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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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. Increase in trade is especially linked to economic growth in developing countries like China and India and arguably improves their national health. However, as a cost of these benefits, developed countries are asked to compromise their safety standards to encourage economic growth in developing countries. Ultimately, this globalization leads to less governmental autonomy to

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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 members\(^8\) 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.”\(^11\)

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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).


8. WORLD TRADE ORG., ANNUAL REPORT 6 (2010), available at http://www.wto.org/english/res_e/books_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).


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. 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. Next, this Comment considers the current trade relationship between the United States and India. 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.

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), signed in 1948. The GATT was signed by twenty-three countries to liberalize trade through a series of negotiations, or rounds, between member countries. 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. However, as time passed, member countries acknowledged the need to address other issues, such as trade of services and nontariff barriers. Consequently, in 1986, member countries met for the eighth round, the Uruguay Round. 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
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.
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. 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. Because public health is an essential part of a population's access to public welfare, democratic theories explain that the government has a responsibility to encourage collective action to protect and assure the population's health. 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." To incorporate this view, various negotiations led to specific agreements outlining safety requirements and rules based on what is regulated by the agreement. These safety standards regarding the trade of goods form the Technical Barriers to Trade and the Sanitary and Phytosanitary Measures Agreements. 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.

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,

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).
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).
40. WORLD TRADE ORG., supra note 17, at 30.
41. Id. at 35.
political, or other status.\footnote{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.\footnote{43}

This goal is furthered most by the WTO’s support of trade restraints set by governments citing public health concerns.\footnote{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.”\footnote{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.\footnote{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.”\footnote{47} This conditional exception is mirrored in Article XIV of the GATS relating to trade of services.\footnote{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.\footnote{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

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\footnote{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.}

\footnote{43. Id.}

\footnote{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).}

\footnote{45. GATT art. XX(b).}

\footnote{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).}

\footnote{47. GATT art. XX(b).}

\footnote{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. . . .”).}

\footnote{49. World Health Org. & World Trade Org. Secretariat, supra note 37, at 31–38.}
health, and do not create "unnecessary obstacles to trade." This agreement requires members to avoid unnecessary obstacles by implementing technical requirements designed to further legitimate objectives that do not unnecessarily restrict trade. Members are encouraged to base such restrictions on international standards, discussed below, in order to promote consistency of laws across member countries. 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. 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.

The Sanitary and Phytosanitary Measures Agreement (SPS Agreement) was created to reduce the use of non-tariff trade barriers falsely attributed to human, animal, or plant health concerns in the agricultural sector. 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." Like the TBT Agreement, the SPS Agreement encourages members to use international standards but allows the adoption of higher levels of health protection. However, in contrast to the TBT Agreement, the SPS Agreement requires that members adopting

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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.\textsuperscript{59}

There is concern that these agreements are designed not to promote safety, but to further trade.\textsuperscript{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.\textsuperscript{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.\textsuperscript{62} As a result, decisions made by Codex usually represent compromises between UN countries that can result in the lowering of safety standards.\textsuperscript{63} There is additional pressure on Codex to lower standards from developing countries that cannot meet even minimal international safety standards.\textsuperscript{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.\textsuperscript{65}

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

\textsuperscript{59} World Health Org. & World Trade Org. Secretariat, \textit{supra} note 37, at 36; Anand Kumar Jaiswal, \textit{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, \textit{supra} note 37, at 36–37.

\textsuperscript{60} Bruce A. Silverglade, \textit{The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?}, 55 Food & Drug L.J. 517, 520 (2000).

\textsuperscript{61} See \textit{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).

\textsuperscript{62} \textit{id.} at 520–21.

\textsuperscript{63} \textit{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).

\textsuperscript{64} \textit{id.}

\textsuperscript{65} See, \textit{e.g.}, \textit{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. \textit{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. After a service sector is open, it is very difficult to close, making these negotiations practically binding.

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. As such, opening a particular sector to trade can limit safety standards and regulation of that sector. 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. 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. The agreement seems to implicitly promote fewer restrictions over more, neglecting to include a corresponding action to challenge countries exercising inadequate safety restrictions.

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. This preferential treatment dates...
to 1965 with the addition of Part IV to the GATT, acknowledging the economic needs of developing countries.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{80}

\section*{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.\textsuperscript{81} Since that time, the United States has increased trade

\begin{itemize}
\item \textit{developing countries in the WTO?}, \textsc{World Trade Org.}, http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited May 4, 2011).
\item \textsc{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).
\item \textit{Id.}
\item \textit{World Trade Org., supra note 17, at 94.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item Shaffer et al., \textit{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. \textit{Id.}
\item \textit{World Trade Org., supra note 17, at 112.}
\end{itemize}
spending on imports from about $8.9 billion to over $2.3 trillion in 2010.\textsuperscript{82} China’s accession to the WTO occurred much later, in 2001, after fifteen years of negotiations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{85}

Before China was a WTO-member, most United States imports from China were low-value, labor-intensive goods.\textsuperscript{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.\textsuperscript{87} China is also the third-largest source of United States agricultural and fish products, including seafood and processed fruits and vegetables.\textsuperscript{88} As this trade relationship has expanded so too have the tensions over various trade issues, including health and safety.\textsuperscript{89}

\textit{A. China’s WTO Compliance and Effects on Health and Safety}

Even with the variety of safety provisions,\textsuperscript{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.\textsuperscript{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.\textsuperscript{92} The United States Trade Representative Office, the General Accounting

\textsuperscript{82} FOREIGN TRADE DIV., U.S. CENSUS BUREAU, U.S. TRADE IN GOODS AND SERVICES - BALANCE OF PAYMENTS (BOP) BASIS (2011).
\textsuperscript{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/d06l62.pdf.
\textsuperscript{84} WAYNE M. MORRISON, CONG. RESEARCH SERV., CHINA-U.S. TRADE ISSUES 1, 1 (2011).
\textsuperscript{85} \textit{Id.} at 1–2 tbl.1.
\textsuperscript{86} \textit{Id.} at 7. Throughout the 1980s and 1990s, major imports from China were toys, games, consumer electronic products, footwear, textiles, and apparel. \textit{Id.}
\textsuperscript{87} \textit{Id.} at 7 tbl.5.
\textsuperscript{88} \textit{Id.} at 6–7.
\textsuperscript{89} \textit{Id.} at 14.
\textsuperscript{90} \textit{See supra} Part 1.B.
\textsuperscript{92} \textit{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.\footnote{Id.}

Among the top health concerns from U.S. trade with China is the safety of imported Chinese products.\footnote{MORRISON, supra note 84, at 14.} 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.\footnote{Id. at 28.} 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.\footnote{GEOFFREY S. BECKER, CONG. RESEARCH SERV., FOOD AND AGRICULTURAL IMPORTS FROM CHINA 13 (2008).} Additionally, the government still relies on outdated standards that are inconsistent with current international standards.\footnote{Id. at 14.}

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,\footnote{Mission, GEN. ADMIN. OF QUALITY SUPERVISION, INSPECTION & QUARANTINE OF CHINA, http://english.aqsiq.gov.cn/AboutAQSIQ/Mission/ (last visited May 4, 2011).} it rarely employs the Ministry of Health of the State Food and Drug Administration to regulate the exports.\footnote{BECKER, supra note 96, at 13–14.} 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.\footnote{Id. at 14.} With such poor regulatory oversight, one-third of China’s food exports were from non-registered manufacturers.\footnote{Id.}

\section*{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)\footnote{About FSIS, U.S. DEP’T OF AGRIC., http://www.fsis.usda.gov/About_FSIS/index.asp (last visited May 4, 2011).} and the Food and Drug Administration
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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. The FSIS also re-inspects imported goods at United States border entry points. 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.

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. 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. 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. Also, unlike the FSIS, the FDA lacks the statutory authority to mandate equivalency standards for imported goods, including those from China.

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

105. BECKER, supra note 96, at 8.
106. Id.
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. The only countries with greater numbers of refusals were India and Mexico.

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. 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. Although China’s stated paint standards for non-industrial paint are considered stringent compared to United States standards, there is limited enforcement of such standards. Many toy factories admit to using lead paint or can identify other factories that do because there is little governmental enforcement. 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. Such an inconsistent and unenforced regulatory scheme has even resulted in lead being used in children’s jewelry. 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.

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


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).


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. The FDA traced the issue to a contaminated pharmaceutical ingredient imported from China. 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. 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.”

Some analysts speculated that the problem really originated from China’s lack of regulation over factories producing pharmaceutical products. 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. Without drug certification, such chemical plants are not subject to inspection by the agency before exporting goods.

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. 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. 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. 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.
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. CPSC officials have also traveled to China to meet with officials and to inspect plants with alleged violations. However, even with these extended safety precautions, the United States still struggles to prevent harmful products from entering the country. 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. Notably, India rose to be the United States’ eighteenth biggest supplier of imports by 2006, with both governments optimistic about encouraging future trade. While India is currently the fourteenth-largest trade partner of the United States, the United States hopes to significantly increase trade over the next few years. India is viewed as the “new China” because of its low-cost labor availability and billion-person consumer market potential.

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

133. Id. at 29–30.
134. Id. at 30.
137. Id.
138. Id.
141. Id.
142. See supra Part II.A.
foods. The Indian government responded that the labeling requirements were too stringent and difficult to implement. 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. However, India is currently working on an agreement to encourage food safety standards as part of its WTO compliance obligations. 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). 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. The food safety and standards regulations currently being developed aim to ensure that all companies exporting to India and all Indian exporters are licensed.

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

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144. Id.


146. RITAMBHARA SINGH, USDA FOREIGN AGRIC. SERV., FSSAI-TOWARDS IMPLEMENTING FOOD SAFETY STANDARDS IN INDIA 1 (2010).

cation=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.\textsuperscript{150} Despite Americans importing almost 350 varieties of generic drugs, the FDA rarely conducts quality-control inspections in India.\textsuperscript{151} The FDA does, however, inspect various samples of imports at the border.\textsuperscript{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.\textsuperscript{153}

The (lack of) drug quality control issues is linked to various Indian drug-makers who create serious problems for public health and safety.\textsuperscript{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 2022\textsuperscript{155} 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{158}

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


\textsuperscript{151} Id.

\textsuperscript{152} Andrew Martin & Griff Palmer, \textit{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).

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

\textsuperscript{154} Kaufman, \textit{supra} note 150.

\textsuperscript{155} Id.


\textsuperscript{157} Id.

\textsuperscript{158} Id.

\textsuperscript{159} Kaufman, \textit{supra} note 150.

\textsuperscript{160} Id.
investigated plants lacked room for the chemical equipment, resulting in drugs that were highly susceptible to cross-contamination.\textsuperscript{161}

India has struggled to maintain adequate food quality standards necessary to permit full access to the United States import market.\textsuperscript{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.\textsuperscript{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.\textsuperscript{164} Lead has also been found in other spices and powders imported from India.\textsuperscript{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.\textsuperscript{166}

\textit{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.\textsuperscript{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.\textsuperscript{168} The HHS Secretary even announced that the United States would be willing to offer technical assistance to help India create its own FDA.\textsuperscript{169}

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

\begin{footnotesize}
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\item[161.] Id.
\item[162.] \textit{US Pledges to Help, supra} note 145.
\item[164.] Id.
\item[166.] James, \textit{supra} note 165.
\item[167.] See \textit{US Pledges to Help, supra} note 145 (describing how one agreement was about food and the other concerned pharmaceuticals and medical equipment).
\item[168.] Id.
\item[169.] Id.
\item[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), \textit{available at}
presence will encourage compliance with safety regulations and collaborative efforts between the two governments.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{174} As such, the enforcement of WTO rules is left to member countries that must initiate and navigate the Dispute Settlement Mechanism.\textsuperscript{175} The Dispute Settlement Body (DSB) encourages countries to work out their differences on their own, if possible.\textsuperscript{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.\textsuperscript{177} The dispute resolution process can take up to fifteen months if a decision is appealed.\textsuperscript{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.\textsuperscript{179} To avoid this lengthy and
restricted process,\textsuperscript{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.

\textit{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.\textsuperscript{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.\textsuperscript{182} Among the regulatory problems in developing countries is a lack of physical and administrative capacity to enforce the agreements.\textsuperscript{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.\textsuperscript{184} This can be very expensive and time consuming, leaving developing WTO member countries with few options.\textsuperscript{185} For example, India's cost of complying with WTO biosafety standards was estimated at around $1.8 million.\textsuperscript{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.\textsuperscript{187}

\textsuperscript{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).

\textsuperscript{181} See supra Part II.D.


\textsuperscript{183} Id. at 7.

\textsuperscript{184} Id.

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

\textsuperscript{186} Id. at 146.

\textsuperscript{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.\(^\text{188}\) The declaration specifically instructs WTO member countries to cooperate with the hopes of providing technical assistance to developing countries.\(^\text{189}\) According to the declaration, this assistance should help developing countries evaluate their policies and objectives to promote predictable trade in the long-run.\(^\text{190}\)

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.\(^\text{191}\) Additionally, one study has shown that foreign direct investment leads to more domestic investment than capital inflows.\(^\text{192}\) 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.\(^\text{193}\) However, studies indicate that foreign direct investment actually increases United States exports and helps maintain both employment and wages within the United States.\(^\text{194}\) 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.\(^\text{195}\)

### 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

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\(^{188}\) WORLD TRADE ORG., supra note 17, at 77.


\(^{190}\) Id.


\(^{192}\) 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. The Government Accountability Office (GAO) has advocated the need for a single food safety agency since the early 1990s. 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. The National Academy of Sciences has also endorsed the idea of a single statute and leader to monitor food safety responsibility.

The current system leaves the various U.S. agencies without the resources to adequately monitor imports. While increasing trade relations with India, the United States should aim to centralize funds thereby promoting the development of a stronger, more efficient agency. In 2004, the FDA inspected just over one percent of imported food at only ninety of the 360 ports of entry. This may be the result of having twelve underfunded agencies attempting to enforce at least thirty-five laws without any authority to issue a mandatory recall. 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, President George W. Bush created a

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198. Id.

199. Id.


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

202. Id.


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. The group used a notice and comment process to get input from stakeholders in both the United States and other countries. While the group only worked for two months, they issued a report of the primary concerns and fourteen broad recommendations for addressing those concerns. 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. Nevertheless, the WTO provisions hold member governments accountable when trade policies are contested. 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. As the individual traders are the most obvious and immediate beneficiaries of globalization, 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, the growth of multinational corporations shows the need for governments to hold private actors

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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.


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.”).
These multinational corporations have great power to effect international trade policy and receive all the benefits of their country’s membership, 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 benefitting 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. 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. 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. In trading with China, the United States witnessed the importance of an efficient domestic regulatory mechanism to ensure imports are meeting quality standards. 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. Such responses will ensure that public

217. Id. at 226–27.
218. See supra Part I.B.
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.