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EDITORIAL

Contesting Assumptions and Unmasking Myths: Key Components of the Mission and Methodology of Transnational Environmental Law

One of the driving aspirations of *Transnational Environmental Law* (*TEL*) is to serve as a platform for challenging the status quo. From its inception, *TEL* has embraced original scholarship that asks provocative questions and challenges long-standing assumptions, that combines methodological rigour with an openness to new and interdisciplinary approaches, and that seeks to extend the debate beyond mainstream topics and inquiries. The contributors to this issue of *TEL* have seized the challenge of contesting assumptions and unmasking myths with both hands. It is with great pleasure that we introduce the fruits of their dedication and commitment to innovation in this Editorial.

The issue opens with a series of five articles that emerged from a symposium organized by Douglas Kysar and Joanna Dafoe at the Yale Center for Environmental Law and Policy and held at Yale Law School, New Haven, CT, United States (US), on 9–10 November 2012. The title of the symposium, 'Global Climate Change Policy Without the United States: Thinking the Unthinkable', refers to a question that preys on the mind of many, but that only few dare to utter: what if we abandon the conventional wisdom that robust US participation is an essential ingredient of any successful global climate change mitigation regime? If we abandon the assumption that, at some point in the not too distant future, the US government and legislature will rally to the cause of global climate change mitigation, will this open our eyes to solutions and alternative pathways to get around the obstacle of non-participation or non-compliance by a major global actor? From the articles featured in this issue of *TEL* it appears that, even if none of the contributors would be inclined to write off the possibility of a more engaged US in the future of global climate change policy, the act of relinquishing hope can be bracingly productive. There is a future for climate change law and policy without the US or, to cast it in more general terms, outside the traditional context of a large-scale multilateral agreement. It goes without saying that none of the alternatives contemplated in the symposium articles muster a full response to the enormity of the climate change challenge. However, they do underscore that one of the redeeming features of complex problems is that they offer multiple angles of attack, evolving along with the challenge itself. Moreover, by examining the scope for

action within the US for climate change law and policy 'without the US', the articles enrich our understanding of the relationship between government and governance, which goes to the heart of so many of *TEL*'s inquiries.

The Symposium Foreword by Joanna Dafoe and Douglas Kysar ably introduces the articles by Stuart Beck and Elizabeth Burleson,[1] Daniel Farber,[2] Edward Parson,[3] and Kenneth Abbott.[4] For details on each contribution and their interconnections, we refer to the Symposium Foreword that follows this Editorial. The contribution by Michael Gerrard and Shelley Welton is an invited commentary to bring readers of this issue of *TEL* up to speed on the latest developments in US climate change policy (up to the end of December 2013).[5] The Yale symposium took place in November 2012, a time of significant pessimism over US action on climate change at the domestic and international levels. One year on, 'US Federal Climate Change Law in Obama's Second Term' by Gerrard and Welton presents a transformed picture of a presidential administration that is determined to take significant initiatives on an action that remains highly political. President Obama's January 2013 State of the Union address was the turning point. Following his promise to act on climate change if Congress will not act soon, Obama's administration followed up with a Climate Action Plan in June 2013.[6] Gerrard and Welton present a masterful analysis of how the Obama administration is firmly forging ahead with the Climate Action Plan during its second term, largely through executive action. However, such regulatory action has not gone and will not go unchallenged because the economic stakes for the regulated entities are so high. It is also highly unlikely that greater regulatory vigour will fully replace alternative initiatives to pursue climate change objectives. Climate change litigation will continue apace to fill perceived regulatory gaps in climate change governance, and even act as 'a major force in transnational regulatory governance of greenhouse gas emissions'.[7] In this regard, the US Supreme Court is playing a critical role in climate governance through its acceptance of the executive use of the Clean Air Act (CAA)[8] to regulate greenhouse gas (GHG) emissions and, more broadly, 'signalling' to other institutional actors that climate change demands attention and action.[9]

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1 S. Beck & E. Burleson, 'Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations' (2014) 3(1) *Transnational Environmental Law*, pp. 17–29.

2 D.A. Farber, 'Climate Policy and the United States System of Divided Powers: Dealing with Carbon Leakage and Regulatory Linkage' (2014) 3(1) *Transnational Environmental Law*, pp. 31–55.

3 E.A. Parson, 'Climate Engineering in Global Climate Governance: Implications for Participation and Linkage' (2014) 3(1) *Transnational Environmental Law*, pp. 89–110.

4 K.W. Abbott, 'Strengthening the Transnational Regime Complex for Climate Change' (2014) 3(1) *Transnational Environmental Law*, pp. 57–88.

5 M.B. Gerrard & S. Welton, 'US Federal Climate Change Law in Obama's Second Term' (2014) 3(1) *Transnational Environmental Law*, pp. 111–125.

6 Ibid., at p. 113.

7 W.C.G. Burns & H.M. Osofsky, 'Overview: The Exigencies that Drive Potential Causes of Action for Climate Change', in *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press, 2011).

8 42 U.S.C. § 7401 et seq. (2012).

9 Ewing and Kysar call this function 'prods and pleas', and argue that this is a corollary to the more traditionally emphasized function of checks and balances: see B. Ewing & D.A. Kysar, 'Prods and Pleas: Limited Government in an Era of Unlimited Harm' (2011) 121 *Yale Law Journal*, pp. 350–424.

Gerrard and Welton also comment on two pending legal challenges that, although not directly related to climate change, may have considerable ramifications for future GHG emissions. These legal challenges are aimed at the Mercury Air Toxics Standard (MATS)[10] and the Cross State Air Pollution Rule (CSAPR),[11] which regulate power plant mercury emissions and sulphur dioxide (SO_2) and nitrous oxide (N_2O) emissions, respectively. Gerrard and Welton suggest that if MATS and CSAPR are upheld, the costs of complying with these new regulations will accelerate the closure of some major GHG sources. This highlights the synergistic aspects of climate change regulation whereby regulating non-GHG pollutants can give rise to climate mitigation benefits.

Together, the Symposium articles speak to many of the issues pervasive in transnational environmental law and will therefore be of great interest to readers: the transnational aspects of regulatory solutions that criss-cross multiple levels of governance, the need for better coordination or 'orchestration' (borrowing Abbott's words)[12] of transnational lawmaking and implementation, the opportunities and challenges posed to transnational environmental law by emerging technologies, and the accountability and legitimacy concerns raised by the multi-site, multi-pathway nature of transnational environmental governance.

The Symposium contributions are a vivid illustration of the energizing impact on legal scholarship of asking unorthodox, even 'unthinkable', questions. The two self-standing articles that complete this issue's article series, in turn, showcase the benefits of methodological ambition in environmental legal research. Andreas Kotsakis' article uses a Foucaultian analysis to uncover the discursive processes and dynamics that, according to the author, explain how the field of international environmental law has lost the capacity to describe itself and to exert a normative influence on the aspects of the world with which it seeks to engage.[13] He writes that '[t]here is no hope for the field to be an engine for global social change when it can no longer understand it'.[14] Kotsakis uses the case study of the transformation of biodiversity into genetic gold to trace 'the emergence of environmental norms in relation to biodiversity, thus challenging positivist understandings of law by focusing on value and norms, rather than facts and rules', and specifically delves into the example of the National Biodiversity Institute of Costa Rica (INBio), which is described as 'an early manifestation of the bioeconomic triptych of biodiversity, biotechnology and neoliberalism' and 'simply designed as a vehicle for attracting funding based on the future potential of genetic gold'.[15] Kotsakis' analysis leads to the conclusion that international biodiversity conservation law during the 1990s failed so desperately because the law was based on antiquated and fixed notions of

10 77 Fed. Reg. 9304, 9305-06 (16 Feb. 2012).

11 Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (8 Aug. 2011) (to be codified at 40 C.F.R. pt. 51, 52, 72, 78, and 97).

12 Abbott, n. 4 above, at p. 83.

13 A. Kotsakis, 'Change and Subjectivity in International Environmental Law: The Micro-Politics of the Transformation of Biodiversity into Genetic Gold' (2014) 3(1) *Transnational Environmental Law*, pp. 127–47.

14 Ibid., at p. 128.

15 Ibid., at p. 140.

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biodiversity, which were in direct competition with the increasingly dominant notion of biodiversity as an economic opportunity. In short, this article gets to the heart of the problem – that international environmental law cannot generate solutions amidst oblivion to reality – and seeks to unmask myths by drawing attention to the 'micro-politics of environmental subjectivity' through a Foucaultian-inspired theoretical framework.

The second self-standing contribution, by Uzuazo Etemire, also celebrates methodological innovation, albeit in a very different way from Kotsakis' discursive analysis.[16] Etemire's article on 'Public Access to Environmental Information: A Comparative Analysis of Nigerian Legislation with International Best Practice' performs a doctrinal analysis with a transnational twist, as it measures the legitimacy of national law, not against a hierarchically higher binding norm such as a constitutional provision, but against a non-binding, authoritative understanding of transnational best practice. Etemire does this with reference to Nigeria's recently adopted Freedom of Information Act (FOI Act).[17] Access to information is widely acknowledged to be crucial in order to foster public participation in environmental governance. Transnational environmental non-governmental organizations (ENGOs) and epistemic networks, as well as local environmental advocacy groups, can function properly only if they have access to pollution inventories, information on law enforcement and policing of environmental offences, and so on. However, in former colonies like Singapore and Nigeria, which retained strict laws criminalizing the giving out and receiving of 'classified information', access to environmental information was virtually non-existent.[18] Etemire's article examines Nigeria's recent FOI Act, which became law after a lengthy citizen-led movement. The Act takes priority over the Official Secrets Act[19] and any other law relating to access to information. As the FOI Act does not distinguish environmental information from other types of information held by public institutions in Nigeria, its passage should improve access to environmental information and thereby strengthen efforts to protect the environment and human health. To assess the adequacy of the FOI Act for environmental purposes, Etemire compares its provisions with those of the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention),[20] even though Nigeria is not a party to this Convention. The author justifies this approach by

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16 U. Etemire, 'Public Access to Environmental Information: A Comparative Analysis of Nigerian Legislation with International Best Practice' (2014) 3(1) *Transnational Environmental Law*, pp. 149–72, at 159.

17 Freedom of Information Act, 28 May 2011, Laws of the Federation of Nigeria, (2011) 36(98) *Official Gazette*, available at: http://foia.justice.gov.ng/pages/resources/Freedom_Of_Information_Act.pdf.

18 The Republic of Singapore, Official Secrets Act (Chapter 213), available at: http://www.statutes.agc.gov.sg (accessed 8 Jan. 2014). For discussion, see Chan Wing Cheong, 'Section 5 of the Official Secrets Act, *Bridges* and Beyond' [1998] *Singapore Journal of Legal Studies*, pp. 260–98. Official Secrets Act, Chapter 3, Laws of the Federation of Nigeria, 2004, available at: http://www.placng.org/lawsofnigeria/node/475 (accessed 8 Jan. 2014). Both pieces of legislation bear striking similarities. As Etemire points out (at p. 157), the wide and vague interpretation given to the term 'classified matter' has meant that, in practice, any government information could fall within the purview of the Official Secrets Act. This poses obvious difficulties for actors seeking access to environmental information.

19 Official Secrets Act (Nigeria), ibid.

20 Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: http://www.unece.org/env/pp/welcome.html.

looking beyond the binding effect of the Aarhus Convention *inter partes* and taking into account its broader, *erga omnes* influence as an emanation of 'international best practice'. In this guise, the Convention provides clear guidance on the legislative and practical steps required to implement the access to information requirements pronounced in other international documents in a more general fashion (for example, the 1992 Rio Declaration on Environment and Development[21]). Etemire's findings are encouraging: some core provisions are in line with international best practice, and some even go beyond it. At the same time, liberal exemption provisions create loopholes for the maintenance of entrenched practices of official non-transparency. On balance, the article concludes that the FOI Act is a positive step towards a more open and transparent Nigeria.[22] *TEL* welcomes such comparative scholarship that casts light on the transnational influence of regional treaties and how the norms and principles of international environmental law take effect in practice, particularly in jurisdictions that receive relatively less scholarly attention.

Finally, in keeping with the spirit of methodological ambition, *TEL* is proud to introduce its new and expanded book review section. In addition to the standard length reviews that have featured so far (and that will continue to be a key part of *TEL*'s range in future releases), starting with this issue *TEL* will offer two new features: firstly, extended, fully peer-reviewed book review essays; secondly, a survey of highlights of recent publications, offering a unique and comprehensive overview of noteworthy new book publications on topics within *TEL*'s broad ambit, accessibly organized into distinct themes of contemporary environmental law, policy and governance.

The new peer-reviewed extended book review essays will offer discussions of scholarly works from the perspective of the themes and questions that drive inquiries in transnational environmental law. The reviewed scholarship may itself fall under the heading of transnational, European or international environmental law, but equally the review essays offer contributors the opportunity to tackle landmark contributions outside the discipline strictly speaking, and reflect on their relation to and relevance for transnational environmental law. This, we consider, is a particularly exciting prospect, as it supports *TEL* in its commitment to engage with the major works and themes of the era and to learn more about our own, burgeoning discipline of transnational environmental law through exchange and comparison. In the first of these new extended review essays, 'Pluralism, Informality and Transnational Environmental Law',[23] Harro van Asselt offers the perfect illustration of the latter approach and of the great added value it generates. His review of the recent volumes *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (by Nico Krisch) and *Informal International Lawmaking* (edited by Joost Pauwelyn, Ramses Wessel and Jan Wouters) offers a lucid discussion of two of the most hotly debated phenomena in contemporary legal

21 Adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. I), 14 Jun. 1992, available at: http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

22 Etemire, n. 16 above, at p. 172.

23 H. van Asselt, 'Pluralism, Informality and Transnational Environmental Law' (2014) 3(1) *Transnational Environmental Law*, pp. 173–89.

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scholarship: pluralism (the existence of multiple and often overlapping legal systems in global society) and informality (the increasing relevance of non-traditional or non-state processes, outputs and actors in international law). Moreover, van Asselt effectively conveys the pivotal contributions of both to scholarship on transnational law[24] and highlights some of the key implications of these works for future research in the field of transnational environmental law in particular.[25] One such challenge that van Asselt identifies for transnational environmental law scholars is 'moving beyond establishing state/non-state and formal/informal dichotomies and attempting to identify how "traditional" lawmaking and regulation interacts with new forms of governance'.[26] We are confident that his insightful analysis will inspire the *TEL* readership and hope that it will encourage aspiring contributors to contact the *TEL* Editors-in-Chief with ideas for further, peer-reviewed book review essays.

As Editors of *TEL*, we have been delighted and motivated by the high quality of the submissions thus far. It drives us to continually strive for the highest quality in feedback and editorial support, and to keep on innovating and increasing our relevance and value to the *TEL* readership. This includes introducing the book review section innovations in this issue of *TEL*, raising our online profile and activities, and connecting more effectively with our growing readership through social media like Twitter,[27] Facebook,[28] and LinkedIn.[29] We look forward to continuing to publish articles that are intellectually stimulating and to supporting our research community's quest to advance understanding and appreciation of transnational environmental law in theory and in practice.

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[24] See, e.g., G.-P. Calliess & P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart, 2010); H.M. Osofsky, 'Climate Change Litigation as Pluralist Legal Dialogue?' (2007) 26A *Stanford Environmental Law Journal* & 43A *Stanford Journal of International Law* 181 (joint issue); D.M. Ong, 'From "International" to "Transnational" Environmental Law? A Legal Assessment of the Contribution of the "Equator Principles" to International Environmental Law' (2010) 79 *Nordic Journal of International Law*, pp. 35–74; C. Scott, '"Transnational Law" as Proto-Concept: Three Conceptions' (2009) 10(7) *German Law Journal*, pp. 859–76.

[25] Van Asselt, n. 23 above, at p. 175.

[26] Ibid., at p. 187.

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