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The Conventional Morality of Trade

Chin Leng Lim, University of Hong Kong

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1. INTRODUCTION

This chapter is concerned with the kinds of moral and political arguments that developing countries have made in the name of global justice. Claims for the direct global redistribution of resources have not loomed large in international trade law and regulation. To be sure, they were raised during the failed negotiations for an International Trade Organization (ITO), but the principal tension that has come to the fore in trade law and policy debate is that between the formal rules of nondiscrimination under the General Agreement on Tariffs and Trade (GATT) and the developing countries’ calls for exceptions to those rules. First, there was the argument against the developing countries having to make reciprocal concessions for developed country market access (or “nonreciprocity”). Developing countries argued for the lowering of tariffs by developed nations without asking for reciprocal concessions. Calls for unilateral liberalization by developed countries fell within that argument. The United States’ Trade Expansion Act of 1962 is one example. While the developing countries made progress between the Dillon and Kennedy Rounds culminating in the Generalized System of Preferences in 1971, they also advanced a second argument – that is, the argument for “new” tariff preferences that would be exempt

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1 Robert E. Hudec, Developing Countries in the GATT Legal System (Brookfield, VT: Gower, 1987; hereinafter Developing Countries). 44.

I am grateful to Frank Garcia, John Linarelli, Chios Carmody, and Tim Sellers for their warm hospitality and for inviting me to speak at the Symposium for which this chapter was originally prepared. Jeffrey Dunoff, Joel Trachtman, Chantal Thomas, Aaron James, and Fernando Tesón offered thoughtful comments on the chapter. Henry Gao read an earlier draft. I am grateful to them all. Finally, I acknowledge with gratitude Hong Kong University’s Committee on Research and Conference Grants, and its Seed Funding Scheme for Basic Research for their financial support. All errors remain my own.
from the GATT’s most favored nation (MFN) obligation.\textsuperscript{2} The argument for developing nations to enter into regional arrangements for broader, preferential market access was made early during the ITO negotiations (ITO Charter Article 15)\textsuperscript{3} but had lain fairly dormant until around 1961, when it resurfaced following the controversy over the establishment of the European Economic Community (EEC).\textsuperscript{4}

At that time, the EEC had sought to make the case for preferences not only among its members but also in relation to preferences for various European colonies. This incursion into the MFN rule gave the developing countries cause to argue for their own customs unions and free-trade areas.\textsuperscript{5} A good example was the Latin-American Free Trade Area, which, together with the colonial preferences of the European Community (EC), marked the increasing use of preferential tariffs as a development strategy by developing-country GATT members.\textsuperscript{6}

By 1979, both nonreciprocity and new preferences had found a firm place in the GATT’s Enabling Clause.\textsuperscript{7} In contrast, broader debate over international economic law and policy was divided in the 1960s and 1970s by redistributionist calls for a new international economic order. Although that argument was central to certain historic General Assembly resolutions during this period, many of the same countries entered the GATT Tokyo Round negotiations in 1973 by calling for “differential and more favorable treatment” instead – that is, exemption from having to make reciprocal concessions, and preferences exempted from the MFN obligation.

\textsuperscript{2} General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-II, T.I.A.S. 1700, 55 U.N.T.S. 194, Article 1. The argument for developing country preferences was characterized as one for “new” preferences because preferential tariffs existing before the establishment of the GATT, such as the British Imperial Preferences, were grandfathered or reserved under GATT Article 1(2)-(4).


\textsuperscript{4} Ibid., 50. See also GATT B.I.S.D. (7th Supplement), 70 (1959).

\textsuperscript{5} See Developing Countries, supra note 1, 150–151.

\textsuperscript{6} Kenneth Dam, “Regional Economic Arrangements and the GATT: The Legacy of a Misconception,” University of Chicago Law Review 30 (1963): 615, 658; World Trade, supra note 3, 602.

\textsuperscript{7} GATT B.I.S.D. (26th Supplement), 203–204 (1980).

Today, little has changed in relation to the basic developing-country position. The kinds of legal policy arguments that these countries have made in the GATT in the name of global justice have been about what lawyers call “substantive” as opposed to “formal” equality. My concerns in this chapter are empirical, having to do with claims that developing countries have actually made, how these claims have contributed to their institutional behavior in the GATT, and to the making and application of trade rules. Before we ask what theories of justice can tell us about actual situations, we would need to know something about the actual situation at hand. We would need to revisit the history of developing-country participation from the earliest days of the GATT. Asking about the nature of actual events could also bridge the gap between today’s ideal theories of global justice and the international lawyer’s preoccupation with how nations have conducted themselves in practice. This would include inquiry into the claims that trading nations make about justice and rules. Understanding such positive or conventional trade morality is an important part of understanding what theories of justice can ultimately bring to improvements in institutional and trade rule design instead of treating such moral claims which developing countries have made as irrelevant or mistaken from the outset.

ii. STRUCTURE

We need to examine the views of the late Robert Hudec, who did important, pioneering work through first-hand interviews at the conference during which the GATT was signed and through a close study of the records of GATT debates. Hudec was among the first, if not the first, to treat actual developing-country claims as a form of moral argument. There is also another reason for his importance. Whereas his study of developing-country behavior became one of the most important works on GATT conventional morality, Hudec consistently criticized the resort to considerations of fairness in trade policy debate. This chapter explores the tension in Hudec’s work, namely that between the importance of studying the claims made by some trading nations as claims about fairness, and Hudec’s own general skepticism about such claims.

Section III introduces Hudec’s views on the normative value of fairness claims; Section IV goes on to describe the moral claims made by developing nations during the formative years of the GATT. Readers who are already familiar with the history of developing-country claims for infant-industry protection, nonreciprocity, and new preferences might wish to skip this part and proceed directly to Section V, which discusses Hudec’s rejection of any role for fairness as a concept in trade policy debate. Sections VI and VII critique Hudec’s moral
skepticism and Section VIII discusses the EC – Tariff Preferences case as the latest step toward “constitutionalizing” the developing-country argument. In this chapter, I argue against treating developing countries’ claims to “reverse discrimination” as mistaken from the outset on grounds of efficiency, and I call for greater attention in our theoretical accounts to the sorts of claims made by the developing nations. I argue that theories that do not account for the question of conventional morality would be incomplete. Our theories about the development principles of the GATT–World Trade Organization (WTO) would be deficient if we accounted only for ideal theories about the normative justifications for alternative distributive arrangements, just as it would be an incomplete description of GATT–WTO practice to focus on WTO members’ behavior without accounting for the normative claims they make about such behavior. This is partly the case because, although the MFN doctrine is widely accepted today as a general governing principle, it is also observed largely in its breach. We do not know where the principle ends and what sorts of normative justifications have, in practice, been considered adequate in creating exceptions to it. Economic or moral theories which simply presuppose the reflective acceptability of the MFN principle presuppose a world that does not exist. Theory must do better.

I am suggesting that our theories about the developing country debate in the WTO should strive toward a fuller understanding of the forms of actual GATT behavior we are dealing with, and thus we should also look toward the reasons that are stated for such behavior – i.e., the “moral” reasons developing countries state for their claims – because we would be striving to “portray the rules for what they are in the eyes of those whose rules they are.” See Neil MacCormick, H.L.A. Hart (Palo Alto, CA: Stanford University Press, 1981), 37–38 (hereinafter MacCormick).

There are other reasons for taking developing country claims in the GATT seriously. As Aaron James argues in this book, whatever our ideal theories of justice about third-world development are, there are “internal principles” that matter. Fairness concepts (such as fair play, nondiscrimination, competitive fairness, level playing fields, and so on) arise for consideration in the context of institutional practice. This would include GATT and WTO institutional practice. On another significant front, Joel Trachtman has drawn our attention in his remarkable contribution to the behavioral aspects of fairness and in particular on the importance of inquiry into (a) the extent to which inadequate theories of justice may have played a historical role in ineffective forms of action to redress poverty, and (b) how a more appealing philosophical theory of justice could be translated into more effective transformative behavior or action. Focusing on what moral claims developing countries make and how such claims govern their actual (i.e., effective) practice within the institutional setting of the GATT and the WTO is closely related to these concerns. It does not require, however, that we treat national boundaries to be ethically significant in themselves in the construction of an ideal theory. In this regard see Daniel Butt’s chapter in this volume. Our concern with the moral claims that developing countries make could simply go toward what fairness means within the WTO, or how fairness claims govern actual practice. My argument is simply that there may be strong reasons other than those that are solely concerned with the construction of the soundest ideal theory of justice that require us to address developing country claims in their own right. I also agree with
iii. “THERE ARE NORMATIVE VALUES AT WORK”

We could start by taking the arguments of the developing countries seriously. We should accept, as a preliminary constraint, that the economic and moral claims and beliefs of the developing countries are potentially coherent. For example, developing countries may concede that preferential tariffs are trade distortive but also believe that they are justified on other grounds. For them, reciprocity – another cardinal notion - is an equally difficult concept when viewed purely in economic terms. If lowering tariffs is good from an economic viewpoint, then why ask for reciprocal concessions at all? The reply from political economy is that reciprocity helps to sell a deal to the domestic populace. Developing countries argue that just as there may be arguments in favor of reciprocity that have nothing to do with efficiency, there may be similar, equally weighty arguments against it. Thus they argue that although special preferences might risk trade distortion, such preferences could nonetheless improve the developing nations’ terms of trade; and that doing so is at least an equally worthy trade law and policy aim.

There is nothing new in studying such claims as a species of moral claim. Robert Hudec’s work remains an appropriate starting point. Arguing against the view that fairness claims, generally, are merely rhetorical, he once wrote this:

I believe that this political constraint involves more than a choice of words. There are normative values at work here. They do supply a certain force to laws which claim to advance them. The normative ideas may be wrong-headed and self-serving. They may also be capable of manipulation to justify purely protectionist goals. But they do give a general shape and direction to trade laws, and they will exert an influence on how such laws develop in the future.

Hudec’s other insight was that developing countries’ claims for fair treatment require serious appraisal, even if these claims are ultimately deficient or mistaken. What follows is a description of developing-country arguments during

Butt that redressing global underdevelopment and poverty requires international institutional action.

11 Developing Countries, supra note 1, 128.
12 It is therefore not necessary to argue that “free trade hurts development.” In this respect see Fernando Tesón’s contribution in this book.
14 Ibid.
that formative period when claims for “special and differential” (S&D) treatment were first fully articulated and heard.

iv. THE UNFOLDING OF SPECIAL AND DIFFERENTIAL TREATMENT

We have seen that the developing countries argued against reciprocity in trade negotiations and for new trade preferences. Some countries had also argued along the lines of resource transfer, but this argument never gained traction and was probably never seriously argued in the ITO–GATT. Nonetheless, there was also a fourth, infant-industry argument that was advanced, roughly speaking, from 1947 to 1958. Although it was a short-lived argument, it provides a useful contrast to the arguments that were eventually to succeed it.

A. The 1947 Debate on Infant Industries: “Equality as Sameness”

The GATT 1947, negotiated by Great Britain and the United States, was rightly characterized as having created a “rich man’s club.” It had introduced an entirely new norm at the time, namely trade nondiscrimination. Despite its novelty, the GATT had a “network effect.” The resultant trade diversion compelled others, including the growing number of developing countries, to seek membership. On the side of the United States, the necessities of the Cold War meant that it could not risk alienating the developing countries, as well as the European nations whose commitment to the MFN principle had always been more mixed. We might have thought that, during this period, the debate

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16 Certainly when viewed against the system of British Imperial preferences and the Smoot-Hawley tariff. See _Developing Countries_, supra note 1, 12. In truth, nondiscrimination’s roots were deeper. By the eighteenth century, the MFN doctrine was considered an essential part of the commercial law of European nations. However, its strength and acceptance among the trading nations ebbed and flowed. Prior to 1923, the United States held to a conditional MFN clause in its treaty practice (i.e., according MFN treatment only upon receiving the same or similar concessions from the claimant as were received from a third state accorded such treatment). It was British practice that held unconditional MFN treatment in high esteem. Unconditional MFN treatment was revived in Woodrow Wilson’s Fourteen Points, thereafter making its way into post-1923 U.S. treaties before the enactment of the Smoot-Hawley Tariff in 1930. The tariff prompted other nations to adopt discriminatory policies, such as the British system of imperial preferences.

17 See _Evolution_, supra note 15, 2.

over GATT Article XVIII – the clause on infant-industry protection – would have been relatively uncontroversial. Moreover, the number of developing countries was still relatively small. But this was not so. According to John Jackson, “the focal point was whether a developing country should be allowed to use quantitative restrictions to assist its development plan without prior permission from the organization, which the underdeveloped countries felt would be composed primarily of unsympathetic industrialized members.”

The developing countries felt that the very structure of international trade rules would freeze the existing international division of labor. For them, the issue had to do with fairness. But what does that mean? According to Hudec, fairness in the U.S. domestic context means something different – that businesses should succeed on merit, and what it comes down to is that “one-sided government assistance” should not be allowed. This disconnect was played out in 1947. Whereas the developed countries saw the developing nations’ argument as amounting to no more than a thinly veiled excuse for governmental intervention, the developing countries saw themselves arguing instead for regulatory evenhandedness.

Cuba, for example, had complained that what the developing countries sought was merely one further exception for infant industries to the one and a half pages of exceptions to the rule prohibiting quotas that the developed nations had already tabled in draft form. This, the Cuban representative said, was demonstrative of the developed world’s immorality dressed up in legal garb. It was all well and good to say that businesses should succeed on merit, but here were the developed-country governments making rules that would favor established businesses over the new industries in the developing countries. The Chilean delegate likewise observed that businesses in the developed countries and their governments were not representing the interests of fair competition at all; instead they feared competition and were seeking to suppress it. Jackson sums up that debate as follows:

The issues at Geneva in 1947 did not . . . seem to be free trade versus protectionism. . . . Each of the groups in the debate desired international control of
some things and not of others. Both sides desired to use certain types of trade protective measures but wanted to limit or restrict others. . . . From the point of view of the less-developed country, the wealthy countries wanted freedom to use those restrictions that only they were most able to use effectively while banning those restrictions that less-developed countries felt they were more able to use.  

Essentially, the developing countries argued that what is sauce for the goose is sauce for the gander. If trade restrictive measures are allowed for developed countries, they too should be allowed for developing countries. No prior approval should be required for measures taken to protect infant industries. A decade later the developing countries would move away from this kind of equality argument. They began to argue, instead, that the developing countries required differential treatment precisely because they are in fact different.

B. Havana to Tokyo: Winning Equal Treatment

Quotas were an especially hard case. As a result of the recent economic experience of the 1920s and 1930s, quantitative restrictions were viewed in 1947 as anathema – hence the inclusion of GATT Article XI prohibiting them. Unsurprisingly, the developing countries did not succeed in Geneva in 1947 in securing permission to impose quotas without the GATT’s prior approval. They were only a little more successful eight years later during the GATT Review Session of 1954–1955, at which Article XVIII:B, which contained the balance-of-payments exception, was inserted.

The significance of this, together with Articles XII and XIV, was that quotas would be justified on the alternative basis of balance-of-payment needs. That route had emerged following the Havana Conference in 1947. In addition, the 1955 Working Party report had pointed out that resort could also be had to GATT Article XIX’s escape clause. For a time, then, the argument appeared to shift from fairness to necessity, with a focus on the kinds of exceptional triggering events that would necessitate the invocation of such exceptions. In reality both of these alternative measures were poor substitutes.

25 See World Trade, supra note 3, 637–638.
27 See World Trade, supra note 3, 636.
28 Political Economy, supra note 18, 386.
30 World Trade, supra note 3, 639.
31 It should be noted, though, that until the conclusion of the Uruguay Round (1986–1994), safeguards were subject to compensation and this in time became a critical negotiating issue at
Something going beyond these eight years of debate from Geneva to the Review Session was needed. By then, the relationship between the developed and the developing countries had reduced itself to quibbling over legal technicalities. It was not until the Tokyo Round in 1979, more than thirty years later, that the developing countries would finally get what they wanted in permanent form – the right to take measures to protect infant industries without prior GATT approval. In the meantime, the battle had moved elsewhere. Developing countries had themselves turned from import substitution to export-oriented policies. Correspondingly, their arguments shifted from a concern with equality in law making, rule design, and policy space to an overriding concern with market access. With that shift, the outlines of the modern S&D doctrine began to take shape, bringing with it a shift from formal equality-based arguments to arguments about substantive equality.

C. The Haberler Report and Market Access

The equality debate lasted roughly from 1947 to 1979. The developing countries’ arguments underwent transformation during that period. That transformative process commenced with the Haberler Report of 1958, which coincided with the shift toward export-oriented policies. The Report observed the different needs of the developing countries and the importance of the issue of preferential market for developing country products, an issue first raised during the 1947 Geneva meetings. As we saw, however, the arguments following the establishment of the GATT had, initially, become focused on infant-industry protection instead. But by 1958, having failed to secure the freedom to impose quotas without prior GATT approval, the developing countries shifted their focus to the need to promote exports. The campaign began in earnest with the preparations for the 1960 Dillon Round. Developing nations started out by asking for trade negotiations on a nonreciprocal basis but were turned down. This was ostensibly because GATT Article XXVIII (bis), which resulted from the earlier 1954–1955 GATT Review Session, already recognized the principle that Round, leading to the present, more flexible regime. They were of arguably limited value to the poorer nations.

32 World Trade, supra note 3, 628–638. 33 Developing Countries, supra note 1, 32.
of nonreciprocity. The developing countries then asked for unilateral liberalization by developed countries, but the United States could not reach a consensus with the EEC on this in the run-up to the 1964 Kennedy Round.

The developing countries then pushed on a third front; namely developing-country special preferences. The corresponding provision in the ITO Charter (Article 15) had fallen through the cracks with the ITO’s collapse. The formation of the EEC had undermined the GATT MFN obligation. The EEC had argued, disingenuously, that its preferential trading arrangements with European colonies fulfilled the requirements of GATT Article XXIV. Debate in the GATT failed to yield consensus on the issue aside from a pragmatic wait-and-see attitude. It was against this background that the developing countries saw their opportunity to revive an issue that Syria and the Latin American nations had first raised in 1946 during the drafting of Article XXIV. They had sought permission for developing countries to enter into regional preferential agreements among themselves. The compromise reached during the drafting of GATT Article I was that whereas “new” trading preferences for developing countries would fall foul of the provision, existing colonial preferences would be preserved. That exception was also extended to the Syria–Lebanon Customs Union and its arrangements with neighboring Palestine and Jordan. Now the developing countries were trying to revive the Syrian and Latin American argument.

Economic debate has concentrated on the distortive effect of such preferences, but what is also important to notice is that the developing countries were advancing a normative argument – that is, an argument about right and wrong, not efficiency. Although GATT Article I prohibits preferential agreements justified solely on the basis of economic development, this was not how the developing countries saw it. Article XXIV, in their view, should have explicitly allowed for such preferences. The political impetus for that was only lost when preferential arrangements such as the Lebanon–Syria Customs Union and other Latin American preferences were specifically exempted from the MFN rule. Now the issue had become one of general principle as opposed to the carving out of specific exemptions, namely whether GATT’s nondiscrimination rule should allow for a development exception.

36 Developing Countries, supra note 1, 14.
37 GATT B.I.S.D. (7th Supplement) 70 (1959); Developing Countries, supra note 1, 50–51.
38 See U.N. Doc. EPCT/C.II/7, 9 (1946); World Trade, supra note 3, 577.
39 World Trade, supra note 3, 578.
40 I am grateful to Jeffrey Dunoff, who was the commentator to this contribution at the symposium. He asked whether this is the only reading available when one surveys the record of the GATT debates. In particular, he questions whether developing countries were in fact arguing on the basis of moral principle. Were they not simply intending to advance their individual national
As the MFN obligation would have it, like cases should be treated alike by treating all GATT contracting parties identically. The developing countries disagreed that they were in a like situation with developed countries. They considered that true equality required recognition of their developing status. Equality required developed countries to respect the differences between the developed and developing countries and not simply treat all GATT members formally in an identical fashion. This was the beginning of the modern era of GATT developmental discourse. Coinciding with a shift from import substitution to export orientation, developing countries were no longer saying that they should be “equally entitled to impose quotas” but that they should have differences in their developmental status recognized. GATT’s formal equality rule had become the principal obstacle to development.

By treating all nations as sovereign equals, the classical Westphalian conception of the legal order that the GATT – unlike the Washington-based international financial institutions – embodied simply assumed its own political inclusiveness. This the developing countries challenged, and they did so in the GATT and elsewhere. Two complementary trends were to coincide – the developing countries’ arguments about status equality (i.e., that they were “different” from developed countries, and that difference is morally significant because it implicates our meaning of equality), and their search for preferential market access. True participation on an “equal” footing in the GATT required recognition of these principles. Robert Hudec once wrote that the “truth is that MFN tariff policy really doesn’t give a damn about whether any particular country gets what it ‘deserves’.” That may be so, but the developing countries do.

D. Deepening the Substantive Reading and the Argument for Status Equality: Debating Reciprocal Concessions

Status equality played out even more forcefully in the debate on reciprocal concessions. Trade talks have always been something of a contradiction.

interests? My answer is that they could do both. Arguing on the basis of state self-interest does not necessarily detract from the moral nature of the claims made.


42 He also wrote that the “true virtue of MFN tariffs is simply their ability to make the world’s productive resources respond efficiently.” See Robert Hudec, “Tiger, Tiger in the House: A Critical Appraisal of the Case against Discriminatory Trade Measures,” in *Essays*, supra note 13, 281, 324.
Concessions are made in the GATT on the basis of concessions received. The trading nations are mercantilist beasts notwithstanding the economic benefits of MFN as a trade accelerator. That is why, today at the WTO, negotiations cannot advance without the agreement of the “Big Four” (the United States, the European Union, India, and Brazil). That other, lesser trading nations would get a “free ride” came to be viewed as a problem, not an ideal. The developing countries’ retort was that if liberalization is good, then it should be pursued without asking for concessions. That in part answers Hudec’s criticism (detailed later) that because fairness lies in the eyes of the beholder, we should stick to the economics. Economics, for whatever reason, do not in any case govern how nations behave; the developing nations know that. The developing countries therefore sought to counter the demand for reciprocal concessions by turning nonreciprocity into a formal principle in multilateral negotiations. Whereas the demand for reciprocal concessions proved an embarrassment to the logic of MFN, calls for nonreciprocity presented both a strong economic argument and a plausible moral claim.

That argument developed in stages. Recall that nonreciprocity had emerged as a developing-country argument during the ITO negotiations, and the developing countries’ attempt to revive the issue during the Dillon Round. However, the 1962 Trade Expansion Act failed to encourage unilateral preferences and the developed nations continued to maintain reciprocity during the Kennedy Round. Matters only came to a head when Uruguay brought a “show trial” type of complaint arguing an overall, resultant imbalance of benefits under GATT Article XXIII. Uruguay’s message was that reciprocal trade concessions had brought the developing countries little. This led to the creation of GATT Part IV, which entered into force on June 9, 1966. Unfortunately, Part IV also added little beyond what had been agreed upon during the

43 See, e.g., John Linarelli, “The Economics of Sovereignty,” in Christopher Harding and C. L. Lim (eds.), Renegotiating Westphalia (Dordrecht: Nijhoff, 1999), 351, 378. For counterarguments against the allegation of developed-country mercantilist behavior, see Developing Countries, supra note 1, 17. Among these, however, are arguments that sound too much like “two wrongs do not make a right,” and “do as I say, not as I do.” As for the need to sell the deal at home, the obvious flip side is rent seeking and capture by special interests.
46 The argument failed when the EC refused to extend unilateral preferences. See Developing Countries, supra note 1, 44.
Kennedy Round – that although there would be a special rule for developing countries, reciprocal concessions were still generally to be expected.\(^\text{49}\) In 1968 at the second United Nations Conference on Trade and Development, known as UNCTAD II, the United States finally reversed its position against developing-country preferences and called for a Generalized System of Preferences (GSP).\(^\text{50}\) However, although the United States did persuade the EEC to abandon its demand for reciprocal concessions, it did not succeed in putting a stop to European selective treatment of developing countries.\(^\text{51}\) In time, the GSP schemes of both the United States and the EEC became neither unilateral and nonreciprocal nor general in application. Instead, they require political payment in kind and even market access. Discrimination between various developing countries also became the norm.\(^\text{52}\) The failure of the GSP meant that developing nations’ attempt to advance status equality through the GSP had failed.\(^\text{53}\)

**E. The Turn to Preferential Trade, Assault on Formal Equality, and Erosion of the MFN Obligation**

It became easier to create an exception to the MFN obligation instead. Two factors were particularly important. The first was the creation of the EEC. The second came when the United States reversed its stance against developing-country preferences. Both events were driven by Cold War necessity.

The emergence of the EEC in 1957 presented an opportunity to renegotiate the GATT. That, however, would have been both drastic and hazardous, and the GATT parties opted instead for ad hoc diplomacy above principle; pragmatism above legality.\(^\text{54}\) The result was MFN erosion.\(^\text{55}\) In reality, the MFN rule had always been a creature of compromise; it was never designed to prevent, but simply to regulate, discriminatory preferences.\(^\text{56}\) As for the EC’s Association Agreements with former European colonies, they too were never

\(^{49}\) See Developing Countries, supra note 1, 45, 58.


\(^{51}\) See Developing Countries, supra note 1, 63.


\(^{53}\) Edwini Kessie, “The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements,” in *WTO Law*, 12, 16 (hereinafter Kessie).

\(^{54}\) The *GATT Legal System*, supra note 48, 212–213.

\(^{55}\) Ibid., 214.

\(^{56}\) Ibid., 221.
intended to become fully blown customs unions, just as the liberalization of substantially all the trade with those dependencies (as GATT Article XXIV would have required) was never intended. The EEC’s preferences, in other words, were legally dubious but the EEC’s Cold War strategic importance precluded any real demand for legal compliance. Other such agreements soon followed suit with the European Free Trade Area while EEC preferences grew in variety and number. The developing countries too jumped on the bandwagon and the Latin-American Free Trade Area was one result. These agreements were justified only very loosely, if at all, under GATT rules.

In short, the years 1957–1958 became a turning point. The Haberler Report had called for greater market access, the EEC was created, and the developing countries shifted away from infant industry and import substitution toward export-oriented policies. The developing countries also shifted from reliance upon an argument in favor of nonreciprocal concessions to an argument which favored the prospect of new, preferential concessions (i.e. concessions that would be accorded to them exclusively in view of their status). The two GATT ten-year waivers in 1971 (and subsequently, the Enabling Clause that put them on a permanent footing) embraced both principles, even if nonreciprocity was weakly stated when compared to the principle that developing countries should be accorded special preferences. Be that so, Resolution 21(ii) at UNCTAD II called for recognition of both principles. The price for developing-country participation in the GATT had gone up. What was more important was that the United States had responded positively to the GSP scheme even though it found itself in the position of intermediary between developing-country complaints of European discrimination and its own felt need to support the Treaty of Rome on strategic grounds.

v. FAIRNESS AS A GOVERNING CONCEPT: HUDEC REVISITED

Hudec’s well-known analysis of these events reveals a tension. On the one hand, he criticized the developed countries (which simply considered GATT to be a “serious” forum for the exchange of trade concessions) for ignoring the developing nations’ paper victories on important questions of principle. On the other hand, he considered these developments in favor of the developing

57 Ibid., 222–223.
58 Ibid., 223.
59 Ibid., 224.
60 See also Kessie, supra note 53, 17.
61 Ibid.
62 The GATT Legal System, supra note 48, 222, 224.
63 Developing Countries, supra note 1, 73–74.
countries to be a part of a period of general decline in GATT legality from 1963–
1964 to 1975. Although he did not attribute the “delegalization” of the GATT
to the developing countries as such, but to pressures resulting from the EEC’s
formation, there was an unmistakable nostalgia in his writings for a return to
GATT legality. At the time he wrote, it was not clear which would prevail –
the developing nations’ attempt to forge new principles or the general decline
of principled behavior; the emergence of developing-country preferences or a
return to legality where such preferences would then be subjected to stricter
scrutiny. Jackson, in comparison, saw that even before the Enabling Clause
in 1979, the GATT’s MFN obligation had been amended in all but name.64
Recall the ITO Charter’s Article 15 and the Syrian and Latin-American call
for developing-country regional arrangements during the drafting of Article
XXIV, which was dealt with pragmatically by creating specifically tailored
exceptions for the Syria–Lebanon Customs Union and other Latin-American
arrangements.65 Nevertheless, the issue of developing-country preferences had
remained and the developing countries pushed for individualized, case-by-case
treatment of their regional arrangements under Article XXIV. For Jackson, the
loosening of Article XXIV legal scrutiny in these instances signified a new kind
of so-called law in action, not lawlessness.66

Hudec instead mounted a significant critique of fairness discourse in trade
policy debate. He accepted that there were “normative values” involved,67 and
he acknowledged the behavioral significance of such talk of fairness at a time
when international lawyers generally would not have paid much attention to
such matters. Conventional international lawyering treats actual state claims
as important mainly for the identification of legal rules.68 Lawyers might
concede, at best, that certain kinds of state practice that lead to nonbinding
principles are only “more than non-law” but still “less than law.”69 In contrast,
economic debate is not hamstrung by such rigid behavioral categories.

64 World Trade, supra note 3, 591.
65 Ibid., 578.
66 Ibid., 590–591. My reference here to the “law in action” is taken from Karl Llewellyn, who
drew a distinction between those “pure paper rules” to which officials paid no heed and “the
accepted patter of the law officials.” See Karl Llewellyn, “A Realistic Jurisprudence: The Next
67 Essays, supra note 13, 230.
68 See, e.g., Kessie’s treatment of the “legal status” of special and differential treatment provisions;
Kessie, supra note 55.
69 G. J. H. van Hoof, Rethinking the Sources of International Law (Deventer: Kluwer, 1983), 187–
189; compare O. A. Elias and C. L. Lim, The Paradox of Consensualism in International Law
(The Hague: Kluwer, 1998), 230–232. Elsewhere, analytical jurisprudence is occupied with the
question of a necessary or conceptual connection between law and morality. See, e.g., Joseph
on Law and Morality (Oxford: Oxford University Press, 1979), 38; John Finnis, “The Truth in


I have chosen the somewhat cumbersome phrase “conventional” or “positive” morality to describe – however loosely – the elaborate behavioral category that Hudec did much to identify.\footnote{MacCormick, supra note 9, 47.} The term was borrowed by the Oxford legal philosopher, H. L. A. Hart, from the early English utilitarian philosophers,\footnote{H. L. A. Hart, Law, Liberty and Morality (Palo Alto, CA: Stanford University Press, 1963), 20.} and it denotes a “morality actually accepted and shared by a given social group” as distinguished “from the general moral principles used in criticism of actual social institutions,” including criticism of positive morality itself.\footnote{MacCormick describes Hartian positive morality as “[a] morality as so characterized is social rather than individualistic, and it is the morality of a group of people who live together and interact socially”; further, “[m]uch of it is learned, much from anyone’s point of view a matter of imitation and going along with the herd, perhaps because one desires that there be a herd along with which to go”; MacCormick, supra note 9, 46. More recent debate has centered on the fact that as an explanation of positive morality, the Hartian method must therefore account for the existence of social rules as the reason for our acting in accordance with them (e.g., such as practice in the GATT following the Enabling Clause). However, individual and social morality need not depend in such a way on the existence of a social practice as a reason for – or as a standard of – behavior. Strict vegetarians criticize meat eating out of conviction instead, even assuming a hypothetical society inhabited exclusively by vegetarians. See further, H. L. A. Hart, The Concept of Law, 2nd ed. (Oxford: Oxford University Press, 1994), 256.} For Hart, attention to positive morality improves our understanding of the social functions of moral rules and standards.\footnote{MacCormick, supra note 9, 47.} This is especially significant where it is also the normative legitimacy of social-moral rules that determines their efficacy. Like Hart, Hudec recognized that normative legitimacy contributes toward the
“compliance pull” of social rules.\textsuperscript{75} His treatment of the concept of fairness in U.S. foreign trade policy gave recognition to these aspects of fairness talk. For example, Hudec addressed the fairness justifications for U.S. antidumping laws (AD laws) as something that lies in the “background” and “supplies normative legitimacy to the technical operation” of the law.\textsuperscript{76}

Why then was Hudec so strangely bound to conventional legal analysis in his treatment of developing-country fairness claims? Having chosen to analyze two distinct movements in the GATT sometime between the mid-1960s and the 1970s – a “legalizing” and another “delegalizing” form of behavior – he characterized the establishment of the new S&D treatment norms as part of a larger, delegalizing move. Elsewhere, Hudec pointed out that the new S&D norms such as the GSP were only “permissive,” not “mandatory” – in other words, his concern was with their precise legal nature.\textsuperscript{77} The reasons for his legal conventionalism, as opposed to his moral conventionalism, are to be found elsewhere in his work.

vi. HUDEC’S “MORAL SKEPTICISM”

In a seminal paper, Hudec had also traced the origin of U.S. trade remedies rules to calls for fair competition. However, such calls are heard despite the fact that the foreign and domestic business competitors are regulated differently in different places. In the purely domestic context, fairness claims had at least a common history in the Interstate Commerce Clause and U.S. antitrust laws. In the domestic setting, fairness means “that businesses should succeed or fail according to their respective merit as competitors.”\textsuperscript{78} The “normative role of the fair competition concept is useful primarily in situations in which there is growing competition.”\textsuperscript{79} Not so with AD laws and countervailing duty (CVD) laws in the United States. These apply to the foreign trade policy sphere and possess no immediate domestic counterpart.\textsuperscript{80}

Noting the political compromise underlying the Trade Agreements Act of 1979 – that is, the tightening of AD and CVD regulation in exchange for greater trade liberalization – Hudec saw the idea of fairness as essentially nothing more than a deal struck between government and business in the

\textsuperscript{76} Essays, supra note 13, 240.
\textsuperscript{77} Developing Countries, supra note 1, 64.
\textsuperscript{78} Essays, supra note 13, 231.
\textsuperscript{79} Ibid.
\textsuperscript{80} This thought was to be played out on the Mexican side during the NAFTA negotiations. See Hermann von Bertrab, \textit{Negotiating NAFTA: A Mexican Envoy’s Account} (Westport, CT: Praeger, 1997), 68.
United States. Business would accept more competition provided it was “fair.” Nonetheless, if fairness were to become a governing criterion, “the facts of the international market [would] still make the concept potentially limitless when applied to foreign trade. Any government-created advantage not available to outsiders [would be] a potential ‘unfair advantage/subsidy’.”

In addition, because CVD laws protect manufacturing industries that benefit from tariff protection at home, talk of fairness makes sense only when the subsidy is considered in pure isolation. In the foreign setting, the concept of fairness becomes therefore either unpersuasive or unadministrable because the global regulatory field can never be level. The same is true with AD. The idea of fair competition is therefore sound when that competition only concerns foreign manufacturers enjoying monopoly profits in their home market. It is persuasive in those instances in which home and export market price differentials are solely at issue. However, as with CVD, the fairness concept is not meant to apply to businesses that are governed differently in different places where any difference (e.g., in national tariffs) would complicate discussion about what is “fair.”

All this explains why Hudec was generally skeptical about moral (i.e., fairness) arguments in trade. Having identified the normative significance of trade fairness discourse, he ultimately rejected its usefulness. Fairness, although significant in explaining behavior because of its normative aspects in terms of positive morality, fails to fulfill its normative promise. In particular, it explains why he believed “reverse discrimination” (as he termed the developing-country argument) is penny gin, and that the developing countries’ desire “would be [for] something like a law proclaiming that concerns for the poor require giving them greater legal freedom to use narcotic substances.”

In the final analysis, proof of the value of arguments about equality or fairness lies not in their normative soundness but in the soundness of their economic premises. Hudec questioned the economic assumptions of infant-industry protection and the call for new preferences. The infant-industry argument is economically unsound because governments are inept market interveners while businesses tend to misbehave and rent seek. The new-preferences argument (i.e., that developed nations should offer new, non-MFN preferences to poor countries) is stronger in economic theory, but it too suffers because developed-country MFN tariffs are already low and there is widespread use of nontariff barriers instead.

81 Essays, supra note 13, 236.
82 Ibid., 237–238.
83 Ibid., 238–242.
84 Developing Countries, supra note 1, 141.
85 Ibid., 144–151.
86 Ibid., 151–153.
Hudec’s account misfires, especially his argument that S&D treatment must be tested not on the strength of its underlying equality claims but its underlying economic reasoning. What is the reason for ultimately choosing to test these claims against economic theory? His moral skepticism might have some role in this. However, in his influential Developing Countries and the GATT Legal System, Hudec advanced the argument that equality was not just meaningless but also deceptive and delusional. Putting aside his skepticism about fairness-based arguments in the AD and CVD contexts (what he called “offensive unfairness” claims), Hudec’s skepticism extended to “defensive unfairness” claims – claims for the United States to do something about getting a more balanced or fairer deal. Defensive arguments are like the claims of developing-country nations; in his essay entitled “Mirror, Mirror on the Wall,” Hudec concluded that the problem was not that of overinclusiveness, as in the case of offensive unfairness:

Un Fortunately, balance is not a measurable phenomenon. It is a crude perception, based on observations about what foreign governments are doing in comparison to one’s own government. The perception is quite manipulable – in either direction. . . . Given the pressure of export interests behind claims of imbalance, attempts to correct imbalance in day-to-day operations must inevitably be corrupted and become simple power diplomacy under a veil of normative justification.87

Hudec’s critique of the developing countries’ arguments for S&D treatment is similar. Those arguments address poverty with the narcotic of mercantilist protectionism. The end result is self-deception or worse, a bald-faced lie, no more than “simple power diplomacy under a veil of normative justification.”88

The result is that Hudec’s views ultimately left virtually no room for any moral argument about trade policy. His is a wholesale skepticism not based simply on spotting confusion at the level of individual arguments but based on an argument about the general incoherence of moral theorizing about trade policy. For Hudec, offensive unfairness claims were doomed. They were overinclusive in those cases in which they try to account for a world divided by states, and underinclusive in those in which they do not account for differences in sovereign regulation. They are unpersuasive because of sovereign regulatory differences or unadministrable in those instances in which they try to address

87 Reprinted in Essays, supra note 13, 249.
88 Clearly, the developing countries had and continue to have power measured in terms of numbers, that is, “power divorced from force.” See further Alan K. Henrikson, “Global Foundations for a Diplomacy of Consensus,” in Alan K. Henrikson (ed.), Negotiating World Order: The Artisanship and Architecture of Global Diplomacy (Wilmington, DE: Scholarly Resources, 1986), 217, 235–239.
all those differences. Defensive claims, in contrast, are not doomed. They are deceptive or delusional because of their concealment of underlying export pressures, which are the real cause that such claims are made in the first place. In other words, defensive unfairness is unpersuasive because it is a disguise for mercantilism.\(^89\) As such, defensive unfairness should be measured by the same economic arguments we would use to defeat mercantilism. Fairness claims seem to matter to trading behavior but cannot live up to their normative promise.

vii. **EQUALITY AS A VALUE**

In the account just given, equality has no value where it has no economic value. Formal equality in the form of the MFN doctrine is valuable because it acts as a worldwide tariff accelerator. The most efficient world economy is one based on MFN liberalization. But for developing countries, MFN alone may not be as useful.\(^90\) Neither those who grant preferences to developing countries nor the developing countries that grant preferences to other developing countries should be compelled to grant similar concessions to third-party countries. This is what substantive equality is about. Developed countries argue the opposite—that MFN liberalization will benefit competitive industries in developing countries.\(^91\) The developed-country argument is similar to saying that equality is an economic concept while the developing nations must deny this. For developing countries, the developed-country argument is not unlike having to challenge the nonadmission of women to the Virginia Military Institute in order to demonstrate not only that women are being discriminated against, but that not discriminating against them will also increase the efficiency of military college education.\(^92\) It might be said that the analogy is inappropriate because the GATT–WTO is about efficiency. There are at least three responses to this.


\(^{90}\) This is not to say that smaller, developing trading nations do not enjoy free riding through multilateral liberalization.

\(^{91}\) *Developing Countries*, supra note 1, 152.000

First, we could modify the analogy by treating this issue of admission to the Virginia Military Institute according to its proper military and educational purposes. It would still be like asking prospective female applicants to demonstrate that their admission to the Virginia Military Institute would advance military education – that is, that equality should not be valued for its own sake. Second, the developing country arguments we have seen actually precede the GATT’s founding. Preferential agreements between developing countries were intended to have been included in the GATT 1947, and the position of the developing countries, including those that joined the GATT subsequently, has remained fairly consistent over time. It is therefore historically questionable to suggest that the GATT–WTO prizes efficiency only. At best, the pure efficiency rationale is no more than advocacy on the part of some, but not all, of the GATT’s members. Third, as Hudec himself acknowledged, the various rounds of liberalization were justified to the populations of GATT members in mercantilist terms. Although his response was to accept this simply as a form of public posturing, we could ask whether the most sensible interpretation of what GATT members have said about what they do is to treat it as an elaborate hoax.

After fifty years of making these kinds of moral claims about status equality, the developing countries are still trying to alter the constitutional norms of the GATT–WTO in a more comprehensive, systematic way. True, at different times in history they did manage to modify the GATT’s formal norm of nondiscrimination by altering the constitutional balance during critical moments. Examples include the argument for developing-country preferences in the 1960s and 1970s at the height of the Cold War. This brings us to a noteworthy ruling of the latest participant in the WTO constitutional order – the Appellate Body.

viii. THE EC – TARIFF PREFERENCES CASE

In the EC – Tariff Preferences case, the Appellate Body drew on the actual, historical claims of developing nations in the face of textual ambiguity. India challenged the preferences that the EC accords to certain developing countries. At the heart of India’s challenge was the view that GATT–WTO law

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93 Developing Countries, supra note 1, 142–144.
94 European Communities – Conditions for the Granting of Preferences to Developing Countries, WT/DS246/AB/R (April 4, 2004).
requires that the EC’s preferences should be accorded equally to all developing countries. The dispute turned on the proper legal interpretation of Articles 2(a) and 3(c) of the Enabling Clause. According to the EC, there was no obligation to treat all developing countries in an identical manner. The panel agreed with India instead and ruled out discriminating between the developing countries under the Enabling Clause. The EC therefore failed to convince the panel that, first, differential treatment is permitted provided the differentiating measure bears a reasonable relation to the developing, financial, and trade needs of the individual developing country (i.e., a “rational basis” rule), and second that not “all” developing countries should be entitled to preferences according to the terms of Articles 2(a) and 3(c).  

On appeal, the Appellate Body also found the text of the Enabling Clause to be somewhat inconclusive. But as Gene Grossman and Alan Sykes have noted, the Appellate Body adopted a “middle way” instead in ruling that preferences need not be identical, and nonidentical treatment need not be discriminatory. In effect, the Appellate Body – having found the Enabling Clause to be law – applied a “substantive” conception of equality. Nations are only treated equally when their legitimate differences are taken into account, especially where differences in their developmental, financial, or trade needs are in question. This is therefore similar, in broad terms, to the developing-country position that economic status does matter. The Appellate Body ruled, however, that the EC had failed to prove that its differentiating measures were sufficiently narrowly tailored toward such differences.

Criticizing the Appellate Body’s reasoning, Grossman and Sykes dismiss the explanation just offered. According to them, the deal struck between the developed and developing countries was that developed countries would put up with trade distortion if preferences were to avoid further differentiation between developing countries, much in the way that was suggested by the panel. If this view is correct, then an economic rationale based on efficiency, or at least a “least distortive method” rule, should define the Enabling Clause. Grossman and Sykes therefore consider that the Appellate Body’s ruling went too far. Their account fits with the economic interpretation of the GATT–WTO, but it does not fit with a historical understanding of the GSP scheme. The United States had wanted to dispense with discrimination between developing countries in a “generalized” scheme of preferences but because the EEC had refused to go along, that attempt failed to achieve a general, or nondiscriminatory, system. Put simply, the EEC never agreed

95 See further WTO Law, supra note 52, 262–264.
96 Ibid., 264–269.
97 Ibid., 267–268.
to a “least distortive method” rule. So whatever we might think about the economic justifications for the Appellate Body’s ruling, the Appellate Body appears correct in treating differentiation between developing nations as legitimate provided that the Appellate Body itself retained the right to scrutinize such differential treatment to ensure their conformity with the actual developmental, financial, and trade needs of individual developing-country recipients. The Appellate Body’s ruling upholds a substantive conception of equality, or at least rejects identical treatment as the default trade law rule. India “lost” its argument but the larger developing-country argument against a rigid, formal view of equality seems to have prevailed. How close will the Appellate Body’s scrutiny be in the future? Perhaps there will be a fair degree of tolerance for differential treatment so long as such treatment bears a reasonable relation to the needs of the individual developing country, a test that in any event the EC failed to pass on the facts of the case. In my view, EC – Tariff Preferences was therefore a victory for India even if it lost the argument that there should be no developing-country differentiation. The GSP system as a thinly veiled system of trade conditionality now falls under the Appellate Body’s equal treatment supervision, and so it is that the Appellate Body is now institutionally entrusted with articulating the conventional morality of the majority of the world’s trading nations.

ix. CONCLUSION

There are two matters I have not dealt with. First, arguments for S&D treatment promise to remain central to WTO debates. For a time during the 1980s, it seemed this would no longer be the case. The Uruguay Round’s Single Undertaking indicated a new trend toward integrating the developing countries. S&D treatment had become “issue specific” or “agreement specific” instead. But fueled by developing-country complaints of the Round’s failed
promises, S&D has risen again with renewed vigor in the 1990s, together with calls for a rethinking of Uruguay.\textsuperscript{101} I have not addressed the ongoing Doha Development Round negotiations. This is not to say that the negotiations are irrelevant to the concerns of this contribution, but simply that we have had the benefit of a longer historical perspective in relation to certain classic arguments that the developing countries have made in the past, and that continue to shape the S&D doctrine.

Second, and perhaps what is more important, I have not taken sides with any top-down or ideal moral theory, much less with moral over economic theory. I do not say, much less show, that equality ultimately matters more than economic reasoning. Simply, I mean to distinguish arguments based solely on fairness from those based on efficiency (or the role of GATT–WTO law in promoting efficiency). By singling out the actual, historical claims of developing countries, the middle-level theorizing attempted here is aimed against the tendency of economic analyses to efface these claims. Top-down moral theories tend to do the same. They proceed directly to the reflective acceptability of alternative arrangements. The argument in this contribution is that understanding the actual claims of developing nations – as Robert Hudec first tried to do – requires us to recognize the persistence, if not the centrality, of claims for equality. It requires us to accord such claims theoretical, even critical attention, instead of treating them as mistaken from the outset.\textsuperscript{102} Failing to do so could lead us to theorize about a world that did not exist, perhaps never truly existed, and that in all probability will never exist.

\textsuperscript{101} Ibid., xxx.

\textsuperscript{102} Compare Posner’s economic analysis of the U.S. Supreme Court’s rulings on racial discrimination and affirmative action; \textit{The Economics of Justice}, supra note 92, chapters 12–14. In trying to show that judicial balancing could result in the upholding of discrimination on efficiency grounds even where distributive effects are weighed in the balance, Posner at least seeks to address racial discrimination as something which is prima facie morally wrong in the mainstream morality of American society. Similarly, we need to address more seriously the developing countries’ argument that inflexible MFN treatment is sometimes morally wrong even if these arguments would, if applied in practice, result in economically inefficient outcomes.