

**WARNING! THIS PRODUCT MAY CAUSE  
HEART DISEASE, DIABETES, OR  
JUST MAKE YOU FAT: USING THE  
INTERNATIONAL STRATEGY  
REQUIRING WARNING LABELS ON  
TOBACCO AS A BLUEPRINT FOR  
REGULATING SOFT DRINKS**

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I. INTRODUCTION

Obesity and the associated risk of noncommunicable diseases (NCDs) now account for 60% of global deaths.<sup>1</sup> NCDs are diseases of long duration that are not passed from person to person.<sup>2</sup> The four main types of NCDs include cardiovascular diseases (e.g., heart disease and stroke), diabetes, cancer, and chronic respiratory diseases.<sup>3</sup> Without intervention, The World Health Organization expects NCDs to contribute to nearly 75% of all deaths by the year 2020.<sup>4</sup> People perceive obesity and its associated risk of NCDs as problems primarily in developed countries.<sup>5</sup> However, in the past twenty years, obesity and NCDs have become a global concern.<sup>6</sup> In fact, 60% of deaths attributed to NCDs occur in developing countries.<sup>7</sup>

The obesity epidemic inflicts significant individual and societal costs through increased risks of disease and death; increased health-care costs; and reduced social status, educational attainment, and employment opportunities.<sup>8</sup> For instance, medical costs associated with the treatment of NCDs are estimated to increase by \$48-66 billion per year in the United States.<sup>9</sup> And yet, it is the developing countries that are of increasing concern. The healthcare systems in developing countries are affected by what the World Health Organization (WHO) refers to as the “double burden of disease.”<sup>10</sup> That is, infectious and

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1. Joint World Health Organization [WHO] and Food and Agriculture Organization of the United Nations [FAO] Expert Consultation, *Diet, Nutrition and the Prevention of Chronic Diseases*, at 4-5, WHO Technical Report Series No. 916, (2003).

2. *Noncommunicable Diseases*, WHO, <http://www.who.int/mediacentre/factsheets/fs355/en> (last updated Jan. 2015).

3. DAVID E. BLOOM ET AL., WORLD ECON. FORUM & HARVARD SCH. OF PUB. HEALTH, *THE GLOBAL ECONOMIC BURDEN OF NON-COMMUNICABLE DISEASES* 8 (2011).

4. Joint WHO and FAO Expert Consultation, *supra* note 1, at 5.

5. Mickey Chopra et al., A Global Response to a Global Problem: The Epidemic of Overnutrition, 80 BULL. WORLD HEALTH ORG., 952, 952 (2002).

6. Emily Lee, *The World Health Organization’s Global Strategy on Diet, Physical Activity, and Health: Turning Strategy into Action*, 60 FOOD & DRUG L.J. 569, 569 (2005).

7. W.H.A. Res. 57/17, 38 (May 22, 2004).

8. Chopra et al., *supra* note 5, at 953.

9. Y Claire Wang et al., *Health and Economic Burden of the Projected Obesity Trends in the USA and the UK*, 378 LANCET 804, 815 (2011).

10. DAVID P. FIDLER, *INTERNATIONAL LAW AND PUBLIC HEALTH: MATERIALS ON AND ANALYSIS OF GLOBAL HEALTH JURISPRUDENCE* 183 (2000).

noncommunicable diseases currently prey on the countries least equipped to deal with either issue.<sup>11</sup>

Responses to the obesity epidemic must include prevention strategies that focus on reversing adverse dietary trends.<sup>12</sup> Part II explains how the liberalization of trade and international trade policies emphasizing trade over public health make it difficult for nations to implement preventative measures.<sup>13</sup> The World Trade Organization (WTO) liberalized trade by administering international trade agreements that eliminate tariffs, quantitative trade restrictions, and nontariff trade barriers.<sup>14</sup> Adding to these trade liberalization schemes, transnational corporations (TNCs), as unregulated entities, facilitate the introduction in the global market of food and beverages low in nutritional value.<sup>15</sup> That is, TNCs are not traditionally thought to be bound by the strictures of international law.<sup>16</sup> Instead, the country where the violative conduct occurs will usually be held liable.<sup>17</sup>

Fortunately, the tobacco epidemic trailblazed international control measures that countries can adopt to curb the obesity epidemic.<sup>18</sup> Part III examines a specific tobacco control measure—warning labels. Warning labels have proved to be an effective measure in increasing consumer knowledge of the health effects caused by tobacco consumption.<sup>19</sup> For example, the United States began to experiment with food and beverage labeling measures, which to date has proven effective.<sup>20</sup>

Although governments of wealthy nations generally undertake positive efforts to address public health concerns within their respective populations, these same governments continue to support domestic producers through policies that intensify the threat of NCDs in developing countries.<sup>21</sup> For this reason, the WHO invoked its authority to create international law to protect developing countries from

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11. *Id.*

12. Lee, *supra* note 6, at 571.

13. *Id.* at 574.

14. *Id.* at 575.

15. *Id.* at 574-75.

16. FIDLER, *supra* note 10, at 82.

17. *Id.*

18. See Chantal Blouin & Laurette Dubé, *Global Health Diplomacy for Obesity Prevention: Lessons from Tobacco Control*, 31 J. PUB. HEALTH POL'Y 244, 245-46 (2010) (discussing how international control measures for tobacco can be implemented to fight obesity).

19. See David Hammond et al., *Effectiveness of Cigarette Warning Labels in Informing Smokers About the Risks of Smoking*, 15 TOBACCO CONTROL (Supplement III) iii19, iii23 (2006).

20. Lisa A. Sutherland et al., *Guiding Stars: The Effect of a Nutrition Navigation Program on Consumer Purchases at the Supermarket*, 91 AM. J. CLINICAL NUTRITION 1090S, 1091S (2010).

21. Lee, *supra* note 6, at 580.

being taken advantage of by developed nations.<sup>22</sup> Part III further examines the WHO invoking its authority to create the Framework Convention on Tobacco Control (FCTC), which included mandatory labeling and packaging requirements for tobacco products.

For the same reasons the WHO invoked its constitutional authority to enact international tobacco control measures, Part IV argues that an international regulation requiring mandatory warning labels on soft drinks<sup>23</sup> should be implemented. However, due to trade liberalization and trade policies that emphasize trade over public health, an international regulation requiring warning labels on soft drinks may prove impossible to implement.<sup>24</sup> Part IV further argues that to enact a mandatory warning label measure on soft drinks, international trade policies need to emphasize public health over trade. To do this, agreements implemented by the WTO must be realistic in the requirements Member Nations must meet to comply with WTO trade rules. This paper concludes with a strategy to implement an international warning label measure on soft drinks that will allow consumers of developed and developing nations alike to be privy to the health effects caused by soda consumption.

## II. BACKGROUND

### A. *The Globalization of Public Health Concerns*

Globalization is defined as “the development of an increasingly integrated global economy marked by free trade, free flow of capital, and the tapping of cheaper foreign labor markets.”<sup>25</sup> Globalization has transformed companies from trading goods and services in local to global markets.<sup>26</sup> This transformation created TNCs:<sup>27</sup> corporations that operate in more than one country at the same time.<sup>28</sup> Examples of TNCs include the Coca-Cola Company and Phillip Morris Interna-

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22. *Id.* at 583. Specifically, Articles 19 and 21 of the WHO’s Constitution grant the WHO the authority to create international law with regards to global public health concerns. Constitution of the World Health Organization arts. 19, 21.

23. “Soft drink” refers to beverages with the same or substantially similar nutritional profile as Coca-Cola and Pepsi-Cola.

24. See Lee, *supra* note 6, at 574-75.

25. WEBSTER’S NEW INT’L DICTIONARY 965 (Phillip Babcock Gove et al. eds., 3rd ed. 2002).

26. FIDLER, *supra* note 10, at 76.

27. *Id.*

28. 13 WEST’S ENCYCLOPEDIA AM. LAW 199 (2d ed. 2005).

tional.<sup>29</sup> These TNCs have introduced goods like tobacco, processed foods, and soft drinks into the global market.<sup>30</sup> Consequently, the introduction of health-damaging products has caused obesity and NCDs to become a global concern.<sup>31</sup>

As their power remains unregulated, TNCs pose a serious threat to public health.<sup>32</sup> TNCs are not traditionally considered subjects of international law.<sup>33</sup> For example, when a TNC allows its facilities to operate in ways that violate international law, it is the country where the facilities are located—not the TNC itself—that is in violation of international law.<sup>34</sup> After the finding of a violation in the host country, the country may attempt to regulate the TNC to comply with international law, but the TNC can either uproot its production location or threaten to do so.<sup>35</sup> This presents a major issue in developing countries, as they rely on the profits generated by the TNCs.<sup>36</sup> “The behavior of transnational tobacco companies provides one of the best illustrations of the health-damaging commerce pursued by some TNCs.”<sup>37</sup>

In the 1990s, developed countries enacted various approaches to regulate tobacco consumption.<sup>38</sup> For instance, in 1998 the leading cigarette manufacturers in the United States signed a contract called the “Master Settlement Agreement” with the Attorney General of forty-six states, five U.S. territories, and the District of Columbia.<sup>39</sup> This agreement regulated marketing, underage prevention, industry lobbying, and communications about the health consequences of smoking.<sup>40</sup> These types of regulations reduced smoking in developed countries due to increased awareness of the health effects induced by tobacco

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29. See ROBERT J. BRYM & JOHN LIE, *SOCIOLOGY: YOUR COMPASS FOR A NEW WORLD* 207 (2d ed. 2010); See ALICE DE JONGE, *TRANSNATIONAL CORPORATIONS AND INTERNATIONAL LAW* 96-97 (2011).

30. See FIDLER, *supra* note 10, at 80.

31. Chopra et al., *supra* note 5.

32. FIDLER, *supra* note 10, at 82.

33. *Id.*

34. *Id.*

35. *Id.*

36. *See id.*

37. *Id.* at 80.

38. See Judith Mackay & John Crofton, *Tobacco and the Developing World*, 52 *BRIT. MED. BULL.* 206, 213 (1996).

39. Nat'l Ass'n of Attorneys Gen., *Master Settlement Agreement*, [http://www.naag.org/naag/about\\_naag/naag-center-for-tobacco-and-public-health/master-settlement-agreement/master-settlement-agreement-msa.php](http://www.naag.org/naag/about_naag/naag-center-for-tobacco-and-public-health/master-settlement-agreement/master-settlement-agreement-msa.php) (last visited Feb. 5, 2015).

40. *Id.*

consumption.<sup>41</sup> Consequently, transnational tobacco companies penetrated the markets of developing countries to circumvent regulations similar the Master Settlement Agreement that were imposed by various developed countries.<sup>42</sup> Transnational tobacco companies could continue selling and advertising to minors because many developing countries do not regulate that type of activity.<sup>43</sup> Transnational tobacco companies' expansion into developing countries caused an uptick in cigarette consumption, an occurrence estimated to kill ten million people per year, with over 70% of deaths occurring in the developing world.<sup>44</sup>

Similarly, transnational soft drink companies are taking a lesson out of big tobacco's playbook. As the health effects of junk food manifest themselves, the junk food industry is sensing a change in the United States' attitude towards nutrition.<sup>45</sup> Soft drink companies are increasingly targeting developing countries' markets as a major area for expansion, as those citizens are less likely to be aware of the health effects induced by soda consumption.<sup>46</sup> For instance, Coca-Cola has invested \$5 billion to increase production and sales in Mexico.<sup>47</sup>

Apart from avoiding regulation under international law, trade liberalization and international trade policies that emphasize trade over public health have helped TNCs introduce health-damaging products into the global market.<sup>48</sup> International trade agreements like those administered by the WTO seek to liberalize trade by eliminating tariffs,<sup>49</sup> quantitative trade restrictions,<sup>50</sup> and nontariff trade barriers.<sup>51</sup> Limited exceptions to its trade liberalization goal are made in the in-

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41. Mackay & Crofton, *supra* note 38.

42. FIDLER, *supra* note 10, at 82.

43. Mackay & Crofton, *supra* note 38.

44. Benjamin C. Adams, *The WHO Framework Convention on Tobacco Control and Trade-Related Protocols*, in RECONCILING ENVIRONMENT AND TRADE 137, 138 (Edith Brown Weiss et al. eds., 2d ed. 2008).

45. 'Globesity': US Junk Food Industry Tips Global Scales, RT (Sept. 7, 2013, 3:15 PM), <http://on.rt.com/nj37uu>.

46. *Id.*

47. Mina Akrami, *Mexico's Nutrition Transition Makes It the Most Obese Country in the World*, RECORD (Aug. 5, 2013), <http://www.newsrecord.co/mexicos-nutrition-transition-makes-it-the-most-obese-country-in-the-world>.

48. Lee, *supra* note 6, at 574-75.

49. A tariff is a schedule or system of duties imposed by a government on imported or exported goods. BLACK'S LAW DICTIONARY 1684 (10th ed. 2014).

50. Quantitative restrictions include quotas, bans, and licenses on imported and exported products. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. xi, 61 Stat. A-11, 55 U.N.T.S. 194.

51. Lee, *supra* note 6, at 574-75.

terest of public health.<sup>52</sup> As such, nations cannot easily justify restrictions on imports, and labeling measures can be attacked as being nontariff trade barriers.<sup>53</sup> For example, the General Agreement on Tariffs and Trade (GATT), the Agreement on Technical Barriers to Trade (TBT Agreement), and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) constrain domestic measures that might be taken to address public health concerns.<sup>54</sup>

The GATT established the normative rules of international trade.<sup>55</sup> These rules were designed to achieve free trade.<sup>56</sup> Building on the norms of the GATT are other measures intended to expand the scope and application of the WTO.<sup>57</sup> These additional measures include “a formal structure for dispute settlement, as well as rules regarding the use of subsidies, consumer standards, and health and safety measures.”<sup>58</sup> In the context of public health and labeling, the “core obligations” of the GATT and the agreements related to consumer standards and health and safety measures are relevant.<sup>59</sup> The agreement related to consumer standards is the TBT Agreement, and the agreement related to health and safety measures is the SPS Agreement.<sup>60</sup>

Since the TBT Agreement and the SPS Agreement build on the norms of the GATT,<sup>61</sup> it is important to first understand the “core obligations” of the GATT. These obligations include: (1) prohibiting discrimination between the products imported by Member States; (2) prohibiting discrimination between imported and domestic goods; and (3) prohibiting quantitative restrictions on trade.<sup>62</sup> The first two obligations, otherwise known as the non-discriminatory treatment obliga-

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52. *Id.*

53. *Id.*

54. *Id.*

55. Adams, *supra* note 44, at 146.

56. *Id.*

57. See, e.g., Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, June 1, 1995, 1867 U.N.T.S. 14.

58. *Id.* at 148.

59. *Id.*

60. Agreement on Technical Barriers to Trade art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 154 [Hereinafter TBT Agreement]; Agreement on the Application of Sanitary and Phytosanitary Measures art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 154 [Hereinafter SPS Agreement].

61. TBT Agreement, *supra* note 60, art. 1; SPS Agreement, *supra* note 60, art. 1.

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

tions, require that any measure implemented to a product extend equally to all other like products—foreign and domestic alike.<sup>63</sup> For example, a measure requiring warning labels on soft drinks would need to be applied to both imported soft drinks and domestic soft drinks.

Most relevant to public health is Article XX(b) of the GATT, also known as the public health and safety exception.<sup>64</sup> This allows Member States to implement measures that are “*necessary* to protect human . . . life or health.”<sup>65</sup> In terms of the GATT, “*necessary*” means there is no other measure that is reasonably available, fulfills the legitimate objective of protecting human life or health, and is significantly less restrictive to trade.<sup>66</sup> This is known as the least-trade restrictive analysis.<sup>67</sup> Although Article XX(b) is an exception to unrestricted trade, these measures must still comply with the non-discriminatory treatment obligations.<sup>68</sup> That is, a measure implemented for the protection of human life or health must apply to imported and domestic goods alike.<sup>69</sup>

The TBT Agreement regulates technical barriers to trade that relate to product characteristics and production methods.<sup>70</sup> An example of a product characteristic would be the warning labels on cigarette packages. Under the TBT Agreement all members have the right to restrict trade for “legitimate objectives,”<sup>71</sup> including the protection of human health or safety.<sup>72</sup> Like the public health and safety exception of the GATT, the TBT Agreement allows countries to obstruct trade to protect human health and safety.<sup>73</sup> Also like the public health and safety exception of the GATT, the TBT Agreement requires that any technical regulations<sup>74</sup> or standards<sup>75</sup> taken are consistent with the

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63. Adams, *supra* note 44, at 146.

64. GATT, *supra* note 62, art. XX(b).

65. *Id.* (emphasis added).

66. Adams, *supra* note 44, at 156.

67. *Id.*

68. *Id.* at 147.

69. *Id.* at 146.

70. TBT Agreement, *supra* note 60, art. 1.

71. TBT Agreement, *supra* note 60, art. 2.2; World Health Org. & World Trade Org. Secretariat, *WTO Agreements and Public Health* 32 (2002), available at [http://www.wto.org/english/res\\_e/booksp\\_e/who\\_wto\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf) [hereinafter *WTO Agreements and Public Health*].

72. TBT Agreement, *supra* note 60, art. 2.2; *WTO Agreements and Public Health*, *supra* note 71.

73. *Id.*

74. TBT Agreement, *supra* note 60, art. 2. A Technical regulation is a document that lays down product characteristics or their related processes and production methods, including the applicable administrative provisions. Michael Leslie Blakeney, *Food Labelling and International*

non-discriminatory treatment obligations of the GATT.<sup>76</sup> Further, the TBT Agreement requires a least-trade restrictive analysis similar to that of the GATT.<sup>77</sup>

The SPS Agreement expressly identifies itself as an elaboration of the GATT's Article XX(b).<sup>78</sup> Article 2 of the SPS Agreement establishes the basic rights and obligations of WTO members, and provides that "members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health . . . ."<sup>79</sup> This necessity requirement is adapted from Article XX(b) of the GATT.<sup>80</sup> However, unlike GATT Article XX(b), which applies to *all* measures necessary to protect human health, the SPS Agreement only covers measures protecting against exposure to pests, disease-carrying or disease-causing organisms, disease-carrying animals or plants, and laws restricting additives, contaminants, and toxins in food and feedstuffs.<sup>81</sup> There is a presumption that measures that comply with the SPS Agreement also comply with the GATT.<sup>82</sup> The SPS Agreement was designed to ensure that countries do not abuse the "protecting public health" argument as an excuse to restrict trade.<sup>83</sup> Although the SPS Agreement recognizes that countries have a right to protect the health and safety of their population,<sup>84</sup> the Agreement is more concerned with placing limitations on the introduction of such measures.<sup>85</sup> Like the TBT Agreement, the SPS Agreement requires that measures comply with the

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*Trade*, 19 INT'L TRADE L. & REG. 15, 16 (2013). The definition includes packaging, marking or labeling requirements as they apply to a product, process, or product method. *Id.* Compliance with a technical regulation is mandatory. *Id.*

75. TBT Agreement, *supra* note 60, art. 2. A standard is a document approved by a recognized body that provides for common and repeated use, rules, guidelines, or characteristics for products or related processes and production methods. Blakeney, *supra* note 74, at 16. A standard is not mandatory, and it may include or deal exclusively with packaging, marking, or labeling requirements as they apply to a product, process, or production method. *Id.*

76. TBT Agreement, *supra* note 60, art. 2.

77. TBT Agreement, *supra* note 60, art. 2.2.

78. GATT, *supra* note 62, art. XX(b); CATHERINE BUTTON, THE POWER TO PROTECT TRADE, HEALTH AND UNCERTAINTY IN THE WTO 10 (2004).

79. SPS Agreement, *supra* note 60, art. 2.2; BENN McGRADY, TRADE AND PUBLIC HEALTH: THE WTO, TOBACCO, ALCOHOL, AND DIET 181 (2011).

80. GATT, *supra* note 62, art. XX(b); SPS Agreement, *supra* note 60, art. 2.2; McGRADY, *supra* note 79, at 181.

81. GATT, *supra* note 62, art. XX(b); SPS Agreement, *supra* note 60, annex A.1; McGRADY, *supra* note 79, at 182.

82. See SPS Agreement, *supra* note 60, art. 3.2; McGRADY, *supra* note 79, at 42.

83. SPS Agreement, *supra* note 60, arts. 5.3-5.4.

84. SPS Agreement, *supra* note 60, art. 2.1.

85. SPS Agreement, *supra* note 60, art. 2.2; Blakeney, *supra* note 74, at 19.

core obligations of the GATT.<sup>86</sup> But unlike the TBT Agreement and the GATT, for a WTO member's health measure to survive review under the SPS Agreement, the measure must have scientific justification.<sup>87</sup>

### B. *The Interaction Between the World Health Organization and the World Trade Organization*

With the globalization of public health problems, nations have turned to international law to develop common rules to address the concern.<sup>88</sup> The WHO is an international organization that has the authority to create and enforce international law in the context of public health concerns.<sup>89</sup> Articles 19 and 21 of the WHO Constitution provide the WHO with this authority.

Article 19 of the WHO Constitution provides the World Health Assembly (WHA)—the governing body of the WHO—with the authority “to adopt conventions<sup>90</sup> and agreements<sup>91</sup> with respect to any matter within the competence of the Organization.”<sup>92</sup> Article 21 grants the WHO with authority to adopt regulations that are binding on WHO members in five health-related areas, including advertising and labeling of biological, pharmaceutical, and similar products.<sup>93</sup> In spite of this, no definitive answer exists as to whether Article 21 grants the WHO authority to adopt binding legislation in relation to food labeling.<sup>94</sup> Nonetheless, some scholars argue that a “structural, purposive, and pragmatic reading” of Article 21 clearly supports the conclusion that Article 21 does grant this power to the WHO.<sup>95</sup>

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86. See SPS Agreement, *supra* note 60, arts. 3.1-3.2.

87. *Id.* art. 3.3; BUTTON, *supra* note 78, at 46.

88. See Adams, *supra* note 44, at 140.

89. *Id.* at 140-41.

90. The United Nations generally uses conventions for formal, multilateral treaties with a broad number of parties. *Definition of Key Terms Used in the UN Treaty Collection*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1\\_en.xml#agreements](https://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#agreements) (last visited Jan. 27, 2015). Conventions are normally open for participation by the international community as a whole; instruments negotiated under the auspices of an international organization are usually entitled conventions. *Id.*

91. Agreements are less formal and deal with a narrower range of subject matter than treaties. *Id.* They are employed for instruments of a technical or administrative character and are signed by the representatives of government departments, but are not subject to ratification. *Id.* Typical agreements deal with matters of economic, cultural, scientific, and technical cooperation. *Id.*

92. Constitution of the World Health Organization, *supra* note 22, art. 19.

93. Constitution of the World Health Organization, *supra* note 22, art. 21.

94. Lee, *supra* note 6, at 584.

95. *Id.*

Although the WHO has the authority to impose regulations on Member States, the regulations must be compatible with trade agreements administered by the World Trade Organization.<sup>96</sup> Thus, if the WHO were to implement a mandatory warning label measure on soft drinks, the measure must simultaneously comply with the GATT, the TBT Agreement, and the SPS Agreement. For example, the WHO invoked its Article 19 authority for the first time in fifty years to create the FCTC and globally harmonize regulations on tobacco.<sup>97</sup> Labeling requirements are one of the protocols established in the FCTC.<sup>98</sup> The labeling protocol requires that warning information in the form of text, pictures, or a combination of these two forms cover at least 30% of the front and back of cigarette packages.<sup>99</sup> Although this protocol was created under the WHO's Article 19 authority, the protocol must still comply with WTO trade agreements.<sup>100</sup>

### III. EFFECTIVENESS OF WARNING LABELS AND THE GLOBAL STRATEGY IMPLEMENTED TO REQUIRE MANDATORY WARNING LABELS ON ALL TOBACCO PRODUCTS

#### A. *Effectiveness of Labeling Measures*

Cigarette warning labels are one of the most common regulations imposed on tobacco products.<sup>101</sup> The labels provide consumers with information regarding the adverse health effects of cigarette consumption.<sup>102</sup> However, the size of the warning label and the way different countries present health information varies.<sup>103</sup> Labeling policies range from vague statements of risk (i.e., "smoking can be harmful to your health") to ghastly pictorial depictions of disease.<sup>104</sup> Regardless of the type of label, studies demonstrate that smokers with warning labels on their cigarettes are more likely to know the health effects of cigarettes than persons whose cigarettes did not have warning labels.<sup>105</sup> But the extent of a person's knowledge depends on the strength of the pack-

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96. See Adams, *supra* note 44, at 145.

97. *Id.* at 141.

98. WHO Framework Convention on Tobacco Control arts. 9, 11, May 21-June 29, 2004, 2302 U.N.T.S. 166 [hereinafter FCTC].

99. Jeremy Kees et al., *Tests of Graphic Visuals and Cigarette Package Warning Combinations: Implications for the Framework Convention on Tobacco Control*, 25 J. PUB. POL'Y & Mktg. 212, 212 (2006).

100. Adams, *supra* note 44, at 145.

101. Hammond et al., *supra* note 19, at iii19.

102. *Id.*

103. *Id.* at iii20.

104. *Id.*

105. *Id.* at iii22.

age warnings.<sup>106</sup> For instance, in Canada—the country with the strongest health warnings—84% of smokers cited warning labels on cigarette packages as a source of health information.<sup>107</sup> On the other hand, in the U.S.—the country with the weakest health warnings—only 47% of smokers cited warning labels on cigarette packages as a source of health information.<sup>108</sup>

The warning labels implemented in Canada demonstrate another success story of effectively implementing warning labels. Canada was the only country to implement a warning label informing consumers that smoking causes impotence; Canadian smokers were almost three times more likely than smokers from the U.S. to believe that smoking causes impotence.<sup>109</sup> It is clear that warning labels bolstered consumer knowledge of the health effects of smoking. However, it is also apparent that the extent of knowledge varies depending on the type of warning labels enacted.

States on the U.S.' east coast began to experiment with food and beverage labeling measures, and the measures have proven successful.<sup>110</sup> A study examined the effect of a comprehensive storewide supermarket nutrition intervention program called "Guiding Stars."<sup>111</sup> More than 60,000 food and beverage grocery items were rated on the basis of nutrition criteria developed specifically for the Guiding Stars program.<sup>112</sup> Depending on the nutrition criteria, a food or beverage would earn a one-, two-, or three-star icon.<sup>113</sup> One star indicated good nutritional value, two stars indicated better nutritional value, and three stars indicated the best nutritional value.<sup>114</sup> The star icon was then on the shelf label that included the item's price.<sup>115</sup> The stars provided consumers with simplified nutritional information that could help guide better food and beverage choices "at-a-glance."<sup>116</sup> The reason for providing this "at-a-glance" nutritional information, also known as "point of purchase" information, was because shoppers on

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106. *Id.* at iii23.

107. *Id.*

108. *Id.*

109. *Id.*

110. Sutherland et al., *supra* note 20, at 1090S. States experimenting with food and beverage labeling include Maine, New Hampshire, Vermont, Massachusetts, and New York. *Id.* at 1091S.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 1091S-92S.

115. *Id.* at 1091S.

116. *Id.* at 1092S.

average spend only thirteen seconds looking at a product.<sup>117</sup> Nine of those thirteen seconds is usually spent making a final product decision.<sup>118</sup> Consumer studies show that average shoppers arrive at the store undecided about what they will buy, look at a fraction of the products, and become distracted by displays and packaging.<sup>119</sup> In an effort to reduce “information clutter,” there is a need to develop intervention strategies that are comprehensive in scope and easy for the consumer to understand and use.<sup>120</sup> For example, Guiding Stars increased the proportion of products with stars that were purchased.<sup>121</sup> In a two-year period, products purchased with the star icons increased from 24.5% to 25.89%.<sup>122</sup> The marginal percentage increase translates into a trade-off of approximately 2.9 million more items with stars being purchased monthly than products without stars.<sup>123</sup> It is apparent that warning labels and nutritional rating system labels are effective because consumers can easily understand them. Thus, a mandatory warning label measure would likely prove effective in dissuading some consumers from purchasing beverages like soft drinks that have no nutritional value.

*B. Implementing an International Mandatory Warning Label Measure on Tobacco*

Although countries like the United States are already experimenting with food and beverage labeling measures, implementing an international warning label measure is a much more difficult task. Despite these obstacles, the WHO wielded its Article 19 authority and the FCTC to implement a mandatory warning label measure for tobacco products.<sup>124</sup> Articles 9 and 11 of the FCTC implement minimum international standards for packaging and labeling of tobacco products.<sup>125</sup> As previously mentioned, these international labeling standards for labeling require that warning information be provided in the

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117. *Id.* at 1090S.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1091S.

122. *Id.* In terms of nutrients, the result was a 542,329-gram reduction of sodium sold during the study period. *Id.*

123. *Id.*

124. Constitution of the World Health Organization, *supra* note 22, art. 19; *see Adams, supra* note 44, at 141-43.

125. FCTC, *supra* note 98, arts. 9, 11.

form of text, pictures, or a combination thereof to cover at least 30% of the front and back of cigarette packages.<sup>126</sup>

The WHO favored the framework convention-protocol model for tobacco to a conventional treaty because of likely political obstacles that would prevent a global consensus.<sup>127</sup> In regards to the tobacco example, the political obstacles are the transnational tobacco companies and the governments that support them.<sup>128</sup> The predictable opposition of Big Tobacco would likely undermine support for a conventional treaty.<sup>129</sup> In light of these concerns and other political factors, the WHO's advisors recommended an incremental approach to setting international standards.<sup>130</sup>

"A framework convention is designed as a compromise solution between a purely recommendatory instrument and a single convention, so as to engage countries in an incremental and flexible normative exercise in a novel area."<sup>131</sup> Member Nations first adopt a framework convention that calls for international cooperation in realizing broadly stated goals, and, ideally, parties to the convention will then create separate protocols containing specific measures designed to implement those goals.<sup>132</sup> There are nine subjects for protocols in the FCTC, one of them being package design and labeling requirements.<sup>133</sup>

By adopting the FCTC, Member Nations were able to overcome heavy resistance from the tobacco industry, collectively succeed where individual countries had failed, and create global norms for tobacco control.<sup>134</sup> However, the drawbacks to using the FCTC model include practical difficulties and major time lag associated with adopting a convention.<sup>135</sup> The convention approach calls for at least two rounds of international negotiation and national ratification.<sup>136</sup> Adoption of an Article 19 convention requires a two-thirds majority vote from Member Nations, and the entry-into-force for each country also depends on its acceptance in accordance with its constitutional pro-

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126. Kees et al., *supra* note 99, at 212.

127. Lee, *supra* note 6, at 590.

128. Jesse B. Bump & Michael R. Reich, *Political Economy Analysis For Tobacco Control in Low- and Middle-Income Countries*, 28 HEALTH POL'Y & PLAN. 123, 128 (2012).

129. Lee, *supra* note 6, at 590.

130. *Id.* at 590-91.

131. *Id.* at 591.

132. *Id.*

133. FCTC, *supra* note 98, art. 11; Adams, *supra* note 44, at 142-43.

134. Lee, *supra* note 6, at 590-91.

135. *Id.* at 592.

136. *Id.*

cess.<sup>137</sup> By the time a convention enters into force, it may no longer be relevant.<sup>138</sup> In the worst case, using the FCTC model allows governments to relieve public pressure without having to take concrete steps to adopt preventive measures.<sup>139</sup> Further it would tie up WHO resources in highly politicized negotiations and would undermine stakeholder confidence in the WHO's ability to confront public health issues through international law.<sup>140</sup> Regardless, for tobacco regulation the FCTC proved to be very successful.

#### IV. IMPLEMENTING WARNING LABELS ON SOFT DRINKS USING THE GLOBAL STRATEGY DEVELOPED FOR TOBACCO CONTROL

##### A. *Differences Between Tobacco and Food Policy*

It is important to identify the differences between tobacco and food policies before developing a global strategy akin to the FCTC.<sup>141</sup> First, although tobacco and soda are both legal products, tobacco is lethal for a high proportion of its users.<sup>142</sup> The relationship between tobacco use and health (more accurately, death and disease) is based on decades of solid epidemiological evidence.<sup>143</sup> In contrast, a bevy of factors impacts the relationship between soda and obesity, including long-term over- or under-consumption of various foods and nutrients.<sup>144</sup> Furthermore, physical activity levels that do not match energy intake complicates obesity projections.<sup>145</sup> Another vital difference between tobacco and food policy relates to private sector interaction.<sup>146</sup> In tobacco control policy, previously-secret documents made it clear that tobacco companies intended to thwart the introduction of effective control policies.<sup>147</sup> The behavior of tobacco companies and the lethal nature of their product demanded that the interaction between

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137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. See Derek Yach et al., *The World Health Organization's Framework Convention on Tobacco Control: Implications for Global Epidemics of Food-Related Deaths and Disease*, 24 J. PUB. HEALTH POL'Y 274, 274 (2003).

142. *Id.* at 275

143. *Id.*

144. *Id.*

145. *Id.* at 276.

146. *Id.*

147. *Id.*

the tobacco industry and public health be tightly regulated.<sup>148</sup> This has not been the case with soda companies.

### B. *Implementing a Solution*

#### 1. International Trade Policies Must Emphasize Public Health over Trade

The policy that trade trumps health must change before the WHO can enact a mandatory warning label measure. In fact, the opposite must come true—international trade policies must now emphasize public health concerns over trade. The policy that trade trumps health is inconsistent with the objectives of the WTO. These objectives are illustrated in the preamble to the agreement, signed in April, 1994, establishing the WTO.<sup>149</sup> The preamble states:

Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development . . . . Recognizing further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development . . . .<sup>150</sup>

The WTO fails to recognize that ignoring public health concerns is detrimental to its objective. The liberalization of trade facilitated the proliferation of foods and beverages of low nutritional value into global markets.<sup>151</sup> This proliferation reduced the standard of living, contrary to the objective that the “field of trade and economic endeavor should be conducted with a view to raising standards of living.”<sup>152</sup> A study conducted by the World Bank<sup>153</sup> indicates that the most immediate impact of NCDs lies in suffering and decreased well-

148. *Id.*

149. *WTO Agreements and Public Health*, *supra* note 71, at 26.

150. Marrakesh Agreement Establishing the World Trade Organization pmb., Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

151. *Lee*, *supra* note 6, at 574-75.

152. Marrakesh Agreement, *supra* note 150.

153. The World Bank is a vital source of financial and technical assistance to developing countries around the world. *What We Do*, WORLD BANK, <http://www.worldbank.org/en/about/what-we-do> (last visited Jan. 27, 2015). The World Bank is not a bank in the ordinary sense but a unique partnership to reduce poverty and support development. *Id.*

being.<sup>154</sup> This is because NCDs affect adults in their productive years, thus requiring long-term treatment of potential disability.<sup>155</sup> Such long-term treatment can result in severe economic consequences for the individual and his or her family—including losses of household income, impoverishment, and losses of savings and assets.<sup>156</sup> For example, amongst people suffering from NCDs in Egypt, the probability of being employed is 25% lower than the average, and their work time is reduced by twenty-two hours per week on average.<sup>157</sup> This loss of employment is also contrary to the objective of the WTO: “trade . . . should be conducted with a view . . . of ensuring full employment . . . .”<sup>158</sup>

Additionally, the WTO objective that recognized the “need for positive efforts designed to ensure that developing countries . . . secure a share in the growth of international trade”<sup>159</sup> is undermined by current trade policies. Rather than growing because of international trade, developing countries are suffering because of it. Moreover, developing countries are already faced with the burden of infectious diseases.<sup>160</sup> To compound the situation, developing countries are burdened with obesity and the associated risk of NCDs as a consequence of soft drink and processed food proliferation.<sup>161</sup> This double burden weighs heavily on health care systems that have inadequate preventive healthcare.<sup>162</sup> The resulting strain on healthcare systems places a burden on the economy of developing countries by increasing pressure for health expenditures and additional health financing challenges.<sup>163</sup>

Further, NCDs are generally more expensive to treat than infectious diseases, requiring patients to have multiple interactions with health systems.<sup>164</sup> To address NCDs effectively, countries will need to invest substantial resources in changing and “strengthening service,

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154. WORLD BANK'S HUMAN DEV. NETWORK, THE GROWING DANGER OF NON-COMMUNICABLE DISEASES: ACTING NOW TO REVERSE COURSE 4 (2011).

155. *Id.*

156. *Id.*

157. Lorenzo Rocco et al., *Chronic Diseases and Labor Market Outcomes in Egypt* 3 (World Bank Human Dev. Network, Policy Research Paper No. 5575, 2011), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5575>.

158. Marrakesh Agreement, *supra* note 150.

159. *Id.*

160. McGRADY, *supra* note 79, at 20.

161. See WORLD BANK'S HUMAN DEV. NETWORK, *supra* note 154, at 13.

162. *Id.* at 4.

163. *Id.*

164. *Id.*

delivery, organization, skills, equipment, and financing models.”<sup>165</sup> Healthcare systems in developing countries will face the particular challenge of coping with the “double burden” of NCDs and infectious diseases.<sup>166</sup> This is troublesome because developing countries do not have the financial means to invest substantial resources.<sup>167</sup> If changes are not made to address the public health concerns in developing countries, these countries will be forever crippled and will never fully engage in the international market.<sup>168</sup>

Some of these developing countries contain resources the entire world utilizes.<sup>169</sup> If public health concerns cause a loss of productivity, this results in suboptimal use of the world’s resources, which once again is contrary to the WTO’s objective of encouraging “optimal use of the world’s resources.”<sup>170</sup> Thus, it is in the best interest of the WTO to support international trade policies that emphasize public health over trade.

## 2. Compatibility of a Mandatory Warning Label Measure with WTO Trade Agreements

As previously mentioned, measures cannot violate WTO trade agreements, so when implementing a mandatory warning label measure on soft drinks, it is important to first determine what agreement would regulate this measure. That is, if a Member Nation (complainant) were to bring an action to the WTO against another Member Nation for enacting the warning label measure, the complainant must first determine which agreement the measure violates.

In the context of labeling, whether the SPS Agreement or the TBT Agreement applies depends on the type of labeling measure.<sup>171</sup> The SPS Agreement does not apply to tobacco control measures because tobacco does not constitute a “food.”<sup>172</sup> Food is defined as a substance taken into the body to maintain life and growth.<sup>173</sup> Because

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165. *Id.*

166. *Id.* at 2.

167. *Id.* at 2-3.

168. See McGRADY, *supra* note 79, at 20-21.

169. See *id.* at 21.

170. Marrakesh Agreement, *supra* note 150.

171. McGRADY, *supra* note 79, at 177-78.

172. See SPS Agreement, *supra* note 60, Annex A; McGRADY, *supra* note 79, at 177-78.

173. See SPS Agreement, *supra* note 60, art. 12.2; Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, para. 7.291, WT/DS291-93/R (Sept. 29, 2006) [hereinafter Panel Report].

tobacco provides no genuine nourishment to the body, tobacco measures are not subject to the SPS Agreement.<sup>174</sup>

In the context of food labeling, whether the labeling measure is subject to the SPS Agreement depends on the type of food-labeling measure.<sup>175</sup> The two types of food labeling measures include (1) measures requiring the disclosure of nutritional information and quantitative ingredient labeling, and (2) measures disclosing health effects.<sup>176</sup> Measures disclosing health effects fall under the SPS Agreement because they protect the life or health of consumers from risks arising from “additives or contaminants” in foods and beverages.<sup>177</sup> The fact that a warning label measure for soft drinks falls under the SPS Agreement poses a potential problem. Unlike the TBT Agreement, implementing a measure under the SPS Agreement requires “sufficient scientific justification.”<sup>178</sup> The fact that the TBT Agreement does not have a “scientific justification” requirement makes it easier for labeling measures to be implemented.

There is considerable room for dispute about the meaning of “sufficient scientific evidence.”<sup>179</sup> Nevertheless, it is clear the Appellate Body of the WTO regards risk assessment as a crucial element of any scientific justification.<sup>180</sup> The process of risk assessment requires both identification of potential adverse effects on human health and an evaluation of the potential for those adverse health effects to occur.<sup>181</sup> The first step of identifying potential adverse effects on health might not be as easy as it appears because the process would have to be done with specificity.<sup>182</sup> Risk assessment must focus on a particular risk and its cause.<sup>183</sup> Obesity is multi-causal in character, and there is a long chain of causation between the consumption of a specific beverage and the onset of obesity.<sup>184</sup> If obesity were not itself considered a disease but merely a risk factor for other NCDs, the chain of causation would be longer, and the difficulty of assessing the potential for ad-

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174. See SPS Agreement, *supra* note 60, Annex A.

175. McGRADY, *supra* note 79, at 195.

176. *Id.* at 194.

177. See Panel Report, *supra* note 173, para. 7.412.

178. BUTTON, *supra* note 78, at 46.

179. *Id.*

180. *Id.* The WTO Appellate Body is a standing body of seven persons that hears appeals from reports issued by panels in disputes brought by WTO members. *Appellate Body*, WORLD TRADE ORG, [http://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm) (last visited Jan. 21, 2015).

181. McGRADY, *supra* note 79, at 186.

182. *Id.* at 186-87.

183. *Id.* at 187.

184. *Id.*

verse effects to occur would be heightened.<sup>185</sup> In this respect, the potential for adverse effects turns largely on the behavior of consumers.<sup>186</sup> Accordingly, a WTO Member would have to take into account a variety of unpredictable factors—such as the way in which a particular food is consumed, the groups in society likely to consume the food, and whether those groups are likely to achieve an energy balance in terms of their overall dietary intake and physical activity.<sup>187</sup> The difficulty in predicting outcomes is one reason why regulation is somewhat experimental.<sup>188</sup> These factors may make it difficult to base a measure on a risk assessment.<sup>189</sup>

The second step—involving an evaluation of the potential for the adverse effects to occur—is even more difficult.<sup>190</sup> Consumption patterns affect the degree of obesity risk.<sup>191</sup> A beverage high in sugar may pose an unacceptable level of risk where that beverage is consumed widely.<sup>192</sup> On the other hand, a beverage within substantially the same nutritional profile might be considered to fall within an acceptable level of risk on the basis that it is not consumed widely.<sup>193</sup> Put simply, the acceptable level of risk could vary from beverage-to-beverage based on consumption patterns.<sup>194</sup>

It is nearly impossible for a mandatory warning label measure to withstand review under the SPS Agreement. The fact the SPS Agreement takes consumption patterns into account can result in the discrimination of like goods, which would result in a violation of the GATT Core Obligations. For example, a mandatory warning label measure on Coca-Cola could possibly survive review because it is consumed widely throughout the world, and thus it is clear that Coca-Cola increases a person's risk of obesity. On the other hand, soft drinks manufactured within a country may not pose an acceptable level of risk to be subject to a warning label because they are not transnationally consumed. In essence, the current system may discriminate against imported products.

Additionally, allowing a mandatory warning label only on widely consumed soft drinks risks consumer confusion. Consumers may be-

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185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 189

192. *Id.*

193. *Id.*

194. *Id.*

lieve that a rarely consumed soft drink with the same nutritional profile as Coca-Cola poses no health effects because it lacks a mandatory warning label. To resolve these issues, the SPS Agreement should evaluate the risk based on the nutritional profile of a product rather than if the product is consumed widely. Doing so would allow a mandatory warning label measure that regulates all soft drinks with similar nutritional profiles. This would also ensure that discrimination of like goods and products does not occur—a fundamental goal of the WTO.

### 3. Implementing a Mandatory Warning Label Measure

Like tobacco regulation, developing countries require a global strategy for implementing a mandatory warning label measure on soft drinks. These countries require a global strategy because they are reaping the costs of unregulated health-damaging products. Unlike the United States and other wealthy nations, developing nations lack the necessary public health infrastructure and resources to develop their own specific policies and implementation measures.<sup>195</sup> Thus, developing nations rely on the WHO to advocate and promote public health law on their behalf.<sup>196</sup>

Furthermore, the United States and the European Union have undertaken some positive efforts to address the crisis within their respective populations.<sup>197</sup> The Guiding Star Nutrition Program is an example.<sup>198</sup> Even with such domestic policies, the United States and the European Union still continue to support producers through policies that result in greater risks for diet-related diseases in *developing countries*.<sup>199</sup> This is why there must be an international governmental organization ready to enforce, interpret, and provoke Member Nations into following through with their commitments.<sup>200</sup> Thus, the WHO must use its constitutional authority to create international laws for soft drinks like it did with tobacco.

Taking into account the differences between tobacco and soft drinks, the WHO should use its Article 21 authority. This gives the WHO the authority to enact binding legislation on advertising and labeling.<sup>201</sup> Since there are numerous products that contribute to

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195. Lee, *supra* note 6, at 579.

196. *Id.* at 580.

197. *Id.*

198. See *supra* text accompany note 20.

199. Lee, *supra* note 6, at 580.

200. *Id.*

201. Constitution of the World Health Organization, *supra* note 22, art. 21.

obesity, it is not practical to implement a framework convention like the one enacted for tobacco because in that instance the only product being regulated was tobacco. Furthermore, the WHO should make sure that TNCs are subject to the legislation. Since they are transnational, international law should have jurisdiction over them.

## V. CONCLUSION

An international regulation requiring warning labels on soft drinks will ensure an increase in consumer awareness of the health effects of consumption. To implement an international warning label measure, the WHO must invoke its constitutional authority to enact binding legislation. By implementing binding legislation, all Member Nations will be required to enforce the legislation with specific, domestic policies. Further, the WHO must regulate TNCs so they cannot circumvent regulations by moving to nations that may not be subject to a mandatory warning label measure. Holding TNCs accountable for violations of international law will aid in regulating their power and abuse of developing countries.

With the increasing globalization of public health concerns, it is important for international organizations like the WHO to lay down common rules. However, the WHO rarely invokes its constitutional authority, and only time will tell if regulations like the FCTC will be effective. If such regulations prove to be effective, the WHO will gain more support when governing public health concerns.

Finally and most importantly, it is imperative the WHO and WTO work together to foster the progression of developing countries. The WHO and WTO should encourage international trade policies that emphasize public health over trade. Doing so will help both global entities reach their objectives of creating a better world.