

# Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space

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## Abstract

This paper presents a view of international law as a framework for problem solving. Many authors have noted the increased legalization of world politics. Where many conventional approaches to legalization conceive of law as regulation and stress compliance with preexisting rules, we argue that, especially in the complex arena of transnational governance dubbed "global space," law often operates very differently. Where many see international governmental organizations as the primary actors in international regulation, we put more emphasis on the operation of multi-level networks, and where many who think of international law stress enforcement and compliance with fixed norms, we put more emphasis on the role of experimentation for the solution of international problems and deliberation for the internalization of international norms. We show that in many cases law-like processes operate more as a framework for collective problem solving in complex and uncertain situations—where multiple actors are involved and multiple levels must be coordinated—than as a set of fixed rules. Such an order may form norms more through bottom-up participatory processes than top-down legislation, rely primarily on open-ended rather than precise legal rules, and deploy flexible and revisable standards. Although such features are present in domestic law, they may be more important in global space. Drawing from the "new governance" literature, this Article develops an alternative framework that embraces the full range of law-like processes, paying particular attention to how they operate as a framework for problem solving. This Article conducts a preliminary empirical analysis of the expanded vision of law in global space in three cases—the WTO council and committee system, the EU's Water Framework Directive, and the "Tuna-Dolphin" case. While these cases all involve some of the more legalized areas in international affairs, we show that each relies heavily on new governance-type mechanisms to operate.

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## I. INTRODUCTION

Law is playing an increasing role in international affairs. Fueled by the integrative forces of globalization, international legal arrangements of one type or another take on greater importance. International institutions like the World Trade Organization ("WTO") reach deeply into national legal orders, as do supranational bodies like the European Union ("EU"), and

transnational norms have evolved to deal with the increasing number of cross-border interactions. Yet law may play different roles than it does in strictly domestic settings because this environment includes states, supranational and international agencies, businesses, and non-governmental organizations ("NGOs"); involves many multi-level arrangements; encounters a great diversity of circumstances; and creates complex coordination issues. This Article explores the special characteristics of the settings that global law increasingly encounters, the challenges these settings create, and the institutions that are emerging. This Article shows that in this fluid and complex regulatory environment there is a growing need for legal tools that encourage problem solving and sketches some of the mechanisms that have developed to facilitate this kind of interaction.

Conventional notions of legalism, broadly defined as "the view that law and legal institutions can keep order and solve policy disputes,"<sup>1</sup> have long informed discourse regarding the role of law in international affairs. A strictly legalist approach tends to project the ideals of municipal law onto the international realm.<sup>2</sup> Thus, legalist approaches to international law emphasize command and control regulation in which courts and similar bodies that apply sanctions for non-compliance lay down and enforce relatively specific rules that define allowable behavior.<sup>3</sup>

While this account has been widely held and continues to influence contemporary debates over the role and efficacy of international law in world politics, it does not provide a complete description or understanding of the function of law in international society. This insight is not new. For example, in his work on the General Agreement on Tariffs and Trade ("GATT") legal system, trade law scholar Robert Hudec recognized that international law was as much a framework for problem solving and negotiation as a set of fixed rules, and he explored ways in which these two dimensions (problem solving and rule orientation) may fit together.<sup>4</sup> As the world becomes more

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<sup>1</sup> ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 21 (2009).

<sup>2</sup> *Id.* See also David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination*, 11 EUR. L.J. 343 (2005).

<sup>3</sup> See K.W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 402-03 (2000); Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 426 (2000) [hereinafter Abbott & Snidal, *Hard and Soft Law*]; George Downs et al., *Is the Good News About Compliance Good News about Cooperation?*, 50 INT'L ORG. 379, 380-81 (1996).

<sup>4</sup> David Trubek & Patrick Cottrell, *Robert Hudec and the Theory of International Economic Law: The Law of Global Space*, in *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* 25-26 (Chantal Thomas & Joel Trachtman eds., 2009), available at [www.law.wisc.edu/facstaff/trubek/hudec\\_final\\_may24.doc](http://www.law.wisc.edu/facstaff/trubek/hudec_final_may24.doc). See generally ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* (Gower ed., 1987); see also, e.g., Robert E. Hudec, "Transcending the Ostensible:" *Some Reflections on the Nature of Litigation between Government* (1987), reprinted in ROBERT E. HUDEC, *ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW* 117-19 (Cameron May ed., 1999); Robert E. Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade* (1971), reprinted in ROBERT E. HUDEC, *ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW* 77-115 (Cameron May ed., 1999); Robert E. Hudec, *The GATT Legal System: A*

complicated, commensurate challenges in understanding the role of law in transnational affairs have become ever more daunting.

In this Article, we put forth an alternative vision that focuses on law as problem solving. Where conventional models of international law stress the importance of rules, we give more attention to open-ended standards. Where many see international governmental organizations as the primary actors in international regulation, we emphasize the operation of multi-level networks, and where many who think of international law stress enforcement and compliance with fixed norms, we emphasize the role of experimentation in solving international problems and deliberation for the internalization of international norms.

## II. THE DISCOVERY OF "GLOBAL SPACE" AND EMERGENCE OF A PROBLEM SOLVING ORIENTATION

Over the past two decades, international relations and legal theorists have been confronted with an increasing diversity and density of law-like governance in "global space," a term we use to refer to an evolving regulatory environment created by both globalization and the increasing role international norms play in domestic settings. A review of the literature suggests that this environment contains at least four defining features.

First, global space is increasingly diverse and complex. To the extent that the law of global space seeks to bring out some degree of uniformity across borders, it must confront the great variation in the social systems and legal orders of the world's more than 190 states. Second, it consists of multiple and overlapping legal orders that transcend conventional state boundaries and bring many more participant actors into the regulatory arena. Legal fictions to the contrary notwithstanding, states are not unitary actors.<sup>5</sup> Rather, the complex interplay of the state and civil society determines state behavior. A third defining feature of global space is the relative weakness of international systems of coercion in the face of national resistance. The range of sanctions available to back up international standards is limited so that coercion is less available in the law of global space than it is in many aspects of municipal law.<sup>6</sup> Even when sanctions are applied, they do not necessarily have the

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*Diplomat's Jurisprudence*, (1970) reprinted in ROBERT E. HUDEC, *ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW* 17-41 (Cameron May ed., 1999).

<sup>5</sup> Indeed, many liberal approaches contend that an understanding of international legal outcomes requires a disaggregation of the state. These scholars propose accounts of international cooperation and compliance that are concerned with how domestic institutions respond to individuals and groups in different ways and aggregate the preferences of those individuals and groups, which in turn affects state behavior. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2005); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997), available at <http://www.princeton.edu/~amoravcs/library/preferences.pdf>.

<sup>6</sup> See, e.g., ABRAM CHAYES & ANTONIA CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1998) (especially Part I).

coercive power required to bring about conformity with legal norms.<sup>7</sup> Finally, global space is characterized by an ongoing knowledge deficit due to the high degree of uncertainty concerning optimal solutions to problems.

The foregoing conditions have fueled a growing emphasis on problem solving in many areas. Collective problem solving, in general terms, is a dynamic process that involves the common identification of a problem, formation of a consensus that it ought to be solved, and the mobilization of appropriate expertise and resources to do so. While these processes bear some resemblance to law at the national level, and sometimes operate in similar ways, in many cases they perform functions and employ features that are fundamentally different from their municipal counterparts.<sup>8</sup> Thus we increasingly see flexible, revisable, decentralized, and participatory legal mechanisms—what many call “new governance”—operating in global space.<sup>9</sup>

This trend can be seen in numerous areas. For example, the WTO is widely considered to be the most legalized and formal international regulatory institution, but its constituent councils and committees operate according to an alternative set of mechanisms that engage in norm elaboration and avoid the need for coercion. The EU employs hybrid forms of governance that mix 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 non-binding guidance. Finally, in the famous “Tuna–Dolphin” case, the suboptimal decision by the GATT dispute panel spurred a participatory process that engaged a range of

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<sup>7</sup> See, e.g., DANIEL DREZNER, *THE SANCTIONS PARADOX* (1999).

<sup>8</sup> For a somewhat similar perspective, see Christoph Knill & Andrea Lenschow, *Compliance, Competition, and Communication: Different Approaches of European Governance and their Impact on National Institutions*, 43 J. COMMON MARKET STUD. 583 (2005).

<sup>9</sup> The term “new governance” arose from recent regulatory developments in the EU and U.S. domestic contexts designed to embrace diversity and promote innovation. It refers to a variety of approaches that differ from traditional forms of command and control governance. The latter are viewed as exclusive, incapable of addressing societal complexity, unable to adapt to changing circumstances, and limited in their production of the new knowledge needed to solve rapidly evolving problems. The literature identifies ways that law can promote problem solving and enhance coordination but avoid the pitfalls of command and control regulation. While relatively young, this literature is voluminous. For overviews, see LAW AND NEW GOVERNANCE IN THE EU AND US (Gráinne De Búrca & Joanne Scott eds., 2006); MARTIN HEIDENREICH & JONATHAN ZEITLIN, *CHANGING EUROPEAN WELFARE AND EMPLOYMENT REGIMES: THE INFLUENCE OF THE OPEN METHOD OF COORDINATION ON NATIONAL REFORMS* (2009); LESTER M. SALAMON, *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (2002). See also Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Charles Sabel & Jonathan Zeitlin, *Learning from Difference: the New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271 (2008); Joanne Scott & David Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L. REV. 1 (2002); Kenneth Armstrong & Claire Kilpatrick, *Law, Governance, or New Governance? The Changing Open Method of Coordination*, 13 COLUM. J. EUR. L. 649 (2007); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

stakeholders in alternative governance arrangements that resulted in significantly strengthened dolphin protection. In each of these situations, law operates not to secure uniform compliance with fixed rules, but rather to ratchet up standards, accommodate diversity, and solve problems before coercion is necessary. Section IV of this Article elaborates on these case studies.

This Article provides an introduction to an emerging vision of law in global space that reflects a growing problem-solving orientation. Such a vision may promote a more complete understanding of the role of law for three principal reasons. First, it brings into the definition of regulatory space a number of institutions and processes that might not normally be labeled law. Second, it illuminates the mechanisms by which certain functions and features of law or law-like arrangements operate to promote problem solving. Third, it brings to light processes that may be more compatible with the needs of global space than more traditional rule-based, top-down approaches.

The remainder of this Article proceeds in three steps. Drawing on prominent strains of literature in international relations and new governance, it first highlights an emerging focus on law as a problem-solving agent and outlines the functions and features of law in this respect. It then provides a few empirical examples of how these processes often work in tandem with more rule-oriented dimensions of global governance. It concludes by teasing out the implications of this emerging vision for the future of international law.

### III. LAW AND PROBLEM SOLVING IN GLOBAL SPACE

#### A. *Limits of the Legalist Model*

Recent discussion of governance beyond the level of the nation-state has drawn more attention to "legalization," or the tendency to bring more and more aspects of international life into the ambit of law-like processes.<sup>10</sup> The conventional approach to legalization largely reflects the traditional legalist model, envisioning the law as a system of precise rules that third-party decision makers interpret and enforce.<sup>11</sup> This approach makes the implicit assumption that greater degrees of obligation, precision, and delegation will lead to more compliance and hence greater cooperative gains.<sup>12</sup>

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<sup>10</sup> Abbott et al., *supra* note 3, at 401. The concept of legalization was advanced by the framing chapter of a special issue of *International Organization* entitled "Legalization and World Politics." Obligation means that states are legally bound by the regime and therefore subject to scrutiny under the rules and procedures of international law. Precision means that the regime's "rules unambiguously define the conduct they authorize, require, or proscribe." Delegation means that third parties have been granted authority to implement, interpret, and apply the rules so that an effective dispute resolution mechanism and an amendment process exist. See also Abbott & Snidal, *Hard and Soft Law*, *supra* note 3; Downs et al., *supra* note 3.

<sup>11</sup> Abbott & Snidal, *Hard and Soft Law*, *supra* note 3; Downs et al., *supra* note 3.

<sup>12</sup> Miles Kahler, *The Causes and Consequences of Legalization*, 54 INT'L ORG. 661, 673 (2000).

However, this assumption might not always hold true. The model presupposes that obligation increases cooperation by enhancing legitimacy and coercion, but this does not always occur.<sup>13</sup> A regime may be perceived as more legitimate if it makes compliance voluntary by using non-binding norms.<sup>14</sup> States may also be more willing to enter into regimes that are non-binding yet follow their norms once they become part of the regime.<sup>15</sup> It is assumed that precision makes compliance easier because actors know exactly what is expected of them, but this is often not the case. When norms must cover substantial variation in national conditions and cultures, as Section III demonstrates, precision may actually reduce compliance as precise rules may create resistance in situations where open-ended standards, allowing for diversity, would not. Further, the model assumes that delegation to a third-party decision-maker reduces non-compliance. This presupposes that there is an expert body that can authoritatively determine the scope of norms and is capable of applying sanctions that can actually affect behavior, yet this rarely occurs. Moreover, delegation may encourage gaming the system, zealous advocacy, and rigidity—all of which can be found in the critique of domestic litigation. Finally, the model assumes that participants can specify detailed norms in advance, but in many cases the optimal solution is not known from the start and can only arise from complex interactions among affected parties.

While it is true that there has been an increase in the use of such "legalization" in international affairs, this model represents only some of international life and is but one form of law-like process operating in the international arena. Much of the legalist discourse tends to stress what law *is*—"hard or soft,"<sup>16</sup> centralized or decentralized, enforceable or unenforceable.<sup>17</sup> There is great emphasis on "compliance," or securing

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<sup>13</sup> See DINAH SHELTON, COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING LAW IN THE INTERNATIONAL LEGAL SYSTEM (2000); see also Martha Finnemore & Stephen Toope, *Alternatives to "Legalization": Richer Views of Law and Politics*, 55 INT'L ORG. 743 (2001) (arguing that the legalization literature paints an incomplete picture of how law operates in global society). They contend that "legalization" fails to account for the role of customary international law, provides no discussion of how "obligation" is generated, and disregards "the processes by which [law] is created and applied—adherence to legal process values, the ability of actors to participate and feel their influence, and the use of legal forms of reasoning." *Id.* at 750.

<sup>14</sup> SHELTON, *supra* note 13.

<sup>15</sup> *Id.* Several regimes, for instance, contain "observer status" designations that can lead to full time membership.

<sup>16</sup> Abbott & Snidal, *Hard and Soft Law*, *supra* note 3, at 421. Abbott and Snidal present a spectrum of law ranging from *hard* ("legally binding obligations that are precise and that delegate authority for interpreting and implementing the law") to *soft* (legal arrangements that in one way or another fall short of complete obligation, precision, or delegation). *Id.* The authors recognize that it is often difficult to create international regimes that bear all the characteristics of hard law, and that sometimes forms of soft law are the best that can be hoped for. *Id.*

<sup>17</sup> For a literature review on classic works of compliance, see Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, in HANDBOOK OF

behavior specified by fixed and preexisting rules.<sup>18</sup> Consequently, strict reliance on conventional notions of regulation can deflect attention from the full complexity of the "new world order," to quote Anne-Marie Slaughter,<sup>19</sup> and obscure the importance of other modes of governance with law-like aspects, the variety of mechanisms by which they can affect outcomes, and their interrelationship with more strictly juridical approaches. This Article, therefore, begins by asking what law *does*.<sup>20</sup>

Indeed, several prominent strains of literature seem to coalesce around the basic insight that law functions in nuanced ways to promote collective problem solving in an ever mutating transnational regulatory environment.<sup>21</sup> The purpose here is not to provide an exhaustive review of the relevant literature, which is voluminous. Instead, the remainder of this section draws on the prominent strains of the international relations<sup>22</sup> and "new

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INTERNATIONAL RELATIONS 538 (Walter Carlsnaes, Beth Simmons & Thomas Risse-Kappen eds., 2002).

<sup>18</sup> See generally Beth Simmons, *International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589 (2001); CHAYES & CHAYES, *supra* note 6; Downs et al., *supra* note 3, at 379–406; Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998); LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (1979). For a critique of the compliance emphasis, see Robert Howse, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL'Y 127 (2010).

<sup>19</sup> SLAUGHTER, *supra* note 5.

<sup>20</sup> For a separate treatment, see Paul F. Diehl, Charlotte Ku & Daniel Zamora, *The Dynamics of International Law: The Interaction of Normative and Operational Systems*, 57 INT'L ORG. 43 (2003).

<sup>21</sup> Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 582 (2005). See also Kenneth Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501 (2009) [hereinafter Abbott & Snidal, *Strengthening Regulation*].

<sup>22</sup> David Lake, *Progress in International Relations: Beyond Paradigms in the Study of International Institutions*, in MILLENNIAL REFLECTIONS ON INTERNATIONAL STUDIES, 145, 148–49 (Michael Brecher & Frank P. Harvey eds., 2002). In international relations, the tension between the instrumentalist treatments of law as a tool for *constraining* behavior of actors with fixed preferences versus the normative treatments of law as a *transformative* tool capable of changing behavior of actors by altering their identity has heretofore structured theoretical debates regarding the role of law. *Id.* A growing number of prominent scholars have asserted that the divide needs to be bridged to make empirical progress. *Id.* As Lake explains, "We work on separate islands of theory . . . . The failure to build bridges between these separate islands and to conceptualize adequately the relevant policy alternatives has hobbled inquiry." *Id.* See also, e.g., Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998); James Fearon & Alexander Wendt, *Rationalism v. Constructivism: A Skeptical View*, in HANDBOOK OF INTERNATIONAL RELATIONS, *supra* note 17, at 52; Kenneth Abbott, *Toward a Richer Institutionalism for International Law and Policy*, 8 J. INT'L L. & INT'L REL. 9 (2005); and Kenneth Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, U. ILL. L. REV. 5 (2008).



governance”<sup>23</sup> literatures to present a vision for the emerging role of law in global space.

### *B. Features and Functions of Collective Problem Solving*

In the context of global space, the overarching purpose of law is to promote a normative order that allows public and private actors to coordinate behavior and solve problems. At its core, the model rests on the idea of collective problem solving in complex multi-level arenas. This emphasis raises two central questions: 1) what does collective problem solving in global space mean and what are its core features? and 2) what are the characteristics of the process and institutions that would promote such problem solving?

Collective problem solving involves a common understanding that a problem exists, consensus that it ought to be solved, and the mobilization of appropriate expertise and resources to do so. Given the characteristics of global space—increased diversity and complexity, multiple legal orders involving a range of actors, a lack of third-party coercive capacity, and a knowledge deficit fueled by uncertainty—collective problem solving in global space is no easy task. To overcome these challenges, the law of global space must accomplish several things.

First, it must create a framework for the construction of new knowledge.<sup>24</sup> In global space, many coordination problems exist not because people fail to follow the rules but because they do not know what the rules should be. Governance arrangements should therefore deploy mechanisms that seek to promote experimentation and knowledge dissemination.

Second, the law of global space must promote participation. Stakeholder involvement is critical because stakeholders have the knowledge necessary to solve problems. Moreover, their meaningful participation in the process generates both procedural and substantive legitimacy. The more representative and transparent a governance process is, the more likely that participants and observers will perceive it as legitimate. Further, outcomes are more likely to be perceived as legitimate to the extent that they capitalize on relevant knowledge.

The third requirement for collective problem solving in global space is the ability to translate knowledge into norms. Knowledge alone does not solve problems, and collective action, however manifested, requires norms of one kind or another. But in a global space defined by complexity and uncertainty,

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<sup>23</sup> See Trubek & Trubek, *supra* note 2.

<sup>24</sup> See, e.g., Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an International Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19 (2000). On the role of knowledge, see, e.g., ERNST HAAS, *WHEN KNOWLEDGE IS POWER: THREE MODELS OF CHANGE IN INTERNATIONAL ORGANIZATIONS* (1990).

norms often cannot be imposed from above. Instead, they are more likely to emerge from the bottom up through participation and experimentation.<sup>25</sup>

In light of the problem solving orientation of the law of global space, we see five related features that operate in pursuit of these overarching goals.

### 1. Standards, Not Rules

While in the municipal context much of law constitutes a set of relatively detailed rules knowable in advance, the law of global space places more emphasis on broad and open-ended standards whose full meaning and impact must be worked out through multi-level, deliberative, and probably consensual means. To be effective, the law must not only allow the participants leeway in defining the standards with which they will have to live; in order to avoid interference with embedded systems of national organization, it should not demand more convergence than is necessary to achieve fundamental goals.<sup>26</sup> These trends also place a premium on governance arrangements that are adaptable to the rapidly evolving global environment.<sup>27</sup> Standards also provide room for flexibility in negotiation and implementation.

### 2. Experimentation

Classical theories of law stress the importance of substantive norms, with procedure seen simply as a tool for ensuring compliance with these norms.<sup>28</sup> In contrast, the expanded vision of the law of global space stresses the procedural role law can play in problem solving by allowing for iterative processes that develop and elaborate upon broad standards over time in order to produce a "ratcheting up" dynamic.<sup>29</sup> Moreover, because of the complexities and uncertainties in global space, law may seek to foster diversity and

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<sup>25</sup> See Trubek & Trubek, *supra* note 2; Sabel & Zeitlin, *supra* note 9.

<sup>26</sup> SHELTON, *supra* note 13.

<sup>27</sup> In their recent work, Abbott and Snidal observe that:

the evolving structures of global production—multinational enterprises and global supply chains—pose major challenges for conventional 'regulation': action by the state—or at the international level by groups of states, acting primarily through treaty-based intergovernmental organizations (IGOs)—to control the conduct of economic actors through mandatory legal rules and enforcement.

Abbott & Snidal, *Strengthening Regulation*, *supra* note 21, at 504–05. In response, they see an emergence of new modes of regulation characterized by the central role of private actors and the "voluntary rather than state-mandated nature" of regulatory norms, a trend that they term "regulatory standard setting (RSS)" or the "promulgation and implementation of non-legally binding, voluntary standards of conduct for business, in situations that reflect Prisoners' Dilemma (PD) externality incentives (the normal realm of 'regulation')." *Id.* at 506–07.

<sup>28</sup> See generally, e.g., Abbott et al., *supra* note 3; Abbott & Snidal, *Hard and Soft Law*, *supra* note 3; Downs et al., *supra* note 3.

<sup>29</sup> Trubek & Trubek, *supra* note 2; Sabel & Zeitlin, *supra* note 9.

experimentation in order to promote the search for "best practices." Legal procedures may create a range of "policy laboratories" that participant actors can use to create new knowledge, which can in turn evolve into norms through the exchange of best practices and revisable standards.<sup>30</sup>

### 3. Dynamic Arenas for Deliberation and Negotiation

All types of law are formed by deliberation and negotiation. But in classical models, this occurs primarily 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, it is often understood that deliberation and negotiation will occur at all stages of the legal process.<sup>31</sup> Global space also may require different structures for deliberation and negotiation.<sup>32</sup> Deliberation involves searching for truth—some sort of common understanding about the problem to be solved—while negotiation involves the arguing of established positions. To solve problems, the law of global space may need to accommodate both.

### 4. Networks and Methods to Coordinate Multiple Levels of Governance

In the conventional understanding of municipal law, the source of law is the legislature and its implementation is the task of formally constituted bureaucracies. But in the law of global space many of the tasks associated with knowledge construction and norm elaboration occur through the work of formal and informal networks that may include public officials, private actors, and epistemic communities.<sup>33</sup>

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<sup>30</sup> Jonathan Zeitlin, *Pragmatic Transnationalism: Governance Across Borders in the Global Economy*, 9 SOCIO-ECON. REV. 187 (2010).

<sup>31</sup> These features of the law appear to track well with the so-called "managerial approach" first articulated by Chayes and Chayes. CHAYES & CHAYES, *supra* note 6. 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. *But see* Koh, *supra* note 18. Koh, while broadly sympathetic to the managerial approach, critiques Chayes and Chayes for failing to specify the social processes that underpin the will to obey international law. Some international relations scholars have addressed this critique by emphasizing the constitutive aspect of deliberative processes. *See, e.g.,* Thomas Risse, *Transnational Governance and Legitimacy*, in GOVERNANCE AND DEMOCRACY (Arthur Benz & Yannis Papadopoulos eds., 2006); Thomas Risse, *Let's Argue! Persuasion and Deliberation in International Relations*, 54 INT'L ORG. 1 (2000) [hereinafter Risse, *Let's Argue!*].

<sup>32</sup> These structures may be more inclusive, occur at multiple levels of society, and have an iterative nature, seeking to ratchet up existing norms. *See infra* Part III(c).

<sup>33</sup> DANIEL DREZNER, *ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES* (2009); Simmons, *supra* note 18; SLAUGHTER, *supra* note 5. Several prominent studies explore the emergence of multi-level governance networks, highlight the corollary coordination challenges, and analyze the enduring relevance of the state therein. Drezner, for instance, contends that global regulatory networks represent a new foreground for politics, but that powerful states still dominate. Major states seek to create regulations and standards consistent with their own preferences, as informed by domestic politics. For another example of how the powerful seek to impose their preferences on others through regulatory arrangements, see Simmons. From a more liberal perspective, Slaughter argues that the state remains the prime

Moreover, received notions of law see it as a unitary command issuing from a single identifiable sovereign.<sup>34</sup> But the law of global space often involves the coordination of multiple levels of governance ranging from global to strictly local.<sup>35</sup> Whereas classical theories of law stress the importance of substantive norms with procedure seen as simply a tool for ensuring compliance with these norms, the law of global space places more and more emphasis on the procedural role law can play in the development and elaboration of broad standards and the coordination of multiple levels of governance.<sup>36</sup>

### 5. Soft and Hard Law

Hand in hand with tendencies to proceduralization, the use of "soft" or non-binding norms is increasing. To the extent that the function of law in global space is to promote coordination rather than impose standards,<sup>37</sup> and to the extent that multi-level coordination works best when decisions are consensual, the use of soft guidance rather than hard standards becomes more important.

However, harder forms of law can serve key purposes in the law of global space.<sup>38</sup> In some cases, the emphasis on standards and softer forms of regulation removes some of the need for coercion.<sup>39</sup> If a legal norm is

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player but is disaggregating: networks of government officials, be they financial regulators or legal and judicial experts, are working with their counterparts in other states to solve the myriad governance challenges facing the international community with the onset of globalization. On the role of epistemic communities, see, e.g., Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 1 (1991). See also Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183 (1997); Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 177 (Michael Byers ed., 2000).

<sup>34</sup> See, e.g., POSNER, *supra* note 1.

<sup>35</sup> See the framing chapters in *WHO GOVERNS THE GLOBE?* (Deborah D. Avant et al. eds., 2010); *THE POLITICS OF GLOBAL REGULATION* (Walter Mattli & Ngaire Woods eds., 2009). Many ask anew "who governs the globe," probing the increased influence of non-state actors and their sources of power and authority in governance arrangements, examining which actors "capture" and thereby control the regulatory processes, and how the consequences lead to distributional problems that undermine the provision of public goods.

<sup>36</sup> See Koh, *supra* note 18.

<sup>37</sup> Several studies show how non-binding legal norms have advantages in solving collective action problems, as they may reduce contracting and sovereignty costs, accommodate diversity, provide for flexibility, increase participation, and serve as a potential springboard for deeper levels of cooperation. See Abbott & Snidal, *Hard and Soft Law*, *supra* note 3; Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991); Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001).

<sup>38</sup> See, e.g., Downs et al., *supra* note 3; James Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT'L ORG. 269 (1998).

<sup>39</sup> SHELTON, *supra* note 13.

completely internalized, compliance becomes automatic and routine.<sup>40</sup> In other cases, coercive pressure that can be brought to bear in a regulatory arrangement is greater if there are inter-subjective understandings about what behavior is inappropriate or what boundaries cannot be crossed. Here the "shadow of law" can exert influence on outcomes.<sup>41</sup>

Moreover, in the law of global space, "new governance" features are often yoked to more traditional forms in hybrid constellations.<sup>42</sup> The systems complement one another: without the standard regulatory framework entities might lack incentives to self-regulate, while without the more flexible new governance processes they would not be able to carry out innovative strategies. Such a system can also lead to what some call a penalty default (discussed below), in which the rules are viewed as so unpalatable to all parties in light of changing circumstances that each is motivated to solve the problem without having to fall back on the traditional components that would likely produce a suboptimal outcome.

### C. Processes

In moving away from a hierarchical design that relies heavily on the state and coercion to secure compliance, a problem solving orientation points to the need to create machinery that will activate the social and ideational mechanisms that produce the knowledge required to identify and address complex problems in diverse settings. The features described above facilitate five processes that promote cooperation in ways that can keep pace with the complexity and rapid change that characterize global space.<sup>43</sup>

#### 1. Deliberation

The emphasis on networked governance models and the potential for revision underscores the importance of the communicative function of the law of global space.<sup>44</sup> The process of deliberation among a more diverse set of actors fosters exchange of policy knowledge and experience, promotes common understandings and purpose through continued interaction, contestation, and justification of action, and thus more likely leads to changes in legal norms. As Keck and Sikkink argue, "normative change is inherently

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<sup>40</sup> See, e.g., CHAYES & CHAYES, *supra* note 6; Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 55 INT'L ORG. 887 (1998).

<sup>41</sup> See Koh, *supra* note 18. For the classic treatment of the shadow of law concept, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>42</sup> On hybridity, see David M. Trubek & Louise G. Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539 (2007).

<sup>43</sup> Slaughter et al., *supra* note 22 (making a systematic case for an interdisciplinary research agenda in this vein).

<sup>44</sup> See generally Risse, *Let's Argue!*, *supra* note 31 (discussing communicative action in international politics).

disruptive or difficult because it requires actors to question . . . routinized practice and contemplate new practices."<sup>45</sup> Consequently, arguments that succeed in changing a dominant belief structure must be extremely convincing in order to overcome ingrained habit and institutionalization.<sup>46</sup> A more decentralized, participatory framework makes persuasion more likely and is capable of spreading ideas that can change actors' preferences.<sup>47</sup> The reduced reliance on material sanctions also enhances the likelihood that deliberation is less strategic than it would be if the outcome of deliberations could lead to punishment. Moreover, actors are more likely to remain engaged in the global legal process if there are mechanisms that effectively solicit and channel their voices without penalty.<sup>48</sup>

## 2. Learning

The communicative and cognitive features of the expanded vision promote learning. Hemerijck and Visser define learning operationally as "a change of ideas and beliefs (cognitive and/or normative orientations), skills, or competencies as a result of the observation and interpretation of experience."<sup>49</sup> Policy learning is facilitated by:

mechanisms that destabilize existing understandings; bring together people with diverse viewpoints in settings that require sustained deliberation about problem-solving; facilitate erosion of boundaries between both policy domains and stakeholders; reconfigure policy networks; encourage decentralized experimentation; produce information on innovation; require sharing of good practice and experimental results; encourage actors to compare results with those of the best performers in any area; and oblige actors collectively to redefine objectives and policies.<sup>50</sup>

In the law of global space, tools such as revisable standards, benchmarking, and exchange of best practices are all designed to enhance

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<sup>45</sup> MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 35 (1998); *see also* NETA CRAWFORD, *ARGUMENT AND CHANGE IN WORLD POLITICS: ETHICS, DECOLONIZATION, AND HUMANITARIAN INTERVENTION* 109 (2002).

<sup>46</sup> CRAWFORD, *supra* note 45, at 111.

<sup>47</sup> *See generally* ALASTAIR I. JOHNSTON, *SOCIAL STATES* (2008) (discussing persuasion and other social mechanisms); JEFFREY T. CHECKEL, *INTERNATIONAL INSTITUTIONS AND SOCIALIZATION IN EUROPE* (2007).

<sup>48</sup> *See generally* ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

<sup>49</sup> ANTON HEMERIJCK & JELLE VISSER, *POLICY LEARNING IN EUROPEAN WELFARE STATES* 5 (2003). *See generally* Peter M. Haas & Ernest B. Haas, *Learning to Learn: Improving International Governance*, 1 *GLOBAL GOVERNANCE* 255 (1995) (analyzing how knowledge affects the social process through informing visions and shaping organizational practices).

<sup>50</sup> James S. Mosher & David M. Trubek, *Alternative Approaches to Governance in the EU: EU Social Policy and the European Employment Strategy*, 41 *J. COM. MAR. ST.* 1, 76-77 (2003).

policy learning. This might result in the construction of an alternative cognitive framework or a new "perspective from which reality can be described, phenomena classified, positions taken and actions justified."<sup>51</sup> Broadly conceived, policy learning may also include the development of a common vocabulary, use of symbols (e.g., indicators), and changes in ordering assumptions and views on causality.<sup>52</sup> Moreover, as Mark Dawson puts it, learning in global legal space

implies that the relation between "local" application discourses, and a common reflection on goals, objectives and procedures can be dialectical in nature, with local practice "feeding in" to broader policy discussions among a wider group of constituents. The distinction between the "political" framing of rules and their "legal" execution is thus broken down.<sup>53</sup>

### 3. Norm Diffusion

The guidelines and information generated by the law of global space often appear before national policy makers and other actors as a coherent policy model that they are encouraged to copy—a process often referred to as "mimetic diffusion."<sup>54</sup> In this regard, the law of global space often provides a shortcut to policy-making, which can be particularly effective in addressing complex issues.<sup>55</sup> Similarly, if experimental forms of regulation work in one area, their lessons and insights might apply elsewhere with room for flexible application at local levels. In both cases, the iterative nature of new governance processes can help the diffusion process.

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<sup>51</sup> Christina Garsten & Kerstin Jacobsson, *Introduction*, in *LEARNING TO BE EMPLOYABLE: NEW AGENDAS ON WORK, RESPONSIBILITY AND LEARNING IN A GLOBALIZING WORLD* 12–13 (Christina Garsten & Kerstin Jacobsson eds., 2004).

<sup>52</sup> See generally Kerstin Jacobsson, *Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy*, 14 J. EUR. SOC. POL'Y 355 (2004).

<sup>53</sup> Mark Dawson, *New Governance and the Proceduralisation of European Law: The Case of the Open Method of Coordination* 161 (September 2009) (unpublished Ph.D. dissertation, European Univ. Inst.).

<sup>54</sup> For other discussions of norm diffusion, see Finnemore & Sikkink, *supra* note 42; Jeffrey T. Checkel, *Why Comply? Social Learning and European Identity Change*, 55 INT'L ORG. 553 (2001); Jeffrey T. Checkel, *International Institutions and Socialization in Europe: Introduction and Framework*, 59 INT'L ORG. 801 (2005); Walter W. Powell, *The New Institutionalism*, in *ORGANIZATIONAL ANALYSIS* (Walter W. Powell & Paul DiMaggio eds., 1991).

<sup>55</sup> See generally Claudio M. Radaelli, *The Diffusion of Regulatory Impact Analysis—Best Practice or Lesson Drawing?*, 43 EUR. J. POL. RES. 5 (2004). Lessons from one policy setting can be applied to another similar setting if the context is appropriate. New governance mechanisms promote this process.

#### 4. Peer Pressure

The heavy reliance on peer review is designed to use the social connections among participants as conduits through which pressure can be applied. This may occur on a very low level where, for example, financial regulatory experts from a compliant state apply pressure to their counterparts from a non-compliant state—a process facilitated by a common professional framework. It may also occur on a much broader level, so that states seen as actively working against the prevailing norm are treated as outsiders in the international system. If this result is considered in light of the idea that sovereignty today is as much about being recognized as a legitimate participant in the international system as it is about territorial integrity, the risk of exclusion seems a serious potential consequence.<sup>56</sup> This exclusion could also lead to material consequences.<sup>57</sup>

#### 5. Penalty Default and Destabilization Regimes

The features and functions of global space explained above do not always work well in isolation. According to Sabel and Zeitlin, mechanisms such as peer review

can be ineffective, indeed unworkable: ineffective because its deliberations might seem to yield only recommendations that can be ignored without penalty by those to whom they are addressed; unworkable because in the absence of any sanction or discipline the actors could well choose to limit themselves to pro forma participation or worse yet manipulate the information they provide so as to show themselves, deceptively, to best advantage.<sup>58</sup>

In the event that moral suasion, the potential for public embarrassment, and reputation costs are not enough to alter behavior of some actors, there are other means to retain quality participation in the law of global space, what Sabel and Zeitlin refer to as penalty default and a destabilization regime.<sup>59</sup>

Penalty default rules and destabilization regimes are a new governance response to situations in which actors seem unwilling or unable to solve a collective problem themselves, but the conditions for framing an imposed solution that would work for all parties do not exist. In such a case, it may be possible to impose a rule that would only come into effect if the stakeholders

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<sup>56</sup> CHAYES & CHAYES, *supra* note 6, at 22–28.

<sup>57</sup> For example, if the World Bank makes funding dependent upon compliance with anti-money laundering standards, which is an ongoing discussion, noncompliance could carry serious costs given that violators would be ineligible for some types of material assistance.

<sup>58</sup> Sabel & Zeitlin, *supra* note 9, at 305.

<sup>59</sup> *Id.*



are unable to work out a satisfactory solution.<sup>60</sup> Such a rule should be designed to impose a penalty on all the parties if they cannot agree, thus creating incentives for them to work together to create a more optimal solution.<sup>61</sup> In order to work, penalty defaults should be part of a “destabilization regime” that does “as much to wean actors from previously unquestioned commitments by suggesting plausible and superior alternatives as by in effect terrorizing them into undertaking a search for novel solutions.”<sup>62</sup> To summarize, “the new destabilization regime—whether or not accompanied by penalty default in the strict sense—shifts the regulatory focus from rules to frameworks for creating rules.”<sup>63</sup>

To show how various forms of “new governance” are playing law-like roles in traditional areas of international regulation, and how they are fostering deliberation and learning, the next section looks at three recent cases. They show that such processes have improved the operation of international regimes and demonstrate the value of employing the expanded vision of the law of global space in both empirical inquiry and policy formation.

#### IV. THE EXPANDED LAW OF GLOBAL SPACE: THREE CASES

The expanded vision of the law of global space is evident in a range of governance arrangements and issue areas. Here we present three case studies that illustrate how some of the processes we have specified operate. First, we examine how new governance processes exist in what looks like a more traditional, rule-bound system—the WTO—highlighting the importance of these processes as means to avoid coercion and generate new knowledge. Second, we explore the EU’s Water Framework Directive, which yokes new governance to hard law in a planned hybrid system, illustrating how the former is doing much of the regulatory work. Finally, we investigate a famous international legal problem that bridges environmental and trade law—the Tuna-Dolphin case—to illustrate participatory problem solving by stakeholders following a destabilization regime as well as an unintended penalty default. Although these cases vary, all are oriented toward problem solving and all rely heavily on new governance processes.

##### *A. The “Hidden Governance” of the WTO: New Governance in the Interstices of a Legalized Regime*

Many scholars consider the trade regime to be among the most legalized in international affairs. With the onset of an era of unprecedented legalization that ushered in the WTO, most of the scholarly attention has

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<sup>60</sup> *Id.* at 306.

<sup>61</sup> *Id.* at 306–08.

<sup>62</sup> *Id.* at 306.

<sup>63</sup> Sabel & Zeitlin, *supra* note 9, at 307.

heretofore focused on the dispute resolution system and formal litigation.<sup>64</sup> However, the WTO also includes less well-known processes that serve primarily communicative and facilitative purposes.

### 1. Communication and Facilitation Through Councils and Committees

One of the core challenges of global space is how legal constellations can be configured to create closure by facilitating consensus. Like the EU and many other multilateral arrangements, 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 find alternative mechanisms geared to promoting flexibility. Take, for example, the operation of the councils under the WTO umbrella. For each major trade area—goods, intellectual property, and services—a corollary council (e.g., the Goods Council) exists, which is responsible for the workings of the WTO agreements dealing with its respective areas of trade.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup>

One area where this flexibility is clear is in the primary work of the WTO administrative body in the services area: the Council for Trade in Services. Article IV(5) of the Marrakesh Agreement (which established the WTO) created a Services Council to “oversee the functioning of the General Agreement on Trade in Services [“GATS”].”<sup>68</sup> It can determine its own procedural rules and has the authority to establish any subsidiary committees.<sup>69</sup> The Council sets its own meeting schedule and convenes roughly every six weeks.<sup>70</sup>

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<sup>64</sup> See, e.g., DANIEL M. KENNEDY & JAMES D. SOUTHWICK, *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT HUDEC* (2002); Judith Goldstein & Richard Steinberg, *Regulatory Shift: The Rise of Judicial Liberalization*, in *THE POLITICS OF GLOBAL REGULATION* 211 (Walter Mattli & Ngaire Woods eds., 2009).

<sup>65</sup> *Understanding the WTO: The Organization: Whose WTO Is It Anyway?*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm) (last visited July 8, 2012).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* For more detailed discussion, which is drawn from heavily in this Article, see Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20 EUR. J. INT'L L. 575 (2009).

<sup>68</sup> Marrakesh Agreement Establishing the World Trade Organization art. IV(5), Apr. 15, 1994, 1867 U.N.T.S. 154, available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm).

<sup>69</sup> The Committee on Trade in Financial Services administers all GATS-related matters as they pertained to the financial services sector. Other subsidiary committees include the Committee on Specific Commitments, which oversees Members' liberalization commitments, the Working Party

The Services Council and its subsidiary Committees provide interactive forums whereby Member States and other actors can exchange information, clarify and justify actions, and discuss their respective experiences.<sup>71</sup> The procedures for how these bodies operate are largely unspecified and allow WTO members to extend invitations to outside actors such as relevant intergovernmental organizations ("IGOs"). These outside actors can participate in meetings as observers, make presentations and answer questions, and act in other capacities. Other stakeholders are involved in "informal seminars and other meetings that occur around the formal committee meetings."<sup>72</sup> These sets of formal and informal meetings not only provide venues for the exchange of information and knowledge, but also facilitate processes of deliberation, contestation, and justification that keep the WTO machinery moving and promote problem solving. These are especially useful for developing countries that may otherwise have difficulty operating within the WTO regime.

A member might, for instance, make a presentation to the Committee on its experience with liberalization and regulatory reform in the financial services sector. Such a presentation then provides the basis for subsequent discussion, elaboration, questioning, and sharing of related experiences from other members and non-state actors such as international organizations. Written responses to many of the questions are later circulated and the dialogue continues at subsequent meetings.<sup>73</sup>

According to Lang and Scott, these more decentralized committees contribute to a process of creating a shared knowledge base from which delegates proceed. Some delegates have expressed appreciation of the extent to which they have "increased awareness of possibilities and limitations deriving from the specificities of the situation" in each country, and thereby led

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on GATS Rules, and the Working Party on Domestic Regulation. The latter two are tasked with carrying out further negotiations on matters which remained unresolved at the end of the Uruguay Round, as required by Articles VI, X, XIII, and XV of the GATS. Lang & Scott, *supra* note 67, at 577-78.

<sup>70</sup> *Id.* at 577.

<sup>71</sup> *Id.* at 604.

<sup>72</sup> *Id.* at 578.

<sup>73</sup> For instance, according to Lang and Scott:

In late 2002, a representative from Hong Kong's regulatory authority for the financial services sector attended the Committee meeting to give a presentation on the challenges that 'e-banking' posed for financial services regulators and recent initiatives that Hong Kong had established to address them. This was followed a short time later by a paper and presentation from the Swiss delegate, setting out not only the Swiss regulatory framework covering e-finance issues, but also drawing attention to the work of the Basel Committee on precisely this issue.

*Id.* at 579.

to a change in the expectations of trade partners in concurrent negotiations. In addition, smaller countries in particular have expressed appreciation for the opportunities these discussions afford to ask questions of and learn lessons from countries which have already progressed some way down a path that they are considering. On a number of occasions specific programmes and measures implemented in one country have been said by other delegates to be of direct relevance to problems faced in theirs . . . . Even if they do not agree on a single solution, they do seem to develop common frameworks for describing and making sense of problems, on the basis of which a range of alternative available viewpoints as to how to address them can be expressed.<sup>74</sup>

In addition, these committees often engage in processes of norm elaboration. When a particular ambiguity in a legal provision exists or when it is unclear whether or how existing law applies to a new service, issues related to the application of legal norms can be brought before the committee for discussion. For example, in a meeting of the Committee on Trade in Financial Services in 2002, Brazil questioned the distinction between "liberalization of financial services trade" and "capital account liberalization."<sup>75</sup> In the ensuing deliberative process, a representative from the International Monetary Fund made a presentation on the issue, the World Bank provided a paper outlining its views, and other state representatives articulated their positions.<sup>76</sup> While no formal agreement materialized, this exercise accomplished three fundamental things: 1) created an inter-subjective understanding among participants on the legal differences between financial services and capital account liberalization; 2) "drew attention to many Members' intention *not* to commit to capital account liberalization" given that this distinction was new to a number of delegates; and 3) enlisted outside experts in the financial community to help understand how to interpret their GATS commitments.<sup>77</sup>

In each of these senses, the committees provide institutional space where communication and facilitation can occur. Although these processes can lead to the formulation of new rules, they might be most valuable for the creation of softer international standards 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.<sup>78</sup>

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<sup>74</sup> Lang & Scott, *supra* note 67, at 581.

<sup>75</sup> *Id.* at 586 (citing WTO Docs S/FIN/M/38-40).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 587.

<sup>78</sup> This discussion is based on Lang & Scott, *supra* note 67.

A second example of mechanisms designed primarily for communication and facilitation in the WTO system might be the Sanitary and Phytosanitary ("SPS") agreement and its corresponding committee. The SPS agreement deals primarily with food safety and animal and plant health standards.<sup>79</sup> The agreement attempts to simultaneously 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."<sup>80</sup> The SPS also relies heavily on the communicative and facilitative functions of the law. According to the WTO website:

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.<sup>81</sup>

An SPS committee consisting of Member States operates in three ways. It serves as a forum in which members can raise specific trade concerns,<sup>82</sup> monitors the harmonization of activities of the standard-setting international organizations,<sup>83</sup> and elaborates upon the open-ended norms laid out in the SPS Agreement.<sup>84</sup> If necessary, however, "the WTO 'courts' [can give] shape

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<sup>79</sup> The WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement], available at [http://www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm).

<sup>80</sup> *Sanitary and Phytosanitary (SPS) Measures: Food Safety, Etc.*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/sps\\_e/sps\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/sps_e.htm) (last visited July 8, 2012).

<sup>81</sup> *Id.* International organization standards include those set out by the FAO-WHO codex alimentarius. *Id.* See also *Standards and Safety*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm) (last visited July 8, 2012).

<sup>82</sup> See Lang & Scott, *supra* note 67, at 592. For example, the EU imposed safeguard measures over the importation of fruit, vegetables, and fish from four African countries experiencing an outbreak of cholera. Tanzania raised the issue in the SPS committee with expert support from the World Health Organization observer at the WTO, who provided assurances that the risk of cholera transmission was very low and encouraged states to avoid import embargoes. Ultimately, the EU removed the measure after additional consultations convinced them that appropriate measures to protect public health were in place. *Id.*

<sup>83</sup> *Id.* at 596. This creates the expectation that members will use international standards as a guideline for their policies and uses those standards as a reference point in monitoring compliance with the agreement. These features allow the committee to play an oversight role, promote peer review, and "[situate] the committee as an interlocutor in the process of international harmonization." *Id.*

<sup>84</sup> The committee employs a variety of instruments—guidelines, recommendations, and procedures—to build upon relevant norms on an ongoing basis, with revisions and addenda being added regularly. See JOANNE SCOTT, *THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES: A COMMENTARY* 61–74 (2007); Lang & Scott, *supra* note 67, at 598.

and meaning to the requirements laid down. In so doing they perform the important function of delimiting the scope of Member State regulatory autonomy in sensitive policy areas, including in relation to food safety.”<sup>85</sup>

In each of these aforementioned contexts, the WTO is working toward processes and policies that allow substantial diversity while protecting core international values and standards.<sup>86</sup> To strike this balance it relies heavily on the communicative and facilitative functions of law. These functions allow Member States the flexibility to temporize, but also promote the social and dialogical processes that shape substantive rules. The WTO committee system also falls back on a hard legal framework, providing boundaries to judge others’ actions and, if necessary, to limit allowable coercive pressures.<sup>87</sup> This hybrid combination of soft processes and hard rules encourages bargaining in the shadow of the law and allows flexibility in the application of general norms.

*B. The EU Water Framework Directive: Mixing Fixed Rules with Process for Mutual Learning and Consensus Formation in a Hybrid Constellation*<sup>88</sup>

One can see aspects of the expanded vision of the law of global space in the EU’s use of “hybrids” such as the Water Framework Directive (hereinafter “WFD” or “the Directive”).<sup>89</sup> The WFD includes both traditional regulation and new governance. It is this combination, and the way the elements may interact, that has led several scholars to see the WFD as a leading example of a hybrid form of governance and thus as the transformation of law.

The WFD is an ambitious piece of legislation that launched an innovative approach to solve the problem of maintaining and improving water quality throughout the EU. It was 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 attempts to achieve this by mixing classic top-down regulatory modes and legally

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<sup>85</sup> Lang & Scott, *supra* note 67, at 590–91.

<sup>86</sup> See generally Richard Steinberg, *The Hidden World of WTO Governance: A Reply to Andrew Lang and Joanne Scott*, 20 EUR. J. INT’L L. 1063 (2009); Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance: A Rejoinder to Richard Steinberg*, 20 EUR. J. INT’L L. 1073 (2009). Both sources provide a critique from a more traditional, intergovernmental perspective.

<sup>87</sup> Indeed, some suggest that the very system embodies power disparities, which has distributional effects. See, e.g., Richard Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 340, 342–46 (2002).

<sup>88</sup> Section IV.B originally appeared at 13 COLUM. J. EUR. L. 539 (2007). We are grateful to the COLUMBIA JOURNAL OF EUROPEAN LAW for allowing it to be reproduced here and to Mark Nance for his assistance on this case.

<sup>89</sup> Council Directive 2000/60/EC, 2000 O.J. (L 327) [hereinafter WFD]. See also Jane Holder & Joanne Scott, *Law and Environmental Governance in the European Union*, in LAW AND NEW GOVERNANCE IN THE EU AND US (Gráinne De.Búrca and Joanne Scott eds., 2006).

binding requirements with decentralized, bottom-up, participatory and deliberative processes; iterative planning; horizontal networks; stakeholder participation; information pooling; sharing of best practices; and non-binding guidance.

The WFD arose out of dissatisfaction with traditional methods of EU environmental lawmaking.<sup>90</sup> The EU has been regulating water quality for some time using standard directives and the Community Method. By the late 1990s eleven separate water directives were in place.<sup>91</sup> However, at the same time, there was widespread dissatisfaction with EU environmental law in general and water quality regulation in particular.<sup>92</sup> In general, many thought that the centralized and detailed directive approach failed to take into account the differences in local conditions, was not well suited to the reality of multi-level governance in which most implementation is done by the Member States, did not make proper use of economic incentives, and put too much strain on the EU's limited capacity both to issue rules and to secure compliance with detailed directives.<sup>93</sup>

Water quality management in the EU has always been complex due to the great difference in the ecologies of the various Member States and their differing approaches to environmental protection. It was becoming more complex due to increased public awareness, growing user demand for water, the privatization of water distribution systems in many countries, emergence of new scientific knowledge, and controversies concerning the impact of chemical discharge and agricultural run-off on ground and surface waters.<sup>94</sup>

The WFD emerged from a long process of interaction among the EU Commission, Parliament, and Council.<sup>95</sup> The resulting document included broad standards and objectives as well as specific requirements. It required Member States to avoid any deterioration of water status and achieve "good water status" within a defined time frame.<sup>96</sup> Member States are required to take measures "with the aim of achieving good water status," but the measures are described in rather general terms and the Directive does not

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<sup>90</sup> Trubek & Trubek, *supra* note 42, at 553.

<sup>91</sup> *Id.*

<sup>92</sup> Katharina Holzinger, Christoph Knill & Ansgar Schäfer, *Rhetoric or Reality? 'New Governance' in EU Environmental Policy*, 12 EUR. L.J. 403, 420 (2006).

<sup>93</sup> *Id.*

<sup>94</sup> Maria Kaika, *The Water Framework Directive: A New Directive for a Changing Social, Political and Economic European Framework*, 11 EUR. PLAN. STUD. 299, 316 (2003); Ben Page & Maria Kaika, *The EU Water Framework Directive: Part 2: Policy Innovation and the Shifting Choreography of Governance*, 13 EUR. ENV. 328, 343 (2003); Trubek & Trubek, *supra* note 42, at 553-54.

<sup>95</sup> Kaika, *supra* note 94, at 316; Page & Kaika, *supra* note 94, at 343; Trubek & Trubek, *supra* note 42, at 553-54.

<sup>96</sup> Trubek & Trubek, *supra* note 42, at 553; WFD, *supra* note 89, art. 4.

define precisely what "good water status" means.<sup>97</sup> While an Annex provides guidance for determining what constitutes "good" status for different types of water, it does not set final, uniform, and technically verifiable standards. That work is left to the Commission and Member State authorities in the implementation phase.<sup>98</sup>

Far from being a single piece of legislation, the WFD is better seen as the initiation of a comprehensive program designed to guide further action by the EU and the Member States. The program seeks to ensure that over a period of time the Member States set up a new and holistic approach to water quality management, adapt overall EU requirements to local conditions, develop detailed metrics for measuring water quality, survey all waters in their territory to determine their status, institute various forms of national level laws and regulations that are consistent with existing EU law and the overall objectives of the WFD, and report regularly on progress. The WFD also mandates further legislative action by the Council and Parliament, delegated legislation by the Commission using comitology, and support and monitoring by the Commission including the possibility of enforcement actions in the European Court of Justice.<sup>99</sup>

The WFD introduced many innovations into EU environmental law. Instead of a series of separate regulations dealing with each aspect of water quality, it envisioned a holistic approach managed primarily by the Member States and based on the principle of integrated river basin management. Instead of detailed centralized rules, it launched a process of constructing separate but coordinated national processes and regulations that would meet common objectives but could take somewhat different form in each of the Member States. Instead of laying out precise measures of ecological and chemical quality, it set up processes through which Member States and the Commission could collaborate to develop such measures.<sup>100</sup>

It is important to note that the WFD includes detailed rules as well as open-ended standards and employs binding legal obligations as well as non-binding guidance and peer review. The system for classifying water status is open ended. The general concept of good water status is not fully defined in the Directive or the Annex. Rather, the Directive indicates that specific, harmonized and binding standards for "good" status are a long-term goal to be reached through subsequent processes and horizontal collaboration. But the WFD also contains some specific requirements of the type found in classic EU directives. The Directive requires that countries adopt a strategy of integrated management based on all waters within each river basin and

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<sup>97</sup> WFD, *supra* note 89, art. 4.

<sup>98</sup> *Id.* annex V.

<sup>99</sup> The Commission has instituted several proceedings in the ECJ against Member States accused of failing to comply with aspects of the WFD. The ECJ ruled against Germany and Belgium in two of these cases. Commission Staff Working Document SEC 2006 1143 [En] at 16.

<sup>100</sup> Trubek & Trubek, *supra* note 42, at 554.



create river basin authorities by a specific date. It specifies that Member States must promulgate a series of measures that deal with various types of waters and risks.<sup>101</sup>

Some of the requirements are quite general, allowing Member States a lot of discretion in shaping river basin management and developing a series of measures that would ensure continuing compliance with the WFD and existing law. But some are specific and detailed: thus, for example, the Directive requires that Member State programs must include "a prohibition of direct discharges of pollutants into groundwater."<sup>102</sup> Certain exceptions to this direct requirement are spelled out in detail in the Directive.<sup>103</sup> In addition to very general, open-ended standards and detailed, specific requirements, the WFD also includes a mandate for the production of further EU legislation.<sup>104</sup> Another important feature of the WFD is the requirement for public participation.<sup>105</sup> The authors of the Directive have recognized that many key decisions will be made in the implementation phase. To ensure democratic legitimacy and secure insights from stakeholders and other interested parties, the Directive requires built-in public participation at all stages.<sup>106</sup>

Such a multi-faceted and programmatic form of legislation presented a major challenge for national authorities charged with implementing the WFD as well as for the Commission, which has been assigned both continuing legislative tasks and executive responsibilities. Facing this challenge, the Commission and the Member States decided to create a Common Implementation Strategy ("CIS") to manage this immense set of responsibilities. The CIS, which seems to have arisen organically from efforts to grapple with all these complexities, introduces several new governance features into the Directive's processes. According to several scholars, it is the existence of the CIS that makes this directive a true hybrid and an example of the transformation of law.<sup>107</sup>

Several elements of the CIS constitute new governance and contribute something unique to the overall governance of water quality in Europe. These

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<sup>101</sup> *Id.* at 554–55; WFD, *supra* note 89.

<sup>102</sup> WFD, *supra* note 89, art. 11(3)(j).

<sup>103</sup> *Id.* Similarly, Annex VI creates binding obligations by requiring that all measures contained in the eleven extant specific water directives must also be included in the measures that Member States are legally obligated to take under the WFD. *Id.* annex VI.

<sup>104</sup> *See, e.g., id.* art. 16.

<sup>105</sup> Article 14 states that "Member States shall encourage the active involvement of all interested parties in the implementation of this Directive." *Id.* art. 14.

<sup>106</sup> A detailed guidance document has been prepared to help Member States manage their public participation requirements. Public Participation in Relation to the Water Framework Directive (European Commission, Guidance Document No. 8, 2000).

<sup>107</sup> *See generally* Holder & Scott, *supra* note 63; Sabel & Zeitlin, *supra* note 9.

include metrics to measure progress, scoreboards, horizontal networking and information pooling, river basin management plans, non-binding guidance documents produced collectively by the Member States and the Commission with expert input, non-binding guidelines produced by the Commission following comitology procedures, and specific requirements for stakeholder and public participation in all aspects of implementation.

The WFD employs two types of non-binding guidance. The first type is *guidelines* that can be set forth by the Commission using comitology procedures, which are seldom, if ever, used.<sup>108</sup> The second type is *guidance documents* prepared by horizontal working groups under the CIS. Guidance documents are the core of the CIS and one of its most interesting features. These are detailed, non-binding, and revisable documents that provide guidance for the performance of specific tasks that are mandated by the WFD. They provide suggestions on how to carry out various implementation tasks as well as outlining possible common approaches to key technical matters. They can be very long and quite detailed. The documents are created by working groups made up of representatives of the Member States and experts.<sup>109</sup> They deal with issues such as how to organize public participation, how to classify lakes and coastal waters, and how to establish precise and common definitions for open-ended terms like "good water quality" and "good ecological status."<sup>110</sup>

To illustrate the role of guidance documents as well as the complexity of the implementation process under the WFD, look at the process of "intercalibration" used to develop a common methodology to define "good ecological status" of waters.<sup>111</sup> Since the twenty-seven Member States, not the Commission, are responsible for assessing all the relevant waters within their territory, it is necessary for them to have a common standard. But as the States have differing ecological conditions and employ different assessment methods, it was important to create a system that allowed national differences and required uniformity only on those issues that demand it and then only after the standard had been agreed upon through horizontal and deliberative processes. The WFD and the CIS set in motion a process of networking and deliberation in which officials from all Member States, experts, stakeholders, and the public work together to harmonize

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<sup>108</sup> Trubek & Trubek, *supra* note 42, at 556. See also e-mail from European Commission's WFD Group to Mark Nance (research assistant to Trubek) (Feb. 7, 2007, 08:29 CST) (on file with author).

<sup>109</sup> Trubek & Trubek, *supra* note 42, at 556–57. For example, Guidance Document No. 1 is 274 pages long, No. 8 is 214 pages, and No. 9 is 166 pages.

<sup>110</sup> European Commission, *The EU Water Framework Directive Guidance Documents*, [http://ec.europa.eu/environment/water/water-framework/facts\\_figures/guidance\\_docs\\_en.htm](http://ec.europa.eu/environment/water/water-framework/facts_figures/guidance_docs_en.htm) (last visited July 8, 2012).

<sup>111</sup> The WFD mandates "good surface water status." WFD, *supra* note 89, art. 4(1)(a). "Good surface water status" is defined as when "both its ecological status and its chemical status are at least 'good.'" WFD, *supra* note 89, art. 2(18).

methods and agree upon a common standard for determining when waters have reached or exceeded "good" status.<sup>112</sup> This process involves sharing of experience, deliberation over specific aspects of the standard, learning through applying provisional standards at test sites, and iterative review of progress.<sup>113</sup>

Intercalibration is just one example of the ways in which the WFD has combined two types of legal norms and several forms of new governance to achieve a result not possible under either system working alone. The Directive introduced a very general and open-ended goal—good water status—which Member States are legally bound to achieve within specified times and with certain specified exceptions. New governance processes are used to give content to this broad standard. This process involves a horizontal network made up of Member State Representatives and experts, with public participation. It should facilitate information pooling, benchmarking, and deliberation over means and ends.

For these reasons, it is easy to see why several leading scholars think that the WFD illustrates the emergence of hybrid forms and the potential of such forms to lead to better problem solving and lawmaking. By allowing as much national diversity as possible while holding Member States to measurable results in the long run, by tapping into the expertise of twenty-seven Member States, by ensuring widespread public participation, and by facilitating information pooling and peer review, the WFD creates the potential for better environmental law and more effective management of water quality.

### C. *The Tuna-Dolphin Case: Problem Solving in the Wake of Penalty Default and Destabilization*

The Tuna-Dolphin Case, one of the most famous cases in international trade and environmental law, also offers an apt illustration of a problem solving orientation in the law of global space.<sup>114</sup> It underscores how harder forms of law, such as conditional import restrictions, can continue to exert

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<sup>112</sup> Trubek & Trubek, *supra* note 42, at 556–57.

<sup>113</sup> Although the guidance document is flexible and non-binding, the final goal of the intercalibration process will be a binding determination produced by the Commission working with the Article 21 comitology committee and setting out the standard to be followed by all states when they determine water status. Article 8 requires that technical specifications and standardized methods for analysis and monitoring of water status must be established following comitology procedures. It appears that the final standard will include a numerical scale to measure ecological quality that will be used by all Member States. European Commission, *Guidance document no. 6: Towards a guidance on establishment of the intercalibration network and the process on the intercalibration exercise*, 41, 42 (2003).

<sup>114</sup> Professor William Simon of Columbia Law School drew our attention to this case and to the study by Richard Parker that we draw on. For a "new governance" analysis of this regime that is similar to ours, see Charles Sabel & William Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. (forthcoming 2012), available at <http://www2.law.columbia.edu/sabel/papers.htm>.

influence, but not because directly applied sanctions led to better behavior. Instead, the Tuna-Dolphin case demonstrates how mechanisms that operate like a de facto penalty default and destabilization regime can promote problem solving—in this case the protection and conservation of dolphin from tuna fishing practices.<sup>115</sup>

With the invention of modern purse-seine fishing methods in the 1950s, fisheries began to capitalize on the association of dolphin and tuna.<sup>116</sup> Large schools of tuna are often found swimming underneath dolphins—a relationship believed to be a result of predator protection and trophic and energetic dependencies.<sup>117</sup> In order to catch the tuna, fishermen drag large nets through the water and then pull them up under the schools of fish. Consequently, fisheries experienced a hundred-fold increase in tuna sets in one year,<sup>118</sup> but raised serious concerns over incidental dolphin by-catch and dolphin conservation.<sup>119</sup> Before the first major regulatory efforts began with the U.S. Marine Mammal Protection Act (“MMPA”) in 1972, dolphin mortality in U.S. fisheries alone reached an estimated 300,000 per year.<sup>120</sup>

The Tuna-Dolphin conflict originated with the MMPA, which established the statutory framework for the domestic and international restrictions that were to follow and which the National Marine Fisheries Service (“NMFS”) was responsible for implementing.<sup>121</sup> In an attempt to maintain dolphin populations at an “optimum sustainable population,” the MMPA mandated a reduction of incidental deaths, a mandatory onboard observer program, and compliance with practice standards, all with the eventual goal of approaching zero-level mortality.<sup>122</sup> Despite opposition to MMPA restrictions by fishers, fleet mortality declined domestically between 1972 and 1980, when mortality stabilized at fewer than 20,500 animals, which met the standard established by the NMFS in 1980 and adopted by Congress in 1984.<sup>123</sup>

From the origination of the MMPA in 1972 to the passage of its amendments in 1988, two particularly notable developments occurred. First, the fishing industry in the Eastern Tropical Pacific (“ETP”) became

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<sup>115</sup> See generally Richard Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1 (1999).

<sup>116</sup> *Id.* at 13.

<sup>117</sup> Martin Hall, *An Ecological View of the Tuna-Dolphin Problem: Impacts and Trade-offs*, 8 REV. FISH BIOLOGY & FISHERIES 1, 5 (1998).

<sup>118</sup> From 1959–60. Nina Joshi, *Tuna Dolphin GATT Case (Tuna Case)*, 2 TED CASE STUD. 1, 72, Jan. 1993, available at <http://www1.american.edu/TED/TUNA.HTM>.

<sup>119</sup> Hall, *supra* note 117, at 3–5.

<sup>120</sup> Parker, *supra* note 115, at 19.

<sup>121</sup> *Id.* at 17–18.

<sup>122</sup> *Id.* at 18–19.

<sup>123</sup> *Id.* at 19.

increasingly international, transitioning from 99 percent U.S. in the 1960s to 33 percent by 1986.<sup>124</sup> Neither bound by the MMPA nor subject to comparable domestic legislation, many of the international vessels lacked observers or dolphin-safe methods, thus compounding the problem.<sup>125</sup> Second, the NMFS enlisted the Inter-American Tropical Tuna Commission ("IATTC")—an international institution charged with making expert recommendations for the management of the tuna resource in the ETP—to collect and disseminate data with respect to tuna fishing practices and dolphin mortality.<sup>126</sup> IATTC efforts ultimately produced the knowledge necessary to generate consensus that a serious problem existed and fueled experimental efforts to solve the problem.

In 1988, increased public awareness of the Tuna-Dolphin issue and dolphin mortality at the hands of the international fleet prompted Congress to pass amendments to the MMPA that instructed U.S. "Secretaries of State and Commerce to seek an international agreement through the IATTC *and* to embargo imports of ETP-harvested yellowfin tuna from any country that lacked a regulatory program and fleet kill rate 'comparable' to that of the United States."<sup>127</sup>

This had an "electric" effect on foreign fleets.<sup>128</sup> The IATTC held workshops and well-attended dolphin mortality reduction seminars for relevant foreign governments and fleets. However, the necessary changes in the international fleet proved difficult to come by under the accelerated timetable mandating that embargo determinations needed to be made in 1990 based on 1989 performance. In 1990, amidst the international frenzy to meet U.S. standards, the Heinz Company and other major canneries announced that they would no longer buy tuna caught by encircling dolphins and began using the dolphin-safe label, which was later supported by the U.S. Dolphin Protection Consumer Information Act ("DPCIA").<sup>129</sup> The boycott and labeling requirements mandated by the DPCIA effectively closed the U.S. market to dolphin-unsafe tuna from any source. Although Mexico and other foreign stakeholders called for more time to meet U.S. standards, the Earth Island Institute, a dolphin conservation group, won a court-ordered embargo on tuna from noncompliant Mexico, and the embargo extended to almost all major ETP fishing states by 1992.<sup>130</sup>

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<sup>124</sup> Joshi, *supra* note 118.

<sup>125</sup> *Id.*

<sup>126</sup> Parker, *supra* note 115, at 20–22.

<sup>127</sup> *Id.* at 30.

<sup>128</sup> *Id.* at 31.

<sup>129</sup> *Id.* at 32.

<sup>130</sup> *Id.* at 33.

States targeted by MMPA embargoes objected to the application of domestic legislation to international trade and denounced what they perceived to be U.S. protectionism.<sup>131</sup> Mexico filed a challenge under the GATT contesting the legality of the embargoes and the dolphin-safe labels.<sup>132</sup> In the famous Tuna II panel report,<sup>133</sup> the GATT found the MMPA to be in violation of GATT Article III, which prohibited a GATT party "from outlawing or limiting products based upon the manner in which they were produced."<sup>134</sup> Furthermore, the panel found that the Article XX(b) exemption did not apply because the MMPA attempted to protect animals outside U.S. jurisdiction.<sup>135</sup> In all, the GATT Panel sustained the dolphin-safe label but ruled against the trade embargoes. This decision was unsatisfactory to both the United States, which wanted to maintain the embargoes, and Mexico, which opposed the label and the boycotts it made possible.<sup>136</sup>

In this case, the GATT ruling exhibited traits of a "destabilization regime" as discussed above. The Disputes Panel in essence imposed a penalty default on all the stakeholders because abiding by the ruling would result in a suboptimal outcome for all. Mexico wanted the boycotts to cease, but the panel upheld the decision, so from Mexico's perspective the panel did not fully address the problem.<sup>137</sup> For the United States, the ruling imposed high sovereignty costs given that the decision overturned its national laws. Moreover, the decision weakened U.S. credibility in the GATT, as the panel report had broad support in the international trade community, which could have repercussions down the line. Environmental groups also expressed serious concerns about the decision because of its negative implications for other multilateral environmental agreements, such as the recent Montreal Protocol on Ozone Depleting Substances, given the jurisdictional precedent (i.e., countries could not impose environmental standards outside of their national legal jurisdiction).<sup>138</sup> In sum, while the Disputes Panel ruling sought to uphold international law and intended to resolve the dispute, it effectively gave participants the choice of either abiding by a rule that satisfied nobody or seeking a superior solution. Consequently, Mexico and the United States

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<sup>131</sup> Parker, *supra* note 115, at 39–40.

<sup>132</sup> *Id.* at 46.

<sup>133</sup> See Panel Report, *United States—Restrictions on Imports of Tuna*, DS29/R (June 16, 1994) [hereinafter *Tuna/Dolphin II*], available at <http://www.worldtradelaw.net/reports/gattpanels/tunadolphinII.pdf>.

<sup>134</sup> Eric Christensen & Samantha Geffin, *GATT Sets Its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System*, 23 U. MIAMI INTER-AM. L. REV. 569, 578 (1992).

<sup>135</sup> *Id.* at 582.

<sup>136</sup> Parker, *supra* note 115, at 47.

<sup>137</sup> *Id.* at 46–47.

<sup>138</sup> *Id.* at 46–47. There were also concerns within the U.S. and Mexican governments over the implications of the report for the future of NAFTA. See Brian G. Wright, *Environmental NGOs and the Dolphin-Tuna Case*, 9 ENVTL. POL. 82, 91 (2000).

agreed not to accept the panel report and attempted to solve the problem through the La Jolla Agreement.

Signed in 1992 by the United States, Mexico, Venezuela, and other flagship states, the La Jolla Agreement established the International Dolphin Conservation Program ("IDCP") and committed members to gradual reductions in dolphin mortality with a maximum of 5,000 total annual deaths by 1999.<sup>139</sup> Not only did the La Jolla Agreement represent a problem-solving approach in the wake of penalty default, but it also embodied several features of the expanded vision of the law of global space.

First, it involved broad, networked, and deliberative stakeholder participation. The Mexican and U.S. Greenpeace contingents, along with several other conservation-minded NGOs such as the World Wildlife Fund, worked with the states to form bases for the La Jolla Agreement under the auspices of the IATTC.<sup>140</sup> As experts on dolphin and marine conservation, the IATTC would work with NGOs, relevant agencies of national governments, and the fisheries to oversee, implement, and strengthen the IDCP.<sup>141</sup> For example, the La Jolla Agreement created an Implementation Review Panel ("IRP") consisting of IATTC staff plus government delegates, two industry representatives, and two NGO representatives.<sup>142</sup>

Second, the La Jolla process largely relied on standards, not rules, to promote experimentation, learning, and norm diffusion. The agreement itself was "non-binding" and allowed stakeholders to work flexibly to achieve the objectives.<sup>143</sup> It featured an ambitious onboard observer program that the IATTC would monitor. The IRP would use the information generated through these observations to make recommendations and exchange best practices (e.g., improving performance with respect to releasing dolphin by-catch alive) with stakeholders in order to reach objectives.<sup>144</sup> Flagship states ultimately complied with the La Jolla Agreement and their fleets' performance exceeded expectations, achieving a dolphin kill rate that was "one-tenth the kill rate of the highly regulated U.S. fleet in 1988, using virtually the same technology (but with greater skill and care)."<sup>145</sup> Moreover, the Agreement facilitated the rise of a broader conservation management program under the oversight of the IATTC for both tuna and dolphins, as the discourse spread into improving

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<sup>139</sup> La Jolla Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, Apr. 21, 1992, 33 I.L.M. 936, [hereinafter La Jolla Agreement], available at <http://faolex.fao.org/docs/texts/mul-67015.doc>. The signatories were Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Spain, the United States, Vanuatu, and Venezuela. *Id.*

<sup>140</sup> Parker, *supra* note 115, at 47.

<sup>141</sup> *Id.*; Wright, *supra* note 138, at 91.

<sup>142</sup> Parker, *supra* note 115, at 48; La Jolla Agreement, *supra* note 139.

<sup>143</sup> Parker, *supra* note 115, at 48.

<sup>144</sup> *Id.* at 67 n.216 and n.218; Wright, *supra* note 138, at 92-93.

<sup>145</sup> Parker, *supra* note 115, at 52.

techniques for ensuring "healthier marine ecosystems by protecting dolphins as well as juvenile tuna and other marine species caught in the course of fishing operations."<sup>146</sup> Such changes would eventually be integrated into successor arrangements.<sup>147</sup>

Third, the La Jolla Agreement proved to be resilient in the face of uncertainty and political turmoil. In the early years of the Agreement, the United States failed to lift embargoes against the Latin American states, who threatened to leave the Agreement if the embargoes stayed in place.<sup>148</sup> Richard Parker cites many factors contributing to the resiliency of the Agreement, including (1) the perceived low cost of compliance after knowledge sharing in the IDCP context, (2) years of deliberation and negotiation that increased "buy-in" and cultivated an inter-subjective understanding of the problem, (3) the enormous economic potential should the U.S. market re-open, and (4) the risk of losing European markets to the same dolphin-safe labels.<sup>149</sup> Ultimately, the Panama Declaration replaced the La Jolla Agreement, formalizing the commitments made hitherto and eventually securing the removal of the boycotts and embargoes.<sup>150</sup>

The Tuna-Dolphin case illustrates how penalty default and trade leverage may promote governance processes better geared toward problem solving. The U.S. trade embargo sparked a transnational legal dispute involving an array of actors including state governments, sub-state actors, IGOs, and NGOs. While numerous disagreements occurred throughout the process, the communicative and facilitative dynamics of the process resulted in active support for efforts to reduce dolphin mortality and strong support for an international agreement to accomplish such reductions. In this case, coercive mechanisms (the embargo on one hand, the Mexico case on the other) provided the appropriate incentives for the relevant actors to engage in the communicative processes necessary to find a mutually acceptable solution.<sup>151</sup>

## V. CONCLUSION

This Article identifies an emerging vision of the role of law in global space centered on collective problem solving. This vision is not new, *per se*. Indeed, its constituent elements have been percolating for some time along the nexus of law and international relations as scholars have continued to chart the

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<sup>146</sup> Press Release, Greenpeace, A Dolphin-Safe Label That Really Means It (Apr. 10, 1996), available at <http://www.ecosystemsafetuna.com/files/NGOs/Greenpeace/gp-web.pdf>.

<sup>147</sup> See Declaration of Panama, Oct. 4, 1995, available at [http://www.iattc.org/PDFFiles2/Declaration\\_of\\_Panama.pdf](http://www.iattc.org/PDFFiles2/Declaration_of_Panama.pdf).

<sup>148</sup> Parker, *supra* note 115, at 75.

<sup>149</sup> *Id.* at 51.

<sup>150</sup> Declaration of Panama, *supra* note 147.

<sup>151</sup> See Parker, *supra* note 115, at 122.



evolving role of law in a world characterized by deepening interdependence and complex multi-level normative orders.

What is emerging, however, is a broadened notion of how law operates in global space that may also be a response to a shift in the functional needs of world order. A case can be made that new models of law are needed to respond to the increased complexity and volatility of many transnational regulatory arenas. Some argue that solutions to many kinds of social problems cannot be identified in advance by experts and legislators, but are best reached through experimentation. Additionally, solutions must emerge from dialogue among stakeholders, so "law" must be expanded or transformed if we are to deal with such issues.<sup>152</sup> The expanded vision of law in global space developed here responds to these imperatives. Standards leave room for negotiation and diversity; networks promote communication and multi-level coordination; and proceduralism encourages the emergence of consensual norms and adaptability.

By unpacking and repacking received notions of what the law does and untethering coercion from what we see as a much more sophisticated legal process that places a premium on communication and facilitation, we are better positioned to ask how these functions might interact. Law as communication transmits or diffuses information and knowledge to affected actors. Whether they arise from centralized or decentralized institutions, or from public, private, or mixed sources, the resulting communications provide the basis for mutual accommodation and interaction. Law may facilitate these interactions by establishing a neutral framework within which private parties create the rules governing their interactions and use the power of the state to back up the resulting obligations—the law of contracts. But facilitation can also mean state-led steering in which state officials create incentives to lead actors toward agreement on socially desirable solutions. Facilitation thus continues the process of creating, adapting, and diffusing inter-subjective understandings and expectations about the problem and solutions thereto. Finally, law as coercion provides sanctions for non-compliance with authoritative standards or mutually agreed upon rules.<sup>153</sup>

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<sup>152</sup> Sabel & Zeitlin, *supra* note 9.

<sup>153</sup> See Abbott & Snidal, *Strengthening Regulation*, *supra* note 21, at 529–32. The legalization literature embraces these three functions, albeit using different language. Hard law, as defined by Abbott and Snidal, communicates because it is precise, facilitates because it establishes clear rules of the road for all parties (thus channeling interaction), and coerces because it is legally binding and administered by a staff. In this literature, coercion seems to be an essential element: without some consequence for noncompliance with specified rules, the account suggests, law lacks the necessary teeth to affect outcomes significantly and keeps legal arrangements much more "shallow" than they could be. To a large extent, this emphasis on coercion resembles traditional legal thought. In the typical municipal regulatory scheme, it is assumed that precise standards and coercion go together. Detailed rules are elaborated by legislatures and agencies and sanctions are provided for non-compliance. Similarly, facilitation and coercion can go together if penalties are provided for breach of the contracts that result from private ordering. *Id.*

In the law of global space, pure coercive capabilities are weak and sometimes counterproductive and "compliance" is unlikely unless the affected parties accept and internalize the applied norms, at least to some degree. For that to happen, law must have performed communicative and facilitative functions. In the theory of law in global space, we can therefore accept that law can communicate without either facilitating or coercing, and law can both communicate and facilitate without also coercing, but it is rare that law can coerce if it does not also communicate or facilitate.

Law in global space has always played communicative and facilitative roles, coercion has always been problematic, and consensual processes have always been at work informally or formally. To that degree, there is nothing new about the expanded vision of law in global space. But there is evidence that the growth of the transnational arena and the proliferation of multi-level regimes has created the need for more deliberation and experimentation and thus for more non-traditional governance.

For example, the alternative processes we have highlighted allow for trial and error and deliberation over the interpretation of general norms, similar to what we saw in the La Jolla Agreement in the Tuna-Dolphin case and the EU Water Framework Directive. This flexibility enables the governed to experiment and tailor solutions to their specific problems, provides feedback mechanisms to share and build knowledge, and promotes the adaptability necessary to respond to ever-evolving transnational challenges. These processes also accommodate disparities among actors and may allow them to establish minimum levels of adherence. They also formalize progressive advancement toward higher standards. Further, they increase access to the policy process, thereby capitalizing on the best available expertise, engaging directly the diverse range of actors required to solve problems.

By emphasizing these processes and how they differ from a strictly legalist interpretation of the role of law in world politics, this Article seeks to go beyond the compliance approach to demonstrate the full complexity and scope of the law of global space. In an increasingly complex and dynamic regulatory environment where effective enforcement is harder to achieve, a primary focus on compliance with rigid legal norms is ill-suited either to grasp the full extent of what is going on, or to serve as a guide for securing the cooperation necessary to address complex problems.

Our expanded vision of law in global space suggests the need to learn more about these developments. Once we expand our definition of what law is and what law does, we can map the emerging terrain and look closely at cases like the three we have sketched here. Such a research agenda must not only look at the accomplishments of these less studied approaches, but also be sensitive to their limitations. That will include looking at some of the criticisms of "new governance" that have emerged. Critics have questioned

both the legitimacy<sup>154</sup> of some new governance procedures and the quality of their output. Some fear these processes violate norms of democratic input and accountability and “associate new governance with a ‘managerialism’ characterized by expert domination, decision-making behind-closed-doors, and Balkanization among technical fields.”<sup>155</sup> Scholars have raised similar concerns about the role of power in networked governance—who exercises it and whether these processes are actually incorporating the perspectives of the publics they are attempting to serve.<sup>156</sup> These concerns overlap with questions about output as critics worry that these processes may be more easily captured by powerful states and private actors in a way that undermines a common good and skews distributional outcomes.<sup>157</sup>

What we have called “the expanded vision of the law of global space” and the new governance literature that helps us understand these developments offer no panacea. But we believe that this way of looking at law and the processes that come to light using this vision are making a contribution to global governance that needs to be better understood.

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<sup>154</sup> See, e.g., THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995); IAN HURD, *AFTER ANARCHY: LEGITIMACY AND POWER AT THE UNITED NATIONS* (2007); JEAN-MARC COICAUD & VEIJO AULIS HESKAINEN, *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* (2001).

<sup>155</sup> William H. Simon, *Afterward—Part II: New Governance Anxieties: A Deweyan Response*, 2010 WIS. INT’L L.J. 727, 734 (2010); but see Lisa T. Alexander, *Afterward—Part III: Reflection on Success and Failure in New Governance and the Role of the Lawyer: Conclusion*, 2010 WIS. INT’L L.J. 737, 748 (2010) (summarizing these critiques and responding to them).

<sup>156</sup> Ann Florini, Nat’l Univ. of Singapore, Roundtable at the 2010 International Studies Association Conference: Global Governance in Theory and Practice: Conceptual Breakthroughs and Policy Innovations (Feb. 18, 2010). See also MICHAEL BARNETT & RAYMOND DUVAL, *POWER IN GLOBAL GOVERNANCE* (2005).

<sup>157</sup> Mattli & Woods, *supra* note 35.

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