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Bob Hudec: A Friend and Colleague

Daniel J. Gifford*

In the late 1970s I arrived at the University of Minnesota as a visiting professor. My wife Ann accompanied me, completing her last year of law school here. Bob Hudec and his wife Marianne welcomed both of us warmly. Bob Hudec became a cherished friend, and one who had a marked influence upon my professional development.

Our interests meshed neatly. Bob, of course, was doing research in international trade, and I was involved with antitrust. These two fields meet at their edges, where issues of trade barriers, industrial policy, and dumping can sometimes be viewed through the lenses of both trade policy and antitrust policy. Indeed, the strictures of GATT Article XXIII on actions that constitute “nullification and impairment” of previously-made trade concessions could at least in theory involve misuse of antitrust or competition laws, government encouragement of private anti-competitive behavior, or perhaps even government tolerance of such behavior. So in this penumbral area where antitrust concerns overlap (or come close to overlapping) with trade concerns, we have had many fruitful and enriching discussions. I have written in this area and have included a chapter on the relationships between antitrust and trade law in an antitrust case book that I co-authored with Leo Raskind, another faculty colleague.¹ When Jim Chen and I wrote a piece about industrial policy,² Bob read the draft and offered suggestions. Indeed, Bob

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1. DANIEL J. GIFFORD & LEO J. RASKIND, *FEDERAL ANTITRUST LAW, CASES AND MATERIALS*, ch. 14 (2d ed. 2002); Daniel J. Gifford & E. Thomas Sullivan, *Can International Antitrust Be Saved for the Post-Boeing Merger World?: A Proposal to Minimize International Conflict and to Rescue Antitrust from Misuse*, 45 *ANTITRUST BULL.* 55 (2000); Daniel J. Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 *MINN. J. GLOBAL TRADE* 1 (1997); Daniel J. Gifford, *Antitrust and Trade Issues: Similarities, Differences, and Relationships*, 44 *DEPAUL L. REV.* 1049 (1995); Daniel J. Gifford, *Rethinking the Relation Between the Antidumping and Antitrust Laws*, 6 *AM. U. J. INT'L L. & POL'Y* 277 (1991).

2. Jim Chen & Daniel J. Gifford, *Law as Industrial Policy: Economic Analysis*

always read my draft manuscripts when they touched on trade issues and often even when they did not. Of course, we did not always agree on the resolution of every policy issue, but I always respected his advice. And when I departed from his suggestions, I did so only after the most careful deliberation and then usually with trepidation.

Bob stimulated and supported my interest in comparative antitrust law. I had earlier offered a comparative antitrust course at a summer school at the Free University of Brussels with the late René Joliet, then a law professor at Liège (later Judge on the European Union's Court of First Instance), and the author of an early two-volume comparison of U.S. antitrust law with that of the European Union and Germany.³ Bob encouraged me to offer a comparative antitrust course in the summer of 1983 at the University of Lyon in France. That experience was successful, and I later repeated it twice at the University of Uppsala in Sweden. I have increasingly incorporated a comparative dimension into my antitrust work. And I owe much of the initial impetus to Bob.

Bob introduced me to Mitsuo Matsushita, then a law professor at the University of Tokyo and now a professor at Seiko University and a member of the WTO appellate tribunal. Professor Matsushita and I collaborated on a paper for a conference chaired by Bob and Columbia University Professor Jagdish Bhagwati, an economist specializing in international trade. Professor Matsushita is not only a leading Japanese authority on international trade issues, but also a prominent Japanese antitrust scholar. Professor Matsushita and I worked well together and our paper⁴ identified and evaluated a series of prominent trading issues on which antitrust analysis could be productively employed. Borrowing from contemporary antitrust law's emphasis on efficiency, our recommendations were premised on the belief that efficiency considerations should be raised to a more prominent place in international trade negotiations. Later Professor Matsushita and I participated in another conference in-

of Law in a New Key, 25 U. MEM. L. REV. 1315 (1995).

3. RENÉ JOLIET, MONOPOLIZATION AND ABUSE OF DOMINANT POSITION: A COMPARATIVE STUDY OF THE AMERICAN AND EUROPEAN APPROACHES TO THE CONTROL OF ECONOMIC POWER (1970); RENÉ JOLIET, THE RULE OF REASON IN ANTITRUST LAW: AMERICAN, GERMAN AND COMMON MARKET LAWS IN COMPARATIVE PERSPECTIVE (1967).

4. *Antitrust or Competition Laws Viewed in a Trading Context: Harmony or Dissonance?*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 269 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

volving international trade and antitrust issues.⁵ I make frequent use of his book on Japanese trade and antitrust policies.⁶ That relationship has been a fruitful one for me, and I am indebted to Bob for bringing the two of us together.

Bob introduced me to the Humphrey Institute's Workshop on International Economic Policy, a bi-weekly seminar that deals with a wide range of trade and trade-related issues. I have pretty regularly attended the Workshop over the years and it has contributed substantially to my awareness and understanding of international trade matters. I have also presented papers to the Workshop on a number of occasions. It was through Bob and the Workshop that I met Bob Kudrle, a professor of public affairs and law at the Institute, and the Workshop's usual chair. Bob Kudrle and I have worked together on a number of occasions, collaboration that we have both found enriching. Much of our joint work has been connected in one way or another with Bob Hudec. Indeed, our first collaborative paper was written for a conference honoring Bob Hudec's contributions to international trade scholarship.⁷ Professor Kudrle and I have subsequently continued to collaborate.⁸

Bob was acutely conscious of the way that domestic politics affects the negotiation of international trade issues. Over the years, he had written profusely about how politicians posture for domestic constituencies, often to achieve socially desirable objectives. Throughout his career, he enjoyed pointing out how agreements, and even legislation, could carry meanings beyond the obvious ones.⁹ The so-called "super 301," for example, might be viewed as an unduly aggressive act of unilateralism. But Bob showed how it could also be viewed as a necessary concession to

5. Mitsuo Matsushita, *Competition Law and Policy in the Context of the WTO System*, 44 DEPAUL L. REV. 1097 (1995); Daniel J. Gifford, *Antitrust and Trade Issues: Similarities, Differences, and Relationships*, 44 DEPAUL L. REV. 1049 (1995).

6. MITSUO MATSUSHITA, *INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN* (1993).

7. Daniel J. Gifford & Robert T. Kudrle, *Alternative National Merger Standards and the Prospects for International Cooperation*, in *POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOUR OF ROBERT E. HUDEC* 208-47 (Daniel L. M. Kennedy & James D. Southwick eds., 2002).

8. Daniel J. Gifford & Robert T. Kudrle, *EU Competition Law and Policy: How Much Latitude for Convergence with the U.S.?* 49 *ANTITRUST BULL.* (forthcoming 2004); Daniel J. Gifford & Robert T. Kudrle, *The Possibilities for Trans-Atlantic Convergence on Antitrust Standards: The United States, Canada, and the European Union* (in process).

9. Robert E. Hudec, *Thinking About New Section 301: Beyond Good and Evil*, in *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* 113 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

that part of the public leaning towards protectionism in order to maintain or even to strengthen this nation's commitment to multilateralism in trade policy. And he taught all of us to look for those meanings lying beneath the obvious ones and to look for the audiences to whom those alternate meanings were addressed. Indeed, it was for this reason that the conference held in his honor at the University of Minnesota in 2000 bore the informal title of "Transcending the Ostensible."¹⁰ As the introduction to the proceedings of that conference points out, Bob used that phrase in the title of a 1987 law review article.¹¹ It expressed his continuing focus on the often double and even multiple facets of public actions.

This focus upon the different meanings of political acts that are conveyed to different audiences resonates with scholars who deal with public law and policy. Political scientists had been examining the phenomenon in the 1960s¹² during the time when Bob was actively participating in the work of the U.S. Trade Representative and beginning to explore the theoretical underpinnings of trade-negotiation strategy at the outset of his academic career. Bob's broad focus helped to bring him into intellectual contact and collaboration with our colleague Dan Farber, who (together with Phil Frickey, another of our colleagues) was not only brilliantly analyzing a range of public-law issues, but who had co-authored the leading book on public choice theory and its legal ramifications.¹³ In the early 1990s, Bob and Dan Farber collaborated in exploring the analogous ways that the dormant commerce clause protects the free flow of trade within the United States and the GATT protects trade among the nations of the world.¹⁴ Bob and Dan Farber's focus on the dormant

10. *Introduction*, in *POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW*, *supra* note 7, at 1.

11. Robert E. Hudec, "Transcending the Ostensible": *Some Reflections on the Nature of Litigation between Governments*, 72 *MINN. L. REV.* 211 (1987). Bob took that phrase from DAVID REISMAN, *INDIVIDUALISM RECONSIDERED, AND OTHER ESSAYS* 445 (1954).

12. *See, e.g.*, GABRIEL KOLKO, *RAILROADS AND REGULATION 1877-1916* (1965); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965); MURRAY J. EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964). *See also* ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

13. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). *See also* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 *VA. L. REV.* 423 (1988); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 *TEXAS L. REV.* 873 (1987).

14. Daniel A. Farber & Robert E. Hudec, *GATT Legal Restraints on Domestic Environmental Regulations*, in 2 *FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?* 59 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); Daniel A.

commerce clause brought my own work close to theirs, as I had been exploring the relationships between the requirements of the dormant commerce clause and antitrust law around that same time.¹⁵

This concern with political acts conveying different meanings to different audiences is highly relevant in administrative law, an area in which I have worked for some time. Although Bob and I did not work together in this area, his interest in this multiple-meaning phenomenon provided a basis for our sharing thoughts and proposing analytical responses to problems. Bob possessed a masterful understanding of the administrative interaction within the GATT and the WTO and was also a keen observer of the political maneuvering going on within the U.S. administration as to its own trade laws. This knowledge made him a resource of high order whenever I wished to discuss matters having to do with administrative strategy.

I last saw Bob when he participated in a conference on global competition held here in 2002 in honor of our retiring Dean Tom Sullivan. On that occasion, he, Marianne, and Bob Kudrle had dinner with my wife and me. We were, of course, unaware that it would be our last such occasion. Recently, I reviewed Bob's most recent paper as part of the editing process at the Antitrust Bulletin which will publish it in the near future. It was a bittersweet occasion, as it was in a way my final contact with a longtime friend. We all miss Bob very much.

Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401 (1994).

15. Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227 (1995).

