1. The meanings of transnational environmental law

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1 INTRODUCTION

Human pressures on the environment increase continuously and thresholds critical to the stability of the life-support functions of the planet have been, or are on the verge of being, exceeded.¹ In this context, environmental lawyers have started to reflect on how inadequate legal systems have contributed to global environmental crises while, at the same, nurturing the hope that new legal forms will provide solutions to the sustainability challenges we are facing. As a relatively new field of law, environmental law is still maturing, which means that it remains faced with significant methodological questions and is prone to existential anxieties.² In addition to trying to make sense of itself as an established yet still somewhat fluid legal discipline, environmental law must operate in a context of significant legal transformation arising from the need to respond to an increasingly complex society, which brings about significant intellectual as well as practical challenges for the legal field. Certainly, the nature of environmental challenges profoundly disturbs existing legal institutions.³ As a result, the traditional foundations of ‘law’ have found themselves challenged by new modes and structures of governance, acting in synergy, but also sometimes in opposition, with existing structures.⁴ The relativization of boundaries has led to the emergence of a variety of theoretical frameworks seeking to explain these phenomena.⁵

Amongst them, transnational law has developed into a discipline which offers a theoretical framework able to identify and explain the normative complexities arising from intensifying cross-border activities. Such promise has attracted a number of scholars and educators, eager to better understand processes that their own field of enquiry – ranging from commercial law

¹ United Nations Environment Programme, *Global Environmental Outlook 6: Summary for Policy-Makers* (Cambridge University Press 2019).

² E. Fisher, B. Lange, E. Scotford and C. Carlarne, ‘Maturity and Methodology: Starting a Debate about Environmental Law Scholarship’ (2009) 21 *Journal of Environmental Law* 213, 228–31; A. Philippopoulos-Mihalopoulos and V. Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Edward Elgar 2017); O. Pedersen, *Perspectives on Environmental Law Scholarship: Essays on Purpose, Shape and Direction* (Cambridge University Press 2018).

³ Illustrated in the context of climate change by, e.g., E. Fisher, E. Scotford and E. Barritt, ‘The Legally Disruptive Nature of Climate Change’ (2017) 80(2) *Modern Law Review* 173; and D. Kysar, ‘What Climate Change Can Do about Tort Law’ (2011) 41(1) *Environmental Law* 1.

⁴ R. Lee and E. Stokes, ‘Environmental Governance: Reconnecting the Global and Local’ (2009) 36(1) *Journal of Law and Society* 1.

⁵ E.g., E. Melissaris, *Ubiquitous Law* (Routledge 2009); J. Pauwelyn, R. Wessel and J. Wouters, *Informal International Lawmaking* (Oxford University Press 2012); V. Heyvaert, ‘The Transnationalization of Law: Rethinking Law through Transnational Environmental Regulation’ (2017) 6 *Transnational Environmental Law* 205.

to public international law – failed to fully account for.⁶ The governance of environmental impacts is no exception: transnational means of regulation fill a gap left by conventional modes of governance by acknowledging multilevel and multi-actor responses, recognizing the value of alternatives to ‘hard law’ and encouraging regime-crossing solutions.

As the promise of transnational law has started to attract wider scholarly attention, its foundational core has diversified considerably, with varying assumptions regarding the meaning of the field underpinning the work of transnational legal scholars. As a result, transnational law is faced with conceptual challenges relative to its definition and scope. First, transnational law is not the only field of scholarly enquiry that seeks to explain similar phenomena. Among others, theories such as global law,⁷ world law,⁸ law and globalization,⁹ or legal pluralism¹⁰ have developed parallel research agendas. The presence of alternative, partially competitive framings serves transnational environmental law as a source of inspiration and ongoing introspection, as well as a trigger for the occasional bout of self-doubt. Secondly, definitions given to transnational law vary from broad to narrow, ranging from any type of trans-border legal relations¹¹ to a more restricted understanding, which qualifies as transnational law only those normative communications which are expressed and enforced by actors other than the state.¹² As a result, how transnational law interacts with other traditional bodies of law, such as international or comparative law, remains debated. Thirdly and relatedly, legal transnationalism challenges the classical dichotomy between law and non-law and hence is often described in various terms to reflect its complex relation to normativity, including ‘law’, but also ‘regulation’,¹³ ‘governance’,¹⁴ ‘process’¹⁵ or ‘legal order’.¹⁶ Whether these different denominations reflect a different reality, or understanding, of legal relations, also remains an unsettled question.

The environmental sphere is not alien to the conceptual uncertainties present in the field of transnational law. While transnational environmental law has certainly consolidated in recent years, scholars tend to rely on different understandings about the meaning, and characteristics, of transnationalism in environmental law. This chapter maps these meanings into three broad

⁶ P. Zumbansen, ‘Transnational Law’ in J. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Edward Elgar 2006) 738.

⁷ See e.g., R. Domingo, *The New Global Law* (Cambridge University Press 2010); G. Ziccardi Capaldo, *The Pillars of Global Law* (Routledge 2016).

⁸ H. Berman, ‘World Law’ (1995) 18 *Fordham International Law Journal* 1617.

⁹ P. Schiff Berman, ‘From International Law to Law and Globalization’ (2005) 43 *Columbia Journal of Transnational Law* 485.

¹⁰ See e.g., F.G. Snyder, ‘Governing Economic Globalization: Global Legal Pluralism and European Law’ (1999) 5 *European Law Journal* 334; P. Schiff Berman, ‘Global Legal Pluralism’ (2007) 80 *Southern California Law Review* 1155; R. Michaels, ‘Global Legal Pluralism’ (2009) 5 *Annual Review of Law and Social Sciences* 243.

¹¹ P. Jessup, *Transnational Law* (Yale University Press 1956); H. Koh, ‘Transnational Legal Process’ (1996) 75 *Nebraska Law Review* 181; G. Shaffer and C. Coye, ‘From International Law to Jessup’s Transnational Law, from Transnational Law to Transnational Legal Orders’ UC Irvine School of Law Research Paper No. 2017-02. Available at SSRN, <https://ssrn.com/abstract=2895159>.

¹² Such as, for instance, focusing only on the role of non-state actors in legal relations.

¹³ Heyvaert (n 5).

¹⁴ N. Rajkovic, ‘“Global Law” and Governmentality: Reconceptualizing the “Rule of Law” as Rule “through” Law’ (2010) 18 *European Journal of International Relations* 29.

¹⁵ Koh (n 11).

¹⁶ T. Halliday and G. Shaffer, *Transnational Legal Orders* (Cambridge University Press 2015).

categories, as discourse, methodology, and field of practice. The reasons why the study of environmental law, specifically, often attracts a transnational perspective are then presented. On this basis, the chapter culminates in a mapping of transnational environmental legal scholarship with the view to explaining the scope and structure of the *Handbook*. A brief synthesis of each contribution concludes the piece.

2 ITERATIONS OF TRANSNATIONAL LAW: AS DISCOURSE, METHODOLOGY, AND FIELD OF PRACTICE

Transnational law is the expression of a desire to challenge and transcend the mainstream organization of law, which imposes a rigid, binary division of law into either national law or international law. The organization into national and international law is implicitly accepted in the discipline of law and deeply influences, even determines, every aspect of legal education, scholarship and practice. It should be remembered, however, that this near-axiomatic representation of law as divided into two exhaustive and mutually exclusive domains is overwhelmingly a product of the past two centuries. It was not nearly as dominant in the pre-Enlightenment era, during which lawyers more readily engaged with thriving bodies of, for instance, canon law and customary commercial law (*lex mercatoria*), neither of which was jurisdictionally organized with reference to statehood and geographical borders.¹⁷ Transnational law, therefore, while reaching for the post-national, equally taps into much older experiences and traditions of law.

Yet, although the organization of law into a national and an international sphere may be less immutable than its present-day ubiquity suggests, the fact remains that it is dominant in today's legal order. As such, it channels legal academic inquiry inexorably towards the state as the primary source of law and as the ultimate arbiter of what constitutes the public and the private sphere in law. Arguably, if at first glance counter-intuitively, the prevalence of mainstream conceptualizations of law into the binary and jointly exhaustive zones of 'national' and 'international' law is nowhere better exemplified than in the concept of 'European Union law'. EU law cannot be adequately qualified as either national or international law, yet other than the occasional reference to 'regional law', a term which has never really caught on in any significant way, we lack even the vocabulary to categorize legal regimes that do not conform to either the national or international model. Hence, EU law typically remains just that, EU law, a *sui generis* oddity to be circumnavigated in an otherwise dualistic legal landscape.

In the term 'transnational law' resonates both a concern for and a protest against this exclusionary mapping of state (or national) and international law. Transnational law draws attention to the extent to which this binary framing suppresses the relevance of decentred normative practices and processes, and of non-state actors, in the production and consolidation of law. This is the case regardless of whether we adopt a broad, Jessupian definition of transnational law as 'all law which regulates actions or events that transcend national frontiers',¹⁸ or define

¹⁷ A.C. Cutler, *Private Power and Global Authority. Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003); C. Reid Jr and J. Witte Jr, 'In the Steps of Gratian: Writing the History of Canon Law in the 1990s' (1999) 48 *Emory Law Journal* 647, 650.

¹⁸ Jessup (n 11).

transnational law more narrowly as law authored by non-state authorities and unconstrained by jurisdictional boundaries.¹⁹

From this vantage point, transnational law presents itself in the first place as a **discourse**. It communicates an alternative conceptualization of law, which focuses less on form and is less beholden to the institutional trappings of law than the binary, national/international law model. Instead, attention is shifted towards the more dynamic aspects of law: its construction, its functions, and its impact. Its departure from formalism is both a source of liberation and of existential challenge. As a discourse, transnational law at the very least needs to be able to explain its preoccupation with the dynamic, transformative aspects of lawmaking and implementation. Moreover, whenever transnational law involves the identification of a body of ‘non-traditional’ norms as constitutive of law, this opens the discourse to the formidable challenge of finding an alternative way of being; of generating and justifying the validity of different benchmarks, criteria or procedures that enable the identification of law and draw new boundaries between what is law and what is not. As a result, the identification of the transnational is not merely a descriptive act, but also a prescriptive one.²⁰ The transnational perspective thus constitutes a provocative challenge to theorizing law.²¹ In particular, it is often looked to as an answer, or an alternative, to the absence of ‘hard’ rules and command-and-control mechanisms in transboundary relations, filling in an ever-more prominent legal accountability gap.

For others, the distinctiveness of transnational law lies not so much in its discursive contribution as in its potential for methodological innovation. Transnational law as **methodology** denotes a field of study and practice that seeks to understand law – whether non-traditional or in all its state-rooted, binary glory – by tracing, untangling and analysing the complex, multipartite, and transboundary exchanges that result in the establishment of new legal norms and the disappearance of others.²² Transnational law as methodology, too, is in part a response to frustration with mainstream understandings of law. In particular, it challenges the widespread practice among legal professionals and scholars of taking the ‘law on the books’ as the starting point for analysis and critique. Instead, transnational law as methodology envisages law within its societal context and emphasizes that the diachronic and transformational process during which a norm becomes law is far more distinctive of law as a discipline than the particular content of the end product. Correspondingly, the challenges of transnational law as methodology in the first place relate to the development of reliable process-tracing strategies, which must be capable of tackling the difficult task of distinguishing causation from correlation and which must deliver an analytical toolkit that enables researchers to identify key transitioning points on the pathway to law. Importantly, this requires the acquisition of methodological skills beyond those that are part of the ‘standard set’ of practices and protocols imparted during legal education and training. In particular, it fuels a demand for empirical and quantitative skills which are more widespread among researchers working in other fields of the social sciences, such as political science and social policy, but may strike fear – or at least spark a twinge of nervousness – among the generally more data processing-averse ranks of legal scholars. At the

¹⁹ R. Cotterrell, ‘What Is Transnational Law’ (2012) 37 *Law & Social Inquiry* 500.

²⁰ E. Fisher, ‘The Rise of Transnational Environmental Law and the Expertise of Environmental Lawyers’ (2012) 1 *Transnational Environmental Law* 43, 47.

²¹ Zumbansen (n 6) 739.

²² P. Zumbansen, ‘Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism’ (2012) 21(2) *Transnational Law and Contemporary Problems* 305.

same time, this growing need for an expanded methodological toolkit underlines the vital role of interdisciplinary communication for the maturation of transnational law. By the same token, the focus on lawmaking as a process, rather than an exclusive engagement with the legal norm as a *fait accompli*, demands a heightened versatility of legal researchers, who should be able to shift easily between different levels of governance as well as different stages of lawmaking, interpretation, application, contestation and reform.

Finally, transnational law may assume a more substantive guise and be taken to refer to a distinctive field of practice; a discrete set of norms that govern transnational spheres of interaction. In this third iteration, the transnational character of law is primarily associated with the transcendental capacity of norms – however state-based and localized in origin – which generates new, transnational variants of legal standards and principles. Transnational law as **a field of practice** builds on transnational discourse and methodology since, rather than focusing on those transboundary provisions that are the product of international negotiation and treaty making, it centres attention on those laws and legal interpretations that are the product of informal influence and exchange. As legislative, judicial and administrative communication courses through transnational governance networks, from the Organisation for Economic Co-operation and Development (OECD) to the European Union Forum of Judges for the Environment (EUFJE),²³ opportunities multiply to develop and consolidate a shared understanding of law, which projects its influence back to both the state and the international level. A key challenge for transnational law as substance involves managing the risk of researcher bias in the distillation of such shared, transcendental and therefore transnational understandings of law. Moreover, if there exists a substantive body of transnational law, then the difficult, politically combustible question of its relation to national and international law must be addressed: what kind of status, what collection of immunities and vulnerabilities, should the ‘transnational’ label convey? This is particularly difficult given that, contrary to the claims other legal orders tend to make for themselves, transnational law does not present as a unitary system but rather as an amalgam of norms, processes and actors with normative effects. It also has to ask the question whether it constitutes a legal order or a body of law and reflect on the differences that it could make.

3 BRINGING IN THE ENVIRONMENT

Whether represented primarily as a discourse, a methodology, or a field of practice, transnational law cuts across legal disciplines, from commercial arbitration to disability law.²⁴ However, as the discipline matures, it has become apparent that the domain of environmental law lends itself particularly well to transnational inquiries and delivers a fertile basis for the further development of transnational legal theory. Conversely, transnational discourse

²³ See Chapter 5 by T. Markus and O. Dilling and Chapter 18 by G. Ganguly in this book.

²⁴ See, e.g., P. Zumbansen, ‘Piercing the Legal Veil: Commercial Arbitration and Transnational Law’ (2002) 8 *European Law Journal* 400; K. Soldatic and S. Grech, ‘Transnationalising Disability Studies: Rights, Justice and Impairment’ (2014) 34 *Disability Studies Quarterly*, DOI: doi:10.18061/dsq.v34i2.4249; S. Bisom-Rapp, ‘Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite’ (2004) 25 *Comparative Labor Law and Policy Journal* 257.

and methodologies, as well as the availability of an emerging body of transnational norms and principles, constitute exceptionally powerful lenses through which to study and access a deeper understanding of the relationship between law and environmental protection.

The affinity between environmental law and transnational law can be explained by a range of factors. Most obviously, the subject matter of environmental law is as inconsiderate of jurisdictional boundaries as transnational law itself. Greenhouse gas emissions in China, the United States and Peru contribute to rising sea levels in Vanuatu; persistent organic pollutants in pesticide residues deposited on African soil wash up on Arctic shores; decades of sulphur and nitrogen emissions from the United Kingdom, Germany, Poland and the North Sea have caused acidification and reduced water quality in Norway, and every day the Yangtze, Indus and Nile rivers transport countless tons of discarded plastics towards the world's oceans. In the light of the transboundary scope of the most pressing environmental risks for which legal and regulatory responses are sought, the state does not present itself as the best-suited medium through which to forge appropriate solutions. As a result, conventional legal framings, constructed on the premise of statehood and based on a domestic–international divide, find themselves ill at ease to explain and regulate phenomena that operate irrespective of borders, leaving space for other scholarly approaches such as transnational law.²⁵

A second point of affinity between environmental and transnational law is that neither is comfortably categorized as a branch of either public or private law. Without calling into question its by now uncontested standing as a distinctive legal discipline, it is well known that the origins of environmental law can be traced back to a variety of public and private legal fields, including but not limited to administrative law, torts, constitutional, and criminal law. Transnational law, too, straddles the public/private divide. Indeed, as argued in greater detail elsewhere, the adoption of a transnational perspective challenges the continued relevance of the public/private distinction as an organizational model.²⁶

Finally, although it manifests in different ways, both fields could be considered united by a concern about the responsiveness of law to social change. Within the context of both transnational and environmental law, pressing questions are being raised about law's ability to understand and engage with a simultaneously globalizing and fragmenting life world, which ability arguably constitutes a vital prerequisite for its potential to effectuate change.²⁷ The mounting expectations for law to serve as an engine for social change,²⁸ as opposed to a stabilizer of interpersonal exchanges and power relations, are well documented in the environmental legal literature and, particularly, the climate change literature of the past few decades.²⁹ The desperate need for more effective responses to the environmental calamities that threaten the well-being and even the survival of present and future generations, coupled with the evident

²⁵ But also including, for instance, 'global law'. See e.g., R. Percival, 'Global Law and the Environment' (2011) 86 *Washington Law Review* 579.

²⁶ V. Heyvaert, *Transnational Environmental Regulation and Governance. Purpose, Strategies and Principles* (Cambridge University Press 2019) 182–214.

²⁷ See A. Kotsakis, 'Change and Subjectivity in International Environmental Law: The Micro-Politics of the Transformation of Biodiversity into Genetic Gold' (2014) 3 *Transnational Environmental Law* 127.

²⁸ P. Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism' (2012) 21(2) *Transnational Law and Contemporary Problems* 305, 306.

²⁹ See V. Heyvaert, 'Governing Climate Change: Towards a New Paradigm for Risk Regulation' (2011) 47 *Modern Law Review* 817.

failure of over half a century of domestic and international environmental law to prevent them, fuel a search for alternative approaches to law which might at least create a possibility of delivering better environmental outcomes. Transnational approaches are at the forefront of this development. Their contribution is likely to become increasingly important to fill the gap left when governments disengage with environmental protection objectives (both domestically and internationally),³⁰ leaving space for non-state actors to step in as subsidiary regulators.

The factors discussed underline the depth of the connection between environmental law and transnational law in terms of their shared transboundary perspective, their hybrid status as neither assuredly a public nor private legal domain, and their shared preoccupation with law as a dynamic rather than a stabilizing social force. Yet significant questions remain regarding the relationship that transnational environmental law entertains with transnational law. Is transnational environmental law to be regarded as a sub-discipline of transnational law, in which case its meanings could be derived directly from those given to transnational law? Or does the specificity of transnational environmental law render such a transposition difficult or undesirable?³¹ Alternatively, transnational environmental law could be cast as a sub-discipline of environmental law, which would result in a different ordering of research questions for the field.³² Overall, these dilemmas appear as new editions of familiar conceptual difficulties running through the environmental law discipline, which relate to an abiding preoccupation with its relative autonomy and relation to other fields of law.³³

4 MAPPING THE FIELD OF TRANSNATIONAL ENVIRONMENTAL LAW

The aim of this *Research Handbook* is to deliver an informed account of the fast-developing field of study and practice at the intersection of transnational and environmental law. As a scholarly discipline, transnational environmental law is a burgeoning enterprise, as attested by the veritable explosion of literature on the subject. This is most prominently reflected in the 2012 launch of *Transnational Environmental Law (TEL)*, a journal dedicated explicitly to the study of the transnational dimension of environmental law and governance.³⁴ In the past eight years, *TEL* has seen its reach expand significantly, publishing scholarship from across the globe and increasing its distribution from two to three issues per year. Obviously, transnational environmental legal scholarship is not confined within the covers of *TEL* itself, as other key environmental law outlets including the *Journal of Environmental Law*, *RECIEL*, the *Asia Pacific Journal of Environmental Law*, leading US environmental law reviews, *McGill*

³⁰ T. Etty, V. Heyvaert and others, 'Transnational Environmental Law on the Threshold of the Trump Era' (2017) 6(1) *Transnational Environmental Law* 1; T. Etty, V. Heyvaert and others, 'New Challenges for Transnational Environmental Law: Brexit and Beyond' (2018) 7(1) *Transnational Environmental Law* 1.

³¹ See Fisher (n 21), who considers *TEL* as distinct from transnational law in other legal areas, in particular in relation to the expertise it requires from scholars.

³² *Ibid* 52.

³³ T. Aagaard, 'Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy' (2010) 95 *Cornell Law Review* 221.

³⁴ Both editors of this Handbook are affiliated with *TEL* as, respectively, Editor-in-Chief and Assistant Editor.

International Journal of Sustainable Development Law and Policy and generalist law journals also publish a healthy flow of contributions with a distinctly transnational environmental perspective.³⁵ This body of work is complemented by an impressive stream of monographs and edited volumes on transnational environmental legal subjects, as documented in the (now annual) 'Highlights of Recent Book Publications' in the back pages of *TEL*.

It is inevitably challenging to distil dominant themes from a rapidly growing body of work in a discipline that is still finding its voice, but certain features have already become apparent. The most obvious point to make is that transnational environmental law is a broad church under the auspices of which a collection of research interests and strategies converge. Some publications present the transnational dimension of their work as primarily reflected in a commitment to deepen and expand international and comparative environmental legal inquiries beyond conventional boundaries. This may involve, for example, shifting the focus of attention from the formally binding provisions of international environmental law towards the teeming mass of institutional arrangements and informal rules which anchor, interpret, extend, moderate or modify the typically brief and opaque official legal provisions.³⁶ Alternatively, the transnational perspective may refer to an interest in the impact of international environmental agreements not within but beyond the jurisdictions of the signatory states, as non-member states deploy them as models, reference points against which to measure or assert the legitimacy of domestic legal initiatives.³⁷ Other transnational studies display a similar preoccupation with the informal transboundary influence of law, but are chiefly interested in analysing and understanding this dynamic in a judicial setting and examine whether and to what extent courts in environmental disputes take their cue from novel argumentation attempted or validated in foreign judgments.³⁸

In addition to the many and varied inquiries into the informal transboundary reach of environmental law, a vibrant body of work engages with transnational environmental law in its guise of an alternative to primarily international (but also regional and even national) environmental law. This line of scholarship displays a pronounced interest in the contribution of non-state actors to environmental law, a contribution that goes beyond facilitation and is instead constitutive in nature. Works in this vein include investigations into the expanding universe of private and hybrid environmental regulation,³⁹ as well as the promulgation by

³⁵ To give a handful of examples, see N. Affolder, 'Transnational Conservation Contracts' (2012) 25 *Leiden Journal of International Law* 443; Y. Naiki, 'Trade and Bioenergy: Explaining and Assessing the Regime Complex for Sustainable Bioenergy' (2016) 27(1) *European Journal of International Law* 129; O. Dilling and T. Markus, 'The Transnationalisation of Environmental Law' (2018) 30 *Journal of Environmental Law* 179; D. Matthews, 'From Global to Anthropocenic Assemblages: Re-Thinking Territory, Authority and Rights in the New Climatic Regime' (2019) 82 *Modern Law Review* 665.

³⁶ E.g., M.E. Recio, 'Transnational REDD+ Rule Making: The Regulatory Landscape for REDD+ Implementation in Latin America' (2018) 7(2) *Transnational Environmental Law* 277.

³⁷ E.g., U. Etemire, 'Public Access to Environmental Information: A Comparative Analysis of Nigerian Legislation with International Best Practice' (2014) 3 *Transnational Environmental Law* 148; S. Whittaker, 'The Right of Access to Environmental Information and Legal Transplant Theory: Lessons from London and Beijing' (2017) 6 *Transnational Environmental Law* 509.

³⁸ E.g., A.-J. Saiger, 'Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach' (2020) 9 *Transnational Environmental Law* 37.

³⁹ J. Green, *Rethinking Private Authority. Agents and Entrepreneurs in Global Environmental Governance* (Princeton University Press 2014); Heyvaert (n 26) 37–49; E. Meidinger, 'Beyond

non-state actors of global environmental principles,⁴⁰ and into the deployment of alternative legal structures, such as transnational contracts, to bypass the machinery of international law.⁴¹ Others yet associate the transnational dimension of their work with a research strategy that seeks to both discover synergies and problematize gaps and inconsistencies between different environmental legal regimes, or between environmental law and other legal disciplines with a pronounced transboundary dimension, such as trade, investment, competition and IT law.⁴²

This brief discussion offers but a glimpse of the abundance and variety of writing on transnational environmental law. For the purpose of organization, however, it is important to devise categories that are at the same time sufficiently flexible to welcome the richness of the literature, and sufficiently instructive to generate a sense of coherence between different inquiries and, importantly, a solid indication of the boundaries of transnational environmental law. To this end, this *Research Handbook* organizes the field into five broad categories of inquiries. The first consists of general theoretical and methodological discussions, which contribute towards the articulation of a philosophy, a mature research agenda and an analytical toolkit for transnational environmental law. The second category groups together works that focus on the emergence and evolution of transnational environmental governance and its impact on environmental law. Part III examines distinctive mechanisms and consequences of the transnationalization of environmental governance. Fourth are studies that focus on the role of non-state actors in environmental lawmaking, and a fifth category groups together those inquiries that are interested in regime-crossing phenomena, including both jurisdictional and disciplinary crossings.

Alternative modes of organization are possible, but in our view the five categories proposed in this *Handbook* offer readers a helpful, sufficiently differentiated yet parsimonious map to the field. As an added benefit, it is possible to discern a decent degree of correlation between the organization of the *Handbook* and the three accounts of transnational law as discourse, methodology and field of practice. Environmental governance studies tend to understand transnationalization of environmental law as a process of problematization, contestation and reconceptualization of legal conventions.⁴³ Many of the questions that propel governance

Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems' in C. Brüttsch and D. Lehmkuhl (eds), *Law and Legalization in Transnational Relations* (Routledge 2007) 121.

⁴⁰ E.g., D. Ong, 'From "International" to "Transnational" Environmental Law? A Legal Assessment of the Contribution of the "Equator Principles" to International Environmental Law' (2010) 79 *Nordic Journal of International Law* 35; J. Spier, 'The Principles on Climate Obligations of Enterprises: An Attempt to Give Teeth to the Universally Adopted View that We Must Keep Global Warming Below an Increase of Two Degrees Celsius' (2018) 23 *Uniform Law Review* 318.

⁴¹ B. Cashore, 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority' (2002) 15 *Governance* 503; N. Affolder, 'Looking for Law in Unusual Places: Cross-Border Diffusion of Environmental Norms' (2018) 7 *Transnational Environmental Law* 425.

⁴² E.g., I. Offor, 'Animals and the Impact of Trade Law and Policy: A Global Animal Law Question' (2020) 9(2) *Transnational Environmental Law* 239; K. Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 *Transnational Environmental Law* 229; L. Rubini and I. Jegou, 'Who'll Stop the Rain? Allocating Emissions Allowances for Free: Environmental Policy, Economics, and WTO Subsidy Law' (2012) 1 *Transnational Environmental Law* 325; C. Lajaunie, B. Schafer and P. Mazzega, 'Big Data Enters Environmental Law' (2019) 8 *Transnational Environmental Law* 523.

⁴³ Heyvaert (n 5).

studies are essentialist in nature, seeking to determine the key attributes and consequences of contemporary environmental regulation, reflecting on the conditions and discursive significance of labelling measures as legal or part of 'soft law', and on the legitimacy of transnational governance institutions. Investigations that focus on the role of non-state actors, in turn, tend to have an interactionist framing in that attention is directed towards the provisions and processes that enable, shape and curtail their engagement with environmental law. This shows affinity with the representation of transnationalization as the process of embedding non-state environmental norms within national or international law, which is reflective of the methodological take on transnational law. As to the fifth and final category, the very notion of regime-crossing is predicated on the identification of converging or shared understandings of environmental rules and standards. We have indications that a norm has traversed a boundary precisely because of its materialization elsewhere. Studies in regime-crossing therefore direct the attention towards transnationalization as the transformation of normative content and the establishment of new fields of practice. In sum, this *Research Handbook* seeks to display a variety of perspectives on transnational environmental law while, at the same time, providing a conceptual map.

5 OVERVIEW OF CONTRIBUTIONS

Following on from this introduction, Part I of the *Research Handbook* offers contributions that aim to explain and fortify attempts to theorize transnational environmental law. It comprises three chapters written by, respectively, Kati Kulovesi; Natasha Affolder; and Elisa Morgera, Louisa Parks and Mika Schroeder.

In 'Exploring transnational legal orders: using transnational environmental law to strengthen the global regulation of black carbon for the benefit of the Arctic region', Kati Kulovesi introduces the theme of regime and jurisdictional complexity, which arguably constitutes the seminal research challenge of transnational environmental law as a field of legal scholarship. She illustrates this by means of a practical example in the field of pollution control law, namely, the regulation of short-lived climate pollutants. The idea of mitigating black carbon emissions to reduce Arctic warming has been subjected to growing policy attention in recent years. Kulovesi's chapter analyses opportunities to strengthen the global regulation of black carbon for the benefit of the Arctic region. In doing so, it draws on the growing body of literature on transnational environmental law and explores the benefits of using transnational environmental law as an analytical framework instead of the more traditional and narrow focus on formal international law. Based on this, the chapter argues that the transnational environmental law perspective reveals a much more active regulatory landscape, and leads to a more nuanced understanding of the opportunities to control global black carbon emissions affecting the Arctic.

Natasha Affolder's chapter, in turn, tackles the major task confronted by transnational environmental law as a legal discipline of developing productive research agendas in a context of pronounced uncertainty. In 'An unknown past, an unequal present, and an uncertain future: transnational environmental law through three research challenges', Affolder seeks to bring into focus three broad research challenges facing transnational environmental law – the eponymous unknown past, unequal present, and uncertain future. Transnational law theory invites scholars to stand at a distance from current orthodoxies and to contemplate environmental law

and its practice from new vantage points. The study of transnational environmental law thus prompts new ways of thinking about where to look for environmental law and its foundational influences. New research agendas emerge organically from such shifts of gaze. Affolder asserts that, by identifying future research agendas, we can illuminate both the diversity of sites of past and present lawmaking and the plurality of ideas that shape concepts of the ‘environment’ and ‘environmentalisms’. These new imaginative spaces are central to understanding law’s roles in a global context – the roads taken and so far not taken.

The concluding instalment of Part I focuses on the ‘Methodological challenges of transnational environmental law’. Elisa Morgera, Louisa Parks and Mika Schroeder’s chapter discusses the growing need for law students and researchers to acquire specific skills to understand complex and increasingly prominent transnational phenomena in environmental law. They focus on three inter-related methodological challenges. One is the use and further development of comparative legal methods for the study of transnational environmental law. The second is the reliance on empirical legal research for the study of transnational environmental law. The chapter assesses progress in empirical environmental legal research and the degree to which it engages with transnational issues, and transnational environmental issues specifically. The final challenge is effectively conducting collaborative and interdisciplinary work. Discussion on this issue includes questions around research ethics and funding needed to advance collaborative and inter- and transdisciplinary research on transnational environmental law. In conclusion, Morgera, Parks and Schroeder identify questions for further research and key issues to be addressed through embedded peer learning and peer review in postgraduate education and in collaborations between researchers and other stakeholders.

Part II of the *Research Handbook* shines a light on the manifold legal questions and challenges that arise in the wake of the proliferation of transnational environmental governance. Contributions in this part of the book, by Till Markus and Olaf Dilling; Jerneja Penca; Aleksandra Čavoški; Suzanne Kingston; and Josephine van Zeben, respectively, tackle core themes of regulation and governance studies, ranging from the identification and categorization of transnational environmental governance regimes, to regulatory instrument choice, compliance, and the legality and legitimacy of transnational environmental governance.

Chapter 5, “‘Interglobalsuprasubandtransialidocious’: mapping and disentangling transnational environmental governance” by Till Markus and Olaf Dilling, is designed to help the readers plot their course through the varied, ever-expanding and often confusing thicket of environmental regulatory and governance regimes. It provides a broad typology and a corresponding diagram of existing and emerging transnational governance phenomena, which are then explored in greater detail. The article 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.

Jerneja Penca’s contribution on ‘Regulatory instruments of transnational environmental governance’ continues the examination of the essential characteristics of transnational environmental governance through a review of the variety of governance instruments, methods and tools. In Chapter 6, Penca discusses the research on transnational environmental regulatory instrumentalization, presenting both traditional attempts by scholars to classify regulatory instruments and more recent approaches that have replaced binary divisions. The chapter argues for the need to examine individual instruments in the broader context of polycentric environmental regimes as well as governance structures and processes. According to Penca, an

awareness of the values and concerns about social justice, which underpin various regulatory attempts, is just as integral to the study of transnational environmental regulation as is the focus on compliance, enforcement and effectiveness aspects.

Compliance, enforcement and effectiveness are, precisely, the key themes addressed in ‘Transnational environmental regulation and evolving approaches to compliance’. In Chapter 7, Aleksandra Čavoški documents an evolution in both thinking about and the practice of transnational environmental regulatory enforcement, from traditional enforcement approaches in transnational environmental law to a more effective use of management strategies to bolster compliance. To that end, Čavoški examines the deployment of these strategies in highly institutionalized legal orders as well as in looser transnational networks. This chapter further argues that management-based approaches to compliance are strengthened when we adopt an action-oriented understanding of compliance.

In Chapter 8, Suzanne Kingston turns her attention to the reception of transnational environmental governance within the judiciary. ‘Transnational environmental governance before the courts’ examines how international and transnational judicial bodies have sought to meet the challenges arising from operating in and needing to respond to a non-traditional regulatory context. Kingston does so by means of a three-pronged focus on courts and private norm creation; courts and private enforcement of environmental law; and courts and transnational diffusion of sources. She concludes that, while others have argued that transnationalization puts the role of courts in jeopardy, the judiciary generates significant added value as a transnational environmental actor in its own right. Public adjudication remains key as an impetus for broader societal transformation and debate.

Whereas Chapter 8 concentrates primarily on the judicial construction of the legality of transnational environmental governance, Josephine van Zeven’s contribution engages with the question of legitimacy of transnational environmental governance, for which legality serves as a fundamental – yet not exclusive – benchmark. In ‘Facing the legitimacy challenge: law as a disciplining force for transnational environmental governance’, van Zeven reminds us that transnational environmental governance has developed in part as a response to the perceived lack of legitimacy of existing national and international regulatory systems. As the geographical scope of environmental impacts seldom overlaps with jurisdictional boundaries, non-state actors have increasingly created systems of governance that exist in parallel with the state-based forms of organization. This has created increased opportunity for voice and participation but also raises questions of legitimacy. Chapter 9 considers the role of law as a vehicle for legitimacy in transnational environmental governance, both in its own right and in relation to other sources of legitimacy. Particular attention is paid to the increasingly polycentric nature of transnational environmental governance and how this interacts with established understandings of the role of law in governance systems.

Part III of the *Research Handbook* moves the discussion forward by examining distinctive mechanisms and consequences of the transnationalization of environmental governance, namely: environmental constitutionalization, discussed by Louis Kotzé; the multiplication of environmental regime interlinkages, explored by Jonathan Verschuuren; and the scope for the emergence and maturing of transnational, or even global, environmental legal values, analysed by Emily Barritt.

Part III starts off with Louis Kotzé’s chapter on ‘The transnationalization of environmental constitutionalism’. After reminding the reader of the considerable potential of environmental protection through its constitutional incorporation, Kotzé presents environmental constitution-

alization as a process with an inherently transnational, rather than a purely domestic, dimension. Chapter 10 interrogates the transnationalization of environmental constitutionalism by exploring the notion of constitutional environmental protection; identifying the context and processes that give rise to the transnationalization of environmental constitutionalism; and reflecting on some of the manifestations of transnational environmental constitutionalism.

In Chapter 11, Jonathan Verschuuren examines one of the inevitable consequences of the expansion of transnational environmental governance, namely, the opportunities and rapidly growing need for regime interlinkages. ‘Regime interlinkages: examining the connections between transnational climate change and biodiversity law’ uncovers the complexity of the interactions between these two key areas of transnational environmental policy. Across the globe, biodiversity has been declining at an alarming rate for several decades, mainly due to habitat loss, pollution and alien invasive species. Global climate change adds further significant threats to already vulnerable species of wild flora and fauna. At the same time, biodiversity plays an essential role in climate change mitigation and adaptation. Healthy forests and other forms of vegetation, soils and oceans are indispensable in any climate change mitigation policy for their carbon uptake. The crossroads of biodiversity law and climate change law therefore provides an excellent case study to research regime interactions – with a potential for disruptive impacts – and the growing need for transnational legal and regulatory orchestration in an era of globalized and systemic environmental risks. Encouragingly, Verschuuren’s work shows that current climate law and biodiversity law regimes at the international and the EU level are increasingly working together. Progress, however, is terribly slow and there are still areas where neither regime speaks to the other or the regimes are in conflict. Faster and more intense forms of inter-regime collaborations and interactions are needed.

Last but by no means least, Emily Barritt’s contribution takes up the gauntlet thrown by Penca to look beyond questions of compliance and to consider transnational environmental governance as a vehicle for the delivery of environmental and social justice. In Chapter 12, ‘Global values, transnational expression: from Aarhus to Escazú’, Barritt seizes on the adoption of regional agreements on environmental procedural rights as an opportunity to examine the distinctive nature of transnational environmental values, which are characterized simultaneously by appeals to universality as well as pronounced degrees of differentiation. She argues that, even though it reflects key principles of international environmental law (transparency, participation, and democracy), the Aarhus Convention has failed to attract adherents beyond its own regional sphere. Instead, it has provided a theme, for transnational variation, incorporated in the 2018 Escazú Convention. The chapter examines how international values of environmental law find transnational expression in these sibling regional agreements, highlighting and explaining the ways in which these two instruments differ. It also considers the scope for the development of other regional instruments. Finally, Barritt reflects on the ways in which transnational environmental law, as expressed in regional agreements, allows for different legal cultures to elaborate on core values of international environmental law.

Part IV of the *Research Handbook* is dedicated to exploring the contributions of a selection of non-state actors to the development and interpretation of transnational environmental law. Jolene Lin tackles the role of subnational actors in the development of transnational environmental law, focusing particularly on their potential to contribute to climate change law. Lisa Benjamin, in turn, addresses the position of corporate actors in transnational environmental law, a position which is both brimming with potential and beset with challenges for the development of effective legal responses. Finally, Benjamin Richardson casts light on a cohort of

actors which are increasingly prominent in transnational legal and governance proceedings, yet rarely subjected to a sustained analysis, namely, artists.

In ‘The role of subnational actors in transnational climate change law’, Jolene Lin takes the proliferation of activity by cities and other subnational actors in the climate change space as a point of departure to study the growing involvement of subnational entities in transnational environmental lawmaking. Their activities take on a transnational dimension when, for example, subnational governments participate in cross-border networks to develop and implement norms, practices and voluntary standards. Subnational governments have also become involved in litigation. Indeed, some subnational governments pursue litigation to seek progress on climate change action where national governments and businesses are perceived as insufficiently proactive. Chapter 13 explores the role of subnational entities – cities, states, and regions – in developing and implementing transnational climate change law. It advances the argument that the participation of subnational actors in transnational legal processes invites us to re-examine theories of international lawmaking that posit the state as the only legally relevant actor in international affairs.

Chapter 14, ‘The responsibilities of corporations: new directions in environmental litigation’ by Lisa Benjamin, starts with an acknowledgement of the overwhelmingly negative impact corporations traditionally have had on environmental quality, while at the same time recognizing their potential for positive contributions. However, carbon major corporations in particular have been slow to transition, and transnational environmental law has been largely ineffective to date in fixing these entities with legal obligations. Other transnational efforts have also had limited effect. Benjamin argues that litigation can open up avenues for the introduction of functional equivalents to good governance expectations, including human rights-based arguments against multinational enterprises such as carbon major corporations. The investigation by the Commission on Human Rights of the Philippines against 47 carbon majors is taken as an analytical point of departure and it serves as an expository exercise to highlight the damaging role these entities continue to play in the context of climate change. Situated in a developing country which was devastated by Typhoon Haiyan, it highlights the devastating impacts of climate change on the climate vulnerable.

The final chapter in this grouping is ‘Art and activism in transnational environmental governance’ by Benjamin Richardson. He asserts that global environmental governance has important aesthetic dimensions, which tend to be overlooked in our preoccupation with the scientific, economic or ethical dimensions of environmental policy and governance. Yet environmental aesthetics are vital in shaping people’s emotional empathy for nature, and building a ‘sense of place’ or cultural connection to landscapes. The arts can help to mediate how people understand the environment, particularly in light of the changing aesthetics of the Anthropocene. In recent years, artists from many parts of the world have emerged as an important new stakeholder in the green activist space, using visual and performance arts, and music, to critique prevailing environmental practices, such as those associated with the fossil fuels economy, and to use art as means for advocating political and legal changes to respond to these problems. Chapter 15 evaluates the goals, methods and influence of green activist art, such as that used by the Extinction Rebellion movement, in transnational environmental governance.

The fifth part of the *Research Handbook* comprises studies in border-crossing, which focus on transboundary environmental impacts and regime interactions. An Hertogen revisits the tension between state sovereignty and the transboundary reach of both environmental harm and environmental protection in a transnational context. In the following chapter, Sébastien

Jodoin, Ling Chen and Carolina Gueiros explore the concept of flexibility as an alternative framing for transboundary environmental regime interactions. Geetanjali Ganguly explores the scope and potential of transnational judicialization, whereas Robert Percival reflects on the lessons, if any, to be drawn from large-scale transboundary environmental litigation. Finally, Ole Pedersen and Shawkat Alam examine the ever-intensifying interactions between the fields of environmental law and human rights, and environmental law and trade law, respectively.

‘Sovereignty, unilateralism, and the transboundary reach of environmental protection’, by An Hertogen, reminds us that the exercise of jurisdiction beyond the territory of the state is often challenged as unilateralism which infringes upon the sovereignty of other states. However, Hertogen draws our attention to a second, overlooked, version of unilateralism, which occurs when states, acting within their territory, cause environmental harm to other states or to areas beyond states’ jurisdiction. Although such activities raise no issues under traditional understandings of territorial jurisdiction, they can affect how another state exercises its sovereignty. After outlining the tension between sovereignty and unilateralism in the context of the environment, Chapter 16 explores how international law practice and scholarship have tried to overcome this challenge through multilateral initiatives, but also through more nuanced understandings of territorial jurisdiction and sovereignty.

In Chapter 17, Sébastien Jodoin, Ling Chen and Carolina Gueiros focus on flexibility as a potential response to the impasse between sovereignty and the transboundary nature of environmental impacts. ‘Vice or virtue? Flexibility in transnational environmental law’ outlines the origins, concept, and manifestations of flexibility in transnational environmental law, examining the ways in which it has been recognized in multilateral, bilateral, and private forms of transnational environmental governance. Jodoin, Ling and Gueiros show that, on the one hand, flexibility can be seen as a practice that enhances the legitimacy and compliance pull of transnational environmental governance and provides opportunities for forms of experimentation, learning, reflexivity, and adjustment that are necessary for actors to grapple with the complexity, uncertainty, and changing nature of contemporary environmental problems. On the other hand, flexibility can be seen as undermining the predictability, certainty, and binding character of transnational environmental law, engendering the fragmentation of transnational legal norms and practices, generating inefficiencies, and ultimately helping to preserve unsustainable practices and patterns of behaviour. Next, the chapter assesses flexibility in the context of the transnational legal process for REDD+. In doing so, the authors consider the complex interactions between the development and implementation of legal norms and practices across the transnational, national, and local levels as well as between public and private forms of governance and the extent to which they have enhanced or undermined the effectiveness of REDD+.

Geetanjali Ganguly’s contribution on ‘Judicial transnationalization’ shifts the focus from regime interactions in the regulatory sphere towards the judiciary. With the growth of litigation around issues such as climate change in recent years, courts and judges have stepped up their engagement with environmental problems through the formation of transnational judicial networks and alliances, with a view to knowledge sharing and enhanced coordination. Chapter 18 examines judicial exchanges and argues that they contribute to the transnationalization of environmental law and regulation. By considering judicial networking on environmental issues such as water justice and examples of high profile climate litigation from around the world, Ganguly contends that national courts are co-producing a new and emergent body of transnational environmental jurisprudence and soft law. These judicially fostered transdisci-

plinary knowledge practices and the resulting cosmopolitan jurisprudence signify a shift away from a purely statist conception of environmental governance towards the transnationalization of environmental regulation and law writ large in recent years.

Robert Percival's chapter, in turn, highlights a different, and highly problematic, dimension of the relation between environmental litigation and transboundary impacts. 'Transboundary litigation: what can we learn from Chevron–Ecuador?' revisits one of the most challenging and frustrating cases in the history of environmental law. Despite decades of litigation, residents of the Oriente region of Ecuador have been unable to force remediation of, or compensation for, massive pollution from oil development in the 1970s. Chapter 19 tracks the myriad twists and turns of the litigation, which was repeatedly tainted by allegations of bad faith on both sides, and which resulted in a US court blocking enforcement of a Peruvian court award for damages and courts in Argentina, Brazil and Canada holding that Chevron's subsidiaries in their countries are not responsible for the parent corporation's debts. As Percival argues, the lessons from the case are complex but, at the very least, the case illustrates how difficult it is to hold multinational corporations accountable for environmental harm in developing countries.

In Chapter 20, 'Human rights in a changing environment', Ole Pedersen examines the discourse between human rights and environmental law through the prism of case law and jurisprudence from human rights tribunals (primarily the European Court of Human Rights), showing that a strong driver behind the emergence of the human rights and environmental law discourse is the transnationalization of environmental standards. This transnationalization of domestic, supranational and international environmental law standards has, in certain jurisdictions, given rise to the emergence of concrete environmental human rights obligations which in turn translate into specific human rights standards. This emergence, however, raises questions in relation to the expertise of human rights bodies, the tendency for human rights discourse to 'crowd out' other assumptions, and the contested and contingent nature of environmental risks and problems.

In the final chapter of this book, Shawkat Alam addresses the regime interactions between the disciplines of environmental and international trade law. Chapter 21, 'Intersections between climate change and the WTO', departs from the abiding goal within the international community to balance economic growth with sustainable development. The World Trade Organization, the General Agreement on Tariffs and Trade and other multilateral trade agreements play a central role in maintaining a system of open international trade to ensure that states do not unjustifiably discriminate between foreign and locally produced goods and services, while still maintaining this balance. Yet the achievement of this goal of balanced growth is now confronted with intensified challenges where paradigms of free trade conflict with climate change policies. Chapter 21 examines the varying challenges arising from the intersection of climate change policy and international trade law. In doing so, it explores how climate change action can operationalize concepts that are inherent in both international trade and environmental law, namely, common but differentiated responsibilities and special and differentiated treatment to illustrate that the two distinct legal regimes share the same path towards achieving sustainable development.

The *Research Handbook* concludes with closing remarks by the editors which highlight the overarching messages of both inspiration and caution which emanate from the contributions to this book, and indicate directions for future research.