

## Hudec's Methods—and Ours

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### I. INTRODUCTION

The republication of Robert Hudec's *Developing Countries and the GATT Legal System*<sup>1</sup> (Developing Countries) provides an apt occasion to reflect on the book's arguments and enduring influence. *Developing Countries* skillfully details the history of GATT's relationship with developing states between GATT's founding, in 1947, and the mid-1980s. Other symposium contributions review trade policy developments in the intervening years.<sup>2</sup> In contrast, this essay will explore one of the most widely noted, and controversial, claims that Hudec offers in *Developing Countries*, namely the argument that developing states' successful advocacy for nonreciprocal and preferential treatment had disserved their economic interests.<sup>3</sup>

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1. ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* (Cambridge Univ. Press 2d ed. 2011) (1987) [hereinafter *Developing Countries*].

2. See generally Bernard M. Hoekman, *Proposals for WTO Reform: A Synthesis and Assessment*, 20 *MINN. J. INT'L L.* (forthcoming 2011); Chiedu Osakwe, *Developing Countries and GATT Rules: Dynamic Transformation in Trade Policy Behavior and Performance*, 20 *MINN. J. INT'L L.* (forthcoming 2011) (discussing the shift from GATT's "special and differential" treatment to policy reforms and liberalization in developing countries).

3. Indeed, Michael Finger's introduction to the new edition suggests that *Developing Countries* is cited most frequently for this proposition. HUDEC, *supra* note 1, at 16–17.

More than two decades after *Developing Countries* was first issued, how should we assess Hudec's claims—and how should we think about preferences? Given Hudec's long and distinguished tenure at the University of Minnesota Law School—and his central role in the founding of this journal—it is entirely appropriate that critical examination of Bob Hudec's controversial claims occur in the pages of the *Minnesota Journal of International Law*.

There is much to admire in *Developing Countries*; elegantly written and closely argued, the book deftly combines incisive political history and careful legal analysis. However, the book's claims are necessarily shaped by the methodological approaches Hudec adopts, the theory of trade politics he employs, and the ontology of international system that he draws upon. Part I of the book, consisting of Hudec's authoritative retelling of GATT debates over preferences, reads as a straightforward realist account of international trade relations. In this retelling, states are the key actors and they both view and use trade negotiations as vehicles to advance their political and economic interests. Part II of the book, containing Hudec's influential analysis of the effects of preferences, has a strikingly different theoretical and methodological orientation. Here, analysis turns from inter-state relations to a public choice account of interactions among interest groups and bureaucracies. In the writings of a less talented author the apparent tension between the differing methodological approaches could be easily dismissed; in Hudec's case they provide an important clue to understanding the assumptions that drive much of Hudec's analysis. In short, virtually all of *Developing Countries*' conclusions are premised upon a highly stylized and deeply pessimistic view of the processes and outcomes of both domestic politics and international institutions.<sup>4</sup>

However, Hudec's methods are not the only possible ones that can be used to understand the effects of preferences, and since *Developing Countries* was first issued much empirical work has focused on the implications of preference programs. I

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4. In focusing upon Hudec's methodological commitments, this paper stands in stark contrast with much of the writing on Hudec's scholarship, which emphasizes Hudec's pragmatism and elides the ideological and methodological commitments that inform this pragmatism. In this respect, Ricardo Ramirez contribution to this symposium is representative of most approaches to Hudec's scholarly work. See Ricardo Ramirez, *Professor Hudec and the Appellate Body*, 20 MINN. J. INT'L L. (forthcoming 2011).

summarize below recent empirical (largely econometric) literature addressing the effects of preferences. As we shall see, some of this more recent research suggests some important qualifications to Hudec's rather bleak view of preferences—and, perhaps, his equally bleak view of the performance of domestic and international political actors. More importantly, juxtaposing Hudec's methodologies with more recent alternative methodological approaches suggests several potentially fruitful lines of future research.

The final section of this paper explores yet another dimension of Hudec's methodological commitments and rhetorical style. Although many properly praise Hudec's lean and jargon-free prose, this paper will show *Developing Countries* is significantly more theoretically sophisticated than it purports to be, and offer a few reasons why the book, in effect, misrepresents itself. This paper also describes some of the costs of selling *Developing Countries* short. By implication, this analysis suggests a number of methodological issues that contemporary trade scholarship should address in light of the ways that the discipline of trade law has evolved since *Developing Countries* was first issued.

## II. THE DEBATE OVER PREFERENCES AT THE GATT

*Developing Countries* opens with the history of a debate that has bedeviled the trade system since its inception—and continues to be controversial today.<sup>5</sup> Given that trading nations enjoy widely varying levels of economic and social development, should the trade system provide differential and more favorable treatment to developing states? In particular, should goods from developing states enjoy preferential access to the markets of developed states? Or does preferential treatment introduce distortions into international markets—and thus, are uniform, nondiscriminatory rules more appropriate? Hudec's authoritative account of the twists and turns in debates over preferences thoughtfully reviews the key issues in this long-standing controversy.

Hudec notes that when considering whether to extend preferential treatment to developing state goods, the framers of

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5. See, e.g., SALLIE JAMES, *THE U.S. GENERALIZED SYSTEM OF PREFERENCES: HELPING THE POOR BUT AT WHAT PRICE?* 1 (CATO Institute 2010), available at [http://www.cato.org/pub\\_display.php?pub\\_id=12555](http://www.cato.org/pub_display.php?pub_id=12555) (proffering that the United States' Generalized Policy of Preferences distorts markets and limits the economic development of developing countries).

the GATT system had little relevant experience to draw on.<sup>6</sup> Although the destructive trade wars and mercantile policies of the 1930s provided GATT's drafters with concrete knowledge regarding tariffs, quotas, and similar issues, the negotiators had little relevant experience regarding the role of developing states in a multilateral trade system.<sup>7</sup>

The basic positions of the key actors in the negotiations were relatively straightforward—but nearly impossible to reconcile.<sup>8</sup> The United States, the dominant economic and political actor and a prime mover in the negotiations, sought a non-discriminatory system that had no special rules for developing states.<sup>9</sup> Contrariwise, the Europeans sought to maintain a version of preference systems historically associated with their colonial possessions.<sup>10</sup> Both positions reflected national interests. As the world's strongest economy, the United States believed that it had the most to gain from open world markets.<sup>11</sup> The Europeans believed that market interventions were necessary to assist developing states.<sup>12</sup> Moreover, European resistance to a strong nondiscrimination norm was rooted in their collective interest in extending preferential treatment to each other to boost post-war European reconstruction.<sup>13</sup> Developing states sought special treatment in the trade realm, including resource transfers, freedom from trade disciplines, tariff preferences, and non-reciprocity.<sup>14</sup> Hudec suggests that developing states' positions

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6. HUDEC, *supra* note 1, at 26–27.

7. *See id.* (“Not only was there no Golden Age to point towards as a goal but, perhaps more important, there had been no past failures that could serve as a lesson about what *not* to do.”).

8. Leading accounts of the negotiations include: WILLIAM ADAMS BROWN, JR., *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE* (1950); RICHARD N. GARDNER, *STERLING-DOLLAR DIPLOMACY* (1956); DOUGLAS A. IRWIN, PETROS C. MAVROIDIS & ALAN O. SYKES, *THE GENESIS OF THE GATT* (reprt. 2009); JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969); CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* (1949); THOMAS W. ZEILER, *FREE TRADE, FREE WORLD: THE ADVENT OF THE GATT* (1999).

9. The U.S. push for an end to discriminatory trade rules should not be understood to mean that the United States was unaware of the special issues posed by developing states. Rather, the U.S. argued that the needs of developing states should be addressed in other fora, such as the United Nations and World Bank. HUDEC, *supra* note 1, at 28–29.

10. *Id.* at 28.

11. *Id.* at 29.

12. *Id.*

13. *Id.*

14. *Id.* at 30.

grew out of their colonial experience, in which they saw colonial powers attempt to maximize economic gains by controlling trade and suppressing economic competition.<sup>15</sup> In addition, developing states were acutely aware of developed nations' protectionist tendencies, such as the U.S. enactment of Smoot-Hawley tariffs.<sup>16</sup>

Initiating a pattern that would recur throughout GATT's history, no single party's view ultimately prevailed in the negotiations, and the discussions "ended, as they had begun, with no basic consensus on the trade-policy rules that should apply to developing countries."<sup>17</sup> As a result, the original GATT contained many terms that reflected parts of various parties' positions. Thus the text contained several provisions developing states favored, including clauses permitting trade restrictions to protect infant industries and for balance-of-payments purposes.<sup>18</sup> However, the original GATT did not adopt the principle of preferential access to developed states' markets that developing states sought.

Hudec perceptively notes that state practice during GATT's early years introduced—and eventually embedded—"fundamental . . . contradiction" into the trade regime.<sup>19</sup> For instance, the United States purported to insist on "reciprocity," that is, that any actions it took to liberalize access to U.S. markets should be paid for—or reciprocated—by reductions in trade barriers by other states. Hudec argues that the United States' "fixation with reciprocity" reflected the country's mercantilist view of international trade.<sup>20</sup> The implicit theory underlying this view is that policies that increase exports are desirable while those that increase imports are undesirable; hence states offer to make "concessions" in lowering their own trade barriers to obtain similar "concessions" from trading partners.<sup>21</sup> Of course, if reducing one's own trade barriers is understood to be a costly "concession," then it follows that maintaining (or raising) barriers will be understood as a benefit. Hudec argues that the United States' mercantile

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15. HUDEC, *supra* note 1, at 30.

16. *Id.*

17. *Id.* at 31.

18. *Id.* at 31–32.

19. *See id.* at 34 (identifying the contradictory nature of developed states demanding trade liberalization policies *and* "payment").

20. *Id.*

21. *Id.*

approach to trade policy implicitly legitimated developing state demands for differential treatment.<sup>22</sup> Accordingly, the United States in effect shifted the basis for all future debate from “whether” preferential treatment was appropriate to “how much” assistance to give: “Once it had been conceded, as a matter of principle, that legal freedom [from GATT disciplines] constitutes ‘help’ to developing states, the future was virtually fixed.”<sup>23</sup>

Developing Countries proceeds to detail that future. Hudec notes that, during GATT’s first decade, trading nations learned that once a negotiation begins, all parties have to be prepared to “give” something, and that “the easiest concession [for developed states] to ‘give’ is a little more legal freedom.”<sup>24</sup> Hudec demonstrates that, by 1955, GATT documents reflected a “fuller and now almost enthusiastic endorsement of the idea that legal freedom ‘helps’ developing countries.”<sup>25</sup> Consequently, “[t]he declining rigor of GATT legal discipline towards developing countries produced a rather curious legal policy. The substance withered, but the form remained.”<sup>26</sup>

In 1959, an influential GATT report directed attention to the link between disappointing developing state export earnings and developed state trade barriers.<sup>27</sup> As a result, developing countries began to focus less on securing exceptions for their own policies and more on obtaining preferential access to developed state markets. Hudec’s account of the contentious and extended debates over the extension of preferences to developing states over the next several decades is, in many respects, a story of form without substance. Time and again, richer nations agreed to texts that seemed to promise preferential treatment to developing states, but these instruments often said less than they appeared to, and frequently delivered less than they promised.

By the 1960s, developing states were organizing to advance a collective voice in trade policy, and successfully pushed for the establishment of the United Nations Conference on Trade

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22. HUDEC, *supra* note 1, at 35.

23. *Id.*

24. *Id.* at 43.

25. *Id.* at 42–43.

26. *Id.* at 44.

27. *See id.* at 43–44 (noting how developing countries were using more balance-of-payments restrictions in spite of substantial economic growth (in absolute terms)).

and Development (UNCTAD) in 1964 as a counterweight or alternative to GATT.<sup>28</sup> Developments at UNCTAD changed the political dynamics within GATT, and in late 1964 GATT parties finalized drafting new treaty language.<sup>29</sup> A new Part IV of GATT, entitled “Trade and Development,” came into effect in 1966.<sup>30</sup> The new language acknowledged that market access for exports from developing states has to be improved; however it did not prescribe the methods for doing so.<sup>31</sup> Significantly, all of the new language in Part IV was carefully worded not to impose new legal obligations on the developed contracting parties.<sup>32</sup> Nevertheless, Part IV can be seen as a formal institutional acknowledgment that action was necessary to increase developing state access to developed state markets.

Preferences were debated at a 1968 UNCTAD meeting in India, and in 1970 UNCTAD adopted “Agreed Conclusions” regarding the establishment of a “Generalized System of Preferences.”<sup>33</sup> Since preferential tariff treatment for developing state goods would violate GATT’s most favored nation provision, in 1971 GATT members agreed to a ten-year waiver permitting—but not requiring—states to grant preferential tariff treatment to developing state goods.<sup>34</sup> In 1979, GATT parties removed the waiver’s time limits through adoption of a decision commonly known as the “Enabling Clause,”<sup>35</sup> which authorizes certain forms of preferential

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28. G.A. Res. 1785, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc A/5217, at 14 (Dec. 8, 1962).

29. See HUDEC, *supra* note 1, at 64 (noting GATT’s reinvigorated commitment to the interests of developing states).

30. *Id.* at 66.

31. See *id.* at 64 (describing how Part IV—from a technical point of view—“added nothing to the existing legal relationship between developed and developing countries.”).

32. See, e.g., *id.* (indicating how new article XXXVII, entitled “Commitments,” requires developed states to take certain actions “to the fullest extent possible – that is, except when compelling reasons, which may include legal reasons, make it impossible” to do so).

33. See *id.* at 69 (clarifying that “developed countries would grant tariff preferences to all (or almost all) developing countries, without reciprocity, on all (or almost all) products.”).

34. *Id.* at 70.

35. The formal name for the “Enabling Clause” is the “Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.” Adopted in November 1979, it includes a number of provisions permitting GATT contracting parties to grant differential and more favorable treatment to developing states, notwithstanding the non-discrimination requirement found in GATT Article I. It thus authorizes, most notably, trade concessions granted to developing

treatment. Hudec notes that although this text used language that appeared to be “legalistic” and thus produced the “illusion of greater commitment,” it actually “contained no definable legal obligations.”<sup>36</sup> Therefore, this much-debated text “added nothing to the existing legal relationship between developed and developing countries.”<sup>37</sup>

The story of the Enabling Clause encapsulates, in many respects, the politics of the debate over preferences at the GATT. Over time, developing states repeatedly demanded new and different forms of preferential treatment, and developed states would, for a time, resist these pleas. Predictably, a compromise would result that recognized in principle the legitimacy of preferential treatment, but that imposed little by way of legal obligation and often produced little economic effect. Hudec summarizes the “pattern” that emerged:

... [A]s experience with this tactic [of demanding preferential treatment] grew, it could be seen that results would continue to be very slow in coming. . . . The absence of any real progress led to a continual search for additional forms of activity that would give the appearance of movement. The GATT became very skillful in creating such appearances, primarily by erecting new procedural mountains and then climbing them. The GATT's work evolved into a slow and patient form of bureaucratic slogging – unending meetings, detailed studies of trade flows and trade barriers and repeated declarations in increasingly urgent but never-quite-binding language.<sup>38</sup>

History does not proceed along a straight path, and developments subsequent to publication of the first edition of *Developing Countries* represent an important turn in the trajectory that Hudec outlines. The Uruguay Round, in particular, marked a significant shift with respect to the role and treatment of developing states in the trade system. First, developing states began to play a significant role in the negotiating process.<sup>39</sup> At the same time, many developing

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states under various Generalized System of Preference (GSP) programs. HUDEC, *supra* note 1, at 64, 85.

36. *Id.* at 64.

37. *Id.*

38. *Id.* at 55.

39. See generally AMRITA NARLIKAR, INTERNATIONAL TRADE AND DEVELOPING COUNTRIES: BARGAINING COALITIONS IN THE GATT & WTO (2003) (providing a detailed study of the bargaining coalitions strategically formed by developing states in the GATT and WTO). It should be noted that although the Uruguay Round marked an increase in participation, following the conclusion of the Round many developing states raised significant concerns about the nature and quality of their participation. For an analysis, see Jeffrey L. Dunoff, *The WTO in Transition: Of Constituents, Competence*



states were engaged in a process of significant economic reform. For instance, the fall of the Berlin Wall and the emergence of the Washington Consensus—not to mention decades of disappointing economic results—prompted many developing states to embrace trade liberalization and privatization as mechanisms to spark economic growth.<sup>40</sup> Thus, in the Uruguay Round agreements, developing states accepted obligations to reduce their own trade barriers, including bindings on a substantial number of tariff lines.

More importantly, the Round's "single undertaking" produced a largely uniform system of rights and obligations.<sup>41</sup> Hence, WTO texts reduced the scope of special exceptions from GATT disciplines available to developing states. Moreover, just as the number and scope of legal obligations increased, the new Dispute Settlement Understanding rendered these obligations judicially enforceable.<sup>42</sup> Many argue that, taken together, these changes reduced the policy flexibility of developing states.

Yet, the concept of "special and differential" treatment for developing states did not disappear entirely in the Uruguay Round. While developing states assumed the same obligations as developed states, in many cases they were granted additional time to implement these obligations.<sup>43</sup> Therefore, the new agreements represented an important shift from a nonreciprocal approach to obligations to a nonreciprocal approach to implementation. However, in the post-Uruguay Round period, developing states experienced capacity constraints and other obstacles that rendered implementation difficult or disproportionately costly.<sup>44</sup> Developing states

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*and Coherence*, 33 GEO. WASH. INT'L L. REV. 979, 980–81 (2001).

40. See John Williamson, *Williamson Versus the Washington Consensus?*, THE GROWTH BLOG (Oct. 12, 2008), <http://www.growthcommissionblog.org/content/williamson-versus-the-washington-consensus> (identifying the need for macroeconomic stability, integration into the world economy, and the actual use of the market as the principal values that motivated the creation of the Washington consensus).

41. See Dunoff, *supra* note 39, at 1007 (clarifying that all parties at the Round must participate in all negotiated agreements as a "single undertaking").

42. *Id.* at 1010.

43. See generally J. Michael Finger & Philip Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge*, 23 WORLD ECON. 511 (2000) (discussing some of the problems developing states faced when they attempted to implement the Round's obligations).

44. See *id.* at 511 (categorizing the obligations as investment decisions rather than policy commitments).

consequently demanded greater amounts of time to meet certain obligations, and for more useful information about relevant requirements.

In 2001 a new round of trade negotiations was launched in Doha, Qatar. The Doha Ministerial Declaration reaffirmed the importance of special and differential treatment of developing states.<sup>45</sup> It called for a review of provisions affording such treatment, with the goal of “making them more precise, effective and operational.”<sup>46</sup> However, the on-again, off-again talks seem to have run aground; in particular, the negotiators’ efforts to improve provisions regarding treatment of developing states have, to date, borne little fruit.<sup>47</sup>

Significantly, in recent years much attention has shifted away from the debate over discriminatory trade policies, largely because of a perception that these policies have enjoyed only moderate success (as discussed in more detail below). An emerging consensus argues that access to developed state markets is necessary but not sufficient, as supply-side capacity and trade-related infrastructure constraints inhibit the ability of developing states to realize the potential benefits of preference programs. Hence, attention has shifted to identifying ways to provide more direct assistance to improve the competitiveness of developing state firms. Such considerations have produced an “Aid for Trade” agenda that has attracted substantial diplomatic and academic energies.<sup>48</sup>

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45. See World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1 ¶ 13 (emphasizing that “special and differential treatment for developing countries shall be an integral part of all elements of the negotiations . . .”).

46. *Id.* ¶ 44.

47. As this is written (in fall 2010), the fate of these negotiations is uncertain, although it is difficult to be optimistic. For analysis of some of the difficulties impeding progress, see Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 TEX. INT'L L.J. 1 (2009); Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 TEX. INT'L L.J. 573 (2009).

48. For a sampling of developed state plans, see, for example, *Conclusions of the Council and of the Representatives of the Gov't of the Member States Meeting Within the Council on EU Strategy on Aid for Trade: Enhancing EU Support for Trade-Related Needs in Developing Countries*, 14470/07 (Oct 29, 2007), available at <http://register.consilium.europa.eu/pdf/en/07/st14/st14470.en07.pdf>; Dep't for Int'l Development [DFID], *Sharing the Benefits of Trade, Strategy 2008–12* (2008); SDC, UNITED SWISS DEVELOPMENT COOPERATION STRATEGY—MESSAGE ON COUNTRIES OF THE SOUTH 2009–12 (2008), available at <http://webarchive.nationalarchives.gov.uk/+http://www.dfid.gov.uk/Media-Room/News-Stories/2008/UK-launches-Aid-for-Trade-Strategy/>. Furthermore, international bodies have produced a number of reports. See,

This paper shall discuss the shift toward “Aid for Trade” and its relationship to some of the ideas in *Developing Countries*, in part III below.

Developing Countries’ account of the history of debates over preferences is nothing if not sobering. As Hudec tells the story, trading nations devoted substantial diplomatic attention over many years to the treatment of developing states. However, what these long-standing efforts generated was an inconclusive political debate that in turn produced ambiguous legal texts. The crucial question, of course, is whether preference programs are effective. This paper shall demonstrate there are various ways to approach this question.

### III. DO PREFERENCE PROGRAMS WORK?

The second part of *Developing Countries* transitions from historical narrative to evaluation: What is the impact of special and differential trade policies? Does the granting of preferential access to developed state markets boost developing state economies? Or, as Hudec frames the inquiry, “[i]s the current GATT legal policy [of providing preferences] in the best interest of the developing countries themselves, or would developing countries achieve better results under a legal policy based on . . . reciprocity and non-discrimination?”<sup>49</sup>

These sound like empirical questions, and a substantial amount of econometric literature purports to provide empirical answers to these questions. However, *Developing Countries* does not draw appreciably upon econometric literature.<sup>50</sup> To be

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*e.g.*, NATIONS DEVELOPMENT PROGRAMME, AID FOR TRADE AND HUMAN DEVELOPMENT, available at <http://europeandcis.undp.org/home/show/96DEA4F0-F203-1EE9-B4C334E151D151DF>; WORLD TRADE ORGANIZATION & ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, AID FOR TRADE AT A GLANCE 2009: MAINTAINING MOMENTUM (2009). The World Economic Forum produces an annual assessment of obstacles to trade, with a focus on market access, border administration, transport and telecommunications infrastructure, and general business environment. See WORLD ECONOMIC FORUM, THE GLOBAL ENABLING TRADE REPORT 2010 (2010), available at [http://www3.weforum.org/docs/WEF\\_GlobalEnablingTrade\\_Report\\_2010.pdf](http://www3.weforum.org/docs/WEF_GlobalEnablingTrade_Report_2010.pdf). A sampling of the academic commentary can be found in AID FOR TRADE AND DEVELOPMENT (Dominique Njinkeu & Hugo Cameron eds., 2007).

49. HUDEC, *supra* note 1, at 115.

50. Indeed, the text explicitly disclaims any intent to engage any empirical literature, stating that “[i]t is not the purpose of this study to examine it [empirical literature] in any depth.” *Id.* at 116. Thus, although the text references the empirical literature from time to time, it does not analyze this literature in any sustained fashion.

sure, much of the literature has been published after *Developing Countries* was first released. Still, the decision not to survey the available empirical literature is puzzling given that all relevant actors in the preferences debate agree on the goal of providing greater economic benefits to developing states; the central point of contention is whether preferences in fact advance this objective.<sup>51</sup>

Rather than undertake an empirical evaluation, Hudec makes an unexpected analytical move; part II of *Developing Countries* evaluates the effects of preferences through a political economy lens. In particular, Hudec examines whether developed states' preference programs make it more or less difficult for developing states to pursue liberal economic policies. Since both the econometric and the political economy approaches can enrich our understanding of the effects of preferences, this paper briefly reviews the empirical literature on preferences that *Developing Countries* does not address, and then summarizes Hudec's political economy arguments. This paper will demonstrate that each line of analysis provides ample reason to doubt the utility of preferential treatment.

#### A. THE ECONOMIC IMPACT OF PREFERENCES

Today, all developed states—and a number of developing states—have adopted GSP programs that grant preferential tariff treatment to goods from developing and least developed states.<sup>52</sup> In addition, several states, including prominently the United States and the EU, have enacted preferential tariff programs targeted at specific groups of developing states.<sup>53</sup>

The commonplace implementation of GSP programs has

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51. *See id.* at 132–34 (focusing on “the extent to which the theoretical welfare gains [from preference policies] are likely to be achieved in practice, the actual cost of achieving those gains and whether the gains are likely to outweigh the costs.”).

52. Under the United States' GSP program, for example, 131 beneficiary developing states, including 43 least-developed states, are eligible to export approximately 4,800 types of products duty free into the United States. *See Generalized System of Preferences (GSP)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp> (last visited Feb. 22, 2011); OFFICE OF THE U.S. TRADE REPRESENTATIVE, U.S. GENERALIZED SYSTEM OF PREFERENCES GUIDEBOOK (2010), *available at* [http://www.ustr.gov/webfm\\_send/1597](http://www.ustr.gov/webfm_send/1597).

53. *See, e.g.*, Caribbean Basin Economic Recovery Act 19 U.S.C. § 2701 (1983); Andean Trade Preference Act 19 U.S.C. § 3201 (1991); African Growth and Opportunity Act 19 U.S.C. § 3701 (2000).

inspired a substantial amount of literature examining the empirical effects of preference programs. Although no consensus exists in this large body of scholarship, it is fair to say that much of this literature is deeply skeptical about the economic and development effects of preferences. Specifically, the weight of the econometric and simulation analysis undertaken to date suggests that preference programs are underinclusive and underutilized, that the benefits generated by preference programs are limited and narrowly focused, and that preferences have contributed disappointingly little to economic development in beneficiary states.<sup>54</sup> Since the various limitations of preference programs have been ably and thoroughly discussed elsewhere, a brief summation of the arguments is presented below.

One factor that significantly reduces the value of preferential treatment is the wide-spread exclusion of goods in developed state preference programs from sectors in which developing states enjoy a comparative advantage.<sup>55</sup> Particularly controversial examples of limitations on economically significant goods include the strict limitations on imports of sugar from the United States' Caribbean Basin Initiative (CBI),<sup>56</sup> the exclusion of tuna, leather and footwear products, petroleum products and apparel from the United States' Andean Trade Preferences Act,<sup>57</sup> and highly complex rules regarding apparel found in the United States' African Growth and Opportunity Act.<sup>58</sup> Conversely, developing state

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54. See KIMBERLY ANN ELLIOTT, *OPEN MARKETS FOR THE POOREST COUNTRIES: TRADE PREFERENCES THAT WORK* (2010); Caglar Ozden & Eric Reinhardt, *Unilateral Preference Programs: The Evidence*, in *ECONOMIC DEVELOPMENT AND MULTILATERAL TRADE COOPERATION* 189 (Simon J. Evenett & Bernard M. Hoekman eds., 2006); Caglar Ozden & Eric Reinhardt, *The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976–2000*, 78 J. DEV. ECON. 1 (2005).

55. See, e.g., *Global Trade Liberalization and the Developing Countries*, INT'L MONETARY FUND (Nov. 2001), <http://www.imf.org/external/np/exr/ib/2001/110801.htm> (describing how developing states often enjoy a comparative advantage in labor-intensive industries and agricultural products, yet developed states often exclude those products from preference programs).

56. 19 U.S.C. § 2703(d). The Caribbean Basin Trade Partnership Act is an extension of CBI; notably the bill extends eligibility for preferential tariff treatment to a number of sensitive products, including apparel and petroleum products. *Id.* at § 2703(b)(4).

57. 19 U.S.C. § 3201 (b)(1)–(2). As amended by the Andean Trade Promotion and Drug Eradication Program, preferences were extended to these goods, subject to restrictive rules of origin. *Id.* at § 3202(d)(11).

58. See Raj Bhala, *The Limits of American Generosity*, 29 FORDHAM INT'L

goods often receive preferential trade treatment in markets where they do not compete.<sup>59</sup>

As states successfully export certain goods, or are dropped entirely from preferential programs, they may be left with overcapacity and a production structure that does not reflect comparative advantage.<sup>60</sup> Moreover, the U.S. and EU GSP programs also contain safeguard clauses that permit preferences to be suspended for certain products or states if those imports cause real or potential injury to domestic producers.<sup>61</sup>

Further, many preference programs condition the grant of preferences. For example, the 1984 amendments to the United States' GSP program authorized the United States Trade Representative to condition the grant of preferences on, *inter alia*, the beneficiary state's intellectual property and labor rights protections.<sup>62</sup> In 1994, the EU added provisions to its GSP program authorizing the withdrawal of trade preferences contingent on a beneficiary state's labor policies and,<sup>63</sup> in 1998, the EU added special preferences conditioned on labor, environmental, and anti-drug trafficking policies.<sup>64</sup> Developed states have repeatedly invoked such conditions to exclude, or threaten to exclude, certain developing states from preferential

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L.J. 299, 382 (2006) (discussing the inherent irony in the African Growth and Opportunity Act as the added complexities of the rules create disincentives to obtain the Act's benefits).

59. Celine Carrere & Jaime de Melo, *The Doha Round and Market Access for LDCs: Scenarios for the EU and US Markets*, 44 J. WORLD TRADE 251, 268 (2010).

60. See Alexander Keck & Patrick Low, *Special and Differential Treatment in the WTO: Why, When and How?*, in ECONOMIC DEVELOPMENT AND MULTILATERAL TRADE COOPERATION 147, 157–159 (Simon J. Evenett & Bernard M. Hoekman eds., 2006).

61. VIVIAN C. JONES, CONG. RESEARCH SERV., RL 33663, GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE 8 (2008).

62. GSP Renewal Act of 1984, Pub. L. No. 98–573, § 503, 98 Stat. 2948, 3019 (1984).

63. 2001 O.J. (C311) 47.

64. DIRECTORATE-GENERAL FOR TRADE, EUROPEAN COMMISSION, THE EUROPEAN UNION'S GENERALIZED SYSTEM OF PREFERENCES 6–9 (2004), available at [http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc\\_116448.pdf](http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc_116448.pdf). India challenged the EU's special tariff program in European Communities. See generally Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004) (providing India's arguments against EU's trade preferences). For an analysis, see Jeffrey L. Dunoff, *When—and Why—Do Hard Cases Make Bad Law? The GSP Dispute*, in WTO LAW AND DEVELOPING COUNTRIES 283 (George A. Bermann & Petros C. Mavroidis eds., 2007).

tariff treatment. For example, the Central African Republic, Eritrea, Cote d'Ivoire and Mauritania were all denied preferential treatment under the AGOA statute following political events such as coups and failures to implement democratic reforms.<sup>65</sup>

In addition, most preference programs are legislated to last a certain number of years then expire, and must then be reauthorized. Legislative reauthorization is, of course, never guaranteed, and has at times occurred on a retroactive basis following expiration of the program. For example, the United States's GSP program has been renewed a number of times since its inception in 1974; at least eight of these legislative renewals have been after periods of expiration ranging in length from two to fifteen months. Most recently, the GSP program expired on December 31, 2010, and as of early 2011 it was unclear whether, and when, it will be renewed. Similarly, the Andean preference program expired in December 2001; it was renewed in late 2002 and several times thereafter. Most recently, in 2009, Congress extended the program until December 31, 2010.<sup>66</sup>

Both individually and in the aggregate, these statutorily-mandated features of preference programs introduce substantial commercial uncertainties, and hence lowered the incentives to invest in eligible sectors. Simply put, investors and importing firms attracted by preferences have reduced incentives to invest in or source from beneficiary states when both the legal status and longevity of the preferences is in doubt.

A number of other factors tend to reduce developing states' ability to take advantage of the preferences that are potentially available. Perhaps most importantly, complex rules of origin and relatively high administrative costs result in significant underutilization of available preferences.<sup>67</sup> In 1999, for

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65. *Compare* General Country Eligibility Provisions, AGAO.GOV, <http://www.agoa.gov/AGOAEligibility/index.asp> (last visited Feb. 22, 2011), with DANIELLE LANGTON, CONG. RESEARCH SERV., RL 31772 U.S. TRADE AND INVESTMENT RELATIONSHIP WITH SUB-SAHARAN AFRICA: THE AFRICAN GROWTH AND OPPORTUNITY ACT AND BEYOND 25 (2008).

66. Press Release, USTR, USTR Ron Kirk Welcomes Extension of GSP and ATPA Programs (Dec. 28, 2009).

67. Rules of origin set the conditions a product must satisfy to be considered as originating from a beneficiary state. For a classic piece on origin in preference programs and their costs, see JAN HERIN, RULES OF ORIGIN AND DIFFERENCES BETWEEN TARIFF LEVELS IN EFTA AND IN THE EC, European

example, just one third of EU imports eligible for preferences actually entered the EU with a reduced tariff, largely due to complex and restrictive rules of origin;<sup>68</sup> during the same year, excluding minerals, only four percent of eligible U.S. imports from developing countries received preferential treatment.<sup>69</sup> A more recent study found that the share of eligible exports to the EU that requested GSP treatment was only six percent.<sup>70</sup> Similarly, for the United State's GSP program, the utilization rate of many tariff lines is zero, and the average for all lines is 25%.<sup>71</sup> Conversely, liberalization of restrictive rules of origin can produce significant results, as changes to AGOA and Canada's GSP program demonstrate.<sup>72</sup>

Finally, the gains that result from preferential tariff programs tend to be narrowly concentrated.<sup>73</sup> Consider, for

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Free Trade Association Occasional Paper No. 13 (1986). For more recent research, see U.S. INTERNATIONAL TRADE COMMISSION, 3906, *THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS: FIFTH UPDATE 2007* (2007); Patricia Augier, Michael Gasiorek & Charles Lai Tong, *The Impact of Rules of Origin on Trade Flows*, 20 *ECON. POL'Y* 567 (2005).

68. Paul Brenton & Miriam Manchin, *Making EU Trade Agreements Work: The Role of Rules of Origin*, 26 *WORLD ECON.* 755, 757 (2003).

69. *Id.*

70. Miriam Manchin, *Preference Utilisation and Tariff Reduction in EU Import from ACP Countries*, 29 *WORLD ECON.* 1243, 1247 (2006). Manchin also reports that ACP states utilized Cotonou preferences (which are generally better than GSP preferences) close to 50% of the time. *Id.* at 1246. Another study found that utilization rates for preferences granted by Canada, the EU, Japan, and the U.S. are 61, 31, 46 and 67% respectively. Sub-Committee on Least-Developed Countries, *Market Access Issues Related to Products of Export Interest Originating from Least-Developed Countries*, 14, *WT/COMTD/LDC/W/31 TN/MA/S/11* (Sept. 29, 2003).

71. Daniel Lederman & Çağlar Özden, *U.S. Trade Preferences: All Are Not Created Equal* 3 (Central Bank of Chile, Working Paper No. 280, 2004).

72. For background reading on some of the effects of liberalization, see Aaditya Mattoo, Devesh Roy & Arvind Subramanian, *The Africa Growth and Opportunity Act and its Rules of Origin: Generosity Undermined?*, 26 *WORLD ECON.* 829 (2003); Denis Audet, *Smooth as Silk? A First Look at the Post MFA Textiles and Clothing Landscape*, 10 *J. INT'L ECON. L.* 267 (2007); José Anson, Marc Bacchetta & Matthias Helble, *Using Preferences to Promote LDC Exports: A Canadian Success Story?*, *J. WORLD TRADE* 285 (2009).

73. For background reading, see UNCTAD, *Trade Preferences for LDCs: An Early Assessment of Benefits and Possible Improvements*, UNCTAD/ITCD/TSB/2003/8 (2003). See also Drusilla K. Brown, *General Equilibrium Effects of the U.S. Generalized System of Preferences*, 54 *S. ECON. J.* 27 (1987). Note that some strands of economic theory suggest that this concentration of benefits, or "lumpiness," should not be a surprise as in a competitive global environment, comparative advantage may be narrowly concentrated in a few tasks. See, e.g., Ricardo Hausmann & Dani Rodrik, *Economic Development as Self-Discovery*, 72 *J. DEV. ECON.* 603 (2003) (noting



example, the United State's AGOA program. In 2003, approximately 33 Sub-Saharan African states were eligible for preferential treatment under AGOA. However, three states—Nigeria, South Africa and Gabon—accounted for over 86% of total AGOA imports.<sup>74</sup> Benefits were similarly highly concentrated in a few economic sectors. In 2003, energy-related products represented 79.5 per cent of U.S. purchases from sub-Saharan states; the second largest sector, textiles and apparel, accounted for 8.5 per cent of US imports.<sup>75</sup> Within the apparel sector, the seven sub-Saharan states that accounted for 99% of exports to the United States before AGOA also captured 99% of exports after AGOA was enacted.<sup>76</sup> Similar results were obtained with other preferential programs;<sup>77</sup> as a general matter “the top ten beneficiaries . . . generally account for 80–90 percent of total imports . . . receiving preferences under any individual scheme.”<sup>78</sup> Even more troubling, emerging literature suggests that a substantial share of the “benefits” generated by preferential market access may accrue to importers in developed states, rather than exporting firms in the beneficiary state.<sup>79</sup>

Taken together, the features identified above have significantly reduced the economic and developmental impacts of preferential programs. Trade effects are historically difficult to estimate accurately, but some conclusions can be drawn from

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narrow specialization of many countries).

74. 5 USITC U.S. TRADE AND INVESTMENT WITH SUB-SAHARAN AFR. 2–4 (2004).

75. *Id.* at iii.

76. Marcelo Olarreaga and Çalgar Özden, *AGOA and Apparel: Who Captures the Tariff Rent in the Presence of Preferential Market Access?* 28 *WORLD ECON.* 63, 67 (2005). On the other hand, these states enjoyed dramatic increases in their exports to the U.S. following AGOA's enactment. *Id.*

77. See, e.g., Sangeeta Khorana, *Do Trade Preferences Enhance Market Access for Developing Countries' Agricultural Products? Evidence from Switzerland*, 41 *J. WORLD TRADE* 1073 (2007) (discussing the impact of trade preferences on the agriculture sector).

78. Keck & Low, *supra* note 60, at 158.

79. See, e.g., Bernard Hoekman & Susan Prowse, *Economic Policy Responses to Preference Erosion: From Trade as Aid to Aid for Trade* 6 (World Bank Policy Research, Working Paper No. 3721, 2005), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2005/09/19/000016406\\_20050919093149/Rendered/PDF/wps3721.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2005/09/19/000016406_20050919093149/Rendered/PDF/wps3721.pdf). (“In the case of market power, the result is a simple redistribution of the benefits of preferences: rents are transferred to importers.”); Olarreaga & Özden, *supra* note 76.

developments since 1960. Firstly, there is little doubt that developing states, especially those in East Asia, which were granted the fewest preferences experienced the greatest growth. Conversely, states granted the most preferences, like those of sub-Saharan Africa, have not significantly diversified their exports or substantially increased their per capita income despite being.<sup>80</sup> More broadly, many of the empirical studies that calculate the aggregate effects of preference programs suggest that they have produced at best a “modest” increase in beneficiary state exports, with some of these gains resulting from trade diversion, rather than trade creation.<sup>81</sup>

Somewhat counterintuitively, a number of more recent empirical studies find that GSP is associated with negative economic effects. For example, Özden and Reinhardt find that participating in the U.S. GSP is not associated with an increase in trade.<sup>82</sup> A more recent study found that in the absence of GATT/WTO membership or a PTA, preference programs increase trade between states by 41%; however, if states have one of these other trade relationships, then the granting of preferences appears to benefit the importing state and harm the exporting state.<sup>83</sup> Similar counterintuitive results were

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80. Joseph Francois, Bernard Hoekman, & Miriam Manchin, *Preference Erosion and Multilateral Trade Liberalization*, 20 WORLD BANK ECON. REV. 197, 197–198 (2006).

81. See generally André Sapir & Lars Lundberg, *The U.S. Generalized System of Preferences and Its Impacts*, in THE STRUCTURE AND EVOLUTION OF RECENT U.S. TRADE POLICY 195 (Robert E. Baldwin & Anne O. Krueger eds., 1984) (examining the complexities of GSP effects on beneficiary countries); Craig R. MacPhee & Victor Iwuagwu Oguledo, *The Trade Effects of the U.S. Generalized System of Preferences*, 19 ATLANTIC ECON. J., Dec. 1991, at 19 (examining the weak impact of the U.S. GSP on LDCs); Drusilla K. Brown, *Trade and Welfare Effects of the European Schemes of the Generalized System of Preferences*, 37 ECON. DEV. & CULTURAL CHANGE 757 (1989) (examining GSP effects on importers and exporters); Ingo Borchert, *Trade Diversion Under Selective Preferential Market Access*, 42 CANADIAN J. ECON. 1390 (2009) (examining the European Community’s GSP program and its “trade-distorting effects”); John Whalley, *Non-Discriminatory Discrimination: Special and Differential Treatment Under GATT for Developing Countries*, 100 ECON. J. 1318 (1990) (examining the effects of special and differential treatment on trade performance).

82. Çalgar Özden & Eric Reinhardt, *The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976–2000*, 78 J. DEV. ECON. 1, 2 (2005).

83. Judith L. Goldstein, Douglas Rivers & Michael Tomz, *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 INT’L ORG. Winter 2007 at 37, 63. The authors characterize this finding as “implausible” and as a “mystery left to be solved.”

reached in a recent study using quite different data and econometric techniques.<sup>84</sup> Hence, the general consensus is that the economic effects of preference programs have been, at best, disappointing; a more pessimistic account concluded that “[b]eyond some relative success stories, the picture is dismal.”<sup>85</sup>

To be sure, the empirical studies summarized above should not be understood as conclusive arguments against the utility of preference programs. First, empirically identifying the effects of preferences is extraordinarily difficult, as researchers must attempt to separate out the specific impacts of preference programs from multiple other factors.<sup>86</sup> In addition, the studies do not always carefully separate the effects of different preference programs; for example, studies that focus the effect of GSP programs may be seriously misleading, as over time some of these programs have been supplemented by a variety of other programs that afford more preferential treatment, such as CBI, AGOA and EBA.<sup>87</sup> And the fact that the benefits of preferential programs are narrowly concentrated may be less a criticism of the design of these programs than a reflection of how comparative advantage operates in a globalized economy, given the fragmentation of global production chains.<sup>88</sup> Finally, it bears repeating that the literature here is vast, and no consensus on the effects of preferences emerges. While a majority of published studies suggest that preferences have limited—or even negative—economic effects, other studies,

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84. See, e.g., Bernhard Herz & Marco Wagner, *Do the World Trade Organization and the Generalized System of Preferences Foster Bilateral Trade?* 10 (Universität Bayreuth, Diskussionspapier 01–07, 2007) (“We find a significantly negative effect of the Generalized System of Preferences of around -16% on bilateral trade . . .”).

85. UNCTAD, *supra* note 73, at X.

86. For example, it is difficult for empirical analysis to address the so-called endogeneity effect. Imagine that the United States extended preferential tariff treatment to goods from a particular developing state just as that state was emerging from a protracted civil war. It would be quite difficult empirically to determine how much of a hypothetical boost in exports would be related to reduced tariffs and how much to the end of the fighting.

87. For example, a more useful, albeit more complex, approach is to look at the size, utilization and value of all non-reciprocal trade preference programs. For one such effort, see Judith M. Dean & John Wainio, *Quantifying the Value of U.S. Tariff Preferences for Developing Countries*, in *TRADE PREFERENCE EROSION: MEASUREMENT AND POLICY RESPONSE* 29 (Bernard Hoekman, Will Martin, Carlos A. Primo Braga eds., 2009).

88. See, e.g., Anthony Venables, *Rethinking Economic Growth in a Globalizing World: An Economic Geography Lens*, in *URBANIZATION AND GROWTH* 47, 51 (Michael Spence, Patricia Clarke Annez & Robert M. Buckley eds., 2008) (discussing fragmentation as a part of the globalization process).

using different assumptions and methodologies, find more positive results.<sup>89</sup>

Perhaps most importantly, the relatively disappointing economic results of preference programs to date can be understood more as an argument for their reform than as an argument for their elimination. That is, the econometric analysis summarized above can be understood as a powerful critique of preference programs as they are currently designed and implemented, as opposed to a critique of their underlying logic or purpose. Empirical research suggests that liberalizing product coverage and rules of origin, for example, can substantially increase developing state exports.<sup>90</sup> Similarly, where preferences are stable and secure, trade and investment have increased.<sup>91</sup> Moreover, recent scholarship suggests a number of ways that preference programs can be reformed to provide greater economic benefits to developing states.<sup>92</sup>

#### B. A POLITICAL ECONOMY ANALYSIS

As noted above, Developing Countries does not attempt to review or analyze the substantial empirical literature on preferences. Nevertheless, Hudec's conclusions are broadly consistent with those reached in the empirical literature:

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89. See, e.g., CHRISTOPHER STEVENS & JANE KENNAN, COMPARATIVE STUDY OF G8 PREFERENTIAL ACCESS SCHEMES FOR AFRICA: REPORT ON A DFID-COMMISSIONED STUDY 125 (2004) (providing a study of preferential schemes and finding that "the system works . . ."); Garth Frazer & Johannes Van Biesebroeck, *Trade Growth under the African Growth and Opportunity Act 2* (Univ. of Toronto Dep't of Econ., Working Paper 289, 2007) (finding that AGAO has had "a large and robust impact" on African exports to the U.S.).

90. Paul Collier & Anthony J. Venables, *Rethinking Trade Preferences: How Africa Can Diversify its Exports*, 14 WORLD ECON: GLOBAL TRADE POL'Y 2007 137, 145–152 (David Greenway ed., 2007) (discussing increase in exports from Africa to the U.S. when the U.S. liberalized rules of origin).

91. See Judith M. Dean, *Do Preferential Trade Agreements Promote Growth? An Evaluation of the Caribbean Basin Economic Recovery Act* (USITC Office of Econ., Working Paper No. 2002–07–A, 2002) (finding the CBERA has trade-induced-investment effects).

92. For recent and thoughtful efforts to prompt a debate over reform along these lines, see PETER KLEEN & SHELIA PAGE, SPECIAL AND DIFFERENTIAL TREATMENT OF DEVELOPING COUNTRIES IN THE WORLD TRADE ORGANIZATION (2005) available at <http://www.odi.org.uk/resources/download/2445.pdf>; T. Edemola Oyejide, *Special and Differential Treatment*, in DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK 504 (Bernard Hoekman, Aaditya Mattoo, & Philip English eds., 2002); Claire Melamed, *Doing "Development" at the World Trade Organization: The Doha Round and Special and Differential Treatment*, INST. DEV. STUD. BULL. April 2003, at 12; Keck & Low, *supra* note 60.

preferential treatment can be expected to provide, at best, marginal benefits to developing states, and may be counterproductive, particularly for developing states that wish to open their economies to the benefits of global trade.<sup>93</sup>

Hudec's skepticism about preferences is rooted in his understanding of the "practical realities" of GATT's impact on domestic policy-making.<sup>94</sup> Hudec explains that trade liberalization hurts some firms and individuals, and that these actors will generate a "normal, permanent and quite vigorous" opposition to trade liberalization.<sup>95</sup> Hence, governments will inevitably confront a "built-in political opposition to liberal trade policy."<sup>96</sup> This opposition to liberalization will be in more or less continuous conflict with the various forces that favor increased openness to trade, including parties with direct interests in lowering trade barriers, such as importers and consumers; those with more diffuse interests in the general conditions of international trade, such as financial intermediaries and foreign investors; and those committed to liberal economic policies for economic or political reasons.<sup>97</sup>

Hudec argues that the role of GATT obligations is to "augment the political power" of the broad, albeit diffuse, set of domestic interests that support trade liberalization.<sup>98</sup> The trade system does so by providing legal and policy arguments to government officials and others who seek to overcome the inevitable forces of protectionism<sup>99</sup> and by helping to mobilize

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93. In this respect, *Developing Countries* can be located within a larger literature that elaborates various critiques of preferential treatment that have been raised repeatedly in the policy literature. See, e.g., HARRY G. JOHNSON, *ECONOMIC POLICIES TOWARD LESS DEVELOPED COUNTRIES* (1967); Gardner Patterson, *Would Tariff Preferences Help Economic Development?*, 76 LLOYDS BANK REV. 18 (1965) (discussing the case for as well as against preferences and concluding that the costs may outweigh the benefits). For an influential contemporaneous report setting out the case in favor of preferences, see also U.N. Secretary-General, *Towards a New Trade Policy for Development, Report by the Secretary-General of the United Nations Conference on Trade and Development*, U.N. Doc. E/CONF.46/3 (1964), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N64/039/90/PDF/N6403990.pdf?OpenElement>.

94. HUDEC, *supra* note 1, at 116 ("[T]he dynamics of policies based on discrimination make it likely that preferential legal structures will eventually cause government to do more harm than good to the supposed beneficiaries of such discrimination.").

95. *Id.* at 140.

96. *Id.*

97. *Id.* at 141.

98. *Id.*

99. Hudec identifies four specific ways that GATT/WTO legal obligations

export-oriented groups to countervail the influence of import-sensitive constituencies. Thus Hudec employs, without using the terms, a “liberal” understanding of the determinants of state policy and a “second image reversed” model of how international law can empower or disempower various domestic constituencies.<sup>100</sup>

How do preferences change the political dynamics in developing states? Preference programs provide developing state exports with preferential access to developed state markets, without developing states having to “pay” for this increased access through tariff reductions.<sup>101</sup> This alters the political dynamic in developing states, as export interests will now have little incentive to lobby their governments to reduce tariffs. Hence, although protectionist interests will continue to lobby developing state governments, these governments will experience reduced pressure from those that favor liberal policies. These governments will therefore face fewer incentives to liberalize and will be more likely to pursue protectionist policies. As a result, Hudec concludes that developed state preference programs can “provid[e] no assistance [to the liberalization project] and [are] probably an active political impediment.”<sup>102</sup>

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can do so: (i) The desire to honor international obligations can be sufficient to drive government positions, as governments seek to avoid unlawful policies that can produce “unpleasant and damaging public controversy;” (ii) International obligations provide a useful public justification for decisions taken on other, including less popular, reasons; (iii) International legal norms “are a concise way of defining policy for government officials;” and (iv) International obligations signal to the public not to expect or rely upon trade-distorting measures. HUDEC, *supra* note 1, at 141–142.

100. For more on liberal theories of international law and international relations, see Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997); Anne-Marie Slaughter & Jose E. Alvarez, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. 240 (2000); Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717 (1995). For more on second image reversed theories of international law and international relations, see Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT'L ORG. 881 (1978); see also INTERNATIONALIZATION AND DOMESTIC POLITICS (Robert O. Keohane & Helen V. Milner eds., 1996); Xinyuan Dai, *Why Comply? The Domestic Constituency Mechanism*, 59 INT'L ORG. 363 (2005). For a recent effort to apply second-image reversed theory to decisions to comply with international legal norms, see Joel P. Trachtman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law*, 11 CHI. J. INT'L L. 127 (2010).

101. HUDEC, *supra* note 1, at 142 (discussing the reciprocity doctrine).

102. *Id.* at 147.

For developing states that wish to pursue interventionist policies on the grounds that under certain circumstances these policies enhance economic welfare,<sup>103</sup> the picture is a bit more nuanced. Here, in principle, a policy of non-reciprocity may be desirable, as greater freedom from GATT disciplines can produce economic gains. The problem is in distinguishing the economically useful forms of government intervention from those that are welfare-reducing.

Given the predictable pressures from protectionist interests, and his dim view of state capabilities, Hudec doubts the ability of developing state governments to appropriately draw this distinction.<sup>104</sup> Hudec argues that “developing-country governments following active interventionist policies are going to need all the outside help they can get in order to contain [protectionist] forces”—and that GATT disciplines are one potentially important source of help.<sup>105</sup> Hence, Hudec concludes that whether a developing state government wishes to pursue a liberal or an interventionist economic policy, preferences disserve developing state interests.

#### IV. THEORIZING DEVELOPING COUNTRIES

All works discussing state behavior necessarily, even if only implicitly, adopt methodological orientations towards and theoretical assumptions regarding the nature of states, the

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103. Hudec reviews the circumstances under which interventionist policies may be welfare enhancing, including in the nurturing of infant industries. *Id.* at 127–32.

104. *Id.* at 144–48. On the other hand, developing states often claim that they are in the best position to decide whether and when to adopt interventionist policies and should be able to do so free of GATT disciplines. They also claim that since some interventions are economically useful, a presumption that pro-export lobbies should prevail over import-sensitive lobbies in developing state domestic politics is unwarranted. Developing states would presumably reject Hudec’s likely response—that liberalized markets are more likely to produce economic growth—as inconsistent with their experience. Some empirical research undertaken after the original publication of *Developing Countries* lends support to Hudec’s argument. *See, e.g.*, Bernard Hoekman et al., *Special and Differential Treatment of Developing Countries in the WTO: Moving Forward after Cancún*, 27 *WORLD ECON.* 481 (2004); Sanjaya Lall, *Selective Policies for Export Promotion: Lessons from the Asian Tigers*, in *NON-TRADITIONAL EXPORT PROMOTION IN AFRICA: EXPERIENCE AND ISSUES* 23 (G.K. Helleiner ed., 2002); Arvind Panagariya, *Evaluating the Case for Export Subsidies*, (The World Bank, Policy Research Working Paper No. 2276, 2000).

I am grateful to Frank Garcia for highlighting these arguments.

105. HUDEC, *supra* note 1, at 149.

factors that motivate them, and the incentives and constraints that the international system imposes upon them. Developing Countries is no exception and, having summarized Developing Countries' arguments, it is useful to review the text's methodological commitments. As noted above, the book opens with a systematic and comprehensive analysis of the historical debate over whether developing state goods should receive preferential treatment. Hudec's historical narrative reads, for the most part, as a straightforward realist account of international trade relations.<sup>106</sup> Thus, Hudec focuses on states that pursue what they understand to be their political and economic interests in the international trade regime. To do so, states exercise diplomatic and economic leverage, with the resulting agreements reflecting a compromise among conflicting national interests.<sup>107</sup>

Developing Countries' second part, which engages in a political economy analysis, has a strikingly different theoretical and methodological orientation. Here, the focus turns from relations among states to interactions among interest groups and bureaucracies within states. However, Hudec's analysis moves well beyond the familiar public choice insight that, due to collective action problems, well-organized special interests can capture domestic law-making processes.<sup>108</sup> Instead, Hudec devotes substantial attention to the ways that international legal norms can empower or disempower various domestic constituencies and hence impact domestic politics.

At first glance, one might be inclined to argue that the

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106. For an analysis that adopts a similar methodological approach, but that disaggregates developing state positions with regard to preferences, see Jeffrey L. Dunoff, *The Political Geography of Distributive Justice*, in *DISTRIBUTIVE JUSTICE AND INTERNATIONAL ECONOMIC LAW* (Chi Carmody, et al. eds., forthcoming).

107. To be sure, Hudec's account is more nuanced than this necessarily brief summary may suggest. Thus, for example, he recognizes the influence of ideas on international relations, e.g., HUDEC, *supra* note 1, at 65–67 (explaining that developed states underestimate the power and significance of non-binding principles and that international law can play an important constraining role in international relations.) However, for the most part, the historical account in part I of *Developing Countries* focuses on states and their interests. Hudec's focus upon state pursuit of national interest finds parallels in Jose Alvarez's contribution to this issue. See Jose Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. (forthcoming, Summer 2011).

108. For a general introduction to public choice theories, see *PUBLIC CHOICE AND PUBLIC LAW* (Daniel A. Farber, ed. 2007); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).



methodological and theoretical orientations of the first part of *Developing Countries* are in unacknowledged tension with the theoretical approaches employed in the second part of the text and that this tension represents an inconsistency in the author's analysis. However, in the work of talented authors such as Hudec, such theoretical tensions often lead to the very center of their work, and provide clues toward understanding the problems Hudec is addressing. In short, the relationship between the different parts of the text are less a methodological flaw than a roadmap that points us toward the possibilities and limits of Hudec's project.

For current purposes, it is more fruitful to understand the diverse methodological frameworks used in different parts of the book as resting upon an even more foundational assumption that animates the entire text, namely Hudec's rather bleak opinion of political actors and political institutions. Indeed, the inconclusive nature of the negotiations over preferential treatment and the disappointing, if not counterproductive, effects of preferential policies are entirely consistent with the larger narrative that informs *Developing Countries*. As explained more fully below, it is only a slight exaggeration to characterize the book's overarching images of the trade system, and the political actors representing states that comprise it, as marked by contradiction and hypocrisy.

#### A. HUDEC'S DARK VISION

Virtually every actor and every policy that comes under Hudec's discriminating gaze is seen as, at best, ineffective, and at worst, counterproductive. Domestic governments are repeatedly pictured as weak and hypocritical. For example, the original U.S. position in post-war trade negotiations was "full of internal contradictions," because at the same time as it argued against preferences and for non-discrimination as a matter of principle, it insisted on trade-distorting exceptions for itself, such as the ability to impose quotas on agricultural imports.<sup>109</sup> Hudec claims that continued U.S. support for these and other exceptions is a "contradiction" that has been "a constant in GATT's legal history and is as true today as it was in 1947."<sup>110</sup>

To be sure, the U.S. is not the only actor Hudec critiques. Hudec claims that developed state critiques of illiberal

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109. HUDEC, *supra* note 1, at 34. The history behind the GATT's treatment of agriculture is explored in BROWN, *supra* note 73, at 22–28, 51–54.

110. HUDEC, *supra* note 1, at 34.

developing state trade policies are a “sham,” and he provocatively argues that “many developed countries are really quite happy with the absence of legal discipline over developing countries because it gives them an excuse for the illegal trade barriers they themselves are imposing.”<sup>111</sup> He colorfully describes many of the ways that developed state governments mask the “inadequacy of the[ir] performance” in the realm of trade policy, including through their ability to “rearrang[e] the numbers until they provide maximum trade gains.”<sup>112</sup> Developing states, as well, seek the “easy way out” and try “to satisfy as many domestic political interests as possible,” even if such policies impose welfare costs on the state’s population.<sup>113</sup>

Multilateral efforts fare little better in Hudec’s view. As noted above, *Developing Countries* details nearly a half-century of international negotiations that prove unable to resolve underlying tensions over preference programs. And, although the trading nations are unable to reach substantive agreement, they can and do repeatedly agree to generate many formal declarations and decisions that, in Hudec’s opinion, represent nothing more than legal form without substance. Hudec is scornful of the enormous amount of energy and attention devoted to GATT’s negotiations, never-ending meetings and useless bureaucratic squabbling, characterizing these efforts as “tedious, repetitive and often, absurd.”<sup>114</sup>

At one point, Hudec goes so far as to suggest that the entire enterprise of creating a multilateral body designed to ensure the smooth functioning of international markets is potentially self-defeating.<sup>115</sup> Hudec perceptively notes the paradox inherent in constructing an international trade regime along the lines of the GATT:

It is possible that the design of the [international trade system] . . . may itself have encouraged preference for market-distorting solutions. The [trade regime] represented a new idea in international economic affairs – the idea that the governments of the world, by acting together in concerted rule-making activity, could shape the international trade environment in which their economies would operate. Although the sponsors of this ‘architectonic’ enterprise were actually seeking to diminish government activity in the market place,

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111. *Id.* at 121.

112. *Id.* at 143.

113. *Id.* at 190.

114. *Id.* at 55.

115. HUDEC, *supra* note 1, at 187 (“It is very difficult to imagine that any multilateral legal instrument, backed by a multilateral institution, could ever be negotiated.”).

rule-making institutions tend to encourage just the opposite instincts – the urge to improve on nature by writing rules about how it should function. The existence of the institution tends to affirm the efficacy of the work it does.<sup>116</sup>

For current purposes, it is not necessary to determine whether the “realist” orientation Hudec adopts in the first part of *Developing Countries* is entirely consistent with, or more or less descriptively accurate than, the “liberal” approach employed in the second part of the book, or whether his dark view of state actors is exaggerated or accurate. Rather, the goal here is to unmask the implications of Hudec’s methodological commitments, to juxtapose them with the tools of the econometric analysis discussed above, and to examine whether and how a research agenda that borrows from or employs both methodologies might enrich our understanding of preferences and their effects upon developing states. I turn to this task below.

#### B. ADVANCING THE DEBATE OVER THE EFFECTS OF PREFERENCES

Hudec’s emphasis on political economy and dark vision of politics and institutions, combined with the empirical research summarized above, suggest the outlines of a progressive research agenda.<sup>117</sup> What insights might be gained by juxtaposing *Developing Countries*’ dark vision of politics with

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116. *Id.* at 31. Ironically, the only entities that do not appear to engage in counterproductive and self-defeating behavior are the protectionist interests who are able to successfully pursue policies that advance their interests while disserving the interests of their fellow citizens. In contrast to the other actors that appear in *Developing Countries*, these rent-seeking interests seem well-organized, purposive, and all-too-successful. Of course, given the problems that plague decision-making in all other institutions, it is not clear why rent-seeking firms and industries will not also, at times, pursue counterproductive strategies. Nor does Hudec address why, even if protectionist interests attempt to pursue their interests in a rational manner, they will not suffer from incomplete information and bounded rationality, or from problems of corruption, fraud, and malfeasance, like other institutions.

117. By “progressive” I do not mean to suggest a particular political orientation but rather a research methodology that seeks to generate predictions, and then prove or disprove these predictions with data, to generate a coherent research agenda. For more the idea of a progressive research agenda, see IMRE LAKATOS, *THE METHODOLOGY OF SCIENTIFIC RESEARCH PROGRAMMES* (John Worrall & Gregory Currie eds., 1978); Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE: PROCEEDINGS OF THE INTERNATIONAL COLLOQUIUM IN THE PHILOSOPHY OF SCIENCE 91* (Imre Lakatos & Alan Musgrave eds., 1970).

the econometric research exploring the empirical effect of preferential trade polices? Can utilizing political economy and econometric analysis reveal any hidden costs—or benefits—associated with the enactment and administration of preferential tariff policies?

A full exploration of these questions is well beyond the scope of this article. However, by way of example, I sketch out below three lines of inquiry that may reveal important and underappreciated effects of preferential trade policies. Utilizing both political economy and econometric analysis could shed light on:

(i) whether the proliferation of preferential tariff programs produces greater protectionism in developing states and, if so, whether preference programs can be refined to avoid this result;

(ii) whether the proliferation of preferential tariff programs has contributed to the dramatic increase in the number of bilateral and regional trade agreements and, if so, whether these agreements promote or hinder developing state interests;

(iii) whether the debate over preferences has served, in part, to divert attention from policies more likely to promote developing state growth and, if so, whether the trade regime can encourage developing states to pursue more successful economic policies.

1. Do preference programs reinforce protectionism in developing states?

As noted above, on political economy grounds Hudec argues that preferences are unlikely to assist developing state governments that wish to pursue liberalized trade policies. This claim should be empirically testable. An influential 2005 study by Özden and Reinhardt examined 154 developing states and found that states dropped from the United States's GSP program subsequently adopted lower trade barriers than those states that remained eligible for the program.<sup>118</sup> This result is entirely consistent with Developing Countries' argument. Hudec suggests that developing states' ability to enjoy preferential access to developed state markets will reduce the incentives that beneficiary state exporters have to lobby for

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118. Özden & Reinhardt, *supra* note 54, at 1.

trade liberalization.<sup>119</sup> As a result, the policy process will be dominated by import-sensitive groups, and governments will be more likely to respond to their pleas.

This apparent confirmation of Hudec's insight by empirical research suggests several areas of further inquiry. For example, the Özden and Reinhardt study examines only states that participate in the U.S. GSP program. Additional studies could examine the effects of participation in various other preference programs to determine whether some have greater effects on beneficiary states than others; similarly, as preference programs differ in their details, it may be fruitful to examine how different types of programs influence the balance between protectionist and liberalizing forces within beneficiary states.

Moreover, the Özden and Reinhardt study examines available data on aggregate trade openness;<sup>120</sup> future studies might focus less on degrees of openness and more on levels of economic performance. Is being a beneficiary of developed state preference programs associated with increased GDP or greater levels of foreign investment? Or with improved quality of life indicators?<sup>121</sup> Perhaps more importantly, future studies should attempt to identify the actual political economy mechanisms that produce the effects Özden and Reinhardt identify. These studies might suggest ways to fine-tune preference programs to avoid the "perverse" effects they seem to have on developing states.

A related topic of great importance involves the effects of preference programs that include various forms of conditionality. For example, following the Appellate Body report in the GSP dispute, the European Union revised its GSP program.<sup>122</sup> The new program extends additional tariff

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119. See generally HUDEC, *supra* note 1, at 176–79 (arguing against preferential treatment policies).

120. Özden & Reinhardt, *supra* note 54, at 9.

121. This approach to development is reflected in, for example, the UNDP's annual Human Development Report. See *Human Development Reports*, UNDP, <http://hdr.undp.org/en/reports/> (last visited Feb. 22, 2011). This approach is associated with the writings of Amartya Sen and Martha Nussbaum. See, e.g., MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000); AMARTYA SEN, *DEMOCRACY AS FREEDOM* (1999).

122. Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004). For an analysis of this decision, see Dunoff, *supra* note 64; Gregory Shaffer & Yvonne Apea, *Institutional Choice in the Generalized System of*

preferences to developing states that commit to ratify and implement a number of human rights and good governance conventions.<sup>123</sup> U.S. preference programs similarly condition certain preferences on various types of domestic reforms in beneficiary states, particularly by requiring that workers' rights be protected. As discussed below, an emerging school of thought argues that increased respect for rule of law, human rights, labor rights, and so forth is important determinants of economic performance. Moreover, the comparative politics literature has long debated the political institutional determinants of liberal trade policy.<sup>124</sup> The existence of multiple preference programs that require different types of domestic reforms offer a valuable means to test the hypotheses developed in these literatures.

Finally, it should be possible empirically to investigate whether PTAs or unilateral preference programs produce greater changes in the human rights and related practices of target states. An emerging literature argues that PTAs can be more effective than human rights treaties at changing the human rights behavior of repressive states.<sup>125</sup> Professor Hafner-Burton, perhaps the most prominent voice in this camp, argues that international instruments designed to influence human rights practices need legally enforceable, binding obligations to be successful.<sup>126</sup> Using cross-national analysis over several decades, she purports to demonstrate that PTAs with hard standards and effective enforcement often induce greater protection of human rights. Hence, she argues, PTAs can be more effective at changing repressive state practice the

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*Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and the Politics of Rights*, 39 J. WORLD TRADE 977 (2005).

123. Council Regulation (EC) 980/2005, Applying a Scheme of Generalised Tariff Preferences, 2005 O.J. (L169/1).

124. See, e.g., Sean Erlich, *Access to Protection: Domestic Institutions and Trade Policy in Democracies*, 61 INT'L ORG. 571 (2007); Witold J. Henisz & Edward D. Mansfield, *Votes and Vetoes: The Political Determinants of Commercial Openness*, 50 INT'L STUDIES Q. 189 (2006); Helen V. Milner & Keiko Kubota, *Why the Move to Free Trade? Democracy and Trade Policy in the Developing Countries*, 59 INT'L ORG. 107 (2005); Gene M. Grossman & Elhanan Helpman, *A Protectionist Bias in Majoritarian Politics*, 120 Q. J. ECON. 1239 (2005); Mancur Olson, *Dictatorship, Democracy, and Development*, 87 AM. POL. SCI. REV. 567 (1993).

125. See, e.g., EMILIE M. HAFNER-BURTON, *FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS* (2009); Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593 (2005).

126. Hafner-Burton, *Trading Human Rights*, *supra* note 125, at 594–595.

human rights practices of repressive governments than human rights agreements can be.<sup>127</sup> Extending this work, it would be useful to compare whether preferential arrangements have a similar effect on human rights policies; whether 'positive' or 'negative' incentives have a greater impact; and how the design of conditionality clauses changes their effects.

2. Do preference programs contribute to an increase in the number of preferential trade agreements?

Trading nations have entered into a frenzy of bilateral and regional trade agreements in recent years; indeed, more preferential trade agreements were created during the WTO's first decade than during GATT's five decades. Moreover, unlike in the past, many recent bilateral and regional free trade agreements have been between developed and developing countries. Although a growing literature attempts to explain the causes and consequences of the proliferation of preferential trade agreements (PTAs),<sup>128</sup> virtually no empirical scholarship examines whether there is a causal link between the creation of preferential trade programs and the rise in preferential trade agreements.<sup>129</sup>

A causal relationship is quite plausible, particularly if one adopts the realist perspective Hudec uses in the first part of *Developing Countries*, where states are concerned about relative gains. As noted above, preferential trade programs are inherently unstable in several respects. For example, developed states have broad discretion to add or subtract countries and goods from their preference programs.<sup>130</sup> Plus, as developing

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127. *Id.* at 597.

128. See, e.g., Jayant Menon, *Dealing with the Proliferation of Bilateral Free Trade Agreements*, 32 *WORLD ECON.* 1381 (2009); John Whalley, *Recent Regional Agreements: Why So Many, Why So Much Variance in Form, Why Coming So Fast, and Where Are They Headed?*, 31 *WORLD ECON.* 517 (2008); Roberto V. Fiorentino et al., *The Changing Landscape of Regional Trade Agreements: 2006 Update*, WTO DISCUSSION PAPER NO 12 (2007), available at [http://www.wto.org/english/res\\_e/publications\\_e/disc\\_paper12\\_e.htm](http://www.wto.org/english/res_e/publications_e/disc_paper12_e.htm).

129. The terminology for these trade agreements can be confusing. For current purposes, I wish to contrast the WTO agreements, on the one hand, and all bilateral, regional and plurilateral trade agreements of a preferential nature, on the other hand. The traditional umbrella term used for this latter group of agreements is "regional trade agreements." However, increasingly these agreements are entered into by states that are not geographic neighbors. Hence, I will usually refer to these agreements as preferential trade agreements (PTAs) rather than use the traditional term of regional trade agreements.

130. See, e.g., *Sunburst Farms Inc.v. U.S.*, 620 F. Supp. 735, 735 (CIT

states grow their economies and become more effective exporters, they are “graduated” from preference programs. To address the instability and uncertainties associated with GSP programs, developing states might seek to enter into PTAs with developed states. The rationale for doing so would be relatively straightforward: in contrast to preference programs which exist and can be changed at the discretion of developed states, PTAs are reciprocal agreements governed by international law and cannot be unilaterally changed.

This relatively simple hypothesis suggests a rich research agenda. For example, empirical research could attempt to identify the factors that induce developing states to enter into trade agreements with developed states. Might developing states fear the loss of preferential access to developed state markets, for example, by being excluded from GSP and related programs? Do developing states seek PTAs when they see developed states negotiating PTAs with other developing countries, or when competitors obtain preferential market access? In short, do developing states use PTAs an insurance policy against being placed at a competitive disadvantage through discriminatory policies?

This potential link between preference programs and PTAs is important, because there is substantial evidence that the rise of PTAs may disserve developing state interests. First, recent experience suggests that, in practice, many of the problems associated with preference programs – such as trade diversion, product exclusions, and complex rules of origin – are largely replicated in PTAs.<sup>131</sup> Moreover, many PTAs are very broad in scope. Notably, in recent years the inclusion of issues beyond the WTO’s ambit has been especially marked in PTAs among developed and developing economies.<sup>132</sup> For example, at the 2004 WTO Ministerial Conference in Cancun, developing states were able to exclude the so-called “Singapore Issues” of trade

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1985); *Florsheim Shoe Co. v. U. S.*, 744 F.2d 787 (Fed. Cir. 1984).

131. See generally Report by the Consultative Board to the Director—General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, WTO (2004) (“examin[ing] the functioning of the institution – the WTO – and consider[ing] how well it is equipped to carry the weight of future.”).

132. See, e.g., World Bank, *Global Economic Prospects 2005: Trade, Regionalism and Development* (2005) (discussing “the characteristics of agreements that strongly promote—or hinder—development for member countries?” and whether “the proliferation of agreements pose[s] risks to the multilateral trading system, and how those risks can be managed?”).



facilitation, investment, government procurement and competition from the negotiating agenda. However, these issues are addressed in many recent PTAs between developing and developed country partners.<sup>133</sup> Similarly, the United States is able to address issues that developing states can keep out of WTO negotiations, like labor and environment, in its PTAs with developing states.

Finally, there is substantial evidence that developed states' ability to address WTO-plus issues in PTAs with developing states has reduced developed states' willingness to reduce tariffs on a multilateral basis. For example, empirical research suggests that both EU and U.S. reductions in MFN tariffs for PTA products during the Uruguay Round were on average only about one-half of the reduction for similar products that did not receive preferences.<sup>134</sup> To the extent that U.S. and EU preference programs require cooperation in labor, environment, drug enforcement, immigration and other issues, we might understand the extension of preferential trade access as payment by developed states to developing states for cooperation. This implies "that a reduction in MFN tariffs that lowers the preferential margin will be resisted by both the country that receives preferences and the country that grants them;"<sup>135</sup> more broadly, it implies that the current round of PTAs between developing and developed states may serve as stumbling blocks, rather than building blocks, to multilateral liberalization.<sup>136</sup> And substantial research suggests that

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133. Examples of PTAs between developed and developing countries including all or some of the Singapore issues include: EC-South Africa, EFTA-Chile, United States-Morocco, United States-Jordan, and Thailand-Australia.

134. Nuno Limão, *Preferential Trade Agreements as Stumbling Blocks for Multilateral Trade Liberalization: Evidence for the US.*, 96 AM. ECON. REV. 896, 903-910 (2006); Baybars Karacaovali & Nuno Limão, *The Clash of Liberalizations: Preferential versus Multilateral Trade Liberalization in the European Union* 18-26 (World Bank Policy Research, Working Paper No. 3493, 2005) ("analyz[ing] the effects of [preferential trade agreements] on multilateral trade liberalization. . .").

135. Nuno Limão & Marcelo Olarreaga, *Trade Preferences to Small Developing Countries and the Welfare Costs of Lost Multilateral Liberalization*, 20 WORLD BANK ECON. REV. 217, 219 (2006).

136. Richard E. Baldwin & Elena Seghezza, *Are Trade Blocs Building or Stumbling Blocs?*, 25 J. ECON. INTEG. 276, 276 (2010); Philippe Aghion, et al., *Negotiating Free Trade*, 73 J. INT'L ECON. 1, 2 (2007); Caroline Freund, *Multilateralism and the Endogenous Formation of Preferential Trade Agreements*, 52 J. INT'L ECON. 359 (2000) ("examin[ing] the interaction between preferential trade agreements and multilateral tariff reduction in a model of imperfect competition").

multilateral liberalization would benefit developing states more than preferential liberalization.<sup>137</sup>

These arguments point towards a series of substantial, albeit indirect, hidden costs associated with preference programs. However, there are a number of claims embedded in these arguments that would benefit from empirical research. For example, the studies cited above examine the effect of PTAs on U.S. and EU tariff rates; future studies could extend this inquiry to other states that grant preferences, such as Australia or Japan, to see if similar results obtain. Moreover, the studies cited above focus on tariffs; future studies could explore whether PTAs affect market access through non-tariff barriers.

In addition, future research could address related lines of inquiry. For example, how do PTAs affect states that are not part of the PTA? If, as suggested above, the EU liberalizes less on an MFN basis because of its PTAs, might that lead, say, the EU's negotiating partners to reciprocate by offering fewer concessions than they would otherwise be willing to?<sup>138</sup> If so, that would mean that the increase in the number of PTAs might generate important adverse spillover effects on non-parties.

Questions like these can be investigated using econometric analysis. However, even if econometric studies reveal various indirect effects of preferences, these studies would ultimately call for a political economy explanation for precisely how PTAs effect multilateral liberalization. Hence, inquiries like these are illustrative of how econometric and political economy explanations can be mutually reinforcing and can illuminate the underexplored relationship between preference programs and PTAs.

### 3. Is the debate over preferences a diversion?

Finally, there is an important issue that Developing Countries does not explicitly address: the possible diversionary effect of the debate over preferences itself. As the first part of Developing Countries illustrates, developing state demands "for

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137. Glenn Harrison et al., *Rules of Thumb for Evaluating Preferential Trading Arrangements: Evidence from Computable General Equilibrium Assessments*, 40 CUADERNOS DE ECONOMÍA 460, at 3 (2003) available at <http://www.wilsoncenter.org/events/docs/harrisonarr.pdf>.

138. Nuno Limão, *Preferential vs. Multilateral Trade Liberalization: Evidence and Open Questions*, 5 WORLD TRADE REV. 155, 171 (2006).

greater market access [became] the first issue on the agenda” during the GATT’s early years,<sup>139</sup> and has remained at or near the center of the international trade agenda ever since. The contrast between the political salience of preferences and their disappointing economic results raises an intriguing puzzle: if preferential treatment generates limited economic benefits – and renders the pursuit of effective economic policies more difficult—why do developing states continue to advocate for these programs?

Perhaps another of Hudec’s observations in *Developing Countries* may shed light on this puzzle. Despite—or perhaps because of—his deep engagement with the trade system, Hudec was acutely aware of the limits of trade law and policy. Hudec emphasizes that the economic performance of a developing state is influenced more by its domestic policies than by developed state trade policy; he writes that “a government’s own trade-policy decisions are the most important determinant of its own economic welfare.”<sup>140</sup> Recent empirical studies lend support the claim that export performance correlates with economic reforms in the exporting country.<sup>141</sup> This claim fits into a larger literature—mostly produced after *Developing Countries* was first published—arguing that access to rich country markets is a necessary but far from sufficient condition for development, and that various features of the domestic domain such as meaningful political representation, individual liberties, independent judiciaries, the rule of law, and other aspects of institutional and legal infrastructure are critical determinants of domestic growth.<sup>142</sup> This research suggests

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139. Hudec, *supra* note 1, at 53.

140. *Id.* at 139.

141. See, e.g., United Nations Conference on Trade and Development, *The African Growth and Opportunity Act: A Preliminary Assessment*, U.N. Doc. UNCTAD/ITCD/TSB/2003/1 (2003) (offer[ing] an early assessment of the utility of the AGOA tariff preferences as an instrument of special and differential (S&D) treatment for the beneficiary countries.”).

142. An influential body of political economy scholarship focuses upon domestic institutions. See, e.g., Dani Rodrik et al., *Institutions Rule: The Primary of Institutions over Geography and Integration in Economic Development*, 9 J. ECON. GROWTH 131 (2004) (“estimate[ing] the respective contributions of institutions, geography, and trade in determining income levels around the world”); Daron Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369(2001) (examining “differences in European mortality rates to estimate the effect of institutions on economic performance”); Robert Hall & Charles Jones, *Why Do Some Countries Produce So Much More Output per Worker than Others*, 114 Q. J. ECON. 83(1999) (“show[ing] that differences in physical

that the primary responsibility for the disappointing economic performance of many developing states reflects domestic constraints—including limited supply side capacity, sub-par infrastructure, and underdeveloped political and legal institutions—rather than developed state trade policies.

Perhaps as a result, in the past few years much of the dialogue at the WTO concerning developing states has shifted from a focus on preferences to the so-called Aid-for-Trade initiative. The key analytic move making this dialogue possible is the widespread acknowledgment that developing states continue to face significant supply-side capacity and infrastructure constraints that inhibit their ability to expand international trade. As a result, developing states, donor nations, regional bodies and international organizations have coalesced around an Aid for Trade mandate agreed to at the WTO's 2005 Hong Kong Ministerial Conference. Since then, much attention has focused on the need to mainstream trade into national development plans on the rationale that doing so will help states mitigate potential adjustment costs and assists developing states seize trade opportunities. Significantly, funding for Aid for Trade activities more than doubled between 2005 and 2007, and has continued to increase even in the face of the global economic crisis.

The emphasis of the Aid for Trade initiative has shifted over time. During the early years—between the Hong Kong Ministerial in 2005 and the First Global Review of Aid for Trade in 2007—the focus was on raising awareness and generating commitment among various stakeholders. Thereafter, the focus has shifted to implementation and monitoring. Implementation rests largely in the hands of developing countries, in partnership with development organizations and funders, including the World Bank and regional development banks, international financial organizations, and bilateral donors. A significant monitoring

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capital and educational attainment can only partially explain the variation in output per worker” and “document[ing] that the differences in capital accumulation, productivity, and...output per worker are driven by differences in institutions and government policies.”). Many of the arguments in this literature regarding the importance of domestic institutions build upon the pioneering work of Douglass North. *See, e.g.*, DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990) (discussing “an analytical framework for explaining the ways in which institutions and institutional change affect performance of economies, both at a given time and over time”).

and evaluation effort is also underway, with the goal of encouraging key actors to meet commitments and improving the effectiveness of programs. The WTO and OECD joint publication “Aid for Trade at a Glance” provides country-specific fact sheets for nearly 90 different states.<sup>143</sup> The WTO has also engaged in analysis and advocacy to highlight the needs of its members and to showcase effective implementation.<sup>144</sup> Although Aid-for-Trade is still in its early stages, it represents a potentially significant shift in the debate within the trade system regarding how to create structures so that developing states can best exploit international trade opportunities. The disappointing economic results from preference programs and the shift of attention to Aid-for-Trade programs raise the question of whether the lengthy and contentious focus on preferences diverted diplomatic and scholarly attention to an issue of decidedly secondary importance and hence obscured more important issues related to domestic reform in developing states.<sup>145</sup> Ironically, although much effort has been devoted to measuring the economic effects of preferences, no scholarly attention has been paid to the opportunity costs associated with this misdirection of diplomatic and political efforts. But current knowledge regarding successful development strategies raises the question of whether this diversion of energies and attention represents a hidden cost of the debate over preferences.

## V. DEVELOPING COUNTRIES' RHETORICAL STRATEGY

Developing Countries is justifiably considered a classic of trade scholarship. However, in several important respects, the text—ambitious as it is—sells itself short. For example, Developing Countries presents itself as providing a straightforward account of the tensions between developed and

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143. Aid-for-Trade statistics can be found at Aid for Trade at a Glance 2009—Partner Country Information, OECD (Feb 21, 2011, 12:45 PM), [http://www.oecd.org/document/1/0,3746,en\\_2649\\_34665\\_42926849\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/1/0,3746,en_2649_34665_42926849_1_1_1_1,00.html).

144. For a fuller description, see WTO, *Aid-for-Trade Work Programme, 2010–2011*, WT/COMTD/AFT/W/16 (Nov. 27, 2009) available at [http://www.wto.org/english/tratop\\_e/devel\\_e/a4t\\_e/aid4trade\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm).

145. To be sure, this literature does not exclude the possibility that the relative importance of domestic policy exists precisely because existing preference policies have been poorly designed and unevenly applied. See, e.g., Frank Garcia, *Beyond Special and Differential Treatment*, 27 B.C. INT'L & COMP. L. REV. 291 (2004). (calling for an agreement on preferential treatment that is fair, clear and creates space for domestic policy.).

developing states over preferential treatment, and offering a pragmatic and realistic critique of then-current thinking about trade policy. The book is relentlessly instrumental in tone and approach, and can easily be taken as an example of Hudec's oft-noted "realistic, functional, fact-focused and anti-conceptual way of" thinking.<sup>146</sup>

And yet, of course, the book presupposes a rather complex set of assumptions about the way the world works. Indeed, it could hardly be otherwise. Any instrumental approach to international law necessarily rests upon a series of assumptions about the principal actors in the trade system, these actors' motivations and capacities, and the constraints imposed by the international system itself.<sup>147</sup>

For example, *Developing Countries* implicitly utilizes an extremely sophisticated vision of the role and limits of international law, including international trade law. The text includes important but underdeveloped insights about the nature of international dispute resolution, an implicit theory of the mechanisms that induce compliance with international norms, and important observations regarding the function and role of soft law.<sup>148</sup> In brief, *Developing Countries* assumes a

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146. David Palmetier, *Robert E. Hudec—A Practitioner's Appreciation*, 37 J. WORLD TRADE 703, 705 (2003). See also Joel Trachtman, *Robert Hudec and the Vocation of International Trade Law*, 6 J. INT'L ECON. L. 742, 743 (2003) ("Hudec was impatient with most legal theory. . .").

147. To be sure, instrumental approaches are not the only, or necessarily the best, approaches to international law. International law, including international trade law, can be understood as a deontological quest for justice. See, e.g., ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* (2003) (aiming "to develop the outlines of a coherent, systematic vision of an international legal order that takes the protection of human rights seriously, while anchoring that vision in moral reasoning that is informed both by a due appreciation of the limitations of existing institutions and a willingness to consider possibilities for institutional reform."); FRANK GARCIA, *TRADE, INEQUALITY AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE* (2003) (arguing that "international trade law does not exist outside of the realm of justice. . .").

148. Hudec explored many of these themes in a number of important works, including Robert E. Hudec, *Adjudication of International Trade Disputes* (Trade Policy Research Centre, Thames Essay No. 16, 1978); Robert E. Hudec, *Reforming GATT Adjudication Procedures: The Lessons of the DISC Case*, 72 MINN. L. REV. 1443 (1988); Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1 (1999); Robert E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, in *IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES—ISSUES AND LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS* 345 (Friedl Weiss ed., 2000); Robert

rather complex account of the ways that international law does and does not affect state behavior, and it is a text of enormous theoretical interest and sophistication. As a result, *Developing Countries* is a much richer and theoretically ambitious undertaking than it lets on. Although it is refreshing to encounter a text that does not try to oversell itself, it is worth considering whether there are hidden costs to Hudec's undersell.

To approach this issue, it is useful to consider what has changed in the two decades since *Developing Countries* first appeared. The trade regime has, of course, seen substantial institutional and doctrinal changes, including the creation of the WTO, the expansion of trade disciplines into new areas such as intellectual property and services, and the establishment of the WTO's strengthened dispute settlement system. Moreover, when *Developing Countries* was first released, the GATT was a relatively obscure institution. Indeed, during its first several decades, the GATT operated as a "club" where a relatively small number of diplomats and economists from like-minded states worked quietly to make trade policy without significant public input or oversight.<sup>149</sup> In short, when Hudec wrote *Developing Countries*, the trade regime was practically unknown outside a small group of trade cognoscenti, "globalization" had not yet entered the public lexicon, and trade negotiations and agreements rarely captured media or public attention.

International trade is no longer an obscure topic. Concerns over globalization and outsourcing are prominent in public debate and political campaigns, and trade is one of the most important and highly developed fields of international law. The WTO is a highly visible and controversial component of an emerging regime of global economic governance. Moreover, the current trade regime is no longer preoccupied with sleepy topics like tariffs and quotas; instead it has become a central

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E. Hudec, *The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective*, in DEVELOPMENT, TRADE AND THE WTO (Bernard Hoekman et al. eds., 2002).

149. Robert Keohane & Joseph Nye, *The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy*, in EFFICIENCY, EQUALITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 264 (Roger Porter et al. eds., 2001). See also J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of Dispute Settlement*, *id.* at 334; Robert Howse, *From Politics to Technocracy— and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94 (2002).

battleground for contentious issues like developing state access to affordable medicines and the locus of transnational conflicts pitting trade against non-trade values.

Changes in the academic study of international trade have been no less dramatic. Trade law was a marginalized and relatively underdeveloped discipline when *Developing Countries* was first issued. Trade law articles rarely appeared in international law journals,<sup>150</sup> let alone flagship general topic law reviews,<sup>151</sup> and many of the peer-reviewed journals that now help to define the field had not yet been established.<sup>152</sup> International trade was not taught at many law schools, and very few US law schools had full-time faculty who specialized in trade law. As a result, despite its substantial strengths, when *Developing Countries* was originally issued it was likely of interest only to a relatively small number of international trade practitioners and scholars.

Today, international courses are offered at numerous law schools, economics departments, public policy schools, and international relations departments; a growing number of monographs, essay collections, and journals address trade issues; and conferences and symposia on international trade are now common. Moreover, the trade regime is an increasingly important object of study in several academic disciplines; specialists in international relations, international political economy, and international economics devote substantial attention to the trade system and address questions of great interest to trade lawyers such as the optimal design of the trade system, the nature and effects of WTO dispute settlement, and the function of contingent protection.

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150. On the relative marginalization of international trade law in a leading US journal, see Detlev F. Vagts, *International Economic Law and the American Journal of International Law*, 100 AM. J. INT'L L. 769 (2006), which "discuss[es] the history of international economic law since the American Journal of International Law was first published," and David Bederman, *Appraising a Century of Scholarship in the American Journal of International Law*, 100 AM. J. INT'L L. 20 (2006), which describes the great nature of the "intellectual content and scholarly character" in the American Journal of International Law.

151. Indeed, it appears that the first article in an American law review on countervailing and antidumping duties was not published until 1958 (see footnote 7, *supra*). Peter Ehrenhaft, *Memories of the Supreme Court in the 1961 Term*, 13 MINN. J. GLOBAL TRADE 215, 220 (2004).

152. The first edition of the *Journal of World Trade* was published in 1967. Other leading journals are even more recent. For example, the *Journal of International Economic Law* was first published in 1998, and the *World Trade Review* was first published in 2001.



The influence of these various disciplines upon each other has been enormous; indeed, it is no exaggeration to suggest that virtually all serious students of the trade regime today necessarily draw upon insights from disciplines that neighbor their own.<sup>153</sup> Perhaps if Bob Hudec was alive today to produce an updated edition of his classic text, he would draw substantially on these literatures. Doing so would enrich *Developing Countries* in at least two respects.

First, insights from these cognate literatures could enrich *Developing Countries*' arguments. For example, the lively debate in international relations circles over the impact of security-related concerns on trade cooperation might inform *Developing Countries*' reflections on why the U.S. originally choose to pursue a GATT with larger membership, but shallower commitments, and why the U.S. later shifted course and insisted that the Uruguay Round be a single undertaking.<sup>154</sup> Perhaps more importantly, Hudec sets forth a controversial claim about the relative importance of developing states' domestic policy as opposed to preferential access to developed state markets. As noted above, I take this claim to be one of the text's central ideas and hence I believe that *Developing Countries* would be a stronger work if it tested this claim against the substantial literature that addresses the domestic determinants of economic growth. Doing so could provide support for many of Hudec's arguments, help identify the limits of these arguments, and help position those arguments within a rich set of scholarly literatures.

Second, locating *Developing Countries*' arguments within their larger scholarly contexts would facilitate dialogue with a broader scholarly audience. Consider, for example, Hudec's work on dispute settlement. His groundbreaking scholarship helped inspire a generation of empirical research by political

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153. Ironically, Hudec himself organized one of the earliest interdisciplinary projects examining trade law. JAGDISH BHAGWATI & ROBERT HUDEC, *FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?* (1996). The American Law Institute's publication of annual volumes that analyze WTO case law is a more recent initiative along these lines. *See, e.g.*, *THE WTO CASE LAW OF 2003* (Henrik Horn & Petros Mavroidis eds., 2006) summarizing that year's studies). For a more recent examination of the ways that interdisciplinary approaches can enhance understanding of international legal phenomena, *see* Jeffrey L. Dunoff & Mark A. Pollack, *CTBS* (forthcoming).

154. Richard Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 *INT'L ORG.* 339, 359–360 (2002).

scientists into GATT and WTO dispute settlement.<sup>155</sup> Hudec's work did so, in part, because it presented data and evidence about trade disputes in a way that political scientists could easily understand and utilize.

Developing Countries should likewise be of interest to a broad and interdisciplinary audience; in addition to international trade law scholars, the topics Developing Countries addresses are of interest to a wide variety of international lawyers, international political economy scholars, economists, and students of international development and international relations. Locating the broader questions raised by Developing Countries in the context of various scholarly literatures it implicates would make the book both more accessible and more appealing to a wide variety of readers from different disciplines. Doing so would render Developing Countries' important insights more salient to a broader audience of readers.

## VI. CONCLUSION

Debates over preferential treatment for developing states have been a defining feature of the multilateral trade system since its inception. Developing Countries masterfully reviews the history of this controversy, and will serve as an authoritative guide to the historical, political and normative dimensions of the debate over preferential treatment for developing states. In addition, Developing Countries clearly details the arguments for and against preferential treatment and offers an influential critique of preference programs.

But Developing Countries' value is not simply historical. Drawing on empirical writings that largely post-date the initial release of Developing Countries, I have suggested some additional lines of inquiry inspired by Hudec's arguments, including (i) whether preferential programs hinder developing states' ability to liberalize; (ii) whether the proliferation of preferential tariff programs has inadvertently contributed to the proliferation of bilateral and regional trade agreements, and, if so, whether these agreements disserve developing state interests; and (iii) whether the debate over preferences diverts

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155. See, e.g., Marc Bush & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC* 457 (Daniel Kennedy & James Southwick eds., 2002) (surveying and analyzing empirical studies on GATT/WTO dispute settlement).

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focus from policies more likely to promote developing state growth. Thus, Hudec's arguments, combined with recent empirical work, suggest a research agenda designed to uncover whether there are hidden costs—or hidden benefits—associated with the debate over preferential treatment for developing states. For these reasons, all those interested in international trade should welcome the opportunity to revisit Developing Countries.