DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM

EDITED BY
CHANTAL THOMAS • JOEL P. TRACHTMAN

OXFORD

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LIST OF ABBREVIATIONS

A Pol Sci Rev	American Political Science Review
ADA	Anti-Dumping Agreement
AE Rev	American Economic Review
Am Bar Found Res J	American Bar Foundation Research Journal
Am Bus LJ	American Business Law Journal
Am J Pol Sci	American Journal of Political Science
Antitrust Bull	Antitrust Bulletin
Antitrust LJ	Antitrust Law Journal
Ari JICL	Arizona Journal of International and Comparative Law
Ari L Rev	Arizona Law Review
ASIL	American Society of International Law
ATC	Agreement on Textiles and Clothing
Atl Econ J	Atlantic Economic Journal
AUIL Rev	American University International Law Review
AUJIL & Pol	American University Journal of International Law and Policy
BCICL Rev	Boston College International and Comparative Law Review
BISD	GATT Basic Instruments and Selected Documents
Buffalo IPLJ	Buffalo Intellectual Property Law Journal
Can JEcon	Canadian Journal of Economics
Card JICL	Cardozo Journal of International and Comparative Law
Case West Res JIL	Case Western Reserve Journal of International Law
Cato J	Cato Journal
Chi-Kent JIP	Chicago-Kent Journal of Intellectual Property
Col JEL	Columbia Journal of European Law
Col JIL	Columbia Journal of International Law
Cont Econ Pol	Contemporary Economic Policy
CornILJ	Cornell International Law Journal
DePaul L Rev	DePaul Law Review
Dev Pol Rev	Development Policy Review
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Duke JCIL	Duke Journal of Comparative and International Law
EC	European Communities
Econ & Pol Weekly	Economic and Political Weekly

Econ & Pol	Economics and Politics
Econ Devl & Ch	Economic Development and Cultural Change
Econ J	Economic Journal
Econ Pol	Economic Policy
EJIL	European Journal of International Law
ELJ	European Law Journal
ELRev	European Law Review
EmILRev	Emory International Law Review
EU	European Union
Eur Econ Rev	European Economic Review
Flor St UJTL & Pol	Florida State University Journal of Transnational Law and Policy
Food Pol	Food Policy
Ford ILJ	Fordham International Law Journal
Ford L Rev	Fordham Law Review
Ford Urb LJ	Fordham Urban Law Journal
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
Geo Wash IL Rev	George Washington International Law Review
GSoc	Global Society
GSP	Generalized System of Preferences
Harv ILJ	Harvard International Law Journal
Hastings ICL Rev	Hastings International and Comparative Law Review
Hous JIL	Houston Journal of International Law
Ind L Rev	Indiana Law Review
Int'l Econ L	International Economic Law
Int'l Leg Theo	International Legal Theory
Int'l Org	International Organizations
Int'l SQ	International Studies Quarterly
IPQ	Intellectual Property Quarterly
J Afr Econ	Journal of African Economies
J App Pract & Pro	Journal of Appellate Practice and Procedure
J Comp L & Econ	Journal of Competition Law and Economics
J ConR	Journal of Conflict Resolution
J Dev Stu	Journal of Development Studies
J Econ Pers	Journal of Economic Perspectives
J Int'l Econ	Journal of International Economics
J Int'l Pol Econ	Journal of International Political Economy
J Leg Stu	Journal of Legal Studies
Japan & W Econ	Japan and World Economy
JCMS	Journal of Common Market Studies
JDE	Journal of Development Economics

JE Pub Pol	Journal of European Public Policy
JEcon Growth	Journal of Economic Growth
JELit	Journal of Economic Literature
JIEL	Journal of International Economic Law
JIPL	Journal of Intellectual Property Law
JL & Econ	Journal of Law and Economics
JL Econ & Org	Journal of Law, Economics and Organizations
John Marshall Rev IPL	John Marshall Review of Intellectual Property Law
JWIP	Journal of World Intellectual Property
JWT	Journal of World Trade
JWTL	Journal of World Trade Law
Kansas L Rev	Kansas Law Review
L & Pol Int'l Bus	Law and Policy in International Business
L & Soc Rev	Law and Society Review
LDC	Least Developed Country
Lloyds Bank Rev	Lloyds Bank Review
MFA	Multi-Fiber Arrangement
MFN	Most Favored Nation
Mich JIL	Michigan Journal of International Law
Mich St LRev	Michigan State Law Review
Minn JGT	Minnesota Journal of Global Trade
Minn L Rev	Minnesota Law Review
NAMA	Non-Agricultural Market Access
NCJIL & Comm Reg	North Carolina Journal of International Law and Commercial Regulation
Nw JIL & Bus	Northwestern Journal of International Law and Business
NYUJIL & Pol	New York University Journal of International Law and Policy
O St JDR	Ohio State Journal on Dispute Resolution
OREP	Oxford Review of Economic Policy
Pac Econ Rev	Pacific Economic Review
Phil & Pub Affairs	Philosophy & Public Affairs
Pol Sci Q	Political Science Quarterly
Pol Theory	Political Theory
PTA	Preferential Trade Agreement
Pub Admin & Dev	Public Administration and Development
QJE	Quarterly Journal of Economics
Res Pol	Research Policy
Rev Econ Stats	The Review of Economics and Statistics
Rev Econ Stu	Review of Economic Studies
Rev Int'l Econ	Review of International Economics
RTA	Regional Trade Agreement

San Diego ILJ	San Diego International Law Journal
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SG Agreement	Agreement on Safeguards
SPS Agreement	Agreement on Sanitary and Phytosanitary Measures
St Pol Q	State Politics and Policy Quarterly
Stan JIL	Stanford Journal of International Law
Sth Econ J	Southern Economic Journal
TBT Agreement	Agreement on Technical Barriers to Trade
Temp Int'l & Comp LJ	Temple International and Comparative Law Journal
Texas ILJ	Texas International Law Journal
TPRM	Trade Policy Review Mechanism
Transnat'l L & Cont Prob	Transnational Law and Contemporary Problems
TRIMS Agreement	Agreement on Trade Related Investment Measures
TRIPS Agreement	Agreement on Trade Related Intellectual Property Rights
U Cinn L Rev	University of Cincinnati Law Review
U San Fran L Rev	University of San Francisco Law Review
UC Davis Bus LJ	UC Davis Business Law Journal
UC Davis JIL & Pol	UC Davis Journal of International Law and Policy
UC Davis L Rev	UC Davis Law Review
UChig Leg For	University of Chicago Legal Forum
UDC L Rev	University of District of Columbia Law Review
UNSWLJ	University of New South Wales Law Journal
UPennJIEL	University of Pennsylvania Journal of International Economic Law
UPitt L Rev	University of Pittsburgh Law Review
URichL Rev	University of Richmond Law Review
US	United States
Va JIL	Virginia Journal of International Law
Vand JTL	Vanderbilt Journal of Transnational Law
W Comp	World Competition
W Econ	The World Economy
W Pol	World Politics
WB Econ Rev	World Bank Economic Rev
West Pol Q	Western Political Quarterly
WT Rev	World Trade Review
YaleLJ	Yale Law Journal

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1. EDITORS' INTRODUCTION

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The problem of poverty continues to plague many countries and the international system as a whole. The international trading system, governed primarily by a single multilateral organization—first the General Agreement on Tariffs and Trade (GATT) and then its successor, the World Trade Organization (WTO)—has served as a central forum for debate and decision making on the relationship between trade law and policy, on the one hand, and poverty reduction and development, on the other. Indeed, the Preamble to the Agreement Establishing the World Trade Organization avers the WTO's recognition that 'relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living,' as well as a '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'.[1]

The question of how an international trading system premised on the foundational principles of nondiscrimination, as articulated in Article I and Article III, should address the special challenges facing developing economies precedes the 1995 establishment of the WTO by several decades and indeed has proved a defining question throughout the evolution of the post-World War II and postcolonial international arena. One of the most astute treatments of this question remains Robert Hudec's *Developing Countries in the GATT Legal System*.[2] The essays in the

1. Preamble, Agreement Establishing the World Trade Organization.
2. RE Hudec, *Developing Countries in the GATT Legal System* (Gower: Aldershot, 1987) 58.

present volume seek to respond to and expand Hudec's central insights and commemorate the twentieth anniversary of the book's publication.

Hudec's book can best be appreciated for two central achievements, one of substance and one of method—although they are intertwined—as the following discussion indicates. First, Hudec was perhaps among the first to apply a 'public choice' approach to the internal workings of international trade negotiations, shaped by a sensitivity to political economy and a realist's eye for internal organizational dynamics. From his experience working as a trade diplomat in Geneva, Hudec saw very well how national self-interest governed the strategies of trade negotiators, generating both the heavy reliance on reciprocity as a driver of progress in trade negotiations and pressures that often created diversions from the principles arising out of trade negotiations, primarily in the form of laxity instead of discipline in the application of the rules to certain political and economically sensitive sectors. Thus, *Developing Countries in the GATT Legal System* often recounts in fascinating detail the political and economic calculus adopted by trade negotiators as they both struggled toward and departed from progress in the trading regime.

Hudec's unique sensibility also caused him to endorse across-the-board liberalization, rather than special treatment, for developing countries. Given the pressures of internal political economy, a strong external impetus toward freer trade was necessary to ensure that negotiators would hew a liberalizing path that would ultimately benefit both their own economies and the global economy as a whole. Additionally, the reduction of global trade barriers would create countervailing domestic producer groups who could push for expanded foreign market access and therefore apply their disproportionate political influence to the greater good of trade liberalization. In this regard, Hudec warned against according preferential treatment to developing countries, fearing that the dangers of capture and self-interest would lead to the abuse of such arrangements to the detriment of both consumers and less advantaged and powerful producers within those countries.

Developing Countries in the GATT Legal System detailed the first few decades of dialogue and evolution in law and policy within the GATT on the question of trade and development. Since the 1987 publication of Hudec's original volume, much has changed within the international trading regime and in the contributions to this volume. Yet the WTO remains a critical forum for discussions of poverty focused on the role of international trade in helping people and countries to escape poverty, and an important role for trade scholars remains the assessment of the extent to which failure to modify the rules in favor of these constituencies may deny them the ability to escape poverty.

Trade, along with the WTO, is an engine for global growth. Although growth is expected to ameliorate poverty,[3] the WTO has not yet directly confronted questions regarding the global distribution of its benefits. However, various initiatives in connection with the Doha Development Agenda (DDA) may be

3. See the preamble language quoted above.

seen as opening up direct confrontation. The focus of the trading system's efforts on development has moved from special treatment for developing countries toward a commitment to nondiscriminatory liberalization in the agricultural and industrial products in which they may enjoy economic advantages. At the same time, the question of whether there is a continuing role for the principle of special and differential treatment (S&D treatment) retains significance in the ongoing WTO negotiations under the DDA.

Poor-country economies, like other economies, of course, include domestic producers interested in protection from competition, domestic producers interested in promoting exports, and domestic consumers interested in inexpensive goods. Standard political economy analysis suggests that domestic producers interested in protection would be able to overcome domestic consumers interested in inexpensive goods without the political intervention of domestic producers interested in promoting exports.

The WTO provides an occasion to motivate domestic producers interested in promoting exports to intervene by providing the possibility for commitments by other states to liberalize access for their exports. This promotes liberalization and the possibility of export-led growth. But the WTO also provides restrictions that are understood by some to limit the scope for industrial policy that can also induce growth. How can WTO rules be structured to limit the scope for protection by developing countries while maximizing the scope for industrial policy that may promote growth?

This volume provides a comprehensive, nuanced, and varied view of the position of developing countries in the WTO legal system. It comprises essays by a spectrum of contributors invited to comment on the issues at the heart of *Developing Countries in the GATT Legal System*. These scholars were invited to gather and discuss their work at the University of Minnesota in the spring of 2007 in celebration of the twentieth anniversary of Hudec's volume. One of our main goals as coconvenors of this conference was to create a forum for dialogue that would reflect the wide array of viewpoints, approaches, and substantive topics that have come to characterize debate over the WTO and its role in economic and social development. The contributors here are leading authors in trade law, law and economics, law and philosophy, and law and political economy.

In the remainder of this introduction, we offer a broad overview of current themes in the discourse on the WTO and developing countries and conclude by describing the contributing essays.

A. TRADE LIBERALIZATION AND POVERTY REDUCTION: THE ROLE OF SPECIAL AND DIFFERENTIAL TREATMENT

i. Special and Differential Treatment: An Overview of the Pre-Uruguay Round Era

Three issues relating to trade liberalization and development have been important since the early history of the GATT, particularly in the evolution of the concept

of S&D treatment: (i) nonreciprocity for developing countries, (ii) 'permissive protection' for developing countries versus promotion of domestic liberalization and institutional reform, and (iii) increased market access for developing country products and services in developed country markets (as well as other developing country markets).

Although it features prominently in the DDA, it appears that S&D treatment, at least as applied so far, has had limited utility.[4] Special and differential treatment is a complex phenomenon—some aspects of S&D treatment are undoubtedly somewhat beneficial. It includes several specific rules and approaches that can be placed in three categories: nonreciprocity, preferential market access, and permissive protection.[5]

First, S&D treatment includes the concept, initially expressed in the mid-1960s, that poor countries will not be expected or requested to make reciprocal concessions in trade negotiations (nonreciprocity).[6] This concept has clearly been honored in the breach in connection with recent negotiations with larger developing countries, including Brazil, China, and India, with leading industrialized countries and even WTO officials calling on them to make concessions to promote the Doha Development Agenda. After its articulation in the 1960s, this vague principle was later incorporated in Part IV of GATT.[7] However, as several commentators have noted, those who are not required to reciprocate often find coincidentally that few concessions are accorded to them—even under conditions of most favored nation (MFN) status.[8] This is because the products of export

4. Paragraph 44 of the Doha Ministerial Declaration calls for a review of S&D treatment, with a view toward making the relevant provisions more precise, effective, and operational. For a proposal to revise S&D treatment in order to make it more favorable to poor countries, see WTO 'Communication from Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe, Proposal for a Framework Agreement on Special and Differential Treatment' WT/GC/W/442 (2002). For the history of the concept of S&D treatment, see JH Jackson, *World Trade and the Law of the GATT: A Legal Analysis of the General Agreement on Tariffs and Trade* (Indianapolis:Bobbs-Merrill, 1969) 625–71. For an analysis of the S&D treatment principle, see P Lichtenbaum, 'Special Treatment' vs. 'Equal Participation': Striking a Balance in the Doha Negotiations' (2002) 17 AUIL Rev 1004. See also J Whalley, 'Special and Differential Treatment in a Millennium Round' (1999) CSGR Working Paper 30/99 <http://www.warwick.ac.uk/fac/soc/CSGR/wpapers/wp3099.PDF>; C Michalopoulos, 'The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization' (2000) <http://www.worldbank.org/research/trade/archive.html>.

5. See WTO, 'Committee on Trade and Development, Implementation of Special and Differential Treatment Provisions in the WTO Agreements and Decisions' WT/COMTD/W/77 (2000).

6. WTO, BISD (13th Supp. 1965).

7. Hudec (n 2 above) 58.

8. See, eg, C Michalopoulous, 'Developing Country Strategies for the Millennium Round' (1999) 33(5) JWT 1, 25; Hudec (n 2 above) 46.

interest to developing countries often differ from those of interest to other countries and are not included in the give-and-take of negotiation over concessions.

Second, S&D treatment includes the aspiration to provide enhanced market access to developing country products. Partly because of the principle of non-reciprocity, this aspiration was often ignored. However, the area in which S&D treatment has had its greatest effect is in connection with the Generalized System of Preferences (GSP), which provides for reduced tariff treatment for certain developing country products.

Third, S&D treatment includes greater permission for protection, in particular under Articles XII and XVIII of GATT,[9] relating to balance of payments. While some economists, led by Dani Rodrik, believe that protection may foster domestic industries, there is a counterargument to the effect that protection may sustain geriatric or crony industries. Thus, the question about permission for protection is one of selectivity. Hudec believed that developing countries, like other countries, need the external constraints of WTO law in order to deny protection to undeserving industries.

ii. Domestic Reform

As Michael Finger has pointed out, '(p)erhaps the least development-friendly side of the Doha Declaration is its willingness to ladle out 'special and differential treatment' without a perception of where developing Members would be better off if *they themselves* observed the disciplines the negotiations aim to establish'.[10] For much of the past 20 years, a consensus—part of the 'Washington Consensus'—developed that poor countries would benefit from liberalization of their domestic markets. The debate about whether protection of domestic markets is good or bad for poor countries has recently been revived.[11] However, there still seem to be solid reasons for poor countries to liberalize at some point in their development path. The important issue here is *context*. In some cases, liberalization will be important to break the grip of oligopoly or cronyism, and provide investor inputs or consumer products more affordably or establish infrastructure for other productive activities. In other cases, there may be a legitimate basis for limiting the impact of imports—particularly if those imports are

9. See C Thomas, 'Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order' (2000) 15 AUIL Rev 1249, 1256.

10. JM Finger, 'A Diplomat's Economics: Development and Trade Perspectives on the Doha Agenda', working paper dated 10 May 2002 (emphasis in original).

11. See D Rodrik and F Rodríguez, 'Trade Policy and Economic Growth: A Skeptic's Guide to the Cross-National Evidence' in B Bernanke and KS Rogoff (eds), *Macroeconomics Annual 2000* (2001). Even more recently, see A Estevadeordal and AM Taylor, 'Is the Washington Consensus Dead? Growth, Openness, and the Great Liberalization, 1970s–2000s' (2008) NBER Working Paper No. W14264.

heavily subsidized, as in the case of some agriculture—to allow for the development of sustainable and competitive national industries, or to ease a process of economic reform or transition.

iii. Market Access in Developed Countries

There is a strong consensus that liberalization by the wealthy states in agriculture, textiles, and tropical products, even on an MFN basis, would assist growth in poor countries although there is wide variation in views regarding the magnitude of benefit.[12] For example, exports from developing countries are limited by continuing developed country tariffs (including quotas that were 'tariff-ied' in the Uruguay Round), domestic supports, and export subsidies. And indeed, market access in products of export interest to poor countries would be an important way to enhance livelihoods in those countries although it is not unambiguous. Easier exports to wealthy countries could mean higher prices at home. Reduction of wealthy country export subsidies on agriculture could hurt impoverished consumers in food-importing states. Import surges from wealthy countries with cheap agriculture developed as a product of superior technology and/or technologies of scale could remove or damage domestic food production—a sensitive political topic as most countries both attach special cultural significance to their rural agricultural communities and see self-reliance in the area of food production as of special importance.

Tariff peaks and tariff escalation in connection with goods of export interest to poor countries have restricted market access not only in agriculture, textiles, and tropical products, but also in other manufactured goods.[13] While developed country tariffs now average less than 5 percent, Hoekman points out that tariff peaks—higher tariffs—are 'often concentrated in products that are of interest to developing countries'.[14] Many of these apply to agricultural products, and they are often associated with tariff escalation, by which the tariffs on unprocessed products are disproportionately less than the tariffs on processed products, providing perverse incentives against manufacturing in poor countries. Tariff peaks may be a result of the principle of nonreciprocity or the result of 'simple political economy'[15] that is the result of some combination of a desire to protect the jobs of the relatively poor in rich countries and to respond to the other sociocultural values described earlier.

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12. See *Make Trade Fair, Rigged Rules and Double Standards: Trade, Globalisation and the Fight Against Poverty* (2002) <www.maketradefair.com> [hereinafter the Oxfam Report].

13. Paragraph 16 of the Doha Declaration calls for the reduction of tariff peaks and tariff escalation.

14. B Hoekman, 'Strengthening the Global Trade Architecture for Development: The Post-Doha Agenda', working paper dated January 2002, 5.

15. J Bhagwati, 'The Poor's Best Hope' Economist (20 June 2002) 24.

While the GSP has provided modest benefits, it has not been applied to provide greater market access for many of the most important poor country products,[16] and the United States and European Communities (EC) have imposed substantial conditions on access to their Generalized System of Preferences (GSP) programs.[17] 'Graduation' policies including ceilings on eligible exports have also diminished the utility of GSP. Furthermore, as developed country tariffs have decreased to an average of less than 5 percent and with the formation of more free trade areas and customs unions, the preferences under the GSP have been greatly eroded and will be further eroded in future. The magnitude of the 'differential' has declined substantially. If benefits are unstable and are a wasting asset, they cannot form a sound basis for investment that would allow poor countries to actually achieve market access. The principle of nonreciprocity, as implemented through GSP, seems to have the effect of diminishing incentives for liberalization by beneficiary countries.[18] The dangers of relying on GSP programs and the lack of certainty that they will effectively create 'infant' industries that can become independently competitive was perhaps best demonstrated by the overhaul of tariff systems for textile industries, long an area in which developed countries maintained protectionist systems that benefited vulnerable domestic workforces, but within that supported benefits for particular developing country textile imports. With the removal of that system, certain powerfully expanding developing country economies, and most particularly China, threatened to eclipse the textile industries that had developed elsewhere. The textile example also demonstrates acutely the differences among developing countries and the dangers inherent in assuming that all countries have similar issues. The limitations on the GSP system and its perverse incentives to remain within primary-product industries had undoubtedly contributed to the fact that most of the benefits of such systems had gone to economies that already possessed the attributes necessary to succeed in export markets—namely the Newly Industrializing Countries (NICs).

In 2004, the WTO Appellate Body made an important decision regarding the scope of permissible conditionality—reciprocity—that may be applied in connection with GSP programs under WTO law. The *EC-Tariff Preferences* decision examined a complaint by India against the EC regarding the conditions under

16. Paragraph 42 of the Doha Ministerial Declaration provides a commitment to the *objective* of duty-free, quota-free market access for products originating from least developed countries. If realized, this commitment could be of some importance.

17. These conditions have been subject to challenge, and to some extent, revision. See discussion below.

18. C Ozden and E Reinhardt, 'The Perversity of Preferences: GSP and Developing Country Trade Policies, A1976–2000', working paper dated 24 May 2002 <http://userwww.service.emory.edu/~erein/research/gsp2.pdf>.

which the EC accords tariff preferences to developing countries.[19] The Appellate Body found that the requirement in the Enabling Clause for nondiscriminatory treatment does not require formally identical treatment but requires identical treatment of similarly situated beneficiaries. The distinction among beneficiaries must 'respond positively' to the needs of developing countries. Thus, reciprocity in the sense of developed countries extracting policy concessions in exchange for GSP treatment is sharply constrained. We may expect that the content and scope of this requirement will be tested in future litigation.

iv. Special and Differential Treatment in the Uruguay Round

As noted previously, prior to the Uruguay Round, S&D treatment included several specific rules and approaches that can be placed in three categories: nonreciprocity, preferential market access, and permissive protection.[20]

The principle of nonreciprocity was abandoned, or at least broadly modified, in the realization, as opposed to the rhetoric, of the Uruguay Round. This was partly due to a perception that S&D treatment had not provided significant benefits in the past.[21] It was also probably partly due to deep shifts in global political economy that had dissolved the political and theoretical basis for the major point of view arguing for nonreciprocity, a perspective that grew out of both radical dependency theory and reformist, UN-centered 'structuralist' reformers such as Raul Prebisch. While this point of view had reached a high point of sorts in the GATT context with the establishment of the GSP Waiver in 1974, over the ensuing two decades its effectiveness had waned for a variety of reasons.

First, the collective political force of developing countries acting as a bloc, as in the 'Group of 77,' had dissolved as a consequence of both internal stratifications and conflicts among developing countries and external alliances among individual or small groups of countries had dissolved that political reality. Examples abound but include the tension between the success of the Oil-Producing Exporting Countries' (OPEC) success in challenging developed-country economic control over oil prices and the deleterious effect of the OPEC price hikes on import prices for other, less well-off developing economies; the growth of a special trade system for former colonies in Africa, the Caribbean, and the Pacific (ACP) of European countries that became known as the Lome agreements; the creation of special arrangements between the United States and countries in the Latin American region of the Andes mountains, partially

19. WTO, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries* (20 April 2004) WT/DS246/AB/R.

20. See WTO, 'Note by Secretariat, Implementation of Special and Differential Treatment Provisions in the WTO Agreements and Decisions' (2001) WT/COMTD/W/77/Rev.1.

21. See J Whalley, 'Special and Differential Treatment in the Millennium Round' (1999) 22 W Econ 1065.

intended to dissuade producers in those countries from turning to lucrative illegal drug markets; and so on. By the early 1980s, moreover, differences in fundamental underlying conditions had become all too clear. For example, whereas annual per capita income in Ghana roughly equaled that in South Korea three decades before *Developing Countries in the GATT Legal System*, by its year of publication, purchasing power in the latter country had increased to approximately ten times that of the former.[22] Thus, the underlying economic argument for developing countries to act as a bloc had, quite simply, weakened from many different directions.

The ability of developing countries to act collectively as a negotiating bloc in the GATT necessarily weakened further as many leading economies faced serious debt crises, requiring them to rely on developed-country governments and financial institutions, and as a consequence to internalize the prescriptions that became known as the 'Washington Consensus': liberalization, privatization, and fiscal austerity. Beyond the pressures exerted by the Bretton Woods Institutions and their developed-country leaders, however, many of these reforms were also welcomed domestically by populations who had failed to see the benefits of the infant-industry, structuralist/protectionist program.

Thus, by the beginning of the Uruguay Round, the climate in the global political economy and international institutional and legal landscape had changed such that the overall position of developing countries had transformed from one of demanding deep structural change toward a 'New International Economic Order',[23] sharply criticized by Hudec in his 1987 work, into one of reconciliation with the liberal values of the global North, toward what has been called 'deep integration.' Of course, to state the transformation in such terms ignores the complexity and compromise pervasive in both eras—from the limitations in the GSP that Hudec described to the difficulties with agricultural liberalization described in this volume.

Nevertheless, the birds-eye view revealed a marked shift in the Uruguay Round, from one of at least superficial recognition of the centrality of S&D treatment toward one of limiting the effects of S&D treatment in the categories of nonreciprocity, preferential market access, and permissive protection, as described at the beginning of this section.

One may argue that nonreciprocity was abandoned in the sense that developing countries were expected to reciprocate in terms of market access to goods and of the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) and services. For example, in connection with the core GATT issue of tariffs,

22. H Werlin, 'Ghana and South Korea: Lessons from World Bank Case Studies' (1991) 11 Pub Admin & Dev 245, 246.

23. See, eg, Hudec (n 2 above) 22.

cuts were expected of developing countries at only a slightly lower level compared to those provided by developed countries.[24]

Preferential market access was reduced in the Uruguay Round by virtue of overall reductions in tariffs on industrial goods. The reduction in the value of preferences due to MFN tariff reductions became a significant impediment in the DDA negotiations. Furthermore, the Uruguay Round did nothing to reduce the erosion of preferential market access through conditionality imposed with respect to preference schemes (although the *EC-Tariff Preferences* decision has subsequently constrained conditionality). This conditionality might be understood as a type of broad reciprocity.

Third, permission for protection under the balance-of-payments exceptions was constrained and effectively reduced under the Uruguay Round Understanding on Balance-of-Payments Provisions.

In the Uruguay Round, a new type of S&D treatment emerged. This new type includes two facets: technical assistance in connection with implementation and transition periods. The Sanitary and Phytosanitary Agreement (SPS), Technical Barriers to Trade Agreement (TBT), and TRIPS Agreement all contain provisions for technical assistance. These provisions have varying degrees of binding force, but none of them may be characterized as clear and unconditional obligations. Important transition period provisions include those in the TRIPS Agreement, the Trade Related Investment Measures Agreement (TRIMS), the Subsidies and Countervailing Measures Agreement (SCM), the SPS Agreement, and the TBT Agreement. At the time of this writing, all of these transition periods contained in the Uruguay Round agreements had passed although some had been subsequently extended.

B. THE WTO AND THE RIGHT TO REGULATE FOR DEVELOPMENT

One of the critical questions about the GATT and the WTO has been the degree to which they have constrained the 'right to regulate,' in particular the degree to which they have constrained the ability of developing countries to implement development policy.[25] In 2004, Dani Rodrik wrote that

> '(a)lmost all successful cases of development in the last fifty years have been based on creative and often heterodox policy innovations . . . . nations combined their trade policy with unorthodox policies: high levels of tariff and non-tariff barriers, public ownership of large segments of banking and

24. JM Finger and LA Winters, 'Reciprocity in the WTO' in B Hoekman, A Mattoo and P English (eds) *Development, Trade and the WTO: a Handbook* (2002) 50, 58 and note 8.

25. See, eg, KP Gallagher (ed), *Putting Development First: The Importance of Policy Space in the WTO and International Financial Institutions* (2005).

industry, export subsidies, domestic content requirements, import-export linkages, patent and copyright infringements, directed credit, and restrictions on capital flows . . . . (T)rade liberalization was a gradual process . . . .'[26]

Of course, the correlation of these heterodox policies with successful development would not necessarily indicate a causal relationship. Nor is there solid econometric evidence of correlation between heterodoxy and growth or of correlation between orthodoxy and growth. It is still worth assessing, as a descriptive if not a normative matter, which heterodox policies are constrained by WTO law.

The Uruguay Round agreements did much to reduce the scope of special exceptions from GATT disciplines available to developing countries. This meant that for the first time, developing countries would have effectively binding obligations in the GATT/WTO system. The enhancement of procedures for litigation under the Dispute Settlement Understanding (DSU) meant that these obligations would be judicially applicable, while the substantive changes in the obligations meant that these obligations would actually constrain developing country measures. They therefore reduced the policy flexibility of developing countries.

The Washington Consensus continued to erode after the conclusion of the Uruguay Round.[27] In fact, something of a backlash against the Washington Consensus took place. Part of this backlash included a return to arguments for infant-industry protection as a basis for export-led growth. While there seems to be wide agreement among economists that infant-industry protection in developing countries is not necessarily adverse to development, there are significant questions about the choice of industries for protection, the duration and magnitude of protection, and the effects of protection on reciprocal negotiations for liberalization. Importantly, even the backlash has not included a reversion to import substitution as a strategy for growth. An import substitution strategy would be aligned with maintenance of high import barriers, which would require a negotiating position of nonreciprocity if developed country import barriers are to be reduced.

The GATT 1947 obligations that developing countries incurred did not significantly restrict their development policy. As set forth, developing countries had few obligations to liberalize, could use balance-of-payments exceptions to protect domestic markets, and had few other obligations. This changed in the Uruguay Round, with increased tariff and other commitments, reduced access to balance-of-payments exceptions, greater additional obligations, and stronger

26. D Rodrik, 'How to Make the Trade Regime Work for Development' (2004) <http://ksghome.harvard.edu/~drodrik/How%20to%20Make%20Trade%20Work.pdf>.

27. See N Birdsall and A De La Torre, *Washington Contentious: Economic Policies for Social Equity in Latin America* (2001); JE Stiglitz, *Globalization and its Discontents* (2002).

dispute settlement. On the other hand, while many developing countries accepted broad tariff bindings in the Uruguay Round, for many of them the commitments were well above applied rates. Therefore, the developing countries could simply move up to bound rates in order to obtain an extra measure of protection.

In the paragraphs below, we focus generally on four types of measures: (a) balance-of-payments measures, (b) other protection, (c) subsidies, (d) TRIMS, and (e) TRIPS.

i. Balance-of-Payments Measures

During the pre-1994 GATT period, review of developing country balance-of-payments measures under Article XVIII lost the power to constrain action. Developing countries won wide discretion to determine their balance-of-payments problems and to impose quotas in response.

The Uruguay Round Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 (the BOP Understanding) made several changes. First, it expressed a preference for price-based measures, such as surcharges, as compared to quotas. The BOP Understanding calls on members to avoid new quotas. Second, the BOP Understanding permits the imposition of balance-of-payments measures without advance approval but subjects them to requirements of subsequent consultations and periodic review. Of importance is that the BOP Understanding affirms that WTO dispute settlement 'may be invoked with respect to any matter arising from the application of restrictive import measures taken for balance-of-payment purposes.' The role of dispute settlement itself was disputed in a case brought against India in 1997. Given the inconclusive nature of most political consultations regarding balance-of-payment measures, binding dispute settlement brought the possibility of greater limitations on the freedom of action of developing countries.

The possibility of protection for balance of payments or infant-industry protection under Article XVIII of GATT has not been viewed as significant. The member states that by 2005 had engaged in consultations within the WTO Committee on Balance-of-Payments Restrictions are Bangladesh, Bulgaria, the Czech Republic, Hungary, India, Nigeria, Pakistan, Romania, the Slovak Republic, Sri Lanka, and Tunisia.

In the years after the conclusion of the Uruguay Round, there were some instances in which states asked whether the GATT-era practices relating to developing countries were really intended to end, countering clear legal text with diplomatic practice, and perhaps intent. This was the thrust of India's position in the *India—Quantitative Restrictions* case, in which India argued for continuity of the lax approach to developing country access to balance-of-payments exceptions that was followed under GATT. The Appellate Body in this case upheld the clear meaning of the Uruguay Round Understanding on Balance of Payments, subjecting member state claims of exceptions under Articles XII or XVIII to judicial

scrutiny. Prior to the advent of the WTO, these claims were sometimes subjected to panel evaluation, but developing countries had become accustomed to undisciplined access to these exceptions.

In subsequent Doha Round negotiations, some developing countries have called for a decision to specify that only the BOP Committee would have authority to examine the justification of balance-of-payments measures.

ii. Other Protection

World Trade Organization law broadly constrains efforts at protection. However, it permits certain types of protection. These permitted types of protection include, most important, tariffs at or below bound rates (to the extent that bindings have been made). By selecting areas for higher tariff rates, states retain flexibility for industrial policy. Thus, the only constraint is that imposed by negotiated commitments. Other areas of permitted protection include contingent protection pursuant to antidumping; antisubsidies; safeguard laws; and protection through standards to the extent of compliance with Article III of GATT, the TBT Agreement, and the SPS Agreement. As tariffs have declined, nontariff measures seem to increase.

iii. Subsidies

The SCM Agreement extended the prohibition of export subsidies on manufactured goods to apply to developing countries and also introduced a prohibition on import substitution subsidies—subsidies contingent upon the use of domestic over imported goods. The prohibition on import substitution subsidies had been understood to be included in Article III of GATT.

The prohibition on export subsidies does not apply to least-developed member states designated as such by the United Nations, nor to those listed in Annex VII(b) of the SCM Agreement, until the GNP per capita of such members has reached $1,000 per annum.[28] Neither India nor China is eligible for this exception. For those developing countries that are not eligible for this exception, the SCM Agreement granted an eight-year transition period, which has now passed. Therefore, India and China are prohibited to use export subsidies on manufactured goods.

The prohibition on import substitution subsidies had no general exceptions but only contained transition periods of eight years for least developed countries and five years for developing countries. All developing countries are subject to the prohibition on import substitution subsidies.

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28. The states listed are Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka, and Zimbabwe. See the UN list of 50 least-developed countries at <http://www.un.org/special-rep/ohrlls/ldc/list.htm>.

The SCM Agreement also includes the concept of 'serious prejudice'. Serious prejudice occurs when a subsidy (a) displaces exports or imports, (b) results in significant price undercutting, or (c) results in an increase in the subsidizing country's market share. Where subsidies cause serious prejudice, they may be subject to dispute settlement procedures, with the result that they may be required to be withdrawn or their adverse effects removed.

iv. TRIMS

Within the Uruguay Round negotiations, the developed countries cut back significantly on their original demands with respect to investment liberalization and settled for the TRIMS Agreement that did little more than codify restrictions that had already been found,[29] or at least considered by some to exist, in Articles III and XI of GATT. Under these provisions, investment conditions that discriminate between imported and domestic goods or that restrict imports may be illegal. Thus, the TRIMS Agreement contains an 'illustrative list' of measures inconsistent with GATT. This illustrative list includes domestic content requirements, restrictions on importation of inputs, restrictions on importation of inputs by restricting access to foreign exchange by reference to inflows attributable to the enterprise, and restrictions on exportation of products. In *Indonesia-Autos*, the panel found that local content requirements imposed in connection with favorable treatment for investment violated the TRIMS Agreement.[30]

Notably, the TRIMS Agreement does not restrict the ability of states to impose export performance requirements as a condition for investment permission.[31] Some argue that export performance requirements are a useful second-best response to alleged anticompetitive practices by multinational corporations that might otherwise restrict production for export at their developing country facilities. For a broader discussion of responses to such anticompetitive practices, see the chapter by Daniel Gifford and Robert Kudrle in this volume.

v. TRIPS

The TRIPS Agreement raises a number of issues for developing countries. In this discussion, we focus on its restrictions on policy flexibility and on the ability to provide implicit benefits to local production through appropriation of

29. GATT, *Canada—Administration of the Foreign Investment Review Act* BISD 30S/140 (1984). The panel declined to find that export performance requirements violate GATT.

30. WTO, *Indonesia—Certain Measures Affecting the Automobile Industry* (23 July 1998) WT/DS 54, 55, 59, 64/R.

31. See D Rodrik, 'The Economics of Export-Performance Requirements' (1987) 102 QJE 633 (welfare effects of export performance requirements); P Low and A Subramanian, 'Beyond TRIMS: A Case for Multilateral Action on Investment Rules and Competition Policy?' in W Martin and LA Winters (eds), *The Uruguay Round and the Developing Countries* (1996) 380–88.

foreign-owned intellectual property. We do not focus on the absolute costs of the TRIPS Agreement in terms of implementation and payment of royalties, as discussed earlier.

The TRIPS Agreement established requirements for harmonization of intellectual property protection as well as minimum standards for enforcement of intellectual property rights. These provisions exceeded substantially the requirements set forth in the treaties administered by the World Intellectual Property Organization, including the Paris Convention and the Berne Convention, which contained no substantial requirements for harmonization or enforcement and no substantial dispute settlement mechanism.

We may understand the failure to protect foreign intellectual property rights as an implicit subsidy to domestic production, and therefore as a possible means to promote growth domestically. As the most valuable intellectual property rights are owned by persons or firms based in developed countries, the TRIPS Agreement denied developing countries the ability to provide these implicit subsidies at foreign expense. For a broader discussion of TRIPS, see the chapter by Daniel Gervais in this volume.

C. MOVING FORWARD

Given that most developing countries (Brazil, China, India, and a few others may be important exceptions) are unlikely to wield significant market power—to have effects on world prices—in most products, they would be unlikely to capture terms of trade benefits from protection. If they were able to select industries for protection accurately, developing countries might benefit from selective protection of infant industries until these industries become able to compete on world markets. Alice Amsden has argued that domestic 'reciprocal control mechanisms,' under which government support is conditioned upon the achievement of measurable goals, might allow governments to discipline domestic industries in exchange for subsidies.[32]

Like many others, Robert Hudec[33] was skeptical of the ability of developing country governments (and all other governments) to select industries to promote and to deny protection to industries that have little hope of attaining globally competitive efficiency. He felt that selective legal obligations—tariff schedules, restrictions on quotas and other balance-of-payments measures, and today, services commitments—would at least assist developing country governments in resisting calls for protection from these hopeless industries.

32. A Amsden, *The Rise of the Rest: Challenges to the West from Late Industrializing Countries* (2001).

33. Hudec (n 2 above).

One reading of Hudec's 1987 work might see it as supportive of the trade component of the Washington Consensus: the prescription for developing countries to liberalize.[34] However, this reading, while partially quite accurate, would miss important nuance. Hudec found that even assuming that some infant-industry protection or subsidization is good for developing countries, some legal commitments would also be good. The trick is in the discrimination: who discriminates and how?

Hudec assumed that the developing country governments themselves would discriminate between good and bad protection and would use their international legal obligations as a tool by which to bind themselves, or more accurately by which to plead to domestic lobbies that they are bound. Where commitments have been made, and now seem inconsistent with development goals of developing countries, what is to be done? Hudec was attracted to the GATT Article XVIII mechanism of multilateral review and chronicled its rise and fall as an effective mechanism for discriminating between valid and invalid protection.

In connection with the DDA, there are important initiatives toward intensifying special and differential treatment for developing countries—for increasing the preferences available to developing countries and reducing the commitments applicable to them. Hudec's work suggested that preferences, at least as heretofore structured, would do little to help developing countries in the real world. Hudec expected these preferences to be granted with strings attached or to develop strings over time; he did not expect the developed world to give something for nothing. While there may be greater political impetus today in developed countries to assist developing countries, it will be difficult to translate this impetus into useful preferences. Hudec also anticipated that these preferences would be granted in ways that resulted in trade diversion hurting other developing countries, rather than trade creation putting the adjustment burden on developed countries. At the 2005 Hong Kong ministerial meeting, ministers agreed to provide duty-free and quota-free access for products from least developed countries. This action accords with Hudec's prediction that preferential treatment would devolve into multiple tiers of preferential treatment. Finally, he understood that these preferences would be unstable, making them poor lures for investment, which is the critical factor in development.

Hoekman, Michalopoulos and Winters find that MFN liberalization of trade in goods and services that are of export interest to developing countries would be superior in global welfare terms to more selective preferences.[35] This is a critical point, and they argue that developing countries should not be placated by preferences but should demand MFN liberalization in areas where they hold actual or

34. While this prescription has been criticized and subject to important empirical challenge, the weight of evidence appears to support it.

35. B Hoekman, C Michalopolous, and LA Winters, 'Special and Differential Treatment in the WTO: Moving Forward' (2004) 27 W Econ 481.

potential advantage. This certainly includes trade in unskilled and semiskilled services under Mode 4 of the General Agreement on Trade in Services (GATS) and even more broadly suggests less reticence to put immigration on the table.

Hudec also suggested that reducing the commitments applicable to developing countries might not be helpful to their development. This is more than paternalism; it is based on a political economy perspective that understands that domestic import-competing producer interests are likely to be more influential than domestic consumer interests. Reciprocity is expected to co-opt domestic export producer interests to add their voice to that of the consumers in order to counter the force of the domestic import-competing producers.

This introduction has shown ambivalence regarding restrictions on the 'right to regulate' for industrial policy under WTO law. Some restrictions may be desirable, as Hudec suggested. Other restrictions may be undesirable. As Amsden and Hikino have argued,

> '(a)t close examination . . . the new rules of the World Trade Organization, a symbol of neoliberalism, are flexible and allow countries to continue to promote their industries under the banner of promoting science and technology. The success formula of late industrialization—allocating subsidies in exchange for monitorable, result-oriented performance standards—is still condoned'.[36]

Substantively, the contributions in this book and their responses to and extensions of the central questions in Hudec's 1987 work can be divided into four categories. The first category features a number of essays that respond directly to Hudec's original arguments. This set of papers by Chimni, Dunoff, Finger, and Ostry evaluate the situation of developing countries generally in the WTO. The second and third essay groups take on issues that influence or stem from current and ongoing negotiations and debates on trade and development. The second group of essays includes David Trubek and Patrick Cottrell's broad analysis of the consequences of Hudec's perspective for the international legal system in general and for development policy in particular. It also includes Yong-Shik Lee's call for reform of the organization of the WTO for development policy. This group also features essays with an empirical or law and economics approach; these essays look at institutional challenges for developing-country capacity to benefit from the WTO dispute settlement system, which has now emerged as an undeniably important force in the evolution of international trade law, even if its long-term implications are still far from measurable. Shaffer and Nordstrom, Mavroidis, Hoekman and Horn, Busch and Reinhardt, and Bown examine the situation of developing countries in WTO dispute settlement. Shaffer and Nordstrom examine the problem of developing country capacity to litigate and

36. AH Amsden and T Hikino, 'The Bark is Worse than the Bite: New WTO Law and Late Industrialization' (2000) Annals AAPSS 570.

recommend a small-claims-type procedure for the WTO. Mavroidis, Hoekman and Horn provide an empirical analysis of the level of developing country participation in WTO dispute settlement.[37] Busch and Reinhardt, and also Bown, examine the question of developing countries as third-party participants in WTO dispute settlement.

The third group of papers looks at a variety of substantive challenges that are relatively new, as topics of concentrated attention in the context of trade negotiations. Some of these papers examine the issue of market access for developing countries, addressing the central question of the benefits of special and differential treatment in market access for developing countries. Cho's paper focuses on market access within the GATS for unskilled and skilled labor. Hoekman's paper examines more broadly the possibility for increased market access in services under the GATS. Trebilcock and Epps focus on the essential field of agriculture and provide a detailed analysis of the problem of special and differential treatment in that context. Kudrle and Gifford examine the issue of competition law as it pertains to market access. Gervais examines special arrangements in the TRIPS Agreement, the intellectual property agreement within the WTO. Garcia examines the complementary competences and activities of the international financial institutions, focusing on issues of justice that are also applicable to trade institutions.

These chapters address the most pressing and interesting issues in connection with the situation of developing countries in the WTO legal system.

37. The Horn-Mavroidis dataset is publicly available from the World Bank. Their paper represents just one possible use of this very rich dataset, which they hope others will use.

PART ONE

THE WTO AND DEVELOPING COUNTRIES

SYSTEMIC PERSPECTIVES

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2. DEVELOPING COUNTRIES AND THE GATT/WTO SYSTEM
Some Reflections on the Idea of Free Trade and Doha Round Trade Negotiations

BS CHIMNI*

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A. INTRODUCTION

Robert Hudec's *Developing Countries in the GATT Legal System* remains, more than two decades after its publication, a most insightful text on the subject.[1] While critical of the trade policies of developing countries, the book considers these sympathetically. Hudec was no less disapproving of the hypocritical policies of the developed countries that preach free trade while practicing protectionism. But his book is, as he himself noted, essentially about what developing countries should do rather than about the trade policies of the developed countries. Through a combination of meticulous attention to detail and generalizations based on a profound understanding of the relevant economic, political, and legal factors, Hudec made out a persuasive case that developing countries should 'in their own economic interest' respond with a fuller commitment to

* Professor of Law, Jawaharlal Nehru University. I would like to thank Professor Joel Trachtman and participants at the conference for their comments. The usual caveat applies.

1. R Hudec, *Developing Countries in the GATT Legal System* (Aldershot: Gower, 1987) For a recent appreciation of the work of Hudec, see DM Trubek and CM Patrick, 'Robert Hudec and the Theory of International Economic Law: The Law of Global Space' (2008) paper published by the Society of International Economic Law <http://ssrn.com/abstract=1144724>.

GATT/WTO law.[2] He argued that 'the current policy of non-reciprocity has . . . (had) a deleterious effect on trade policy of developing countries' as it had encouraged inefficient modes of protection.[3] Developing countries have simply become "non-paying participants" in unilateral preferential schemes that cannot be enforced.[4] Hudec firmly believed that 'the MFN obligation is the only foundation on which can be built a legal policy that will be effective in promoting and protecting market access for developing countries that lack economic power'.[5] The developing countries were therefore urged to invest their diplomatic capital not in seeking the expansion of the GSP and other preferential regimes but in ensuring the strict adherence of developed countries to the MFN obligation within GATT/WTO.[6] Bhagwati, a leading trade theorist of our time, agrees when he observes:

> '. . .through much of the postwar period the developing countries were treated with kid gloves on trade liberalization because of the pervasive doctrine of infant-industry protection and the notion that the benefits of open trade did not apply to countries that were behind the curve of development.'[7]

The Bhagwati-Hudec thesis raises the broader question why, despite the convincing case made out on behalf of free trade since the days of Adam Smith and David Ricardo, it does not find adequate support among policy makers and civil society in the developing countries?[8] Why do developing countries continue to

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2. Ibid 203.

3. Ibid 199.

4. C Ozden and E Reinhardt, 'Unilateral Preference Programs: The Evidence' in SJ Evenett and BM Hoekman (eds), *Economic Development & Multilateral Trade Cooperation* (London and Washington, DC: Palgrave Macmillan, CEPR and World Bank, 2006) 189–211, 209. Ozden and Reinhardt reviewing 'unilateral preference programs' conclude:

> . . . .only a few countries are actual beneficiaries, and utilization levels are not high, even in eligible product categories, due largely to rules of origin restrictions. The most interesting finding is that superior export performance is one of the reasons for removal from GSP programs, and that these countries adopt less protectionist trade policies themselves after removal. The link between export performance and removal from GSP is an explicit part of the preference schemes. The evidence suggests that developing countries may find it in their interest to revisit the insistence on SDT and nonreciprocal preferential access to export markets.

5. Hudec (n 1 above) 199.

6. Ibid.

7. Cited in Hudec (n 1 above) 258.

8. A Keck and P Low, 'Special and Differential Treatment in the WTO: Why, When, and How?' in SJ Evenett and BM Hoekman (eds), *Economic Development & Multilateral Trade Cooperation* (London and Washington, DC: Palgrave Macmillan, CEPR and World Bank, 2006) 147–89, 155. The Bhagwati-Hudec thesis has the support of many commentators. Thus, for instance, Keck and Low write:

> A particular problem arising from a generalized insistence on the political right to enjoy SDT is the tendency to assume that the best contribution the WTO can make to

pitch for S&D treatment despite the evidence that it has not delivered? A principal objective of this paper is to sketch the *general* or *popular* sources of free trade skepticism among ordinary citizens, civil society organizations, and policy makers in the developing countries. It is contended that the sentiment against free trade in developing countries is not simply a function of rent-seeking special interests. Free trade skepticism is rooted in a profound appreciation of the historical, ethical, legal, and political contexts in which the idea of free trade has been advanced and practiced. Section B therefore rehearses the reasons for free trade skepticism in developing countries.

Section C addresses in this backdrop the critical question raised by Trachtman in his contribution to this volume, that is, 'which obligations should not be imposed on/accepted by developing countries, which obligations should be imposed on/accepted by developing countries, and how and when should these later obligations be contingently relaxed'.[9] While raising the question, Trachtman rightly draws attention to the fact that Hudec's original book 'only addressed GATT, and did not address the WTO'.[10] Therefore, 'significantly, his analysis does not apply directly to TRIPS or TRIMS commitments, or perhaps to certain subsidies commitments'.[11] But in Trachtman's view it would 'seem to apply to GATS liberalization commitments'.[12] The GATT focus on international trade in goods, it is worth noting, also characterizes trade theory in general. On the other hand, the opposition to GATT/WTO law in developing countries is often to the TRIPS, TRIMS, and GATS texts.

In so far as trade in goods is concerned, the central question today is whether developing countries will be compelled to make 'more than reciprocal' concessions in the ongoing Non-Agricultural Market Access (NAMA) Negotiations of the Doha Round of Trade Negotiations? This would, in the light of the arguments made in Section B, be unfortunate from a welfare point of view. A distinct issue is whether the Hudec insights on goods apply to the area of trade in services. It is argued in Section C that since specific commitments undertaken

development is to ensure that developing countries assume minimum obligations under the system—the fewer the better. . .To the extent that developing countries limit their commitment to the system in this manner, they weaken their negotiating position and lessen the degree to which the trading partners are willing to pursue policies that support development. They limit their ability to fashion new rules in a development-friendly manner. They also weaken the scope for challenging elements in the system that are arguably unbalanced, independent of any consideration of SDT. Developing countries also forgo the opportunity to use a commitment to WTO obligations as a weapon against narrowly based domestic pressure to pursue policies that do not reflect the national interests.

9. J Trachtman, Chapter 6 of this collection of essays.

10. Ibid.

11. Ibid.

12. Ibid.

under GATS are difficult to withdraw or modify; enough is not known about the consequences of liberalizing trade in services; and 'services' include key social sectors like education and health: developing countries should err on the side of caution at least where key social sectors are concerned. Finally, the section looks at the question whether keeping the Hudec thesis in view, a fundamentally different S&D treatment principle can be adopted in the WTO? In this respect it is contended that from the perspective of developing countries, the recent formulations which recommend the phasing in of GATT/WTO obligations rather than carving out exceptions to them, may be helpful but difficult to institutionalize.

In sum, it is argued that the principle of free trade may not necessarily lead to just consequences in a world in which countries are at different stages of economic development and power is unequally distributed in internal and international relations. This paper does not contest the fact that there are good reasons for promoting free trade viz., benefits to consumers and increased efficiency/competitiveness of domestic industries. The difficult questions relate to the timing, extent, and distributive consequences of trade liberalization. It makes the 'local context' in which free trade obligations are undertaken of crucial import. It is these that must engage us. For this reason, the paper begins by identifying the basis of free trade skepticism in developing countries.

B. FREE TRADE AND DEVELOPING COUNTRIES

The popular sources of free trade skepticism in developing countries may be considered under three broad heads: (i) Historical and Economic, (ii) Ethical and Political, and (iii) Nature and Character of WTO.[13]

i. Historical and Economic Objections

First, it may be noted that the critique of the principle of free trade is a historically contingent critique. Free trade skeptics ask why developing countries should not pursue policies that the developed countries have *successfully* followed in the past rather than their narration in the *official* history of free trade? The unofficial history of free trade reveals that most developed countries used the instruments of tariffs and subsidies in the nineteenth and much of the twentieth century to strengthen their economies.[14] Thus, for example, the United States maintained average applied industrial tariffs 'of 40 to 50 percent from

13. It is worth stressing that the perception of different groups in developing countries is not necessarily the same. Thus, the views of the subaltern classes are different from that of the capitalist classes. See generally BS Chimni, 'The World Trade Organization, Democracy and Development: A View From the South' (2006) 40 JWT 5.

14. H Chang, *Why Developing Countries Need Tariffs: How WTO NAMA Negotiations Could Deny Developing Countries' Right to a Future* (Geneva: South Centre, 2005) xii–xiii.

1820 to 1931'.[15] Indeed, contrary to popular belief, the "notorious" Smoot-Hawley Tariff of 1930 'only marginally (if at all) increased the degree of protectionism in the United States economy".[16] Skeptics also point out that the success stories among developing countries over the last 50 years, including the Republic of Korea and more recently China, India, and Vietnam, have come through the use of tariff walls or other measures of protectionism. The case of Japan was no different.[17] In short, not only historical but also contemporary experience tells us that free trade may be good in principle, but free trade policies need to be implemented gradually as an economy gathers strength and particular sectors become competitive.[18] Bhagwati himself advises that 'the optimal speed at which one

15. The infant-industries argument 'was centrally relied on by the USA and Canada in maintaining a high tariff policy throughout most of the nineteenth century and the first quarter of the twentieth century. . . It is also, more controversially, claimed to have been a central strategic element in the rise of Japan as a major industrial power'. See MJ Trebilcock and R Howse, *The Regulation of International Trade* (3rd edn 1995) 8. It may also be noted that France had average tariffs of 20 to 30 percent from 1913 to 1931. Spain had a 41 percent tariff in 1913 and 1925, rising to 63 percent in 1931. Germany's tariff was 20–21 percent in 1925 and 1931 and 26 percent in 1950'. M Khor, *WTO's Doha Negotiations and Impasse: A Development Perspective* (Penang; Third World Network, 2006) 13.

16. Chang (n 14 above) 41.

> 'The average tariff rate for manufactured goods that resulted from this bill was 48 per cent, and it still falls within the range of the average rates that had prevailed in the United States since the Civil War, albeit in the upper region of this range. It is only in relation to the brief "liberal" interlude of 1913–1929 that the 1930 tariff bill can be interpreted as increasing protectionism, although even then it was not by very much (from 37 per cent in 1925 to 48 per cent in 1931)'

See Chang (n 14 above) xii–xiii. For a different view, see J Bhagwati, *In Defense of Globalization* (2004) 60–64; K Dam, 'Cordell Hull, the Reciprocal Trade Agreements Act, and the WTO' in E Petersmann (ed), *Reforming the World Trading System* (2005) 83–99, 85. Dam writes that 'the Smoot-Hawley tariff legislation' 'had led to such great general increase in US tariffs in that 1930 legislation that Hull felt that it had been the cause of the Great Depression'.

17. Chang (n 14 above) xii–xiii. Chang therefore aptly observes:

> Success stories such as the Japanese and Korean auto industries, or Korean steel conform to the historical pattern established by almost all successful industrial countries from 18th Century Britain onwards. Without protection, Japan and the Republic of Korea would still be exporting silk and wigs made with human hair respectively. Anyone who drives a Japanese or a Korean car is living proof that infant-industry protection is still a very much valid argument in today's world. More recently, China's take-off in the 1990s took place behind average tariffs of over 30 per cent, while Viet Nam has used state trading, import monopolies, import quotas and high tariffs in generating annual growth rates of 8 per cent since the mid 1980s.

18. As Dani Rodrik observes: 'Policy "A" is to be recommended only if conditions "x" "y" and "z" obtain'. India and China have adopted this perspective. See D Rodrick, 'GoodbyeWashingtonConsensus.Hello,WashingtonConfusion?'<http://209.85.175.104/

liberalizes is not necessarily the fastest'.[19] Thus, China's decision to lock in after a certain stage means that it can reap the benefits that increased competition brings in the wake of its membership of WTO. On the other hand, it is doubtful if the Chinese industry would have developed without state support.[20]

Second, the general historical lesson is reinforced by the colonial experience of developing countries that finds little mention in the official history of free trade. In the colonial era, contrary to the prescriptions of trade theory, the comparative advantage of colonies was coercively restructured. The story of Indian silks and calicoes that were imported into England is widely known: from being an exporter of the finest textiles, India turned into an exporter of raw cotton in the nineteenth century. The economic historian Carlo Coppola has therefore wryly noted that it was 'fortunate for England that no Indian Ricardo arose to convince the English people that, according to the law of comparative costs, it would be advantageous for them to turn into shepherds and import from India all the textiles that were needed. Instead, England passed a series of acts designed to prevent importation of Indian textiles and some "good results" were achieved.'[21] Metropolitan powers greatly benefited from unequal exchange in the colonial period.[22] This is at least true of the trade between Britain and large colonies like India.[23] In the absence of the possibility of developing countries today benefiting from such unequal exchange, what is required is more policy flexibility, be it in terms of giving infant-industry protection or receiving S&D treatment.

Third, the advocates of free trade do not always assess free trade policies in the light of other economic policies that developing countries are often compelled/coerced to adopt. To be sure, there is the danger here of embracing what Bhagwati calls the *fallacy of aggregation*. He rightly points out that it is mistaken to believe that if you are for free trade you are also for capital account convertibility, direct foreign investment, etc. Bhagwati, however, assumes that developing countries are entirely free to reject or accept certain economic policies. But often these countries are unable, for reasons beyond their control (eg, primary commodity

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search?q=cache:wylTNamLKZ8J:ksghome.harvard.edu/~drodrik/lessons%25200f%2520the%25201990s%2520review%2520_jel_.pdf+Dani+Rodrik,+%22Goodbye+Washington+Consensus.+Hello,+Washington+Confusion%22&hl=en&ct=clnk&cd=1>.

19. J Bhagwati, *Free Trade Today* (2002) 90.

20. Rodrick (n 18 above).

21. CM Coppola, *European Culture and European Expansion* (1970) 152.

22. Therefore, even as Hudec advised against drawing the wrong lessons in the contemporary world, he noted that 'those that had been colonies had been taught by their parent countries that economic benefit was maximized by controlling trade and suppressing competition from alternative suppliers.' See Hudec (n 1 above) 29.

23. D Naoroji, *Poverty and Un-British Rule in India* (Delhi: Government of India, 1962); B Chandra, The *Rise and Growth of Economic Nationalism in India* (Delhi: People's Publishing House, 1966); and Sumit Sarkar, *Modern India* (Delhi: Macmillan India Ltd, 1983).

crisis, rise of oil prices), including conditionalities imposed by the international financial institutions, to have this policy space. Indeed, if the list of recommendations that eminent trade theorists like Bhagwati advance on global economic policy are accepted by the developed countries, the case against free trade would lose some of its force. These include (a) a liberal immigration policy, and for this purpose create an International Migration Organization; (b) an agreement not to compel a turn to capital account convertibility; and (c) the regulation of transnational corporations through a mandatory code on corporate social responsibility.[24] But these recommendations have found little favor with policy makers of developed countries.

Fourth, there is the problem of providing adjustment assistance to individuals/communities negatively affected by policies of free trade. The lowering of trade barriers, it is universally recognized, can harm domestic industries with consequences for employees.[25] Therefore, the United States provides for trade adjustment assistance. Under the Trade Act of 2002, the scope of those protected is "far-reaching": 'it includes secondary workers and self-employed persons such as farmers and ranchers. It covers income support for two years as well as a 65 percent tax credit for health insurance while these workers are in re-training'.[26] While this may be far from being an ideal scheme and may also require to be extended to the service sector, it does offer some protection to workers negatively affected by trade liberalization. Developing countries, on the other hand, go in for trade liberalization without the provision of adjustment assistance since they do not have the resources to provide it.[27] The possibility of introducing adjustment assistance will recede further in the future. Many developing countries rely on customs revenues for 20 to 30 percent of government revenue. These would shrink when tariffs are lowered further under the ongoing Doha Round Trade

24. Bhagwati (n 16 above); Chimni (n 13 above) 390–91.

25. Indeed, free trade may even accentuate poverty at times Bhagwati (n 19 above) 90.

26. J Gathii, "Insulating Domestic Policy Through International Legal Minimalism: A Re-Characterization of the Foreign Affairs Trade Doctrine" (2004) 25 UPennJIEL 1, 46; US Department of Labor, *Employment & Training Administration* (2007) <http://www.doleta.gov/tradeact/2002act_index.cfm>. The scope of the coverage is sought to be enhanced by those anticipating the effects of further trade liberalization. F Bergsten, 'Rescuing the Doha Round' *Foreign Affairs (WTO Special Edition)*(December 2005) 1, 5.

27. R Chadha and others, 'Computational Analysis of the Impact on India of the Uruguay Round and the Doha Development Agenda Negotiations' in A Mattoo and RM Stern (eds), *India and the WTO* (2003) 13, 14. In sum, as Gathii notes, 'the theory of comparative advantage overstates the benefits of trade liberalization and thereby understates its distributional consequences, especially on those who bear the losses attendant with rising prosperity from freer trade'. JT Gathii, 'Re-characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis' (2001) VII Widener Law Symposium Journal 137, 144.

Negotiations on NAMA.[28] It is said that the developing countries may suffer losses worth $63.4 billion under the formula presently proposed in NAMA negotiations, which is incidentally almost four times the possible benefits that may accrue from trade liberalization to developing countries.[29] In these circumstances, trade theorists have called upon international financial institutions 'to provide grant funds to make possible a welfare-enhancing, poverty-reducing transition to free trade'.[30] But the problem in this case may be, as Hoekman notes, the unwillingness to borrow from these institutions. He suggests, instead, 'dedicated grant-based funding' to strengthen an MFN-based system.[31] But should in its absence developing countries go in for hasty structural adjustment as a consequence of adopting policies of trade liberalization? There are in this regard a number of ethical and political issues as well that have not received adequate consideration.

ii. Ethical and Political Objections

First, in calling for structural adjustment through trade liberalization, free trade theorists tend to treat individuals and local communities as mere means to an end?[32] Even where adjustment assistance is provided, the question remains whether it takes care of the social and cultural loss to individuals and local communities. Kant exhorted that 'so act that you use humanity, whether in your person or in the person of any other, always at the same time as an end, never merely as a means'.[33] Murphy and Nagel therefore legitimately ask, 'whether it is right to change the rules midway through people's lives'?[34] To be sure, the means and ends issue is implicated both when the tool of protection is used as when it is removed; protectionist policies also have moral consequences. But trade liberalization has a more certain and immediate impact on human rights and therefore cannot be ignored despite its apparent status quo bias. For as Fernandez and Rodrik note, the status quo bias is the result of 'uncertainty about who the

28. Khor (n 15 above).

29. N Kumar and KP Gallagher, 'Relevance of "Policy Space" for Development: Implications for Multilateral Trade Negotiations' (2007) RIS Discussion Paper 120, 1-26, 4 <http://www.ris.org.in/dp120_pap.pdf>.

30. Bhagwati (n 19 above) 90.

31. B Hoekman, 'Expanding WTO membership and Heterogeneous Interests', (2005) 4 WT Rev 401, 404.

32. P Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 EJIL 815.

33. D Palmeter, 'A Note on the Ethics of Free Trade' (2005) 4 WT Rev 449, 459.

34. Murphy and Nagel go on to note: 'Even though no one may be entitled to any particular bundle of resources in the abstract sense, a plausible norm of political morality has it that we are entitled to enjoy what we had reason to believe would be the consequences of our choices under the prevailing institutional arrangement'. Cited in ibid 451.

individual winners and losers from a policy change might be'.[35] In these circumstances, the welfare of those negatively impacted by free trade policies cannot be sacrificed.

Second, feminist trade theory has in recent years highlighted the fact that mainstream trade theory has been 'gender-blind'.[36] Where in a rare instance gender has been taken into account, the methodology and empirical evidence used to show that free trade contributes to gender equality has been questioned.[37] The understanding of feminist trade theory coincides with the popular view that free trade contributes to gender inequality and highlights the need for looking at gender indicators for monitoring trade agreements.[38]

Third, free trade skeptics distinguish between harm caused to individuals and local communities by fellow nationals as against those caused by strangers. As Kemp points out, 'individuals often think beyond their own narrow self-interest when considering government economic policies in areas such as trade. However, this altruism may extend only to conationals, rather than to everyone affected by these government decisions'.[39] This is not an entirely irrational response. The reason why harm caused by a foreigner is viewed with greater disapproval is that the goal of distributive justice is still confined to the nation state and the idea of *global* distributive justice hotly contested (even in the era of accelerated globalization).[40] The classic Hull view that 'one could not expect to get something for nothing', and that 'reciprocity was the key' even when economic theory suggests that unilateral tariff reductions are advantageous is simply an acceptance of this reality.[41] In other words, where developing countries are concerned, the framing moral calculus for free trade is how much fellow nationals gain from international trade as against strangers. Given the fact of unequal power and resources, this moral calculus is however not to the point where developed countries are concerned.

Fourth, while free trade theory uses the idea of special interests to emphasize the benefits of accepting GATT/WTO obligations, it proceeds to make other recommendations (eg, with regard to adjustment assistance) on the assumption

35. Cited in S Kemp, 'Psychology and opposition to free trade' (2007) 6 WT Rev 25, 31.

36. D Elson, C Grown and N Cagatay, 'Mainstream, heterodox and feminist trade theory' in I Stavern and others (eds), *The Feminist Economics of Trade* (2007) 33, 36.

37. Ibid 37–41; E Kongar, 'Importing equality or exporting jobs? Competition and gender wage and employment differentials in US manufacturing' in ibid 215.

38. On gender indicators to monitor trade indicators, see I Van Stavern, 'Gender indicators for monitoring trade indicators' in I Stavern and others (eds), ibid 257.

39. Kemp (n 35 above) 35.

40. J. Gathii, 'International Justice and the Trading Regime' (2007) 19 EmILRev 1407; JP Trachtman, 'Welcome to Cosmopolis, World of Boundless Opportunity' (2006) 39 CornILJ 477; BS Chimni, 'A Just World Under Law: A View from the South' (2007) 22, AUIL Rev 199, 212.

41. Dam (n 16 above) 86.

that the State is a neutral actor possessing autonomy from dominant interest groups. But if the extent of autonomy is misjudged or exaggerated, the State may not heed the concerns of the poor and marginal groups negatively affected by trade liberalization. Trade-led growth rates do not, it is widely accepted, automatically translate into welfare for the poor. For this to happen, appropriate laws and institutions have to be put in place.[42] In other words, simply stating that 'x' is the rational response in situation 'y' is not very helpful. Trade theorists may legitimately argue that they can do no more than indicate what these are. On the other hand, free trade skeptics are well within their rights to point out that since state policies are determined by dominant social classes, the appropriate legal and institutional framework to benefit the poor may never be created. In countries where the working class/peasant movement is weak, it may not be able to restrain the State from undertaking trade liberalization to the disadvantage of subaltern groups. Indeed, the inability of the organized worker/peasant movement to mobilize opposition explains recent trade liberalization in countries like India. In short, free trade theory relies on political assumptions that do not withstand close scrutiny.

iii. Nature and Character of GATT/WTO

Likewise free trade theorists rely on questionable assumptions about the nature and character of GATT/WTO. *First*, free trade theory yields a set of abstract propositions that do not take into account the manner in which its recommendations are negotiated and embodied in legal texts. This process is seen as the domain of international politics. But the popular support or opposition to free trade is often a function of how its principles are negotiated and codified in legal regimes. Free trade skeptics draw attention in this regard to the undemocratic nature of the trade negotiation process that led to the creation of the WTO and characterize all subsequent negotiations.[43]

Second, the rules embodied in GATT/WTO have always favored the developed world. The developed countries, for instance, have taken more than 60 years for undertaking structural adjustment of inefficient industry. As Hudec pointed out, the GATT incorporated 'a very large number of exceptions written for the benefit of developed country producers'.[44] These included the right to use quantitative import restrictions on agricultural imports and export subsidies. Equally, the 'escape clause' seemed to testify to a developed country view that trade protection could "help" weak industries. Further, as Hudec went on to note, exports of advanced developing countries were faced with discriminatory protection whenever these were 'uncomfortably successful' in the markets of developed countries. Such protection often assumed 'the form of export-restraint arrangements

42. Bhagwati (n 16 above) 260.
43. Chimni (n 13 above), 13ff.
44. Hudec (n 1 above).

negotiated "outside" the framework of GATT norms, rules and procedures'.[45] In the textile sector, new trade restrictions were constantly put in place to limit the competitive exports from developing countries, ending only with the Agreement on Textiles and Clothing (ATC).[46] The policy space historically available to the developed countries to undertake slow structural adjustment is today denied by GATT/WTO rules to developing countries.

Third, free trade skeptics are concerned about the linkages between trade and nontrade issues like environment and labor standards being established. Here the popular view is no different from that of trade theorists. Thus, for example, Bhagwati notes in his book *Free Trade Today* that these nontrade issues 'are more potent and potentially lethal to free trade'.[47] He views it as 'dangerous rhetoric' to suggest that unequal environmental and labor standards amounts to unfair trade.[48] But attempts at establishing these linkages continue at various levels. It also did not deter the WTO Appellate Body in the *Shrimp Turtle II* case to decide that in the final analysis (ie, subject to certain procedural preconditions being met), unilateral trade measures could be used to deny market access to exports of developing countries.[49] Reference may also be made to the near consensus that the WTO Agreement on TRIPS has little to do with trade and negatively affects the welfare of the peoples of the developing countries. In these circumstances, it is not difficult to understand the popular opposition to the idea of 'free trade'. This is true, especially because the results of the Uruguay Round of Trade Negotiations were adopted through the 'single undertaking' mechanism that removed the possibility of developing countries not accepting extra trade obligations. The 'single undertaking' mechanism is also the basis on which the Doha Round is now being negotiated.

Fourth, free trade skeptics point to the manner in which legal obligations relating to free trade are interpreted; developed-country protectionism is often smuggled in through the interpretative route. This is especially so in the case of WTO agreements because indeterminacy happens to be their defining feature. Broadly speaking, there are five categories of indeterminacy that typify

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45. Hudec (n 1 above) 15.

46. See Trebilcock and Howse (n 15 above) 472.In this light, one has to agree with Trebilcock and Howse that

> although it is fashionable to blame leftist theories of development economics and the influence of Soviet bloc central planning approaches for the protectionist follies of the developing world in this epoch (ie, GATT era) the treatment of developing countries in the Western-dominated global trading order made inward-oriented policies easy, while it set up obstacles to export-led growth.

47. Bhagwati (n 19 above) 47.

48. Bhagwati (n 19 above) 57.

49. BS Chimni, 'WTO and Environment: The Legitimization of Unilateral Trade Sanctions' (2002), 37 Econ & Pol Weekly 133; BS Chimni, 'WTO and Environment: The *Shrimp-Turtle* and *EC-Hormone* cases', (2000) 35 Econ & Pol Weekly 1752.

WTO agreements. These include indeterminacy (i) relating to the object and purpose of WTO agreements; (ii) arising from linguistic ambiguities and unanticipated gaps in the text (iii) resulting from the fact that the legal texts are written in very general terms and then applied to complex factual situations, (iv) arising from the inability to reach closure during negotiations on particular issues; and (v) stemming from the inapplicability of the formal doctrine of precedent. These categories of indeterminacy are to be resolved using international rules of interpretation (customary rules of public international law) that are in turn to be interpreted. The result is that sufficient space is created for interpretations that favor dominant trading interests. Gathii has shown how WTO norms are incorporated 'into US law only to the extent that international trade norms are consistent with US policy considerations.'[50] Illustrating this in the context of Article 17.6(ii) of the ADA, Gathii notes that 'international legal minimalism is facilitated by the plasticity or the possibility of ascribing multiple permissible interpretations of US and international antidumping rules and their interrelationship'.[51] Therefore, 'rather than constraining US sovereignty, international anti-dumping rules seem to promote US power and influence'.[52] The WTO dispute settlement bodies also tend to accept those interpretations that have the support of powerful trading nations (eg, the *Shrimp Turtle* case cited earlier).

To sum up, it is time to ask what do these difficulties/criticisms add up to? While these certainly do not make a case against free trade or for protectionism, the popular sources of trade skepticism do suggest the limits of free trade theory and the need to give it a contextual interpretation. But it may be said that there is little new in this claim inasmuch as advocates of free trade admit the need for some contextual interpretation. The contention is that these difficulties/criticisms cumulatively make a case for *strong* contextual interpretation of the idea of free trade. Such an approach would allow developing countries *greater flexibility* to determine the *timing* and *extent* of trade liberalization in the matrix of prevailing local conditions. It would incorporate the critical insight that trade regimes are, above all, the function of international power relations. Adam Smith himself recognized, it is worth noting in this regard the deleterious role of power in international commerce in observing that such commerce was 'the most fertile source of discord and animosity' and hoped that greater equality between states would lead to making it 'a bond of union and friendship'.[53]

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50. Gathii (n 26 above) 3.

51. Ibid 5.

52. Ibid 11.

53. S Muthu, 'Adam Smith's Critique of International Trading Companies: Theorizing "Globalization" in the Age of Enlightenment' (2008) 56 Pol Theory 185, 207.

C. BEYOND GATT

In the ongoing Doha Round of Trade Negotiations, the policy flexibility desired by developing countries is being denied by the powerful bloc of western industrialized nations. Their proposals on NAMA and GATS further erode the policy space of developing countries. In the instance of GATS this section takes issue with the Trachtman view that the Hudec thesis on accepting GATT/WTO disciplines can be extended to GATS. Finally, this section considers the proposal advanced by several scholars on the need for an external mechanism that would help convert the "enabling clause" into an "enabling mechanism". The problem in this case is that it may not be easy to establish an international mechanism that has the trust of both the developed and developing countries. In the circumstances, the question is whether the traditional form of S&D treatment is entirely inappropriate?

i. NAMA

The developing countries are today being asked to make major concessions in the ongoing NAMA Negotiations that may result in the codification of a reverse S&D rule or a 'more than full reciprocity' instead of 'less than full reciprocity' principle agreed to for the Doha Round of Trade Negotiations.[54] The Hong Kong Ministerial meeting of December 2005 accepted a Swiss formula that calls for tariff reductions on each product which represents a 'significant departure' from the past practice of reducing only the average of industrial tariff.[55] This means that the developing countries would lose flexibility to 'spread the average over the whole range of tariffs' in keeping with their development goals.[56] It thereby removes the discretion of the policy maker at the product level.[57]

Calculations showed that the developing countries would be making deeper cuts than the developed countries, a far cry from the 'less than reciprocity' principle.[58] In this context, Chang compares the situation of the United States

54. Paragraph 16 of the Doha Ministerial Declaration states that the negotiations on NAMA shall take fully into account the special needs and interests of developing countries and least developed countries. WTO, 'Doha WTO Ministerial 2001: Ministerial Declaration' (20 November 2001) WT/MIN (01)/DEC/1.

55. BL Das, 'Dangers in the Dark Alleys'' (2007) 42 Econ & Pol Weekly 627–29.

56. Ibid.

57. J Francois, W Marti, and V Manole, 'Formula Approaches to Liberalizing Trade in Goods: Efficiency and Market Access Considerations' in SJ Evenett and BM Hoekman (eds) (n 8 above) 89. Moreover, 'the Swiss formula connects the initial and final tariffs in such a way that adoption of a lower coefficient results in greater tariff reduction', Das (n 55 above) 629.

58. Chang notes that under the circumstances, 'it is wrong to say that these countries are being less than fully reciprocal, even if they are making less cuts in proportional terms than are the developed countries. In the smoke and mirrors of the Doha Round, the reality

in the late nineteenth until the middle of the twentieth century with that of India:

> When the USA accorded over 40% average tariff protection to its industries in the late 19th century, its per capita income in PPP terms was already about 3/4 that of Britain ($2,599 vs. $3,511 in 1875). And this was when the "natural protection" accorded by distance, which was especially important for the USA, was considerably higher than today.... Compared to this, the 71% trade-weighted average tariff rate that India used to have just before the WTO agreement, despite the fact that its per capita income in PPP terms is only about 1/15 that of the US, makes the country look like a champion of free trade. Following the WTO agreement, India cut its trade weighted average tariff to 32%, bringing it down to the level below which the US average tariff rate never sank between the end of the Civil War and World War II.[59]

India has since brought down its trade weighted average tariff further through unilateral and multilateral tariff cuts. The developing countries have therefore rightly argued:

> Whilst many developing countries have continued to undertake unilateral liberalization beyond their WTO Uruguay Round commitments and reform their industrial sectors, a significant part of their production and employment remain in sensitive sectors, and further liberalization of these sensitive sectors would have to be preceded by carefully managed adjustment policies.[60]

It is not as if developing countries have not been willing to provide more NAMA. But the Group of 11 in June 2006 expressed the legitimate concern that[61]

> . . . developed countries are offering a (tariff) reduction of only 20% to 30%. In sharp contrast, in this development Round, developing country Members are being asked to undertake tariff reductions of 60% to 70%. This inverts the mandate of "less than full reciprocity in reduction commitments" by developing countries.[62]

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for many developing countries is closer to "more-than-full reciprocity"'. Chang (n 14 above) 95.

59. Ibid 47.

60. WTO, 'Reclaiming Development in the WTO Doha Development Round: Submission by Argentina, Brazil, India, Indonesia, Namibia, Pakistan, the Philippines, South Africa, and Venezuela to the Committee on Trade and Development' (1 December 2005) WT/COMTD/W/145 3.

61. The Group of 11 countries are Argentina, Bolivarian Republic of Venezuela, Brazil, Egypt, India, Indonesia, Namibia, Pakistan, Philippines, South Africa, and Tunisia.

62. WTO, 'Negotiating Group on Market Access Communication from the NAMA 11 Group of Developing Country' (6 July 2006) TN/MA/W/79.

But rather than attend to the concerns of developing countries, the February 8, 2008 draft of the chairman of NAMA Negotiations has suggested modalities that perhaps make matters worse.[63] Speaking for the Group of 11, South Africa stressed that what should have been proposed is the negotiation architecture and not the level of ambitions relating to the two key elements of coefficients and flexibilities.[64] Trade Unions from the Group of 11 and other developing countries have expressed their concern about the impact of the new proposals on employment and industrial development and opposed them.[65] Independent analysis confirms that 'the latest draft modalities do not address the core concerns of a large number of developing countries'.[66] Subsequent texts (the May 2008 proposals) have also been found problematic and criticized by developing countries.[67] On the other hand, the developed world, as Hudec had noted, 'seem committed to the practice of imposing new restrictions that limit developing country exports once they begin to cause discomfort and none of the legal strategies currently being advocated appears capable of changing this situation'. Add to this the use of a number of nontariff barriers, including antidumping and strenuous technical regulations, against goods from developing countries, and the problem becomes acute.[68]

ii. Services

In so far as GATS Negotiations are concerned, a key issue is whether the response of developing countries should be based on a different premise from that of

63. WTO, 'Draft Modalities for Non-Agricultural Market Access, Negotiating Group on Market Access' (8 February 2008) TN/MA/W/103.

64. M Khor, 'Different responses to issue of Chair's NAMA options' (19 March 2008) <http://www.twnside.org.sg/title2/wto.info/twninfo20080320.htm>.

65. K Raja, 'Trade Unions Voice Opposition to WTO's revised NAMA text' (2008) <http://www.twnside.org.sg/title2/wto.info/twninfo20080220.htm>.

66. P Kumar, and A Kaushik, 'Chair's Draft NAMA Modalities: Against the Core Mandate of Less than Reciprocity' (2008) <http://www.cuts-citee.org/pdf/A-Critical-Note-on-NAMA-Draft-Modalities.pdf >.

67. M Khor, 'Developed and Developing Countries Clash over NAMA Text' (29 May 2008) <http://www.twnside.org.sg/title2/wto.info/twninfo20080531.htm>; South Centre, 'Comments to the Second Revision of the WTO NAMA Draft Modalities' (May 2008) TN/MA/W/103/Rev.1 <http://www.southcentre.org/index.php?option=com_docman&task=cat_view&gid=45&Itemid=69>.

68. WTO (n 60 above) 3.

'Developed countries have largely become highly competitive in the industrial sector and will need to make relatively insignificant adjustments in this Round. However, many developed countries still maintain high tariffs, tariff peaks and tariff escalation on products of interest to developing countries. In addition a range of non-tariff barriers, including strenuous technical regulations and excessive anti-dumping measures, are frequently utilized by developed countries to disrupt developing country exports and potential to export their products to these markets'.

GATT? Or, to put it differently, is there a need to distinguish between unilateral liberalization of the services sector and liberalization under GATS? The answer to both the questions is perhaps a partial 'Yes'.

There is a need to distinguish between unilateral liberalization and GATS liberalization because of three kinds of uncertainties that characterize GATS commitments. These uncertainties relate to (i) the scope and nature of GATS obligations, (ii) the trade impact of GATS commitments, and (iii) the difficulties in modifying or withdrawing GATS commitments.[69] First, GATS is not clear as to the scope of exclusion from the definition of "services" of 'services supplied in the exercise of governmental authority' which is defined as 'any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers'. Thus, to take an extreme example, would the simple fact that public and private service suppliers coexist mean that public services are provided in competition 'with one or more service suppliers'? There is also some anxiety about how issues related to subsidies, treatment of monopolies and domestic regulation, will eventually be handled.[70] Second, the benefits that will accrue from the acceptance of greater WTO discipline are uncertain. As Trachtman concedes in the context of Article VI and disciplines on domestic regulation, 'the general disciplines that exist today are somewhat asymmetric in the wrong direction: they seem to discipline new regulation more strongly than existing regulation, and so may be expected to have a greater restrictive effect on developing countries'.[71]

Finally, given the sensitivity of some service sectors like education and health, there is the issue of inability to recover policy space lost if this proves necessary. In the absence of sufficient information and analysis, there may be unforeseen consequences of undertaking specific commitments.[72] Under the GATS text, certain preconditions (vide Article XXI) have to be met before any commitment

69. VJ Anthony, 'Navigating between the Poles: Unpacking the Debate on the Implications for Development of GATS Obligations relating to Health and Education Services' in E Petersmann (ed), *Reforming the World Trading System* (2005) 167, 192.

70. P Agarwal, 'Higher Education Services in India and Trade Liberalization' in R Chanda (ed), *Trade in Services & India: Prospects and Strategies* (2006) 299, 343, and 345.

71. JP Trachtman, 'Negotiations on Domestic Regulation and Trade in Services (GATS Article VI): A Legal Analysis of Selected Current Issues' in Petersmann (n 69 above) 205, 206.

72. 'A significant challenge for many developing countries is the absence of adequate capacity to assess the costs and benefits of GATS commitments in health and education and to conceive and implement an appropriate regulatory regime capable of ensuring that the benefits of trade liberalization are attained in a manner consistent with the achievement of a range of objectives informing government policy related to these areas'. JA Van Duzer, 'Navigating between the Poles: Unpacking the Debate on the Implications for Development of GATS Obligations relating to Health and Education Services' in Petersmann (n 69 above) 167, 202.

in the schedule can be withdrawn or modified. Arguably these together render undertaken commitments almost irreversible. First, three years must have elapsed from the date on which that commitment entered into force.[73] Second, at the request of an affected member, the modifying member 'shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment'. Third, the compensatory adjustment must be maintained on an MFN basis.

In sum, since the consequences of opening up certain service sectors are not fully known and in the absence of a dumping and safeguards provisions like in the GATT text, undertaking GATS commitment may have a negative welfare impact. Therefore, cautious liberalization may be the appropriate response.[74] This does not, of course, prevent unilateral liberalization.[75] Take the case of India. Significant changes have taken place in the domestic policy regime in services in the belief that liberalization would facilitate development.[76] There has been substantial liberalization in transport, telecommunications, and financial services.[77] At the multilateral level, also, India submitted a revised offer in August 2005.[78] India has 'signaled that it was willing to remove commercial presence

73. A notice of three months has also to be given to modify or withdraw a commitment to the Council for Trade in Services.

74. It must certainly be accompanied by strengthening of the public health and education systems. N Singh, 'Services-led industrialization in India: Prospects and Challenges' in *Industrial Development for the 21st Century: Sustainable Development Perspectives* (New York: UN 2007) 235, 256.

75. In the case of India the present position is described in a consultation paper thus:

> . . . . hundred per cent FDI (foreign direct investment) in higher education services on automatic route is allowed in India. Also, foreign participation through twinning, collaboration, franchising, and subsidiaries is permitted. India has received requests from several countries like Australia, Brazil, Japan, New Zealand, Norway, Singapore, and the US.

The same paper states that civil society 'fears and reservations seem to be somewhat overstated'. Department of Commerce, India, 'A Consultation Paper on Higher Education in India and GATS: An Opportunity' (2006) 17 <http://commerce.nic.in/trade/international_trade_tis_gaitis.asp>.

76. The share of service sector in India's GDP 'has been rising consistently over the years, with an average share of 52% between 2000-01 and 2005-06 . . . During the 1990s, India had the highest growth of service exports among all economies, and during the 2000–05 period, its services exports grew at an average annual growth rate of 33% . . . India's exports of IT and IT-enabled services have grown from $4 billion in 2000 to around $24 billion in 2006'. R Chanda, 'Introduction and Overview' in Chanda (n 70 above) 1, 2; A Mattoo and RM Stern, 'India and the Multilateral Trading System Post-Doha: Defensive or Proactive?' in A Mattoo and RM Stern (eds), *India and the WTO* (2003) 327.

77. Ibid 347–49.

78. Chanda (n 76 above) 5.

restrictions in some key areas that it had already committed. Eleven sectors and 94 sub-sectors were covered in the revised offer as opposed to seven sectors and 47 sub-sectors in the initial conditional offer. The change in stance reflected a new strategy on the part of India—of being more forthcoming in the services negotiations'.[79] But it may not be prudent to go beyond the revised offer, at least to further open up crucial social sectors like education and health.[80] In the case of both, the problems include commercialization and commodification with implications for equitable access and quality.[81] In short, the response to GATS should be based on a different premise because unlike in the case of trade in goods, it is not certain as to when, in which sectors, and to what extent a country should liberalize. The need for such policy flexibility is explicitly incorporated in Article XIX of GATS.[82]

However, the decision of the Hong Kong Ministerial Conference goes against the letter and spirit of Article XIX and the Doha Development Agenda. First, the Hong Kong Declaration has 'fixed the base levels for liberalization across the board in all sectors'.[83] Thus, in Mode 3 it calls for (i) commitments on enhanced levels of foreign equity participation, (ii) removal or substantial reduction of economic needs tests, and (iii) commitments allowing greater flexibility on the types of legal entity permitted. In other modes, the proposals called for developing countries to bind existing levels of actual liberalization and then commit to

79. Ibid.

80. For India's revised offer on higher education services, see Agarwal, (n 67 above) 349 or <http://commerce.nic.in>.

81. Agarwal (n 70 above) 343–45; KM Gopakumar and N Syam, 'Health Services Liberalization in India' in Chanda (n 70 above) 249, 261–63. It may be noted that Agarwal, after reviewing the objections to the opening up of the higher education sector concludes: 'Both the apprehensions associated with the liberalization of higher education services and India's export potential in higher education services are overstated. These are not based on facts and objective analysis. The debate is often driven by baseless sensitivities', ibid 357.

82. Article XIX (1) on "Negotiation of Specific Commitments" *inter alia* states that negotiations 'shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations'. Article XIX (2) states:

> The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such conditions aimed at achieving the objectives referred to in Article IV entitled "Increased Participation of Developing Countries".

83. Das (n 55 above) 629.

liberalize further.[84] In these circumstances, policy space may be lost, and the outcome may not represent an overall balance of rights and obligations.

Second, the developing countries have not received a favorable response on Mode 4 requests. This is despite the fact that according to one study, '. . .an increase in developed countries' quotas on the inward movement of temporary workers equivalent to 3 per cent of their work forces would generate an estimated increase in world welfare of over $150 billion per annum'.[85]. Subsequent to the Hong Kong Ministerial meeting, a plurilateral request by India and a group of countries has called for new and/or improved market access commitments in Mode 4 categories delinked from commercial presence. It is to be seen if a positive response is forthcoming. In sum, according to Action Aid,

> The Ministerial Declaration on services is anti-development, anti-poor and favors transnational corporations. The text will force developing countries to liberalize sectors which they don't want to, binds countries to increase foreign equity levels, focuses on commercial presence, replaces the bilateral request-offer approach with a plurilateral process, targets sectors under a sectoral approach that are of export interest to rich countries, takes away the right to regulate, and contradicts the GATS negotiating guidelines and Doha mandate. This text will increase poverty, deny people's rights to basic services, expand the role of corporations and shrink the role of the state.[86]

Even if this were just rhetoric, it would be advisable for developing countries to not rapidly open up social sectors like the education and health sectors as this may have far-reaching implications. Recent developments show that the developing countries await firm developments with regard to the negotiations on agriculture and NAMA and the new offers in the service sectors from developed countries before agreeing to adopt a new text on services negotiations.[87]

iii. The Special and Differential Treatment Principle

It is time to turn to the Hudec thesis that developing countries are better off not placing reliance on the S&D principle. At present it is estimated that there are 155 S&D provisions in WTO. The Doha Round has seen more proposals advanced.

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84. Khor (n 15 above) 15. Further, the European Union on 28 October 2005 proposed that developing countries be required 'to improve their commitments or make new ones in 57% of the services sub-sectors. Other proposals are that developing countries would be required to bind in the GATS their present level of liberalization in the various sectors, and then to extend the level of liberalization through new GATS commitments'. Das, ibid.

85. WTO (n 60 above) 4.

86. T Rice and M Talpurl, *A Development Analysis of the WTO Hong Kong Declaration* (2006).

87. M Khor, 'WTO Services talks caught in webs of "horizontal process" and blame game' <http://www.twnside.org.sg/title2/wto.info/twninfo20080309.htm>.

These have been classified by one writer under five categories: (i) dispensation from obligations; (ii) financial support and technical assistance; (iii) preferential market access; (iv) incentives for transfer of technology; and (v) result-oriented, purposive provisions (eg, rapid and sustained growth of export earnings).[88] Hudec was not necessarily against S&D concepts like infant industry protection. But as Trubek and Cottrell point out, he was skeptical

> whether developing countries could effectively *implement* them. He saw three obstacles to making such protection work for the general good. The first was the limited ability of governments to pick the right winners. The second was that even potentially efficient industries may lose their competitive edge due to the subsidies protection gives them. And the third—and most important—is that once such protective policies are adopted, the pressure to protect inefficient as well as efficient industries, will be too great to overcome. For that reason he thought it best for developing country governments to nail themselves to the mast of reciprocity rather than seek special and differential treatment.[89]

In a recent analysis of the standard arguments in favor of S&D treatment, Keck and Low conclude in the manner of Hudec that S&D provisions are difficult to support as these are politicized and blunt instruments that are insufficiently discriminating between development objectives and protectionism and between different sets of developing countries.[90] Others, including Keck and Low, lament the absence of empirical work on whether S&D treatment promotes development.[91] But there appears to be, it is believed, enough evidence to conclude that

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88. T Cottier, 'From Progressive Liberalization to Progressive Regulation in WTO Law' (2006) 9 JIEL 779, 787.

89. DM Trubek and PM Cottrell, 'Robert Hudec and the Theory of International Economic Law: The Law of Global Space' (in this volume).

90. A Keck and P Low, 'Special and Differential Treatment in the WTO: Why, When, and How?' in SJ Evenett and B M Hoekman (eds) (n 8 above) 147. The five arguments that they identify are: SDT is an acquired political right; countries should enjoy privileged access to the markets of their trading partners, particularly the developed countries; developing countries should have the right to restrict imports to a greater degree than developed countries; developing countries should be allowed additional freedom to subsidize exports; and developing countries should be allowed flexibility with respect to the application of certain WTO rules or be allowed to postpone the application of rules. Ibid 152–53.

91. 'Economic theory tells us that S&D treatment may or may not foster development; therefore, the question is ultimately an empirical one. Unfortunately, there is very little quantitative work that has been done regarding how S&D treatment has actually affected the economic performance of DCs. A recent study by Oezden and Reinhardt found perverse effects of GSP, retarding the integration of countries eligible into the world trading system:

> While empirical studies are far from complete, it is increasingly recognized that existing and well-established legal strategies, addressing regulatory problems of DCs

the case for preferential arrangements is overstated.[92] Therefore, arguably there is a need for a new regulatory approach.

But what will be the essential features of this new approach? Cottier usefully summarizes for us some of the new thinking on S&D treatment:

> Hoekman, Michalopolous, and Winter suggest that current country groupings be renegotiated. They contend that an 'LDC+' group would, by and large, capture those countries in actual need of S&D treatment. Prowse suggests country-specific 'audits' that would determine a tailored package of temporal exemptions and technical assistance for each developing WTO member. While these approaches seek for refined country groupings, Stevens [. . .] suggested . . . to determine the application of S&D treatment on the basis of thresholds specific to the application of specific rules, based on relevant economic factors and criteria. This approach was assessed by Keck and Low . . . .In their view, 'S&D treatment provisions should be defined to the maximum extent possible in terms of economic needs that automatically identify the beneficiary Members' . . . .Hoekman summarized suggestions made for a new approach to S&D treatment focusing on implementation of rules: (i) acceptance of the principle of 'policy space' implying flexibility for all DCs to implement rules 'as long as this does not impose significant negative (pecuniary) spillovers'; (ii) a country-specific approach rendering implementation commensurate with national policy priorities; (iii) an agreement-specific approach involving *ex ante* criteria that allow countries to opt out of the application of rules for a limited period of time; and finally (iv) a simple rule-of-thumb approach that allows DCs to opt out from what he calls 'resource-intensive' agreements. According to him, all these avenues share in common recourse to economic criteria in order to determine the applicability of (resource-intensive) rules.[93]

Cottier himself suggests, in the vein of Hoekman and others, that the S&D idea needs to move beyond transitional periods. It should involve 'the idea of applying single and uniform rules in a manner that different levels of social and economic development are taken into account *as a matter inherent to the rule itself*. . .'.[94] Thus, 'progressive regulation responds to phasing in of obligations, rather than defining opting out and exceptions'.[95]

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and LDCs, are failing in bringing about the results aspired: consideration of developmental needs, competitiveness, and progressive integration into the world trading system, combined with enhanced market access in industrialized markets'. See Cottier (n 88 above) 791.

92. Keck and Low (n 90 above) 157–59, 181.

93. Cottier (n 88 above) 791–92.

94. Ibid 794. Emphasis added.

95. Ibid.