A. INTRODUCTION

Robert Hudec's work on trade law not only helped create and guide the field, it also made a contribution to the general theory of law in a globalized world economy. While Hudec's contribution to trade law is well-known and fully documented in this volume and elsewhere, there has been less attention to the broader relevance of his work. In his struggle to understand trade law in action, he worked out a framework of analysis that has implications for many areas of international law and can be used to illuminate a wide variety of issues. In this chapter we outline some general principles about the role of law in the world economy, show how Hudec anticipated them in his work on trade, and demonstrate how these principles can help us deal with contemporary issues in international economic law. We show that Hudec's general analysis can still be used...
to deal with current issues in the area of trade and development, in the operation of councils and committees in the WTO and their potential for opening more policy space for developing countries, and even for understanding the role of law in the EU.

B. THE LEGALIZATION OF 'GLOBAL SPACE'

Much recent discussion of governance beyond the level of the nation state has drawn attention to 'legalization' or the tendency to bring more and more aspects of international life into the ambit of law-like processes. The legalization discussion has looked at the growing importance of rules governing the behavior of many actors, from states to private parties, in more and more areas of international life. Attention has been given to the rules, processes to interpret and apply the rules, and questions of compliance. Nowhere has this development been more pronounced than in the area of trade. The replacement of the GATT by the WTO has been heralded as a move from a diplomatic approach to the governance of trade to a legal regime, which includes binding rules and a court-like system for authoritative interpretation of the rules.

While no one would question the importance of legalization, it would be a mistake to think that this trend has totally transformed global governance in trade or in any other aspect of world society. Indeed, concentration on legalization may deflect attention from the full complexity of the 'new world order', to quote Anne Marie Slaughter, obscuring the continued importance of other modes of governance, the variety of mechanisms by which they can affect outcomes, and their interrelationship with more strictly juridical approaches. Consequently, one of the foremost challenges facing legal theory is to confront the diversity and density of 'global space'. Because global space involves states, supranational and international agencies, multilevel arrangements, great diversity of circumstances, and complex coordination issues, law may play different roles than it does in domestic settings.

1. See, for example, the special issue of Int’l Org (2000) on 'The Legalization of World Politics' and the emerging literature on 'new governance' in the European Union and elsewhere, one finds a more nuanced understanding of these complexities and relationships. See, for example, the special issue of the Col JEL (2007) on 'Narrowing the Gap: Law and New Approaches to Governance in the European Union'.


As a result of globalisation, international regimes often play a growing role in the regulation of affairs. International institutions like the WTO reach deeply into national legal orders as do supranational bodies like the EU. We are presented with a proliferation of regulatory approaches and instruments with legal or law-like characteristics creating a new phenomenon we might call the 'law of global space'.

This new phenomenon challenges our received understandings of law. Because some of the law of global space is set out in treaties, it bears some resemblance to traditional public international law. But because it may have direct impact on subnational bodies and private actors and because it may emanate from arenas that include some degree of popular participation, it often has features not normally associated with public international law. The law of global space, like national regulatory law, may specify detailed rules for behavior and provide sanctions for noncompliance. But it also may rely on very broad standards, collective deliberation over norm elaboration, and voluntary adherence to agreed-upon standards. Where classical theories of law saw international law and municipal law as distinct legal orders, the very purpose of much of the law of global space is to bring them together.

The result has been a vigorous debate about the nature, functions, and effectiveness of law in international regimes like the WTO and supranational institutions like the EU. Scholars have drawn attention to many of the features to be found in the law of global space and argued about their importance and desirability. To be sure, many of the developments highlighted in the debate over law in global space have their counterparts in debates about the changing nature and role of law at the national level, and arguments could be made that there is a general move away from classical legal conceptions. However, this not the place to debate such issues; our task is to outline the characteristics thought most salient to the law of global space.

C. OUTLINE OF THE CHAPTER

Our purpose in this chapter is threefold. First, we sketch a preliminary vision of the role of law in global space. This requires both an examination of law's functions and law's features. What role do we think law is or should be playing in the regulation of transborder phenomena? What tools have or could be used to carry out those functions? Traditional legal theory tends to see law as combining three functions: communication, facilitation, and coercion. But in order to theorize about the role of law of global space, it is necessary to separate the three functions and ask how they relate to one another. Traditional theory stresses the importance of such features as clear and predictable rules backed by sanctions and administered by specialized staff. In contrast, in global space we may see much more use of open-ended, nonbinding standards managed through transnational public/private networks.
D. FUNCTIONS AND FEATURES OF LAW IN GLOBAL SPACE

When we speak of the law of global space, we refer to the use of various authoritative processes that affect transactions that cross national borders. While these processes bear some resemblance to law at the national level and in some cases may operate in similar ways, in many cases they are performing functions and employing features that are fundamentally different from their municipal counterparts.

Law at any level can perform various functions. These include communication, facilitation, and coercion. Law as communication sets forth standards for behavior, whether it is of individuals, organizations, or states. Law as facilitation creates arenas in which individuals or groups may seek to set rules for their interaction or solutions to common problems. Law as coercion provides sanctions for noncompliance with authoritative standards or mutually agreed-upon rules.

In the typical municipal regulatory scheme, standards and coercion go together. Detailed rules are elaborated by legislatures and agencies and sanctions provided for noncompliance. Similarly, facilitation and coercion can go together if penalties are provided for breach of the contracts that result from private ordering.

3 Parts of this chapter are inspired by D Trubek’s remarks, ‘Transcending the Overtaking: Some Reflections on Bob Hudec as Friend and Scholar’ (May 2007) which will be reprinted in a forthcoming issue of Minn JIL.

and internalize the norms being applied. For that to happen, law must have performed communicative and facilitative functions.

Because the functions of law in global space differ from those of municipal law, it is no surprise to see that global institutions employ features that, while they may have counterparts in municipal law, are much more developed in global arenas. If one looks at the literature, we can see at least six such features:

i. Standards Not Rules
Although in municipal law much of law constitutes a set of relatively detailed rules knowable in advance, in the law of global space more emphasis is placed on broad and open-ended standards whose full meaning and impact must be worked out through multilevel, deliberative, and probably consensual means.

ii. Networks
In our conventional understanding of municipal law, the source of law is the legislature and its implementation the task of formally constituted bureaucracies. But in the law of global space, much of the task of norm elaboration occurs through the work of formal and informal networks that may include public officials, private actors, and technical experts.

iii. Decentered Deliberation and Negotiation
All types of law are formed by deliberation and negotiation. But in classical models, this occurs at the legislative level so that once the norms are promulgated they can, at least in theory, be imposed by authoritative and coercive means. In the law of global space, however, we see often it is understood that deliberation and negotiation will occur at all stages of the legal process.

iv. Multilevel Coordination
Received notions of law see it as a unitary command, issuing from a single identifiable sovereign. But the law of global space often involves the coordination of multiple levels of governance from the global to the strictly local.

v. Substance versus Procedure
Classical theories of law stress the importance of substantive norms, with procedure seen as simply a tool for ensuring compliance with these norms. But in the debates about the law of global space, more and more emphasis is placed on the procedural role law can play in the development and elaboration of broad standards and the coordination of multiple levels of governance.

vi. Soft and Hard Law
Hand in hand with tendencies to proceduralization, we see the increasing use of 'soft' or nonbinding norms. To the extent that the function of law in global space is to promote coordination rather than impose standards, and to the extent that

multilevel coordination works best when decisions are consensual, the use of soft guidance rather than hard standards becomes more important.

Each of these emerging features of the law of global space underscores the increased importance of communicative and facilitative aspects of law. Standards leave room for negotiation and diversity, networks promote communication and multilevel coordination, and proceduralism encourages the emergence of consensual norms and adaptability.

E. HUDEC ON GOVERNANCE ISSUES

Robert Hudec’s discussion of trade law anticipated these developments. Hudec came to trade law after a period of practical work for the US government and maintained close contacts to GATT and its operations throughout his career. To explain the working of what he observed as he followed trade law ‘in action’, he had to disaggregate the three functions specified above and show that trade law could communicate and facilitate even when it was unable to coerce.

Hudec wrote his early work in an era when there was less transnational interaction than we see today. But his pragmatic insights proved to be prescient, particularly in terms of his treatment of three issues: (1) why diplomats may draft detailed rules but then include very broad exceptions, (2) why detailed trade rules may be preferable to open-ended bargaining even if the rules cannot be strictly enforced, and (3) why legal processes may advance substantive goals even when the legal standards are vague.

In his seminal essay, ‘The GATT Legal System: A Diplomat’s Jurisprudence’, Hudec began by noting an apparent paradox between the style of the GATT agreement itself and the way that its parties went about enforcing it. On one hand, the substantive obligations of the GATT resembled a tax code in that they ‘form a long, complex, and carefully drafted instrument which is on the whole fairly rigorous in its demands’. On the other, the GATT’s enforcement apparatus presented ‘a front of ambiguity and uncertainty’ that seemed ‘altogether at odds with the lawyer-like precision of the code’. The legal decisions produced through the enforcement mechanisms of the GATT tended to be ‘deliberately obscure, often leaving it unclear whether there has even been a legal ruling at all’. In light of this paradox, Hudec took a step back to ponder the very nature of legal obligations—how they were understood; what purposes they served; and most important, how they were meant to be used in practice.

6. Ibid 17.
7. Ibid 17.
international institution." Through a discussion of the Belgian Family Allowances case, he showed how
the techniques used to soften the application of established rules happens also to
be a perfect mechanism for advancing and testing more novel propositions
of law. And likewise, the tradition of treating all legal obligations as less-
than-absolute mechanisms makes it much easier for governments to accept,
and to use, something new. In short, however cautious and restricted the
initial commitment by governments, there is some possibility of growth. 12
These arguments are strikingly similar to those advocated by proponents of
experimental forms of ‘new governance’ in contemporary times.

Almost four decades ago, Hudec saw a flexible legal process that tracks well
with the emphasis on standards, soft law, and multilevel deliberation we see
today. He found evidence in the evolution of the ITO into the GATT and in the
application of GATT procedures that law often functions more to facilitate settle-
ment through bargaining rather than setting a firm rule that everybody has to
comply with. But he also saw the need for balance between traditional legal per-
spectives and the alternative forms of governance so prominent in the contem-
porary law of global space.

In a second early work, ‘GATT or GAB? The Future Design of the General
Agreement on Tariffs and Trade’, Hudec pondered the role of substantive rules
in international trade policy. At the time, he felt that the GATT as he had come
to know it was in danger. ‘Unless governments decide, fairly soon, to make a
major effort to save the old GATT code’, he argued, ‘the pressures of a changing
world will leave no choice but to commit the major part of GATT’s work to
GAB-type procedures’.13 By GAB, Hudec meant a General Agreement on
Better Bargaining—a hypothetical institution devoid of substantive rules.

The question to be addressed is whether a code of substantive rules contributes
to the success of [GATT] procedures ... The major difference is that GAB
procedures would not be directed toward formal judgment about previously
defined normative standards, but would seek to produce a satisfactory result
through consultation in which all the relevant social and economic factors
would be considered in depth. One hesitates to say that GAB procedures reject
all forms of normative judgment, for even in negotiations both sides will strive
to marshal the community’s normative sentiments as a tool of persuasion. But
GAB would reject prior standards, trusting instead to the analysis of causes
and consequences to reveal whatever normative judgments are appropriate.13

8. Ibid 75.
9. Ibid 76.
10. Ibid 76.
11. Ibid 76.
12. R Hudec, ‘GATT or GAB? The Future Design of the General Agreement on
Tariffs and Trade’ (1971) reprinted in R Hudec (n 5 above) 79.
However, Hudec saw this as a mistake. He argued that ‘conciliation’ procedures alone would not work as effectively as the more rule-oriented GATT.

The principal difficulty with the GABB approach is that it assumes a much greater degree of cooperation from the object government than usually exists... The object government may try to find reasons for not discussing the matter at all. It may try to draw out and divert what discussion there is by insisting on consideration of as many other things as possible. And it may, as a final defense, take whatever plausible position there is in defense of its action and hold that position to impasse.

In this cleverly constructed counterfactual argument, Hudec seemed to make the case that substantive rules prevented the abuse of a diplomat’s jurisprudence. 'By rejecting not only the means but also the objective of imposing any more systematic normative framework on its procedures', he wrote, 'GABB puts itself at the mercy of any government practicing this all-too-developed art'. In this sense, Hudec appeared to advocate 'bargaining in the shadow of the law' idea in which substantive rules functions more to facilitate settlement than setting out final and hard prescriptions requiring and receiving strict compliance.  

Hudec recognized that there were disadvantages to relying on substantive rules. Anticipating later scholarship, he understood that traditional forms of top down, command and control regulation could be too rigid to accommodate diversity and achieve the compromise required to adapt to exogenous shocks and exigent circumstances that would inevitably confront the legal framework over time. He asked whether... the tendency to approach trade problems in terms of wooden rules may not blind the participants to the possibility of exceptional circumstances, as well as the general need to consider compromise. But this was not a reason to eschew rules altogether. Contrary to some critics, Hudec argued that ‘GATT practice has generally vindicated this expectation. Then as now, special circumstances were invariably argued as the excuse for such deviations, and the decisions permitting them were justified in these terms'.

Hudec also observed that actors tended to rely on hard law only as a last resort. And when hard legal mechanisms had been utilized, they produced legal decisions and precedents that were sufficiently ambiguous as to facilitate a continued process of delibration among relevant actors. 'Formal legal rulings have seldom been sought before the parties are in evident deadlock. The rulings themselves have usually been expressed in terms that are soft and tentative, and have almost invariably been accompanied by an invitation to continue negotiations.'

Also addressed by Hudec is what he called... the increasingly common argument that introduction of legal claims will 'poison the atmosphere' in a way which reduces the possibility of favorable action by the object government. Unlike domestic models of enforcement, coercive compliance on the world stage is much more difficult to achieve, particularly by the more powerful actors. The imposition of 'hard' legal mechanisms such as formal adjudication, one could argue, would impinge upon the perceived sovereignty of a given state in a way that would cause them to disengage diplomatically from the legal process. But Hudec, showing his legalistic side, did not see this happening in the case of the WTO/GATT. 'The short answer is,' he wrote, 'that the poison seems not have been noticed very much during the years when lawsuits were very common. To be sure, legal rulings cause some discomfort. That is one of their purposes. The word “poison” simply means that, for some reason, governments no longer consider the discomfort worthwhile.'

Robert Hudec was a legalist in the sense that he saw a role for rules in the trade regime and world order more generally. But he was a pragmatic and qualified legalist, and he maintained his faith in rules in large measure because, in our terms, he emphasized the facilitative and communicative rather than coercive elements of the law. He saw that both general standards and detailed rules sometimes can play an important but not necessarily decisive role in a complex normative process. He showed how actors deploy rules in varied ways and how they may buttress them with other sources of power and persuasion.

Finally, Hudec recognized that the norms of trade law were part of a larger whole. In another one of his well-known essays, 'Transcending the Ostensible: Some Reflections on the Nature of Litigation between Governments', Hudec illustrated through a discussion of subsidy code litigation during the Tokyo Round how legal processes may advance substantive goals even when the legal standards are vague. Although the subsidy code negotiations did not produce any real groundbreaking substantive results, for Hudec it highlighted subtle functions of the international legal process at work.

If the story of the Subsidies Code teaches any lesson, it is to underline just how useful and inviting the overselling of international legal instruments can be. It solves problems for any number of participants in the political process. Consequently, one should be ready to find, in almost any particular structure of international obligations, a significant number of what might be called paper obligations—apparent engagements which do not in fact reflect any real consensus or commitment. And when one finds the tendency to create paper obligations coupled with the tendency to write more rigorous litigation rules, one can expect to find dramatic legal failures.

15. Hudec (n 12 above) 114.
For Hudec, the legal process at times could allow actors to ‘temporize,’ to maintain the political momentum toward the eventual strengthening of legal norms without the precise (and potentially more controversial) legal rules. He had a vision of trade law as a governance system designed to harmonize and control the behavior of states. He saw that states are not unitary actors but made up of competing interests and tendencies. He saw that there are things that you can keep states from doing, but there are times when it is an error to try to constrain them too much. And 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. Hudec 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 trade disputes.

In many ways, Hudec’s early work anticipated several aspects of the law of global space that we see today. In each of the cases discussed above, Hudec stresses that either rules or mandatory processes can communicate norms and facilitate internalization of the norms even though the likelihood of strong coercive measures is low. When these communicative and facilitative functions of the legal process are operating, legal standards are more likely to take hold; when they are not or they are blocked, it complicates the ability of the legal arrangement to achieve its goals.

The emphasis on communicative and facilitative functions of the law appear to track well with the so-called ‘managerial approach’ first articulated by Chayes and Chayes, which draws upon social constructivist insights to understand compliance with legal norms. For them, legally binding agreements and institutions promote interactive processes such as justification, deliberation, and persuasion, which establish and reinforce norms that actors use to pattern their behavior. It follows from this logic that the more these legal norms become internalized, the more compliance becomes automatic. Enforcement mechanisms have little...


19. Conversely, the sources of noncompliance derive from three factors: the ambiguity and indeterminacy of treaty language, capacity limitations of states, and uncontrollable social or economic changes. Because of the intense negotiation process required to develop consensus (or ‘least common denominator’) between states on a given agreement, treaties are often ambiguously worded by design. Once in force, agreements are open to a wide degree of interpretation, which makes it difficult to determine noncompliance. Indeed, states might have different understandings of what the treaty means. In addition, states might not have the internal capacity to comply to the same degree as other states (because...
F. GLOBAL LEGAL SPACE AND THE FUTURE OF GOVERNANCE

A glance at some current issues in transnational law show the continued relevance of the functional analysis underlying Hudec’s insights, and his instincts concerning the need for a complex system that employs communication, facilitation, and coercion in varying degrees and circumstances. In this section, we take up three contemporary issues and suggest ways in which Hudec’s insights have continued relevance. The cases include but are not limited to trade matters. In this section we look at (a) proposals to reform the WTO to make it more supportive of development, (b) the operation of committees and councils in the WTO, and (c) the role of framework directives in the EU.

22. Ibid 170.
23. Koh (n 18 above) 2640.
uniformity in trade law. Quite the contrary, he thinks global rules are important to ensure sound functioning of the global market, just as he thinks the law is important for domestic markets. Indeed, his belief in the importance of rules is one reason he favors flexibility. Thus he states that ‘(b)uilding opt-outs into the rules generally does better than the alternatives, which are either not to have rules or to have rules that are frequently flouted’.25

And Rodrik observes that the rules are more likely to be effective if they encourage convergence on a voluntary basis.26

While Rodrik makes no reference to Hudec (or any other trade lawyer) in his discussion, his view of the importance of combining universal rules with various forms of flexibility echo Hudec’s analysis in important ways. Rodrik, like Hudec, believes in a rules-based global trading system. And, like Hudec, he understands that such a system cannot operate in a rigid manner, and that it must rely on communication and facilitation more than coercion. So both favor a complex combination of rules and ways to soften or defer the impact of the rules. Both want to include formal exceptions and opt-outs although Hudec also stresses the role of informal processes that can temper the strict application of the rules.

However, while it seems clear that at a general level Rodrik and Hudec agree on the need for some flexibility to be built into the architecture for the trade regime, they could be seen as disagreeing on the goals such flexibility should serve. In his 1987 book, Hudec argued that it was better for developing countries to be subject to MFN disciplines than to be free of reciprocal obligations. He concluded that on balance it was more in their interest to be bound by the obligation to open their markets than it was to enjoy the freedom to protect domestic industries on economic development grounds. But that freedom is one of the changes Rodrik argues for since one of his goals is to allow developing countries to be able to shield domestic producers from import competition while maintaining access to developed country markets.

We believe that these two positions can be reconciled, and that Hudec’s deep understanding of the relationship between trade law and trade politics can help us flesh out Rodrik’s proposals. While no one can say what Hudec would think about a proposal he never saw, there is evidence that he would have shared Rodrik’s policy views and reason to believe we can use his insights on the relationship between trade law and politics to improve on the procedural suggestions sketched in Rodrik’s chapter.

The first thing to establish is Hudec’s position on infant-industry protection and the value of allowing such an exception. Like Rodrik, Hudec accepted the case for such protection as a theoretical matter. He saw that infant industries might fail in such cases and recognized that if governments protected industries that would in the long run become globally competitive, it could enhance overall welfare. While admitting that such policies could promote development, Hudec questioned whether developing countries could effectively implement them. He saw three obstacles to making such protection work for the general good. The first was the limited ability of governments to pick the right winners. The second was that even potentially efficient industries may lose their competitive edge due to the subsidies protection gives them. And the third—and most important—is that once such protective policies are adopted, the pressure to protect inefficient as well as efficient industries will be too great to overcome.28 For that reason, he thought it best for developing country governments to nail themselves to the mast of reciprocity rather than seek S&D treatment.

Rodrik understands that governments, like markets, may ‘fail’ and is aware of the risks that infant-industry protection could be inefficient. But he thinks that such government failure can be avoided and has two arguments to counter Hudec’s pessimism about governmental capacity. First, Rodrik is able to point out that countries like Japan, Korea, Taiwan, and China effectively managed these policies, shielding industries behind protectionist walls initially but ensuring they would become globally competitive. Full information on the ‘Asian miracle’ was not available at the time that Hudec wrote his book, but now the role of protection in that story has been well-documented.

Second, Rodrik believes that there are procedures that can be implemented to ensure that the kinds of government failures Hudec feared can be overcome. Rodrik wants to change the trade rules to allow opt-outs from reciprocal obligations for a variety of reasons including developmental priorities.29 But he would condition this privilege on proof that the policies in question were adopted through an open and transparent process in which all affected parties would be required to participate, and the decision maker enjoined to ‘... ensure that protectionist measures that benefit a small segment of industry at large cost to society would not have much chance of success’.30

Hudec, like Rodrik, saw that there might be a way to build procedures into trade law that would ensure that infant-industry policies could be pursued without the risk of their being captured by inefficient domestic producers. He suggested that instead of being completely free of trade disciplines, developing countries might accept them subject to requests for a waiver under GATT Article XVIII.31

27. He stated that “The theoretical case for intervention is certainly a respectable one”.


30. Ibid 231.

31. Hudec (n 21 above) 231.
Such a process, if properly designed, could provide the discipline necessary to avoid misuse of the protectionist measures for development while allowing legitimate use for developmental goals.

While neither Hudec nor Rodrik developed a full-blown procedural proposal, it seems to us that Hudec’s detailed analysis of the barriers to effective use of a developmental exception could illuminate any effort to flesh out Rodrik’s suggestions. Thus, any effective procedure would have to ensure that the government has determined that there is a strong case that the results of its policy will be efficient in the long run, that the protected industry has strong incentives to become globally competitive without continued subsidy, and that mechanisms are in place to offset any disproportionate political power that might be exercised by inefficient domestic industries.

ii. The WTO: Communication and Facilitation through Councils and Committees

One of Hudec’s core insights was that trade law needed to employ complex mechanisms and procedures designed to create closure when possible but only when some degree of real consensus exists. An example of just this type of mechanism can be found in some of the processes that operate within the WTO. While most scholarly attention with respect to governance in the WTO these days is focused on legal rules and formal litigation, in fact the WTO also includes less well-known processes that serve communicative and facilitative purposes. Like the EU, the WTO faces a tremendous challenge in balancing the diversity and complexity of the governed. Reaching decisions by consensus among some 150 members, with their diverse interests and cultures, can be extremely difficult. Therefore, it is not surprising that we can find alternative mechanisms performing communicative and facilitative functions similar to those that Hudec discovered in an earlier era of the trade regime. The resulting flexibility and the opportunity these mechanisms provide for dialogue and deliberation could be of substantial benefit to developing countries as they seek to carve out more policy space within the trade regime.

Take, for example, the operation of the councils that operate under the WTO umbrella. For each major trade area—goods, TRIPS, and services—a corollary council (e.g., Goods Council) exists, which is responsible for the workings of the WTO agreements dealing with its respective areas of trade. Each council consists of all WTO members, reports to the General Council (the primary governing organ of the WTO), and contains subsidiary committees, which are further specialized in focus. These committees deal largely with tensions between national regulatory orders and international norms, practices, and standards. The committee process is soft, flexible, and open-ended, but operates in conjunction with the substantive rules that constitute the WTO framework.

The Services Council and its subsidiary committees provide interactive forums whereby member states and other actors can exchange information, seek clarification for and justify actions, and discuss their respective experiences. In addition, these committees often engage in processes of norm elaboration. When a particular ambiguity in a legal provision exists or a new service arises and it is not clear whether and how existing law applies to it, issues related to the application of legal norms can be brought before the committee for discussion. In each of these senses, the committees provide institutional space in which routinized practices of communication and facilitation can occur. They are involved in the construction and dissemination of knowledge about the services economy. The body of knowledge, in turn, helps to provide a common foundation for discursive interaction and the formation of substantive consensus at the committee level and beyond.13

A second example of mechanisms designed primarily for communication and facilitation in the WTO system might be the SPS Agreement and the corresponding WTO committee. The SPS Agreement deals primarily with food safety and animal and plant health standards. It attempts simultaneously to help member states protect their consumers against known dangers and potential hazards related to animal, plant, and human health while ‘avoiding the use of health and safety regulations as protectionism in disguise.’ 14 The SPS Agreement relies heavily on the communicative and facilitative functions of the law. According to the WTO Web site,

The WTO’s SPS Agreement encourages member countries to use standards set by international organizations ... but it also allows countries to set their own standards. These standards can be higher than the internationally agreed ones, but the agreement says they should be based on scientific evidence, should not discriminate between countries, and should not be a disguised restriction to trade.15

An SPS committee consisting of Member States operates as a forum in which members can raise “specific trade concerns”, monitor the harmonization of activities of the standard-setting international organizations; and elaborate upon

---

13. A Member might, for instance, make a presentation to the Committee on their experience with liberalization and regulatory reform in the financial services sector. This presentation then provides the basis for subsequent discussion, elaboration, questioning, and sharing of related experiences from other Members and nonstate actors such as international organizations. Written responses to many of the questions are later circulated, and the dialogue continues at subsequent meetings. A Lang and J Scott, The Hidden World of WTO Governance: Law and Constitutionalism in the WTO’, unpublished manuscript.

14. This discussion is based on Lang and Scott (n 34 above).


16. Ibid. Relevant standards include those set out by the FAO-WHO Codex Alimentarius. See also <http://www.wto.org/english/tratop_e/minist_e/min99_e/english/about_e/08spse/h.htm>. 
iii. Hybrid Governance in the European Union

Not only does Hudec’s approach to the law of global space help us deal with new issues in trade law; it also can be useful in other areas of international economic law. Hudec has taught us that it is often important to combine communication, facilitation, and coercion in global space. We can see such a constellation is the EU’s use of ‘hybrids’ in which new forms of governance and more traditional legal approaches are combined to create a system that includes both communication and facilitation and, in some limiting cases, coercion. An excellent example can be found in the EU’s Water Framework Directive (WFD). The WFD is an ambitious piece of legislation that launched an innovative approach to maintaining and improving water quality throughout the EU. Designed to replace a series of centralized and traditional command and control directives that dealt separately with groundwater, surface water, drinking water, and so forth, the WFD mixes classic top-down regulatory modes and legally binding requirements with decentralized, bottom-up, participatory and deliberative processes; iterative planning; horizontal networks; stakeholder participation; information pooling; sharing of best practices; and nonbinding guidance.

36. See Lang and Scott (n 32 above).

37. Lang and Scott (n 34 above).


40. EC, Council Dir 2000/60/EC, annex V.
Over 30 years ago, Robert Hudec began to construct a vision for the role of law in 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. Through close observation, he saw behavior that did not square with traditional conceptions of the law nor with what proponents of a regime devoid of substantive rules would predict. He viewed the roles and functions of the GATT legal framework in ways that most others did not. He saw how law could communicate, facilitate, and coerce. And he appreciated how these functions might sometimes work separately and sometimes work together. 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.

Of course, it would be too much to argue that Hudec had developed a full-blown theory that would account for all the features and functions of the contemporary law of global space. He did not spell out a systematic model to account for the relations between legal constraint and unregulated spaces, hard and soft law, detailed rules and open-ended standards, litigation and negotiation, or authority and dialogue. Although we might say he was a constructivist avant la lettre, he did not fully anticipate recent developments in the theories of global governance and law. Hudec did not fully incorporate the lessons of network analysis, the managerial approach, or multilevel governance theory. He wrote before the rise of ‘new governance’ or experimentalist theories of law which suggest that law at all levels from the municipal to the international may be undergoing transformation. There is plenty of work left to be done. But Hudec built a solid foundation on which all of us and future generations can build.

8. WINNERS AND LOSERS IN THE PANEL STAGE OF THE WTO DISPUTE SETTLEMENT SYSTEM

BERNARD HOEKMAN, HENRIK HORN AND PETROS C MAVROIDIS*

A. INTRODUCTION

Most research on the role of developing countries in the WTO Dispute Settlement (DS) system has focused on their propensity to participate as complainants, respondents, and third parties. Much of this line of research has sought to examine claims that developing countries are under-represented as complainants and/or over-represented as respondents in the DS system. Several reasons have been suggested why such biases are likely. For instance, developing countries may lack economic/legal capacity to defend their rights; or ‘power’ considerations might play a role (fear of issue linkage). Alternatively, market size considerations may play a role, with the limited scope for credibly threatening retaliation acting as a disincentive to bring cases.1 The research along these lines has looked for

* Of the World Bank, Washington and CEPR, London; Research Institute of Industrial Economics (IFN), Stockholm and Bruegel, Brussels and CEPR, London; and Columbia Law School, New York, University of Neuchâtel, CEPR, London respectively. We are very grateful to our discussant Richard Steinberg and to Chad Rowen, Marc Busch, and Bill Davey for helpful comments on the conference version of this paper. We are also indebted to Ivan Crowley and Martin Olsson for excellent research assistance and to Pehr-Johan Norbäck and Fredrik Hesselborn for help with the dataset. Horn and Mavroidis gratefully acknowledge financial support from the World Bank and Horn also from the Marianne and Marcus Wallenberg Foundation. The views expressed are personal and should not be attributed to the World Bank.

1. There is also research arguing that there are good reasons why one would expect to see developing countries under-represented as respondents in the DS system, reflecting the fact that the small size of markets acts as a disincentive for trading partners to bring cases—the expected ‘rate of return’ is too low.