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Belgian Family Allowances and the challenge of origin-based discrimination

STEVE CHARNOVITZ*

George Washington University Law School, Washington, DC

Abstract: The first significant GATT case regarding the principle of trade discrimination was 'Belgian Family Allowances,' a complaint by Denmark and Norway against Belgium. This 1952 decision expounding the meaning of the unconditional 'most-favoured-nation' principle is often cited for the proposition that origin-based conditions are inconsistent with that core principle. This article reconsiders 'Family Allowances' through the window of Professor Hudec's classic case study written in 1975. In particular, the article considers whether the panel and Professor Hudec correctly interpreted the term 'unconditionally,' in light of the pre-1947 international trade law practices. In addition, the article explores the status of 'Family Allowances' as the first GATT case holding that a governmental social program violated trade rules. Although Belgium did not invoke GATT Article XX as a defense, this paper assesses how current WTO jurisprudence would be applied to the facts in 'Family Allowances,' and concludes that Belgium would still lose the case.

Our symposium in honor of Professor Robert E. Hudec examines the issue of non-discrimination in trade rules. The non-discrimination rule to be explored here is Article I (General Most-Favoured-Nation Treatment) of the General Agreement on Tariffs and Trade (GATT). In particular, this study examines the decision in *Belgian Family Allowances*,[1] a 1952 GATT panel report that Hudec explored in his influential 1975 treatise *The GATT Legal System and World Trade Diplomacy*.[2] Indeed, *Belgian Family Allowances* is his longest case study. This holding was the first occasion for a GATT panel to rule that a violation had occurred.[3]

This article proceeds in two parts: Part 1 discusses *Belgian Family Allowances* and considers whether the case was properly decided. Part 2 looks at how Belgium's program would be analyzed today under the GATT's rules for public policy exceptions. A short conclusion follows.

* Correspondence: George Washington University Law School, 2000 H Street, Washington, DC 20052, USA, e-mail: scharnovitz@law.gwu.edu.

1 *Belgian Family Allowances* (Allocations Familiales), Report of the Panel, BISD 1S/59 (adopted 7 November 1952).

2 Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (Butterworth, 2nd edn, 1990), at 135. Because of its wider availability, I have used Hudec's second edition for the citations.

3 Ibid., at 86, 90, 307.

1. *Belgian Family Allowances* revisited

My first attention to the most-favoured-nation (MFN) obligation came when I was an analyst at the US Department of Labor working on fair labor standards in international trade. My search to understand the meaning of GATT Article I led me to Hudec's case study of *Belgian Family Allowances*. The short panel decision enveloped by Hudec's lengthy exegesis presented a puzzle that I have pondered ever since.

The dispute in *Belgian Family Allowances* was about the application of a Belgian law of 1939 imposing an ad valorem levy on imported goods purchased by local government bodies.[4] This import tax was enacted so as to broaden the revenue base for Belgium's family allowance program which, until then, had been funded primarily through a payroll tax on Belgian employers. Under the 1939 law, products imported from a particular country could be exempt if that country had a family allowances regime similar to Belgium's.

The controversy began in 1949 when Denmark and Norway sought an exemption from the tax. At that time, Belgium had granted exemptions to France, Italy, The Netherlands, Luxembourg, and the United Kingdom. In 1950, Belgium granted a tax exemption to Sweden, yet still refused one to Denmark and Norway despite the similarity of the social programs in those three applicant countries. The invocation of GATT dispute settlement occurred in 1951 when Denmark and Norway complained that they too should be granted an exemption, and that the continued application of the 7.5 % tax to them was a violation of GATT Article I. In 1952, with no resolution in sight, the dispute was sent to the newly established panel on complaints.

GATT Article I:1's requires that:

> any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[5]

The scope of Article I:1 is broad including not only 'customs duties and charges of any kind', but also all matters referred to in Article III:2 (taxes) and III:4 (domestic regulations).[6] Belgium's tax was covered by Article III:2 and therefore correlatively by Article I:1.

After examining the facts, the Panel on complaints pronounced it 'clear' that Article I required that an exemption had 'to be granted unconditionally' to all

4 The state-of-play in this paragraph is drawn from ibid., at 135–141. Like Hudec's book, this article uses 'tax' to describe Belgium's internal charge.

5 *Supra* note 1, para. 3.

6 See GATT Article I:1.

GATT contracting parties, including Denmark and Norway.[7] In that regard, the panel explained:

> The consistency or otherwise of the system of family allowances in force in the territory of a given contracting party with the requirements of the Belgian law would be irrelevant in this respect, and the Belgian legislation would have to be amended insofar as it introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependent on certain conditions.[8]

Although the panel did not arrive at a definite ruling, it concluded that the Belgian legislation was not only inconsistent with the provisions of Article I, 'but was based on a concept which was difficult to reconcile with the spirit of the General Agreement'.[9] The entire process from referral to the panel to the adoption of the panel report took *nine* days.[10] The panel's report was adopted with little discussion.[11]

In Hudec's presentation of the case, he sees no doubt that the tax exemption violated GATT Article I. He states:

> The Belgian statute was unquestionably inconsistent with the provisions of Article I.[12]

> Requiring a country to have a family allowances program was exactly the kind of 'condition' which the MFN clause was designed to eliminate.[13]

> The prospect of GATT sitting down to sort out the membership for Belgium's exclusive family allowances club was plainly offensive. GATT was supposed to eliminate discrimination, not to referee it.[14]

Although Hudec's analysis also points out the calculated ambiguities in the panel decision, he notes that in 1953, when the Contracting Parties discussed the implementation of the panel report, every delegate who spoke assumed that the panel had ruled that the entire exemption system was illegal.[15]

Belgian Family Allowances is often cited as the fountainhead for a strict interpretation of the unconditional MFN requirement in GATT Article I. For example, in *The World Trading System*, John H. Jackson wrote:

> The case can be interpreted to support the proposition that while treatment can differ if the *characteristics of goods* themselves are different, differences

7 *Supra* note 1, para. 3.
8 Ibid.
9 Ibid., para. 8.
10 Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Butterworth Legal Publishers, 1993), at 425.
11 *Supra* note 2, at 154.
12 Ibid., at 142.
13 Ibid., at 136 (footnote omitted).
14 Ibid., at 143.
15 Ibid., at 157.

> in treatment of imports cannot be based on differences in characteristics of the *exporting country* which do not result in differences in the goods themselves.[16]

To the best of my knowledge, no commentator has ever argued that the case was wrongly decided. Nevertheless, the correctness of *Belgian Family Allowances* is worth reconsidering. Indeed, some cracks in the foundation are apparent in Hudec's meticulous presentation of the case.

The biggest puzzle is that the two complaining countries, Denmark and Norway, did not contend that the system of exemptions was an Article I violation; rather, their argument was that they deserved an exemption as much as Sweden and the others.[17] Although the plaintiffs argued that Belgium had applied the tax exemption in a discriminatory manner, the panel seemingly ruled that Belgium's tax law as such violated Article I.

If it were really true, as Hudec contended, that the Belgian statute was 'unquestionably' a GATT violation and that requiring a country to have a family allowances program was 'exactly' the kind of condition that the MFN clause was designed to eliminate, then why did neither of the two complaining countries make such an argument? As Hudec reports:

> Norway and Denmark seemed to accept the existence of the conditions as such. The 'discrimination' they were complaining about was merely that Belgium was not applying its conditions evenhandedly.[18]

Why did the two complaining governments make such narrow claims if the meaning of Article I was so clear?

Hudec suggests that the Denmark/Norway position was a 'tactic' having to do with the effect of the GATT Protocol of Provisional Application.[19] The tax itself was thought to be covered by the Protocol's reservation for pre-existing mandatory laws, but the ongoing exemption practices could be subject to legal challenge. Certainly, the applicability of the Protocol's so-called grandfather clause was the central issue in the case. Nevertheless, because the Protocol itself lacks a non-discrimination requirement, any complaint had to conceptualize exactly what Article I prohibits.

An alternative explanation is that before *Belgian Family Allowances*, no widely shared view existed in the GATT interpretive community that Article I prohibited all origin-based discrimination. As Hudec notes, some governments (including both sides in the dispute) apparently believed that an internal tax linked to the

16 John H. Jackson, *The World Trading System* (MIT Press, 1989), at 138. See also Mitsuo Matsushita, Thomas J. Schoenbaum, and Petros C. Mavroidis, *The World Trade Organization* (Oxford, 2003), at 149 (referring to it as 'the leading case').

17 *Supra* note 2, at 137–141.

18 Ibid., at 138, 139, 141.

19 Ibid., at 138.

government policy in the exporting country could be GATT-legal, so long as this condition was applied in an evenhanded way to all GATT parties.[20]

As a result of *Belgian Family Allowances*, however, the discipline in Article I hardened. Henceforth, the interpretation would be that a policy present (or absent) in a foreign country was 'irrelevant' to the quality of the treatment given to a product from that country *vis-à-vis* the like product from another. A government seeking to precondition a tax exemption on the availability of a family allowance program in the country of export would learn that GATT Article I requires that the exemption be given to any other GATT party, even when that country has no family allowance system at all.

1.1 Examining the foundations of the decision

The panel decision states the GATT law of today, but it is worth considering whether the panel's rigid view of GATT Article I was justified. One preliminary point to remember is that there was no disagreement about 'like product' in *Belgian Family Allowances*. No participant argued that the taxed goods imported from Norway were not 'like' the untaxed goods imported from Sweden and the United Kingdom. In fact, we do not even learn in the panel decision what the taxed goods in contention were. Instead, the problem with the *Belgian Family Allowances* holding, if there is one, lies in the proposition that the term 'unconditionally' in Article I:1 forbids any origin-based condition.[21]

We know that GATT Article I:1 does not discipline every trade advantage. As Hudec has noted:

> Although the terms of the Article I:1 MFN obligation preclude explicit discrimination against other countries by name, governments have agreed, tacitly, that they may discriminate against free riders by making fine product distinctions in their tariffs – product distinctions that are calculated to limit the benefit of tariff reductions to the countries that have granted equivalent concessions in return.[22]

Hudec further explained that the practice under GATT has been to tolerate in tariff classifications 'any distinction based on an objective characteristic of the products in question', including those relating to materials of construction, methods of manufacture, differences in species, differences in value, differences in shape or size, and quality distinctions.[23] To be sure, tariffs specialized in this way may be challenged as discriminating between 'like' products, as done successfully

20 Ibid., at 140, 141 (noting that at the GATT panel hearing, Norway, Denmark, West Germany, and Austria each pleaded that it was entitled to an exemption). But see ibid., at 140 (noting that during the pre-panel phase, Belgium may have admitted that the tax itself violated Article I).

21 See *Supra* note 1, para. 3.

22 Robert E. Hudec, '"Like Product": The Differences in Meaning in GATT Articles I and III', Thomas Cottier and Petros C. Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (University of Michigan Press, 2000), 101, at 109.

23 Ibid., at 110.

in the 1981 case *Spain – Tariff Treatment of Unroasted Coffee*.[24] In general, however, such product-related conditions are accepted as consistent with GATT Article I, even though their impact can vary considerably across different countries.[25]

Tariff and tax treatment explicitly linked to geography is problematic however. In his discussion of *Belgian Family Allowances*, Hudec gave an explanation of the discipline in Article I:1 that has stood the test of time. He wrote:

> Customs laws are full of 'conditions'. The target of Art. I is that class of conditions which pertain to the country of origin. The 'favor,' whatever it is, must be made available to every country without the country itself having to meet any qualifications. Put another way, a condition is not addressed to countries if the classification it produces is not one that can be expressed in terms of countries that do not qualify.[26]

In *Belgian Family Allowances*, the favor (i.e., the tax exemption) was available only to countries meeting certain qualifications. Unlike a condition relating to the foreign producer, which can be expressed without regard to country of origin, the condition in *Belgian Family Allowances* is inescapably origin-based because a country is either exempt or not. Belgium's tax was of a type I have termed 'government policy standards', and such measures are distinguishable from origin-neutral measures contingent on how a product is made.[27]

Although it is origin-specific, the condition in *Belgian Family Allowances* is not intrinsic to a country. Any exporting country can meet the condition so long as it is applied fairly. Indeed, as Hudec pointed out, the panel could have limited its ruling to whether Denmark and Norway had adopted policies that entitled them to the exemption.[28]

Because the panel did not seem to do so, the Article I discipline tightened into forbidding not only facial discrimination between countries but also discrimination between countries based on their policies. Following the panel report, as Hudec noted, the governments increasingly assumed that the panel had ruled the entire exemption system illegal.[29]

24 *Spain – Tariff Treatment of Unroasted Coffee*, Report of the Panel, BISD 28S/102, paras. 4.6, 4.11 (adopted 11 June 1981).

25 See William J. Davey and Joost Pauwelyn, 'MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of "Like Product"', in *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law, supra* note 22, at 14, 29 (suggesting that allowing WTO Members to establish fine distinctions in their tariff schedules seems supported by GATT practice).

26 *Supra* note 2, at 136–137, n. 5.

27 Steve Charnovitz, 'Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures', 7 *Tulane Environmental Law Journal*, 299, at 330, 348 (1994).

28 Hudec viewed the ambiguity and obscurity in the panel's decision as a virtue and explained that anyone challenging the decision could be confronted with a record showing that the discrimination involved was merely the exclusion of Norway and Denmark from the exemption enjoyed by other countries. *Supra* note 2, at 150.

29 Ibid., at 157.

The MFN rule in Article I:1 encompasses both de jure and de facto discrimination. In *Belgian Family Allowances*, the issue was de jure discrimination. By the terms of the law, the authorities would decide whether a particular exporting country was or was not going to be granted an exemption. Of course, the MFN rule is not intolerant of all de jure, origin-based discrimination.[30]

While seemingly frowning on family-friendly tax policies, Article I smiles on antidumping and countervailing duties. Such duties are designed to treat exporting countries differently depending on various criteria not related to the imported product itself. For dumping, the criteria relate to how the product is priced (or valued) in the exporting country as compared to the importing country. For countervailing duties, the criteria relate to whether the government in the exporting country has subsidized the product. So, in both instances, there is discrimination hinging on facts occurring inside the foreign country that have no adverse bearing on the consumer in the importing country.

Nevertheless, neither antidumping nor countervailing duties per se are viewed as violations of GATT Article I. This result seems dictated by the architecture of the GATT, which contains disciplines in Article VI on antidumping and countervailing duties. These disciplines would be inutile if Article I prohibited those trade remedies. Therefore, Article VI must have been intended as an implied exception to Article I.[31] To be sure, nothing in the text of Article I states that Article VI is an exception, and nothing in the text of Article VI states that it is an exception to Article I. Nevertheless, panels have found such an exception.[32] The question of whether antidumping and countervailing duties were consistent with MFN had received considerable attention among international and trade law experts pre-1948.[33] Indeed, in one judicial proceeding, the US Court of Customs and

30 As Hudec explained with regard to countervailing and antidumping duties, the 'GATT's MFN principle does not entirely prohibit governments from imposing certain kinds of selective trade restrictions on particular countries'. Robert E. Hudec, 'Tiger, Tiger, in the House: A Critical Appraisal of the Case Against Discriminatory Trade Measures' (1988), reprinted in Hudec, *Essays on the Nature of International Trade Law* (Cameron May, 1999), 281, at 321.

31 See John H. Jackson, 'Equality and Discrimination in International Economic Law: The General Agreement on Tariffs and Trade' (1983), reprinted in Jackson, *The Jurisprudence of GATT and the WTO* (Cambridge, 2000), 57, at 59–60 (calling attention to the practice and custom of not perceiving countervailing duties as an MFN violation).

32 *Swedish Anti-Dumping Duties*, Report of the Panel, BISD 3S/81, para. 8 (adopted 26 February 1955) ('If the low-cost producer is actually resorting to dumping practices, he foregoes the protection embodied in the most-favoured-nation clause.'); *United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, Report of the Panel, BISD 38S/30, para. 4.4 (adopted 11 July 1991) (stating that GATT Article VI:3 is an exception to the basic principles in GATT Articles I and II); *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, Report of the Panel, BISD 39S/128, para. 6.8 (adopted 19 June 1992) (holding that the rules and formalities applicable to countervailing duties are within the meaning of Article I:1). Note that GATT Article II:2(b) exempts antidumping and countervailing duties from the discipline of Article II if they are carried out consistently with Article VI.

33 For example, see Stanley K. Hornbeck, 'The Most-Favored Nation Clause', 3 AJIL 619, at 639 (1909).

Patent Appeals overruled the application of a 'countervailing duty' on the grounds that it violated the MFN obligation contained in a US bilateral treaty with Germany.[34]

The *Belgian Family Allowances* decision continues to be followed in WTO practice.[35] In *Indonesia – Certain Measures Affecting the Automobile Industry*, the panel cited *Belgian Family Allowances* for the proposition that any advantage to an imported product 'cannot be made conditional on any criteria that is not related to the imported product itself'.[36] In that dispute, lower sales taxes and customs duties were applied to imported autos from foreign exporters that met the so-called 'National Car' requirements, and a lower custom duty was applied to certain auto parts and components from Korea. The purpose of Indonesia's program was to increase the domestic content in its automotive sector. In *Canada – Certain Measures Affecting the Automotive Industry*, the panel rejected an argument from Japan (one of the complaining parties) that Article I:1 prohibits any advantage to an imported product based on criteria unrelated to the imported product itself.[37] Instead, the panel explained that the word 'unconditionally' in Article I:1 means that 'the extension of that advantage may not be made subject to conditions with respect to the situation or conduct' of the exporting country.[38]

34 *John T. Bill Co.* v. *US*, 104 F.2d 67 (1939); Hugh O. Davis, *America's Trade Equality Policy* (American Council on Public Affairs, 1942), at 136 (discussing the Bill case). This case was unusual in that the court held that the Tariff Act of 1930, which was seemingly inconsistent with the MFN clause in the Germany–US treaty of 1923, would not supersede that prior treaty. The court explained that the 1923 treaty was intended to extend unconditional MFN to Germany and therefore to modify the countervailing duty applying to Germany in the Tariff Act of 1922. (The countervailing duty involved was not aimed at countering a German subsidy but rather at penalizing Germany's high tariff.) Because the 1922 language was repealed and re-enacted verbatim by the Congress in 1930, the court concluded that the Congress did not intend to return the German–US trade relationship to what existed before the 1923 treaty. The stringent MFN provision in that treaty provided that any advantage 'shall simultaneously and unconditionally, without request and without compensation' be extended to the like article of the other party. 104 F.2d at 69. This language came from Article 267 of the Treaty of Versailles. It is interesting to note that the 'without request and without compensation' language was not used by the GATT's drafters to clarify the meaning of 'unconditionally'.

35 The one deviation is *EEC – Programme of Minimum Import Prices, Licenses, and Surety Deposits for Certain Processed Fruits and Vegetables*, Report of the Panel, BISD 25S/68, paras. 3.64, 4.19 (adopted 18 October 1978), where the panel upheld a European Community import measure contingent on whether the exporting country government had provided certain guarantees about the price of the good and the deflection of trade. Although the complaining government had argued that the measure amounted to conditional MFN, the panel explained that the measure was not an MFN violation because it applied likewise to all countries of origin. Aside from panel reports, there was one deviation by a GATT working party. In 1955, the working party on Schedules and Customs Administration agreed that when more favorable customs treatment for diplomatic and consular officials was linked to reciprocity, that practice should not be disturbed, notwithstanding the MFN obligation. Schedules and Customs Administration, BISD 3S/205, para. 3.

36 *Indonesia – Certain Measures Affecting the Automobile Industry*, Report of the Panel, WT/DS54, paras. 14.143–14.144 (adopted 23 July 1998).

37 *Canada – Certain Measures Affecting the Automotive Industry*, Report of the Panel, WT/DS139/R (adopted 19 June 2000).

38 Ibid., para. 10.23.

In other words, the panel suggested that, while not all distinctions unrelated to the product necessarily violate Article I, such a distinction will violate Article I:1 if the distinction is 'discriminatory with respect to the origin of imported products'.[39] Based on the facts in the case, the panel found that the conditions in Canada's automobile program did discriminate according to national origin.[40] On appeal, Canada argued that the advantages in its program were granted to specific manufacturers rather than linked to the origin of imported products.[41] In its ruling, the Appellate Body explained that Article I:1 applies to both discrimination in law and in fact, and that the facts found by the panel showed that only a small number of countries would benefit from Canada's program.[42] Therefore, the Appellate Body upheld the finding of discrimination and did not address the panel's dicta on 'unconditionally'. GATT Article I:1 was also at issue in the *Bananas* case. The panel found several violations of Article I:1, and those appealed were upheld by the Appellate Body.[43] The discrimination involved was plain origin-based discrimination. *Belgian Family Allowances* was not cited.

In the most recent WTO dispute ruling on Article I, the *Tariff Preferences* case, the complaint concerned certain preferences offered by the European Communities to 12 designated countries that were experiencing a certain gravity of drug problems.[44] The panel ruled that this measure violated GATT Article I:1.[45] According to the panel, the term 'unconditionally' in Article I:1 has the 'ordinary' meaning of 'not limited by or subject to any conditions', and cited the latest edition of *The New Shorter Oxford English Dictionary*, published in 1993, as authority for this proposition.[46]

In presenting its defense, the European Communities had proffered a different interpretation of 'unconditionally'. The Communities argued that the 'conditions' prohibited in Article I:1 are 'those which require providing some form of compensation for receiving the MFN treatment'.[47] Not all legal classifications are prohibited 'conditions', according to the Communities, because, if so, all laws or

39 Ibid., paras. 10.23–10.24, 10.29. The panel explained that this holding was not inconsistent with *Belgian Family Allowances*. Ibid. para. 10.26.

40 Ibid., para. 10.50. The gist of this part of the complaint was that Canada granted an import duty exemption to some importers but not others, and the favored importers tended to import from affiliated companies in the United States, Mexico, Sweden, and Belgium.

41 *Canada – Certain Measures Affecting the Automotive Industry*, Report of the Appellate Body, WT/DS139/AB/R (adopted 19 June 2000).

42 Ibid., paras. 78–86.

43 *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Panel, WT/DS27/R/USA; Report of the Appellate Body, WT/DS27/AB/R, paras. 205–207 (adopted 25 September 1997). In paragraph 190, the Appellate Body explained that for the GATT and the other WTO agreements on trade in goods, 'the essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin'.

44 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Report of the Panel, WT/DS246/R (adopted 20 April 2004).

45 Ibid., para. 7.60.

46 Ibid., para. 7.59.

47 Ibid., para. 4.56.

regulations would have to be characterized as conditional.[48] To bultress its position, the Communities pointed to some analyses of the MFN principle written before and after the drafting of the GATT, which suggest that a conditional MFN clause is one that has either a condition providing for compensation or a condition of reciprocal treatment.[49] Applying its interpretive principle to the trade preferences contested in *Tariff Preferences*, the Communities contended that drawing a line according to whether a country is affected by drug problems is not a prohibited condition because no compensation is requested from countries suffering from such problems.[50] The Communities sought to distinguish *Belgian Family Allowances* by calling it 'notoriously unclear', and saying that it was relevant for the interpretation of the term 'like product', not the term 'unconditionally'.[51]

As noted above, the *Tariff Preferences* panel rejected this argument and held that MFN in Article I:1 has a broader meaning than simply not requiring compensation. The panel did not offer an alternative historical analysis of the term 'unconditionally', but instead said that it would 'give that term its ordinary meaning' as ascertained by perusing *The New Shorter Oxford English Dictionary*.[52]

What can be said about the historical argument the Communities offered drawn from the negotiating history and legal commentary? The notion that unconditional MFN treatment can be accompanied by a condition applying equally to all exporting countries seems to have been the view held by the two sides (Belgium and Denmark/Norway) in *Belgian Family Allowances*. Of course, that panel rejected this narrow interpretation of Article I:1, and so did the *Tariff Preferences* panel. But neither really engaged with the argument as to the meaning of 'unconditionally' intended by GATT's drafters.

The *Tariff Preferences* panel's lack of interest in ascertaining the original meaning of the language written in 1947 is fully consistent with the interpretive approach regularly used in the WTO, which draws insight from an English dictionary published in 1993.[53] This practice is justified as being required by the Vienna Convention on the Law of Treaties, which, in Article 31, states the 'General rule of interpretation' – namely that: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of

48 Ibid., para. 4.57.

49 Ibid., para. 4.61.

50 Ibid., para. 7.56.

51 Ibid., para. 4.55. In my view, this assertion regarding 'like' product is not justified by the language of *Belgian Family Allowances*.

52 Ibid., para. 7.59.

53 See, e.g., *European Communities – Trade Description of Sardines*, Report of the Appellate Body, WT/DS231/AB/R, para. 244 (adopted 23 October 2002). See also *United States 1–1 Continued Dumping and Subsidy offset Act of 2000*, Report of the Appellate Body, WT/DS217,234/AB/R, para. 248 (adopted 27 January 2003) (stating that dictionaries are not dispositive).

the treaty in their context and in the light of its object and purpose.'[54] Under Article 32 of the Vienna Convention, recourse may be had to supplementary means of interpretation, including the preparatory work, in order to confirm the meaning indicated by Article 31 or to determine the meaning when Article 31 leaves the meaning ambiguous or obscure, or the result manifestly absurd or unreasonable. Therefore, when the so-called ordinary meaning of a treaty term can be found in a dictionary, a panel might embrace that definition, and use it along with both textual context and deductions by the panel about the treaty's object and purpose.

In my view, this over-reliance on dictionaries is troubling. Although there is nothing wrong with using a dictionary to illuminate the meaning of words, why use the latest dictionary rather than a dictionary in existence in 1947 when the GATT was drafted? As the meaning of a word changes over time, the approach taken by the Appellate Body can allow interpretations to evolve for purely linguistic reasons. A better approach to interpretation would be to give more weight to the understanding of key terms at the time that GATT was written. Examining the negotiating history can often be helpful in this endeavor. As Bill Davey has perceptively noted, when Bob Hudec served on a GATT or WTO panel, that panel examined the negotiating history of the provision being interpreted.[55]

What was the understanding in 1947 about the meaning of unconditional MFN?[56] In the nineteenth and early twentieth century, there was a well-understood distinction between the unconditional and conditional forms of MFN.[57] As the European Communities stated in *Tariff Preferences*, the conditional form of MFN was predicated on reciprocal treatment or compensation.[58] For example, in a treaty between A and B, A would promise B that B would receive the same treatment that A gave to C so long as A gave C the treatment freely, but that if A gave C a favor following compensation from C, then B could demand the same favor from A only after B gave equivalent compensation to A.

Being able to identify the conditional form of MFN is one thing, but drawing inferences from it are another. After all, we know that the GATT's drafters chose

54 See *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R at 17, 20 (adopted 20 May 1996); Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art. 31.1.

55 William J. Davey, 'Hudec as Panelist', 37 *Journal of World Trade*, 761, at 762–763, 767–769 (2003).

56 Although I have not personally researched the GATT preparatory documents, my impression from secondary sources is that those documents do not reveal much about the meaning of the 'unconditionally' guarantee in GATT Article I. See John H. Jackson, *World Trade and the Law of GATT* (Bobbs-Merrill, 1969), at 253–259. A careful study of the preparatory documents on this question would be a good topic for a student paper.

57 The unconditional form of MFN was the traditional one going back at least as early as 1055, and to 1713 using the term 'most favored'. The conditional form was initiated in 1778. See 'Most-Favoured-Nation Clause', 1969 *Yearbook of the International Law Commission*, Vol. II, 157, at 159–161.

58 *Supra* note 44, para. 4.61. See Jackson, *supra* note 16, at 137 (suggesting that the traditional conditional MFN concept required a particular negotiation of reciprocal benefits).

the *unconditional* form of MFN. So the question that needs answering is whether the unconditional form of MFN was thought to permit conditions hinged on the origin of an import. Official studies of MFN in the decades leading up to the GATT shed some light.

In 1927, the Committee of Experts for the Progressive Codification of International Law adopted a report on 'The Most-Favoured-Nation Clause'.[59] The report pointed to two types of conditions that were inconsistent with unconditional MFN. First, there were conditions precedent (to the granting of the favor) such as reciprocal or equivalent favors; this was conditional MFN.[60] Second, there were conditions that were inconsistent with both forms of MFN identifiable because they crossed the line into being unreasonable. As examples, the report pointed to actual provisions from national tariff law such as 'salt from a country that imposes no duty on salt' or 'products from countries whose tariff schedule the President deems unreasonable'.[61] The report did not discuss any conditions analogous to having a regime of family allowances, but both of its examples bear some similarity.

Another valuable report came from the Economic Committee of the League of Nations. This 1929 report stated that a provision is incompatible with MFN if it depends 'on entirely external characteristics or conditions which, by the very nature of things, only the products of given countries can possess or fulfil'.[62] As an example, the report pointed to a requirement that an imported product be accompanied by an analysis certificate issued by a specified authority in one country, while refusing to accept similar certificates from an equally qualified authority in another country. If the production of a certificate can be fulfilled by all countries, then presumably the requirement of a certificate would not constitute a violation of MFN. This analysis suggests that some external conditions relating to foreign government action are acceptable. Yet there is a big difference between a requirement for a product certificate and a requirement that a foreign government provide family allowances to its residents.

Some expert opinions also provide useful background. In 1936, the Institut de Droit International adopted a resolution on MFN, which stated, among many points, that: 'The most-favoured-nation regime must be applied in good faith and precludes recourse to all measures tending to create *de facto* discrimination against

59 League of Nations, Committee of Experts for the Progressive Codification of International Law, 'The Most-Favoured-Nation Clause', League Doc. C.205.M.79.1927.V.

60 Ibid., at 9.

61 Ibid. A 1929 report by Richard Riedl points to different tariff examples and comes to the same conclusion. See 'Exceptions to Most-favoured Nation Treatment in Favour of Countervailing and Antidumping Duties', Appendix to Richard Riedl, *Exceptions to the Most-Favoured Nation Treatment* (P.S. King & Son, 1931), at 53–56.

62 League of Nations, Recommendations of the Economic Committee Relating to Commercial Policy, League Doc. C.138.M.53.1929.II, at 10.

the contracting parties, contrary to the spirit of that regime.'[63] In 1945, Georg Schwarzenberger contrasted MFN and reciprocal treatment, and explained that: 'The aim of the m.f.n. standard is the prevention of discrimination between foreign States; that of the reciprocity standard the identical treatment of the contracting parties.'[64] In 1948, *The Most-Favored-Nation Clause*, a treatise by Richard Carlton Snyder, was published in which Snyder explains that:

> Once the proposition is established that the most-favored-nation clause gives the right to treat nations on the basis of a classified differential status according to their economic position, the way is open for the destruction of the efficacy of the clause. Germany, in her protest against the countervailing duties imposed by the United States in 1894, struck upon this very weakness in the argument when she argued that 'the United States could with the same justification assert that German manufacturers in any particular industry paid lower taxes than the manufacturers of other countries, and then, in order to bring about a so-called equalization, levy a discriminating duty on the German product concerned, on its importation into an American port.[65]

This passage is part of Snyder's analysis of why a countervailing duty against bounties is inconsistent with MFN, but obviously the GATT's drafters did not share that purism. The example offered in the German demarche is highly relevant because the issue of an equitable levy peeped its head in *Belgian Family Allowances*, and then resurfaced decades later in the trade policy debates about environmental taxation.

What conclusion is to be drawn from this history? A full analysis is beyond the scope of this article, but my own take on these pre-GATT studies is that unconditional MFN was understood either to preclude all origin-based conditions or to manifest a strong presumption against them. Any allowed condition would have to be reasonable for an importing country to impose. The issue of whether Denmark offers family allowances seems to lack a reasonable nexus to the goods that Denmark's producers export to Belgium.

1.2 Reflections on a seminal decision

Let me offer a few observations about *Belgian Family Allowances*. Was it correctly decided? Was Hudec's commentary on target? What are the implications of this case for judicial deference and collective preferences?

The statement by the *Belgian Family Allowances* panel that the exporting country's attitude toward family allowances was irrelevant was not the only way the panel could have decided the case, but it was the surely the most progressive

63 Resolution of the Institute of International Law adopted at its Fortieth Session (Brussels, 1936), para. 9, translated and reprinted in 1969 *Yearbook of the International Law Commission*, Vol. II, 180 at 181.

64 Georg Schwarzenberger, 'The Most-Favoured-Nation Standard in British State Practice', 22 *British Yearbook of International Law* 96, at 121 (1945).

65 Richard Carlton Snyder, *The Most-Favored-Nation Clause* (King's Crown Press, 1948), at 126.

interpretation open to the panel. The panel may have calculated that its decision would strengthen the aspiration of the GATT's Preamble for 'the elimination of discriminatory treatment in international commerce'. For that contribution to the liberal trading system, the panel should be applauded.

As for Hudec's commentary, it played an important role in GATT legal discourse by enthroning a brief panel decision into being appreciated as the leading case for a broad interpretation of MFN. Moreover, the methodology used by Hudec provides an excellent model for WTO case studies. Among the exemplary features of Hudec's analysis were interviews with the panelists and attention to actual compliance.

Looking back from the vantage of 2004, I wonder whether the panel or Hudec gave enough attention to the term 'General' in GATT Article I (General Most-Favoured-Nation Treatment). One implication of that term might be that the MFN obligation was general and not merely bilateral.[66] Prior to the GATT, the grant of MFN had almost always been extended on a bilateral basis. Thus, the identification of the features of bilateral conditional MFN clauses, as suggested by the European Communities in *Tariff Preferences*, may be doubly[67] unhelpful because whatever particularization existing in bilateral trade relations was meant to be washed out in adopting the multilateral and general MFN requirement.

This point will be clearer with an example. Imagine that GATT had not existed in 1952 and that both Norway and Denmark had treaties with Belgium providing MFN treatment in internal taxes. When Belgium does not grant the exemption, both countries complain using whatever dispute resolution is available. Although similar on their facts, the disputes would be handled differently by adjudicators depending on the exact terms of the MFN clause in each of the bilateral treaties.[68] One complainant might win and the other might lose. Now go back to the GATT dispute on family allowances. The panel may have reasoned that, with a general MFN clause, the obligations that Belgium owes to Denmark and Norway cannot be different from each other or from Belgium's obligation to countries that have not yet applied for an exemption. Therefore, the panel chose a strict interpretation that did not require any inquiry into behind-the-border conditions.

The panel's choice reflects a great deal of judicial activism. However cautious the panel might have been in drafting its opinion, the decision is remembered for its expansive reading of Article I that went beyond the claims that the plaintiffs

66 The more obvious meaning of 'general' is that Article I deals with advantages relating to all aspects of trade policy. See Hector Gros Espiell, 'The Most-Favoured-Nation Clause', 5(1) *Journal of World Trade Law*, 29, at 34, n. 20 (1971).

67 As noted above, recognizing the conditions that were anticipated in conditional MFN clauses may help in identifying such a clause, but will not be conclusive in figuring out whether other conditions are permitted or precluded by an unconditional MFN clause.

68 For example, with a bilateral MFN clause like the one in the Germany–US treaty discussed in *supra* note 34, the government of the exporting country should not need to request an exemption.

were making.[69] The panel certainly did not adopt the 'in dubio mitius' approach used by the Appellate Body in the *Hormones* case whereby an ambiguous term is to be interpreted in a manner that is less onerous to the party under obligation.[70] Instead, the panel resolved the ambiguity in Article I's text to solidify a stronger, pro-trade discipline. In one of his last articles, Hudec extolled the gap-filling role of adjudicators, saying: 'If done skillfully, this kind of judicial creativity can succeed in capturing intentions that were implicit, and helps the parties to realize the goals that they did in fact agree to pursue.'[71]

1.3 Collective preferences

Finally, let me offer a brief observation about 'collective preferences' as an issue in *Belgian Family Allowances*. In a provocative lecture delivered in September 2004, European Commissioner for Trade Pascal Lamy discussed the problem of 'collective preferences' in international trade and suggested ways that international cooperation might help.[72] The problem is that trade is the 'geometric point' at which the preferences of countries interconnect as embodied in tradable goods and services. Lamy calls this a 'new difficulty' for the trading system, because WTO rules will be in tension with national demands to exercise legitimate social choices. Due to their 'sudden emergence' in international trade, Lamy argues that collective preferences risk provoking a backlash against market opening, when that opening is seen as a challenge to legitimately expressed collective preferences. Although Lamy's claims about novelty are unjustified, the overall problem he addresses is a real one – namely, that WTO rules may improperly infringe on social choices that should be determined at the national level.

With *Belgian Family Allowances*, an important question is whether the decision in that dispute undermined legitimate social choices to be made by Belgium. Hudec tells us that Belgium abolished the tax on imports in 1954, but his write-up does not indicate what happened to the family allowances. Belgium continues to provide family allowances, and found a way to do so that did not involve taxing imports. Suppose Belgium was not able to do so, however, and terminated or cut back the family allowances. Had this happened, that situation might be said to provide a paradigmatic case of a clash between collective preferences and trade rules.

69 See *supra* note 2, at 143 (stating that no one in the case had advanced any grounds for stating that the Belgian statute as a whole was GATT-illegal), 150–151 (noting that the panel report does not even refer to the Norway–Denmark position), ISI (pointing to the panel's 'larger objective').

70 See *European Communities – Measures Containing Meat and Meat Products* (*Hormones*), Report of the Appellate Body, WT/DS26/AB/R, para. 165 and n. 154 (adopted 13 February 1998).

71 Robert E. Hudec, 'Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization', 1 *World Trade Review*, 211, at 215 (2002). Hudec further notes that GATT panels engaged in gap-filling and cites several cases. He does not cite *Belgian Family Allowances*, perhaps reflecting his view that the panel did not face a gap in law. Ibid., at 215–216 and n. 10.

72 Pascal Lamy, 'The Emergence of Collective Preferences in International Trade: Implications for Regulating Globalisation', 15 September 2004, available at http://europa.eu.int/comm/archives/commission_1999_2004/lamy/speeches_articles/indexpldat_en.htm#2004.

Yet no so fast. The panel did not say that Belgium could not have a domestic subsidy for families. All it said was that the subsidy could not be financed (in part) by a specific tax on imports.[73] Belgium was free to put a sales tax on all imported and domestic products to pay for the family allowances, if it believed that its domestic production was too small a share of the economy to serve as a revenue base to pay for family allowances.

In an important article that Hudec authored in the mid-1990s, he distinguishes two motivations for import measures that raise discrimination concerns.[74] First, measures can seek to level the playing field. Second, measures can be externally directed to change foreign government behavior.

Belgium's reason for imposing the tax on imports was a level-playing field motivation. The law itself stated that the exemption was designed 'with a view to compensating' for the charge on domestic production.[75] Rather than tax all imports, however, Belgium gave an exemption to governments that had a comparable system of family allowances. One might perceive this as an effort to avoid double taxation or as a means to offer comity to countries with family allowances.[76] Either way, the exemption cannot be justified under Article I. Nor can the underlying quest for a level playing field justify such an exemption.

The other motivation, to influence foreign government policy, was not present in *Belgian Family Allowances*. Nothing in the record suggests that Belgium sought to promote adoption of family allowances in its trading partners.

1.4 Summary

A re-examination of *Belgian Family Allowances* leads to a conclusion that the panel reached the right result and that Hudec's commentary provides a valuable aid in understanding the choices faced by the panel and why it made the right decision. Nevertheless, Hudec may exaggerate in asserting that requiring a country to have a family allowances program was 'exactly' the kind of condition which the MFN clause was designed to eliminate.[77]

In considering the anti-discrimination principle explicated in *Belgian Family Allowances*, it is important to remember that it was a decision about the requirements of Article I, not the entire GATT. The GATT General Exceptions

73 Hudec explained that the option of getting rid of the exemption was not available because taxing the imports was a GATT Article III national treatment violation. *Supra* note 2, at 143.

74 Robert E. Hudec, 'GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices', Jagdish Bhagwati and Robert E. Hudec (eds.), 2 *Fair Trade and Harmonization* (MIT Press, 1996), 95 at 96.

75 See *supra* note 1, at Annex, Extracts from the Royal Order of 19 December 1939, Article 130.

76 See Frederic L. Kirgis, Jr., 'Effective Pollution Control in Industrialized Countries: International Economic Disincentives, Policy Responses, and the GATT', 70, *Michigan Law Review*, 859, at 895 (1972) (suggesting that a government tax on imports might provide an exemption to serve equity by exempting imports already burdened by pollution control costs, and yet doing so would open up the importing country to an MFN challenge).

77 *Supra* note 2, at 136 (footnote omitted).

in Article XX were not invoked by Belgium, presumably because Belgium did not imagine that any of those exceptions covered family allowances.[78] Yet suppose there had been a GATT Article XX(k) exception reading: 'relating to family allowances'.[79] I presume that the panel would have decided whether Article XX would constitute a valid defense for the MFN violation. The availability of such an exception would have necessitated the panel 'sitting down to sort out the membership for Belgium's exclusive family allowances club', a task that Hudec called 'plainly offensive'.[80] Would Belgium have won the case? Part 2 answers that question.

2. Family allowances and GATT Article XX

GATT Article XX (General Exceptions) contains a chapeau followed by a list of qualifying exceptions:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
> (b) necessary to protect human, animal or plant life or health;
> (c) relating to the importations or exportations of gold or silver;
>
> ....

These (a) to (c) exceptions are followed by seven additional ones in paragraphs (d) through (j). The question to be considered here is whether under a hypothetical paragraph (k) relating to family allowances, Belgium's law and practice of 1952 would qualify for an exception under the WTO's jurisprudence on GATT Article XX. More precisely, assuming that Article I:1 has been violated, and that a family allowance tax comes within the range of policies in paragraph (k), how would a WTO panel approach and decide the case today under the chapeau of Article XX?

One move the panel would not make is the one tried by the *Shrimp* panel. The *Shrimp* panel contended that the Article XX chapeau only allows WTO Members

78 See Donald Regan, 'Internet Roundtable – The Appellate Body's GSP Decision', 3 *World Trade Review* 239, at 262–263 (2004) (presenting a hypothetical of a special low-tariff rate for countries that annually give at least one percent of their GNP in foreign aid, and then calling that tariff an MFN violation for which an Article XX defense would not have much hope of success).

79 I chose the simplest possible formulation to avoid the issue of whether the tax on imports is 'necessary' in order to provide family allowances.

80 See *supra* note 2, at 143.

'to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system'.[81] In drawing this conclusion, the *Shrimp* panel cited the holding in *Belgian Family Allowances* that the tax exemption was based on a concept which was difficult to reconcile with the 'spirit' of the GATT.[82] This dogmatic line of analysis, quite rightly, was reversed by the Appellate Body.[83]

Instead, the panel adjudicating my hypothetical would apply Article XX jurisprudence, and find that Belgium's tax fails to qualify under the chapeau. I can see two main reasons why Belgium would lose.

First, the tax is 'unjustifiable discrimination' between countries where the same conditions prevail in contradiction to the Article XX chapeau. As explained *in Belgian Family Allowances*, the tax was indirectly imposed on goods originating in a country whose system of family allowances did not meet the specific requirements in Belgium's law: viz., (1) that the foreign government has a legislative provision requiring companies to pay contributions for their employees in order to provide family allowances, (2) that the foreign law covers more than half of the companies in the country, (3) that all employees of each company are covered, and (4) that the level of the contribution (i.e., tax) is at least 80 % of the Belgian tax.[84] The Belgian Ministry of Labour and Social Insurance was responsible for certifying whether a foreign government met these requirements. In *Shrimp*, the Appellate Body found that the US import ban was unjustifiable discrimination because it required other countries to adopt a regulatory program that was essentially the same as that applied by the United States.[85] The Appellate Body held that in international trade relations, it is not acceptable for one WTO Member to use an economic embargo to require other Members 'to adopt essentially the same comprehensive regulatory program'… '*without* taking into consideration different conditions which may occur in the territories of those other Members'.[86] Furthermore, according to the Appellate Body, discrimination results when an importing country's measure 'does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries'.[87] Although the facts in *Belgian Family Allowances* differ in many ways from the facts in *Shrimp* – for example, a tax rather than regulatory embargo[88] – the same underlying flaw exists

81 *United States – Import Prohibitions of Certain Shrimp and Shrimp Products*, Report of the Panel, WT/DS58/R, para. 7.44 (adopted 6 November 1998).

82 Ibid., para. 7.46.

83 *United States – Import Prohibitions of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, para. 122 (adopted 6 November 1998).

84 *Supra* note 1, Annex.

85 *Supra* note 83, para. 163.

86 Ibid., para. 164.

87 Ibid., para. 165.

88 In *Shrimp*, the Appellate Body noted that an embargo is the heaviest 'weapon' in a government's 'armoury' of trade measures. Ibid., para. 171. The decision is unclear as to why the Appellate Body views an import ban as a weapon.

because the Belgian provisions for exemption are inflexible and do not take into consideration the different conditions that might prevail in other countries.[89] Even if a foreign government completely agreed with the goal of family allowances, it would not qualify if it chose to fund family allowances through a progressive income tax or if it considered Belgium's benefit levels too high to be appropriate for emulation.

A tax may also be 'unjustifiable discrimination' if it influences other countries to adopt family allowances. In *Shrimp*, the Appellate Body held that the 'most conspicuous flaw' in the US measure was 'its intended and actual coercive effect on the specific policy decisions made by foreign governments'.[90] Whether a panel would view the Belgian measure as coercing other countries to have family allowances is unclear. There could be many countries exporting to Belgium that do not have family allowances, perhaps because they are too poor. Those countries might consider a 7.5 % tax as actually coercing them to adopt family allowances.

The second reason Belgium would lose is that its tax provision as applied led to 'arbitrary discrimination' between countries where the same conditions prevail. As Hudec explained, Belgium had made a hash of its eligibility determinations; indeed, the Belgian delegate admitted that the exemption for Sweden was based on a very elastic interpretation that could have applied to Norway and Denmark.[91] In *Shrimp*, the Appellate Body found the US certification process to be arbitrary discrimination because exporting countries whose applications were rejected were 'denied basic fairness and due process, and are discriminated against, *vis-à-vis* those Members which are granted certification'.[92] In *Belgium Family Allowances*, the fairness defects were comparable to those in *Shrimp*. Furthermore, the Appellate Body suggested that Article XX requires a modicum of procedural due process, such as a formal opportunity for the applicant country to be heard, to respond to arguments against it, to receive a formal reasoned decision, and to be able to appeal.[93] Neither the *Belgian Family Allowances* decision nor Hudec's write-up suggest that Belgium fulfilled any of those administrative law niceties.

89 See Robert Howse and Damien J. Neven, 'US – Shrimp', Henrik Horn and Petros C. Mavroidis (eds.), *The WTO Case Law of 2001* (Cambridge, 2003), 41, at 69 (suggesting that there may be some situations where the design of the measure itself, rather than only its application, may be highly relevant to whether its application will violate the chapeau).

90 *Supra* note 83, para. 161.

91 *Supra* note 2, at 140; *supra* note 1, para. 7 (finding that Belgium had granted an exemption to a country whose system of family allowances did not fully meet the requirements in Belgium's law).

92 *Supra* note 83, para. 181. See also para. 160 where the Appellate Body states that the chapeau projects both substantive and procedural requirements. If Belgium were to apply its standards more consistently, it could paradoxically run into another problem under *Shrimp* because the Appellate Body held that 'rigid and unbending' requirements and 'little or no flexibility' can also constitute arbitrary discrimination. See ibid. para. 177.

93 Ibid., para. 180.

Another Article XX concern with Belgium's certification process is that, even if it provides an exemption to all eligible WTO Members, Belgium could still be engaged in arbitrary or unjustifiable discrimination if it does not give an exemption to non-Members of the WTO that might qualify. This surprising conclusion is an implication of the recent *Tariff Preferences* decision. In that dispute, the panel ruled that the European Communities's program failed to qualify under the Article XX chapeau because it was *not* offering favorable tariff treatment to Iran, a country that is not a WTO Member (or even an observer).[94] The panel did not explain why the GATT gave the European Communities any obligations toward Iran. Given that the Communities did not appeal the point and that the panel report was adopted, one should presume that this holding is good WTO law.

Still another Article XX concern relates to so-called WTO 'rights'. In *Shrimp*, the Appellate Body stated that a defendant government's 'right' to rely upon Article XX has to be exercised 'reasonably'.[95] Furthermore, the 'right' to invoke Article XX has to be in 'equilibrium' with the 'right' of the exporting country under the substantive obligations of the GATT, including Article I, so that neither of the 'competing rights' will cancel out the other.[96] The Appellate Body did not explain why the GATT's substantive obligations, such as Article I, convey any 'rights', including intriguingly, 'the right to export shrimp'.[97] In the hypothetical case about Article XX(k) being mooted here, one can imagine the complaining governments arguing that the import tax as such violates their MFN rights and therefore does not qualify under Article XX. For example, they might argue that the compensatory purpose of the tax is illegitimate because it cancels out the benefits of trade.

3. Conclusion

Belgian Family Allowances is a landmark GATT case and anyone interested in international trade law can benefit from rereading it in conjunction with Hudec's marvelous commentary. Since the early 1990s, when the problem of origin-specific trade measures for non-protectionist reasons (such as the environment) gained a high profile in the field of international trade policy and law, the legacy of *Belgian Family Allowances* has loomed more important. In this essay honoring Bob Hudec, I have tried to shine light on the *Belgian Family Allowances* case and on its continuing vitality as a precedent in the WTO law of the future.

94 *Supra* note 44, paras. 7.228, 7.235.

95 *Supra* note 83, para. 158.

96 Ibid., paras. 150 (noting substantive obligations), 159. See Gabrielle Marceau and Joel P. Trachtman, 'GATT, TBT and SPS: A Map of WTO Law of Domestic Regulation of Goods', Federico Ortino and Ernst-Ulrich Petersmann (eds.), *The WTO Dispute Settlement System 1995–2003* (Kluwer, 2004), 275, at 317.

97 See *supra* note 83, paras. 156, 163, 186.