THE WTO'S GEMEINSCHAFT

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> "[Human beings] are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."**

> "[P]overty anywhere constitutes a danger to prosperity everywhere."***

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** Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR 3d Sess., art. 1 (1948).

*** Constitution of the International Labor Organization, Annex (Declaration concerning the aims and purposes of the International Labor Organization), para. I (c), http://www.ilo.org/public/english/about/iloconst.htm#annex.

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I. INTRODUCTION: INTERNATIONAL TRADE AND ITS DISCONTENTS

The initially ambitious march by members of the World Trade Organization (WTO),[1] clad with pompous commitments, to Cancún, Mexico in September 2003 for the fifth WTO Ministerial Conference quickly degraded into frustration and disappointment.[2] Betraying hopes across the globe that it would usher in a new era of development and thus send a positive signal to the global village, the Cancún Conference failed to address rampant protectionism by the rich countries in the sectors of agriculture and textiles, on which many poor countries depend for their subsistence. Poor countries did not demand "special favors," but merely that the rich "play[ ] by the rules," which the rich coldly refused.[3] As one African cotton farmer reportedly bemoaned, even the WTO is now against the poor, in addition to hardship, famine, and disease.[4] While the collapse certainly precipitated skepticism about the WTO's effectiveness, it also revealed problems inherent in the current system's deep structural limitations.

Despite a half-century's institutional evolution, the WTO's ontology largely remains an agora for trade "negotiation" in which reciprocal bar-

1. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND; 33 I.L.M. 1140 (1994) [hereinafter RESULTS OF THE URUGUAY ROUND]; Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1140 (1994) [hereinafter WTO Agreement].

2. *See generally* Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J. INT'L ECON. L. 219 (2004) [hereinafter Cho, *A Bridge Too Far*].

3. WTO, Summary of 10 September, 2003, *Day 1: Conference Kicks Off with "Facilitators" Named and Cotton Debated*, http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_10sept_e.htm (last visited Feb. 14, 2004).

4. BRIDGES DAILY UPDATE ON THE FIFTH WTO MINISTERIAL CONFERENCE, *At the Eleventh Hour, Divergence All Over Again*, Issue 5, Sept. 14, 2003, http://www.ictsd.org/ministerial/cancun/wto_daily/ben030914.htm.

gains take place among members, and members share only their affluence and not their hardships. Negotiation is, in itself, an inferior form of discourse in that its dialectical pressure tends to eliminate, not accommodate, voices of the less powerful. Negotiation reflects and reinforces power disparities among participants.[5] The power sensitive negotiation structure, in turn, even in the presence of official yet vague rules, tends to shape international commerce in a mercantilist, or sometimes exploitive, fashion. Therefore, in this global "Gesellschaft"—metaphorized as a "metropolis" pulling everything and everyone toward the global center via materialistic gravity[6]—the poor and powerless are vulnerable to being ill-treated and marginalized. Their sufferings, although sympathized with intermittently, are structurally and inherently off the radar of the rich and powerful and thus inaccessible to the latter's socio-political equations that control resources and determine policy change. All told, "global empathy" does not exist in the current global trading system, and hence there is no true community.

As a result of this condition, we often experience the perplexing and unpleasant phenomenon in which parochial, narrow-minded commercial interests in the rich countries block economic development in the poorest countries. For example, African cotton is driven out of the global market by highly-subsidized cotton production in the United States.[7] Similarly, the European Union (EU), under its Common Agricultural Policy, bans the importation of fruit and vegetables. These are the only types of products a small country like Moldova has to compete with, while lavishly subsidized like-products undersell Moldovan products even in the Russian market.[8] To these Africans and Moldovans, the current global trading system, symbolized by the WTO, is neither beneficial nor fair and legitimate. The ghost of Karl Marx *still* haunts us.[9]

Admittedly, the General Agreement on Tariffs and Trade (GATT 1947),[10] which was part of the post-war international economic architec-

5. *See* Jeff Ward, *Jürgen Habermas*, *at* http://thispublicaddress.com/catalogue/Habermas.html (last visited Feb. 14, 2004). Ward criticizes the Platonic notion of dialogue emphasizing its outcome (persuasion), which tends to silence the voices of the persuaded (the powerless). He finds a more desirable construction in the Habermasian version, which regards dialogue as a process, rather than a result, and thus accommodates dissenting or minority views.

6. FERDINAND TÖNNIES, COMMUNITY AND SOCIETY 223-31 (GEMEINSCHAFT UND GESELLSCHAFT) (Charles P. Loomis trans. & ed., 1957), *reprinted in* MARCELLO TRUZZI, SOCIOLOGY: THE CLASSIC STATEMENTS 145-54 (1971) [hereinafter THE CLASSIC STATEMENTS], *available at* http://www2.pfeiffer.edu/~lridener/courses/GEMEIN.HTML (last visited Feb. 17, 2004).

7. *See Stitched Up*, ECONOMIST, July 26, 2003, at 71. *Cf.* Jagdish Bhagwati, *Don't Cry for Cancún*, 83 FOREIGN AFF. 52, 61 (2004) (submitting that the U.S. should have conceded on the issue of reducing of cotton subsidies). Recently, Brazil successfully challenged the U.S. cotton subsidies before the WTO. *See* WTO Appellate Body, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R (Sept. 8, 2004).

8. *See Outsiders Aren't Helping—What Future for Moldova?*, ECONOMIST, Feb. 15, 2003, at 48.

9. Here, I mostly focus on an international dimension of the Marxian apocalypse. For an excellent recount of its domestic dimension, see WILLIAM GREIDER, ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM 39-53 (1998). *See also After Communism—Marx: The Post-Communist Karl Marx*, ECONOMIST, Dec. 21, 2002, at 17.

10. General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter GATT 1947].

ture,[11] has contributed to unprecedented global economic growth during the past half century.[12] GATT has served as an icon of, or an agent for, globalization.[13] Many once impoverished countries, such as South Korea, were able to escape from their miserable economic status through a rewarding mechanism of international trade—successful accumulation of foreign reserves earned by export and re-investment of this capital for further economic growth.[14] This unremitting march of international commerce and its liberal agenda climaxed with the fall of the Berlin Wall and the launch of the WTO. The WTO succeeded GATT, implementing an even more ambitious vision and agenda.[15] A nirvana of global economic integration appeared to be just a few steps away.

However, deep beneath the wave of liberal optimism and promises of free trade ran an undercurrent of lagging development and poverty suffered by the poor and unfortunate.[16] Globalization during the last two decades led many once-poor countries to a successful integration to the world market through a dramatic shift in their exports from primary commodities to manufactured goods and services. Therefore, three billion "new globalizers," such as China, India and Mexico, were enabled to experience a large scale of poverty reduction. However, countries with around two billion people, most living in remote corners of Asia, Africa, and Europe, fail to be included in the mainstream of global economic activities. The result of this frustrating phenomenon is that poverty in these countries is greater now than it was twenty years ago.[17]

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11. *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 35-37 (2d ed. 1997) [hereinafter WORLD TRADING SYSTEM].

12. For instance, during the period of 1965 to 1999, the average annual growth rate of gross domestic product (GDP) was 4.2% in the low and middle income countries and 3.2% in the high income countries; during the same period, the average annual growth rates of the exportation of goods and services were 5.3% and 5.9%, respectively. WORLD BANK, 2001 WORLD DEVELOPMENT INDICATORS 24-27 (2002), *available at* http://www.worldbank.org/data/wdi2001/pdfs/tab1_4.pdf (last visited Feb. 23, 2004).

13. Globalization can be broadly defined as "the widening, deepening and speeding up of worldwide interconnectedness in all aspects of contemporary social life, from the cultural to the criminal, the financial to the spiritual." GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE 2 (David Held et al. eds., 1999). However, this Article focuses on an economic, more narrow aspect of trade and globalization. *See id.* at 149-88 (discussing global trade and global markets).

14. Regarding the role of trade in the economic development of Korea, see THE MULTILATERAL TRADING SYSTEM IN A GLOBALIZING WORLD (Lee-Jay Cho & Yoon Hyung Kim eds., 2000); TUN-JEN CHENG ET AL., INSTITUTIONS, ECONOMIC POLICY AND GROWTH IN THE REPUBLIC OF KOREA AND TAIWAN PROVINCE OF CHINA (1996); and DAVID C. COLE ET AL., THE KOREAN ECONOMY: ISSUES OF DEVELOPMENT (1980).

15. *Cf.* Ernst-Ulrich Petersmann, *The Transformation of the World Trading System Through the 1994 Agreement Establishing the World Trade Organization*, 6 EUR. J. INT'L L. 161, 189 (1995) (arguing that the 1994 WTO Agreement "completes the original design of the Bretton Woods system, and reduces the existing fragmentation of international economic law, by a 'global integration law' for international movements of goods, services, persons, investments and payments").

16. Nicholas Stern, Senior Vice President and Chief Economist of the World Bank, observed that "[a]bout one-fifth of the world's population lives on less than $1 per day," which is "unacceptable in a world of such plenty." Nicholas Stern, *Foreword* to GLOBALIZATION, GROWTH, AND POVERTY: BUILDING AN INCLUSIVE WORLD ECONOMY, at ix (A World Bank Policy Research Report, 2002) [hereinafter GLOBALIZATION, GROWTH, AND POVERTY].

17. *Id.* at x, 31-32. In the same context, a recent report by the United Nations Conference on Trade

Given these circumstances, developing countries (the South)[18] participated vigorously in the historic Uruguay Round (UR) negotiations con-

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and Development (UNCTAD) sharply observed as follows:

> [T]he trade performance of developing countries during the past two decades has been uneven. A number of countries, concentrated in East and South-East Asia, have been able to expand and diversify their exports of manufactures and increase their share of world trade. On the other hand, many least developed countries (LDCs) and other commodity-dependent developing countries have lost shares. In manufactures, the successful export performance of some countries does not always involve increasing domestic value added. A number of developing countries continue to depend on the export of undynamic products with low income elasticity and low value added, from both the primary and manufacturing sectors. Many labour-intensive manufactures exported by developing countries are behaving increasingly like commodities, with a risk of market saturation that could lead to a fallacy of composition. At the same time, many middle-income developing countries are finding it difficult to upgrade their productive and technological profile, and they remain dependent on imported parts and components, as well as on design and technology skills.

UNCTAD, TRADE AND DEVELOPMENT REPORT 33 (2002) [hereinafter UNCTAD TDR 2002], *available at* http://www.unctad.org/en/docs//tdr2002_en.pdf (last visited Feb. 23, 2004). *See also South Summit Hits Global Economic Gap: Havana Conference Assails "Marginalization" of Developing Countries*, 14 AFR. RECOVERY 24 (2000), *available at* http://www.un.org/ecosocdev/geninfo/afrec/vol14no2/g77summ t.htm. *But cf.* International Monetary Fund, *Global Trade Liberalization and the Developing Countries* II (IMF Issues Brief, Nov. 2001) [hereinafter *Global Trade Liberalization*] (observing that the reasons for the marginalization of countries are complex, including "deep-seated structural problems, weak policy frameworks and institutions, and protection at home and abroad"), *available at* http://www.imf.org/external/np/exr/ib/2001/110801.htm#i; Alexander J. Yeats et al., *What Caused Sub-Saharan Africa's Marginalization in World Trade*, 4 FIN. & DEV. 38, 38 (1996) (observing that the anticompetitive policies of the developing countries are culpable for marginalization, rather than trade barriers), *available at* http://www.worldbank.org/fandd/english/abstract/1296/06a1296.htm.

18. There is no official definition of "developing countries." Countries often declare themselves to be developing countries, in which case other countries can challenge that declaration. Within the WTO system, developing countries are treated more favorably than developed countries under certain circumstances. For instance, developing countries may be given a longer period for implementing their obligations. However, these special rights under the WTO do not necessarily apply to other occasions, such as the granting of the Generalized System of Preference (GSP) status, which is determined unilaterally by donor countries. In the case of Least Developed Countries (LDCs), the UN officially designated 50 countries as the LDCs. *See* WTO, *Development: Definition (Who Are the Developing Countries in the WTO?)*, *available at* http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited Feb. 23, 2004). On the other hand, a wide spectrum of developmental stages exists among developing countries. Markedly, divergent paths in terms of GDP per capita growth rate have been witnessed in the 1990s between "more globalized" developing countries, such as China, India, Uganda and Vietnam, and "less globalized" developing countries, such as many sub-Saharan African countries and the former Soviet Union. GLOBALIZATION, GROWTH, AND POVERTY, *supra* note 16, at 5, 35. These more globalized developing countries, or new globalizers, are characterized by open trade policies, adequate basic education and well-established legal systems. *Id.* at 35. On the other hand, three schools of thought, which all make sense to some extent, explain why these less globalized developing countries have been marginalized: first, poor domestic institutions as well as policies are culpable, but they can be still improved (the "Join the Club" view); second, inherent disadvantages of unfavorable geography and climate are to blame (the "Geographic Disadvantage" view); and third, as a result of poor policies these countries permanently missed the opportunity to industrialize (the "Missed the Boat" view). *Id.* at 7, 39-40. *Cf.* ANNE O. KRUEGER, TRADE POLICIES AND DEVELOPING NATIONS 59-61 (1995) (discussing "[d]ifferent [g]roups and [i]nterests" of developing countries). Despite the existence of such a wide spectrum, when negotiating on certain issues vis-à-vis developed countries, coalition among developing countries may still be a conceivable strategy. *See generally* Rajiv Kumar, *Developing-Country Coalitions in International Trade Negotiations*, *in* THE DEVELOPING COUNTRIES IN WORLD TRADE: POLICIES AND BARGAINING STRATEGIES 205-21 (Diana Tussie & David Glover eds., 1993) [hereinafter THE DEVELOPING COUNTRIES IN WORLD TRADE] (discussing the experience of the umbrella coalition during the period leading up to the Uruguay Round); David Glover & Diana Tussie, *Developing Countries in World Trade: Implications for Bargaining*, *in* THE DEVELOPING COUNTRIES IN WORLD TRADE, *supra*, at 225-41.

ducted throughout the late eighties and the early nineties.[19] A grand deal between the developed countries (the North) and the South finally launched the WTO in 1995. The South, in exchange for extended market access to the North, accepted the entire UR results as a "single undertaking." This single undertaking included various new sectors, such as intellectual property rights and services, which the North had strongly demanded.[20] Yet in the course of implementing the UR deal, the South became increasingly frustrated, chiefly because the North, contrary to its original commitment (the improved market access in development-sensitive products, such as agricultural products and textiles), continued to maintain high trade barriers to imports on those primary, labor-intensive products, such as agricultural products and textiles—the only products that the South can offer to trade.[21] Such protection in rich countries costs developing countries over $100 billion per year, twice the total sum of foreign aid from North to South.[22] Simply put, the balance sheet of the WTO enterprise has revealed only the "uneven distribution"[23] of benefits among rich and poor members, thus failing to materialize the goal of substantial and sustainable economic development. Consequently, seven years under the WTO has not narrowed the global income gap between the poor and the rich—the gap has widened.[24]

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19. For a comprehensive survey concerning the impact of the Uruguay Round on developing countries, see generally THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES (Will Martin & L. Alan Winters eds., 1996).

20. UNCTAD TDR 2002, *supra* note 17, at 34.

> Participation in the WTO—like the General Agreement on Tariffs and Trade (GATT) before it—has brought developing countries a number of important benefits, but also poses new and difficult challenges. Their willingness to participate has been motivated by the hope of improved and more secure access to markets, particularly in the industrialized countries, and the expectation that the means to enforce acquired rights through the dispute settlement mechanism would more than offset a loss in policy autonomy that follows from their taking on an increasing number of obligations, including market opening and the implementation of rules in new areas.

Id. *See also* J. Michael Finger & Philip Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge*, *in* DEVELOPING COUNTRIES AND THE WTO: A PRO-ACTIVE AGENDA 115-29 (Bernard M. Hoekman & Will Martin eds., 2001) [hereinafter A PRO-ACTIVE AGENDA]; Evelyn Su, *The Winners and Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and Its Effects on Developing Countries*, 23 HOUS. J. INT'L L. 169, 195-218 (2000) (exploring the effects of the Agreement on Trade-Related Intellectual Property Rights (TRIPs) on the economic development of developing countries).

21. Joseph E. Stiglitz, *Two Principles for the Next Round or, How to Bring Developing Countries in from the Cold*, 23 WORLD ECON. 437, 437-38 (2000) (criticizing the developed countries' "hypocrisy" when they continuously exhort developing countries towards further market openings, while they still maintain trade barriers in sectors of natural comparative advantage for developing countries), *available at* http://www.worldbank.org/knowledge/chiefecon/articles/geneva.pdf; *see also* Celso L.N. Amorim, *The WTO from the Perspective of a Developing Country*, 24 FORDHAM INT'L L.J. 95, 96-99 (2000) (criticizing the WTO's "development deficit" in the areas of agriculture and textiles).

22. GLOBALIZATION, GROWTH, AND POVERTY, *supra* note 16, at 9, 53.

23. Mike Moore, Address at the Conference of African Trade Ministers, Algiers (Sept. 23, 1999) [hereinafter Challenges and Opportunities] ("There must be something in the pie for everyone. Not pie in the sky when we die, but pie on the table."), *at* http://www.wto.org/english/news_e/spmm_e/spmm07_e.htm (last visited Feb. 23, 2004).

24. *Global Gap Rising, World Bank Study Shows*, UN WIRE, Jan. 18, 2002, *at* http://www.unfoundation.org/unwire/util/display_stories.asp?objid=23173 (last visited Feb. 23, 2004).

Under these circumstances, the third WTO Ministerial Conference in Seattle was doomed from the start.[25] In addition to general anti-globalization sentiments,[26] the apparently irreconcilable fissure between the North and the South was one of the main culprits in the collapse of the Seattle Conference.[27] The "Northern Agenda" included the issues of climate change and regulatory enhancement in the areas of health, environment, and labor. These issues clashed with the "Southern Agenda," driven by improved access to the developed countries' markets for agricultural and textile products.[28] With unpleasant memories of tear gas and rubber bullets in the streets of Seattle still vividly haunting the WTO, the fourth Ministerial Conference was held in Doha, Qatar in November 2001.[29] Once again, the chasm between North and South almost derailed the launch of the new round of negotiations for trade liberalization under the auspices of the WTO. It would have certainly done so without such extraordinary events as the global recession and the September 11 attacks. Consequently, some members were forced to be conciliatory in order to seal a deal. Ironically, this inclement climate drove negotiators from both rich and poor countries to reach a compromise, motivated by a prevailing understanding that the global trading system could go astray and eventually fail without an impetus at such a critical point in time.[30] Yet despite the historic launch of a new round after painstaking efforts, implementation has been depressingly minimal, particularly in areas of development.[31] This evanescent nature of the Doha Development Agenda (DDA) was painfully confirmed by the eve of the fifth Ministerial Conference in Cancún, Mexico in September 2003.[32]

Clearly, development is not a new issue in international trade law. Since the birth of GATT, development has been discussed among contracting par-

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25. *See* Stiglitiz, *supra* note 21, at 437.

26. *See* Rob Norton, *Not So Fast: Anti-Trade/Pro-Trade*, FORTUNE, Jan. 10, 2000, at 40.

27. GLOBALIZATION, GROWTH, AND POVERTY, *supra* note 16, at 60.

> The Seattle WTO ministerial meeting failed to launch a new round, not because of the protests in the streets, but because the major trading powers lacked the political will to accommodate the interests of developing countries . . . . In order for developing countries to have confidence in a new round, rich countries must deliver on commitments made in the past, such as accelerating the agricultural trade negotiations and phasing out quotas on textiles and clothing.

Id. (quoting the recent report of the UN High-Level Panel on Financing for Development); *see also* Diana Tussie & Miguel F. Lengyel, *Developing Countries: Turning Participation into Influence*, *in* DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK 485, 491 (Bernard Hoekman et al. eds., 2002) [hereinafter HANDBOOK] (observing that "[a]fter the significant concessions made in the Uruguay Round, developing countries felt entitled to be included in the green-room process").

28. Symposium, *Issues Confronting the World Trading System—Summary Reports by the Moderators*, *at* www.wto.org/english/forums_e/ngo_e/ngo_symp2001_modreps_e.htm (last visited Feb. 23, 2004); *see also* Scott Vaughan, *Trade and Environment: Some North-South Considerations*, 27 CORNELL INT'L L.J. 591, 592 (1994) (detecting the "North-South impasse" in the area of environmental policies).

29. WTO, *The Fourth Ministerial Conference (An Official Website)*, *at* http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm (last visited Feb. 23, 2004).

30. *See infra* Part II.B.3.

31. *See infra* Part II.B.3.

32. *See* Cho, *A Bridge Too Far*, *supra* note 2, at 219.

ties. Despite this long-standing engagement, efforts to deliver any substantial and meaningful outcome to underdeveloped countries have failed for the most part. Many gestures have been made, but few actions have been taken; semblances of developmental aid, but no genuine assistance. Even the rare aid program concentrated on affirmative action-type measures such as tariff preferences. Tariff preferences, however, are doomed to fail since they do not reflect the development demands of the recipients, but depend strictly on the budgetary or political considerations of the donors. To wit, the aid programs have been handled in a temporary, spasmodic and unilateral dimension, at the mercy of rich donor countries. Most products in which developing countries enjoy a comparative advantage—and which, therefore, could be a potential threat to domestic industries in rich countries producing similar products—have been deliberately singled out from the list of goods receiving preferential access. Admittedly, the WTO has recently geared up to respond directly to the demands of the developing countries through the concept of "capacity-building." Although this new direction of development assistance appears to be agreeable, and even laudable, the chronic quandary of a lack of physical and political capital has rendered previous development programs fruitless and now fundamentally threatens the current initiative.

This Article focuses on the current development-related problems in the global trading system. A widening income gap and widespread poverty among trading nations denote the WTO's Gesellschaftian nature—interest and power—resulting in structural distortion and manipulation. This Article maintains that the global trading system can achieve its development agenda and become fair and legitimate only through a critical paradigmatic transformation enabled by the configuration of the "WTO's Gemeinschaft." This Article observes that a fundamental legal precept, the "Law of Nations" (*jus gentium*), plays a critical role in actualizing this communitarian *telos*. Part II redefines the global trading system through the theoretical lens of "Gesellschaft," a term articulated by the German sociologist Ferdinand Tönnies in the late nineteenth century. Part II tracks down futile attempts, under the Gesellschaftian limitation, to tackle development issues and consequent distributional injustice. Part III highlights and problematizes the Gesellschaftian limitation and resultant development failure as it enumerates the causes and effects of that failure: persistent protectionism, regulatory unilateralism, and rhetoric without action. Part IV then attempts to address the development problem by overcoming the WTO's Gesellschaftian limitation through exercising a communitarian paradigm shift and constructing, with the vehicle of the Law of Nations, the WTO's Gemeinschaft. This consists of a dual agenda of free trade and development assistance implemented and vindicated in an atmosphere of global empathy. Part V concludes that an ideal project of WTO's Gemeinschaft leads us to transform our perspective from *could* (right) to *should* (duty).

II. THE FLAWED GLOBAL GESELLSCHAFT: DEVELOPMENT LOST

A. The Gesellschaftian Interpretation of the Global Trading System

Tönnies' illustrious dichotomy of Gesellschaft and Gemeinschaft, often translated as "society" and "community" respectively, provides simple yet powerful insights into human interactions and group dynamics. Gemeinschaft in its original form, the "Gemeinschaft of Blood," is defined as a natural human connection bestowed by birth and family. This can be developed into the "Gemeinschaft of Locality," based on a common habitation or locale.[33] In contrast, Gesellschaft is defined as an artificial human connection that people build up with the intent and interest to work together.[34] Gemeinschaft connotes the "relationships in traditional agrarian societies," and thus a rural life, while Gesellschaft connotes "sterilized associations which exist in the realm of 'business, travel, or sciences,'" and thus an urban life.[35]

The construction of GATT as a global Gesellschaft departs from the historical path-dependent structure of Tönnies' original theory to the extent that GATT has not directly evolved from any pre-existing Gemeinschaft.[36] However, one can still discover useful corollaries of a Gesellschaft in GATT.[37] The genesis of the modern global trading system, GATT was a "contract" among trading nations to achieve the collective purposes of reducing and eliminating trade barriers such as tariffs and quotas. Thus, the original twenty-four "contracting parties" signed and ratified the multi-party contract, constituting a positivistic form of agreement. The prototypes of GATT were in fact interwar U.S. bilateral trade agreements aiming for reciprocal tariff reduction negotiation.[38] Therefore, GATT presupposes bargains and quid pro quo, and requires the existence of "nullification" or "impairment" of benefits—similar to the concept of "injury" in the law of con-

33. Daniel S. Reimer, *The Role of "Community" in the Pacific Northwest Logging Debate*, 66 U. COLO. L. REV. 223, 229 (1995); FERDINAND TÖNNIES, COMMUNITY AND SOCIETY 33-34, 35, 41-44, 76-78 (1967), *reprinted in* THE SOCIOLOGY OF COMMUNITY 7-10 (Colin Bell & Howard Newby eds., 1974) [hereinafter THE SOCIOLOGY OF COMMUNITY].

34. Reimer, *supra* note 33, at 229; THE SOCIOLOGY OF COMMUNITY, *supra* note 33, at 7-10.

35. Reimer, *supra* note 33, at 229 (quoting THE SOCIOLOGY OF COMMUNITY, *supra* note 33, at 7-10).

36. THE CLASSIC STATEMENTS, *supra* note 6.

37. *See* Chi Carmody, *When "Cultural Identity Was Not at Issue": Thinking about Canada—Certain Measures Concerning Periodicals*, 30 LAW & POL'Y INT'L BUS. 231, 237 (1999) (observing that the tension between trade and culture is a "modern manifestation of the age-old debate between society (Gesellschaft) and community (Gemeinschaft)"). Carmody's main argument is that "too much Gesellschaft" corrodes the familiar local culture which represents Gemeinschaft. *Id.*

38. Robert E. Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD TRADE L. 615, 616-36 (1970) [hereinafter *A Diplomat's Jurisprudence*]; Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMMON MKT. L. REV. 1157, 1171 (1994); Ernest H. Preeg, TRADERS AND DIPLOMATS: AN ANALYSIS OF THE KENNEDY ROUND OF NEGOTIATIONS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE 23-24 (1970); Edwin Vermulst & Bart Driessen, *An Overview of the WTO Dispute Settlement System and Its Relationship with the Uruguay Round Agreements*, 29 J. WORLD TRADE 131, 136 (1995).

tracts.[39] Interestingly, Tönnies himself conceived of a global Gesellschaft with the international nature of merchants and metaphorized it as a metropolis where world commerce and traffic converge.[40]

However, the statist structure of this global Gesellschaft, which was inherited from the Treaties of Westphalia, tends to invite mercantilist competition and the creation of national wealth, as states are likely to be obsessed with exportation and sensitive to importation.[41] Moreover, the contract and negotiation characteristics of the global Gesellschaft tend to put its operation at the mercy of power dynamics among contracting parties. Simply put, you are likely to enjoy a better bargain if you are the superior, more powerful party vis-à-vis your counterpart in a contract. The mere existence of a convention seldom corrects the power disparity, mainly because the convention itself is a negotiational outcome. Worse, if you happen to be a very small party you can easily be trivialized and excluded from the negotiation itself; what remains is to accept the outcome (contract) as a *fait accompli* no matter how it affects you. Under these circumstances, even important convention principles can be bent and clouded—not via violations per se, but through exemptions and reservations for the political convenience of the rich and powerful.

Yet, more troubling than the blatant legal impotence of the global Gesellschaft is the nature of the law and order itself. Under the current WTO system, legal remedies ultimately hinge on enforcement mechanisms, often sanctions or retaliation.[42] Thus, international commerce is maintained in a belligerent situation through "underlying mutual fear" and veiled hostility toward each other.[43] In the name of sanctions or retaliation, the WTO authorizes and accordingly privatizes the unilateral imposition of trade barriers against the condemned, the very outcome which the WTO aims to eliminate.[44] In this regard, Steve Charnovitz trenchantly observes that "the World Health Organization does not authorize one party to spread viruses to another. The World Intellectual Property Organization does not fight piracy with piracy. So the WTO's use of trade restrictions to promote freer trade is bizarre."[45]

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39. Admittedly, most treaties would be some kind of contract from a positivistic standpoint in that they are based on the consent of contracting governments. *See* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 438-39 (Robert W. Tucker ed., 2d rev. ed. 1966); Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291, 293 (1999).

40. THE CLASSIC STATEMENTS, *supra* note 6.

41. Michael M'Gongile, *Between Globalism and Territoriality: The International Constitution and the Challenge of Ecological Legitimacy*, 15 CAN. J.L. & JURIS. 159, 166 (2002).

42. *See* Sungjoon Cho, *The Nature of Remedies in International Trade Law*, 65 U. PITT. L. REV. 763, 777 (2004) [hereinafter Cho, *Remedies*].

43. THE CLASSIC STATEMENTS, *supra* note 6.

44. Steve Charnovitz, *Should the Teeth Be Pulled?: An Analysis of WTO Sanctions*, *in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 602, 622 (Daniel L. M. Kennedy & James D. Southwick eds., 2002) [hereinafter POLITICAL ECONOMY].

45. *Id.*; *see also* Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 487 (1994) (observing that retaliation is not favored under the DSU

Furthermore, this enforcement mechanism itself reveals power imbalances between the rich and the poor in the international law arena.[46] Because the mechanism leaves retaliation in the hands of the winner, even if a poor member attempts to retaliate against its rich trading partner, such retaliation is likely to be ineffective due to the discrepancy between their economic sizes.[47] It is not the incompleteness of the enforcement mechanism which is biased against the poor,[48] but rather the Gesellschaftian nature itself which begets this developmental dilemma. The WTO once acknowledged this quandary when Ecuador attempted to retaliate against the EU in the course of the notorious banana saga. As a WTO arbitration panel pointedly observed:

> *Given the difficulties and the specific circumstances of this case which involves a developing country Member*, it could be that *Ecuador may find itself in a situation where it is not realistic or possible for it to implement the suspension* authorized by the [Dispute Settlement Understanding] for the full amount of the level of nullification and impairment estimated by us in all of the sectors and/or under all agreements mentioned above combined. *The present text of the DSU does not offer a solution for such an eventuality.*[49]

In addition, considering negative future political ramifications that such treacherous retaliation may precipitate against powerful trading partners, poor countries are not likely to opt for such an ephemeral, Pyrrhic victory.[50] Therefore, in the banana saga, Ecuador, even as a winner, had to stomach further negotiation with the EU to resolve the situation without retaliation because of the price it would have paid otherwise.[51] On the contrary, big,

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because it is "by definition" against the WTO rules and also erects a new trade barrier).

46. *See* Cho, *Remedies*, *supra* note 42, at 785.

47. POLITICAL ECONOMY, *supra* note 44, at 625-26; Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 338 (2000).

48. *See* Henrik Horn & Petros C. Mavroidis, *Remedies in the WTO Dispute Settlement System and Developing Country Interests* (1999), http://www1.worldbank.org/wbiep/trade/papers_2000/BPdisput.PDF (last visited Feb. 23, 2004). Horn and Mavroidis argue that the lack of a workable sanction mechanism in the WTO tends to privatize the sanction against violators, which puts "economically and politically weak" countries in a disadvantageous position. *Id.* at 2.

49. European Communities, *Regime for the Importation, Sale and Distribution of Bananas, Recourse to Arbitration by European Communities under Article 22. 6 of the DSU*, WT/DS27/ARB/ECU (Mar. 24, 2000), at para. 177 (emphasis added); *see also* Robert E. Hudec, *The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective*, *in* HANDBOOK, *supra* note 27, at 81, 84 (observing that the WTO's greater emphasis on retaliation makes the dispute settlement system even more "one-sided" than before, favoring larger developed countries); David Palmeter & Stanimir A. Alexandrov, *"Inducing Compliance" in WTO Dispute Settlement*, *in* POLITICAL ECONOMY, *supra* note 44, at 646, 662.

50. *See* Cho, *Remedies*, *supra* note 42, at 786.

51. *Banana Dispute: Ecuador and EC Hold Talks to Avoid WTO Dispute*, 5 BRIDGES WKLY. TRADE NEWS DIG., Apr. 24, 2001 (quoting an informed source stating that "[i]t is difficult for Ecuador as a small developing country with severe economic problems to resist major pressure from the US and the EU over the banana issue."), *available at* http://www.ictsd.org/html/weekly/24-04-01/story3.htm.

rich countries can influence small, poor countries by a mere threat of sanctions simply because the impact of retaliation to the latter would be so damaging.

B. Unearthing Development Disparity in the Global Gesellschaft

1. Development Disparity as a Structural Dilemma

At first glance, development appears to be such a natural corollary of international trade that the relationship does not seem to merit any particular inquiry or analysis. That is to say, countries trade with each other ultimately for the sake of their own economic development.[52] The preamble of GATT also describes the fundamental purpose of international trade as various aspects of economic development, such as "raising standards of living," "ensuring full employment," and producing a "large and steadily growing volume of real income."[53] Classical international economic theory also supports this general proposition. According to the theory, trade leads each participant to specialize in products in which it retains comparative, not necessarily absolute, advantages over its trading partner. Such specialization reduces the average cost to produce goods for trade due to economies of scale. The collective welfare of trading nations increases when trading partners exchange specialized goods through export and import since resources are reallocated in a more efficient manner than they were in a pre-trade (autarky) situation.[54] Therefore, every country taking part in this exchange game is expected to increase its welfare, whether it is rich or poor.[55] In this sense, development may not be a special, independent agenda at all in inter-

52. *See, e.g.*, Jeffrey A. Frankel & David Romer, *Does Trade Cause Growth?*, 89 AM. ECON. REV. 379 (1999) (proving empirically that trade raises income). *Cf.* JAMES M. CYPHER & JAMES L. DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT 105-204 (1997) (introducing theories of development and underdevelopment including classical (Adam Smith, Thomas Malthus, David Ricardo, and Karl Marx), neo-classical (Robert Solow), unbalanced growth, and heterodox theories (dependency analysis) of economic development); GERALD M. MEIER & JAMES E. RAUCH, LEADING ISSUES IN ECONOMIC DEVELOPMENT 213-40 (7th ed. 2000) (highlighting the importance of education and human capital in economic development); *but cf.* DANI RODRIK, U.N. DEV. PROGRAMME, THE GLOBAL GOVERNANCE OF TRADE: AS IF DEVELOPMENT REALLY MATTERED 10 (Oct. 2001) (arguing that not trade but "domestic institutional innovations" contribute to economic development), *available at* http://www.undp.org/mainundp/propoor/docs/pov_globalgovernancetrade_pub.pdf.

53. WTO Agreement pmbl. WTO Agreement Annex 1A incorporates a document labeled GATT 1994, which is essentially GATT 1947, as amended through the Uruguay Round, along with all the ancillary agreements pertaining to GATT 1947, as modified. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 1A, RESULTS OF THE URUGUAY ROUND, *supra* note 1, 33 I.L.M. 1154 (1994) [hereinafter GATT 1994].

54. RICHARD E. CAVES ET AL., WORLD TRADE AND PAYMENTS: AN INTRODUCTION 38-48 (7th ed. 1996) [hereinafter WORLD TRADE AND PAYMENTS].

55. This mutually beneficial effect of trade, though it is derived mostly from an economic standpoint, can also be glimpsed in the early history of GATT, which was characterized by a parity of obligations among contracting parties, regardless of economic development. *See* ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 4 (1987) [hereinafter HUDEC, DEVELOPING COUNTRIES].

national trade; development is, in fact, presumed in trade.[56] In sum, the general proposition that trade connotes economic development seems to be supported not only by intuition but also by theory.

However, the simple, yet appealing, original vision of the global Gesellschaft is in fact non-existent in the real world. A somber reality check soon reveals that the aforementioned free trade proposition is subject to limitations and qualifications which expose the vulnerability and disadvantage of the poor, less-developed trading partners vis-à-vis the rich, fully industrialized ones. These vulnerabilities and disadvantages can be approached and recounted in a variety of ways. First, even economists admit that economically dominant countries may strategically improve their terms of trade at the expense of their smaller trading partners using such mechanisms as "optimal tariffs."[57] On the other hand, under certain circumstances, overconcentrated production of commodities whose world demands are highly inelastic, such as agricultural products, tends to lower real incomes of exporting developing countries through a deterioration of their own terms of trade. For instance, when Brazil decides to increase coffee production in pursuit of the theory of comparative advantage, it may encounter (and precipitate) declining prices of coffee and consequently diminished real income merely because of the vast amount of coffee production in the world market. This rather paradoxical phenomenon, which is called "immiserizing growth,"[58] casts the counterintuitive and frustrating insight that hard work and a good crop do not necessarily bring prosperity.

Secondly, developing countries or least-developed countries (LDCs) are still largely blocked from exporting their products of natural comparative advantage to their trading partners. This state of *unfree* trade, in most cases, originates in domestic politics. In a horizontal sense, regional economic blocs exclusively share preferential and thus discriminatory treatment, which tends to hurt non-member countries, whose economic scale is relatively small and who are consequently most affected by exclusive policies.[59]

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56. This basic position on trade and development has recently been reiterated at the UN's International Conference on Financing for Development held in Monterrey, Mexico in March, 2002 by a number of world leaders, such as the U.S. President George W. Bush (arguing that "the vast majority of financing for development comes not from aid but from trade and domestic capital and foreign investment"), the Iranian Finance Minister Tahmasb Mazaheri (pointing "to trade as 'the most important vehicle for financing of development'"), the World Bank President James Wolfensohn (stressing that all trading nations would eventually "benefit from more open trade"), the IMF Managing Director Horst Koehler (describing "trade as 'the most import avenue for self-help'"), and the WTO Director-General Mike Moore (pointing "out that 'poor countries need to grow their way out of poverty and trade can serve as a key engine of that growth'"). *Mixed Reaction on Trade in Financing for Development Outcome*, 6 BRIDGES WKLY TRADE NEWS DIG., Mar. 26, 2002, *available at* http://www.ictsd.org/weekly/02-03-26/story3.htm.

57. *See* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 22-24 (4th ed. 2002) [hereinafter LEGAL PROBLEMS].

58. WORLD TRADE AND PAYMENTS, *supra* note 54, at 64-67.

59. The creation or enlargement of preferential regional trading blocs among developed countries or between developing and developed countries is likely to worsen the marginalization of the LDCs. In general, those blocs diffuse pre-existing sector-specific protections via the common external trade policies that all members of the blocs adopt. Therefore, this regional expansion of protection impedes not

In a vertical sense, powerful domestic industries in the developed countries often lobby against the importation of competitive products from developing countries that enjoy a comparative advantage in the production of those goods. Under either situation, the comparative advantage of developing countries fails to be realized, eventually dampening their development process.

Third, non-trade factors continue to constrain poor countries, encroaching on any modicum of a developmental base that they manage to establish. For instance, heavy foreign debts borne by most of the LDCs frustrate trade-induced development because a large portion of money earned through trade must be devoted to the service of debt.[60] Furthermore, a number of LDCs, particularly those located in sub-Saharan Africa, regularly suffer from catastrophic events such as civil wars, pandemic diseases, and natural disasters that international trade seems so powerless to cope with.[61]

Critically, however, a new factor has begun to contribute to the increasing developmental gap between rich and poor nations. Under the banner of the welfare state, the governments of the rich countries have been eager to enhance the quality of their social regulations in areas such as human health and the environment, thereby both increasing the number of new regulations and reinforcing pre-existing ones.[62] In addition, unseen hazards combined with new scientific revelations have fueled consumer angst and led to deep regulatory intervention, as in the case of genetically modified (GM) foods.[63] Heightened levels of regulatory protection require sufficient capital, technology, education, and institutions, none of which are available to the necessary extent in poor countries.[64] Only developed, industrialized countries

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only North-South trade, but also South-South trade through serious trade diversion, resulting in a disaster for the LDCs since their economic development depends upon the export of only one or a few products, such as agricultural products or textiles, on which they enjoy comparative advantages vis-à-vis developed countries. Sungjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT'L L.J. 419, 449 (2001).

60. *See infra* subpart IV.B.3 (discussing the insufficiency of market access as a tool for development).

61. *See, e.g.*, Jeffrey Sachs, *Helping the World's Poorest*, ECONOMIST, Aug. 14, 1999, *available at* http://www.cid.harvard.edu/cidinthenews/articles/sf9108.html. Sachs emphasized that too many countries are "stuck in a trap of poverty" from which they will not be able to escape without a true international partnership. Jim Wurst, *Poverty II: Poorest Countries Can Never Escape Without Aid, Sachs Says*, UN WIRE, June 18, 2002, *at* http://www.unwire.org/UNWire/20020618/27090_story.asp; *see also* Jeffrey D. Sachs, *A New Framework for Globalization*, *in* EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 63-77 (Roger B. Porter et al. eds., 2001); *cf.* Richard Blackhurst et al., *Options for Improving Africa's Participation in the WTO*, *in* A PRO-ACTIVE AGENDA, *supra* note 20, at 95-114; David F. Luke, *Trade-Related Capacity Building for Enhanced African Participation in the Global Economy*, *in* HANDBOOK, *supra* note 27, at 509-15 (regarding various options for the integration of Africa into the global economy).

62. *See, e.g.*, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), *Agriculture, Food and Fisheries, available at* http://www.oecd.org/topic/0,2686,en_2649_37401_1_1_1_1_37401,00.html (last visited Feb. 23, 2004).

63. *Cf.* Judson O. Berkey, *The Regulation of Genetically Modified Foods*, ASIL INSIGHTS (Oct. 1999) (regarding diverging regulatory philosophies on biotechnology), *at* http://www.asil.org/insights/insigh37.htm (last visited Feb. 23, 2004).

64. In the same context, Professor John Jackson highlighted the importance of "human institutions" in benefiting from the market economy, citing pre-eminent economists like Ronald Coase and Douglas

enjoy such an infrastructure.[65] To other countries that are incapable of establishing the necessary infrastructure, trading with rich countries while complying with their high regulatory threshold is prohibitive.[66] Therefore, poor countries fail to integrate themselves into the global economy via trade and are pushed toward the edge of the global Gesellschaft.

Against this backdrop, it is fair to say that a "development disparity," not just development, is entrenched in the current global trading system, where a classical economic philosophy on trade and development generates only limited practical significance.[67] For the purpose of this Article, development disparity can be defined as the existence of disproportionate levels of economic development between the rich and the poor trading nations resulting from non-trade, structural reasons such as infrastructure disparity. Although the development disparity has been consistently manifested in the troublesome tension of North versus South, it has recently been more dramatized and complicated due to a stampede of entrants into the WTO, who used to be subject to the centralized economic system but now struggle to overcome chronic poverty and underdevelopment by actively tapping into the global trading system. If left neglected, the development disparity will further marginalize the poor, developing countries, and consequently affect the rich countries in various ways in our highly interdependent world. A cataclysmic global recession may occur due to the collapse of poor countries' economies and the subsequent decline of global purchasing power through a chain effect. Humanitarian disasters would follow, represented by starvation and a flood of refugees. The absence of a resolute approach to development disparity not only creates an international economic system malfunction, but also generates the vast economic injustice that forces many poor nations to remain in their current miserable economic status despite their best efforts. This is the very reason why development disparity should be a serious, independent agenda in the WTO's Gesellschaft.

North. John H. Jackson, *Reflections on the MJIL Special Issue*, 20 MICH. J. INT'L L. 183, 185 (1999); John H. Jackson, *Global Economics and International Economic Law*, 1 J. INT'L ECON. L. 1 (1998), *available at* http://www.jiel.oupjournals.org. *Cf. Implementing Agenda 21: Report of the Secretary-General*, U.N. ESCOR, 2d Sess., para. 192, U.N. Doc. E/CN.17/2002/P.C. 2/7 (2001) [hereinafter Agenda 21 Report].

65. *See* Stiglitz, *supra* note 21, at 440 (observing that "underdevelopment is an inherent reflection of poorly functioning markets"); EDWARD F. BUFFIE, TRADE POLICY IN DEVELOPING COUNTRIES 5 (2001) (questioning an "export-oriented" trade strategy in poor countries where market failures are common).

66. *See* THE WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 3-27 (2002) (highlighting the role of institutions in development); CARLOS A. MAGARIÑOS, MARGINALIZATION VERSUS PROSPERITY: REFLECTIONS ON THE DEVELOPMENT AGENDA 1 (2000) [hereinafter MARGINALIZATION VERSUS PROSPERITY] (observing that "inadequate flows of information, skills and knowledge," constitute a barrier to development), *available at* http://www.unido.org/doc/50023.htmls (last visited Feb. 23, 2004).

67. For a more radical view, see Raj Bhala, *Marxist Origins of the "Anti-Third World" Claim*, 24 FORDHAM INT'L L.J. 132, 133 (2000) (submitting that the "WTO is anti-development, and international trade law helps tilt the playing field on which the great game of trade is played against developing countries").

2. *Development Under the Early Gesellschaft (GATT 1947): Spasmodic Charity*

In the pre-GATT era, colonialism represented the most conspicuous relationship between rich and poor countries.[68] Yet, its pattern varied depending on the parent state and on the location of the respective colonies. According to Robert Hudec, colonies in Asia and Africa were formally linked to their parent countries, such as England and France, forming "*de jure* colonies," while those in the Central and South America were connected to the United States rather loosely, constituting "*de facto*" colonies.[69] In the latter case, no formal trade preferences were found in various bilateral trade agreements between the United States and its de facto colonies that would characterize those agreements as "sovereign-to-sovereign dealings."[70] Following the Second World War and the establishment of the Bretton Woods architecture, the United States' bilateral trade agreements having no general tariff preferences, in particular one with Mexico in 1942, became the GATT archetypes.[71] Yet, other allied countries, such as England and France, were eager to include those preferences in the initial GATT draft not only for the economic well-being of the colonies, but also for their own reconstruction needs.[72] Realistically, it can be argued that the spirit of non-discriminatory, free trade would better serve the economic interests of the United States at its high time of dominance, just as England advocated free trade in its own high time in the nineteenth century.[73] Against this background, "parity of obligation" came to prevail in GATT 1947, and no particular concern for developing countries appeared in the early text save the "token exceptions," such as an infant-industry protection clause in Article XVIII.[74] However, these were seldom invoked.[75]

This parallel stance changed in the fifties, when former colonies rapidly gained independence.[76] Both parent states—in particular, England and France—and former colonies were eager to establish a non-reciprocal, preferential system in GATT 1947, either through tariff preferences or more drastic waivers.[77] Moreover, the idea that developing countries required special treatment began to gather steam within the GATT Secretariat and

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68. HUDEC, DEVELOPING COUNTRIES, *supra* note 55, at 6.
69. *Id.*
70. *Id.*
71. *Id.* at 7.
72. *Id.* at 10.
73. *See* Patrica Clavin, *The Triumph of Regionalism Over Globalism: Patterns of Trade in the Interwar Period, in* REGIONAL TRADE BLOCS, MULTILATERALISM, AND THE GATT: COMPLEMENTARY PATHS TO FREE TRADE 31, 32 (Till Geiger & Dennis Kennedy eds., 1996).
74. *Id.* at 4. The United States viewed this clause as a major concession and refused to adopt any other trade preferential system in the ITO draft. *Id.* at 14.
75. LEGAL PROBLEMS, *supra* note 57, at 1169.
76. BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND 385-86 (2d ed. 2001) [hereinafter THE WTO AND BEYOND]; HUDEC, DEVELOPING COUNTRIES, *supra* note 55, at 23-24.
77. THE WTO AND BEYOND, *supra* note 76, at 386.

contracting parties.[78] Thanks to this changed atmosphere, contracting parties added Section B to Article XVIII in order to allow developing countries to deviate from their GATT obligation for the balance-of-payment (BOP) reason.[79] Although textually vague, Article XVIII was frequently invoked and interpreted in a very lax fashion[80]—undermining the legal integrity of the early GATT.

Advocates for international development gained more support when the United Nations Conference on Trade and Development (UNCTAD) was launched in 1964. UNCTAD eventually pushed the GATT contracting parties to accept the notion of "non-reciprocity," which diverged sharply from the premise of the tariff reduction mechanism under GATT, and to codify this idea by adding Part IV on Trade and Development to the GATT text.[81] Nonetheless, the real impact of Part IV has been questioned because of its non-binding, hortatory nature.[82] Another watershed in the history of development was the U.S. response to a call from UNCTAD to accept the Generalized System of Preferences (GSPs),[83] which was nothing more than a non-reciprocal, unilateral mechanism of tariff preferences.[84] Subsequent institutional efforts reinforced the GSP by acquiring a GATT waiver in 1971, and

78. LEGAL PROBLEMS, *supra* note 57, at 1168.

79. THE WTO AND BEYOND, supra note 76, at 386.

80. *Id.*

81. *Id.* at 387-88; *see also* Gerard Curzon & Victoria Curzon, *GATT: Traders' Club*, *in* ROBERT W. COX & HAROLD K. JACOBSON, THE ANATOMY OF INFLUENCE 298, 309 (1973); José E. Alvarez, *The WTO as Linkage Machine*, 96 AM. J. INT'L L. 146, 149 & n.17 (2002).

82. LEGAL PROBLEMS, *supra* note 57, at 1171; MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 371 (2d ed. 1999) [hereinafter THE REGULATION OF INTERNATIONAL TRADE]. In a very rare case in the seventies, the GATT panel ruled that the EC's failure to join the developing countries in the International Sugar Agreement to stabilize world sugar prices violated Part IV, in particular Article XXXVIII:1. However, the EC rejected this specific conclusion thanks to the veto power under the old GATT dispute settlement mechanism. European Communities, *Refunds on Exports of Sugar*, L/5011; GATT B.I.S.D. 27S/69-98 (Nov. 10, 1980), *available at* http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm. *See also* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 474-76 (1993) [hereinafter HUDEC, ENFORCING INTERNATIONAL TRADE LAW].

83. Under the Generalized System of Preferences, developed countries offer non-reciprocal preferential treatment, such as low or zero duties on imports to products originating in developing countries, but developed countries (preference-giving countries) *unilaterally* determine the recipient (which countries) as well as the subject (which products) of the GSP schemes. *See generally* WTO, *Development: Main Legal Provisions*, http://www.wto.org/english/tratop_e/devel_e/d2legl_e.htm (last visited Feb. 23, 2004). For instance, The U.S. GSP provides preferential duty-free entry for more than 4,650 products from approximately 140 designated beneficiary countries and territories. U.S. Trade Representative, *A Guide to the U.S. Generalized System of Preferences*, *at* http://www.ustr.gov/assets/Trade_Development/Preference_Programs/GSP/asset_upload_file333_5430.pdf (last visited Feb. 23, 2004). The U.S. GSP program was instituted on January 1, 1976, and authorized under Title V of the Trade Act of 1974, 19 U.S.C. 2461 et seq. (2000), for a ten-year period, and the authorization has been renewed four times. *Id.* (July 4, 1993, by the Trade and Tariff Act of 1984; July 31, 1995, by the Uruguay Round Agreement Act; May 31, 1997, by the Small Business Act of 1996; and June 30, 1998, by the Budget and Reconciliation Act of 1997).

84. *Id.*; THE REGULATION OF INTERNATIONAL TRADE, *supra* note 82, at 374-75. In contrast with the GSP, the Global System of Trade Preferences (GSTP) was invented during the early seventies, under the auspices of UNCTAD, as a system of tariff preferences negotiated and applied only among developing countries. *Id.* at 378. The GSTP was initiated by UNCTAD's aspiration to promote South-South trade amid developed countries' domination of North-South trade. *Id.*

the Enabling Clause made the waiver permanent following the Tokyo Round in 1979.[85] In general, the Enabling Clause[86] codified earlier principles and practices of development-related exemptions, such as the BOP exception under GATT Article XVIII.[87] This "*de facto* amendment"[88] of the obligations under Article I established a general legal reference for non-reciprocal or special and differential treatment under GATT 1947. This series of developmental initiatives may be understood in a much broader political dimension—the context of the Cold War. Considering that GATT 1947 was operated and led by the anti-Communist (Western) bloc, it would not be hard to imagine that those initiatives were, in certain respects, motivated by foreign affairs considerations against the Soviet (Eastern) bloc.[89]

It is still doubtful that the commitments and promises described thus far have helped developing countries to improve their economic situation, to escape from their chronic poverty, and to catch up with developed countries. The most problematic feature of preferential developmental aid under GATT 1947 (such as the GSP) can be found in its "unilateral, spasmodic" nature.[90] Development aid is essentially subject to the discretion of donor countries, sometimes even under "paternalistic overtones."[91] Recipient countries not only fail to raise their own concerns and demands but also are forced to accept various conditions—often the adoption of certain labor standards or cooperation with drug control—attached to such aid, despite the fact that those conditions are often irrelevant to trade matters.[92] Under these circumstances, the political whim of donor countries, driven by the political mood of domestic constituencies, tends to hamper the efficacy of preferential development aid programs, as the total volume of these pro-

85. THE WTO AND BEYOND, *supra* note 76, at 387.

86. WTO Decision on Differential and More Favourable Treatment, *Reciprocity and Fuller Participation of Developing Countries*, L/4903 (Nov. 28, 1979), http://www.jus.uio.no/lm/wto.gatt.developing.countries.enabling.clause.1979/landscape.

87. THE WTO AND BEYOND, *supra* note 76, at 388.

88. HUDEC, DEVELOPING COUNTRIES, *supra* note 55, at 85.

89. *Id. See generally* MICHEL M. KOSTECKI, EAST-WEST TRADE AND THE GATT SYSTEM (1979).

90. In fact, GSP benefits were limited to a small number of elite developing countries. *See* Frieder Roessler, *Domestic Policy Objectives and the Multilateral Trade Order: Lessons from the Past*, 19 U. PA. J. INT'L ECON. L. 513, 519-20 (1998).

91. MICHEL KOSTECKI, TECHNICAL ASSISTANCE SERVICES IN TRADE-POLICY: A CONTRIBUTION TO THE DISCUSSION ON CAPACITY-BUILDING IN THE WTO 6 (ICTSD Resource Paper No. 2, Nov. 2001) [hereinafter TECHNICAL ASSISTANCE SERVICES], *at* http://www.ictsd.org/pubs/ictsd_series/resource_papers/TApaper5-12-01.pdf.

92. *See* Roessler, *supra* note 90, at 520; LEGAL PROBLEMS, *supra* note 57, at 1192-93; Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT'L L.J. 529, 569-76 (2000) (regarding a similar condition imposed on developing countries when the IMF grants them structural adjustment loans). *Cf.* Charlotte Denny, *US Ties New Aid Package to Reform Targets*, GUARDIAN UNLIMITED, Mar. 23, 2002 (reporting President Bush's new "compact for development" linking aid to the poorest countries to the country's domestic reforms such as market opening and anti-corruption activities), *available at* http://www.guardian.co.uk/debt/Story/0,2763,672648,00.html. Recently, the WTO panel ruled against such conditioning. *See* European Communities, *Conditions for the Granting of Tariff Preferences*, WT/DS246/R (Dec. 1, 2003), *available at* 2003 WL 22873192; *see also* ÇAGLAR ÖZDEN & ERIC REINHARDT, THE PERVERSITY OF PREFERENCES: GSP AND DEVELOPING COUNTRY TRADE POLICIES 1976-2000 (World Bank, Working Paper No. 2955, 2003), *available at* http://econ.worldbank.org/files/23188_wps2955.pdf.

grams decreases with the introduction of elements of irregularity.[93] More significantly, the unilateral, temporary nature of the abovementioned preferences, or "special and different treatment," tended to induce a short-term economic view on the part of developing countries. Both governments and the private sector demonstrate rent-seeking behavior based on short-term preferences, rather than pursuing longer-term structural reforms based on the painful, yet rewarding, process of efficient resource allocation under a classic model of international trade.[94]

Nonetheless, these adverse aspects of development assistance did not justify other developmental strategies or initiatives that departed from the original prescriptions of GATT 1947. For instance, "import-substitution policies,"[95] which were applied experimentally in the Latin America economies, left behind enormous inefficiencies caused by high cost in local production as well as the nurturing of local monopolies, and eventually faded away in the sixties.[96] Similarly, the New International Economic Order (NIEO),[97] which reacted to "interventionist trade policies" and attempted to move trade forums from GATT to the United Nations, was a failure. This resulted not only because it was built on "bad economics and naïve politics" despite "well-intentioned legal theorizing,"[98] but also be-

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93. The IMF expressed the same view on the shortcomings of preferential aid programs. In an Issues Brief, it stated:

> For a variety of reasons, preferential access schemes for poorer countries have not proven very effective at increasing market access for these countries. Such schemes often exclude, or provide less generous benefits for, the highly protected products of most interest to exporters in the poorest countries. They are often complex, nontransparent, and subject to various exemptions and conditions (including noneconomic ones) that limit benefits or terminate them once significant market access is achieved.

Global Trade Liberalization, *supra* note 17, at III; *see also* WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2004: REALIZING THE DEVELOPMENT PROMISE OF THE DOHA AGENDA 215 (2003) (highlighting that "[p]references have not increased the share of the least developed countries in imports into the European Union and the United States"), *available at* http://www.worldbank.org/prospects/gep2004/full.pdf (last visited Feb. 23, 2004).

94. *See* J. Michael Finger & L. Alan Winters, *What Can the WTO Do for Developing Countries?*, *in* THE WTO AS AN INTERNATIONAL ORGANIZATION 365, 385 (Anne O. Krueger ed., 1998) [hereinafter INTERNATIONAL ORGANIZATION]. *See also* Jagdish N. Bhagwati, *The Poor's Best Hope: Trading for Development*, ECONOMIST, June 22, 2002 (highlighting the "perils of preferences" and urging the poor nations to return to the basic tenet of free trade on a "non-preferential" basis), *available at* http://www.cfr.org/pub4631/jagdish_n_bhagwati/the_poors_best_hope__trading_for_development.php.

95. "Import substitution" refers to a strategy for economic "development from within" that emphasizes domestic production of basic consumer goods as a substitute for importation of those goods. JAMES M. CYPHER & JAMES L. DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT 174-75 (1997).

96. THE WTO AND BEYOND, *supra* note 76, at 408. Although the import substitution strategy failed to bring economic growth to developing countries, its rationale of "self-sufficiency" might be understandable considering the developing countries' bitter experiences of exploitation in the colonial period. *Id.* at 386. In the face of the demise of the import substitution policies, this rationale came to be reincarnated in the form of a "dependency theory" that attributes underdevelopment to "complicity between the local power, elites and the forces of developed-country capitalism." THE REGULATION OF INTERNATIONAL TRADE, *supra* note 82, at 382.

97. *See generally* LARS ANELL & BIRGITTA NYGREN, THE DEVELOPING COUNTRIES AND THE WORLD ECONOMIC ORDER (1980) (regarding a detailed background as well as a comprehensive analysis of the NIEO).

98. Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, *in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?, 95,

cause most developed countries withdrew their support when it became apparent that the NIEO privileged sovereignty over international law, particularly in the area of expropriation.[99]

3. *Reinventing the Gesellschaft?: Uruguay Round and the Nascent "Capacity-Building"*

By the late eighties, the contours of the global Gesellschaft had been vastly transformed. An intensified move towards global market integration led to much freer movement of goods, services, and capital. The fall of the Berlin Wall and the end of the Cold War offered a supportive context for a higher level of material globalization, and developing countries became eager to reap the benefits of participating in the global marketplace.[100] Moreover, they had already learned that inward-looking developmental strategies, such as import-substitution policies, fail to deliver solid economic growth.[101] Developed countries also needed the support from developing countries to launch a new trade round that would address both old and new issues. The result was a successful, new North-South bargain concluded in the Uruguay Round, which led to the establishment of the WTO.[102] As an essential part of this bargain, developing countries agreed to the inclusion of new sectors under the WTO system, such as services and intellectual property rights.[103] This proactive, participatory approach on the part of developing countries in the new global trade order seemed to match an ambitious *telos* of the WTO, epitomized by an integrated, more viable and durable multilateral trading system.[104]

With this transformation in the relationship between developed and developing countries, the nature of development assistance also began to change. Apart from the past donor-recipient relationship,[105] the new dynamic between developed and developing countries has elevated their relationship to the level of a partnership,[106] through which the parties exercise

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110 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

99. LEGAL PROBLEMS, *supra* note 57, at 1194-96.

100. *See* Alejandro Jara, *Bargaining Strategies of Developing Countries in the Uruguay Round*, *in* THE DEVELOPING COUNTRIES IN WORLD TRADE, *supra* note 18, at 27.

101. THE WTO AND BEYOND, *supra* note 76, at 391-92.

102. LEGAL PROBLEMS, *supra* note 57, at 1183.

103. *Id.*

104. *See* WTO Agreement, *supra* note 1, pmbl.

105. Press Release, WTO, Speech by the Director General Mike Moore, National Conference on the Millennium Round, Rome (Nov. 11, 1999) [hereinafter Rome Speech], *available at* http://www.wto.org/english/news_e/pres99_e/pr146_e.htm.

106. "Development, in the knowledge era, must mean partnerships based on sustainable systems of innovation in both developed and developing nations for equity to be achieved." *Globalization: Neither a Devil Nor a Panacea*, OECD OBSERVER, June 27, 2000 (citing the statement by Baldwin Sipho Ngubane, South African Minster for Art, Culture, Science and Technology), *available at* http://www.oecdobserver.org/news/fullstory/php/aid/288. In the same context, J.M. Migai Akech detected the current shift in the U.S. development assistance policy towards Sub-Saharan Africa from aid to trade, which can be dubbed a "neoclassical paradigm" in that this shift is based on the idea of creating a "unified global economy" through further trade liberalization, in contrast with capitulations, which

collective efforts in the pursuit of the aforementioned *telos*. Under these circumstances, the focus of development assistance shifted from a short-term, unilateral ground to a long-term, collective ground.[107] Critically, development assistance came to emphasize the "capacity-building" of developing countries from their own standpoint, rather than from that of their donors.[108] Capacity-building requires an organized set of resources from multiple sources[109] and presupposes a well-surveyed "needs assessment,"[110] to produce "tailored," "demand-driven,"[111] or "beneficiaries-oriented"[112] assistance packages. According to Joseph Stiglitz, the degree of sensitivity to the special needs of developing countries tends to determine the fairness of trade relations between developed and developing countries.[113]

In various new side agreements under the WTO system, capacity-building programs of this kind are widely apparent. This reflects the realization that without such assistance developing countries would never be able to "implement" new obligations flowing from those agreements,[114] such as the Agreement on Sanitary and Phytosanitary Measures (SPS),[115] the

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tend to impose the Western policies and rules on non-Western developing countries. J.M. Migai Akech, *The African Growth and Opportunity Act: Implications for Kenya's Trade and Development*, 33 N.Y.U. J. INT'L L. & POL. 651, 651-53 (2001).

107. TECHNICAL ASSISTANCE SERVICES, *supra* note 91, at 6.

108. Press Release, WTO, General Council Special Session on Implementation: 22 June 2000 Organization of Work and Indicative Schedule of Meetings, *available at* www.wto.org/english/news_e/pres00_e/pr184_e.htm; Press Release, WTO, Officials Examine How to Analyze Risk for Food Safety Measures (June 20, 2000), *available at* http://www.wto.org/english/news_e/pres00_e/pr183_e.htm; News Items, WTO, WTO Highlights January–August 2000 [hereinafter WTO Highlights January–August 2000], *available at* http://www.wto.org/english/news_e/news00_e/bknote_e.htm (last visited on Feb. 23, 2004); APEC, Statement of Chair, Meeting of APEC Ministers Responsible for Trade (Darwin, Australia, June 6-7, 2000), *available at* http://www.apecsec.org.sg/content/apec/ministerial_statements/sectoral_ministerial/trade/2000_trade.html (last visited Feb. 23, 2004). In a broad sense, this increasing attention to each developing country's capacity derives from the early failure of developmental prescription, which developed countries touted in the eighties. Based on the so-called "Washington consensus," policy recommendations from developed to developing countries chiefly focused on stringent fiscal and monetary policies without due consideration of each developing country's economic structure or "different response capacity," producing very uneven results and thus rendering the "first-generation" reforms unsatisfactory. MARGINALIZATION VERSUS PROSPERITY, *supra* note 66, at 4-6. Against this background, the "second-generation" reforms in the nineties came to highlight the "right set of institutions." *Id.* at 6-7.

109. In this sense, the OECD views capacity building as synonymous with "networks across institutions and individuals, often across borders, to achieve common objectives." OECD, *Trade and Development in the New Global Context—The Capacity Dimension* 4 (OECD Policy Brief, Sept. 2001) [hereinafter OECD Policy Brief], *available at* http://www.oecd.org/document/20/0,2340,en_2649_201185_1899092_119696_1_1_1,00.html (last visited Feb. 23, 2004).

110. TECHNICAL ASSISTANCE SERVICES, *supra* note 91, at 15-16.

111. *Id.* at 15.

112. *Id.* at 6.

113. Stiglitz, *supra* note 21, at 450.

114. *See* Philippe Cullet, *Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations*, 10 EUR. J. INT'L L. 549, 552 (1999) (defining "technology transfer" or "aid mechanisms" to foster the implementation of treaties by less developed countries as the application of "differential treatment").

115. Agreement on Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 1A, RESULTS OF THE URUGUAY ROUND [hereinafter SPS Agreement], *available at* http://wto.org/english/doc_e/legal_e/15-sps.pdf (last visited Oct. 18, 2004).

Agreement on Technical Barriers to Trade (TBT), [116] and the General Agreement on Trade in Services (GATS).[117] For instance, the SPS Agreement offers certain patterns of technical assistance, such as "research and infrastructure," "establishment of national regulatory bodies," and "technical expertise, training and equipment" to assist developing countries in building the capacity to implement the Agreement.[118] Similar assistance programs are also found in the TBT Agreement and the GATS.[119] These new provisions triggered a four-fold increase in the actual demand for technical assistance by developing countries during the first five years after the launch of the WTO.[120] This phenomenon underscores the commitment to, and struggle with, the implementation of new and burdensome obligations on the part of developing countries. Markedly, the emphasis on capacity building has also been found outside of the WTO realm. One example is the recent regulatory rule-making treaty on "bio-safety."[121] Along these lines, a

116. Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 1A, RESULTS OF THE URUGUAY ROUND [hereinafter TBT Agreement], *available at* http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf (last visited Oct. 18, 2004).

117. General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 1B, RESULTS OF THE URUGUAY ROUND, 33. I.L.M. 1167 (1994) [hereinafter GATS].

118. SPS Agreement, *supra* note 115, art. 9.

119. TBT Agreement, *supra* note 116, art. 11; *see also* WTO News: 2000 News Items, *Developing Countries Call for More Help in the Area of Technical Barriers to Trade* (July 20, 2000), *at* www.wto.org/english/news_e/news00_e/wkpres_e.htm; WTO News: 2000 News Items, *Workshop on Technical Assistance and Special and Differential Treatment in the Context of the TBT Agreement* (July 20, 2000), *at* www.wto.org/english/news_e/news00_e/chairs_e.htm. Regarding the GATS, most developing countries want specific mechanisms for "effective implementation" or even "operationalisation" of Article IV. *WTO's Draft Guidelines for Services Talks Strive for Inclusiveness*, 3 BRIDGES WKLY. TRADE NEWS DIG. 5 (Jan. 30, 2001), *available at* http://www.ictsd.org/html/weekly/story5.30-01-01.htm.

120. *See* Challenges and Opportunities, *supra* note 23.

121. *See* Cartagena Protocol on Biosafety, Convention on Biological Diversity, arts. 20, 22, Jan. 29, 2000, *available at* http://www.biodiv.org/biosafety/protocol.asp.

> Article 20, paragraph 1 (A Biosafety Clearing-House)
>
> A Biosafety Clearing-House is hereby established as part of the clearing-house mechanism under Article 18, paragraph 3, of the Convention, in order to:
>
> (a) Facilitate the exchange of scientific, technical, environmental and legal information on, and experience with, living modified organisms; and
>
> (b) *Assist* Parties to *implement* the Protocol, taking into account the special needs of developing country Parties, in particular the least developed and small island developing States among them, and countries with economies in transition as well as countries that are centres of origin and centres of genetic diversity.
>
> Article 22 (Capacity Building)
>
> 1. The Parties shall cooperate in the development and/or strengthening of human resources and institutional capacities in biosafety, including biotechnology to the extent that it is required for biosafety, for the purpose of the effective *implementation* of this Protocol, in developing country Parties, in particular the least developed and small island developing States among them, and in Parties with economies in transition, including through existing global, regional, subregional and national institutions and organizations and, as appropriate, through facilitating private sector involvement.
>
> 2. For the purposes of implementing paragraph 1 above, in relation to cooperation, the needs of developing country Parties, in particular the least developed and small island developing States among them, for *financial resources* and access to and *transfer of technology* and know-how in accordance with the relevant provisions of the Convention, shall be taken fully into account for capacity-building in biosafety. Cooperation in capacity-building shall, subject to the different situation, capabilities and requirements of each Party, include scientific and technical training in the proper and safe management of biotechnology, and in the use of

remarkable aspect of the Cartagena Protocol on Biosafety is its "country-specificity" approach. Among other things, the Protocol emphasizes the "special needs" of developing countries,[122] and therefore seeks to "identify" these needs before it launches any assistance program.[123]

Another critical aspect of development assistance is the maximization of its effectiveness through the integration of discrete activities conducted by different international organizations.[124] Collaboration among the WTO, the International Monetary Fund (IMF), the World Bank, and other UN agencies is regarded as crucial not only because it ensures the concentration of scant resources, but also because it provides developing countries with more coherent and focused assistance for capacity-building projects.[125] For instance, the World Bank assists developing countries to build human and infrastructural capacity, while the WTO helps them to implement their legal obligations.[126] To execute this form of inter-institutional collaboration, representatives of the six core agencies (IMF, International Trade Center, UNCTAD, United Nations Development Program, World Bank, and WTO) formed the "Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries (IF),"[127] pledging to make the IF an effective mechanism for capacity-building.[128]

In conclusion, the global Gesellschaft has begun to initiate development programs centering on capacity-building as a result of a grand bargain between the rich and the poor in the Uruguay Round. Although the direction of those programs is correct, mere initiation of programs never delivers ac-

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risk assessment and risk management for biosafety, and the enhancement of technological and institutional capacities in biosafety. The needs of Parties with economies in transition shall also be taken fully into account for such capacity-building in biosafety.

Id. (emphasis added).

122. *Id.* at art. 20.

123. *Decision V/1*, Annex A (3), Convention on Biological Diversity, UNEP/CBD/BS/TE-BCH/1/INF/3 (Aug. 4, 2000), *available at* http://www.biodiv.org/doc/meetings/bch/tebch-01/information/tebch-01-inf-03-en.pdf.

124. The WTO is increasingly underbudgeted and understaffed in technical cooperation activities. WTO Committee on Trade and Development, 27th Sess., *WTO Programme for Technical Cooperation*, WT/COMTD/W/64 (Oct. 15, 1999).

125. *See generally* WTO, *Coherence: Closer Cooperation between Multilateral Institutions*, *at* www.wto.org/english/thewto_e/coher_e/coher_e.htm (last visited Feb. 23, 2004); *WTO Highlights January—August 2000*, *supra* note 108.

126. To help developing countries to fulfill their legal obligations through implementation, legal training and advice is critical. *See* Press Release, WTO, 14th WTO Trade Policy Course Comes to an End (July 14, 2000), *at* www.wto.org/english/news_e/pres00_e/pr187_e.htm.

127. *See* Integrated Framework, http://www.integratedframework.org/ (last visited Feb. 23, 2004).

128. WTO News: 2000 News Items, *Joint Statement on the Mandated Review of the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries (IF) by the Six Core Agencies (IMF, ITC, UNCTAD, UNDP, World Bank and WTO)* (July 6, 2000), *at* http:// www.wto.org/english/news_e/news00_e/ifstat_e.htm. This *integrated* pattern of efforts to help developing countries to build capacity through technical assistance to implement trade-related regulatory treaties, such as the TBT and the SPS, can also be found in a recent decision of the WTO General Council. The General Council Decision on "Implementation-Related Issues and Concerns" urged international standard-setting organizations to ensure participation of developing countries throughout *all* phases of development. *See* WTO General Council, *Decision on Implementation-Related Issues and Concerns*, WT/L/384 (Dec. 19, 2000).

tual results. As discussed below, these attempts have thus far borne little fruit for a variety of reasons that derive mainly from the Gesellschaftian structure of the current global trading system.

4. *Reaffirming the Gesellschaftian Dilemma: The Futility of the Doha Development Agenda*

The fourth WTO Ministerial Conference in Doha, Qatar was haunted by two grave events: the debacle of the third Ministerial Conference in Seattle and the September 11 terrorist attacks in New York and Washington. These two events pressured delegates from both rich and poor countries to strike a deal to send the global village a strong signal. If the Doha Conference had collapsed like the previous Seattle talks, it would have been a fatal blow to the credibility of the global trading system. International commerce would have been chilled and damaged, particularly in view of the U.S. recession, which was compounded by the September 11th attacks. This desperate atmosphere contributed to the conclusion of a deal between developed and developing countries, despite the failure of the Seattle meeting that left a seemingly unbridgeable chasm between Southern and Northern agendas.[129] In preparation for the Doha Conference, developed countries had revealed their strong interests in new issues, such as investment and competition policy. Developing countries, on the other hand, remained fiercely opposed to these ideas. They emphasized the importance of *old* issues, such as agriculture and textiles, in addition to other implementation-related challenges.[130] This chasm was eventually bridged simply to save the meeting, which inevitably rendered the final Ministerial Declaration more rhetorical than substantial.

Markedly, the Doha Conference was labeled a "development round." Even before the Doha Conference, there existed a wide consensus in the international society that any new trade initiative had to take into account development issues, ranging from poverty eradication to secured access to essential medicines. Not only the UN Secretary-General, but also the World Bank President and the IMF Managing Director expressly advocated the launch of a development round in Doha.[131] In this respect, the Doha Minis-

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129. *See Qatar Meeting to Take Place Despite Security Concerns*, UN WIRE, Oct. 23, 2001, *at* http://www.unwire.org/UNWire/20011023/20084_story.asp; *Talks Extended; EU Withdraws Objections, India May Follow*, UN WIRE, Nov. 14, 2001, *at* http://www.unwire.org/UNWire/20011114/21720_story.asp.

130. *Doha Ministerial: Six Key Issues in Search of a Solution*, 1 BRIDGES DAILY UPDATE 1, Nov. 9, 2001, *available at* http://www.ictsd.org/ministerial/doha/wto_daily/englishissue1.htm.

131. *Annan Calls for "Development Round" of Trade Talks*, UN WIRE, Sept.19, 2000, *at* http://www.unwire.org/UNWire/20000919/10846_story.asp. World Bank President James Wolfensohn also warned that "global poverty and the resulting social unrest threatens to destabilize developed countries" and that "it is in their interest to bring about poverty alleviation in the developing world because we are one world and, unless we get stability and growth in the developing world, we are not going to have a peaceful world." *Wolfensohn Promotes Equitable Growth*, UN WIRE, Sept. 22, 2000, *at* http://www.unwire.org/UNWire/20000922/10924_story.asp; *cf.* Frederick M. Abbott, *The Enduring Enigma of TRIPs: A Challenge for the World Economic System*, 1 J. INT'L ECON. L. 497 (1998) (arguing that the developed

terial Declaration seems ambitious and promising. The rhetoric drew attention from the outset through language like "well targeted, substantially financed technical assistance and capacity-building programmes."[132] Straightforward usage of terms, such as "particular vulnerability" and "marginalization," reflects the realization by the delegates of the seriousness of developmental concerns.[133] Moreover, no new issue, such as investment and competition policy, failed to be accompanied by some commitment to technical assistance.[134] Nonetheless, it would be too early to celebrate the Doha Declaration. Closer inspection reveals that the Declaration is rife with verbal commitments but lacks detailed and concrete action plans or programs for development. No paragraph speaks of how to *fund* the ambitious technical assistance project. Furthermore, its legal nature as a "work program" is still controversial, making it implausible to argue that it is formally binding. In sum, it would be fair to say that the Doha Declaration amounts to more of a blueprint for future development assistance than to an enforceable legal document. It is unimaginable that the WTO dispute settlement mechanism would ever be employed to enforce the work program under the Doha Declaration.

Frustratingly, current developments in the implementation of the Doha round seem only to confirm this pessimistic view. The WTO Director General, Supachai Panitchpakdi, deplored disappointing trade figures for 2001 and early 2002,[135] as well as the failure to agree on the urgent issue of access by the poor countries to essential medicines.[136] Meanwhile, the new U.S. farm bill introducing $180 billion in subsidies over the next decade, and the EU's failure to reform its Common Agricultural Policy (CAP) initiated by a Franco-German collusion were "making a mockery of the idea that the Doha round was to be a 'development round.'"[137]

The fifth WTO Ministerial Conference in Cancún, Mexico in September 2003 was doomed by these gloomy post-Doha developments. The Cancún conference collapsed amid an apparent lack of political will toward development. Many of the developed countries anticipated local elections. Addi-

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countries' emphasis on the *static* protection of intellectual property rights is misplaced and that this "emphasis on maintaining technological advantage is a 'beggar thy neighbor' approach" incompatible with an integrating world economy).

132. WTO, *Ministerial Declaration: The Fourth WTO Ministerial Meeting (Doha, Qatar)*, WT/MIN(01)/DEC/1, para. 2 (adopted Nov. 14, 2001) [hereinafter Doha Declaration]. *See also id.* at paras. 38-41.

133. *Id.* at para. 3. *But cf.* Philip C. Aka, *Africa in the New World Order: The Trouble with the Notion of African Marginalization*, 9 TUL. J. INT'L & COMP. L. 187 (2001) (arguing that the concept of marginalization is troubling because it "depicts Africa as sui generis, when most of the problems Africans face are global features of underdevelopment common to the developing world as a whole").

134. Doha Declaration, *supra* note 132, at paras. 20-21, 23-24.

135. *WTO Says Slowdown Underscores Need for Progress on Doha*, UN WIRE, Oct. 11, 2002, *at* http://www.unwire.org/UNWire/20021011/29596_story.asp.

136. Press Release, WTO, Supachai Disappointed over Governments' Failure to Agree on Health and Development Issues (Dec. 20, 2002), *at* http://www.wto.org/english/news_e/pres02_e/pr329_e.htm.

137. Finance and Economics: Trading Insults; The Zoellick Plan, ECONOMIST, Nov. 30, 2002, at 81; see also Leaders: Coming Unstuck; World Trade, ECONOMIST, Nov. 2, 2002, at 14.

tionally, an alliance of unprecedented intransigence existed among the most influential developing countries. Most of all, developing countries demanded that agricultural subsidies be scrapped so that they could earn hard currencies from the export of their agricultural products—the only way for many of them to escape poverty. Yet, developed countries countered this demand with a demand of their own—the incorporation of an investment agenda into the WTO—despite the fact that the establishment of such a basic tenet of free trade should not require a quid pro quo. The several days of negotiation were simply too short a period of time to bridge their divergent stances. Hence, the call of the Doha Development Agenda was left unanswered and the global Gesellschaft remains flawed.

III. SCRUTINIZING THE FLAWED ENTERPRISE OF GLOBAL GESELLSCHAFT: WHY AND HOW IT FAILED

A. The Main Failure: Persistent Protectionism

Although the origin of the global Gesellschaft (GATT 1947), is found in the painful historical lesson of the global economic balkanization that eventually contributed to World War II,[138] old habits die hard. Political realities have demonstrated recidivistic patterns of protectionism. Accordingly, the global Gesellschaft operates in a schizophrenic manner where the official axiom of the elimination of discriminatory treatment in international commerce coexists with an anathematic protectionist phenomenon. It seems that GATT's proverbial Odysseus tied his hands loosely enough to steer his course toward the Sirens of protectionism.

Indeed, the very architecture of the global Gesellschaft is defenseless to mercantilism because trade negotiations are premised on the principle of reciprocity or quid pro quo. These negotiations produce a reciprocal exchange of concessions, based on a general assumption that exportation is good and importation is bad from the standpoint of creating national wealth.[139] Simply put, the extent of market access to one country tends to depend on that to the other. This reciprocity certainly goes against an underlying theoretical proposition of free trade mandating even unilateral, voluntary trade liberalization for the liberalizing country's own benefit.[140] Understandably, yet still problematically, such a mantra does not appeal to politicians who usually respond, and often pander, to their own domestic constituencies under short-term election cycles.[141] Frustratingly, even some

138. Catastrophically, major economies in the inter-war period responded to the global depression by a mutually destructive spiral of protectionism. GLOBALIZATION, GROWTH, AND POVERTY, *supra* note 16, at 26-27. The U.S. opened the salvo by passing the notorious Smoot-Hawley Act in 1930, which caused a chain reaction of retaliation abroad. *Id.* at 27; *see also* GREIDER, *supra* note 9, at 43.

139. HUDEC, DEVELOPING COUNTRIES, *supra* note 55, at 17.

140. *See* JAGDISH BHAGWATI, PROTECTIONISM 24-33 (1988) (discussing the "Intellectual Case for Unilateral Free Trade").

141. *See* G. Edward Schuh, *Developing Country Interests in WTO Agricultural Policy*, *in* POLITICAL

intellectuals defend this distorted version of trade, which Paul Krugman aptly termed "pop internationalism."[142]

This reciprocal approach is particularly painful to poor countries who cannot bargain with rich countries on equal footing. For example, developed countries refuse to bargain over certain products that are being produced by developing countries under a comparative advantage, but which developed countries are nonetheless eager to protect for political reasons. These products include textiles and clothing,[143] agricultural products,[144] and other commodities produced through labor-intensive manufacturing processes.[145] As a result, the tariffs on certain basic products in developed countries, despite several rounds of tariff reduction, are still higher—greater than fifteen percent—than on manufactured goods. This phenomenon is defined as a "tariff peak."[146] In the case of agricultural products, the tariff peak is so severe that the average tariff for agricultural protection in developed countries is almost nine times higher than for manufacturing.[147] In addition, tariff

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ECONOMY, *supra* note 44, at 446-47 (observing that protection breeds more protection because the benefits of protection are "soon capitalized into the structure of costs and thus seem to disappear and in turn to give rise to more pleas for additional protectionism").

142. *See generally* PAUL KRUGMAN, POP INTERNATIONALISM (1996). Krugman trenchantly exposed several common misleading clichés of pop internationalism and illuminated why they were wrong. Paul R. Krugman, What Do Undergrads Need To Know About Trade?, Address Before the American Economic Association (Jan. 5-7, 1993), *in* AM. ECON. REV., May 1993, at 23-26.

143. *Cf.* Michael Kitchen, *Meetings Focus on Reform, Millennium Goals*, UN WIRE, Sept. 30, 2002 [hereinafter UN WIRE (Stern)] (citing World Bank Chief Economist Nicholas Stern who argued that "for every textile job saved in an industrialized country through the use of tariff barriers, 35 textile jobs are lost in low-income nations"), *at* http://www.unwire.org/UNWire/20020930/29272_story.asp.

144. UNCTAD TDR 2002, *supra* note 17, at 35.

While tariffs on many traditional primary commodities and agricultural raw materials are either zero or minimal in developed country markets, a number of "sensitive" products such as sugar, cocoa, rice and tobacco continue to face high barriers, and tariff escalation impedes diversification efforts. Subsidies to farmers in the member countries of the Organisation for Economic Co-operation and Development (OECD) further limit export opportunities to developing country producers.

Id.; *see also* Kym Anderson, *Bringing Discipline to Agricultural Policy Via the WTO*, *in* A PRO-ACTIVE AGENDA, *supra* note 20, at 26-28.

145. Developing countries resented the developed countries' encroachment into the developing countries' comparative advantage. In one display of this frustration, Uruguay sued 15 developed countries before a GATT panel in the early sixties for their protectionist trade restrictions, such as the EC Common Agricultural Policy (CAP). Though the panel refused to rule on some sensitive legal issues, it did recommend that all violations admitted or self-confessed by the defendants be settled or removed by March 1, 1963. Report of the Panel on Uruguayan Recourse to Article XXIII, Nov. 15, 1962, GATT B.I.S.D. 11S/95 (1963). *See also* HUDEC, ENFORCING INTERNATIONAL TRADE LAW, *supra* note 82, at 445-47.

146. WTO, *Understanding the WTO: Developing Countries*, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm (last visited Feb. 23, 2004); *Global Trade Liberalization*, *supra* note 17, at III. For instance, the U.S. has tariff peaks on about three hundred individual products, while its average tariff is only five percent. *Id.*

147. *Global Trade Liberalization*, *supra* note 17, at III. To make matters worse, agricultural subsidies in developed countries, which amount to two thirds of Africa's total GDP, also undermine developing countries' exports and development. *Id. See also* Hans Binswanger & Ernst Lutz, *Agricultural Trade Barriers, Trade Negotiations, and the Interests of Developing Countries* (2000) (arguing that developed countries' export subsidies in agriculture should be removed; domestic producer subsidies and bound tariffs should be reduced; access under tariff quotas should be increased; and tariff escalation on processed agricultural products should be terminated), *available at* http://www.unctad-10.org/pdfs/ux_tdxrt1d8.en.pdf.

protection of manufactured goods in developed countries tends to increase in proportion to the sophistication of the manufacturing process.[148] This "tariff escalation" discourages developing countries from diversifying or upgrading their exports to "higher value-added products."[149] Undoubtedly, these protectionist phenomena impede and undermine the economic development of developing countries.[150]

In addition to tariff protection, developed countries have responded to fierce lobbying by domestic competitors and have systematically blocked the import of "low-skill, labor-intensive goods."[151] When such goods are uncomfortably successful in the developed countries' markets, the respective governments have not hesitated to circumvent or even override the GATT obligations, invoking for example Voluntary Export Restraints (VERs), which are concluded in a less-than-voluntary manner.[152] One of the most notorious VERs is the Multifiber Arrangement (MFA),[153] which re-

148. *Global Trade Liberalization*, *supra* note 17, at III.

149. *Id.*

150. The Monterrey Consensus, which is the result of the recent International Conference on Financing for Development held in Mexico in March 2002, provided a panoply of areas in which developing countries suffer from the protectionist trade policies of developed countries. The Consensus stated:

> We acknowledge the issues of particular concern to developing countries and countries with economies in transition in international trade to enhance their capacity to finance their development, including trade barriers, trade-distorting subsidies and other trade-distorting measures, particularly in sectors of special export interest to developing countries, including agriculture; the abuse of anti-dumping measures; technical barriers and sanitary and phytosanitary measures; trade liberalization in labour intensive manufacturers; trade liberalization in agricultural products; trade in services; tariff peaks, high tariffs and tariff escalation, as well as non-tariff barriers; the movement of natural persons . . . .

U.N. International Conference on Financing for Development, Adoption of the Monterey Consensus, A/Conf/198/3 (2002), *available at* http://www.un.org/esa/ffd/aconf198-3.pdf (last visited Feb. 23, 2004). *See also African Finance Ministers Call for Rich Countries to Open Markets*, UN WIRE, Aug. 1, 2002, *at* http://www.unwire.org/UNWire/20020801/28049_story.asp (last visited Feb. 23, 2004). Interestingly, the Oxfam International, an NGO, invented a Double Standards Index (DSI) in order to "quantify the gap" between free trade principles promoted by developed countries and their "actual protectionist policies." *Oxfam Report Highlights Hypocrisies in Global Trading System*, 6 BRIDGES WKLY. TRADE NEWS DIG. 14 (2002), *available at* http://www.ictsd.org/weekly/02-04-16/story4.htm (last visited Feb. 23, 2004).

151. WORLD TRADE AND PAYMENTS, *supra* note 54, at 299; *see also* Gerald K. Helleiner, *The New Industrial Protectionism and the Developing Countries*, *in* INTERNATIONAL TRADE AND THIRD WORLD DEVELOPMENT (Pradip K. Ghosh ed., 1984) (criticizing developed countries' "new protectionism" in specific labor-intensive sectors in which developing countries retain a definite comparative advantage as beyond a general "economic nationalism"). This systematic protection against developing countries' exports can be found not only in multilateral but also in *regional* trade relations. *Cf.* BELA BALASSA, THE NEWLY INDUSTRIALIZING COUNTRIES IN THE WORLD ECONOMY 118-19 (1981) (discussing "international cartels" and "market-sharing" in some industries, including textiles and shoes, resulting from new protectionist moves by developed countries which feared competition from developing countries). *See generally* Stephany Griffith-Jones, *Economic Integration in Europe: Implications for Developing Countries*, *in* THE DEVELOPING COUNTRIES IN WORLD TRADE, *supra* note 18, at 33-49.

152. Hugh Corbet, *Preface* to HUDEC, DEVELOPING COUNTRIES, *supra* note 55, at xiv.

153. The MFA is an agreement between nine importing developed country parties and 31 exporting developing countries which limits the exportation of textiles and clothing through various instruments, such as Voluntary Export Restraints (VERs) and quotas. THE REGULATION OF INTERNATIONAL TRADE, *supra* note 82, at 310. For an economic analysis on the impact of the MFA, see Yongzheng Yang, *The Impact of MFA Phasing Out on World Clothing and Textile Markets*, 30 J. DEV. STUD. 892, 908-09 (1994). Yang concluded that the MFA's "dampening effect" on trade was substantial, though its effect on global production and consumption was small. *Id.* Yang also suggested that the MFA be eliminated as

stricted nearly eighty percent of U.S. potential imports in textile and apparel from the LDCs in the early eighties.[154] Likewise, even in the unilateral reduction of tariffs for developing countries, as seen in the GSP, donor (developed) countries deliberately excluded from the system those products which competed with similar domestic products but tended to be produced in poor countries because of their labor-intensive nature.[155] Surprisingly, on average less than thirty percent of all dutiable imports from developing countries actually benefit from GSP programs.[156]

This persistent trend towards protectionism by rich countries is particularly problematic if one considers that the notion of comparative advantage is dynamic. That is to say, as a country's general economic situation improves, that country's comparative advantage tends to shift away from labor-intensive sectors to more capital or technology-intensive ones.[157] This transformation of comparative advantage has been demonstrated by developments in East Asian countries, such as Korea and Taiwan, in the 1970s and 1980s,[158] and by more dramatic performances on the part of new globalizers, such as China, India, and Mexico, in the 1990s.[159] Nonetheless, significant protectionism on the part of developed countries continues to prevent other developing countries from capitalizing on their comparative advantages and from reaching higher levels of economic development. As a

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quickly as possible because the liberalization of the MFA would mean a "Pareto improvement" for all participants. *Id.* at 89. Regarding the political economic aspects of textiles trade, see generally VINOD K. AGGARWAL, LIBERAL PROTECTIONISM: THE INTERNATIONAL POLITICS OF ORGANIZED TEXTILE TRADE (1985); and CARL B. HAMILTON, TEXTILES TRADE AND THE DEVELOPING COUNTRIES: ELIMINATING THE MULTI-FIBRE ARRANGEMENT IN THE 1990S (1990).

154. WORLD TRADE AND PAYMENTS, *supra* note 54, at 299.

155. *Id.* at 300. Section 503(c)(2) of the U.S. Trade Act of 1974, 19 U.S.C. § 2463(c)(2) (2001), articulates the "competitive need test" by which any GSP beneficiary may lose its status when it is deemed to enjoy sufficient competitiveness in the U.S. market. LEGAL PROBLEMS, *supra* note 57, at 1192. Though its main purpose is to benefit other not-so-competitive countries, it can be abused to benefit domestic industries that produce competitive products. In addition, this exclusionary practice not only undermines the actual effect of preferential aid programs, such as GSPs, but also is a disservice to economic justice. Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT'L L. 975, 1033-35 (2000).

156. *See* INTERNATIONAL ORGANIZATION, *supra* note 94, at 385.

157. According to the Hecksher-Ohlin theorem, which is basically grounded on the Ricardian model, countries will export products which use the factor of production which abounds and thus is relatively cheap. *See* JAN S. HOGENDORN & WILSON B. BROWN, THE NEW INTERNATIONAL ECONOMICS 229-30 (1979).

158. WORLD TRADE AND PAYMENTS, *supra* note 54, at 171-72. However, some observers make reservations on the "sustainability and generalizability" of the East Asian experience. *See* THE REGULATION OF INTERNATIONAL TRADE, *supra* note 82, at 394. Some may even contend that the East Asian economies have been so successful not because of classical trade liberalization, but because of proper protectionism or managed trade. *Cf. Trade, Civil Society Decision-Makers Convene at WTO Symposium*, 6 BRIDGES WKLY. TRADE NEWS DIG. 16 (2002), *available at* http://www.ictsd.org/weekly/02-05-02/story1.htm. After all, the speed, sequence and modalities of trade liberalization (which should be applied on a case-by-case basis), as well as the socio-cultural characteristics, are determinative of the success of trade policies. This may be why the East Asian examples are often hard to generalize as development prescriptions.

159. GLOBALIZATION, GROWTH, AND POVERTY, *supra* note 16, at 8.

result, many developing countries remain trapped in their initial stage of development.[160]

Admittedly, certain developing countries have only themselves to blame for limitations on market access to developed countries. Originally, developing countries had been persuaded by developed countries to tolerate the latter's trade barriers over basic goods, such as agricultural products or textiles, in exchange for GATT exemptions. This enabled developing countries to pursue their own models of developmental strategies outside the legal terrain of GATT, such as import-substitution policies. However, this "Faustian bargain" [161] turned out to be disastrous to most developing countries that accepted it, because the cost incurred by the limited market access had become too high.[162] Moreover, the putative benefit of developmental strategies that remained outside of GATT proved to be a mirage.[163] Instead, those strategies, as seen in the case of import-substitution policies, generated counter-productive effects, in that special interest groups began to form within developing countries at the expense of general, structural reforms.[164]

Nonetheless, in the case of transition economies, developed countries seem to be more vulnerable to criticism than in the aforementioned case of the Faustian bargain. In fact, those economies, mostly concentrated in Eastern and Central Europe, were in an advantageous position to pursue liberal, free trade policies, since no prominent vested interests prevailed after the centrally planned economies collapsed.[165] However, as soon as these transition economies restructured their domestic laws and procedures towards the open market system, they discovered that rich countries, who untiringly preached the value of free trade to them, actually maintained heavy trade

160. *See* INTERNATIONAL MONETARY BANK & WORLD BANK, MARKET ACCESS FOR DEVELOPING COUNTRY EXPORTS—SELECTED ISSUES 14 (2002) (observing that "[t]he pattern of protection creates particular hurdles for countries taking the first steps up the technology ladder"), *at* http://www.imf.org/external/np/pdr/ma/2002/eng/092602.pdf (last visited Feb. 23, 2004).

161. THE REGULATION OF INTERNATIONAL TRADE, *supra* note 82, at 368 (quoting Sidney Weintraub who argued that developing countries received special and differential treatment which freed them from the legal disciplines of GATT in return for allowing their most competitive export products to be excluded from trade preferences).

162. Corbet, *supra* note 151, at xiv; *see also* Murray Gibbs, *Special and Differential Treatment in the Context of Globalization* (Paper Presented in the G15 Symposium on Special and Differential Treatment in the WTO Agreements in New Delhi, Dec. 10, 1998) (listing a variety of increasingly *negative* discrimination by developed countries, such as VERs, anti-dumping duties, and MFAs, which eventually outweighed *positive* discrimination under special and differential treatment), *available at* http://www.wto.org/english/tratop_e/devel_e/sem01_e/gibbs_e.doc. In the same context, WTO Director General Moore noted that potential benefits from special and differential (S&D) treatments for developing countries might have been outweighed by exemptions that had in practice favored developed countries: something that may be called "reverse S&D." Ablasse Ouedraogo, Seminar on Special and Differential Treatment for Developing Countries, Closing Remarks (July 30, 2000), *at* www.wto.org/english/tratop_e/devel_e/sem01_e/sdtrem_e.htm.

163. THE WTO AND BEYOND, *supra* note 76, at 408.

164. *See* WTO Committee on Trade and Development, 28th Sess., Note on the Meeting of March 10, 2000, WT/COMTD/M/28/Add.1 (Aug. 2, 2000), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/COMTD/M28A1.doc.

165. Jaroslaw Pietras, *The Role of the WTO for Economies in Transition*, *in* INTERNATIONAL ORGANIZATION, *supra* note 94, at 359.

barriers against their exports, such as agricultural products or clothing.[166] This not only frustrated the new governments but also compelled them to imitate protectionist trade policies pursued by wealthy nations, thus raising new trade barriers.[167] In other situations, EU member states even pressed transition economies to follow elements of the EU's own pre-existing protectionist trade regime, such as the Common Agricultural Policy (CAP), as a condition on their objective to "rejoin Europe."[168] Accession to the EU, of course, is one of the highest political priorities of many transition economies, which made it difficult to reject such conditionality.[169] Frustratingly, this forced spiral of protectionist dynamics, through the expansion of the CAP, is a serious impediment to the economic development of non-member developing countries whose major exports are agricultural products.

Finally, the anti-dumping (AD) system merits some discussion with respect to its protectionist nature and adverse effect on development.[170] The low price of foreign imports is often associated with the theory of comparative advantage since cheap products usually result from cheap factors of production, such as labor. The anti-competitive rationale of the AD system, that is, "predatory pricing," is unpersuasive because cheap imports from the poor do not, and *cannot*, drive big companies out of their markets. Therefore, AD rules lack all economic justification.[171] Nonetheless, the AD system, as a contingent protectionist instrument, is widely used to curb the flow of cheap imports into domestic markets and thus continuously hinders developing countries producing these products.[172] The actual and potential damage the AD system inflicts on developing countries is illustrated by the fact that the usual suspects alleged to be dumping are developing countries with insufficient market power to exclude competitors, while their accusers tend to be developed countries.[173] In particular, some developing countries

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166. *Id.*
167. *Id.*
168. *Id.* at 360.
169. *Id.*
170. UNCTAD TDR 2002, *supra* note 17, at 36.

> Despite efforts to tighten the rules on the application of anti-dumping procedures and measures, such measures can be relatively easily applied, and they have become a preferred tool of protection used by many developed countries and an increasing number of developing countries. Even if duties are finally not imposed, such procedures often have a dampening effect on trade, prompting importers to seek alternative sources of supply. Moreover, responding to an investigation can create a huge burden for affected countries.

Id.

171. GLOBALIZATION, GROWTH, AND POVERTY, *supra* note 16, at 61.
172. In the Tokyo Round Anti-Dumping Code, Article 13 included a special consideration for developing countries in the form of "constructive remedies" to mitigate any devastating impact that AD measures might cause them. THE REGULATION OF INTERNATIONAL TRADE, *supra* note 82, at 372. However, this general provision failed to be effectively implemented in the developed countries' domestic legal systems. *Id.*
173. GLOBALIZATION, GROWTH, AND POVERTY, *supra* note 16, at 61 (observing that developing countries bear a disproportionate burden of AD measures in both rich-country markets and other developing countries vis-à-vis developed countries); *see also* ARVIND PANAGARIYA, THE MILLENNIUM ROUND AND DEVELOPING COUNTRIES: NEGOTIATING STRATEGIES AND AREAS OF BENEFITS 24 (2000); *The Dumping Dilemma; Rising Protectionism*, ECONOMIST, June 1, 2002, at 91.

are haunted by the possible surge of AD measures by developed countries in the textiles and clothing sector when MFA-related quotas are eventually phased out under the WTO Agreement on Textiles and Clothing.[174]

The perils of AD rules do not stop there. In stark contrast with their anti-competitive, market-protecting rationale, AD rules create anti-competitive situations such as "cartelization."[175] Through prosecuting low prices, AD rules produce the same effect of fixing prices.[176] Moreover, even a threat of AD suits discourages new producers from attempting to enter the market.[177] As Federal Reserve Board Chairman Alan Greenspan trenchantly observed, AD rules are "just simple guises for inhibiting competition," despite their hypocritical disguise in the name of "fair trade."[178] What is more demoralizing is the AD rules' contagion effect or negative learning effect. Developing countries have now begun to imitate the developed countries' penchant for AD suits for their own protectionist purposes under the subterfuge of a defensive attack.

In sum, along with the Faustian Bargain discussed above, the AD rules tend to convert the poor from victims to accomplices in distorting and corrupting the global Gesellschaft's original goal of promoting free trade.

B. The New Complication: Regulatory Unilateralism

The global Gesellschaft in its original form was mainly designed to tackle traditional trade barriers, such as tariffs and quotas. Recently, however, developed country governments, under the banner of the welfare state, have been pressured to respond to ever-growing regulatory demands on various issues of social hygiene, such as human health, public safety, and environmental protection. No matter how legitimate these domestic regulations may be, they often constitute a new form of trade barrier—Non-Tariff Barriers (NTBs). For example, the proliferation of domestic regulations in the rich nations affects poor nations most painfully when they are denied market access because their exports fail to conform to high and costly regulatory standards imposed by the rich nations.

China, for instance, increasingly uses asbestos, not only in the constructionsector but also in manufacturing, despite known health risks.[179] Some developed countries, including those of the EU, strictly ban any use, mar-

174. Vangelis Vitalis, *The Development Impact of Developed-World Policies on Developing Countries: The Case of Trade* (Paper Presented at the Global Development Technical Workshop, Cairo, Egypt, Jan. 16-17, 2003), *available at* http://www.oecd.org/dataoecd/15/17/1680402.pdf.

175. Richard J. Pierce Jr., *Antidumping Law as a Means of Facilitating Cartelization*, 67 ANTITRUST L.J. 725, 739 (2000).

176. *Id.*

177. *Id.* at 740.

178. *Id.* at 725.

179. *In Brief*, BRIDGES WKLY. TRADE NEWS DIG. (International Centre for Trade and Sustainable Development, Geneva), Oct. 19, 1998, *available at* http://www.newsbulletin.org/getbulletin.cfm?bulletin_ID=14&issue_ID=1165&browse=1&SID=#In%20Brief.

keting, or importation of asbestos and asbestos-based products.[180] However, as a developing country, China cannot afford to switch to costly asbestos substitutes and thus loses access to foreign markets. Another example of the developmentally fatal effects of regulatory unilateralism can be found in the recent debate on genetically modified foods. Confronting widespread poverty, as well as a grim Malthusian scenario,[181] GM technology may revolutionize the current farming process and contribute greatly to increased food production.[182] Yet, some developed countries, including EU countries, strongly oppose GM foods from a regulatory or socio-cultural perspective.[183] Regardless of the legitimacy of these highly precautionary policies, they deter the economic development of poor countries desiring to use this technology to boost their exports. Tönnies would have found another Gesellschaftian trait in these examples: the rich forcing the poor to conform to high standards set by the rich.[184]

In sum, regulatory unilateralism puts the global Gesellschaft in a dilemma. On the one hand, a failure to respond to contemporary regulatory demand would result in political backlash within developed countries, ultimately diminishing its legitimacy. In this regard, many critics, including many NGOs, fear that a pro-trade ethos embedded in the global Gesellschaft is likely to lead states to introduce competitive strategies based on an efficiency-driven philosophy, which is "dysfunctional or at best disruptive,"[185] and will eventually engage them in a regulatory "race to the bottom."[186]

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180. *See, e.g.*, Appellate Body and Panel Report, *Measures Affecting the Prohibition of Asbestos and Asbestos Products*, as amended, WT/DS135 (Apr. 5, 2001), *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm.

181. It is estimated that an additional two billion people will be born within the next thirty years, which necessitates that the human race double the current level of food production. WTO, Mike Moore, Prospects for the Developing Countries for the Next Round, Address to the Development Committee of the European Parliament (Feb. 21, 2000), *at* http://www.wto.org/english/news_e/spmm_e/spmm25_e.htm.

182. *New Report Cites Importance of Technology to Poor States*, UN WIRE, July 9, 2001, *at* http://www.unwire.org/unwire/20010709/15881_story.asp.

183. *EU Rules in Dispute; Trade War Brewing?*, UN WIRE, June 16, 1999, *at* http://www.uwire.org/unwire/19990616/3219_story.asp.

184. THE CLASSIC STATEMENTS, *supra* note 6.

185. William W. Bratton et al., *Introduction: Regulatory Competition and Institutional Evolution*, *in* INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES 1, 3 (William W. Bratton et al. eds., 1996).

186. However, many economists reject this notion. *See, e.g.*, John Douglas Wilson, *Capital Mobility and Environmental Standards: Is There a Theoretical Basis for a Race to the Bottom?*, *in* FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? ECONOMIC ANALYSIS 393, 423 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) [hereinafter FAIR TRADE AND HARMONIZATION I] (observing that a "race" is not an accurate description of the behaviors of independent governments, and that this race model fails to explain the absence of more direct means to attract foreign firms, such as subsidies or a lower tax rate on capital gains); Arik Levinson, *Environmental Regulations and Industry Location: International and Domestic Evidence*, *in* FAIR TRADE AND HARMONIZATION I, *supra*, at 429, 453 (emphasizing the lack of economic evidence to support such a claim). In contrast, many others recognize the opposite phenomenon of "race to the top." *See, e.g.*, Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 61 (2002); Patrick B. Griffin, *The Delaware Effect: Keeping the Tiger in Its Cage: The European Experience of Mutual Recognition in Financial Services*, 7 COLUM. J. EUR. L. 337, 340 (2001); ADRIENNE HÉRITIER ET AL., RINGING THE CHANGES IN EUROPE: REGULATORY COMPETITION AND THE

On the other hand, if developed countries were to saddle developing countries with the former's high standards without due regard for the latter's incapability, developing countries' access to developed countries' markets would be severely damaged, thwarting the developing countries' economic growth and their integration into the global market.[187] The bottom line is that, due to their limited financial and technical capacity, most developing countries—and particularly the least-developed countries—cannot afford to comply with the demanding and sophisticated regulations enacted by developed countries.[188] Under these circumstances, forced compliance tends to

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TRANSFORMATION OF THE STATE: BRITAIN, FRANCE, GERMANY 1 (1996).

187. *See* Jim Rollo & L. Alan Winters, *Subsidiarity and Governance Challenges for the WTO: Environmental and Labour Standards*, *in* A PRO-ACTIVE AGENDA, *supra* note 20, at 185, 186 (observing that enforcing labor and environmental standards through trade sanctions will result not only in the maladministration of these standards, but also in the loss of traditional economic benefits through the trade liberalization flowing from GATT); Robert M. Stern, *Labor Standards and Trade*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON 425, 437 (Marco Bronckers & Reinhard Quick eds., 2000) (arguing that "the surest way to achieve higher labor standards" in poor countries is for rich countries to open their markets and encourage the economic development of poor countries); THIRD WORLD NETWORK, UNITED NATIONS DEVELOPMENT PROGRAMME, MULTILATERAL TRADING SYSTEM: A DEVELOPMENT PERSPECTIVE 15 (2001) (arguing that trade-related issues such as health and the environment should be dealt with not by the WTO but by relevant specialized international organizations such as the World Health Organization (WHO) and the United Nation Environmental Program (UNEP), respectively), *available at* http://www.undp.org/mainundp/propoor/docs/multitradesystem.pdf (last visited Feb. 23, 2004); Roessler, *supra* note 90, at 514 (arguing that the integration of certain regulatory subject matters, such as labor and environment, into the multilateral trade order undermined both trade and non-trade objectives); Jose E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1, 4-15 (2001) (criticizing an effort to link "human rights obligations" to trade disciplines); Jeffrey L. Dunoff, *The WTO in Transition: Of Constituents, Competence and Coherence*, 33 GEO. WASH. INT'L L. REV. 979, 1009 (2001) (discovering the conceptual as well as practical difficulties of incorporating "national interest" (non-WTO law) and "comparative advantage" (WTO law), considering the fundamentally different and conflicting assumptions of the two); Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, 24 FORDHAM INT'L L. J. 608, 647-48 (2000) (observing that any linkage effort by developed countries would be futile without significant financial assistance to developing countries to help them implement certain regulatory obligations demanded by the developed countries); Hal S. Shapiro, *A New Liberal Trade Policy Foundation*, 9 ILSA J. INT'L & COMP. L. 431, 432-33 (2003) (arguing that, in the interest of developing countries, liberals should stop promoting "linkages" between trade and other social issues such as labor and the environment, and instead advocate freer trade, with separate U.S. government initiatives ("carrots" rather than "sticks") to promote development in developing countries); Laurent A. Ruessmann, *Putting the Precautionary Principle in Its Place: Parameters for the Proper Application of a Precautionary Approach and the Implications for Developing Countries in Light of the Doha WTO Ministerial*, 17 AM. U. INT'L L. REV. 905, 938-39 (2002) (submitting that the EC's effort to strengthen a "precautionary principle" in WTO law is misguided and would be prejudicial to the interests of developing countries). *But cf.* James Thuo Gathii, *Re-Characterizing the Social in the Constitutionlization of the WTO: A Preliminary Analysis*, 7-SPG WIDENER L. SYMP. J. 137, 138 (2001) (arguing that "social issues should be reconceptualized to reflect the proper theoretical premise of the actual reality of the international trading regime").

188. *See* Spencer Henson et al., *The Impact of Sanitary and Phytosanitary Measures on Developing Country Exports of Agricultural and Food Products* (Paper Presented at the Conference on Agriculture and the New Trade Agenda in the WTO 2000 Negotiations, Geneva, Switzerland, Oct. 1-2, 1999) (exploring the impact of the WTO Agreement on Sanitary and Phytosanitary Measures on developing countries' exports of agricultural and food products into the developed countries' markets), *available at* http://lnweb18.worldbank.org/ESSD/essdext.nsf/12DocByUnid/58DFE7F9DFBBE1615256C85006EF343/$FILE/henson_et%%0.pdf; John S. Wilson, *Standards, Regulation, and Trade: WTO Rules and Developing Country Concerns*, *in* HANDBOOK, *supra* note 27, at 428, 437 (pointing to a "common constraint" that developing countries face, the "[l]ack of modern technical infrastructure and capacity to

offset any comparative advantage that developing countries naturally retain vis-à-vis developed countries. Furthermore, regulatory unilateralism is easily abused and breeds camouflaged forms of protection, as manifested by "green" (environmental regulation-driven) or "blue" (labor regulation-driven) protectionism.[189]

Yet this problem cannot be effectively tackled through the traditional approach to development that focuses mainly on preferential tariffs, such as GSPs. The root of the problem is inextricably linked to a far more profound premise, namely the tension between regulatory autonomy in developed countries and trade concerns in developing countries. This tension transforms the contours of development in international trade and compels us to seek a new paradigm. The new paradigm is different from the current Gesellschaftian model centered on such premises as negotiation, bargain, and contract. Even rich countries should include poor countries' circumstances in their policy equations as relevant parameters, not only from a philanthropic standpoint, but also for the sake of the very success of their own regulatory policies. Unfortunately, the current Gesellschaftian structure of international trade is incapable of materializing this global empathy.

C. Evanescent Initiatives: Rhetoric Without Action

Although a plethora of provisions and texts have been devoted to development assistance under the WTO rules, including the Doha Declaration, most are vague and hortatory and lack both concreteness and teeth. While references to the consideration of particular interests or special needs of developing countries frequently appear in those legal documents,[190] they

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engage in international standards-development activities"); *see also* STANDARDS & GLOBAL TRADE: A VOICE FOR AFRICA xxxiii-xliii (John S. Wilson and Victor O. Abiola eds., 2003).

189. Sometimes governments disguise their protectionist intent by using these seemingly legitimate regulatory objectives. Such disguised protection is often called "protectionism," in contrast with direct "protection." OECD, FOOD SAFETY AND QUALITY ISSUES: TRADE CONSIDERATIONS 53 (1999). *See* GLOBALIZATION, GROWTH, AND POVERTY, *supra* note 16, at 64-65. Based on the possibility of this protectionist abuse of domestic regulations, many scholars express a negative view of the so-called "linkage" idea that aims to attain certain regulatory goals by proactively linking them to international trade disciplines. *See* T.N. SRINIVASAN, DEVELOPING COUNTRIES AND THE MULTILATERAL TRADING SYSTEM: FROM THE GATT TO THE URUGUAY ROUND AND THE FUTURE 73 (1998). As Srinivasan eloquently stated:

> The demand of developed countries for a social clause for enforcing a set of core standards on which there is no political consensus through the threat of *trade sanctions* is seen by many developing countries as driven largely by crass protectionist motives. Since increased competition from low-cost imports from developing countries imposes an adjustment cost in terms of declines in output and employment in import-competing industries of developed countries, forcing exporting countries to raise their *labor standards* in the expectation that their costs of production will rise will thus shift most, if not all, of the costs of adjustment to developing countries. Clearly, a social clause is nothing but a thinly veiled protectionist device in such a context.

Id. (emphasis added).

190. *See, e.g.*, WTO Committee on Trade and Development, *WTO Measures Relating to Developing Country Members: Note by the Secretariat*, WT/COMTD/W/10 (Nov. 8, 1995) [hereinafter WTO Committee on Trade and Development (Fourth Session)], *available at* http://www.wto.org/english/traptop_e/devel_e/teccop_e/wlo_e.doc; Agreement on Textiles and Clothing, WTO AGREEMENT, Annex 1A, *supra*

accomplish little in practice because no criteria for consideration is provided. Thus, the whole assistance regime remains unilateral and at the mercy of donor countries. Likewise, although those provisions commit the rich to the provision of advice and assistance to their poor counterparts, no further explanations follow as to how to assist the poor in building their administrative and regulatory capacity. Not surprisingly, the result is that many suspect such commitments are mere lip-service.[191] Moreover, most instruments for capacity-building assistance, such as training courses, seminars, and workshops, tend to be general or inspirational rather than problem-driven.[192] These instruments are also applied irregularly and anecdotally, mostly due to a lack of resources.[193] With these predicaments, it would be very difficult, though not impossible, for the poor to succeed in building to their capacity.

In general, the lack of political will among the rich countries has led to a steady decline in the level of Official Development Assistance (ODA) since 1992.[194] This funding restraint is reflected through the technical assistance activities in the WTO Secretariat, which have become dramatically "overstretched and underfinanced."[195] For instance, only $16 million is currently devoted to technical cooperation missions.[196] Even the once vibrant IF initiative has failed to secure adequate funding.[197] The lack of stable and

note 1, art. 1:4 (considering "particular interests") [hereinafter ATC]; SPS Agreement, *supra* note 115, art. 10:1 (considering "special needs" in the preparation and application of SPS measures); TBT Agreement, *supra* note 116, art. 12:2 (considering special needs in the implementation); Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Annex 1 A, WTO AGREEMENT, *supra* note 1, art. 15 (regarding special situations in considering anti-dumping measures); Agreement on Agriculture, Annex 1A, WTO AGREEMENT, *supra* note 1, art. 20(c) (considering of special and differential treatment).

191. *See, e.g.*, SPS Agreement, *supra* note 115, art. 9:2 (providing assistance where substantial investments are required for complying with trading partners' requirements); TBT Agreement, *supra* note 116, art. 11:4 (providing advice and assistance for "the establishment of bodies for the assessment of conformity with standards"). *See generally* WTO Committee on Trade and Development (Fourth Session), *supra* note 190.

192. TECHNICAL ASSISTANCE SERVICES, *supra* note 91, at 21.

193. *See* Mary E. Footer, *The WTO, Developing Countries and Technical Assistance for Trade Law Reform*, *in* GOVERNANCE, DEVELOPMENT AND GLOBALIZATION 353, 366 (Julio Faundez et al. eds., 2000) (observing that WTO technical assistance may be "inherently contradictory" and "poorly coordinated").

194. Agenda 21 Report, *supra* note 64, para. 7; *see also* Stiglitz, *supra* note 21, at 437 (observing that "aid per capita to the developing world [fell] by nearly a third in the 1990s").

195. TECHNICAL ASSISTANCE SERVICES, *supra* note 91, at 18; *see also* THE WTO AND BEYOND, *supra* note 76, at 398; Supachai Panitchpakdi, *The Evolving Multilateral Trade System in the New Millennium*, 33 GEO. WASH. INT'L L. REV. 419, 444 (2001) (observing that the WTO's budget constraints make it less able to assist developing countries in the areas of "[i]nstitutional building, capacity building, [and] human resource training" than other international institutions, such as the World Bank and the IMF); *cf.* Constantine Michalopoulos, *The Developing Countries in the WTO*, 22 THE WORLD ECON. 117, 142 (1999) (arguing that developing countries should actively participate in the WTO Committee on Budget, Finance and Administration and raise their collective voice to secure necessary resources for development assistance).

196. TECHNICAL ASSISTANCE SERVICES, *supra* note 91, at 18.

197. *Id.* at 23.

predictable budgets prevents technical assistance activities from being designed in an operable fashion over a long-term period.[198]

Likewise, the recent Doha Declaration, despite its ambitious and promising framework, will not be effective by itself. Words and plans must be accompanied by actions, and actions must be funded by the major developed countries if they are to materialize. Although the United States recently pledged an additional $5 billion of foreign aid over the next three years—a step in the right direction—this amount should be put into perspective. As former U.S. President Jimmy Carter pointed out, the current level of U.S. ODA spending amounts only to one-third of its spending in the 1970s.[199] More frustratingly, even if the rich countries were to undertake more aid programs, these scarce resources would probably be spent on new issues in which the rich countries have heavily vested interests, such as competition and investment[200]—areas that do not signifincantly impact the poor countries' economic development. In sum, under the current Gesellschaftian structure of the global trading system in which helping other nations is translated and conducted only through the concept of a donation, not a duty, it is impossible to expect that true development assistance will materialize into actual change.

IV. TOWARD THE WTO'S GEMEINSCHAFT

A. *The WTO's Gemeinschaft: Its Construct and the Global Empathy*

Despite the varying administrative instruments assiduously adopted and applied for the enhancement of global welfare, the nature of the global Gesellschaft tends to solidify the stratification between the rich and the poor.[201] This troubling phenomenon, which John Rawls describes as "unjust,"[202] has the additional effect of stigmatizing poor nations in general. This poses the question of whether the Gesellschaft should be expanded and strengthened to the extent that it can eventually deliver, backed by an authority with an enforcement mechanism, effective (re-)distributional justice? In addition to being practically infeasible, this Austinian World Government as a Super-Gesellschaft has long been rejected by many philosophers, including Immanuel Kant and Emmerich de Vattel. Kant warns, and John Rawls follows, that the World Government would turn to either a global tyranny or a mass chaos.[203] Vattel also objected to the *civitatis maximae* which Christian

198. Press Release, WTO, WTO General Council Informal Meeting (Mar. 28, 2000), http://www.wto.org/english/news_e/pres00_e/pr173_e.htm.

199. Jim Wurst, *Rich Countries Lauded, Criticized Over New Pledges*, UN WIRE, Mar. 20, 2002, *at* http://www.unwire.org/UNWire/20020320/24888_story.asp.

200. *See Millions Pledged in Technical Assistance Present New Challenges to WTO*, 6 BRIDGES WKLY. TRADE NEWS DIG. 9 (2002), *available at* http://www.ictsd.org/weekly/02-03-12/story1.htm.

201. THE CLASSIC STATEMENTS, *supra* note 6.

202. JOHN RAWLS, THE LAW OF PEOPLES 114 (2002).

203. IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795), *available at* http://www.mtholyoke.edu/acad/intrel/kant/kant1.htm. Instead, Kant envisioned a "Federation of Free States."

Wolff proposed, because he feared that small nations would be dwarfed by big ones in such a republic.[204]

This dilemma invokes the consideration of the notion of Gemeinschaft as a solution for the problematic Gesellschaft. Tönnies maintains that the only way to save the decaying Gesellschaft is to revive the seeds of Gemeinschaft,[205] in particular the "Gemeinschaft of [M]ind."[206] Therefore, Gemeinschaft is an alternative, not a regression, even to Tönnies.[207] Perhaps, the nostalgic appeal of Gemeinschaft both as "a symbol and aspiration" derives naturally from our very humanness that seeks various social relationships such as mutual concern and support.[208] Nonetheless, Tönnies' typological and highly connotative original approach suffers from binarism. Most of all, such an approach overlooks the fact that the dividing line of the concepts of Gemeinschaft and Gesellschaft is not as bright as Tönnies demonstrates theoretically.[209] Any Gemeinschaft may hold some attributes or qualities of Gesellschaft and vice versa. In other words, there may be a Gemeinschaftian Gesellschaft or a Gesellschaftian Gemeinschaft.

Steven Brint attempts to overcome this theoretical shortcoming and better define the appropriate coordinates of the Gemeinschaft. Brint employs Emile Durkheim's "disaggregating" methodology, perceiving community not as a physical entity, but as a set of variable properties of human interaction which can be discovered in Tönnies' metropolis as well as the classical loci of Gemeinschaft, such as rural hamlets.[210] Of those interactive, communicative Gemeinschaftian properties, four variables are particularly pertinent and useful in constructing the WTO's Gemeinschaft out of its Gesellschaftian template: "dense and demanding social ties"; "ritual occasions"; "perceptions of similarity with the physical characteristics, expressive style, way of life, or historical experience of others"; and "common beliefs in an idea system, a moral order, an institution, or a group."[211]

The first variable, "dense and demanding social ties," can be witnessed in an incremental fashion in the contemporary global trading landscape that is both highly interdependent and integrated. Although such interdependence and integration is primarily centered on economic and materialistic

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Id. See also RAWLS, *supra* note 202, at 36.

204. *See* Robert Trout, *Vattel's Natural Law*, [hereinafter *Vattel's Natural Law*] *available at* http://east_west_dialogue.tripod.com/vattel/id6.html (last visited Feb. 16, 2004).

205. THE CLASSIC STATEMENTS, *supra* note 6.

206. Reimer, *supra* note 33, at 229; THE SOCIOLOGY OF COMMUNITY, *supra* note 33, at 13-20.

207. Steven Brint, *Gemeinschaft Revisited: A Critique and Reconstruction of the Community Concept*, 19 SOC. THEORY 1, 2 (2001).

208. *Id.* at 1. *But cf.* Eisabeth Zoller, *Institutional Aspects of International Governance*, 3 IND. J. GLOBAL LEGAL STUD. 121, 123 (1995) (rejecting the possibility of an "international community" and instead positing the notion of "international society" on the ground that the international society lacks the "commonness" which can only be found in "national communities").

209. Brint, *supra* note 207, at 3.

210. Brint observes that this disaggregating approach has been "followed up in productive ways by many sociologists" such as "Robert K. Merton, Erving Goffman, Travis Hirschi, Rosabeth Moss Kanter, and William Julius Wilson." *Id.*

211. *Id.* at 3-4.

aspects inherent in an ever-expanding market, the very frustration of the Gesellschaftian failure in addressing social problems such as poverty and development disparity calls for more social ties to embrace and fix the failure. The original WTO architecture reveals such a social consciousness in its preamble.[212] The subsequent initiative represented by the Doha Development Round (DDR)[213] further promotes certain social connectedness within the system. The WTO also highlights inclusiveness by warning against the phenomenon of the marginalization of its poorest members and urges other members to accommodate those poorest members through development assistance.[214] Even outside the institutional purview of the WTO, a variety of capacity-building or other development-oriented attempts, such as the "Global Compact,"[215] are being made toward building these social ties through the medium of inter-governmental or non-governmental organizations.

The second and third variables, "ritual occasions" and "perceptions of similarity with the physical characteristics, expressive style, way of life, or historical experience of others,"[216] may be found in the WTO's membership structure. Members are entitled, and in a sense privileged, to participate in a variety of ritual occasions, such as various committee and council meetings under the auspices of the WTO. These ritual occasions nurture a sense of belonging and group identity.[217] Similarly, common *modus operandi* within the WTO system provide members with "social identifications," which are "strongly related to feelings of safety and comfort."[218] This social identification offers an explanation as to why many countries are still queuing to be-

212. WTO AGREEMENT, *supra* note 1, pmbl. ("*Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development . . . .").

213. WTO, *Doha WTO Ministerial 2001: Ministerial Declaration*, WT/MIN(01)/1, para. 2 (Nov. 14, 2001), *available at* http://www.wto.org/english/thewto_e/minist_e/mindecl_e/htm ("Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development.").

214. *Id.* at para. 3 ("We recognize the particular vulnerability of the least-developed countries and the special structural difficulties they face in the global economy. We are committed to addressing the marginalization of least-developed countries in international trade and to improving their effective participation in the multilateral trading system.").

215. United Nations Global Compact, *About the GC: General Information About the Global Compact, Its Principles, Objectives, and Operations, at* http://www.unglobalcompact.org/Portal/Default.asp (last visited Feb. 16, 2004) ("Through the power of collective action, the Global Compact seeks to advance responsible corporate citizenship so that business can be part of the solution to the challenges of globalisation. In this way, the private sector—in partnership with other social actors—can help realize the Secretary-General's vision: a more sustainable and inclusive global economy.").

216. Brint, *supra* note 207, at 3.

217. *Id.* at 4; *see* EMILE DURKHEIM, THE ELEMENTARY FORMS OF RELIGIOUS LIFE 303-87 (Karen E. Fields trans., 1995) (discussing the purposes of rituals). *See generally* W. LLOYD WARNER & PAUL S. LUNT, THE SOCIAL LIFE OF A MODERN COMMUNITY (1941); RANDALL COLLINS, THEORETICAL SOCIOLOGY (1988).

218. Brint, *supra* note 207, at 4. *See generally* RICHARD RODRIGUEZ, HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ (1981).

come a WTO member, thus gaining access to the mainstream of the global trading system.[219]

The fourth and final variable, "common beliefs in an idea system, a moral order, an institution, or a group," is teleological, and in fact hearkens back to the genesis of the prototypical Gesellschaft (GATT 1947).[220] Building a community of peace and prosperity via the commercial bond is the seed of this Kantian communitarian *telos*, first sown in the initial enterprise of GATT 1947, after countries again witnessed the tragic consequences of economic balkanization precipitated by the failed global Gesellschaft.[221] Interestingly, these common beliefs may also be retranslated into a logical outcome of interest-based observation. This nascent community element may result from enlightened self-interests that bind the hands of sovereign countries to the mast of GATT against the sirens of mutually destructive parochialism or protectionism.[222] Or, it may be a corollary of the "coordination game" to overcome the prisoners' dilemma from the game theory standpoint.[223] Or, an institutional reconstruction of the global trading system via GATT might have simply been compatible with the political interests of the Allies, in particular the United States.[224] Although theoretically captivating, these often pessimistic and even scornful "anti-community" perspectives[225] tend only to recount—and thus highlight—the very properties of Gesellschaft, such as power and interest, which we strive to overcome through the construction of the WTO's Gemeinschaft.

Based on human interactions, these four variables shape the conceptual contour of the WTO's Gemeinschaft. These communitarian human interactions, which can be paraphrased as "communication"[226] or "discourse,"[227]

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219. *See* WTO, *Current Status of Individual Accessions*, *at* http://www.wto.org/english/thewto_e/acc_e/status_e.htm (Updated Mar. 2004).

220. Brint, *supra* note 207, at 3-4.

221. SUNGJOON CHO, FREE MARKETS AND SOCIAL REGULATION: A REFORM AGENDA OF THE GLOBAL TRADING SYSTEM 11-12 (2003) [hereinafter A REFORM AGENDA].

222. *See* Robert E. Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade*, 80 YALE L.J. 1299, 1309-36 (1971); Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 10 (1999).

223. *See* Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 400-01 (2000); Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679, 750-52 (2003).

224. *See* Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485 (1988); JOANNE GOWA, ALLIES, ADVERSARIES AND INTERNATIONAL TRADE (1994); Joanne Gowa & Edward D. Mansfield, *Power Politics and International Trade*, 87 AM. POL. SCI. REV. 408 (1993). *But cf.* Stephen D. Krasner, *State Power and the Structure of International Trade*, 28 WORLD POL. 317 (1976) (discussing the idea that an uneven distribution of political power will create a more open trading scheme).

225. Brint, *supra* note 207, at 6. Ruth Glass even declared that community studies were "the poor sociologist's substitute for the novel." Reimer, *supra* note 33, at 230. *See* COLLIN BELL & HOWARD NEWBY, COMMUNITY STUDIES: AN INTRODUCTION TO THE SOCIOLOGY OF THE LOCAL COMMUNITY 13 (1971).

226. Thomas McCarthy, *Translator's Introduction* to 1 JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY vi (Thomas McCarthy trans., 1984). McCarthy states that Habermas agrees that communication renders "individual purposive actions" coordinated and integrated with social teleology. *Id.* at ix.

227. Thomas McCarthy, *Habermas*, *in* A COMPANION TO CONTINENTAL PHILOSOPHY 397, 402

are operated and facilitated by "cooperation."[228] Only through this cooperative communication or discourse among different members, rich and poor, will global empathy be established, bringing the development crisis to the attention of all. Only through this global empathy can apparent contradictions of values in different corners of the world be mediated and reconciled. The rich would not force the poor to conform to unilateral regulations set by the former, instead the rich would situate themselves in the position of the poor and realize that such regulatory unilateralism may devastate the economic development of the poor. Thus, *we* in the WTO's Gemeinschaft could truly comprehend, immune from parochial prejudice, that unilateral protection of the "Flippers" (dolphins) in rich countries may threaten the livelihood of small Mexican tuna fishermen in the absence of appropriate (re-)distributive justice on a global scale.[229] We would then finally move from rhetoric to action.

This global empathy is not generated merely by a pure egalitarian or philanthropic impulse. It is, in fact, an outgrowth of human reason or rationality. Although it is often associated with self-interest rather than empathy, human reason is not necessarily the type of calculative and strategic behavior reminiscent of Justice Holmes' "bad man."[230] On the contrary, "communicative rationality" [231] can extend our empathy by enabling the projection of individual life experiences into the public sphere (that is, the WTO's Gemeinschaft) in which human rationality is continuously tested and enriched by the connectedness and interdependence of human existence. In sum, the ethics of our Gemeinschaftian discourse, as a reconstructed Kantian "practical reason," mandate us to exercise "perspective-taking" and build a moment of empathy.[232]

(Simon Critchley & William R. Schroeder eds., 1999); *see also* Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4-11 (1983). To Cover, a community or society is a *nomos*, a normative universe in which law cannot be separated by narratives or discourse concerning the history, literature, and purpose of the community or society. *Id.*

228. Habermas' view is that values such as truth and justice cannot be earned as an outcome, but can be reached only in a procedural sense—that is, via a dialogue—in which argumentation or justification is rationally accepted by means of "perspective-taking" or "empathy." McCarthy, *supra* note 227, at 402. This communicative cooperation is regarded as "discourse ethics," which is nothing but a "reconstruction of Immanuel Kant's idea of practical reason." *Id.*; *see also* Ward, *supra* note 5.

229. GATT Dispute Panel Report on United States, Restrictions on Imports of Tuna, unadopted, DS21/R-39S/155 (Sept. 3, 1991), *available at* http://www.worldtradelaw.net/reports/gattpanels/tunadolphinl.pdf.

230. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a *bad man*, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reason for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.") (emphasis added).

231. McCarthy, *supra* note 227, at 404.

232. *Id.* at 402.

B. The Law of Nations (Jus Gentium) Revisited

1. Jus Gentium in the Gemeinschaftian Context

Admittedly, the WTO's Gemeinschaft is an ideality, rather than a phenomenon. To bridge the gap between this ideality and reality, and to drive the often frustrating *what is* toward *what ought to be*, we need a norm or law as a steering mechanism.[233] In constructing the WTO's Gemeinschaft, law is an indispensable communicative device or language, the use of which continuously increases the possibilities of acceptable realities, channeled by the equation of global empathy. Therefore, as Ronald Dworkin submits, law is "constructive" in that it "show[s] the best route to a better future" and thus "unifying" despite divergent interests and projects scattered in the community.[234]

This very nature of law as a communicative device is especially imperative within the context of the WTO's Gemeinschaft, which is an imagined community where domestic analogies of political deliberation are dramatically limited.[235] Therefore, members rely heavily on law as a means of reflecting others' behaviors, designing their own, and thus communicating with one another. Furthermore, atomic players such as consumers and producers, in addition to states, give and take signals via the translating of the law (and thus the communicative function), which predicates the WTO's Gemeinschaft on systematic values such as stability and predictability.[236] Even in a pragmatist sense, this invisible communicative device is superior to other decisional mechanisms institutionalized in the WTO, such as the General Council, whose material restraints, including unrealistic voting rules[237] and other physical inconveniences,[238] tend to discourage any efficient and meaningful discourse within the community.[239]

When we construe law as an essential communicative device largely supplementing, or even supplanting, political deliberations, our immediate attention tends to be directed toward existing conventions or written legal documents. As for basic legislation in the field of development, one might

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233. *Cf.* Cover, *supra* note 227, at 9-10 (discussing law as it fits into a normative system).
234. RONALD DWORKIN, LAW'S EMPIRE 413 (1986)
235. Brint, *supra* note 207, at 11.
236. *Cf.* WTO, *WTO Panel Report on United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, para. 7.76 (Dec. 22, 1999), *available at* http://www.docsonline.wto.org/DDFDocuments/t/WT/DS/152R.doc. "The security and predictability in question are of 'the multilateral trading system.' The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of *individual economic operators*. The lack of security and predictability affects mostly these individual operators." *Id.* (emphasis added).
237. WTO Agreement, *supra* note 1, art. IX, paras. 1-4 (stipulating "consensus" and "super-majority" rules).
238. *See* Supachai Panitchpakdi, *Keynote Address: The Evolving Multilateral Trade System in the New Millennium*, 33 GEO. WASH. INT'L L. REV. 419, 439-40 (2001) (describing a dilemma of the "green room" process).
239. *Id.*

refer to the "Declaration on the Right to Development,"[240] which was adopted in the UN General Assembly on December 4, 1986. Despite its symbolic significance(in the sense that it elevated the development issue to the realm of human rights), the Declaration suffers from its abstract and vague structure. It leaves open a myriad of legal questions, such as the determination of beneficiaries and duty-holders, as well as its enforceability.[241] The Doha Work Program shares the same problem. As previously discussed, the Work Program itself would have difficulty providing any immediate legal force on its own accord.

Thus, one might reasonably speculate that teeth should be added to these legislative instruments to overcome their impotent nature. In this context, some scholars even suggest that technical assistance based on "best endeavors" should be converted to binding obligations whose failure would be adjudicated in the WTO dispute settlement system.[242] Though this suggestion sounds impressive, the practical difficulty of amendment as well as the political sensitivity of this issue, particularly from the standpoint of developed countries, undermines its feasibility. Instead of hastily deriving adjudication directly from a foundational document, such as the Doha Declaration (Work Program), the global trading community should consider the document as a "framework convention" (as seen in many environmental treaties) which spawns a network of subsequent sub-agreements or protocols that are necessary for effective micro-level implementation of the framework convention.[243] These sub-agreements or protocols should not merely declare the goodwill rhetoric that has been frustratingly repeated throughout GATT history; they should contain detailed criteria and standards as to what should be done to provide development assistance and how those initiatives should be funded.

However, these sub-agreements or protocols are not easy to obtain because most formal legislation in the WTO context must take the form of a treaty, which is extremely hard to create under the current WTO mechanism.[244] Even if the WTO was equipped with a workable decision-making

240. G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986).

241. *See* Isabella D. Bunn, *The Right to Development: Implications for International Economic Law*, 15 AM. U. INT'L L. REV. 1425, 1434-35 (2000).

242. TECHNICAL ASSISTANCE SERVICES, *supra* note 91, at 11-12; THE WTO AND BEYOND, *supra* note 76, at 242-43.

243. In the field of international environmental law, a "framework convention" provides a basic structure of regulation, subsequently followed by more detailed "protocols." Therefore, regulations as well as their negotiations tend to be conducted in an incremental fashion, minimizing unnecessary tension and conflict. *See, e.g.*, United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, *available at* http://www.unfcc.int/resource/docs/convkp/conveng.pdf; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S 3; Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11, 097, 1513 U.N.T.S. 293.

244. *See* John H. Jackson, *Appraising the Launch and Functioning of the WTO*, 39 GERMAN Y.B. INT'L L. 20, 39 (1996) ("[T]he decision-making and voting procedures of the WTO, although much improved over the GATT, still leave much to be desired. It is not clear how the consensus practice will proceed, particularly given the large number of countries now or soon involved.").

mechanism, the depth of its regulations would likely be minimal in a traditional treaty setting for several reasons. First, concluding a treaty is a lengthy and painstaking enterprise. Most treaties are negotiated, signed and ratified in a slow and tortuous manner. More often, a loss of passion or lack of momentum in the middle of the treaty-making process hinders its further development. On top of this, due to its strict formality, a treaty is likely to be plagued by bureaucratic over-circumspection and red tape throughout the whole process. Accordingly, at the very end, the substance that the states manage to agree upon may not be beneficial, despite the stylistic and linguistic elegance of the treaty.[245] Second, a treaty-making process is basically political; it calls for a large amount of political capital that can accommodate the cost of both initiation and compromise. Moreover, the whole process tends to be swamped by vehement and continuous lobbying from interest groups or domestic constituencies, thereby resulting in the drawing of a cat instead of a lion. Third, because countries do not want to be shamed as "violators," they tend not to commit themselves to formally binding pacts.[246] Moreover, most countries are eager to retain as much room as possible for future flexibility, leading states to minimize the scope of their commitments in any formally binding treaty. Very often, treaties' practical effects are also qualified by express reservations. Fourth, treaty texts are usually vague and nebulous enough to raise the possibility of self-serving interpretations by signatories, and hence an unsatisfying level of compliance. Fifth, most treaties are static and hard to amend. Even if the initial scope of regulation was sufficient, the lack of dynamism inherent in treaties tends to prevent them from keeping pace with subsequently rising development demands.

In sum, law in the form of mere documents is deficient as an effective communicative tool. Although the WTO retains a plethora of agreements and provisions, the fact of which is deemed a legal evolution from GATT 1947 in many ways,[247] such *corpus juris* alone still fails to fulfill the WTO's Gemeinschaftian aspirations under the Gesellschaftian power politics. Even with the presence of institutionalized development assistance within the WTO, local politics of the rich rampantly ignore basic developmental needs of the poor.[248] Therefore, this failure is better characterized as a general lack of normative consciousness than a mere violation or inadequacy of the rules. Only through Gemeinschaftian discourses and consequent global empathy can this failure be reversed. Current WTO rules as *lex lata* derive

245. *See* John H. Jackson, *International Economic Law in Times That Are Interesting*, 3 J. INT'L ECON. L. 3, 8 (2000) (stating that "[t]reaties are often an awkward albeit necessary method of designing institutions needed in today's interdependent world, but they do not solve many problems").

246. *See* Charles Lipson, *Why Are Some International Agreements Informal*, 45 INT'L ORG. 495, 537-38 (1991) (summarizing the benefits of informal agreements vis-à-vis formal agreements (treaties), including a non-binding nature).

247. *See generally* Ernst-Ulrich Petersmann, *The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization*, 6 EUR. J. INT'L L. 161 (1995).

248. *See supra* Part III.A.

from a series of compromised negotiational outcomes. Accordingly, these rules inevitably radiate the political preferences of the rich and powerful members; they are often contrary to the fundamental norm of free trade or anti-protection. Consequently, after a half-century of institutional evolution, the WTO still underperforms its foremost agendum. Therefore, the WTO's Gemeinschaft must function to allow the free trade mechanism to bear its original distributive justice without undue political interference and manipulation. The current WTO should rise above those positivistic—and thus excusable—*lex*, and construct an ultimate normative referential precept, *jus*, which not only guides and regulates members' behaviors but also constitutes the Gemeinschaft. It is this very reason why we should pursue the "Law of Nations" ("*jus gentium*") not only as a source of law premised on the Thomist "distinguo,"[249] but also as central hermeneutics which should reveal, through interpretations, the Gemeinschaftian *telos* of the WTO.

In fact, the history of *jus gentium* eloquently relates its supreme communitarian aspiration, a virtuous cycle of common peace and prosperity. Starting from a municipal system in the Roman Empire, *jus gentium* earned its international appeal after the Thirty Years War devastated several centuries' brilliant civilizational achievements in Europe.[250] After witnessing the misery of the war, pioneering philosophers and legal scholars strived to achieve a mutually supportive and peaceful human community. These innovators attempted to tame and regulate brutal and irrational human behaviors—often committed in the name of sovereignty—through *jus gentium.*

Remarkably, Leibniz formulates universal justice as the discovery of one's own benefit in benefiting others, and thus mankind.[251] He sermonizes through his life the precept that a person's true felicity comes only from "locating their identity in benefitting mankind and their posterity."[252] Throughout his works, including the *Elementra Juris Naturali* and the *Codex Juris Gentium*, Leibniz emphasizes that empathy and compassion toward others is "never absurdity nor negligence" and that "[u]njust is my good that causes harm to others."[253] Therefore, his version of natural law (*jus naturale*) is that "[t]he most perfect society is that whose purpose is the universal and supreme happiness."[254] Leibniz believes that the idea of natural law as a robust manifestation of egalitarian ethics can be reincarnated in the real world, in accordance with the contingence of time and place.[255] Vat-

249. ROSCOE POUND, A WORLD LEGAL ORDER: LAW AND LAWS IN RELATION TO WORLD LAW 4 (1959).

250. *See* INTERNATIONAL LAW: CASES AND MATERIALS, at xxix-xxx (Lori F. Damrosch et al. eds., 4th ed. 2001).

251. Robert Trout, *Life, Liberty, and the Pursuit of Happiness: How the Natural Law Concept of G.W. Leibniz Inspired America's Founding Fathers* (pt. 2), FIDELIO, Spring 1997, *available at* http://www.schillerinstitute.org/fid_97-01/971_vattel-2.html (last visited Feb. 23, 2005).

252. *Id.*

253. HIDEAKI HIRANO, LEIBNIZ'S CULTURAL PLURALISM AND NATURAL LAW 42 (1997), http://prof.mt.tama.hosei.ac.jp/~hhirano/academia/leibniz.htm (last visited Feb. 17, 2004).

254. Trout, *supra* note 251, *available at* http://www.schillerinstitute.org/fid_97-01/971_vattel-2.html.

255. HIRANO, *supra* note 253, at 14.

tel, based on the Leibnizian natural law perspective, concretized the concept of *jus gentium*. He stresses that each man's selfish pursuit of interest without consideration of the welfare of others inevitably falls into the crack of wretchedness, and argues that we should *first* endeavor to promote the general happiness of mankind, which will be rewarded by the same deed from others.[256] Therefore, Vattel defines the first general law of nations as the following: "[E]ach individual nation is bound to contribute every thing in her power to the happiness and perfection of all the others."[257]

This "duty to assist" as the foremost form of the Law of Nations has also been adopted and advocated by modern philosophers such as John Rawls. Rawls acknowledges that certain societies may be burdened in that they lack material resources needed to be well-ordered, and that well-ordered and thus affluent peoples have a duty to assist these "burdened societies."[258] He elevates this duty to one of the "Principles of the Law of Peoples."[259] Certainly, this communitarian duty bases its legitimacy on the high probability that no member participating in the WTO discourse and communication would disapprove of it.[260] It is in fact a definitional feature of the Gemeinschaft, clad with a norm.

2. *The Gemeinschaftian Mission of Jus Gentium: Regulating Politics*

The WTO's development failure, which is a defining feature of anti-Gemeinschaft, is attributable largely to the mechanics of domestic politics. Ironically, the protectionist barriers imposed by the rich on basic products, such as the agricultural products and textiles, hurt the poor and also damage their own domestic constituencies. Consumers have a preference for cheap products, producers want cheap (foreign) raw materials to manufacture upper-level products, and retailers depend on low input prices in order to establish sustainable profit margins. However, the damage suffered by domestic economic players in the rich nations is rather indirect and diffuse. It provides them with little incentive to organize and defend their interests by contesting those trade barriers.[261] Therefore, these consumers, producers, and retailers tend to be underrepresented in terms of trade policy development.

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256. *Vattel's Natural Law*, *supra* note 204 (citing VATTEL, THE LAW OF NATIONS, PRELIMINARIES, sec. 10 (1758)).

257. *Id.* (citing VATTEL, THE LAW OF NATIONS, PRELIMINARIES, sec. 13 (1758)).

258. RAWLS, *supra* note 202, at 106.

259. *Id.* at 37.

260. McCarthy, *supra* note 227, at 402; JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 66 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990).

261. *See* Judith Goldstein, *International Institutions and Domestic Politics: GATT, WTO, and the Liberalization of International Trade*, *in* INTERNATIONAL ORGANIZATION, *supra* note 94, at 140; C. FRED BERGSTEN, THE GLOBAL TRADING SYSTEM AND THE DEVELOPING COUNTRIES IN 2000, (Int'l Inst. of Econ., Working Paper No. 99-6, 1999), *available at* http://www.iie.com/publications/wp/1999/99-6.htm (last visited Feb. 23, 2004).

In contrast, domestic producers whose products compete with cheap foreign imports in the domestic market tend to have a more direct interest in maintaining the trade barriers than other domestic actors. This is mainly due to the fear of losing the "competition" to the foreign producers. Consequently, they tend to engage in well-organized lobbying activities.[262] Those producers tend to be overrepresented in terms of trade policies. This discrepancy in representation translates into political failure, or worse, "constitutional failure"[263] from a Madisonian perspective.[264] Moreover, its impact is not confined to the domestic sphere. The distortion in domestic interest representation will eventually hurt those developing countries that produce basic input products, which in turn will undermine their economic base.

The elimination of domestic protection has proven to be a political challenge in developed countries. However, it would be even more difficult for those developed countries to share their national resources with other developing countries to the extent necessary for the latter to improve their economic situation. Politicians basically represent and are held accountable to their domestic constituencies—groups not known to be advocates of international economic justice at the expense of their own wealth. Even if some politicians realize a serious need for development assistance from an economic, humanitarian, or other perspective, they would not risk their political lives to urge their constituencies to contribute their precious money to the development of a far-away poor country.[265]

It is often and accurately stated that all politics is local.[266] While development assistance requires a long-term commitment to realize a tangible outcome in an area such as capacity-building, most politicians have a short-sighted perspective on account of the length of the typical election cycle. Advocating a long-term project where the real outcome may materialize after they are out of office would not be a wise political strategy.[267] This

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262. *See, e.g., Bush the Anti-Globalizer*, ECONOMIST, May 11, 2002, at 14, 16 (criticizing the United States' new farm bill, which would severely undermine free trade principles to protect the domestic agricultural sector, but eventually benefit only the "biggest and richest 10%" of farmers); *Cleansing the Augean Stables*, ECONOMIST, July 13, 2002, at 12 (criticizing the EU's Common Agricultural Policy (CAP) for spending half of the EU budget to feed a small population of farmers who are "less than 5% of the workforce"). *Cf.* UN WIRE (Stern), *supra* note 143 (reporting that World Bank Chief Economist Nicholas Stern accused rich countries of hypocrisy for urging free trade in the developing world "while imposing protectionist measures that cater to powerful special interests").

263. ROBERT E. HUDEC, ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW 133 (1999) (quoting Jan Tumlir that "[p]rotectionism is a constitutional failure"). *See generally* JAN TUMLIR, PROTECTIONISM: TRADE POLICY IN DEMOCRATIC SOCIETIES (1985).

264. *See* Peter M. Gerhart, *The Two Constitutional Visions of the World Trade Organization*, 24 U. PA. J. INT'L ECON. L. 1, 19-20 (2003) (highlighting the WTO's "internal, economic" vision as a "healthy antidote" to parochial interests).

265. *See* Jack Goldsmith, LIBERAL DEMOCRACY AND COSMOPOLITAN DUTY, 55 STAN. L. REV. 1667, 1675-82 (2003).

266. *Cf.* Shaffer, *supra* note 187, at 609, *at* http://www.UNWire/20020930/29272_story.asp (observing that protection costs imposed on domestic constituencies are less transparent than the costs of other positive programs, and accordingly politicians tend to "respond more favorably" to protectionism against "unrepresented foreigners"). *See generally* TIP O'NEILL, ALL POLITICS IS LOCAL: AND OTHER RULES OF THE GAME (1994).

267. Of course, under the peculiar situation of the Cold War, political motivations for development

inherent myopia of domestic politics lies at the heart of the failed Gesellschaft of GATT and the WTO. Power-oriented politics continue to distort and manipulate free trade and basic market mechanisms. Sadly, if used correctly, these tools could transform the economic standing of the poor by allowing them to acquire foreign currencies and reinvest them for further development.

In the face of such political failure, *jus gentium* of international trade signifies a perspectival shift from negotiational politics to a norm which checks politics, promotes free trade, and achieves effective development assistance. In this regard, a functional, operational mission of *jus gentium* lies in "legalization,"[268] which can be broadly defined as a tendency to increase reliance on norms and normative pull in the context of trade relations between the rich and the poor. Legalization is a practical manifestation of *jus gentium* that realizes the WTO's Gemeinschaft by imbuing stability and

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aid could remain. However, in a post-Cold War era, the volume of foreign aid by rich countries has substantially shrunk. *See* WORLD TRADE AND PAYMENTS, *supra* note 54, at 299.

268. No unified definition of "legalization" exists. Many scholars of international law as well as international relations have long used the term legalization or its siblings—such as "judicialization" or "juridicization"—within different contexts and with different meanings. Arie Reich provided for a quite general concept of juridicization, which was defined as a tendency of regulating trade relations by "using norms and enforcement procedures that are LEGAL in character," thereby "creat[ing] significant limitations on the sovereignty of the States." Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 NW. J. INT'L & BUS. 775, 776 (1996-97). However, Reich conceptually distinguished between juridicization and legalization, which was defined as "making lawful a phenomenon which prior thereto was against the law." *Id.* at 777 n.3. Other scholars explored legalization from a judicial standpoint, highlighting a dispute settlement mechanism involving international courts or tribunals. *See* Robert E. Hudec, *The Judicialization of GATT Dispute Settlement*, *in* IN WHOSE INTEREST?: DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE 9-43 (Michael M. Hart & Debra P. Steger eds., 1992); Alec Stone Sweet, *The New GATT: Dispute Resolution and the Judicialization of the Trade Regime in* LAW ABOVE NATIONS: SUPRANATIONAL COURTS AND THE LEGALIZATION OF POLITICS 138 (Mary L. Volcansek ed., 1997) (observing that "WTO legal norms gradually embed themselves within national legal systems, either by domestic legislative actions or judicial decisions."). More recently, Kenneth Abbott and other legal scholars and political scientists have attempted to define legalization in a clearer and more analytical fashion. Based on the proposition that legalization refers to a "particular set of characteristics that institutions may (or may not) possess," they define legalization along three dimensions: "obligation," which means that states or other actors are bound by rules or commitments; "precision," which means that those rules or commitments are determinate; and "delegation," which means that third parties are authorized to interpret and apply those rules as well as resolve disputes. Kenneth W. Abbott et al., *The Concept of Legalization*, *in* LEGALIZATION AND WORLD POLITICS 17 (Judith L. Goldstein et al. eds., 2001) [hereinafter LEGALIZATION]. A wide spectrum exists in each of these dimensions, ranging from "hard" to "soft" legalization. *Id.* at 17-18. This multi-dimensional definition of legalization, despite its analytical sharpness and clarity, cannot be free from controversy mainly due to its inherent political overtone. In other words, it basically assumes that legalization as institutionalization is a matter of *choice* by states, insinuating that states can freely withdraw their initial choice of legalization. *Id.* at 7. Finally, legalization should be distinguished from "constitutionalization," which deals more deeply with "foundational problems of social order." *Id.* at 5. *See* Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 MICH. J. INT'L L. 1, 30 (1998). *But see* Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far in* EFFICIENCY EQUITY & LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 227-30 (Roger B. Porter et al. eds., 2001). However, this constitutionalization should also be differentiated from the "constitutional understanding" of international trade law posited by John Jackson. *See* WORLD TRADING SYSTEM, *supra* note 11, at 339; John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT'L ECON. L. 17, 25-28 (1996); John H. Jackson, *Perspectives on Regionalism in Trade Relations*, 27 LAW & POL'Y INT'L BUS. 873, 873 (1996) [hereinafter *Perspectives on Regionalism*].

predictability in development-related issues and tames political whims and uncertainty by making them more *costly* than ever.[269] Therefore, legalization eventually communicates with the concept of a "trade constitution," in the sense that it denotes "an intricate set of constraints imposed by a variety of rules or legal norms" in a particular institutional setting.[270]

3. *The Dual Nature of Implementing Jus Gentium*

The aforementioned "duty to assist" as the fundamental Law of Nations of the WTO's Gemeinschaft can be implemented under the WTO's everyday operation in two different forms—negative and positive.

The first form of *jus gentium* of international trade is the most fundamental tenet of international trade, which is nothing but a negative obligation of anti-protection. Free trade without protection is a superior developmental apparatus to any special trade preferences or aid—aid without free trade never surpasses free trade without aid. Yet, the realities of the political economy of the rich, in addition to the legal vacuum or lacunae that is inevitable under positivistic conventions, often compromise this supreme norm. Therefore, the first mode of implementing *jus gentium* in the WTO's Gemeinschaft is to save the fallen mission of the global Gesellschaft—free trade—and thus pave a firm ground for international economic justice by enabling, and eventually *helping*, the poor to make the most of their comparative advantage.

Importantly, trade jurisprudence can contribute to realizing this negative mode of *jus gentium* of international trade by declaring and expounding the unwritten law of development. Facing various cases that intersect trade and development, dispute settlement organs, such as the WTO panels and the Appellate Body, can authoritatively strike down various forms of protectionist and other WTO-illegal measures adopted and applied by developed countries, which hurt developing countries.[271] The advanced and highly calibrated dispute settlement mechanism under the WTO tends to nurture such case law and enhance the arbiters' authority vis-à-vis the old GATT.[272] Development case law reverberates in future cases, influencing and determining state behavior in this field. In fact, in contrast with various past leg-

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269. *See* Goldstein, *supra* note 261, at 149, 151; *see also* ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 97 (1984).

270. WORLD TRADING SYSTEM, *supra* note 11, at 339 (2d ed. 1997); JOHN H. JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE 101-04 (1998); John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT'L ECON. L. 17, 25-28 (1996); *Perspectives on Regionalism*, *supra* note 268, at 873; *see also* Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 YALE J. INT'L L. 301, 316-24 (1998) (discussing Professor Jackson's constitutional premise of international trade law).

271. *Cf.* Julio Lacarte-Muró & Petina Gappah, *Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench*, 3 J. INT'L ECON. L. 395, 395-401 (2000) (noting the active participation in the WTO dispute settlement system by the developing countries with the increasing awareness of the benefits derived from participation).

272. *Cf.* Goldstein, *supra* note 261, at 149 (stating that the new dispute settlement mechanism does not allow countries to be punished if they fail to live up to their WTO obligations).

islative initiatives that started with fanfare but ended with a fizz, international trade tribunals have recently responded to developmental concerns in a quiet, yet effective manner. They often speak softly but carry a big stick. Even without relying on an eventual enforcement mechanism (sanctions), normative radiation emitted against the background of rich jurisprudence can successfully check the problematic behaviors of the developed countries. In this regard, Robert Hudec observes that "[t]he key point . . . is that a *legal* ruling without retaliation can still be an effective policy tool for a developing country seeking to reverse a legal violation by a larger country."[273]

This negative mode of jurisprudence tends to police developed countries' protectionism and push for further trade liberalization so that developing countries can secure better access to developed markets for manufactured as well as agricultural products. For instance, in 1999 the WTO Appellate Body (AB) blocked Turkey's attempt to launch a new quantitative restriction on textiles imported from India in Turkish Quantitative Restrictions (QRs).[274] In this case, Turkey, a developing country, actually introduced a new quota.[275] However, the EU left Turkey, who had already signed an association agreement with the EU, no option but to replicate the pre-existing quota that formed part of the EU's common external trade policies.[276] Turkey justified the new quota by invoking the GATT Article XXIV exception, arguing that its association agreement with the EU exempted the quota under Article XXIV.[277] If accepted, the new quota would have harmed India's economic development, since textiles represent one of its main exports. However, the AB interpreted Article XXIV not as an exception, but as an important parameter of trade liberalization. According to the AB, regional trade agreements are meaningful only to the extent that they promote further liberalization and do not establish new restrictions against non-member countries like India.[278] This decision yields a critical implication in terms of development, in which case law will prevent developed countries from expanding their pre-existing trade barriers against developing countries in the name of regional trade agreements.

As another example of negative jurisprudence regulating rich countries' protectionist trade policies, the recent *U.S.—Combed Cotton Yarn*[279] decision merits special attention. Policies affecting textiles are commonly known as some of the "hardest-fought" issues under the old GATT and the

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273. Robert E. Hudec, *The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective*, *in* HANDBOOK, *supra* note 27, at 83 (emphasis added).

274. WTO Appellate Body, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, paras. 64-66 (Nov. 19, 1999) [hereinafter *Turkish QRs*], *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

275. *Id.* at para. 2.

276. *Id.* at para 3.

277. *Id.* at para. 17.

278. *Id.* at para. 57.

279. WTO Appellate Body, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R (Oct. 8, 2001) [hereinafter *U.S.—Combed Cotton Yarn*], *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

new WTO system.[280] Spurred by domestic lobbies, developed countries have desperately protected this industry—despite the absence of comparative advantage—primarily through bilateral import quotas and VERs under the Multifiber Arrangement.[281] Such a blatant antithesis of free trade has consistently plagued developing countries, such as Pakistan, whose chief comparative advantage lies in this sector—their gains from trade have been forfeited due to this protectionism. Naturally, finding a remedy to this distorted situation was one of the most grave missions of the Uruguay Round. The Agreement on Textiles and Clothing (ATC)[282] was created for the purpose of phasing out those trade restrictions under the MFA by fully integrating the textiles and clothing sector into the WTO discipline.[283] However, developed countries, such as the United States and the EU, have failed to take any positive steps in implementing the ATC even as the 2005 deadline draws near.[284] Critically, the vague text of the ATC, which pursues the progressive integration of textiles and clothing to the WTO system, rather than specifying a concrete timetable for phase-out of quotas, provides developed countries with an excuse for delay or lack of effort in implementing the agreement.[285] To make things worse for developing countries, the ATC also provides for a "transitional safeguard mechanism" under which developed countries can still protect their domestic textiles and clothing industries under certain circumstances.[286]

Against this gloomy background, the case was brought before the WTO. Pakistan complained that the United States unduly restricted imports of Pakistani yarn through the transitional safeguard mechanism under the ATC, while the United States attempted to justify its action by arguing that the increased Pakistani yarn imports caused "serious damage, and actual threat thereof," to its domestic industry.[287] In addition to the tedious phasing-out of textiles quotas under the ATC, the existence of this special safeguard clause is extremely vexing to textile-exporting countries like Pakistan. It would be a serious blow to developing countries if the clause functioned as a new trade barrier through overly generous interpretations by the panel or the AB. However, the AB imposed firm discipline in invoking the clause. Upholding the panel's findings, the AB declared the U.S. transitional safeguard mechanism illegal under the ATC, pointing out that the United States improperly narrowed the scope of the affected domestic industry and that it also exaggerated damages from Pakistani yarn imports by

280. WTO, *Trade Topics: Textiles*, *at* http://www.wto.org/english/tratop_e/texti_e/texti_e.htm (last visited Feb. 23, 2004).
281. *See* THE REGULATION OF INTERNATIONAL TRADE, *supra* note 82, at 375-77.
282. *See supra* note 190.
283. WTO, *supra* note 280.
284. *See* Alice J.H. Wohn, *Towards GATT Integration: Circumventing Quantitative Restrictions on Textiles and Apparel Trade Under the Multi-Fiber Arrangement*, 22 U. PA. J. INT'L ECON. L. 375, 375-76 (2001); Dunoff, *supra* note 187, at 981.
285. GLOBALIZATION, GROWTH, AND POVERTY, *supra* note 16, at 61.
286. ATC, *supra* note 190, art. 6.
287. *U.S.—Combed Cotton Yarn*, *supra* note 280, paras. 1-2.

not examining the effects of imports from Mexico.[288] Undoubtedly, this strict interpretation of the traditional safeguard mechanism suits the objective of the ATC—"further liberalization of trade"[289]—thereby eventually responding to the concerns of developing countries that export textiles and clothing.

Nonetheless, this type of negative enforcement of the Law of Nations, or the duty to assist, may not suffice to fulfill the purpose of the WTO's Gemeinschaft. Indeed, rich countries may pursue policies that are based on legitimate, non-trade grounds, which *inadvertently* have a protectionist effect and are not within the scope of the WTO's preventative power. A common example arises out of divergent social or environmental standards resulting from different levels of development. Although general economic growth fueled by free trade in poor countries tends to result in increasing levels of social hygiene under the regulatory Kuznets effect,[290] this phenomenon, even if it should transpire, would occur only in the long-term. However, in the short to medium term, the effect is different under typical circumstances. Rich countries adopting and enforcing social policies based on purely legitimate, non-protectionist objectives, such as the protection of human health or the environment, will find that their poor trading partners are unable to comply with high, sophisticated regulatory standards. These countries lack the technical and financial capacity necessary to adopt and implement such standards. This regulatory non-compliance, albeit innocent and inescapable from the standpoint of the poor countries, results in the denial of access to the rich countries' markets. Clearly, without workable technical and financial assistance from the rich to the poor, the WTO's Gemeinschaft would suffer from a serious "development deficit."[291]

As this dilemma of divergent standards and capacities demonstrates, the Law of Nations in international trade should also be manifested through a positive mode. This requires the rich to play a more active role (beyond mere anti-protection) in sharing regulatory burdens with the poor without undue interference with the latter's market access—a critical developmental mechanism. A positive role connotes a redistribution of resources, both technical and financial, between rich and poor countries.[292] In 1996, *United States—Standards for Reformulated and Conventional Gasoline*, [293] the

288. *Id.* at para. 128.

289. ATC, *supra* note 190, pmbl.

290. *See* Simon Kuznets, *Economic Growth and Income Inequality*, 45 AM. ECON. REV. 1 (1955); BJORN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD 33 (1998) (observing that people tend to care about high environmental standards only after they become rich).

291. Amorim, *supra* note 21, at 96-99.

292. *See* Peter M. Gerhart, *Slow Transformations: The WTO as a Distributive Organization*, 17 AM. U. INT'L L. REV. 1045, 1085-93 (2002). *But cf.* Joel Trachtman, *Legal Aspects of a Poverty Agenda at the WTO: Trade Law and "Global Apartheid,"* 6 J. INT'L ECON. L. 3, 5 (2003) (submitting that "global redistribution" falls under the "domain of politics," and law "tells us little" about it).

293. WTO Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/9 (May 20, 1996) [hereinafter *Gasoline*], *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm.

very first case adjudicated under the new WTO dispute settlement system, provided an archetype for development-related litigation of this kind. Brazil and Venezuela complained that the United States discriminated against foreign refiners in enforcing its domestic environmental standards. The AB rejected a U.S. defense based on domestic administrative difficulties, holding that the U.S. administration failed to take into account foreign (developing countries *in casu*) interests and to establish a certain cooperative arrangement with affected countries (Brazil and Venezuela).[294] Undoubtedly, in a setting involving developed and developing countries, a cooperative arrangement tends to contain both technical and financial assistance. Otherwise, developed countries could not achieve their domestic regulatory goals on account of the limited regulatory capacity of the developing countries that are affected by those regulations.

Similarly, in 1998, the WTO Appellate Body once again struck down a U.S. application of its turtle protection legislation in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*.[295] The AB found that the United States failed to make "available and feasible" efforts to negotiate a cooperative agreement with foreign (developing) countries (India, Pakistan, and Malaysia) affected by the measure, despite the existence of various multilateral fora for such an agreement.[296] Inspiringly, this jurisprudence has resonated even outside of the WTO, particularly within the context of North American Free Trade Agreement (NAFTA) dispute settlement proceedings. A recent case, *In the Matter of Cross-Border Trucking Services*,[297] arose from the U.S. refusal to allow cross-border transportation of Mexican trucks for public safety reasons after the United States failed to phase out the initial moratorium, which was required pursuant to Annex I of the NAFTA. Faced with a politically sensitive case, the NAFTA panel unanimously ruled that the United States violated NAFTA Articles 1202 (national treatment for cross-border services) and 1203 (most-favored-nation treatment for cross-border services), since the U.S. government failed to consider "more acceptable, less trade restrictive, alternatives" to a blanket moratorium.[298] The panel also determined that the "inadequacies of the Mexican regulatory system" could not form the basis for a U.S. moratorium.[299] It thereby implied that the U.S., as a developed country, should have expended more effort to address Mexico's regulatory inadequacies. The NAFTA panel cited and relied on the WTO decisions in *Gasoline* and *Shrimp-Turtle*.[300]

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294. *Id.* at paras. 26-27.

295. WTO Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58 (Nov. 6, 1998) [hereinafter *Shrimp-Turtle*], *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm.

296. *Id.* at paras. 166-70.

297. In the Matter of Cross-Border Trucking Services, USA-MEX-98-2008-01, para.1 (Feb. 6, 2001) [hereinafter *NAFTA Trucking*], *available at* http://www.worldtradelaw.net/nafta20/truckingservices.pdf.

298. *Id.* at para. 268.

299. *Id.* at para. 296.

300. *Id.* at paras. 265, 267.

Finally, one should note *how* the Appellate Body has reached this development-related jurisprudence. Obviously, there is no direct textual basis for this jurisprudence in the relatively few (only 38) provisions of GATT, which have become obsolete since they have not been updated at all in GATT's half-century history. However, the AB managed to develop an innovative method of interpretation on the basis of the depressingly fixed text of GATT. The AB focused on the previously unused preambulary language in Article XX, know as the "chapeau." The AB interpreted the chapeau's phrases of "arbitrary" or "unjustifiable" discrimination in scrutinizing whether the United States took reasonable measures to take into account foreign interests. Although the chapeau provides a technical, textual basis for this new approach, the AB transcended the lexicographical meaning in articulating an integrative *telos* for the WTO's Gemeinschaft.[301] In a highly interdependent world, aggressive regulatory unilateralism by a developed country—often accompanied by trade sanctions—undoubtedly hurts many developing countries.[302] The only way to attain both regulatory and developmental goals is for developed countries to assist developing countries attempting to comply with the former's high regulatory standards by offering proper financial and technical assistance. This is the ideal status in which a dual goal of free markets and regulatory autonomy can be achieved in a non-conflicting and harmonious fashion, realizing the aforementioned *telos* of communitarian integration.

4. Beyond Formalism: Manifesting Jus Gentium as Soft Law

Once the *jus gentium* of international trade has fully permeated the WTO's Gemeinschaft, the format which caused it to materialize will be marginalized. When *jus gentium* becomes more atmospheric, it effectively conducts communication and discourse by transcending narrow legal formality. Then, a development-related legal reference need not clothe itself in a hard layer of textual justification. The legal format will be less relevant once it delivers certain legal meaning and legal force, through which it may influence and alter the trade and development behavior of its members. This legal reference is often labeled a "guideline" or "recommendation" and collectively termed "soft law."[303] Admittedly, it is not a formal treaty and thus is technically non-binding.

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301. *Cf.* K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 31 (1934) (maintaining that "a sane theory would utterly disregard a Documentary text *if any relevant practices existed* to offer a firmer, more living basis for the ideal picture.").

302. *See* Cullet, *supra* note 114, at 558-59 (emphasizing "solidarity," reflecting the interdependence and integration of the global trading system).

303. *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, *in* LEGALIZATION, *supra* note 268, at 37-72; Eibe Riedel, *Standards and Sources: Farewell to the Exclusivity of the Sources Triad in International Law?*, 2 EUR. J. INT'L L. 58, 79 (1991) (discussing "new economic standards" with the proliferation of international economic transactions). For example, one of the most representative sectors in the APEC in which such guidelines and standards proliferate is the "standards and conformance" sector. The Sub-Committee on Standards and Conformance (SCSC) was estab-

However, regardless of its format, such guidelines or recommendations are typically well observed, chiefly because their creators are mostly working-level regulators (specialists) who regularly participate in sector-specific committees,[304] rather than high-ranking bureaucrats or political appointees (generalists). In other words, the normative value of soft law can be guaranteed by an epistemic understanding among its creators who engage in the "jurisgenerative"[305] process. Moreover, guidelines or recommendations are usually clear and unambiguous enough to directly respond to certain situations that involve development concerns. This concreteness contributes to strong compliance with such micro-legislation or soft law, which can be referenced, cited, and invoked in real disputes through the vehicle of legal arguments.

Remarkably, this soft law often provides a constructive solution to potential disputes involving developed and developing countries. As discussed above,[306] the evolution of jurisprudence through the WTO dispute settlement mechanism is capable of addressing development-related disputes. However, an adjudicative framework unavoidably involves an adversarial and confrontational dynamic between developed and developing countries. This dynamic may be undesirable when both parties have high stakes—where losing the case is politically intolerable to either party. These disputes are more likely to be intensified and escalated than to be resolved. Under these circumstances, both developed and developing countries would be better off if they could resolve their disputes through a rule-making process rather than an adjudicative procedure possibly involving retaliation as an enforcement measure. Because it is more transparent and constructive, the resolution of development-related disputes through the establishment of new guidelines is far superior to normal settlements which tend to be private and bilateral. Additionally, a guideline established in this manner can radiate a legal force to third parties in future cases.

A recent WTO case involving Canada and Brazil illuminates and supports the aforesaid position. On February 3, 2001, Canada banned the importation of Brazilian beef for the fear of mad cow disease (BSE).[307] Al-

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lished under the Committee for Trade and Investment (CTI). One reason for establishing the SCSC was to encourage the alignment of members' standards with international standards and to achieve mutual recognition among APEC economies of conformity assessment in regulated and voluntary sectors. The SCSC completed the "Guidelines for the preparation, adoption and review of technical regulations" and the "APEC Food MRA (Mutual Recognition Arrangement): Supplementary Material" in 1997. *See* APEC Committee, *Standard and Conformances*, *at* http://203.127.220.66/loadall.htm?http://203.127.220.66/committee/standards.html (last visited Feb. 24, 2004).

304. *See* OCED Working Party of the Trade Committee, *Regulatory Reform and International Standardization*, TD/TC/WP(98)36/FINAL, at 28-32 (Jan. 28, 1999) (discussing "regulators as players in standardisation"), *available at* http://www.oecd.org/dataoecd/33/19/1955309.pdf.

305. *See* Robert M. Cover, *Nomos and Narrative*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 110 (Martha Minow et al. eds., 1992).

306. *See supra* Part IV.B.3.

307. *Canadian Ban on Brazilian Beef Imports Escalates Trade Battle*, BRIDGES WKLY. TRADE NEWS DIG. (Int'l Centre for Trade & Sustainable Dev., Geneva, Switzeland), Feb. 13, 2001, [hereinafter *Trade Battle*], *available at* http://www.newsbulletin.org/getbulletin.cfm?bulletin_ID=14&issue/ID=1937&bro

though Canada based the ban on a previous measure announced to the WTO, the measure was originally not meant to apply to Brazil.[308] This unexpected, sudden ban by Canada enraged the Brazilian community, prompting the Brazilian government to threaten to challenge Canada in various international dispute settlement fora, including the International Court of Justice and the WTO, and to support public protests and boycotts of Canadian products.[309] This high-profile dispute could have easily developed into a full-blown WTO case.[310]

However, rather than resorting to litigation, the parties elected to address this dispute in the Committee on Sanitary and Phytosanitary Measures (SPS Committee). During the SPS Committee consultations, Brazil proposed a mandate for EU members to notify the WTO of the introduction of SPS measures which arise from previously announced SPS policies if those new SPS measures "may have negative effects on trade opportunities of developing countries."[311] This proposal was eventually adopted in the SPS Committee in the form of a revised "Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)."[312] Both Brazil and Canada agreed that the dispute had been resolved with the adoption of the revised recommendation.[313] All told, through a rich discourse steered by the clear legal consciousness of a "development-sensitive" obligation, a developed country (Canada) and a developing country (Brazil) succeeded in breathing new life into the existing legal document, and consequently materializing a communitarian symbiosis through the settlement of this dispute. This was only possible within the legal "force-field" of *jus gentium.*

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308. *SPS Committee Resolves Implementation Issue, Discusses Biotech*, BRIDGES WKLY. TRADE NEWS DIG. (Int'l Centre for Trade & Sustainable Dev., Geneva, Switzerland), Mar. 26, 2001, [hereinafter *SPS Committee*], *available at* http://www.ictsd.org/weekly/02-03-26/story4.htm.

309. *See Trade Battle, supra* note 307.

310. *See, e.g.*, WTO Panel, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26 (Feb. 13, 1998), *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm.

311. WTO Committee on Sanitary and Phytosanitary Measures, *Implementation Proposal under Paragraph 21: Proposal by Brazil*, G/SPS/W/108 (June 22, 2001), *available at* http://docsonline.wto.org.

> Where the introduction of SPS measures may have negative effects on trade opportunities of developing countries, Members shall provide information in accordance with the provisions of Annex B and the additional requirements for justification alluded to in Article 10.2, including where the concerned measures constitute an administrative measure, such as a ban or a temporary suspension of importation, arising from an SPS policy previously notified to the WTO.

Id.

312. WTO Committee on Sanitary and Phytosanitary Measures, *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7): Revision*, G/SPS/7/Rev.2 (Apr. 2, 2002), *available at* http://docsonline.wto.org.

313. *See SPS Committee, supra* note 308.

C. *The Gemeinschaftian Education of Jus Gentium*

Law,[314] not politics, is the medium of discourse in the WTO's Gemeinschaft. Participants of the discourse—whether governments, consumers, or producers—comprehend, evaluate, and predict each other's trade behaviors through the law. They also design their own behaviors based on the law. Therefore, understanding such law (the *jus gentium* of international trade) is critical to participation in the Gemeinschaftian discourse within the WTO system. Without this understanding of the law, the discourse itself is inconceivable. With an inaccurate understanding of the law, the efficiency of the discourse decreases dramatically. On the contrary, if those participants are well-versed in the law, the discourse tends to be productive and constructive. It then effectively mediates between what we are and what we ought to be, and thus achieves the Gemeinschaftian goal—global empathy.

In reality, however, WTO laws, including its statutes and case law, are too complicated to be understood by ordinary people. WTO jurisprudence is full of esoteric semantics and codes, which very few would actually venture to read, let alone comprehend. Typically, only trained legal scholars grapple with these subjects. Under such circumstances, the discourse in the WTO tends to be highly exclusive, concentrated in the hands of these elites, or the titular "groupe sémiotique."[315] Ordinary people remain excluded from the communicative process because they do not, and cannot, understand WTO laws if they lack the necessary background knowledge or analytical skills. This alienating, disintegrative aspect of WTO law can only be overcome by "educating" ordinary people to comprehend a fundamental, and thus more understandable, legal precept—the *jus gentium* of international trade—rather than those puzzling codes. After all, *law*, not *laws*, should be the supreme communicative vehicle for all participants, be they states or individuals. Only then will all participants become proficient in the law, thus improving communication.

In sum, public education on the WTO's Gemeinschaft, for the sake of increased public proficiency, should inform the public of the *jus gentium* of international trade without seeking mastery of the complicated details of WTO jurisprudence. For this purpose, an easily comprehensible set of core precepts about international trade law, tantamount to the "Restatement of International Trade Law," should be developed.[316] In a sense, this heuristic document would function as a device to convert esoteric WTO codes to

314. The term "law" connotes specific treaties, agreements, and other legal documents which are "reified" forms of law such as the *jus gentium* of international trade. Yet, these laws cannot contradict law because the former are reified—directly derived—from the latter. Thomas Aquinas formulated this structure of understanding law and laws in his notion of "distinguo." *See* POUND, supra note 249, at 4.

315. *Cf.* BERNARD S. JACKSON, SEMIOTICS AND LEGAL THEORY 286 (1985) (observing that the "audience," or "groupe sémiotique" of judicial discourse is relatively restricted); PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS 7 (1987) (arguing that "legal practice and legal language are structured in such a way as to prevent the acquisition of such knowledge by any other than a highly trained elite of specialists in the various domains of legal study").

316. A REFORM AGENDA, *supra* note 221, at 196.

exoteric law. In addition to this device, an accessible platform where the public can gain access to this heuristic should also be provided. Such a platform, be it in physical space or cyber space, should be non-commercial and consultative. Admittedly, it is a challenging mission to launch this platform, requiring a vast amount of time, money, and energy. Disappointingly, the WTO as an organization seems to be an implausible candidate for the task considering its current infrastructure and limited capacity.[317]

V. CONCLUSION: A PARADIGM SHIFT FROM GESELLSCHAFTIAN *COULD* TO GEMEINSCHAFTIAN *SHOULD*

This Article defines the contemporary global trading system as the global Gesellschaft and ascribes its development failure to a Gesellschaftian structure driven by interest, negotiation, and contract, and thus vulnerable to power disparity and exploitation. The global Gesellschaft is motivated by the liberal spirit of "right" under which each member *could* do whatever may suit its interest. As Steven Brint observes, liberalism has often been antagonistic to community, that is, the Gemeinschaft, as a normative concept mainly because it views community as having a tendency to limit freedom and creativity with potential authoritarianism.[318] Although this liberal concern is in harmony with the Lockean premise of the social contract, and is adept at explaining domestic political phenomena, it has its own limitations in the international sphere. Indeed, right-oriented behavioral patterns risk rationalizing the selfish behavior of powerful members that often disregards other members' interests. Perhaps, more profoundly, there is simply a "deep tension" between liberal democracies and cosmopolitan consideration.[319] Yet, such inherited and embedded liberal assumptions are prone to criticism and problematization in this era of unsustainability and development disparity.[320]

However, if we transform our paradigmatic perspective from right to duty under the Gemeinschaftian realization, we will take the interests of others into account when we configure our own. After all, common prosperity and peace is the ultimate goal of the Gemeinschaft. The gestalt of WTO's Gemeinschaft is cosmopolitan communitarianism governed by the Law of Nations, or the *jus gentium* of international trade, whose core precept is the duty to assist. Under such a premise, the Gesellschaftian understanding of a state's sovereignty as the unbridled exercise of its physical power in the international anarchy transforms into the Gemeinschaftian con-

317. The WTO is increasingly underbudgeted and understaffed in technical cooperation activities. *See* WTO Committee on Trade and Development, 27th Sess., *WTO Programme for Technical Cooperation*, WT/COMTD/W/64 (Oct. 15, 1999).

318. Brint, *supra* note 207, at 19. *But see* Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 686-67 (1992) (observing that certain conservatives and critical legal scholars attack liberalism in the name of community).

319. *See* Goldsmith, *supra* note 265, at 1696.

320. M'Gongile, *supra* note 41, at 162.

struct of the "vindication of the state's existence as a *member* of the international system."[321]

In fact, the *raison d'être* of the WTO's Gemeinschaft stems directly from the dire implications of the lost agenda of development. The global Gesellschaft can no longer sustain the current level of widening inequality and growing poverty,[322] which might be depicted as the "global apartheid."[323] The annual sum of agricultural subsidies by the rich countries is deplorable—"enough to fly their 41 million dairy cows first class around the world one and a half times"[324]—while countless farmers in poor countries suffer from a continued suppression of their produce's prices due to these subsidies.[325] Critically, poverty is not merely an economic policy issue, but "a matter of life and death"[326] to many people around the globe.[327] A system failing to address such unsustainable economic inequality and injustice cannot resist being criticised as illegitimate and unfair.[328] This global economic injustice resulting from the failed global Gesellschaft will become more painful and severe, and thus less tolerable, as the Gesellschaft becomes more integrated and interdependent.[329] Thus, underdevelopment and marginalization in one corner of the globe could cause asymmetrical shocks or direct physical threats to another.[330] Ultimately, the failure to deliver true development assistance is not confined to economic ramifications: It threatens peace. In the face of such exigency, the WTO Gesellschaft has not been, and should not be, an answer. Only global empathy realized through the achievement and operation of the WTO Gemeinschaft based on the Law of Nations can deliver true changes.

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321. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 27 (1995) (emphasis added).

322. *Cf. United Nation Millennium Declaration*, U.N. Doc. A/res/55/2, para. 5 (Sept. 18, 2000) ("For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed."), *available at* http://www.un.org/millennium/declaration/ares552e.pdf.

323. *See* Trachtman, *supra* note 293, at 3 (quoting South African President Thabo Mbeki).

324. WTO, *The 10 Benefits of the WTO Trading System: 4. Freer Trade Cuts the Cost of Living*, http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b04_e.htm. (last visited Feb. 23, 2004). The average European cow receives more monetary aid ($2.50) than most African workers receive as a daily wage ($2). Michael Kitchen, *IMF-World Bank: Meetings Focus on Reform, Millennium Goals*, UN WIRE, Sept. 30, 2002, *at* http://www.unwire.org/unwire/20020930/current.asp.

325. *See* John Kanjagaile, *Cancún Should Cultivate Fairness*, FIN. TIMES, Sept. 10, 2003, *available at* www.ft.com.

326. Rome Speech, *supra* note 105.

327. *See, e.g.*, Charlotte Denny, *US Blocks Brown-led Drive for Increase in Aid*, GUARDIAN UNLIMITED, Jan. 23, 2002 (reporting that 2.8 billion people on earth live on less than $2 a day), *available at* http://www.guardian.co.uk/business/story/0,3604,637808,00.html.

328. Amartya Sen eloquently wrote that this inequality will become less and less tolerable as the global trading community becomes more integrated. Amartya Sen, *Global Doubts*, HARV. MAG. 68 (Sept.-Oct. 2000).

329. *Id.*

330. *See POVERTY: U.K. Chancellor Calls for New Marshall Plan for the Developing States*, UN WIRE, Dec. 18, 2001 (quoting Gordon Brown, U.K. Chancellor of the Exchequer, who linked "poverty in the developing world" to "direct physical threats to people in industrialized countries"), *available at* http://www.unwire.org/unwire/20011218/22676_story.asp.

After all, we are all "involved in Mankind."[331]

331. JOHN DONNE, MEDITATION XVII, DEVOTIONS UPON EMERGENT OCCASIONS (1624), *available at* http://isu.indstate.edu/ilnprof/ENG451/ISLAND/text.html (last visited Feb. 17, 2004).