

Horizontal Transformations in Administrative Norms and Procedures: An Introduction

Anne Meuwese

Full Professor, Tilburg University
anne.meuwese@uvt.nl

Phillip Paiement

Assistant Professor, Tilburg University
p.m.paiement@uvt.nl

Abstract

This introduction explores the underlying question addressed in each of the contributions to this special issue: what impact does the use of general administrative governance principles and processes by hybrid and transnational private regulatory bodies have on 'transnational administrative law doctrine'? The importance of this inquiry arises out of the growing role that such regulatory bodies play, despite their lack of formal competence, in introducing principles and procedures of general administrative nature into their respective sector. The hypothesis is that these 'horizontal' – due both to the absence of formal hierarchy as well as their cross-sector applicability – administrative norms and procedures undergo transformations as the regulatory bodies formulate them for their particular fields. By pursuing this hypothesis across a number of different case studies, the contributions to this special issue develop both transnational private regulation and global administrative law scholarship by mapping normative transformations that occur in their mutual intersections.

Keywords

transnational private regulation – global administrative law – principles of good administration

* Anne Meuwese gratefully acknowledges the support from the NWO Veni grant 'You Need no Competence: Alternatives to Constitutional Law', which has made possible the workshop in October 2014, which brought together the authors of this special issue.

1 Introduction

1.1 *The Rise of Transnational Private Regulation*

Globalization means that actors responsible for public decision-making often transgress physical and legal boundaries, with the contestation or marginalization of ‘competence’ as one possible consequence.¹ Various, often hyper-specialized, regulatory bodies, many of which are not public but hybrid or private, make their mark on the governance of issues with a clear public interest element.² Most of the literature concerned with this phenomenon focuses on substantive or institutional aspects of transnational and/or private regulation.³ The literature on transnational (private) regulation (TPR) has been steadily growing over the past few years, with the special issue of the *Journal of Law and Society*, edited by Colin Scott, Fabrizio Cafaggi and Linda Senden as perhaps the most dedicated example.⁴ As the influence of transnational bodies grows, their governance becomes a more important object for research and debate. While the literature has focused extensively on the private law instruments of TPR and on the process of its constitutionalization, it is clear that the manner in which TPR bodies institutionalize decision-making processes, relate to their stakeholders, and provide transparent accounts of their activities is also crucial for their legitimization and development. These more

- 1 A. Slaughter, *A. New World Order* (Princeton University Press 2005); K. Abbott and D. Snidal, ‘The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State’ in W. Mattli and N. Woods (eds.), *The Politics of Global Regulation* (Princeton University Press 2008); A. Hamann and H.-R. Fabri, ‘Transnational Networks and Constitutionalism’ (2008) 6 *International Journal of Constitutional Law* 481; C. Joerges, I.-J. Sand and G. Tuebner (eds.), *Transnational Governance and Constitutionalism* (Hart Publishing 2004).
- 2 G.P. Calliess and P. Zumbansen, *Rough consensus and running code: a theory of transnational private law* (Hart Publishing 2010); T. Hale and D. Held (eds.), *Handbook of Transnational Governance: Institutions and Innovations* (Polity Press 2011); A. Murray and C. Scott, ‘Controlling the New Media: Hybrid Responses to New Forms of Power’ (2002) 65 *Modern Law Review* 491; E. Meidinger, ‘The Administrative Law of Global Private-Public Regulation: The Case of Forestry’ (2006) 17 *European Journal of International Law* 47; G. Auld, *Constructing Private Governance: The Rise and Evolution of Forest, Coffee, and Fisheries Certification* (Yale University Press 2014); T. Bütthe and W. Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press 2012).
- 3 B. Eberlein, K. Abbott, J. Black, E. Meidinger and S. Wood, ‘Transnational Business Governance Interactions: Conceptualization and framework for analysis’ (2014) 8 *Regulation & Governance* 1; F. Cafaggi, *Enforcing Transnational Private Regulation: Ensuring compliance in a global world* (Edward Elgar 2012).
- 4 C. Scott, F. Cafaggi, and L. Senden (eds.), *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates* (Wiley-Blackwell 2011).

specific administrative law dimensions of hybrid and TPR bodies developing and implementing sector-generic procedural norms has yet to receive substantial attention. In response, this special issue questions what impact the use of general administrative governance principles and processes by hybrid and TPR bodies has on what may be loosely called ‘transnational administrative law doctrine’.

1.2 *The Rise of Horizontal Self-regulation and Meta-regulation*

Because of the unsteady interactions between hybrid bodies and the legally demarcated public sphere, it is difficult for constitutional and administrative law to adequately regulate their behavior. Bodies outside of the traditional national public law setting so clearly and pervasively impact the freedoms of individuals and business that a certain degree of ‘regulation’ of their activities is warranted.⁵ And many transnational bodies do indeed respond to calls for legitimacy and accountability by developing procedural norms for their own governance; they might even come up with their own self-restraining principles and procedures, a form of ‘horizontal self-regulation’.⁶ The term ‘horizontal’ conveys the absence of formal hierarchy as well as the generic applicability of the norms at hand (e.g. ‘whenever we deny a request we publish the reasons online’). The development that global governance is increasingly subjected to ‘administrative law like’ norms has been charted in impressive detail by the ‘global administrative law’ movement (GAL).⁷ GAL has made us see that international bodies need such norms and more often than not start adhering to ‘universal standards of the administrative process’.⁸ This special issue proposes to extend the GAL charting exercise in two directions: 1) further towards the horizontal regulation of hybrid and private bodies and 2) with a stronger focus on *transformations* of general administrative procedures and principles.

To this end, the rise of ‘meta-regulation’ – the ‘regulation of regulation or regulatory processes’ – is another relevant development in the world of global

5 See, e.g. M. Scheltema, ‘Internationale regelgeving buiten de staten om: de behoefte aan bestuursrechtelijke beginselen over regelgeving’ (2014) 28 *Nederlands Tijdschrift voor Bestuursrecht* 236.

6 J. Bomhoff and A. Meuwese ‘The Meta-regulation of Transnational Private Regulation’ (2011) 38 *Journal of Law and Society* 138.

7 S. Cassese, ‘Global Standards for National Administrative Procedure’ (2005) 68 *Law and Contemporary Problems* 109; B. Kingsbury, N. Krisch and R. Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15.

8 D. Barak-Erez and O. Perez, ‘Whose Administrative Law is it Anyway? How Global Norms Reshape the Administrative State’ (2013) 46 *Cornell International Law Journal* 455, 463.

regulation.⁹ Non- or semi-governmental bodies reviewing governmental actors for their performance in different fields (ranging from the rule of law to sustainability) are emerging globally and regionally.¹⁰ ‘No competence is needed to join in’¹¹ for engaging with (good) public governance. The diversification of public governance forums has seen new – often private – actors propose improved versions of these norms and launch attempts to monitor their compliance and influence their interpretations. Without having any legal competence in this regard, NGOs, such as Statewatch or The World Justice Project, take it upon themselves to ‘watch’ governments, and private meta-regulatory bodies, such as ISEAL Alliance,¹² do the same vis-à-vis private regulators. These additional layers of review may bring further fine-tuning of, and consensus on, the best ways to implement ‘universal standards of the administrative process’ in specific fields or sectors.¹³

1.3 *Zooming in Resulting Normative and Procedural Transformations*

The surge in transnational regulation of hybrid or private origin, the horizontal self-regulatory processes associated with this, and the specific development of transnational meta-regulation jointly prompt us to take a closer look at actual administrative law-like procedures and norms out there. Not bound by competence, ‘international NGOs such as Transparency International [...] are free to set their own standards and criteria by which to assess the conduct of national governments,’¹⁴ but it is likely that they will aim at using existing domestic and international public law norms as a starting point, and build off of them to achieve slight improvements in the direction of the values for which they stand. Suggestions as to the evolving position of non-governmental actors in the development of global administrative legal principles and processes are found across a number of overlapping bodies of theory, in addition to the TPR and GAL literature above. Gunther Teubner describes how a fragmented ‘capillary constitutionalism’ can introduce the kind of general administrative

9 C. Scott, ‘Reflexive Governance, Regulation and Meta-Regulation: Control or Learning?’ in O. de Schutter and J. Lenoble (eds.), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Hart Publishing 2010).

10 See A. Meuwese, ‘Peer Review in the Context of Constitutionalism and the Rule of Law’ in M. Adams, E. Hirsch Ballin and A. Meuwese, *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press 2016 (forthcoming)).

11 O. Kamm, ‘A parody of democracy’ *The Guardian* (London, 9 April 2007) 19.

12 See Phillip Paiement’s and Stepan Wood’s contributions in this special issue.

13 Barak-Erez & Perez (n 8).

14 C. Scott, ‘Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance’ (2002) 29 *Journal of Law and Society* 56.

governance principles discussed here across the ‘reflection centers’ in each specific sector.¹⁵ From another perspective, increasing attention is given to the ‘interactions’ among TPR bodies and domestic and international public law actors, both in terms of ‘regulatory orchestration’ and ‘regulatory cooperation’.¹⁶ While these areas of research imply a growing role for TPR bodies in the administrative governance of self-regulation, they tend to emphasize the analysis of actors and institutions, and particularly the state in an ‘orchestrator’ role, while the transformation of administrative norms as they are taken up by private bodies has received less attention. Furthermore, they are often more concerned with the effectiveness of sector-specific regulation, rather than the general administrative principles relayed across governance interactions. It is the goal of this special issue to push the GAL mapping exercise further into the field of TPR and to examine more specifically how general administrative governance norms and procedures are taken up by private and hybrid (meta-) regulatory actors without legal competence and whether significant norm transformations occur in the process.

The contributions to this special issue discuss many concrete examples of private actors involved in using norms that resemble those found in administrative law. For instance, without having any legal competence in this regard, research ethics committees take it upon themselves to interpret and apply proportionality in the handling and transferring of biomaterials from databanks for research purposes.¹⁷ Similarly, but as an example of the activities of ‘meta-regulatory’ bodies, the ISEAL Alliance codifies its own interpretations of horizontal governance norms.¹⁸ One of the interesting aspects of the phenomenon of horizontal self-regulation and meta-regulation is that there is an enormous potential for norm variation and informal experimentation.¹⁹ ‘[N]on-state organizations may draft rules aimed to be used irrespective of national borders. For instance, these organizations may be industry groups, NGOs, religious organizations, or groups of academics’, as Siems states in his book on the contemporary practice of comparative law.²⁰

15 G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012) 88.

16 K. Abbott and D. Snidal, ‘Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit’ (2009) 42 *Vanderbilt Journal of Transnational Law* 501; Eberlein and others (n 3).

17 See the contribution by Reichel in this special issue.

18 See the contribution by Paiement in this special issue.

19 M. Siems, *Comparative Law* (Cambridge University Press 2014) 249.

20 *ibid.*

As mentioned, the extent to which this is true for substantive regulatory norms has already been the subject of considerable research efforts.²¹ But what normative shifts or transformations do we find in transnational arenas compared to the procedural norms and principles that are traditionally used to keep public bodies in check? The informal 'privatization' of the formulation, enactment and monitoring of general administrative principles and procedures activities that used to squarely belong to the realm of constitutional and administrative law, raises important questions about their legitimation and origin. Could it be that private actors are sometimes 'better' at shaping governance norms?²² Is there a spill-over to formal constitutional and administrative law settings, for instance through the route of judicial review?²³ And, given that much of the involvement of new actors happens without any mandate, is the concept of competence on the decline or is it making a comeback in a different guise?²⁴ These are some of the follow-up questions raised and partially answered in this special issue.

The contributions that follow this introductory note vary in terms of policy area, scale and scope. They examine the general administrative governance principles as they arise across a number of sectors, including: bioethics committees for transborder biomaterial transfers, sustainability production standards, transnational food safety regulators, and European advertising standards. Some focus on single governance bodies, while others focus on meta-regulators and their relationship to their target regulatees. This variety allows for the identification of some core areas of governance challenges where regulation of regulators' behavior is generally needed and likely to take the form of general administrative procedures and principles. For instance, decision-makers, public and private alike, left to their own devices, will most likely prefer to act alone without having to motivate their decisions or make underlying considerations public. Thus reasoned decision-making is one category of solutions those attempting to self-regulate or meta-regulate private regulatory processes will need to draw from and perhaps develop. A more broadly defined governance challenge of concern in the following contributions is the need to encourage an attitude of vulnerability – in the interest of legitimacy – in decision-makers with power that may not be public in origin but perhaps public in effect. This introduction first presents an inventory of ways in which hybrid and private (meta-)regulators go about such challenges and then proceeds to link these to

21 Eberlein and others (n 3).

22 E. Meidinger, 'Competitive Supragovernmental Regulation: How Could it be Democratic?' (2008) 8 *Chicago Journal of International Law* 513.

23 See the contribution by Ramraj in this special issue.

24 See the contribution by Wood in this special issue.

insights from the individual contributions, which also includes responses from traditional public law settings such as the burgeoning tendency to bring actions of private bodies into the scope of judicial review.²⁵ As a next step, we are interested not only in the process of formulating and utilizing horizontal governance norms in particular contexts as it relates to an ongoing process of the regulatory organization's legitimation, but also to the evolution of these norms and their corollary procedures. Being free of 'competence constraints' hybrid and private bodies have more scope for 'perfecting' their governance arrangements. Possibly, they also have greater incentives to do so since they face the constant threat of public law arrangements taking over²⁶ and therefore must 'do better' in terms of 'output' and – or so our hypothesis goes – 'input'.

The hypothesis pursued in this series of articles is that contexts of self- and meta-regulation of hybrid and private bodies provide sites of freedom for (implicitly) experimenting or transforming administrative procedures and principles. This proposition arises by taking an opposite approach to the functionality of administrative law than traditionally used in the domestic context. Whereas public actors are generally treated as powerful actors whose governance requires 'red light' administrative legal mechanisms, the hybrid and private regulatory actors examined here generally have to develop their governance capacities through a greater emphasis on 'green light' mechanisms, and only later concern themselves with the traditional 'red light' functions of administrative governance.²⁷ Our hypothesis therefore suggests that these radically different starting points with respect to public power and the functionality of administrative law provide new spaces for transformations of administrative procedures, which might in turn provide inspiration for public actors.

2 Horizontal Governance Norms as Transnational Administrative Law?

2.1 *What Categories of Norms are Taken on by Private and Hybrid Regulators?*

Looking to where meta-regulators turn their attention and energy provides us with an indication of the most pressing concerns that traditional public

²⁵ See the contribution by Ramraj in this special issue.

²⁶ A. Héritier and D. Lehmkuhl, 'The Shadow of Hierarchy and New Modes of Governance' (2008) 28 *Journal of Public Policy* 1.

²⁷ C. Harlow and R. Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) ch 1.

law is failing to address. Mostly they review for prominent public law norms that are easily linked to ‘government behavior’: fundamental rights, prohibitions to commit criminal offences, fraud, and corruption. A further category consists of norms related to specific substantive public policy goals: governments are expected to have their finances in order, to care about traffic safety and to prevent disasters. Third, there is a category that might be described as explicitly behavioral in nature and concerns values such as ‘goodness’, ‘integrity’, ‘responsiveness’. A final category, is more procedural or ‘technical’ and concerns ‘due process rules that focus on the fairness of the administrative process (e.g., notice-and-comment rules, transparency rules)’ and ‘perfecting rules that seek to improve the decision outcome in terms of some overarching principle such as collective welfare (e.g., proportionality, cost-benefit analysis, risk assessment)’.²⁸ At first sight, it may come as a surprise that this final category, which squarely falls in the realm of traditional administrative law, gained so much traction among norm setters that are relatively free to set their own agendas.²⁹ We do not aim to explain this development, as there is still so much documentation work to do, but we think it is likely that the attention for ‘administrative law like’ norms and procedure originates in socio-legal processes around legitimation – an expectation supported by Stepan Wood’s contribution.

28 Barak-Erez & Perez (n 8) 468.

29 Potential norm setters whose sources were surveyed for the purposes of this outline include: Ombuds institutions, the ReNEUAL model rules (<http://www.reneual.eu/>), the World Justice Project (WJP), OECD indicators and guidelines (For instance, the OECD Multinational Guidelines and Accountability standards all include provisions on disclosure and stakeholder participation), ISO as a source for technical and organizational standards (Mainly ISO 14001 and ISO 26000 social responsibility guidance standards. See also K. Webb, ‘ISO 26000: Bridging the Public/Private Divide in Transnational Business Governance Interactions’ (2012) Comparative Research in Law & Political Economy Research Paper 21/2012; and S. Wood, ‘The Meaning of ‘sphere of Influence’ in ISO 26000, in A. Henriques (ed.), *Understanding ISO 26000: A Practical Approach to Social Responsibility* (British Standards Institution 2011); INGO Accountability Charter (‘[T]he only global, fully comprehensive and cross-sectoral accountability framework for NGOs driven by NGOs’, see <http://www.ingoaccountabilitycharter.org/>), ISEAL as an example of a private meta-regulator, the Global Reporting Initiative (GRI) (‘the global leader in the area of environmental reporting’), the Equator Principles, AccountAbility and the Basel Committee. The WTO has long been contributing to a ‘transnational body’ of horizontal governance norms, but mainly in a direct trade-related context. Finally, the concept of ‘good regulatory practices’ (GRP), which is emerging in a trade context, but rather indirectly, namely through efforts towards ‘horizontal regulatory cooperation’ is relevant.

Each potential norm setter has its own way of promoting norms, procedures and principles. For instance, International Organization for Standardization (ISO) standard 26000 operates through Seven Key Principles as the roots of 'socially responsible behavior', which include transparency and respect for stakeholder interests, and Seven Core Subjects, which every user of ISO 26000 should consider. ISO operationalizes the Principles and Subjects through 'definitions, examples, and suggestions on how to identify and communicate with stakeholders, and how to identify and address specific issues in each Core'. The OECD, to give a further example, next to issuing 'recommendations' and 'guidelines', works with questions in surveys of member countries based on indicators. The question 'is all subordinate regulation freely accessible to the public in searchable format?', then, implies a rather specific transparency norm that prioritizes accessibility and searchability.

Transparency is one area that makes for a good test case for our hypothesis on norm transformation. Transparency norms include rules about the publication of institutional documents, meeting minutes, 'reasonable administrative costs' rules for printed documents, as well as transparency as to the procedures and participants of institutions. Investigating 'general policies on transparency' in international institutions, Donaldson and Kingsbury conclude that more and more international organizations have 'transparency policies'.³⁰ But what about the actual norms involved? Active transparency norms encourage or require institutions to provide certain information even when it is not requested. Passive transparency norms specify or assume request mechanisms through which those outside of the institution can request access to information not already released. It is likely that meta-regulators and transnational bodies would have a preference for the former, because of their cosmopolitan views on who counts as a 'stakeholder'. A well-known distinction in approaches to transparency is that between 'document-based' and 'information-based' systems. One direction in which meta-regulators might be expected to innovate is a move towards 'data-based' systems. One example of this is the INGO Accountability Charter, which recommends, among other things 'basing disclosure of information (wherever possible and appropriate) on existing formats such as those provided by GRI or IATI to allow better systematic use of the data.' Another big dividing line when it comes to document-based transparency norms is whether: 'all documents' or 'official documents' (e.g. WTO) should be published upon request. Many global transparency policies now include a 'presumption of

30 M. Donaldson and B. Kingsbury, 'The Adoption of Transparency Policies in Global Governance Institutions: Justifications, Effects, and Implications' (2013) 9 *Annual Review of Law and Social Science* 119.

disclosure',³¹ meaning that the basic rule is that the institution provides (requested) information unless specified exceptions (see below) apply or unless a certain decision-maker does not agree. Periods to decide on transparency requests tend to vary between four and eight weeks and however do not reveal many pushes for change.

A further relevant category of norms, procedures and principles revolve around what we may call 'participation', or 'consultation' if we use a narrower term. The OECD here proposes a clean basic standard, by posing the question, in its Regulatory Indicators Questionnaire, 'is it required that consultation open to the general public is conducted?' It also implants the idea that consulting is the 'default option' firmly in the minds of those involved in its regulatory policy work: '[w]here public consultation is required, who is responsible for giving permission for public consultation to be bypassed?'. On the administrative law side, the 'notice and comment' mechanism is something of a blueprint. This involves publication of a draft act/decision/measure on which interested parties can then comment. Another norm often presented as 'best practice' is the possibility for individuals to 'petition' the government (or other body exercising power). This is for instance one of the indicators used by the WJP under the heading of 'Open Government'. The apparent trend towards more rigorous participation norms is mitigated somewhat by the fact that this category of administrative law norms touches on the fundamentals of the relationship between citizens or stakeholders on the one hand, and governments and regulators on the other. Practice suggests that it is not easy to implement truly open 'notice and comment' procedures in neo-corporatist or 'members only' settings. As this is a limitation for hybrid and private regulatory bodies, too, a lot of transformation in this area appears as 'fine-tuning' of existing norms. Examples include inserting non-discrimination clauses in procedures to secure participation positions as ISEAL does,³² or modernizing the way we think about accessibility.³³ ReNEUAL, for instance, proposes that websites used for consultation purposes 'must be clear, simple and easy to use' and should be 'so

31 *ibid.*

32 See Paiement's contribution to this special issue and ISEAL Alliance, 'Setting Social and Environmental Standards: ISEAL Code of Good Practice' (Version 6.0 December 2014), <<http://www.isealalliance.org/sites/default/files/ISEAL%20Standard%20Setting%20Code%20v6%20Dec%202014.pdf>> accessed 17 June 2016, para 5.5.3: '[w]here a standard-setting organization limits decision-making to members, membership criteria and application procedures shall be transparent and non-discriminatory.'

33 See also C. Conglianese, 'It's Time to Make Rulemaking Really Transparent on Agency Websites' (*Regblog*, 11 August 2014) <<http://www.regblog.org/2014/08/11/11-coglianese-time-for-transparent-rulemaking-on-agency-websites/>> accessed 17 June 2016.

designed as to enable users to see the views of those who have already offered written comments'.³⁴ Minimum periods for consultations and good information provision before and after consultation are further points on which small improvements can be made that still allow for a reality that governments/regulators will not always seek public participation for every rule or decision.³⁵ A final focus found in transnational discussions on participation norms concerns the timing of consultation and is represented for instance in the idea that participation is only useful if it can still serve to inform decision-makers about the nature of the problem and to feed into discussions on possible solutions.

2.2 *Concrete Transformations: A First Mapping Exercise*

2.2.1 Transformation of Norms and Procedures

Drawing from the contributions in this special issue for some more concrete examples of how meta-regulators as well as private and hybrid regulators further develop the types of norms identified above, Phillip Paiement's article traces normative transformations in a clear case of horizontal meta-regulation. He assesses the codification of transparency, public participation and reasoned-decision making norms by ISEAL Alliance, a private membership organization of major sustainability standards bodies such as the Forest Stewardship Council and Fairtrade International. His assessment of ISEAL Alliance sheds light on the role that codified horizontal governance norms play in the overarching strategy to build legitimacy among an increasingly complex and opaque field of governance actors. Paiement illustrates how ISEAL Alliance's use of transparency norms has focused on the procedural transparency of the standard-setting and accreditation processes, rather than financial transparency or insight into the affiliation of influential participants in the standard-setting process. Furthermore, his study illustrates how ISEAL Alliance developed active participation norms that require its member organizations to solicit expressly the input of key stakeholders during the process of (re-)writing standards.

In a closely related study, Stepan Wood comparatively assesses the administrative governance structures of the ISO and ISEAL Alliance, and in doing so, relates their specific evolution within a context of interaction dynamics

34 ReNEUAL Model Rules on EU Administrative Procedure, Book III – Single Case Decision-Making <http://www.reneual.eu/images/Home/BookIII-Single_CaseDecision-Making_in_individualized_final_2014-09-03.pdf> accessed 18 June 2016, para 25(5).

35 E.g., the OECD asks 'is there a formal requirement for a minimum period for consultations with the public, including citizens, business and civil society organizations? Are members of the public systematically informed in advance that a public consultation is planned to take place?'

between regulators and their audiences. His analysis provides a thorough depiction of private bodies that have drawn heavily upon existing administrative law concepts, particularly from the World Trade Organization, and subsequently introduced elements of variation to tailor the use of these norms to the particular field of (sustainable) standard-setting.

Along similar lines, Paul Verbruggen and Tetty Havinga's article assesses private meta-regulatory bodies in the fields of advertising standards and food safety standards. By analysing the institutional backgrounds and organizational drivers of the European Advertising Standards Alliance and the Global Food Safety Initiative (GFSI), these actors' roles in developing and enforcing participation, transparency and reasoned decision-making norms is linked to the legitimacy and autonomy of the self-regulatory framework in both food safety and advertising standards. More specifically, they identify how participatory norms evolved in GFSI as a response to criticism from external audiences, transitioning them from single-interest dominated organizations into multi-stakeholder initiatives over time.

In her article on the role of research ethics committees in governing the handling of human biological samples of medical research purposes, Jane Reichel illustrates how the European Union's lack of regulatory competences, and increasing cross-border exchanges of human biological samples, has led to a formal regulatory void that has been filled by research ethics committees without any formal delegated competencies. In this article, research ethics committees are found to be using a number of horizontal governance norms including privacy, informed consent, and proportionality norms. This contribution illustrates the difficulty in balancing the autonomy of medical research while simultaneously maintaining minimum protection of individual and public interests vis-à-vis the cross-border handling of biodata.

2.2.2 Responses to Horizontal Transformations in Administrative Norms and Procedures?

Some of the articles in this collection examine the reactions that arise from private and hybrid regulatory bodies' transformative uses of general administrative governance principles. Reichel's narrative is one on how soft law is employed, ultimately, by public authorities, who in the case of the regulation of biomedical research position themselves as meta-regulators. Using the EU research funding scheme as catalyst, the European Commission has construed an additional layer of (meta-)regulation, implemented by the (hybrid) national research ethics committees.

A second account of how the public realm reclaims a role in private governance is by Victor Ramraj, who explores the links between domestic public

law structure and horizontal governance norms as applied in TPR constellations through the lens of judicial review. As, both in Singapore and in Canada, courts are starting to experiment with bringing hybrid transnational regulators under the scope of judicial control, Ramraj emphasizes the learning potential for domestic administrative law. In particular, the ten credibility principles (sustainability, improvement, relevance, rigour, engagement, impartiality, transparency, accessibility, truthfulness, and efficiency) of the ISEAL Alliance could develop into practices for national regulators themselves to adopt. Drawing on a comparison between the two aforementioned jurisdictions, conclusions of this article relate to opportunities that may emerge for the development of domestic public law from its engagement with transnational regulatory space.

As Stepan Wood argues though, the shifts in the regulatory and administrative landscapes may well be taking place in its foundations rather than in new procedural constructs. While most private and hybrid bodies may lack formal delegated authority, they may very well be constructing their competences or powers – and thereby their legitimate authority – through socio-legal processes and discourses. In particular, Wood illustrates how horizontal governance norms play an influential role in these processes of competence construction by providing an alternative discourse to the responsiveness to business interests which is often emphasized in private and self-regulation.

3 Outlook and Concluding Remarks: Hybrid Innovations in Administrative Principles and Procedures

Through the short and diverse series of cases of meta- and hybrid regulation that this special issue presents, general patterns can be identified regarding the borrowing and re-interpretation of governance norms by non-state governance bodies as a strategy for both retaining the autonomy of their governance role in their sector while simultaneously strengthening their legitimacy. Building on what the mainstream literature on Global Administrative Law (GAL) predicts, the development of horizontal principles and procedures appears to occur in a sector-specific manner. A special role is reserved for meta-regulatory bodies with varying degree of specialization: from membership-based and fairly specialized (ISEAL) to more traditional standard-setting business models that cater for both generic and specialized normative and procedural needs (ISO). Although it is true for all hybrid and private administrative law laboratories that ‘regardless of their status at this point, internal policies and practices may have the potential to give rise to a fabric of legal, or legally significant,

norms in the future',³⁶ the authors of this special issue appear to hold out the greatest hope for these meta-regulators. ISEAL's substantive *regulatory* role may be limited,³⁷ i.e. the extent to which it has an impact on the behavior of its members, but its norms, principles and procedures find recognition beyond its membership.³⁸ How could some of the transformative suggestions for horizontal governance norms produced by meta-regulators gain a foothold in formal public settings? Through epistemological authority ('recognition of the superior knowledge and expertise of the rule-making body, and normative authority, which reflects recognition of the authority of these transnational bodies to produce binding norms')³⁹ would be one option. Relatedly the formation of a new type of profession,⁴⁰ some kind of global process manager for regulatory decision-making, could play a role as well in the diffusion of norm and procedure innovations as social norms 'embedded in society and its general culture'.⁴¹ Or, as the uptake of private governance codes spreads through multinational corporations' supply chain networks, national courts may use contract- and tort-law doctrines to evaluate the bindingness of these 'private legal transplants'.⁴² As the contributions in this issue jointly show, we can and should not stop at GAL's main insight that administrative procedures are being mimicked in non-traditional administrative settings. Even if the idea of 'best practices' is particularly controversial in a public law context,⁴³ efforts by

36 Donaldson & Kingsbury (n 30) 131.

37 See Paiement's contribution to this special issue.

38 See Ramraj's contribution to this special issue.

39 Barak-Erez & Perez (n 8).

40 A.-M. Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 193; Siems (n 19) 148. These publications call attention to the phenomenon of 'fellow professionals' whom we are much more willing to learn from.

41 M. Siems, 'The Curious Case of Overfitting Legal Transplants' in M. Adams and D. Heirbaut (eds.), *The Method and Culture of Comparative Law (Essays in Honour of Mark Van Hoecke)* (Hart Publishing 2014); M. Van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 *International and Comparative Law Quarterly* 495, 502.

42 T. Ferrando, 'Private Legal Transplant: Multinational Enterprises as Proxies of Legal Homogenisation' (2014) 5 *Transnational Legal Theory* 1, 52–55. See also A. Beckers, *Enforcing Corporate Social Responsibility Codes* (Hart Publishing 2015).

43 A. Garapon, 'A New Approach for Promoting Judicial Integrity' in R. Peerenboom (ed.), *Judicial Independence in China* (Cambridge University Press 2010) 37–51; K. Hendley, 'The Rule of Law and Economic Development in a Global Era' in A. Sarat (ed.), *The Blackwell Companion to Law and Society* (Blackwell 2004) 605–623; M. Patton, 'Evaluation, Knowledge Management, Best Practices, and High Quality Lessons Learned' (2001) 22 *American Journal of Evaluation* 329; A. Perrin, *Citizen Speak: The Democratic Imagination in American Life* (University of Chicago Press 2006).

hybrid bodies and meta-regulators to improve on the global administrative law toolkit represent transformative developments worth following. Apart from the important functional and institutional implications of the rise of hybrid and private regulators and meta-regulators, the specific novelties they bring to the design of governance norms are also worth considering as an addition to the global administrative law debate.