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The TBGI Project

Transnational initiatives to regulate business activities interact increasingly with each other and with official regulation, generating complex governance ensembles. Heterogeneous actors and institutions interact at multiple levels and in various ways, from mimicry and cooperation to competition and conflict. The TBGI Project investigates the forms, drivers, mechanisms, dynamics, outputs and impacts of transnational business governance interactions (TBGI) from diverse theoretical and methodological perspectives. It is funded by a Social Sciences and Humanities Research Council of Canada grant led by Professor Stepan Wood, Osgoode.



Transnational Governance Interactions: A Critical Review of the Legal Literature

Stepan Wood

Abstract:

Overlaps and interactions among diverse legal rules, actors and orders have long preoccupied legal scholars. This preoccupation has intensified in recent years as transnational efforts to regulate business have proliferated. This proliferation has led to increasingly frequent and intense interactions among transnational regulatory actors and programs. These transnational business governance interactions (TBGI) are the subject of an emerging interdisciplinary research agenda. This paper situates the TBGI research agenda in the broader field of transnational legal theory by presenting a critical review of the ways in which legal scholars have addressed the phenomenon of governance interactions. Legal scholars frequently recognize the importance of transnational governance interactions, but their accounts are tentative and incomplete for the most part. Scholars bring varying—often sharply divergent—theoretical, methodological and normative perspectives to bear on the issue. Some scholars focus on rule formation, others on monitoring or adjudication. Some investigate cooperation and convergence, others conflict and competition. Some examine interactions within a particular organization or program, others among programs or even between entire normative orders. Some emphasize description or explanation, others evaluation or prescription. In short, while understanding intersections among the multiple sites, scales and instances of law is a central concern of transnational legal scholarship, the picture that emerges is incomplete and fragmented.

Keywords:

Transnational, business, governance, interaction, international law, legal process, legal order, regime complex, legalization, fragmentation, soft law, network, comparative law, regulation, legitimation, competition, co-opetition, non-state actors, multilevel governance, transnational private regulation, meta-regulation, experimentalism, global administrative law, global constitutionalism, legal pluralism, interlegality, systems theory, autopoiesis

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Transnational Governance Interactions: A Critical Review of the Legal Literature¹

Overlaps and interactions among legal rules, principles, actors, systems and orders have long preoccupied scholars of international, comparative and transnational law. In recent years there has been a surge of interest in the proliferation of state and non-state efforts to regulate the conduct of business in increasingly globalized markets. This proliferation has led to increasingly frequent and intense interaction among these regulatory authorities and schemes. These *transnational business governance interactions* (TBGI), as we call them, are the subject of an emerging interdisciplinary research agenda. Elsewhere, my coauthors and I have proposed a common analytical framework for TBGI research² and a set of criteria for theory building.³ In this article, I situate the TBGI research agenda in the transnational legal scholarship by presenting a critical review of the ways in which the legal academic literature grapples with the phenomenon of governance interactions.

Legal scholars frequently recognize the importance of these interactions. Yet with notable exceptions, their accounts are tentative and incomplete. Scholars bring varying—often sharply divergent—theoretical, methodological and normative perspectives to bear on the issue. They employ a wide range of concepts including legal pluralism, conflict of laws, interlegality, regulatory competition and regime complexity, to name a few. Some scholars focus on rule formation, others on monitoring or adjudication. Some investigate cooperation and convergence, others conflict and competition. Some examine interactions within a particular organization or program, others among programs or even between entire normative orders. Some emphasize description or explanation, others evaluation or prescription. In short, while understanding intersections among the multiple sites, levels and instances of law is a central concern of transnational legal scholarship, the picture that emerges is incomplete and fragmented.

Analyses of interactions among normative orders are not, of course, confined to transnational law scholarship. They are informed by developments in private and public international law, comparative law, regulation, sociolegal studies, law and economics, and legal

¹ The research for this article was supported by a Partnership Development Grant from the Social Sciences and Humanities Research Council of Canada (principal investigator: Stepan Wood). I am grateful to Ken Abbott, Julia Black, Burkard Eberlein and Errol Meidinger for input and support.

² Burkard Eberlein and others, 'Transnational Business Governance Interactions: Conceptualization and Framework for Analysis' (2014) 8 *Regulation and Governance* 1.

³ Stepan Wood and others, 'The Interactive Dynamics of Transnational Business Governance: A Challenge for Transnational Legal Theory,' this issue.

pluralism. I draw on those literatures here, while focusing primarily on scholarship concerned with transnational law.⁴

The article proceeds as follows. Part 1 discusses the literature on private international, public international and comparative law. Part 2 turns to the legal literature on regulation and governance. Part 3 discusses global public law (administrative and constitutional). Part 4 takes up legal pluralism, while Part 5 addresses systems theory. Part 6 offers a brief conclusion. The order of presentation is not intended to imply an intellectual or historical progression, apart from presenting private and public international law first as sort of parent disciplines of transnational law.

1. Governance Interactions in International and Comparative Law

1.1 Private International Law

Private international law is centrally concerned with transnational encounters among legal systems. The question of how to determine which rules prevail when the rules of different legal systems conflict is at the heart of private international law,⁵ usually accompanied by a strong normative commitment to harmonization.⁶ National legal systems come into collision with each other when commercial actors use contracts to choose which laws will govern their dealings and which forums will resolve their disputes, or when plaintiffs and defendants contend to have claims heard in jurisdictions whose laws favour their interests. Some scholars have proposed conflicts of law as a framework for understanding and managing encounters among a variety of legal orders.⁷ A few have sought to displace private international law's focus on conflict among national legal systems and extend it to the 'complex interaction among different legal and social regimes' that characterizes contemporary governance, including non-state normative orders.⁸ Robert Wai, for example, argues that private international law plays a

⁴ My coauthors and I engage with relevant scholarship in international relations, political science and global governance in Eberlein and others, above (n 2).

⁵ Eg John Westlake, *A Treatise on Private International Law, or, The Conflict of Laws: With Principal Reference to its Practice in the English and other Cognate Systems of Jurisprudence* (Maxwell; Hodges & Smith, 1858); AV Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws, With Notes of American Cases by John Bassett Moore* (Stevens & Sons; Sweet & Maxwell; Boston Book Co, 1896).

⁶ Filomena Chirico and Pierre Larouche, 'Convergence and Divergence, in Law and Economics and Comparative law' in Pierre Larouche and Péter Cserne (eds) *National Legal Systems and Globalization: New Role, Continuing Relevance* (TMC Asser Press 2013) 9, 12 ('When browsing through the legal literature, one cannot escape the impression that jurists are slightly (at least) biased against divergence').

⁷ Eg Karen Knop, Ralf Michaels and Annelise Riles (eds), 'Foreword' (Special Issue: Transdisciplinary Conflict of Laws) (2008) 71:3 *Law and Contemporary Problems* 1, 7; Marianne Constable, 'Afterword: Conflicts as a Law of Laws?' (2008) 71:3 *Law and Contemporary Problems* 343.

⁸ Robert Wai, 'Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation through Plural Legal Regimes' in Christian Joerges and Ernst-Ulrich

crucial governance role as a decentralized form of coordination that accepts and manages conflicts among various forms of private law and ordering.⁹ He argues that private international law concepts such as comity can provide models for addressing conflicts among multiple state and private rule systems.¹⁰ He also argues that private international law's orientation toward conflict and contestation, if taken seriously, can be an antidote to the tendency of international economic law scholars to emphasize the gains realized from cooperation while downplaying the role of contestation.¹¹

Wai's aeronautical metaphor of transnational 'lift-off' and judicial 'touchdown' is an intriguing way to characterize the interactive dynamic between non-state ordering and national courts.¹² John Biggins extends this metaphor by arguing that the International Swaps and Derivatives Association uses selective litigation strategies to prevent its derivatives-trading regulatory regime from 'crashing down to national courts.'¹³ The interaction between national legal systems and transnational private orders goes both ways. ISDA does not simply assert its own authority unilaterally: It enlists national courts to validate it. As Anna Gelper observes, 'ISDA's legislative and litigation posture has steadfastly discouraged functional and contextual analysis of its contracts by judges ... it asks the court to fix and police the outer boundary of private regulation, not to interfere in its substance, which remains in ISDA's domain'.¹⁴ The process is reciprocal: while ISDA has succeeded at minimizing state interference in its transnational regulatory regime, it has tweaked the regime to accommodate national court decisions interpreting certain terms in the ISDA Master Agreement.¹⁵

This example illustrates a broader interactive phenomenon in which transnational governance authorities interact in attempts to delineate the domains within which each has governance authority.¹⁶ Debates about the extent to which non-state regulation is or should be

Petersmann, eds, *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart, 2011) 229, 229.

⁹ *Ibid*; see also Robert Wai, 'The Interlegality of Transnational Private Law' (2008) 71 *Law and Contemporary Problems* 107.

¹⁰ Wai, 'Conflicts and Comity,' *ibid*.

¹¹ *Ibid*; Robert Wai, 'Private v Private: Transnational Private Law and Contestation in Global Economic Governance' in H Muirwatt and D Fernandez Arroyo, eds, *Private International Law and Global Governance* (Oxford UP, forthcoming).

¹² Robert Wai 'Transnational Liftoff and Juridical Touchdown: The regulatory function of private international law in an era of globalization' (2002) 40 *Columbia J Transnational L* 109.

¹³ John Biggins, "'Targeted Touchdown" and "Partial Liftoff": Post-Crisis Dispute Resolution in the OTC Derivatives Markets and the Challenge for ISDA' (2012) 13 *German Law Journal* 1297, 1327.

¹⁴ Anna Gelper, 'Commentary: Public Promises and Organizational Agendas' (2009) 51 *Arizona Law Review* 57 at 70, quoted by Biggins, *ibid*, 1324.

¹⁵ Biggins, *ibid*, 1321; see also Biggins and Scott, this issue.

¹⁶ Eg Stepan Wood, 'Three Questions About Corporate Codes: Authorizations, Problematizations, and the Public/Private Divide' in Wesley Cragg (ed) *Ethics Codes, Corporations and the Challenge of Globalization* (Edward Elgar, 2005).

autonomous from state legal systems, or international organizations are or ought to be autonomous from states,¹⁷ can be understood partly as struggles to delineate the respective domains of different authorities in global governance. Philip Jessup anticipated a version of this phenomenon six decades ago when he observed that law-making authority is effective only when other authorities recognize and give effect to its exercise.¹⁸ This opens up a fruitful line of inquiry, which Jessup left unexplored, into the ways in which one actor's law-making authority is legitimated by other authorities, rendering the conflict of laws inseparable from mutual construction of authority.

1.2 International Arbitration and the New *Lex Mercatoria*

The literature on international commercial arbitration is another potential source of perspectives on TBGI. International commerce is hailed by some as generating a new *lex mercatoria* created by and for transnational business and built on the principle of parties' autonomy to choose which norms will govern their cross-border dealings with each other and who will adjudicate their disputes. The nature and extent of interaction between this normative order and state law are central subjects of academic debate in this field, including the circumstances in which national courts should be able to set aside arbitral awards. Proponents of this new legal order typically strive to minimize such interaction by insisting that the new law merchant is an autonomous legal order that is and ought to be prior to and independent from state law, and that the latter should intervene in this non-state legal order only in very limited circumstances.¹⁹ Others including Peer Zumbansen remind us²⁰ that the *lex mercatoria*, like 'private' ordering generally, is inextricably embedded in state legal systems with each simultaneously governing and being governed by the other.²¹

Investor-state arbitration under international investment treaties is a particularly controversial example of interaction between non-state and state authority, because it is a site for contestation of states' sovereign regulatory choices.²² As in international commercial

¹⁷ Eg Richard Collins and Nigel D White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, 2011).

¹⁸ Philip Jessup, *Transnational Law* (Yale UP 1956) 70.

¹⁹ Eg Galf-Peter Calliess, 'Lex Mercatoria: A Reflexive Law Guide to An Autonomous Legal System' (2001) 2 *German Law Journal* 17; Ralf Michaels, 'The True *Lex Mercatoria*: Law Beyond the State' (2007) 14 *Indiana Journal of Global Legal Studies* 447; Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, 2010).

²⁰ Citing among others Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Quarterly* 470; Morris R Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Review* 8; Karl Llewellyn, 'What Price Contract? - An Essay in Perspective' (1930) 40 *Yale Law Journal* 704.

²¹ Eg Peer Zumbansen, 'Transnational Law' in Jan Smits (ed), *Encyclopedia of Comparative Law* (Edward Elgar, 2006) 738; Peer Zumbansen, 'The Law of Society: Governance Through Contract' (2007) 14 *Indiana Journal of Global Legal Studies* 191; Peer Zumbansen, 'Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power' (2013) 76 *Law and Contemporary Problems* 117, 123-4.

²² Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007).

arbitration and the new *lex mercatoria*, non-state arbitrators play a key role in drawing a line between private interests and sovereign democratic authority. Gus Van Harten shows that, notwithstanding numerous calls for investor-state arbitrators to exercise restraint in favour of sovereign regulatory choices,²³ such arbitrators tend to take an expansive view of investors' rights and of their own authority,²⁴ and to pass judgment on states' regulatory decisions surprisingly often.²⁵ Unlike national courts, they rarely exercise restraint based on such principles as legislatures' democratic accountability, governments' regulatory capacity, or other decision-making forums' suitability.²⁶ Van Harten concludes that investor-state arbitrators 'appear to be reconfiguring the review role of adjudication'²⁷ to the point that they are better described as 'strict controllers' than 'gentle civilizers' of nations.²⁸

1.3 Public International Law

Public international law scholarship, for its part, has long emphasized the interaction between international and domestic law, whether as separate systems²⁹ or as elements of a unified legal system.³⁰ Much of this literature combines positive analysis (eg which countries are monist or dualist?) with normative-doctrinal (eg which is preferable?). Sophisticated accounts examine processes of interaction such as persuasion, transformation and incorporation.³¹ Other writers deny that domestic or international legal systems exist as discrete, stable entities before interacting with one another, focusing instead on their mutual constitution and interpenetration.³²

²³ Eg William W Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (2010) 35 *Yale Journal of International Law* 283.

²⁴ Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 *Osgoode Hall Law Journal* 211.

²⁵ Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press, 2013), vi.

²⁶ *Ibid*, v, 157.

²⁷ *Ibid*.

²⁸ *Ibid*, 164, citing Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge UP, 2001).

²⁹ Eg the *Interactions between International and National Law* project at the Amsterdam Centre for International Law, which culminated in Janne Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford UP, 2007). Much scholarship in this vein focuses on reception or application of international law in domestic law and the monist/dualist debate, eg L Erades, *Interactions Between International and Municipal Law: A Comparative Case Study* (TMC Asser Instituut, 1993).

³⁰ Eg Hans Kelsen, *Pure Theory of Law* (trans Max Knight) (University of California Press, 1967).

³¹ Eg Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford UP, 2011).

³² Eg Saskia Sassen, *Globalization and its Discontents* (New Press, 1998); Saskia Sassen, 'The Participation of States and Citizens in Global Governance' (2003) 10 *Indiana Journal of Global Legal Studies* 5; Fleur Johns, 'International Law-National Law: Thinking through the Hyphen' in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (Federation Press, 2005) 188.

As for interactions within public international law, to the extent that a stereotype of monolithic, autarkic sovereign states clashing like billiard balls ever held sway, it gave way long ago to more nuanced visions. The New Haven School defined international law as a continuous process of authoritative decision that could be understood in terms of a variety of state and non-state participants; the values, resources and strategies they deploy; the institutional settings in which they interact; and the aggregate values that result from interaction.³³ Its normative commitment to a world public order of human dignity provided criteria to manage interactions between state and non-state order, seeking to maximize the latter but intervening if the latter contravened the goals of the former.³⁴

International Legal Process scholars likewise focused attention on the actors and institutions involved in making, implementing and enforcing decisions affecting international affairs, inquiring into how decision-making competence is allocated, why particular regulatory structures emerge, how legal institutions constrain state and individual behaviour, how lawyers shape international affairs and how compliance with international law can be managed via ongoing justificatory discourses.³⁵ This tradition continues to evolve with Harold Koh's work on transnational legal process. Koh emphasizes states' internalization of international norms, which he theorizes as an interactive process in which norm entrepreneurs such as states, business groups, international organizations and civil society organizations interact with each other in the international arena, forcing articulation or interpretation of applicable international norms. These norms stabilize over time into legal rules that guide future interactions. Repeated participation in this interactive process helps to reconstitute participants' interests and identities.³⁶ Koh pays particular attention to specifying pathways by which international norms shape state identities, including transnational public law litigation in domestic courts, incorporation of international norms in legislation, political elites' adoption of international norms as policy, and broader societal acceptance.³⁷

³³ Myres S McDougal, Harold D Lasswell and W Michael Reisman, 'Theories About International Law: Prologue to a Configurative Jurisprudence' (1968) 8 *Virginia Journal of International Law* 188; Harold D Lasswell and Myres S McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (Nijhoff, 1992); W Michael Reisman, Siegfried Wiessner and Andrew L Willard, 'The New Haven School: A Brief Introduction' (2007) 32 *Yale Journal of International Law* 575.

³⁴ Eg W Michael Reisman, 'Autonomy, Interdependence and Responsibility' (1993) 103 *Yale Law Journal* 401.

³⁵ Abram Chayes, Thomas Ehrlich and Andreas F Lowenfeld, *International Legal Process: Materials for an Introductory Course* (Little, Brown 1968); Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995).

³⁶ Harold Hongju Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181; Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599.

³⁷ Harold Hongju Koh, 'Transnational Public Law Litigation' (1991) 100 *Yale Law Journal* 2347; Harold Hongju Koh, 'Internalization through Socialization' (2005) 54 *Duke Law Journal* 975.

A relevant contemporary extension of transnational legal process theory is the Transnational Legal Orders (TLO) project led by Gregory Shaffer and Terence Halliday.³⁸ This project 'places processes of local, national, international and transnational public and private lawmaking and practice in dynamic tension within a single analytic frame.'³⁹ This frame conceptualizes transnational legal ordering as a dynamic, recursive process of interaction among transnational and national law, in which national and transnational legal norms influence one another, temporary and contingent normative settlements are reached, and periodic destabilizations trigger further recursive cycles.⁴⁰ The TLO analytical framework revolves around the interaction of three clusters of factors involving law and politics at the transnational level (including the legitimacy, clarity and coherence of transnational legal norms), law and politics at the national level (including domestic demand, power asymmetries, institutional capacities, path dependencies and cultural frames), and law and politics between them (including transnational power asymmetries and strategically situated norm intermediaries).⁴¹ This project has begun to explore how transnational legal orders interact and align with each other and the conditions in which they are competitive or complementary,⁴² but this remains largely a question for future research.⁴³

In the 1980s and 1990s critical scholars of international law opened very different analytical avenues, informed in part by the linguistic turn in social theory. They explored how concepts and norms deployed by lawyers, scholars, judges and diplomats interact in various binaries, contradictions and paradoxes to produce and reproduce the discursive fabric of international law while constituting and being constrained by professional practices, institutional cultures and entrenched power disparities.⁴⁴ This varied literature provides provocative perspectives on interactions within discursive formations and between ideational and material structures.

During the same period, a resurgence of interest in the relation between international law and international relations theory (IL/IR) introduced a different range of perspectives

³⁸ Eg Gregory Shaffer, ed., *Transnational Legal Ordering and State Change* (Cambridge UP, 2013); Terrence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press, 2015).

³⁹ Terrence C Halliday and Gregory Shaffer, 'Transnational Legal Orders,' in Halliday and Shaffer, *ibid*, 3, 3.

⁴⁰ Gregory Shaffer, 'The Dimensions and Determinants of State Change' in Shaffer (ed), *Transnational Legal Ordering and State Change*, *ibid*, 23, 47-49; Terrence C Halliday and Bruce Carruthers, 'The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes' (2007) 112 *American Journal of Sociology* 1135; Terrence Halliday, 'Recursivity of Global Lawmaking: A Sociolegal Agenda' (2009) 5 *Annual Review of Law and Social Science* 263.

⁴¹ Shaffer, 'Dimensions and Determinants,' *ibid*.

⁴² Halliday and Shaffer, *Transnational Legal Orders*, above (n 38).

⁴³ Terrence C Halliday and Gregory Shaffer, 'Researching Transnational Legal Orders' in Halliday and Shaffer, *Transnational Legal Orders*, *ibid*, 475.

⁴⁴ David Kennedy, *International Legal Structures* (Nomos, 1987); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Lakimiesliiton Kustannus, 1989).

relevant to TBGI, from game theory to neoliberal institutionalism to social constructivism.⁴⁵ Most of this work focuses on explaining the emergence, operation and effects of individual legal regimes.⁴⁶ To the extent it considers interactions, these usually take the form of competition or cooperation among actors (especially states, but with increasing attention to interstate, sub-state and non-state actors) within particular regimes. Interactions across regimes have recently received increasing attention. Rationalist and institutionalist approaches have been particularly prominent in this respect. Kenneth Abbott and Duncan Snidal introduced the notion of a 'governance triangle' to capture the diversity of actors and institutions involved in various aspects of transnational regulatory standards-setting.⁴⁷ This mapping exercise provides a springboard to examine how 'old governance' can interact with 'new governance' to support the latter's innovative features, for example via international organizations' orchestration of transnational governance.⁴⁸

Laurence Helfer, Kal Raustiala and others have elaborated regime complexity theory to investigate the overlaps and clashes occasioned by the increasing density of international institutions.⁴⁹ This literature asks such questions as whether a densely institutionalized order has distinctive political dynamics, whether density benefits certain actors and disadvantages others, whether density is an intended or unintended outcome, and how powerful states use it to advance their interests.⁵⁰ These scholars study how states pursue strategies of forum-shopping, regime-shifting and intentional rule inconsistencies amongst nested, parallel and

⁴⁵ Eg Kenneth W Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers' (1989) 14 *Yale Journal of International Law* 335; Anne-Marie Slaughter, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *American Journal of International Law* 205.

⁴⁶ Eg Eyal Benvenisti, 'Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law' (1996) 90 *American Journal of International Law* 384; Jutta Brunnée and Stephen J Toope, 'Environmental Security and Freshwater Resources: Ecosystem Regime Building' (1997) 91 *American Journal of International Law* 26.

⁴⁷ Kenneth W Abbot and Duncan Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State' in Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009) 44.

⁴⁸ Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 *Vanderbilt Journal of Transnational Law* 501; Kenneth W Abbott and Duncan Snidal, 'International Regulation without International Government: Improving IO Performance through Orchestration' (2010) 5 *Review of International Organizations* 315; Philip Schleifer, 'Orchestrating Sustainability: The Case of European Union Biofuel Governance' (2013) 7(1) *Regulation & Governance* 533-546; Kenneth W Abbott and Duncan Snidal, 'Taking Responsive Regulation Transnational: Strategies for International Organizations' (2013) 7 *Regulation & Governance* 97; Kenneth Abbott and others (eds), *International Organizations as Orchestrators* (Cambridge University Press, 2015).

⁴⁹ Eg Laurence R Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 *Yale Journal of International Law* 1; Kal Raustiala and David G Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 58 *International Organization* 277; Laurence R Helfer, 'Regime Shifting in the International Intellectual Property System' (2009) 7(1) *Perspectives on Politics* 39.

⁵⁰ Kal Raustiala, 'Institutional Proliferation and the International Legal Order' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of The Art* (Cambridge University Press, 2013), 293, 294.

overlapping international regimes. While most focus on state actors and inter-state regimes, some examine transnational regulatory dynamics.⁵¹

Another relevant branch of the rational-institutionalist IL/IR literature addresses the legalization of international governance. Legalization—with its archetype in the European Union⁵²—can be understood in interactive terms as the transposition of distinctively legal features (obligation, precision and delegation) from some institutions and domains to others,⁵³ supplementing or displacing softer norms, techniques and practices and recapitulating to a certain extent the wider story of the juridification of social spheres.⁵⁴

Constructivist IR theory, with its insistence that structure and agency are mutually constituted and that ideas, norms and discourses shape actor identities and behaviour, resonates both with international legal process scholars' emphasis on the importance of norms, social interaction and identity and with critical international legal scholars' focus on language, discourse and power. Much constructivist literature on international law focuses on how international norms are generated by social interaction and how they enable or constrain decisions and behaviour.⁵⁵ Jutta Brunnée and Stephen Toope have called upon constructivists to address what, if anything, makes law distinctive in this respect (as distinct from non-legal normative ordering).⁵⁶ They propose an interactional theory that explains the making, remaking and unmaking of international law in terms of interplay between, on the one hand, the intersubjective creation of norms meeting Lon Fuller's eight criteria of legality, and on the other, ongoing 'practices of legality.'⁵⁷ Abbott and Snidal have criticized their approach for

⁵¹ Eg Kenneth W Abbott, 'The Transnational Regime Complex for Climate Change' (2012) 30 *Environment and Planning C: Government and Policy* 571; Kenneth W Abbott, 'Strengthening the Transnational Regime Complex for Climate Change' (2014) 3 *Transnational Environmental Law* 57. The regime complexity literature relates closely to scholarship on the fragmentation of international law, to which I turn after completing this brief survey of relevant international law/international relations (IL/IR) scholarship.

⁵² Eg Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

⁵³ Kenneth W Abbott and others, 'The Concept of Legalization' (2000) 54 *International Organization* 401; but note that Abbott and Snidal have sought more recently to reconceptualize legalization more generally as the process by which law changes and develops. Kenneth W Abbott and Duncan Snidal, 'Law, Legalization and Politics: An Agenda for the Next Generation of IL/IR Scholars' in Dunoff and Pollack, above (n 50), 33.

⁵⁴ Gunther Teubner (ed), *Juridification of Social Spheres* (de Gruyter, 1987).

⁵⁵ Eg Friedrich Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1989); Nicholas G Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (University of South Carolina Press, 1989); Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press, 2011).

⁵⁶ Jutta Brunnée and Stephen J Toope, 'Constructivism and International Law' in Dunoff and Pollack, above (n 50), 119.

⁵⁷ Jutta Brunnée and Stephen J Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 *Columbia Journal of Transnational Law* 19; Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010); Jutta

downplaying sources of obligation and legitimacy beyond Fuller's criteria, discounting the role of pre-interactive formal agreements in creating the expectations on which interactions can develop, and denying the inextricability of law and politics.⁵⁸ Constructivism nevertheless provides insights into the interactive dynamics of the creation, implementation and enforcement of international governance norms, but like other IR-inspired approaches, its attention until now has focused on dynamics within rather than among legal regimes.

Liberal international relations theory, for its part, explains international governance mainly in terms of functional interdependence across national borders and variation in domestic state-society relations. It directs attention to the diversity of state, inter-state, sub-state and non-state actors that interact in multi-level, nested international and domestic games, as well as the variety of societal mechanisms of state preference formation.⁵⁹ Liberal approaches to international law thus emphasize vertical interaction between international and domestic spheres and horizontal interaction between sub-state actors like regulators and courts.⁶⁰ Anne-Marie Slaughter, for example, identifies five categories of cross-border judicial interactions.⁶¹ As with other IR-informed legal scholarship, however, the emphasis remains on state actors and on interactions within rather than between regimes.

This is not to say that public international lawyers have ignored the latter interactions. Legal scholars have recently examined the proliferation and increasing congestion of international institutions,⁶² the fragmentation of public international law into multiple, overlapping, specialized regimes,⁶³ the interaction between 'hard' and 'soft' law⁶⁴ and between

Brunnée and Stephen J Toope, 'Interactional International Law and the Practice of Legality' in Emanuel Adler and Vincent Pouliot (eds), *International Practices* (Cambridge University Press, 2011) 108.

⁵⁸ Abbott and Snidal, 'Law, Legalization and Politics,' above (n 53), 38-40.

⁵⁹ Eg Anne-Marie Slaughter, 'Dual Agenda,' above (n 45); Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503; Andrew Moravcsik, 'Liberal Theories of International Law,' in Dunoff and Pollack, above (n 50), 83.

⁶⁰ Eg Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41; Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004).

⁶¹ Eg Anne-Marie Slaughter, 'Judicial Globalization' (2000) 40 *Virginia Journal of International Law* 1103.

⁶² Eg Edith Brown Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 *Georgetown Law Journal* 675.

⁶³ Eg Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Post-Modern Anxieties' (2002) 15 *Leiden Journal of International Law* 553; International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Report of the Study Group of the International Law Commission), UN Doc A/CN.4/L.682 (13 April 2006); William Boyd, 'Climate Change, Fragmentation, and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage' (2010) 32 *University of Pennsylvania Journal of International Law* 457; Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012); Harro van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Edward Elgar, 2014).

⁶⁴ Eg Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421; John J Kirton and Michael J Trebilcock (eds), *Hard Choices, Soft Law: Voluntary*

state and non-state actors,⁶⁵ intersections among different international law regimes (eg various ‘trade and ...’ debates),⁶⁶ and the emergence of transnational networks of sub-state actors.⁶⁷ Most legal scholars who study fragmentation and overlap of public international law tend (like their private international law counterparts) to focus on conflict and inconsistency, to worry that proliferation and fragmentation weaken international law’s moderating influence on power, and to share a normative commitment to enhancing harmony and coherence.⁶⁸ Some, however, argue that ‘competitive multilateralism’ and international forum-shopping can improve the quality of rules and decisions and enhance the accountability of international bodies.⁶⁹ Similarly, Margaret Young emphasizes the ‘productive friction’ between international law regimes.⁷⁰ The literature on fragmentation is further fragmented between legal scholarship focused on the normative question of whether fragmentation is good or bad, and social science-informed work that focuses on explaining its dynamics.⁷¹

Within the ‘hard law-soft law’ literature, John Kirton and others investigate why the ‘galaxies’ of ‘hard,’ multilateral law and organizations, on the one hand, and ‘soft,’ informal, plurilateral clubs like the G8, on the other, have come to cooperate and converge rather than

Standards in Global Trade, Environment, and Social Governance (Ashgate, 2004); Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000).

⁶⁵ Eg Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005); Hanneke van Schooten and Jonathan Verschuuren (eds), *International Governance and Law: State Regulation and Non-State Law* (Edward Elgar, 2008); Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate, 2010); and the journal *Non-State Actors and International Law*, launched in 2001.

⁶⁶ Eg David W Leebron, ‘Linkages’ (2002) 96 *American Journal of International Law* 5; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge UP, 2003).

⁶⁷ Eg Anne-Marie Slaughter, ‘The Accountability of Government Networks’ (2001) 8 *Indiana Journal of Global Legal Studies* 347; Kal Raustiala, ‘The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law’ (2002) 43 *Virginia Journal of International Law* 1; Anne-Marie Slaughter, *New World Order*, above (n 60); Anne-Marie Slaughter, ‘A Global Community of Courts’ (2003) 44(1) *Harvard International Law Journal* 191; Anne-Marie Slaughter and David Zaring, ‘Networking Goes International: An Update’ (2006) 2 *Annual Review of Law and Social Science* 211.

⁶⁸ Eg International Law Commission, above (n 63); Ruti Teitel and Robert Howse, ‘Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order’ 41 *New York University Journal of International Law and Politics* 959; Harro van Asselt, ‘Managing the Fragmentation of International Climate Law’ in Erkki J Hollo, Kati Kulovesi and Michael Mehling (eds), *Climate Change and the Law* (Springer, 2013) 329.

⁶⁹ Eg Jonathan I Charney, ‘Is International Law Threatened by Multiple International Tribunals?’ (1998) 271 *Recueil des Cours* 101; Jonathan I Charney and others, ‘The “Horizontal” Growth of International Courts and Tribunals: Challenges or Opportunities?’ (2002) 96 *Proceedings of the American Society of International Law* 369; Jacob Katz Cogan, ‘Competition and Control in International Adjudication’ (2008) 48 *Virginia Journal of International Law* 411; Eyal Benvenisti and George W Downs, ‘Toward Global Checks and Balances’ (2009) 20 *Constitutional Political Economy* 366; Joost Pauwelyn and Luiz Eduardo Salles, ‘Forum Shopping before International Tribunals: (Real) Concerns, (Im)possible Solutions’ (2009) 42 *Cornell International Law Journal* 77.

⁷⁰ Margaret A Young, ‘Introduction: The Productive Friction Between Regimes’ in Young, *Regime Interaction*, above (n 63), 1.

⁷¹ Raustiala, above (n 50), 294-95.

compete and conflict.⁷² They offer a typology of interactions in which each of these ‘galaxies’ can, in theory, govern through, against or without the other.⁷³ Focusing more at the level of norms, Gregory Shaffer and Mark Pollack study antagonism and complementarity of hard and soft law.⁷⁴ ‘Trade and ...’ scholars emphasize normative conflict among legal regimes and the tendency of trade norms to dominate over others, warning recently of the adverse environmental consequences of the emergence of multiple fora (beyond the World Trade Organization) for the resolution of ‘trade and environment’ disputes.⁷⁵

1.4 Transgovernmental Networks

The burgeoning legal literature on transnational regulatory networks is likewise divided between scholarship concerned with understanding how networks work and more conventional legal scholarship concerned with evaluating their legitimacy and effectiveness.⁷⁶ Transnational networks of specialized regulatory professionals are relevant to the study of TBGI in at least two ways. First, they provide potentially important pathways through which actors pursue regulatory agendas within and across governance fora. While many legal scholars who study transnational regulatory networks emphasize their agility, flexibility, and promise in fostering cooperation, dialogue, learning and capacity building,⁷⁷ Sol Picciotto notes their symbiotic combination of competition and coordination: they result from international regulatory conflicts and provide arenas for continued competition.⁷⁸

The second way in which transnational regulatory networks are relevant to TBGI is that variation in network characteristics may help determine whether interactions between regulatory networks and conventional international regimes are competitive or complementary. Abraham Newman and David Zaring hypothesize that the wider the

⁷² John Kirton, Marina Larionova and Paolo Savona, ‘Introduction, Arguments and Conclusions’ in John Kirton, Marina Larionova and Paolo Savona (eds), *Making Global Economic Governance Effective: Hard and Soft Law Institutions in a Crowded World* (Ashgate 2010) 5.

⁷³ John Kirton, ‘Multilateral Organizations and G8 Governance: A Framework for Analysis’ in *ibid*, 23.

⁷⁴ Gregory Shaffer and Mark Pollack, ‘Hard vs Soft: Alternatives, Complements and Antagonists in International Governance’ (2010) 94 *Minnesota Law Review* 706.

⁷⁵ Mark Wu and James Salzman, ‘The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy’ (2014) 108 *Northwestern University Law Review* 401, 466-74.

⁷⁶ Abraham L Newman and David Zaring, ‘Regulatory Networks: Power, Legitimacy and Compliance’ in Dunoff and Pollack, above (n 50), 244, 245.

⁷⁷ Eg Raustiala, above (n 67); Slaughter, *New World Order*, above (n 60); Richard B Stewart, ‘The Global Regulatory Challenge to US Administrative Law’ (2005) 37 *NYU Journal of International Law and Politics* 695. Others have criticized regulatory networks for ineffectiveness, opacity, industry capture and lack of accountability, eg Pierre Hugues Verdier, ‘Transnational Regulatory Networks and their Limits’ (2009) 34 *Yale Journal of International Law* 113; Eric Pan, ‘Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks’ (2010) 11 *Chicago Journal of International Law* 243.

⁷⁸ Sol Picciotto, ‘The Regulatory Criss-Cross: Interaction between Jurisdictions and the Construction of Global Regulatory Networks’ in William Bratton and others (eds), *International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and the United States* (Clarendon, 1996), 89.

membership and legitimacy and the deeper the capacity and authority of networks, the more likely they are to compete with conventional interstate institutions; and vice versa.⁷⁹ That said, the legal academic literature on regulatory networks remains focused on state actors.⁸⁰ Its extension to networks of non-state regulators and to interactions among such networks (rather than between networks and conventional treaty regimes) represents a research opportunity.⁸¹

1.5 Comparative Law

Comparative law boasts long traditions of examining interactions among national legal systems in such contexts as 'legal transplants,'⁸² 'legal irritants,'⁸³ convergence and divergence of corporate governance laws,⁸⁴ and other processes of cross-border norm diffusion.⁸⁵ This literature offers various explanations for the dynamics of norm diffusion including transnational normative entrepreneurship by NGOs and lawyers, internalization of transnational norms by domestic elites, and the facilitative role of global communications technology.⁸⁶ The focus of this research is squarely on state law, however.

⁷⁹ Newman and Zaring, above (n 76), 258.

⁸⁰ But see Annelise Riles' skeptical analysis of the effects of nongovernmental organizations in the context of women and development: Annelise Riles, *The Network Inside Out* (University of Michigan Press, 2000).

⁸¹ This extension is already well underway outside the legal literature, eg Karin Bäckstrand, 'Accountability of Networked Climate Governance: The Rise of Transnational Climate Partnerships (2008) 8 *Global Environmental Politics* 74; Alan J Richardson 'Regulatory Networks for Accounting and Auditing Standards: A Social Network Analysis of Canadian and International Standard-Setting' (2009) 34 *Accounting, Organizations and Society* 571; Timothy M Smith and Miriam Fischlein, 'Rival Private Governance Networks: Competing to Define the Rules of Sustainability Performance' (2010) 20 *Global Environmental Change* 511; Christine Overdevest and Jonathan Zeitlin, 'Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector' (2014) 8 *Regulation & Governance* 22.

⁸² Alan Watson, *Legal Transplants: An Approach to Comparative Law* (UP of Virginia, 1974); Brian Z Tamanaha, *Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law* (Brill, 1993).

⁸³ Gunther Teubner, 'Legal Irritants: How Unifying Law Ends up in New Divergences' in Peter A Hall and David Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford UP, 2001) 417.

⁸⁴ Eg Ronald J Gilson, 'Globalizing Corporate Governance: Convergence of Form or Function?' (2001) 49 *American Journal of Comparative Law* 329; Joseph McCahery et al (eds), *Corporate Governance Regimes: Convergence and Diversity* (Oxford UP, 2002); Katharina Pistor, 'Of Legal Transplants, Legal Irritants, and Economic Development' in Peter Cornelius and Bruce Kogut (eds), *Corporate Governance and Capital Flows in a Global Economy* (Oxford UP, 2003) 347; Jeffrey N Gordon and Mark J Roe (eds), *Convergence and Persistence in Corporate Governance* (Cambridge UP, 2004); Klaus J Hopt et al (eds), *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US* (Oxford UP, 2005); Pierre Larouche and Péter Cserne (eds), *National Legal Systems and Globalization: New Role, Continuing Relevance* (TMC Asser Press, 2013).

⁸⁵ Eg Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart, 2001); Mary L Volcansek and John F Stack (eds), *Courts Crossing Borders: Blurring the Lines of Sovereignty* (Carolina Academic Press, 2005); Donald W Jackson, Michael C Tolley and Mary L Volcansek (eds), *Globalizing Justice: Critical Perspectives on Transnational Law and the Cross-Border Migration of Legal Norms* (State University of New York Press, 2010).

⁸⁶ Eg Jackson, Tolley and Volcansek, *ibid*.

In addition to international and comparative law, legal scholars have for many decades examined the complex interactions among legislatures, courts, regulatory agencies, rules, standards, regulated firms, NGOs and individuals within national legal systems. Numerous analytical perspectives elaborated in the domestic context have ‘gone global,’ including regulation, governance, private ordering, administrative law, constitutional law, legal pluralism, and systems theory. These approaches, which often overlap, have the potential to elucidate transnational governance interactions in ways I can only hint at here.

2. Governance Interactions in Theories of Regulation and Governance

The literature on regulation offers diverse perspectives on regulatory interactions at various levels of analysis including micro-interactions among actors to produce, interpret, comply with and enforce regulation; meso-interactions among regulatory agencies or between social agency and social structure; and macro-interactions among intersecting regulatory systems.⁸⁷ Actor-centred approaches grounded in welfare economics, public choice or game theory offer contending explanations of and prescriptions for regulatory interactions, mostly at the micro level.⁸⁸ Institutional perspectives explore how social structures enable, shape and constrain regulatory actors’ choices and how actors and institutions interact at the meso level, usually within a given policy domain.⁸⁹ Systems theory, discussed further below, examines macro-level interactions between the legal system and other functionally differentiated social subsystems.⁹⁰

The transposition of these approaches to the transnational domain has been facilitated in part by the burgeoning literatures on the (post-)regulatory state and New Governance, which emphasize the decentring of the state, the processes of regulatory legitimation and the dynamics of bargaining and intermediation among actors and institutions that span the conventional public-private divide.⁹¹ From a normative perspective, these literatures—like the

⁸⁷ For a survey see, eg, Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) ch 2.

⁸⁸ Eg Eugene Bardach and Robert A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple University Press, 1982); Robert W Hahn and Roger G Noll, ‘Barriers to Implementing Tradable Air Pollution Permits: Problems of Regulatory Interactions’ (1983) 1 *Yale Journal on Regulation* 63; Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1990); Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Hart, 2004).

⁸⁹ Eg Errol Meidinger, ‘Regulatory Culture: A Theoretical Outline’ (1987) 9 *Law and Policy* 355; John and Valerie Braithwaite, ‘The Politics of Legalism: Rules versus Standards in Nursing-Home Regulation,’ (1995) 4 *Social & Legal Studies* 307; Julia Black, *Rules and Regulators* (Clarendon, 1997); Robert Baldwin and Julia Black, ‘Really Responsive Regulation’ (2008) 71 *Modern Law Review* 59.

⁹⁰ Eg Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (de Gruyter, 1986).

⁹¹ Eg Julia Black, ‘Proceduralizing Regulation, Part I’ (2000) 20 *Oxford Journal of Legal Studies* 597; Julia Black, ‘Proceduralizing Regulation, Part II’ (2001) 21 *Oxford Journal of Legal Studies* 33; Julia Black, ‘Decentring

systems approaches discussed below—advocate forms of regulation that manage the interaction between regulating and regulated systems by creating choice architecture, setting default rules, nudging regulated entities, and requiring self-monitoring and self-reflection.⁹²

2.1 Global Business Regulation

John Braithwaite and Peter Drahos's magisterial study of global business regulation⁹³ is one of the most promising global extensions of regulation scholarship for purposes of studying TBGI. Given the richness of their empirical data and the clarity of their middle-range theory-building, it is a surprise that the book has not had more traction in recent scholarship about transnational law and global governance. Braithwaite and Drahos present a fundamentally interactive theory of the globalization of business regulation in which 'different types of actors use various mechanisms to push for or against principles' by mobilizing multiple strands in complex webs of influence.⁹⁴ The main actors in their account are organizations, but individuals also act as norm entrepreneurs, epistemic communities enroll support for regulatory agendas, and mass publics sometimes provide impetus for regulatory change.

Actors advance regulatory agendas by engaging in contests of principles. Braithwaite and Drahos find that fewer than three dozen principles have been recurrently important in regulatory globalization over long periods.⁹⁵ They show that principles can interact to set regulatory systems in motion upward or downward. Certain principles can combine to prevent a reversal of direction, turning a regulatory race into a ratchet.⁹⁶ While downward ratchets predominate in many domains of global business regulation, Braithwaite and Drahos find that upward ratchets predominate in recent global environmental, safety and financial regulation.⁹⁷

Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems* 103; Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002); Colin Scott, 'Regulation in the Age of Governance,' in Jacint Jordana and David Levi-Faur (eds) *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar 2004); Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 342; Christine Parker and others (eds), *Regulating Law* (Oxford University Press, 2004); Gráinne de Búrca and Joanna Scott (eds), *Law and New Governance in the EU and the US* (Hart, 2006); Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137); John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Elgar, 2008).

⁹² Eg On Amir and Orly Lobel, 'Liberalism and Lifestyle: Informing Regulatory Governance with Behavioural Research' (2012) 3 *European Journal of Risk Regulation* 17.

⁹³ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge UP 2000).

⁹⁴ *Ibid*, 9.

⁹⁵ *Ibid*, 24-5, 508-9, 526.

⁹⁶ *Ibid*, 518.

⁹⁷ *Ibid*, 522.

Their third key concept is mechanisms. Seven mechanisms emerge inductively from their research: coercion, reward, modelling, reciprocal adjustment, non-reciprocal coordination and capacity-building.⁹⁸ Of these, modelling is the most consistently important, but regulatory globalization always involves multiple mechanisms.⁹⁹ The authors conclude that there is no master actor or mechanism in the globalization of business regulation. Instead, there are complex webs of influence in which many types of actors mobilize many mechanisms.¹⁰⁰ Webs of dialogue are more common and more often effective than webs of reward and coercion.¹⁰¹

Using these four key concepts of actors, principles, mechanisms and webs, Braithwaite and Drahos theorize three interactive strategies by which actors can intervene in regulatory webs to effect structural change. In the first two, micro-level regulatory entrepreneurship produces macro-level structural change via the mechanism of modelling.¹⁰² A proactive micro-macro sequence unfolds when regulatory entrepreneurs promote a regulatory innovation; they enroll organizational power in support of the innovation via webs of dialogue and persuasion; the innovation spreads as actors model it; the innovation becomes the new standard; and early adopters reap first-mover benefits. In the reactive sequence a disaster generates media hype and mobilizes mass publics to demand regulatory change; entrepreneurs exploit the crisis as an opportunity to promote a pre-packaged regulatory innovation as a solution to the disaster; the innovation spreads via modelling; the innovation becomes the new standard; and mass publics are placated.

Regulatory entrepreneurs often emerge from civil society, professions, consulting industries, academia, and modest international secretariats.¹⁰³ The prevalence of dialogue over reward or coercion enables them to 'enter existing webs as purveyors of new regulatory ideas and models,' gain access to inner circles, enrol the organizational power of members of these inner circles, and ultimately 'remake macro regulatory worlds.'¹⁰⁴

Braithwaite and Drahos also theorize a third strategy, forum-shifting, in which a structurally powerful actor shifts regulatory negotiations from an unfavourable forum to a more favourable one and secures an outcome in the second forum that entrenches its favoured principles, which then pattern the development of a global regulatory regime.¹⁰⁵

⁹⁸ *Ibid*, 25-6, 532-33.

⁹⁹ *Ibid*, 30, 542-3, 546-7.

¹⁰⁰ *Ibid*, 7, 550.

¹⁰¹ *Ibid*, 537-9, 556-8.

¹⁰² *Ibid*, 33, 551, 559-62.

¹⁰³ *Ibid*, 559-61.

¹⁰⁴ *Ibid*, 563.

¹⁰⁵ *Ibid*, 564, 569-71.

In addition to these generic strategies, Braithwaite and Drahos theorize several strategies aimed specifically at empowering structurally weak actors to intervene in regulatory webs to ratchet up global regulatory standards and enhance citizen sovereignty. These strategies include making government-business-civil society tripartism a constitutional feature of global governance, thus lowering barriers to contestation¹⁰⁶ (a strategy already familiar from Braithwaite's earlier work with Ian Ayres on responsive regulation);¹⁰⁷ mobilizing oppositional principles to create nested vertical and horizontal games, thus increasing game complexity for powerful opponents and occasionally outflanking their forum-shifting strategies;¹⁰⁸ exploiting strategic trade thinking to divide and conquer business (eg setting European against US businesses, or early industry movers against laggards);¹⁰⁹ targeting gatekeepers in regulatory webs;¹¹⁰ embracing framework agreements;¹¹¹ conducting regulatory contests at the level of principles rather than detailed rules;¹¹² harnessing principles like continuous improvement, best available technology and world's best practice to create upward regulatory ratchets;¹¹³ and transforming NGOs into experimental model mongers.¹¹⁴

Braithwaite and Drahos' conceptual framework holds substantial promise for building theories of TBGI. It also has limitations. Braithwaite and Drahos' insistence that the globalization of regulation proceeds—and should be studied—at the level of general principles¹¹⁵ forecloses an avenue of investigation that the authors themselves recognize as critical to understanding the globalization of regulation: the tedious, mundane processes of detailed rule-making in countless committee rooms, international organizations and voluntary

¹⁰⁶ *Ibid*, 572-74.

¹⁰⁷ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

¹⁰⁸ Braithwaite and Drahos, above (n 93), 31-2, 574-6.

¹⁰⁹ *Ibid*, 612-14, 618.

¹¹⁰ *Ibid*, 518. The idea that regulation should target gatekeepers such as auditors, certifiers, accreditors, insurers, lawyers, securities analysts and credit rating agencies because they can combine the capacity to prevent rule-breaking with limited incentives to engage in it is a familiar one. Eg Reinier H Kraakman, 'Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy' (1986) 2 *Journal of Law, Economics and Organization* 53; Michael Power, *The Audit Society: Rituals of Verification* (Oxford University Press, 1997); Timothy J Sinclair, *The New Masters of Capital: American Bond Rating Agencies and the Politics of Creditworthiness* (Cornell University Press, 2005); John C Coffee, *Gatekeepers: The Role of the Professions in Corporate Governance* (Oxford University Press, 2006).

¹¹¹ Braithwaite and Drahos, above (n 93), 619-20. They argue that while often vague and spineless, framework agreements facilitate contests of principles, provide fora for dialogue, often harden into complex rule systems, and for these reasons present opportunities for clever NGOs to use the dialogic space so opened to model-monger.

¹¹² *Ibid*, 572.

¹¹³ *Ibid*, 615-18.

¹¹⁴ *Ibid*, 626.

¹¹⁵ Braithwaite and Drahos, above (n 93), 19, 29, 30; see also 527-8, 531.

standardization bodies.¹¹⁶ As the authors recognize, the many thousands of technical rules that emerge from these processes

largely control what we buy and whom we buy it from; they determine how safe we are at work and at play. They constitute a normative fabric far beyond the capacities of any state. Markets wouldn't exist without them. Regulators wouldn't know what to do without them.¹¹⁷

This limitation notwithstanding, *Global Business Regulation* is a conceptual and empirical gold mine, an unsurpassed entry point into the history and contemporary practice of transnational business governance in more than a dozen key domains.

2.2 Regulatory Competition

Theories of multilevel or polycentric governance developed in the context of federal and other decentralized political systems also have much to offer the study of TBGI. The regulatory competition literature provides insight into the drivers, dynamics and effects of one form of regulatory interaction: competition among jurisdictions to attract or retain mobile citizens and factors of production by offering attractive regulatory environments.¹¹⁸ Proponents argue that competition among legal systems enhances social welfare by generating more efficient regulatory standards and can induce regulatory 'races to the top' toward more stringent standards.¹¹⁹ Critics argue that regulatory competition can generate a race to the bottom or put a chill on regulation, especially where there are negative social or environmental spillovers between jurisdictions.¹²⁰ William Bratton and Joseph McCahery show that the conditions for competition are often absent and that the welfare-enhancing benefits of decentralization cannot be assumed.¹²¹ Daniel Esty and Damien Geradin coin the term 'regulatory co-opetition'

¹¹⁶ *Ibid*, 475, 499, 530-1, 542, 606, 624.

¹¹⁷ Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart, 2005), 404. In the same vein see Liora Salter, 'The Housework of Capitalism: Standardization in the Communications and Information Technology Sectors' (1993-94) 23 *International Journal of Political Economy* 105; Stepan Wood, 'Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law and Private Authority in Canada' in Law Commission of Canada (ed) *New Perspectives on the Public-Private Divide* (University of British Columbia Press, 2003) 123; Annelise Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53 *Buffalo Law Review* 973.

¹¹⁸ Eg Bratton and others, above (n 78); Daniel C Esty and Damien Geradin (eds), *Regulatory Competition and Economic Integration* (Oxford UP, 2001).

¹¹⁹ William W Bratton and others, 'Introduction: Regulatory Competition and Institutional Evolution' in Bratton and others, above (n 78), 1; David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Harvard University Press, 1995).

¹²⁰ Eg William L Cary, 'Federalism and Corporate Law: Reflections Upon Delaware' (1974) 83 *Yale Law Journal* 663.

¹²¹ William W Bratton and Joseph A McCahery, 'The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World' (1997) 86 *Georgetown Law Journal* 201; see also Joel P Trachtman, 'Regulatory Competition and Regulatory Jurisdiction in International Securities Regulation' in Esty and Geradin, above (n 118), 290.

to argue that regulatory systems should recognize and promote a mix of competition and cooperation across horizontally and vertically arrayed governmental jurisdictions, among the various branches and departments within government, and between governmental and non-state regulatory actors.¹²² Others likewise emphasize that international regulatory interactions involve a complicated mix of conflict, cooperation, coordination and harmonization.¹²³

Most of the international regulatory competition literature addresses interaction among national legal systems,¹²⁴ but some examines how NGOs and industry groups reinforce or exert competitive pressure on government regulation.¹²⁵ Extending regulatory competition analysis to transnational governance raises several questions, including whether and when the conditions for competition exist in domains in which jurisdiction is not defined territorially and regulators cannot necessarily require all actors within their jurisdiction to adhere to their standards. In these circumstances, regulatory cooperation or competition may be determined by forces other than factor mobility.

Transnational regulatory competition also raises questions about legitimacy and regulatory races. Errol Meidinger, for example, predicts that competition among schemes for acceptance will create pressure to adopt standards that respond to or even anticipate public demands, leading toward more transparent, participatory processes and more ambitious and effective rules.¹²⁶ Other legal commentators are more pessimistic, arguing that such competition—especially between non-state and intergovernmental rulemaking institutions—endangers democratic governance.¹²⁷

¹²² Daniel C Esty and Damien Geradin, 'Regulatory Co-opetition' in Esty and Geradin, *ibid*; see also Luca Enriques and Martin Gelter, 'How the Old World Encountered the New One: Regulatory Competition and Cooperation in European Corporate and Bankruptcy Law' (2007) 81 *Tulane Law Review* 577.

¹²³ Eg George A Bermann, Matthias Herdegen and Peter A Lindseth (eds), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford University Press, 2000); David A Wirth, 'The EU's New Impact on US Environmental Regulation' (2007, Summer) 31 *Fletcher Forum of World Affairs* 91; Noah M Sachs, 'Jumping the Pond: Transnational Law and the Future of Chemical Regulation' (2009) 62 *Vanderbilt Law Review* 1817, 1853-7.

¹²⁴ Eg Bratton and others, 'Introduction,' above (n 119), 4 (global regulation is 'a practice of competitive interaction among national legal systems').

¹²⁵ Eg Damien Geradin and Joseph A McCahery, 'Regulatory Co-opetition: Transcending the Regulatory Competition Debate' in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Elgar, 2004), 90, 112-14.

¹²⁶ Errol Meidinger, 'Competitive Supragovernmental Regulation: How Could it be Democratic?' (2008) 8 *Chicago Journal of International Law* 513.

¹²⁷ Eg Halina Ward, 'The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy' (2011) 12 *Theoretical Inquiries in Law* 665; Janelle M Diller, 'Private Standardization in Public International Lawmaking' (2012) 33 *Michigan Journal of International Law* 481.

2.3 Multilevel Governance

Like regulatory competition theory, accounts of multilevel, multipolar and polycentric governance have emerged mainly in the contexts of federalism and European integration. From US federal politics, to courts, comitology and coordination in the European Union, these accounts paint complicated positive and normative pictures of the distribution of regulatory jurisdiction, accountability and legitimacy among a mix of authorities that interact horizontally, vertically and diagonally across various levels and scales.¹²⁸ Some accounts, like Ernst-Ulrich Petersmann's 'plywood principle,' exhibit a normative commitment to harmony and mutual reinforcement.¹²⁹ All emphasize increasing complexity and overlap of regulatory actors and structures, the increasing interdependence of regulatory agencies, and the increasing salience of coordination and persuasion in the dynamics of regulatory interaction—features that Robert Ahdieh incorporates in his concepts of dialectical (as opposed to merely dialogic) regulatory interaction and 'intersystemic governance.'¹³⁰ Although this literature remains focused on state actors,¹³¹ Paul Schiff Berman urges its extension to the variety of non-state regulatory actors and interlocking governance structures that characterize transnational law.¹³² Fabrizio Cafaggi proposes a deterritorialized concept of multilevel governance that predicts different constellations (from plurality to monopoly) of private regulators and different coordination

¹²⁸ Eg Christian Joerges and Jürgen Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 *European Law Journal* 273; Francesca E Bignami, 'The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology' (1999) 40 *Harvard International Law Journal* 451; Hari M Osofsky, 'The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance' (2005) 83 *Washington University Law Quarterly* 1789; Robert A Schapiro, 'Toward a Theory of Interactive Federalism' (2005) 91 *Iowa Law Review* 243; David M Trubek and Louise G Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination' (2005) 11 *European Law Journal* 343; Robert A Schapiro, 'From Dualist Federalism to Interactive Federalism' (2006) 56 *Emory Law Journal* 1 (introduction to special issue on interactive federalism); William W Buzbee, 'Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons' (2007) 57 *Emory Law Journal* 145; Hari M Osofsky, 'Is Climate Change "International"? Litigation's Diagonal Regulatory Role' (2009) 49 *Virginia Journal of International Law* 585 (2009).

¹²⁹ Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (University Press, 1991), 17.

¹³⁰ Robert B Ahdieh, 'From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction' (2007) 57 *Emory Law Journal* 1; see also Robert B Ahdieh, 'Dialectical Regulation' (2006) 38 *Connecticut Law Review* 863; Robert A Schapiro, 'Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World' (2007) 57 *Emory Law Journal* 115.

¹³¹ Eg Ahdieh, above (n 130), 11-17; Robert Baldwin, Julia Black and Gerard O'Leary, 'Risk Regulation and Transnationality: Institutional Accountability as a Driver of Innovation' (2014) 3 *Transnational Environmental Law* 373; Edward J Janger, 'Arbitrating Systemic Risk: System Definition, Risk Definition, Systemic Interaction, and the Problem of Asymmetric Treatment' (2014) 92 *Texas Law Review* See Also 217; Davor Jancic, 'Multilayered International Parliamentarism: The Case of EU-Brazil Relations,' LSE Law, Society and Economy Working Papers No. 17/2014, <http://ssrn.com/abstract=2457871> (visited April 7, 2015).

¹³² Paul Schiff Berman, 'Dialectical Regulation, Territoriality, and Pluralism' (2006) 38 *Connecticut Law Review* 929.

mechanisms (contract or organization) at different governance levels, depending on how the interests of regulators, regulatees and beneficiaries are aligned.¹³³

2.4 Transnational Private Regulation

Cafaggi's proposal is part of a burgeoning literature on transnational private regulation (TPR). The TPR literature holds great promise for generating insights into TBGI but has made only modest progress toward fulfilling that promise because it focuses primarily on the legitimacy, quality, effectiveness and enforcement of particular transnational private regulatory initiatives rather than these initiatives' interactions with each other.¹³⁴ While it often features deft comparative analysis across regulatory domains,¹³⁵ it pays little attention to governance interactions beyond the relationship between public law and private regulation, often with an emphasis on the use of the former to control the latter.¹³⁶

Some TPR scholarship examines broader governance interactions, including Cafaggi's account of multilevel governance discussed above, and Harm Schepel's exhaustive study of complex, heterarchic interactions in the field of product safety standards.¹³⁷ Other TPR scholars explore meta-regulation, an important mode of transnational governance interaction. Originally used to denote to state regulation of industry self-regulation,¹³⁸ meta-regulation can operate in both directions across the state/non-state and national/international divides. International agreements or non-state actors may regulate state regulation; non-state regulators may regulate other non-state regulation; and so on. Meta-regulation can also be multi-layered. For example, international regulation may regulate national regulation, which in turn regulates industry or individual self-regulation—'regulation of regulation of regulation.'¹³⁹

¹³³ Fabrizio Cafaggi, 'The Architecture of Transnational Private Regulation,' Osgoode CLPE Research Paper No 20/2012, <http://ssrn.com/abstract=2144407> (visited March 12, 2015).

¹³⁴ Eg Special Issue, *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates* (2011) 38 *Journal of Law and Society* 1; Fabrizio Cafaggi (ed), *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* (Elgar, 2012); Special Issue, *Transnational Private Regulatory Governance: Regimes, Dialogue, Constitutionalization* (2012) 13 *German Law Journal* 1269.

¹³⁵ Eg Paul Verbruggen, 'Gorillas in the closet? Public and private actors in the enforcement of transnational private regulation' (2013) 7 *Regulation & Governance* 512-532; Paul Verbruggen, *Enforcing Transnational Private Regulation: A Comparative Analysis of Advertising and Food Safety* (Edward Elgar, 2014).

¹³⁶ Eg Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 *Modern Law Review* 24; Jodi Freeman, 'Private Parties, Public Functions and the New Administrative Law' (2000) 52 *Administrative Law Journal* 813; Alfred C Aman Jr, 'Globalization, Democracy, and the Need for a New Administrative Law' (2002) 49 *UCLA Law Review* 1687; Geoffrey P Miller and Fabrizio Cafaggi (eds), *The Governance and Regulation of International Finance* (Elgar, 2013).

¹³⁷ Schepel, above (n 117).

¹³⁸ Parker, *Open Corporation*, above (n 91); see also Sharon Gilad, 'It Runs in the Family: Meta-Regulation and its Siblings' (2010) 4 *Regulation & Governance* 485.

¹³⁹ Braithwaite and Drahos, above (n 93), 10.

Meta-regulation includes regulation via ‘meta-norms’—cross-cutting procedural or substantive norms that actors adopt to govern their own transnational standard-setting or conflict-management initiatives. Jacco Bomhoff and Anne Meuwese examine the development and application of meta-norms within and between transnational private regulatory regimes.¹⁴⁰ Fabrizio Cafaggi, Andrea Rendi and Rebecca Schmidt examine how such norms facilitate and steer cooperation among potentially conflicting TPR regimes that strive for power in contested regulatory spaces.¹⁴¹

Echoing Braithwaite and Drahos’ concept of modelling, Colin Scott shows that even private-private meta-regulation involves public-private interaction insofar as private meta-norms like ISEAL’s Codes of Good Practice are modelled after public metaregulatory initiatives like the OECD’s Better Regulation program. For Scott, private transnational meta-regulation instantiates a broader phenomenon in which private regulation seeks legitimacy by interacting with the state, either via emulation (where private regulators imitate legislative, administrative or metaregulatory techniques deployed by states) or via co-regulation (where state authorities initiate, approve or adopt private regulation).¹⁴²

Christine Chinkin examines subtle and complex interactions among private authority, international law and national law. She characterizes these interactions as chaotic, involving privatization of certain national and international governmental functions; national and international regulation of private authority; some private authorities’ mimicry of public authority; other private authorities’ hostility toward it; and varied national and international legal responses to such hostility. She emphasizes this chaos’s normative ambivalence either as a problem demanding order or an opportunity to accommodate new actors and open new spaces for diverse forms and arenas of regulation.¹⁴³

While the transnational private regulation literature has not (yet) devoted much attention to governance interactions beyond the private-public interface, the literature on private regulation in the domestic context certainly has. Among others, David Snyder argues that putative private lawmakers compete for adherents and that this competition both confers legitimacy on private lawmakers and magnifies the benefits of intergovernmental competition by increasing the speed and flexibility of lawmaking, reducing the risk of capture, producing differentiated regulatory products, and enhancing social welfare by allowing consumers to

¹⁴⁰ Jacco Bomhoff and Anne Meuwese, ‘The Meta-Regulation of Transnational Private Regulation’ (2011) 38 *Journal of Law and Society* 138, 139.

¹⁴¹ Fabrizio Cafaggi, Andrea Renda and Rebecca Schmidt, ‘Transnational Private Regulation’ in OECD, *International Regulatory Co-operation: Case Studies, Vol. 3: Transnational Private Regulation and Water Management* (OECD, 2013) 9.

¹⁴² Colin Scott, ‘Beyond Taxonomies of Private Authority in Private Regulation’ (2012) 13 *German Law Journal* 1329.

¹⁴³ Christine Chinkin, ‘Monism and Dualism: The Impact of Private Authority on the Dichotomy between National and International Law’ in Nijman and Nollkaemper, above (n 29), 134.

choose those that match their preferences.¹⁴⁴ The literature on private lawmaking and social norms¹⁴⁵ therefore has much to offer the study of TBGI.

2.5 More Regulation and Governance

Global business regulation, polycentric regulation, private regulation, meta-regulation and co-regulation are all closely related to the burgeoning literatures on responsive or smart regulation, regulatory capitalism and the (post-)regulatory state.¹⁴⁶ These literatures emphasize the increasing allocation of governance authority along functional rather than territorial lines and the crucial role of interaction among state and non-state regulation in shaping the distribution of power and the corresponding forms of interest intermediation in different functional arenas.¹⁴⁷ Although much of this literature remains focused on interaction between states and non-state actors and institutions,¹⁴⁸ it also yields numerous more general insights into transnational governance interactions.

At the micro level, for example, Drahos argues that a weak regulator (say, a developing country securities regulator) that lacks the resources or capacity to escalate credibly up a responsive regulation pyramid can employ a networked escalation strategy in which it enrolls increasingly powerful networked partners (say, a global accounting firm) to escalate pressure on regulated actors (say, by reporting on the performance of one of its client firms and then monitoring corrective actions by the firm).¹⁴⁹

Bruno Latour's concept of enrollment¹⁵⁰ plays an important role in many accounts of regulation and New Governance. It refers to the interactive process by which a regulatory actor

¹⁴⁴ David V Snyder, 'Private Lawmaking' (2003) 64 *Ohio State Law Journal* 371, 437-47.

¹⁴⁵ Eg Robert W Hamilton, 'The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health' (1978) 56 *Texas Law Review* 1329; Harold I Abramson, 'A Fifth Branch of Government: The Private Regulators and their Constitutionality' (1989) 16 *Hastings Constitutional Law Quarterly* 165; Robert C Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard UP, 1991); William K Jones, 'A Theory of Social Norms' (1994) *University of Illinois Law Review* 545; Jodi Freeman, 'The Private Role in Public Governance' (2000) 75 *New York University Law Review* 543.

¹⁴⁶ Eg Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Harper and Row, 1978); Ayres and Braithwaite, above (n 107).

¹⁴⁷ David Levi-Faur, 'Foreword' in John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Elgar, 2008) vii.

¹⁴⁸ Eg Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart, 2008); Olaf Dilling, 'From Compliance to Rulemaking: How Global Corporate Norms Emerge from Interplay with States and Stakeholders' (2012) 13 *German Law Journal* 381, and other research coming out of the Collaborative Research Centre 597 'Transformations of the State' at the University of Bremen, which completed its work in December 2014. For more information see <http://www.sfb597.uni-bremen.de/?SPRACHE=en>, accessed 4 May 2015.

¹⁴⁹ Peter Drahos, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) 77 *Temple Law Review* 401.

¹⁵⁰ Bruno Latour, *Laboratory Life: The Social Construction of Scientific Facts* (Princeton University Press, 1986).

mobilizes other actors and their resources in support of the first actor's regulatory agenda. Although scholarly attention focuses on state actors' enrollment of non-state actors and resources,¹⁵¹ the concept is also applicable to non-state actors' enrollment of state and non-state actors and resources.

Enrollment of other actors and resources is an important element in the legitimation of regulatory authority. While many legal scholars are preoccupied with the normative question of whether and when transnational governance ought to be considered legitimate, Peer Zumbansen is not alone in pointing out that just as law has come loose from its moorings, so have normative theories of law's legitimacy.¹⁵² In this context the empirical question of how the legitimacy of transnational regulation is gained or lost comes to the fore.¹⁵³ Legitimation and delegitimation are inherently interactive processes, involving micro-level interaction between regulators, regulatory targets, beneficiaries and other audiences in the context of particular regulatory schemes, as well as meso-level interaction among regulatory schemes vying for authority in a larger regulatory arena.

Complicating this picture, the same actors may be regulators, targets and audiences conferring or withholding legitimacy. John Biggins shows that state authorities simultaneously serve as an audience conferring legitimacy on ISDA and as regulators undermining ISDA's legitimacy as they seek to interpret its norms or even regulate derivatives markets directly in the wake of the global financial crisis.¹⁵⁴ Julia Black urges scholars to pay greater attention to how organizations in regulatory regimes respond to multiple legitimacy claims and how they seek to build legitimacy for themselves in complex and dynamic situations.¹⁵⁵ She probes how transnational governance initiatives pursue 'regulatory share' via co-evolution, coordination or competition.¹⁵⁶

Others employ Foucault's concept of governmentality to explore the ways in which would-be governors interact with each other and with governed subjects to establish or contest governance authority, and the ways in which material techniques of government interact with discursive mentalities. In this vein, Stepan Wood studies interactive processes of

¹⁵¹ Eg Peter Grabosky, 'Using Non-Governmental Resources to Foster Regulatory Compliance' (1995) 8 *Governance* 527; Julia Black, 'Mapping the Contours of Contemporary Financial Services Regulation' (2002) 2 *Journal of Corporate Law Studies* 253; Julia Black, 'Enrolling Actors in Regulatory Processes: Examples from UK Financial Services Regulation' (2003) *Public Law* 62.

¹⁵² Peer Zumbansen, 'The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of "Context"' (2012) 13 *German Law Journal* 1269.

¹⁵³ Eg David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Hart, 2007).

¹⁵⁴ Biggins, above (n 13).

¹⁵⁵ Black, 'Constructing and Contesting Legitimacy,' above (n 91).

¹⁵⁶ Julia Black, 'Legitimacy and the Competition for Regulatory Share' (2009) LSE Law, Society and Economy Working Paper 14/2009 <<http://ssrn.com/abstract=1424654>> accessed 12 August 2014.

problematization (the definition of problems in need of governance) and authorization (the allocation of governance authority) in the field of environmental management,¹⁵⁷ and proposes a typology of eight modes of interaction between states and voluntary standardization institutions: steering, self-discipline, knowledge production, reward, command, benchmarking, challenge and borrowing.¹⁵⁸

At the meso level, the concept of 'regulatory space' provides a useful frame for examining the complex mix of cooperation, competition and conflict that determines which players and which issues are 'in' or 'out,' and which organizations' rules prevail, when regulation is de-territorialized and regulatory authority dispersed.¹⁵⁹ Leigh Hancher and Michael Moran argue that the domination of most regulatory spaces by large, hierarchical organizations leads to an elaborate cooperative division of regulatory labour that is inevitably accompanied by competitive pursuit of institutional advantage, including 'pursuit of command over the regulatory process itself, as measured by the right to make rules and to command the means of their implementation.'¹⁶⁰

At the macro level, Oren Perez proposes the concept of regulatory 'ensembles'—complex formations constituted by multiple links and cross-sensitivities among global private regulatory regimes. He argues that the regulatory ensemble for corporate sustainability has positive enforcement and normative externalities, constitutes a new transnational political sphere associated with a cross-institutional quest for legitimacy, and presents new political opportunities even while it limits radical critique.¹⁶¹ Errol Meidinger argues that transnational regulation can be analyzed in terms of 'regulatory ecosystems' in which programs occupy different regulatory 'niches' reflecting their respective capacities and interests. Like organisms in an ecosystem, these regulatory programs mimic, accommodate, compete with and exchange resources with each other.¹⁶² Some ecologically-inspired approaches to regulation favour multi-scalar, polycentric, multi-modal regulation on the theory that diversity, overlap and even

¹⁵⁷ Wood, 'Three Questions,' above (n 16).

¹⁵⁸ Stepan Wood, 'Environmental Management Systems and Public Authority in Canada: Rethinking Environmental Governance' (2003) 10 *Buffalo Environmental Law Journal* 129.

¹⁵⁹ Eg Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' (2001) *Public Law* 283.

¹⁶⁰ Leigh Hancher and Michael Moran, 'Organizing Regulatory Space' in Leigh Hancher and Michael Moran (eds), *Capitalism, Culture and Regulation* (Clarendon, 1989), 271.

¹⁶¹ Oren Perez, 'Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and the New Ensemble Politics' (2011) 12 *Theoretical Inquiries in Law* 543.

¹⁶² Errol Meidinger, 'Private Import Safety Regulation and Transnational New Governance' in Cary Coglianese, Adam M Finkel and David Zaring (eds) *Import Safety: Regulatory Governance in the Global Economy* (University of Pennsylvania Press, 2009) 233.

redundancy of regulators and forms of regulation, like diversity and redundancy in biological systems, foster experimentation, learning, adaptation and resilience.¹⁶³

Experimentation and learning are also central to another fruitful approach to TBGI: experimentalist governance. An outgrowth of democratic experimentalism,¹⁶⁴ experimentalist governance claims to provide the architecture in which regime complexity can promote positive interactive outcomes such as learning, accountability, coherence, effectiveness and resilience.¹⁶⁵ Experimentalist governance creates a recursive cycle in which central and local governance units set broad framework goals and indicators for a particular issue; local units have a high degree of autonomy to decide how to pursue these goals, but must report regularly on their performance, participate in a peer review comparing different units' approaches, and take appropriate corrective action informed by their peers' experiences; and the broad framework goals and metrics are periodically revised in light of lessons learned from the peer review process, to start the cycle again.¹⁶⁶

Widespread in the European Union and developed democracies, experimentalist regimes are also emerging transnationally in numerous issue areas.¹⁶⁷ Christine Overdevest and Jonathan Zeitlin argue that experimentalist governance facilitates the emergence of coherent, effective transnational regulatory regimes in the face of polyarchy, disagreement, volatility and uncertainty—precisely the conditions that are often thought to disfavour such emergence.¹⁶⁸ By accommodating local diversity and promoting recursive learning from decentralized experience, the experimentalist features of interacting transnational regulatory regimes 'make it possible to build up a flexible and adaptive transnational governance regime from an

¹⁶³ Eg Kai N Lee, *Compass and Gyroscope: Integrating Science and Politics for the Environment* (Island Press, 1993); Maria Savasta-Kennedy, 'Introduction to the North Carolina Law Review Symposium, Adaptation and Resiliency in Legal Systems' (2011) 89 *North Carolina Law Review* 1365; Barbara Cosens, Lance Gunderson and Brian Chaffin, 'The Adaptive Water Governance Project: Assessing Law, Resilience, and Governance in Regional Socio-Ecological Water Systems Facing a Changing Climate' (2014) 51 *Idaho Law Review* 1 (introduction to special issue); Ahjond S Garmestani and Craig R Allen (eds), *Social-Ecological Resilience and Law* (Columbia University Press, 2014); Tracy-Lynn Humby, 'Law and Resilience: Mapping the Literature' (2014) 4 *Seattle Journal of Environmental Law* 85.

¹⁶⁴ Eg Joshua Cohen and Charles Sabel, 'Directly-Deliberative Polyarchy' (1997) 3 *European Law Journal* 313; Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267.

¹⁶⁵ Christine Overdevest and Jonathan Zeitlin, 'Assembling an experimentalist regime: Transnational governance interactions in the forest sector' (2014) 8 *Regulation and Governance* 22.

¹⁶⁶ Charles F Sabel and Jonathan Zeitlin, 'Experimentalist Governance' in David Levi-Faur (ed) *The Oxford Handbook of Governance* (Oxford University Press, 2012), 169.

¹⁶⁷ Overdevest and Zeitlin, above (n 165); Charles F Sabel and Jonathan Zeitlin, Experimentalism in Transnational Governance: Emergent Pathways and Diffusion Mechanisms. GR:EEN (Global Reordering: Evolution through European Networks) Working Paper No. 3. Available from URL:

<http://www2.warwick.ac.uk/fac/soc/csgr/green/papers/workingpapers/>.

¹⁶⁸ Overdevest and Zeitlin, *ibid*, 26.

assemblage of interconnected pieces.’¹⁶⁹ That said, creating the institutional infrastructure to ensure that learning actually occurs is a major challenge for experimentalist governance.¹⁷⁰

It should be clear from the foregoing that the burgeoning literatures on regulation and governance offer a variety of perspectives on various aspects of transnational governance interactions. Much (though certainly not all) of this literature grows out of a broader public law tradition, which also offers other perspectives on transnational governance interactions in the form of global administrative law and global constitutional law.

3. Governance Interactions in Global Administrative and Constitutional Law

The global administrative law (‘GAL’) research agenda¹⁷¹ shares meta-regulation scholars’ fascination with cross-cutting norms of transparency, accountability, reasoned decision-making, fairness and the like, but it emphasizes normative analysis and the study of individual regulatory organizations in isolation. The GAL agenda has only very recently expanded to include inter-institutional interaction. Introducing this theme in 2012, Benedict Kingsbury asked: ‘Might there be some practical pay-offs to studying interactions, rather than institutions in isolation?’¹⁷² Some earlier GAL-inspired work already answered this question affirmatively, including Kalypso Nicolaïdis and Gregory Shaffer’s work on transnational regimes for mutual recognition and Errol Meidinger’s work on public-private governance interactions in forestry.¹⁷³

¹⁶⁹ *Ibid*, 23.

¹⁷⁰ Eg Oren Perez, ‘Courage, Regulatory Responsibility, and the Challenge of Higher-Order Reflexivity’ (2014) 8 *Regulation & Governance* 203, 206-8.

¹⁷¹ Eg Benedict Kingsbury, Nico Krisch and Richard Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15.

¹⁷² Institute for International Law and Justice, ‘Analyzing and Shaping Inter-Institutional Relations in Global Governance,’ report of a workshop at the NYU School of Law, 16 April 2012, online: <http://www.iilj.org/newsandevents/documents/Aprilreport.pdf> (visited March 12, 2015), 1. For early GAL research on this subject, see Amedeo Arena, ‘The Role of GAL Standards in Juris-generative Interactions between Global Antitrust Institutions in the light of the *Mexico – Telecoms* case,’ IRPA Global Administrative Law Working Papers No 3/2013, http://www.irpa.eu/wp-content/uploads/2014/02/Arena_No3-2013_def..pdf (visited March 12, 2015), Alex Latu, ‘Public Procurement and Private Certification: The Case of the UK TPP,’ Osgoode Hall Law School CLPE Research Paper No 53/2013, <http://ssrn.com/abstract=2360264>; Ching-Fu Lin, ‘Public-Private Regime Interactions in Global Food Safety Governance,’ Osgoode Hall Law School CLPE Research Paper No 41/2013, <http://ssrn.com/abstract=2309495> (visited March 12, 2015); David Rossati, ‘Inter-institutional Dynamics of Global Climate Finance: Complementarity and Competition in the Emerging Practices of Coordination,’ IRPA Global Administrative Law Working Papers No 6/2013, <http://ssrn.com/abstract=2401309> (visited March 12, 2015).

¹⁷³ Eg Kalypso Nicolaïdis and Gregory Shaffer, ‘Transnational Mutual Recognition Regimes: Governance Without Global Government’ (2005) 68 *Law and Contemporary Problems* 263; Errol Meidinger, ‘The Administrative Law of Global Private-Public Regulation: The Case of Forestry’ (2006) 17 *European Journal of International Law* 47.

Constitutional ordering, which holds itself out as distinct from other forms of ordering such as markets, hierarchies and networks,¹⁷⁴ provides another potential lens through which to study transnational governance interactions. Insofar as constitutional law is concerned with the fundamental norms and practices that allocate powers among governance authorities, enable and constrain the exercise of those powers, and define relationships between governors and governed,¹⁷⁵ it is concerned fundamentally with how governance interactions are or ought to be structured and managed. But the global constitutional law literature is not concerned mainly with interactions within a single constitutional order. Rather, it focuses on two broad types of governance interactions, often in conjunction: interactions among a plurality of constitutional orders, and the constitutionalization of a plurality of state and non-state legal orders.

In this connection Jeffrey Dunoff and Joel Trachtman identify seven constitutional mechanisms: horizontal allocation of powers, vertical allocation of powers, supremacy, stability, fundamental rights, review, and democratic accountability.¹⁷⁶ For present purposes, these can be understood both as mechanisms by which constitutional functions are implemented within an existing constitutional order and as mechanisms by which the process of constitutionalization (ie, the process by which constitutional norms and practices emerge and spread to domains previously lacking constitutional features¹⁷⁷) advances. In both senses they operate as mechanisms of transnational governance interaction.

Concepts drawn from constitutional law may thus help fill what David Kennedy identifies as a significant gap in knowledge about the structure of global society: ‘How is public power exercised, where are the levers, who are the authorities, and how do they relate to one another?’¹⁷⁸—precisely the sorts of questions that interest us here. The literature on global constitutionalism approaches these questions from a variety of positive and normative perspectives. Constitutionalization has been mooted as a way to coordinate the various components of the international legal system, to respond to the fragmentation of international law, and to manage the confrontations and intersections of a plurality of constitutional

¹⁷⁴ Charles Sabel, ‘Constitutional Ordering in Historical Context’ in Fritz W Scharpf (ed) *Games in Hierarchies and Networks: Analytical and Empirical Approaches to the Study of Governance Institutions* (Campus, 1993), 65.

¹⁷⁵ Eg Stephen Clarkson and Stepan Wood, *A Perilous Imbalance: The Globalization of Canadian Law and Governance* (UBC Press, 2010), 47-63; Jeffrey L Dunoff and Joel P Trachtman, ‘A Functional Approach to International Constitutionalization’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009) 3, 10-13.

¹⁷⁶ Dunoff and Trachtman, ‘A Functional Approach,’ above (n 175).

¹⁷⁷ Eg Deborah Cass, ‘The “Constitutionalization” of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade’ (2001) 12 *European Journal of International Law* 39; Deborah Cass, *The Constitutionalization of the World Trade Organization* (Oxford University Press, 2005).

¹⁷⁸ David Kennedy, ‘The Mystery of Global Governance’ in Dunoff and Trachtman, *Ruling the World*, above (n 175), 37, 38.

orders.¹⁷⁹ As an example of the latter, Mark Tushnet draws on regulatory competition theory to argue that nations compete with respect to constitutional law and to examine whether the race is to the top, bottom, or to multiple resting points.¹⁸⁰

The global constitutional law literature displays a strong preoccupation with state and interstate institutions such as the United Nations,¹⁸¹ the World Trade Organization,¹⁸² the European Union¹⁸³ and the international legal system generally.¹⁸⁴ Some authors, however, extend the constitutional gaze to non-state governance. Gunther Teubner and others, for example, conceptualize private law and non-state governance regimes as building blocks of a global societal constitutionalism and propose rules for managing transnational regime collisions.¹⁸⁵ This latter strand has less in common with constitutional law scholarship than it does with global legal pluralism and systems theory, which are the last bodies of literature I consider in this survey.

4. Governance Interactions in Global Legal Pluralism

The study of transnational governance interactions lends itself to a pluralist approach insofar as it is concerned with the interaction of multiple legal and normative orders within a given social field.¹⁸⁶ Legal anthropologists and legal sociologists have long explored such interactions within nation states, often with a focus on how indigenous, customary, everyday

¹⁷⁹ Dunoff and Trachtman, 'A Functional Approach,' above (n 175), 30-32.

¹⁸⁰ Mark Tushnet, 'The Inevitable Globalization of Constitutional Law' (2009) 49 *Virginia Journal of International Law* 985.

¹⁸¹ Eg Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Brill, 2009).

¹⁸² Eg Ernst-Ulrich Petersmann, 'The WTO Constitution and Human Rights' (2000) 3 *Journal of International Economic Law* 19; Joel P Trachtman, 'The Constitutions of the WTO' (2006) 17 *European Journal of International Law* 623.

¹⁸³ Eg Joseph HH Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge University Press, 1999); Joseph HH Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (Cambridge University Press, 2003); Mattias Kumm, 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly so Called' (2004) 54 *American Journal of Comparative Law* 505.

¹⁸⁴ Eg Ronald St J Macdonald and Douglas M Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff, 2005).

¹⁸⁵ Eg Gunther Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems' (1997) 45 *American Journal of Comparative Law* 149, 159; Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012); Schepel, above (n 117), 32, 407; Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism: International Studies in the Theory of Private Law* (Hart, 2004).

¹⁸⁶ Eg Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law and Society Review* 719.

and informal law and norms interact with the formal, centralized institutions of state law.¹⁸⁷ More recently, the burgeoning literature on transnational legal pluralism has begun to explore such interactions beyond the nation state. This literature offers a range of promising analytical perspectives and empirical materials, but its progress towards a coherent theory of interactive dynamics and effects remains tentative and fragmentary.

A few examples will have to suffice. Interlegality, a term coined by Boaventura de Sousa Santos in 1987,¹⁸⁸ is a highly promising analytical concept insofar as it seeks to capture the encounter between multiple legal orders:

We live in a time of porous legality or of legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by an intersection of different legal orders, that is, by *interlegality*. Interlegality is the phenomenological counterpart of legal plurality and that is why it is [a] key concept of a postmodern conception of law.¹⁸⁹

With its emphasis on the 'manifold interactions' among different norm structures, the concept of interlegality represents 'the starting point of a most promising research programme.'¹⁹⁰ It requires further specification, however, before it can support a workable theory of transnational governance interactions; and there are many ways it might be elaborated. Some legal pluralists might conceptualize it in terms of interaction among separate legal and normative orders coexisting in the same time and space.¹⁹¹ For Santos, however, it refers to the 'different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions.'¹⁹² Santos conceptualizes interlegality in cartographic terms, emphasizing that legal orders employ differing scales, projections and systems of symbolization to distort social reality in the service of their competing claims to regulatory authority. The

¹⁸⁷ Eg Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 1; John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1; Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review* 869.

¹⁸⁸ Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law and Society* 279. Alf Ross coined the term 'interlegal law' forty years earlier as a replacement for 'private interational law': Alf Ross, *A Textbook of International Law: General Part* (Longmans, Green, 1947) 73.

¹⁸⁹ Santos, *ibid*, 298, emphasis in original; see also Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed (Butterworths LexisNexis, 2002), 437.

¹⁹⁰ Martin Herberg, 'Global Legal Pluralism and Interlegality: Environmental Self-Regulation in Multinational Enterprises as Global Law-Making' in Dilling, Herberg and Winter, above (n 148), 17, 20.

¹⁹¹ Eg Moore, above (n 186); William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2008); William Twining, 'Normative and Legal Pluralism: A Global Perspective' (2010) 20 *Duke Journal of Comparative and International Law* 473, 517.

¹⁹² Santos, *Toward a New Legal Common Sense*, above (n 189), 437.

asynchronic character of these different legal spaces makes interlegality ‘a highly dynamic process’ that results in ‘uneven and unstable combinations of legal codes.’¹⁹³

Interlegality is far from chaotic, however: Santos emphasizes that it is patterned by rules of scale, projection and symbolization, and by asymmetrical power relations between legal centres and peripheries and between hegemonic and counter-hegemonic legalities. Advocating a counter-hegemonic politics of emancipation, Santos draws attention to the legal peripheries and ‘contact zones’ where interlegality is most frequent and intense, and where the possibilities for counter-hegemonic or ‘subaltern cosmopolitan’ legality are greatest.¹⁹⁴ These contact zones, for Santos, are ‘zones in which rival normative ideas, knowledges, power forms, symbolic universes and agencies meet in unequal conditions and resist, reject, assimilate, imitate, subvert each other, giving rise to hybrid legal and political constellations.’¹⁹⁵ He identifies four modes of interlegal interaction in the contact zone—violence, coexistence, reconciliation and conviviality—and explores how hegemonic and counter-hegemonic legalities differ both in which modes they tend to favour and in the extent to which they embrace legal hybridity and complexity.¹⁹⁶

Robert Wai criticizes Santos for presenting ‘flattened, simplified’ and segregated accounts of hegemonic and counter-hegemonic legalities and for neglecting heterogeneity and interlegality within the putatively hegemonic domain of global business itself.¹⁹⁷ Wai presents transnational private law as a model for understanding interlegality within this domain and as a key mechanism for coordinating it. This model portrays interlegality not simply as a site of harmonization but also of productive normative contestation.¹⁹⁸ In a different vein, Zenon Barikowski proposes subsidiarity (the principle that governance authority should reside at the smallest unit of governance consistent with the character of the policy problem) as a master principle to manage interlegality and to engender legitimacy.¹⁹⁹ Marc Amstutz proposes an evolutionary conceptualization of interlegality in which the European Court of Justice’s meta-regulatory requirement for national courts to interpret national law in conformity with

¹⁹³ *Ibid*, 437.

¹⁹⁴ *Ibid*, 431, 472-74.

¹⁹⁵ *Ibid*, 472.

¹⁹⁶ *Ibid*, 473-74; see also Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005).

¹⁹⁷ Wai, ‘Interlegality of Transnational Private Law,’ above (n 9), 111.

¹⁹⁸ *Ibid*, 108.

¹⁹⁹ Zenon Barikowski, ‘Subsidiarity, Sovereignty and the Self’ in Knut Wolfgang Nörr and Thomas Oppermann (eds), *Subsidiarität: Idee und Wirklichkeit* (Mohr/Siebeck, 1997) 23.

European directives can trigger a process of trial and error, self-reflection and institutional learning in which Member States define ‘their “niche” in the “biotope” of European law.’²⁰⁰

Interlegality might alternatively be conceptualized in terms of a plurality of interacting cultures.²⁰¹ It might also be understood in terms of Robert Cover’s concept of nomos, the intersecting and sometimes conflicting normative worlds by which different communities order their experiences and expectations, and from which they perceive the rest of the world.²⁰² This approach would analyze interlegality in terms of the narratives that constitute these normative worlds, emphasizing the jurisgenerative roles of some actors (eg insular religious communities, radical social reformers and revolutionaries) who seek to create and transform normative worlds, and the jurispathic roles of other actors (eg judges and courts) who seek to quash alternative normative worlds while reifying dominant ones. Finally, systems theory would conceptualize interlegality in terms of the intersection of self-referentially closed systems of social communication.²⁰³

Suffice it to say that interlegality accommodates a variety of divergent theoretical, methodological and normative approaches. This variety accentuates the difficulties of individuating legal and normative orders and of specifying units and levels of analysis.²⁰⁴

Beyond interlegality, the global legal pluralism literature is a trove of other fruitful perspectives on transnational governance interactions. This literature overlaps substantially with the literature on transnational regulation, discussed earlier.²⁰⁵ David and Louise Trubek identify three forms of transnational governance interaction—rivalry, complementarity and transformation—but they restrict their attention to interactions between emerging transnational legal arrangements and existing state law.²⁰⁶ Oren Perez examines trade-environment conflicts through a pluralist lens that emphasizes the intricate linkages and interactions among a range of state-based, non-state and hybrid organizations within a

²⁰⁰ Marc Amstutz, ‘In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning’ (2005) 11 *European Law Journal* 766, 769.

²⁰¹ Eg André Hoekema (ed), Special Issue: Multicultural Interlegality (2005) 51 *Journal of Legal Pluralism and Unofficial Law* 1; Ralph Grillo, Roger Ballard, Alessandro Ferrari, André J Hoekema, Marcel Maussen and Prakash Shah (eds), *Legal Practice and Cultural Diversity* (Ashgate, 2009).

²⁰² Robert M Cover, ‘The Supreme Court 1982 Term: Foreword: Nomos and Narrative’ (1983) 97 *Harvard Law Review* 4, 31.

²⁰³ See Part 5, below.

²⁰⁴ Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001) 206-08; William Twining, ‘Diffusion of Law: A Global Perspective’ (2004) 49 *Journal of Legal Pluralism and Unofficial Law* 1, 14; William Twining, ‘Diffusion and Globalization Discourse’ (2006) 47 *Harvard International Law Journal* 507, 513.

²⁰⁵ See Part 2.4, above.

²⁰⁶ David Trubek and Louise G Trubek, ‘New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation’ (2007) 13 *Columbia Journal of European Law* 539. For an empirical application, see Meinhard Doelle and others, ‘New Governance Arrangements at the Intersection of Climate Change and Forest Policy: Institutional, Political and Regulatory Dimensions’ (2012) 90 *Public Administration* 37.

'complex discursive labyrinth.'²⁰⁷ He argues for an assemblage of context-specific solutions aimed at strengthening ecologically sensitive inter-institutional and discursive linkages and dampening ecologically insensitive ones.²⁰⁸

Others focus on the political economy of transnational governance. Francis Snyder, for example, identifies global commodity chains as key pathways for normative diffusion and other interactions among different governance sites.²⁰⁹ Combining agency and structure, he analyzes the institutions, norms and processes of global legal pluralism in terms of structural sites, the structural and processual relations among these sites, and the activities of strategic actors. He argues that the overall constellation of institutions, norms, processes and sites that together govern a specific global commodity chain, and the character of their interaction, depend, *inter alia*, on the number of component units in each segment of the chain, their geographic concentration or dispersal, the extent to which segments participate in multiple commodity chains, the ways segments are linked to each other within one chain, and the types of relations (horizontal, vertical, competitive or cooperative) that exist between the sites. These relations take many forms including 'equality or hierarchy, dominance or submission, creativity or imitation, convergence or divergence, and so on.'²¹⁰

Yet other scholars seek to integrate global legal pluralism into general jurisprudence, analyzing 'purported instances of law beyond, between, within, and/or outside state borders; and any resulting interactions or overlaps between different legal systems.'²¹¹ Nicole Roughan, for example, contends that the best normative and explanatory account of legal pluralism adopts a relative conception of authority in which authority is shared or interdependent and the relationships between authorities condition the authorities' legitimacy.²¹² This means that 'authorities might, depending on context, need to cooperate, coordinate, or tolerate one another if they are to have legitimacy'; or the conditions for legitimate authority might require

²⁰⁷ Oren Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Hart, 2004), 259.

²⁰⁸ Perez, *Ecological Sensitivity*, above (n 207), 261-2.

²⁰⁹ Francis G Snyder, 'Governing Globalisation,' in Michael Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths, 2002), 65.

²¹⁰ *Ibid*, 72.

²¹¹ Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford UP, 2013), 1, citing as examples Twining, *General Jurisprudence*, above (n 191); Keith Charles Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford University Press, 2010); Detlev Von Daniels, *The Concept of Law from a Transnational Perspective* (Ashgate, 2010); Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010); Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart, 2010); Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, trans Naomi Norbert (Hart, 2009); Brian S Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001).

²¹² Roughan, *ibid*, 6-8.

them to exclude or conflict with one another.²¹³ The thrust of Roughan's argument is normative: she seeks to derive standards for appropriate inter-authority relationships, and hence for the legitimacy of authority, from principles of analytical jurisprudence rather than from observed practice. It does, however, have practical implications. Her account of relative authority 'is a model for thinking about how and when institutional authorities ought to work with, alongside, or against one another, and a tool for evaluating how well actual institutions are engaging in relative authority relationships.'²¹⁴

Unlike Roughan, who focuses on the question of when plural authority can be legitimate, other global legal pluralists focus on how to manage it. Mireille Delmas-Marty's sophisticated argument for managing legal pluralism emphasizes the elimination or resolution of conflicts between authorities and the integration of interacting regimes.²¹⁵ Her normative commitment to harmonization and integration contrasts with Paul Schiff Berman's embrace of productive contestation, local variation and creative adaptation.²¹⁶ Berman argues that we should 'deliberately seek to create or preserve spaces for productive interaction among multiple, overlapping legal systems by developing procedural mechanisms, institutions, and practices that aim to manage, without eliminating, the legal pluralism we see around us.' The goal of such management is to mobilize a range of procedural mechanisms that provide opportunities to hear plural voices, channel normative conflict and forge 'provisional compromises that fully satisfy no one but may at least generate grudging acquiescence.'²¹⁷ Drawing on existing pluralist scholarship, Berman identifies eight such mechanisms in a tentative, exploratory fashion: dialectical legal interactions, margins of appreciation, limited autonomy, subsidiarity, hybrid participation, mutual recognition, safe harbour agreements, and regime interactions.²¹⁸ His account invites further theoretical and empirical specification²¹⁹ and focuses on state and interstate arrangements, addressing non-state governance mainly in terms of its interaction with state law.²²⁰

²¹³ *Ibid*, 8, 10.

²¹⁴ *Ibid*, 6.

²¹⁵ Delmas-Marty, above (n 211); see also Mireille Delmas-Marty, *Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism*, trans Naomi Norberg (Cambridge University Press, 2002).

²¹⁶ Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012), 10.

²¹⁷ *Ibid*, 14.

²¹⁸ *Ibid*, 153-88.

²¹⁹ *Ibid*, 189.

²²⁰ *Ibid*, 43.

Although many other global and transnational legal pluralists' work is relevant to the study of transnational governance interactions,²²¹ I close with Graft-Peter Calliess and Peer Zumbansen's groundbreaking work on 'rough consensus and running code' ('RCRC').²²² They weave many of the strands of scholarship discussed in this article into a pluralist legal theory organized around an evocative metaphor drawn from internet standard-setting. According to Calliess and Zumbansen, transnational legal regimes are constituted by 'a complex interaction and overlapping of public and private rule making processes,'²²³ combining an 'ongoing evolutionary state-of-becoming' with an 'experimental and open-ended nature'.²²⁴ The interactive, experimental and evolving character of transnational law is captured in an iterative process of 'rough consensus' and 'running code.' In the first phase, an informal consensus in favour of a new standard emerges from a deliberative process involving relevant actors in a given functional issue area. This rough consensus has three dimensions: social (near unanimity or widely prevailing agreement among participants), substantial (a common core content) and temporal (a provisional or interim character open to future improvement).²²⁵ The consensus evolves into a 'running code' via a threefold implementation process that involves a pilot phase in which the proposed standard is road-tested; a recognition phase in which the wider community accepts or rejects the standard by implementing it in practice; and a binding phase in which the standard is locked in and becomes an effective requirement in the community.²²⁶ The whole RCRC process is characterized by loosely organized deliberation, continual experimentation and reconsideration, a lack of formal voting, and constant creative breaking down and recombination of the paradoxes that constitute any legal order: public vs private, technical vs political, coordination vs regulation, substance vs procedure and authority vs affectedness.²²⁷

From the opening epigraph²²⁸ to the last page,²²⁹ Calliess and Zumbansen recognize the pervasiveness and importance of transnational governance interactions. They identify a wide range of interactive patterns, including overlap, intersection, interpenetration, intertwining, multi-layering, embeddedness, and densely woven normative webs; and a wide range of modes of interaction including competition, cooperation, collaboration, antagonism, collision,

²²¹ Eg Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012), exploring numerous examples of governance interactions and overlaps.

²²² Calliess and Zumbansen, above (n 211).

²²³ *Ibid*, 242.

²²⁴ *Ibid*, 243.

²²⁵ *Ibid*, 135.

²²⁶ *Ibid*, 135-36.

²²⁷ *Ibid*, 135-36, 244, 254-55.

²²⁸ *Ibid*, xxii (reproducing at greater length the excerpt from David Kennedy, above (n 178).

²²⁹ *Ibid*, 277 (RCRC is 'emerging as a particular form of societal self-governance at a time where domestic and transnational, public and private law-makers compete over regulatory competency and authority').

contestation, conflict, harmonization, constitution, delegation, translation, transposition, integration, migration, co-regulation and meta-regulation.²³⁰ Elsewhere, Zumbansen notes that the ‘running code’ of a transnational legal regime changes continually through cross-fertilization, co-evolution, competition and other ‘intricate collision[s]’ among myriad rule-making processes.²³¹

And yet RCRC remains tantalizingly underdeveloped, more an evocative image than an explanatory framework or normative recipe. Calliess and Zumbansen neither develop it into a coherent analytical approach nor apply it seriously to the various empirical examples they discuss, aside from the one from which it emerged—internet governance. Numerous questions remain unresolved. Does ‘rough consensus’ include only rule-makers²³² or also rule-addressees, enforcers and audiences?²³³ Does RCRC involve micro-level interactions within a single regulatory program, meso-level interactions among programs within a transnational law regime, macro-level interactions among regimes, or all of the above? The authors illustrate the RCRC model mainly at the micro level,²³⁴ but in some cases explore meso-level interactions among transnational governance schemes²³⁵ and macro-level interactions ‘among and between spheres of societal norm-production.’²³⁶ As a result of these shifting levels and units of analysis, it is not always clear who or what is interacting: norms,²³⁷ products,²³⁸ actors,²³⁹ regimes,²⁴⁰ cultures,²⁴¹ functionally differentiated social subsystems,²⁴² spaces or scales,²⁴³ or a little bit of everything.

It is also unclear how RCRC helps explain or predict the drivers, forms, dynamics and effects of interaction in specific contexts. Calliess and Zumbansen identify some possible drivers of regulatory interactions²⁴⁴ and recognize that interactions can have impacts on legitimacy,

²³⁰ *Ibid*, passim.

²³¹ Peer Zumbansen, ‘Neither “Public” nor “Private”, “National” nor “International”: Transnational Corporate Governance from a Pluralist Perspective’ (2011) 38(1) *Journal of Law and Society* 50, 69.

²³² Eg Calliess and Zumbansen, above (n 211), 135.

²³³ Eg *ibid*, 210 (‘market participants’).

²³⁴ Eg *ibid*, 137-39, 142-44, 191, 234.

²³⁵ Eg *ibid*, 157, 159, 163, 179 (discussing online consumer protection regimes); 214 (discussing European corporate governance regulation).

²³⁶ *Ibid*, 145.

²³⁷ *Ibid*, 24, 80.

²³⁸ *Ibid*, 161-167 (blurring the line between products (‘private ordering services’) and regulations).

²³⁹ *Ibid*, x, 80.

²⁴⁰ *Ibid*, xvi, 166.

²⁴¹ *Ibid*, 24.

²⁴² *Ibid*, 34, 46-50.

²⁴³ *Ibid*, x, 244-45.

²⁴⁴ Primarily, the functional differentiation of societal subsystems, the proliferation of rule-making sites and the limits of state law in the face of globalizing corporate power. *Ibid*, 34, 46-50, 107, 185, 220, 233, 275-6.

accountability and compatibility of governance efforts.²⁴⁵ Much of the time, however, they content themselves with identifying general patterns of overlap, embeddedness, and intersection, only hinting at the dynamics of interaction or acknowledging the need to study them.²⁴⁶ Finally, like many scholars of transnational law, Calliess and Zumbansen remain preoccupied with the law/non-law question even while problematizing it.²⁴⁷ Throughout the book there is a sustained focus on non-state norms' relation to state law.²⁴⁸

In short, the global legal pluralism literature provides fascinating insights into transnational governance interactions, but continues to be preoccupied with the definitional dichotomy of law/not law. It often alludes to 'a complex notion of overlapping authority but does not analyse just what that means.'²⁴⁹ It recognizes a wide variety of sources and forms of law—national and international, formal and informal, public and private, state and non-state—yet often fails to provide analytical insight into how these forms and sources interact, or identifies only a limited range of interactions.

This survey of legal perspectives on transnational governance interactions would be incomplete without considering systems theory, which has had a major influence on theories of regulation, legal pluralism and transnational law.

5. Governance Interactions in Systems Theory

Some of the more innovative transnational legal pluralists discussed above, including Perez, Schepel, Calliess and Zumbansen, draw inspiration from systems theory. Like many accounts of transnational law, systems theory starts by recognizing the increasing functional differentiation of society into specialized fields, the increasing organizational complexity of global business, the increasing deterritorialization of regulatory authority, and the multiplication, fragmentation and collision of regulatory regimes.²⁵⁰ Systems theory parts company with other approaches, however, by insisting that the basic elements of social systems are communications, not human beings,²⁵¹ and that global society is composed of self-

²⁴⁵ *Ibid*, 264.

²⁴⁶ Eg *ibid*, 196 ('our attention has to turn as well to the dynamics that are unfolding between different levels and sites of rule-making from a *regulatory* perspective,' emphasis in original).

²⁴⁷ Eg *ibid*, ix, 15, 21, 134, 248.

²⁴⁸ Eg *ibid*, 110, 121-2, 125.

²⁴⁹ Roughan, above (n 211), 8.

²⁵⁰ Eg Gunther Teubner, "'Global Bukowina": Legal Pluralism in the World Society' in Gunter Teubner (ed), *Global Law Without a State* (Dartmouth, 1997) 3; Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999.

²⁵¹ Teubner, *Global Bukowina*, *ibid*, 4; Gunther Teubner, 'Introduction to Autopoietic Law' in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter, 1988) 1, 3.

reproducing, self-regulating, autopoietically closed subsystems.²⁵² As David Doorey reminds us in this issue,²⁵³ debates about the relative merits of theories of open and closed social systems continue,²⁵⁴ but I focus here on the theory of autopoietically closed systems because of its greater influence on transnational legal theory.

For autopoietic systems theory, regulation is all about interaction,²⁵⁵ but what interacts are communications, not individuals, groups, norms, institutions or cultures. Regulation involves communicative interactions within and between self-referential autopoietic systems. Such systems are of two main types: formal organizations, understood as operatively closed decision-making cycles; and functionally differentiated social subsystems such as law, politics, science and the economy. The 'pressing question' for regulation in this context is how to achieve and steer inter-systemic coordination.²⁵⁶

Autopoietic closure means that one system, such as law, cannot regulate another directly, be it a functional social subsystem like the economy or a formal organization like a firm. The only way to regulate such systems 'from the outside is to grant them a high degree of autonomy and to lay down only general structural guidelines to regulate the context of action.'²⁵⁷ Systems theory, like New Governance and responsive regulation, thus advocates reflexive law, which influences the other system's own self-regulation indirectly by encouraging self-reflection and self-regulation by regulatory targets in line with values articulated in the regulating system.²⁵⁸ Efforts to regulate other systems confront Gunther Teubner's 'regulatory trilemma': one system's effort to regulate another can result in the disintegration of the initiating system, disintegration of the target system, or mutual indifference.²⁵⁹

To escape this trilemma, systems must achieve 'structural coupling,' which occurs when elements of different systems (eg law and the economy) are linked via the same communicative event (eg a business dispute).²⁶⁰ The singular, micro-level social interaction is the eye of the needle through which all macro-level inter-systemic interactions must pass, because it is here

²⁵² Teubner, Introduction to Autopoietic Law, *ibid*; Niklas Luhmann, 'The Unity of the Legal System' in Teubner, *Autopoietic Law*, *ibid*, 12; Niklas Luhmann, 'The Self-Reproduction of Law and its Limits' in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (de Gruyter, 1985).

²⁵³ David Doorey, 'Mapping the Ascendance of the "Living Wage" Standard in Non-State Global Labour Codes,' this issue.

²⁵⁴ Eg Richard Nobles and David Schiff, *Observing Law Through Systems Theory* (Hart, 2013).

²⁵⁵ Gunther Teubner, *Law as an Autopoietic System*, trans Anne Bankowska and Ruth Adler (Oxford: Blackwell, 1993), 80.

²⁵⁶ Schepel, above (n 117), 15.

²⁵⁷ Teubner, *Law as an Autopoietic System*, above (n 255), 142.

²⁵⁸ *Ibid*, 71-77; Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239.

²⁵⁹ Gunther Teubner, 'After Legal Instrumentalism: Strategic Models of Post-Regulatory Law' in Gunther Teubner (ed) *Dilemmas of Law in the Welfare State* (De Gruyter, 1986).

²⁶⁰ Teubner, *Law as an Autopoietic System*, above (n 255), 86-89.

that ‘the expectations of various subsystems converge, complement each other, supplement each other and conflict with each other.’²⁶¹ Structurally coupled systems can co-evolve such that their structures develop via exposure to various systems’ selection processes, the expectations singled out in individual interactions are reconciled with the different systems’ logics, and these logics exert reciprocal (albeit very indirect) influence on each other by having to be compatible with other expectations in concrete interactions.²⁶²

The processes of structural coupling and co-evolution are generally blind,²⁶³ but different systems’ conflicting demands can prompt deliberate efforts to regulate inter-systemic interaction.²⁶⁴ Teubner argues that inter-systemic regulation employs two mechanisms: information and interference.²⁶⁵ Information refers to a system’s generation of knowledge about other systems within the system itself. This is a process of reciprocal observation. This is how command-style regulation typically operates, despite its aspiration to intervene directly in the regulated firm or domain. There is no genuine interaction between systems: rather, each system creates an image of the other within itself and interacts with that internally generated image.²⁶⁶ Regulation succeeds to the extent that regulatory acts withstand the autopoiesis of both systems.²⁶⁷ The likelihood of such success can be enhanced by deliberately exposing the ‘regulating’ system to greater evolutionary forces of variation, in particular by opening it to a wider variety of actors and claims.²⁶⁸

Interference, by contrast, allows autopoietic systems to ‘get beyond self-observation and link up with each other through one and the same communicative event.’²⁶⁹ Interference is the key to structural coupling and can occur at the level of events, structures or roles. Event interference is the simultaneous presence of the same communicative event in multiple systems.²⁷⁰ Contracts and rights are leading examples, insofar as ‘three actions—namely, legal, social and economic—coincide’ in every contract and every assertion of a right.²⁷¹ Structural interference exists where one system’s general expectations coincide with another’s or where

²⁶¹ Gunther Teubner, ‘Evolution of Autopoietic Law’ in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter, 1988) 217, 236.

²⁶² Teubner, *Law as an Autopoietic System*, above (n 255), 62-3; Teubner, ‘Evolution of Autopoietic Law,’ above (n 261), 236; on structural coupling and co-evolution see also Oren Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Hart, 2004), 17-23.

²⁶³ Teubner, *Law as an Autopoietic System*, *ibid*, 80.

²⁶⁴ Teubner, ‘Evolution of Autopoietic Law,’ above (n 261), 237.

²⁶⁵ Teubner, *Law as an Autopoietic System*, above (n 255), 65, 97.

²⁶⁶ *Ibid*, 79, 84.

²⁶⁷ *Ibid*, 80.

²⁶⁸ *Ibid*, 81-82, 95.

²⁶⁹ *Ibid*, 87.

²⁷⁰ *Ibid*, 89.

²⁷¹ *Ibid*, 92.

one system adopts another's reality constructions.²⁷² Reflexive regulation can intensify both types of interference by requiring regulated entities to choose from a menu of regulatory options, putting conditions on the exercise of chosen options, linking the choice of options to valuable entitlements, or linking regulatory impulses belonging to different system logics (eg making economic incentives available via the legal system).²⁷³ Third, role interference exists where communicative events in different systems are linked via overlapping organizational roles.²⁷⁴ Formal organizations can communicate with each other across system boundaries through interlocking memberships, neo-corporatist governance arrangements, multi-stakeholder discussion groups and other intermediary structures that bring political, economic and other constituencies together.²⁷⁵ Technical and scientific experts and the standards they develop—often outside or in the penumbra of legal systems—can play key roles in inter-systemic interference and coupling.²⁷⁶ This form of interference can be regulated indirectly, for example by mandating particular forms, procedures or competencies for intra- and inter-organizational relationships.²⁷⁷

Both information and interference are highly indirect modes of regulation, preserving regulated systems' autonomy in substantive rule-making while encouraging them to take heed of collective values and assumptions articulated in the regulating system.²⁷⁸ And yet, even if reflexive law has more inter-systemic regulatory potential than does command regulation, it 'is still a closed autopoietic system operating in a world of closed autopoietic systems' and 'cannot break down the barriers which result from this double closure.'²⁷⁹

Aside from these deliberate efforts to regulate inter-systemic interaction, systems theorists predict that the legal system will respond more or less organically to the perpetual conflicts among social subsystems by developing a new 'inter-systemic law of conflict'.²⁸⁰ Building on Santos' interlegality, Teubner examines how the legal system evolves to mediate three kinds of conflicts: conflicts among non-legal social subsystems; conflicts among the various legal and quasi-legal orders that comprise a pluralist legal system; and conflicts among

²⁷² *Ibid*, 90.

²⁷³ *Ibid*, 93-95.

²⁷⁴ *Ibid*, 90.

²⁷⁵ *Ibid*, 95; Gunther Teubner, 'The "State" of Private Networks: The Emerging Legal Regime of Polycorporatism in Germany' (1993) *Brigham Young University Law Review* 553.

²⁷⁶ Eg Schepel, above (n 117), 15-16, 35; Helmut Willke, 'Societal Guidance Through Law?' in Gunther Teubner and Alberto Febbrajo (eds) *State, Law and Economy as Autopoietic Systems* (Giuffrè, 1992) 353; Gunther Teubner, 'The King's Many Bodies; The Self-Destruction of Law's Hierarchy' (1997) 31 *Law and Society Review* 763.

²⁷⁷ Gunther Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in Gunther Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust and Social Welfare Law* (de Gruyter, 1987) 3.

²⁷⁸ Teubner, Law as an Autopoietic System, above (n 255), 97.

²⁷⁹ *Ibid*.

²⁸⁰ *Ibid*, 100; Fischer-Lescano and Teubner, above (n 250), 1000.

specialized legal fields within state law.²⁸¹ Each type of conflict has its own analytical and normative challenges, but legal responses include formal ‘collision rules’ referring a matter to one system or another;²⁸² procedural rules guaranteeing self-regulatory autonomy or creating fora for negotiating ‘intersystemic agreements’;²⁸³ substantive legal norms (eg for standard contract clauses); and quasi-constitutional rules governing the constitutive conditions of quasi-legal orders. The focus in all cases is on balancing the intrinsic logics and functional requirements of conflicting systems, rather than balancing the conflicting interests of individual or collective actors.²⁸⁴

Systems theory’s focus on inter-systemic interaction makes it very relevant to the study of TBGI. Built around self-referential communicative cycles rather than actors or institutions, it offers a radical alternative to other theoretical perspectives. It departs from other approaches in insisting that every attempt to regulate a formal organization or a social field from the outside involves inter-systemic interaction and can at most have an indirect effect. Systems theory’s demanding theoretical assumptions and radical implications make dialogue and comparison with other approaches difficult. Yet despite its singularity, it shares with other approaches an emphasis on the relationship between state law and private ordering. Harm Schepel’s highly nuanced systems theory-inspired analysis of technical product standards, for example, documents in exquisite detail the complex interactions among multiple organizations, codes and standards ‘beyond the state,’²⁸⁵ but focuses ultimately on the questions of whether private governance is the ‘impulse-generating periphery’ of state law²⁸⁶ or vice-versa;²⁸⁷ when state law should recognize private standards as legitimate;²⁸⁸ and how public administrative law principles have been imposed upon or borrowed by private standardization.²⁸⁹

6. Conclusion

Despite its length, the preceding account of transnational legal scholarship’s treatment of governance interactions is oversimplified and incomplete. It suffices, however, to illustrate the tendency in contemporary transnational legal scholarship either to view interactions

²⁸¹ Teubner, *Law as an Autopoietic System*, above (n 255), 109-114.

²⁸² *Ibid*, 108.

²⁸³ *Ibid*, 110.

²⁸⁴ *Ibid*, 112.

²⁸⁵ Schepel, above (n 117), 405.

²⁸⁶ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity, 1995) 442.

²⁸⁷ Schepel, above (n 117), 414; Gunther Teubner, ‘The Two Faces of Janus: Rethinking Legal Pluralism’ (1992) 13 *Cardozo Law Review* 1443.

²⁸⁸ Schepel, above (n 117), 2, 413-14.

²⁸⁹ *Ibid*, 409, 414.

narrowly and in isolation, or to examine them in a tentative, preliminary manner. The literature exhibits a heavy emphasis on interaction within and between state-based legal orders, and between state and non-state normative orders, as opposed (for example) to interactions among various transnational non-state regulatory programs. Many authors are concerned primarily with conflict or competition, others with cooperation. Many confine their attention to interactions within individual institutions or regimes; some examine interactions between competing or overlapping regimes within larger legal or organizational fields; while a few address interacting social systems. Many focus on one or two components of regulatory governance to the exclusion of others, with rulemaking and compliance getting the most attention often at the expense of other aspects such as implementation or interpretation.²⁹⁰

The transnational legal literature is nevertheless a rich mine of empirical, theoretical and methodological insights into transnational governance interactions, ripe for consolidation in an overarching conceptual framework that defines a fruitful research agenda and allows these diverse perspectives to speak to each other.²⁹¹ Given the great variety of legal scholarly perspectives on the proliferation, fragmentation, intersection and interaction of actors, institutions and systems in transnational and international regulatory governance, it would not be fair to claim, as Kal Raustiala does, that understanding the implications of these developments 'is a question that has only begun to be asked.'²⁹² On the contrary, this question, in one form or another, has been at the heart of transnational law since its beginnings. Yet Raustiala is surely correct in going on to claim that 'the most interesting question for the future is probably not whether international institutions matter—they do—nor why they are designed the way they are. It will be how to manage and navigate an international order that is growing ever more complex.'²⁹³

The critical literature review presented here provides useful intellectual and historical context for this task and for the exercise in theory-building that it will require.²⁹⁴

²⁹⁰ Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Matters' (2010) 1 *Global Policy* 127.

²⁹¹ My coauthors and I propose such a framework in Eberlein and others, above (n 2).

²⁹² Raustiala, above (n 50), 316.

²⁹³ *Ibid.*

²⁹⁴ This theoretical challenge is laid out in Wood and others, [this issue](#).