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**Publication date**

2014

**Document Version**

Final published version

**Published in**

Rivista Trimestrale di Diritto Pubblico

[Link to publication](#)

**Citation for published version (APA):**

Schill, S. W. (2014). Transnational legal approaches to administrative law: Conceptualizing public contracts in globalization. *Rivista Trimestrale di Diritto Pubblico*, 2014(1), 1-33.  
[https://www.giuffre.it/2988146/R010801401\\_indice.pdf](https://www.giuffre.it/2988146/R010801401_indice.pdf)

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TRANSNATIONAL LEGAL APPROACHES  
TO ADMINISTRATIVE LAW: CONCEPTUALIZING PUBLIC  
CONTRACTS IN GLOBALIZATION

STEPHAN W. SCHILL (\*)

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1. The idea of the nation-state as the exclusive unit of governance wanes, but administrative law is more present than ever. In times of globalization, it is pushing its disciplinary boundaries in multiple dimensions <sup>(1)</sup>. *First*, it has expanded its subject-matter over

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<sup>(1)</sup> For overviews over the changes administrative law is experiencing from a US perspective R.B. STEWART, «Administrative Law in the Twenty-first Century», 78 *New York University Law Review* (2003) 437; from a German perspective D. GRIMM, *Das Öffentliche Recht vor der Frage nach seiner Identität* (Mohr Siebeck, Tübingen, 2012); E. SCHMIDT-ABMANN, «Internationalisierung des Verwaltungsrechts - Einwirkungspfade und Rechtsprobleme», in H. BAUER, D. CZYBULKA, W. KAHL and A. VOBKUHLE (eds.), *Wirtschaft im offenen Verfassungsstaat. Festschrift für Reiner Schmidt* (C.H. Beck, München, 2006) 149; ID., «Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen», 45 *Der Staat* (2006) 315;

the past decades and entered areas such as the regulation of energy, telecommunication, food safety, health, migration, employment, anti-trust, competition, and financial market regulation; and it continues to do so as recent discussions about fracking, carbon capture and storage, or geo-engineering show. *Second*, it has discovered novel modes and instruments of governance, including information, indicators, or tax incentives <sup>(2)</sup>, but also contractual arrangements, such as public-private partnerships (PPPs) and public procurement <sup>(3)</sup>. And *third*, it has expanded into the transnational legal space, with domestic agencies regulating extraterritorial behavior, such as corporate or environmental responsibility in foreign trade and investment <sup>(4)</sup>, with domestic agencies cooperating across borders, for example by sharing information or implementing joint projects <sup>(5)</sup>, and with international institutions and international law fulfilling administrative functions and being analyzed with administrative law tools, for example the Basel Committee, the International Atomic Energy Agency, the Clean Development Mechanism, or multilateral development banks <sup>(6)</sup>. All

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from a French perspective J.-B. AUBY, «La bataille de San Romano. Réflexions sur les évolutions récentes du droit administratif», 57 *L'actualité juridique - Droit administratif AJDA* (2001) 912; Id., «Globalisation et droit public», in *Gouverner, administrer, juger. Liber amicorum Jean Waline* (Dalloz, Paris, 2002) 135; and from an Italian perspective S. CASSESE, «New Paths for Administrative Law: A Manifesto», 10 *International Journal of Constitutional Law* (2012) 603.

<sup>(2)</sup> See e.g. K.E. DAVIS, A. FISHER, B. KINGSBURY and S.E. MERRY (eds.), *Governance by Indicators - Global Power through Quantification and Rankings* (Oxford University Press, Oxford, 2012).

<sup>(3)</sup> See e.g. G.A. HODGE, C. GREVE and A.E. BOARDMAN (eds.), *International Handbook on Public-Private Partnerships* (Edward Elgar Publishing, Cheltenham, 2010); S. ARROWSMITH and A. DAVIES (eds.), *Public Procurement: Global Revolution* (Kluwer Law International, London, 1998).

<sup>(4)</sup> See P. MUCHLINSKI, *Multinational Enterprises and the Law* (Oxford University Press, Oxford, 2<sup>nd</sup> ed. 2007) 125 *et seq.*

<sup>(5)</sup> See e.g. M. AUDIT, *Les conventions transnationales entre personnes publiques* (Librairie Générale de Droit de Jurisprudence, Paris, 2002); M. KOTZUR, *Grenznachbarschaftliche Zusammenarbeit in Europa* (Duncker & Humblot, Berlin, 2004); M. KMENT, *Grenzüberschreitendes Verwaltungshandeln* (Mohr Siebeck, Tübingen, 2010); M. GLASER, *Internationale Verwaltungsbeziehungen* (Mohr Siebeck, Tübingen, 2010).

<sup>(6)</sup> See B. KINGSBURY, N. KRISCH and R.B. STEWART, «The Emergence of Global Administrative Law», 68 *Law & Contemporary Problems* (2005) 15; C. MÖLLERS, A. VOBKUHLE and C. WALTER (eds.), *Internationales Verwaltungsrecht* (Mohr Siebeck, Tübingen, 2007); C. TIETJE, *Internationalisiertes Verwaltungshandeln* (Duncker & Humblot, Berlin, 2001).

of this leads to an impressive expansion of administrative law, partly within, but above all beyond the nation-state.

At the same time, the theory of administrative law is in crisis (7). The enlargement of administrative law's subject matter, the use of new instruments, cooperation between public and private actors, the rise of administrative actors at the supranational and international levels, and the interaction between international and national law have started to corrode the two foundational paradigms upon which administrative law, and its theory, traditionally have been based: *first*, hierarchy (or command and control) as an internal and external ordering model for administrative law-relations and a method of governance; and, *second*, the intrinsic connection between administrative action, the state, and domestic law. Both elements are dissolving with the rise of non-hierarchical forms of governance and with the emergence of administrative action that is not tied to the territory and domestic law of a specific state. This challenges the main boundaries that have traditionally defined administrative law: its distinction from private law as a consent-based horizontal order between equal actors, its distinction from the administrative legal orders of other states, and its distinction from international law (8).

These developments raise the question of what the distinctive features of administrative law are, or can be, today. What seems clear is that administrative law in a global perspective cannot be construed around the idea of a monolithic center, or acme in a pyramidal structure, but needs to be decoupled from its nationalistic bases. Moreover, one needs to ask how a discipline of administrative law can be framed that does not understand itself as a discipline of English, French, German, Italian, or US administrative law, but that has a global outlook and that deals with administration and administrative law as a phenomenon of different levels of governance, involving multifaceted actors, both within and beyond the nation-state. What, in other words, is the identity of administrative law when administrative action takes place in a seemingly fragmented, but global administrative space on the basis of multiple legal sources and implemented, often across borders, by actors who are not coordinated vertically through hierarchy or horizontally by compartmentalizing their authority into defined territorial units? Under such circumstances, what are possible

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(7) On the identity problems of public law see Grimm, *supra* note 1.

(8) *Ibid.*, 28 *et seq.*

anchors to frame the identity and unity of administrative law in times of globalization?

Certainly, the comparative study of the common roots of administrative laws in different countries and the integration of international and supranational law into the thinking about administrative law are crucial in order to «reestablish some form of unitary and systematic perspective on public law in general» <sup>(9)</sup>. In addition, one should not exclusively focus on the exercise of public authority by public actors and the changes of administrative law in supranational and international legal processes, but also take account of the incremental dissolution of the public-private divide and the closer interaction between public and private actors in public governance. In my view, a new theory of administrative law that manages to frame administrative law as a global subject-matter and discipline should therefore take a transnational legal outlook, meaning that it is open towards comparative law, supranational and international legal developments, just as it is vis-à-vis the impact of private law, private actors, and their norm-generating activity in the area of administrative relations and administrative law <sup>(10)</sup>. In this perspective, administrative law is not exclusively a matter of national culture and national law — and therefore compartmentalized into different territorial sectors — but a discipline that focuses on the legal infrastructure that enables and restricts how public governance plays out in a world where borders become increasingly permeable and where accountability vis-à-vis those affected is needed.

A transnational legal approach to administrative law calls to build a theory of administrative law that overcomes both the national-international divide and the public-private divide and develops administrative law as a discipline that cuts across these basic disciplinary boundaries. Such a transnational legal approach accounts for the fact that a theory of administrative law cannot anymore be attached to the state and the nature of administrative law not be understood in terms of its domestic sources. Instead, it takes its course from a functional

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<sup>(9)</sup> L. CASINI, S. CASSESE and G. NAPOLITANO, «The New Italian Public Law Scholarship», 9 *Int'l J. Const. L.* (2001) 301, 309.

<sup>(10)</sup> Certainly, not all activity of private actors is relevant in this context (otherwise there would be no meaningful distinction in relation to private law), but it is to the extent that private actors are integrated through mechanisms of cooperation into performing public functions.

analysis of social relations and public-private interaction wherever and whenever administrative action takes place. A transnational legal approach does not put the sources of administrative law or specific institutions at the center of a theory of administrative law, but focuses on the functions of, and the legal instruments used to implement administrative governance.

A transnational approach to administrative law would not only search for the commonality of rules and principles in administrative law across borders and across multiple levels of administration, but insist on the need to study and practice administrative law, even in a seemingly purely domestic setting, by taking into account the interconnections of different administrative spaces and the way ideas and concepts of administrative law travel across borders, traverse the national, regional, and international levels, and develop in the interaction between public and private actors <sup>(11)</sup>. Administrative law, in this perspective, is not crafted entirely autonomously within the boundaries of a pyramidal domestic structure, but develops and is applied within a web of administrative law thinking that is becoming increasingly deterritorialized and focused on administration as a social phenomenon that is independent from specific sources and institutions. The identity of administrative law then does not consist of a center or acme, a paradigm reflected in the focus on domestic sources, competences and administrative organization, but in a unifying framework for, and a way of thinking about, the plurality of administrative phenomena.

To illustrate such a transnational legal approach to administrative law, I will use an increasingly important form of administrative action as an example, namely cooperation between administrations and private actors through (public) contracts, such as PPPs, concession agreements, or state contracts. This area is particularly apposite to illustrate transnational legal thinking in administrative law not only because it shows the impact of supranational and international institutions and their law on the domestic law of public contracts; it also shows the

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<sup>(11)</sup> On the underlying concept of transnational legal processes as «processes through which these norms are constructed, carried, and conveyed, [and which] always confront national and local processes that may block, adapt, translate, or appropriate a transnational legal norm and spur its reassessment», see G. SHAFER, «Transnational Legal Process and State Change», 37 *Law & Social Inquiry* (2012) 229, 230. See also H. KOH, «Transnational Legal Process», 75 *Nebraska Law Review* (1996) 182.

dissolution of the public-private divide, and the concomitant challenge to hierarchy as administrative law's central ordering paradigm, because public contracting and public contracts law are deeply influenced by private actors acting as contracting parties, financiers or guarantors, but also as norm-makers.

While contractual instruments are regularly attributed only minor importance in administrative law theory, which is primarily built on unilateral administrative action<sup>(12)</sup>, a comprehensive theory of administrative law needs to encompass them. To change the traditional focus on unilateral action by taking account of the practical, but also structural importance of instruments of horizontal order in administrative law, is one aim of the present article. Another is to understand that administrative law does not develop anymore in a purely domestic setting, but rather that administrative law and ideas about administrative law are generated in processes that increasingly often bridge the divide between different domestic legal orders, between national and international law, and between public and private actors. This illustrates the need for approaching administrative law as part of a transnational framework.

Against this background, I will first provide a more in-depth analysis of the challenges administrative law is facing that make it impossible to develop a unifying theory of administrative law on the basis of a state-centered and source-centered model. Instead, I will argue that the new structure and breadth of today's administrative law is best captured by a transnational legal approach to administrative law that focuses on actors and the instruments they use (section 2). Subsequently, I will focus on the example of public contracts as a

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<sup>(12)</sup> See the standard textbooks on administrative law, for example, H. MAURER, *Allgemeines Verwaltungsrecht* (C. H. Beck, München, 18<sup>th</sup> ed. 2011) (dealing with public contracts on roughly 50 pages as compared to unilateral administrative acts on more than 160 pages); P. CRAIG, *Administrative Law* (Sweet & Maxwell, London, 7<sup>th</sup> ed. 2012) (dealing with public contracts on only 39 pages (Chapter 5) as compared to dealing mostly with unilateral administrative action in the context of judicial review (Chapters 12-30)), G. LAWSON, *Federal Administrative Law* (Thomson/West, St. Paul, Minnesota, 4<sup>th</sup> ed. 2007) (dealing with administrative rulemaking and adjudication only and not dealing with contracts passed by the administration at all). An exception may be France where public contracts are given broader space; see, for example, J. WALINE, *Droit administratif* (Dalloz, Paris, 24<sup>th</sup> ed. 2012) (dealing with unilateral acts on 47 pages and contracts passed by the administration on 34 pages; nonetheless, the discussion on judicial review in France is also mostly focused on unilateral administrative action).

practical illustration of the need for such a transnational approach to administrative law (section 3). Section 4 concludes.

2. If the task of a unifying theory of administrative law is to capture administrative law writ large, it needs to start with, and then react to, an analysis of the structural changes that challenge the traditional conceptualization of administrative law as tied to the state. After all, initially, it was the state-oriented and state law-centered approach to administrative law, which was able to ensure the unity of administrative law and circumscribe the identity of administrative law as a domestic legal discipline. This orientation is disappearing due to the dissolution of administrative law's traditional frontiers in a transnational legal space (2.1.). At the same time, new theoretical and conceptual approaches to administrative law have appeared that analyze these challenges and develop new theories (2.2.). While every single approach captures important facets of administrative law in the age of globalization, these approaches do not mirror all structural changes in a comprehensive manner and do not aim at formulating an overarching theory for administrative law. Instead, only a transnational legal approach to administrative law can offer a comprehensive perspective and provide a basis for such a theory (2.3.).

2.1. Globalization, privatization, and new instruments of governance are bringing about fundamental structural and institutional shifts in respect of the traditional ordering paradigms of administrative law, that is, hierarchy (or command-and-control) as a principle of administrative law-relations and a method of governance, on the one hand, and the intrinsic connection between administrative action and domestic law, on the other. In that context, globalization leads to the dissolution of the most fundamental categorizations used to structure and define fields of law or even entire legal orders, namely the dichotomies of national and international law, on the one hand, and public and private law, on the other. Accordingly, globalization embeds administrative law in a transnational legal space. This process can be observed by all administrative lawyers worldwide and can be described along three dimensions: *first*, the dissolution of vertical boundaries between national and international law; *second*, the dissolution of horizontal boundaries between different domestic administrative legal orders; and *third*, the dissolution of the boundary between



public law and private law that lies diagonally towards, or cuts across, the two other distinctions <sup>(13)</sup>.

First, domestic administrative law today is faced with the increasing influence of legal sources that are not of domestic origin but exercise pressure on domestic law from the outside <sup>(14)</sup>. This may consist of a change in the applicable law (from domestic to non-domestic), such as the direct application of EU law by domestic administrations <sup>(15)</sup>. But even in seemingly purely domestic settings there may be transborder aspects involved in respect of the pedigree of the law applied. EU law, for example, requires that domestic administrative procedure be applied indiscriminately to domestic and intra-EU cases in a way that domestic administrative law does not constitute an obstacle to the effective implementation of EU law <sup>(16)</sup>. Likewise, many international treaties require the adaptation of domestic administrative law to international requirements. For example, the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters has transformed administrative law and procedure by granting the public

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<sup>(13)</sup> I see the public-private boundary as a diagonal boundary, because the impact of private actors and private law can take place from within the domestic administrative legal order concerned; it can stem from the private law of a foreign domestic jurisdiction; but it can also originate from actors constituted under international law that act like private actors and perform essentially private functions, such as international organizations that finance or guarantee infrastructure projects like a commercial bank or insurer or together with commercial actors, such as is the case with the Multilateral Investment Guarantee Agency or the International Finance Corporation, both of which are affiliates of the World Bank Group. Conversely, domestic or international actors may use private law instruments or private law vehicles to fulfill their public tasks, such as the Global Fund for AIDS. All these examples show that the public-private divide cuts across national, international, and foreign law; that is why it is understood as a diagonal boundary for present purposes.

<sup>(14)</sup> See generally S. CASSESE, «Global Standards for National Administrative Procedures», 68 *Law & Contemporary Problems* (2005) 109.

<sup>(15)</sup> See *Fratelli Costanzo v. Comune di Milano*, 22 June 1989, CJEU, Case 103/88, ECR 1989, 1839 para. 31 («the individual must also have the right to rely on a directly applicable directive in dealings with State administrative authorities»); *Kühne & Heitz*, 13 January 2004, Case C-453/00, ECR 2004, I-837 para. 20 («it is for all the authorities of the Member States to ensure observance of the rules of Community law within the sphere of their competence»).

<sup>(16)</sup> See *Deutsche Milchkontor v. Germany*, 21 September 1983, CJEU, joint cases 205-215/82, ECR 1983, 2633 para. 19. See further T. von Danwitz, *Europäisches Verwaltungsrecht* (Springer, Berlin, 2008) 483 *et seq.*

rights to information, participation, and access to justice regarding decision-making processes concerning the environment (17); and Art. XVI:4 of the WTO Agreement requires WTO members to «ensure the conformity of its laws, regulations and administrative procedures» with WTO law (18). But also foreign public law can have an impact on how domestic administrations act, for example when the recognition of foreign administrative acts is in question (19).

Second, administrative law faces a proliferation of actors that assume functions in administrative governance. At the international level, there is an increase in conduct by international institutions that can be understood as fulfilling administrative tasks. For instance, the Organization for Economic Cooperation and Development's PISA study can be understood as administrative governance by information (20). The acts of foreign administrations, or interests of those living abroad, also become increasingly relevant and perforate the horizontal boundary between different domestic administrative legal orders. This is the case, for example, if environmental impact assessments has to take account of the interests of people living in a neighboring jurisdiction (21). The grant of mining rights in territory under foreign administration or occupation may be another case of foreign actors influencing administrative activity and domestic administrative law (22), and so is the joint cross-border administration of infrastruc-

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(17) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, opened for signature 25 June 1998, 2161 U.N.T.S. 447. See further A. FISCHER-LESCANO, «Transnationales Verwaltungsrecht», 63 *Juristenzeitung* (2008) 373.

(18) Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154. See further P. ALA'Ì, «From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance», 4 *Journal of International Economic Law* (2008) 779.

(19) See H. WENANDER, «Recognition of Foreign Administrative Decisions», 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2011) 755.

(20) A. VON BOGDANDY and M. GOLDMANN, «Taming and Framing Indicators: A Legal Reconstruction of the OECD's Programme for International Student Assessment (PISA)», in DAVIS et al, *supra* note 2, 52. See also more generally on international institutions exercising administrative tasks, the case studies in A. VON BOGDANDY et al (eds.), *The Exercise of Public Authority by International Institutions* (Springer, Heidelberg, 2009).

(21) See e.g. the case underlying the dispute in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010, ICJ, Judgment, *I.C.J. Reports 2010*, 14, paras. 203 et seq.

(22) See e.g. Case HCJ 2164/09, 26 December 2011, Israel Supreme Court,

ture facilities, such as a waste landfill or a waste-water processing plant. Finally, privatization is an example of administrative tasks being delegated to private actors, who in turn become actors engaged in fulfilling administrative functions.

Third, administrative law is not only subject to an increasing amount of non-domestic and non-public sources and actors. Administrative law also has been used to analyze areas of law and institutional activity that were traditionally seen as phenomena of either international law or private law. The Global Administrative Law project, for example, has used administrative law principles to restructure the accountability of international institutions <sup>(23)</sup>. Similarly, areas of extraterritorial activity of domestic administrations, for example the grant of official development aid, have been analyzed as administrative, not foreign relations activity <sup>(24)</sup>. Finally, various areas of social activity organized under private law and carried out by non-governmental actors have been analyzed through an administrative law lens. This includes private codes of conduct, such as the Equator Principles that apply to lending activities of commercial banks for development projects <sup>(25)</sup>, the activity of the Internet Corporation for Assigned Names and Numbers (ICANN) <sup>(26)</sup>, or the rules of the World Anti-Doping Agency that suppresses doping in the world of sporting events <sup>(27)</sup>.

All of these developments entail various and partly contradictory dynamics that affect administrative law. Some of these dynamics lead to more harmonization across different administrative legal orders, as

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English translation available at <http://www.yesh-din.org/userfiles/file/%D7%94%D7%9B%D7%A8%D7%A2%D7%95%D7%AA%20%D7%93%D7%99%D7%9F/psak.pdf>.

<sup>(23)</sup> See KINGSBURY/KRISCH/STEWART, *supra* note 6.

<sup>(24)</sup> P. DANN, *Entwicklungsverwaltungsrecht* (Mohr Siebeck, Tübingen, 2012).

<sup>(25)</sup> A. MEYERSTEIN, «Global Private Regulation in Development Finance: The Equator Principles and the Transnationalization of Public Contracting», in M. AUDIT and S. SCHILL (eds.), *The Transnational Law of Public Contracts* (Bruylant, Brussels, forthcoming 2014).

<sup>(26)</sup> B. CAROTTI, «L'ICANN e la governance di internet», *57 Rivista Trimestrale di Diritto Pubblico* (2007) 681; J. VON BERNSTORFF, «The Structural Limitations of Network Governance: ICANN as a Case in Point», in C. JOERGES, I.-J. SAND and G. TEUBNER (eds.), *Transnational Governance and Constitutionalism* (Hart Publishing, Oxford, 2004) 257; M. HARTWIG, «ICANN - Governance by Technical Necessity», in VON BOGDANDY et al, *supra* note 20, 575.

<sup>(27)</sup> L. CASINI, *Il diritto globale dello sport* (Giuffrè, Milano, 2010).

is the case with EU law. Others fragment administrative law, dissolve well-established boundaries, and create less rather than more homogeneity. Moreover, these dynamics lead to a modified perception of what characterizes administrative action and administrative law. They deterritorialize administration and reflect an increasing functional differentiation, as well as the increase in international law, international institutions, but also private law and private actors. These developments question the boundaries between international and national law, both public and private law. In addition, cooperative elements in administrative law increase both at the domestic level, but also across borders, including public-private, but also public-public cooperation. These developments also exist in the field of public contracting, on which Part 3 will focus. They embed administrative law today in a transnational legal space because administrative action is dispersed across the spectrum of domestic and international, private and public law.

2.2. Various approaches have started theorizing about the novel forms of administrative law in the post-national constellation discussed above. They can be grouped into five categories: 1) literature adopting network models to analyze the increasingly informal interaction between administrations; 2) literature adopting conflict of laws-thinking to coordinate normative commands stemming from different administrative legal orders; 3) literature analyzing the Europeanization and internationalization of administrative law; 4) literature on privatization and its impact on administrative law; and 5) literature using administrative law to analyze international institutions and phenomena of global governance. These approaches, and their limits to serve as encompassing theories of administrative law, are discussed in turn.

First, network models, such as that of Anne-Marie Slaughter, focus on the emergence of transnational administrative networks in which administrations from different countries cooperate across borders, exchange information, and coordinate their decision-making informally <sup>(28)</sup>. Examples of such administrative networks are the International Organization of Securities Commissions (IOSCO) <sup>(29)</sup> or

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<sup>(28)</sup> A.-M. SLAUGHTER, *A New World Order* (Princeton University Press, Princeton, 2004); C. MÖLLERS, «Transnationale Behördenkooperation», 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005) 351.

<sup>(29)</sup> See <http://www.iosco.org>.

the Basel Committee <sup>(30)</sup>, in which financial regulators interact in the context of an intergovernmental setting without making binding decisions <sup>(31)</sup>. The advantage of such network approaches to administrative law is to grasp informal interactions that have real governance effects but would be disregarded by traditional administrative law concepts. As a basis of a general unifying theory of administrative law, network approaches are, however, both too limited and too comprehensive: too limited because they focus only on the interaction between public bodies, while leaving public-private interactions aside; and too comprehensive because network phenomena are not specific to administrative coordination, but equally occur in entirely private settings.

Second, conflict-of-law approaches are interested in transnational effects and limits of classical administrative action, for example the effect of unilateral administrative acts on people abroad, the participation of residents of other countries in administrative planning, or the recognition of foreign administrative acts <sup>(32)</sup>. Furthermore, conflict-of-law approaches are used to analyze transnational cooperation between administrative actors in different states, for example in the management of joint infrastructure projects <sup>(33)</sup>. Analytically, the framework and categories used to analyse these phenomena are similar to private international law thinking and focus strongly on questions of applicable law and the recognition of foreign administrative acts <sup>(34)</sup>. Their focus, however, is limited to adapting classical administrative law and procedure to transnational situations and to develop modes of coordination between the administrative laws of different domestic legal orders <sup>(35)</sup>. They remain largely domestic, including in how they view the interaction between public and private actors, and

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<sup>(30)</sup> See <http://www.bis.org/bcbs>.

<sup>(31)</sup> See also P.-H. VERDIER, «Transnational Regulatory Networks and Their Limits», 34 *Yale Journal of International Law* (2009) 113.

<sup>(32)</sup> KMENT, *supra* note 5, 267 *et seq.*

<sup>(33)</sup> *Ibid.*, 617 *et seq.*; M. NIEDOBITEK, *Das Recht der grenzüberschreitenden Verträge* (Mohr Siebeck, Tübingen, 2001); Glaser, *supra* note 5; Kotzur, *supra* note 5, 461 *et seq.*

<sup>(34)</sup> K. NEUMEYER, *Internationales Verwaltungsrecht* (Schweitzer, München, 1910 to 1936); for similar approaches to international administrative law, see also C. E. Linke, *Europäisches Internationales Verwaltungsrecht* (Lang, Frankfurt am Main, 2001); C. OHLER, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts: Strukturen des deutschen Internationalen Verwaltungsrechts* (Mohr Siebeck, Tübingen, 2005).

<sup>(35)</sup> Cf. KMENT, *supra* note 5, 7.

often disregard the interaction between national and international law. This limits the usefulness of conflicts-of-law approaches as a basis for a unifying theory of administrative law.

Third, a large amount of literature in administrative law analyzes the influence of supranational or international law on domestic administrative law, such as the influence of EU law or the Aarhus Convention on national law. Titles like the «transformation of administrative law in Europe», the «Europeanization of administrative law», or the «internationalization of administrative relations» are indicative for this perspective <sup>(36)</sup>. While grasping an important aspect of change in administrative law, these studies retain a domestic perspective and view international law as an external factor, not a genuine part, of the discipline of administrative law <sup>(37)</sup>. Moreover, they do not deal with the phenomenon of administrative law of regional or international institutions and are therefore limited as general theories of administrative law.

The fourth strand of literature deals with the role of private actors in administration, in particular in the context of the privatization of formerly public functions and contractual cooperation, for example through PPPs <sup>(38)</sup>. While this literature tackles the public-private

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<sup>(36)</sup> M. RUFFERT (ed.), *The Transformation of Administrative Law in Europe/La mutation du droit administratif en Europe* (Sellier, München, 2007); J.H. JANS et al (eds.), *Europeanisation of Public Law* (Europa Law Publishing, Groningen, 2007); F. SNYDER (ed.), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart Publishing, Oxford, 2000); C. HILSON, «The Europeanization of English Administrative Law: Judicial Review and Convergence», 9 *European Public Law* (2003) 125; K.-H. LADEUR (ed.), *The Europeanisation of Administrative Law* (Ashgate, Aldershot, 2002); E. SCHMIDT-ABMANN, «The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship», in VON BOGDANDY et al, *supra* note 20, 943.

<sup>(37)</sup> This is so even if the increasing influence of supranational and international law on administrative law may ultimately lead administrative lawyers to understand their identity in a broader, non-domestic context. See A. VON BOGDANDY, «Verwaltungsrecht im europäischen Rechtsraum - Perspektiven einer Disziplin», in A. VON BOGDANDY, S. CASSESE and M. HUBER (eds.), *Handbuch Ius Publicum Europaeum IV: Verwaltungsrecht in Europa* (C. F. Müller, Heidelberg, 2010) 10; Id., «National Legal Scholarship in the European Legal Area - A Manifesto», 10 *International Journal of Constitutional Law* (2012) 614.

<sup>(38)</sup> See, for example, P. VERKUIL, «Public Law Limitations on Privatization of Government Functions», 84 *North Carolina Law Review* (2004) 397; M. BURGI, *Privatisierung öffentlicher Aufgaben - Gestaltungsmöglichkeiten, Grenzen, Regelungsbedarf* (C. H. Beck, München, 2008) (with further references).

divide, its blind spot remains, similarly to the literature on Europeanization and internationalization, its domestic focus. Studies on privatization in administrative law are typically interested in how domestic law privatizes and what limits it contains for privatization and how public-private cooperation is implemented, supervised and controlled by public actors. By contrast, public-private interaction is typically not analyzed in relation to its effects on administrative law theory more generally. Similarly, the interplay of national and international law in privatization does often not play a central role in this strand of literature.

Finally, a growing body of literature focuses on Global Administrative Law <sup>(39)</sup>, international administrative law <sup>(40)</sup>, and International Public Authority <sup>(41)</sup>. These projects react to the phenomenon that there are more and more international institutions whose activities, in terms of their modes of operations and their effect vis-à-vis private citizens, resemble that of domestic administrations. Instead of making use of classical public international law concepts and methods, they draw on (domestic) administrative law thinking and analogies to analyze the resulting problems of accountability when international institutions take decisions that directly impact the lives of ordinary citizens. However, as a general theory of administrative law they are also limited because they exclude the area where administrative law still is most widely practiced and rooted, namely the domestic level <sup>(42)</sup>. Furthermore, the distinction between private and public remains crucial for them <sup>(43)</sup>, thus excluding an analysis of the influence of private actors on public governance.

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<sup>(39)</sup> See KINGSBURY/KRISCH/STEWART, *supra* note 6; N. KRISCH and B. KINGSBURY, «Introduction: Global Governance and Global Administrative Law in the International Legal Order», 17 *European Journal of International Law* (2006) 1; B. KINGSBURY and L. CASINI, «Global Administrative Law Dimensions of International Organizations Law», 6 *International Organizations Law Review* (2009) 319; G. DELLA CANANEA, «Procedural Due Process of Law Beyond the State», in VON BOGDANDY et al, *supra* note 20, 965; CASSESE, *supra* note 14.

<sup>(40)</sup> See e.g. D. EHLERS, «Internationales Verwaltungsrecht», in H.-U. ERICHSEN and D. EHLERS (eds.), *Allgemeines Verwaltungsrecht* (De Gruyter, Berlin, 14th edn 2010) § 4; cf. also Tietje, *supra* note 6.

<sup>(41)</sup> VON BOGDANDY et al, *supra* note 20.

<sup>(42)</sup> KINGSBURY/KRISCH/STEWART, *supra* note 6, 17 (limiting its analysis to transborder situations, including «formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime,



In sum, although there is no lack of theoretical reflection on the influence of globalization on administrative law and the dissolution of the foundational boundaries of the state-centered and source-centered theory of administrative law, no single approach encompasses all structural changes. Every single approach explains part of how administrative law changes in a globalized world. Yet, none provides an overarching theoretical framework for today's administrative law as a whole. Arguably only a transnational legal approach to administrative law can offer such a comprehensive perspective as a unifying theory for administrative law in the transnational legal space. This approach will be sketched out in the following section.

2.3. Unlike the various approaches discussed above, a transnational approach to administrative law is not only interested in how administrative law changes, how domestic and international law interact in the field, how privatization projects are implemented, and which criteria of legitimacy the exercise of global regulatory powers and international public authority have to fulfil. It is interested more broadly in mapping how administrative law today transcends national and international, public and private law, and asks how to develop a framework upon which to build a theory of administrative law that carves out the overarching identity of administrative law independently of where, by whom, and on which legal basis administrative action takes place. This identity of administrative law would have a twofold function: *first*, to designate the specificities of administrative law in comparison to other legal disciplines; and *second*, to ensure that administrative lawyers can communicate across borders regarding solutions to problems of administrative relations independently of the domestic or international law that may govern particular cases.

A transnational approach to administrative law denotes a frame-

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hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance»); A. VON BOGDANDY, P. DANN and M. GOLDMANN, «Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities», in VON BOGDANDY et al, *supra* note 20, 3, 13 (looking towards «institutions [that] exercise authority attributed to them by political collectives on the basis of binding or non-binding international acts»).

(<sup>43</sup>) This is particular true for the International Public Authority project. See *ibid.*, 14 (stating that «drawing the line between public and private authority [is] indispensable for legal research»).



work of thinking about administrative law that not only transcends the national-international and the public-private divide; it wants to do away with the very idea that these categorizations delimit separate disciplines. Instead, a transnational approach aims at carving out the identity, essence and characteristics of administrative law independently of the applicable law. Although there is English, French, German, Italian, and US administrative law, etc., and an administrative law of international institutions, these disciplines are not self-sufficient and autonomous, but are, as shown above, and as illustrated in Part 3 with respect to public contracts, increasingly interconnected. International law influences domestic administrative law, domestic law feeds back into international regimes, ideas on domestic administrative law travel across borders, and are influenced both by norm-making activities of public and private actors. All of these processes integrate administrative law into a transnational legal space.

A transnational legal approach, in turn, breaks with the classical perspectives that international and national are «two spheres that at best touch one another, but never intersect» (Triepel) <sup>(44)</sup> and that «le droit administrative et le droit civil forment comme deux mondes séparés, qui ne vivent point toujours en paix, mais qui ne sont ni assez amis, ni assez ennemis pour se bien connaître» (Alexis de Tocqueville) <sup>(45)</sup>. Moreover, it does not presume hierarchies between national and international, public and private law, but accepts that different actors assume independent, and potentially diverging positions.

The perspective adopted here is also broader than Philip Jessup's classical definition of transnational law as «all law which regulates actions or events that transcend national frontiers» <sup>(46)</sup>, because it does not only cover transborder administrative relations in the strict sense, such as the involvement of foreign interests or foreign laws, but encompasses

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<sup>(44)</sup> H. TRIEPEL, *Völkerrecht und Landesrecht* (Hirschfeldt, Leipzig, 1899) 111 («zwei Kreise, die sich höchstens berühren, niemals schneiden» - English translation by the author).

<sup>(45)</sup> A. DE TOCQUEVILLE (1831) (cited after L. CASINI, «Down the Rabbit-Hole»: *The Projection of The Public/Private Distinction Beyond the State*, Jean Monnet Working Paper No. 8/2013).

<sup>(46)</sup> P.C. JESSUP, *Transnational Law* (Yale University Press, New Haven, 1956) 2; see further P. ZUMBANSEN, «Transnational Law», in J.M. SMITS (ed.), *Elgar Encyclopedia of Comparative Law* (Elgar, Cheltenham, 2006), available at <http://ssrn.com/abstract=1105576>. For a suggestion to link administrative law and transnational law see already Fischer-Lescano, *supra* note 17.

administrative law and administrative relations generally, including in the domestic context. This broader perspective rests on the premise that the amount of entirely autonomous areas of administrative law are continuously shrinking and that transnational legal processes understood as «processes through which [...] norms are constructed, carried, and conveyed, [and which] always confront national and local processes that may block, adapt, translate, or appropriate a transnational legal norm and spur its reassessment»<sup>(47)</sup>, are more generally on the rise. Independent of the considerable amount of regional and international law that affect domestic administrative law, a frequent transnational element will be that domestic administrative law is viewed in comparison to, and is developed or interpreted against, the experience made with administrative law elsewhere. This embeds even purely national situations into a transnational framework.

In fact, looking abroad for comparison, and hence a transnational perspective, has been a recurring feature since the very beginnings of administrative law and theory. As outlined by Giacinto della Cananea, for Alexis de Tocqueville, for example,

[t]he idea that comparative analysis is essential to understand the evolution of political and administrative institutions was not new [...]. When he was younger, and had attempted to study the new institutions of the United States, he was not simply interested in understanding their underlying rationales, ie equality and democracy, for their own sake. Rather, he compared such institutions with the administrative institutions of Europe, particularly with those of France, which he knew best as a member of the *Conseil d'Etat*. In criticizing the French constitutional framework of his time, he was not simply animated by polemic intentions against the patent arbitrariness of administrative justice, which was later emphasized by Albert Venn Dicey. His aim was intellectually more challenging. It consisted of searching for invariable laws, or, more precisely, *les règles invariables qui régissent les sociétés*<sup>(48)</sup>.

Moreover, a transnational approach to administrative law has a different focus from other approaches in finding unity among, or commonalities between, different administrative laws. It is based on

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<sup>(47)</sup> SHAFFER, *supra* note 11, 230.

<sup>(48)</sup> G. DELLA CANANEA, «Minimum Standards of Procedural Justice in Administrative Adjudication», in S. SCHILL (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford, 2010) 39, 53 (quoting from A. DE TOCQUEVILLE, *De la démocratie en Amérique* (1835), Part I, Ch IV - footnotes omitted).

the functional analysis of administrative relations and does not construct a theory of administrative law with based on the sources of law as its centerpiece. Instead, it recognizes that administrative law in a transnational space originates from different sources, both domestic and international, but also emerges from the behaviour of public and private actors. It brings structure to administrative law by focusing on administrative actors and the instruments they use <sup>(49)</sup>. Furthermore, it aims at developing principles underlying administrative action independently of the specific legal basis and thereby searches for procedural and substantive law guideposts that mitigate between universalist aspirations and the protection of particularities of domestic systems. Such principles can bring structure to administrative law independently of the applicable source or the relevant actor <sup>(50)</sup>.

As regards method, the content of principles of transnational administrative law cannot be attached to any specific legal system, whether domestic or international. Instead, principles of transnational administrative law must be developed through comparative law analysis that encompasses both domestic administrative legal orders, as well as international legal regimes, and takes account of relevant private law sources. Furthermore, both formal and informal sources and processes are relevant to understand how administrative law structures social relations. All of this does not exclude the fact that there can be conflicts between different administrative actors, and between the requirements of different administrative law sources. Yet, a transnational approach to administrative law does not put conflict center stage; it rather looks at the commonalities and at the joint efforts of administrative actors at different levels and places to engage in the task of administrative governance. To illustrate the need for such a transnational framework in more practical terms, Part 3 now turns to an analysis of public contracts, which are one form of action of transnational administrative law.

3. Having laid out an abstract framework for thinking about administrative law in a transnational perspective, this Part turns to an

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<sup>(49)</sup> Similarly M. GOLDMANN, «Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority», in VON BOGDANDY et al, *supra* note 20, 661.

<sup>(50)</sup> See A. VON BOGDANDY, «General Principles of International Public Authority: Sketching a Research Field», in VON BOGDANDY et al, *supra* note 20, 727.

analysis of the law governing public contracts. The purpose of this is both to illustrate the challenges administrative law is facing in the transnational legal space, but also to offer a practical example for developing a transnational theory of administrative law. In doing so, the following analysis of contractual public-private interaction takes up the basic switch a transnational approach to administrative law entails, as discussed above: from sources to actors, instruments, and process. This highlights how a uniform theory of administrative law can be conceived that is not based on the idea of hierarchical ordering among actors and that conceptualizes administrative law without placing the state at the center.

With this in mind, I will discuss, *first*, that cooperative forms of administration are becoming increasingly important instruments of administrative governance and are not a marginal phenomenon (3.1.); *second*, that public contracting law develops through an interaction of international and national law (3.2.); and *third*, that a comprehensive understanding of the processes that determine why and how public contracting disassociates itself from domestic public law cannot content itself with looking at international legal sources, but needs to endorse a broader vision that focuses on both private and public actors, the instruments they use, and the pressures they exercise on forging public contracts into an instrument of global governance (3.3.). All of this illustrates that the processes of administrative governance through contract are best grasped by a transnational approach that integrates national and international, as well as public and private perspectives. Similar transnational legal processes also take place in other areas of administrative law, but their study is for another day and place.

3.1. Administrative action was traditionally understood against the background of a hierarchical relationship of supra- and subordination between the state and society. Accordingly, administrative law operated on the basis of command and control. Contracts between the administration and private actors, by contrast, were of little relevance for theorizing about administrative law (with France being a notable exception) <sup>(51)</sup>. Even more, for purists, such as the founder of German administrative law Otto Mayer, writing in 1888, «true contracts of the

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<sup>(51)</sup> See, for example, WALINE, *supra* note 12, 446 *et seq.* (with many further references to the French literature on public contracts).

state in the field of public law are unthinkable» (52). For him, cooperation in administrative law was an inexistent ordering paradigm. Even today, hierarchy is so deeply enshrined in administrative law thinking that cooperation is still viewed in administrative scholarship in many domestic traditions as an exceptional form of administrative action (53). Accordingly, contracts as a form of administrative action are not placed at equal par with unilateral administrative action when developing a theory about administrative law and its identity.

The focus on unilateral action in theorizing about administrative law, however, is increasingly in dissonance with the reality of administrative action. Today, public contracts (and other forms of cooperation) are becoming increasingly important instruments of administrative governance, leading some scholars to qualify the modern state as a «contracting state» (54). Privatization of public functions and the rise of state-owned enterprises, the significant increase of PPPs and of concession agreements, private finance of public bodies, including but not limited to sovereign lending, and rule-making and standardization by purely private and hybrid public-private bodies all reflect the rise of the cooperative paradigm in state-market relations (55). In the United Kingdom, for example, at the end of March 2011 the net book value of private finance initiative (PFI) projects, a form of PPP, amounted to £34.9 billion, and the value of future PFI obligations to £144.6 billion (56).

This phenomenon is precipitated not only by the spread of the market-friendly Washington consensus and the voluntary retreat of the state, but by the increasing dependency of public bodies on private finance and expertise when providing public goods in infrastructure, energy, health, education, etc. What is more, the underlying change of

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(52) O. MAYER, «Zur Lehre vom öffentlichrechtlichen Verträge», 3 *Archiv des öffentlichen Rechts* (1888) 3, 42.

(53) Cf. P. KIRCHHOF, «Mittel staatlichen Handelns», in J. ISENSEE and P. KIRCHHOF (eds.), *Handbuch des Staatsrechts*, vol. V (C. F. Müller, Heidelberg, 3rd ed. 2007) § 99 para. 159.

(54) I. HARDEN, *The Contracting State* (Open University Press, Buckingham, 1992).

(55) See K.-H. LADEUR, *The Changing Role of the Private in Public Governance - The Erosion of Hierarchy and the Rise of a New Administrative Law of Cooperation: A Comparative Approach*, EUI Working Paper No. 2002/9.

(56) HM TREASURY, Whole of Government Accounts year ended 31 March 2011 (October 2012), para. 3.83, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/185537/whole\\_of\\_government\\_accounts\\_31-03-2011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/185537/whole_of_government_accounts_31-03-2011.pdf).

paradigm in administrative action is due both to the dynamics of globalization and to changes in what is considered as the object and purpose of the state and its administration more generally, namely the rise of the modern welfare state which leads to the state providing public goods in areas that before were outside its responsibility. Both factors are responsible for states and state entities being increasingly dependent on cooperation with private economic actors in achieving public policy goals.

Policy responses to the financial and monetary crisis perhaps best illustrate the importance of the cooperative paradigm. Thus, the increase of private-public cooperation is one of the central policy goals of the EU and its Member States in response to the crisis, as expressed in the EU's 2020 Strategy for smart, sustainable and inclusive growth<sup>(57)</sup>. One of the premier responses of that Strategy is that «Europe must also do all it can to leverage its financial means, pursue new avenues in using a combination of private and public finance, and in creating innovative instruments to finance the needed investments, including public-private partnerships (PPPs)»<sup>(58)</sup>.

Likewise, the Innovation Union, which is promoted as another so-called Flagship Initiative, stresses the importance of private finance in research and development and notes the chilling effect poor administrative processes have on private initiatives, leading partly to outsourcing research and development to countries outside the EU<sup>(59)</sup>. Accordingly, a commitment under the Innovation Union initiative is the creation of closer links with the private sector<sup>(60)</sup>. This, as the Europe 2020 Flagship Initiative notes, «requires the intelligent use of public private partnerships as well as changes to the regulatory framework»<sup>(61)</sup>. PPPs thus become one central instrument to mobilize private and public investment for recovery and long term structural change<sup>(62)</sup>.

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<sup>(57)</sup> Communication from the Commission, Europe 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020.

<sup>(58)</sup> *Ibid.*, 20.

<sup>(59)</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Europe 2020 Flagship Initiative - Innovation Union, SEC(2010) 1161, COM(2010) 546 final, pp. 6-7.

<sup>(60)</sup> *Ibid.*, 13.

<sup>(61)</sup> *Ibid.*, 14.

<sup>(62)</sup> See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the

Quite similarly, increasing investment is a strategy stressed and pursued by many international organizations that aim at addressing underdevelopment. The United Nations, to name but one example, view private investment as one important means to reach the Millennium Development Goals of ending poverty and hunger, of achieving universal education, gender equality, lowering child mortality, sustainable development, etc. <sup>(63)</sup>. All of this enhances the importance of public-private cooperation at the expense of governance based on command and control.

However, the decline of hierarchy as an ordering paradigm is not limited to public contracts as a form of administrative action. It also plays out in more traditional areas of administrative law and administrative action, albeit more discretely. After all, the dependency of governments on private actors also affects how administrations govern in unilateral contexts, and how administrative laws are made that are implemented by administrative agencies, because private actors today, including multinational companies, but also institutional and private investors, can easily reallocate their financial resources from one jurisdiction to another. This reinforces competition of laws among different jurisdictions that not only play out in the context of corporate law, where this phenomenon has been widely described as the so-called «Delaware effect» <sup>(64)</sup>, but also in the context of administrative law and public governance <sup>(65)</sup>. Competition among different administrative laws therefore also dissolves hierarchy as the traditional ordering paradigm of administrative law even beyond the context of strictly cooperative administrative action.

Accordingly, the theory of administrative law must recognize that in important areas the state does not govern anymore in an entirely

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Regions, Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships, COM(2009) 615 final.

<sup>(63)</sup> See United Nations Development Program, Investing in Development: A Practical Plan to Achieve the Millennium Development Goals, Report to the UN Secretary General (2005), available at <http://www.unmillenniumproject.org/documents/overviewEngLowRes.pdf>.

<sup>(64)</sup> But see G. Subramanian, «The Disappearing Delaware Effect», 20 *Journal of Law, Economics & Organization* (2004) 32.

<sup>(65)</sup> Cf. on international competition in the area of investment rules A. GUZMAN, «Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties», 38 *Virginia Journal of International Law* (1998) 639. Likewise, there is heavy competition among countries with respect to tax legislation.



unilateral manner by command and control, but increasingly cooperatively, including by cooperating with foreign public and private actors. This should also be reflected in the theory of administrative law by not placing the unilateral exercise of public authority at the center, but by encompassing cooperative forms of administrative governance and by realizing that even the unilateral exercise of public authority is subject to cooperation restraints, *inter alia*, because capital can flow increasingly freely between jurisdictions in search for the most efficient investment, thus influencing the way states govern and administer. All of this exposes administrative law to international and foreign law and their respective concepts, as discussed in the following section, and hence dissolves the boundaries of administrative law in the transnational perspective outlined in Part 2.

3.2. One of the core discontinuities with classical state-centered administrative law in the context of public contracts relates to the legal sources that govern cooperative forms of administrative action. Public contracts, as this section will show, need to be conceptualized as instruments of global governance not, as traditionally done, as instruments of domestic public law that were used within markets confined to the territory of a specific state. This focus on domestic territory, domestic actors, and domestic law disregards many of the modern processes that take place at the supranational and international level and that have significant impact on public contracting. These developments correspond to the dissolution of the national-international divide that has been discussed in Part 2 as one element of a transnational legal approach.

Public contracting today is internationalized not only as regards participating actors, but also in terms of the legal sources, which encompass the domestic, supranational, and international levels. They affect all phases of public contracting, including the selection of contractors, the conclusion and implementation of public contracts, and dispute settlement. They can affect the personal eligibility of contractors, the substantive eligibility of projects that are implemented by means of public contracts, the procedures applicable to selecting, concluding, and implementing public contracts, the substantive rights and obligation governing the implementation of public contracts, the procedural protection against governmental misconduct and related accountability mechanisms, and institutions involved in monitoring and supervising the conduct of parties under public contracts.



A particular role in bridging the national-international law divide in public contracting and in internationalizing public contracts law is played by contracts involving a foreign private contractor. This has the effect that international law relating to the protection of foreign investors comes into play <sup>(66)</sup>, including customary international law and the now more than 3,000 bilateral, multilateral, and sectoral investment treaties, including Chapter 11 of the North-American Free Trade Agreement and the Energy Charter Treaty.

The rights granted to foreign investors in these instruments affect the substantive and procedural law applicable to public contracts independently of the state party's domestic law. Investment treaties establish independent requirements for administrative procedure, such as the right to be heard and the duty to give reasons, condition the exercise of administrative discretion, and require non-discrimination with domestic contractors. They may also limit the state party's regulatory or special contractual powers to modify or terminate public contracts. Finally, investment treaties grant foreign investors access to a specific dispute resolution forum, namely international arbitration. To the extent foreign entities are involved as parties to a public contract, international law therefore supplements domestic public contracts law (partly in a complementary fashion, partly overriding it).

Yet, the participation of foreign entities is often not the result of chance but of deliberate international planning. States deliberately make use of international law to break open the domestic focus of public contracting by implementing contract award procedures that systematically extend the market for public contracts beyond the state. International procurement rules, including the WTO Agreement on Government Procurement <sup>(67)</sup>, bilateral free trade agreements containing procurement chapters <sup>(68)</sup>, or the EU procurement directi-

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<sup>(66)</sup> For a brief overview of the impact of international investment law on public contracting see S. SCHILL, «Contracting with Foreigners: International Investment Law Implications», in R. NOGUELLOU and U. STELKENS (eds.), *Droit comparé des contrats publics/Comparative Law on Public Contracts* (Bruylant, Bruxelles, 2010) 63 (with further references).

<sup>(67)</sup> Agreement on Government Procurement, entered into force 1 January 1996, amended 15 December 2011; see [http://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm).

<sup>(68)</sup> See R. ANDERSON et al, «Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to GPA Accession?», in S. ARROWSMITH and R.D.

ves<sup>(69)</sup>, mandate international advertisement of certain public contracts and standardize bidding, award and review procedures of the contracts in question. The respective international instruments thereby aim at breaking open the territorial limitations of markets for public contracts. In addition, international procurement rules do not only affect contracts with foreign nationals (i.e., international public contracts strictly speaking), but also contracts that would normally be classified as purely domestic. International and supranational law on public contracts law therefore becomes a phenomenon of general impact on the domestic law of public contracts.

Finally, there are even instances where international law is used to harmonize domestic public contracts law in multiple jurisdictions. This is the case, for example, with the EU directives relating to public procurement, which harmonize the award procedure and law relating to the conclusion of public contracts by EU Member States. But there are also cases where international law is used more broadly to harmonize the public contracts regimes of states. In the mining industry, for example, the West African Economic and Monetary Union started, based on an international treaty, to harmonize the mining laws, including the awarding of mining concessions<sup>(70)</sup>. This affects domestic and international public contracts law in that specific sector and does away with a strict separation of domestic and international law.

Although autonomous processes in domestic administrative law that internationalize public contracting may exist (eg national procure-

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ANDERSON (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, Cambridge, 2011) 567.

<sup>(69)</sup> See Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30 April 2004, 114; Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30 April 2004, 1; Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216, 20 August 2009, 76.

<sup>(70)</sup> See Economic Community of West African States, Directive C/DIR.3/05/09 on the Harmonization of Guiding Principles and Policies in the Mining Sector, 27 May 2009, available at [http://www.comm.ecowas.int/sec/en/directives/ECOWAS\\_Mining\\_Directives.pdf](http://www.comm.ecowas.int/sec/en/directives/ECOWAS_Mining_Directives.pdf).

ment laws requiring international tenders independently of any international legal obligation to this effect), it is supranational and international law that increasingly impacts domestic administrative action in the conclusion, implementation, and dispute settlement phase of public contracts. In the procurement phase, international processes lead to an internationalization of public contracting by expanding the limits of the market within which public contracts are procured. In the implementation, as well as the dispute settlement phases, international and supranational law internationalizes public contracts by modifying or adapting applicable substantive and procedural rules and by bringing in additional institutions, such as investment treaty tribunals or the WTO Dispute Settlement Body, that determine legal questions relating to public contracts.

On a theoretical level, these developments mandate, in order to get the full picture of legal sources that are active in the transformation of public contracts from an instrument of domestic governance to an instrument of global governance, to have regard to domestic as well as supranational and international legal sources. Only looking at these sources together can explain the law governing public contracts and its social impact comprehensively. In consequence, as the example of public contracts shows, the study of administrative law and its theory must be decoupled from domestic law and domestic perspectives as posited by the transnational legal approach to administrative law outlined in Part 2. Theorizing about administrative law today needs to realize the increasing interaction of domestic and international law and integrate them in a transnational perspective.

3.3. The transnationalization of public contracting and public contracts law is not limited, however, to changes in the applicable legal sources. Instead, there are other less obvious and more discrete processes that affect public contracting and that require giving up a focus on formal public law sources. In fact, in many cases public contracting is influenced by processes that do not change the applicable law to public contracts as such and that do not make use of legal means to affect public contracting. Instead, in many cases non-binding soft-law instruments play an increasingly important role in affecting public contracting. Furthermore, public-private cooperation brings in additional actors beyond domestic and international public authorities. Notably private actors, including financiers and guarantors and their interest associations, in addition to contractors themselves, affect how

public contracting is conducted today. Likewise, arbitrators as new dispute settlers other than domestic or international courts have started acting as governance institutions affecting public contracting. All in all, the spaces of norm generation for public contracts law now encompass public authorities at the domestic and the international levels, as well as private actors and institutions. The following is intended to illustrate these developments, without being comprehensive.

First, public contracting is not only determined by domestic, supranational, and international hard law. There is also a significant body of soft law created by international public bodies that impacts domestic public contracts law and public contracting. Its effect is mostly to harmonize cooperative administrative action and related domestic law. One example for such a soft law instrument is the UNCITRAL Model Law on Public Procurement, which has been developed by an international organization and can be enacted autonomously by domestic legislators to govern public procurement<sup>(71)</sup>. Notably, the purpose of developing such a model law is not only to compensate for a lack of law-making and legal drafting expertise at the domestic level. Its purpose is also to bring about autonomous harmonization of domestic procurement laws in the absence of international treaty obligations and to widen the domestic market for public contracting by allowing foreign bidders to participate in public tenders governed by standardized procedures<sup>(72)</sup>. Thus, although any law enacted based on the model remains domestic and subject to the jurisdiction of domestic courts, its interpretation and application is intrinsically connected to the law-making process at the international level. Only capturing this background will provide a full picture of the administrative law resulting from the implementation of that, or any other, model law.

Another example of how soft-law developed by international organizations can impact and harmonize domestic public contracting are the UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing, which set out substantive and procedural

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<sup>(71)</sup> See the text in *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, Annex I, available at [http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/ML\\_Public\\_Procurement\\_A\\_66\\_17\\_E.pdf](http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/ML_Public_Procurement_A_66_17_E.pdf).

<sup>(72)</sup> See Guide to Enactment of UNCITRAL Model Law on Public Procurement, adopted 28 June 2012, 2, available at <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/pre-guide-2012.pdf>.

principles for how states should structure and restructure sovereign debt (including debt subscribed to in contracts with private financiers) <sup>(73)</sup>. Again, the purpose of such an instrument is not only to influence how domestic law structures substantive rights and obligations in sovereign debt contracts and their restructuring. The principles also aim at harmonizing, and thereby facilitating private-public transactions in a global market for sovereign debt, thereby contributing to the management of a global public good. International soft law in this case serves an important function in bridging the national-international law divide and illustrates the influence of international actors on public contracting in the absence of binding norms.

Second, public contracting is influenced significantly by expectations created, and requirements set, at the transnational level that are transmitted to the domestic level via the involvement of financiers or guarantors of contracts between states and private actors. For instance, the World Bank's Environmental and Social Safeguard Policies that apply to World Bank lending activities <sup>(74)</sup>, or the Multilateral Investment Guarantee Agency's Environmental and Social Safeguard Policies that govern the issuance of investment guarantees <sup>(75)</sup>, affect public contracting, *inter alia*, because they influence the eligibility of projects. Yet, this may also incentivize governments more broadly to adapt domestic administrative laws and policies to international standards which are, in turn, set by financiers and guarantors of relevant projects. In addition, international financing of public contracts can bring in new monitoring mechanisms also for the benefit of affected populations, such as the World Bank Inspection Panel <sup>(76)</sup>. Likewise, this can affect the domestic administrative process and law governing the projects at stake.

Third, not only soft-law generated by public financiers influences domestic public contracting. Also purely self-regulatory private re-

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<sup>(73)</sup> See UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing, amended and restated 10 January 2012, available at [http://unctad.org/meetings/en/Miscellaneous%20Documents/Principles\\_Sovereign.pdf](http://unctad.org/meetings/en/Miscellaneous%20Documents/Principles_Sovereign.pdf).

<sup>(74)</sup> See, for example, World Bank, Operational Policy 4.01 on Environmental Assessment, available at <http://go.worldbank.org/K7F3DCUDD0>, and Operational Policy 4.10 on Indigenous Peoples, available at <http://go.worldbank.org/UBJJIRUDP0>.

<sup>(75)</sup> See Multilateral Investment Guarantee Agency's Policy on Social and Environmental Sustainability of 1 October 2007 (Annex B to Operational Regulations).

<sup>(76)</sup> See I.F.I. SHIHATA, *The World Bank Inspection Panel in Practice* (Oxford University Press, Oxford, 2<sup>nd</sup> ed. 2000).

gimes, such as the Equator Principles, which contain requirements for environmental and social risk management in private financing of development projects<sup>(77)</sup>, influence domestic public contracting. Furthermore, private actors are active in developing soft law for public contracts in many industry sectors through model contracts that then serve as a basis for concluding binding contracts between private and public actors. The petroleum industry is a particularly striking example because many of the contracts between governments and oil companies are concluded based on models developed, for example, by the Association of International Petroleum Negotiators (AIPN), a private industry association<sup>(78)</sup>. Similarly, in sovereign financing, model contracts of private banks play an important role<sup>(79)</sup>. These examples illustrate the need to widen the perspective beyond public regimes (both domestic and international) in order to understand what processes, actors, and instruments affect public-private contracting, as suggested by the transnational approach set out in Part 2.

Finally, new adjudicators at the national and international levels play an important role as generators of public contracts norms, in particular arbitrators that are called to decide disputes under public contracts. They derive their authority either from arbitration clauses in the contracts themselves or from provisions in investment treaties. Illustrative for such private-public arbitrations in administrative relations are arbitrations involving water concessions in Bolivia, Argentina, and Tanzania<sup>(80)</sup>. Most importantly, arbitrators in such cases do not only settle individual disputes, but also develop the law relating to the underlying relations, including in such important fields as energy, public utilities, and infrastructure. They effectively make law in these cases because arbitral awards become public and influence subsequent

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<sup>(77)</sup> See <http://www.equator-principles.com/>. See further MEYERSTEIN, *supra* note 25.

<sup>(78)</sup> See K. TALUS, S. LOOPER and S. OTILLAR, «*Lex Petrolea* and the Internationalization of Petroleum Agreements: Focus on Host Government Contracts», 5 *Journal of World Energy Law & Business* (2012) 181.

<sup>(79)</sup> See, for example, S.J. CHOI, M. GULATI and E.A. POSNER, *Political Risk and Sovereign Debt Contracts*, John M. Olin Law & Economics Working Paper No. 583, available at <http://ssrn.com/abstract=1962788>.

<sup>(80)</sup> See, for example, *Biwater v. Tanzania*, 24 July 2004, Award, ICSID Case No. ARB/05/22; *Aguas del Tunari v. Bolivia*, 21 October 2005, Decision on Respondent's Objections to Jurisdiction, ICSID Case No. ARB/02/3; *Suez Vivendi v. Argentina*, 30 July 2010, Decision on Liability, ICSID Case No. ARB/03/19.

decision-making as precedent <sup>(81)</sup>. The law thus made is likely to become increasingly independent from specific national contexts, considering that similar developments have also taken place in private-private arbitrations with the emergence of the so-called *lex mercatoria* <sup>(82)</sup>. Arbitrators thus become law-makers and contribute to the making of a transnational administrative law.

In sum, cooperative administrative action does not only bring in additional non-domestic sources of law, it also brings in additional actors, both private and public, that make use of, or interpret, binding and also non-binding instruments that influence how public contracts are concluded, implemented, and applied in disputes. Disregarding the entirety of such influences by pointing to the non-bindingness of these processes and disregarding actors other than domestic administrations or domestic legislators as makers of administrative law will miss out important factors that are influential in affecting the reality of cooperative administrative action at a global scale and the normative expectations of the actors involved. Instead, it is necessary to realize that only a broad, transnational perspective on the different spaces of norm production, norm implementation, and norm interpretation will enable us to have a comprehensive perspective on public contracting and the law governing it. A theory of administrative law, in turn, must capture all of these instruments, processes, and actors beyond both the national-international and the public-private divide. This calls for a transnational approach to administrative law as marking the unity and identity of administrative law under the influence of globalization.

4. Administrative law, both as an area of law and as an academic discipline, faces transformatory challenges. These challenges are connected to the increase in transnational legal problems that transcend the boundaries of any single nation-state and that induce legal solutions that are not tied to a specific domestic legal framework. Instead, solutions to transnational legal problems develop within a transnational space. Two phenomena come together in this context: *first*, the

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<sup>(81)</sup> B. KINGSBURY and S. SCHILL, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, IILJ Working Paper 2009/6 (Global Administrative Law Series), available at <http://www.iilj.org/publications/documents/2009-6.KingsburySchill.pdf>.

<sup>(82)</sup> Cf. S. SCHILL, «Lex Mercatoria», in R. WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, vol vi (Oxford University Press, Oxford, 2012) 823 (with further references).



increasing deterritorialization of modern society in the process of globalization, and hence the transnational nature of that society's needs and concerns (ranging from simple transborder transactions to global phenomena such as the internet); and *second*, the denationalization of legal authority to get to grips with such problems, including a relocation of legal authority to international institutions, the exercise of extraterritorial authority of domestic administrations, and increased involvement of private actors. The way of thinking about law and legal processes in this context in a comprehensive manner forms the object of a transnational legal approach. It builds on a framework of thinking that transcends both the national-international and the public-private divide, and aims at understanding law today, including administrative law, as a transnational phenomenon.

In the context of administrative law, transnational legal processes illustrate a fundamental break with the traditional idea that administrative authority, and hence administrative law, is necessarily connected to the nation-state. Rather, administration today takes place both at the national and the international level and involves both public and private actors. This increases the legal sources of administrative law as well as the actors applying and creatively shaping it. Transnational legal processes challenge the idea that administrative law has a center or acme, like the one that existed in the classical nation-state with its Weberian command-and-control bureaucracy that could govern top-down. Today, administrative law as a whole lacks a hierarchical structure and instead consists of multiple actors that bring their understandings and approaches to administrative law to bear in different contexts and fora.

Globalization also poses challenges to a theory of administrative law that can serve as a unifying framework to think about administrative action and administrative law in such a transnational legal space. If one aims at sustaining the idea that there is a general theory of administrative law in a globalized world, that is a theory that explains the specificities of administrative law, its subject-matter, and legal principles, independently of any specific domestic or international administrative institution, such a theory of administrative law must be decoupled from a national basis and grounded in different concepts and methods. Such a general theory, this article has argued with a specific focus on public contracts, must be based on a transnational approach that overarches domestic and international law and encom-



passes the idea that administrative law is also formed through interactions between public and private actors.

Such a general theory must start with a functional analysis of the problems, interests, and structural elements of administrative relations *per se*, meaning that it needs to abstract from specific legal orders and institutions, and construct a generally valid legal framework from an analysis of administration as a general social phenomenon. Such a general theory could develop, for example, more specific theories or sub-categories of a general theory, such as a theory of forms of action <sup>(83)</sup> or procedural and substantive principles <sup>(84)</sup>, based on an analysis of common features of administrative activity. Methodological tools for such a functional approach could be law and economic analysis, political economy, governance analysis or normative-doctri-  
nal reconstruction, but above all a comparative analysis of the legal structures of administrative law as they can be found in different domestic legal orders and international regimes. Ultimately, such an analysis could result in developing general principles of transnational administrative law for both administrative procedure and substantive administrative law.

Until unifying principles are carved out and developed that could form the nucleus of a developed body of transnational administrative law, the identity of administrative law in a globalized world can only be found in a more modest perspective. I see this identity in a transnationally uniform method of analyzing problems of administrative governance and of providing solutions to them on the basis of administrative law reasoning. This can be a discipline-defining characteristic that other legal disciplines, above all international law and private law, cannot replace. While it is difficult to understand administrative law in times of globalization as the entirety of all laws that govern, both procedurally and substantively, the relations between the state and its citizens, one can find unifying features in the way administrative lawyers practice administrative law, analyze its underlying problems, and conceptualize the methods for their solutions, independently of the governing legal framework. The identity of administrative law that

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<sup>(83)</sup> Cf. M. GOLDMANN, *Internationale Öffentliche Gewalt* (Springer, Berlin, forthcoming 2014).

<sup>(84)</sup> See A. VON BOGDANDY, «Grundprinzipien von Staat, supranationalen und internationalen Organisationen», in *Handbuch des Staatsrechts*, vol. XI (C.F. Müller, Heidelberg, 3rd ed. 2013) 275.

encompasses national and international, public and private actors in a transnational perspective, then lies in the specific mindset and method of analyzing problems of administrative relations as problems of administrative law.