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LABELING PROGRAMS AS A REASONABLY AVAILABLE LEAST RESTRICTIVE TRADE MEASURE UNDER ARTICLE XX'S NEXUS REQUIREMENT

*John J. Emslie**

I. INTRODUCTION

Product labels, as the term is used throughout this Article, are labels placed on the outside of a product which illustrate the product's effects on the environment or human health.¹ The use of product labels by manufacturers, producers, and packagers as a method to communicate such information is increasing in international trade. It is nearly impossible to walk through a local store or supermarket and not see dozens of labels affixed to a variety of products. Some producers voluntarily place labels on their products to communicate the positive effect the product may have on the environment or human life or health, for example, "made from recycled paper." Other producers are required to place a label on their products that warn customers of certain dangers, for example, "this product con-

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1. The term "product label" could be used to define almost every form of communication placed on a product's packaging, i.e. advertisements, price tags, the ubiquitous nutritional information labels which are required on all food fit for consumption in the United States, etc. This Article, for the sake of brevity, limits the definition of product labels to those labels which communicate a product's effects on the environment and human health. Such labels are commonly referred to as "eco-labels" and "health warnings." Hereinafter, the terms "labels" and "labeling programs" will exclusively refer to labels and labeling programs which are implemented to communicate a product's effects on the environment or human life or health.

tains ozone-depleting substances” or “cigarette smoke contains carbon monoxide.” However, regardless of the message or its impetus, product labels are likely to become an important component of international trade and international law. This Article presents the argument that product labeling programs could become a default or catch-all reasonably available least restrictive trade measure under Article XX of the General Agreement on Tariffs and Trade (GATT).²

Part II of this Article further defines product labels and explains the three principal categories of labeling programs. These programs are mandatory government sponsored schemes, voluntary government sponsored schemes, and voluntary privately-sponsored schemes. Additionally, Part II demonstrates the advantages and disadvantages of labels and labeling programs. Generally, labeling programs provide advantages to the consumer, business and manufacturing sectors. Labeling program disadvantages include a labeling program’s potential for abuse, the potential inconsistency and inaccuracy of labels, and the increased costs associated with poorly-managed or regulated labeling programs.

Part III sets forth the dispute settlement mechanism of the GATT/World Trade Organization (WTO), the forum under which disputes involving Article XX are decided. Generally, under the GATT/WTO dispute settlement system, a complaining party requests a panel to be established to hear the dispute and prepare a report. The panel then applies regime rules to the facts of the dispute, which results in a binding decision that is reviewed by the Appellate Body. Part III also explains and provides an analysis of three major provisions of the GATT: Article I: General Most-Favoured-Nation Treatment; Article III: National Treatment on Internal Taxation and Regulation; and, Article XI: General Elimination of Quantitative Restrictions.

2. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement]. The World Trade Organization (WTO) is the exclusive organization dealing with international trade among its Member nations. See WTO Website, at http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Feb. 19, 2005). Currently, there are 148 Members of the WTO. For a listing of all Members and their date of membership, see WTO Website, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Feb. 19, 2005).

Part IV analyzes Article XX of the GATT. Generally, Article XX provides a limited exception to GATT's default rules, which permit a trading Member to institute a trade restriction if the restriction is necessary to protect, *inter alia*, human, animal or plant life or health, or the conservation of exhaustible natural resources. Part IV explains the three-step Article XX analysis established by recent GATT/WTO decisions: (1) the policy test; (2) the nexus requirement; and (3) the chapeau. A trading Member must satisfy each of these requirements in order to successfully invoke an Article XX defense. The Shrimp Turtle dispute, discussed at length in this Part, provides a perfect example of the Article XX exception analysis.

Part V focuses upon the principal GATT/WTO decisions that have confronted the issue of product labels and labeling. The Thai Cigarettes dispute between the United States and Thailand, the EC Asbestos dispute between Canada and the European Communities (EC), and the Tuna I dispute between the United States and Mexico all discussed the legality and availability of labeling programs under Article XX. Each of the situations presented was factually distinct and, therefore, the decisions concerning the availability of a labeling program as a least restrictive trade alternative were different in the disputes.

Part VI concludes that it may be possible for labeling programs to develop into a default or catchall least restrictive trade measure under Article XX. However, such a labeling program must possess certain attributes and characteristics, which are explored in this section. For example, the labeling program must be effective, international support or agreement must exist, and, finally, the program must be reasonably fair to all trading Members. These characteristics were developed by the panel and Appellate Body reports discussed throughout the Article.

II. LABELING PROGRAMS

Put simply, a product label is a label placed on the outside of a product that communicates various information about the product, whether it be the product's composition, production method, or the possible effects the product has on the environ-

ment, or human health.³ The information may be negative, positive, or neutral. A labeling program establishes the requirements or conditions that a producer must satisfy to place a label on the product. Labeling programs may exist on a domestic, regional, or international level. There are three major types of labeling programs: (1) mandatory government-sponsored programs; (2) voluntary government-sponsored programs; and (3) voluntary private-sponsored programs. Labeling programs provide advantages to both the consumer and business and manufacturing sectors. However, the proliferation of labeling programs has resulted in some well-founded criticisms as well. Specifically, if not adequately monitored and regulated, labeling programs present the potential for abuse, labels may be inconsistent and inaccurate, and producers fear the increased costs associated with labeling programs.

A. *Defining Labels and Labeling Programs*

Product labels are typically labels placed on the outside of a product that contain information concerning the product's potential effect on the environment, human, animal or plant life.⁴ However, labels may also be affixed to products in an effort to pursue other socially-conscious goals, such as the eradication of child labor.⁵ Environmental labels, which are gaining popularity, are labels that communicate the product's interaction with the environment.⁶ These labels communicate to the consumer

3. Matthias Vogt, *Environmental Labelling and Certification Schemes: A Modern Way to Green the World or GATT/WTO – Illegal Trade Barrier?*, 33 ENVTL. L. REP. 10522 (2003). See also Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL. L. 205, 206–20 (1996) (discussing the use of labels to warn consumers about human health and environmental issues, production methods, and the effects of the product on plant and animal species).

4. Atsuko Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, 11 GEO. INT'L ENVTL. L. REV. 599, 601 (1999).

5. See Janelle M. Diller & David A. Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 663, 680 (1997) (discussing GATT and the potential use of product labeling in the context of child labor). See also discussion of RUGMARK, *infra* notes 19–24 and accompanying text.

6. Teresa Hock, Note, *The Role of Eco-labels in International Trade: Can Timber Certification be Implemented as a Means to Deforestation?*, 12 COLO. J.

that use of the product may adversely effect the environment or, conversely, that the product is more friendly to the environment than its competitors'.⁷

Labels are not basic standard requirements for products. Instead, basic standards are the minimum requirements for a product being commercialized in a given country.⁸ Conversely, labeling programs do not pose "internal requirements" on the product (i.e., the minimum composition and/or ingredients the product must contain for it to be sold to the public), but rather impose an "external requirement" (i.e., a requirement as to which information must be contained on the label).

One common category of product labels, environmental labels, has become more prominent in the United States and Europe where consumers have expressed greater concern about the effects that industrialization and consumption patterns have on the environment.⁹ The information usually communicated to the consumer on an environmental label is that the particular product is, for example, more environmentally friendly than other products in the same category.¹⁰ For example, a label that explains that the product contains organically-grown ingredients conveys the message that such a product is more environmentally friendly than products that use pesticides and other chemical treatments.

Environmental labels often transmit messages to consumers that promote the consumption and production of alternative products that are more environmentally friendly than products currently used by the market.¹¹ For example, a label may be placed on reusable canvas shopping bags that explains that the

INT'L ENVTL. L & POL'Y 347, 350 (2001) (noting the increased popularity of environmental labels among countries, especially in Japan, Canada, and in Europe).

7. Markku Lehtonen, *Criteria in Environmental Labelling: A Comparative Analysis of Environmental Criteria in Selected Labelling Schemes*, United Nations Environmental Programme (UNEP), 13 ENV'T AND TRADE 7 (1997) (citing the UNCTAD Ad hoc Working Group on Trade, Environment and Development's definition of environmental labeling).

8. See Henrique Freire de Oliveira Souza, *Genetically Modified Plants: A Need for International Regulation*, 6 ANN. SURV. INT'L & COMP. L. 129, 163 (2000).

9. Lehtonen, *supra* note 7, at 8.

10. *Id.* at 10.

11. Okubo, *supra* note 4, at 601.

use of such bags is more environmentally friendly than the use of paper or plastic bags currently used by grocery stores. Thus, the producer, through use of a label, could either attempt to set itself apart from its own product class (i.e., with the use of a biodegradable container) or it can promote the environmentally friendly aspects of the entire class versus another class of products (i.e., canvas bags versus paper and plastic bags). Therefore, the most proper definition is a “catchall,” one that defines labels and labeling programs as a “range of labels” used to communicate information about a product to the consumer.¹²

Labeling programs exist on a domestic, international, or regional level. An example of a domestic labeling program is the dolphin-safe label on tuna and tuna products in the United States.¹³ A typical international labeling program is that established by the International Organization for Standardization (ISO).¹⁴ The ISO is a network of national standards institutes from 147 countries, working in partnership with international organizations, governments, industry, business, and consumer representatives.¹⁵ The ISO provides standards and guidelines for environmental labeling.¹⁶ These guidelines are typically referred to as ELP.¹⁷ In addition, various United Nations Conferences have directly supported labeling programs.¹⁸

12. Foundation for International Environmental Law and Development (FIELD), *Briefing Paper: Legal and Policy Issues in the Market Access Implications of Labelling for Environmental Purposes*, Sub-Regional Brainstorming Workshop (Asia) - Specific Trade and Environment Issues in Paragraphs 31 and 32 of the Doha Ministerial Declaration in Preparation for the Cancun WTO Ministerial Conference, 4 (July 30, 2003 – Aug. 1, 2003) [hereinafter FIELD Briefing Paper] (discussing environmental labels in particular).

13. Dolphin Protection Consumer Information Act, 16 U.S.C.A. §1385 (1990). This act specifies the labeling standard for any tuna product exported from or offered for sale in the United States.

14. See generally ISO Website, at <http://www.iso.org/iso/en/ISOOnline.open> erpage (last visited Nov. 20, 2004).

15. *Id.*

16. Doris Gaskell Nuyda, *Eco-labeled Goods Will Soon be in Local Markets*, PHILIPPINE DAILY INQUIRER, Apr. 25, 2003. ISO 14000 contains International Standards for Environmental Management. See ISO Website, ISO 14000, at <http://www.iso.ch/iso/en/iso9000-14000/iso14000/iso14000index.html> (last visited Nov. 20, 2004).

17. Nuyda, *supra* note 16.

To obtain an ELP certification, a company or manufacturer must first apply to the ELP administrator who processes the forms and ar-

An example of a regional labeling program would be the RUGMARK program.¹⁹ RUGMARK is a nonprofit organization that works to end child labor and offers educational opportunities for children in Nepal, India and Pakistan.²⁰ RUGMARK recruits producers and importers of carpets to make and sell carpets that are free from illegal child labor.²¹ Producers agree to adhere to RUGMARK's strict no child-labor guidelines and permit random inspections of carpet looms. In doing so, RUGMARK grants the producers the right to place the RUGMARK label on their carpets. RUGMARK contends that this system provides the best assurance that children were not employed in the making of the carpet.²² In addition, a portion of the carpet price is contributed to the rehabilitation and education of former child weavers.²³

The RUGMARK labeling program is very similar to environmental and health-related labeling programs in that it shares similar implementation, influence, philosophy, and underlying

ranges the site visiting and product testing by technical experts. If the experts' assessment is favorable, the ELP administrator then declares the product as having passed. The ELP board gives it approval and the label or certification is awarded to the applicant. It takes about two months to process applications.

Id.

18. See, e.g., REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, at 38–39, U.N. Doc. A/CONF 151/26/Rev.1 (Vol. 1), U.N. Sales No. E.93.I.8 (1993). Chapter 4(B)(c) related to assisting individuals and households in making environmentally sound purchasing decisions states:

4.21 Governments, in cooperation with industry and other relevant groups, should encourage expansion of environmental labeling and other environmentally related product information programmes designed to assist consumers to make informed choices.

4.22 They should also encourage the emergence of an informed consumer public and assist individuals and households to make environmentally informed choices by ... (b) Making consumers aware of the health and environmental impact of products, through such means as consumer legislation and environmental labelling.

Id.

19. See generally RUGMARK Foundation, at <http://www.rugmark.org> (last visited Jan. 21, 2005).

20. See RUGMARK Foundation, *About RUGMARK*, at <http://www.rugmark.org/about.htm> (last visited Jan. 21, 2005).

21. See *id.*

22. See *id.*

23. See *id.*

“socially friendly” intention. First, with its similarities to environmental and health-related labeling programs, its ingenuity and success reinforces the argument of the need for a cohesive and standardized labeling program.²⁴ Second, it demonstrates that worldwide acceptance of labeling programs and their potential international success makes labeling programs applicable not only to the protection of the environment and human health, but also to other important objectives such as human rights and various other socially friendly goals. Therefore, it is possible that in the future successful labeling programs may be extended to a wealth of other causes, where demand shifts generated by socially conscious consumers having access to the information contained on the labels can affect the supply of other socially friendly products to the detriment of socially unfriendly products.

The goals of a labeling program are fairly straightforward. Generally, the purpose of a labeling program is to increase demand for environmentally friendly or more health-conscious products with the hope that the products will gain a larger market share.²⁵ The labels placed on tuna and tuna products

24. It has been documented that RUGMARK inspectors rescue, on average, one child carpet weaver per week, and RUGMARK is viewed internationally as a model program for the eradication of child labor. Press Release, National Consumers League, *NCL to U.S. Retailers: Stop Ignoring Child Slaves in Carpet Industry* (Mar. 26, 2001), available at http://www.nclnet.org/news/2001/carpet_child_labor.htm (outlining RUGMARK's success story.)

25. See Staffin, *supra* note 3, at 209:

While there are many different types of environmental labeling schemes, they all share a common goal: to identify for the consumer those products that are environmentally less harmful than other competing goods within the same product category, either because of their ingredients, the PPMs by which they were generated, or both, so that the consumer will become motivated to purchase only these ‘green’ goods, thereby increasing the ‘green’ producer’s market share to the detriment of its competitors.

Id.

PPMs are “Processing and Production Methods.” They “concern the way in which products are manufactured or processed and natural resources are extracted or harvested, and are often the basis for national regulations.” Elizabeth Barham, *What’s in a Name?: Eco-Labeling in the Global Food System*, Paper Presented at the Joint Meetings of the Agriculture, Food, and Human Values Society and the Association for the Study of Food and Society,

are a perfect illustration of this technique and its success. Although the American embargo on Mexican tuna was lifted in 1999 in response to the GATT panel's decision in the Tuna I dispute,²⁶ since U.S. law prevents Mexican tuna from being labeled Dolphin Safe, virtually no retailer in the United States will stock it.²⁷ In addition, labeling programs hope that providing certain information to the public will "serve as a normative process to influence and shape international behavior over time, with a goal of sustainable development."²⁸

Therefore, labeling programs are usually designed to achieve four basic goals: "(i) to improve the sale or image of the labelled product; (ii) to raise the environmental [or health-conscious] awareness of consumers; (iii) to provide accurate and timely information for consumers to make informed judgments; and, (iv) to direct manufacturers to account for the ... impact of their products."²⁹ However, the manner in which these labeling programs meet these goals and the compliance level attributed to each of these programs depends on the way in which these programs are structured.

B. Types of Labeling Programs

To date, there are at least thirty different labeling programs implemented in forty different countries worldwide, each bearing its own, sometimes intriguing, name.³⁰ Germany's is called Blue Angel, Japan's program is Eco Mark, Canada's is Environmental Choice, and, in the United States, it is Green Seal.³¹ The degree of governmental oversight and regulation varies from country to country and among organizations.³² There are

held in Madison, Wisconsin, June 5–8 (1997), available at <http://www.pmac.net/bbarham.htm> (last visited Jan. 21, 2005).

26. For a full discussion of the Tuna I dispute, including the panel's decision, see *infra* notes 180–194 and accompanying text.

27. See *Tangled Nets*, THE ECONOMIST, Oct. 4, 2003, at 38. This fact is especially interesting considering that tuna demand is increasing worldwide. *Id.*

28. Okubo, *supra* note 4, at 601.

29. FIELD Briefing Paper, *supra* note 12, at 5.

30. Nuyda, *supra* note 16.

31. *Id.*

32. For example, sometimes environmental labels are based on a tool known as a life cycle assessment (LCA), which is a "method in which the environmental effects of a particular product are evaluated by analysis of the in-

three main categories of labeling programs: (1) mandatory government-sponsored schemes; (2) voluntary government-sponsored schemes; and (3) voluntary private-sponsored schemes.³³

1. Mandatory Government-Sponsored Schemes

Under a mandatory government-sponsored scheme, producers are required to attach labels to their products which convey either the negative, neutral, or positive contents or effects of their products.³⁴

The primary purpose of a program requiring the labeling of negative content is to warn consumers of the adverse effect such a product may have on human health or the environment. The aspirations of such a program are to persuade manufacturers to switch to a more "friendly" or "healthy" process or, instead, have the consumer avoid the product altogether and find an alternative.³⁵ One example of such a scheme is the U.S. Clean Air Act Amendments of 1990.³⁶ The amendments were made in response to the highly successful Montreal Protocol³⁷ and were intended to get the United States in compliance with the Protocol. The Clean Air Act requires:

the labeling of any product that contains or was manufactured with certain chemical substances known to deplete the stratospheric ozone layer....The required label must read: "Warning: Contains [or Manufactured with] [name of substance], a sub-

puts and outputs of materials and energy and other important factors related to the product." FIELD Briefing Paper, *supra* note 12, at 5. Although not all programs apply a comprehensive LCA, the recent trend supports its inclusion or a similar technique. *Id.* at 5-6.

33. Okubo, *supra* note 4, at 603.

34. *Id.*

35. See Staffin, *supra* note 3, at 211.

36. Clean Air Act, Pub. L. 101-549, Title VI, § 602(a), 104 Stat. 2649 (1990) (codified as amended at 42 U.S.C. § 7671 (1994), available at <http://www.epa.gov/air/caa/title6.html> (last visited Jan. 21, 2005).

37. See Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3, reprinted in 26 I.L.M. 1550 (1987) (entered into force Jan. 1, 1989). The purpose of the Montreal Protocol was to eliminate substances that cause ozone depletion by instituting a total phase out of such products. See *id.* pmbl.

stance which harms public health and the environment by destroying ozone in the upper atmosphere.”³⁸

The primary purpose of a neutral labeling program is to provide consumers with information that is not necessarily negative or positive, but would be considered valuable information to the consumer in his or her decision making. The label is neutral because the information provided may not be sufficiently material to generate a negative or positive response *per se*. For example, in the United States, the Environmental Protection Agency (EPA) requires car manufacturers to place a sticker on the window of a new automobile stating the fuel economy the consumer can expect from the car.³⁹

The positive type of labeling program allows a producer to place a label on the product illustrating the product's positive feature, as compared to other products in the same category. An example of this program is the labeling of tuna and tuna products in the United States.⁴⁰ This label allows the producer to communicate the lengths taken to ensure that the product was produced with positive environmental intention. Although these products often cost more than products that do not bear the label, the seller is hoping to “cash in” on the environmentally or health conscious segment of the market, thereby gaining an economic advantage.⁴¹

2. Voluntary Government-Sponsored Labeling Schemes

Voluntary government-sponsored labeling schemes vary greatly in content.⁴² These programs involve government participation in the formation, administration, and sometimes fi-

38. Staffin, *supra* note 3, at 211–12 (discussing the Clean Air Act).

39. Fuel Economy Regulations for 1977 and Later Model Year Automobiles—Labeling, 40 C.F.R. § 600.307-95 (1994).

40. Dolphin Protection Consumer Information Act, 16 U.S.C.A. § 1385 (1990).

41. Okubo, *supra* note 4, at 601 (explaining that where consumers' environmental awareness is well developed, labeling programs should create demand pressures in favor of environmentally friendly products). *See also* FIELD Briefing Paper, *supra* note 12, at 8 (stating that “the potential for growth in the market share of eco-labeled products makes eco-labeling a compelling marketing tool”).

42. Okubo, *supra* note 4, at 605.

nancing of the program⁴³ without creating the “adversarial posture of the mandatory requirements” because peer and public pressure are the only factors for the producer to consider.⁴⁴ One example of this type of program is the German Blue Angel program, which is credited as being the world’s first environmental labeling program.⁴⁵

Launched in 1977 to promote more environmentally-sound products, Blue Angel is administered by the German government through three bodies: the Federal Environmental Agency (FEA), the Environmental Label Jury (ELJ), and the Institute for Quality Assurance and Labeling (RAL).⁴⁶

The FEA performs a streamlined LCA⁴⁷ in order to determine which stages of the product’s life cycle results in the most significant environmental impacts. The FEA next drafts criteria regarding these significant impacts, which are to be met by recipients of the ‘Blue Angel’ award. It forwards these criteria to the [RAL] for review. RAL ... then convenes a panel of experts, drawn from manufacturing, environmental, consumer, and union groups to critique the draft criteria. It then forwards this critique to the ELJ, which possesses the final authority on whether to approve the new set of ecolabeling criteria. In the past, the ELJ has approved between three to six new eco-label categories each year. This entire process of establishing a new eco-label can last from between six months to two years.⁴⁸

Another example of a voluntary government sponsored program is a so-called “seal of approval.” In such a program, the government, or an institution closely connected to the government, gives compliant products a government “seal of approval”

43. FIELD Briefing Paper, *supra* note 12, at 6 (explaining that government involvement would help to “ensure consistency of criteria, balance of views of different parties, greater accountability to the public and greater transparency”).

44. Okubo, *supra* note 4, at 605.

45. FIELD Briefing Paper, *supra* note 12, at 6 n.16.

46. *Id.*

47. For a definition of LCA, see *supra* note 32 and accompanying text.

48. Staffin, *supra* note 3, at 225 (internal citations omitted). For a more detailed discussion of the German Blue Angel program, see OECD, ECO-LABELLING: ACTUAL EFFECTS OF SELECTED PROGRAMMES 25–27 (1997), available at [http://www.olis.oecd.org/olis/1997doc.nsf/linkto/ocde-gd\(97\)105](http://www.olis.oecd.org/olis/1997doc.nsf/linkto/ocde-gd(97)105) (last visited Jan. 30, 2005).

or other similar positive label.⁴⁹ Both the German Blue Angel program and other similar seals of approval garner more credibility than voluntary privately-sponsored programs discussed below.⁵⁰

3. Voluntary Private-Sponsored Labeling Programs

The voluntary private-sponsored labeling program is a newly-developing area.⁵¹ This type of program is significant because it does not require the support of individual governments, and thus, should not conflict with GATT/WTO rules. This is so because GATT/WTO rules are normally understood to cover only state activities.⁵² These programs do not involve government oversight or participation, as they are either administered by a third party or based on self assessment, i.e. a declaration by the manufacturers themselves.⁵³

One example of such a program is Green Seal in the United States.⁵⁴ Green Seal is an independent non-profit organization that identifies and endorses products and services that cause less toxic pollution and waste, conserve resources and habitats, and minimize global warming and ozone depletion.⁵⁵ On the basis of proposals made by industry and the public, Green Seal selects product categories for its program based on a number of factors including: significance of environmental impact, the opportunity for its reduction, public interest, manufacturer interest and promotional opportunity.⁵⁶

49. Okubo, *supra* note 4, at 605.

50. *Id.* at 605–07 (discussing the advantages of government involvement).

51. *Id.* at 607.

52. *Id.* at 609. The author goes on to note that some arguments remain as to state responsibility for the activities of private groups. *Id.*

53. FIELD Briefing Paper, *supra* note 12, at 6–7 (explaining that typically voluntary privately-sponsored labeling programs receive no government sponsorship, funding or assistance and are typically made without third party certification or investigation).

54. See Green Seal Website, *About Green Seal*, at <http://www.greenseal.org/about.htm> (last visited Nov. 21, 2004).

55. *Id.*

56. See OECD, *supra* note 48, at 28. Green Seal's specific programs include: (1) *Greening Your Government* (technical assistance to all levels of government in their purchasing, operations, and facilities management); (2) *Product Standards and Certification* (development of environmental standards for leadership products in specific categories and certification of prod-

One attribute that all three types of labeling programs share is their common advantages and disadvantages. However, the level of compliance and regulation associated with each type of program may help to alleviate some of the disadvantages present in all labeling programs.

C. Advantages of Labeling Programs

The following is a list of the possible advantages of a labeling program. The advantages can be broken down into the following sections: (a) advantages to the consumer; (b) advantages to business and manufacturing; and (c) advantages to the environment or human health.

1. Advantages to the Consumer

Perhaps the most obvious advantage to the consumer is heightened consumer awareness.⁵⁷ For example, consider labels on alcoholic beverages that warn a pregnant consumer that consumption of the product could adversely affect the pregnancy. Likewise, environmental labels provide an environmentally-conscious consumer with the necessary information to make an informed decision. Labels may be a powerful tool to express the health or environmental component of a product, so much so that certain producers may fear the requirement of a label.⁵⁸ However, many critics argue that it may be difficult for the consumer to determine whether statements on a product

ucts that meet them); (3) *Product Recommendations* (technical reports called Choose Green Reports on products in a variety of categories giving specific brand recommendations of those that meet screening criteria); (4) *Greening the Lodging Industry* (long-term project with hotels and motels to green their operations and purchasing and includes certification of specific properties); and (5) *Policy* (leadership in green procurement policy, international policy for environmental labeling, etc.). See *About Green Seal*, *supra* note 54.

57. See Staffin, *supra* note 3, at 215.

58. For example, company documents produced during toxic tort litigation involving the W.R. Grace insulating product Monokote revealed that the company knew in 1977 that the product contained low levels of a rare form of asbestos called tremolite. Grace chose not to label the product or otherwise inform customers out of fear that labeling would severely dampen sales of the product. Thomas O. McGarity, *Proposal for Linking Culpability and Causation to Ensure Corporate Accountability for Toxic Risks*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 1, 36 (2001).

are truthful.⁵⁹ It is possible that a consumer may mistake a label on a product as an advertising ploy or attention grabber. This concern emphasizes the need for a supervised governmental program, independent third-party oversight, or expert assessment techniques that are able to provide the consumer with the necessary verification.⁶⁰

2. Advantages to Business and Manufacturing

Labeling may create greater efficiency for manufacturers.⁶¹ Companies that are forced to meet the requirements of a label either through government regulation or market pressures will feel pressure to comply with the standards to compete in the marketplace. Such companies will be forced to invest in cleaner or safer technologies which may, in turn, increase production, efficiency, and profitability. In addition, companies that earn the reputation of being more “green” or healthy than others will likely enjoy greater sales, customer loyalty, and consideration.⁶²

3. Advantages to the Environment

Unsurprisingly, the environmental advantage is perhaps the main goal of an environmental program; the same is true for a labeling program that seeks to reduce potential negative effects on human health.⁶³ Labeling provides the opportunity to differ-

59. See George Richards, Note, *Environmental Labeling of Consumer Products: The Need for International Harmonization of Standards Governing Third-Party Certification Programs*, 7 GEO. INT'L ENVTL. L. REV. 235, 247 (1994) (arguing that, “consumers are unable to determine the truthfulness of whether a product is, for example ‘ozone friendly.’ Verification of such a claim is beyond the capacity of the typical consumer.”).

60. See *id.* (noting that the result of an “objective verification is a reduction of the information gathering cost to the consumer, which translates into greater use and acceptance of the program by consumers and a greater demand for the products”).

61. *Id.* at 247–48.

62. See Okubo, *supra* note 4, at 601, 602–03 (explaining that many producers use labels to gain a competitive advantage through their green image, especially where environmental awareness is high). See also Richards, *supra* note 59, at 238 n.16, 17 (citing surveys that place the percentage of “green” consumers as 82% to 90% of the total population and noting the significant impact of “green labeling” on the production and advertising of products).

63. For a discussion of the purposes and goals of a labeling program see *supra* notes 25–29 and accompanying text.

entiate products that are produced in a healthier or more environmentally-sound way from those that are not,⁶⁴ perhaps without even violating the rules of the WTO.⁶⁵ A labeling program may avoid violating WTO rules because labeling programs are often regarded as a less restrictive trade measure than traditional legislative and administrative policy instruments and “[g]overnments tend to support these schemes because labeling provides incentives for producers to lessen the environmental [or health] impact of their products without establishing binding restrictions or direct bans on products.”⁶⁶ For example, successful environmental labeling protects the environment in two ways. First, it assures that the labeled products are more environmentally-friendly than could be expected without the label, and second, it gives environmentally-concerned consumers the ability to avoid products with negative environmental impacts.⁶⁷ Some argue that labeling programs aim to help improve the environment “in each country by reducing the pollution that unconcerned, non-compliant companies might otherwise cause.”⁶⁸

A labeling program’s success hinges on its ability to use its greatest characteristic: its ability to attack the use of damaging products from the demand side of the market. Shifts in demand will create a competitive incentive to suppliers and manufacturers to raise the level of environmental quality of their products.⁶⁹ Hopefully, such shifts will lead directly to less environmental damage or decreased medical costs. By addressing the

64. Anna Henriksen, *Voluntary Environmental Labelling and the World Trade Organisation*, INTERNATIONAL TRADE, ENVIRONMENT AND DEVELOPMENT WITH CHRISTIAN FRISS BACH 3 (Nov. 9, 1998), available at <http://www.econ.ku.dk/cfb/trade/papers/henriksen.pdf> (last visited Feb. 13, 2005).

65. *Id.* at 5. A country with high environmental demands may legislate for its domestic industry, ensuring that domestic products are produced in an environmentally sound way. However, the domestic products face competition with imported products that may have been produced in a more polluting manner. In the WTO, the country is not allowed to differentiate between the foreign and domestic products when the characteristics of the products are the same. *Id.*

66. Okubo, *supra* note 4, at 602.

67. Henriksen, *supra* note 64, at 2.

68. Nuyda, *supra* note 16.

69. Richards, *supra* note 59, at 248.

demand side, labeling cannot be overruled by suppliers, largely because labeling programs use market mechanisms.⁷⁰ Market mechanisms and demand shifts are especially important because “protection measures addressing the supply side are often overruled by lobbying.”⁷¹

D. Labeling Disadvantages

A labeling program has potential disadvantages if not administered properly. These disadvantages include: (a) its potential for abuse as a restrictive trade measure, which serves as a source of continuing debate between developed and developing nations; (b) a label’s potential inconsistency and inaccuracy; and (c) fear among producers that labeling programs may be too costly to implement.

1. The Debate between Developing Countries’ and Developed Countries’ Labeling Programs and their Potential for Abuse When Used as Restricted Trade Measures

The debate between the principal of uninhibited free trade and a nation’s right to protect the health of its citizenry and environment has revealed sharp distinctions between the positions of developed and developing countries.⁷² Developed countries enjoy a higher per capita standard of living than developing countries.⁷³ Due to a greater amount of disposable income, citizens in developed countries can choose between different products. Recognizing this ability, “developed countries have been prone to utilize (or at least threaten to utilize) trade measures, such as import bans, in order to cause producers in developing countries to change their environmentally harmful PPMs⁷⁴ to more benign methods.”⁷⁵ However, developing coun-

70. Henriksen, *supra* note 64, at 6. *See also* Staffin, *supra* note 3, at 210 (stating that “eco-labeling schemes attempt to marshall the forces of consumer demand in order to effect environmentally beneficial changes on the supply side”).

71. Henriksen, *supra* note 64, at 5.

72. *See* Scott Vaughan, *Trade and Environment: Some North-South Considerations*, 27 CORNELL INT’L L.J 591 (1994).

73. *See* Staffin, *supra* note 3, at 207 (noting that while their standard of living is high, developed nations have recently become conscious of the devastating environmental harm caused by unfettered economic growth).

74. For a definition of PPMs, see *supra* note 25 and accompanying text.

tries see this use of trade measures “as a unilateral attempt to export the [developed country’s] domestic environmental laws, which may be appropriate for the [developed country’s] ... level of industrial development, but which are too restrictive for ... [the developing] countries.”⁷⁶ Developing countries view these trade restrictions as an unfair attempt to punish them for environmental damage that was arguably caused by the developed countries themselves.⁷⁷ Additionally, developing countries argue that such restrictions are “protectionist, discriminatory, and in violation of their sovereign rights to develop and exploit their own resources.”⁷⁸

These arguments have some import. Labeling requirements set forth by a protectionist country can be abused as a non-tariff trade barrier in numerous ways.⁷⁹ For example, criteria can be designed to favor the domestic production, application procedures for compliance with the label program can be made exceedingly difficult for foreign producers, or the choice of product category can be heavily influenced by local industries’ needs.⁸⁰ However, developing countries are equally concerned with ensuring that labels will not become yet another restrictive business practice which further limits market access for their products. After all, many national economies of developing countries depend greatly upon the export earnings with which to pay for food imports and social services.⁸¹

2. The Potential Inconsistency and Inaccuracy of Labels

Labels can send a dubious message. Some labels currently in use may not clearly communicate the harm the product or process is seeking to avoid or the protection the product offers. Consider, for example, labels that encourage consumers to buy locally.⁸² One could walk the aisles of a local grocery store’s

75. Staffin, *supra* note 3, at 208.

76. *Id.*

77. See DANIEL C. ESTY, INST. FOR INT’L ECON., GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 182 (1994).

78. Staffin, *supra* note 3, at 208.

79. Henriksen, *supra* note 64, at 7.

80. *Id.*

81. Barham, *supra* note 25.

82. See *id.* For example, such labels may be used by local farmers to attract sales.

produce department and see these labels affixed to a variety of goods, including farm produce. One argument is that such purchases might reduce the environmental costs of excess pollution that accompany the additional transportation of the produce shipped from greater distances. However, these labels may have other connotations than simply escaping the pollution associated with transportation.⁸³ They can be used to support local business and, therefore, stymie other domestic or foreign goods. Without government checks and qualification assessments on these labeling techniques, the messages sent by producers are, at least, dubious and, at worst, worthless. Of course, the level of regulation of the truth and accuracy of the label may depend on who, in fact, sponsors the labeling program. If it is a government-sponsored labeling program,⁸⁴ then it stands to reason that the government would regulate the truth and accuracy of the label. If it is a voluntary privately-sponsored program,⁸⁵ then the industry, trade group, or non-governmental organization (NGO) sponsor of the program would regulate the label's truth and accuracy.

It has been argued that some labels are ineffective because they are susceptible to abuse by manufacturers who may deceive customers into thinking that a product is safer than it is.⁸⁶ Additionally, environmentally-friendly production is rarely the cheapest method and it often requires a higher price.⁸⁷ Moreover, an additional argument which supports the conclusion that labels are ineffective is that "labelling is not an effective instrument in guiding the consumers to choose between products that belong to different categories, but serve the same purpose," i.e., "rechargeable batteries in comparison with non-rechargeable."⁸⁸ Therefore, in such a situation, it may be difficult for a producer to significantly increase its market share.

83. *See id.* The reasons supported for buying locally often reference non-market, non-commodifiable values of a social or ethical basis as well as ecological. *Id.*

84. *See* discussion *supra* Parts II.B.1, II.B.2.

85. *See* discussion *supra* Part II.B.3.

86. Henriksen, *supra* note 64, at 2 (discussing single issue labels).

87. *Id.* at 3. The reward for this process is that the label may give the product a marketing advantage, which hopefully offsets the higher price. *Id.*

88. *Id.*

3. Fear Among Producers Could Inhibit a Labeling Regime from Coming to Fruition

Labels provoke fears among producers.⁸⁹ This fear stems partially from the producer's concern that it may be unable to comply economically with a mandatory labeling scheme which will result in a loss of market share.⁹⁰ Needless to say, a change of procedure or production method requires a tremendous amount of capital expenditures. In addition, this fear and concern could create tension between NGOs and producers.⁹¹ If the birth of an international label regime is in the near future, this tension may result in the granting of too many concessions by label supporters to the arguably more powerful producers, which may, in turn, give rise to the hasty adoption of an ineffective regime.

This situation is compounded by the unbalanced level of bargaining power between the collectively strong producers and the relatively weak label supporters. A successful labeling program would require tremendous support from the producers themselves.⁹² The producers must have faith that the investments required to meet the labeling requirements will pay off in the market. However, risk-averse producers will fear the significant up-front costs and worry that the label will not have its intended effect. In addition, a producer's decision to join a labeling program may quell other possible innovation which necessarily will be foregone to satisfy the labeling program's requirements. Research and development for other solutions may cease so that the company can focus all attention on being a leader in its label program. In addition, in the case of environmental labeling, the "label requires good marketing when introduced in order to gain credibility. The label has no effect if the consumers do not consider it a guarantee for an environmentally-friendly product."⁹³

In order to fully understand how these programs will interact with the GATT rules, specifically Article XX, it is first necessary

89. Freire de Oliveira Souza, *supra* note 8, at 164.

90. *Id.*

91. *See id.* at 164–65.

92. *See* Richards, *supra* note 59, at 250 (discussing the lack of industry support).

93. Henriksen, *supra* note 64, at 6.

to set forth the GATT/WTO dispute settlement mechanism and the major provisions of the GATT. This discussion is necessary because Article XX is used as a defense to the following rules and the validity of the Article XX defense is usually determined within the GATT/WTO dispute settlement mechanism.

III. GATT/WTO LAW AND DISPUTE SETTLEMENT

A. *The Dispute Settlement Mechanism Under the World Trade Organization*

One of the problems with the status quo of reconciling free trade with environmental or human health measures that may restrict free trade is that the WTO has the only worldwide mandatory and binding dispute settlement mechanism. Therefore, because they often incite trade measures, unresolved environmental conflicts have great potential for facing a WTO panel.⁹⁴ This problem lies in the fact that environmental conflicts are often resolved by trade experts on WTO panels who may not be sufficiently educated in environmental or human health related issues to resolve disputes concerning them.⁹⁵ Because, for better or worse, such disputes will often end up before the dispute resolution machinery of the WTO, it is imperative that this Article set out the dispute settlement procedures under the WTO.

Before the Uruguay Round of Trade Negotiations,⁹⁶ the dispute settlement mechanism of the GATT was not binding. It was not until the establishment of the WTO and the creation of the Dispute Settlement Understanding (DSU) that decisions were binding.⁹⁷ The DSU is administered by the Dispute Set-

94. Laura Yavitz, *The WTO and the Environment: The Shrimp Case that Created a New World Order*, 16 J. NAT. RESOURCES & ENVTL. L. 203, 203 (2001–2002).

95. See Shane Spelliscy, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 COLUM. J. TRANSNAT'L L. 143, 155 (2001), citing M.C.W. Pinto, *The Court and Other International Tribunals*, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE: PROCEEDINGS OF THE ICJ/UNITAR COLLOQUIUM TO CELEBRATE THE 50TH ANNIVERSARY OF THE COURT 280, 295 (Connie Peck & Roy S. Lee eds., 1997).

96. The Uruguay Round of Trade Negotiations resulted in the establishment of the World Trade Organization. See WTO Agreement, *supra* note 2.

97. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade

tlement Body.⁹⁸ First, the parties to the dispute are encouraged to solve the dispute between themselves.⁹⁹ If a solution cannot be reached between the parties, the complaining party may request that a panel be established to complete a report.¹⁰⁰ The panel will apply the regime rules to the dispute and set forth an appropriate decision.¹⁰¹ If requested, the Appellate Body will review legal appeals from the panel's decision.¹⁰² The panel consists of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, or have served as a representative of a Member or of a contracting party to the GATT, or have served as a representative to the Council of Committee of any covered agreement or its predecessor agreement, or in the Secretariat, or have taught or published on international trade law or policy, or have served as a senior trade policy official of a Member.¹⁰³ During the interim review stage, the panel shall issue a report to both parties.¹⁰⁴ Upon completion of this report three things may happen: (1) the parties can appeal the report, in which case the DSB would await the decision of the Appellate Body,¹⁰⁵ (2) the report is adopted at a DSB meeting;¹⁰⁶ or (3) the DSB decides by consensus not to adopt the report.¹⁰⁷

The losing party to the trade dispute is provided three options under the DSU: (1) it can bring the measure found to be inconsistent with the Agreement into compliance or otherwise comply

Organization, Annex 2, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, vol. 27, art. 17.14, 33 I.L.M. 1226 (1994) [hereinafter DSU] (providing that an Appellate Body report must be “unconditionally accepted by the parties to the dispute”).

98. *See id.* art. 2.

99. *Id.* art. 4.

100. *Id.* art. 6.

101. *Id.* arts. 6, 11

102. *Id.*

103. *Id.* art. 8

104. *Id.* art. 15.

105. *Id.* art. 17.

106. *Id.* art. 16.4.

107. *Id.* However, this result is unlikely to happen because of the danger that it poses to the legitimacy of the dispute settlement system. *See* Antonio Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 *YALE J. INT'L L.* 301, 341 n.168 (1998). *See also* Bal Gopal Das, *Intellectual Property Dispute, GATT, WIPO: Of Playing by the Game Rules and Rules of the Game*, 35 *IDEA* 149, 169 n.128 (1994).

with the recommendations and ruling within the reasonable period of time determined; (2) it may enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation; or (3) if no satisfactory agreement on compensation is reached within a reasonable time period, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend any concessions entered under the covered agreements.¹⁰⁸ However, the DSU promotes “prompt compliance” to ensure effective resolution of disputes to the benefit of all members.¹⁰⁹

B. GATT/WTO Provisions and Laws

This Article discusses the Article XX exception to the GATT/WTO rules and its application to labeling programs. However, to fully understand Article XX’s application with respect to labeling programs, it is first necessary to understand how it interacts with other GATT/WTO rules. Article XX is invoked by a WTO Member as a defense to that Member’s challenged trade restriction.¹¹⁰ Therefore, it is essential to provide a background explaining the challenges which may be brought by an “attacking” Member who is claiming that a trade restriction is being imposed on them by the “defensive” Member who has imposed the trade restriction. Defensive Members will invoke the Article XX exception. It is also important to note that the provision which Article XX is intended to shelter may perhaps be a violation of one of the following provisions and rules. However, as long as the trade restriction is acceptable under Article XX, meaning the least restrictive trade measure necessary to satisfy the protected policy covered under Article XX, it will be permitted under GATT/WTO rules.¹¹¹

108. See DSU, *supra* note 97, art. 22.2.

109. See *id.* art. 21.1. See also Claire R. Kelly, *The Value Vacuum: Self Enforcing Regimes and the Dilution of the Normative Feedback Loop*, 22 MICH. J. INT’L L. 673, 705 (2001) (arguing that the “DSU explicitly states that compliance is preferred”).

110. See JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 533 (4th ed. 2002) (explaining the proper analysis of an Article XX “defense”).

111. See *infra* Part IV discussing Article XX.

1. Article I: General Most-Favoured-Nation Treatment

Article I, often considered the cornerstone of the GATT,¹¹² provides that:

[With] respect to customs and duties and charges of any kind imposed on, or in connection with, importation or exportation or imposed on the international transfer of payments for imports or exports ... 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.¹¹³

Essentially, Article I requires “that in the administration of their tariffs and other regulations relating to trade in goods, WTO members [must] not discriminate between their trading partners; [and must] accord each other most-favored-nation (MFN) status.”¹¹⁴ Thus, for example, all members must pay the same custom duties or be subject to the same regulations as the MFN.¹¹⁵

2. Article III: National Treatment on Internal Taxation and Regulation

Custom duties or “tariffs” are covered by Article I and thus, are not covered by Article III. However, other types of taxes are covered by Article III.¹¹⁶ Article III sets forth the principle of “National Treatment,” which provides that a country may not discriminate against imported products via use of an internal tax or other internal measure.¹¹⁷ Thus, Article III prohibits internal taxes, as well as internal charges, laws and regulations, and other requirements that may affect the sale of the product in the country. Article III:2 provides, in relevant part, that “the products of the territory of any contracting party imported

112. See, e.g., ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 481 (2d ed. 1999).

113. WTO Agreement, *supra* note 2, art. I.

114. SWAN & MURPHY, *supra* note 112, at 481.

115. Yavitz, *supra* note 94, at 209.

116. *Id.*

117. *Id.*

into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."¹¹⁸ While Article III:4 concerns differential treatment of all laws, regulations, and requirements, and provides, in relevant part, "the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale..."¹¹⁹

One example of a WTO panel report and subsequent Appellate Body decision that addressed Article III is the Gasoline Case.¹²⁰ In the Gasoline Case, the United States imposed a measure which prohibited the sale of conventional gasoline in metropolitan areas and only permitted the sale of reformulated gasoline in an effort to reduce the pollution caused by conventional gasoline.¹²¹ The U.S. law provided that certain domestic refiners had to create individual quality baselines (representing the quality of gasoline produced by them in 1990) and subsequent domestic production need only satisfy such baselines, whereas foreign manufacturers were required to satisfy the statutory baselines provided in the law.¹²² The panel report concluded that the rule violated Article III:4 because imported gasoline was required to meet the statutory baseline, while domestic gasoline need only meet the applicable individual baseline.¹²³ Clearly, the United States was in violation of Article III because it did not treat like products alike.

3. Article XI: General Elimination of Quantitative Restrictions

Article XI may be the GATT rule with which most people are familiar. Essentially, Article XI prohibits any kind of quantita-

118. WTO Agreement, *supra* note 2, art. III:2.

119. *Id.* art. III:4.

120. WTO Appellate Body Report on Gasoline: United States – Standards for Reformulated and Conventional Gasoline, AB-1996-1, WT/DS2/AB/R, 35 I.L.M. 603 (1996) (adopted May 20, 1996) [hereinafter Gasoline Case].

121. *Id.* para. I.B.

122. *Id.* para. I.B.3.iii.

123. *Id.* para. I.C. The United States did not appeal this finding at the Appellate Body level.

tive restriction on imports.¹²⁴ Article XI provides in relevant part:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.¹²⁵

The most typical quantitative restriction on imports is the use of a quota or an outright ban either through direct or indirect action. An example of an indirect ban or quota would be the requirement of a license to import goods.

There have been many panels through the GATT/WTO's relatively short history which have addressed Article XI claims. The most notable include the Beef Hormone dispute,¹²⁶ and the Tuna I,¹²⁷ Tuna II,¹²⁸ and Shrimp Turtle disputes.¹²⁹ In the Beef Hormones dispute, the EC attempted to prohibit imports of beef containing hormones from Canada and the United States.¹³⁰ In the Tuna I and II disputes, the United States attempted to ban the importation of tuna which was fished using methods that

124. See WTO Agreement, *supra* note 2, art. XI.

125. *Id.* art. XI:1.

126. WTO Appellate Body Report, European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, (Jan. 16, 1998), 1998 WL 25520 at 1 [hereinafter Beef Hormones Case].

127. GATT Dispute Settlement Panel Report on United States – Restrictions on Imports of Tuna, GATT B.I.S.D. (39th Supp.) at 155 (1993), *reprinted in* 30 I.L.M. 1594 (Aug. 16, 1991) (unadopted) [hereinafter Tuna I].

128. GATT Dispute Settlement Panel Report, United States – Restrictions on Imports of Tuna, GATT Doc. DS29/R, *reprinted in* 33 I.L.M. 839 (June 16, 1994) [hereinafter Tuna II] (unadopted).

129. WTO Dispute Panel Report on United States – Import Prohibitions of Certain Shrimps and Shrimp Products, WT/DS58/R/Corr.1 (May 15, 1998), *reprinted in* 37 I.L.M. 832 (1998) [hereinafter Shrimp Turtle Panel Report]; WTO Appellate Body Report on United States – Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R (Oct. 12, 1998), *reprinted in* 38 I.L.M. 118 (1999) [hereinafter Shrimp Turtle AB Report] (adopted on Nov. 6, 1998).

130. Beef Hormones Case, *supra* note 126.

were not considered “dolphin-safe.”¹³¹ In the Shrimp Turtle dispute, the United States attempted to ban the importation of shrimp that were harvested using methods which were not sea-turtle friendly.¹³² In each of these disputes, the trade restrictions were considered violations of Article XI.¹³³

The rules discussed above provide an illustration of the legal rules a trading Member may use to challenge a trade measure or restriction of another trading Member. However, there is an important exception to these rules provided for in Article XX. Generally, Article XX provides that a Member may institute a trade restriction if that restriction is necessary to protect human, animal or plant life, or, *inter alia*, is related to the conservation of exhaustible natural resources.¹³⁴ Part IV, *infra*, discusses in greater depth the application of the Article XX exception.

IV. ARTICLE XX GENERAL EXCEPTIONS CLAUSE

A. *Description of the General Exceptions Clause*

The Article XX General Exceptions Clause is of particular importance to the WTO’s most contentious issue in recent years—the relationship or, more precisely, conflict between trade and environmental protection.¹³⁵ This trade-environment conflict first came to a head in the Tuna I and Tuna II disputes.¹³⁶ Even though the results of Tuna I and Tuna II were never adopted by the GATT Council,¹³⁷ the cases received wide-

131. Tuna I, *supra* note 127, paras. 2.7–2.8; Tuna II, *supra* note 128, para. 1.1. See also, *infra* notes 276–283 and accompanying text discussing the Dolphin Protection Consumer Information Act.

132. Shrimp Turtle Panel Report, *supra* note 129, para. 2.6.

133. See, e.g., Tuna I, *supra* note 127, para. 7.1(a) (“The import prohibitions imposed by the United States with respect to certain yellowfin tuna and certain yellowfin tuna products of ‘intermediary nations’ ... are contrary to Article XI:1.”); Shrimp Turtle AB Report, *supra* note 129, para. 7.16 (“[T]he United States [sic] prohibition on imports of shrimp from non-certified Members violates Article XI:1.”).

134. WTO Agreement, *supra* note 2, art. XX(b), (g).

135. JACKSON ET AL., *supra* note 110, at 532.

136. See generally Tuna I, *supra* note 127; Tuna II, *supra* note 128.

137. JACKSON ET AL., *supra* note 110, at 532.

spread attention and caused many to view the GATT in a very unfavorable light.¹³⁸

As discussed above, Article XX is a defense to a trade restriction¹³⁹ that is invoked by the trading member who imposed a measure that another trading member argues is a restriction on trade in violation of the GATT Agreement. The practice of the DSU panels “has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation, and not to examine Article XX exceptions unless invoked.”¹⁴⁰ A discussion of the structure of Article XX is necessary for understanding its analysis in DSU panels. This Article will focus solely on three of the exceptions articulated in Article XX: XX(b)’s protection of health exception,¹⁴¹ Article XX(d)’s enforcement exception,¹⁴² and Article XX(g)’s conservation exception.¹⁴³ The reason for this focus is because these three exceptions, compared to the other exceptions of Article XX, “have been the subject of an extraordinarily detailed Appellate Body jurisdiction developed during the first seven years of WTO’s existence.”¹⁴⁴

Article XX consists of three main parts, which the next section of the Article addresses in turn. First is the list of measures a contracting party may impose that fall within Article XX’s scope.¹⁴⁵ This part is often referred to as the “policy test.”¹⁴⁶

138. See, e.g., Jessica Mathews, *Dolphins, Tuna and Free Trade; “No Country Can Protect Its Own Smidgen of Air or Ocean”*, WASH. POST, Oct. 18, 1991, at A21 (arguing that the analysis and reasoning of the panel would invalidate laws designed to protect endangered species in the United States).

139. See JACKSON ET AL., *supra* note 110, at 533 (explaining the proper analysis of an Article XX defense).

140. Tuna I, *supra* note 127, para. 5.22.

141. For the language of article XX(b), see *infra* note 145.

142. For the language of article XX(d), see *infra* note 145.

143. For the language of article XX(g), see *infra* note 145.

144. JACKSON ET AL., *supra* note 110, at 532.

145. WTO Agreement, *supra* note 2, art. XX. The list of measures which fall within Article XX’s scope includes those which are:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importation or exportation of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with GATT rules themselves;

Second is what is called the “nexus requirement.”¹⁴⁷ Third is Article XX’s introduction, which is often referred to as the “chapeau.”¹⁴⁸

B. Analysis of Article XX

1. The Policy Test

The Appellate Body has declared that a proper analysis of an Article XX defense must begin with a determination of whether the trade measure at issue is covered under one of Article XX’s enumerated measures.¹⁴⁹ For example, under Article XX(b), the panel would inquire whether the trade measure or provision is

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- (e) relating to the products of prison labor;
 - (f) imposed for the protection of national treasures;
 - (g) relating to the conservation of exhaustible natural resources;
 - (h) undertaken pursuant to obligations of certain international commodity agreements;
 - (i) involving restrictions on exports necessary to ensure domestic supplies when the domestic price is held below the world price by the government for price stabilization reasons; and
 - (j) essential to the acquisition or distribution of products in short supply.

Id. See also JACKSON ET AL., *supra* note 110, at 532–33.

146. See, e.g., Yavitz, *supra* note 94, at 215.

147. Although typically referred to as the necessary requirement, this definition is a misnomer. Although Art. XX(b) and (d) require that the measure be necessary for the goal sought, Art. XX(g) does not require the restrictive measure to be necessary to the objective of protecting the exhaustible natural resource; instead, it only requires that it “relate” to the objective. WTO Agreement, *supra* note 2, art. XX(b),(d), (g). However, this difference may not have a significant impact, “presumably because any measure that limits depletion of a natural resource is justified per se” and, arguably, would meet a necessary requirement in any event. Philip Bentley Q.C., *A Re-Assessment of Article XX, Paragraphs (B) and (G) of GATT 1994 in the Light of Growing Consumer and Environmental Concern About Biotechnology*, 24 *FORDHAM INT’L L.J.* 107, 112 (2000). Therefore, to avoid any confusion, this Article will use the term “nexus requirement” to avoid any further confusion in developing this term.

148. For the language of the chapeau, see *infra* note 219 and accompanying text.

149. See, e.g., Shrimp Turtle AB Report, *supra* note 129. See also JACKSON ET AL., *supra* note 110, at 533.

necessary to protect human, animal or plant life or health. Analysis of this requirement is fairly straightforward and the easiest of the three requirements to apply and satisfy.¹⁵⁰ To illustrate this point, many of the challenged measures brought under the GATT/WTO Dispute Settlement Procedures that were found inconsistent with GATT/WTO rules, in fact, satisfied this first requirement under Article XX. Examples of such disputes include: the Thai Cigarettes dispute,¹⁵¹ where the panel concluded that a measure to reduce cigarette use was within the policy area, but later found the measures Thailand imposed inconsistent with the GATT rules on other grounds;¹⁵² Tuna II, where the panel determined that the protection of dolphin life was in the policy area, however, later found that the measures imposed by the United States were inconsistent with the GATT rules on other grounds;¹⁵³ and, with the same result for the United States as that in Tuna II, the Shrimp Turtle dispute, where the panel found that the protection of turtles as an endangered species was within the policy area.¹⁵⁴

2. The Nexus Requirement

In order for a WTO Member to successfully raise a defense under Article XX (b) and (d), the measure must be strictly necessary for the objective pursued with respect to the defenses raised.¹⁵⁵ For defenses raised under Article XX(g), the measure must be “related to” the conservation of an exhaustible natural resource.¹⁵⁶ In other words, the nexus test prohibits a Member

150. See Yavitz, *supra* note 94, at 215.

151. GATT Dispute Settlement Panel Report on Thai Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200 (1990), *reprinted in* 30 I.L.M. 1122 (1991) [hereinafter Thai Cigarettes].

152. For a full discussion of the Thai Cigarettes dispute, see notes 159–179 and accompanying text.

153. See Tuna II, *supra* note 128, at 890–98.

154. Shrimp Turtle AB Report, *supra* note 129, para. 160 (explaining that the panel agreed that the US measure falls within the terms of Article XX(g), but the issue was whether the US measure constituted “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or “a disguised restriction on international trade” under the chapeau).

155. See, e.g., WTO Agreement, *supra* note 2, art. XX(b) (requiring that the measure be *necessary* to protect human, animal or plant life or health).

156. See *id.* art. XX(g).

from adopting a measure that is inconsistent with any other GATT/WTO provision if an alternative, which is not inconsistent with other GATT/WTO provisions, can reasonably be employed by such Member.¹⁵⁷ However, this nexus test is not whether the policy underlying the measure is necessary but, rather, whether the measure is necessary to achieve the stated policy objective.¹⁵⁸

3. Application of the Nexus Requirement

a. Thai Cigarettes Dispute

The best way to illustrate the nexus requirement is through analysis of the Thai Cigarettes dispute. The Thai Cigarettes dispute involved a challenge brought by the United States with regards to the Thai government's restrictions on imports of, and disproportionate taxes on, foreign-made cigarettes.¹⁵⁹ The panel found that Thailand's restrictions on imports were in violation of Article XI:1 because the government had not granted licenses for the importation of cigarettes in ten years.¹⁶⁰ However, the panel found that the regulations relating to the excise, business, and municipal taxes on cigarettes were consistent with Thailand's obligations under Article III of the GATT.¹⁶¹ The

157. Thai Cigarettes, *supra* note 151, para. 74.

158. Yavitz, *supra* note 94, at 215.

159. See Thai Cigarettes, *supra* note 151, para. 1. Under section 27 of the Tobacco Act, 1966, the importation of various types of tobacco was prohibited except by license granted by the Director-General of the Excise Department or a competent officer authorized by him. But licenses have only been granted to the Thai Tobacco Monopoly, and the monopoly has only imported cigarettes on three occasions in the previous 25 years. *Id.* para. 6.

160. *Id.* para. 67. Article XI:1 provides in relevant part that "[n]o prohibitions or restrictions ... made effective through...import licenses...shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party...." WTO Agreement, *supra* note 2, art. XI:1.

161. Thai Cigarettes, *supra* note 151, para. 88. This conclusion was reached because there was no showing on the part of the United States that the taxes were applied contrary to Article III, only that they could have been applied inconsistent with Article III, and the possibility that the Thai Act might be applied contrary to Article III:2 was, by itself, not sufficient to make it inconsistent with the General Agreement." *Id.* para. 86. See also *id.* paras. 84, 85 (discussing the excise tax and business and municipal tax, respectively). Both paragraphs state the same result and rationale.

United States argued, *inter alia*, that the restrictions on imports could not be defended under Article XX(b) because the Thai measures were not necessary to protect human health.¹⁶² The United States asked the panel to recommend that Thailand eliminate its offensive restrictions and amend its tax regime to conform with its obligations under the GATT.¹⁶³

Thailand argued that its restrictions were justified under Article XX(b) because chemical and other additives contained in U.S. cigarettes might make them more harmful than Thai cigarettes.¹⁶⁴ Thailand also argued that the more harmful imported cigarettes could only be eliminated through a prohibition on cigarette imports and, therefore, the measure was “necessary to protect human health” as permitted under Article XX(b).¹⁶⁵ Additionally, Thailand argued that the production and consumption of tobacco undermined the objectives set forth in the Preamble of the GATT. These objectives included raising the standard of living, thus ensuring full employment thus increasing real income and demand, and developing the full resources of the world.¹⁶⁶ Thailand argued that smoking lowered the standard of living and increased illness, leading to large and unnecessary disbursements attributable to increased medical costs, which consequently reduced real income and prevented the efficient use of resources.¹⁶⁷ The United States countered that Thailand “could pursue the objective of seeking to prevent the increased number of smokers without imposing a ban on imports ... through education and the recognition of the effects of smoking rather than restraints on the availability of cigarettes.”¹⁶⁸ Moreover, the United States responded that Thailand could not successfully “argue that the ban on imports was necessary to protect human life or health since domestic produc-

162. *See id.* para. 12. Article XX(b) states in relevant part that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (b) necessary to protect human ... life or health.” WTO Agreement, *supra* note 2, Art. XX.

163. *See Thai Cigarettes, supra* note 151, para. 13.

164. *See id.* para. 14.

165. *Id.* para. 21.

166. *See id.* para. 21.

167. *See id.*

168. *See id.* para. 23.

tion, sales and exports of cigarettes and tobacco remained at high levels.”¹⁶⁹

The panel accepted that smoking was a “serious risk to human health”¹⁷⁰ and that measures “designed to reduce the consumption of cigarettes fell within the scope of Article XX(b),” which clearly permits contracting parties to give priority to human health over trade liberalization.¹⁷¹ However, this ability is not without limits. The measure, even for the purpose of giving priority to human health had to be “necessary.”¹⁷² The panel concluded that the import restrictions imposed by Thailand could be considered necessary only if there were no alternative measures consistent or less inconsistent with the goals of the GATT.¹⁷³ The panel then examined whether the objectives of the Thai government could be met through other measures more consistent with the GATT.¹⁷⁴ The panel noted the strict, nondiscriminatory labeling and ingredient disclosure regulations implemented by other governments which allowed them to better control the content of cigarettes and increase consumer awareness of the dangers associated with tobacco use.¹⁷⁵

The panel ultimately determined that these alternative, non-discriminatory labeling programs may be more consistent with the GATT than an outright ban on cigarette importation. These measures could be implemented on a national treatment¹⁷⁶ basis in accordance with Article III:4 and could require complete disclosure of ingredients coupled with a ban on unhealthy substances.¹⁷⁷ Another possibility suggested by the panel was a ban on cigarette advertising of both domestic and foreign-made cigarettes.¹⁷⁸ These are some examples of “various measures

169. *See id.*

170. *Id.* para 73. This conclusion was influenced by reports prepared by the World Health Organization, whose work created a number of recommendations designed to reduce smoking. *Id.* para. 56.

171. *See id.* para. 73.

172. *See id.*

173. *See id.* para. 74.

174. *See id.* para. 77.

175. *See id.*

176. For a discussion of national treatment, see *supra* note 117 and accompanying text.

177. *See Thai Cigarettes, supra* note 151.

178. *See id.* para. 78. The panel concluded that a ban on advertising would normally meet the requirements of Article III:4. *Id.* A general ban on adver-

consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which, taken together, could achieve the health policy goals that the Thai government pursues by restricting the importation of cigarettes inconsistently with Article XI:1.¹⁷⁹

b. Tuna / Dolphin Dispute (Tuna I)

The U.S. Marine Mammal Protection Act of 1972 (MMPA)¹⁸⁰ requires a general prohibition of the “taking” and importation of marine mammals into the United States.¹⁸¹ On August 28, 1990, the United States imposed an embargo on imports of commercial yellowfin tuna and yellowfin tuna products harvested with purse-seine nets¹⁸² in the Eastern Tropical Pacific

tising would create unequal competitive opportunities between existing Thai producers and new foreign producers, however, the measure would satisfy Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes. *Id.*

179. *Id.* para. 81.

180. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended in scattered sections of 16 USC). For example, 16 U.S.C. § 1371 provides that “there shall be a moratorium on the taking and importation of marine mammals and marine mammal products ... during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States.”

181. *See* Tuna I, *supra* note 127, para 2.3.

182. *Id.* para. 2.1.

A fishing vessel using this technique locates a school of fish and sends out a motorboat (a “seine skiff”) to hold one end of the purse-seine net. The vessel motors around the perimeter of the school of fish, unfurling the net and encircling the fish, and the seine skiff then attaches its end of the net to the fishing vessel. The fishing vessel then purses the net by winching in a cable at the bottom edge of the net, and draws in the top cables of the net to gather its entire contents.

Id.

Studies monitoring ... catch levels have shown that fish and dolphins are found together in a number of areas around the world and that this may lead to incidental taking of dolphins during fishing operations. In the Eastern Tropical Pacific Ocean (ETP), a particular association between dolphins and tuna has long been observed, such that fisherman located schools of underwater tuna by finding and chasing dolphins....

Ocean.¹⁸³ The United States considered the provisions of the MMPA to be justified under Article XX(b) because they served the purpose of protecting dolphin life and health and were ‘necessary’ within the meaning of the provision. The United States argued that with respect to the protection of dolphin life outside its jurisdiction, there was no alternative measure reasonably available to achieve this purpose.¹⁸⁴ However, Mexico, the party who brought the dispute, argued that Article XX(b) was not applicable to a measure imposed to protect the life or health of animals outside the jurisdiction of the United States.¹⁸⁵ Mexico also submitted that the import measure was not “necessary” because alternative means, consistent or less inconsistent with the GATT, were available to the United States to protect dolphin life.¹⁸⁶ Mexico specifically noted international cooperation as a more consistent alternative action.¹⁸⁷

The panel concluded that even if Article XX(b) was interpreted to permit extrajurisdictional protection of health and life, the United States would not meet the requirement of necessity set out in Article XX(b).¹⁸⁸ This failure to satisfy the Article XX(b) necessity requirement was because the United States:

[H]ad not demonstrated to the panel - as required of the party invoking an Article XX exception - that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.¹⁸⁹

Not only were less restrictive alternatives available, but the U.S. measure was also not necessary within Article XX(b).¹⁹⁰ The measure was deemed unnecessary because, under the

Id. para. 2.2.

183. *See id.* para 2.7.

184. *See id.* para. 5.24.

185. *Id.*

186. *Id.*

187. *Id.*

188. *See id.* para. 5.28.

189. *Id.*

190. *See id.*

MMPA, the United States linked the maximum incidental dolphin taking rate which Mexico had to meet during a particular period as a condition for importing tuna, to the taking rate actually recorded for U.S. fisherman during the same period.¹⁹¹ Thus, Mexican authorities could never predict whether, at any given time, their policies conformed to that of the United States.¹⁹² The panel found that limitations on trade based on such unpredictable conditions could not be regarded as necessary to protect the health or life of dolphins.¹⁹³ The panel's conclusion was based largely on the U.S. failure to exhaust all reasonably available options to pursue its dolphin protection objectives.¹⁹⁴

*c. The EC Asbestos Dispute*¹⁹⁵

The EC Asbestos dispute provides an important component to the Article XX analysis and its necessity requirement. The EC Asbestos dispute represents the first time both a panel and Appellate Body decision condoned a ban on imported goods pursuant to Article XX(b).¹⁹⁶ The EC Asbestos dispute concerned a

191. *Id.*

192. *See id.* paras. 5.28, 5.33.

193. *See id.* para. 5.28.

194. *See id.* However, even though the U.S. measures did not pass scrutiny under the WTO's DSU, with the help of subsequent international agreements, the amount of dolphin deaths has drastically decreased over time. Over the past decade, fisherman have become significantly more proficient at catching yellowfin tuna without harming dolphins. *Tangled Nets*, *supra* note 27, at 38.

Techniques and nets have been changed to allow the mammals to escape. In 1998, an international agreement - now endorsed by the United States, the European Union, Vanuatu and 13 Latin American countries - set rules to limit dolphin death to fewer than 5,000 a year, a number thought to be sustainable. Last year, out of an estimated population of more than 9m dolphins in the eastern Pacific, fewer than 1,600 died, compared with 133,000 in 1986.

Id.

195. WTO Appellate Body Report on European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Mar. 12 2001), 40 I.L.M. 1193 [hereinafter Asbestos AB Report]; WTO Dispute Settlement Panel Report on European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R (Sept. 18, 2000) [hereinafter Asbestos Panel Report], available at www.wto.org/english/tratop_e/dispu_e/distab_e.htm.

196. Kelly, *supra* note 109, at 716–17.

French Decree prohibiting the importation of white asbestos from Canada due to the negative health concerns associated with the use of white asbestos.¹⁹⁷ The panel held that the EC (defending the French Decree) made a *prima facie* case for the non-existence of a reasonably available alternative to an outright ban of asbestos products, and the need for substitute products.¹⁹⁸ The panel gave great consideration to the comments provided by experts consulted in the course of the proceeding.¹⁹⁹

At the Appellate Body level, Canada made four arguments. First, based on the scientific evidence presented, Canada argued that the panel erred in finding that asbestos and asbestos products pose a risk to human health.²⁰⁰ Second, the panel had an obligation to quantify the risks associated with asbestos and could not simply rely on the hypotheses of French Authorities.²⁰¹ Third, the panel erred by concluding that a ban was necessary to halt the spread of asbestos-related health risks.²⁰² Finally, Canada argued that “controlled use” was a reasonably available alternative to the French Decree.²⁰³

As to the first argument, the Appellate Body dismissed Canada’s contention that the evidence before the panel was insufficient to support its findings. All four scientific experts consulted by the panel concurred that asbestos products “constitute a risk to human health, and the panel’s conclusions on this point are faithful to the views expressed by the four scientists.”²⁰⁴ As to Canada’s second argument, the Appellate Body held that there is no requirement under Article XX(b) to quantify the risk to human life or health.²⁰⁵ With regards to the third argument, the Appellate Body noted that:

197. See Asbestos Panel Report, *supra* note 195, paras. 2.3–5. See also Kelly, *supra* note 109, at 717.

198. Asbestos Panel Report, *supra* note 195, para. 8.222

199. *Id.*

200. See Asbestos AB Report, *supra* note 195, para. 165.

201. See *id.*

202. See *id.*

203. See *id.*

204. See *id.* para. 166. In addition, the carcinogenic nature of asbestos has been acknowledged since 1977 by international bodies. *Id.*

205. See *id.* para. 167 (citing Beef Hormones Case, *supra* note 126, para. 186). The Appellate Body concluded that a risk may be evaluated either in quantitative or qualitative terms. *Id.*

It is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined and the panel accepted, that the chosen level of health protection by France is a 'halt' to the spread of asbestos-related health risks.²⁰⁶

Accordingly, the Appellate Body found that it was "perfectly legitimate" for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place.²⁰⁷

The fourth, and most compelling, argument made by Canada related to the availability of "controlled use" as an alternative measure. The measures of controlled use that Canada presented were influenced by ILO Convention 162.²⁰⁸ These measures included:

(i) making work in which exposure to asbestos may occur subject to regulations prescribing adequate engineering controls and work practices, including workplace hygiene; (ii) prescribing special rules and procedures, including the authorization of a competent authority in the field, for the use of asbestos or of certain types of asbestos or products containing asbestos or for certain work processes; (iii) where necessary to protect the health of workers and technically practicable, replacement of asbestos by other materials or products evaluated as harmless or less harmful; and, (iv) total or partial prohibition of the use of asbestos or of certain types of asbestos or products containing asbestos in certain work processes.²⁰⁹

206. *See id.* para. 168.

207. *See id.*

208. Asbestos Panel Report, *supra* note 195, para. 3.139 (referencing Convention Concerning Safety in the Use of Asbestos). For more information on the Convention Concerning Safety in the Use of Asbestos see *infra* note 260 and accompanying text.

209. Asbestos Panel Report, *supra* note 195, para. 3.139. In addition, national regulations should:

(i) establish procedures for the notification by the employer of certain types of work involving exposure to asbestos; prescribe adequate engineering controls and work practices to prevent or control exposure to asbestos; (ii) enforce laws and regulations through an adequate and appropriate system of inspection, including appropriate penalties; (iii) prescribe limits for the exposure of workers to asbestos and

The Appellate Body balked at the opportunity to support unrestricted free trade and took a more narrow view of the term “reasonably available.”²¹⁰ However, the Appellate Body, by incorporating the holdings of various other panel reports that struck down assorted Article XX defenses, did not provide much opportunity for subsequent attempts to eliminate reasonably available alternatives.²¹¹ Consequently, the Appellate Body held that an “alternative measure” is one that can achieve the same objective as the challenged measure but is consistent or less inconsistent with the GATT (and hence less restrictive).²¹² In other words, an “alternative measure did not cease to be reasonably available simply because the alternative measure involved administrative difficulties for the Member.”²¹³

The Appellate Body held that the determination of whether an alternative measure is reasonably available is the extent to which the alternative measure contributes to the realization of

make employers reduce exposure to as low a level as is reasonably practicable; (iv) measure the concentrations of airborne asbestos dust in workplaces and monitor the exposure of workers to asbestos at intervals; take appropriate measures to prevent pollution of the environment; (v) ensure that employers have established policies and procedures on measures for the education and periodic training of workers on asbestos hazards and methods of prevention and control; (vi) establish standards for respiratory protective equipment and special protective clothing for workers; (vii) recognize contractors qualified to carry out the demolition of plants or structures containing friable asbestos insulation materials, and removal of asbestos from buildings or structures; (viii) ensure that workers who are or have been exposed to asbestos are provided with free medical examinations to supervise their health in relation to the occupational hazard; and, (ix) prescribe adequate labelling of containers, including material safety data sheets indicating the asbestos content, the health risks and the appropriate protection measures concerning the materials or the product.

Id. para. 3.140.

210. See Asbestos AB Report, *supra* note 195, paras. 160, 170.

211. See, e.g., *id.* para. 170 (explaining that in determining whether a suggested alternative measure is reasonably available one factor that must be taken into account is the conclusion drawn by the Panel in Thai Cigarettes).

212. Asbestos Panel Report, *supra* note 195, para. 3.318.

213. Asbestos AB Report, *supra* note 195, para. 169 (citing Gasoline Case, *supra* note 120).

the end pursued.²¹⁴ In this case, France claimed that the restriction was aimed at preserving human life and health, through the elimination of the well-known and life-threatening health risks posed by asbestos products.²¹⁵ Thus, the remaining question would be whether controlled use would achieve the same end as the Decree and constitute a less restrictive trade measure than the Decree. In the panel's view, "France would not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to halt."²¹⁶ More importantly, the panel noted that "even in cases where 'controlled use' practices are applied 'with greater certainty,' the scientific evidence suggests that the level of exposure can, in some circumstances, still be high enough for there to be a 'significant residual risk of developing asbestos-related diseases.'"²¹⁷ For these reasons, the Appellate Body upheld the panel's finding that the EC had demonstrated that there was no reasonably available least restrictive alternative to the French prohibition, and therefore, the Decree was necessary to protect human life or health within the meaning of Article XX(b).²¹⁸

4. The Chapeau

If the trade restriction satisfies one of the provisions set forth in Article XX(a-j) and the provision satisfies the nexus requirement discussed above, then the final step in the analysis is to determine whether the measure complies with the requirements of the chapeau. The chapeau conditions the availability of the Article XX exception by subjecting the measure to the requirement that:

214. *Id.* para. 172 (citing WTO Report of the Appellate Body, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (Jan. 10, 2001) [hereinafter *Korea Beef Dispute*]).

215. *See id.*

216. *See id.* para. 174.

217. *See id.*

218. However, The Appellate Body's conclusion in the EC Asbestos dispute did differ from that of the panel report. Unlike the panel report, the Appellate Body determined that chrysotile asbestos and PCG fibres were not like products within the meaning of Article III:4. *See Asbestos AB Report, supra* note 195, para. 126. However, even if they were like products, the Appellate Body would agree with the panel that the French Decree would satisfy Article XX(b). *See id.* para. 175.

Such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of [the] measures [listed in Art. XX] (a)-(j).²¹⁹

Therefore, the “scope for Member Countries to adopt public health or environmental protection measures that restrict free trade is limited by the prohibition on arbitrary or unjustifiable discrimination and disguised restrictions on trade contained in the chapeau to Article XX.”²²⁰ The Shrimp Turtle dispute provides the perfect illustration of the analysis of the three requirements of Article XX.

C. The Embodiment of Article XX's Three Requirements: The Shrimp Turtle Dispute

The Shrimp Turtle dispute is a particularly telling example of how Article XX is applied because it contains the most detailed consideration of the meaning of the chapeau.²²¹ In 1987, the United States issued regulations, pursuant to the 1973 Endangered Species Act,²²² which required all U.S. shrimp trawlers to use turtle excluder devices (TEDs) while fishing in areas where there was a possibility that shrimp trawling would interfere with sea turtles.²²³ In 1989, the United States enacted Section 609 of Public Law 101-162²²⁴ which imposed an import ban on shrimp harvested with fishing techniques that may adversely

219. See WTO Agreement, *supra* note 2, art. XX.

220. Bentley, *supra* note 147, at 112.

221. Shrimp Turtle AB Report, *supra* note 129, paras. 146–86. The Shrimp Turtle dispute “stands in stark contrast to Tuna-Dolphin dispute under GATT.” Kelly, *supra* note 109, at 711.

222. Endangered Species Act of 1973, Pub. L. No. 93-205, 76 Stat. 884 (1973) (codified as amended at 16 U.S.C. §1531).

223. JACKSON ET AL., *supra* note 110, at 552 (providing a summary of the regulations promulgated under the 1973 Endangered Species Act as it existed in 1987).

224. Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. 101-162, § 609l 103 Stat. 988 (1989) (codified as note at 16 U.S.C.A. § 1537) [hereinafter Appropriations Act].

affect sea turtles.²²⁵ This was followed by the U.S. Department of State issuance of its 1996 Guidelines which provided that, "all shrimp imported into the United States must be accompanied by a form attesting that the shrimp was harvested either in the waters of a certified nation or under conditions that do not adversely affect sea turtles."²²⁶ Although the United States legitimately sought to protect turtles by differentiating between shrimp caught with TEDs and those caught without TEDs, the WTO found that the United States violated the GATT rules.²²⁷

The Appellate Body held that although the U.S. measure served a legitimate environmental objective under Article XX(g), the measure, as applied by the United States, constituted arbitrary and unjustifiable discrimination between the WTO Members, and was thus contrary to the chapeau of Article XX.²²⁸ The Appellate Body began its analysis of Article XX's chapeau by stating that:

[In] order for a measure to be applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, three elements must exist. First, the application of the measure must result in *discrimination*. As we stated in *United States — Gasoline*, the nature and quality of this discrimination is dif-

225. *Id.* However, there were certain exceptions. For instance,

the import ban would not apply to harvesting nations that are certified as (i) having a fishing environment (e.g., lack of sea turtles or use of artisanal harvesting methods) which does not pose a threat of the incidental taking of sea turtles in the course of shrimp harvesting or (ii) providing documentary evidence of a regulatory program governing the incidental taking of sea turtles in the course of shrimp trawling comparable to the US program *and* having an average rate of incidental taking of sea turtles comparable to that of US vessels.

JACKSON ET AL., *supra* note 110, at 553.

226. Appropriations Act, *supra* note 224.

227. Kelly, *supra* note 109, at 711. Although the United States subsequently brought its legislation into compliance, its failure to do so would have allowed affected nations to seek compensation from the United States for the cost of the ban. *Id.* Compensation could have exceeded \$200 million dollars per year. See Press Release, Sea Turtles Restoration Project, Environmentalists Blast International Trade Panel Decision Which Places Sea Turtles and U.S. Endangered Species Act at Risk (Mar. 19, 1998) (citing the National Fisheries Institute), at http://www.seaturtles.org/press_release2.cfm?pressID=20 (last visited Jan. 21, 2005).

228. Shrimp Turtle AB Report, *supra* note 129, para. 186.

ferent from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI. Second, the discrimination must be *arbitrary* or *unjustifiable* in character ... Third, this discrimination must occur *between countries where the same conditions prevail*.... Thus, the standards embodied in the language of the chapeau are not only different from the standard used in determining that Section 609 is violative of the substantive rules of Article XI:1 of the GATT 1994.²²⁹

Therefore, “a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members.”²³⁰

The Appellate Body found the controlling fact to be that the actual application of the U.S. measure which, “*required* other WTO Members to adopt a regulatory program that is not merely *comparable*, but rather *essentially the same*, as that applied to U.S. shrimp trawlers.”²³¹ The Appellate Body concluded that, “thus the effect was to establish a rigid and unbending standard by which U.S. officials determined whether or not countries would be certified, thus granting or refusing other countries the right to export shrimp to the United States.”²³² The Appellate Body was unmoved by the uniform standard the United States imposed throughout its territory and further concluded that although it might be acceptable for a government in establishing its domestic policy to adopt a single standard, it was not acceptable with regards to international trade:

[F]or one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, without taking into consideration different conditions which may occur in the territories of those other Members.²³³

The problem was exacerbated because there were instances in which shrimp caught using methods identical to those em-

229. *Id.* para. 150 (emphasis in original).

230. *Id.* para. 156 (emphasis in original).

231. *Id.* para. 163 (emphasis in original).

232. *Id.*

233. *Id.* para. 164 (emphasis in original).

ployed by U.S. fisherman were excluded solely because those countries were not certified by the United States.²³⁴ This result was difficult to reconcile with the stated policy objective of the United States and was therefore found “unnecessary.”²³⁵

Another problem with the U.S. measure was that the United States did not engage in any “across-the-board negotiations” with any of the other Members before enforcing the import prohibition.²³⁶ The Appellate Body cited both the Rio Declaration on Environment and Development²³⁷ and Agenda 21²³⁸ and found that “[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.”²³⁹ Although one regional agreement with selected states existed, it alone was insufficient²⁴⁰ because it was clear to the Appellate Body that the United States “negotiated seriously with some, but not with

234. *Id.* para. 165.

235. *Id.*

236. *Id.* para. 166. The Appellate Body considered these negotiations vital because “the protection and conservation of highly migratory species of sea turtles ... demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations.” *Id.* para. 168.

237. *Id.* para. 168.

238. *Id.*

239. *Id.* (emphasis omitted). Furthermore, the Shrimp Turtle Appellate Body report notes that:

WTO members in the Report of the CTE, forming part of the Report of the General Council to Ministers on the occasion of the Singapore Ministerial Conference, endorsed and supported: ... *multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature.* WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue *shared goals*, and in the development of a mutually supportive relationship between them, *due respect must be afforded to both.*

Id.

240. *Id.* para. 172.

other Members (including the appellees)” and that effect was “plainly discriminatory” and “unjustifiable.”²⁴¹

In order to discuss whether product labels and labeling programs may satisfy the three requirements of Article XX or, in the alternative, whether any other restrictive trade measure may pass Article XX analysis when there is a potential for the existence of a successful and efficient labeling program, a discussion of the GATT/WTO panel and Appellate Body reports that have confronted the issue of labeling is necessary. Part V will explore these disputes and the requirements for labeling programs which have resulted from them.

V. GATT/WTO PANELS THAT HAVE CONFRONTED THE ISSUE OF LABELING

Although there have been quite a few GATT/WTO panels that have considered the issue of labeling, this Article will focus on three: (1) the Thai Cigarettes dispute; (2) the EC Asbestos dispute; and (3) the Tuna I dispute. These disputes were chosen because they best reflect the broad spectrum that Article XX was intended to cover. The Thai Cigarettes panel preferred labeling as a substitute to an outright ban or other more restrictive trade barriers supposedly created to protect human health, yet the EC Asbestos panel concluded that labeling and other methods of controlled use are insufficient to ward off the dangerous effects of asbestos on human health. Last, in the Tuna I dispute, the panel decided that the labeling program, designed to protect the environment and wildlife, was permissible under the GATT.

A. *Thai Cigarettes Dispute*

As discussed earlier, the GATT panel concluded that the import restrictions imposed by Thailand²⁴² could be considered necessary with respect to Article XX(b) only if there were no

241. *Id.* In addition, there was differing treatment of countries desiring certification because of the difference in the level of effort made by the US in transferring the required TED technology to specific countries. *Id.*

242. The Royal Thai government placed restrictions on imports of foreign made cigarettes and applied disproportionate taxes on foreign made cigarettes. Thai Cigarettes, *supra* note 151, para. 1.

alternative measures consistent with the GATT.²⁴³ The panel found that there were other measures that Thailand could incorporate, especially considering that contracting parties to the GATT may, in accordance with Article III:4 of the GATT, “impose laws, regulations and requirements affecting the internal sale, offering for sale, purchase transportation, distribution or use of imported products provided they do not thereby accord treatment to imported products less favourable than that accorded to ‘like’ products of national origin.”²⁴⁴ In fact, as the panel noted, other countries have introduced strict, non-discriminatory labeling requirements which allowed their governments to control, and the public to be informed of, the contents and hazards of cigarettes.²⁴⁵ Therefore, the panel decided that such labeling programs and dangerous content bans, implemented on a national treatment basis in accordance with Article III:4, would be appropriate alternative measures to import bans and disproportionate tax treatment that had been deemed inconsistent with the GATT.²⁴⁶

Two factors were critical to the panel’s determination. First, the panel was influenced by the testimony of World Health Organization (WHO) representatives. The WHO made a number of recommendations designed to reduce smoking based on the findings of an expert Committee convened to study smoking control strategies in developing countries.²⁴⁷ These recommendations included activities aimed at curbing the promotion and sale of tobacco products and a compilation of standards of conformity in terms of health warnings and product information to be used in the form of product labeling.²⁴⁸ Second, the panel noted that Thailand had already implemented non-discriminatory controls on demand including, *inter alia*, warnings on cigarette packs.²⁴⁹ Such non-discriminatory controls are examples of “various measures consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which,

243. *Id.* para. 75.

244. *Id.*

245. *Id.* para. 77.

246. *Id.*

247. *Id.* para. 56.

248. *Id.* paras. 56, 78.

249. *Id.*

taken together, could achieve the health policy goals that the Thai government pursued by restricting the importation of cigarettes inconsistently with Article XI:1.²⁵⁰

The Thai Cigarettes dispute determined that a labeling program coupled with other programs, such as advertising regulations and educational programs, could be deemed a reasonable or feasible alternative to a trade restriction under Article XX. However, it is important to note that, arguably, a reasonable or feasible alternative under Article XX need not be in complete compliance with the GATT. An alternative measure that is *less inconsistent* with the GATT than the challenge restriction may suffice. However, with regards to labeling programs this distinction may be academic because, as decided in the Tuna I dispute,²⁵¹ labeling programs are fully consistent with the GATT.

B. EC Asbestos Dispute

The EC Asbestos dispute, admittedly, complicates the labeling solution. This case also concerned trade restrictions designed to address products that pose a risk to human health. In this case, the French attempted to ban the use, production, and import of asbestos and asbestos products because of their adverse health effects.²⁵² The EC, on behalf of France, argued that because of asbestos' carcinogenic nature,²⁵³ asbestos fibers cannot be considered a "like product" to other fibers that do not share the same chemical composition as asbestos.²⁵⁴ However, the panel determined after extensive review that it was not decisive that asbestos and asbestos products do not have the same chemical composition, nor that asbestos was "unique." Rather, the panel focused on "market access" and whether the products

250. *Id.* para. 81.

251. For a full discussion of the Tuna I dispute, see *supra* notes 180–194 and accompanying text.

252. See generally Asbestos AB Report, *supra* note 195. The health risks posed by contact with asbestos are mesothelioma, a cancer of the lining of the chest and the abdominal cavity; lung cancer; and asbestosis, in which the lungs become scarred with fibrous tissue. See U.S. Environmental Protection Agency Website, Asbestos – Asbestos in Your Home, at <http://www.epa.gov/asbestos/ashome.html> (last visited Jan. 21, 2005).

253. The carcinogenicity of asbestos and its fibers has been acknowledged for some time by international bodies. See Asbestos Panel Report, *supra* note 195, para. 8.188.

254. *Id.*

have the “same applications” and can “replace” each other for some industrial uses.²⁵⁵

However, the Appellate Body found that the panel had erred in its analysis.²⁵⁶ Their decision centered on the fact that different products often have similar uses and, although two products' end uses might be similar, their physical properties may be different.²⁵⁷ The Appellate Body therefore concluded that when evaluating the criterion of physical property, evidence relating to health risks associated with that product may be pertinent in an examination of ‘likeness’ under Article III:4 of the GATT.²⁵⁸

In addition to the analysis of likeness under Article III:4, the EC Asbestos panel considered Canada's argument for the use of labels as a least restrictive trade measure vis-à-vis the use of the restrictions placed by the EC. This argument addressed the overall proposal by Canada of the controlled use approach.²⁵⁹ Canada relied on the principles of controlled use outlined in ILO Convention 162.²⁶⁰ ILO Convention 162 included in its proposal, *inter alia*, that national regulations should prescribe adequate labeling on containers, including material safety data sheets indicating the asbestos content, the health risks and the appropriate protection measures concerning the materials of the product.²⁶¹ It is important to stress that Canada's argument was not for a labeling program per se; instead, it argued for the principle of controlled use, which included the implementation of a labeling program.

The panel concluded that controlled use would not be reasonably available or feasible to the EC.²⁶² Although it was possible to apply controlled use successfully “upstream” (mining and manufacturing) or “downstream” (removal and destruction), controlled use could not be applied to the building sector and

255. *Id.* See also Vogt, *supra* note 3, at 7.

256. See generally Asbestos AB Report, *supra* note 195.

257. *Id.* para 112. See also Vogt, *supra* note 3, at 7.

258. Vogt, *supra* note 3, at 7–8.

259. Asbestos Panel Report, *supra* note 195, para. 3.139.

260. Convention Concerning Safety in the Use of Asbestos, June 24, 1986, International Labour Organization, ILO 86B09.316 ENGL, recommendation (ix), available at <http://www.ilolex.ilo.ch:1567/english/convdisp2.htm> [hereinafter ILO Convention 162].

261. *Id.*

262. Asbestos Panel Report, *supra* note 195, para. 8.212.

was, therefore, not a true alternative measure.²⁶³ Therefore, the difficulties of applying controlled use to these sectors made such a program inadequate in relation to the decree's policy objectives.²⁶⁴

This decision may rest on the fact that the exposure to dangerous asbestos and asbestos products is not restricted exclusively to workers who consistently use the products or to those people responsible for its disposal.²⁶⁵ In fact, asbestos may pose a risk to people in the general work area, as well as to spouses of exposed workers.²⁶⁶ Moreover, as one of the experts who presented at the panel illustrated, exposure to asbestos may be the result of pure chance.²⁶⁷ This observation is corroborated by the U.S. Environmental Protection Agency (EPA).²⁶⁸ The EPA explains that asbestos can be found in a variety of household items including steam pipes, boilers, furnace ducts, resilient floor tiles, cement sheet, decorative material sprayed on walls, patching and joint compounds, roofing, shingles, and siding.²⁶⁹ If these items are disturbed, even by an individual involved in home improvements, they may damage health.²⁷⁰

Can the Thai Decree and the French Decree be reasonably distinguished even though one panel found that labeling and similar programs were feasible alternatives to the Thai Decree, but the other held that labeling and controlled use was not a feasible alternative to the French Decree? The following may help explain the reasoning. Arguably, a distinction may be drawn between the underlying products in the two disputes.

263. *Id.* para. 8.209. The panel noted that the building sector was one of the areas more particularly targeted by the measure contained in the decree. *Id.* para 8.212.

264. *Id.* para. 8.209.

265. *Id.* para. 8.215.

266. *Id.*

267. *Id.* para. 8.215 n.185 (discussing the examples of the lecturer and the fireman mentioned by Dr. Henderson during the meeting with experts).

268. See generally U.S. Environmental Protection Agency Website, *supra* note 252.

269. *Id.*

270. *Id.* However, “[m]ost people exposed to small amounts of asbestos, as we all are in our daily lives, do not develop these health problems.” *Id.* Even still, if the home-improver is interested or required to disturb products containing asbestos, the EPA encourages the use of a trained expert in asbestos-removal. *Id.*

Although both products are clearly injurious to health, the products are used and distributed differently and, therefore, the effectiveness of a labeling program would differ for each product. One would assume that cigarette smokers typically purchase packs of cigarettes for themselves for personal use. Therefore, a cigarette user would see the warnings on the pack. On the other hand, asbestos and asbestos products are likely to harm more than just the user of the product. Had the panel or the Appellate Body found that controlled use was a feasible alternative to the French Decree and a labeling program was created, the program would likely have proven ineffective. Consider the situation of a builder using ceiling products containing asbestos. If the label was on the asbestos product itself, the builder would be cautioned on the effects of asbestos use. However, that would not adequately protect the homeowner, who may later install a ceiling fan and become exposed to asbestos dangers. In this example, a labeling program would not work to warn all those who may be exposed to the hazardous product.

Surely, one could make a similar argument for cigarettes in that cigarette users are not the only people who are endangered by cigarette smoke, as evidenced by the growing studies on the danger of second-hand smoke.²⁷¹ A label on the cigarette pack, which the non-smokers do not have contact with, will not adequately alert non-smokers to the dangers of inhaling second-hand smoke. Thus, the Thai government could have argued that labeling alone could not be deemed a feasible alternative because it does not protect the non-smoking population from the dangers of cigarette smoke. This concern may have played a role in the Thai Cigarette panel's determination that a labeling program alone would not be a feasible alternative. Rather, the labeling program needed to be coupled with other programs such as a restriction on advertising and/or educational programs. Such programs should help offset the dangers of second-hand smoke. Based on the results in the Thai Cigarettes and EC Asbestos disputes, a labeling program alone may not be a

271. See, e.g., EPA Website, *Smoke-free Homes: Secondhand Smoke Can Make Children Suffer Serious Health Risks*, at <http://www.epa.gov/smokefree/> (last visited Jan. 23, 2005). See also Environmental Tobacco Smoke Related Links, at <http://www.epa.gov/ebtpages/airindoorenvironmentaltobaccosmoke.html> (last visited Jan. 23, 2005) (providing studies about the dangers of second-hand smoke).

reasonable and feasible alternative to a defending party's trade restriction if it is designed to protect human health under Article XX(b)'s necessary requirement.²⁷²

C. Tuna I Dispute

The Tuna I dispute is a famous case, largely because of the press coverage that it received and the U.S. public support behind the dolphin-safe labels at issue in the case.²⁷³ It involved a challenge to the U.S. Dolphin Protection Consumer Information Act (DPCIA), which provided a labeling standard for any tuna product exported from, or offered for sale, in the United States.²⁷⁴ Any producer, importer, exporter, distributor, or seller of tuna or tuna products who labeled the product "Dolphin Safe" or included any other term falsely suggesting that the tuna was fished using a method that was not harmful to dolphins violated the statute.²⁷⁵ Mexico argued that the labeling requirements of the DPCIA were marking requirements within the scope of Article IX:1.²⁷⁶ The panel disagreed because the DPCIA's labeling provisions did not restrict the sale of tuna products. Tuna products could be sold freely with or without the Dolphin Safe label, and the provisions did not establish threshold require-

272. Recall that Article XX(b) requires that the trade restriction be "necessary to protect human, animal or plant life or health." WTO Agreement, *supra* note 2, art. XX(b) (emphasis added).

273. See *Tangled Nets*, *supra* note 27, at 38 (discussing the difficulty of selling tuna that is not dolphin-safe in the United States despite increased demand for tuna products).

274. Tuna I, *supra* note 127, para. 2.12 (referencing Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385(d) (1990)). Tuna products include any food product containing tuna processed for retail sale, except perishable items with a shelf life of fewer than three days. 16 U.S.C. § 1385(c)(5).

275. Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385(d)(1)(1990). This requirement is applicable if the tuna was fished in either of two situations: (1) in the Eastern Tropical Pacific Ocean by a fishing boat using purse-seine nets which do not meet the U.S. requirements of being dolphin safe, or (2) fished on the high seas by a fishing boat through drift net fishing. *Id.* § 1385(d)(1)(A)&(B). Violators are subject to civil penalties. *Id.* § 1385(e).

276. Tuna I, *supra* note 127, para. 5.41. Article IX:1 provides that "[e]ach 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." WTO agreement, *supra* note 2, art. IX:1.

ments that must be met in order to obtain an advantage to the United States.²⁷⁷ The labeling provision, therefore, “did not make the right to sell tuna or tuna products, nor the access to a government-conferred advantage affecting the sale of tuna or tuna products, conditional upon the use of tuna harvesting methods.”²⁷⁸ Hence, the only remaining issue was whether the DPCIA met the requirements of Article I:1.²⁷⁹ The panel found that the controlling fact was that

[U]nder United States customs law, the country of origin of fish was determined by the country or registry of the vessel that had caught the fish; the geographical area where the fish were caught was irrelevant for the determination of origin. The labelling regulations governing the tuna caught in the ETP thus applie[d] 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.²⁸⁰

The panel concluded that, for these reasons, the DPCIA and its labeling requirements were not inconsistent with the obligations of the United States under Article I:1.²⁸¹ Therefore it is now safe to conclude that labeling requirements similar to the DPCIA are not inconsistent with the GATT generally.

277. Tuna I, *supra* note 127, para. 5.42 (“Any advantage which might possibly result from access to this label depends on the free choice by consumers to give preference to tuna carrying the ‘Dolphin Safe’ label.”).

278. *Id.*

279. WTO Agreement, *supra* note 2, art. I:1. Article I:1 provides that:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III 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.

Id.

280. Tuna I, *supra* note 127, para. 5.43.

281. *Id.*

The above cases support the general proposition that labeling programs are consistent with GATT/WTO rules, although they may not always be a reasonable alternative to other measures. Moreover, these cases provide a framework for determining what attributes and characteristics a labeling program must possess in order to satisfy Article XX analysis. Further, pursuant to these cases, a labeling program that possesses these attributes and characteristics may in fact be considered the least restrictive trade measure available to a defending trading Member. However, this ability may, in fact, be a double-edged sword. If a labeling program satisfies Article XX analysis, it may be found to be the least restrictive trade measure compared to other measures available to a defending nation. This available alternative may stymie other restrictive trade measures that the defending trading member is considering or has implemented under Article XX. Such a result is possible because, as discussed previously in Part IV of this Article, the nexus requirement of Article XX mandates that a Member may not adopt a measure inconsistent with the GATT if an alternative measure is available which is not inconsistent, or is less inconsistent, with other GATT provisions, and is as effective as the more restrictive measure. A labeling program which possesses the attributes and characteristics discussed in the next part of this Article may fill this role in many situations.

VI. MAY LABELING PROGRAMS DEVELOP INTO A CATCHALL LEAST RESTRICTIVE TRADE MEASURE?

The development of labeling programs, their successes (both real and potential), and the relative acceptance of these programs by GATT/WTO panels, raises the question of whether labeling programs may develop into a catchall least restrictive trade measure for the purpose of Article XX analysis. If that were to be the case, then if the possibility of a labeling program exists, other trade measures may not survive the nexus requirement of Article XX. Given the successes of labeling programs in the past,²⁸² the potential for greater successes in the

282. For example, the amendments to the Clean Air Act in the United States have been successful in establishing U.S. compliance with the Montreal Protocol. See Staffin, *supra* note 3, at 211–12.

future,²⁸³ and the legality of labeling programs under Art. III:4 of the GATT,²⁸⁴ labeling programs may potentially trump other challenged restrictions under Article XX. This is particularly true because it is difficult to conceptualize other trade measures that would be less restrictive than a labeling program. However, recent decisions by the GATT/WTO suggest that proposed labeling programs must have certain attributes, abilities and conditions in order to be reasonably considered a least restrictive trade measure.

A. How Such a Labeling Program Would Need to Function

It is possible that successful labeling regimes could become reasonably available alternative measures²⁸⁵ to many other more restrictive trade measures proposed by trading members seeking an Article XX defense. This may be an attractive route for Members challenging a trade restriction, chiefly because an alternative measure can only be ruled out if it is shown to be impossible to implement.²⁸⁶ Moreover, an alternative measure does not cease to be reasonably available simply because it would involve administrative difficulties.²⁸⁷ However, it must be reasonably available, meaning it must contribute to the realization of the end pursued²⁸⁸ and, last, it absolutely must not involve a continuation of the very risk that the challenged restriction seeks to combat.²⁸⁹ A successful labeling program could

283. For a discussion of the advantages of labeling programs, see *supra* Part II.C.

284. The Thai Cigarettes panel held that labeling programs are consistent with Art. III:4 so long as the regulations and restrictions placed on imported products treat the latter no less favorably than like products of national origin. See *Thai Cigarettes*, *supra* note 151, para. 75. Therefore, it stands to reason that, if the requirements of a labeling program are applied equally to imported products and products of national origin, the labeling program requirements are consistent under Art. III:4.

285. A reasonably alternative measure is one that can achieve the same objective as the challenged measure, but is consistent or less inconsistent with the GATT (and hence less restrictive). See *Asbestos Panel Report*, *supra* note 195, para. 3.318.

286. See *Asbestos AB Report*, *supra* note 195, para. 169 (citing *Gasoline Case*, *supra* note 120).

287. *Id.*

288. *Id.* para. 172 (citing *Korea Beef Dispute*, *supra* note 214).

289. *Id.* para. 174.

surely act as a least restrictive alternative in many circumstances; recent panel and Appellate Body decisions have established standards and qualifications for such acceptable labeling programs.

1. The Labeling Program Must Be Effective

In order for the labeling program to be a reasonably available alternative measure under Article XX, the label must be “effective,” which means it must be both informative and credible. In the Thai Cigarettes dispute, the panel held that nondiscriminatory labeling and ingredient disclosure regulations were reasonably available least restrictive trade measures, making the measures instituted by the Thai government overly restrictive and therefore unnecessary.²⁹⁰ These alternative labeling regimes would not have been reasonable alternatives had they failed to “contribute to the realization of the end pursued.” However, the panel found that the labeling regulations were a reasonably available alternative under Article XX because the labeling and disclosure regulations were *effective* measures and were used successfully by other countries to reduce smoking and its harmful effects.²⁹¹

In addition, it would be prudent to augment a labeling program’s effectiveness by coupling it with other successful measures. For example, the Thai Cigarettes panel suggested education,²⁹² a ban on unhealthy substances,²⁹³ and a ban on advertising.²⁹⁴ However, such measures must apply to both foreign and domestic products equally in order to meet the requirements of Art. III:4.²⁹⁵ These supplemental steps will likely raise the effectiveness of a labeling program, thus helping it rise to the level of an effective alternative measure.

Unfortunately, the threshold level of a label’s effectiveness has not yet been established by a panel or an Appellate Body.²⁹⁶

290. Thai Cigarettes, *supra* note 151, para. 77.

291. *Id.*

292. *Id.* para. 80.

293. *Id.* para. 77.

294. *Id.* para. 78.

295. *Id.* para. 78 n.1.

296. With the exception of Thai Cigarettes, GATT/WTO panels have not measured a label’s effectiveness. Although the label placed on tuna fish was scrutinized in Tuna I, the issue in that case was whether the label was consis-

But, the cases suggest that the required level of effectiveness might be relatively low. For instance, in the Thai Cigarettes dispute, the panel held that labels could be a reasonably available alternative under Art. XX, yet there was evidence that the Thai government had already implemented non-discriminatory controls including, *inter alia*, warnings on cigarettes packs.²⁹⁷ These controls were implemented prior to the establishment of the challenged restrictive measures at issue in the dispute.²⁹⁸ Consequently, the panel did not investigate how effective the non-discriminatory controls (i.e., the warnings on the cigarette packs) must be to rise to the level of a reasonably available alternative. If so, the panel could have determined that the cigarette warnings, which arguably were ineffective, were not a reasonable alternative to the Thai Decree. Therefore, the required level of a labeling program's effectiveness may not be relatively high. However, in the Thai Cigarettes dispute, there was also evidence presented by WHO which suggested that labeling programs, coupled with other measures, could be effective in reducing the harmful effects of tobacco use.²⁹⁹

The EC Asbestos dispute stands for the proposition that the effectiveness of the alternative measure must be real and not just a mere possibility. Both the panel and the Appellate Body held that controlled use, which would include a labeling program, would not meet the goal sought by the French Decree. Taken together, the decisions in the Thai Cigarettes and EC Asbestos disputes may stand for the proposition that although the alternative trade restriction does not have to be completely effective, it must be reasonably effective. Moreover, simply because controlled use was not an available alternative to the French decree, it does not automatically follow that the French Decree was the least restrictive measure.

At first glance, the EC Asbestos decision may be seen as a limitation to both labels and the notion of controlled use. Many observers could conclude that the panel and Appellate Body decided as they did because asbestos is simply too dangerous for a

tent with Art. I:1 of the GATT, not whether it was a reasonably available alternative measure under Art. XX. See Tuna I, *supra* note 127, para 5.43.

297. Thai Cigarettes, *supra* note 151, para. 78.

298. *Id.*

299. *Id.* para. 56.

controlled use program. However, this reason misses the important point that for a label to be effective it must reach the end user or persons at risk. This requirement is especially true in situations where the label serves as a warning rather than as a simple information source. Therefore, a labeling program would not work in situations where the label or warning is not read or observed by the end user of the product. For example, a label placed on commercial food might not be effective. Suppose that the production of truffle oil involved socially unfriendly or unsafe procedures. The label on the bottle explaining such procedures should notify those who keep truffle oil at home. However, most people experience the enjoyment of truffle oil while dining at restaurants, and a label on the bottle of truffle oil at a fancy restaurant would not reach the consumer at table six. Likewise, a label on the fertilizer bag used to treat a soccer field would not serve as a warning for the players but would only alert the groundskeeper. However, sometimes the strategic placing of the label would cure this problem. For instance, the groundskeeper of the soccer field might place a sign on the sidelines of the field, thus alerting end users of the danger. Of course, the effectiveness of the label or labeling program not only augments the program's ability to satisfy the requirements set forth by the discussed cases, it also increases the chances of satisfying its paramount goal, i.e., the promotion of healthy, environmentally-friendly, or socially-conscious products.

2. The Importance of International Support or Agreement

International support, agreement, or evidence of international negotiations should increase the legitimacy of a labeling program, thereby increasing its effectiveness. However, GATT/WTO panels and Appellate Bodies have also suggested that such a feature may actually be a requirement for a measure requiring an Article XX defense. For example, the Tuna I panel required the United States to first exhaust all options reasonably available to it before seeking to invoke an Article XX exception. In particular, the panel looked to see if the United States had entered into any negotiations or international cooperative arrangements.³⁰⁰ Therefore, international agreement or

300. Tuna I, *supra* note 127, para. 5.28.

negotiations may be required or, at the very least, considered an important element to any proposed labeling program.

International acceptance of the measure was also investigated in the Thai Cigarettes dispute, where the regulatory programs instituted by other Members clearly influenced the panel's decision.³⁰¹ Additionally, the recommendation of the WHO was given great weight by the panel.³⁰² Similarly, in the Shrimp Turtle dispute, the Appellate Body's decision was influenced by the fact that the United States did not engage in any "across-the-board negotiations" before enforcing their restrictive provision;³⁰³ instead, the Appellate Body found that the negotiations were impermissibly selective because the United States negotiated seriously with some countries and not with others.³⁰⁴ The Appellate Body concluded that "[e]nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus."³⁰⁵

At the very least, the above decisions may require acceptance of a labeling program's effectiveness on an international level. It is important to emphasize that a labeling program must be reasonably effective and available to be the least restrictive trade measure. If the labeling program is time-tested in other countries or is recommended by international organizations, then it is more likely to be found a reasonably effective alternative measure. However, it is questionable under these disputes whether labeling programs that are new and untested will meet the requirements of being reasonably effective.

3. The Labeling Program Must be Fair

A labeling program instituted by one trading Member must be fair to all other trading Members. A labeling program must be fair because, as the Appellate Body in the Shrimp Turtle dispute concluded, under the chapeau of Article XX "a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to

301. Thai Cigarettes, *supra* note 151, para. 77.

302. *See id.* para. 56.

303. Shrimp Turtle AB Report, *supra* note 129, para. 166.

304. *Id.* para. 172.

305. *Id.* para. 168.

respect the treaty rights of other Members.”³⁰⁶ Further, the Appellate Body held that although it might be acceptable for a government in establishing its domestic policy to adopt a single standard, it is not acceptable with regard to international trade “for one WTO Member ... to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal...without taking into consideration different conditions, which may occur in the territories of those other Members.”³⁰⁷

Therefore, the Shrimp Turtle decision may require the Member instituting the labeling program to consider the capabilities of developing nations. The requirements of a labeling program cannot be unattainable to other Members such that compliance would be impossible and, in effect, would result in a trade ban on the products of that country. This requirement is consistent with Article III:4, which provides that a Member can regulate the products bought and sold in its territory; however, foreign and domestic goods, which are considered alike, must be treated similarly.³⁰⁸ The real issue, which is beyond the scope of this Article, is how far this requirement should be taken. It is relatively simple to imagine a situation where a surmountable requirement for a product in a developed nation could seem impossible for a developing nation to implement.³⁰⁹ It is unclear whether such a situation would inhibit the formulation of a labeling requirement. Although industry is far more sophisticated in a developed nation, it seems unlikely that the requirement of a label on a product would be considered too great a burden on a developing nation.

However, if the label requires certain content, then the program may be seen as a disguised restriction on trade and, thus, impermissible. However, in such a situation the issue would likely be addressed when applying the chapeau. In other words,

306. *Id.* para. 156.

307. *Id.* para. 164.

308. *See* WTO Agreement, *supra* note 2, art. III:4.

309. For example, one trading Member may require that if a product does not contain an ingredient that can only be obtained through a domestic producer for an economically unfeasible amount, then the product’s label must read “Obnoxious Waste” or “The Modern Day Lead Paint.” Such a requirement would make it impossible for the producer to meet the requirement and the label would destroy the hope of selling any of the product in that country.

the challenge would be that the label is a disguised restriction or trade barrier because the label requires that the product itself meet certain qualifications. Such a requirement, however, is entirely different than simply requiring a label with the sole purpose of conveying information.

The Tuna I panel held that a labeling program possessing certain attributes complies with the GATT Agreement. Yet, the role labeling programs play in international law is incomplete. More specifically, labeling programs could develop into a default least restrictive trade measure to other challenged trade restrictions. The existence, or potential existence, of a labeling program may provide an attacking Member with additional arguments to challenge other restrictive trade measures. Any given attacking Member could argue that most, if not all, restrictive trade measures fall short of satisfying the "necessary requirement" under Art. XX due to the existence of the least restrictive alternative labeling program.

Therefore, a defending Member may be forced to defend its trade restriction under not only the GATT, but also from the argument that an existing or obtainable labeling program, as the least restrictive measure, should be implemented in its stead. As such, labeling programs could act as "catchall" least restrictive trade measures under WTO jurisprudence. Such an opportunity was present and successfully raised by the United States in the Thai Cigarettes dispute.

The increased use of labeling programs in international trade will support such arguments in the future. In turn, future WTO panel and Appellate Body decisions that support the use of labeling programs will sustain the use and international acceptance of labeling programs in general. Consequently, it is imperative that labeling programs incorporate the required attributes set forth by the aforementioned cases. Hence, labeling programs should diligently implement all steps necessary to ensure that the program is effective, international support or agreement of its effectiveness and relevance exists, and its requirements are fair. Prospective WTO decisions supporting the use of labeling programs will only increase the clout of such programs, hopefully resulting in decreased environmental damage and human health risks.

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VII. CONCLUSION

The development and use of labeling programs in international trade is rapidly increasing. These programs have many advantages and some disadvantages. In the near future, labeling programs may change the face of Article XX analysis in the WTO. Disputes involving labeling programs are increasing in stature and frequency in the WTO dispute panels. A Member seeking to defend a challenged restriction under Article XX may, at some point in the future, be required to defend its restriction both from the challenge of the attacking Member and from the argument that a labeling program would be a reasonably available alternative measure. This contention would be especially true if the labeling program was found to be effective, agreeable to the international community or accepted in an international agreement, and reasonably fair to all trading members.