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Testimony of Lori Wallach
Director, Public Citizen's Global Trade Watch

Hearing on Protecting Public Health in a Global Economy

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On behalf of Public Citizen's 100,000 members, I want to thank the Chairwoman and members of the subcommittee for the opportunity to discuss the problem of ensuring consumer safety in the context of Americans' food supply increasing coming from countries around the world without strong domestic food safety systems. Public Citizen is a nonprofit research, lobbying and litigation group based in Washington, D.C. Founded in 1971, Public Citizen accepts no government or corporate funds. The mission of Public Citizen's Global Trade Watch division is to ensure that in this era of globalization, a majority have the opportunity to enjoy America's promises: economic security; a clean environment; safe food, medicines and products; access to quality affordable services such as health care; and the exercise of democratic decision-making about the matters that affect their lives. Global Trade Watch monitors the outcomes of the current globalization model and its implementing mechanisms, including the World Trade Organization (WTO) and North American Free Trade Agreement (NAFTA) with respect to their effect democracy, economic and social justice, public health and safety, and a healthy environment.

At issue with today's increasingly globalized food supply are critical public health and safety issues. However, because of the inappropriate invasion of domestic food safety and public health regulatory space by 'trade' agreements, perversely much of my testimony today will focus on trade agreement policy.

Indeed, the rapid growth in imported food, the current trade pact rules prioritizing expansion of food trade volumes by limiting countries' food safety policies, and the way that some U.S. agencies have applied these trade rules means that U.S. consumers are increasingly being forced to rely on foreign governments to regulate the safety of foods sold and consumed here. Unfortunately, our recent experience has highlighted that many foreign regulatory systems are simply not up to the task. Thus, relying on foreign governments and their food safety systems to protect Americans' health is a recipe for disaster – and must be changed.

In this testimony, I will focus on six key issues:

- **An increasing share of Americans' food is being grown and/or processed in other countries.** Nearly $80 billion in food goods are imported into the United States annually – more than double the level when NAFTA went into effect in 1994.

- **This shift has occurred following U.S. entry into agreements such as WTO and NAFTA that contain trade, investment and safety deregulation and standardization requirements designed to expand the volume of agricultural trade. These pacts prioritize expanding trade volumes over the goal of consumer safety and contain rules to constrain signatory countries' food safety requirements.** For instance, the pacts require signatory countries to set their tariff levels so as to facilitate imports of at least 5% of each agricultural tariff line, even if the country is also a major exporter of the same products. The pacts also require that to facilitate such trade expansion, countries conform their domestic food safety regulations to certain limits. The trade pacts provide new rights for exporting countries to challenge domestic food safety laws in foreign tribunals to seek their elimination if such laws extend beyond the trade agreement-imposed constraints. Yet, there is no similar mechanism for challenge of trade rules that undermine critical food safety and public health goals. As a result, some targets of such attacks, such as the European Union with respect to its ban on artificial growth hormones in meat; have paid millions in trade sanctions to maintain their important consumer health protections.

- **One particularly dangerous trade agreement limitation on food safety involves obligations related to "equivalence" – the requirement that countries may no longer require imported food to actually *meet* their domestic standards.** Trade agreement equivalence rules involve a process under which an exporting country requests to show that its own, different safety system provides an equivalent level of food safety protection to U.S. policy and then the United States must accept imported food that meets the exporting country's laws, even if such food does not meet U.S. safety laws' requirements. However, the term equivalent is not defined in the trade pacts, providing U.S. agencies more authority than is now being employed by some U.S. agencies to ensure the safety of imported food.

- **Americans expect the food they eat meets U.S. safety standards. This is not the case with respect to some imported meat and poultry under current U.S. Department of Agriculture (USDA) Food Safety and Inspection Service (FSIS) equivalence policy.** USDA has used various trade pact rules and related U.S. statutory changes to establish an equivalence policy that shifts away from explaining to other countries how to comply with U.S. standards and instead FSIS staff now spend their time discussing whether or not other countries' varying technical standards and differing rules and regulations are "close enough" to U.S. rules to provide the same level of protection for U.S. consumers as the domestic system. As a result, U.S. consumers increasingly are being forced to rely with respect to meat and poultry purchased and consumed in the United States on the food safety systems of foreign countries whose regulatory systems are simply not up to the task. Meat and poultry that does not meet U.S. safety standards is being allowed entry into the United States under such USDA "equivalence" determinations. The increasing level of food imports combined with equivalency determinations, different foreign standards, the inadequate auditing of foreign plants and minimalist border checks has resulted in a broad abrogation of U.S. food safety standards.

- **USDA has found equivalence and sought to force U.S. consumers to rely on the food safety systems of countries known for widespread and deadly safety failures.** Consider China: how could U.S. consumers ever be left relying on a system which is responsible for a chain of deadly food and product safety problems domestically and internationally and where an absolute lack of government accountability and transparency have resulted in a steady stream of international news headlines – from the early H5N1 avian influenza outbreaks and their suppression of this information and associated human illnesses and deaths as only one prominent example.

- **Changes are needed to the relevant U.S. laws and regulations implementing trade pact food safety-related policies, notably including meat and poultry equivalence policy.** The fifteen year track record through Democratic and Republican administrations that the U.S. Department of Agriculture has had in implementing WTO equivalence rules shows U.S. law and agency regulations and practices must change – as well as trade agreement constraints on food safety. It is not only a matter of the agency 'doing better,' but changes to underlying policies.

1. An increasing share of Americans' food is being grown and/or processed in other countries.

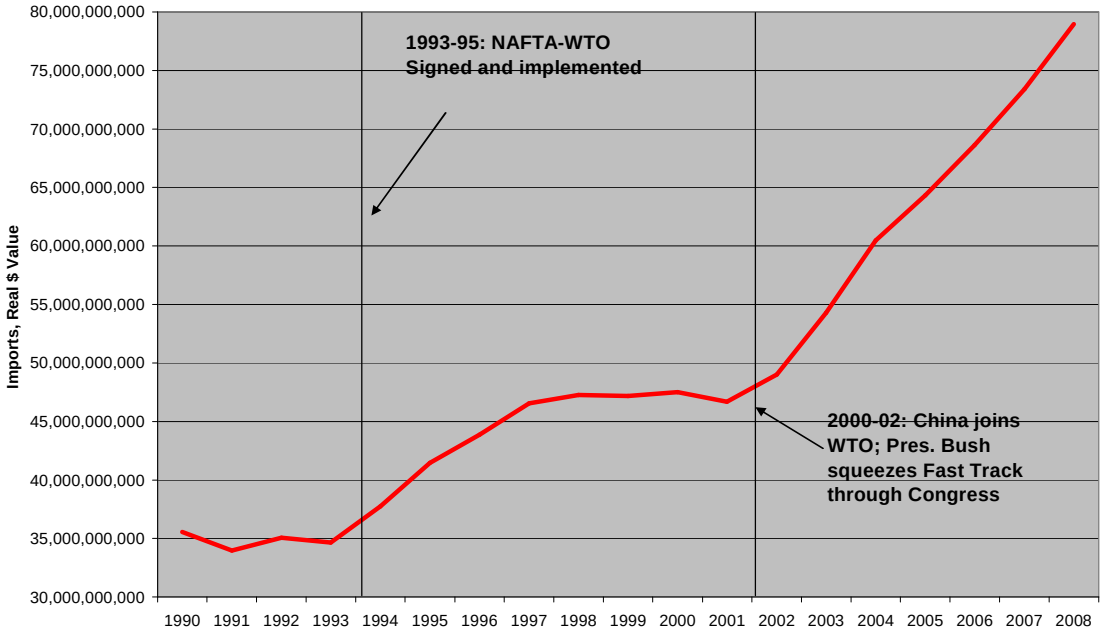
In the decade-plus since the implementation of the WTO, NAFTA and other U.S. Free Trade Agreements (FTAs), food imports have risen from a trickle to a flood. Figure 1, below, shows that nearly $80 billion in food goods are imported here annually – well over double the level when NAFTA went into effect in 1994.

The CDC estimates that some 76 million people a year suffer from food-borne illness. An estimated 325,000 are hospitalized and an estimated 5,000 die.[1] It is impossible to estimate what percentage of food-borne illness is due to imports, but since imports are at a record high, it is safe to say that the numbers of food illness attributable to food imports is on the rise.[2] As the *New England Journal of Medicine* argued succinctly, "with a global food supply, we worry less about the possibility that Grandmother's potato salad will affect 80% of the people attending a church picnic than about the prospect that hundreds of thousands of people in many countries will be exposed to a single contaminated product."[3]

American farmers were told by NAFTA and WTO supporters that the pacts would increase exports and thus provide a new path for struggling farmers to succeed economically.[4] In fact, U.S. agriculture exports increased, but food imports skyrocketed. Thus, from 1993 to 2005, the United States went from a $24 billion food surplus to an $840 million food deficit. While this has improved somewhat in recent years, the fact remains that food imports grew 128 percent over the 1993-2008 period, while exports only grew 86 percent. Nearly 300,000 U.S. family farms have gone under since NAFTA and the WTO went into effect[5] and net farm income (minus government payments) declined 13 percent for family farmers.[6] These food trade shifts impact the environment as well. The United States is now importing massive amounts of the grains and foods it also exports, with tons of redundant trade being shipped in and out simultaneously.[7] A recently leaked United Nations study found that carbon emissions from merchant shipping are nearly three times greater than previously estimated, or an estimated 4.5 per cent of global carbon emissions.[8]

FIGURE 1

U.S. Food Imports Explode During NAFTA-WTO Era



Source: USDA's FATUS Aggregations, authors' calculations

2. Agreements such as WTO and NAFTA prioritize expanding trade volumes over the goal of consumer safety and contain rules to constrain signatory countries' food safety requirements.

The pressure for globalized agricultural trade is largely being driven by the transnational agribusiness and shipping companies. These interests played a disproportionate role in establishing U.S. trade policies and agreements such as WTO and NAFTA. Such firms were heavily represented among the 500 corporate representatives comprising the U.S. trade advisory committee system while not a single consumer, health or safety organization was included. Many of these agribusiness firms were interested in 'trade' rules that would facilitate their desire to relocate production and processing to other nations because of cheap labor and production costs and weaker food safety and environmental regulations while still being able to sell such food back here in the key U.S. market.

As a publication by the U.S. Department of Agriculture's Animal Plant Health Inspection Service states, "International commerce is increasingly the result of more commercial activities than just exporting or importing. Most of the top-ranked U.S.-based meat corporations are also investing overseas in processing or production. Market access, lower production costs, growth opportunities, and regulation drive international location decisions."[9] The agency specifically points to lower labor and environmental compliance costs in nations like Mexico.[10]

Meat and poultry industry giants such as Perdue Farms, Inc., Tyson Foods, Inc., Smithfield Foods, Conagra Foods, and Cargill, Inc. have all located plants abroad, many in order to send product back to the U.S. market under the equivalency system.[11] The increasingly international nature of the enterprise is leading meat processing interests to push for weakening of governmental regulation of slaughter and processing of meat and poultry products at home and abroad.

In 1993, Congress passed NAFTA, a comprehensive international investment, deregulation and trade agreement covering Canada, the U.S. and Mexico. In 1994, Congress passed the Uruguay Round Agreements Act making the United States part of the now 153-member WTO which enforces seventeen major agreements, many of which have little to do with trade per se, but rather require the conformity of signatory countries domestic non-trade regulatory policies to various constraints. Indeed, a key WTO and NAFTA provision requires each signatory country "to ensure the conformity" of all of its "laws, regulations and administrative procedures" to the agreements' expansive terms.[12] Domestic policies that fail to conform to NAFTA or WTO constraints can be challenged by other agreement signatory countries as barriers to trade in the built-in dispute resolution bodies established in these agreements.

Among the common provisions of varying strength in these pacts and other U.S. FTAs are those that establish new 'foreign investors' protections that, by eliminating certain costs and risks previously associated with the offshoring of U.S. investment and production to developing countries, incentivize and protect such relocations.

Meanwhile, the actual agricultural trade provisions of the WTO eliminated quotas that many countries, including the United States, once used to manage food supplies – often with formulas designed to modulate imports levels based on the actual gap in supply provided by domestic producers. That is to say, many countries only imported food that their domestic producers could not adequately supply until the WTO eliminated such policy options. And, the WTO, NAFTA and the FTAs also decreased tariff rates. For instance, the pacts require signatory countries to set their tariff levels so as to facilitate imports of at least 5% of each agricultural tariff line, even if the country is also a major exporter of the same products.

Finally, the WTO includes as one of the agreement it enforces an Agreement on Sanitary and Phytosanitary Standards (SPS) – which is incorporated into and in some instances expanded on in various U.S. FTAs. In the name of facilitating expanded volumes of agriculture trade, the SPS agreement sets criteria that WTO nations must follow regarding their domestic policies designed to protect human, animal or plant life from pests, diseases and toxins in food, beverages, or animal feed. In sum, this agreement establishes a

ceiling on food safety standards, but no floor; requires that domestic regulations should be constructed in the least trade restrictive manner possible to facilitate trade; and, as discussed below, requires countries to use uniform international standards when possible and to accept other countries' different safety policies as equivalent in the name of trade facilitation.

Taken in combination, the agreements constitute a deregulatory superstructure which undermines strong domestic policies to protect the food supply and consumers from pathogens and contaminants. Consider the bottom line established through these agreements: foreign governments – and the export interests they represent including U.S.-brand-name agribusiness corporations who have relocated production offshore - that are unhappy about U.S. food safety laws can now challenge such laws as 'illegal trade barriers' in a regime where losing countries have the choice of either changing their policy or paying trade sanctions.[13] This regime obviously puts trade expansion above consumer safety: decisions by U.S. government officials about food safety are now subject to oversight by trade tribunals operating behind closed doors whose goal is to facilitate trade, not to safeguard the interests of U.S. consumers – while obviously there is no mechanism to challenge the ways in which trade expansion had exposed U.S. consumers to new safety threats - must less an obligation to remedy that conflict in favor of safety.

When NAFTA's implementing legislation and the Uruguay Round Agreements Act passed Congress in the early 1990s, huge swaths of U.S. domestic laws and policy were rewritten in one fell swoop. Because the agreements were passed under the extraordinary limits on Congress' normal committee and floor debate functions provided for in special requirements of the "Fast Track" trade agreement voting procedure (no normal mark ups, no amendments, limited debate), many in Congress had only the vaguest sense of what was contained in these bills. Because no amendments are allowed to Fast-Tracked trade bills, even the members of Congress who noticed and understood the arcane details (such as the regulatory roll backs enacted in the name of "trade" agreement food and product safety harmonization and equivalency requirements) had no ability to fix the provisions that troubled them.

3. One particularly dangerous trade agreement limitation on food safety involves obligations related to "equivalence" – the requirement that countries may no longer require imported food to actually *meet* their domestic standards.

Trade agreement equivalence rules involve a process under which an exporting country requests to show that its own, different safety system provides an equivalent level of food safety protection to U.S. policy and then the United States must accept imported food that meets the exporting country's laws, even if such food does not meet U.S. safety laws' requirements. Thus, once another country's food safety system or an individual foreign standard is declared "equivalent" to a U.S. domestic system or standard, products produced under that system must be treated as if they were produced under the U.S. domestic system or standard, even though the two systems may differ in significant ways.

This notion stands in sharp contrast to U.S. policies to ensure the safety of imported meat and poultry that were in place before WTO and NAFTA. Under that safety system, foreign meat inspection systems were required to produce meat destined for export to the United States utilizing sanitary and quality standards *the same as* those of the United States. U.S. government inspectors had to certify that foreign processing plants met U.S. standards in order for such a facility to send food to the U.S.

NAFTA and the WTO both oblige member governments to make equivalency an aspect of their domestic regulatory systems. For instance, Article 4.1 of the WTO Sanitary and Phytosanitary Agreement, states that, "*Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection*."[14] Similarly, Article 2.7 of the WTO Technical Barriers to Trade (TBT) Agreement, which sets parameters for WTO signatory countries' domestic standards not related to food safety or animal or plant health (but sometimes applying to

food) states "*Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own...*"[15]

Various WTO signatories have implemented these rules in differing ways. Indeed, various U.S. agencies have taken different approaches. And, the trade agreements do not include a definition of equivalency. However, with respect to U.S. meat and poultry safety, the 1995 Uruguay Round Agreements Act rolled back pre-existing safety standards. The WTO implementing legislation changed the Federal Meat Inspections Act and the Poultry Products Inspection Act so that the words "equal to" were replaced with the word "equivalent."[16] '

Whether that statutory change was even necessary is questionable given there is no definition of equivalent in the trade pacts that would call for such a change. Indeed, the USDA FSIS' latest equivalence policy report notes that under WTO rules: "Meat, poultry and egg products exported from another nation must meet all safety standards applied to foods produced in the United States. The burden for demonstrating equivalence rests with an exporting country. The importing country has a sovereign right to set any level of protection it deems appropriate to eliminate or abate a food safety hazard within its territory."[17]

However, whether or not the statuary changes in the Uruguay Round Act were indeed required, USDA has used the WTO SPS Agreement and the statutory changes to establish an equivalence policy that shifts away from explaining to other countries how to comply with U.S. standards and instead FSIS staff now spend their time discussing whether or not other countries' varying technical standards and differing rules and regulations are "close enough" to U.S. rules to provide the same level of protection for U.S. consumers as the domestic system.

As a result, the meat industry in foreign nations could maintain *differing* standards, certify their own plants for export, and still be eligible to export into the United States.[18] As explained by FSIS officials: "since 1995 the United States, along with other members of the World Trade Organization, has shifted its emphasis from 'compliance' with importing country inspection requirements to 'equivalence' in conformance with our obligations under the [WTO Sanitary and Phytosanitary] SPS Agreement," which governs trade in food.[19] Another official states, "if you revert to 'the same as,' then there's even arguably a higher standard and a more difficult challenge to meet to gain entry [into U.S. markets]."[20]

The result has been FSIS repeatedly authorizing meat imports from nations whose standards did not meet U.S. regulatory requirements.[21] In a 2002 review of the FSIS system audits of countries that FSIS found to be "equivalent" systems, Public Citizen found sanitary measures that not only dramatically differed from FSIS policy, but in some cases, actually violate the express language of U.S. laws and regulation.[22] This included:

- The U.S. law requiring meat to be inspected by independent government officials was violated by plants in *Brazil and Mexico.*

- U.S. regulations requiring monthly supervisory reviews by foreign government officials were violated by *Argentina, Brazil, Canada,* and *Mexico.* Canada and Brazil are requesting an equivalency determination on this core requirement of U.S. regulation. Monthly reviews are vitally important to remind the meat industry that the meat inspector who works the line in the plant is backed by the weight of the government and to double check the work of meat inspectors on a regular basis.

- Even though U.S. regulations require that a government official and not a company employee sample meat for *Salmonella* contamination, USDA approved company employees performing this task as part of equivalency determinations with *Brazil and Canada*.

- Even though U.S. regulations require government samples to be tested at government laboratories, the U.S. approved testing by private labs as part of the equivalency determinations with *Brazil, Canada and Mexico.*

- USDA's sanitary and zero tolerance policies for contaminants including feces, urine, and ingesta (stomach contents) was violated by *Australia, Canada* and *Mexico*.

- Unapproved and/or improper testing procedures and sanitation violations have been re-identified by FSIS year after year for *Australia, Brazil, Canada* and *Mexico,* but the countries have retained their eligibility to export to the U.S.

- After its regulatory system was designated equivalent, *Mexico* began using alternative procedures for *Salmonella* and *E. Coli* that had never been evaluated by FSIS.

- *Australia* and *Canada* were allowed to export to the U.S. while utilizing their own methods and procedures for such matters as *E. Coli* testing, post-mortem inspection, monthly supervisory reviews and pre-shipment reviews while awaiting a decision from FSIS on a request for an equivalency determination on these standards.

- FSIS auditors and Canadian food safety officials continue to disagree about whether or not particular measures have already been found "equivalent" by FSIS, yet Canadian meat exports to the U.S. continued uninterrupted.

- The regulatory systems of *Brazil and Mexico* were rated equivalent even though the countries pleaded insufficient personnel and monetary resources to explain their inability to carry out all required functions.

Post equivalence determination, when problems have been discovered, FSIS has given countries seemingly time-unlimited opportunities to try to address them. As noted above, many of the problems identified had been reported before. For instance, in violation of U.S. requirements for government meat inspection, Mexico was allowed to have company-paid meat inspectors year after year. Canada and the United States still have not agreed that differing sanitary standards, such as those governing *E. coli* testing, are in fact equivalent. Yet, Mexican and Canadian meat still flows into the U.S. and is stamped with the USDA seal.

Not surprisingly, the very notion that trade pacts require that goods be allowed entry if they meet the *exporting* country's laws and regulations but not the standards of the *importing* country has been broadly criticized by consumer and health organizations and experts. For instance, consider the conclusion of the Transatlantic Consumer Dialogue, the network of all major U.S. and European consumer organizations: "The very notion of equivalence allows for imprecise, subjective comparisons that are not appropriate when dealing with issues as important as public health and safety."[23] According to the Center for Science in the Public Interest, "Equivalency is a method by which nations can create exemptions to each other's food safety laws to advance trade."[24]

Under WTO use of equivalence is mandatory. A WTO member country "shall accept" another member country's food safety measures if the exporting country demonstrates that its standards achieve the importing country's appropriate level of protection.[25] However, most interestingly, what exactly equivalence means is not defined. This provides discretion that other countries with strong domestic systems have employed to safeguard their consumer protections, In contrast, as discussed below, the USDA's FSIS has set up equivalence policies and procedures seemingly aimed at always finding equivalence when asked by another country. Indeed, USDA has issued equivalence determinations allowing reliance on the domestic food safety systems of countries in which visiting American tourists are extremely cautious about what foods they can safety consume.

Yet, once "equivalence" is agreed to, the standards of the exporting party apply and U.S. consumers purchasing food here are forced to rely on the other nations' policies and their implementation. In other words, different regulatory standards for the same food product exist at the same time, both of which are considered legal in the United States. One set of standards has been adopted by a U.S. regulatory agency to implement a U.S. law enacted by Congress. Citizen input into these standards has been assured by an array of U.S. laws including: the Administrative Procedure Act,[26] requiring public notice and opportunity for public comment on proposed regulations or regulatory changes; the Freedom of Information Act,[27] permitting citizen access to the records of government agencies; the Government in the Sunshine Act,[28] ensuring that important agency meetings are publicly noticed; and the Federal Advisory Committee Act,[29] requiring balanced representation on government advisory committees. Compliance with the U.S. standards is secured through the monitoring and enforcement mechanisms of U.S. law.

In sharp contrast to this consultative democratic process, an "equivalent" set of standards has been agreed to by the U.S. regulatory agency at the request of a foreign country on the basis of a claim that the foreign country's standards promulgated under its own domestic procedure achieve the same level of protection as the standards that the U.S. agency itself has selected after consideration of the opinions of its own experts, representatives of public interest groups, industry and academia, and the affected public.

Equivalency is a fairly new concept in U.S. domestic law, but it has a track record elsewhere. The notion first arose in Europe in the context of the Common Market integration where the principal of mutual recognition ensures the free flow of goods across borders based on the recognition of differing national regulations as being equivalent to each other.[30] Notably, these issues still remain controversial in Europe and generate frequent lawsuits between nations. This is true even though the Common Market countries also provided a significant amount of financial and technical assistance to nations which needed to elevate their standards to achieve a comparable level of protection to other EU nations. This is particularly striking considering the relatively small gaps in levels of development and the strength, robustness and funding of safety regulatory systems between the European countries compared to the differences between U.S. standards and those of many of the nations from which it imports meat.

Given the vast discrepancy in resources and infrastructure between the 153 member nations of the WTO and the discrepancies even within the three NAFTA nations, it is becoming abundantly clear that the concept of equivalence does not translate well. Yet, highlighting the perils inherently involve in the equivalence concept, are continuing issues related to Canada, a country with a level of economic development and development of its regulatory infrastructure the same as that of the United States. The first U.S. meat safety equivalence program was with Canada under the 1989 Canada-U.S. Free Trade Agreement. Two decade later, after considerable turmoil and numerous investigations and programs reversals and changes, the equivalence concept has resulted in entry into the United States of Canadian product produced under *E. Coli* testing and other policies different from U.S. policy that U.S. consumer groups believe fail to meet U.S. protection levels.[31]

But then consider the practical implications of relying on the food safety systems of developing countries with extremely limited safety infrastructure and experience, no funding for or culture of enforcement and uneven records with respect to the most basic rule-of-law issues. Just consider the funding issues. For instance, the U.S. food safety budget is close to a billion dollars.[32] By contrast, in 1992, Mexico's spending on food safety inspection was $25 million. Three years later, with food exports soaring under NAFTA, but with Mexico reeling from the peso crash and obligated by new loan agreements to implement further "structural adjustment," Mexico's food inspection funding was slashed to $5 million.[33] By 2001, Mexico's total food safety and animal and plant health budget had returned to the $25 million level – half a percent of Mexico's agriculture ministry budget and less than one dollar per Mexican citizen.[34] Yet, over the years since NAFTA went into effect, the real dollar value of Mexico's exports of FSIS-regulated foods to the U.S. (meat, poultry and eggs) has risen 3525 percent, from $4.7 million in 1993 to $170 million in 2008.[35]

4. Americans expect the food they eat meets U.S. standards. Given this is not the case under current USDA equivalence policy, changes are needed to the relevant laws and regulations.

Although the American public has every reason to assume that they are protected by laws enacted by their elected representatives and enforced by administrative agencies in a publicly transparent and participatory fashion, this is not necessarily the case. U.S. consumers increasingly are being forced to rely with respect to food purchased and consumed domestic on the food safety systems of foreign countries whose regulatory systems are simply not up to the task. Meat and poultry that does not meet U.S. safety standards is being allowed entry into the United States under various USDA "equivalence" determinations.

FSIS, which regulates meat and poultry products, has pushed the equivalence concept the furthest, a fact FSIS itself touts: "FSIS' process for evaluating the equivalency of foreign meat and poultry food regulatory systems is both path breaking and precedent-setting. No other food regulatory system in the world, to our knowledge, is actively engaged in applying the concepts of equivalence to the degree and extent as is FSIS. The matter of exactly how an importing country judges, and determines equivalence is controversial. The world is watching how FSIS carries out its equivalency process."[36] These equivalency decisions are being made by a small number of officials with extremely limited information available about how these decisions are made.

Thirty-seven countries that had previously been found to meet the U.S. meat and poultry import "equal to" standard were grandfathered in and immediately declared "equivalent."[37] When the HACCP and pathogen reduction regulations were adopted in 1996, FSIS became responsible for determining these 37 countries' "equivalent" with regard to the new HACCP program and this was done without public notice or an opportunity to comment.[38]

By 2002, 43 countries had been granted equivalency status by FSIS for exports to the U.S. of meat and meat products from cattle, sheep, swine and goats:[39] Argentina, Australia, Austria, Belgium, Belize, Brazil, Canada, Costa Rica, Czech Republic, Denmark, Dominican Republic, El Salvador, England and Wales, Finland, France, Germany, Guatemala, Honduras, Hungary, Iceland, Ireland, Italy, Japan, Mexico, Netherlands, New Zealand, Nicaragua, Northern Ireland, Norway, Paraguay, Poland, Republic of China, (Taiwan), Republic of Croatia, Republic of Slovenia, Romania, Scotland, Spain, Sweden, Switzerland, Uruguay, Venezuela, and Yugoslavia. Five had been granted equivalency status for poultry exports: Canada, France, Great Britain, Hong Kong, Israel and Mexico.[40] Currently, in 2009, the FSIS lists Australia, Chile, China, Costa Rica, and New Zealand as additional countries having equivalence status for poultry.[41] Not surprisingly, the amount of imported meat and poultry has grown under the equivalence regime – which no longer requires that exporting countries take special care to meet U.S. standards.

Moreover, the American consumer cannot distinguish these imports from meat produced under U.S. standards. Unbeknownst to consumers, in the meat sections of grocery stores all over the United States, there are packets of beef and poultry bearing the USDA seal that were produced in slaughterhouses and processing plants abroad that are not required to obey the same rules as U.S. facilities and in which no U.S. government inspector may ever have set foot. Yet, the appearance of the USDA grade stamp (which marks beef "choice," "prime" or "select") on certain meat packages as well as the inspection stamp for certain meats processed in the United States misleads many consumers to believe that the meet is homegrown.[42] One hamburger sold in the U.S. could potentially contain a veritable United Nations of meat as processors may mix beef from many nations in one batch. This is a cause for concern that the new country of origin labels take some critical first steps in addressing.

Prior to adoption of the 1994 Uruguay Round Agreements Act, FSIS had detailed procedures in place governing eligibility to export meat to the U.S. Foreign meat inspection systems were required to have laws and regulations, and sanitary and quality standards, identical to those of the U.S., including those requiring government meat inspectors.[43] In addition, all foreign inspection systems were required to conduct "supervisory" visits to each establishment certified as eligible to export meat to the U.S., no less frequently than once a month as a backup check to ensure that the regulatory requirements were being met.[44] To ensure

compliance with U.S. standards, FSIS itself conducted the actual audits of foreign slaughter and processing establishments certifying them as eligible to export to the U.S.,[45] and FSIS staff was frequently stationed in the other countries.[46]

However, shortly after the passage of the Uruguay Round Agreements Act, in 1995 FSIS amended its meat and poultry import regulations stating that "[u]nder this new law, drafted to comply with GATT, the United States can no longer require foreign countries wishing to export meat and poultry products to have meat and poultry inspection systems that are 'at least equal' to those in the United States...."[47]

Instead of directly inspecting foreign establishments as it did before the 1995 adoption of the "equivalence" mandate, FSIS now relies on "system audits" to determine whether an exporting country's regulatory system can be declared "equivalent" to that of the U.S. FSIS auditors, who are veterinarians, are responsible for conducting all foreign country audits. Each audit can take from two to six weeks.[48] In conducting annual "system audits," FSIS auditors translate and analyze documents and data, meet with exporting country inspection officials, and accompany the foreign country officials on-site as they inspect usually a small sample of the plants that are approved by foreign governments as eligible to export to the U.S.[49]

Once a system has been declared "equivalent," FSIS relies on the *other country's* regulatory officials to conduct the ongoing inspection and monitoring of the establishments in which animals are slaughtered and meat is prepared for export to the U.S. The number of eligible plants that are actually visited by an FSIS auditor as part of the annual system audit varies widely and can be as few as nine out of 513 certified establishments, which was the case for Canada.[50] As explained by Sally Stratmoen, Acting Director, Equivalence Division, FSIS' Office of International Affairs: "We used to approve plants. Now we approve governments."[51]

In order to be classified as "equivalent," a country must be found by USDA to have a regulatory program administered by its national government that implements standards equivalent to those of the U.S. meat inspection system in the following areas: uniform enforcement; ultimate control by the national government; competent, qualified inspectors; authority to certify or refuse to certify meat intended for export; adequate technical and administrative support; and inspection, sanitation, quality, species verification, and residue standards.[52] The country's legal authority must impose equivalent requirements for antemortem and post-mortem inspection; official control of establishments; direct and continuous official supervision of slaughtering and preparation of product; separation of certified establishments from uncertified ones; sanitation requirements; control over condemned product; and HACCP system.[53]

According to the regulatory requirements, maintenance of eligibility is dependent on the results of periodic reviews conducted by FSIS.[54] In order to ensure that its requirements are being met, the regulations require that foreign regulatory system must conduct supervisory inspection visits to establishments eligible to export least once a month (these are the so-called "monthly supervisory reviews") and write up the results and must perform random sampling in accordance with sampling and analytical techniques approved by FSIS.[55] Moreover, once a country's system is declared equivalent, that nation's government becomes responsible for approving plants interested in exporting to the U.S., not U.S. auditors. U.S. auditors will then annual inspect only a small sample of these plants as part of the systems audit they are supposed to conduct on an annual basis.

The policies FSIS established to implement "equivalence" and their practices alike have been extremely problematic. The first report on the extent of the problems was produced by the USDA's own Office of the Inspector General in 2000. The unusually harsh report described a meat and poultry inspection system in chaos. The report noted that:

- FSIS granted equivalency status to six countries for their HACCP program without conducting onsite reviews;[56]

- Seven foreign establishments that had lost their eligibility to export to the U.S. were found to have shipped 4,625,363 pounds of meat and poultry into the U.S.;[57]
- Nineteen plants that had not been re-certified as meeting U.S. standards were allowed to continue to export meat to the U.S.;[58]
- Procedures for determining equivalency were not detailed enough to ensure that all aspects of a country's regulatory system were reviewed in accordance with applicable regulation and equivalency determinations were based on insufficient documented analysis and support;[59]
- Regulatory requirements that countries provide annual certifications of plants and residue test plans were not enforced;[60]
- FSIS had no clear procedures for determining if another country's alternative testing methods were equivalent;[61]
- FSIS was underutilizing technical experts of the Technical Services Center and over utilizing program analysts of the Equivalency and Planning Branch. In astonishingly severe language, the Inspector General wrote "We question whether the Equivalence and Planning Branch, collectively, has the technical expertise to make equivalency determinations;"[62] and
- Violations by certain countries were tolerated, while the same violations by other countries were not tolerated. The fact that FSIS had no written procedures for terminating eligibility raised the specter of arbitrary decision-making.[63]

The USDA Inspector General followed up with a 2003 report. Eighteen of the recommendations in the June 2000 Inspector General's Report concerned port-of-entry re-inspection. Yet, amazingly, in a report released in February 2003, the Inspector General found that FSIS had taken "adequate action" on only four of these 18 recommendations.[64] Although the need for increased management oversight had been one of the major findings of the June 2000 report, the Inspector General found in 2003 that "inaction occurred because no one was held accountable for implementing these recommendations and no mechanism was established to alert top FSIS management officials that this work was not being done."[65] The report revealed that between January 1999 and March 2001, over seven million pounds of meat which had entered the U.S. market came from 37 foreign establishments whose eligibility in the computerized information system was contradicted by other documents.[66] Because of FSIS' laxity and failure to take corrective action after the June 2000 report, the Inspector General concluded that it was not possible for the agency to ensure that all meat entering the U.S. market was produced in plants that were eligible to export to the United States. In a January 2003 interview with Public Citizen, one FSIS employee confirmed the confusion and lack of good processes in the equivalency division of FSIS, by describing incomplete files, lengthy delays in responding to a request for an equivalency determination, and pressure from supervisors to declare a file complete even though many documents had not yet been translated into English.[67]

Public Citizen's 2002 review of the FSIS equivalence audits of five countries, Argentina, Australia, Brazil, Canada, Mexico, and Argentina, reveal a significant degree of confusion about the application of "equivalence" in practice and an alarming gap between decisions made at the policy level and information used for equivalency determinations acquired in the slaughterhouses and processing plants. In these countries whose regulatory systems have been declared equivalent to that of the United States, U.S. officials documented significant violations of all of the core protections of the U.S. meat safety laws. Sanitary standards have not been met; required testing has not been performed or has been performed improperly; continuous inspection and required supervisory oversight have not been provided; and the key safeguard of direct inspection by impartial publicly-paid inspectors has been disregarded. And yet, current policy allowed FSIS to continue to rate these country's meat inspection standards as "equivalent" and U.S. consumers continue, unknowingly, to purchase and eat meat that has not been produced in compliance with their democratically enacted laws:

- Systems with sanitary measures that differ from FSIS policy, and in some cases, actually violate the express language of U.S. laws and regulations, have been declared "equivalent;"[68]

- Improper and/or unapproved testing procedures and sanitation violations have been re-identified by FSIS year after year and are not remedied, but the countries have retained their eligibility status to export to the U.S.;[69]
- After their regulatory systems have been designated "equivalent," countries have altered their methods and procedures or adopted new ones that have never been evaluated by FSIS, which FSIS has only discovered when later conducting an on-site audit;[70]
- Regulatory systems have been rated equivalent even though sufficient personnel and monetary resources are not available to carry out all required functions;[71]
- Countries continue to use their own methods and procedures while awaiting a response from FSIS to a request for an equivalency determination, but are treated as equivalent while they wait for a response;[72] and,
- FSIS auditors and foreign food safety officials disagree about whether or not particular measures have already been found to be "equivalent" by FSIS.

Finally, USDA's focus on facilitating expansion in agricultural trade volumes rather than public health has meant that rather than requiring the exporting country to provide equivalence assessment documents in English, the agency was spending vast sums on translation costs.[73] Other federal agencies, such as the FDA in the context of similar multinational agreement (the U.S.-EU Mutual Recognition Agreement for pharmaceuticals and medical devices), have insisted that nations requesting equivalency bear the burden of translation costs.

Given the results of the current USDA policy, a new approach is needed – one that focuses on public health, not only trade facilitation.

The equivalence polices and practices of the department of Transportation's National Highway Traffic Safety Administration (NHTSA) could provide useful information in this respect to USDA. NHSTA is the only federal agency to have performed formal rulemaking to establish its harmonization and equivalency procedures. After soliciting public comment and responding to it on the record, it issued a final rule in May 1998 which incorporates a number of helpful elements.[74]

First, the NHTSA policy clearly states that its practice will be to identify and adopt those foreign vehicle safety standards that "clearly reflect best practices i.e., that require significantly *higher* levels of safety performance."[75] Second, "if resource limitations make it necessary to choose between competing petitions [for amendment of standards], the agency will give priority to granting a petition asking the agency to *upgrade* one of its standards to the level of a superior foreign standard over granting another petition simply asking the agency to add a compliance alternative."[76] Third, every petition to amend a NHTSA vehicle safety standard must be accompanied by appropriate data and an analysis of the relative benefits of the NHTSA and foreign standards meaning that NHTSA places the burden of proof on the petitioner by requiring the petitioner to supply the data and analysis to support the petition.[77] Fourth, if the agency tentatively decides that a foreign standard is functionally equivalent or better than a NHTSA standard, the agency will issue a notice of proposed rulemaking and request public comment on the tentative determination and the proposed amendment.[78] Finally, the agency explicitly affirms that any final rule to amend a NHTSA standard will be made in accordance with the applicable law of the United States and "only after careful consideration and analysis of the public comments."[79]

That is to say that the process is designed to implement U.S. trade obligations in a manner that prioritizes consumer safety. If a foreign system does not meet U.S. safety standards, then it is not determined to be equivalent. Thus, under this process, NHTSA has already turned down a number of equivalency petitions, such as one for windshield wipers that they believe were an unacceptable abrogation of a U.S. standard. This stands in contrast to the current USDA policy under which countries which clearly do not provide reliable safety protections, much less those meeting U.S. levels of protection, such as China, can be found to be equivalent. That there is any possibility, regardless of the vagrancies of political will and staffing, that China's food safety system could be found equivalent to the U.S. system highlights when the USDA policy itself must be changed.

5. USDA has found equivalence and sought to force U.S. consumers to rely on the food safety systems of countries known for widespread and deadly safety failures.

As repeated incidents of import safety breakdowns have demonstrated, the People's Republic of China's (China) food safety standards are neither adequate nor enforced properly. China's food safety problems are well documented. With respect to the products that already are imported from the PRC that fall under the jurisdiction of the Food and Drug Administration (FDA), 12 of the 18 current Import Alerts listed for China are for food items -- with the most recent alert covering products that contain dairy powder that might be adulterated with melamine.[80] In just the past four months, 467 different human food items imported from the PRC – from seafood to candy – were refused entry by the FDA. The reasons cited included: filth; illegal animal/veterinary drugs used; suspected contamination with melamine; unsafe food additives; unsafe color additives; lack of labeling; salmonella contamination; packed in unsanitary conditions; unsafe pesticide residue; poisonous; unfit for food; and failure to register process. And, people in scores of countries have suffered the deadly consequences of China's exports of contaminated cough syrup, toothpaste and pet food. Yet, even China could obtain a USDA food safety equivalence determination under the current policy.

That the current USDA policy could lead to a finding of "equivalence" is made even more horrifying when considering the recent comments from China's own Health Ministry. He described the food safety situation in the country as "grim, with high risks and contradictions."[81] This unusually candid statement makes it clear that China's regulatory system cannot adequately enforce food safety standards for domestic, much less exported, food products.

The recent melamine scandal is a perfect example of how China's food safety system is unable to prevent even *intentional* contamination of the food supply or detect widespread problems. It is also an example of the Chinese government's extreme lack of transparency with respect to its food safety regulatory system and that system's frequent failings. Indeed, the Chinese government systematically suppresses news of major food-borne illness outbreaks, including the extreme steps it took to prevent news of illnesses and infant deaths caused by this mass food adulteration from being made public because it would have conflicted with the staging of the Beijing Olympics in August 2008. China's food safety system cannot protect its own people, yet under USDA's equivalence policies Americans were to be forced to rely on this system? That the underlying USDA policy must be changed is also highlighted by the fact that the evidence provided by a major food safety scandal that called into question every fundamental critical aspect of China's safety system did not result in revocation of the USDA equivalence determination. Under the current policy, Americans would have been exposed to food imports whose only safety assurance would have been the obviously inadequate Chinese system had Congress not intervened.

Further, consider the PRC's handling of the early H5N1 avian influenza outbreaks in the PRC and the associated human illnesses and deaths from those outbreaks. The Chinese government lowered a veil of secrecy, denying critical information to its own citizens and the world at large. China has been one of the epicenters for H5N1 avian influenza that has impacted both poultry and humans. According to the World Health Organization, there have been twenty-three H5N1 avian influenza outbreaks in the PRC that have afflicted birds and poultry since 1996,[82] with 38 reported human cases and 25 deaths.[83] Obviously, this is a significant animal health issue that impacts public health, which needs to be addressed before the United States can even consider importing any poultry products from China – a fact that again highlights the critical need for USDA equivalence policies to be reformed given under current policy it was *possible* to force U.S. consumers to rely on this Chinese system for our safety.

The bottom line is clear: under current USDA policy that it was even *possible* to find China's system equivalent shows it is not only the past practices, but the underlying policies that must be altered. And the China case is only the most extreme example of the limits of the notion of equivalence: the appropriateness of relying on the regulatory authority of other nations is called into question every time another cover-up hits

the papers, from Britain's mishandling of the "mad cow" crisis to Argentina's delay in reporting a foot and mouth disease outbreak to the Belgian government's cover-up of dioxin-contaminated chicken.[84]

However, the case of China is perhaps the poster child for the inherent limitations of the equivalence concept. It is simply impossible for the U.S. government to shift responsibility for U.S. consumers' safety into a government that has repeated demonstrated that it will not and cannot ensure the safety of its own citizens' food – and in fact does not put emphasis on that goal. It is impossible for the U.S. government to shift responsibility for U.S. consumers' safety into a government that has shown repeatedly that it will not even provide basic information about problems. Thus, an appropriate USDA equivalence policy would NOT find equivalence between the U.S. and Chinese systems.

6. Changes are needed to the relevant U.S. laws and regulations implementing trade agreement food safety-related policies, notably including meat and poultry equivalence policy.

Neither USDA, nor any other U.S. government agency engaged in trade-related equivalency decision-making, has answered the fundamental paradox posed by the equivalence concept: how can something that is different be the same? When it comes to important public health and safety standards, most Americans would argue that "close" is simply not good enough.

And, when it comes to the safety of food – and the threat of deadly food borne illnesses – most Americans would not even contemplate putting their families' wellbeing second to corporate-inspired "trade" agreement rules. Given the beating the concept of "free trade" has already gotten in the public mind thanks to being associated with corporate-managed-trade agreements like NAFTA and WTO, one could only imagine the level of backlash that would be generated by a public airing of the notion that a trade agreement required the United States to permit imports from, say, China based on reliance on a domestic 'safety' system that the American public is only too well aware had led to the deaths of scores of Chinese babies, cough medicine consumers in Latin America and thousands of American pets.

Whenever new leaders arrive at FSIS, consumer groups are told that the past equivalence disasters have been the result of bad practices or past staff. Yet, on a bipartisan basis through numerous staff turnovers, implementation of the current FSIS policy has resulted in imports of unsafe meet and poultry that clearly do not satisfy U.S. food safety protection standards. It may be the case that the past China poultry equivalence assessment was done in a slipshod manner, but the bottom line problem is the underlying policy that could ever result in China's system being considered equivalent given an array of obvious structural issues, not the least of which is a record of the government covering up severe food safety problems, not seeking to avoid them.

- **The USDA should conduct a rulemaking to establish a new process for determining standard for meat and poultry imports.** To date, USDA's policy for equivalence assessments and determinations has been focused on trade facilitation rather than U.S. consumers' food safety and American public health. A new policy is needed that establishes public health based standards and processes for reviewing existing meat and poultry import equivalence determinations and issuing future ones. The basic principles of such a new policy must be that the safety and inspection laws and systems of another country can only be found equivalent when the relevant foreign laws, standards and procedures either are the same as U.S. standards or function to deliver the same or higher level of public health protection, enforceability, and effectiveness of the comparable U.S. laws, standards and procedures in all respects – as actually applied and implemented. That is to say that some countries will be required to modify their policies and practices with respect to food they seek to prepare for export to the United States – in contrast to the past policy which resulted in systems with vastly different standards and outcome being declared equivalent to the U.S. system.

- **Equivalence determinations must be conducted through formal rule making so that all interested parties can participate**. To ensure that all potentially interested parties have an opportunity to review

the analysis of whether a foreign country's food safety and inspection laws and systems are the same as U.S. standards or deliver the same or a higher level of public health protection, enforceability, and effectiveness, equivalence determinations must be conducted through on-the-record notice and comment ruling-making similar to the practice of NHTSA.

- **Equivalence determinations should be granted for set periods of time with reauthorizations based on reassessments of not only the food safety laws in question, but their application, enforcement and future funding levels.** Existing equivalence determinations must be reassessed under the new policy noted above given the extended audit record of problems within the system previously determined to be equivalent.

- **USDA auditors should resume the practice of inspecting and certifying every foreign plant shipping product to the U.S. on an annual basis**. First, there is no requirement in the WTO or other trade agreements that requires that this vital function be outsourced to foreign governments' officials. Second, given the lack of whistle blower and other government employee protections in numerous countries, it is critical that U.S. officials have the power to make these determinations and that they do so through careful written reports of their findings with respect to specific facilities.

- **USDA and FDA must be given more money for conducting rigorous overseas audits and the follow-up that is necessary to instruct foreign regulators on U.S. food safety policies and procedures.**

- **Equivalence status and the right to export must be terminated promptly upon audit findings of problems**. The only way to ensure that other countries' law continue to meet U.S. standards is to hold them accountable to such standards by conditioning their continuing right to export to the United States on such compliance. If an audit finds that the exporting country is not fully implementing and enforcing the laws, standards and procedures that were found to be equivalent, the equivalence determination must be suspended and not reinstated until USDA re-inspection verifies that the implementation and enforcement problems are remedied.

- **Congress must act to substantially increase border inspection activities**. Even if the system of U.S. officials certifying which foreign plants may export to the United States was restored as it must be, increased border inspection is a critical tool in ensuring continuing compliance of such facilities. It is unconscionable – and dangerous – that the U.S. inspection rates for produce and seafood is less than one percent and meat and poultry inspection is only 11 percent. In contrast, the European Union physically inspects many high risk imports, such as seafood, at a rate of 20-50 percent.

- **Trade should not trump public health: trade agreement need rebalancing.** A thorough review is needed now of our existing trade agreements – including NAFTA and WTO - to carefully identify the provisions that are causing problems. The Trade Reform Accountability Development and Employment (TRADE) Act H.R. 3012 provides a process for doing just that and sets a new road map to allow trade expansion under rules that also ensure food safety. We must fix the existing agreements by renegotiating problematic provisions – and do better in the future. If we are to enjoy the benefits of trade – and also reverse the trend of growing public opposition to trade expansion- the non-trade limits on our basic health and safety that have been inserted into recent trade agreements must be removed. Indeed, there is a growing international call for a paring back of the key WTO agreements like the WTO TBT and WTO SPS agreements that inappropriately delve into regulatory issues via such trade promotion mechanisms as harmonization and equivalency. Not only do such provisions establish new means to attack public health, consumer protection, and food safety regulations at barriers to trade, but they inappropriately elevate the expansion of trade volumes over all other public policy concerns, including that of ensuring a safe and wholesome food supply. If the same domestic regulatory standard is applied to both domestic and imported food, the level of protection or enforcement is something those living with the results must decide. That is to say that there is no trade issue if there is no discrimination

and trade agreements must be renegotiated to roll back the inappropriate limits on legitimate food safety and other public health protections. Specifically, our current trade agreements must be modified to remove provisions that:

→ Limit the level of food or product safety protection countries choose to implement. We must be free to set our own level of desired safety and environmental protection.

→ Limit countries' rights to inspect imports at a more intensive rate than similar domestic goods. We must be free to inspect imports at the rate government safety agencies determine is needed to ensure safety.

→ Require the United States to allow imports of food and non-food products from foreign countries that use "equivalent" and often lesser safety standards. We must be free to require that only goods that meet our U.S. safety and environmental standards can be imported.

→ Include trade agreement harmonization requirements that give primacy of internationally harmonized rules relative to domestic law. Unless they are designed with the *intent* of discriminating against foreign goods, our domestic safety standards and the level of safety protection we desire are not a trade issue.

- **Restore meat and poultry acts to 'equal to' standard.** Congress must intervene to change the underlying law and regulations so to clarify that only food that meets U.S. safety standards is eligible for sale in the United States.

ENDNOTES

[1] The Centers for Disease Control and Prevention, "Foodborne Illness, Frequently Asked Questions," U.S. Department of Health and Human Services website. Available at http://www.cdc.gov/ncidod/dbmd/diseaseinfo/foodborneinfections_g.htm.

[2] Roughly 20 percent of the foods we eat are now imported. Number derived from the ratio of the dollar sum of Foreign Agricultural Service's Agricultural (Food) Import Commodity Aggregations to the dollar sum of food expenditures calculated by the U.S. Department of Agriculture's Economic Research Service.

[3]. Michael T. Osterholm, Ph.D., M.P.H., "Emerging Infections: Another Warning," *New England Journal of Medicine* editorial, Vol. 342, No. 17, Apr. 27, 2000.

[4] Charles Conner, "Agribusiness Food Producers Back NAFTA," *Memphis Commercial Appeal,* Aug. 15, 1993; Jennifer Lin, "In Texas, High Noon over NAFTA," *Knight-Ridder Newspapers*, Oct. 31, 1993.

[5] From numbers for the USDA's "limited resources," "farming occupation – lower sales," and "farming occupation – higher sales" farm typology categories. *See* USDA's Economic Research Service's "Farm Business and Household Survey Data: Customized Data Summaries for Agricultural Resource Management Survey," for numbers after 1996, and "Farm structure: historic data on farm operator household income" data tables for numbers prior to 1996.

[6] This figure is the sum of the average net cash income for both limited resources and farming occupation farms, minus government payments, and is inflation adjusted, for years 1996 and 2005, the most recent comparable data. For 1996, the average inflation-adjusted net cash income for limited resource, low- and high- sales farming occupation farms were -$3,721, -$979, and $35,947, respectively; while the comparable 2005 figures were -$4,245, $1,538, and $29,354.

[7] The food items with the highest volume of highly redundant trade include rice, tomatoes, potatoes, watermelon, onions, and beef cuts. *See* Public Citizen, forthcoming, 2009,

[8] John Vidal, "Shipping boom fuels rising tide of global CO2 emissions," *The Guardian*, Feb.13, 2008.

[9]. USDA, Animal Plant Health Inspection Service, "Overseas Investments by U.S. Meat Corporations: What's the Future for U.S. Exports?" Changing Times in Animal Agriculture, Jul. 2000, available at, www.aphis.usda.gov/vs/ceah/cei/chtimes0700.htm

[10]. Id. at 4.

[11]. Id. at 3.

[12] See e.g. Agreement Establishing the WTO, Article XVI-4.

[13]. USDA, Public Meeting: FSIS Equivalence of Foreign Meat and Poultry Food Regulatory Systems, Washington, D.C. Apr. 14, 1999, Transcript, at 167, on file with Public Citizen.

[14]. World Trade Organization, Agreement on Application of Sanitary & Phytosanitary Measures, [WTO SPS Agreement], Articles 4.1, available at www.wto.org/goods/spsagr.htm.

[15]. World Trade Organization, Agreement on Technical Barriers to Trade, [WTO TBT Agreement], Article 2.7, available at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm
[16]. 60 Fed. Reg. 38667, Jul. 28, 1995.
[17] USDA FSIS, "Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems," Oct. 2005 at 5. (http://www.fsis.usda.gov/regulations/Equivalence_Process/index.asp)
[18]. 9 CFR §327.2.
[19]. Dr. John Prucha, Asst. Dep. Administrator for Int'l and Domestic Policy, USDA, Public Meeting: Equivalence Evaluation of Pathogen Reduction HACCP Requirements, Transcript, Washington, D.C. Dec. 14, 1999 at 15, on file with Public Citizen.
[20]. Mark Mannis, Int'l Policy Development Division, USDA, Public Meeting: Equivalence Evaluation of Pathogen Reduction HACCP Requirements, Transcript, Washington, D.C. Dec. 14, 1999 at 170, on file with Public Citizen.
[21] Just one obvious example: in its 2000 report on equivalency, the USDA Office of Inspector General determined that 19 plants that had not been certified were allowed to ship meat to U.S. and that the U.S. had granted 6 countries equivalency status without first conducting on-site reviews. USDA, *Food Safety and Inspection Service, Imported Meat and Poultry Inspection Process, Phase I*, Report No. 24099-3-Hy, June 2000, Section III at ii-iii.
[22]. Public Citizen, The WTO Comes to Dinner: U.S. Implementation of Trade Rules Bypasses Food Safety Requirements, 2002. For instance, in its 2000 report on equivalency, the USDA Office of Inspector General determined that 19 plants that had not been certified were allowed to ship meat to U.S. and that the U.S. had granted 6 countries equivalency status without first conducting on-site reviews. USDA, *Food Safety and Inspection Service, Imported Meat and Poultry Inspection Process, Phase I*, Report No. 24099-3-Hy, June 2000, Section III at ii-iii.
[23]. The Transatlantic Consumer Dialogue, formed in 1998. is comrpised of the largest consumer organizations in the U.S. and Europe and provides consensus recommendations on trade and consumer matters to the U.S. and European governments. Transatlantic Consumer Dialogue, Principles of Harmonization, Feb. 2000, at 2, available at http://www.tacd.org.
[24]. Silverglade, Bruce, "The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?," *Food and Drug Law Journal*, Vol. 55, No. 4, at 517.
[25]. WTO SPS Agreement, Articles 4.1.
[26]. 5 U.S.C. §551.
[27]. 5 U.S.C. §552.
[28]. 5 U.S.C. §552b.
[29]. 5 U.S.C. Appx. §1.
[30]. The Riksdag (Swedish Parliament), "EU Information: A Common Market, Fact Sheet 3," Aug. 29, 2001 at 3.
[31] The two nations' meat inspection systems were declared equivalent and a "streamlined" border inspection system was implemented. In February 1990, the two countries announced that they would take this new system one step further and proposed a one-year experiment with an "open border" which would eliminate all border inspections for meat imported from one country to another.(See GAO, "Issues USDA Should Address Before Ending Canadian Meat Inspections," Jul. 1990, GAO/RCED-90-176, at 1.) At the time, some FSIS officials interviewed by the GAO questioned whether this move was in compliance with U.S. law on import inspection or whether it needed an act of Congress to drop all border controls, but the experiment proceeded. (GAO, "United States-Canada Open Border Proposal for Meat and Poultry Inspection System," Testimony by John Harman, Director GAO Food and Agriculture Issues before the Subcommittee on Agriculture Research and General Legislation, Senate Committee on Agriculture, Nutrition and Forestry, GAO/T-RCED-90-96, Jul. 12, 1990, at 10.) Shortly after U.S. and Canadian officials touted the agreement as "the first time in our countries' history that we have been able to open our borders for food safety standards," alarming warnings reached Congress about the results. Bill Lehman, a U.S. meat inspector with 26 years of experience blew the whistle on USDA for allowing contaminated Canadian meat into the country unchecked. (David Lapp, "Return to the Jungle," *Multinational Monitor*, May 1990.) Jack Perrault, director of the International Import Inspection Service, condemned USDA for "giving up consumer protection for free trade." (Id) The brouhaha generated bad press and congressional investigations, prompting USDA to abandon its "open border" with Canada. Yet, a streamlined inspection system remains in effect between the U.S. and Canada to this day despite significant differences with respect to *E. Coli* testing and other matters that U.S. consumer groups believe fail to meet U.S. protection levels.
[32] USDA, Office of Budget and Program Analysis, FY10 Budget Summary listed the budget authority for FSIS programs at $981 million, at 68. Available at: http://www.obpa.usda.gov/budsum/FY10budsum.pdf. Accessed July 27, 2009.
[33]. OECD, *Examen de las Políticas Agrícolas de México* (1997).
[34]. Steve Suppan, Institute for Agriculture and Trade Policy, speech before the conference "Legal Platform for Consumer Concerns and International Trade in Food and Agriculture," July 2002.
[35] Data for red meat & products; eggs; mutton, goat & lamb; pork; poultry meat; fresh or frozen variety meats. Extracted on July 27, 2009, from USDA's Economic Research Services FATUS system for FATUS Commodity Aggregations. Available at: http://www.fas.usda.gov/ustrade/USTImFatus.asp?QI= . Adjusted for inflation using CPI-U-RS from Congressional Budget Office, extracted on July 27, 2009.
[36]. Undated FSIS document quoted in USDA Office of the Inspector General, *Food Safety and Inspection Service, Imported Meat and Poultry Inspection Process*, Phase I, June 2000 USDA/OIG-A/24099-3-Hy, Section III, at 65.
[37]. USDA, Office of Inspector General, *Food Safety and Inspection Service, Imported Meat and Poultry Inspection Process, Phase I*, Report No. 24099-3-Hy, June 2000, Section III, at 2, available at http://www.usda.gov/oig/webdocs/imported.pdf.

[38] At a public meeting on December 14, 1999, with no prior public notice of its intentions to declare nations equivalent, FSIS announced that 32 of the 37 countries already approved for shipping meat products to the U.S. had been determined to have "equivalent" pathogen reduction and HACCP systems in place. (USDA, Public Meeting; Equivalence Evaluation of Pathogen Reduction/HACCP Requirements, Transcript, Washington, D.C. Dec. 14, 1999 on file with Public Citizen.) FSIS announced that 36 countries had adopted FSIS' Sanitation Standard Operating Procedure (SSOP) requirements; that 32 had adopted FSIS' HACCP requirements; that 18 had adopted FSIS' *E. coli* testing requirements, with 13 adopting different testing requirements, which FSIS had found to be equivalent;[38] and that of the 27 countries to which the *Salmonella* testing regulations were applicable, eight had adopted FSIS' requirements, with 19 adopting different measures which FSIS had found to be equivalent. (Id. At 78.) In addition, it is notable that one country, the Netherlands, decided to use an altogether different microbiological indicator of contamination, testing for enterobacteriaceae not *Salmonella*. This departure from U.S. regulation was also defined as "equivalent" by FSIS staff. (Id at 82.) Although the federal regulations require that FSIS employees conduct *Salmonella* testing and send the test samples to government labs, FSIS revealed at the meeting that other countries' export establishments could use private laboratories for this purpose if the laboratories met certain criteria.[38] This departure from U.S. federal regulatory requirements did not go through notice and comment rulemaking prior to its adoption by the agency. Ten countries allow their meat processing establishments to take samples, 12 countries' systems use private laboratories. (Id. At 91.) FSIS explained at the meeting, "We don't, or we are not in a position to, dictate that you must [use a government laboratory]. That is the way we operated before 1994. If we had these requirements prior to then, it would have been rather simply put, it's got to be government labs, its got to be government people selecting the samples." (Id at 112) FSIS staff had undertaken a massive comparison of nations for pathogen reduction and HACCP with no public notice or opportunity for comment. Yet, FSIS' own policy is to give public notice regarding renewals of nations' declared equivalent when nations make changes to their system. It is difficult to imagine a more significant change that required for each nation to develop a fully functioning HACCP system. Secondly, FSIS also revealed that rather than requiring the exporting country to provide documents in English, the agency spent over $550,000 on translation costs. (Id. at 63.) Other federal agencies, such as the FDA in the context of similar multinational agreement (the U.S.-EU Mutual Recognition Agreement for pharmaceuticals and medical devices), have insisted that nations requesting equivalency bear the burden of translation costs.

[39]. 9 CFR §327.2(b). Because of endemic disease conditions, some countries, including Brazil, are eligible to export only cooked and canned products. 9 CFR §94.1. An outbreak of disease can cause a country to lose its eligibility, as happened to Argentina at the beginning of 2001 when foot and mouth disease was brought in by animals from a bordering country. 66 Fed. Reg. 29897 (Jun. 4, 2001).

[40]. 9 CFR §381.196(b). Mexico is eligible to export only process poultry products from poultry that has been slaughtered in the U.S. or another country eligible to export to the U.S.

[41] http://www.fsis.usda.gov/pdf/Countries_Products_Eligible_for_Export.pdf Accessed on July 22, 2009.

[42]. Noel C. Paul, "Where is the beef (from)?" *Christian Science Monitor*, Apr. 14, 2003.

[43]. 9 CFR §327.2; 35 Fed. Reg. 15610 (Oct. 3, 1970).

[44]. 9 CFR §327.2(a)(2)(iv)(A); 35 Fed. Reg. 15610 (Oct. 3, 1970).

[45]. Clark Danford, USDA, Public Meeting: FSIS Equivalence of Foreign Meat and Poultry Food Regulatory Systems, Apr. 14, 1999, Transcript, at 90, on file with Public Citizen.

[46]. Winifred DePalma, Public Citizen telephone interview with Sally Stratmoen, Acting Director, Equivalence, Office of International Affairs, FSIS, Nov. 22, 2002.

[47]. 60 Fed. Reg. 38667, 38668 (Jul. 28, 1995).

[48]. *Id*.

[49]. FSIS Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems, Mar. 1999, at 9-10, on file with Public Citizen.

[50]. Audit Report for Canada, June 11 through July 6, 2001, USDA, available at http://www.fsis.usda.gov/OFO/TSC/foreign_country_audit_reports.htm. In approximately half of the countries that are eligible to export to the U.S., because comparatively few plants are certified, 100% are visited by FSIS. Dec. 5, 2002 Winifred DePalma, Public Citizen telephone interview with Don Smart, Director, Review Division, Technical Service Center, FSIS.

[51]. Winifred DePalma, Public Citizen telephone interview with Sally Stratmoen, Acting Director, Equivalence Division, Office of International Affairs, FSIS Nov. 22, 2002.

[52]. 9 CFR §327.2(a)(2)(i).

[53]. 9 CFR §327.2(a)(2)(ii).

[54]. 9 CFR §327.2(a)(2)(iii).

[55]. 9 CFR §327.2(a)(2)(iv).

[56]. USDA, Office of Inspector General, *Food Safety and Inspection Service, Imported Meat and Poultry Inspection Process, Phase I*, Report No. 24099-3-Hy, June 2000, Section III, at iii, available at http://www.usda.gov/oig/webdocs/imported.pdf.

[57]. *Id.*, at Section III, at 37.

[58]. *Id*., at Section III, at ii.

[59]. *Id.*, at Section III, at ii, 26.

[60]. *Id.*

[61]. *Id.*, at Section III, at 31.

[62]. *Id*, at 63.
[63]. *Id*, at 28-29.
[64]. USDA, OIG, Food Safety and Inspection Service, Imported Meat and Poultry Reinspection Process, Phase II, February 2003, Audit report No. 24099-04-Hy, at iii-v, available at usda,gov/oig/webdocs/24099-04-Hy.pdf.
[65]. Id., at 6.
[66]. Id., at ii.
[67]. Winifred DePalma, Public Citizen telephone interview with USDA employee, Linda Lewis, Jan. 14, 2003.
[68]. *See*, Argentina, Australia, Brazil, Canada and Mexico, below.
[69]. *See*, Australia, Brazil, Canada and Mexico, below.
[70]. *See*, Mexico, below.
[71]. *See*, Brazil and Mexico, below.
[72]. It is FSIS policy to continue to allow trade while an equivalency request is under review. FSIS claims that it will suspend eligibility if a country does not provide satisfactory documentary evidence of an equivalent sanitary measure. 64 Fed. Reg. 70690, 70692 (Dec. 17, 1999). However, as the cases below demonstrate, this is not practise. *See*,, Argentina and Mexico.
[73]. USDA, Public Meeting; Equivalence Evaluation of Pathogen Reduction/HACCP Requirements, Transcript, Washington, D.C. Dec. 14, 1999 at 63, on file with Public Citizen.
[74]. 63 Fed. Reg. 26508 (May 13, 1998).
[75]. 63 Fed. Reg. 26508 (May 13, 1998), at 26509.
[76]. 63 Fed. Reg. 26508 (May 13, 1998), at 26509.
[77]. 63 Fed. Reg. 26508 (May 13, 1998), at 26512.
[78]. 63 Fed. Reg. 26508 (May 13, 1998), at 26513.
[79]. 63 Fed. Reg. 26508 (May 13, 1998), at 26513.
[80] http://www.fda.gov/ora/fiars/ora_import_country.html
[81] Shanghai Daily, "New Law Fights Grim Situation in Food Safety," March 3, 2009, see http://www.shanghaidaily.com/sp/article/2009/200903/20090303/article_392914.htm
[82] See http://www.who.int/csr/disease/avian_influenza/ai_timeline/en/index.html
[83] See http://www.who.int/csr/disease/avian_influenza/country/cases_table_2009_04_23/en/index.html
[84]. The 1999 Belgian dioxin scare brought down the Belgian government when it was revealed that the government knew as early as mid-March 1999 that it had a problem with dioxin contaminated animal feed which spread to chicken and eggs, but failed to notify the public until May 1999. (Corie Lok and Douglas Powell," Belgian Dioxin Crisis of the Summer of 1999, a case study in crisis communication and management," Department of Food Science, University of Guelph, Ontario, May 2000.) In 2001, Argentina's neighbors blasted the government for not promptly notifying them of an outbreak of foot and mouth disease in that country. ("South Americans Call on Governments to Come Clean on Foot and Mouth," *Agence France Presse*, Mar. 14, 2001). News reports indicate that Chinese officials suppressed news and accurate statistics about the SARS epidemic for months. In April 2003, Chinese officials announced the country harbored 10 times the number of previously disclosed SARS infections. ("China Admits SARS Cover-Up," Seattle Times, Apr. 21, 2003.)