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Robert E. Hudec  
*University of Minnesota*

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# THE EXPEDITION TO DARKEST GENEVA

*Robert E. Hudec\**

At the end of 1964, I was serving as Assistant General Counsel in the Office of the Special Representative for Trade Negotiations (STR), as it was then known. STR was a new agency, having been organized in early 1963. It had a professional staff of only fourteen persons, with only two lawyers—the General Counsel John Rehm and myself. With this tiny staff, STR was charged with (1) conducting the Kennedy Round Trade Negotiations in GATT, and (2) managing all other GATT business as well.

In those days, research in GATT law was an art more than a craft. The text of the General Agreement on Tariffs and Trade, some fifty or so pages of reasonably detailed legal prose, was, of course, the critical source document. The importance of this text was magnified by the fact that there were no readily available materials about its negotiating history and the way it had been administered over the fifteen-odd years since it came into force. The State Department archives did have a complete set of the documents generated by the GATT/ITO negotiations and by the GATT itself. But there was no index to guide one to where, if at all, the subject in question had been treated. The only way to go behind or beyond the text of the GATT agreement was to find someone who was able to recall something about what had happened on this subject. Fortunately, the State Department Legal Advisor's office had an attorney named Walter Hollis who had been involved with GATT affairs since the 1940s, and who was a walking data base on GATT history. Research usually began, therefore, by asking Walter Hollis. If Walter did not know, the next step was to find one of the other GATT veterans in the State Department's diplomatic corps who did. If there was time, help might also be obtained from the international civil servants in the GATT Secretariat, many of whom had served since the time GATT had been negotiated. The telephone was the principal research tool.

The key to survival for those government lawyers who were responsible for GATT law was the fact that GATT itself seldom stopped to worry about legal issues. There was no lawyer on the staff of the GATT Secretariat, and the Secretary General (Sir Eric Wyndham-White, a lawyer by training) was committed to the view that GATT did not need one. The government representatives and international civil servants who ran the GATT's business seldom stopped to ask whether this or

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\* Melvin C. Steen Professor of Law, University of Minnesota. B.A. 1956, Kenyon Coll.; M.A. 1958, Cambridge Univ.; L.L.B. 1961, Yale; L.L.D. 1979, Kenyon Coll.—Ed.

that decision or procedure was legal. It was enough that there was a consensus to do what needed to be done. Governments did prepare and sign elaborate protocols to record the results of negotiations, but all these documents gathered dust in a storeroom in the basement of the GATT headquarters—then located in the Villa Bocage on the grounds of the Palais des Nations in Geneva.

It was either in late 1964 or early 1965 that John Jackson, then a member of the Boalt Hall law faculty, paid a visit to the STR offices in Washington. I do not remember the exact date, and John does not even remember the visit at all. John stopped in my office, and informed me that he was going to spend the spring and summer of 1965 in Geneva researching the law of GATT. I do not remember the details of the conversation very well. John probably told me that he had arranged with the Secretariat to take quarters in the Villa Bocage and to have access to all GATT documents during his stay. I may have told John I was planning to do the same thing myself the year following. I recall that John asked some questions, but I cannot remember what they were. Looking back, I have come to regard this brief meeting as a sort of having-been-there-at-the-creation. If I had known what was to come of it, I would have taken a picture.

My plans to spend a year in Geneva did come together in the Spring of 1965. Having secured the necessary research grant and a teaching position to start in the Fall of 1966, I left STR in July or August and arrived in Geneva in September. John had gone back to the United States by then. Needless to say, I had been following John's progress during my several visits to Geneva earlier in the year. I do not remember whether I actually saw John during those visits, but either from John or others I learned that he had been working prodigiously. I recall being told that John would leave the Villa Bocage every evening with an armload of bound volumes containing GATT documents, apparently to continue reading them late into the night. (Needless to say, this was considered extraordinarily deviant behavior by most of those officials who inhabited the "lotus land" that was diplomatic Geneva of that era.) I do have a recollection of either John saying, or a Secretariat official quoting John as saying, "There's so much to read and so little time to do it."

At some point, I learned that the goal of John's 1965 research visit to Geneva had been to collect and organize all of the "law" of the General Agreement into a systematic treatise. I do recall one conversation—it must have been with John himself—when he took delight in explaining the system of index cards by which he could organize and access every subject within the large volume of research notes he was taking.

(It may have been the system involving metal rods passed through punch holes in the cards.) The more I became familiar with the extent of GATT documentation that had to be covered, the more improbable it began to seem that John would be able to accomplish this goal in the limited time available to him. Working at a steady (albeit not prodigious) pace myself, it was taking me a full year to assemble and understand the data pertaining to the history and jurisprudence of GATT dispute settlement procedures alone. I recall hearing that John had returned to Geneva over one or more summers, but even so . . . .

Having had the unique perspective of being the only other legal scholar to have excavated GATT's legal archives at the time, I think I can say that no one in the entire world was more astounded to see the publication of John's treatise in 1969 than was I. In those few years, a book half that size would have been a gigantic accomplishment. That it should be not only so comprehensive but also so consistently perceptive, accurate, and informative is still difficult to believe.

It is difficult to overstate the impact of the treatise. Of course it was a godsend to those lawyers, mainly government lawyers, who actually had to give legal opinions about GATT law. As one who practiced a bit of GATT law "B.J." (Before Jackson), I can attest to the enormous advantage of having this book for research purposes.

The impact of the treatise goes well beyond its contribution to GATT legal research, however. First and foremost, the treatise demonstrated to the world that the experience of the GATT was a coherent body of international law. It has long been a characteristic of international legal scholarship that scholars make law by finding it. Like those who speak prose without knowing it, governments tend to engage in legal behavior without treating it as such. They write agreements, they administer them, they follow regular patterns of behavior, and they consistently try to make each other's behavior conform to the norms and precedents created by all this activity. All the while, governments avoid any appearance of commitment to a binding legal system. It takes a work like John Jackson's treatise to concretize this sort of informal legal behavior, and, in doing so, to make it possible for this activity to move to a higher level of conscious commitment to effective legal institutions.

The evolution of the GATT/WTO legal system over the past thirty years has followed the developmental path just described. No one would argue that John Jackson's treatise was the sole cause of this development. In one sense the evolution of that legal system was probably inevitable, because that is the way most social institutions evolve when they are perceived to be useful. But no one can question that the Jackson treatise did exert a decisive influence on the speed and direction of that

development. A research tool usually needs to be updated. A book which serves this more important foundational function achieves its objective on the basis of the first edition alone.

Interestingly, the Jackson treatise arrived on the scene during the high point of what became known as the “anti-legalist” movement in GATT. This was a period from the early 1960s to about 1970 when the leading GATT governments—chiefly the United States, the European Community and the United Kingdom—became attached to the view that legal claims were not the way to solve trade conflicts, and that only diplomatic negotiation could reconcile the underlying social and economic interests that gave rise to such conflicts. In my view, the reason for the emergence of this anti-legalist position was that GATT needed a legal “time-out” in order to accommodate the demands of its new developing country membership to the manifest imperfections of developed country trade policy behavior. Likewise, the anti-legalist period ended when two things happened: when the developing countries did lower their expectations to a more “realistic” level, and when the United States realized it needed a working legal system in order to attack the growing problem of non-tariff trade barriers.

The Jackson treatise was written during the peak years of the anti-legalist movement. The author clearly had that movement in mind as he wrote. Chapter 29 contains a long and detailed critique of the “negotiation” methods favored by the anti-legalists, and of the power-based diplomacy that usually comes with it. Even more effective, perhaps was the fact that the book as a whole was a personal declaration of the author’s belief in the value of the contrary position—a rule-oriented system of governance. Even if one recognizes that other forces were already at work bringing the anti-legalist period to an end, it must be admitted that the Jackson treatise did arrive at exactly the right time—if not to persuade governments to change course, then at least to provide a splendid tool for those governments that were, for whatever reason, seeking to revive and strengthen the GATT legal system.

Of course, it all happened a long time ago.