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BOOK REVIEW

DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM. By Robert E. Hudec.† Gower: Trade Policy Research Centre, 1987. Pp. xix, 259. £12.95.

Reviewed By Christopher T. Curtis*

This is a timely book. The general economic condition of developing countries continues to be poor. Trade is an important element in the economic welfare of these countries; the GATT¹ is the principal international structure for regulating trade; and a new round of GATT trade negotiations—the “Uruguay Round”—is underway. So it is appropriate to review how well the GATT system is working for the developing countries and whether the present legal regime should be changed. This study, by an eminent scholar of the GATT,² argues that the present regime does not work well for the developing countries that are its intended beneficiaries, and should be replaced.³

The GATT is not an undertaking by its members to eliminate all trade barriers. Rather, the GATT imposes three more modest obligations. First, member governments seeking to control foreign trade should do so only by means of tariffs, and should eliminate nontariff barriers such as quantitative restrictions.⁴ Second, governments should participate in periodic negotiations to reduce existing tariff

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¹ General Agreement on Tariffs and Trade, *opened for signature* October 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

² See, e.g., R. HUDEC, *THE GATT AND WORLD TRADE DIPLOMACY* (1975); *ADJUDICATION OF INTERNATIONAL TRADE DISPUTES* (1977). During the Kennedy Round Trade Negotiations (1963-1967), Hudec served as Assistant General Counsel for the Office of the Special Trade Representative for Trade Negotiations, which is currently called the Office of the United States Trade Representative.

³ R. HUDEC, *DEVELOPING COUNTRIES AND THE GATT LEGAL SYSTEM* (1987).

⁴ GATT, *supra* note 1, art. XI.

General Elimination of Quantitative Restrictions.

1. No prohibitions other than duties, taxes, or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exporta-

levels through a process of reciprocal bargaining whereby each government reduces trade barriers in exchange for similar action by other governments.⁵ This is the "reciprocity" principle that is central to GATT trade negotiations. Third, a member government's trade barriers, and reductions in those barriers, must apply equally to all trading partners, not just to one or a few.⁶ This is the "most favored nation" (MFN) principle, also a central principle of the GATT since its creation in 1947.

As Professor Hudec explains, there is a fundamental contradiction between modern economic theory and the economic assumptions of the GATT. The reciprocity principle that is at the heart of the GATT assumes that, from an individual country's perspective, exports are good and imports are bad. Under this "mercantilist" theory of trade, a country that lowers its trade barriers is taking action harmful to itself, and it does so in GATT negotiations only to obtain a benefit from other countries: reductions in their trade barriers. It is true that greater exports stimulate greater activity and employment in the export sector of a country's economy, while greater imports harm import-competing industries and reduce employment. But mercantilist theory ignores the fact that inexpensive imports benefit a country's consumers. While inexpensive imports reduce employment in import-competing industries, they thereby free a country's economic resources for more productive activity. The universally accepted modern economic theory of international trade is the theory of "comparative advantage," which argues that global economic welfare will be maximized if each country applies its resources to those products in the production of which it is relatively more efficient than other countries. A country should export those products in which it has a comparative advantage and import others in which it does not have such an advantage. Under modern economic theory, a country will benefit even if it lowers trade barriers unilaterally.⁷

Why then is the GATT based on reciprocity? Why does the

tion or sale for exportation of any product destined for the territory of any other contracting party.

Id.

⁵ See *id.*, art. II (Schedules of Concession), and art. XXVIII (Modification of Schedules).

⁶ *Id.* art. I.

General Most-Favoured-Nation Treatment.

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Id.

⁷ For an introductory discussion of comparative-advantage theory in world trade, see F. ROOT, *INTERNATIONAL TRADE & INVESTMENT* 55-87 (3d ed. 1973).

GATT practice "voodoo economics"?⁸ It is because reciprocity is necessary to overcome internal political barriers to trade liberalization. The benefits of free trade are spread thinly across all of a country's consumers, but the disadvantages are focused sharply on import-competing industries, which as a result are likely to be vocal and politically active. (That effect is especially visible in the United States in this election year). Reciprocal lowering of trade barriers in other countries has the effect of mobilizing important domestic constituencies for free trade, primarily export industries. The fact that GATT rules are obligations of international law provides additional support for governments seeking to do what they know is right in the face of domestic opposition. The GATT rules are usually called the GATT "discipline." This is appropriate. Like the discipline of a diet, the GATT discipline is for the patient's own good although it may be uncomfortable.

Professor Hudec describes how, from the first, the developing countries insisted that the GATT rules should not apply to them. Their demand was for "special and differential treatment," a demand based on what Professor Hudec calls the "welfare obligation,"⁹ the obligation of the developed countries to assist their poorer neighbors. That demand has been a compelling one since the developing countries plainly have needed assistance. And, as Professor Hudec puts it, since the GATT had no money to give the developing countries, instead it gave rules.¹⁰ That is, the developing countries were not to be bound by the same restrictions as the developed countries. Over the decades, despite opposition by developed country representatives, the GATT regime applicable to developing countries has come to be quite different from the regime that applies to developed countries dealing among themselves. First, the developing countries are not subject to the reciprocity requirement.¹¹ The developed countries should reduce their trade barriers, but the developing countries are not required to reduce theirs in return. Second, the developing countries are entitled to "preferences" in the import regulations of the developed countries.¹² That is, the developed countries should impose lesser restraints on imports from developing countries than on imports from other developed countries—the MFN requirement does not apply.

⁸ Hudec, *supra* note 3, at 143-44.

⁹ *Id.* 186-87.

¹⁰ *Id.*

¹¹ See GATT, *supra* note 1, at Part IV (entered into force June 27, 1966). "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties." *Id.* art. XXXVI(8).

¹² See *id.* art XVIII. (Governmental Assistance to Economic Development). Section 1 describes developing countries as "those contracting parties the economies of which can only support low standards of living and are in the early stages of development." *Id.*

The GATT regime applicable to developing countries is completely consistent with the mercantilist trade theory that the GATT, as a whole, at least superficially reflects. The rules are intended to promote exports from developing countries, which are good, without requiring increased imports by developing countries, which would be bad. But the special GATT regime for developing countries is also justifiable within the framework of modern comparative-advantage theory if that theory is modified to accommodate the so-called "infant-industry" doctrine. That doctrine asserts that, because of market barriers and imperfections, capital will not flow to potentially efficient new industries in developing countries unless those industries are protected from import competition for a time sufficient to allow them to become competitive in world markets.¹³ The extent to which the infant-industry phenomenon justifies import restraint by developing countries is a point on which economists do not agree. Disagreement about appropriate GATT rules resulting from disagreement over the underlying economic realities is a basic element in the present GATT scene.

Professor Hudec's thesis is that it is possible to evaluate the soundness of the GATT's legal rules applicable to developing countries separately from the underlying economic theories. He strongly criticizes the GATT's legal rules, but, he argues, acceptance of his criticisms does not require adherence to one or another camp of development economists.

Professor Hudec analyzes and criticizes both the nonreciprocity aspect and the preferences aspect of the GATT's present approach to developing countries. First, Professor Hudec questions whether acceptance of the reciprocity rule would benefit developing countries. It is commonly argued that acceptance of reciprocity would assist the developing countries in obtaining concessions from developed countries, but Professor Hudec disagrees. He argues that developing countries already import as much as their foreign-exchange earnings allow, and that export interests in developed countries know this. Consequently, an offer of lower trade barriers by developing countries would not mobilize domestic interests in developed countries to a greater degree than developing country insistence on the welfare obligation already has.¹⁴

Nevertheless, Professor Hudec urges that the acceptance by developing country governments of the "discipline" of reciprocity would assist those governments in resisting protectionist forces in their own countries. Even if one assumes that the infant-industry doctrine is correct, developing country governments are besieged by many economically unjustifiable claims for relief. If developing

¹³ Hudec, *supra* note 3, at 144-47.

¹⁴ *Id.* at 193-96.

country governments were able to plead GATT legal obligations, they could more easily fend off undeserving claimants and focus import relief where it was needed.

Professor Hudec's judgment on preferences is likewise mixed. He thinks it likely that developing countries' clamor for preferences has resulted in some instances of lower trade barriers in developed countries, stimulating developing country exports with attendant benefits. Professor Hudec also thinks, though, that the legitimation of preferences as an exception to the MFN obligation has stimulated a fantastic proliferation of other discriminatory practices, the detrimental effects of which have outweighed the benefits attributable to the initial preferences.

Furthermore, Professor Hudec argues that the real impediment to developing countries' growth through trade has not been developed country trade barriers of general applicability, but rather the springing up of new, discriminatory practices directed specially against developing countries. For example, developing countries tend to have a comparative advantage in labor-intensive industries; hence they pose the greatest threat to such industries in developed countries and are a likely target for protectionist restraints. But developing countries are not economically powerful trading partners and therefore lack sufficient leverage to resist such restraints. Consequently, they would benefit most from renewed application of the GATT's MFN principle. No developed country could restrain imports from developing countries without also restraining those from other developed countries. Developing countries' interests would be linked with those of powerful developed countries, and trade restraints detrimental to developing countries would be much less easy to impose.¹⁵

Professor Hudec's recommendations flow from his criticisms of the existing rules. First, he thinks that developing countries should abandon their continuing demands for preferences and instead should work toward strengthening the GATT's MFN requirement. He also thinks, though, that the GATT's MFN rules have so deteriorated over the decades that "the moment to create a strong and effective MFN policy has been allowed to slip away and . . . the next opportunity will probably not arrive until the world's next major economic collapse."¹⁶

Second, Professor Hudec thinks that developing countries should accept the GATT's legal disciplines, particularly with respect to reciprocity—not as a means of extracting trade concessions from

¹⁵ Discriminatory trade restraints are generally illegal under GATT. How developed countries nevertheless get away with them to a degree severely damaging to developing countries is a question the book does not completely answer. See *id.* at 182-85.

¹⁶ *Id.* at 228.

developed countries, but rather to assist themselves in opposing domestic demands for protection. Professor Hudec suggests a variety of mechanisms by which developed countries can pressure developing countries into accepting greater discipline.¹⁷

Professor Hudec's basic argument—that the GATT legal rules can be criticized and improved upon regardless of which economic theory one accepts—is a bold one. Normally one would expect the opposite to be true: To evaluate the efficacy of legal rules directed toward an economic objective, as the GATT rules are, one must know what the economic realities are. So it is fair to ask whether Professor Hudec succeeds in the approach he has taken.

It appears that his success is mixed. His criticism of preferences as promoting the use of other discriminatory practices that outweigh the benefits of the preferences is an argument that, though requiring considerable feel for the empirical realities of international trade, does not depend for its acceptance on one's being a mercantilist, a free trader, or a protector of infant industries. The same is true of Professor Hudec's argument that, because developing countries are already importing all that their foreign-exchange earnings allow, acceptance of the GATT's reciprocity discipline would not significantly increase their political ability to obtain trade concessions from developed countries.¹⁸

The same cannot be said of Professor Hudec's argument that developing countries would benefit most from reinforcement of the GATT's MFN obligation. It appears that there are those who disagree, arguing that "developing countries would not benefit very much from [a world economy based on MFN liberalization] because the handicaps faced by their industries render them unable to compete effectively in such a market."¹⁹ Professor Hudec admits that this is a "disagreement over basic economic issues."²⁰

The validity of Professor Hudec's argument that developing countries would benefit from accepting more GATT reciprocity discipline as a means of controlling unjustified domestic demands for

¹⁷ *E.g.*, by means of conventional tariff negotiations with developing countries, by stimulating enactment of codes within the current structure of the GATT (as was done to a limited extent in the Tokyo Round negotiations), by more vigorously enforcing procedure for review of balance-of-payment restrictions, and by urging the Trade and Development Committee to foster developing country acceptance of GATT discipline. *Id.* at 232-36.

¹⁸ There is some tension, though, between Professor Hudec's argument that the developing countries already import as much as their foreign-exchange earnings permit and his argument that the current regime of nonreciprocity results in excessive protection of developing countries' domestic industries. Combining these two points, Professor Hudec's argument must be that, while developing countries import as much as they can, they do not import the economically optimal mix of products. That is, the current regime distorts the choice of imports rather than reducing the amount of them. But, if that is Professor Hudec's argument, it should be developed more clearly.

¹⁹ HUDEC, *supra* note 3, at 152.

²⁰ *Id.*

protection also, in my opinion, depends in some degree on one's underlying economic beliefs. First, of course, the argument is contrary to mercantilist thinking, which holds that suppression of imports is good per se. Professor Hudec may be right that, as an economic theory, mercantilism is bankrupt, indefensible, "voodoo economics," not advocated by any serious economist in more than two centuries (if ever). But Professor Hudec also admits that mercantilist thinking continues to exert a powerful hold over politicians, officials, and their publics. For example, a recent U.S. presidential candidate saw his political fortunes rise sharply after he advocated the imposition of massive trade barriers to preclude American consumers from purchasing an inexpensive automobile manufactured in South Korea. A better-functioning system of international trade, within or without the GATT, therefore requires continuing education of the world's policy makers in the economic framework within which such trade must be analyzed—that is, the theory of comparative advantage.²¹

Second, and more significantly, the validity of Professor Hudec's criticism of the nonreciprocity policy as exposing developing country governments to too many unwarranted claims for import relief depends on the extent to which one accepts the infant-industry doctrine. GATT discipline fortifying developing country governments against unjustified demands for protection is desirable if one believes, with Professor Hudec, that much or most protection is harmful and that governments are not good at identifying the few claims that are meritorious. Professor Hudec's arguments in support of his position are persuasive. But an enthusiast for the protection of infant industries might conclude, to the contrary, that the risk of overprotection if the government is not restrained by GATT discipline is outweighed by harmful restrictions on government action that that discipline would require.²²

The force of the recommendations for change that Professor Hudec offers at the end of his book is likewise affected by the continuing disagreement over the economic effects of international trade on developing countries. Professor Hudec's first recommendation is that, instead of fighting for more preferences, developing countries should work to strengthen the GATT's MFN obligation. But if pro-

²¹ That theory, because it underlies much of Professor Hudec's analysis, deserves fuller explanation in his book. It is not a self-evident theory, and is in some degree counter-intuitive—for example, in the importance that it ascribes to comparative rather than absolute advantage. See, e.g., Root, *supra* note 7, at 87-136 (discussing qualifications of the basic theory of comparative advantage in international trade). For a discussion of the economic effects of international trade on developing countries, see *id.* at 401-44.

²² As Professor Hudec notes, Japan imposed extensive protective measures in the post-war period but nevertheless prospered. "Although Japan might have gained even more from a more liberal trade policy, few governments would turn down the Japanese growth rate as it was." Hudec, *supra* note 3, at 145.

ponents of preferences are correct that a strong MFN system would produce few benefits for developing countries,²³ then developing countries should not "spend diplomatic capital"²⁴ working toward that objective—especially if, as Professor Hudec also suggests, a strong MFN system is already a lost cause.²⁵

Professor Hudec's second recommendation is that the reciprocity obligation be resurrected for developing countries. As noted above, though, the desirability of reciprocity discipline for developing countries may depend on one's view of the limits of the infant-industry doctrine.

The continuing disagreement over the economics of international trade results in a degree of schizophrenia in Professor Hudec's specific recommendations. In the main, those recommendations comprise ways in which developed countries can pressure developing countries into greater acceptance of GATT discipline.²⁶ But, as Professor Hudec elsewhere notes,²⁷ developed countries do not have a strong self-interest in promoting the developing country legal regime that he recommends. On the contrary, the tendency of developed country governments is "to lie back and simply watch as developing countries impale themselves on ineffective policies."²⁸ More importantly, if it is the developing countries that are the intended beneficiaries of Professor Hudec's proposals, it is they who should take the initiative in implementing those proposals. That the correct legal regime should be adopted as a result of developed country pressure suggests an attitude that Professor Hudec elsewhere criticizes as "coercive paternalism."²⁹ Perhaps, though, such an incongruous situation simply results from the same political realities that gave rise to the mercantilist structure of the GATT in the first place: To overcome domestic pressure for trade-restrictive practices, developing country governments need to be able to rely on pressure from developed countries.

My principal criticism of Professor Hudec's book is that it is harder than he suggests to separate legal from economic issues. But

²³ *Id.* at 152.

²⁴ *Id.* at 228.

²⁵ *Id.*

²⁶ See *supra* note 17 and accompanying text.

²⁷ HUDEC, *supra* note 3, at 181-85.

²⁸ *Id.* at 231.

²⁹ *Id.* at 132. Indeed, Professor Hudec asserts that his book is "addressed primarily" to developing country governments, although he saves that assertion for the last sentence, and the evidence that developing country governments might be interested in his recommendations is limited to a single footnote, also the last. *Id.* at 235. There is considerable ambivalence in Professor Hudec's study as to the extent to which developing country governments are likely to be receptive to his ideas. On the one hand, Professor Hudec speaks of "the commitment of the developing countries to the current policy." *Id.* at 231. On the other hand, he posits the existence of developing country governments that "want greater legal discipline." *Id.* at 233.

that is always a difficult task. That it is not fully feasible in the context of international trade by developing countries means simply that it is necessary to argue both the legal and the economic issues to the developing countries in order to promote change. Professor Hudec's book is a useful and very readable contribution to that campaign.³⁰

³⁰ I have two formal criticisms of the book.

1. It has no index.

2. Part I of the book, describing the history of the GATT's legal approach to developing countries and how the GATT came to its present situation, though well written, is too long. One must wade through too much of "the painful word-by-word battle," *id.* at 230, before arriving exhausted at Professor Hudec's analysis.

But that analysis is worth waiting for, providing insights into many interesting issues. For example, in two pages, *id.* at 186-88, Professor Hudec dispatches the argument, described more fully elsewhere, *id.* at 103-08, that the present GATT system of nonreciprocity and preferences for developing countries has matured into customary international law—that it has become part of the new international law of development corresponding to the "new international economic order." *Id.* at 186-88.

