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Tribute

Transcending the Ostensible: Some Reflections on Bob Hudec as Friend and Scholar

David M. Trubek*

Bob Hudec¹ and I were friends and colleagues for almost 40 years. We met as law students, worked together on the Yale Law Journal, entered the Kennedy administration as young lawyers working on international matters, he in trade and me in development, taught at Yale Law School in the late 1960s and early '70s, and ended up in the upper Midwest for much of our careers. We never worked together closely but we crossed paths professionally at a few events where trade and development issues were debated. We saw each other socially from time to time. I visited him when he was at the Fletcher School and my wife and I entertained Bob and Marianne, his wife, in

* Voss-Bascom Professor of Law and Senior Fellow, Center for World Affairs and the Global Economy (WAGE), Univ. of Wisc. Law School. These remarks were presented in commemoration of the 20th anniversary and revised publication of ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM (Joel P. Trachtman ed., 2007) (1987), at the conference "Developing Countries in the WTO Legal System: An ASIL Regional Meeting at the University of Minnesota" (May 25, 2007) (agenda and video recordings *available at* http://www.law.umn.edu/facultyprofiles/trade_development_program.html).

1. Professor Robert E. Hudec (1935–2003), was on the faculty of the University of Minnesota Law School for 28 years. He was a valued teacher and scholar as well as one of the founders of this Journal. Professor Hudec graduated *magna cum laude* from Yale Law School in 1961 and served as law clerk to Mr. Justice Potter Stewart of the U.S. Supreme Court from 1961-1963. He also held positions with the Office of the Special Representative for Trade Negotiations, the Office of the General Agreement on Tariffs and Trade, and Yale Law School before joining the faculty of the University of Minnesota Law School in 1972. Professor Hudec joined the faculty of the Fletcher School at Tufts University in 2000.

Cambridge a few weeks before he died.

I had always been a bit intimidated by Bob Hudec. My first memory of him is during our first year as students at the Yale Law School. We were sitting across from each other in the library preparing for exams. He was studying with such fierce intensity that he seemed oblivious to everything around him while I was always fidgeting and glancing around the room. He had a nervous habit of tugging on his hair while he read that showed just how much energy was going into his preparation.

Bob was already touted as the smartest guy in the class. In those days, believe it or not, upper classmen took bets on who would be ranked number one in the first year class. That year all the smart money was on Bob and when class rankings were announced, anyone who bet against him ended losing their shirt. By the end of our second year he was not only number one in the class; he was also selected as editor-in-chief of the Yale Law Journal.

I followed behind Bob in the class and on the Journal, where I was a more junior editor, always a bit in awe of his powers of concentration, his abilities in legal analysis, his authority. His mastery of the case law, his ability to read complex statutes, and his thorough grasp of the legal literature marked him as the consummate master of legal doctrine and technique.

In preparing this talk, I have had to wrestle with an apparent contradiction. How can I reconcile the Bob Hudec I knew in the early days with the Bob Hudec celebrated in the field of trade law? I always thought of Bob Hudec as the lawyer's lawyer—the consummate legalist, the master of cases and doctrine. But when I asked people in the trade field to name the most significant aspect of Bob's work, the thing everyone stressed was how he went beyond the strictly legal materials in trade law to introduce insights based on his knowledge of economics, international relations, and practical diplomacy. From within the trade world, Hudec the legalist looks more like Hudec the interdisciplinary pioneer.

Had the Bob I knew from our days as students, in the Kennedy administration, and as junior faculty members at Yale somehow transmogrified into another Bob Hudec altogether? To put it another way, had Arthur Corbin become Stewart Macaulay? Had Bob changed radically and I failed to see it? Or did he simply add a second dimension so that two legal *personae* somehow co-existed?

The answer is that not only did they coexist, it was because of their coexistence that Bob was able to play such a decisive role in the history of trade law. There is no question that when you read Bob's work you see all the skills of the consummate legal scholar: close attention to texts, careful analysis of sources, relentless probing for principles that lie behind outcomes, articulation of the general significance of specifics. But at the same time this analysis is placed in the context of a deep understanding of the nature of interstate relations, the limited powers of international bodies, and the ways that international law in general and trade law in particular, are embedded in power relations in which diplomatic skills and approaches are as important as legal analysis.

For Bob, diplomacy was important in understanding trade law. But it was not all-important and that is the *core message*. For the key to understanding Hudec's contribution was his recognition that legal rules, analysis, and process are important in trade law even if they are not always decisive. Rules, especially detailed rules, must be seen as factors in a more complex process involving diplomacy as well as litigation. Hudec teaches us to understand trade law as a process that is neither strictly legalistic, nor purely diplomatic, but a complex and sometimes contradictory mixture of the two. He shows how delay and dissimulation may be as valuable as swift adjudication and strict construction. But he also cites situations where rigorous application of the rules is desirable. He sees the value of legal rules, while appreciating the importance of exceptions, flexibilities, even calculated use of disobedience. Although these insights were developed before the WTO and the increased legalization of trade relations it ushered in, they remain valid and serve as a cornerstone of the field to this day.

Reading his early work, I was amazed at how many ideas now commonplace in socio-legal studies are already foreshadowed in articles he published over three decades ago. These articles examine empirically how rules are actually deployed in managing international trade relations. In them, one can see many things that have subsequently been theorized about and given fancy labels. They include concepts like "bargaining in the shadow of the law," which implies that law plays a role but only a partial role in determining outcomes; "litagotiation," which describes how negotiation and litigation are linked phenomena; and "two level games," which explain how national administrations may claim they are constrained by

international rules in order to resolve otherwise difficult domestic disputes. He did not use the terms—most of which didn't even exist at the time—but he understood all the processes they describe. One might be so bold as to say that Hudec was a legal sociologist *avant la lettre*.

But that is not the whole story. He was, indeed, an incipient legal sociologist, a sophisticated international relations scholar, and a good trade economist. Had that been all we would have had much to praise him for. But he was all this and at the same time something more—the consummate legal scholar I knew at Yale. It was the combination of *all* these skills that made his work so powerful. His ability to draw on all the traditions in order to illuminate the operation of the trade regime created a paradigm that has influenced all subsequent work in the field. This rare ability helps explain why younger legal scholars still find him fresh and vital, and why his work continues to influence economists, political scientists, and trade officials as well as lawyers.

One of Bob's well known essays is the lecture he gave when he assumed the Melvin C. Steen Chair he held at the University of Minnesota Law School. Quoting sociologist David Reisman, he called the essay "Transcending the Ostensible."² He suggested that to understand trade law, one has to look for latent as well as manifest functions and he illustrated this brilliantly by analyses of several recent trade disputes.

I like to think the title of that essay could summarize much of Bob Hudec's work over the years. He looked beyond the doctrinal surface of trade law to find other forces at work. He started with an apparent paradox: the authors of the GATT wrote extremely detailed rules—I think he once said they looked like a tax code. But at the same time the authors knew they would not be applied in the way we think a domestic tax law is enforced, if they were applied at all. Why, he asked, would smart people write detailed rules if they knew that they would often have to be honored in the breach, not the observance?

Some might say: maybe they were just creating a smokescreen behind which power and bargaining will go on and deals will be struck. But Bob rejected that approach. He saw that the detailed rules were part of a larger whole. He saw they

2. Robert E. Hudec, "Transcending the Ostensible": *Some Reflections on the Nature of Litigation Between Governments*, 72 MINN. L. REV. 211 (1987). Professor Hudec delivered this inaugural lecture of the Melvin C. Steen Professorship at the University of Minnesota Law School on April 6, 1987.

played an important but not necessarily decisive role in a complex normative process. He taught us to focus carefully on the texts and the cases while recognizing that other forces are also at work. He showed how actors deploy rules in varied ways and how they may buttress them with other sources of power and persuasion. He showed how rules solve some problems, and what happens when rules are not sufficient. He showed that there were times when it is best to have no rules at all, or even ignore the ones that exist.

Bob had a vision of trade law as a governance system designed to harmonize and control the behavior of nations. He saw that nations are not unitary actors, but made up of competing interests and tendencies. He saw that there are things that you can keep nations from doing, but there are times when it is an error to try to constrain them too much. He saw that detailed rules had a role to play in managing this regime, but that other tools were needed as well. He showed it is often important to use broad standards that would permit flexibility, and allow exceptions that would avoid irresolvable impasses.

Many think that Bob introduced a new paradigm into trade law. That seems plausible to me even though I am no trade expert or historian of ideas. What I can say is that the approach reflected in his work on trade law is valuable today for legal scholars in many areas of law, not just in the trade field.

We live in a time of normative pluralism in which more and more transactions are governed by multiple and possibly conflicting normative orders. We live in a time of increased complexity and rapid change when solutions are not always clear. We need normative systems to cope with uncertainty, govern increased interaction, and handle conflicting imperatives. Sometimes, it is best to do this with detailed and binding rules. But we also need ways to escape from these rigors when the rules no longer work.

What we need today is a vision of governance that embraces both legal constraints and unregulated areas, hard law and soft law, detailed rules and open-ended standards, litigation and negotiation, conflict and cooperation, and authority and dialogue. We need processes that will foster deliberation while maintaining legality. We need a way to cope with multi-level governance and multi-actor processes. We need guidelines for when to employ law, and when to leave decisions to other processes.

Over 30 years ago, Bob Hudec began to construct such a

vision for the trade regime. He built it empirically from his deep knowledge of how things work, and his understanding of both the value and the limits of law. This vision is still with us. It will continue to live when all the specific rules and trade disputes he wrote about are long forgotten.

It is sad that Bob is not with us today. I am sure he would be fascinated by all the papers, which he would have read with meticulous care and commented on with both acuity and humanity. He would be pleased to see his work discussed and cited by so many people. So perhaps we can say of Bob, as Auden said in his eulogy for W.B. Yeats: he has become his admirers. I am proud to include myself among them.