



5-24-2013

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Recommended Citation

Oren Perez, *International Environmental Law as a Field of Multi-Polar Governance: The Case of Private Transnational Environmental Regulation*, 10 SANTA CLARA J. INT'L L. 285 (2013).

Available at: <http://digitalcommons.law.scu.edu/scujil/vol10/iss2/6>

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International Environmental Law as a Field of Multi-Polar Governance: The Case of Private Transnational Environmental Regulation

Oren Perez

Daniel Bodansky's *The Art and Craft of International Environmental Law* is a valuable scholarly work that offers the reader a journey into the complexities of contemporary international environmental law. One of the advantages of writing a review that is part of a dedicated volume is that I do not have to give an account of the whole book, but can focus on those to which I have more to say, hoping that the other contributors to this volume will fill the gap.

The book carves a unique path in international environmental law literature. First, it does not seek to offer a comprehensive survey of international environmental law, but rather to examine the "processes through which international environmental law is developed, implemented, and enforced."¹ Second, the book was written with a stronger methodological and philosophical outlook than is typical of introductory works. It is, in other words, a theoretically motivated work.

My critique of the book highlights what, in my mind, is a significant blind-spot of the book: the increasingly important role of private transnational environmental regulation ("PTER") in the contemporary field of global environmental governance. A book that is seeking to unfold the dynamic of international environmental law should, I will argue, be interested not only in the art and craft of treaty-making, but also in the craftsmanship of rule-making as it takes place within global organizations such as the Global Reporting Initiative, the International Organization for Standardization, the Forest Stewardship Council ("FSC") and the Marine Stewardship Council. Further, as the universe of PTER is

1. DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL LAW* (2011).

growing in both its influence and in its scale, studying the linkages between this universe and the classic domain of public international law is becoming a critical policy question. What are the potential synergies or dis-complementarities between the two domains? To what extent normative developments within the PTER domain can support or facilitate normative processes within the treaty domain (and vice-versa). Further, reflecting on the linkages between these domains also requires us to deal directly with some of the theoretical questions that lie at the core of the book, such as the meaning of law in the international realm, the distinction between soft law and hard law, and the mechanisms of compliance.

I. Setting the Scene: The Emergence of Private Transnational Environmental Regulation as a New Source of Global Ordering

Over the last several years, the environmental regulation system has undergone radical changes. Various private normative schemes, including voluntary corporate codes,² environmental management systems,³ “green label” schemes,⁴ environmental reporting standards,⁵ green financial schemes and green indexes,⁶ have taken an increasingly important role in the environmental regulatory field.⁷ The emergence of private environmental schemes with global reach has changed the nature of the private governance field. Once a field that was highly fragmented and consisted of uncoordinated organizational routines and segregated contractual arrangements, PTER has turned into a much more ordered domain, dominated by several centers of global governance. This change influenced all the facets of the governance game — from the norm-production process to implementation and enforcement. Further, these emerging regimes developed highly specified and articulated legal schemes, supported by intricate institutional structures.⁸ As such, the new regimes

2. See, e.g., *OECD Guidelines of Multinational Enterprise*, OECDILIBRARY (Sept. 29, 2011), <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.
3. For examples of management systems, see *ISO 14001*, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, *available at* http://www.iso.org/iso/iso_catalogue/catalogue_ics/catalogue_detail_ics.htm?csnumber=31807; EU EMAS Regulations, No 1221/2009 of Nov. 25, 2009, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009R1221:EN:NOT>; & Responsible Care program, *available at* <http://www.icca-chem.org/en/Home/Responsible-care/>.
4. For examples of “green label” schemes, see FOREST STEWARDSHIP COUNCIL UNITED STATES, <http://www.fscus.org/> (last visited May 20, 2012); & *About Certification*, ENERGY STAR, http://www.energystar.gov/index.cfm?c=cbd_guidebook.cbd_guidebook_apply_3, (last visited May 20, 2012).
5. For examples of environmental reporting standards, see *Sustainability Reporting Guidelines (GR)*, GLOBAL REPORTING INITIATIVE, *available at* <https://www.globalreporting.org/resourcelibrary/G3.1-Guidelines-Incl-Technical-Protocol.pdf>; & *AA1000 Assurance Standard*, *available at* <http://www.accountability.org/standards/aa1000as/index.html>.
6. Green financial schemes include codes regulating lending practices and “ethical” investment standards. For examples of green indexes, see DOW JONES SUSTAINABILITY INDEXES <http://www.sustainability-index.com/> (last visited May 20, 2012), & *FTSE4Good Index Series*, FTSE INDEX COMPANY, http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp (last visited May 20, 2012).
7. Some of the foregoing instruments, such as the GRI, also cover non-environmental issues. There are similar instruments covering other aspects of the corporate responsibility issue, such as the SA8000 standard, dealing with human rights of workers. *Social Accountability 8000*, SOCIAL ACCOUNTABILITY INTERNATIONAL, (2008) <http://www.sa-intl.org/>.
8. Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private*

differ from some of the first-generation global codes, which lacked both the extensive specificity and the intricate institutional fabric that characterize their second-generation successors.⁹ The increasing importance of private environmental schemes can be linked to the rise of regulatory capitalism as the predominant form of capitalism at the beginning of the twenty-first century.¹⁰

It is beyond the scope of this brief paper to examine in detail these varied regimes. The table below outlines some of the leading PTER schemes. As can be seen from the table, the schemes differ in their style and scope. They include both general standards that seek to regulate the rule-making process itself, meta-regulatory norms seeking to regulate institutional processes at the firm level (e.g., environmental self-management, environmental disclosure), and substantive standards that regulate specific environmental policy domains (relating to production methods or product components).¹¹ What is common to these examples is that they all have an elaborated normative structure, supported by a developed institutional framework.¹²

Regulation of Labor and Environmental Conditions, 113 AM. J. SOC. 297 (2007); see also Benjamin Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority*, 15 GOVERNANCE: INT'L J. POL'Y, ADMIN, INST. 503 (2002); see also Tim Buthe, *Private Regulation in the Global Economy: A (P)Review*, 12 BUS. & POL. 1 (2010).

9. Two good examples of first-generation codes are *The Ceres Principles*, CERES <http://www.ceres.org/about-us/our-history/ceres-principles> (last visited May 21, 2012); *Global Sullivan Principles*, THE LEON H. SULLIVAN FOUNDATION, <http://thesullivanfoundation.org/about/global-sullivan-principles>.
10. David Lazer, *Regulatory Capitalism as a Networked Order: The International System as an Informational Network*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 52 (2005); John Braithwaite, *Neoliberalism or Regulatory Capitalism*, REGNET OCCASIONAL PAPER 5 (2005), available at <http://ctsi.anu.edu.au/publications/nontaxpubs/ROP5.pdf>.
11. For a discussion of meta-regulation, see John Braithwaite, *Meta Risk Management and Responsive Regulation for Tax System Integrity*, 25 LAW & POL'Y 1 (2003).
12. For further discussion of PTER schemes, see Klaus Dingwerth & Philipp Pattberg *World Politics and Organizational Fields: The Case of Transnational Sustainability Governance*. 15 EUR. J. INT'L REL. 707 (2009), available at <http://ejt.sagepub.com/content/15/4.toc>; see also Buthe, *supra* note 8.

Table 1: The Universe of Global Private Environmental Ordering (Partial Picture)

Regulatory Category	Field of Intervention	The Legal Instrument	Responsible Organization	Compliance Mechanisms
Meta-regulation of standard setting	Transnational Standard-Setting	ISEAL Code of Good Practice for Setting Social and Environmental Standards, Vol. 5	ISEAL Alliance	Independent Evaluation Mechanism (http://www.isealliance.org/resources/p049-independent-evaluation-mechanism-procedure)
Meta-regulation of corporate governance (Process based intervention)	Environmental Management	ISO 14001, Responsible Care	International Organization for Standardization, International Council of Chemical Associations (ICCA) ,	Private external verification (relatively robust in the case of ISO 14001)
	Sustainability Reporting	GRI Guidelines	Global Reporting Initiative	GRI (documents check), Private External Assurance (based on global rules)
	Assurance Practices	ISAE 3000, AA1000 Assurance Standard	The International Auditing and Assurance Standards Board; AccountAbility	None
Specific Intervention				
	General CSR Guidelines	Global Compact	UN led	<i>Transparency based</i>
	Green Labeling (product & process oriented)	Forest Stewardship Council global label; SA8000 (social accountability standard); FairTrade International Standards	Forest Stewardship Council; Social Accountability International; FairTrade International	<i>Independent certification</i> bodies accredited by the Forest Stewardship Council; SAAS (in the case of SA8000) and FLO-CERT GmbH (in the case of FairTrade International, http://www.flo-cert.net/flo-cert/)

	Sustainability Indexes	FTSE4Good, Dow Jones Sustainability Index ("DJSI")	FTSE, Dow Jones	Private compliance governed by FTSE and Dow Jones and drawing on external consultants (Eiris & SAM)
	Environmental Impact Assessment	Equator Principles ¹³	Joint Governance by Participating Banks	Voluntary reporting mechanism (http://www.equator-principles.com/reporting.shtml)

II. Private Transnational Environmental Regulation ("PTER") as a Reflexive Network

Over the past five years the PTER field has reached a turning point, which has transformed it from a highly fragmented domain into a reflexive network that exhibits increasing capacity for introspection, coordination and cross-regime synergy. Consider first, the issue of reflexivity. A prerequisite for the emergence of such reflexivity is the intensification of ties among the network elements (density).¹⁴ Indeed, within the PTER it is possible to find multiple links and cross-sensitivities between the distinct regimes that are part of the network. Thus, for example, The GRI Guidelines refer to external standards, by requiring organizations to list all the external economic, environmental, and social codes to which they subscribe, including any environment-related performance or certification system.¹⁵ The FTSE4Good Inclusion Criteria state that high-impact companies with ISO or EMAS certification are considered to meet several core indicators, which are required from such companies; such firms are also subject to stricter disclosure requirements.¹⁶

The intensification of the ties between the network nodes does not suffice, however, for the emergence of network reflexivity. The communicative interaction between the network elements has to take a dialogical form, which is not hierarchical. The idea of network reflexivity refers, therefore, to reciprocal communicative processes through which the elements of the network refer to each other in a way that involves complex epistemic and normative judgement, and continuously challenges the network structure.¹⁷ Three prominent

13. There are close links between the Equator Principles and the GRI Financial Services Sector Supplement. *See OECD, supra* note 2 (procedures for assessing and screening environmental and social risks in business lines).
14. Following Marwell and Oliver, I define density as the number of actual social ties in a collective divided by the number possible. *See* Gerald Marwell, Pamela E. Oliver, & Ralph Prahl, *Social Networks and Collective Action: A Theory of the Critical Mass. III.*, 94 AM. J. SOC. 502, 505 (1988).
15. *Global Reporting Initiative, supra* note 4, at 23, 27.
16. *FTSE4Good Index Series Inclusion Criteria*, at 3, FTSE INDEX COMPANY (2006), available at http://www.ftse.com/Indices/FTSE4Good_Index_Series/Downloads/FTSE4Good_Inclusion_Criteria.pdf.
17. For example, in terms of the structure and weight of the links between the network elements and the centrality of different elements within the structure see Alain Barrat et al., *The Architecture of Complex Weighted Networks*, at 3747, PNAS, March 16, 2004, available at <http://www.pnas.org/content/101/11/3747.full.pdf+html>; see also Steven H. Strogatz, *Exploring*

examples for the emergence of this kind of reflexivity within the contemporary PTER field are ISEAL Code of Good Practice for Setting Social and Environmental Standards (representing an attempt to regulate the global standard-setting process), the International Standard ISO 26000:2010, Guidance on social responsibility (representing an attempt to develop an international consensus on what social responsibility ("SR") means and the SR issues that organizations need to address) and Accountability AA1000 Stakeholder Engagement Standard (a general mechanism to achieve the stakeholder requirements of various global standards, such as GRI, ISO 26000 and others).¹⁸ These three examples were not just the culmination of a reflexive dialogue, but would also serve as the basis for continued reflexive interaction within the network in the future.

Another feature of reflexive networks is the emergence of *coordination dynamics*. The foregoing three standards also represent a form of emerging coordination. Another reflection of the coordination dynamic in the PTER field is the emergence of structured sites for conversation between network elements. Examples include joint forums such as the European Multi-Stakeholder Forum on Corporate Social Responsibility chaired by the EU Commission and the ISEAL Alliance and the UN Global Compact Network,¹⁹ long-term contractual arrangements such as the Memorandum of Understanding between ISO and GRI which was signed on September 2011,²⁰ and the emergence of transnational associations such as the International Business Leaders Forum (IBLF) and CSR Europe.²¹

A third feature of the emerging field of private environmental governance concerns its *ensemble regulatory structure*.²² This ensemble structure characterizes, in particular, the corporate social responsibility ("CSR") universe. By ensemble regulation, I refer to a collection of autonomous regulatory schemes that form a regulatory network, clustering around a common core of basic principles and exhibiting positive enforcement and normative externalities. The notion of positive enforcement externalities refers to the way in which compliance mechanisms of each regime also serve as an enforcement agent of the other

Complex Networks, NATURE, March 8, 2001, at 268.

18. See *ISEAL Code of Good Practice*, ISEAL ALLIANCE, <http://www.isealalliance.org/code> (last visited May 21, 2012); *ISO 26000 – Social Responsibility*, THE INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/social_responsibility/sr_iso26000_overview.htm (last visited May 21, 2012); *AA1000 Stakeholder Engagement Standard*, ACCOUNTABILITY <http://www.accountability.org/standards/aa1000ses/index.html> (last visited May 21, 2012).
19. *European Multi-Stakeholder Forum*, available at http://circa.europa.eu/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/csr%20ems%20forum.htm; *UN Global Compact Participants*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last visited May 12, 2012).
20. *ISO and Global Reporting Initiative Increase Cooperation on Sustainable Development*, GLOBAL REPORTING, (Oct. 4, 2011), <https://www.globalreporting.org/information/news-and-press-center/Pages/ISO-and-Global-Reporting-Initiative-increase-cooperation-on-sustainable-development.aspx>.
21. INTERNATIONAL BUSINESS LEADERS FORUM, <http://www.iblf.org/>; CSR EUROPE, <http://www.csreurope.org/>.
22. See Oren Perez, *Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and the New Ensemble Politics*, 12 THEORETICAL INQUIRIES IN L. 543 (2011).

regimes in the network, generating an amplified compliance effect. The meaning of this effect is that firms entering into the world of CSR are finding it increasingly more difficult to reap the reputational gains associated with voluntary CSR codes without undertaking real organizational efforts. Once a firm starts to publish environmental reports drawing on the GRI guidelines, adopts a certified EMS (ISO 14001 or Responsible Care), and enters the reputable list of either FTSE4Good or DJSI, it becomes increasingly more difficult for this firm to renege on its multidimensional commitments. Therefore, ensemble regulation makes it much more difficult to maintain a schizophrenic decoupling between the organization's stated policies and its (actual) internal culture.²³

But the ensemble structure of this new private order has another, more subtle effect. There is positive feedback between the multi-focal invocation of the idea of sustainability across the ensemble, the normative standing of the idea as a moral-political principle, and the moral legitimacy of the ensemble and each of its constituent regimes. The mutual engagement with the concept of sustainability through the distinct regime-spaces and the normative cross-reference it facilitates is thus a source of positive normative externality.

The emergence of this kind of positive network externality is not a necessary consequence of the evolution of PTER. The fact that these various schemes all operate within a common subject-matter domain — environmental regulation — is a necessary, but not sufficient, condition for the emergence of ensemble regulatory structure.²⁴ I can offer two tentative observations in this context. First, the idea of sustainable development provided the network regimes with a focal ideological point, giving more room for cross-network collaboration.²⁵ A second point concerns the institutional characteristics of this regulatory ensemble. First, the non-statal nature of the transnational institutions involved in this network has allowed them to transcend the national frictions that tend to haunt treaty-based regimes.²⁶ Second, the fact that the distinct regimes composing the ensemble have evolved in a *non-imperialistic* fashion, each capturing a different segment of the CSR universe, has reduced the competitive tensions between the institutions, thereby facilitating the emergence of a synergic structure.

Unfolding the structure of the PTER field as a reflexive network requires further theoretical and empirical work, but there are strong indications that this field has indeed reached a structural tipping point, which changed its underlying dynamic.²⁷

23. See Oren Perez, *Between Soft Law and Greenwash: The Compliance Dynamic of Civil Forms of Environmental Regulation*, in HANDBOOK ON THE POLITICS OF REGULATION (D. Levi-Faur & Edward Elgar ed., 2011).

24. A good counterexample is the field of international trade law, in which the proliferation of bilateral free-trade treaties poses an increasing risk to the WTO multilateral framework. See Jayant Menon, *Dealing with the Proliferation of Bilateral Free Trade Agreements*, 32(10) WORLD ECONOMY 1381 (2009).

25. See Nils Ringe, *Policy Preference Formation in Legislative Politics: Structures, Actors, and Focal Points*, 49(4) AM. J. POL. SCI. 731 (2005).

26. For example of the frictions that underlie the trade and climate change regimes, see James Scott & Rorden Wilkinson, *What Happened to Doha in Geneva? Re-engineering the WTO's Image While Missing Key Opportunities*, 22 EUR. J. DEV. RES. 141 (2010); John Whalley & Sean Walsh, *Bringing the Copenhagen Global Climate Change Negotiations to Conclusion*, 55(2) CESIFO ECON. STUD 255 (2009).

27. See Perez, *supra* note 22, at 548; KELSO, J.A. SCOTT & DAVID A. ENGSTROM, THE COMPLEMENTARY NATURE 6-14 (The MIT Press, 2006); Andrew Pilny & Michelle Shumate, *Hyperlinks as Extensions*

III. PTER In the "The Art and Craft of International Environmental Law": Reflections and Critique

Bodansky recognizes the fact that private transnational regulation and private social agents (businesses, NGOs, experts) are taking an important role in the contemporary global governance system. However, his conceptual framework disregards the systemic aspects of this process, leading him to understate the significance of this phenomenon. Already in the preface to the book, Bodansky refers to private standards — "the sustainable fishery and forestry standards used by Wal-Mart and Home Depot" which were developed "more informally by environmental groups and business, and are applied to producers through supply-chain contracts, without any government involvement" — as an example of international environmental norm.²⁸ He returns to this example later in the book when he enumerates the norms of international environmental law. In addition to intergovernmental agreements, decisions of treaty bodies, conference resolution and declarations, claims by states, and writings of legal scholars and experts, he similarly refers to business codes and conduct. The latter are defined as self-regulation efforts by business groups, sometimes in conjunction with environmental groups. He gives the example of the Marine Stewardship Council rules on sustainable fisheries (adopted by Wal-Mart). The development of these rules can be associated, he writes, with several motives: a wish to forestall intergovernmental regulation, reputation building or a genuine desire to improve the environment.²⁹

What is the legal status of private transnational environmental norms, in comparison to the classic instruments of public international law such as treaties or customary law? Bodansky seems inclined to the view that they represent either non-legal norms or soft law, given that "business codes of conduct are developed by non state actors, without any law making authority."³⁰ This statement is somewhat relaxed in the pages that follow. Bodansky argues that what distinguishes hard law from soft law is the psychological state of mind of the relevant community: "Ultimately what makes a norm 'hard' is not that violations can be sanctioned, at least in the way that we ordinarily mean, or that norm can be applied by courts. Instead, what matters is the state of mind of the actors that comprise the relevant community – what we referred to earlier as the actor's internal point of view — a sense that the norm represents an obligation and that compliance is therefore required rather than optional."³¹ This definition seems to leave open the possibility that 'legal-like' private instruments, which have the mandatory quality of legal statements,³² could constitute "law" and lead to the emergence of legal communication. However, while Bodansky's theoretical

of Offline Instrumental Collective Action, 15(2) INFO., COMM. & SOC'Y 260 (2012).

28. BODANSKY, *supra* note 1.

29. *Id.* at 96.

30. *Id.* at 99.

31. *Id.* at 101.

32. Paul McNamara, *Deontic Logic*, in THE STANFORD ENCYCLOPEDIA OF PHIL. 103-04 (Edward N. Zalta ed. Summer 2010), available at <http://plato.stanford.edu/archives/sum2010/entries/logic-deontic/> (discussing how the mandatory quality of legal statements reflects their adherence to the deontic syntax, which is based on the following three basic forms: a *prescriptive* form (it is obligatory that), *permissive* form (it is permissible that) or *prohibitive form* (it is impermissible that)). Bodansky does not refer to literature of deontic logic).

framework seems open to that possibility, he rejects that possibility as a practical matter, as he states in various places that private regulatory instruments are "non-legal." Indeed, in footnote 52 he states generally that he uses the term soft law to refer only to non-legal norms,³³ and he later repeats that observation with reference to the specific example of ISO 14000 environmental management series.³⁴

Despite the characterization of PTER as non-law Bodansky does not ignore the potential contribution of private standards, and more importantly private agents, in the advancement of environmental goals. He concludes chapter five (Varieties of Environmental Norms) by stating that international lawyers "can even pursue norm-making activities outside the intergovernmental process altogether, through private-standard setting. As a result, the question "what is law?" though still a favorite, has lost its prominence."³⁵

Bodansky provides further discussion of private players in chapter six ("Who's Who in the Legal Process") in which he devotes several pages to NGOs and Business parties. International Environmental NGOs, such as Greenpeace, WWF, FIELD, and World Resources Institute, play an important role, Bodansky argues, by mobilizing public opinion, by utilizing their expertise to advocate pro-environmental policies and by using their moral authority and data-gathering capacities to condemn ecologically adverse activities using blaming and shaming campaigns.³⁶ Business, Bodansky argues, "contribute[s] significantly both to the creation and to the solution of environmental problems."³⁷ In the context of our discussion of PTER, Bodansky notes that business groups participate directly in the standard-setting process and provide crucial technical expertise.³⁸ He notes other examples of private standard-setting initiatives such as the Equator Principles (a framework for addressing environmental and social risks in project financing currently adopted by 73 financial institutions) and the International Chamber of Commerce Business Charter for Sustainable Development.³⁹

Bodansky's approach to PTER seems lacking both in its conceptual structure and in its empirical grounding. Conceptually, Bodansky's discussion of the role of private codes and private agents seems incoherent. On the one hand he develops a psychological account of legal validity that emphasizes the state of mind of the actors that comprise the relevant community as the primary criterion for legal validity; on the other hand he seems committed to the view that sees PTER schemes as non-law. One possible source for this inherent tension in his account is an implicit commitment to a binary distinction between soft law and hard law. Such commitment, however, disregards the possibility of conceptualising the idea of normativity as a fuzzy predicate that may be realised in degrees.⁴⁰ "Softness" under this

33. BODANSKY, *supra* note 1, at 99.

34. *Id.* at 105.

35. *Id.* at 107.

36. *Id.* at 124-49.

37. *Id.* at 130.

38. *Id.* at 130-31.

39. *Id.* at 134; EQUATOR PRINCIPLES, <http://www.equator-principles.com>; *Policy and Business Practices*, INT'L CHAMBER OF COMM., <http://www.iccwbo.org/policy/environment/id1309/index.html>.

40. Perez, *supra* note 22; Oren Perez, *Law as a Strange Loop*, BAR ILAN UNIV. PUB LAW Working Paper No. 01-10, available at <http://ssrn.com/abstract=1520969> (Dec. 9, 2009) in *SOCIOLOGICAL JURISPRUDENCE – LIBER AMICORUM GUNTHER TEUBNER* (Graf-Peter Calliess et al. eds., Gruyter,

alternative conceptualisation does not designate a state of lawlessness, but a state of graded normativity, with differing levels of normative force. This interpretation invites us to understand normativity in terms of a continuum, which is closed by the ideal types of “non-law” and “crisp (or absolute) law”. The notion of fuzzy legality stipulates a legal universe in which legal norms do not possess the full force attributed to them in the ideal world of absolute legality. From a classic jurisprudential perspective the key for understanding the meaning of fuzzy legal norms lies in relaxing the assumption that legal norms provide content-independent reason for action, which cannot, in particular, be defeated by non-legal considerations. Relaxing this assumption would allow for the possibility that fuzzy norms (unlike ideal-type, 'Razian' legal norms) could be defeated by (some) non-legal reasons.⁴¹

Empirically, Bodansky seems to underestimate the scope and scale of PTER as a social phenomenon. While, as noted above, Bodansky certainly acknowledges this phenomenon, and the role of private players in the international governance arena, he does not seem sensitive enough to the structural transformation that took place within the PTER domain and the enforcement and normative positive externalities associated with it.⁴² One reflection of this neglect is the way in which Bodansky analyzes PTER conceptually — under the heading of either NGOs or Business.⁴³ This categorization disregards the institutional autonomy of many of the standard-setting organizations or networks that are involved in the process and the way they have created a new idiosyncratic field of action.⁴⁴ This sociological neglect also means that his discussion cannot fully capture the policy potential of PTER, both independently and in connection with the more traditional instruments of international law.

IV. Concluding comments

The increasing importance of PTER in the governance of global environmental dilemmas turns the question of the inter-linkages between the classic domain of public international law and PTER into an important policy issue. Of particular importance is the following question: to what extent do these two domains offer synergetic opportunities, or rather generate conflicting processes which may undermine the overall goal of pushing the global society into a more sustainable path? Consider for example the climate change domain. Parallel to the climate change convention and the Kyoto Protocol, one can find a variety of private mechanisms that regulate diverse aspects of the climate change problematic. The

Berlin 2009).

41. Such possibility can be conceptualized with the theoretical tools of defeasible logic. See John L. Pollock, *Defeasible Reasoning with Variable Degrees of Justification*, 133 (1-2) ARTIFICIAL INTELLIGENCE 233 (2001); Giovanni Sartor, *Defeasibility in Legal Reasoning*, EUR. UNIV. INST. Working Paper No. 2009/02 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1367540.
42. Perez, *supra* note 22, at 549; Oren Perez, *The New Universe of Green Finance: From Self-Governance to Multi-Polar Governance*, in RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 151 (Olaf Dilling, Martin Herberg & Gerd Winter eds., Hart Publishing 2008).
43. BODANSKY, *supra* note 1, at 123, 130.
44. Dingwerth & Pattberg, *supra* note 12; Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct*, 18 IND. J. GLOBAL LEGAL STUD. 617 (2010).

environmental chapter of the GRI Guidelines requires reporting corporations to disclose their "total direct and indirect greenhouse gas emissions by weight".⁴⁵ FTSE4Good Inclusion Criteria were expanded in January 2008 to include climate change criteria, which require firms in general to address their climate change impacts.⁴⁶ Finally, the carbon offset market includes, alongside the compliance mechanisms of the Kyoto Protocol (the Joint Implementation and Clean Development Mechanisms),⁴⁷ a variety of voluntary schemes, such as WWF Gold Standard and the Voluntary Carbon Standard.⁴⁸

Do these voluntary programs form a synergetic coupling with the climate change regime? One can offer competing hypotheses in this context, and it is far from trivial how to determine which is right empirically. The claim that there is strong potential synergy between the regimes draws on the governance deficit of the climate change regime and international environmental law in general (as discussed by Bodansky).⁴⁹ PTER offers governance flexibility that is not available within the classic treaty regime. While it is true that firms cannot be compelled to join a particular PTER regime, once they enter into the voluntary green club there are multiple institutional mechanisms through which the regime can foster compliance, from disclosure to third-party verification and continuous engagement, drawing on normative, institutional and market incentives.⁵⁰ The thesis that there is a positive complementarity between the public and private regimes is supported by various studies that demonstrate the efficacy of these regimes.⁵¹ The counter thesis argues that the emergence of PTER regimes should be understood as a strategic maneuver to counter more formal collective action. Thus, according to this story, the existence of private climate change regimes could support the opposition to the climate change negotiations. By creating a façade of regulatory activity, these regimes may forestall more formal (and efficient) regulatory intervention. While this story is not completely implausible, it seems to disregard the

45. GRI, *supra* note 14.

46. *FTSE4Good Climate Change Criteria*, FTSE, http://www.ftse.com/Indices/FTSE4Good_Index_Series/Downloads/FTSE4Good_Climate_Change_Criteria.pdf (last visited May, 21, 2012).

47. See William Boyd & James Salzman, *The Curious Case of Greening in Carbon Markets*, 41 ENVTL. L. 73, 79 (2011).

48. See THE GOLD STANDARD, <http://www.cdmgoldstandard.org> (last visited Apr. 7, 2012); Ecofys, TÜV-SÜD & FIELD, *Requirements Version 2.1*, THE GOLD STANDARD (June 2009), http://www.cdmgoldstandard.org/wp-content/uploads/2011/10/GSv2.1_Requirements-11.pdf; *Voluntary Carbon Standard 2007.1*, VERIFIED CARBON STANDARD (Nov. 18, 2008), http://www.v-c-s.org/sites/v-c-s.org/files/Voluntary%20Carbon%20Standard%202007_1.pdf; see Anja Kollmuss, Helge Zink & Clifford Polycarp, *Making Sense of the Voluntary Carbon Market: A Comparison of Carbon Offset Standards*, SEI-TRICORONA (Mar. 2008), http://assets.panda.org/downloads/vcm_report_final.pdf; K. Kathy Dhanda & Laura P. Hartman, *The Ethics of Carbon Neutrality: A Critical Examination of Voluntary Carbon Offset Providers*, 100(1) J. BUS. ETHICS 119 (2011).

49. BODANSKY, *supra* note 1, at 139-45.

50. See, e.g., ASEEM PRAKASH & MATTHEW POTOSKI, *THE VOLUNTARY ENVIRONMENTALISTS: GREEN CLUBS, ISO 14001, AND VOLUNTARY ENVIRONMENTAL REGULATIONS* [page number] (Cambridge Univ. Press 2006).

51. See, e.g., Prakash and Potoski, *supra* note 50; Perez, Oren, Yair Amichai-Hamburger, and Tammy Shterental, *The Dynamic of Corporate Self-Regulation: ISO 14001, Environmental Commitment, and Organizational Citizenship Behavior*, 43(3) LAW & SOC'Y REV. 593 (2009).

formidable obstacles for concluding and implementing environmental treaties (such as free riding and lack of effective sanctioning) which Daniel Bodansky rightly points to.⁵²

Further, the skeptic camp also disregards a further form of synergy between the fields — a circular normative cross-support. The ensemble-like engagement with the climate change problematic can facilitate social-wide concern for the climate change problematic and legitimize further international action on this front. This could be particularly important as negotiations on the future of the Kyoto Protocol continue even after the 2011 meeting in Durban.

Overall, the parallel universes of environmental treaties and PTER regimes generate a series of theoretical questions and practical challenges that clearly fall within the book's main project: the examination of the "processes by which international environmental law is developed, implemented, and enforced."⁵³ The fact that these questions are not resolved in this book does not detract from its value — the book is a great piece of legal scholarship, exposing the structural nuances of international environmental law in a theoretically complex fashion. Rather this lacuna should be seen as an invitation for further scholarly work on these cardinal questions.

52. Bodansky, *supra* note 1, at 162-64, 205-08.

53. *Id.*