

W(h)ither the Idea of Publicness? Besieged Democratic Legitimacy under the Extraconstitutional Hybrid Regulation across the Taiwan Strait

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Hybrid regulatory bodies have been credited for functioning as an institutional bypass around the bureaucratic procedures and providing expedient responses to the changing needs of administrative governance. As hybrid regulatory bodies are utilized in transnational regulation, however, concerns have arisen over the lack of transparency and the evasion of accountability in the face of their informality and flexibility. This article aims to explore the issues surrounding the democratic legitimacy of transnational hybrid administration through a case study of the Cross-Straits Economic Cooperation Committee (CSECC) provided in the Economic Cooperation Framework Agreement between the Straits Exchange Foundation and the Association for Relations Across the Taiwan Straits, two private legal bodies on behalf of Taiwan and China, respectively. I argue that the CSECC is deliberately designed to avoid the institutional features associated with the idea of publicness. Both traditional constitutional design and global

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administrative law fall short of restoring the idea of publicness to transnational hybrid administration in the hybrid cross-strait economic regulation. As a result, the idea of publicness is withering away in the cross-strait economic regulation, laying siege to the democratic legitimacy of the extraconstitutional hybrid administration across the Taiwan Strait.

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I. INTRODUCTION

“New governance” strategies have been adopted to address multifarious governance needs and challenges facing traditional administrative authorities.¹ Among them, privatization, contracting-out (or outsourcing), and “hybridity” are regarded as pivotal to the organizational innovation of administration and regulation.² Functions

¹ See generally LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006) (addressing complex social problems and the challenges they raise for understanding law and constitutionalism, as well as legal and constitutional values).

² While privatization means “the asset sale of state-owned industries,” contracting-out (or outsourcing) refers to “entrust[ing] a private entity with a task that remains under public

and powers that have traditionally rested with public agencies are contracted out to institutions that are organized differently and function independently from traditional public agencies, from which emerge new regulatory bodies that transcend the distinction between the public agency and the private corporation and lead to hybrid regulation and administration.³ These new hybrid regulatory bodies have been credited in functional terms and function as an institutional bypass around bureaucratic procedures, providing expedient responses to the changing needs of administrative governance at a lower price.⁴ Hybrid regulation does not only gain currency in the traditional domestic regulatory context,⁵ but it is also deployed beyond national borders to address the growing needs of transnational regulation.⁶

However, concerns have arisen over the lack of transparency and evasion of accountability in the face of the informality and flexibility that is characteristic of hybrid regulatory bodies.⁷ These concerns are not only that the idea of publicness, which underlies public authorities in constitutional democracy, has been at risk with the privatization of regulation.⁸ Also, as hybrid regulatory bodies are utilized in transnational

supervision and is not purely left to the market.” Jean-Bernard Auby, *Contracting Out and Public Values: A Theoretical and Comparative Approach*, in *COMPARATIVE ADMINISTRATIVE LAW* 511, 511 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010); see also Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 *HARV. L. REV.* 1285, 1286–87 (2003) (discussing how privatization and contracting-out can be understood as different forms of privatization in a broad sense). When the organization that takes over the devolved governmental function is hard to characterize as public or private, it becomes institutionally hybrid. Daphne Barak-Erez, *Three Questions of Privatization*, in *COMPARATIVE ADMINISTRATIVE LAW*, *supra*, at 493–97; see also Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, *supra* note 1, at 1, 6–9 (giving a measure-oriented conception of hybridity).

³ See JONATHAN G.S. KOPPELL, *THE POLITICS OF QUASI-GOVERNMENT: HYBRID ORGANIZATIONS AND THE DYNAMICS OF BUREAUCRATIC CONTROL* 8–12 (2003) (discussing different types of hybrid and private regulatory bodies); William J. Novak, *Public-Private Governance: A Historical Introduction*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 23, 27–28 (Jody Freeman & Martha Minow eds., 2009) (showing how hybrid/private bodies can be traced to the blurring of conceptions of private and public in the Middle Ages).

⁴ KOPPELL, *supra* note 3, at 1–2.

⁵ See generally Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 *HARV. L. REV.* 1229 (2003) (casting historical light on the adoption of public-private partnerships in the U.S. context).

⁶ Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 *VAND. J. TRANSNAT'L L.* 501, 518 (2009).

⁷ Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in *GOVERNMENT BY CONTRACT*, *supra* note 3, at 1, 4–5.

⁸ See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 168–93 (William Rehg trans., 1996) [hereinafter HABERMAS, *BETWEEN FACTS AND NORMS*]; Andrew Arato, *Procedural Law and Civil*

regulation, they threaten to further upend the constitutional structure of checks and balances with respect to foreign affairs and pose fundamental challenges to the core of democratic legitimacy.⁹

In response, there has been new interest in the idea of publicness.¹⁰ The values of publicness have been identified in the functioning of administrative law beyond the realm of constitutional law. The idea of publicness is seen as embedded in the requirements of reasoning and due process, including the rights to timely notice, meaningful hearing, and effective judicial review.¹¹ For this reason, global administrative law is praised as the antidote to secrecy and the accountability avoidance caused by deployment of hybrid administration in transnational regulation.¹² The problem of democratic legitimacy

Society: Interpreting the Radical Democratic Paradigm, in HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES 26 (Michel Rosenfeld & Andrew Arato eds., 1998) (“Without proper reflection . . . private and public autonomy are understood . . . as a zero sum game, while democracy and constitutional rights are generally viewed in terms of potential conflict and antagonism[.]”); see also JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 1–26 (Thomas Burger trans., 1989) [hereinafter HABERMAS, STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE] (giving a historical account of the idea of publicness).

⁹ See Christoph Engel, *Hybrid Governance Across National Jurisdictions as a Challenge to Constitutional Law*, in SPONTANEOUS ORDER, ORGANIZATION AND THE LAW: ROADS TO A EUROPEAN CIVIL SOCIETY 141, 145 (Liber Amicorum et al. eds., 2003) (critically analyzing the challenges from transnational hybrid regulatory bodies to national constitutional orders); Paul Craig, *Shared Administration and Networks: Global and EU Perspectives*, in VALUES IN GLOBAL ADMINISTRATIVE LAW 81, 107–08, 113–15 (Gordon Anthony et al. eds., 2011) (examining the literature on policy networks).

¹⁰ John Morison & Gordon Anthony, *The Place of Public Interest*, in VALUES IN GLOBAL ADMINISTRATIVE LAW, *supra* note 9, at 215. See generally JANET NEWMAN & JOHN CLARKE, PUBLICS, POLITICS AND POWER: REMAKING THE PUBLIC IN PUBLIC SERVICES (2009); Benedict Kingsbury, *International Law as Inter-Public Law*, in MORAL UNIVERSALISM AND PLURALISM 167 (Henry S. Richardson & Melissa S. Williams eds., 2009) [hereinafter Kingsbury, *Inter-Public Law*]; Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, 9 GERMAN L.J. 1909, 1918–21 (2008); Armin von Bogdandy et al., *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN L.J. 1375 (2008); Laurence Boisson de Chazournes, *Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies*, 6 INT’L ORG. L. REV. 655 (2009); Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUR. J. INT’L L. 23 (2009) [hereinafter Kingsbury, *Concept of ‘Law’*]; Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT’L ORG. L. REV. 319, 353–54 (2009); Ming-Sung Kuo, *The Concept of ‘Law’ in Global Administrative Law: A Reply to Benedict Kingsbury*, 20 EUR. J. INT’L L. 997, 999–1001 (2009).

¹¹ Kingsbury, *Concept of ‘Law’*, *supra* note 10, at 41–50.

¹² Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 31–42 (2005).

concerning transnational hybrid administration seems to find its resolution in publicness-centered global administrative law.¹³

Yet, what if public authorities deliberately design a regulatory body to stay away from the idea of publicness? What if public authorities create a private regulatory body as a veneer to address regulatory issues, and transnational ones at that? Under such circumstances, is global administrative law underpinned by the idea of publicness an effective tool to address the issues of transparency and accountability arising from what I call an “ultra hybrid” regulatory body?¹⁴ In other words, if the deviation from the idea of publicness is the inbuilt value, instead of merely function run amok, does this pose a challenge to global administrative law? Does it expose the functional limits of global administrative law in addressing the challenges of transnational hybrid administration?

To address these issues, I present a case study in this article of the Cross-Straits Economic Cooperation Committee (hereinafter CSECC), provided in the Cross-Straits Economic Cooperation Framework Agreement (hereinafter ECFA) recently signed between the Straits Exchange Foundation (hereinafter SEF) and the Association for Relations Across the Taiwan Straits (hereinafter ARATS), two private legal bodies on behalf of Taiwan and China, respectively.¹⁵ The purpose of this case study is to examine, from the perspective of Taiwan, how the idea of publicness at the core of public authorities in constitutional democracy is doubly strained in the face of hybrid administration in transnational regulation.¹⁶ I argue that the CSECC is deliberately designed to avoid the institutional features associated with the idea of publicness. It not only bypasses the constitutional structure of checks and balances by escaping parliamentary oversight, but this hybrid administration’s organizational and procedural features expose the functional limits of global administrative law. As the idea of publicness, institutionalized in the constitutional system of checks and balances and embedded in the functioning of global administrative law, fails to rein in the CSECC, transnational hybrid administration raises the question of its own democratic legitimacy.

The remainder of this article is organized as follows: in Part II, I first analyze the legal strategy underpinning the political rapprochement

¹³ *Id.* at 50. See also Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. INT’L L. & POL. 763 (2004) (arguing that global administration raises new accountability problems, and that addressing the problems has important implications for democratic practice and theory).

¹⁴ For a discussion of an “ultra hybrid regulatory body,” see *infra* III.B.

¹⁵ STRAITS EXCHANGE FOUNDATION, CROSS-STRAITS ECONOMIC COOPERATION FRAMEWORK AGREEMENT (2010) [hereinafter ECFA].

¹⁶ Since the focus of this article is on the impact of transnational hybrid administration on the issues surrounding democratic legitimacy in constitutional democracy, I tackle these issues from the perspective of Taiwan, which has a democratically elected government.

between Taiwan and China. In Part III, I proceed to discuss how democratic legitimacy is threatened by the use of hybrid administration in economic regulation across the Taiwan Strait. I first establish that the underlying idea of publicness of public authorities is institutionalized in the constitutional system of checks and balances and in the functioning of administrative law. Yet, this state-oriented understanding of publicness is tenuously strained in the face of the globalizing regulatory environment. On the one hand, transnational hybrid administration displaces the idea of publicness embodied in the constitution as globalization has weakened legislative oversight over transnational administrative acts. Thus, global administrative law reflects the trend of searching for the idea of publicness beyond the state. On the other hand, the function of global administrative law is to keep private/hybrid administration from running amok at the cost of public interest. However, the effect of turning to global administrative law is constrained when facing an ultra hybrid regulatory body. I then take a closer look at the legal framework in Taiwan that governs relations between Taiwan and China. I argue that it not only eludes the legal control over the executive power in a constitutional state, but also shows that global administrative law reaches its limit in reining in hybrid/private administration when non-publicness becomes an end in itself. Part IV provides a summary of the argument and concludes that the idea of publicness is withering away in the hybrid regulation across the Taiwan Strait, and is laying siege to the democratic legitimacy of the cross-strait hybrid administration.

II. INSTITUTIONALIZING HYBRIDITY: THE STRATEGY TO CROSS THE TAIWAN STRAIT

This part aims to tell the story of the underlying legal strategy of the political rapprochement between Taiwan and China. Like other cases of conciliation between political rivals, the legal framework underpinning the cross-strait relations was not the product of automatic legal functioning, but has instead resulted from political decisions.¹⁷ To reveal the relationship between law and politics in the rapprochement between Taiwan and China, I first introduce the political background from which the legal framework of the cross-strait relations has emerged. Law has been creatively constructed and interpreted to provide a framework within which cross-strait regulatory issues following the political rapprochement can be addressed. Then I show how the legal framework has moved from

¹⁷ See Kjell-Åke Nordquist, *Reconciliation as a Political Concept: Some Observations and Remarks*, in *MULTIDISCIPLINARY PERSPECTIVES ON PEACE AND CONFLICT RESEARCH: A VIEW FROM EUROPE 197* (Francisco Ferrándiz & Antonius C.G.M. Robben eds., 2007) (discussing observations of and reflections on reconciliation in connection with peace processes and peace-building initiatives).

ad hoc management to the signing of ECFA, formally institutionalizing the idea of hybridity in the cross-strait economic regulation.

A. From Politics to Law: The Political Background and the Legal Framework of the Cross-Strait Relations

The complicated relationship between Taiwan and China dates back to the Chinese Civil War of 1945–49. When the Allies, including China, defeated Japan to end World War II (WWII) in 1945, Taiwan was part of Japan's territory as a result of the 1895 Treaty of Shimonoseki between Japan and the (Chinese) Qing Empire.¹⁸ As part of the Allies' post-WWII transitional arrangement, the Allied Powers militarily occupied Taiwan after Japan's unconditional capitulation to the Allies.¹⁹ General Douglas MacArthur, the Supreme Commander for the Allied Powers and the Commander in Chief of the United States Armed Forces in the Far East, entrusted the occupation of Taiwan and Northern Vietnam to Generalissimo Chiang Kai-Shek and his representatives.²⁰ Yet, Generalissimo Chiang acted beyond his mandate, governing Taiwan as a province of China before Taiwan's legal status was settled.²¹ Following the outbreak of the Chinese Civil War in 1945, China declared a state of emergency in 1948, but did not impose martial law rule on Taiwan until May 1949.²² Generalissimo Chiang's Nationalist (or KMT) government lost ground to the Communists in China both militarily and politically.²³

¹⁸ Lung-Chu Chen & W.M. Reisman, *Who Owns Taiwan: A Search for International Title*, 81 *YALE L.J.* 599, 610–11 (1972).

¹⁹ *Id.*, at 611–12, n.43.

²⁰ *Id.* at n.43 (“The senior Japanese commanders and all ground, sea, air and auxiliary forces within China excluding Manchuria, and Formosa and French Indo-China north of sixteen degrees north latitude shall surrender to Generalissimo Chiang Kai[-]Shek[.]”).

²¹ For example, Generalissimo Chiang violated his mandate by imposing Chinese nationality on Taiwanese inhabitants, who were still subjects of the Japanese Empire in 1945. *Id.*, at 652 n.200. This unilateral act has been retrospectively recognized in the Treaty of Peace between the Republic of China and Japan (Taipei Treaty), a peace treaty between Chiang's regime in Taipei and Japan in 1952. Treaty of Peace between the Republic of China and Japan, China-Japan, art. X, Apr. 28, 1952, 138 *U.N.T.S.* 3. Since the treaty does not include China, it is not clear whether it ended the state of war between China and Japan under international law.

²² The state of emergency, i.e. the “state of mobilization,” was not declared according to the constitutional provisions regarding the declaration of a state of emergency. Rather, the Constitution was suspended to create unchecked emergency powers that were entrusted to the president. To enlarge the presidential powers by shifting the executive power from the prime minister to the president and bypassing the Constitution's limited state of emergency, Temporary Articles were enacted in accordance with the constitutional provisions regarding constitutional revision on December 10, 1948, although they were separate from the Constitution of 1946. Tay-Sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 *PAC. RIM L. & POL'Y. J.* 531, 541 (2002).

²³ KMT stands for “Kuomintang,” also known as the Nationalist Party.

However, Chiang ordered his loyalist troops and civilian followers to regroup in Taiwan, despite his own ambiguous domestic and international legal status.²⁴

Before Generalissimo Chiang and his loyalists fled to Taiwan, Chinese Communists had formed a new national government in Beijing and proclaimed the creation of the People's Republic of China (PRC) on October 1, 1949.²⁵ Even so, Generalissimo Chiang's troops continued to fight their Communist rivals in China as the newly established PRC struggled to gain international recognition amid the global fear of the expansion of communism.²⁶ In the meantime, he moved the defeated Nationalist government to Taiwan in December 1949, but continued using the name the Republic of China (ROC).²⁷ Despite an unresolved international law status, Taiwan has remained governed by the terms of the 1946 ROC Constitution.²⁸ Moreover, the ROC regime in Taiwan did not forfeit its claim as the legitimate government of China and conducted several failed commando raids along China's southeast coast in the 1950s.²⁹ In sum, as a consequence of the Civil War, Chinese warring forces claimed that Taiwan was a part of China even though the rivaling

²⁴ In terms of international law, Taiwan remained part of Japan but was under the occupation of the Allied Powers. See Y. Frank Chiang, *One-China Policy and Taiwan*, 28 *FORDHAM INT'L L.J.* 1, 20–22 (2004) (“In May 1951 . . . General MacArthur said, ‘Formosa is still a part of Japan[.]’”); see also Chen & Reisman, *supra* note 18, at 639–41 (“Chiang . . . acted as the trustee of the Allied Forces[.]”); cf. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 199 (2d ed. 2006) (“With the consent of the Allied Powers, administration of Formosa was undertaken by the Government of the Republic of China[.]”). But see Pasha L. Hsieh, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan*, 28 *MICH. J. INT'L L.* 765, 769 (2007) (“After the Second World War, the Japanese retreated from Taiwan under the terms of the Cairo Declaration, issued in 1943, which mandated that Taiwan ‘be returned to the Republic of China.’”). In regard to the Republic of China's (ROC) domestic law, Chiang Kai-Shek announced his “retirement” and the “disclaimer” of presidential powers to Vice President Li Tsung-Jen on January 21, 1949, while Li formally succeeded to presidency on the same day. Thus, legally speaking, Generalissimo Chiang and his loyal troops' retreat to Taiwan without President Li's authorization was effectively a coup d'état. Moreover, President Li fled to the U.S. in 1949 in his capacity as Acting President; the 1946 ROC regime collapsed in December 1949. Notably, several members of the three houses of Parliament convened a “rump Parliament” in Taiwan, which laid the ostensible legal ground for the post-1949 ROC regime. Robert E. Bedeski, *Li Tsung-Jen and the Demise of China's “Third Force”*, 5 *ASIAN SURV.* 616, 622–24 (1965).

²⁵ MICHAEL BRECHER & JONATHAN WILKENFELD, *A STUDY OF CRISIS* 382 (1997).

²⁶ R. Owendale, *Britain, the United States, and the Recognition of Communist China*, 26 *HIST. J.* 139, 153 (2009).

²⁷ Chiang, *supra* note 24, at 21.

²⁸ The ROC Constitution was passed by the Constituent National Assembly in 1946 but did not come into effect until December 25, 1947. Wen-Chen Chang, *East Asian Foundations for Constitutionalism: Three Models Reconstructed*, 3 *NAT'L TAIWAN U. L. REV.* 111, 123 (2008).

²⁹ NANCY BERNKOPF TUCKER, *STRAIT TALK: UNITED STATES-TAIWAN RELATIONS AND THE CRISIS WITH CHINA* 15 (2009).

governing authorities in Taiwan and China regarded each other as rebels to be forcefully suppressed.

In the 1980s, the international political standing of both the PRC and the ROC changed.³⁰ However, Taiwan and China's perspectives on their political rivalry did not change until Taiwan underwent democratization in the 1980s. Dr. Lee Teng-Hui, a native Taiwanese, succeeded to the presidency in 1988 after the death of Chiang Ching-Kuo, Generalissimo Chiang's elder son and anointed successor.³¹ During this time, Taiwan was already under a gradual process of political reform, which ultimately brought about fundamental changes to cross-strait relations.³² Acknowledging the end of Chiangs' policy to reclaim Nationalist rule in China through military means, President Lee declared an end to the state of emergency in 1991.³³ In addition, the bans on post, communications, and travel across the Taiwan Strait were lifted as part of Taiwan's new conciliatory policy toward China.³⁴ Correspondingly, the ROC Constitution of 1946 was amended to reflect the new political reality. Using the model of the pre-unification Basic Treaty of West Germany, the jurisdiction of the ROC Constitution was confined to Taiwan and the

³⁰ Generalissimo Chiang's representative controlled China's seat in the United Nations until 1971 when the United States, Taiwan's only major ally, failed to garner enough votes in the General Assembly to support its stance under which the resolution of China's legitimate representation would require a two-thirds majority. Following the defeat in the vote over the procedural question, Taiwan's representative announced Taiwan's withdrawal from the U.N. before the General Assembly resolved to "expel forthwith the representatives of Chiang Kai-Shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it." G.A. Res. 2758 (XXVI), U.N. GAOR, 26th Sess., U.N. Doc. A/630, at 2 (Oct. 25, 1971). After Chiang's government lost its seat in the U.N., it faced a series of diplomatic defeats as well; now, only twenty-three countries recognize the ROC regime as the legitimate representative of China and have diplomatic relations. See Chiang, *supra* note 24, at 67–71 ("[T]he question of China's representation in the General Assembly agenda was made each year from 1953 through 1960 by a member of the Soviet bloc. Each time the proposal was rejected.").

³¹ Here, "Native Taiwanese" refers to persons whose forebears immigrated to Taiwan before 1945, even though most, like immigrants who moved after 1945, were ethnically Han Chinese. See Chen & Reisman, *supra* note 18, at 625–26 ("From the sixteenth century onward, the Chinese population . . . created a new Taiwanese ethnic identity[.]"). Generalissimo Chiang died in 1975, and the presidency passed to Vice President Yen Chia-Kan, who was considered a caretaker president until Chiang Ching-Kuo was elected in 1978. John F. Copper, *Taiwan's Failed President*, 34 ASIAN AFF. 179, 189 (2008).

³² The martial law rule was lifted on July 15, 1987 but the state of emergency remained in place until 1999 when the Temporary Articles of the Constitution were rescinded. Wang, *supra* note 22, at 538–39.

³³ Martial law was lifted in 1987 during Chiang Ching-Kuo's presidency. Cheng-Yi Lin & Wen-Cheng Lin, *Democracy, Divided National Identity, and Taiwan's National Security*, TAIWAN J. DEMOCRACY 69, 70 (2005).

³⁴ The total ban on travel had been modified in 1987 to allow the veteran soldiers to visit their families in China via third countries. Larry Yu, *Travel between Politically Divided China and Taiwan*, 2 ASIA PAC. J. TOURISM RES. 19, 22–23 (1997).

small islands under Taipei's administration.³⁵ As a result, Taiwan ceased making political or legal claims on China. Rather, Taipei currently treats Taiwan and Mainland China as two independent legal bodies, since a final political settlement has not been reached.³⁶

In contrast, China has not changed its stance toward Taiwan despite the transformation of Taiwan's political situation, but continues to regard Taiwan as a renegade province.³⁷ On the one hand, the PRC is committed to bring Taiwan into the fold by military means if necessary.³⁸ On the other hand, Beijing does not recognize the legitimacy of the Nationalist government's rule, whether it is extended to China or confined to Taiwan.³⁹ To avoid the impression of acquiescing to the legitimacy of Taiwan's governing authorities, the PRC continues to refuse direct contact with Taiwan's government, despite the fact that issues resulting from civilian interactions have required increased cooperation from both sides to reach practical resolutions.⁴⁰

Since the early 1990s, both sides have understood the practical need to tackle issues resulting from interactions across the Taiwan Strait. Even though no formal contact has been established between the governments of Taiwan and China, both sides have agreed on the so-called "white gloves" strategy.⁴¹ In 1991, two proxy organizations were established as the only legal contact points: the SEF in Taiwan and the ARATS in China.⁴² It is noteworthy that the SEF is a private legal body established under the terms of Taiwan's Civil Code even though most of

³⁵ See generally Markus G. Puder, *The Grass Will Not Be Trampled Because the Tigers Need Not Fight—New Thoughts and Old Paradigms for Détente Across the Taiwan Strait*, 34 VAND. J. TRANSNAT'L L. 481 (2001) ("Desist from representing each other or exerting jurisdiction in the other's territory[.]"). Notably, among these small islands, Kinmen (Quemoy), Matsu, and their adjacent islets were not ceded to Japan in 1895. These islands were part of the Chinese Province of Fujian but had been occupied by Generalissimo Chiang's troops as a consequence of Chinese Civil War. Chen & Reisman, *supra* note 18, at 645.

³⁶ Puder, *supra* note 35, at 510–16. This position seems to have shifted again since the KMT was voted back to power in 2008. See *infra* note 51 and accompanying text.

³⁷ *Id.* at 507.

³⁸ Lin & Lin, *supra* note 33, at 74.

³⁹ Puder, *supra* note 35, at 507.

⁴⁰ Lin & Lin, *supra* note 33, at 83–84.

⁴¹ The prototype of the white gloves strategy can be traced to the Kinmen Agreement of 1990. To facilitate the deportation of Chinese illegal immigrants, an agreement was signed in Kinmen by representatives of the Red Cross Committees from Taiwan and China. Pasha L. Hsieh, *The Taiwan Question and the One-China Policy: Legal Challenges with Renewed Momentum*, 84 DIE FRIEDENS-WARTE: J. INT'L PEACE & ORG. 59, 73 & n.47 (2009); see also Ko Shu-Ling, *Ma Praises 1990 Kinmen Agreement*, TAIPEI TIMES, Sept. 12, 2010, at 3 (discussing the Kinmen Agreement as well as President Ma Ying-Jeou's reaction to it).

⁴² Yu, *supra* note 34, at 24.

its funding has come from the government budget.⁴³ According to the 1992 Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area (hereinafter the 1992 Act), a special statute governing the cross-strait relationship, “[the] Executive Yuan may set up or designate an institution to handle the affairs relating to any dealings” across the Taiwan Strait.⁴⁴ However, the SEF has been the only institution designated to handle cross-strait relations, and it is subject to the supervision and direction of the Mainland Affairs Council (MAC), a ministerial collegiate body under the Executive Yuan.⁴⁵ The scope of the SEF’s mandate and its relations with the MAC are stipulated in administrative contracts.⁴⁶

However, after a bumpy start in 1993, the “white gloves” method ground to a halt late in Lee’s presidency. As President Lee continued to advocate that Taiwan was a separate political identity from China, the PRC suspended all contact between the SEF and the ARATS in 1999.⁴⁷ This suspension continued after 2000, when the pro-independence Democratic Progressive Party (DPP) won the Taiwanese presidency.⁴⁸ Nevertheless, China could not afford to maintain a no-contact policy, since the political cold war did not chill interactions between Taiwanese and Chinese civilians.⁴⁹ To address practical issues resulting from these interactions without abandoning the boycott of the DPP government, sporadic negotiations and contacts were conducted between specially designated private organizations in Taiwan and China, bypassing the SEF and the ARATS.⁵⁰ These specially designated private organizations handled cross-strait relations in the same manner as the SEF used to, but on an ad hoc basis during the DPP administration.

China did not relent in its boycott until 2008, when the pro-unification KMT defeated the DPP in the presidential elections and reverted to a platform of eventual unification from former President Lee’s independence-oriented policy.⁵¹ Ever since, the direct contact between the SEF and the ARATS has resumed and both organizations have reclaimed

⁴³ Steven Goldstein, *The Cross-Strait Talks of 1993—The Rest of the Story: Domestic Politics and Taiwan’s Mainland Policy*, in *ACROSS THE TAIWAN STRAIT: MAINLAND CHINA, TAIWAN AND THE 1995–96 CRISIS* 197, 206 (Suisheng Zhao ed., 1999).

⁴⁴ Taiwan Diqu yu Dalu Diqu Renmin Guanxi Tiaoli (臺灣地區與大陸地區人民關係條例) [Act Governing Relations Between The People Of The Taiwan Area And The Mainland Area], July 31, 1992, art. IV, para. 1, China-Taiwan [hereinafter 1992 Act] (the 1992 Act came into effect on Sept. 18, 1992).

⁴⁵ 1992 Act, art. IV, para. 2.

⁴⁶ MAINLAND AFFAIRS COUNCIL, *WORK SYSTEM OF MAINLAND POLICY* (2012).

⁴⁷ Hui-Wan Cho, *China-Taiwan Tug of War in the WTO*, 45 *ASIAN SURV.* 736, 742 (2005).

⁴⁸ *Id.* at 743.

⁴⁹ *Id.* at 747.

⁵⁰ This is the so-called “Macau Model.” Jewel Huang, *Now is the Time for Cross-Strait Cooperation*, *Says MAC*, *TAIPEI TIMES*, Jan. 17, 2007, at 3.

⁵¹ *Editorial: Keep the President in President Ma*, *TAIPEI TIMES*, Jul. 7, 2008, at 8.

their position as the only bodies entrusted to negotiate on behalf of Taiwan and China.⁵² Moreover, Taiwan's government officials at the level of deputy ministers have been seated at the negotiating table as part of the delegation headed by the SEF, although they take off their official hats. As a whole, hybridity is characteristic of the legal framework underpinning Taiwan's rapprochement with China. On the one hand, negotiations have been represented by the SEF as well as other private organizations. On the other hand, they have been subjected to the MAC's supervision, while government officials have begun to take part in the negotiations despite wearing different hats. Thus, the SEF is a hybrid body.

B. From Ad Hoc Management to Institutional Arrangement: the Road to ECFA and the Institutionalization of the Idea of Hybridity

Under the "white gloves" model, Taiwan and China have signed over twenty single-issue agreements since 1990, most of which were negotiated by the SEF and the ARATS.⁵³ The driving force for continuing contact between the two sides is the practical need to tackle issues arising from the interactions between the peoples of Taiwan and China. For this reason, even during the DPP administration from 2000 to 2008, an agreement was signed between both sides to arrange charter flights for the 2005 Lunar New Year holidays.⁵⁴ In that case, the SEF and the ARATS were bypassed. Taiwan and China were instead represented by two private organizations, the Taipei Airlines Association and the Civil Aviation Association of China.⁵⁵ Although it was a one-off agreement that dealt with a technical, singular issue,⁵⁶ it is of historical significance

⁵² Dimitri Bruyas, *SEF Cleared for Resuming Talks*, THE CHINA POST, May 27, 2008.

⁵³ These cross-agreements are signed under different names, such as "agreement," "joint agreement," and "summary record." According to the most recent statistics available on the SEF website, there are twenty-eight cross-strait agreements as of October 20, 2011, including those not negotiated or signed by SEF. STRAITS EXCHANGE FOUNDATION, LIANG AN XIEYI [NEGOTIATED AGREEMENTS] (2012), available at <http://www.sef.org.tw/lp.asp?CtNode=3810&CtUnit=2083&BaseDSD=7&mp=19&nowPage=1&pagesize=15>. Notably, only twenty-four agreements are listed under the English version of the same document. STRAITS EXCHANGE FOUNDATION, NEGOTIATED AGREEMENTS (2012) [hereinafter SEF], available at <http://www.sef.org.tw/lp.asp?CtNode=4384&CtUnit=2569&BaseDSD=7&mp=300&nowPage=1&pagesize=15>.

⁵⁴ Philip P. Pan & Tim Culpan, *China, Taiwan Agree to Direct Flights*, WASH. POST, Jan. 16, 2005, at A21.

⁵⁵ *Id.*

⁵⁶ Joy Su, *MAC Chilly to Chinese Flight Offer*, TAIPEI TIMES, Feb. 26, 2005, at 1.

because it paved the way for the first legal direct flight across the Strait since 1949.⁵⁷

As the 2005 agreement on charter flights indicates, practical needs have prompted the two sides to negotiate regulatory issues as a consequence of increasing cross-strait civilian interactions. However, the parties employing this method of ad hoc management based on single-issue agreements, whether signed between the SEF and the ARATS or not, have faced challenges when tackling the increasingly complicated myriad of cross-strait issues. Of more than twenty agreements signed between Taiwan and China, more than three quarters were negotiated and concluded after the KMT was voted back to power in 2008. Most of these agreements were negotiated individually to address specific matters, including the deportation of criminals,⁵⁸ cross-strait cooperation on food safety,⁵⁹ financial regulation, and a wide range of other regulatory areas.⁶⁰ Considering Taiwan's smaller population and territory relative to China, the single-issue agreements in the aggregate have impacted Taiwanese society.⁶¹ In the meantime, as more and more single-issue oriented agreements are needed to respond to the new issues resulting from the accelerated interactions across the Taiwan Strait, the mode of ad hoc management has been stretched to the limit.

This backdrop provided the impetus for the 2010 ECFA, one of the latest agreements signed between Taiwan and China.⁶² At first glance, ECFA is another single-issue agreement. It is expected to lay groundwork for a future cross-strait common market. However, with the prospect of economic integration between Taiwan and China, ECFA cannot be confined to the pattern of ad hoc management, and instead requires special note.⁶³

As to its substance and purpose, ECFA is an interim agreement under Article XXIV of the General Agreement on Tariffs and Trade

⁵⁷ Pan & Culpan, *supra* note 54.

⁵⁸ SEF, CROSS-STRAIT JOINT CRIME-FIGHTING AND JUDICIAL MUTUAL ASSISTANCE AGREEMENT (2009).

⁵⁹ SEF, CROSS-STRAIT FOOD SAFETY AGREEMENT (2008).

⁶⁰ SEF, CROSS-STRAIT FINANCIAL COOPERATION AGREEMENT (2009).

⁶¹ Mo Yan-Chih, *Cross-Strait Talks Not Transparent: Panel*, TAIPEI TIMES, May 16, 2010, at 3.

⁶² A note of caution is needed here. As the heated debate prior to the signing of ECFA revealed, political calculation played a significant role in the advocacy on behalf of ECFA. According to this view, economic integration is expected to pave the way for an eventual political union. See, e.g., Ted Yang, *Economists Add Their Voices Against ECFA*, TAIPEI TIMES, Apr. 26, 2010, at 12. I shall limit my present analysis to the implications of ECFA for transboundary governance. Together with ECFA, the Cross-Strait Agreement on Intellectual Property Right Protection and Cooperation was signed on June 29, 2010. Later, on December 21, 2010, the Cross-Strait Agreement on Medical and Health Cooperation was signed. SEF, *supra* note 53.

⁶³ Cindy Sui, *Trade Deal Casts Shadow on Taiwan*, ASIA TIMES, Aug. 5, 2010, available at <http://www.atimes.com/atimes/China/LH05Ad01.html>.

(GATT).⁶⁴ Accordingly, ECFA aims to establish a cross-strait free trade zone, which would lead to the economic integration of Taiwan and China.⁶⁵ Although ECFA was negotiated and signed under the terms of the World Trade Organization (WTO), it both reflects and deviates from the pattern in which previous agreements between Taiwan and China were concluded.⁶⁶ On the one hand, despite having WTO law as the underlying legal framework, the signatories of ECFA are not the two equal members of the WTO, i.e., “the Separate Customs Territory of Taiwan, Penghu, Kinmen . . . Matsu” and the PRC.⁶⁷ Rather, paralleling previous cross-strait agreements, it is signed between the SEF and the ARATS with no reference to the principal entities they represent. Juxtaposed with trade agreements signed between Taiwan and other countries that do not recognize its statehood, this deliberate obscuring of the principals represented by the SEF and the ARATS in ECFA is remarkable.⁶⁸ The Bilateral Investment Promotion and Protection Agreement (BIPA) between Taiwan and India, which was signed by the Taipei Economic and Cultural Center in New Delhi and the India Association in Taipei, provides an example. The agreement’s text suggests that the two contracting parties are merely the representatives of “the authorities of the

⁶⁴ Pasha L. Hsieh, *The China-Taiwan ECFA, Geopolitical Dimensions and WTO Law*, 14 J. INT’L ECON. L. 121, 140 (2011). GATT was the predecessor of the World Trade Organization (WTO), which was established in 1995. See Cho, *supra* note 47, at 739–41 (discussing how China has attempted to prevent Taiwan from joining the GATT).

⁶⁵ Hsieh, *supra* note 64, at 147.

⁶⁶ The WTO is the only international organization in which both Taiwan and China participate as equal members: “Any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement and the Multilateral Trade Agreements may accede to this Agreement.” Marrakesh Agreement Establishing the World Trade Organization art. XII, Apr. 15, 1994, 1867 U.N.T.S. 154 (emphasis added). Notably, Taiwan joined the WTO as a separate customs territory on January 1, 2002, assuming the name of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, while China’s WTO membership, which came into effect on November 10, 2001, is based on its statehood. Hsieh, *supra* note 64, at 123–24. The impact of ECFA on the overarching WTO regime in governing the cross-strait relationship will be addressed later.

⁶⁷ Cho, *supra* note 47, at 737.

⁶⁸ Notably, most of the countries in the world do not recognize the statehood of Taiwan and thus engage in no direct official contact with the Taiwanese government. For example, since the U.S. established diplomatic relations with the PRC in 1979, the U.S. has only maintained representation in Taipei; the representative body is called the American Institute in Taiwan (AIT). Reciprocally, Taiwan’s representation in Washington, D.C. is called Taipei Economic and Cultural Representative Office in the United States (TECRO). In terms of consular functions, both are equal to embassies. Agreements between Taiwan and the U.S. also follow this path. The U.S. is referred to as “the Territory of the Authorities Represented by AIT,” while Taiwan is referred to as “the Territory of the Authorities Represented by TECRO.” See, e.g., Chen I-Chung, *Beef Controversy a Political Issue*, *TAIPEI TIMES*, Mar. 14, 2012, at 8.

respective territories” where they exercise jurisdiction.⁶⁹ Thus, the Taipei Economic and Cultural Center in New Delhi and the India Association in Taipei are the representatives, while Taiwan and India, the authorities of territories they represent respectively, are the principals.

In contrast, reading the ECFA text in entirety does not illuminate whether it is an agreement signed between two principals of public authorities through their authorized representatives, or one between two private organizations, the SEF and the ARATS. Rather, the text was drafted to give the impression that the ECFA would be a private contract between the SEF and the ARATS. For example, Article 5, Paragraph 2 of the text provides for “gradually reducing restrictions on mutual investments between the two Parties,” rather than the territories or authorities represented by the SEF and the ARATS, respectively, as formulated in the BIPA between Taiwan and India.⁷⁰ Even if the ECFA notification had been sent to the WTO Secretariat on May 6, 2011, according to Article XXIV of GATT, third parties cannot tell of the existence of an interim agreement between the two WTO members by browsing the list of regional trade agreements filed with the WTO.⁷¹

On the other hand, deviating from the ad hoc management mode, ECFA has suggested a move towards formal establishment of a cross-strait governance regime. Article 11 provides, “[t]he two Parties [i.e., SEF and ARATS] shall establish a Cross-Straits [sic] Economic Cooperation Committee . . . which consists of representatives designated by the two Parties.”⁷² The CSECC has a potentially wide-ranging competence. It will be in charge of “handling matters relating to [ECFA],” which is defined as “including but not limited to” the following matters:

⁶⁹ Agreement between the India Taipei Association in Taipei and the Taipei Economic and Cultural Center in New Delhi on the Promotion and Protection of Investments, India-Taiwan, art. 1, para. 4, Nov. 28, 2002, available at <http://www.finmin.nic.in/bipa/Taiwan.pdf>.

⁷⁰ *Id.* at art. 5, para. 2.

⁷¹ Staff Writer, *WTO Notified of ECFA*, TAIPEI TIMES, May 7, 2011, at 11. The ECFA is currently listed as “The Cross-Straits Economic Cooperation Framework Agreement (ECFA)” among early announcements in relation to regional trade agreements (RTAs). WTO, LIST OF ALL EARLY ANNOUNCEMENTS MADE TO WTO, <http://rtais.wto.org/UI/PublicEARList.aspx>. Unlike other early announcements or RTAs in force, this is the only agreement whose title falls short of indicating its (possible) signatories, as the term “Cross-Strait” does not signify the relations across the Taiwan Strait at all. Rather, when visitors click the link under “The Cross-Straits Economic Cooperation Framework Agreement (ECFA),” further information of the signatories is provided. An annotation—“The Association for Relations Across the Taiwan Straits (China); The Straits Exchange Foundation (the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu)” —is inserted under the current and original signatories. WTO, THE CROSS-STRAITS ECONOMIC COOPERATION FRAMEWORK AGREEMENT (ECFA) (2010).

⁷² ECFA art. 11, para. 1 (1)–(5).

(1) concluding consultations necessary for the attainment of the objectives of this Agreement; (2) monitoring and evaluating the implementation of this Agreement; (3) interpreting the provisions of [ECFA]; (4) notifying important economic and trade information; (5) settling any dispute over the interpretation, implementation and application of [ECFA] in accordance with Article 10.⁷³

Although Article 10 stipulates that “appropriate dispute settlement procedures” should be established through subsequent consultations between the SEF and the ARATS, the CSECC will be the institution where disputes arising from ECFA are to be settled before the formal dispute settlement mechanism comes into force. Many agreements signed between the SEF and the ARATS have also included the consultation clause. However, without an institutional arrangement, those clauses are of little practical significance, and only express the good will of both sides. In contrast, the CSECC establishes a formal institution in which further consultations and future negotiations can be conducted. Unlike other single-issue cross-strait agreements negotiated and concluded on an ad hoc basis, it is provided that the CSECC meets regularly every six months in addition to ad hoc meetings convened when necessary.⁷⁴ Due to the wide range of issues covered by ECFA, the CSECC is predicted to evolve into an institutional platform with comprehensive competence.⁷⁵

Moreover, the CSECC will not only operate as an institutional forum, but will also function as a cross-strait governance body. As the main implementing agency of ECFA, the CSECC is expected to grow into a functional equivalent of a transnational administration in charge of cross-strait regulatory affairs.⁷⁶ In addition, it will exercise regulatory powers as well as authorities of (quasi-)judicial nature in interpreting ECFA and settling related disputes.⁷⁷ Even so, the CSECC will not result in an established administrative or judicial body comprising permanent staff, but rather an institutional framework with administrative and judicial functions.⁷⁸ As its initial formation in January 2011 suggests, the number of CSECC members is not fixed, while the members, all of whom are sitting government officials from both sides except the heads of both the

⁷³ *Id.*

⁷⁴ The convening of the CSECC ad hoc meetings requires the consent of the SEF and the ARATS. ECFA art. 11, para. 3.

⁷⁵ Tsai-Lung Hung, *The Political and Economic Implications of the Cross-Strait Economic Cooperation Committee*, TAIWAN BRAIN TRUST NEWSLETTER, Mar. 2011, at 2.

⁷⁶ *Id.* at 2–3.

⁷⁷ *Id.* at 2.

⁷⁸ Honigmann Hong, *CSECC Could be Recipe for Conflict*, TAIPEI TIMES, Jan. 16, 2011 at 8.

SEF and the ARATS delegations, are appointed on an ad hoc basis.⁷⁹ In addition, different ad hoc “working groups” are being set up to “handle matters in specific areas pertaining to [ECFA].”⁸⁰ Thus, in terms of organization and personnel composition, the CSECC shows features of high flexibility and fluidity.

Taken together, the rapprochement between Taiwan and China has moved from the mode of ad hoc management to some form of institutional arrangement, culminating in the signing of the ECFA. Still, as establishment of the CSECC suggests, the institutional arrangement in relation to governance of cross-strait issues is incomplete. Rather, it maintains characteristics of flexibility that have taken shape during the political thaw between Taiwan and China in the early 1990s. Through its malleable organizational form and flexible personnel composition, the CSECC epitomizes the institutionalization of the idea of hybridity, which is characteristic of the legal framework underpinning Taiwan’s relationship with China.

III. PUBLICNESS IN TATTERS: THE WITHERING OF DEMOCRATIC LEGITIMACY IN TRANSNATIONAL HYBRID ADMINISTRATION

As epitomized in the establishment of the CSECC under the ECFA framework, hybridity is the underlying feature of Taiwan’s legal framework governing cross-strait affairs. While the ambiguous legal nature of hybridity as an institutional arrangement in administrative law raises eyebrows, the CSECC will have little impact on regulatory governance if it is simply adopted to satisfy two opposing sides’ concerns over diplomatic protocols.⁸¹ However, as its competence covers a wide range of issues across the Taiwan Strait, the CSECC evokes transnational hybrid administration. From this perspective, as the idea of publicness is obscured in hybridity, the question of lacking democratic legitimacy, of which transnational hybrid administration has long been accused, worsens with respect to the CSECC.⁸² To shed light on the issue of democratic legitimacy of the CSECC, I take up this issue in light of the idea of publicness, which underlies public authorities. First, I discuss how the idea of publicness is institutionalized in the constitutional state and, alternatively, in the functioning of global administrative law beyond the state: neither provides promising hope for transposing the idea of publicness to transnational hybrid administration. Taking a close look at the CSECC, I then suggest that global administrative law, as an alternative

⁷⁹ Ko Shu-Ling, *Taipei, Beijing Set Up Trade Committee*, TAIPEI TIMES, Jan. 7, 2011 at 1.

⁸⁰ ECFA art. 11, para. 2.

⁸¹ Barak-Erez, *supra* note 2, at 500–09; *see also* KOPPELL, *supra* note 3, at 1–3 (discussing the benefits and proliferation of hybrids).

⁸² *See* Engel, *supra* note 9, at 145; Craig, *supra* note 9, at 113–15.

institutionalization of the idea of publicness, is limited in controlling transnational hybrid administration when non-publicness becomes an end in itself.

A. Taming Transnational Hybridity: in Quest of the Idea of Publicness

The rise of the state as the epitome of the modern political form has been ascribed to the rediscovery of the idea of publicness at the waning of the Middle Ages.⁸³ The idea of publicness suggests the rise of political autonomy in modern politics as opposed to the blurring of public and private spheres in the premodern era.⁸⁴ Moreover, it makes the concept of the constitutional state possible. Through the idea of publicness, the constitutional state remains sovereign because public opinion is channeled through mechanisms of political representation and lends legitimacy to political power held by state organs.⁸⁵ On the other hand, the political power centralized by the state is not unlimited but instead attached to the public through the constitutional system. In this way, the constitutional system, which is mainly concerned with the control of political power through separation of powers and the protection of fundamental rights, embodies the idea of publicness. The idea of publicness provides the key to understanding the challenges that transnational hybrid administration poses to constitutional democracy.⁸⁶

In this section, I first discuss the close relation between publicness and the constitutional state. In terms of the organization of power, which is the underlying theme of transnational hybrid administration, the idea of publicness is embodied in the principles and rules regarding the control of political power in constitutional and administrative law. In this way, constitutional and administrative law links state sovereignty to the idea of publicness, legitimizing the exercise of the sovereign power in the constitutional state. Yet, as the new configuration of power in transnational hybrid administration undermines the traditional mechanisms in constitutional and administrative law that ensure the legality and legitimacy of the exercise of political power, the idea of publicness in the constitutional state is thus jeopardized. The displacement of the idea of publicness from the constitutional state

⁸³ HABERMAS, STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE, *supra* note 8, at 5–26; *see also* MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 17–88 (2010) (discussing the medieval origins of Public Law and its subsequent development).

⁸⁴ LOUGHLIN, *supra* note 83, at 228; *see also* Novak, *supra* note 3, at 27–28 (discussing the roots of American public-private governance).

⁸⁵ LOUGHLIN, *supra* note 83, at 229–31; *see also* HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 8, at 168–93.

⁸⁶ *See* Kingsbury, *Inter-Public Law*, *supra* note 10, at 175–88 (arguing that publicness is a necessary quality of international law).

constitutes the central concern over the rise of transnational hybrid administration.

If constitutional and administrative law offer little assurance to the concern over transnational hybrid administration, we must adopt new approaches to bring back the idea of publicness.⁸⁷ Global administrative law is argued to provide the source of legitimacy not confined to the sovereign state by virtue of the idea of publicness.⁸⁸ Upon conducting close inspection, I indicate in the second part of this section that global administrative law's capability of taming the beast of transnational hybrid administration is not unconditional.

1. Displacing Publicness from the Constitutional State: the Question of Transnational Hybrid Administration

The idea of publicness lends legitimacy to the political power of the constitutional state by virtue of the constitutional separation of powers.⁸⁹ Separation of powers is designed to ensure that no single state organ holds sway in the exercise of state power. Rather, decisions resulting from the complex and sometimes cumbersome political processes, involving distinct constitutional branches of power mediated by electoral processes, are regarded as willed by the public.⁹⁰

However, separation of powers is ineffective in terms of transnational hybrid administration. The area of foreign affairs has exemplified how the constitutional separation of powers is limited. On the other hand, considering the political nature of foreign affairs, the judiciary traditionally takes a back seat and lets the political branches, the executive and the legislative, take charge.⁹¹ It is true that with the traditional legislative oversight through legislation and appropriation as well as appointment, checks and balances can be maintained between the

⁸⁷ See, e.g., Christian Joerges, *A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation*, in KARL POLANYI, *GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS* 465 (Christian Joerges & Joseph Falke eds., 2011) (showing how the Bremen-centered "conflicts-law approach," the project on public authority, and international organizations are representative examples in the effort to rebuild the legitimacy of public power in the postnational world order); see also Andreas Fisher-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004) (evaluating the idea of rethinking conflict laws and maintaining compatibility in different legal fields); Special Issue, *The Exercise of Public Authority by International Institutions*, 9 GERMAN L.J. 1375 (2008) (analyzing the rise of publicness in international law).

⁸⁸ Morison & Anthony, *supra* note 10, at 217.

⁸⁹ Bruce A. Ackerman, *Neo-Federalism?*, in CONSTITUTIONALISM AND DEMOCRACY 153, 166–74 (Jon Elster & Rune Slagstad eds., 1988).

⁹⁰ *Id.* at 169–73; see also HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 8, at 186–93 (discussing the constitutional state).

⁹¹ Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 987–92 (2004).

executive and the legislative with respect to foreign affairs.⁹² Nevertheless, developments since WWII have rendered legislative oversight of the executive's power over foreign affairs ineffective.

As more powers are delegated to international organizations, the legislative power enshrined in constitutions is curtailed. For example, with the United Nations Security Council resolution in hand, President George H.W. Bush could deploy armed forces in the first Persian Gulf War without prior Congressional authorization.⁹³ In addition to political decisions, more regulatory matters require cooperation between administrative agencies and their myriad international or regional counterparts. Regulation and administration have become transnationalized.⁹⁴ Take the WTO for example: despite the so-called American exceptionalism in regard to international law and organizations,⁹⁵ the U.S. was the principal advocate for the WTO as the institutional mechanism that would facilitate free trade.⁹⁶ Yet, with the WTO's enhanced role in regulating international trade independent of national control, concerns have been raised over the dilution of U.S. sovereignty.⁹⁷ Moreover, as administrative agencies take on transnational characteristics, the state is considered "disaggregated" and regulatory power decentralized,⁹⁸ making the legislative oversight of administration more difficult.⁹⁹

If the globalizing regulatory environment undermines constitutional design regarding the legislative oversight of administration,¹⁰⁰ administrative law may be turned to in order to restore

⁹² LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 63–130 (2d & rev. ed. 1996).

⁹³ Although President George H. W. Bush did obtain congressional approval for using armed forces to expel the Iraqi troops from Kuwait, as authorized in the United Nations Security Council Resolution No. 660, he only turned to Congress on the eve of the commencement of the bombing campaign. Paul W. Kahn, *Lessons for International Law from the Gulf War*, 45 *STAN. L. REV.* 425, 430–33 (1993) (discussing the use of international hybrid organizations and its relationship with sovereign states).

⁹⁴ See MARIE-LAURE DJELIC & KERSTIN SAHLIN-ANDERSSON, *TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION* 1–31 (2006) (emphasizing the impact of the advance of transnational governance); see also Kingsbury et al., *supra* note 12, at 331.

⁹⁵ John Gerard Ruggie, *American Exceptionalism, Exemptionalism, and Global Governance*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 304, 305–06, 323–34 (Michael Ignatieff ed., 2005).

⁹⁶ Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 *N.Y.U. L. REV.* 1971, 1987–88 (2004).

⁹⁷ *Id.* at 2025.

⁹⁸ Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 *GOV'T & OPPOSITION* 159, 186–89 (2004).

⁹⁹ Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies and Disaggregated Democracy*, 24 *MICH. J. INT'L L.* 1041, 1055–58 (2003).

¹⁰⁰ ALFRED C. AMAN, *ADMINISTRATIVE LAW IN A GLOBAL ERA* 78–130 (1992); see also Engel, *supra* note 9, at 145 (discussing how the constitutional separation of powers has

the idea of publicness in transnational hybrid administration.¹⁰¹ Yet, traditional administrative law has limitations in transnational hybrid administration.

In the eye of traditional administrative law, hybrid/private administration has been regarded as the exception.¹⁰² The classical approaches to alleviating the uneasiness of private/hybrid administration are either to trace decisions to the public agency that devolve the mandate of public authorities thereto, or to regard the administration as the extension of the devolving public agency.¹⁰³ In the first approach, the devolving public agency, together with its staff of government officials, can be held accountable for the decisions made by hybrid/private administration.¹⁰⁴ Under the second approach, the decisions of the agent private/hybrid administration can be scrutinized in light of administrative law.¹⁰⁵

To be sure, classical approaches do not succeed in bringing hybrid/private administration in line with administrative law. On the one hand, holding the devolving public agency accountable for what hybrid/private administration does is ineffective at ensuring that the requirements of administrative law be observed. Hybrid/private bodies tasked with public regulation are kept from the direct legal liability incurred from their decisions; rather, they are only liable to the devolving agencies.¹⁰⁶ Considering the package devolution of regulatory decisions, devolving public agencies tend to find it difficult to react to the misconduct or even unlawful decisions of hybrid/private administration.¹⁰⁷

been weakened in regard to transnational administration, while the appearance of transnational hybrid administration only worsens this trend).

¹⁰¹ Alfred C. Aman, Jr., *Administrative Law for a New Century*, in THE PROVINCE OF ADMINISTRATIVE LAW 90, 95 (Michael Taggart ed., 1997); cf. Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15, 15–17 (2006) (analyzing the globalization of administrative law under the eyes of the Basel Committee on Banking Supervision in Switzerland).

¹⁰² Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 548–49, 662–63 (2000); see also Matthias Ruffert, *The Transformation of Administrative Law as a Transnational Methodological Project*, in THE TRANSFORMATION OF ADMINISTRATIVE LAW IN EUROPE 3, 30–31 (Matthias Ruffert ed., 2007) (addressing the development of privatization).

¹⁰³ Nele Parrest, *Constitutional Boundaries of Transfer of Public Functions to Private Sector in Estonia*, 16 JURIDICA INT'L 44, 53 (2009); cf. CATHERINE DONNELLY, DELEGATION OF GOVERNMENTAL POWER TO PRIVATE PARTIES: A COMPARATIVE PERSPECTIVE 102–03 (2007) (discussing legal accountability as a benefit of delegation).

¹⁰⁴ Richard Mulgan, *Government Accountability For Outsourced Services*, 65 AUSTL. J. PUB. ADMIN. 48, 48 (2006).

¹⁰⁵ Auby, *supra* note 2, at 518–20; see also Barak-Erez, *supra* note 2, at 507–08 (“When private actors function as *de facto* substitutes for the government in fulfilling important public functions, they should be subject to duties similar to those that would have applied to the government[.]”).

¹⁰⁶ Auby, *supra* note 2, at 520.

¹⁰⁷ KOPPELL, *supra* note 3, at 43–45.

Reacting aggressively by imposing heavy legal penalties on the entrusted regulatory bodies does harm to the relationship between the devolving public agency and the entrusted agent organizations, casting a shadow on the future regulatory decisions of hybrid/private administration. In addition, as the relationship of devolution becomes more complicated, it is more difficult to identify a single devolving public agency. Under such circumstances, it is hard to know which public agency should be held accountable.¹⁰⁸

On the other hand, applying administrative law directly to hybrid/private administration appears to be a more enticing choice but it turns out to be of little help. First, private bodies tasked with public regulation are diverse.¹⁰⁹ Some are established to implement public regulatory policies.¹¹⁰ The SEF in Taiwan is an example of this type of private body. In contrast, other private bodies tasked with public regulation still conduct private business that has no bearing on public policy.¹¹¹ In such situations, it is challenging to apply administrative law to private bodies in a way that aligns with their public functions.¹¹² In addition, there is no agreement as to which part of administrative law should apply.¹¹³ Will the decision made by hybrid/private administration be subject to the internal review of administrative justice? If so, will the hybrid/private administration establish its own internal review mechanism? Will there be any qualification requirements for the internal reviewers? Is the decision made by hybrid/private administration justiciable? Will the notice and comment requirement in administrative procedures apply to hybrid/private administration? Administrative law itself fails to provide clear answers to these complicated questions.¹¹⁴

In sum, by combining transnational and hybrid elements, transnational hybrid administration defies the institutional mechanisms as to the control of administration provided in the constitutional structure and traditional administrative law. Transnational hybrid administration calls the idea of publicness in the constitutional state into question.

¹⁰⁸ David M. Van Slyke, *The Mythology of Privatization in Contracting for Social Services*, 63 PUB. ADMIN. REV. 296, 306 (2003).

¹⁰⁹ KOPPELL, *supra* note 3, at 8–12; *see also* Jack M. Beermann, *The Reach of Administrative Law in the United States*, in THE PROVINCE OF ADMINISTRATIVE LAW, *supra* note 101, at 171–73 (discussing the border line between private and public actors).

¹¹⁰ Beermann, *supra* note 109, at 172.

¹¹¹ *Id.* at 172; *see* Barak-Erez, *supra* note 2, at 495–97 (“The first signs of a privatization policy are usually government efforts to establish state-owned businesses—be they corporations owned by the central government or municipal companies under local government control.”).

¹¹² Freeman, *supra* note 2, at 1310–14.

¹¹³ Paul Craig, *Public Law and Control Over Private Power*, in THE PROVINCE OF ADMINISTRATIVE LAW, *supra* note 101, at 196–97.

¹¹⁴ *Id.* at 211–14.

2. Discovering Publicness beyond the State: is Global Administrative Law the Answer to Transnational Hybrid Administration?

Even if there is a constellation of legal issues surrounding hybrid/private administration, the employment of hybrid/private administration in global governance seems to be inevitable,¹¹⁵ covering a wide range of issues such as banking regulation,¹¹⁶ governance of the Internet,¹¹⁷ the establishment of international standards,¹¹⁸ and so on.

It is not hard to see why hybrid/private administration has become popular with global governance. The needs for global governance result from the drive of globalization, going beyond the institutional framework designed by sovereign states. Take the prime example of the International Organization for Standardization (ISO). Tracing its origin far back to the 1920s,¹¹⁹ the ISO has taken on the role of a global governance actor, as its standards have continuously exerted influence on nearly every aspect of daily life. With its standards adopted by other international organizations, the ISO's de facto governance role is further strengthened.¹²⁰ On the other hand, as global governance issues have become more diverse and more complex, their regulation and resolution require not only innovative measures but also new forms of institutional arrangement.¹²¹ Thus emerges hybrid/private administration, defying the traditional organizational forms of public administration.

Facing the increasing importance of hybrid/private administration in global governance, attempts have been made to reconstruct the idea of publicness beyond the state. As suggested in the preceding section, the idea of publicness is entwined with the state in which all political powers are centered. The idea of publicness is embedded in constitutional and administrative law, which is traditionally state-centered, aiming at the

¹¹⁵ Kingsbury et al., *supra* note 12, at 20–23.

¹¹⁶ Barr & Miller, *supra* note 101, at 16.

¹¹⁷ Jochen von Bernstorff, *The Structural Limitations of Network Governance: ICANN as a Case in Point*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 257, 262–74 (Christian Joerges et al. eds., 2004).

¹¹⁸ CRAIG N. MURPHY & JOANNE YATES, THE INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO): GLOBAL GOVERNANCE THROUGH VOLUNTARY CONSENSUS 49 (2009).

¹¹⁹ *See id.* at 5–26 (discussing the role of standard-setting, the advantages of a voluntary consensus standard, and the recent history of the ISO).

¹²⁰ Kingsbury et al., *supra* note 12, at 23; *see also* Oren Perez, *The Many Faces of the Trade-Environment Conflict: Some Lessons for the Constitutionalisation Project*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, *supra* note 117, at 233, 239–40 (discussing growth in the use of international standards in many fields such as economics and environmentalism).

¹²¹ Charles F. Sabel & William H. Simon, *Epilogue: Accountability without Sovereignty*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 1, at 395, 407–09.

legitimacy of the state power.¹²² While this state-oriented construction of publicness is strained in the globalizing world, a close look at the formation of the idea of publicness in the constitutional state suggests an alternative conception of publicness.

The emphasis on legislative oversight in the constitutional separation of powers and the focus on the relationship between devolving agencies and entrusted organizations in administrative law reveal that the institutional construction of the idea of publicness in the constitutional state is centered on the “source” of power.¹²³ Both indicate that the legitimacy of the power exercised by transnational hybrid administration must be traced to the state through the principles and rules of constitutional and administrative law. However, this only tells half the story of the idea of publicness. In the constitutional state, the state power results from the political processes through which public opinion underpins decisions made by state organs.¹²⁴ Elections, referendums, public debate over public policies, and other channels of citizen participation in the decision-making process are elements of the political process through which political power finds its legitimacy.¹²⁵ Taken together, the idea of publicness is organized around both the source of state power and the political processes in relation to it. If the state-oriented idea of publicness falls short on the side of the source of power, the solution to the strained idea of publicness may be found on the side of political process. Here is where global administrative law comes in.

As widely discussed in literature, global administrative law aims to bring global governance into line with the ideals of rule of law by remodeling transnational regulatory regimes with the aid of administrative

¹²² Bernardo Sordi, *Révolution, Rechtsstaat, and the Rule of Law: Historical Reflections on the Emergence of Administrative Law in Europe*, in *COMPARATIVE ADMINISTRATIVE LAW*, *supra* note 2, at 23, 25.

¹²³ Craig, *supra* note 113, at 198; *see also* Sabel & Simon, *supra* note 121, at 409 (“This separation of powers has come to map onto the democratic pedigree view of law and the principal-agent model of accountability[.]”).

¹²⁴ Morison & Anthony, *supra* note 10, at 226–28.

¹²⁵ *Id.* Notably, the institutional embodiment of democracy in Germany is centered around the parliament, while German legal scholars frown on citizen participation in administrative decision-making. *Cf.* Eberhard Schmidt-Aßmann & Christoph Möllers, *The Scope and Accountability of Executive Power in Germany*, in *THE EXECUTIVE AND PUBLIC LAW: POWER AND ACCOUNTABILITY IN COMPARATIVE PERSPECTIVE* 268, 281 (Paul P. Craig & Adam Tomkins eds., 2006) (arguing that the right to an adequate administrative procedure where citizens have an opportunity to be heard can complement democratic legitimacy but is not a substitute for it); *see also* Veith Mehde, *Political Accountability in Germany*, in *POLITICAL ACCOUNTABILITY IN EUROPE: WHICH WAY FORWARD?* 101, 104 (Luc Verhey et al. eds., 2008) (“The personal legitimacy of the acting officials is regarded as deriving from the fact, that they were appointed by a minister, who . . . was chosen by the Chancellor, who was elected by Parliament, which was elected by the people.”).

law tools.¹²⁶ Moreover, as global governance has grown more complex, the traditional conception of legitimacy of transnational regulation centered on the parliamentary approval of treaties is stretched to the limit.¹²⁷ The transmission belt model of legitimacy, which focuses on the source of the power exercised by transnational hybrid administration, does not hold up.¹²⁸ A new conception of legitimacy focused on political processes arises. Moreover, as the story of globalization tells, this new conception of legitimacy looks beyond the confines of the state. As a global political community is not within sight and national parliaments do not provide enough checks and balances,¹²⁹ political processes that are considered essential to the legitimacy of transnational hybrid administration focus on non-electoral channels and extend them onto the globalizing regulatory environment.¹³⁰ Thus, administrative law values such as due process, transparency, accountability, and reasonable decision-making are read into hybrid/private administration in global governance. For this reason, global administrative law is distinct from the classical approaches to reining in hybrid/private administration by improvising the doctrinal tools of traditional administrative law. In other words, drawing inspiration from the idea of publicness, global administrative law is not argued to break free of the will of nation-states, but is rather embedded in the practices of global governance.¹³¹

¹²⁶ Kingsbury et al., *supra* note 12, at 37–42; *see also* Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Governance*, 37 N.Y.U. J. INT'L L. & POL. 663, 670 (2006) (“Does [global administrative law] operate according to international law . . . or according to traditional administrative law[?]”); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1510 (2006) (“[T]he tools of administrative law, which have been used to legitimate regulatory decision-making in the domestic context, should be deployed more systematically . . . at the international level.”); Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247, 248 (2006) (“Contestation over the right constituency of global governance is written into the institutional structures of global governance and global administrative law.”).

¹²⁷ Kingsbury, *Concept of 'Law'*, *supra* note 10, at 35–36.

¹²⁸ *See* Nico Krisch, *Global Administrative Law and the Constitutional Ambition*, in THE TWILIGHT OF CONSTITUTIONALISM? 245, 247–48 (Martin Loughlin & Petra Dobner eds., 2010) (enumerating the limitations of a system wherein the powers of international institutions are derived from their delegatory relationship with member states).

¹²⁹ *See* Morison & Anthony, *supra* note 10, at 225–29 (noting the association between the traditional notion of democracy and the lack of a global *demos*); *see also* Esty, *supra* note 126, at 1503–04 (discussing the accountability of appointed international officials).

¹³⁰ *See* Morison & Anthony, *supra* note 10, at 231–38 (“There is . . . a way in which internal procedures of decision-making can provide the basis for a legitimate form of global governance without recourse to any idea of publicness as found in the State.”).

¹³¹ *Id.* at 229–31; *see also* Kingsbury, *Concept of 'Law'*, *supra* note 10, at 31–33 (“The idea of law being wrought by, and for, the whole society overlaps with an approach to administrative law[.]”); Kuo, *supra* note 10, at 999–1001 (“[J]urisdictions in global administrative law are the state and non-state entities which exercise public authorities and regulatory powers in global regulatory practices.”).

Specifically, the practices of hybrid/private administration in transnational regulation are reconstructed in light of the idea of publicness, at the core of which is “the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such.”¹³² In this way, the relationship between administrative law and the practices of hybrid/private administration in transnational regulation is no longer centered on whether and how to apply the former to the latter. Rather, “legality” is identified in the practice of transnational hybrid/private administration.¹³³ For it to have legal character beyond a code of conduct, it must be accepted by the stakeholders in transnational regulation “as wrought by the whole society.”¹³⁴

However, such a claim pivots on whether the practices of transnational hybrid administration come out of the processes in which the public, or, rather, stakeholders can take part and influence their substance.¹³⁵ These processes include the participation of stakeholders through notice and comment or hearing procedures bolstered by the requirements of reason-giving and transparency. Through these administrative law mechanisms, the alternative routes tied to the practices of transnational hybrid administration redirect public opinion from the political processes that are aimed at preserving the state-centered source of political power.¹³⁶ As a result, those practices of transnational hybrid/private administration underpinned by these processes constitute part of global administrative law, functioning as the normative model for future transnational hybrid/private administration. In addition, the exercise of regulatory power by hybrid administrations gains legitimacy. In this way, transnational hybrid/private administration is no longer a moving target of traditional administrative law, but rather an innovative institutional arrangement with normative values in global governance.¹³⁷ Global administrative law appears to resolve issues surrounding hybrid/private administration left unanswered in the state-oriented constitutional system and traditional administrative law.

From this perspective, global administrative law works to rein in transnational hybrid/private administration, but not without limitation. While transnational hybrid/private administration arises to tackle the pragmatic needs of transboundary regulation, its hybrid or private

¹³² Kingsbury, *Concept of ‘Law’*, *supra* note 10, at 31.

¹³³ *Id.* at 29–31; Kuo, *supra* note 10, at 998–1001.

¹³⁴ Kingsbury, *Concept of ‘Law’*, *supra* note 10, at 31.

¹³⁵ *Id.* at 41–50.

¹³⁶ See Morison & Anthony, *supra* note 10, at 229–37 (“The process of decision-making may add further to the already existing standards, goals, metrics and mores of all the various actors who together are developing and refining new versions of global democracy beyond States.”).

¹³⁷ Kingsbury, *Concept of ‘Law’*, *supra* note 10, at 25.

character is simply functional.¹³⁸ It fills in the regulatory vacuum where states, international organizations, or public administrative bodies have failed.¹³⁹ It goes to great lengths to develop practices that will be accepted as “[having] been wrought by the whole society, by the public, and the connected claim that [they] address[] matters of concern to the society as such” just like the regulations, rules, and laws made by public administrative bodies.¹⁴⁰ For this reason, transnational hybrid/private administration remains a functional equivalent to public administration.¹⁴¹ In this regard, it echoes the classical approaches to hybrid/private administration in traditional administrative law: either tracing back to the devolving public agency or regarding hybrid/private administration as the extension of public administration. Here is where traditional administrative law approaches and global administrative law converge in regard to hybrid/private administration.

It is the ties between hybrid/private regulation and public administration that have made the functioning of hybrid/private administration compatible with the values clustered around the idea of publicness.¹⁴² Only by means of these ties can the alternative political processes work alongside the political processes conceived in the constitutional system. Taken together, the political processes in and beyond the state compensate for the shortcomings of constitutional and administrative law that focuses on the source of political power. The idea of publicness is thus restored in transnational hybrid administration. Cutting the ties between hybrid/private regulation and public authorities would forestall the effort to restore the idea of publicness in transnational hybrid administration through global administrative law. This is the condition for global administrative law to function properly with respect to transnational hybrid/private administration.

B. When Non-Publicness Becomes an End in Itself: Double Jeopardy for Publicness in the Hybrid Cross-Strait Economic Regulation

I have argued in the preceding section that the function of global administrative law in keeping private/hybrid administration from running amok at the cost of public interest is conditioned by the compatibility of private/hybrid administration and the values associated with the idea of publicness. In other words, for global administrative law to restore the

¹³⁸ Abbott & Snidal, *supra* note 6, at 505–06.

¹³⁹ *Id.* at 577.

¹⁴⁰ Kingsbury, *Concept of ‘Law’*, *supra* note 10, at 31.

¹⁴¹ Abbot & Snidal, *supra* note 6, at 521.

¹⁴² von Bogdandy, *supra* note 10, at 1914–21; von Bogdandy et al., *supra* note 10, at 1378–86.

idea of publicness displaced from the constitution, the hybrid or private character of hybrid/private administration cannot be an end in itself but must be only a means driven by functional expediency. If hybrid/private administration were deliberately designed to stand apart from the authorities of public administration, the invocation of the idea of publicness would be futile in breathing new life to the democratic legitimacy of transnational hybrid administration. Under such circumstances, the idea of publicness is faced with the double jeopardy of being displaced from the constitutional state and emptied of meaning in the functioning of global administrative law beyond the state. A close inspection of the legal framework and institutional arrangement concerning cross-strait governance issues in Taiwan reveals this double jeopardy that threatens the idea of publicness in the hybrid economic regulation across the Taiwan Strait. Before going to the hybrid cross-strait economic regulation in Taiwan, it helps to look into why the idea of publicness fails to enhance the democratic legitimacy of transnational hybrid administration if hybrid/private administration is deliberately severed from the authorities of public administration.

Suppose that the element of hybridity or privateness is added mainly to conceal the public character of states, international organizations, and other administrative bodies. This kind of hybrid/private administration, which I call ultra hybrid regulation, is in effect designed to elude “the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such.”¹⁴³ If so, it would contradict the *raison d’être* of ultra hybrid regulation to reattribute the displaced normative values of publicness to the practices resulting from hybrid/private administration. It may be argued that this case is virtually inconceivable given that hybrid/private administration is either created by public administrative bodies to extend the reach of public administration in a more expedient organizational form or emerges of itself to complement public administration in resolving regulatory issues. Yet, a closer inspection of the legal framework and institutional arrangement concerning the cross-strait governance issues in Taiwan indicates otherwise.

In terms of the cross-strait governance concerning Taiwan, there is not much that the constitution can do to address the issue of democratic legitimacy, as the SEF is not considered part of the government. Formally speaking, all agreements between Taiwan and China are subject to parliamentary oversight, even if the signatory on Taiwan’s behalf is the SEF.¹⁴⁴ However, the effectiveness of parliamentary oversight as to the cross-strait relations is questionable. According to Article 5 of the 1992

¹⁴³ Kingsbury, *Concept of ‘Law’*, *supra* note 10, at 31.

¹⁴⁴ 1992 Act art. 5, para. 1.

Act, the agreements between Taiwan and China are divided into two types.¹⁴⁵ The first type refers to those agreements the implementation of which will require existing laws being amended or new legislation being made. With respect to this type of agreement, the Legislative Yuan, which is Taiwan's parliament, has to decide whether to assent to the signed agreement within thirty days. Unlike the parliamentary oversight of other international treaties or executive agreements, however, the inaction of the Legislative Yuan as to the agreement under consideration within thirty days will be construed as parliamentary approval.¹⁴⁶ To make matters worse, if the parliamentary debate on the agreement under consideration carries on beyond the limit of thirty days, the agreement will come into effect automatically. In other words, to reject a cross-strait agreement, the Legislative Yuan must complete the debate and vote on it within thirty days. Suppose that Legislators (members of the Legislative Yuan) have expressed strong opposition to the agreement under consideration in the parliamentary debate but failed to conclude the debate within thirty days. According to the 1992 Act, the failure to vote in a prolonged parliamentary debate amounts to an act of tacit consent!

The second type of agreement under Article 5 of the 1992 Act is of those whose implementation requires neither existing laws being amended nor new legislation being made. The role of the Legislative Yuan in controlling this type of agreement is merely nominal in that the agreements are only to be filed for record with the Legislative Yuan.¹⁴⁷ No parliamentary vote is even needed. Taken together, these imply that the Legislative Yuan is straightjacketed with respect to parliamentary oversight of the agreements between Taiwan and China.

If the constitution provides no solution to the displacement of publicness, global administrative law may come into play in ensuring that the cross-strait agreements are in accordance with the rule of law and other constitutional principles. In this regard, the executive oversight of the SEF and other entrusted organizations is important.¹⁴⁸ However, as the experience with the classical approaches to hybrid/private administration in traditional administrative law suggests, the oversight from the MAC is limited too. Either the MAC changes the SEF board of directors through the government share in the foundation or the MAC

¹⁴⁵ 1992 Act art. 5, para. 2.

¹⁴⁶ Xianfa Shang 'Tiaoyue' zhi Yihan? Hezhe Ying Song Lifayuan Shenyi? [What is the Meaning of "Treaty" in the Constitution? Which Kind of International Agreement Should Be Sent to the [Legislative] Yuan for Deliberation?], DA FAGUAN JIESHI (大法官解釋) [TAIWAN CONST. CT. INTERP.] no. 329 (Dec. 24, 1993), available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=329; see also 1992 Act art. V, para. 2 (providing the regulation of the Legislative Yuan's role in these types of agreements).

¹⁴⁷ 1992 Act art. V, para. 2.

¹⁴⁸ 1992 Act art. IV, para. 2.

exercises its oversight in accordance with its administrative contract with the SEF and other entrusted organizations.¹⁴⁹ Considering the diversity of cross-strait issues, however, it is unlikely that administrative contracts can be well drafted in advance to address all situations.

What makes matters worse is the signing of the ECFA and the establishment of the CSECC. First, as the ECFA covers a wide range of subject matters, the executive oversight of the SEF is stretched thin. Moreover, as the CSECC is gradually evolving into a transboundary governance body, the already limited parliamentary oversight will be further curtailed. According to the 1992 Act, the SEF and other private organizations entrusted to negotiate with their Chinese counterparts may even further devolve their function to other organizations.¹⁵⁰ However, the CSECC is not an incorporated organization under Taiwan's legal system but instead a creation of the ECFA itself. Thus, it is dubious whether the CSECC can legally act as the secondary agent organization of the SEF in the eye of the 1992 Act if the CSECC is to be understood in the framework of the 1992 Act.

On the other hand, it may be argued that the oversight of the CSECC should be considered under the framework of the ECFA instead of the 1992 Act because the CSECC is a new creation of the ECFA. According to this view, as the ECFA has been approved by the Legislative Yuan, the legal basis of the CSECC as a transnational regulatory body appears to be unquestionable. Yet, considering the textual parsimony of the ECFA, it is inconceivable for a national parliament to devolve tasks and functions of such importance to the CSECC *carte blanche*.¹⁵¹ Notably, under the terms of the 1992 Act, parliamentary oversight of cross-strait affairs is limited to the approval of the first type of agreement noted above. Thus, as the regulatory and governance function of the CSECC is expected to grow without more agreements to be signed between the SEF and the ARATS, the Legislative Yuan will be further pushed away from overseeing cross-strait affairs.

Moreover, with the CSECC staying beyond the reach of the Legislative Yuan, government officials may well be induced to take advantage of the uncontrolled cross-strait institutional arrangement as the main decision-making body with regard to economic affairs and thus

¹⁴⁹ Should the situation revert to the political coldness during the DPP administration, more contacts and negotiations between Taiwan and China would bypass the SEF and be conducted through other agent organizations, as the 2005 agreement on charter flights suggested. Vincent Y. Chao, *DPP Downplays Joseph Wu Remarks*, TAIPEI TIMES, May 6, 2011, at 3. Under such circumstances, the MAC would be left with one option: oversight through the careful drafting of administrative contracts with the entrusted organizations.

¹⁵⁰ 1992 Act art. 4, para. 4.

¹⁵¹ See *supra* notes 69–75 and accompanying text.

bypass regular parliamentary oversight in this regard.¹⁵² As noted above, government officials at the level of deputy minister have taken part in the CSECC. According to Article 11 of ECFA, they are appointed by the SEF on the side of Taiwan. Ironically, Taiwan's members of the CSECC appointed by the SEF have included officials from the MAC, which is the ministerial collegiate body responsible for overseeing the SEF.¹⁵³ Consequently, the executive oversight of the SEF by the MAC has been rendered toothless. To sum up, as Taiwan's administration of cross-strait relations moves toward ultra hybrid regulation, traditional oversight by parliament and the executive branch has been left in shambles.

In such a situation, global administrative law may contribute to reining in the ultra hybrid regulation in another way. If neither legislative control nor executive oversight is feasible, the CSECC may still be brought into compliance with rule of law values through administrative law tools that implement the idea of publicness. This will place the CSECC among other hybrid/private administrations in global governance.¹⁵⁴ Specifically, the CSECC may enact its own guidelines governing the procedures under which its decisions and interpretations of ECFA will be made.¹⁵⁵ Also, it may self-impose transparency requirements on prospective consultations pertaining to the attainment of the ECFA objectives.¹⁵⁶ Moreover, the CSECC, which is entrusted with the settlement of disputes in relation to ECFA before the establishment of a formal dispute settlement mechanism, may bring in judicial or quasi-judicial mechanisms to guarantee impartiality and fairness in dispute settlement.¹⁵⁷ In this way, global administrative law may compensate for the oversight deficit arising from the hybridity embedded in the CSECC.¹⁵⁸

Yet, a closer look at the ultra hybrid regulation of cross-strait affairs in general and the CSECC in particular suggests that global

¹⁵² If the Europe Coal and Steel Community provides a lesson, we should worry about the prospective role of the CSECC in surpassing the Executive Yuan as the main decision-making body. See PETER L. LINDSETH, *POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE* 91–132, 251–82 (2010) (describing the evolution of the Europe Coal and Steel Community into the European Union).

¹⁵³ Ko, *supra* note 79, at 1.

¹⁵⁴ See Barr & Miller, *supra* note 101, at 24–28 (discussing the role of self-imposed administrative requirements in bolstering the accountability and legitimacy of the Basel Committee).

¹⁵⁵ Cf. ECFA art. 11, para. 1(3) (stipulating that the CSECC shall be responsible for “interpreting the provisions of [ECFA]”).

¹⁵⁶ Cf. ECFA art. 11, para. 1(1) (stipulating that the CSECC shall be responsible for “concluding consultations necessary for the attainment of the objectives of [ECFA]”).

¹⁵⁷ Cf. ECFA art. 10, para. 2 (providing the institutional and procedural measures governing the dispute settlement mechanism under ECFA).

¹⁵⁸ Cf. Barr & Miller, *supra* note 101, at 23 (“Whenever possible, international mechanisms ought to be designed to enhance, rather than supplant, the meaningfulness of domestic administrative law.”).

administrative law will not help much in this regard. As noted above, if hybrid/private administration is invoked in response to the practical needs of transboundary regulation, administrative law tools may be instituted to give legitimacy and rationality to the operation of hybrid/private administration, making it compatible with the idea of publicness. On the contrary, the ultra hybrid regulation of cross-strait affairs was not created to fill in the regulatory vacuum where public administrative bodies failed, but to bypass public authorities.¹⁵⁹ Based on its hardline stance of rejecting Taiwan as an equal and sovereign polity, China has refused any direct contact with Taiwan's national government; moreover, any indication of sovereign authorities has also been rejected.¹⁶⁰ As a consequence, two proxy organizations have had to be established as private-law bodies; all cross-strait agreements have had to be negotiated and signed as private contracts between these two window organizations; cross-strait agreements are treated differently from international treaties and are only subject to limited parliamentary oversight in Taiwan; and the CSECC cannot be integrated as part of the government, which would otherwise subject it to constitutional checks and balances.

If the hybrid institutional arrangement regarding governance issues across the Taiwan Strait is designed to be uncolored by public authorities, there is little hope that the CSECC will follow other examples of hybrid/private administration in global governance to introduce administrative law control.¹⁶¹ Supposing the CSECC remodeled itself on the idea of publicness, the CSECC's administrative law mechanisms would still not automatically be regarded as sufficient. Rather, the CSECC would have to open itself to scrutiny of the values emanating from the same idea of publicness.¹⁶² Specifically, the CSECC's would-be self-imposed administrative law mechanisms would have to be assessed against the procedural requirements that constrain the operation of the sovereign state, which is considered the epitome of publicness.¹⁶³ In this way, the CSECC would move closer to the government from which—under the white gloves strategy—it has been designedly separated. Also, further demands would be made on the CSECC to bring it under the control of the parliament. Moreover, as the case of the Basel Committee

¹⁵⁹ Hsieh, *supra* note 41, at 67.

¹⁶⁰ Chi Chung, *International Law and the Extraordinary Interaction between the People's Republic of China and the Republic of China on Taiwan*, 19 *IND. INT'L & COMP. L. REV.* 233, 270 (2009).

¹⁶¹ *Cf.* Barr & Miller, *supra* note 101, at 24–28 (describing the rule-making process followed by the Basel Committee, which can be viewed as an example for this purpose).

¹⁶² *Id.*

¹⁶³ See Ming-Sung Kuo, *(Dis)Embodiments of Constitutional Authorship: Global Tax Competition and the Crisis of Constitutional Democracy*, 41 *GEO. WASH. INT'L L. REV.* 181, 211–23 (2009) (analyzing the state government as the reference point in transnational administration).

suggests, global administrative law enhances the legitimacy and accountability of a hybrid body not only through its self-imposed administrative requirements but also through the incorporation of those self-imposed requirements into the domestic administrative law.¹⁶⁴ However, this would result in bringing the CSECC into the government fold. Taken together, these requirements would be linked to political processes in the constitutional system—a system laden with the character of the sovereign state. Yet, this is precisely opposite to the direction of ultra hybrid regulation in which Taiwan's legal framework of the cross-strait relations has thus far moved.

Delinking itself from any implications of sovereignty, the ultra hybrid regulation of cross-strait affairs not only precludes the idea of publicness but also undermines another way of applying the WTO-related global administrative law rules to cross-strait relations.¹⁶⁵ While Taiwan has been excluded from most international organizations because of China's hardline stance of denying legitimacy to Taiwan's sovereign claim as a polity, Taiwan and China have been equal members of the WTO from the perspective of WTO law. It was expected that Taiwan and China would address their bilateral trade issues on the WTO platform.¹⁶⁶ In this way, direct official contact could be initiated between the two sides. Moreover, WTO law might compensate for the procedure and oversight deficit in the white gloves strategy as noted above.¹⁶⁷ Yet, sticking to its hardline stance, China has averted the WTO mechanism's enshrinement as the means for dealing with its trade issues with Taiwan, even if China has suffered economic losses due to Taiwan's WTO-inconsistent discriminatory measures.¹⁶⁸ As a result, the WTO platform does not work out as the overarching framework governing cross-strait economic and trade affairs. Moreover, with the signing of the ECFA and the establishment of the CSECC, the hope for invoking WTO law to compensate for the existing ultra hybrid regulation of cross-strait affairs is further diminished.¹⁶⁹ Regardless of the statement in its preamble that the ECFA is signed in accordance with the basic principles of the WTO, the CSECC rather than the WTO is expected to play the central role in

¹⁶⁴ Barr & Miller, *supra* note 101, at 28–29.

¹⁶⁵ See generally Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 INT'L J. CONST. L. 556 (2011) (situating the multifaceted WTO legal regime in the analytic framework of global administrative law).

¹⁶⁶ Cho, *supra* note 47, at 743.

¹⁶⁷ See Kingsbury, *Inter-Public Law*, *supra* note 10, at 190–91 (explaining how WTO law complements domestic administrative law in regulating global governance).

¹⁶⁸ Hsieh, *supra* note 64, at 130.

¹⁶⁹ *Id.* at 152.

governing cross-strait economic and trade issues in the future.¹⁷⁰ Again, this WTO-averse prospect just echoes the adoption of the ultra hybrid regulation of cross-strait relations.

In sum, attempts to bring the ultra hybrid regulation of cross-strait relations in line with global administrative law fail because of the implications for sovereignty arising from the procedural and institutional requirements of the idea of publicness. As the case of the legal framework governing the relations between Taiwan and China shows, when it comes to ultra hybrid regulation, global administrative law reaches its limit in reining in hybrid/private administration, in that the condition for invoking the idea of publicness is not satisfied. With the functioning of global administrative law hampered as well as the oversight mechanisms of the constitutional state in shambles, the idea of publicness is faced with double jeopardy in the case of Taiwan's extraconstitutional hybrid regulation across the Taiwan Strait.

IV. CONCLUSION

Hybrid regulatory bodies have been credited for functioning as an institutional bypass around bureaucratic procedures and providing expedient responses to the changing needs of administrative governance. As hybrid regulatory bodies are utilized in transnational regulation, however, concerns have arisen over the lack of transparency and the evasion of accountability in the face of the informality and flexibility that is characteristic of hybrid regulatory bodies. The constitutional structure of checks and balances with respect to foreign affairs is upended with regulation becoming privatized and administration taking on hybridity. Transnational hybrid administration not only displaces the idea of publicness from public administration but also poses fundamental challenges to the core of democratic legitimacy.

In response, interest has been reinvigorated in the idea of publicness. Looking beyond the realm of constitutional law, the idea of publicness is seen as embedded in the underlying principles of administrative law. Transposed to the transnational regulatory environment, the idea of publicness lends legitimacy to global administrative law. Thus, global administrative law is praised as the antidote to secrecy and accountability-avoidance caused by the deployment of hybrid administration in transnational regulation. The problem of democratic legitimacy concerning transnational hybrid administration seems to find solution in global administrative law.

¹⁷⁰ Hung, *supra* note 75, at 3; *see also* Jou Ying-Cheng, *Trade Move Fuels Taiwan Fear*, ASIA TIMES, Jan. 14, 2011 (discussing how China and Taiwan set up the CSECC after enacting ECFA).

In this article, I examined the issue of democratic legitimacy resulting from transnational hybrid administration and the proposed solution by studying the governance framework of the relationship between Taiwan and China in general and the newly established CSECC in particular. I argued that the CSECC is deliberately designed to avoid the institutional features associated with the idea of publicness, exposing the functional limits of global administrative law. I first analyzed the legal strategy underpinning the political rapprochement between Taiwan and China. After revealing the move toward institutionalized hybridity, I discussed how democratic legitimacy is threatened as hybrid administration is utilized in the economic regulation across the Taiwan Strait. On the one hand, transnational hybrid administration displaces the idea of publicness as legislative oversight over transnational administrative acts has been seriously weakened by globalization. On the other hand, global administrative law's function to keep private/hybrid administration from running amok at the cost of the public interest is not unconditional. Rather, as the legal framework governing the relations between Taiwan and China suggests, global administrative law reaches its limits in reining in hybrid/private administration when non-publicness becomes an end in itself.

As the hybrid regulation across the Taiwan Strait shows, both traditional constitutional design and global administrative law fall short of restoring the idea of publicness in transnational hybrid administration. It is true that hybrid administration gains currency in transnational regulation mainly as a consequence of the changed regulatory environment. It is also true that global administrative law points to the direction in which the legitimacy of transnational administration can be improved. Nevertheless, not only the strengths but also the limits of global administrative law have to be carefully investigated before we subscribe to the displacement of the idea of publicness from the constitution in transnational hybrid administration to the haven of global administrative law. The case of hybrid regulation across the Taiwan Strait illustrates the unique regulatory environment in which Taiwan is situated. Moreover, it alerts us to the exceptional situation in which transnational hybrid administration may sabotage rule of law mechanisms. Without taking seriously the withering away of the idea of publicness in the changing, complicated regulatory environment of our globalized world, we may risk leaving democratic legitimacy under the siege of uncontrolled transnational hybrid administration.