

**SPECIAL ISSUE:  
PUBLIC AUTHORITY & INTERNATIONAL INSTITUTIONS**

*Cross-cutting Analyses*

## **International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority**

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### **A. Introduction**

The administration of the traditional nation-state used to operate as a rather closed system to the outside world. Today, cooperation between the public authorities of different States and between States and international bodies is a common phenomenon. Yet the characteristics and mechanics of such cooperation can hardly be understood using the concepts domestic public law or public international law currently on offer. Conventional concepts, such as federalism, confederalism or State-centered "realism" hardly fathom the complexity of interactions or reflect the changed role of the State, while more recent concepts, such as multi-level systems or networks, seem to encompass only parts of the phenomena at hand. Given this void, we propose to explore the notion of "composite administration" (*Verbundverwaltung*) and argue that it offers a concept which can combine more coherently the seemingly diverging legal elements of cooperation and hierarchy that distinguish administrative action in what often is called a multi-level administrative system.<sup>1</sup> Even though the concept of composite administration was originally designed<sup>2</sup> and further developed<sup>3</sup> with respect to the largely federal European administrative

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<sup>1</sup> Eberhard Schmidt-Aßmann, *Der Europäische Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrechts*, in *DER EUROPÄISCHE VERWALTUNGSVERBUND 7* (Eberhard Schmidt-Aßmann & Bettina Schöndorf-Haubold eds., 2005). For a similar approach, see GIACINTO DELLA CANANEA, *L'UNIONE EUROPEA. UN ORDINAMENTO COMPOSITO* 6, 146 (2003).

<sup>2</sup> ARMIN VON BOGDANDY, *SUPRANATIONALER FÖDERALISMUS ALS WIRKLICHKEIT UND IDEE EINER NEUEN HERRSCHAFTSFORM* 11 (1999); Sabino Cassese, *Der Einfluß des gemeinschaftsrechtlichen Verwaltungsrechts auf die nationalen Verwaltungssysteme*, 33 *DER STAAT* 25 (1994).

<sup>3</sup> Gabriele Britz, *Vom Verwaltungsverbund zum Regulierungsverbund?*, 41 *EUROPARECHT* 47 (2006); Jens-Peter Schneider, *Verwaltungsrechtliche Instrumente des Sozialstaats*, 64 *VERÖFFENTLICHUNG DER*

space, we suggest testing the concept in the wider context of international cooperation.<sup>4</sup> We believe that it offers valuable insights and raises critical questions, even though we do not intend to insinuate any proto-federal prospects of the institutions discussed in this paper.<sup>5</sup>

The present article analyzes the multi-level and network aspects of the exercise of public authority and the legal structures providing the basis for cooperation between national and international authorities in light of the composite administration model. It aims to provide a legal phenomenology of international administrative cooperation in order to test whether the concept of composite administration can be fruitfully applied in this arena.<sup>6</sup> The article proceeds in three steps: the first will outline the basic concept of composite administration, its limits and its context (B.). In the second, more extensive part, we will analyze five elements that characterize the interlinked operation of international and domestic institutions as features of international composite administration (C.). To that end, we will focus on the normative basis of cooperation in composite structures, examine more closely informational exchange and expert committees, the various modes of implementation and analyze cross-linkages between institutions and their law. In a third step (D.), we will summarize our arguments on why we think that the notion of composite administration is helpful to conceptualize inter-authority cooperation and point to some important differences between European and international forms of composite administration.

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VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (VVDStRL) 262. For a similar treatment but with his own terminology, see GERNOT SYDOW, VERWALTUNGSKOOPERATION IN DER EUROPÄISCHEN UNION (2004).

<sup>4</sup> On the catalytic role of European concepts for international phenomena, see Matthias Ruffert, *Perspektiven des Internationalen Verwaltungsrechts*, in INTERNATIONALES VERWALTUNGSRECHT 412 (Christoph Möllers, Andreas Voßkuhle & Christian Walter eds., 2007); Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 HARVARD INTERNATIONAL LAW JOURNAL 327 (2006).

<sup>5</sup> On the differences between European and international composite administration, see Part C. Against proto-federal concepts in the analysis of global governance, see von Bogdandy, in this issue.

<sup>6</sup> The notion of “administration” is understood here primarily in its operational (not its organizational) meaning, i.e. focused on activity. On the terminology, see von Bogdandy, Dann & Goldmann, in this issue.

## B. The Concept of Composite Administration

### I. Basic Idea

The concept of composite administration aims to reconcile "autonomy, mutual considerateness and the ability to undertake common action".<sup>7</sup> Considering the growing demand for understanding international cooperation, a concept combining these features promises to be useful. It should be noted that such a concept is, first of all, a proposal; its power lies in its descriptive (and partly figurative) value, it is not a legal term.<sup>8</sup> It may facilitate understanding the *operations* conducted within and by such multi-layered structures. The concept does not focus on powers, organizational structures or the relation of legal norms as such,<sup>9</sup> but rather on bureaucratic cooperation and the interaction of institutions in the exercise of public authority.<sup>10</sup> At the same time, one should note that the concept does not focus on processes *within* one organization but encompasses the *entirety* of cooperation between international institutions and member States.<sup>11</sup> Some might wonder whether such a concept would be too broad and rather obfuscate the problems. However, this would misread our intention and the concept's purpose: Sabino Cassese recently remarked that "between the global and the domestic sphere there is a gray area of mixed bodies and procedures, joint decisions and parasitical systems".<sup>12</sup> Our aim is to put this "gray area" under a magnifying glass and to analyze what we find there in detail. The concept of composite administration might help to get hold of what we find and in fact focus our research. Its basic idea can be summed up in the following terms:

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<sup>7</sup> Schmidt-Aßmann (note 1), at 7 [translation by the authors].

<sup>8</sup> Britz (note 3), at 47.

<sup>9</sup> On these issues, see INTERNATIONAL LAW COMMISSION, *Fragmentation of International Law*, 58th session, General Assembly A/CN.4/L.682; DAN SAROOSHI, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS (2005); CHRISTOPH MÖLLERS, GEWALTENGLIEDERUNG. LEGITIMATION UND DOGMATIK IM NATIONALEN UND INTERNATIONALEN RECHTSVERGLEICH 253 (2005).

<sup>10</sup> It is easier to express this very point in German: we focus on *Verbundverwaltung*, not on the *Verwaltungsverbund*.

<sup>11</sup> On the different dimensions of cooperation, see Part B.II.

<sup>12</sup> Sabino Cassese, *Administrative Law without a State?*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 684 (2005).

The first hallmark is one of functional and routinized cooperation between bureaucratic institutions which maintain organizational separation.<sup>13</sup> Composite administration takes place when a plurality of legally independent public authorities pursue aims of public concern as a common task. These authorities are, in contrast to those of a federal State, not part of a comprehensive body politic. Whereas in a federal State, all authorities are conceived as being part of one body politic (*Verband*), this is not the case in instances of composite administration which only forms a compound or composite arrangement (*Verbund*).<sup>14</sup> What is missing is the idea of an overarching political and legal unity.<sup>15</sup> The common operation is principally based on the idea of a division of labor.<sup>16</sup> Hence, functional cooperation and organizational separation form structural principles on which a composite administration rests.

The codependence of the participants is also characteristic of composite administration. Standards, be they binding legal acts or soft law requirements, are not only developed, but also implemented in a cooperative way. Especially implementation as composite administration is characterized by manifold forms of interaction with respect to the exchange of information, procedural alliances or even forms of institutional combinations in order to ensure implementation and to avoid the prisoners' dilemma. In effect, while the organizations are legally separate, their exercise of public authority can often not be attributed to one level; rather, is an interconnected effort of functionally interwoven bureaucratic actors. This form of codependence is therefore another structural principle of composite administration. A further characteristic element of composite administration is a difference in the territorial scope of the authorities involved. There is usually one public authority, often conceived as the "upper level", that operates for the entire territory covered by the regime, and a plurality of further institutions, often seen as the "lower level" which

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<sup>13</sup> By composite administration we therefore focus on a smaller range of institutions than the overall project.

<sup>14</sup> In German, the terms "*Verband*" and "*Verbund*" easily express the difference between these two forms of association. In English such wordplay is not possible. On the notion of *Verband* (organization / association) as a social relationship that is closed or limited in the admission of outsiders and the regulations of which are enforced by specific individuals, see MAX WEBER, *ECONOMY AND SOCIETY* §§ 12, 17 (Gunter Roth & Claus Wittich eds., 1978).

<sup>15</sup> DANIEL ELAZAR, *FEDERALISM AND POLITICAL INTEGRATION* (1979). For a comparative perspective, see MICHAEL BOTHE, *DIE KOMPETENZSTRUKTUR DES MODERNEN BUNDESSTAATES IN ECHTSVERGLEICHENDER HINSICHT* (1977).

<sup>16</sup> See Venzke, in this issue.

are territorially more limited.<sup>17</sup> Most importantly, the territorially more limited institutions (usually a nation-state) generally carry more legitimacy.<sup>18</sup> As public law gravitates around the issue of legitimacy, this feature deeply informs the structure and operation of composite administration. It also proves how misleading the use of the terms "upper" and "lower" in this context can be.

## *II. Dimensions of Cooperation – The Problem of Hierarchy*

Cooperation between public authorities is often conceived as taking place in different "dimensions". The most common way is to distinguish between a vertical and a horizontal dimension: the vertical dimension is mostly understood in terms of the multi-level metaphor, meaning the cooperation between an "upper" and "lower" level.<sup>19</sup> The levels are characterized by their territorial scope, quite often complemented by an implicit Kelsenian understanding of a *Stufenbau*, distinguishing an international, supranational, national and regional level.<sup>20</sup> The horizontal dimension is understood as meaning cooperation between organizations on the same level.

However, this terminology is problematic. Although intuitively appealing and helpful for approaching the topic, it might convey an idea of hierarchy which is

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<sup>17</sup> On the notion and legal contours of level (*Ebene*), see MÖLLERS (note 9), at 210-218 (2005); Franz C. Mayer, *The European Constitution and the Courts*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 320 (Armin von Bogdandy & Jürgen Bast eds., 2006).

<sup>18</sup> Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 596 (1999); Rainer Wahl, *Der einzelne in der Welt jenseits des Staates*, in VERFASSUNGSSTAAT, EUROPÄISIERUNG, INTERNATIONALISIERUNG 62-66 (Rainer Wahl ed., 2003); Joseph H. H. Weiler, *The Geology of International Law - Governance, Democracy and Legitimacy*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 547 (2004); Wolfrum, in this issue; Michael Zürn, *Global Governance and Legitimacy Problems*, 39 GOVERNMENT AND OPPOSITION 260 (2004).

<sup>19</sup> The concept of multi-level systems made a fast career since the 1990s in political science as well as law. For political scientist's perspective, see Beate Kohler-Koch & Markus Jachtenfuchs, *Regieren im dynamischen Mehrebenensystem*, in EUROPÄISCHE INTEGRATION, 15 (Beate Kohler-Koch & Markus Jachtenfuchs eds., 1996); DAS EUROPÄISCHE MEHREBENENSYSTEM (Thomas König, Elmar Rieger & Hermann Schmitt eds., 1996); Gary Marks & Liesbet Hooghe, *Contrasting Visions of Multi-Level Governance*, in MULTI-LEVEL GOVERNANCE 15 (Ian Bache & Matthew Flinders eds., 2004). For the perspective of legal scholarship, see Thomas Groß, *Verantwortung und Effizienz in der Mehrebenenverwaltung*, 66 VVDSTRL 154-157 (2006); Wahl (note 18); Ingolf Pernice, *The Global Dimension of Multilevel Constitutionalism*, in VÖLKERRECHT ALS WERTORDNUNG. FESTSCHRIFT FÜR CHRISTIAN TOMUSCHAT, 973 (Pierre-Marie Dupuy ed., 2006).

<sup>20</sup> HANS KELSEN, REINE RECHTSLEHRE 228 (1960). Against a hierarchical understanding of levels, see FRANZ C. MAYER, DIE INTERNATIONALISIERUNG DES VERWALTUNGSRECHTS 320-321 (forthcoming).

misleading in comprehending today's reality of the relationships and interactions between the various actors and levels. It implies a traditional meaning of hierarchy, in which the "upper" level dominates the "lower" level and in which hierarchy is organized mostly in formal instruments. This, however, would today be equally wrong as describing all international cooperation as cooperation of equal and sovereign subjects of international law, acting on neatly separated levels. Instead, the concept of composite administration takes into account the multiple forms of interconnectedness which are characteristic of today's global governance system. At the same time, the concept does not disguise the existence of hierarchy in the sense of power imbalances. On the contrary: obviously, power imbalances shape the relations between actors, but such power is rather based on informal and non-legal facts, such as economic, military or cultural advantages.<sup>21</sup> This non-legal power finds its expression in the way processes are created (or blocked), used (or abused) or publicly communicated (or not reported) and not so much by the formal status of actors or their positions on an upper or lower level. It taints the concept of "multi-level systems" that it is not able to avoid such a (mis)conception.<sup>22</sup>

For similar reasons, the concept of network administration is unconvincing. Moreover, the term *network* is often meant to focus on informal relationships.<sup>23</sup> While such relationships need to be considered for a full understanding of institutional and procedural rules, it appears problematic from a legal perspective to concentrate on a concept that largely does away with the central research object, i.e. positive rules.<sup>24</sup> These problems of adequately naming dimensions of interaction show the

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<sup>21</sup> ANDREW HURRELL, ON GLOBAL ORDER. POWER, VALUES AND THE CONSTITUTION OF INTERNATIONAL SOCIETY (2007); JOSEPH NYE, SOFT POWER (2004). On how these aspects play out in the field of development cooperation, see Philipp Dann, *Grundfragen eines Entwicklungsverwaltungsrechts*, in INTERNATIONALES VERWALTUNGSRECHT 44 (Christoph Möllers, Andreas Voßkuhle & Christian Walter eds., 2007).

<sup>22</sup> Another way of defining different dimensions could focus on the central instrument of action: if this is unilateral (e.g. an administrative act, a regulation, a binding resolution, a decision) one assumes that a vertical dimension is at stake, while conventional bilateral or multilateral acts (e.g. contracts, treaties) indicate a horizontal dimension. However, the problem of this approach is that the difference between a horizontal instrument and a vertical one does not necessarily reveal the power relationship between the actors involved. This is easily demonstrated by examples from the law of subsidies, where these are agreed in contractual form, but often on terms of the (donating) State or parallel cases of development assistance.

<sup>23</sup> On the notion of networks, see ANNE-MARIE SLAUGHTER, THE NEW WORLD ORDER 18-23 (2004); GUNNAR FOLKE SCHUPPERT, VERWALTUNGSWISSENSCHAFT 384 (2000).

<sup>24</sup> For further problems of the concept of networks, see Matthias Goldmann, *Der Widerspenstigen Zähmung, oder: Netzwerke dogmatisch gedacht*, in NETZWERKE 226 (Sigrid Boysen et al. eds., 2007); Eyal Benvenisti, "Coalitions of the Willing" and the Evolution of Informal International Law, TEL AVIV UNIVERSITY LAW SCHOOL, FACULTY PAPERS 31/2006; more appreciative of the ambiguities of the notion, Christoph Möllers, *Transnationale Behördenkooperation*, 65 ZAÖRV 380 (2005).

urgency in developing less metaphorical concepts for such legal phenomena. The notion of composite administration therefore sets aside such terms yet combines their perspectives. In effect, composite administration captures various modes and dimensions of cooperation between the actors involved.

### *III. Participants and Constellations of Composite Administration*

This leads to a second set of questions concerning the notion of composite administration, namely the questions of who takes part in it, what are the regular configurations and what would *not* be considered composite administration. In response to these questions one has to realize that the concept of composite administration alludes to more than the interaction of an organization and its members. Inter-institutional cooperation as composite administration can occur in three ways:<sup>25</sup>

First, it takes into account the fact that organizations deal with their members not only as members but also as external partners.<sup>26</sup> When UNDP conducts a Good-Governance-project in the Sudan, both the UNDP and the central administration of Sudan act as independent legal entities administering the project. Hence, there is an external relationship between both which can include the exercise of public authority. If this cooperation is continuous and routinized, and not just ad hoc, such cooperation would be an example of composite administration.<sup>27</sup> On the other hand, the participation of member States in the bodies of the organization is not an expression of a composite administration.

Second, an international institution can also cooperate with other external partners, namely other international institutions, non-member States or non-governmental organizations. The common and concrete unity of action and the regular exercise of public authority with regard to an agreed purpose marks composite administration.<sup>28</sup> We can therefore observe such administration when the FAO regularly cooperates with the World Health Organization on issues of fisheries, or when CITES cooperates with certain NGOs to assemble and assess data, but we cannot assume a

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<sup>25</sup> With respect to the European composite administration, Eberhard Schmidt-Aßmann writes of the "triadic structure of roles" (translation of the authors) of Member States - as masters of the treaties, as partners of the Commission and as subjects of control, *see* Schmidt-Aßmann (note 1), at 7; VON BOGDANDY (note 2), at 11-14.

<sup>26</sup> HERNY G. SCHERMERS & NIELS BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* § 1688 (2003, 4th ed.).

<sup>27</sup> On the special question of host States, *see* A. S. MULLER, *INTERNATIONAL ORGANIZATIONS AND THEIR HOST STATES* (1995).

<sup>28</sup> Irrelevant is also whether an organization is part of a "family of international organizations". On these, *see* SCHERMERS & BLOKKER (note 26), at §§ 1691-1701.

composite administration between FAO and WIPO just because both of them are part of the UN family.<sup>29</sup>

Third, there can also be cooperation among the member States of an organization (or some of them), for example in order to coordinate the implementation of common obligations. This type of transnational cooperation has become especially relevant within the European composite administration.<sup>30</sup> Needless to say, not every cooperation between States, which (also) happen to be members of the same organization, constitutes composite administration.

In sum, composite administration includes the cooperation of international institutions with other legal entities (be it member States or other institutions) if the institutions are bureaucratic in nature, the purpose of this cooperation is the exercise of public authority, the exercise of public authority also involves instruments external to the organization and the cooperation is continuous, not just ad hoc in nature. The concept thus aims to grasp cooperation outside the regular shell of an organization, and it implies that an organization can take part in different instances of composite administration and with different partners.

### C. Elements of International Composite Administration

There is not one fixed form of international composite administration, but rather several typical elements that characterize it and the dynamics in it. In the following section, we want to highlight five elements; others could be added.

#### I. Normative Basis

A starting point for understanding international composite administration is the question of its respective normative basis. This might be surprising, since the normative basis for any cooperation between the international institution and its member States (or third parties) can be found in the general principles of *pacta sunt servanda* and *good faith*, Articles 26 and 31 VCLT. These doctrines oblige the respective

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<sup>29</sup> See Paul C. Szasz, *The Complexification of the United Nations System*, 3 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW (UNYB) 1 (1999).

<sup>30</sup> Jürgen Bast, *Transnationale Verwaltung des europäischen Migrationsraums. Zur horizontalen Öffnung der EU-Mitgliedstaaten*, 46 DER STAAT 8, 27 (2007); Giacinto della Cananea, *The European Union's Mixed Administrative Proceedings*, 68 LAW AND CONTEMPORARY PROBLEMS 197 (2006); Hans Christian Röhl, *Verantwortung und Effizienz in der Mehrebenenverwaltung*, DEUTSCHE VERWALTUNGSBLÄTTER 1078 (2006).



parties to honor the terms of the treaty and to collaborate in its framework.<sup>31</sup> It is an interesting and telling fact, however, that the treaties usually contain more specific norms. A central aspect of the European composite administration is its legal anchor in Art. 10 EC Treaty. Similar provisions can be found in a number of treaties in the international sphere. For example, Art. 4.1 of the FAO-Code of Conduct for Responsible Fisheries stipulates that: "All members and non-members should collaborate in the fulfillment and implementation of the objectives and principles contained in this Code."<sup>32</sup> Similarly, Art. 6 of the UNESCO World Heritage Convention States that: "Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage [...] is situated, [...] the States Parties [...] recognize that such heritage constitutes a world heritage for whose protections it is the duty of the international community as a whole to co-operate". Art. 2.2 and 2.5 of the UN Charter express an equivalent idea.

It is difficult to construe these provisions as imposing concrete obligations of collaboration in specific cases.<sup>33</sup> But it would also be unconvincing to consider them as simply repeating the basic principles of *pacta sunt servanda* and *good faith*, for this would be redundant and without additional value.<sup>34</sup> Rather, these provisions highlight the fact that member States in a composite administration play more than one role. They are creators of the treaty but also members and partners of the international institution, entrusted with the obligation to contribute to its effectiveness, as well as addressees of binding obligations imposed by such institution.<sup>35</sup> The analysis of the following elements might provide instances for where an obligation to cooperate as a member of the institution can be relevant. This might, for example, include the obligation to provide information, to comply with soft forms of coordination measures or to cooperate in implementation schemes.

## II. Informational Exchange

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<sup>31</sup> Jean Salmon, *Article 26*, in LES CONVENTIONS DE VIENNE SUR LE DROIT DE TRAITES, 1075 (Olivier Corten ed., 2006); Jean-Marc Sorel, *Article 31*, in LES CONVENTIONS DE VIENNE SUR LE DROIT DE TRAITES, 1289 (Olivier Corten ed., 2006).

<sup>32</sup> FAO, The Code of Conduct for Responsible Fisheries, Report of the Conference of FAO, Twenty-eighth Session, 20-31 October 1995, Appendix I, also available at: <ftp://ftp.fao.org/docrep/fao/005/v9878e/v9878e00.pdf>; see also Art. 11 FAO-Constitution, OECD, Art. 3.

<sup>33</sup> See von Bogdandy (note 5).

<sup>34</sup> On this tension, see JAN KLABBERS, INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 194 (2002).

<sup>35</sup> SCHERMERS & BLOKKER (note 26), at § 156; see also Schmidt-Aßmann (note 1), at 8.

Gathering, analyzing and channeling information are pivotal exercises in international composite administration. Appropriate solutions and rational administration rest on a sound basis of knowledge and analysis. The collection, processing, and distribution of information are important functions of many international institutions, and one basis of their communicative power. Yet international institutions and especially their secretariats seldom have the capacity to make inquiries and do research themselves. By their nature and position, they are detached from a larger administrative system which could furnish them with information internally. They thus depend on input from other sources. In addition, providing common data is the basis for creating a unified understanding of tasks and possible solutions. Establishing common data is hence a necessary step towards the perception of organizational unity and a sense of being connected.<sup>36</sup> Rules on the exchange of information are therefore important in the legal regimes of international organizations. While there are a number of such rules, three distinct typical structures have emerged.

There are, first of all, obligations of member States or parties to provide the central bureaucracy with relevant information. These obligations may arise at different stages of the policy-making process. UNESCO, for example, requires that its State parties provide an extensive dossier about the site that is supposed to be listed as a World Heritage.<sup>37</sup> State parties hence provide the main factual basis of the listing procedure.

Reporting obligations with respect to the implementation of international commitments are another form of bottom-up information channeling.<sup>38</sup> The FAO fisheries regime contains an extensive though voluntary system of reporting on the implementation of the central Code of Conduct and specific Plans of Action.<sup>39</sup> These reports are guided by a questionnaire that the Secretariat provides. The results from the reports then provide a basis for general annual reports to the member States.<sup>40</sup>

In addition to these bottom-up channels of information, international composite administration is often characterized by cooperation with non-members and expert NGOs which provide or evaluate data. An especially telling example in this respect

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<sup>36</sup> Schmidt-Aßmann (note 1), at 16.

<sup>37</sup> Art. 11(1) of the Convention; para. 32 Operational Guidelines 2005. On the UNESCO World Heritage regime in general and on these informational connections in particular, see Diana Zacharias, in this issue.

<sup>38</sup> On such reporting duties, see Röben, in this issue.

<sup>39</sup> See Friedrich, in this issue.

<sup>40</sup> See de Wet, *Administration through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work*, in this issue (on extensive reporting on implementation).

is CITES.<sup>41</sup> The CITES Secretariat regularly contracts out research and analysis to two global NGO-networks<sup>42</sup> regarding the situation of certain species and trade in them. It can thus tap into a massive pool of expertise. At the same time, it depends, in its information gathering, on annual reports from its member States, which are then compiled and analyzed by another external organization, the World Conservation Monitoring Center (UNEP-WCMC). Moreover, CITES keeps in touch with a wide variety of NGOs which provide information.

Finally, certain variants of international composite administration have evolved in which little happens beyond collecting and sharing information. No further administrative activity occurs here; the main task is the assessment and channeling of information. Perhaps the most important example of this kind occurs in the International Criminal Police Organization (Interpol).<sup>43</sup> Interpol's central task is not to take police actions itself, not even to collect data by itself, but only to channel information that it receives from its members and to ensure the integrity of the information.<sup>44</sup> It hence provides a central database and serves as a transmitter of information and searches (so-called notices).<sup>45</sup>

Composite administration by way of information networks does not reach the level of institutionalization as known in the European Union,<sup>46</sup> but the amount of attention and legal regulation that concerns the administration of information in such international systems is becoming ever more obvious. They are therefore an integral part of composite structures.

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<sup>41</sup> See Fuchs, in this issue (on CITES).

<sup>42</sup> Trade Records Analysis of Fauna and Flora in Commerce ([www.traffic.org](http://www.traffic.org)) and International Union for the Conservation of Nature and Natural Resources ([www.iucn.org/](http://www.iucn.org/)). On these links, see Rosalind Reeve, *Enhancing the International Regime for Protecting Endangered Species: the Example of CITES*, 63 ZAÖRV 339 (2003).

<sup>43</sup> See Schöndorf-Haubold, in this issue; MATTHIEU DEFLEM, *POLICING WORLD SOCIETY* 124 (2002). A similar role is played by different committees of the OECD. They too serve to compile information and provide statistics rather than to administer (OECD-DAC, see Schuler, in this issue).

<sup>44</sup> See Art. 10.1(a) of the Rules on the processing of information for the purposes of international police co-operation, adopted as Resolution No. AG-2003-RES-04 by the General Assembly in 2003.

<sup>45</sup> Schöndorf-Haubold, in this issue.

<sup>46</sup> See Armin von Bogdandy, *Links Between National and Supra-national Institutions*, in *LINKING EU AND NATIONAL GOVERNANCE*, 24 (Beate Kohler-Koch ed., 2003); Armin von Bogdandy, *Informationsbeziehungen innerhalb des Europäischen Verwaltungsverbundes*, in *II GRUNDLAGEN DES VERWALTUNGSRECHTS* 347 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle eds., 2008).

### III. Expert Committees

Another typical element of international composite administration is the role played by expert committees. Often an integral part of policy-making procedures, they are used to provide expertise and knowledge as well as to test concepts stemming from the international or national participants of composite administration. In their somewhat detached institutional position (being neither organs nor unrelated actors) and due to their mandate of objectivity, they are intended to avoid political impasses and provide legitimacy to international institutions and their decisions.<sup>47</sup>

The membership in such committees is based on scientific qualification and not based on member State representation. An example can be seen in the Advisory bodies of the UNESCO World Heritage Convention.<sup>48</sup> These are composed of two independent non-governmental organizations<sup>49</sup> and a separate intergovernmental organization<sup>50</sup> which evaluate properties named for the listing as World Heritage, monitor the state of conservation of properties and basically advise the UNESCO committee. A similar example is provided by the expert bodies to the Codex Alimentarius Commission.<sup>51</sup> Its Joint FAO/WHO expert bodies<sup>52</sup> are consulted at the beginning of the procedure of establishing food standards. As in the case of UNESCO, they are composed of independent experts.

It is especially important to examine the role of these committees in relation to the political bodies. Their relationship is supposed to be characterized by a functional separation between scientific assessment and political judgment, for example in the case of food standards and the work of the Codex Alimentarius Commission. Here, *risk assessment* is primarily assigned to the Joint FAO/WHO expert bodies and their consultation in the standard setting procedure, whereas *risk management* is sup-

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<sup>47</sup> On the role of such experts in international institutions, *see* von Bernstorff, in this issue; Venzke, in this issue. Expert committees also play a major role in the European governance system, *see* EU COMMITTEES (Christian Joerges ed., 1999).

<sup>48</sup> Art. 13(7) and Art. 14(2) Convention, (*see* Zacharias, in this issue).

<sup>49</sup> International Council on Monuments and Sites (ICOMOS) and International Union for Conservation of Nature and Natural Resources (IUCN), now called World Conservation Union.

<sup>50</sup> International Centre for the Study of the Preservation and Restoration of Cultural Property in Rome (ICCROM).

<sup>51</sup> On the structure in detail, *see* Pereira, in this issue.

<sup>52</sup> Joint FAO/WHO Expert Committee on Food Additives (JECFCA); Joint FAO/WHO Meeting on Pesticides Residues (JMPR); Joint FAO/WHO Expert Meetings on Microbiological Risk Assessment (JEMRA).

posed to lie with the Commission and its subsidiary bodies.<sup>53</sup> These in turn are not composed of scientific experts, but of government representatives from the domestic level.<sup>54</sup> However, the idea that the tasks of scientific consultation and political decision-making can therefore be neatly separated with a mutual gain of legitimacy in both parts of the process (the expert committee not being tainted by having to make final decisions, the political body expected to take into account scientific advice and common welfare considerations) might be premature. One can doubt whether scientific consultation can ever be free of subjective interests and specific agendas. Also, one has to wonder to what extent political decision-makers can understand the specific advice and still make a sound and independent judgment.<sup>55</sup> In sum, one has to ask to what extent such experts really help to de-politicize decision-making or rather disguise certain interests and power imbalances. Often, the question will be how such experts are selected, where they come from and whose interest they are closest to. Informal pressure and power might tilt the expertocratic balance.

#### *IV. Various Modes of Implementation*

The implementation of international legal obligations is a critical aspect of global governance, and it has taken on a new complexity, as various new modes are being developed that complement the conventional State-centered model.<sup>56</sup> Traditionally, the implementation of international obligations was part of a two-step procedure. International obligations were first agreed upon among contracting parties, and then, in a second step, implemented by the State parties.<sup>57</sup> Implementation in this model was principally *legislative* implementation, i.e. by means of general rules. In the current system of global governance, this concept has not been replaced, but it is complemented by a wide variety of other models and techniques to make obligations operative in domestic law.<sup>58</sup>

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<sup>53</sup> CAC, Working Principles for Risk Analysis for Application in the Framework of the Codex Alimentarius (ALINORM 03/41, para. 146 and Appendix IV).

<sup>54</sup> Pereira, in this issue.

<sup>55</sup> On such doubts, *see id.*

<sup>56</sup> Implementation is understood here as encompassing all measures parties take to make international agreements operative in their domestic law. *See* Catherine Redgwell, *National Implementation*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 925 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007).

<sup>57</sup> At least according to a dualist approach, *see* IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31 (2003, 6th ed.).

<sup>58</sup> MAYER (note 20), at 235. On the limited use of traditional models with respect to the hierarchy between national and international norms, *see* Ruffert (note 4), at 413.

We shall analyze these techniques by, first, distinguishing different models of implementation (1.), then taking a closer look at the instruments of central bureaucracies to coordinate the implementation in the member States (2.) and finally focusing on technical and financial assistance as specific instruments of international institutions to ensure the correct implementation of their rules (3.).

### 1. *Different Models*

Different models of implementation can be distinguished according to the relevant actor or the primary instrument.<sup>59</sup> We will use both yardsticks here and look at five types of implementation. All these models demonstrate to what extent authorities are codependent in their exercise of public authority and point to further instances where the normative bases, as named above, and/or the perception as composite administration entail a heightened normative expectation to act cooperatively to the achieve the commonly agreed purpose.

(a) The conventional (and still most common) model of implementation is that of legislative implementation. International rules set by an agreement between States are implemented by the public authorities of the member States through general norms. Although the final act might be enacted by parliament, it is usually drafted by the ministerial bureaucracy; that is why the implementation procedure can count as composite administration. A typical example of an organization that primarily relies on this kind of mechanism is the International Labor Organization (ILO). The ILO promulgates Conventions, which lay down labor standards. These Conventions are international treaties and thus open to ratification by member States.<sup>60</sup> Multi-level cooperation hence takes on the form of legislative cooperation and international standards are made operative by national (or regional) norms.<sup>61</sup>

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<sup>59</sup> See Benedict Kingsbury, *Global Environmental Governance as Administration*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 72-83 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007); Redgwell (note 56), at 929.

<sup>60</sup> de Wet (note 40). It should be added that even though the ILO Declaration of 1998 is itself a non-binding declaration, its aim is to promote the legislative implementation of the core ILO Conventions.

<sup>61</sup> Two special aspects of such legislative implementation should be pointed out, as they demonstrate the variety of today's implementation regimes. First, in areas of regional integration the implementation can be done by regional (and not national) legislatures, esp. in the EU (*see* Friedrich, in this issue). And secondly, the international norms do not have to be binding. To an ever growing extent, non-binding norms are agreed on the international level yet domestic authorities deem it expedient to implement them. Many OECD Guidelines can serve as examples (*see* Schuler, in this issue).

(b) Implementation can, secondly, take place through administrative action by the relevant domestic authorities. Such administrative implementation hence concerns cases in which individual decisions are taken domestically on the basis of international agreements. A prominent example in this respect are the export or import permits issued in accordance with and on the basis of CITES appendices. These appendices contain lists of species which require special protection; the import and export of them is therefore regulated. National Management Authorities are designated to grant individual permits if animals or plants on one of the CITES Appendices are concerned.<sup>62</sup> CITES rules are hence executed directly by domestic authorities.

(c) While *national* authorities are responsible for the implementation in these first two models, *international* authorities are decisive in the following three. The first of these three can be called "international direct implementation". Here, an international authority is itself responsible for executing an international agreement vis-à-vis a private individual or a State. The most prominent of this revolutionary, although still extremely rare form of implementation can be found in the UNHCR's system of refugee status determination.<sup>63</sup> Here, the UNHCR staff makes a decision as to whether an asylum seeker falls within the criteria for international refugee protection. This determination can<sup>64</sup> have the effect that a national authority has no further discretion with respect to accepting a person's status. The decision of an international institution is hence directly operative in domestic law.<sup>65</sup>

(d) A second type of international implementation might be termed "integrated implementation". Here, the final decision vis-à-vis an individual actor is also taken by an international authority, but it has been prepared by a national authority which was given authority to make a preliminary decision. Implementation here is therefore an integrated procedure involving national and international authorities. A prominent example of this type is the Clean Development Mechanism (CDM) under the Kyoto protocol.<sup>66</sup> In this case, the CDM member States set up national

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<sup>62</sup> In more detail, see Fuchs, in this issue.

<sup>63</sup> See Smrkolj, in this issue.

<sup>64</sup> The effect depends on the concrete legal relation between UNHCR and the host country in question. In more detail, *id.*

<sup>65</sup> Another example of such direct international implementation can be found in the WIPO's Madrid System of registering trademarks. There, a legal effect of the (international) registration sets in automatically, unless a country raises an objection. See Kaiser, in this issue.

<sup>66</sup> Mindy G. Nigoff, *The Clean Development Mechanism: Does the Current Structure Facilitate Kyoto Protocol Compliance?*, 18 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW 249 (2006).

contact points, so-called designated operational entities (DOE). If a company now wants to propose a CDM project, it will first have to turn to the (national) DOE. This examines the project and verifies its emissions reduction. The certification by the DOE will automatically result in the issuance of the specified number of certified emission reductions by the CDM registry administrator, *unless* the CDM Executive Board exercises its powers of review and, for example, detects fraud. Hence, legal effect comes from the international certificate, but the *de facto* implementing decision is made by a "loaned" national contact point.<sup>67</sup>

(e) Finally, the fifth type of international administration is in essence a model of shared implementation. Here, an international decision is taken and valid as such. However, national authorities are required to complement the international decision to make it effective. Such a model can be found in the listing of a site as a World Heritage site by the UNESCO. The listing decision is taken autonomously by the international committee. This listing decision then triggers a whole variety of obligations for the respective municipality to protect and preserve the listed sight.<sup>68</sup>

These five modes of implementation can be used simultaneously by one organization for its different tasks. CITES is an example for this.<sup>69</sup> However, they underline how the interaction between the international and the domestic level has moved away from State-centered ratification and become a more cooperative and varied common effort. They also highlight the codependence of authorities in composite administration. And, last but not least, they indicate to what degree the idea of international cooperation as always free and equal cooperation has been eroded and become inadequate to describe the reality of the situation. The modes of international direct and integrated implementation (c and d above) contain elements (even though in small doses) of hierarchy in favor of the international authority. If these two modes of cooperation are admittedly rare cases, the next two sections provide examples for further soft and not so soft instruments of power.

## 2. *Instruments of Coordinated and Consistent Implementation*

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<sup>67</sup> The registration of domain names for the internet follows a similar, though slightly different procedure. ICANN, the global internet administration, does not have the competence to register domain names itself but has contracts with national registries. These can be public authorities or private companies but they are accredited with ICANN.

<sup>68</sup> On the legal effect of listing in detail, *see* Zacharias, in this issue.

<sup>69</sup> CITES obligations are implemented through legislative and administrative instruments and by national and international actors (*see* Reeve (note 42), at 338).



Even if responsibilities for the implementation of international rules are laid down, questions on how exactly to implement them can remain, especially where the implementation is done in a decentralized way. The question therefore remains as to how the implementation of rules can be ensured to be correct and consistent.<sup>70</sup> To counter this problem, manuals or guidelines instructing those actually implementing the rules on how to understand and apply them have become a central instrument of coordination. Such manuals are often formulated in general terms and hence resemble norms themselves; they are promulgated by the international bureaucracies.

Several examples demonstrate the growing insistence on such coordination: The OECD provides official commentaries on its draft agreements on double taxation to orchestrate the unified application of these.<sup>71</sup> FAO hands out so-called Circular Letters that give guidance on questions of implementation.<sup>72</sup> CITES is slightly stricter as it promulgates binding interpretations for the central provisions of its convention as well as resolutions that concretize it.<sup>73</sup> The UNESCO uses a "reactive monitoring" system in which a "Policy Guidance Tool" directs the handling of listed places.<sup>74</sup>

All in all, there is thus a broad variety of such instruments of coordination. In most cases, these instruments are soft instruments, proposing interpretations, nudging parties to keep in line with obligations or the like. Although being soft, these instruments can also be read together with the norms on the duty to mutual cooperation<sup>75</sup> and thereby be normatively "hardened". Obviously, there is no court to enforce such duties, but central bureaucracies can nevertheless make an argument from general provisions of mutual and loyal cooperation and remind lax members of their respective commitment. And often enough, central bureaucracies have further resources to back up their demands, as – for example – the next section demonstrates.

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<sup>70</sup> SCHERMERS & BLOKKER (note 26), at § 1739.

<sup>71</sup> Ekkehart Reimer, *Transnationales Steuerrecht*, in INTERNATIONALES VERWALTUNGSRECHT 187 (Christoph Möllers, Andreas Voßkuhle & Christian Walter eds., 2007).

<sup>72</sup> Friedrich, in this issue.

<sup>73</sup> Fuchs, in this issue.

<sup>74</sup> Operational Guidelines, para. 169; Zacharias, in this issue.

<sup>75</sup> Zacharias, in this issue.

### 3. *Supported Implementation: Technical and Financial Assistance*

Providing technical and financial assistance is another instrument that has become central to the effective and consistent implementation of international agreements or decisions.<sup>76</sup> In the process of composite administration such assistance is often available to developing countries that need additional means or expertise to fulfill their obligations.<sup>77</sup> Providing such assistance is hence often a necessary precondition or complement for implementation to take place at all or in the envisioned form. The allocation is organized and controlled by the institution that is also responsible for setting the international obligation.<sup>78</sup>

The UNESCO World Heritage Convention provides a fine example. Art. 15 of the World Heritage Convention establishes a World Heritage fund, while art. 13 sets out a procedure according to which the central decision-making body, the World Heritage Committee, has to decide on requests for funding.<sup>79</sup> Such assistance may be requested for emergency assistance for sites that have suffered due to natural or man-made incidents, preparatory assistance for the preparation of nominations for the World Heritage List, technical cooperation covering the provision of experts and/or equipment for the conservation or management of world heritage sites, or assistance for the training of specialized staff or for education, information and awareness-raising.<sup>80</sup> Between 1998 and 2005 there were 787 grants with a total amount of nearly US\$ 20 million approved. And obviously, such grants are not ineffective instruments. Any poorer country with an important tourism industry depends on retaining the status of its sites. Granting or refusing such money is therefore a powerful tool to ensure that proper "cooperation" takes place.

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<sup>76</sup> Laurence Boisson de Chauzournes, *Technical and Financial Assistance*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 948 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007); Nele Matz, *Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements*, 6 UNYB 473 (2003); Lothar Gündling, *Compliance Assistance in International Environmental Law*, 56 ZAÖRV 796 (1996).

<sup>77</sup> Such programs are not exclusive to the international sphere. The EU also used a wide number of such programs to help countries to prepare for accession (see Armin von Bogdandy, *The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity*, 19 EJIL 241 (2008)).

<sup>78</sup> See Philipp Dann, *Accountability in Development Aid Law: The World Bank, UNDP and Emerging Structures of Transnational Oversight*, 44 ARCHIV FÜR VÖLKERRECHT 394 (2006).

<sup>79</sup> See Zacharias, in this issue.

<sup>80</sup> See Arts. 22 and 23 of the World Heritage Convention; paras. 235 and 241 of the Operational Guidelines 2005. Available at: <http://whc.unesco.org/archive/opguide05-en.pdf>.

### V. Cross-Linkages

Another characteristic element of international composite administration should be highlighted: the importance of cross-linkages, i.e. cooperation across one level. Such ("horizontal") cooperation takes place between domestic authorities, between international bureaucracies or between bureaucracies and non-State actors and contributes greatly not just to broadening the viewpoint but also to the effects of international administration.<sup>81</sup> The horizontal dimension of composite administration is thus central in order to grasp the nature of today's global governance system. Two media of such cross-linkages shall be distinguished here: institutional and instrumental linkages.

#### 1. Institutional Cross-Linkages

Cross-linkages can, first of all, mean the *institutional* cooperation between different organizations. The regular participation of representatives of other organizations as observers in meetings and decision-making procedures of an organization is one example. Such observers do not have a right to vote, but often enough they have a right to speak. They can attend the meetings of different bodies. FAO, for example, permits observers in its Conference and also its topical committees (esp. in the COFI).<sup>82</sup> The identity of such observers can vary; they can be other international organizations but also private, non-State actors. FAO, to stick to this example, allows other international organizations, non-member States and non-State actors to attend.<sup>83</sup> Decisions about their admission rest with the Director General. In the case of the OECD's Export Credit Arrangement, it is generally the respective member State's Export Credit Agency that is invited to the sessions (Para. 3 ECA). The WTO also takes part here.

A different form of institutional cross-linkage is found where an organization is not part of an agreement but provides the forum and the organizational structure to a meeting of parties. A special example of such forum-function can be found in the Development Aid Committee (DAC) of the OECD. This, together with staff members of the World Bank, organizes a continuous exchange between donors and between donors and recipients.<sup>84</sup> The DAC obviously has no hierarchical means at

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<sup>81</sup> Cassese (note 12), at 675.

<sup>82</sup> Art. III(5) and Art. V of FAO General Rules of Organization; Art. XXX General Rules of the Organization (FAO) and Rule III of RoP COFI.

<sup>83</sup> FAO, Conference Resolution 39/57 and 44/57.

<sup>84</sup> Dann (note 21), at 17.

hand to order participation, but it serves as host and provides the logistical (and financial) support for the process.

Both occurrences of horizontal institutional cross-linkages demonstrate the permeability and perhaps even openness of some international institutions and the flexibility of processes, at least in certain circumstances. Instead of being closed and complete systems, organizations seek an exchange with other organizations. The reasons for such permeability will be addressed below.

## 2. Instrumental Cross-Linkages

Another type of cross-linkage is of a rather instrumental character. It is the mutual use of norms by means of reference.<sup>85</sup> An organization can incorporate provisions of other organizations by reference in its legal framework. This can take place in explicit or implicit form. For example, the UN-Convention of the Law of the Sea (UNCLOS) and the UN Fish Stocks Agreement refer implicitly to the FAO Code of Conduct for Responsible Fisheries when they demand respect for "generally recommended international minimum standards".<sup>86</sup> The Lake Tanganyika Convention, on the other hand, refers explicitly to the FAO Code of Conduct in order to establish the relevant standards that are to be applied pursuant to the Lake Tanganyika Convention.<sup>87</sup> Other examples can be added: The OECD Export Credit Arrangement incorporates norms which the Bern Union has promulgated and which are laid down in the Bern Union General Understanding. The WTO has incorporated norms of this agreement in its Agreement on Subsidies and Countervailing Measures.<sup>88</sup> All of these examples underline the interconnectedness of legal regimes on the international plane and even a surprising degree of normative collaboration.<sup>89</sup>

### D. Comparative Summary

The previous parts have examined a wide range of international institutions in their interaction with national authorities, other international institutions and non-State actors. It was asked what recurrent forms of interaction occur and how they can be explained. The central idea put forward was to conceptualize these interactions as composite administration, hence with a model that offers a wider horizon of such interaction and emphasizes the specific interplay of cooperation and power, autonomy and interdependence in it.

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<sup>85</sup> MAYER (note 20), at 281. On the problems of such references from the perspective of rule of law and democratic legitimacy, see CHRISTIAN TIETJE, *INTERNATIONALISIERTES VERWALTUNGSHANDELN* 599 (2002).

<sup>86</sup> Art. 5(b), 10(c) Fish Stock Agreement; Art. 61(3), Art. 119(1)(a) UNCLOS. See Friedrich, in this issue.

<sup>87</sup> Art. 7(2)(b) Convention on the Sustainable Management of the Lake Tanganyika.

<sup>88</sup> WTO Agreement on Subsidies and Countervailing Measures, Annex I, lit. (k), para. 2. See Janet K. Levit, *The Dynamics of International Trade Finance Regulation*, 45 *HARVARD INTERNATIONAL LAW JOURNAL* 65, 120-121 (2004).

<sup>89</sup> A perhaps rather troubling instance from a rule of law perspective concerns CITES. Its Art. VIII(1)(a) obliges the member States to penalize trade in protected species, which has been implemented, for example by Germany, with a dynamic reference in its penal code to the CITES appendices. See Fuchs, in this issue.

The following section sums up these analyses from a comparative angle. It is guided by two questions: first, we ask to what extent the concept of international composite administration might provide a convincing framework which captures the characteristics of international cooperation between public authorities (I.). In a second step we inquire into the differences between the *international* type of a composite administration vis-à-vis the *regional* (European) type (II.). Even though these two types share common basic features, it is necessary to point to some fundamental differences.

*I. International Composite Administration: Why Propose a New Term?*

Different reasons can be put forward to argue that the new term and concept helps to better grasp the nature of cooperation between public authorities than other concepts.

For one, the concept should work as a magnifying glass and as a tool to frame and focus scholarly attention on this increasingly important aspect of global governance. The concept of composite administration, as outlined here, is more specific than concepts of multi-level-structures or networks, which can include various aspects such as competences, organizational structure or procedures alike. Our concept of composite administration, instead, concentrates on the exercise of public authority, hence on the operational side. It focuses on the routine forms of cooperation that are bureaucratic in nature. It therefore concentrates on only one aspect of what other concepts take into consideration.

At the same time, composite administration as a concept might help to avoid the terminological ambiguities of multi-level and network analysis, which are grounded in a misleading understanding of hierarchy. It does not insinuate top-down hierarchy (multi-level) or the absence of hierarchy (networks). Instead, it stresses the interwoven structure of authorities and the end of clear-cut levels. Yet by acknowledging this "marble cake situation", it can move on and uncover disguised power imbalances and thus informal hierarchies.

Moreover, even though it is not a legal term, the concept of composite administration can be connected to normative bases and impart certain normative meaning. In connection with a concrete legal basis (see B.I.), it can provide an argument for heightened obligations to cooperate, for example to provide information or to implement a program faithfully. In this respect, the term can help to accentuate normative consequences.

Finally, the term connects to an existing body of scholarship, which has been dealing intensely with similar phenomena in the European Union.<sup>90</sup> While the European sphere is certainly different in many respects, as we shall see in the next section, the basic phenomena and issues are the same. The term "composite administration" therefore helps to strengthen the intra-disciplinary exchange.

However, the concept of composite administration also has flaws – and it is important to name them. First of all, it is still very broad. It does not focus on one issue area, a specific regime or a special mechanism of interaction, but tries to grasp the whole area of inter-institutional interaction. More important perhaps is another limitation: the concept of composite administration does not indicate how to resolve the central problem of the "gray area" where the lines of responsibility are blurred. It might help to better indicate where power imbalances and informal hierarchies exist, but it provides no recipe of how to deal with them. Like many current notions, it rather highlights the cooperative and efficiency enhancing aspects but does not indicate standards or critical expectations. However, the term is meant as a tool for further research. Using it as a magnifying glass and with these limitations in mind should help to address such issues.

## *II. International and European Composite Administration: Where are the Differences?*

While the concept of composite administration has so far not been used for the international sphere, it has played a remarkable role in the analysis of European administrative cooperation.<sup>91</sup> We should therefore inquire as to the differences between the European and international examples, for even though composite administration in different settings shares defining features, important distinctions have to be made.

### *1. Controlling Applicability and Impact*

A first and fundamental distinction can be drawn with respect to the surrounding legal order. Here, the question arises of which legal order is determining the impact and applicability of common or "higher" level law on the particular or "lower" level. In the European example, the instruments of primacy and direct applicability assign this competence to the "higher" level.<sup>92</sup> In the international sphere, this is not

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<sup>90</sup> See (notes 1-3).

<sup>91</sup> See (notes 1-3) (including literature cited).

<sup>92</sup> KOEN LENAERTS & PIET VAN NUFFEL, *CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 665 (2005, 2nd ed.); Franz C. Mayer, *Supremacy – Lost?*, in *THE UNITY OF THE EUROPEAN CONSTITUTION* 87 (Philipp Dann & Michal Rynkowski eds., 2006).

the case. Here, the constitutional mechanisms of Member States or parties act as "gatekeepers" concerning the applicability and implementation of decisions taken by the international level.<sup>93</sup> This "reversed order" and the dominant role of nation-states has manifold repercussion when it comes to the mechanics of administrative cooperation, be it in the instruments used, the need for coordination or the supervision of implementation and compliance control.

## 2. *Topos and Telos: "Sectorality" vs. Universality*

Another difference between European and international forms of composite administration lies in their *topos*, and ultimately their *telos*. Composite administration in the *supranational* European Union is a process within one polity, whose organs act within a (mostly) unified institutional framework and which offers thematic universality, i.e. acts on a broad variety of fields. *International* composite administration, on the other hand, does not contain a proto-federal *telos*, but follows the logic of functional differentiation. The exercise of public authority here is principally focused on one theme, one sector, hence its regulatory perspective is in principle functionally limited. Moreover, it is not bent on political integration but technocratic perfection. This has profound consequences.

For one, an exchange of legal concepts between different sectors is much more difficult in the international context. A mechanism of "traveling concepts" that profoundly shaped today's coherence of European administrative law (e.g. the emphasis on procedural safeguards or the relevance of proportionality considerations) is lacking.<sup>94</sup> With respect to its *telos* (integration or expertise) and its *topoi* (activities across the range of issues or functional specialization) composite administration can thus take place in profoundly different environments.

The sectoral specialization goes along with organizational and legal fragmentation.<sup>95</sup> While there is only one institutional and legal system for European composite administration, the various international regimes produce distinct systems in which public authority can be exercised as composite administration. This multi-

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<sup>93</sup> For a recent defense of this mechanism, see Advisory Opinion of Advocate General Maduro in the ECJ-Case C-402/05 (*Kadi vs. Council*).

<sup>94</sup> For the principle of proportionality, see PAUL CRAIG, *EU ADMINISTRATIVE LAW* 658-666 (2006); for the exchange of concepts between EU and member states, see ECJ, Case C-28/05, *Dokter*, 2006 E.C.R. I-5431, paras. 71-75; Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say*, 6 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* (forthcoming 2008).

<sup>95</sup> *PROLIFERATION OF INTERNATIONAL ORGANIZATIONS* (Niels Blokker ed., 2001); International Law Commission, *Fragmentation of International Law* (note 9).



tude heightens the problem of coordination. Especially with respect to actors on one level and overlapping jurisdictions, coordination becomes a major task.<sup>96</sup> It is from this perspective, that the cross-linkages gain special importance.

### *3. Permeability: The Boundaries of Composite Administration*

International and European composite administration are also distinct with respect to the permeability of their boundaries. It is typical that the organs of international institutions involved in composite administration are open to representatives from other organizations which often take part in their deliberations. Their institutional boundaries are hence less hermetic than those of domestic authorities.

The reasons for this permeability can be found, first, in the functional need for cooperation and external advice. In European instances of composite administration, the exchange between the "branches of government" is a natural aspect of European governance and politics,<sup>97</sup> but not so in the international sphere. Another reason could lie in the fact that international bodies do not form polities. Their organs therefore have more of a functional than a representational role. This would also mean that the question of who is present and can voice his concerns is seen as less strict.

### *4. Density of Cross- or Horizontal Cooperation*

Another difference becomes apparent when we compare typical elements of international and European composite administration, namely the central role of horizontal interaction. In the European setting, composite administration often takes place as cross-linkages and cooperation between Member States.<sup>98</sup> In other words, in the European setting composite administration also frequently takes place as cooperation at the purely national level between the various national agencies and authorities. However, this cooperation between the member States (cross-linkage at the national level) can hardly be observed in the international examples of composite administration. Member State cross-linkage, let us say, in CITES or the World Bank, is rather limited. On the other hand, cooperation between international institutions is frequent in international composite administration.<sup>99</sup> This lack of member State to member State cooperation in international composites may be explained by

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<sup>96</sup> SCHERMERS & BLOKKER (note 26), at §§ 1706-1739.

<sup>97</sup> See FLORIAN WETTNER, *DIE AMTSHILFE IM EUROPÄISCHEN VERWALTUNGSRECHT* (2005); Craig (note 94), at 57.

<sup>98</sup> Bast (note 30).

<sup>99</sup> See Part C.V.1.

the fact that there is less trust between the national bureaucracies, much less an understanding of organizational unity and thus less willingness to cooperate.

##### *5. Collusion of Powers – or the Lack of Institutional Counter-Bearings*

A characteristic feature in the exercise of international public authority by composite administration lies in the significance of separation of powers mechanisms for them – or rather, the lack thereof. This is to some extent similar to the EU. In both cases, legislative, executive and judicial functions are exercised by several organs.<sup>100</sup> Legislative and executive functions are mostly exercised by identical actors, rendering this distinction almost meaningless on the supra- and international plane. However, the lack of judicial organs that can serve as institutional counter-balances to the norm-setting organs is more problematic, and in sharp contrast to the European composite administration. It would be the task of judicial organs, especially on the central level and thus with effect for all members, to establish and shape guiding principles and to lay down the normative standards for the composite exercise of public authority. Yet, while in the European context the ECJ and the ECHR play this role, judicial organs are rare on the international level and it seems more likely that decentralized courts, i.e. national or regional courts, will take on the task of judicial oversight.<sup>101</sup> This, however, could have problematic consequences, e.g. for the coherence of their rules or the protection of common concerns.

#### **E. Conclusion**

The concept of composite administration has been presented here as a conceptual tool for a better legal understanding of the various and heterogeneous norms concerning the exercise of public authority through the interplay between international institutions and national administrations, between various member State administrations as well as between various international institutions. In doing so, the concept should demonstrate its usefulness for the legal analysis of such forms of administrative collaboration, and its difference to the concepts of multi-level systems and networks. The aim of the concept is therefore not one of critique. The legitimacy of composite administration has not been the central focus. The concept's aim is rather to provide an analytical concept to mark typical elements, name recurrent problems and indicate further areas of research.

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<sup>100</sup> Koen Lenaerts, *Some Reflections on the Separation of Powers in the European Community*, 28 COMMON MARKET LAW REVIEW 15 (1991); MÖLLERS (note 9), at 253.

<sup>101</sup> On the role of decentralized courts, see de Wet (note 40); on the potential role of the ICJ, see Eyal Benvenisti, *The Interplay Between Actors as Determinant of the Evolution of Administrative Law in International Institutions*, 68 LAW AND CONTEMPORARY PROBLEMS 336 (2005).

However, even though the main purpose of the concept is heuristic, it carries a normative component as it is embedded in a normative vision of peaceful co-operation between polities organized by international institutions which live up to their publicness.<sup>102</sup> International administration does not always conform to this vision: distrust, neglect, or hegemonic aspirations are not unfamiliar phenomena. Yet we believe that the vision which underlies the concept of composite administration has a sufficient legal basis in order to inform the construction of positive law and provide a meaningful general idea.

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<sup>102</sup> On this notion, *see* von Bogdandy, Dann & Goldmann, in this issue.