

SMITHFIELD AND SHUANGHUI: IMPLICATIONS ON THE AMERICAN AGRICULTURAL SYSTEM AND THE GOVERNMENT’S FLAWED REVIEW PROCESS

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I. INTRODUCTION

There is one phrase that many Americans would not think to find in American agriculture. It can be found when looking at the tag of your favorite shirt, on the label of your favorite toy, and possibly on your cell phone. There is no way one could find it in a field, on a combine, or on a hog—or is there? As of September 6, 2013, the phrase, “Made in China” may be found on your future pork purchases.¹ National security officials approved the takeover of Smithfield Foods by Chinese company, Shuanghui International Holdings.² What does this mean for the American agricultural system? In addition, what does the current review process say about our concerns?

The \$7.1 billion deal was approved on September 6; however, a number of concerns were raised, including: national security, food safety laws, and the cur-

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1. See generally Bill McConnell, *The Deal: No CFIUS Strings Attached to Smithfield Deal*, THESTREET.COM (Sept. 9, 2013, 5:02 PM), <http://www.thestreet.com/story/12031338/1/the-deal-no-cfius-strings-attached-to-smithfield-deal.html>.

2. *Id.*

rent review process.³ Due to China's shaky history of domestic food safety, one may wonder what will happen to the quality of American pork if it is owned by a foreign entity. Will there be any national security effects from this sale? In addition, what do we make of the USDA not being involved in the current review process, even though the issue deals almost exclusively with agriculture? These are the ultimate issues and this Note is a discussion of the future effects of this sale and the current review process.

Part II of this Note will explore the background of the deal. Part III examines the security of American agriculture, from both a food and a defense standpoint. Part IV focuses on current United States and Chinese food safety laws and China's shaky food production history. Part V explores foreign direct investment in the United States, Iowa's corporate, nonresident alien, and producer farming laws, foreign ownership of American land, and safeguards for American consumers.

II. HISTORY OF SHUANGHUI AND INITIAL REACTION TO THE DEAL

A. *Who is Shuanghui?*

"Shuanghui is the majority shareholder of Henan Shuanghui Investment & Development Co., which is 'China's largest meat processing enterprise.'"⁴ China has been looking for ways to recover from its recent food scandals, such as: fluorescent pork, meat tainted with an asthma medicine, and thousands of dead pigs found floating in a Chinese river. Shuanghui has been at the center of these scandals.⁵ A subsidiary company of Shuanghui was found to have been involved in the Clenbuterol case, where the illegal additive was allegedly found in meat products in China.⁶ Clenbuterol can cause nausea, headaches, limb tremors, and even cancer when consumed by humans.⁷ The scandal has caused some Chinese consumers to express concern and disappointment in Shuanghui, with some even claiming they would no longer buy meat from the producer.⁸

Shuanghui's influence and importance in China has its roots in the gov-

3. *Id.*

4. *M&A Watch: Shuanghui International/Smithfield Foods Deal Underscores National Security and Food Safety Concerns*, BUS. L. CURRENTS, June 3, 2013, available at 2013 WLNR 13611042 [hereinafter *M&A Watch*].

5. *Id.*

6. *Shuanghui Apologizes Over Additive Scandal*, CHINADAILY.COM (Mar. 16, 2011, 7:10 PM), http://www.chinadaily.com.cn/china/2011-03/16/content_12182955.htm.

7. *Id.*

8. *Id.*

ernment.⁹ The clenbuterol scandal implicated sixteen government officials and another forty-one were still being probed.¹⁰ Investigations are also being conducted into the actions of twelve civil servants and four officials from the Commerce Bureau and Animal Health Control Department.¹¹ The subsidiary had over eighteen inspection procedures to ensure the quality of its pork, and they did not come up with an explanation of why or how the illegal additive failed to show up.¹²

B. The Deal

As China's largest meat processing enterprise, it is understandable that Shuanghui would want to invest in Smithfield, America's largest pork producer.¹³ The deal is valued at \$7.1 billion, and it comprises of \$4.9 billion in cash and approximately \$3.45 billion in assumed gross debt outstanding.¹⁴ Because Smithfield has around \$2.2 billion in debt, the deal allows them to get rid of their debt, while continuing to mass-produce pork for a new market.¹⁵ Smithfield will survive and continue as a wholly owned subsidiary of Shuanghui.¹⁶ However, the officers of Smithfield prior to the merger will remain officers post-merger, and Smithfield's president and CEO and management teams will continue to run the company.¹⁷ Finally, the headquarters will remain in Virginia, which will allow Smithfield to run continuously, as it was prior to the merger.¹⁸

The deal makes sense for both parties; it will allow Smithfield to continue operating with significantly less debt and it will allow Shuanghui to meet the rising demand for pork, while working with the "gold standard" in agricultural pro-

9. See *Sixteen Suspects Charged in Pork Scandal*, CHINADAILY.COM (Apr. 2, 2011, 7:04 AM), http://europe.chinadaily.com.cn/china/2011-04/02/content_12267397.htm.

10. *Id.*

11. *Id.*

12. *Shuanghui Apologizes Over Additive Scandal*, *supra* note 6.

13. *Who's Behind the Chinese Takeover of World's Biggest Pork Producer?*, PBS NEWSHOUR (Sept. 12, 2014, 6:31 PM), <http://www.pbs.org/newshour/bb/whos-behind-chinese-takeover-worlds-biggest-pork-producer/>; see also *M&A Watch*, *supra* note 4.

14. *M&A Watch*, *supra* note 4.

15. See Denny Thomas & Michael Flaherty, *China's Shuanghui Said to Buy Smithfield Foods for About \$5bln in Cash*, REUTERSNEWS (May 29, 2013, 11:02:33), <http://www.reuters.com/article/2013/05/29/shuanghui-idUSL3N0EA2HQ20130529>; Doug Palmer, *Approval Close for Chinese Acquisition of Smithfield*, POLITICO (Sept. 4, 2013, 2:15 PM), <http://www.politico.com/story/2013/09/smithfield-foods-chinese-acquisition-deal-96278.html>.

16. *M&A Watch*, *supra* note 4.

17. *Id.*

18. *Id.*

duction. The Asian market is a huge opportunity for Smithfield as they can now reach the world's largest population.¹⁹ For all of the benefits, significant concerns have been raised by politicians regarding the ultimate price Smithfield will pay by being owned and operated by Shuanghui, a company with a shaky past.

C. Recent Criticism of The Deal

Although Smithfield will continue to operate out of Virginia and be subject to American food safety laws, many in politics have voiced concern over the implications of the deal on American agriculture. Iowa Senator Chuck Grassley has led efforts to keep agricultural markets competitive for market participants and consumers, and remarked, "the agriculture industry has consolidated to the point where many smaller market participants do not have equal access to fair and competitive markets."²⁰ Senator Grassley points out that the merger between two large pork-producing corporations will only make it harder for participants to get a fair deal when purchasing pork products.²¹ He also explains that the concentration of pork producers will lead to consumers having fewer choices and higher costs at the grocery store.²² Finally, he points out, "[n]o one can deny the unsafe tactics used by some Chinese food companies."²³

While some think the purpose behind the deal is to feed the Chinese people, they are still concerned with the implications on the American agricultural system.²⁴ "[T]his is a move by China to make sure their population is going to get fed in a cheaper manner . . . [t]ime will tell whether it's the right move for the rest of the pork industry."²⁵ While Shuanghui insists that nothing will change, regarding management and current practices, others have doubts, including those that have lived and worked for Smithfield.²⁶

Echoing Senator Grassley's concern over food safety and security, Senator

19. See *Shuanghui's \$4.7bn Deal to Buy Top US Pig Producer Smithfield Faces National Security Scrutiny*, TELEGRAPH ONLINE (May 30, 2013, 6:56 AM), <http://www.telegraph.co.uk/finance/china-business/10088209/Shuanghuis-4.7bn-deal-to-buy-top-US-pig-producer-Smithfield-faces-national-security-scrutiny.html> [hereinafter *Shuanghui's \$4.7bn Deal*].

20. *Grassley Reacts to Smithfield-Shuanghui Deal*, GRASSLEY.SENATE.GOV (May 29, 2013), <http://www.grassley.senate.gov/news/news-releases/grassley-reacts-smithfield-shuanghui-deal> [hereinafter *Grassley Reacts*].

21. *Id.*

22. *Id.*

23. *Id.*

24. See Palmer, *supra* note 15.

25. *Shuanghui's \$4.7bn Deal*, *supra* note 19.

26. Palmer, *supra* note 15.

Debbie Stabenow expands on national security concerns.²⁷ America has “created the gold standard for global food production and safety” in the world.²⁸ It is no surprise that Shuanghui wants “to obtain American innovation and expertise in food production,” benefitting China both at home and abroad.²⁹ This deal raises concerns about foreign competitors acquiring American innovation and food production technology.³⁰ To date, this would be the largest acquisition of any American company by a Chinese company and it calls into question the national security of American agriculture.³¹ Currently, agriculture is one of the only areas where America has a trade surplus; however, China’s protectionist policies block trade and put America’s companies at a competitive disadvantage.³² Therefore, while China blocks United States pork exports, they are buying large American pork companies to work around their own policies; this creates a trade imbalance in which the only way United States companies can export to the world’s largest population, and fastest-growing pork market, is to sell its own pork companies.³³

That is not to say that American pork producers have been model global citizens when preparing their product.³⁴ For all of the Chinese pork containing clenbuterol, there is American Smithfield pork containing ractopamine.³⁵ However, this provides an interesting view at the deal in which an already shaky American pork producer operates even more in the grey area after the takeover from a Chinese company. The concerns of politicians deal more with the ideology of the Chinese and what will happen to the American product after the takeover. With demand rising for United States meat, American standards cannot afford to slip in order to meet the demand of the Chinese people.³⁶

From a food security perspective, Smithfield may only be the beginning.³⁷ Experts have testified that China is watching the Smithfield/Shuanghui deal with

27. Debbie Stabenow, *Protect American Food Innovation*, POLITICO (Sept. 4, 2013, 5:03 AM), <http://www.politico.com/story/2013/09/united-states-food-innovation-96238.html>.

28. *Id.*

29. *Id.*

30. *Id.*

31. *See id.*

32. *Id.*

33. *Id.*

34. *See Latest US China-Bashing: Hog Farm Protectionism*, INT’L POL’Y ECON. ZONE (Jul. 13, 2013, 3:48 PM), <http://ipezone.blogspot.com/2013/07/latest-us-china-bashing-hog-farm.html>.

35. *Id.*

36. *See Shuanghui’s \$4.7bn Deal*, *supra* note 19.

37. Stabenow, *supra* note 27.

interest and waiting to purchase more United States food companies.³⁸ China is the world's fastest growing pork consumer, but what if it creates a demand for poultry, dairy, or grain?³⁹ China could look to American companies in those industries in order to supply their growing demand.⁴⁰ In the next section, the security of American agriculture and the current review process are described.

III. SECURITY OF AMERICAN AGRICULTURE

Foreign investment in American companies has always been subject to intense scrutiny. The Shuanghui takeover of Smithfield is no exception; in fact, there are important implications for both the pork industry and how the American government looks at Chinese investment.⁴¹ The history of the review process centers on national security concerns in areas other than agriculture. While foreign investment practices have adapted to the changing supply and demand of people, the Committee on Foreign Investment in the United States' review has not. Despite the committee's lack of flexibility, the Smithfield/Shuanghui merger poses a new review topic, agriculture, which provides the opportunity to insist on using potential experts in the review process going forward.

A. *The CFIUS*

The Committee on Foreign Investment in the United States (CFIUS) receives the authorization to review certain mergers, acquisitions, and takeovers from 50 App. U.S.C. § 2170.⁴² Pursuant to Section 2170 (f), the committee shall consider factors relating to the potential effects of the transaction and their potential to affect national security.⁴³ Originating in the 1980s when the United States feared investment from Japan, the committee initially reviewed four categories of companies: manufacturing, finance and information services, mining and construction, and transportation.⁴⁴ In the case of Smithfield, the product is pork, and this will be one of the first agriculture deals under review.⁴⁵ Steven M. Davidoff provides what will most likely be the three issues under review,

38. *Id.*

39. *Id.*

40. *Id.*

41. Steven Davidoff Solomon, *China's Pork Deal May Hinge on the Risk for an Uproar*, N.Y. TIMES (May 30, 2013, 1:18 PM), <http://dealbook.nytimes.com/2013/05/30/running-the-national-security-gantlet-in-a-pork-deal/>; see generally Stabenow, *supra* note 27.

42. 50 App. U.S.C. § 2170 (2012).

43. *Id.* at § 2170(f).

44. Solomon, *supra* note 41.

45. *Id.*

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[f]irst, it is likely to look at any contracts Smithfield has to supply pork to the military or other security agencies [; s]econd, it is likely to examine any special technology like farm techniques, that might be transferred to China [; f]inally and perhaps most relevant, there is the food supply chain itself and whether Shuanghui will be in a position to disrupt the United States food supply.⁴⁶

While it is likely the food supply issue will receive much of the discussion, a look at the members of the CFIUS indicates that there are no members of the Department of Agriculture or the Food and Drug Administration present.⁴⁷ The bipartisan coalition of Senate Agriculture Committee members has urged Treasury Secretary Jack Lew to include USDA and FDA experts in the review process so that food safety and security will be effectively considered.⁴⁸ Even though current law does not require it, the addition of heads of the USDA and the FDA would provide the CFIUS with the adequate expertise in order to make an informed decision.⁴⁹

The CFIUS will also review any special technology that might be transferred to China during the deal.⁵⁰ However, if the deal goes as planned for Shuanghui, other Chinese companies may make further purchases of American agricultural companies and it is critical that American farmers and families are protected.⁵¹ New food technologies have been essential to building the safety, abundance, convenience, and economy of the American food supply.⁵² Without protection, these American innovations may become common knowledge and the American agricultural system will cease to be the gold standard.

While the CFIUS is not made up of any representatives from the USDA or the FDA, the president has the authority to appoint the heads of any other executive department or agency.⁵³ Others have advocated for the USDA and FDA to

46. *Id.*

47. 50 App. U.S.C. § 2170(k)(2).

48. Stabenow, *supra* note 27.

49. *See* Palmer, *supra* note 15.

50. Solomon, *supra* note 41.

51. *DeLauro Statement on CFIUS Decision on Shuanghui's Purchase of Smithfield Foods*, DELAURO.HOUSE.ORG (Sept. 6, 2013), http://delauro.house.gov/index.php?option=com_content&view=article&id=1390:delauro-statement-on-cfius-decision-on-shuanghuis-purchase-of-smithfield-foods&catid=2&Itemid=21.

52. Michael R. Taylor, *Preparing America's Safety System for the Twenty-First Century – Who is Responsible for What When it Comes to Meeting the Food Safety Challenges of the Consumer-Driven Global Economy?*, 52 FOOD & DRUG L.J. 13, 25 (1997).

53. 50 App. U.S.C. § 2170(k) (2012).

play a more prominent role on the committee; however, the report is confidential and we may never know how much influence the USDA or FDA had in the review.⁵⁴

The CFIUS does an admirable job reviewing mergers that deal with national security measures, but when the focus is American agriculture, the importance of expert knowledge from the USDA or FDA cannot be underestimated, in light of recent national security concerns.

B. Recent National Security Concerns

In 2012, Ralls Corporation, owned by Chinese executives, was ordered to divest its ownership in four planned Oregon wind farms citing “national security [interests] of the United States.”⁵⁵ The divestment comes after it was discovered the wind farms are near a naval training facility in Oregon.⁵⁶ This provides a situation where there are agricultural aspects but the issue deals with national security. In this case, the national security interest is defensive and military in nature, one that is appropriate for the members of the committee, including the Secretary of Homeland Security and the Secretary of Defense. In the Smithfield/Shuanghui merger, the membership of the committee does not include either the head of the USDA or the FDA.

The President’s action is rare and upholds the recommendation issued by the CFIUS pursuant to 50 U.S.C. app. § 2170(d) and the Exon-Florio Amendment, which grants the president authority to block a foreign acquisition if there is “credible evidence” that a “foreign interest exercising control might take action that threatens to impair the national security of the United States.”⁵⁷ The situation of Ralls Corporation supports a review process that includes experts on the issue at hand.

Additionally, SoftBank’s takeover of Sprint Nextel (Sprint) garnered attention from Congress amid national security concerns after it was discovered that SoftBank had ties to Chinese telecommunications equipment makers.⁵⁸ The Pen-

54. See Palmer, *supra* note 15; Stabenow, *supra* note 27.

55. Andrew Engblom, *Obama Orders Chinese-Backed Company to Divest Ownership in Oregon Wind Farms*, SNL POWER DAILY WITH MKT. REP., Oct. 1, 2012, available at 2012 WLNR 21167596.

56. *Id.*

57. Solomon, *supra* note 41.

58. See Michael J. De La Merced, *Some in Congress Grow More Wary of Selling Sprint to SoftBank of Japan*, N.Y. TIMES, May 24, 2013, <http://dealbook.nytimes.com/2013/05/23/california-commission-approves-softbanks-bid-to-buy-sprint/>; see *Shuanghui’s \$4.7bn Deal*, *supra* note 19.

tagon said that China appeared to be engaged in cyber spying against the United States government, and SoftBank has offered to remove the Chinese-made equipment that is already in Sprint's network.⁵⁹ Congress has asked the FCC to carefully review the proposal, and the Japanese firm needs clearance from both the FCC and the CFIUS in order to complete the deal.⁶⁰ Requiring the approval from the FCC is unlike the current review process in the Smithfield/Shuanghui merger. The FCC regulates interstate and international communications by radio, television, wire, satellite and cable.⁶¹ In a merger that includes a foreign communications company purchasing an American telecommunications company, it would only make sense for the FCC to complete a review.

Despite this precedent, the CFIUS has chosen to follow the model set forth in the Ralls Corporation merger. Instead of requiring the USDA or the FDA to conduct a separate review based on agricultural grounds, the CFIUS has chosen to review the case based on national security grounds that it deems important. Considering the potential effects on the American agricultural system and national security, the importance of the USDA and the FDA's involvement in a merger of this magnitude cannot be understated.

IV. FOOD SAFETY

In addition to the national security concerns present in the Smithfield/Shuanghui merger, there are concerns over food safety and production, which highlight both domestic and foreign food safety laws.⁶² China's history in food production has been questioned amid pork, poultry, and milk scandals.⁶³ By examining both domestic and Chinese food safety laws, we gain a better understanding of the future of American pork.

59. See *Sprint Says Treasury Department Committee Clears Softbank's Proposed Acquisition of US Company*, CANADIAN BUS. (May 29, 2013), <http://www.canadabusiness.com/business-news/sprint-says-treasury-department-committee-clears-softbanks-proposed-acquisition-of-sprint/>.

60. De La Merced, *supra* note 58.

61. FED. COMM. COMM'N, *What We Do*, FCC.GOV., <http://www.fcc.gov/what-we-do> (last visited Oct. 3, 2015).

62. See generally *Grassley Reacts*, *supra* note 20.

63. See *Shuanghui Apologizes Over Additive Scandal*, *supra* note 6; Stephanie Strom, *Chinese Chicken Processors Are Cleared to Ship to United States*, N.Y. TIMES, Aug. 30, 2013, <http://www.nytimes.com/2013/08/31/business/chinese-chicken-processors-are-cleared-to-ship-to-us.html>; see *Chinese Government Admits Missteps in Tainted Milk Scandal*, USA TODAY, (Oct. 20, 2008), http://usatoday30.usatoday.com/news/health/2008-10-18-government-milk-scandal_N.htm.

A. America's Food Safety Law

In order to ensure food safety in American agriculture, the FDA implemented the Food Safety and Modernization Act (FSMA).⁶⁴ The FSMA is designed to provide a strategy for creating a safe food environment for consumers.⁶⁵ Under this strategy, the FSMA will attempt to set goals relating to: preparedness, detection, emergency response, and recovery.⁶⁶ Under the FSMA, the FDA can deny the entry of foreign imports that do not comply with United States food safety requirements.⁶⁷ This allows the FDA to have more power to control what enters the United States food supply from overseas. In the current case, the FSMA would allow the FDA to review any supply of foreign imports and submit it to United States food safety standards.

The FSMA also allows the FDA to “develop specific scientific standards, provide oversight to increase conformance, act effectively when problems emerge and build collaboration with other local, state and foreign government agencies.”⁶⁸ The FSMA is focused on prevention and surveillance, implementing specific standards for the safe production of food and worker health and hygiene in food facilities.⁶⁹ Section 2224 allows the FDA and the Centers for Disease Control and Prevention to survey and review food facilities by coordinating with federal and state governments and facilitating the sharing of surveillance with other agencies.⁷⁰

However, the FSMA only addresses the powers of the FDA and does not deal with the safety of meat and poultry.⁷¹ The USDA has control over meat and poultry, and the argument of a single food agency has been debated.⁷² Expanding the FSMA to include the USDA and laws regarding meat and poultry would be a huge step for the administration and for food safety laws in the United States.

Current United States laws regarding the preparation of meat include those relating to: inspection of meat products, examination of carcasses, labeling, pro-

64. See 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, 353-54 (2011); see also Food Safety Act, 21 U.S.C. § 2201 (2012).

65. Strauss, *supra* note 64, at 358-59; see also Food Safety Act, 21 U.S.C. § 2201.

66. 21 U.S.C. § 2202.

67. Strauss, *supra* note 64, at 358.

68. *Id.*

69. *Id.* at 359.

70. 21 U.S.C. § 2224(b)(1)(A)-(B).

71. See Strauss, *supra* note 64, at 369.

72. *Id.*

hibited acts, imports, storage, and penalties.⁷³ The “USDA carries out ‘continuous inspection’ of meat and poultry plants, which means that USDA inspectors physically examine every carcass passing through slaughterhouses . . .”⁷⁴ USDA members are primarily responsible for every carcass that leaves the slaughterhouses, which leaves consumers assured that a government inspector has personally overseen the production of a certain meat product.⁷⁵

Under the current USDA approach, the USDA covers the objective violations of food safety laws; however, the contamination of carcasses (those containing salmonella or *E. coli*) falls in a grey area when assigning responsibility.⁷⁶ The USDA inspection system illustrates the importance of delegating food safety roles and responsibilities.⁷⁷ The need for testing at this microbial pathogen level illustrates USDA’s adoption of the Hazard Analysis Critical Control Point System (HACCP).

Under HACCP, microbial testing is required; controls on conditions that pose threats to contamination throughout the process are implemented, and the facility is required to develop a HACCP plan so the USDA does not have to inspect every carcass.⁷⁸ HACCP is made up of seven principles which are applicable to most facilities even though every facility is unique: (1) hazard analysis of each process within the facility to identify all food safety hazards; (2) identification of every step in the process which can “prevent, eliminate, or otherwise reduce potential food safety hazard to acceptable levels;” (3) establishing critical limits for each critical control point (CCP); (4) establishing monitoring requirements for the CCPs; (5) corrective action; (6) recordkeeping; and (7) the ability to systematically verify the HACCP system.⁷⁹ Ultimately, the seven principles serve to influence facilities to develop and implement written sanitation standard operating procedures, test for pathogenic microbes, meet “pathogen reduction performance standards” for Salmonella, and “develop and implement a system of preventive controls.”⁸⁰

While the HACCP system has been the major reform of the government’s

73. See Meat Inspection, 21 U.S.C. §§ 606, 607, 609, 610, 620, 624.

74. Taylor, *supra* note 52, at 16.

75. *Id.* at 16-17.

76. See *id.* at 17.

77. *Id.* at 17-18.

78. See Eileen Starbranch Pape, *A Flawed Inspection System: Improvements to Current USDA Inspection Practices Needed to Ensure Safer Beef Products*, 48 HOUS. L. REV. 421, 437-38 (2011).

79. *Id.* at 436-37.

80. *Id.* at 435-36.

food safety policies, it still has flaws.⁸¹ The new system has caused meatpacking facilities to keep their own records, which do not need to be shared with federal inspectors.⁸² This creates a potential problem in the review and inspection process and could cause a facility to get around a food safety law when, in fact, it should have failed. The HACCP system also does not account for penalties available to the USDA. Currently, there are no clear guidelines as to how many violations warrant a sanction, no power for the USDA to fine facilities, and no power to recall contaminated meat.⁸³

Despite the shortcomings of HACCP, the system has changed the way the government approaches food safety.⁸⁴ The HACCP system has addressed the need to test for microscopic pathogens, even if the implementation of the system has fallen short of its goals.⁸⁵ The American agricultural system is still the gold standard in global food production and as this Note will next explore the gold standard in food safety when compared to the Chinese model.

B. China's Food Safety Laws

While the American system was built on identifying and eliminating risks to the food system, the Chinese food safety laws lacked the enforcement mechanisms needed to ensure that policies were being followed. Before the Chinese Food Safety Law (FSL) was implemented, the "government had crystallized the concepts of consumer protection and product quality and safety."⁸⁶ The Chinese government implemented the Food Hygiene Law (FHL) in 1982, which sets forth prohibited acts with respect to food processing or production and circulation.⁸⁷ Other substantive laws and regulations governed the slaughter of livestock and the control of imported and exported products and ingredients, in other words, the food safety system before the FSL included a basic structure for regulation and safety, and the only thing lacking was the enforcement.⁸⁸ "China was viewed as a place where the government did not have the capacity to . . . set and enforce necessary public health laws and regulation."⁸⁹ Increasingly, the government failed to enforce their own rules and regulations, resulting in low public confi-

81. *See id.* at 439-40.

82. *Id.* at 439.

83. *See id.* at 440-45.

84. *See id.* at 435.

85. *See id.* at 435-36.

86. John Balzano, *China's Food Safety Law: Administrative Innovation and Institutional Design in Comparative Perspective*, 13 *ASIAN-PAC. L. & POL'Y J.* 23, 29 (2012).

87. *Id.* at 29-30.

88. *See id.* at 30.

89. *Id.* at 31.

dence and trust in the safety of their own food products, as well as administrative cases that did not emphasize enforcement.⁹⁰ In addition to the lack of enforcement taken by the Chinese government, there were other structural problems contributing to the disappointing reputation of China's food safety including: a lack of transparency, a high emphasis on economic development, and a lack of infrastructure and agricultural education.⁹¹

The 2009 FSL is the result of a process that took almost thirty years to complete.⁹² As an amendment to the original Food Hygiene Law, the FSL builds upon the basic guidelines of food purity and cleanliness; however, the new FSL increases the government's role in managing and supervising inspection and remediating food safety accidents.⁹³ It is understandable that a Communist run government would want to have food safety and regulatory power centralized in the government due to party beliefs. The FSL also attempts to raise the level of transparency, an issue with the first food safety laws, by encouraging consumers to play a role in enforcement in terms of making choices and reporting on the discovery of bad practices.⁹⁴ It encourages self-supervision, self-regulation, and the creation of high internal standards; it also creates positive incentives for compliance and grants the courts the power to award damages when there is a clear failure to follow the safety rules in the FSL.⁹⁵ The FSL fills holes left by the FHL and attempts to close them by introducing more legislation and a tighter regulatory body.⁹⁶ Certain procedures that have been tightened include inspection and testing, supervision of food additives, and the imposition of fines.⁹⁷ The main question is, "what does this new FSL mean for the safety of American agricultural products?" While that may not be directly answered by the 2009 FSL, the merger of Smithfield and Shuanghui means that American legislators will have to be aware of the possibility of purchasing tainted products coming from China.⁹⁸ The new FSL is a step in the right direction but the apathy of the Chinese people towards the government on this issue, should cause the same American legislators to be extra careful when dealing in the Chinese agricultural market. Introduction of a member of the USDA or the FDA to the CFIUS when

90. *Id.*

91. *Id.* at 32-34.

92. *Id.* at 35.

93. *Id.*

94. *Id.* at 35-36.

95. *Id.* at 36.

96. *Id.* at 37.

97. *Id.*

98. Ramy Inocencio & Feng Ke, *Maggots, Bacteria Allegedly Plagued China's Number One Meat Brand*, CNN (May 31, 2013, 4:49 PM), <http://edition.cnn.com/2013/05/31/business/china-food-tainted-shuanghui-maggots/>.

debating the security of American assets with a foreign entity is an easy way for the government to assure its people that they are securing their interests and keeping food safety at the front of their minds.

V. FOREIGN DIRECT INVESTMENT

While the issues of food safety and national security should require the input from a member of the FDA or the USDA during the approval discussions for the Smithfield/Shuanghui merger, the issue of foreign direct investment should also require input from an agricultural expert. When the merger is approved, there will be a foreign, corporate entity that is processing livestock in the United States generally have authority to oversee the investment that occurs in their state. For instance, Iowa currently has statutes 9H (Corporate Farming laws); 9I (Nonresident Alien – land ownership); 202B (Swine and Beef Processors) that deal with this type of land ownership. This section will discuss the potential problems with foreign corporate land ownership in America by analyzing state's statutory provisions and common law, as well as discuss the protection American landowners need when a large entity own land in their state.

In Missouri, the same meat packers, including Smithfield Foods, who deny local farmers the right to label their own products, control most livestock confinements.⁹⁹ Pursuant to Missouri's statute, Sections 442.560 to 442.591, nonresident alien ownership of land in Missouri is limited in both scope and amount.¹⁰⁰ In contrast, pursuant to Iowa Code 9I.3 (1), "a nonresident alien, foreign business or foreign government . . . shall not purchase or otherwise acquire agricultural land in [Iowa]."¹⁰¹ The concern is for the people of the home state losing the ownership of their agricultural land to the foreign entity. In Missouri, the concern is that civilians think they will not be able to return to the days when family farms produced the bulk of what they ate.¹⁰² However, in government, bigger has always been better; Americans are always looking for ways to become more efficient and if that means moving resources overseas, locals are going to be replaced by foreign entities looking to invest in a piece of America.¹⁰³

In the Wisconsin Supreme Court case, *Lehndorff Geneva, Inc. v. Warren*,

99. Richard R. Oswald, Op-Ed, *Missouri Amendment Could Hurt Family Farms*, ST. LOUIS POST-DISPATCH, Feb. 3, 2014, <http://www.stltoday.com/news/opinion/columns/missouri-amendment-could-hurt-family-farms/article817e34b5-2913-5a3b-a7f6-b8c31d12e297.html>.

100. See MO. ANN. STAT. §§ 442.560-442.591 (West 2013).

101. IOWA CODE § 9I.3(1) (2013).

102. Oswald, *supra* note 99.

103. *Id.*

the court is concerned with resident's ability to stay on their land.¹⁰⁴ "The right of a sovereign state to restrict land ownership by aliens is deeply imbedded in our law."¹⁰⁵ The Wisconsin Constitution of 1848 gave resident aliens the same right to possess property as citizens, that provision remains, and the classification of nonresident aliens is sufficiently related to the State's asserted desire to limit possibly detrimental absentee land ownership to survive the test applied.¹⁰⁶ While there has not been an Iowa case reflecting the laws limiting nonresident alien landownership, the justifications are the same as Wisconsin's in *Lehndorff Geneva, Inc. v. Warren*. The question remains, "has the federal government done anything to protect landowners from foreign ownership?" *Lehndorff* tells us that the power to regulate the tenure of real property remains with the state.¹⁰⁷ The state has the resources better suited to determine the most beneficial ownership of land in its respective state.¹⁰⁸ States are different in size and require different standards for ownership. If the federal government had its own standards, the same acreage limits might be consistent throughout all fifty states; this strategy would not work between states with a lot of land, and states with very little land. In Wisconsin, a nonresident alien and a corporation that has more than twenty percent of its stock owned by nonresident aliens cannot own more than 640 acres of land.¹⁰⁹ Similarly, in Iowa, an interest in agricultural land must not exceed 320 acres, the effect being that foreign corporations cannot buy up a lot of land and create these mass production farms that put local farmers out of business.¹¹⁰

Wisconsin Governor, Scott Walker, recently proposed a change to the current state law that prevents individuals from other countries from owning land in Wisconsin.¹¹¹ His proposal would allow nonresident aliens to own land in the state; the only catch is that farming is still an exception.¹¹² While proponents of the change cite recreational activities like hunting and fishing as reasons to buy land in Wisconsin, opponents are concerned that the change will drive up the cost

104. See generally *Lehndorff Geneva, Inc. v. Warren*, 74 Wis. 2d 369 (1976).

105. *Lehndorff Geneva, Inc.*, 74 Wis. 2d at 369, 383.

106. *Id.* at 385, 388.

107. See *id.* at 384.

108. See *id.*

109. *Id.* at 385-86.

110. IOWA CODE § 9I.3(e) (2013).

111. Jessica VanEgeren, *Realtors Asked for Budget Provision Expanding Foreign Ownership of State Land*, THE CAPITAL TIMES (Madison, WI), Mar. 13, 2013, http://host.madison.com/ct/news/local/writers/jessica_vanegeren/realtors-asked-for-budget-provision-expanding-foreign-ownership-of-state/article_7c88c158-88c4-11e2-8920-001a4bcf887a.html.

112. *Id.*

of farmland, creating an investor-owned rather than farmer-owned land base.¹¹³

In Missouri and Iowa, agriculture has always been a mainstay where local farmers and massive corporate poultry and hog confinements work side by side.¹¹⁴ Protecting these local farmers from foreign entities is essential to their survival. The Smithfield/Shuanghui merger highlights the threat on local farmers and the importance of an FDA or USDA member present when discussing the implications of the deal. Next, this note will discuss the implications with respect to Iowa Code 9H and applicable common law, which highlights corporate farming in America.

Iowa Code 9H works closely with Section 202B when looking at corporate farming and prohibited operations and activities in the United States.¹¹⁵ Iowa Code 9H establishes restrictions on the types of land owned by corporations, limited liability companies, and trusts that do not meet the family farm requirement.¹¹⁶ A family farm corporation is defined as a corporation founded for owning agricultural land where persons that are related to each other hold the majority of the voting stock and where sixty percent of the gross revenues of the corporation from the last three-years, comes from farming.¹¹⁷ These types of entities cannot own or acquire agricultural land in Iowa unless: it is part of an encumbrance; the land is used for research; a nonprofit acquires the land; the land is used for non-farming purposes; it is collected to satisfy debts; the corporation is a municipal corporation . . .¹¹⁸

Webster v. Lehndorff Geneva, Inc., dealt with the issue of both 9H and 9I where the State attempted to require the defendant, a foreign corporation, to divest it of instate farmland.¹¹⁹ In their complaint, defendants claim that Chapter 350 of Missouri's Annotated Statutes is unconstitutional because it: (1) allows certain corporations to engage in agricultural activities but not others; (2) allows individuals but not corporations to own land; (3) allows any corporation to own farmland if owned before September 28, 1975; and (4) singles out appellants, whose shareholders are principally Europeans.¹²⁰ Ultimately, the court rejects all arguments and finds for the appellees.¹²¹ For this paper's purposes, the court es-

113. *See id.*

114. Oswald, *supra* note 99.

115. *See* IOWA CODE §§ 9H.1-9H.4, § 202B.102 (2013).

116. *Id.* § 9H.4(1).

117. *Id.* § 9H.1(9).

118. *See id.* §§ 9H.4(16) (2013).

119. *See Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 803 (Mo. 1988).

120. *See id.* at 804-05.

121. *See id.* at 805.

tablished that the effect of the statute “is to prevent the concentration of agricultural land, and the production of food therefrom, in the hands of business corporations to the detriment of traditional family units and corporate aggregations of natural persons primarily engaged in farming.”¹²² Corporations have superior financial and other business resources and that would be detrimental to the traditional farming entities, the families.¹²³ Traditionally, farming is a cyclical business where the industry sees depressed markets and farmers incur huge losses; the court establishes that corporations, with large financial assets, will be able to work around the lull in the farming market and always stay profitable, essentially pricing farm families out of business.¹²⁴

Family farms are not far from being extinct as rural populations fall, and members of national agricultural institutions are not supporting homegrown legislation because most of their members are multinational meat packers.¹²⁵ As previously mentioned, efficiency and large operations are staples of American industrialism; it is just working its way into the agricultural field sooner than expected.¹²⁶ Smithfield’s merger with Shuangui has alerted the top politicians in Washington D.C. to the issues about national security and food safety but it is also having an impact at the state level, where some states have initiated the procedure to redraw the limits placed on foreign ownership of land, specifically in Missouri.¹²⁷ The Missouri legislature has proposed an amendment to the Missouri Constitution that would add language including the terms farmer and rancher.¹²⁸ Opponents to the amendment claim that the terms will be taken advantage of and the vague wording will favor corporations, including nonresident corporations, over Missouri family farms.¹²⁹

Finally, Iowa Code Chapter 202B preserves the free and private enterprise, prevents monopoly, and protects consumers by regulating the balance of competitive forces in the beef and swine producing industries.¹³⁰ Working closely with Iowa Code Section 9H, Chapter 202B seeks to help the individual or family farm by limiting the number of monopolies in a given agricultural sector. The result is a fair industry that provides opportunities for all farmers to make a living. For

122. *Id.*

123. *Id.*

124. *See id.*

125. *See Oswald, supra* note 99.

126. *See id.*

127. *See generally id.*

128. *Id.*

129. *Id.*; *see also* ‘Right to Farm’ Measure to be Decided by Voters, SPRINGFIELD NEWS-LEADER, May 29, 2013, available at 2013 WLNR 13168738.

130. IOWA CODE § 202B.101 (2013).

the purposes of Chapter 202B, a processor is a person who alone or in conjunction with others directly or indirectly controls the manufacturing, processing, or preparation for sale of beef or pork products.¹³¹ A processor shall not own, control, or operate a cattle operation in the state of Iowa; for swine, a processor shall not directly or indirectly own, control, or operate a swine operation in Iowa.¹³²

After initially ruling in favor of Smithfield Foods, Judge Riley, of the Eighth Circuit vacated and remanded the decision of the trial court, which found Iowa Code Chapter 202B (9H.2) unconstitutional.¹³³ While the court found the possibility of discriminatory purpose, Eighth Circuit concluded that statements by legislators and the governor did not contain enough evidence to show a discriminatory purpose.¹³⁴ This result is particularly important to the future of 202B because it results in the *Smithfield Foods, Inc. v. Miller* settlement agreement, in which Smithfield agrees to refrain from imposing terms against contract growers in the state and Smithfield will not engage in conduct that coerces or intimidates contract growers in Iowa.¹³⁵ This establishes Smithfield's withdrawal from competition with contract growers in Iowa, allowing those farmers the livelihood they need to continue business. The presence of a representative from the FDA or the USDA in the CFIUS would ensure that Chapter 202B is enforced against a large corporation, now foreign owned, that would be competing with the same family farms that have farmed the land for generations and do not have the capacity to compete with Smithfield/Shuanghui.

It is tough to determine whether Iowa's statutory policies would work on a national level. The federal government would have to deal with each state government individually and their federal statutes might overstep onto some crucial state statutes. On a smaller scale, as we saw in Missouri, individual states might be able to adopt statutes close to Iowa's in order to protect their local farmers. Each state could tailor the language to fit the most common farming practice in the state (livestock versus harvesting) in order to benefit its farmers.

A. Iowa's Role in the Global Economy

Iowa plays an important role in the agricultural economy, both internationally and domestically.¹³⁶ Each year, Iowa farmers produce approximately 3.8

131. *See id.* §§ 202B.101-.102.

132. *Id.* § 202B. 201(1)(a-b).

133. *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1063 (8th Cir. 2004).

134. *See id.* at 1066.

135. Consent Decree, *Smithfield Foods, Inc. v. Miller*, No. 45:02-CV-90324 (S.D. Iowa 2005).

136. *See Ag Facts*, IOWA FARM BUREAU, <http://www.iowafarmbureau.com/public/167/ag->

million cattle, 525 million bushels of soybeans, 2.1 billion bushels of corn, and 8.2 million turkeys.¹³⁷ The recent Smithfield/Shuanghui merger will be felt all over the globe and certainly in Iowa, where livestock consume about 400 million bushels of Iowa-grown corn annually.¹³⁸ Corn also plays an important economic role in providing jobs for Iowans in the form of ethanol production.¹³⁹ Iowa produces twenty-five percent of the country's supply of ethanol, twice as much as any other state in America.¹⁴⁰ So how does the Smithfield/Shuanghui merger affect Iowa? We have just discussed the effects on foreign direct investment and the measures the Iowa legislature has taken to protect Iowans and their farms. Smithfield/Shuanghui will be in the market to expand their production of livestock as the Chinese people's appetites for meat grow, this is where Iowa Code 9H, 9I, and Chapter 202B will be important to protect Iowa's agricultural economy.

Future relations with the Chinese seem to be bright in the eyes of Iowans and especially the Iowa Legislature.¹⁴¹ Iowa Governor Terry Branstad has met with Chinese President Xi Jinping on numerous occasions, as far back as 1985, when the Chinese leader was a local party leader traveling on an exchange program to the state.¹⁴² Iowa has a rich history in trade with the Chinese, including in 2012, when Xi Jinping and Branstad signed an agreement for the sale of \$4.3 billion in Iowa soybeans and soy products to China.¹⁴³ This continuing trade with the Chinese will have to be monitored, and the protection of Americans needs to be at the front of discussions. The CFIUS not only needs to think of the safety of the product that is being traded, but the impact on the landowners and people of the state with which China is trading. Iowa has been trading crops with the Chinese, and as Branstad has hinted at a "friendly" relationship with the Chinese leader, it may not be a coincidence that the state has statutory measures protecting its citizens from corporate, foreign land ownership.¹⁴⁴

Although Iowa has a well-established market development relationship

in-your-life/ag-facts (last visited Oct. 3, 2015).

137. *See id.*

138. *Id.*

139. *See id.*

140. *Id.*

141. *See* William Petroski, *Iowa Gov. Branstad to Meet With Chinese President Xi Jinping on Monday*, DES MOINES REGISTER (Apr. 11, 2013, 1:49 PM), <http://blogs.desmoinesregister.com/dmr/index.php/2013/04/11/iowa-gov-branstad-to-meet-with-chinese-president-xi-jinping-on-monday/article>.

142. *Id.*

143. *Id.*

144. *See id.*

when it comes to grains, it is still working on building its relationship with China when it comes to livestock exports.¹⁴⁵ Members of the Iowa Corn Leadership Enhancement and Development (I-LEAD) travelled to China in order to build relationships with key Chinese customers and to develop trade opportunities.¹⁴⁶ The members worked on reviewing markets in Asia, meeting with current and future consumers, and learning about market access.¹⁴⁷

Iowa also trades competitively with Canada as well as China.¹⁴⁸ In 2012, thirty percent of everything Iowa sold to the world went to Canada.¹⁴⁹ Iowa farmers work closely with Canadian producers, who feed their hogs with soybean meal grown in Iowa; they also benefit from the Canadian hog farmers keeping plants operating at full capacity, meaning there will always be a demand for Iowa corn and soybeans.¹⁵⁰ Canada bought \$138 million of pork from Iowa in 2011 alone.¹⁵¹ The fact is that Iowa has a significant impact on the global agricultural economy by providing products and services for other countries. From Iowa's ties with the Chinese government to the amount of product that is sold to Canada, Iowa farmers grow crops and livestock locally that go towards feeding people at the far reaches of the world. One of the reasons that Iowans have such a large impact is the fact that they are able to work on their own land because of Iowa Code provisions that ensure that Iowans will be working on the land; not corporations, not foreign entities, not processors. The competition is friendly between local farmers and if it works for Iowa, it could work for other states in America.

The USDA and the FDA know that Americans produce a significant amount of the world's agricultural product, and when there is a merger between two global companies, the interests of local farmers needs to be protected. It might be unrealistic to allow state representatives to participate in the CFIUS discussions, but state agricultural matters are run by the state, not the federal government. Participation must come from the USDA and the FDA and they must ensure that local farmers are not being run out of the market by foreign corporate

145. See *Iowans Participate in International Agriculture Trade Mission to China*, IOWA CORN PROMOTION BD. (Dec. 2, 2013), http://www.iowacorn.org/index.cfm/30321/26773/iowans_participate_in_international_agriculture_trade_mission_to_china.

146. *Id.*

147. *Id.*

148. See Jamshed Merchant, *Another View: Canada is Iowa's Best Customer*, DES MOINES REGISTER (Feb. 4, 2014, 9:32 AM), <http://www.desmoinesregister.com/story/opinion/columnists/2014/02/03/another-view-canada-is-iowas-best-customer/5194703/>.

149. *Id.*

150. *Id.*

151. *Id.*

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Smithfield and Shuanghui

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entities.

VI. CONCLUSION

The CFIUS has been praised in allowing the largest Chinese takeover of a United States company to be completed this past fall.¹⁵² The “CFIUS no longer sees some foreign governments as having a coordinated strategy to acquire valuable United States technology by buying United States firms.”¹⁵³ The CFIUS did its job in relation to national security and food safety concerns; however, this was an agricultural deal that involved a foreign entity buying a major United States agricultural company and the USDA and the FDA were conspicuously left out of discussions. As noted, the Chinese food safety system is well behind the United States food safety model in both inspections and penalties. In February of this year, the spread of a virus that kills infant pigs was taking its toll on the United States pork industry which could have influenced global pork consumption; this comes after the approval of the Smithfield/Shuanghui merger this fall.¹⁵⁴ It is possible that the inclusion of either the USDA or the FDA in the CFIUS discussions to approve the deal, would have foreseen these types of issues and they could have made the transition easier.

The argument is not for Chinese investment in the United States. It is undisputed that China is viewing United States goods with interest; in 2012 Chinese corporations filed twenty-three notices with United States regulators indicating the desire to purchase United States assets.¹⁵⁵ The argument is for a more agricultural-specific review process. The USDA and the FDA work with agricultural issues every day and they have a better idea of protection measures that work in various states in the country. Allowing these agricultural-specific agencies to work closely with the CFIUS would ensure that the local farmer’s interest would be thought of, as well as the national security of American interests.

Chinese investment in the United States is just taking off. Chinese nationals have even been caught trying to steal trade secrets from DuPont Pioneer and Monsanto.¹⁵⁶ Although this situation could present challenges for United States-

152. Michael Barris, *In Praise of CFIUS: U.S. Watchdog Gets the Job Done*, CHINA DAILY USA (Dec. 26, 2013, 10:45), http://usa.chinadaily.com.cn/epaper/2013-12/26/content_17198145.htm.

153. *Id.*

154. Jack Freifelder, *Virus Hits U.S. Pork Exports*, CHINA DAILY USA (Feb. 4, 2014, 12:02), http://usa.chinadaily.com.cn/epaper/2014-02/04/content_17268199.htm.

155. Barris, *supra* note 152.

156. Rod Bashart, *Alias Case at Iowa State Dinner Heightens Need for Security*, *Branstad Says*, THE GAZETTE (Cedar Rapids, IA), (Mar. 29, 2014), <http://thegazette.com/2013/12/16/alias-case-at-iowa-state-dinner-heightens-need-for-security->

Chinese relations, it's not going to prevent the Chinese from either trying to buy American assets or steal trade secrets.¹⁵⁷ Protecting the local farmer should be at the front of the review process. Iowa and Missouri code provisions have protected the local from corporate and foreign entities for years; the FDA and the USDA can address food safety. These agencies should have a major role in the next foreign takeover of an American agricultural corporation, for the safety of both the product and the producer. Dealing with states on a local level would ensure that the state maximizes the protection for their farmers; if the FDA and the USDA work on a local level, they can implement what has worked in Iowa into surrounding states. This would avoid confusion that comes along with federal statute's application in given situations and promotes state sovereignty in a global issue.

branstad-says.

157. *See id.*