*Journal of International Economic Law 6(3), 729–744* 

# TRIBUTE TO ROBERT HUDEC

## IN MEMORY OF PROFESSOR ROBERT HUDEC, A GREAT MIND AND A PASSION FOR TRUTH

*John H. Jackson*

Bob and I were never close and yet we were always close. Never were we formal colleagues of the same faculty or other professional positions, but always (it seems) we knew each other and knew each other's work because we had independently chosen and developed a passion for a fascinating subject matter area now broadly called international economic law, but often more specifically focused on international trade law. At a time when the GATT (General Agreement on Tariffs and Trade) was so little known that we would joke about the public perception being 'GATT – What's That?', we both were struggling to get our minds around a unique institution of international law. Here was an entity known as the most important treaty regarding international trade, and the most important international organization for the subject of international trade, yet technically (in some minds at least) the GATT was neither.

The GATT was not a treaty in the normal sense, because it was always 'provisional', applied by the Protocol of Provisional Application. It was not an organization as such, because the treaty language which created it ('provisionally') was never intended to establish an organization, but rather designed to create a massive group of treaty obligations under the supervision of an 'International Trade Organization – ITO' which was intended to be created by a thoroughly crafted charter, the 'Havana Charter' completed in 1948, but which never came into force.

So we two, mostly alone as legal academics at the start and then gradually joined by others, had to struggle with these paradoxes as well as with the intense intersection of law and economics on the international stage. What a journey it has been! Finally, by virtue of the Uruguay Round of trade negotiations completed in 1994, a true organization – the WTO (World Trade Organization) has been established with all the usual trimmings of an international legal entity, and with certain characteristics particularly relating to the most unique and probably most powerful international dispute settlement system and procedures ever known in world legal history. Bob and I both had small but professionally rewarding roles in that recent history.

I always viewed Bob as a consummate legal professional, a person with whom I could communicate in even the jargon of legalese and come away with a feeling we understood each other, even if we did not (often) agree. I always knew and followed Bob's work and writings, as I felt he did mine. We both (with many others) founded a new journal (this journal, the JIEL!) with the desire to advance the frontiers of this paradoxical subject, and with the goals of the Bretton Woods System (war prevention and enhancing world welfare) centrally in mind. I can remember some meetings in Geneva when we two were the only academics in a small group of trade diplomats and officials, struggling with 'devilish detail' fundamentals of a newly emerging dispute settlement system at the end of the Uruguay Round. I can remember conferences on various continents when we would relax after arduous and long sessions by – guess what – talking 'GATT-ese shop' with relish. I remember the recorded statement of Senator Millikin made at a 1951 US Senate Hearing, which I quoted in one of my books, that 'Anyone who reads GATT is likely to have his sanity impaired.' And indeed there were some on this earth who might have considered that Bob and I had been so infected.

But both Bob and I were not only academics for our subject matter. Both of us had government official experience, and both of us engaged in many practical endeavors related to that subject matter, including advising governments (not just the US), members of Congress, GATT and WTO officials, private clients, and even as members of dispute settlement panels as well as other commissions with responsibility. Both of us felt that this mixture of practical reality and frontier-pushing conceptual thinking was very important to our conceptions of our roles. I continue to think so today, and so I think does Bob who remains with us in spirit concretely manifested by the published wonderful and prodigious product of his amazing mind.

## REMEMBERING BOB HUDEC

*Andreas F. Lowenfeld*

I met Bob Hudec for the first time in 1963, when he was Assistant Counsel (in a two-person office) of STR, the office of the Special Trade Representative. That office (now USTR) had been invented by the House Ways and Means Committee, in one of the few provisions of the Trade Expansion Act of 1962 written on Capitol Hill, rather than by the Executive Branch.[1] The idea was that the new emphasis on international trade as an important element of American foreign policy should not be entrusted to the State Department which, it was said, always looked out for the interests of

[1] Trade Expansion Act of 1962, 48 Stat. 943, § 241.

the foreigners or for broader foreign policy goals, nor to the Commerce Department, which always looked out for narrow domestic political interests, which tended to favor protectionism. STR would stand in the middle, not as an umpire, but as an office with trade as its only mission, not weighed down by traditional bureaucracies and persistent constituencies.[2] President Kennedy accepted the suggestion, and appointed as the first Special Trade Representative Christian Herter, a former Republican governor who had been Secretary of State in the final years of the Eisenhower administration. Interestingly enough, subsequent Special Trade Representatives have nearly all been professional politicians, in at least four instances national party chairmen or presidential campaign managers.

I bring this background up because I think it sheds light on Hudec's continuing interest in exploring and explaining international trade and trade policy from all sides – political, economic, and technical, international and domestic. I did not know Bob well enough at the time to ask him why he left STR after only two years – whether it was the lure of academia or disillusion with the processes of government as he had observed them up close. (Remember, for instance that the 'bold new vision' of the Kennedy Round was also the period of launching the round of textile agreements, bilateral and multilateral.) Four decades later, looking back over Bob's professional life, I don't think he was disillusioned, in the sense of being disappointed. I do believe that the few years at STR opened Bob's eyes to the way international trade policy is conducted – not quite like Bismarck's sausage factory,[3] but not like the textbooks written before his own books and articles came out.

Bob was, of course, interested in dispute settlement, and his books on that subject from the beginning of the GATT through its absorption into the World Trade Organization remain as his lasting monument.[4] But I think he was interested not just in 'cases' – claim, defense, decision, outcome – but in evolution of institutions, particularly the GATT, which was just 15 years old when Bob started studying it, and had been endowed only with a provisional charter, no legal staff, and not even with a Director General.[5]

Despite the various handicaps with which the GATT began and the

[2] The first general counsel of STR, John Rehm, came over from the State Department, where he had been Assistant Legal Adviser for Economic Affairs. I succeeded Rehm in that post, leaving me with many things to do – East-West trade, economic sanctions, investment protection, shipping, and aviation – but only a watching brief on trade negotiations and trade disputes.

[3] 'Laws are like sausages', Bismarck is quoted as saying. 'It's better not to see them being made.'

[4] Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (1st edn, 1975, 2nd edn, 1990); Robert E. Hudec, *Enforcing International Laws: The Evolution of the Modern GATT Legal System* (1993). In reviewing the latter book, I wrote that it was not only indispensable for anyone seeking to explore the development of dispute settlement in the GATT, but valuable for everyone concerned with dispute settlement among states. Lowenfeld, Book Review, 89 Am J Int'l L 663 at 664.

[5] The first principal officer of the GATT, Eric Wyndham-White, was known simply as Executive Secretary, to emphasize, it seems, the provisional character of the organization.

ambivalence of all the major participants, the GATT survived and even prospered. Bob chronicled the ironies, the hypocrisies, and the inconsistencies, describing the behavior of governments *vis-à-vis* GATT rather in the way a novelist, say Balzac, would chronicle adventures of ordinary people – not all good, not all bad, but human and therefore interesting. At the end of the day, as Bob understood and predicted more than once, the contracting states (as they were called to avoid hints of a treaty or a permanent organization) would go to the limit, but not take the 'one more step', immortalized by Charles Addams. Even in time of war – i.e. 'trade war' – states were not prepared to reject the founding principles of the GATT.

I was surprised when Bob showed up at the 1990 Annual Meeting of the American Society of International Law with a defense of the recently reinforced Section 301,[6] the notorious self-help measure conjured up by the US Congress to retaliate against unfair foreign trade practices as defined by the United States.[7] Exponents of liberal trade such as Jagdish Bhagwati, Hudec's friend and collaborator in several projects, called Section 301 'aggressive unilateralism'.[8] How could Hudec, who had devoted his career to resolution of disputes through adjudication or other institutional processes, defend a law that purported to authorize the Special Trade Representative to determine on her own that Country *X* (read the EEC or Japan) had violated a rule of trade law, and then prescribe the measure of retaliation – the 'punishment that fits the crime'?

Bob addressed not only the situation when Country *X*, having been found to be in violation by a GATT panel, refused to withdraw the condemned measure or repeatedly postponed implementation of its promise to do so. He addressed directly the situation contemplated by the proponents of Section 301, where the United States would bypass international decision making and 'enforce' the law, – i.e. determine on its own the violation or the 'unreasonable measure' by *X* as well as the sanction designed to punish Country *X* or to bring its government to the negotiating table. He did not assert that such behavior would be legal. Rather, he called it 'justified disobedience'.

Bob did not claim to be the Martin Luther King of trade law, or even the Henry Thoreau. But he suggested – and in a longer article illustrated – that a GATT-illegal act by one major actor could help to stimulate desirable long-term legal developments.[9] For instance, the United States had no right

[6] Section 301 of the Trade Act of 1974 as amended in 1988, 19 U.S.C. § 2411 et seq.

[7] 'Self-Help in International Trade Disputes', Proceedings of the 84th Annual Meeting of the American Society of International Law, 33–38 (1990), at 32.

[8] See e.g., Jagdish Bhagwati, *The World Trading System at Risk,* ch 4 (1991).

[9] See 'Thinking about the New Section 301: Beyond Good and Evil', first published in Jagdish Bhagwati and Hugh Patrick (eds), *Aggressive Unilateralism: America's 301 Policy and the World Trading System* 111–62 (1990). Both the short remarks at the ASIL and the long article, as well as many other papers by Hudec, were collected and published in Robert E. Hudec, *Essays on the Nature of International Law* (1999).

to impose import restrictions against Brazil in 1988 for failing to protect patents of American pharmaceutical manufacturers, which were not covered by GATT at all. But that action, and the negotiations that followed, moved the participants in the Uruguay Round, including Brazil and other developing countries, to accept intellectual property protection in what became the TRIPs Agreement. For an even more compelling example, would the members of what became the WTO have agreed to binding dispute settlement without the commitment by the United States to forgo unilateral retaliation as authorized and several times implemented under Section 301?

In light of current events far removed from trade law, I cannot do better than concluding this brief memoir by quoting the following passage from Bob's 1990 speech:

> . . . I would like to examine my first conclusion – that there are situations in which disobedience can be justified, as a matter of policy, in terms of strengthening support for the legal system in question. I want to step back and examine the implications of that conclusion for international law generally. How does this example of GATT law help us to think about claims for justified disobedience in other areas of international law?

We have lost not only a friend, but a thoughtful, creative member of the international community and the community of legal scholars.

# BOB HUDEC AS CHAIR OF THE *CANADA – GENERIC PHARMACEUTICALS* PANEL – THE WTO GETS SOMETHING RIGHT

*Frederick M. Abbott*

Bob Hudec's career as an international trade scholar spanned decades. A fitting tribute to his lifetime of achievement was published last year.[10] That collective work recognizes and applauds the range of Bob's interests, his remarkable depth of insight and his humanitarian character. Bob Hudec was a great friend and colleague to the international trade community.

Out of the expanse of Bob's many contributions, there is perhaps none that has been (or will be) more widely read and commented on than the report of the WTO dispute settlement panel in *Canada – Patent Protection of Pharmaceutical Products* ('*Canada – Generic Pharmaceuticals*'),[11] for which Bob served as Chair. In today's contentious global environment, it seems almost

[10] Daniel L. M. Kennedy and James D. Southwick (eds), *The Political Economy of International Trade: Essays in Honor of Robert E. Hudec* (Cambridge University Press, 2002).

[11] WT/DS114/R, 17 March 2000.

inescapable that the message will be tied to the messenger. Ideas and their execution are linked to individuals. Perhaps there is nothing so new in this. The history of entire civilizations is often recounted by reference to a few emblematic individuals who, for better or worse, made a difference. I hope in a few short paragraphs to suggest that, in the matter of *Canada – Generic Pharmaceuticals*, we were fortunate to have a person of the character and wisdom of Bob Hudec to serve as a pivotal decision-maker.

The decision rendered by the panel in *Canada – Generic Pharmaceuticals*, which was not appealed, is certainly the most important analysis of the TRIPS Agreement to date. It was evident from the inception of the proceedings that the case was significant because it addressed a subject matter of intense interest in the field of medicines. The relationship between pharmaceutical patents and the regulatory approval of generic medicines had been the subject of legislative and court battles in the United States, as well as in Europe. There were critical issues of public health policy and access involved, and a great deal of money at stake.

We may of course ask whether the WTO should be involved at all in dealing with issues of significance to public health. Should there be a TRIPS Agreement? Should it have been drafted in a different way? Is the WTO sufficiently democratic? All of these are legitimate questions. But when in November 1998 the European Communities (EC) asked the Dispute Settlement Body (DSB) to establish a panel, the WTO Legal Division (then directed by Bill Davey) was obligated to work with the EC and Canada to agree upon a three-person panel and, in the absence of agreement (and the parties did not agree), to seek its appointment by the Director-General of the WTO (then Renato Ruggiero).

Who should be entrusted to Chair a panel making a decision of such importance to global public health policy? When Bob Hudec's appointment was announced, I felt the WTO had done itself a great service. It had appointed a person of enormously good and sound judgment, of great personal integrity, and with extensive experience looking at trade problems from different angles, to preside in the affair. To me, one thing was certain, Bob Hudec would exercise his best personal judgment in light of the facts and law presented to him. He would approach the matter as we might hope in the best case for a judge: as a particularly well-informed and intelligent neutral.

The qualifications of the two other panel members should be mentioned. Mihály Fiscor, a Hungarian national, until shortly prior to his appointment had been Assistant Director-General of WIPO. His principal expertise was in the field of copyright. Dr Jaime Sepulveda, a Mexican national, was (and presently is) the Director-General of Mexico's National Institute of Public Health. He had researched and published extensively in the field of AIDS prevention and treatment, and on tropical diseases, and had worked with the major international organizations involved in these areas (such as UNICEF and WHO).

The panel made several key findings. The main determination was to approve Canada's regulatory review exception. This was a major step in safeguarding public health interests because such an exception reduces the lead time to market for generic pharmaceuticals. Several ancillary points regarding the panel's determination are notable. First, it rejected the EC's claim that such an exception would only protect the legitimate interests of patent holders if coupled with a patent term extension. Since the US Congress had adopted its 'Bolar' regulatory review exception and patent term extension as a package, there was certainly pressure from EC demands and US precedent to impose such a condition. Today, the issue of patent term extension is high on the Pharma agenda for turning back the impact of this case. Second, although the US Congress legislatively reversed the decision, it is worth recalling that in *Roche* v *Bolar* the US Court of Appeals for the Federal Circuit (CAFC) *disallowed* a regulatory review exception (under the guise of experimental use) as a matter of US patent law.[12] In approving the regulatory review exception for Canada (where it had been adopted by statute) and, in essence, for other countries (where in a number of cases it had been adopted as judicial doctrine), the panel effectively rejected a very narrow interpretation of patent law adopted by the CAFC.

A fundamental legal development in the case was the panel's focus on the term 'discrimination' in Article 27.1, TRIPS Agreement. The discussion here is very much that of a highly sophisticated trade lawyer paving the way for a far more nuanced approach to the agreement than might be appreciated by industry *demandeurs*. 'Discrimination', the panel said, 'is a normative term, pejorative in connotation, referring to results of the unjustified imposition of differentially disadvantageous treatment'.[13] In the long run, the panel's focus on 'discrimination' as the key term for analysis under Article 27.1 will be a significant milestone in the development of TRIPS law. Differentiation based on field of technology or whether products are imported or locally produced is justifiable depending on the facts and circumstances.[14]

From the standpoint of pharmaceutical patent holders the panel's decision to approve the regulatory review exception would have a major financial impact, reducing the extent of their monopolies. The decision would, in a very significant way, inure to the benefit of consumers around the world.

The panel's disapproval of Canada's stockpiling exception was not unexpected based on the absence of production constraints. This ruling on stockpiling was of much lesser importance to generics producers and the consuming public than that on the regulatory review exception.

[12] 733 F. 2d 858 (CAFC 1984).

[13] *Canada – Generic Pharmaceuticals*, at para 7.94.

[14] To quote the panel, 'The standards by which the justification for differential treatment is measured are a subject of infinite complexity.' Id.

Do I agree with all the details of the decision? No. Very shortly after the case was decided, I told Bob (and wrote) that I disagreed with subjecting Article 30 limited exceptions to the Article 27.1 rule against discrimination as to field of technology. Bob said he thought this had been pretty clear.

More recently I have critiqued at some length the panel's decision to adopt a definition of 'limited exception' that is narrower than the dictionary requires. Yet the panel's decision to adopt a narrow definition of 'limited exception' should be considered in its context. In late 1999, the political pressures resulting from aggressive US and EC policies on TRIPS were building up, but public antipathy towards that conduct had not yet manifested itself at the level surrounding the Medicines Act trial in South Africa. The Doha Declaration on the TRIPS Agreement and Public Health was about two years off.

In its *Shrimp-Turtles* decision, the Appellate Body said that WTO texts are 'evolutionary'.[15] Just as the language of GATT Article XX(g) must be interpreted in light of contemporary concerns, as evidenced by the preamble of the WTO Agreement, so must Article 30 of the TRIPS Agreement be interpreted in light of evolutionary developments in the field of public health, the adoption by Ministers in November 2001 of the Doha Declaration, and the express recognition of the objective of the WTO to 'promote access to medicines for all'.[16]

Was there a better candidate than Bob Hudec for Chair of the panel? It has been suggested to me on a number of occasions that some other Chair might have had more background in intellectual property law. From a public health perspective, would this have worked an improvement on the decision? Experience suggests that the group least amenable to offsetting strong intellectual property protection with public health and consumer interests is the patent bar.[17] Moreover, the *Canada – Generic Pharmaceuticals* case did not concern the intricacies of patent law – such as interpretation of a set of equivalents claims in a specialized field of science. It addressed instead a question of balancing patent and regulatory policies in the achievement of a

[15] 'The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* – which informs not only the GATT 1994, but also the other covered agreements – explicitly acknowledges "the objective of *sustainable development*"'. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R, 12 October 1998, para 130.

[16] Ministerial Conference, Declaration on the TRIPS Agreement and Public Health, adopted 14 Nov. 2001, WT/MIN(01)/DEC/2, 20 November 2001, para 4.

[17] This observation is certainly not new here. Fritz Machlup 50 years ago observed that the group most resistant to critical analysis of patents was the patent bar. See his foreword to Edith Tilton Penrose, *The Economics of the International Patent System* (1951).

preferred public health outcome. Did this call for a patent lawyer? It would hardly seem so.

No decision-making body in the United States exercises more influence in the field of patents than the Supreme Court. Are the Justices patent lawyers? Not to my knowledge.

Did the panel suffer from a lack of public health expertise and sympathy? I commend Dr Sepulveda's curriculum vitae to you.[18]

The WTO may have many failings. I could provide you with a list. Sometimes, however, the WTO gets things just right. The appointment of Bob Hudec as Chair of the *Canada – Generic Pharmaceuticals* panel was such an instance.

## REMEMBERING BOB HUDEC

*Gary Horlick*

I first heard the word GATT as a first-year law student in my contracts course, which may sound odd until you know that my contracts professor was Bob Hudec. Little did I appreciate what lay behind his question, 'Is the GATT a contract?'

I want to note that Bob is the unacknowledged father of the most important single concept in the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) – 'specificity'. One night in Poland in 1980, during the International Law Institute's Interface 11 Conference, the group took up the topic of the role of exchange rates in international trade and their interaction with theories of comparative advantage. This may sound like a fairly intense topic for conversation on a bus ride, but most other topics had been exhausted over a series of dinners during the previous days. One of the sessions was held, appropriately, in a meeting room at the aircraft factory, which was the assembly point for the famous Polish golf carts that became that source of the most ridiculed anti-dumping case ever. *Electric Golf Carts from Poland*, 40 Fed. Reg. 53383 (Treas. 18 Nov. 1975) (Antidumping Order), revoked by *Electric Golf Carts from Poland*, 45 Fed. Reg. 52780 (Dep't Comm. 8 Aug. 1990), and too many law review articles since to be cited. On this particular bus ride, Bob commented that it was important to distinguish between general changes in a national economy with floating exchange rates and distortions in favor of specific industries. A few months later, two related issues were rather forcefully brought to my attention while I was international trade counsel for the US Senate Finance Committee: US concerns about Canada's National Energy Program, which

[18] Available at http://www.insp.mx.

attempted to set the price of oil for Canadian industry at 15 percent below the price in the United States, and EU complaints about low fixed natural gas prices in the United States. A year later [after I became head of Import Administration at the US Department of Commerce] Bob's observation became the 'specificity' rule now found in Article 2 of the WTO Subsidies Agreement.

## PROFESSOR HUDEC'S CONTRIBUTION TO WORLD ORDER

*Steve Charnovitz*

For over three decades, Professor Robert E. Hudec shaped the field of international trade law, and inspired students, colleagues, and policymakers around the world. His sudden death on 12 March saddened everyone who worked with him and learned from him. Bob Hudec was a spirited, witty, unassuming, kind, and honest man. He enjoyed having his ideas contested by others, and was willing to spend time to help colleagues and students think through their ideas.

In the first paper of the *Festschrift* volume prepared in Hudec's honor, Professor John H. Jackson remarked that Bob's 'enormous output of research, writing, and thinking has made a substantial contribution to world order and to the burgeoning new subject of international economic law.'[19] Readers of each of the 22 essays in that volume (including my own) will see the many ways in which Hudec's ideas influenced analysts of trade law and the political economy of trade policy.

Professor Hudec's first book, *The GATT Legal System and World Trade Diplomacy* (1975) explored the dialectic between legalism and diplomacy, and articulated the theme for which he is most well known. (An earlier article written while Bob taught at Yale Law School was entitled: *The GATT Legal System: A Diplomat's Jurisprudence*.) The book argued that in the community of the General Agreement on Tariffs and Trade (GATT), it would have to be the 'force of normative pressure' that leads to legal compliance. Although his analysis saw merit in the adoption of more rigorous dispute procedures, Hudec cautioned that 'flexibility' would continue to be needed. In the obituary published in the *New York Times*, the reporter quoted Professor Robert Howse as explaining that Hudec 'developed an approach

[19] John H. Jackson, 'Sovereignty, Subsidiarity, and Separation of Powers: The High-wire Balancing Act of Globalization', in Daniel L. M. Kennedy and James D. Southwick (eds), *The Political Economy of International Trade Law* 13 (Cambridge University Press, 2002).

that neither reduced international trade law to economic policy nor made the law into a kind of formal structure impermeable to politics and diplomacy. He gave both legalism and diplomacy their due.'[20]

In his 28 years at the University of Minnesota Law School, Professor Hudec helped to transform the GATT into a more legalistic system. In *The GATT Legal System*, he opened a window into GATT case law by bringing each case to life for the reader so that the issues before the panel could be understood and the panel's reasoning and techniques appreciated. Each case study also discussed what happened *after* a panel ruling. By standardizing his approach to each GATT case, Hudec developed the first database for empirical research on the GATT dispute system. He continued the same approach in his subsequent major volume on the GATT published in 1993. Attention to the politics of GATT disputes and to implementation – alongside good analysis of specific legal issues – has been called the 'Hudec methodology', and is now a standard in good scholarship on trade cases. One can see it in many of the articles in the *Minnesota Journal of Global Trade*, the student journal initiated by Hudec in 1992 with the support of his colleague Professor Fred Morrison. Readers who want to plow deeper into Hudec's views about international trade litigation should start with his essay 'Transcending the Ostensible' originally published in 1987, and reprinted in a major collection of his articles entitled, *Essays on the Nature of International Trade Law*.

The *Essays* contain many gems from Hudec's meticulous scholarship on political economy, including topics as diverse as the infamous Section 301 of US trade law, Jan Tumlir's critique of protectionism as a Constitutional failure, the political morality of multilateral trade negotiations, and the demands for achieving 'fairness' in international trade law. Hudec's interest in this latter problem led to an innovative collaboration with Professor Jagdish Bhagwati during the early 1990s in organizing a multi-year, inter-disciplinary research project of lawyers and economists to examine the most challenging harmonization claims of that era including industrial and regulatory policy, environment, labor, tax, antitrust, and other issues. The project led to a two-volume set of essays that became an instant classic.

My own collaboration with Professor Hudec began in the early 1990s when he took an interest in my research on trade and the environment. He had some strong views about that linkage, and in numerous exchanges by fax, he convinced me of some errors in my analysis, and I tried to persuade him of one or two fault lines in his approach. Debating with Bob was always stimulating and satisfying, and if someone showed him a convincing opposite position, he was willing to change his opinion.

[20] Daniel Altman, 'Robert E. Hudec, 68, Expert on Global Trade Law, Dies', *New York Times* (31 March 2003), at F7.

Although illness had reduced his ability to attend conferences in the past couple of years, Bob Hudec remained active in teaching at the Fletcher School, in research, in editorial board work, and in wide-ranging correspondence with colleagues. In early 2003, I had been in correspondence with him about an essay he was writing for a new collection in honor of Justice Florentino Feliciano, the former chair of the Appellate Body. Hudec was planning an historical and reflective essay on the GATT negotiations in the mid-1960s regarding rules for disputes brought by developing countries, based on his own notes as an Assistant General Counsel in the Office of the US Special Trade Representative. Sadly, he was still a few months away from turning that tantalizing prospectus into a manuscript.

In an obituary in the *Financial Times*, Martin Wolf wrote that 'Breadth of vision, curiosity, originality and rigour marked all Hudec's work.'[21] We will remember those qualities in Bob, and we will miss his friendship.

## A SHORT TRIBUTE TO BOB HUDEC

*William J. Davey*

The recent passing of Bob Hudec is a milestone event in the history of international trade law. Bob was one of a very few pioneers in the academic study of the General Agreement on Tariffs and Trade (GATT), and, the first to analyze comprehensively its system of settling trade disputes between sovereign states. His first book, dating back more than a quarter of a century, set the standard of how to approach the evaluation of such a system. Consequently, Bob's work was truly indispensable. Indeed, for much of the GATT period, the only reliable sources of information about what actually happened in all but a handful of high-profile dispute settlement cases were his seminal books – *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* and *The GATT Legal System and World Trade Diplomacy*. The vast detail on individual disputes contained in these volumes epitomized the care and thoroughness with which Bob approached his scholarly activities.

As someone interested in GATT/WTO dispute settlement, I always found Bob to be a fascinating person with whom to talk. His experience in respect of trade dispute settlement processes and procedures was truly encyclopedic as he spared no efforts to amass relevant data. Indeed, his detailed research on the outcomes of the various dispute settlement cases, which involved extensive interviews with participants in the process, meant that there was

[21] Martin Wolf, 'Trade Law Loses World Expert', *Financial Times* (24 March 2003), at 9.

little, if anything, that he did not know about what actually happened in virtually all of those cases. Moreover, his service in the US Special Trade Representative's Office gave him a governmental perspective; his many summers researching in Geneva gave him an internationalist perspective; and his service as a panelist on cases arising under GATT and the WTO agreements, as well as the US–Canada Free Trade Agreement and NAFTA gave him practical arbitral experience on a myriad of issues: from technical customs classification issues (when is butter really butter?), to customs user fees, to countervailing duty rules, to conservation issues, to safeguards, to complex intellectual property issues. He truly understood how the system worked.

To have an impact, a scholar must share his or her knowledge, and Bob excelled at that. Of critical importance to the future, and what obviously resulted in the huge impact that he had on thinking about dispute settlement, was his willingness, even eagerness, to share his knowledge with others, both through his works and in one-on-one conversations.

Bob's interest in the system, however, went far beyond simply trying to understand it and describe it. He had a fundamental interest in its continued successful operation. While he certainly did not hesitate to criticize it, he was always mindful of its fragility and the difficulties of trying to resolve effectively disputes between sovereign states. Thus, I think it could be said that he was protective of the system. Indeed, in some of his writings in the last decade, he raised legitimate concerns about the movement of the GATT/WTO dispute settlement system toward a more and more judicial-like process, especially with the advent of the Appellate Body and the rules on automatic adoption by the WTO Members of the reports produced by the dispute settlement system. Time will tell whether this judicialization was a wise idea. For the moment, it is fair to say that some of the bloom of initial enthusiasm has begun to wilt a bit as problems of implementation by the 'big players', first the EC and more recently the United States, have seemed to become more pervasive, a result that could undermine the otherwise rather amazing success of the system to date.

While I have emphasized Bob's work on dispute settlement, it must be noted that his interests in GATT/WTO law were much broader. While he wrote on many topics, I think the two other areas where he had a particularly significant impact were in the area of the national treatment and in respect of the position of developing countries in the GATT/WTO system. His questioning of the wisdom of developing countries seeking to avoid commitments and to obtain special and differential treatment remains relevant many years after he wrote on the subject.

For me, Bob's impact can be simply summarized. For someone interested in GATT/WTO dispute settlement, Bob will always be the perfect role model of what an academic should do and how one should act.

# ROBERT HUDEC AND THE VOCATION OF INTERNATIONAL TRADE LAW

*Joel P. Trachtman*

I began reading Bob Hudec's work when I became interested in international trade law. I first met Hudec in the mid-1990s, at an American Society of International Law meeting. We began a correspondence when in 1997 I sent him one of my papers to review. When, in 1999, he inquired about joining the faculty of the Fletcher School of Law and Diplomacy, where I teach, I was delighted.

During the too-brief period when we were colleagues at Fletcher, I looked forward to our weekly luncheon discussions, or other discussions when I would stop at his office down the hall to ask a question. In response to any question, Hudec would quickly show me the history of the issue, and the depth of legal, political, economic, and historical complexity that one must master in order to formulate an answer. For Hudec, there were few easy answers. It was wonderful to have a nearby colleague who studied the same topics, with the depth and background of Bob Hudec.

I quickly grew to think of our lunches as my private tutorial, and would plan carefully the topic on which I wanted to be educated at our next meeting. For example, at one point recently, I was preparing a talk about the problem of TRIPS restraints on access by poor people to medicines. I had read the WTO *Canada – Generic Medicines* panel decision, and knew that Hudec had been on the panel. I came to lunch with a list of questions. It was a rare privilege to be able to ask him why he had analyzed the law the way that he had. He was able to convey to me the complexity, and the contingency, of the tribunal's task in a case like this, and the occasion for the exercise of judgment. He conveyed to me the political context of the negotiation of the TRIPS agreement, and how this context resulted in specific provisions of the treaty. These tutorials conveyed to me not only Hudec's knowledge, but also a sense of his beliefs about our vocation.

Hudec was a positivist, in the sense that he believed in the authority of states expressed through positive law, as the main source of law. However, Hudec believed in the exercise of judgment by tribunals. He felt that tribunals play a dynamic social role, and work with treaty-writers in a complex relationship. Hudec believed that tribunals must be faithful to their mandate, and understood well the political legitimacy of statutes and treaties, as compared to adjudicative action. However, he saw the mandate of panels as a delegation of judgmental authority, rather than a mechanical assignment to apply clear law to discreet facts. He understood this delegation in its political context. This is one of the points expressed in 'Transcending the

Ostensible'[22] and in Hudec's later work on the WTO panel decision in the Section 301 case. States sometimes agree to disagree, or simply fail to agree in detail, and leave it to tribunals to fill in the blanks.

Hudec believed in a subsidiary role for scholars. The role of the legal scholar is not normative, but is positive, or descriptive. Hudec was impatient with most legal theory, and I can now see why, as it is often mere speculation that is not testable, and has no empirical or other support. Hudec was known as one of the great realists of international trade law. He loved nothing better than to debunk conventional wisdom, and 'transcend the ostensible'. His perspective, which recognized that international trade law is inextricably joined with international trade politics, and cannot be understood except in historical perspective, is captured in the title of his first article, entitled 'The GATT Legal System: A Diplomat's Jurisprudence'.[23] A frustrated chemist (he had to give it up when, in college, he clumsily broke too many costly test tubes), Hudec was also a pioneering empiricist of international trade law. He painstakingly analyzed and categorized hundreds of GATT and WTO opinions, in order to be able to make informed observations about varying features of GATT and WTO dispute settlement.

Hudec felt strongly that the key element in superior scholarship is the instinct and the ability to look behind the conventional explanations of legal conclusions in search of a better understanding of what the law really is, and why. According to Hudec, this requires a critical, or skeptical, perspective that poses additional and more rigorous questions asking whether conventional explanations are in fact logical, coherent, persuasive, and grounded in reality. It is the sort of perspective that searches for something wrong, or something missing. Hudec's perspective is demanding of the scholar. It requires the closest attention to detail, and sensitivity to nuances of facts and of argument. Moreover, it requires great modesty and integrity. These characteristics are exemplified by Hudec's work.

Hudec's approach to teaching was much like his approach to scholarship: clear, empirical, and nuanced. I found it a revelation to see how well students responded to this approach. The students seemed to have an instinct for this type of learning, and immediately understood their good fortune to study with him. Hudec saw it as an opportunity and a trust to educate the next generation of scholars and policymakers in international trade, and he performed this role with dedication and talent.

Horace Walpole wrote that the world is a tragedy to those who feel, but a comedy to those who think. Bob Hudec had the depth to both feel and think, and our luncheon conversations moved easily from dismay to humor, and often back again. Hudec believed in the important role of international

[22] See Robert E. Hudec, 'Transcending the Ostensible: Some Reflections on the Nature of Litigation Between Governments', 72 Minn L Rev 211 (1987).

[23] 4 J World Trade 615 (1970).

trade law in global society. He was especially concerned about the position of developing countries, and at the time of his death was about to begin work on a new book on the treatment of developing countries in the WTO legal system. His positivism and realism should not be mistaken for detachment. But he felt that he could contribute the most by assisting in the pursuit of truth about the logic, coherence, and realism of international trade law rules.

We will all miss our encounters with Bob Hudec. Perhaps more importantly, his contribution to global society will be missed, as the role he performed was important to the understanding and enhancement of the rules of international trade, and to the improvement of the position of the poor.

## FOND MEMORIES OF PROFESSOR ROBERT HUDEC

*Marci Hoffman*

I worked with Professor Hudec for six years at the University of Minnesota Law School. During that time, I worked closely with him and, more importantly, I learned a great deal from him. When I arrived at Minnesota, I was a fairly new international law librarian, and he took the time to teach me about the international trading system, the relevant agreements, and the complex documentation. Much of what I know and understand about the GATT and the WTO is because of Professor Hudec. I always appreciated his attention to detail and his precise research requests. While I will miss him, I am comforted by the knowledge that his legacy lives on in his students, colleagues, and others he touched over the years.