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In memory of Robert Emil Hudec (1934–2003)

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Professor Robert Emil Hudec (Fletcher School, Tufts University) passed away last week. He belonged, together with Professor John H. Jackson of Georgetown University Law Center and Professor Ernst-Ulrich Petersmann of University of Geneva, Faculty of Law, to the first generation of legal scholars who founded and developed the branch of international law known as international economic law, centering on the study of world trade rules negotiated in the World Trade Organization.

During the Kennedy Round of multilateral trade negotiations (1964–1967) conducted under the auspices of the General Agreement on Tariffs and Trade, he served as Assistant General Counsel of the Office of the US Special Representative for Trade Negotiations, as the USTR was then called. A Yale Law School graduate, Hudec later turned to academia and was appointed Melvin C. Stern Professor of Law at the University of Minnesota and taught there until his retirement in 2000.

He then moved to Boston, where his family lived, but he was still active, both in teaching and writing at the Fletcher School. In fact, he was working hard to finish his volume on the analysis of GATT jurisprudence in its final years (1990–1995) as a sequel to his seminal *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Matthew Bender, 1993) until he met his sudden death. Only a few weeks ago, I made some comments on his draft based on my colleague Nozomi Sagara's research, and we received a positive response from him. It is still hard for me to believe that the world has lost one of the best sources of WTO legal analysis.

Professor Hudec was never good at networking or empire building. He was essentially a solo act, but his pungent critiques, so elegantly written, were well received by readers. He himself also participated in the formation of GATT/WTO jurisprudence by serving as panelist in the dispute settlement process. He was widely respected by both academics and trade officials, as evidenced by the

* The author was director of research at the Research Institute of Economy, Trade and Industry (RIETI), an incorporated administrative agency affiliated with the Japanese Ministry of Economy, Trade and Industry, when he wrote this article, dated 20 March 2003, which first appeared as RIETI's weekly newsletter *Miyakodayori*.

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impressive list of contributors to The *Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press, 2002), which includes Professors Jackson and Petersmann.

RIETI's predecessor, the Research Institute of the Ministry of International Trade and Industry (MITI/RI), once invited him to a symposium on the Uruguay Round held in Tokyo in June 1990. There, he gave a lecture on the legalization of GATT dispute settlement. The timing of the symposium was significant. It was before the Brussels Ministerial Conference of December 1990, which was supposed to conclude the Round but in reality produced no agreed texts, prompting a sense of crisis among negotiators (just as the Seattle Ministerial nine years later would do in a different context). At the time of the symposium, there was no agreed draft of the Dispute Settlement Understanding (DSU); yet, although it was becoming clear that under the new dispute settlement mechanism, more elements of 'automaticity' would be introduced by eliminating the possibility of 'blockings' (veto power) by losing contracting parties.

Professor Hudec was critical of this approach. He thought that the political underpinnings of the GATT system were so fragile that such an 'automatic' quasi-judicial procedure would be unsustainable in the long run. Instead, he preferred a gradualist approach. Indeed, at his lecture, he stressed that the GATT dispute settlement system was already being legalized as panel rulings had gained authority by adopting a more professional and consistent approach to interpretative issues.

He also observed:

> If one had access to all the government submissions in GATT dispute-settlement proceedings since 1975, one would see the slow change that has taken place in the way that governments argue their cases. At one time, governments simply stated their reading of the relevant GATT provisions, asserted that the result they wanted was the best GATT policy, and let it go at that. Now, government briefs are many times longer. They are likely to analyze the text carefully, cite all other relevant GATT studies and panel decisions in their favor, and cite all the favorable negotiating history they can find. Even the policy arguments are longer and more careful. The lesson is: If panels look at these sources when deciding cases, the lawyers for the parties will soon be including analysis of the same sources in their arguments. This is a happy phenomenon, because it raises the level of legal practice on all sides.[1]

Now, let us fast forward to 1995, and then to 2003. The DSU was adopted with all the features of 'automaticity' despite Prof. Hudec's cautions. Initially, it was welcomed by all WTO Members. The new dispute settlement system, with its efficiency and effectiveness, was frequently praised as the crown jewel. This expression is hardly heard anymore. In his farewell speech of July 2002, the outgoing Director General of the WTO, Mike Moore, did not even allude to dispute

1 Professor Hudec's speech note on file with RIETI.

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settlement in his list of achievements of the last three years. 'The honeymoon is over', said the former member of the Appellate Body, Professor Claus-Dieter Ehlermann.[2]

Indeed, the dispute settlement system of the WTO has been under attack from the left (civil society groups who are critical of the way in which panels and the Appellate Body handle environmental cases) and right (traditional protectionist groups who cannot stand panels' second guessing of US trade remedy laws); from the north (such as the US government, which must be sensitive to these criticisms) and the south (developing countries, which are critical of panels' practice of accepting amicus curiae briefs, or unsolicited legal opinions, from civil society groups). The tension is so high that even a free trader like Claude Barfield of the American Enterprise Institute has concluded that the WTO has bitten off more than it can chew. He advocates a system of 'blocking minority' in the adoption of a panel/Appellate Body report. Under this proposal, a substantial minority (one-third of all Members representing at least one-quarter of WTO trade) would be allowed to block any legal rulings.[3]

What did Prof. Hudec have to say about this proposal? Again, in his own words:

> Almost every commentator who has reviewed the new DSU has expressed some discomfort with the fact that the WTO has no viable legislative arm that can reverse decisions believed to be incorrect. The need for some sort of political review has often been advocated. Barfield quotes this reviewer's 1992 recommendation that a majority or substantial minority be given blocking power. Viewing that statement ten years later, I am now of the opinion that my middle position was never really viable. Contrary to Barfield's heroic assumption to the contrary, I feel certain that governments would never be able to employ such a blocking power objectively. It would become a political filter for all legal rulings, pure and simple.
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> This option was considered and rejected by the DSU negotiators for the same reason that the Uruguay Round negotiators insisted on consensus decision making in most other parts of the WTO – namely, the fear that block voting that would swamp the US, and possibly the EU. After watching the WTO operate for seven years, I see no reason to believe that the reasons for that fear have diminished. Conferring the blocking power on a minority would distribute the power to block rulings more widely, but it would probably leave the WTO legal system in the unflattering position of the spider's web that catches only middle-sized flies.
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> Once again, therefore, if it is thought necessary to retreat from the present system of unreviewable legal rulings, the only practicable option I can see would

2 Claus-Dieter Ehlermann, 'Tensions between the dispute settlement process and the diplomatic and treaty-making activities of the WTO', *World Trade Review*, 1 (3, 2002): 302.

3 Claude E. Barfiled, *Free Trade, Sovereignty, Democracy: the Future of the World Trade Organization* (The AEI Press, 2001).

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> be to give every defendant government a veto – a return to the old adoption-by-consensus system.[4]

It appears Prof. Hudec was telling us, 'I told you so.' Of course, it is too early to jump to any conclusion at this stage. The review of the DSU is underway as part of the negotiating agenda for the Doha Round, with the deadline of 31 May 2003. In the meantime, academics will have to analyze the functioning of the WTO dispute settlement system more carefully. The burden is on the shoulders of the second and third generation scholars – those younger professors who contributed their articles to the Hudec Festschrift mentioned above.

4 R. E. Hudec, 'Review article', *World Trade Review*, 1 (2, 2002): 222.

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