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Note

From Beer to BST: Circumventing the GATT Standards Code's Prohibition on Unnecessary Obstacles to Trade

The United States and the European Community (EC)¹ are

1. The "European Community" is actually composed of three communities: the European Coal and Steel Community, the European Atomic Energy Community and the European Economic Community. J. GROUX & P. MANIN, *THE EUROPEAN COMMUNITIES IN THE INTERNATIONAL ORDER* 9 n.1 (1985). Separate treaties established these three communities, and their legal foundations differ, but they have been organically united since their merger in 1967. *Id.* The European Communities no longer refer to themselves as separate bodies, but prefer to call themselves the "European Community." See Brimelow, *The dark side of 1992*, *FORBES*, Jan. 22, 1990, at 85. This Note, therefore, will refer to the European Communities as the "European Community" (EC).

The EC was established to aid in the reconstruction and revitalization of war torn Europe by providing for an organized European political and economic partnership. See generally P. KAPTEYN & P. VERLORAN VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 3 (2d ed. 1989) (the post-war international political situation gave all the more impetus to a political trend that "aimed at a firmly organised political and economic partnership of European nations"). European national markets were to be fused through the establishment of a customs union, the abolishment of quantitative trade obstacles within the EC, the facilitation of the free intra-union movement of services, and the creation of a common agricultural policy. *Id.* at 14.

The Council of Ministers (Council) functions as the EC's legislative body by adopting regulations and other acts developed by the Commission. J. JACKSON & W. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* § 4.2, at 200 (2d ed. 1986). The European Commission (Commission) is the EC's equivalent of the United States executive branch. *Id.* The Commission ensures that the EC members (Member States) observe the EC treaties and implement the decisions of EC institutions. *Id.* The Commission also administers EC programs, enforces regulations promulgated by the Council, and assists in the development of new legislation that will be enacted by the Council. *Id.* The European Court of Justice serves as the EC's judicial branch, ensuring the observance of EC law by regulating the actions of the EC and its Member States and attempting to ensure that national courts interpreting EC law do so in a uniform manner. P. KAPTEYN & P. VERLORAN VAN THEMAAT, *supra*, at 151.

Belgium, France, Italy, Luxembourg, the Netherlands, and the Federal Republic of Germany (West Germany) created the EC in 1957 by signing the Treaty of Rome, and thereby became the first six Member States. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 11; J. JACKSON & W. DAVEY, *supra*, § 4.2, at 199; P. KAPTEYN & P. VERLORAN

currently embroiled in a dispute over the application of the Agreement on Technical Barriers to Trade (Standards Code or Code)² to certain foodstuffs regulations. The EC has imposed a temporary ban on the use of the naturally occurring growth hormone, bovine somatotropic (BST).³ The ban is facially neu-

VAN THEMAAT, *supra*, at 16. A current reprint of the official text is published in 1 TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 207 (1987) [hereinafter Treaty of Rome]. The EC presently has twelve Member States. J. JACKSON & W. DAVEY, *supra*, § 4.2, at 199. Effective January 1, 1973, the original six Member States were joined by Denmark, Ireland, and the United Kingdom. 15 J.O. COMM. EUR. (No. L 73) 3 (1972). In 1979, the nine Member States agreed to admit Greece as the tenth member of the EC. 22 O.J. EUR. COMM. (No. L 291) 9 (1979). Spain and Portugal joined the EC in 1986. 28 O.J. EUR. COMM. (No. L 302) 9 (1985). Turkey and Austria are currently pursuing membership. Elkes, *Europe 1992: Its Impact on Nontariff Trade Barriers and Trade Relations with the United States*, 44 FOOD DRUG COSM. L.J. 563, 567 (1989).

2. General Agreement on Tariffs and Trade: Technical Barriers to Trade, *opened for signature* Apr. 12, 1979, 31 U.S.T. 405, T.I.A.S. No. 9616, 1186 U.N.T.S. 276 [hereinafter Standards Code or Code]. The Code is a separate treaty from the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter General Agreement on Tariffs and Trade or GATT]. The current version of the GATT is published in THE TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT/1986-4). A current reprint of the official text is published in 4 CONTRACTING PARTIES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 1 (1969) [hereinafter GATT, BASIC INSTRUMENTS].

The Standards Code was finalized during the Tokyo Round of trade negotiations within the GATT. Middleton, *The GATT Standards Code*, 14 J. WORLD TRADE L. 201, 201 (1980). The Code became effective on January 1, 1980. Standards Code, *supra*, art. 15, para. 6, 31 U.S.T. at 430, 1186 U.N.T.S. at 304. The Standards Code was enacted by its members in an effort to reduce the presence and effect of technical obstacles to trade. Comment, *The United States-EC 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, 139 (1989). The Code governs the regulation of all products, including industrial and *agricultural* products. Standards Code, *supra*, art. 1, para. 3, 31 U.S.T. at 414, 1186 U.N.T.S. at 278.

3. *EC Commission Proposed Evaluation Period for Bovine Somatotropin Use Through 1990*, 6 Int'l Trade Rep. (BNA) No. 17, at 1201 (Sept. 20, 1989) [hereinafter *Proposed Evaluation Period*]. BST is a bovine growth hormone produced in the pituitary gland of all animals and is an important endocrine factor for normal growth and milk production in cattle and other mammals. Juskevich & Guyer, *Bovine Growth Hormone: Human Food Safety Evaluation*, 249 SCIENCE 875, 875 (1990); Schneider, *F.D.A. Defends Milk-Producing Drug in Study*, N.Y. Times, Aug. 24, 1990, at A18, col. 4 (nat'l ed.). BST is not a steroid hormone and has no biological action in humans. OFFICE OF ECONOMICS, INT'L TRADE COMM'N, UNITED STATES AND EUROPEAN COMMUNITY MAY BE HEADED FOR A NEW HORMONES DISPUTE, in INT'L ECON. REV. 3 (Sept. 1989) [hereinafter HORMONES DISPUTE]. BST is nearly identical in chemical structure to the natural bovine growth hormone present in all milk, and milk from a freshly calved heifer contains the hormone to a degree many times higher

tral as its provisions apply to the use of BST inside the EC.⁴ Nonetheless, it could eventually have a disproportionate impact upon United States farmers and producers who wish to export their products to the EC and who could become far more dependent on BST than their European counterparts.⁵ The United States government has objected to the EC ban, arguing that it is impermissible under the Standards Code as an unnecessary obstacle to trade.⁶

than that from a cow that has been treated with BST. Bloom, *Veterinary Chief Backs Milk-Boosting Hormone*, Fin. Times, Sept. 8, 1989, at 32, col. 1 [hereinafter Bloom, *Veterinary Chief*]. Walter Beswick, president of the British Veterinary Association, defends BST as a natural product that simply enables a cow to "reach maximum milking potential at minimum extra cost in feed." *Id.*

BST treatment increases milk production by affecting several physiological processes. Juskevich & Guyer, *supra*, at 875. Cattle injected with BST generally experience increased mammary uptake of nutrients used for milk synthesis and altered metabolism in their other tissues, which results in the increased availability of nutrients for milk synthesis. *Id.*

Scientists have known since the 1930s that injecting dairy cattle with BST increases their milk yields by up to 30%. *Id.*; *Proposed Evaluation Period*, *supra*, at 1201. Commercial use of BST was not economically feasible until the advent of biotechnology in the last decade. Juskevich & Guyer, *supra*, at 875.

On September 13, 1989, the EC Commission proposed an 18 month delay in the use of BST to allow for further evaluation of the product. *Proposed Evaluation Period*, *supra*, at 1201. The proposed regulation became official EC policy after it was formally proposed by the EC Commission, approved by each of the EC Member States, reviewed and approved by the European Parliament, and adopted by the EC Council. 33 O.J. EUR. COMM. (No. L 116) 27 (1990); HORMONES DISPUTE, *supra*, at 3-4; *Proposed Evaluation Period*, *supra*, at 1201. The legislation provides that Member States must "prohibit the administration of [BST] on their territory by any means whatsoever to dairy cows." 33 O.J. EUR. COMM. (No. L 116) 27 (1990). The EC's actions effectively ban both the EC's use of BST and the sale within the EC of dairy products produced with the aid of BST. Bloom, *No licence for dairy hormone product*, Fin. Times, July 27, 1990, at 30, col. 4 [hereinafter Bloom, *No licence*].

The EC also banned the sale of all meat produced with the aid of steroid growth hormones. 33 O.J. EUR. COMM. (No. L 224) 29 (1990) (prohibiting the use in livestock farming of certain substances having a hormonal action). The EC believes that the hormones may pose a health hazard to consumers. *Id.* As the EC ban shut out \$100 million of United States beef exports to the EC, the United States retaliated against \$100 million worth of EC products, which ranged from fruit juices to pet food. *U.S., EC Nearing Accord on Partial Solution to Hormone Ban Dispute*, U.S. Official Says, 6 Int'l Trade Rep., No. 17, at 516 (Sept. 20, 1989). The U.S. retaliated by subjecting the EC products to an additional 100% ad valorem tariff. *Id.* Negotiations to settle this trade dispute are in progress. Elkes, *supra* note 1, at 585.

4. Bloom, *No licence*, *supra* note 3, at 30, col. 4.

5. *Proposed Evaluation Period*, *supra* note 3, at 1201.

6. Both former United States Secretary of Agriculture Clayton Yeutter and United States Trade Representative Carla Hills believe that the ban is un-

The BST trade dispute has generated a great deal of heated debate, but has yet to be resolved.⁷ The difficulty that Code analysts, those charged with adjudicating Standards Code disputes, have had in resolving the dispute highlights a crucial weakness in Standards Code adjudication: the lack of an analytical framework for determining when a technical trade regulation violates the Standards Code.

This Note addresses the lack of a Standards Code framework for determining whether a facially neutral regulation is an impermissible obstacle to trade. Part I presents the BST trade dispute and the difficulty analysts have encountered in seeking its resolution.⁸ In the hope of crafting a model analytical framework for Code adjudication, Part II examines how analogous disputes are resolved under the commerce clause of the United States Constitution and the EC Treaty of Rome.⁹ Drawing upon the central premises of commerce clause and EC jurisprudence, Part III proposes a model framework for resolving trade disputes under the Standards Code.¹⁰ Under this framework, Code signatories that impose new technical obstacles to trade would be required to prove that the barrier's net costs to world trade do not exceed the net gains that the regulating state will derive from imposing the new obstacle. For the purposes of this test, a new barrier has a net benefit if it serves the public interest in safety, quality, or effectiveness, and if it uses narrowly tailored measures to effectuate its legitimate purposes. This Note concludes that the EC's temporary ban on BST fails this test.

I. THE STANDARDS CODE AND THE BST TRADE DISPUTE

A. THE EC BAN ON BST

BST was the first product of gene-splicing biotechnology that became available to farmers.¹¹ Scientists discovered that the introduction into a cow's bloodstream of tiny quantities of a synthetically-produced duplicate of the bovine growth hormone

necessary and thus violative of the GATT Standards Code. HORMONES DISPUTE, *supra* note 3, at 3.

7. Bloom, *No licence*, *supra* note 3, at 30, col. 4.

8. See *infra* notes 11-46 and accompanying text.

9. See *infra* notes 47-109 and accompanying text.

10. See *infra* notes 110-48 and accompanying text.

11. *Riskless Hormone*, N.Y. Times, Sept. 2, 1990, § 4, at 12, col. 1; Schmickle, *New questions arise in old debate over bovine hormone for cows*, Minneapolis Star Tribune, Feb. 4, 1990, at 4B, col. 1.

BST, a substance secreted by the glands of every dairy cow, stimulates the cow to eat more fodder and produce more milk.¹² Tests conducted on several hundred cows injected with BST demonstrated that the cows remained in good health, yielded significantly more milk at a lower cost than untreated cows, and behaved and reproduced normally in every way.¹³ The United States Food and Drug Administration (FDA) later published a report that confirmed that consumption of dairy products produced with the aid of BST poses no increased health risk to the consumer.¹⁴

Nevertheless, the EC has banned the use of BST until the end of 1990.¹⁵ The EC Commission claims that the ban will give it time to develop and adopt new regulations governing the authorization of veterinary medicinal substances such as BST.¹⁶ The Commission's real concerns do not relate to the safety of BST,¹⁷ but rather that large, sophisticated dairy farmers will

12. Richardson, *Biological Luddites Hold Back Progress: Farmer's Viewpoint*, *Fin. Times*, Apr. 18, 1989, at 38, col. 5; see *supra* note 3.

13. *Id.*

14. Juskevich & Guyer, *supra* note 3, at 875. The FDA report was published in *SCIENCE*. *Id.* The report concluded that BST is biologically inactive in humans and, therefore, residues of it in food products would have no physiological effect in humans, even if consumers of the dairy products were to absorb the substance intact from their gastrointestinal tracts. *Id.*; Schneider, *supra* note 3, at A18, col. 4; Schmickle, *Report: FDA OK'd milk sales as safety studies continue*, *Minneapolis Star Tribune*, Aug. 24, 1990, at 6A, col. 1. The FDA report described more than 120 studies submitted by the four American producers of BST: Monsanto Agricultural, American Cyanamid, Eli Lilly, and Upjohn. Juskevich & Guyer, *supra* note 3, at 877-83; Schneider, *supra* note 3, at A18, col. 4. The producers' studies revealed that BST residues in milk were within the range naturally found in milk produced without the aid of BST, and that pasteurization destroyed 90% of the remaining BST. Juskevich & Guyer, *supra* note 3, at 883; *N.Y. Times*, *supra* note 11, § 4, at 12, col. 2; Schmickle, *supra*, at 6A, col. 1.

15. 33 O.J. EUR. COMM. (No. L 116) 27 (1990); see *supra* note 3 and accompanying text.

16. 33 O.J. EUR. COMM. (No. L 116) 27 (1990).

17. *Id.* The FDA insists that its studies demonstrate that humans may safely consume milk that has been produced with the aid of BST. Juskevich & Guyer, *supra* note 3, at 875; Schneider, *supra* note 3, at A18, col. 4; Schmickle, *FDA delays approving bovine drug for a year*, *Minneapolis Star Tribune*, Apr. 24, 1990, at 7B, col. 5. The FDA's research is directed to determining BST's effectiveness and its effect on cows. Juskevich & Guyer, *supra* note 3, at 875; Schmickle, *supra*, at 7B, col. 5. The FDA is required to consider these factors in its determination of whether it should permit American farmers to continue their use of BST. Juskevich & Guyer, *supra* note 3, at 875; Schmickle, *supra*, at 7B, col. 5.

United States Senate Agriculture Committee Chairman Patrick J. Leahy requested that the General Accounting Office investigate the FDA's review of BST. *Leahy Asks FDA Probe*, *Wash. Post*, Jan. 16, 1990, at A21, col. 1. Leahy's

use BST to increase their yields and profits and exacerbate the enormous surplus of dairy products produced by EC farmers,¹⁸ thus forcing more of the EC's remaining inefficient family farmers¹⁹ out of business.²⁰ The United States government and European dairy pharmaceutical industry officials believe that such socioeconomic concerns have no place in marketing authorization procedures that historically have been based entirely on existing scientific evidence related to the product's safety, quality, or effectiveness.²¹ Thus, the United States gov-

request followed allegations from a former FDA veterinarian that the FDA favors animal-drug companies, ignored flaws in safety studies, and overlooked harmful side effects to cows involved in the studies. *Id.*; Tolchin, *F.D.A. Accused of Improper Ties in Review of Drug for Milk Cows*, N.Y. Times, Jan. 12, 1990, at A21, col. 1 (nat'l ed.); Schmickle, *supra* note 11, at 4B, col. 1. The four United States producers of BST have invested more than \$500 million in developing and producing the hormone. Schneider, *supra* note 3, at A18, col. 4. Despite the controversy, the FDA allowed researchers to sell milk from experimental herds in Minnesota and several other states. Juskevich & Guyer, *supra* note 3, at 883 n.2; Schmickle, *supra* note 11, at 4B, col. 1; *cf.* Tolchin, *supra*, at A21, col. 1 (several supermarket companies recently barred sales of dairy products produced from the milk of cows treated with BST). Such sales took place even though the FDA had not yet officially approved the use of BST. Schmickle, *supra*, at 7B, col. 5; *cf.* Schneider, *supra* note 3, at A18, col. 4 (in 1985, the FDA approved the experimental use of BST in dairy herds around the United States before it had finished evaluating BST's effect on cows or had granted approval of the drug).

18. *Powerful New Hormone Hovering Over United States-EC Trade Clash*, The Reuter Library Report, Jan. 31, 1989 (LEXIS, NEXIS library, wires file). The EC even tried to reduce its surplus by slaughtering five-million dairy cattle. *Id.* The EC also instituted internal quotas on the production of milk. *Ban on Genetically Engineered Hormone Could Set Precedent for Biotechnology*, 6 Int'l Trade Rep. (BNA) No. 30, 997, 997 (July 26, 1989) [hereinafter *Ban Could Set Precedent*].

19. *Cf. Europe's Farms Face Uncertain Future*, United Press Int'l, Oct. 2, 1989 (LEXIS, NEXIS library, wires file) (the EC has witnessed a dramatic shift to fewer and apparently larger farms, with the number of farmers declining from 15 million in 1957 to today's total of only 5.6 million).

20. *Proposed Evaluation Period*, *supra* note 3, at 1201. Small farmers may still suffer from the introduction of BST even if it were to become available at a relatively low cost because the use of BST may trigger milk surpluses, drive down milk prices, and squeeze the least efficient farmers out of business. *Ban Could Set Precedent*, *supra* note 18, at 997. Concerns over a possible milk surplus and lower prices are exacerbated by fears that EC consumers may reduce their purchases of milk if they begin to perceive that the dairy products are not of a high quality. HORMONES DISPUTE, *supra* note 3, at 4. Such a consumer scare could increase the already serious EC surplus in dairy products. *Id.*; see also *supra* note 18 and accompanying text (EC farmers are currently experiencing a huge dairy surplus).

21. *Proposed Evaluation Period*, *supra* note 3, at 1201. A major complicating fact to the BST dispute is that the EC's actions are an attempt to supplement the traditional Code criteria of safety, quality, and effectiveness with the new socioeconomic criterion. *Proposed Evaluation Period*, *supra* note 3, at

ernment opposes the ban,²² arguing that the ban is impermissible under the Standards Code as an unnecessary obstacle to trade.²³

B. ASCERTAINING THE EXISTENCE OF UNNECESSARY OBSTACLES TO TRADE

The Standards Code was finalized in 1979 during the Tokyo Round of trade negotiations²⁴ within the General Agreement on Tariffs and Trade (GATT).²⁵ The GATT is a series of inter-

1201; HORMONES DISPUTE, *supra* note 3, at 4 (safety, quality, and effectiveness are the three traditional criteria used to judge veterinary substances for use in livestock). The socioeconomic criterion comprises the EC's primary justification for the new obstacle. HORMONES DISPUTE, *supra* note 3, at 4.

The EC has historically sought to increase the earnings of its family farmers and stabilize its agricultural markets. Comment, *United States/Common Market Agricultural Trade and the GATT Framework*, 5 NW. J. INT'L L. & BUS. 326, 338 (1983). The Treaty of Rome contains the philosophical underpinnings for these ideas. *Id.* Article 39(1) of the Treaty of Rome states that:

The objectives of the common agricultural policy shall be:

- (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, in particular labour;
- (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
- (c) to stabilize markets;
- (d) to assure the availability of supplies; [and]
- (e) to ensure that supplies reach consumers at reasonable prices.

Treaty of Rome, *supra* note 1, art. 39(1), at 254-55. Indeed, the EC itself was designed, in part, to increase farm income and to stabilize the agricultural markets. STAFF OF SENATE COMM. ON AGRIC., NUTRITION, AND FORESTRY, 98TH CONG., 2D SESS., TRADE POLICY PERSPECTIVES: SETTING THE STAGE FOR 1985 AGRICULTURAL LEGISLATION (Comm. Print 1984) [hereinafter TRADE POLICY PERSPECTIVES]. The EC uses export subsidies to promote the export of agricultural products. Comment, *supra*, at 338-39 (although the EC's common agricultural policy ignores the GATT limitations on the use of export subsidies, the EC makes little effort to hide such GATT violations).

22. See *supra* note 6 and accompanying text. United States officials are concerned that proposals such as the BST ban could dampen both the future study in biotechnological areas and the implementation of findings that result from the studies. HORMONES DISPUTE, *supra* note 3, at 3-4.

23. See *supra* note 6 and accompanying text.

24. Middleton, *supra* note 2, at 201. The beginning of the slow process towards regulating international agricultural trade began during the Tokyo Round negotiations of the mid-1960s. Comment, *supra* note 21, at 328. Although the GATT's formal provisions apply equally to the agricultural, industrial, and manufacturing sectors, its signatories initially focused most of their attentions on reducing trade obstacles within the world's industrial and manufacturing sectors. *Id.*

25. See *supra* note 2.

national trade agreements and protocols.²⁶ The GATT's General Articles describe the basic trade policy commitments of the GATT signatories (Contracting Parties).²⁷ Essentially, these

26. The GATT emerged out of the devastation resulting from World War II and was designed to promote international understanding and interdependence through international monetary and trade transactions. J. JACKSON & W. DAVEY, *supra* note 1, § 5.4, at 294-95 (the GATT became the central organization for coordinating national policies on international trade even though it was merely supposed to embody both the results of tariff negotiations and some general protective clauses designed to prevent its signatories from evading these tariff commitments).

The GATT is one of the central organizations for coordinating world trade policies, although it was never intended to become the central international trade organization. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 251-52 (1967). The GATT is frequently utilized by its signatories (Contracting Parties) to reduce the quantity and significance of obstacles to international trade. J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* § 10.9, at 248 (1969).

A large, informal, international organization, also known as "the GATT," administers the rules of the GATT agreement. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L. REV. 145, 147 & n.3 (1980) (the Contracting Parties have all powers of administration; they act as a collective entity and, by decision, practice, and tradition, the Parties have constructed a large organization with many branches, headed by the executive GATT Council). One of the primary functions of the GATT organization is to provide for ad hoc consultations on issues that are of concern to any of the Contracting Parties. *Id.* at 147. Third-party adjudication is relied on when the consultations fail to resolve disputes. *Id.* (the panel procedure is used for third-party adjudication of legal claims).

27. GATT, BASIC INSTRUMENTS, *supra* note 2, preamble, at 1; J. JACKSON & W. DAVEY, *supra* note 1, § 5.4, at 296. In addition to the 96 Contracting Parties, about 30 other nations participate in the work of the GATT. Hudec, *Reforming GATT Adjudication Procedures: The Lessons of the DISC Case*, 72 MINN. L. REV. 1443, 1444 n.2 (1988). While most of the GATT's 23 original Contracting Parties can be classified as developed Western market economies, well over two-thirds of today's signatories belong to the third world. Jackson, *The Changing International Law Framework for Exports: The General Agreement on Tariffs and Trade*, 14 GA. J. INT'L & COMP. L. 505, 511 (1984).

The United States is a signatory both to the GATT and the Standards Code. GATT, BASIC INSTRUMENTS, *supra* note 2, at 1; Standards Code, *supra* note 3, 31 U.S.T. at 405, 1186 U.N.T.S. at 276. The GATT Contracting Parties accept the EC as a representative that has power to negotiate on behalf of its Member States and as a party to various GATT agreements. Note, *The Status of GATT in Community Law*, 15 J. WORLD TRADE L. 337, 337 (1981). In 1972, the EC became a de facto GATT Contracting Party with the right both to speak and to table proposals and amendments in its own name. *International Fruit Co. NV v. Produktschap Voor Groenten en Fruit*, 1972 E. Comm. Ct. J. Rep. 1221, 1227, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8194, at 8,614; J. GROUX & P. MANIN, *supra* note 1, at 52-53 (on December 12, 1972, the European Court of Justice recognized that the EC had succeeded its Member States in the exercise of the GATT responsibilities). The EC has not formally replaced its Member States as GATT Contracting Parties. *Id.* at 52. The EC, however, has assumed most of its Member States' functions that relate to

Parties agree not to raise tariffs²⁸ or impose other obstacles²⁹ on any of the commodities listed on their GATT tariff schedules.³⁰

According to the national treatment obligations of GATT Article III, regulatory measures "should not be applied to imported or domestic products *so as to afford protection* to domestic production."³¹ Thus, a trade regulation generally will not

GATT matters. *Id.* Provisions of the GATT have legal force both in international and United States domestic law. *See generally* Jackson, *supra* note 26, *passim* (the GATT is directly applicable to state and local government in the United States and supersedes state and local law when such laws are not automatically pre-empted by federal law).

28. GATT, BASIC INSTRUMENTS, *supra* note 2, preamble, art. II, at 1, 3-5. Tariffs are taxes imposed on imported goods at a nation's border. J. JACKSON & W. DAVEY, *supra* note 1, § 6.2, at 364.

29. GATT, BASIC INSTRUMENTS, *supra* note 2, art. XI, at 17-18. Tariffs are the most basic and simple obstacle to international trade, but nontariff barriers may also be utilized by countries in order to place restrictions upon the flow of imports. J. JACKSON & W. DAVEY, *supra* note 1, § 6.1, at 364. The quota, or quantitative restriction, is but one of hundreds, if not thousands, of different types of nontariff barriers. *Id.* A quota is a quantitative restriction on a particular good that a country will allow to be imported. Quotas may be "global," in that they apply to the total amount of the specified good from all origins or sources. *Id.* "Country" quotas allow only a certain quantity from specified countries. *Id.*

30. GATT, BASIC INSTRUMENTS, *supra* note 2, art. 2, at 3-5; *see also* J. JACKSON & W. DAVEY, *supra* note 1, § 5.4, at 296-97 (for each commodity listed on a Contracting Party's schedule, that nation agrees not to charge a tariff that will exceed the amount specified in the schedule). The GATT operates by reducing or eliminating tariff obstacles and by liberalizing international trade relations between its Contracting Parties. CONTRACTING PARTIES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS: REPORT BY THE DIRECTOR-GENERAL OF GATT 18 (1979). The GATT discourages, but does not actually bar, the use of tariffs. GATT, BASIC INSTRUMENTS, *supra* note 2, preamble, at 1. GATT Article XI, however, generally prohibits the use of measures that operate as quantitative restrictions. *Id.* art. XI, para. 1, at 17. With a few exceptions, the remainder of the GATT reinforces its tariff obligations. J. JACKSON & W. DAVEY, *supra* note 1, § 5.4, at 296-97.

31. GATT, BASIC INSTRUMENTS, *supra* note 2, art. III, para. 1, at 6 (emphasis added). Article III, paragraph 1 reads, in part: "The [C]ontracting [P]arties recognize that internal . . . regulations and requirements affecting the internal sale, offering for sale, purchase, . . . or use of products, . . . should not be applied to imported or domestic products so as to afford protection to domestic production." *Id.* The Article III national treatment obligation is clarified by Article III, paragraph 4, which reads in part: "The products of the territory of any [C]ontracting [P]arty . . . 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, offering for sale, purchase, . . . or use." *Id.* para. 4, at 6. The drafters of Article III intended to cover not only legislation that directly governed the conditions of sale or purchase but also any legislation that could indirectly modify the competitive

violate Article III if it applies equally³² to domestic and imported goods.³³ Because of this limitation, Article III is largely ineffective against unnecessary technical obstacles to trade — obstacles that are facially neutral yet discriminatory in their effect.³⁴

The Standards Code³⁵ — one of several “side agreements” to the GATT — addresses this problem.³⁶ The Code signatories

conditions that would exist between the domestic and imported products. *Italian Discrimination against Imported Agricultural Machinery*, GATT 7th Supp. Basic Instruments & Selected Documents 60 (1959). This goal is reflected in GATT annex I, ad Article III:

Any . . . law, regulation or requirement of the kind referred to in [Article III] paragraph 1 which applies to an imported product and to the like domestic product and is . . . enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal . . . law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

GATT, BASIC INSTRUMENTS, *supra* note 2, annex I, ad art. III, at 63.

32. Akehurst, *Decisions of the Court of Justice of the European Communities During 1978*, 50 BRIT. Y.B. INT'L L., 273, 278 (1981). The GATT does not require that the Contracting Parties treat imported and domestic goods in an identical fashion. *Id.* Indeed, similar treatment of dissimilar products can operate to create disproportionate obstacles as surely as differential treatment of similar cases. *Id.* at 278. The principle of proportionality simply “requires that *similar* situations shall not be treated differently.” *Royal Scholten-Honig (Holdings) Ltd. v. Intervention Bd. for Agricultural Produce*, 1978 E. Comm. Ct. J. Rep. 2037, 2072, [1977-1978 Transfer Binder] Common Mkt. Rpt. (CCH) ¶ 8486 at 8,745 (emphasis added).

33. One can infer from the “no less favourable” language of Article III, paragraph 4 that the Contracting Parties are prohibited from favoring domestic products but, at the same time, are free to treat domestic products differently than imported products. *See supra* notes 31-32 and accompanying text. Annex I, ad Article III provides an example of such different yet equal treatment. GATT, BASIC INSTRUMENTS, *supra* note 2, annex I, ad art. III, at 63. Under this provision, a Contracting Party may impose border regulations or requirements on imported goods if the Party imposes similar regulations or requirements on domestic goods. *Id.*

34. Middleton, *supra* note 2, at 201. Technical obstacles to trade comprise some of the most complex and numerous of nontariff obstacles to trade. *Id.* These obstacles generally apply similarly to imported and domestic goods and are thus not overtly violative of the GATT Article III national treatment obligation. J. JACKSON & W. DAVEY, *supra* note 1, § 8.5, at 532-33. As a result, the obstacles were, previous to the inception of the Standards Code, subject to virtually no GATT Article III or any other multilateral supervision. Middleton, *supra* note 2, at 201-02.

35. *See supra* note 2 and accompanying text. Provisions of the Code bind only its individual signatories. Standards Code, *supra* note 3, art. 15, para. 6, 31 U.S.T. at 430, 1186 U.N.T.S. at 304; Middleton, *supra* note 2, at 201.

36. Comment, *supra* note 2, at 138-39. The Standards Code governs regulations that impose technical specifications because such regulations act as technical barriers to international trade of agricultural and other products. *Id.*

agree to refrain from adopting future³⁷ technical regulations³⁸ and standards³⁹ that create unnecessary trade obstacles.⁴⁰ Under the Code, however, it is the exporting party that has the burden of proving that the regulating party imposed the technical regulation for protectionist reasons, or that the terms or effect of the measure are unduly burdensome and thus unnecessary.⁴¹

If a party to the Code enacts a regulation or a standard that creates, in the words of the Code, an "unnecessary obstacle to international trade,"⁴² then an aggrieved Standards Code signatory may resort to the Code's consultation and dispute settlement provisions.⁴³ The Code, however, neither defines the

37. The Standards Code generally applies prospectively to regulations or standards that were enacted after January 1, 1980. Standards Code, *supra* note 2, art. 2, paras. 5-7, 31 U.S.T. at 415-16, 1186 U.N.T.S. at 280-82 & art. 15, para. 6, 31 U.S.T. at 430, 1186 U.N.T.S. at 304.

38. Technical regulations are technical specifications with which importers must comply. Standards Code, *supra* note 2, annex 1, para. 2, 31 U.S.T. at 433, 1186 U.N.T.S. at 308.

39. *Id.* para. 3, 31 U.S.T. at 433, 1186 U.N.T.S. at 308. Standards are non-mandatory technical specifications that are approved by a recognized standardizing body. *Id.*

40. *Id.* para. 1, 31 U.S.T. at 433, 1186 U.N.T.S. at 308; Eicher, *Technical Regulations and Standards*, in THE URUGUAY ROUND: A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS 137, 140 (1987). Government documents normally contain these regulations and standards that specify the required characteristics of products, including quality levels or specifications that relate to performance, safety, or dimensions. Standards Code, *supra* note 2, annex 1, para. 1, 31 U.S.T. at 433, 1186 U.N.T.S. at 308. Process and production method requirements or, in the words of the Code, "codes of practice," are not subject to the provisions of the Standards Code. *Id.* The strength of the Code is diminished because its terms only regulate product characteristics, and not process and production methods.

41. Standards Code, *supra* note 2, art. 2, para. 1, 31 U.S.T. at 414, 1186 U.N.T.S. at 278-80.

42. *Id.*

43. *Id.* art. 14, 31 U.S.T. at 426-29, 1186 U.N.T.S. at 298-304. The descriptive term of dispute settlement is "a nice sort of nonadversarial, nonthreatening, look-at-the-positive-side phrase for what most people would call a lawsuit." Hudec, "Transcending the Ostensible": *Some Reflections on the Nature of Litigation Between Governments*, 72 MINN. L. REV. 211, 214 (1987). At the conclusion of the dispute settlement investigation process, an aggrieved party may be able to suspend appropriate obligations, in respect of the other party or parties, under the Code. Standards Code, *supra* note 2, art. 14, para. 21, 31 U.S.T. at 428, 1186 U.N.T.S. at 302. This suspension of obligations is designed to "restore mutual economic advantage and balance of rights and obligations." Hudec, *supra*, at 214. It is unlikely, however, that any signatory will ever suspend its obligations after the occurrence of an alleged Code violation. *Id.* at 215.

Unfortunately, recent battles between the United States and the emerging EC have led to increased levels of resistance to Standards Code adjudicatory

term "unnecessary,"⁴⁴ nor provides Code analysts with a frame-

rulings. *Id.* Much of this resistance is due to the nature of the GATT's provisions, which are too weak to effectively counteract the strong political pressures within the EC that advocate the support of high agricultural prices and, therefore, overproduction by European farmers. *Id.* at 215-16.

Aggrieved Code signatories initially attempt to reach a resolution through consultation. Standards Code, *supra* note 2, art. 14, paras. 1-2, 31 U.S.T. at 426, 1186 U.N.T.S. at 298. A signatory to the Code may invoke the right to consultation whenever it believes that another signatory is interfering with any benefit to which it is entitled under the agreement. *Id.* If consultation fails, either party may request that the matter be examined by the Committee on Technical Barriers to Trade. *Id.* arts. 13-14, 31 U.S.T. at 425-29, 1186 U.N.T.S. at 298-304.

A Standards Code committee is composed of representatives from each of the Standards Code signatories. *Id.* art. 13, para. 1, 31 U.S.T. at 425, 1186 U.N.T.S. at 298. The committee meets at least once a year to provide Code signatories with the opportunity of consulting on any matters relating to the operation of the Code or furthering its objectives. *Id.*

The committee will create a technical expert group if it cannot propose a mutually satisfactory solution within three months and if one of the parties to the dispute "considers the issues to relate to questions of a technical nature." *Id.* art. 14, para. 9, 31 U.S.T. at 427, 1186 U.N.T.S. at 300. The committee may call upon technical expert groups to provide panels with reports in the event that the committee must consider issues that involve questions of a technical nature. *Id.* art. 14, para. 17, 31 U.S.T. at 428, 1186 U.N.T.S. at 302. A technical expert group examines the matter, consults with the parties in an effort to reach a mutually satisfactory solution, makes a statement concerning the facts of the dispute, and, if so directed by the committee, makes findings "concerning the detailed scientific judgments involved, whether the measure was necessary for the protection of human, animal or plant life or health, and whether a legitimate scientific judgment is involved." *Id.* para. 9, 31 U.S.T. at 427, 1186 U.N.T.S. at 300. The agreement encourages technical expert groups to accomplish their objectives within a six month time frame. *Id.* para. 11, 31 U.S.T. at 427, 1186 U.N.T.S. at 300.

Panels are created by the committee in the event that no mutually satisfactory solution has been reached within three months of the beginning of the committee investigation and no technical expert group has been created. *Id.* para. 14, 31 U.S.T. at 427, 1186 U.N.T.S. at 300. The GATT panels function in a manner that is quite similar to appellate tribunals in the United States. Hudec, *supra*, at 213. The parties to the dispute present their arguments in both oral and written form. *Id.* In order to facilitate the committee in making recommendations or giving rulings on a matter, the panels examine the matter, consult with the disputing parties in an attempt to reach a settlement, make a statement concerning the facts of the matter, and make such findings as the committee requests. Standards Code, *supra* note 2, art. 14, para. 15, 31 U.S.T. at 427-28, 1186 U.N.T.S. at 300-02. The agreement encourages panels to deliver their findings within four months from the date that they were established. *Id.* para. 18, 31 U.S.T. at 428, 1186 U.N.T.S. at 302.

44. The Code, however, does define such terms as "technical specification," "technical regulation," "standard," "international body or system," "regional body or system," "central government body," "local government body," "non-governmental body," "standardizing body," and "international standard." Standards Code, *supra* note 2, annex 1, paras. 1-10, 31 U.S.T. at 433-35, 1186 U.N.T.S. at 308-10.

work for determining whether a technical obstacle to trade is "unnecessary" and thus impermissible.⁴⁵

The EC's temporary ban on selling and importing dairy products derived from animals treated with BST constitutes a technical barrier to international trade that is, in the opinion of the United States, unnecessary and therefore violative of the GATT Standards Code.⁴⁶ Resolution of the BST controversy depends, then, on the proper interpretation of the Standards Code — the GATT agreement drafted to deal with technical barriers to trade. Part II of this Note considers the central premise of the commerce clause of the United States Constitution and internal EC jurisprudence as a starting point to crafting an analytical framework for evaluating technical barriers to trade under the GATT Standards Code.

II. FREE TRADE JURISPRUDENCE WITHIN THE UNITED STATES AND THE EC

A. UNITED STATES INTERSTATE COMMERCE JURISPRUDENCE

Shortly after World War II and just before the birth of the GATT, the United States Supreme Court decided two interstate transportation cases that explicitly set out the analytical framework that United States courts should follow when determining whether a facially neutral, state-imposed trade obstacle conflicts with the commerce clause.⁴⁷ In *Southern Pacific Co. v. Arizona*,⁴⁸ the Court struck down a state law that imposed limits on the length of trains operated within the state.⁴⁹ The

45. See Middleton, *supra* note 2, at 206.

46. See *supra* note 6 and accompanying text (United States officials believe that the ban is unnecessary and thus violative of the Standards Code); Dunne, *Yeutter Applauds EC's Caution on Dairy Hormone*, Fin. Times, Sept. 15, 1989, at 42, col. 1. Nevertheless, former United States Secretary of Agriculture Clayton Yeutter praised the EC's temporary ban as an effort to allow the EC to conduct further scientific studies of BST. *Id.* Yeutter, in praising the EC's decision only to temporarily ban BST, appeared to be motivated by fear that the EC might employ non-scientific grounds to impose a permanent ban on the first major biotechnology product that pharmaceutical companies have attempted to sell. Buchan, *Brussels Seeks Dairy Hormone Moratorium*, Fin. Times, Sept. 14, 1989, at 46, col. 1.

47. The United States Constitution specifically grants Congress the power to regulate interstate commerce. U.S. CONST. art. 1, § 8, cl. 3. The purpose of the commerce clause is to prevent any state from successfully gaining an economic advantage at the expense of another state. *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 532-39 (1949); Stern, *The Problems of Yesteryear — Commerce and Due Process*, 4 VAND. L. REV. 446, 456 (1951).

48. 325 U.S. 761 (1945).

49. *Id.* at 763.

Southern Pacific Court held that states lack the authority to substantially impede interstate commerce;⁵⁰ securing national uniformity in the operation of the railroads outweighed the states' interest in limiting the length of trains.⁵¹ In *Morgan v. Virginia*,⁵² the Court struck down a state law that mandated the racial segregation of passenger buses operated within the state.⁵³ The *Morgan* Court held that "state legislation is invalid if it unduly burdens [interstate] commerce in matters where uniformity is necessary."⁵⁴

In both cases, the United States Supreme Court applied a balancing test to decide if national interests in the unhampered operation of interstate commerce outweighed state interests.⁵⁵ Yet neither case suggested which standard of review courts should apply in determining whether a state regulation impermissibly burdens interstate commerce.

The United States Supreme Court first addressed the issue of burden of proof in *Dean Milk Co. v. City of Madison*.⁵⁶ The Court held that courts should uphold obstacles to interstate trade only if the regulation is nondiscriminatory and it imposes the least restrictive burdens on interstate trade.⁵⁷ In *Dean Milk*, a municipality prohibited the sale of non-locally pasteurized milk.⁵⁸ The ordinance, although parlaying favors upon local pasteurizers, helped to ensure the safety of the local milk supply by simplifying health department inspections of the pasteurizers.⁵⁹ The Court noted that the ordinance did not conflict with any federal legislation and that the subject matter lay within the sphere of state regulation even if the resulting legis-

50. *Id.* at 767.

51. *Id.* at 773.

52. 328 U.S. 373 (1946).

53. *Id.* at 374.

54. *Id.* at 377.

55. See *Southern Pacific*, 325 U.S. at 767, 773; *Morgan*, 328 U.S. at 377. By virtue of the supremacy clause, U.S. CONST. art. VI, cl. 2, a federal law enacted under the commerce clause controls if it is inconsistent with a state law. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 8.1, at 260 (3d ed. 1986). States still have some power to directly or indirectly regulate interstate commerce. Stern, *supra* note 47, at 451-60. When the national interest in the commerce is sufficiently great, however, the United States Supreme Court has consistently prohibited states from burdening interstate commerce. *Id.*

56. 340 U.S. 349 (1951).

57. *Id.* at 354-56.

58. *Id.* at 350. *Dean Milk* pasteurized its milk outside of Madison's restrictive mileage limitation. *Id.* at 352. *Dean Milk* distributed milk and milk products within Illinois and Wisconsin. *Id.* at 351.

59. *Id.* at 352.

lation imposed burdens upon interstate commerce.⁶⁰ The Court held, however, that the health related ordinance was an unnecessary trade obstacle⁶¹ because less burdensome means existed to safeguard the city's supply of milk.⁶² For instance, the Court suggested that the ordinance could have required non-local pasteurizers to reimburse the city for any inspection costs or that the city could have required non-local officials to perform expensive inspections.⁶³

As a result of *Southern Pacific, Morgan, and Dean Milk*, United States courts uphold state legislation that imposes interstate trade barriers only when the legislation serves the public interest in safety, quality, or effectiveness, and when the legislation is narrowly tailored to effectuate the barrier's legitimate purposes.⁶⁴ This tremendous bias of United States courts towards free trade between the states is mirrored by the jurisprudence of the European Court of Justice, which has repeatedly imposed similar requirements on members of the EC attempting to impose barriers to trade within the EC.⁶⁵

B. EC TREATY OF ROME HEALTH AND LIFE EXCEPTIONS

Created and governed by the 1957 Treaty of Rome,⁶⁶ the EC is becoming a superstate⁶⁷ as the economic and political sys-

60. *Id.* at 353-54.

61. *Id.* at 354.

62. *Id.* at 354-56.

63. *Id.*

64. *E.g.*, *Pike v. Bruce Church, Inc.*, 397 U.S. 139, 143 (1970) (citations omitted). This formulation implicitly sets forth a free trade balancing test. Under this analytical test, United States courts weigh the rights and interests of the disputing parties to decide whether the importance of the sought after benefit justifies the imposition on free trade. Generally, state legislation violates the commerce clause if it either conflicts with a national economic policy or a valid federal law. *California v. Zook*, 336 U.S. 725, 728-29 (1949); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 768 (1945); Powell, *The Still Small Voice of the Commerce Clause*, in 3 A.A.L.S., SELECTED ESSAYS ON CONSTITUTIONAL LAW 931, 932 (D. Maggs ed. 1938).

65. See *infra* notes 76-109 and accompanying text.

66. See *supra* note 1 and accompanying text.

67. Brimelow, *supra* note 1, at 86. The view of the EC emerging as a superstate is supported by Jacques Delors, a French socialist who heads the EC Commission. *Id.* The European population of nearly 320 million is scheduled to form the world's most populace, and perhaps most muscular, economic unit by the end of 1992. Elkes, *supra* note 1, at 563. This massive population base is intended to match the strengths of the United States and Japan. Kirkland, *Outsider's Guide to Europe in 1992*, FORTUNE, Oct. 24, 1988, at 121-22. Indeed, Europe's population base will almost equal the combined total of the 220 million people living in the United States and the 120 million people living in Japan. Elkes, *supra* note 1, at 569.

terms of much of Europe unify.⁶⁸ One of the primary goals of the EC is to remove intra-European Community obstacles to trade.⁶⁹ As with the United States commerce clause, an entire body of jurisprudence has evolved that delineates the ability of Treaty of Rome signatories (Member States) to impose barriers to free trade within the EC.

EC Treaty of Rome Article 30 prohibits Member States from imposing import quotas on goods that are lawfully pro-

68. Brimelow, *supra* note 1, at 85-86. The 1986 Single European Act calls for a completely integrated Internal Market by December 31, 1992. 30 O.J. EUR. COMM. (No. L 169) 1 (1987). This integration should harmonize the virtual maze of existing nontariff trade obstacles. Elkes, *supra* note 1, at 571. Jacques Delors, *see supra* note 67, believes that by 1998 the Commission will be responsible for no less than 80% of Europe's microeconomic legislation. Brimelow, *supra* note 1, at 86.

The effect of the Single European Act worries many Americans who fear that the lifting of nontariff trade obstacles between EC Member States will only accelerate the increasingly serious and frequent occurrences of trade disputes that are already erupting between the EC and the United States. Elkes, *supra* note 1, at 564. Such fears may be warranted by some evidence of spiraling tensions between EC Member States and the United States. For example, in an advertisement created by the French government, a "skinny French boxer is squaring off to battle a giant American football player and a menacing Japanese sumo wrestler. Suddenly eleven buddies — the rest of the [EC,] of course — rush to his side, and the aggressors turn away." Kirkland, *supra* note 67, at 121-22.

The United States has historically supported the plans to eliminate all economic barriers within the EC by 1992. Brimelow, *supra* note 1, at 85. Nevertheless, some Americans have recently questioned such supportive sentiments due to growing concerns that the proposed "European superstate one day could emerge as a protectionist, corporatist, anti-American Frankenstein." *Id.* The recognition that the EC has refused to pay for its own defense and that Britain has been unable to block French and German protectionist tendencies compound these concerns. *Id.* at 89. The EC's political integration could result in a protectionist and highly regulated, and therefore high-cost, superstate. *Id.*

69. Comment, *supra* note 21, at 338. The central feature of the EC is the customs union that is created by removing all duties and obstacles to trade that exist between Member States and adopting a common tariff for imports from the rest of the world. TRADE POLICY PERSPECTIVES, *supra* note 21, at 323-28. All EC nations will operate with common regulations on standards of composition, packaging, labeling requirements, and industrial codes of practice. Elkes, *supra* note 1, at 571. To counteract the wide variety of national standards for food products, Member States must not impose obstacles to products licensed for sale in at least one other Member State. *Id.*

Another example of the rapid centralization can be seen in the ongoing struggle by the Commission to force the Member States to harmonize their value-added taxes. Brimelow, *supra* note 1, at 86. This tax harmonization is particularly striking when one compares the experience in the United States, where each state determines the types and levels of taxes that its citizens shall pay. *Id.*

duced and marketed within other Member States.⁷⁰ Article 36 provides several exceptions to this general rule. Under Article 36, a Member State may create those obstacles to intra-European Community trade that are necessary for "the protection of human or animal life or health."⁷¹

70. Treaty of Rome, *supra* note 1, art. 30, at 244 (Member States may not impose quantitative restrictions on goods imported from other EC states).

71. *Id.* art. 36, at 248. Article 36 provides that:

The provisions of Articles 30 to 34 [generally forbidding quantitative restrictions on trade between EC Member States] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals, or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Id.

Article XX is the GATT's equivalent to the Treaty of Rome Article 36 general exceptions provision. Article XX contains a series of exceptions that may be the most troublesome and most subject to abuse of all of the exceptions to the general prohibition against the use of new trade obstacles. J. JACKSON, *supra* note 26, § 28.1, at 741. One example is the Article XX(b) health protection exception, which allows a Contracting Party to establish a partial or complete prohibition on the importation of a product if that nation can demonstrate that the product poses a threat to the life or health of humans, animals, or plants. GATT, BASIC INSTRUMENTS, *supra* note 2, art. XX(b), at 37. If a Contracting Party can demonstrate that the consumption of the product would pose a danger to human, animal, or plant health, and the resulting protective quantitative barriers are administered in a non-discriminatory fashion, the barriers would probably be deemed to be permissible under Article XX(b). *Id.*; see Kirgis, *Effective Pollution Control in Industrialized Countries: International Economic Disincentives, Policy Responses, and the GATT*, 70 MICH. L. REV. 859, 892 (1972). Article XX does not apply to the BST controversy because the EC's proposed ban would apply both to domestic and imported goods, thereby satisfying the GATT Article III national treatment obligation. See GATT, BASIC INSTRUMENTS, *supra* note 2, art. III, at 6-7. The Article XX general exceptions would only be utilized if the ban were applied against imported, and not domestic, dairy products. *Id.* art. XX, at 37-38. Article XX reads as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any [C]ontracting [P]arty of measures . . . necessary to protect public morals; . . . necessary to protect human, animal or plant life or health; [or other specified matters that relate to intellectual property, prison labor, national treasures, exhaustible natural resources, inter-governmental commodity agreements, domestic materials that are necessary to a domestic processing industry, or products that are in general or local short supply].

Read together, Articles 30 and 36 implicitly create an EC free trade balancing test. The European Court of Justice⁷² will strike down an intra-European Community obstacle to trade unless the grounds for imposing the barrier are legally justified, such as being necessary for the protection of human or animal

Id. The general exceptions to the Standards Code are set forth in its preamble:

No [Standards Code signatory] should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between [signatories] where the same conditions prevail or a disguised restriction on international trade

Standards Code, *supra* note 2, preamble, 31 U.S.T. at 413, 1186 U.N.T.S. at 278.

72. The European Court of Justice holds the real power within the EC because its rulings bind the Member States and consistently go beyond the letter of the law to further European integration. Brimelow, *supra* note 1, at 85. The Court ensures the observance of EC law in the interpretation and application of the Treaty of Rome and its implementing rules. *See infra* notes 73-74 and accompanying text. The Court settles disputes, issues binding opinions, and provides preliminary rulings by interpreting and applying EC law. P. KAPTEYN & P. VERLORAN VAN THEMAAT, *supra* note 1, at 151 (EC law has expressly conferred on the European Court of Justice a number of powers that enable the Court to judge the acts and omissions of the EC institutions and the Member States in accordance with EC law and to ensure that national courts uniformly interpret and apply EC law). A Member State must take the necessary measures to comply with the Court's judgment if the State's actions or rules are inconsistent with provisions of the EC Treaty of Rome. *See, e.g.,* Procureur De La Republique v. Waterkeyn, 1982 E. Comm. Ct. J. Rep. 4337, 4360-61, [1981-1982 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8889, at 8,486 (holding that if the European Court of Justice determines that a Member State's legislation is incompatible with the obligations that the Member State has under the Treaty of Rome, the Member State's national courts must draw the necessary inferences from the judgment of the European Court of Justice); *see also* Treaty of Rome, *supra* note 1, art. 171, at 375 (decisions of the Court are binding on the Member States).

The EC litigation process more closely resembles the United States judicial system than does the Standards Code consultation and dispute settlement adjudicatory committees, expert groups, or panels. *See supra* note 43 and accompanying text. The EC Commission and the EC Council may use the European Court of Justice to sue a Member State. J. JACKSON & W. DAVEY, *supra* note 1, § 4.2, at 202. Similarly, Member States may sue each other. *Id.* Aggrieved EC Member States may file suit over alleged violations of obligations that arise under the Treaty of Rome. Treaty of Rome, *supra* note 1, arts. 169-71, at 374-75.

If such a dispute arises between Member States, the States provide their comments and pleadings to the Commission. *Id.* art. 170, at 374. The Commission then returns an opinion to the parties. *Id.* If one or more of the Member States refuse to comply with the opinion, the Commission or a Member State may refer the matter to the Court of Justice. *Id.*

life or health.⁷³ Member States that impose Article 36 trade obstacles have the burden of demonstrating⁷⁴ that the enacted barriers serve the public interest in safety, quality, or effectiveness, and employ the least restrictive means necessary to effectuate the regulation's legitimate purposes.⁷⁵

73. See, e.g., *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E. Comm. Ct. J. Rep. 649, 663-64, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8543, at 7,784.

74. The EC Commission, which often acts as the plaintiff in Article 30 litigation, normally has the burden of proving that a Member State did not fulfill a Treaty of Rome obligation due to the nation's alleged breach of Article 30 of the EC Treaty of Rome. Brealey, *The Burden of Proof Before the European Court*, 10 EUR. L. REV. 250, 256 (1985). In contrast to Article 30 cases, in litigation under Article 36, the regulating nation has the onus of establishing that one of the Article 36 exceptions justifies the national legislation. *Criminal Proceedings Against Sandoz BV*, 1983 E. Comm. Ct. J. Rep. 2445, 2464, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,006, at 14,092-93; *Commission v. Kingdom of Belgium*, 1983 E. Comm. Ct. J. Rep. 531, 550-51, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8905, at 8,637. The European Court of Justice strictly interprets Article 36. D. WYATT & A. DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC* 138 (2d ed. 1987).

The burden of proof in EC Article 36 cases is similar to the burden contained in United States commerce clause cases. See *supra* notes 47-64 and accompanying text. The burden in GATT Standards Code cases, however, lies not with the signatory that established the obstacle, but with the non-regulating party. See Middleton, *supra* note 2, at 206.

75. See *infra* notes 76-105 and accompanying text. A related element that the European Court of Justice occasionally analyzes is whether the facially neutral regulation impacts disproportionately on imported goods in a manner that affords protection to domestically produced goods. See, e.g., *Commission v. French Republic*, 1980 E. Comm. Ct. J. Rep. 2299, 2316-17, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8591, at 8,273. This element is not central to the BST dispute, although certainly relevant within the context of EC litigation, because the element's requirement of proportionality is more than adequately addressed by the GATT Article III national treatment obligation. See *supra* notes 31-34 and accompanying text.

French Republic illustrates EC proportionality litigation. The Commission charged France with having violated the provisions of Article 30 by subjecting the advertising of certain alcoholic beverages to discriminatory rules. *French Republic*, 1980 E. Comm. Ct. J. Rep. at 2311-12, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 8,721. French legislation divided both alcoholic and non-alcoholic beverages into five groups. *Id.* The first group consisted of non-alcoholic beverages. *Id.* Groups two through three were comprised of different categories of alcoholic beverages, while the fifth group consisted of all the alcoholic beverages not expressly contained in groups two through four. *Id.* The legislation prohibited advertising any of the group five alcoholic beverages. *Id.* at 2313, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 8,721. The legislation placed no advertising restrictions on groups two and four. *Id.* It placed some restrictions on group three. *Id.* This third group included certain natural sweet wines, liqueur wines, wine-based aperitifs, and strawberry, raspberry, blackcurrant, or cherry liqueurs that did not exceed a fixed amount of pure alcohol. *Id.* at 2312, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 8,721. The legislation did not subject any of France's

The landmark 1979 case of *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*⁷⁶ provides a useful introduction to EC Article 36 case law. In *Rewe-Zentral AG*, West Germany refused to permit the importation of certain potable spirits, including the liqueur "Cassis de Dijon."⁷⁷ The liqueur contained less than the minimum alcohol percentage mandated by West German regulations.⁷⁸ The importer, Rewe-Zentral AG, argued that the barrier made well-known spirits from other Member States unmarketable in West Germany and was tantamount to a quantitative restriction on imports contrary to Article 30.⁷⁹ Germany replied that its composition rules protected the health of German consumers and shielded

natural sweet wines to any advertising restrictions, but did impose a system of advertising restrictions on imported natural sweet wines, liqueur wines, and certain rums and spirits. *Id.* at 2313, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 8,721.

In defense of its legislation, the French government argued that it applied to some nationally produced goods, did not discriminate in favor of French products, and was designed solely to protect the health of the public. *Id.* at 2314, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 8,271. According to the French government, the legislation promoted these goals by distinguishing between aperitifs and drinks consumed for "digestive" purposes, the former being more dangerous to public health because aperitifs are taken on an empty stomach. *Id.* at 2315, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 8,272. Although France may have advanced this argument with great sincerity, it appears that it did not actually believe that the use of aperitifs posed a threat to the health of humans, animals, or plants, but instead to the health of French alcohol producers.

The European Court of Justice rejected the French government's arguments and stated that the legislation impermissibly placed imported products at a disadvantage compared to domestic products. *Id.* at 2316-17, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 8,273. The Court held that legislation restricting the advertising of alcoholic beverages would comply with Article 36 only if the rules were applied in a manner that equally affected both domestic and imported alcoholic beverages. *Id.*

76. 1979 E. Comm. Ct. J. Rep. 649, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8543.

77. *Id.* at 651, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 7,779.

78. *Id.* The German government stated that spirits containing low volumes of alcohol were more likely to induce a tolerance towards alcohol than spirits containing higher volumes of alcohol. *Id.* at 663, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) at 7,787. Germany also argued that the lower alcohol content of the foreign beverages subjected them to less taxation, which secured a competitive advantage for the foreign producers over German-produced beverages. *Id.*

79. *Id.* at 652, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) at 7,781.

them from unfair commercial practices.⁸⁰ The European Court of Justice rejected this claim, ruling that the composition rules had not, in fact, been established or applied to protect consumers.⁸¹ The Court stated that the low alcohol liqueur posed no health risk as German consumers regularly dilute their high alcohol volume beverages and that, moreover, labeling requirements would have adequately protected German consumers.⁸²

Rewe-Zentral AG provided the foundation for modern EC free trade jurisprudence. It nonetheless left many questions unanswered. *Rewe-Zentral AG* was essentially a pretext case. The European Court of Justice found that West Germany's avowed health concerns were merely pretexts to shroud Germany's enactment of protectionist legislation.⁸³ The case left open the question of the proper approach to disputes involving burdensome technical trade obstacles that are based on arguably legitimate concerns for the health of the citizens of the regulating Member State.⁸⁴ Following *Rewe-Zentral AG*, EC case law has evolved on this issue. The European Court of Justice has gradually begun to require regulating states to *prove* that a restrictive trade regulation is justified, such as being necessary to protect the life or health of humans or animals.

The European Court of Justice initially placed the burden of proof on the importer. In the 1983 case of *Criminal proceedings against Sandoz BV*,⁸⁵ for example, the Court evaluated an arguably legitimate health-related obstacle. In *Sandoz BV*, a Danish magistrate⁸⁶ charged Sandoz BV with selling and marketing, without governmental authorization, food to which vita-

80. *Id.* at 663, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) at 7,787.

81. *See id.* (the protection of human health cannot justify the fixing of a minimum wine-spirit content for potable spirits).

82. *See id.* at 663-64, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) at 7,787 (holding that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State falls within the Article 30 prohibition of measures having an effect equivalent to quantitative restrictions on imports).

83. *Id.* at 664, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) at 7,787.

84. *Cf. id.* at 663, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) at 7,787 (by finding that the German legislation was designed to protect the German spirits industry, and not the health of German consumers, the court was able to reach its decision without addressing whether it would allow a nation to impose technical trade obstacles that are designed to protect the health of the public).

85. 1983 E. Comm. Ct. J. Rep. 2445, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,006.

86. The Danish magistrate's title was the "Economische Politiechter"

mins had been added.⁸⁷ The Danish government argued that consumption of such food was dangerous as consumers might be lulled into believing that excessive or prolonged consumption of such vitamin-enriched foodstuffs posed no risk, and could even be beneficial, to the health of the unwary user.⁸⁸ The EC Commission countered that the nondiscriminatory trade obstacle should be removed as the vitamins were not in themselves a danger to human health.⁸⁹ The European Court of Justice upheld the Danish regulations on the grounds that importer Sandoz BV could not conclusively guarantee the safety of the imported foodstuffs.⁹⁰ Thus, the Court required the importer to prove a negative: that the foodstuffs were not dangerous; that they were absolutely safe in every respect.⁹¹

Over time, however, the European Court of Justice realized that it was more reasonable, and rational, to require the regulating state to demonstrate that a product was not safe if

(magistrate dealing with commercial offenses). *Id.* at 2447, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) at 14,083.

87. *Id.*

88. *See id.* at 2457, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) at 14,089 (Denmark argued that intoxication may result from the absorption of Vitamins A, B, C, and D in abnormal quantities or over a prolonged period and that consumer reliance on enriched foodstuffs actually may result in an improper diet).

89. *Id.* at 2457, 2459, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) at 14,090, 14,091. The European Court of Justice observed that although excessive consumption of certain vitamins may be unhealthy, scientific research established objective and internationally recognized criteria for use in determining what levels of ingestion are safe for different vitamins. *Id.* at 2449, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) at 14,084. Consumption of the Sandoz BV products could not lead to intoxication because a person would have to consume more food than he or she would be capable of digesting. *Id.* at 2449-50, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) at 14,084.

90. *Id.* at 2460, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) at 14,092.

91. *Id.* at 2461, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) at 14,093; *see also id.* at 2462-63, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) at 14,093 (holding that when scientific research is inconclusive in determining the product's safety, Member States, in the absence of harmonization, must decide to what degree they intend to assure the protection of the health and life of humans, although these States must have regard for the overriding interests of maintaining intra-European Community free trade). Animal studies are used to determine the safety of a variety of foodstuffs destined for consumption by consumers. Comment, *supra* note 2, at 149. It is unclear whether consumers can confidently rely upon the data produced by such studies. *Id.* at 150 (citing COMMITTEE FOR A STUDY ON SACCHARIN AND FOOD SAFETY POLICY, INSTITUTE OF MEDICINE AND THE NAT'L RESEARCH COUNCIL/ASSEMBLY OF LIFE SCIENCES, FOOD SAFETY POLICY: SCIENTIFIC AND SOCIETAL CONSIDERATIONS Part 2, 5-23 (1979)).

that state wished to impede the free flow of goods within the EC. Four years after *Sandoz BV*, the European Court of Justice decided the *Commission v. Federal Republic of Germany*⁹² and *Commission v. Hellenic Republic*⁹³ (*German and Greek beer*) cases. In these cases, the Court clearly announced a new standard for Article 36 cases: The regulating Member State would bear the burden of proving that its trade barriers were not unnecessary obstacles to trade.⁹⁴ The *German and Greek beer* cases involved facially neutral legislation enacted by West Germany and Greece that required both domestic and imported beer to conform to a set of stringent traditional domestic purity standards.⁹⁵ Despite German and Greek arguments to the contrary,⁹⁶ the EC Commission argued that Article 36 did not protect the obstacles because the two nations could not prove that the protection of human life or health justified the prohibitions.⁹⁷ In ruling that the obstacles were unreasonable and con-

92. 1987 E. Comm. Ct. J. Rep. 1227, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,417.

93. 1987 E. Comm. Ct. J. Rep. 1193, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,418.

94. *Hellenic Republic*, 1987 E. Comm. Ct. J. Rep. at 1221, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 17,922; *Federal Republic of Germany*, 1987 E. Comm. Ct. J. Rep. at 1272, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 17,908.

95. *Hellenic Republic*, 1987 E. Comm. Ct. J. Rep. at 1197-98, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 17,913; *Federal Republic of Germany*, 1987 E. Comm. Ct. J. Rep. at 1264, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 17,904. Both the Greek and German legislation provided that producers of bottom-fermented beers could only be manufactured using malted barley, hops, yeast, and water. *Hellenic Republic*, 1987 E. Comm. Ct. J. Rep. at 1197-98, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 17,913; *Federal Republic of Germany*, 1987 E. Comm. Ct. J. Rep. at 1264, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 17,904. Under the German legislation, top-fermented beer could also contain other malts, sugars, and colorants. *Id.*

96. *Hellenic Republic*, 1987 E. Comm. Ct. J. Rep. at 1221, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 17,922; *Federal Republic of Germany*, 1987 E. Comm. Ct. J. Rep. at 1266, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 17,905. Germany argued that its legislation was necessary to protect public health and, if beer was manufactured using only the raw materials listed in the legislation, the use of additives could be avoided. *Id.* Similarly, Greece argued that the long-term effects of the additives could be dangerous. *Hellenic Republic*, 1987 E. Comm. Ct. J. Rep. at 1221, [1986-1988 Transfer Binder] Common Mkt. Rep. at 17,922. Because additives and enzymes were not technologically necessary when beer was manufactured using only the raw materials prescribed in the Greek legislation, Greece argued that it needed to preclude the use of such additives and enzymes in the manufacture of beer. *Id.*

97. *Hellenic Republic*, 1987 E. Comm. Ct. J. Rep. at 1216, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 17,920; *Federal Republic of*

trary to Article 30, the European Court of Justice affirmed that general prohibitions are impermissible unless the regulating nation proves that a product is dangerous to legitimate national interests, such as the health of the citizenry.⁹⁸ The *German and Greek beer* cases thus preclude a Member State from restricting the importing of lawfully marketed products unless the State can prove that the product is dangerous.

The *German and Greek beer* cases establish that the burden of proof rests with the regulating nation in internal EC trade disputes. The standard of review in such disputes, however, remained unclear until the 1979 case of *Commission v. Federal Republic of Germany*.⁹⁹ West German legislation required that all imported meat products be processed in a government-approved establishment located in the country where the animals were actually slaughtered.¹⁰⁰ West Germany argued that this regulation was intended to eliminate the risk that the slaughtering of the animals occurred in unsanitary facilities located outside of the EC.¹⁰¹

The European Court of Justice rejected the German regulation.¹⁰² The Court stated that Article 36 allows restrictive measures to derogate from the fundamental principle of free trade only to the extent that the measures are necessary to effectuate the legitimate purposes of the regulating nation.¹⁰³ In this case, however, the Court held that the German regulations

Germany, 1987 E. Comm. Ct. J. Rep. at 1266-67, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 17,905.

98. See *Hellenic Republic*, 1987 E. Comm. Ct. J. Rep. at 1225, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 17,924 (holding that "by prohibiting the marketing of beers lawfully manufactured and marketed in another Member State if they do not comply with the requirements laid down in the Greek legislation, the Hellenic Republic has failed to fulfill its obligations under Article 30 of the Treaty [of Rome]"); *Federal Republic of Germany*, 1987 E. Comm. Ct. J. Rep. at 1277, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 17,910 (holding that "by prohibiting the marketing of beers lawfully manufactured and marketed in another Member State if they do not comply with [the German legislation], the Federal Republic of Germany has failed to fulfill its obligations under Article 30 of the Treaty [of Rome]").

99. 1979 E. Comm. Ct. J. Rep. 2555, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8,601.

100. *Id.* at 2557, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 7,104.

101. *Id.* at 2565, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 7,105.

102. *Id.* at 2568, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 7,105.

103. *Id.* at 2564, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 7,105.

were excessive in relation to their stated objective¹⁰⁴ because Germany could have achieved its stated goals by the far less burdensome requirement that meat importers provide German customs agents with proof that the animals had been killed in a slaughterhouse that a Member State had previously approved as sanitary.¹⁰⁵

The *Commission v. Federal Republic of Germany* case reflects reasoning similar to the United States Supreme Court's analysis in *Dean Milk v. City of Madison*.¹⁰⁶ *Dean Milk* illustrates the onerous requirements placed on states to justify even legitimate reasons for imposing burdens upon interstate trade.¹⁰⁷ The United States Supreme Court's use of the "no less burdensome alternative" standard inevitably leads to the subjugation of state sovereignty interests in favor of a more unified and uniform national economy.¹⁰⁸ In following the *Dean Milk* reasoning, the EC, as an emerging superstate, strove to create a similar bias to ensure that its Member States were free only to create the least restrictive, necessary obstacles to intra-European Community trade.¹⁰⁹

III. A STANDARDS CODE FREE TRADE BALANCING TEST

The GATT Standards Code prohibits "unnecessary" techni-

104. *Id.* at 2567, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 7,105.

105. *Id.* at 2566, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 7,105. The European Court of Justice determined, however, that Germany would violate Article 30 if it continued to require that processing take place within the borders of the Member State in which the animal was slaughtered. *Id.* at 2568, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 7,105. Germany argued unsuccessfully that such measures were required to prevent the importation of pork that was contaminated by the organism trichinae. *Id.* at 2567, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) at 7,105. The Court determined that there was no proof that the incidence of trichinae in meat products increased simply due to the fact that fresh meat had crossed a border prior to the processing stage, or to accept that such a border crossing made it more difficult or less reliable to detect which imported meat products contained trichinae. *Id.*

106. *See supra* notes 56-63 and accompanying text.

107. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-56 (1951).

108. *See supra* notes 66-69 and accompanying text (the European Court of Justice's application of the 1957 Treaty of Rome has facilitated the EC's transformation into a superstate, which will unify the economic and political systems of much of Europe and remove intra-European Community obstacles to trade).

109. *See supra* notes 76-105 and accompanying text (tracing the evolution of EC Article 36 case law).

cal obstacles to trade.¹¹⁰ The Code's use of the word "unnecessary" at least implicitly requires the analyst to use a free trade balancing test to determine whether the technical obstacle to trade creates an unnecessary burden on trade. Unfortunately, the Code does not provide its adjudicatory panelists with a framework for determining if a facially neutral regulation is an unnecessary obstacle to trade.¹¹¹ Such a framework is needed if Standards Code analysts are to resolve complicated trade disputes such as the BST controversy. This Note proposes an analytical framework by drawing upon the balancing test principles enunciated in United States and EC internal free trade jurisprudence.

United States and EC jurisprudence require the nation that imposes a trade obstacle to prove that the barrier has a net benefit to world trade.¹¹² Such measures have a net benefit if they serve the public interest in safety, quality, or effectiveness, and use narrowly tailored measures to effectuate legitimate purposes.¹¹³ Applying this framework to the BST trade dispute demonstrates that the EC's ban is an unnecessary technical obstacle to trade and therefore violative of the GATT Standards Code.¹¹⁴

A. SHIFTING THE BURDEN OF PROOF

The first issue in determining a GATT Standards Code analytical framework is re-evaluating the allocation of the burden of proof in Standards Code adjudication. Unlike United States¹¹⁵ and EC¹¹⁶ case law, both of which assign the burden of proof to the regulating nation, the Code assigns the burden of proof to the non-regulating party.¹¹⁷ To be successful under Code litigation, the non-regulating party must prove either that the actions of the regulating state were deliberately protectionist or that the trade barrier cannot be justified as necessary.¹¹⁸ In the BST dispute, the United States would bear the unenviable task of attempting to prove a negative: that the ban is without foundation and that it therefore functions as an unne-

110. *See supra* notes 35-43 and accompanying text.

111. *See supra* notes 44-45 and accompanying text.

112. *See supra* notes 64, 72-75 and accompanying text.

113. *See supra* notes 64, 72-105 and accompanying text.

114. *See infra* notes 133-43 and accompanying text.

115. *See supra* notes 47-64 and accompanying text.

116. *See supra* note 94 and accompanying text.

117. *See supra* note 44 and accompanying text.

118. *Id.*

essary obstacle to trade.¹¹⁹

The inherent problem with the Standards Code burden of proof is that the non-regulating party must prove a negative. When regulating nations argue that the imposition of technical barriers are justified on the grounds that they are necessary to protect human health or life, the non-regulating nation must counter by conclusively demonstrating that the restricted product is perfectly safe.¹²⁰ Herein lies the crux of the problem: An exporting state can rarely, if ever, *guarantee* that the consumption of a particular foodstuff poses absolutely no risk to the health of the importing nation's consumers.

The different political structures within the EC, the United States, and the GATT reflect the differing allocations of the burden of proof within these respective coalitions. The United States functions as one nation and, in matters that relate to interstate commerce, federal law controls over state law inconsistent with it.¹²¹ A similar subjugation of state powers is rapidly emerging within the EC¹²² as the European Court of Justice now places the burden of proof upon Member States that attempt to rely on Article 36 exceptions.¹²³

In contrast to the United States and EC political structure, the GATT is a large, informal organization.¹²⁴ The GATT has more experience in assisting its signatories reach voluntary settlements than in enforcing its infrequent rulings.¹²⁵ Ostensibly,

119. See Standards Code, *supra* note 2, art. 2, para. 1, 31 U.S.T. at 414, 1186 U.N.T.S. at 278-80.

120. See *supra* note 45 and accompanying text. It may be impossible to prove that a product such as BST poses absolutely no risk to national interests because the science of biotechnology is so new that researchers do not know what hazards to look for when screening food and, further, conducting such exhaustive tests would cost billions of dollars, crippling the biotechnology industry. Schmickle, *supra* note 14, at 6A, col. 1; *cf.* Comment, *supra* note 2, at 149-50 (it is very unclear whether consumers can confidently rely upon the data produced by animal studies that are used to determine the safety of a variety of foodstuffs destined for consumption by consumers).

121. See *supra* note 47 and accompanying text (the United States Supreme Court has applied the United States commerce clause to prevent any state from successfully gaining an economic advantage at the expense of another state).

122. See *supra* notes 66-69 and accompanying text (the EC is evolving into a superstate that will unify the economic and political systems of much of Europe and remove intra-European Community obstacles to trade).

123. See *supra* note 94 and accompanying text.

124. See *supra* note 1 and accompanying text.

125. Contracting Parties filed 82 legal complaints in the three decades after the GATT's 1947 inception. Hudec, *supra* note 26, at 1456 n.44. An additional 83 complaints were filed in the fourth decade. *Id.* Most complaints were vol-

the GATT strives to create free trade,¹²⁶ a goal that it shares with the internal trade policies of the United States¹²⁷ and the EC.¹²⁸ Yet the GATT's loose and informal structure is not conducive to the accomplishment of this grand objective. Thus, it may be unrealistic to expect that the signatories to the GATT Standards Code will become willing to adopt the United States

untarily settled through negotiation. Hudec, *supra* note 43, at 214. Complaining parties reported a satisfactory solution to approximately 80% of the 82 initial complaints. *Id.*

126. The preamble to the GATT provides that the Contracting Parties agreed to the GATT provisions:

Recognizing that their relations in the field of trade and economic endeavour 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, developing the full use of the resources of the world and expanding the production and exchange of goods, [and] [b]eing desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the *elimination of discriminatory treatment in international commerce*

GATT, BASIC INSTRUMENTS, *supra* note 2, preamble, at 1 (emphasis added). Article 2, paragraph 1 of the GATT Standards Code reads, in part, as follows: "Parties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade. . . . [Parties] shall likewise ensure that neither technical regulations nor standards themselves nor their application have the effect of creating unnecessary obstacles to international trade." Standards Code, *supra* note 2, art. 2, para. 1, 31 U.S.T. at 414, 1186 U.N.T.S. at 278-80.

127. The United States Constitution grants to Congress the power to regulate commerce. U.S. CONST. art. 1, § 8, cl. 3. Although states may enact legislation that regulates commerce, such laws generally may not create obstacles to interstate trade:

[W]hen a state regulation conflicts with federal legislation enacted under the commerce clause, the federal statute controls pursuant to the supremacy clause. . . . [T]he rationale of the commerce clause was to create and foster the development of a common market among the states, eradicating internal trade barriers, and prohibiting the economic Balkanization of the Union. . . . When local legislation thwarts the operation of the common market of the United States, the local laws have then exceeded the permissible limits of the . . . commerce clause.

J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 55, § 8.1, at 260, 262.

128. The EC Treaty of Rome prevents Member States from imposing quotas on goods that are lawfully produced or marketed in other EC Member States. Treaty of Rome, *supra* note 1, art. 30, at 244. Article 30 provides that "[q]uantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between Member States." *Id.*; see also Criminal proceedings against Sandoz BV, 1983 E. Comm. Ct. J. Rep. 2445, 2460, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,006, at 14,091 (the European Court of Justice regards all commercial rules likely to impede intra-European Community trade as measures that are equivalent to prohibited quantitative restrictions).

or the EC allocation of the burden of proof.¹²⁹

Nonetheless, to resolve the dilemma created by forcing the non-regulating party to prove a negative, the GATT Standards Code should shift to the regulating nation the burden of proving that a trade barrier is justified. Such a shift of the burden of proof would result in a far more reasonable requirement than the present system, which places the onerous burden of proving a negative upon the non-regulating party.¹³⁰

B. OBSTACLES MUST SERVE THE PUBLIC INTEREST IN SAFETY, QUALITY, OR EFFECTIVENESS

EC officials fear that wide-scale use of BST could exacerbate the already serious surplus of dairy products within the EC and force smaller EC dairy producers out of business.¹³¹ Not surprisingly, the EC believes that it must protect the livelihoods of its small dairy producers by prohibiting the importation of dairy products produced with the aid of BST.¹³² The EC's concerns are understandable. Yet the question remains whether these concerns can support the drastic measure of imposing a complete ban on the domestic production and importation of dairy products produced with the aid of BST. Quite simply, the socioeconomic concerns of the EC should not be relevant in determining whether the ban violates the Standards Code.¹³³ Under the Code, the only criteria that a signatory can justifiably utilize in imposing a quantitative trade restriction are those that relate to safety, quality, or effectiveness.¹³⁴

The EC's invocation of socioeconomic concerns is entirely inconsistent with the GATT's avowed purpose of promoting world-wide free trade.¹³⁵ The signatories have agreed to be bound by the GATT and the Standards Code not to protect inefficient producers, but to raise living standards, ensure full employment, increase real income, develop the full use of resources of the world, and expand the production and exchange

129. Cf. Petersmann, *The EC as a GATT Member — Legal Conflicts Between GATT Law and European Community Law*, in 4 THE EUROPEAN COMMUNITY AND THE GATT 23, 59 (1986).

130. See *supra* note 45 and accompanying text.

131. See *supra* notes 18-20 and accompanying text.

132. See *supra* note 21 and accompanying text.

133. *Id.* (the EC is using a new socioeconomic criterion as its primary justification for its ban on BST, even though safety, quality, and effectiveness are the three traditional criteria used to judge veterinary substances for use in livestock).

134. *Id.*

135. See *supra* note 126 and accompanying text.

of goods.¹³⁶ Although the EC's interests in maintaining employment could be benefited if the United States were to accede to the use of the socioeconomic criterion as a basis for restricting free trade,¹³⁷ such benefits would pale beside the resulting burdens on international trade. Any benefits in employment would largely accrue only to those industries targeted for government favors.¹³⁸ The greater burden of reduced access to foreign markets would be felt across the world.¹³⁹ GATT acceptance of protectionist trade restrictions would most certainly lead to a series of retaliatory technical trade barriers, further reducing world living standards.¹⁴⁰ Thus, Standards Code panelists should reject the EC's use of the socioeconomic criterion in its attempt to ban the sale of dairy products produced with the aid of BST.

C. LEGISLATION MUST EMPLOY MOST NARROWLY TAILORED MEANS TO EFFECTUATE THE OBSTACLE'S LEGITIMATE PURPOSES

Even if a state imposes a trade regulation for legitimate purposes, United States and EC jurisprudence demonstrate that a regulating state must prove that the obstacle to trade employs the most narrowly tailored means to effectuate the barrier's legitimate purposes.¹⁴¹ The United States Supreme Court, as the *Dean Milk* case demonstrates, hardly hesitates to limit the narrow state powers to regulate interstate commerce when the Court believes that the state can effectuate its interests with less disruption to interstate commerce.¹⁴² Likewise, in *Federal Republic of Germany*, the European Court of Justice struck down German trade restrictions, ruling that Germany could ad-

136. See *supra* note 126.

137. V. CANTO, THE DETERMINANTS AND CONSEQUENCES OF TRADE RESTRICTIONS IN THE U.S. ECONOMY 146-51 (1986).

138. *Id.*

139. *Cf. id.* at 143 (a decline in stock indices occurs in anticipation of forthcoming trade restrictions).

140. The rise of protectionist policies is linked to the concern for the international competitiveness of products produced in the United States. *Id.* at 2. Empirical evidence indicates that trade restrictions, even if designed to improve the domestic economy and protect selected industries, can impoverish domestic and foreign producers and consumers. *Id.* at 2, 135-51. As economist Paul Samuelson explains: "Free [or freer] trade promotes a mutually profitable intentional division of labor, greatly enhances the potential real national product of all nations, and makes possible higher standards of living all over the globe." P. SAMUELSON, ECONOMICS 651 (11th ed. 1980).

141. See *supra* notes 56-64, 100-05 and accompanying text.

142. See *supra* note 105 and accompanying text.

dress its purported health and safety concern in a manner far less detrimental to international trade.¹⁴³

Standards Code analysts should adopt the EC Treaty of Rome and United States commerce clause balancing tests that, in part, require technical barriers to trade to be narrowly tailored. Analysts applying a similar test to the BST dispute would find that the ban is not narrowly tailored to effectuate the EC's asserted interests.¹⁴⁴ Even if one accepts the premise that BST poses a health risk, a total ban is not narrowly tailored. The EC could protect its residents through less onerous regulations. For example, the EC could subject domestically produced and imported milk to analysis.¹⁴⁵ Should future research indicate that milk becomes dangerous when BST residues exceed some level, the EC could prohibit the consumption and importation of milk that contains an unsafe level of BST.

D. APPLYING THE ANALYTICAL FRAMEWORK TO THE BST DISPUTE

The proposed framework requires the Standards Code analyst to apply a free trade balancing test to determine if the benefits to the regulating nation of a technical obstacle to trade outweigh its costs to international trade.¹⁴⁶ A technical obstacle to trade has a net benefit if it serves the public interest in safety, quality, or effectiveness, and uses narrowly tailored measures to effectuate the obstacle's legitimate purposes.¹⁴⁷

The EC's ban on BST fails this proposed free trade balancing test.¹⁴⁸ The EC's socioeconomic concerns should not be relevant in determining whether the ban violates the Standards Code. The BST ban does not serve the public interest in safety, quality, or effectiveness and, therefore, fails the first part of the balancing test. Furthermore, even if one accepts the EC's assertions that BST poses a health risk, a total ban is not narrowly tailored: The EC could less onerously protect its

143. See *supra* notes 56-64 and accompanying text.

144. See *supra* notes 16-20 and accompanying text (although the EC Commission has claimed that the ban is necessary to provide it with time to implement regulations governing the authorization of substances such as BST, its real concerns are that some farmers will use BST to increase their yields and profits, exacerbate the surplus of dairy products produced by EC farmers, and force more inefficient EC farmers out of business).

145. See *supra* note 91 (animal studies are already used, albeit perhaps unreliably, to test the safety of foodstuffs).

146. See *supra* notes 64, 72-75 and accompanying text.

147. See *supra* note 113 and accompanying text.

148. See *supra* note 114 and accompanying text.

residents by prohibiting the consumption and importation of all milk that contains more than a safe level of the naturally occurring BST.

CONCLUSION

The GATT Standards Code provides that its signatories, which include both the EC and the United States, may not enact a technical regulation that creates, in the words of the Code, "an unnecessary obstacle to international trade." The ongoing dispute between the EC and the United States over the application of the Code to dairy products produced with the aid of BST illustrates that the Code neither defines the term "unnecessary," nor provides its adjudicatory analysts with a framework for determining when a technical obstacle to trade is unnecessary and thus impermissible.

This Note crafts a Standards Code balancing test for evaluating these technical barriers by examining how analogous disputes are resolved under United States commerce clause and EC Treaty of Rome jurisprudence. The test requires Code analysts to weigh the benefits to the regulating nation of a technical obstacle to trade against the costs from the increased barriers to international trade. A technical obstacle to trade has a net benefit if it serves the public interest in safety, quality, or effectiveness, and uses narrowly tailored measures to effectuate its legitimate purposes. This balancing test should serve as a model framework for Standards Code adjudication. The test will help to provide Code analysts with a consistent and rational determination of what technical obstacles should be defined as "unnecessary," and thus impermissible, under the GATT Standards Code.

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