5. ‘Interglobalsuprasubandtransialidocious’: Mapping and Disentangling Transnational Environmental Governance

Till Markus and Olaf Dilling

INTRODUCTION

Transnational environmental governance takes a wide array of forms. Its variety is only surpassed by the number of explanations and ideas regarding its nature. Ultimately, the terms seem to point mainly to an elusive and opaque patchwork of norms, which have evolved partly within and partly outside the traditional ‘Westphalian’ modes of law and government, and which have not yet fully developed into a distinct and stable legal or institutional order.

This chapter aims to cut through this thicket. To this end it applies conventional lenses to transnational governance, using traditional dichotomies and distinctions such as private/public, international/domestic, as well as supranational/national, and social/legal norms. Despite the fact that these dichotomies and distinctions have inherent limitations, they are useful for the purpose of better understanding the continuing ties and dependencies between new forms of environmental governance and more established institutions with their organizational structures. Transnational governance mechanisms and norms usually develop as informal solutions within more established institutional frameworks and often still rely on their capacities and resources.

As a first step, this article will investigate the etymological roots of the term ‘transnational’. Secondly, it will outline the term’s conceptual history in the governance context and then, thirdly, distinguish it clearly from other pertinent governance semantics such as ‘domestic’, ‘inter’, and ‘supra’. Fourthly, as its centrepiece, the chapter introduces a diagram to sketch the field of transnational environmental governance. This map provides a broad typology of existing and emerging transnational governance phenomena, which are then explored in a variety of cases. Finally, the article will also try to illuminate the different types of contexts in which transnational environmental governance mechanisms are embedded. This will allow us to explain how some of the arrangements have developed quite independently from more formal modes of law and government, or are based on organizational or contractual arrangements of the private sector, while others are still deeply rooted in public sector regulatory structures. The

Formatiert: Rechts: 0,63 cm

article ends with a conclusion and an outlook regarding this overview's relevance for future research in transnational environmental law.

MAPPING TERMINOLOGIES

The term 'transnational' has been used extensively in the social science and legal literature over the last two or three decades, often in order to qualify the words 'governance' or 'law'. Particularly since the turn of the millennium, there has been a steep increase in publications using this term. As a survey of the legal and social science databases HeinOnline and JSTOR shows, from the second half of the 1990s until the first half of the 2010s, the phrase 'transnational law' in publications more than doubled, while 'transnational governance' was used more than ten times as often.[1] The term 'transnational' is not only featured in scientific publications, but is used in titles of legal research institutes, master's programs or other courses of higher education, and academic journals.[2]

However, the term's prevalence cannot conceal that it is used to denote considerably different phenomena and that it is based on a variety of distinct theories. Accordingly, discussions of related aspects of transnational governance also use expressions and terms such as supranational law, global law, public authority beyond the state, regulatory governance, inter-legality, legal pluralism, and so on.[3] Often it is unclear how these terms relate to each other. For this reason, Gregory Shaffer refers to the literature on transnational law as 'a jungle without a map'.[4] Indeed, the question of how to define 'transnational', and which phenomena fall within the term's scope, is far from settled. For our mapping exercise, it is crucial to reflect further on the meaning

[1] According to a data-base survey conducted on 4 February 2019 by Marvin Neubauer, Helmholtz-Centre for Environmental Research. The results were compared and adjusted to the whole set of data. See also Gregory Shaffer, 'Theorizing Transnational Legal Ordering' (2016) 12 Annual Review of Law and Social Science 231.

[2] By now, four journals use the term 'transnational' in their title: *Columbia Journal of Transnational Law*, *Vanderbilt Journal of Transnational Law*, *Journal of Transnational Law and Policy* and *Transnational Law and Contemporary Problems*. Since 2012, there is also a Cambridge University Press journal dealing specifically with *Transnational Environmental Law*.

[3] Mathias Reimann, 'Beyond National Systems: A Comparative Law for the International Age' (2001) 75 Tulane L Rev 1103; Paul Berman, *Global Legal Pluralism: A Jurisprudence Of Law Beyond Borders* (Cambridge University Press 2014); Kanishka Jayasuriya, 'Globalization, Law, and the Transformation of Sovereignity: The Emergence of Global Regulatory Governance' (1999) 6 Indiana J of Legal Studies 425. See also Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Law in Context, 2nd edn, Cambridge University Press 2002) 472ff.; William Twining, *Globalisation and Legal Theory* (Law in Context, Cambridge University Press 2000), 174-245; Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law & Contemporary Problems 15; E. Morgera, 'Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law' (2012) 23 European Journal of International Law 743.

[4] *Shaffer* (n 1) 232.

Formatiert: Rechts: 0,63 cm

of ‘transnational’ and to distinguish the different meanings it has acquired since it was first introduced into the political science and legal discourse.

Investigating the changing meaning of the prefix ‘trans’ in different functional and historic contexts can be a starting point to approach Schaffer’s ‘jungle without a map’ and contribute to clarifying the term’s meaning as compared to other prominent prefixes such as ‘inter-‘, ‘sub-‘ and ‘supra-‘. In Latin, and subsequently as a loanword in the English language, ‘trans’ describes a relationship that goes beyond, through or across something. For example, ‘Gallia Cisalpina’ covered the Roman side of the Alps, now Upper Italy, while ‘Gallia Transalpina’ referred to the region North-West of the Alps. From a Roman perspective, the latter denoted the region *beyond* or *across* the Alps. Using the prefix ‘trans’ in describing relations between elements or entities may imply that they connect across borders, which often establishes a direct relation between elements of these entities. In the ‘transplantation’ of organs or ‘transfusion’ of blood in medicine, the physical delimitations of the organisms are overstepped.[5] In contrast, ‘inter’ denotes a relation or object being situated *between* two separate entities, usually leaving them intact. ‘Supra’, in turn, indicates a hierarchical order between entities or elements involved.

The two meanings of ‘what lies beyond’ and ‘what pierces through boundaries’ have been a source of confusion and ambiguity within the discourse on the ‘transnational’. In our view, something is transnational if it lies beyond the system of the nation-state or transgresses its borders. Sometimes, this difference is made explicit by distinguishing between global and transnational norms. However, as Veerle Heyvaert puts it, transnational may also cover both the interstitial and the universal aspects of law and regulation.[6]

CONCEPTUAL HISTORY OF THE TRANSNATIONAL

The term ‘transnational’ was probably first used by the journalist Randolph Bourne in 1916. Bourne advocated the ‘transnational’ as a paradigm for integration in the Unites States (US). To him, it served as a counter-model to the then prevailing idea of assimilation, often metaphorically referred to as the ‘melting pot’.[7] Ethnic differences became evident in the US in the course of the First World War. Bourne argued that peoples’ traditional cultural ties should

[5] In terms of governance and administration Dilling, Herberg, Winter, ’Introduction’ in: *Transnational Administrative Rule-Making* (Hart Publishing, Oxford 2011) 2-4.
[6] Veerle Heyvaert, *Transnational Environmental Regulation and Governance* (Cambridge University Press 2019) 30. See also Claudio Franzius, 'Auf dem Weg zu einem transnationalen Klimaschutzrecht? ' [2018] Zeitschrift für Umweltrecht 641.
[7] Randolph Bourne, 'Trans-National America' (1916) 118 Atlantic Monthly 86; cf. also Paul Enríquez, 'Deconstructing Transnationalism: Conceptualizing Metanationalism as a Putative Model of Evolving Jurisprudence' (2010) 43 Vanderbilt J of Transnational L 1265, 1269.

Formatiert: Rechts: 0,63 cm

be tolerated. For him, the cultural diversity presented a chance to seek ways of reconciling differing perceptions and values. Rather than a melting pot, Bourne envisioned a transnational America as a model for world peace. The concept of the transnational that is implicit in Bourne's thoughts is one that acknowledges that individual citizens can keep and modify their relations with their countries of origin, thereby influencing the foreign policy of their new home country.

In the German-speaking community of international private law or conflict of laws scholars, the term transnational acquired a different meaning in the first half of the 20th century. The Swiss Max Gutzwiller and the Austrian Gustav Walker used 'transnational' to refer to rules of conflict that are common to many jurisdictions, for example, the *lex situs*. Ernst Rabel, a German scholar of international private law who was forced to emigrate to pursue his career, introduced this terminology to the US legal community. Rabel pointed out that similarities of the conflict rules in different jurisdictions often result from the rules having common roots, such as Roman law. According to Rabel, it was the historical *origin* of those rules that made them 'transnational'.[8]

In the 1950s, international lawyer Phillip Jessup popularized the concept of transnational law.[9] Compared to Rabel, he did not restrict transnational law to those rules dealing with conflicts of laws. In his view, the term comprehensively encompassed any national and international law regulating cross-border issues, including rules generated by private actors.[10] His terminology thus refers to norms that are *applied* across borders, regardless of their origin.[11] This concept opened up a more realist legal perspective on global normative phenomena.[12] According to this conception, the law is primarily shaped and defined by those who apply it rather than by those who legislate. Consequently, under the heading of 'transnational', norms come into play that have not been dignified as law by a formal pedigree, but can be considered law from a functional perspective.

[8] See Ernst Rabel, *Conflict of Laws. A Comparative Study*, vol 1 (2nd edition, Michigan Law 1958), 44-45.
[9] Gregory Shaffer and Carlos Coye, 'From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Orders' (2017) UC Irvine School of Law Research Paper No. 2/2017 <https://ssrn.com/abstract=2895159> accessed 12 December 2017.
[10] Philip Jessup, *Transnational Law* (Yale UP 1956) 2.
[11] For the difference between transnational origins and application of rules, see already Gregory Shaffer (ed.), *Transnational Legal Ordering and State Change* (Cambridge University Press 2012), 5.
[12] Gregory Shaffer, 'Legal Realism and International Law' (2018) Legal Studies Research Paper Series No. 55/2018, 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3230401##> accessed 11 July 2019 .

Formatiert: Rechts: 0,63 cm

In the 1990s, the term was once again taken up by authors to describe legal evolution in the context of globalization.[13] This new strand of literature was influenced by a broad social science perspective on global institutions rather than by a narrow legal focus. In addition, the discussion was now also more closely related to public than to private international law. For instance, Anne-Marie Slaughter emphasized the emergence of transnational administrative and judicial cooperation.[14]

A renewed interest in legal pluralism also fuelled the interest in developing a less state-centred perspective on the law. Legal pluralists mainly point out that multiple normative systems, be they legal or quasi-legal, effectively control human behaviour in specific societies. Norms that govern these societies are being generated by both state and non-state actors. Pluralists base their observations on ethnologic field-work, nowadays focussing on modern western contexts.[15] For example, Gunther Teubner analyzed the global 'new law merchant' or *lex mercatoria* and compared it to the field-work of Eugen Ehrlich. In the beginning of the 20th century, Ehrlich had analyzed the plurality of orders ('Living Law') in the former Habsburg Empire, particularly the relationship of social norms and state-made laws in the remote province Bukowina.[16]

In this more recent phase, the term 'transnational' was given a new turn, which in certain respects brought it closer to the meaning envisioned by Randolph Bourne and his conceptualization of integration. Under this new perspective, transnational norms are not exclusively imposed on global society by the territorial state or jointly by groups of states, but are created in the virtual space through functional communities. 'Transnational norms' then usually refer to rules that are developed in response to the practical needs of involved practitioners or by ethical demands of an emerging global public.

Against the background of the term's complex history, it does not come as a surprise that even today there are different schools of 'transnationalists' that use the term differently. One school, primarily in the tradition of Rabel and Jessup, mainly focuses on *private cross-border*

[13] Harold Hongju Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process' (1996) 75 Nebraska L Rev 181; Harold Hongju Koh, 'Why Transnational Law Matters' (2006) 24 Penn State International L Rev 745; Gunther Teubner, 'Globale Bukowina. Zur Emergenz eines transnationalen Rechtspluralismus' (1996) 15 Juristische Rundschau 255.
[14] Anne-Marie Slaughter, *A New World Order* (Princeton UP 2005).
[15] E.g. John Griffiths, 'What is Legal Pluralism' (1986) 18 The Journal of Legal Pluralism and Unofficial Law 1; Sally Engle Merry, 'Legal Pluralism' (1988) 22 Law & Society Review 869. From a comparative law perspective see particularly Werner Menski, *Comparative Law in a Global Context* (Cambridge University Press 2006).
[16] *Teubner* (n 13) 255. On Eugen Ehrlich see, for example, David Nelken, 'Eugen Ehrlich, Living Law, and Plural Legalities ' (2008) 9 Theoretical Inquiries in Law 443.

Formatiert: Rechts: 0,63 cm

regulatory processes, such as the *lex mercatoria*.[17] Another group of writers engaged in the discourse on Global Administrative Law, also discusses those and similar *cross-border regulatory processes* under the label of the transnational law.[18] From this vantage point, transnational norms emerge from the cooperation of actors from the public sector who operate below the intergovernmental level. Examples of such actors include institutionalized administrative transboundary networks, associations of semi-governmental organizations, arbitration courts, public-private-partnerships, and informal networks of judges, parliamentarians, officials or scientists.[19] Some authors, who do not generally subscribe to the wide concept of transnational norm-application advanced by Jessup, often regard European Union (EU) regulation and sometimes even international law as transnational.[20] Regulation that has been produced with the substantial involvement of actors who are not state authorities, such as the European Commission or Parliament, is then regarded as transnational.[21]

As with many nascent concepts, transnational governance is mostly defined in the negative: non-state management of public goods. Without a base in state authority, the question remains as to why people should participate in such forms of governance or even obey transnational norms. One answer could be 'consumer democracy', namely, the market power of ethical consumption that requires producers to consider sustainability. However, apart from state authority and market power, there are other, subtler ways of influencing behaviour, for example by disseminating scientific knowledge or by holding people morally accountable. Therefore, it makes sense to acknowledge the role of civil society. This opens up possibilities to take the distinction between 'bourgeois' and 'citoyen' to the global level: Beyond the state, people and organizations act politically. Even transnational corporations are no exception. On the contrary, they often strategically try to shape the rules that establish the framework for global markets.[22] Without formal democratic institutions, public discourses on political, ethical, scientific and

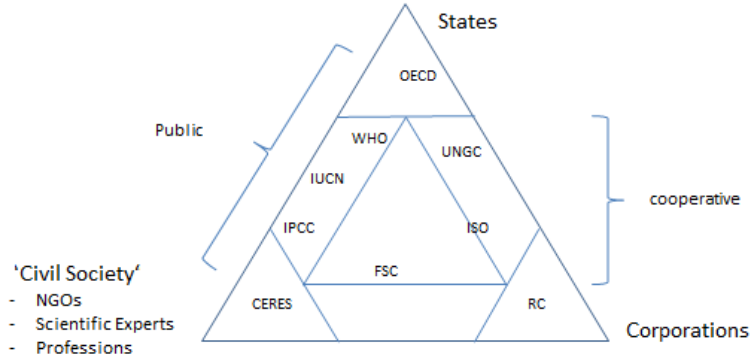
[17] With reference to transnational law, Gunther Teubner, 'Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?' in Karl Heinz Ladeur (ed), *Globalization and Public Governance* (Ashgate Publishing 2004).
[18] For a discussion of the slightly different focus of Global Administrative law vs. transnational law, see *Heyvaert*, (n 6) 29-30.
[19] For most of these examples see Slaughter, *A New World Order* (n 13). See also Marco Schäferhoff, Sabine Campe and Christopher Kaan, 'Transnational Public-Private Partnerships in International Relations: Making Sense of Concepts, Research Frameworks and Results' (2009) 11 International Studies Rev 451.
[20] T. Etty, V. Heyvaert, C. Carlarne and others, 'Transnational Envrionmental Law, Editorial' (2013) UC Berkeley Public Law Research Paper No. 2277621, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2277621##> accessed 15 July 2019.
[21] *Heyvaert* (n 6) 30.
[22] See for example, John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press 2000).

Formatiert: Rechts: 0,63 cm

technical aspects of protecting global public goods flourish transnationally. In the case of climate protection, for example, the recent call for immediate action by demonstrating school children spread from Sweden to many other countries and puts politicians under pressure to act.

Accordingly, Kenneth Abbot and Duncan Snidal have visualized transnational governance as situated in a triangle that spans between three poles: the state, firms, and civil society (non-governmental organizations (NGOs)) (Map 1). This approach tries to overcome the idea that 'transnational' only refers to 'non-state-governance', which, again, is based on an overly simplistic 'state vs. market' dichotomy. By displaying the full range of the triangle, transnational governance is not reduced to the private sphere of contractual relations and proprietary organization. Such a triangular framing also suggests that private lawmaking is often complemented by public pressure and state intervention in the pursuit of regulatory goals, particularly where they aim at generating and supporting public goods. However, public control over state and non-state governance is not a task exclusive to classical NGOs such as Greenpeace or Amnesty International. Rather, scientific, semi-public, and professional organizations which do not primarily pursue political or commercial objectives can also become involved, such as the Intergovernmental Panel on Climate Change (IPCC) or the International Union for Conservation of Nature (IUCN).

Map 1: The (revised) Governance Triangle (after Abbott / Snidal 2009)



Formatiert: Rechts: 0,63 cm

TRANSNATIONAL GOVERNANCE vs. DOMESTIC, INTER- AND SUPRANATIONAL LAW

After this brief survey, it is useful to sketch the 'transnational' in comparison with other categories such as domestic, inter- and supranational. For this mapping exercise, we distinguish public transnational governance from other governance mechanisms which reach out beyond national borders. The most well-established instruments in this regard are of course those domestic laws that have extraterritorial effects, and international law, which currently mostly results from contractually ordered institutionalized cooperation between heads of states.[23]

Supranational institutions such as the European Commission have been provided with state-like authority, albeit on the basis of conferred powers. This enables them to initiate legislation and to adopt laws and decisions (to the extent it has been authorized by the European Parliament and the Council), which are directly binding on citizens of the Member States. Compared to traditional international law, supranational law is therefore less dependent on grounds for legitimacy that derive from the nation state. The requirements of consensus-based procedures to protect sovereignty are relaxed. Compared to other transnational governance mechanisms, supranational law is quite formalized. In our map, we symbolize this by overlapping forms that still have the domestic state at their centre, but increasingly reach out to global society composed of public civil society and private organizations and markets (see below, map 2).

Public transnational governance and domestic, international and supranational law do not exist as separate, autonomous normative systems. Rather, there is close interaction between them and sometimes they overlap. Indeed, formal legal institutions often initiate informal transnational rule making. For example, international treaties often contain compromise formulae or leave important politically contentious questions open. In order to avoid a fragmented or even contradictory implementation practice, the process of interpreting vague international norms is often guided by implementation networks, expert commissions, or other transnational governance mechanisms, including the globally connected community of legal scholars that lead discourses on interpretation practices.[24]

[23] In the present day, treaties have become the most important source of law ordering international relations. ICJ Judge Bruno Simma referred to international agreements as the 'workhorse of international law', see Bruno Simma, 'From Bilateralism to Community Interest in International Law (Volume 250) ' in *Collected Courses of the Hague Academy of International Law* (Brill Nijhoff 1994), 221ff.

[24] While Art. 31 Nr. 3, lit. a) and b) of the Vienna Convention on the Law of Treaties highlight the formal legal mechanisms of a subsequent agreement or practice of States to promote a specific interpretation, Art. 38 I lit. d of the ICJ-Statute refers to ‚teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

Formatiert: Rechts: 0,63 cm

In other cases, transnational governance mechanisms develop more or less independently from formal obligations under domestic or international law. The development of test guidelines and standards of good laboratory practice under the Organisation for Economic Co-operation and Development (OECD) can serve as an example.[25] Sometimes, regulators also try make use of private governance structures to promote public goods. For example, the EU Eco-Regulation is derived from earlier transnational standards of the International Federation of Organic Agriculture Movements (IFOAM).[26] In either case, close interaction can result in a complex hybrid system of formal international, national, and transnational norms and institutions, which can hardly be disentangled. This further demonstrates the porosity of traditional distinctions. In the diagram, this is symbolized by dashed or dotted lines.

In principle, interaction happens at all levels of regulation. For example, transnational governance can interact with domestic law if the latter is extraterritorially enforced by means of third-party certification. This happens, for example, in the case of the declaration of conformity with European Law (Conformité Européenne - CE) or, similarly, with the declaration of conformity with the standards of the US Federal Communications Commission (FCC). Often, domestic manufacturers impose the legal requirements of their home jurisdictions upon overseas suppliers in systems of supply chain management. Another example is the significant involvement of NGOs in the drafting of guidelines for toxic substances control issued by public authorities in various countries.[27] Furthermore, there is cross-border cooperation of a primarily public-law nature, such as the informal coordination of authorities on the consistent implementation of environmental and planning legislation in specific regional infrastructure projects.[28]

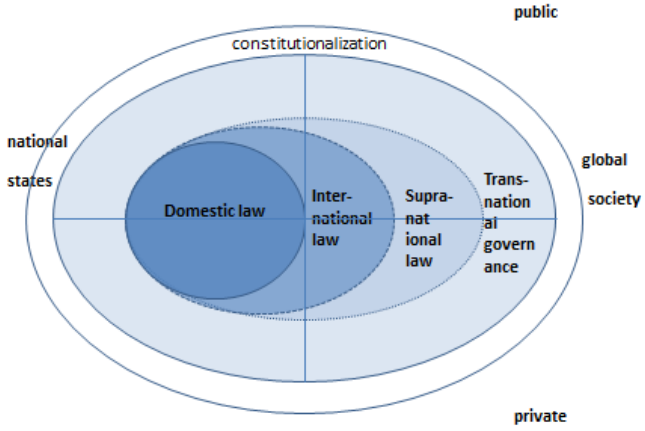
Similarly, international law may become a point of reference for transnational norm development.[29] The United Nations (UN) Global Compact features standards and governance projects for corporations worldwide.[30] Similarly, private actors in the shipping sector have

[25] Michael Warning, *Transnational Public Governance: Networks, Law and Legitimacy* (Transformations of the State Series, Palgrave Macmillan UK 2009).
[26] European Regulation (EEC) 2092/91 of the European Council of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs [1991] OJ L 198.
[27] *Warning* (n 26) 203.
[28] Martin Kment, *Grenzüberschreitendes Verwaltungshandeln: Transnationale Elemente Deutschen Verwaltungsrechts* (Mohr Siebeck 2010) especially 267ff.
[29] *Heyvaert* (n 6) 6-9.
[30] For further examples, addressed as the 'orchestration' of contributions to transnational governance by international organizations, see K. Abbott, P. Genschel, D. Snidal and others (eds.), *International Organizations as Orchestrators* (Cambridge University Press 2015).

Formatiert: Rechts: 0,63 cm

established standards to reach the goals of the Paris Agreement.[31] The International Centre for Settlement of Investment Disputes (ICSID) is another example of transnational governance which has its point of departure in international law, found in the ICSID Convention. The actual settlement of disputes allows private arbitrators to come to binding decisions, however, which often significantly affect domestic law. It could therefore be argued that dispute settlement has evolved beyond its international source of legitimacy.

Map 2: The Transnational Governance 'Egg'



Overlaps can be observed, e.g. while EU law is generally characterized by supranational and intergovernmental procedures, transnational elements of direct networking between national administrations also play a significant role. A specific example is the implementation of EU law through the so-called Comitology Procedure: before the Commission can adopt implementing measures in furtherance of an EU legal act, it has to consult a committee of specialists of Member States' administrations. The opinions and decisions developed within these expert committees are not formally binding, but have a strong mandatory force and are often adopted 1:1 by the Commission. Comitology is regarded as a 'networked deliberative

[31] Joanne Scott, T. Smith, N. Rehmatulla and others, 'The Promise and Limits of Private Standards in Reducing Greenhouse Gas Emissions from Shipping' (2017) 29 JEL 231.

Formatiert: Rechts: 0,63 cm

forum' promoting 'constructive cooperation and a non-hierarchical mode of decision-making'.[32]

The chapter emphasizes that transnational governance mechanisms can best be understood when considered from the perspective of more traditional and formal modes of government and law in which they are embedded and from which they have developed varying degrees of independence. In a nutshell, transnational governance mechanisms emerge from and interact with traditional and formal modes of government and law. Accordingly, transnational governance mechanisms cannot be analyzed in isolation from these more specific normative phenomena. Analyses should thus be based on clear analytical distinctions. However, due to the many different mechanisms and forms of interaction, in practice these distinctions are sometimes fluid or blurred.

MAPPING THE FIELD OF GOVERNANCE STRUCTURES

The following section will try to sketch the broad range of transnational governance structures by drawing together actor-based and scale-based mapping approaches. Filling in the blank spaces of the elliptical map, we distinguish between actor constellations that are purely corporate and economic in the bottom right segment of the map (5.1), civil societal and scientific in the top right segment (5.2), and primarily attached to state institutions in the left segment (5.3). Our map will not include international or supranational organizations that have been assigned formal legislative powers independent from states (such as the UN Security Council or the European Commission). However, it will include some of the borderline cases which are in fluid transition from domestic, international, or supranational law to transnational governance.[33]

1. Companies and Economic Associations

In the course of globalization, social and economic processes increasingly create transboundary effects and are thus subjected to multiple political and legal orders. Different environmental rules and standards may weaken environmental law's effectiveness. A central challenge is to bridge or to level out the differences in legal protection. In the absence of applicable

[32] Maria Weimer, 'No More Blame Game: Back to the Future of Comitology' (*Verfassungsblog*, 18 February 2017) <http://verfassungsblog.de/no-more-blame-game-back-to-the-future-of-comitology/> accessed 12 July 2019. See also Maria Weimer, *Risk Regulation in the Internal Market* (Oxford University Press 2019).

[33] Cf. the instructive 'governance triangle' with its locating of different transnational regulatory initiatives in Kenneth Abbott and Duncan Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State' in Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton UP 2009).

Formatiert: Rechts: 0,63 cm

international law rules, the task is sometimes taken over by non-state economic actors.[34] Interactions between economically or legally independent firms or groups of companies (for example, a parent company and its subsidiaries, or individual subsidiaries or branches)[35] are often shaped by voluntary environmental standards or codes of conduct,[36] which often involve a commitment to third-party certification.

There are many reasons why companies orient their actions towards sustainability in the sense of corporate social responsibility.[37] Motivations can include *inter alia* savings by increasing resource efficiency, opening up new markets for sustainable products, improving public perception, avoiding liability, or averting state regulation.[38] Yet, sometimes these strategies are criticized as 'greenwashing', as they are part of public image campaigns rather than providing any substantive improvements.[39]

Environmental rules, codes, and standards with transboundary effects are not only adopted by individual companies, but also by corporate associations. A well-known and firmly established example is the *Responsible Care* (RC) initiative of the International Council of Chemical Associations.[40] This program was initially developed in the US in response to the Bhopal disaster, which resulted in the deaths of several thousand people after an incident in a plant of a subsidiary of Union Carbide in 1984. The aim of the program was to develop internal rules as well as to create organizational structures and resources to support member organizations in

[34] Olaf Dilling, Martin Herberg and Gerd Winter, *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing 2008); Jürgen Friedrich, 'Codes of Conduct' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2010) 3-27; Gerald Moore, 'The Code of Conduct for Responsible Fisheries' in Ellen Hey (ed), *Developments in International Fisheries Law* (Brill 1999); David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights' (2003) 97 AJIL 901.

[35] *Dilling, Herberg, Winter* (n 35) 3.

[36] Jürgen Friedrich, 'Environment, Private Standard-Setting' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012); Martin Herberg, *Globalisierung und private Selbstregulierung: Umweltschutz in multinationalen Unternehmen* (Staatlichkeit im Wandel, Campus 2007); Helen Keller, 'Codes of Conduct and their Implementation: the Question of Legitimacy' in Rüdiger Wolfrum and Volker Roeben (eds), *Legitimacy in International Law* (Springer-Verlag 2008) 219ff.

[37] For further relevant questions, see Gerd Winter, 'Transnationale Regulierung' (2009) 8 APUZ 9-10.

[38] Olaf Dilling, 'Proactive Compliance? – Repercussions of National Product Regulation in Standards of Transnational Business Networks' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing, Irish Academic Pr 2008) 118-119.

[39] Olaf Dilling, 'From Compliance to Rulemaking: How Global Corporate Norms Emerge from Interplay with States and Stakeholders' (2012) 13 German LJ 381, 404. See also Nick Feinstein, 'Learning from Past Mistakes: Future Regulation to Prevent Greenwashing' (2013) 40 B C Envtl Aff L Rev 229.

[40] Aseem Prakash, 'Responsible Care: An Assessment' (2000) 39 Business & Society 183.

Formatiert: Rechts: 0,63 cm

achieving specific environmental objectives.[41] Similar initiatives emerged in a large number and variety, including, for instance, self-commitments by the tourism industry to protect Antarctica.[42] In some cases, these self-commitments transcend individual sectors, such as the Business Charter on Sustainable Development of the International Chamber of Commerce in Paris.[43] The latter is designed to 'provide a practical framework including tools for businesses of all sectors and geographies to help them shape their own business sustainability strategy'.[44]

2. Standardization Organizations and Expert Commissions

Sustainability and environmental standards are also initiated and developed by a large number of societal actors who do not predominantly pursue profit-making interests. These actors include standard-setting organizations, civil societal actors (e.g., environmental or consumer groups and associations), and academics or representatives of certain professions (e.g., engineers or doctors).

2.1. Standardization Organizations

The International Organization for Standardization (ISO) with its standard for the certification of corporate environmental management (ISO 14001 et seq.) is a very well-known example of an influential transnational standard-setting body.[45] This international body is in part composed of representatives of public bodies and in part of representatives of private standardization organizations of the member states. The latter, including for example the German Institute for Standardization (DIN), are usually bound by agreements with states or international organizations. While in its early days the ISO focused mainly on very technical standardization questions, it has increasingly turned to more politically charged regulatory matters, such as ethical consumption.[46] In addition to the above-mentioned environmental management systems, in 2010 the ISO developed the ISO 26000 guide to social responsibility, which includes a

[41] Ivan Montiel, 'Responsible Care' in Thomas Hale and David Held (eds), *The Handbook of Transnational Governance: Institutions and Innovations* (Wiley 2011) 328-329. See ICCA, Responsible Care <https://www.icca-chem.org/responsible-care/> accessed 21 October 2015.b

[42] See the visitor, decontamination, and wildlife watching guidelines of the International Association for Antarctic Tour Operators, IAATO, Guidelines and Resources <https://iaato.org/guidelines-and-resources> accessed 09 May 2017.

[43] Cf. Lee Thomas, 'The Business Charter for Sustainable Development: Action Beyond UNCED' (1992) 1 RECIEL 325, 352ff.

[44] The current version (2015) is provided at <https://cdn.iccwbo.org/content/uploads/sites/3/2015/01/ICC-Business-Charter-for-Sustainable-Development.pdf> accessed 26 June 2019.

[45] Oren Perez, 'Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law' (2003) 10 Indiana J of Global Legal Studies 25; *Winter* (n 38).

[46] *Dilling* (n 40) 381; Coline Ruwet, 'Towards a Democratization of Standards Development? Internal Dynamics of ISO in the Context of Globalization' (2011) 5 New Global Studies 1.

Formatiert: Rechts: 0,63 cm

chapter on environmental protection.[47] Its aim is not to certify organizations according to detailed material standards, but to provide guidance, for example, by pointing out best practices in terms of responsibility for transparent procedures, human rights and sustainable development.

In contrast to corporate standards or standards set by economic associations, transnational sector-specific production standards have been developed along with stakeholders from outside the business sector. They concern not only procedural aspects (like organizational structures and process sequences), but also include detailed and substantial production requirements. These sustainability standards are particularly common when it comes to the use of natural resources in agriculture, forestry, aquaculture and fisheries. A prominent example are the standards produced by the Forest Stewardship Council (FSC).[48] In this organization, representatives of companies, trade unions and environmental groups cooperate closely according to the three pillars of sustainability (ecology, social equity and economy). In addition to the material sustainability standards, it also developed procedures for independent certification and monitoring.[49] Similar standards are developed by the Marine Stewardship Council (MSC). This organization was founded in 1996, originally by WWF and Unilever as main cooperation partners, after the collapse of the Grand Banks cod fishery. Just as the FSC, the MSC is a 'non-state market driven' governance program.[50] It uses an eco-label and a certification program to tie the marketing of products to their sustainable production. Further cases, for example in the area of climate change governance, include the Gold Standard for assessing energy projects in the context of the Clean Development Mechanism as well as the carbon reporting standard developed through the Carbon Disclosure Project.[51]

2.2. Expert Commissions

[47] Kernaghan Webb, 'ISO 26000 social responsibility standard as 'proto law' and a new form of global custom: Positioning ISO 26000 in the emerging transnational regulatory governance rule instrument architecture' (2015) 6 Transnational Legal Theory 466.

[48] Philipp Pattberg, 'Forest Stewardship Council' in Thomas Hale and David Held (eds), *The Handbook of Transnational Governance: Institutions and Innovations* (Wiley 2011) 265ff.

[49] Errol Meidinger, 'Multi-Interest Self-Governance through Global Product Certification Programs' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing 2008) 259; *Keller* (n 37) 219ff; see also Elisa Morgera, *Corporate Accountability in International Environmental Law* (Oxford University Press 2009).

50 Frank Wijen and Mireille Chiroleu-Assouline, 'Controversy Over Voluntary Environmental Standards: A Socioeconomic Analysis of the Marine Stewardship Council' (2019) 32 Organization & Environment 98, 100.

51 Regarding the Gold Standard see Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017) 185-186. Regarding Carbon Disclosure Probject see Daniel C. Matisoff, Douglas S. Noonan and John J. O'Brien, 'Convergence in Environmental Reporting: Assessing the Carbon Disclosure Project' (2013) 22 Business Strategy and the Environment 285-305.

Formatiert: Rechts: 0,63 cm

In addition to the normative aspects of the sustainable use of natural resources, the establishment of environmentally sound standards has a cognitive dimension.[52] Environmental law has given scientists and experts a leading role in the development of standards.[53] Often, scientists and experts are the ones who identify, interpret and offer solutions to environmental problems. Because environmental research often transcends national borders, scientists and experts frequently are part of cross-border networks, leading to the emergence of global scientific discourses.[54]

Three types of transnational scientific networking can be distinguished. First, some networks emerge in response to national or international public sector initiatives. Although they originate in state action, these scientific networks generally are characterized by a high degree of autonomy, both in terms of their task as objective advisor to states and their membership of scientists. Such networks include, for example, institutionalized groupings like the IPCC, the Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES), the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP), technical and legal working groups under international treaties, and ad hoc groups of experts specialized in specific areas that are convened for specific legislative procedures or implementation processes.[55]

Secondly, expert networks also include so-called hybrid organizations such as the IUCN. This body allows national authorities to network, so that it is strongly anchored in public structures. Additionally, it involves a large number of local and globally active nature conservation associations and thousands of scientists and experts. The IUCN addresses a wide range of environmental issues. It supports and funds research as well as projects on the ground, and organizes political and legal processes by bringing together governments, NGOs, international organizations and corporate actors to develop environmental concepts and strategies, best practices, legislation and treaties, e.g. about protected areas[56] or sustainable land use[57].

[52] Till Markus, 'Changing the Base: Legal Implications of Scientific Criteria and Methodological Standards on what Constitutes Good Marine Environmental Status' (2013) 2 TEL 145.
[53] Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) 87-88.
[54] Transnational networks of experts in fact are not a new phenomenon, see Christian Tietje, 'History of Transnational Administrative Networks' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Transnational Administrative Rule-Making* (Hart Publishing 2011) 23-37.
[55] See *Markus* (n 53) 145-164.
[56] See, for instance, IUCN, *Guidelines for Applying Protected Area Management Categories* (2013).
[57] IUCN, *World Soil Erosion and Conservation* (1993); IUCN, *Legal and Institutional Frameworks for Sustainable Soils - A Preliminary Report* (2002); IUCN, *Drafting Legislation for Sustainable Soils: A Guide* (2004).

Formatiert: Rechts: 0,63 cm

The third category, which can be addressed as transnational scientific networking, includes those numerous networks that ultimately rest on autonomously created initiatives by scientists, engineers or other professions, often reflecting and reinforcing rules of appropriate behaviour for specific practices. An important global crystallization point for many different private initiatives is the International Council for Science, which convenes, *inter alia*, an interdisciplinary Committee on Problems of the Environment. In the field of environmental law, one could also mention the Environmental Law Network International and the European Environmental Law Forum.[58]

All of these networks and panels allow experts to come to a shared understanding and a common interpretation of environmental problems.[59] Additionally, they develop scientific criteria and methodological standards to support their analytical work (hence, they are often called 'epistemic communities').[60] To this end, they collect, compile, interpret, process and prepare data for national or international regulatory processes, or publish the data themselves.[61] These networks and commissions develop model rules, codes of conducts and standards, and exchange best practices. Through their collaboration and cross-border consultations, such networks contribute significantly to the design and consolidation of standards without direct binding effect and promote a global dissemination of normative requirements.[62]

3. Transnational Administrative and Judicial Networks

Cross-border networks of public actors can also produce rules or decisions which, like law, guide behaviour and establish expectations transnationally. According to the different functions of norm development, norm implementation, and conflict resolution, one can distinguish different forms of transnational management of environmental issues.[63]

[58] See, ELNI <http://www.elni.org/> accessed 16 May 2017; see also EELF <http://www.eelf.info/> accessed 16 May 2017.
[59] On the governance effects of these institutions see T. Markus, H. Hillebrand, A.-K. Hornidge and others, 'Disciplinary diversity in marine sciences: the urgent case for an integration of research' (2918) 75 ICES Journal of Marine Sciences 502.
[60] Peter Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 International Organization 1; *Markus* (n 5253).
[61] *Sands, Peel* (n 54) 88.
[62] Martin Herberg, 'Global Governance Networks in Action: the Development of Toxicological Test Methods at the OECD' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Transnational Administrative Rule-Making* (Hart Publishing 2011).
[63] Olaf Dilling, Martin Herberg and Gerd Winter, 'Introduction: Exploring Transnational Administrative Rule-Making' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Transnational Administrative Rule-Making: Performance, Legal Effects and Legitimacy* (Hart Publishing 2011), 5-6.

Formatiert: Schriftart: (Standard) +Textkörper (Calibri), Englisch (Großbritannien)

Formatiert: Rechts: 0,63 cm

3.1. Networks of Government Agencies

In close proximity to epistemic communities, but with a stronger anchoring in the public sector, are the networks of transnational administrators. These networks are often established and coordinated under the auspices of international organizations and are mainly composed of representatives of national specialized authorities.[64] Since they are only rarely influenced directly by politics, they may be classified as non-governmental.[65] One example is the Cooperative Chemicals Assessment Program (CoCAP—the current successor project of the High Production Volume Initiative), put together by the OECD. Within this framework, a network of national specialist authorities which collects and publishes information on hazardous substances has been established, taking into account self-imposed rules on test procedures and laboratory best practice.[66] Other examples are the Globally Harmonized System (GHS)[67] or the Codex Alimentarius Commission, an organization established by the World Health Organization (WHO) and the Food and Agriculture Organization (FAO).[68]

3.2. Harmonized Administrative Processes and Best Practices

In addition to setting standards towards the maintenance of shared natural resources, transnational efforts are being made to ensure a uniform application and enforcement of existing environmental standards. In a grey zone between these two areas, cooperation also includes the identification and exchange of best practices, which has become an important instrument for the cross-border coordination of administrative practices.[69] These are not instances of transnational standardization in a narrow sense but rather of norm application.

The way in which the cooperative transnational implementation of international obligations can be achieved becomes apparent when one considers the example of city networks in the field of

[64] Cf. generally Christoph Möllers, 'Transnationale Behördenkooperation: Verfassungs- und völkerrechtliche Probleme transnationaler administrativer Standardsetzung ' (2005) 65 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 351.
[65] *Winter* (n 38) 11.
[66] *Warning* (n 26).
[67] Gerd Winter, 'Transnational Administrative Comitology: The Global Harmonisation of Chemicals Classification and Labelling ' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Transnational Administrative Rule-Making* (Hart Publishing 2011) 111-150.
[68] See FAO and WHO, Codex Alimentarius: International Food Standards <http://www.fao.org/fao-who-codexalimentarius/en/> accessed 16.05.2017. Alexia Herwig, 'The Contribution of Global Administrative Law to Enhancing the Legitimacy of the Codex Alimentarius Commission' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Transnational Administrative Rule-Making* (Hart Publishing 2011) 188f.
[69] Hollin Dickerson, 'Best Practices' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010).

Formatiert: Rechts: 0,63 cm

climate protection.[70] In the past decade, cities have been identified as major institutional actors who can contribute significantly to environmental protection, in particular to global climate protection.[71] Examples abound of cities from all around the world that act within the framework of their respective competencies to protect the climate. Individual actions and climate programs as well as legislation deal with, among other things, climate-friendly urban and traffic development, waste disposal services, energy-efficient construction planning and regulation, and the use of renewable energies.[72] In addition, cities active in climate protection are increasingly networking transnationally with regard to their protection and adaptation efforts. These include, in particular, the activities of the World Mayors Council on Climate Change, the C40 Cities Climate Leadership Group and the Local Governments for Sustainability Initiative (ICLEI).[73] Within the framework of these networks, possibilities for urban climate protection are identified and the exchange of best practices is organized. The resulting resolutions and normative guidelines are often implemented in political strategies, action programs or legislation at the city level, but in order to achieve their goals, cities are also active at higher political levels, particularly the international level.[74]

Parallel to this public-transnational networking, private or semi-private transnational initiatives emerge in the field. They play a key role in the ecological certification of entire cities or

[70] See eg Michéle Finck, 'Above and Below the Surface: The Status of Sub-National Authorities in EU Climate Change Regulation' (2014) 26 JEL 443.

[71] Harriet Bulkeley, *Cities and Climate Change* (Routledge 2013). See also WBGU, 'Humanity on the Move: Unlocking the Transformative Power of Cities' (WBGU 2016) <https://www.wbgu.de/fileadmin/user_upload/wbgu/publikationen/hauptgutachten/hg2016/pdf/wbgu_hg2016_z_en.pdf> accessed 12 July 2019; OECD, 'Competetive Cities and Climate Change' (OECD 2008) <https://www.oecd.org/cfe/regional-policy/44232251.pdf> accessed 12 July 2019 ; J. Corfee-Morlot; L. Kamal-Chaoui, M. G. Donovan and others, 'Cities, Climate Change and Multilevel Governance' (2009) OECD Environment Working Papers 14/2009 <http://www.oecd.org/regional/regional-policy/44232263.pdf> accessed 12 July 2019. In 2011, for instance, globally 75 per cent of final energy was consumed in cities, IIASA, 'Progress Report 2009' (IIASA 2010) <http://www.iiasa.ac.at/web/home/resources/publications/ProgRep09-web.pdf> accessed 12 July 2019. It is projected that by 2050 the share of the world population living in urban areas will increase to about 69 per cent (of then 9 billion people), which will consequently also increase the share of urban emissions, *WBGU* (n 7172) 58.

[72] Kristine Kern and Gotelind Alber, 'Governing Climate Change in Cities: Modes of Urban Climate Governance in Multi-Level Systems' (OECD International Conference "Competitive Cities and Climate Change", Milan, 9-10 October 2008) <http://search.oecd.org/cfe/regional-policy/50594939.pdf> accessed 12 July 2019, 171ff; *WBGU* (n 7172) 267-269; Anna-Lisa Müller, *Green Creative City* (UVK 2013).

[73] Harriet Bulkey, 'Cities and the Governing of Climate Change' (2010) 35 Annu Rev Environ Resour 229.

[74] Jolene Lin, *Governing Climate Change – Global Cities and Transnational Law Making* (Cambridge University Press 2018); Liliana Andonova, Michele Betsill and Harriet Bulkeley, 'Transnational Climate Governance' (2009) 9 Global Environmental Politics 52; Sofie Bouteligier, *Cities, Networks, and Global Environment Governance: Spaces of Innovation, Places of Leadership* (Routledge 2013).

Formatiert: Schriftart: (Standard) +Textkörper (Calibri)

Formatiert: Schriftart: (Standard) +Textkörper (Calibri)

Formatiert: Rechts: 0,63 cm

individual subsectors, for instance, in port development ('green ports').[75] Because of their regulatory, administrative, and financial powers, they are crucial actors and addressees of transnational best practices in the area of climate protection. In addition, they can now register their climate actions in the Non-State Actor Zone for Climate Action platform toward the achievement of the climate protection targets laid down in the Paris Agreement.[76]

The transnational implementation and control of environmental requirements can also take advantage of transnational administrative networks. The highest degree of institutionalization can be found in the network for the Implementation and Enforcement of Environmental Law (IMPEL).[77] This network consists of the environmental authorities of the EU Member States, EU candidate countries, the Member States of the European Economic Area (EEA) and the European Free Trade Area (EFTA). IMPEL was founded in 1992 with the aim of reducing implementation deficits in EU environmental law. Some key goals are the development of a common problem-consciousness, the development of institutional capacities, mutual peer review, exchange of information and experience about the implementation of law, cooperation in the implementation of international law, and improvements in the practicability and enforceability of EU environmental law.[78]

Transnational instruments can also contribute to the extraterritorial implementation of domestic law, including EU environmental law. This has become particularly evident in the case of the import of biomass, which, for example, plays an important role in the German energy transition policy (*Energiewende*).[79] Since the cultivation of energy crops in emerging and developing countries often creates social and ecological problems, sustainability criteria and corresponding certification schemes were required.[80] To this end, sustainability criteria as defined in Article

[75] See, eg, the certification by the 'Port Environmental Review System (PERS)', which was developed by the Sea Ports Organization and is implemented by Lloyd's Register. See, ESPO <http://www.ecoports.com/> accessed 12 December 2017.
[76] UNFCCCC, Decision 1/CP.21, paras. 117, 133-136; Sander Chan, Clara Brandi and Steffen Bauer, 'Aligning Transnational Climate Action with International Climate Governance: The Road from Paris' (2016) 25 RECIEL 238.
[77] Miroslav Angelov and Liam Cashman, 'Environmental Inspections and Environmental Compliance Assurance Networks in the Context of European Union Environment Policy ' in Michael Faure, Peter De Smedt and An Stas (eds), *Environmental Enforcement Networks: Concepts, Implementation and Effectiveness* (Edward Elgar 2015); Martin Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2nd edn, Routledge 2015) 546ff.
[78] See the network's webpage, IMPEL <https://www.impel.eu/about-impel/> accessed 12 December 2017.
[79] BMU and BMEL, *Nationaler Biomasseaktionsplan für Deutschland: Beitrag der Biomasse für eine nachhaltige Energieversorgung* (BMU and BMEL 2010) 2.
[80] Andrea Schmeichel, *Towards Sustainability of Biomass Importation. An Assessment of the EU Renewable Energy Directive* (Europa Law Publishing, 2014); Carola Glinski, 'Certification of the Sustainability of Biofuels in Global Supply Chains' in Peter Rott (ed), *Certification - Trust, Accountability, Liability* (Springer 2019) 163-185.

Formatiert: Rechts: 0,63 cm

29 of the Directive (EU) 2018/2001 on the promotion of renewable energies must be taken into account along the entire value chain.[81] In particular, the production must consider displacement effects as well as the protection of biodiversity and minimum social standards. Certification also fulfils a function as a transnational control of implementation, and is typically carried out by private auditors subject to recognized standards.[82]

4. Transnational Arbitration

In addition to the development of general norms and the cooperation between authorities in the implementation and application of legal prescriptions, transnational structures play a role in the judicial resolution of conflicts through transnational arbitration in cases of conflict between states and foreign private investors.[83] Usually the International Centre for the Settlement of Investment Disputes (ICSID) established by the World Bank or the Arbitration Institute of the Stockholm Chamber of Commerce provide for arbitration, or in rare cases investment treaties provide for bespoke arbitration arrangements. Their jurisdiction and procedures are governed by international law, but their staffing is in many cases *ad hoc* and determined by the non-state parties to the conflict. Negotiations are generally not public (although many decisions are now available online).[84] Private arbitrators come to binding decisions on cross-border issues and have a decisive influence on the development of law of the participating state.[85] These practices have raised widespread concerns that dynamic environmental regulation, which sometimes has to respond flexibly to new challenges, may be obstructed through arbitral decisions that are geared towards the protection of investor rights and the elimination of obstacles to trade. Eventually, corporate actors might be allowed to maintain low-cost but environmentally harmful production if they have to be compensated for state counter-measures. Particularly in

[81] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, [2009] OJ L140/16.

[82] Andrea Schmeichel, *Towards Sustainability of Biomass Importation. An Assessment of the EU Renewable Energy Directive* (Europa Law Publishing 2014) 181ff.

[83] Seminal Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (International Courts and Tribunals Series, Oxford University Press 2014).

[84] Cf. Markus Krajewski, 'Umweltschutz und internationales Investitionsschutzrecht am Beispiel der Vattenfall-Klagen und des Transatlantischen Handels- und Investitionsabkommens (TTIP)' [2014] Zeitschrift für Umweltrecht 396, 398.

[85] ibid, 401; it is feared that imminent compensation payments for damages will prevent states from implementing certain environmental protection measures. See, for instance, Tamara L. Slater, 'Investor-State Arbitration and Domestic Environmental Protection' (2015) 14 Wash. U. GlobalStud. L. Rev. 131; Zachary Douglas, 'The enforcement of environmental norms in investment treaty arbitration' in Pierre-Marie Dupuy and Jorge E. Viñuales (eds.) *Harnessing Foreign Investment to Promote Environmental Protections – Incentives and Safeguards* (CUP 2013), 415-444; Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (CUP 2009); Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007); Eric Neumayer, *Greening Trade and Investment* (Taylor & Francis 2001).

Formatiert: Rechts: 0,63 cm

conjunction with strict austerity policies, this practice may deter the adoption of effective environmental regulations able to react to industrial developments, which impacts negatively on the environment.[86] In addition, the status quo-oriented protection of investors' rights may contravene the polluter-pays principle and lead to an unjust distribution of environmental costs within society.

THE INSTITUTIONAL CONTEXT OF TRANSNATIONAL GOVERNANCE

Transnational governance can be understood best when its institutional context is considered. Many of its expressions have indeed been described as 'indirect regulation'. This means that states or international institutions use intermediaries to solve problems that would otherwise lie beyond their reach. This understanding, however, underestimates the independent momentum of transnational governance by simply regarding it as another instrument to further governmental regulatory policies. Rather, the interactions of transnational governance structures with established political institutions and state-based forms of environmental law are quite complex.[87] National, inter- and supranational law can form various relationships by initiating, recognizing, integrating, limiting or modifying transnational norms.[88]

An example of transnational governance structures initiated by EU law can be observed in the field of product-related regulation. For example, according to the Directive concerning the restriction of the use of certain hazardous substances in electrical and electronic equipment (Directive 2011/65/EU), it usually is the responsibility of importers or manufacturers to ensure compliance of the products with environmental and safety standards. This also applies to producers who assemble parts delivered by overseas suppliers. To fulfil their responsibility, manufacturers have developed corporate structures of compliance control which extend beyond national and EU borders. These structures can equally serve as a platform that is used for genuinely corporate requirements of a transnational nature.[89] Sometimes, industrial associations

[86] Usually called "chill effect", *Krajewski* (n 91) 398.
[87] Cf. the social scientific research into the transnational aspect of economic governance, B. Eberlein, K. W. Abbott, J. Black and others, 'Transnational Business Governance Interactions: Conceptualization and Framework for Analysis' (2013) 8 Regulation and Governance 21.
[88] See, for instance, Gunther Teubner and Andreas Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2006) 25 Michigan J of Intl L 999.
[89] *Dilling* (n 40).

Formatiert: Rechts: 0,63 cm

take up the task to develop common standards, which may in turn influence EU or national regulation. [90]

State regulation may also bestow credibility upon voluntary standards of the private sector which are in global use. This especially applies to organic farming, eco-friendly production and fair trade, and may also include environmental and work safety standards. The goal is to help consumers discern which of the many private eco-standards can be taken seriously and which are mere PR-stunts. An example of such a conditional endorsement of corporate self-regulatory standards is given in the Ecodesign Directive 2009/125/EC. Its Annex VIII lists nine criteria for legitimate and effective mechanisms of self-regulation, including open participation, added value in terms of environmental effects compared to the status quo, clearly defined quantitative goals and effective monitoring. According to Articles 15 and 17 of the Ecodesign Directive, self-regulatory measures of producers or importers may then substitute formal law enforcement.

In the public sector, transnational guidelines often serve to harmonize administrative practices across national borders. This is particularly evident within the EU, where the common market calls for equal treatment by the competent public authorities of different Member States. Another purpose of harmonization can be aligning technical or scientific requirements. For example, CoCAP depends on standardized data, so that datasets from different countries can be compared and aggregated. Therefore, transnational standards for good laboratory practice have to be observed for testing and evaluating chemicals regardless of their non-binding nature.[91] In general, the relevance and effects of these usually non-binding forms of transnational governance depend on the significance that is attached to them within different national administrations.

As domestic and supranational law are limited to their territorial jurisdictions, they cannot give transnational governance a comprehensive institutional framework. Therefore, international law is considered to be a promising candidate for the orchestration or even constitutionalization of transnational law. This is especially so as international law no longer solely addresses states, but is increasingly structuring the behaviour of non-state actors.[92] However, international law itself is fragmented into regimes that have treaties with various and often conflicting objectives. An often invoked example is world trade law with its links to transnational governance; while

[90] Alexandra Lindenthal, Transnational Management of Hazardous Chemicals by Interfirm Cooperation and Associations, in: Dilling, Herberg, Winter (eds.) *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing 2008), 123.
[91] *Warning* (n 26) 78.
[92] *Heyvaert* (n 6) 221.

Formatiert: Rechts: 0,63 cm

the General Agreement on Tariffs and Trade (GATT) and other World Trade Organization (WTO) agreements such as the one on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) primarily serve to promote free trade, they also have a huge environmental impact.[93]

These treaties often invoke 'international standards.' As these are understood in a broad sense, in practice, they open up the possibility of bringing transnational standards into adjudication. The food standards of the Codex Alimentarius Commission are, for instance, recognized as international standards and are therefore binding under WTO law according to Articles 2.4 and 2.5 TBT as well as Articles 3.1 and 3.2 SPS: compliance with the standards by the contracting states results in the assumption that there is no unlawful barrier to trade.[94]

International courts frequently refer to the jurisprudence of other international courts and bodies in other matters under international law.[95] This applies in particular to cases dealing with situations or problems courts deem comparable.[96] In addition, national courts increasingly refer to the interpretation given to international norms by the domestic courts of other states.[97] Although this initially occurred only *ad hoc* and in isolated cases, now an increasing institutionalization can be observed through the formation of transnational judicial networks.[98] In the area of environmental law, the European Forum of Judges for the Environment is one example. Its explicit objective is '[…] to promote the enforcement of national, European and international environmental law by contributing to a better knowledge by judges of

[93] See for example Tim Büthe, 'Institutionalization and Its Consequences' in: Halliday and Shaffer (eds) *Transnational Legal Orders* (Cambridge University Press 2015).
[94] WTO Apellate Body, European Communities – Trade Descriptions of Sardines (DS231), WT/DS231/AB/R 26 September 2002, <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds231_e.htm> accessed 12 July 2019.
[95] See, for example 'Oil Platforms' (Zslamic Republic of Iran v. United States of America), Judgment, I. C. J. Reports 2003 161, 182-183. Referencing to other courts has been discussed under various terms, such as „cross-referencing", "cross-fertilization", "borrowing among courts", "transnational communication of courts", "dialogue of courts", etc. See, for example, Tullio Treves, 'Cross Fertilization between Different International Courts and Tribunals: The Mangouras Case' in Holger P. Hestermeyer, Doris König, Nele Matz-Lück and others (eds), *Coexistence, Cooperation, and Solidarity – Liber Americorum Rüdiger Wolfrum*, vol 2 (Leiden 2012) 1787-1896; Anne-Marie Slaughter, 'A Typology of Transjudicial Communication, University of Richmond Law Review' (1994) 29 Univ Richmond Law Rev 99. For the prevailing interpretation of especially Art. 31 Ans. 3 lit. c Vienna Convention on the Law of Treaties, see Campbell Mclachlan, 'The Principle of Systematic Integration and Article 31(3)(C) ot the Vienna Convention' (2005) 54 ICLQ 279.
[96] See also Gráinne de Búrca, 'After the EU Charter of Rights: The Court of Justice as a Human Rights Adjudicator' (2013) 20 Maastricht J of European and Comparative L 168
[97] In this regard, Roberts invokes the notion of "comparative international law". See Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 ICLQ 57.
[98] *Slaughter* (n 14), 65ff.; Erik Voeten, 'Borrowing and Nonborrowing among International Courts' (2010) 39 J of Legal Studies 547.

Formatiert: Rechts: 0,63 cm

environmental law, by exchanging judicial decisions and by sharing experience in the area of training in environmental law'.[99]

The institutional context can also set limits or define requirements for transnational governance. This already becomes clear in some of the examples introduced above. In response to constitutional problems, non-conventional, non-state constitutional norms arise within the field of transnational governance.[100] Thus, fundamental rights are being discussed at the transnational level, which target, for instance, issues such as workplace safety or the right to participate and influence the substantial content of codes of conduct developed and used by multinational corporations. Similarly, meta-norms are defined, such as ISO 26000 on social responsibility of both business and public sector organizations that govern the procedure of rule making, i.e. by requiring basic forms of participation of concerned parties. Both requirements defined by the institutional context and meta-rules, which emerge transnationally, are part of a process of constitutionalization or re-embedding that limits and controls transnational governance. In our egg-shaped diagram, this is symbolized by an outer layer, the 'shell' of the egg.

CONCLUSION AND OUTLOOK

Finally, we would like to highlight some of the key findings of this chapter. First, we share the common view that the term transnational indicates that something lies beyond the system of the nation-state or transgresses its borders. Secondly, we suggest distinguishing public transnational governance from other forms of regulation which reach out beyond national borders, be it domestic law with extraterritorial effects, international law, or supranational law. To distinguish does not mean, however, to ignore overlaps and close interactions. Indeed, formal legal institutions often open up new fora for transnational governance, thereby initiating transnational rule making. In other cases, they use already existing transnational governance mechanisms to reach their own regulatory goals. In both cases, close interactions can result in a complex amalgam. Accordingly, we understand transnational governance as norms, procedures and decisions that direct social processes in more than one country, but which are not formally based on sovereign rights of governments, or on formally delegated authority, be it at the international or supranational level. They are rather established by private, civil society or administrative actors outside of parliamentary or governmental competencies and control.

[99] EUFJE <http://www.eufje.org/index.php/en/> accessed 12 December 2017.
[100] G. Teubner, H. Lindahl, E. Christodoulidis and others 'Dialogue & Debate: Constitutionalising Polycontexturality' (2011) 20 Social and Legal Studies 209.

Formatiert: Rechts: 0,63 cm

Thirdly, we provisionally and tentatively identified and categorized several existing and emerging transnational governance structures, namely, companies and associations of companies, standardization organizations and expert commission, networks of government agencies, and transnational dispute settlement bodies. Fourthly, we emphasize that transnational governance can be understood best when its institutional context is considered. It allows observers to see that transnational governance mechanism to some extend develop inside and rely on existing modes of government, that they also have an independent momentum, and that they interact in many different ways with established political institutions and state-based forms of environmental law.

The aim of our chapter is to insist on terminological and conceptual clarity in dealing with transnational environmental governance. Hopefully, this has been achieved, at least to some extent. At best, this approach will allow for locating and connecting the many different ideas about emerging or changing forms of environmental governance beyond the Westphalian state- or inter-state centred paradigm. This includes other approaches to transnational environmental governance as well as emerging concepts such as global environmental law, environmental constitutionalism, or comparative environmental law.[101] Highlighting the differences between traditional and formal modes of environmental governance on one side and new or changing forms on the other will also hopefully provide a better understanding of the connections existing between them.

Such a comparison and classification of the different forms of transnational environmental governance should not just be regarded as a purely academic excersise: it shall also help to acquire a more reflective view on the risks and chances of these new governance modes to achieve environmental objectives worldwide.

Formatiert: Schriftart: 12 Pt.

[101] For a broader understanding of transnational environmental law, see, for example, Claudio Franzius, 'Das Paris-Abkommen zum Klimaschutz – Auf dem Weg zum transnationalen Klimaschutzrecht?' [2017] Zeitschrift für Umweltrecht 515. Regarding environmental constitutionalism see, for example, Klaus Bosselmann, 'Global Environmental Constitutionalism' (2014) 12 R. Opin. Jur., Fortaleza 372; see also Louis J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart Publishing, Oxford 2016); also Louis J. Kotzé 'Arguing Global Environmental Constitutionalism' (2012) 1 TEL 199. Regarding global environmental law see, for example, T. Yang, R.V. Percival, 'The Emergence of Global Environmental Law, Ecology Law Quaterly' (2009) 36 Ecology L.Q. 615; see also Ellen Hey, 'Global Environmental Law and Global Institutions: A System Lacking „Good Process"' in R. Pierik and W. Werner (eds.), *Cosmopolitanism in Context: Perspectives from International Law and Political* Theory, (Cambridge University Press 2010) 45. Regarding comparative environmental law see particularly the contributions in Jorge Viñuales / Emma Lees (eds.) *Oxford Handbook on Comparative Environmental Law* (Oxford University Press 2019).

Formatiert: Rechts: 0,63 cm

5. ‘Interglobalsuprasubandtransialidocious’: Mapping and Disentangling Transnational Environmental Governance

Till Markus and Olaf Dilling

INTRODUCTION

Transnational environmental governance takes a wide array of forms. Its variety is only surpassed by the number of explanations and ideas regarding its nature. Ultimately, the terms seem to point mainly to an elusive and opaque patchwork of norms, which have evolved partly within and partly outside the traditional ‘Westphalian’ modes of law and government, and which have not yet fully developed into a distinct and stable legal or institutional order.

This chapter aims to cut through this thicket. To this end it applies conventional lenses to transnational governance, using traditional dichotomies and distinctions such as private/public, international/domestic, as well as supranational/national, and social/legal norms. Despite the fact that these dichotomies and distinctions have inherent limitations, they are useful for the purpose of better understanding the continuing ties and dependencies between new forms of environmental governance and more established institutions with their organizational structures. Transnational governance mechanisms and norms usually develop as informal solutions within more established institutional frameworks and often still rely on their capacities and resources.

As a first step, this article will investigate the etymological roots of the term ‘transnational’. Secondly, it will outline the term’s conceptual history in the governance context and then, thirdly, distinguish it clearly from other pertinent governance semantics such as ‘domestic’, ‘inter’, and ‘supra’. Fourthly, as its centrepiece, the chapter introduces a diagram to sketch the field of transnational environmental governance. This map provides a broad typology of existing and emerging transnational governance phenomena, which are then explored in a variety of cases. Finally, the article will also try to illuminate the different types of contexts in which transnational environmental governance mechanisms are embedded. This will allow us to explain how some of the arrangements have developed quite independently from more formal modes of law and government, or are based on organizational or contractual arrangements of the private sector, while others are still deeply rooted in public sector regulatory structures. The

Formatiert: Rechts: 0,63 cm

article ends with a conclusion and an outlook regarding this overview's relevance for future research in transnational environmental law.

MAPPING TERMINOLOGIES

The term 'transnational' has been used extensively in the social science and legal literature over the last two or three decades, often in order to qualify the words 'governance' or 'law'. Particularly since the turn of the millennium, there has been a steep increase in publications using this term. As a survey of the legal and social science databases HeinOnline and JSTOR shows, from the second half of the 1990s until the first half of the 2010s, the phrase 'transnational law' in publications more than doubled, while 'transnational governance' was used more than ten times as often.[1] The term 'transnational' is not only featured in scientific publications, but is used in titles of legal research institutes, master's programs or other courses of higher education, and academic journals.[2]

However, the term's prevalence cannot conceal that it is used to denote considerably different phenomena and that it is based on a variety of distinct theories. Accordingly, discussions of related aspects of transnational governance also use expressions and terms such as supranational law, global law, public authority beyond the state, regulatory governance, inter-legality, legal pluralism, and so on.[3] Often it is unclear how these terms relate to each other. For this reason, Gregory Shaffer refers to the literature on transnational law as 'a jungle without a map'.[4] Indeed, the question of how to define 'transnational', and which phenomena fall within the term's scope, is far from settled. For our mapping exercise, it is crucial to reflect further on the meaning

[1] According to a data-base survey conducted on 4 February 2019 by Marvin Neubauer, Helmholtz-Centre for Environmental Research. The results were compared and adjusted to the whole set of data. See also Gregory Shaffer, 'Theorizing Transnational Legal Ordering' (2016) 12 Annual Review of Law and Social Science 231.

[2] By now, four journals use the term 'transnational' in their title: *Columbia Journal of Transnational Law*, *Vanderbilt Journal of Transnational Law*, *Journal of Transnational Law and Policy* and *Transnational Law and Contemporary Problems*. Since 2012, there is also a Cambridge University Press journal dealing specifically with *Transnational Environmental Law*.

[3] Mathias Reimann, 'Beyond National Systems: A Comparative Law for the International Age' (2001) 75 Tulane L Rev 1103; Paul Berman, *Global Legal Pluralism: A Jurisprudence Of Law Beyond Borders* (Cambridge University Press 2014); Kanishka Jayasuriya, 'Globalization, Law, and the Transformation of Sovereignity: The Emergence of Global Regulatory Governance' (1999) 6 Indiana J of Legal Studies 425. See also Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Law in Context, 2nd edn, Cambridge University Press 2002) 472ff.; William Twining, *Globalisation and Legal Theory* (Law in Context, Cambridge University Press 2000), 174-245; Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law & Contemporary Problems 15; E. Morgera, 'Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law' (2012) 23 European Journal of International Law 743.

[4] *Shaffer* (n 1) 232.

Formatiert: Rechts: 0,63 cm

of ‘transnational’ and to distinguish the different meanings it has acquired since it was first introduced into the political science and legal discourse.

Investigating the changing meaning of the prefix ‘trans’ in different functional and historic contexts can be a starting point to approach Schaffer’s ‘jungle without a map’ and contribute to clarifying the term’s meaning as compared to other prominent prefixes such as ‘inter-‘, ‘sub-‘ and ‘supra-‘. In Latin, and subsequently as a loanword in the English language, ‘trans’ describes a relationship that goes beyond, through or across something. For example, ‘Gallia Cisalpina’ covered the Roman side of the Alps, now Upper Italy, while ‘Gallia Transalpina’ referred to the region North-West of the Alps. From a Roman perspective, the latter denoted the region *beyond* or *across* the Alps. Using the prefix ‘trans’ in describing relations between elements or entities may imply that they connect across borders, which often establishes a direct relation between elements of these entities. In the ‘transplantation’ of organs or ‘transfusion’ of blood in medicine, the physical delimitations of the organisms are overstepped.[5] In contrast, ‘inter’ denotes a relation or object being situated *between* two separate entities, usually leaving them intact. ‘Supra’, in turn, indicates a hierarchical order between entities or elements involved.

The two meanings of ‘what lies beyond’ and ‘what pierces through boundaries’ have been a source of confusion and ambiguity within the discourse on the ‘transnational’. In our view, something is transnational if it lies beyond the system of the nation-state or transgresses its borders. Sometimes, this difference is made explicit by distinguishing between global and transnational norms. However, as Veerle Heyvaert puts it, transnational may also cover both the interstitial and the universal aspects of law and regulation.[6]

CONCEPTUAL HISTORY OF THE TRANSNATIONAL

The term ‘transnational’ was probably first used by the journalist Randolph Bourne in 1916. Bourne advocated the ‘transnational’ as a paradigm for integration in the Unites States (US). To him, it served as a counter-model to the then prevailing idea of assimilation, often metaphorically referred to as the ‘melting pot’.[7] Ethnic differences became evident in the US in the course of the First World War. Bourne argued that peoples’ traditional cultural ties should

[5] In terms of governance and administration Dilling, Herberg, Winter, ’Introduction’ in: *Transnational Administrative Rule-Making* (Hart Publishing, Oxford 2011) 2-4.
[6] Veerle Heyvaert, *Transnational Environmental Regulation and Governance* (Cambridge University Press 2019) 30. See also Claudio Franzius, 'Auf dem Weg zu einem transnationalen Klimaschutzrecht? ' [2018] Zeitschrift für Umweltrecht 641.
[7] Randolph Bourne, 'Trans-National America' (1916) 118 Atlantic Monthly 86; cf. also Paul Enríquez, 'Deconstructing Transnationalism: Conceptualizing Metanationalism as a Putative Model of Evolving Jurisprudence' (2010) 43 Vanderbilt J of Transnational L 1265, 1269.

Formatiert: Rechts: 0,63 cm

be tolerated. For him, the cultural diversity presented a chance to seek ways of reconciling differing perceptions and values. Rather than a melting pot, Bourne envisioned a transnational America as a model for world peace. The concept of the transnational that is implicit in Bourne's thoughts is one that acknowledges that individual citizens can keep and modify their relations with their countries of origin, thereby influencing the foreign policy of their new home country.

In the German-speaking community of international private law or conflict of laws scholars, the term transnational acquired a different meaning in the first half of the 20th century. The Swiss Max Gutzwiller and the Austrian Gustav Walker used 'transnational' to refer to rules of conflict that are common to many jurisdictions, for example, the *lex situs*. Ernst Rabel, a German scholar of international private law who was forced to emigrate to pursue his career, introduced this terminology to the US legal community. Rabel pointed out that similarities of the conflict rules in different jurisdictions often result from the rules having common roots, such as Roman law. According to Rabel, it was the historical *origin* of those rules that made them 'transnational'.[8]

In the 1950s, international lawyer Phillip Jessup popularized the concept of transnational law.[9] Compared to Rabel, he did not restrict transnational law to those rules dealing with conflicts of laws. In his view, the term comprehensively encompassed any national and international law regulating cross-border issues, including rules generated by private actors.[10] His terminology thus refers to norms that are *applied* across borders, regardless of their origin.[11] This concept opened up a more realist legal perspective on global normative phenomena.[12] According to this conception, the law is primarily shaped and defined by those who apply it rather than by those who legislate. Consequently, under the heading of 'transnational', norms come into play that have not been dignified as law by a formal pedigree, but can be considered law from a functional perspective.

[8] See Ernst Rabel, *Conflict of Laws. A Comparative Study*, vol 1 (2nd edition, Michigan Law 1958), 44-45.
[9] Gregory Shaffer and Carlos Coye, 'From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Orders' (2017) UC Irvine School of Law Research Paper No. 2/2017 <https://ssrn.com/abstract=2895159> accessed 12 December 2017.
[10] Philip Jessup, *Transnational Law* (Yale UP 1956) 2.
[11] For the difference between transnational origins and application of rules, see already Gregory Shaffer (ed.), *Transnational Legal Ordering and State Change* (Cambridge University Press 2012), 5.
[12] Gregory Shaffer, 'Legal Realism and International Law' (2018) Legal Studies Research Paper Series No. 55/2018, 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3230401##> accessed 11 July 2019 .

Formatiert: Rechts: 0,63 cm

In the 1990s, the term was once again taken up by authors to describe legal evolution in the context of globalization.[13] This new strand of literature was influenced by a broad social science perspective on global institutions rather than by a narrow legal focus. In addition, the discussion was now also more closely related to public than to private international law. For instance, Anne-Marie Slaughter emphasized the emergence of transnational administrative and judicial cooperation.[14]

A renewed interest in legal pluralism also fuelled the interest in developing a less state-centred perspective on the law. Legal pluralists mainly point out that multiple normative systems, be they legal or quasi-legal, effectively control human behaviour in specific societies. Norms that govern these societies are being generated by both state and non-state actors. Pluralists base their observations on ethnologic field-work, nowadays focussing on modern western contexts.[15] For example, Gunther Teubner analyzed the global 'new law merchant' or *lex mercatoria* and compared it to the field-work of Eugen Ehrlich. In the beginning of the 20th century, Ehrlich had analyzed the plurality of orders ('Living Law') in the former Habsburg Empire, particularly the relationship of social norms and state-made laws in the remote province Bukowina.[16]

In this more recent phase, the term 'transnational' was given a new turn, which in certain respects brought it closer to the meaning envisioned by Randolph Bourne and his conceptualization of integration. Under this new perspective, transnational norms are not exclusively imposed on global society by the territorial state or jointly by groups of states, but are created in the virtual space through functional communities. 'Transnational norms' then usually refer to rules that are developed in response to the practical needs of involved practitioners or by ethical demands of an emerging global public.

Against the background of the term's complex history, it does not come as a surprise that even today there are different schools of 'transnationalists' that use the term differently. One school, primarily in the tradition of Rabel and Jessup, mainly focuses on *private cross-border*

[13] Harold Hongju Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process' (1996) 75 Nebraska L Rev 181; Harold Hongju Koh, 'Why Transnational Law Matters' (2006) 24 Penn State International L Rev 745; Gunther Teubner, 'Globale Bukowina. Zur Emergenz eines transnationalen Rechtspluralismus' (1996) 15 Juristische Rundschau 255.
[14] Anne-Marie Slaughter, *A New World Order* (Princeton UP 2005).
[15] E.g. John Griffiths, 'What is Legal Pluralism' (1986) 18 The Journal of Legal Pluralism and Unofficial Law 1; Sally Engle Merry, 'Legal Pluralism' (1988) 22 Law & Society Review 869. From a comparative law perspective see particularly Werner Menski, *Comparative Law in a Global Context* (Cambridge University Press 2006).
[16] *Teubner* (n 13) 255. On Eugen Ehrlich see, for example, David Nelken, 'Eugen Ehrlich, Living Law, and Plural Legalities ' (2008) 9 Theoretical Inquiries in Law 443.

Formatiert: Rechts: 0,63 cm

regulatory processes, such as the *lex mercatoria*.[17] Another group of writers engaged in the discourse on Global Administrative Law, also discusses those and similar *cross-border regulatory processes* under the label of the transnational law.[18] From this vantage point, transnational norms emerge from the cooperation of actors from the public sector who operate below the intergovernmental level. Examples of such actors include institutionalized administrative transboundary networks, associations of semi-governmental organizations, arbitration courts, public-private-partnerships, and informal networks of judges, parliamentarians, officials or scientists.[19] Some authors, who do not generally subscribe to the wide concept of transnational norm-application advanced by Jessup, often regard European Union (EU) regulation and sometimes even international law as transnational.[20] Regulation that has been produced with the substantial involvement of actors who are not state authorities, such as the European Commission or Parliament, is then regarded as transnational.[21]

As with many nascent concepts, transnational governance is mostly defined in the negative: non-state management of public goods. Without a base in state authority, the question remains as to why people should participate in such forms of governance or even obey transnational norms. One answer could be 'consumer democracy', namely, the market power of ethical consumption that requires producers to consider sustainability. However, apart from state authority and market power, there are other, subtler ways of influencing behaviour, for example by disseminating scientific knowledge or by holding people morally accountable. Therefore, it makes sense to acknowledge the role of civil society. This opens up possibilities to take the distinction between 'bourgeois' and 'citoyen' to the global level: Beyond the state, people and organizations act politically. Even transnational corporations are no exception. On the contrary, they often strategically try to shape the rules that establish the framework for global markets.[22] Without formal democratic institutions, public discourses on political, ethical, scientific and

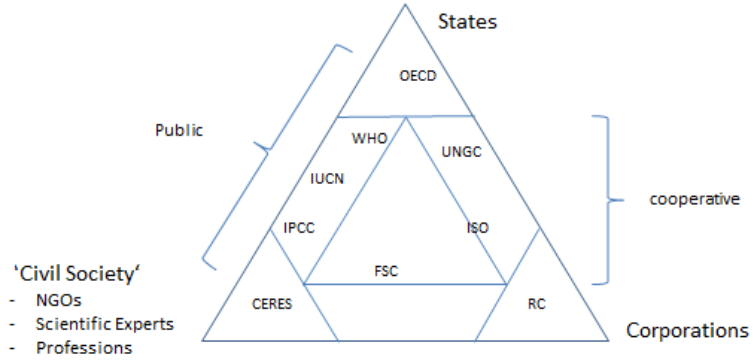
[17] With reference to transnational law, Gunther Teubner, 'Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?' in Karl Heinz Ladeur (ed), *Globalization and Public Governance* (Ashgate Publishing 2004).
[18] For a discussion of the slightly different focus of Global Administrative law vs. transnational law, see *Heyvaert*, (n 6) 29-30.
[19] For most of these examples see Slaughter, *A New World Order* (n 13). See also Marco Schäferhoff, Sabine Campe and Christopher Kaan, 'Transnational Public-Private Partnerships in International Relations: Making Sense of Concepts, Research Frameworks and Results' (2009) 11 International Studies Rev 451.
[20] T. Etty, V. Heyvaert, C. Carlarne and others, 'Transnational Envrionmental Law, Editorial' (2013) UC Berkeley Public Law Research Paper No. 2277621, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2277621##> accessed 15 July 2019.
[21] *Heyvaert* (n 6) 30.
[22] See for example, John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press 2000).

Formatiert: Rechts: 0,63 cm

technical aspects of protecting global public goods flourish transnationally. In the case of climate protection, for example, the recent call for immediate action by demonstrating school children spread from Sweden to many other countries and puts politicians under pressure to act.

Accordingly, Kenneth Abbot and Duncan Snidal have visualized transnational governance as situated in a triangle that spans between three poles: the state, firms, and civil society (non-governmental organizations (NGOs)) (Map 1). This approach tries to overcome the idea that 'transnational' only refers to 'non-state-governance', which, again, is based on an overly simplistic 'state vs. market' dichotomy. By displaying the full range of the triangle, transnational governance is not reduced to the private sphere of contractual relations and proprietary organization. Such a triangular framing also suggests that private lawmaking is often complemented by public pressure and state intervention in the pursuit of regulatory goals, particularly where they aim at generating and supporting public goods. However, public control over state and non-state governance is not a task exclusive to classical NGOs such as Greenpeace or Amnesty International. Rather, scientific, semi-public, and professional organizations which do not primarily pursue political or commercial objectives can also become involved, such as the Intergovernmental Panel on Climate Change (IPCC) or the International Union for Conservation of Nature (IUCN).

Map 1: The (revised) Governance Triangle (after Abbott / Snidal 2009)



Formatiert: Rechts: 0,63 cm

TRANSNATIONAL GOVERNANCE vs. DOMESTIC, INTER- AND SUPRANATIONAL LAW

After this brief survey, it is useful to sketch the 'transnational' in comparison with other categories such as domestic, inter- and supranational. For this mapping exercise, we distinguish public transnational governance from other governance mechanisms which reach out beyond national borders. The most well-established instruments in this regard are of course those domestic laws that have extraterritorial effects, and international law, which currently mostly results from contractually ordered institutionalized cooperation between heads of states.[23]

Supranational institutions such as the European Commission have been provided with state-like authority, albeit on the basis of conferred powers. This enables them to initiate legislation and to adopt laws and decisions (to the extent it has been authorized by the European Parliament and the Council), which are directly binding on citizens of the Member States. Compared to traditional international law, supranational law is therefore less dependent on grounds for legitimacy that derive from the nation state. The requirements of consensus-based procedures to protect sovereignty are relaxed. Compared to other transnational governance mechanisms, supranational law is quite formalized. In our map, we symbolize this by overlapping forms that still have the domestic state at their centre, but increasingly reach out to global society composed of public civil society and private organizations and markets (see below, map 2).

Public transnational governance and domestic, international and supranational law do not exist as separate, autonomous normative systems. Rather, there is close interaction between them and sometimes they overlap. Indeed, formal legal institutions often initiate informal transnational rule making. For example, international treaties often contain compromise formulae or leave important politically contentious questions open. In order to avoid a fragmented or even contradictory implementation practice, the process of interpreting vague international norms is often guided by implementation networks, expert commissions, or other transnational governance mechanisms, including the globally connected community of legal scholars that lead discourses on interpretation practices.[24]

[23] In the present day, treaties have become the most important source of law ordering international relations. ICJ Judge Bruno Simma referred to international agreements as the 'workhorse of international law', see Bruno Simma, 'From Bilateralism to Community Interest in International Law (Volume 250) ' in *Collected Courses of the Hague Academy of International Law* (Brill Nijhoff 1994), 221ff.

[24] While Art. 31 Nr. 3, lit. a) and b) of the Vienna Convention on the Law of Treaties highlight the formal legal mechanisms of a subsequent agreement or practice of States to promote a specific interpretation, Art. 38 I lit. d of the ICJ-Statute refers to ‚teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

Formatiert: Rechts: 0,63 cm

In other cases, transnational governance mechanisms develop more or less independently from formal obligations under domestic or international law. The development of test guidelines and standards of good laboratory practice under the Organisation for Economic Co-operation and Development (OECD) can serve as an example.[25] Sometimes, regulators also try make use of private governance structures to promote public goods. For example, the EU Eco-Regulation is derived from earlier transnational standards of the International Federation of Organic Agriculture Movements (IFOAM).[26] In either case, close interaction can result in a complex hybrid system of formal international, national, and transnational norms and institutions, which can hardly be disentangled. This further demonstrates the porosity of traditional distinctions. In the diagram, this is symbolized by dashed or dotted lines.

In principle, interaction happens at all levels of regulation. For example, transnational governance can interact with domestic law if the latter is extraterritorially enforced by means of third-party certification. This happens, for example, in the case of the declaration of conformity with European Law (Conformité Européenne - CE) or, similarly, with the declaration of conformity with the standards of the US Federal Communications Commission (FCC). Often, domestic manufacturers impose the legal requirements of their home jurisdictions upon overseas suppliers in systems of supply chain management. Another example is the significant involvement of NGOs in the drafting of guidelines for toxic substances control issued by public authorities in various countries.[27] Furthermore, there is cross-border cooperation of a primarily public-law nature, such as the informal coordination of authorities on the consistent implementation of environmental and planning legislation in specific regional infrastructure projects.[28]

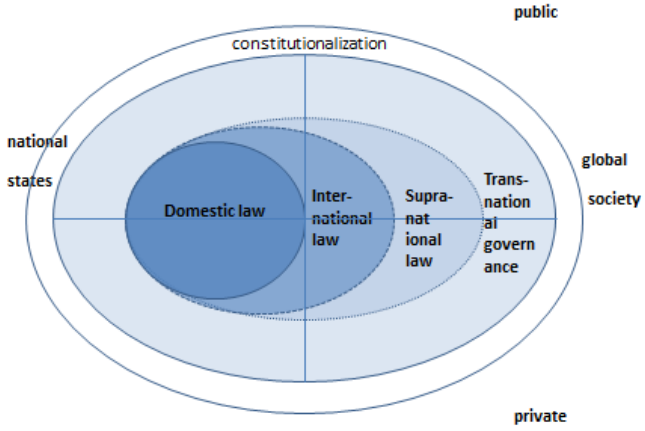
Similarly, international law may become a point of reference for transnational norm development.[29] The United Nations (UN) Global Compact features standards and governance projects for corporations worldwide.[30] Similarly, private actors in the shipping sector have

[25] Michael Warning, *Transnational Public Governance: Networks, Law and Legitimacy* (Transformations of the State Series, Palgrave Macmillan UK 2009).
[26] European Regulation (EEC) 2092/91 of the European Council of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs [1991] OJ L 198.
[27] *Warning* (n 26) 203.
[28] Martin Kment, *Grenzüberschreitendes Verwaltungshandeln: Transnationale Elemente Deutschen Verwaltungsrechts* (Mohr Siebeck 2010) especially 267ff.
[29] *Heyvaert* (n 6) 6-9.
[30] For further examples, addressed as the 'orchestration' of contributions to transnational governance by international organizations, see K. Abbott, P. Genschel, D. Snidal and others (eds.), *International Organizations as Orchestrators* (Cambridge University Press 2015).

Formatiert: Rechts: 0,63 cm

established standards to reach the goals of the Paris Agreement.[31] The International Centre for Settlement of Investment Disputes (ICSID) is another example of transnational governance which has its point of departure in international law, found in the ICSID Convention. The actual settlement of disputes allows private arbitrators to come to binding decisions, however, which often significantly affect domestic law. It could therefore be argued that dispute settlement has evolved beyond its international source of legitimacy.

Map 2: The Transnational Governance 'Egg'



Overlaps can be observed, e.g. while EU law is generally characterized by supranational and intergovernmental procedures, transnational elements of direct networking between national administrations also play a significant role. A specific example is the implementation of EU law through the so-called Comitology Procedure: before the Commission can adopt implementing measures in furtherance of an EU legal act, it has to consult a committee of specialists of Member States' administrations. The opinions and decisions developed within these expert committees are not formally binding, but have a strong mandatory force and are often adopted 1:1 by the Commission. Comitology is regarded as a 'networked deliberative

[31] Joanne Scott, T. Smith, N. Rehmatulla and others, 'The Promise and Limits of Private Standards in Reducing Greenhouse Gas Emissions from Shipping' (2017) 29 JEL 231.

Formatiert: Rechts: 0,63 cm

forum' promoting 'constructive cooperation and a non-hierarchical mode of decision-making'.[32]

The chapter emphasizes that transnational governance mechanisms can best be understood when considered from the perspective of more traditional and formal modes of government and law in which they are embedded and from which they have developed varying degrees of independence. In a nutshell, transnational governance mechanisms emerge from and interact with traditional and formal modes of government and law. Accordingly, transnational governance mechanisms cannot be analyzed in isolation from these more specific normative phenomena. Analyses should thus be based on clear analytical distinctions. However, due to the many different mechanisms and forms of interaction, in practice these distinctions are sometimes fluid or blurred.

MAPPING THE FIELD OF GOVERNANCE STRUCTURES

The following section will try to sketch the broad range of transnational governance structures by drawing together actor-based and scale-based mapping approaches. Filling in the blank spaces of the elliptical map, we distinguish between actor constellations that are purely corporate and economic in the bottom right segment of the map (5.1), civil societal and scientific in the top right segment (5.2), and primarily attached to state institutions in the left segment (5.3). Our map will not include international or supranational organizations that have been assigned formal legislative powers independent from states (such as the UN Security Council or the European Commission). However, it will include some of the borderline cases which are in fluid transition from domestic, international, or supranational law to transnational governance.[33]

1. Companies and Economic Associations

In the course of globalization, social and economic processes increasingly create transboundary effects and are thus subjected to multiple political and legal orders. Different environmental rules and standards may weaken environmental law's effectiveness. A central challenge is to bridge or to level out the differences in legal protection. In the absence of applicable

[32] Maria Weimer, 'No More Blame Game: Back to the Future of Comitology' (*Verfassungsblog*, 18 February 2017) <http://verfassungsblog.de/no-more-blame-game-back-to-the-future-of-comitology/> accessed 12 July 2019. See also Maria Weimer, *Risk Regulation in the Internal Market* (Oxford University Press 2019).

[33] Cf. the instructive 'governance triangle' with its locating of different transnational regulatory initiatives in Kenneth Abbott and Duncan Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State' in Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton UP 2009).

Formatiert: Rechts: 0,63 cm

international law rules, the task is sometimes taken over by non-state economic actors.[34] Interactions between economically or legally independent firms or groups of companies (for example, a parent company and its subsidiaries, or individual subsidiaries or branches)[35] are often shaped by voluntary environmental standards or codes of conduct,[36] which often involve a commitment to third-party certification.

There are many reasons why companies orient their actions towards sustainability in the sense of corporate social responsibility.[37] Motivations can include *inter alia* savings by increasing resource efficiency, opening up new markets for sustainable products, improving public perception, avoiding liability, or averting state regulation.[38] Yet, sometimes these strategies are criticized as 'greenwashing', as they are part of public image campaigns rather than providing any substantive improvements.[39]

Environmental rules, codes, and standards with transboundary effects are not only adopted by individual companies, but also by corporate associations. A well-known and firmly established example is the *Responsible Care* (RC) initiative of the International Council of Chemical Associations.[40] This program was initially developed in the US in response to the Bhopal disaster, which resulted in the deaths of several thousand people after an incident in a plant of a subsidiary of Union Carbide in 1984. The aim of the program was to develop internal rules as well as to create organizational structures and resources to support member organizations in

[34] Olaf Dilling, Martin Herberg and Gerd Winter, *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing 2008); Jürgen Friedrich, 'Codes of Conduct' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2010) 3-27; Gerald Moore, 'The Code of Conduct for Responsible Fisheries' in Ellen Hey (ed), *Developments in International Fisheries Law* (Brill 1999); David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights' (2003) 97 AJIL 901.

[35] *Dilling, Herberg, Winter* (n 35) 3.

[36] Jürgen Friedrich, 'Environment, Private Standard-Setting' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012); Martin Herberg, *Globalisierung und private Selbstregulierung: Umweltschutz in multinationalen Unternehmen* (Staatlichkeit im Wandel, Campus 2007); Helen Keller, 'Codes of Conduct and their Implementation: the Question of Legitimacy' in Rüdiger Wolfrum and Volker Roeben (eds), *Legitimacy in International Law* (Springer-Verlag 2008) 219ff.

[37] For further relevant questions, see Gerd Winter, 'Transnationale Regulierung' (2009) 8 APUZ 9-10.

[38] Olaf Dilling, 'Proactive Compliance? – Repercussions of National Product Regulation in Standards of Transnational Business Networks' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing, Irish Academic Pr 2008) 118-119.

[39] Olaf Dilling, 'From Compliance to Rulemaking: How Global Corporate Norms Emerge from Interplay with States and Stakeholders' (2012) 13 German LJ 381, 404. See also Nick Feinstein, 'Learning from Past Mistakes: Future Regulation to Prevent Greenwashing' (2013) 40 B C Envtl Aff L Rev 229.

[40] Aseem Prakash, 'Responsible Care: An Assessment' (2000) 39 Business & Society 183.

Formatiert: Rechts: 0,63 cm

achieving specific environmental objectives.[41] Similar initiatives emerged in a large number and variety, including, for instance, self-commitments by the tourism industry to protect Antarctica.[42] In some cases, these self-commitments transcend individual sectors, such as the Business Charter on Sustainable Development of the International Chamber of Commerce in Paris.[43] The latter is designed to 'provide a practical framework including tools for businesses of all sectors and geographies to help them shape their own business sustainability strategy'.[44]

2. Standardization Organizations and Expert Commissions

Sustainability and environmental standards are also initiated and developed by a large number of societal actors who do not predominantly pursue profit-making interests. These actors include standard-setting organizations, civil societal actors (e.g., environmental or consumer groups and associations), and academics or representatives of certain professions (e.g., engineers or doctors).

2.1. Standardization Organizations

The International Organization for Standardization (ISO) with its standard for the certification of corporate environmental management (ISO 14001 et seq.) is a very well-known example of an influential transnational standard-setting body.[45] This international body is in part composed of representatives of public bodies and in part of representatives of private standardization organizations of the member states. The latter, including for example the German Institute for Standardization (DIN), are usually bound by agreements with states or international organizations. While in its early days the ISO focused mainly on very technical standardization questions, it has increasingly turned to more politically charged regulatory matters, such as ethical consumption.[46] In addition to the above-mentioned environmental management systems, in 2010 the ISO developed the ISO 26000 guide to social responsibility, which includes a

[41] Ivan Montiel, 'Responsible Care' in Thomas Hale and David Held (eds), *The Handbook of Transnational Governance: Institutions and Innovations* (Wiley 2011) 328-329. See ICCA, Responsible Care <https://www.icca-chem.org/responsible-care/> accessed 21 October 2015.b

[42] See the visitor, decontamination, and wildlife watching guidelines of the International Association for Antarctic Tour Operators, IAATO, Guidelines and Resources <https://iaato.org/guidelines-and-resources> accessed 09 May 2017.

[43] Cf. Lee Thomas, 'The Business Charter for Sustainable Development: Action Beyond UNCED' (1992) 1 RECIEL 325, 352ff.

[44] The current version (2015) is provided at <https://cdn.iccwbo.org/content/uploads/sites/3/2015/01/ICC-Business-Charter-for-Sustainable-Development.pdf> accessed 26 June 2019.

[45] Oren Perez, 'Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law' (2003) 10 Indiana J of Global Legal Studies 25; *Winter* (n 38).

[46] *Dilling* (n 40) 381; Coline Ruwet, 'Towards a Democratization of Standards Development? Internal Dynamics of ISO in the Context of Globalization' (2011) 5 New Global Studies 1.

Formatiert: Rechts: 0,63 cm

chapter on environmental protection.[47] Its aim is not to certify organizations according to detailed material standards, but to provide guidance, for example, by pointing out best practices in terms of responsibility for transparent procedures, human rights and sustainable development.

In contrast to corporate standards or standards set by economic associations, transnational sector-specific production standards have been developed along with stakeholders from outside the business sector. They concern not only procedural aspects (like organizational structures and process sequences), but also include detailed and substantial production requirements. These sustainability standards are particularly common when it comes to the use of natural resources in agriculture, forestry, aquaculture and fisheries. A prominent example are the standards produced by the Forest Stewardship Council (FSC).[48] In this organization, representatives of companies, trade unions and environmental groups cooperate closely according to the three pillars of sustainability (ecology, social equity and economy). In addition to the material sustainability standards, it also developed procedures for independent certification and monitoring.[49] Similar standards are developed by the Marine Stewardship Council (MSC). This organization was founded in 1996, originally by WWF and Unilever as main cooperation partners, after the collapse of the Grand Banks cod fishery. Just as the FSC, the MSC is a 'non-state market driven' governance program.[50] It uses an eco-label and a certification program to tie the marketing of products to their sustainable production. Further cases, for example in the area of climate change governance, include the Gold Standard for assessing energy projects in the context of the Clean Development Mechanism as well as the carbon reporting standard developed through the Carbon Disclosure Project.[51]

2.2. Expert Commissions

[47] Kernaghan Webb, 'ISO 26000 social responsibility standard as 'proto law' and a new form of global custom: Positioning ISO 26000 in the emerging transnational regulatory governance rule instrument architecture' (2015) 6 Transnational Legal Theory 466.

[48] Philipp Pattberg, 'Forest Stewardship Council' in Thomas Hale and David Held (eds), *The Handbook of Transnational Governance: Institutions and Innovations* (Wiley 2011) 265ff.

[49] Errol Meidinger, 'Multi-Interest Self-Governance through Global Product Certification Programs' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing 2008) 259; *Keller* (n 37) 219ff; see also Elisa Morgera, *Corporate Accountability in International Environmental Law* (Oxford University Press 2009).

50 Frank Wijen and Mireille Chiroleu-Assouline, 'Controversy Over Voluntary Environmental Standards: A Socioeconomic Analysis of the Marine Stewardship Council' (2019) 32 Organization & Environment 98, 100.

51 Regarding the Gold Standard see Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017) 185-186. Regarding Carbon Disclosure Probject see Daniel C. Matisoff, Douglas S. Noonan and John J. O'Brien, 'Convergence in Environmental Reporting: Assessing the Carbon Disclosure Project' (2013) 22 Business Strategy and the Environment 285-305.

Formatiert: Rechts: 0,63 cm

In addition to the normative aspects of the sustainable use of natural resources, the establishment of environmentally sound standards has a cognitive dimension.[52] Environmental law has given scientists and experts a leading role in the development of standards.[53] Often, scientists and experts are the ones who identify, interpret and offer solutions to environmental problems. Because environmental research often transcends national borders, scientists and experts frequently are part of cross-border networks, leading to the emergence of global scientific discourses.[54]

Three types of transnational scientific networking can be distinguished. First, some networks emerge in response to national or international public sector initiatives. Although they originate in state action, these scientific networks generally are characterized by a high degree of autonomy, both in terms of their task as objective advisor to states and their membership of scientists. Such networks include, for example, institutionalized groupings like the IPCC, the Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES), the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP), technical and legal working groups under international treaties, and ad hoc groups of experts specialized in specific areas that are convened for specific legislative procedures or implementation processes.[55]

Secondly, expert networks also include so-called hybrid organizations such as the IUCN. This body allows national authorities to network, so that it is strongly anchored in public structures. Additionally, it involves a large number of local and globally active nature conservation associations and thousands of scientists and experts. The IUCN addresses a wide range of environmental issues. It supports and funds research as well as projects on the ground, and organizes political and legal processes by bringing together governments, NGOs, international organizations and corporate actors to develop environmental concepts and strategies, best practices, legislation and treaties, e.g. about protected areas[56] or sustainable land use[57].

[52] Till Markus, 'Changing the Base: Legal Implications of Scientific Criteria and Methodological Standards on what Constitutes Good Marine Environmental Status' (2013) 2 TEL 145.
[53] Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) 87-88.
[54] Transnational networks of experts in fact are not a new phenomenon, see Christian Tietje, 'History of Transnational Administrative Networks' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Transnational Administrative Rule-Making* (Hart Publishing 2011) 23-37.
[55] See *Markus* (n 53) 145-164.
[56] See, for instance, IUCN, *Guidelines for Applying Protected Area Management Categories* (2013).
[57] IUCN, *World Soil Erosion and Conservation* (1993); IUCN, *Legal and Institutional Frameworks for Sustainable Soils - A Preliminary Report* (2002); IUCN, *Drafting Legislation for Sustainable Soils: A Guide* (2004).

Formatiert: Rechts: 0,63 cm

The third category, which can be addressed as transnational scientific networking, includes those numerous networks that ultimately rest on autonomously created initiatives by scientists, engineers or other professions, often reflecting and reinforcing rules of appropriate behaviour for specific practices. An important global crystallization point for many different private initiatives is the International Council for Science, which convenes, *inter alia*, an interdisciplinary Committee on Problems of the Environment. In the field of environmental law, one could also mention the Environmental Law Network International and the European Environmental Law Forum.[58]

All of these networks and panels allow experts to come to a shared understanding and a common interpretation of environmental problems.[59] Additionally, they develop scientific criteria and methodological standards to support their analytical work (hence, they are often called 'epistemic communities').[60] To this end, they collect, compile, interpret, process and prepare data for national or international regulatory processes, or publish the data themselves.[61] These networks and commissions develop model rules, codes of conducts and standards, and exchange best practices. Through their collaboration and cross-border consultations, such networks contribute significantly to the design and consolidation of standards without direct binding effect and promote a global dissemination of normative requirements.[62]

3. Transnational Administrative and Judicial Networks

Cross-border networks of public actors can also produce rules or decisions which, like law, guide behaviour and establish expectations transnationally. According to the different functions of norm development, norm implementation, and conflict resolution, one can distinguish different forms of transnational management of environmental issues.[63]

[58] See, ELNI <http://www.elni.org/> accessed 16 May 2017; see also EELF <http://www.eelf.info/> accessed 16 May 2017.
[59] On the governance effects of these institutions see T. Markus, H. Hillebrand, A.-K. Hornidge and others, 'Disciplinary diversity in marine sciences: the urgent case for an integration of research' (2918) 75 ICES Journal of Marine Sciences 502.
[60] Peter Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 International Organization 1; *Markus* (n 5253).
[61] *Sands, Peel* (n 54) 88.
[62] Martin Herberg, 'Global Governance Networks in Action: the Development of Toxicological Test Methods at the OECD' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Transnational Administrative Rule-Making* (Hart Publishing 2011).
[63] Olaf Dilling, Martin Herberg and Gerd Winter, 'Introduction: Exploring Transnational Administrative Rule-Making' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Transnational Administrative Rule-Making: Performance, Legal Effects and Legitimacy* (Hart Publishing 2011), 5-6.

Formatiert: Schriftart: (Standard) +Textkörper (Calibri), Englisch (Großbritannien)

Formatiert: Rechts: 0,63 cm

3.1. Networks of Government Agencies

In close proximity to epistemic communities, but with a stronger anchoring in the public sector, are the networks of transnational administrators. These networks are often established and coordinated under the auspices of international organizations and are mainly composed of representatives of national specialized authorities.[64] Since they are only rarely influenced directly by politics, they may be classified as non-governmental.[65] One example is the Cooperative Chemicals Assessment Program (CoCAP—the current successor project of the High Production Volume Initiative), put together by the OECD. Within this framework, a network of national specialist authorities which collects and publishes information on hazardous substances has been established, taking into account self-imposed rules on test procedures and laboratory best practice.[66] Other examples are the Globally Harmonized System (GHS)[67] or the Codex Alimentarius Commission, an organization established by the World Health Organization (WHO) and the Food and Agriculture Organization (FAO).[68]

3.2. Harmonized Administrative Processes and Best Practices

In addition to setting standards towards the maintenance of shared natural resources, transnational efforts are being made to ensure a uniform application and enforcement of existing environmental standards. In a grey zone between these two areas, cooperation also includes the identification and exchange of best practices, which has become an important instrument for the cross-border coordination of administrative practices.[69] These are not instances of transnational standardization in a narrow sense but rather of norm application.

The way in which the cooperative transnational implementation of international obligations can be achieved becomes apparent when one considers the example of city networks in the field of

[64] Cf. generally Christoph Möllers, 'Transnationale Behördenkooperation: Verfassungs- und völkerrechtliche Probleme transnationaler administrativer Standardsetzung ' (2005) 65 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 351.
[65] *Winter* (n 38) 11.
[66] *Warning* (n 26).
[67] Gerd Winter, 'Transnational Administrative Comitology: The Global Harmonisation of Chemicals Classification and Labelling ' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Transnational Administrative Rule-Making* (Hart Publishing 2011) 111-150.
[68] See FAO and WHO, Codex Alimentarius: International Food Standards <http://www.fao.org/fao-who-codexalimentarius/en/> accessed 16.05.2017. Alexia Herwig, 'The Contribution of Global Administrative Law to Enhancing the Legitimacy of the Codex Alimentarius Commission' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Transnational Administrative Rule-Making* (Hart Publishing 2011) 188f.
[69] Hollin Dickerson, 'Best Practices' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010).

Formatiert: Rechts: 0,63 cm

climate protection.[70] In the past decade, cities have been identified as major institutional actors who can contribute significantly to environmental protection, in particular to global climate protection.[71] Examples abound of cities from all around the world that act within the framework of their respective competencies to protect the climate. Individual actions and climate programs as well as legislation deal with, among other things, climate-friendly urban and traffic development, waste disposal services, energy-efficient construction planning and regulation, and the use of renewable energies.[72] In addition, cities active in climate protection are increasingly networking transnationally with regard to their protection and adaptation efforts. These include, in particular, the activities of the World Mayors Council on Climate Change, the C40 Cities Climate Leadership Group and the Local Governments for Sustainability Initiative (ICLEI).[73] Within the framework of these networks, possibilities for urban climate protection are identified and the exchange of best practices is organized. The resulting resolutions and normative guidelines are often implemented in political strategies, action programs or legislation at the city level, but in order to achieve their goals, cities are also active at higher political levels, particularly the international level.[74]

Parallel to this public-transnational networking, private or semi-private transnational initiatives emerge in the field. They play a key role in the ecological certification of entire cities or

[70] See eg Michéle Finck, 'Above and Below the Surface: The Status of Sub-National Authorities in EU Climate Change Regulation' (2014) 26 JEL 443.

[71] Harriet Bulkeley, *Cities and Climate Change* (Routledge 2013). See also WBGU, 'Humanity on the Move: Unlocking the Transformative Power of Cities' (WBGU 2016) <https://www.wbgu.de/fileadmin/user_upload/wbgu/publikationen/hauptgutachten/hg2016/pdf/wbgu_hg2016_z_en.pdf> accessed 12 July 2019; OECD, 'Competetive Cities and Climate Change' (OECD 2008) <https://www.oecd.org/cfe/regional-policy/44232251.pdf> accessed 12 July 2019 ; J. Corfee-Morlot; L. Kamal-Chaoui, M. G. Donovan and others, 'Cities, Climate Change and Multilevel Governance' (2009) OECD Environment Working Papers 14/2009 <http://www.oecd.org/regional/regional-policy/44232263.pdf> accessed 12 July 2019. In 2011, for instance, globally 75 per cent of final energy was consumed in cities, IIASA, 'Progress Report 2009' (IIASA 2010) <http://www.iiasa.ac.at/web/home/resources/publications/ProgRep09-web.pdf> accessed 12 July 2019. It is projected that by 2050 the share of the world population living in urban areas will increase to about 69 per cent (of then 9 billion people), which will consequently also increase the share of urban emissions, *WBGU* (n 7172) 58.

[72] Kristine Kern and Gotelind Alber, 'Governing Climate Change in Cities: Modes of Urban Climate Governance in Multi-Level Systems' (OECD International Conference "Competitive Cities and Climate Change", Milan, 9-10 October 2008) <http://search.oecd.org/cfe/regional-policy/50594939.pdf> accessed 12 July 2019, 171ff; *WBGU* (n 7172) 267-269; Anna-Lisa Müller, *Green Creative City* (UVK 2013).

[73] Harriet Bulkey, 'Cities and the Governing of Climate Change' (2010) 35 Annu Rev Environ Resour 229.

[74] Jolene Lin, *Governing Climate Change – Global Cities and Transnational Law Making* (Cambridge University Press 2018); Liliana Andonova, Michele Betsill and Harriet Bulkeley, 'Transnational Climate Governance' (2009) 9 Global Environmental Politics 52; Sofie Bouteligier, *Cities, Networks, and Global Environment Governance: Spaces of Innovation, Places of Leadership* (Routledge 2013).

Formatiert: Schriftart: (Standard) +Textkörper (Calibri)

Formatiert: Schriftart: (Standard) +Textkörper (Calibri)

Formatiert: Rechts: 0,63 cm

individual subsectors, for instance, in port development ('green ports').[75] Because of their regulatory, administrative, and financial powers, they are crucial actors and addressees of transnational best practices in the area of climate protection. In addition, they can now register their climate actions in the Non-State Actor Zone for Climate Action platform toward the achievement of the climate protection targets laid down in the Paris Agreement.[76]

The transnational implementation and control of environmental requirements can also take advantage of transnational administrative networks. The highest degree of institutionalization can be found in the network for the Implementation and Enforcement of Environmental Law (IMPEL).[77] This network consists of the environmental authorities of the EU Member States, EU candidate countries, the Member States of the European Economic Area (EEA) and the European Free Trade Area (EFTA). IMPEL was founded in 1992 with the aim of reducing implementation deficits in EU environmental law. Some key goals are the development of a common problem-consciousness, the development of institutional capacities, mutual peer review, exchange of information and experience about the implementation of law, cooperation in the implementation of international law, and improvements in the practicability and enforceability of EU environmental law.[78]

Transnational instruments can also contribute to the extraterritorial implementation of domestic law, including EU environmental law. This has become particularly evident in the case of the import of biomass, which, for example, plays an important role in the German energy transition policy (*Energiewende*).[79] Since the cultivation of energy crops in emerging and developing countries often creates social and ecological problems, sustainability criteria and corresponding certification schemes were required.[80] To this end, sustainability criteria as defined in Article

[75] See, eg, the certification by the 'Port Environmental Review System (PERS)', which was developed by the Sea Ports Organization and is implemented by Lloyd's Register. See, ESPO <http://www.ecoports.com/> accessed 12 December 2017.
[76] UNFCCCC, Decision 1/CP.21, paras. 117, 133-136; Sander Chan, Clara Brandi and Steffen Bauer, 'Aligning Transnational Climate Action with International Climate Governance: The Road from Paris' (2016) 25 RECIEL 238.
[77] Miroslav Angelov and Liam Cashman, 'Environmental Inspections and Environmental Compliance Assurance Networks in the Context of European Union Environment Policy ' in Michael Faure, Peter De Smedt and An Stas (eds), *Environmental Enforcement Networks: Concepts, Implementation and Effectiveness* (Edward Elgar 2015); Martin Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2nd edn, Routledge 2015) 546ff.
[78] See the network's webpage, IMPEL <https://www.impel.eu/about-impel/> accessed 12 December 2017.
[79] BMU and BMEL, *Nationaler Biomasseaktionsplan für Deutschland: Beitrag der Biomasse für eine nachhaltige Energieversorgung* (BMU and BMEL 2010) 2.
[80] Andrea Schmeichel, *Towards Sustainability of Biomass Importation. An Assessment of the EU Renewable Energy Directive* (Europa Law Publishing, 2014); Carola Glinski, 'Certification of the Sustainability of Biofuels in Global Supply Chains' in Peter Rott (ed), *Certification - Trust, Accountability, Liability* (Springer 2019) 163-185.

Formatiert: Rechts: 0,63 cm

29 of the Directive (EU) 2018/2001 on the promotion of renewable energies must be taken into account along the entire value chain.[81] In particular, the production must consider displacement effects as well as the protection of biodiversity and minimum social standards. Certification also fulfils a function as a transnational control of implementation, and is typically carried out by private auditors subject to recognized standards.[82]

4. Transnational Arbitration

In addition to the development of general norms and the cooperation between authorities in the implementation and application of legal prescriptions, transnational structures play a role in the judicial resolution of conflicts through transnational arbitration in cases of conflict between states and foreign private investors.[83] Usually the International Centre for the Settlement of Investment Disputes (ICSID) established by the World Bank or the Arbitration Institute of the Stockholm Chamber of Commerce provide for arbitration, or in rare cases investment treaties provide for bespoke arbitration arrangements. Their jurisdiction and procedures are governed by international law, but their staffing is in many cases *ad hoc* and determined by the non-state parties to the conflict. Negotiations are generally not public (although many decisions are now available online).[84] Private arbitrators come to binding decisions on cross-border issues and have a decisive influence on the development of law of the participating state.[85] These practices have raised widespread concerns that dynamic environmental regulation, which sometimes has to respond flexibly to new challenges, may be obstructed through arbitral decisions that are geared towards the protection of investor rights and the elimination of obstacles to trade. Eventually, corporate actors might be allowed to maintain low-cost but environmentally harmful production if they have to be compensated for state counter-measures. Particularly in

[81] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, [2009] OJ L140/16.

[82] Andrea Schmeichel, *Towards Sustainability of Biomass Importation. An Assessment of the EU Renewable Energy Directive* (Europa Law Publishing 2014) 181ff.

[83] Seminal Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (International Courts and Tribunals Series, Oxford University Press 2014).

[84] Cf. Markus Krajewski, 'Umweltschutz und internationales Investitionsschutzrecht am Beispiel der Vattenfall-Klagen und des Transatlantischen Handels- und Investitionsabkommens (TTIP)' [2014] Zeitschrift für Umweltrecht 396, 398.

[85] ibid, 401; it is feared that imminent compensation payments for damages will prevent states from implementing certain environmental protection measures. See, for instance, Tamara L. Slater, 'Investor-State Arbitration and Domestic Environmental Protection' (2015) 14 Wash. U. GlobalStud. L. Rev. 131; Zachary Douglas, 'The enforcement of environmental norms in investment treaty arbitration' in Pierre-Marie Dupuy and Jorge E. Viñuales (eds.) *Harnessing Foreign Investment to Promote Environmental Protections – Incentives and Safeguards* (CUP 2013), 415-444; Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (CUP 2009); Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007); Eric Neumayer, *Greening Trade and Investment* (Taylor & Francis 2001).

Formatiert: Rechts: 0,63 cm

conjunction with strict austerity policies, this practice may deter the adoption of effective environmental regulations able to react to industrial developments, which impacts negatively on the environment.[86] In addition, the status quo-oriented protection of investors' rights may contravene the polluter-pays principle and lead to an unjust distribution of environmental costs within society.

THE INSTITUTIONAL CONTEXT OF TRANSNATIONAL GOVERNANCE

Transnational governance can be understood best when its institutional context is considered. Many of its expressions have indeed been described as 'indirect regulation'. This means that states or international institutions use intermediaries to solve problems that would otherwise lie beyond their reach. This understanding, however, underestimates the independent momentum of transnational governance by simply regarding it as another instrument to further governmental regulatory policies. Rather, the interactions of transnational governance structures with established political institutions and state-based forms of environmental law are quite complex.[87] National, inter- and supranational law can form various relationships by initiating, recognizing, integrating, limiting or modifying transnational norms.[88]

An example of transnational governance structures initiated by EU law can be observed in the field of product-related regulation. For example, according to the Directive concerning the restriction of the use of certain hazardous substances in electrical and electronic equipment (Directive 2011/65/EU), it usually is the responsibility of importers or manufacturers to ensure compliance of the products with environmental and safety standards. This also applies to producers who assemble parts delivered by overseas suppliers. To fulfil their responsibility, manufacturers have developed corporate structures of compliance control which extend beyond national and EU borders. These structures can equally serve as a platform that is used for genuinely corporate requirements of a transnational nature.[89] Sometimes, industrial associations

[86] Usually called "chill effect", *Krajewski* (n 91) 398.
[87] Cf. the social scientific research into the transnational aspect of economic governance, B. Eberlein, K. W. Abbott, J. Black and others, 'Transnational Business Governance Interactions: Conceptualization and Framework for Analysis' (2013) 8 Regulation and Governance 21.
[88] See, for instance, Gunther Teubner and Andreas Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2006) 25 Michigan J of Intl L 999.
[89] *Dilling* (n 40).

Formatiert: Rechts: 0,63 cm

take up the task to develop common standards, which may in turn influence EU or national regulation. [90]

State regulation may also bestow credibility upon voluntary standards of the private sector which are in global use. This especially applies to organic farming, eco-friendly production and fair trade, and may also include environmental and work safety standards. The goal is to help consumers discern which of the many private eco-standards can be taken seriously and which are mere PR-stunts. An example of such a conditional endorsement of corporate self-regulatory standards is given in the Ecodesign Directive 2009/125/EC. Its Annex VIII lists nine criteria for legitimate and effective mechanisms of self-regulation, including open participation, added value in terms of environmental effects compared to the status quo, clearly defined quantitative goals and effective monitoring. According to Articles 15 and 17 of the Ecodesign Directive, self-regulatory measures of producers or importers may then substitute formal law enforcement.

In the public sector, transnational guidelines often serve to harmonize administrative practices across national borders. This is particularly evident within the EU, where the common market calls for equal treatment by the competent public authorities of different Member States. Another purpose of harmonization can be aligning technical or scientific requirements. For example, CoCAP depends on standardized data, so that datasets from different countries can be compared and aggregated. Therefore, transnational standards for good laboratory practice have to be observed for testing and evaluating chemicals regardless of their non-binding nature.[91] In general, the relevance and effects of these usually non-binding forms of transnational governance depend on the significance that is attached to them within different national administrations.

As domestic and supranational law are limited to their territorial jurisdictions, they cannot give transnational governance a comprehensive institutional framework. Therefore, international law is considered to be a promising candidate for the orchestration or even constitutionalization of transnational law. This is especially so as international law no longer solely addresses states, but is increasingly structuring the behaviour of non-state actors.[92] However, international law itself is fragmented into regimes that have treaties with various and often conflicting objectives. An often invoked example is world trade law with its links to transnational governance; while

[90] Alexandra Lindenthal, Transnational Management of Hazardous Chemicals by Interfirm Cooperation and Associations, in: Dilling, Herberg, Winter (eds.) *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing 2008), 123.
[91] *Warning* (n 26) 78.
[92] *Heyvaert* (n 6) 221.

Formatiert: Rechts: 0,63 cm

the General Agreement on Tariffs and Trade (GATT) and other World Trade Organization (WTO) agreements such as the one on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) primarily serve to promote free trade, they also have a huge environmental impact.[93]

These treaties often invoke 'international standards.' As these are understood in a broad sense, in practice, they open up the possibility of bringing transnational standards into adjudication. The food standards of the Codex Alimentarius Commission are, for instance, recognized as international standards and are therefore binding under WTO law according to Articles 2.4 and 2.5 TBT as well as Articles 3.1 and 3.2 SPS: compliance with the standards by the contracting states results in the assumption that there is no unlawful barrier to trade.[94]

International courts frequently refer to the jurisprudence of other international courts and bodies in other matters under international law.[95] This applies in particular to cases dealing with situations or problems courts deem comparable.[96] In addition, national courts increasingly refer to the interpretation given to international norms by the domestic courts of other states.[97] Although this initially occurred only *ad hoc* and in isolated cases, now an increasing institutionalization can be observed through the formation of transnational judicial networks.[98] In the area of environmental law, the European Forum of Judges for the Environment is one example. Its explicit objective is '[…] to promote the enforcement of national, European and international environmental law by contributing to a better knowledge by judges of

[93] See for example Tim Büthe, 'Institutionalization and Its Consequences' in: Halliday and Shaffer (eds) *Transnational Legal Orders* (Cambridge University Press 2015).
[94] WTO Apellate Body, European Communities – Trade Descriptions of Sardines (DS231), WT/DS231/AB/R 26 September 2002, <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds231_e.htm> accessed 12 July 2019.
[95] See, for example 'Oil Platforms' (Zslamic Republic of Iran v. United States of America), Judgment, I. C. J. Reports 2003 161, 182-183. Referencing to other courts has been discussed under various terms, such as „cross-referencing", "cross-fertilization", "borrowing among courts", "transnational communication of courts", "dialogue of courts", etc. See, for example, Tullio Treves, 'Cross Fertilization between Different International Courts and Tribunals: The Mangouras Case' in Holger P. Hestermeyer, Doris König, Nele Matz-Lück and others (eds), *Coexistence, Cooperation, and Solidarity – Liber Americorum Rüdiger Wolfrum*, vol 2 (Leiden 2012) 1787-1896; Anne-Marie Slaughter, 'A Typology of Transjudicial Communication, University of Richmond Law Review' (1994) 29 Univ Richmond Law Rev 99. For the prevailing interpretation of especially Art. 31 Ans. 3 lit. c Vienna Convention on the Law of Treaties, see Campbell Mclachlan, 'The Principle of Systematic Integration and Article 31(3)(C) ot the Vienna Convention' (2005) 54 ICLQ 279.
[96] See also Gráinne de Búrca, 'After the EU Charter of Rights: The Court of Justice as a Human Rights Adjudicator' (2013) 20 Maastricht J of European and Comparative L 168
[97] In this regard, Roberts invokes the notion of "comparative international law". See Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 ICLQ 57.
[98] *Slaughter* (n 14), 65ff.; Erik Voeten, 'Borrowing and Nonborrowing among International Courts' (2010) 39 J of Legal Studies 547.

Formatiert: Rechts: 0,63 cm

environmental law, by exchanging judicial decisions and by sharing experience in the area of training in environmental law'.[99]

The institutional context can also set limits or define requirements for transnational governance. This already becomes clear in some of the examples introduced above. In response to constitutional problems, non-conventional, non-state constitutional norms arise within the field of transnational governance.[100] Thus, fundamental rights are being discussed at the transnational level, which target, for instance, issues such as workplace safety or the right to participate and influence the substantial content of codes of conduct developed and used by multinational corporations. Similarly, meta-norms are defined, such as ISO 26000 on social responsibility of both business and public sector organizations that govern the procedure of rule making, i.e. by requiring basic forms of participation of concerned parties. Both requirements defined by the institutional context and meta-rules, which emerge transnationally, are part of a process of constitutionalization or re-embedding that limits and controls transnational governance. In our egg-shaped diagram, this is symbolized by an outer layer, the 'shell' of the egg.

CONCLUSION AND OUTLOOK

Finally, we would like to highlight some of the key findings of this chapter. First, we share the common view that the term transnational indicates that something lies beyond the system of the nation-state or transgresses its borders. Secondly, we suggest distinguishing public transnational governance from other forms of regulation which reach out beyond national borders, be it domestic law with extraterritorial effects, international law, or supranational law. To distinguish does not mean, however, to ignore overlaps and close interactions. Indeed, formal legal institutions often open up new fora for transnational governance, thereby initiating transnational rule making. In other cases, they use already existing transnational governance mechanisms to reach their own regulatory goals. In both cases, close interactions can result in a complex amalgam. Accordingly, we understand transnational governance as norms, procedures and decisions that direct social processes in more than one country, but which are not formally based on sovereign rights of governments, or on formally delegated authority, be it at the international or supranational level. They are rather established by private, civil society or administrative actors outside of parliamentary or governmental competencies and control.

[99] EUFJE <http://www.eufje.org/index.php/en/> accessed 12 December 2017.
[100] G. Teubner, H. Lindahl, E. Christodoulidis and others 'Dialogue & Debate: Constitutionalising Polycontexturality' (2011) 20 Social and Legal Studies 209.

Formatiert: Rechts: 0,63 cm

Thirdly, we provisionally and tentatively identified and categorized several existing and emerging transnational governance structures, namely, companies and associations of companies, standardization organizations and expert commission, networks of government agencies, and transnational dispute settlement bodies. Fourthly, we emphasize that transnational governance can be understood best when its institutional context is considered. It allows observers to see that transnational governance mechanism to some extend develop inside and rely on existing modes of government, that they also have an independent momentum, and that they interact in many different ways with established political institutions and state-based forms of environmental law.

The aim of our chapter is to insist on terminological and conceptual clarity in dealing with transnational environmental governance. Hopefully, this has been achieved, at least to some extent. At best, this approach will allow for locating and connecting the many different ideas about emerging or changing forms of environmental governance beyond the Westphalian state- or inter-state centred paradigm. This includes other approaches to transnational environmental governance as well as emerging concepts such as global environmental law, environmental constitutionalism, or comparative environmental law.[101] Highlighting the differences between traditional and formal modes of environmental governance on one side and new or changing forms on the other will also hopefully provide a better understanding of the connections existing between them.

Such a comparison and classification of the different forms of transnational environmental governance should not just be regarded as a purely academic excersise: it shall also help to acquire a more reflective view on the risks and chances of these new governance modes to achieve environmental objectives worldwide.

Formatiert: Schriftart: 12 Pt.

[101] For a broader understanding of transnational environmental law, see, for example, Claudio Franzius, 'Das Paris-Abkommen zum Klimaschutz – Auf dem Weg zum transnationalen Klimaschutzrecht?' [2017] Zeitschrift für Umweltrecht 515. Regarding environmental constitutionalism see, for example, Klaus Bosselmann, 'Global Environmental Constitutionalism' (2014) 12 R. Opin. Jur., Fortaleza 372; see also Louis J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart Publishing, Oxford 2016); also Louis J. Kotzé 'Arguing Global Environmental Constitutionalism' (2012) 1 TEL 199. Regarding global environmental law see, for example, T. Yang, R.V. Percival, 'The Emergence of Global Environmental Law, Ecology Law Quaterly' (2009) 36 Ecology L.Q. 615; see also Ellen Hey, 'Global Environmental Law and Global Institutions: A System Lacking „Good Process"' in R. Pierik and W. Werner (eds.), *Cosmopolitanism in Context: Perspectives from International Law and Political* Theory, (Cambridge University Press 2010) 45. Regarding comparative environmental law see particularly the contributions in Jorge Viñuales / Emma Lees (eds.) *Oxford Handbook on Comparative Environmental Law* (Oxford University Press 2019).

Formatiert: Rechts: 0,63 cm