1. The expansion of the material scope of global law

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1 BEYOND THE ‘BUREAUCRATIC HAZE’: THE EMERGENCE OF GLOBAL LAW

Today there is more global policymaking, in more varied forms, than ever before, and the unwary student soon finds him- or herself stumbling through a landscape of obscure acronyms that stretch endlessly into a bureaucratic haze. There are military alliances, such as NATO and WEU; intergovernmental organizations in the classic mold, from the UN to specialist agencies such as the ILO, ICAO, ICC, WHO, and GATT; regional bodies, like the Council of Europe, the European Commission, and the Organization of American and African states; post-imperial clubs, like the Commonwealth and the Organisation international de la Francophonie; quasi-polities like the European Union; and regular summit conferences like the G-20. Nor should one ignore the vast number of NGOs of all kinds, many of which also now play a more or less formalized role in shaping global politics.1

The ‘bureaucratic haze’ described in this quotation is evidence of the extraordinary expansion of international law over the last few decades. Although the origins of this expansion date back as early as the enactment of the UN Charter, it was with the end of the Cold War that globalization was boosted in all aspects: economic, political and legal. Since the 1990s, therefore, international law has progressively expanded its jurisdiction, to the extent that almost all sectors of human activity are now regulated by norms produced beyond the State. Data and figures clearly show this irresistible rise of rules, institutions and regimes, as demonstrated in all chapters of this Handbook. This now happens in fields as diverse as

forest preservation, the control of fishing, water regulation, environmental protection, standardization and food safety, financial and accounting standards, internet governance, pharmaceuticals regulation, intellectual property protection, refugee protection, coffee and cocoa standards, labor standards, antitrust regulation, regulation and finance of public works, trade standards, regulation of finance, insurance, foreign investments, international terrorism, war and arms control, air and maritime navigation, postal services, telecommunications, nuclear energy and nuclear waste, money laundering, education, migration, law enforcement, sport, and health.2

If almost all fields of activity today are more or less affected by globalization, there are of course sectors in which global law presents a higher degree of development and maturity. This happens for specific reasons, which can be identified as the ‘drivers’ of

1 Mark Mazower, Governing the World. The History of an Idea (Penguin 2012) XVII.
global law expansion: the need to establish global rules in specific sectors, such as trade and finance; the development of human rights law, exemplified by the increasing size of the human rights apparatus within and outside the UN system; the emergence of global public goods, followed by the need to deal with them at global scale (such as in the case of the environment, world heritage, health, peace and security); the growth of transnational – namely private – regimes such as sports or the Internet, which have been progressively hybridized with public authorities and public law elements (see, for example, the case of anti-doping). These four drivers – but many more may be named – have triggered the expansion of global law in all its aspects – regulatory, institutional, (quasi-)judicial and procedural: unsurprisingly, the above-mentioned sectors are those with the highest number of active international organizations (IOs).

Therefore, of the over 60,000 international organizations and more than 2,000 global regulatory regimes, this chapter will focus on the material scope of global law and its expansion. In particular, the material scope of global law is considered here from a dual point of view. On one hand, it is intended as the various sectors in which global law has expanded pursuant to different ‘drivers’. On the other, it refers to global law’s degree of development and the depth of its interconnectedness with international law and domestic legal orders. The first perspective may be defined as horizontal because it deals mostly with the main causes that triggered and fostered the expansion of global law in different sectors. The second perspective may be described as vertical, because it focuses essentially on how global law increased its permeation of national legal orders. These two perspectives are of course closely intertwined, but will be separated here to better illustrate how global law has formed and expanded. Indeed, it is necessary to consider that horizontal expansion goes hand in hand with the vertical expansion and vice versa, since global law often penetrates national legal orders by adopting horizontal linkages and borrowing legal instruments across sectors.

This analysis will be divided into three sections. The first section will identify and analyse various drivers of global law’s development, examining the main reasons why this type of law could flourish. The second section will discuss the expansion of global law and its four main dimensions – regulatory, institutional, (quasi-)judicial, and procedural – to illustrate how international law and national law are now embedded in global norms. The third section will describe the interactions between the drivers and the dimensions, and will outline the patterns of legal globalization that led to such a significant expansion in the material scope of global law. Finally, some conclusions will be drawn on how these phenomena affect the very essence of global law and its growth.

First, however, it is necessary to clarify what is meant by ‘global law’. As for the term ‘global’, this can be considered from three perspectives. First, it refers to the entire world to include any geographical area. For example, the Internet aims to reach every corner of the world; climate change affects the entire planet; and the Olympic Games involve athletes from the whole world. Second, the term ‘global’ can include

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3 Stefano Battini, ‘The proliferation of global regulatory regimes’, Ch 2 of this Handbook.
4 Ibid.
The expansion of the material scope of global law

both international and national spheres, both international organizations and domestic administratings. Third, it indicates the coexistence of all the different legal ‘labels’ that are usually adopted to discuss ‘global governance’, i.e. international, transnational and supranational.

Regarding ‘law’, the Fuller/Hart discourse will be temporarily set aside and the term will be used in its meaning of ‘system of rules’, which in this case regulate international organizations, States and civil societies. Therefore, ‘global law’ refers to norms that spread across the entire world, involve international, transnational and domestic levels, and affect individuals directly. This heterogeneous complex of norms has dramatically expanded its material scope. It is indeed significant that all areas that were labelled ‘new fields of international law’ in the 1960s are now substantive parts of global law: international constitutional law, international administrative law, international labour law, international criminal law, international commercial law, international economic development law, international corporation law, international antitrust law, and international tax law.6

2 THE HORIZONTAL EXPANSION IN THE MATERIAL SCOPE OF GLOBAL LAW

The material scope of global law has thus constantly grown over the last few decades, and now covers almost every single sector. To explain this expansion, a functionalist approach is fundamental: according to this approach, a public aim that is identified and regulated by norms justifies the application of administrative law rules regarding the public to the institutions (and any other actors) of a given regime. In other words, in many cases global law could expand its material scope simply because there was a need to pursue a global collective or public interest, which requires norms, institutions and procedures. As observed in the early twentieth century,

[when any social or economic interest has assumed the character of a world-wide relation, when its activities in order to succeed must rest on the experience of all mankind, and must extend their operations over numerous national territories, then such an interest can be effectively regulated only upon a world-wide basis.7

Are there any patterns behind such a huge expansion? There are, of course, several reasons for this growth, which can be traced to different factors. These range from the globalization of markets to information technology. Indeed, the effects of globalization include the extraterritorial impact of human activity and a deficit in the effectiveness

and accountability of national regulation, together with a need to control the exercise of national rights to regulate.\(^8\)

This chapter will now focus on the main dynamics of this phenomenon, which appears to have most favoured the development of global law and the expansion of its material scope.

### 2.1 Common Rules for Global Markets

One of the first drivers of the expansion of global law was the need to establish global rules in specific sectors, such as finance and trade. Indeed, trade is one of the most ancient and perhaps the most prominent example in which these dynamics arose.\(^9\) The World Trade Organization (WTO) currently has over 150 Member States (in the original General Agreement on Tariffs and Trade (GATT) 1947, there were only 23). Moreover, the WTO’s complex system of norms reaches across different fields and ranges from GATT and the General Agreement on Trade in Services (GATS), through the TBT (Technical Barriers to Trade) and SPS (Application of Sanitary and Phyto-sanitary Measures) Agreements, to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and a set of multilateral agreements. Many of these have some potential for overlap or conflict, occasionally with each other but more problematically with norms of other special regimes or of general international law. Beyond this, the WTO produces guidelines, recommendations, best practices, and informal committee or secretariat interpretations. All of these contribute to normative development and harmonization, and sometimes appear to be authoritative interpretations or statements of international law, bringing to the fore relevant hermeneutic issues such as reasonableness and proportionality. Finally, in the WTO, we may find both the vertical dimension – the relations between the WTO and its members’ domestic administrations – and the horizontal dimension, which consists in the WTO’s recognition of regulatory standards set by other global regulatory bodies (in accordance with the TBT and SPS agreements).\(^10\)

The development of global markets thus required common basic principles, which could be enforced by means of appropriate regimes and institutions. This explains the emergence of transgovernmental and transnational networks,\(^11\) little-structured forms of governance in which the relationships between States, IOs and/or other actors are not greatly formalized, but can be even more effective than they would be in the context of traditional international governmental organizations (IOGs). The G-8 and the Basel Committee are significant examples of this type of network. Another interesting case is

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8 Battini (n 3).


The Financial Action Task Force (FATF), which develops and promotes policies to protect the global financial system against money laundering and terrorist financing.12

2.2 Promoting and Protecting Universal Rights

A second driver of the expansion of global law’s material scope was the development of human rights law. Indeed, international organizations act to give concrete expression to legal human rights standards that have already been agreed (and that are usually formulated in global or regional treaties), by means of sub-treaty normative activities e.g. adopting guidelines, best practices and other documents of relatively general application; monitoring (as, for example, the Organization for Security and Co-operation in Europe (OSCE) often does during elections); deploying newer techniques such as devising or applying indicators to measure compliance with human rights standards, which may de facto define the human right in question; deciding what to accept and reject in a specific post-conflict peace deal or other negotiated solution; making determinations on individual situations, thereby establishing potentially significant interpretations and precedents; and creating specialist institutions, such as the criminal investigatory and adjudicative mechanism of the Special Tribunal for Lebanon. Furthermore, global law has greatly expanded in the field of development, in which specific institutions have been created and entrusted with the financing and monitoring of investments for this purpose (such as the World Bank and the International Monetary Fund).13

Over the last few decades, the IOs’ specific apparatus for the promotion and protection of human rights has raised several legal issues, such as: transparency and reason giving (or lack thereof) in the work of the UN Human Rights Council and other bodies; transparency in the appointments processes, mandate formulation and approved activities of special rapporteurs and special representatives; the use of review mechanisms and their effective operation; the effective and fair treatment of complainants/victims and other interested parties; the efficiency of work and the adequacy of human rights bodies’ deliberative processes, as well as their criteria for accepting cases; the adequacy of due process and notice procedures for potential targets of international human rights investigations; the robustness of fact-finding and other processes; problems of institutional coordination and integration (and even competition) due to the incredibly large number of global, regional, national and local actors – both public and private – operating in the field (such as in the case of arms control.)

Human rights is therefore one of the sectors in which global law has developed most in recent decades, and the one in which it has probably most expanded its judicial dimension: consider, for instance, the rising number of international or regional courts

12 The FATF, with approximately 30 Member States and 2 regional organizations, is not a formal international organization but a transnational network of regulatory officials. Furthermore, in 1995 the public actors involved in the FATF’s ‘peer review system’ established the ‘Egmont Group’, a transnational network of Financial Intelligence Units (FIUs) aiming to promote cooperation, especially in the fields of information exchange and expertise sharing.

or special tribunals having jurisdiction in the field. This has also fostered the development of specific fields of international law, such as international criminal law.

It is often argued that in global institutions of public governance, human rights may be acquiring a ‘constitutional’ nature, thus giving rise to a hierarchy of values and public interests that may be recognized by the various actors involved (IOs, States, national administrations, courts). The latter phenomenon refers to more general normative claims, such as the globalization of law and ‘global constitutionalism’.

2.3 Chasing Public Goods at the Global Scale

The third driver of the expansion in global law’s material scope is the emergence of global public goods, which thus gave rise to the need to deal with them at global scale. Examples in this respect abound. Consider, for example, the environment: in the 1970s, it was clear that no single State could effectively regulate and ensure environment protection without the cooperation of other States. This progressively led to the establishment of a set of international norms for the protection of a truly global public good. Similar dynamics occurred with the Internet, public health, world heritage, and world security. For example, the UNESCO World Heritage Convention of 1972 was designed to identify and protect world cultural and natural sites of outstanding universal value. Another case is that of international security.

The path taken in this case is not very different from that usually adopted in domestic contexts, namely the establishment of an administrative body to pursue the public interest. Indeed, the practices followed by international organizations display some parallels with earlier national experiences concerning matters such as the proliferation and fragmentation of public bodies; the growing use of private law instruments; the increase in administrative rulemaking (a major feature of the US’s New Deal, addressed in the Administrative Procedure Act of 1946); and the establishment of multiple field offices (a feature of the French administrative system). However, any straightforward transposition of institutions and concepts from State legal systems to the complex practice of intergovernmental institutions in global governance is challenged by the fundamental differences that exist between these entities.

Globalization, therefore, triggered the emergence of global public goods, which led to the formation of a system and of rules and institutions having the purpose of controlling and leading States’ exercise of powers, ultimately to better protect these

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The expansion of the material scope of global law

goods. This fostered the emergence of a genuinely global administration to protect the interests of mankind, e.g. in the fields of the environment, world heritage or international security. As a result, international legal scholarship has provided useful taxonomies on the different varieties of ‘global public goods’, inspired by economic science and aiming to depict the variable role of global norms and international institutions. Among these ‘global public goods’ are, for example, climate engineering, polio vaccination and eradication, and nuclear proliferation.18

2.4 Ensuring the Global Effectiveness of Transnational Regimes

A fourth driver for the expansion of global law and its material scope is the need to ensure the effectiveness of transnational (namely, private) regimes, which have been progressively hybridized with public authorities and public law elements.

In recent years, all major global private regimes – such as the Internet, sports and accounting – have been increasing their degree of ‘publicness’, a quality relating to the adoption of public law instruments, the involvement of States and public bodies – namely, the public administration – and the presence of global public interests that require mechanisms for ensuring democratic accountability (the latter phenomenon is typical of private standard setting, as in the case of food standards).19

Therefore, on the one hand, private regimes have developed forms of enforcement that cannot easily be defined as purely consensual, a characteristic that has become increasingly common in complex legal systems. In the case of sport, for example, the sophisticated multi-degree review mechanism having the Court of Arbitration for Sport (CAS) at its apex is formally applied thanks to ad hoc clauses that are accepted by all the parties involved; however, for athletes and sporting institutions, there are no real alternatives to accepting those clauses. On the other hand, the absence of political authority beyond the State prompts intergovernmental organizations to adopt norm-making procedures based on negotiations and participation (from this perspective, accounting and banking standards are prime examples).

As a result, norms produced within global regulatory regimes tend to appear extremely hybridized – at once, both public and private, both national and supranational – and they make it possible to infer that there is a global law without the State.20

Among the many examples that include standard setting and norm making in several sectors, from accounting to forestry, one case that is clearly related to these dynamics comes from the field of sport: the World Anti-Doping Code (WADC). The WADC is a prime example of a source of norms that is formally private but nevertheless shows a high degree of ‘publicness’. This ‘public’ character is based on several factors. First,


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governments have participated both in drafting the Code, through extensive consultations, and, in its final adoption, through the World Anti-Doping Agency (WADA) decision-making process and the Final Declaration agreed at the World Conference on Doping. Second, the UNESCO International Convention against Doping in Sport expressly refers to WADA and its Code and requires States to align their anti-doping legislation with WADC principles. Furthermore, States’ ratification of the UNESCO Convention triggers the implementation of WADA’s policies and regulations, which produces significant effects in the domestic context: for instance, since the US ratified the Convention in 2008, the public relevance of the US Anti-Doping Agency has been rising, and some scholars have suggested that it should be considered a State actor; similarly, in the UK, a specific non-departmental body was created in 2009 to ensure compliance with the world anti-doping policy.

The WADC is a formally private regulation with which States comply, also due to a certain number of public elements at stake: governments participate in the norm-making process, domestic orders enact legislation in accordance with global norms, and the regimes themselves may have public actors as their members. In this case, hybridization was necessary to better pursue relevant global public interests, especially since the International Olympic Committee (IOC) and the other sporting institutions had failed to deal with doping effectively.

This type of dynamics may occur often and vary depending on the specific sector or regime (e.g. the Code of Ethics adopted by the International Council of Museums or the German Corporate Governance Code); the legal outputs, however, tend to be similar. In other circumstances, there may be no hybridization, due, for example, to a need to ensure the full independence of the private actors that deliver a specific function. Hybridization may also depend on historical and technical reasons, such as in the case of international sports federations (ISFs), which have always been private (although the Court of Arbitration has often likened them to governmental entities), or on the need to guarantee freedom of expression (such as in the case of credit rating agencies; these are an interesting case of private standard setting in which hybridization could, but has not yet, occurred, although calls to this effect are sometimes made).

This process of hybridization has also triggered a significant development of global law in the fields of international private law and transnational law, with particular focus on the dynamics of the distinction between public and private.21

3 THE VERTICAL EXPANSION OF GLOBAL LAW AND ITS FOUR DIMENSIONS

Can any common threads be found in the irresistible expansion of global law’s material scope? Some key elements tend to arise in several regimes, although of course at varying degrees of development. In particular, the rise of global law can be seen to have four main dimensions: regulatory, (quasi-)judicial, institutional and procedural.

The expansion of the material scope of global law

Unsurprisingly, these dimensions resemble those of the enduring point of reference for any legal system, i.e. the State. Indeed, the expansion of global law does not necessarily mean that States are losing their powers. First, since the end of World War II, the number of States has been rising: in 1945, there were 50 States; by 2010, there were approximately 200. Second, international regimes – including those that are private (such as the Internet or sports) – need States if they are to develop further. To establish a global network, almost all IOs and regimes require the creation of domestic ‘terminals’, which are often public administration bodies that are regulated by the domestic law of the country in which they operate. Moreover, global regulatory regimes grow and develop by adopting legal mechanisms (norms, institutions, procedures) that are mostly ‘inspired’ by State legal systems (in a ‘mimetic’ process). Also, these mechanisms often change once they are adopted, because States are both regulators and subjects of regulation.

In other words, the role of States can still crucially affect the development of global law. This produces significant effects on the material scope of global law, in both of its perspectives. Indeed, States influence both the degree to which global norms and global institutions permeate national legal orders and the scope of these norms and institutions in different sectors.

3.1 The Increase of Global Norms

The regulatory dimension is perhaps the most intuitive and immediate indicator of the expansion of global law’s material scope. The norm-making activity that is being performed at the international level is accelerating at an incredible pace. One significant example is the sector of nuclear energy, for which the International Atomic Energy Agency (IAEA) has developed a complex framework based on standards and agreements to avoid the exposure of such a sensitive field to the arbitrary powers of States. A global legal order has also progressively emerged in the health sector, consisting of the rules produced by the World Health Organization (WHO), such as the International Health Regulations (IHR). These are connected to several norms created in other fields: environmental protection, food safety, etc. However, although the WHO has been an IO with regulatory powers (Articles 19 and 21 of the WHO Constitution) since its establishment in 1948, it has produced significantly fewer norms than other institutions.

As a result, there is a large volume of norms, which may take several different forms and names: standards, recommendations, guidelines, policies, etc. For example, the International Labour Organization (ILO) was created for the very purpose of elaborating rules that would be more flexible than traditional treaties. The World Bank issues important operational policies addressed to the developing countries that receive the

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Bank’s funds for infrastructural projects. UNESCO too adopts similar instruments; in addition, several significant private regulatory regimes exist.

Most global norms are generally labelled ‘soft law’, but they also display a certain degree of ‘publicness’. For example, although the WTO Codes of ‘Good Practice’ are not binding, all international standard setters comply with them, so that they may fall within the scope of the TBT Agreement. In communications, the International Telecommunication Union (ITU) adopts hundreds of recommendations every year, which, although not mandatory, are observed by States. Consequently, the regulatory framework no longer relies only on traditional instruments of international law (such as treaties and conventions), but is now enriched with legal tools based on consensus. Similarly, private regimes turn to public law instruments and their ‘language’ to build more sophisticated (and powerful) models of governance: hierarchies of norms, ‘constitutional’ instruments, and review mechanisms.

Several instruments of coordination have been designed to foster this regulatory activity. These instruments may operate directly between norms, through mechanisms of cross-reference between treaties, conventions or other acts (such as in the WTO); or they may act at the institutional level, through the establishment of a joint organization (e.g. the Codex Alimentarius Commission, created in 1963 by the FAO and WHO for the elaboration of food standards); the instruments may have a procedural dimension, such as when a joint action is provided by several different IOs and/or private actors (e.g. in the environmental realm); or they may consist of dispute settlement mechanisms, in which a regime borrows the arbitration or quasi-judicial body of another: this happens with ICANN (Internet Corporation for Assigned Names and Numbers) and the Internet, which both use the World Intellectual Property Organization (WIPO) Arbitration System to settle disputes concerning domain names.

The growing volume of norms has significant implications for domestic legal orders: on the one hand, conflicts between norms have become more frequent; on the other, coordination instruments are adopted (e.g. in the context of the EU, the mechanism for requesting preliminary rulings from the European Court of Justice (ECJ)). The proliferation of norms has therefore led to the development of mechanisms for conflict resolution; to reduce the fragmentation that characterizes this multiplication, forms of harmonization have also been developed, such as international standards. Moreover, IOs themselves may perceive the need for harmonization to be more urgent in some sectors than in others. From this point of view, instruments such as recommendations and directives should be capable of ensuring greater harmonization, especially among domestic legal systems. Finally, the proliferation of norms and lawmakers has led IOs to establish a hierarchy, or several hierarchies, between norms: as a consequence, a rule
of ‘normative supremacy’ has been affirmed.\(^{28}\) This is why some scholars have claimed that a process of ‘constitutionalization’ of specific sectors – such as the WTO or UN more generally – has been taking place.\(^{29}\)

### 3.2 The Proliferation of International Courts and Tribunals

There is a connection between the increase in norms and administrative functions on the one hand, and the need for oversight and review mechanisms, on the other. The rising numbers of administrative tribunals within international organizations is a clear example in point.\(^{30}\) A greater body of rules will require more enforcement mechanisms, as a matter of fact.\(^{31}\)

The ‘judicial’ function will continue to grow at global level. International courts or tribunals play a key role in developing the regimes of which they are part: consider the case of the WTO and its Dispute Settlement Body (DSB), which progressively launched a process of ‘constitutionalization’ of international economic law.\(^{32}\) This may also happen in global private regimes, such as in the case of the Court of Arbitration for Sport (CAS), which plays a crucial role within the sport legal system.

At a global level, dispute settlement mechanisms are often used as reviewing bodies to control how international organizations operate: consider the ILO (ILO Constitution, Articles 26, 27, 28 and 33), but also private regimes such as the Internet (ICANN Bylaws, Article IV, on ‘Accountability and Review’). At the same time, a need to protect fundamental rights arises. Indeed, international courts and tribunals appear to be most effective the more tools are at their disposal, and also if they can perform different functions: dispute settlement, enforcement, administrative review and constitutional review. This happens when they not only resemble one type of court, but rather deal with several issues (civil, administrative, constitutional and even criminal). This mixed, hybrid nature of dispute settlement bodies appears to work extremely well, at least in those regimes in which it is achieved. In other cases, the solution is not found in courts but in faster alternative dispute resolution mechanisms such as arbitration (e.g. investment law). In addition, courts and tribunals play a crucial role in connecting

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29 Christoph Möllers, ‘Constitutional foundations of global administration’, Ch 5 of this Handbook.

30 Olufemi Elias (ed), The Development and Effectiveness of International Administrative Law (Martinus Nijhoff 2012).


different regimes: this is the case again for the WTO DSB, when it is called upon to decide issues relating to the TBT or SPS agreements.33

3.3 The Emergence of Supranational Bureaucracies

The growth of both regulatory and ‘judicial’ functions at the global level is connected to a dramatic increase in the administrative tasks. There is a growing number of activities that are neither legislative nor judicial in nature.34 This is also enhanced by the role played by domestic administrations in the development of global regimes. The less IOs engage in developing their own administration, the more they will rely on States and national administrations to operate. At the same time, the more a global administration develops, the more likely it will be for IOs to require States to establish a domestic terminal that is entrusted with delivering a given function in that country.

Data shows that IOs are constantly adding new offices and employees. For example, in the last few decades, the number of field offices has been growing steadily. The development of the administrative functions delivered at the supranational level may be examined from a dual perspective: the emergence of global administrations, and the implementation of administrative decisions.

First, there is a tendency to establish an apparatus to support a given international organization in carrying out its primary task. In this connection, besides inter-governmental organs (such as Councils or Assemblies), many organizations also have a Secretariat or an Executive Committee: the very name of these bodies highlights their main function, i.e. that of furthering the IO’s mission. In addition, many global organizations have progressively expanded the scope of their activity; in doing so, they have also created several other new bodies. The example of the EU agencies is perhaps the most significant in this respect: there are approximately 30 decentralized agencies across Europe, each of which is an independent legal entity of a technical, scientific, operational and/or regulatory nature; due to the great number of these bodies, the EU has launched a Common Approach programme to harmonize the establishment and the functioning of decentralized agencies that had been previously created on a case-by-case basis. These agencies have greatly contributed to the EU’s legal integration because they are distributed in different Member States (for example, the European Food Safety Authority (EFSA) in Italy, the European Environment Agency (EEA) in Denmark, the European Chemicals Agency (ECHA) in Finland, the European Aviation Safety Agency (EASA) in Germany, etc.) and they tend to require intense cooperation with domestic national administrations (e.g. in relation to the environment, health or food security, to mention but a few).35

35 Giulio Vesperini, ‘Europe and global law’, Ch 17 of this Handbook.
The expansion of the material scope of global law

The second perspective concerns the forms of implementation. This issue is naturally closely related to the previous one, as the more developed the administration, the more decisions will be taken and thereafter implemented at the administrative level. From this point of view, the EU again clearly demonstrates that so-called ‘indirect administration’, in which the regional organization issues rules and its Member States implement them, cannot be the only form that is capable of ensuring effective regulation, especially when the scope of activities delivered by the regime expands. It is for this reason that the EU has progressively adopted other forms of implementation, from direct administration to co-administration and distributed administration (through its 30-odd agencies). This may explain why, since the 1990s, a specific field of EU administrative law has been developing.

The growing institutional dimension of global law is exemplified by the increasing number of international organizations and by their growing differentiation. Furthermore, the rise of emergency actions by IOs in crisis situations confirms the key role played by the administrative dimension of global law. In public health, for example, a situation such as the SARS crisis required the WHO to operate immediately, beyond its treaty mandate, adopting recommendations and measures addressed and sent by email to airline companies and other private subjects, including individuals. The IHR were extensively revised in 2006 to account for this experience to some extent, and to give States more control: ‘the global governance model that emerged during SARS accorded the WHO independent power vis-à-vis its Member States, an astonishing development that indicates the extent to which Westphalian governance has been abandoned’.

Another interesting example comes from the WTO’s initial response to the 2008–2009 financial crisis: in this case, (mostly informal) emergency actions were taken by the Director General and the Secretariat, not by WTO legislative or judicial bodies. Other examples stem from the countermeasures adopted by IAEA against the threat of nuclear terrorism (IAEA Action Plan), the case of natural disaster relief, and the efforts to protect human rights in humanitarian emergencies. Indeed, in the field of international humanitarian relief, emergency becomes almost ‘ordinary’, oriented not towards States but towards victims, especially refugees. National courts have played a fundamental role in democratic countries, limiting excesses or abuses of emergency powers, but this function is much more delicate in the context of IOs. Liability concerns could also have a chilling effect on action; this could easily have occurred with the WHO’s warnings and travel advisories concerning SARS, which had significant consequences for private economic operators as well as entire cities and regions.

3.4 The Rise of Global Procedures

In connection with the three dimensions illustrated above (regulatory, judicial, institutional), the expansion of global law displays a growing degree of proceduralization. Procedures are, first of all, a device for governing complex organizations and their

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36 Battini (n 3).
37 Kingsbury and Casini (n 17).
decision-making processes. Data shows that global regulatory regimes and global institutions have been increasingly engaged in developing procedures. Most of these procedures are similar to models adopted at the domestic level (such as procedures for granting licences, permissions, grants, etc.); however, the more complex legal framework of the global arena enables other forms to be detected too, such as ‘policy-making’ procedures. The same is true of other supranational experiences (see the EU-related ‘composite’ proceedings).

Examples of this growing number of procedures may be found in several sectors. For example, the system built on the World Heritage Convention has progressively acquired a significant procedural dimension, which is regulated by the UNESCO Operational Guidelines for the Implementation of the World Heritage Convention: there are new forms of cooperation between international institutions, States, domestic administrations and other actors. Other examples of the rise of proceduralization come from the financial field – in which standard-setting procedures have become very complex – and sports, health and the environment. Indeed, if for institutions procedure is a rational way of organizing their activities, the increase of the latter will directly entail the increase of the former.

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Thus, proceduralization beyond the State features interactions between different levels of activity (national, regional and international), different bodies of law (public and private), and a plurality of actors (governments, administrations, international organizations, civil society). Furthermore, once national borders have been transcended, the notion of proceduralization appears to lose neutrality and gains additional functions: it can enhance legitimacy and democratic accountability, for example, or it can

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41 CAS 2008/A/1480, especially paras 56 ff.
43 Niklas Luhmann, Legitimation durch Verfahren (Suhrkamp 1969).
The expansion of the material scope of global law

be an instrument to control power. This may occur through participatory mechanisms because procedures are also instruments for representing and negotiating interests.

Global law tends to develop and refine procedural tools such as participation, consultation and due process clauses. Thus, it is often resonant of administrative law techniques (see, for example, the Internet or sports), for several reasons: governments and domestic administrations are part of the game; public and administrative law techniques are well equipped to balance powers; there is no democratic context; there is a need to guarantee procedural safeguards for addressees. On the other hand, international organizations often adopt instruments deriving from private law. The increasing use of public procurement, for example, triggers the adoption of procedural mechanisms that are capable of ensuring transparency and competition. Similarly, the need to involve civil society and the population affected in the establishment of public-private arrangements increases the use of participatory mechanisms.

However, the degree of proceduralization still varies significantly, depending on the individual regime under consideration. There are many asymmetries, which derive from the diversity of the functions delivered by different international organizations, but also from the level of involvement of public powers. Indeed, in almost all global regulatory regimes, procedural principles such as participation, due process and the duty to give reasons are first established in norms (e.g. the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters for the environment, the WTO TBT Agreement, or the World Anti-Doping Code). When these principles are to be applied, the more public the supranational regime, the more their enforcement will be delegated to the States (as occurs with the Aarhus Convention). Instead, in private regimes, supranational bodies usually directly ensure observance of these principles, which enhances the degree of proceduralization of these very regimes.

4 PATTERNS OF LEGAL GLOBALIZATION

The expansion in the material scope of global law has therefore followed a process triggered by four main drivers and which has developed four main dimensions – regulatory, judicial, institutional and procedural. The above analysis has emphasized the connections existing between these two closely intertwined facets of the process. This section will investigate them in further detail to identify possible patterns in legal globalization.

First, there is a clear correspondence between the regulatory dimension of global law and the need for global principles and norms in specific sectors. This is evident in the field of finances, competition and trade, for instance. Wherever a globalized market has been formed, there emerges the need for a common ‘playground’. This has fostered the development of transgovernmental or transnational networks. In many cases, these networks are formed by national administrations (such as independent authorities in the case of the International Competition Network). The need for common principles and rules has triggered the emergence of global legal systems, such as in the case of the WTO. However, this need for global rules is not always met by the establishment of an international regime or the creation of a global network. In these circumstances, the gap can be covered through bilateral or trilateral treaties or agreements: this is the case for investment treaties, for example, or also for the Global Fund’s immunities negotiations in the countries where it operates.

Second, the increasing efforts to promote and protect human rights require courts and tribunals more than do other fields. This is why global law in these sectors has a significantly developed judicial dimension: it was necessary to ensure that fundamental rights would be effectively protected. This was, naturally, accompanied by the spread of global norms, institutions and procedures: the number of field offices and field operations engaging in the field of human rights, for example, has been increasing over the last few decades. The sector of human rights is one of those in which the highest number of courts and tribunals has been established in recent decades.

Third, the need to pursue public interests and/or public goods at global scale has fostered the development of genuinely global administrations. The environment, the Internet, and public health – to give but a few examples – are all public goods that can now be adequately protected only through the establishment of global regulatory regimes built around institutions having a specific mission. This need has proved that traditional mechanisms of international law are not capable of dealing with the legal challenges raised by globalization. As a consequence, all of these sectors have experienced the development of different legal tools, such as non-binding regulatory instruments (guidelines, policies, standards, etc.) or procedural principles (e.g. participation or transparency). The case of the UNESCO World Heritage Convention of 1972 is perhaps one of the most significant in this respect.

Fourth, there is the need to ensure the global effectiveness of transnational private regimes. This has happened with the Internet, sports and accounting, for example. In this case, a process of hybridization occurs, in which States and domestic authorities progressively gain power in genuinely private regimes. An example of the increasingly strong procedural dimension of sport legal orders can be seen in the world anti-doping regime, in which it is possible to find both rulemaking activities (specifically, the establishment of the WADC) that take place through consultations that are open to public bodies and sporting institutions, and adjudication activities (i.e. decisions related to doping, from exemptions to penalties) in which procedural safeguards and fair hearings are accorded to affected parties.

All these drivers and dimensions often operate together, and each global regime is usually the result of their combination rather than of the action of only one factor.
Indeed, international trade, public health and environmental policy regimes were soon identified as the most suitable for conceptualizing global administrative law. In the environmental sector, there is at once the need to deal with a global ‘public good’ (the environment itself, or climate engineering for example), the quest for common rules at global scale, and the need to promote and protect fundamental rights (e.g. participation and access to justice in accordance with the Aarhus Convention). Another example comes from the sports system, where there is a global public interest (the celebration of the Olympic Games), the need for common rules at global scale (ISFs are among the most ancient international standard setters, some of them having enacted the rules of games since the nineteenth century), the need to secure the effectiveness of autonomous sports legal order through the involvement of States and public authorities (such as in the case of anti-doping regulation), and the need to promote and protect fundamental rights (e.g. due process in doping sanctions).

Therefore, some sectors may present a more pervasive presence of global law dimensions than others. Thus, the emergence of global public goods, such as the environment or the Internet, has fostered the establishment of global regimes in which both public and private actors – especially civil society – operate together in pursuing a common interest. When the quest for global principles and norms is considered, it is possible to find instead a higher number of sectors in which the State still plays a dominant role, such as trade, finance, or competition. This is why States tend to create loose networks, which allow them to maintain more sovereignty than in other, more structured, regimes. In sectors that are based mostly on private law or on the initiatives of private actors – such as sports, standardization, or accounting – global law develops because these regimes seek the endorsement of public authorities, to continue to operate at global level. Finally, the field of human rights has been a fertile ground for the development of the judicial dimension of global law.

The interactions of all these elements enable different patterns of legal globalization to be drawn, which may vary depending on the sector.

First, there may be a shift from international law to global law, which takes place whenever traditional law mechanisms are enriched with other legal tools (regulatory, institutional, judicial or procedural): this happens in the UNESCO World Heritage System, for instance, where the international conventions of 1972 have been progressively accompanied by a complex set of operational guidelines, international and national procedures, and public and private international bodies; however, this also occurs in the case of the WTO, where the GATT agreement was replaced by a more sophisticated legal order that was also equipped with a Dispute Settlement Body.

Second, there may be a shift from international law to transnational law. This can happen whenever treaties or conventions lack in effectiveness or simply do not exist in the field, often due to States’ sovereignty, and therefore public and/or private actors establish common norms either through self-regulated or private regimes (e.g. in professions) or through bilateral agreements. This pattern appears to reduce the material scope of global law, rather than trigger its expansion.

However, the development of transnational law fosters, in turn, the formation of global regulatory regimes. Indeed, the third and final pattern is the shift from
transnational law to global law. This phenomenon occurs whenever a transnational regime, which in most cases is genuinely private, must secure its global effectiveness: how can an ISO’s private and voluntary system ensure that its standards will reach a high degree of compliance? How can the IOC be sure that States and cities hosting the Olympic Games will comply with its rules? To date, the answers to these questions have been always the same: hybridization, i.e. bringing public authorities within private regimes.49

5 CONCLUSION

Over the last few decades, global law has significantly expanded and now covers almost all sectors. Its expansion has developed along two dimensions. On the one hand, it widened its material scope horizontally, pursuant to four main drivers: regulating global markets; chasing global public goods; promoting and protecting universal rights; and ensuring the global effectiveness of transnational regimes. These drivers are also consistent with the main issues emphasized by political scientists when dealing with a global order, i.e. human rights and democracy; war, violence and collective security; economic globalization in an unequal world; and the ecological challenge.50 These sectors are also those in which the relationships between global law and regional law appear to be more intense.51

On the other hand, global law has progressively enriched the toolbox of international law, and it vertically penetrated domestic legal orders in terms of norms, institutions and procedures. This allowed global law to expand its jurisdiction to cover almost all sectors, from security to the environment, from sports to accounting, from the Internet to fisheries, to name but a few.

The result of this expansion is that global law has begun to present some distinctive features, which are analysed in detail in this Handbook.

First, it is a sector-based law. This implies that global law is asymmetrical, since each sector displays a different degree of development. Second, global law is hybrid, because public and private elements constantly interact. Third, global law develops through cross-references and interconnections between different sectors, through norms, shared institutions and common procedural principles. Fourth, global law displays a strong administrative law framework, which is easily explained by the type of drivers that have fostered the expansion of the material scope of global law; in this respect, the case of the environment is emblematic. Fifth, States still play a dominant role in the expansion of global law; however, while they are capable of influencing this process, it appears that they are no longer capable of stopping it.

49 Cafaggi (n 19).
51 Vesperini (n 35).
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