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Book Reviews

Transnational Environmental Regulation and Governance: Purpose, Strategies and Principles,
by Veerle Heyvaert
Cambridge University Press, 2018, 312 pp, £80 hb, $88 ebk
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Although scholarship involving transnational law generally[1] and transnational environmental law more specifically[2] has increased dramatically over the past two decades or so, transnational environmental regulation (TER) remains notoriously difficult to describe, define, or categorize. Multilateral environmental treaties, the European Union's environmental directives, bilateral multi-jurisdiction conservation agreements, local climate action coalitions, and global voluntary resource certification schemes – all of which involve a diverse array of 'regulators' and 'regulatees' – fit within the broad framework of TER, even though they deploy a mix of hard and soft law instruments. Considering the wide range of regulatory mechanisms and diverse set of actors involved in environmental regimes that are considered transnational, it is not surprising that scholars have struggled to accurately or succinctly explain what TER encompasses. Yet, as TER systems have expanded into new arenas and become increasingly capable of influencing, if not displacing, 'traditional' environmental regulation, there is a growing need for environmental regulators, practitioners, and scholars to gain a better grasp of what TER involves, how it functions, who it regulates, and whether it can effectively serve as a useful tool to address the urgent environmental problems facing our planet.

In her book, *Transnational Environmental Regulation and Governance: Purpose, Strategies and Principles*, Veerle Heyvaert offers a thoughtful, analytical, structured, and detailed exploration and description of TER that will serve as a useful and thought-provoking guide to anyone interested in understanding the growing field of transnational environmental law, as well as environmental regulation more broadly. *Transnational Environmental Regulation and Governance* brings order to a field that may otherwise appear chaotic or inchoate. In so doing, the book offers important insights for anyone engaged in the exploration of environmental governance and policy design.

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1 E.g., G. Shaffer, 'Theorizing Transnational Legal Ordering' (2016) 12 *Annual Review of Law and Social Science*, pp. 231–53; A. Menon & S. Weatherill, 'Transnational Legitimacy in a Globalising World: How the European Union Rescues Its States' (2008) 31(3) *Western European Politics*, pp. 397–416; K. Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43(1) *Virginia Journal of International Law*, pp. 1–92.

2 E.g., L. Andonova, M. Betsill & H. Bulkeley, 'Transnational Climate Governance' (2009) 9(2) *Global Environmental Politics*, pp. 52–73; V. Heyvaert & T.F.M. Etty, 'Introducing Transnational Environmental Law' (2012) 1(1) *Transnational Environmental Law*, pp. 1–11; N.M. Sachs, 'Jumping the Pond: Transnational Law and the Future of Chemicals Regulation' (2009) 62(6) *Vanderbilt Law Review*, pp. 1815–69.

The book proceeds in nine chapters. Chapter 1 explains how and why an understanding of TER has remained elusive and outlines how Heyvaert will approach her own analysis of the subject. Chapters 2 and 3 then begin to examine the nature and purposes of TER. These two chapters serve as an introductory guide to how TER can be understood based on who is regulating whom, and the goals the regulation seeks to fulfil. Chapters 4 to 6 then engage in a deeper exploration of the regulatory nature of various TER systems. To perform this investigation, Heyvaert first describes a new way of evaluating environmental regulation, using an 'activity-based model' explained in Chapter 4, which she applies through 'case studies' to various types of TER regime in Chapter 5. In Chapter 6, Heyvaert examines the lessons of the case studies, which reveal many TER regimes to be highly networked and regulatorily complex, and thus deserving of more nuanced analysis and treatment in scholarship and application. Chapters 7 and 8 evaluate the normative aspects of TER regimes by exploring the interrelationships and potential conflicts between TER and more traditional legal systems, and assessing the extent to which TER integrates various legal principles. Chapter 9 concludes.

In Chapter 2, Heyvaert begins to develop a more concrete description of TER, while remaining cognizant that TER regimes will always include at least some elements that are difficult to categorize. As a point of departure, she uses Philip Jessup's description of transnational law: 'all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules'.[3] As Heyvaert notes, this broad definition, which conveys the potential scope of transnational law, can also be 'unwieldy' (p. 28), but other definitions have similarly failed to capture the essence of transnational law. The book thus rejects definitions that categorically separate transnational law from international law as overly formalistic, and it distinguishes global law, which aims to create 'universalistic' normative laws, from transnational law, which embraces diversity. Heyvaert thus proposes her own definition of transnational regulation as that which is '*produced* rather than merely *applied* in a transnational setting, with the involvement of actors that are not state authorities' (p. 30). With this overarching definition settled, the remainder of the chapter then examines the nature of TER based on the roles that private and public actors play.

The chapter maps 'five continents' of TER (p. 37), which reflect the respective roles of the regulators and addressees of the regulation. These five categories include:

- public/public TER, in which public authorities develop transnational environmental regulations aimed primarily at public actors;
- public/private TER, in which public authorities develop regulations aimed primarily at private entities;
- private/private TER, in which private actors develop rules for other private parties;

[3] P. Jessup, *Transnational Environmental Law* (Yale University Press, 1956), p. 2.

- private/public TER, in which private regulations are either adopted by or serve as de facto regulatory regimes for public entities; and
- hybrid TER, in which some combination of public/private regulatory system applies to some combination of private and public actors.

For each of these categories, Heyvaert provides concrete examples. For instance, multilateral environmental agreements exemplify public/public TER, as they create international obligations designed to bind state actors. A typical private/private TER might be a private certification scheme, such as the Forest Stewardship Council (FSC), a private certification system that applies to timber harvesters and other private actors.[4] Through this chapter, Heyvaert thus illustrates how diverse the actor relationships can be in TER regimes.

Chapter 3 then explores the motivations underlying the creation of TER regimes, notwithstanding the expansive infrastructure of existing local, national, and international environmental laws. Heyvaert identifies five primary purposes for TER systems; these are the prevention of 'leakage' that can result from the imposition of national laws, trade facilitation, gap-filling for inadequate state or international regulation, risk management, and enhancement of existing laws. Based on these purposes, Heyvaert then divides TER regimes into five categories: (i) collective action TER (to prevent leakage), (ii) trade facilitation TER, (iii) substitute TER (to fill gaps), (iv) risk management TER, and (v) enhancement TER. Chapter 3 then describes the common features of each type as well as the most likely actors to participate in each TER category. For example, collective action TER would typically involve public/public regulators/addressees and focus on reaching a consensus regulatory agreement to prevent leakage. Risk-management TER would be likely to focus on limiting the reputation risk of private actors through private certification programmes (such as the FSC) or renewable energy acquisition programmes. Chapter 3 thus serves to integrate the actor-based structure with a purpose-based categorization of TER schemes and to highlight the benefits and potential downsides of each scheme.

Collectively, Chapters 2 and 3 provide a good overview of different types of TER system, the likely participants in TER regimes, the motivations underlying TER creation and participation, and the risks and weaknesses of TER structures. These chapters are necessarily complex, but Heyvaert provides clarity and accessibility by including examples of each TER category and how they would work in practice. By the end of Chapter 3, the reader has a clear understanding of how TER systems evolved, what they often seek to achieve, who participates, and why.

Chapters 4, 5 and 6 then examine the nature of regulatory systems often used in TER, in comparison with environmental regulation more generally. Through this examination, Heyvaert first challenges the widely held view that environmental law can be appropriately described as a contest between 'command-and-control *versus* alternatives' (p. 90). This dichotomy, she explains, is premised on the unproven

[4] See at: https://fsc.org.

assumption that command-and-control regulation is inferior to the various alternatives, and it wrongly assumes that many aspects of regulation that accompany substantive regulatory controls – including permitting, monitoring, outreach, and enforcement – share the same categorization as command-and-control or 'alternative'. This standard account of environmental regulation is also 'less attuned to scenarios of multilevel governance' (p. 100), as it assumes that command-and-control regulation involves a single regulator and a clear set of regulatees, all of whom are driven solely by a restricted compliance framework. The standard account also ignores the various motivations that influence regulators and addressees described in Chapter 3, as well as the myriad ways in which laws approach regulatory obligations, permitting, monitoring, and compliance. Chapter 4 thus proposes an alternative mechanism for understanding and assessing regulation: the activity-based model.

The activity-based model is one of the great innovations of the book which provides a means to reconceptualize environmental regulation. The model assesses the nature of regulation according to five activities: '1) regulatory goal setting; 2) normalisation; 3) engagement; 4) learning and 5) response' (p. 102). Heyvaert argues that all regulations 'cycle … through these stages' (p. 102). At each stage, moreover, the regulators must decide the general regulatory principles they will use and how they will implement the regulatory work. The remainder of Chapter 4 then explains how this application would play out for each of the five activities. For example, in discussing goal setting, the book notes that from a regulatory principles perspective, goals may be broad or specific, integrated or sectoral, or outcome- or performance-based. The means of implementing the goals may involve legislation, policy declarations, treaty preambles, and other statements of intent. Normalization refers to the means by which goals are translated into actionable terms that will change the behaviour of the addressee. For example, rules and standards that prescribe, mandate, or incentivize certain conduct would fit within this category. Engagement may include various means of communicating with addressees; 'bonding' strategies that include permitting, registration, and licensing requirements; as well as means to facilitate compliance and performance. The learning phase requires both feedback (including data collection) and assessments of how the regulatory regime is functioning. Finally, the fifth activity, response, involves actions taken by regulators on the basis of the information they have learned. Such actions may include enforcement and other 'sticks' or incentives and other 'carrots.' Response may also involve regulatory reform, and a host of activities in between.

By the end of Chapter 4, it is clear that the activity-based model could serve as a useful means for evaluating and understanding all types of environmental regulation, in addition to TER regimes. The model requires its users to ditch any preconceived assumptions about how a given law should be categorized and instead to understand how the law works in practice, from its goals, to its substantive requirements, to its compliance and reporting mechanisms.

To illustrate how the activity-based model would work in the transnational environmental law context, Chapter 5 then assesses several types of TER regime, representing the collective action TER, trade facilitation TER, substitute TER, risk management TER, and enhancement TER regimes introduced in Chapter 3. To enable an

apples-with-apples comparison, Heyvaert's application focuses on applying the activity-based models to TER regimes focused on addressing climate change. One by one, the chapter examines how the activity-based model would apply to each regime type and, by the end of the chapter, it is clear that activity-based analysis results in a much more thorough, deliberative, and honest assessment of how different TER systems will work in practice.

Chapter 6 applies the assessments from Chapter 5 to reach some overarching conclusions. Firstly, Heyvaert notes that the case studies reveal the 'networked, interdependent nature of TER' (p. 161). Secondly, the analysis confirms that traditional environmental law categories, which tend to describe laws as 'flexible' or 'technology-based' or something similar, do not adequately capture the nature of TER regimes, at least in the climate context. Thirdly, and perhaps most importantly, the analysis challenges common assumptions about compliance and deterrence in TER regimes. As Heyvaert explains, the common wisdom is that TER systems necessarily employ weaker enforcement mechanisms because many TER programmes involve entities that lack strong regulatory powers or depend on other actors for enforcement. While the activity-based analysis confirms that traditional enforcement tools are limited in the TER context, it also reveals that other enforcement mechanisms – such as strict contract terms – often serve as credible replacements for regulatory compliance and deterrence. Chapter 6 thus illustrates how activity-based assessment can provide new insights into and understanding of the strengths and weaknesses of TER regimes.

The subsequent two chapters of *Transnational Environmental Regulation and Governance* explore the normative aspects of TER regimes. In Chapter 7, Heyvaert identifies several ways in which TER challenges conventional law, and discusses potential state responses to these challenges. 'Law is an intensely territorial concept' (p. 185), so it is perhaps unsurprising that TER regimes, which often involve non-state regulators and actors, challenge the fundamental precepts underlying conventional laws. TER regimes tend to emerge from outside the territorial context; they may not be based on or derived from state law; they often involve a combination of private and public law; and they use a mix of instruments. All of these features are potentially at odds with state-based environmental regulation. Heyvaert explains that states can respond to TER regimes defensively by reclaiming their own authority through regulation and narrowing the scope of TER regimes; by reconstructing (or, more likely, by simply tweaking) their laws to adapt them to a TER regime; or by reconceptualizing law in a way that challenges the traditional understanding of law and recognizes that legal systems are more pluralistic and complex than we acknowledge. However states respond, Chapter 7 shows that TER systems will have an influence on traditional environmental regulation.

Chapter 8 then examines the extent to which TER regimes integrate and uphold a shared sense of legal principles. The examination includes a 'deductive' inquiry of external sources of law that may establish legal principles applicable to TER, followed by an 'inductive' inquiry of TER regimes which themselves incorporate and espouse legal principles. The deductive approach explores how and whether international environmental law, human rights law, and the broader category of 'public institutional law'

(which includes constitutional law, administrative law, and international public law) have created legal principles applicable to TER. Heyvaert concludes that each category of law has embedded legal principles that influence TER, but that the public law disciplines exert the strongest force by creating minimum procedural expectations which affect TER.

This conclusion is bolstered by the inductive analysis, in which Heyvaert discovers a set of shared general principles common to TER regimes. Many TER programmes espouse and implement the legal principles of transparency, stakeholder participation, and commitments to sound science and precaution, as well as 'sustainability' and progression. The analysis goes deeper, however, to explain that these legal principles do not necessarily manifest in TER regimes in the same way in which they would under traditional environmental regulation. For example, while most TER regimes include statements related to transparency, those that use contractual arrangements (such as conservation contracts) tend to be far more opaque. Similarly, stakeholder participation under TER often embraces a narrower understanding of who the stakeholders are, and many TER regimes limit third-party involvement. Finally, references to sustainability and progression do not necessarily indicate that TER regimes are particularly ambitious. As Heyvaert explains, many TER regimes begin with a limited understanding of sustainability which excludes concerns for future generations, and progression seems to reflect the idea that any degree of improvement in ambition is adequate, regardless of the actual impacts on the ground.

Heyvaert then draws some overarching conclusions regarding legal principles common to TER. Above all, she notes, many TER regimes embrace a managerial approach to governance, which tends not only to fulfil minimum legal principles but also exhibits tendencies towards opacity and elitism, rather than openness and inclusivity. This approach not only goes against participatory governance embraced under human rights laws, but it also makes TER regimes 'particularly vulnerable to underdelivering on environmental quality' as managerialism focuses on 'incremental improvements from an arbitrary baseline' (p. 251). Chapter 8 thus illustrates that TER tends to adhere to a set of common legal principles, but cautions that such legal principles may not align with more ambitious substantive or procedural expectations in environmental law.

The final chapter of the book, Chapter 9, offers a useful summary of, and some concluding insights about, the nature of TER as revealed in the earlier chapters. It also identifies a range of issues that would benefit from greater analysis and investigation. However, this does not suggest that the book is incomplete; rather, by Chapter 9, the reader will have gained a deeper understanding of TER and discovered a new tool – the activity-based model – for assessing environmental regulation more generally.

Transnational Environmental Regulation and Governance is an excellent book. It is creative, well structured, deeply researched, and analytical. The book is very well written and easy to read. It conveys a welcome sense of humility and openness. Heyvaert often describes her thought processes and takes care to identify areas where others may disagree with her proposed structures and analyses, while she simultaneously explains why she selected the approach she used. This openness adds credibility to her arguments throughout the book. The book also uses several examples of laws or

practices to make otherwise amorphous ideas more concrete and accessible. *Transnational Environmental Regulation and Governance* will advance our understanding of how environmental regulation works generally and how various models of TER operate. I highly recommend this book.

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Climate Justice and Historical Emissions, edited by Lukas H. Meyer & Pranay Sanklecha
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The devastating effects of climate change are unfolding before us as heatwaves, severe drought, fires, floods, hurricanes, rising seas, and land loss occur with increased intensity and frequency. The 1.5°C report of the Intergovernmental Panel on Climate Change (IPCC),[1] released in 2018, showed that the effects of climate change have become more immediate and severe than the IPCC had expected, evidenced by the discovery that Alaskan glaciers are melting 100 times faster than previously thought[2] and the frightening spectacle of Greenland's ice sheets losing more than 12 billion tons of ice in a single day in the summer of 2019.[3] As greenhouse gases (GHGs) continue to flood the atmosphere and feedback loops are set into motion, conditions will only worsen, exposing the most vulnerable and least culpable communities to the greatest damage. To prevent catastrophic outcomes, the world must achieve rapid and massive emissions reductions and invest in significant restoration and adaptation efforts. Yet, policymakers must also ensure that these response efforts are fair.

Climate Justice and Historical Emissions, edited by Lukas H. Meyer and Pranay Sanklecha, is a multivalent volume dedicated to the question of who can and who should be held responsible for historic emissions. Because of the long atmospheric lifespan of carbon dioxide (CO_2), climate change is the product of GHGs that have accumulated in the atmosphere for hundreds of years. Given that industrialized countries like the United States (US) have consumed a disproportionate share of the

1 IPCC, 'Global Warming of 1.5°C' (2018), available at: https://www.ipcc.ch/sr15.

2 J. Howard, 'Alaskan Glaciers Melting 100 Times Faster than Previously Thought', *National Geographic*, 29 July 2019, available at: https://www.nationalgeographic.com/environment/2019/07/alaskan-glaciers-melting-faster-than-previously-thought.

3 M. Solly, 'Greenland Lost 12.5 Billion Tons of Ice in a Single Day', *Smithsonian Magazine*, 5 Aug. 2019, available at: https://www.smithsonianmag.com/smart-news/greenland-lost-record-breaking-125-billion-tons-ice-single-day-180972808.