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An Original Approach and Original Insights

Robert Kudrle*

The legal and political complexities of what we now call economic globalization first engaged Bob Hudec as a young lawyer. He discovered that much of his formal legal training served poorly for understanding international law and institutions, despite their sometimes superficial resemblance to domestic practices and structures. Bob spent a career developing his own approach: a painstaking attempt to “transcend the ostensible” that joined detailed observation and sharp logic with analogies and parables rather than the concepts familiar to social scientists.

Until the mid-eighties, Bob focused his professional associations largely on trade officials and other lawyers with similar interests. In 1986, however, Bob joined with several colleagues from around the University of Minnesota in a multi-college and multidisciplinary discussion group inspired by our Industrial Relations colleague, Mahmood Zaidi. The group included faculty from Law, Economics, Applied Economics, Political Science, Industrial Relations, and the Humphrey Institute. We originally aimed to gain support from the National Science Foundation for an unusually multifaceted look at the determinants of U.S. trade policy. After many meetings and much drafting this quest was ultimately abandoned, partly because of the departure of a key player from the University. The activity paid rich dividends nonetheless. The group became the core of what Bob dubbed “The International Trade Consortium;” by the early nineties this group had established a university-wide seminar on international economic policy that has met biweekly ever since.

During the initial years of the International Trade Consortium, Bob also established a collaboration with the distinguished international economist, Jagdish Bhagwati, that ulti-

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mately resulted in the two volumes of *Fair Trade and Harmonization*.¹ Bob and I had many discussions during those years, and skepticism about the approach of his social science colleagues was a recurrent theme. He admired their mastery of what appeared to be arcane theory with its sometimes counter-intuitive implications, but he was more struck by its limitations. He saw most of the writing as an attempt to provide quite simple answers to what were, for him, artificial and uninteresting questions. (This was true not only of the work of economists but also of the more formal political scientists.) He felt closest to those social scientists whose approach was similar to his own: those who favored complete immersion in the details of international economic affairs and who offered satisfactory accounts of the complexities of law and policy development.²

In their excellent introduction to Bob Hudec's *Festschrift*³ Dan Kennedy and Jim Southwick state a distinct Hudec contribution very succinctly: because international legal institutions operate to influence political behavior and often command tenuous domestic political support in critical polities, it is necessary to transcend analogies with domestic institutions and straightforward explanations.⁴ Bob accomplished this transcendence almost continuously in his writing, most notably in the Steen Chair inaugural lecture in 1987. There he argued for an interpretation of the Tokyo Round Subsidies Code as a complex deal between the U.S. and the EU involving multiple objectives and understandings, with some of the latter not fully known even many years later. He provides detailed argument and evidence to support his memorable conclusion that "[b]oth sides wanted what the Subsidies Code could buy, but neither was able to come up with the payment. So they decided to negotiate something that would look like payment."⁵

Much of Bob's argument can be recast in more formal social science terms. There are interests, ideologies, and institutions. There are principals and agents and multilevel games. And

1. FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996).

2. Although a pioneer in the development of international trade theory, his collaborator, Jagdish Bhagwati, also served as Economic Policy Advisor to the Director-General of GATT from 1991-1993.

3. THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC (Daniel L. M. Kennedy & James D. Southwick eds., 2002).

4. *Id.* at 1-2.

5. Robert E. Hudec, *Transcending the Ostensible: Some Reflections on the Nature of Litigation Between Governments*, 72 MINN. L. REV. 211, 220 (1987).

there are largely exogenous developments in technology and relative prices in each of the national economies altering the challenges faced by policymakers. Indeed, Bob Hudec put great emphasis on politicians temporizing—projecting (or at least hoping) that future conditions would change. In many cases, for example, the failure to provide immediate relief (protection) could be expected to lead to the decline of a sector's political power as its increasing economic weakness led to closures and labor force dispersion. But it is hard to find a place in Bob's writing where a key argument would be greatly improved in clarity or persuasiveness by invoking additional theory. Bob was as interested in the detailed texture of developments in law and policy as much as broader trends. He gave the impression that he would have been delighted to find illumination and support from the economics and political science literature and was in fact always on the look out for it—largely without success (as the paucity of his references to those literatures suggests).

Shortly before he died Bob applied his insights to a question of immense importance to the future of the trading system: how should U.S. unilateralism be confronted? The heart of the argument again centers on non-unitary actors developing national positions that compromise internal differences. In this unpublished piece⁶ he sketches the familiar dynamic linking the desire of other states to win U.S. abandonment of Section 301 unilateralism (about which he had won fame earlier for categorizing as similar to civil disobedience⁷) to Article 23 of the WTO's Dispute Settlement Understanding, which may be read as not only requiring the neglect of 301 but its actual repeal. Bob argues that the Congress would never have allowed 301 to be repealed, so progress required some way to render it merely dormant. He dissects a WTO panel argument that interprets the continued existence of 301 as the equivalent of a sign remaining on the property of one of the two previously quarreling farmers stating, "Trespassers may be shot on sight." He argues instead that the United States and the EU are better thought of as clans rather than individuals—the Hatfields and the McCoys—and that the

6. Robert E. Hudec, *Getting to Maybe: An Interpretation of International Agreements Between Divided Governments* (2001) (unpublished manuscript, on file with the *Minnesota Journal of Global Trade*).

7. This rationale was not offered for the 1988 version, so-called "Super-301." See Robert E. Hudec, *Thinking about the New Section 301: Beyond Good and Evil, in AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

U.S. Hatfields are in fact two subgroups: the peacemakers and the hotheads. Prudent McCoys, understanding the problem, would do well not to push the issue too far. In support of his interpretation, Bob demonstrates that, despite its seemingly positive response to EU objections to the continued existence of 301, the panel ultimately develops another argument that allows the offending legislation to pass muster anyhow. This kind of argument is hard to develop with partial derivatives. The implicit overall conclusion is that each major party will push its advantage at the margin, but the stakes are so high that accommodation will likely be reached.

The subtle complexities of international trade relations vividly underlie a concern Bob (and others) voiced in his last years. The introduction of automatic sanctions in the WTO created an impression that Bob and other supporters found misleading and dangerous. Many, far removed from the WTO's actual workings, saw the sanctions innovation as a dramatic confirmation of the power of the world trading system and a means to advance many diverse causes. Bob saw instead continued systemic fragility that could prove fatal if the scope of sanctionable offenses were significantly broadened.

In sharp contrast with most modern social scientists who apply general tools to an array of problems, Bob Hudec spent a career focusing his great gifts on understanding the messy reality of international economic law and developing his own abstractions to suit the problem. He cared deeply about the success of the enterprise he studied and saw his own scholarship contributing to that success.⁸ In his inaugural lecture for the Steen Chair, Bob wrote of the complex history of GATT developments in the eighties. "There is probably no alternative to this process of staggering from one inadequate form of temporizing to another . . . It is possible I think to identify some kinds of halting progress amid all this wreckage."⁹ The observation applies just as well to the uneven process of international economic cooperation over the ensuing fifteen years, and Bob Hudec helped us understand all of it better than anyone else.

8. Bob spared no effort to set people straight when their characterization of the GATT system appeared unfair or simply wrong. I once sent him an op-ed from the *Financial Times* by a leading continental economist that I thought he might otherwise miss. Bob disagreed strongly with the piece, but instead of ginning up a clever riposte for publication—which he easily could have done—he wrote a long, elegant, and carefully reasoned letter to the author.

9. Hudec, *supra* note 5, at 224.