

Jason Wiener

World Trade Organization's Identity Crisis: Institutional Legitimacy and Growth Potential in the Developing World

Over and above multilateral system, we need...to promote the social ethics of globalization...there is no future in globalization that tolerates predatory behavior and the hoarding of its profits by a minority...There is no future in globalization that destroys the social and environmental balances...It is up to us to refuse these drifts and to give globalization a conscience and social ethics, to give it its full legitimacy and meaning at the service of humankind.¹

The free trade paradigm that envelops the new economic order is facing a mid-life crisis. Trade liberalization is a polarizing concept that has divided scholars, trade experts, jurists, economists and trade blocs alike into two opposing schools of thought. Both sides proclaim they possess the holy grail of trade theory to eliminate economic inequality and rid the world of nefarious paradoxes. Much of the debates have borne themselves out in the last decade as the General Agreements on Tariffs and Trade (“GATT”) system developed into the World Trade Organization (“WTO”) and an incipient body of jurisprudence began to tackle difficult analytical, institutional, self-identity and political questions.

The result of institutionalized global trade rules and semi-regular ministerial summits has been a bifurcated agenda whereby developed countries and well-established trade blocs negotiate highly self-satisfying trade policies while the developing world scrambles to interject a development agenda that presently appears incompatible with existing policies. The developing countries must simultaneously juggle their domestic development, attempt to juxtapose trade rules that fit their needs, and struggle to reshape the dominant free trade philosophy to yield to its interests. They do so within an uncompromising system that favors unbridled economic competition over progressive implementation. Further, the WTO's judicial branch, comprised of

¹ Jacques Chirac, speaking at the unveiling of the World Commission on the Social Dimension of Globalization report, [A Fair Globalization: Implementing the Millennium Declaration](#), ILO/04/42 (Sept. 20, 2004).

the Dispute Settlement Panel and Appellate Body, has explicitly excluded protection for the developing world's most potent comparative advantage- labor and cultural uniqueness. As trade principles continue to buttress the relative influence of developed countries to establish preferential rules vis-à-vis the developing world, the system risks losing legitimacy among the beneficiaries of international trade.²

Therefore, this Article will suggest a novel perspective on WTO jurisprudence that focuses on the existing legal foundation for supporting interests of the developing world, and illustrates that latent resources exist in the developing world that are worthy of WTO protection and enforcement. Hence, this Article will argue that the future expansion and even the continued feasibility of the WTO's trade liberalization model rest squarely on its willingness to incorporate and promote the developing world's agenda in a way that recognizes cultural uniqueness and production process as intrinsic components of internationally traded goods and services.

I. Integral Connection Between Developing Countries' Agenda and GATT Instruments

This section will analyze several provisions of the principle trade instruments that give rise to special or differential treatment for developing countries. The foregoing will demonstrate that the interests of the developing world lie at the heart of the legal structure empowered to interpret and administer trade rules.

A. The WTO- Institution and 'Constitution'

² "Globalization's benefits have been unevenly distributed, with many of its burdens falling hardest on those who can least protect themselves...Too many people, particularly in developing countries, feel excluded and threatened by globalization...They feel that they are the servants of markets, when it should be the other way around...We should not forget that, in a range of areas- including trade...solemn promises have been made. We should not await institutional reform before summoning the political will to keep those promises." Kofi Annan, speaking at the unveiling of the World Commission on the Social Dimension of Globalization report, A Fair Globalization: Implementing the Millennium Declaration, ILO/04/42 (Sept. 20, 2004).

In the WTO Agreement, the preamble proclaims a platitudinous recognition for the need to secure for developing countries and least developed countries (“LDC”) a share of the growth of international trade proportionate to their developmental needs.³ Article 3 of the same agreement ends with an understanding that the WTO should coordinate its global economic policy-making with other international organizations such as the World Bank and the International Monetary Fund (“IMF”).⁴

The WTO’s judicial branch is governed by the Dispute Settlement Understanding (“DSU”), which empowers the Dispute Settlement Body (“DSB”) to administer the rules and procedures, and to establish panels and adopt panel and appellate body decisions.⁵ The DSU prescribes overarching policy guidelines to direct its decision making; including providing security and predictability, preserving the rights and obligations of Members, and significantly, to clarify existing rules and agreements in conformity with customary rules of interpretation and public international law.⁶ Additionally, when a Dispute Settlement Panel adjudicates a particular dispute, it has the right to seek information and technical advice from either the parties or any appropriate third party; presumably, this includes information regarding local custom or varying perspectives on legal entitlement to trade benefits.⁷

³ World Trade Organization Agreement, prea. 2nd para. [hereinafter WTO Agreement].

⁴ WTO Agreement, Art. 3. Critically, the mission of the World Bank is to reduce and ultimately eradicate global poverty through developmental and institutional reform. See World Bank Mission Statement, at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (Dec. 9, 2004). Most of the World Bank’s work focuses on developing countries. *Id.*

⁵ Dispute Settlement Understanding, Art. 2, § 1. [hereinafter DSU].

⁶ DSU, Art. 3, §§ 2 and 3.

⁷ DSU, Art. 13.

The 1947 GATT is the constitution that provides the institutional framework in which the DSB and the WTO operate.⁸ The GATT establishes the notion that trade should be aimed at raising living standards, ensuring full employment, and developing the full use of world resources through expanding production and exchange of goods.⁹ In order to have meaning, this expression of general purpose must underlie the Panel and Appellate Body's jurisprudence and must influence doctrinal development.

In Article 3, the so-called National Treatment clause, the GATT draws a bright-line around "like products," and accords them equal treatment once they have entered a host country's domestic market.¹⁰ This Article has been the subject of innumerable litigations surrounding cultural and societal definitions of "like" and "directly substitutable or competitive" products, and whether the definitions are susceptible to a market criteria analysis or a generalized intrinsic properties analysis.¹¹ Article 3's protectionism proviso is also important because it recognizes that protectionism is sometimes a legitimate interest and it incorporates the GATT's Trade and Development section by reference.¹²

Many consider Article 4, termed the "cinema exception," a unique cultural exception that permits import quotas for foreign films.¹³ This quota exception for cinematographic films reflects an underlying value in cultural sensitivity and serves as a "hook" for developing

⁸ Cf., Robert Howse and Kalypso Nicolaidis, Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?, appearing in Deliberately Democratizing Multilateral Organization, **Governance**, 2003.

⁹ General Agreement on Tariffs and Trade, Prea. para. 2, Oct. 30, 1947. [hereinafter GATT].

¹⁰ GATT, Art. 3, § 2. The "like" products clause will become crucial to section 3's analysis of cultural uniqueness and values in trade.

¹¹ See e.g. *European Communities- Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, Appellate Body Report adopted by the DSB on Apr. 5. 2001.

¹² GATT, Art. 3, § 1; GATT, Arts. 36-38.

¹³ GATT, Art. 4; Chi Carmodi, When "Cultural Identity Was not at Issue": Thinking About Canada-Certain Measures Concerning Periodicals, **Law & Policy in International Business**, Jan. 1, 1999.

countries who must defend seemingly protectionist trade measures.¹⁴ At a minimum, Article 4 affirms the right of developing countries to shield their national culture from foreign penetration to the extent films act as cultural conduits.

In Article 9, the GATT addresses marks of origin, which Members often require to denote country of origin on imported products.¹⁵ This article purports to limit a Member's 'marking' requirements to a standard that does not overly burden the product's exporter.¹⁶ Beyond the textual requirements, Article 9 implicitly recognizes a Member's interest in identifying a product's country of origin. Whether such information is relevant for tariff or duty purposes, or because such information is an intrinsic component of the product itself, the 'mark' makes goods unique to its country of origin.¹⁷

Article 18 justifies a Member's protectionist behavior if done for the purpose of implementing an economic development policy aimed at raising the standard of living.¹⁸ Examples of permissible protections include tariff barriers and narrowly targeted quantitative restrictions.¹⁹ Only developing countries and those with low standards of living are permitted to temporarily deviate from other GATT obligations.²⁰ Notably, the remaining Article 18 provisions treat developing countries and LDC's differently on account of their disparate level of development and prescribe permissible deviations from other GATT principles.²¹ Article 18 thus embodies the principle that developing countries merit special protections and greater flexibility

¹⁴ See Carmodi, *supra* note 13 at 8.

¹⁵ GATT, Art. 9.

¹⁶ *Id.*

¹⁷ Anecdotally, consumers often discriminate between products based on the location of production. For example, consumers may prefer Burgundy (made in France), versus Chianti (made in Italy).

¹⁸ GATT, Art. 18.

¹⁹ GATT, Art. 18, § 2.

²⁰ GATT, Art. 18, § 4.

²¹ GATT, Art. 18, §§ 7-23.

in trade liberalization. The developing world's margin of appreciation to define the terms of its own industrial development underlies this principle of special treatment.²²

Article 20 of the GATT contains the so-called social-clauses because it carves out exceptions for, *inter alia*: protection of public morals, compliance with other laws or regulations not inconsistent with the GATT, prohibition of prison labor, protection of national treasures with historic or archeological value and protection of natural exhaustible resources.²³ Naturally, litigation has focused on whether to construe these exceptions broadly or narrowly so as to afford a modicum of domestic control over trade that affects the foregoing. In the context of developing countries that seek to defend allegedly protectionist trade measures, Article 20 is designed to shift the burden to the party seeking to limit trade.²⁴ This creates a presumption that international trade measured in dollars trumps a country's right to protect its collective values.²⁵ Nevertheless, Article 20 provides a broad legal foundation from which developing countries can assert their right to define, develop and protect collective values and culture.²⁶

Article 36 and 37 establish a trade and development agenda within the WTO that should also influence the jurisprudence of the DSB.²⁷ Article 36 lays out principles and objectives, including: improving the standard of living, progressively developing economies, recognizing that export interests are vital to LDC's and developing countries, export earnings are vital to

²² In accordance with public international law, interpreting judicial bodies must accord Member States a certain margin of appreciation regarding their adherence to the GATT. See supra note 6 and accompanying text.

²³ GATT, Art. 20, §§ a-j.

²⁴ GATT, Art. 20. Measures must not constitute arbitrary or unjustifiable discrimination against imports and the measure must not amount to a disguised restriction on international trade. Id.

²⁵ Panel and Appellate Body reports in several cases discussed below exacerbate this presumption and make it virtually irrebuttable.

²⁶ Article 20 is also a last resort in the event that the Panel, and more likely the Appellate Body, view culture as extrinsic to the traded goods themselves. If the argument prevails that values and culture are intrinsic properties of products, a Member country can defend disparate product treatment under Article 3's National Treatment provision, and specifically the "like" products analysis. See supra note 10 and accompanying text; infra Part III.

²⁷ GATT, Arts. 36-37.

economic development, and acknowledging the gap in standard of living between LDC's and other countries.²⁸ Article 36 reaffirms the principle that the GATT affords developing countries and LDC's special and differential treatment.²⁹ This article reflects the underlying principle that developing countries shall be accorded protection and treated fairly on account of their unique economic and developmental circumstances. It would not be logically inconsistent to suggest according Article 20 or even Article 3 protection to developing countries on account of the uniqueness of their cultural and other self-identified values. Article 37 goes on to require that developed countries treat the interests of developing countries and LDC's with equity and priority.³⁰ This includes, *inter alia*, reducing trade barriers, eliminating tariff barriers or import duties on LDC-produced goods and maintaining equitable trade margins on government-determined prices.³¹

B. Focused Trade Agreements- Special and Differential Treatment Clauses

Many of the specific trade agreements contain provisions that confer special status and rights to developing countries. The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), which purports to establish a multilateral framework for protecting intellectual property, aims to promote technological innovation and the dissemination thereof in a manner conducive to social and economic welfare.³² In order to facilitate its goals, TRIPS seeks to balance the rights and obligations of producers and users of intellectual property.³³

²⁸ GATT, Art. 36.

²⁹ Id. Article 36 further provides that positive efforts must ensure that developing countries gain the benefits of trade commensurate with their need for economic development, favorable and acceptable conditions of market access must be granted to developing countries reliant on export revenue, equitable prices shall be paid as remuneration, economic diversification within developing countries shall be promoted, etc. Id.

³⁰ GATT, Art. 37.

³¹ Id. at §§ 1 & 2.

³² Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 7. [hereinafter TRIPS].

³³ Id.

Article 8 confers on Members the right to adopt measures to protect public health and nutrition, and to promote the public interest in sectors that are important to technological and socio-economic development.³⁴ Implicit in this provision is the right of Members to self-identify within a recognized margin of appreciation what constitutes public interest and whether measures are designed to promote it.

Section three of TRIPS provides for the protection of geographical indicators that “identify a good as originating in the territory of a Member, or a region or locality in that territory.”³⁵ Article 22 recognizes that geographical indicators are important to symbolize quality, reputation and other characteristics of a good that are intrinsic to its value.³⁶ Article 23 provides additional protection for the geographic indicators of wines and spirits.³⁷ In toto, Section three expresses the underlying assumption that the place of origin is an intrinsic characteristic of goods.

In theory, Part six of TRIPS, which covers transitional arrangements, treats developing and LDC’s differently and permits them to progressively implement intellectual property protections.³⁸ The text of Article 65 authorizes developing countries to transitionally implement intellectual property regimes within five years of the date of application.³⁹ Further, Article 66 allows LDC’s ten years from the date of application to implement an intellectual property regime.⁴⁰ Developed countries are encouraged to provide domestic incentives to promote technology transfer to LDC’s.⁴¹ At its core, Part six recognizes the special circumstances of

³⁴ TRIPS, Art. 8.

³⁵ TRIPS, Art. 22.

³⁶ Id.

³⁷ TRIPS, Art. 23.

³⁸ TRIPS, Arts. 65-66.

³⁹ TRIPS, Art. 65.

⁴⁰ TRIPS, Art. 66.

⁴¹ Id.

developing countries and LDC's and permits them to slowly transition towards recognizing and protecting intellectual property- a notably western convention.

The Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”) contains special technical assistance and differential treatment provisions for developing countries and LDC's with respect to adopting measures to protect human, animal or plant life.⁴² Article 9 promotes technical assistance especially to developing countries through either bilateral agreements or through appropriate international organizations.⁴³ The goal of such technical assistance is to permit developing countries to maintain and expand market access for products implicated by the SPS Agreement.⁴⁴ Further, Article 10 is the special and differential treatment clause, which recognizes the special needs of developing countries and permits them to phase-in sanitary and phytosanitary measures.⁴⁵ Critically, section 3 allows for specified, time-limited exceptions from SPS obligations in order for developing countries to meet their developmental needs first.⁴⁶

In the case of the Agreement on Trade-Related Investment Measures (“TRIMS Agreement”), developing countries are permitted to freely deviate temporarily from obligations to reduce inappropriate investment restrictions.⁴⁷ Article 5 extends the transition period for compliance with the TRIMS Agreement from two years for developed countries, to five years for developing countries, and seven years for LDC's.⁴⁸ Special and differential treatment in the case of investment measures is especially important for developing countries because domestic

⁴² The Agreement on the Application of Sanitary and Phytosanitary Measures. [hereinafter SPS Agreement].

⁴³ SPS Agreement, Art. 9.

⁴⁴ SPS Agreement, Art. 9, § 2.

⁴⁵ SPS Agreement, Art. 10.

⁴⁶ SPS Agreement, Art. 10, § 3.

⁴⁷ Agreement on Trade-Related Investment Measures, Art. 3. [hereinafter TRIMS Agreement].

⁴⁸ TRIMS Agreement, Art. 5.

control over the use of locally produced products, employment of domestic labor, and other investment restrictions are critical to their trade and social development.

The Agreement on Agriculture, which commits Members to liberalizing their agriculture industry, is of great interest to the developing world because enormous agricultural subsidies in developed countries are strangling market access for the developing world. Hence, the Agricultural Agreement commits developed countries to improving market access for agricultural products from developing countries and fully liberalizing trade in tropical agricultural products.⁴⁹ Further, Article 6 purports to exempt developing countries from requirements that they reduce agricultural input subsidies in order to encourage agricultural and rural development.⁵⁰ Like other special and differential treatment provisions in aforementioned agreements, Articles 15 and 16 recognize relative economic imbalances and permits developing countries flexibility and leverage in meeting agricultural liberalizations obligations.⁵¹ In its totality, the Agricultural Agreement seeks to equalize the trade status of developing countries by promoting greater market access for their agricultural products and exempting their subsidies in this sector.

The Safeguards Agreement also contains critical exceptions for developing countries designed to promote their socio-economic and developmental status. Although the Safeguards Agreement regulates maintenance of temporary industry-wide safeguards, Article 9 provides that no such safeguard shall be applied against a product originating in a developing country.⁵²

⁴⁹ Agricultural Agreement, Prea.

⁵⁰ Agricultural Agreement, Art. 6.

⁵¹ Agricultural Agreement, Arts. 15 & 16.

⁵² Safeguards Agreement, Art. 9. In order to qualify for the exception, a developing country's exports subject to a particular safeguard must not exceed three percent of total imports into the country seeking to maintain the safeguard and may not exceed nine percent of total imports of the product concerned. *Id.* at § 1.

Additionally, a developing country may extend application of a safeguard for up to two years beyond the eight-year maximum.⁵³

Lastly, the General Agreement on Trade in Services (“GATS”) commits to increasing participation of developing countries in the services trades.⁵⁴ Article 4 provides that to accomplish such expansion, Members shall negotiate commitments to: strengthen their domestic services capacity, increase efficiency and competitiveness through access to technology; improve access to distribution channels and information networks, and liberalize market access in sectors of interest to developing countries.⁵⁵ This provision is critical to the developing world’s trade agenda because it purports to cater to their special needs and interests. This provision implicitly authorizes developing countries to develop their services trade through their own institutions and capacity building with assistance from the developed world. Article 4 obligates developed countries to provide specific forms of assistance and it gives LDC’s heightened priority.⁵⁶

The foregoing recognizes the special rights and needs of developing countries and supports a broad interpretation of clauses that afford special and differential treatment. Dispute Settlement Panels and the Appellate Body should heed the ubiquity of such language in the many trade instruments and accord greater deference to and protection for measures that developing countries maintain.

II. Dispute Settlement Panel and Appellate Body Decisions- Indifferent to Culture and Developing Status

Within the jurisprudence of the Dispute Settlement Panel and Appellate Body, examples of cultural indifference, economic presumptuousness, moral vacuity, and analytical isolation

⁵³ Safeguards Agreement, Art. 9, § 2.

⁵⁴ General Agreement on Trade in Services, Prea. [hereinafter GATS].

⁵⁵ GATS, Art. 4, § 1.

⁵⁶ GATS, Art 4, §§ 2 & 3.

abound. This Article will discuss some of the premier illustrations and will introduce the DSB's "like products" analysis.

"Like products" issues primarily arise under GATT Article 3's National Treatment provision. Members must accord similar treatment to "like products" once they enter a domestic market.⁵⁷ Where products are not "like," but are "directly competitive or substitutable," importing countries may not discriminate between them upon entry into the domestic market.⁵⁸ The analysis for competitive or substitutable products is broader and necessitates investigation into whether protectionist motives exist.⁵⁹ For the purposes of this Article's discussion, there are two predominant "like product" analyses, one more culturally competent than the other.

In 1970, The Working Party on Border Tax Adjustments established a factors test for determining likeness, which takes into account: "the product's end-uses in a given market, consumers' tastes and habits, which change from country to country; [and] the product's properties, nature and quality."⁶⁰ This test is considered the high-water mark for the range of considerations because it involves both objective factors, relating to the product's physical properties, and subjective factors, like its end-use and varying consumer tastes.

The alternate approach to "like products" is narrower and entirely objective because it considers the product's physical properties and its tariff classification alone.⁶¹ In the sequel to the *Japan-Alcoholic Beverages*, the Panel examined Japan's customs duties, taxes and labeling

⁵⁷ See supra notes 10-11 and accompanying text; Chi Carmody, When "Cultural Identity Was Not an Issue": Thinking About Canada- Certain Measures Concerning Periodicals, **Law and Policy in International Business** 231, Jan. 1, 1999.

⁵⁸ GATT, Art. 3, § 2.

⁵⁹ Id. Section 2 contains a proviso that harkens back to section 1's last paragraph. The language bars discrimination that affords protection to domestic products. Id.

⁶⁰ Working Party on Border Tax Adjustments, Dec. 2, 1970, GATT B.I.S.D. (18th Supp.) at 97 (1970).

⁶¹ See WTO Panel Report, Japan-Taxes on Alcoholic Beverages, WT/DS8/R, paras. 6.18, 6.22 (1996) [hereinafter *Japan-Alcoholic Beverages*]; see also Carmody, supra note 57.

practices for imported wines and alcoholic beverages.⁶² Japan maintained highly specified definitions for alcoholic beverages, in particular for a traditional Japanese spirit called shochu, to protect its culturally unique products. Without belaboring the text of the panel’s decision, suffice it is to say that the panel downplayed the importance and relevance of consumer tastes- which it considered solely a function of economics, relating to price, availability and its competitive relationships with other products- and focused on objective economic factors.⁶³ When the newly formed Dispute Settlement Panel and Appellate Body revisited the case in its delinquency phase in 1995, they applied a “marketplace” test that considered the elasticity of substitution.⁶⁴ This increasingly narrow methodology has dispensed with consumer tastes and end-uses as meaningful definitions.⁶⁵

The Panel and Appellate Body faced another trade dispute that involved sensitive cultural issues in *Canada-Certain Measures Concerning Periodicals*.⁶⁶ This case involved a dispute over a Canadian excise tax that regulated the content of advertising in imported magazines. The United States perceived the tax as a direct attack on an American magazine, Sports Illustrated, which recently began running editorialized split-run editions in Canada.⁶⁷ The Panel considered the “likeness” of the editorial content in the Sports Illustrated magazines compared to that contained in a Canadian magazine, Harrowsmith Country Life.⁶⁸ Although Canada argued that

⁶² See *GATT Panel Report, Japan-Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, Nov. 10, 1987, GATT B.I.S.D. (34th Supp.) at 83 (1987).

⁶³ *Id.* at 117, 119; see also Carmody, *supra* note 57.

⁶⁴ See *WTO Appellate Body Report, Japan-Taxes on Alcoholic Beverages*, Oct. 4, 1996, WT/DS8/AB/R, at n. 46; see also Carmody, *supra* note 57.

⁶⁵ See generally Carmody, *supra* note 57.

⁶⁶ For a more detailed factual recount, see Carmody, *supra* note 57 at § IV (B).

⁶⁷ *Id.* See also *WTO Panel Report, Canada-Certain Measures Concerning Periodicals*, Mar. 14, 1997, WT/DS31/R [hereinafter *Canada-Periodicals Panel Report*]; *WTO Appellate Body Report, Canada-Certain Measures Concerning Periodicals*, Jun. 30, 1997, WT/DS31/AB/R [hereinafter *Canada-Periodicals Appellate Body Report*].

⁶⁸ See *supra* note 67.

the cultural content of a magazine should be considered its prime characteristic, the Panel analyzed the magazines' end uses and similar physical properties, natures and qualities.⁶⁹ Based on this limited inquiry, the Panel concluded that the products were "like" and that the Canadian excise tax violated GATT's Article 3.⁷⁰

On appeal, the Appellate Body avoided the "like products" issue by concluding that the Panel Report lacked adequate analysis and let stand the Panel's legal conclusions.⁷¹ The language in the Appellate Body's analysis resembled that in *Japan-Taxes on Alcoholic Beverages* and "demonstrated indifference to the fact that the case dealt with a unique product- a cultural good- and that the GATT and WTO function not only within markets, but also in a broader political, social, and cultural environment."⁷² Despite that the Canadian magazine maintains an interest in identifying and publishing its own culture specific content, the Appellate Body eschewed its value and concluded that the U.S. magazine's content was a substitute for "Canadian" content.⁷³

The trend in the Panel and Appellate Body's "like products" analysis towards physical characteristics and marketplace behavior overlooks cultural distinctions and the right and ability of countries to autonomously identify their cultural trademarks. Such a narrow focus ignores qualitative and subjective features of a product and leads to an inference that a country's differential treatment of certain imports is inherently protectionist. Moreover, the "marketplace" test demeans and undervalues consumers' tastes and habits by describing their behavior as purely

⁶⁹ See *Canada-Periodicals Panel Report*, supra note 67, paras. 3.71, 5.25.

⁷⁰ Id. at para. 5.26.

⁷¹ See *Canada- Periodicals Appellate Body Report*, supra note 67 at 22. The Appellate Body proceeded to analyze the Canadian magazine under a "substitutability" analysis and applied the marketplace test. Id. at 25; Carmody, supra note 57.

⁷² See Carmody, supra note 57 at § IV (D).

⁷³ See *Canada-Periodicals Appellate Body Report*, supra note 67 at 29; Carmody, supra note 57 at § IV (D).

economic. The Appellate Body has forsaken analysis of difficult legal, philosophical, and cultural questions that inhere in products' end-uses and consumer tastes.

In *Indian Pharmaceuticals*, the Panel and Appellate Body displayed contempt and impatience for India's developing legal system that had not yet integrated intellectual property protections. Under the TRIPS agreement, the United States complained that the Indian patent system lacked adequate intellectual property protections for pharmaceutical products. Despite India's qualification for an extended transition towards implementing such protections, TRIPS required India to maintain a "mailbox" repository for patent applications while it developed its patent laws.⁷⁴ To comply with the mailbox requirement, India's legislature created an administrative system to register and collect patent applications; however, the Panel concluded that India's administrative process failed to preserve the "novelty and priority" of the patent applications.⁷⁵

On appeal, India challenged that its administrative system was a sufficient "means" for accepting applications and that it had created an adequate "mechanism" for creating and protecting exclusive marketing rights.⁷⁶ The Appellate Body chastised the Panel for its interpretive breadth, which considered whether India's administrative patent system had satisfied U.S. legitimate expectations, and analyzed the authoritative weight of India's municipal laws.⁷⁷ The Appellate Body compared India's "administrative instructions" regarding patent applications to the U.S. Patent Act.⁷⁸ After interpreting domestic law, the Appellate Body concluded that

⁷⁴ TRIPS, Art. 70, §§ 8-9.

⁷⁵ See WTO Panel Report, *India-Patent Protection For Pharmaceutical And Agricultural Chemical Products*, Sept. 5, 1997, WT/DS50/R [hereinafter *India-Pharmaceuticals Panel Report*]; WTO Appellate Body Report, *India-Patent Protection For Pharmaceutical And Agricultural Chemical Products*, Dec. 17, 1997, WT/DS50/AB/R [hereinafter *India-Pharmaceuticals Appellate Body Report*].

⁷⁶ *India-Pharmaceuticals Appellate Body Report*, supra note 75 at § II (A).

⁷⁷ Id. at § III.

⁷⁸ Id.

India's administrative patent system failed to preserve the novelty and priority of patent applications made during the transition period.⁷⁹ India retorted that the Panel had misinterpreted the authority of municipal law within India's legal system.⁸⁰

The Appellate Body's interpretation of India's municipal law displayed legal naiveté and cultural insensitivity because it failed to consider India's own description of the weight of administrative instructions within its legal system. The Appellate Body should have deferred to India's definition and interpretation of its legal structure because it is they who have developed it. The adequacy and sufficiency of India's administrative patent system are shaped within India's legal culture and depend on the legal significance *Indian* law accords, and thus, the Appellate Body ought to resist second-guessing. Further, the Appellate Body displayed obtuse insensitivity to India's developing status by comparing the authority of its municipal law to the U.S. Patent Act, which was promulgated within a well-developed formal legal system. By such decisional conduct, the Appellate Body eviscerated the meaning of TRIP's transitional exception for developing countries by requiring a high level of interim patent protection. Further, it stripped India of its margin of appreciation in adhering to TRIPS.⁸¹

III. Trade and Cultural Uniqueness - Values to Unlock Developing World's Potential

Although the Panel and Appellate Body have engrafted onto GATT's Article 3 "like products" jurisprudence an indifference to many factors that contribute to a product's end-use, goods produced in developing countries and LDC's uniquely reflect sensitive and vulnerable

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Cf., supra notes 32-34, 38-41 and accompanying text.

local culture and social values.⁸² Widget A and Widget B may appear physically identical despite production in a developed country and a developing country respectively; however, tangible social values and unique production processes inhere therein to distinguish between them in critical ways.⁸³

Thus, Panels and the Appellate Body should analyze otherwise “like” products in light of the labor conditions under which they were manufactured, an importing country’s collective preferences, inherent characteristics of quality and craftsmanship, unique local or indigenous production methods, local or indigenous novelty of the good itself, and other socio-cultural characteristics. Therefore, Panels and the Appellate Body should not presume protectionist intent when countries maintain trade restrictions to reflect these values, but should rather defer to the country’s proffer of a legitimate collective preference.

The relationship between societal values and international trade is not new; however, recognizing that culture and values are intrinsic to traded goods is the key to unlocking latent potential in the developing world.⁸⁴ This Article suggests that international trade law must recognize that culture and values underlie the collective preferences of countries seeking to maintain trade restrictions and must recognize that culture and values associated with goods produced in the developing world distinguish otherwise “like products.” This Article will demonstrate that “like products” jurisprudence lags behind the reality that societal values and culture matter to end-users.

⁸² This does not imply a certain banality to culture in the developed world. On the other hand, social values and culture in developing countries should be given special attention in an effort to envision novel methods of reducing poverty, and promoting development.

⁸³ See Philip Nichols, Trade Without Values, 90 *Nw. U.L. Rev.* 658 (Winter 1996); Michael Braun, Leigh Parker, Trade in Culture: Consumable Product or Cherished Articulation of a Nation’s Soul?, 22 *Denv. J. Int’l L & Pol’y* 155 (1993-1994).

⁸⁴ For the purpose of this Article, societal values is defined as “an enduring belief that a specific mode of conduct or end state is personally or societally preferable relative to an opposite or converse mode of conduct or end state of existence.” See Nichols, supra note 83 at 667.

Professor Nichols identifies why, theoretically, culture matters to international trade. First, cultural identity “provides patterns of values and standards in shaping motivational orientations and attributes, and consequently in personality formation.”⁸⁵ This same argument applies to goods themselves because products and the country of origin have unique characteristics akin to personalities. Second, cultural identity “guides and directs the behavior of individuals and societies,” thus creating collective preferences for trade.⁸⁶ Finally, cultural identity “helps individuals organize the world” by creating common codes to facilitate affiliation with the environment, groups and oneself.⁸⁷ This same principle applies to goods themselves because human seek invariably to categorize and classify goods by their characteristics, one of which includes cultural identifiers.

A recent spate of commercial anti-Americanism illustrates why culture and societal values that imbue traded goods matters to importing societies. Iconic American companies such as Coca-Cola, McDonald’s, Marlboro and General Motors reported slumping sales in “old Europe” where it is well known that popular support for American foreign policy is dismal.⁸⁸ European consumers appear to be manifesting their virulent disapproval of U.S. foreign policy by avoiding American brand-labeled products, which in isolation are generally indistinguishable from “like” non-American products. Hence, European tastes discriminate against products identified as “American” on the basis of societal and political values unrelated to the product.

Consumers identify products by the national brand that makes them. For example, sale of the Scottish Glenmorangie whisky company to French owners has stirred interest in recent weeks

⁸⁵ Nichols, *supra* note 83 at 685.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Dan Roberts, “Well-known US Brands see sales in Europe Fall,” **Financial Times** 1, Oct. 25, 2004.

because the Scottish company, like many, has a strong national identity that faces erasure.⁸⁹ Corporate nationality is important because it characterizes a company's business style and influences corporate behavior.⁹⁰ "Decision-making is influenced by the culture in which the executives were educated, work and live."⁹¹ Thus, it is important for companies to associate their product's identity with the owner's national culture because local commerce breeds successful business leaders, autonomy and pride.⁹² Therefore, trade policies that discriminate between "like products" is sometimes justified because Scotch-owned Glenmorangie whisky is inherently distinct from French-owned Glenmorangie whisky. This argument should not be construed to justify protection of waning domestic industries. When maintained by developing countries to protect products' cultural identity, however, Panels and the Appellate Body should defer, which is consistent with the object and purpose of GATT's Article 20 exceptions and the controlling instrument's special or differential treatment clause.

In the context of collective preferences, the European Union ("E.U.") has lead in molding trade policy around its cultural values and public policy concerns. For example, the E.U. rejects the 1999 WTO *Beef Hormones* decision, which declared its ban in hormone-treated beef GATT illegal, and it sets animal-welfare standards for chickens, pigs and cows.⁹³ The E.U. Article on collective preferences in international trade suggests creation of a special safeguards clause in

⁸⁹ John Kay, "The brands that are a matter of national interest," **Financial Times** 17, Oct. 26, 2004. Although no governmental adverse trade conduct has taken place here, it is important to note that collective preferences often form the basis of national trade policy. In such circumstances, this Article assumes that Panel and Appellate Body jurisdiction applies conceptually. Collective preference for national branding is analogous to the European Union's trade policy that bans the importation of hormone-infused beef.

⁹⁰ Id.

⁹¹ Id.

⁹² Id.

⁹³ See *contra*, Bruce Stokes, New Trade Barriers: National Preferences, **The National Journal**, Apr. 24, 2004. The Article critiques the European Union's (E.U.) discussion Article, entitled "The Emergence of Collective Preferences in International Trade," dated November 2003.

trade law that would enable a Member to restrict imports based on collective preference.⁹⁴ For developing countries, this proposition already finds legal support in GATT's Article 20 and among the numerous special and differential treatment clauses.⁹⁵ Additionally, this proposal would permit countries to display proclivities towards "like" products produced in developing countries, a device this Article suggests would unlock unknowable trade potential in the developing world.

Contrary to the gripes of free trade enthusiasts, developed countries' demand for products with cultural value, such as those produced in the developing world by unique processes, are not necessarily protectionist. Professor Nichols suggests that a ban on a product is just as likely to have protectionist motives as a ban on a process, and thus distinguishing between product and process is disingenuous.⁹⁶ Additionally, "the value-laden reasons for tolerating bans on products are just as compelling for tolerating the ban on goods made in certain ways."⁹⁷ For example, many developed countries maintain restrictions in their Generalized Trade Schedules for goods produced by forced or child labor.⁹⁸ The WTO sanctions such trade restrictions in its founding Charter and in the GATT.⁹⁹

In many markets already, consumers identify and select products from developing countries on the basis that the products are made by unique processes or because of cultural distinctions embedded in the products. For instance, the expansion of "Fair Trade" brands demonstrates the potential for culturally-branded and process-oriented goods. Although Fair

⁹⁴ Id.; Manuela Saragosa, Lamy Bids Farewell With Call for Trade Reform, **BBC News World Edition**, Nov. 17, 2004, available at <http://news.bbc.co.uk/2/hi/business/4017155.stm> [last visited Dec. 13, 2004].

⁹⁵ See supra Part I.

⁹⁶ See Nichols, supra note 83 at 14.

⁹⁷ Id.

⁹⁸ See Kimberly Ann Elliot and Richard B. Freeman, Can Labor Standards Improve Under Globalization?, Institute for International Economics, 2003, p. 80.

⁹⁹ See Nichols, supra note 83 at 14.

Trade represents a small share of the market in the coffee trade, its steady growth is evidence of a growing collective preference.¹⁰⁰ Fair Trade brands and organic products offer an opportunity for quality and process-oriented consumers to connect with the developing world. These goods should be accorded special trade protection and developing countries should be entitled to protect such enterprises.

Importantly, developing countries are accorded differential trade treatment on the basis of their economic development. In the context of improving and expanding the market for developing countries' exports, developed countries should be permitted to maintain preferential trade status for commodities and cultural products on the basis that these products are not "like" under Article 3 of the GATT.¹⁰¹ This section argues that such products are unique because of cultural and value-laden process characteristics in the country of origin, and because developing world production is a value-added alternative. Under the Border Tax Adjustments' likeness definition, consumer tastes and collective preference for goods produced in the developing world would be enough to justify a preferential trade measure.

IV. Untapped Growth and Trade Potential- Informal Economic Sector

In addition to the connection between cultural values and trade, the international trade regime fails to take account of alternative economic forms that are prevalent in the developing world.

The informal economies in South and Central America alone represent an enormous un-tapped

¹⁰⁰ Fair Trade coffee has now become a popular feature in many mainstream and niche coffee houses, such as Starbucks. Transfair USA reported that as of 2002 around 160 importers and roasters, 10,000 retail outlets and 200 college campuses were offering fair trade coffee. These numbers are still small and account for roughly \$400 million in sales in the \$18 billion coffee market. See Elliot and Freeman, *supra* note 98 at 39; "Fair Trade Update," Fall 2002, www.transfair.org/pdfs/Update_Fall2002.pdf (May 8, 2003); Associated Press, September 24, 2000, available at www.globalexchange.org/economy/coffee/ap092400.html (September 26, 2000).

¹⁰¹ For example, Canada is working through the WTO's 2001 Doha Ministerial Conference to revise and strengthen special and differential treatment clauses and favors their application. See Development and Society, *Canada's Position in WTO and FTAA Negotiations*, at <http://www.dfait-maeci.gc.ca/tna-nac/DS/special-en.asp> [last visited Dec. 13, 2004].

resource that WTO jurisprudence and international trade does not recognize. Currently, developing countries' economies are growing at six percent per annum (6%), which is the fastest pace in thirty years.¹⁰² Unless structural reforms take place to legitimize the laborers and vendors comprising regional trade within these economic hotbeds, external shocks or financial bubbles could severely disrupt these economies once again.¹⁰³ Further, the workers and employers within the informal sector lose out on international trade's benefits because traditional law and international trade do not recognize them. Thus, extralegal commercial transactions take place outside traditional markets to the tune of \$74 billion in Peru alone.¹⁰⁴ Capitalizing and legitimizing the informal, extralegal sectors of the developing world represent an enormous pool of latent resources that can fuel equitable and efficient trade growth into the future.

To grasp the entire context of the legitimacy crisis, roughly 534 million people can be classified as working poor in developing countries.¹⁰⁵ In 1997, the working poor constituted roughly twenty-five percent (25%) of the employed labor force in the developing countries, and approximately ninety-five percent (95%) of the working poor live in low income countries.¹⁰⁶ Further, support for privatization, such as that supported by the WTO, has slipped from 46% to 36% of the population in Latin America.¹⁰⁷ In 1993, Mexico City had roughly 150,000 unlicensed street-vendor stands with another 293,000 in other Mexican Centers.¹⁰⁸ In the Philippines, around 57% of city residents and 67% of rural people live in extralegal dwellings for

¹⁰² Grow Up: Developing countries are growing at their fastest pace in decades, **The Economist** 16, Oct. 16, 2004.

¹⁰³ Id.

¹⁰⁴ Hernando De Soto, **The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else** 33, 2000.

¹⁰⁵ Nomaan Majid, The Size of the Working Poor Population in Developing Countries, **International Labour Organization Employment Articles**, 2001/16, 2001.

¹⁰⁶ Id.

¹⁰⁷ De Soto, supra note 104 at 2. This statistic is from May, 2000.

¹⁰⁸ Id. at 28.

which there is no legal title and of which the State has no record.¹⁰⁹ In total, Mr. De Soto's study concluded that about 85% of urban land in the developing and former communist world, and between 40% and 53% of rural land, is held in informal and extralegal arrangements not recognized or protected by the State.¹¹⁰ The value this real estate is estimated to be at least \$9.3 trillion.¹¹¹

These statistics are not intended to comprehensively survey the demographics or economies of developing countries, but rather beg the question. Has globalization, bent on free trade principles, positively distributed wealth in a way that maximizes resource efficiency in the developing world? This is not the first Article to suggest it has not, however by arguing that the WTO ought to re-shape its identity, this Article poses a sobering perspective.

The unattractive consequence of extralegal property arrangements and informal labor is that without government-enforceable legal protection, they cannot derive capital benefits such as eligibility for international trade.¹¹² Complex property systems in developed countries provide meaningful protection for capital-intensive projects that are the engines for international trade. The lack thereof in developing countries acts as a disincentive for such forms of international trade as intellectual property. *Indian Pharmaceuticals* is a highly pertinent example that contrasts the remarkably different stages of property development between developing countries and developed ones.

In developing countries where informal economies prevail, information is highly imperfect and dispersed, social and professional networks rarely connect, value is a highly subjective and

¹⁰⁹ Id. at 33.

¹¹⁰ Id. at 35.

¹¹¹ Id.

¹¹² Mr. De Soto opines that undercapitalization in the developing world precludes it from reaping economic benefits from assets such as exchange value in trade, derivative value in shareholding, legal recognition and, *inter alia*, standardization for valuation. See De Soto, supra note 104 at 44-60.

localized feature of a product, and otherwise fungible assets rarely exchange for value. That is, transactions do not take place within a regulated framework and resources are underutilized because of discrepancies in information and a lack of exchangeability. What this means for international trade is what economists call dead capital or, in other words, inefficient resource utilization.

Service industries that underwrite a broad array of legally recognized contractual relationships in developed countries might not have those within the informal economies on their radar. Informal and extralegal employment and property arrangements do not lend themselves easily to capitalization because bureaucracies in developing countries are ill-equipped to handle them. For instance, in Peru, it takes almost seven years to obtain legal authorization to build a house on state-owned land and 207 administrative steps, and 728 steps to obtain legal title for the land.¹¹³ With such obfuscation, it is not surprising that few international financiers are willing to endure such delay. Further, opaque administrative processes in developing countries make technology transfer, a feature of TRIPS, less attractive for developed countries.¹¹⁴

To guard against financiers who exploit endemic imbalances in informal economies, developing countries must be broadly authorized to maintain investment measures that protect their resources. Gaps in information and discrepancies in value for fungible assets are pervasive in developing countries and investors often seek to take advantage of un-regulated or lightly regulated sectors. To counteract this force, developing countries must be entitled to the protection of investment measures for longer durations than in the developed world, pursuant to TRIMS, Article 5.

¹¹³ De Soto, supra note 104 at 20.

¹¹⁴ See supra note 40.

Moreover, the laborers in these informal economies work without legal protection, such as work condition regulations, working hour limits, unionization, minimum wage rates, etc. It is estimated that informal economic sectors employ between 50% and 75% of all working people in the developing world, and these people produce between 20% and 66% of economic output from the Third World.¹¹⁵ The sheer enormity of the extralegal workforce in developing countries, whose residential and consumer existence is also likely to be extralegal, thwarts attempts by developed countries to impose formal developmental reforms.¹¹⁶ For example, imposition of a mailbox system for patent applications, such as that introduced in TRIPS and which was the basis of the *Indian Pharmaceuticals* case, is hardly legitimate or effective in a country where the majority of inhabitants live, work and purchase within an extralegal environment.

Developing countries must be given wider latitude to adapt domestic law to meet the social and economic needs of its own population before it can cater to zealous traders from developed countries. International trade jurisprudence should judge the sufficiency of such laws not against the standards of the developed world, but rather against the internally defined needs of the developing country. Capitalizing the informal and extralegal economies of the developing world should be hailed when it satisfies the developmental needs of the populations of developing countries, and not the needs of the investors. Mr. De Soto argues that “Law is the instrument that fixes and realizes capital,” and this Article suggests that special entitlements and protections for developing countries in international trade law must be applied to this end.¹¹⁷

¹¹⁵ De Soto, *supra* note 104 at 85.

¹¹⁶ For a study on the effects of trade liberalization on labor markets, see Michael Landesmann, Robert Stehrer & Sandra Leitner, *Trade Liberalization and Labour Markets: Perspective from OECD Economies*, **ILO Employment Articles** 2002/41 (2002).

¹¹⁷ De Soto, *supra* note 104 at 157. William R. Cline has written extensively on the topic of trade and development with an economic perspective. See generally William Cline, **Trade Policy and Global Poverty**, Jun. 2004; see also Joseph Stiglitz, **Globalization and Its Discontent**, Jun. 2002.

V. Proposed Reform- The Power of Discourse

The foregoing illustrates that the WTO, through its jurisprudence and the dominance of developed countries, reflects a narrow understanding of international trade's implications for developing countries. Through its indifference to cultural distinctions and its rigid prescriptions for economic and legal formality, the WTO is jeopardizing its legitimacy among the developing countries' populations. This Article suggests that to reverse this destructive course, developed countries and dominant trade blocs should transform their trade discourse and re-phrase their development agenda.

The E.U., under Pascal Lamy's leadership, has popularized a "development discourse" by integrating "rhetorical action" that favors expansion and promotion of equitable trade with developing countries.¹¹⁸ By changing its trade and development discourse from rhetoric that favors economic self-interest to its broader role in international trade, the E.U. shapes the way its members perceive trade policy as an instrument to equalize and stabilize the international trading system.¹¹⁹ Further, trade policy has considerable political undertones and so adopting a pro-development discourse for trade expresses a certain moral and political message to the developing countries. The E.U.'s success in gaining the multilateral support of developing countries has earned them a competitive trade and negotiating advantage over competitors, such as the U.S.

The E.U. has successfully gained trust from developing countries and it has become the largest market for developing countries' exports while conversely contributing the largest

¹¹⁸ See Adrian Van Den Hoven, Assuming Leadership in Multilateral Economic Institutions: The EU's 'Development Round' Discourse and Strategy, *West European Politics* 256, Mar. 1, 2004; see also Saragosa, supra note 94. Many E.U. representatives at a conference in September 2004, entitled "Europe and the South: A New Era- European Development Cooperation: towards policy and a new commitment," trumpeted fair trade as a way to promote development in developing countries. See Inter Press Service, Trade: Trade Presented As Best Way for E.U. to Promote Development, *Africa News*, Sept. 28, 2004.

¹¹⁹ Id.

amount in foreign direct investment and development aid.¹²⁰ Although this cycle has made developing countries somewhat dependent on the E.U. markets, it has fostered a symbiotic trade relationship characterized by leniency and understanding. The E.U. structures its trade policy as a pyramid by providing differential access to its markets based on historic and developmental characteristics.¹²¹ In contrast to the U.S. iron-fisted approach to India regarding its Pharmaceuticals industry, the E.U. essentially excused South Africa's refusal to abide by TRIPS so that it could obtain drugs needed to combat AIDS.¹²² South Africa returned the favor by bringing other African countries to the bargaining table in Doha.¹²³

Reciprocity in multilateral trade agreements is another key component that demonstrates a willingness to back discourse with action. For example, the E.U. has liberalized its agricultural markets consistent with the Agricultural Agreement by importing 35 billion Euros worth of products from developing countries.¹²⁴ Canada, similarly, recognizes that developing countries and LDC's have low per capita incomes, low levels of human resource development and highly vulnerable economies and thus offers many of them duty free and quota free access for eligible products.¹²⁵

¹²⁰ Id.

¹²¹ Id. LDC's receive 95% duty free access, regional trade agreements receive 80%, Generalized Schedule of Preference countries receive 54% and Most Favored Nation countries receive 20%. Id. See also WTO 2000: xix). See also Tobias Buck, EU to Offer Rewards to 'Good' Poor Countries, **Financial Times** 1, Oct. 21, 2004. The E.U. declared that it plans to open its markets to developing countries that adopt progressive environmental and labour policies. Id. In particular, the E.U. has staked its promise on the ratification of 27 "key international conventions" and, in return, it will offer duty-free access for about 7,200 products, including sensitive products like agriculture. Id. The revised trade preference scheme offers graded duty and quota benefits depending on a countries level of development. Id.

¹²² See Van Den Hoven, supra note 118.

¹²³ Id.

¹²⁴ Id. These imports amount to more than the U.S., Canada, Japan, Australia, and New Zealand taken together. Id. This Article is not meant to appear like a supportive mouth-piece for the E.U. trade policies, however, it demonstrates by example which types of reforms are working.

¹²⁵ Development and Society: Market Access for the Least Developed Countries, at <http://www.dfait-maeci.gc.ca/tna-nac/lcd-en.asp> [last visited Dec. 15, 2004].

China and France have proclaimed their support for fair and equitable international trade by signing a declaration to support “balanced international trade and globalization based on mutual benefit.”¹²⁶ Although both countries have tarnished human rights records, they have extended an olive branch by publicly supporting fair trade that seeks to help developing countries. Their promises may not be binding, but they express a set of moral and political values that offsets the countervailing free trade rhetoric. Over time these public expressions of equity, development, mutuality and fairness, among others, help to spawn dialogue, promote popular legitimacy, and ultimately catalyze political change.

Discourse is also a way of empowering developing countries in bilateral and multilateral trade negotiations. On the one hand, rhetoric in trade instruments, at trade summits and in public statements has already emphasized the connection between trade and intellectual property, investment, subsidies and the like. Trade agreements sometimes even sound like mouthpieces for private interests. Corporate-dominated trade notwithstanding, reshaping the discourse of international trade to reflect the needs of developing countries, on the other hand, can embolden their status and ensure their opportunity to influence trade policy.

VI. Conclusion

For too long the WTO has artificially insulated trade discourse and jurisprudence from their natural connection with society, the environment, labor and other such public interests. The free trade institution must recognize that it owes its legitimacy and continued feasibility to its perception in the developing world, and not to post-industrial developed countries. Trade policy-makers should seek to integrate equity, balance, cultural understanding, pluralism and modesty principles into trade agreements and not attempt to eschew them as externalities. Lastly,

¹²⁶ China, France Vow to Work For Solution of Global Issue, **BBC Monitoring**, Jan. 28, 2004.

developed countries ought to recognize the value-added potential in implementing a trade agenda that promotes developing countries' interests.