



**Essential Readings in Environmental Law**  
**IUCN Academy of Environmental Law ([www.iucnael.org](http://www.iucnael.org))**

**TRANSNATIONAL ENVIRONMENTAL LAW**

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**OVERVIEW OF KEY SCHOLARSHIP**

**Transnational Legal Theory (General Background)**

1. Zumbansen, P., “Law & Society and the Politics of Relevance: Facts and Field Boundaries in ‘Transnational Legal Theory in Context’” (2014) 11 *No Foundations* 1.
2. Twining, W., *Globalization and Legal Scholarship* (The Netherlands: Wolf Legal Publishers, 2011).
3. Van Asselt, H., “Review Essay: Pluralism, Informality and Transnational Environmental Law” (2014) 3:1 *Transnational Environmental Law* 173.

**‘Transactional’ Environmental Law**

4. Affolder, N., “Transnational Conservation Contracts” (2012) 25 *Leiden Journal of International Law* 443.
5. Ferrando, T., “Global Land Grabbing: A Tale of Three Legal Homogenizations” in H. Muir Watt and D. P. Fernandez Arroyo, *Private International Law and Global Governance* (Oxford: OUP, 2014) 71.

**Transnational Climate Law**

6. Pollack, M. A. and Shaffer, G. C., “The Interaction of Formal and Informal International Lawmaking” in J. Pauwelyn et al (eds), *Informal International Lawmaking* (Oxford: Oxford University Press, 2012).
7. Bodansky, D., “Climate Change: Transnational Legal Order or Disorder?” in T.C. Halliday and G. Shaffer eds., *Transnational Legal Orders* (Cambridge University Press, 2015) 287.
8. Dannenmaier, E., “Constructing Transnational Climate Regimes” in G. Handl *et al* eds., *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* 519.

## **Transnational Biodiversity Law**

9. Affolder, N., "The Market for Treaties" (2010) 11:1 Chicago Journal of International Law 160.
10. Morgera, E., '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.
11. Lin, J., Transnational Environmental Law in Action: The European Union's Sustainable Biofuels Experiment (June 1, 2013). University of Hong Kong Faculty of Law Research Paper No. 2013/034. Available at SSRN: <http://ssrn.com/abstract=2305904>.

## **Transnational Environmental Law Scholarship**

12. *Transnational Environmental Law* (a journal published by Cambridge University Press).

### **Background:**

The scholarly development of Transnational Environmental Law is in some ways still at a 'connect the dots' stage so it is valuable to contextualize the recent, and largely empirical, transnational environmental law scholarship within the wider literature on transnational law theory. While some of the authors cited here might not self-identify as 'transnational environmental law' scholars, their work can be framed as 'essential readings' in inspiring a rich and diverse appreciation of the blurring of scholarly boundaries which transnational environmental law scholarship embraces.

Transnational environmental law grapples with the collapse of two powerful distinctions – the distinction between the national and the international; and the divide between the public and the private. Dismantling these distinctions has involved a scholarly commitment to acknowledging the role of actors other than states in law-making.

'Transnational law' means many different things to different writers. This review is not the place to fully canvass those debates nor to satisfactorily capture what makes 'transnational law' law. This review begins by discussing some key works of transnational legal theory and law and globalization which set the backdrop for an understanding of the development of transnational environmental law scholarship.

### **Transnational Legal Theory**

1. Choosing which of **P. Zumbansen's** works to select here as critical to a study of transnational legal theory is a tremendously difficult task. It's rather akin to being asked "well, which of your children do you like best?" For this review I have selected "***Law & Society and the Politics of Relevance: Facts and Field Boundaries in 'Transnational Legal Theory in Context'***", but many of his other contributions (cited in that piece) equally force the reader to engage with the dominant forces shaping transnational environmental law today.

2. **W. Twining**'s published Montesquieu seminar, *Globalization and Legal Scholarship*, is essential reading as it provides an elegantly written essay on the wider forces which shape transnational legal scholarship. **Twining** calls for an adaptation of Western intellectual traditions to engage with the new reality of global law. In examining the implications of 'globalisation' for law, he reveals how the whole tradition of Western law is embedded with assumptions that need to be re-evaluated. He calls for the development of more sophisticated normative theories that are sensitive to pluralism of beliefs and the differences between value systems – foreshadowing some of the challenges shaping current transnational legal scholarship.
  
3. **H. van Asselt**'s book review essay, '*Pluralism, Informality and Transnational Environmental Law*' is particularly valuable for its analysis of wider transformations in traditional conceptions of international law and their relevance for transnational environmental law scholarship. This essay reviews *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (by **Nico Krisch**) and *Informal International Lawmaking* (edited by **Joost Pauwelyn, Ramses Wessell** and **Jan Wouters**), highlighting the implications of these books for future research on transnational environmental law.

### **'Transactional' Environmental Law**

One of the novel contributions that transnational environmental law scholarship is making is to highlight the importance of 'transactional issues' in environmental law. These issues have often been eclipsed by the scholarly spotlight shining most brightly on litigation and judicial decisions.

4. **N. Affolder**, in her article titled "*Transnational Conservation Contracts*", contributes to efforts to understand transnational law's multilayered architecture by drawing attention to the use of transnational contracts as a mechanism to protect habitats and species. The diverse and proliferating examples of conservation contracts discussed in this article – which include forest carbon agreements, conservation concessions, debt-for-nature swaps, conservation performance payments, and private protected area agreements – reveal an ongoing and intensifying transnational attempt to use private contracts to address some of the most pressing issues of common concern.
  
5. **T. Ferrando**'s chapter, "*Global Land Grabbing: A Tale of Three Legal Homogenizations*" frames global land grabbing as not merely an "enclosure of land" but equally as a form of legal homogenization which displaces the pluralism of existing legal regimes. He analyzes provisions of investment contracts to provide examples of how contracts dismantle legal diversity, asserting that the substantive law needs to be taken seriously to understand how contract law can dismantle legal diversity. This work is important in underlining the wider public significance of private transactional agreements and the interaction between investment law, resettlement law, and environmental law regimes implicated in global land grabbing.

## Transnational Climate Law

Climate Law continues to dominate the field of transnational environmental law in terms of the number of new articles and books emerging monthly. Below is only a small sample of this work. The three book chapters I highlight below are particularly valuable as they are situated within wider studies of transnational legal processes, allowing for a contextualization of environmental law developments within the study of transnational legality more generally.

6. The interaction between formal and informal lawmaking is addressed by **M. Pollack and G. Shaffer** who, in “*The Interaction of Formal and Informal International Lawmaking*” examine climate change as one example of the contemporary reality of overlapping legal regimes in a wider collection entitled *Informal International Lawmaking*. Their analysis describes how “the deep distributive conflicts among the various groups of States and non-State actors has produced a now familiar pattern of antagonistic interaction, characterized by forum-shopping, strategic inconsistency, and increasing confusion, rather than progressive development of law” (262). The contribution this chapter makes is to provide a wider theory of where interactions are likely to be complementary as opposed to antagonistic. The climate change example is but one valuable empirical case study contained in this chapter, but set against a wider literature that advances our understanding of the broad spectrum of issues at stake in assessing the accountability of informal transnational law-making processes.
7. **D. Bodansky’s** chapter on “*Climate Change: Transnational Legal Order or Disorder?*” in **Halliday and Shaffer’s** edited collection on *Transnational Legal Orders* asks whether a transnational legal order relating to climate change has emerged, and if so what are its boundaries, causes, and implications. The chapter carefully sets out both the “disorder and order” that have led international responses to climate change to be so fragmented with little convergence of either expectations or results.
8. In a collection of essays on extraterritoriality, **E. Dannenmaier’s** chapter, “*Constructing Transnational Climate Regimes*” explores climate change as an inherently extra-territorial problem. Rather than documenting (as many other authors do) the ‘threats’ that the proliferation of transnational legal responses to climate change pose to state actors, **Dannenmaier** argues that States remain essential “progenitors and sustainers of networks, negotiation processes, regime construction, and systems for monitoring, reporting, and verification”. His study suggests that while states are active in constructing transnational institutions that engage non-state actors, this extra-territorial framework does not appear to threaten the essence of state sovereignty.

## Transnational Biodiversity Law

9. A critical theme in transnational environmental law is the interaction of legal systems and orders. Examining the interface between intergovernmental treaty-making and private environmental governance, **N. Affolder** in “*The Market for Treaties*” challenges the way that ‘private environmental governance’ and ‘public international law’ have been captured in scholarship as isolated legal domains. This study draws on

an empirical examination of three biodiversity treaty regimes - the *Convention on Biological Diversity*, *Ramsar Convention*, and *World Heritage Convention* - to demonstrate that corporations implement or internalize treaty norms in a variety of ways that are not captured by the dominant model of treaty implementation – national implementation. The article explores how corporations use biodiversity treaties as a source of private environmental standards. The central claim is that treaties provide a vital, but overlooked, point of interaction between intergovernmental environmental law and transnational law as developed by private actors. This article reveals that the gravitational pull of treaties on private actors is differentially experienced. The shadow of law (both national and international) works variably across different companies, different industries and different geographies.

10. **E. Morgera's** article, titled 'Bilateralism at the Service of Community Interests? Non-Judicial Enforcement of Global Public Goods in the Context of Global Environmental Law', addresses interactions at a different level. This piece examines the usefulness of the literature on global public goods in relation to the plurality of legal orders and forms of non-judicial enforcement of international law. The focus of the article is an examination of international biodiversity law as a testing ground for the interaction of legal orders. The 'sites' of these interactions chosen for this article are i) the linkages between the compliance system under the *Convention on International Trade in Endangered Species* and bilateral trade agreements recently concluded by the European Union and the US; and ii) the opportunities for bilateral initiatives supporting the implementation of the *Nagoya Protocol on Access and Benefit-sharing*. From these examples, **Morgera** argues that complex inter-relationships between different legal orders are likely to continue to proliferate.
  
11. Transnational law expands our 'visual field' beyond the state to capture the realities of social ordering at the periphery. **J. Lin's** Research Paper, *Transnational Environmental Law in Action: The European Union's Sustainable Biofuels Experiment*, situates a detailed examination of biofuels policy within a wider, critical look at the emergence of transnational environmental law. **Lin's** work is valuable far beyond the biofuels context in highlighting what is at stake in framing something as transnational environmental law, and how this label can shape both conceptual and methodological approaches.

### **Transnational Environmental Law and Scholarship**

12. The Journal, **Transnational Environmental Law**, deserves its own mention. It is not only the articles published in this journal, but also its editorials and book reviews which are richly contributing to the growing scholarship in this area. It has quickly emerged as a foundational resource for scholars engaged with transnational environmental law in its many forms.

## Further Notables

The succinct ‘essential readings’ list above attempts to capture the ways in which Transnational Environmental Law scholarship departs from more traditional approaches to international and domestic environmental law literature. I highlight below a further handful of important scholarly contributions which serve as further foundational reading in this area.

### Transnational Legal Theory

Schultz, T., *Transnational Legality: Stateless Law and International Arbitration* (Oxford: Oxford University Press, 2014). Deciding what is and isn’t *law* in the transnational environmental context becomes a perplexing challenge. While **T. Schulz**’ book, *Transnational Legality*, is focused on the law of international arbitration, it provides very useful background reading into thinking about transnational legality, and particularly the question of ‘why being law matters’. **Schulz** powerfully illustrates why it is important to understand the nature of legality and how such understandings can help define what constitutes “law without the state”. This piece offers essential background to thinking about transnational law in any form.

### Transnational Litigation

Perez, O., *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Oxford: Hart, 2004) (chapter 6 on transnational environmental litigation). **O. Perez**’s book, *Ecological Sensitivity and Global Legal Pluralism*, maps the complex transnational legal terrain within which multinational enterprise activities are ‘enfolded’. He argues that the common characteristics of the laws governing transnational environmental litigation create a ‘global common law’ for multi-national enterprises. His chapter on transnational environmental tort litigation examines how the theories of legal jurisdiction and corporate entity that underlie transnational litigation operate to create ecological ‘blindspots’ which have yet to be remedied.

Osofsky, H., “The Continuing Importance of Climate Change Litigation” (2010) 1:1 Climate Law 3. Climate litigation is a subject of a growing scholarship. **H. Osofsky**’s 2010 article on “*The Continuing Importance of Climate Litigation*” addresses the foundational importance of the *Massachusetts v. EPA* decision in the United States, but situates this discussion within a wider appreciation of the many other cases which have been filed in local, state, national, and international tribunals both in the US and around the world that might be described as transnational climate change regulation. **Osofsky**’s mapping of this litigation illustrates how courts have become a critical forum in which issues of greenhouse gas emissions regulation and liability are being articulated.

Boer, B., ed., *Environmental Dimensions of Human Rights* (Oxford: Oxford University Press, 2015). This collection explores the convergence of diverse aspects of the legal protection of the environment and human rights. Several chapters in this collection draw on litigation to map both substantive and procedural hurdles to integrating environmental and human rights’ concerns. **R. Pavoni**’s chapter offers a comparative analysis of environmental jurisprudence in the European and Inter-American human rights courts. He highlights the importance of transnational activists in bringing this litigation. **L. Krämer** adds to an understanding of access to justice, tracing

European jurisprudence on this issue since the 1960s. And **A. Boyle**'s concluding chapter demonstrates how the European Court of Human Rights has used various human rights to compel governments to take action, to enforce environmental laws and to disclose environmental information.

### **'Transactional Environmental Law'**

Szablowski, D., *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Hart, 2007). **D. Szablowski**'s study of transnational law-making in the context of a mining project in Peru illustrates the blurring between transnational law/indigenous law/ corporate social responsibility/investment law. *Transnational Law and Local Struggles* aptly illustrates a contemporary reality of the study of transnational environmental law study: there are no clear boundaries. **Szablowski**'s detailed study aims to reconcile the gap between law and practice in presenting an account of the lived norms and everyday social interactions which mark transnational lawmaking. He investigates the multiple levels of legitimation at work in contexts where states transfer legal authority to mining companies.

### **Non-State Actors and Non-State Lawmaking**

Helfand, M. A., *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge: Cambridge University Press, 2015). **M. Helfand**'s edited collection, *Negotiating State and Non-State Law*, documents the proliferation of diverse forms of non-state law. This collection provides an important theoretical backdrop for transnational environmental law scholars seeking to understate the relationship between the nation state and non-state lawmaking. Particularly valuable for environmental law scholars is the chapter (chapter 6) by **D. Barak-Erez and O. Perez**, "*The Administrative State Goes Global*" which focuses on the way in which international law norms "*intervene and reshape* decision-making processes within domestic bureaucracies". This analysis examines both the influence of WTO rulings and global private standard –setting authorities.

Heyvaert, V., 'What's in a Name? The Covenant of Mayors as Transnational Environmental Regulation (2013) Vol 22(1) RECIEL 78. This article exemplifies the sophistication of recent scholarship emerging from Europe in mapping the multiple levels at which EU environmental regulation takes place (both formally and informally).

### **Transnational Environmental Law and Scholarship**

**W. Twining**'s writings on law and globalization (referenced above) remind of the importance of self-reflective and self-critical scholarship. This theme is reinforced in a number of important recent articles addressing environmental law scholarship, expertise, and methods.

Fisher, E., B. Lange B., E. Scotford E., and C. Carlane, "Maturity and Methodology: Starting a Debate about Environmental Law Scholarship" (2009) 21 *Journal of Environmental Law* 213. This article offers critical reading for scholars embarking on research projects, and serves as an important 'benchmark' for thinking about the current state of the field of scholarship.

## Other Representative Scholarly Literature:

- Abbott, K. W. "Strengthening the Transnational Regime Complex for Climate Change." (2014) 3 *Transnational Environmental Law* 57.
- Bäckstrand, K., and E. Lövbrand, eds. *Research Handbook on Climate Governance*. (Edward Elgar Publishing, 2015).
- Bulkeley, H., et al., *Transnational Climate Change Governance* (Cambridge: Cambridge University Press, 2014).
- Cafaggi, F. ed., *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* (Edward Elgar, 2012).
- Cotterrell, R., "What is Transnational Law?" (2012) 37(2) *Law & Social Inquiry* 500.
- Cotula, L., *Human Rights, Natural Resource and Investment Law in a Globalized World* (Routledge, 2012).
- de Cendra de Larragan, J., "EU Climate Change Law and Consumers" (2011) 1 *European Journal of Consumer Law* 149.
- Dupuy, P-M and Vinuales, J., *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge: Cambridge University Press, 2013).
- Fisher, E., "The Rise of Transnational Environmental Law and the Expertise of Environmental Lawyers" (2012) 1 *Transnational Environmental Law*, 1, pp 43-52.
- Green, J., *Rethinking Private Authority: Agents and Entrepreneurs in Global Environmental Governance* (Princeton: Princeton University Press, 2014).
- Heyvaert, V., "Regulatory Competition - Accounting For the Transnational Dimension of Environmental Regulation" (2012) 25(1) *Journal of Environmental Law* 1.
- Joerges C. et al. eds., *Transnational Governance and Constitutionalism* (Oxford: Hart, 2004).
- Lee, T., "Global Cities and Transnational Climate Change Networks." (2013) 3(1) *Global Environmental Politics* 108.
- Lister, J., *Corporate Social Responsibility and the State: International Approaches to Forest Co-Regulation* (Vancouver: UBC Press, 2012).
- Marín Durán, G. and E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Oxford; Portland, Or.; Hart, 2012).
- Marx, A. et al. eds., *Private Standards and Global Governance* (Edward Elgar, 2012).
- Mehling, M., "The Comparative Law of Climate Change: A Research Agenda." (2015) 24(3) *Review of European, Comparative & International Environmental Law* 341.
- Michaels, R. and Jansen N., "Private Law Beyond the State? Europeanization, Globalization, Privatization" (2006) 54 *American Journal of Comparative Law* 843.
- Minas, S., "The Rise of Transnational Networks in Climate Change Governance: A Study in Hybridity" TLI Think! Paper 05/2015:  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2698561](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2698561).
- Mrljic, R. and D. Lapas. "International Non-Governmental Organizations, "Soft Law" and Protection of Environment" (2013) 4 *Contemporary Legal and Economic Issues* 29.
- Peel, J., L. Godden and R. Keenan, "Climate Change Law in an Era of Multi-level Governance" (2012) 1 *Transnational Environmental Law* 245.
- Penca, J., "Biodiversity Offsetting in Transnational Governance" (2015) 24(1) *Review of European, Comparative & International Environmental Law* 93.
- Peters, A., *Non-State Actors as Standard Setters* (Cambridge University Press, 2009).

- Richardson, B.J., *Local Climate Change Law: Environmental Regulation in Cities and other Localities* (Edward Elgar, 2012).
- Romppanen, S., "The Role and Relevance of Private Actors in EU Biofuel Governance"(2013) 22(3) *Review of European, Comparative & International Environmental Law* 340.
- Roy, S. and Woerdman, E., "Situating *Urgenda versus the Netherlands* within Comparative Climate Change Litigation" (forthcoming 2016) 34 *Journal of Energy & Natural Resources Law*.
- Zumbansen, P., "Why Global Law is Transnational" (2013) 4(4) *Transnational Legal Theory* 463