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

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Jessica Karbowski

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Abstract

Despite the increases in global wealth attributable to globalization and increased international trade, the damage done by socially irresponsible production practices remains an area of concern for international human and labor rights advocates. Because international trade law under the World Trade Organization (WTO) imposes strict limitations on the policy options available to Member States, international human rights and international trade have been viewed as fundamentally at odds with one another. This Article argues that market-based incentives can be used to allow international trade to reinforce established human rights principles, rather than constantly undermining government attempts to formulate appropriate policy solutions.

This Article proposes that the United States create and implement a voluntary, government-run system of human rights label. Like the content positive labels currently offered for organic products, this human rights labeling system would provide consumers with additional information in order to reward producers who had met certain standards. Unlike the current system that allows producers to place whatever “human rights” labels that they want on their products and allows numerous third-party certification schemes, a government-run system could serve to create one label that consumers will recognize as credible, consistent, and enforceable.

Most importantly, the labeling system proposed by this Article does not run afoul of the United States’s commitments under the WTO. The two relevant agreements, the Agreement on Technical Barriers to Trade (TBT Agreement) and the General Agreement on Tariffs and Trade (GATT), are examined in depth for any possible conflicts. The Article concludes that because of the voluntary nature of the label, the proposed labeling scheme should be able to survive scrutiny by a WTO dispute settlement panel, if it such a challenge were to arise. Further, the Article argues that the label could be justified as a general exception, as provided for in Article XX of the GATT.

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

### **I: Introduction**

In a local grocery store in middle-America, 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 United States government for being produced in a socially responsible manner. This seal, if credible and easily recognizable, has added 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 to effectively 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 12,000 children trafficked for this purpose in Cote d'Ivoire alone.<sup>2</sup> Approximately 40% of world cocoa production originates in Cote d'Ivoire, where the pressure to keep production prices as low as possible stems from the easy substitutability and high competition in the market for this agricultural good.<sup>3</sup> Stories of children being trafficked to work in "horrific" conditions in the West African cocoa fields were brought to the public's attention in 2000, yet consumers in the United States are still unwittingly buying chocolate produced by trafficked children. Pressure from the public and from Congress shamed the chocolate industry into agreeing to a comprehensive protocol<sup>4</sup> aimed at creating a certification process for a "no child slavery" label, but stalled negotiations have left chocolate unlabeled and consumers uninformed.<sup>5</sup> Further, consumers are forced to rely on the representations of the industry rather than knowing

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

<sup>2</sup> Tiaji Salaam-Blyther et. al, *Child Labor in West African Cocoa Production: Issues and U.S. Policy*, CRS Report for Congress, 9, July 13, 2005.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> The text of the Harkin-Engel Protocol is available at <http://www.cocoainitiative.org/images/stories/pdf/harkin%20engel%20protocol.pdf>.

<sup>5</sup> For more information on where the chocolate industry has fallen short in this regard, see Brian Campbell & Bama Athreya, *October 2006 – Report on Cocoa and Forced Child Labor*, International Labor Rights Forum, available at <http://www.laborrights.org/stop-child-labor/cocoa-campaign/resources/425>.

that a credible and enforceable framework is 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>6</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, the international trade regime has come to be viewed by many social reformers as the enemy.<sup>7</sup>

This paper argues that trade and human rights can reinforce one another rather than engage 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. As this paper will show, states have the ability to take measures that do not directly restrict the flow of trade and allow consumers to express their preferences for products that are produced in a socially responsible manner.

Putting responsibility in the hands of consumers allows the market to respond and allows states to avoid taking direct action that restricts trade, while still making progress towards accomplishing non-commercial goals. For labeling to be successful, consumers need to be provided with reliable and recognizable information that allows them to make purchasing choices that will appropriately reflect preferences for products that are produced in conditions that do not exploit the people producing them. From a basic economic standpoint, it would be difficult for a WTO panel to agree that it is best to perpetuate a market failure based on imperfect information, as the entire premise of the international trade regime is to let the market dictate. The sheer size and strength of the market for consumer goods in the United States puts the government in the unique position of providing a small amount of information and then allowing this market to respond in a manner that will have an impact world-wide.

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<sup>6</sup> For a general description of the World Trade Organization and the multilateral agreements included under its auspices, see *World Trade Organization mainpage*, available at [www.wto.org](http://www.wto.org).

<sup>7</sup> For example, the WTO ministerial meeting in Seattle 1999 was hampered by street-protests, where many of the protestors identified themselves as pro-Labor, anti-Capitalist, anarchists, or environmentalists. 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* (John Arquilla & David F. Ronfeldt eds., 2001).

The federal government should take a more active stance by creating and administering an appropriate system of labels that takes the human rights costs of product production into account, and that this type of labeling is not a violation the United States' commitments under the WTO. I put forward a new proposal for a voluntary, government-run system of human rights labels<sup>8</sup> that provides several practical and normative advantages over the current mishmash of private labels on the market and to provide a comprehensive analysis of this proposal using existing WTO jurisprudence.<sup>9</sup> This approach is an essential step forward in the struggle to make progress towards addressing pervasive social problems while working within the constraints that are necessary for a predictable and robust trade regime.

This article will proceed 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 II demonstrates, the lack of integration between these regimes necessitates creative solutions that allow human rights concerns to be appropriately valued while avoiding the pitfall of creating further barriers to trade, highlighting the need for a solution such as the proposed labeling scheme to allow these regimes to reinforce one another. To illustrate the contours of how labeling works and its successes, Part III offers a brief sketch of labels historically and takes stock of the current "labeling landscape." The history of labeling offers a jumping-off point for this article's outline of what a

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<sup>8</sup> For the purposes of this paper, 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 paper does not intend to define the contours of what rights should be reflected in labels, the term 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.

<sup>9</sup> In light of the two aforementioned goals, this paper 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 paper 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 the economists and industry specialists, and it does not engage in the larger debate on whether or not 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 or not eliminating practices like sweatshops is beneficial or detrimental to developing country workers, see Nicolas Kristof & Sheryl WuDunn, *Two Cheers for Sweatshops*, in *BEYOND INTEGRITY: A JUDEO-CHRISTIAN APPROACH TO BUSINESS ETHICS* (Scott B. Rae & Kenman L. Wong, eds. 2004), 239; Denis Gordon Arnold & Laura Pincus Hartman, *Worker Rights and Low Wage Industrialization: How to Avoid Sweatshops*, 28 *HUMAN RTS. Q.* 676 (2006); Peter Dorman, *International Labor Standards: The Economic Context*, 11 *MSU-DCL J. INT'L L.* 125 (2002). However, the paper does advocate targeting responsive products and focusing on the most egregious abuses associated with production as a starting point.

government-sponsored labeling scheme should look like and what its primary goals should be. Although the picture offered is far from complete, given the necessity of allowing the political process to articulate the appropriate balances between opposing interests, the basic idea is evaluated from a normative perspective and shown to be superior to the labeling options currently on the market.

After offering the basic proposal and reasons behind it, the bulk of this article is dedicated to a comprehensive legal analysis of a voluntary, government-run social labeling scheme under the international trade regime. If the labeling scheme were scrutinized by a WTO dispute settlement panel, Part IV explains how the labels would 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 V 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 found in Article XX. Article XX offers additional justification for the proposed labeling scheme, in the unlikely event that an initial violation had been found. This legal analysis demonstrates that there are several strong arguments for exempting this type of labeling scheme. Part IV 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 even the best-reasoned challenge at the WTO.

The paper 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 it is difficult to predict how successful a label will be, the value derived from allowing consumer access to credible information far outweighs the inconvenience of developing an appropriate and responsive certification system. Significantly, this paper offers a way to bridge the divide between two growing areas of international law in a way that is both logical and legal.

## **II: 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 on addressing global social ills. Throughout history, states have resorted to carrots and sticks of an economic nature to encourage cooperation and to coerce one another into behaving in a certain way.<sup>10</sup> Customary international law does not prohibit a state from utilizing international trade mechanisms to encourage or coerce compliance with human

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<sup>10</sup> See generally, David Montgomery, *Labor Rights and Human Rights: A Historical Perspective*, in Environment, HUMAN RIGHTS AND INTERNATIONAL TRADE, 13-21 (1996) (tracing the international aspects of the labor rights movement in the United States).

rights norms.<sup>11</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>12</sup> However, the strict rules associated with membership in the WTO have limited states' ability to take action that impedes international trade, even to encourage progress on internationally recognized human rights issues.<sup>13</sup>

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

Both the modern multilateral trade regime and the international human rights movement are a product of post-World War II phenomenon.<sup>14</sup> Both regimes limit the policy options available to governments—the trade regime by clearly articulating a set of global trade

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<sup>11</sup> *Id.* at 208-61.

<sup>12</sup> See Sarah H. Cleveland, *Human Rights Sanctions and the WTO*, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE, 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).

<sup>13</sup> 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, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, Art. 22, 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

<sup>14</sup> Robert Howse and Makau Mutua, *Protecting Human Rights in a Global Economy*, International Centre for Human Rights and Democratic Development: Rights and Democracy, 4 (2000).

The WTO grew out of the GATT. The original twenty-three parties to the General Agreement intended to draft a charter for an International Trade Organization (ITO), 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. However, this proposal failed, 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. The GATT was modernized through voluntary membership and subsequent agreements through a series of trade rounds *The Roots of the WTO*, Economics at Iowa State University, available at <http://www.econ.iastate.edu/classes/econ355/choi/wtoroots.htm>, last visited 21 Jan 2008.



rules and the international human rights regime by limiting government's actions with regard to individuals.<sup>15</sup> However, because these regimes have developed along parallel, but not necessarily "consistent" paths, 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<sup>16</sup> the same treatment regardless of how they are produced, and using trade to improve the human rights situations of workers on the ground. 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>17</sup>

In addition to requiring adherence to trade agreements, the WTO offers a binding settlement body to adjudicate trade disputes. Dispute settlement panels and the WTO's Appellate Body have refused to stray far from the exact letter of the WTO treaties, and have thus struck down measures intended to address other social ills as being inconsistent with trade rules.<sup>18</sup> Because the WTO dispute settlement opens the potential for countermeasures against states that lose in trade disputes, many policies intended to improve areas such as human rights or environmental conservation have been abandoned to avoid economic retaliation sanctioned by the WTO. 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>19</sup> The combination of a forum to negotiate trade concerns and the enforceability of

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<sup>15</sup> Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies*, 24 HUMAN RTS QTLY 1, 4 (2004) [hereinafter Dommen, *Raising*].

<sup>16</sup> The definition of "like product" within the meaning of Articles I:1 and III:4 of the GATT will be analyzed in Part IV(C)(1) and (2).

<sup>17</sup> SUSAN ARIEL AARONSON & JAMIE M. ZIMMERMAN, TRADE IMBALANCE: THE STRUGGLE TO WEIGH HUMAN RIGHTS CONCERNS IN TRADE POLICYMAKING, 6 (2008) (arguing 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).

<sup>18</sup> See e.g., *United States – Restrictions on Imports of Tuna*, GATT B.I.S.D. (39th Supp.) (unadopted) (Aug. 16, 1991) [hereinafter U.S.—Tuna I]; Panel Report, *United States – Restrictions on Imports of Tuna*, reprinted in 33 I.L.M. 839 (1994) (unadopted) (June 1994) [hereinafter U.S.—Tuna II]; *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 21 (Apr. 29, 1996) [hereinafter U.S.—Gasoline]; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998) [hereinafter U.S.—Shrimp I].

<sup>19</sup> See e.g., U.S.—Tuna I, *supra* note 18; U.S.—Shrimp I, *supra* note 18; Report of the Appellate Body, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005); Panel Report, *United States—Section 337 of the Tariff Act of 1930*, L/6439 - 36S/345 (Jan 16, 1989) (adopted Nov. 7, 1989) [hereinafter U.S.—Section 337]; Report of

dispute settlement decisions has contributed to the perception that trade is often elevated above human rights concerns.<sup>20</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>21</sup> Because dispute settlement is costly and attracts international attention, states often want to avoid it, chilling the formation and implementation of policies that may otherwise benefit international human rights.

Because the WTO system has significantly limited the space that states have to link non-commercial considerations to trade, the international trade and international human rights regimes have developed in isolation in many ways.<sup>22</sup> Given the strong incentive offered by international trade and the important deterrent that trade barriers have traditionally provided, human rights activists have found themselves frustrated at the inability of states to use trade to pressure other states into improving human rights conditions.<sup>23</sup> Further, such advocates of linking the two regimes have argued that the current state of international trade law actually inhibits national policymakers' ability to live up to their commitments under international human rights law, as they are unable to take any measures that may serve as a barrier to trade.<sup>24</sup> Given this tension, countries often behave differently from one another when faced with decisions at the intersection between the two. Because of the existence of trade-offs, there is an inherent balancing act and a series of value judgments that states are forced to make. The explicit limitations offered by each regime complicate what would otherwise be a decision within the sovereignty of a particular state.

Although the GATT/WTO developed in relative isolation institutionally because the GATT had no associated international organization until the advent of the WTO, the text of Article XX demonstrates that the drafters recognized the interplay between non-trade public values such as human rights and international trade and made allowances for them

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the Appellate Body, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter U.S.—Gambling]. 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*, 281-93 (discussing the particular difficulties that small economies face within the WTO system).

<sup>20</sup> AARONSON, *supra* note 17, at 3 (2008).

<sup>21</sup> For a larger discussion and a graphical layout of these perceived incompatibilities, see Dommen, *Raising*, *supra* note 15, at 14-15.

<sup>22</sup> For a table listing the perceived incompatibilities between international human rights and trade law, see *id.*

<sup>23</sup> Caroline Dommen, *Safeguarding the Legitimacy of the Multilateral Trading System: The Role of Human Rights Law*, in *INTERNATIONAL TRADE AND HUMAN RIGHTS*, EDS ABBOTT ET AL. (2006), at 125 [hereinafter Dommen, *Safeguarding*].

<sup>24</sup> See Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, *MINN. J. GLOBAL TRADE* 62, 63 (2001).

within the text itself.<sup>25</sup> Article XX allows for general exceptions to the rules found in the rest of the agreement for reasons such as “public morals” or to protect human life or health.<sup>26</sup> Further, the Agreement Establishing the WTO lists lofty goals beyond simply eliminating barriers to trade, such as encouraging sustainable development and increasing developing countries’ access to the benefits from increased trade.<sup>27</sup> Article 103 of the United Nations Charter also makes the obligations of Member States to the Charter superior to their obligations under other international agreements, thus some commentators have argued that a commitment to a universally recognized right should prevail over the GATT or other WTO agreements in the event of a conflict.<sup>28</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 its free trade agreements.<sup>29</sup> Although scholars have proposed a variety of measures intended to

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<sup>25</sup> Howse, *supra* note 14, at 7.

<sup>26</sup> General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), Art. XX, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT].

<sup>27</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), preamble, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement].

<sup>28</sup> Howse, *supra* note 14, at 9; U.N. Charter art. 103.

<sup>29</sup> For a more comprehensive list of mechanisms Congress has used to combat child labor, see CHILD LABOR IN WEST AFRICAN COCOA PRODUCTION: ISSUES AND U.S. POLICY, CRS REPORT FOR CONGRESS, RL32990 (July 13, 2005).

increase interaction between trade and human rights,<sup>30</sup> the WTO still poses a significant bar to more actively using trade to enforce human rights norms.<sup>31</sup>

### ***B. Labels as a way to resolve this tension and incentivize progress on human rights goals***

This article proposes a new and innovative way for the United States government to take advantage of its market power to encourage compliance with internationally recognized human rights norms. The government is able to play an active role and determine what social goals it would like to prioritize, while avoiding conflict with any WTO rules. The labeling scheme proposed allows governments to be directly involved in decisions regarding what types of conduct on behalf of producers selling on their markets should be rewarded and what conduct should be discouraged. As 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. These 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>32</sup>

Labels offer an important way to allow trade to reinforce human rights norms, rather than undermine them. These “human rights labels” would be modeled on the success of “eco-labels” used by the environmental movement to promote products that have been

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<sup>30</sup> See e.g., Daniel S. Ehrenberg, *From Intention to Action An ILO-GAA Enforcement Regime for International Labor Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, EDS. LANCE A. COMPRA & STEPHEN F. DIAMOND (1996) (arguing for a combination of the ILO and WTO with a single enforcement mechanism); Susan Ariel Aaronson, *A Match Made in the Corporate and Public Interest: Marrying Voluntary CSR Initiatives and the WTO*, 41(3) J. OF WORLD TRADE 629 (2007) (promoting increased linkages of voluntary corporate social responsibility and the WTO); 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 EIJL 621 (2002) (arguing for the enforcement of human rights through the WTO).

<sup>31</sup> See generally FRANCESCO FRANCONI, ENVIRONMENT, HUMAN RIGHTS AND THE LIMITS OF FREE TRADE, 1-9 (2001) (identifying the sources of discontent with the WTO and the resulting questions about the legitimacy of the WTO decision-making process).

<sup>32</sup> Most human rights treaties protect the rights of individuals against state action, since states agree to be bound by these conventions. A variety of approaches have been taken to hold the extraterritorial abuses of multi-national corporations liable under United States law, such as using indirect liability under the Alien Torts Claims Act. 28 U.S.C. §1350. For examples of cases in which this has been argued, see *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp.2d 1229, 1234 (N.D. Cal. 2004); *In re South African Apartheid Litigation*, 346 F. Supp.2d 538, 547 (S.D.N.Y. 2004).

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,” 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 government.

### **III. 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 by any means, and there is value in considering the successes and failures of existing labeling schemes. Further, the government should develop human rights labels with a clear set of objectives in mind because of the difficult political realities associated with the substantive criteria for certification. Section A of this Part will identify three types of labeling schemes and highlight important features and examples of each. This Section articulates the reasons why a voluntary scheme is the most appropriate in the human rights context. Section B will further articulate the underlying goals of such a scheme and how the voluntary label is likely to meet them. This paper 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. Three categories of labeling schemes: an evaluation of relative strengths and weaknesses***

There are three possible types of labels that can be employed to signal information about the broader effects of a product to the consumer: mandatory labeling schemes, voluntary labeling schemes, and private labeling schemes.<sup>33</sup> There are notable examples of each type of label, and each has different strengths and weaknesses. For the purposes of human rights labeling, this paper will advocate on behalf of the second option as the best fit.

##### *i. Mandatory labels: in the WTO danger-zone and impracticable*

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<sup>33</sup> Manoj Joshi, *Are Eco-Labels Consistent with World Trade Organization Agreements?*, 38(1) J. OF WORLD TRADE, 69, 73 (2004). Note that the first two types of schemes are government-run and the third is implemented by private actors.

A mandatory labeling scheme requires that all producers provide certain standard information about their product on the packaging. Mandatory labels are effective at communicating information, as all similar products are required to have the same information to allow consumers to directly compare products to one another.<sup>34</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>35</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 country's markets.<sup>36</sup> Only these types of mandatory schemes have thus far been challenged in front of GATT and WTO panels, as they clearly contain direct restrictions on trade.

It is impossible to know 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 by this paper. 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>37</sup> Thus, a mandatory label not only runs the risk of being struck down by a WTO panel, but it also is likely to prove impracticable.

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<sup>34</sup> 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).

<sup>35</sup> 21 U.S.C. § 343. For more discussion see Keane, *supra* note 34, at 297-99.

<sup>36</sup> 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 four times 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. U.S.—Tuna I, *supra* note 18; U.S.—Tuna II, *supra* note 18; U.S.—Shrimp I, *supra* note 18; Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001). 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*, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter EC—Asbestos].

<sup>37</sup> Onno Kuik, Note and 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 (2005) (articulating the difficulties associated with labeling in the textile market because of issues such as complicated supply chains).

*ii. 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>38</sup> Many of these types of labels are familiar to consumers who purchase “fair trade” coffee or “sweat shop-free” apparel. However, it is often difficult for a consumer to tell whether or not 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 “sweat shop-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>39</sup> This indicates that there is consumer demand for products that are produced in a socially responsible way, and that producers recognize this need and are willing to make adjustments in this production practices and in the transparency of such production practices in order to provide consumers with the assurances necessary to meet this need. This is not a recent phenomenon—reformers have used labeling to mobilize public support for responsible business practices since the late 19<sup>th</sup> century with the “White Label Campaign” which was a predecessor of today’s no-sweat labeling schemes.<sup>40</sup> Further, companies such as “No Sweat Apparel” have been founded solely to meet the demand for socially responsible products and market only products made under “fair trade” conditions.<sup>41</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>42</sup> As a result, companies that produce consumer goods that are particularly vulnerable to consumer

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<sup>38</sup> Sarah H. Cleveland, *Global Labor Rights and the Alien Torts Claims Act*, 76 TEX. L. REV 1533, 1551 (1998) (reviewing HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE, LANCE A. COMPRA & STEPHEN F. DIAMOND eds (1996)).

<sup>39</sup> Cleveland, *supra* note 12.

<sup>40</sup> Michele Micheletti & Dietlind Stolle, *The Politics of Consumption/The Consumption of Politics: Mobilizing Consumers to Take Responsibility for Global Social Justice*, 611 ANNALS 157, 162 (2007).

<sup>41</sup> No Sweat Apparel—About Us, <http://www.nosweatapparel.com/> (last visited Jan. 23, 2008).

<sup>42</sup> *Id.*

choice and public exposure of inappropriate labor conditions have taken action to avoid such negative attention.<sup>43</sup>

However, not all corporate codes are created equal, and some have come under fire as being “self-serving” and having ineffectual internal monitoring.<sup>44</sup> Others, such as Levi-Strauss, have developed praise-worthy initiatives that have elaborate structures for “auditing, evaluating, and enforcing its code terms” and have demonstrated that they are willing to eliminate contracts with suppliers who are not meeting the stated expectations and to force reforms in less serious cases.<sup>45</sup> 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 prices low.<sup>46</sup>

Action is being taken at an industry-wide level as well, often with the support and encouragement of the U.S. government. For example, in 1996, President 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>47</sup> Congress has also taken a stance to force the chocolate industry to make progress on the problem of child labor through developing an appropriate label.<sup>48</sup> However, the failure of stakeholders to meet the 2005 deadline for public certification standards 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>49</sup>

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<sup>43</sup> Companies such as Levi-Strauss, Reebok, Gap, Nike, Sears, JC Penney, Wal-Mart, Home Depot, and Philips Can-Heusen are among the producers than have adopted such codes. Micheletti, *supra* note 40, at 162.

<sup>44</sup> Nike is a notable target of such accusations. *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 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. *Kasky v. Nike, Inc.* 27 Cal.4th 939, 45 P.3d 243 (2002). This could serve to strengthen private labeling schemes and increase their credibility with consumers by offering litigation as a deterrent. However, this will do little to level the playing field between codes with lower standards and those that have more exacting requirements.

<sup>47</sup> *Id.* at 1552.

<sup>48</sup> Harkin-Engel Protocol, *supra* note 4.

<sup>49</sup> See Harkin, Engel, *Congressional Leaders, Work to Eliminate Child Labor in Cocoa Industry* (Oct 30, 2007), Webpage of Tom Harkin, available at <http://harkin.senate.gov/pr/p.cfm?i=286485>.



The above examples demonstrate that the United States 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 to imagine the government moving from the position of facilitator/instigator of the negotiations and into the role of being the ultimate decision maker after receiving input from all of the stakeholders. Because it is ultimately a political decision, it seems as though the government may be the most appropriate entity to unlock the types of deadlocks that have handicapped the Harkin-Engel negotiations.

### *iii. Voluntary labels: striking the appropriate balance*

Although Section B will fully articulate the labeling scheme proposed by this paper, the category of voluntary labels offers several advantages in the human rights context as a general matter. The knockdown argument for voluntary labels over mandatory labels is simply their legality, which will be explored in Part IV. Even from a practical standpoint, allowing producers to *choose* whether or not to seek certification for their production methods provides an incentive for companies to both produce in a socially responsible manner and to provide appropriate documentation, such that producers who cannot document 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 Organization 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 3,600 labeled products.<sup>50</sup> Today, more than twenty OECD countries have products with environmental labels distributed for purchase in their domestic territory.<sup>51</sup> Although there has been a significant amount of debate within the WTO’s Committee on Trade and Environment (CTE),<sup>52</sup> no challenge has been brought before the WTO’s dispute settlement mechanism over a voluntary labeling scheme.<sup>53</sup> Considering how widespread such labels are, it would be difficult to isolate a challenge against only one Member State’s program, and the lack of such a challenge seems to indicate that states are unwilling to litigate this matter and would prefer to debate and negotiate.

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<sup>50</sup> JAMES SALZMAN, TECHNOLOGY & ENVIRONMENT PROGRAMME: OECD, ENVIRONMENTAL LABELLING IN OECD COUNTRIES, 13 (1991).

<sup>51</sup> *Id.*

<sup>52</sup> See Marianne Jönsson, *Discussions in the Committee for Trade and Environment: Eco-labeling and the TBT Agreement*, Kommerskollegium National Board of Trade, Appendix 1 (Mar. 3, 2002).

<sup>53</sup> 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. *U.S.—Tuna I*, *supra* note 18.

The United States government has also elected to voluntary labeling schemes for eco-labeling purposes. Both the Energy Star program<sup>54</sup> and the “dolphin-safe” tuna label<sup>55</sup> are well known examples of this type of label. Both have been extremely successful, with non-dolphin safe tuna being almost eliminated from the market and with the Energy Star program estimated to have prevented 13 million metric tons of carbon from being released as well as cumulative energy bill savings estimated between \$40 billion and \$57 billion.<sup>56</sup> Another important example of a voluntary label that is based on product production methods is the labeling of organic products under the Organic Foods Protection Act of 1990,<sup>57</sup> under which sales have grown between 15 and 21% annually.<sup>58</sup>

Along with the legitimacy that the government brings along with it because 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>59</sup> and the DPCIA provides for up to \$100,000 in civil penalties.<sup>60</sup>

Voluntary labels strike the appropriate balance necessary for human rights labeling by improving the legitimacy, clarity, and credibility of the certification process by setting the government in the roll of 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. Recognizing the core goals and basic strategies***

The intended contribution of this paper is to advocate on behalf of a particular category of labels—voluntary government-run human rights labels—that have never been used in

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<sup>54</sup> The U.S. Environmental Protection Agency (EPA) 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. Energy Star, *About Energy Star*, <http://www.energystar.gov>. For a description of the Energy Star Program and the estimated savings attributed to it, see C.A. Webber, R.E. Brown and J. Koomey, *Savings Estimates for the Energy Star Voluntary Labeling Program*, SCIENCE DIRECT (1999), available at <http://www.sciencedirect.com/>.

<sup>55</sup> This label is mandated by the Dolphin Protection Consumer Information Act (DPCIA), 16 U.S.C. § 1385.

<sup>56</sup> *Id.*

<sup>57</sup> 7 U.S.C. §§ 6501-6523.

<sup>58</sup> 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).

<sup>59</sup> 7 U.S.C. § 6519(a).

<sup>60</sup> 16 U.S.C. § 1385(e).

the United States<sup>61</sup> and to defend the legality of this proposal under the WTO. As a result of this limited goal, this paper does not address the intricacies that drawing up appropriate regulations for such a labeling scheme would require. However, even in absence of the exact criteria that such a scheme would be based on, this Section will focus on general strategies for such a label and articulate the main goals that should underlie any human rights label. For the sake of clarity, this discussion will openly admit that such a labeling scheme 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 which will become important in the debate over the legality of such labels.<sup>62</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 is foreseeable from those within the government who want to keep regulation to a minimum, a government-run scheme is not a far leap considering that have already been involved in encouraging industries to develop their own standards.<sup>63</sup> This paper will also avoid 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 Procedures Act (APA) meets any expectations of transparency through publication of draft regulations and providing opportunities for public participation.<sup>64</sup> It is important that the agency charged with formulating such regulations pays careful attention to the successes and failures of exiting schemes and benefits from the expertise developed in the implementation of private labeling schemes.

Steering clear of ancillary issues, it is still logical that the nature of the violations that such human-rights labels are seeking to address should be strategically considered in order to evoke maximum sympathy from consumers and leverage public relations support. Commentators have noted that the most successful American eco-labels have often focused on “charismatic marine creatures.”<sup>65</sup> In the same way, labels that focus on particularly egregious working conditions for traditionally exploited groups like women and children are likely to be more effective. Consumers rallied behind the image of dolphins being drowned by purse seine nets and refused to purchase tuna that was not

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<sup>61</sup> This idea is not entirely new as Belgium adopted a social label in 2002, see Bruno Melchmans, General Labour Federation of Belgium, *Strengths and Weaknesses of Belgium’s Social Label*, available at <http://www.ilo.org/public/english/dialogue/actrav/publ/130/7.pdf>.

<sup>62</sup> See *infra* Section IV(A).

<sup>63</sup> See *infra* Section III(B).

<sup>64</sup> 5 U.S.C. 511-599.

<sup>65</sup> Stanford 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).

“dolphin safe,” so it is likely that images of child slaves or sweatshop workers will invoke similar sentiments in the American market.

In order to fulfill legality requirements that will be discussed later in the paper, the United States should base a labeling scheme on existing international human rights standards that are as widely accepted as possible.<sup>66</sup> For example, it makes sense to use the International Labor Organization’s Conventions (ILO) regarding child labor as the basis for a label advocating “child labor/slavery-free” products.<sup>67</sup> Again, it may make sense to take an incremental approach and start by focusing on the most widely accepted abuses in the most sensitive industries. The only existing government run human rights label, the Belgian social label, provides a useful example of relying on international standards.<sup>68</sup> These labels are based on the eight ILO “core standards,” which enshrine the basic rights and principles of international labor rights.<sup>69</sup>

Beyond strategy and purely legal considerations, it is useful to identify the main goals of a human rights labeling system and 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 the awareness of consumers; (3) providing accurate information; (4) directing manufacturers to account for the environmental impacts of their products; and (5) protecting the environment.<sup>70</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 (5) to protecting *human rights*. Attempting to accomplish these five

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<sup>66</sup> See *infra* Section IV(B).

<sup>67</sup> For a discussion on international child labor standards and interational enforcement of labor standards, see Timothy P. McElduff, Jr. and Jon Veiga, *The Child Labor Deterrence Act of 1995: A Choice Between Hegemony and Hypocrisy*, 11 ST. JOHN’S J.L. COMM. 581, 593-99 (1996).

<sup>68</sup> 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. Melchmans, *supra* note 61.

<sup>69</sup> The core standards consist of: Convention 29: Forced Labour Convention (1930); Convention 87: Freedom of Association and Protection of the Right to Organise Convention (1948); Convention 98: Right to Organise and Collective Bargaining Convention (1949); Convention 100: Equal Remuneration Convention (1951); Convention 105: Abolition of Forced Labour Convention (1957); Convention 111: Discrimination (Employment and Occupation) Convention (1958); Convention 138: Minimum Age Convention (1973); Convention 182: Worst Forms of Child Labour Convention (1999). However, the United States is not a party to all of these conventions, 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 must 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.

<sup>70</sup> SALZMAN, *supra* note 50.

goals can inform the process of developing appropriate labels and also serves to demonstrate 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 are effectively 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 non-tariff barrier to trade. A government label is more likely to be successful in this regard 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 is providing so that consumers understand the meaning that the label conveys. 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 the American consumer does pay attention to social issues while making routine purchases, at least when it comes to an inexpensive, substitutable product like 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 American are willing to pay more for “ethically produced goods,” with 68% reporting a willingness to pay more for a \$20 sweater produced in a sweat shop-free environment and 75% reporting a willingness to pay at least 50 cents per pound more for “fair trade coffee.”<sup>71</sup> This research seems to indicate that a well-executed government labeling scheme should have a fairly easy time meeting the first two goals, as the market has been shown to be responsive and consumers are already reacting to similar private labels.

Goals number three and four (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 down 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 acting to exacerbate existing informational problems.<sup>72</sup> Providing accurate information will be a challenge regardless of who is running a labeling scheme, but the enforcement capability of the government

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<sup>71</sup> Shareen Hertel, Lyle Scruggs, C. Patrick Heidkamp, *Human Rights and Public Opinion: From Attitudes to Action* (Univ. of Conn. Economics Rights Working Paper Series, Paper No. 3, 2007).

<sup>72</sup> See *infra* Section III(A)(3).

increases the likelihood that producers are providing accurate information and are documenting their production processes. In addition, a government standard is more likely to be viewed as credible and consistent by the public than private schemes offered through 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) who is providing certification of the product as meeting this standard, and (3) what the criteria the certification is based on. The government has the legitimacy to develop a label that people will see as credible, offer uniform standards, and not be overly influenced by industry.<sup>73</sup>

The final goal of protecting human rights is the most important to keep in sight, as it can easily be lost amidst political wheeling and dealing. While compromises will be required in order to formulate labeling criteria that is possible for producers to achieve but still incentivizes 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 weight 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 priorities.

The broader normative argument in favor of such a labeling scheme can be based on the idea that a well-executed scheme serves an important informational function. The consumer “right to know” has become a rallying cry from consumers who care about how products are produced. Arguably there is an element of consumer democracy at stake in which consumers feel entitled to “vote” with their buying habits and want to purchase more than just the product itself.<sup>74</sup> Additionally, as it is a market-driven policy, it puts the choice in the hands of the consumers rather than allowing the government to mandate certain policies.<sup>75</sup> This should allow for the market to respond appropriately to the demand from consumers for socially responsible products. Perhaps equally importantly, it puts pressure on producers to compete with one another for public favor by racing to the top rather than 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, which will 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

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<sup>73</sup> 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.

<sup>74</sup> Kyser, *supra* note 1, at 527.

<sup>75</sup> 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 of 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.

the playing field between producers who are committed to fair labor practices and those who are not.<sup>76</sup> 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>77</sup>

#### **IV. 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 mentioned earlier, 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>78</sup> This section will utilize the existing WTO jurisprudence to evaluate the legality of the proposed human rights label. Although this Part ultimately concludes that a voluntary labeling system is likely to survive a challenge at the WTO, care is taken to highlight the areas in which outstanding legal issues exist and where the labeling scheme would be most susceptible to a legal challenge.

This Part will proceed in Section A by explaining the debate over whether or not product production methods (PPMs) that are not related to the nature of the product itself (npr-PPMs) are covered by the specialized WTO Agreement on Technical Barriers to Trade (TBT Agreement)<sup>79</sup> that covers packaging, marking and labeling requirements. Because there is no clear resolution of this question, this paper will consider both the possibility that the proposed scheme will be evaluated under the TBT Agreement and in the alternative, that it must withstand muster under the GATT.<sup>80</sup> Section B will highlight the legal constraints imposed by the TBT Agreement specifically, beyond the basic requirements found in both the GATT and the TBT Agreement.

Because of the wider universe of dispute resolution jurisprudence under the GATT, Section C will offer a more robust analysis of the legal tests implicated by a voluntary labeling scheme and their application. As this section constitutes a lengthy analysis, it is organized by first walking through the GATT articles most directly relevant to the labeling scheme (Articles I and III), explaining why the marks of origin requirements do

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<sup>76</sup> *Effects of Ecolabels: Assessment and Response*, United Nations Environment Programme, available at [www.unep.ch/etb/publications/Ecolabelpap141005f.pdf](http://www.unep.ch/etb/publications/Ecolabelpap141005f.pdf)

<sup>77</sup> Micheletti, *supra* note 40, at 160-61.

<sup>81</sup> SALZMAN, *supra* note 50; Melchmans, *supra* note 61.

<sup>79</sup> Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, [hereinafter TBT Agreement].

<sup>80</sup> For a discussion of the interaction between the GATT and TBT Agreement, see Joshi, *supra* note 33, at 79.

not apply to this scheme, considering the possibility for a “non-violation” complaint<sup>81</sup> against the labeling scheme, and finally explaining how the remedies available under the GATT do not give other Member States much incentive to challenge the proposed labeling scheme. Although Sections B and C conclude that a panel is unlikely to find a violation of either the TBT or GATT, Section D examines the possibility of affirmative defenses under Article XX of the GATT.<sup>82</sup> The labeling scheme will be considered under each of the most relevant sub-paragraphs and under the introductory paragraph of Article XX. However, it is important to note that no 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 product production methods (npr-PPMs): an ongoing debate***

Much of the debate surrounding measures that take non-commercial considerations into account centers on the issue of whether it is appropriate to distinguish between “like products” because of the manner in which these products were produced. The GATT refers to the concept of “like products” in connection with all of its most significant obligations.<sup>83</sup> Thus, products that are produced in different or less socially responsible ways may still be considered “like products” within the meaning of the WTO agreements,<sup>84</sup> so treating them differently may pose a problem.

Because there are different types of PPMs, it is first necessary to identify how the distinction between products occurs. Then, 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 more 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>85</sup> On the other hand, npr-PPMs are not inherently based on the product itself, but rather connected to some

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<sup>81</sup> A “non-violation” complaint is based on Article XXIII, and allows Member States to argue that their benefits under the General Agreement have been “nullified or impaired” by a measure, even if the challenged measure does not actually breach any of the provisions of the GATT. GATT, *supra* note 26, art. XXIII.

<sup>82</sup> 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.

<sup>83</sup> The term “like product” is mentioned in Article I (MFN), Article II (schedule of concessions), Article III (national treatment), Article IX (marks of origin), and Article XI (general elimination of quantitative restriction) for example. These constitute the most important obligations that states parties to the WTO have entered into.

<sup>84</sup> 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.

<sup>85</sup> Steve Charnovitz, *The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT’L L. 59, 65 (2002). Charnovitz offers food safety based on “process-based sanitary rules” as an example of such product related PPMs.



broader social goal that is implicated in the production of the product.<sup>86</sup> Since 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.

Whether or not npr-PPMs are covered by the TBT Agreements is an issue that has been hotly debated by commentators on both sides of the issue.<sup>87</sup> The language of the TBT Agreement does not seem to preclude the inclusion of npr-PPMs under the agreement, and textual arguments have been made that the structure of the definitions of regulation and standard imply that npr-PPMs fall within their scope.<sup>88</sup> However, the negotiating history of the TBT agreement implies that only product related PPMs fall within the purview of TBT, although the issue is far from settled.<sup>89</sup>

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>90</sup> In order to provide for both possible alternatives, the below sections analyze the proposed labeling scheme under both the TBT Agreement and the GATT. Because the general interpretative note that is associated with Annex IA of the Marrakech 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 the conflict,” it is logical to consider the proposed labeling scheme under the TBT Agreement first.<sup>91</sup>

### ***B. The voluntary label as a “standard” under the TBT Agreement***

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<sup>86</sup> *Id.* (noting that the consumer may or may not care about the social goal targeted by the npr-PPM label).

<sup>87</sup> For a background on the debate and negotiating history of the TBT as it relates to the PPM issue, see Joshi, *supra* note 33, at 72-75.

<sup>88</sup> The word “related” appears only in the second sentence of each definition, which may indicate that this intentional omission in the first part of the sentence brings even npr-PPMs under these definitions. ARTHUR E. APPLETON, ENVIRONMENTAL LABELLING PROGRAMMES: INTERNATIONAL TRADE LAW IMPLICATIONS (1997) 93

<sup>89</sup> *Id.* at 93, citing a telephone conversation with Richard Englin of the WTO Secretariat. *See also*, Joshi, *supra* note 33, at 74.

<sup>90</sup> Joshi, *supra* note 33, at 79.

<sup>91</sup> *Id.* at 73.

The TBT Agreement sets forth a framework for technical regulations<sup>92</sup> and standards<sup>93</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. As a result, the labeling scheme would not be subject to the strict requirements of TBT Articles 2 and 3, which contain antidiscrimination provisions and notification requirements. Standards must conform instead with the much-lowered constraints of Article 4 and the associated Code of Good Practice in Annex 3.<sup>94</sup> The requirements for a voluntary standard are less stringent than those required of a regulation, and as a result, it is more difficult to challenge a standard. However, even the Code of Good Practices contains a number of obligations that states need to meet in order to promulgate standards that are appropriate under international trade rules.<sup>95</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 Practice that must be followed 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 like products originating in another member state or domestic products; (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) where international standards exist they should be used; (4) standards should be created with an eye to achieving international harmonization; (5) the creation and maintenance of standards should be handled in a participatory and transparent manner that allows for input and cooperation with interested domestic and international stakeholders.<sup>96</sup> As a result, most of these issues will be dealt with in depth

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92 The TBT Agreement defines a technical regulation as, a “document 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 79.

93 Annex 1 defines a standard as a “document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for producers of related processes and production methods, with which compliance is not 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. *Id.*

94 *Id.*, art 4.

95 For example, the Code of Good Practice 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 “Where 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.* at Annex 3.

96 *Id.*

in Section C, as there the similar GATT provisions have more case law to illuminate them, and the requirements are likely to be even more stringent in the GATT context.<sup>97</sup>

The proposed labeling scheme should not encounter much difficulty in meeting these requirements. The anti-discrimination requirement is inherent in the scheme, as it will label all products—regardless of country of origin—to be eligible for the label if they meet pre-determined criteria. Although this paper does not advocate 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 Practice. 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 requirements would be satisfied by the APA required process for developing federal regulations that agencies are already required by law to follow.

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>98</sup> This argument is analogous to arguments that will be discussed later as part of the discussion under Article XX.<sup>99</sup> This article will take up the debate about the term necessary<sup>100</sup> in its analysis of the labeling scheme under the GATT. 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 for products without the label to be sold.<sup>101</sup> However, labels like the one proposed are less of an obstacle to trade and more of an informative tool that allows consumers to know more about what they are buying. Like any other specialization, this simply allows producers who are interested in catering to socially aware consumers to help their product stand out against the competition—no different than products produced organically, in certain places, or by a certain ethnic groups. A determination of whether or not the labeling

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<sup>97</sup> Carlos Lopex-Hurtado, *Social Labeling and WTO Law*, 5 J. OF 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 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.”).

<sup>98</sup> *Id.* at Annex 3, para E.

<sup>99</sup> *Infra* Section IV(D)(4).

<sup>100</sup> *Infra* at Section IV(D).

<sup>101</sup> Environmental groups, such as Earth Island Institute, support movements to encourage stores to refuse to stock products without the “dolphin safe” label, and it has become rare to see tuna for sale without such a label, given the strong consumer preference in this area. See Rigel Gregg, *Not All Tunas Are Created Equal, That’s Fit*: AOL Body (Aug. 8, 2007), available at <http://www.thatsfit.com/2007/08/08/not-all-canned-tunas-are-created-equal/> (last visited Aug. 16, 2007).

scheme violates this requirement will also hinge on the interpretation of the word “unnecessary,” which has not been explored by a panel thus far. However, the use of the negative form of the word “necessary” 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>102</sup>

### ***C. The label as a GATT-friendly possibility: analysis of the label under the relevant GATT provisions***

One of the most important goals of the WTO trading system is that trade should occur without discrimination.<sup>103</sup> In fact, commentators have identified the three most important principles underlying the GATT to be: most-favored nation (MFN) treatment, which requires that each party must grant the same treatment to any like product of another contracting party that it affords to any most-favored trading partner; national treatment, which requires that all imported goods and services be treated in the same way as those produced domestically; and transparency, which requires publication of measures regulating or impacting trade.<sup>104</sup> The biggest hurdle for the proposed labeling scheme to overcome is to demonstrate that it is neither discriminatory on its face nor 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 answered in a sufficiently clear manner. 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 World Trade Organization 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.

#### *i. The label does not discriminate between trading partners: an examination of GATT’s most-favored-nation treatment 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>105</sup> The issue of product likeness will be discussed in more detail in the context of the national treatment standard

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<sup>102</sup> The discussion in Part IV(D) will cover the meaning of the word “necessary” which is instructive for determining the meaning of unnecessary.

<sup>103</sup> World Trade Organization, *Understanding the WTO* (2007), Chapter 1, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/utw\\_chap1\\_e.pdf](http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap1_e.pdf).

<sup>104</sup> Dommen, *Raising*, *supra* note 15, at 11.

<sup>105</sup> GATT, *supra* note 26, art I.

in Article III,<sup>106</sup> but unless npr-PPMs are considered to be a relevant basis to distinguish between otherwise alike products, it can be assumed that the labels are treating like products differently.<sup>107</sup>

However, the fact that products with the same physical characteristics are being treated differently is not necessarily determinative of whether or not 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—Autos*, 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>108</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. Given the focus on production methods that often occur in multiple steps in multiple countries, it is difficult to argue that a label awarded on the basis of clear and objective criteria is discriminatory. In addition, 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 argue 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.—Tuna I* issued an opinion on the voluntary “dolphin-safe” labeling scheme called the Dolphin Protection Consumer Information Act (DPCIA).<sup>109</sup> Unlike the proposed labeling scheme in this case, 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>110</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

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<sup>106</sup> 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*, ¶ 14.141, WT/DS54/R (July 2, 1998).

<sup>107</sup> 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.”

<sup>108</sup> Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶ 78, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000) [hereinafter *Canada—Autos*].

<sup>109</sup> 16 U.S.C. 1385.

<sup>110</sup> *U.S.—Tuna I*, *supra* note 18, at ¶ 2.12.

given more freely to vessels fishing in other waters.<sup>111</sup> However, even in the face of the label's assignment being administered differently on the basis of geography, the Panel held that there was no violation of Article I:1, writing,

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>112</sup>

Although the Panel's holding in *U.S.—Tuna I* carries with it no precedential weight<sup>113</sup> because it is an unadopted GATT Panel decision, it is instructive in its evaluation of a voluntary, government-instituted labeling system. The Panel was clearly willing to allow a voluntary scheme, *even* if it was having 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.

This holding 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. However, the fact remains that “like products” from different states may be labeled differently on the basis of how they were produced and depending on whether or not their producers decide to seek the certification of the labeling scheme. If a panel believes that the “like product” analysis of

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<sup>111</sup> *Id.* at ¶ 5.42.

<sup>112</sup> *Id.*

<sup>113</sup> The status of GATT panel decision 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 Marrakech Agreement establishing the WTO recognizes the importance of its inheritance from the GATT system in Article XVI: 1, which reads “[e]xcept as otherwise provided under this Agreement of the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting 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 27, preamble.

Article I<sup>114</sup> 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. This seems relatively unlikely though, being that 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.

*ii. The label does not discriminate between domestic products and imported products: an examination of GATT's national treatment requirements*

Article III of the GATT articulates the requirements for national treatment on internal taxation and regulation. The general purpose underlying this principle is to prevent Member States from applying internal tax and regulations in a protectionist manner in an attempt to protect domestic production.<sup>115</sup> The Appellate Body further maintained that the intention of the drafters was to ensure that like imported and domestic products will be treated the same once they have entered the internal market of a Member State.<sup>116</sup> However, 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>117</sup>

The subparagraph that most clearly applies to the proposed labeling scheme is 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>118</sup> Thus an analysis of the proposed labeling scheme under the broad objectives of this article requires that the domestic and imported products at issue are “like products” within the meaning of III:4, and that the treatment being afforded to the imported products is relatively less favorable than that given to its domestically produced counterparts.<sup>119</sup>

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<sup>114</sup> 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*, *supra* note 18, at ¶ 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.

<sup>115</sup> Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 16, WT/DS8/AB/R (Oct. 4, 1996) [hereinafter *Japan—Alcohol*].

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> GATT, Article III:4.

<sup>119</sup> *See EC—Asbestos*, *supra* note 36, at ¶ 100.

As referenced earlier, one of the most significant issues being debated is whether or not GATT rules allow “like products” that have the same physical product characteristics but differ in terms of non-product related production methods can be treated differently.<sup>120</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>121</sup> Although 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>122</sup> it explicitly stated 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>123</sup> The Appellate Body ultimately concluded that whether or not this framework was adopted, the term “like products” within Article III:4 was concerned with the competitive relationships between and among products.<sup>124</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 are otherwise “like products,” has not been answered conclusively by neither a WTO panel nor 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>125</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,

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<sup>120</sup> For a discussion of the npr-PPM issue, see *infra* at Section IV(A).

<sup>121</sup> *EC—Asbestos*, *supra* note 36, at ¶ 101.

<sup>122</sup> *Id.* This framework has its origins in the *Border Tax Adjustments* report. Report of the Working Party, *Border Tax Adjustments*, L/3464 (adopted Dec. 2, 1970).

<sup>123</sup> *EC—Asbestos*, *supra* note 36, at ¶ 101.

<sup>124</sup> *Id.* at ¶ 103.

<sup>125</sup> *EC—Asbestos*, *supra* note 36, at ¶ 100.



according to the group of "like" imported products "less favourable treatment" than that accorded to the group of "like" domestic products.<sup>126</sup>

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 make arguing that the labels amount to less favorable treatment for imported products a difficult sell. Since the consumer makes the ultimate decision about how much weight to 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. Thus, 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>127</sup> However, 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 produced in a particular way—in effect lending the imprimatur of the federal 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 referring to. However, the 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>128</sup>

The second necessary element of an Article III:4 violation is that the challenged measures results in relatively less favorable treatment for the imported product as compared to a like product produced domestically. For the sake of argument, assume that the targeted product receiving the label is produced domestically and a like imported product has not undergone the certification process and thus has not received the content-positive label. In such a case, the question to be answered is whether or not there is "effective equality" of opportunities for imported products, as compared to domestic products.<sup>129</sup> The Appellate Body further fleshed out this requirement in *Korea—Beef*, writing,

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<sup>126</sup> *Id.*

<sup>127</sup> *Canada—Autos*, *supra* note 108, at ¶ 10.73 (internal citations omitted). This report was not subsequently reconsidered by the Appellate Body.

<sup>128</sup> *Id.* at ¶ 10.84-10.85.

<sup>129</sup> U.S.—Section 337, *supra* note 19, at ¶ 5.11; *see also* U.S.—Gasoline, *supra* note 18 (arguing that there is no textual basis for requiring identical treatment of domestic and imported products, but rather "identity of treatment").

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>130</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, as all 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 is that providing consumers with additional credible information on the products they are purchasing 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 an 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 if they feel that the label disrupts the competitive conditions for the targeted product. Since it requires a case-by-case evaluation, such determinations are likely to be highly fact specific and depend on the application and impact of the label—an impossible prediction to make at this point. Article III:4 represents the most significant potential violation of a provision of the GATT, but the built-in uniformity and non-mandatory character of the scheme make this of a far-less trade restrictive nature than any measures that have been identified in the past as national treatment violations.<sup>131</sup>

### *iii. The label being proposed 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>132</sup> However, the GATT Panel’s decision in *U.S.—Tuna I* offered a clear decision that labels that are not based on product origin, such as the “dolphin-safe” label, are not properly evaluated under Article IX. This Article is

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<sup>130</sup> Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, ¶ 137 (Dec. 11, 2000) [hereinafter *Korea—Beef*].

<sup>131</sup> See e.g., *Canada—Autos*, *supra* note 108; *U.S.—Gasoline*, *supra* note 18.

<sup>132</sup> 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 26, art. IX:1.

intended to govern the making of imported products with the country of origin. The *U.S.—Tuna I* Panel engaged in some basic treaty interpretation and reasoned that because Article IX:1 only contains 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>133</sup>

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

#### *iv. 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 General Agreement.<sup>134</sup> This Article allows for contracting parties 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>135</sup> It is conceivable that a party could argue that the labeling scheme is a *de facto* barrier to trade that either negatively impacts their products gaining access to the U.S. market or is contrary to the objectives of the GATT.<sup>136</sup>

Although Article XXIII appears to be an appropriate grounds for a challenge of the proposed labeling scheme, past panels have chosen to interpret Article XXIII narrowly.<sup>137</sup> The GATT panel in *EC—Oilseed* stated their view that Article XXIII:1(b) was intended

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<sup>133</sup> U.S.—Tuna I, *supra* note 18, at ¶ 5.41.

<sup>134</sup> GATT, *supra* note 26, art. XXIII.

<sup>135</sup> *Id.*, art. XXIII:1(b).

<sup>136</sup> Article XXIII was intended to prevent Member States from taking actions to avoid reaching their bound tariff rates, which would undermine the concessions that had been negotiated for. Jean Monnet Center, Evolution of Non-Violation Cases, *available at* <http://www.jeanmonnetprogram.org/papers/98/98-9--I.html>. Thus, a measure that directly interferes with another Member States 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.

<sup>137</sup> 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).

to protect tariff concessions, rather than to be used as a type of catch-all.<sup>138</sup> This reading is strengthened by the fact that all successful nullification claims concerned Article II tariff concessions.<sup>139</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>140</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>141</sup> Past GATT panels have held that a “legitimate expectation of improved market-access opportunities arising out of relevant tariff concessions as a benefit accruing under the GATT.”<sup>142</sup> Thus there must be a cognizable injury which is occurring as a result of the proposed labeling scheme would have to occur with respect to a product that had been given market access opportunities through Article II tariff concessions.<sup>143</sup> Such an injury could not have been foreseen at the time of the negotiation of the Uruguay Round negotiations, which may not be hard to establish because there were no government sponsored human rights labeling schemes in existence during the negotiations, although there were comparable eco-labeling schemes.

However, even if these initial nullification factors are met, 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 to domestic and foreign producers.<sup>144</sup> This is likely the most important consideration with respect to any analysis undertaken under Article XXIII, since it is difficult to argue that an Article II concession is impaired under a scheme that does not violate the GATT’s national treatment provisions because of consistent application to foreign and domestic producers. Further, since the most important target of a voluntary labeling scheme is likely to be U.S. corporations which are operating abroad and are sensitive to the pressures of the U.S. market, the labeling standard is most likely to impact multinational corporations that are manufacturing overseas rather than targeting raw goods from foreign-based producers.

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<sup>138</sup> Report of the Panel, *European Economic Community-Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, Jan. 25, 1990, GATT B.I.S.D. (37<sup>th</sup> Supp.) at 86 (1991).

<sup>139</sup> Okubo, *supra* note 137, at 628.

<sup>140</sup> Panel Report, *Japan—Measures Affecting Consumer Photographic Film & Paper*, WT/DS44/R, ¶ 10.41 [hereinafter *Japan-Photo Film*].

<sup>141</sup> *Id.* at ¶ 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 137, at 629-30 (analyzing eco-labels under Article XXIII).

<sup>142</sup> Okubo, *supra* note 137, at 629, *citing* GATT Panel Report on Japan: trade in Semi-conductors, May 4, 1988, GATT B.I.S.D. (35<sup>th</sup> Supp.) at 116 (1988); *EC-Oilseeds*, at 86; GATT Panel Report on United States: Agricultural Waiver, Nov. 7, 1990, GATT B.I.S.D. (37<sup>th</sup> Supp.) at 288.

<sup>143</sup> Okubo, *supra* note 137, at 629.

<sup>144</sup> *Id.*

*v. Remedies: Why challenging the labeling scheme in the WTO may not be in the strategic interest of the stakeholders*

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>145</sup> Bringing a challenge is expensive and time-consuming. Unless the damage done to a particular Member State's exports is significant enough to justify investing in bringing such a dispute and the claim seems as though it 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 their wide proliferation. Further, Belgium's government-run, voluntary social labeling system has not been challenged, and it has existed since 2002.<sup>146</sup>

It is imaginable that a successful lobby on behalf of producers could convince a Member State to request consultations under the 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>147</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 to simply 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 down) 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

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<sup>145</sup> William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17 (2005)

<sup>146</sup> Clean Clothes Campaign, *Belgian Social Label*, available at [http://www.cleanclothes.org/codes/belgium\\_label.htm](http://www.cleanclothes.org/codes/belgium_label.htm) (last visited Mar. 30, 2008); Melchmans, *supra* note 61. The official French language cite for the label is available online at <http://www.social-label.be>.

<sup>147</sup> See generally, John. J. Emslie, *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).

the relevant regulations or their implementation are flawed—which gives incentive for improvement rather than entirely scrapping the labeling scheme.

#### ***D. Exempt from GATT requirements? An analysis of the proposal as an Article XX exemption***

While the GATT significantly restricts what Member States can and cannot do in terms of regulating in areas that have an impact on international trade, Article XX provides that the General Agreement will not prevent the adoption and enforcement of a limited scope of qualified measures.<sup>148</sup> The inclusion of enumerated exceptions to the GATT rules indicates that the drafters were at least aware of the potential clash between international trade rules and non-economic public values, such as human rights considerations or environmental conservation.<sup>149</sup> However, GATT and WTO panels have construed Article XX “so restrictively as to almost read it out of text,”<sup>150</sup> further increasing the gulf between non-commercial issues and the international trade regime. Arguments have been that trade restrictions based on human and labor rights concerns both should and should not be justified under Article XX exceptions.<sup>151</sup> However, it is clear that a linkage exists between trade and human rights, as increased globalization has led to a demonstrable “race to the bottom” and 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 article.

Although the previous section argued that an appropriately tailored labeling scheme is reasonably likely to survive the scrutiny of a WTO panel, if a violation was 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. Subparagraph (a) allows an exception for measures that are “necessary to protect public morals;”<sup>152</sup> (b) for measures “necessary to protect human, animal or plant life or health;”<sup>153</sup> and (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

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<sup>148</sup> GATT, *supra* note 26, art. XX. For a general overview of how Article XX can be used to exempt measures aimed at improving human rights, see Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62 (2001).

<sup>149</sup> Howse, *supra* note 14, at 2.

<sup>150</sup> *Id.*

<sup>151</sup> Compare *id.* with Tatiana Eres, Note, *The Limits of GATT Article XX: A Back Door for Human Rights?*, 35 GEO. J. INT’L L 597 (2004).

<sup>152</sup> GATT, *supra* note 26, art. XX(a).

<sup>153</sup> *Id.* at art. XX(b).

Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.”<sup>154</sup>

Existing WTO jurisprudence has developed a two-part test for deciding whether measures should be exempted under Article XX. A panel first considers whether the labeling scheme is provisionally justified under any of the substantive language in the enumerated subparagraphs, and evaluates the measure’s compliance with the Article XX chapeau—the Article XX introductory paragraph containing the general requirements that all exceptions must meet.<sup>155</sup> Thus 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, the paper will proceed by evaluating the proposed labeling scheme under subparagraphs (b), (a), and (d) and then consider its likelihood of overcoming the legal hurdles associated with the chapeau. The scheme must only qualify for ONE of the subparagraphs, but it MUST meet the requirements of the chapeau.

### *i. The basics of qualifying under the enumerated subparagraphs*

Any trade restrictive measure being justified under subparagraphs (a), (b), or (d) must meet two requirements: (1) the measure must fall within the policy objective enumerated in the subparagraph,<sup>156</sup> and (2) the measure must meet a “necessity test.”<sup>157</sup> Some commentators suggest a third element should be utilized—if the measure is a proportional response to the circumstances and the nature of the problem being faced.<sup>158</sup> However, it is again important to note that this two-prong test has been applied in the face of measures that 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 or not the same reasoning would be applied or if a less demanding test would be created for this

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<sup>154</sup> *Id.* at art. XX (d).

<sup>155</sup> U.S.—Shrimp I, *supra* note 18; U.S.—Gasoline, *supra* note 18, at 22.

<sup>156</sup> 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 151, at 616.

<sup>157</sup> Eres, *supra* note 151, at 616. The word “necessary” is found 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 WTO Analytical Index: GATT 1994, ¶ 520, available at [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/gatt1994\\_01\\_e.htm#general](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#general).

<sup>158</sup> Christop 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).

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,<sup>159</sup> there is reason to suspect that panels may apply less stringent requirements to measures that are not coupled with a trade restriction.

The following three sections will examine existing jurisprudence on each of the applicable subparagraphs. There is necessarily some overlap in the analysis, as all three contain the word "necessary." However, this concept will be explored in depth in the context of Article XX(b), as the Appellate Body has ruled on the meaning of this term, hence the order of subparagraphs explored will be Article XX(a), XX(b), and XX(d) respectively.

### *ii. 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 GATT, thus no panel has interpreted the meaning of the text in this subparagraph.<sup>160</sup> However, the Appellate Body recently considered Article XIV(a) of the General Agreement on Trade in Services (GATS), which reads "necessary to protect public morals or to maintain public order" 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>161</sup> Given the similar language, the decision in *U.S.—Gambling* is instructive in terms of the way that it evaluated the necessity requirement and with regard to the definition of public morals.<sup>162</sup>

The Panel offered a definition of "public morals" which 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>163</sup> The Appellate Body then upheld the determination that the challenged measures aimed at preventing underage gambling and protecting pathological gamblers would qualify under this subparagraph—

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<sup>159</sup> U.S.—Tuna I, *supra* note 18, at ¶ 5.42.

<sup>160</sup> Feddersen, *supra* note 158, at 96 (1998).

<sup>161</sup> General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

<sup>162</sup> U.S.—Gambling, *supra* note 19. For academic analysis of this decision, see 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?*, RICH. J. GLOBAL L. & BUS. 45 (2006); and 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 (2008).

<sup>163</sup> U.S.—Gambling, *supra* note 19, at ¶ 296



offering a useful example of the type of activities that can be situated under this exception.<sup>164</sup> However, the lack of a “public order” element in Article XX(a) leaves its interpretation fairly open. If it so to be 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 the meaning of this subparagraph.<sup>165</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>166</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>167</sup> However, this is not certain, 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 that both characterize conduct as right or wrong and stipulate the behavioral norms in that society,”<sup>168</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 or not 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>169</sup> Scholars have argued that if this view is accepted, it could easily be used to justify taking trade actions to improve treatment of human beings.<sup>170</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 fact that the population that the labeling scheme is intended to protect is not limited to the citizens of the United States demonstrates that this measure is intended to have extraterritorial effects.<sup>171</sup> The labels are also closely related to the policy goal that they are aimed at, as they are attempting to influence consumers to make purchasing decisions on the basis of how products were 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*

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<sup>164</sup> *Id.* at ¶ 298.

<sup>165</sup> Vienna Convention on the Law of Treaties (May 23, 1969), 1144 U.N.T.S. 331 [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 162.

<sup>166</sup> *Id.* at Article 31(1); *see also* Feddersen, *supra* note 158, at 105-06

<sup>167</sup> Feddersen, *supra* note 158, at 95.

<sup>168</sup> *Id.* at 106, *citing* Black’s Law Dictionary 1008 (6th ed. 1990).

<sup>169</sup> *U.S.—Tuna I*, *supra* note 18, at ¶ 181.

<sup>170</sup> Bal, *supra* note 148, at 76-77.

<sup>171</sup> For a discussion of extraterritoriality, *see infra* Section IV(D)(6).

case, in which 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 [compliance] measure produces restrictive effects on international commerce.”<sup>172</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>173</sup> The Appellate Body also recognized that the alternative must still achieve the desired level of protection.<sup>174</sup>

This necessity test, particularly when it is 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 to purchase accordingly. Finally, because of the voluntary nature of the program, it does not restrict international commerce on its face, thus it would be difficult to find a less-restrictive alternative which served the same informational function and so clearly related to the goal of improving the treatment of humans in the production of various products.

*iii. 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 narrowly interpret this exception.<sup>175</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>176</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

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<sup>172</sup> *Korea—Beef*, *supra* note 130, at ¶¶ 162-64.

<sup>173</sup> *U.S.—Gambling*, *supra* note 19, at ¶ 308.

<sup>174</sup> *Id.*

<sup>175</sup> *EC—Asbestos*, *supra* note 36.

<sup>176</sup> *U.S.—Tuna II*, *supra* note 18, at ¶ 5.29; *see also* *U.S.—Gasoline*, *supra* note 18, at ¶ 6.20 (offering a substantively identical test). Compliance with the Article XX chapeau will be discussed *infra* at Section IV(D)(5).

to health-related concerns. Thus 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, for example.

The Panel in *U.S.—Tuna II* used a definition of necessary articulated in *Thai Cigarettes*,<sup>177</sup> which required that the measure chosen be the least inconsistent with other GATT provisions among all of the measures reasonably available. However, as previously mentioned, the Appellate Body backed off this absolute position in evaluating the measure in *EC—Asbestos* under Article XX(b) by again recognizing 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>178</sup> Further, because this exception 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. The evaluation of the labeling scheme under Article XX(b) will follow the same reasoning offered in the discussion of Article XX(a), 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 a product that could harm the consumer directly.<sup>179</sup> No panel has yet justified 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.

*iv. Article XX(d): 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*

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<sup>177</sup> Report of the Panel, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, adopted on 7 Nov. 1990, DS10/R – 37S/200 (1990) [hereinafter *Thai Cigarettes*]. This report was adopted by the membership of the GATT, in contrast to the *U.S.—Tuna* reports.

<sup>178</sup> *EC—Asbestos*, *supra* note 36, at ¶ 172.

<sup>179</sup> 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.

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. Importantly, 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 is comprised of 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 that these two requirements are met.<sup>180</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 cross.

The Article XX(d) necessity test in *Korea—Beef* has been discussed above in the context of Article XX(a) and (b), and the same weighing/balancing approach would be undertaken. However, in the absence of specifics in terms of how the proposed labeling system would interact to secure compliance with another law, any analysis on the likely outcome of such a balancing test is little more than conjecture. If the law it 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 distortional 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 whatever law it was being aimed at.

An alternative argument under Article XX(d) can also be made—that the proliferation of numerous independent labeling schemes can be a deceptive practice that the government has to act to combat. No panel has considered this type of argument, and thus there is no framework available on what type of test would be used to evaluate such a claim under 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>181</sup> Because the panel in this case did not find that DPCIA violated the GATT, it did not rule on the possibility of justifying such a scheme under Article XX(d), but clearly the Australian government was arguing that Article XX(d) could be a viable justification if there had been such a violation.

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<sup>180</sup> *Korea—Beef*, *supra* note 130, at ¶ 157.

<sup>181</sup> Submission of Australia, *U.S.—Tuna I*, *supra* note 18, at ¶ 4.6.

*v. Step two: complying with the Article XX Chapeau*<sup>182</sup>

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. 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, which did not qualify for labels designating them socially responsible.

The term “arbitrary and unjustifiable discrimination” appears in both the chapeau of Article XIV of GATS<sup>183</sup> and in the chapeau of Article XX of GATT<sup>184</sup> regarding general exceptions. Both WTO panels and the Appellate Body have interpreted this language, and come to the conclusion that the chapeau’s wording is intended to prevent the abuse of the enumerated exceptions and requiring that reasonableness be employed.<sup>185</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 Member’s rights under the treaty,<sup>186</sup> foreshadowing their intention to interpret the chapeau as a strict standard to avoid the exceptions from encroaching much on the established GATT rules. The Appellate Body further emphasized the connection between the chapeau and the general principle of good faith in recognition that when the assertion of 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>187</sup>

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<sup>182</sup> 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 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.

GATT, *supra* note 26, art XX.

<sup>183</sup> 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 161, art. XIV.

<sup>184</sup> 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 .

<sup>185</sup> U.S.—Gasoline, *supra* note 18, at 22.

<sup>186</sup> U.S.—Shrimp I, *supra* note 18, at ¶ 156.

<sup>187</sup> WTO Analytical Index: GATT 1994, Article XX, *available at*

[http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/), *citing* B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953), Chapter 4.

The *U.S.—Shrimp I* case provides important insight into the way that the Appellate Body has interpreted the language within the Article XX chapeau, particularly the “arbitrary and unjustifiable discrimination” language. The Appellate Body looked to two elements of the measure at issue in this case,<sup>188</sup> (1) the “intended and actual coercive effect on other governments”<sup>189</sup> and (2) the lack of “any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in those exporting countries.”<sup>190</sup> The Appellate Body has expressed their discomfort with the idea that the challenged measure in this case required that other governments adopt essentially the same policy as the United States, which counsels flexibility in policymaking.<sup>191</sup> 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 shrimps, holding that this rigidity constituted “arbitrary discrimination” within the meaning of the Article XX chapeau.<sup>192</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>193</sup> However, the United States will be able to maintain that the labeling standard would be applied in a manner that is uniform and is not discriminatory (as all producers, importers, distributors, or 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 discrimination 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* cases and in the *U.S.—Shrimp* cases were all mandatory certifications that imposed an embargo against goods that did not reach a particular standard. The labeling scheme being proposed by this paper does not suffer from this same lack of flexibility, as flexibility is intrinsic in its voluntary nature. Further, this paper recommends that the certification standards be developed in a way that takes into account the unique situations of the countries that production is occurring in order to avoid any indication that this labeling is aimed at coercing other Member States to change their policies. Finally, because the

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<sup>188</sup> Section 609 in its application did not permit imports of shrimp harvested by commercial shrimp trawl vessels using Turtle EDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609.

<sup>189</sup> *U.S.—Shrimp I*, *supra* note 18, at ¶ 161.

<sup>190</sup> *Id.* at ¶ 164.

<sup>191</sup> *U.S.—Shrimp I*, *supra* note 18, at ¶ 161.

<sup>192</sup> *Id.* at ¶ 177.

<sup>193</sup> 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*, available at <http://www.buyusa.gov/france/en/116.html>.

labeling scheme focuses on the product, 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.

However, a potential hang up for the United States in defending the labeling scheme under the chapeau may be their spotty participation in human rights treaties.<sup>194</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 if such an agreement is concluded,<sup>195</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>196</sup> and (3) there is no inter-governmental body that is currently negotiating standards in this area. 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 international standards in this area. Currently, 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>197</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 it is neither a violation of MFN or national treatment.<sup>198</sup> Additionally there are no mandatory import restrictions, but 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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<sup>194</sup> 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. However, the United States has expressed a willingness to negotiate labor rights standards in the context of trade agreements, as evidenced by the NAALC and the labor provisions in other FTAs.

<sup>195</sup> U.S.—Shrimp II, *supra* note 36, at ¶ 134.

<sup>196</sup> 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*, available 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).

<sup>197</sup> As argued earlier, the agency formulating the certification criteria should draw from international standards, for example ILO standards, as much as possible in order to maximize the chance that the labeling scheme could qualify for Article XX exemption.

<sup>198</sup> See e.g., Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; The Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. §1801, et. Seq.; Occupational Safety and Health (OSH) Act 29 USC § 651 et seq.; Family and Medical Leave Act (FMLA), 5 U.S.C. §§ 6381-6387.

*vi. 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. The argument is simply 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 because of consumer expectations, doing an end-run around the governments with authority over the relevant jurisdictions.<sup>199</sup> Scholars have argued that the standards used are likely to reflect domestic environmental 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>200</sup> The developing world may argue that human rights standards in the form of labeling is unable to reflect the adjustments that they have already made to improve their human rights practices and does not adequately reflect their human rights priorities at home.<sup>201</sup>

Considering the question of extraterritoriality requires an examination of the labeling scheme's ultimate goal—who is the scheme aiming to protect and what goal is it seeking to accomplish?<sup>202</sup> It is important to recognize that such a labeling scheme has both domestic and international effects, 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, and the GATT does not explicitly address the issue of extraterritoriality, instead the issue of extraterritoriality entered the analysis as part of the jurisprudence of GATT panels examining environmental embargos.<sup>203</sup> In the same case, extraterritoriality was not raised as a problem when the “dolphin-safe” labeling scheme was analyzed. Based on the text of the GATT, there is no explicit prohibition against providing consumers with information independent of any trade restrictions, particularly when all products are being treated the same.

Because the goal of the labeling is to provide information, not to promote the kind of policy reform that was necessitated by the schemes in the *Tuna* and *Shrimp* cases. Allowing goods to be sold regardless of whether or not they have qualified for a socially responsible label ameliorates the concern of the GATT panel that, “each contracting party could unilaterally determine the conservation policies [or labor practices] from which

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<sup>199</sup> Okubo, *supra* note 137, at 609.

<sup>200</sup> *Id.* at 610 (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).

<sup>201</sup> *See generally id.* at 609-10 (articulating the issues that labels based on criteria reflecting domestic priorities and conditions may raise in the environmental context).

<sup>202</sup> Cleveland, *supra* note 12, at 233.

<sup>203</sup> *See e.g.*, U.S.—Tuna I, *supra* note 18; U.S.—Shrimp I, *supra* note 18.



other contracting parties could not deviate without jeopardizing their rights under the General Agreement.”<sup>204</sup> In *U.S.—Shrimp I*, the Panel held that parties could not act to coerce another contracting party into changing their domestic policies.<sup>205</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 contracting party—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—a market-based incentive for producers worldwide. While there ARE extraterritorial effects which may be viewed as an incursion on sovereignty, there are no direct coercive elements, only incentives for improvement.

## **V. 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 its willingness to take even more trade restrictive measures than a voluntary labeling scheme to accomplish human rights goals.<sup>206</sup> However, because a well-functioning labeling scheme will have sweeping effects on the industries that produce the targeted goods, 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 paper will address a few of the counterarguments that could arise in a political discussion over the proposed labeling scheme. When possible, the paper will recommend strategies to avoid potential problems. Although there is no perfect solution to harmonize trade and human rights, as this Part recognizes, the proposed labeling scheme strikes the appropriate balance to incentivize 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. Cost 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 industry 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 not costs associated with certifying and labeling products, but compared to the possible benefits, this paper posits that the expenditures will be worthwhile because they allow the market to account for negative externalities.

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<sup>204</sup> U.S.—Tuna I, *supra* note 18, at ¶ 5.32.

<sup>205</sup> U.S.—Shrimp I, *supra* note 18, at ¶ 161.

<sup>206</sup> For a discussion of the more restrictive Child Labor Deterrence Act of 1995, see McElduff, *supra* note 67.

The issue of preventing “sweat washing”<sup>207</sup> may further raise costs as it becomes necessary to investigate claims of false information in order to maintain the credibility of the label. A balance must be struck between ensuring a sufficiently high rate of detection and 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 the changing standards and higher demand for more labels for other products. The government needs to be proactive enough to continue to encourage improvement and recognize that worldwide human rights standards are evolving and the criteria used may need to be adjusted to reflect such 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 but do not set the bar too low.

### ***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—a far less attractive endorsement than a guarantee that the consumer can buy with absolute certainty that the product was produced in a particular manner. Because of globalization, the production process and supply chains have become increasingly complicated. As a result, the companies producing products are often unaware of exactly where and under what conditions their products have been produced.<sup>208</sup>

However, private certifiers such as the Fair Labor Association have years of experience in dealing with and accounting for these challenges.<sup>209</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 documentation will give producers the incentive to regulate their supply chains and there is upward pressure, where multi-national corporations

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<sup>207</sup> “Sweat washing” and “green washing” are popular terms to describe the problem of producers claiming that their products were made in a sweat-shop-free environment or in an environmentally friendly manner, when the reality does not live up to those representations.

<sup>208</sup> Kuik, *supra* note 37, at 623.

<sup>209</sup> For more information on the FLA, see their webpage at [www.fairlabor.org](http://www.fairlabor.org).

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>210</sup> and existing private labels have fared well on the market, it is always difficult to predict with 100% accuracy what the impact of a nation-wide labeling scheme will be. Naturally, willingness to pay more for such goods is often based on ability to pay,<sup>211</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 which consumers are most likely to be willing to adjust their behavior in. Just as negative public attention has the most impact on “logo” products,<sup>212</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 the developing countries that cannot afford the advanced technologies that are required to produce goods in a less environmentally damaging fashion.<sup>213</sup> However, improving human and labor rights is often possible without significant investment in new technologies. It is true, however, that providing better work conditions does raise production cost, which can erode the comparative advantage for countries with low labor costs. Conceivably, a very successful label could be a type of entry barrier into the market, and it could also be a difficult hurdle for small and medium-sized enterprises. This paper recommends that such labeling schemes focus on products that are generally produced largely by multinationals to the extent possible to assuage these problems. The genius of this type of labeling program is that it is applied universally at the point of consumption, regardless of what the country of origin is, so there is no incentive for a corporation to move its operations to another country where there are lower human rights standards. Thus, this scheme does not put pressure on

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<sup>210</sup> See Hertel, *supra* note 71.

<sup>211</sup> *Id.*

<sup>212</sup> Micheletti, *supra* note 40.

<sup>213</sup> APPLETON, *supra* note 88, at 20 (listing a number of concerns raised by voluntary eco-labels).

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 that sanctions are criticized for.<sup>214</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 get better, but jobs through entire sectors are not lost the way that 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. However, considering that this paper encourages such labels to be based on international standards wherever possible as a basis for its 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 paper, it is more likely that these labels will be mutually reinforcing rather than retaliatory. If anything, such labels would level the playing field and give American-made products that are produced in appropriate conditions a better chance against products made in less labor-friendly environments.

## **VI. Conclusion**

Strict trade rules have limited governments’ ability to take effective action against poor human rights practices associated with the production of consumer goods. This problem has been exacerbated by globalization which gives producers the incentive to “race to the bottom” to keep production costs to a minimum. 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 to only work well when government is mandated to enact strong laws that allow it to establish who is

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<sup>214</sup> See e.g., Joy Gordon, *Economic Sanctions, Just War Doctrine, and the “Fearful Spectacle of the Civilian Dead,”* available at <http://www.crosscurrents.org/gordon.htm>; Michael P. Malloy, *Economic Sanctions and Human Rights: A Delicate Balance*, The Center for Human Rights and Humanitarian Law at Washington College of Law, available at <http://www.wcl.american.edu/hrbrief/v3i1/malloy31.htm>.

to blame for intentional wrongdoings concentrated in time and room.”<sup>215</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 are willing to act to take advantage of their market position and create market-based incentives for socially responsible behavior.

Even if there was universal agreement about what standards producers should be held to and every country in the world had passed laws codifying these standards, developing countries would likely still lack the capability to prosecute transnational corporations for wrongdoings, even if they are willing to do so.<sup>216</sup> Prosecution is additionally complicated by the fact that there are numerous actors, including some hidden actors, in the commodity chain for industries such as apparel.<sup>217</sup> The labeling scheme proposed in this paper avoids these pitfalls associated with hard law by allowing developed countries to take actions within their own markets to voluntarily reward those companies who are willing to participate in a certification process, regardless of where the production is occurring. Then the market failure caused by imperfect information is avoided, and consumers can reward socially responsible producers as they see fit.

Because this standard is content-positive and focuses on incentives rather than punishing less responsible producers, it is much more 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 labels can be used more broadly, they can be developed through a participatory process, penalties can be attached to deception, and the government can identify priority areas that the labels can focus on.

Moving forward, it is essential to identify those products and industries that are the best suited for human rights labels. While this article undertook the necessary legal analysis to demonstrate the legality of such a label under the United States international trade commitments, the heavy lifting of deciding how to establish appropriate criteria and how to best administer the certification process has been left to future scholarship and the political 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 article is accepted, that human rights labeling is a useful tool that does not violate international trade rules, then it is appropriate to consider how to operationalize this idea in the domestic context.

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<sup>215</sup> Michele Micheletti & Dietlind Stolle, *The Politics of Consumption/The Consumption of Politics: Mobilizing Consumers to Take Responsibility for Global Social Justice*, 611 ANNALS 157, 159 (2007).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

Ultimately, labels offer governments an important opportunity to accomplish international human rights goals while not 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.