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## The Reliance Interest in Trade Law

Daniel A. Farber\*

Much has been said, and will continue to be said, about what a terrific person Bob Hudec was and also about his deservedly great influence on trade law. All of that is true. I would be happy to make a few additions to the stock of anecdotes illustrating the humor, insight, and modesty of this eminent scholar. But I can vividly imagine his response: "Yes, that's all very nice, but a little discussion of my actual ideas might be nice, too." In this brief tribute, I want to say something about one of his key ideas about trade law—an idea that he stressed in conversation, but that does not seem to have received the attention it deserves. However, I do not want to neglect his human qualities and scholarly impact, and will try to say something about those things along the way too.

I will take an indirect approach to the point about trade law, and my starting point is an article that Bob wrote two decades ago about contract law.<sup>1</sup> (Please be patient: I will make the connection with trade law shortly.) That article was, in turn, largely a commentary about one of the great classics of contract scholarship, Fuller and Perdue's *The Reliance Interest in Contract Damages*.<sup>2</sup> Essentially, Fuller and Perdue had argued for a shift in the usual way of thinking about contract damages. Rather than seeking to put the plaintiff in the same position as if the contract had been performed, this measure of damages would put the plaintiff in the same position as if the contract had never been made in the first place. Fuller and Perdue's work strongly influenced the drafting of the *Second Restatement of Contracts*. In his own article, Bob carefully traced this influence and then patiently disentangled the various meanings of

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1. Robert E. Hudec, *Restating the "Reliance Interest"*, 67 CORNELL L. REV. 704 (1982).

2. L. L. Fuller & William R. Perdue Jr., *The Reliance Interest in Contract Damages I*, 46 YALE L.J. 52 (1936); L. L. Fuller & William R. Perdue Jr., *The Reliance Interest in Contract Damages II*, 46 YALE L.J. 373 (1936).

"reliance," their incorporation into the *Restatement*, and their connection with doctrinal issues.

A reader who knew only Bob's work in trade law would find many familiar characteristics in his contracts article: analytic precision and clarity, sensitivity to political and social context, thorough research, and awareness of policy implications. It was those traits that helped make his trade scholarship so influential—and indeed, have led one of my current colleagues to speak of the "Hudec Effect," which is a degree of respect that makes that scholarship almost too authoritative to question. (Or in other words, scholarship that is worthy of reliance, and on which people do unquestioningly rely.) But it may seem more surprising that those traits were exhibited in a work about the seemingly arid subject of contract damages.<sup>3</sup>

Rather than taking up space here with the details of the article, let me use a few sample quotations to give a sense of his intellectual style:

[T]he recognition of these other types of liability shows that there is not necessarily a single measure of reliance liability. The measure of recovery will necessarily depend on the discrete value judgments underlying the particular concept of liability at issue.<sup>4</sup>

Still, the black-letter definitions themselves leave considerable room for interpretation, and that is not necessarily undesirable. The border line is vague, and case-by-case resolution appropriate.<sup>5</sup>

The difficulty with the essential/incidental distinction arises primarily because two distinctions, rather than one, lurk in this terminology.<sup>6</sup>

The reason for the court's divided treatment seems obvious. The transaction took place near the end of World War II . . . . Even if the machines had arrived on time, it was quite doubtful that the buyer would have commenced operations, or if it had, that it would have earned any money.<sup>7</sup>

Distinctions between various types of reliance claims tend to be obscured by our preoccupation with the larger reliance-expectancy distinction . . . . We need to be reminded that important differences in the degrees of ethical urgency exist within the category of reliance claims as well. These differences are quite likely to influence decisions, appearing in one form or another as a grudging attitude toward some

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3. Offended contracts scholars should note that I said "seemingly" arid.

4. Hudec, *supra* note 2, at 717.

5. *Id.* at 721.

6. *Id.* at 724.

7. *Id.* at 730.

consequential-reliance claims.<sup>8</sup>

It may seem admirable that Bob was able to bring his customary acumen to bear on a topic as dusty as contract damages, but one might still wonder why he bothered. Why should the same person find contract damages and trade law to be compelling subjects?

The answer, I think—and this finally gets to the connection I promised earlier—is that he saw them as, in some sense, the same subject. In his patient efforts to tutor me in the rudiments of trade law—simply one example of his frequent generosity as a colleague and mentor—he was at pains to remind me that the GATT (later the WTO) was a *deal*, a contract, not an enactment by a legislature. He made the same point in one of his later writings. If I may impose on you with another quotation, this time a lengthier one:

The central “wrong” that triggers legal remedies in the WTO legal system is a concept known as “nullification and impairment,” which refers to a failure by a government to receive some part of the market access it was promised as a quid pro quo for the market access that it has granted to other governments . . . . If the defendant government does not (or cannot) remove the offending measure, then the defendant government must either grant new trade concessions in compensation—a substitute quid pro quo that will restore the balance of the original deal—or must suffer a proportionate increase of trade barriers by the other government or governments injured by the measure—a “money-back” type of remedy that also restores the balance of the deal, in a downward direction . . . .

Nonviolation nullification and impairment is a less binding form of remedy along the same lines. Under the NVN&I concept, a measure not in violation of any promise, and thus not a legal violation, can nevertheless be found to be “impairing” the market-access benefits that a country could reasonably have anticipated from the promises made in a trade agreement . . . . [T]he government injured by this unanticipated measure is still entitled to rebalance the deal—either by receiving equivalent trade concessions from the offending country, or by taking its money back in the form of trade retaliation.<sup>9</sup>

What the article calls a “money-back” remedy here is of course a form of reliance damages,<sup>10</sup> putting the complaining country in the same position that it would have been if that part of the deal had never been made. The article goes on to suggest

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8. *Id.* at 733.

9. Robert E. Hudec, *A WTO Perspective on Private Anti-Competitive Behavior in World Markets*, 34 N. ENG. L. REV. 79, 89-90 (1999).

10. It could also be viewed as a restitutionary remedy.

that such reliance damages might be used to solve a new problem: how to remedy a country's fostering of anticompetitive practices by its industries. Thus, Fuller and Perdue's reliance interest may have a role to play in the future evolution of trade law!

Bob's suggestion of a reliance remedy is creative and may well turn out to be fruitful. But the larger point is the more important one. It is tempting for lawyers to think of GATT (and even more so, WTO rules) as the equivalent of domestic law—to speak, for example, of GATT as a constitution for world trade. Such analogies may be enlightening. From an economist's point of view, trade rules may be all gain and no pain (as I sometimes reminded Bob in our conversations, with all the confidence of the neophyte who is studying hard to become a novice). But that is hardly true as a political matter, as he was quick to remind me. Countries enter into trade agreements because they are willing to accept provisions they do not like in return for provisions they do like—in other words, because there is a *bar-gain*. Forgetting the contractual nature of trade law risks a degree of confusion.

More generally yet, the contracts article aptly illustrates the strengths of Bob's scholarship. It is not easy to find such insistence on intellectual precision, combined with such well-seasoned realism and balanced judgment. In one of his last publications—a gemlike introduction to trade law in ten pages—Bob announced what might have stood as his scholarly motto, when he remarked that “clarity for its own sake is always good.”<sup>11</sup> That quest for clarity was a characteristic of all his scholarship, including (as we saw earlier) the article on reliance damages. But intellectual clarity did not come at the expense of a willingness to pass judgment. In the same article, Bob also took the occasion to denounce some WTO provisions for giving foreign traders “a greater set of legal rights than is given to the domestic producers with whom they compete.”<sup>12</sup> Embedded throughout the article are the lessons of his own experiences as a member of trade tribunals,<sup>13</sup> including a rueful awareness that “governments make deliberately protectionist decisions all the time.”<sup>14</sup>

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11. Robert E. Hudec, *Science and “Post-Discriminatory” WTO Law*, 26 B.C. INT'L & COMP. L. REV. 185, 189 (2003).

12. *Id.* at 188.

13. *Id.* at 186.

14. *Id.* at 192.

This combination of intellectual clarity, political and economic realism, and moral integrity was the hallmark of his scholarship—whether the subject was international trade or the more mundane issue of contract damages. Those of us who knew Bob will miss him as a friend and colleague. The world will miss him as a scholar. On that, you can rely.

