

# **Merging the GATT and the Havana Charter: How the World Trade Organization Took on Development Tasks**

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## **Abstract**

This article argues that: 1) trade and development reflect different mindsets and policy implications; 2) both are deeply embedded in the WTO's legal past; and 3) tensions between them jeopardize the WTO's policymaking future. At the argument's core is the contrast between "reciprocation" and "redistribution." Trade is associated with reciprocation (bargaining and two-way concessions), while development is associated with redistribution (assistance and one-way concessions). The WTO's predecessor—the General Agreement on Tariffs and Trade (GATT)—initially insisted on reciprocation but relaxed that insistence over time, eventually merging with redistribution-related elements of the defunct Havana Charter to form the Marrakesh Agreement that established the WTO. Consequently, tensions between reciprocation and redistribution now impede the WTO's ability to make and enforce policies. The article is novel in its juxtaposition of reciprocation and redistribution; demonstration of the Havana Charter's legacy; exposure of deep disagreement about the WTO's purpose; and recognition that recent gridlock may have a profound cause.

## **Key Words**

trade, development, reciprocation, redistribution, concession, World Trade Organization, General Agreement on Tariffs and Trade (GATT), Havana Charter, International Trade Organization (ITO), international law, policy

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## **I. Introduction**

In her opening remarks to the 2022 Ministerial Conference of the World Trade Organization (WTO), WTO director-general Ngozi Okonjo-Iweala portrayed her organization as a *development* institution. She asserted that trade, far from being an end in itself, “is an instrument for development.”<sup>1</sup> As evidence, she paraphrased the WTO’s purpose per its founding document: “to enhance people’s living standards, create employment, and support sustainable development.”<sup>2</sup>

Her portrayal of the World Trade Organization as a development institution may have been uncomfortable for some WTO member-governments. After all, when Okonjo-Iweala was one of two remaining candidates for the director-generalship in early 2021, the United States Trade Representative dismissed her as someone with “no experience in trade,” who therefore “knows nothing about [the WTO’s] core mission.”<sup>3</sup> Looking at the candidate’s years of development work in the World Bank, the US Trade Representative saw experiences that were irrelevant.

But regardless of whether all member-governments like it, there is truth behind Okonjo-Iweala’s assertion that the WTO is a development institution—and far from being new, that truth actually has a long history. This article makes a three-part argument:

- 1) Trade and development reflect different mindsets<sup>4</sup> and policy implications.
- 2) Both trade and development are deeply embedded in the WTO’s legal past.
- 3) Tensions between trade and development jeopardize the WTO’s policymaking future.

At the heart of this three-part argument is the contrast between “reciprocation” and “redistribution.”

To explore this contrast and construct the three-part argument, the article proceeds as follows. It begins by explaining how trade is associated with reciprocation (bargaining and two-way concessions), while development is associated with redistribution (assistance and one-way concessions). Next it recounts how the WTO’s predecessor—the General Agreement on Tariffs and Trade (GATT)—initially insisted on reciprocation but relaxed that insistence over time, eventually merging with redistribution-related elements of the defunct Havana Charter to form the Marrakesh Agreement that established the WTO. Then it explores how tensions between reciprocation and redistribution impede the WTO’s ability to make and enforce policies. This three-part argument is nuanced: it acknowledges that developing countries often felt marginalized<sup>5</sup> as the US shaped the initial GATT and later the WTO,<sup>6</sup> but it also traces how developing countries have made their mark, and the US has not always gotten its way.

The article closes with guidance on the WTO’s way forward. First, there needs to be a

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<sup>1</sup> “MC12 Opening Session: Opening remarks by the Director-General.” 12 June 2022. World Trade Organization. See: [https://www.wto.org/english/news\\_e/spno\\_e/spno26\\_e.htm](https://www.wto.org/english/news_e/spno_e/spno26_e.htm)

<sup>2</sup> “MC12 Opening Session: Opening remarks by the Director-General.” 12 June 2022. World Trade Organization. See: [https://www.wto.org/english/news\\_e/spno\\_e/spno26\\_e.htm](https://www.wto.org/english/news_e/spno_e/spno26_e.htm)

<sup>3</sup> “Outgoing US Trade Chief Says Leading WTO Candidate Lacks Experience.” 19 January 2021. *Financial Times*. See: <https://www.ft.com/content/baca66bb-5987-47e1-861d-3375a6f6d01b>

<sup>4</sup> In companion work, I refer to these mindsets more technically, as different “rhetorical frames.” See: Tana Johnson & Margaret Foster, *Rhetorical Frames: A Strategy of Governmental Power in International Negotiations*. THIRD WORLD Q. (forthcoming).

<sup>5</sup> See, e.g., Robert Hudec, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* (1987).

<sup>6</sup> See, e.g., John Jackson, *RESTRUCTURING THE GATT SYSTEM* (1990).

pause in other policy areas looking at the organization as a role model whose features should be widely emulated. Second, would-be reformers must recognize that the WTO is in a gray area in which reciprocity is no longer dominant, but redistribution is not wholly embraced either. And third, member-governments have to address their fundamental disagreement about the WTO's purpose before they pursue apt reforms to the WTO's operations.

In four respects, this article is novel:

- By looking not only at reciprocity (which has a centuries-long history in world affairs) but also redistribution (which has gained momentum more recently), the article exposes a fundamental tension between the former's prescription of two-way concessions and the latter's prescription of one-way concessions.
- By tracing how redistributive elements from the unratified Havana Charter altered the status quo and reference points for governments in the GATT and WTO systems, the article demonstrates how agenda-setting and precedents can stem even from international law that countries do *not* adopt.
- By showing how the GATT and the WTO incrementally imported the mix of reciprocity and redistribution that had contributed to governments not ratifying the Havana Charter in the first place, the article points out why the WTO displeases not only those who want the organization to be all about trade and reciprocity, but also those who want the organization to be all about development and redistribution.
- By elaborating member-states' fundamental disagreement about whether the WTO is primarily a trade organization or a development organization, the article reveals how prevalent explanations for organizational gridlock—such as consensus decision-making, American peevishness, or developed countries' assertiveness—may be mere symptoms of the more profound cause examined here.

## **II. Trade and Development Reflect Different Mindsets and Policy Implications**

At first glance, the idea of tensions between trade and development may be surprising. In theory, trade and development can coexist or even help each other. According to the bedrock economic concept of comparative advantage, *all* countries can benefit if each focuses on what it is comparatively (even if not absolutely) most efficient at producing, and then trades with other countries to get other things.<sup>7</sup> Indeed, claims of a symbiotic relationship between trade and development appear frequently in economic theory,<sup>8</sup> history,<sup>9</sup> and institutions.<sup>10</sup>

But in practice, trade and development are regularly in tension, *because they contain different policy implications about concessions*. A concession is something done or agreed to, even if grudgingly, to reach an agreement or improve a situation.<sup>11</sup> A key way of pursuing trade

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<sup>7</sup> David Ricardo, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1819). See: <https://www.gutenberg.org/ebooks/33310>

<sup>8</sup> See, e.g., Paul Samuelson & William Nordhaus, ECONOMICS, 19<sup>TH</sup> ED. (2010).

<sup>9</sup> See, e.g., Douglas Irwin, AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE (2020).

<sup>10</sup> World Trade Organization. (2024) "The WTO Can... Help Countries Develop." See: [https://www.wto.org/english/thewto\\_e/whatis\\_e/10thi\\_e/10thi06\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi06_e.htm)

<sup>11</sup> Here, concession is not used in the narrower legal sense of "a right to undertake a specified activity for profit on another's real property." Instead, it is used in the broader sense of "an instance of conceding or yielding." See:

is through reciprocation, which implies concessions that are two-way—meanwhile, a key way of pursuing development is through redistribution, which implies concessions that are one-way.

### ***Trade: Reciprocation and Two-Way Concessions***

Reciprocation has long been central in world affairs. Even centuries ago, before international organizations became widespread, reciprocation was employed in world affairs to characterize issues and imply appropriate policy actions in line with that characterization.<sup>12</sup> Reciprocation is a “you-scratch-my-back-and-I’ll-scratch-yours” mindset that exists in a variety of international policy areas, including military alliances,<sup>13</sup> treatment of diplomats,<sup>14</sup> management of natural resources,<sup>15</sup>—and of course trade,<sup>16</sup> where many economists expect reciprocation and the miracle of comparative advantage to “make a bigger pie.”<sup>17</sup>

Reciprocation carries a particular policy implication: governments bargain with one another and make mutual concessions to gain mutual benefits. In other words, they expect something in return, either getting something good or avoiding something bad.<sup>18</sup> Reciprocation can be “diffuse,” with mutual benefits accumulating in the aggregate or over time, rather than on every occasion.<sup>19</sup> Besides not needing to be concurrent, governments’ concessions to each other do not need to be identical in kind, or even size.<sup>20</sup> They simply are expected to be two-way.

This mode of operating is central to international trade. Trade is often expedited via reciprocal, *quid pro quo* concessions. One familiar example is tariff concessions (e.g., Actor A lowers tariffs on cars imported from Actor B, and Actor B lowers tariffs on trucks imported from

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<https://dictionary.findlaw.com/definition/concession.html> Concessions come in many forms—for example, even in a specific context such as trade negotiations, concessions are not necessarily tariff reductions, but instead could involve money, know-how, access, technology, etc.

<sup>12</sup> Tana Johnson, *Formal International Institutions*. In *THE OXFORD HANDBOOK OF INTERNATIONAL INSTITUTIONS* (Michael Barnett & Duncan Snidal eds., forthcoming).

<sup>13</sup> For example, the 1386 Anglo-Portuguese Treaty of Windsor, a military alliance that continues today, lays out England and Portugal’s mutual obligations not to attack one another and to assist if one of the parties is attacked by a third-party. See: <https://history.blog.gov.uk/2016/05/09/historys-unparalleled-alliance-the-anglo-portuguese-treaty-of-windsor-9th-may-1386/>

<sup>14</sup> For example, the 1961 Vienna Convention on Diplomatic Relations lays out mutual rights and responsibilities of all parties in their dual role as Senders and Receivers of diplomats. See: [https://legal.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf)

<sup>15</sup> For example, the 1978 Treaty for Amazonian Cooperation lays out mutual rights and responsibilities of all parties in navigating the Amazon River and using other resources in the Amazon Basin. See: <https://treaties.un.org/doc/Publication/UNTS/Volume%201202/volume-1202-I-19194-English.pdf>

<sup>16</sup> For example, between 1934 and early 1947, under the authority of the 1934 US Reciprocal Trade Agreements Act (RTAA), the United States government concluded 29 reciprocal trade agreements with other countries (US Tariff Commission, “Operation of the Trade Agreements Program, June 1934-April 1948, Part I Summary, Report #160,” p. 6. See: [https://www.usitc.gov/publications/332/otap\\_1\\_part\\_1\\_optimized.pdf](https://www.usitc.gov/publications/332/otap_1_part_1_optimized.pdf)

<sup>17</sup> Paul Krugman, Maurice Obstfeld, & Marc Melitz, *INTERNATIONAL TRADE: THEORY AND POLICY*, 12<sup>TH</sup> ED. (2022).

<sup>18</sup> Given the implicit role of actors’ understanding of their interests, a kinship may exist between reciprocation and the “logic of consequences.” See James March & Johan Olsen, *The Institutional Dynamics of International Political Orders*, 52 *INT’L ORG.* 943 (1998).

<sup>19</sup> John Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 *INT’L ORG.* 561, 571 (1992).

<sup>20</sup> For instance, the post-World War II “Marshall Plan”—by which the US government helped war-devastated European countries to rebuild—involved two-way concessions. The US government had numerous conditions (e.g., recipients would use US funding to purchase from or partner with American companies) and expectations (e.g., in future political or military challenges, countries rebuilt through the Marshall Plan ought to side with the US). The concessions differed in kind, size, and timing, but they were still two-way. Wariness about reciprocation helps to explain why the Soviet Union, despite being offered Marshall Plan funding, refused to participate.

Actor A), but many other forms are also possible. What matters is not the form, but that each party gets and gives something, so the concession is two-way.

### ***Development: Redistribution and One-Way Concessions***

In contrast to reciprocity, there is redistribution. Calls for redistribution gained momentum in the 1960s and 1970s, as the number of decolonized and newly independent countries swelled. These countries promoted initiatives such as the United Nations Conference on Trade and Development (UNCTAD),<sup>21</sup> the International Covenant on Economic, Social, and Cultural Rights (ICESCR);<sup>22</sup> the Charter of Economic Rights and Duties of States (CERDS);<sup>23</sup> and the New International Economic Order (NIEO).<sup>24</sup> Over time, redistribution demands took

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<sup>21</sup> After the Havana Charter's stillbirth, various developing countries demanded a UN conference devoted to development concerns. The Soviet Union, which had chosen to remain outside of the GATT and was looking for ways to court developing countries in its burgeoning Cold War with the US, reinforced this demand. In 1962, the idea for a UN Conference on Trade and Development solidified: it was recommended by the UN Economic and Social Council (ECOSOC) in its resolution 917 (XXXIV) (See: <https://documents.un.org/doc/resolution/gen/nr0/372/40/img/nr037240.pdf?token=L VX3dPexHxi3GoDqLD&fe=tru e>) and approved by the UN General Assembly in its resolution 1785 (XVII) (See: <https://documents.un.org/doc/resolution/gen/nr0/192/93/pdf/nr019293.pdf?token=k7OuBWypRpgnEi1URN&fe=tru e>). The initial conference was held in Switzerland in March-June 1964. It was chaired by the Argentinian development economist Raúl Prebisch, whose redistributive mindset was clear: he “wanted the Conference to be less about trade promotion or the giving of aid than the rectification of an injustice.” See John Toye, *UNCTAD at 50: A Short History*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) 11 (2014). In December 1964, UN General Assembly Resolution 1995 (XIX) established UNCTAD as an ongoing institution (See: <https://research.un.org/en/docs/ga/quick/regular/19>).

<sup>22</sup> The ICESCR is a treaty that was adopted by UN General Assembly resolution 2200A (XXI) in 1966 and received sufficient state-ratifications to enter into force in 1976 (See: [https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch\\_IV\\_03.pdf](https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf)). It lists numerous “positive” economic rights, such as the right to work, unionize, receive social security, have an adequate standard of living, and receive education. It also indicates the (possibly redistributive) means by which governments are to deliver those rights to people who do not already enjoy them: for example, the right to work is to be ensured by training programs (Article 6: 2), and the right to education is to be ensured by free universal primary education (Article 13: 2a). The ICESCR and its optional protocol—together with the 1948 Universal Declaration on Human Rights (UDHR) and the 1966 International Covenant on Civil and Political Rights (ICCPR)—comprise the “International Bill of Human Rights.”

<sup>23</sup> The CERDS is a document created through working-group consultations and adopted by UN General Assembly resolution 3281 (XXIX) in 1974 (See: <https://legal.un.org/avl/ha/cerds/cerds.html>). In it, the mindset of development-through-redistribution is conspicuous: “With a view to accelerating the economic growth of developing countries and bridging the economic gap between developed and developing countries, developed countries should grant generalized preferential, non-reciprocal and non-discriminatory treatment to developing countries” (Chapter II, Article 19). The policy implication of one-way concessions, without asking for things in return, is overt: “Every State should cooperate with the efforts of developing countries to accelerate their economic and social development by providing favorable external conditions and by extending active assistance to them, consistent with their development needs and objectives, with strict respect for the sovereign equality of States and free of any conditions derogating from their sovereignty” (Chapter II, Article 17).

<sup>24</sup> The NIEO is a reform proposal that came from developing countries, meeting in forums such as the Group of 77, UNCTAD, and the Non-Aligned Movement. The proposal became particularly visible and specific in May 1974, when the UN General Assembly passed Resolution A/RES/S-6/3201, titled “Declaration on the Establishment of a New International Economic Order” (See: <http://www.un-documents.net/s6r3201.htm>). That resolution calls for the existing economic order to be replaced because it “perpetuates inequality” and was “established at a time when most of the developing countries did not even exist as independent States” (paragraph 1). The NIEO explicitly emphasizes *development*: according to the resolution’s preamble, the aim is to “correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries, and ensure steadily accelerating economic and social development and peace and justice.” The NIEO also

hold not only in overt development organizations such as the International Bank for Reconstruction and Development (World Bank) or the United Nations Development Program (UNDP), but also spread throughout the United Nations (UN) system<sup>25</sup> and into regional organizations.<sup>26</sup> In the redistribution mindset, countries that have been fortunate (or perhaps exploitative) in the past are now obliged to assist others.

Redistribution, too, carries a particular policy implication: more-endowed entities make concessions to less-endowed entities, without asking for things in return. In other words, the “haves” are to give to the “have nots”<sup>27</sup>—not to get something good, but to do what is right.<sup>28</sup> This has become a key prescription for jump-starting development.<sup>29</sup> “Making a bigger pie” through reciprocation is insufficient; instead, the pie needs to be split more fairly.<sup>30</sup> Hurt by misfortune or outright exploitation in the past, perhaps many countries now should receive concessions without having to reciprocate.<sup>31</sup> With redistribution, the concessions (whether in the form of money, know-how, access, technology, or something else) are to be one-way.<sup>32</sup>

This mode of operating is central to international development, which combines economic policy with human rights.<sup>33</sup> According to its proponents, development is expedited by redistributing something from a more-endowed entity to a less-endowed one.<sup>34</sup> For example, Actor A provides preferential treatment to Actor B without anything in return. This is a one-way concession.

### ***Who Favors What?***

Very different policy implications flow from the reciprocation mindset associated with

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explicitly urges *redistribution*: because developing countries “constitute 70 percent of the world’s population [but] account for only 30 percent of the world’s income” (paragraph 1), the international community ought to give “active assistance to developing countries... free of any political or military conditions” (paragraph 4.k).

<sup>25</sup> Paul Collier, *Why the WTO is Deadlocked: And What Can Be Done about It*, 29 THE WORLD ECONOMY 1423, 1427 (2006).

<sup>26</sup> See, e.g., Diane Desierto, 36 *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia*, INT’L J. LEGAL INFO. 387 (2008).

<sup>27</sup> A concession that goes in the opposite direction (from the “have-nots” to the “haves,” without anything in return) is more like “exploitation.” It is worth exploring elsewhere but is beyond this article’s scope.

<sup>28</sup> Given the implicit role of actors’ understanding of their identities, a kinship may exist between redistribution and the “logic of appropriateness.” See James March & Johan Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT’L ORG. 943 (1998).

<sup>29</sup> Without doubt, redistribution *has* been a key prescription—even though some observers debate whether it is the *only or best* way to jump-start development.

<sup>30</sup> See, e.g., Andrew Lang, *WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER* (2011).

<sup>31</sup> Amrita Narlikar, *New Powers in the Club: The Challenges of Global Trade Governance*, 86 INT’L AFFS. 717, 720 (2010).

<sup>32</sup> For example, in the view of Argentinian development economist Raúl Prebisch, global economic governance was systemically biased against developing countries, who should therefore be given compensatory financing, preferential trade access, and other one-way concessions. See John Toye, *UNCTAD at 50: A Short History*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) 6 (2014). This economic doctrine gained influence when Prebisch served as Executive-Director of the UN Economic Commission for Latin America and the Caribbean (ECLAC) in 1950-1963, and then as the inaugural Secretary-General of the UN Conference on Trade and Development (UNCTAD) in 1964-1969.

<sup>33</sup> Harlan Grant Cohen, *Editorial Comment: What Is International Trade Law For?*, 113 AM. J. INT’L L. 326, 337 (2019).

<sup>34</sup> See, e.g., Oisín Suttle, *DISTRIBUTIVE JUSTICE AND WORLD TRADE LAW: A POLITICAL THEORY OF INTERNATIONAL TRADE REGULATION* (2017).

trade, versus the redistribution mindset associated with development. Whereas reciprocation emphasizes bargaining and concessions that are two-way, redistribution emphasizes assistance and concessions that are one-way. And whereas reciprocation envisions fairness as everyone contributing something, redistribution envisions fairness as the “haves” contributing to the “have-nots.” For instance, describing one-way technical assistance as a “moral imperative,” one observer demands countries that are richer in economic knowledge and resources to reduce their advantage by “placing such knowledge, and the funds to pay for it, in the service of the less-advantaged.”<sup>35</sup>

The policy implications of reciprocation and redistribution—two-way and one-way concessions, respectively—are in tension. After all, always insisting on one would rule out the other. Yet both reciprocation and redistribution have proponents in international affairs.

For the world’s least-developed countries, it is sensible to insist on redistribution, not reciprocation. After all, if more-endowed entities make unreciprocated concessions to less-endowed entities, least-developed countries would be beneficiaries. Moreover, the scarce resources of least-developed countries are not enough to cover all of their own needs, let alone to reciprocate concessions made by other countries. For least-developed countries, then, redistribution is attractive, while reciprocation is unattractive and infeasible.<sup>36</sup>

For middle-income countries, the situation is more complicated. Although “emerging economies” may have sufficient resources to make reciprocal transfers to other countries, perhaps it does not seem fair to be asked to do so. And even if it would be fair, a more strategic move is to have “solidarity” with least-developed countries as beneficiaries of unreciprocated transfers from the most-endowed countries.<sup>37</sup> Therefore, even for middle-income countries for whom reciprocation is feasible, being beneficiaries of redistribution may be very alluring. This does not mean middle-income countries *always* favor redistribution; it simply means that they may be attracted to redistribution even when it is not sorely needed.

In contrast, high-income countries—as the more-endowed entities from which one-way concessions are often demanded—have reasons to favor reciprocation over redistribution. This inclination is reinforced by fears that emerging economies may be “elephants hiding behind mice”: middle-income countries may refuse to reciprocate despite having sufficient resources to do so, and thereby benefit from redistribution intended for least-developed countries.<sup>38</sup> However, high-income countries’ preference for reciprocation is somewhat offset by reciprocation’s obvious unattractiveness and infeasibility for least-developed countries, and perhaps by humility over past luck or exploitation. Consequently, even in high-income countries where reciprocation is compelling, there also is a toehold for redistribution: economic efficiency is not necessarily more important than goals such as greater cross-country equity.<sup>39</sup>

Therefore, even though the reciprocation mindset has a long history in international trade policy, it is also reasonable to examine the WTO’s legal antecedents for traces of the

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<sup>35</sup> Frank Garcia, *Beyond Special and Differential Treatment*, 27 B.C. INT’L & COMPAR. L. REV. 291, 292, 309 (2004).

<sup>36</sup> Tana Johnson & Margaret Foster, *Rhetorical Frames: A Strategy of Governmental Power in International Negotiations*, THIRD WORLD Q. (forthcoming).

<sup>37</sup> Paul Blustein, MISADVENTURES OF THE MOST FAVORED NATIONS: CLASHING EGOS, INFLATED AMBITIONS, AND THE GREAT SHAMBLES OF THE WORLD TRADE SYSTEM 283 (2009).

<sup>38</sup> Susan Schwab, *After Doha: Why the Negotiations Are Doomed and What We Should Do About It*, 90 FOREIGN AFF. 104 (2011).

<sup>39</sup> Harlan Grant Cohen, *Editorial Comment: What Is International Trade Law For?*, 113 AM. J. INT’L L. 326, 334 (2019).

redistribution mindset—which is associated with development policy.

### **III. Both Trade and Development Are Deeply Embedded in the WTO's Legal Past**

Today's WTO has two main legal antecedents. One is the Havana Charter, which was written during multilateral meetings in 1946-1948 but never came into force to create an International Trade Organization (ITO). The other is the General Agreement on Tariffs and Trade, which was adopted on a provisional basis in 1947 but, when the ITO did not come to fruition, became the centerpiece of global trade governance. Although both the GATT and the Havana Charter stemmed from American proposals,<sup>40</sup> the GATT hewed more closely to US preferences. But even though the ITO never actually operated, it remained a looming “road not taken,” thereby shaping not only the GATT's initial form but also its subsequent evolution and the form of the eventual WTO.

#### ***The Havana Charter***

The Havana Charter was a product of the fledging United Nations system. Negotiations were instigated by war-time discussions between the US and UK governments, resulting in a draft charter that the US government distributed to other UN member-states for consideration.<sup>41</sup> Brazil responded with an alternative draft charter, which relaxed reciprocity for developing countries<sup>42</sup> in ways that the US's draft charter did not.<sup>43</sup>

Convening as “the UN Conference on Trade and Employment,” UN members hammered out some guidelines in October-November 1946 in London, then debated details in two much longer rounds: April-November 1947 in Geneva, and November 1947-March 1948 in Havana.<sup>44</sup> Developing countries in Latin America and the Caribbean were especially proactive—not only because they wanted to see relaxations of reciprocity as pushed by Brazil, but also because they were geographically proximate to the lengthy negotiations in Cuba. And more generally, developing countries were heartened by the conference's name (indicating that trade must be considered alongside employment and other socioeconomic goals) and by the resulting Havana Charter's stated aims (prominently specifying “industrial and general economic *development*, particularly of those countries which are still in the early stages of industrial development”).<sup>45</sup>

In fact, much like WTO director-general Okonjo-Iweala decades later, the Havana Charter emphasized that trade was not an end in itself, but a means for aims such as development. Indeed, the Charter elaborated:

[T]he *industrial and general economic development* of all countries, *particularly of those*

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<sup>40</sup> See, e.g., John Jackson, *RESTRUCTURING THE GATT SYSTEM* (1990).

<sup>41</sup> United States Department of State. (September 1946). ‘Suggested Charter for an International Trade Organization of the United Nations, Commercial Policy Series, Publication 2598.’ See: <https://www.worldtradelaw.net/document.php?id=misc/Suggested%20Charter.pdf>

<sup>42</sup> This article uses the terms “less-developed countries” and “developing countries” interchangeably, in keeping with historical usage: although governments relied on the former term in the early GATT system, they transitioned to the latter term in the later GATT system and the current WTO system. Neither term is ideal, but thus far there is no widely agreed substitute.

<sup>43</sup> Riordan Wilkinson & James Scott. *Developing Country Participation in the GATT: A Reassessment*, 7 *WORLD TRADE REV.* 473, 482 (2008).

<sup>44</sup> United States Department of State, Office of the Historian. (1947) ‘Foreign Relations of the United States, 1947: The United Nations, Volume 1, Document 453.’ See: <https://history.state.gov/historicaldocuments/frus1947v01/d453>

<sup>45</sup> Havana Charter, Chapter I, emphasis added. See: [https://www.wto.org/english/docs\\_e/legal\\_e/havana\\_e.pdf](https://www.wto.org/english/docs_e/legal_e/havana_e.pdf)



*in which resources are as yet relatively undeveloped*, as well as the reconstruction of those countries whose economies have been devastated by war, will improve opportunities for employment, enhance the productivity of labor, increase the demand for goods and services, contribute to economic balance, expand international trade and raise levels of real income.<sup>46</sup>

The Havana Charter explicitly pointed to development and the imperative of aiding the “have-nots.”<sup>47</sup> Insisting on one vote per country, it rejected weighted voting that would have benefited the “haves.”<sup>48</sup> It also went farther, prescribing some one-way concessions associated with redistribution. For example, it cited technical assistance to facilitate poorer countries’ economic catch-up.<sup>49</sup>

Ultimately, the Havana Charter strayed in important ways from the draft charter proposed by the United States. US Under-Secretary of State William Clayton described the Havana Charter as “not one agreement but six,” dealing with trade, development, employment, cartels, commodity agreements, and the design of a new trade agency within the UN system.<sup>50</sup> Partly due to efforts to incorporate other countries’ priorities and views, the Havana Charter was complex: although vestiges of reciprocity remained, there were numerous carve-outs for non-reciprocity and also several insertions of redistribution.<sup>51</sup>

Even so, the final version of the Havana Charter did not completely please developing countries. For example, China’s delegate praised it as a “delicately balanced document,” but also noted that it was cobbled together from “the welter of no less than 800 amendments.”<sup>52</sup> Meanwhile, Brazil’s delegate lamented that although his country had collaborated with Australia, Chile, and India to insert “the chapter on economic development, of the greatest interest to us all,” the chapter was not as forceful as it could have been in promoting the industrialization of less-developed countries.<sup>53</sup>

The Havana Charter did not completely please the United States, either. One American negotiator grumbled that, in trying to rewrite important parts of the Charter to fit their own ideas and interests, “most assertive of all seem to be the smaller countries which have little industry and small variety of natural resources; they seem carried away by a hope of rapid development, executed by governments, using capital and technique to be freely provided by the United States.”<sup>54</sup> US government officials, concluding that the Havana Charter did not sufficiently

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<sup>46</sup> John Evans, *The General Agreement on Tariffs and Trade*, 22 INT’L ORG. 72, 75 (1968).

<sup>47</sup> Havana Charter, Chapter III:10. See: [https://www.wto.org/english/docs\\_e/legal\\_e/havana\\_e.pdf](https://www.wto.org/english/docs_e/legal_e/havana_e.pdf)

<sup>48</sup> United Nations Conference on Trade and Employment. (21 January 1947) ‘Formula for Weighted Voting Proposed by the United Kingdom Representative, E/PC/T/C.6/W.3’ (at page 1). See: <https://docs.wto.org/gattdocs/q/UN/EPCT/C6-W3.PDF>

<sup>49</sup> Havana Charter, Chapter III:10. See: [https://www.wto.org/english/docs\\_e/legal\\_e/havana\\_e.pdf](https://www.wto.org/english/docs_e/legal_e/havana_e.pdf)

<sup>50</sup> Herbert Feis, *The Geneva Proposal for an International Trade Charter*, 2 INT’L ORG. 39, 43 (1948).

<sup>51</sup> William Diebold, *The End of the ITO*, 16 PRINCETON UNIVERSITY ESSAYS IN INTERNATIONAL FINANCE 1, 13 (1952). <https://ies.princeton.edu/pdf/E16.pdf>

<sup>52</sup> United Nations Conference on Trade and Employment. (19 March 1948). ‘Press Release ITO/179: Speech to be Delivered by the Chief Delegate of China at the Closing Session of the Havana Conference,’ at page 1. See: [https://www.wto.org/gatt\\_docs/English/SULPDF/90200378.pdf](https://www.wto.org/gatt_docs/English/SULPDF/90200378.pdf)

<sup>53</sup> United Nations Conference on Trade and Employment. (23 March 1948) ‘Press Release ITO/214: Text of Speech to be Delivered by the Delegate of Brazil at the Closing Session,’ at page 2. See: [https://www.wto.org/gatt\\_docs/English/SULPDF/90200406.pdf](https://www.wto.org/gatt_docs/English/SULPDF/90200406.pdf)

<sup>54</sup> Herbert Feis, *The Geneva Proposal for an International Trade Charter*, 2 INT’L ORG. 39, 51 (1948).

serve American interests, eventually abandoned it in favor of the GATT.<sup>55</sup> Hence, the GATT—and later, the WTO—would operate in the shadow of an unrealized International Trade Organization whose Charter was negotiated under UN auspices, spoke of development sympathetically and repeatedly, and even incorporated some provisions for redistribution.

Although the Havana Charter never came into force, it was signed by 53 states and territories—about *two-thirds* of which would now be called developing countries.<sup>56</sup>

### ***The General Agreement on Tariffs and Trade***

Around the same time as the broader ITO negotiations at the UN conference in Cuba, a handful of richer, like-minded countries undertook separate discussions about reciprocally reducing tariffs among themselves.<sup>57</sup> These discussions were strongly influenced by US practices and preferences. Operating under a key piece of domestic legislation, the 1934 Reciprocal Trade Agreements Act, the American approach to trade centered on reciprocation.

Reciprocation was attractive not only economically, but also politically. Economically, it could result in rapid market liberalization around the world. Politically, it could reassure businesses and the public that governmental concessions were garnering goodies in return.

For the US, a particular passion was reciprocation in tariff-reductions. Key US negotiators saw tariffs as a flexible policy tool that permitted some governmental intervention in the economy, while being less disruptive to the private sector.<sup>58</sup> To prompt other governments to incrementally and reciprocally reduce their tariffs, the US government wanted an international ban on an alternative policy tool, quotas.<sup>59</sup> When the US had floated this idea in the ITO negotiations, it was opposed by India and numerous other countries that did not want quotas outlawed and were not as enamored with the idea of reciprocal tariff-reductions.<sup>60</sup>

The US had greater success in the GATT arena. Among the small set of rich countries initially involved in that arena, there was a “strong logical basis” for reciprocation. Since these countries were major players that could affect the terms of trade, they would suffer a loss of

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<sup>55</sup> William Diebold, *The End of the ITO*, 16 PRINCETON UNIVERSITY ESSAYS IN INTERNATIONAL FINANCE 1, 2-3 (1952). <https://ies.princeton.edu/pdf/E16.pdf>

<sup>56</sup> There were 34 “developing countries”: Afghanistan, Bolivia, Brazil, Burma, Ceylon, Chile, China, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Egypt, El Salvador, Guatemala, Haiti, India, Indonesia, Iran, Iraq, Lebanon, Liberia, Mexico, Nicaragua, Pakistan, Panama, Peru, Philippines, Southern Rhodesia, Syria, Transjordan, Union of South Africa, Uruguay, Venezuela. There were 17 “developed countries”: Austria, Belgium, Canada, Czechoslovak Republic, Denmark, France, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, United Kingdom, United States. And two countries—Australia and New Zealand—were liminal, due to their economies’ reliance on agriculture and other primary commodities.

<sup>57</sup> Patrick Low, Hamid Mamdouh, & Evan Rogerson, *Balancing Rights and Obligations in the WTO—A Shared Responsibility*, Government Offices of Sweden, at page 8. See: <https://www.swedenabroad.se/globalassets/ambassador/fn-geneve/documents/balancing-rights-and-obligations-in-the-wto.pdf> The richer, like-minded countries that initiated the GATT negotiations included Australia, Belgium, Canada, France, Luxembourg, Netherlands, United Kingdom, United States.

<sup>58</sup> United Nations Conference on Trade and Employment. (1 July 1947). ‘Preparatory Committee of the United Nations Conference on Trade and Employment: Verbatim Report of 22<sup>nd</sup> Meeting of Commission A, E/PC/T/A/PV/22,’ at page 16. See: <https://docs.wto.org/gattdocs/q/UN/EPCT/APV-22.PDF>

<sup>59</sup> United Nations Conference on Trade and Employment. (1 July 1947). ‘Preparatory Committee of the United Nations Conference on Trade and Employment: Verbatim Report of 22<sup>nd</sup> Meeting of Commission A, E/PC/T/A/PV/22,’ at page 17. See: <https://docs.wto.org/gattdocs/q/UN/EPCT/APV-22.PDF>

<sup>60</sup> United Nations Conference on Trade and Employment. (21 October 1946) ‘Government of India: Comments on US Proposals for Expansion of World Trade and Employment, E/PC/T/W.14 and E/PC/T/5,’ at page 56-57. See: <https://docs.wto.org/gattdocs/q/UN/EPCT/5.PDF>

income if they reduced their tariffs unilaterally, rather than reciprocally.<sup>61</sup>

Reciprocal tariff-reductions were not as compelling for less-developed countries, because they used tariffs as an important source of government revenue, were not yet “principal suppliers” of the manufactured goods on which tariff-reductions focused, had less wherewithal to make concessions that interested other parties, and faced impediments beyond tariffs.<sup>62</sup> Nevertheless, already worrying that the ITO would not come to fruition, a handful of poorer countries had joined the GATT negotiations. Among those countries, India tried to push the GATT negotiations toward a very different set of rules that did not focus on tariffs or reciprocity.

In an accommodation that India and some other countries deeply resented, the US resolutely retained the GATT negotiations’ emphasis on reciprocal tariff-reductions and merely agreed to a few conditions under which exceptions could be made. This suggested that anything other than reciprocal tariff-reductions was exceptional, even deviant. It also irked governments that believed tariffs should not be considered separately from issues such as development.<sup>63</sup> The accommodation would reverberate for decades: from the start, India and some other countries resented experiencing the GATT not as negotiating forum, but as a body that sought to surveil and control them.<sup>64</sup>

Nevertheless, in 1947 the General Agreement on Tariffs and Trade became operational with 23 founding parties, almost *evenly split* between what now would be called developing<sup>65</sup> and developed<sup>66</sup> countries.

### ***Initially, the GATT System Insisted on Trade and Reciprocity***

In short, in the 1940s the Havana Charter and the GATT exhibited key differences. The Havana Charter was negotiated under UN auspices, by a heterogeneous group of more than 50 countries making up the state-system of the time. In contrast, the GATT was initiated in a less formal and comprehensive way, by a small and relatively homogeneous set of rich countries. Whereas developed countries were significantly outnumbered by developing countries in the Havana Charter negotiations, in the GATT negotiations they had more even numbers and were earlier agenda-setters. Unsurprisingly, then, the Havana Charter listed a variety of

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<sup>61</sup> Patrick Low, Hamid Mamdouh, & Evan Rogerson, *Balancing Rights and Obligations in the WTO—A Shared Responsibility*, Government Offices of Sweden, at page 9. See:

<https://www.swedenabroad.se/globalassets/ambassador/fn-geneve/documents/balancing-rights-and-obligations-in-the-wto.pdf>

<sup>62</sup> Nicolas Lamp, *How Some Countries Became ‘Special’: Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking*, 18 J. INT’L ECON. L. 743, 759-760 (2015). Seeking efficiency in dealing with requests, prior to the fourth round of GATT negotiations in 1956, one country could not request another country to cut tariffs on a particular item unless the former was the principal supplier of that item to the latter.

<sup>63</sup> William Diebold, *The End of the ITO*, 16 PRINCETON UNIVERSITY ESSAYS IN INTERNATIONAL FINANCE 1, 29 (1952). <https://ies.princeton.edu/pdf/E16.pdf>

<sup>64</sup> Nicolas Lamp, *How Some Countries Became ‘Special’: Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking*, 18 J. INT’L ECON. L. 743, 750-751 (2015).

<sup>65</sup> There were 12 “developing countries”: Brazil, Burma, Ceylon, Chile, China, Cuba, India, Lebanon, Pakistan, Southern Rhodesia, Syria, Union of South Africa. Missing were 22 Havana Charter signatories: Afghanistan, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, El Salvador, Guatemala, Haiti, Indonesia, Iran, Iraq, Liberia, Mexico, Nicaragua, Panama, Peru, Philippines, Transjordan, Uruguay, Venezuela.

<sup>66</sup> There were 9 “developed countries”: Belgium, Canada, Czechoslovak Republic, France, Luxembourg, Netherlands, Norway, United Kingdom, United States. Missing were 8 Havana Charter signatories: Austria, Denmark, Greece, Ireland, Italy, Portugal, Sweden, Switzerland. And two additional countries, Australia and New Zealand, were liminal due to their economies’ reliance on agriculture and other primary commodities.

socioeconomic aims, discussed numerous policy instruments, and contained elements of redistribution and one-way concessions. Meanwhile, the GATT underscored the aim of market liberalization, focused on the policy instrument of tariff-reductions, and emphasized reciprocity and two-way concessions.

The GATT became the centerpiece of global trade governance when the ITO envisioned in the Havana Charter did not come to fruition. But the Havana Charter did not disappear. Having been signed by 53 states and territories, its text was a reminder that the GATT finalized in 1947 had not been the only option, and that alternatives might arise in the future. The GATT's operations would occur in its shadow—and the Havana Charter, like an old car that does not run, would be scavenged for parts.

Compared to the Havana Charter, at first the GATT system was much more insistent on facilitating trade, via reciprocity and two-way concessions. Facilitating development, via redistribution and one-way concessions, was neither the GATT's initial purpose nor practice.<sup>67</sup> As one set of observers starkly puts it: “The GATT was not designed to be, nor were claims made that it would become, an instrument for facilitating economic development in the periphery.”<sup>68</sup> Although the GATT's preamble acknowledged goals such as higher living standards, these goals were not called “development.” In fact, in the original 1947 version of the GATT, the word “development” appeared only eight times, and always in a generic sense that applied to all countries.

For example, the original Article XVIII, titled “Adjustments in Connection with Economic Development,” acknowledged that governments might want to erect trade barriers so industrial or agricultural sectors could be built up. Such barriers were supposed to be temporary, announced in advance, designed in consultation with other GATT parties—and they were not for poorer countries alone. Indeed, the original Article XVIII repeatedly referred to economic “development” and “reconstruction” in tandem. This reflected the early post-war view that, since numerous industrialized economies interrupted or harmed by World War II also needed to be treated delicately, economic catch-up was a concern held well beyond the poorest countries.

Rather than development and redistribution, the original 1947 version of the GATT highlighted trade and reciprocity. The word “trade” appeared 125 times.<sup>69</sup> The preamble committed parties to conducting “*trade* and economic endeavor” by “entering into *reciprocal* and *mutually* advantageous arrangements directed to the substantial reduction of tariffs and other barriers to *trade* and to the *elimination of discriminatory treatment* in international commerce.”<sup>70</sup>

At the core of the initial GATT were two commitments that all parties made to each another: most-favored nation (MFN) treatment and national treatment. MFN treatment prohibited favoritism for some GATT parties over others, while national treatment prohibited favoritism for domestic products over products from fellow GATT parties. In contrast to the Havana Charter (where MFN treatment and national treatment were elaborated in Articles 16 and 18), in the GATT these two commitments were at center stage (in Articles I and III). Although often described as commitments to non-discrimination, in some ways MFN and national treatment also reinforced reciprocity. Both meant that GATT parties—regardless of whether rich or poor—were expected to get concessions from, and give concessions to, one another.

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<sup>67</sup> John Evans, *The General Agreement on Tariffs and Trade*, 22 INT'L ORG. 72, 73 (1968).

<sup>68</sup> Riordan Wilkinson & James Scott. *Developing Country Participation in the GATT: A Reassessment*, 7 WORLD TRADE REV. 473, 487 (2008).

<sup>69</sup> See: <https://treaties.un.org/doc/Publication/UNTS/Volume%2055/volume-55-I-814-English.pdf>

<sup>70</sup> Emphasis added.

The GATT system was galling to many developing countries, especially when compared to the “road not taken” with the Havana Charter. As one organizational history puts it:

At that time the GATT did not concern itself with the development of developing countries. It saw its mission as lowering barriers to trade in industrial goods and services, and it was very successful in achieving this among its small membership over successive rounds of tariff negotiation through the 1950s. Developing countries were less interested in negotiating down industrial tariffs than in getting new industries started.<sup>71</sup>

And to get new industries started, they began to demand redistribution.

### ***Incrementally, the GATT System Incorporated Elements of Development and Redistribution***

Compared to the Havana Charter, the original 1947 version of the GATT was more insistent on reciprocity. That insistence, however, was not static. Although more than half of the countries from the Havana Charter negotiations were outside of the GATT negotiations, *all* of the GATT’s founding parties had been part of the Havana Charter negotiations.

Hence, among GATT parties there was firsthand knowledge of the Havana Charter’s frank incorporation of development, one-way concessions, and the needs of poorer countries. For example, when the parties prepared to review the General Agreement on Tariffs and Trade in 1953, the representative of Chile complained:

[The draft announcing the review<sup>72</sup> seemed] to indicate that [the parties’] experience had been unfailingly good in the past years.... [but] it should make more explicit mention of the difficulties that had been encountered... [and that] if it had been known that the ITO would not come into existence, the provisions of the Agreement would certainly have been different. Confronted with these realities... [the parties] should consider enlarging [the GATT’s] scope by including in the text provisions of the Havana Charter.<sup>73</sup>

Canada and the United States immediately refuted Chile’s complaint<sup>74</sup>—nevertheless, over time the GATT system would incrementally relax its insistence on reciprocity, as parties sought to inject elements of development and redistribution not only from the Havana Charter, but also from UNCTAD and other sources.

Four significant changes are discussed below: 1) the amendment and expansion of Article XVIII in 1955, 2) the addition of Part IV in 1965, 3) the authorization of the Generalized System of Preferences in 1971, and 4) the implementation of the Enabling Clause and the Tokyo Codes in 1979.

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<sup>71</sup> John Toye, *UNCTAD at 50: A Short History*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) 11 (2014). See: [https://unctad.org/system/files/official-document/osg2014d1\\_en.pdf](https://unctad.org/system/files/official-document/osg2014d1_en.pdf)

<sup>72</sup> General Agreements on Tariffs and Trade (GATT). (12 November 1953). ‘Decisions, Resolutions, Declarations, and Recommendation of the Contracting Parties, November 1952-October 1953,’ at page 18-19. See: <https://docs.wto.org/gattdocs/q/GG/G/70.PDF>

<sup>73</sup> General Agreement on Tariffs and Trade (GATT). (31 October 1953). ‘Summary Record of the 20<sup>th</sup> Meeting of the 8<sup>th</sup> Session, SR.8/20’ at page 8. See: <https://docs.wto.org/gattdocs/q/GG/SR/8-20.PDF>

<sup>74</sup> General Agreements on Tariffs and Trade (31 October 1956), 9. See: <https://docs.wto.org/gattdocs/q/GG/SR/8-20.PDF>

### *The Amendment and Expansion of Article XVIII in 1955*

The original 1947 agreement, which contained 35 articles, did not distinguish “developing countries” or apply different expectations to them. Indeed, as noted above, the original Article XVIII repeatedly referred to economic “development” in tandem with “reconstruction,” suggesting that economic catch-up was a concern of many countries, not just the poorest ones. But by 1954, this view was becoming untenable.

For example, the representative of Brazil claimed that by expecting reciprocal obligations from less-developed countries, despite those countries’ very different economic structures and production, the GATT was perpetuating under-development.<sup>75</sup> The representative of Cuba, too, condemned the GATT’s insistence on reciprocity: “When [less-developed] countries requested some tariff flexibility or other exceptional treatment to protect their economic development, they were told that they were seeking a privileged position and trying to deviate from the main principles of the Agreement.”<sup>76</sup> Instead, argued the representative of Cuba, the GATT should relax reciprocity and mirror the United Nations’ paramount objective of “economic development.”<sup>77</sup>

The GATT’s initial stance—that economic catch-up was a concern of many countries, not just the poorest ones—was disavowed in 1955, with changes and expansions of Article XVIII.<sup>78</sup> The article grew to 23 sub-sections and referred explicitly to GATT parties that “can only support low standards of living and are in the early stages of development.”<sup>79</sup> Poorer countries fulfilling both conditions would “enjoy additional facilities” to modify or withdraw their previously made concessions, thereby sheltering their infant industries or protecting their monetary reserves. The amended Article XVIII was a shift, for it began demarcating poorer countries *and* applying different expectations to them. Just a few years after the 1947 version of the GATT had been adopted, its emphasis on reciprocity was already being relaxed.

But even with this change, poorer countries still did not develop as quickly as hoped.<sup>80</sup> To understand why, in 1957 the GATT parties enlisted a group of experts to examine international trade trends. The group’s findings, which became known as the Haberler Report of 1958,<sup>81</sup> prompted the GATT parties to launch a Program for the Expansion of International Trade. The program had three prongs: Committee I on further tariff negotiations, Committee II on agricultural protectionism, and Committee III on obstacles to the expansion of the trade of poorer countries.

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<sup>75</sup> General Agreement on Tariffs and Trade (GATT). (22 November 1954). ‘Summary Record of the 16<sup>th</sup> Meeting of the 9<sup>th</sup> Session, SR.9/16,’ at page 3. See: <https://docs.wto.org/gattdocs/q/GG/SR/9-16.PDF>

<sup>76</sup> General Agreement on Tariffs and Trade (GATT). (22 November 1954). ‘Summary Record of the 16<sup>th</sup> Meeting of the 9<sup>th</sup> Session, SR.9/16,’ at page 8. See: <https://docs.wto.org/gattdocs/q/GG/SR/9-16.PDF>

<sup>77</sup> General Agreement on Tariffs and Trade (GATT). (22 November 1954). ‘Summary Record of the 16<sup>th</sup> Meeting of the 9<sup>th</sup> Session, SR.9/16,’ at page 7. See: <https://docs.wto.org/gattdocs/q/GG/SR/9-16.PDF>

<sup>78</sup> Special attention to the poorest countries’ economic catch-up was also touted in the Declaration on International Investment and Economic Development (March 1955) and the Resolution on the Particular Difficulties Connected with Trade in Primary Commodities (November 1956).

<sup>79</sup> This definition, per *Note ad Article XVIII*, includes parties in the early stages of development *or* industrialization. Thus, the amended Article XVIII not only defines “less-developed” parties but also (obliquely) distinguishes already-developed/industrialized parties—which presumably are not authorized to protect their own infant industries or monetary reserves in the ways the amended Article XVIII provides.

<sup>80</sup> “Trends in International Trade: Decision Adopted by the [GATT] Contracting Parties on 30 November 1957, L/775.” See: [https://www.wto.org/gatt\\_docs/English/SULPDF/90710108.pdf](https://www.wto.org/gatt_docs/English/SULPDF/90710108.pdf)

<sup>81</sup> “Trends in International Trade.: A Report by a Panel of Experts (October 1958).” See: [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_trends\\_in\\_international\\_trade.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_trends_in_international_trade.pdf)

While Committee I still hinged on reciprocity and two-way concessions, the other two committees considered redistribution and one-way concessions. Implicitly, the three-pronged approach acknowledged that reciprocity would not work if there were systemic problems—if trade systematically delivered imbalanced benefits between agricultural importers and exporters (Committee II) or between developed and less-developed parties (Committee III).<sup>82</sup> In addition to entertaining the possibility of systemic problems, Committees II and III clearly ventured into the realm of development.

With poorer countries now demarcated by the amended Article XVIII, they also became more organized as a group with the GATT system. In 1959 and 1960 they began jointly authoring notes to submit to the rest of the parties.<sup>83</sup> In 1963 they started holding weekly meetings.<sup>84</sup>

### *The Addition of Part IV in 1965*

Reciprocity was relaxed even more in the 1960s—first informally, then more formally. At a November 1961 meeting, 44 GATT contracting parties responded to the work of Committee III by agreeing that “a more flexible attitude should be taken with respect to the degree of reciprocity to be expected” from less-developed parties.<sup>85</sup> They adopted a “Declaration on Promotion of the Trade of Less-Developed Countries,” which urged “a sympathetic attitude on the question of reciprocity, keeping in mind the needs of [less-developed parties] for a more flexible use of tariff protection.”<sup>86</sup> According to this Declaration, one-way concessions would replace two-way concessions in the following sense: 1) efforts would be focused on reducing barriers against exports of “tropical products” and other items that especially interested less-developed parties, and 2) other parties would tolerate less-developed parties keeping their own tariff barriers in place, even as other parties lowered theirs.

Such one-way concessions became more concrete in 1965. That year—partially to preempt demands from the newly formed UNCTAD, in which developing countries were working together even more closely—GATT parties established a formal Committee on Trade and Development (CTD) to mainstream development discussions within the GATT system. They also revised the General Agreement on Tariffs and Trade itself, adding a new Part IV and articles XXXVI, XXXVII, and XXXVIII.<sup>87</sup>

Pointedly titled “Trade and Development,” Part IV distinguished between developed and less-developed contracting parties, with the latter referenced 27 times. As explicitly stated in the new Article XXXVI, the reciprocity described in the original version of the GATT did not apply to less-developed parties: “*The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers*

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<sup>82</sup> Nicolas Lamp, *How Some Countries Became ‘Special’: Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking*, 18 J. INT’L ECON. L. 743, 753, 755 (2015).

<sup>83</sup> GATT Contracting Parties’ Fourteenth Session, “Expansion of International Trade: Note Submitted by the Less-Developed Countries on 20 May 1959, W.14/15” (See: [https://www.wto.org/gatt\\_docs/English/SULPDF/91870019.pdf](https://www.wto.org/gatt_docs/English/SULPDF/91870019.pdf)) and GATT Contracting Parties’ Seventeenth Session, “Expansion of International Trade: Note Submitted by the Less-Developed Countries on 10 November 1960, W.17/11” (See: [https://www.wto.org/gatt\\_docs/English/SULPDF/91870133.pdf](https://www.wto.org/gatt_docs/English/SULPDF/91870133.pdf)).

<sup>84</sup> “Notes on the Proceedings of the Meeting of a Group of Less-Developed Countries on 11 November 1963, LDC/M/1.” See: <https://docs.wto.org/gattdocs/q/GG/LDC/M1.pdf>

<sup>85</sup> “GATT Press Release #651 of 30 November 1961,” 2. See: <https://docs.wto.org/gattdocs/q/GG/GATT/651.PDF>

<sup>86</sup> “GATT Press Release #651 of 30 November 1961,” 8. See: <https://docs.wto.org/gattdocs/q/GG/GATT/651.PDF>

<sup>87</sup> Part IV entered into force in 1966.

to the trade of less-developed contracting parties.”<sup>88</sup> Having more-endowed entities make concessions to less-endowed entities, without asking for things in return, relaxed reciprocity.

Besides casting off reciprocity for a substantial portion of GATT contracting parties, Part IV also sowed a few seeds for redistribution. In contrast to the original GATT’s early post-war depiction that economic catch-up applied to many countries, the 1965 addition portrayed economic catch-up as a special concern of relatively poor countries. The text noted the “wide gap between standards of living,” making it “particularly urgent” to bring about a “rapid advance” by which less-developed parties “secure a share in growth in international trade commensurate with” their greater needs.<sup>89</sup> Remarking that development is facilitated not only by (one-way) trade concessions but also by (one-way) financial assistance, Part IV urged all GATT parties to collaborate with international lending agencies, United Nations development bodies, and “any institutions that may be created by the United Nations Conference on Trade and Development.”<sup>90</sup> Indeed, in 1967, UNCTAD and the GATT system partnered to create the International Trade Center (ITC), which would be the focal point for trade-related technical assistance and directly work with business communities in less-developed GATT parties.

To be sure, Part IV did not give less-developed parties everything they wanted: there was a lot of verbiage, but not precise commitments.<sup>91</sup> Part IV contained phrases (e.g., “where appropriate” or “to the fullest extent possible”) that made one-way concessions sound more like optional charity than an enforceable entitlement. Moreover, it was inconsistently actionable by developed parties’ trade negotiators, since domestic legislatures might not authorize one-way concessions—or might make them conditional on other developed parties doing likewise.<sup>92</sup> Nevertheless, this 1965 addition to the GATT clearly challenged the focus on trade and reciprocity, opening the door to development and redistribution.

### *The Authorization of the Generalized System of Preferences in 1971*

In the early 1970s, the door opened farther. Throughout the previous decade, the GATT had added dozens of contracting parties. The majority were less-developed<sup>93</sup>—and among these, many were former colonies that had bypassed the initial concessions generally demanded by Article XXXIII’s process of accession, instead becoming parties automatically through Article XXVI’s process of “sponsored” newly independent countries. This handling of decolonization in the GATT regime was another relaxation of reciprocity, and it quickly increased the number

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<sup>88</sup> GATT Article XXXVI: 8, emphasis added. See: [http://www.sice.oas.org/trade/ur\\_round/58c.asp](http://www.sice.oas.org/trade/ur_round/58c.asp) Note ad Article XXXVI elaborates: “the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial, and trade needs.”

<sup>89</sup> GATT Article XXXVI: 1-2. See: [http://www.sice.oas.org/trade/ur\\_round/58c.asp](http://www.sice.oas.org/trade/ur_round/58c.asp)

<sup>90</sup> GATT Article XXXVI: 6-7 and Article XXVIII: 1b-c. See: [http://www.sice.oas.org/trade/ur\\_round/58c.asp](http://www.sice.oas.org/trade/ur_round/58c.asp)

<sup>91</sup> Thirukodikaval Srinivasan, DEVELOPING COUNTRIES AND THE MULTILATERAL TRADING SYSTEM: FROM THE GATT TO THE URUGUAY ROUND AND THE FUTURE 24 (1998).

<sup>92</sup> This was a problem, for example, with the United States’ Trade Expansion Act of 1962. The domestic legislature had authorized the one-way concession of eliminating tariffs on tropical agricultural and forest commodities exported by poorer countries. But US trade negotiators ended up unable to use this authority, since it was conditioned on the European Economic Community (EEC) doing likewise—and the EEC preferred to make such a one-way concession only to their former colonies. See: Nicolas Lamp, *How Some Countries Became ‘Special’: Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking*, 18 J. INT’L ECON. L. 743, 757, 758 (2015).

<sup>93</sup> Riordan Wilkinson & James Scott. *Developing Country Participation in the GATT: A Reassessment*, 7 WORLD TRADE REV. 473, 480 (2008).



of GATT parties that were also associated with the development-focused UN Conference on Trade and Development.

Under pressure from UNCTAD, in 1971 the GATT regime authorized the Generalized System of Preferences (GSP). As a counter to grandfathered special preferences that particular developed parties had been extending to their former colonies, the GSP aimed to assist less-developed parties more generally. The authorizing text's opening line declared that a principal aim of the GATT was "promotion of the trade and export earnings *of developing countries* for the *furtherance of their economic development*."<sup>94</sup>

The authorizing text then issued a waiver of the core principle of most-favored nation treatment, enshrined in GATT Article I: the new GSP permitted developed parties to apply lower tariffs on various goods from less-developed parties than on goods from other parties. Although the waiver was set to expire after 10 years, and developed parties were not *required* to participate, the GSP was a blunt divergence from MFN treatment. Whereas MFN treatment prohibited any discrimination among GATT parties, the GSP allowed discrimination if it favored less-developed GATT parties.

Permitting particular types of discrimination also relaxed reciprocity. The mutual concession of MFN treatment still applied where developed parties dealt only with each other, but did not necessarily apply where less-developed parties were also in the mix. Thus within just a few years, reciprocity was relaxed in dual ways: 1) with Part IV of 1965, the *less-developed* parties were not required to make concessions back to the developed parties, and 2) with the GSP of 1971, the *developed* parties who made concessions to less-developed parties were not required to extend those concessions to fellow developed parties.

### *The Implementation of the Enabling Clause and the Tokyo Codes in 1979*

On the path to distinguishing "developing countries" and applying different expectations to them, two even bigger leaps occurred in the 1973-1979 Tokyo Round of negotiations.

One leap was the 1979 "Decision on Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries"—also known as the Enabling Clause. With the Enabling Clause, instead of reverting to full MFN treatment after 10 years of tariff discrimination in favor of less-developed parties, the waiver permitting the GSP was made permanent. Making the GSP permanent was hoped to make under-development temporary: as one-way concessions facilitated development, more GATT parties would "graduate" from their less-developed status.<sup>95</sup>

Beyond cementing the earlier departure from reciprocity, the Enabling Clause permitted additional departures. For one thing, developed parties could extend one-way concessions to less-developed parties not only through tariffs but also through non-tariff measures. Plus, less-developed parties could enter regional trade agreements that contravened the criteria laid out in GATT Article XXIV—this carve-out reinstated a right that had been won by less-developed countries in the Havana Charter, but that had been omitted from the GATT.<sup>96</sup> Moreover, all parties could extend even greater one-way concessions (e.g., money, know-how,

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<sup>94</sup> GATT Decision of 25 June 1971 (BISD 18S/24), emphasis added. See: <https://www.worldtradelaw.net/document.php?id=misc/gsp.pdf&mode=download#page=1>

<sup>95</sup> GATT Decision of 28 November 1979 (L/4903), paragraph 7. See: <https://www.worldtradelaw.net/document.php?id=tokyoround/enablingclause.pdf>

<sup>96</sup> Riordan Wilkinson & James Scott. *Developing Country Participation in the GATT: A Reassessment*, 7 WORLD TRADE REV. 473, 497 (2008).

access, technology) to the subset of parties that the United Nations had recently begun classifying as “least-developed.”<sup>97</sup>

A second leap toward different expectations for different GATT parties was the Tokyo Round’s introduction of voluntary codes. Having already slashed many tariffs, by the 1970s the GATT negotiations were tackling more complex non-tariff issues, including government procurement, subsidies, and technical requirements. Expectations related to such issues were summarized in “codes,” with parties choosing which (if any) they would follow. Although numerous developed parties opted in, many less-developed parties opted out.

Thus, “Special and Differential Treatment” (SDT) solidified in the Tokyo Round. With the *à la carte* codes, less-developed parties did not have to adhere to all bargains struck in GATT negotiations. With the Enabling Clause, less-developed parties did not have to reciprocate favorable treatment. Hence the voluntary codes and the Enabling Clause outlined a dual system in which developed parties were expected to make *two-way* concessions among themselves, but *one-way* concessions to others. As the major market players at the time, developed parties could afford to relax reciprocity for the other players.

### ***An Uneasy Coexistence of Trade and Development in the GATT System***

In relaxing its early insistence on trade and reciprocity, the GATT system incrementally opened itself to development and redistribution. Development became a bigger part of the system’s expressed purpose. One-way concessions became a bigger part of the system’s practice.

By the 1980s, the so-called Green Room discussions—where a small subset of influential GATT contracting parties made arrangements among themselves, then pitched those arrangements to the rest of the parties for system-wide adoption—regularly included major developing countries such as Brazil and India. For them, a key goal was to maintain Special and Differential Treatment for less-developed parties. Under the mantra “Don’t Obey, Don’t Object,” they usually did not oppose what developed parties wanted to arrange, so long as less-developed parties were exempt from the rules and not required to make reciprocal concessions.<sup>98</sup>

Hence, although the GATT system began as a legal relationship based on “parity of obligation,” over the decades it had moved toward “the one-sided non-reciprocal and preferential relationship demanded by the developing countries.”<sup>99</sup>

This shift might sound like a boon for less-developed parties, but in fact it was a mixed blessing. As reciprocity became voluntary rather than required for less-developed parties, many predictably chose to leave concessions unreciprocated. In the evolved GATT system, such choices were accommodated, but not necessarily appreciated. Developed parties—perceiving that less-developed parties were free-riders who did not “pay” for what they received from the trading system—marginalized them in negotiations and made one-way concessions that were of lowest cost or greatest interest to themselves.<sup>100</sup> Meanwhile less-developed parties—perceiving that developed parties owed even more due to their past luck or exploitation—chafed at marginalization, derided the one-way concessions that were offered, and instead demanded

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<sup>97</sup> GATT Decision of 28 November 1979 (L/4903), paragraph 2. See:

<https://www.worldtradelaw.net/document.php?id=tokyoround/enablingclause.pdf>

<sup>98</sup> Paul Blustein, MISADVENTURES OF THE MOST FAVORED NATIONS: CLASHING EGOS, INFLATED AMBITIONS, AND THE GREAT SHAMBLES OF THE WORLD TRADE SYSTEM 28-29 (2009).

<sup>99</sup> Robert Hudec, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 4 (1987).

<sup>100</sup> Sonia Rolland, DEVELOPMENT AT THE WORLD TRADE ORGANIZATION 65 (2012)..

changes (e.g., abolition of agricultural subsidies) that developed parties opposed.<sup>101</sup>

Consequently, all parties could feel “aggrieved.”<sup>102</sup> Developed parties were providing a free ride, as they gave concessions that others did not have to reciprocate.<sup>103</sup> But it was not the free ride the less-developed parties would have chosen, since they could not dictate which concessions were given.<sup>104</sup>

Non-reciprocation pleased neither group: developed parties were no longer entitled to reciprocation, but less-developed parties wanted more redistribution. Carve-outs from reciprocation were irritating not only to parties who wanted reciprocation to dominate again, but also to parties who wanted redistribution to dominate instead. Such aggrievement was the context for the Uruguay Round negotiations, which were launched in 1986 and ultimately created the WTO.

### **Trade and Development in the Uruguay Round that Created the WTO**

GATT contracting parties launched the Uruguay Round negotiations at their 1986 ministerial conference, declaring that within the next four years they would discuss liberalization of previously exempted goods (particularly, textiles and agricultural products) and begin considering liberalization of services (including investment and intellectual property). In the 1986 Ministerial Declaration, one of the GATT system’s relaxations of reciprocation was unambiguously rejected: instead of the *à la carte* codes of the Tokyo Round, the conduct and implementation of the negotiations was to be a “single undertaking.”<sup>105</sup> Thus, the bargains struck in the Uruguay Round would be an overall package, and contracting parties were not permitted to opt into some but not others.<sup>106</sup> Since all existing GATT Articles, provisions, and disciplines were also reopened for review,<sup>107</sup> the single-undertaking stipulation enabled a significant rethinking of the evolved GATT system.

But other than the Tokyo codes, the GATT system’s other relaxations of reciprocation—the amendment and expansion of Article XVIII, the addition of Part IV, the authorization of the Generalized System of Preferences, the Enabling Clause—were not repudiated in the 1986 Ministerial Declaration. In fact, the document’s only two mentions of reciprocation were:

- 1) a reference to the full name of the 1979 Enabling Clause, which had made the GSP permanent and multiplied the one-way concessions that could be extended to developing parties, and
- 2) an overt statement that “developed countries *do not expect reciprocity* for commitments made by them in trade negotiations to reduce or remove tariffs and other

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<sup>101</sup> Paul Collier, *Why the WTO is Deadlocked: And What Can Be Done about It*, 29 THE WORLD ECONOMY 1423, 1424-1425 (2006).

<sup>102</sup> James Bacchus and Inu Manak, THE DEVELOPMENT DIMENSION: SPECIAL AND DIFFERENTIAL TREATMENT IN TRADE 34 (2021).

<sup>103</sup> Jagdish Bhagwati, 168 *Reshaping the WTO*, FAR EASTERN ECON. REV. 25, 26 (2005).

<sup>104</sup> Nicolas Lamp, *How Some Countries Became ‘Special’: Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking*, 18 J. INT’L ECON. L. 743, 761-764 (2015).

<sup>105</sup> GATT Ministerial Declaration of 20 September 1986, Part I, B: ii. See: [http://www.sice.oas.org/trade/punta\\_e.asp](http://www.sice.oas.org/trade/punta_e.asp)

<sup>106</sup> Although the stipulation of a “single undertaking” appears only in the Declaration’s Part I (about goods), ultimately it was also applied to Part II (about services).

<sup>107</sup> GATT Ministerial Declaration of 20 September 1986, Part I, D. See: [http://www.sice.oas.org/trade/punta\\_e.asp](http://www.sice.oas.org/trade/punta_e.asp)

barriers to the trade of developing countries.”<sup>108</sup>

That is, the two explicit mentions of reciprocation were direct disavowals. The document also disavowed reciprocation indirectly, by emphasizing that the negotiations would follow Part IV’s principle of differential and more favorable treatment for less-developed parties.<sup>109</sup>

Although it is debatable whether particular contracting parties intended these negotiations to result in a World Trade Organization,<sup>110</sup> that was the Uruguay Round’s crowning outcome. Covering some issues for the first time, and also re-thinking existing GATT practices, the negotiations stretched far past the envisioned four years. Needing more time to discuss their disagreements about agricultural reforms, the US and the European Community extended the original 1990 deadline.

Then in December 1991, GATT Director-General Arthur Dunkel offered a “Draft Final Act” (DFA, also known as the Dunkel draft) that met most of the 1986 Ministerial Declaration’s stipulations, encapsulated agreements that negotiators had already reached, and proposed solutions for remaining disagreements.<sup>111</sup> Besides interpreting existing GATT provisions, this 500-page draft captured texts for several additional agreements (e.g., on agriculture, intellectual property, investment measures, subsidies and countervailing measures, technical barriers, textiles). It also outlined a new “integrated dispute settlement system”—and, importantly, sketched an agreement to create a larger and more formalized multilateral trade organization.

While some governments accepted Dunkel’s intervention and wanted the draft to be adopted without many changes, other governments voiced opposition. One major concern was non-reciprocation, which was narrower and timebound. Whereas the previous GATT system had evolved in ways that allowed less-developed parties to avoid some obligations entirely, the “single undertaking” of the new system would expect less-developed parties to take on *more* obligations, with implementation merely scaled down or delayed. Such expectations prompted Brazil and India to complain that the Dunkel Draft was “tilted against the developing countries.”<sup>112</sup> Bangladesh accused it of insufficiently reflecting all of the special treatment that the 1986 Ministerial Declaration had promised to least-developed countries.<sup>113</sup>

Nevertheless, as the “Quad” (Canada, the new European Union, Japan, and the United States) incrementally ironed out their internal differences, they reverted to the reciprocal bargaining that had dominated the early GATT system. Moreover, they also hinted that they would create a substitute for the GATT system, regardless of whether anyone else came on board. In fact, the United States—emboldened by the 1988 US-Canada Free Trade Agreement,

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<sup>108</sup> GATT Ministerial Declaration of 20 September 1986, Part I, B: iv-v, emphasis added. See:

[http://www.sice.oas.org/trade/punta\\_e.asp](http://www.sice.oas.org/trade/punta_e.asp)

<sup>109</sup> GATT Ministerial Declaration of 20 September 1986, Part I, B: iv. See:

[http://www.sice.oas.org/trade/punta\\_e.asp](http://www.sice.oas.org/trade/punta_e.asp)

<sup>110</sup> John Jackson, *RESTRUCTURING THE GATT SYSTEM* (1990). Jackson’s book outlined a full-fledged inter-governmental organization containing a stronger dispute settlement system—provisionally called a “World Trade Organization.”

<sup>111</sup> GATT Uruguay Round. (3 December 1992). ‘Press Summary: The Draft Final Act of the Uruguay Round.’ See:

[https://www.wto.org/gatt\\_docs/English/SULPDF/91670028.pdf](https://www.wto.org/gatt_docs/English/SULPDF/91670028.pdf)

<sup>112</sup> General Agreement on Tariffs and Trade (GATT). (1993) ‘Dunkel: Complete Package Cannot Be Completed by Early March,’ at page 2. *FOCUS GATT Newsletter* (January/February), 1-8. See:

<https://docs.wto.org/gattdocs/q/GG/GATTFOCUS/96.pdf>

<sup>113</sup> General Agreement on Tariffs and Trade (GATT). (1993) ‘Dunkel: Complete Package Cannot Be Completed by Early March,’ at page 2. *FOCUS GATT Newsletter* (January/February), 1-8. See:

<https://docs.wto.org/gattdocs/q/GG/GATTFOCUS/96.pdf>

which was in the process of adding Mexico to form the North American Free Trade Agreement (NAFTA)—signaled that if it did not get its way in renegotiating GATT, it would use its economic leverage to strike bilateral deals instead.

This put other governments, especially in less-developed countries, in a tough spot. Reciprocation seemed to be making a comeback. Less-developed countries had better prospects for tempering reciprocation if they worked together in a multilateral setting, instead of being isolated in bilateral talks. And voting “no” to the Quad’s substitute for the GATT could not preserve the existing system, but doing so would exclude them from the new system in which textiles and agricultural products were finally on the table.<sup>114</sup> Warily, developing countries engaged in the discussions about a GATT substitute.<sup>115</sup>

GATT parties did replace the Director-General in 1993, and they made some changes to his draft. Yet Dunkel’s document remained a touchstone for negotiators and fed into the Marrakesh Agreement, which was signed by 123 governments in April 1994 and created a full-fledged World Trade Organization. The new WTO subsumed the GATT (as “GATT 1994”) and incorporated dozens of additional agreements and understandings. As developing countries had feared, several arrangements under the WTO umbrella made non-reciprocation narrower and timebound: instead of being entirely avoided, some obligations could only be scaled down or delayed.<sup>116</sup>

#### **IV. Tensions between Trade and Development Jeopardize the WTO’s Policymaking Future**

The Marrakesh Agreement that created the WTO did not fully reinstate reciprocation. As mentioned above, the voluntary Tokyo codes disappeared, but other relaxations of reciprocation did not. Article XVIII, Part IV, the Generalized System of Preferences, the Enabling Clause all carried over to the new system, appearing in the agreement’s Annex I.

Furthermore, the Marrakesh Agreement permitted reciprocation to be relaxed in some new ways. To deal with issues such as government procurement and civil aircraft, its Annex IV introduced “plurilateral” agreements; these contradicted the single-undertaking concept, for governments could decide whether to opt in, and many less-developed countries (as had happened with the Tokyo codes) simply opted out of such commitments.<sup>117</sup> Meanwhile, the Marrakesh Agreement’s preamble explicitly mentioned reciprocation but depicted it as a means to more important aims, not an aim itself: “[The Parties to this Agreement are] desirous of

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<sup>114</sup> Frank Garcia, *Beyond Special and Differential Treatment*, 27 B.C. INT’L & COMPAR. L. REV. 291, 297-298 (2004).

<sup>115</sup> A group of 24 developing countries—Argentina, Bangladesh, Brazil, Burma, Cameroon, Columbia, Cote d’Ivoire, Cuba, Cyprus, Democratic Republic of Congo (at that time, Zaire), Egypt, Ghana, India, Jamaica, Nicaragua, Nigeria, Pakistan, Peru, Romania, Sri Lanka, Tanzania, Trinidad and Tobago, Uruguay, Yugoslavia—continued opposing the Uruguay Round’s expanded agenda, but eventually capitulated. See: Riordan Wilkinson & James Scott. *Developing Country Participation in the GATT: A Reassessment*, 7 WORLD TRADE REV. 473, 503 (2008).

<sup>116</sup> The General Agreement on Trade in Services (GATS) provides an example of implementation being scaled down: developing-country members can open fewer sectors, liberalize fewer types of transactions, extend market access incrementally, and make access to their markets subject to additional conditions. Meanwhile, both the Subsidies and Countervailing Measures (SCM) Agreement and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement provide examples of implementation being delayed: whereas full and immediate implementation is asked of developed-country members, developing-country members can stagger or postpone implementation.

<sup>117</sup> World Trade Organization. (2024) ‘Plurilaterals: Of Minority Interest.’ See: [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm10\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm)

*contributing to these objectives by entering into reciprocal and mutually advantageous arrangements.*<sup>118</sup> This opened a door for reciprocity to be further relaxed if it was not advancing the WTO's stated objectives.

### ***The WTO System Continues the Uneasy Coexistence of Trade and Development***

And what are the WTO's stated objectives? The preamble of the Marrakesh Agreement lists six:

- 1) raising standards of living
- 2) ensuring full employment
- 3) ensuring economic growth
- 4) expanding production and trade
- 5) allowing for environmentally sustainable use of natural resources
- 6) ensuring that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development<sup>119</sup>

Only the first four had been stated objectives for the previous GATT system. The fifth was a dramatic revision: both the 1947 and 1994 versions of the GATT declare the decidedly un-environmental objective of “developing the full use of the resources of the world,”<sup>120</sup> but the Marrakesh Agreement transforms the objective to “sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so.”<sup>121</sup>

The sixth objective is new to the Marrakesh Agreement's preamble and—unlike the first five objectives, which are lumped into a single paragraph—commands a paragraph of its own. The sixth objective is an exact quote from GATT Part IV, successfully added to the GATT in 1965 by less-developed parties. Hence this quote—which had been somewhat buried in one of the dozens of agreements brought together in 1994—has become a key part of the WTO's stated objectives. In contrast to the GATT system that took decades to incrementally embody development alongside trade, the WTO's stated objectives have, from the start, included development.

Accordingly, the WTO carried over the GATT system's International Trade Centre. Operated jointly with UNCTAD, the ITC helps micro, small, and medium-sized enterprises in developing countries. The majority of the ITC's funding comes from voluntary contributions from governments in developed countries. In 2022, for instance, the ITC's largest funder by far was the European Union, which delivered nearly US\$ 60 million. In addition, Germany, Switzerland, the Netherlands, the United Kingdom, Sweden, and Finland each provided over US\$ 3 million each. Beyond voluntary contributions, the ITC is also funded by its parent organizations and by assessed contributions from governments.<sup>122</sup>

The WTO also carried over the GATT system's Committee on Trade and Development.

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<sup>118</sup> Marrakesh Agreement of 15 April 1994, preamble, emphasis added. See: [https://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm)

<sup>119</sup> Marrakesh Agreement of 15 April 1994, preamble. See: [https://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm)

<sup>120</sup> See: <https://treaties.un.org/doc/Publication/UNTS/Volume%2055/volume-55-I-814-English.pdf>

<sup>121</sup> Marrakesh Agreement of 15 April 1994, preamble. See: [https://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm)

<sup>122</sup> International Trade Centre: Funding. See: <https://intracen.org/about-us/funding>

The CTD is open to all WTO members and follows a regular schedule of three or four meetings annually.<sup>123</sup> Per its terms of reference, the CTD is a focal point for development-related work, by which less-developed WTO members are offered assistance, special provisions, and favorable treatment.<sup>124</sup>

To facilitate development, developed members are supposed to provide one-way concessions (e.g., money, know-how, access, technology) to less-developed members, without something in return. This not only *relaxes* reciprocity (for less-developed members). It also *replaces* reciprocity with redistribution (from developed to less-developed members).

Implicitly indicating that reciprocity cannot be fair if there are vast disparities among members,<sup>125</sup> mechanisms of redistribution are sprinkled throughout WTO agreements. For example, both the Sanitary and Phytosanitary (SPS) Agreement and the Technical Barriers to Trade (TBT) Agreement facilitate capacity-building and technical assistance in poorer countries. The SPS Agreement's Standards and Trade Development Facility (STDF)—which is administered by the WTO and several other international organizations—is funded largely by richer countries.<sup>126</sup>

### ***The “Doha Development Agenda” Intensified Development Expectations***

All of these redistribution mechanisms—ITC, CTD, and STDF—are institutions preserved or created by the Uruguay Round negotiations that concluded in 1994. But development and redistribution received a much bigger boost in 2001 with the launch of a new round of negotiations, named the Doha Development Agenda. The name was chosen by WTO Director-General Mike Moore, who had been wrestling with how to rejuvenate the organization in the aftermath of its chaotic 1999 ministerial meeting in Seattle and amid serious criticism from developing countries. The Seattle meeting had shown that labor rights and environmental protection were explosive issues that the WTO might not want to take on.<sup>127</sup> Meanwhile, numerous developing countries (the Dominican Republic, India, Malaysia, Pakistan, Tanzania, and others) had formed “the Like-Minded Group” to oppose WTO expansion into issues such as investment and competition.

With labor rights, environmental protection, investment, and competition seen as non-starters, Moore wagered that the WTO should center its next negotiating round on development. He knew that the Like-Minded Group, with their often-strident imagery of the rich trampling the poor, “caused eyes to roll among the Americans and other free-market-oriented policymakers.”<sup>128</sup> Yet he thought that if the WTO took on the issue of development, the Like-Minded Group would stop resisting a new negotiating round, and development could be packaged in a way that also appealed to richer countries:

By cloaking itself in that mantle [of development], the WTO could attract support from

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<sup>123</sup> Tana Johnson & Margaret Foster, *Rhetorical Frames: A Strategy of Governmental Power in International Negotiations*. THIRD WORLD Q. (forthcoming).

<sup>124</sup> CTD Terms of Reference of 31 January 1995. See:

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/46.pdf&Open=True>

<sup>125</sup> Frank Garcia, *Beyond Special and Differential Treatment*, 27 B.C. INT'L & COMPAR. L. REV. 291, 300 (2004).

<sup>126</sup> Standards and Trade Development Facility (STDF). See: [https://www.wto.org/english/tratop\\_e/dtt\\_e/dtt-stdf\\_e.htm](https://www.wto.org/english/tratop_e/dtt_e/dtt-stdf_e.htm)

<sup>127</sup> Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28, 28 (2002).

<sup>128</sup> Paul Blustein, MISADVENTURES OF THE MOST FAVORED NATIONS: CLASHING EGOS, INFLATED AMBITIONS, AND THE GREAT SHAMBLES OF THE WORLD TRADE SYSTEM 67 (2009).

both the Left, which was sympathetic to the grievances of developing countries and the Right, which wanted to encourage low-income nations to see trade rather than aid as their salvation.<sup>129</sup>

To Moore, development was a win-win focus for the WTO's next phase.<sup>130</sup>

At the 2001 ministerial meeting in Doha, Qatar, the Director-General did not share the "Doha Development Agenda" name until the last minute, thinking he might need the moniker as a bargaining chip to get governments to agree to launch a new round. That bargaining chip proved unnecessary, so Moore revealed the name only at the end of the meeting, when announcing the new round. His announcement startled American and other negotiators, who worried whether a "development agenda" was to be interpreted as trade liberalization by developing countries—or just transfers from rich countries for the benefit of the less fortunate.<sup>131</sup> The name, even if only a quirk from a legacy-defending WTO Director-General, could easily be read as the latter, endorsing redistribution.

Indeed, endorsements of redistribution went beyond the round's name. The second paragraph of the 2001 ministerial declaration specified one-way concessions:

The majority of WTO Members are developing countries... enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programs have important roles to play.<sup>132</sup>

The ministerial declaration pushed richer countries to assist poorer countries, without expecting things in return.

This was accompanied by the 2001 Doha Decision on Implementation-Related Issues and Concerns. This decision signaled WTO members' change of heart about how the Uruguay Round had made developing countries' non-reciprocation narrower and timebound. It stated that "the Uruguay Round requirements were too stringent and too costly to implement for poor countries."<sup>133</sup> The decision recommended redistribution not only through technology transfers, technical assistance, and capacity-building programs, but also through duty- and quota-free access for products from the least-developed countries, plus making SDT provisions more obligatory and enforceable.<sup>134</sup>

Both the ministerial declaration and the Doha decision from the WTO in 2001 suggest "a comprehensive effort to respond to developing country concerns" by embracing one-way

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<sup>129</sup> Paul Blustein, *MISADVENTURES OF THE MOST FAVORED NATIONS: CLASHING EGOS, INFLATED AMBITIONS, AND THE GREAT SHAMBLES OF THE WORLD TRADE SYSTEM* 82 (2009).

<sup>130</sup> World Trade Organization. (12 April 2002). 'Speech by DG Mike Moore: To Doha and Beyond: A Roadmap for Successfully Concluding the Doha Development Round.' See: [https://www.wto.org/english/news\\_e/spmm\\_e/spmm83\\_e.htm](https://www.wto.org/english/news_e/spmm_e/spmm83_e.htm)

<sup>131</sup> Paul Blustein, *MISADVENTURES OF THE MOST FAVORED NATIONS: CLASHING EGOS, INFLATED AMBITIONS, AND THE GREAT SHAMBLES OF THE WORLD TRADE SYSTEM* 129, 130 (2009).

<sup>132</sup> Doha Ministerial Declaration of 14 November 2001. See: [https://www.wto.org/english/res\\_e/booksp\\_e/ddec\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/ddec_e.pdf)

<sup>133</sup> Emanuel Ornelas, *Special and Differential Treatment for Developing Countries Reconsidered*, Center for Economic Policy Research (CEPR), at page 3. See: <https://cepr.org/voxeu/columns/special-and-differential-treatment-developing-countries-reconsidered>

<sup>134</sup> James Bacchus and Inu Manak, *THE DEVELOPMENT DIMENSION: SPECIAL AND DIFFERENTIAL TREATMENT IN TRADE* 30 (2021).



concessions facilitating development.<sup>135</sup>

Some countries continued to insist on reciprocity, however. For example, after the 2003 Cancun ministerial meeting ended, US Trade Representative Robert Zoellick complained that redistribution demands from the UN should not bleed into the WTO:

[A] number of countries just thought it was a freebie—they could just make whatever points they suggested, argue, and not offer and give.... It would be a shame if the models and methods of the UN General Assembly extend to an organization that for some 50 years has always realized that it's a reciprocal give and take.<sup>136</sup>

Finding that its preferences for reciprocity and two-way concessions were challenged by other WTO members' preferences for redistribution and one-way concessions, the US increasingly pursued reciprocal trade agreements on a bilateral basis outside the WTO, in one-to-one negotiations with Chile, Singapore, Australia, Bahrain, Morocco, and others.

But the US's insistence on reciprocity was not mirrored by all the WTO's richer members. The European Union, for example, entertained redistribution at times. In 2004, EU Trade Commissioner Pascal Lamy proposed a "free round" for the WTO's least-developed members: these very poor countries would not be asked for any commitments, even though they would benefit from the market-opening commitments of richer countries.<sup>137</sup>

### ***The Doha Round Was Suspended—But the Push for One-Way Concessions Was Not***

Although the GATT system's relatively tight "Quad" (Canada, EU, Japan, US) continued to meet in the WTO's initial years, by 2004 the parties at the center of WTO negotiations had changed. The Quad was supplanted a larger and more heterogeneous group of influential WTO members. Instead of being dictated by richer countries, major decisions needed to appeal to major emerging economies (e.g., Brazil, China, India) and to representatives of key coalitions (e.g., the least-developed members).<sup>138</sup> Since this larger and more heterogeneous group included proponents of one-way concessions, redistribution gained ground vis-a-vis reciprocity—not only as developing countries' majority in the WTO kept growing, but also as some developing countries became central negotiators.<sup>139</sup>

WTO members reached consensus on several items that interested proponents of redistribution. For example, the 2005 ministerial meeting agreed on one-way concessions for members in the least-developed category:

- 1) expediting their process of obtaining waivers from their GATT 1994 obligations
- 2) cementing their duty-free and quota-free access to developed-country markets
- 3) reminding aid agencies not to impose conditionalities that are inconsistent with least-

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<sup>135</sup> Frank Garcia, *Beyond Special and Differential Treatment*, 27 B.C. INT'L & COMPAR. L. REV. 291, 292 (2004).

<sup>136</sup> US Trade Representative Robert B. Zoellick Press Conference of 14 September 2003. See: <https://www.iatp.org/news/us-trade-representative-robert-b-zoellick-press-conference-september-14-2003>

<sup>137</sup> Ironically, the EU's proposal for a free round was criticized by Egypt and other developing countries that were not poor enough to qualify. See Paul Blustein, MISADVENTURES OF THE MOST FAVORED NATIONS: CLASHING EGOS, INFLATED AMBITIONS, AND THE GREAT SHAMBLES OF THE WORLD TRADE SYSTEM 184 (2009).

<sup>138</sup> Tana Johnson & Joshua Lerner, *Environmentalism among Poor and Rich Countries: Using Natural Language Processing to Handle Perfunctory Support and Rising Powers*, 30 REV. INT'L POL. ECON. 127 (2023).

<sup>139</sup> Tana Johnson & Johannes Urpelainen, *The More Things Change, the More They Stay the Same? Developing Countries' Unity in International Politics*, 15 REV. INT'L ORG. 445 (2020).

- developed countries' capacities or self-determined development needs
- 4) prolonging their deviations from the TRIMs Agreement and permitting them to introduce new deviations
  - 5) directing the WTO Secretariat to collaborate in increased technical assistance and capacity-building<sup>140</sup>

The push for redistribution and one-way concessions continued.

Occasionally, WTO members tried to combine redistribution and reciprocity. For example, the 2014 Trade Facilitation Agreement (TFA) committed richer countries to providing technical assistance to poorer countries. If this assistance succeeded in increasing capabilities, then poorer countries would join richer countries in taking on trade-facilitation commitments. Thus, instead of mere non-reciprocity (scaling-down or delaying poorer countries' implementation), the TFA required redistribution (one-way concessions from richer to poorer countries)—and reciprocity was held off, kicking in only if redistribution had occurred and succeeded.<sup>141</sup>

These individual agreements, however, did not amount to the “single undertaking” that had been envisioned for the Doha negotiating round. Policy disagreements were rampant, and many stemmed from a broader conceptual disagreement: was the WTO primarily about trade, operating according to reciprocity and two-way concessions? Or was it primarily about development, operating according to redistribution and one-way concessions?

The first view—that the WTO was primarily about trade—built upon the preceding GATT system's initial insistence on reciprocity and a longing for less-complicated operations. In contrast, the second view—that the WTO was primarily about development—was informed by the GATT system's subsequent carve-outs for non-reciprocity and the Doha round's recent endorsement of redistribution. Indeed, promises made in Doha in 2001 had “fed expectations in developing countries that nearly all the concessions would come from rich WTO members and that the South would surrender little or nothing.”<sup>142</sup> Developing countries held out hope that some comprehensive agreement would stipulate that their own top economic priority is “development, not trade liberalization,” that the basis for one-way concessions is “fairness, not charity,” and that one-way concessions are to be binding, unconditional, and sustained.<sup>143</sup>

Dragging far past its original deadline of January 2005, the Doha negotiating round was unofficially suspended in 2015, when WTO members declined to renew its mandates. However, redistribution had already permeated WTO discussions and practices. For example, looking at governments' statements within WTO discussions, research shows that middle-income and least-developed members show remarkable solidarity vis-à-vis developed members.<sup>144</sup> In addition, richer and poorer members have differed markedly in how they frame their remarks.<sup>145</sup> Richer

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<sup>140</sup> Hong Kong Ministerial Declaration: Annex F Adopted on 18 December 2005. See: [https://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/final\\_annex\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm)

<sup>141</sup> Nicolas Lamp, *How Some Countries Became 'Special': Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking*, 18 J. INT'L ECON. L. 743, 768 (2015).

<sup>142</sup> Paul Blustein, MISADVENTURES OF THE MOST FAVORED NATIONS: CLASHING EGOS, INFLATED AMBITIONS, AND THE GREAT SHAMBLES OF THE WORLD TRADE SYSTEM 282 (2009).

<sup>143</sup> Frank Garcia, *Beyond Special and Differential Treatment*, 27 B.C. INT'L & COMPAR. L. REV. 291, 291 (2004).

<sup>144</sup> Tana Johnson & Johannes Urpelainen, *The More Things Change, the More They Stay the Same? Developing Countries' Unity in International Politics*, 15 REV. INT'L ORG. 445 (2020).

<sup>145</sup> Tana Johnson & Joshua Lerner, *Environmentalism among Poor and Rich Countries: Using Natural Language Processing to Handle Perfunctory Support and Rising Powers*, 30 REV. INT'L POL. ECON. 127 (2023).

members have regularly used words (e.g., bargaining, in return, deal, mutual) evoking trade and reciprocity. Meanwhile poorer members—often led by the major emerging economies—have regularly used words (e.g., assistance, inequality, transfer, justice) evoking development and redistribution.<sup>146</sup>

Redistribution became part of actual practices, too. In a 2018 report examining major WTO agreements, the Secretariat found that the number of one-way concessions from richer to poorer countries totaled 155. These one-way concessions ranged from policy flexibility to transition periods to technical assistance.<sup>147</sup>

The 2001 Doha Decision on Implementation-Related Issues and Concerns aimed to make such one-way concessions mandatory. But that was not achieved prior to the suspension of the Doha negotiating round, and many poorer countries lamented that the push for development and redistribution did not go even farther. Although it may sound impressive that the Secretariat tallied 155 one-way concessions from richer to poorer countries, only a small portion are fully mandatory. Some are “fake mandatory”: the underlying agreement uses obligatory words like “shall,” but the action itself (e.g., “pay special attention”) is vague and hard to enforce.<sup>148</sup> Others require only a “best endeavor”: one-way concessions must be attempted by richer countries, but do not necessarily have to succeed.<sup>149</sup> And finally, some (e.g., the GSP) are purely discretionary<sup>150</sup>: richer countries are free to favor particular developing countries, make one-way concessions of lowest cost or greatest interest to themselves, and alter the program at any time.<sup>151</sup> All of this wiggle room means that the WTO’s talk of development may warm hearts, but does not necessarily fill bellies.<sup>152</sup>

### ***Concerns about One-Way Concessions***

As made clear in the earlier section about the Havana Charter and the GATT system, the one-way concessions that facilitate development have long existed—but also have been long contested. Most fundamentally, there is tension between the policy implications of reciprocity and trade on the one hand, and redistribution and development on the other. How could concessions be simultaneously one-way *and* two-way? If one form is fairer or more effective, then shouldn’t the other be ruled out?

Development, redistribution, and one-way concessions now have a significant footprint in the WTO system—but they do not yet dominate. Instead, they exist alongside trade, reciprocity, and two-way concessions. The WTO exhibits a delicate dual approach, in which

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<sup>146</sup> Tana Johnson & Margaret Foster, *Rhetorical Frames: A Strategy of Governmental Power in International Negotiations*. THIRD WORLD Q. (forthcoming).

<sup>147</sup> WTO Secretariat Note of 12 October 2018. See: [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?CatalogueIdList=248759](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=248759)

<sup>148</sup> Frank Garcia, *Beyond Special and Differential Treatment*, 27 B.C. INT’L & COMPAR. L. REV. 291, 312, 315 (2004).

<sup>149</sup> Frank Garcia, *Beyond Special and Differential Treatment*, 27 B.C. INT’L & COMPAR. L. REV. 291, 310-311 (2004).

<sup>150</sup> Emanuel Ornelas, *Special and Differential Treatment for Developing Countries Reconsidered*, Center for Economic Policy Research (CEPR), at page 4. See: <https://cepr.org/voxeu/columns/special-and-differential-treatment-developing-countries-reconsidered>

<sup>151</sup> Patrick Low, Hamid Mamdouh, & Evan Rogerson, *Balancing Rights and Obligations in the WTO—A Shared Responsibility*, Government Offices of Sweden, at page 11. See: <https://www.swedenabroad.se/globalassets/ambassader/fn-geneve/documents/balancing-rights-and-obligations-in-the-wto.pdf>

<sup>152</sup> David Christy, *Round and Round We Go*, 25 WORLD POLICY J. 19, 24 (2008).

developed members are urged to redistribute with respect to less-developed members, but still reciprocate with respect to one another.

And within this delicate dual approach, one-way concessions continue to be contested. Some WTO members, as noted above, want to make one-way concessions more obligatory and enforceable, tipping the scales toward redistribution. But others want to make them more conditional and limited, tipping the scales toward reciprocation.

For those who want conditions and limits, a key concern is how easily one-way concessions in the WTO can be exploited. A natural human tendency—to shun *giving* one-way concessions but to enjoy *receiving* them—may have contributed to the international economic woes of the 1930s, and overcoming this tendency is why the GATT system insisted on reciprocation when it began operating in the 1940s.<sup>153</sup> Reciprocation and two-way concessions were initially expected of all because, if exceptions were made, who could resist taking advantage?

This temptation became more concrete as reciprocation was relaxed in the GATT system, and eventually came to coexist with redistribution in the WTO system. Although few governments would wish their countries to be poor or backward, they often do wish to be on the receiving end of one-way concessions that such countries can receive. In other words, it can be attractive to be *treated* like a poor or backward member without actually *being* so poor or backward.

And something like this is actually permitted by WTO practices. While the WTO uses the United Nations' official list of "least-developed" countries to identify the poorest (currently, 35) members,<sup>154</sup> it permits each member to decide whether to self-declare as a "developing country," thus eligible for particular one-way concessions. Brazil, China, and India are among the WTO members that, with large economies but modest income on a per capita basis, have self-declared as developing countries. And Israel, Qatar, Saudi Arabia, Singapore, South Korea, and Turkey are other WTO members that, while perhaps not immediately springing to mind as developing countries, have used the self-declared "developing country" identity within the WTO.

### ***How Tensions between Trade and Development Jeopardize the WTO's Policymaking Future***

The result is many members to redistribute *to*, and few to redistribute *from*. Predictably, the latter want to make redistribution more conditional and limited. For example, in 2019 the US government proposed importing the World Bank's method for classifying all countries according to Gross National Income per capita, then excluding the better-off developing countries from particular forms of assistance.<sup>155</sup>

Indeed, in the first few paragraphs of its 2019 reform proposal, the US government was explicit that—with the possible exception of the very poorest countries—the WTO should return to the GATT system's initial insistence on reciprocation.<sup>156</sup> Calling reciprocation "a foundational principle going back to the GATT 1947," the proposal noted that only a handful of

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<sup>153</sup> See, e.g., John Jackson, *RESTRUCTURING THE GATT SYSTEM* (1990).

<sup>154</sup> World Trade Organization, "Least Developed Countries." See: [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org7\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm)

<sup>155</sup> "16 January 2019 Communication from the United States: An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance." See: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W757.pdf&Open=True>

<sup>156</sup> "16 January 2019 Communication from the United States: An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance." See: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W757.pdf&Open=True>

richer members are subject to all WTO rules, while the rest of the membership is not.<sup>157</sup> The US proposal also charged that “these are not ‘reciprocal and mutually advantageous arrangements’” that the Marrakesh Agreement had called for in establishing the WTO.<sup>158</sup>

US disgruntlement matters not only because it affects the WTO’s political capabilities, but also because it jeopardizes the organization’s judicial capabilities. Lack of responsiveness to US complaints<sup>159</sup> is one of the reasons given by US presidents Barack Obama, Donald Trump, and Joe Biden for blocking appointments to the WTO Appellate Body.<sup>160</sup> Although an interim arrangement among a subset of the WTO membership has been operating,<sup>161</sup> observers remain concerned that the organization’s dispute-settlement apparatus is significantly hampered, so that policies cannot be adequately enforced.<sup>162</sup>

In addition to dispute-settlement, other activities that are under threat include leadership selection. Consider the fraught process by which the WTO’s current director-general was appointed. It took governments nine months, three decision rounds, and substantial in-fighting for WTO members to whittle the field to two candidates: Yoo Myung-hee of South Korea and Ngozi Okonjo-Iweala of Nigeria. These two women embodied the WTO’s increasingly split identity: is the organization primarily about governing trade, or promoting development? Yoo, from a country that had been poor in the mid-20<sup>th</sup> century but was now developed, had had a 25-year career in trade policy and was serving as South Korea’s trade minister. In contrast, Okonjo-Iweala hailed from a developing country in Africa, and much of her path had focused on development policy and redistribution. In addition to serving twice as Nigeria’s finance minister and briefly as its foreign minister, she sat on the board of a major charitable foundation, chaired the philanthropic Global Alliance for Vaccines and Immunizations (GAVI), and had worked for 25 years in the World Bank.

US Trade Representative Robert Lighthizer praised Yoo as “a bona fide trade expert who has distinguished herself during a 25-year career as a successful trade negotiator and trade policymaker.”<sup>163</sup> He opposed Okonjo-Iweala. “We need a person who actually knows trade,” he counseled, “not somebody from the World Bank who does development.”<sup>164</sup> Although in

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<sup>157</sup> “16 January 2019 Communication from the United States: An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance.” See:

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W757.pdf&Open=True>

<sup>158</sup> “16 January 2019 Communication from the United States: An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance.” See:

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W757.pdf&Open=True>

<sup>159</sup> Gregory Schaffer, *Governing the Interface of US-China Trade Relations*, 155 AM. J. INT’L L. 622 (2021).

<sup>160</sup> See, e.g., Joseph Biden, (15 June 2021) ‘Joint Statement: US-European Union Summit Statement,’ paragraph 22. See: <https://www.presidency.ucsb.edu/documents/joint-statement-us-european-union-summit-statement>

<sup>161</sup> Joost Pauwelyn, *The WTO’s Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What’s New?*, 22 WORLD TRADE REV. 1 (2023).

<sup>162</sup> See, e.g., Wolfgang Alschner, *Shifting Design Paradigms: Why Tomorrow’s International Economic Law May Look More Like the Tax Regime than the WTO*, 114 AM. J. INT’L L. UNBOUND 270 (2020); Cosette Creamer, *From the WTO’s Crown Jewel to its Crown of Thorns*, 113 AM. J. INT’L L. UNBOUND 51 (2019); William Davey, *WTO Dispute Settlement: Crown Jewel or Costume Jewelry?*, 21 WORLD TRADE REV. 291 (2022); Robert Howse, *The Limits of the WTO*, 116 AM. J. INT’L L. UNBOUND 41 (2022); Robert Howse & Joanna Langrille, *Continuity and Change in the World Trade Organization: Pluralism Past, Present, and Future*, 117 AM. J. INT’L L. 1 (2023); Gregory Schaffer, Manfred Elsig, & Sergio Puig, *The Extensive (But Fragile) Authority of the WTO Appellate Body*, 79 LAW & CONTEMP. PROBS. 237 (2016).

<sup>163</sup> Aime Williams. “Outgoing US Trade Chief Says Leading WTO Candidate Lacks Experience.” *Financial Times* January 2021. See: <https://www.ft.com/content/baca66bb-5987-47e1-861d-3375a6f6d01b>

<sup>164</sup> Aime Williams. “Outgoing US Trade Chief Says Leading WTO Candidate Lacks Experience.”

February 2021 Okonjo-Iweala eventually was chosen, the fraught selection process underscored the WTO's tenuous position.

In sum, tension between trade and development jeopardize the WTO's policymaking future—undercutting the organization's wherewithal to enact reforms, enforce policies through dispute-settlement, select leaders, and more. It is true that US preferences strongly shaped the initial GATT and later the WTO,<sup>165</sup> and that developing countries frequently felt marginalized.<sup>166</sup> But the fuller picture is that developing countries also have made their mark, and the US does not always get its way.

## **V. Conclusion**

In four respects, this article is novel. For one thing, while much legal and economic scholarship on international affairs has discussed reciprocity,<sup>167</sup> this article explicitly juxtaposes that reciprocity vis-à-vis redistribution—exposing a fundamental tension between insisting on trade-focused concessions that are two-way, versus insisting on development-focused concessions that are one-way. And while recent legal and political economy scholarship aptly warns that governments in the US, United Kingdom, and elsewhere need to heed demands for redistribution within countries (wherein domestic “winners from trade” compensate domestic “losers from trade”),<sup>168</sup> this article draws attention to demands for redistribution *across* countries (wherein countries that have been fortunate or exploitative in the past now assist other countries, without asking for things in return).

In addition, while much legal scholarship focuses on agenda-setting and precedents supplied by hard and soft law that countries have actually adopted,<sup>169</sup> this article demonstrates how agenda-setting and precedents can stem even from international law that countries do *not* adopt. The Havana Charter, negotiated in the UN system and embracing elements of development and redistribution, never came into force. Yet even as it was supplanted by the GATT, the Havana Charter remained a tangible “road not taken,” and elements from it could be injected into the GATT and WTO to relax reciprocity and encourage redistribution. Even without coming into force, the Havana Charter altered governments' status quo and reference points<sup>170</sup>: they no longer lived in a world in the GATT's insistence on reciprocity was the sole model for economic relations.

Furthermore, while there is truth in the conventional story that the Havana Charter failed to come to fruition because the US government cooled on it,<sup>171</sup> this article shows why the Havana Charter also suffered from its mixing of reciprocity and redistribution. It was not going to deliver the starkly reciprocal trade institution that would have made sense for richer

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*Financial Times* January 2021. See: <https://www.ft.com/content/baca66bb-5987-47e1-861d-3375a6f6d01b>

<sup>165</sup> See, e.g., John Jackson, *RESTRUCTURING THE GATT SYSTEM* (1990).

<sup>166</sup> See, e.g., Robert Hudec, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* (1987).

<sup>167</sup> Ariana Whelan, *RECIPROCITY IN PUBLIC INTERNATIONAL LAW* (2023).

<sup>168</sup> See, e.g., Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 *VANDERBILT LAW REVIEW* 985 (2017); Dani Rodrik, *Populism and the Economics of Globalization*, 1 *JOURNAL OF INTERNATIONAL BUSINESS POLICY* 12 (2018); Judith Goldstein, *A New Era for Trade?*, 115 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 52 (2021).

<sup>169</sup> See, e.g., Ryan Goodman & Derek Jinks, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013).

<sup>170</sup> Tana Johnson, *ORGANIZATIONAL PROGENY: WHY GOVERNMENTS ARE LOSING CONTROL OVER THE PROLIFERATING STRUCTURES OF GLOBAL GOVERNANCE* (2014).

<sup>171</sup> See, e.g., William Diebold, *The End of the ITO*, 16 *PRINCETON UNIVERSITY ESSAYS IN INTERNATIONAL FINANCE* 1 (1952). <https://ies.princeton.edu/pdf/E16.pdf>

countries alone—and which, via the initial GATT, richer countries could actually get. But it also was not going to create the unequivocally redistributive development institution that poorer countries wanted. In mixing reciprocity and redistribution, it made its primary purpose unclear, experienced tensions between two-way and one-way concessions, and delighted neither side. Ultimately only one government, Liberia, ratified it.<sup>172</sup> By bringing elements of redistribution from the Havana Charter to live alongside reciprocity, the GATT and the WTO *imported* some of the complexities—such as developing countries’ need for more “policy space”<sup>173</sup>—that prevented the Havana Charter from coming to fruition in the first place.

Lastly, while many reform-minded observers have blamed contemporary WTO gridlock on consensus decision-making,<sup>174</sup> American peevishness,<sup>175</sup> or developing countries’ assertiveness,<sup>176</sup> this article reveals a more profound reason for the organization’s gridlock: *member-states fundamentally disagree about the purpose, mindset, and policy implication by which the WTO should operate*. Some view the WTO as primarily about trade, believing it should operate according to reciprocity and two-way concessions. But others view the WTO as primarily about development, believing it should operate according to redistribution and one-way concessions. Both views can substantiate themselves by pointing to parts of the WTO’s legal history—either the “purity” of reciprocity in the initial GATT system, or the “progress” of redistribution injected since then. The tension between the views is more severe than ordinary organizational challenges such as expanded mandates or multiple goals,<sup>177</sup> because insisting on two-way concessions precludes one-way concessions, while insisting on one-way concessions precludes two-way concessions. In fact, proximate causes of WTO gridlock (such as consensus decision-making, American peevishness, and developing countries’ assertiveness) may be mere symptoms of a deeper cause: member-governments’ fundamental disagreement about what the WTO should be doing, and why. And when member-governments disagree so fundamentally, it is difficult for an IGO to espouse a shared ‘social purpose’ or a coherent set of policies.<sup>178</sup>

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<sup>172</sup> Besides Liberia, Australia ratified the Havana Charter *conditional on* the United States doing likewise—but the United States never did so.

<sup>173</sup> Riordan Wilkinson & James Scott, *Developing Country Participation in the GATT: A Reassessment*, 7 *WORLD TRADE REV.* 473, 490 (2008).

<sup>174</sup> See, e.g., Paul Collier, *Why the WTO is Deadlocked: And What Can Be Done about It*, 29 *THE WORLD ECONOMY* 1423, 1427 (2006).

<sup>175</sup> See, e.g., Ian Sheldon, *The United States’ Power-Based Bargaining and the WTO: Has Anything Really Been Gained?* 44 *APPLIED ECON. PERSPECTIVES & POLICY* 1424 (2022).

<sup>176</sup> See, e.g., Matthew Stephen & Michal Parizek, *New Powers and the Distribution of Preferences in Global Trade Governance: From Deadlock and Drift to Fragmentation*, 24 *NEW POL. ECON.* 735 (2019).

<sup>177</sup> Tana Johnson, *Ordinary Patterns in an Extraordinary Crisis: How International Relations Makes Sense of the COVID-19 Pandemic*, 74 *International Organization* 1 (2020).

<sup>178</sup> See, e.g., Valbona Muzaka & Matthew Louis Bishop, *Doha Stalemate: The End of Trade Multilateralism?*, 41 *REV. INT’L STUD.* 383 (2015); Julieta Zelicovich, *Are There Still Shared Values to Sustain Multilateralism? Discourse in World Trade Organization Reform Debates*, 43 *THIRD WORLD Q.* 332, 332 (2022).