

# Introduction

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'Fairness' is a multifaceted notion, comprising several different dimensions. It is used in various areas of law and policy, including intellectual property, consumer protection, antitrust, taxation, public utility, contracts, and international trade.<sup>1</sup> With the progressive maturing of the international system, this notion has acquired relevance at this level as well.<sup>2</sup> In the international context, fairness is particularly important, since only a system that its participants perceive as *fair* can command acceptance and compliance. The main focus of this study is on investigating the development of the notion of fairness in United States (US) trade policy and law and the impact of this notion on international trade discussions and rule-making, and especially on the formation of the multilateral trade regime. The contention is that fairness concerns that have been present in US trade policy debates and treaty practice from the Republic's inception have contributed to shaping these debates and practice over the years, both at home and abroad, and were finally thrust upon the international scene through inclusion in the multilateral trade regime after World War II.

The study focuses on US domestic trade law and policy debate because of the importance that the notion of fairness has been accorded in the USA and because of the USA's role in shaping the multilateral trade regime. In US trade policy discourse, 'fairness' or 'fair trade' has often come to be viewed as either an excuse, by its detractors, or a justifiable reason, by its supporters, for demanding protectionist measures and initiatives.<sup>3</sup> The trade policy objective of pursuing 'free' or 'freer' trade frequently has been couched in terms of demands for 'fair' trade through government intervention to protect domestic industry and to open allegedly closed foreign markets.

The rationale put forward has been that 'fair' trade or a 'level playing field' is a necessary precondition for 'freer' trade. While complaints about unfair trade policies and measures have become entrenched in the USA, they also surface frequently in the debate surrounding trade frictions in many other countries with different traditions and levels of economic development, including in Europe.<sup>4</sup> Hence, despite the fact that there is little uniformity in the way the notion of fairness is understood and used (and often abused), its role in trade policy-making, at both national and international levels, has remained so significant and pervasive over the years that it can be neither underestimated nor ignored. Unfairness allegations remain at the core of the

accusations that countries level against each other, and fairness has endured as a central feature of the international trade policy discourse.

Although much protectionist rhetoric<sup>5</sup> meddles with the concept of fairness and its use, even its critics tend to admit that it possesses an added dimension ‘... of appealing to a notion of natural justice’.<sup>6</sup> In the words of one of its main critics: ‘Fair trade is a two-faced creature: One face is friendly to free trade; the other frowns on it, indeed, seeks to devour it, for fair trade mechanisms can be misused to allege unfair trade unfairly and thus undermine free trade’.<sup>7</sup> However, while the notion of fairness is clearly prone to policy capture by protectionist groups, it remains critical for ensuring the public’s support for trade liberalization.

Clearly, social pressures are often viewed as an explanation for how policy develops, and interest group activity is certainly a very significant, sometimes decisive, determinant of US trade policy. But equally important appears to be the sets of ideas, values, and ideologies that underpin the various pressures and claims, as well as law-makers and executive agencies’ officials’ beliefs, which translate and filter such claims into legislation, policy, and implementation.<sup>8</sup> Fairness is certainly one of these ideas. This is not to deny that the notion of fairness is multifaceted and can provide a useful cover for protectionist objectives.<sup>9</sup> For instance, its reciprocity component may be used to support not only legitimate claims by businesses to seek similar or comparable access conditions and commercial opportunities in all markets, but also mercantilist demands for equal outcomes in terms of sales and profits and/or for equalized conditions of production (e.g., in wage levels, as well as health, safety, and environmental standards). However, as with many political and economic ideas, the fact that fairness can be harnessed to support different policy goals and utilized in different and sometimes contradictory ways does not detract from its importance in framing the discourse and influencing policy outcomes.

The notion of fairness contains powerful normative ideas that play an important role in law- and policy-making at both national and international levels. These include an adherence to international commitments and international law, non-discrimination (i.e., most-favoured-nation and national treatment), reciprocity, and the respect of free-market, competitive conditions.<sup>10</sup> This study identifies and investigates the relevant normative ideas that have been used in US trade policy and foreign economic relations, as well as in the domestic regulation of import trade, the so-called trade remedies laws (e.g., antidumping and countervailing duty laws and import relief or safeguard measures), with a view to examining the impact that these ideas have had in forming the trade regime.

By examining the way that such normative ideas have been used over time, especially in the construction of the trade regime, a common theme appears to emerge. Notwithstanding the existing contentious and often competing

protectionist ideas, it seems possible to isolate the main significance of fairness as revolving around the free-market norm and, in particular, the pursuit of competition between economic agents through legitimate market behaviour.<sup>11</sup> The free-market norm obviously requires respect for the law, including international trade law, since no behaviour in the market can be considered legitimate if it breaks or circumvents agreed-upon rules. But the free-market norm also encompasses non-discrimination and reciprocity (in its benign, barrier-reducing form), as both ultimately seek the elimination of market distortions and are, therefore, instrumental to establishing free markets. The strongly held belief in the virtues of free enterprise and the market mechanism that characterizes US polity has provided the basis for this core element. Firms and governments that distort the market's 'natural' functioning are to be condemned. In this sense, fairness is also consonant with the moral imperative to ensure the commutative justice of economic exchanges as existing between the parties to them.<sup>12</sup> This study contends that fairness-related norms are quite widespread in the General Agreement on Tariffs and Trade (GATT) and subsequently in the World Trade Organization (WTO) Agreements, as well as in international practice.<sup>13</sup> In fact, the preservation of the international competitive process is a familiar notion in the GATT/WTO system, which is in line with the objective of protecting 'competitive relationships' and the 'conditions of competition', which is how the basic provisions of the General Agreement have been consistently interpreted.<sup>14</sup>

Fairness may be viewed as lending legitimacy to the competitive process within which (international) economic transactions take place. It integrates a set of principles and rules defining the accepted behavioural parameters for the unfolding of international economic relations between nations, as well as between firms. Hence, fairness concerns apply to both the international economic exchanges of goods and services and the agreed-upon exchanges of 'treatment' concessions between governments (as well as the setting of other behavioural rules) governing such transactions. In this sense, fairness reinforces a rule-based approach to the international trading system, stresses the importance of the equality of opportunities and access, and does not seek to predetermine or influence economic outcomes.

This understanding of the notion of fairness generally consonant with the capitalist tradition of US political life needs to be distinguished from an interpretation that concentrates on its distributive justice elements, which is equally important in ensuring the system's legitimacy.<sup>15</sup> In general, issues linked to resource allocation and redistribution of income appear less grounded in US trade policy discourse, although – at least domestically – redistribution policies, through, for instance, safeguard measures, special regulation for the agricultural sector, and the Trade Adjustment Assistance (TAA) programme, have played an important role.

The recent debate regarding the relative costs and benefits of liberalization and, more broadly, globalization has focused public attention on the sad reality that ‘too few share in its benefits [and] too many have no voice in its design and no influence on its course’.<sup>17</sup> Such renewed awareness again stresses the importance of the fairness of international trade. But even in this context, much of US ‘fairness-related’ attention in the debates surrounding the deep integration and globalization of the world economy has been devoted to ensuring that stark differences in domestic regulatory standards (e.g., in the areas of labour and the environment) prevailing in many trading partners would not translate into ‘unfair’ production cost disadvantages for domestic producers.<sup>18</sup> On the contrary, the necessity to modify the distribution of income and resources through (inter-)governmental action to ensure a more equitable and inclusive globalization has received relatively little heed. Both fairness as a source of legitimacy for the international competitive process and fairness as distributive justice have given rise to domestic and international law and policy debates, but only the former notion appears to have been heavily influenced by US trade policy discourse and tradition.

The extent to which this understanding of fairness has informed the international debate and has been incorporated in law, or at least has had an impact on rules formulation, provides a measure of the international acceptance of this notion of fairness and its influence in international policy discourse. Despite the particular pressure that the USA can exert in decision-making at the international level, the consensus (or the lack thereof) that fairness-related normative ideas have been able to muster among countries and the adherence to them in international practice indicate the existence of an internationally shared core understanding of what fairness means in international trade relations. Such consensus is also suggestive of the trading system’s prospects in terms of its legitimacy, its pull towards voluntary compliance, and further liberalization.

By investigating the meaning of fairness in the multilateral trading system, as well as its role in and impact on creating and developing that system, this study also attempts to reflect on what justice means in international trade relations. The study thus disputes the widespread argument that fairness, like many other ‘ethical’ concepts, is elusive, subjective, and ultimately meaningless. In this regard, the somewhat facetious quip commonly used that ‘fairness, like truth, beauty and contact lenses, lies in the eyes of the beholder’<sup>19</sup> does not reflect the complexity and importance of the issue. The study starts from the premise that ‘fairness is not “out there” waiting to be discovered, it is a product of social context and history’.<sup>20</sup> Hence, the methodological approach chosen is that of an ‘intellectual history’, which seeks to understand the origin of a particular idea, trace its trajectory within (in this case) international trade

policy) discourse and evaluate its impact on policy, especially regime formation.

The study is organized as follows. Chapter 1 briefly reviews the role of ideas in international relations and situates the approach selected for the study within the theoretical parameters of social constructivism. Chapter 2 attaches a meaning to and deepens the understanding of the fairness idea by examining its various dimensions in different areas of thought. Chapter 3 examines how fairness (*rectius*, the particular understanding of this idea identified in Chapter 2) has inspired and influenced US political discourse related to international trade issues and how the notion has been translated into domestic law and treaty practice in the period that preceded the creation of the GATT regime. Chapter 4 then considers how this understanding of the notion of fairness has shaped the international debates and negotiations that have led to the creation of the trade regime, and the extent to which fairness-inspired approaches have been accepted and incorporated into international trade law up until the conclusion of the Uruguay Round of trade negotiations and the transformation of the GATT into the WTO. This is done selectively by looking at the cases of the safeguard and subsidies rules. Chapter 5 examines the main competing notion of fairness (based on equity demands) that has emerged in the debate, with its early manifestations already apparent at the time of the regime negotiations, and which mainly has come to be referred to as ‘special and differential treatment for developing countries’. The study thus remains within the realm of narrative analysis (in an understanding more than explaining mode) and concentrates on the role that fairness considerations played in the formation of the GATT regime. Through historical research, it elucidates the USA’s role as the main intellectual actor in this endeavour. However, the study is ultimately intended to contribute to the ongoing debate about the relationship between globalization and the overlapping notions of justice, equity, and fairness. Additional normative considerations in this regard are advanced in the Conclusion in Chapter 6.

## NOTES

1. For an economic investigation of the concept as applied in a domestic regulatory context, see E. Zajac, *Political Economy of Fairness*, The MIT Press, Cambridge, MA, 1995.
2. See, in general, Thomas Franck, *Fairness in International Law and Institutions*, Clarendon Press, Oxford, 1995.
3. ‘Until 1980, the proposition that the world was unfair and the USA fair remained an assertion; by 1988 it had become accepted as a fact, beyond question, among most policy-makers and with the general public. More importantly, it had become the cornerstone of US trade policy and a principal excuse for poor US trade performance’, see C. Pearson, ‘Free Trade, Fair Trade? The Reagan Record’, in C. Pearson and J. Riedel, eds., *The Direction of Trade Policy*, Basil Blackwell, Cambridge, MA, 1998, p. 12.

4. See, for instance, L. Brittan, 'How to Make Trade Liberalisation Popular', *The World Economy*, November 1995, pp. 761–7. Quite interestingly, in the draft new EU Constitution, Art. I-3, setting out the Union's overall objectives and specifically in paragraph 4 the relations with the wider world, states that the Union 'shall contribute to ... free and fair trade'. While no elaboration of the concept is provided, 'the reference to fair trade is more naturally read as an instruction to take account of the interests of developing countries in the international trading system, because the reference is juxtaposed to the "sustainable development of the earth", solidarity and mutual respect among peoples, and the eradication of poverty and protection of human rights and in particular children's rights'. See P. Eeckhout, *External relations of the European Union: Legal and Constitutional Foundations*, Oxford University Press, Oxford, 2004, p. 53.
5. See D. Conti, *Reconciling Free Trade, Fair Trade, and Interdependence: The Rhetoric of Presidential Economic Leadership*, Praeger, Westport, CT, 1998.
6. See P. Low, *Trading Free: The GATT and US Trade Policy*, The Twentieth Century Fund Press, New York, 1993, p. 28.
7. See J. Bhagwati, *The World Trading System at Risk*, Harvester Wheatsheaf, New York, 1991, p. 14; see also J. Bhagwati, *Protectionism*, The MIT Press, Cambridge, MA, 1988, pp. 33–5.
8. See J. Goldstein, 'Ideas, Institutions, and American Trade Policy', *International Organization*, Winter 1988, pp. 179–217.
9. See P. Nicolaides, 'How Fair is Fair Trade?', *Journal of World Trade Law*, no. 4, 1987, pp. 147–62.
10. See K. Abbott, 'Defensive Unfairness: The Normative Structure of Section 301', in J. Bhagwati and R. Hudec, eds., *Fair Trade and Harmonization: Prerequisites for Free Trade*, The MIT Press, Cambridge, MA, 1996, pp. 415–71; R. Hudec, "'Mirror, Mirror on the Wall": The Concept of Fairness in United States Foreign Trade Policy', in D. Fleming, ed., *Canada Japan and International Law*, 1990 Proceedings, Canadian Council of International Law, pp. 88–110; on reciprocity see, in particular, T. Bayard and K. Elliott, *Reciprocity and Retaliation in US Trade Policy*, Institute for International Economics, Washington, DC, 1994.
11. 'The objective of fair trade should be the ultimate elimination of all anti-competitive devices, measures and other impediments. The concept of fair trade can be made operational by using it to identify those government practices that reduce rather than increase competition. Trading firms voice their concerns about competition because they are more distressed by unfavourable discrimination in internal markets than at the border.' See Nicolaides, *op. cit.*, p. 158.
12. See S. Benn, 'Justice', in Paul Edwards, ed., *The Encyclopaedia of Philosophy*, Macmillan, New York, 1972, p. 299.
13. The general objective to achieve greater fairness in the trading system was openly recognised by Ministers at the close of the Uruguay Round when they stated in the Marrakesh Declaration of 1 April 1994 that the establishment of the WTO '... ushers in a new era of global economic cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system ...' (emphasis added), in *The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts*, WTO, Geneva 1995, p. iv.
14. See, for instance, United States – Taxes on Petroleum and Certain Imported Products, GATT BISD 34th Supp. 136, 1988; EEC–Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, GATT BISD 37th Suppl. 86, 1991.
15. See Frank, *Fairness*, *op. cit.*
16. For an early discussion, see C. Wilcox, 'Relief for Victims of Tariff Cuts', *The American Economic Review*, December 1950, pp. 884–9. See also E. Kapstein, 'Trade liberalization and the politics of trade adjustment assistance', *International Labour Review*, vol. 137, no. 4, 1998, p. 501; André Sapir, 'Who's Afraid of Globalization? Domestic Adjustment in Europe and America', in Roger Porter et al., *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium*, Brookings Institution Press, Washington, DC, 2001, pp. 179–204.

17. See the World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All*, International Labour Office, Geneva, 2004, p. 2.
18. See J. Bhagwati, 'Trade Liberalisation and "Fair Trade" Demands: Addressing the Environmental and Labour Standards Issues', *The World Economy*, November 1995, pp. 745–59.
19. See D. Das, *International Trade Policy: A Developing-Country Perspective*, Macmillan, London, 1990, p. 125.
20. See Franck, *Fairness*, op. cit., p. 14.

