation of transmission frequencies by the International Telecommunication Union,¹³ the common rules for diplomats,¹⁴ or the preservation of endangered sea turtles, the multilateral approach seems more desirable. In other situations, such as foreign investment, joint watercourse management,¹⁵ or military cooperation, bilateralism can be more successful. In yet other circumstances, different forms of cooperation, such as framework-protocol treaty designs¹⁶ or multi-bilateral regulatory networks,¹⁷ may be the optimal choice.

This article explores the optimal choice of institutional design by examining the multilateral and bilateral efforts by states in pursuing better global food-safety governance. Part II briefly reviews the regulatory gaps in existing multilateral mechanisms in relation to food safety. The complex nature of food technology,¹⁸ the lack of related scientific consensus,¹⁹ political bottlenecks in WTO negotiations,²⁰ and

¹² See Blum, *supra* note 4.

¹³ *Id.* at 355.

¹⁴ *Id.* at 348.

¹⁵ *Id.* at 357.

¹⁶ See generally Allyn L. Taylor, *An International Regulatory Strategy for Global Tobacco Control*, 21 YALE J. INT'L L. 257, 258, 292–93 (1996).

¹⁷ See generally Chang-fa Lo, *Environmental Protection Through FTAs: Paradigm Shifting from Multilateral to Multi-Bilateral Approach*, 4 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 309, 328–29 (2009).

¹⁸ See generally MARION NESTLE, *SAFE FOOD: THE POLITICS OF FOOD SAFETY* (2010).

¹⁹ It is reflected in many cases of political and scientific contests in the Codex Alimentarius Commission, see e.g. Frode Veggeland & Svein Ole Borgen, *Changing the Codex: The Role of International Institutions*, Working Paper 2002-16 (Norwegian Agricultural Economics Research Institute, Jan. 2002), http://www.ecolomics-international.org/caa_veggeland_borgen_changing_codex_nilf_oslo_02.pdf; see also Sara Poli, *The European Community and the Adoption of International Food Standards Within the Codex Alimentarius Commission*, 10 EUR. L.J. 613 (2004).

²⁰ Many have discussed the political barriers to as well as momentums for the current WTO negotiations. See, e.g., Pitou van Dijk & Gerrit Faber, *How to Save the Doha Round: A European Perspective*, 11 EUR. FOREIGN AFF. REV. 291 (2006); see generally Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations and Trade in Agriculture*, 40 J. WORLD TRADE 259, 275–76 (2006); see Denise Prévost & Mariëlle Mathee, *The SPS Agreement as a Bottleneck*

the WHO's unwillingness to further engage in international lawmaking with regard to food safety²¹ all discourage states from seeking multilateral solutions for the present. Part III examines the bilateral agreements signed between China, the United States, the European Union, and Japan, and argues that SPS-plus elements—rights and obligations that go beyond the baseline of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)²²—have become a common feature of these bilateral arrangements. Yet states are still in the process of experimental lawmaking. In Part IV, this article revisits the nature of cross-border food-safety governance and discusses the strengths and weaknesses of multilateralism and bilateralism in tackling such issues. Part V concludes by offering several recommendations and caveats on locating optimal institutional designs for global food safety.

II. THE GLOBALIZATION OF FOOD-SAFETY PROBLEMS AND THE MULTILATERAL DYSFUNCTION OF INTERNATIONAL ORGANIZATIONS

A. GLOBALIZATION AND THE PREVALENCE OF FOOD-SAFETY INCIDENTS WORLDWIDE

Foodborne illnesses and food contamination are ubiquitous in all corners of the world, and the toll in terms of human life and suffering is enormous. According to the WHO, contaminated food contributes to 1.5 billion cases of diarrhea in children each year, resulting in more than three million premature deaths.²³ Those deaths and illnesses are shared by both developed and developing countries. One person in three in industrialized countries may be affected by foodborne illnesses each year.²⁴ For instance, in developing countries, approximately 1.8 million

in Agricultural Trade Between the European Union and Developing Countries: How to Solve the Conflict, 29 LEGAL ISSUES ECON. INTEGRATION 43 (2002).

²¹ Lin, *supra* note 2, at 681-84.

²² Agreement on the Application of Sanitary and Phytosanitary Measures Annex A, pt. I, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

²³ WHO, *Food Safety: An Essential Public Health Issue for the New Millennium*, pt. 2, at 9, WHO/SDE/PHE/FOS/99.4 (1999).

²⁴ Asian Dev. Bank, *Suggestions on Strengthening Food Safety in the PRC*, OBSERVATIONS AND SUGGESTIONS, Nov. 2006, at 2, available at <http://www.adb.org/Documents/Produced-Under-TA/37599/OS-Food-Safety-EN.pdf>.

children die each year from foodborne diseases caused by microbiological agents in contaminated food and water.²⁵ The United States Centers for Disease Control and Prevention (CDC) estimates that within the US borders, foodborne diseases cause approximately 48 million illnesses, 128,000 hospitalizations, and 3,000 deaths annually.²⁶

The ever-increasing number of foodborne-disease outbreaks is the result of multiple factors associated with intense economic globalization, which has made state boundaries increasingly permeable to the flow of goods, services, humans, investment, and information.²⁷ Food-safety problems, together with food production and consumption, have also become globalized.²⁸ A food product can be made in one place with raw materials from multiple regions and enter into the global supply chain, which transports the product to distant locations for consumption or further processing.²⁹ National authorities are therefore increasingly interdependent in the effort to address food-safety crises.

B. MULTILATERAL PROMISES AND DISCONTENTS OF INTERNATIONAL ORGANIZATIONS

While it is intuitive to appreciate the importance of having a comprehensive regulatory and cooperative strategy at the international level, existing multilateral institutions—the WTO, the WHO, and the Codex—fail to warrant satisfactory food-safety governance. There exists no international legal instrument aimed at addressing food-safety issues in a comprehensive and effective manner.

²⁵ Regional Office for South East Asia [SEARO], WHO, *Health Situation in the South East Asia Region 1994-1997*, at 213–14, SEA/HS/209 (1999), available at http://www.searo.who.int/LinkFiles/Health_Situation_health_situation-94_97.pdf.

²⁶ CTR. FOR DISEASE CONTROL AND PREVENTION, *CDC Estimates of Foodborne Illness in the United States*, http://www.cdc.gov/foodborneburden/PDFs/FACTSHEET_A_FINDINGS_updated4-13.pdf (last updated Feb. 7, 2012).

²⁷ World Health Organization, *supra* note 1, at 5–13; Motarjeremi et al., *supra* note 1, at 340–41; Käferstein et al., *supra* note 1, at 503–04; Käferstein & Abdussalam, *supra* note 1, at 347, 349.

²⁸ Major forces behind the globalization and complexification of food-safety systems are, among others, the rapid advancement of food science and transportation technology, the advent of the WTO and its covered agreements aimed at trade liberalization, and the formulation and growth of transnational food corporations in the food industry. See WORLD ECONOMIC FORUM [WEF], *GLOBAL RISKS 2008: A GLOBAL RISK NETWORK REPORT 12–13*, <http://www.weforum.org/pdf/globalrisk/report2008.pdf> (last visited Apr. 26, 2012).

²⁹ Gangahar, *supra* note 1, at 25; See generally Derek Yach & Douglas Bettcher, *The Globalization of Public Health, I: Threats and Opportunities*, 88 AM. J. PUB. HEALTH 735 (1998) (discussing the effects of globalization on public health issues).

The WTO regime, being a set of trade rather than health agreements, does not have any provisions regarding the active promotion of food safety.³⁰ Indeed, food safety and public-health issues have never been core considerations throughout the WTO's history.³¹ For example, the SPS Agreement does not require WTO Members to take positive measures to enhance their food-safety regulations. Rather, it merely represents a channel through which countries can create exceptions regarding one another's food-safety laws for the purpose of trade liberalization.³² Some other unbalanced requirements in the SPS Agreement can even create unnecessary barriers to governments genuinely aiming at protecting public health rather than at taking protectionist actions.³³ National food-safety regulations may possibly be weakened under the WTO rules in the name of trade liberalization.³⁴ Food safety is usually treated as a trade issue.³⁵ However, WTO rules, with the objectives of trade liberalization, hardly play a positive role in improving global food safety.

Owing to its elevated legal status as a quasi-legislative standard setter in the WTO SPS regime,³⁶ the Codex previously regarded as a technical body unaffected by international power struggles or commercial interests³⁷ has recently become politicized.³⁸ Incentivized by

³⁰ See Lin, *supra* note 2, at 665–69.

³¹ Huei-chih Niu, *A Comparative Perspective on the International Health Regulations and the World Trade Organization's Agreement on the Application of Sanitary and Phytosanitary Measures*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 513, 515 (2006).

³² See Bruce A. Silverglade, *The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?*, 55 FOOD & DRUG L.J. 517, 517–20 (2000).

³³ See, e.g., Alan O. Sykes, *Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View*, 3 CHI. J. INT'L L. 353, 354, 368 (2002); *But cf.* TRACEY EPPS, *INTERNATIONAL TRADE AND HEALTH PROTECTION: A CRITICAL ASSESSMENT OF THE WTO'S SPS AGREEMENT* (2008) (viewing the SPS Agreement as an appropriate balance between international trade and public health).

³⁴ For a more thorough discussion on the problems with the SPS Agreement from the perspective of food-safety enhancement, see Lin, *supra* note 2, at 668.

³⁵ See generally MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY* 103–40 (2006); See also Lin, *supra* note 2, at 648.

³⁶ Joel P. Trachtman, *The World Trading System, the International Legal System and Multilevel Choice*, 12 EUR. L.J. 469, 480 (2006).

³⁷ Frode Veggeland & Svein Ole Borgen, *Changing the Codex: The Role of International Institutions* 10 (Norwegian Agric. Econ. Res. Inst., Working Paper No. 16, 2002), available at <http://tinyurl.com/235njpz>.

³⁸ ALBERTO ALEMANNI, *TRADE IN FOOD: REGULATORY AND JUDICIAL APPROACHES IN THE EC AND THE WTO* 262–63 (2007); As put by Alemanni, the express reliance on the Codex standards, guidelines, and recommendations has “an impact not only on their functioning but

the enforceability and effectiveness of the WTO dispute-settlement mechanism, Codex member states tend to vote in a manner that would advance their trade interests rather than promote food safety.³⁹ Numerous problems such as frequent use of majority voting in the proceedings,⁴⁰ poor participation of developing countries,⁴¹ decreasing legitimacy and weakened scientific authority,⁴² have rendered the Codex unbalanced regarding its two competing mandates—protecting consumer health and ensuring fair food trade practices. Therefore, Codex's present institutional design is ill-suited to be an effective safeguard for global food safety.⁴³

While the WHO is the most relevant international institution to play a crucial role in global food safety, it has failed to provide leadership or facilitate better governance in the area. Many scholars share the view that the WHO has failed to fully harness the normative powers assigned in its constitution.⁴⁴ In fact, it has refrained from adopting any legally binding instruments on food-safety issues for more than half a century.⁴⁵ Although the agency's recent activities on the

also on their nature." *Id.* at 262. As the Codex standards directly or indirectly play a role in the results of WTO dispute-settlement cases, "WTO members have incentives to make sure that the new standards of the Codex, IPPC and OIE find inspiration in their current or future national SPS measures." *Id.* at 262–63.

³⁹ A country that successfully has its standards adopted in the Codex will not have to defend its SPS measures in the WTO dispute settlement proceedings. Such presumption of conformity doubtlessly tempts countries to make frequent use of majority voting at Codex meetings. *Id.* at 263–67.

⁴⁰ *Id.* at 263–67. This tactic, in turn, renders the recent Codex standards short of consensus and weakens their legitimacy and scientific authority.

⁴¹ See Livermore, *supra* note 19, at 781–89.

⁴² See David Jukes, *The Codex Alimentarius Commission - Current Status*, FOOD LAW PAGES, <http://www.reading.ac.uk/foodlaw/codex-1.htm> (last visited Apr. 26, 2012) (discussing the growing realization that the Codex may become politicized as it loses its ability to make decisions based strictly on science).

⁴³ See generally Thorsten Hüller & Matthias Leonhard Maier, *Fixing the Codex? Global Food-Safety Governance Under Review*, in CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 267, 267–99 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006) (providing a comprehensive analysis on the challenges and opportunities of the Codex).

⁴⁴ See generally Taylor, *supra* note 16, at 278–81; Allyn Lise Taylor, *Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health*, 18 AM. J.L. & MED. 301 (1992); Gostin, *supra* note 7, at 375. See generally David P. Fidler et al., *Emerging and Reemerging Infectious Diseases: Challenges for International, National, and State Law*, 31 INT'L L. 773 (1997).

⁴⁵ See, e.g., David P. Fidler, *The Future of the World Health Organization: What Role for International Law?*, 31 VAND. J. TRANSNAT'L L. 1079, 1089–90 (1998).

revision of the International Health Regulations⁴⁶ and adoption of the Framework Convention on Tobacco Control⁴⁷ may imply a change of attitude, it remains unclear whether the WHO and its Member States are politically and practically ready for a multilateral food-safety agreement.⁴⁸ In January 2010, the WHO Executive Board recommended that the World Health Assembly (WHA) adopt a resolution “[r]ecognizing the importance of international agreement on global management of food safety.”⁴⁹ However, in May 2010, the Sixty-Third WHA simply repeated the existing but ineffective International Food Safety Authorities Network (INFOSAN) mechanism.⁵⁰ The Sixty-Third WHA shied away from either taking a step that could have helped the WHO play a leading role or open up future deliberations such as an intergovernmental working group for the reorganization of food-safety governance.⁵¹

These international organizations are facing various problems that hamper rather than foster global food safety. A comprehensive, multilateral agreement that addresses food safety issues on a single legal and political platform does not seem to be on the agenda of either the WTO, the WHO, or the Codex. The unrecognized importance of the multilateral-governance approach further discourages states from engaging in effective cooperation.

⁴⁶ WHO, *International Health Regulations* (2d ed. 2005); For a discussion of the 2005 IHR, see Michael G. Baker & David P. Fidler, *Global Public Health Surveillance Under New International Health Regulations*, 12 EMERGING INFECTIOUS DISEASES 1058 (2006).

⁴⁷ WHO, WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL (2005) [hereinafter WHO FCTC], available at <http://whqlibdoc.who.int/publications/2003/9241591013.pdf>; For a discussion of the WHO FCTC, see Taylor, *supra* note 16.

⁴⁸ Lin, *supra* note 2, at 682–83.

⁴⁹ WHO, *Advancing Food Safety Initiatives*, at 2, EB126.R7 (Jan. 21, 2010), available at http://apps.who.int/gb/ebwha/pdf_files/EB126/B126_R7-en.pdf.

⁵⁰ For an introduction to both the INFOSAN and its problems, see Lin, *supra* note 2, at 678–81.

⁵¹ See generally WHA Res. 63, WHA63/2010/REC/1 (May 21, 2010), available at http://apps.who.int/gb/ebwha/pdf_files/WHA63-REC1/WHA63_REC1-en.pdf.

III. STATES SHIFT TO BILATERAL FOOD-SAFETY AGREEMENTS: A STOPGAP OR AN ALTERNATIVE?

A. BILATERAL EFFORTS OF STATES IN CROSS-BORDER FOOD-SAFETY MANAGEMENT: EXAMPLES

In recent years, many governments have been facing increasing public pressure for the establishment of better food-safety management.⁵² Therefore, states have gradually shifted to alternative approaches pragmatic enough to address the states' imminent needs. More and more countries have signed a growing number of bilateral or regional food-safety agreements or arrangements, or incorporating an SPS (food safety-related) chapter into their Free Trade Agreements (FTAs).⁵³ For example, China entered into sixty agreements on food-safety and SPS issues, both regional and bilateral, with other WTO Members in 2007 and 2008.⁵⁴ In 2009, Japan signed with Switzerland and Vietnam bilateral FTAs, which include an SPS chapter.⁵⁵ The United States Food and Drug Administration (FDA) has also been aggressively pursuing formal and informal cooperation on food-safety governance through agreements with foreign counterparts. The United States has 110 international arrangements (104 of which are bilateral) as of 2011, at least fifty-six of which are directly related to food-safety or SPS issues.⁵⁶ In addition to a bilateral food-safety agreement with China and a trilateral cooperation arrangement with China and the European Union, the United States FDA has participated in the signing of seventeen confidential arrangements on food-safety/ SPS issues with sixteen government authorities dispersed

⁵² See generally ED RANDALL, *FOOD, RISK AND POLITICS: SCARE, SCANDAL AND CRISIS—INSIGHTS INTO THE RISK POLITICS OF FOOD SAFETY* (2009).

⁵³ Having an SPS (food safety-related) chapter in FTAs is a very common practice and, therefore, does not necessarily demonstrate states' growing attention to cross-border food-safety management. Nevertheless, SPS-plus elements in newly signed FTAs are, in terms of importance, the equal of independent bilateral food-safety agreements or arrangements. This paper focuses mainly on independent bilateral food-safety agreements or arrangements.

⁵⁴ World Trade Organization [WTO] Secretariat, *Trade Policy Review: China*, ¶ 54, WT/TPR/S/230 (Apr. 26, 2010).

⁵⁵ WTO Secretariat, *Trade Policy Review: Japan*, ¶ 80, WT/TPR/S/243 (Jan. 11, 2011).

⁵⁶ There are currently 67 memoranda of understanding and other cooperative arrangements, and 34 confidentiality commitments under the FDA International Programs. Among these 110 international arrangements, 104 are bilateral (2 are between the US and WHO) and 6 trilateral (5 between the US, Mexico, and Canada, and 1 between the US, Australia, and New Zealand). For the complete list, see *International Agreements*, U.S. FDA (Apr. 26, 2012), <http://www.fda.gov/InternationalPrograms/Agreements/default.htm>.

among twelve countries, the goal being to facilitate relevant law enforcement or regulatory matters.⁵⁷

International food-trade players have concluded arrangements, agreements, or chapters on food-safety issues in a bilateral setting owing to two practical needs. First, some states aim to impose more rigorous regulation on imported products from the other contracting parties so as to respond to growing consumer pressure and to protect domestic populations from undesirable health hazards, in relation to specific food-safety issues. Second, other players request more preferential (less rigorous) treatment and less protectionist measures on (usually specific) exported products in order to expedite border entry, alleviate procedural burdens, and facilitate food trade. To deal with conflicting needs in practice, both parties to a bilateral food-safety arrangement or agreement have to ensure that their respective payoffs from the mutual cooperation are similar or equivalent to each other based on the information available. For those major food-trade players—the United States, the European Union, Japan or China—locating such equilibrium in food-safety regulatory cooperation can be found in many different manners. Bilateralism offers such flexibility.⁵⁸ For countries with similar levels of food-safety standards, a mutual recognition or equivalence agreement will do;⁵⁹ for countries with asymmetric levels of food-safety standards, such as China and the United States, substantial tradeoffs are needed.

A common conception is that a bilateral food-safety arrangement is concluded mainly because food-safety scares originating in country X drive country Y to urge country X to elevate its health standards, thus ensuring country Y's import safety. It is true that government responses, political and legal, are very often incident-driven⁶⁰ and usually problem-specific. It is particularly because food-safety scares usually can cause public outrage and therefore political pressure.⁶¹ Counterintuitively, however, a bilateral food-safety agreement is rarely concluded in such a one-way manner. Those concluded by important food-trade actors such as the United States, Japan, the European Union, and China are essentially reciprocal. For instance, China must improve its food-safety conditions according to its agreement with the United States, but in

⁵⁷ WTO Secretariat, *Trade Policy Review: United States*, ¶ 143, WT/TPR/S/200 (May 8, 2008).

⁵⁸ Blum, *supra* note 4, at 339.

⁵⁹ SPS Agreement, *supra* note 22, at art. 4.

⁶⁰ Lin, *supra* note 2, at 683.

⁶¹ See generally NESTLE, *supra* note 18.

return, China gains some preferential treatment regarding its food products at the US border.⁶² China must tighten its food-safety regulation on seafood exports destined for Japan, but again in return, China can dispatch technical experts to or perform on-site inspections in Japan regarding nuclear risks to food, after the Fukushima Daiichi disaster.⁶³ This article specifically examines the agreements concluded between China, whose food-safety record is notoriously poor, and the United States, the European Union and Japan.

1. THE US-CHINA FOOD-SAFETY AGREEMENT⁶⁴

The United States and China concluded a food-safety agreement on December 11, 2007.⁶⁵ The US-China Food-Safety Agreement serves to “establish a bilateral cooperative mechanism regarding food and feed safety”⁶⁶ through existing or future schemes of registration and certification,⁶⁷ strengthened and expedited information sharing,⁶⁸ and regulatory cooperation.⁶⁹

Article III sets out the reciprocal appearance of the Agreement, which serves to cover both export of products from China and products from the United States.⁷⁰ Article IV requires the both parties to engage in information-sharing so as to improve each party’s understanding of the other party’s regulatory systems, relevant laws and regulations, allocation of jurisdiction. Contrary to the non-binding and unspecific notification requirement under the INFOSAN,⁷¹ the US-China Food-

⁶² See *infra* Part III.1(1).

⁶³ See *infra* Part III.1(3).

⁶⁴ See Chenglin Liu, *The Obstacles of Outsourcing Imported Food Safety to China*, 43 CORNELL INT’L L.J. 249, 276–80 (2010), for a relevant discussion.

⁶⁵ Agreement Between the Department of Health and Human Services of the United States of America and the General Administration of Quality Supervision, Inspection and Quarantine of the People’s Republic of China on the Safety of Food and Feed, U.S.-China, Dec. 11, 2007 [hereinafter US-China Food-Safety Agreement], available at <http://www.state.gov/documents/organization/108850.pdf>; See Steve Suppan, *U.S.-China Agreement on Food Safety: Terms and Enforcement Capacity* (May 26, 2008), http://www.iatp.org/files/451_2_102837.pdf, for a general introductory note on the US-China Food-Safety Agreement.

⁶⁶ US-China Food-Safety Agreement, *supra* note 65, at art. I.

⁶⁷ *Id.* at Annex, § II.

⁶⁸ *Id.* at art. IV.

⁶⁹ *Id.* at art. V.

⁷⁰ *Id.* at art. III.1.

⁷¹ See Lin, *supra* note 2, at 645–47, 679–81, for more information on the notorious 2008 Chinese Melamine Contamination Problem which reveals the problems of INFOSAN.

safety Agreement stipulates a strict two-day notification rule for a broad range of conditions. Each party is required to notify the other of significant food-safety risks to public health, manufacturing conditions, recalls, and “other instances that involve imminent or significant danger to health, or the gross deception of consumers with regard to Covered Products” within two days of the discovery of the problems.⁷² Further information regarding notifications, such as contact information for the producer, exporter, distributor, or other entities concerned, shall be provided by each party within five days upon request from the other party.⁷³ The aim of Article V is to alleviate the previous difficulties faced by the United States when FDA officials tried to access Chinese facilities for on-site inspection.⁷⁴ In addition to bilateral training programs, registration and certification programs, and laboratory cooperation plans, Article V emphasizes the facilitation of foreign on-site inspection. The United States and China shall develop a streamlined process for cross-border on-site inspections, for example, issuing a letter of invitation for visa application within five days after receiving a request from the other party.⁷⁵ Such foreign inspection of food producers can be conducted “with or without providing advance notice” to the facilities concerned.⁷⁶

Equally important are the registration and certification systems set out in detail in the Annex to the Agreement.⁷⁷ Building on the existing Chinese registration and certification programs, the Agreement stipulates specific and detailed provisions regarding the effective implementation of strengthened registration and certification systems. Before the establishment of the Agreement, an estimated one-third of Chinese food exports came from non-registered food facilities, and only 12,000 to

⁷² US-China Food-Safety Agreement, *supra* note 65, at art. IV.3.

⁷³ *Id.*

⁷⁴ In 2007, Chinese authorities intentionally created obstacles to the FDA’s plan to inspect the producers of melamine-contaminated pet food by delaying the visa-issuing process. *See* SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, FOOD FROM CHINA: CAN WE IMPORT SAFELY? 7, n.10 (Oct. 4, 2007) (“[T]he Chinese Government delayed [sic] FDA’s visas so the [sic] when the American inspectors were finally allowed to visit the suspect plants, one had been bulldozed and the other chained with its equipment removed. In both cases, requests to view the shipment records of the firms in order to determine if other melamine laced vegetable proteins had been exported to the US were denied on the grounds that the records were in the possession of the local police and those files were confidential.”).

⁷⁵ US-China Food-Safety Agreement, *supra* note 65, at art. V.4.

⁷⁶ *Id.*

⁷⁷ *Id.* at art. V.2, Annex, § II. s

15,000 registered food factories were eligible to export food products.⁷⁸ Under the Agreement's registration system, the General Administration of Quality Supervision, Inspection and Quarantine/ Certification and Accreditation Administration of China (AQSIQ/ CNCA) shall "require that all Establishments of Designated Products for export to the United States register with AQSIQ/ CNCA."⁷⁹ Only food factories that meet US FDA Requirements can be registered. AQSIQ/ CNCA must also inform all the registered establishments of all applicable US FDA requirements, and monitor the establishments to ensure continuous compliance.⁸⁰ Furthermore, AQSIQ/ CNCA shall perform annual inspection of all registered facilities to ensure that they satisfy US FDA requirements.⁸¹ Failure to comply with US FDA requirements will result in revoked or suspended registration.⁸²

Under the Agreement's certification system, China's AQSIQ/ CNCA can issue a certificate containing a unique ID number that declares that the products comply with US FDA requirements.⁸³ For the secure and efficient transmission of electronic certificates, the United States and China should designate technical experts to develop a scheme that "avoids counterfeiting of certificates or the falsification of information."⁸⁴ Furthermore, AQSIQ shall facilitate periodic US FDA audits or reviews of the certification program.⁸⁵ On the basis of registration and certification information, the US FDA will make import-entry decisions about the covered food products, and as expressly specified, these decisions include such matters as "a reduction in the rate of examination."⁸⁶ If in possession of evidence that a product (covered by the Agreement) is unsafe, China's AQSIQ shall not permit the product to be exported to the United States of the product.⁸⁷ No such "voluntary

⁷⁸ GEOFFREY S. BECKER, CONG. RESEARCH SERV., RL 34080, FOOD AND AGRICULTURAL IMPORTS FROM CHINA 14 (Sept. 26, 2008), available at <http://www.fas.org/sgp/crs/row/RL34080.pdf>; There are approximately 448,000 food or feed establishments in China, almost 80% of which are "cottage industries" with no more than 10 employees. Drew Thompson & Hu Ying, *Food Safety in China: New Strategies*, GLOBAL HEALTH GOVERNANCE, Fall 2007, at 1, 5, available at http://www.ghgj.org/Thompson_and_Ying.htm.

⁷⁹ US-China Food-Safety Agreement, *supra* note 65, at Annex, § II, B.2.

⁸⁰ *Id.* at Annex, § II, B.1.

⁸¹ *Id.* at Annex, § II, B.4.

⁸² *Id.*

⁸³ *Id.* at Annex, § II, C.1.

⁸⁴ *Id.* at Annex, § II, C.2.

⁸⁵ *Id.* at Annex, § II, C.5.

⁸⁶ *Id.* at Annex, § II.2.

⁸⁷ *Id.* at Annex § II, D.8.

export prohibition” element exist in the current WTO or WHO regime.⁸⁸ The scope of covered food products is rather limited in the Agreement’s first phase, but subject to future expansion agreed to by the two parties.⁸⁹ In the first-phase implementation of the agreement, certificates are required for products with a high import-refusal rate and associated risks, specifically low-acid canned products or acidified foods, pet foods, ingredients of food and feed such as wheat gluten and rice protein, and all farmed seafood other than molluscan shellfish.⁹⁰

2. EU-CHINA MEMORANDUM OF UNDERSTANDING ON PRODUCT SAFETY

China is one of the EU’s largest trading partners in food.⁹¹ Products of Chinese origin have also accounted for the most intense food scares in the EU over recent years—345 safety alerts in 2009, 500 in 2008, and 355 in 2007—far exceeding those from Turkey, which is the EU’s second largest food trading partner.⁹² Aiming to promote common interests and enhance product and food safety in trading between the EU and China, the both sides signed the basic Memorandum of Understanding on January 16, 2006 to set up a framework for future communication and collaboration.⁹³ This cooperation framework, established by the Directorate General for Health and Consumers of the European Commission (DG SANCO) and China’s AQSIQ, has been the focal point for regular information exchanges and joint initiatives to

⁸⁸ Lin, *supra* note 2, at 665.

⁸⁹ US-China Food-Safety Agreement, *supra* note 65, at Annex, § I.

⁹⁰ *Id.* at Annex, § I, B.1.

⁹¹ Press Release, Europa Press Release RAPID, EU - China Memorandum of Understanding on Product Safety (Nov. 11, 2005), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/418&format=HTML&aged=0&language=EN&guiLanguage=en> (“In 2004, the EU imported over €2 billion worth of Chinese agricultural goods, food and processed food, while exporting over €1 billion worth of these products to China—almost triple the 1997 figure.”).

⁹² See HEALTH AND CONSUMERS DIRECTORATE-GENERAL OF THE EUROPEAN COMMISSION, THE RAPID ALERT SYSTEM FOR FOOD AND FEED (RASFF) ANNUAL REPORT 2009, at 66 (2010), *available at* http://ec.europa.eu/food/food/rapidalert/docs/report2009_en.pdf.

⁹³ Memorandum of Understanding on Administrative Co-operation Arrangements Between the European Commission’s Directorate General for Health and Consumer Protection (DG SANCO) and the General Administration of Quality Supervision, Inspection and Quarantine of the People’s Republic of China (AQSIQ), EU-China, Jan. 16, 2008, [hereinafter EU-China Product-Safety MoU], *available at* http://ec.europa.eu/consumers/safety/int_coop/bilateral_en.htm.

ensure the safety of both general consumer products and food or feed products.⁹⁴

In the area of food safety and SPS issues, the purpose of the EU-China Product Safety Memorandum of Understanding (MoU) is to establish a bilateral platform for SPS consultation channels, exchanges of SPS information or notifications, and “discussion and cooperation in the resolution of SPS issues” between the two sides.⁹⁵ According to Annex 2 of the MoU, entitled “Food Safety, Sanitary and Phytosanitary Issues,” the EU and China shall establish the “Joint Committee on Food Safety/SPS between SANCO and AQSIQ,” which will hold an annual plenary meeting to discuss all issues related to food safety.⁹⁶ In addition, the Technical Working Group meeting is to be held once a year, before the Joint Committee meeting.⁹⁷ Both the EU and China “will adequately support the working group so that it implements its work programme and reports back to the Joint Committee meeting within a suitable time period.”⁹⁸ Furthermore, to deepen mutual cooperation on food safety, the signatories will strengthen the existing two cooperation mechanisms, namely, an arrangement that promotes “cooperation on joint prevention of illegal action in the import and export of food” and a cooperation mechanism that operates “between both sides to improve the means of information concerning notifications of the Rapid Alert System for Food and Feed (RASFF).”⁹⁹ The MoU improves the RASFF alert mechanism by providing China, a major food-product provider, with instant access to the mechanism, so that Chinese authorities can notify the EU about Chinese product-safety cases in a timely manner.¹⁰⁰ The RASFF alert mechanism was more passive before the EU-China Product-Safety MoU, as no responsive measure would be taken until EU Member States’ discovery of unsafe food products at the border or when outbreaks occur on EU territory. The EU-China Product-Safety MoU allows China, an exporting country, to actively provide timely product-safety information and to facilitate the tracking of unsafe food products even before they

⁹⁴ See Alberto Alemanno, *The European Food Import Safety Regime Under a ‘Stress Test’: The Melamine Contamination of the Global Food Supply Chain*, 3 ERASMUS L. REV. 203, 213–15 (2010).

⁹⁵ EU-China Product-Safety MoU, *supra* note 93, Annex 2, para. 2.

⁹⁶ *Id.* at Annex 2, para. 3.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at Annex 2, para. 4.

¹⁰⁰ *EU/China Step Up Food Safety Cooperation*, PIGPROGRESS.NET (Nov. 19, 2008), <http://www.pigprogress.net/news/eu-china-step-up-food-safety-cooperation-2317.html>.

enter EU territory. Last, the two sides are responsible for establishing contact points whose function is to accelerate exchanges of information and notifications of incidents.¹⁰¹

3. JAPAN-CHINA FOOD-SAFETY MEMORANDUM OF UNDERSTANDING

Driven by the Chinese melamine-contaminated dairy products and pesticide-tainted dumplings cases, Japan and China entered into a memorandum on May 31, 2010 during a bilateral summit.¹⁰² The bilateral agreement, signed by the Ministry of Health, Labour and Welfare, Japan and AQSIQ, China, functions to restore consumer trust and upgrade the food safety of Chinese food products through regulatory cooperation and technical assistance.¹⁰³ Chinese Premier Wen Jiabao stated “Signing the food safety cooperation framework agreement offers the two countries a good chance to promote cooperation in food production and trade.”¹⁰⁴ Indeed, like most other food-safety agreements, the Japan-China Food-Safety MoU serves to strike a more delicate balance between food-safety protection and food-trade facilitation.

The scope of the Japan-China Food-Safety MoU covers food products, food additives, utensils, food packaging, and baby toys.¹⁰⁵ China and Japan have established a standing collaborative framework for bilateral exchanges and cooperation on food-safety issues, and have done so on the basis of two variables: (1) the rules under the SPS Agreement and (2) each signatory’s domestic laws and regulations.¹⁰⁶ The MoU highlights principles of scientific evidence, transparency, and regulatory consistency.¹⁰⁷ Moreover, the agreement goes beyond the SPS baseline and establishes more rigorously cooperative mechanisms. Pursuant to

¹⁰¹ EU-China Product-Safety MoU, *supra* note 93, at Annex 2, para. 5.

¹⁰² *China Signs Food Safety Agreement With Japan*, CHINA CSR (Feb. 1, 2010), <http://www.chinacsr.com/en/2010/02/01/7082-china-signs-food-safety-agreement-with-japan/>; Wang Yan, *Japan, China Discuss Food Safety*, CHINA DAILY (Feb. 11, 2010), http://www.chinadaily.com.cn/china/2010-02/11/content_9459637.htm.

¹⁰³ Memorandum Between Ministry of Health, Labour, and Welfare of Japan and the General Administration of Quality Supervision, Inspection and Quarantine of the People’s Republic of China on the Food-safety Promotion Initiative in China and Japan, Japan-China, May 31, 2010, ONE TREATY SOURCE [hereinafter Japan-China Food-Safety MoU], available at <http://www.mhlw.go.jp/stf/houdou/2r9852000006r22-img/2r9852000006r5t.pdf>.

¹⁰⁴ Helena Bottemiller, *Japan, China Release Food Safety Agreement*, FOOD SAFETY NEWS (June 3, 2010), <http://www.foodsafetynews.com/2010/06/japan-china-release-food-safety-agreement/>.

¹⁰⁵ Japan-China Food-Safety MoU, *supra* note 103, at pmb1.

¹⁰⁶ *Id.* at art. 1.

¹⁰⁷ *Id.*

Article 2, the parties agree to hold annual ministry-level food-safety meetings to discuss key matters, evaluate implementation, exchange information, and investigate food-safety incidents.¹⁰⁸ Article 3 sets out a fundamental requirement of enhanced bilateral information sharing pursuant to which both parties promptly exchange information regarding relevant laws, regulations, and standards;¹⁰⁹ relevant statistics such as inspections or registrations of imports and exports;¹¹⁰ means of supervision and inspection;¹¹¹ food-safety measures;¹¹² comprehensive information about food-safety incidents, in particular cross-border ones;¹¹³ safety certification procedures and a registration program for corporations and other facilities;¹¹⁴ and other information upon agreement.¹¹⁵ The two countries will dispatch technical experts when necessary and hold symposiums in order to promote information exchange.¹¹⁶ The parties shall also ensure the correctness of the information.¹¹⁷

The two countries require their respective food-exporting producers, manufacturers, processors, and retailers to comply with the food-safety or health regulations and standards of importing countries.¹¹⁸ When necessary, or when concerns are raised over the safety of food imports, officials in each signatory country can inspect the other signatory country's food-related facilities with advance consent obtained via diplomatic channels; the two sides shall cooperate to facilitate such on-site inspections.¹¹⁹ To further deepen the framework-style agreement, China and Japan will form an action plan at ministerial meetings to evaluate the implementation and progress of the agreement and to settle concerns over food-safety problems.¹²⁰ The first bilateral Action Plan (signed on May 31, 2010 at the first ministerial meeting) focuses on

¹⁰⁸ *Id.* at art. 2.

¹⁰⁹ *Id.* at art. 3(1).

¹¹⁰ *Id.* at art. 3(2).

¹¹¹ *Id.* at art. 3(3).

¹¹² *Id.* at art. 3(4).

¹¹³ *Id.* at art. 3(5)–(6).

¹¹⁴ *Id.* at art. 3(7).

¹¹⁵ *Id.* at art. 3(8).

¹¹⁶ *Id.* at art. 4.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

specific food-safety issues of particular concern to the signatories.¹²¹ To facilitate implementation of information-exchange mechanisms under the MoU, the signatories will establish a contact point for information exchange and assign a corresponding official in charge of relevant events.¹²² When any change is made regarding this contact point, the other party should be notified in a timely manner.¹²³

Both parties held two working meetings during the 2010 fiscal year to negotiate and agree upon specific issues of concern to both China and Japan.¹²⁴ During these meetings, participants addressed China's concerns regarding Japanese seafood with heavy metals (*e.g.*, arsenic, lead, or cadmium), processed snacks and seafood with organisms (*e.g.*, *E. coli* or *Listeria*) beyond tolerance levels, sugar-containing processed snacks with excessive food additives (*e.g.*, sorbitol, Gardenia Yellow, or Sunset Yellow), and prohibited additives (*e.g.* thin gold leaves) in Japanese Shochu.¹²⁵ During the same meetings, participants addressed Japanese concerns regarding Chinese seafood with organisms over tolerance levels, excessive levels of animal drugs (*e.g.*, Ractopamine, Salbutamol, Terbu-talin or Clenbuterol) in pork products, and Chinese scallions with high pesticide residues (*e.g.*, aldicarb sulfoxide).¹²⁶ Both Japan and China have reaffirmed their obligation to facilitate on-site inspection and investigation for the purpose of confirming the progress on the above matters.¹²⁷

When food safety problems occur with regard to food-product imports or exports, the responsible party will provide facts and other relevant information promptly to the other side, as per the prescription of Article 3(5).¹²⁸ Relevant information includes the cause of such problems, such as pathogenic organisms, poisonous materials, or other hazardous residues; details of products, such as name, origin, producer, marks on package, ingredients, and production date; entry date and port of import/export, distribution status of the products, and ingredients if necessary;

¹²¹ Japan-China Food-Safety 2010 Action Plan, Japan-China, May 31, 2010, ONE TREATY SOURCE, available at <http://www.mhlw.go.jp/stf/houdou/2r9852000006r22-img/2r9852000006r5z.pdf>.

¹²² Japan-China Food-Safety MoU, *supra* note 103, at art. 2.

¹²³ The contact point in Japan is the Ministry of Health, Labour and Welfare, Department of Food Safety; the Chinese contact point is AQSIQ Bureau of Import and Export Food Safety.

¹²⁴ Japan-China Food-Safety 2010 Action Plan, *supra* note 121.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Japan-China Food-Safety MoU, *supra* note 103, at art. 5.

methodology of inspection and results; and relevant certificates.¹²⁹ The other party will investigate such issues and deliver the results without delay. Both of the parties will make efforts toward swift settlement of the problems through consultations and investigations at the working-level, with a focus on discovering the cause of the problem and evaluating possible preventive measures.¹³⁰

B. SPS-PLUS ELEMENTS AS A COMMON REGULATORY PRACTICE

Clearly, there is an emerging practice whereby countries enter into bilateral agreements to address highly specific food-safety problems with increasingly rigorous cooperative tools, rights and obligations that extend beyond the baseline of the SPS Agreement.¹³¹ This type of practice reflects the recent high frequency of food scares that have made headlines all over the world. The safety of imported food products is of increasing importance to governments as they are constantly under public criticism for their lack of a satisfactorily responsive regulatory system capable of combating threats to import safety and of restoring consumers' confidence. As negotiating and concluding a comprehensive multilateral treaty with meaningful depth of cooperation and reasonable effectiveness of outcomes can be extremely time-consuming and politically challenging, countries turn to easier and quicker ways such as bilateral memorandums or accords. This "fast-food approach" to treaty-making seems to be a pragmatic reaction that enables governments, especially after a salient food scare, to demonstrate to the public their commitment to tackling threats to imported food. From the examples above, we can observe several important trends in the development of recent food-safety regulations related to bilateral agreements. These bilateral agreements exhibit shared features which are "SPS-plus" in nature. "SPS-plus" describes legal instruments that are signed by countries and that include *more detailed or demanding provisions* than the multilateral rules under the SPS Agreement, or that contain other regulatory or cooperative elements *beyond the scope* of the SPS Agreement:¹³² (1) a shift from response-oriented border inspection to a

¹²⁹ *Id.* at art. 3(5).

¹³⁰ *Id.* at art. 5.

¹³¹ See JOANNE SCOTT, *THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES: A COMMENTARY* (2007), for a comprehensive analysis of the SPS Agreement.

¹³² The provisions of the SPS Agreement seek to prevent countries from taking SPS measures to unjustifiably restrict trade (through requiring scientific evidence and risk assessment) so as to

more prevention-based mechanism; (2) deeper cooperation in a more institutionalized apparatus; and (3) expansion in breadth and depth of information-sharing obligations.

First of all, the bilateral food-safety agreements above exhibit a shift from response-oriented border inspection to a more preventive approach. The purpose is to prevent unsafe food or feed products from entering the given importing country. For instance, under the US-China Food-Safety Agreement, only registered food producers can export their products to the United States, and these producers can register with the Chinese authorities only when they satisfy the US FDA's safety requirements.¹³³ China's AQSIQ/ CNCA must inform all the registered facilities of relevant FDA standards and rules, and must ensure that they comply with the requirements.¹³⁴ China must also prohibit exports that involve products that are non-compliant with FDA standards.¹³⁵ In addition, the United States can conduct on-site inspection of Chinese food producers without having to give them prior notice, and can disqualify their eligibility to export if violations are found.¹³⁶ Japan and China have also agreed upon on-site inspection of facilities in each other's territory when necessary or when concerns are raised over the safety of food imports, though with advance consent.¹³⁷ According to the EU-China Product-Safety MoU, both of the sides are to strengthen the

minimize the market-access implications of regulatory autonomy. In this sense, the term "SPS-plus" might appear somewhat counterintuitive to some trade law scholars for it refers to pro-health rather than pro-trade expansion of rules here in this paper. From the perspective of trade liberalization, some may argue that pro-health rules that may loosen trade-centered obligations are better framed as "SPS-minus," while stricter trade-centered requirements (e.g. demanding harder scientific evidence) "SPS-plus." The case of "TRIPS-plus" is illustrative here. However, the author is of the view that the SPS Agreement, though a trade agreement under the WTO regime, aims at striking a balance between trade and health (leave aside the issue whether the balance is properly established or maintained), as set out in its preamble. Hence, "SPS-plus" can refer to pro-trade (or "stricter" from the WTO's perspective) rules that require specific and compelling scientific evidence prior to the implementation of any health measures; "SPS-plus" can also refer to (additional) pro-health cooperative mechanisms such as a certification program, Hazard Analysis Critical Control Point preventive requirements, or a rapid alert system of information exchange. Despite its pro-trade or pro-health nature, "SPS-plus" is defined as legal instruments that include *more detailed or demanding rules* than those under the SPS Agreement, or that contain additional regulatory or cooperative elements *beyond the scope* of the SPS Agreement.

¹³³ US-China Food-Safety Agreement, *supra* note 65, at Annex, § II, B.2.

¹³⁴ *Id.* at Annex, § II, B.1.

¹³⁵ *Id.* at Annex, § II, D.8.

¹³⁶ *Id.* at Annex, § II, B.4.

¹³⁷ Japan-China Food-Safety MoU, *supra* note 103, at art. 4.

joint prevention of illegal actions in the import and export of food.¹³⁸ Also, China can have access to the EU RASFF alert system and the Chinese authorities will notify the EU of unsafe EU-bound food products from China before they reach the EU border.¹³⁹

The shift from border-inspection mechanisms to preventive approaches has an important implication: In contrast to the SPS Agreement's default setting, exporting countries in the bilateral food-safety agreements are to bear more of the responsibility and the cost of ensuring food safety than previously. The rules under the SPS Agreement imply that importing countries are those that bear the cost of ensuring the safety of food products because the customary practice of discovering unsafe food products has rested on border inspection. In the SPS Agreement, countries are responsible for performing and implementing food-safety regulations and standards whose function is to protect the countries' own citizens. The countries can determine their own levels of protection and design their own health measures, provided that these levels and measures are warranted by scientific evidence.¹⁴⁰ The importing countries therefore bear the cost of ensuring the safety of imported food products at the border. Before food or feed products actually arrive at the border of importing countries, the exporting countries use no regulatory tools to inform the importing country of the exported products' sanitary condition. However, the US-China, EU-China, and Japan-China agreements express an intention to shift the burden of ensuring food safety, at least partially, to exporting countries by requiring registration, voluntary export bans, certificates, or on-site inspection. The aim of such measures is to prevent food hazards from permeating borders in the first place.

Second, states are institutionalizing their bilateral cooperation. For example, the EU-China Product-Safety MoU asks the two sides to establish the Joint Committee on Food Safety/ SPS and Technical Working Group to hold annual discussions on treaty implementation and further cooperation.¹⁴¹ Japan and China are to hold ministry-level food-safety meetings on an annual basis to evaluate treaty effectiveness, discuss crucial issues, and investigate important food-safety cases.¹⁴²

¹³⁸ EU-China Product-Safety MoU, *supra* note 93, at Annex 2, para. 4.

¹³⁹ *Id.* at Annex 2, para. 4; *see also* Phillips, *supra* note 100.

¹⁴⁰ SPS Agreement, *supra* note 22, at art. 2.2, 3.3, 5.1.

¹⁴¹ EU-China Product-Safety MoU, *supra* note 93, at Annex 2, para. 3.

¹⁴² Japan-China Food-Safety MoU, *supra* note 103, at art. 1.

Such institutional developments are not part of the SPS baseline rules either. An institutionalized platform better helps states implement the treaty, investigate problems, negotiate settlements, and so on. As we can see from the three agreements above, states also intend to discuss in annual meetings the opportunity to deepen and broaden their cooperation and go beyond existing commitments in the near future. Through regular and in-depth communication between government officials, such a platform further secures long-term partnership and enhances treaty effectiveness.¹⁴³ Therefore, institutionalized apparatus collaboration facilitates deeper and more effective cooperation in food-safety governance.

Third, recent bilateral food-safety agreements have tended to impose broader and more serious obligations on signatories regarding information sharing and notification. The only transparency requirement of the SPS Agreement focuses on importing countries' SPS measures, including any relevant laws, regulations, procedures, standards, inspection methodologies, or risk-assessment processes.¹⁴⁴ WTO Members such as the United States, China, the European Union, and Japan shall publish promptly all of their SPS rules for the benefit of interested Members.¹⁴⁵ WTO Members shall notify one another of changes in their respective SPS measures and provide one another with information detailing those measures.¹⁴⁶ To ensure the availability of information about SPS measures, each Member shall establish an "enquiry point" to answer questions with regard to SPS measures such as production and quarantine treatment, pesticide tolerance, food-additive approval procedures, or appropriate levels of SPS protection.¹⁴⁷ Such transparency (or information-sharing) requirements apply merely to the importing country's laws and regulations. Possible internationally significant food-borne hazards or newly discovered methods of inspection or treatment for certain food-borne organisms or diseases, however, are *not* subject to the SPS transparency requirements.

On the other hand, under the WHO regime, although the current INFOSAN information-sharing framework encourages notification of

¹⁴³ See generally Emanuel Adler, *Seizing the Middle Ground: Constructivism in World Politics*, 3 EUR. J. INT'L REL. 319 (1997); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1836–38 (2002).

¹⁴⁴ SPS Agreement, *supra* note 22, at art. 7 & Annex B.

¹⁴⁵ *Id.* at Annex B.1.

¹⁴⁶ *Id.* at art. 7.

¹⁴⁷ *Id.* at Annex B.3.

food safety incidents, it has not produced fruitful results.¹⁴⁸ The INFOSAN presents only non-binding requirements, that is, countries are merely “expected” to share information about food-safety problems.¹⁴⁹ In effect, countries usually have different considerations, either political or economic, which promote the delay or concealment of internationally significant public-health information.¹⁵⁰ In addition, the multilateral nature of INFOSAN has negative effects on the organization’s effectiveness—as countries want to minimize the self-harm that would likely occur were they to notify another country of their own domestic food-borne hazards.¹⁵¹ For this reason, countries may tend to use the bilateral and confidential information-exchange mechanism regarding foodborne illness incidents (*e.g.*, FDA confidential agreements with various countries). Both confidentiality and a bilateral setting encourage countries to engage in rapid exchanges of genuine information. Therefore, recent bilateral food-safety agreements have tended to impose serious obligations on signatories regarding prompt sharing of food-safety incidents. The US-China accord even specifies the period of time within which a party has to notify other parties.¹⁵²

C. A STOPGAP OR AN ALTERNATIVE? EXPERIMENTAL LAWMAKING IN SEARCH OF OPTIMAL INSTITUTIONAL DESIGN

SPS-plus is a common feature of recent bilateral-cooperation designs. Nevertheless, countries are still experimenting in international food-safety governance. We can observe such experimental approaches from the specific and limited scopes covered by the bilateral agreements. In the US-China Food-Safety Agreement, the bilateral rules apply only to specific covered products.¹⁵³ In the Japan-China MoU, the initial focus

¹⁴⁸ See Lin, *supra* note 2, at 678–81.

¹⁴⁹ Workshop on Public Health: International Trade and Domestic Legal Issues, Taipei, Taiwan, Oct. 16–17, 2008, *Remarks by Professor Chang-Fa Lo*.

¹⁵⁰ See Workshop on Public Health: International Trade and Domestic Legal Issues, Taipei, Taiwan, Oct. 16–17, 2008, *Who Moved Our Milk? A Primer on the Domestic and International Legal Issues in the Contaminated Milk Case in China; China Milk Scandal Widens, More Recalls*, CANBERRA TIMES, Oct. 2, 2008, <http://tinyurl.com/27kb89m>.

¹⁵¹ See, *e.g.*, Michelle Forrest, *Using the Power of the World Health Organization: The International Health Regulations and The Future of International Health Law*, 33 COLUM. J.L. & SOC. PROBS. 153, 166–67 (2000).

¹⁵² See *supra* Part III.1(1).

¹⁵³ See *supra* Part III.1(1).

was on products of significant concern to both of the parties.¹⁵⁴ Although these two agreements show that parties will expand their focus to cover more products and to strengthen rules, a statement that these bilateral agreements will grow into full-fledged frameworks of comprehensive cooperation is not conclusive. Indeed, many states want food safety, but they are not quite sure which regulatory design would promote the highest and most practical level of food safety. This lack of convergence reflects the complex nature of food-safety issues,¹⁵⁵ due to the rapid advances in food technology, uncertainty about scientific findings,¹⁵⁶ sensitive consumer-industry relationships,¹⁵⁷ diverging development agendas,¹⁵⁸ and difficult international politics.¹⁵⁹ While it is fair to say that states have gravitated toward bilateral approaches as a pragmatic stopgap for now, we do not know if bilateralism will be the rule of the game. States are nonetheless undertaking experimental lawmaking in search of optimal institutional designs for global food-safety governance.

IV. MULTILATERALISM V. BILATERALISM IN GLOBAL FOOD-SAFETY GOVERNANCE

Food-borne hazards and illnesses have in recent years become a serious problem of global concern. When facing such a global problem, many usually assume that a universal and uniform legal system would be an ideal approach to achieving collective goals and to alleviating global evils for states in an interdependent world.¹⁶⁰ According to Blum, “[t]he lodestar guiding the movement toward universal legislation over the past 150 years or so has been the increasingly dominant assumption that global problems require global solutions.”¹⁶¹ As just noted, many trans-boundary issues such as climate change and infectious diseases generally

¹⁵⁴ See *supra* Part III.1(3).

¹⁵⁵ See Lin, *supra* note 2, at 647, 662, 688.

¹⁵⁶ See, e.g., Livermore, *supra* note 19.

¹⁵⁷ See Gillian K. Hadfield et al., *Information-Based Principles for Rethinking Consumer Protection Policy*, 21 J. CONSUMER POL’Y 131, 136 (1998); Michael J. Trebilcock, *Rethinking Consumer Protection Policy*, in INTERNATIONAL PERSPECTIVES ON CONSUMERS’ ACCESS TO JUSTICE 68, 68–98 (Charles E. F. Rickett & Thomas G. W. Telfer eds., 2003).

¹⁵⁸ See Prévost & Matthee, *supra* note 20.

¹⁵⁹ See, e.g., Lin, *supra* note 2, at 681–84; see Prévost & Matthee, *supra* note 20.

¹⁶⁰ See generally PHILIP ALLOTT, TOWARDS THE INTERNATIONAL RULE OF LAW: ESSAYS IN INTEGRATED CONSTITUTIONAL THEORY 453–63 (2005); see generally also PHILIP ALLOTT, *supra* note 7; see also Gostin, *supra* note 7.

¹⁶¹ Blum, *supra* note 4, at 348.

require real collective actions by the entire global community. A widely held assumption is that, in the absence of multilateral efforts, states would have great difficulty in tackling with such global problems.¹⁶²

Likewise, the global food-safety problem needs a global solution, but this does not necessarily require a multilateral legal regime—which has uniform rules and gathers most of the states into a single pact—to make food-safety governance work. There are multiple solutions to this problem. Blum challenges the traditional intuitive and categorical assumption of multilateral treaties' superiority over bilateral treaties, stating that “the supposed benefits of multilateral treaties are often not as great as advertised or expected, and the effects of bilateral treaties are not necessarily as limited as universalists fear or unilateralists hope.”¹⁶³ Multilateral treaties do not necessarily perform better in terms of probable compliance with obligations, efficiency of bargaining and negotiation, and effectiveness of their operation. The overall effectiveness of multilateralism and bilateralism is rather issue-oriented.¹⁶⁴ One has to consider the workings of multilateral and bilateral treaties in different settings—for example, whether the parties are playing the coordination game or cooperation game, collaborating on issues involving common goods or club goods, and regulating areas with positive or negative externalities.¹⁶⁵

Drawing upon Blum's insights, the following section will first unpack the global food-safety problem to find out whether it is a public or club good and whether its governance is a coordination or cooperation game. In the second section, this article will draw on the previous analysis regarding the three aforementioned bilateral food-safety agreements in order to evaluate the strengths and weaknesses of bilateral and multilateral approaches in the governing of global food safety issues.

¹⁶² Many hold that for the threat to public health is beyond the unilateral power of states, the protection of public health requires multilateral cooperation. *See, e.g.*, Fidler, *supra* note 33, at 1097–98.

¹⁶³ Blum, *supra* note 4, at 325.

¹⁶⁴ *See generally id.*

¹⁶⁵ *Id.* at 354–62.

A. UNPACKING THE GLOBAL FOOD-SAFETY PROBLEM

1. FOOD SAFETY: PUBLIC OR CLUB GOOD?

Samuelson's classic analysis *The Pure Theory of Public Expenditure* in 1954 defines "public goods" as having the key characteristics of "non-excludability" in supply and "non-rivalry" in consumption.¹⁶⁶ Non-excludability means that one is unable to exclude another from enjoying the same benefits of the good. Non-rivalry means that one's consumption does not exhaust the good.¹⁶⁷ Conventional wisdom has long held that, owing to these two unique characteristics, one is incentivized to "free-ride"—that is, one tries to secure the benefits of a public good without paying for it.¹⁶⁸ Because of the prevalence of the free rider problem, the private provision of public goods is very unlikely.¹⁶⁹ In contrast, private goods are characterized as excludable in supply and "rivalrous" in consumption.¹⁷⁰ Another term, "club goods," can be defined as "public goods *sans* non-excludability."¹⁷¹ That is, a club good is one that is produced within a membership-based organization or group (*i.e.*, the club) and that, regarding consumption, is non-excludable for the members but excludable for non-members.¹⁷² As food safety is intertwined with international trade and poses global concerns, it is clearly not a private good. Yet is the enhancement of global food safety a public good or a club good?

(a) *The "Public Good" Side of the Case*

A few decades ago, food production and consumption were mostly local, and import safety was not a point of emphasis in

¹⁶⁶ Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. STAT. 387, 387–89 (1954).

¹⁶⁷ *Id.*

¹⁶⁸ Oliver Kim & Mark Walker, *The Free Rider Problem: Experimental Evidence*, 43 PUB. CHOICE 3, 3–8 (1984).

¹⁶⁹ PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 713 (12th ed. 1985).

¹⁷⁰ Bruce L. Benson, *Are Roads Public Goods, Club Goods, Private Goods, or Common Pools?* 2 (manuscript), available at http://www.coss.fsu.edu/economics/sites/coss.fsu.edu/economics/files/users/bbenson/roads_public.pdf.

¹⁷¹ Patrick McNutt, *Public Goods and Club Goods*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* 927, 929 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000), available at <http://encyclo.findlaw.com/0750book.pdf>.

¹⁷² Benson, *supra* note 170, at 3.

international health law. The term global food safety was unknown. The rapid development of food science and transportation technology,¹⁷³ the establishment of the WTO,¹⁷⁴ and the formulation and growth of multinational food corporations¹⁷⁵ have greatly changed the pattern of food production and consumption.¹⁷⁶ Consequently, foodborne hazards have gone global. A food or feed product can be manufactured in one location with raw materials from different multiple regions and exported into the global supply chain, which further transports the product to distant places for consumption or more processing.¹⁷⁷ Take the melamine-contaminated dairy products from China for example.¹⁷⁸ Cream manufactured in the United States can contain melamine-contaminated milk powder from China, fresh milk from Canada, and sugar from Mexico. Such cream can go on to be imported and used by other companies in different countries to make coffee, cookies, candies, and many other food products.¹⁷⁹ In this sense, indeed, food-safety incidents in one country can, along the global supply chain, pose substantial risks to other states and amplify the interdependence of national authorities in addressing such risks.

In light of the global nature of food-related problems, it is appropriate to view the enhancement of food safety as a *public good* from a macro perspective. The management of food safety is directly relevant to the whole international community. Even countries having vigorous food regulatory systems at the domestic level cannot ensure overall food safety without collective action.¹⁸⁰ Within the global trading system, states cannot avoid suffering from the insufficiency and the ineffectiveness of one another's food-safety regulations. Likewise, if

¹⁷³ See Barry M. Popkin, *Technology, Transport, Globalization and the Nutrition Transition Food Policy*, 31 FOOD POL'Y 554, 554–55, 558–62 (2006).

¹⁷⁴ WORLD AGRICULTURE: TOWARDS 2015/2030: AN FAO PERSPECTIVE 232–62 (Jelle Bruinsma ed., 2003).

¹⁷⁵ See WHO Commission on Social Determinants of Health, *Globalization, Food and Nutrition Transitions*, at 10–11, 26–32 (Aug. 23, 2007), available at http://www.who.int/social_determinants/publications/globalization/en/.

¹⁷⁶ Lin, *supra* note 2, at 641–43.

¹⁷⁷ Gangahar, *supra* note 1, at 25. See generally Yach & Bettcher, *supra* note 29, for a discussion of the effects of globalization on public health issues.

¹⁷⁸ For a detailed analysis, see Lin, *supra* note 2, at 645–49.

¹⁷⁹ Lin, *supra* note 2, at 649.

¹⁸⁰ See Lawrence O. Gostin, *Public Health Law in a New Century: Part I: Law as a Tool to Advance the Community's Health*, 283 JAMA 2837, 2838 (2000); TRACEY EPPS, INTERNATIONAL TRADE AND HEALTH PROTECTION: A CRITICAL ASSESSMENT OF THE WTO'S SPS AGREEMENT 63–64 (2008); Lin, *supra* note 2, at 660.

overall food-safety governance is elevated at the global level, states cannot be blocked from enjoying the ensuing benefits. Indeed, deeply intertwined with the rapidly expanding international trade in food, food-safety problems and solutions, just like the free flow of food products, potentially pose positive and negative externalities to numerous states.

(b) The “Club Good” Side of the Case

In some circumstances, however, the promotion of food safety can be akin to a club good between certain states. For example, the United States imports 80% of its domestically consumed (rather than processed and re-exported) seafood.¹⁸¹ China is the largest exporter of seafood by volume to the United States, particularly shrimp and catfish products, which are two of the most consumed seafood products in the United States.¹⁸² China depends on the revenues from its US-bound exports of seafood, which are contingent on US food-safety regulations. The United States government has an interest in ensuring the safety and quality of food products, either domestically manufactured or imported, to satisfactorily respond to consumer needs. In this sense, Chinese seafood qualifies as a more limited good for the club formed by China and the United States. The two states are much more concerned than countries outside this club with the safety of a specific food product: Chinese seafood. Although actions taken by China and the United States may yield some (probably positive) externalities (*i.e.*, other states may benefit from the improved safety conditions of Chinese seafood), the incentives compelling China and the United States to consider these improvements would be strong enough to result in the two states' collaboration in making the improvements a reality. Free riding is largely absent here. This pattern applies in the same way to other situations where specific products are of particular importance to specific countries or regions.

¹⁸¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-873, FOOD SAFETY: AGENCIES NEED TO ADDRESS GAPS IN ENFORCEMENT AND COLLABORATION TO ENHANCE SAFETY OF IMPORTED FOOD (2009).

¹⁸² See *Chinese Seafood Imports: Testimony Before U.S. and China Economic and Security Review Commission* (April 25, 2008), available at <http://www.fda.gov/NewsEvents/Testimony/ucm115243.htm> (statement of Don Kraemer, Deputy Dir. of Office of Food Safety, Ctr. for Food Safety and Applied Nutrition, U.S. Food and Drug Admin.).

2. HARNESSING GLOBAL FOOD SAFETY: A COORDINATION OR COOPERATION GAME?

A cooperation game is best described as the prisoner's dilemma. Each player has strong incentives to defect, although mutual cooperation provides the largest overall benefits. States strive to locate an equilibrium of collaboration. Extra pulling forces, such as an enforcement mechanism, are needed to make states in the prisoner's dilemma cooperate (*i.e.*, to secure and stabilize the equilibrium).¹⁸³ Conversely, in a coordination game, states' interests in a specific issue converge on one or more focal points where "the equilibrium of reciprocal movements is self-enforcing."¹⁸⁴ When an equilibrium emerges in a situation where the states have a common interest, they tend to be willing to cooperate with each other regarding this interest—and this willingness is unaccompanied by a pronounced incentive to defect.¹⁸⁵

(a) *At the Multilateral Level: A "Coordination Game" Has Yet to Come*

At first glance, regulating global food safety seems to be a coordination game—countries should have common goals and be willing to collaborate. However, states' interests in global food-safety governance do not readily converge at any points of equilibrium. As we can see from the numerous controversial WTO SPS cases on apples,¹⁸⁶ salmon,¹⁸⁷ hormone-treated beef,¹⁸⁸ and genetically modified organisms,¹⁸⁹ countries simply do not have a common understanding

¹⁸³ See Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 599 (2005). See generally Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes et al. eds., 2002).

¹⁸⁴ Blum, *supra* note 4, at 354.

¹⁸⁵ Blum, *supra* note 4, at 354–55.

¹⁸⁶ See, e.g., Denise Prévost, *What Role for the Precautionary Principle in WTO Law After Japan-Apples?*, ECOLOGICAL POL'Y & L.: J. TRADE & ENV'T STUD., June 2005, at 1, 7.

¹⁸⁷ See, e.g., Andrew P. Thomson, *Australia-Salmon and Compliance Issues Surrounding the SPS Agreement: Sovereign Acceptance and Measure Adaptation*, 33 L. & POL'Y INT'L BUS. 717 (2002).

¹⁸⁸ See, e.g., Mitsuo Matsushita, *Human Health Issues in Major WTO Dispute Cases*, 4 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 1 (2009).

¹⁸⁹ See, e.g., Caroline Henckels, *GMOs in the WTO: A Critique of the Panel's Legal Reasoning in EC-Biotech*, 7 MELBOURNE J. INT'L L. 278 (2006).

regarding proper levels of protection, scientific evidence, precautionary approaches, or even the most basic approaches to food safety itself. Furthermore, some developing countries are usually more concerned with food security (to feed the people first) rather than food safety. In this situation, states cannot easily reach a multilateral consensus, much less negotiate, conclude, sign, and ratify a comprehensive multilateral treaty. Therefore, global food safety at the international level is not a coordination game, yet.

At the international level, states are facing neither a coordination game nor a cooperation game for three reasons: the science behind every stage of food production keeps changing, as does consequently the food production itself; states differ greatly from one another regarding their perceptions of food-related risks, as much of the science on these risks remains inconclusive or vague; and states have different development agendas, where developing countries may be more concerned with food security while developed countries food safety. National authorities, although in pursuit of food safety at the global level, are actually in need of regulatory experimentation for the time being.

(b) In Certain Contexts: A “Cooperation Game”

In certain contexts, states can be facing a cooperation game, a (repeated) prisoner’s dilemma game. When states are deeply concerned with specific food-safety issues, such as the safety of an individual product, an outbreak notification, a certification program, or on-site audit or inspection arrangements, they may be facing a cooperation game. Consider the following scenario as an example: country A is anxious about the safety of beef and beef products produced in country B. Domestic pressures from consumer groups and the meat industry in country A can lead to stringent border inspection or other health measures imposed on beef imports from country B (entailing substantial administrative costs for country A). While country B is not interested in greatly leveling up its beef regulation and related quality controls (incurring for country B significant administrative costs), both country B and its beef industry have a commercial stake in their beef products destined to country A. A holistic view of this game shows that the safety of imported beef is country A’s goal, while relatively unimpeded market access to country A is country B’s target. Both country A and country B stand to benefit from cooperation with each other. For country A, successful cooperation translates into no expensive heightened border

measures and no unduly unsafe beef. For country B, successful cooperation translates into secure export revenue stemming from elevated beef safety. However, if the game is just a one-shot deal, the temptation to defect is high. For country A, its defection would translate into public- and industry-pleasing strict health measures. For country B, its defection would translate into cost-saving lax food-safety regulations and would, in this sense, satisfy the domestic beef industry. Therefore, countries A and B may wish to arrive at a balanced collaborative effort by entering into a bilateral agreement. A bilateral regime stipulating specific rules for a specific matter helps prolong the shadow of the future, and maintains an official channel through which the two signatories can either communicate with each other or at least apply political pressure on the other, thereby further stabilizing the collaborative relationship. It should be noted that states face various food-safety issues that depend on the particular context products, geographical regions, legal systems, and so on. A cooperative agreement dealing with specific problems thus needs great flexibility to accommodate the affected states' concerns. That is why different levels and types of risk regulation and cooperative tools can be seen in the bilateral agreements discussed above.

Last, it should be noted that the bilateral level of the game is not irrelevant to food-safety governance at the multilateral level. As previously observed, states need experimentation in search of the optimal structure and content (*i.e.*, the focal points) for global food-safety governance. What they undertake and learn in the bilateral settings definitely sheds light on the states' possible future lawmaking at the multilateral level. The abovementioned bilateral food-safety pacts between major players in the global economy are part of this ongoing experimentation.

B. A MULTILATERAL OR A BILATERAL APPROACH TO GLOBAL FOOD SAFETY?

As this article has noted, a global solution is key to addressing the global food-safety problem, but the global nature of the solution does not necessarily lead to a multilateral approach. Blum proffers a typology of issue areas on the compliance, efficiency, and effectiveness that characterize different situations where bilateralism and multilateralism

have different roles to play.¹⁹⁰ Building upon Blum's theory, this paper aims at digging further into the root of the global food safety problem. By unpacking and analyzing the global food-safety problem, this article here examines two regulatory problems and the respective multilateral and bilateral solutions available to states seeking to better their governance.

Global food safety presents two different types of regulatory problems. The first problem typically entails a problem-solving approach whose usual target is a given set of specific regulatory symptoms stemming from, for example, a given food product and whose usual goal is immediate regulatory returns. This is the symptomatic problem. Such specific food-safety problems and approaches can be framed as a cooperation game over club goods. The bilateral approach is particularly effective in coping with this first type of problem.¹⁹¹ The second type of problem centers on states' fundamental, underlying public-health conditions, and thus, favors a universal, long-term approach.¹⁹² The governance of this problem—the root problem—involves public goods, although the approaches to collaboration among states here do not rank as a coordination game. To cope with the second type of problem (the root problems),¹⁹³ states could consider a multilateral treaty (probably a framework-protocol approach) or in some situations, a bilateral-treaty network,¹⁹⁴ which would quite possibly be a promising start, but subject to the development of the game.

The next section discusses the respective roles that the bilateral and multilateral approaches could play in the governance of global food safety.

¹⁹⁰ See Blum, *supra* note 4.

¹⁹¹ The US-China Food-Safety Agreement, EU-China Product-Safety MoU, and Japan-China Food-Safety MoU discussed previously basically fall within the scope of such bilateral approach.

¹⁹² For example, Gostin calls for a "Framework Convention on Global Health" in order to meet the basic public health needs of world population in various fundamental areas. See Lawrence O. Gostin, *A Proposal for a Framework Convention on Global Health*, 10 J. INT'L ECON. L. 989 (2007).

¹⁹³ *Id.*

¹⁹⁴ In some cases a multi-bilateral treaty network can be practically as effective as a multilateral treaty. While a multilateral framework on food safety is not foreseeable in the near future, a multi-bilateral treaty network may be desirable. See, e.g., Lo, *supra* note 17.

1. THE ROLES OF THE BILATERAL APPROACH TO THE “SYMPTOMATIC” PROBLEM

(a) Flexibility

For the symptomatic problem, the bilateral approach has many advantages. First, bilateralism better ensures necessary flexibility¹⁹⁵ for regulating specific food products. With limited administrative resources, it is sometimes necessary for states facing different problems to prioritize certain concerns with particular importance or urgency. In contrast to a multilateral regime that requires consensus of opinion among a relatively large number of states, a bilateral agreement chiefly responds to two sets of preferences and can more easily be tailored to accommodate the two states’ particular needs. In addition, bilateral treaties provide parties with better opportunities for renegotiation¹⁹⁶ and adaptation to changing circumstances.¹⁹⁷ This is especially suitable for dealing with food-safety problems, which highly depend on rapidly changing science and technology.

(b) Effectiveness

Second, for the symptomatic problem, a bilateral treaty can create a stronger compliance pull and, therefore, more effectiveness than a multilateral treaty. Having much fewer parties than its multilateral counterpart,¹⁹⁸ a bilateral treaty is easier to monitor and enforce because both of the parties have more direct and intense interactions and the prisoner’s dilemma game can be prolonged and repeated. In addition, as the required strict two-day notification of food-safety incidents under the US-China Food-Safety Agreement has demonstrated, it is more likely that deep commitments and a meaningful and effective cooperation

¹⁹⁵ Jean-Frédéric Morin & Gilbert Gagné, *What Can Best Explain the Prevalence of Bilateralism in the Investment Regime?*, INT’L J. POL. ECON., Spring 2007, at 53, 67–68, available at http://dev.ulb.ac.be/sciencespo/dossiers_membres/morin-jean-frederic/fichiers/morin-jean-frederic-publication.pdf; Blum, *supra* note 4, at 339, 354.

¹⁹⁶ Such flexibility would potentially increase the parties’ willingness to initially accept deeper obligations. See, e.g., Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 514–19 (2005).

¹⁹⁷ Blum, *supra* note 4, at 339, 354.

¹⁹⁸ “Diffused reciprocity among parties and greater difficulty in direct retaliation for defections complicate multilateral collaboration efforts.” *Id.* at 356–57. “[S]ince the bargaining process of [bilateral treaties] requires compromises between fewer parties, reciprocal concessions are easier to secure and monitor, and deeper and more meaningful obligations may be assumed.” *Id.* at 351.

mechanism would result from a bilateral setting than from a multilateral setting.¹⁹⁹ In contrast, members in a multilateral treaty usually concede to compromises around the lowest common denominator,²⁰⁰ as evident in the weakness of the INFOSAN, SPS Agreement, and Codex standards.²⁰¹

(c) *Political Expediency*

Third, in the face of particular food scares (e.g., Chinese melamine-tainted milk) and the resulting public criticism and pressure, states would prefer the bilateral approach for its political expediency.²⁰² With its highly workable number of parties and its limited scope, a bilateral treaty is easier and swifter to negotiate and conclude. Given the salience, seriousness, and frequency of recent food scares regarding specific food products from specific origins, states have strong incentives to choose the bilateral approach when the goal is to respond immediately to consumer pressure and public criticism regarding specific food-safety problems.

(d) *Public-private Partnership*

Fourth, a bilateral setting can provide a more focused forum for lawmaking and a more suitable environment for public-private partnership (PPP).²⁰³ In a multilateral regime such as the Codex Alimentarius, a considerable amount of industry and NGO actors, despite their relevance to and interests in food safety (and public health more

¹⁹⁹ Multilateral treaties usually prioritize the perceived optimal number of parties that will agree to accept obligations at the expense of the depth of the obligations. Hathaway, *supra* note 196; see also R.R. Baxter, *International Law in "Her Infinite Variety"*, 29 INT'L & COMP. L. Q. 549, 549–66 (1980); Kenneth W. Abbot & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421–56 (2000).

²⁰⁰ Bruno Simma, *Consent: Strains in the Treaty System*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 485, 485–94 (R.St.J. Macdonald & Douglas M. Johnston eds., 1983).

²⁰¹ See Lin, *supra* note 2, at 665–84.

²⁰² Blum, *supra* note 4, at 339.

²⁰³ PPP is not a new term in social science literature, and it has been applied (mostly in the domestic setting) in some issue areas. Most of these utilizations of PPP were ad hoc, small-scale attempts. See BENEDICTE BULL & DESMOND MCNEILL, DEVELOPMENT ISSUES IN GLOBAL GOVERNANCE: PUBLIC-PRIVATE PARTNERSHIPS AND MARKET MULTILATERALISM (2006); PUBLIC-PRIVATE PARTNERSHIPS FOR PUBLIC HEALTH (Michael R. Reich ed., 2002); Ilona Kickbusch & Jonathan Quick, *Partnerships for Health in the Twenty-First Century*, 51 WORLD HEALTH STAT. Q. 68 (1998); Richard Smith, Editorial, *Vaccines and Medicines for the World's Poorest: Public-Private Partnerships Seem to Be Essential*, 320 BRIT. MED. J. 952 (2000); Roy Widdus, *Public-Private Partnerships: An Overview*, 99 TRANSACTIONS ROYAL SOC'Y TROPICAL MED. & HYGIENE (SUPP. 1) S1 (2005).

generally), usually take part in the wish to affect lawmaking in order to serve their varying interests.²⁰⁴ International rulemaking can be distracted or even distorted. A bilateral agreement dealing with specific topics between merely two countries creates a forum of greater focus that promote participation from relevant industry members and NGOs. Moreover, complying with bilateral treaties' comparatively deep commitments to food-safety regulation definitely requires the active involvement of private actors.²⁰⁵ For example, a tracking system of seafood between the United States and China cannot be effectively established and operated without the professional knowledge and experience of each country's seafood industry. In addition, food-safety standards would be more tailored to and meaningful for private actors under a bilateral treaty under a multilateral treaty. A bilateral setting is suitable for PPP's successful operation in the governance of food safety.

2. THE ROLES OF THE MULTILATERAL APPROACH TO THE "ROOT" PROBLEM

(a) Multilateral Efficiency & Political Reluctance

For the second type of problem—the root problem—concerning fundamental public-health capabilities, multilateralism seems to be the preferred approach.²⁰⁶ Scaling up the overall food-safety conditions globally creates a public good and, therefore, requires wide participation of the international community. If states can converge at certain focal points of collaboration, the second type of problem can be seen as a coordination game over public goods. In such a case, multilateralism is efficient because it makes negotiation-related transaction costs typically lower than would result if thousands of coordinated bilateral arrangements would have to be concluded.²⁰⁷ For example, if states can reach consensus on the maximum tolerance level of animal drug residue in shellfish, it is economically and politically efficient to do this in the

²⁰⁴ Dario Bevilacqua, *The Codex Alimentarius Commission and its Influence on European and National Food Policy*, 1 EUR. FOOD & FEED L. REV. 3, 8–9 (2006).

²⁰⁵ See Lin, *supra* note 2, at 661–64, 691–92. See generally Martinez et al., *supra* note 3.

²⁰⁶ For example, see Gostin, *supra* note 192, for relevant discussion.

²⁰⁷ Blum, *supra* note 4, at 348.

Codex platform, rather than let 181 Codex member states²⁰⁸ pair up their own unilateral standards.

Yet facing the uncertainty of food science and a lack of consensus in general, setting uniform rules and standards at the multilateral level is not a coordination game. As noted, free-rider problems may be prevalent without effective monitoring and enforcement mechanisms. In addition, the multilateral approach is not flexible enough in terms of renegotiation and adaptation to changing circumstances such as scientific development of genetically modified food or cloned animals.²⁰⁹ Considering the facts as a whole and their implications, it is not likely for the time being that countries will readily enter into a multilateral treaty covering a comprehensive scope of food-safety issues and soliciting meaningfully deep commitments. The Sixty-Third WHA resolution shows that WHO Member States are reluctant to even enter into further discussion about a comprehensive multilateral treaty on global food safety.²¹⁰

(b) The Bilateral-treaty Network—A Pragmatic Substitute?

While a multilateral overhaul is unlikely at this moment, a bilateral-treaty network²¹¹ with multiple SPS-plus arrangements might be a pragmatic substitute. As previously discussed, bilateral food-safety agreements with SPS-plus elements concluded between major powers have relatively deep commitments from the signatories and generate positive externalities for other parts of the world. A treaty network consisting of multiple bilateral cooperative mechanisms practically cumulates the positive spillovers projected by those treaties. Positive externalities of bilateral food-safety agreements can multiply, and thus, may help construct and strengthen a regulatory net. Because states are highly interdependent in the international trading system where food

²⁰⁸ *FAQs—General Questions*, CODEX ALIMENTARIUS COMMISSION, http://www.codexalimentarius.net/web/faq_gen.jsp#G1 (last visited April 29, 2012).

²⁰⁹ With the FDA Food Safety Modernization Act signed into law in 2011, many in the United States are still discussing the possibility of expending the new food safety rules to cover genetically modified food and cloned animal products. *See, e.g.*, Debra M. Strauss, *An Analysis of the FDA Food Safety Modernization Act: Protection for Consumers and Boon for Business*, 66 *FOOD & DRUG L.J.* 353 (2011).

²¹⁰ Lin, *supra* note 2, at 683–84; WHA Res. 63, *supra* note 51.

²¹¹ In the field of international environmental protection, a paradigm shift from a multilateral approach to a multi-bilateral approach has been proposed by Chang-fa Lo. *See generally* Lo, *supra* note 17.

products are produced, transported, reproduced, distributed, sold, and consumed, it is fair to argue that every bilateral food-safety agreement affects other non-party states, directly or indirectly. For example, when China centralizes its food-safety authorities to avoid agency jurisdictional overlaps and to tighten up its outbreak notification-and-response system owing to the state's obligations under the EU-China MoU, other countries trading with China potentially benefit from China's improved system. The relevant government structure undergoes substantial changes because of one bilateral food-safety agreement, but the improved regulatory environment remains applicable to other countries and products. A bilateral food-safety agreement's positive externalities cannot be contained within its intended scope of regulatory change.

Nevertheless, it is true that the cumulative effect of multiple bilateral treaties depends considerably upon their scope and depth of cooperation. If most bilateral treaties deal only with very limited product groups in a fire-fighting manner (addressing not at all the topic of general regulatory transformation), the cumulative effects will be limited. Conversely, if countries with a weak public-health system strengthen their food-safety governance tools according to bilateral promises, the treaty network will have stronger multilateral effects. Although there is not a central enforcement system in such a bilateral-treaty network (as would usually be seen in a multilateral-treaty regime), a looser form of numerous bilateral and effective enforcement mechanisms via communication, transparency, reciprocity, and strong interest of parties can secure compliance. Working on top of existing multilateral rules (the SPS Agreement, the Codex standards, and WHO INFOSAN information sharing), a pool of bilateral treaties can serve as a greenhouse for regulatory experimentation and facilitate future multilateral undertakings.

V. CONCLUSION

Global food safety is a pressing and complex issue in the terrain of global governance and institutional design. However, the role of international law in food safety has not been satisfactorily appreciated by relevant international institutions and states at the multilateral level. While states in recent years have entered into bilateral compacts to address imminent food-safety needs, the space for multilateral undertaking is nearly empty. This article breaks from the traditional

dichotomist typology of multilateralism and bilateralism, and discusses the perspective strengths and weaknesses of both approaches to different sorts of food-safety problems. The global food-safety problem can be categorized into two types of regulatory questions: one concerns focused issues specific to particular states, and the other concerns fundamental public-health capability. This article argues that bilateral treaties—functioning in a problem-solving manner—can help address the first category of problem (the “symptomatic” problem); and that multilateral treaties can address the second category of problem (the “root” problem). If a multilateral undertaking is not feasible at the moment, a bilateral-treaty network may help generate cumulative effects, or at least, foster regulatory experimentation and facilitate future multilateral endeavors.

To conclude, this article offers three caveats. First, so that a bilateral-treaty network can actually work, bilateral food-safety treaties must extend beyond a reliance on fire-fighting tactics for handling unwelcome regulatory symptoms: bilateral cooperation must get to the root of these symptoms and at least touch upon important changes or reforms that parties should apply to their governance mechanisms and risk-management systems.

Second, a pool of bilateral treaties inevitably creates differing rules and standards that may overlap and even conflict with one another. It is desirable for states to harmonize different standards through further negotiation or mutual recognition.²¹² Private actors also play a crucial role in harmonizing different standards to the lowest common multiples through the private standards setting as well as horizontal integration.²¹³ At last, however, one has to embrace the idea that the existence of diverse food-safety standards is the norm rather than the exception.²¹⁴ A multilateral treaty such as the SPS Agreement is usually, in effect, a network of multiple bilateral treaties, since states inevitably differ from one another regarding their respective concerns. As a result, varied applications are to be expected under the framework of universalization

²¹² See, e.g., John G. Surak, *Harmonization of International Standards*, in ENSURING GLOBAL FOOD SAFETY: EXPLORING GLOBAL HARMONIZATION 340, 340–41, 349–50 (Christine E. Boisrobert et al. eds., 2010).

²¹³ Actually, differing standards can be a driving force in industry efforts to harmonize at the private level worldwide. Industry members can also be incentivized to lobby their respective governments to go multilateral (rather than pursue uniformity of standards by themselves).

²¹⁴ World Bank, *Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports*, at 32, Report No. 31207 (Jan. 10, 2005), available at http://siteresources.worldbank.org/INTRANETTRADE/Resources/Topics/Standards/standards_challenges_synthesisreport.pdf.

of rules. In the area of food safety, an unchallenged premise is that a state has the right to take into account its special concerns and to establish legitimate but differentiated rules and standards in order to protect the health of its citizens.²¹⁵

Third, the bilateral setting is more susceptible to power exploitation²¹⁶ in terms of negotiation and even enforcement. The three examples discussed above do not reveal this concern, as the parties, which are the four biggest food-trade players worldwide, do not face power asymmetry. However, the potential problems of power exploitation should be appreciated. A WHO model food-safety agreement in the form of recommendations under Article 23 of the WHO Constitution²¹⁷ may help states alleviate problems of power exploitation. By referring to a WHO soft-law model of food-safety treaty, weaker states may cite their preferred model provisions and push powerful states to maintain the reciprocity of the agreement.

This paper points out the insufficiency of multilateral institutions, examines recent bilateral food-safety agreements and their SPS-plus nature, and unpacks global food-safety issues to see how they work in the contexts of bilateralism and multilateralism. Rather than provide an ultimate solution to the identified problems, this paper opens up a forum for future discourse on the search for optimal institutional designs in the area of global food safety.

²¹⁵ See Paul Martin, *Sovereignty and Food Safety in a NAFTA Context*, 24 CAN.-U.S. L.J. 369 (1998). See generally Gabrielle Marceau & Joel P. Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the WTO Law of Domestic Regulation of Goods*, 36 J. WORLD TRADE 811 (2002).

²¹⁶ Blum, *supra* note 4, at 356–57.

²¹⁷ Constitution of the World Health Organization art. 23, July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185; see Lin, *supra* note 2, 677–78. For a general overlook, see GIAN LUCA BURCI & CLAUDE-HENRI VIGNES, WORLD HEALTH ORGANIZATION (2004).