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FALSE FOODS: HARMONIZING THE EU AND US ORGANICS PROGRAMS

INTRODUCTION

The emergence of the global food market has had considerable political, economic, and legal effects on the states that wish to participate in the growing market,¹ especially for those in the organic food market. The popularity of national organics programs has grown significantly since their creation and implementation during the 1970s.² Between 2000 and 2016, global sales of organic products rose from \$17.9 billion to \$90 billion, showing more than five times growth.³ This influx of demand is predominantly caused by increased environmental concerns associated with non-organic products, as well as a recognition of the “conscious consumer.”⁴ With the increase in demand, states have been forced to create standards of certification and qualify the criteria for what “organic” or even “safe” mean under the label of the law.⁵

In light of the varying cultural and historical contexts of different countries, statutory organic definitions similarly diverge,⁶ as do states’ views on the importance of enforcing such

1. Carsten Daugbjerg & Linda Courtenay Botterill, *Ethical Food Standards Schemes and Global Trade: Paralleling the WTO?*, 31 POLICY AND SOC’Y 307, 307 (2012).

2. *Id.* at 313.

3. THE ASSOCIATED CHAMBERS OF COMMERCE AND INDUS. OF INDIA (ASSOCHAM), THE INDIAN ORGANIC MARKET: A NEW PARADIGM IN AGRICULTURE 38 (2018), <http://kisanmitra.ekrishi.net/wp-content/uploads/sites/3/2019/10/2018-ey-the-indian-organic-market-report-online-version-21-march-2018.pdf> [hereinafter ASSOCHAM Report].

4. Conscious consumption entails individuals being more aware of the types of food that they are consuming, while holding food producers to a higher expectation of quality. Morven G. McEachern et al., *Thinking locally, acting locally? Conscious consumers and farmers’ markets*, 26 J. MKTG. MGMT. 395, 395 (2010).

5. Marsha A. Echols, *Food Safety Regulations in the EU and the US: Different Cultures, Different Laws*, 4 COLUM. J. EURO. L. 525, 530 (1998).

6. For example, agricultural products derived from animals treated with antibiotics are prohibited from being designated organic in the United States (US) but not in Canada, while agriculture products produced with sodium nitrates are prohibited to be sold as organic in Canada but not in the US. *Canada-US Equivalency Agreement*, ORGANIC TRADE ASS’N, <https://www.ota.com/resources/global-market-opportunities/trade-agreements/canada-us-equivalency-agreement> (last visited Jan. 12, 2019).

regulations.⁷ In general, it is assumed that “organic” products are grown or raised without the use of pesticides, synthetics, or genetically modified organisms (GMOs), and the producers have followed some type of rigid cultivation criteria.⁸ With such a general idea of what it means to be “organic,” variations between what states allow producers to do in consideration for an organics label can vary significantly. Since there is no multilateral agreement specifically outlining organic produce requirements, many states have created bilateral organic equivalency agreements.⁹ These bilateral equivalency agreements are forms of trade treaties that fall under World Trade Organization (WTO)¹⁰ regulations¹¹ and create mutual recognition of each country’s organics standards.¹² For example, under the US-Canada Organic Equivalency Arrangement, if an item can be marked as organic in the United States (US), then it may also be marked as organic in Canada.¹³ While such agreements are helpful in creating more fluid importation and exportation of organics products, the process of constructing one can often be slow due to states’ negotiation tactics and the need to ensure that both parties have comparable standards.

7. OFFICE OF INSPECTOR GENERAL, USDA, INTERNATIONAL TRADE ARRANGEMENTS AND AGREEMENTS, AUDIT REPORT 01601-0001-21 5 (2017), <https://www.usda.gov/oig/webdocs/01601-0001-21.pdf> [hereinafter US Audit].

8. ASSOCHAM Report, *supra* note 3, at 10.

9. The European Union (EU) currently has equivalency agreements with Argentina, Australia, Canada, Chile, Costa Rica, India, Israel, Japan, Tunisia, Republic of Korea, Switzerland, US, and New Zealand. *Importing Organics*, EUR. COMM’N, https://ec.europa.eu/agriculture/organic/eu-policy/eu-rules-on-trade/non-eu-trading-partners_en (last visited Jan. 12, 2019). The US has equivalency agreements with Canada, the EU, Japan, Korea, and Switzerland. US Audit, *supra* note 7, at 3. The US is currently negotiating agreements with Mexico and Taiwan. *Id.* The US National Organics Program also has recognition programs with India, Israel, and New Zealand. *Id.*

10. The WTO is an international organization that creates and mediates the rules of trade between states globally. *The WTO*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/thewto_e.htm (last visited Jan. 21, 2019). The WTO’s goal is to ensure proper trade practices between states in order to have streamlined, predictable trade transactions. *Id.*

11. GLOBAL ORGANIC MARKET ACCESS (GOMA), BILATERAL EQUIVALENCE ARRANGEMENTS ON TRADE OF ORGANIC PRODUCTS 10 (2013), <http://www.fao.org/3/aq205e/aq205e.pdf>

12. *Id.* at 6.

13. *International Trade Partners*, USDA: AGRIC. MARKETING SERV., <https://www.ams.usda.gov/services/organic-certification/international-trade> (last visited Jan. 21, 2020).

Globally, there are discrepancies in how states certify and respond to non-compliance issues for imported organic products.¹⁴ As a result, there is a strong need for harmonization¹⁵ between states' organics programs, particularly between the European Union (EU) and the US because they are the two largest markets for organic products.¹⁶ Harmonization between these two systems, as well as countries like Australia and Argentina—which have the largest organic cultivations worldwide¹⁷—would yield greater compliance with national organics programs and the potential to cut down on transaction costs. The WTO, and more specifically the Sanitary and Phytosanitary Measures (SPS)¹⁸ for food trade, looks to create such harmonization in trade between states;¹⁹ the use of such programs would aid such efforts.

This Note will argue that some organic import models are better than others, and the best solution for addressing current compliance issues would be for the US to unilaterally adopt the EU's organic import program, specifically the Trade Control and Expert System (TRACES)²⁰ electronic certification program. The US's implementation of the EU program would create greater harmonization globally, provide greater benefits due to the superiority and longer lifespan of the EU program, and be more efficient than a multilateral agreement.

Part I of this Note will review the history of organics programs globally, as well as the reasoning behind consumers' and

14. For how the US is addressing compliance issues, see generally Agriculture Improvement Act of 2018, H.R. 2, 115th Cong. §§ 10104, 10105, 2122A (2018). For EU addressing compliance issues, see generally Commission Regulation 16/1842, 2016 O.J. (L 282) 19.

15. Under the SPS Agreement, the WTO defines harmonization as “the establishment, recognition and application of common sanitary and phytosanitary measures by different Members.” Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1A 1867 U.N.T.S. 493, 33 I.L.M. 1165 (1994) [hereinafter SPS Agreement].

16. The US makes up 47 percent of the global market for organics, with the EU following at 37 percent. Global Organic Market Access, a project of FAO, IFOAM and UNCTAD. ASSOCHAM Report, *supra* note 3, at 39.

17. *Id.* at 10.

18. See generally SPS Agreement, *supra* note 15.

19. *Id.* prmb1.

20. TRACES: TRAdE Control and Expert System, EUR. COMM'N, https://ec.europa.eu/food/animals/traces_en (last visited Jan. 3, 2020) [hereinafter TRACES].

advocacy groups' push for such programs. It will focus on the effect that international organizations, such as the International Federation of Organic Agriculture Movements (IFOAM),²¹ have had upon such programs, as well as the importance of such enforcement, which has continued since the development of the organic market. An assessment of the current equivalency standards that the US and EU have with each other will follow. Part I will also examine the international representation of the WTO, specifically the SPS. Part II will focus on the past and current operation of EU regulations,²² which have led to the implementation of TRACES, in creating a higher standard for organic import transparency. This will include an examination of the EU audit of the organics program in 2012,²³ which caused the European Council²⁴ to become aware of enforcement issues. Part III will discuss the US laws that fall under the Organic Foods Production Act of 1990,²⁵ the recent audit of the US National Organics Program (NOP),²⁶ and the Agriculture Improvement Act of 2018 (the "2018 Farm Bill").²⁷ Finally, Part IV will propose the US adopts the EU's organics program in order to solve the global issues within the organics market.

I. HISTORY OF ORGANICS PROGRAMS GLOBALLY

The organics global market is distinct from general trade due to its driving factor of demand being more than just a need for

21. *History*, IFOAM ORGANICS INT'L, <https://www.ifoam.bio/en/about-us/history> (last visited Jan. 21, 2020) [hereinafter IFOAM History].

22. *See generally* Commission Regulation 837/2007, 2007 O.J. (L 186) 5; Commission Regulation 834/2007, 2007 O.J. (L 189) 1; Commission Regulation 1235/2008, 2008 O.J. (L 334) 25; Commission Regulation 16/1842, 2016 O.J. (L 282).

23. *See generally* EUROPEAN COURT OF AUDITORS, SPECIAL REPORT NO. 9: AUDIT OF THE CONTROL SYSTEM GOVERNING THE PRODUCTION, PROCESSING, DISTRIBUTION AND IMPORTS OF ORGANIC PRODUCTS 7 (2012), https://www.eca.europa.eu/Lists/ECADocuments/SR12_09/SR12_09_en.PDF [hereinafter EU Audit].

24. The European Council is an official institution of the EU that defines the political direction and main concerns to be addressed, but it does not pass laws. *European Council*, EUR. COMM'N, https://europa.eu/european-union/about-eu/institutions-bodies/european-council_en (last visited Feb. 29, 2020).

25. *See generally* Organic Food Production Act of 1990, 7 U.S.C. § 6502 (1990).

26. *See generally* US Audit, *supra* note 7.

27. H.R. 10104, 10105, 2122A.

sustenance. Many consumers view the use of organic agriculture to be more ethical, politically sound, and healthier than conventionally grown products.²⁸ The demand for organic products is spurred by the consumer belief that organics are better for a person's "physical content," but also that the production of such food is ethically sound.²⁹ Further demand is created by consumers whose consumption choices are motivated by environmental concerns, meaning they often choose organic cultivation to promote sustainable farm practices³⁰ and a more balanced ecosystem.³¹ A US study of organic farming from 1981 to 2011 drew six conclusions in support of organic farming methods:

- (1) Organic yields match conventional yield;
- (2) Organic crops far outperform conventional crops in years of drought;
- (3) Organic farming systems build, rather than deplete soil organic matter, making them more sustainable systems;
- (4) Organic farming uses forty-five percent less energy;
- (5) Conventional systems produce forty percent more greenhouse gases; and
- (6) Organic farming systems are more profitable than conventional.³²

These findings give consumers the data necessary to support and promote organic production. While there is ongoing debate regarding the health and safety factors associated with the

28. Sheila Gholkar, *Moving Beyond the Industrial Organic Movement: Rethinking Organic Food Regulations*, 2 ARIZ. J. ENVTL. L. & POL'Y 1, 1 (2012).

29. Daugbjerg & Botterill, *supra* note 1, at 308.

30. Sustainable farming involves agricultural production practices that aim to create economic stability, environmental protection, and social viability. Shannon Avery Hughes, *Global Sustainable Farming and the "Soco" Soil Conservation Project*, 45 DENV. J. INT'L L. & POL'Y 431, 438 (2017). The focus of sustainable farming, in order to achieve these ends, tends to be projects attempting to "reduce soil erosion and [making] improvements to the physical structure of the soil." *Id.*

31. Organic farming's contribution to a more balanced ecosystem can be seen through its effect on wildlife, such as birds and amphibians whose habitats are often degraded by the use of pesticides. PETER V. FOSSEL, ORGANIC FARMING: HOW TO RAISE, CERTIFY, AND MARKET ORGANIC CROPS AND LIVESTOCK 17, 39 (Elizabeth Noll ed., 2014). Further, organic farming may positively impact the progression of global warming due to organic soil's ability to retain larger quantities of carbon compared to conventional soil. *Id.*

32. *The Farming System Trial: 30 Years*, RODAL INST. 19 (2011), <https://mk0rodaleinstitydwux.kinstacdn.com/wp-content/uploads/fst-30-year-report.pdf>.

consumption of GMO or pesticide-grown produce, it is still the catalyst for the demand of organically grown foods globally.

A. *Emergence of Organic Regulation Programs*

The establishment of the organics market came in response to the conventional agriculture industry, which is predominantly driven by economics.³³ Under the economically driven conventional market, producers tend to rely heavily on pesticides, synthetics, and GMOs.³⁴ In order to establish organic markets, proponents needed to institute agriculture certification programs, which essentially regulate what organic means in a given community and then verify that a product is in fact organic.³⁵

IFOAM was established in 1972 to create movement of organics globally by facilitating scientific research and data on organics.³⁶ This international organization was founded by five organizations: the Soil Association of the United Kingdom,³⁷ the Swedish Biodynamic Association,³⁸ the Soil Association of South Africa,³⁹ Rodale Press of the US,⁴⁰ and Nature et Progrés of France.⁴¹ It has since grown to include seven hundred and

33. Heidrun Moschitz & Matthias Stolze, *Organic Farming Policy Networks in Europe: Context, Actors and Variation*, 34 RES. INST. OF ORGANIC AGRIC. 1, 1 (2009).

34. The economically driven market, in which pesticides and GMOs were used in exceedingly high levels, was motivated by the need to produce large quantities and low prices to deal with consumer demand. *Id.* at 9.

35. Gholkar, *supra* note 28, at 2.

36. IFOAM History, *supra* note 21.

37. *About Us*, SOIL ASS'N, <https://www.soilassociation.org/about-us/> (last visited Jan. 12, 2020).

38. *Swedish Biodynamic Farmers: Swedin – Agriculture*, TERRA MADRE: SWEDISH BIODYNAMIC ASS'N, <https://www.terramadre.info/en/food-communities/swedish-biodynamic-farmers/> (last visited Jan. 12, 2020).

39. *South Africa Certification*, SOIL ASS'N, <https://www.soilassociation.org/certification/food-drink/business-support/exportsupport/global-guide/south-africa/> (last visited Jan. 12, 2019).

40. *About Rodale Institute*, RODALE INST., <https://rodaleinstitute.org/about/> (last visited Jan. 21, 2020).

41. *Fédération Nature et Progrès La Bio Associative et Solidaire*, NATURE ET PROGRÉS, <http://www.natureetprogres.org/> (last visited Jan. 12, 2020); IFOAM History, *supra* note 21.

fifty members from over one hundred countries.⁴² IFOAM did not release a basic set of standards until 1980; such standards were an attempt to create international harmonization of organics programs.⁴³ While the definition of organic differs from state to state, IFOAM has defined organic agriculture as “a production system that sustains the health of the soils, ecosystems, and people . . . [in combination with] tradition, innovation, and science to benefit the shared environment and promote fair relationships and good quality of life for all involved.”⁴⁴ Through this definition, IFOAM attempts to establish the organic movement as an idea that emphasizes the importance of safe produce while keeping in mind the cultural and traditional aspects that communities bring to organic production.

In 1987, Denmark created the first national regulation on organic production and labeling,⁴⁵ which was quickly followed by the US regulation under the US Organic Food Production Act of 1990 (OFPA).⁴⁶ Soon after, the EU implemented its own organics farming and certification program under EEC No. 2029/91.⁴⁷ These initial programs in the US and EU seemed to give little deference to IFOAM or each other, creating certificate conflicts from the beginning.⁴⁸ Under the US OFPA, the US Department of Agriculture (USDA) was given the authority to establish the NOP, which is housed under the Agricultural Marketing Services (AMS).⁴⁹ The AMS, through the NOP, is tasked with administering foreign agreements to assure compliance with OFPA regulations.⁵⁰ The EU’s regulation EEC No. 2029/91 came under the EU’s extensification program of 1988,

42. B. Geier, *IFOAM and the History of the International Organic Movement*, in *ORGANIC FARMING AN INTERNATIONAL HISTORY* 175 (William Lockertz ed., 2008).

43. Daugbjerg & Botterill, *supra* note 1, at 313.

44. *Definitions of Organic Agriculture*, IFOAM ORGANICS INTERNATIONAL, <https://www.ifoam.bio/en/organic-landmarks/definition-organic-agriculture> (last visited Jan. 21, 2020).

45. Sarah Storma, *Regulatory Governance of Organic Farming in the EU: From a Multilevel Perspective*, UNIV. TWENTE, 5 (2015), http://essay.utwente.nl/67214/1/Storma_BA_BMS.pdf.

46. Organic Foods Production Act, 7 U.S.C. §§ 6501–6522 (1990).

47. Commission Regulation 2092/91, 1991, O.J. (L 198).

48. STORMA, *supra* note 45, at 5.

49. US Audit, *supra* note 7, at 1.

50. *Id.*

which initially set out to address overproduction in Europe.⁵¹ The 1991 regulation set a minimum standard for EU member states and had the intended purpose of ensuring fair competition and transparency through each step of the organic production line.⁵² EEC No. 2092/91 not only regulated what qualified as organic, but also established the initial labeling protocols for agricultural products.⁵³ This regulation currently controls agreements regarding compliance between third parties and foreign states.⁵⁴

More recently, the EU and US have established an equivalency arrangement⁵⁵ in order to recognize each other's domestic organics standards.⁵⁶ In 2012, the US and EU announced that, beginning in June of that year, certified organic products from the US would qualify as organic in the EU, and vice versa.⁵⁷ This agreement intended to decrease barriers for administrators in each country and allow greater opportunity for organic product importation between the two largest organic consumers.⁵⁸ The scope of the agreement covered all organic products produced, processed, and packaged within the US or EU, with some exceptions for requirements.⁵⁹ Prior to the signing of this agreement, distributors were required to obtain organics certification in both the EU and the US in order to sell in both markets, causing unnecessary and costly delays.⁶⁰

Equivalency for each country's organics is recognized under two conditions for US exports to the EU. First, tetracycline and

51. Commission Regulation 4115/88, 1988 O.J. (L 361) 13.

52. *Id.*

53. Commission Regulation 2092/91, 1991, O.J. (L 198).

54. STORMA, *supra* note 45, at 5.

55. In order to implement the US-EU equivalency agreement, the EU amended European Commission Regulation 1235/2008, while the US amended the OFPA and CFR part 205. *Id.* at 16.

56. Press Release, USDA, *European Union and United States Agree to Historic New Partnership on Organic Trade*, Release No. 0051.12 (Feb. 15, 2012), <https://www.usda.gov/media/press-releases/2012/02/15/european-union-and-united-states-agree-historic-new-partnership> [hereinafter USDA Press Release].

57. USDA FOREIGN AGRIC. SERV., GAIN Report Number NL2006, *The EU-US Organic Equivalence Cooperation Arrangement* (2012) [hereinafter GAIN Report].

58. *Id.*

59. *Id.*

60. *Id.*

streptomycin⁶¹ are not to be used to control fire blight⁶² in apples and pears, and second, for EU exports to the US, antibiotics are not to be given to animals.⁶³ Under this agreement, the EU and US intended to establish common practices for the recognition of third-party country organics programs and to work together to improve the enforcement and integrity of organics importation and exportation.⁶⁴ Plans to improve the programs through this partnership failed in many regards, as will be illustrated below, when each national organics program was audited, exposing enforcement issues.⁶⁵

B. International Regulatory Systems

Internationally, organic imports generally operate under three systems; namely, the SPS, the Codex Alimentarius guidelines (“the Codex”), and IFOAM. Countries that are party to international treaties or members of international organizations prescribe to the idea that equivalency agreements are necessary for liberalizing trade in order to benefit their domestic economies.⁶⁶ The SPS, an agreement created under the WTO in 1994, is intended to address concerns about the application of food, animal, and plant health regulations within international trade.⁶⁷ The SPS allows states to set their own standards regarding trade but requires that the regulations be science-based and only apply as necessary to protect human, animal, or plant life health.⁶⁸ Arbitrary or discriminatory regu-

61. Tetracycline and Streptomycin are antibiotics created from soil bacteria that are used to deal with bacteria, fungi, and algae in crops. *Tetracycline (Oxytetracycline Calcium Complex) Crops*, USDA, (Jan. 27, 2006) <https://www.ams.usda.gov/sites/default/files/media/Tetracycline%20report.pdf>; see also, *Streptomycin Crops*, USDA (Jan. 27, 2006) <https://www.ams.usda.gov/sites/default/files/media/Streptomycin%20TR%202006.pdf>.

62. Fire blight is an infectious disease, caused by the erwinia amylovora bacteria, that is exceedingly destructive to apples, pears, and other related fruits. *Fire Blight*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/fire%20blight> (last visited Feb. 29, 2020).

63. GAIN Report, *supra* note 57.

64. *Id.*

65. See generally US Audit, *supra* note 7; EU Audit, *supra* note 23.

66. James Robert Burke, *Warning: The Imported Food You Are About to Consume May (Or May Not) Be Harmful to Your Health*, 15 J. CONTEMP. HEALTH L. & POL’Y 183, 197 (1998).

67. SPS Agreement, *supra* note 15.

68. *Id.*

lations imposed upon other countries by the buying country are deemed contrary to WTO standards.⁶⁹ The SPS does not have specific regulations regarding certification and labeling requirements for organic foods, but organic imports likely still fall under the SPS because the agreement is intended to deal with trade issues concerning food safety.⁷⁰ Organic certifications go further than the SPS regarding risk assessment of food safety,⁷¹ as many states' organic standards are stricter in regard to pesticide levels, potential contaminants, and packaging materials. It is difficult for countries to create science-based definitions for "organic" because it is a subjective concept that can change from state to state, in part due to domestic cultural contexts or distinct products that are only available in certain countries, leading to variable approaches to regulation from country to country.⁷²

The two international sets of standards that directly provide guidance for organic certification and labeling are the Codex and IFOAM.⁷³ Neither the Codex nor IFOAM are legally binding to any state; they are seen as international food standards that states can use when crafting their own national programs for organic importation and exportation.⁷⁴ The Codex Board was appointed under two UN organizations, the World Health Organization (WHO)⁷⁵ and the Food and Agriculture Organization (FAO).⁷⁶ The WHO and FAO created the Codex to guide

69. *Understanding the WTO*, WTO (2015), https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

70. Milica Kosovska, *Equivalence of organic food standards in the European Union and the United States of America*, TILBURG U., NETH. 1, 25 (2013), <http://arno.uvt.nl/show.cgi?fid=133406>.

71. *Id.*

72. Echols, *supra* note 5, at 533–34.

73. *The Codex system: FAO, WHO and the Codex Alimentarius Commission, Principles for food Import and Export Certification and Inspection*, FAO (1995) <http://www.fao.org/docrep/w9114e/W9114e04.htm> (last visited Jan. 21, 2020) [hereinafter *The Codex*].

74. Kosovska, *supra* note 70.

75. The WHO, a UN subsidiary that was created in 1948, has the intended purpose of directing and coordinating international health work in order for individuals globally to attain the highest possible levels of health. World Health Organization, *Constitution* (July 22, 1946). This includes mental, physical, and social health, not just the state of being disease-free. *Id.*

76. FAO, a UN subsidiary, was created in 1945 with the intended purpose to coordinate initiatives that raise international nutrition levels, as well as general standards of living for individuals. FAO, 1 *Basic Text of the Food and*

the execution of their joint food standards program with the goal of “standardizing, coordinating, and continually reviewing food practices.”⁷⁷ The Codex’s intended purpose is to protect consumer health and ensure fair trade practices in regard to food by encouraging uniformity of food standards by international governmental and non-governmental groups.⁷⁸ The Codex procedures are designed to inform states on the proper structure of certification bodies for food control systems.⁷⁹ This includes such activities as physical inspections of production space, audits for quality assurance, and reviews of the final products intended for sale.⁸⁰ While legal scholars like Milica Kosovska have argued that a binding Codex would be a much more powerful tool in ensuring food safety standards, such a multilateral agreement would be difficult due to the inconsistent policies currently enforced in different countries.⁸¹

Similarly, IFOAM serves the function of providing flexible guidelines instead of legally binding instruments, which states can use for creating optimal organics programs. IFOAM created the program to recognize conformity assessment systems, which are similar to government accreditation programs based on equivalency standards.⁸² Both the EU and US are listed on the conformity assessment systems that are recognized by IFOAM⁸³ as equivalent to their organics standards.⁸⁴

Agriculture Organization of the United Nations, 1, 3 (2017), <http://www.fao.org/3/a-mp046e.pdf>; The Codex, *supra* note 73.

77. Burke, *supra* note 66, at 191.

78. The Codex, *supra* note 73.

79. *Id.*

80. *Id.*

81. Kosovska, *supra* note 70, at 28.

82. *The Organic Guarantee System of IFOAM – Organics International*, IFOAM ORGANICS INT’L, <https://www.ifoam.bio/en/organic-guarantee-system-ifoam-organics-international> (last visited Jan. 21, 2020).

83. Other states that are recognized by IFOAM’s equivalency standards include: Argentina, Australia, Canada, Costa Rica, India, Israel, Korea, Japan, New Zealand, Switzerland, and Tunisia. *List of Conformity Assessment Systems Recognized by IFOAM as Equivalent to the IROCB*, IFOAM ORGANICS INT’L, https://www.ifoam.bio/sites/default/files/conformity_systs_list_web.pdf (last updated Oct. 2019).

84. *Id.*

C. *The Need for Enforcement of Organics Programs*

As the demand for organics grew, the importance of enforcement became clear to states heavily involved in the importation and exportation of organic products. In recent years, the market has grown considerably in response to the abundance of “consumption-related ailments.”⁸⁵ This has led to a greater awareness of the impact that different types of food can have on the body, inspiring consumers to be more informed about the products they are buying.⁸⁶ Consumers are willing to pay higher prices on organics based on the belief that such products are of higher quality than conventionally grown produce.⁸⁷ Certification programs that fail to verify that the products being imported are actually organic cause the consumer to no longer purchase organic products.⁸⁸ This doubt in the validity of organic products could have detrimental effects on several states, as the organic market is large and expanding.⁸⁹ For example, in the EU, 15 percent of the organics consumed are from non-EU countries, and the EU is specifically reliant upon imports of products such as coffee, bananas, and cotton.⁹⁰

Currently, 178 countries are actively participating in organic agriculture,⁹¹ meaning that each would be negatively affected if consumers lose faith in the organic enforcement of their states. As Gill H. Harden, the Assistant Inspector General for Audit of the USDA, explained within the most recent audit of the NOP, a lack of transparency about organic certification and practices led to reductions in consumer confidence.⁹² If consumer confidence is lost, then the more than 2.7 million organics producers that are performing globally could be negatively affected.⁹³ Specifically, great harm could occur in developing countries, such as India. In 2016, the Indian state of Sikkim banned the use of fertilizers and pesticides in farming, making

85. ASSOCHAM Report, *supra* note 3, at 10.

86. *Id.*

87. McEachern et al., *supra* note 4, at 400.

88. US Audit, *supra* note 7, at 4.

89. Over the past two decades, the annual growth rate of the organic market has been more than ten percent growth. EU Audit, *supra* note 23, at 7.

90. *Id.* at 10.

91. ASSOCHAM Report, *supra* note 3, at 22.

92. US Audit, *supra* note 7, at 4.

93. ASSOCHAM Report, *supra* note 3, at 41.

it a completely organic state—the first of its kind in India.⁹⁴ Organic producers in Sikkim are heavily reliant on exportation to developed countries, such as the US, Germany, and France, because they are the largest consumers of organics.⁹⁵ If the US and the EU do not enforce consistent organics regulations to maintain consumer confidence, such developing countries could be financially harmed.

II. THE EUROPEAN UNION’S ORGANICS PROGRAM

When the EU’s organics program was initially promulgated in 1991 through EEC No. 2029/91, it defined how agricultural foods were to be designated and what was required to be deemed organic.⁹⁶ Since 1991, that initial regulation has been amended numerous times, including incorporating stricter labeling requirements,⁹⁷ implementing an electronic tracking system,⁹⁸ and specifying regulations for third-party importers of organic products.⁹⁹ Many of these regulations were implemented after the European Court of Auditors¹⁰⁰ surveyed the effectiveness of the EU’s organic program and found major issues regarding compliance and enforcement.¹⁰¹ An examination of the development of the EU’s organics program showed a trend of improvement and superiority in compliance and transparency compared to other developed countries’ organics enforcement programs.

A. Pre-Audit European Union Organics Regulations

EEC No. 2092/91 initiated a set of standards for EU member states to follow regarding organic products with specifics relating to such activities as crop rotation, prohibition of GMOs,

94. *Id.* at 30.

95. *Id.* at 10.

96. Commission Regulation 2092/91, 1991, O.J. (L 198).

97. Commission Regulation 834/2007, 2007 O.J. (L 189).

98. Commission Regulation 16/1842, 2016 O.J. (L 282).

99. *Id.*

100. The European Court of Auditors was created to audit the EU’s finances in order to improve public accountability, create reports for policymakers, and set principles for public audits. *European Court of Auditors (ECS): Overview*, EUR. COMM’N, https://europa.eu/european-union/about-eu/institutions-bodies/european-court-auditors_en (last visited Jan. 21, 2019).

101. *See generally* EU Audit, *supra* note 23; *see also* Commission Regulation 16/1842, 2016 O.J. (L 282).

synthetic pesticides and fertilizers, antibiotics for livestock meant for consumption, and food additives and processing aids.¹⁰² In order to acquire organic certification, member states could choose between three methods: (1) accreditation through private control bodies; (2) accreditation through public control authorities; or (3) accreditation through hybrid public-private authorities.¹⁰³ The standards for organics set in place by EEC No. 2092/91 were repealed and replaced in 2007 by EC No. 834/2007, which placed greater emphasis on the labeling aspect of organics.¹⁰⁴ EC No. 834/2007 attempted to address the dual societal roles that organics serve: first, the need to react to consumer needs or wants concerning organic products, and second, the public benefit associated with environmental and animal welfare.¹⁰⁵

Generally, EC No. 843/2007 was meant to simplify the EU organics program by increasing harmonization, clarity, and flexibility.¹⁰⁶ Article 3 of EC No. 843/2007 defined the major objectives of the regulation,¹⁰⁷ including the creation of a sustainable administrative system and facilitation of high-quality products being brought to market.¹⁰⁸ Further, in response to consumer demand, the directive intended to provide a wide array of foods that do not harm the environment or human and plant health and welfare.¹⁰⁹ This language is similar to that of the SPS agreement, which was established over a decade before this regulation was enacted. The regulation allowed for minimal flexibility when granting distributors exceptions for deviating from organic requirements, going so far as to provide an exhaustive list of permissible exceptions.¹¹⁰

102. EU Audit, *supra* note 23, at 9.

103. *Id.* at 14.

104. Commission Regulation 834/2007, art. 39, 2007 O.J. (L 189).

105. *Id.*

106. STORMA, *supra* note 45, at 15.

107. Commission Regulation 834/2007, art. 3, 2007 O.J. (L 189).

108. *Id.*

109. *Id.*

110. Exceptions are permissible in the following cases:

- (a) where they are necessary in order to ensure that organic production can be initiated or maintained on holdings confronted with climatic, geographical or structural constraints; (b) where it is necessary in order to ensure access to feed, seed and vegetative propagating material, live ani-

The more important changes implemented with the institutionalization of EC No. 843/2007 included updated labeling requirements and adjustments to the control system set in place to monitor the movement and certification of organics.¹¹¹ Member states were required to have one or more competent authorities¹¹² that were to be responsible for controls.¹¹³ These controls mandated that producers be subject to compliance checks at least once per year, and they were required to inform the Council of any non-compliance issues regarding the regulations.¹¹⁴ Under Article 33, when assessing equivalency for third-country producers, the competent authorities were required to take into account the Codex, showing that the Codex is influential, despite having no binding effect.¹¹⁵

mals and other farm inputs, where such inputs are not available on the market in organic form; (c) where it is necessary in order to ensure access to ingredients of agricultural origin, where such ingredients are not available on the market in organic form; (d) where they are necessary in order to solve specific problems related to the management of organic livestock; (e) where they are necessary with regard to the use of specific products and substances in the processing referred to in Article 19(2)(b) in order to ensure production of well-established food products in organic form; (f) where temporary measures are necessary in order to allow organic production to continue or recommence in the case of catastrophic circumstances; (g) where it is necessary to use food additives and other substances as set out in Article 19(2)(b) or feed additives and other substances as set out in Article 16(1)(d) and such substances are not available on the market other than produced by GMOs; (h) where the use of food additives and other substances as set out in Article 19(2)(b) or feed additives as set out in Article 16(1)(d) is required on the basis of Community law or national law.

Id. art. 22.

111. Commission Regulation 834/2007, art. 39, 2007 O.J. (L 189).

112. “Competent authority” means the principal authority of a member state that is proficient in the control mechanisms of organic production or another authority that has been deemed competent by the Commission; this includes authorities in third countries. Commission Regulation 834/2007, art. 3, 2007 O.J. (L 189).

113. Commission Regulation 834/2007, art. 27, 2007 O.J. (L 189).

114. *Id.*

115. *Id.* art. 33.

Following EC No. 843/2007 came EC No. 1235/2008, which gave detailed rules for the implementation of EC No. 843/2007 regarding the importation of organic products from third countries.¹¹⁶ EC No. 1235/2008 was intended to increase transparency by requiring uniform documentation and certification.¹¹⁷ Regarding enforcement, this regulation made clear that electronic certification and validation were allowed, but it did not include a standardized requirement for competent authorities or member states to follow.¹¹⁸ This meant variations between enforcement policies were bound to occur. EC No. 1235/2008 required third-party countries to send in annual reports and comply with potential on-the-spot examinations, which required keeping proper paperwork on site.¹¹⁹ If a third-country certified producer did not comply, and if their lack of compliance was viewed as a severe enough problem, then they were subject to review by the Commission.¹²⁰ For a product to be released for free circulation, Article 13 outlined the channels a product must go through, including proper submission of the certificate of inspection, verification of the consignment, or certification through a control body.¹²¹ Once again, the Commission did not lay out uniform documentation methods or preferred certification standards, leaving room for error.

B. European Court Audit of Organics Program

In 2012, an audit of the control system governing the production, processing, distribution, and imports of organic products took place through the European Court of Auditors.¹²² The audit exposed several failures of oversight, including issues of supervision of the program, an inability to track produce information, and a lack of implementation of control procedures.¹²³ Due to the failures of the organic screening process, the EU promulgated several changes in regard to the tracking and

116. "Third countries" are countries that are not members of the EU but that trade with EU countries. Commission Regulation 1235/2008, 2008 O.J. (L 334).

117. *Id.*

118. *Id.*

119. *Id.* art. 9.

120. *Id.*

121. *Id.* art. 13.

122. EU Audit, *supra* note 23, at 7.

123. *Id.* at 8.

screening process of organic produce, as seen through EC No. 2016/1842.¹²⁴ The issues regarding traceability became a major focus in the reform that followed.¹²⁵ The purpose of the audit was to determine if the control systems for organic production were providing adequate assurance that the organic-labelled products being sold within the EU were actually organic.¹²⁶ One of the major problems presented through the audit was the issue of product traceability, which is needed to determine whether producers attained organic compliance through each stage of transportation.¹²⁷ The auditors were unable to trace 40 percent of products from the producer level.¹²⁸ In addition, there was a lack of information flow between the control system and certification agencies, to the point that third-party countries were not submitting annual reports.¹²⁹ The Commission was also unable to access reliable data regarding third-party country distributors.¹³⁰

Further, the audit found major weaknesses in the management of the list of equivalent third-party countries.¹³¹ Between 2000 and 2011, twenty-five countries had applied to receive equivalency certification, but as of 2020, the EU has only thirteen equivalency agreements.¹³² Having a backlog of applications creates unnecessary barriers for applying countries to get their organic products into the international market. The many issues discovered by the Commission's audit spurred the EU to initiate a major restructuring of its organics program.¹³³

C. Implemented Changes to the European Union Organics Program

In response to the findings in the 2016 audit of the EU organics program, the European Council implemented Regulation EC No. 2016/1842 in October 2016, in which the Commission declared multiple changes to the prior regulations set forth in

124. *See generally* Commission Regulation 16/1842, 2016 O.J. (L 282).

125. EU Audit, *supra* note 23, at 31.

126. *Id.* at 7.

127. *Id.* at 31.

128. *Id.* at 33.

129. *Id.* at 28.

130. *Id.*

131. *Id.* at 37.

132. *Id.*

133. Commission Regulation 16/1842, 2016 O.J. (L 282).

EC No. 834/2007, EC No. 889/2008, and EC No. 1235/2008.¹³⁴ In October 2017, it became compulsory for imported organics to comply with the new electronic certificate of inspection.¹³⁵ This new tracking program was placed under the pre-existing platform referred to as TRACES, and it completely replaced the paper-based certification system.¹³⁶ TRACES is beneficial for both traders and control bodies¹³⁷ because it enhances the traceability of imported goods and reduces the potential of fraudulent produce being sold within the EU.¹³⁸ Integrating the organics enforcement procedures into an already established, working system subsequently allowed for greater fluidity in the transitional period.¹³⁹

Article 7 of Regulation EC No. 2016/1842 sets out the required information for the importer to provide to the system, including name, address, email address, internet address, and code number of the control authority.¹⁴⁰ The most important changes occurred within Article 13, which outlined the certificate of inspection requirements.¹⁴¹ Through this regulation, member states are required to indicate a point of entry for organic produce, at which point customs inspections must occur for verification of the licensed parties.¹⁴² This verification occurs through entering the certification number into the TRACES system and waiting for confirmation that the produce and distributor are permitted to enter the EU.¹⁴³ Any item that is infringing or has any irregularity results in an immediate refusal of endorsement of certification, which then notifies the Commission through TRACES.¹⁴⁴ Once a certificate is issued by a certifier and endorsed by a control body, access is granted.¹⁴⁵

134. *Id.*

135. *Id.*

136. *Id.* art. 13(2).

137. Specifically, the ability of control bodies to obtain information regarding the movement of organic goods allows for faster administrative procedures and flow of products. TRACES, *supra* note 20.

138. *Id.*

139. *Id.*

140. Commission Regulation 16/1842, art. 7, 2016 O.J. (L 282).

141. *Id.* art. 13.

142. *Id.*

143. *Id.*

144. *Id.* art. 15.

145. *Id.* art. 13.

Each item used in organically labeled products must have verification by a control body of each distributor.¹⁴⁶

More than thirty thousand users have joined TRACES since its implementation, connecting eighty-six countries worldwide.¹⁴⁷ The success of this multilingual management tool is attributed to its easy accessibility, around the clock availability, and general reliability.¹⁴⁸ Although the system is relatively new, it has allowed for the EU to capture comprehensive information on organic trade flow and gain a better understanding of organics consumption globally.¹⁴⁹ Other countries have followed suit in implementing pilot TRACES, including South Africa, Costa Rica, and Australia, among others.¹⁵⁰

III. THE US ORGANICS PROGRAM

Similar to the EU, the US has gone through many stages of development in shaping the way in which it enforces organics procedures and compliance requirements.¹⁵¹ While the US began regulating organic enforcement nationally prior to the EU,¹⁵² it has been slower in updating and implementing procedures to improve the enforcement mechanism that ensures only qualifying organic products are sold within the US mar-

146. *Id.*

147. TRACES, *supra* note 20.

148. *Id.*

149. *Id.*

150. Other countries that have implemented TRACES include: Andorra, Bosnia-Herzegovina, Faeroe Islands, Kosovom Moldavia, Saint-Marin, Serbia, the former Yugoslav Republic of Macedonia (FYROM), Albania, Algeria, Cap-Verde, Ivory Coast, Kenya, Madagascar, Morocco, Maurice, Mauritania, Uganda, Senegal, the Seychelles, Tanzania, Tunisia, El Salvador, Ecuador, Greenland, Guatemala, Honduras, the Falklands, Mexico, Nicaragua, Panama, Peru, Saint-Pierre and Miquelon, Uruguay, Indonesia, Israel, Myanmar, Maldives, Philippines, Taiwan, Turkey, Vietnam, Thailand, Bangladesh, Singapore, Solomon Islands, New Caledonia, New Zealand, Papua New Guinea, French Polynesia, and the Republic of Fiji. Didier Carton, *TRACES Control and Expert System (TRACES) Newsletter*, EC HEALTH AND FOOD SAFETY, EU, May 2017, https://ec.europa.eu/newsroom/sante/newsletter-specific-archive-issue.cfm?newsletter_service_id=450&newsletter_issue_id=3672&pdf=true&fullDate=&lang=en. [hereinafter TRACES Newsletter].

151. *See generally* 7 U.S.C. §§ 6501–6522; Organic Foods Production Act Regulations, 7 C.F.R. § 205 (2000).

152. 7 U.S.C. §§ 6501-6522; *see generally* Commission Regulation 2092/91, 1991, O.J. (L 198).

ket.¹⁵³ Since the 1990 enactment of the OFPA, the NOP has created the guidelines for organic regulation.¹⁵⁴ The 2017 audit of the organics enforcement program blatantly exposed that the organics procedures required under the OFPA were not being followed.¹⁵⁵ In 2018, the US House of Representatives and Senate discussed negotiations for amendments to the US Farm Bill.¹⁵⁶ Proposed changes to the US Farm Bill included implementing more stringent organics standards, such as employing an electronic certification standard, but omitted specific reference to what the electronic system would entail.¹⁵⁷ The USDA launched the new Electronic Trade Document Exchange System (eTDE)¹⁵⁸ in October 2018 in order to conform to foreign certification requirements for exported food.¹⁵⁹

A. Pre-Audit United States Organics Regulations

When the OFPA was initiated in 1990, the three main goals of the Act were to: (1) create national criteria for organics agricultural products in regards to their marketing standards, (2) establish consumer confidence in reliable standards, and (3) aid the process of interstate commerce in regards to organic produce.¹⁶⁰ The USDA, under the OFPA, defined “organic”¹⁶¹ as food or agricultural products that promote ecological stability and preserve biodiversity, while preserving or enriching the

153. Compare H.R. 10104, 10105, 2122A with Commission Regulation 16/1842, 2016 O.J. (L 282).

154. USDA, NATIONAL ORGANICS PROGRAM (2016), <https://www.ams.usda.gov/sites/default/files/media/TheNationalOrganicProgramNov2016.pdf> [hereinafter USDA NOP].

155. See generally US Audit, *supra* note 7.

156. Summary: H.R.2 — 115th Congress (2017-2018), CONGRESS <https://www.congress.gov/bill/115th-congress/house-bill/2> (last visited Jan. 21, 2020) [hereinafter HR2 Summary].

157. H.R. 10104.

158. “The eTrade Document Exchange (eTDE) System supports the trade of US agricultural commodities domestically and internationally. This system makes trade documents, including official certificates, available via the internet to facilitate foreign and domestic trade of US agricultural products.” *Welcome to the Electronic Trade Document Exchange System (eTDE)*, USDA (Mar. 9, 2018), <https://www.etde.usda.gov/etde/>.

159. *Electronic Trade Document Exchange (eTDE) Organic Module*, USDA: AMS (2018), <https://www.ams.usda.gov/sites/default/files/media/eTDEPublic.pdf>. [hereinafter eTDE Organic Module].

160. US Audit, *supra* note 7, at 1.

161. USDA NOP, *supra* note 154.

soil or water, without using synthetic fertilizers, sewage sludge, irradiation or genetic engineering.¹⁶² Initially, the OFPA attempted to use states' organics standards to craft an overarching regulation that would create uniformity or harmonization across the country, similar to what is needed today on the international scale.¹⁶³ The three instruments that the OFPA was intended to ensure were certification, authentication, and labeling of organic products.¹⁶⁴

The US certification process is similar to that of the EU in that products can be certified through three different methods, including an NOP accredited certifying agent, an equivalency agreement, or a recognized agreement.¹⁶⁵ Likewise, the US relies on private certifiers for a majority of its certification.¹⁶⁶ The OFPA exempts small farmers from the certification process if their annual gross organics sales are less than \$5,000.¹⁶⁷ For farms to obtain the USDA organic label, the certification process is broken down into five steps.¹⁶⁸ First, the farm must adopt the organic practices identified by the USDA and submit an application of compliance to an accredited certifying agent.¹⁶⁹ Next, the certifying agent will evaluate the submission, which is followed by an on-site visit to the farm.¹⁷⁰ Then, the certifying agent will determine whether the application and

162. *Id.*

163. Gholkar, *supra* note 28, at 2.

164. *Id.*

165. The Audit defined these methods as follows:

Certifying agents are entities NOP accredits for the purpose of certifying a farm or handling operation as a certified organic farm or handling operation in accordance with OFPA. An equivalency arrangement is used for foreign countries whose organic standards are at least equivalent to NOP standards. A recognition agreement is used for foreign countries that do not have organic standards in place or whose organic standards are not equivalent to NOP standards.

US Audit, *supra* note 7, at 1 n. 4–6.

166. *Id.*

167. 7 U.S.C.A. § 6505(d) (West, Westlaw through Pub. L. No.101-624).

168. Miles McEvoy, *Organics 101: Five Steps to Organic Certification*, USDA (Feb. 21, 2017), <https://www.usda.gov/media/blog/2012/10/10/organic-101-five-steps-organic-certification>.

169. *Id.*

170. *Id.*

farm are in full compliance with USDA requirements.¹⁷¹ Finally, the certifying agent will issue the organic certification.¹⁷² When a farm is found to be selling produce with the USDA organic label but is not complying with organic requirements, it is in direct violation of 7 C.F.R. §205.¹⁷³ In such an instance, the USDA can revoke certification, as well as impose penalties.¹⁷⁴

For organic products that are shipped from foreign countries, the process is in flux regarding certification procedure and requirements.¹⁷⁵ For a foreign organic product to enter the US market, it must be certified through either the USDA organic regulation or an authorized international standard.¹⁷⁶ Upon importation, the product must also comply with import requirements set by the US Customs and Border Protection (CBP).¹⁷⁷ CBP then evaluates the imports for labeling, import codes, grading, and health inspection, as well as further inspections for meats, poultry, and egg products.¹⁷⁸ If during the health inspection CBP detects any disease or pests, the shipment is immediately quarantined and the USDA's Animal and Plant Health Inspection Service (APHIS) submits an Emergency Action Notification form in order to report the detection.¹⁷⁹

The owner of the contaminated product is then notified of such detection and is given three options for what the CBP can do with the product.¹⁸⁰ The product can either be re-exported to the country from which it came or to a third country, destroyed, or treated to remove the disease or pest.¹⁸¹ The third option allows the product to still be sold within the US market after the

171. *Id.*

172. *Id.*

173. 7 C.F.R. § 205.102.

174. USDA, ORGANIC OVERSIGHT AND ENFORCEMENT: SUMMARY OF ACTIVITIES AND OVERVIEW ACTION PLAN 3 (2018), <https://www.ams.usda.gov/sites/default/files/media/ActionUpdatePlanEnforcement.pdf>.

175. H.R. 10104, 10105, 2122A

176. *Importing Organic Products into the U.S.*, USDA (Jan. 12, 2019), <https://www.ams.usda.gov/sites/default/files/media/Importing%20Organic%20Products%20Factsheet.pdf>.

177. *Id.*

178. *Id.*

179. US Audit, *supra* note 7, at 12.

180. *Id.*

181. *Id.*

issue has been eradicated,¹⁸² rendering this option preferable in most cases. The problem with this process, however, is that there are no procedures in place for fumigated products to lose their organic designation.¹⁸³ The products used by CBP to fumigate are not US organic compliant, meaning that the product should no longer be permitted for sale at a premium price as an organic on the US market.¹⁸⁴ This issue became apparent through the USDA's 2017 audit of the US organics program.¹⁸⁵

B. United States Department of Agriculture Audit of Organics Program

As was revealed in the USDA's September 2017 audit of the NOP,¹⁸⁶ enforcement of the USDA's organics standards and product compliance was extremely lacking with regard to imported produce.¹⁸⁷ The audit found three major issues concerning the enforcement of the NOP.¹⁸⁸ First, the AMS's transparency in determining equivalency for standards of imported organic produce had no methodology for disclosing such information.¹⁸⁹ Second, the AMS was unable to provide assurance that proper review of organic certification was occurring at US ports to guarantee the accurate labeling of organic products.¹⁹⁰ Finally, the AMS had no tracking system in place to ensure that produce that was fumigated at the ports lost its organic designation when sold within the US.¹⁹¹ The Assistant Inspector General (AIG) for the NOP Audit gave nine recommendations for the program to implement.¹⁹²

First, regarding transparency, the AIG recommended that, before issuing any further equivalency letters, the AMS needed to create and apply a procedure for documenting and disclosing

182. *Id.*

183. *Id.*

184. Organic Foods Production Act Regulations, 7 C.F.R. § 205.272 (2000); *see also* US Audit, *supra* note 7.

185. US Audit, *supra* note 7.

186. The NOP manages eighty agents and over 33,300 certified organic operations in and outside of the US. USDA NOP, *supra* note 154.

187. *See generally* US Audit, *supra* note 7.

188. *Id.*

189. *Id.* at 5.

190. *Id.* at 7.

191. Once fumigated, a fruit or vegetable can no longer be deemed organic. 7 C.F.R. § 205.272; *see also* US Audit, *supra* note 7, at 14.

192. US Audit, *supra* note 7, at 6–18.

all differences between foreign states' organics programs.¹⁹³ This would allow for a greater understanding of the differences between organics programs globally, as well as prepare CBP for what variations to expect between products.

For issues with verification, the AIG made three recommendations in order to enhance reliability. First, the AIG recommended that the AMS request aid from CBP and CBP officials to fund the review of NOP certificates from countries with equivalency agreements when products arrive at US ports of entry.¹⁹⁴ Second, the AIG suggested that the AMS request the CBP update its electronic system in order to inform CBP officials at the ports to foster greater knowledge about the requirements for reviewing NOP certificates and the appropriate procedures should there not be a valid certificate.¹⁹⁵ Finally, regarding documentation verification, it was recommended that the AMS develop an in-depth procedure regarding fraudulent certification and subsequent action after such a finding.¹⁹⁶

The AIG also made three recommendations for addressing products fumigated at ports, including AMS requesting that APHIS officials notify NOP officials when organic-labelled products are sprayed with substances that would cause the products to no longer be organic.¹⁹⁷ Next, the AIG recommended that the AMS request CBP update its electronic system to notify APHIS when a fumigation occurs and include a procedural plan that would prove such notification occurred.¹⁹⁸ The last recommendation regarding fumigation requested that the AMS create and implement a tracking system for the products that had been fumigated so that distributors could be made aware such fumigation had occurred.¹⁹⁹ These recommendations, including fumigation and notification procedures, were taken into account when drafting the 2018 Farm Bill, which passed through the US Congress in December 2018.²⁰⁰

193. *Id.* at 6.

194. *Id.* at 10.

195. *Id.*

196. *Id.* at 11.

197. *Id.* at 14.

198. *Id.*

199. *Id.*

200. H.R. 10104, 10105, 2122A

C. Proposed Changes to United States Organics Program

The first Farm Bill was enacted in 1938 as the Agriculture Adjustment Act, which heavily emphasized the protection of small farms, as well as general economic safeguards through the regulation of commodity crops.²⁰¹ The US Congress reassesses the Farm Bill every five to seven years in order to accommodate the changing needs of US farmers and general changes in the agricultural industry.²⁰² The past several iterations of the Bill that passed through Congress have been heavily influenced by environmental concerns, including changes to the regulatory scheme of the organics program.²⁰³ The 2018 Farm Bill was initially introduced in the House of Representatives in April 2018, but was not passed until June of that year, at which time it was sent to the Senate for approval.²⁰⁴ The Senate amended the House version, then sent it back to the House²⁰⁵ for approval.²⁰⁶ In the final draft, Congress attempted to address several agricultural and nutritional policies, including the Supplemental Nutrition Assistance Program (SNAP),²⁰⁷ modifying funding for conservation programs, among others.²⁰⁸

Through negotiations and consideration of the AIG's recommendations, the 2018 Farm Bill was able to include several remedies to the organics enforcement issue regarding foreign imports.²⁰⁹ Specifically, the Bill addresses ways to improve

201. Agricultural Adjustment Act, 7 U.S.C. §§ 1281–1393 (1938).

202. Devan A. McGranah et al., *A Historical Primer of the US Farm Bill: Management and Conservation Policy*, 68 J. SOIL & WATER CONSERVATION, n.3 (2013).

203. Erin Morrow, *Agri-Environmentalism: A Farm Bill For 2007*, 38 TEX. TECH L. REV. 345, 350 (2006).

204. HR2 Summary, *supra* note 156.

205. The 2014 Farm Bill expired in September of 2018, but in December of 2018, the House agreed to the further changes proposed by the Senate. JIM MONKE, RANDY ALISON AUSSENBERG & MEGAN STUBBS, CONGRESSIONAL RESEARCH SERVICE, EXPIRATION OF 2014 FARM BILL 1 (2018), <https://fas.org/sgp/crs/misc/R45341.pdf>.

206. HR2 Summary, *supra* note 156.

207. SNAP is a government-run program that provides economic benefits to millions of low-income people in order to combat domestic hunger. *Supplemental Nutrition Assistance Program (SNAP)*, USDA Food and Nutrition Services, <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap> (last visited Jan. 21, 2020). By working with state agencies, SNAP provides eligible families with nutritional assistance. *Id.*

208. HR2 Summary, *supra* note 156.

209. H.R. 10104.

NOP investigations,²¹⁰ transform the International Trade Technology System,²¹¹ establish a tracking system for fumigated produce,²¹² and regulate the National Organic Standards Board.²¹³ To improve NOP investigations, the 2018 Farm Bill allows the Secretary of the Department of Agriculture to access CBP data, permits AMS to require additional information from producers and handlers in high risk fraud areas, and requires annual report submissions for all domestic and foreign investigations and compliance.²¹⁴ Under Section 2122A and Section 10104, the Bill establishes the Organic Agricultural Product Imports Interagency Working Group, which is charged with the duty of verifying the authenticity of organic products, as well as tracking fumigated produce to ensure that it is not sold as organic once in the US market.²¹⁵ Certifying agents that are found to be contravening the 2018 Farm Bill's provisions may be suspended by the Secretary.²¹⁶ Further, the Bill provides an expedited procedure for determining the national list of approved and prohibited substances for organic farming and handling.²¹⁷

In order to address traceability issues, and in hopes of complying with the 2018 Farm Bill, the AMS introduced eTDE in October 2018 as a "new organic module" that allows for electronic certification of organics set to be exported.²¹⁸ Through this system, US organic producers can comply with foreign certification requirements electronically, which allows authorities in participating countries to obtain electronic export certificates.²¹⁹ This means foreign countries must transfer information from eTDE to their own systems in order to accept US exports.²²⁰ Only four countries currently participate in eTDE: Japan, Taiwan, South Korea, and Mexico.²²¹ These countries

210. *Id.*

211. *Id.*

212. Agriculture Improvement Act of 2018, H.R. 2, 115th Cong. § 2122A (2018).

213. H.R. 10105.

214. H.R. 2122A.

215. H.R. 10104; H.R. 2122A.

216. H.R. 10104.

217. *Id.*

218. eTDE Organic Module, *supra* note 159.

219. *Id.*

220. *Id.*

221. *Id.*

make up four of the top eight recipients of imported US organic products.²²² The participating countries for eTDE list does not include the top recipient of organic US products, Canada, which averaged over \$247 million in annual sales for the US, compared to the second largest from Mexico at only \$134 million annually.²²³ These changes, while a step in the right direction, are not what the global community needs in regards to harmonization of global standards.

IV. HARMONIZATION OF ORGANICS PROGRAMS

The US should adopt the EU's organic imports program in order to create harmonization between the two leading organics consumers, which would allow for exporters to cut down on transaction costs and improve overall efficiency. Trade harmonization is a principle that both the EU and US subscribe to as members of the UN and as signatories to the General Agreement on Tariffs and Trade²²⁴ and SPS.²²⁵ The USDA should follow the EU's TRACES program in order to increase transparency, create procedure to capture organic import data, and, finally, to establish processes that ensure fumigated products sprayed with non-organic substances are no longer sold as organic. This would be more beneficial due to the superiority of the EU program and the fact that it has been functioning much longer than the newly introduced eTDE program in the US. Finally, a bilateral adoption of TRACES would be more efficient than a multilateral agreement, which would establish an international electronics system, as negotiations for such efforts are complicated and take years to institutionalize.

On the global scale, harmonization²²⁶ and internationally accepted criteria for organics are important to the trade law system in order to expedite trade. As previously discussed, international organizations, such as the WHO, cannot fix enforce-

222. The top eight recipients of US organic imports between 2011 and 2016 included Canada, Mexico, Japan, Taiwan, Australia, Hong Kong, South Korea, and United Arab Emirates. IRYNA DEMKO ET AL., U.S. ORGANIC TRADE DATA: 2011 TO 2016 11 (Organic Trade Ass'n, 2017), https://ota.com/sites/default/files/indexed_files/OTATradeReport_10-30-2017.pdf.

223. *Id.*

224. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

225. SPS Agreement, *supra* note 15.

226. *Id.* annex A, ¶ 2.

ment issues for organic importing countries because they are advisory in nature and lack any functional power to require compliance.²²⁷ While organic compliance is not an issue of life or death, it is important for the stability of the food market and for the producers who are undertaking the onerous effort of growing safe and arguably superior foods. Since international organizations have no control over enforcement, and because the importance is mostly seen by developed countries, it is up to the US and the EU to put in place structures that will facilitate the greatest ease of compliance. If the US were to unilaterally adopt the EU's program, specifically TRACES for tracking organic produce globally, it would substantially benefit food producers by creating easier entry, less bureaucracy, and less expenses, all of which would improve the competitiveness of the market, as was seen when the EU and US agreed to recognize each other's organics as equivalent in 2012.²²⁸ Since the US is already fixing the compliance of organic issues within the NOP, then as leaders in the organic market, the US should focus on helping prevent other countries from facing future issues within their organics programs. The US government's actions in the 2018 Farm Bill and subsequent creation of eTDE demonstrate its desire to remedy organic import issues, but it is approaching the issue with an "America first"²²⁹ attitude. If the US were to approach the organics market with a global mindset, it could be beneficial for future producers and consumers in the US by strengthening the competitiveness of this sector of trade.

The EU program's superiority is largely attributed to it being implemented on an international scale longer than other programs, as well as its ease of use. Through this larger scale of implementation, the EU has had a strong influence on food and dietary practices, thus further informing the globalization of food commerce.²³⁰ As a result, the EU may have ultimately in-

227. Burke, *supra* note 66, at 199.

228. USDA Press Release, *supra* note 55.

229. "America first" is the idea of putting the national interests of the US and all Americans before the common interests of other countries or the international community. Jesse Byrnes, *Trump aide: 'America First' doesn't mean 'America Alone'*, HILL (July 09, 2017, 7:00 AM), <https://thehill.com/blogs/blog-briefing-room/news/341144-trump-aide-america-first-doesnt-mean-america-alone>.

230. Echols, *supra* note 5, at 526.

fluenced the US. For example, the US was quick to implement the practice of using pesticides and GMOs in order to meet the demand of consumers, while the EU was more committed to using “natural” methods;²³¹ however, the US is now attempting to follow a “natural” method,²³² similar to that seen in the EU. The EU’s longer commitment to organic agriculture is demonstrable in its faster response to fixing its compliance program when issues arose, even though its program started later than the US NOP.

As previously stated, more countries are using TRACES than ever before,²³³ especially compared to the amount of countries that have agreed to use eTDE.²³⁴ The US can use the size of its domestic markets to extend standards into foreign countries. By adopting TRACES, the amount of countries the US would need to extend to would be less than attempting to gain support for eTDE. Generally, the US has been more eager to use new technologies, as it is seen as a way of supporting business innovation and a flexible regulatory system.²³⁵ With an organic community in the US that is more supportive of new regulatory systems and advancements in technology, implementing the EU program would likely be easier than requiring each member state of the EU to agree to adopt eTDE.

If the US were to unilaterally adopt the EU model, it would be a more effective route for ensuring compliance rather than creating a multilateral agreement between the largest consumers and exporters of organics, which would take years to complete and would cost each country greatly. In order to create such a multilateral agreement, the countries would be required to go through negotiations that are often “slow, cumbersome, expensive, uncoordinated and uncertain.”²³⁶ Further, when multilateral agreements are reached, countries with higher standards will often lower those standards in an effort to com-

231. *Id.*

232. *Id.*

233. TRACES Newsletter, *supra* note 145.

234. eTDE Organic Module, *supra* note 159.

235. Echols, *supra* note 5, at 526.

236. Bartlett P. Miller, *The Effect of the GATT and the NAFTA on Pesticide Regulations: A Hard Look at Harmonization*, 6 *Colo. J. INT'L ENVTL. L. & POL'Y* 201, 215 (1995); Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 *AM. J. INT'L L.* 259, 259 (1992).

promise,²³⁷ which is detrimental to organics programs. For example, under the Codex, the standard for pesticide allowance is greatly below many countries' national standards, such that consumers in those countries face a higher risk of their state lowering its pesticide standards in order to avoid trade issues.²³⁸ Additionally, the negotiations for such an agreement can be sensitive, as they are inclined to be swayed by cultural practices, politics, the types of organic markets, and the geography of the negotiating countries.²³⁹ By the US implementing the same program as the EU, negotiations between countries attempting to create equivalency agreements with either the EU or the US would be more streamlined and less likely to be swayed by the sensitive topics that could harm negotiations. When dealing with a program that is well-established and known to the organic trade community, there will be less room for discussion as to what changes need to occur for products to be able to enter a country. Sensitive subjects will not need to be discussed at length if countries use the precedents or early negotiations that allowed for entrance under TRACES.

CONCLUSION

While both the EU and US have attempted to address the issues revolving around organic compliance with regard to imports and exports, these concerns are still prevalent globally. This is largely due to the fact that such compliance issues were not formally addressed until the EU audit in 2012 or the US audit in 2017. The EU's strategy to merge organics traceability into the already existing TRACES program is the proper path in correcting compliance concerns. The fact that the US gave little deference to the EU's program in its 2018 Farm Bill and the creation of eTDE will lead to issues down the road for countries participating in organic trade, such as those associated with negotiations and determining what standard outside states will implement. While it could be argued that the EU's program cannot be adopted by the US so seamlessly, or that a multilateral agreement would be a good solution due to its stability, a unilateral adoption is the best option for the global or-

237. Miller, *supra* note 237.

238. *Id.*

239. US Audit, *supra* note 7, at 5.

ganic's markets because it will best harmonize the programs in an efficient manner.

The EU and US have followed similar paths in regard to the creation, certification, and regulation of national organics programs that lacked oversight and enforcement. Rather than further traversing the nuanced issues of organics in a parallel fashion, the US should adopt the EU program in order to create greater harmonization globally, thus enhancing the traceability of organics as the products make their way around the globe.

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