

Professor Hudec and the Appellate Body

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GATT dispute settlement will probably always teeter on the edge of crisis, for there will always be a tendency to use it to cover up substantive failures. I like to believe, however, that if GATT dispute settlement keeps its balance for another forty years, Governments may end up creating an effective litigation procedure in spite of themselves.

Robert E. Hudec¹

I. INTRODUCTION

I met Professor Hudec only once. September 1997. It was during a NAFTA panel hearing in the broom corn brooms case. He was a panelist in that case. In fact, he was chosen by Mexico to serve in that dispute. According to the NAFTA's "crossed selection" mechanism, a party to a dispute gets to choose panelists who are nationals of the other party.² At that time, I was a junior attorney in the office of the General Counsel at the Mexican Ministry of Economy, I had to do the research for panelists selection among American trade lawyers. To be sincere, I don't remember very much of the result of that research. The only thing I do remember was that one of the reasons behind Professor Hudec's selection was his impeccable reputation as a fair-minded person and as one of the founders of the American international trade law doctrine.

So, there I was in front of him, listening to his questioning

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1. Robert E. Hudec, *"Transcending the Ostensible": Some Reflections on the Nature of Litigation Between Governments* 72 MINN. L. REV. 211, 226 (1987).

2. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, 605 (1993).

and feeling somewhat overwhelmed by the whole scene. Bear in mind that this was in fact the very first trade case handled by a group of young and inexperienced Mexican attorneys. At that time, GATT/WTO disputes were handled by the Mexican Mission in Geneva, so this was our very first trial and actually the first time Mexico was participating in a NAFTA dispute.

Maybe this feeling was the reason which prevented me from approaching him when that hearing ended. This was my only chance and alas, turned out to be my last chance to have a chat with him. This is why when Professor Shaffer very kindly invited me to participate in this gathering, it gave me the perfect opportunity, since I was coming to his alma mater, to go through his work again and pay a very humble tribute to a great international trade law scholar.

As I reviewed his work, a lot of adjectives were used to describe him. Professor Davey called him “the role model of what an academic should be”³; Professor Trachtman stated that he was the “pioneering empiricist of international trade law”⁴; Professor Jackson called him a “consummate legal professional”⁵.

But the more I reflect on it, the more I come to the conclusion that the word that best describes him is “honest.” According to the Oxford shorter dictionary, honest means “free of deceit and untruthfulness; sincere”⁶. Professor Hudec was an honest person. As far as I can tell, Professor Hudec did not believe in “mantras,” he had the honesty to accept or modify his views according to the reality at hand or simply accept when his ideas were wrong.

He always tried to find balance between diplomacy and the rule of law. Between law and economy reality. This is evidenced by the fact that his work continues to be an essential reference in many topics. In this brief journey through Hudec’s work, I will try to touch upon some of the key aspects of his international trade work.

II. AIM AND EFFECTS DOCTRINE

On substance, one has to start with his aim and effects test

3. John A. Jackson et. al., *Tribute to Robert E. Hudec*, 6 J. INT'L ECON. L. 729, 740 (2003).

4. *Id.* at 743.

5. *Id.* at 730.

6. SHORTER OXFORD ENGLISH DICTIONARY, 1534 (5th ed. 2002).

or doctrine with regard to the concept of “like product.”⁷ In my view, the best example of Hudec’s thinking or approach towards the concept of like product is his description of actions taken by the United States during the Chicken war, when he describes in one of his papers that, when he was a U.S. official during the Chicken War the United States raised tariffs for brandy, clearly directed to France by including a tariff heading of “brandy of more than 9 dollars per gallon.”⁸ In this regard, Hudec asks: “[w]hy would GATT permit governments to do indirectly (discrimination-by-product-distinction) what prohibits them doing directly (origin specific discrimination)?”⁹

The most telling indication that his work in this area remains an important reference is that some authors continue to debate whether or not every new report from a WTO panel or the Appellate Body comes closer or departs from this concept.¹⁰ It is also telling that his legacy in this respect went beyond the like product concept and contributed to the discussion of other aspects of trade law beyond GATT Article III, such as GATT Article I, intellectual property or technical barriers to trade.¹¹

Despite the importance and longevity of the like product concept, I believe Hudec’s most important contribution of the aim and effects doctrine is his introduction of the notion of the application of economic concepts to the rule of law. I am sure that if he were still with us, he would want to expand the applicability of this notion to every aspect of international trade.

I understand that this was not Professor Hudec’s only contribution to the substance of international trade law. For instance, Gary Horlick mentions that he is the “unacknowledged father of the most important single concept in the WTO Subsidi-

7. Robert Hudec, *Like Product: The Differences in Meaning in GATT Articles I and III*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 105 (Thomas Cottier & Petros Mavroidis eds., 2000).

8. *Id.*

9. *Id.*

10. See Roessler Frieder, *Beyond the Ostensible: A Tribute to Professor Robert E. Hudec’s Insights on the Determination of the Likeness of Products under the National Treatment Provisions of the General Agreement on Tariffs and Trade*, 37 J. WORLD TRADE 771-781 (2003).

11. See Amelia Porges & Joel P. Trachmann, *Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects*, 37 J. WORLD TRADE 783 (2003); T.N. Srinivasan, *Nondiscrimination in GATT/WTO: Was There Anything to Begin With and is There Anything Left*, 4 WORLD TRADE REV. 69 (2005).

dies and Countervailing Measures Agreement—"specificity."¹²

III. DISPUTE SETTLEMENT

In addition to pioneering economic concepts, Hudec was also the most active advocate of the GATT dispute settlement procedure. He defended the balance between diplomacy and rule of law created by both aspects of the system. In this regard, I want to highlight two key problems that he identified in this transition from GATT to WTO, which remain valid today.

A. TRANSPARENCY

Hudec was critical of the current practice and made it clear that "the GATT must first remove the excessive blanket of confidentiality that surrounds its law and its legal sources."¹³ This critic was directed towards the fact that GATT dispute settlement documents kept restricted for a long period of time. Thus, Hudec proposed that, "instead of thinking about how to run away from the unpleasant legal behavior caused by the public attention, the WTO should think about how to manage it."¹⁴

Hudec went as far as proposing allowing "anyone" to file briefs before panels and the Appellate Body.¹⁵ Of course, WTO Members have not gone that far, although transparency has indeed increased substantially over the last years. So far, panels have held public hearings in fourteen disputes and the Appellate Body in eight disputes. Currently, an open hearing relating to an aircraft dispute between the United States and the European Union is taking place before the Appellate Body.

WTO has also increased transparency by making public most of the dispute settlement documents. The WTO website shows many, if not most, of the communications between the parties and the Dispute Settlement Body, as well as those between the parties, and panels, and the Appellate Body.¹⁶ Some

12. Jackson et. al., *supra* note 3, at 737.

11. Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 11-14 (1999) [hereinafter *New WTO Dispute Settlement Procedure*].

14. *Id.*

15. *Id.* at 48.

16. The official WTO dispute settlement documents that may be consulted by the public on the WTO official website, see Dispute Settlement, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm, and on the WTO dispute database, see Find Dispute Documents, http://www.wto.org/english/tratop_e/dispu_e/find_dispu_documents_e.htm, *inter alia*: consultations requests, panel requests, establishment and constitu-

WTO Members have also made strides to increase transparency by making public submissions to Panels and Appellate Body.¹⁷ In fact, Hudec was quite supportive of the first Appellate Body report, which authorized the filing of amicus curiae briefs.¹⁸

B. REMEDIES

Hudec recognized that countries had made good efforts toward increasing compliance and in fact, was “somewhat surprised by the extent of WTO government efforts to comply.”¹⁹ As far as I can tell, Hudec always tried to support his assertions by looking at the empirical data, in other words, he liked numbers. I am sure that he will be “somewhat satisfied” to see that today only 37% of disputes have reached the panel stage and 19% have reached the Appellate Body stage.

There are two things which caught my attention while reading his work. First is his view of the current scheme of suspension “of equivalent effect” and the other is the value he saw in what he called the ultimate “remedy,” i.e., “community pressure.”

Regarding the first aspect, throughout his work, he looked at the economic aspect of the suspension of benefits and concluded that the economic rationale of suspending benefits of equivalent effect was actually a “fiction” because he believes that the country imposing the remedy would not gain anything by raising trade barriers and that the “act usually inflicts a net loss upon its own citizens even though most of its citizens are not aware of that.”²⁰ Moreover, he identified the forward-

tion of panels, most communications from the chairperson of panels to the parties, preliminary rulings and final reports. There are other documents that are by nature confidential such as the series of slates of suggested panellists that are sent by the WTO Secretariat to the parties during the constitution of panels and, most importantly, the interim report. The Appellate Body, in turn, also makes public the notices of appeal and other appeal, preliminary rulings, and the Appellate Body reports.

17. Certain independent, private websites, such as www.worldtradelaw.net and www.tradelawguide.com, have also helped enhance transparency by providing analytical and thematic access to WTO dispute settlement documents.

18. See Hudec, *supra* note 14, at 47.

19. Robert E. Hudec, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 1 *WORLD TRADE REV.* 211, 213 (2002).

20. Robert E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, in *IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES: ISSUE & LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS & TRIBUNALS* 388 (Friedl Weiss ed., 2000).

looking character of WTO remedies as a problem and criticized the fact that "there is no compensation for the economic harms done by the legal violation."²¹

It is interesting that in one of his articles, Hudec mentions a proposal submitted by developing countries during the Uruguay Round Negotiations seeking "monetary damages" as a remedy for violations.²² It would be difficult to imagine that he would have had any objection, not only because of his concerns regarding the existing remedies, but also and most importantly, because he firmly believed in the rights of developing countries.²³

Today, members have tabled proposals to improve remedies in the context of the DSU review negotiations. Some of the proposals, including the one mentioned by Professor Hudec related to the right of a complaining party to seek monetary damages for a WTO violation, seek to expand the scope of remedies.²⁴

Finally, one can only acknowledge Professor Hudec's insightfulness in looking at things from two angles. On one hand, he criticizes this "equivalent effect"-standard of trade remedies, but on the other hand, he recognized, referring to the GATT

21. *Id.* at 399.

22. *Id.* at 383.

23. *Id.*

24. See Special Session of the Dispute Settlement Body, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations: Communication from Kenya*, TN/DS/W/42 (Jan. 24, 2003). For instance, Kenya's proposal to amend Article 22.8 of the DSU to state: "[w]here injury has resulted from the withdrawn measure, and if the developing or least-developed country Member so requests, the DSB may recommend monetary and any other appropriate compensation taking into account the nature of injury suffered." A similar proposal was submitted by Haiti and by the group of least-developed countries. See Special Session of the Dispute Settlement Body, *Text for LDC Proposals on Dispute Settlement Understanding Negotiations: Communication from Haiti*, TN/DS/W/37 (Jan. 22, 2003); Special Session of the Dispute Settlement Body, *Negotiation on the Dispute Settlement Understanding: Proposal by the LDC Group*, TN/DS/W/17 (Oct. 9, 2002). Ecuador has in turn proposed an amendment to Article 22.2 of the DSU, adding the following sentence: "[s]uch compensation may be partly or entirely monetary." See Special Session of the Dispute Settlement Body, *Negotiation on Improvements and Clarifications of the Dispute Settlement Understanding: Proposal by Ecuador*, TN/DS/W/33 (Jan. 23, 2003). Mexico, for its part, has suggested that Article 22.2 of the DSU be amended to read, in relevant part: "[c]ompensation to developing country Members will be monetary unless otherwise agreed (note 1)." See Special Session of the Dispute Settlement Body, *Improvements and Clarifications of the Dispute Settlement Understanding: Proposal by Mexico*, TN/DS/W/91 (Jul. 16, 2007).

dispute settlement system, that the “ultimate” remedy was something beyond a legal obligation, something he called “community pressure.”

I am not able to nor in the position to characterize or to label the reasons why countries complied with WTO rulings. The only thing I can do, as Professor Hudec did many times, is to look at the empirical data. In particular, out of 418 disputes initiated only seventeen have received authorization from the DSB to suspend benefits - that is, only 4%.

IV. THE APPELLATE BODY

Finally, we’ve come to the complicated part of my presentation: Professor Hudec’s take on the Appellate Body.

As many of you certainly are aware, Professor Hudec’s romance with the Appellate Body can be divided into two parts. As any good novel or soap opera, it started with hate and it ended with love. The hate episode started with Professor Hudec’s strong opposition to the whole idea of creating an appellate tribunal.²⁵ The first thing he questioned was the number of obstacles to making high-quality legal decisions.²⁶ As he points out, good panel reports would be subject to mediocre appellate proceedings.²⁷

The other cause of opposition raised by Professor Hudec was more a systemic one. As a firm believer of the current GATT dispute settlement system, he had serious doubts regarding the transformation of the WTO system into a quasi-judicial system.²⁸ Hudec believed that the only way for this new system to work was if governments were prepared to abide by it and he had some doubts that this could actually happen.²⁹

Alas, Professor Hudec had the opportunity of looking at no more than twenty Appellate Body reports, but it is clear that this was enough for him to become a believer of this institution. Professor Hudec considered that the Appellate Body was “securely established and functioning well.”³⁰

25. R. Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure*, in *THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOR OF ARTHUR DUNKEL* 116 (Jagdish Bhagwati & Mathias Hirsch eds., 1998).

26. *Id.* at 116-20

27. *Id.*

28. *See New WTO Dispute Settlement Procedure*, *supra* note 14, at 11-14

29. *Id.*

30. *New WTO Dispute Settlement Procedure*, *supra* note 14, at 33.

In one article which may well be the best example of Professor Hudec's honesty, leaving aside any consideration on whether the Appellate Body agreed with his legal views, Professor Hudec stated that "the substance of the first dozen Appellate Body decisions rendered during the first three years has been viewed by governments as competent, conservative and 'responsible.'"³¹

In fact, he believed so much in this new institution that he went beyond mere praise and proposed to eliminate the panel stage and increase the Appellate Body membership to nine full-time members.³² Another more practical proposal he made was to increase the amount of time for the Appellate Body to issue its decisions from sixty to ninety days.³³ Due to the complexity and size of the cases, the Appellate Body has regularly used the ninety-day maximum in the DSU.³⁴

Maybe what Professor Hudec anticipated was that as general familiarity with WTO rules and complexity of disputes grow, so will the amount of claims and arguments made by participants. To give an example, the two disputes currently before the Appellate Body involve panel reports of around 500 and 1,000 pages respectively.³⁵

Finally, the major substantial change Professor Hudec proposed was to grant the Appellate Body the power to remand its findings to panels. Members have already identified this issue in the context of the DSU negotiations and have put forward proposals to address it.³⁶

31. *Id.* at 31.

32. *See id.* at 33.

33. *See id.* at 31–32.

34. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 ("In no case shall the proceedings exceed 90 days.")

35. *See, e.g.*, Dispute Settlement Body, *Contribution of the European Communities and its Member States to the improvement and clarification of the WTO Dispute Settlement Understanding*, TN/DS/W/38 (Jan. 23, 2003) (proposing to amend DSU Article 17.12 and add an Article 17bis), and Dispute Settlement Body, *Jordan's Further Contribution Towards the Improvement and Clarification of the Dispute Settlement Understanding*, TN/DS/W/56 (May 19, 2003) (proposing to add an Article 17bis to account for remand procedures).

36. *See* Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009), and Panel Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R (June 30, 2010).

Overall, Hudec identified what in my view, are two of the four pillars on which the Appellate Body stands. After my still short residence in the Appellate Body, I am convinced that the institutional four pillars are integration, collegiality, Members' trust, and the quality of its support staff.

As to integration, I think the Appellate Body attributes should be measured in terms equivalent to the ample experience of its members. The seven Members come from different professional, academic, and cultural backgrounds. This gives the Appellate Body great force in looking at every issue from very different angles

This integration is only strengthened by the rule on collegiality, whereby the Division hearing the case will exchange views with the other four members. Again, as Hudec would have looked at it, out of seventy-eight reports, so far there have only been two dissents and two concurring opinions.

The next aspect is one which Hudec identified as a prerequisite to the success or not of this new body and that is the trust of the WTO Membership. The best empirical data on this is my own experience, during my interview process with each WTO Member. There it became clear to me the value and support the membership has in this institution.

Last, but not least, another pillar identified by Professor Hudec was the need for the Appellate Body to be well-assisted by the WTO. In this regard, we are quite fortunate to be supported by a group of eleven extraordinary lawyers, all of whom greatly facilitate our task.

I am sure that, as he predicted, "a small army of academic lawyers and well-published practicing lawyers [such as the ones I see today] are already gathering around the Appellate Body's work product, with sharpened pencils in hand."³⁷ We welcome that. The Appellate Body will not discuss its reports but will always listen to the views, comments, and critiques of others.

Certainly Professor Hudec's voice will always be heard. As I hope I could express to some extent here today, his legacy should not be denied or forgotten. He "transcended the ostensible" and has become a vital reference to any "honest" international trade expert.³⁸

37. *New WTO Dispute Settlement Procedure*, *supra* note 14, at 29.

38. Robert E. Hudec, "Transcending the Ostensible": *Some Reflections on the Nature of Litigation Between Governments* 72 MINN. L. REV. 211, 226 (1987).