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Stephan W. Schill

Transnational Legal Approaches to Administrative Law:
Conceptualizing Public Contracts in Globalization

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TOWARDS A MULTIPOLAR ADMINISTRATIVE LAW: A THEORETICAL PERSPECTIVE

Jean Monnet Working Paper 05/13

Stephan W. Schill

**Transnational Legal Approaches to Administrative Law:
Conceptualizing Public Contracts in Globalization**

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

By Stephan W. Schill*

Abstract

The advent of multipolar administrative law poses challenges to the theory of administrative law. These consist in the growing disconnect between administrative law and the nation-state and the continuously close interaction, and at times fusion, of domestic and international administrative law and action, but also in the incremental dissolution of the public-private divide, the contribution of private actors to public governance, and the migration of administrative law ideas across legal orders. Administrative law is thereby placed in a transnational legal space and becomes subject to transnational legal processes. This also has repercussions on the theory of administrative law if the goal of such a theory is to provide an overarching framework for thinking about administrative law whenever and wherever administrative action occurs in times of the increasing detachment of its object from domestic legal sources and domestic public institutions. Such a theory, the paper argues, should take a transnational outlook that overarches domestic and international law and encompasses the idea that both public and private actors and instruments contribute to norm-generation in administrative law. The paper illustrates the idea of a transnational administrative law by looking at the law governing, and emerging from, cooperation between administrations and private actors through (public) contracts, such as public-private partnerships, concession agreements, or state contracts.

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Introduction

The idea of the nation-state as the exclusive unit of governance wanes, but administrative law is more present than ever. In times of globalization, privatization, citizen's participation, and new responsibilities of public authority, it is pushing its disciplinary boundaries in multiple dimensions.¹ *First*, it has continuously expanded its subject-matter over the past decades and entered into areas such as the regulation of energy networks, telecommunication, transport, licensing of medicines, food and health governance, consumer protection, health care, animal protection, regulation of migration and employment, anti-trust and competition law, and financial market supervision and regulation – to name but a few; and it continues to do so as more recent discussions about fracking, carbon capture and storage, or geo-engineering show. *Second*, it has discovered novel instruments of governance and adopted new procedures, including governance through information, indicators, or tax incentives,² but also by recourse to contractual arrangements, such as public-private partnerships (PPPs) and public procurement.³ And *third*, it has expanded into the transnational legal space, with domestic agencies regulating extraterritorial behavior, such as corporate or environmental responsibility in foreign trade and investment,⁴ with domestic agencies cooperating across borders, for example by sharing information or implementing joint

¹ For overviews over the changes administrative law is experiencing from a US perspective R. B. Stewart, "Administrative Law in the Twenty-first Century", 78 *New York University Law Review* (2003) p. 437; from a German perspective D. Grimm, *Das Öffentliche Recht vor der Frage nach seiner Identität* (Mohr Siebeck, Tübingen, 2012); E. Schmidt-Aßmann, "Internationalisierung des Verwaltungsrechts - Einwirkungspfade und Rechtsprobleme", in H. Bauer, D. Czybulka, W. Kahl and A. Voßkuhle (eds.), *Wirtschaft im offenen Verfassungsstaat. Festschrift für Reiner Schmidt* (C. H. Beck, München, 2006) p. 149; *id.*, "Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen", 45 *Der Staat* (2006) p. 315; from a French perspective J.-B. Auby, "La bataille de San Romano. Réflexions sur les évolutions récentes du droit administratif", 57 *L'actualité juridique – Droit administratif AJDA* (2001) p. 912; *id.*, "Globalisation et droit public", in *Gouverner, administrer, juger. Liber amicorum Jean Waline* (Dalloz, Paris, 2002) p. 135; and from an Italian perspective S. Cassese, "New Paths for Administrative Law: A Manifesto", 10 *International Journal of Constitutional Law* (2012) p. 603.

² See e.g. K. E. Davis, A. Fisher, B. Kingsbury and S. E. Merry (eds.), *Governance by Indicators – Global Power through Quantification and Rankings* (Oxford University Press, Oxford, 2012).

³ See e.g. G. A. Hodge, C. Greve and A. E. Boardman (eds.), *International Handbook on Public-Private Partnerships* (Edward Elgar Publishing, Cheltenham, 2010); S. Arrowsmith and A. Davies (eds.), *Public Procurement: Global Revolution* (Kluwer Law International, London, 1998).

⁴ See P. Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press, Oxford, 2nd ed. 2007) pp. 125 *et seq.*

projects,⁵ and with international institutions and international law fulfilling administrative functions and being analyzed with administrative law tools, for example in the context of targeted sanctions by the UN Security Council, the activity of the Basel Committee, the International Atomic Energy Agency, the Clean Development Mechanism under the Kyoto Protocol, or multilateral development banks.⁶ All of this leads to a truly impressive expansion of administrative law, partly within, but above all beyond the borders of the nation-state.

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

⁵ See e.g. M. Audit, *Les conventions transnationales entre personnes publiques* (Librairie Générale de Droit de Jurisprudence, Paris, 2002); M. Kotzur, *Grenznachbarschaftliche Zusammenarbeit in Europa* (Duncker & Humblot, Berlin, 2004); M. Kment, *Grenzüberschreitendes Verwaltungshandeln* (Mohr Siebeck, Tübingen, 2010); M. Glaser, *Internationale Verwaltungsbeziehungen* (Mohr Siebeck, Tübingen, 2010).

⁶ See B. Kingsbury, N. Krisch and R. B. Stewart, "The Emergence of Global Administrative Law", 68 *Law & Contemporary Problems* (2005) p. 15; C. Möllers, A. Voßkuhle and C. Walter (eds.), *Internationales Verwaltungsrecht* (Mohr Siebeck, Tübingen, 2007); C. Tietje, *Internationalisiertes Verwaltungshandeln* (Duncker & Humblot, Berlin, 2001).

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

⁸ *Ibid.*, pp. 28 *et seq.*

dissolutions of boundaries, the question then becomes what are the distinctive features of administrative law as compared to private law and international law today. Furthermore, one needs to ask how a discipline of administrative law can be framed that does not understand itself as a discipline of French, German, Italian, English, or US administrative law, but that has a global outlook and outreach and that deals with administration and administrative law as a phenomenon taking place at different levels of governance and by different actors, and beyond the realm of the nation-state. What, in other words, is the identity of administrative law when administrative action takes place in a seemingly fragmented, but global administrative space on the basis of multiple legal sources and implemented, often across borders, by actors who are not coordinated vertically through hierarchy or horizontally by compartmentalizing their authority into defined territorial units. Under such circumstances, what are possible anchors to frame the identity and unity of administrative law in times of globalization?

The multipolar administrative law approach, which is forwarded in the present set of papers, is an attempt to react to these challenges. Drawing analogies with the concept of multipolarity in neurobiology and international relations⁹ in order to stress that administrative law cannot be construed around the idea of a monolithic center, or acme in a pyramidal structure, it suggests to decouple administrative law from its nationalistic bases and to search for unity elsewhere. Unity, the multipolar administrative law approach posits, could be found in the comparative study of the common roots of administrative legal orders in different countries and by integrating international and European Union (EU) law firmly into the thinking about administrative law. The idea of an integrated view of public law resulting from this

⁹ In neurobiology, a multipolar neuron is a neuron with one axon and multiple dendrites allowing for the integration of a great deal of information from other neurons (see http://en.wikipedia.org/wiki/Multipolar_neuron); in international relations, multipolarity refers to the existence of four or more centers of power that influence and structure international relations (see http://en.wikipedia.org/wiki/Polarity_in_international_relations). Multipolarity in administrative law can then mean two things: *first*, that administrative law, like the axon in a neurone has multiple sources from which stimuli may originate; and *second*, that administrative law is shaped by multiple centers of power and not only anymore the power residing in the state. While the neuronal analogy would consider an outward-looking perspective of administrative law vis-à-vis outside influences that merely stimulate administrative law's information processing behavior, and thus assume a general structural and procedural stability of administrative law, the international relations-inspired idea of multipolarity would focus on the fact that both the content of information and its processing and the institutions and structure of administrative law are subject to multiple influences from outside the state.

perspective could, so it is hoped, “reestablish some form of unitary and systematic perspective on public law in general.”¹⁰ Comparative public law analyses and a study of international and EU law then become central methods to open the science of administrative law both horizontally vis-à-vis the administrative law of other states and vertically vis-à-vis administrative law in the international legal order. The means to develop unity, in turn, consist in stressing the common roots and common principles of an overarching global public legal order.

However, in describing the growing disconnect between administrative law and the nation-state, and in developing a new theory of administrative law, a multipolar administrative law approach should not exclusively focus on the exercise of public authority by public actors and the way that authority changes with the continuously close interaction, and at times fusion, of domestic and international administrative law and action. It should also take account of the incremental dissolution of the public-private divide and integrate the interaction between public and private actors in contributing to public governance. A new theory of administrative law that manages to frame administrative law as a global subject-matter and discipline, in other words, should take a transnational legal outlook, meaning that it is open towards comparative public law, supranational and international legal developments, as the multipolar administrative law approach already is, just as it is vis-à-vis the impact of private law, private actors, and their norm-generating activity as regards administrative relations and administrative law. Certainly, not all activity of private actors is relevant in this context (otherwise there would be no meaningful distinction in relation to private law), but it is to the extent that private actors are integrated through mechanisms of cooperation into performing public functions. Multipolarity in administrative law today, I therefore argue, does not only result from multiple centers of public authority, but involves a multipolarity of public and private actors that engage in administrative governance in a transnational legal space. In this perspective, administrative law is not exclusively a matter of national culture and national law, and compartmentalized into different territorial sectors that transmit public authority to the ground, but a discipline

¹⁰ See “Toward a Multipolar Administrative Law – A Theoretical Perspective”, Call for Papers, available at <http://www.irpa.eu/gal-section/6432/a-multipolar-administrative-law-call-for-paper/> (last visited 29 April 2013).

that focuses on the legal infrastructure the enables and restricts how public governance plays out in a world where borders become increasingly permeable.

A transnational legal approach to administrative law, in turn, calls to build a theory of administrative law that overcomes both the national-international divide and the public-private divide and develops administrative law as a discipline that cuts across these basic disciplinary boundaries. Such a transnational legal approach accounts for the fact that a theory of administrative law cannot anymore be attached to the state and understand the nature of administrative law in terms of its domestic law sources. Instead it must be a theory of administrative law that takes its course from a functional analysis of social relations and public-private interaction, and the respective problems that occur whenever and wherever administrative governance takes place. It does not put the sources of administrative law or specific institutions at the center of a theoretical reconstruction of administrative law, but focuses on the functions of, and the legal instruments used to implement, a multipolar administrative law by both public and private actors.

A transnational approach to administrative law would not only search for the commonality of rules and principles in administrative law across borders and across multiple levels of administration, but insist on the need to study and practice administrative law, even in a seemingly purely domestic setting, by taking into account the interconnections of different administrative spaces and the way ideas and concepts of administrative law travel across borders, traverse the national, regional, and international levels, and develop in the interaction between public and private actors.¹¹ Administrative law, in this perspective, is not crafted entirely autonomously within the boundaries of a pyramidal domestic structure, but develops and is applied within a web of administrative law thinking that is becoming increasingly deterritorialized and focused on administration as a social phenomenon that takes place whenever and wherever public authority is exercised. The identity of administrative law then does not

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

consist of a center or acme, a paradigm reflected in the focus on domestic sources, competences and administrative organization, but in a unifying framework for, and way of thinking about, the plurality of administrative phenomena that brings order to a seemingly fragmented convolute of administrative law sources.

I will illustrate such a transnational legal approach to administrative law in a study of an increasingly important form of administrative action, namely cooperation between administrations and private actors through (public) contracts, such as PPPs, concession agreements, or state contracts. This field is particularly apposite for illustrating a transnational legal approach to administrative law because in the theory of administrative law, such contractual instruments are regularly attributed only minor importance.¹² In fact, they are often treated as an exception to a theory of administrative law that is still primarily, if not exclusively, built on unilateral administrative action as the archetypical instrument constituting administrative law relations. Yet, a comprehensive theory of administrative law cannot anymore be built by focusing only on unilateral administrative action, but needs to attribute equal importance to instruments reflecting horizontal ordering paradigms in administrative relations. To change the traditional focus on unilateral action by taking account of the practical, but also structural importance of instruments of the horizontal ordering paradigm for administrative law, is one aim of the present paper, and of a transnational legal approach to administrative law more generally. Another is to understand that administrative law does not develop anymore in a purely domestic setting, but rather that administrative law and ideas about administrative law are generated in processes that increasingly often bridge the divide between different domestic legal orders, between national and international law, and between public and private actors.

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

In fact, a study of public contracts does not only illustrate the impact of supranational and international institutions and their law on the domestic law of public contracts, it also shows how public contracting is deeply influenced by private actors who influence public contracts in a variety of functions, including as contracting parties, as financiers or guarantors, but also as norm-makers through the development of model contracts. All of this reinforces not only the need for administrative law to cut across the divide between international and domestic law, and to understand which international legal sources affect public contracting domestically; it also calls for transcending the public-private divide, which is deeply enshrined in domestic legal orders and academic discourse, in order to understand the governance impact and structure of public contracts. Finally, public contracts also play an important role in reconstructing a transnational theory of administrative law because these contracts embody heterarchy (or multipolarity) as an ordering paradigm of today's multipolar administrative law.

Against this background, I will first provide a more in-depth analysis of the challenges administrative law is facing that make it impossible to develop a unifying theory of administrative law on the basis of a state-centered and source-centered model. Instead, as I will argue, the new structure and breadth of today's administrative law is best captured by a transnational legal approach to administrative law (Part 1). Subsequently, I will focus on the example of public contracts to reconstruct such a transnational approach to administrative law (Part 2). This will provide an illustration for the argument that administrative law today is best grasped from a transnational perspective that integrates national and international law, as well as public and private actors as coining factors for a multipolar administrative law.

1. Multipolar Administrative Law as Transnational Law

If the task of a unifying theory of administrative law is to capture administrative law writ large, it needs to start with, and then react to, an analysis of the structural changes that challenge the traditional conceptualization of administrative law as tied to the state. As noted, for example, by Paul Craig:

The legislature and the courts are both important in determining the nature and shape of administrative law. The legislature enacts the policies which are

directly constitutive of the administrative state. The legislature chooses whether these policies should be imbued with, for example, a market-oriented neoliberal philosophy, or with one which is more social democratic in its orientation. In this sense, the shape of administrative law is affected by the philosophy that underlies government policy. The courts also have a major influence on the nature of the subject. They decide what particular constraints to impose on administrative action, and more generally on the overall purpose of judicial review. Administrative law, when viewed in this way, is always a combination of the political world, combined with the reactions of the judiciary.¹³

This state-oriented and state law-centered approach to administrative law, which was able to ensure the unity of administrative law and circumscribe the identity of administrative law as a domestic legal discipline, is disappearing due to the dissolution of administrative law's traditional frontiers in a transnational legal space (1.1.). At the same time, new theoretical and conceptual approaches to administrative law have appeared that analyze these structural challenges and develop new theories of administrative law (1.2.). While every single approach captures important facets of administrative law in the age of globalization, these approaches do not mirror all structural changes in a comprehensive manner and are not geared towards formulating an overarching theory of today's multipolar administrative law. Instead, in my view, only a transnational legal approach to administrative law can offer a comprehensive perspective that encompasses other approaches to administrative law and serve as the basis for a unifying theory of a multipolar administrative law (1.3.).

1.1. Structural Change in Administrative Law in a Transnational Legal Space

When constructing a theory that catches the identity of administrative law as a subject-matter and an academic discipline, it is important to reflect and then build on the structural challenges to the traditional ordering paradigms of administrative law of the past, that is, hierarchy (or command-and-control) as an ordering paradigm for administrative law-relations and a method of governance, one the one hand, and the intrinsic connection between administrative action and domestic law, on the other. Both

¹³ Craig, *supra* note 12, para. 1-001 iv.

of these aspects are dissolving in light of the impact of globalization, privatization, and new instruments of governance on the classical, state-centered administrative law. While these factors certainly impact social reality, and hence modify the content of administrative law in reaction to those social changes, globalization also brings about more fundamental structural and institutional shifts.

Most importantly, globalization leads to the dissolution of the most fundamental categorizations used to structure and define fields of law or even entire legal orders, namely the dichotomies of national and international law, on the one hand, and public and private law, on the other. This twofold process reflects the dissolution of the connection between administrative law and the nation-state and reinforces the need to embed administrative law in a transnational legal space. This process can be, and actually is, observed by all administrative lawyers worldwide and can be described along three dimensions: first, the dissolution of vertical boundaries between national and international law; second, the dissolution of horizontal boundaries between different domestic administrative legal orders; and third, the dissolution of the boundary between public law and private law that lies diagonally towards, or cuts across, the two other distinctions.¹⁴

First, domestic administrative law today is faced with the increasing influence of legal sources that are not of domestic law origin but exercise pressure on domestic law to change or demand from domestic administrations to be applied.¹⁵ This may result in a change in the applicable law (from domestic to non-domestic); but even in purely domestic settings there may be transborder aspects involved because the administrative law applied, even though it is formally purely domestic, is based on a norm coming from

¹⁴ I see the public-private boundary as a diagonal boundary, because the impact of private actors and private law can take place from within the domestic administrative legal order concerned; it can stem from the private law of a foreign domestic jurisdiction; but it can also originate from actors constituted under international law that act like private actors and perform essentially private functions, such as international organizations that finance or guarantee infrastructure projects like a commercial bank or insurer or together with commercial actors, such as is the case with the Multilateral Investment Guarantee Agency or the International Finance Corporation, both of which are affiliates of the World Bank Group. Conversely, domestic or international actors may use private law instruments or private law vehicles to fulfill their public tasks, such as the Global Fund for AIDS. All these examples show that the public-private divide cuts across national, international, and foreign law; that is why it is understood as a diagonal boundary for present purposes.

¹⁵ See generally S. Cassese, "Global Standards for National Administrative Procedures", 68 *Law & Contemporary Problems* (2005) p. 109.

outside the domestic context. EU law, for example, requires that domestic administrative procedure be applied indiscriminately to domestic cases and cases involving intra-EU transborder aspects and in a way that domestic administrative law does not constitute an obstacle to the effective implementation of EU law.¹⁶ Similarly, EU law demands the application of any other provisions of EU law by domestic administrations.¹⁷ Likewise, many international treaties require the adoption of domestic administrative law to requirements set by international law. This is the case with the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which has transformed administrative law and procedure by granting the public rights to information, public participation, and access to justice regarding decision-making processes concerning the environment,¹⁸ with GATT Art. X, which requires, *inter alia*, that certain administrative rulings be published and that trade-related rules be administered in a uniform, impartial and reasonable manner,¹⁹ or with Art. XVI:4 of the WTO Agreement, which requires WTO members to “ensure the conformity of its laws, regulations and administrative procedures” with WTO law.²⁰ But also foreign public law can have an impact on how domestic administrations act, for example when the recognition of foreign administrative acts is in question.²¹ Finally, private law sources can affect administrative action, for example when public administrations make use of private law

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

¹⁷ See *Fratelli Costanzo v. Comune di Milano*, 22 June 1989, CJEU, Case 103/88, ECR 1989, 1839 para. 31 (“the individual must also have the right to rely on a directly applicable directive in dealings with State administrative authorities”); *Kühne & Heitz*, 13 January 2004, Case C-453/00, ECR 2004, I-837 para. 20 (“it is for all the authorities of the Member States to ensure observance of the rules of Community law within the sphere of their competence”).

¹⁸ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, opened for signature 25 June 1998, 2161 U.N.T.S. 447. See further A. Fischer-Lescano, “Transnationales Verwaltungsrecht”, 63 *Juristenzeitung* (2008) p. 373.

¹⁹ General Agreement on Tariffs and Trade 1994 (GATT 1994), 1867 U.N.T.S. 187; General Agreement on Tariffs and Trade 1947 (GATT 1947), 55 U.N.T.S. 194. See further D. Livshiz, “Updating American Administrative Law: WTO, International Standards, Domestic Implementation and Public Participation”, 24 *Wisconsin International Law Journal* (2007) p. 962.

²⁰ Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154. See further P. Ala'i, “From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance”, 4 *Journal of International Economic Law* (2008) p. 779.

²¹ See H. Wenander, “Recognition of Foreign Administrative Decisions”, 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2011) p. 755.

to purchase convenience goods, such as office material, or hire contractors to build an office building.²²

Second, administrative law faces a proliferation of actors that assume functions in administrative governance. At the international level, there is an increase in conduct by international institutions that can be understood as fulfilling administrative tasks. For instance, the Organization for Economic Cooperation and Development's PISA study can be understood as administrative governance by information.²³ The acts of foreign administrations, or interests of subjects of a foreign administrative legal order, also become increasingly relevant and hence perforate the horizontal boundary between different domestic administrative legal orders. This is the case for example in an administrative proceeding involving the approval of an industrial plant at a border river, where environmental impact assessments may have to take account of the people living in the neighboring jurisdiction.²⁴ The grant of mining rights in territory under foreign administration and/or occupation may be another case of foreign actors influencing administrative activity and domestic administrative law,²⁵ and so is the joint cross-border administration of infrastructure facilities, such as a waste landfill or a waste-water processing plant. Finally, privatization is an example of administrative tasks being delegated to private actors, who in turn become actors engaged in fulfilling administrative functions.

Third, administrative law is not only subject to an increasing amount of non-domestic and non-public sources and actors. Administrative law also has been exported to conceptualize areas of law and institutional activity that formerly have been analyzed

²² Comprehensively on the use of private law by administration in Germany U. Stelkens, *Verwaltungsprivatrecht: Zur Privatrechtsbindung der Verwaltung, deren Reichweite und Konsequenzen* (Duncker & Humblot, Berlin, 2005).

²³ A. von Bogdandy and M. Goldmann, "Taming and Framing Indicators: A Legal Reconstruction of the OECD's Programme for International Student Assessment (PISA)", in Davis et al, *supra* note 2, p. 52. See also more generally on international institutions exercising administrative tasks, the case studies in A. von Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions* (Springer, Heidelberg ua, 2009).

²⁴ See e.g. the case underlying the dispute in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010, ICJ, Judgment, *I.C.J. Reports 2010*, p. 14, paras. 203 *et seq.*

²⁵ See e.g. Case HCJ 2164/09, 26 December 2011, Israel Supreme Court, English translation available at <http://www.yesh-din.org/userfiles/file/%D7%94%D7%9B%D7%A8%D7%A2%D7%95%D7%AA%20%D7%93%D7%99%D7%9F/psak.pdf>.

purely through the lens of international law or private law. Thus, the Global Administrative Law project has used tools and methods of administrative law to conceptualize the activity of international institutions and restructure its accountability in line with administrative law principles.²⁶ Similarly, areas of extraterritorial activity of domestic administrations, for example in the context of official development aid, have been analyzed as administrative action and subjected to administrative law principles.²⁷ Finally, in a number of different areas, social activity that is organized on the basis of private law and is carried out by non-governmental actors has been analyzed by recourse to administrative law. This is the case, for example, with private codes of conduct, such as the Equator Principles that apply to development finance projects of adhering commercial banks,²⁸ the activity of the Internet Corporation for Assigned Names and Numbers (ICANN),²⁹ or the *lex sportiva*, including the rules of the World Anti-Doping Agency that aims at regulating and suppressing doping in the world of sporting events.³⁰

All of these developments entail various and partly contradictory dynamics that affect administrative law. On the one hand, some of these dynamics lead to more harmonization across different administrative legal orders, as is the case with EU law. On the other hand, most of the dynamics described above fragment administrative law, dissolve well-established boundaries, and create less rather than more homogeneity. Furthermore, these dynamics lead to a modified perception of what characterizes administrative action and administrative law. They lead to a deterritorialization of administration and reflect the increasing functional differentiation, the increase in international law and institutions, and the growing importance of private law and private actors. Structurally, these developments question the boundaries between

²⁶ See Kingsbury/Krisch/Stewart, *supra* note 6.

²⁷ P. Dann, *Entwicklungsverwaltungsrecht* (Mohr Siebeck, Tübingen, 2012).

²⁸ A. Meyerstein, "Global Private Regulation in Development Finance: The Equator Principles and the Transnationalization of Public Contracting", in M. Audit and S. Schill (eds.), *The Transnational Law of Public Contracts* (Bruylants, Brussels, forthcoming 2014).

²⁹ B. Carotti, "L'ICANN e la governance di internet", 57 *Rivista Trimestrale di Diritto Pubblico* (2007) p. 681; J. von Bernstorff, "The Structural Limitations of Network Governance: ICANN as a Case in Point", in C. Joerges, I.-J. Sand and G. Teubner (eds.), *Transnational Governance and Constitutionalism* (Hart Publishing, Oxford, 2004) p. 257; M. Hartwig, "ICANN – Governance by Technical Necessity", in von Bogdandy et al, *supra* note 23, p. 575.

³⁰ L. Casini, *Il diritto globale dello sport* (Giuffrè, Milano, 2010).

national and international law, public and private law, but also bring about changes to today's administrative means of governance. Administrative action is not anymore exclusively top-down command-and-control, but dispersed on a horizontal axis. Cooperative elements increase between public administrations and private actors at the domestic level, but also across borders, including between public and private actors in different jurisdictions, but also between public actors, from the local level of administrations up to intergovernmental cooperation. All in all, these developments embed administrative law today in a transnational legal space that encompasses national and international as well as public and private law and actors.

At the same time, this development poses a risk for the theory of administrative law because both its sources and its actors are dispersed across domestic and international, private and public law. Furthermore, administrative law is not anymore a uniform academic discipline or epistemic community because administrative law thinking and concepts are also used to analyze phenomena that are in the domain of other academic disciplines, such as international law or private law. It is this risk of fragmentation that brings about the need for new conceptual approaches to administrative law to which the paper now turns.

1.2. New Theoretical Approaches to Administrative Law

Numerous approaches have appeared in academic literature that theorize about novel forms of administrative law and that react to some of the challenges discussed above in constructing theories about administrative law in the post-national constellation. They can be grouped roughly into five categories: 1) literature adopting network models to conceptualize the increasing interaction of domestic administrations; 2) literature adopting conflict of laws-thinking in administrative law in order to coordinate between normative commands stemming from different administrative legal orders; 3) literature dealing with the Europeanization and internationalization of administrative law; 4) literature analysing the phenomenon of privatization and its impact on administrative law; and 5) literature using administrative law to conceptualize international institutions, or more broadly, phenomena of global governance.

The first strand of literature focuses on the increasing interaction between domestic administrative law and domestic administrations across borders. On the one hand, it comprises theories that focus on transnational administrative networks in which administrators from different countries cooperate across borders, exchange information, and coordinate their decision-making informally.³¹ Examples of such administrative networks are the International Organization of Securities Commissions (IOSCO)³² or the Basel Committee,³³ in which financial regulators interact in the context of an intergovernmental setting without making binding decisions.³⁴ The advantage of these network approaches to administrative law is the widening of the analysis of administrative law to informal governance. As a basis of a general unifying theory of administrative law, network approaches are, however, both too limited and too comprehensive. On the one hand, the analysis of administrative networks is too limited as it remains within a state-centered paradigm that does not encompass the interaction between public and private actors. On the other hand, its structural analysis is too comprehensive as network phenomena are not specific to administrative coordination across borders, but equally occur in entirely private settings that have no bearing on administrative law.

The second strand of literature focuses on transnational effects and limits of traditional administrative action, for example the transnational effects of unilateral administrative acts. This includes the effect of such acts on foreigners residing abroad, administrative planning and participation of foreign residents and residents abroad, or the recognition of foreign administrative acts.³⁵ But it also includes the analysis of transnational cooperation between administrative actors of different states, for example through transborder contracts between administrations to manage joint infrastructure projects.³⁶ In part, this genre of literature explicitly adopts a conflict of laws-approach

³¹ A.-M. Slaughter, *A New World Order* (Princeton University Press, Princeton, 2004); C. Möllers, "Transnationale Behördenkooperation", 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005) p. 351.

³² See <http://www.iosco.org>.

³³ See <http://www.bis.org/bcbs>.

³⁴ See also P.-H. Verdier, "Transnational Regulatory Networks and Their Limits", 34 *Yale Journal of International Law* (2009) p. 113.

³⁵ Kment, *supra* note 5, p. 267 *et seq.*

³⁶ *Ibid.*, pp. 617 *et seq.*; M. Niedobitek, *Das Recht der grenzüberschreitenden Verträge* (Mohr Siebeck, Tübingen, 2001); Glaser, *supra* note 5; Kotzur, *supra* note 5, pp. 461 *et seq.*

that is reminiscent of private international law thinking in analyzing the interaction of different domestic administrative legal orders in terms of applicable law and recognition of administrative acts on foreign territory.³⁷ In part, it focuses on adapting administrative law and administrative procedure to the exigencies of transnational effects.³⁸ Yet, these approaches focus solely on the horizontal limits of domestic administrative law and the coordination between the administrative laws of different domestic legal orders. They do not take account of the interaction between national and international law and also view the interaction between public and private actors primarily from the perspective of domestic administrative law.

Third, a large part of the literature dealing with the impact of globalization on administrative law analyzes the increasing dissolution between national and international law by focusing on the influence that supranational or international law has on domestic administrative law. This can be the punctual influence of specific supranational or international norms, such as EU law or the Aarhus Convention, that bring about the need for national administrative law to adapt. But external influence on administrative law can also occur in the context of larger legal reform projects where ideas on administrative law travel across borders. Titles like the “transformation of administrative law in Europe”, the “Europeanization of administrative law”, or the “internationalization of administrative relations” are indicative for this perspective.³⁹ While grasping an important aspect of change in administrative law, these studies remain rooted in domestic law and view the impact of international law as an external

³⁷ K. Neumeyer, *Internationales Verwaltungsrecht* (Schweitzer, München, 1910 to 1936); for similar approaches to international administrative law, see also C. E. Linke, *Europäisches Internationales Verwaltungsrecht* (Lang, Frankfurt am Main, 2001); C. Ohler, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts: Strukturen des deutschen Internationalen Verwaltungsrechts* (Mohr Siebeck, Tübingen, 2005).

³⁸ Cf. Kment, *supra* note 5, p. 7.

³⁹ M. Ruffert (ed.), *The Transformation of Administrative Law in Europe/La mutation du droit administratif en Europe* (Sellier, München, 2007); J. H. Jans, R. de Lange, S. Prechal and R. J.G.M. Widdershoven (eds.), *Europeanisation of Public Law* (Europa Law Publishing, Groningen, 2007); F. Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart Publishing, Oxford, 2000); C. Hilson, “The Europeanization of English Administrative Law: Judicial Review and Convergence”, 9 *European Public Law* (2003) p. 125; K.-H. Ladeur (ed.), *The Europeanisation of Administrative Law* (Ashgate, Aldershot, 2002); E. Schmidt-Aßmann, “The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship”, in von Bogdandy et al, *supra* note 23, p. 943.

influence on, not as a genuine part of, their discipline.⁴⁰ Above all, they do not deal with the phenomenon of administrative law on the regional or international level as such.

The fourth strand of literature deals with the increasing impact of private actors on administrative law, in particular in the context of the privatization of formerly public functions, but also through increased cooperation between public and private actors, for example in the context of PPPs.⁴¹ While this literature widens the perspective of administrative law in tackling the public-private divide, its blind spot remains, similarly to the literature focusing on the Europeanization and internationalization of administrative law, a mostly domestic focus. Studies on privatization in administrative law are typically interested in how domestic administrative law implements privatization and how public-private cooperation is operationalized, in particular through various control mechanisms implemented by the public administration, and what limits domestic law imposes on privatization. These studies, however, typically do not analyze the progressive dissolution between public and private as a broader phenomenon affecting administrative law and its theory more generally and do not draw interconnections to the dissolution of national and international law.

Finally, there is the growing body of literature on Global Administrative Law,⁴² international administrative law,⁴³ and International Public Authority.⁴⁴ These projects all react to the phenomenon that there are more and more international bodies that

⁴⁰ This is so even if the increasing influence of supranational and international law on administrative law may ultimately lead administrative lawyers to understand their identity in a broader, non-domestic context. See A. von Bogdandy, "Verwaltungsrecht im europäischen Rechtsraum - Perspektiven einer Disziplin", in A. von Bogdandy, S. Cassese and P. M. Huber (eds.), *Handbuch Ius Publicum Europaeum IV: Verwaltungsrecht in Europa* (C. F. Müller, Heidelberg, 2010) p. 10; *id.*, "National Legal Scholarship in the European Legal Area - A Manifesto", 10 *International Journal of Constitutional Law* (2012) p. 614.

⁴¹ See, for example, P. Verkuil, "Public Law Limitations on Privatization of Government Functions", 84 *North Carolina Law Review* (2004) p. 397; M. Burgi, *Privatisierung öffentlicher Aufgaben – Gestaltungsmöglichkeiten, Grenzen, Regelungsbedarf* (C. H. Beck, München, 2008) (with further references).

⁴² See Kingsbury/Krisch/Stewart, *supra* note 6; N. Krisch and B. Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order", 17 *European Journal of International Law* (2006) p. 1; B. Kingsbury and L. Casini, "Global Administrative Law Dimensions of International Organizations Law", 6 *International Organizations Law Review* (2009) p. 319; G. della Cananea, "Procedural Due Process of Law Beyond the State", in von Bogdandy et al, *supra* note 23, p. 965; Cassese, *supra* note 15.

⁴³ See e.g. D. Ehlers, "Internationales Verwaltungsrecht", in H.-U. Erichsen and D. Ehlers (eds.), *Allgemeines Verwaltungsrecht* (De Gruyter, Berlin, 14th edn 2010) § 4; cf. also Tietje, *supra* note 6.

⁴⁴ von Bogdandy et al, *supra* note 23.

“appea[r] to be engaging in legislative or regulatory activity in ways and for reasons that might be more readily explained by students of bureaucracy than by scholars of the traditional forms for making customary law or engaging in treaty-making.”⁴⁵ Instead of making use of classical public international law concepts and methods, all of these projects draw on (domestic) administrative law thinking to analyze the problems that arise when international institutions increasingly act like administrations vis-à-vis private citizens. However, while recognizing the close interaction between national and international law, these approaches assume the directly opposite perspective from approaches dealing with the internationalization of (domestic) administrative law: while drawing on domestic law to analyze an international legal phenomenon, they exclude administrative action that takes place purely within nation-states.⁴⁶ Furthermore, the distinction between private and public law remains important. For the International Public Authority project, “drawing the line between public and private authority [is] indispensable for legal research”⁴⁷ and hence leads to the exclusion of the analysis of private actors and their influence on public governance.

Global Administrative Law, in turn, is more comprehensive and comes closer to the transnational legal approach suggested in the present paper. It has a broad understanding of administrative bodies as encompassing “formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance.”⁴⁸ Yet, Global Administrative Law also excludes from its scope of analysis domestic administrative action even if it is influenced by foreign or international legal norms and therefore does not claim to deal with the area where administrative law still is most widely practiced and rooted, namely domestic administrative law.

⁴⁵ J. E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, Oxford, 2005) p. 217.

⁴⁶ A. von Bogdandy, P. Dann and M. Goldmann, “Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities”, in von Bogdandy et al, *supra* note 23, pp. 3, 13 (looking towards “institutions [that] exercise authority attributed to them by political collectives on the basis of binding or non-binding international acts”).

⁴⁷ *Ibid.*, p. 14.

⁴⁸ Kingsbury/Krisch/Stewart, *supra* note 6, p. 17.

To summarize, the research questions fueling all of the above mentioned approaches differ from that of the transnational approach to administrative law suggested in the following section. The transnational approach is not only interested in how administrative law changes, how domestic and international law interact in the field, how privatization projects are implemented, or in the criteria under which the exercise of global regulatory powers, or the exercise of public authority, is legitimate and requires normative justification.⁴⁹ It is interested more broadly in mapping how administrative law today transcends national and international, public and private law, and asks how to develop a framework upon which to build a theory of administrative law in such a multipolar world that carves out the overarching identity of administrative law independently of where, by whom, and on which legal basis administrative action is taking place.

1.3. Theorizing Administrative Law in a Transnational Legal Space

Although there is no lack of theoretical reflection on the new forms and instruments of today's administrative law and the challenges that dissolve the foundational boundaries of the state-centered and source-centered theory of administrative law, no single approach in and of itself mirrors all structural changes in a comprehensive fashion. Every single approach explains part of how administrative law changes or is useful to deal with governance problems in a globalized and interconnected world. Yet, none provides an overarching theoretical framework for today's multipolar administrative law. Instead, arguably only a transnational legal approach to administrative law can offer such a comprehensive perspective as a unifying theory for a multipolar administrative law in the transnational legal space. It answers to the much broader question on which basis to develop a theory of administrative law that incorporates all structural challenges administrative law is facing today, that allows us to identify the characteristics of administrative law as a discipline overarching the various scholarly approaches to deal with administrative law beyond national borders, that allows us to understand the specificities of administrative law in comparison to other legal disciplines, and that ensures that administrative lawyers can communicate across

⁴⁹ This is the focus of the International Public Authority Project, see von Bogdandy et al, *supra* note 46, p. 16.

borders and engage in cooperative efforts at developing substantive solutions to problems of administrative relations independently of the domestic or international law that may govern the particular case in concreto.

Such an overarching transnational approach to administrative law is characterized by the aim to develop a framework of thinking about administrative law that not only transcends the boundaries of national and international, public and private law, and analyzes interactions between them, but that does away with the idea that these categorizations denote separate disciplines. Instead, a transnational approach aims at carving out the identity, essence and characteristics of administrative law independently of the applicable legal order. True, there is, and remains, a French, German, English, and US administrative law and theory, just as there is an emerging administrative law of international institutions. Yet, these administrative law disciplines are not self-sufficient and autonomous from each other, but are, as shown above, and as illustrated in Part 2 with respect to the law governing public contracts, increasingly interconnected. International law influences domestic administrative law, domestic law feeds back into international regimes, ideas on domestic administrative law travel across borders, and are influenced both by norm-making activities of public and private actors, and overall integrate into a transnational legal space. All of this allows approaching the analysis of today's multipolar administrative law within the framework of transnational legal thinking.

A transnational legal approach bridges national and international law, public and private law, and asks how actors and instruments contribute to providing order to social relations in administrative contexts. It overcomes the perspective, held for example by Heinrich Triepel, that international and national are "two spheres that at best touch one another, but never intersect,"⁵⁰ just as it transcends the view, held for example by Alexis de Tocqueville, that "le droit administrative et le droit civil forment comme deux mondes séparés, qui ne vivent point toujours en paix, mais qui ne sont ni assez amis, ni assez ennemis pour se bien connaître."⁵¹ It does also not presume hierarchies between

⁵⁰ H. Triepel, *Völkerrecht und Landesrecht* (Hirschfeldt, Leipzig, 1899) p. 111 („zwei Kreise, die sich höchstens berühren, niemals schneiden“ – English translation by the author).

⁵¹ A. de Tocqueville (1831 – cited after Lorenzo Casini, *"Down the Rabbit-Hole": The Projection of The Public/Private Distinction Beyond the State*, Jean Monnet Working Paper No. 8/2013).

different legal orders or approaches, but accepts that different actors assume their own position (and potentially diverging positions) on how national and international, public and private law relate to each other. Its outlook is broader than Philip Jessup's classical definition of transnational law as "all law which regulates actions or events that transcend national frontiers,"⁵² because it does not only cover transborder aspects of administrative relations, such as the involvement of foreign interests or foreign laws, but encompasses administrative law and administrative relations in an all-encompassing way, including where no transborder element is obvious, but is present in how a specific domestic legal norm came about or is applied, for example, by borrowing from a foreign legal system. This is justified by the premise that the amount of entirely autonomous areas of administrative law are continuously shrinking and that transnational legal processes understood as "processes through which these norms are constructed, carried, and conveyed, [and which] always confront national and local processes that may block, adapt, translate, or appropriate a transnational legal norm and spur its reassessment,"⁵³ are more generally on the rise. Independent of the considerable amount of regional and international law that affect domestic administrative law, a frequent transnational element will be that domestic administrative law is viewed in comparison to, and is developed or interpreted against, the experience made with administrative law elsewhere.

In fact, looking abroad for comparison has been a recurring feature in many of the great administrative law systems and among great thinkers of administrative law. As outlined by Giacinto della Cananea, for Alexis de Tocqueville, for example,

[t]he idea that comparative analysis is essential to understand the evolution of political and administrative institutions was not new [...]. When he was younger, and had attempted to study the new institutions of the United States, he was not simply interested in understanding their underlying rationales, ie equality and democracy, for their own sake. Rather, he compared such institutions with the administrative institutions of Europe, particularly with those of France, which he knew best as a member of the *Conseil d'Etat*. In

⁵² P. C. Jessup, *Transnational Law* (Yale University Press, New Haven, 1956) p. 2; see further P. Zumbansen, "Transnational Law", in J. M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Elgar, Cheltenham, 2006), available at <http://ssrn.com/abstract=1105576>. For a suggestion to link administrative law and transnational law see already Fischer-Lescano, *supra* note 18.

⁵³ Shaffer, *supra* note 11, p. 230.

criticizing the French constitutional framework of his time, he was not simply animated by polemic intentions against the patent arbitrariness of administrative justice, which was later emphasized by Albert Venn Dicey. His aim was intellectually more challenging. It consisted of searching for invariable laws, or, more precisely, *les règles invariables qui régissent les sociétés*.⁵⁴

This is an illustration of how domestic administrative law is embedded in transnational legal thinking already at a time when the interconnections between different nations and territories have been far less intensive than today.

Moreover, a transnational approach to administrative law has a different focus from other approaches in order to find unity among different administrative laws and hence to uncover the identity of administrative law. It is based on a functional analysis of administrative relations and does not construct a theory of administrative law that views the sources of law as its centerpiece. Instead, it recognizes that administrative law in a transnational legal space originates from a number of different sources, both domestic and international, but also emerges from the behaviour of public and private actors. It brings structure to administrative law by focusing on administrative actors and the instruments they use in order to reconstruct administrative law in a transnational legal space.⁵⁵ Furthermore, it aims at developing principles underlying administrative action independent of the legal basis on which it takes place and thereby searches for procedural and substantive law guideposts that mitigate between universalist aspirations and safeguarding particularities of different domestic legal orders. Such principles can bring structure to administrative law independently of the applicable source or the relevant actor.⁵⁶

As regards method, the content of principles of transnational administrative law cannot be attached to any specific legal system, whether that is a specific domestic system, or a group of domestic systems, specific international legal regimes, or the

⁵⁴ G. della Cananea, "Minimum Standards of Procedural Justice in Administrative Adjudication", in S. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford, 2010) pp. 39, 53 (quoting from A. de Tocqueville, *De la démocratie en Amérique* (1835), Part I, Ch IV - footnotes omitted).

⁵⁵ Similarly M. Goldmann, "Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority", in von Bogdandy et al, *supra* note 23, p. 661.

⁵⁶ See A. von Bogdandy, "General Principles of International Public Authority: Sketching a Research Field", in von Bogdandy et al, *supra* note 23, p. 727.

international legal order as a whole. Instead, principles of transnational administrative law must be developed through comparative law analysis that encompasses both domestic administrative legal orders, as well as international legal regimes, and takes account of relevant private law sources. Furthermore, both formal and informal sources and processes are relevant to understand how administrative law contributes to governance of a transnational legal space. All of this does not exclude the fact that there can be conflicts between different administrative actors, and between the requirements of different administrative law sources. Yet, a transnational approach to administrative law does not put conflict center stage, but rather looks at the commonalities and at the joint efforts of administrative actors at different levels and in different places to engage in the same task, that is, to govern administrative legal relations. How such a transnational framework of thinking can play out in practice will be discussed in Part 2 with respect to public contracts, which is one form of action of a transnational law in a multipolar world.

2. The Transnational Law of Public Contracts

Having laid out an abstract framework for thinking about administrative law in a transnational perspective, this Part turns to an analysis of the law governing public contracts. The purpose of this is both to illustrate the challenges administrative law is facing in the transnational legal space, but also to offer a practical example for developing and applying a transnational theory of administrative law. In doing so, the following analysis takes up the basic switch a transnational approach to administrative law requires: from sources to actors, instruments, and discourse. This highlights how a uniform theory of administrative law can be conceived that is not based on the idea of hierarchical ordering among actors and that conceptualizes administrative law without placing the state at the center. With this in mind, I will show, first, that cooperative forms of administration are becoming increasingly important instruments of administrative governance (2.1.); second, that public contracting needs to be conceptualized in a transnational perspective (2.2.); and third, that a comprehensive understanding of the processes that determine why and how public contracting disassociates itself from domestic public law cannot content itself with looking at

international legal sources, but needs to endorse a broader vision that focuses on both private and public actors, the instruments they use, and the pressures they exercise on forging public contracts into an instrument of global governance (2.3.). All of this will illustrate that the processes of administrative governance through contract are best grasped by a transnational approach that integrates national and international, as well as public and private law. While the present analysis is limited to public contracts, similar transnational legal processes also take place in other areas of administrative law. Their study, however, is for another day and place.

2.1. From Command to Contract: The Cooperative State in Public Administration

Administrative action was traditionally understood against the background of a hierarchical relationship of supra- and subordination between the state and society. Accordingly, administrative law operated on the basis of command and control. Contracts between the administration and private actors, by contrast, were of little relevance for theorizing about administrative law (with France being a notable exception).⁵⁷ Even more, for purists, such as the father of German administrative law Otto Mayer, writing in 1888, "true contracts of the state in the field of public law are unthinkable."⁵⁸ For him, cooperation in administrative law was an nonexistent ordering paradigm. Even today, hierarchy is so deeply enshrined in administrative law thinking that cooperation is still viewed in administrative scholarship in many domestic traditions as an exceptional form of administrative action.⁵⁹ In any event it is not the form of administrative action that is placed at equal par with unilateral administrative action, let alone at the center, when developing a theory about administrative law and its identity.

The focus on unilateral action in theorizing about administrative law, however, is increasingly in dissonance with the reality of administrative action. Today, public

⁵⁷ See, for example, Waline, *supra* note 12, pp. 446 ff. (with many further references to the French literature on public contracts).

⁵⁸ O. Mayer, "Zur Lehre vom öffentlichrechtlichen Vertrage", 3 *Archiv des öffentlichen Rechts* (1888) pp. 3, 42.

⁵⁹ Cf. P. Kirchhof, "Mittel staatlichen Handelns", in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. V (C. F. Müller, Heidelberg, 3rd ed. 2007) § 99 para. 159.

contracts (and other forms of cooperation) are becoming increasingly important instruments of administrative governance, leading some scholars to qualify the modern state as a “contracting state.”⁶⁰ Privatization of public functions and the rise of state-owned enterprises, the significant increase of PPPs and of concession agreements, private finance of public bodies, including but not limited to sovereign lending, and rule-making and standardization by purely private and hybrid public-private bodies all reflect the rise of the cooperative paradigm in state-market relations.⁶¹ In the United Kingdom, for example, at the end of March 2011 the net book value of private finance initiative (PFI) projects, a form of PPP, amounted to £34.9 billion, and the value of future PFI obligations to £144.6 billion.⁶²

This phenomenon is precipitated not only by the spread of the market-friendly Washington consensus and the voluntary retreat of the state, but by the increasing dependency of public bodies on private finance and expertise when providing public goods in infrastructure, energy, health, education, etc. What is more, the underlying change of paradigm in administrative action is due both to the dynamics of globalization and to changes in what is considered the object and purpose of the state more generally and administrative action in particular, namely the rise of the modern welfare state which leads the state to providing public goods in areas that before were outside its responsibility. Both factors are responsible for states and state entities being increasingly dependent on cooperation with private economic actors in achieving public policy goals.

Policy responses to the financial and monetary crisis perhaps best illustrate the importance of the cooperative paradigm. Thus, the increase of private-public cooperation is one of the central policy goals of the EU and its Member States in response to the crisis, as expressed in the EU’s 2020 Strategy for smart, sustainable and

⁶⁰ I. Harden, *The Contracting State* (Open University Press, Buckingham, 1992).

⁶¹ See K.-H. Ladeur, *The Changing Role of the Private in Public Governance – The Erosion of Hierarchy and the Rise of a New Administrative Law of Cooperation: A Comparative Approach*, EUI Working Paper No. 2002/9.

⁶² HM Treasury, Whole of Government Accounts year ended 31 March 2011 (October 2012), para. 3.83, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/185537/whole_of_government_accounts_31-03-2011.pdf.pdf.

inclusive growth.⁶³ One of the premier responses of that Strategy is that “Europe must also do all it can to leverage its financial means, pursue new avenues in using a combination of private and public finance, and in creating innovative instruments to finance the needed investments, including public-private partnerships (PPPs).”⁶⁴ Similarly, the “Innovation Union” promoted as another so-called Flagship Initiative stresses the importance of private finance in research and development and notes the chilling effect poor administrative processes have on private initiatives, leading partly to outsourcing research and development to countries outside the EU.⁶⁵ Accordingly, a commitment under the Innovation Union initiative is the creation of closer links with the private sector.⁶⁶ This, as the Europe 2020 Flagship Initiative notes, “requires the intelligent use of public private partnerships as well as changes to the regulatory framework.”⁶⁷ PPPs thus become one central instrument to mobilize private and public investment for recovery and long term structural change.⁶⁸ Quite similarly, increasing investment is a strategy stressed and pursued by many international organizations that aim at addressing underdevelopment. The United Nations, to name but one example, view private investment as one important means to reach the Millennium Development Goals of ending poverty and hunger, of achieving universal education, gender equality, lowering child mortality, sustainable development, etc.⁶⁹ All of this enhances the importance of public-private cooperation as a public policy goal, which in turn leads to increasing regulation of that type of cooperation, including in the field of administrative law.

⁶³ Communication from the Commission, Europe 2020 – A strategy for smart, sustainable and inclusive growth, COM(2010) 2020.

⁶⁴ *Ibid.*, p. 20.

⁶⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Europe 2020 Flagship Initiative - Innovation Union, SEC(2010) 1161, COM(2010) 546 final, at pp. 6-7.

⁶⁶ *Ibid.*, at p. 13.

⁶⁷ *Ibid.*, at p. 14.

⁶⁸ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships, COM(2009) 615 final.

⁶⁹ See United Nations Development Program, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals*, Report to the UN Secretary General (2005), at <http://www.unmillenniumproject.org/documents/overviewEngLowRes.pdf>.

However, the decline of hierarchy as an ordering paradigm is not limited to public contracts as a form of administrative action. It also plays out in more traditional areas of administrative law and administrative action, albeit more discretely. After all, the dependency of governments on private actors also affects how administrations govern in unilateral contexts, and how administrative laws are made that are implemented by administrative agencies, because private actors today, including multinational companies but also institutional and private investors, can easily reallocate their financial resources from one jurisdiction to another. This reinforces competition of laws among different jurisdictions that not only play out in the context of corporate law, where this phenomenon has been widely described as the so-called “Delaware effect”,⁷⁰ but also in the context of administrative law and public governance.⁷¹ Competition among different administrative laws therefore also dissolves hierarchy as the traditional ordering paradigm of administrative law even beyond the context of strictly cooperative administrative action.

Accordingly, the theory of administrative law must recognize that in important areas the state does not govern anymore in an entirely unilateral manner by command and control, but increasingly cooperatively. This should also be reflected in the theory of administrative law, namely by not placing the unilateral exercise of public authority at the center of a theory of administrative law, but by encompassing cooperative forms of administrative governance and by realizing that even the unilateral exercise of public authority is subject to restraints, *inter alia*, because capital can flow increasingly freely between jurisdictions in search for the most efficient investment, thus influencing the way states govern and administer.

⁷⁰ But see G. Subramanian, “The Disappearing Delaware Effect”, 20 *Journal of Law, Economics & Organization* (2004) p. 32.

⁷¹ Cf. on international competition in the area of investment rules A. Guzman, “Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties”, 38 *Virginia Journal of International Law* (1998) p. 639. Likewise, there is heavy competition among countries with respect to tax legislation.

2.2. Public Contracts as Instruments of Global Governance: Dissolving the Domestic-International Divide

A further discontinuity in the context of public contracts relates to the legal sources that govern cooperative forms of administrative action. Public contracting and public contracts law, as this section will show, needs to be conceptualized as an instrument of global governance and, in consequence, the law governing public contracts cannot sensibly be conceptualized exclusively through a domestic law lens. This breaks with the traditional conceptualization of administrative law in general, and public contracts law in particular, which viewed public contracts as instruments of domestic public law used within markets confined to the territory of the state party to a public contract. This focus on domestic territory, domestic actors, and domestic law, however, disregards many processes that take place at the supranational and international level and that have significant impact on domestic public contracting. In consequence, transnational legal processes need to be taken into account when conceptualizing public contracts law.

In fact, public contracting today is internationalized not only as regards participating actors, but also in terms of the legal sources that govern it. The law relating to cooperative administrative action encompasses domestic, supranational, and international sources. Furthermore, international and supranational law influences all phases of public contracting, including the selection of contractors, the conclusion of public contracts, the implementation phase of public contracts, and dispute settlement. It can affect, *inter alia*, the selection of contractors and their personal eligibility, the substantive eligibility of projects that are implemented by means of public contracts, the procedure applicable to selecting, concluding, and implementing public contracts, the substantive rights and obligation governing the implementation of public contracts, the procedural protection against governmental misconduct and related review and accountability mechanisms, and institutions involved in monitoring and supervising conduct of parties under public contracts.

Several factors play a role in internationalizing public contracting and in bringing international and supranational law into the picture. First, in addition to the competition between different administrative legal orders already mentioned, the

cooperative form of public contracting as such has the effect of breaking with a purely domestic law focus because in many cases the contracting partner will be a foreign entity. This has the effect that international law relating to the protection of foreign investors comes into play.⁷² This includes the customary international law minimum standard and, more importantly, the law of now more than 3,000 bilateral, multilateral, and sectoral investment treaties, including Chapter 11 of NAFTA and the Energy Charter Treaty. The rights granted to foreign investors in these instruments have an effect on the substantive and procedural law applicable to public contracts independently of the state party's domestic law, and establish independent requirements, such as a right to be heard and a duty to give reasons, and condition the exercise of administrative discretion. They may also limit the regulatory powers of the state party and specific contractual powers to modify or terminate public contracts, which domestic law often provides, and require non-discrimination with domestic contractors. Finally, investment treaties grant foreign investors access to international arbitration, thus bypassing dispute settlement as provided for under public contracts or domestic law. To the extent foreign entities are involved as parties to a public contract, international law therefore supplements domestic public contracts law (partly in a complementary fashion, partly overriding it).

Second, the participation of foreign entities is often not the result of chance but of deliberate planning. States deliberately make use of international law to break open the domestic focus of public contracting by implementing contract award procedures that systematically extend the market for public contracts beyond that of the contracting state party. Various instruments of international procurement law, including the WTO Agreement on Government Procurement,⁷³ various bilateral free trade agreements containing procurement chapters,⁷⁴ or EU directives relating to procurement,⁷⁵ mandate

⁷² For a brief overview on the impact of international investment law on public contracting see S. Schill, "Contracting with Foreigners: International Investment Law Implications", in R. Noguellou and U. Stelkens (eds.), *Droit comparé des contrats publics/Comparative Law on Public Contracts* (Bruylants, Bruxelles, 2010) p. 63 (with further references).

⁷³ Agreement on Government Procurement, entered into force 1 January 1996, amended 15 December 2011; see http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

⁷⁴ See R. Anderson, A. C. Müller, K. Osei-Lah, J. Pardo de Leon and P. Pelletier, "Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to GPA Accession?", in S. Arrowsmith and R. D. Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, Cambridge, 2011) p. 567.

international advertisement of public procurement, bidding procedures according to international standards, and international standards for contract awarding and review. All of these instruments are geared towards breaking open the territorial limitations of markets for public contracts. They do not only internationalize the selection and conclusion phase of public contracts but also are responsible for strengthening the impact of those international rules and principles that affect the implementation phase of public contracts and the rights and procedures of parties to public contracts. Moreover, these processes do not only affect contracts between the state and foreign nationals (ie international public contracts in the strict sense of the word), but also contracts that would normally be classified as purely domestic contracts. International and supranational law on domestic public contracts law therefore becomes a phenomenon of general impact; it is not restricted to a certain class of private economic actors or specific industry sectors.

Finally, there are even instances where international law is used to harmonize domestic public contracts law. This is the case, for example, with the EU directives relating to public procurement, which harmonize the award procedure and law relating to the conclusion of public contracts by EU Member States. But there are also cases where international law is used more broadly to harmonize the public contracts regimes of several states. In the mining industry, for example, the West African Economic and Monetary Union started, based on an international treaty, to harmonize the mining laws, including the award of mining concessions.⁷⁶ This affects domestic and international public contracts law in that specific sector and does away with a strict separation of domestic and international law.

⁷⁵ See Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30 April 2004, p. 114; Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30 April 2004, p. 1; Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216, 20 August 2009, p. 76.

⁷⁶ See Economic Community of West African States, Directive C/DIR.3/05/09 on the Harmonization of Guiding Principles and Policies in the Mining Sector, 27 May 2009, available at http://www.comm.ecowas.int/sec/en/directives/ECOWAS_Mining_Directives.pdf.

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

On a theoretical level, these developments mandate, in order to get the full picture of legal sources that are active in the transformation of public contracts from an instrument of domestic governance to an instrument of global governance, to have regard to domestic as well as supranational and international legal sources. Only looking at all of these sources together can explain the law governing public contracts sufficiently and, in particular, how it contributes to ordering social relations. In consequence, the study of administrative law and its theory must be decoupled from domestic law and domestic perspectives. Instead, theorizing about administrative law today needs to integrate not only a comparative law perspective in order to enhance domestic administrative law; it needs to realize the increasing interaction of domestic administrative law with both international law and foreign administrative law and integrate this factor into the very conception of administrative law.

2.3. Norm-Production in Public Contracting: Dissolving the Public-Private Divide

The transnationalization of public contracting and public contracts law is not limited, however, to changes in the applicable legal sources. Instead, there are other less obvious and more discrete processes that affect public contracting and that require giving up a focus on public contracting that concentrates exclusively on formal public law sources.

In fact, in many cases public contracting is influenced by transnational processes that do not change the applicable law to public contracts as such and that do not make use of legal means to affect public contracting. A focus on legal sources would disregard these informal processes, although they transform public contracts into instruments of global governance and require adaptations to the theory of administrative law. In fact, in many cases non-binding soft-law instruments play an increasingly important role in affecting public contracting. Furthermore, public-private cooperation brings in additional actors beyond domestic and international *public* authorities. Notably private actors, including financiers and guarantors and their interest associations, in addition to contractors themselves, affect how public contracting is conducted today. Likewise, arbitrators as novel dispute settlers other than domestic or international courts come into play in settling disputes and acting as governance institutions. All in all, the spaces of norm generation relating to public contracts therefore become dispersed and encompass public authorities at the domestic and the international levels, as well as private actors. Let me illustrate this with a few examples.

First, public contracting is not only determined by domestic, supranational, and international law hard law. There is also a significant body of soft law created by international public bodies that impacts domestic public contracts law and public contracting. Its effect is mostly to harmonize cooperative administrative action and its bases in domestic law. One example for such a soft law instrument is the UNCITRAL Model Law on Public Procurement.⁷⁷ It represents a model law developed by an international organization that can be enacted autonomously by domestic legislators to govern public procurement. Notably, the purpose of developing such a model laws is not only to compensate for a lack of law-making and legal drafting expertise at the domestic level. The purpose of the model law is also to bring about autonomous harmonization of domestic procurement laws in the absence of an international treaty obligation to do so and therefore to widen the domestic market for public contracting by allowing foreign

⁷⁷ See the text in *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I, available at http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/ML_Public_Procurement_A_66_17_E.pdf.

bidders to participate in public tenders on the basis of standardized procedures.⁷⁸ As a consequence, even though any law enacted on the basis of the model remains a domestic law, which is subject to the jurisdiction of domestic courts, its interpretation and application is intrinsically connected to the law-making process at the international level. Only capturing this background will provide a full picture of the administrative law resulting from the implementation of that, or any other, model law.

Another example of how soft-law developed by international organizations can impact and harmonize domestic public contracting are the UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing, which set out substantive and procedural principles for how states should structure and restructure sovereign debt (which is usually subscribed to in the form of contracts with private financiers).⁷⁹ Again, the purpose of such an instrument is not only to influence how domestic law structures substantive rights and obligations of parties to sovereign debt contracts and how the respective procedures for borrowing and restructuring sovereign debt should be set up. Rather the principles aim at harmonizing, and thereby facilitating transactions between public and private actors in a global capital market. They thereby contribute to the management of a global public good, namely the global market for sovereign debt. International soft law in this case serves an important function in breaking the national-international law divide and illustrates the influence of international actors on public contracting in the absence of binding norms.

Second, public contracting is influenced significantly by expectations created, and requirements set, at the international level that are transmitted to the domestic level via the involvement of financiers or guarantors of public contracts passed between states and private economic actors. For instance, the Worldbank's Environmental and Social Safeguard Policies that apply to Worldbank lending activities,⁸⁰ or the Multilateral

⁷⁸ See Guide to Enactment of UNCITRAL Model Law on Public Procurement, adopted 28 June 2012, p. 2, available at <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/pre-guide-2012.pdf>.

⁷⁹ See UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing, amended and restated 10 January 2012, http://unctad.org/meetings/en/Miscellaneous%20Documents/Principles_Sovereign.pdf.

⁸⁰ See, for example, World Bank, Operational Policy 4.01 on Environmental Assessment, available at <http://go.worldbank.org/K7F3DCUDD0>, and Operational Policy 4.10 on Indigenous Peoples, available at <http://go.worldbank.org/UBJJIRUDPO>.

Investment Guarantee Agency's Environmental and Social Safeguard Policies that govern the issuance of investment guarantees,⁸¹ affect public contracting because they influence, *inter alia*, the eligibility of projects. They thereby exercise a compliance pull that requires governments to adapt domestic administrative laws and policies whose implementation involves public contracts to international standards which are, in turn, set by financiers and guarantors of relevant projects. In addition, international financing of public contracts can bring in new monitoring mechanisms also for the benefit of affected populations as is the case with the World Bank Inspection Panel.⁸² Likewise, this can affect the domestic administrative process and law governing the projects at stake.

Third, not only soft-law generated by *public* financiers influences domestic public contracting. Also purely self-regulatory private regimes, such as the Equator Principles, which contain requirements for environmental and social risk management in private financing of development projects,⁸³ exercise pressure on domestic law and domestic public contracting. Furthermore, private actors are active in developing soft law for public contracts in many industry sectors through model contracts that then serve as a basis for concluding binding contracts between public bodies and private actors. The petroleum industry is a particularly striking example in that many of the contracts between host governments and oil companies are concluded on the basis of models developed, for example, by the Association of International Petroleum Negotiators (AIPN), a private industry association.⁸⁴ Scholars accordingly speak, in parallel to the concept of *lex mercatoria*, of the existence of a *lex petrolea* that consists of national and international, public and private law governing the mostly contractual relations between governments and oil companies in a field that many will consider as a core area of administrative law. Likewise, model contracts developed by private actors play an

⁸¹ See Multilateral Investment Guarantee Agency's Policy on Social and Environmental Sustainability of 1 October 2007 (Annex B to Operational Regulations).

⁸² See I. F. I. Shihata, *The World Bank Inspection Panel in Practice* (Oxford University Press, Oxford, 2nd ed. 2000).

⁸³ See at <http://www.equator-principles.com/>. See further Meyerstein, *supra* note 28.

⁸⁴ See K. Talus, S. Looper and S. Otillar, "Lex Petrolea and the Internationalization of Petroleum Agreements: Focus on Host Government Contracts", 5 *Journal of World Energy Law & Business* (2012) p. 181.

important role in sovereign debt financing.⁸⁵ All of these cases illustrate the need to widen the perspective beyond public regimes (both domestic and international) in order to understand what processes, actors, and instruments affect contracting between public and private entities.

Finally, new adjudicators other than judges in national and international courts play an important role as generators of public contracts norms, in particular arbitrators that are called to decide dispute arising under public contracts. They derive their authority either from arbitration clauses in public contracts themselves or from arbitration clauses in international investment treaties. Illustrative for the type of disputes settled by private-public arbitration are arbitrations involving water concessions in Bolivia, Argentina, and Tanzania,⁸⁶ or arbitrations challenging measures for the protection of the environment under a contract-like operating license for a coal-fired power plant in Germany.⁸⁷ What is important in this context is that arbitrators do not only settle individual disputes under public contracts, but increasingly exercise governance functions as arbitration becomes the preferred method of resolving disputes between the state and the private sector in important fields like energy, public utilities, and infrastructure. Arbitrators exercise governance authority in these cases because arbitral awards become increasingly public and influence arbitral decision-making through precedent. Furthermore, the core community of arbitrators is sufficiently small so as to generate an *esprit des corps* that leads to specific modes of interpreting, and thus making, public contracts law.⁸⁸ This law is likely to become increasingly independent from specific national contexts, considering that similar developments,

⁸⁵ See, for example, S. J. Choi, M. Gulati and E. A. Posner, *Political Risk and Sovereign Debt Contracts*, John M. Olin Law & Economics Working Paper No. 583 (2d Series), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3102&context=faculty_scholarship.

⁸⁶ See, for example, *Biwater v. Tanzania*, 24 July 2004, Award, ICSID Case No. ARB/05/22; *Aguas del Tunari v. Bolivia*, 21 October 2005, Decision on Respondent's Objections to Jurisdiction, ICSID Case No. ARB/02/3; *Suez Vivendi v. Argentina*, 30 July 2010, Decision on Liability, ICSID Case No ARB/03/19.

⁸⁷ *Vattenfall v. Germany*, 30 March 2009, Request for Arbitration, ICSID Case No. ARB/09/6.

⁸⁸ B. Kingsbury and S. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, IILJ Working Paper 2009/6 (Global Administrative Law Series), available at <http://www.iilj.org/publications/documents/2009-6.KingsburySchill.pdf>.

namely the generation of a *lex mercatoria*,⁸⁹ took place when transborder disputes between private parties were settled by arbitral tribunals. Arbitrators thus become power players in the field of governance and may redefine through their dispute settlement activity the relationship between private rights and public interests in the context of administrative action. This raises important legitimacy issues,⁹⁰ but for present purposes, it is sufficient to note that public contracts law is also affected by how it is interpreted by international arbitrators and that those arbitrators do much more than simply settling individual disputes; instead, they contribute to the making of a transnational administrative law.

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

3. Conclusion

Administrative law, both as an area of law and as an academic discipline, faces transformative challenges. These challenges are connected to the increase in transnational legal problems, that is, problems that transcend the boundaries of any

⁸⁹ Cf. S. Schill, "Lex Mercatoria", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol vi (Oxford University Press, Oxford, 2012) p. 823 (with further references).

⁹⁰ See, for example, M. Sornarajah, "A Coming Crisis", in K. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, New York, 2008) p. 39; C. N. Brower, "A Crisis of Legitimacy", *National Law Journal* (7 Oct. 2002), B9.

single nation-state and that induce legal solutions, including under administrative law, that are not tied to a domestic legal frame. Instead, legal solutions to transnational legal problems develop within a transnational legal space. Two phenomena come together in this context: first, the increasing deterritorialization of modern society in the process of globalization, and hence the transnational nature of that society's needs and concerns (ranging from simple transborder transactions to global phenomena such as the internet), and second, the denationalization of legal authority to get to grips with such problems. Denationalization can involve a relocation of legal authority to international institutions, but also the exercise of extraterritorial authority of public actors at the domestic level, the borrowing and transplantation of laws and legal concepts across borders, or a more intensive involvement of private actors in accomplishing the task of governing legal problems. The aggregate of all law and legal processes involved in dealing with such problems then forms the object of a transnational legal approach. It builds on a framework of thinking that transcends both the national-international and the public-private divide, but aims at understanding law today, including administrative law, as a transnational phenomenon.

Transnational legal processes also affect administrative law. They illustrate a fundamental break with the traditional idea that administrative authority, and hence administrative law, is necessarily connected to the nation-state. Rather, administrative action today takes place both at the national and the international level and originates from both public and private actors. This increases the legal sources of administrative law as well as the actors applying, and most importantly creatively shaping, it. Transnational legal processes thus challenge the idea that administrative law has a center or acme, like the one that existed in the form of the classical nation-state with its Weberian command-and-control bureaucracy that governed top-down. Today, administrative law as a whole is multipolar because it lacks a hierarchical structure and instead consists of a network of multiple actors that bring their understandings and approaches to administrative law to bear in governing administrative legal problems.

The advent of a multipolar administrative law also poses challenges to a theory of administrative law that can serve as a unifying framework to think about administrative action and administrative law in a transnational legal space. If one aims at sustaining

the idea that there is a general theory of administrative law in a globalized world, that is a theory that explains the specificities of administrative law, its subject-matter, and legal principles, independently of any specific domestic or international administrative institution, an adequate theory of administrative law must decouple administrative law from its national basis and put it on a different conceptual and methodological footing. Such a general theory, this paper has argued with a specific focus on public contracts, requires a transnational outlook that overarches domestic and international law and encompasses the idea that public administration (or administration in the public interest) can be exercised by public and private actors.

Such a general theory cannot be developed in departing from the administrative law of a specific country. Instead, it must depart from a functional analysis of the problems, interests, and structural elements of administrative relations *per se*, meaning that it needs to abstract from specific legal orders and institutions, and construct a generally valid legal framework from an analysis of administration as a generic phenomenon of different societies and their respective political order. Such a general theory could develop, for example, more specific theories or sub-categories of a general theory, such as a theory of forms of action⁹¹ or procedural and substantive principles,⁹² based on an abstracted analysis of common features of any administrative activity. Methodological tools for such a functional approach could be law and economic analysis, political economy, governance analysis, normative-doctrinal reconstruction, or critical thinking, but above all a comparative analysis of the legal structures of administrative law as they can be found in different domestic legal orders and international regimes. Such a comparative analysis can then be used to attempt to develop general principles of administrative law, as regards procedure, and perhaps even substance, that form part of a transnational administrative law.

Suggesting the methods to achieve such an aim in the future does not, of course, equal such a theory. It just describes the path towards it. Until such a transnational theory of administrative law has been spelled-out and written, a general theory of

⁹¹ Cf. M. Goldmann (ed.), *Internationale Öffentliche Gewalt* (Springer, Berlin, forthcoming 2014).

⁹² See A. von Bogdandy, "Grundprinzipien von Staat, supranationalen und internationalen Organisationen", in *Handbuch des Staatsrechts*, vol. XI (C.F. Müller, Heidelberg, 3rd ed., forthcoming 2013).

administrative law has to content itself with more modest ambitions. While it needs to have a transnational outlook and understand administration and administrative law as a phenomenon that cuts across the national-international and the public-private divide, it can only draw tentative conclusions. But it arguably can make a virtue out of this necessity and claim its specific methods of analyzing problems of administrative governance in a transnational legal space and its method of providing solutions to such problems on the basis of administrative law principles as a discipline-defining characteristic that other legal disciplines, above all international law and private law, cannot replace. Administrative law in times of its multipolarity can therefore not be understood as the entirety of all laws that govern, both procedurally and substantively, the relations between the state and its citizens. Instead, the unifying features behind administrative law in times of its multipolarity can so far only consist in the unifying features of the discipline of administrative law and the way it practices administrative law, analyzes its underlying problems, and conceptualizes the methods for their solutions. The identity of administrative law then lies in its specific mindset and method of analyzing problems of administrative relations.

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