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Lorenzo Casini

**‘Down the Rabbit Hole’:
The Projection of the Public/Private
Distinction Beyond the State**

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THE JEAN MONNET PROGRAM
J.H.H. Weiler, Director

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**TOWARDS A MULTIPOLAR ADMINISTRATIVE LAW:
A THEORETICAL PERSPECTIVE**

Jean Monnet Working Paper 08/13

Lorenzo Casini

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The Projection of the Public/Private Distinction Beyond the State**

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Prologue:
**Towards a Multipolar Administrative Law:
A Theoretical Perspective**

The idea that administrative law concepts can remain stable over time has been abandoned. Today, administrative agencies are no longer conceived of as simply executive “machines” and command-and-control bodies. There is a growing tension within countries between the executive branches and social expectations for rights-based institutions, and administrative bodies accordingly develop in an increasingly interstitial and incremental manner. This also happens because the separation of society and administration is less clear, and the public-private dividing line has blurred: dual relationships are becoming an exception; networking and multipolar linkages between norms, actors and procedures are the rule. Legal systems have become more interdependent, due to the import-export of administrative models: this has several implications, such as the fact that some basic principles of administrative law beyond the State have been developing. Furthermore, economic and political analyses of public administrations are increasing; this requires the adoption of multi-disciplinary approaches in examining the field.

All these phenomena – to name but a few – constitute the main features of an emerging “multipolar administrative law”, where the traditional dual relationship between administrative agencies and the citizen is replaced by multilateral relations between a plurality of autonomous public bodies and of conflicting public, collective and private interests. For a long time, administrative law was conceived as a monolithic body of law, which depended on its master, the modern State: as such, administrative law was intended to be the domain of stability and continuity. Continuity in the paradigms for study paralleled the idea of continuity in administrative institutions. However, from the last quarter of the 20th century, both assumptions became obsolete. Administrative institutions have undergone significant changes, due to several factors such as globalization, privatization, citizens’ participation, and new global fiscal responsibilities. Thus, it is necessary to review the major transformations that took place in the field over the last 30 or 40 years, and to address the consequent transformations in the methods used to study this branch of law.

To analyze this emerging multipolar administrative law, the first objective should be to decouple the study of administrative law from its traditional national bases. According to this tradition, administrative law is national in character, and the lawyer’s “ultimate frontier” is comparison, meant as a purely scholarly exercise. On the contrary, administrative law throughout the world is now grounded on certain basic and common principles, such as proportionality, the duty to hear and provide reasons, due process, and reasonableness. These principles have different uses in different contexts, but they share common roots.

A second objective would be to consider each national law’s tendency toward macro-regional law (such as EU law) and global law. While the leading scholars of the past labored (to a great extent in Germany and Italy, less so in France and the UK) to establish the primacy of national constitutional law (“*Verwaltungsrecht als konkretisiertes Verfassungsrecht*”), today the more pressing task is to ensure that the

increasingly important role of supranational legal orders is widely acknowledged. Whereas administrative law was once state-centered, it should now be conceived as a complex network of public bodies (infranational, national, and supranational).

A third objective should be the reconstruction of an integrated view of public law. Within legal scholarship, constitutional law, administrative law, and the other branches of public law have progressively lost their unity: for instance, constitutional law is increasingly dominated by the institution and practice of judicial review; most administrative lawyers have been overwhelmed by the fragmentation of legal orders, which led them to abandon all efforts at applying a theoretically comprehensive approach. The time has come to re-establish a unitary and systematic perspective on public law in general. Such an approach, however, should not be purely legal. In the global legal space, the rules and institutions of public law must face competition from private actors and must also be evaluated from an economic and a political point of view.

To better analyze and understand such a complex framework, to elaborate and discuss new theories and conceptual tools and to favor a collective reflection by both the leading and the most promising public administrative law scholars from around the world, the Jean Monnet Center of the New York University (NYU) School of Law and the Institute for Research on Public Administration (IRPA) of Rome launched a call for papers and hosted a seminar (<http://www.irpa.eu/gal-section/a-multipolar-administrative-law/>). The seminar, entitled “Toward a Multipolar Administrative Law – A Theoretical Perspective”, took place on 9-10 September 2012, at the NYU School of Law.

This symposium contains a selection of the papers presented at the Seminar. Our hope is that these articles can contribute to the growth of public law scholarship and strengthen its efforts in dealing with the numerous legal issues stemming from these times of change: discontinuity in the realm of administrative institutions requires discontinuity in the approaches adopted for studying administrative law.

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Giulio Napolitano, *University of “Roma Tre”*
Lorenzo Casini, *University of Rome “Sapienza”*

**'DOWN THE RABBIT HOLE':
THE PROJECTION OF THE PUBLIC/PRIVATE DISTINCTION BEYOND THE STATE**

By Lorenzo Casini*

Abstract

This paper deals with two of the greatest “dualisms” present in contemporary legal systems: the distinction between international law and domestic law on one hand, and the distinction between public law and private law on the other.

The evolution of these two great dualisms is linked to the emergence of global public interests, the strategic role played by States and domestic administrations in the global arena, and the need to control and review how global hybrid institutions exercise their increasing powers. This contributes significantly to the emergence of a multipolar administrative law, in which both public and private traits, and both domestic and international dimensions, constantly interact. Beyond the State, public and private law find new ways of combining, borrowing tools and imitating solutions. In particular, when the public/private distinction goes international, it operates as a technology of global governance: it is a “proxy” for bringing given values into a new legal context and for re-creating a “familiar” legal endeavour beyond the State. But this projection can be problematic: like in Carroll’s “Rabbit-Hole”, there is no guarantee that, when the values and legal mechanisms behind them are moved from one level to another, they will remain the same.

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Alice started to her feet, for it flashed across her mind that she had never before seen a rabbit with either a waist-coat pocket, or a watch to take out of it, and, burning with curiosity, she ran across the field after it, and was just in time to see it pop down a large rabbit-hole under the hedge. In another moment down went Alice after it, never once considering how in the world she was to get out again.

(L. Carroll, *Alice's Adventures in Wonderland*, 1865)

1. "Über die zwei großen 'dualismen'" in Contemporary Legal Systems

In the late 1930s, Carl Schmitt observed that the two great dualisms within contemporary legal systems were the distinction between international law and domestic law on one hand, and that between public law and private law on the other. He considered that both these dualisms were internally linked by the evolution of the concept of stateness and by their common opposition to the *ius commune*.¹ Over 70 years later, these distinctions appear to be much more complex, because they have been deeply transformed and blurred:² but, above all, these dualisms incorporate two of the main features of a "multipolar" administrative law, where the trait of "multipolarity" can be considered as relating to several aspects and problems such as the development of basic principles of administrative law beyond the State triggered by globalization, the blurring line between what is public and what is private and the emergence of hybrid forms of governance, the proliferating relations between different actors (agencies, corporations, NGOs, individuals, etc.) which currently dominate the global legal landscape, and the crisis of legality enhanced by the growth of norm-making activities beyond the State.³

¹ C. Schmitt, "Über die zwei großen 'dualismen' des heutigen rechtssystems" (1939), now in Id., *Positionen u. Begriffe* (Dunker & Humblot, Berlin, 1988), pp. 261 *et seq.* In this work, written for the *Mélanges Georges Streit*, Schmitt moves from the notion of private international law and its relationships with States to deal with these two dualisms. His thesis on the *ius commune* must of course be contextualized within that period and within his broader conceptual framework.

² See I.-J. Sand, "Globalization and the Transcendence of the Public/Private Divide – What is Public Law under Conditions of Globalization?", in C. Mac Amhlaigh *et al.* (eds.), *After Public Law* (Oxford University Press, Oxford, 2013), p. 201 *et seq.*

³ On these issues, see S. Cassese, "New Paths for Administrative Law: A Manifesto", 10 *International Journal of Constitutional Law* 603 (2012), which includes both the national/international dimension and the public/private divide in the most relevant issues of continuity and change in administrative law. On the features of administrative law, see also J.-B. Auby, "La bataille de San Romano. Réflexions sur les évolutions récentes du droit administratif", 57 (11) *Actualité Juridique—Droit*

The first feature is the public/private divide.⁴ This may be traced to the very origins of administrative law, which materialized as a “special” type of law, distinct from the more ancient private law.⁵ Today, “hybridity” has become the rule: States and IGOs have been increasing their use of private law instruments; new public and private bodies have been established at international level; global private regimes often see States intervening and acquiring more powers within contexts which were originally only based on consensus and mutual agreements (as happened with the Internet and sports).⁶ Furthermore, private ordering and global transnational regulation have been constantly growing, often using public actors as instruments of their expansion.⁷

Administratif 912 (2001); more generally on public law, see M. Loughlin, *The Foundations of Public Law* (Oxford University Press, Oxford, 2010), who examines the emergence of administrative law within the new architecture of public law (pp. 436 *et seq.*). See also W. Lucy, “Private and Public: Some Banalities About a Platitude”, in Mac Amhlaigh *et al.* (eds.), *supra* note 2, pp. 56 *et seq.*, and S. Rose-Ackerman and P. Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar, Cheltenham, 2010), in which Part 6 on Administrative Law and the Boundaries of the State is divided into two subparts: A. *The Boundary between Public and Private* (pp. 493 *et seq.*), with contributions by D. Barak-Erez, J.-B. Auby, L.A. Dickinson, I.E. Sandoval, and G. Napolitano; B. *Administration Beyond the State: The Case of the European Union* (pp. 595 *et seq.*), with contributions by G.A. Bermann, R.D. Kelemen, J. Saurer, and F. Bignami.

⁴ Here and elsewhere in this article, the terms “public” and “private” refer to the legal regime, the kind of actor or sometimes both. On the public/private distinction, see M. Ruffert (ed.), *The Public-Private Law Divide: Potential for Transformation?* (BIICL, London, 2009), and G. Napolitano, *Pubblico e privato nel diritto amministrativo* (Giuffrè, Milano, 2003). At the international level, see H. Muir Watt, “Private International Law Beyond the Schism”, *ILLJ Working Paper 2012/1 Global Administrative Law Series*, and M. Goldmann, “A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and Not Law)”, paper presented at the Jean Monnet Center for International and Regional Economic Law & Justice and Max Planck Institute for Comparative Public Law and International Law Workshop on “The Changing German Landscape of Theorizing Public Law” (New York, 14-15 April 2013) (available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2260293>).

⁵ A.C. Aman Jr., “Politics, Policy and Outsourcing in the United States: the Role of Administrative Law”, in L. Pearson *et al.* (eds.), *Administrative Law in a Changing State. Essays in Honour of Mark Aronson*, (Oxford University Press, Oxford, 2008), pp. 205 *et seq.*, which underlines the “not structural, but political” character of the public and private distinction (p. 218). See also M. Freedland and J.-B. Auby, *The Public Law/Private Law Divide. Une entente assez cordiale? La distinction du droit public et du droit privé: regards français et britanniques* (Hart, Oxford, 2006), M. Taggart (ed.), *The Province of Administrative Law* (Hart, Oxford, 1997), and J.W.F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Clarendon, Oxford, 1996). More recently, G. Jurgens and F. van Ommeren, “The Public-Private Divide In English And Dutch Law: A Multifunctional And Context-Dependant Divide”, 71 *The Cambridge Law Journal* 172 (2012).

⁶ See T. Schultz, “Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface”, 19 *European Journal of International Law* 799 (2008), and L. Casini, “Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (Wada)”, 6 *International Organizations Law Review* 411 (2009).

⁷ See P. Zumbansen, “The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of ‘Context’”, 13 *German Law Journal* 1269-1281 (2012), and the contribution, published in that issue, to the Symposium on “Transnational Private Regulatory Governance: Regimes, Dialogue, Constitutionalization”; G.P. Callies and P.C. Zumbansen,

The second, more recent, feature, is the development of administrative law beyond the State.⁸ This phenomenon, which has been expanding significantly since the 1990s with the rise of globalization, is twofold: on one hand, it implies that domestic administrations operate beyond national borders (in the case of accounting and supervising, for instance, with the Basel Committee and the International Organization of Securities Commissions (IOSCO)); on the other, it means that norms produced by international regimes apply to national public bodies to an increasing extent (e.g. in the fields of Environment, World Cultural Heritage and the World Bank).⁹

Three examples easily illustrate how these two “dualisms” interact, with respect to three different fields: sport, Internet, and cultural property.

First, the case of the World Anti-Doping Program and the World Anti-Doping Agency is a prime example of a formally private source of norms that shows a high degree of “publicness”. This “public” character derives from many factors. Governments participate both in drafting the Code, through extensive consultations, and in its final adoption, through the WADA decision-making process and the Final Declaration at the World Conference on Doping. The UNESCO Convention against Doping in Sport – a traditional measure of international law – expressly refers to the WADA and its Code and requires States to align their anti-doping legislation with the Code’s principles. States’ ratification of the UNESCO Convention triggers a mechanism of implementation of WADA’s policies and regulations that produces significant effects in the domestic context: most of the countries established their own national anti-doping agencies.¹⁰ What is the legal status of the WADA Code? It is a key reference in international sports

Rough Consensus and Running Code. A theory of transnational private law (Hart, Oxford, 2010); formerly, A. Katz, “Taking Private Ordering Seriously”, 114 *University of Pennsylvania Law Review* 1745 (1996).

⁸ On these aspects, J.-B. Auby, *La globalisation, le droit et l'État* (L.G.D.J., Paris, 2nd ed., 2010), S. Battini, *Amministrazioni senza Stato. Profili di diritto internazionale* (Giuffrè, Milano, 2003), E. Kinney, “The Emerging Field of International Administrative Law: Its Contents and Potential”, 54 *Administrative Law Review* 415 (2002), and B. Kingsbury, N. Krisch and R.B. Stewart, “The Emergence of Global Administrative Law”, 68 *Law and Contemporary Problems* 15 (2005); lastly, see C. Bories (ed.), *Un droit administratif global? / A Global Administrative Law?* (Pedone, Paris, 2012). More generally, on the international law/national law divide, see A. Nollkaemper (ed.), *New Perspectives on the Divide Between National and International Law* (Oxford University Press, Oxford, 2007).

⁹ A large number of cases regarding these issues is collected in S. Cassese *et al.* (eds.), *Global Administrative Law: The Casebook*, (IRPA–IILJ, Rome-Edinburgh-New York, 3rd ed., 2012). See also J. Van Der Heijden, “Friends, Enemies, or Strangers? On Relationships between Public and Private Sector Service Providers in Hybrid Forms of Governance”, 33 *Law and Policy* 367 (2011).

¹⁰ See *infra*, § 3.1.

arbitration, including the Court of Arbitration for Sport (CAS): but how do courts relate to it?

Second, Internet is ruled by a peculiar legal entity, the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit corporation governed by Californian law. Within ICANN, there is a specific Governmental Advisory Committee, which brings together representatives of each government of the world. The role of the GAC has become progressively more important; this led to significant structural reforms within the organization. The events surrounding the “.xxx” domain name for pornographic contents – with States stepping into the decision-making process to influence ICANN – is clear proof to that effect.¹¹ What kind of law regulates hybrid bodies like ICANN? What kind of institutional devices can be adopted to balance public power and private actors? Is a formula like GAC replicable in other fields?

Third, the system built on the UNESCO World Heritage Convention has progressively acquired a significant procedural dimension, which is regulated by the UNESCO Operational Guidelines.¹² There are new forms of cooperation between international institutions, States, domestic administrations and other actors. Moreover, the procedure for proposing additions to the World Heritage List must involve all relevant actors and a key role is played by private advisory bodies – international NGOs – in including world sites on the list. What kind of procedural devices can accord States’ and people participation? What happens if UNESCO Operational Guidelines are violated?

These three examples – but there are many more – shed light on various significant problems and issues related to two great legal dualisms: the public/private divide and the distinction between national law and international law and, more precisely, the development of administrative law beyond the State. They also highlight the three different dimensions in which these dynamics operate: regulatory, institutional, and procedural.

This paper, therefore, is premised on the assumption that the interconnections between these two “great dualisms” have been constantly multiplying, to the extent that today, almost any branch of law – and administrative law especially – cannot be

¹¹ *See infra*, § 3.2.

¹² *See infra*, § 3.3.

understood without shedding light on the implications of the relationships between public law and private law beyond the State. At the same time, the evolution of these two great dualisms is linked to the emergence of global public interests, the strategic role played by States and domestic administrations in the global arena, and the need to control and review how global hybrid institutions exercise their increasing powers. This contributes significantly to the emergence of a multipolar administrative law, in which both public and private traits, and both domestic and international dimensions, constantly interact. Beyond the State, public and private law find new ways of combining, borrowing tools and imitating solutions.¹³

The public/private divide, however, is blurring. This happens at the national level, due to the many ways in which these two poles are connected, and even more at the international level, where “hybridization” is at stake.¹⁴ For this reason, it would be preferable to use the term “interaction” or “distinction” in this context, instead of “divide” or “dichotomy”.¹⁵ Therefore, the more complex the legal system, in terms of its norms, institutions, and procedures, the more blurred the distinction between public and private:¹⁶ and this is exactly what happens beyond the State, where there are over 2,000 regulatory regimes which interact with each other, and between them and any of the regional and/or national legal orders participating in such regimes. The result is a

¹³ On these issues, M. Rosenfeld, “Rethinking the boundaries between public law and private law for the twenty first century: An Introduction”, 11 *International Journal of Constitutional Law* 125 (2013), who underlined the effects produced by globalization and privatization on the relationship between public law and private law, and the three contributions published in the same issue: A. Supiot, “The public-private relation in the context of today’s refeudalization”, pp. 129 *et seq.*, P. Goodrich, “The Political Theology of Private Law”, pp. 146 *et seq.*, and J. Resnik, “Globalization(s), privatization(s), constitutionalization, and statization: Icons and experiences of sovereignty in the 21st century”, pp. 162 *et seq.*

¹⁴ See C. Scott *et al.*, “The Conceptual and Constitutional Challenge of Transnational Private Regulation”, 38 *Journal of Law and Society* 1 (2011), and F. Cafaggi, “New Foundations of Transnational Private Regulation”, 38 *Journal of Law and Society* 20 (2011). See also B. Eberlein *et al.*, “Transnational Business Governance Interactions: Conceptualization and Framework for Analysis”, 29 *Osgoode CLPE Research Paper* (2012).

¹⁵ Jurgens and van Ommeren, *supra* note 5, p. 173.

¹⁶ M.J. Horwitz, “The History of the Public/Private Distinction”, 130 *University of Pennsylvania Law Review* 1423 (1982), indeed highlighted that “[t]he public/private distinction could approximate the actual arrangement of legal and political institutions only in a society and economy of relatively small, decentralized, nongovernmental units. Private power began to become increasingly indistinguishable from public power precisely at the moment, late in the nineteenth century, when large-scale corporate concentration became the norm. The attack on the public/private distinction was the result of a widespread perception that so-called private institutions were acquiring coercive power that had formerly been reserved to governments” (at 1428).

“context” which is neither public nor private, neither national nor international.¹⁷

The study of public law and private law beyond the State, therefore, may raise some paradoxes and contradictory trends. On one hand, public law and private law seem to find new ways of combining, but on the other, the distinction between these two poles is less clear. These two major trends trigger a significant amount of ambiguities, which are generally labelled as “hybridity”. However, they also point out very important questions. First of all, if public law and private law beyond the State become extremely close and ever more intertwined, is the distinction still useful?¹⁸ Or should a new paradigm be designed to accommodate all these legal interactions and to explain their connection with global governance? Second, as the criteria according to which public law and private law can be distinguished mostly rely on the presence and on the very idea of the State, how can this distinction be determined beyond the borders of national legal systems? Briefly, what happens when the public/private distinction moves from the domestic level to the international one?

These two sets of questions are closely connected and they will be addressed in the final section of this article. In particular, it will emerge that when the public/private distinction goes international and global, it performs several functions, and operates mainly as a “proxy” for bringing given values into a new legal context and for re-creating a “familiar” legal endeavour beyond the State: these values may consist, for instance, in the immunities regime or in the adoption of enforcement mechanisms, as well as in freedom of contract and mutual agreements. States may use this proxy to retain their sovereignty; private actors may see it as an effective way to organize their powers. But this national-to-international transposition can be problematic: for how long will international organizations be able to enjoy immunities in a way similar to that experienced by domestic public authorities many decades ago? Why should private actors feel compelled to adopt public law principles? The fact is that beyond the State,

¹⁷ P. Zumbansen, “Neither ‘Public’ nor ‘Private’, ‘National’ nor ‘International’: Transnational Corporate Governance from a Legal Pluralist Perspective”, 38 *Journal of Law and Society* 50 (2011).

¹⁸ The decay of the distinction is portrayed by D. Kennedy, “The Stages of the Decline of the Public/Private Distinction”, 130 *U. PA. L. Rev.* 1349 (1982). Moreover, in the English tradition, the usefulness of the divide has been challenged: see C. Harlow, “‘Public’ and ‘Private’ Law: Definition without Distinction”, 43 *Modern Law Review* 241 (1980); D. Oliver, *Common Values and the Public-Private Divide* (Butterworths, London 1999) and *Id.*, “What, if Any, Public-Private Divides Exist in English Law?” in Ruffert, *supra* note 4, pp. 1 *et seq.* Different positions, more favourable to the relevance of the distinction in the British context, are in Freedland and Auby, *supra* note 5.

the public/private divide is like Carroll's "White Rabbit": it is the "key" to access another dimension, but doing so, there is no guarantee that once the values and legal mechanisms behind them are moved from one level to another, they remain the same.

The analysis will now focus on the catalogue of interactions between public law and private law beyond the State, on the main processes of interbreeding that can be detected at the global level, and on the reasons for this interbreeding. This study will of course consider mainly hybrid public-private forms of governance, such as the Internet, sports, the environment, health, standardization, cultural property, and international investment: most of the cases examined will be therefore taken from those fields, though some examples will come from more traditional contexts of international law or from transgovernmental networks.¹⁹

Lastly, as anticipated, the perspective adopted here will be mainly that of administrative law, taken in all its "continuity and change".²⁰ This does not imply that other branches of law should not be considered. On the contrary, a multipolar administrative law stems from emulation, dialog and conflict between different bodies of laws, different administrative models, and methodological pluralisms: and this is why the two "great dualisms" analysed in this paper constitute an invaluable field for investigating this multipolarity.

2. Public/Private Interactions at the International Level: A First Approach

The public/private distinction is multifaceted and implies the existence of several different perspectives and relationships, which can often all appear together in a single field:²¹ this is the case of international investment law and arbitration, for instance, where "antinomies of public and private" present a foundational nature²²; or of cultural

¹⁹ All these regimes are analysed in depth in Cassese, *supra* note 9, I.C "Hybrid Public-Private Organizations And Private Bodies Exercising Public Functions". An overview is also given in F. Cafaggi (ed.), *Enforcement Of Transnational Regulation. Ensuring Compliance in a Global World* (Edward Elgar, Cheltenham, 2012).

²⁰ Cassese, *supra* note 3, p. 604.

²¹ Lucy, *supra* note 3, p. 61 *et seq.*

²² See A. Mills, "Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration", 14 *Journal of International Economic Law* 469 (2011), and G. Van Harten, "The Public-Private Distinction in the International Arbitration of Individual Claims Against the State", 56 *International Comparative Law Quarterly* 371 (2007). More generally, J.E. Alvarez and K.P. Sauvart (eds.), *The Evolving International Investment Regime* (Oxford University Press, Oxford, 2011), J.W. Salacuse, "The Emerging Global Regime for Investment", 51 *Harvard International Law Journal* 427

property law, where public and private legal instruments may play several different roles.²³ In the case of property rights, for instance, some scholars consider public regulation to be part of the definition of private property, rather than an “incursion” on property.²⁴

First, the distinction may refer to the legal regime, mirroring the more usual distinction between public law and private law. From this perspective, at international level, it is worth distinguishing between “a private law framework”, meaning “the result of spontaneous co-ordination efforts”, and “a public law framework”, where law can be defined “as the result of a political process, which is not autonomous, but is intentionally steered”.²⁵ Such a distinction echoes the Kelsenian approach in which, in strictly legal terms, public law brings power (*Macht*) and sovereignty (*Herrschaft*) into the picture, while private law would rely on a more “democratic” autonomy.²⁶ As recently observed, therefore, “law that regulates the vertical relationships between the state and private parties shall be deemed public whereas law that applies to horizontal dealings among private parties shall be labeled private.”²⁷ this definition may work perfectly at the national level, but it becomes much less tenable in light of the hybridization that dominates the global legal space. In fact, “private law beyond the state is bound to be less coherent and hierarchical, at least to some degree, than private law within the state.

(2010), and S.W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, Cambridge, 2009).

²³ J.H. Merryman, “The Public Interest in Cultural Property”, 77 *California Law Review* 339 (1989), now in *Id.*, *Thinking About the Elgin Marbles. Critical Essays on Cultural Property, Art and Law* (Wolters Kluwer, Austin, 2nd ed., 2009), pp. 142 *et seq.*, E. Jayme, “Globalization in Art Law: Clash of Interests and International Tendencies”, 38 *Vanderbilt Journal of Transnational Law* 927 (2005), L. Casini, “Italian Hours: The globalization of cultural property law”, in *Symposium on “The New Italian Public Law Scholarship”*, 9 *International Journal of Constitutional Law* 369 (2011), and F. Francioni, “Public and Private in the International Protection of Global Cultural Goods”, 23 *European Journal of International Law* 719 (2012).

²⁴ R.P. Malloy and M. Diamond, *The Public Nature of Private Property* (Ashgate, Burlington, 2011).

²⁵ C. Moellers, “Transnational Governance without a Public Law?”, in C. Joerges, I-J Sand and G. Teubner (eds.), *Transnational Governance and Constitutionalism* (Hart, Oxford, 2004), pp. 329 *et seq.*, here at p. 337.

²⁶ See H. Kelsen, *Reine Rechtslehre* (2nd ed., 1960), Eng. transl., Berkeley, 1967, especially at pp. 280-281, where he states that “private law represents a relationship between coordinated, legally equal-ranking subjects; public law, a relationship between a super- and a subordinated subject, that is, between two subjects of whom one has a higher value as compared with that of the other”. On these aspects, see N. Bobbio, “La grande dicotomia” (1974), in *Id.*, *Dalla struttura alla funzione. Nuovi studi di teoria del diritto* (Laterza, Roma-Bari, 2007), pp. 122 *et seq.*

²⁷ Rosenfeld, *supra* note 13, p. 126. As to the features of public law, see also M. Loughlin, *The idea of Public Law* (Oxford University Press, Oxford, 2003), especially pp. 154 *et seq.*

This raises new problems for those who seek clear and predictable answers.”²⁸

Second, the public/private distinction may refer to the legal status of the actors involved; here, the nuances in differentiation between public bodies, private bodies exercising public functions and fully private bodies become relevant. In this context, for instance, the criteria often proposed to distinguish between public and private organizations are based mainly on the entities' ownership arrangements, their source(s) of financial resources, or their models of social control.²⁹ Similarly, EU law has intervened to define “body governed by public law” as “any body: (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) having legal personality; and (c) - financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; - or subject to management supervision by those bodies; - or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law”.³⁰ It is also worth noting that the public and private distinction based on the legal status of actors may be difficult, especially at domestic level: the UK Human Rights Act 1998, for instance, defines “public authorities” as “a court or tribunal, and any person certain of whose functions are functions of a public nature” (Section 6(3)); the House of Lords provided a broad and functional interpretation of this definition, independently of the formally public or private nature of the subjects considered (see the *Aston Cantlow* and *Marcis* cases, both from 2003).³¹

In addition, beyond the State, public actors often act as “private” ones, especially when they are subjected to a given regime: for instance, this can happen with States that aim to include their sites on the World Heritage List. Whenever global institutions develop procedures, participation may be accorded to every addressee indistinctly,

²⁸ R. Michaels and N. Jansen, “Private Law Beyond the State? Europeanization, Globalization, Privatization”, in N. Jansen and R. Michaels (eds.), *Beyond the State: Rethinking Private Law* (Mohr Siebeck, Tübingen, 2008), pp. 69 *et seq.*, at p. 117.

²⁹ See J.L. Perry and H.G. Rainey, “The Public-Private Distinction in Organization Theory: A Critique and Research Strategy”, 13 *Academy of Management Review* 182 (1988). A broader perspective in K.J. Meier and L.J. O’Toole, *Public Management: Organizations, Governance, and Performance* (Cambridge University Press, New York, 2011).

³⁰ See Art. 1, para. 9, 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.

³¹ Jurgens and van Ommeren, *supra* note 5.

whether they are either public or private.³²

This latter scenario leads us to a third hypothesis, which is when the public/private distinction hinges upon the interests at stake.³³ Such a perspective justifies public intervention in pursuit of a public interest; therefore, in these cases legal systems allow special measures to be taken, or derogations from private law to be made: the most ancient example is perhaps that of expropriation, which provides evidence of the supremacy of the public interest over private ones. However, beyond the State, the public interests dynamics become much more complex, due to the interplay between several actors – including States – and to the high degree of “hybridization” which makes it hard to detect what is actually public and what, instead, private.

As mentioned, two interesting examples of how these hypotheses can operate together come from international investment law and cultural property law. In the former, the public/private distinction may refer both to “how the subject of international investment law should be described or analyzed” – whether in terms of public law or private law – and to “how does it strike a balance between the public regulatory needs of states, and the private interests of investors?”;³⁴ each of these two “antinomies” can yield various combinations. In the field of cultural property law, we may have all three hypotheses, whenever, for instance, a State claims a private artwork from a foreign private museum or an individual or vice versa (such as in the well-known *Maria Altmann v. Republic of Austria*, in which Austria had to return famous Gustav Klimt paintings stolen by the Nazis to their legitimate heir): here there are interplays and conflicts of private and public norms, actors and interests, including issues relating to human rights.³⁵

These different criteria, therefore, allow us to list a catalogue of a possible set of interactions between public and private law at the international level.³⁶

³² S. Cassese, “A Global Due Process of Law?”, in G. Anthony *et al.* (eds.), *Values in Global Administrative Law* (Hart, Oxford, 2011).

³³ See G. Anthony, “Public interest and the three dimensions of judicial review”, 64(2) *Northern Ireland Legal Quarterly* 125 (2013).

³⁴ Mills, *supra* note 22, p. 476 and p. 488.

³⁵ E. Jayme, “Human Rights and Restitution of Nazi-Confiscated Artworks from Public Museums: The Altmann Case as a Model for Uniform Rules?”, 11 *Uniform Law Review n.s.* 393 (2006).

³⁶ See also Lucy, *supra* note 3, p. 63 *et seq.*, who lists five ways of distinguishing public and private: public law v. private law; matters of general concern v. matters of individual concern; public goods v.

First, public actors, such as States and IGOs, may use private law instruments. This is the case of contracting, of international arbitrations involving States, and of any other cases where international agencies enter into agreements, memoranda of understanding or similar private law instruments. Other relevant examples come from claims in tort or other liability issues, when States seek to sue IOs, for example, such as the case of Haiti attempting to sue the UN because of a cholera epidemic.³⁷ As a matter of fact, some scholars noted that globalization produced a “cascade” effect on tort law, because it both increased the number of claims against States (and international organizations) and favoured the view of liability as an instrument of accountability.³⁸ And in sectors such as environmental liability, these issues have become an important specialized field of law.³⁹

Second, private actors increasingly use public law instruments, such as review mechanisms, transparency principles, and notice and comment forms of proceedings. This type of interaction produces a peculiar form of hybridization, where regimes that originate as entirely private progressively increase their degree of “publicness” (Internet and anti-doping in sports are clear examples of this phenomenon).

Third, public and private actors often cooperate. This is the case of public-private partnerships, which have been constantly increasing in the last decades, in sectors such as health, the environment, cultural property, sports, public procurement, and even in the field of military and peacekeeping.⁴⁰ This type of partnership can reach different degrees of institutionalization, depending on, for example, whether a public-private body has been established or not: at times, States and private actors may create a

private goods; realm of the state v. realm beyond or free from the state; public realm of politics, law and the market v. private realm of family, the household, and intimacy.

³⁷ See the statement by the UN Secretary General at www.un.org/sg/statements/index.asp?nid=6615, and also the article from *The Economist* available at www.economist.com/news/americas/21572819-un-condemns-baby-doc-exonerates-itself-double-standards.

³⁸ See C. Harlow, *State Liability: Tort law and Beyond* (Oxford University Press, Oxford and New York, 2004), pp. 42 *et seq.*

³⁹ An overview is in M. Wilde, *Civil Liability for Environmental Damage: a Comparative Analysis of Law and Policy in Europe and the United States* (Kluwer, The Hague, 2nd ed., 2013); see also L. Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context* (Kluwer, The Hague, 2001).

⁴⁰ See S. Chesterman and C. Lehnardt (eds.), *From Mercenaries to Market. The Rise and Regulation of Private Military Companies*, (Oxford University Press, Oxford, 2007), and S. Chesterman and A. Fisher (eds.), *Private Security, Public Order: The Outsourcing of Public Services and its Limits* (Oxford University Press, Oxford and New York, 2010). As to the domestic context, L.A. Dickinson, “Organizational structure, international culture and norm compliance in the era of privatization: the case of US military contractors”, in Rose-Ackerman and Lindseth, *supra* note 3, pp. 524 *et seq.*

specific Fund or other type of body (such as the World Anti-Doping Agency); others, cooperation is only procedural and is regulated through agreements (as happens often in the nuclear energy sector); yet others, both institutional and procedural arrangements are adopted (such as in the case of public health).

Fourth, public actors can pursue private interests, such as when they act like investors. A significant example of this interaction is the case of sovereign wealth funds. Indeed, questions arise as to how these funds should be regulated, whether they require specific discipline or whether they may be likened to general forms of foreign investment.⁴¹ This hypothesis, which brings to mind the time when States ran several enterprises, acquired greater prominence after the financial and sovereign debt crises.

Fifth, private actors may pursue public interests. This can happen whenever private bodies, such as NGOs or funds, deliver public functions. The Global Fund to Fight AIDS, Tuberculosis and Malaria is a prime example. Other cases are the International Council of Museums (ICOM), the International Organization for Standardization (ISO) and the Internet Corporation for Assigned Names and Numbers (ICANN). However, at the international level, these hypotheses tend to be seen as forms of hybridization, because the more public the interest, the more likely will public actors seek to become involved in the private regime.

The taxonomy outlined above is an attempt to illustrate different ways of combining the public and private law spheres, though of course several caveats should always be kept in mind: the catalogue does not at all seek to be complete, because there may be other kinds of interaction, which follow to different criteria; indeed, each interaction presents different operational forms and can coexist with other combinations (this often happens in cases of hybrid public-private regimes ruled by an international hybrid institution, as with the Internet or the sports regimes); the catalogue focuses on the international level and should be combined with all the other relationships between public law and private law that can be found at domestic level (although the divide would not have the same significance in all national legal orders); the labels “public” and “private” may refer in turn, or simultaneously, to the legal

⁴¹ See L. Catá Backer, “The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law”, 82 *Tulane Law Review* 1 (2008); M. De Bellis, “Global Standards for Sovereign Wealth Funds: The Quest for Transparency”, 1 *Asian Journal of International Law* 349 (2011).

regime, the legal status of actors or the interests at stake; finally, the usefulness of concretely applying these hypotheses – which stem directly from reality and from what can be observed in the global legal space – mostly rely on understanding *how* and *why* such interactions take place as well as *when* they are used. With regard to this latter aim, it becomes important also to verify whether there are cases when hybridization should or could happen but did not.

3. The Public/Private Distinction Beyond the State From a Multipolar Administrative Perspective: Three Processes of Interbreeding

It now becomes possible to outline *how* the dialectic between these two “poles” is shaped and unfolds. Three cases can shed light on the various relevant aspects and issues, namely on the three dimensions mentioned at the beginning. The first relates to the regulatory dimension; in particular, to the norms produced at international level. The second refers to the institutional design of the phenomenon, namely to the rise of global public and private partnerships. The third concerns one of the most significant trends in the development of global regulatory regimes, i.e. proceduralization.

All of these hybrid public-private processes of interbreeding demonstrate several facets of what can be defined multipolar administrative law: from experimentation with new forms of participation to a less clear separation between society and administration. This is one of the reasons why administrative law can productively assist in framing the development of global hybrid public-private regimes, i.e. those regimes with a high degree of interpenetration (in regulatory, institutional and procedural terms) between private autonomy and the public sphere.⁴²

As a matter of fact, States and national public administrations are actors operating within these regimes, and they act in accordance with mechanisms for both consensus and authority. The institutional design, procedures adopted and review mechanisms all follow models that are typical of – if not directly subject to – administrative law. It can be further stated that global hybrid regimes provide for the direct application, to private

⁴² As mentioned (*supra*, § 1), the study will consider mainly hybrid public and private forms of governance, such as the Internet, sports, the environment, health, standardization, cultural property, and international investment.

entities or individuals, of norms and decisions made by ultra-State bodies, usually without any intermediation on part of States.

Thus administrative law – the branch of law in which the dialectic between public and private is clearest⁴³ – plays a significant role in framing the development of global public and private regulatory regimes. It enables better comprehension of the relations between legal orders: “The majority of legal orders (from the most ancient, pertaining to territorial groups, to the most recent, such as the sports legal system and sectoral legal orders) operate in the context of administrative law” and the latter, therefore, “must address them”.⁴⁴ In addition, the dynamics linked to the dialogue between private autonomy and public powers give rise to an ever-increasing degree of direct involvement of governments and domestic authorities in global regimes; this indicates that the significance of public administration and their law is constantly growing within these contexts. Lastly, the administrative law perspective can bring useful tools to better examine global institutions, in terms of their organizational and procedural aspects and review mechanisms.

However, administrative law cannot be considered the sole perspective. In several cases, the same problem can be explained either through the application of administrative law tools or through private law.⁴⁵ For example, in cases of dispute resolution through arbitration, one may investigate the phenomenon having sole regard to private law, civil procedure and private international law, without any need to turn to public law: also, participation and transparency in the decision-making processes can be seen as forms of fiduciary duties; moreover, many legal problems may be solved through private law mechanisms – such as tort or liability claims – instead of administrative law-type review mechanisms.

Finally, an administrative law perspective cannot be considered as self-sufficient, because it should interact productively with other legal disciplines that may have more experience with studying ultra-State phenomena, such as international law and the law of international organizations, but less experience with examining the dichotomy between public and private elements. In addition, an administrative law approach can

⁴³ Napolitano, *supra* note 4, and Ruffert, *supra* note 4.

⁴⁴ M.S. Giannini, *Diritto amministrativo* (Giuffrè, Milano, 3rd ed., 1993), I, p. 97 (translation by the Author).

⁴⁵ *See*, for instance, Muir Watt, *supra* note 4.

be combined with other projects, which seek to outline the global legal context, such as, for example, “global constitutionalism”⁴⁶ or the theory based on the exercise of international “public authority”⁴⁷ or on the concept of Informal International Lawmaking (IN-LAW),⁴⁸ as well as on research projects focusing on “Transnational Private Regulation” and “Transnational Business Governance”.⁴⁹

3.1. *The Hybridization of International Regimes: the Emergence of Global Law?*

From the regulatory perspective, public-private relationships influence the development of global regimes in many different ways.

The dialog between these two poles plays a fundamental role in driving the growth of legal mechanisms; in particular, through a mimetic process. Public and intergovernmental regimes use private law mechanisms to advance growth: among the many examples, the International Atomic Energy Agency (IAEA) has developed a complex set of rules based on standards, agreements and memoranda of understanding, to establish global norms capable of limiting States’ discretion in a sensitive sector.⁵⁰

As a consequence, the regulatory framework no longer relies solely on traditional instruments of international law (such as treaties and conventions), but is enriched with other legal tools based on consensus. Similarly, private regimes turn to public law instruments and their “language” so as to build more sophisticated (and powerful)

⁴⁶ On “global constitutionalism”, see C.E. J. Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff, The Hague, 2011); J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009); J. Klabbers *et al.*, *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009), and the journal entitled *Global Constitutionalism*, published since 2012 by Cambridge University Press (see the editorial on *Global constitutionalism: Human Rights, democracy and the rule of law*, by A. Wiener, A.F. Lang Jr., J. Tully, M. Poiares Maduro and M. Kumm).

⁴⁷ A. von Bogdandy *et al.* (eds.), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (Springer, Heidelberg, 2010).

⁴⁸ IN-LAW can be meant as “[c]ross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations (IOs), in a forum other than a traditional IO (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality), and/or which does not result in a formal treaty or other traditional source of international law (output informality)”: J. Pauwelyn, “Informal International Lawmaking: Framing the Concept and Research Questions”, in J. Pauwelyn *et al.* (eds.), *Informal International Lawmaking* (Oxford University Press, Oxford, 2012).

⁴⁹ See respectively Scott *et al.*, *supra* note 14, and Eberlein *et al.*, *supra* note 14.

⁵⁰ See W. Tonhauser, “IAEA Technical Standard Setting”, paper presented at the Conference on “Practical Legal Problems of International Organizations. A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights” (Geneva, 20-21 March 2009), available at <www.iilj.org/GAL/GALGeneva.asp>, and H. Blix, “The Role of the IAEA in the Development of International Law”, 58 *Nordic J. Intl L.* (1989) pp. 231 *et seq.*

models of governance: hierarchies of norms, ‘constitutional’ instruments, review mechanisms. In recent years, all major global private regimes – such as the Internet, sports, accounting – have been increasing their degree of “publicness”, a quality related to the adoption of public law instruments, the involvement of States and public bodies – namely, the public administration – and the presence of global public interests which demand mechanisms for ensuring democratic accountability (this latter phenomenon is typical of private standard setting,⁵¹ such as the case of food standards⁵²).

Furthermore, public law and private law interactions become relevant whenever one seeks to analyse the legal nature of the norms produced within these regimes. Different rules of interpretation apply in international public and private law.⁵³ The very concept of public authority appears nebulous, while the concept of power becomes crucial.⁵⁴ In particular, in this context, it emerges that the distinction based on the notion that private law is consensual and public law is authoritarian appears to fail, and requires refinement: this is why some scholars have noted that “one very important difference between the public and the private at transnational level is that the former operates within a regime of attributed competences while the latter more frequently exercises original rule-making power based on freedom of contract and association.”⁵⁵

On one hand, private regimes develop forms of enforcement that cannot easily be labelled as purely consensual, a fact that becomes increasingly common in complex legal systems:⁵⁶ in the case of sport, for instance, the sophisticated multi-degree mechanism of review having the Court of Arbitration for Sport (CAS) at its apex is formally ruled by *ad hoc* clauses between all the parties involved; however, for athletes and sporting institutions, no concrete alternatives to signing those clauses exist. On the other, the

⁵¹ H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets* (Hart, Oxford, 2005), and K.W. Abbott e D. Snidal, “The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State”, in W. Mattli and N. Woods (eds.), *The Politics of Global Regulation* (Princeton University Press, Princeton, 2009), pp. 44 *et seq.* More recently, J.M. Diller, “Private Standardization in Public International Lawmaking”, 33 *Michigan J. Int’l L.* 481 (2012).

⁵² N. Hachez and J. Wouters, “A Glimpse at the Democratic Legitimacy of Private Standards - Democratic Legitimacy as Public Accountability: The Case of GLOBAL G.A.P.”, 17 *Journal of International Economic Law* 677 (2011).

⁵³ Cafaggi, *supra* note 14, p. 43.

⁵⁴ S. Cassese, “Is There a Global Administrative Law?”, in A. von Bogdandy *et al.* (eds.), *The Exercise of Public Authority by International Institutions* (Springer, Heidelberg, 2010), pp. 210 *et seq.*

⁵⁵ Scott *et al.*, *supra* note 14, p. 15.

⁵⁶ On these issues, Cafaggi, *supra* note 19.

absence of political authority beyond the State prompts intergovernmental organizations to adopt norm-making procedures based on negotiations and participation (from this perspective, accounting and banking standards offer prime examples⁵⁷).

As a result, norms produced within global regulatory regimes tend to appear extremely hybridized – at once both public and private, both national and international – and they allow us to infer the existence of a global law without the State.⁵⁸ This phenomenon also affects the other dualism, between national law and international law: indeed, the emergence of a hybrid global law blurs the dividing line between the latter poles and fades the monism/dualism dichotomy.⁵⁹

From the regulatory perspective, therefore, the public/private interaction beyond the State seems to overcome the view according to which the two great dualisms were similar in contrasting the formation of a *ius commune*. On the contrary, the emergence of hybrid global regulatory regimes, where both pairs of distinctions (public and private on one hand, international and national on the other) are blurred, appears to favour the creation of global norms that transcend such dichotomies. However, the public/private distinction maintains its usefulness, especially because, if not mistaken or misunderstood, it can favour the establishment of more effective, accountable and democratic regulatory regimes. In other words, hybridity can and should be unpacked whenever it may be the result of pursuing the most powerful interest, instead of the very public interests that required the emergence of a global regime.

This is why, in this context, it is first essential to analyse and understand how these norms are produced; how private law and public law mechanisms interact; and how the different interests at stake are represented. These aspects are intertwined with the growing degree of proceduralization at the global level (*infra*, 3.3), and their examination can profit from an administrative law perspective (namely in terms of the

⁵⁷ M. De Bellis, *La regolazione dei mercati finanziari* (Giuffrè, Milano, 2012).

⁵⁸ G. Teubner (ed.), *Global Law Without a State* (Dartmouth, Aldershot and Brookfield, 1997). Regarding non-state law, more recently, H. van Schooten and J. Verschuuren (eds.), *International Governance and Law. State Regulation and Non-state Law* (Edward Elgar, Cheltenham, 2008).

⁵⁹ See A. von Bogdandy, "Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law", 6 *I-Con* 397 (2008); and H. Owada, "The Problems of Interactions Between International and Domestic Legal Orders", Singapore Academy of Law Annual Lecture 2010, 23 *SaCLJ*1 (2011).

principles governing rule-making procedures). Second, this hybrid law often consists of numerous and diverse documents, such as guidelines, standards, codes of conducts, principles. Setting aside the question of whether these can or cannot be considered law and under what conditions of legality and legitimacy,⁶⁰ it is important to verify which remedies can be taken against these norms, which nevertheless prove to be extremely effective. Indeed, the more hybrid global regimes are, the higher is the level of compliance that their norms appear to achieve. This may be due to the peculiar law-making processes and to the interaction between the public law and private law tools present in these regimes.

Among the numerous examples that include standard setting and norm-making in several sectors – from accounting to forestry – two cases clearly related to these dynamics come from, respectively, sports and museums.

The first is the case of the World Anti-Doping Code, which offers a prime instance of a formally private source of norms that nevertheless show a high degree of “publicness”.⁶¹ This “public” character is based on many factors. First, governments participate both in drafting the Code, through extensive consultations, and in its final adoption, through the WADA decision-making process and the Final Declaration at the World Conference on Doping. Second, the UNESCO International Convention against Doping in Sport expressly refers to the WADA and its Code and requires States to align

⁶⁰ B. Kingsbury, “The Concept of ‘Law’ in Global Administrative Law”, 20 EJIL 23 (2009) pp. 34 *et seq.*, and D. Dyzenhaus, “Accountability and the Concept of (Global) Administrative Law”, in *Acta Juridica 2009. Global Administrative Law* (Cape Town, 2009), pp. 3 *et seq.*, who examine respectively H.L.A. Hart, *The Concept of Law* (Clarendon Press, Oxford, 1961), and L.L. Fuller, *The Morality of Law* (Yale University Press, New Haven, 1964); *see also* J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University press, Cambridge, 2010). Also M. Goldmann, “Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority”, 9 *German Law Journal* (2008), pp. 1865 *et seq.*, and L. Boisson de Chazournes, “Governance et regulation au 21ème siècle: quelques propos iconoclasts”, in L. Boisson de Chazournes and R. Mehdi, *Une société internationale en mutation: quels acteurs pour une nouvelle gouvernance?* (Bruylant, Brussels, 2005), pp. 19 *et seq.*

⁶¹ On the concept of “publicness” at the global level, *see* Kingsbury, *Ibid.*, and *Id.*, ‘International Law as Inter-Public Law’ in H.R. Richardson and M.S. Williams (eds.), *NOMOS XLIX: Moral Universalism and Pluralism* (New York University Press, New York, 2009) pp. 167 *et seq.*, especially at pp. 175 *et seq.*, and B. Kingsbury and M. Donaldson, “From Bilateralism to Publicness in International Law”, in U. Fastenrath *et al.*, *From bilateralism to community interest. Essays in honour of Judge Bruno Simma* (Oxford University Press, Oxford, 2011), p. 79 *et seq.* Regarding non-state law, more recently, van Schooten and Verschuuren, *supra* note 58.

their anti-doping legislation with WADC principles.⁶² Furthermore, States' ratification of the UNESCO Convention triggers an implementation mechanism of WADA's policies and regulations that produces significant effects in the domestic context: for instance, since the US ratified the Convention in August 2008, the public relevance of the US Anti-Doping Agency has been rising, and some scholars suggest that it should be considered a State-Actor;⁶³ similarly, in the UK, a specific non-departmental body was created in 2009, to comply with the World Anti-Doping policy.

The second example is the one of standard setting for museums. The International Council of Museums (ICOM), a non-governmental organization created in 1946, which has formal relations with UNESCO and enjoys consultative status in the United Nations' Economic and Social Council, governs the system of museum management.⁶⁴ One of the most important documents produced by ICOM is the Code of Ethics for Museums,⁶⁵ which sets minimum standards of professional practice and performance for museums and their staff. In joining the organization, ICOM members undertake to abide by this Code. ICOM is therefore a relevant example of self-regulation which operates at the global level: an international non-governmental organization that adopts global standards, with which its members must comply. However, the scope of this Code

⁶² In particular, the Convention enables governments to align – the principles of the World Anti-Doping Code are “the basis” for national measures – their domestic policy with the Code, thereby harmonizing global sports regulation and public legislation in the fight against doping in sport. Indeed, Article 3 of the UNESCO Convention establishes that “[i]n order to achieve the purpose of the Convention, States Parties undertake to: (a) adopt appropriate measures at the national and international levels which are consistent with the principles of the Code; (b) encourage all forms of international cooperation aimed at protecting athletes and ethics in sport and at sharing the results of research; (c) foster international cooperation between States Parties and leading organizations in the fight against doping in sport, in particular with the World Anti-Doping Agency”. On these aspects, *see* Casini, *supra* note 6.

⁶³ M. Straubel, “The International Convention Against Doping in Sport: Is It the Missing Link to USADA Being A State Actor and WADC Coverage of U.S. Pro Athletes?”, 19 *Marquette Sport Law Review* 63 (2008); before the ratification of the Convention, P. McCaffrey, “Playing Fair: Why The United States Anti-Doping Agency's Performance-Enhanced Adjudications Should Be Treated As State Action”, 22 *Wash. U. J.L. & Pol'y* 645 (2006). The State Action Doctrine was also recalled in the case of the US Olympic Committee: D.L. Koller, “Frozen In Time: The State Action Doctrine's Application To Amateur Sports”, 82 *St. John's Law Review* 183 (2008).

⁶⁴ With its headquarters in Paris, ICOM has around 28,000 members in 137 countries, and its activities are focused on “enhancing professional cooperation and exchange, dissemination of knowledge and raising public awareness of museums, training of personnel, advancing of professional standards, elaborating and promoting professional ethics, preserving heritage and combating the illicit traffic in cultural property” (*see* <www.icom.museum/hist_def_eng.html>).

⁶⁵ The ICOM Code of Professional Ethics was adopted unanimously by the 15th General Assembly of ICOM in Buenos Aires, (Argentina) on 4 November 1986. It was amended by the 20th General Assembly in Barcelona (Spain) on 6 July 2001, retitled ICOM Code of Ethics for Museums, and revised by the 21st General Assembly in Seoul (Republic of Korea) on 8 October 2004.

exceeds ICOM membership, because many countries, such as Italy, have enacted statutes or regulations which expressly refer to the Code.⁶⁶ This is partly due to the fact that, although ICOM and the Code are formally private, they implicate – like the World Anti-Doping Code – a number of elements of “publicness”, such as the public mission carried out by museums or the public nature of many of ICOM’s members. Furthermore, such standards rely on a high level of professional expertise, which also acts as a source of legitimacy for this regulation.

These examples – the anti-doping regime and museums standards – both represent a similar product, i.e. formally private regulation with which States comply, also due to a certain number of public elements at stake: governments participate in the norm-making process, domestic orders enact legislation in accordance with global norms, and the regimes themselves may have public actors as their members. However, they show significant differences as to the reasons why such regulatory hybrid public-private regimes were created: in the case of anti-doping, as illustrated above, the hybridization was necessary to better pursue relevant global public interests, especially since the IOC and the other sporting institutions had failed to deal with doping effectively; in the case of museums, a phenomenon of self-regulation developed, based on best practices, which progressively moved from a transnational dimension to a global one.

This kind of dynamics may occur often, and vary according to the specific kind of sector or regime;⁶⁷ the legal output, however, tends to be similar. In other circumstances, hybridization may not occur, due to different reasons that can relate to the need to ensure the full independence of the private actors that deliver a specific function: hybridization may depend on historical and technical reasons – such as in the case of international sports federations, which have always been private although the Court of Arbitration has often likened them to governmental entities – or also on the need to accord freedom of expression (such as in the case of credit rating agencies, which display an interesting case of private standard-setting where hybridization could

⁶⁶ See, for Italy, the “Atto di indirizzo sui criteri tecnico-scientifici e sugli standard di funzionamento e sviluppo dei musei”, adopted with the Decree of the Ministry for Cultural Property of May 10th 2001.

⁶⁷ The case of the German Corporate Governance Code, for instance, displays many similarities to the example of the World Anti-Doping Code as a phenomenon of hybrid law making: see Zumbansen, *supra* note 17, pp. 63 *et seq.*

occur – and is sometimes prospected – but has not yet taken place).⁶⁸

3.2. *The Rise of Global Public-Private Partnerships: Towards a “Hybrid” Global Administration?*

Both States and international organizations increasingly form, and operate through, formalized partnerships with private commercial and civil society entities.⁶⁹ Public-private partnerships (PPPs) involving intergovernmental organizations as one of the partners are important in the global governance of areas such as public health (including organizations such as the Global Fund and GAVI), nuclear safety (the IAEA acts within a framework built upon a complex set of conventions, agreements, and binding and non-binding MOUs), environmental protection, the Internet, and sports.

For example, the Global Fund has close links with the World Health Organization, but is, in formal legal terms, a Swiss foundation. Its Board comprises donor and recipient states, and representatives of groups affected by HIV and other infectious diseases that the Global Fund combats; it has a sophisticated independent review system, and links to some very large funding sources such as the Gates Foundation. Other examples are the Internet Corporation for Assigned Names and Numbers (ICANN), the World Anti-Doping Agency (WADA), the private Stewardship Councils for forest products and marine products (comprising industry and civil society members) and the International Organization for Standardization (ISO).

This type of institution encompasses both hybrid public-private and fully private bodies exercising public functions. They can be defined negatively, as being non-formal intergovernmental organizations. In more positive terms, they constitute a very interesting example of how the use of private law instruments to fulfil public functions is widespread at the international level, too. To a certain extent, bodies like the International Union for the Conservation of Natural Resources (IUCN), the International Red Cross and Red Crescent Movement (IRCRCM), and the Codex

⁶⁸ M.R. Das Gupta, “The external accountability gap of private regulators: accountability paradoxes and mitigation strategies: The case of credit rating agencies”, 1 *International public policy review* 37 (2005). However, regulatory intervention in the field is increasing: see the recent EU Regulation No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies.

⁶⁹ B. Bull and D. McNeill, *Development Issues in Global Governance. Public-Private Partnerships and Market Multilateralism* (Routledge, London, 2006).

Alimentarius Commission can be also included in this category. Data shows that the number of this type of international institutions has been growing constantly, connected to the emergence of a fragmented global civil society: there are now over 55,000 NGOs, while there were around 13,000 in the 1980s.⁷⁰

These forms of global public-private partnership are triggered by the need to increase the effectiveness, legitimacy or accountability of the global regimes to which these bodies belong. The use of private instruments and the involvement of private actors within more structured forms of agreement can bring in further resources, and can enable the involvement of affected parties: in the cases of the WHO, UNCTAD, UNDP, UNICEF and the World Bank, for instance, public-private partnerships are also seen as an important tool for development. Not surprisingly, therefore, these solutions are common in areas such as public health⁷¹ and the environment.⁷²

Cooperation may take different shapes: in some cases, such as the WADA, governments do not participate directly in the governing bodies of the institutions, but they appoint delegates for each continental area; in other cases, such as in the IUCN, States are members of the association; in others yet, such as the ICANN, a specific Governmental Advisory Committee brings together representatives of each government. The case of the ICANN is highly significant because the role of the GAC has become progressively more important and this led to important structural reforms of the organization.⁷³

Together with the rise of foundations, associations, and similar bodies in which public and private actors interact on an institutional level, there is a surge in contractual activity (e.g. in public procurement⁷⁴). Moreover, the number of memoranda of understanding concluded by international organizations and these hybrid institutions is

⁷⁰ Uia, *Yearbook of International Organizations* (Brill, Bruxelles, 48th ed., 2011).

⁷¹ G.L. Burci, "Public/Private Partnerships in The Public Health Sector", 6 *International Organizations Law Review* 359 (2009), and K. Buse and G. Walt, "Global Public-Private Partnerships: Part I – A New Development in Health?", 78 *WHO Bulletin* 549 (2000).

⁷² B. Bierman *et al.*, *International Organizations in Global Environmental Governance* (Routledge, Abingdon, 2009).

⁷³ J. Weinberg, "Governments, Privatization, and 'Privatization': ICANN and the GAC", 18 *Mich. Techn. L. Rev.* 189 (2011), available at <www.mttl.org/voleighteen/weinberg.pdf>, especially pp. 196 *et seq.* See also M.L., Mueller, *Networks and States: The Global Politics of Internet Governance* (Mit Press, Cambridge, 2010).

⁷⁴ See H. Caroli Casavola, "Global Rules on Public Procurement", and E. Morlino, "Procurement Regimes of International Organizations", both in S. Cassese *et al.*, *Global Administrative Law: An Italian Perspective* (EUI RSCAS PP; 2012/04; Global Governance Programme).

constantly increasing.

However, international organizations' growing engagement in hybrid public-private bodies, and their use of or concerted action with such bodies and with fully private bodies, and even with State military forces and agencies, raise significant issues of accountability.⁷⁵ The use of PPPs and contractors may contribute to international organizations' evasion of accountability, to the diminished use of legal and legal-type instruments for the organization and control of activities, the extension of their activities beyond established mandates, and their avoidance of transparency on grounds such as commercial necessity. Conversely, there are circumstances in which the use of PPPs and contractors may entail a whole host of advantages; accountability may be improved, the standard of operations may be raised to industry-leader levels, controls of legality through contracting may be heightened, the specificity and clarity of mandates may be improved, participation could be broadened, and transparency enhanced. At the same time, international organizations may come to bear a disproportionate or unrealistic share of accountability and responsibility (e.g. through being attributed with the acts and omissions of others), especially since international organizations may be a more visible, responsive and enduring target for complaints than some States, many PPPs, and most contractors (such as in the case of peace operations).⁷⁶

This hybrid public-private institutional design prompts several issues and questions: what kind of law regulates these hybrid bodies? Are they international organizations? What is the role, if any, of the national law of the States where their headquarters are located? These bodies often have field offices and lead several field operations: which legal regimes can be applied in these cases? More generally, what institutional devices can be adopted to balance public power and private actors? Under what conditions should international organizations engage in PPPs and associated private law instruments? And how can "regulatory capture" be avoided?

It is clear that these problems are significantly similar to those that habitually arise

⁷⁵ B. Kingsbury and L. Casini, "Global Administrative Law Dimensions of International Organizations Law", in the symposium on "Global Administrative Law in the Operations of International Organizations" (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* 319 (2009).

⁷⁶ K. Mujezinovic Larsen, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test", 19 *European Journal of International Law* 509 (2008), and M. Sassoli, "State Responsibility for Violations of International Humanitarian Law", 84 *IRRC* 401 (2002).

within domestic legal orders, especially since the development of “government by contract”.⁷⁷ In particular, national administrative bodies’ use of private law instruments, and the integration of private actors into national regulatory processes, are among the characteristics of the “new public management” of national administration that have become significant as techniques and, to some extent, as ideologies, within international organizations too. Responses to these phenomena in the realm of national administrative law may thus be of some relevance even to the radically different contexts in which international organizations operate. Administrative law may assist in addressing problems such as: what kinds of effective and non-stifling oversight mechanisms could such public bodies use, in relation to PPPs? Will these be sufficient to ensure adequate accountability and legitimacy?

In addition, how can these public-private mechanisms fit within the traditional regimes of immunities applied to international organizations?⁷⁸ The Global Fund, for instance, enjoys privileges and immunities in Switzerland where it is based and in the U.S.A. where most of its funds are, but should other States (particularly, the developing countries in which it operates) accord similar immunities or otherwise recognize the Global Fund as a public international organization? Where PPPs directly affect fundamental human rights or other interests of persons, it is apparently becoming orthodox practice for the extension of the regime of immunities and privileges to PPPs (on the condition of a delegation or some similar link between these and the relevant public international organization) to be accompanied by duties to observe rights and guarantees for individuals or legal persons; these duties are similar to those imposed on cognate national public bodies, including rights of access to information (such as in the case of the UK in relation to human rights).

⁷⁷ T. Daintith, “Regulation by Contract: The New Prerogative”, *CLP* 32 (1979), pp. 41 *et seq.*, I. Harden, *The Contracting State* (Open University Press, Buckingham, 1992), M. Freedland, “Government by Contract and Private Law”, *Public Law* 86 (1994), J.P. Gaudin, *Gouverner par contrat* (Presses de Sciences Po, Paris, 1999), J. Freeman, “The Private Role in Public Governance”, *NYU Law Rev.* 43 (2000), *Id.*, “Private Parties, Public Functions and the New Administrative Law”, *Admin. Law Rev.* 814 (2000), Aman Jr., *supra* note 5, pp. 205 *et seq.*

⁷⁸ P.H.F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (M. Nijhoff, Dordrecht, 1994), A. Reinisch, *International Organizations Before National Courts* (Cambridge University Press, Cambridge, 2000); and D. Abdul Aziz, “Privileges and Immunities of Global Public-Private Partnerships: A Case Study of the Global Fund to Fight AIDS, Tuberculosis and Malaria”, in Symposium on “Global Administrative Law in the Operations of International Organizations” (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* (2009).

All these examples confirm that treating a distinction between public and private as rigid and obvious risks “conceal[ing] both the complexity of its political history and important potential areas of overlap and compromise in the future”.⁷⁹ There is considerable imprecision, and tension, about what it means to be “public” in global governance. Due to the absence of a decisive referent (beyond the simple inter-State nature of international organizations), the public and democratic interests at stake in the use of PPPs by international organizations require especially scrupulous procedures, subjected to administrative law mechanisms such as transparency and participation. This leads us to the third form of interbreeding between public law and private law beyond the State.

3.3. The Key Role of Proceduralization: A New Field for Public/Private Interactions?

Both the rise of global hybrid regulatory regimes and of global PPPs demonstrate the increasing importance of procedures. This is not surprising, because their number grows proportionally with the rise of activities and institutions. Therefore, the more norms are produced, the more procedures will be required. And the more institutions are created, the more activities will be carried out.

Proceduralization is, first of all, a device to govern complex organizations and their decision-making processes. From this perspective, procedures are neutral as to the public/private divide. Multinational corporations have plenty of procedural schemes and handbooks of procedure: this does not imply that they are public administrations. In other words, proceduralization is crucial to public and administrative law and domestic authorities, but it is not exclusive to public law: indeed, private law knows several procedural tools.⁸⁰ In some way, procedures display the same neutrality as

⁷⁹ Aman Jr., *supra* note 5, p. 218; M. Taggart, “The Peculiarities of English’: Resisting the Public/Private Law Distinction”, in P. Craig and R. Rawlings (eds.), *Law and Administration in Europe*. Essays in Honour of Carol Harlow (Oxford University Press, Oxford, 2003), pp. 107 *et seq.*

⁸⁰ C. Lavagna, “Considerazioni sui caratteri degli ordinamenti democratici”, 5 *Riv. trim. dir. pubbl.*, 392 (1956), for example, underlined the high number of procedural provisions set forth in the civil code and aimed at regulating different forms of private actions in collective endeavours (p. 421); similarly, E. Betti, *Teoria generale del negozio giuridico* (1943; 1950) (reprint of 2nd ed., ESI, Napoli, 2002) observed that “le forme più complesse di procedimento s’incontrano nel campo del diritto pubblico, nelle figure del procedimento giurisdizionale e amministrativo; ma non mancano esempi nel campo del diritto privato” (p. 300). As to international organizations, see J. von Bernstorff, “Procedures of Decision-Making and the Role of Law in International Organizations”, 9 *German Law Journal* 1939 (2008), and R.W. Cox and

bureaucrats, meaning “not someone in a government office, but [...] the representative of an anonymous order [...] Our age has rightly been called the administrative age. The administrative officers are as characteristic of an industrial society as are the factories themselves.”⁸¹

Data shows that global regulatory regimes and global institutions have been increasingly developing procedures. Most of these can be likened to the models adopted at the domestic level (such as procedures for granting licenses, permissions, grants, etc.), but the more complex legal framework of the global arena enables detection of other forms, such as “policy-making” procedures;⁸² the same is true of other supranational experiences (see the EU-related “composite” proceedings).

Examples of the growing number of procedures come from several sectors. The system built on the World Heritage Convention, for instance, has progressively acquired a relevant procedural dimension, which is regulated by the UNESCO Operational Guidelines for the Implementation of the World Heritage Convention:⁸³ there are new forms of cooperation between international institutions, States, domestic administrations and other actors. Moreover, the procedure for proposing additions to the World Heritage List must involve all relevant actors;⁸⁴ and the *Operational Guidelines* also detail some common elements and practices for effective management, such as ensuring a thorough and shared understanding of the property by all stakeholders, a cycle of planning, implementation, monitoring, evaluation and feedback, the involvement of partners and stakeholders, the allocation of necessary resources,

H.K. Jakobson (eds.), *The Anatomy of Influence. Decision Making in International Organizations* (Yale University Press, New Haven, 1974).

⁸¹ R. Aron, *Democracy and totalitarianism: a theory of political systems* (1958), transl. of *Sociologie des sociétés industrielles* (University of Michigan Press, Ann Arbor, 1990), p. 235.

⁸² J. Barnes, “Towards a third generation of administrative procedure”, in Rose-Ackerman and Lindseth *supra* note 3, pp. 336 *et seq.*, and *Transforming Administrative Procedure – La transformación del procedimiento administrativo*, ed. by J. Barnes (Sevilla, 2009). See also G. della Cananea, “Beyond the State: the Europeanization and Globalization of Procedural Administrative Law”, 9 *European Public Law* 563 (2003).

⁸³ See D. Zacharias, “The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution”, 9 *German Law Journal* 1833 (2008), S. Battini, “The World Heritage Convention and the Procedural Side of Legal Globalization”, 9 *International Journal of Constitutional Law* 340 (2011), and *Id.*, *Amministrazioni nazionali e controversie globali* (Giuffrè, Milano, 2007), p. 69 *et seq.*

⁸⁴ *Operational Guidelines*, para. 64: “States Parties are encouraged to prepare their Tentative Lists with the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, NGOs and other interested parties and partners”.

capacity-building, and an accountable, transparent description of how the management system functions.⁸⁵

Other examples of the rise of proceedings come from finance – where standard-setting procedures have become much more complex – to sports, from health to environment. As a matter of fact, the reason for this growth relies in the abovementioned linkages between delivery of functions and procedures: if procedure is, for an institution, a rational way of organizing its activities, the increase of the latter will directly imply the increase of the former.

Thus proceduralization beyond the State displays the multipolar character of contemporary administrative law, due to the presence of different levels of activity (national, regional and international), different bodies of law (public and private), and the plurality of actors (governments, administrations, international organizations, civil society).⁸⁶ Furthermore, once national borders have been transcended, the notion of proceduralization appears to lose its neutrality and gains additional functions: it can enhance legitimacy⁸⁷ and democratic accountability, for example, or it can be an instrument to control power.⁸⁸ This can happen because procedures are also instruments for representing and negotiating interests, through participatory mechanisms.⁸⁹

This new dimension of proceedings beyond the State can represent a new field for interaction between public law and private law. As mentioned, global private regimes

⁸⁵ Para. 111.

⁸⁶ S. Sassen, "The Participation of States and Citizens in Global Governance", 10 *Indiana Journal of Global Legal Studies* 5 (2003).

⁸⁷ N. Luhmann, *Legitimation durch Verfahren* (Frankfurt am Main, 1969), where the concept of procedure is analysed as a social system, an instrument capable of giving legitimacy to legislative, judicial and administrative functions. This theory, however, was criticized by J. Habermas, *Legitimationsprobleme im Spätkapitalismus* (Suhrkamp, Frankfurt am Main, 1973) (both positions have been discussed by J. Přibáň, "Beyond Procedural Legitimation: Legality and Its 'Inflections'", 24 *Journal of Law and Society* 331 (1997)). See also J. Habermas, *Deliberative Politik – ein Verfahrensbegriff der Demokratie*, in *Id.*, *Fatti e norme*, pp. 341 *et seq.*, and in *Id.*, *Die Einbeziehung des Anderen. Studien zur politischen Theorie* (1996), It. transl. *L'inclusione dell'altro. Studi di teoria politica* (Feltrinelli, Milano, 1998), pp. 216 *et seq.* and pp. 235 *et seq.*

⁸⁸ M.D. McCubbins *et al.*, "Administrative Procedures as Instruments of Political Control", 3 *Journal of Law, Economics, and Organization* 243 (1987); J.L. Mashaw, "Explaining Administrative Process. Normative, Positive and Critical Stories of Legal Development", 6 *Journal of Law, Economics and Organization* 267 (1990).

⁸⁹ R.B. Stewart, "The Reformation of American Administrative Law", 88 *Harvard Law Review* 1670 (1975) and *Id.*, "Administrative Law in the Twenty-first Century", 78 *N.Y.U. Law Review* 437 (2003).

tend to develop and refine procedural tools, such as participation, consultation, and due process clauses. In doing so, they are often resonant of administrative law techniques (see, for example, the Internet or sports), for several reasons: governments and domestic administrations are part of the game; public and administrative law techniques are well-equipped to balance powers;⁹⁰ the absence of a democratic context; a need to guarantee procedural safeguards for addressees. On the other hand, international organizations often adopt private law instruments and PPPs (*supra*, 3.2). The increasing use of public procurement, for instance, triggers the adoption of procedural mechanisms capable of ensuring transparency and competition. Similarly, the need to involve civil society and the population affected in the establishment of public-private arrangements increases the use of participatory mechanisms.

Beyond the State, therefore, a dual relationship between proceduralization and the public law-private law distinction can be seen.

On one hand, increasing interactions between public law and private law in terms of norms and institutions favor the growth of procedures. These include rule-making and adjudicatory activities. They can be “administrative” but also “quasi”-judicial, as is the case with the ever-growing number of arbitration proceedings. Furthermore, relationships between public and private actors can create new forms of procedures and new techniques in ensuring procedural rights (e.g. when States or the government must be consulted, such as in the cases of World Heritage Protection or the World Anti-Doping regime).⁹¹ Finally, we must consider that the rise of proceduralization is also due to the creation of multi-level (international, regional and national) systems of governance.⁹²

On the other, proceduralization becomes an instrument for improving the effectiveness, accountability and legitimacy of these forms of public and private interactions. This means that here, procedures transcend the neutral discourse of “more norms, more institutions, then more procedures”, to represent a means of enhancing the connections between the public and private spheres: they can bring public powers into

⁹⁰ Cassese, *supra* note 3; the point was already highlighted by Kelsen, *supra* note 26, pp. 280-281.

⁹¹ Cassese, *supra* note 32.

⁹² E. Schmidt-Aßmann, “Structures and Functions of Administrative Procedures in German, European and International Law”, in *Transforming Administrative Procedure*, *supra* note 82, pp. 47 *et seq.*

private regimes; they can introduce private actors into intergovernmental negotiations; they can offer a “market” where private law and public law can strike a deal.

These kinds of problems are connected with the emergence of a multipolar type of administrative law, where both the public/private distinction and national/international dialectics are at stake. The questions to be raised are numerous: Does this public-private interbreeding affect the very notion of procedure? How does this coexistence of public and private elements transform the procedural mechanisms traditionally adopted at the domestic level? How does the blurring line between rule-making and adjudicatory activities beyond the State influence the effectiveness of procedural tools?

In addition, the degree of proceduralization is still very much diverse depending on the individual regime being considered. There are many asymmetries, to the extent that it would not be possible to build a “universal set of administrative law principles”.⁹³ These asymmetries derive from the diversity of the functions delivered by different international organizations, but also from the level of involvement of public powers. In almost all global regulatory regimes, indeed, procedural principles such as participation, due process, and the duty to give reasons, are first established in norms (see, for instance, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters for the environment, or the WTO TBT Agreement, or the World Anti-Doping Code). When these principles are to be applied, the more public the international regime, the more their enforcement will be delegated to the States (as with the Aarhus Convention). In private regimes, instead, observance of these principles is usually directly ensured by international bodies (this is the case of sports or the Internet), which enhances the degree of proceduralization of these very regimes.

4. The Reasons *for* the Public/Private Distinction Beyond the State and Its Functions

The analysis of three significant processes of interbreeding between public and private that take place at the global level showed how the projection of this distinction beyond the State operates, and in which dimensions: regulatory; institutional; and procedural.

⁹³ C. Harlow, “Global Administrative Law: The Quest for Principles and Values”, 17 *European Journal of International Law* 187 (2006).

The first dimension highlights the interbreeding between legal regimes, the second that between actors, and the third that between both. It is now crucial to deal with “what this purported” public/private “distinction is *for*, that is, *why* we want to make it all”, beyond the State.⁹⁴

As illustrated above, at the international level, hybridization is the most common phenomenon, and it is extremely difficult to distinguish clearly between public and private elements. Evidence of this is given by the hybridization of private global regulatory regimes and by the proliferation of public-private partnerships (PPPs) at international level:⁹⁵ health, environment, water, standardization, the Internet, and sports are among the most relevant examples.⁹⁶

However, the reason for this growth at the global level is not the same as that true for the national context.⁹⁷ Indeed, in the former case, the creation of hybrid public-private regimes has often seen the entry of public powers into a fully private regime; in contrast, in more traditional PPPs, it is usually public authorities that seek to involve private actors, to gain further resources, expertise or consensus (as occurs, for instance, in the environmental or public health sectors). In other words, while the usual track for public-private relationships is a form of “privatization”, in the case of hybrid global regimes, a partial “nationalization” of formerly wholly private systems can occur. This happened, for instance, in the case of the World Anti-Doping regime: originally fully regulated by the International Olympic Committee and international sports federations, through private law mechanisms, since the 1990s it has progressively witnessed greater intervention by States and governments, which led to the establishment of a hybrid public-private international body (the WADA) and to the adoption of an International Convention against doping in sport. This was due to the emergence of high-profile

⁹⁴ R. Geuss, *Public Goods, Private Goods* (Princeton university press, Princeton, 2001), p. 107. In some ways, this approach is not different from the lesson taught by Justice Holmes when he wrote that “The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.” (O.W. Holmes, Jr., “The Path of the Law”, 10 *Harvard Law Review* 457 (1897)).

⁹⁵ Bull and Mc Neill, *supra* note 69.

⁹⁶ See Cassese, *supra* note 9, I.C “Hybrid Public-Private Organizations And Private Bodies Exercising Public Functions”.

⁹⁷ See D. Barak-Erez, “Three questions of privatization”, and J.-B. Auby, “Contracting out and ‘public values’: a theoretical and comparative approach”, both in Rose-Ackerman and Lindseth, *supra* note 3, respectively pp. 493 *et seq.* and pp. 511 *et seq.*

doping scandals and to the increasing concerns for athletes' health and the integrity of fair game (and their implications, in terms of both education and economic revenues).⁹⁸

The reasons behind the increasing relationships between public and private beyond the State are different – and perhaps more numerous – than those existing in domestic contexts. At the global level, we can find not only all the traditional reasons which prompt public authorities to adopt private law instruments – the growth of public procurement is a significant example in point. Beyond the State, it is often private law that requires public law to strengthen its effectiveness, not least because any international regulatory regime needs the support of States to develop. In addition, hybrid public-private global bodies can be created both to admit public powers into relevant fields as well as to enhance their legitimacy, through the involvement of private actors within the institutional design (as in the case of NGOs' committees). Thus, at the global level, due to the absence of a dyadic state/society relationship, the relationship between public and private actors may find its reasons either in the attempt to strengthen existing powers and maintain the *status quo*, in the effort to enhance legitimacy and accountability of a given regime, or even both.⁹⁹

Once again, the case of sport offers relevant examples of all these dynamics. On one hand, the IOC system progressively evolved towards forms of accountability and participation inspired by public law, so as to not lose its supremacy over the sports world; as a result, today the Olympic System has reached a highly sophisticated degree of institutionalization and regulation (for example, take the rules governing for the Olympic bid), although within a regime which remains, at the international level, essentially private. On the other hand, as illustrated above, the anti-doping regime, which originated as fully private, was progressively hybridized due to the increasing role played by governments and domestic authorities, concerned for the protection of

⁹⁸ C. Miège and J.-C. Lapouble, *Sport & Organisations Internationales* (Économica, Paris, 2004) pp. 215 *et seq.*, A. Van Varenbergh, "Regulatory features and administrative law dimensions of the Olympic movement's anti-doping regime", IILJ Working Paper 2005/11 (Global Administrative Law Series), J.-L. Chappelet and B. Kübler-Mabbott, *The International Olympic Committee and the Olympic System: The governance of world sport* (Routledge, London, 2008.) pp. 132 *et seq.*, and Casini, *supra* note 6.

⁹⁹ Problems connected with the adoption of accountability mechanisms in hybrid public and private or private regimes are analysed by D. Curtin and L. Senden, "Public Accountability of Transnational Private Regulation: Chimera or Reality?", 38 *Journal of Law and Society* 163 (2011).

fundamental rights and health of athletes.¹⁰⁰

Furthermore, the relationship between these two poles may become unavoidable when common public goods require public intervention, but this intervention also affects private rights (such as in the case of the environment or cultural heritage). In particular, the case of “global public goods” sheds light on the difficulties related to the adoption of the public-private distinction beyond the State; and the very conceptualization of the “global commons” is indeed powered by the need to protect public interests which are greater, in global terms.¹⁰¹ And to pursue such interests, a set of norms and procedures can be established, through decision-making processes that often involve complex forms of public-private partnerships. This happens in the case of the World Heritage Convention, for example, where the role of the UNESCO non-governmental advisory bodies (namely the International Council on Monuments and Sites (ICOMOS) and the International Union for the Conservation of Nature (IUCN)) within the system has been growing in the last few decades.¹⁰² And similar dynamics occur in the field of environment and health, or in the intellectual property regime.¹⁰³

Moreover, the development of regulatory regimes beyond the State appears to follow a path of “mimesis”, according to which, on one hand, public law looks to private law for agreements, foundations, arbitrations, but, on the other, private law imitates public law in introducing instruments such as norm-making processes, review mechanisms, procedural guarantees and other mechanisms to ensure accountability.¹⁰⁴

¹⁰⁰ An overview may be found in F. Latty, *La lex sportiva. Recherche sur le droit transnational* (M. Nijhoff, Leiden-Boston 2007), and in L. Casini, *Il diritto globale dello sport* (Giuffrè, Milano 2010).

¹⁰¹ See G. Shaffer, “International Law and Global Public Goods in a Legal Pluralist World”, and the other contributions to the Symposium on “Global Public Goods and the Plurality of Legal Orders”, ed. by F. Cafaggi and D.D. Caron, 23 *European Journal of International Law* (2012), and I. Kaul, “Global Public Goods: Explaining Their Underprovision”, 15 *Journal of International Economic Law* 729 (2012). Formerly, E.A. Andersen and B. Lindsnaes (eds.), *Towards New Global Strategies: Public Goods and Human Rights* (Leiden, M. Nijhoff, 2007), and I. Kaul *et al.* (eds.), *Providing Global Public Goods: Managing Globalization* (Oxford University Press, Oxford, 2003), and J.-B. Auby, “Public Goods and Global Administrative Law”, in G. Anthony *et al.* (eds.), *Values in Global Administrative Law* (Hart, Oxford, 2011), pp. 239 *et seq.*

¹⁰² E. Cavalieri, “I.E.15 The Role of Advisory Bodies in the World Heritage Convention”, in Cassese, *supra* note 9.

¹⁰³ As illustrated by K.E. Maskus and J.H. Reichman, “The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods”, 7 *Journal of International Economic Law* 279 (2004).

¹⁰⁴ A. Riles, “The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State” 56 *Am. J. Comp. L.* 605 (2008), for instance, observes that “global private law” is “not a radical departure from state law, but really more of the same” (p. 629); E. Meidinger, “Competitive

As a matter of fact, this imitative process is not new: for example, in 1949, Vittorio Emanuele Orlando wrote on the crisis of international law and on its need to productively look to notions and tools developed by public law, as the former appeared to be *minus quam perfectum* than the latter, exactly as public law appeared to be less perfect than private law, which had older origins.¹⁰⁵ There is cyclicity in the relations between public law – and administrative law especially – and private law, insofar as on the national level, the former has been growing by affirming its special character, but at the same time borrowing and modifying private law instruments;¹⁰⁶ once beyond the State, it is the latter that borrows public and administrative law mechanisms.¹⁰⁷

The basic reason for the multiplying interbreeding between public and private law at the international level seems, therefore, to be linked to the main legal features of the global arena, on one hand, and to the role of States, on the other.

First, the global arena lacks a democratic context and requires the development of legitimacy and accountability mechanisms: this favours forms of hybridization between the public and the private because public authorities will seek consensus through agreements and other contractual instruments, and private regimes will look to tools developed in the context of public law – such as reviews, participation, transparency, etc. – to strengthen their own legitimacy and power. In both cases, the result would be a greater coexistence between public law and private law, with new combinations and new problems.¹⁰⁸ However, this is an optimistic view of these forms of hybridization, as the combination of public and private legal elements can often hide a “dark” side: public actors may involve private interests and stakeholders to strengthen their powers or because they have been “captured” by stronger private powers; also, private actors can

Supragovernmental Regulation: How Could It Be Democratic?”, 8 *Chicago Journal of International Law* 513, 516 (2008). See also C.C. Wendehorst, “The State as A Foundation of Private Law Reasoning”, and J. Basedow, “The State’s Private Law and the Economy Commercial Law as An Amalgam of Public and Private Rule-Making”, both in Jansen and Michaels (eds.), *supra* note 28, respectively at pp. 145 *et seq.* and at pp. 281 *et seq.*

¹⁰⁵ V.E. Orlando, “La crisi del diritto internazionale”, *Rass. dir. pubbl.*, 1949, I, pp. 1 *et seq.*

¹⁰⁶ See Napolitano, *supra* note 4, and Ruffert, *supra* note 4.

¹⁰⁷ As observed by F. Cammeo, *Corso di diritto amministrativo* (Padova, 1914), I, p. 49, at the beginning of the 20th century, administrative law used to adopt instruments already regulated by private law: a similar, but opposite, phenomenon is currently taking place at the international level, where private regimes tend to develop public law-like frameworks.

¹⁰⁸ An interesting case of these problems comes from the public participation standards applied by multilateral development banks (MDBs) to the private sector: see D.D. Bradlow and M.S. Chapman, “Public Participation and the Private Sector: The Role of Multilateral Development Banks in the Evolution of International Legal Standards”, 4 *Erasmus Law Review* 91 (2011).

use public law tools – such as transparency, participation, review mechanisms – as “manifestos” or as merely formal requirements that do not actually affect the actual decision-making process, which will continue in its present state behind “closed doors”. Some observers have already noticed, in relation to the EU and US systems, that among the problems caused by the emergence of transnational governance is that “maximizing transparency and participation for the interested minimizes transparency and participation for the disinterested.”¹⁰⁹

Second, States and governments play a crucial role in this process, and this contributes towards the transformation and hybridization of legal tools, whether public or private. For instance, procedures for rule-making must be adapted when these rules are addressed to States, and review mechanisms may encounter limits when political actors are their subjects. This triggers the development of new instruments, specifically tailored to fit the relationships between States, international organizations and civil society. Furthermore, in legal theory, the State is still seen as a foundation of private law reasoning.¹¹⁰ Not surprisingly, therefore, the more States participate in a global regime, the less it will develop as an autonomous legal system: in the case of the IOC and the global sports regime, for instance, the fact that States are not (at least neither formally nor directly) stakeholder actors favoured the establishment of an extremely complex set of norms and procedures, including a world “supreme court” for sport, the Court of Arbitration for Sport; in the case of the World Heritage Conventions, instead, the preeminent role played by States – first of all as the only parts entitled to submit the candidacy of a site to be inscribed in the World Heritage List – determined the formation of a regime with weak enforcement and sanctioning powers. In sum, beyond the State, public actors themselves contribute to modifying the way in which public law and private law can be combined and perceived.

Lastly, it emerges that the public/private distinction – although not viewed in the same way in different domestic legal orders – tends to be reproduced at the international level to ensure the establishment of certain values. The distinction

¹⁰⁹ See M. Shapiro, “Administrative Law Unbounded: Reflections on Government and Governance”, 8 *Ind. J. Global Legal Stud.* 369 (2000), here at p. 373; and *Id.*, “‘Deliberative’, ‘Independent’ Technocracy v. Democratic Politics: Will the Globe Echo the EU?”, 68 *Law & Contemp. Probs.* 341 (2005).

¹¹⁰ See Wendehorst, *supra* note 104.

operates as a technology of global governance: it is a “proxy”, capable of bringing given values and the legal instruments for protecting them to the international level. This may happen, for instance, when States insist on the immunities and privileges regime and whenever they purport to not cede sovereign powers. But it may also happen when global private regimes – such as that of sports – develop a complex system of governance, that can keep governments out of the game. Once the distinction is considered multifunctional and a “proxy”, it becomes less important to endorse one value or another – such as democracy, legitimacy, freedom of association, etc. – while it becomes crucial to unpack the diverse declinations that the public/private distinction may acquire. Beyond the State, sometimes what is public can act as private, and vice-versa: see for instance, the procedure for selecting the Olympic Host Cities, where a international private body, the IOC, sets the rules for a bid in which the only competitors are municipal public authorities endorsed by their national governments.¹¹¹ This is why, at the global level, the notion of “public authority” has also been used to refer to private actors.¹¹²

5. Public and Private “Coexistence” and “Inter-Breeding” Beyond the State: Perils and Opportunities

In 1831, writing to Blosseville from New York, Alexis de Tocqueville observed that “*le droit administratif 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*”. In 1915 Dicey recalled this sentence in his *Introduction to the Study of the Law of the Constitution*, insisting that “for the term *droit administratif* English legal phraseology supplies no proper equivalent”.¹¹³

This paper has attempted to show that today, public law and private law are extremely close and appear to be rather well-acquainted with each other. The process of imitation that drove administrative law to private law for support for the regulatory

¹¹¹ See Casini, *supra* note 100, p. 154 *et seq.*

¹¹² Goldmann, *supra* note 4.

¹¹³ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, London, 8th ed., 1914) (1982), pp. 214-215.

state may appear to have slowed down.¹¹⁴ But its repercussions are still profuse, and hybrid public-private entities and arrangements dominate domestic legal systems (see the number of public companies and bodies governed by public law).

Beyond the State, the dialectic between these two “poles” becomes extremely intense. The interaction between the other two poles – national and international – triggers new relationships and enhances the dynamics of mimesis. Above all, imitation is no longer only one-way, with public law borrowing instruments from private law. At the same time, this dynamic between public and private seems to enhance the links between domestic law and international law, but also to blur the distinction between the “national” and the “international” in favour of genuinely global legal phenomena.

There is a “mutual” process in which both couples of poles imitate each other: private regimes adopt public law tools and vice versa; international law looks to domestic law instruments and vice versa. Such a multipolar process is amplified by the horizontal links that exist between different regimes, and by their borrowing mechanisms.¹¹⁵ This is why some scholars have already attempted to classify the various ways in which the relationships between the public and private dimensions at the transnational level can change. According to this approach, there are forms of *hybridization*, *collaborative rule-making* (like in the anti-doping regime or for the UN Global Compact), *coordination* (e.g. when a public regime – such as the WTO TBT – relies on the products of another – such as ISO standards), and *competition* (which can happen, for instance, in the production of global indicators).¹¹⁶ This classification is mainly focused on regulatory issues and on legal regimes, and is based on a transnational law perspective and on the idea of “institutional complementarity”. From an administrative law perspective, the public-private relationship can be framed in terms of “coexistence” and “interbreeding”, touching upon several aspects: regulatory, institutional, and procedural. Once projected beyond the State, the public/private distinction serves as a technology of global governance: it is a “proxy”, capable either of consolidating power and retaining sovereignty or of bringing other values to the

¹¹⁴ See C. Harlow, “The ‘Hidden Paw’ of the State and the Publicisation of Private Law”, in D. Dyzenhaus *et al.*, *A Simple Common Lawyer. Essays in Honour of Michael Taggart* (Hart, Oxford and Portland, 2009), pp. 75 *et seq.*

¹¹⁵ K. Raustiala, “The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law”, 43 *Vanderbilt Journal of International Law* 1 (2002).

¹¹⁶ Cafaggi, *supra* note 14, p. 44.

international level. In both circumstances, the projection of this distinction to the international level appears to act as an effective “stabilizer”.

Each of the three processes of interbreeding analysed above can be related to the multipolar character of administrative law, and they all present both ambiguous perspectives.

First, regulatory hybridity is closely connected to the crisis of legality, which characterizes the global legal space as well as domestic contexts. This crisis is also due to the multiplication of law-makers and the rise of norm-producers outside the traditional democratic circuit, as well as to the increasing number of activities delivered by administrative agencies: there are, therefore, legal “black holes” and “grey holes”.¹¹⁷ Beyond the State, this trait is extremely evident: as already observed in the 1960s, “[i]n so far as the rule of law enters international relations, it exists only at the sufferance of the major power holders and to the extent that the latter find it advantageous to submit to its working”;¹¹⁸ many things have changed since then, yet the applicability of the rule of law to States at international level remains problematic:¹¹⁹ the State “is not *just* a subject to international law; it is additionally both a *source* and an *official* of international law”.¹²⁰ From this point of view, the hybridization of public law and

¹¹⁷ This terminology comes from J. Steyn, “Guantanamo Bay: The Legal Black Hole”, 53 *Int'l & Comp. L.Q.* 1, 1 (2004), and D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, Cambridge 2006). It is analysed in detail by A. Vermeule, “Our Schmittian Administrative Law”, 122 *Harvard Law Review* 1095 (2009), who explained – quoting Dyzenhaus – that “legal black holes arise when statutes or legal rules ‘either explicitly exempt[] the executive from the requirements of the rule of law or explicitly exclude [...] judicial review of executive action.’ Grey holes, which are ‘disguised black holes,’ arise when ‘there are some legal constraints on executive action - it is not a lawless void - but the constraints are so insubstantial that they pretty well permit government to do as it pleases.’ Grey holes thus present “the façade or form of the rule of law rather than any substantive protections.” (p. 1096).

¹¹⁸ O. Kirchheimer, “The *Rechtsstaat* as Magic Wall”, in B. Moore Jr. *et al.* (eds.), *The Critical Spirit: Essays in Honor of Herbert Marcuse* (Beacon Press, Boston, 1967), pp. 287 *et seq.*, reprinted in F.S. Burin and K.L. Shell (eds.), *Politics, Law, and Social Change. Selected Essays of Otto Kirchheimer* (Columbia U.P., New York and London, 1969), pp. 428 *et seq.*, at p. 446. In particular, Kirchheimer was responding to A. Chayes, “A Common Lawyer Looks at International Law”, 78 *Harvard Law Review* 1396 (1965), who suggested that “most great disputes between states, even when they involve important legal elements, are not justiciable and for much the same reason that most disputes between organs of our government not involving invasions of private right are not justiciable” (p. 1409). More recently on the function of the rule of law, see J. Waldron, “The Concept and the Rule of Law”, in 43 *Georgia Law Review* (2008), pp. 1 *et seq.*, and D. Dyzenhaus, “The Legitimacy of the Rule of Law”, in *A Simple Common Lawyer. Essays in Honour of Michael Taggart*, *supra* note 114, pp. 33 *et seq.*

¹¹⁹ J. Waldron, “Are Sovereigns Entitled to the Benefit of the International Rule of Law?”, 22 *European Journal of International Law* 315 (2011).

¹²⁰ J. Waldron, “The Rule Of International Law”, 30 *Harvard Journal of Law and Public Policy* (2006) 16, here 23.

private law towards a genuine global law may be considered an instrument to ensure power in the hands of the most powerful actors, i.e. a way to strengthen the parties that already rule a given regime: in other words, hybrid norm-making beyond the State can produce more “grey holes” and exacerbate the crisis of legality in which administrative agencies operate; hybridization would therefore risk favouring what some scholars have labelled the “refeudalization” of public and private, where government by men would prevail over government by laws.¹²¹ However, in such cases the public/private distinction can play a strategic role: it can help to reduce the crisis of legality by helping to build some principles of hierarchical normativity, based on public and private values and interests. To this end, the basic and traditional distinction according to which “all rules of law whose immediate purpose is the promotion of the rights of individuals are parts of the private law”¹²² still appears to be useful. If national legal systems can put a limit on privatization and retain a core of activities as inherently public (such as in the Israeli Supreme Court case regarding prisons)¹²³, then hybrid public-private regimes could progressively build a set of public values which would require further legal protection within the regime itself: “separating public from private is an inevitable task in *any* legal system. To form a government is to agree first and foremost on those decisions a collective will make together and those it will leave for its constituents.”¹²⁴

Second, the proliferation of hybrid public-private institutions at the global level confirms the growing complexity of administrative organization beyond the State. This too favours abandoning the idea that administrative law can be used at the international level only with respect to its procedural aspect, and through principles of participation, transparency and review: a notion deriving from the supremacy of the American administrative law perspective, but one that is gradually giving way to a more comprehensive view of the administrative phenomenon (not only globally, but in

¹²¹ Supiot, *supra* note 13, p. 138 *et seq.*

¹²² F.J. Goodnow, *Comparative Administrative Law. An Analysis of the Administrative Systems National and Local, of the United States, England, France and Germany* (Putnam, New York and London, 1893), I, pp. 14-15, who also recalled the famous line by Ulpian: “Publicum ius est quod as statum rei Romanae spectat, privatum quod ad singulorum utilitatem” (*Institutiones*, I, sec. 4). More recently, see Goodrich, *supra* note 13.

¹²³ *Academic Center of Law and Business v. Minister of Finance*, 19 November 2009, HCJ 2605/05 <http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm>. The case is discussed by Resnik, *supra* note 13, pp. 165 *et seq.*

¹²⁴ C. Turner, “Law’s Public/Private Structure”, 39 *Florida St. U. L. Rev.* 1003 (2012), p. 1005.

American legal scholarship itself).¹²⁵ The growing numbers of IOs, both governmental and non-governmental, and of public-private partnerships requires administrative law tools too, to better frame the coexistence of public and private elements. However, such institutional hybridization should not be pursued to endow private entities with immunities, instead of ensuring the protection of public interests: it is for this reason that the extension of the immunities regime to private bodies should be always seen as an instrument of last resort, as it risks according too much power to those institutions and because it reduces the effectiveness of liability claims – which can often be invoked to fill accountability gaps.¹²⁶ Once again, the public-private distinction can be productively considered to avoid these spill over effects; here, the divide is basically anchored to the role that States and governments can or cannot play in the institution. Although this does not necessarily imply that hybrid public and private regimes will be more democratic, it can at least accord more linkages to public law mechanisms of review and oversight. However, sometimes this cannot be considered satisfactory: in the case of the Internet, for instance, despite the fact that ICANN established an Accountability and Transparency Review Team (ATRT) in 2010, to evaluate its mechanisms for public input, accountability, and transparency, in 2011 some States – like India – continued to request that Internet governance be placed “under the auspices of the UN”.¹²⁷

Third, the procedural dimension beyond the State shows perhaps the highest degree of hybridity, due to the neutral nature of proceedings as an instrument for designing institutions. From this perspective, procedures become the battlefield in which all these hybrid norms are produced and all these hybrid actors play their roles. Here, the public/private divide is even more blurred and ambiguous, to the extent that its usefulness may appear to be low. As for the regulatory dimension, therefore, the distinction can be relevant once it is applied to the interests at stake. Yet, procedures in the global legal space resemble the “interest representation model” of administration, so

¹²⁵ See J.L. Mashaw, *Creating the Administrative Constitution. The Lost One Hundred Years of American Administrative Law* (Yale University Press, New Haven and London, 2012).

¹²⁶ An analysis of these issues with regard to global health is given in L. Clarke, “responsibility of International Organizations under International Law for Acts of Global Health Public-Private Partnerships” 12 *Chicago Journal of International Law* 55 (2011-2012).

¹²⁷ See J. Waz and P. Weiser, “Internet Governance: The Role of Multistakeholder Organizations”, 10 *J. on Telecomm. & High Tech. L.* 331 (2012), at 332.

that all different interests will be assessed to take the best possible decision.¹²⁸ However, as illustrated above, beyond the State, the adoption of administrative law-type procedural tools – such as transparency, participation, and review – can sometimes be only a “panacea”, which may even have negative implications for democracy and accountability.¹²⁹

Thus, the two sets of questions raised at the beginning of this article – related to the doubtful usefulness of the public/private divide once these two poles are so hybridized, and to the very possibility of making such a state-centered distinction in a context where there are no States – find possible answers.

The public/private distinction beyond the State is indeed useful, insofar as it is accepted, but not as a rigid dichotomy capable of identically reproducing itself in all contexts. On the contrary, we have sought to demonstrate that globalization has increased the ways in which public and private law interact at the international level, that there are several criteria for drawing such a distinction, and that what is highly relevant is to understand why hybridization may or may not take place. As a matter of fact, analysis of national legal contexts has already demonstrated that the public/private distinction is a “multifunctional” and “context-dependent” divide rather than a dichotomy.¹³⁰ Furthermore, when the public/private distinction moves from the national level to the international and global levels, it operates mainly as a technology of governance and a “proxy” for bringing given values to a new legal context, and for recreating a “familiar” legal endeavour beyond the State. Regardless of what these values are, both States and private actors may use this proxy as an effective way to organize, manage and protect their powers. However, this functional approach produces several implications: once values and the legal mechanisms behind them are moved from one level to another, it is unlikely that they will remain the same. And sometimes, what appears to be an instrument for maintaining the *status quo* – such as States’ attempt to retain their sovereignty – may have significant spill over effects: the current outcry against IOs’ immunities regime is only one example of this kind of problems.

¹²⁸ Stewart, *supra* note 89.

¹²⁹ As illustrated by Shapiro, *supra* note 109, pp. 373 *et seq.* As a matter of fact, Curtin and Senden, *supra* note 99, p. 187, observe that “[t]oday’s global governance arena is not considered to be defined by unaccountable organizations but, rather, by organizations that are either accountable to the wrong set of stakeholders or focus their accountability on one set of stakeholders at the expense of others.”

¹³⁰ Jurgens and van Ommeren, *supra* note 5.

As to the role of the State, the global level cannot offer the same coordinates as those consolidated at the domestic level, where the distinction between public law and private law can be placed within the State/society dialectic. As mentioned above, the very emergence of global public goods appears to stem from the difficulties in building a similar dyadic relationship beyond the State – where there is neither a “global state” nor a global civil society – given that the latter can be more visible in some regimes, such as the environment, but almost absent in others, such as finance. However, once it is recognized that the public/private distinction can be usefully applied to drive different processes of interbreeding at the global level, the role of the State changes. The State is no longer an indispensable concept for building the public/private divide; it is an actor within the global arena and it contributes towards incrementing the ways in which public law and private law can interact. As a matter of fact, the presence of the State has no longer been considered as the sole condition for building a legal system as well as to produce law.¹³¹

Finally, the relationship between the two great dualisms, once both firmly anchored to domestic legal systems and aimed at resisting the formation of a *ius commune*, appear to be significantly transformed. Not only are both the public/private and the national/international divides more blurred, but they jointly interact in a common global legal space, towards the formation of a genuine global law, “neither ‘public’ nor ‘private’, ‘national’ nor ‘international’”.¹³² In this context, no matter how blurred they may be, such distinctions remain extremely useful because they appear to transcend their contexts of origin. Moreover, these two dualisms, though profoundly modified and reframed, represent fundamental features of multipolar administrative law and they assist to further understand how it operates: the interbreeding processes analysed above confirm the need to “abandon the public law regime paradigm, to depublicize the approach adopted by administrative law scholarship and to study the ambiguities and the richness of the interconnections between public and private law”.¹³³

In conclusion, the perils and opportunities of this coexistence and interbreeding

¹³¹ See J. Raz, “The Identity of Legal Systems”, in *Essays in Honour of Hans Kelsen Celebrating the 90th Anniversary of His Birth*, edited by the California Law Review (South Hackensack, 1971), pp. 795 *et seq.*, especially pp. 811 *et seq.*; formerly, L. Jaffe, “Law Making by Private Groups”, 51 *Harvard Law Review* 201 (1937), and S. Romano, *L'ordinamento giuridico* (Pisa, 1918).

¹³² Zumbansen, *supra* note 17.

¹³³ Cassese, *supra* note 3, p. 608.

are manifold, but they can be summarized in two main possible scenarios. There is a risk that this “mimesis” may trigger a negative dynamic, where “doubles” of legal tools, either public or private, represent – like in Dostoevsky’s novel – “nasty” reproductions, which are less virtuous, and capable of progressively consuming the original ones. Should this happen, the international dimension may become an instrument to favour the strongest interests, discriminate against less powerful actors (such as developing countries) and weaken the effectiveness of domestic legal systems. This kind of process may produce negative effects on both great “dualisms” and may lead to strong reactions: States – especially through domestic courts – could overreact against the development of international regimes to protect fundamental rights. Governments could also activate processes of (re)nationalization despite the directives or policies established by global bodies: see the nationalization of YPF that took place in Argentina, a member of the G-20.

But there is also an opportunity to develop a positive process of transformation, in which the continuous borrowing and lending between public and private can produce *ad hoc* tools that are suitable for dealing with global issues: public law and private law will move from their original mutual indifference – where “*ne sont ni assez amis, ni assez ennemis pour se bien connaître*” – toward a “mutual friendship”. The public/private divide may be “replaced by polycontextuality”, because “contemporary social practices can no longer be analysed by a single binary distinction, neither in the social sciences nor in law; the fragmentation of society into a multitude of social segments requires a multitude of perspectives of self-description. Consequently, the distinction of state/society which translates into law as public law vs. private law will have to be substituted by a multiplicity of social perspectives which need to be simultaneously reflected in the law”.¹³⁴ As a matter of fact, world politics appear to go beyond the friend-enemy distinction:¹³⁵ rather, they appear to sail towards more sophisticated “politics of friendship”.¹³⁶ The case of the G-20’s Financial Stability Board framework and its relationships with private actors seem to confirm this trend, because “the

¹³⁴ G. Teubner, “State Policies in Private Law? A Comment on Hanach Dagan”, in Jansen and Michaels (ed.), *supra* note 28, pp. 411 *et seq.*, p. 413.

¹³⁵ C. Schmitt, *The Concept of the Political* (University of Chicago Press, Chicago, 1996), transl. *Der Begriff des Politischen* (1932).

¹³⁶ J. Derrida, *The Politics of Friendship* (Verso, London and New York, 2006), transl. *Politiques de l'amitié* (1994). *See also* Van Der Heijden, *supra* note 9.

intermeshing of regulatory networks of multinational corporations creates an autonomous governance framework, which then intermeshes with autonomous networks of states and vice versa.”¹³⁷ Within this context of “mutual friendship”, consisting of “transmissions links”¹³⁸ and “borrowing instruments”, many regimes and actors will be interconnected, sometimes knowing where they belong, and sometimes appearing to be “not particularly well acquainted” with each other.¹³⁹

In fact, “if in private life we were to organize a unit for the operation of an industry, it would scarcely follow Montesquieu’s lines. As yet no organization in private industry either has been conceived along those triadic contours, nor would its normal development, if so conceived, have tended to conform to them. Yet the problems of operating a private industry resemble to a great degree those entailed by its regulation. The direction of any large corporation presents difficulties comparable in character to those faced by an administrative commission. Rates are a concern, likewise wages, hours of employment, safe conditions for labour, and schemes for pension and gratuities. There must follow the enforcement of pertinent regulations as well as the adjudication of claims of every nature made not only by employees but also by the public. This is in fact governance.”¹⁴⁰

¹³⁷ L. Catá Backer, “Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order”, 18 *Ind. J. Global Legal Stud.* 751 (2011), p. 799.

¹³⁸ Wendehorst, *supra* note 104.

¹³⁹ C. Dickens, *Our Mutual Friend*, 1865.

¹⁴⁰ J.M. Landis, *The Administrative Process* (Yale University Press, New Haven, 1938), pp. 10-11.

