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LESSONS FROM U.S. TRADE WITH CHINA: HOW TO USE THE WORLD TRADE ORGANIZATION TO PROMOTE PUBLIC HEALTH IN TRADE RELATIONS WITH INDIA

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INTRODUCTION

Economists regularly advocate the advantages of globalization, highlighting the economic, social, and political benefits of trade to both developing and developed countries.¹ Increase in trade is especially linked to economic growth in developing countries like China and India² and arguably improves their national health.³ However, as a cost of these benefits, developed countries are asked to compromise their safety standards to encourage economic growth in developing countries.⁴ Ultimately, this globalization leads to less governmental autonomy to

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* J.D. Candidate, 2012, University of Maryland School of Law (Baltimore, MD); B.S., 2009, Towson University (Towson, MD). I would like to thank the editorial staff of the 2010-11 *Journal of Health Care Law & Policy* for their work in editing this Comment. Special thanks also to my parents for encouraging me, Uncle Mark for inspiring me, and my friends (especially MW) for supporting me.

1. Kenneth F. Scheve & Matthew J. Slaughter, *A New Deal for Globalization*, 86 FOREIGN AFF. 34, 35-36 (2007).

2. David Dollar & Aart Kraay, *Trade, Growth, and Poverty*, 114 ECON. J., Feb. 2004, at F22, F23. Developing countries with a more open trade policy increased growth rates from 2.9% in the 1970s to 5% in the 1990s, while both developed countries and developing countries with restrictive trade policies actually declined in growth rate during the same period. *Id.* at F24.

3. See Richard G. A. Feachem, *Globalisation is Good for Your Health, Mostly*, 323 BRIT. MED. J. 504, 504 (2001) (observing that there is a correlation between gross national product per capita and health status, supporting the inference that economic growth spurred by trade leads to improvements in health); Lant Pritchett & Lawrence H. Summers, *Wealthier is Healthier*, 31 J. HUM. RESOURCES 841, 844 (1996) (demonstrating a causal and structural relationship between income and health, "most likely though increased public and private spending on goods that directly or indirectly improve health[.]").

4. See *infra* Part I.B (describing a push for downward harmonization of standards evident in the various WTO agreements).

exercise control over imported products and services, ranging from food, medicine, and even toys,⁵ that detrimentally affect all aspects of public health in developed countries.⁶

To facilitate globalization, the World Trade Organization (WTO) was created with the intent of “lowering trade barriers . . . [to] break[] down other barriers between peoples and nations.”⁷ As a member-driven international trade organization, all 153 WTO members⁸ are involved in the decision-making of the organization regarding fair rules of trade.⁹ This broad participation compels WTO members to negotiate with countries at all levels of development in the interest of “harmonization” of regulatory standards and encourages regulations that are least restrictive of trade.¹⁰ Such a framework demonstrates WTO’s favorable treatment of developing countries and seems to exacerbate the risks to public safety by allowing for more broad market access to developing countries while eliminating health protections, considering them to be “barriers to trade.”¹¹

5. See *infra* Part II.C (discussing various recalls of imported goods).

6. See Ellen R. Shaffer et al., *Global Trade and Public Health*, 95 AM. J. PUB. HEALTH 23, 23–24 (2005) (finding that global trade restricts the ability of government agencies to ensure accountability and quality of goods by promoting the least restrictive trade regulations at the expense of health and safety measures). *But see* Pritchett & Summers, *supra* note 3, at 841–44 (describing the various health benefits of the economic growth resulting from trade including lower infant mortality rates and longer life expectancy in wealthier nations).

7. WORLD TRADE ORG., THE WORLD TRADE ORGANIZATION (2009) available at http://www.wto.org/english/res_e/doload_e/inbr_e.pdf.

8. WORLD TRADE ORG., ANNUAL REPORT 6 (2010), available at http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep10_e.pdf. Any state or territory with full control over its trade policies may join the WTO, provided that WTO members agree on the terms of accession. The accession process includes an application describing all aspects of trade and economic policies of the state or territory that could affect WTO agreements. The applicant then engages in bilateral talks with individual WTO members in order to determine the expected benefits allowing membership. Third, a working party drafts a membership treaty outlining requirements and deadlines for compliance. This treaty is presented to the WTO General Council and if a two-thirds majority of the WTO members vote in favor, the applicant may sign the treaty and accede to the organization. *Membership, alliances and bureaucracy*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (last visited May 3, 2011).

9. Caroline Dommen, Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies, 24 HUM. RTS. Q. 1, 7 (2002). *The decisions are binding on all member countries and each country is permitted to join a council or committee to help with implementation.* *Id.* *The United States Department of the State currently recognizes 194 independent countries worldwide. Bureau of Intelligence & Research, Independent States in the World, U.S. DEP’T OF STATE, <http://www.state.gov/s/inr/rls/4250.htm> (last visited May 3, 2011). As such, over 75% of countries are WTO-members.*

10. Shaffer et al., *supra* note 6, at 24 (describing the WTO provision requiring harmonization of regulatory standards).

11. *Id.* at 27 (explaining that corporations and investors have successfully challenged and stopped governments from pursuing “traditional public health functions,” classifying such functions as barriers to trade).

This Comment will analyze how globalization and WTO membership impacts the health of Americans. It begins with a background discussion of the connection between the WTO and public health.¹² Then, the focus shifts to the successes and failures of the trade relationship between the United States and China by evaluating current regulations on trade of goods and services under the WTO.¹³ Next, this Comment considers the current trade relationship between the United States and India.¹⁴ Finally, this Comment offers proposals to promote world trade without sacrificing public health, such as investing in overseas technology, reorganizing the domestic regulatory scheme, and promoting corporate accountability.¹⁵

I. THE WORLD TRADE ORGANIZATION AND PUBLIC HEALTH

A. *History and Background of the World Trade Organization*

Although the WTO as it exists today was created in 1995, the principles behind its formation date back to the General Agreement on Tariffs and Trade (GATT),¹⁶ signed in 1948.¹⁷ The GATT was signed by twenty-three countries to liberalize trade through a series of negotiations, or rounds, between member countries.¹⁸ Most of these rounds were focused on lowering tariffs and are attributed with increasing world trade about eight percent per year during the 1950s and 1960s.¹⁹ However, as time passed, member countries acknowledged the need to address other issues, such as trade of services and nontariff barriers.²⁰ Consequently, in 1986, member countries met for the eighth round, the Uruguay Round.²¹ Because the GATT originally did not discuss public health, it was not until this round that countries finally voiced concerns about social issues and human

12. *See infra* Part I.

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Part IV.

16. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

17. WORLD TRADE ORG., UNDERSTANDING THE WTO 15 (2010), available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf. The GATT was formed shortly after World War II ended. *Id.* It was originally intended to be temporary, as over 50 other countries were negotiating the creation of an International Trade Organization (ITO). *Id.* The ITO was to join the World Bank and the International Monetary Fund as a specialized agency of the United Nations designed to manage world trade disciplines, employment rules, commodity agreements, and other extensive goals. *Id.* The ITO eventually failed, with the United States Congress leading the opposition against its ratification. *Id.*

18. *Id.*

19. *Id.* at 17.

20. *Id.* at 16.

21. *Id.*

rights.²² These issues were extensively discussed in the Uruguay Round, ultimately culminating with the creation of the WTO.²³

The Uruguay Round lasted over seven years and 123 countries participated.²⁴ This negotiation was the largest trade negotiation ever, covering almost all trade areas to bring about the biggest reform of world trade since the GATT,²⁵ and included the promotion of public health as a goal of the WTO.²⁶ The results take the form of approximately sixty agreements and decisions that fall into six parts, the largest being the agreements covering the trade areas of goods and services.²⁷ Today, goods are regulated by the GATT, which continues to exist as the umbrella treaty for the trade of goods and has been updated since its original version.²⁸ Trade of services, however, is governed by the General Agreement on Trade in Services (GATS),²⁹ negotiated in 1994 as part of the Uruguay Round.³⁰ While each agreement contains provisions aimed to further social goals like health and human rights, concerns still arise from those who fear that such agreements actually hinder public health because the agreements interfere with developing countries' ability to retain autonomy and control of the goods and services they import.³¹

B. The Influence of Public Health on Agreements Under the WTO

Politically, public health is not always a priority, especially when considering the various other public goods to provide with the

22. Dommen, *supra* note 9, at 13.

23. WORLD TRADE ORG., *supra* note 17, at 18-19. The agreements under the WTO expanded to cover goods, services, and intellectual property. *Id.* at 23.

24. *Id.* at 18.

25. *Id.*

26. See Dommen, *supra* note 9, at 13 (describing how health concerns are reflected in different provisions of the WTO agreement).

27. WORLD TRADE ORG., *supra* note 17, at 23. The first part is the Agreement Establishing the WTO, followed by agreements covering goods, services, intellectual property, dispute settlement and, finally, reviews of governments' trade policies. *Id.*

28. *Id.* at 19.

29. General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183 [hereinafter GATS].

30. WORLD TRADE ORG., *supra* note 17, at 33.

31. See, e.g., Gopal Sreenivasan, Does the GATS Undermine Democratic Control over Health?, 9 J. ETHICS 269, 278-80 (2005) (explaining how GATS interferes with the governments' control over privatization in health services because the country must comport with GATS no matter what the legislators votes). But see Carl K. Winter, Pesticide Residues in Foods: Recent Events and Emerging Issues, 10 WEED TECH. 969, 972-73 (1996) (stating that "it is difficult to envision how United States pesticide residue standards would be weakened" under the GATT).

government's limited resources.³² Conversely, most individuals recognize the importance of health to their individual happiness and well-being, even if they are not aware of the benefits to the population as a whole.³³ Because public health is an essential part of a population's access to public welfare,³⁴ democratic theories explain that the government has a responsibility to encourage collective action to protect and assure the population's health.³⁵ As such, the United States should reevaluate how it can protect public health while complying with international agreements like the WTO.

Signed at the conclusion of the Uruguay Round, the preamble of the Marrakesh Agreement, establishing the WTO, encourages parties to the agreement to conduct trade "with a view to raising standards of living."³⁶ To incorporate this view, various negotiations led to specific agreements outlining safety requirements and rules based on what is regulated by the agreement.³⁷ These safety standards regarding the trade of goods form the Technical Barriers to Trade³⁸ and the Sanitary and Phytosanitary Measures³⁹ Agreements.⁴⁰ The GATS contains an internal safety provision that calls for objective and reasonable government regulation of services and strives not to interfere with the governments' right to set standards regarding quality and safety.⁴¹

Additionally, the WTO upholds a "most-favored-nation" (MFN) treatment principle requiring countries to consistently apply trade benefits to goods and services from all WTO members, independent of economic,

32. Lawrence O. Gostin, *A Theory and Definition of Public Health Law*, 10 J. HEALTH CARE L. & POL'Y 1, 2 (2007) (pointing to the low public health expenditures and suggesting politicians prefer to spend on communal goods like highways, energy, and the military).

33. *Id.*

34. *Id.* (explaining that population health is valuable because it allows for access to social, political, and economic activities that are "critical to the public's welfare").

35. *Id.* at 2-3 (explaining that people form governments to provide collective goods, such as uncontaminated food, that can only be secured through organized government action).

36. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 410.

37. *See, e.g.*, WORLD HEALTH ORG. & WORLD TRADE ORG. SECRETARIAT, WTO AGREEMENTS & PUBLIC HEALTH 28-29 (2002) (explaining that while the GATT and GATS outline general principles, other more specific agreements govern quality and safety regulations).

38. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

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

40. WORLD TRADE ORG., *supra* note 17, at 30.

41. *Id.* at 35.

political, or other status.⁴² The MFN principle aims to further non-discriminatory policies and to open markets to all countries in order to promote economic growth and, therefore, public health.⁴³

This goal is furthered most by the WTO's support of trade restraints set by governments citing public health concerns.⁴⁴ For example, one provision in Article XX of the GATT allows member countries to adopt and enforce measures inconsistent with other GATT principles that are "necessary to protect human, animal or plant life or health."⁴⁵ This public health exception has been used to ban the import of cigarettes and hormone-treated meat, bans which would typically violate the GATT, because of government fears of the negative effects such goods would have on their citizens.⁴⁶ However, this provision is subject to the condition that such measures are "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination."⁴⁷ This conditional exception is mirrored in Article XIV of the GATS relating to trade of services.⁴⁸ While these provisions seem to indicate that the WTO holds public health in high regards, application of the public health principle to specific trade agreements demonstrates that public health exceptions are narrowly construed and generally scrutinized by the WTO.⁴⁹

1. Public Health and the Technical Barriers to Trade Agreement and the Sanitary and Phytosanitary Measures Agreement

The Technical Barriers to Trade Agreement (TBT Agreement) was designed to ensure that technical barriers like product requirements and certification procedures are based on legitimate objectives, such as public

42. See WORLD HEALTH ORG. & WORLD TRADE ORG. SECRETARIAT, *supra* note 37, at 29. The MFN principle is outlined in Article I of the GATT and is also an obligation listed in Article II of the GATS and Article IV of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). These agreements represent the main areas of trade the WTO governs. *Id.*

43. *Id.*

44. *Id.* at 11 (explaining that the WTO recognizes human health as "important in the highest degree" and so allows governments to implement trade restrictions to provide an appropriate level of health protection).

45. GATT art. XX(b).

46. Matthew T. Mitro, Comment, *Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions*, 51 AM. U. L. REV. 1223, 1224-25 (2002) (explaining that governments can ban goods if they are acting in good faith to protect human health).

47. GATT art. XX(b).

48. GATS art. XIV(b) ("Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures . . . (b) necessary to protect human, animal or plant life or health. . . .").

49. WORLD HEALTH ORG. & WORLD TRADE ORG. SECRETARIAT, *supra* note 37, at 31-38.

health, and do not create “unnecessary obstacles to trade.”⁵⁰ This agreement requires members to avoid unnecessary obstacles by implementing technical requirements designed to further legitimate objectives that do not unnecessarily restrict trade.⁵¹ Members are encouraged to base such restrictions on international standards, discussed below, in order to promote consistency of laws across member countries.⁵² However, should members instead use different standards that the member country considers appropriate, the implementing government must be prepared to justify those standards upon request by another WTO member.⁵³ Moreover, the TBT Agreement also encourages countries to accept the technical standards of the countries they are trading with to prevent inefficiencies that could impede trade.⁵⁴

The Sanitary and Phytosanitary Measures Agreement (SPS Agreement)⁵⁵ was created to reduce the use of non-tariff trade barriers falsely attributed to human, animal, or plant health concerns in the agricultural sector.⁵⁶ While the SPS Agreement aims to recognize the autonomy of members in determining appropriate health protection, its goal is to “ensure that a sanitary and phytosanitary requirement does not represent an unnecessary, arbitrary, scientifically unjustifiable, or disguised restriction on international trade.”⁵⁷ Like the TBT Agreement, the SPS Agreement encourages members to use international standards but allows the adoption of higher levels of health protection.⁵⁸ However, in contrast to the TBT Agreement, the SPS Agreement requires that members adopting

50. *Id.* at 32. Only forty-six countries adhered to the original TBT Agreement, which was called the “Standards Code” when it was created in 1980. The current TBT Agreement was enacted with the WTO in 1995 and “contains more stringent obligations than the preceding version of the agreement.” *Id.* The current TBT Agreement is binding on all WTO members. *Id.*

51. *Id.* at 33. To determine if a restriction is necessary, the WTO will balance factors such as the importance of the interest the measure is designed to protect, how well the measure achieves its designed purpose, and its effect on trade. The WTO will also consider the importance of the interest so that a restriction designed to protect a strong interest will more easily pass as necessary than a restriction designed to protect a weaker interest. *Id.* at 31.

52. *Id.* at 33.

53. *Id.* at 34.

54. WORLD TRADE ORG., *supra* note 17, at 30–31 (explaining that if countries did not recognize each other’s procedures, products might end up being tested twice: once by the exporting country and again by the importing country).

55. SPS Agreement.

56. WORLD HEALTH ORG. & WORLD TRADE ORG. SECRETARIAT, *supra* note 37, at 34–35. The current, more specific version of the SPS Agreement became binding as a part of the WTO in 1995 but was preceded by more general rules within the GATT in 1947 and the original TBT Agreement in 1979 regarding sanitary and phytosanitary measures. *Id.* at 35 n.6.

57. *Id.* at 35.

58. *Id.*

independently created health protection standards support their measures with scientific data.⁵⁹

There is concern that these agreements are designed not to promote safety, but to further trade.⁶⁰ As such, there is evidence of a push for downward harmonization, so that there is an overall lowering of safety standards to comport with the WTO and increase trade.⁶¹ This downward harmonization is seen in the international safety standards the Codex Alimentarius Commission (Codex) creates. The Codex is a subsidiary of the United Nations (UN) and creates the international safety standards that the WTO encourages member countries to adopt.⁶² As a result, decisions made by Codex usually represent compromises between UN countries that can result in the lowering of safety standards.⁶³ There is additional pressure on Codex to lower standards from developing countries that cannot meet even minimal international safety standards.⁶⁴ Finally, the WTO encourages countries to accept safety standards of other member-countries as equivalent even before making a proper determination, which leads to developed countries accepting goods that have not passed WTO-accepted safety requirements.⁶⁵

2. Public Health and the General Agreement on Trade in Services

59. WORLD HEALTH ORG. & WORLD TRADE ORG. SECRETARIAT, *supra* note 37, at 36; Anand Kumar Jaiswal, *WTO Agreement on SPS: Strategic Implications*, 38 ECON. & POL. WKLY. 4737, 4737 (2003) (explaining that the standards used to protect human health must be “objectively based on sound scientific principles.”). The distinction between the TBT Agreement and the SPS Agreement is quite important, as the two agreements are mutually exclusive. Members should be aware of which agreement they are subject to, and therefore what support they will need if involved in a trade dispute. The SPS Agreement places strict requirements on a narrow range of health protection measures while the TBT Agreement considers scientific support only one element of the analysis of technical requirements permitted for a variety of reasons. WORLD HEALTH ORG. & WORLD TRADE ORG. SECRETARIAT, *supra* note 37, at 36–37.

60. Bruce A. Silverglade, *The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?*, 55 FOOD & DRUG L.J. 517, 520 (2000).

61. *See id.* (pointing to one provision in the SPS Agreement that allows for countries to challenge one another for being too restrictive and noting that there is no equivalent provision to challenge a country whose standards are too passive, thereby encouraging governments to lower standards).

62. *Id.* at 520–21.

63. *Id.* at 521 (pointing to a Codex decision allowing for the use of certain pesticides that were subsequently banned by the United States Environmental Protection Agency).

64. *Id.*

65. *See, e.g., id.* at 522 (pointing to the new rules the United States adopted in 1998 regarding meat and poultry inspection.) The U.S. maintained trade with all exporters who claimed to be adhering to the equivalent standard, but discovered that four of the exporting countries were not employing consistent standards after more than one million pounds of their meat and poultry were imported into the U.S. *Id.*

The GATS is designed so that member countries agree to open markets in specific service sectors to trade to the extent they negotiate with other member countries.⁶⁶ After a service sector is open, it is very difficult to close, making these negotiations practically binding.⁶⁷

The public health concern with the GATS is similar to that of the TBT and SPS Agreements because the primary focus of GATS is to treat services as commodities used to further international trade, without adequate attention paid to public health.⁶⁸ As such, opening a particular sector to trade can limit safety standards and regulation of that sector.⁶⁹ For example, opening hospital services to foreign investment could prevent a government from regulating what services are offered at particular facilities and what equipment must be available in order to comport with international standards.⁷⁰ Also, although GATS provides for a public health exception, actions taken under that exception may be challenged by countries who feel that there is an unjust burden on trade in services.⁷¹ The agreement seems to implicitly promote fewer restrictions over more, neglecting to include a corresponding action to challenge countries exercising inadequate safety restrictions.⁷²

3. *Developing Countries Exception*

Unlike the narrowly construed public health exception, there is a pattern of WTO agreements expanding exceptions for developing countries that allow for inferior safety standards.⁷³ This preferential treatment dates

66. WORLD TRADE ORG., *supra* note 17, at 34.

67. *Id.* at 35. Such sectors may be subsequently closed or modified through negotiations under Article XXI of the GATS. Under this article, the member who wishes to modify the agreement must wait until three years after the commitment entered into force, notify its intent to modify, is subject to compensatory adjustment negotiations, and may seek arbitration if a compromise cannot be reached. The Council for Trade in Services may also create procedures for modification of a commitment. GATS art. XXI.

68. Shaffer et al., *supra* note 6, at 28.

69. *Id.*

70. *Id.* at 30 tbl.3.

71. WORLD HEALTH ORG. & WORLD TRADE ORG. SECRETARIAT, *supra* note 37, at 50 (stating that the exception must not be used to implement a “disguised restriction on trade in services” and that any country may bring an action under the WTO dispute settlement mechanism if they feel they are being discriminated against).

72. *See id.* (explaining that the “application of a measure must not discriminate arbitrarily or unjustifiably between countries where like conditions prevail,” and implying that use of the exception is scrutinized similar to the those under the TBT and SPS Agreements).

73. *See* WORLD TRADE ORG., *supra* note 37, at 94 (explaining that WTO agreements encourage developed countries to make extra efforts to reduce trade barriers for exports of least-developed countries). The WTO does not define “developed” or “developing” countries, but rather members self-select such classification. However, the WTO will not necessarily concede to a member’s self-selection and other members can challenge such a classification. *Who are the*

to 1965 with the addition of Part IV to the GATT, acknowledging the economic needs of developing countries.⁷⁴ In 1979, GATT members challenged the most-favored nation principle by adopting the Enabling Clause which provides preferential treatment to developing countries without requiring the extension of that treatment to other contracting parties.⁷⁵ At a 1996 meeting in Singapore WTO ministers negotiated a “Plan of Action for Least-Developed Countries” that included offers of technical assistance and increased market-access for least-developed countries.⁷⁶ In 2002, the WTO even created a work program that provides a more prompt and lenient membership process for least-developed countries seeking to join.⁷⁷

The WTO agreements contain various other measures providing developing countries with special economic assistance. Most provisions offer developing countries extra time to fulfill commitments and require developed countries to safeguard the interests of developing countries when adopting regulations.⁷⁸ Also, the WTO Secretariat provides legal counsel and free legal advice to developing countries involved in a WTO dispute, eliminating some of the accountability other countries have when they violate an agreement.⁷⁹

The WTO’s favorable treatment of developing countries in combination with weak public health defenses results in public safety issues, especially when health protections are struck down as “barriers to trade.”⁸⁰

II. TRADE RELATIONS BETWEEN THE UNITED STATES AND CHINA UNDER THE WTO

The United States was a founding member of the WTO, joining in January of 1995.⁸¹ Since that time, the United States has increased trade

developing countries in the WTO?, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm (last visited May 4, 2011).

74. JEANNE J. GRIMMETT, CONG. RESEARCH SERV., TRADE PREFERENCES FOR DEVELOPING COUNTRIES AND THE WTO 2 (2006) (describing the amendment’s inclusion of the principle of non-reciprocity allowing developing countries to receive a reduction or elimination of trade barriers without providing reciprocal advantages to developed countries).

75. *Id.*

76. WORLD TRADE ORG., *supra* note 17, at 94.

77. *Id.*

78. *Id.*

79. *Id.*

80. Shaffer et al., *supra* note 6, at 24. One example of a health protection that the WTO limited is the successful United States challenge to the European Union’s ban of beef treated with artificial hormones. During the dispute, the United States used the protections of the SPS Agreement to counter the restriction. *Id.*

81. WORLD TRADE ORG., *supra* note 17, at 112.

spending on imports from about \$8.9 billion to over \$2.3 trillion in 2010.⁸² China's accession to the WTO occurred much later, in 2001, after fifteen years of negotiations.⁸³ The trade commitments made by China upon entering the WTO were designed to promote trade liberalization and have increased U.S.–China trade relations extensively.⁸⁴ Since China's entry to the WTO, the United States' imports from China have increased from \$45.6 billion in 1995 to a projected \$365.8 billion in 2010, making China the largest source of U.S. imports.⁸⁵

Before China was a WTO-member, most United States imports from China were low-value, labor-intensive goods.⁸⁶ By contrast, in 2009 the top five United States imports from China were computer equipment, miscellaneous manufactured articles (like toys and games), communications equipment, apparel, and audio and video equipment.⁸⁷ China is also the third-largest source of United States agricultural and fish products, including seafood and processed fruits and vegetables.⁸⁸ As this trade relationship has expanded so too have the tensions over various trade issues, including health and safety.⁸⁹

A. China's WTO Compliance and Effects on Health and Safety

Even with the variety of safety provisions,⁹⁰ the WTO agreements do not adequately protect public health. China's inconsistent history of WTO compliance, for example, prevents the United States from receiving the full benefit of China's WTO membership.⁹¹ In order to monitor compliance, the WTO created a special group, in addition to several groups formed by the United States, responsible for reporting on trade developments in China.⁹² The United States Trade Representative Office, the General Accounting

82. FOREIGN TRADE DIV., U.S. CENSUS BUREAU, U.S. TRADE IN GOODS AND SERVICES - BALANCE OF PAYMENTS (BOP) BASIS (2011).

83. Letter from Loren Yager, Dir. of Int'l Affairs & Trade, U.S. Gov't Accountability Office, to the Honorable Charles E. Grassley, Chairman, the Honorable Max Baucus, Ranking Minority Member, U.S. Senate, and the Honorable William M. Thomas, Chairman, the Honorable Charles B. Rangel, Ranking Minority Member, U.S. House of Representatives 6 (Dec. 9, 2005), available at <http://www.gao.gov/new.items/d06162.pdf>.

84. WAYNE M. MORRISON, CONG. RESEARCH SERV., CHINA-U.S. TRADE ISSUES 1, 1 (2011).

85. *Id.* at 1–2 tbl.1.

86. *Id.* at 7. Throughout the 1980s and 1990s, major imports from China were toys, games, consumer electronic products, footwear, textiles, and apparel. *Id.*

87. *Id.* at 7 tbl.5.

88. *Id.* at 6–7.

89. *Id.* at 14.

90. See *supra* Part I.B.

91. KENT H. HUGHES, *Keeping an Eye on China*, in CHINA AND THE WTO: DOMESTIC CHALLENGES AND INTERNATIONAL PRESSURES 21, 22 (2002).

92. *Id.*

Office, the U.S.-China Security Review Commission, and the Congressional-Executive Commission on China are all tasked with ensuring Chinese compliance with WTO commitments.⁹³

Among the top health concerns from U.S. trade with China is the safety of imported Chinese products.⁹⁴ Some analysts attribute the various recalls and safety warnings involving products from China to China's poorly regulatory framework for enforcing safety regulations and standards.⁹⁵ This unfortunate infrastructure issue can be credited to obstacles China faces as a developing country, including a fragmented oversight structure with little coordination resulting in difficulty standardizing and monitoring production practices.⁹⁶ Additionally, the government still relies on outdated standards that are inconsistent with current international standards.⁹⁷

The effects of poor infrastructure are especially damaging when it appears as though a country's regulatory system comports with international standards. For example, although China's General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) has oversight authority to ensure safety of all exports,⁹⁸ it rarely employs the Ministry of Health of the State Food and Drug Administration to regulate the exports.⁹⁹ As a result, in 2007, less than 15,000 of the 400,000 food manufacturers in China were actually registered with AQSIQ, and thus eligible to export goods.¹⁰⁰ With such poor regulatory oversight, one-third of China's food exports were from non-registered manufacturers.¹⁰¹

B. United States Regulatory Agencies

The United States primarily relies on two federal agencies to regulate food imports – the United States Department of Agriculture's Food Safety and Inspection Service (FSIS)¹⁰² and the Food and Drug Administration

93. *Id.*

94. MORRISON, *supra* note 84, at 14.

95. *Id.* at 28.

96. GEOFFREY S. BECKER, CONG. RESEARCH SERV., FOOD AND AGRICULTURAL IMPORTS FROM CHINA 13 (2008).

97. *Id.*

98. *Mission*, GEN. ADMIN. OF QUALITY SUPERVISION, INSPECTION & QUARANTINE OF CHINA, <http://english.aqsiq.gov.cn/AboutAQSIQ/Mission/> (last visited May 4, 2011).

99. BECKER, *supra* note 96, at 13–14.

100. *Id.* at 14.

101. *Id.*

102. *About FSIS*, U.S. DEP'T OF AGRIC., http://www.fsis.usda.gov/About_FSIS/index.asp (last visited May 4, 2011).

(FDA)¹⁰³ – although various other federal, state and local agencies also participate.¹⁰⁴ The FSIS is responsible for ensuring the equivalence of other countries' meat and poultry safeguards and for preventing imports from countries unless the countries have certified that their standards are at least equivalent to the relevant United States safety standards.¹⁰⁵ The FSIS also re-inspects imported goods at United States border entry points.¹⁰⁶ As recently as 2010, the FSIS has not certified China to export meat and poultry products into the United States because the FSIS determined Chinese safety standards were inconsistent with those imposed by the United States.¹⁰⁷

The FDA has the general authority to refuse entry to any food import if it appears to violate U.S. safety provisions based on a physical examination or otherwise.¹⁰⁸ To do so, the FDA works closely with Customs and Border Protection officials to collect notifications from every importer to help monitor the risk of each shipment.¹⁰⁹ Weaknesses arise because the number of FDA-regulated imports is continuously growing while the FDA's ability to closely monitor the practices of other countries is hindered by staffing and funding limitations.¹¹⁰ Also, unlike the FSIS, the FDA lacks the statutory authority to mandate equivalency standards for imported goods, including those from China.¹¹¹

The FDA issues a monthly "Import Refusal Report" for rejected food shipments.¹¹² In January 2011, there were approximately 2,300 refusals recorded in this report; over 200 of these refusals were shipments from

103. *Import Program*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ForIndustry/ImportProgram/default.htm> (last visited May 4, 2011).

104. BECKER, *supra* note 96, at 8. *See also* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 374(a)(1) (2009); Poultry Products Inspection Act, 21 U.S.C. § 466(a) (2009); Federal Meat Inspection Act, 21 U.S.C. § 620(f) (2009).

105. BECKER, *supra* note 96, at 8.

106. *Id.*

107. OFFICE OF INT'L AFFAIRS, FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., COUNTRIES/PRODUCTS ELIGIBLE FOR EXPORT TO THE UNITED STATES (Apr. 7, 2011), *available at* http://www.fsis.usda.gov/pdf/Countries_Products_Eligible_for_Export.pdf (showing that the U.S. has revoked China's approval to export processed poultry to the U.S. pending equivalence re-verification). According to the USDA, "about three-fourths [of the food imports from China] fall into a few broad categories: fish and shellfish, juices, canned fruits, and other fruit, vegetable, and nut products." FRED GALE & JEAN C. BUZBY, U.S. DEP'T OF AGRIC., IMPORTS FROM CHINA AND FOOD SAFETY ISSUES 6 (2009).

108. BECKER, *supra* note 96, at 8–9. *See also* Federal Food, Drug, and Cosmetic Act § 374(a)(1).

109. BECKER, *supra* note 96, at 9.

110. *Id.*

111. *Id.* at 8–9.

112. *Id.* at 10.

China.¹¹³ The only countries with greater numbers of refusals were India and Mexico.¹¹⁴

C. Recalls, Warnings and Other Safety Concerns

Although the United States has an established regulatory framework, various goods are regularly imported that threaten public health. In 2007, Mattel, the world's largest toy maker, issued sixteen recalls when Mattel discovered that toys manufactured in China contained dangerously high levels of lead paint.¹¹⁵ Experts attribute the use of such paint to its price; paint with higher levels of lead sells for one-third of the price of paint with lower levels of lead, which encourages some manufacturers to cut corners in order to increase profits.¹¹⁶ Although China's stated paint standards for non-industrial paint are considered stringent compared to United States standards,¹¹⁷ there is limited enforcement of such standards.¹¹⁸ Many toy factories admit to using lead paint or can identify other factories that do because there is little governmental enforcement.¹¹⁹ Also, the Chinese government does not regulate the level of lead in industrial paint, which leads to fears that such paint may continue to appear in toy factories until the government initiates appropriate oversight.¹²⁰ Such an inconsistent and unenforced regulatory scheme has even resulted in lead being used in children's jewelry.¹²¹ The United States Consumer Product Safety Commission (CPSC) found that of about thirty-nine lead-related recalls in 2007, thirty-eight were from goods manufactured in China.¹²²

Lead paint is only one reason for recalling imported Chinese goods. In January 2008 the FDA noted that Baxter Healthcare Corporation had

113. *Import Refusal Report: OASIS Refusals by Country/Area of Manufacturer's for January 2011*, U.S. FOOD & DRUG ADMIN., http://www.accessdata.fda.gov/scripts/importrefusals/ir_byCountry.cfm?DYear=2011&DMonth=1 (last visited May 4, 2011).

114. *Id.* (showing that India had 338 refusals while Mexico had 266). While more refusals are expected from countries that import more to the United States, Canada provides the most imports to the United States yet only had ninety-two refusals. *Id.* See *Top Ten Countries with which the U.S. Trades*, U.S. CENSUS BUREAU, <http://www.census.gov/foreign-trade/top/dst/current/balance.html> (last visited May 4, 2011) (showing that the United States imports approximately \$45 billion in goods from Canada compared to about \$39 billion from China).

115. David Barboza, *Why Lead in Toy Paint? It's Cheaper*, N.Y. TIMES, Sept. 11, 2007, at C1.

116. *Id.*

117. *Id.* (explaining that China's paint standard permits no more than 90 parts of lead per million while the United States regulations permit up to 600 parts of lead per million).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

temporarily halted manufacture of a particular blood thinner after reports of adverse effects caused by its use.¹²³ The FDA traced the issue to a contaminated pharmaceutical ingredient imported from China.¹²⁴ Baxter commented that the contaminant was chemically modified in a way that it was not detectable through internationally recognized quality tests Baxter performs on every import.¹²⁵ Baxter additionally noted that the contaminant was introduced before the ingredient reached Baxter and that it seemed to represent a “deliberate scheme to adulterate a life-saving medication.”¹²⁶

Some analysts speculated that the problem really originated from China’s lack of regulation over factories producing pharmaceutical products.¹²⁷ This “regulatory void” exists because many producers of exported drug ingredients are actually chemical companies, which the Chinese drug agency does not regulate, unlike drug producers who must obtain certification from China’s State Food and Drug Administration.¹²⁸ Without drug certification, such chemical plants are not subject to inspection by the agency before exporting goods.¹²⁹

The concern with many recalls is that the harms are only identified after the products are purchased by consumers and such harms have long lasting effects.¹³⁰ As such, steps must be taken to both create regulation and, as previously mentioned, enforce existing regulation.

D. The United States’ Response

In response to such public safety concerns, the United States has signed many agreements with China regarding cooperation and training involving health and safety issues.¹³¹ For example, the CPSC and China’s AQSIQ agreed to hold biennial summits to discuss major issues surrounding consumer product safety and to strategize about how to meet health and safety needs.¹³² Furthermore, the FDA opened offices in three

123. MORRISON, *supra* note 84, at 28. The adverse effects included 246 deaths from January 2007 to May 2008. *Id.*

124. *Id.*

125. *Id.* at n.66.

126. *Id.*

127. Walt Bogdanich & Jake Hooker, *China Didn’t Check Drug Supplier, Files Show*, N.Y. TIMES, Feb. 16, 2008, at A1.

128. *Id.*

129. *Id.*

130. See, e.g., Rebecca Mowbray, *Drywall Saga Easing; A Pilot Program to Repair Tainted Homes Spells Relief for Residents of Pelican Point Subdivision in Gonzales*, TIMES-PICAYUNE (NEW ORLEANS), Feb. 27, 2011, at E01 (reporting that claims of negative health effects from Chinese drywall recalled in 2008 are still being resolved).

131. MORRISON, *supra* note 84, at 29.

132. *Id.*

major Chinese cities in 2008 and the CPSC opened a Beijing office to help monitor safety issues.¹³³ CPSC officials have also traveled to China to meet with officials and to inspect plants with alleged violations.¹³⁴ However, even with these extended safety precautions, the United States still struggles to prevent harmful products from entering the country.¹³⁵ Moreover, these options are expensive and may not be feasible for all agencies that regulate imports.

III. TRADE RELATIONS BETWEEN THE UNITED STATES AND INDIA

Trade between the United States and India flourished with the creation of the WTO; growing from under \$10 billion in 1996 to almost \$31 billion a decade later.¹³⁶ Notably, India rose to be the United States' eighteenth biggest supplier of imports by 2006,¹³⁷ with both governments optimistic about encouraging future trade.¹³⁸ While India is currently the fourteenth-largest trade partner of the United States,¹³⁹ the United States hopes to significantly increase trade over the next few years.¹⁴⁰ India is viewed as the "new China" because of its low-cost labor availability and billion-person consumer market potential.¹⁴¹

While trade has benefited the economic situation of India, the country continues to experience hardships similar to those China encountered as a developing country trying to expand its market.¹⁴² For example, a recent complaint is related to India's hesitance to label genetically modified

133. *Id.* at 29–30.

134. *Id.* at 30.

135. *See, e.g.*, Press Release, U.S. Consumer Prod. Safety Comm'n, James Perse Recalls Jackets Due to Violation of Federal Flammability Standard (Feb. 17, 2011), available at <http://www.cpsc.gov/cpscpub/prerel/prhtml11/11134.html> (recalling jackets manufactured in China because they violated the federal flammability standard); Press Release, U.S. Consumer Prod. Safety Comm'n & Health Can., Children's Toy Jewelry Sets Recalled by Playmates Toys; Charms Violate the Total Lead Standard (Feb. 2, 2010), available at <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10131.html> (recalling toy sets manufactured in China because they violated the total lead standard).

136. MICHAEL F. MARTIN & K. ALAN KRONSTADT, CONG. RESEARCH SERV., INDIA-U.S. ECONOMIC AND TRADE RELATIONS I (2007).

137. *Id.*

138. *Id.*

139. *India*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/south-central-asia/india> (last visited May 4, 2011).

140. Vikas Bajaj & Heather Timmons, *Obama to Visit India, and Both Sides Hope to Expand Ties*, N.Y. TIMES, Nov. 4, 2010, <http://www.nytimes.com/2010/11/05/business/global/05indiabiz.html>.

141. *Id.*

142. *See supra* Part II.A.

foods.¹⁴³ The Indian government responded that the labeling requirements were too stringent and difficult to implement.¹⁴⁴ As a developing country, India has less available funding to spend on such regulations, even if it comes at the cost of safety.

A. India's WTO Compliance and Safety Efforts

United States' concerns about importing goods from India are largely the result of health and safety standards that are not being met.¹⁴⁵ However, India is currently working on an agreement to encourage food safety standards as part of its WTO compliance obligations.¹⁴⁶ These regulations are being established in response to the creation of the Food Safety and Standards Authority of India (FSSAI) by the Food Safety and Standards Act of 2006 (FSSA).¹⁴⁷ The FSSAI operates under the Ministry of Health and Family Welfare to establish regulations and an enforcement system; create guidelines for certification of food safety management; collect data for the government related to food safety; and carry out various other responsibilities afforded it by the FSSA.¹⁴⁸ The food safety and standards regulations currently being developed aim to ensure that all companies exporting to India and all Indian exporters are licensed.¹⁴⁹

B. Safety Concerns Regarding Imports from India

As a new agency, the FSSAI has much work to ensure India fully complies with the various WTO safety standards. This is a major concern in areas where the United States' regulatory framework is inadequate. For example, India has become a major supplier of generic pharmaceuticals and

143. Ashok B. Sharma, *Government Hesitant on Labeling Genetically Modified Food*, FIN. EXPRESS, Oct. 1, 2007, <http://www.financialexpress.com/news/Government-hesitant-on-labelling-genetically-modified-food/223027/>.

144. *Id.*

145. *US Pledges to Help India Improve Food and Drug Safety Standards*, VOICE OF AM. NEWS, Jan. 11, 2008, <http://www.voanews.com/english/news/a-13-2008-01-11-voa9-66789812.html>.

146. RITAMBHARA SINGH, USDA FOREIGN AGRIC. SERV., FSSAI-TOWARDS IMPLEMENTING FOOD SAFETY STANDARDS IN INDIA I (2010).

147. *About FSSAI, Introduction*, FOOD SAFETY & STANDARDS AUTH. OF INDIA, http://www.fssai.gov.in/AboutFSSAI/introduction.aspx?RequestID=hus8Ki3EmsiH8U4i4k3_doAction=True (last visited May 4, 2011). The Food Safety and Standards Act replaced all similar acts pre-dating it, including the Prevention of Food Adulteration Act of 1954, the Fruit Products Order of 1955, and the Meat Food Products Order of 1973. It merged food safety authority from various departments into a single line of command that acts as a reference point for all food and safety standard issues. *Id.*

148. *Id.*

149. SINGH, *supra* note 146, at 3.

drug ingredients to American consumers.¹⁵⁰ Despite Americans importing almost 350 varieties of generic drugs, the FDA rarely conducts quality-control inspections in India.¹⁵¹ The FDA does, however, inspect various samples of imports at the border.¹⁵² Even with the limited number of shipments actually being inspected, almost as many shipments from India were rejected in 2007 as from China, who leads United States' imports.¹⁵³

The (lack of) drug quality control issues is linked to various Indian drug-makers who create serious problems for public health and safety.¹⁵⁴ Although experts typically agree that Indian drug-makers are mostly high-quality firms, serious concerns remain because the United States is predicted to import more than half of the active ingredients needed for pills manufactured within United States' borders from China and India by 2022¹⁵⁵ and various recalls of such goods regularly occur. For example, in 2008 the FDA issued a warning letter to India's largest pharmaceutical company, Ranbaxy Laboratories, Ltd., for manufacturing deficiencies that caused drugs to deviate from United States safety standards.¹⁵⁶ This led to an import alert that permitted U.S. officials to detain any pharmaceutical products manufactured at a Ranbaxy facility at the United States border.¹⁵⁷ Because Ranbaxy is one of the largest suppliers of generic drugs to the United States, the import alert covered over thirty different drugs, presenting a major threat to public health.¹⁵⁸

Reports by private inspectors United States companies hired to investigate foreign plants indicate additional concerns about the safety of drugs imported from India.¹⁵⁹ Investigators reported that some plants did not have walls, exposing the chemicals to dust and pests.¹⁶⁰ Other

150. Marc Kaufman, *FDA Scrutiny Scant in India, China as Drugs Pour Into U.S.: Broad Overseas Checks Called Too Costly*, WASH. POST, June 17, 2007, at A1.

151. *Id.*

152. Andrew Martin & Griff Palmer, *China Not Sole Source of Dubious Food*, N.Y. TIMES, July 12, 2007, at C1 (reporting that federal inspectors have stopped food shipments from India, Mexico, and China).

153. *Id.* (stating that 2,723 shipments were stopped from China and 2,620 from India). See also *supra* text accompanying notes 82 and 85 (listing import figures for the U.S.).

154. Kaufman, *supra* note 150.

155. *Id.*

156. Press Release, U.S. Food & Drug Admin., FDA Issues Warning Letters to Ranbaxy Laboratories Ltd., and an Import Alert for Drugs from Two Ranbaxy Plants in India (Sept. 16, 2008), available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2008/ucm116949.htm>.

157. *Id.*

158. *Id.*

159. Kaufman, *supra* note 150.

160. *Id.*

investigated plants lacked room for the chemical equipment, resulting in drugs that were highly susceptible to cross-contamination.¹⁶¹

India has struggled to maintain adequate food quality standards necessary to permit full access to the United States import market.¹⁶² As of 2010, a number of goods imported from India have been recalled for safety purposes. For example, in July 2010, the California Department of Public Health warned against eating dry mango spicy candy imported from India after tests found that the candy contained unacceptably high levels of lead.¹⁶³ The candy had as much as 0.29 parts per million of lead, well exceeding the California standard defining 0.10 parts per million of lead as contaminated.¹⁶⁴ Lead has also been found in other spices and powders imported from India.¹⁶⁵ A study conducted from 2006 to 2008 concluded that American children exposed to Indian spices or powders are more susceptible to contracting lead poisoning.¹⁶⁶

C. United States' Response and Participation

In 2008, the United States pledged to work with India to improve standards for food and drugs shortly after the series of recalls of goods imported from China that led to two separate agreements with China.¹⁶⁷ The Secretary of the United States Department of Health and Human Services (HHS) travelled to India to meet his Indian counterparts to discuss creating working groups to enhance health standards.¹⁶⁸ The HHS Secretary even announced that the United States would be willing to offer technical assistance to help India create its own FDA.¹⁶⁹

The Department of HHS also opened a joint office with the FDA in New Delhi and Mumbai, India,¹⁷⁰ with the expectation that an in-country

161. *Id.*

162. *US Pledges to Help*, *supra* note 145.

163. Suzanne Schreck, *Mango Candy Recalled for Lead Contamination*, FOOD SAFETY NEWS, Jul. 6, 2010, <http://www.foodsafetynews.com/2010/07/mango-candy-recalled-for-lead-contamination/>.

164. *Id.*

165. Cristiane Gurgel Lin et al., *Pediatric Lead Exposure From Imported Indian Spices and Cultural Powders*, 125 PEDIATRICS e828, e829 (2010); Susan Donaldson James, *Indian Spices, Powders Linked to Lead Poisoning*, ABC NEWS, Mar. 15, 2010, <http://abcnews.go.com/Health/indian-spice-religious-powders-lead-poisoning-children-study/story?id=10099654>.

166. James, *supra* note 165.

167. *See US Pledges to Help*, *supra* note 145 (describing how one agreement was about food and the other concerned pharmaceuticals and medical equipment).

168. *Id.*

169. *Id.*

170. Press Release, U.S. Dep't of Health & Human Servs., HHS Opens U.S. Food and Drug Administration Offices in India (Jan. 15, 2009), *available at*

presence will encourage compliance with safety regulations and collaborative efforts between the two governments.¹⁷¹ Since India is a significant exporter of pharmaceuticals and food products to the United States, the new offices will offer technical advice and conduct inspections of facilities in order to facilitate the trade of safe, regulated goods.¹⁷²

IV. THE FUTURE OF PUBLIC HEALTH AND UNITED STATES' TRADE WITH INDIA

The experience of open trade between the United States and China should serve as a reference point for the United States as the United States expands trade with India. While current efforts in both India and China promote trade, these efforts have failed to fully satisfy public health needs.¹⁷³ The United States should now focus on working within the boundaries of the WTO agreements to add to domestic and international policies in an effort to further public health.

Because the WTO lacks efficient mechanisms of evaluation, compliance and enforcement, the organization provides little accountability for member-countries.¹⁷⁴ As such, the enforcement of WTO rules is left to member countries that must initiate and navigate the Dispute Settlement Mechanism.¹⁷⁵ The Dispute Settlement Body (DSB) encourages countries to work out their differences on their own, if possible.¹⁷⁶ When that is not possible, the DSB facilitates mediation and, if necessary, convenes a panel to rule on whether there is a trade violation.¹⁷⁷ The dispute resolution process can take up to fifteen months if a decision is appealed.¹⁷⁸ If the member country eventually receives a favorable decision from the DSB after going through all of the proper steps, the member country is then responsible for enforcing that decision.¹⁷⁹ To avoid this lengthy and

<http://www.hhs.gov/news/press/2009pres/01/20090115a.html>. These offices are part of the Beyond Our Borders Initiative that HHS and FDA launched to expand consumer protection efforts and to help partner governments promote product safety. *Id.*

171. *Id.*

172. *Id.*

173. *See supra* Parts II.C and III.B (describing the various recalls of imported goods).

174. Ngaire Woods & Amrita Narlikar, *Governance and the Limits of Accountability: The WTO, the IMF and the World Bank*, 53 INT'L SOCIAL SCI. J. 569, 574 (2001), available at <http://www.globaleconomicgovernance.org/wp-content/uploads/governance%20and%20wto.PDF>.

175. *Id.* at 579.

176. WORLD TRADE ORG., *supra* note 17, at 56.

177. *Id.*

178. *Id.* at 57.

179. Woods & Narlikar, *supra* note 175, at 579 (stating that "the WTO as a collectivity of members or the Secretariat cannot enforce the rulings directly.").

restricted process,¹⁸⁰ the United States government should concentrate trade expansion efforts on promoting investment, accountability and organization domestically and abroad. Each of these goals will further public health by providing clear, effective regulations while encouraging increased trade by reducing confusion for trade partners.

A. Overseas Investment in Technology

One United States response to the failures of regulating imports from China was to move agency offices overseas to help monitor safety issues and inspect manufacturing plants.¹⁸¹ While this increased awareness of safety issues, the United States should increase foreign direct investment in developing countries, including India, to assist in policy and infrastructure organization. In the Uruguay Round, developing countries adopted investment commitments that will require significant amounts of funding and other resources to implement.¹⁸² Among the regulatory problems in developing countries is a lack of physical and administrative capacity to enforce the agreements.¹⁸³ Appropriate physical infrastructure requires enough people to supervise the goods leaving the country while the administrative burden is on the government to create effective regulations to be enforced by a trained, efficient agency.¹⁸⁴ This can be very expensive and time consuming, leaving developing WTO member countries with few options.¹⁸⁵ For example, India's cost of complying with WTO biosafety standards was estimated at around \$1.8 million.¹⁸⁶ For a developing country, this is a significant investment addressing only a single problem that limits their ability to enforce domestic regulations that promote health.¹⁸⁷

180. See *Chronological list of disputes cases*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited May 5, 2011) (showing that only 422 disputes have gone through the entire dispute process since the WTO's creation in 1995).

181. See *supra* Part II.D.

182. J. Michael Finger & Philip Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge 1* (World Bank Policy Research, Working Paper No. 2215, 1999) (listing the various obligations including reforms of import licensing procedures and other standard-setting regulations).

183. *Id.* at 7.

184. *Id.*

185. See generally Carl E. Pray et al., *Costs and Enforcement of Biosafety Regulations in India and China*, 2 INT'L J. TECH. & GLOBALISATION 137, 139 (2006) (discussing the various costs associated with compliance).

186. *Id.* at 146.

187. Finger & Schuler, *supra* note 182, at 22 (stating that developing countries are forced to choose how to apply standards within the confines of their resources).

The Doha Development Round of WTO agreements resulted in adopting the Ministerial Declaration, setting out the development-related obligations of the WTO and creating a Work Programme designed to help fulfill those obligations.¹⁸⁸ The declaration specifically instructs WTO member countries to cooperate with the hopes of providing technical assistance to developing countries.¹⁸⁹ According to the declaration, this assistance should help developing countries evaluate their policies and objectives to promote predictable trade in the long-run.¹⁹⁰

The United States should encourage companies to invest both capital and training in India to promote WTO compliance. Not only will foreign direct investment allow for the transfer of technology and employee training, but infrastructure assistance would provide a framework for India to create an appropriate regulatory policy.¹⁹¹ Additionally, one study has shown that foreign direct investment leads to more domestic investment than capital inflows.¹⁹² In this way, by investing in India, the United States will encourage India to invest in effective and enforceable trade regulatory schemes. There are potential concerns that overseas investment will cause firms to shift parts of their production abroad, resulting in Americans losing jobs and decreasing wages.¹⁹³ However, studies indicate that foreign direct investment actually increases United States exports and helps maintain both employment and wages within the United States.¹⁹⁴ This could be very beneficial because the United States could rely on private organizations to fund a majority of the investment since the benefits are mostly felt by individual firms who can lower their costs abroad.¹⁹⁵

B. Re-Organize the Domestic Regulatory Scheme to Promote Efficiency

The United States regulatory infrastructure should also be reorganized to provide consistent, clear guidelines on acceptable imports. Even President Obama has acknowledged U.S. regulatory weaknesses and

188. WORLD TRADE ORG., *supra* note 17, at 77.

189. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

190. *Id.*

191. See Prakash Loungani & Assaf Razin, *How Beneficial is Foreign Direct Investment for Developing Countries?*, 38 FIN. & DEV., June 2001, available at <http://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm> (explaining the advantages developing countries can expect from foreign direct investment).

192. *Id.* The study showed that investment brings about a one-for-one increase in domestic investment while capital inflows brings about fifty cents for every dollar. *Id.*

193. JAMES K. JACKSON, CONG. RESEARCH SERV., FOREIGN DIRECT INVESTMENT: CURRENT ISSUES 14 (2010).

194. *Id.* at 15.

195. *Id.* at 14.

suggested that restructuring will help restore faith in the government's ability to protect United States citizens.¹⁹⁶ The Government Accountability Office (GAO) has advocated the need for a single food safety agency since the early 1990s.¹⁹⁷ If such an agency existed, more resources could be devoted to an inspection and regulatory system that would surpass the current, fragmented structure in efficiency.¹⁹⁸ The National Academy of Sciences has also endorsed the idea of a single statute and leader to monitor food safety responsibility.¹⁹⁹

The current system leaves the various U.S. agencies without the resources to adequately monitor imports.²⁰⁰ While increasing trade relations with India, the United States should aim to centralize funds thereby promoting the development of a stronger, more efficient agency.²⁰¹ In 2004, the FDA inspected just over one percent of imported food at only ninety of the 360 ports of entry.²⁰² This may be the result of having twelve underfunded agencies²⁰³ attempting to enforce at least thirty-five laws²⁰⁴ without any authority to issue a mandatory recall.²⁰⁵ Alternatively, if there was one organization responsible for enforcing one body of food safety regulations, that agency could more effectively promote public health while providing clear standards that would encourage international trade.

To most efficiently address all of these issues' intricacies, it would be best to survey the extent of each issue and where reform might be most useful. Recognizing the safety issues presented by the "snapshot" regulatory system of imports,²⁰⁶ President George W. Bush created a

196. President Barack Obama, Remarks by the President in State of Union Address (Jan. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address> (pointing to the confusion resulting from twelve different agencies responsible for exports and advocating a merging of responsibilities).

197. Caroline Smith DeWaal, *Rising Imports, Bioterrorism, and the Food Supply*, 59 FOOD & DRUG L.J. 433, 435 (2004).

198. *Id.*

199. *Id.*

200. Timothy M. Hammonds, *It Is Time to Designate a Single Food Safety Agency*, 59 FOOD & DRUG L.J. 427, 428 (2004).

201. Smith DeWaal, *supra* note 197, at 436 (describing the struggles of the FDA resulting from limited resources and increasing imports).

202. *Id.*

203. COMM. TO ENSURE SAFE FOOD FROM PROD. TO CONSUMPTION, INST. OF MED. & NAT'L RESEARCH COUNCIL, *ENSURING SAFE FOOD: FROM PRODUCTION TO CONSUMPTION* 9 (1998), available at http://www.nap.edu/openbook.php?record_id=6163&page=1. *Some of the federal agencies involved are the Agricultural Marketing Service, the Economic Research Service, the Food Safety and Inspection Service, and the Food and Drug Administration.* *Id.* at 3.

204. *Id.* at 7.

205. Smith DeWaal, *supra* note 197, at 437 (explaining that the agencies instead must rely on a voluntary company recall).

206. INTERAGENCY WORKING GRP. ON IMP. SAFETY, ACTION PLAN FOR IMPORT SAFETY: A ROADMAP FOR CONTINUAL IMPROVEMENT 4 (2007), available at

working group in September 2007 to assess the situation and suggest a more comprehensive, preventative system.²⁰⁷ The group used a notice and comment process to get input from stakeholders in both the United States and other countries.²⁰⁸ While the group only worked for two months,²⁰⁹ they issued a report of the primary concerns and fourteen broad recommendations for addressing those concerns.²¹⁰ The United States should create a new taskforce to review these regulatory issues so that any new regulatory systems and laws can be more effective and target the most important concerns.

C. Promote Individual Accountability

In many of the recall examples from both China and India, the trade originated in the private sector.²¹¹ Nevertheless, the WTO provisions hold member governments accountable when trade policies are contested.²¹² As a result, a decision to sanction a WTO member through the Dispute Settlement Mechanism effectively disturbs all private actors within a country, which could impede trade and only exacerbates the problem.²¹³ As the individual traders are the most obvious and immediate beneficiaries of globalization,²¹⁴ it seems that a more equitable solution would be to hold those private actors who are responsible for the harm accountable.

Although the international agreements are traditionally considered to only create legal obligations for states,²¹⁵ the growth of multinational corporations shows the need for governments to hold private actors

<http://archive.hhs.gov/importsafety/report/actionplan.pdf>. See also *supra* Part II.C (discussing the 2007 recalls of imported goods from China).

207. INTERAGENCY WORKING GRP. ON IMP. SAFETY, *supra* note 206, at 5. Secretary of the Department of Health and Human Services Michael Leavitt led the group. *Id.* at 2.

208. *Id.* at 2. The group met with stakeholders at all levels of trade including producers, importers, and retailers on both the state and federal level. In addition, they met with members of Congress and representatives from foreign governments. *Id.*

209. Letter from Michael O. Leavitt, Sec'y, Health & Human Servs., Chair, Interagency Working Grp. on Imp. Safety, to President George W. Bush (Nov. 6, 2007), available at <http://archive.hhs.gov/importsafety/report/actionplan.pdf>.

210. INTERAGENCY WORKING GRP. ON IMP. SAFETY, *supra* note 206, at 10. Examples of recommendations include "create new and strengthen existing safety standards" and "promote good importer practices." *Id.* at 11.

211. See *supra* Parts II.C and III.B (pointing to the Mattel recall of toys imported from China and recall of all pharmaceutical products manufactured by Ranbaxy Laboratories, Ltd. in India).

212. Dommen, *supra* note 9, at 14 fig.2.

213. *Id.*

214. *Id.* at 47.

215. See, e.g., Shaffer et al., *supra* note 6, at 27 (stating that "the WTO considers only federal governments as members.").

responsible.²¹⁶ These multinational corporations have great power to effect international trade policy and receive all the benefits of their country's membership,²¹⁷ which justifies making them subject to enforcement of those agreements. For example, if Mattel decided to import dolls from India then Mattel should be responsible for ensuring import regulations are upheld. Domestic law could require that private companies bear the burden of safety standard enforcement, as they are benefiting significantly from the trade in terms of finances. This would ensure that safety standards are being upheld while reducing the cost to the government to monitor imports. The additional resources could instead be allocated to expanding exports and otherwise furthering trade.

CONCLUSION

The history of globalization demonstrates the various implications of economic and social issues for all those involved in trade. While the economic advantages of trade are expansive, it is important that governments weigh those interests with public health. The WTO aims to promote improved living standards for all, but the organization is ineffective in enforcing and monitoring compliance with its various agreements.²¹⁸ Although the safety provisions included in the WTO Agreements suggest that member countries are aware of the strong correlation between international trade and public health, there is still continued movement towards less regulation and safety standards to promote economic interests.²¹⁹ As a result, the burden rests on individual member countries to operate within the restrictions of the WTO agreements while promoting the safety of their citizens.

Safety concerns are especially important when trading with developing countries that may not have the means to comport with all of the WTO agreements, like China and India.²²⁰ In trading with China, the United States witnessed the importance of an efficient domestic regulatory mechanism to ensure imports are meeting quality standards.²²¹ To apply this lesson to trade with India, the United States should maintain previous responses to enforcement failures while focusing on investment, organization, and accountability.²²² Such responses will ensure that public

216. Lucy Reed, *Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?*, 96 AM. SOC'Y INT'L L. PROC. 219, 225 (2002).

217. *Id.* at 226–27.

218. *See supra* Part I.B.

219. *See supra* Part I.B.1–2.

220. *See supra* Part I.B.

221. *See supra* Part II.

222. *See supra* Part IV.

health interests are considered while furthering international trade as advocated by the WTO.