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# Will GATT Take a Bite Out of the Organic Food Production Act of 1990?

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Consumers worldwide are purchasing organic food products in ever-increasing numbers. As a consequence, numerous countries, including the United States, have enacted laws designed to ensure that what consumers are purchasing is, in fact, organic. These laws, which often include a labeling requirement, may implicate provisions of the General Agreement on Tariffs and Trade (GATT) or its side agreements.<sup>1</sup> The specific issue of whether labeling programs which allow distinctions based on production and processing methods violate GATT was not resolved by the recent World Trade Organization (WTO) Panel decision in the celebrated Beef Hormones case.<sup>2</sup> In that case, the Panel recognized the possibility of a voluntary labeling program as an alternative to the European Union's prohibition on beef grown with the assistance of hormones.<sup>3</sup> The Panel, however, specifically declined to decide whether such a program would violate GATT or its side agreements.<sup>4</sup>

A voluntary labeling law which is similar to the one addressed in the Beef Hormones case is the United States' Organic Food Production Act of 1990 (OFPA).<sup>5</sup> The OFPA allows organic farming and production operations to affix a United States Department of Agriculture (USDA) "certified organic" label to organic food. The OFPA endeavors to bring consistency to existing state organic labeling laws by implementing a national organic standard.

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1. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

2. Panel Report on "EC Measures Concerning Meat and Meat Products (Hormones)," WT/DS48/R/CAN (Aug. 18, 1997) [hereinafter Beef Hormones].

3. *Id.* "Likewise, the ability of any Member to enact measures which are intended to protect not consumer health but other consumer concerns was not addressed. In this regard, we are aware that in some countries, . . . voluntary labeling schemes operate . . ." *Id.* ¶ 8.278.

4. *Id.*

5. Organic Food Production Act of 1990, 7 U.S.C.A. § 6501-22 (West Supp. 1998) [hereinafter OFPA].

The Commerce Clause of the U.S. Constitution grants Congress the power to pass legislation such as the OFPA.<sup>6</sup> Generally, such laws must only pass a rational-basis test to be constitutional.<sup>7</sup> However, laws affecting international trade must also meet the requirements set forth under GATT and its side agreements. For example, a domestic law could violate GATT by acting as a protectionist measure for the domestic industry.<sup>8</sup> In addition to challenges directly under GATT, sanitary measures (which include laws or regulations concerning food) are subject to scrutiny under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).<sup>9</sup> The SPS Agreement requires that, where possible, standards for sanitary measures be in accord with applicable internationally accepted standards. In the absence of such standards, the SPS Agreement requires that standards be scientifically supported.<sup>10</sup> Technical regulations that are not sanitary measures, such as labeling, packaging or marking standards, are covered by the Agreement on Technical Barriers to Trade (TBT Agreement).<sup>11</sup> The TBT Agreement prohibits a country from using its technical standards to create unnecessary obstacles to trade. The SPS and TBT Agreements work in tandem with GATT to prevent impermissible trade barriers.

This Note examines the OFPA and its potential conflict with GATT, the SPS Agreement and the TBT Agreement. Part I outlines the history of the OFPA, its purposes and its goals. It explores the difference between organic and conventionally produced food with an eye to the defining characteristics of organic food and whether the differences are related to the end product or the production methods. It also discusses the United States' primary food safety law, the Federal Food, Drug, and

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6. U.S. CONST. art. I, § 8, cl. 3. See generally Richard E. Levy & Stephen R. McAllister, *Defining the Roles of the National and State Governments in The American Federal System: A Symposium*, 45 U. KAN. L. REV. 971 (1997) (discussing the history and theory of federalism, as well as its place in the political process).

7. For a treatment of the standard of review for Congress' Commerce Clause power, see generally *United States v. Lopez*, 514 U.S. 549 (1995). See also Levy & McAllister, *supra* note 6.

8. GATT art. I.

9. Agreement on the Application of Sanitary and Phytosanitary Measures, Dec. 15, 1993, GATT Doc. MTN/FA II-AIA-4 [hereinafter SPS Agreement].

10. See *infra* notes 115-24 (explaining the SPS standard requiring a scientific basis for sanitary measures).

11. Agreement on Technical Barriers to Trade, GATT Doc. MTN/FA II-AIA-6 (Dec. 15, 1993) [hereinafter TBT Agreement].

Cosmetic Act,<sup>12</sup> and its interaction with the OFPA. Part II details relevant provisions from GATT, the SPS Agreement and the TBT Agreement. GATT Articles III and XI are the main provisions under which a complaining party may challenge the OFPA. Part II also discusses GATT Article XX general defenses. Part III scrutinizes the OFPA under GATT, the SPS Agreement, and the TBT Agreement. This Note concludes that the OFPA could not likely survive a challenge brought under GATT, the SPS or TBT Agreements, particularly when a complaining party has an equivalent organic program which the United States does not recognize under the OFPA.

## I. THE OFPA AND ORGANIC FOODS

### A. THE ORGANIC FOOD PRODUCTION ACT OF 1990

Prior to passage of the OFPA, the organic food industry tried to implement a self-regulated national organic labeling program.<sup>13</sup> Efforts by organizers failed because the various factions could not decide on a coherent set of standards.<sup>14</sup> Failing at self-organization, the organic groups resorted to lobbying Congress, which responded by passing the OFPA.<sup>15</sup> The purposes advanced by Congress for the OFPA were: "(1) to establish national standards governing the marketing of certain agricultural products as organically produced products; (2) to assure consumers that organic products meet a consistent standard; and (3) to facilitate interstate commerce in fresh and processed food that is organically produced."<sup>16</sup>

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12. Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C.A. § 301 (West 1972 & Supp. 1995) [hereinafter FDCA].

13. Kyle W. Lathrop, *Pre-empting Apples with Oranges: Federal Regulation of Organic Food Labeling*, 16 J. CORP. L. 885, 885-89 (1991).

14. *Id.*

15. *Id.* See also OFPA, Pub. L. No. 101-624, 104 Stat. 3935 (1990).

16. 7 U.S.C.A. § 6501 (West Supp. 1998). The general legislative history of the bill supports the general purposes set forth *ante*, but the record also shows additional purposes, including environmental stewardship and regulation of production methods. See S. REP. NO. 101-357, at 640-90 (1990). There is a plethora of evidence supporting the argument that organic farming reduces the toll on the environment compared to conventional methods. For a treatment of this issue, see generally John Bell Clark, *Impact and Analysis of the U.S. Federal Organic Food Production Act of 1990 with Particular Reference to the Great Lakes*, 26 U. TOL. L. REV. 323 (1995). The difference between the stated purpose in § 6501(1) of the OFPA (governing marketing standards) and the regulation of methods defined as "organic" is subtle but important. Because there is no national or international standard defining exactly what constitutes "organic," Congress in essence gave the Secretary of Agriculture a blank slate on which to draft the meaning of the term. 7 U.S.C.A. § 6518 (West Supp. 1998)

Congress' concern about misleading or fraudulent labeling in the organic food market was one reason behind the OFPA.<sup>17</sup> Fraudulent labeling is attractive because consumers are willing to pay premium prices for organic food.<sup>18</sup> One reason for the higher prices on organic food is the higher cost of organic farming. Another reason is purely market-driven: the demand for organic products is greater than the supply. Concern over the incentive to mislabel food as organic, combined with the rate of growth in the organic food market, spurred Congress to enact the OFPA.<sup>19</sup> Congress delegated the authority to promulgate final rules on organic labeling to the Secretary of Agriculture. When the final rules go into effect in mid-1998, the OFPA will regulate production, marketing and labeling of organic food.<sup>20</sup>

When the OFPA was passed, twenty-two states had existing laws regulating organic food labeling.<sup>21</sup> Congress included a provision in the OFPA which allowed states to have parallel, more stringent regulations as long as they are consistent with the OFPA and do not interfere with interstate trade of organic

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(allowing the Secretary of Agriculture to appoint a board to develop standards for substances used in organic production). This in effect allows the Secretary to regulate the production methods that can be used. Since the board advising the Secretary consists of members from the domestic organic food industry, it is highly probable that the final rules will favor the domestic methods.

17. S. REP. NO. 101-357, at 640-90.

18. See Suzanne Vaupel, *Advising Producers of Organic Crops*, 2 DRAKE J. AGRIC. L. 137, 138 (1997) (indicating how organic food sales grew at a rate of more than 20% annually from 1989-1995). Consumers generally pay 30% to 75% for organic food compared to the same non-organic produce. *Id.*

19. *Id.* at 138-39. Similar market growth is being observed globally, and as a consequence foreign countries are devoting more land to organic production. See, e.g., *Hanoi to Expand Organically Grown Vegetable Output*, ASIA PULSE, Sept. 1, 1997, available in 1997 WL 13561078 (showing projected growth of organic farmland from 300 to 2,000 hectares); *Argentina Organic Food Output Depends on Free Trade*, DOW JONES COMMODITIES SERVICE, Aug. 24, 1997, (explaining Argentina's plan to increase land allotted to organic agriculture from 5,500 to 346,978 hectares).

20. 7 U.S.C.A. § 6501. See also *supra* note 16.

21. Lathrop, *supra* note 13, at 891 (listing the state regulations in effect when the OFPA passed in 1990).

produce not carrying additional labels.<sup>22</sup> As a result, numerous states will retain laws regulating organic food labeling.<sup>23</sup>

The OFPA allows certified organic operations to use a USDA "certified organic" label on food products. The label guarantees that the end product was grown and/or produced in accordance with national organic standards.<sup>24</sup> "Certified organic," as used in the OFPA, means that a product was grown or processed in a specified manner.<sup>25</sup> Attainment of "organic" status does not depend on the characteristics of the end product, but rather on whether production meets OFPA standards.<sup>26</sup>

The OFPA standards are set by the Secretary of Agriculture with the assistance of the National Organic Standards Board (NOSB).<sup>27</sup> The NOSB is comprised of four organic farmers, two organic handlers, one retailer of organic products, three environmentalists, two consumer interest advocates, one scientist and

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22. 7 U.S.C.A. § 6507(b)(1)-(2) (West Supp. 1998). *See also* Lathrop, *supra* note 13, at 885-86 (explaining the potential practical effects of allowing parallel state labeling requirements). The states must allow organic food meeting the OFPA standards to carry the USDA certified organic label, regardless of the state of origin. 7 U.S.C.A. § 6507(b)(2). But the states may allow their own certified organic labels to be affixed to the same food carrying the USDA label as long as it is not discriminatory to organic produce from other states. *Id.*

23. For examples of the parallel state organic labeling laws, see generally the California Organic Foods Act of 1990, CAL. HEALTH & SAFETY CODE § 110810 (1996 & Supp. 1998); the Oregon Organic Food Act, OR. REV. STAT. § 616.406 (1996). The use of additional state labels may have little practical significance because the state standards, by law, must be equal to or higher than the OFPA requirements. 7 U.S.C.A. § 6507(b)(1). The USDA label alone should give consumers confidence they are buying certified organic food. However, a potentially discriminatory situation arises when the state labels carry a *perception* of having requirements that produce superior quality food compared to those labeled by the USDA. This would be inconsistent with the OFPA's purpose. 7 U.S.C.A. § 6507(b)(2)(B). While this issue needs to be examined, it will not be ripe until the OFPA regulations are in effect and the effects of state labels which frustrate the purposes of the OFPA are litigated. *See* Lathrop, *supra* note 13.

24. 7 U.S.C.A. § 6505(a)(2) (West Supp. 1998). "A label affixed, or other market information provided, in accordance with paragraph (1) may indicate that the agricultural product meets Department of Agriculture standards for organic production and may incorporate the Department of Agriculture seal." *Id.*

25. 7 U.S.C.A. § 6502(14) (West Supp. 1998). "The term 'organically produced' means an agricultural product that is produced and handled in accordance with this chapter." *Id.*

26. *Id.*

27. 7 U.S.C.A. § 6518(a) (West Supp. 1998). "The Secretary shall establish a National Organic Standards Board (in accordance with the Federal Advisory Committee Act) . . . to assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of this chapter." *Id.*

one certifying agent.<sup>28</sup> A major function of the NOSB is to determine what substances, such as pesticides and fertilizers, will be permitted for use in organic operations.<sup>29</sup> The NOSB, in making such determinations, is required to consider possible adverse human and environmental effects.<sup>30</sup>

In December 1997, nearly eight years after the OFPA's passage, the USDA issued the proposed rules for organic certification.<sup>31</sup> While the rules were to be open for public comment until March 1998,<sup>32</sup> strong initial opposition to some of the permitted practices delayed any final action until the summer of 1998.<sup>33</sup> For example, one proposed rule would allow beef fed up to twenty percent non-organic food to carry the "certified organic" label.<sup>34</sup> Opposition arose from traditional organic groups who felt the proposed rules were inconsistent with current organic practices.<sup>35</sup> While the resistance comes from many factions, one theme is clear: the concerns are driven more by consumer preferences than by any other factor.<sup>36</sup>

Another area that remains unsettled is how countries exporting organic food to the United States will fare under the OFPA. Foreign programs with organic labeling requirements equivalent to or more strict than the OFPA rules should be granted the USDA label with little objection.<sup>37</sup> The Secretary of Agriculture can allow the sale of imported products as organic if

28. 7 U.S.C.A. § 6518(b).

29. 7 U.S.C.A. § 6518(a). ["The] National Organic Standards Board . . . [shall] assist in the development of standards for substances to be used in organic production." *Id.*

30. 7 U.S.C.A. § 6518(l)(1). "In establishing the proposed National List [of substances approved for or banned from organic operations] . . . the Board shall . . . review available information . . . concerning the potential for adverse human and environmental effects of substances considered for inclusion in the proposed National List." *Id.*

31. Proposed Rules, National Organic Program, 62 Fed. Reg. 65,850 (1997).

32. *Id.*

33. *Organic Groups' Outcry Compels USDA to Delay Action on Labeling Rules*, MINNEAPOLIS STAR-TRIB., Feb. 7, 1998, at 10A. The Secretary of Agriculture extended the comment period to April 30, 1998. *Id.* As a result, the earliest any rules will be in effect is summer of 1998.

34. Proposed Rules, National Organic Program, 62 Fed. Reg. at 65,942.

35. *Organic Groups' Outcry Compels USDA to Delay Action on Labeling Rules*, *supra* note 32. The organic groups also complained that the proposed rules permitted the use of synthetic pesticides and irradiation to kill bacteria on food. *Id.* Further, the groups complained that the Secretary of Agriculture had ignored many of the NOSB proposals. *Id.*

36. See, e.g., *Fed Plan Threatens Organic Agriculture*, PRESS DEMOCRAT, Jan. 18, 1998, at G1; *What Food is Organic? Federal Rules Decide*, ST. LOUIS POST-DISPATCH, Jan. 15, 1998, at A7.

37. 7 U.S.C.A. § 6505(b) (West Supp. 1998).

the "production and handling is *at least* equivalent to the requirements [of the OFPA]."38

The meaning of "equivalent" is yet to be determined, but if the controversy over the final rules is any indication, American organic interest groups will likely lobby to ensure that recognized "equivalent" foreign programs do not permit any of the practices that they disfavor. A recent case, *Mississippi Poultry Association. v. Madigan*,<sup>39</sup> illustrates that the meaning of "equivalent" will most likely be narrowly construed. At issue in *Madigan* was the meaning of foreign standards "at least equal to" U.S. standards.<sup>40</sup> The *Madigan* court read the language to be a statutory requirement of identical treatment.<sup>41</sup>

The requirement that foreign programs be "at least equivalent to" the OFPA rules is potentially ambiguous. Foreign organic programs with standards slightly lower than the OFPA may not be recognized. If so, the exporting countries may challenge the OFPA, alleging that it acts to unfairly protect the U.S. organic industry. Additionally, even if a foreign organic program is recognized under the federal standard, its organic food may not qualify for a state label if the state's requirements are more stringent than the OFPA.<sup>42</sup> If foreign programs with lower standards than the OFPA requirements are deemed "equivalent" to the OFPA, state labels could become the *de facto* minimum standard acceptable to organic food consumers. The eventual result could be that foreign organic producers alone would carry the USDA label. U.S. consumers would then only purchase food carrying a state organic label.<sup>43</sup>

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38. *Id.*

39. 31 F.3d 293 (5th Cir. 1994).

40. *Id.* at 295 (citing 21 U.S.C. § 454 (1994)). "Congress also addressed the issue of foreign standards. Under § 17(d) of the [Poultry Products Inspection Act] PPIA, Congress directed the Secretary to require imported poultry products to be subject to the same . . . standards applied to products produced in the United States." *Id.*

41. *Id.* at 308.

42. 7. U.S.C.A. § 6507(b)(1) (West Supp. 1998). "A State organic certification program established under subsection (a) of this section may contain more restrictive requirements governing the organic certification of farms and handling operations and the production and handling of agricultural products that are to be sold or labeled as organically produced under this chapter than are contained in the program established by the Secretary." *Id.*

43. But this would contravene the requirement that the parallel state labels do not make claims of superiority beyond the USDA labels. *See generally* Lathrop, *supra* note 13.



## B. DISTINGUISHING ORGANIC FROM NON-ORGANIC FOOD

For the purpose of analyzing the OFPA under GATT and its side agreements, it is important to determine what makes organic food different from non-organic food. The question to be answered is whether the end result or the production method makes food "organic."<sup>44</sup> The OFPA contains no language defining "organic" in terms of the end product produced.<sup>45</sup> The legislative history of the OFPA supports defining "organic" in terms of the process/production method rather than product characteristics.<sup>46</sup> Under the OFPA, the primary distinction between organically produced and conventionally produced food is that the former is produced without synthetic substances.<sup>47</sup>

Many consumers believe that organic food is healthier than other alternatives, although consumer preference for organic food is not unanimously driven by this belief.<sup>48</sup> Available studies do not tend to support the perception that organic food is healthier for consumption.<sup>49</sup> The link between organic food and

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44. While this distinction is somewhat tautological, it is important because categorizing the difference between organic and non-organic food determines how the OFPA is analyzed under relevant GATT provisions.

45. 7 U.S.C.A. § 6502 (West Supp. 1998). This section defines organically produced food as "an agricultural product that is produced and handled in accordance with [the OFPA]." *Id.* § 6502(14).

46. S. REP. NO. 101-357, at 640-90 (basing criteria set by the National Organic Standards Board (NOSB) on whether the practice caused environmental problems). The Committee report states "[t]his legislation does not attempt to make scientific judgments about whether organically produced food is more healthful, nutritious, or flavorful than conventionally produced food." *Id.* at 642. See also Terence J. Centner & Kyle W. Lathrop, *Differentiating Food Products: Organic Labeling Provisions Facilitate Consumer Choice*, 1 *DRAKE J. AGRIC. L.* 30, 41 (1996) (explaining why organic foods cannot claim superior health benefits compared to conventionally produced food).

47. 7 U.S.C.A. § 6504 (West Supp. 1998). "To be sold or labeled as . . . organically produced . . . an agricultural product shall—(1) have been produced and handled without the use of synthetic chemicals, except as otherwise provided [ . . . and] . . . not be produced on land to which any prohibited substances . . . have been applied during the 3 years immediately preceding the harvest of the agricultural products." *Id.*

48. Lathrop, *supra* note 13, at 890. The demand for organic food is driven by two factions. *Id.* The first group consists of those concerned with the effects of traditional farming methods that rely on chemicals. *Id.* They support organic farming because they favor sustainable agricultural practices that are not as destructive to the environment as the traditional chemical-based practices. *Id.* The public perceives, and studies support this view, that organic farming is environmentally safe. *Id.* The second group consists of consumers who believe that organic food is a superior health alternative. *Id.*

49. Centner & Lathrop, *supra* note 46, at 41 (explaining why organic foods cannot claim superior health benefits compared to conventionally produced food).

greater consumer health is based on the consumer's belief that, because synthetic substances are not used in growing or production, organic products are free from residual pesticides and contaminants.<sup>50</sup> Congress recognized that consumers define organic food by the production methods rather than the end products and thus based the OFPA standards for organic food on the former.<sup>51</sup>

In fact, the OFPA does not guarantee that organic food is free from pesticides or other contaminants. The OFPA does not even require organic food to be residue- or pesticide-free. Certifying an operation as organic is not tantamount to certifying the end products are residue-free,<sup>52</sup> which can lead to some anomalous results. For example, farmers using conventional methods may be able to produce residue-free products, but cannot carry the "certified organic" label.<sup>53</sup> Conversely, farmers whose operations are organically certified will be able to use the USDA label, but may not be producing residue-free products.<sup>54</sup>

Because the OFPA standards are formulated in terms of the processing and production methods used, rather than end product quality, the question arises whether the OFPA should be classified as a health or safety measure under the applicable international trade agreements.<sup>55</sup> One factor weighing against classification of the OFPA as a health or safety measure is that

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50. *Id.*

51. Because the *process* is certified and not the *product*, the products may not be residue-free because of the naturally occurring concentration of prohibited substances. S. REP. NO. 101-357, at 640-90. Thus, the USDA label is not a guarantee that organic products are residue free. *Id.* In fact, the Committee considering the OFPA recognized that pesticide-free or residue-free food is not the equivalent of organically-produced food. *Id.* The OFPA codified this difference in 7 U.S.C.A. § 6511(c)(2)(B) (West 1998) (allowing residue on food if it is unavoidable due to background concentration of a substance).

52. *See supra* note 51.

53. Under the OFPA, it is the process, not the end result, that is certified by the label. 7 U.S.C.A. § 6505 (West 1998).

54. *See supra* note 34 and accompanying text.

55. Two points are in order here. First, there is an absolute absence in the legislative history that the OFPA is a measure aimed at the health or safety of consumers. *See supra* note 46. However, most consumers prefer organic products *exactly because* the products are perceived as safer, and therefore, healthier. Centner & Lathrop, *supra* note 46, at 41. Second, the reason organic food is perceived to be safer than conventional food is because of the absence of pesticides. *Id.* But pesticide levels are already regulated by the Federal Food, Drug, and Cosmetic Act. 21 U.S.C.A. § 301 (West 1972 & Supp. 1995). The default safety level of a pesticide residue is set by the Codex Alimentarius Commission. *Id.* § 346a(b)(4). The Codex Alimentarius Commission is a joint Food and Agriculture Organization (FAO) and World Health Organization (WHO) body responsible for international food standards. Michele D. Carter, Note, *Selling*

the United States already has a food safety standard, namely the Federal Food, Drug, and Cosmetics Act (FDCA).<sup>56</sup> The FDCA sets the maximum safe levels of pesticides and other contaminants allowable in food sold for consumption.<sup>57</sup> The FDCA seeks to harmonize U.S. food safety standards with the rest of the world by adopting the Codex Alimentarius Commission's standards.<sup>58</sup>

As a health or safety measure, the OFPA would be superfluous to the FDCA. Additionally, it is difficult to categorize the OFPA as a health or safety measure because compliance is only *voluntary*. A measure truly aimed at protecting the health and safety of consumers would logically *require* compliance. It is important to address these concerns because the classification of a health measure as such determines whether it is challenged under GATT, the SPS, or the TBT Agreements. Characterization also determines which defenses can be raised in support of a given regulation.

## II. CHALLENGING REGULATIONS AFFECTING INTERNATIONAL TRADE: GATT, THE SPS AGREEMENT, AND THE TBT AGREEMENT

### A. GATT

Two related purposes of GATT are to reduce barriers to international trade and to eliminate protective treatment of domestic goods.<sup>59</sup> GATT especially disfavors national laws that protect domestic products at the expense of imports.<sup>60</sup> Examples of domestic protection include regulations that treat domestic products favorably in comparison to imports or import bans on competing products. Two sections of GATT work in tandem to prohibit discrimination against imports. Article III, the national treatment clause, requires that internal taxes or regula-

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*Science Under the SPS Agreement: Accommodating Consumer Preference in the Growth Hormone Controversy*, 6 MINN. J. GLOBAL TRADE 625, 635 (1997).

56. FDCA, *supra* note 55.

57. *Id.* § 346a(a). If a pesticide is used in growing food, the FDCA limits the amount that may be present in the end product to a scientifically determined safe amount. *Id.* The effect is that if any pesticide residues on food exceed a safe threshold limit, a limit established by *scientific methods*, the food cannot be lawfully sold for consumption. *Id.*

58. *Id.* § 346a(b)(4) (requiring adoption of Codex standards unless reasons exist for departure from the standards).

59. GATT preamble.

60. GATT arts. III and XI.

tions cannot act to protect domestic production or products.<sup>61</sup> Article XI is a general prohibition against quantitative restrictions or import quotas.<sup>62</sup> The difference between Articles III and XI is that Article III applies to measures that affect imported products and Article XI applies to measures which affect the actual importation of products.<sup>63</sup> Together, Articles III and XI seek to make all protection of domestic products transparent and in the form of tariffs.<sup>64</sup>

A regulation that violates either Article III or XI, however, may still be permitted if it qualifies as one of a limited number of GATT exceptions. GATT Article XX contains the general exceptions that may be invoked to maintain a regulation which otherwise violates GATT.<sup>65</sup> The SPS and TBT Agreements, enacted during the 1994 Uruguay Round of trade negotiations,<sup>66</sup> have significantly restricted the exercise of Article XX defenses for health and safety measures.<sup>67</sup> The SPS Agreement requires that sanitary and phytosanitary measures have a scientifically supported and verifiable basis.<sup>68</sup> Similarly, the TBT Agreement requires that packaging, marking or labeling requirements do not create unnecessary barriers to international trade or unjustifiably or arbitrarily discriminate against imports.<sup>69</sup>

### 1. GATT Article III:4

Article III of GATT is the national treatment clause. It requires that a country treat imported products "no less favorably"

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61. GATT art. III.

62. GATT art. XI.

63. See generally JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS, ch. 11.1 (1995) (discussing the differences and interrelationship between Articles III and XI).

64. Panel on "Canada — Administration of the Foreign Investment Review Act," Feb. 7, 1984, GATT B.I.S.D. (30th Supp.) at 157; JACKSON, *supra* note 63, at 423.

65. GATT art. XX. The specific Article XX provision pertinent to analyzing the OFPA is Article XX(b), regarding the health and safety of human life. *Id.*

66. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, reprinted in 33 I.L.M. 9 (1994).

67. See generally Julie Cromer, *Sanitary and Phytosanitary Measures: What They Could Mean for Health and Safety Regulations Under GATT*, 36 HARV. INT'L L.J. 557 (1995) (analyzing the effect of the SPS Agreement on health regulations).

68. SPS Agreement art. 2.2.

69. TBT Agreement preamble.

than it treats domestic products.<sup>70</sup> Article III:4 deals with the treatment of products and the conditions affecting their sale.<sup>71</sup> Internal regulations violate Article III:4 if they treat products of foreign origin less favorably than like products of domestic origin with respect to the sale, purchase or use of the products.<sup>72</sup> For example, Article III:4 can be violated when a government gives a purchaser a rebate for buying a domestically produced product but does not give a rebate for buying the imported like product.<sup>73</sup>

A violation of GATT Article III:4 may also occur if there are procedural differences in the way foreign and domestic products are treated.<sup>74</sup> For example, a WTO Panel found a violation of Article III:4 where patent infringement claims against domestic products were subject to different procedures than claims against imported products. Infringement claims against domestic products could be brought in either the federal district court or the United States International Court of Trade (USITC).<sup>75</sup> Claims of patent infringement against imported products could only be brought in the USITC.<sup>76</sup> The Panel concluded that the procedural difference violated Article III:4 because imported products were treated less favorably than "like" domestic products.<sup>77</sup>

A violation of GATT Article III:4 may also be established if the regulation represents disguised protection of a domestic product or industry.<sup>78</sup> Disguised discrimination occurs when a

70. GATT art. III:4. For an in-depth discussion of Article III:4, see JACKSON, *supra* note 63, ch. 11.

71. GATT art. III:4. "The products of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale [or] offering for sale . . ." *Id.*

72. *Id.*

73. See Panel on "Italian Discrimination Against Imported Agricultural Machinery," Oct. 23, 1958, GATT B.I.S.D. (7th Supp.) at 60 (1959) [hereinafter *Agricultural Machinery*].

74. See Panel Report on "United States—Section 337 of the Tariff Act of 1930," Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345 [hereinafter *Section 337*].

75. *Id.* ¶ 5.4.

76. *Id.*

77. *Id.* ¶ 5.20.

78. See, e.g., Section 337, *supra* note 74, ¶¶ 5.13-14. For example, if a government develops a set of standards to govern a product, it will do so in a way that favors methods or distinctions used by the domestic industry. If the measures are sanitary or phytosanitary, Article 2 of the SPS Agreement governs the regulation. If it is not a sanitary or phytosanitary measure, then the measure

facially neutral regulation adversely affects imported products. This type of protection is difficult to challenge under Article III:4 because health, safety or environmental reasons are often advanced in support of the regulation. The SPS and TBT Agreements address these areas, and are better vehicles with which to challenge disguised discrimination.<sup>79</sup>

a. The Product/Process Distinction Under Article III:4

Article III:4 does not apply to regulations based on the process by which a product is made or manufactured.<sup>80</sup> The language of Article III:4 applies only to regulations affecting "products."<sup>81</sup> If the regulation does not affect the quality, safety, or features of the end product, it must logically relate instead to the process and is not covered by Article III.<sup>82</sup> Given Article III's exclusion of process methods, classification as a product or process regulation takes on increased importance.

The Tuna/Dolphin case aptly illustrates the process/product distinction.<sup>83</sup> In Tuna/Dolphin, the United States banned importation of tuna harvested by methods resulting in the incidental deaths of dolphins.<sup>84</sup> The WTO Panel deciding the dispute noted that Article III:4 only addresses regulations relating to products, not the processes by which products are created.<sup>85</sup> The Panel concluded that Article III:4 did not apply to the regulation in question because the regulation distinguished tuna products based on the process by which they were harvested,

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is covered by the TBT Agreement. Article 2.8 of the TBT requires that standards be "based on product requirements in terms of performance rather than design or descriptive characteristics." This issue was raised in the Beef Hormones dispute, but since all parties agreed that the measures were sanitary, scrutiny of the issue under the TBT did not occur. Beef Hormones, *supra* note 2, ¶ 8.32. A claim for disguised discrimination is difficult to prove. See JACKSON, *supra* note 63, at 522.

79. "Members shall ensure that their sanitary . . . measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail . . . . Sanitary . . . measures shall not be applied in a manner which would constitute a disguised restriction on international trade." SPS Agreement ¶ 2.3. ["Measures . . . should not be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade . . . ." TBT Agreement preamble.

80. GATT art. III:4.

81. *Id.*

82. See *supra* note 72 and accompanying text.

83. United States—Restriction on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993) (panel report not adopted by the GATT Contracting Parties) [hereinafter Tuna/Dolphin].

84. *Id.* ¶¶ 5.1-4.

85. *Id.* ¶ 5.10.

rather than the product itself.<sup>86</sup> The Panel further found that, even if the regulation could be construed as affecting the sale of tuna as a *product*, it still violated Article III:4 because it treated imports less favorably than “like” domestic products.<sup>87</sup>

#### b. Analysis of an Article III:4 Claim

Analysis of a challenged regulation under GATT Article III:4 follows a straightforward procedure. To find a violation, the measure must first be determined to be an internal regulation.<sup>88</sup> Second, if the law is an internal regulation, it must affect the sale, purchase or use of the product.<sup>89</sup> Third, the products affected must be “like” products with those domestic products which the measure in question protects.<sup>90</sup> Finally, if an Article III:4 violation is found, the offending party can attempt to justify the regulation with GATT defenses.<sup>91</sup>

An internal regulation is defined as any governmental action that applies to all goods, whether foreign or domestic.<sup>92</sup> A regulation may be considered “internal” even if it is enforced at the border.<sup>93</sup> For example, a border regulation barring the import of a good is analyzed as an internal measure under GATT Article III:4 if the regulation affects the sale of products.<sup>94</sup> Recall also that the regulation must relate to the product as a product rather than to the production method.<sup>95</sup>

86. *Id.* ¶ 5.11.

87. *Id.* ¶ 5.15.

88. GATT art. III:4; *see also* Tuna/Dolphin, *supra* note 83, ¶¶ 5.6-.9; JACKSON, *supra* note 63, at 502.

89. *See* Tuna/Dolphin, *supra* note 83, ¶¶ 5.6-.9.

90. GATT art. III:4.

91. GATT art. XX.

92. Section 337, *supra* note 74, ¶ 5.10.

93. *See* GATT ad art. III. “Any internal . . . law, regulation or requirement . . . which applies to an imported product and a like domestic product and is . . . enforced . . . at the time or point of importation, is nevertheless to be regarded as . . . internal . . . and is accordingly subject to the provisions of Article III.” *Id.*; *see also* Section 337, *supra* notes 74-77 and accompanying text (establishing that violations of GATT Article III:4 may occur if there are procedural differences in the way foreign and domestic products are treated).

94. GATT ad art. III.

95. *See* Tuna/Dolphin, *supra* note 83. The product/process distinction was solidified in the Tuna/Dolphin case. *Id.* However, that final Panel decision was never adopted, partly because Mexico, the complaining party against the United States, was negotiating the North American Free Trade Agreement at the time. *See* JACKSON, *supra* note 63, at 584. It is assumed for this Note that any similar future disputes concerning a regulation affecting a process and not a product’s qualities would be analyzed in the same manner.

Whether a regulation affects the sale of a product is broadly interpreted under Article III:4. This interpretation encompasses more than just direct regulation of sales. A sale is affected if the regulation directly governs the conditions of the purchase or sale, or when it may "adversely modify the conditions of competition between the domestic and imported products on the internal market."<sup>96</sup>

For a difference in treatment between foreign and domestic products to be actionable, the products must be "like" products within the meaning of Article III:4. The determination of "like" is done on a case-by-case basis.<sup>97</sup> Factors in determining whether products are "like" include consumer preferences, tariff classification, end use, and physical properties and characteristics.<sup>98</sup> If an imported product is given less favorable treatment than the "like" domestic product, a *prima facie* violation of Article III:4 is established.<sup>99</sup> A party can defend a measure violating GATT Article III:4 by raising an affirmative defense under Article XX.<sup>100</sup> If the defense is that the regulation is a sanitary measure, the regulation faces additional scrutiny under the SPS Agreement.

## 2. GATT Article XI

GATT Article XI generally prohibits import quotas or restrictions on products.<sup>101</sup> Because it is, effectively, a quota restriction limiting imports to zero, a complete import ban on a product is also considered a quota restriction. While GATT strongly disfavors quota restrictions, it exempts limited categories within Article XI.<sup>102</sup> Quota restrictions may also be justified under Article XX.<sup>103</sup> With respect to the OFPA, it is

96. See *Agricultural Machinery*, *supra* note 73, at 160.

97. Panel Report on "United States—Standards for Reformulated and Conventional Gasoline," WT/DS2/R at ¶ 6.9 (appealed) (Jan.17, 1996).

98. Panel on "Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages," Nov. 10, 1988, GATT B.I.S.D. (34th Supp.) at 83.

99. See Section 337, *supra* note 74, ¶¶ 5.10-12.

100. *Id.* ¶ 5.9.

101. See GATT art. XI. "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained . . . on the importation of any product . . ." *Id.*

102. GATT Article XI:2(c)(i), which provides exceptions for certain agricultural situations, is the exception most relevant to the OFPA. But, the exceptions allowed have been very narrowly construed. See *infra* notes 104-07 and accompanying text.

103. See GATT art. XX.



unclear whether the denial of a "certified organic" label to an equivalent foreign organic program constitutes an import restriction within the meaning of Article XI.

Article XI exempts a limited number of import restrictions from its coverage.<sup>104</sup> Article XI:2(c)(i), for example, exempts import bans on agricultural products.<sup>105</sup> The United States could assert that this exception covers the OFPA. This exception, however, has been narrowly construed by a WTO Panel, which concluded that a party invoking the exemption must meet seven criteria: (i) only import restrictions, not prohibitions, are permitted; (ii) the restriction must be on an agricultural product; (iii) the government must restrict domestic supplies of the product; (iv) restrictions must be imposed on "like" products; (v) import restrictions must be necessary for enforcement of the domestic restriction; (vi) public notice must be given; and (vii) import restrictions must not reduce the proportional market share of each importing country.<sup>106</sup> Because of these many criteria, it is difficult to defend an import restriction under GATT Article XI:2(c)(i).<sup>107</sup>

### 3. GATT Article XX

Article XX of GATT contains general exceptions for regulations that otherwise violate GATT. Exceptions include regulations to protect, *inter alia*, public morals, health or safety of human life, and conservation of exhaustible resources.<sup>108</sup> To qualify under an exception, regulations cannot be applied arbitrarily, cannot unjustifiably discriminate and cannot constitute a disguised trade restriction.<sup>109</sup> The United States would likely argue that the OFPA qualifies under Article XX(b), which exempts measures "necessary to protect human, animal, or plant life or health."<sup>110</sup> The term "necessary," as used in Article

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104. GATT art XI:2. "The provisions of this Article shall not extend to the following [exceptions] . . ." *Id.*

105. GATT art. XI:2(c)(i). "Import restrictions on any agricultural . . . product . . . necessary to the enforcement of [a] governmental measure[] which operate[s]: (i) to restrict the quantities of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted . . ." *Id.*

106. Panel Report on "Japan—Restrictions on Imports of Certain Agricultural Products," Mar. 21, 1988, GATT B.I.S.D. (35th Supp.) at 163 [hereinafter Japan—Agricultural Products].

107. *Id.* ¶ 3.2.2; see also JACKSON, *supra* note 63, at 355-56.

108. GATT art. XX.

109. *Id.*

110. GATT art. XX(b).

XX(b), has been interpreted as requiring all GATT-consistent measures to have failed.<sup>111</sup>

## B. THE SPS AGREEMENT

In addition to facing scrutiny under GATT, import restrictions related to health and safety measures classified as "sanitary" must be examined under the SPS Agreement. The SPS Agreement was passed during the Uruguay Round of negotiations.<sup>112</sup> The SPS Agreement does not address any particular sanitary or phytosanitary measure.<sup>113</sup> Instead, it establishes a number of general requirements and procedures to ensure that sanitary or phytosanitary measures are in fact intended to protect against the risk asserted, and are not simply disguised trade barriers.<sup>114</sup> The force of the SPS Agreement lies in its requirement that sanitary and phytosanitary measures be based on scientific principles.<sup>115</sup> Article 2.2 establishes the general obligation that sanitary or phytosanitary measures be "applied only to the extent necessary to protect human, animal, or plant life or health, [be] based on scientific principles and [not be] maintained against scientific evidence, except as provided in Article [5.7]."<sup>116</sup> Further, Article 2.3 requires that measures shall not "constitute a . . . restriction on international trade."<sup>117</sup>

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111. See Section 337, *supra* note 74, ¶ 5.26. See generally Tuna/Dolphin, *supra* note 83, ¶¶ 5.22-29 (analyzing Article XX(b) in light of the parties' arguments).

112. Office of the United States Trade Representative, Executive Office of the President, The Uruguay Round Agreements Act, Statement of Administrative Action, available in 1994 WL 761638 (G.A.T.T.) at \*1.

113. *Id.*

114. *Id.*

115. See SPS Agreement art. 2.2. A sanitary or phytosanitary measure is defined as one "protect[ing] human . . . life or health . . . from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs." *Id.* annex A, ¶ 1(b). This definition is incorporated into the main SPS Agreement. *Id.* art. 1.2.

116. SPS Agreement art. 2.2. Article 5.7 reads:

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

SPS Agreement art. 5.7.

117. SPS Agreement art. 2.3.

The SPS Agreement seeks to internationally harmonize SPS measures.<sup>118</sup> The SPS Agreement seeks to accomplish this goal by encouraging parties to adopt sanitary measures based on international standards.<sup>119</sup> Sanitary measures based on international standards are presumptively valid under the SPS Agreement and GATT.<sup>120</sup>

Often no international standards for a particular sanitary regulation exist. In such instances, Article 5.7 of the SPS Agreement allows a Member to adopt provisional measures.<sup>121</sup> Article 5.7 requires, however, that the Member obtain information to conduct an objective risk assessment within a reasonable time.<sup>122</sup> A member may also adopt measures which are more stringent than the international standards,<sup>123</sup> but the higher standards must comply with the SPS Agreement.<sup>124</sup>

A complaining party challenging a regulation under the SPS Agreement does not first have to establish that the measure

118. SPS Agreement art. 3.1. Article 3.1 reads, "To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary and phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3." *Id.* Article 4.1 further seeks reciprocity of recognition between members whose equivalent measures accomplish the same levels of sanitary protection:

Members shall accept the sanitary and phytosanitary measures of other Members as equivalent, even if those measures differ from their own or from those used by other Members trading in the same product, if the government of the exporting Member objectively demonstrates to the government of the importing country that its measures achieve the importing Member's appropriate level of S&P protection. For this purpose, the Agreement requires that the exporting Member provide reasonable access to the importing Member for inspection, testing and other relevant procedures.

SPS Agreement art. 4.1.

119. SPS Agreement art. 3.2. Article 3.2 provides that "[s]anitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994." *Id.*

120. SPS Agreement, annex A(3)(a). ["The] international standards, guidelines and recommendations . . . [for food safety are] established by the Codex Alimentarius Commission on food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice." *Id.* Thus, if a sanitary measure such as the OFPA were based on the guidelines of the Codex Alimentarius, it would be presumptively valid under both the SPS Agreement and GATT. *See* Beef Hormones, *supra* note 2, ¶ 2.11.

121. SPS Agreement art. 5.7.

122. *Id.*

123. SPS Agreement art. 3.3.

124. *Id.*; *see also* Beef Hormones, *supra* note 2, ¶¶ 8.248-249.

violates GATT.<sup>125</sup> For example, the United States successfully used the SPS Agreement to challenge the European Union's import ban of hormone-treated beef.<sup>126</sup> The United States and the European Union agreed that the ban was a sanitary measure.<sup>127</sup> The United States complained that the measure violated the SPS Agreement because it lacked scientific support.<sup>128</sup> The United States argued that the ban should be examined under the SPS Agreement and that a showing of a GATT violation should not be required.<sup>129</sup> The WTO Panel agreed, giving the SPS Agreement independent significance from GATT.<sup>130</sup> The Panel then analyzed the ban and concluded it violated the SPS Agreement.<sup>131</sup>

In Beef Hormones, the European Union defended the ban by raising the Precautionary Principle.<sup>132</sup> The Precautionary Principle states that in cases of uncertain or unknown health or safety risks it is better to err on the side of safety by regulating too stringently, rather than too leniently.<sup>133</sup> This approach is warranted, for example, when there is a concern that potential damage from a substance may not be known until long after it has been ingested.<sup>134</sup>

Invoking the Precautionary Principle, the European Union claimed that the unknown, long-term effects of hormones justified a complete ban in order to protect consumers.<sup>135</sup> To bolster its claim, the European Union pointed to the Thalidomide and DES disasters as historical examples of substances originally considered safe but which ultimately caused serious health problems.<sup>136</sup> The Beef Hormones Panel rejected the Precaution-

125. Beef Hormones, *supra* note 2, ¶ 8.41. The WTO Panel found that "there is no requirement . . . that a prior violation of a GATT provision need be established before the SPS Agreement applies." *Id.*

126. *Id.* ¶¶ 8.16-19.

127. *Id.* ¶ 8.22. See also *supra* notes 115-16 and accompanying text (discussing what qualifies as a sanitary measure).

128. *Id.* ¶ 8.16-17.

129. *Id.* ¶ 8.30.

130. *Id.* ¶ 8.16-17.

131. *Id.*

132. Beef Hormones, *supra* note 2, ¶¶ 4.202-207.

133. See *id.* ¶ 4.202-203. For a treatment of the Precautionary Principle and its relationship with international trade law, see generally D. FREESTONE & E. HEY, *THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW* (1995).

134. Beef Hormones, *supra* note 2, ¶ 4.203.

135. "The European Communities stressed that the difference in degree of regulation . . . was due to the greater attachment of the European Communities to use the precautionary principle." *Id.*

136. *Id.*; see also Carter, *supra* note 55, at 626-28.

ary Principle as an independent defense.<sup>137</sup> It concluded that the SPS Agreement incorporated the Precautionary Principle into numerous provisions, including Article 5.7.<sup>138</sup> The Beef Hormones case demonstrates that, even though the Precautionary Principle is incorporated into the SPS Agreement, caution alone, without scientific support, will not likely support a sanitary measure.

### C. THE TBT AGREEMENT

The TBT Agreement<sup>139</sup> replaces the Standards Code, which did not effectively resolve controversies because it lacked a clear dispute settlement mechanism.<sup>140</sup> The TBT Agreement incorporates specific dispute settlement procedures of the WTO, eliminating this problem.<sup>141</sup> The major purpose of the TBT Agreement is to "ensure [that] technical regulations<sup>142</sup> and standards do not create unnecessary obstacles to international trade."<sup>143</sup> The TBT Agreement requires that standards are not "prepared, adopted, or applied with a view to or effect of creating unnecessary obstacles to international trade . . . and fulfil a legitimate objective."<sup>144</sup> Legitimate objectives include prevention of deceptive practices, protection of human health and safety, and protection of the environment.<sup>145</sup>

137. Beef Hormones, *supra* note 2, ¶ 8.249.

138. *Id.* ¶ 8.157. This finding was affirmed in Report of the Appellate Body, EC Measures Concerning Meat and Meat Products (Hormones) (Jan. 16, 1998) ¶ 253, available in 1998 WL 25520, at \*69.

139. TBT Agreement, *supra* note 11.

140. *Id.* The Agreement on Technical Barriers to Trade, also called the Standards Code, was adopted during the Tokyo Round of negotiations and supplanted by the TBT Agreement during the 1994 Uruguay Round. For example, the Beef Hormones complaint by the United States was originally brought under the Standards Code but never resolved under it. See Adrian Halpern, Comment, *The U.S.-E.C. Hormone Beef Controversy and the Standards Code: Implications for the Application of Health Regulations to Agricultural Trade*, 14 N.C. J. INT'L L. & COM. REG. 135 (1989).

141. TBT Agreement, *supra* note 11, ¶ 14.

142. A technical regulation is defined as a "[d]ocument which lays down product characteristics or their related processes and production methods . . . . It may also include . . . labeling requirements as they apply to a product, process or production method." TBT Agreement, *supra* note 11, annex 1, ¶ 1. Legitimate objectives are "national security requirements[; the] prevention of deceptive practices; protection of human health or safety . . . ." *Id.* ¶ 2.2. The OFPA arguably fulfills a legitimate purpose in that it is aimed at preventing the deceptive practice of using an organic label on conventionally produced food in order to sell it for the premium that organic produce commands.

143. TBT Agreement, *supra* note 11, preamble.

144. *Id.* art. 2.2.

145. *Id.*

The TBT Agreement requires, in addition to fulfilling a legitimate objective, that “wherever appropriate . . . technical regulations shall be based on product requirements in terms of performance rather than design or descriptive characteristics.”<sup>146</sup> Standards based on the end product characteristics, rather than process and production methods, are more effective in preventing countries from creating trade barriers for imported products through technical regulations.<sup>147</sup> The scope of the TBT Agreement is broad; it applies to all industrial and agricultural products.<sup>148</sup> Sanitary and phytosanitary regulations are not covered by the TBT Agreement because they fall under the purview of the SPS Agreement.<sup>149</sup> Thus, there exists no conflict between the two agreements—they are mutually exclusive. By working in tandem, the TBT and SPS Agreements seek to prevent all disguised discrimination imposed by technical regulations.

A type of regulation the TBT Agreement seeks to prevent is one intentionally designed to protect or favor a domestic industry.<sup>150</sup> To avoid this, the TBT Agreement encourages a country to base its domestic technical standards on existing international standards.<sup>151</sup> When a domestic regulation conforms to international standards, it enjoys a presumption of legality under the TBT Agreement and GATT.<sup>152</sup> If an international standard does not exist, the TBT Agreement strongly encourages countries to participate in the formulation of new standards that can be applied internationally.<sup>153</sup> The TBT Agreement also encour-

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146. *Id.* art. 2.8.

147. *See* JACKSON, *supra* note 63, at 538-41.

148. TBT Agreement, *supra* note 11, art. 1.3. Article 1.3 reads: “All products, including industrial and agricultural products, shall be subject to the provisions of this Agreement.” *Id.*

149. *Id.* art. 1.5. Article 1.5 provides: “The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the [SPS Agreement].” *Id.*

150. *Id.* preamble.

151. *Id.* art. 2.4. “Where technical regulations are required and relevant international standards exist[] . . . Members shall use them, or the relevant parts of them, as a basis for their technical regulations . . . except where such standards would be[] . . . ineffective or inappropriate . . .” *Id.*

152. TBT Agreement, *supra* note 11, art. 2.5.

153. *Id.* art. 2.6 (requiring Members to play a part in harmonizing international technical standards).

ages GATT members to accept other members' measures if they adequately fulfill domestic objectives.<sup>154</sup>

In Beef Hormones, the United States challenged the European Union's hormone ban under the TBT Agreement.<sup>155</sup> The United States claimed the ban was designed to protect Europe's domestic beef industry in violation of Article 2.2 of the TBT Agreement.<sup>156</sup> The United States asserted the ban was a technical regulation requiring mandatory process and production methods related to product characteristics.<sup>157</sup> Because both parties stipulated the ban was a sanitary measure, the TBT issues in the complaint were not addressed.<sup>158</sup> While jurisprudence in the area of technical regulations is as yet undeveloped, the TBT Agreement provides an additional weapon for challenging process and production regulations such as the OFPA.<sup>159</sup>

### III. TAKING A BITE OUT OF THE OFPA: CHALLENGES UNDER GATT, THE SPS AGREEMENT, AND THE TBT AGREEMENT

The OFPA is ripe for scrutiny under GATT and its side agreements. The crucial determination is whether a *voluntary* labeling program such as the OFPA, which distinguishes between otherwise-identical end products, is legal under GATT. An analysis of this kind can proceed along two paths. First, the OFPA may be viewed as a sanitary measure under an analysis similar to the one in the Beef Hormones case.<sup>160</sup> A second method of analysis is to treat the OFPA as a non-sanitary measure.

#### A. THE OFPA AS A SANITARY MEASURE

If the OFPA is viewed as a sanitary measure, a challenge to it can be brought directly under the SPS Agreement because

154. *Id.* art. 2.7. "Members shall give positive consideration to accepting equivalent technical regulations . . . provided they are satisfied these regulations adequately fulfil the objectives of their own regulations." *Id.*

155. Beef Hormones, *supra* note 2, ¶ 4.241. The TBT challenge was in addition to the challenge under the SPS Agreement.

156. *Id.*

157. *Id.*

158. Beef Hormones, *supra* note 2, ¶ 8.32.

159. One threshold issue would be whether the OFPA is a product or process restriction.

160. While the United States has not made any claims heretofore that the measure is either a sanitary or non-sanitary measure, it could characterize the OFPA in a way such that it would receive most favorable treatment under the GATT.

there is no requirement that another GATT violation first be established.<sup>161</sup> As a threshold matter, a party challenging the OFPA under the SPS Agreement would have to show the regulation is a sanitary measure.<sup>162</sup> While the legislative history of the OFPA indicates it was not aimed primarily at health or safety, a complaining party could make a strong case that the OFPA meets the definition of a sanitary measure found in the SPS Agreement.

The SPS Agreement defines a "sanitary measure" as one "protect[ing] human . . . life or health . . . from risks arising from additives, contaminants, toxins or disease-causing organisms in foods . . ." <sup>163</sup> Consumers view the OFPA as guaranteeing reduced levels of pesticides and contaminants in organic food.<sup>164</sup> Further, the OFPA defines the distinguishing characteristic of organic food as being untreated with synthetic substances.<sup>165</sup> Together, these factors support classifying the OFPA as a sanitary measure.

Assuming that the OFPA is defined as a sanitary measure, a complaining party could argue the OFPA violates the SPS Agreement in numerous ways. First, Article 3.2 requires that, where possible, health and safety standards should be set in accordance with the appropriate international standards.<sup>166</sup> For food products, the appropriate international standard is the standard promulgated by the Codex Alimentarius.<sup>167</sup> The United States, however, already has a food safety measure that meets the requirement of the SPS Agreement, namely the FDCA.<sup>168</sup> The FDCA incorporates by reference the food safety standards set by the Codex Alimentarius.<sup>169</sup> In contrast, the OFPA makes no reference to either the FDCA standards or the Codex Alimentarius. Since the OFPA incorporates neither the

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161. See *supra* notes 116, 125-27 and accompanying text. If a regulation violates GATT Articles III or XI, the only possible defense would be under Article XX. Any of the Article XX defenses for health or safety reasons would then have to pass SPS scrutiny.

162. See *supra* notes 113-16, 126-27 and accompanying text. Similarly, both parties could agree for purposes of the complaint that the OFPA is a sanitary measure. This was the situation in Beef Hormones where the United States and the EC agreed that the hormone ban was a sanitary measure. See *supra* notes 126-27.

163. SPS Agreement annex A, ¶1(b).

164. See *supra* notes 48-49 and accompanying text.

165. 7 U.S.C.A. § 6504 (West Supp. 1993).

166. SPS Agreement art. 3.2.

167. SPS Agreement annex A(3)(a).

168. See *supra* note 58 and accompanying text.

169. See *supra* notes 56-58 and accompanying text.



Codex Alimentarius standards nor the FDCA standards, it would appear to violate Article 3.2 of the SPS Agreement.

In defense, the United States could claim that the OFPA sets a higher standard than either the FDCA or the Codex Alimentarius, an action permitted under Article 3.3.<sup>170</sup> Further, the United States could argue that, by making participation in the OFPA voluntary, it is the least trade restrictive method possible to attain the highest level of protection. A challenging party could counter that, even if the OFPA does provide a higher level of protection, it still violates Article 2.2 because the measure is not "necessary."<sup>171</sup> For example, a party having an organic program similar to the OFPA may differ slightly by allowing practices prohibited by the OFPA.<sup>172</sup> If the foreign program is not recognized as equivalent to the OFPA, even though the end-products are virtually identical, the OFPA is most likely not the least trade-restrictive method possible, and so is not "necessary" within the meaning of the SPS Agreement. If it can not meet the standard of being "necessary," the OFPA would violate Article 2.2 of the SPS Agreement with respect to the foreign program.

A second potential challenge to the OFPA is that it violates Article 2.3 because it acts to protect the domestic production of organic food.<sup>173</sup> As described above, a foreign organic program might be virtually equivalent to the OFPA, but be denied certification by the USDA due to a minor difference. Such a result would likely be found to violate Article 2.3.

Failure to recognize the equivalent program could also violate Article 4.1 of the SPS Agreement. Article 4.1 requires a country to accept equivalent foreign measures if the foreign measures achieve the same level of sanitary protection as the domestic law.<sup>174</sup> The OFPA could violate Article 4.1 where foreign organic measures are substantially equivalent to the OFPA and achieve the same level of product quality. While the USDA has not yet ruled on the equivalency of particular foreign programs, it is likely that American organic consumers will lobby for denial of certification for foreign programs which permit controversial practices.<sup>175</sup>

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170. See *supra* notes 123-24 and accompanying text.

171. SPS Agreement art. 2.2.

172. See *supra* notes 37-43 and accompanying text.

173. SPS Agreement art. 2.3.

174. SPS Agreement art. 4.1.

175. See *supra* notes 31-36 and accompanying text.

The process of OFPA rule formulation could lead to the denial of recognition of foreign organic programs. Because the OFPA standards are set by representatives of the U.S. organic food industry,<sup>176</sup> the standards will likely reflect the practices and preferences of American consumers. Since consumer preferences are partly based on environmental concerns, certain practices acceptable to foreign organic certification programs may be prohibited by the OFPA.<sup>177</sup> A party denied certification in the U.S. market because of minor technical differences with the OFPA would have a strong claim that the denial violates Articles 2.3 and 4.1 of the SPS Agreement because it protects domestic production.<sup>178</sup>

In summary, the OFPA, if regarded as a sanitary measure, may violate Articles 3.1, 2.3 and 4.1 of the SPS Agreement. The OFPA would violate Article 3.1 because it does not adopt standards set by the Codex Alimentarius Commission. Similarly, because the FDCA already regulates food safety and incorporates the Codex Alimentarius standards, the OFPA appears designed to protect U.S. production of organic food in violation of Article 2.3. Finally, the OFPA may violate Article 4.1 if it fails to recognize equivalent foreign programs which guarantee similar product quality.

#### B. THE OFPA AS A NON-SANITARY MEASURE UNDER GATT

Analysis of the OFPA as a non-sanitary measure under GATT can be approached in two ways. First, viewed as a product regulation, the OFPA is covered by Article III:4. To fall under Article III:4, the regulation must be found to regulate products *qua* products. If the OFPA is instead viewed as a process regulation, it could be challenged as an import restriction under Article XI.

While for the purposes of this analysis it is acceptable to assume that the OFPA is both a process and a product regulation, a WTO panel addressing a challenge to the OFPA would

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176. See *supra* notes 27-30 and accompanying text.

177. Because the final rules for the OFPA certification program are not yet set, this is an open issue. However, some of the open issues do not affect the end quality of organic products, but instead reflect environmental concerns of the organic food consumer lobby. Clark, *supra* note 16.

178. Of course, the party bringing the claim would have to show there was no difference between the products. But the reason for the ongoing debate over the final organic rules is that the methods are perceived to be environmentally responsible rather than because of any effect they have on the end products. See *supra* notes 31-36 and accompanying text.

still need to make this determination. The Tuna/Dolphin decision gives some guidance on how to distinguish between product or process regulations. The Tuna/Dolphin Panel found that the process regulation had no effect on any characteristic of the end-product; as a result, the regulation was not covered by Article III.<sup>179</sup> Whether the OFPA affects end-product characteristics of organic foods is a closer question. The OFPA is not written in terms of a resulting end-product.<sup>180</sup> Even so, a strong argument can be made that the organic certification requirements are intended to insure contaminant-free products by regulating the process inputs. On the other hand, the fact that some organic processes are preferred precisely *because* they are more environmentally friendly than conventional methods points toward a process classification not affecting the end-products.<sup>181</sup>

### 1. Article XI

A party challenging the OFPA under GATT Article XI would initially have to establish that the OFPA acts as an import ban or restriction. If treated as a process regulation, the OFPA may act as an import ban on foods produced under equivalent foreign programs that are denied recognition. While denying an equivalent organic program the ability to use the USDA label does not constitute a *de jure* import ban, it has the same effect. Exclusion from the U.S. market would occur because the foreign organic food could not be sold competitively in the market.

Without the certified organic label, foreign organic food could not compete for a variety of reasons. First, since organic food is more costly to produce, it could not compete with conventionally produced domestic food on price. It also could not compete with the domestically produced organic food because consumers would not purchase the unlabeled imported food at organic prices. Thus, denying an equivalently produced foreign organic food the opportunity to carry *any* organic label would have the effect of a ban on the imports.

A counter-argument to the assertion that the OFPA acts as an import ban is that it is voluntary. Foreign producers, therefore, could adjust their organic certification programs to comply with the OFPA if they wanted to participate in the U.S. market. However, the fact that the OFPA rules will likely reflect current

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179. See *supra* notes 83-87 and accompanying text.

180. See *supra* note 38 and accompanying text.

181. See *supra* note 85-87 and accompanying text.

U.S. practices and preferences indicates it operates to benefit domestic producers. A foreign producer following a program which differs only slightly from the OFPA has a strong argument that, if the program is not recognized as equivalent, the OFPA acts as an import ban to equivalently produced products and thus violates Article XI.

One way a party could bring an Article XI challenge is as follows: First, a complaining party could demonstrate its country's food is classified as organic in its home market because the growing and handling are done according to local regulations. Second, the party would have to show its country's organic program results in identical end-products. Third, because the foreign standard is not recognized, the OFPA is essentially an import ban on the complaining party's organic food in violation of Article XI.

If a complaining party establishes that the OFPA violates Article XI, the United States could assert either an Article XI:2(c)(i) or an Article XX defense. Article XI:2(c)(i) exempts certain import restrictions for agricultural products.<sup>182</sup> The food products covered by the OFPA are certainly in the agricultural category. However, of the seven conditions precedent to raising a successful exception, the United States would fail to satisfy at least two.<sup>183</sup> The first condition the OFPA would likely fail is that it does not set up a domestic *quantitative* supply restriction.<sup>184</sup> "Restriction," as used in Article XI:2(c)(i), is related to a quantitative limitation, not a restriction on how a product is characterized. The second condition the OFPA fails to meet is that its impact is not a *restriction* on foreign organic products, but a prohibition.<sup>185</sup> As it fails to meet these two conditions, the OFPA would not likely meet the Article XI:2(c)(i) exception for import restrictions.

Another defense the United States could raise would be an Article XX exception. The United States would likely assert the OFPA is necessary to protect human health, and thus is exempted from GATT obligations by Article XX(b).<sup>186</sup> An Article XX(b) defense, however, would most likely be classified as a sanitary measure, necessarily implicating the SPS Agreement. As already demonstrated, the OFPA would most likely violate vari-

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182. See *supra* notes 104-05 and accompanying text.

183. See *supra* notes 104-06 and accompanying text.

184. See Japan—Agricultural Products, *supra* note 106, ¶ 5.1.

185. *Id.* This assumes that the OFPA is being enforced by denying certification to an equivalent foreign certification program.

186. GATT art. XX(b).

ous provisions of the SPS Agreement.<sup>187</sup> Even as a non-sanitary measure, the OFPA would most likely fail under Article XX(b) because it is not “necessary” to protect human health. That function is already performed by the FDCA, which insures food safety in the United States.

As a process regulation, the OFPA can act as an import ban. As such, it would violate Article XI. Defenses to the Article XI violation would likely fail. The OFPA may not qualify as an Article XI:2(c)(i) restriction because it is not a quantitative restriction. Similarly, the OFPA is unlikely to pass muster as an Article XX(b) exception because it is not “necessary.” Alternatively, if the OFPA is characterized as a permitted sanitary measure, it violates the SPS Agreement.

### C. THE OFPA AS A NON-SANITARY PRODUCT REGULATION

As a product regulation, the OFPA is open to challenge under either the TBT Agreement or GATT Article III:4. Under the TBT Agreement, the OFPA could be attacked as a technical regulation protecting the domestic organic food industry. A GATT Article III:4 challenge can be made if an equivalent foreign organic program is denied certification under the USDA organic label.

A party could raise various challenges to the OFPA under the TBT Agreement.<sup>188</sup> First, a party could challenge the OFPA under TBT Article 2.8, which requires that, whenever appropriate, technical regulations be based on product performance requirements.<sup>189</sup> Organic food regulations could be specified in terms of product characteristics. For example, organic food could be defined as contaminant-free, since many organic food consumers purchase organic food for precisely this reason.<sup>190</sup> Given the consumer belief that organic food is more healthful than conventionally produced food, it would be appropriate for the OFPA regulations to target product characteristics rather than process regulations.<sup>191</sup> Ironically, the United States made this same argument against the European Union’s measures in

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187. See *supra* notes 161-78 and accompanying text.

188. The OFPA on its face meets the definition of a technical regulation. See *supra* notes 141-45. Concededly, the objective of the OFPA, if accepted to be for the prevention of deceptive practices, is legitimate. However, there is the argument that the actual purpose of the Act is to protect domestic production. This Note assumes the objective of the OFPA is legitimate.

189. TBT Agreement art. 2.8.

190. See *supra* notes 48-49 and accompanying text.

191. See *supra* note 46 and accompanying text.

the Beef Hormones case.<sup>192</sup> The crux of the U.S. argument in Beef Hormones, which applies to the OFPA with equal force, was that the European Union's claim that the use of growth hormones resulted in different end-products was not justified.<sup>193</sup> The end-products were the same.

This argument is exactly on point with respect to organic and non-organic food.<sup>194</sup> The FDCA already regulates food safety in the United States.<sup>195</sup> Thus, the OFPA allows an additional label on food already determined to be safe under the FDCA. The only apparent difference between organic and conventionally produced food is in the production method used. Because only the production methods differ, the organic product distinction appears to be the type that Article 2.8 seeks to avoid, namely one not based on product characteristics.

A party could also challenge the OFPA under Article 2.7, which encourages Members to accept foreign equivalent technical standards if the foreign regulations fulfill the objectives of the domestic regulation.<sup>196</sup> While the language of Article 2.7 is not as strongly worded as the requirement to accept foreign equivalent measures in Article 4.1 of the SPS Agreement, the analysis is similar under each.<sup>197</sup> Where the Secretary of Agriculture fails to recognize a foreign organic program that is substantially equivalent to the OFPA, such failure to recognize will go against the spirit of Article 2.7 of the TBT Agreement.

One way to avoid going against the spirit of Article 2.7 would be to base the OFPA rules on internationally accepted standards. However, no international scientific body currently addresses the scientific aspects of production and processing of organic food.<sup>198</sup> If such standards existed and were adopted by the OFPA, the OFPA would enjoy a presumption of validity under Article 2.5 of the TBT Agreement. However, until such

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192. See Beef Hormones, *supra* note 2, ¶ 4.246.

193. *Id.*

194. If such a challenge is ever brought against the OFPA, the United States would not likely concede the point.

195. See *supra* notes 56-57 and accompanying text.

196. See TBT Agreement art. 2.7.

197. See *supra* notes 118, 154 and accompanying text.

198. There is a body trying to coordinate the international efforts of the organic movement, International Federation of Organic Agriculture Movements (IFOAM). However, IFOAM is aimed at implementing organic methods as a matter of social, as opposed to scientific, policy. IFOAM (visited Feb. 4, 1998) <<http://www.ecoweb.dk/ifoam/general.htm>>.

standards exist, Article 2.7 prefers that the Secretary of Agriculture seriously consider foreign equivalent organic measures.<sup>199</sup>

In addition to a challenge under the TBT Agreement, a party could also challenge the OFPA under Article III:4 of GATT. Article III:4 prohibits internal regulations which treat foreign products less favorably than "like" domestic products.<sup>200</sup> The situation where this is most likely to occur is when the Secretary of Agriculture fails to recognize a substantially equivalent foreign organic program. Failure to recognize foreign programs could violate Article III:4 because denying the imported product the organic label would treat it less favorably than the "like" domestic product.

To prevail on this claim, a foreign organic program would first have to establish that its products were "like" domestic organic products within the meaning of Article III:4. WTO panels consider factors such as consumer preferences, tariff classification, end use, and physical properties and characteristics when determining whether products are "like."<sup>201</sup> These factors point toward a finding that organic and conventionally produced foods are "like" products. Organic and conventionally produced products enjoy the same tariff classification. The use of organic and conventional food is identical—both are consumed for nutritional purposes. The physical properties and characteristics of organic and conventional food are the same. Even the healthful aspects are the same, at least as measured by the FDCA standards. The only difference between organic and non-organic food is the consumer preference for the former. It is unlikely consumer preference alone would prevent a finding of "likeness" under Article III:4.<sup>202</sup>

Upon a showing of "likeness," a complaining party must further establish that the foreign products are treated less favorably. Certainly, denial of an organic label to products from substantially equivalent programs constitutes less favorable treatment. Specifically, less favorable treatment occurs because, absent the organic label, the foreign products cannot be imported. Once a party establishes their foreign program produces "like" products to those produced under the OFPA, failure to recognize the foreign program would most likely violate Article III:4 of GATT.

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199. See TBT Agreement art. 2.7.

200. GATT art. III:4.

201. See *supra* notes 97-98 and accompanying text.

202. See *id.*

The United States could raise three possible defenses to this type of Article III:4 challenge. First, it could invoke a GATT Article XX(b) defense that the OFPA is a health or safety measure.<sup>203</sup> However, as previously discussed, an Article XX(b) defense would most likely fail as a sanitary measure under the SPS Agreement.<sup>204</sup>

A second possible defense would be that the OFPA is not covered by Article III:4 because it is aimed at processes not products. If the OFPA is characterized as a process regulation, it would not violate GATT Article III:4 because Article III:4 covers only regulations that relate to products as products.<sup>205</sup> Characterizing the OFPA, however, as a process regulation opens it to challenge under the TBT Agreement. As previously shown, the OFPA would most likely violate the TBT Agreement.<sup>206</sup>

A final defense would be a claim that organic and non-organic products are not "like" for Article III:4 purposes. This argument is weak at best because the only recognized difference between organic and conventional food is consumer preference. It would be a slippery slope indeed if the United States were allowed to cure what is otherwise an Article III:4 violation by raising the sole defense of consumer preference in support of the distinction.

#### IV. CONCLUSION

While there may be a strong consumer preference in the United States for organic food, the OFPA appears vulnerable to a challenge under the triumvirate of GATT, the SPS Agreement and the TBT Agreement. Although the OFPA is supported by a variety of disparate interests, including health conscious consumers and environmental groups, it must be fine tuned to avoid conflicts with international trade obligations. The most problematic issue surrounding the OFPA concerns the criteria the Secretary of Agriculture will use to grant foreign organic programs recognition. If the current OFPA rule formulation dispute is any indication, domestic consumer and producer groups will likely lobby the Secretary to limit recognition to foreign programs that meet or exceed the OFPA requirements. The United States should ameliorate the possibility for challenge by leading an international effort to harmonize the various organic food

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203. GATT art. XX(b).

204. See *supra* notes 161-78, 185-87 and accompanying text.

205. Tuna/Dolphin, *supra* note 83, ¶ 5.10.

206. See *supra* notes 188-99 and accompanying text.



programs in operation throughout the world. As leader of the harmonization effort, the United States could mold the international standard to reflect the goals of the OFPA and promote increased international trade in organic products.