

## ARTICLE

# *The Transnationalization of Law: Rethinking Law through Transnational Environmental Regulation*

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### Abstract

This article argues that the rise of transnational regulation has a transformative impact on law. It examines the field of transnational environmental regulation to show that its proliferation challenges the continued appropriateness of representations of law as (i) territorial, (ii) emanating from the state, (iii) composed of a public and private sphere, (iv) constitutive and regulatory in function, and (v) cohesive and regimented. Instead, law is increasingly perceived as (i) delocalized, (ii) flowing from a plurality of sources, (iii) organizationally inchoate, (iv) reflexive and coordinating in function, and (v) polycentric. Together, these shifts in perception amount to a transformation that the article identifies as the transnationalization of law. The article then explores three responses to the transnationalization of law. It distinguishes responses motivated by a desire to reclaim the traditional conception of law from those that seek to reconstruct law at the transnational level and responses that advocate a context-responsive reconceptualization of law. Each response, it will be shown, creates a different set of opportunities for, and challenges to, the relevance of law for transnational regulation.

**Keywords:** Transnational law, Environmental regulation, Legal pluralism, Reflexive law, Legal theory

## 1. INTRODUCTION

This article explores the relationship between transnational regulation and law. It identifies five dominant perspectives that have shaped our thinking about law and its relation to society: namely, that law (i) is a territorial concept, which (ii) emanates from the state; (iii) it is divided into a public and a private sphere; (iv) it has a constitutive, regulating and communicative function, and (v) is cohesive and comprehensive in its

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coverage. The central argument advanced in the article is that the proliferation of regulation beyond the state fundamentally disrupts each of these perspectives and invites alternative modes of understanding law. This process of problematization, contestation and reform is referred to as the ‘transnationalization of law’.

The chosen lens through which to study the transnationalization of law is that of environmental regulation. The growing prominence of regulation beyond the state is certainly not exclusive to the field of environmental protection, but few regulatory domains can match it for depth and variety of transnational regulatory initiatives. From plastic waste disposal restrictions under the International Convention for the Prevention of Pollution from Ships (MARPOL Convention)<sup>1</sup> to the FTSE4Good Index for responsible investing,<sup>2</sup> environmental governance has proved to be a uniquely fertile soil for the development of and experimentation with alternative, non-state based strategies to steer polluters towards a higher level of environmental responsibility. Hence, environmental regulation offers the best possible vantage point from which to construct a richly informed, nuanced and expansive understanding of the transnationalization of law, both in the field of environmental protection and beyond.

The article first gives a brief explanation of what it means by the term ‘transnational environmental regulation’ (TER) and the distinction between regulation and the related concepts of law and governance. The core of the analysis examines the five-fold impact of TER on traditional conceptualizations of law, and then canvasses a range of potential responses to the transnationalization of law, highlighting significant strengths and weaknesses of each response. In so doing, the article provides a critical frame of reference through which to analyze the burgeoning body of procedural and substantive norms that are increasingly treated as constituent parts of an emergent field of transnational environmental law.

## 2. TRANSNATIONAL ENVIRONMENTAL REGULATION AND LAW

Environmental regulation has undergone fundamental changes in the past 20 years. A key factor in its transformation is the rapid expansion of environmental regulation ‘beyond the state’: regulation that is not under the sole authorship and control of national public authorities which have received a mandate and competences to that effect in domestic environmental law, but that is instead characterized by a pronounced and substantive involvement of non-state actors.

Explanations for the proliferation of environmental regulation beyond the state abound and vary. Some view the transnationalization of regulation as, in large part, a consequence of economic globalization.<sup>3</sup> Freer flows of goods, services, capital and human resources between regions and across borders, and the global scale of operation of a large cohort of multinational enterprises, are said to foster a demand for rules that

<sup>1</sup> London (UK), 2 Nov. 1973, in force 2 Oct. 1983, available at: [http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-\(marpol\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-(marpol).aspx).

<sup>2</sup> See <http://www.ftse.com/products/indices/FTSE4Good>.

<sup>3</sup> C. Knill & D. Lehmkuhl, ‘Private Actors and the State: Internationalization and Changing Patterns of Governance’ (2002) 15(1) *Governance*, pp. 41–63.

are unconstrained by jurisdictional boundaries.<sup>4</sup> Others point to the proliferation of global environmental risks – such as climate change, ozone depletion and marine pollution – and the very limited ability of individual national governments effectively to respond to global risks, as key factors in the proliferation of TER.<sup>5</sup> International treaties, it is argued in this context, are a first but highly imperfect and incomplete response to the collective action problems that limit the effectiveness of the individual state as environmental regulator.<sup>6</sup> They do not obviate the need for alternative, often more informal initiatives to steer environmental behaviour. In fact, international environmental agreements increasingly rely on non-state actors and transnational networks for the effective articulation and implementation of their regulatory goals.<sup>7</sup>

The proliferation of TER creates a number of acute definitional dilemmas. If regulation is disassociated from state authority, then by which features and qualities can regulatory acts be identified? The challenge is all the more difficult because the expansion of regulatory authority, to include supranational authorities and other non-state actors, coincides with a diversification of regulatory strategies.<sup>8</sup> Regulators may seek to steer their addressees' behaviour through command-and-control rules, but may alternatively try to influence polluters by means of, say, a pricing mechanism, a disclosure-based strategy or a negotiated agreement.<sup>9</sup>

Various attempts have been made at redefining regulation,<sup>10</sup> one of the most successful of which is found in Julia Black's discussion of 'decentred' regulation, which defines regulation as:

the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.<sup>11</sup>

Another influential approach to developing a de-institutionalized meaning of regulation features in the work of Colin Scott, who focuses on the authoritative nature of regulatory communications and calls regulation:

any process or set of processes by which norms are established, the behaviour of those subject to the norms monitored or fed back into the regime, and for which there are

<sup>4</sup> D. Held & A.G. McGrew, *Governing Globalization: Power, Authority and Global Governance* (Polity Press, 2002).

<sup>5</sup> J.B. Wiener, 'Global Environmental Regulation: Instrument Choice in Legal Context' (1999) 108(4) *Yale Law Journal*, pp. 677–800, at 686.

<sup>6</sup> E. Ostrom, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change' (2010) 20(4) *Global Environmental Change*, pp. 550–7, at 550–1.

<sup>7</sup> E. Meidinger, 'Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems', in C. Brüttsch & D. Lehmkuhl (eds), *Law and Legalization in Transnational Relations* (Routledge, 2007), pp. 121–43, at 129.

<sup>8</sup> This article does not claim a full causal connection between the proliferation of non-state regulators and the diversification of regulatory strategies. For a fuller treatment of this issue, see V. Heyvaert, *The Transformation of Environmental Regulation* (Cambridge University Press, forthcoming 2018), Ch. 4.

<sup>9</sup> N. Gunningham, 'Environment Law, Regulation and Governance: Shifting Architectures' (2009) 21(2) *Journal of Environmental Law*, pp. 179–212.

<sup>10</sup> For an overview, see J. Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy*, pp. 1–35, at 8.

<sup>11</sup> *Ibid.*, p. 26.

mechanisms for holding the behaviour of regulated actors within the acceptable limits of the regime (whether by enforcement action or by some other mechanism).<sup>12</sup>

Building on this rich body of thought, this article uses a related but slightly different and, to some extent, more pared-down understanding of regulation as the deliberate exercise of influence on a target's behaviour (designed either to stabilize or modify this behaviour), performed with a certain degree of authority and persistence. In contrast to Black's definition, this formulation recognizes that the goal of regulation can be to stabilize rather than modify behaviour and focuses less on a non-exhaustive list of mechanisms that is subject to change. In contrast to Scott's definition, it pays more attention to the intent of the regulator, and relatively less to the existence of specific compliance mechanisms.

Two further definitional questions that are relevant for the forthcoming analysis relate to the distinction between regulation and governance on the one hand, and regulation and law on the other. This article treats regulation as a subset of the broader category of governance, which comprises 'all processes and institutions, both formal and informal, that guide and restrain the collective activities of a group'.<sup>13</sup> Whether attempts at governance amount to regulation depends on the degree of authority with which they steer the addressees' behaviour. Authority is difficult to measure directly, but it can reasonably be inferred from characteristics such as the status and esteem of the regulator, the severity of consequences for regulatory addressees of non-accession or non-compliance, and the extent to which regulatory decisions impact on third parties.<sup>14</sup> The distinction between law and regulation, in turn, is primarily understood in this article as one between content and process. Regulation refers to the authoritative exercise of influence addressed to an identifiable target audience with the aim of stabilizing or modifying behaviour in the pursuit of public interest goals. In the context of the present project, these public interest goals are environmental protection goals. Regulation is therefore an action-based notion that focuses on the communicative qualities of norms. Law, by comparison,

<sup>12</sup> C. Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] *Public Law*, pp. 329–53, at 331.

<sup>13</sup> D. Kysar, 'Sustainable Development and Private Global Governance' (2005) 83(7) *Texas Law Review*, pp. 2109–66, at 2145. Kellow and Zito deploy a narrower definition of governance, one that emphasizes a less direct, more steering-oriented mode of engagement but still assumes the central position of a public authority: 'Governance is the capacity of governments or designated public actors to steer their economy and society in a goal-oriented way that differs from what the spontaneous cooperation of actors in the markets and society might achieve': A. Kellow & A.R. Zito, 'Steering through Complexity: EU Environmental Regulation in the International Context' (2002) 50(1) *Political Studies*, pp. 43–60, at 43. Möllers treats 'governance' as the institutional perspective on the conduct of public institutions that focuses particularly on their externality from the state, their public/private hybridity, their high degree of informality, their efficiency and output, and their sectorality: C. Möllers, 'European Governance: Meaning and Value of a Concept' (2006) 43(2) *Common Market Law Review*, pp. 313–36, at 314–8. Pauwelyn, Wessel and Wouters, in turn, relate 'governance' particularly to policy coordination between public and private actors: J. Pauwelyn, R.A. Wessel & J. Wouters, 'An Introduction to Informal International Lawmaking', in J. Pauwelyn, R.A. Wessel & J. Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012), pp. 1–10, at 2.

<sup>14</sup> V. Heyvaert, 'What's in a Name? The Covenant of Mayors as Transnational Environmental Regulation' (2013) 22(1) *Review of European, Comparative and International Environmental Law*, pp. 78–90, at 83.

is understood as a conceptual, ideal-based notion. It refers to authoritative organizational norms that regulate conduct. When the analysis focuses on the act of communicating norms and all that this entails, it focuses on regulation. When it engages with what is being communicated, it engages with law.

### 3. TRANSNATIONAL ENVIRONMENTAL REGULATION AND THE CHALLENGE TO LAW

Transnational environmental regulatory initiatives cause legal complexity. Consider, for instance, the intricate legal and regulatory context in which the Covenant of Mayors<sup>15</sup> operates. The Covenant is a climate change initiative to which many of Europe's major cities voluntarily subscribe. It is administered by the Covenant of Mayors Office (COMO), which was established and is funded by the European Commission. Participating towns and cities must develop a baseline emissions inventory and are required to submit a Sustainable Energy Action Plan (SEAP), which maps out the different approaches and policies that they intend to implement to achieve the minimum 20% carbon dioxide (CO<sub>2</sub>) emissions reduction target. Additionally, participating towns and cities are expected to submit regular implementation reports.<sup>16</sup> Failure to meet the membership criteria may negatively impact on a participant's access to the funding opportunities created within the framework of the Covenant, and may result in their membership being suspended.

Which legal regime governs the relations between the European Commission, the COMO and the signatory towns and cities? The answer is supremely challenging. The official text of the Covenant gives no indication as to applicable law,<sup>17</sup> nor does the adhesion form that town and city councils are requested to sign as confirmation of their intent to join.<sup>18</sup> Should such a determination need to be made, several jurisdictions could credibly vie for the spot. At the very least, a claim could be made for the relations between Covenant participants to be governed by European Union (EU) law, or Belgian law (the law of the jurisdiction in which the COMO and the European Commission are located), or the law of the country in which the town or city concerned is located. Either choice creates advantages and limitations. A choice for EU law would reflect the relevance of EU institutions in the scheme and of EU legal commitments as the key reference points to determine the minimum aspirations that Covenant participants agree to embrace in the fight against climate change. On the other hand, it would arguably defeat the deliberate establishment of the Covenant outside the institutional apparatus of the EU. It might be seen to favour EU-based participants over those from outside the EU, and it would subject the Covenant to a relatively thin legal regime with limited experience in both judicial review and adjudicating contractual relationships. This may not be the best choice for the governance of such complex, multipartite relationships.

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<sup>15</sup> See [http://www.covenantofmayors.eu/about/covenant-of-mayors\\_en.html](http://www.covenantofmayors.eu/about/covenant-of-mayors_en.html).

<sup>16</sup> Heyvaert, n. 14 above, p. 81.

<sup>17</sup> Available at: [http://www.eumayors.eu/IMG/pdf/covenantofmayors\\_text\\_en.pdf](http://www.eumayors.eu/IMG/pdf/covenantofmayors_text_en.pdf).

<sup>18</sup> Available at: [http://www.eumayors.eu/support/library\\_en.html](http://www.eumayors.eu/support/library_en.html).

Alternatively, the Brussels location of both the European Commission and the COMO point towards Belgian law. This choice shares with the previous one the advantage of consistency in that all relations under the Covenant would be reviewed against the same legal standards, without suffering from the relative paucity of experience that characterizes EU law. On the other hand, the choice is highly formalistic and could produce inefficient, artificial and potentially unfair results. The prospect that, say, a disagreement between an Italian funding body and an Italian town or city would be shoehorned into the Belgian jurisdiction purely because the facilitating bodies are formally established there is unattractive. This is all the more so since the connection between these facilitating bodies and the Belgian state is itself tenuous. Yet reverting to the law of the country in which the parties involved in the proceedings are located would lead to both legal fragmentation and considerable complexity, as various authorities in different countries could stamp their own, disparate interpretations on the legal arrangements under the Covenant and the ensuing rights and responsibilities.

The choice of law challenges represented by the Covenant extend beyond the determination of the governing regime, and include the identification of the appropriate legal discipline. It is by no means clear whether any conflict between, for instance, the COMO and a signatory participant regarding the former's decision to suspend membership rights is contractual, administrative, or even tort-based in nature. If the Covenant is treated as a regulatory regime, the first option seems appropriate. However, the voluntary nature of membership, with no overt scope for punishment beyond exclusion from the club for non-adherence to club rules, makes the case for contract law. From a formalistic angle, the unilateral commitment structure of the Covenant might argue in favour of treating any disagreements between parties as being of a private but non-contractual nature.

These reflections convey a first impression of the destabilizing impact of transnational regulatory activity on assumptions about legal governance. However, the examples still underplay the essentially disruptive impact of TER on the very concept and content of law. Law, in the preceding example, is talked of as the pre-existing governance regime under which the Covenant resorts. The latter is portrayed, for all intents and purposes, as the passive subject that undergoes law and adjudication. Yet, if we embrace the notion that the Covenant produces behaviour that is at least in part regulatory, then the normative content actively developed through Covenant processes may itself be a source of law. The Covenant does not merely operate in an intricate legal context; it creates an intricate legal context.<sup>19</sup> Transnational, decentred regulation thus co-produces transnational, decentred law. Moreover, this transnationalization of law calls into question the usefulness of many of the attributes that conventionally serve to distinguish law from non-law.<sup>20</sup>

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<sup>19</sup> Cf. R. Cotterrell, 'What Is Transnational Law' (2012) 37(2) *Law & Social Inquiry*, pp. 500–24, at 515; K.-H. Ladeur, 'The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law', Osgoode CLPE Research Paper No. 16/2011, 21 Mar. 2011, pp. 3, 8, available at: <http://ssrn.com/abstract=1792062> or <http://dx.doi.org/10.2139/ssrn.1792062>.

<sup>20</sup> Cf. Cotterrell, *ibid.*, pp. 512, 515; P. Zumbansen, 'Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power' (2013) 76(2) *Law & Contemporary Problems*, pp. 117–38, at 118, 130–1.

#### 4. MAPPING THE IMPACTS OF TRANSNATIONAL ENVIRONMENTAL REGULATION ON THE CONVENTIONAL ATTRIBUTES OF LAW

The following sections offer a framework for organizing and discussing the transnationalization of law. It is argued that to understand the breadth and richness of reactions to the rise of TER, account must be taken of its impact on conventions regarding the location, the sources, the organization, the functions, and the structure of law. The framework makes it possible to map the range of challenges to law encapsulated in the emergence of transnational regulation (see Table 1). This, in turn, fosters appreciation of the different and often divergent reactions to the transnationalization of law, which are reviewed in the final part of this article.

##### *4.1. Location: Transnational Environmental Regulation and the 'End of Geography'*

Law is an intensely territorial concept. Laws emanate from the city, the state, the empire, and hold sway within – and only within – the geographical zone that falls under the governing bodies' control, a zone bordered by physical and frequently contested frontiers. The intimacy of the bond between government, territory, and law resonates in the notion of 'jurisdiction', which means both the official power to make legal decisions and judgments, and the territory over which legal authority extends. The exclusivity of the relationship is encapsulated in our understanding of legal sovereignty, which represents the entitlement to legal autonomy and self-determination and 'rests fundamentally on the notion of exclusive authority over discrete parcels of territory'.<sup>21</sup> Indeed, the very notion of independent statehood signifies a successful claim to a connection between a governance regime, a physical territory and its population. This connection conveys the entitlement to defend the territory militarily, to levy taxes within the territory, to issue laws for the territory, and to enter into international agreements on behalf of the territory.<sup>22</sup>

The rise of transnational regulation threatens the bond between law and geography in two ways. Firstly, it is difficult to locate transnational actors in a particular jurisdiction: they do not have a 'seat' of authority in the way that state regulators do. Secondly, there is no clearly demarcated field of application of the normative content they produce. For private environmental standard setters, for example, the size of their field of application depends entirely on the successful uptake of the standards.

The challenges that TER poses to law and geography are particularly pressing with regard to transnational regulatory activity that takes place outside the auspices of a pre-established supra- or international legal framework. Unless they restrict their membership and field of action explicitly to a single state, private environmental

<sup>21</sup> D. Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' (2014) 25(1) *European Journal of International Law*, pp. 9–24, at 13.

<sup>22</sup> *Ibid.*, pp. 13–4.

**Table 1** Impacts of Transnationalization on Law

	Conventional Context	Transnational Context
<b>Location</b>	Territorial	Delocalized
<b>Source</b>	Based in or derived from the state	Plural
<b>Organization</b>	Public and private law	Inchoate
<b>Functions</b>	Constitutive, regulatory, communicative	Cognitive, reflexive, coordinative
<b>Structure</b>	Cohesive and regimented	Polycentric

regulators are genuinely and doubly delocalized. As illustrated in the Covenant of Mayors example, there is no obvious candidate jurisdiction in which to ground (quasi) regulatory behaviour that occurs in a transnational network. Often, there will be no legal discipline which can claim undisputed governance over the relations that unfold within the network.<sup>23</sup> Secondly, the normative content that is generated through the transnational network is itself delocalized. The Forest Stewardship Council (FSC)<sup>24</sup> does not create American, Japanese or French sustainable forestry standards; it produces FSC sustainable forestry standards. If the FSC standards are accepted as transnational law,<sup>25</sup> then this is indeed law that has sprung up in the absence of claims to territory and sovereignty.

Transnational regulation developed through the implementation of regional or international legal frameworks, such as pollutant emissions limit values adopted under the EU Industrial Emissions Directive<sup>26</sup> or decisions to include further species in the endangered lists annexed to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),<sup>27</sup> is comparatively less problematic. The geographical realm of application of such regional and international regulatory measures formally corresponds with the territory of the signatory states, which functions as an expanded field of jurisdiction. Nevertheless, in this context, too, challenges arise. They are perhaps less acute than those created by the rise of private transnational regulation, but they are certainly not negligible. In the EU, tensions arise because of the perennial need to mediate competing claims to territorial exclusivity. At the international level, in turn, the relevance of territoriality is significantly eroded by the growing complexity of international decision making and the dearth of international administrative law. The following paragraphs explain each point in turn.

In the EU context, the growth of a level of legal authority that geographically overlaps that of the Member States has put enormous pressure on domestic conceptions of the relation between law, territory, and sovereignty.<sup>28</sup> Many of

<sup>23</sup> Cf. Pauwelyn, Wessel & Wouters, n. 13 above, p. 2.

<sup>24</sup> See <http://www.fsc-uk.org/en-uk>.

<sup>25</sup> Ibid.

<sup>26</sup> Directive 2010/75/EU on Industrial Emissions (Integrated Pollution Prevention and Control) [2010] OJ L 334/17.

<sup>27</sup> Washington, DC (US), 3 Mar. 1973, in force 1 July 1975, available at: <https://www.cites.org/eng/disc/text.php>.

<sup>28</sup> C. Thornhill, 'National Sovereignty and the Constitution of Transnational Law: A Sociological Approach to a Classical Antinomy' (2013) 3(4) *Transnational Legal Theory*, pp. 394–460, at 406;



the landmark European constitutional cases of the past decade reflect, precisely, a preoccupation to reconceptualize or reclaim sovereignty over the national 'parcel of territory' in the face of competing claims from a centralized, delocalized legal authority.<sup>29</sup> Here, the rise of transnational regulation has not resulted in the absence of geography but has co-produced competing claims to territorial sovereignty which, from a different vantage point but equally urgently, call for a reconsideration of traditional assumptions regarding the relation between law and geography.

Regulatory measures adopted under the auspices of international treaties put relatively less pressure on domestic claims to territorial sovereignty because their authority is typically contingent on ex post state validation. Yet, at the international level, too, the bond between law and geography is increasingly strained. A first contributing factor to delocalization is the growing institutional complexity of international regulatory and administrative decision making. Consider, for example, the approval of Clean Development Mechanism (CDM) projects under Article 12 of the Kyoto Protocol.<sup>30</sup> For such approval to come about, at least three different entities need to make affirmative decisions: the Designated National Authority (DNA), which approves the participant's project proposal and forwards the project for validation; the Designated Operational Entity (DOE), a private third-party certifier which validates the project; and the CDM Executive Board, which registers and thereby formally accepts a validated project as a CDM project activity.<sup>31</sup> Given the geographical spread of DNAs, DOEs and the CDM Executive Board, it is difficult to anchor the set of decisions that culminates in CDM approval within a particular jurisdiction. A potential determination that, ultimately, the decision is taken in furtherance of the Kyoto Protocol and that, therefore, its jurisdiction corresponds with the combined territory of the signatory states does not offer a genuine resolution. Firstly, the international regime itself provides few administrative principles and standards that could be marshalled to govern CDM decision making. Resorting to the administrative law bodies of the signatory states instead is equally problematic because these bodies differ from state to state. Hence, CDM decisions are floating entities: they are disconnected from the national level without having been adequately relocated in the international sphere.

In sum, the intensity and precise nature of the challenge differ, but all main variants of TER cause a degree of delocalization of law.

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A. van Bogdandy & S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48(5) *Common Market Law Review*, pp. 1417–53; N. Krisch, 'Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space' (2011) 24(4) *Ratio Juris*, pp. 386–412, at 407.

<sup>29</sup> 2 BVerfGE 2/08 *Treaty of Lisbon*, Judgment of 30 June 2009 (German Constitutional Court); BVerfGE 37, 271 2 BvL 52/71 (Solange I–Beschluss); K 32/09 *Treaty of Lisbon*, Judgment of 24 Sept. 2010 (Polish Constitutional Court); Pl. US 5/12 *Slovak Pensions*, Judgment of 31 Jan. 2012 (Czech Constitutional Court).

<sup>30</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

<sup>31</sup> M.J. Kang & J. Park, 'Analysis of the Partnership Network in the Clean Development Mechanism' (2013) 52 *Energy Policy*, pp. 543–53, at 543.

#### 4.2. Source: Transnational Environmental Regulation and the Triple Challenge to the State

Stronger even than the link with physical territory is the connection between law and the concept of the state. The 19<sup>th</sup> and 20<sup>th</sup> centuries, in equal parts celebrated and denounced as the heyday of the nation state, witnessed the consolidation of the trinity of state government, legislature, and judiciary as a dominant, even exclusive source of law. In the third millennium, in contrast, the exclusivity – even the dominance – of the state as a source of law is under threat.<sup>32</sup>

The proliferation after the Second World War of public international law in policy fields outside the traditional zones of international relations, including environmental protection, introduced a greater degree of diversity in recognized sources of law. However, this development did not yet genuinely call into question the centrality of the state because international legal authority is understood as derived from state authority.<sup>33</sup> States sign up to international agreements. States agree to recognize the competence of international courts and tribunals. State law and practice are the key benchmarks for the recognition of customary international law. Instead of constituting a threat, public international law validates the state as the inescapable, original source of law.

The arrival of EU law as a source of law within the European region, on the other hand, heralded a more challenging proposition. The extent to which the exercise of legal authority at the EU level is reducible to the (member) state is a topic of endless examination and contestation. This is not the place to discuss the range of positions in this rich and ever-evolving debate. It suffices to say that, to many participants in the debate, the representation of EU law as an affirmation of its Member States' prerogative to enter into international binding agreements, which therefore shores up the legal sovereignty of the state, strains the limits of credibility. Arguably, such representation overlooks the role of key players, such as the European Commission and the European Parliament, which are not accountable to the state.<sup>34</sup> It ignores the existence of majority voting among Member States.<sup>35</sup> It does not account for the enormous issue-interdependence and complexity of EU decision making, which easily reduces Member State day-to-day self-determination to a purely theoretical possibility.<sup>36</sup> To a more significant extent than public international law, EU law worries at the fabric of state-centred conceptualizations of law and legality.

<sup>32</sup> Thornhill, n. 28 above, p. 406.

<sup>33</sup> C. Brütisch & D. Lehmkuhl, 'Complex Legalization and the Many Moves to Law', in Brütisch & Lehmkuhl, n. 7 above, pp. 9–32, at 22–3; J.H.H. Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, pp. 547–62, at 553–6.

<sup>34</sup> A. Ellinas & E. Suleiman, 'Supranationalism in a Transnational Bureaucracy: The Case of the European Commission' (2011) 49(5) *Journal of Common Market Studies*, pp. 923–47; E.O. Eriksen & J.E. Fossum, 'Post-national Integration', in E.O. Eriksen & J.E. Fossum (eds), *Democracy in the European Union: Integration Through Deliberation* (Routledge, 2002), pp. 1–28, at 4.

<sup>35</sup> Cf. S.C. Sieberson, 'Inching Towards EU Supranationalism? Qualified Majority Voting and Unanimity under the Treaty of Lisbon' (2010) 50(4) *Virginia Journal of International Law*, pp. 920–95, at 926–32.

<sup>36</sup> R. Kardasheva, 'Package Deals in EU Legislative Politics' (2013) 54(4) *American Journal of Political Science*, pp. 858–74.

Its existence calls into question those classical iterations of the rule of recognition that inexorably lead back to the constitutional authority of the state.

The proliferation of transnational regulation within and beyond Europe intensifies this challenge in several ways. Firstly, the provenance of the rules that are deemed to govern much of transnational regulatory activity is unclear. This is definitely the case for private transnational regulation, which typically has no obviously identifiable 'home jurisdiction'. However, it is also the case for transnational regulation under the auspices of international legal instruments, because neither these instruments nor public international law are rich in legal provisions that are essentially administrative in nature. It is therefore not surprising that discussions on the legality and legitimacy of TER often refer to abstract notions of, for example, accountability or transparency without clarifying which legal regime's rendition of accountability or transparency is targeted.<sup>37</sup> They seemingly operate on the assumed existence of an inchoate, common conception of the meaning of administrative standards, but it is rarely made explicit where this common conception comes from and what it consists of.<sup>38</sup> Karl Heinz Ladeur recognizes this and advocates the development of an experimental, inductive approach to the production of a new administrative legality:

Particular emphasis should be placed on the question of the 'sources' of the emerging regulatory order. Arguably, the new relational 'rationality of networks' can no longer be regarded as being 'deposited' in a canonical (legal) text; instead, legal meaning must be generated from several overlapping texts and contexts of practice in an experimental approach that comprises both the domestic and the transnational realms.<sup>39</sup>

Secondly, transnational regulation may itself be considered as a source of law, one that is emphatically not traceable to the state. The legal content produced by transnational environmental regulators does not just problematize the state's dominance as a source of law (as EU law does); it raises the possibility of law in the very absence of the state. Roger Cotterrell speaks of a paradigm shift:

One might think of transnational networks of community as the ultimate source of their own legal regulation but, equally, as being subject to legal regulation created in other such networks that impinge on them ... So it is possible to envisage a kind of paradigm shift in legal inquiry provoked in part by the development of transnational law: a shift away from a limited nation-state focus and toward a new emphasis on the law-creating potential of complex, interpenetrating networks of social relationships of community.<sup>40</sup>

Both as author and subject, TER calls into question the assumption that the construction of law is the privilege of a single actor (the state) or, at most, a select few.<sup>41</sup> It even calls into question the long-established function of the source of law as

<sup>37</sup> See, e.g., R. Glicksman & T. Kaime, 'A Comparative Analysis of Accountability Mechanisms for Ecosystem Services Markets in the United States and the European Union' (2013) 2(2) *Transnational Environmental Law*, pp. 259–83.

<sup>38</sup> B. Kingsbury, N. Krisch & R.B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3/4) *Law and Contemporary Problems*, pp. 15–61, at 29–31 (on the difficulty of identifying the source(s) of global administrative law).

<sup>39</sup> Ladeur, n. 19 above, p. 249.

<sup>40</sup> Cotterrell, n. 19 above, p. 515.

<sup>41</sup> Thornhill, n. 28 above, p. 406.

a rule of recognition. Indeed, if we take TER seriously as a source of law, the question arises whether legal authorship is genuinely knowable and attributable. In the multi-directional and reflexive environment of transnational regulatory networks, the distinction between regulator and regulatee fades.<sup>42</sup> In a Habermasian sense, it could be argued that TER blurs the distinction between strategic action and communicative action.<sup>43</sup> With it, opportunities to designate with conviction those nodes within the network that constitute the source of law recede. TER thus erodes the conceptual wall that protects formal representations of law and regulation – representations that thrive on binary distinctions between regulator and regulatee, lawmaker and legal subject, legality and illegality – and uncompromisingly confronts us with the much messier, reflexive reality in which law is being made and experienced through the countless interactions of ever-permutating groups and networks.

#### 4.3. *Organization: Transnational Environmental Regulation and the Dissolution of Disciplinary Divides*

Possibly the most tangible pressure that transnationalization exerts on the legal system is exercised through the problematization of public/private disciplinary divides.<sup>44</sup> This is largely a consequence of private and hybrid actors stepping into roles that are traditionally associated with public authority.

A significant proportion of transnational environmental governance initiatives are elective. Membership is voluntary. Non-compliance with relevant standards and practices is not necessarily actively policed or, should it be, may not entail punitive consequences beyond the suspension or withdrawal of membership status. Yet the compliance pull that radiates from these programmes often belies their modest formal status. In fact, their real but informal authority, and the means it creates to ensure the programme's effectiveness without resorting to the apparatuses of administrative and criminal law, are among the key benchmarks to distinguish regulatory initiatives from other, non-regulatory governance structures.<sup>45</sup>

The regulatory or near-regulatory character of transnational environmental initiatives provokes by now familiar questions of legal governance: should the legality of the interactions within the group or network be judged by public or private law standards? The question is deeply relevant for the day-to-day organization and conduct of TER since private, contractual behaviour is judged against considerably different yardsticks from those used for public, administrative behaviour.<sup>46</sup> Transparency and openness, for example, are keystone virtues in public law. In a private, contractual setting, the qualities of exclusivity and confidentiality often take precedence. Moreover, as in matters concerning location and source, the ambiguity of TER problematizes both the determination of the legal system to which regulatory

<sup>42</sup> Brütsch & Lehmkuhl, n. 33 above, p. 23.

<sup>43</sup> J. Habermas, *Theorie des kommunikativen Handelns* (Surhkamp, 1981).

<sup>44</sup> Cf. S. Cassese, 'Administrative Law Without the State? The Challenge of Global Regulation' (2005) 37(4) *New York University Journal of International Law & Politics*, pp. 663–94, at 669, 679.

<sup>45</sup> Heyvaert, n. 14 above, pp. 83–5.

<sup>46</sup> Cf. Zumbansen, n. 20 above, p. 120.

behaviour ought to be subjected and the disciplinary affiliation of the legal content it produces. The potential ramifications of classifying, say, a conservation contract as a public act or a private contract are hugely significant, particularly when it comes to determining the rights and responsibilities of third parties. In a public law sphere, interested outsiders would have greater opportunities for involvement in the decision-making process and for judicial review. In the private sphere, third party rights derived from contract are virtually non-existent. On the other hand, any external negative impact arising from the conservation contract may be more easily vindicated if the contract is considered a private arrangement than if it is treated as an administrative decision in the pursuit of the public interest.

The position of much of transnational environmental activity at the crossroads of public and private law presents a taxing intellectual puzzle, although the challenges run more deeply. This position calls into question the very usefulness of organizing the discipline of law into demarcated public and private spheres. Pioneering case studies such as Natasha Affolder's work on transnational conservation contracts, and Benjamin Richardson's exploration of tensions between fiduciary and environmental law prescriptions in the field of socially responsible investing (SRI), suggest that it is not a question of ascertaining the 'right' sphere in which to house TER; neither private nor public law can autonomously deliver the regulating and legitimizing qualities that are necessary for such conservation contracts or responsible investment practices to flourish.<sup>47</sup>

In the transnational regulatory sphere, the walls that separate public and private law may therefore lose both their resilience and their usefulness. Their crumbling can be read as another tell-tale symptom of the weakening bond between state, territory, and law.<sup>48</sup> The affirmation of private law is, after all, an exercise of public authority. Such affirmation may be highly explicit, as in the strategic enactment of civil law codes in the Napoleonic era.<sup>49</sup> It might also be residually established through the legal construction of public institutions with clearly and exhaustively designated competencies, privileges, and responsibilities. This fences off newly established bastions of public authority and lifts them out of the mass of private entanglements fomented from human interaction. TER questions both the sturdiness and the relevance of the fence.

#### 4.4. *Function: Transnational Environmental Regulation and the Enhanced Reflexivity of Law*

Transnationalization has re-energized debates regarding the role of law in global society. Preliminarily, it should be acknowledged that to talk of 'the role of law' and the impact of TER on the role of law suggests that, outside the context of transnational regulation, the role of law is a singular, universally understood and

<sup>47</sup> N. Affolder, 'Transnational Conservation Contracts' (2012) 25(2) *Leiden Journal of International Law*, pp. 443–60; B.J. Richardson, 'Socially Responsible Investing for Sustainability: Overcoming Its Incomplete and Conflicting Rationales' (2013) 2(2) *Transnational Environmental Law*, pp. 311–38.

<sup>48</sup> Cf. Thornhill, n. 28 above, p. 406.

<sup>49</sup> J.-L. Halpérin, 'L'Histoire de la Fabrication du Code. Le Code: Napoléon?' (2003–04) 107 *Pouvoirs*, pp. 11–21.

agreed concept. Centuries of heated jurisprudential exchange attest to the contrary. Viewpoints abound about what role – or, what combination of roles – law fulfils for society, about the relation and ranking between different roles, and the desirability to enhance or suppress particular functionalities. The point is, rather, that the emergence of transnational regulation, and TER in particular, suits some accounts of what law does for society, but problematizes others. TER thus productively destabilizes the debate and creates a new agenda both for those who see their account of the role of law affirmed by the rise of TER and those who see law's functions as frustrated by transnational regulatory activity.

The examination of the impact of TER on the functions of law starts from a familiar place, namely, the mainstream account of the role of law as constitutive of regulatory and administrative authority.<sup>50</sup> Law sets the terms for the institutionalization of power and thereby enables the very establishment of regulatory and administrative institutions. The constitutive force of law is embodied by the 1995 United Kingdom (UK) Environment Act, which opens with the lofty words '[t]here shall be a body corporate to be known as the Environment Agency'; by Article 4 of the 2014 Environmental Protection Law of the People's Republic of China, which recognizes environmental protection as a basic national policy and mandates the state to adopt measures in its furtherance;<sup>51</sup> by the provisions mapping out the composition and competencies of the European Commission, the Council, and the European Parliament in the Treaty on European Union (TEU);<sup>52</sup> and by any international convention article entitled 'Conference of the Parties'. The last two examples simultaneously affirm that the constitutive role of law does not disappear beyond the level of the state, although it is severely impacted.<sup>53</sup> For every transnational environmental regulator that operates under the auspices of exogenous, binding terms of reference, there is a counter-example that does not. Private and hybrid regulators such as the Marine Stewardship Council (MSC)<sup>54</sup> and the International Organization for Standardization (ISO),<sup>55</sup> and transnational networks such as the Covenant of Mayors, all organize without the constitutive *pneuma* of law.

TER equally puts severe pressure on the regulating functions of law. This refers to the role of law as a meta-regulator, a supplier of procedural and substantive norms that constitute a framework capable of structuring, supervising and disciplining the conduct of regulation.<sup>56</sup> This function is typically associated with administrative law.

<sup>50</sup> M.-S. Kuo, 'From Administrative Law of Administrative Legitimation? Transnational Administrative Law and the Process of European Integration' (2012) 61(4) *International & Comparative Law Quarterly*, pp. 855–79, at 863.

<sup>51</sup> Translation available at: <https://www.chinadialogue.net/Environmental-Protection-Law-2014-eversion.pdf>.

<sup>52</sup> Lisbon (Portugal), 13 Dec. 2007, in force 1 Dec. 2009, available at: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012M%2FTXT>.

<sup>53</sup> Thornhill, n. 28 above, pp. 403–4.

<sup>54</sup> See <http://www.msc.org>.

<sup>55</sup> See <http://www.iso.org>.

<sup>56</sup> Cf. C. Anderson, 'Contrasting Models of EU Administration in Judicial Review of Risk Regulation' (2014) 51(2) *Common Market Law Review*, pp. 425–54, at 425; A. Alemanno, 'The Shaping of

It is readily apparent that the triple impacts of delocalization, institutional decentring, and the blurring of disciplinary boundaries limit opportunities for administrative law to fulfil the functions of structuring, supervising and disciplining regulatory behaviour. With the possible exception of EU administrative law, supranational administrative legal regimes are normatively thin and disconnected from the institutional enforcement apparatus that is vital to enhance the effectiveness of the structuring and disciplining influence of administrative law. As the roster of transnational regulators expands, the perceived deficit of administrative law to govern their conduct becomes ever more acute.<sup>57</sup>

The erosion of the constitutive and regulatory functions of law vis-à-vis transnational regulation can also impede the communicative function of law.<sup>58</sup> Law is a key channel through which governments and courts publicize their vision of what constitutes good regulation and administration. A dearth of constitutive and administrative law reduces opportunities for interpellation, debate and, consequently, government accountability.

From this vantage point, TER has a profound and potentially crippling impact on law's functionality. However, not everyone subscribes to the idea of law as conceptually and operationally separate from that which it professedly governs. According to Ladeur, the constitutive role of law as an external organizing principle that beams down on regulatory and administrative behaviour has always been an illusion: 'The fundamental forms and components of general administrative law have not been developed by the legislator nor by the judiciary (which has made some of its implicit rules explicit) but by an experimental search process of the administration itself.'<sup>59</sup> This account represents a more self-generating and organic understanding of law: one in which the role of law is not to create normative content but to reflect rules and standards as they emerge and consolidate within the day-to-day reality of regulatory and administrative decision making. Law is not superimposed on the regulatory and administrative life world; it is produced and reabsorbed within the very processes and practices that it codifies. It is, in Lon Fuller's words, a 'language of interaction'.<sup>60</sup>

If law is a co-product rather than an originator of decision making, then our expectations of its autonomous constitutive and disciplining power have been overstated. At most, law can contribute to the 'stabilization of normative expectations'<sup>61</sup> and foster 'the selection and upholding of such expectations even in the face of disappointment'.<sup>62</sup> Law is informative rather than formative; law facilitates stable self-ordering rather than imposes order.

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European Risk Regulation by Community Courts', Jean Monnet Working Paper No. 18/2008, pp. 7–10, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1325770](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1325770).

<sup>57</sup> Kuo, n. 50 above, p. 863.

<sup>58</sup> V. Heyvaert, 'Levelling Down, Levelling Up, and Governing Across: Three Responses to Hybridization in International Law' (2009) 20(3) *European Journal of International Law*, pp. 647–74, at 662.

<sup>59</sup> Ladeur, n. 19 above, p. 5.

<sup>60</sup> L.L. Fuller, 'Law and Human Interaction' (1977) 47(3/4) *Sociological Inquiry*, pp. 59–89, at 61.

<sup>61</sup> G.-P. Calliess & M. Renner, 'Between Law and Social Norms: The Evolution of Global Governance' (2009) 22(2) *Ratio Juris*, pp. 260–80, at 267.

<sup>62</sup> *Ibid.*

In the autopoietic/constructivist/interactive perspective associated with the writings of authors such as Luhmann, Teubner, Calliess and Renner, Ladeur, and Fuller, the key functions of law are facilitative and cognitive. The rise of TER changes the way in which law is co-produced but does not fundamentally threaten its facilitative and cognitive functionality. Evidently, the existing corpus of international, administrative, environmental, and contract law does enough to manage uncertainty to an extent that it does not impede the blossoming of manifold transnational environmental regulatory initiatives. Expectations between the participants in governance networks are stable enough for these networks to persist and even thrive.<sup>63</sup> Simultaneously, a developing body of decision-making protocols and standard-setting practice is being documented. Protocols and standards fulfil a vital informative function about what the normative expectations within the transnational regime are.<sup>64</sup> The information thus created is diverse and differentiated but it does contribute to an evolving, flexible understanding of the normativity of TER, which then in turn helps to stabilize continuing transnational regulatory and administrative behaviour.

In sum, accounts that position law as a hierarchically superior force external to administration, yet capable of shaping its design and operation, are threatened by the rise of transnational regulatory regimes.<sup>65</sup> The latter seem to exemplify much more aptly the reflexive potential of law. To some, the shift in representation from ‘law as authority’ to ‘law as reflection’ constitutes a diminishment of the status of law and its role in society. To others, it is instead a closing of the gap between the myth and the reality of law.

#### 4.5. *Structure: Transnational Environmental Regulation and Regime Polycentricity*

As it challenges the monopoly of the state as the source of law, so does TER call into question the accuracy of representing the legal system as a hierarchically organized, regimented and fully articulated structure.<sup>66</sup> Concepts such as the ‘architecture’ of law evoke an image of law as a cohesive, comprehensive system built on solid, singular foundations: national constitutions for domestic law, the EU treaties for the EU legal regime, the Vienna Convention on the Law of Treaties (VCLT)<sup>67</sup> for international law.<sup>68</sup>

The difficulties in determining which sets of laws and rules should govern TER, illustrated in the example of the Covenant of Mayors, cast a shadow on the assumption of architectural cohesion of the legal edifice. The claims to legal status of the normative content produced through transnational regulatory decision making

<sup>63</sup> Fuller, n. 60 above, pp. 61–4.

<sup>64</sup> On the cognitive function of law, see also F. von Benda-Beckmann & K. von Benda-Beckmann, ‘The Dynamics of Change and Continuity in Plural Legal Orders’ (2006) 53(4) *Journal of Legal Pluralism & Unofficial Law*, pp. 1–44, at 12.

<sup>65</sup> Cf. Scott, n. 12 above, p. 333.

<sup>66</sup> Brütisch & Lehmkuhl, n. 33 above, pp. 22–3.

<sup>67</sup> Vienna (Austria), 23 May 1969, in force 27 Jan. 1980, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

<sup>68</sup> Neil Gunningham’s work illustrates both the assumption of stability and the extent to which this assumption is under threat: Gunningham, n. 9 above.



are even harder to reconcile with a systematic, pyramidal vision of law. Instead, law unfolds as a network: one with stronger, weaker and even missing links – maybe a patchwork more than a network.<sup>69</sup> The law that feeds into and emanates from transnational regulatory decision making does not self-organize into a monolithic structure; it is fragmented and polycentric. The normative practices developed and replicated within, for example, ISO standard setting certainly reflect aspects of domestic and regional administrative law regimes which are imported into the proceedings via the expectations and routines of governmental as well as non-governmental ISO members, but they cannot be properly ‘housed’ within a pre-established organigram of international, regional or national administrative law. The structure of law is perennially inchoate.

## 5. RESPONDING TO TRANSNATIONALIZATION: RECLAIMING, RECONSTRUCTING OR RECONCEPTUALIZING

Both as subject and source of law, transnational regulation calls into question established assumptions about the key attributes of law. Law is perceived as increasingly delocalized, pluralistic, inchoate, reflexive, and polycentric. The preceding discussion also affirms that not every variant of TER exerts an equal amount of pressure. The decisions of transnational environmental standard setters such as the ISO, which defy easy classification under any legal regime or discipline, present a more acute challenge than those of the European Commission, which are generated through a highly developed, supranational legal regime that replicates many features and functions of domestic law. Yet, whether nagging or acute, it would be desperately short-sighted to ignore the practical and conceptual problems that accompany the rise of TER.

The following pages map out a variety of possible responses to the transnationalization of law. For the sake of clarity, the material is organized into three distinctive categories: (i) responses that aim to reclaim law as conventionally conceived; (ii) those that seek to reconstruct law and thereby restore its conventional attributes and functionalities; and (iii) responses that advocate a reconceptualization of law that is more in tune with the changes rung in by transnationalization.<sup>70</sup> It goes without saying that the full wealth of reactions to the transnationalization of law – as

<sup>69</sup> Benvenisti observes a similar sensibility reflected in recent American writing on international law: ‘a view shared by scholars who deny that there is anything “out there” other than solitary treaties floating around in no particular hierarchy in the abyss of international anarchy’. It should, however, be noted that representation is typically used not to challenge the systemic vision of law at a fundamental level, but to buttress claims for a return to the values of state sovereignty and subordination of transnational to national law: E. Benvenisti, ‘The Future of International Law Scholarship in Germany: The Tension Between Interpretation and Change’ (2007) 67 *ZaöRV*, pp. 585–98, at 587.

<sup>70</sup> For comparison, see Nico Krisch’s discussion of ‘containment’, ‘transfer’ and ‘break’ as three reactions to the democracy challenges represented by the emergence of postnational law: N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010), pp. 14–22. Krisch’s brief analysis focuses chiefly on the different interpretations of the relation between democracy, legitimacy and constitutionalism that underscore the diverse responses. The analysis below, in contrast, focuses its attention on the consequences of embracing one or other viewpoint. See also Berman’s discussion of sovereigntist, universalist and pluralist constructions of the global legal order: P.S. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2014), p. 14.

expressed in regulation, case law and scholarship – does not always allow itself to be neatly stored in one of three mutually exclusive categories; nor are commentators necessarily aware of whether their suggestions have an essentially defensive, conservative, or creative bent. However, a more systematic understanding of the range of possible reactions to transnationalization, whether expressed in case law, in scholarship or through legislative reform initiatives, strengthens our ability to process, contextualize and critically engage with individual responses.

### 5.1. *Conservative and Defensive: Reclaiming Law*

The transnationalization of law unlocks a Pandora's box of conceptual dilemmas, uncertainties and transitional problems. One way to solve the deluge of new challenges is to reseal the box and reassert the traditional boundaries of law. To this end, the transnationalization of law is resolutely kept outside the zone of 'law proper'. Defensive responses to transnationalization seek to keep intact the formal distinction between state-sanctioned public regulation and private regulation, however similar their impact. The barrier between officially promulgated, binding laws which are made effective through national enforcement mechanisms and backed up by punitive sanctions on the one hand, and conventional norms which derive their authority primarily from expertise, persuasion, and widespread voluntary compliance on the other, is strictly maintained.

Consequently, defensive responses relegate the lion's share of TER to the private legal sphere. The standards adopted by, for instance, the FSC are treated as private conventions; the relationship between the FSC and its members is of a contractual nature. Choice of law questions that may arise in a dispute between parties in the FSC network are resolved through conflict of law rules (known also as '*private international law*') as applied by the dispute settlement body seized of the conflict. Third party ramifications of the contractual standards agreed to by FSC members are legally relevant only to the extent that such standard setting might constitute anti-competitive behaviour.

More nuanced defensive responses to transnationalization combine the desire to safeguard the formal divisions between law and non-law with an awareness of the de facto similarities between legal and non-legal norms.<sup>71</sup> This resonates in the popularity of concepts such as 'soft law', 'quasi-regulation' and 'governance', which simultaneously underscore the similarity and the otherness of normative dynamics in the transnational field. Codes of conduct of the Organisation for Economic Co-operation and Development (OECD) are like law, yet not law; they are 'soft law'.<sup>72</sup> Transnational cooperation in standard setting for sustainable farming is like regulation, but not regulation; it is 'quasi-regulatory'<sup>73</sup> or constitutive of 'governance' rather than a regulatory regime.<sup>74</sup> The introduction of a *sui generis*

<sup>71</sup> Ladeur, n. 19 above, p. 9.

<sup>72</sup> M. Marcussen, 'OECD Governance through Soft Law', in U. Mörth (ed.), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Edward Elgar, 2004), pp. 103–28.

<sup>73</sup> C. Ray, 'Transnational Co-operation between Rural Areas: Elements of a Political Economy of EU Rural Development' (2001) 43(3) *Sociologia Ruralis*, pp. 279–95.

<sup>74</sup> Cf. L. Kotzé, *Global Environmental Governance: Law and Regulation for the 21st Century* (Edward Elgar, 2012), p. 83.

set of paralegal terminology offers the benefit of locating the transnationalization of law close enough to the legal sphere to legitimize its colonization by lawyers, but simultaneously affirms the specialness and authority of the newly constructed 'core' of law and regulation. State-issued law is no longer merely law; it is 'hard law'.

The establishment of a paralegal zone conceptually shelters the core of 'real' law from the challenges triggered by transnationalization and stimulates inquiries into the nature and status of this newly established soft, para, or quasi-legal periphery. Soft law is the subject of a rich vein of scholarship which explores the main reasons why actors resort to non-binding modes of norm setting, the variety of formats in which soft law is encapsulated, and the ways in which soft law has been used alongside or distinguished from hard law by traditional sources of legal authority.<sup>75</sup> Many writings emphasize the precursor status of soft law: it often functions to lower the threshold for agreement and as a stepping stone towards a final, binding legal product.<sup>76</sup> This is an affirmative account, but it does portray non-traditional legal activity as instrumental and in support of a more enduring, prestigious end goal. The final destiny for successful soft law is elevation to the ranks of real, hard law.

#### *Advantages and disadvantages of reclaiming law*

Defensive responses to the transnationalization of law have an obvious appeal. They avoid the disruption that accompanies attempts at reconceptualization; they preserve the relevance of generations of legal knowledge and praxis; and imbue decision making with continuity and, hence, predictability. On the other hand, unwillingness to confront the impacts of transnationalization widens the gap between 'the law on the books' and 'what really happens', which may dent the credibility of law as an effective disciplining force of political power. Moreover, the decision not to engage with the regulatory character of transnational arrangements arguably represents a missed opportunity to lend structure and support to innovative attempts at public interest regulation. Considering the gaping chasm between the scope and pace of 'traditional' climate change regulation and the extent of intervention required to achieve sustainable climate targets, such opportunities may be too costly to miss.

Ultimately, the main shortcoming of boundary-drawing exercises is that they tend to ignore or displace, rather than truly resolve, the tensions caused by transnationalization. The conceptual clarification that comes from firmly locating, say, the environmental instruments adopted under the 2007 Association of South

<sup>75</sup> F. Terpan, 'Soft Law in the European Union: The Changing Nature of EU Law' (2015) 21(1) *European Law Journal*, pp. 68–96; J. d'Aspremont & T. Aalberts (eds), 'Symposium on Soft Law' (2012) 25(2) *Leiden Journal of International Law*, pp. 309–78; Heyvaert, n. 58 above, n. 3 (overview of key publications on soft law between 1990 and 2009).

<sup>76</sup> G. Shaffer, 'Theorizing Transnational Legal Ordering' (2016) 12 *Annual Review of Law and Social Science*, pp. 231–53, at 246; K.W. Abbott & D. Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) *International Organization*, pp. 421–56; G. Shaffer & M.A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) 94 *Minnesota Law Review*, pp. 706–99.

East Asian Nations (ASEAN) Charter<sup>77</sup> outside the sphere of real law does little to alleviate concerns about the transparency and responsiveness with which such measures were adopted. Housing the same instruments in the ‘soft law’ category does create some space for these issues to be debated, but offers little instruction on how such debates should be settled.

Arguably, the introduction of notions such as soft law, quasi-regulation, and governance do not so much fix the boundaries between law and non-law as they represent an institutional choice about the appropriate forum for determination. The question of exactly what consequences to attach to the label of ‘soft law’ usually remains suspended until it falls in the lap of judicial and arbitration bodies.<sup>78</sup> The Court of Justice of the EU (CJEU) ruling in *Fra.bo* exemplifies this.<sup>79</sup> In this case the CJEU was asked whether the refusal by a German certification body (the Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW)) to recognize the validity of a certificate issued by an Italian certification entity, which was not on the DVGW’s approved list, could be construed as an impediment to the free movement of goods (Article 34 of the Treaty on the Functioning of the EU (TFEU),<sup>80</sup> then Article 28 of the Treaty establishing the European Community (EC)<sup>81</sup>). The catch was that the DVGW is a private organization. Under German law, DVGW certification is not essential to prove that construction products (in this case, copper fittings) meet mandatory safety standards, but the DVGW certificate bestows a presumption of conformity. Alternative avenues to prove compliance are underspecified and costly.<sup>82</sup> In its submission, the DVGW asserted that only the German state was bound by Article 28 EC. Consequently:

[there was] nothing preventing the DVGW from drawing up technical standards which go beyond those in place in Member States other than the Federal Republic of Germany and to apply them to its certification activities. It is also free, on quality-related grounds, to take account only of laboratories accredited by it.<sup>83</sup>

The CJEU did not dispute the DVGW’s status as a private body, but considered that because (i) German legislation provided that goods certified by the DVGW would be compliant with national law; (ii) the DVGW was the only body that certified copper fittings in Germany; and (iii) a lack of certification by the DVGW would result in serious difficulties in placing the product on the market, the DVGW ‘in reality (held) the power to regulate’.<sup>84</sup>

<sup>77</sup> K. Kheng-Lian, ‘Transboundary and Global Environmental Issues: The Role of ASEAN’ (2012) 1(1) *Transnational Environmental Law*, pp. 67–82.

<sup>78</sup> E. Korkea Aho, ‘Laws in Progress? Reconceptualizing Accountability Strategies in the Era of Framework Norms’ (2013) 2(2) *Transnational Environmental Law*, pp. 363–85, at 378–384.

<sup>79</sup> Case C–171/11, *Fra.bo SpA v. Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) – Technisch-Wissenschaftlicher Verein*, Judgment of 12 July 2012, ECLI:EU:C:2012:453.

<sup>80</sup> Lisbon (Portugal), 13 Dec. 2007, in force 1 Dec. 2009 [2010] OJ C 83/47, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF>.

<sup>81</sup> [2002] OJ C 325/33, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT>.

<sup>82</sup> *Ibid.*, para. 29.

<sup>83</sup> *Ibid.*, para. 14.

<sup>84</sup> *Ibid.*, para. 31.

*Fra.bo* relies on a preponderance of the evidence approach to resolve the boundary dispute and situate the DVGW's certification activities on the public side of the public/private divide. The case-by-case, problem-solving approach to questions regarding the legal status of non-traditional regulators, which is inherent in judicial determination, imbues the process with a considerable degree of flexibility and scope for fairness in decision making. At the same time, however, it is not the most conducive to establishing general criteria regarding the legal status of de facto authoritative bodies. It takes more than one ruling to confidently crystallize generalizable rules. In this manner, too, the institutional choice to settle 'boundary disputes' through (individual) judicial determination instead of through (general) rule making presents itself as a defensive rather than offensive response to the transnationalization of law.

### 5.2. *Conservative and Adaptive: Reconstructing Law*

A second cohort of responses to the transnationalization of law shares with the first that it is essentially conservative: it seeks to alleviate the pressures on conventional understandings of the location, sources, functions, disciplines, and structure of law. However, in contrast to the first response, commentators who espouse conservative and adaptive perspectives display a greater willingness to confront the undesirable consequences of maintaining a strict law/non-law, public/private divide. Such undesirable consequences may manifest in, for example, the inability of contract law to address the lack of transparency with which private transnational regulators behave, or in the inability to appeal against decisions adopted by transnational environmental regulators, such as the CDM Executive Board.<sup>85</sup> Following a conservative and adaptive approach, law should be tweaked, adapted and, where necessary, newly produced to bridge the discrepancy between the private form and the public substance of transnational regulation. New law should fix the gaps in the fabric of legal protection torn by the emergence of transnational regulators. Conservative and adaptive responses to the transnationalization of law aim to reconstruct the conventional role and functions of law through the creation of new generations of public transnational law.

Views differ on whether adapting law to the transnational context is a matter of implementing a few discrete fixes, or instead calls for a large-scale overhaul. It has been argued that, in their enthusiasm for the new and the challenging, scholars easily overestimate the proportion and weight of transnational regulation. In reality, it is countered, the irritation caused by the transnationalization of law remains modest, and most of it can be managed with old-fashioned legal tools.<sup>86</sup> Conflict of laws doctrines may not provide perfect answers to problems of dislocation, but they still

<sup>85</sup> C. Streck & J. Lin, 'Making Markets Work: A Review of CDM Performance and the Need for Reform' (2008) 19(2) *European Journal of International Law*, pp. 409–42, at 426–8.

<sup>86</sup> Ralf Michaels, e.g., has proposed a more inclusive approach to conflicts of law as a way to resolve competing claims between state and non-state law: R. Michaels, 'The Re-Statement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism' (2005) 51(3) *The Wayne Law Review*, pp. 1209–58, at 1250–8. Zumbansen, n. 20 above, p. 127; note that Zumbansen discusses this view in the literature, but does not personally espouse it.

perform the core task of identifying possible forums and plausible legal regimes under which transnational legal conflicts may be housed. Similarly, in response to the challenges associated with the blurring public/private divide, it is possible to expand the scope of state regulation of the private sector to introduce requirements that specifically address the increasingly regulatory character of private governance. Such requirements may be adopted under the mantle of shareholder protection, consumer protection, or environmental protection. Their main target is to imprint an ethos of good governance on the private sector which is comparable with the expectations of administrative law vis-à-vis public regulators. The official justification of transparency, consultation and review requirements may be the protection of shareholder or consumer interests, but their introduction simultaneously supports the development of a broader concept of responsibility and accountability of (private) transnational regulators.

Thus, the tensions that result from maintaining a formal distinction between public and private regulators are alleviated through the introduction of functional equivalents of public law expectations in the private sphere.<sup>87</sup> As an example, Kahler refers to the United States (US) Sarbanes-Oxley Act (2002),<sup>88</sup> which requires private companies to establish a contract management system. Such systems can reduce the risk of contract failure, but whether it was cost-effective to implement them was formerly down to the individual enterprise to decide. The introduction of the contract management requirement as a legal obligation could be viewed as a response to the growing expectation that private as well as public organizations conform to ‘best practice’ or ‘good governance’ as a matter of law, in the interests of both their contractual partners and the public at large.<sup>89</sup>

Others consider that the disruptive consequences of the transnationalization of law cannot be countered by mere tweaking, but require more thorough and systematic legal reform efforts.<sup>90</sup> Natasha Affolder’s aforementioned study of transnational conservation contracts leads her to examine the notions of fairness in private (contractual) law and in public (international environmental) law.<sup>91</sup> Her conclusion is that the two notions are not fully reconcilable; in fact, they pull in opposite directions. Fairness in contract law refers to the fairness between the contracting parties, and is typically protected by ensuring the privity of the contractual relations and prioritizing contractual interests over external concerns. Fairness in international environmental law, in contrast, is closely bound with notions of transparency and access to the negotiation process. In these circumstances, it is difficult to simply tweak notions of fairness in contract law to reflect the regulatory aspects of transnational conservation contracts without such adaptation effectively constituting a distortion.

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<sup>87</sup> See H.J. Steiner & D.F. Vagts, *Transnational Legal Problems*, 2<sup>nd</sup> edn (Foundation Press, 1976), p. xvii.

<sup>88</sup> Public Law 107–204, 107<sup>th</sup> Congress, 30 July 2002, 116 Stat. 745.

<sup>89</sup> L. Kahler, ‘Contract-Management Duties as a New Regulatory Device’ (2013) 76(2) *Law & Contemporary Problems*, pp. 89–103, at 90, 94.

<sup>90</sup> Bethlehem, n. 21 above, p. 19.

<sup>91</sup> Affolder, n. 47 above.

Correspondingly, Affolder calls for a more advanced response in the development of a transnational legal concept of fairness that 'extends rather than simply recycles fairness thinking in domestic and international law'.<sup>92</sup> In a similar vein, Benjamin Richardson uncovers fundamental tensions between SRI as a transnational governance regime and fiduciary finance law: 'The seemingly exclusive focus of fiduciary law on the interests of investors, especially their financial interests, potentially clashes with any vision of SRI prioritizing environmental and social responsibility'.<sup>93</sup> The reconciliation, he argues, involves adopting both a more productive rationale for SRI *and* a reconceptualization of fiduciary law.<sup>94</sup>

In their most expansive expression, conservative and adaptive responses to the transnationalization of law advocate the establishment of new, encompassing legal frameworks to govern TER. EU administrative law, an initially underdeveloped tenet of EU legal integration which has gradually matured in response to the growing presence and immediacy of EU regulation,<sup>95</sup> is often advanced as a model for the development of additional regional, or potentially global, regimes of public law.<sup>96</sup> Alternative conceptions for models of public transnational law include the development of 'an international law of corporate social responsibility'. The idea starts from the premise that contemporary international law, although formally established through and for states, usually has major economic actors as its real addressees. Their differentiated status is increasingly recognized in international law, for example, in the context of investor/state dispute settlement mechanisms. An international law of corporate social responsibility could constitute the 'differentiated responsibility pillar' to match the differentiated position and access that major economic actors increasingly enjoy in the international legal sphere.

Along similar lines, Bethlehem suggests a '*lex congregatio*' or 'law of society'. In a preliminary attempt to operationalize this model, he proposes the following features:

[F]irst, an instrument of traditional inter-state law that would act as a platform on which would stand a second tier set of protocols and principles addressing the application and mutual recognition of rules and standards relevant to particular conduct; thirdly, a further tier of industry-driven and derived minimum standards of conduct; and all this finally held together by a basic principle that actors are bound by what they accept – whether by their conduct, by the click of a mouse button on an 'agree' icon on a software program, or in some other manner.<sup>97</sup>

### *Reconstructing law: strengths and weaknesses*

The strongest appeal of conservative and adaptive responses is that they acknowledge the disruptive impacts of transnationalization head-on, and seek to mend the fissures between the idea of law and law in practice through enduring, sustainable solutions.

<sup>92</sup> Ibid., pp. 456–60.

<sup>93</sup> Richardson, n. 47 above, p. 327.

<sup>94</sup> Ibid., pp. 332–7.

<sup>95</sup> H.P. Nehl, *Principles of Administrative Procedure in EC Law* (Hart, 1999), p. 214.

<sup>96</sup> Kuo, n. 50 above, pp. 857–8, 862; E. Vos, 'Making Informal International Law Accountable: Lessons from the EU', in Pauwelyn, Wessel & Wouters, n. 13 above, pp. 369–81.

<sup>97</sup> Bethlehem, n. 21 above, p. 24.

These solutions, which usually consist of the introduction of new layers of public law to govern transnational action and clarify the status of transnational regulatory decisions, enable law to regain a sense of locality, exclusivity in authorship, disciplinary clarity, constitutional and regulatory functionality, and comprehensiveness. They recast the net in order better to cover the richness and variety of transnational regulatory activity, which helps to restore the concept of law in its traditional splendour.

Less felicitously, the reconstruction of law engenders an extensive degree of juridification in an already heavily legalized world. Moreover, it begs the question by whose authority any new layers of law to govern transnational activity could legitimately be adopted. The dilemma is neatly illustrated in a discussion by Thoko Kaime and Robert Glicksman on the vulnerability of ecosystem markets to underperformance, abuse and fraud. The authors trace the problem partly to a dearth of accountability requirements in ecosystem contracting, and propose the following solution:

We believe that the foundation of a reliable market that is capable of achieving efficient and effective protection of ecosystem services must rest on five pillars of accountability: (i) financial safeguards, (ii) verifiable performance standards, (iii) transparency and public participation standards, (iv) regulatory oversight mechanisms, and (v) rule of law safeguards. We derive these standards from three sources. Firstly, these accountability tools emerge from identification of the flaws we believe are responsible for the abuses of market-based approaches to environmental protection discussed above. Secondly, we draw on experience from market-based programmes which appear to have worked well or which include mechanisms that promise to effectively curb abuses of environmental markets, such as the US CAA [Clean Air Act] acid rain programme and the CWA [Clean Water Act] wetlands protection programme. Thirdly, we rely on important principles of international law, such as the obligations to provide transparency and opportunities for public participation imposed by the Aarhus Convention.<sup>98</sup>

Kaime and Glicksman's care in justifying the basis for their selection of five accountability standards underscores the essentially precarious nature of the exercise. In the absence of a transnational legislature, the borders between proposing and imposing legal order are ill-defined. When all is said and done, Kaime and Glicksman's list of accountability standards remains the fruit of *their* selection process; it has credibility because the authors are legal professionals and experts, but this is not the kind of credibility that is typically considered sufficient to justify acts of lawmaking.

Proposals for the reconstruction of law at the transnational level must confront the uneasy reality that they are, in essence, undemocratically formulated responses to problems that are themselves in no small measure a consequence of the dissolution between regulation and democratic oversight in the transnational sphere.<sup>99</sup> The EU legal regime, we recall, faces unrelenting 'democratic deficit' allegations, in spite of having incorporated over the years a veritable arsenal of checks and balances, institutional innovations and decision-making mechanisms in a continuing quest to boost the

<sup>98</sup> Glicksman & Kaime, n. 37 above, p. 271.

<sup>99</sup> Cf. A. Somek, 'Constituent Power in National and Transnational Contexts' (2012) 3(1) *Transnational Legal Theory*, pp. 31–60.



democratic credibility of its legislative and regulatory output. The EU experience serves as a cautionary reminder that the mission of reconstructing law at the transnational level to govern transnational regulatory activity will inevitably be fraught with political controversy and ongoing challenges to the authority of the transnational legal regime.

### 5.3. *Creative and Adaptive: Reconceptualizing Law*

Whether a fringe event or a development that affects vast swathes of the legal system, the transnationalization of law presents a problem that needs to be managed. That is the view shared by those who seek to reclaim or reconstruct law. The implicit assumption from which both lines of thought depart is that the traditional understanding of law as territorial, emanating from the state, organized in public and private domains, functionally constitutive, regulating and structurally comprehensive, is a notion worth protecting and preserving. However, what if we relinquish the idea that law is and must always remain defined by these traditional attributes and instead embrace the possibility of the metamorphosis of law into a ubiquitous, pluralistic, fragmented, and reflexive phenomenon? Or, what if we start from an alternative assumption, namely, that the traditional attributes of law have always been mythical? Arguably, law has never really lived up to its territorial, state-based and comprehensive billing.<sup>100</sup> If that is the case, then the rise of transnational regulation has not transformed the nature of law but instead tipped the veil on the artificiality of the incumbent paradigm.<sup>101</sup>

The latter perspectives are likely to elicit adaptive and creative responses that seek not to restore but instead to reconceptualize law.<sup>102</sup> The transnationalization of law is not so much a disruption to be managed as it is an opportunity to further our knowledge about law's nature and dynamics, to adapt the cognitive frameworks through which legal processes are perceived and constructed, and to develop a paradigm that is better attuned to the new (or newly revealed) reality of law. In this context, transnational law is no longer a shorthand for law that does not fit within the mainstream paradigm, but becomes the denominator of an alternative account of law that 'methodologically responds to the fragmented, embedded evolutionary dynamics of norm creation in the context of world society'.<sup>103</sup>

The reconceptualization of law necessitates the development of new tools to organize and structure our thinking about law; tools that are not reliant on conventional tropes (such as sovereignty and jurisdiction), dividing lines (such as the public/private divide), and decisionistic mechanisms (primacy). The creative effort of rethinking law in a mode that is less beholden to its conventional attributes echoes the intellectual challenges experienced in the quest for a de-institutionalized, decentred concept of regulation. As in that case, it is difficult to break free from the shackles of conventional thinking; we all too easily equip new models with thinly disguised

<sup>100</sup> Ladeur, n. 19 above, p. 5.

<sup>101</sup> Brüttsch & Lehmkuhl, n. 33 above, p. 23.

<sup>102</sup> Zumbansen, n. 20 above, p. 133.

<sup>103</sup> *Ibid.*

reworkings of old formulae. In a second parallel with the reconceptualization of regulation, the development of a paradigm of transnational law is very much work in progress. The paragraphs below introduce some of the key exponents of the process so far.

### *The organization of transnational law*

A first prominent feature in transnationalization scholarship is the demarcation of nascent legal spheres that are neither territorially defined nor clearly reducible to the public or private sphere. Attempts to chart domains of law that are united by characteristics other than their shared geography or location in the public or private field respond to our abiding need for boundaries to structure legal thought and action. The existence of disciplinary boundaries facilitates the performance of a number of essential operations including, to name but a few, the framing and scoping of legal conflicts; the selection of relevant bodies of legislation, case law and literature for the purpose of research and argumentation; and the identification of fields of professional expertise. The waning relevance of territorial boundaries and public/private divides is therefore as disorienting as it is liberating, and fuels a demand for new categorizations and criteria to organize the vast expanse of law into manageable segments.

The quest for functional equivalents to territorial and traditional disciplinary divides may well explain why the *lex mercatoria*, for instance, is experiencing something of a revival in today's legal scholarship. In contemporary writing, it is frequently held up as a model for transnational law that has an autonomous identity and an internal logic without being territorially confined or anchored to a predetermined source of legal authority.<sup>104</sup> It serves as both a structural and, evidently, linguistic inspiration for the denomination of new transnational fields such as the *lex digitalis*, which refers to the burgeoning body of principles, conventions and rules that structure the online environment, and the *lex sportiva*, which fulfils a parallel function for sports.<sup>105</sup>

The identification of delocalized fields of law may be accompanied by proposals to align emerging legal frameworks along traditional formats, which imbue the discussion with a reconstructive lean. Yet others eschew the traditional trappings of legality and are geared towards the analytical exercise of uncovering transnational law as they find it. Compare, for example, Bethlehem's aforementioned proposal for a *lex congregatio* with Von Benda-Beckmann's discussion of 'project law'. The former derives its legal status from 'an instrument of traditional inter-state law that would act as a platform'.<sup>106</sup> 'Project law', in contrast, refers to an organically evolving body of principles, rules and procedures made and replicated by transnationally operating

<sup>104</sup> E.g., G. Teubner, 'The Project of Constitutional Sociology: Irritating Nation State Constitutionalism' (2013) 4(1) *Transnational Legal Theory*, pp. 44–58, at 49; K.P. Berger, *The Creeping Codification of the New Lex Mercatoria*, 2<sup>nd</sup> edn (Center for Transnational Law, 2010); A. Stone Sweet, 'The New Lex Mercatoria and Transnational Governance' (2006) 13(5) *Journal of European Public Policy*, pp. 627–46.

<sup>105</sup> Ladeur, n. 19 above, p. 10.

<sup>106</sup> N. 97 above.

funding agencies and development projects. It is a flexible category that may expand to include stipulations determined by the law and political conditions of the donor country, but its identity as project law and its internal organization are not dependent on the involvement of state law.<sup>107</sup>

The turn towards delocalized fields of law which are neither public nor private has important institutional ramifications. The dissolution of clear public/private distinctions between actors connected with a transnational project or linked via commercial practices, digital networks or sporting events, creates scope for access on equal terms to institutional resources such as review processes and dispute settlement mechanisms. The multiplication of legal authorship may thus constitute the basis for an expansion of external accountability. Thus far, the cracks in the institutional wall between the public and private spheres have mostly favoured large transnational firms, granting them privileged standing in claims vis-à-vis state bodies, most controversially so in litigation on the basis of investment treaty provisions.<sup>108</sup> However, a fuller reconceptualization of law in the transnational context might open the door towards a finer calibration of actors' rights and responsibilities which is no longer determined by their public or private status, and which instead takes its cue from their relative position in the commercial/digital/project/sporting network.

### *The plurality of transnational law*

A pressing agenda point for advocates of reconceptualization is to devise productive solutions to the loss of hierarchy as an ordering mechanism and a problem-solving technique. The sources of transnational law are understood as plural, heterarchical, and theoretically infinite: there is no pre-ordained limit on the range of actors that engage in transnational norm-generating behaviour.<sup>109</sup> Moreover, no single institution – whether state, intergovernmental organization, or association of large commercial enterprises – can credibly lay claim to the exclusive competence to recognize and validate the creation of transnational law. Transnational law can thrive in the absence of a discernible *Grundnorm* and beyond the control of a designated authority equipped to sanction and rank its normative communications. The rise of transnational law thus creates a double bind: it generates new layers of normativity, which increases the likelihood that situations will be governed by multiple, potentially conflicting bodies of law. Yet it simultaneously strips law of its most effective decision-making technique, namely, resolving conflict through determinations of primacy, made by institutions that have been constitutionally empowered to that effect.

The most obvious way of dealing with the plurality of law is, simply, to bear it: that is, to resist the urge to stratify spheres of legality and to tolerate accompanying incommensurabilities in legal decision making as the inevitable side-effect of high

<sup>107</sup> Von Benda-Beckmann & von Benda-Beckmann, n. 64 above, p. 19.

<sup>108</sup> Cf. J. Kleinheisterkamp, 'Financial Responsibility in European International Investment Policy' (2014) 63(2) *International & Comparative Law Quarterly*, pp. 449–76.

<sup>109</sup> Thornhill, n. 28 above, pp. 398–9.

levels of diversified legal productivity. One of the most developed exponents of this approach can be found in Nico Krisch's postnational, radical pluralism. Radical pluralism embodies an appealingly optimistic disposition: it expresses faith in the resilience of legal structures; they can bear a quantity of dissonance without descending into chaos.<sup>110</sup> Moreover, Krisch argues that it is important not to overstate the degree of conflict that legal pluralism will elicit: for all its diversity, there are strong similarities and overlaps in our normative heritage that influence legal decision making within and outside conventional legal regimes. Finally, an absence of hierarchy does not necessarily equate an unwillingness to take inspiration from others. Plurality leaves scope for informal coordination, which could potentially reap more stable results than hierarchically imposed assimilation.

### *The functions and structure of transnational law*

Creative and adaptive responses to transnationalization are less preoccupied with restoring the waning constitutive and disciplining force of law vis-à-vis TER and more with harnessing the reflexive and communicative strengths of law. In this vein, one of transnational law's chief functions is to enable the 'peaceful co-existence' of heterarchical normative regimes. Importantly, transnational law does so not by exogenously imposing a superstructure of constitutional and administrative prescriptions to which transnational regimes must be subjected, but through the introduction of interstitial norms<sup>111</sup> which serve to coordinate, orchestrate and moderate.<sup>112</sup> The emphasis on the liaising, facilitating functions of law has a profound structural impact. Under a creative, adaptive conceptualization of transnational law, the norms that govern transnational regulatory behaviour are not created outside the regulatory context but are better understood as composite co-products of the very practice of transnational regulation.<sup>113</sup> They are not situated above but between an indeterminate and changing number of regulatory regimes, their content and status constantly evolving through processes of regulatory application and feedback.

### *Reconceptualizing law: strengths and weaknesses*

Creative and adaptive responses to transnationalization exercise a powerful draw on the legal imagination. Although less familiar, the idea of organically co-produced norms that emerge from the very behaviour that they seek to govern arguably rings truer to experience than the sterile representation of law and action as essentially

<sup>110</sup> Krisch, n. 28 above, pp. 397–400.

<sup>111</sup> Cf. V. Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23(2) *European Journal of International Law*, pp. 377–400, at 388–90.

<sup>112</sup> O. Dilling, 'Legitimacy-Collisions in 3D: Some Queries with the Third Dimension of Joerges' Conflicts Law', in C. Joerges & T. Ralli (eds), *After Globalisation: New Patterns of Conflict and their Sociological and Legal Reconstructions*, RECON Report No. 15 (ARENA, 2011), p. 140, available at: [http://pure.au.dk/portal/files/70590248/After\\_Globalization.pdf](http://pure.au.dk/portal/files/70590248/After_Globalization.pdf).

<sup>113</sup> Ladeur, n. 19 above, p. 5.

separate spheres.<sup>114</sup> In this vein, Zumbansen comments on the concreteness, the earthiness of legal pluralism:

Legal pluralists, by drawing on anthropological and sociological accounts to more adequately capture the dynamics of norm-creation and regulatory practice, scrutinize the distinction between a legal and a social norm to better understand the concrete process through which a norm comes into existence and is adhered to or rejected.<sup>115</sup>

The lure of reconceptualizing law seems to grow even stronger when contrasted with the repressive inclination of attempts to reclaim law. The former's willingness to acknowledge 'norms that do not fit' throws into sharp relief the tendency of defensive and conservative responses to ignore or define them out of existence. Such responses may bring short-term relief, but they are hardly sustainable attempts at problem solving.

The reconceptualization of law along more heterarchical, pluralistic and reflective lines could also be preferable to conservative and adaptive (reconstructive) approaches. Pragmatically speaking, reconceptualization may be more attainable than the large-scale legislative efforts that would be required to replicate the conventional structure, organization and functions of law at the transnational level. If developments in international environmental law over the past 20 years are an indication, there is currently a limited appetite for the kind of grand legislative orchestration that would be needed to develop a coherent, overarching transnational legal framework. The universalistic spirit of the 1992 United Nations Framework Convention on Climate Change (UNFCCC)<sup>116</sup> and the Convention on Biological Diversity (CBD),<sup>117</sup> it transpires, did not set the mould for the future of environmental agreements, but instead contrasts with the more recent practice of international environmental lawmaking which, when it is not amending protocols and annexes to older treaties, tends to be either regional and/or narrowly sectoral in nature.<sup>118</sup> The only arguable exception to the narrowing remit of international agreements is the Convention on Access to Environmental Information, Public Participation in Decision Making and Access to Justice (Aarhus Convention),<sup>119</sup> which is now nearly 20 years old and is, in fact, regional rather than global in scope.

Reconceptualization and reconstruction also represent starkly different political choices, neither of them unproblematic. To many, the advanced juridification that accompanies reconstructive approaches, and the extent to which they concentrate

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<sup>114</sup> Berman, n. 70 above, p. 11.

<sup>115</sup> Zumbansen, n. 20 above, p. 133.

<sup>116</sup> New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <http://unfccc.int>.

<sup>117</sup> Rio de Janeiro (Brazil), 5 June 1992, in force 29 Dec. 1993, available at: <http://www.cbd.int/convention/text>.

<sup>118</sup> For a comprehensive overview of international environmental lawmaking activity through time, see the International Environmental Agreements Database Project at: <http://iea.uoregon.edu/page.php?query=summary&ctype=MEA>.

<sup>119</sup> Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: <http://www.unece.org/env/pp/welcome.html>.

decision-making power in the hands of a global, politically unaccountable elite, are deeply unsettling.<sup>120</sup> The pluralism of creative and adaptive responses to transnationalization could offer an antidote to the development of a winner-takes-all society.<sup>121</sup> The absence of a supreme body of law, interpreted by a privileged set of transnational institutions, is a welcome reminder of the virtues of opposition and contestability. Moreover, as Krisch observes with regard to contestation, in instances where legal regimes collide there is no reason to assume that law is better equipped than politics to resolve the ensuing tensions.<sup>122</sup>

Yet, for all their promise, creative and adaptive approaches are also seriously problematic. A pluralistic model of law, too, poses significant political risks. Pluralism may result in a greater diffusion of power than attempts to reconstruct law at the transnational level, but it is equally vulnerable to the democratic deficit critique.<sup>123</sup> The *lex mercatoria*, for example, is hardly the law of the people; it is made by and arguably in support of a global commercial elite with expert transactional knowledge, yet its reach extends far beyond its authors.<sup>124</sup>

Secondly, an open acknowledgement of legal pluralism may erode the legitimizing function of law. Since the connection between TER and democratic representation is both weak and remote, the legitimacy of transnational regulators is strongly beholden to alternative claims to authority. These are typically partially based on qualities such as expertise and output efficiency, but they are also significantly furthered by the perception that the transnational actor under scrutiny is accountable and respects the rule of law. Legal pluralism might both limit the availability and robustness of accountability mechanisms and erode the universal significance of the concept of the rule of law, thus diluting the alternative bases upon which transnational actors can justify the power they wield. Unless backed up by additional guarantees, diffusion is a very thin basis on which to legitimate the exercise of otherwise unchecked legislative power.

Thirdly, Krisch's analysis, although impressively expansive, does not take into account what might be labelled as the 'more advanced' forms of transnational law – namely, the norms generated by private, hybrid or networked regulators outside the auspices of an international legal regime, established with the fiat of participating states. Delmas-Marty's work on ordering pluralism, too, stays within the confines of highly institutionalized legal orders such as the UN treaty regime, the World Trade Organization (WTO), the European Convention on Human Rights (ECHR), and the EU.<sup>125</sup> Whether the legal system possesses sufficient resilience to also productively

<sup>120</sup> Berman, n. 70 above, p. 10.

<sup>121</sup> T.C. Halliday & G. Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press, 2015), p. 27.

<sup>122</sup> Krisch, n. 70 above, p. 283.

<sup>123</sup> I am grateful to Greg Shaffer for this observation.

<sup>124</sup> Cf. T. Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford University Press, 2014), pp. 12–4.

<sup>125</sup> M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (trans. N. Norberg, Hart, 2009).

respond to the normativity generated through private, hybrid and informal regulatory networks remains untested.

A final weakness is that, although creative responses may be grounded in a more contextualized and resonant understanding of processes of norm-creation than conservative responses, their very analytical richness can simultaneously stunt their normative potential. Like spontaneity, plurality is difficult to engineer. It is in the formulation of reform proposals that advocates of pluralism are most prone to fall back on conventional tropes. The above-mentioned ‘interstitial norms’,<sup>126</sup> which should serve to coordinate between heterarchical normative spheres, exemplify the slippery slope between coordination and juridification and thus between reconceptualization and reconstruction. In Delmas-Marty’s work, for example, the assertion is made that legal pluralism should in the first place be organized through practices of cross-referencing.<sup>127</sup> It is an elegant solution to the decisionistic void at the heart of legal pluralism, and there is widespread evidence of this practice in transnational regulatory and judicial decision making.<sup>128</sup> However, the suggestion does inevitably beg the question whether the requirement to cross-reference then itself becomes the hierarchically superior norm with which the plurality of legal regimes must conform and thus carries within itself the seeds to undermine the pluralistic vision.<sup>129</sup>

## 6. CONCLUDING REMARKS

It makes intuitive sense that the emergence of new spheres of transnational and often informal authority would challenge conventional understandings of law. The contribution of this article was to pinpoint with greater precision where the impacts are being felt. To this end, the analysis identified five key pressure points – namely, conceptualizations of the location, source, organization, functions, and structure of law. For each of these attributes, the expansion of transnational governance regimes, such as those aimed at TER, provokes a problematization of long-held assumptions about what law is and how it works.

Beyond mapping out the breadth of transformations that, together, constitute the transnationalization of law, the discussion conveyed a number of significant messages regarding the relationship between TER and law. Not every variant of transnational regulation is equally challenging to mainstream conceptualizations of law. Unsurprisingly, regulatory initiatives that flourish under the auspices of well-established frameworks of international or regional law, with EU regulation as a prime example, pose less acute conceptual challenges than transnational private and hybrid regulatory networks, which may display an evolving composition and exert

<sup>126</sup> Barral, n. 111 above.

<sup>127</sup> Delmas-Marty, n. 125 above, pp. 19–37.

<sup>128</sup> Ibid.

<sup>129</sup> Similarly, in what Van Asselt calls a ‘constitutional twist’, Krisch cannot resist the siren call of ‘interface norms’ which reintroduce a degree of layering or informal hierarchy into the system of law: H. van Asselt, ‘Pluralism, Informality and Transnational Environmental Law’ (2014) 3(1) *Transnational Environmental Law*, pp. 173–89, at 179.

fluctuating levels of authority. However, the discussion equally confirmed that dissonances remain, even if the presence of a mature regime such as EU environmental regulation is superficially reconcilable with the traditional conceptualization of law. The EU legal regime may offer rough functional equivalents to the assumptions of territoriality, exclusivity, exhaustiveness and cohesion that support traditional understandings of legality, but closer inspection quickly reveals their frailty. Even the densely institutionalized, highly organized landscape of EU law cannot fully camouflage the gaps and fissures caused by the evolution of transnational regulatory authority.

A key message that resonates from the overview of possible reactions to the transnationalization of law is that seemingly ‘commonsensical’ proposals for the classification of new forms of environmental regulation, or for the extension or introduction of new rules and principles to govern them, represent important choices that are not only conceptual but also deeply political in nature. The term ‘soft law’ has become so ubiquitous that its use is hardly questioned. Yet it is important to remember that its deployment implies a clear choice to maintain a hierarchy between traditional and alternative sources of authority. In a similar vein, the frequently voiced opinion that TER is likely to suffer from deficiencies in transparency and accountability, which should be overcome through the imposition of good governance standards borrowed from the wellsprings of national administrative law, is not ‘simply’ a sound suggestion to respond to perceived legitimacy deficits, but also represents a decision to centralize legislative authority – a decision with serious democratic and distributive consequences. Conversely, the approach to reconceptualize law as pluralistic, polycentric, and reflexive may result in an alternative distribution of authority, but it is equally political and contentious. The aim of the exploration in this article was not to elevate one of the three identified responses as superior, but to drive home the point that none of these choices are innocent.