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Robert E. Hudec

Excerpt

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Introduction to the New Edition

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The history of GATT's relationship with developing countries began with what Robert E. Hudec describes as "a legal relationship based essentially on parity of obligation" {24}.¹ Yet as the GATT system evolved it increasingly left developing countries outside of the momentum towards liberalization that the negotiations built up among developed countries and exempted them from the general though imperfect sense of discipline that developed countries came to accept. From GATT's beginning through the mid-1980s – the period Hudec studied – the identity of developing countries in the system became almost entirely a matter of their demanding non-reciprocal and preferential treatment and developed countries responding grudgingly to those demands.

The result was a relationship that Hudec describes as "form without substance" {99}.

In form, the relationship was extensively elaborated:

After years of debate and of gradual compromising, all the key ideas advanced by developing countries – non-reciprocity, preferences, special and differential treatment – were accepted at the formal level during the 1970s. They now appear in several GATT legal texts and in countless declarations. {155}

These expressions did not, however, have the force of international law obligation. The commitments were compromised by language such as "The developed countries shall to the fullest extent possible – that is, except where compelling reasons, which may include legal reasons, make it impossible, . . ." ²

This is almost a mirror image of the "diplomat's jurisprudence" that Hudec in other investigations found to exist among developed countries.³ This "diplomat's jurisprudence" was a compromise between jurisprudence as understood by lawyers and the reality of the limited influence trade negotiators had over national trade policy decisions. In an era in which there was sometimes a greater sense of shared objective among trade negotiators than

between these negotiators and government officials at home, not pinning down trade differences with legal precision could allow the working out of a mutually acceptable solution before the matter reached domestic politics.

If the system did not ask for reciprocity from developing countries in exchange for what they wanted, for example, better access to developed country markets, then how did it attempt to motivate developed countries to provide such concessions?

Hudec's answer: appeal to "the welfare obligation".

The power to govern usually brings with it, according to most twentieth-century political norms, a duty to take care of the disadvantaged members of the group being governed. For example, it would not have been possible to create governing power in the European Community unless the Community undertook a responsibility to do something for the depressed areas within its domain. {31}⁴

Not reciprocity but rather the welfare obligation of the rich to assist the poor came increasingly to be the motive that the system called on to stimulate developed countries response to the demands of developing countries.

Hudec moves on to ask if further appeal to the welfare obligation – or to an alternative strategy in which developing countries' offered reciprocity – might be effective (a) to discipline developed country restrictions of particular relevance to developing country exports and (b) to support policies within developing countries that would help them to better use international trade as a vehicle for development.

As to influencing developed country liberalization, he concludes that the gradual pace of developed country liberalization is likely to continue but would not be significantly affected by either strategy. Likewise – writing in the mid-1980s – he saw neither strategy as likely to discipline the growing use of "voluntary" quantitative restrictions where developing countries were enjoying particular export success. The moral force of the welfare obligation had been spent and, so far as trade is concerned, refocused on the poor at home. As for reciprocity, developing countries did not have the economic size or power for it to provide them great leverage.

The one source of power the system might provide is the most-favored nation (MFN) principle:

[T]he MFN obligation is, above all else, a legal substitute for economic power on behalf of smaller countries. {180}

But the MFN obligation, particularly with regard to developing countries, had been compromised. The institutionalization of special and differential

treatment for developing countries has been part of the general erosion of this principle.⁵ What developing countries have gained from the granting of discriminatory treatment in their favor has been overwhelmed by this systemic erosion.

From this followed Hudec's first recommendation:

[D]eveloping countries should re-direct their long-term objectives to the strengthening of the GATT's MFN obligation in all respects. {189}

His second recommendation was that:

GATT's legal policy towards developing countries should change and . . . the Contracting Parties should instead establish a regime of developing country legal obligations that would provide support for governments of developing countries in opposing unwanted protectionist policies at home. {190}

"Unwanted protectionist policies" does not necessarily mean *all* protectionist policies. Hudec admitted the possibility that while some import restrictions will be wasteful, others could be constructive. Developing countries, like developed ones, would benefit from the support the system can provide to sort one from the other.

However, for the system to provide such support, developing countries would have to change their attitude towards it. Even on application and reform of GATT provisions such as Article XVIII's infant-industry protection provisions, the developing country stance had been simply to broaden what the provisions allow rather than to work for an effective differentiation of constructive from wasteful trade interventions. The system Hudec saw was about more latitude to intervene versus less, not about good intervention versus bad.

CONTENT OF THE INTRODUCTION

In the following parts of this introduction, I summarize the arguments behind these conclusions and recommendations – in a way that I hope will be a stimulus to read the book rather than a substitute for such a reading. I also report what I have learned from an examination of the citations the book has received in other published works.

The summary has been significantly influenced by what I learned from the citations. When I first read the book I interpreted it as a skilled example of what in my undergraduate days had been called "institutional economics" and has come since to be called "the new institutional economics".⁶ However, I found

when I examined the citations that hardly anyone else had read the book as an application of institutional economics.

Readers have cited Hudec's historical-institutional analysis as "expert testimony" that special and differential treatment has been an unproductive strategy, but have not taken up the reasoning he brought to the issue. Its conclusions but not its logic have been added to the more familiar comparative static and econometric analysis of the impact of this policy or that, for example, of infant-industry protection or the General System of Preferences (GSP). This overlooks Hudec's work to understand how the GATT got into the historical-institutional rut he identified and wastes the insights this analysis might provide to move it to a more productive relationship. I therefore precede my summary with a brief note on institutional economics.

In the last section I speculate on an extension of Hudec's analysis to cover the extensive liberalization by developing countries and their growing role in the international trading system. Hudec's story line was to ask how developing countries remained outside of the momentum toward liberalization that the GATT legal system created among developed countries. I suggest that the new story line is how – and influenced by what – they created their own momentum and how this momentum has interacted with the momentum of the GATT/World Trade Organization (WTO) system. Analyzing the evolution of developing country trade policy as either application of or resistance to the GATT/WTO system would miss a lot of what has gone on.

HUDEC AND INSTITUTIONALISM

David Palmetier (2003), in a perceptive tribute to Robert Hudec, pointed out that much of Hudec's work is grounded in a mode of thought Palmetier identifies as "American legal realism", whose counterpart in economics he points out is institutionalism.⁷

Institutionalism studies how organizations and their formalities (rules, procedures, etc.) evolve from the intersection of the customs, traditions, values and perceptions of reality (e.g., the science or economics) of the persons and groups who are prominent in the events that make up this evolution. A key precept here is that organizations and their formalities *evolve* rather than *are created*. They are shaped by repetitions (experiences) perhaps more than by design.

One of the key findings of institutional economics is that institutions such as the WTO – evolving as they do from their principal actors' limited perceptions of the relevant science and the varied if not conflicting objectives they bring to the issues taken up – often turn out not to be socially or economically efficient. Douglass North, whose work has earned a Nobel Prize in economics,

separates successful examples of economic development from unsuccessful ones according to how the institutions for ownership, use and exchange of economic resources have developed.⁸ Walton H. Hamilton, in the *Encyclopaedia of the Social Sciences* that first appeared in 1932, phrased the point well: “An institution is an imperfect agent of order and of purpose. . . . Intent and chance alike share in its creation” (1963, p. 89).

The issues that institutions take on and the procedures they evolve to deal with these issues feed back to reshape values and perceptions of reality. The quip, “When we put on our GATT hats, we put on our GATT minds,” captures something of the meaning here. Drawing again on Walton Hamilton’s graceful phrasing, “Institutions and human actions, complements and antitheses, are forever remaking each other in the endless drama of the social process” (1963, p. 89).

THE EVOLUTION OF THE RELATIONSHIP

The GATT began as part of the plan among post–Second World War Western leaders to establish a safer and more stable (Western) world than they had inherited. Linking countries into a web of commerce and shared prosperity would help to free them from the power diplomacy and every second-generation cycle of war in which Europe-based civilization had been trapped.

The evolution of developing countries’ position in the GATT system, as Hudec explained it, is a matter of the ethics and the economics that the major actors brought to the issues they took up within the GATT and how these were applied in the repetitions that fixed them into policies, regulations and procedures.

Developing countries at the ITO and GATT negotiations demanded a commitment from developed countries to provide significant resource transfers. They also wanted freedom from the general idea of discipline that the arrangements were trying to impose on others. In the latter regard, their position was hardly different from that of developed countries, acting individually {29–31}.

However, the GATT as adopted in 1948 made few concessions to the developing country position. How then, Hudec asked, did developing countries’ position in the system become increasingly a demand for unreciprocated trade concessions and the developed countries’ reluctant response to these pleas?

The Path of Least Resistance

Part of the answer is the values that the system embodied. As high politics, the GATT was collective action: *individual sacrifice for the common good*. As low

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politics it was mercantilism – the benefit was access to foreign markets, but this had to be paid for by giving access to one’s own.

Another element in the ethics of the system was the welfare obligation. The moral obligation of the rich to assist the poor came increasingly to be what the system called on to motivate developed countries to respond to the demands of developing countries.

As to economics, the mercantilist virtue of import restrictions and the (individual) sacrifice of giving them up was driven home by the developed countries’ insistence on retaining some of theirs. Europeans were more sympathetic to the infant-industry (and reconstruction) argument for protection than were US leaders, but the US position on discipline had its own exceptions, including quantitative restrictions on agricultural imports, escape clauses and antidumping provisions.

The ethics and the economics came together in a way that Hudec described as follows:

This theoretical contradiction was fundamental. In an avowedly welfare relationship, where the needy have a recognized claim to unilateral payments, the strong cannot make a principled demand for liberal trade policies by the needy when, in the same breath, they define trade liberalization as a “payment”. {34}

Within such a conception, developing country leaders can enhance their status by demanding exemption from discipline over trade restrictions; developed countries’ trade officials find it easier to acquiesce in these demands than to convince their governments to reduce import barriers. This is a principal-agent problem in the making:

Once it has been conceded, as a matter of principle, that legal freedom constitutes “help” to developing countries, the future was virtually fixed. . . . When other kinds of “help” were not enough (which was almost invariably the case), there was always the possibility of doing something more on the legal side. {35}

The policy of non-reciprocity has flourished primarily because, for both sides, it has been **the path of least resistance**. . . . It has been the easy way out for diplomats from developing countries, for it has allowed them to maintain the posture of vigorous representation without ever having to ask home governments to take difficult decisions. Finally, and perhaps most important, it has been the easy way out for the governments of developed countries and for their diplomats. Relaxation of legal discipline has always been the cost-free answer – the concession that developed countries could make without having to go through the unpleasant business of asking legislatures for real trade

liberalization [or real resources]. Like penny gin, it was an inexpensive way to keep the peace by pandering to the other side's worst instincts. {190–91, emphasis added}

*Not about Developing Country Policies but about
How Developed Countries Treat Them*

Within GATT's first decade, pressure waned on developing countries to give concessions in the tariff negotiations, and rules that regulated restrictions by developing countries were relaxed. What this came to was that:

From about 1958 onwards, developing countries seized the initiative and persuaded the GATT to concentrate on the behavior of developed countries towards them, rather than on their own behavior. {46}

The GATT response to the Haberler Report of 1958⁹ was an early indication that the GATT was about the behavior of developed, not developing, countries. It concluded that existing arrangements were relatively unfavorable to primary producing countries, but it also concluded that progress depends on both developing and developed countries reducing their restrictions. The Action Program that followed took up only the need for change in developed country policies.

The formality of the legal relationship between developed and developing countries disguised its lack of substance. By the mid-1950s, a large share of GATT's developed as well as of its developing contracting parties had balance-of-payments measures in place, and legal reviews were as rigorous for developing countries as for developed. The difference was that developed countries were pressed to remove such measures – through the GATT reviews and other relationships such as the International Monetary Fund (IMF) and the Organization for European Economic Co-operation. In contrast,

The developing country reviews became increasingly pro forma as their balance of payments problems remained drearily the same. Waivers for surcharges were routinely given. {44}

And soon:

With developing countries, legal form is all there is to the relationship. Setting aside the formalities . . . they [developed and developing countries] would have nothing else to say to each other. {46}

In contrast, the relationship among developed countries was less formal but more substantive. A “diplomat’s jurisprudence”¹⁰ among developed countries

avoided clear legal decisions so as to allow developed country governments to adjust towards shared objectives in ways that their understandings of domestic politics indicated would be most effective.

The GATT-UNCTAD Rivalry

The Cold War rivalry for developing countries' loyalties played an important role in shaping the place of developing countries in the GATT system. United Nations agencies, in documents such as the Declaration of a New International Economic Order and the Charter of Economic Rights and Duties of States, provided general voice for the claim of developing countries to non-reciprocal and preferential treatment {77–78}. The United Nations Conference on Trade and Development (UNCTAD), created in 1964, became a trade-specific venue for this competition, and in the rivalry between GATT and UNCTAD to “staff out” the concern to promote developing country interests, UNCTAD achieved several important victories.

One of these victories concerned the attachment of negative connotations to the way in which the normal GATT mode of reducing trade barriers would provide improved access for developing country exporters – even when the improved access was provided without reciprocity from developing countries. Let me give an example. Suppose that in negotiations with each other, Australia and New Zealand agree that each will reduce its MFN tariff rates on products on which each imports \$1,000 worth from the other and \$500 worth from a developing country. Australia and New Zealand have each reduced their tariff on \$500 of imports from a developing country and have done so without a reciprocal concession from the developing country.

The formula UNCTAD applied in its evaluation of the Kennedy Round, however, would not grant Australia and New Zealand credit for affirmative action. UNCTAD's calculations would compare the amount of developed country exports covered by the agreed concessions (\$2,000, in this example) with the amount of developing country exports covered (only \$1,000) and use the comparison as a basis to criticize Australia and New Zealand's treatment of developing countries rather than to acknowledge the non-reciprocal market access they had provided.

The UNCTAD formula detached the traditional GATT mode of trade liberalization – exchanging reciprocal concessions, extended to all through the MFN principle – from the earning of any affirmative action credits. It focused attention on the lower coverage of “products of export interest to developing countries,” and it became quickly the accepted approach, adopted even by the GATT Secretariat in its assessment of the Tokyo Round.

Hudec described that assessment as follows:

It was written quickly (but very thoroughly) in order to preempt the kind of negative evaluation that UNCTAD had made after the Kennedy Round. . . . It celebrated all the “victories” achieved by the Group of 77. . . . [A] central element of the “victories” was all the new legal freedoms developing countries had won, especially those which involved discriminatory special and differential treatment. . . . The year was 1979. Here was the GATT, still thoroughly preoccupied with holding the allegiance of developing countries and still making a virtue of the fact that GATT rules do not apply to developing countries. {90}

If the Kennedy and Tokyo Rounds were the two halves of a GATT-UNCTAD soccer match, one could say that the score was UNCTAD 2, GATT 0; the second goal being an own-goal.

Form without Substance

The last chapter in Hudec’s history of the legal relationship bears the sub-title “Form without Substance”. The GATT system, as it evolved, came to include an increasing number of expressions of the role of special and differential treatment in the system and an increasing use of legal language in these expressions. To the extent that the expressions had legal force, such as the Framework Agreements of 1979, they relaxed obligations that would otherwise have prevented discriminatory action such as tariff preferences in favor of developing countries. They also relaxed certain disciplines on developing countries such as those on infant-industry protection.

To the extent that the expressions were about obligating developed countries to provide special treatment for developing countries, they stopped short of making such into obligations. The “commitments” language of GATT Part IV, for example, states that “developed countries shall to the fullest extent possible – that is, except where compelling reasons, which may include legal reasons, make it impossible . . .” (GATT Article XXXVII, paragraph 1).

MAKING SPECIAL AND DIFFERENTIAL TREATMENT AN INTERNATIONAL LAW OBLIGATION

The many repetitions of the special and differential treatment obligation bring forward a key question: Will the non-reciprocity principle ever take on the nature of an international law obligation? As Hudec posed the issue:

[T]he effort in recent years to define a new “international law of economic development” has included, as one of the new obligations to be recognized,

a duty of preferential and non-reciprocal treatment towards developing countries. If such a duty were recognized as an obligation of customary international law, binding on all governments, this would obviously make a major contribution to the success of the non-reciprocity policy. {158–59}

In his review of the legal discussion, Hudec noted that

[T]he number of quasi-commitments has already persuaded many legal scholars to characterize the welfare concept as a sort of quasi-law, using various labels such as “soft law”, “legal principle”, “law-in-the-making” and “obligation of good faith”. {159}

He concluded, however, that “this is as far as the legal force of the welfare obligation can ever go” {159} and quoted in support a United Nations review of the development of such legal principles {100–01}. He also examined the form that the “have versus have-not obligation” has taken in national laws and points out that:

The examples of redistributive justice found in national tax and welfare laws do not... create citizen-to-citizen rights and duties. They are always structured as public law; the extra duties of the rich (for example, paying higher taxes) are owed to the sovereign rather than to particular deserving claimants; the rights of the deserving poor (for example, rights to welfare payments) are recognized as an obligation owed by the sovereign, rather than by any individual taxpayer. {159}

Creating in contemporary law an obligation or right to non-reciprocal and preferential treatment is not in the cards, even though, Hudec pointed out, feudal law “was able to enforce status-defined rights and duties”¹¹ {159}.

Hudec concluded that “the emerging international law of economic development will not be able to add any legal force to the demand of developing countries for non-reciprocal liberalization by developed countries” {160}.

Even so, the repetition of demands and acknowledgements might have some effect: It could influence actions by the developed countries without going so far as to regulate them. Ever the institutionalist, Hudec concluded that “[t]ime has also endowed GATT obligations with a quality of law in the institutional sense, so that GATT obligations now possess a certain amount of respect-for-law force independent of their substance” {161}.