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EDITORIAL

Crossing (Conceptual) Boundaries of Transnational Environmental Law

1. INTRODUCTION

As this Editorial is being written, we reflect on yet another extraordinary year. While vaccination programmes brought immense hope in the fight against COVID-19, the effects of the pandemic continued to be severely felt. In particular, the borderless world that globalization had increasingly created seems to be reverting to one with legal and practical obstacles to movement and connection. Our news cycle has been dominated with reporting on constantly changing COVID-19 travel restrictions and last-minute border closures,[1] new and controversial immigration control measures,[2] and the tragic deaths of migrants in attempting to cross borders.[3] At the same time, the Director General of the International Organization for Migration noted a record-breaking increase in the number of forcibly displaced persons combined with a significant drop in global mobility as a result of strict travel rules, described as a 'paradox not seen before in human history'.[4]

An earlier *Transnational Environmental Law* (*TEL*) Editorial, in 2017, reflected on how recent inward-looking policies had affected the rule of law.[5] Protectionism materialized even more sharply in the past two years as borders closed to limit the spread of COVID-19, significantly affecting the global environmental agenda. The 26th Conference of the Parties (COP-26) to the United Nations Framework Convention on Climate Change,[6] held in Glasgow (United Kingdom) in November 2021, is illustrative

1 See, e.g., 'Omicron: Which Countries Have Closed their Borders?', *Deutsche Welle*, 30 Nov. 2021, available at: https://www.dw.com/en/omicron-which-countries-have-closed-their-borders/a-59979182.

2 R. Syal, 'Priti Patel's Borders Bill "Breaches International and Domestic Law"', *The Guardian*, 12 Oct. 2021, available at: https://www.theguardian.com/world/2021/oct/12/priti-patel-borders-bill-breaches-law-human-rights.

3 J. Arraf, S. Khaleel & M. Specia, '"Our Boat Was Surrounded by Dead Bodies": Witnessing a Migrant Tragedy', *The New York Times*, 12 Dec. 2021, available at: https://www.nytimes.com/2021/12/12/world/middleeast/migrants-channel-france-uk-sinking.html.

4 UN News, 'Global Displacement Rising Despite Lockdowns that Kept Billions Grounded', 1 Dec. 2021, available at: https://news.un.org/en/story/2021/12/1106902.

5 T.F.M. Etty & V. Heyvaert, et al., 'Transnational Environmental Law on the Threshold of the Trump Era' (2017) 6(1) *Transnational Environmental Law*, pp. 1–10.

6 New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: https://unfccc.int/resource/docs/convkp/conveng.pdf.

of these disruptions. The COVID-19 pandemic had delayed the climate summit by a year; in the meantime, the limitations of online meetings quickly became clear, as diplomats proved uneasy about negotiating over Zoom an agreement vital for the future of our planet.[7] Lack of vaccines, quarantine requirements, and other risks linked to bringing together thousands of people negatively affected the feasibility of the summit, and led to critiques that COP-26 was the 'most exclusionary' climate summit to date.[8]

Restrictions on global mobility bring new challenges for transnational environmental law, a field built around global and shared challenges, and various forms of border crossings, both practical and intellectual: How do we engage with multilateralism and carry out international cooperation in a semi-closed world? Is border closure necessarily associated with environmental regression or can political ambition still be raised? How do legal norms travel in a world impacted by border closures?

As we look ahead, 2022 is likely to see further disruptions of the global environmental agenda as a result of COVID-19.[9] At the same time, it will be a year to reflect on past achievements and future challenges, as the international community comes together to commemorate the 50-year anniversary of the 1972 United Nations (UN) Stockholm Conference on the Environment.[10] The Stockholm+50 Summit[11] is an opportunity for the community of scholars to reflect on how contemporary international environmental law (IEL) has developed, while at the same time catalyzing environmental action. For us, as scholars of transnational environmental law, it is the chance to reflect on how scholarship has made sense of the increasing complexity of actions governing the protection of the environment and of the remaining gaps in our knowledge.

Contributions to this issue of *TEL* similarly represent opportunities to reflect on the boundaries of transnational environmental law: they offer rich insights into the core themes of transnational environmental law that question our conceptualization of both the environment and the law. At the same time, they offer the chance to take stock of 50 years of international cooperation in the field of environmental protection and to encourage our community of transnational legal scholars to further extend its analytical lenses.

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7 J. Shankleman, 'The Dangers of Turning High-Stakes Climate Talks into a Zoom Call', *Bloomberg*, 10 Feb. 2021, available at: https://www.bloomberg.com/news/articles/2021-02-10/the-dangers-of-turning-high-stakes-climate-talks-into-a-zoom-call.

8 See, e.g., S. Meredith, 'COP 26 Sharply Criticized as the "Most Exclusionary" Climate Summit Ever', *CNBC News*, 5 Nov. 2021, available at: https://www.cnbc.com/2021/11/05/cop26-sharply-criticized-as-the-most-exclusionary-climate-summit-ever.html; A. Taylor, 'At COP26, Climate Inequality Will Meet Vaccine Inequality', *The Washington Post*, 28 Oct. 2021, available at: https://www.washingtonpost.com/world/2021/10/28/climate-covid-developing-countries.

9 See, e.g., how the pandemic has affected the European Green Deal: S. Eckert, 'Regulatory Power in Times of Crisis and Beyond: Assessing the European Green Deal', 1 Nov. 2021, available at: https://blogs.lse.ac.uk/europpblog/2021/11/01/regulatory-power-in-times-of-crisis-and-beyond-assessing-the-european-green-deal.

10 Stockholm (Sweden), 16 June 1972, UN Doc. A/Conf.48/14/Rev.1 (1973), available at: https://digitallibrary.un.org/record/523249?ln=en.

11 See: https://www.stockholm50.global.

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2. EXTENDING THE HORIZONS OF ENVIRONMENTAL LAW BEYOND THE HUMAN

The first two contributions to this issue speak to environmental law's increasingly visible failure to stop, or even meaningfully mitigate, the climate and biodiversity crises. Specifically, environmental law scholarship has become critical of the anthropocentric focus of the field, which is considered one of the reasons for its inability to address environmental degradation effectively. Through reflection on the rights of nature and non-human animals, the first two articles of this issue both make a case for a rule of law that protects the more-than-human world.

In 'Steps Towards a Legal Ontological Turn: Proposals for Law's Place beyond the Human', Emille Boulot and Joshua Sterlin are interested in how the framing of environmental law justifies human exploitation of nature, seen as an object devoid of meaning.[12] They lament the 'ontological assumption of a single objective, and an objectifiable reality' that underpins the field[13] and which 'continues to reinforce the constructed dichotomy between the sphere of the *anthropos* and that of the natural world'.[14] Boulot and Sterlin engage with the rights of nature discourse that has been widely analyzed in *TEL*.[15] They argue that the growth of the rights of nature discourse has been mischaracterized as mere progress in the field of environmental law, when it, instead, represents something much more profound. They explain that rights of nature can be seen as a 'radical leaking' of Indigenous legal orders into the legal framework of the nation-state.[16]

Extending the scope of environmental law by accounting for alternative worldviews creates significant challenges for legal thinking; the authors argue that the meeting of 'vastly differing legalities'[17] cannot be fully understood through the traditional notion of legal pluralism and has the potential to destabilize modern legal orders.[18] Boulot and Sterlin thus make a passionate call for a 'legal ontological turn' to explore important questions about how to communicate with the more-than-human world.[19] In order

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[12] E. Boulot & J. Sterlin, 'Steps Towards a Legal Ontological Turn: Proposals for Law's Place beyond the Human' (2022) 11(1) *Transnational Environmental Law*, pp. 13–38, at 14.

[13] Ibid., pp. 14 and 16–9.

[14] Ibid., p. 14.

[15] See, e.g., S. Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) *Transnational Environmental Law*, pp. 113–43; M. Tănăsescu, 'Rights of Nature, Legal Personality, and Indigenous Philosophies' (2020) 9(3) *Transnational Environmental Law*, pp. 429–53; E. O'Donnell et al., 'Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature' (2020) 9(3) *Transnational Environmental Law*, pp. 403–27; L. Schimmöller, 'Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador' (2020) 9(3) *Transnational Environmental Law*, pp. 569–92; P. Villavicencio Calzadilla & L. Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7(3) *Transnational Environmental Law*, pp. 397–424; L.J. Kotzé & P. Villavicencio Calzadilla, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) 6(3) *Transnational Environmental Law*, pp. 401–33.

[16] Boulot & Sterlin, n. 12 above, p. 16.

[17] Ibid., p. 13.

[18] Ibid., p. 23.

[19] Ibid., p. 30.

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to extend our understanding of the environment beyond the human, they find a need for 'inspiration from and cross-fertilization with fields more familiar with ontological analysis and questioning'.[20] In particular, they rely on the ontological turn within anthropology and invite legal scholars to 'bring its essential instruction to legal thinking'.[21]

The anthropocentric function of the law is also at the heart of the case comment written by Charlotte Blattner and Raffael Fasel, which reflects on how the protection of the law can be extended to non-humans.[22] In 'The Swiss Primate Case: How Courts Have Paved the Way for the First Direct Democratic Vote on Animal Rights', the authors offer unique insights into a dispute in Switzerland over a citizens' initiative to include a right to life and to bodily and mental integrity for non-human primates in the Basel-Stadt Cantonal Constitution. The case comment reflects on the 2019 decision of the Constitutional Court of Basel-Stadt, which ruled that citizens should be allowed to vote on whether to 'expand the circle of rights holders beyond the anthropological barrier',[23] and the subsequent decision of the Swiss Federal Supreme Court to uphold the validity of the citizens' initiative.[24] Blattner and Fasel explain why including rights for non-human primates in a cantonal constitution could add value to their protection in comparison with the traditional animal welfare protection measures.[25] While acknowledging that the change of law advocated by the initiative might have limited practical implications, they posit that the mere symbolism of the initiative is worthwhile.[26]

These two decisions form part of a recent judicial trend of challenging the absence of basic rights for non-human beings.[27] However, it emerges from the case comment that these decisions are particularly original in three ways. Firstly, the courts addressed, possibly for the first time, the relationship between animal rights and federalism in order to evaluate whether the primate rights initiative would be inconsistent with federal law. The courts responded in the negative, finding that while the Swiss Civil Code precludes animals from having fundamental rights, the initiative sought to reform Swiss public law to alter the relationship between individuals and the state: as a result, cantons were free to extend rights to non-human animals.[28] Secondly, the decision of the Federal Supreme Court departed from existing animal rights scholarship, which concentrates on the overlaps between human and animal rights. Instead, it declared that

[20] Ibid., p. 21.

[21] Ibid., p. 38.

[22] C.E. Blattner & R. Fasel, 'The Swiss Primate Case: How Courts Have Paved the Way for the First Direct Democratic Vote on Animal Rights' (2022) 11(1) *Transnational Environmental Law*, pp. 201–214.

[23] Constitutional Court of Basel-Stadt, 15 Jan. 2019, VG.2018.1, para. 3.7.3 (authors' translation).

[24] Swiss Federal Supreme Court, Judgment, 16 Sept. 2020, 1C_105/2019.

[25] Blattner & Fasel, n. 22 above, pp. 203–5.

[26] Ibid., pp. 210–1.

[27] See, e.g., A. Staker, 'Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-Human Animals' (2017) 6(3) *Transnational Environmental Law*, pp. 485–507; A. Peters, 'Liberté, Égalité, Animalité: Human–Animal Comparisons in Law' (2016) 5(1) *Transnational Environmental Law*, pp. 25–53; S. Jolly & K.S. Roshan Menon, 'Of Ebbs and Flows: Understanding the Legal Consequences of Granting Personhood to Natural Entities in India' (2021) 10(3) *Transnational Environmental Law*, pp. 467–92.

[28] Blattner & Fasel, n. 22 above, pp. 211–2.

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the initiative 'does not aim to extend existing human constitutional rights to animals, but instead seeks to create special fundamental rights for non-human primates'.[29] Thirdly, the case resulted in an important opportunity for citizens to participate in law-making processes as it paved the way for 'the first ever direct democratic vote on whether some non-human animals should be granted basic rights to life and to bodily and mental integrity'.[30]

While the two contributions adopt a different starting point – one grounded in a theoretical exercise, the other in the commentary of a judicial decision – they nevertheless converge in their claims that our legal systems need to be reconceptualized to better account for the non-human in our worlds.

3. PROTECTING THE ENVIRONMENT BEYOND THE BOUNDARIES OF ENVIRONMENTAL LAW

A second set of articles centres on the promises of other legal fields for enhancing environmental protection. In 1972, the Stockholm Declaration recognized the connection between human rights and environmental protection,[31] setting the scene for recognition by the UN Human Rights Council (HRC) in 2021 of a human right to a clean, healthy and sustainable environment.[32] Building upon a rich body of literature on the relationship between human rights law and environmental law,[33] these two contributions offer a hopeful, albeit cautious, message. Both articles aim to identify synergies between two fields which share a common concern for upholding fundamental values that cannot be squarely protected by a state-driven, reciprocity-based international legal system – IEL and international human rights law (IHRL).

In 'Mind the Compliance Gap: How Insights from International Human Rights Mechanisms Can Help to Implement the Convention on Biological Diversity',[34] Niak Sian Koh, Claudia Ituarte-Lima and Thomas Hahn examine issues of compliance and accountability that hinder the effectiveness of multilateral environmental agreements. They address weak compliance with the Aichi Biodiversity Targets by the parties to the Convention on Biological Diversity (CBD).[35] This analysis comes at a crucial time as the international community is set in 2022 to identify new biodiversity targets for the decade to 2030.[36]

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29 Ibid., pp. 211–2.

30 Ibid., p. 214.

31 Stockholm Declaration, n. 10 above, Principle 1.

32 UN HRC Resolution 48/13, 8 Oct. 2021, available at: https://undocs.org/A/HRC/RES/48/13.

33 See, e.g., S. Adelman & B. Lewis, 'Symposium Foreword: Rights-Based Approaches to Climate Change' (2018) 7(1) *Transnational Environmental Law*, pp. 9–15.

34 N.S. Koh, C. Ituarte-Lima & T. Hahn, 'Mind the Compliance Gap: How Insights from International Human Rights Mechanisms Can Help to Implement the Convention on Biological Diversity' (2022) 11(1) *Transnational Environmental Law*, pp. 39–67.

35 Ibid., p. 39.

36 CBD COP-14, Resolution 14/34, 'Comprehensive and Participatory Process for the Preparation of the Post-2020 Global Biodiversity Framework', UN Doc. CBD/COP/DEC/14/34, 30 Nov. 2018, available at: https://www.cbd.int/doc/decisions/cop-14/cop-14-dec-34-en.pdf.

Through the analysis of national reports and multi-stakeholder interviews, the authors identify core obstacles to implementation and enforcement facing the CBD.[37] These include difficulties in monitoring, a lack of institutional capacity, and complications in mainstream biodiversity policies.[38] In order to remedy this situation, the authors look at how lessons from human rights review mechanisms could help to improve compliance with biodiversity targets. They conclude that relying on both managerial and enforcement compliance approaches of human rights mechanisms could help in strengthening accountability within the CBD regime.[39]

The next article, 'Addressing Climate Change through International Human Rights Law: From (Extra)Territoriality to Common Concern of Humankind',[40] looks at the other side of the coin: it is not interested in how IEL can copy techniques from IHRL, but rather what IHRL can learn from IEL to better protect the planet. Vincent Bellinkx, Deborah Casalin, Gamze Erdem Türkelli, Werner Scholtz and Wouter Vandenhole take climate change migrations as a case study of the inability of IHRL adequately to respond to environmental challenges. They emphasize that IHRL's focus on territoriality and causality makes it unable to respond to global, a-territorial challenges that are difficult to link back to specific acts or omissions of individual states. The authors hence warn that the 'human rights-environment project may be doomed from the outset as a result of the jurisdictional tenets of IHRL'.[41]

Bellinkx and his co-authors go on to advocate a radical reconfiguration of IHRL. To do so, they suggest reliance on global international cooperation obligations, inspired by the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights of 2011.[42] Duties of international cooperation, however, remain vague and general, and to implement them 'states must have the political will to accept burden sharing that deviates from the doctrinal tenets of IHRL'.[43] The authors consider that the IEL concept of common concern of humankind can provide guidance on how states can facilitate international cooperation, in particular, because it enables the sharing of global environmental burdens.[44] They hope that such an approach will form the basis of a 'radical reform'[45] that will make the field better able to respond to the harmful effects of climate change.

A third article, entitled 'Fighting Deforestation in Non-International Armed Conflicts: The Relevance of the Rome Statute for Rosewood Trafficking in Senegal', considers the potential of another field of law – international criminal law – to protect

[37] Rio de Janeiro (Brazil), 5 June 1992, in force 29 Dec. 1993, available at: http://www.cbd.int/convention.

[38] Koh, Ituarte-Lima & Hahn, n. 34 above, pp. 55–7.

[39] Ibid., p. 67.

[40] V. Bellinkx, D. Casalin, G. Erdem Türkelli, W. Scholtz & W. Vandenhole, 'Addressing Climate Change through International Human Rights Law: From (Extra)Territoriality to Common Concern of Humankind' (2022) 11(1) *Transnational Environmental Law*, pp. 69–93.

[41] Ibid., p. 92.

[42] Maastricht (The Netherlands), 28 Sept. 2011, available at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23.

[43] Bellinkx et al., n. 40 above, p. 93.

[44] Ibid., p. 70.

[45] Ibid., p. 93.

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natural resources and the environment.[46] Pauline Martini and Maud Sarlième note the shortcomings of international criminal law when attempting to prosecute acts of mass deforestation; like Boulot and Sterlin, they lament the anthropocentric nature of the law, noting that the International Criminal Court's 'Rome Statute is an anthropocentric instrument; it was not designed to protect the environment but to protect humankind'.[47] This explains why the Rome Statute[48] does not provide for the prosecution of environmental crimes, except via Article 8(2)(b)(iv), which sets a high threshold, and establishes conditions that are rarely applicable and are restricted to armed conflicts of an international nature.[49]

To circumvent these difficulties, Martini and Sarlième analyze the applicability of the war crimes of destruction of property and pillage.[50] To do so, they use the case study of the non-international armed conflict in the Casamance region of Senegal, involving illegal logging and trafficking of rosewood timber, a species threatened with extinction and protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[51] Throughout their article, the authors emphasize the complexity of assessing whether and how this situation would qualify as a war crime under the Rome Statute, noting, for instance, the absence of clear data on the role of various actors involved in logging and trafficking,[52] and the difficulty of establishing a causal relationship between resource exploitation and armed conflict.[53]

When thinking about the applicability of the Rome Statute, the authors delve into the notion of 'property', and whether it could encompass ownership of natural resources. Indeed, for acts of deforestation to qualify as war crimes, important questions around ownership of the forests and the relationship between the owners and the armed forces would need to be resolved.[54] If forests on Senegalese territory are the collective property of the people, 'any act of exploitation of natural resources would require the consent of the Senegalese people as a whole', which causes significant legal challenges based on the fact that some individuals consent to the exploitation of forests while others value their sacred nature.[55]

Each contribution in this section critically reflects on the rigidity of international law and how this has a negative impact on its potential contribution to environmental protection. Each also offers suggestions for reform. In this vein, Martini and Sarlième urge

[46] P. Martini & M. Sarlième, 'Fighting Deforestation in Non-International Armed Conflicts: The Relevance of the Rome Statute for Rosewood Trafficking in Senegal' (2022) 11(1) *Transnational Environmental Law*, pp. 95–117.

[47] Ibid., p. 116.

[48] Rome (Italy), 17 July 1995, in force 1 July 2002, available at: https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf.

[49] Martini & Sarlième, n. 46 above, p. 98.

[50] Rome Statute, n. 48 above, Art. 8(2)(e)(v) and (xii).

[51] Geneva (Switzerland), 3 Mar. 1973, in force 1 July 1975, available at: https://www.cites.org/eng/disc/text.php.

[52] Martini & Sarlième, n. 46 above, p. 103.

[53] Ibid., p. 103.

[54] Ibid., p. 104.

[55] Ibid., pp. 107–8.

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scholars to look at the rights of Indigenous peoples to understand how collective property can be managed.[56] In addition, they draw general lessons for the prosecution of environmental crimes, which are particularly relevant in the light of the debates around the recognition of a crime of ecocide, which have gained in momentum in the past year.[57]

4. BRIDGING THE LEGAL AND NON-LEGAL TO STRENGTHEN ENVIRONMENTAL LAW

The final trio of articles extends our scholarly understanding of the interactions between the legal and the non-legal to offer thoughts on how to bridge the divide in order to better govern our environment. Their contribution could not be more timely as the international community reflects on how the Stockholm Declaration,[58] a political declaration adopted 50 years ago, served as the basis for the development of contemporary IEL. At the core of the three articles is an important willingness to make sure that as environmental law relies more heavily on non-traditional tools, its interactions with law's existing tools are positive and contribute to the shared goal of enhanced environmental protection.

In 'The Rule of Climate Policy: How Do Chinese Judges Contribute to Climate Governance without Climate Law?', Mingzhe Zhu concentrates on what she calls the 'lawlessness' of China's climate governance – that is, the absence of legislative instruments with regard to climate change and the preference of the executive branch for adopting action plans on mitigation and adaptation.[59] Climate litigation in China has been the subject of multiple *TEL* articles in the past.[60] Zhu adds to this debate by considering the implications of the absence of legally binding laws for climate litigation. She finds that existing climate policies are not legally binding in civil litigation and do not actually prescribe well-defined rights and duties for private entities; yet, courts do implement them through contractual and statutory interpretation.[61] By doing so, Chinese judges have tended to 'behave more akin to enforcers of state policy

[56] Ibid., p. 108.

[57] See, e.g., Stop Ecocide Foundation, 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text', June 2021, available at: https://www.stopecocide.earth/expert-drafting-panel.

[58] Stockholm Declaration, n. 10 above.

[59] M. Zhu, 'The Rule of Climate Policy: How Do Chinese Judges Contribute to Climate Governance without Climate Law?' (2022) 11(1) *Transnational Environmental Law*, pp. 119–139, at 120.

[60] See, e.g., Q. Gao & S. Whittaker, 'Standing to Sue Beyond Individual Rights: Who Should Be Eligible to Bring Environmental Public Interest Litigation in China?' (2019) 8(2) *Transnational Environmental Law*, pp. 327–47; Y. Zhao, S. Lyu & Z. Wang, 'Prospects for Climate Change Litigation in China' (2019) 8(2) *Transnational Environmental Law*, pp. 349–77; X. He, 'Mitigation and Adaptation through Environmental Impact Assessment Litigation: Rethinking the Prospect of Climate Change Litigation in China' (2021) 10(3) *Transnational Environmental Law*, pp. 413–39, L. Xie & L. Xu, 'Environmental Public Interest Litigation in China: A Critical Examination' (2021) 10(3) *Transnational Environmental Law*, pp. 441–65.

[61] Zhu, n. 59 above, p. 129.

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than as impartial arbitrators of the law'.[62] Zhu argues that the situation has led to a 'rule of climate policy' rather than a strict rule of law.[63]

In order to explain this development, the legal reasoning behind such positioning is analyzed. Zhu concludes that Chinese judges tend to rely on a different type of argument compared with courts in other jurisdictions that rely on human rights and ethics-based justification. Chinese courts turn to 'national or local state policies to determine what is required for the global public good, and thus justify [their] rulings and interpretations'.[64] In doing so, Chinese judges 'guide private entities towards more sustainable business activities and lifestyles'.[65]

The next contribution illustrates the governing power of private initiatives that aim to address deforestation, ecosystem conversion, and human rights violations driven by trade in agricultural commodities.[66] In 'Private Processes and Public Values: Disciplining Trade in Forest and Ecosystem Risk Commodities via Non-Financial Due Diligence', Enrico Partiti shows that private initiatives form a transnational legal order that, despite contributing to the governance of deforestation, suffers from important shortcomings and coordination challenges as a result of its multi-level, multi-actor nature.[67] Overlaps, lack of comprehensiveness, and 'tokenistic'[68] corporate commitments limit the effectiveness of the transnational legal order. As a result, Partiti argues, public intervention 'remains indispensable'[69] because it alone is able to remedy these weaknesses and offers 'institutional complementarity'.[70]

Partiti maintains that human rights due diligence, in line with the UN Guiding Principles on Business and Human Rights,[71] offers an opportunity to govern private regulation. According to the author, it 'allocates responsibilities for harm caused by or directly linked to firms'[72] as well as 'provides the boundaries of expected corporate conduct while offering accountability, participation, and remediation mechanisms'.[73] Partiti therefore advocates combining private management systems with public enforcement measures to enhance the effectiveness and accountability of the transnational legal order.[74]

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62 Ibid., p. 128.
63 Ibid., p. 119.
64 Ibid., p. 136.
65 Ibid., p. 137.
66 E. Partiti, 'Private Processes and Public Values: Disciplining Trade in Forest and Ecosystem Risk Commodities via Non-Financial Due Diligence' (2022) 11(1) *Transnational Environmental Law*, pp. 141–172, at 142–3.
67 Ibid., p. 145.
68 Ibid., p. 152.
69 Ibid., p. 151.
70 Ibid., p. 147.
71 UN HRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework', 21 Mar. 2011, UN Doc. A/HRC/17/31, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.
72 Partiti, n. 66 above, p. 172.
73 Ibid., p. 172.
74 Ibid., p. 172.

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The final article in this issue also looks at the lack of binding effect in the context of climate litigation. In 'From Bushfires to Misfires: Climate-related Financial Risk after *McVeigh* v. *Retail Employees Superannuation Trust*', Esmeralda Colombo reflects on the fiduciary duties (including disclosure and due diligence) of retail pension funds.[75] Her analysis of the Australian case *McVeigh*,[76] the first brought by a beneficiary against a public pension fund, provides a unique opportunity to assess the positive implications, not of a court pronouncement, but of an out-of-court settlement.[77] The absence of legal binding effect is at the heart of Colombo's piece. Firstly, the commitments of the Retail Employees Superannuation Trust (REST) to comply with both disclosure and due diligence climate-related duties[78] rest on the voluntary recommendations of the Task Force on Climate-related Financial Disclosures (TCFD).[79] She evaluates the complex role played by this non-binding instrument, noting that it seems to be 'defining the discourse on climate-related financial risk',[80] but remains, nevertheless, insufficient to force the financial sector to manage climate risks effectively.[81] Secondly, Colombo also looks at the implications of the voluntary settlement beyond REST, arguing that the settlement 'raise[s] the bar for pension fund climate-risk practices',[82] and will carry repercussions for the entire superannuation industry in Australia.[83]

The article shares commonalities with the two other contributions in this set. Like Partiti, Colombo finds a role for public authority (in this case, the courts) to fortify the TCFD Recommendations. She argues that the discourse on climate risk can cover binding standards and could provide courts with 'opportunities to clarify and standardize climate-related duties for pension funds',[84] and notes that '*McVeigh* suggests that courts, as well as out-of-court settlements, may articulate a duty, rather than grant permission, for pension funds to consider climate-related financial risk in their investment decisions'.[85] Like Zhu, Colombo is interested in thinking about how non-legally binding instruments should be used. She considers that it is not possible to rely on the TCFD Recommendations merely as a disclosure instrument because 'the business case for pension funds to align their investment portfolios with climate risk assessments is

[75] E. Colombo, 'From Bushfires to Misfires: Climate-related Financial Risk after *McVeigh* v. *Retail Employees Superannuation Trust*' (2022) 11(1) *Transnational Environmental Law*, pp. 173–199.

[76] *Mark McVeigh* v. *Retail Employees Superannuation Pty Ltd*, Federal Court of Australia, NSD1333/2018, Amended Complaint, 21 Sept. 2018.

[77] Colombo, n. 75 above, p. 184.

[78] Ibid., p. 182.

[79] TCFD, 'Recommendations of the Task Force on Climate-related Financial Disclosures: Final Report', June 2017, p. ii, available at: https://www.fsb-tcfd.org/publications.

[80] Colombo, n. 75 above, p. 188.

[81] Ibid., pp. 188–9.

[82] Ibid., p. 175.

[83] Ibid., p. 182.

[84] Ibid., p. 177.

[85] Ibid., p. 173.

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insufficient'.[86] Rather, she shows that the Recommendations need to become a 'normative expectation' used as a benchmark for the interpretation of due diligence.[87]

The articles by Zhu, Partiti, and Colombo reveal that an important question for transnational environmental scholars is how to integrate traditional means of lawmaking with complementary solutions with a view to better protecting the environment. They are keen to ensure that legislation and court decisions remain legitimate while, at the same time, flexible enough to accommodate newer actors and forms of governance.

5. CONCLUSION

Fifty years since the emergence of contemporary IEL, legal protection of the environment has significantly improved. The contributions in this issue are a tribute to how research can contribute to better conceptualizing our relationship with the environment and to clarifying the functions and nature of law in this endeavour. They are also a powerful reminder that transnational environmental scholars are increasingly concerned about the inadequacy of the rule of law to respond to environmental degradation. This explains why each contributor in this issue laments the constrained analytical lenses that reduce our ability to protect the environment and call upon our readers to extend their horizons. In the coming year, the pandemic may keep us local, if not home-bound, but this issue shows that this should not restrict our imagination and that, by crossing conceptual borders of all sorts, we might be better able to respond to the complexity of the task ahead.

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[86] Ibid., p. 192.
[87] Ibid., p. 193.

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