

## Grocery Store Activism: A WTO Compliant Means to Incentivize Social Responsibility

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## INTRODUCTION

In a grocery store in an average American neighborhood, a chocolate-loving consumer contemplates two substantially identical candy bars. The hungry shopper has no particular brand loyalty, and both sweets are of a comparable price. Before proceeding to the checkout line, the consumer spots a seal on the wrapper of one of the candy bars, indicating that the chocolate has been certified by the U.S. government as having been produced in a socially responsible manner. This seal, if credible and easily recognizable, adds a new dimension to the consumer's choice by allowing her to make a decision based on information that goes beyond nutrition, ingredients, taste, or any other properties associated with the candy bar itself. Instead, the consumer is empowered to make a choice based on how the candy bar was produced. As a consequence of this information, the consumer can elect to use her buying power effectively to cast a vote in favor of socially responsible production by giving the certified chocolate a competitive edge.<sup>1</sup>

On the other side of the globe, in West Africa, a child works long hours harvesting cocoa beans, one of an estimated twelve thousand children trafficked for this purpose in Cote d'Ivoire alone.<sup>2</sup> Approximately forty percent of world cocoa production originates in Cote d'Ivoire,<sup>3</sup> where farmers' lack of control over the market price forces them to keep production prices as low as possible. Stories of children being trafficked to work in "horrific" conditions in the West African cocoa fields were brought to the public's attention after a BBC documentary on the topic was aired in 2000,<sup>4</sup> yet unwitting consumers in the United States are still buying chocolate produced by trafficked children. Pressure from the public and from Congress shamed the chocolate industry into agreeing to a comprehensive protocol<sup>5</sup> aimed at creating a

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1. The use of the term "vote" to describe consumer choice in favor of goods produced in a particular way was coined by Douglas Kysar. See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 527 (2004).

2. TIAJI SALAAM-BLYTHER ET AL., CHILD LABOR IN WEST AFRICAN COCOA PRODUCTION: ISSUES AND U.S. POLICY 9 (Cong. Research Serv., Order Code RL 32990, July 13, 2005), available at <http://digital.library.unt.edu/govdocs/crs/data/2005/meta-crs-9107.tkl>.

3. *Id.* at 2.

4. See Liz Blunt, *The Bitter Taste of Slavery*, BBC NEWS, Sept. 28, 2000, at <http://news.bbc.co.uk/2/hi/africa/946952.stm>.

5. Protocol for the Growing and Processing of Cocoa Beans and Their Derivative Products in a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, Sept. 19, 2001, available at <http://www.cocoainitiative.org/images/stories/pdf/harkin%20engel%20protocol.pdf> [hereinafter

certification process for a “no child slavery” label, but stalled negotiations have left chocolate unlabeled and consumers uninformed.<sup>6</sup> Further, consumers are forced to rely on the representations of the industry rather than having a credible and enforceable framework in place to ensure the reliability of socially responsible product labels.

The United States has pursued a number of trade-related measures to tackle human rights concerns globally, but human rights activists have often overlooked state-run, market-based policies. Many states are unable to pursue human rights policies that might limit market access because of the commitments they have made to the World Trade Organization (WTO).<sup>7</sup> As a consequence, there have been relatively few formal government programs linking trade and human rights. At the same time, because trade commitments are often seen as conflicting with human rights concerns, many social reformers view the international trade regime as the enemy.<sup>8</sup>

This Note argues that trade and human rights can reinforce one another rather than result in a zero-sum game. It is possible to use the power of consumer choice to achieve human rights goals within the confines set by the international trade regime. Although some private organizations have attempted to harness the power of consumer choice through social labeling programs, a more coherent and consistent approach to social labeling—one not simply tolerated by national governments, but sponsored by them—is required to expand on the early success of labeling. States retain the ability to take measures that do not directly restrict the flow of trade and that allow consumers to express

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Harkin-Engel Protocol].

6. For more information on where the chocolate industry has fallen short in this regard, see INT’L LABOR RIGHTS FORUM, REPORT ON COCOA AND FORCED CHILD LABOR (2006), available at <http://www.laborrights.org/files/COCOA06Critique.pdf>.

7. For example, a country that wanted to create a policy that encouraged equal educational opportunities for women worldwide in accordance with Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women may wish to refuse to import goods from countries that do not have a certain percentage of women enrolled in secondary school. Such a policy would clearly run afoul of the implementing state’s WTO obligation to extend most-favored nation status to all other member states. See Convention on the Elimination of All Forms of Discrimination against Women art. 10, Dec. 18, 1979, 1249 U.N.T.S. 13.

8. For example, the 1999 WTO ministerial meeting in Seattle was hampered by street protests, where many of the protestors identified themselves as pro-labor, anti-capitalist, anarchists, or environmentalists. For a brief description of the major players in the Seattle protests, see Paul de Armond, *Netwar in the Emerald City: WTO Protest Strategy and Tactics*, in NETWORKS AND NETWARS: THE FUTURE OF TERROR, CRIME, AND MILITANCY 203–08 (John Arquilla & David Ronfeldt eds., 2001).

their preferences for products that are produced in a socially responsible manner.

Because the sheer size of the U.S. market creates a situation where consumer preferences can have a global impact, the federal government should take a more active stance by creating and administering an appropriate system of labels to communicate the human rights costs of product production, without violating the United States' commitments under the WTO. In offering a new proposal for a voluntary, government-run system of human rights labels,<sup>9</sup> this Note has two main goals: (1) provide several practical and normative advantages over the current mishmash of private labels on the market and (2) provide a comprehensive analysis of this proposal using existing WTO jurisprudence.<sup>10</sup> This approach is an essential step towards addressing pervasive social problems while working within the constraints that are necessary for a predictable and robust trade regime.

This Note proceeds by first taking stock of the tensions between the international trade and human rights systems and demonstrating that they are not inherently at odds. As Part I demonstrates, the lack of integration between these regimes necessitates creative solutions that allow human rights concerns to be valued appropriately without creating further barriers to trade. A solution—such as the proposed labeling scheme—must allow these regimes to reinforce one another. To illus-

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9. For the purposes of this Note, the term “human rights” is being used in its broadest sense to encompass everything from human trafficking, to labor rights, to social and political rights. Because this Note does not intend to define the contours of what rights should be reflected in labels, “human rights” is used as a synonym for “socially responsible” but is distinguished from those labels that are intended to protect the environment or the consumer.

10. In light of these two goals, this Note does not intend to answer all of the larger administrative questions about how such a labeling scheme should be developed, what its focus should be, and what criteria the labels should be based on, but rather leaves such determinations to the appropriate stakeholders through the agency regulatory process. Further, this Note does not seek to identify the industries and products that are most likely to be responsive to a labeling scheme of this type, as such determinations are best left to economists and industry specialists, and it does not engage in the larger debate on whether practices such as “sweatshops” are ultimately a net positive or negative for the people laboring in such conditions. For more information on the debate surrounding labor conditions in the developing world and whether eliminating practices such as sweatshops is beneficial or detrimental to developing country workers, see Denis G. Arnold & Laura P. Hartman, *Worker Rights and Low Wage Industrialization: How to Avoid Sweatshops*, 28 HUM. RTS. Q. 676 (2006); Peter Dorman, *International Labor Standards: The Economic Context*, 11 MICH. ST. U.-DETROIT C.L. J. INT'L L. 125 (2002); and Nicolas Kristof & Sheryl WuDunn, *Two Cheers for Sweatshops*, in BEYOND INTEGRITY: A JUDEO-CHRISTIAN APPROACH TO BUSINESS ETHICS 239 (Scott B. Rae & Kenman L. Wong eds., 2d ed. 2004). This Note does advocate, however, targeting responsive products and focusing on the most egregious abuses associated with production as a starting point.

trate the contours of how labeling works and the successes of labeling, Part II offers a brief historical sketch of labels and takes stock of the current “labeling landscape.” The history of labeling offers a starting point for a description of what a government-sponsored labeling scheme should look like and what its primary goals should be. The snapshot of the labeling scheme offered in Part II is far from complete, given that eventually, the political process must articulate the appropriate balance between opposing interests. Yet, a basic evaluation from a normative perspective shows a government scheme to be superior to the labeling options currently on the market.

After offering the basic proposal and reasons behind it, the bulk of this Note is dedicated to a comprehensive legal analysis of a voluntary, government-run social labeling scheme under the international trade regime. Part III explains how, if the labeling scheme were scrutinized by a WTO dispute settlement panel, the labels might be evaluated for compliance with the Agreement on Technical Barriers to Trade (TBT Agreement) and/or the General Agreement on Tariffs and Trade (GATT). Part III takes stock of the legal tests articulated by WTO panels and the Appellate Body and applies these tests to the case of voluntary government labels, ultimately concluding that a panel would be unlikely to find a violation. Further, the United States would also have the option of raising the equivalent of “affirmative defenses” by invoking the exceptions clause of the GATT. Article XX offers additional legal support for the proposed labeling scheme in the unlikely event that an initial violation would be found. This legal analysis demonstrates several strong arguments for exempting this type of labeling scheme. Part III also highlights the trade law provisions under which the scheme is the most vulnerable, but ultimately concludes that the proposed labeling scheme is likely to survive any challenge at the WTO.

This Note concludes by recognizing some of the major obstacles and criticisms that a government-instituted labeling scheme geared towards human rights would face and offering ways in which the scheme can avoid potential pitfalls. While it is inevitable that difficulties will be encountered in the implementation of labeling regulations and the ultimate likelihood of relative success is hard to predict, the value derived from allowing consumer access to credible information far outweighs the inconvenience of developing an appropriate and responsive certification system. Significantly, this proposal seeks to bridge the divide between two growing areas of international law in a way that is both logical and legal.

## I. DEALING WITH THE CONFLICT BETWEEN TRADE AND HUMAN RIGHTS

One of the most significant challenges facing the international community is maintaining a fair and predictable international trade regime, while at the same time making progress towards addressing global social ills. Throughout history, states have resorted to economic carrots and sticks to encourage cooperation and to coerce one another into behaving in a certain way.<sup>11</sup> Customary international law does not prohibit a state from utilizing international trade mechanisms to encourage or coerce compliance with human rights norms.<sup>12</sup> Thus a linkage between human rights and trade seems intuitive and perhaps necessary to achieve progress on human rights goals because of the lack of effective enforcement mechanisms within international human rights treaties. Historically, states have used a variety of strategies to encourage adherence to human rights norms, both unilaterally and under the auspices of international and regional organizations.<sup>13</sup> The strict rules associated with membership in the WTO have, however, limited states' ability to take action that impedes international trade, and even to encourage progress on internationally recognized human rights issues.<sup>14</sup>

### A. *Trade and Human Rights: Inherently at Odds?*

Both the modern multilateral trade regime and the international human rights movement are products of post-World War II phenomena.<sup>15</sup>

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11. See generally David Montgomery, *Labor Rights and Human Rights: A Historical Perspective*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 13 (Lance A. Compa & Steven F. Diamond eds., 1996) (tracing the international aspects of the labor rights movement in the United States).

12. Sarah H. Cleveland, *Human Rights Sanctions and the World Trade Organisation*, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 199, 208–61 (Francesco Francioni ed., 2001).

13. *Id.* at 200–01 (discussing the variety of mechanisms available to states to fill the hole left by the absence of effective international remedies for human rights violations).

14. For example, the GATT prohibits discrimination against any member state and does not allow a state to take action to discriminate against imported products relative to domestic products. If a WTO member enacted an embargo against a particular product from another member state because it wanted to punish the other member for perceived human rights violations, this would be a violation of the WTO rules. States that are found to be in violation of a WTO agreement by the WTO's dispute settlement body are subject to countermeasures. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. XXII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

15. See ROBERT HOWSE & MAKAU MUTUA, RIGHTS & DEMOCRACY, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION 6

Both regimes limit the policy options available to governments—the trade regime by clearly articulating a set of global trade rules and the international human rights regime by limiting governments' actions with regard to individuals.<sup>16</sup> Because these regimes have developed along parallel, but not necessarily consistent paths, however, there are points of considerable tension. Globalization has created new opportunities for human rights abuses to occur. Concerns about the “race to the bottom” have permeated discussions of globalization, as the pressure to keep production prices low has impacted producers' willingness to expend more resources by providing adequate protections for their workers. Even conceptually, it is clear that a choice must be made between promoting completely free trade that affords all like products the same treatment regardless of how they are produced and using trade to improve the human rights situations of workers on the ground.<sup>17</sup> At the same time, increasing trade may inherently enhance human rights by improving human welfare and stimulating a stronger middle class that will demand political freedoms.<sup>18</sup>

The WTO's settlement body that adjudicates trade disputes is responsible for much of the perceived tension between trade and human rights or trade and the environment.<sup>19</sup> Many policies intended to improve areas

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(2000), available at <http://lic.law.ufl.edu/~hernandez/Trade/Howse.pdf>. The WTO grew out of the GATT. The original twenty-three parties to the GATT intended to draft a charter for an International Trade Organization, which would be a specialized agency of the United Nations to coordinate international rules on trade, employment, commodities, restrictive business practices, international investment, and trade in services. This proposal failed, however, leaving the GATT with “virtually no institutional framework,” and leaving the international community without agreements in the associated areas listed above and without mechanisms to deal with related issues such as labor rights and environmental degradation. *Id.* The GATT was modernized through voluntary membership and subsequent agreements through a series of trade rounds. World Trade Organization, Understanding the WTO—The GATT Years: From Havana to Marrakesh, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (last visited Nov. 13, 2008).

16. Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies*, 24 HUM. RTS. Q. 1, 4 (2002).

17. The definition of “like product” within the meaning of Articles I(1) and III(4) of the GATT will be analyzed in Part III.C.1–2.

18. SUSAN ARIEL AARONSON & JAMIE M. ZIMMERMAN, *TRADE IMBALANCE: THE STRUGGLE TO WEIGH HUMAN RIGHTS CONCERNS IN TRADE POLICYMAKING* 6 (2008) (“Many policymakers and scholars of trade . . . claim that trade stimulates an export-oriented middle class, which will use its increasing economic clout to demand political freedoms and to press for openness and good governance.”).

19. Because GATT and WTO dispute settlement panels and the WTO Appellate Body have refused to stray far from the exact letter of the WTO treaties, the dispute settlement mechanisms have struck down measures intended to address other social ills as being inconsistent with WTO trade rules. *See, e.g.*, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products (U.S.—Shrimp I)*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter U.S.—Shrimp

such as human rights or environmental conservation have been abandoned to avoid economic retaliation sanctioned by the WTO because the WTO dispute settlement creates the potential for countermeasures against states that lose in trade disputes. This is especially true for states with smaller economies that are more likely to be damaged irreparably by countermeasures, but even the United States has been ruled against several times in the WTO.<sup>20</sup> The combination of a forum to negotiate trade concerns and the enforceability of dispute settlement decisions has contributed to the perception that trade is often elevated above human rights concerns.<sup>21</sup> Numerous other tensions between the two regimes have been identified by scholars, ranging from their different fundamental aims to asymmetry between the rights and obligations of countries and corporations.<sup>22</sup> Because dispute settlement is costly and attracts international attention, states often want to avoid it, which creates a chilling effect on the formation and implementation of policies that may otherwise benefit international human rights.

Because the WTO system has significantly limited the ability of states to link noncommercial considerations to trade, the international trade and international human rights regimes have developed in isolation in many ways.<sup>23</sup> Given the strong incentive offered by international trade and the important deterrent that trade barriers traditionally have provided, human rights activists have found themselves frustrated at the

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I Appellate Body Report]; Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline (U.S.—Gasoline)*, WT/DS2/AB/R, at 21 (Apr. 29, 1996) [hereinafter U.S.—Gasoline Appellate Body Report]; Report of the Panel, *United States—Restrictions on Imports of Tuna (U.S.—Tuna II)* (June 16, 1994), GATT/DS29/R (unadopted) [hereinafter U.S.—Tuna II Report of the Panel]; Report of the Panel, *United States—Restrictions on Imports of Tuna (U.S.—Tuna I)* ¶ 155 (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) (unadopted) [hereinafter U.S.—Tuna I Report of the Panel].

20. See, e.g., Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (U.S.—Gambling)*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter U.S.—Gambling Appellate Body Report]; Appellate Body Report, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005); U.S.—Shrimp I Appellate Body Report, *supra* note 19; U.S.—Tuna I Report of the Panel, *supra* note 19; Panel Report, *United States—Section 337 of the Tariff Act of 1930 (U.S.—Section 337)*, (Jan 16, 1989), GATT B.I.S.D. (36th Supp.) (1989) [hereinafter U.S.—Section 337 Panel Report]. See generally Roman Grynberg & Jan Ives Remy, *Small Vulnerable Economy Issues and the WTO*, in *WTO AT THE MARGINS: SMALL STATES AND THE MULTILATERAL TRADING SYSTEM* 281 (Roman Grynberg ed., 2006) (discussing the particular difficulties that small economies face within the WTO system).

21. AARONSON & ZIMMERMAN, *supra* note 18, at 3.

22. For a larger discussion and a graphical layout of these perceived incompatibilities, see Dommen, *supra* note 16, at 14–15.

23. For a table listing the perceived incompatibilities between international human rights and trade law, see *id.*

inability of states to use trade to pressure other states into improving human rights conditions.<sup>24</sup> Further, such advocates have argued that the current state of international trade law actually inhibits national policy-makers' ability to live up to their commitments under international human rights law at home, as they are unable to take any measures that may serve as a barrier to trade.<sup>25</sup> Countries faced with legal tension at the intersection of human rights law and trade law will often behave differently from one another. Because of the existence of tradeoffs, an inherent balancing act exists and states are forced to make a series of value judgments. The explicit limitations offered by each regime complicate what would otherwise be a decision within the sovereignty of a particular state.

The development of the GATT/WTO in relative isolation institutionally—the GATT had no associated international organization until the advent of the WTO—contributed to the lack of a coherent position within the WTO on how to integrate noneconomic concerns into the trade regime. The GATT treaty texts themselves, however, contain language that offers guidance and flexibility for such integration. For example, the text of Article XX demonstrates that the drafters recognized the interplay between nontrade public values, such as human rights, and international trade and made allowances for them within the text itself.<sup>26</sup> Article XX allows for general exceptions to the rules found in the rest of the agreement for reasons such as the defense of “public morals” or the protection of human life or health.<sup>27</sup> Further, the Agreement Establishing the WTO lists lofty goals beyond simply eliminating barriers to trade, such as encouraging sustainable development and increasing de-

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24. See Caroline Dommen, *Safeguarding the Legitimacy of the Multilateral Trading System: The Role of Human Rights Law*, in INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES 121, 125–30 (Frederick M. Abbott et al. eds., 2006).

25. Tatjana Eres, Note, *The Limits of GATT Article XX: A Back Door for Human Rights?*, 35 GEO. J. INT'L L. 597, 601 (2004) (“They [human rights advocates] contend that trade liberalization and other economic forces of globalization are weakening the international human rights regime through two mechanisms: a ‘race to the bottom’ and a constraint on domestic policy-making ability.”); see also Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 64 (2001) (“[T]he export of products produced under low standards results in unfair competition that negatively affects working conditions in countries with higher labor standards. This disparity results in a ‘race to the bottom’ and weakens the working conditions in previously ‘high standard’ countries.”).

26. HOWSE & MUTUA, *supra* note 15, at 10 (“[T]he actual text of the GATT reflects the recognition of supervening non-trade public values which were meant to prevail in the event of conflict with the free trade rules in the GATT.”).

27. General Agreement on Tariffs and Trade 1994 art. XX, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT].

veloping countries' access to the benefits of increased trade.<sup>28</sup> Article 103 of the UN Charter also makes the obligations of member states to the Charter superior to their obligations under other international agreements, leading some commentators to argue that a commitment to a universally recognized right should prevail over the GATT or other WTO agreements in the event of a conflict.<sup>29</sup>

Despite the perception that human rights and trade are at odds, states have found a few ways to link the two regimes in a logical way. For example, Congress has found some limited flexibility within international trade agreements to fight human rights and labor rights abuses by conditioning eligibility for preferential market access under the Generalized System of Preferences (GSP) on commitments from states to eliminate the worst forms of child labor and including labor rights components in U.S. free trade agreements.<sup>30</sup> Still, while scholars have proposed a variety of measures intended to increase interaction between trade and human rights,<sup>31</sup> the WTO still poses a significant bar to more active use of trade to enforce human rights norms.<sup>32</sup>

### *B. Labels Can Help Resolve this Tension and Incentivize Progress on Human Rights*

This Note proposes a new and innovative way for the U.S. government to take advantage of its market power to encourage compliance with internationally recognized human rights norms. The government can play an active role and determine what social goals it would like to prioritize, while avoiding conflict with any WTO rules. The proposed

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

29. U.N. Charter art. 103; HOWSE & MUTUA, *supra* note 15, at 12.

30. For a more comprehensive list of mechanisms Congress has used to combat child labor, see SALAAM-BLYTHER ET AL., *supra* note 2, at 15–22.

31. See, e.g., Susan Ariel Aaronson, *A Match Made in the Corporate and Public Interest: Marrying Voluntary CSR Initiatives and the WTO*, 41 J. WORLD TRADE 629 (2007) (promoting increased linkages of voluntary corporate social responsibility and the WTO); Daniel S. Ehrenberg, *From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 11, at 163 (arguing for a combination of the ILO and WTO with a single enforcement mechanism); Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621 (2002) (arguing for the enforcement of human rights through the WTO).

32. See generally Francesco Francioni, *Environment, Human Rights and the Limits of Free Trade*, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 12, at 1, 1–9 (identifying the sources of discontent with the WTO and the resulting questions about the legitimacy of the WTO decision making process).

labeling scheme will allow the federal government to be directly involved in decisions regarding what producer conduct should be rewarded within their market and what conduct should be discouraged. Because setting human rights priorities is largely a political decision, governments have an essential role to play in determining how labeling criteria should be developed and ultimately where lines should be drawn. Labels are also useful because they operate in the gray area where exploitative conduct taken by private sector actors is not directly beholden to international human rights law, since only state action is subject to the international human rights treaties.<sup>33</sup>

Labels offer an important way to allow trade to reinforce human rights norms, rather than undermine them. Such “human rights labels” would be modeled on the success of “eco-labels” used by the environmental movement to promote products that have been produced in a manner that is environmentally friendly. Like eco-labels, the impact of the proposed labels is market-based rather than “command and control” centered, where governments set exact regulations that products must meet in order to be sold. This makes a scheme less of a barrier to international trade because the government allows all products equal market access, regardless of how they are produced. As long as the labeling scheme is based (as much as possible) on internationally recognized human rights norms, it would not only be a difficult legal battle for a WTO member state to challenge the labels, but it would also be an incredibly unpopular political move. If successful, human rights labels could create a win-win situation for the United States.

## II. VOLUNTARY HUMAN RIGHTS LABELS: A PROPOSAL FOR GOVERNMENT INVOLVEMENT

In order to accomplish the goal of creating market-based incentives for improving human rights practices during production, it is important to take stock of the existing world of labels. Labels are not a new phenomenon, and there is value in considering the successes and failures of existing labeling schemes. Further, the government should develop hu-

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33. Most human rights treaties protect the rights of individuals against state action, because states agree to be bound by these conventions. A variety of approaches have been taken to hold the extraterritorial abuses of multinational corporations liable under U.S. law, such as using indirect liability under the Alien Torts Claims Act, 28 U.S.C. § 1350 (2000). For examples of cases in which this has been argued, see *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1234 (N.D. Cal. 2004); *In re South African Apartheid Litig.*, 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 884 (C.D. Cal. 1997).

man rights labels with a clear set of objectives in mind because of the difficult political realities associated with the substantive criteria for certification. Part II.A identifies three types of labeling schemes and highlights important features and examples of each and articulates the reasons why a voluntary scheme is most appropriate in the human rights context. Part II.B further articulates the underlying goals of such a scheme and how the voluntary label is likely to meet them. This Note contributes to the literature through both its proposal of a type of labeling scheme that has never existed in the United States and by articulating the relative advantages associated with such a scheme on a broad, normative level.

A. *Relative Strengths and Weaknesses of Three Categories of Labeling Schemes*

There are three possible types of labels that can be employed to provide information about the broader effects of a product to the consumer: mandatory labeling schemes, private labeling schemes, and voluntary labeling schemes.<sup>34</sup> There are notable examples of each type of labeling scheme, and each has different strengths and weaknesses. For the purposes of human rights labeling, a voluntary labeling scheme is the most appropriate option.

1. *Mandatory Labels: In the WTO Danger Zone and Impracticable*

A mandatory labeling scheme requires that all producers provide certain standard information about their products on the packaging. Mandatory labels are effective at communicating information, as all similar products are required to have the same information to allow consumers directly to compare products to one another.<sup>35</sup> For example, the Nutrition Labeling and Education Act of 1990 requires that food products for human consumption in the United States be labeled with a list of ingredients and a general nutrition label.<sup>36</sup>

In some cases, mandatory labeling schemes have been associated with an embargo—if the product at issue did not qualify for certification under a particular standard, it could not be sold in the certifying coun-

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34. Manoj Joshi, *Are Eco-Labels Consistent with World Trade Organization Agreements?*, 38 J. WORLD TRADE 69, 73 (2004). Note that the first two types of schemes are government run and the third is implemented by private actors.

35. See Steve Keane, *Can a Consumer's Right to Know Survive the WTO?: The Case of Food Labeling*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 291, 297 (2006).

36. 21 U.S.C. § 343 (2006). For more discussion, see Keane, *supra* note 35, at 297–99.

try's markets.<sup>37</sup> Only these types of mandatory schemes have thus far been challenged in front of GATT and WTO panels, since they clearly contain direct restrictions on trade.

It is difficult to predict how a mandatory label based on production information without an associated embargo would fare in front of a WTO panel. In the context of human rights labeling, it seems that a mandatory label would become a de facto barrier to trade for all producers who were unable or unwilling to provide the necessary information about the human costs of their production process to the U.S. government. The mandatory nature of the label would exclude products that did not provide this information from the market, giving rise to a much stronger claim of an infringement under WTO rules than the voluntary scheme being proposed. It is entirely possible that some producers are simply unable to provide enough information on their production processes because of complicated supply chains that span international borders.<sup>38</sup> Thus, a mandatory label not only runs the risk of being struck down by a WTO panel, but it may also prove impracticable.

## 2. *Private Labels: Legal but Lacking Consistency and Enforcement*

Because the U.S. government has not instituted any type of labeling scheme in the realm of human or labor rights, a number of private and industry-driven standards have arisen to provide consumers with production method information. The private sector has created voluntary codes of conduct and social labeling schemes to promote responsible business practices both domestically and abroad.<sup>39</sup> Many of these types of labels are familiar to consumers who purchase "fair trade" coffee or

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37. The labeling schemes that GATT/WTO panels have ruled against have all been this type of scheme. For example, the United States was ruled against for refusing to allow the sale of tuna fished with purse seine nets or the sale of shrimp that had been caught without the use of turtle excluder devices. *See* U.S.–Shrimp I Appellate Body Report, *supra* note 19; U.S.–Tuna II Report of the Panel, *supra* note 19; U.S.–Tuna I Report of the Panel, *supra* note 19. However, France was allowed to exclude products containing asbestos from its market under this type of mandatory scheme based on an Article XX exception. Appellate Body Report, *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products (EC–Asbestos)*, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter EC–Asbestos Appellate Body Report].

38. Onno Kuik, Comment, *Fair Trade and Ethical Labeling in the Clothing, Textile, and Footwear Sector: The Case of Blue Jeans*, 11 ILSA J. INT'L & COMP. L. 619, 623–24 (2005) (articulating the difficulties associated with labeling in the textile market because of issues such as complicated supply chains).

39. Sarah H. Cleveland, *Global Labor Rights and the Alien Torts Claims Act*, 76 TEX. L. REV. 1533, 1551 (1998) (book review).

“sweatshop-free” apparel. It is often difficult, however, for a consumer to tell whether these representations are the result of an independent evaluation or are simply a claim the manufacturer is making unilaterally. The sheer number of such labels adds to the confusion, and there is no clear definition for what constitutes “fair trade” or “sweatshop-free.”

Despite the inherent lack of legitimacy associated with private labeling, more than one hundred companies—mainly those that produce consumer goods—have adopted social codes with associated labels.<sup>40</sup> This indicates that there is consumer demand for products that are produced in a socially responsible way and that producers recognize this demand and are willing to increase transparency in and make adjustments to production practices in order to meet this demand. This is not a recent phenomenon—reformers have used labeling to mobilize public support for responsible business practices since the late nineteenth century with the “White Label Campaign,” a predecessor of today’s no-sweat labeling schemes.<sup>41</sup> Further, companies such as “No Sweat Apparel” were founded solely to meet the demand for socially responsible products and market only products made under “fair trade” conditions.<sup>42</sup>

Public opinion has played a major role in driving the demand for social labels and spurring corporations to take action to improve their human rights records. Both Nike and Wal-Mart’s Kathy Lee Gifford clothing line faced a media storm after exploitative labor conditions were discovered at their overseas production centers.<sup>43</sup> As a result, companies that produce consumer goods that are particularly vulnerable to consumer choice and public exposure of inappropriate labor conditions have taken action to avoid such negative attention.<sup>44</sup>

Not all corporate codes are created equal, however, and some have come under fire as being self-serving and as having ineffectual internal monitoring.<sup>45</sup> Other companies, such as Levi-Strauss, have developed praiseworthy initiatives that have elaborate structures for “auditing, evaluating, and enforcing its code terms.”<sup>46</sup> Some social responsibility minded companies have demonstrated their commitment to enforcing

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40. *See id.*

41. Michele Micheletti & Dietlind Stolle, *Mobilizing Consumers to Take Responsibility for Global Social Justice*, ANNALS AM. ACAD. POL. & SOC. SCI., May 2007, at 157, 162 (2007).

42. No Sweat, Changing an Industry, at <http://www.nosweatapparel.com/> (last visited Jan. 23, 2009).

43. Cleveland, *supra* note 39, at 1551.

44. Companies such as Levi-Strauss, Reebok, Gap, Nike, Sears, JCPenney, Wal-Mart, Home Depot, and Philips Van-Heusen are among the producers than have adopted such codes. *Id.*

45. Nike is a notable target of such accusations. *Id.*

46. *Id.*

these self-imposed codes by instituting appropriate reforms in cases of less serious code violations and eliminating contracts with suppliers with more serious violations where the stated expectations have not been met. In the absence of government guidelines for human rights labeling, both Nike and Levi-Strauss can put a similar “made in socially responsible conditions” label on their product, even though it seems relatively clear that Levi-Strauss is holding its suppliers to far more rigorous standards. This inequality creates an incentive for deception as companies seek to maintain a positive public image while continuing to compete to keep production costs low.<sup>47</sup>

Action has been taken at an industry-wide level as well, often with the support and encouragement of the U.S. government. For example, in 1996, President Bill Clinton helped establish the Apparel Industry Partnership—a group composed of industry representatives, unions, and groups dedicated to labor advocacy—for clothing and footwear industries in which sweatshop conditions were garnering a significant amount of public attention.<sup>48</sup> Members of Congress have also taken a stance to force the chocolate industry to make progress on the problem of child labor through the development an appropriate label.<sup>49</sup> The failure of the cocoa industry to meet the 2005 deadline for public certification standards, however, demonstrates the problem that many private schemes face as stakeholders on opposite sides of the debate deadlock and are unable to reach a mutually acceptable solution.<sup>50</sup>

As shown above, the U.S. government is willing to get involved to encourage and facilitate negotiations between stakeholders with the expected outcome of developing industry-wide standards that will result in consumer labels. It is not a far leap for the government to move from its current role as a facilitator/instigator of the negotiations into the role of the ultimate decision maker after receiving input from all stakeholders. Because a labeling scheme and the standards it endorses are ultimately

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47. It is noteworthy that false representations by manufacturers may be actionable under state law, giving individuals the ability to bring private attorney general actions against patently false public relations campaigns. See *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002). Such private actions could serve to strengthen private labeling schemes and increase their credibility with consumers by offering litigation as a deterrent. Those same actions, however, will do little to level the playing field between codes with lower standards and those that have more exacting requirements.

48. See Cleveland, *supra* note 39, at 1552.

49. Harkin-Engel Protocol, *supra* note 5.

50. See Press Release, Office of Senator Tom Harkin, Harkin, Engel, Congressional Leaders, Work to Eliminate Child Labor in Cocoa Industry (Oct. 30, 2007), at <http://harkin.senate.gov/pr/p.cfm?i=286485>.

political decisions, the government may be the most appropriate entity to unlock the types of deadlocks that have handicapped industry attempts to create labeling schemes based on human rights criteria, such as the Harkin-Engel negotiations in the cocoa industry.

### 3. *Voluntary Labels: Striking the Appropriate Balance*

Voluntary labels offer several advantages in the human rights context as a general matter. The best argument for voluntary labels instead of mandatory labels is that voluntary labels do not violate international trade law, as discussed in Part III below. Even from a practical standpoint, allowing producers to *choose* whether to seek certification for their production methods—when coupled with a carrot or a stick—provides an incentive for companies both to produce in a socially responsible manner and to provide appropriate documentation. Producers who cannot provide the requisite documentation simply do not get a label but are not otherwise penalized. Compared to a mandatory scheme, a voluntary scheme is less trade restrictive because unlabeled products are still eligible for commercial sale without restriction.

Currently, successful government-instituted voluntary labeling schemes exist in the environmental context in several Organisation of Economic Cooperation and Development (OECD) countries. Germany issued its first environmental label in 1978, and by the early 1990s its “Blue Angel” program consisted of over 3600 labeled products.<sup>51</sup> This trend extends beyond Germany—by the end of 2000 more than twenty-three OECD countries had created national eco-labeling programs.<sup>52</sup> Although there has been a significant amount of debate within the WTO Committee on Trade and Environment (CTE),<sup>53</sup> no challenge has been brought before the WTO’s dispute settlement mechanism over a voluntary labeling scheme.<sup>54</sup> Considering how widespread such labels are, it

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51. JAMES SALZMAN, ORG. FOR ECON. COOPERATION & DEV., ENVIRONMENTAL LABELLING IN OECD COUNTRIES 13 (1991).

52. Kerstin Tews et al., *The Diffusion of New Environmental Policy Instruments*, 42 EUR. J. POL. RES. 569, 585 (2003).

53. See MARIANNE JÖNSSON, KOMMERSKOLLEGIUM NATIONAL BOARD OF TRADE, DISCUSSIONS IN THE COMMITTEE FOR TRADE AND ENVIRONMENT: ECO-LABELING AND THE TBT AGREEMENT (2002) app. 1, available at [http://www.kommers.se/upload/Analysarkiv/In%20English/Discussions\\_in\\_the\\_Committee\\_for\\_Trade\\_and\\_Environment.pdf](http://www.kommers.se/upload/Analysarkiv/In%20English/Discussions_in_the_Committee_for_Trade_and_Environment.pdf).

54. The *U.S.–Tuna I* case involved a challenge to a voluntary label, but this came before a GATT panel that was never adopted by the membership. See *U.S.–Tuna I* Report of the Panel, *supra* note 19. In order for a GATT panel report to be adopted, there must be positive consensus of the membership. Under the WTO, the Dispute Settlement Body automatically adopts panel and appellate body reports, unless there is a consensus of the membership not to adopt the decision

would be difficult to isolate a challenge against only one member state's program. The lack of such a challenge seems to indicate that states are unwilling to litigate this matter and would prefer to debate and negotiate.

The United States has also adopted voluntary labeling schemes for eco-labeling purposes. Both the Energy Star program<sup>55</sup> and the "dolphin-safe" tuna label<sup>56</sup> are well-known examples. Both have been extremely successful, with non-dolphin-safe tuna being almost eliminated from the market and with the Energy Star program estimated, in 2007, to have prevented "greenhouse gas emissions equivalent to those from 27 million cars" and saving Americans "\$16 billion on their utility bills."<sup>57</sup> Another important example of a voluntary label that is based on process and production methods (PPMs) is the labeling of organic products under the Organic Foods Protection Act of 1990,<sup>58</sup> under which sales of organically labeled products have grown between fifteen and twenty-one percent annually.<sup>59</sup>

Along with the legitimacy of the democratic process, government involvement lends further credibility to a label through its police power. Because the government awards voluntary labels, it is free to punish misrepresentations and imitation labels. For example, misuse of the organic label can result in a fine of up to \$10,000,<sup>60</sup> and the Dolphin Protection Consumer Information Act (DPCIA) provides for up to \$100,000 in civil penalties.<sup>61</sup>

Voluntary labels strike the appropriate balance for human rights labeling by improving the legitimacy, clarity, transparency, and credibility of the certification process by setting the government in the role of

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(negative consensus).

55. The U.S. Environmental Protection Agency and the Department of Energy run the Energy Star program as a voluntary labeling program designed to identify and promote energy-efficient products to reduce greenhouse gas emissions. See Energy Star, About Energy Star, at [http://www.energystar.gov/index.cfm?c=about.ab\\_index](http://www.energystar.gov/index.cfm?c=about.ab_index) (last visited Nov. 3, 2008). For a description of the Energy Star program and the estimated savings attributed to it, see Marla C. Sanchez et al., *Savings Estimates for the United States Environmental Protection Agency's Energy Star Voluntary Labeling Program*, 36 ENERGY POL'Y 2098 (2008).

56. This voluntary label is mandated by the Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (2006).

57. Energy Star, *supra* note 55.

58. 7 U.S.C. §§ 6501–6523 (2006).

59. A. Bryan Endres, *An Awkward Adolescence in the Organics Industry: Coming to Terms with Big Organics and Other Legal Challenges for the Industry's Next Ten Years*, 12 DRAKE J. AGRIC. L. 17, 18 (2007).

60. 7 U.S.C. § 6519(a) (2006).

61. 16 U.S.C. § 1385(e) (2006).

an independent evaluator and publisher of the certification criteria. Further, the voluntary nature of the scheme allows the government to avoid directly interfering in international trade, thus keeping the scheme legal. This balance of effectiveness and legality is essential for the success of a human rights labeling program.

*B. Basic Strategies and the Core Goals of the Proposed Label*

This Note advocates a particular category of labels—voluntary, government-run human rights labels—that have never been used in the United States<sup>62</sup> and defends the legality of this proposal under the WTO. As a result of this limited goal, this Note does not address the intricacies involved in drawing up appropriate regulations that such a labeling scheme would require. Even in absence of the exact criteria that such a scheme would be based on, however, this Section focuses on general strategies for such a labeling scheme and articulates the main goals that should underlie any human rights label. For the sake of clarity, this discussion openly admits that a labeling scheme of the type proposed will be based on non-product-related processes and production methods (npr PPMs). Thus the label will focus on *how* a product is made, not the characteristics of the product itself—a distinction that will become important in the debate over the legality of such labels under the GATT/WTO regime.<sup>63</sup>

As articulated earlier, the only existing human rights labeling schemes in the United States are private schemes that suffer serious limitations in the areas of credibility, recognizability, enforcement, and consistency. While some resistance to human rights labels from those within the government who want to keep regulation to a minimum is foreseeable, a government-run scheme is not a far leap considering that the government has already been involved in encouraging industries to develop their own standards.<sup>64</sup> This Note also avoids the more political questions of how to get such a proposal into legislative form and what the process of consultations and negotiations between the relevant stakeholders should be in the development of industry-specific standards. The federal regulatory process required by the Administrative

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62. This idea is not entirely new, as Belgium adopted a social label in 2002. For a summary of the Belgian labeling policy, see Bruno Melckmans, *Strengths and Weaknesses of Belgium's Social Label*, 2003 LABOUR EDUC. 41, available at <http://www.ilo.org/public/english/dialogue/actrav/publ/130/7.pdf>.

63. See *infra* Part III.C.

64. See *supra* Part II.A.

Procedures Act (APA) meets any expectations of transparency through publication of draft regulations and provides opportunities for public participation.<sup>65</sup> It is important that the agency charged with formulating such regulations pays careful attention to the successes and failures of existing schemes and benefits from the expertise developed in the implementation of private labeling schemes.

The proposed human rights labeling scheme must strategically consider the nature of the violations that the labels address in order to evoke maximum sympathy from consumers and leverage public relations support. Commentators have noted that the most successful American ecolabels have often focused on “charismatic marine creatures.”<sup>66</sup> In the same way, labels that focus on particularly egregious working conditions for traditionally exploited groups such as women and children are likely to be the most effective. Consumers rallied behind the image of dolphins being drowned by purse seine nets and refused to purchase tuna that was not “dolphin safe,” so it is likely that images of child slaves or female sweatshop workers will stir similar sentiments in the American market.

In order to fulfill GATT/WTO legality requirements that will be discussed later, the United States should base a labeling scheme on existing international human rights standards that are accepted as widely as possible.<sup>67</sup> For example, it makes sense to use the International Labor Organization’s (ILO) conventions regarding child labor as the basis for a label advocating “child labor/slavery-free” products.<sup>68</sup> An existing government-run human rights label, the Belgian social label, provides a useful example of relying on international standards.<sup>69</sup> These labels are based on the eight ILO “core standards,” which enshrine the basic rights and principles of international labor rights.<sup>70</sup> Again, it may make sense

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65. 5 U.S.C. §§ 511–599 (2006).

66. Sanford E. Gaines, *Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-based Trade Measures?*, 27 COLUM. J. ENVTL. L. 383, 384 (2002).

67. See *infra* Part III.B.

68. For a discussion on international child labor standards and international enforcement of labor standards, see Note, *The Child Labor Deterrence Act of 1995: A Choice Between Hegemony and Hypocrisy*, 11 ST. JOHN’S J. LEGAL COMMENT. 581, 593–99 (1996).

69. This label was adopted by law in February 2002 and was the first of its kind. There is talk about the social label being adopted by all of Europe. See Melckmans, *supra* note 62, at 42.

70. The core standards consist of: Worst Forms of Child Labour Convention of 1999 (No. 182); Minimum Age Convention of 1973 (No. 138); Discrimination (Employment and Occupation) Convention of 1958 (No. 111); Abolition of Forced Labour Convention of 1957 (No. 105); Equal Remuneration Convention of 1951 (No. 100); Right to Organise and Collective Bargaining Convention of 1949 (No. 98); Freedom of Association and Protection of the Right to Organise Convention of 1948 (No. 87); Forced Labour Convention of 1930 (No. 29). The United States is

to take an incremental approach and to start by focusing on the most widely accepted abuses in the most sensitive industries.

Beyond strategy and purely legal considerations, it is useful to identify the main goals of a human rights labeling system and to articulate how the proposed scheme can best accomplish them. The policy goals of countries with voluntary eco-labels offer useful guidance as to what the important features of a labeling system should be. OECD members have identified five main goals for their existing environmental labeling schemes: (1) improving the sales or image of a labeled product; (2) raising consumer awareness; (3) providing accurate information; (4) directing manufacturers to account for the environmental impacts of their products; and (5) protecting the environment.<sup>71</sup> These goals can apply in the human rights context by changing goal (4) to directing manufacturers to account for the human rights impacts associated with the production of their products and goal (5) to protecting human rights. Attempting to accomplish these five goals can inform the process of developing appropriate labels. Examining the steps needed to accomplish these goals demonstrates the relative superiority of a government scheme over the existing private initiatives.

Improving the sales or image of a labeled product is an important first step, because producers need an incentive to go through the certification process as they essentially are betting that consumers will respond to the label. The catch-22 of a voluntary labeling scheme is that a perfectly successful label would create a situation where products without the label are basically unmarketable, but this is the exact situation in which the scheme is vulnerable to challenge in the WTO as a nontariff barrier to trade. A government label is more likely to be successful from a market standpoint because a single label can be developed that bears the imprimatur of the U.S. government, rather than the array of labels from private organizations that are currently available. This recognizability makes the label more likely to be effective at succeeding in this goal.

Naturally, this first goal operates in combination with the second goal, as an informed and socially motivated consumer is a necessary element to improve sales. The label must be clear in the information that it provides, so consumers understand the meaning that the label con-

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not a party to all of these conventions, however, and is more likely to want to use standards based on its labor laws than ILO conventions. This tension would have to be resolved, and the criteria should at least be couched in the language of ILO conventions, even if the substantive standards are selectively taken from the conventions in a way that aligns them with U.S. labor laws.

71. See generally SALZMAN, *supra* note 51.

veys. The government is well-situated to run appropriate educational campaigns and to focus national attention on human rights issues. The success of the “dolphin-safe” tuna label is an important indication that American consumers respond to social issues while making routine purchases, at least when it comes to an inexpensive, substitutable product such as tuna. Studies have shown that the American market has been responsive to private labeling schemes that promote human rights issues. Research has indicated that a majority of Americans are willing to pay more for “ethically produced goods,” with 68% of those surveyed reporting a willingness to pay more for a twenty dollar sweater produced in a sweatshop-free environment and 75% reporting a willingness to pay at least fifty cents per pound more for “fair trade coffee.”<sup>72</sup> This research seems to indicate that a well-executed government labeling scheme should be fairly effective in meeting the first two goals, as the market has been shown to be responsive and consumers are already reacting to similar private labels.

The success of goals (3) and (4) (providing accurate information and directing manufacturers to account for the human rights impacts of their products) depend on the criteria used and the proper execution of such a scheme. A balance must be struck between keeping administrative costs low and ensuring that the labeling scheme does not fall victim to opportunistic producers who are willing to misrepresent their production processes. It is imperative that appropriate penalties are attached to knowing and willful misrepresentations to prevent the labeling scheme from exacerbating existing informational problems.<sup>73</sup> Providing accurate information will be a challenge regardless of who is running a labeling scheme, but the government’s enforcement capacity increases the likelihood that producers are providing accurate information and are documenting their production processes. Additionally, a government standard is more likely to be viewed as credible and consistent by the public than private schemes offered by nongovernmental organizations (NGOs) or industry. Currently, even the most informed consumer may see a “fair trade” label and still not know: (1) what “fair trade” actually means, (2) what criteria the certification is based on, and (3) who is providing certification of the product. The government has the legiti-

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72. Shareen Hertel et al., *Human Rights and Public Opinion: From Attitudes to Action* 14 (Univ. of Conn. Economic Rights Working Paper Series, Paper No. 3R, 2008).

73. See *infra* Part IV.A.

macy to develop a label that people will see as credible, to offer uniform standards, and to avoid excessive influence by industry.<sup>74</sup>

The final goal of protecting human rights is the most important to keep within view, as it can easily be lost amidst political negotiating and maneuvering. While compromises will be required in order to formulate labeling criteria that are possible for producers to achieve but that still incentivize improvement, it is essential that the label not become a political or marketing tool that producers use to manipulate consumers. The government's role is to be an independent and objective certifier, and the government is the best situated to weigh the competing concerns in the development of certification criteria. The labels should not be co-opted by special interests and must be strategically designed to make progress on human rights a priority.

The broader normative argument in favor of such a labeling scheme can be based on the important informational function served by a well-executed scheme. The "right to know" has become a rallying cry for consumers who care about how products are produced. Reflecting an ideal of consumer democracy, consumers feel entitled to "vote" with their buying habits and want to purchase more than just the product itself.<sup>75</sup> Additionally, rather than allow the government to mandate certain policies, a market-driven policy puts the choice in the hands of consumers.<sup>76</sup> This allows the market to respond appropriately to consumers' demand for socially responsible products. Perhaps equally important, it puts pressure on producers to compete with one another for public favor by racing to the top—or at least to the line drawn by the certification criteria—rather than to the bottom. Participating in labeling schemes is a way for corporations to distinguish themselves from their competitors, which has the effect of encouraging their competitors to do the same and will, in turn, encourage entire industries to account for the externalities caused by their production methods. Beyond profit-based considerations, socially responsible labeling can assist in building brand equity, leveling the playing field between producers who are committed to

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74. Industry-based standards and corporate codes are based on negotiations that take place between corporations. Naturally, criticisms have arisen arguing that corporations water down standards so that they can claim to be operating in a socially responsible manner without necessarily making many changes to the way that they operate.

75. Kysar, *supra* note 1, at 527.

76. Beyond the fact that a command and control approach may not be preferable, it may not be *possible*, as most of the human rights abuses being targeted by the proposed labels are occurring outside the jurisdiction of the United States. The United States could not mandate that producers in other countries produce in a certain way, but they can use labels to incentivize certain types of production, regardless of where they occur.

fair labor practices and those who are not.<sup>77</sup> This incentive is significant because it is particularly difficult for producers in highly competitive markets that do not encourage a lot of brand loyalty to make headway in keeping costs down while improving their production methods.<sup>78</sup>

### III. THE LEGALITY OF THE LABELING SCHEME UNDER THE WTO FRAMEWORK

The element of the voluntary labeling scheme that sets it apart from many other proposed ways of linking trade and human rights is that this scheme is market driven. There are no direct restrictions on trade, so the labels can exist under the WTO system. As previously mentioned, the most important evidence that voluntary government-instituted labeling schemes are legal under the WTO is the fact that several already exist unchallenged in the eco-labeling context, and Belgium has already created such a social label.<sup>79</sup> This Part utilizes existing WTO jurisprudence to evaluate the legality of the proposed human rights label. Although this analysis ultimately concludes that a voluntary labeling system is likely to survive a challenge at the WTO, care is taken to highlight the areas where outstanding legal issues exist and where the labeling scheme would be most susceptible to a legal challenge.

Part III.A explains the debate over whether process and production methods (PPMs) that are not related to the nature of the product itself (npr PPMs) are covered by the specialized TBT Agreement,<sup>80</sup> which covers packaging, marking, and labeling requirements. Because there is no clear resolution of this question, this Section considers both the possibility that the proposed scheme will be evaluated under the TBT Agreement and, in the alternative, that it must withstand scrutiny under the GATT.<sup>81</sup> Part III.B highlights the legal constraints imposed by the TBT Agreement specifically, constraints that go beyond the basic requirements found in both the GATT and the TBT Agreement.

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77. See TOM ROTHERHAM, UNITED NATIONS ENV'T PROGRAMME, THE TRADE AND ENVIRONMENTAL EFFECTS OF ECOLABELS: ASSESSMENT AND RESPONSE (2005), available at <http://www.unep.ch/etb/publications/Ecolabelpap141005f.pdf>.

78. Micheletti & Stolle, *supra* note 41, at 160–61.

79. SALZMAN, *supra* note 51; Melckmans, *supra* note 62, at 41.

80. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

81. For a discussion of the interaction between the GATT and the TBT Agreement, see Joshi, *supra* note 34, at 79.

Because of the wider universe of dispute resolution jurisprudence under the GATT, Part III.C offers a more robust analysis of the legal tests implicated by a voluntary labeling scheme and their application. Part III.C first describes the GATT articles most directly relevant to the labeling scheme (Articles I and III); second, it explains why the marks of origin requirements do not apply to this scheme; third, it considers the possibility for a “non-violation” complaint<sup>82</sup> against the labeling scheme; and finally, it explains how the remedies available under the GATT do not give other member states much incentive to challenge the proposed labeling scheme. Although Parts III.B and III.C conclude that a panel is unlikely to find a violation of either the TBT Agreement or the GATT, Part III.D examines the possibility of affirmative defenses under Article XX of the GATT.<sup>83</sup> The labeling scheme will be considered under each of the most relevant subparagraphs and under the chapeau—the introductory paragraph—of Article XX. It is important to note, however, that no legal analysis can be complete until both the regulations for such a labeling scheme are formulated and the scheme is actually implemented, as most of the relevant tests are highly fact dependent.

A. *The Role of Non-Product-Related Process and Production Methods (npr PPMs)*

Much of the debate surrounding measures that take noncommercial considerations into account centers on the issue of whether it is appropriate to distinguish between “like products” because of the manner in which the products were produced. The GATT refers to the concept of “like products” in connection with its most significant obligations.<sup>84</sup> Because products that are produced in different or less socially responsible

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82. A “non-violation” complaint is based on Article XXIII and allows member states to argue that their benefits under the GATT have been “nullified or impaired” by a measure, even if the challenged measure does not actually breach any of the provisions of the GATT. *See* GATT, *supra* note 27, art. XXIII.

83. Article XX offers general exceptions from the requirements of the GATT, giving states the option to argue that the particular measure fits within the category of policies that is eligible for such an exemption. *See id.* art. XX.

84. The term “like product” is mentioned in Article I (General Most-Favoured-Nation Treatment), Article II (Schedule of Concessions), Article III (National Treatment of Internal Taxation and Regulation), Article IX (Marks of Origin), and Article XI (General Elimination of Quantitative Restrictions). *See id.* arts. I–III, IX, XI. These constitute the most important obligations of state parties to the WTO.

ways may still be considered “like products” within the meaning of the WTO agreements, treating them differently may pose a problem.<sup>85</sup>

Because there are different types of PPMs, it is first necessary to identify how the distinction between products occurs. A label can be classified as being based on product-related PPMs, npr PPMs, or a life-cycle analysis (LCA). Product-related PPMs are based on the nature of the product itself and are used to “assure the functionality of the product, or to safeguard the consumer who uses the product.”<sup>86</sup> On the other hand, npr PPMs are not inherently based on the product itself, but are instead connected to some broader social goal that is implicated in the manufacture of the product.<sup>87</sup> Because this human rights labeling scheme would operate under the assumption that there is no discernable difference between products produced under socially responsible conditions and those that were not, it fits into the category of being based on an npr PPM.

Commentators have hotly debated whether the TBT Agreement covers npr PPMs.<sup>88</sup> The language of the TBT Agreement does not seem to preclude the inclusion of npr PPMs under the agreement. As a result, textual arguments have been made that the structure of the definitions of “regulation” and “standard” imply that npr PPMs fall within their scope.<sup>89</sup> The negotiating history of the TBT Agreement implies that only product-related PPMs fall within the purview of the TBT Agreement. The issue, however, is far from settled.<sup>90</sup>

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85. The term “like products” does not necessarily mean the same thing each time that it is used, and panels have engaged in treaty interpretation to discern the meaning of this phrase in different locations of the GATT. *See, e.g.*, Appellate Body Report, *Japan—Taxes on Alcoholic Beverages (Japan—Alcohol)*, WT/DS8/AB/R, at 21 (Oct. 4, 1996) [hereinafter *Japan—Alcohol Appellate Body Report*] (analogizing the concept of product “likeness” to an accordion in order to explain how its scope is relative depending on which provision containing the language is applied).

86. Steve Charnovitz, *The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality*, 27 *YALE J. INT’L L.* 59, 65 (2002) (offering food safety based on “process-based sanitary rules” as an example of such product-related PPMs).

87. *Id.* (noting that the consumer may or may not care about the social goal targeted by an npr PPM label).

88. For a background on the debate and negotiating history of the TBT Agreement as it relates to the PPM issue, see Joshi, *supra* note 34, at 72–75.

89. The word “related” appears only in the first sentence of each definition, which may indicate that this intentional omission in the second sentence brings even npr PPMs under these definitions. ARTHUR EDMOND APPLETON, *ENVIRONMENTAL LABELLING PROGRAMMES: INTERNATIONAL TRADE LAW IMPLICATIONS* 92–93 (1997).

90. *Id.* at 93 (citing a telephone conversation with Richard Eglin of the WTO Secretariat); *see also* Joshi, *supra* note 34, at 74.

If npr PPMs, such as this labeling scheme, are not included within the specialized TBT Agreement, they will be considered under the GATT more generally.<sup>91</sup> In order to provide for both possible alternatives, the following Sections analyze the proposed labeling scheme under both the TBT Agreement and the GATT. The general interpretative note that is associated with Annex IA of the Marrakesh Agreement Establishing the WTO states that when there is conflict between a GATT provision and a provision of a specialized agreement, such as the TBT Agreement, the specialized agreement “shall prevail to the extent of conflict.”<sup>92</sup> Therefore, it is logical to consider the proposed labeling scheme under the TBT Agreement first.

*B. The Voluntary Label as a “Standard” Under the TBT Agreement*

The TBT Agreement sets forth a framework for preventing “technical regulations”<sup>93</sup> and “standards”<sup>94</sup> from becoming additional trade barriers. The suggested labeling scheme would fall under the definition of a standard rather than a regulation because compliance with the labeling scheme is not mandatory.<sup>95</sup> As a result, the labeling scheme would not be subject to the strict requirements of Articles 2 and 3 of the TBT Agreement, which contain antidiscrimination provisions and notification requirements, because only technical regulations are subject to these provisions. Standards must conform instead with the significantly lower constraints of Article 4 and the associated Code of Good Practices in Annex 3.<sup>96</sup> The requirements for a voluntary standard are less stringent than those required for a regulation, and, as a result, it is more difficult to challenge a standard. Even the Code of Good Practices, how-

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91. Joshi, *supra* note 34, at 79.

92. *Id.* at 73.

93. The TBT Agreement defines a technical regulation as a “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.” TBT Agreement, *supra* note 80, annex 1.

94. Annex 1 defines a standard as a “[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.” *Id.*

95. Samuel N. Lind, *Eco-labels and International Trade Law: Avoiding Trade Violations While Regulating the Environment*, 8 INT’L LEGAL PERSP. 113, 135 (1996).

96. TBT Agreement, *supra* note 80, art. 4.

ever, contains a number of obligations that states need to meet in order to promulgate standards that are appropriate under international trade rules.<sup>97</sup> These obligations should be followed when the designated agency is preparing a government-sponsored labeling scheme.

The substantive provisions of the Code of Good Practices align closely with the main obligations in the GATT: (1) the standardizing body must not treat products from one member state better than it treats its own domestic products or “like products” originating in another member state; (2) the standards must not be “prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade”; (3) international standards should be used where they exist; (4) standards should be created with an eye to achieving international harmonization; and (5) the creation and maintenance of standards should be handled in a participatory and transparent manner that allows for input from and cooperation with interested domestic and international stakeholders.<sup>98</sup> As a result, most of these issues will be dealt with in depth in Part III.C under the discussion of the GATT provisions that impose similar requirements.<sup>99</sup>

The proposed labeling scheme should not encounter much difficulty in meeting these requirements. The antidiscrimination requirement is easily met, as all products—regardless of country of origin—are eligible for the label if they meet predetermined criteria. Although this proposal does not recommend any particular criteria and recognizes that numerous elements would require consideration in the development of the labeling standard, using ILO conventions may serve as the best approximation of an international standard within the meaning of the Code of Good Practices. The ILO represents a solid multilateral effort that the United States has actively participated in to improve labor conditions worldwide. The publication, participation, and transparency require-

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97. For example, the Code of Good Practices requires that “the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country” and that “[w]here international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection . . .” *Id.* annex 3.

98. *Id.*

99. Carlos Lopez-Hurtado, *Social Labelling and WTO Law*, 5 J. INT’L ECON. L. 719, 740–41 (2002) (“Voluntary social labeling schemes will not encounter more difficulties under the TBT Agreement than the ones encountered under the GATT with respect to the MFN and national treatment rules as well as to the requirement to avoid unnecessary obstacles to trade. In fact, the obligations under the TBT Agreement appear to be more lenient.”).

ments would be satisfied by the APA-required process for developing federal regulations that agencies are already required to follow by law in the United States.

The most significant challenge that the proposed labeling scheme would have to overcome if it were being considered under the TBT Agreement is the requirement that the scheme not be an unnecessary obstacle to international trade.<sup>100</sup> The debate about the term “necessary” will be highlighted in the analysis of the labeling scheme under the GATT.<sup>101</sup> Even at first glance, it is difficult to argue that other wildly successful labeling schemes such as the “dolphin-safe” tuna label have not become at least somewhat of a trade barrier, because consumers have expressed their preference for products with the label to such an extent that it is almost impossible to sell products without the label.<sup>102</sup> Labels like the one proposed are not an obstacle to trade, but rather an informative tool that allows consumers to know more about what they are buying. Like any other specialization, this label simply allows producers who are interested in catering to socially aware consumers to help their product stand out against the competition; this is no different from products produced organically, in certain locations, or by certain ethnic groups. A determination of whether the labeling scheme violates this requirement will also hinge on the interpretation of the word “unnecessary,” which has not been explored by a WTO panel thus far. The use of the negative form of the word “necessary,” however seems to indicate that the complaining party will have the burden of demonstrating that the label is not necessary to accomplish the stated policy goal.<sup>103</sup>

### C. *The Label as a GATT-Friendly Possibility*

One of the most important goals of the WTO trading system is that trade should occur without discrimination.<sup>104</sup> In fact, commentators

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100. See TBT Agreement, *supra* note 80, annex 3. This argument is analogous to arguments that will be discussed later as part of the discussion under Article XX *infra* Part III.D.4.

101. See *infra* Part III.D.

102. The pressure from consumers is strong enough that the three largest tuna processors that collectively represent ninety percent of the market (Chicken of the Sea, StarKist, and Bumble Bee) have agreed to follow the “dolphin-safe” requirement not to use purse seine nets. Since 1990, dolphin deaths have been reduced in the Eastern Tropical Pacific zone by ninety-seven percent because of the “dolphin-safe” label’s pressure to stop this form of encirclement. Allison Sloan, *Tuna Isn’t Dolphin Safe*, GREEN GUIDE, June 1999, available at <http://e-greenguide.info/docprint.mhtml?i=68&s=tuna>.

103. The discussion *infra* Part III.D covers the meaning of the word “necessary,” which is instructive for determining the meaning of unnecessary.

104. WORLD TRADE ORG., UNDERSTANDING THE WTO 10 (2007), available at

have identified the three most important principles underlying the GATT to comprise: (1) most-favored nation (MFN) treatment, which requires that each party grant the same treatment to any like product of another contracting party that it affords to any most-favored trading partner; (2) national treatment, which requires that all imported goods and services be treated in the same way as those produced domestically; and (3) transparency, which requires publication of measures regulating or impacting trade.<sup>105</sup> The biggest hurdle for the proposed labeling scheme to overcome is to avoid being discriminatory on its face and in its implementation, by complying with the principles of MFN and national treatment. Further, this labeling scheme cannot be a disguised barrier to trade, and it must be sufficiently transparent and fairly administered in order to increase predictability. Given the limited jurisprudence of the WTO's Appellate Body, many of the questions raised by labeling have not been litigated and clearly answered. This Section aims to identify the most salient questions likely to be raised if the legality of a government-sponsored voluntary labeling program were challenged under the dispute settlement system of the WTO and to offer an analysis of the existing case law that a panel is likely to rely on if called upon to decide this issue.

### 1. *The Label Does Not Violate MFN Requirements*

Article I of the 1994 GATT requires that any "advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."<sup>106</sup> The issue of product likeness will be discussed in more detail in the context of the national treatment standard in Article III.<sup>107</sup> Unless npr PPMs are considered to be a relevant basis to distinguish between otherwise alike

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[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/tif\\_e.htmD](http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htmD).

105. Dommen, *supra* note 16, at 11.

106. GATT, *supra* note 27, art. I.

107. Although it is not entirely clear that the concept of like products found in Article I is equivalent to the more fleshed out standard in Article III, the panel in *Indonesia-Autos* indicated that the standard it used to determine product likeness in its consideration of Article III(2) was appropriate to justify a finding of product likeness within the meaning of Article I. Panel Report, *Indonesia-Certain Measures Affecting the Automobile Industry (Indonesia-Autos)*, ¶ 14.141, WT/DS54/R (July 2, 1998).

products, it can be assumed that the labels are treating like products differently.<sup>108</sup>

The fact that products with the same physical characteristics are being treated differently, however, is not necessarily determinative of whether there has been a violation of Article I. A violation would require that discrimination, either de jure or de facto, is occurring as a result of the labeling scheme. In *Canada–Auto*, the Appellate Body recognized that Article I(1) applied even to measures that were origin-neutral on their face if they were resulting in de facto discrimination.<sup>109</sup> Thus, although the proposed labeling scheme allows all producers the option of applying for certification and subsequent use of the content-positive label, it could have a disparate impact on products from particular trading partners and be interpreted as de facto discrimination. If the proposed labels indeed result in a disparate impact on a few trading partners, the affected member state would have to be willing to argue that the “offending” member state cannot reward producers for meeting a certain standard of human rights behavior—clearly a less than popular position to take publicly. Additionally, because the program is voluntary, is content positive (i.e., only attaches labels with positive information), is not trade restrictive, and burdens/rewards the individual producer rather than the exporting member state, even a disparate impact is likely to be tolerated by a WTO panel.

The use of PPMs in this labeling program might also ease the possibility of a disparate impact because the focus is on production methods that often occur in multiple steps in multiple countries. Further, it is difficult to argue that a label awarded on the basis of clear and objective criteria is discriminatory, even if it encourages more improvements in some member states. Because all producers are given the same opportunity to receive a label and all labels are based on the same criteria, it becomes increasingly difficult to contend that some trading partners are receiving advantages that others are not—particularly because the label is voluntary and is based on the practices of the producer rather than its host member state.

Although no WTO dispute settlement panel has faced the issue of a voluntary government-run labeling scheme, the GATT panel in *U.S.–*

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108. If a panel decides that npr PPMs are an appropriate basis to distinguish between products, products produced in a socially responsible manner and those that are not would not be considered “like products.”

109. Appellate Body Report, *Canada–Certain Measures Affecting the Automotive Industry (Canada–Autos)*, ¶ 78, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000) [hereinafter *Canada–Autos Appellate Body Report*].

*Tuna I* issued an opinion on the DPCIA, a voluntary “dolphin-safe” labeling scheme.<sup>110</sup> Unlike the proposed labeling scheme in this Note, the DPCIA contained a geographical element, in that it only required that vessels fishing in the Eastern Tropical Pacific Ocean (ETP) prove that they had not used purse seine nets, exempting vessels fishing in other waters.<sup>111</sup> Mexico challenged the DPCIA, arguing that the labeling requirements were inconsistent with Article I(1) because Mexico, due to its geographical location, was a country fishing in the ETP and was accordingly required to demonstrate that its fishing techniques met a certain standard in order to receive a label given more freely to vessels fishing in other waters.<sup>112</sup> Even in the face of the label’s assignment being administered differently on the basis of geography, however, the panel held that there was no violation of Article I(1):

According to the information presented to the Panel, the harvesting of tuna by intentionally encircling dolphins with purse-seine nets was practised only in the ETP because of the particular nature of the association between dolphins and tuna observed only in that area. By imposing the requirement to provide evidence that this fishing technique had not been used in respect of tuna caught in the ETP the United States therefore did not discriminate against countries fishing in this area. The Panel noted that, under United States customs law, the country of origin of fish was determined by the country of registry of the vessel that had caught the fish; the geographical area where the fish was caught was irrelevant for the determination of origin. The labelling regulations governing tuna caught in the ETP thus applied to all countries whose vessels fished in this geographical area and thus did not distinguish between products originating in Mexico and products originating in other countries.<sup>113</sup>

Although the panel’s holding in *U.S.–Tuna I* carries with it no precedential weight because it is an unadopted GATT panel decision,<sup>114</sup> it is

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110. See 16 U.S.C. § 1385 (2006); U.S.–Tuna I Report of the Panel, *supra* note 19.

111. U.S.–Tuna I Report of the Panel, *supra* note 19, ¶ 2.12.

112. *Id.* ¶ 5.42.

113. *Id.* ¶ 5.43.

114. The status of GATT panel decisions in the WTO dispute settlement system remains unclear. WTO panels have cited to GATT panel decisions, implying that these decisions remain influential. In addition, the Marrakesh Agreement Establishing the WTO recognizes the importance of its inheritance from the GATT system in Article XVI(1), which reads, “Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING

instructive in its evaluation of a voluntary government-instituted labeling system. The panel was clearly willing to allow a voluntary scheme, even if it had a disparate impact on some member states because the regulation was reasonable, based on the scientific evidence available on dolphin behavior in that particular region.

The holding in *U.S.–Tuna I* would seem to indicate that a voluntary labeling scheme that is given economic force on the basis of consumer preference is not a violation of the principle of MFN. This bodes well for the proposed labeling scheme. The fact remains, however, that “like products” from different states may be labeled differently on the basis of how they were produced and depending on whether their producers decide to seek the certification of the labeling scheme. If a panel believes that the “like product” analysis of Article I should not distinguish between products on the basis of how they were produced and that a successful labeling scheme constituted discrimination against those member states with lower human rights standards, it is possible that a violation could be found.<sup>115</sup> Yet, this seems relatively unlikely because the same criteria would be applied to products originating in any country in the world—a uniform application which allowed the DPCIA to avoid causing a violation of MFN.

## 2. *The Label Does Not Run Afoul of National Treatment Requirements*

Article III of the GATT articulates the requirements for national treatment on internal taxation and regulation. The general purpose underlying these requirements is to prevent member states from applying internal taxes and regulations in a protectionist manner.<sup>116</sup> The Appellate Body has maintained that the intention of the drafters was to ensure that like imported and domestic products will be treated the same once

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PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.” This article can be read as an argument for giving GATT panel decisions more weight than they may otherwise be afforded. Marrakesh Agreement, *supra* note 28, art. XVI. For more on the role of unadopted panel decisions in future WTO jurisprudence, see Adrian T. L. Chua, *Precedent and Principles of WTO Panel Jurisprudence*, 16 BERKELEY J. INT’L L. 171, 174–78 (1998).

115. It is important to recognize that the *U.S.–Tuna I* panel did not believe that PPMs were an appropriate basis for distinguishing between products because the incidental taking of dolphins did not affect tuna as a product. *U.S.–Tuna I* Report of the Panel, *supra* note 19, ¶ 5.14; Kysar, *supra* note 1, at 543. Notwithstanding this position, the panel still did not believe that the labeling scheme violated Article I(1). Thus, even if like products are treated somewhat differently, there seems to be a minimum threshold of discrimination that a voluntary, content-positive labeling scheme does not seem to reach.

116. Japan–Alcohol Appellate Body Report, *supra* note 85, at 14–16.

they have entered the internal market of a member state.<sup>117</sup> The import of Article III is not to protect expectations of “any particular trade volume but rather of the equal competitive relationship between imported and domestic products.”<sup>118</sup>

The subparagraph that most clearly applies to the proposed labeling scheme is Article III(4), which requires that imported products “be accorded treatment no less favorable 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, transportation, distribution or use.”<sup>119</sup> An analysis of the proposed labeling scheme under the broad objectives of Article III requires that the domestic and imported products at issue are “like products” within the meaning of Article III(4) and that the treatment of the imported products is relatively less favorable than that given to their domestically produced counterparts.<sup>120</sup>

As referenced earlier, one of the most significant issues being debated is whether GATT rules allow differential treatment for “like products” that have the same physical product characteristics but differ in terms of npr PPMs.<sup>121</sup> When considering the issue of product likeness, the Appellate Body in *EC–Asbestos* recognized the importance of a case-by-case approach to making a determination of whether two products were “like” within the meaning of Article III(4).<sup>122</sup> There, the Appellate Body recognized the usefulness of the four-part framework, which considers: “(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers’ tastes and habits—more comprehensively termed consumers’ perceptions and behaviour—in respect of the products; and (iv) the tariff classification of the products.”<sup>123</sup> The Appellate Body explicitly stated, however, that this framework was simply a tool that was neither “treaty-mandated nor a closed list of criteria that will determine the legal characterization of products.”<sup>124</sup> The Appellate Body ultimately concluded that whether this framework was adopted, the term “like products” within Article

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117. *Id.*

118. *Id.* at 15.

119. GATT, *supra* note 27, art. III(2).

120. See EC–Asbestos Appellate Body Report, *supra* note 37, ¶ 100.

121. For a discussion of the npr PPM issue, see *supra* Part III.A.

122. EC–Asbestos Appellate Body Report, *supra* note 37, ¶ 101.

123. *Id.* This framework has its origins in the *Border Tax Adjustments* report. GATT General Council, *Report by the Working Party on Border Tax Adjustments*, ¶ 18, L/3464 (Nov. 20, 1970), available at [http://www.wto.org/gatt\\_docs/English/SULPDF/90840088.pdf](http://www.wto.org/gatt_docs/English/SULPDF/90840088.pdf).

124. EC–Asbestos Appellate Body Report, *supra* note 37, ¶ 102.

III(4) was concerned with the competitive relationships between and among products.<sup>125</sup> The question of whether or not npr PPMs can be taken into account in such an analysis—and perhaps allow a distinction between products which would otherwise be “like products”—has not been answered conclusively by either a WTO panel or the Appellate Body.

If a panel evaluating the proposed labeling scheme concludes the conditions under which the products have been produced is not a legitimate basis for distinguishing between them, relatively “less favorable” treatment will still have to be demonstrated in order for the proposed scheme to be a violation of Article III(4).<sup>126</sup> As the Appellate Body held in *EC–Asbestos*:

[E]ven if two products are “like”, that does not mean that a measure is inconsistent with Article III:4. A complaining Member must still establish that the measure accords to the group of “like” *imported* products “less favourable treatment” than it accords to the group of “like” *domestic* products. The term “less favourable treatment” expresses the general principle, in Article III:1, that internal regulations “should not be applied . . . so as to afford protection to domestic production”. If there is “less favourable treatment” of the group of “like” imported products, there is, conversely, “protection” of the group of “like” domestic products. However, a Member may draw distinctions between products which have been found to be “like”, without, for this reason alone, according to the group of “like” imported products “less favourable treatment” than that accorded to the group of “like” *domestic* products.<sup>127</sup>

In other words, drawing distinctions between products is not enough; the member state must use the distinction to offer less favorable treatment to imported products.

While it seems relatively clear that affixing a content-positive label to certain products is a form of preferential treatment, the combination of the voluntary nature of this measure and its uniform application to all products regardless of origin makes the argument that the labels amount to less favorable treatment for imported products a difficult sell. Because consumers make the ultimate decision about how much weight to

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125. *Id.* ¶ 103.

126. *Id.* ¶ 100.

127. *Id.*

give such a label in their purchasing decisions, it is unclear if a voluntary labeling scheme rises to the level of discriminatory treatment under Article III(4). All products, regardless of origin, are eligible for certification if their producers elect to submit the appropriate information. Even though like products are being treated differently based on a label, it does not seem to rise to the level of “less favorable treatment” within the meaning of Article III(4).

It is important to recognize that the voluntary nature of the labeling program does *not* serve to exempt it from scrutiny under Article III(4). The panel in *Canada–Autos* held, “Article III(4) applies not only to mandatory measures but also to conditions that an enterprise accepts in order to receive an advantage, including in cases where the advantage is in the form of a benefit with respect to the conditions of importation of a product.”<sup>128</sup> The labeling scheme proposed is factually distinct from offering duty-free importation of qualifying products, as Canada did in the aforementioned case, because it does not translate into a direct price advantage to the favored product. Instead, the only advantage offered by the label is providing consumers with credible reassurance that the labeled products were manufactured in a particular way—in effect lending the imprimatur of the U.S. government to back up the claim of responsible production. It is less clear that this seal of approval is enough to qualify as the type of advantage that the *Canada–Autos* panel was contemplating. This panel emphasized that the key element is the modification of the conditions of competition between domestic and imported products, and the label, if extremely effective, may rise to this level.<sup>129</sup>

The second necessary element of an Article III(4) violation is that the challenged measures result in relatively less favorable treatment for the imported product as compared to a like product produced domestically. Assume *arguendo* that the targeted product receiving the label is produced domestically and a like imported product has not undergone the certification process and as a result has not received the content-positive label. In such a case, the question to be answered is whether there is “effective equality” of opportunities for imported products, as compared to domestic products.<sup>130</sup> The Appellate Body fleshed out this requirement in *Korea–Beef*, writing:

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128. *Canada–Autos* Appellate Body Report, *supra* note 109, ¶ 10.73 (citation omitted). This report was not subsequently reconsidered by the Appellate Body.

129. *Id.* ¶¶ 10.84–85.

130. U.S.–Section 337 Panel Report, *supra* note 20, ¶ 5.11; *see also* U.S.–Gasoline Appellate Body Report, *supra* note 19, at 21 (arguing that there is no textual basis for requiring identical

A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated “less favourably” than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.<sup>131</sup>

Applying this standard to the proposed labeling scheme, a strong argument can be made that the uniform application of the certification criteria does not impact the competitive conditions between products, since all producers have the same opportunity to apply for certification. Although the higher labor standards in the developed world may result in easier compliance for domestic producers, it is difficult to argue that holding all products to the exact same standard is somehow protectionist and not preserving effective equality. A strong counterargument to any challenge is that providing consumers with additional credible information on the products they buy has the effect of leveling the playing field, rather than creating an unfair advantage for some products.

Ultimately, it is impossible to predict exactly where a WTO panel evaluating Article III(4) will come down with respect to these two tests. Much of the analysis hinges on whether or not the panel is willing to consider the role of production methods in determining product likeness, and whether they feel that the label disrupts the competitive conditions for the targeted product. Because it requires a case-by-case evaluation, such determinations are likely to be highly fact specific and dependent on the application and impact of the label—a difficult prediction to make at this time. Article III(4) represents the most significant potential violation of a provision of the GATT, but the built-in uniformity and nonmandatory character of the scheme make it far less trade restrictive than any measures that have been identified in the past as national treatment violations.<sup>132</sup>

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treatment of domestic and imported products, but rather “identity of treatment”).

131. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea—Beef)*, ¶ 137, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter *Korea—Beef Appellate Body Report*].

132. See e.g., *Canada—Autos Appellate Body Report*, *supra* note 109; *U.S.—Gasoline Appellate Body Report*, *supra* note 19.

### 3. *The Label is Not a Mark of Origin Under Article IX*

The GATT also contains an article that relates specifically to marking requirements—Article IX, “Marks of Origin.”<sup>133</sup> The GATT panel’s decision in *U.S.–Tuna I*, however, clearly explained that labels that are not based on product origin, such as the “dolphin-safe” label, are not properly evaluated under Article IX.<sup>134</sup> This article is intended to govern when member states import products with the name of the country of origin. The *U.S.–Tuna I* panel engaged in some basic treaty interpretation and reasoned that because Article IX(1) contains only an MFN requirement, rather than also requiring national treatment, it is not intended to cover the general marking of products and only applied to labels based on the country of origin.<sup>135</sup>

Thus, because the labeling scheme proposed by this Note is neither a mark of origin nor is based on the policies of the government of the country in which the product is produced, it is not subject to Article IX. Human rights labels, like eco-labels, are not concerned with *where* a product is produced or the legal framework of the country in which it is produced, but with the methods of production themselves.

### 4. *The Label Does Not Give Rise to a Non-Violation Complaint*

Even if there is no direct violation of any provision of the GATT, the proposed labeling scheme could be challenged under Article XXIII, which provides measures against nullification and impairment of the benefits of the GATT.<sup>136</sup> This article allows for member states to take action when they consider that “any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded,” even if the measure being challenged is not a violation of any of the provisions of the GATT—a non-violation complaint.<sup>137</sup> It is conceivable that a member state could argue that the labeling scheme is a *de facto* barrier to trade that either negatively impacts its products gaining access to the U.S. market or is contrary to the objectives of the GATT.<sup>138</sup>

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133. The first subparagraph of Article IX reads: “1. Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.” GATT, *supra* note 27, art. IX(1).

134. *U.S.–Tuna I* Report of the Panel, *supra* note 19, ¶ 5.41.

135. *Id.*

136. GATT, *supra* note 27, art. XXIII.

137. *Id.* art. XXIII(1)(b).

138. Article XXIII was intended to prevent member states from taking actions to avoid reach-

Although Article XXIII appears to be appropriate grounds for a challenge to the proposed labeling scheme, past panels have chosen to interpret Article XXIII narrowly.<sup>139</sup> The GATT panel in *EEC–Oilseed* stated its view that Article XXIII(1)(b) was intended to protect tariff concessions, rather than to be used as a type of catch-all.<sup>140</sup> This reading is strengthened by the fact that all successful nullification claims have involved Article II tariff concessions.<sup>141</sup> The WTO panel in *Japan–Photo Film* set forth three elements that a member must demonstrate in order to raise a successful claim under Article XXIII(1)(b): (1) there must be a measure that was applied by another member; (2) there must be a benefit that was accruing under the GATT; and (3) this benefit must be nullified or impaired as a result of the measure taken.<sup>142</sup> Because the government would administer the labeling scheme, it would likely meet the first requirement, even though it is of a voluntary nature.<sup>143</sup> Past GATT panels have held that there are “legitimate expectations of improved market-access opportunities arising out of relevant tariff concessions as a benefit accruing under the GATT.”<sup>144</sup> Thus, to fail under Article XXIII, the proposed labeling scheme would, at least, have to cause a cognizable injury to a product that had been given market access opportunities through Article II tariff concessions.<sup>145</sup> Such an injury could not have been foreseen at the time of the Uruguay Round negotiations, since there were no government-sponsored human rights labeling schemes in

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ing their bound tariff rates, which would undermine the concessions that had been negotiated. Sung-joon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles’ Heel of the Dispute Settlement Process?*, 39 HARV. INT’L L.J. 311, 314–15 (1998). Thus, a measure that directly interferes with another member state’s expected benefits by undermining a bound tariff rate is much more likely to give rise to a non-violation complaint than a measure like the proposed labeling scheme.

139. Cf. Atsuko Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, 11 GEO. INT’L ENVTL. L. REV. 599, 627–28 (1999) (discussing the applicability of Article XXIII to voluntary environmental labeling programs).

140. Report of the Panel, *European Economic Community–Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins (EEC–Oilseeds)*, ¶ 144, L/6627 (Jan. 25, 1990), GATT B.I.S.D. (37th Supp.) at 86 (1991) [hereinafter *EEC–Oilseeds Report of the Panel*].

141. Okubo, *supra* note 139, at 628.

142. Panel Report, *Japan–Measures Affecting Consumer Photographic Film and Paper (Japan–Photo Film)*, ¶ 10.41, WT/DS44/R (Mar. 31, 1998) [hereinafter *Japan–Photo Film Panel Report*].

143. *Id.* ¶ 10.43 (considering that a measure within the meaning of Article XXIII includes governmental actions short of legally enforceable enactments); see also Okubo, *supra* note 139, at 629–30 (analyzing eco-labels under Article XXIII).

144. Okubo, *supra* note 139, at 629; see also *EEC–Oilseeds Report of the Panel*, *supra* note 140, ¶ 144.

145. Okubo, *supra* note 139, at 630.

existence during the negotiations, although there were comparable eco-labeling schemes.

Even if these initial nullification factors were met, however, the challenging state would have to demonstrate that the program “adversely affected the relative positions of domestic and foreign competitors,” which is unlikely considering that any labeling scheme would be applied uniformly to domestic and foreign producers.<sup>146</sup> This is likely the most important consideration under Article XXIII, because it is difficult to argue that an Article II concession is impaired under a scheme that does not violate the GATT national treatment provisions. Further, the label is not hiding some protectionist purpose. The most important targets of a voluntary labeling scheme are likely to be U.S. multinational corporations (MNCs) that operate both domestically and abroad because they are sensitive to the pressures of the U.S. market.

##### 5. *The Limited Remedies Available Discourage a Challenge to the Label*

Because the WTO’s dispute resolution system does not provide compensation for injuries that have already occurred as a result of the offending measure, there is less of an incentive for a developing country to want to challenge the proposed labeling scheme. Instead, when a violation of the WTO system is found under international trade rules, the preferred solution is removal of the offending measure.<sup>147</sup> Bringing a challenge is expensive and time consuming. Unless the damage done to a particular member state is significant enough to justify bringing a dispute and the claim is likely to be successful on the merits, it is difficult to see how challenging the claim before the WTO makes sense strategically. Currently, no voluntary eco-labeling system (except the DPCIA, as part of a larger scheme involving embargos) has been challenged in the WTO, despite voluntary eco-labels’ wide proliferation. Further, Belgium’s government-run, voluntary social labeling system has not been challenged, and it has existed since 2002.<sup>148</sup>

It is imaginable that a successful lobby on behalf of producers could convince a member state to request consultations under the Understanding on Rules and Procedures Governing the Settlement of Disputes

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146. *Id.*

147. William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT’L ECON. L. 17, 45 (2005).

148. Melckmans, *supra* note 62, at 42; Clean Clothes Campaign, *Belgian Social Label*, at [http://www.cleanclothes.org/codes/belgium\\_label.htm](http://www.cleanclothes.org/codes/belgium_label.htm) (last visited Mar. 30, 2008).

(DSU), but this could prove to be an extremely risky public relations move, as consumers may react adversely if such efforts were made public.<sup>149</sup> Unless all producers of a product were willing to collude and join together against the labeling scheme, those who publicly opposed it would appear to support questionable human rights practices; thus it would be better simply to refuse to apply for certification. This creates a type of prisoner's dilemma in which all producers would be better off (in terms of keeping production costs low) if none elected to be certified, but any defectors receive significant advantages over those who do not participate. Additionally, it can be assumed that some producers are willing to improve their production practices or are already producing in a socially responsible manner. Again, this simply rewards those producers and makes any public or legal efforts to undermine the labeling system appear in the worst possible light to consumers. The only real argument that a producer who does not want to suffer reputational harm can make is that the relevant regulations or their implementation are flawed, which provides an incentive for improvement rather than an entire abandonment of the labeling scheme.

*D. Exempt from GATT Requirements? The Proposal as an Article XX Exemption*

While the GATT significantly restricts the type of regulations that a member state can implement depending on the regulation's impact on international trade, Article XX provides that the GATT will not prevent the adoption and enforcement of a limited scope of qualified measures.<sup>150</sup> The inclusion of enumerated exceptions to the GATT rules indicates that the treaty's drafters were at least aware of the potential clash between international trade rules and noneconomic public values, such as human rights considerations or environmental conservation.<sup>151</sup> GATT and WTO panels, however, have construed Article XX "so restrictively as to almost read it out of text,"<sup>152</sup> thus further increasing the gulf between noncommercial issues and the international trade regime. Trade

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149. See generally John. J. Emslie, Note, *Labeling Programs as a Reasonably Available Least Restrictive Trade Measure Under Article XX's Nexus Requirement*, 30 BROOK. J. INT'L L. 485, 504 (2005) (recognizing that there is an unbalanced level of bargaining power between producers and supporters of a labeling regime, as producers are likely to fear initial costs and the somewhat unpredictable consequences of labels).

150. GATT, *supra* note 27, art. XX. For a general overview of how Article XX can be used to exempt measures aimed at improving human rights, see Bal, *supra* note 25.

151. HOWSE & MUTUA, *supra* note 15, at 4.

152. *Id.*

scholars have advanced arguments that trade restrictions based on human and labor rights concerns both should and should not be justified under Article XX exceptions.<sup>153</sup> Nonetheless, it is clear that a linkage exists between trade and human rights, as increased globalization has led to a demonstrable “race to the bottom,” while at the same time the international trade regime has narrowed the policy space in which a state can legislate in order to act on human rights concerns. Article XX may provide a reasonable alternative to justify limited measures, such as the labeling scheme proposed in this Note.

Although the previous Part argued that an appropriately tailored labeling scheme is reasonably likely to survive the scrutiny of a WTO panel, if a violation were found, it is possible that the proposed labeling scheme would qualify as an Article XX exception. Existing GATT/WTO jurisprudence provides significant support for such a justification. The labeling scheme could be justified under Article XX(a), XX(b), or possibly XX(d), depending on how narrowly a panel chooses to interpret the language of these exceptions. Article XX(a) allows an exception for measures that are “necessary to protect public morals;”<sup>154</sup> Article XX(b) for measures “necessary to protect human, animal or plant life or health;”<sup>155</sup> and Article XX(d) for measures:

necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.<sup>156</sup>

Existing WTO jurisprudence has developed a two-part test for deciding whether measures should be exempted under Article XX. Following this test, a panel will first consider whether the labeling scheme is provisionally justified under the substantive language in any of the enumerated subparagraphs, and then will evaluate the measure’s compliance with the Article XX “chapeau”—the Article XX introductory paragraph containing the general requirements that all exceptions must meet.<sup>157</sup>

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153. Compare *id.* (offering legal arguments to support the integration of the trade and human rights regimes), with *Eres*, *supra* note 25 (arguing that there is no legal basis to use the WTO to enforce human rights).

154. GATT, *supra* note 27, art. XX(a).

155. *Id.* art. XX(b).

156. *Id.* art. XX(d).

157. U.S.—Gasoline Appellate Body Report, *supra* note 19, at 22; U.S.—Shrimp I Appellate Body Report, *supra* note 19, ¶ 119.

The proposed labeling scheme must first fit under one of the categories listed in (a), (b), or (d), and then meet the additional qualifications of the chapeau in order to be granted an exemption. Consistent with this sequential evaluation this analysis will proceed by evaluating the proposed labeling scheme under subparagraphs (a), (b), and (d) of Article XX and then consider its likelihood of overcoming the legal hurdles associated with the chapeau. Again, the scheme must only qualify for *one* of the subparagraphs, but it *must* meet the requirements of the chapeau.

### 1. *The Basics of Qualifying Under the Enumerated Subparagraphs*

Any trade restrictive measure being justified under subparagraphs (a), (b), or (d) of Article XX must meet two requirements: (1) the measure must fall within the policy objective enumerated in the subparagraph,<sup>158</sup> and (2) the measure must meet a “necessity test.”<sup>159</sup> Some commentators suggest a third element should be utilized: the measure must be a proportional response to the circumstances and the nature of the problem being faced.<sup>160</sup> It is again important to note that this two-prong test, thus far, has only been applied to measures that in fact restrict trade, such as the embargo used under the Marine Mammals Protection Act in the two *U.S.–Tuna* cases or the ban on asbestos in the *EC–Asbestos* dispute. Because a labeling scheme is *not* a trade restrictive measure, it is uncertain whether the same reasoning would be applied or if a less demanding test would be created for this softer measure that simply provides information to consumers. Based on the panel’s acceptance of the “dolphin-safe” label as being consistent with the GATT because the label did not relate to any market access conditionality, there is reason to suspect that panels may apply less stringent requirements to measures that are not coupled with a trade restriction.<sup>161</sup>

The following three Sections will examine existing jurisprudence on each of the applicable subparagraphs, as applied to the proposed label-

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158. This requirement is often described as requiring a sufficient “nexus” between the measure and the policy objective that it is supposed to achieve. Eres, *supra* note 25, at 616.

159. *Id.* at 615–16. The word “necessary” is found in all three paragraphs that are relevant to the proposed labeling scheme. Distinct tests would be required for paragraph (j) which uses the word “essential”; paragraphs (c), (e), and (g), which contain “related to”; paragraph (f)’s use of “for the protection of” and “in pursuance of” (also used in paragraph (h)); and “involving” in paragraph (i). See WORLD TRADE ORG., WTO ANALYTICAL INDEX: GATT 1994, ¶ 520 (2006), available at [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/gatt1994\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_e.htm).

160. Christoph T. Feddersen, *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT’s Article XX(a) and “Conventional” Rules of Interpretation*, 7 MINN. J. GLOBAL TRADE 75, 96 (1998).

161. *U.S.–Tuna I* Report of the Panel, *supra* note 19, ¶ 5.42.

ing scheme. Because a defending state retains the ability to invoke as many subparagraphs as it sees fit to justify its policy measures, it seems likely that the United States would invoke all three subparagraphs in its defense. Naturally, there is some overlap in the analysis, as all three contain the word “necessary,” so a justification based on any of these three subparagraphs must meet the “necessary” standard to qualify.

## 2. *Article XX(a): Necessary to Protect Public Morals*

At this point in time, no member state has attempted to justify a trade restriction of any type under Article XX(a) of the GATT, thus no panel has interpreted the meaning of the text in this subparagraph.<sup>162</sup> Recently, however, the Appellate Body considered Article XIV(a) of the General Agreement on Trade in Services (GATS), which describes its function as “necessary to protect public morals or to maintain public order”<sup>163</sup> and its associated footnote reads, “The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”<sup>164</sup> Given the similar language, the decision in *U.S.–Gambling* is instructive with regard to its evaluation of the necessity requirement and with regard to the definition of public morals.<sup>165</sup>

The panel offered a definition of “public morals” that was later affirmed by the Appellate Body, characterizing the meaning of this term as “standards of right and wrong conduct maintained by or on behalf of a community or nation.”<sup>166</sup> The Appellate Body then upheld a decision that the challenged measures aimed at preventing underage gambling and protecting pathological gamblers would qualify under this subparagraph, offering a useful example of the type of activities that can be situated under this exception.<sup>167</sup> The lack of a “public order” element in

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162. Feddersen, *supra* note 160, at 96.

163. General Agreement on Trade in Services art. XIV(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

164. *Id.*

165. U.S.–Gambling Appellate Body Report, *supra* note 20, ¶¶ 296–99. For analysis of this decision, see Nicolas F. Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. INT’L ECON. L. 43 (2007) and Albena P. Petrova, *The WTO Internet Gambling Dispute as a Case of First Impression: How to Interpret Exceptions Under GATS Article XIV(a) and How to Set the Trend for Implementation and Compliance in WTO Cases Involving “Public Morals” and “Public Order” Concerns?*, 6 RICH. J. GLOBAL L. & BUS. 45 (2006).

166. U.S.–Gambling Appellate Body Report, *supra* note 20, ¶ 296.

167. *Id.* ¶¶ 296–99.

Article XX(a) may lead to a different interpretation of its language, so the *U.S.–Gambling* decision is not completely reliable as an indicator of how a WTO panel will read the similar GATT exception.

If this subparagraph were invoked in a dispute, the panel would most likely turn to the Vienna Convention on the Law of Treaties as the most appropriate way to interpret its meaning.<sup>168</sup> Under the Vienna Convention, the interpretation of the text of a treaty should begin with the ordinary meaning of the text itself—in this case, “public morals.”<sup>169</sup> Unfortunately, this term could lend itself to an endless range of potential interpretations, which some commentators have argued is likely to lead to a narrow interpretation of this term, as both civil and common law traditions interpret statutory exceptions narrowly.<sup>170</sup> This is not certain, however, as the Vienna Convention contains no such rule of treaty interpretation, and nothing in the language of Article XX indicates that the intention of the drafters was to keep the enumerated exceptions as narrow as possible. While the accepted definition of public morals includes those “rules and principles . . . which both characterize conduct as right or wrong and stipulate the behavioral norms in that society,”<sup>171</sup> which could offer an alternative to the *U.S.–Gambling* interpretation, this definition neither opens the door to a particular range of policies nor offers any clear limitations.

It is questionable whether the definition of public morals could include measures taken to improve human rights practices. In *U.S.–Tuna I*, Australia argued that Article XX(a) could “justify measures regarding inhumane treatment of animals, if such measures applied equally to domestic and foreign animal products.”<sup>172</sup> Scholars have argued that if this view is accepted, it could easily be used to justify taking trade actions to improve the treatment of human beings.<sup>173</sup> Certainly a viable argument can be made that protecting vulnerable groups from exploitation is equally as important as protecting compulsive gamblers, particularly when the measure being employed is not trade restrictive. However, the labeling scheme aims to protect more than just U.S. citizens. This broad

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168. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. For an in-depth analysis of how Article XX(a) is likely to be interpreted under the Vienna Convention, see Petrova, *supra* note 165.

169. Vienna Convention, *supra* note 168, art. 31(1); *see also* Feddersen, *supra* note 160, at 105–06.

170. Feddersen, *supra* note 160, at 95.

171. *Id.* at 106 (citing BLACK’S LAW DICTIONARY 1008 (6th ed. 1990)).

172. *U.S.–Tuna I* Report of the Panel, *supra* note 19, ¶ 4.4.

173. Bal, *supra* note 25, at 76–77.

scope demonstrates that the labeling scheme is intended to have extra-territorial effects, protecting certain types of vulnerable groups worldwide.<sup>174</sup> The labels are also closely related to the policy goal that they are aimed at because they are attempting to influence consumers to make purchasing decisions on the basis of how products are produced.

In determining whether or not a measure is “necessary” within the meaning of Article XX(a), the Appellate Body in *U.S.–Gambling* endorsed its approach in the *Korea–Beef* case, where it employed a balancing test that considered (1) “the relative importance of the common interests or values that the law or regulation . . . is intended to protect”; (2) “the extent to which the measure contributes to the realization of the end pursued”; and (3) “the extent to which the . . . measure produces restrictive effects on international commerce.”<sup>175</sup> The Appellate Body considered the requirement that no WTO-consistent alternative be reasonably available and said that this standard should not be “deviated from lightly” but that an “alternative measure may be found not to be ‘reasonably available’ . . . where the responding member is not capable of taking it, or where the measure imposes an undue burden on that member, such as prohibitive costs or substantial technical difficulties.”<sup>176</sup> The Appellate Body also recognized that the alternative must still achieve the desired level of protection.<sup>177</sup>

This necessity test, particularly when based on a weighing of the various factors, appears to tip in the favor of the proposed labeling scheme. Protecting human rights is a goal that the international community has repeatedly identified and responded to, giving it legitimacy and demonstrating its relative importance. The proposed labeling scheme does not offer a particularly high level of protection, but it contributes to allowing consumers to take action through purchases according to their values. Finally, because of its voluntary nature, the labeling scheme does not restrict international commerce on its face. Thus, it would be difficult to find a less restrictive alternative that served the same informational function while so clearly promoting the goal of improving the treatment of humans in the production of various products.

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174. For a discussion of extraterritoriality, see *infra* Part III.D.6.

175. *Korea–Beef* Appellate Body Report, *supra* note 131, ¶¶ 162–63.

176. *U.S.–Gambling* Appellate Body Report, *supra* note 20, ¶ 308.

177. *Id.*

3. *Article XX(b): Necessary to Protect Human, Animal, or Plant Life or Health*

Currently, only the measure in *EC–Asbestos* has managed to qualify as such an exception under Article XX(b), as panels and the Appellate Body have chosen to interpret this exception narrowly.<sup>178</sup> An analysis of the proposed labeling scheme under Article XX(b) is likely to rely on the three questions laid out by the GATT panel in *U.S.–Tuna II* to determine whether the labeling scheme is necessary to protect human life and health. These questions are: (1) did the policy fall within the “range of policies” to “protect human, animal or plant life or health”; (2) was the measure itself “necessary to protect human, animal or plant life and health”; and (3) was the measure “applied in a manner consistent with” the Article XX chapeau?<sup>179</sup> The labeling scheme seems to fall solidly within a range of policies that are intended to protect human life and health, provided that the certification criteria targeted those human rights violations that were intimately connected to health-related concerns. Thus, for example, a certification scheme that required producers to demonstrate that their workers had not been exposed to dangerous pesticides is more likely to meet this standard than requiring producers to demonstrate that their workers had been paid a fair wage.

The panel in *U.S.–Tuna II* used a definition of “necessary” articulated in *Thai–Cigarettes*, which required that the measure chosen be the least inconsistent with other GATT provisions among all of the measures reasonably available.<sup>180</sup> Naturally, this is a very difficult standard to meet because a state can demonstrate that a challenged measure fails this test by providing just one alternative measure that is less trade restrictive, while still making progress on the same goal. As previously mentioned, however, the Appellate Body backed off from this absolute position in evaluating the measure in *EC–Asbestos* under Article XX(b). The Appellate Body recognized that the importance of the policy goal must be taken into account as well as the extent to which alternative measures allow the implementing state to realize its ultimate policy objective.<sup>181</sup>

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178. See *EC–Asbestos* Appellate Body Report, *supra* note 37.

179. *U.S.–Tuna II* Report of the Panel, *supra* note 19, ¶ 5.29; see also *U.S.–Gasoline* Appellate Body Report, *supra* note 19, ¶ 6.20 (offering a substantively identical test). Compliance with the Article XX chapeau will be discussed *infra* Part III.D.5.

180. Report of the Panel, *Thailand–Restrictions on Importation of and Internal Taxes on Cigarettes (Thai–Cigarettes)*, ¶ 74, DS10/R (Oct. 5, 1990), GATT B.I.S.D (37th Supp.) at 200 (1990). This report was adopted by the membership of the GATT, in contrast to the *U.S.–Tuna* reports.

181. *EC–Asbestos* Appellate Body Report, *supra* note 37, ¶ 172.

Further, because Article XX(b) is available for the protection of plant and animal life, the fact that the measure is aimed at protecting humans elevates it in importance and may play a role in overcoming the necessity test. An evaluation of this Note's labeling scheme under Article XX(b) will follow the same reasoning offered in the discussion of Article XX(a) above, except that it will require a nexus to preserving human life or health rather than protecting public morals.

Ultimately, it is difficult to know how a particular panel will come down on the question of necessity. The connection between the measure, which relies on consumer action, and the human life it is aiming to protect (those harmed during the earlier production process) is more tenuous than the connection would be in the case of a product that could harm the consumer directly.<sup>182</sup> No panel has yet endorsed the use of an Article XX(b) exception on the basis of protecting human, animal, or plant life or health during the production process. This does not foreclose the possibility of the label being exempted on the basis of Article XX(b), but there is no precedent for such a decision.

#### 4. *Article XX(d): Necessary to Secure Compliance with Laws or Regulations*

The seminal case for the application of Article XX(d) is the *Korea–Beef* case, whose balancing test is described in the two previous Sections.<sup>183</sup> Importantly, in the context of Article XX(d), this test hinges on the idea that the challenged measure is being used to enforce another law. The test that was articulated by the Appellate Body comprises two distinct steps:

First, the measure must be one designed to “secure compliance” with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be “necessary” to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating

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182. In the *EC–Asbestos* case, the measure was aimed at protecting domestic consumers from the harms associated with the product itself. The proposed labeling scheme would instead aim at protecting the people associated with the production process from harms arising during the production phase.

183. The full text of Article XX(d) provides an exception for any measures “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.” See GATT, *supra* note 27, art. XX(d).

that these two requirements are met.<sup>184</sup>

This may be a more difficult test for the labeling scheme to pass than those required for provisional justification under Article XX(a) or (b), as the relationship between the labeling scheme and a particular law is necessarily dependent on how the labeling scheme is framed and its connection to securing compliance with another distinct law. Hypothetically, the United States could craft a voluntary labeling scheme to effectuate existing international human rights treaty commitments that were self-executing or that had been implemented through domestic legislation. Further, the requirement that the original law is not inconsistent with the GATT adds another hurdle to overcome.

The Article XX(d) necessity test in *Korea–Beef* was discussed earlier with regard to Article XX(a) and (b), and the same weighing/balancing approach would be undertaken. In the absence of specifics in terms of how the proposed labeling system would function to secure compliance with another law, however, any analysis on the likely outcome of such a balancing test is little more than conjecture. If the law the labeling system is acting to effectuate is targeted at human rights, it is likely to be perceived as having a high level of importance, and again it is not a highly trade restrictive measure so it will have less of a distortionary effect on international commerce. The real question that would be left to a panel would be the extent to which the labeling scheme secured compliance with a particular law. This should be taken into account when the legislation creating the labeling scheme is written, and its purpose of securing compliance with a particular law should be explicitly stated within the legislative history.

An alternative argument under Article XX(d) can also be made that the proliferation of numerous independent labeling schemes creates a situation where deception is common, so the government is acting to combat such deceptive practices. No panel has considered this argument, and thus there is no indication of what type of test would be used to evaluate such a claim under Article XX(d). It is noteworthy that the Australian submission in *U.S.–Tuna I* argued that an important purpose behind the “dolphin-safe” label was to protect consumers from false and deceptive labeling.<sup>185</sup> Because the panel in this case did not find that the DPCIA violated the GATT, it did not rule on the possibility of justifying such a scheme under Article XX(d). Clearly the Australian government was arguing that Article XX(d) could be a viable justification if

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184. Korea–Beef Appellate Body Report, *supra* note 131, ¶ 157.

185. U.S.–Tuna I Report of the Panel, *supra* note 19, ¶ 4.6.

there had been such a violation, demonstrating that this argument is not completely novel.

##### 5. *Step Two: Complying with the Article XX Chapeau*

Perhaps the most difficult challenge for a voluntary, government-instituted labeling scheme to overcome in order to qualify as an Article XX exception is meeting the requirements of the Article XX chapeau.<sup>186</sup> A challenging state could argue that such a labeling scheme constitutes arbitrary and unjustifiable discrimination or is a disguised restriction on trade. Such an argument would assume that the labeling standard is a de facto barrier to trade, particularly if consumer preference significantly limited the market for goods that did not qualify for labels designating them socially responsible.

The term “arbitrary and unjustifiable discrimination” appears in both the chapeau of Article XIV of the GATS<sup>187</sup> and in the chapeau of Article XX of the GATT<sup>188</sup> regarding general exceptions. Both WTO panels and the Appellate Body have interpreted this language and have concluded that the chapeau’s wording is intended to prevent the abuse of the enumerated exceptions and to require that reasonableness be employed.<sup>189</sup> In a later report, the Appellate Body emphasized the balance that must be achieved between members’ right to invoke Article XX exceptions and their duty to respect other members’ rights under the treaty.<sup>190</sup> That report would foreshadow the Appellate Body’s later interpretation of the chapeau as a strict standard to prevent the exceptions from encroaching much on the established GATT rules. The Appellate Body further emphasized the connection between the chapeau and a general principle of good faith by recognizing that when the assertion of

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186. The text of the Article XX chapeau reads: “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 contracting party of measures.” GATT, *supra* note 27, art. XX.

187. The Article XIV chapeau reads: “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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures.” GATS, *supra* note 163, art. XIV.

188. The language with respect to “arbitrary and unjustifiable restrictions” is identical, thus it can be assumed that panels will utilize the same legal tests for this particular element.

189. U.S.—Gasoline Appellate Body Report, *supra* note 19, at 22.

190. U.S.—Shrimp I Appellate Body Report, *supra* note 19, ¶ 156.

an Article XX right “impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.”<sup>191</sup>

The *U.S.–Shrimp I* case provides important insight into the way the Appellate Body has interpreted the language within the Article XX chapeau, particularly the phrase “arbitrary and unjustifiable discrimination.” The Appellate Body looked to two elements of the measure at issue:<sup>192</sup> (1) the “intended and actual coercive effect” on other governments,<sup>193</sup> and (2) the lack of “any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.”<sup>194</sup> The Appellate Body expressed its discomfort with the idea that the challenged measure in this case required that other governments adopt essentially the same policy as the United States.<sup>195</sup> Thus any policy promulgated by the U.S. government must offer sufficient flexibility to other member states. The main criticism of the United States in the *U.S.–Shrimp I* case was its use of a “single, rigid and unbending requirement” that all other countries must meet in order to be allowed to import shrimp.<sup>196</sup> The holding reasoned that this rigidity constituted “arbitrary discrimination” within the meaning of the Article XX chapeau.<sup>197</sup>

An argument that the labeling scheme is a disguised restriction on trade may have some resonance, particularly because the United States has also referred to labeling standards as possible de facto barriers to trade in other contexts.<sup>198</sup> But in this situation, the United States will be able to maintain that the labeling standard would be applied in a manner that is uniform and not discriminatory (as all producers, importers, distributors, and sellers must meet the same objective criteria to receive the applicable “socially responsible” label), has clear guidelines, and is completely voluntary. The United States can argue that there is no dis-

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191. WORLD TRADE ORG., *supra* note 159, ¶ 526 (citing BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 125 (1953)).

192. Section 609 in its application did not permit imports of shrimp harvested by commercial shrimp trawl vessels using turtle excluder devices comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609. *U.S.–Shrimp I* Appellate Body Report, *supra* note 19, ¶¶ 3–6.

193. *Id.* ¶ 161.

194. *Id.* ¶ 165.

195. *Id.* ¶ 161.

196. *Id.* ¶ 177.

197. *Id.*

198. For example, the U.S. Commercial Service’s report on France identifies the voluntary European Union eco-label as a possible de facto barrier to trade. U.S. Commercial Service, France, Trade Regulations and Standards, at <http://www.buyusa.gov/france/en/116.html> (last visited Nov. 7, 2008).

crimination inherent in labeling and that these labels are intended solely to provide consumers with information rather than to serve as a trade restriction.

Further, one of the most important strengths of the proposed labeling scheme is its flexible nature. The measures taken to protect the environment in the *U.S.–Tuna* and *U.S.–Shrimp* cases were all mandatory certifications that imposed an embargo against goods that did not satisfy a particular standard. The labeling scheme being proposed by this Note does not suffer from the same rigidity, as flexibility is intrinsic in its voluntary nature. Further, the certification standards should take into account the unique situations of producing countries to avoid any indication that this labeling is aimed at coercing other member states to change their policies. Finally, because the labeling scheme focuses on how the product was made rather than where it was produced, it is not discriminating against countries where the *same* conditions prevail, but rather employing a uniform standard across the board.

A potential difficulty that the United States could face in defending the labeling scheme under the chapeau is the U.S. government's inconsistent participation in human rights treaties.<sup>199</sup> Fortunately, this should not undercut the legality of the scheme for several reasons: (1) the Appellate Body stressed the importance of negotiating an agreement only, regardless of whether such an agreement is concluded,<sup>200</sup> and the United States has played an integral role in the negotiation of almost all international human rights agreements; (2) the United States has participated in the ILO and is party to several ILO conventions;<sup>201</sup> and (3) there is no intergovernmental body that is currently negotiating standards in this

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199. For example, the United States is not a party to the International Convention on Economic, Social and Cultural Rights, the Convention for the Rights of the Child, or the Convention for the Elimination of Discrimination Against Women. The United States has expressed a willingness to negotiate labor rights standards in the context of trade agreements, as evidenced by the North American Agreement on Labor Cooperation (NAALC) and the labor provisions in other free trade agreements. See generally Marley S. Weiss, *Two Steps Forward, One Step Back—Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689 (2003) (providing an overview of the integration of labor provisions into free trade agreements from the NAALC forward).

200. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 134, WT/DS58/AB/RW (Oct. 22, 2001).

201. The United States has ratified 14 of 187 ILO Conventions, including two of the earlier listed core labor standards: No. 105 on the Abolition of Forced Labor and No. 182 on the Elimination of the Worst Forms of Child Labor. Department of Labor, Bureau of International Labor Affairs, ILAB Involvement in International Organizations, at [http://www.dol.gov/ilab/map/countries/ILO\\_int-org.htm](http://www.dol.gov/ilab/map/countries/ILO_int-org.htm) (last visited Apr. 20, 2008).

area.<sup>202</sup> It may behoove the United States to make a formal statement that it is ready and willing to negotiate to improve human rights in product production and then avail itself on an equal basis and in good faith to other countries that are interested in negotiating measurable international standards. Currently, the United States can make a strong argument that the labeling scheme takes a value-neutral stance in terms of the legal and regulatory environments employed in other jurisdictions and is relying on international standards to provide credible information to interested consumers.<sup>203</sup> Additionally, the United States can counter that it is living up to ILO standards for its domestic producers and will be applying the label uniformly to all domestic- and foreign-produced products, so the scheme is a violation of neither MFN nor national treatment.<sup>204</sup> Finally, there are no mandatory import restrictions; instead, any barriers to market access are based purely on consumer choice, rather than on governmentally imposed restrictions on market access.

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202. The International Organization for Standardization is in the process of negotiating guidance standard 26000 on social responsibility. For a general overview, see International Organization for Standardization, *ISO and Social Responsibility*, at <http://www.iso.org/iso/socialresponsibility.pdf> (last visited Nov. 24, 2008). The six main stakeholder groups involved in the negotiations are: industry; government; consumer; labor; NGOs; and others. International Organization for Standardization, *Social Responsibility*, at <http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/home.html> (last visited Nov. 24, 2008). The U.S. government does not participate directly in the negotiation of ISO standards; it is instead represented as part of the American National Standards Institute (ANSI) whose membership includes labor unions, industry representatives, local government representatives, and civic society. See American National Standards Institute, *ANSI Membership Roster*, at <https://eseries.ansi.org/Source/directory/Search.cfm> (last visited Nov. 28, 2008). Given the stage of the negotiations and the criticism that this draft standard has faced, it is unclear whether the final standard would be considered an international standard or an international negotiation for the purposes of meeting the requirements of the Article XX chapeau. See Lisa Roner, *Scale, Not Detail, is the Aim*, ETHICAL CORP., Sept. 2006, at 2, available at [http://www.hohnen.net/articles/ISO\\_special\\_report.pdf](http://www.hohnen.net/articles/ISO_special_report.pdf) (noting that critics claim that “the standard will be so general and vague, in order to cover a broad range of organizations and topics, that it will be useful to no-one”). The utility of basing a labeling scheme on guidance standard 26000 in order to allow a social label to meet the requirements of the Article XX chapeau should be revisited after the standard is promulgated in final form.

203. As argued earlier, the agency formulating the certification criteria should draw from international standards (i.e., ILO standards) as much as possible in order to maximize the chance that the labeling scheme could qualify for Article XX exemption.

204. See, e.g., Family and Medical Leave Act, 5 U.S.C. §§ 6381–6387 (2006); Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2000); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801–1803 (2000); Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (2000).

6. *Exceptions Allowable for Measures with an Extraterritorial Impact?*

Another argument that could be litigated in the context of the chapeau is that all effective labeling schemes *do* have extrajurisdictional effects, even if they are not intended to coerce other member states to alter their regulatory environments. Simply stated, the argument is that because the United States has the power to set the standards required, foreign producers may be forced to meet this de facto standard in order to compete. Consumer expectations may make qualifying for the label a necessity, thus creating a situation where the labeling scheme does an end run around foreign governments with authority over the relevant jurisdictions.<sup>205</sup> Scholars have argued that the standards used are likely to reflect domestic priorities rather than international goals, and producers may be required to adjust their production processes accordingly to meet different and potentially expensive standards required by different markets.<sup>206</sup> The developing world may argue that labeling fails to reflect both the improvements they have already made in human rights practices and does not adequately respect their human rights priorities at home.<sup>207</sup>

Considering the question of extraterritoriality requires an examination of the labeling scheme's ultimate goals: who is the scheme aiming to protect and what goal is it seeking to accomplish?<sup>208</sup> It is important to recognize that such a labeling scheme has both domestic and international effects and thus it is aiming to protect all human life regardless of national boundaries. Valuing all human life, regardless of nationality, is certainly in accordance with the goals of international human rights law. The GATT does not explicitly address the issue of extraterritoriality; instead, extraterritoriality entered the analysis as part of the jurisprudence of GATT panels examining environmental embargos.<sup>209</sup> The GATT panel did not raise extraterritoriality as a problem where the "dolphin-safe" labeling scheme was analyzed. Based on the text of the GATT,

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205. Okubo, *supra* note 139, at 609.

206. *Id.* at 609–10 (noting that developing countries are particularly concerned about their inability to make adjustments to their production processes in order to avoid being excluded from the market, especially when they are selling in several markets that have different standards based on PPMs).

207. *See id.* (articulating the issues that labels based on criteria reflecting domestic priorities and conditions may raise in the environmental context).

208. Cleveland, *supra* note 12, at 233.

209. *See, e.g.,* U.S.–Shrimp I Appellate Body Report, *supra* note 19; U.S.–Tuna I Report of the Panel, *supra* note 19.

there is no explicit prohibition against providing consumers with information independent of any trade restrictions, particularly when all products are being treated the same.

The fundamental goal underlying the measure also serves to distinguish the proposed labeling scheme from the measures challenged in the *U.S.–Tuna* and *U.S.–Shrimp* cases; the goal of the labeling is to provide information, not to make importation rights contingent on policy change in the exporting country. Allowing goods to be sold regardless of whether they have qualified for a socially responsible label would ameliorate the concern of a GATT panel that “each contracting party could unilaterally determine the conservation policies [or labor practices] from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.”<sup>210</sup> In *U.S.–Shrimp I*, the panel held that member states could not act to coerce another member state into changing its domestic policies.<sup>211</sup> Because the labeling standard is aimed at encouraging businesses, particularly MNCs, to change their production practices—something that would require no change in policy on the part of another member—extraterritoriality is likely to be less of an issue. The use of a content-positive, voluntary label simply alerts consumers who are interested in using their purchasing power to support producers who are utilizing the best production methods. This creates a market-based incentive for producers worldwide. While there *are* extraterritorial effects that may be viewed as an incursion on sovereignty, there are no direct coercive elements, only incentives for improvement. If a panel accepts these arguments, the extraterritorial nature of the labeling scheme is likely to meet the requirements of the Article XX chapeau.

#### IV. AVOIDING POTENTIAL PITFALLS: DIFFICULTIES ASSOCIATED WITH A “SOCIAL LABELING” SCHEME

Causes such as improving human rights tend to garner political support, particularly when taking up a cause such as eliminating child labor, and Congress has demonstrated its willingness to take trade measures that are even more restrictive than a voluntary labeling scheme to accomplish human rights goals.<sup>212</sup> Because a well-functioning labeling

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210. *U.S.–Tuna I* Report of the Panel, *supra* note 19, ¶ 5.32.

211. *U.S.–Shrimp I* Appellate Body Report, *supra* note 19, ¶ 161.

212. For a discussion of the more restrictive Child Labor Deterrence Act of 1995, see Note, *supra* note 68.

scheme will have sweeping effects on the industries that produce the targeted goods, however, it is likely to face at least some political opposition from both sides—advocates that want a scheme to go farther and producers who want to keep the status quo. This Part addresses a few of the counterarguments that could arise in a political discussion over the proposed labeling scheme. When possible, this Part recommends strategies to avoid the potential problems raised by these counterarguments. Although there is no perfect solution to harmonize trade and human rights, the proposed labeling scheme strikes the appropriate balance by creating an incentive for improvement in human rights without unduly restricting trade.

#### A. *Cost of Implementation and Administration*

Naturally, lawmakers are likely to be concerned with the potential costs of such a labeling scheme. Costs could be kept down by using a system of self-certification and random audits with appropriate penalties for misrepresentations, instead of attempting to inspect the production facilities of all producers seeking certification. The United States already devotes significant resources to assisting industries in developing standards for themselves, so it is a small step to change the position of the government at these negotiations. It is disingenuous to pretend that there are no costs associated with certifying and labeling products, but compared to the possible benefits, the expenditures will be worthwhile because they allow the market to account for negative externalities.

The issue of preventing “sweat washing” may further raise costs as it becomes necessary to investigate claims of false information in order to maintain the credibility of the labeling program.<sup>213</sup> A balance must be struck between ensuring a sufficiently high rate of detection and administering an appropriate punishment when a company is caught misrepresenting itself in order to deter such behavior. While it is impossible that enforcement will be completely effective, it is important that consumers can purchase the labeled goods with confidence and know that the government is willing to stand behind such certifications.

Another possible cost-raising factor could be the success of the labels. If the labels have the desired effect of significantly improving the human rights situation in the production phases of targeted products, there may be a need to reflect changing standards and higher demand

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213. “Sweat washing” and “green washing” are popular terms to describe the problem of producers claiming that their products were made in a sweatshop-free environment or in an environmentally friendly manner, when the reality does not live up to those representations.

for more labels for other products. The government would need to be proactive in encouraging improvement and recognize that worldwide human rights standards are evolving and adjust the criteria used to reflect those changes. An appropriate notice and public comment procedure will be essential to adjusting labeling criteria, as experts and activists need to be heard alongside industry voices, and the government should strike a balance where its standards are achievable without setting the bar too low.

Critics may also argue that setting measurable benchmarks or standards for producers to meet is too difficult or impossible and that the political costs are just too high. But, the government constantly engages in such balancing and standard setting in other contexts. There is no reason to assume that developing a human rights label presents challenges that far exceed those necessary in the administration of our own domestic labor laws, in regulating environmental degradation, or in developing a label for organic products. To be certain, establishing the criteria for a human rights label and implementing it is no easy task, but Congress and agencies constantly engage in balancing tests in their attempt to create workable policies.

#### *B. Possibility for Inaccuracies in Labels*

Realistically, it is impossible to create a labeling scheme that can *guarantee* that a product was produced in the manner represented by the label. Labels actually signify that, to the best of the knowledge of the producer and certifier, the product was produced according to the criteria offered by the label. Because of globalization, production processes and supply chains have become increasingly complicated. As a result, companies manufacturing products are often unaware of exactly where and under what conditions their products have been produced.<sup>214</sup>

Private certifiers such as the Fair Labor Association (FLA), however, have years of experience in dealing with and accounting for these challenges.<sup>215</sup> The government certainly stands to benefit from the practices employed by the private sector and should highly value input from activists in this area. An appropriately structured system of penalties can offer producers some flexibility for honest mistakes but still employ the idea of a multiplier effect, in which the likelihood of deviations not being detected is accounted for in the penalty. Further, requiring documen-

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214. Kuik, *supra* note 38, at 623.

215. For more information on the FLA, see Fair Labor Association, at <http://www.fairlabor.org>.

tation will give producers the incentive to regulate their supply chains. This will create upward pressure within MNCs to encourage all of their subsidiaries to improve their production practices, thus raising working conditions worldwide.

### C. *Consumer Disinterest*

The success of a human rights labeling scheme is necessarily dependent on the willingness of consumers to pay attention to such labels and to adjust their consumption decisions accordingly. Although survey data has shown that consumers profess a willingness to pay more for ethically produced goods,<sup>216</sup> and existing private labels have fared well on the market, it is always difficult to predict with exact accuracy the potential impact of a nationwide labeling scheme. Naturally, willingness to pay more for such goods is often based on ability to pay,<sup>217</sup> and thus, as a strategic matter, it makes sense to focus informational campaigns on those consumers who are most likely to adjust their behavior. Additionally, market research should be undertaken to identify those products in regard to which consumers are most likely to be willing to adjust their behavior. Just as negative public attention has the most impact on “logo” products,<sup>218</sup> human rights labels are most likely to work in relatively low-cost goods in competitive industries without high levels of preexisting brand loyalty. Further, educational campaigns can help to educate the public on the meaning of the labels and the abuses associated with production in extreme cases.

### D. *Disadvantage to the Developing World and Small Businesses*

One of the most significant criticisms that eco-labels have faced is that there is a risk of disadvantaging products from developing countries that cannot afford the advanced technologies that are required to produce goods in a less environmentally damaging manner.<sup>219</sup> Improving human and labor rights, however, is often possible without significant investment in new technologies. It is true, however, that providing better working conditions does raise production cost, which can erode the competitive advantage for countries with low labor costs. Conceivably, a very successful label could be a type of entry barrier into the market,

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216. See Hertel et al., *supra* note 72, at 4.

217. *Id.* at 3.

218. Micheletti & Stolle, *supra* note 41, at 161.

219. APPLETON, *supra* note 89, at 20–21 (listing a number of concerns raised by voluntary eco-labels).

and it could also be a difficult hurdle for small- and medium-sized enterprises. To assuage these problems, to the extent possible, such labeling schemes should focus on products that are generally and primarily produced by MNCs. A processed-based labeling program applied universally at the point of consumption, regardless of where the product was produced, offers no incentive for an MNC to move its operations to another country where there are lower human rights standards. Thus, this scheme does not put pressure on developing countries to change their domestic laws and may even limit the incentive for countries to “race to the bottom” to encourage investment.

In addition, voluntary labels do not suffer from the problem of collateral damage for which sanctions are criticized.<sup>220</sup> The problem with “human rights” sanctions is that even the most carefully tailored sanctions are likely to hurt those in the most vulnerable economic positions. Instead of being a hard sanction, these labels simply provide incentives to reward producers for making socially responsible choices rather than acting to punish entire countries for perceived human rights abuses. Workers benefit because their working conditions should improve, but jobs in entire sectors are not lost as they may be through trade policies that are tantamount to boycotts.

#### *E. Retaliatory Labels from Other Countries*

The possibility of retaliatory labels put in place in other markets could potentially damage the competitiveness of American-made products overseas. Considering that these labels will be based on international standards wherever possible as a basis for their criteria, it is less likely that this will be a problem because of international agreement around these standards. Additionally, the fact that the proposed labeling scheme is both content-positive and voluntary makes it less likely to result in retaliation. The United States retains the right to challenge a labeling scheme instituted by another country that is unnecessarily discriminatory, but provided that a foreign labeling scheme follows the same general principles outlined in this Note, it is more likely that similar labeling schemes will be mutually reinforcing rather than retaliatory. If anything, such labels would level the playing field and give Ameri-

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220. See, e.g., Joy Gordon, *Economic Sanctions, Just War Doctrine, and the “Fearful Spectacle of the Civilian Dead,”* 49 *CROSS CURRENTS* 387 (1999), available at <http://www.crosscurrents.org/gordon.htm>; Michael P. Malloy, *Economic Sanctions and Human Rights: A Delicate Balance*, 3 *HUM. RTS. BRIEF* 12 (1995), available at <http://www.wcl.american.edu/hrbrief/v3i1/malloy31.htm>.

can-made products that are produced in appropriate conditions a better chance against products made in less labor-friendly environments.

### CONCLUSION

Strict trade rules have limited governments' ability to take effective action against poor human rights practices associated with the production of consumer goods outside of their territorial jurisdiction. This problem has been exacerbated by globalization that gives producers an incentive to "race to the bottom" to keep production costs competitive. Traditional legislation has proven to be ineffective because of the cross-border nature of production and the fact that the traditional political responsibility process breaks down because it "seems only to work well when government is mandated to enact strong laws that allow it to establish who is to blame for intentional wrongdoings concentrated in time and room."<sup>221</sup> Because not all countries are willing or able to pass and enforce strong laws to protect workers within their territorial jurisdiction, it is important that governments in the developed world take advantage of their market position and create market-based incentives for socially responsible behavior.

Even if there were universal agreement about what standards producers should be held to, and every country in the world passed laws codifying these standards, developing countries would likely still lack the capability to prosecute transnational corporations for wrongdoings, even if they were willing to do so.<sup>222</sup> Prosecution is also complicated by the fact that there are numerous actors, including some hidden actors, in the commodity chain for industries such as apparel.<sup>223</sup> The labeling scheme proposed in this Note avoids these pitfalls associated with hard law by allowing developed countries to take actions within their own markets to reward voluntarily those companies who are willing to participate in a certification process, regardless of where the production is occurring. This approach avoids the market failure caused by imperfect information and allows consumers to reward socially responsible producers as they see fit.

Because this standard is content-positive and focuses on incentives rather than on punishing less responsible producers, it is much more dif-

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221. Micheletti & Stolle, *supra* note 41, at 159.

222. *Id.* For a brief summary of the difficulties associated with holding MNCs liable, see Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 84-88 (1999).

223. *Id.*

difficult to challenge legally. In addition, its voluntary nature and the fact that it is not attached to an embargo is further evidence that the choice is really in the hands of consumers. It is difficult to argue, as a normative matter, that it is unfair to allow consumers to choose to reward producers for exceptional behavior. The main differences between this proposed scheme and existing private labels are all positive: the proposed labels can be used more broadly and can be developed through a participatory process; penalties can be attached to deception; and the government can identify priority areas on which labels should focus.

Moving forward, it is essential to identify those products and industries that are the best suited for human rights labels. While this Note undertook the necessary legal analysis to demonstrate the legality of such a label under U.S. international trade commitments, the heavy lifting of deciding how to establish appropriate criteria and how to best administer the certification process is for future scholarship and the political and administrative process. Naturally, the practical development of such criteria is likely to be contentious and will require a significant commitment from the government. If the premise of this Note—that human rights labeling is a useful tool that does not violate international trade rules—is accepted, then it is appropriate to consider how to implement this idea in the domestic context.

Ultimately, labels offer governments an important opportunity to accomplish international human rights goals without violating their commitments under the WTO. Harnessing the power of consumer preference is an important step toward making human rights and trade mutually reinforcing rather than mutually exclusive.