

THE PRINCIPLE OF PREFERENTIAL TREATMENT IN THE LAW OF GATT: TOWARD ACHIEVING THE OBJECTIVE OF AN EQUITABLE WORLD TRADING SYSTEM*

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INTRODUCTION

This Article examines the world trading system as embodied in the General Agreement on Tariffs and Trade¹ and the degree to which I shall refer to these derogations from GATT law as the “principle of preferential treatment.”

The first indication that the developing countries (DCs) were

* This Article is a much expanded version of a paper delivered to the 13th Conference on the Law of the World held at Seoul, South Korea, September 6-11, 1987. I am grateful to those participants in the panel on the New International Economic Order whose questions and comments forced me to clarify several of my ideas. I am particularly indebted to Professor Sang-Myon Rhee, College of Law, Seoul National University; Dr. Galen S. Hull, Micro-Enterprise Institute, Arlington, Virginia and Ms. Elizabeth Farr, J.D. (Tennessee). Responsibility for the views expressed remain my own.

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1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. GATT has been modified in several aspects since 1947. The current version of the agreement is contained in 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969). GATT is not technically an organization of which countries become members but a treaty with contracting parties. When it was signed in 1947 there were 23 signatories but the membership has now grown to include 92 countries representing over four-fifths of world trade. The guiding principles of GATT include: (1) trade without discrimination through application of the Most-Favored-Nation principle; (2) reliance on tariff as opposed to other commercial measures (such as, quantitative restrictions, voluntary export restraints, etc.) where protection of domestic industries is necessary; (3) provision of a stable and predictable basis for trade through negotiated ‘bindings’ of tariffs at fixed minimum levels, and (4) settlement of disputes through consultation, conciliation and, as a last resort, dispute settlement procedures. See UNITED STATES COUNCIL OF INTERNATIONAL CHAMBER OF COMMERCE, INC., G.A.T.T. AN ANALYSIS AND APPRAISAL OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE (1955). GATT was originally a part of the preparatory negotiations to set up an International Trade Organization (ITO) and was originally conceived as the first of a number of agreements that were to be negotiated under the auspices of the ITO. The ITO was one of three major international institutions—the other two being the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank)—established in the 1940’s to manage the postwar international economic system. Following the failure of the ITO to gather the requisite ratifications, GATT by default became the framework for the conduct of world trade. See generally J. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969) (Background information about GATT) [hereinafter JACKSON, WORLD TRADE LAW].

completely dissatisfied with the GATT framework of trade rules was in the form of a publication in developing member states from Africa, Asia, the Caribbean, and Latin America (DCs) that have been fully integrated into that system. In this article special attention will be paid to the series of exceptions and derogations² from GATT trade rules made to accommodate the special and differential needs and interests of the DCs. The concern here is with the process of translating the normative basis of preferential treatment into a basic right within the boundaries of the General Agreement; that is, the right to an automatic grant of tariff concessions as well as other trade advantages, favors, or privileges to DCs, backed by an appropriate regime of sanctions to discipline those preference-giving countries who flout this rule.

I. AN HISTORICAL OVERVIEW OF PREFERENTIAL TREATMENT

In September 1986, trade ministers and representatives from ninety-two countries met in Punta Del Este, Uruguay to launch the "Uruguay Round"³ of multilateral trade negotiations (MTNs) under the aegis of GATT. It is generally acknowledged that the agreements reached in the course of these MTNs over the next four years⁴ will define and shape the structure of trade relationships between the industrialized countries (ICs) and the DCs for the remainder of this century and for much of the next.⁵ The significance of this round of MTNs cannot be overstated; for, in addition to renegotiating rules for trade in goods, it represents the first attempt to bring trade in services under international discipline.⁶ If previous

2. I shall refer to these derogations from GATT law as the principle of preferential treatment throughout this discussion.

3. See Ministerial Declaration of September 15, 1986, signed at Punta Del Este, Uruguay; see also *GATT Launches Uruguay Round as Consensus Reached on Services, Agricultural Trade*, 3 INT'L TRADE REP. (BNA) No. 38 at 1150 (Sept. 24, 1986). For a background to the Uruguay Round see Rivers, Slater & Paolini, *Putting Services on the Table: The New GATT Round*, 23 STAN. J. INT'L L. 13 (1987).

4. See Yeutter, *A GATT for the 21st Century*, 9 BUS. AMERICA No. 21 at 3 (Oct. 13, 1986).

5. *Id.*

6. *Id.* at 4. See also Baldrige, *The New Round and U.S. Business*, 9 BUS. AMERICA, No. 21 at 6 (Oct. 13, 1986). "Trade in services" means the standard balance-of-payments item denoted as 'non-factor services,' which excludes workers' remittances and investment income. See Sapir & Lutz, *Trade in Non-Factor Services: Past Trends and Current Issues*, World Bank Staff Working Paper, No. 410 (Aug. 1980). Services generally constitute activities producing an intangible output. The International Standard Industrial Classification classifies service activities under the following major divisions: (1) wholesale and retail trade, restaurants and hotels; (2) transport, storage, and communication; (3) financing, insurance, real estate, and business services; (4) community, social, and personal services. *Id.* See also Sapir & Lutz, *Trade in Services: Economic Determinants and Devel-*

rounds of MTNs have accurately reflected the issues typically and perennially raised by DCs, then the Uruguay Round will be confronted with the issue of the special and differential needs of DCs and how these can be accommodated within the GATT system. As in the past, DCs will continue to press for the acceptance of the principle of preferential treatment as a basic right under GATT; a right which cannot be withdrawn without subjecting the preference-giving country to sanctions.

The need to secure firmly the principle of preferential treatment as a permanent feature of the world trading system is dictated by several factors. Most will agree that international trade is one of the most important areas of international cooperation among states. However, it remains an area in which the DCs feel very acutely their economic inequality and dependency *vis-a-vis* the ICs.⁷ Trade, particularly commodity trade, is central in the relations between DCs and ICs⁸ because most DCs derive the bulk of their export earnings from exports of agricultural commodities⁹ to markets in the ICs. As a matter of fact, roughly eighty percent of exports from DCs are consumed by ICs.¹⁰ The structure of trade relationships between these two groups of countries which evolved during the age of imperialism, when colonies in the southern hemisphere became sources of primary products and markets for the manufactured goods produced in the metropole, persists to this day.¹¹ This historical division of the world into exporters of primary and semi-manufactured products (DCs) and exporters of manufactured goods (ICs) has remained a major source of friction in North-South relations.¹² When one adds to this demonstrably unequal division of labor the equally demonstrable unfavorable terms of trade¹³ be-

opment-Related Issues, World Bank Staff Working Paper, No. 480 at 3 (Aug. 1981).

7. See, e.g., Rahman & Hesse, *Industrialization, Trade, and the International Division of Labour*, in *RESHAPING THE INTERNATIONAL ORDER* 235 (J. Tinbergen ed. 1976).

8. See generally C. KEGLEY & E. WITTKOPF, *THE GLOBAL AGENDA: ISSUES AND PERSPECTIVES* (1984) [hereinafter *KEGLEY & WITTKOPF, THE GLOBAL AGENDA*].

9. See R. ROTHSTEIN, *GLOBAL BARGAINING: UNCTAD AND THE QUEST FOR A NEW INTERNATIONAL ECONOMIC ORDER* 40 (1979). [hereinafter *ROTHSTEIN, GLOBAL BARGAINING*]. While DCs rely on primary products for over two-thirds of their total export earnings, for ICs primary products account for less than 25 percent of their export earnings. See M. McLAUGHLIN, *THE UNITED STATES AND WORLD DEVELOPMENT: AGENDA 1979* 207 (1979).

10. ROTHSTEIN, *GLOBAL BARGAINING*, *supra* note 9, at 40.

11. K. BOULDING, *STABLE PEACE* (1978); see also W. LEWIS, *THE EVOLUTION OF THE INTERNATIONAL ECONOMIC ORDER* (1978); R. HANSEN, *THE NORTH-SOUTH STALEMATE* (1978).

12. K. BOULDING, *supra* note 11.

13. There is now a substantial body of evidence which suggests that the prices DCs

tween DCs and ICs, one may understand why DCs have made reform of the world trade¹⁴ structure their central goal in these international negotiations.

For the last four decades GATT has provided the legal framework within which most international trade between DCs and ICs has occurred. Throughout this period DCs have consistently voiced their disaffection with the GATT system of world trade.¹⁵ This perception of GATT as being unresponsive¹⁶ to the economic needs of

receive for their exports vary erratically in the short-run and deteriorate progressively in the long haul. In contrast, prices of the manufactured goods that they import increase steadily. See, e.g., R. HANSEN, *THE U.S. AND WORLD DEVELOPMENT: AGENDA FOR ACTION* 178 (1976); D. PIRAGES, *THE NEW CONTEXT FOR INTERNATIONAL RELATIONS: GLOBAL ECOLOGICS* 239 (1978); S. ROSEN & W. JONES, *THE LOGIC OF INTERNATIONAL RELATIONS* 170 (1980).

14. The persistent deterioration has been blamed on the structural characteristics of the old international economic order of which the world trading system is a central component. See, e.g., *THE REPORT OF THE BRANDT COMMISSION, COMMON CRISIS NORTH-SOUTH: COOPERATION FOR WORLD RECOVERY* (1983) [hereinafter *BRANDT COMMISSION REPORT*]. The old order which is usually associated with the post-World War II Bretton Woods system has not operated entirely to the disadvantage of DCs, many of which, South Korea being a prominent example, "clearly achieved the situation described by Walt W. Rostow in his famous image . . . of the 'take-off into sustained growth'." See Singer, *The New International Economic Order: An Overview* 16 *J. MOD. AFR. STUD.* 539, 540 (1978). Aside from the spectacular economic growth of a group of DCs, the so-called 'newly industrialized countries' (NICs)—typified by Brazil, Mexico, Singapore, Hong Kong, Taiwan, and, of course, S. Korea—the Bretton Woods era also witnessed the G.N.P. of the DCs as a whole increase by 5 to 6 percent *per annum*, a growth rate very similar to that of the ICs. During this period also, the trickle-down effect of growth from the ICs to the DCs was evident and the flow of aid was considerable. But the growth, in sharp contrast to the ICs, was uneven and divergent leading to the present division of the DCs into two sectors—one faster growing and relatively wealthier and the other poorer and stagnant. *Id.* at 540. See also N. HARRIS, *THE END OF THIRD WORLD: NEWLY INDUSTRIALIZING COUNTRIES AND THE DECLINE OF AN IDEOLOGY* (1986).

On the question of whether the terms of trade of DCs have in fact deteriorated and what the causes of the alleged deterioration are, there is still some disagreement among learned commentators. For a useful and comprehensive discussion of the terms of trade debate, see Streeten, *World Trade in Agricultural Commodities and the Terms of Trade with Industrial Goods*, in *AGRICULTURAL POLICY IN DEVELOPING COUNTRIES* 207 (n. Islam ed. 1974). See also D. BLAKE & R. WALTERS, *THE POLITICS OF GLOBAL ECONOMIC RELATIONS* (1976); H. SINGER & J. ANSARI, *RICH AND POOR COUNTRIES* (1977); and B. HIGGINS & J. HIGGINS, *ECONOMIC DEVELOPMENT OF A SMALL PLANET* (1979).

15. The first indication that the DCs were completely dissatisfied with the GATT framework of trade rules was in the form of a publication in 1958 of the Report by a Panel of Experts entitled *Trends in International Trade*. The Panel was made up of four eminent economists—Habeler (the chairman and after whom the report was named), Meade, Tinbergen, and Campos. The substance of the report was that the predicament of DCs was due in no small measure to the trade policies of the Western industrialized countries. On the basis of this finding the GATT quickly went into action and inaugurated a Programme for the Expansion of International Trade which brought under GATT scrutiny the problems of economic development. Committee III was established to study the obstacles that stood in the way of DCs' exports entering the markets of the industrialized countries. See generally, K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 228-29 (1970) [hereinafter *DAM, GATT LAW*].

16. Dissatisfaction with GATT led to the establishment of the United Nations Con-

DCs is symptomatic of a more general dissatisfaction with traditional international law which the DCs view as the normative product of Eurocentric civilization¹⁷ and which, for most of its existence, has served as the “white man’s law” and *not* as the Law of Nations.¹⁸

The DCs’ disenchantment with the GATT system of world trade relations has expressed itself in two forms. At a more general level, their displeasure has been directed at GATT’s organizing principles and objectives, which were formulated in the immediate post-World War II years,¹⁹ but have now become inadequate in attacking the

ference on Trade and Development (UNCTAD) in 1964 to focus on trade and development issues as they affect DCs. In its first meeting which was convened in Geneva, the rules of GATT came under attack for their exclusion of the DCs from the benefits of postwar expansion. DCs’ objections to GATT were summarized by UNCTAD’s Secretary-General, Dr. Raul Prebisch:

Why has GATT not been as efficacious for the developing countries as for the industrial countries? There are two main reasons. First [it] is based on the classic concept that the free play of international economic forces by itself leads to the optimum expansion of trade and the most efficient utilization of the world’s productive resources; rules and principles are therefore established to guarantee free play. Secondly, the rules and principles in question have not always been strictly complied with and, even though they seem to have been observed in the letter in certain instances, the spirit underlying them has not been respected.

See United Nations Conference on Trade and Development in PROCEEDINGS OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, vol. II p. 18 (1964). UNCTAD began as a U.N.-sponsored conference to moot the twin issues of trade and development with reference to the DCs but soon after became a permanent organ of the General Assembly of the United Nations. The aims of UNCTAD are to promote trade in the interest of development, to formulate principles and policies concerning such trade, to initiate multilateral trade agreements, and to act as a center for harmonizing governmental policies affecting the area. It began life with 77 members who dubbed themselves the “Group of 77” but now has over 166 members. UNCTAD has reached agreement on a number of international conventions dealing with topics such as liner conferences, multimodal transport and various commodities. It was instrumental in bringing to fruition the Charter of Economic Rights and Duties of States which was adopted by the United Nations General Assembly in 1975. See also note 33 *infra* and accompanying text. See generally Gardner, *The United Nations Conference on Trade and Development*, 22 INT’L ORG. 99 (1968); K. HAGRAS, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (1965); B. GOSOVIC, UNCTAD CONFLICT AND COMPROMISE (1972); Walters, *UNCTAD: Intervenor Between Poor and Rich States*, 7 J. WORLD TRADE L. 527 (1973); Ramsey, *UNCTAD’s Failures, The Rich Get Richer*, 38 INT’L ORG. 387 (1984); T. WEISS, MULTILATERAL DEVELOPMENT DIPLOMACY IN UNCTAD (1986).

17. See, e.g., Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking The Contemporary Dynamics of Norm-Creation*, 11 CALIF. W. INT’L L. J. 445 (1981) [hereinafter Joyner, *General Assembly Resolutions*]. For similar conclusion, see Laing, *International Economic Law and Public Order in the Age of Equality*, 12 LAW POL’Y INT’L BUS. 727 (1980) [hereinafter cited as Laing, *International Economic Law*]; Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal Law*, 55 AM. J. INT’L L. 863, 866 (1961); C. JENKS, *THE COMMON LAW OF MANKIND* (1958); W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1970); M. BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (1979); G. TUNKIN, *THEORY OF INTERNATIONAL LAW* (1974).

18. Joyner, *General Assembly Resolutions*, *supra* note 17, at 445.

19. The preeminent position of the United States in the early postwar years meant

trade problems already discussed. Hence the urgent need to revise, expand, reform, and improve upon GATT so as to bring its objectives and principles in conformity with contemporary realities of international trade.²⁰ More specifically, attacks have been leveled at some GATT trade rules, in particular the Most-Favored-Nation (MFN)²¹ principle of reciprocal nondiscrimination in international

that American views on how international trade should be conducted would dominate, influence, and ultimately shape GATT. Three such values have been identified: (1) trade liberalization which is reflected in the aims of the GATT preamble of reducing tariffs and other barriers to trade. America's much more liberal position on trade prevailed even though it was opposed by her European allies; (2) multilateralism, which became embodied in the MFN principle of Article 1 and its guarantee of nondiscrimination in trade matters. Again the American position met resistance from the Europeans who feared that their weaker economies would not be able to compete effectively in the multilateral trade liberalization framework constructed around the MFN principle. According to Winham "because of their importance to the United States the principle of multilateralism and nondiscrimination were prominent in the commitments of the GATT, but from the outset they were principles flawed by controversy and inconsistency." See G. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND OF NEGOTIATION 32 (1986) [hereinafter WINHAM, THE TOKYO ROUND OF NEGOTIATION]; (3) American value that shaped GATT was the means of implementing the trade-liberalizing objectives of the General Agreement. To the Europeans who "preferred to build a postwar trading system on practice rather than pronouncement," the Americans responded with a code of international trade law that clearly set out the rights and obligations the contracting parties had toward each other's commercial activities. *Id.* at 32-33. Two things are clear from a reading of the genesis of GATT. First, that America's attachment to an economic philosophy of free trade and her view of world politics, values which her junior partners in Europe may not have shared but which they acquiesced to grudgingly, were imposed on GATT. The result then was a world system of trade which reflected principally the interests and objectives of the U.S. and, to some extent, of her European satellites. Second, little effort, if any, was made to include the interests of the developing countries—the vast majority of whom were still under European colonial domination at that time—in the framework of world trade that was negotiated in 1947. For a discussion of the U.S. role in the making of GATT, see generally Curzon, *Crisis in the International Trading System*, IN SEARCH OF A NEW WORLD ECONOMIC ORDER 33 (H. CORBET & R. JACKSON eds. 1974); DAM, GATT LAW, *supra* note 15, at 12; R. GARDNER, STERLING-DOLLAR DIPLOMACY (1969); T. MURRAY, TRADE PREFERENCES FOR DEVELOPING COUNTRIES 6-8 (1977) [hereinafter MURRAY, TRADE PREFERENCES].

20. The feeling is widespread that GATT rules are unresponsive not only to trade problems faced by governments that had written the rules but also to those faced by the new members of GATT who had not shared in the rule-making. See Gwin, *Strengthening the Framework of the Global Economic Organizations*, in POWER, PASSIONS, AND PURPOSE 140 (J. Bhagwati & R. Ruggie eds. (1984) [hereinafter Gwin, *Global Economic Organizations*].

21. The Most-Favored-Nation clause has featured as one of the central provisions in commercial treaties over the past 300 years. It is generally referred to as the foundation stone on which the whole structure of modern international trade rests. The clause, according to Hyder, has not yet crystallized into a rule of international customary law and is pre-eminently an optional standard which derives its validity from the treaties in which it is embodied. See generally K. HYDER, EQUALITY OF TREATMENT AND TRADE DISCRIMINATION IN INTERNATIONAL LAW (1968) [hereinafter HYDER, EQUALITY OF TREATMENT AND TRADE DISCRIMINATION]; S. BASDEVANT, LA CLAUSE DE LA NATION LA PLUS FAVORISE (1929); N. ITO, LA CLAUSE DE LA NATION PLUS FAVORISE (1930); Catudal, *The Most Favored Nation Clause and the Courts*, 35 AM. J. INT'L L. 41 (1941); R. SNYDER, THE MOST FAVORED NATION CLAUSE (1948); Schwarzenberger, *The Most Favoured nation Standard in British State Practice*, (1945) BRIT. Y.B. INT'L L. 102. Its central objective is to ensure non-discriminatory treatment in international trade by imposing an obligation on parties to a com-

trade relations.²² This bed-rock principle of GATT, contained in its Article 1, imposes on the signatory countries the obligation to grant to each other equality of treatment and to apply tariffs and other similar regulatory measures unconditionally and automatically on a nondiscriminatory basis.²³ The procrustean MFN rule of reciprocal tariff concessions imposes upon the DCs a burden so crushing, and demands of them such disproportionate sacrifices in relation to those expected of ICs, that it has become increasingly difficult for DCs to compete with producers in the ICs under Most-Favored-Nation conditions.

All previous rounds of MTNs have had to contend with DCs' pleas for a competitive advantage to be provided through a system of preferential tariffs favoring their exports of manufactured and semi-manufactured products.²⁴ In 1971, such a preferential scheme,

mercial treaty that citizens of one State receive at the hands of another, treatment no less favorable than that accorded to citizens of third states. See generally JACKSON, *WORLD TRADE LAW*, *supra* note 1, at 250. It should be noted that the GATT MFN clause does not of itself bring about an obligation to reduce tariffs or to refrain from increasing them. This occurs through tariff negotiations and renegotiations among the contracting parties. See note 47 *infra* and accompanying text.

22. For instance, the Secretary-General's report to the first United Nations Conference on Trade and Development had this to say about the MFN standard: "However valid the most-favoured-nation principle may be in regulating trade relations among equals, it is not a suitable concept for trade, involving countries of vastly unequal economic strength." Prebisch, *Towards a New Trade Policy for Development*, Report by the Secretary-General of the United Nations Conference on Trade and Development, United Nations, 1964, at 66. See also Espiell, *The Most-Favoured-Nation Clause: Its Present Significance in GATT*, 5 *J. WORLD TRADE L.* 29 (1971) [hereinafter Espiell, *The Most-Favoured-Nation Clause*].

23. GATT, art. 1(1).

24. The first response by the ICs to DC entreaties came in 1964 when a new chapter entitled "Trade and Development" was drafted and subsequently incorporated as Part IV of GATT. With the addition of Part IV comprising Articles XXXVI, XXXVII, and XXXVIII the law of GATT recognized, for the first time, the new principle of non-reciprocity which established a differential treatment in favor of DCs in tariff negotiations or renegotiations by eliminating the mutuality of concessions principle enshrined in the MFN standard. Article XXXVI lays down broad principles and objectives which recognize that "international trade as a means of achieving economic and social advancement should be governed by such rules and procedures—and measures in conformity with such rules and procedures—as are consistent with the objectives set forth in this Article" (paragraph 1(e); notes that "the Contracting Parties may enable less-developed contracting parties to use special measures to promote their trade and development" (paragraph 1(f); and states that "the developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties" (paragraph 8). These Article XXXVI principles and objectives are governed by specific obligations assumed by the contracting parties individually (Art. XXXVII) and/or collectively (Art. XXXVIII). Article XXXVII requires *inter alia* less-developed contracting parties "to take appropriate action in implementation of the provisions of Part IV for the benefit of the trade of other less-developed contracting parties" (paragraph 4); and the contracting parties agree through joint action to "establish such institutional arrangements as may be necessary to further the objectives set forth in Article XXXVI and give effect to the provisions of this Part." Article XXXVIII, paragraph 2(f). But Part IV proved to be nothing more than a "symbolic" gesture, hardly the panacea it was touted to be. See WINHAM, *THE*

the Generalized System of preferences (GSP), was adopted in favor of all DCs by derogating from the GATT MFN principle.²⁵ The GSP, as it was then structured, fell short of the DCs' goal of having the principle of preferential tariffs grounded as a basic right within GATT and not as an *ex gratia* favor from ICs.

In 1979 at the conclusion of the Tokyo Round of MTNs the Contracting Parties agreed to set up a permanent legal basis for preferential treatment in the GATT system.²⁶ Through an enabling clause the ICs agreed that, notwithstanding the MFN provisions of Article of the General Agreement, Contracting Parties *may* accord differential and favorable treatment to DCs without according such treatment to other contracting parties.²⁷

Some scholars contend that the Enabling Clause has succeeded in transforming the principle of preferential treatment, from a provisional and undesirable exception to the GATT equality of treatment doctrine, to an accepted norm of international trade law.²⁸ In this author's view, this contention reads too much into that clause. While it is conceded that the recognition of the principle of preferential treatment in favor of DCs will profoundly affect legal rules and principles underlying the regulation of international trade, it is still unclear whether: (1) the Enabling Clause can be read as an expression of such recognition, and (2) whether, independent of the

TOKYO ROUND NEGOTIATION, *supra* note 19, at 143. With respect to Articles 36-38 which make up Part IV, Dam has commented on "how few concrete commitments and how few qualifications of other provisions of the General Agreement are actually involved." See DAM, GATT LAW, *supra* note 15, at 237-38.

25. It should be noted that the principle of preferential treatment under the GSP operates in negation to the MFN principle of reciprocity and nondiscrimination in international trade. To be sure, the ICs recognized the problem of including in one instrument two contradictory and fundamentally divergent principles: one (MFN) which promotes equality of treatment and the other (preferential treatment) which advocates discriminatory treatment in trade relations. Rather than amend GATT by removing the MFN provision of Article 1, the West chose instead to relieve those contracting parties that instituted preference-granting programs with DCs from their obligations under the basic MFN provision of Article 1 through the waiver device as provided for in Article XXV, paragraph 5. The text of the waiver is set forth in GATT Doc. L/3545 (1971), *reprinted in* GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 24 (18th Supp. 1972). And to ensure that the central feature of GATT would not be destroyed, the ICs made certain that the agreement to waive the MFN principle was not only temporary but it would not constitute a binding commitment. See *Agreed Conclusions of the Special Committee on Preferences*, UNCTAD Doc. TD/B/330, at 6.

26. The text of the Group Framework Agreement appears in Doc. MTN FR/W20 Rev. 2 [hereinafter the Declaration].

27. See GATT Doc. L/4903 (28 November 1979).

28. See Yusuf, "Differential and More Favourable Treatment": *The GATT Enabling Clause*, 18 J. WORLD TRADE L. 488, 507 (1980) [hereinafter Yusuf, *The Enabling Clause*]. For a similar conclusion, see Nicolaidis, *Preferences for Developing Countries: A Critique*, 19 J. WORLD TRADE L. 373, 375 (1985)[hereinafter Nicolaidis, *Critique of Preferences*].

clause, the principle has ripened sufficiently to be accorded the status of a customary rule of international trade law. Learned commentaries are not only sharply divided on this point but, even more fundamentally, on whether or not the principle of preferential treatment has any place in a framework of world trade based on the concept of free trade.

The balance of this Article examines the emergence and progression of this new international legal principle and, in particular, its relationship to the emerging international law of development. Although many of the principles undergirding the new international law of development have not evolved into "hard" international law in the sense that failure to comply with the norms results in international liability, they do represent emerging law or "soft" law that carries with it a strong moral and practical effect. Given the widespread acceptance of the principles of the international law development in the Third World and Socialist Bloc, their metamorphosis from "soft" to "hard" law is only a matter of time.²⁹

II. THE GENERALIZED SYSTEM OF PREFERENCES

The framework of rules governing trade relations between the DCs and the industrialized countries has been under continuous discussion since the inception of GATT.³⁰ And during the forty years that GATT has been in existence, provisions have, from time to time, been incorporated into the agreement to allow the DCs to maintain trade restrictions for development purposes.³¹ These provisions for special and differential treatment of the DCs have been debated within GATT, in the various multilateral trade negotiations³² that have occurred since GATT was adopted in 1947, as

29. See *Report of the Secretary General Progressive Development of the Principles and Norms of International Law Relating to the new International Economic Order*, U.N. Doc. A/39/504/Add. 1 at 27.

30. See DAM, GATT LAW, *supra* note 15, chapter 14; and JACKSON, WORLD TRADE LAW, *supra* note 1.

31. For instance, Part IV on Trade and Development was added to GATT in 1965. DAM, GATT LAW, *supra* note 15, at 236-242; see also B. GOSOVIC, UNCTAD: CONFLICT AND COMPROMISE (1972).

32. There have been seven major tariff conferences or 'Rounds' of tariff negotiations under the GATT framework with the most recent being the Tokyo Round held in Geneva from 1973-79. The first was held in Geneva in 1947, the second in Annecy, France, in 1949, the third in Torquay, England in 1951. The fourth (1956), the fifth (Dillon Round— 1960-62), and the sixth (Kennedy Round— 1964-67) were all held in Geneva as would the present round— the eighth (Uruguay Round). For an excellent coverage of the first six rounds, see DAM, GATT LAW, *supra* note 15, at 56. For a comprehensive coverage of the Tokyo Round, see generally WINHAM, THE TOKYO ROUND NEGOTIATION *supra* note 19; L. GLICK, MULTILATERAL TRADE NEGOTIATIONS: WORLD TRADE AFTER THE TOKYO ROUND (1984).

well as without.³³ Attention is here focused on the Generalized System of Preferences (GSP), the most concrete expression to date of the principle of preferential treatment.

A. A Species of Preferential Treatment: The Generalized System of Preference

Agreement on the general form of the GSP was reached by the industrialized countries in 1970.³⁴ Subsequently, a waiver³⁵ was passed by the Contracting Parties on June 25, 1971, pursuant to Article XXV³⁶ of GATT, allowing the industrial countries to institute programs that would otherwise be in conflict with the Most-Favored-Nation (MFN) principle of reciprocal, nondiscriminatory trade. It bears noting that the waiver setting up the GSP was no novel departure from the GATT MFN principle of equality of treatment and nondiscrimination.

Requests for waivers from the provisions of GATT Art. 1(1) have been routinely accommodated since the inception of GATT. The first application for such a waiver with respect to the preferential treatment of imports from an individual country was submitted by none other than the United States, the champion of trade liberalization, in 1948. This waiver of tariffs to all imports from those Pacific Islands formerly under Japanese mandate, which had then become United States trust territories under the U.N. trusteeship system (Marshall, Caroline and Mariana Islands), was granted and set the precedent for future preferences. All the major Western industrialized countries have subsequently sought and obtained waiv-

33. In the many conferences sponsored by United Nations Conference on Trade and Development. See note 16 *supra* and accompanying text.

34. See Graham, *The U.S. Generalized System of Preferences for Developing Countries: International Innovation and the Art of the Possible*, 72 AM. J. INT'L L. 513, 513 (1978).

35. The text of the waiver is set forth in GATT Doc. L/3545 (1971), reprinted in GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 24 (18th Supp. 1972).

36. Article XXV, paragraph 5, provides: "In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement" provided that "such decision[s] shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties." To place some restriction on what many considered a liberal waiver provision, the CONTRACTING PARTIES adopted in 1956 a set of "Guiding Principles to be Followed by the CONTRACTING PARTIES in Considering Applications for Waivers from Part 1 of Other Important Obligations of the Agreement." These principles provide for 30-day notice for a waiver request, full consultation by interested parties, inclusion in the waiver of procedures for consultation and arbitration, and annual reports and reviews. For the text of the guiding principles, see GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 25 (5th Supp. 1957).

ers of their MFN obligations under GATT: Italy in 1960; Australia in 1953; and the UK and France in 1960.³⁷ In all of these cases, preferential treatment was granted whenever it was aimed to contribute to the economic development of an underdeveloped dependent or newly-independent country, and with the understanding that such preferential arrangements did not result in damage or substantial injury to the trade of other Contracting Parties.³⁸ Perhaps the fundamental difference between the preferential treatment that DCs demand in international trade relations and the kind long tolerated by GATT is that preferences for development are to be accorded on the basis of the differences in levels of economic development in the West and DCs and not on account of longstanding political, cultural, geographical and historical ties.³⁹

The adoption of this waiver was the culmination of a series of legal maneuvers that began during the Kennedy Round⁴⁰ of trade talks in the 1960s with the addition of Part IV to GATT (Articles XXXVI, XXXVII and XXXVIII).⁴¹ Part IV was primarily a non-binding statement of principles and objectives concerning new approaches to be taken to DC development rather than specific legal obligations.⁴² But Article XXXVI was different in that it specifically provided the first legal basis for non-reciprocal dealings between the DCs and the industrialized countries.⁴³

The GSP is not really a “generalized system”⁴⁴ but a cluster of

37. See DAM, *GATT LAW*, *supra* note 15, Chapter 4; and JACKSON, *WORLD TRADE LAW*, *supra* note 1, Chapter 22.

38. See A. YUSUF, *LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES* (1982) [hereinafter YUSUF, *LEGAL ASPECTS OF TRADE PREFERENCES*].

39. *Id.*

40. DeBouter, *Tariff Preferences Revisited*, 11 *J. INT'L L. & ECON.* 53, 354-62 (1977). In 1963, when the Kennedy Round MFNs were inaugurated, the Ministers agreed that: “in the trade negotiations every effort shall be made to reduce barriers to exports of the less-developed countries but that the developed countries cannot expect to receive reciprocity from the less-developed countries.” See Analytical Index, February 1966, note on Article XXXVIII *bis*, p. 147, and Article XXXVI, p. 165.

41. See *supra* note 24 and accompanying text.

42. JACKSON, *WORLD TRADE LAW*, *supra* note 1, at 646.

43. Art. XXXVI, para. 8. *Id.* at 360.

44. The prospects of establishing a common scheme were dashed on the shoals of the competing political interests of the preference-granting countries. For example, the United Kingdom already tied to a preferential trading arrangement with developing commonwealth countries was reluctant to grant GSP tariff treatment to non-Commonwealth DCs as that would undermine the Commonwealth preference scheme. Similar preferential arrangements between the EEC and its Associated DC Member States accounts for the former's resistance to a single uniform system of preferences. In theory, the GSP is a non-discriminatory and non-reciprocal system for all DCs but because the contracting parties were unable or unwilling to agree on a common list of beneficiaries they left it up to the DCs to “self-elect” themselves into the group of beneficiaries. The operation of the self-election principle has led to some rather dubious claims to beneficiary status. For example, Cuba, Romania, Bulgaria,

eleven country schemes⁴⁶ that share certain features in common:⁴⁶ (1) each preference-giving country retains the right to select the recipient countries entitled to more favorable tariff treatment as well as the products to be covered;⁴⁷ (2) preferential imports are subject to quantitative restrictions, that is, ceiling limitations are imposed on either the volume or the value of a product entitled to access at a preferential rate;⁴⁸ and (3) preferential tariffs are not bound⁴⁹ as MFN tariffs are, meaning preferences are introduced *ex gratia*. For this reason, preferential concessions can be withdrawn or the margin of preferences reduced unilaterally with prior notification. The affected country has no recourse to compensation or retaliation as is the case with MFN tariffs bound within the GATT.⁵⁰

1. *The Objectives of the GSP*—The GSP is in essence a tariff policy whose primary goal is to expand exports and export earnings of DCs by stimulating preference-granting IC imports of their manufactured products.⁵¹ A second goal of the GSP is to offer an alternative source of export earnings to DCs by weaning them away from their heavy dependence on primary agricultural commodities and industrial raw materials, whose slow long-term growth and

Taiwan, Yugoslavia, Hong Kong have laid claim to beneficiary status as well as the relatively advanced DCs of the Mediterranean basin (Greece, Israel, Malta, Portugal, Spain and Turkey). See MURRAY, TRADE PREFERENCES, *supra* note 19, at 34; see also ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE GENERALIZED SYSTEM OF PREFERENCES: REVIEW OF THE FIRST DECADE 21 (1983) [hereinafter OECD REPORT].

45. These are Australia, Austria, Canada, EEC, Finland, Japan, New Zealand, Norway, Sweden, Switzerland and United States. See OECD REPORT, *supra* note 44, at 23-25.

46. D. TUSSIE, THE LESS DEVELOPED COUNTRIES AND THE WORLD TRADING SYSTEM 31 (1987)[hereinafter TUSSIE, WORLD TRADING SYSTEM].

47. *Id.*

48. *Id.*

49. GATT does not require the member countries to abolish tariffs automatically. Rather it relies on specific agreements among contracting parties to reduce particular tariffs. In other words, tariffs are the negotiable item. See TUSSIE, WORLD TRADING SYSTEM, *supra* note 46, at 13. The basic concept in the GATT tariff negotiating system is the 'binding' of customs duties on particular items in the tariff schedules of individual contracting parties. Professor Dam has described the binding process as follows: "A given rate of customs duty on a particular item is 'bound' when an agreement has been reached with respect to it. Basically there are three types of bindings: (1) agreements to lower a duty to a stated level (2) agreements not to raise a ditty above its present level; (3) agreements not to raise a duty above a specified higher level." DAM, GATT LAW, *supra* note 15, at 31. Bound rates are then included in a schedule which then becomes an integral part of the GATT (Art. 11:7). There is a separate schedule for each contracting party after each major round of tariff negotiated. These separate schedules are, periodically consolidated for each contracting party. The contracting parties are obligated with respect to a bound duty not to raise it beyond the level agreed upon it. DAM, GATT LAW, *supra* note 15, at 31.

50. DAM, GATT LAW, *supra* note 15, at 31.

51. MURRAY, TRADE PREFERENCES, *supra* note 19, at 22.

marked price instability frequently contributed to chronic trade deficits.⁵² Attainment of these goals will require the DCs to adopt a deliberate policy of “export-oriented industrialization”⁵³ which requires a shift of productive effort away from primary products toward manufacturing.⁵⁴ As a consequence, the Contracting Parties built into the GSP the understanding that preferential tariffs would apply to manufactured products only, i.e., industrial manufactures and semi-manufactures.⁵⁵

The beneficial effects of the GSP were also expected to redound to the preference-granting ICs as well. For instance, it was anticipated that the increased export earnings brought about by the GSP would invariably strengthen the economic base making it possible for DCs to buy more products from ICs. As one commentator noted the United States GSP⁵⁶ is not “a mere token of U.S. largess designed solely for the benefit of the developing countries.”⁵⁷ Supporters of the U.S. GSP believe that the program will eventually create new markets for United States exports. It is no coincidence that the program was adopted at a time when United States trade with the DCs had been expanding rather rapidly. For example, between 1969 and 1973, total U.S. imports from DCs grew from \$9.4 billion to \$20.2 billion, a 115.2% increase.⁵⁸ During this same period, imports of manufactures from DCs increased by about 164.7%, from \$3 billion to \$8 billion.⁵⁹ A large portion of these DCs’ export earnings were spent in the United States for goods that were necessary for their economic development.

2. *The Legal Status of the GSP*—The legal nature of the commitments assumed by preference-granting ICs, together with the legal consequence of their implementation at the international level, are all contained in Part IX, paragraph two of the Agreed Conclusions of the Special Committee on Preferences⁶⁰ which provides:

The Special Committee takes note of the statement made by the preference-giving countries that the legal status of the tariff pref-

52. *Id.*; see also OECD REPORT *supra* note 44.

53. *Id.*

54. *Id.*

55. *Id.*

56. Comment, *The Generalized System of Preferences: Nations More Favored Than Most*, 8 LAW & POL’Y INT’L BUS. 783, 785-86 (1976).

57. *Id.*

58. *Id.* at 785.

59. *Id.* at 786.

60. *Agreed Conclusions*, *supra* note 25.

erences to be accorded to the beneficiary countries by each preference-giving country individually will be governed by the following considerations:

a) The tariff preferences are temporary in nature;
b) Their grant does not constitute a binding commitment and, in particular, it does not in any way prevent:

i) Their subsequent withdrawal in whole or in part;
ii) The subsequent reduction of tariffs on a most favoured-nation basis, whether unilaterally or following international tariff negotiations;

c) Their grant is conditional upon the necessary waiver or waivers in respect of existing international obligations, in particular in the General Agreement on Tariffs and Trade.

It is clear from reading Part IX, paragraph two that ICs did not consider the grant of tariff preferences to DCs as constituting a legally binding commitment.

III. CONTENDING PERSPECTIVES ON THE PRINCIPLE OF PREFERENTIAL TREATMENT

DCs have historically viewed GATT as an outgrowth of the interests of ICs.⁶¹ Even among the critics of preferential treatment, there is acknowledgment that the GATT game is controlled by the developed countries with the DCs looking in from the fringes.⁶² To begin with, most DCs were not parties to the establishment of GATT,⁶³ although India and some Latin American countries, including Brazil, Chile, and Cuba, were active participants in post-war negotiations on international trade arrangements. It is not surprising, therefore, that GATT ended up addressing the specific and particular needs of the industrialized countries⁶⁴ while making

61. Professor Friedmann points out that even though GATT makes claim to being a global trading system, its effectiveness had been limited almost entirely to the economically more developed nations. Friedmann, *The Relevance of International Law to the Processes of Economic and Social Development*, in *THE FUTURE OF INTERNATIONAL LEGAL ORDER* 3, 32-33 (R. Falk & C. Black 1970).

62. See, e.g., Behrman, *Rethinking Global Negotiations, Trade*, in *POWER, PASSIONS, AND PURPOSE* 231, 245 (J. Bhagwati & J. Ruggie eds. 1984) [hereinafter Behrman, *Trade Issues*].

63. TUSSIE, *WORLD TRADING SYSTEM*, *supra* note 46, at 4.

64. A good example of GATT's catering to the needs of its most powerful member countries is evidenced in the provisions on commercial policy a careful examination of which, as Professor Dam has done, will lead to the inescapable conclusion that GATT, in his words, "is a sufficiently direct expression of U.S. views on the appropriate form of concerted international action in the commercial policy area" DAM, *GATT LAW*, *supra* note 15, at 12. See also *supra* note 19 and accompanying text.

short shrift of the needs of the DCs.⁶⁵ As Winham correctly points out, since the time GATT was adopted DCs have been particularly concerned with finding ways to escape their underdevelopment.⁶⁶ They have accordingly adhered to visions of a world trading system which explicitly recognizes and promotes the principle of trade protectionism to achieve the goals of import substitution and export promotion.⁶⁷

Given the role that institutions play in improving the functioning of markets, and particularly that played by GATT in improving post World War II international trade for ICs,⁶⁸ DCs have doggedly waged a protracted campaign to have their vision of the ideal world trading system institutionalized in GATT. Toward this end, DCs have tried to change GATT trade rules in the direction that favors them. Satisfaction of their demands for special and differential treatment would help overcome the disparities in economic and political power that have worked to their disadvantage in the GATT system. However, they have been met with mixed reactions in the scholarly community. Scholarly reassessments of the whole concept of preferential treatment in favor of DCs have given rise to two competing perspectives.

The first approach is extremely critical of the principle seeing it as having the effect of robbing the GATT trading system of its vitality and eventually contributing to its ultimate collapse.⁶⁹ Critics of the preferential treatment principle strongly favor the principles of equality of treatment and nondiscrimination as the founda-

65. For example, the areas of international trade that the DCs have consistently demanded be included in GATT (such as primary commodity agreements and discriminatory preferences) were in fact contained in the stillborn International Trade Organization (ITO) Charter (Articles 8-12, 14-15). But with "the death of the ITO Chapter III of the Havana Charter, entitled 'Economic Development and Reconstruction,' slipped into desuetude *Elaborate provisions on the supply of capital funds and other facilities for economic development, on international investment and on preferential agreements among less-developed countries were thereby allowed to fall into legal oblivion.*" (emphasis added). DAM, GATT LAW, *supra* note 15, at 226. GATT by excluding much of what had been negotiated at the Havana conference addressing the specific needs of DCs forced them in a position of reinventing the wheel, so to speak.

66. WINHAM, THE TOKYO ROUND NEGOTIATION, *supra* note 19, at 140, 142.

67. *Id.*

68. Behrman, *Trade Issues*, *supra* note 62, at 238.

69. This perspective has been articulated in the writings of Behrman, *Trade Issues*, *supra* note 62; Bressand, *A Time for Painful Rethinking*, in POWER, PASSIONS, AND PURPOSE 49 (J. Baghwati & J. Ruggie 1984) [hereinafter Bressand, *Painful Rethinking*]; Wolf, *Two-Edged Sword: Demands of Developing Countries and the Trading System*, in POWER, PASSIONS, AND PURPOSE 201 (J. Baghwati & J. Ruggie 1984) [hereinafter Wolf, *Two-Edged Sword*]; and R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 208 (1975) [hereinafter HUDEC, THE GATT LEGAL SYSTEM].

tion stones of the world trading system embodied by GATT. This critical perspective objects to what a principal proponent describes as “the desire of developing countries to create a world in which one group of countries [ICs] has most of the obligations and another [DCs] most of the rights”⁷⁰ This perspective finds nothing commendable in the “very considerable divergence in the formal application of GATT principles and rules to the trade of developing countries, on the one hand, and to that of developed countries, on the other.”⁷¹ According to this school of thought, the unequal application of GATT trade rules, and caving in to the demands of DCs for preferential treatment, has succeeded in emasculating GATT and worse threatens to destroy it unless a hasty retreat is made to GATT’s founding principles of nondiscrimination, liberalism, stability, and transparency.⁷² Because this viewpoint has held such a strong fascination for advocates of free trade and of a liberal international economic order, throughout this essay critical perspective of preferential treatment will be referred to as “liberal internationalism.”

In opposition to liberal internationalism is a perspective⁷³ that has been influenced by, and draws its inspiration from, laudable visions of a New International Economic Order.⁷⁴ This perspective

70. Wolf, *Two-Edged Sword*, *supra* note 69, at 202; *see also* Meier, *The Tokyo Round of Multilateral Trade Negotiations and the Developing Countries*, 13 CORNELL INT’L L.J. 239 (1980).

71. *Id.* at 203.

72. *Id.* at 204.

73. *See generally* HYDER, EQUALITY OF TREATMENT AND TRADE DISCRIMINATION, *supra* note 21; YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES *supra* note 38; and the BRANDT COMMISSION REPORT, *supra* note 14.

74. The New International Economic Order (NIEO) comprises a set of three instruments passed in 1974 by the United Nations General Assembly (UNGA) spelling out certain economic demands and principles. Two of these instruments were adopted by the UNGA at its Sixth Special Session on May 1, 1974—the *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201 (S-VI), 6 (Special) U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974), *reprinted in* 13 I.L.N. 715 (1974), and the *Programme of Action on the Establishment of a New International Economic Order*, G.A. Res. 3202 (S-VI), 6 (Special) U.N. GAOR Supp. (No.1) at 5, U.N. Doc. A/9559 (1974), *reprinted in* 13 I.L.M. 720 (1974). The third instrument was adopted by the UNGA at its 29th regular session on December 12, 1974: *Charter of Economic Rights and Duties of States*, G.A. Res. 3281 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A./9361 (1975), *reprinted in* 14 I.L.M. 251 (1975) [hereinafter the *Economic Charter*]. The historical roots of the NIEO can be traced back to the 1950s and 1960s when the DCs began forming a united front for dealing with the industrialized countries on international economic matters. The first United Nations Conference on Trade and Development (UNCTAD) held in Geneva in 1964 became the institutional glue holding together this motley group of countries. There have been four other such conferences since 1964 in the course of which UNCTAD’s role as the spokesman for the world’s poor has come to be accepted. For the background and evolu-

is sympathetic to the idea of preferential treatment and would substitute this for the GATT orthodoxy of equality of treatment and nondiscrimination. This perspective will be referred to as “equitable internationalism” since it is grounded in the vision of an equitable world trading system in which States that are equal will be treated equally and those that are unequal will be treated unequally in proportion to the inequality.⁷⁵

An extreme view argues that preferential treatment of DCs should be accepted as a permanent feature of the world trading system rather than as a temporary exception.⁷⁶ This view would like to see the principle of preferential treatment backed by sanctions to assure its effectiveness. It should also be nondiscriminatory and irrevocable, or subject to compensation if withdrawn.⁷⁷

The more orthodox view believes that preferential treatment should not be granted on a permanent basis but as a transitional measure⁷⁸ to enable DCs to realize their development targets by reducing their persistently widening trade gap and increasing their foreign exchange.⁷⁹ Once the transitional phase through which DCs are passing is over and the structural disparities between DCs and the ICs have been reduced or eliminated, the orthodox position contends that the *raison d’être* of preferential treatment will disappear and the MFN principle of equality of treatment will be restored to its former status. According to this more orthodox view, the grant of preferential treatment to DCs should not result in any permanent change in the existing legal framework of international trade.⁸⁰

tion of DC’s demands articulated in the five UNCTAD conferences held between 1964 and 1979. See Burney, *A Recognition of Interdependence: UNCTAD V.*, 16 FINANCE AND DEVELOPMENT 18 (Sept. 1979).

75. See text accompanying *infra* note 116.

76. This is the view espoused by the BRANDT COMMISSION REPORT, *supra* note 14, at 183.

77. This view found expression in the proposals put forward by Ambassador Maciel at the Tokyo Round in 1976. See *Statement by the Representative of Brazil, H. E. Ambassador George A. Maciel, on 21 February 1977*, GATT Docs. MTN/FR/W/1, at 2 (Feb. 21, 1977).

78. This view comports with Par. 2, Part IX of the Agreed Conclusions of the Special Committee on Preferences which subjects the granting of preferential treatment to two major limitations: (1) that preferences should be temporary in nature; and (2) that they should not be regarded as binding on the preference giving countries. See, e.g., HYDER, EQUALITY OF TREATMENT AND TRADE DISCRIMINATION, *supra* note 21; YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES, *supra* note 38, at 95 *et seq.*

79. HYDER, EQUALITY OF TREATMENT AND TRADE DISCRIMINATION, *supra* note 21.

80. *Id.*

A. *The Liberal Internationalist Perspective*

A basic objection to the demand by DCs that international trade rules be universal in nature and not uniform is that these rules have an overall damaging effect on the entire system of world trade. As Martin Wolf, director of Studies at the Trade Policy Research Centre in London, argues, it is not possible to secure derogations from GATT principles in favor of DCs without the basic framework of liberal trade being affected in the long run.⁸¹ In a particularly blistering attack, Wolf accuses the DCs of engaging in a “sustained assault on the liberal international trading system including the principle of nondiscrimination, embodied in Article 1 of the GATT.”⁸² The DCs, Wolf continues, “have argued that ‘equal treatment of unequals is unjust’ and have urged, instead, that there be discrimination”⁸³ in their favor. In a similar vein, Hudec views the exceptions and derogations to pre-existing general rules of international trade as constituting a progressive delegalization of the relationship between GATT and its developed country members.⁸⁴

1. *Preferential Treatment is a Double-Edged Sword*—A more specific objection to the principle of preferential treatment is that it allows the DCs to pursue policies damaging to themselves as well. One critic has likened the demand for special and differential treatment to “a demand by a pedestrian for the ‘right’ to jaywalk and to step under a bus.”⁸⁵ Preferential treatment is damaging to the very countries advocating them because, contrary to earlier views, limitless protection is not in the interests of individual DCs.⁸⁶ It is believed that “the release from all external constraints on their policies, however weak, combined with the constant preaching that the ideas embodied in those constraints are damaging”⁸⁷ has allowed DCs to “. . . construct restrictive regimes that can be liberalized only with great difficulty and that strangle their own growth.”⁸⁸ The protectionist preferential trading arrangements are singled out as prime examples of the havoc that special and differential treat-

81. Wolf, *Two-Edged Sword*, *supra* note 69, at 215.

82. *Id.* at 202.

83. *Id.*

84. Hudec, *THE GATT LEGAL SYSTEM*, *supra* note 67, at 208.

85. *Id.*; see also I. LITTLE, *ECONOMIC DEVELOPMENT: THEORY, POLICY AND INTERNATIONAL RELATIONS* 370 (1982).

86. Wolf, *Two-Edged Sword*, *supra* note 69, at 214.

87. *Id.*

88. *Id.*

ment can wreak on the economies of DCs.⁸⁹ Regional trading arrangements, we are told, have proved fragile “because of the large element of trade diversion inherent in these schemes Worse, they have proved a diversion from consideration of the need for more comprehensive liberalization”⁹⁰ For example, in 1979 trade in manufactures within Latin American Free Trade Area (LAFTA) was \$4.7 billion which was about a third of the gross manufactured exports of Hong Kong alone.⁹¹

2. *Preferences Provoke a Backlash From Industrialized Countries*—Another objection to the preferential treatment of DCs within GATT is the damaging effect it has on industrial countries’ attitude toward trade with DCs. Preferential treatment helps to “undermine the belief that liberal trade is a matter of mutual advantage or of unilateral advantage to the industrial countries. Rather, the impression is that it is a burden on the industrialized countries. It is not surprising, therefore, that in more difficult times the industrial countries have been less willing to bear such a ‘burden’.”⁹²

3. *Preferences Are of Doubtful Value*—A third objection to the principle of preferential treatment focuses on the illusion that it conveys of granting real and meaningful preferences to the DCs when in point of fact the derived benefits are of doubtful value.⁹³ Preferences, according to this criticism, are neither generous nor secure enough to have the hoped-for impact on infant industries.⁹⁴ The Western industrialized countries have come to regard preferences as an *ex gratia* favor to DCs but, as a form of aid, liberal internationalists find them particularly inefficient and inequitably distributed.⁹⁵ Behrman has observed that the benefits of preferential treatment have been modest and concentrated in their distribution.⁹⁶ As he put it: “The complexities of the GSPs presumably have discriminated in favor of the wealthier among the DCs be-

89. *Id.* at 215; see also Vaitos, *Crisis in Regional Economic Cooperation (Integration) Among Developing Countries*, 6 *WORLD DEV.* 719 (June 1978).

90. Wolf, *Two-Edged Sword*, *supra* note 69, at 215.

91. *Id.*

92. *Id.* at 213.

93. *Id.* at 212; see also S. GOLT, *DEVELOPING COUNTRIES IN THE GATT SYSTEM* 26-29 (1978).

94. *Id.*

95. *Id.*

96. Behrman, *Trade Issues*, *supra* note 62, at 244.

cause of their comparative advantage in acquiring information and satisfying complicated requirements.”⁹⁷ His observation of the unequal distribution of the gains from GSP is corroborated by Krishnamurti⁹⁸ and Baldwin-Murray.⁹⁹ The latter’s empirical study shows that over three-fourths of the GSP trade can be accounted for by a dozen relatively advanced DCs: Taiwan, Mexico, Yugoslavia, South Korea, Hong Kong, Brazil, Singapore, India, Peru, Chile, Argentina and Iran.¹⁰⁰

4. *Loss of Bargaining Leverage*—The adaptations of the GATT trade regime to the needs of the DCs are dismissed by some as being limited in scope—too little, too late—because they have been unsuccessful in bringing about any fundamental change in the structure of unequal relations between the DCs and the industrialized countries.¹⁰¹ If anything, preferential treatment has contributed to the diminution of the bargaining power of the DCs in two ways. First, the insistence on preferential treatment puts DCs in a position where they are unable to attract the industrialized countries with real bargaining counters.¹⁰² Bergsten and Cline summarize this position:

An inherent limitation on the bargaining strength of developing countries in past rounds of trade negotiations has been the lack of liberalization offers of their own to serve as bargaining chips. Indeed the concept that developing countries provide automatic reciprocity because they spend virtually all the foreign exchange they earn on imports, largely from the industrial countries, while broadly true, has meant a lack of bargaining power.¹⁰³

97. *Id.*; see also Srinivasan, *Why Developing Countries Should Participate in the GATT System*, 5 *WORLD ECON.* 85, 90 (1982). (DCs gain unequally from the GSP because their very different economies respond differently to the export opportunities offered by the GSP.)

98. See Krishnamurti, *Tariff Preferences in Favor of Developing Countries*, 4 *J. WORLD TRADE L.* 447, 456 (1970).

99. See Baldwin & Murray, *MFN Tariff Reductions and Developing Country Trade Benefits Under the GSP*, 5 *ECON. J.* 30 (1977).

100. *Id.* at 43-44.

101. Ruggie, *Another Round, Another Requiem? Prospects for the Global Negotiations*, in *POWER, PASSIONS, AND PURPOSE* 33, 39 (J. Bhagwati & J. Ruggie eds. 1984). See also R. HANSEN, *THE NORTH-SOUTH STALEMATE* 149 (1979). (“The South requests a system of generalized tariff preferences (GSP) to increase its capacity to export manufactured goods to the North in 1964; in 1974 the U.S. Congress finally adopts legislation granting the President the power to implement a scheme that bears only a pale resemblance to the program requested a decade earlier.”)

102. C. BERGSTEN & W. R. CLINE, *TRADE POLICY IN THE 1980s* 29 (1982).

103. *Id.* This view is also shared by Ibrahim, *Developing Countries and the Tokyo Round*, 12 *J. WORLD TRADE L.* 1, 19 (1978). (The refusal to consider the possibility of

Secondly, in placing emphasis on nonreciprocal arrangements, DCs are depriving themselves of bargaining power in another sense. Having cast themselves as permanent exceptions to the GATT rules, DCs' complaints against industrial countries neglect and indifference cannot be, and are not, taken as seriously as they should be taken.¹⁰⁴

B. *The Equitable Internationalist Perspective*

To the question asking why DCs should be treated differently from other GATT contracting members, two answers are possible: one normative and the other economic. The focus here is on the two possible economic justifications for preferential treatment in favor of DCs of which again there are two possible: (1) its trade creation potential and its agreeable effect on world welfare, and¹⁰⁵ (2) the unleashing of dynamic factors,¹⁰⁶ these being shifts in supply and demand functions which bode well for the economies of preference-receiving DCs.

1. *The Economic Rationale for Preferential Treatment*

a. Trade Creation Benefits and World Welfare—Preferential tariff treatment is a Janus-faced concept in that it can contribute positively toward the liberalization of world trade or operate negatively by distorting it.¹⁰⁷ Thus, such treatment has traditionally been analyzed in terms of trade creation and trade diversion and the extent to which world welfare is affected. It is asserted that trade creation helps to increase world welfare while trade diversion has the opposite effect.¹⁰⁸ World welfare increases to the extent that duty free imports from preferred DCs displace less efficient domestic production in the preference-granting countries.¹⁰⁹ Conversely, world welfare decreases to the extent that imports from preference-beneficiaries displace more efficiently produced imports from other non-preferred ICs.¹¹⁰

reciprocal concessions has weakened the bargaining position of DCs and tends to isolate them from the course of negotiations.) See also, Finger, *Trade Liberalization: A Public Choice Perspective*, in CHALLENGES TO LIBERAL ECONOMIC ORDER 421 (R. Amacher, G. Haberler & T. Willett eds. 1979)

104. Bressand, *Painful Rethinking*, *supra* note 69, at 59.

105. *Id.* MURRAY, TRADE PREFERENCES, *supra* note 19, at 21.

106. *Id.* at 19.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

The trade creation potential of tariff preferences and the impact it portends for global welfare are reasons to justify the establishment of preferential treatment. Admittedly, the expected impact on world welfare has been “negligibly small,”¹¹¹ but as Murray admonishes this should not be taken to mean that tariff preferences have little value:

Even if world welfare remains unchanged, the redistribution of world income in favour of developing countries might increase the welfare value of a constant (or even declining) level of world income. Furthermore, welfare measurements based on the concepts of trade creation and trade diversion assume that factors of production have alternative employment opportunities (i.e. welfare is measured in terms of consumer and producer surplus). But in developing countries it is probable that some of the increased exports generate employment of otherwise unemployed or underemployed resources. In such cases the contribution to welfare is the entire factor wage bill, not just the producer surplus. On the other hand, resources displaced in non-preferred exporting countries (i.e. other developed countries), are likely to be re-employed; to the extent permanent unemployment results, world welfare will be reduced.¹¹²

Murray’s point is that, by factoring into the global welfare equation such variables as income redistribution and changes in the level of employment, a noticeable increase in world welfare results.

b. **Dynamic Benefits**—Preferential treatment has always been viewed as playing an essential role in accelerating the growth of DCs, that is “as a means of overcoming underdevelopment and economic backwardness, since [its] objective is to provide an equality of opportunity to the weak and poor nations by increasing their competitive power in world markets.”¹¹³ This expectation is consistent with international trade theory that posits that the major benefits to be derived from tariff preferences result from so-called dynamic factors, such as shifts in demand and supply functions.¹¹⁴ Tariffs are viewed by DCs as a source of revenue and as a form of

111. Much of this has to do with the dissimilarity of economic structures in both DCs and ICs. Murray contends that a large trade creation is most likely when DCs and preference-granting ICs have similar economic structures; since such similarity increases the opportunity for preferential tariffs to lead to the displacement of domestic IC production by DCs’ imports. But the scope for trade creation is significantly reduced if the economic structures between preferred DCs and preference-giving ICs are dissimilar. *Id.* at 22.

112. *Id.*

113. Yusuf, *The Enabling Clause*, *supra* note 28, at 492.

114. MURRAY, TRADE PREFERENCES, *supra* note 19, at 21.

temporary protection for "infant industry." The benefits resulting from infant industry "protection" are precisely the kinds of "dynamic factors" trade theory postulates would result from preferential treatment.¹¹⁵

The argument for protecting infant industry is premised on the belief that a noncompetitive industry will become competitive due to gradual improvements in production efficiency.¹¹⁶ "The growth from infancy," as Murray puts it, "requires a protected market which is large enough to justify efficient production—such a market is not available at home. It can only be provided by protecting world markets for developing-country exports of manufactured products."¹¹⁷ Thus, the dynamic benefits enjoyed by DCs as a result of preferential treatment are *inter alia* opportunities for large-scale production, improved access to world markets, increased exports and income, not to speak of enlarged domestic markets for domestic production. In any event, the export earnings derived from improved access to IC markets would be used by DCs to underwrite some of the costs of their social and economic development. By encouraging economic growth, preferential treatment would reduce the need of DCs for financial assistance from ICs.

2. *The Normative Appeal of the Principle of Preferential Treatment*—The normative content of this principle is derived from two postulates. First, that equitable opportunities are truly equitable only among countries having equal trading abilities.¹¹⁸ That being the case, poorer countries should be treated more favorably in terms of market options than the richer countries.¹¹⁹ In the words of the representative of India at the Ninth Session of the GATT Contracting Parties, "[e]quality of treatment is equitable only among equals. A weakling cannot carry the same load as a gi-

115. *Id.* at 20.

116. *Id.*

117. *Id.*

118. See MURRAY, TRADE PREFERENCES, *supra* note 19, at 9. This has been referred to as the 'principle of substantive equality.' This principle "justifies that relations between states with a sufficiently comparable level of development be governed by the principles of reciprocity, most-favored-nation treatment and other principles of formal non-discrimination and fair trade *** Without prejudice to other elaborations in binding international rules, the principle of equality or non-discrimination also justifies preferential and non-reciprocal treatment of developing countries by developed countries and among developing countries, in view of their differentiated needs of development in the various areas of international economic, financial and monetary relations." See Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order, 62nd Conference of the International Law Association, Seoul, 1986, paragraphs 10, 10.1 and 10.2.

119. See Behrman, *Trade Issues*, *supra* note 62, at 238.

ant.”¹²⁰ In the same vein, the Uruguayan Permanent Representative to the United Nations Organization in Geneva in stating his opposition to the MFN standard noted that the MFN was “not the proper means to combat underdevelopment because economic inequality among States can only be corrected through unequal treatment. Inequality cannot be put right by applying equal measures: this can only be done through differential treatment favoring some in order to obtain effective equalization in the end.”¹²¹ Since justice demands that equals be treated equally, it must also require that unequals be treated unequally, at least, in proportion to the inequality. Viedrag expressed this view succinctly:

Justice requires equal treatment of equals. This is the classic formula in its most simple form, from which it follows, as a second part, that justice likewise requires unequal treatment of unequals. This addition implies the notion of proportionality which underlies the principle of *sum cuique tribuere*. The formulations may differ from one another, but basically they all amount to something like equal treatment of equals and unequal treatment of unequals in proportion to the inequality.¹²²

This formulation of equality requiring that the unequal should be treated unequally has impeccable historical roots in Western intellectual thought. It can be traced back to classical Greek metaphysics in the writings of the Ancient Greats. For example, in Aristotle’s *Nicomachean Ethics*¹²³ this idea is squarely confronted:

There will be the same equality between the shares than between the persons, since the ratio between the shares will be equal to the ratio between the persons; for if the persons are not equals possess or allotted unequal shares, or persons not equal shares, that quarrels and complaints arise.¹²⁴

A second postulate of the normative universe on the principle of

120. Quoted in K. KOCK, *INTERNATIONAL TRADE POLICY AND THE GATT 1947-67* 289 (1969). Some have characterized the plea for special and differential treatment as an “anachronistic throwback to the mid-sixties” quite understandable in the “days that followed the civil rights movement, the Peace Corps, and Kennedy idealism, such demands would be accorded credence. But it was also a time when the United States still boasted a large trade surplus. Preferential treatment for developing countries was not only viewed by the United States to be morally correct but practically affordable.” Berger, *Preferential Trade Treatment for Less Developed Countries: Implications of the Tokyo Round* 20 HARV. INT’L L.J. 540, 581-82 (1979) [hereinafter *Berger, Preferential Trade Treatment*].

121. See Espiell, *The MFN Clause*, *supra* note 22, at 36.

122. See E. VIEDRAG, *THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW* 7 (1973).

123. See BOOK V, SECTION III, at 6 quoted in 1 Y.B. INT’L L. COMM. 185-86 (1986).

124. *Id.*

preferential treatment is the belief that a pre-condition for the harmonious development of the world community as a whole is the recognition of the existence of a common interest in the social and economic development of the DCs.¹²⁵ In effect, the DCs and the ICs are each other's keepers and must either swim together or suffer the common fate of sinking together.

IV. A CRITICAL LOOK AT THE CONFLICTING PERSPECTIVES

Implicit in the liberal international perspective is the assumption that the conditions that gave rise to the demands for preferential treatment in favor of DCs have ceased to exist thus vitiating the need for a principle that undermines the GATT legal system. In the event that these conditions still prevail, liberal internationalists seem to suggest that preferential treatment is not the appropriate antidote. Equitable internationalists, on the other hand, implicitly assume that certain conditions justify the need for preferential treatment and, so long as these conditions persist, preferential treatment remains the only logical and defensible posture the world community can adopt. Since this author sympathizes with the view put forth by the equitable internationalists, the analysis will proceed directly to an evaluation of the arguments from those opposed to this viewpoint.

A. *Flaws in the Liberal Internationalist Position*

1. *Failure to Give Adequate Attention to GATT's Own Inherent Flaws*—In their eagerness to deny the principle of preferential treatment any legal status in GATT, advocates of liberal internationalism have been somewhat reluctant to confront the philosophy of trade liberalization that undergirds the GATT approach to international trade and questions whether it is compatible with the objective realities of contemporary international economic relations.¹²⁶ The failure to critically re-examine the organizing philosophy of the GATT system is accompanied by a tendency to overlook some of the major defects of GATT itself. These flaws are potentially more threatening to the continued sustainability of that system, than are the paltry exceptions and derogations to accommodate the special and differential needs of the DCs. Indeed, the internal weaknesses of the GATT system have been so noticeable that calls have been

125. See YUSUF, *LEGAL ASPECTS OF TRADE PREFERENCES*, *supra* note 38, at ix.

126. See text accompanying notes 19, 21 & 22 *supra*.

heard for replacing it with something totally new.¹²⁷

Miriam Camps and others¹²⁸ have argued that the greatest need for institutional innovation in the structure of North-South economic relations is in the trade field. This would require among other things replacing GATT which has failed

to deal adequately with two major interrelated issues of the present decade: the need to find ways to incorporate the DCs more fully into a global trading system that they accept as both being responsive to their needs and requiring certain obligations on their part and the need to cope efficiently with the process of structural change and shifting patterns of international trade and production.¹²⁹

What has been billed as DC's undermining of the GATT system has bottomed in a fundamental clash between two contending views of the role of international trade and GATT. The conflict between the DCs and the ICs in GATT "is in the intellectual world born of profound differences about how national governments should handle international trade."¹³⁰

As an organization, GATT promotes the principles of reciprocity, nondiscrimination, and trade liberalism, and views protectionism as the major evil to avoid. This model of international trade draws its theoretical strength from the doctrine of comparative advantage which holds that all nations will benefit if each specializes in producing what it can best produce (those things in which it has relative advantages) and *if* it buys from others the things *they* are better equipped to produce.¹³¹ When trade is unfettered by nonmarket forces or politically imposed barriers, *all* nations benefit. It is on this rather simple equation—that the net gain in welfare to most countries is greater as a consequence of their trade with one another—that provides the intellectual prop for the liberal internationalist vision of world trade.

The fundamental flaw with this equation that needs to be recognized if the DCs' demands for preferential treatment can be understood, is that it abstracts from the reality of power—the differences

127. M. CAMPS, *COLLECTIVE MANAGEMENT: THE REFORM OF GLOBAL ECONOMIC ORGANIZATIONS* Chapter 5 (1981); Gwin, *Global Economic Organizations*, *supra* note 20.

128. *Id.*

129. Gwin, *Global Economic Organizations*, *supra* note 20, at 140.

130. HUDEC, *THE GATT LEGAL SYSTEM*, *supra* note 69.

131. For an exposition of this doctrine see generally Ricardo, *On the Principles of Political Economy and Taxation*, reprinted in *THE WORKS AND CORRESPONDENCE OF DAVID RICARDO* 1:135 (P. Sraffa 1951); A. SMITH, *THE WEALTH OF NATIONS* 424 (1937).

in power between nations and between private economic agents—and this robs GATT of its usefulness as an optimal method of organizing world trade.¹³² As Grey put it:

[T]he conventional trade relations model fails to take properly into account the fact that there are gross differences in market power and in political power as between trading nations. Moreover, the *model* abstracts from the reality of private economic power; it ignores the differences in power and control of markets as between private entities engaging in international transactions. The model also abstracts from differences in modes of production and their influence on market behavior. Economists have addressed some of these factors as separate realities; nonetheless much of the discussion of trade policy at public and political levels seems to assume that the simplified teaching device embodied in the notion of comparative advantage says all that it is important to say about trade policy.¹³³

The demands for reform of the GATT system stem from a recognition that the principle of comparative advantage on which liberal trade is based is not entirely neutral. Not all nations benefit from free trade, as Kegley writes:

[F]actor endowments (such as land, labor, and capital) are not so distributed that all gain from a system of free and unfettered international trade. Some may be systematically denied benefits, others enjoy special privileges as a result of the contributions made by the less fortunate to those already well endowed. In other words, *the international division of labor implied by the principle of comparative advantage reinforces the advantages of some, while making permanent the dependencies of others*. Inequalities are thus perpetuated, with unequal distributions of technological capabilities a critical factor. The perceived need among many developing nations to create a new order founded on something other than liberal precepts derives from their raised consciousness about the way in which the existing economic order operates—advantageously to a few and disadvantageously to the many.¹³⁴

132. Grey, *The Decay of the Trade Relations System*, printed in *ISSUES IN WORLD TRADE POLICY: GATT AT THE CROSSROADS* 17, 20 (R. Snape ed. 1986) [hereinafter Grey, *Trade Relations System*].

133. *Id.*

134. C. KEGLEY, JR. & E. WITTKOPF, *WORLD POLITICS* 195 (1981) [emphasis added].

2. *Disregard of Industrialized Countries Noncompliance with GATT*—Equally important, but rarely ever addressed by critics¹³⁵ of preferential treatment, is the long and distinguished history of continuous disregard and flagrant violations of GATT rules¹³⁶ and principles by the very countries that consider themselves the guardians and defenders of these principles. As Gwin observed:

GATT's effectiveness in handling trade issues has clearly declined since the end of the 1960's, as evidenced by a decline in strict adherence to the rules of GATT and widespread resort to nontariff measures of various kinds. This trend has reflected, at bottom, a widespread feeling that the rules do not adequately respond to the situations that were posing the most acute problems for governments—neither those governments that had written the rules nor the members of GATT who had not shared in the rule making.¹³⁷

3. *Tendency to Overlook DCs' Implicit Bargaining Leverage*—The criticism that the DCs' insistence on non-reciprocal concessions has cost them whatever bargaining power they might have had in the GATT MTNs is premised on the belief that since DCs have no *explicit* reciprocity to offer ICs, they therefore have no bargaining leverage. This argument is flawed in two respects. First, it overlooks the *implicit* reciprocity that DCs continue to offer through their export earnings.¹³⁸ Additional export earnings received by DCs as a result of preferential tariffs can be fully reciprocated by increased imports from ICs.¹³⁹

A second, and perhaps more fundamental flaw with the loss of bargaining leverage argument is that it worships the concept of reciprocity and treats it as a *conditio sine qua* of trade relations between DCs and ICs. But the emphasis on strict one-to-one reciproc-

135. To his credit Wolf, at least, acknowledges that GATT is an "enfeebled system" given "the multitude of loopholes" contained in the Agreement: Article XXVIII which permits the renegotiation of bound tariffs; Article XIX which allows for the imposition of (non-discriminatory) emergency protection against competitive imports; Article VI and the code on subsidies and countervailing duties which deal with countervailing action against dumped or subsidized goods; Article XII which provides protection for balance-of-payment reasons; Article XXIV which permits the formation of customs unions and free-trade areas; and Article XI which permits the imposition of quantitative restrictions against imports. See Wolf, *Two-Edged Sword*, *supra* note 69, at 209.

136. For evidence of noncompliance with GATT rules, see generally Jackson, *The Crumbling Institutions of International Trade*, 12 J. WORLD TRADE L. 93 (1978); see also Roschke, *The GATT: Problems and Prospects*, 12 J. INT'L L. & ECON. 85 (1977).

137. Gwin, *Global Economic Organizations*, *supra* note 20, at 140.

138. See MURRAY, TRADE PREFERENCES, *supra* note 19, at 9.

139. *Id.*

ity can be counterproductive to the goal of a liberal trading order.¹⁴⁰ The raw pursuit of reciprocal exchanges, as Winham discovered in his thoughtful analysis of the Tokyo Round MTNs,¹⁴¹ can introduce distortions and lack of coherence into trade policy. Furthermore, he observed, because reciprocity works better between parties that are equal than between those that are unequal, it is not an appropriate vehicle for integrating DCs into the GATT system and for promoting a stable and equitable world trading order.¹⁴²

V. THE LEGAL STATUS OF THE PRINCIPLE OF PREFERENTIAL TREATMENT

The traditional definition of international law, by general agreement,¹⁴³ was shaped at a time when the principal actors on the world stage were a small number of relatively homogeneous European states. The world community has, however, since changed and now includes a large contingent of states from Africa, Asia, the Caribbean, the Middle East and Latin America as well as a welter of global and regional international organizations, transnational business enterprises and interest groups, and other non-state actors.¹⁴⁴ These changes in the complexion and composition of the international system compel a corresponding reorientation in the conceptualization of international law.¹⁴⁵ Regrettably, efforts in this direction have so far been futile as the defenders of the status quo have proved to be uncompromisingly resistant to new formulations and paradigms of international law. Therefore, despite the concerted and determined efforts by the DCs, to universalize international law, few of the norms and principles promoted by them have been crystallized into customary law or translated into universal international conventions.¹⁴⁶

140. *Id.*; see also WINHAM, THE TOKYO ROUND NEGOTIATION, *supra* note 19, at 364.

141. *Id.*

142. *Id.*

143. See *supra* note 17 and accompanying text. See generally B. WESTON, R. FALK & A. D'AMATO, INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM ORIENTED COURSEBOOK (1980); W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 70 (1964).

144. See generally W. JENKS, INTERNATIONAL LAW IN A CHANGING WORLD (1963); T. ELIAS, THE EXPANDING FRONTIERS OF INTERNATIONAL LAW (1979).

145. *Id.*; see also Abi-Saab, *The Newly-Independent States and the Rules of International Law: An Outline* 8 HOW. L.J. 95 (1962).

146. See Rhee, *Law-Making Process for the new International Economic Order*, paper presented at the 13th Conference on the Law of the World, sponsored by the World Peace Through Law Center, Seoul, Korea, Sept. 6-11, 1987; see also, Rabasa, *The Charter of*

In this final section, the legal status of the principle of preferential treatment will be discussed and the obstacles that prevent it from being recognized as a customary rule of international law will be considered.

A. *Preferential Treatment in the Law of GATT*

Mention has already been made of the Declaration¹⁴⁷ made at the conclusion of the Tokyo Round in 1979 to accord the principle of preferential treatment permanent status in the GATT. That Declaration is implemented in points 1 and 4 of the Group Framework Agreement. Paragraph 1 of this Declaration (commonly referred to as the Enabling Clause) provides the legal basis for preferential treatment in favor of DCs. This paragraph provides:

Notwithstanding the provisions of Article 1 of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties.¹⁴⁸

The remainder of the Declaration carefully circumscribes the actual circumstances in which such discriminatory treatment is permitted, delineates the expectations of the parties with respect to the grant of tariff concessions to DCs, and provides a mechanism for introducing or withdrawing preferential treatment.

1. *Commitments*—In Paragraph 2 of the Declaration, the ICs commit themselves to granting preferential treatment in four specific categories: (i) preferential tariff treatment (that is duty-free entry) to products from DCs in accordance with the GSP; (ii) differential and more favorable treatment for DCs under agreements concerning non-tariff measures negotiated multilaterally in GATT; (iii) regional or global arrangements entered into among DCs in the context of any general or specific measures favoring DCs; and (iv) special treatment for least developed among the DCs. In addition, ICs can consider on an *ad hoc* basis, under the provisions of the General Agreement for joint action, any proposal for preferential treatment in other areas.¹⁴⁹ This allows ICs to consider other proposals for special and differential treatment outside the scope of

Economic Rights and Duties of States, A.S.I.L., PROCEEDINGS OF THE 68TH ANNUAL MEETING 302, 303-05 (1975).

147. See *supra* note 26 and accompanying text.

148. *Id.*

149. *Id.*

the Enabling Clause for example, those granted on a bilateral or regional basis under a procedure identical with that of obtaining a waiver under Article XXV of the General Agreement.

2. *Expectations*—Paragraph 3 of the Declaration sets out three limitations on use of preferential treatment, that is, what the ICs expect would result from the grant of concessionary tariff treatment to DC products. It provides that such treatment shall: (i) be designed to facilitate and promote the trade of DCs and not to raise barriers to the trade of other countries; (ii) not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on an MFN basis; and (iii) if necessary, be modified to the extent called for by the development, financial and trade needs of DCs.

Paragraph 5 declares that the ICs do not expect reciprocity from DCs for commitments made by them in trade negotiations with the DCs. This provision makes it clear that DCs are not expected to make concessions or contributions that are inconsistent with their development, financial and trade needs.

Paragraph 6 further expands on this concept of non-reciprocity by requiring ICs to “exercise the utmost restraint” in seeking concessions from DCs. It reiterates and extends to the least developed DCs, the standard set out in Paragraph 5 that DCs shall not be expected to make concessions or contributions that are inconsistent with their particular problems and situations.

The expectation that DCs would someday “graduate” from the need for preferential treatment to participate fully in GATT MTNs—the so-called ‘graduation principle’¹⁵⁰—briefly touched upon in Paragraph 3(c) is spelled out in detail in Paragraph 7. This provision indicates that DCs “expect” that their capacity to make contributions or negotiated concessions would improve with the

150. The graduation clause reiterates the non-reciprocity principle of Article XXXVI, Paragraph 8, of the General Agreement. *See supra* note 24 and accompanying text. *See also* Interpretive Note to Article XXXVI, GATT Annex 1, Ad Article XXXVI. The graduation clause was extremely important to ICs like the US who conditioned their support for the Declaration “on a commitment by developing countries to assume fuller GATT obligations in line with their development progress and recognition that benefits of special treatment would be phased out as that economic progress is made.” *See* Executive Office of the President, Office of Special Trade Representative, *Framework*, (GATT Reform) Release No. G-6 (May 2, 1976); *see also* *Statement of United States Representative on 21 February 1977*, GATT Docs. MTN/FR/W/Z, at 6 Mar. 1, 1977. For a comprehensive discussion of how graduation has been implemented in the US GSP program, *see* Glick, *The Generalized System of Preferences—Yesterday, Today and Tomorrow*, 30 FED. B. NEWS & J. 284 (May 1983).

“progressive development of their economies and improvement in their trade situation,” and they “would accordingly expect” to participate more fully in the framework of rights and obligations under GATT.

3. *Procedural Requirements*—Paragraph 4 of the Declaration provides that before a party takes any action to introduce, modify or withdraw a preferential treatment arrangement under this Declaration, it must do two things: (i) notify the other contracting parties and provide them with all the information they “may deem appropriate” to this action, and (ii) provide “adequate opportunity” for prompt consultations with any interested party regarding “any difficulty or matter that may arise.”

Finally, Paragraph 9 requires that the parties collaborate in arrangements for review of the operations of the provisions of this Declaration.

Against this backdrop, it is appropriate to ask whether the principle of preferential treatment has acquired a legal basis of equal standing to the MFN clause. It is doubtful whether the Declaration imposes any legally enforceable obligations on ICs to grant preferential tariffs to DCs. To begin with, the main provision of the text clearly states that “contracting parties *may* accord differential and more favorable treatment” to DCs. Note that it is the volitional “may” and *not* the obligatory “shall” that is preferred. Furthermore, such treatment is to be granted in accordance with the concessional GSP. The GSP, as we have already indicated, is not a *common* system benefitting a *common* list of DCs as these countries had hoped. Rather, it constitutes a variety of schemes, each identifying the DCs that would benefit, the products that would qualify for preferential tariffs, and the rules and regulations that would apply.

The main contribution of the Enabling Clause to the ‘legalization’ of the principle of preferential treatment is its rendering superfluous the practice between 1971 and 1979 of legitimizing the GSP through temporary waivers pursuant to GATT Article XXV, paragraph 5. In short, the Enabling Clause merely gives some permanence to an already non-binding preferential arrangement embodied in the various GSP programs.¹⁵¹ It is our view that the le-

151. See, e.g., Footnote 3 to Paragraph 2 of the Declaration. The so called benefits of the Enabling Clause, according to a report by the Secretary-General of UNCTAD, “are more a matter of form than of substance. On the one hand, the enabling clause introduces in the GATT legal system differential treatment in four areas where the developing countries

gality of the principle of preferential treatment must rest upon a basis more substantial than favor, yet favor is all that the Enabling Clause promises.

How then can DCs enforce the principle of preferential treatment? Generally speaking, there are two ways that states can be bound to new norms and principles of international law. One is through their consent as expressed in international conventions and the other is through custom. In the absence of a binding treaty between DCs and ICs on the issue of preferential tariffs in favor of the former, we must look elsewhere for legal support for this principle.

B. The Principle of Preferential Treatment as International Law

The principle of preferential treatment is a basic principle of the emerging international law of development; a law which is mainly aimed at contributing to the reduction of the socio-economic inequalities which presently characterize the relations between DCs and ICs.¹⁵² The content of this law, as Professor Schachter¹⁵³ reminds us, derives from two sources. The first is the network of international undertakings and arrangements concerned with aid, trade, and investment for the benefit of DCs.¹⁵⁴ Second, this law has also been shaped by the resolutions, declarations, charters of rights, duties, standards, and final acts of the United Nations and its specialized agencies.¹⁵⁵

Since the first source of the international law of development consists of treaties which have traditionally been accepted as reliable evidence of *opinio juris communis* among the States of the world, it presents no special problem among legal scholars.¹⁵⁶ Rather, it is the second body of international instruments, which Schachter characterizes as "*normes sauvages*,"¹⁵⁷ that has aroused

already enjoyed it on a *de facto* basis (and to some extent on a legal basis). On the other hand, the clause limits any further enlargement of the scope of differential treatment within the GATT structure by making it subject to approval by the Contracting Parties to the General Agreement." See UNCTAD: *Assessment of the Results of the Multilateral Trade Negotiations*, TD/B/778/Rev. 1, at 29 (1982).

152. See YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES, *supra* note 38, at xvii.

153. See Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1 (1976) [hereinafter Schachter, *International Law of Development*].

154. *Id.*

155. *Id.* at 3; see also, Laing, *International Economic Law*, *supra* note 17.

156. *Id.* at 2; see also HYDER, EQUALITY OF TREATMENT AND TRADE DISCRIMINATION, *supra* note 21; and YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES, *supra* note 38.

157. Schachter, *International Law of Development*, *supra* note 153, at 3.

reactions among international lawyers. These resolutions and declarations, according to Schachter, do not purport to be treaties even though they are formulated as norms and requirements of state behavior and often times in juridical terms of obligations and rights.¹⁵⁸

Since the principle of preferential treatment is expressly mentioned in four United Nations General Assembly (UNGA) resolutions¹⁵⁹ that are widely acknowledged as constituting the pillars of the evolving international law of development, it is necessary to determine preliminarily whether UNGA resolutions in general and these in particular are legally binding. In turn, the legal character of UNGA resolutions will depend on whether they can and, perhaps more important, should be subsumed under the *a priori* formal “sources” of international law.

1. *A Priori Formal Sources of International Law*—The most convenient and concise statement regarding the “sources” of international law appears in Article 38 (1) of the Statute of the International Court of Justice which reads:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - (b) international custom, as evidence of a general practice accepted as law;
 - (c) the general principles of law recognized by civilized nations;
 - (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.¹⁶⁰

Some learned commentators have taken Art. 38(1) as representing an authoritative and exclusive list of present-day sources of international law.¹⁶¹ According to this view, the only way in which a

158. *Id.*

159. See (1) Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States; (2) International Development Strategy for the Second United Nations Development Decade. (paragraphs 31-33); (3) Declaration on the Establishment of a New International Economic Order (paragraph 4(a)); and (4) Charter of Economic Rights and Duties of States (Article (9)).

160. Statute of the International Court of Justice, Art. 38, reprinted in L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS 707-08 (3d ed. 1969).

161. See, e.g., H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION (1972) [hereinafter THIRLWAY, INTERNATIONAL CUSTOMARY LAW].

new "law" can become binding is by finding a home for it under one of the headings of Article 38(1). Accordingly, several writers have attempted to subsume UNGA resolutions under one of the several headings of Article 38, viz treaties,¹⁶² custom,¹⁶³ and general principles of law.¹⁶⁴

Others, on the other hand, have concluded that UNGA resolutions cannot be construed as a formal source of law because there is no reference to them in Article 38.¹⁶⁵ Professor Joyner, in a very thoughtful essay, exposes the fallacy of this reasoning and advances three reasons for rejecting it:¹⁶⁶ (1) the notion that Article 38 legally constitutes *the* "sources" of modern international law is not explicitly stipulated in the Statute of the Court, nor is it universally accepted; (2) nowhere in the text is it specified that these are exclusively the only "sources" of international law; and (3) nowhere is it postulated in Article 38 that the Court should eschew from considering other factors as consultative "evidence" in rendering an opinion. As Joyner and others have demonstrated, the International Court of Justice has in the past used non-Article 38(1) legal sources, such as UNGA resolutions in reaching its decisions.¹⁶⁷ Two recent decisions in which the Court accorded weight to UNGA resolutions are the Advisory Opinion on Namibia¹⁶⁸ and

162. See, e.g., J. CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 150 (1969); Skubiszewski, *Resolutions of International Organizations and Municipal Law*, 2 POLISH Y.B. INT'L L. 83 (1968-69); Skubiszewski, *Enactment of Law by International Organizations*, 41 BRIT. Y.B. INT'L L. 198, 220 (1965-66); Skubiszewski, *A New Source of the Law of Nations: Resolutions of International Organizations*. RECUEIL D'ETUDES DE DROIT INTERNATIONAL EN HOMMAGE A PAUL GUGGENHEIM 517 (1968); Tammes, *Decisions of International Organs as a Source of International Law*, 94 REC. DES COURS 90 (1958); Arangio-Ruiz, *The Normative Role of the General Assembly in the United Nations and the Declaration of Principles of Friendly Relations*, 136 REC. DES COURS 419 (1972); Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BRIT. Y.B. INT'L L. 97 (1955-56); Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L. 1 (1948); O. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS 63 (1966) [hereinafter ASAMOAH, LEGAL SIGNIFICANCE].

163. See, e.g., H. BOKER-SZEGO, THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION (1978); Chiang, *United Nations Resolutions on Outer Space: 'Instant' International Customary Law?* 5 INDIAN J. INT'L L. 23 (1965); and THIRLWAY, INTERNATIONAL CUSTOMARY LAW, *supra* note 161, at 491.

164. See, e.g., ASAMOAH, LEGAL SIGNIFICANCE, *supra* note 159, at 61; Zamanek, *The United Nations and the Laws of Outer Space*, 19 Y.B. WORLD AFF. 1965, 208 (1966).

165. See, e.g., Guradze, *Are Human Rights Resolutions of the United Nations General Assembly Law Making?* 4 HUM. RTS. J. 456 (1971).

166. See Joyner, *General Assembly Resolutions*, *supra* note 17, at 455. For further elaboration of this view see J. BRIERLY, THE LAW OF NATIONS 66 (H. Waldock 6th ed. 1978); M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 44 (3d ed. 1977).

167. Joyner, *General Assembly Resolutions*, *supra* note 17.

168. See the Court's analysis in its Advisory Opinion on Namibia. 1971 I.C.J. 15; see

the Western Sahara.¹⁶⁹

Since the sources of international law listed in Article 38(1) do not constitute a closed list, it is pertinent to now establish through which other sources UNGA resolutions derive their binding force.

2. *The General Assembly and International Law-Making*—Opinion is divided on the legislative competence of the General Assembly and by extension on the legal effect of the resolutions and declarations adopted by that body. One view is that the General Assembly has no legislative authority and its resolutions do not in any way have the force of law.¹⁷⁰ The presumption that UNGA resolutions have no binding effect goes back to the very origins of the United Nations. At the San Francisco Conference which drew up the U.N. Charter, a proposal¹⁷¹ that the General Assembly should be vested with law-making authority was rejected. However, this presumption of the non-binding effect of UNGA resolutions is a rebuttable presumption.¹⁷² There are indeed cases where such resolutions can be binding.¹⁷³

A second view of the legal effect of UNGA resolutions emphasizes the need for a new approach to the theory of obligation in international law.¹⁷⁴ In light of the active participation of DCs in

also Higgins, *The Advisory Opinion on Namibia: Which U.N. Resolutions are Binding Under Article 25 of the Charter?* 25 INT'L COMP. L.Q. 270 (1972).

169. See *Western Sahara*, 1975 I.C.J. 12, 13-33 (1975).

170. See, e.g., Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States*, 9 INT'L L. 591, 597 (1975); see also I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 14 (2d ed. 1973). A variant of this view holds that although UNGA resolutions are not legally binding, they can nevertheless be construed by those States rejecting traditional international law as the basis for a new standard of international law or as a device to pressure future international law-making; see Brower & Tepe, Jr., *The Charter of Economic Rights and Duties: A Reflection or Rejection of International Law?*, 9 INT'L L. 295, 302 (1975).

171. Committee 2 of Commission which examined this proposal by the Filipino delegation rejected it by 26 votes to 1. See Mendelson, *The Legal Character of General Assembly Resolutions: Some Considerations of Principle*, in *LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER* 95, 96 (K. Hossain ed. 1984) [hereinafter Mendelson, *Legal Character of Resolutions*]. But see Joyner, *General Assembly Resolutions*, *supra* note 17, at 44.

172. Mendelson, *Legal Character of Resolutions*, *supra* note 171.

173. Examples of such binding resolutions are: (1) "house-keeping" resolutions which involve decisions to admit members, to apportion the budget, etc.; (2) resolutions purporting to give an "authentic interpretation" of the Charter for the purpose of an organ of the U.N.; and (3) resolutions empowering the General Assembly to dispose of territory, such as terminating the mandate or trusteeship systems, or resolutions to admit a State to the United Nations. *Id.*

174. See Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782, 783 (1986); see also *ESSAYS ON INTERNATIONAL LAW AND RELATIONS IN HONOR OF A. J.P. TAMMES* (H. Meijers & E. Vendag 1977).

international organizations and the growth of global consensus, it is suggested that the time has come for a sociological reorientation of the basis of international obligations in international law.¹⁷⁵ This would require the substitution of the traditional concept of *consent* with that of *consensus* as the new basis of obligation in international law.¹⁷⁶ Proponents of this view contend that a consensual public order has emerged in the international community with the United Nations as its institutional locus.¹⁷⁷ Therefore, to the extent that UNGA resolutions and declarations reflect the overriding consensus among a large number of States they should, despite opposition from some States, be treated as rules of order and norms of obligation.

Scholars sympathetic to this view argue that UNGA resolutions can have as much legal effectiveness as a treaty.¹⁷⁸ In this vein, a French legal scholar, Professor Bollecker-Stern, has proposed a three-pronged test for determining the precise legal effect to be given to UNGA resolutions.¹⁷⁹ The first test deals with the *conditions of adoption*, that is, the number of States that voted for the particular resolution and the importance of the dissenters and abstainers.¹⁸⁰ According to Bollecker-Stern, the more representative of all groups composing the international community, the closer the resolution will be to being regarded as an instrument of binding force.¹⁸¹ Under this test, none of the basic instruments that codify the evolving international law of development would pass muster. A case in point is the Charter of Economic Rights and Duties of States which was adopted by the General Assembly by a roll-call vote of one hundred and twenty to six, with ten abstentions. Although the Charter was adopted by a very large majority, it did not receive the consent of the industrialized states.¹⁸²

175. *Id.*

176. *Id.*

177. *Id.*; see also Joyner, *General Assembly Resolutions*, *supra* note 17; Laing, *International Economic Law*, *supra* note 17; R. ANAND, LEGAL REGIME OF THE SEA-BED AND THE DEVELOPING COUNTRIES 203 (1975) (The quasi-legislative role of the General Assembly is being increasingly recognized in the international field.)

178. Bollecker-Stern, *The Legal Character of Emerging Norms Relating to the New International Economic Order: Some Comments* in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 68 (K. Hossain 1984)[hereinafter Bollecker-Stern, *Legal Character of Emerging Norms*].

179. *Id.*

180. *Id.*

181. *Id.*

182. The Declaration on the Establishment of a New International Economic Order and The Programme of Action on the Establishment of a New International Economic Order suffer from the same fate. Both were adopted without vote but with reservations from some

A key question here is whether the dissent of one or a small group of states can and, perhaps more important, should suffice to prevent a norm from being one of general international law?¹⁸³ In a seminal essay on the subject of consensus,¹⁸⁴ Professor D'Amato takes the position that an actively dissenting state with a vested interest in the subject matter of the resolution would more greatly affect international expectations of authority and control and thus weigh in favor of defeating the idea of consensus of opinion *vis-a-vis* that resolution.¹⁸⁵

In support of Professor D'Amato's position, reliance can be placed upon the decision of the International Court of Justice in the *Fisheries Case*.¹⁸⁶ Thus, the reservations and negative votes of some ICs in relation to the three instruments comprising the international law of development make these States persistent objectors and, like Norway with respect to the ten-mile rule in that case, are not bound by a rule of customary international law to which they have expressed dissent while the law is still developing.

It may alternatively be argued, relying upon the *North Sea Continental Shelf Cases*,¹⁸⁷ that the provisions of the international law of development have become part and parcel of customary law inasmuch as they are regarded as binding by an overwhelming majority of the U.N. members. The *North Sea Continental Shelf Cases* in-

ICs. See, e.g., McWhinney, *The International Law-Making Process and the new International Economic Order*, CAN. Y.B. INT'L L. 57, 64 (1976) [hereinafter McWhinney, *International Law-Making Process*].

Particularly those ICs that would in practice be called upon to implement the cardinal principles of this new law) who either voted against it (e.g., the United States, Belgium, Denmark, the Federal Republic of Germany, Luxembourg, and the United Kingdom) or abstained (e.g., Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway, and Spain).

See U.N. Doc. A/RES/3281 (XXIX).

183. See generally O. LISSITZYN, *INTERNATIONAL LAW: TODAY AND TOMORROW* 36 (1965).

184. D'Amato, *On Consensus*, CAN. Y.B. INT'L L. 104, 108 (1970). [hereinafter D'Amato, *On Consensus*].

185. *Id.* In *The North Sea Continental Shelf Cases*, discussed *infra*, the Court observed that one of the elements generally regarded as necessary before a conventional rule can become a general rule of international law, even absent the passage of any considerable period of time, is that a very widespread and representative participation in the convention might suffice of itself, provided it includes the participation of states whose interests are specifically affected. *North Sea Continental Shelf Cases*, 1969 I.C.J. 4, 5.

186. *Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116. On various aspects of this case, see 4 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 137-94 (1963); Waldo, *The Anglo-Norwegian Fisheries* BRIT. Y.B. INT'L L. 114 (1951); Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54*, BRIT. Y.B. INT'L L. 371 (1954); Johnson, *The Anglo-Norwegian Fisheries Case*, 1 INT'L COMP. L.Q. 145 (1952); Evenson, *Anglo-Norwegian Fisheries Case and Its Legal Consequences*, 46 AM. J. INT'L L. 609 (1952).

187. 1969 I.C.J. 4.

volved a dispute between the Federal Republic of Germany on one side and the Netherlands and Denmark on the other concerning the proper delimitation of the boundaries of their respective continental shelves in the North Sea.¹⁸⁸ Denmark and the Netherlands contended that delimitation should be determined by the application of the principle of equidistance set forth in Article 6 of the 1958 Geneva Convention on the Continental Shelf that had been ratified or acceded to by thirty-nine states, but to which Germany was not a party.¹⁸⁹

Denmark and the Netherlands maintained that Germany was bound to accept delimitation on the basis of the principle of equidistance “because the use of this method is not in the nature of a merely conventional obligation but is, or must now be regarded as involving, a rule that is part of the *corpus* of general international law;—and, like other rules of general or customary international law, is binding on the Federal Republic automatically and independently of any specific assent; direct or indirect, given to the latter.”¹⁹⁰ In the alternative, Denmark and the Netherlands argued that even if there was no rule of the equidistance principle when the Geneva Convention was signed, such a rule has evolved since the Convention, partly because of its own impact, and partly on the basis of subsequent state practice.¹⁹¹

While rejecting the first contention that the principle of equidistance was inherent in the doctrine of the continental shelf, the Court nonetheless agreed that the principle was “a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law . . . so as to . . . become binding even for countries which have never, and do not, become parties to the Convention.”¹⁹² This process, the Court opined, constitutes one of the recognized methods by which new rules of customary international law can be formed.

A major problem with the first prong of the Bollecker-Stern test is that it grants to a few, albeit very powerful, Western industrialized states *de facto* veto power within the General Assembly. As long as these states choose to withhold their votes on a particular

188. *Id.*

189. *Id.*

190. *Id.* at 5.

191. *Id.* at 6.

192. *Id.*

UNGA resolution, then that resolution is not likely to pass the test of representativeness. These states can, under this test, effectively prevent the emergence of any “new” law by their few negative votes.

The second prong of the Bollecker-Stern three-part test focuses on the *style and content of the resolutions*.¹⁹³ The more precise the content, the more likely it is to have legal consequences. This holds true whether the resolution has a concrete content such as creation of an organ, statement of a program or of a strategy, or whether it is purely abstract, (merely declaring certain principles).¹⁹⁴

The resolutions on the international law of development have been faulted for being too vague and ambiguous.¹⁹⁵ Commenting on the Charter of Economic Rights and Duties of States, one critic derides,¹⁹⁶ the “cornucopia approach to legal drafting” (his felicitous phrase) that was followed. He goes on to define this approach to mean “when in doubt, throw everything in and leave it to subsequent historians to try to work out why.”¹⁹⁷

The Charter also embraces what has historically been characterized as the Weimer Constitution drafting principle: “if faced with latent or even patent contradictions in demands pressed in the drafting stage, one should put them all in and hope that the passage of time will resolve the conflict by disposing of one or the other.”¹⁹⁸

Imprecision and generalities are not unknown even in treaty drafting. As Professor Schachter points out, if one were to apply the strict requirements of definitions and specificity to all treaties, many of them would have most of their provisions without legal effect.¹⁹⁹ But the vagueness and ambiguity of a treaty’s provisions does not necessarily deprive the instrument of its legal force.²⁰⁰ It follows, therefore, that an UNGA resolution can contain vague and indefinite language while still embodying some very essential and fundamental principles.

193. Bollecker-Stern, *Legal Character of Emerging Norms*, *supra* note 178, at 71.

194. *Id.*

195. *See, e.g.*, White, *A New International Economic Order?* 16 VA. J. INT’L L. 323, 335 (1976).

196. McWhinney, *International Law-Making Process*, *supra* note 182, at 65.

197. *Id.*

198. *Id.*

199. *See* Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT’L L. 296, 298 (1977) [hereinafter Schachter, *Nonbinding Agreements*]; *see also* P. REUTER, *INTRODUCTION AU DROIT DES TRAITES* 44 (1972).

200. *See* REUTER, *supra* at note 199.

In addition to the conditions of adoption and the style and content of the resolution, the specified *means of enforcement*²⁰¹ completes the trinity of the Bollecker-Stern test for assessing the legal effect of UNGA resolutions. The existence of a mechanism for enforcement gives more chances to the resolution to be enforced than its absence.²⁰² Of importance with respect to this test is whether action has to be taken only by the international organization adopting the resolution or if similar action would be required from the States. A resolution is more likely to be enforced if the means of enforcement are within the control of the international organization which enacted it. It may indeed be true that the failure to specify mechanisms of enforcement explains why UNGA resolutions have not been able to make the transition from *de lege ferenda* to *lex lata*.

To be sure, a rule of law has authority if it is enforceable and normally will be enforced.²⁰³ The question is, can that rule of law be enforced even when no enforcement mechanism is specified? The answer clearly is yes because by and large laws are obeyed because those subject to it acknowledge its binding force. A law is not binding because it is enforced; rather, it is enforced because it is already binding.²⁰⁴ As Judge Fitzmaurice wrote, “[e]nforcement presupposes the existence of a legal obligation incumbent on those concerned. The prospect of enforcement is in fact little more than a factor or motive inclining people to obey rules that they are in any case under an obligation to obey: but it is not itself the source of the obligation.”²⁰⁵

The issue of the obligatoriness of UNGA resolutions must be resolved first before venturing into the question of its enforcement. The insertion of provisions for enforcement in those resolutions is no guarantee that the resolution will be enforced for, as Judge Fitzmaurice suggests, enforcement will occur only when States believe they are under an obligation to comply with a rule of law.

201. Bollecker-Stern, *Legal Character of Emerging Norms*, *supra* note 178, at 72.

202. *Id.*

203. See Fitzmaurice, *The Foundations of Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 2 (1956).

204. *Id.*

205. *Id.*

CONCLUSION

The Group Framework Agreement which provides the legal basis for the principle of preferential treatment in GATT is a non-binding agreement. Such an agreement is considered to be without legal effect (“*sans portee juridique*”).²⁰⁶ Thus, noncompliance by a party would not be ground for a claim for reparation or for judicial remedies.²⁰⁷ Though non-binding instruments such as the Group Framework Agreement still carry legal consequences.²⁰⁸ In the first place, as an official act of the ICs, this instrument is reliable evidence of the positions taken by these states and consequently it is entirely appropriate, as Professor Schachter suggests, to draw inferences that these states have recognized the principles, rules, status and rights acknowledged.²⁰⁹ This being the case, noncompliance by an IC can give rise to an international delict. Schachter contends that:

states entering into a non-legal commitment generally view it as a political (or moral) obligation and intend to carry it out in good faith. Other parties and other States concerned have reason to expect such compliance and to rely on it. What we must deduce from this . . . is that the political texts which express commitments and positions of one kind or another are governed by the general principle of good faith. Moreover, since good faith is an accepted general principle of international law, it is appropriate and even necessary to apply it in its legal sense.²¹⁰

There is no question but that DCs have come to rely on the preferential access of their products into the markets of the ICs. In the course of the Tokyo MTNs, DCs “argued that before they could use scarce resources to make investments to expand their export trade, they had to be confident that such trade would in fact materialize. This could not be done without a stable system of preferences. . . .”²¹¹ Thus, from the onset, DCs’ reliance on preferential tariffs was communicated to the ICs. Developing Countries will be justified in treating noncompliance as a breach of a legal obligation.

While the preoccupation of this Article has been with the search for a legal home for the principle of preferential treatment within the GATT framework of trade rules, we must not forget that

206. See Schachter, *Nonbinding Agreements*, *supra* note 199, at 297.

207. *Id.* at 300.

208. *Id.*

209. See SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 129 (1985).

210. *Id.* at 130.

211. See WINHAM, *THE TOKYO ROUND NEGOTIATION*, *supra* note 19, at 276.

GATT is a unique mixture of law, economics and politics.²¹² Since law is pre-eminently about rules, lawyers writing about GATT tend, as Professor Dam observed, to see it as nothing more than a legal document.²¹³ Flowing from this is the naive view that GATT rules are capable of resolving all future problems faced by the world trading system.²¹⁴ This rigid legalistic view obscures the fact that GATT trade rules are not only enveloped in a cocoon of political and economic imperatives but are themselves the product of a careful and delicate balancing of the goals and interests of the more powerful contracting parties. Law, as Professor Bollecker-Stern reminds us, can have very different relations to reality:²¹⁵

[I]t can adopt very different positions in front of unequal situations: law can *disregard* reality and treat equally unequal situations giving thus its sanction to existing inequalities: law can take into account reality to *reinforce* it and transpose the existing unequal situations in the legal sphere, by the establishment of parallel legal inequalities. . . . [L]aw can also take reality into account not by reinforcing it, but by *correcting* it.²¹⁶

The principle of preferential treatment takes into account the reality of unequal economic relations between DCs and ICs and seeks to change this into a more equitable relationship. The principle represents an attempt, and a long overdue one at that, to institutionalize within GATT the trade policies of DCs. These policies reject the orthodox GATT view of international trade as an end in itself rather than as an *instrument* of economic and social development. Thus, the challenge posed by this principle to the GATT world trade system is fundamentally one of reconciling two diametrically opposed trade policies: on the one hand, the policy of trade protectionism embraced by DCs in which tariffs are viewed as a form of temporary protection for 'infant industry' and as a source of revenue; and on the other, the policy of trade liberalization with its emphasis on free trade, unfettered by any form of government-imposed trade barriers other than those negotiated multilaterally under GATT auspices. The debate over legal rules merely camouflages this basic and historical tension between two competing perspectives on how international trade should be conducted.

212. *Id.* at 277; see also DAM, GATT LAW, *supra* note 15, Chapter 1.

213. DAM, GATT LAW, *supra* note 15, at 4.

214. *Id.* at 5.

215. See Bollecker-Stern, *legal Character of Emerging Norms*, *supra* note 178, at 76.

216. *Id.*

