

EDITORIAL

‘This Battle is Hard and Huge’: Intractable Problems in Transnational Environmental Law

1. INTRODUCTION

Environmental challenges – notably climate change – are often characterized as ‘wicked’ problems:¹ societal in scope, such problems encompass countless stakeholders, defying consensus as to solution and even definition.² Wicked problems present as intractable and irreducible. Remedial action along one dimension may ramify in multiple sets of consequences downstream – some helpful, some unhelpful, some disastrous – with no clear way in science or in politics to predict *ex ante* which will dominate, or if a given characterization can even secure accord among the relevant stakeholders.³ In such cases the ‘battle’ is, in poet Amanda Gorman’s memorable words to the United Nations, ‘hard and huge’.⁴

It might seem like certain environmental challenges are no longer quite so ‘wicked’. In our previous editorial we noted several encouraging diplomatic and legislative developments in the field of environmental law:⁵ for example, the United Nations (UN) General Assembly’s recognition of the human right to a clean, healthy, and sustainable environment,⁶ and the US\$1.2 trillion Infrastructure Act enacted into law by the Congress of the United States (US).⁷ To this list we can now add two more such developments. At the 27th Conference of the Parties (COP-27) to the UN Framework Convention on Climate Change (UNFCCC)⁸ in Sharm el-Sheikh (Egypt), a historic

¹ F.P. Incropera, *Climate Change: A Wicked Problem. Complexity and Uncertainty at the Intersection of Science, Economics, Politics, and Human Behavior* (Cambridge University Press, 2016). Others go one step further, labelling climate change a ‘super-wicked’ problem; see, e.g., R. Lazarus, ‘Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future’ (2009) 94 *Cornell Law Review*, pp. 1153–234.

² H.W. Rittel & M.M. Webber, ‘Dilemmas in a General Theory of Planning’ (1973) 4(2) *Policy Sciences*, pp. 155–69.

³ B.W. Head, ‘Wicked Problems in Public Policy’ (2008) 3(2) *Public Policy*, pp. 101–18, at 103–5.

⁴ A. Gorman, ‘An Ode We Owe’, poem delivered at the opening session of the 77th UN General Assembly, 19 Sept. 2022, available at: <https://media.un.org/en/asset/k13/k13ke28y6c>.

⁵ T.F.M. Etty & J. van Zeben, et al., ‘The Possibility of Radical Change in Transnational Environmental Law’ (2022) 11(3) *Transnational Environmental Law*, pp. 447–61.

⁶ UN General Assembly, ‘The Human Right to a Clean, Healthy and Sustainable Environment’, 28 July 2022, UN Doc. A/RES/76/300, available at: <https://digitallibrary.un.org/record/3983329?ln=en>.

⁷ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

⁸ New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

agreement was reached to provide ‘loss and damage’ payments for vulnerable countries impacted by climate disasters.⁹ Just one month later, the 15th Conference of the Parties (COP-15) to the UN Convention on Biological Diversity (CBD)¹⁰ reached agreement on the so-called ‘30 by 30’ plan to protect 30% of the planet’s land by 2030 in order to stem biodiversity loss.¹¹ Six months, four long-awaited blockbusters.

Despite the sense of optimism that these events may inspire, the intractability of addressing environmental degradation remains. The first set of articles in this issue highlights this intractability in the context of oil spills, stubborn greenhouse gas (GHG) emissions in certain sectors, and the collective action conundrums that thwart regional and global cooperation. The second group of articles in this issue undertakes critical re-examination of important doctrines in environmental law, as ever a key tool in addressing environmental degradation.

2. INTRACTABLE PROBLEMS

It is undeniable that decarbonization is more straightforward in some domains than others, in terms of both technology and political will. Improvements in energy efficiency, for example, have long been considered the ‘low-hanging fruit’ of the mitigation challenge; all else being equal, trimming energy use both saves money and reduces emissions. Even energy-intensive operations can be decarbonized with relative ease when renewable fuel solutions are at hand, but certain economic sectors will be decarbonized only with great difficulty. Aviation and agriculture rank highly on that list, and the first two articles in the current issue examine developments in these sectors.

In their article, ‘Climate Change Mitigation in the Aviation Sector: A Critical Overview of National and International Initiatives’, Benoit Mayer and Zhuoqi Ding take up the issue of civil aviation GHG emissions, a sector long considered one of the most intractable in respect of GHG emissions reduction.¹² The challenge is clear: large aircraft simply will not achieve significant decarbonization in the short term. No battery even approaches the fuel density required for mass air travel.¹³ It is a technological obstacle of the first order; yet the relevant social and behavioural dynamics are no less confounding. Long considered a mark of affluence, travel by aeroplane was democratized by budget airlines, which have grown unabatedly in recent decades as wider swathes of civil society make use of commercial air carriers. Even among proponents of strict environmental regulation, air travel is a ‘guilty pleasure’ that many find very difficult to do without.

⁹ UNFCCC COP-27, Decision /CP.27 /CMA.4, ‘Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, including a Focus on Addressing Loss and Damage’, 20 Nov. 2022, available at: https://unfccc.int/sites/default/files/resource/cma4_auv_8f.pdf.

¹⁰ Rio de Janeiro (Brazil), 5 June 1992, in force 29 Dec. 1993, available at: <http://www.cbd.int/convention>.

¹¹ CBD COP, Decision CBD/COP/15/L.25, ‘Kunming-Montreal Global Biodiversity Framework’, 18 Dec. 2022, available at: <https://www.cbd.int/doc/c/e6d3/cd1d/daf663719a03902a9b116c34/cop-15-l-25-en.pdf>.

¹² B. Mayer & Z. Ding, ‘Climate Change Mitigation in the Aviation Sector: A Critical Overview of National and International Initiatives’ (2023) 12(1) *Transnational Environmental Law*, pp. 14–41.

¹³ National Academies of Sciences, Engineering and Medicine et al., *Commercial Aircraft Propulsion and Energy Systems Research: Reducing Global Carbon Emissions* (National Academies Press, 2016).

Cognizant of these headwinds, Mayer and Ding analyze regulatory efforts to limit GHG emissions from civil aviation. Their objective is to assess the relationship between national and international efforts, noting that decarbonization is ‘unlikely without a combination’ of initiatives at both regulatory levels.¹⁴ Happily, the authors find the two regulatory streams to be ‘generally compatible from a legal perspective and complementary from a policy perspective’.¹⁵ However, the ready fit masks a yawning difficulty: the International Civil Aviation Organization (ICAO) – the UN specialized body formed by the Chicago Convention on International Civil Aviation¹⁶ – has largely failed to pursue serious mitigation in the aviation sector. Instead, its principal goal has been the *growth* of international civil aviation; the authors characterize its climate change mitigation strategy as ‘dilatatory’.¹⁷ Although the ICAO has articulated several aspirational goals, including global fuel-efficiency improvements, those goals impose no particular obligations on individual states. The only explicit policy requirement for ICAO members stems from their adoption of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), a mechanism that seeks to freeze global net aviation carbon dioxide (CO₂) emissions at 2020 levels by way of a market-based mechanism.¹⁸ The programme is voluntary until 2026; it applies only to international flights between participating states; and requires no limits on civil aviation, relying instead on offsetting with its well-known endemic faults.¹⁹ The authors conclude that even CORSIA ‘is not intended to (and will not) lead to a deep decarbonization of the aviation sector’.²⁰

The domestic regulatory stream, while not wholly captured by industry boosterism, is only slightly more promising. Mayer and Ding’s main conclusion is that no state ‘has outlined a realistic plan for the decarbonization of aviation’, but instead states are gesturing at ‘unproven technological fixes’.²¹ Domestic efforts have thus focused on small-bore tools, such as technical standards for fuel content and efficiency, and a small suite of tax policies, such as ticket taxes and the phase-out of tax benefits for airlines and their associated infrastructure.²² Nonetheless, given international dynamics, states may be best positioned to address the climate impacts of commercial aviation, if not to ‘limit or reduce societies’ reliance on aviation’ altogether.²³ Indeed, the authors conclude that ‘it is in the national stream that lies the best hopes for the implementation of effective mitigation action’.²⁴

¹⁴ Mayer & Ding, n. 12 above, p. 34.

¹⁵ *Ibid.*

¹⁶ Chicago, IL (US), 7 Dec. 1944, in force 4 Apr. 1947, as amended, available at: <https://www.icao.int/publications/pages/doc7300.aspx>.

¹⁷ Mayer & Ding, n. 12 above, p. 39.

¹⁸ ICAO Assembly Resolution A39-3 (2016), paras 5, 6; ICAO, *Annex 16 to the Convention on International Civil Aviation: Environmental Protection*, Vol. IV (2018).

¹⁹ See Mayer & Ding, n. 12 above, p. 25, nn. 99–102 and accompanying text.

²⁰ *Ibid.*, p. 25.

²¹ *Ibid.*, p. 27.

²² *Ibid.*, pp. 26–34.

²³ *Ibid.*, p. 40.

²⁴ *Ibid.*, p. 41.

From the rarefied air of aviation, we descend to the earthy soil of agriculture. The two sectors have in common the stubbornness and scale of their GHG emissions, but if air travel is an affluent indulgence, surely agriculture is its political and practical opposite: we can surely excuse this sector's emissions because we must, after all, *eat*? Alexander Zahar's provocative article, 'Agricultural Exceptionalism in the Climate Change Treaties', draws our attention to this intuition and its consequences for GHG emissions regulation or, rather, the historical lack thereof.²⁵ 'Agricultural exceptionalism', the political favour frequently extended to agriculture on account of, inter alia, its undeniable importance for human well-being, is well documented in domestic politics. Farmers and others in the chain of food supply wield substantial political influence and often enjoy generous subsidization, while being shielded from regulatory stringency.²⁶ But Zahar goes one step further, arguing that this shield extends, without adequate justification, to the international treaties that address climate change.

The Paris Agreement, for example, qualifies its central mitigation imperative by requiring its accomplishment 'in a manner that does not threaten food production'.²⁷ So also the UNFCCC insists that food production should not be 'threatened'.²⁸ In a careful textual analysis, Zahar notes that these phrases collapse the language of mitigation and adaptation such that one could conclude that 'protection from the adverse impacts of climate change should be the priority for agriculture'.²⁹ Indeed, Zahar calls out a number of states – Argentina, Brazil, New Zealand – for making precisely this argument, while excusing themselves from mitigating agricultural emissions.³⁰ 'Agriculture's actual vulnerability – in certain circumstances, in certain countries – can be exploited to sow confusion' about the fairness of mitigation duties in agriculture-dependent economies.³¹

To be sure, climate change alters regional growing patterns, often in negative ways, and protecting agricultural capacity is an important warrant for climate action. However, fears over declining food production have been overblown, Zahar argues, and ought not sidetrack us from demanding that the agricultural sector does its part.³² Moreover, to return to treaty text, a closer look reveals that 'adaptation is not the sole concern' of the Paris Agreement.³³ Far from it: agricultural emissions are

²⁵ A. Zahar, 'Agricultural Exceptionalism in the Climate Change Treaties' (2023) 12(1) *Transnational Environmental Law*, pp. 42–70.

²⁶ See, e.g., J.B. Ruhl, 'Farms, Their Environmental Harms, and Environmental Laws' (2000) 27 *Ecology Law Quarterly*, pp. 263–349; J.M. Hansen, *Gaining Access: Congress and the Farm Lobby, 1919–1981* (University of Chicago Press, 1991).

²⁷ Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, Art. 2(b), available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf; Annex to Conference of the Parties to the United Nations Framework Convention on Climate Change, 'Decision 1/CP.21, Adoption of the Paris Agreement', 29 Jan. 2016, UN Doc. FCCC/CP/2015/10/Add.1.

²⁸ N. 8 above, Art. 2.

²⁹ Zahar, n. 25 above, p. 51 (emphasis in original).

³⁰ *Ibid.*, pp. 58–64.

³¹ *Ibid.*, p. 67.

³² See *ibid.*, p. 44, n. 7 (citing A. Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Clarendon, 1981), pp. 7, 57, 158).

³³ Zahar, *ibid.*, p. 54.

increasing at a faster rate than non-agricultural emissions, and the overarching, economy-wide mitigation obligations of the Agreement clearly require states to report and address agricultural emissions. But the lure of the ‘potential loophole’ described above is strong: ‘[o]nce noticed, its influence could be enough to weaken a country’s resolve to mitigate its emissions from [the agricultural] sector’.³⁴ Furthermore, the resistance to mitigation extends to states’ willingness even to *report* agricultural emissions: ‘the considerable influence of agricultural protectionism’ has ‘left us with no well-informed projection of agricultural GHG emissions ... to rely on’, precisely because the sector ‘has so far successfully resisted the brunt of GHG mitigation policy’.³⁵

Ultimately, Zahar calls for the widespread adoption of proven agricultural mitigation technologies, in addition to robust state reporting. These technologies have, thus far, ‘hardly been explored’, partly as a result of legal arguments grounded in agricultural exceptionalism.³⁶ In Zahar’s words, agriculture may lend itself to a ‘sentimental portrayal’, but at the end of the day ‘raising beef cattle ... is no more innocent than digging up coal’.³⁷

We turn now from GHG emissions mitigation to Andreas Kotsakis and Avi Boukli’s study of oil disasters, entitled ‘Transversal Harm, Regulation, and the Tolerance of Oil Disasters’.³⁸ These accidents are ‘strangely tolerated, portrayed almost like unavoidable natural disasters that one simply has to live with’.³⁹ By highlighting the apparent inevitability of oil spills, the authors echo others perplexed at humanity’s willingness to abide avoidable horrors.⁴⁰ However, unlike many of those authors, Kotsakis and Boukli are not principally motivated to propose ways to diminish the harms associated with a particular activity. Instead, their goal is to stimulate new ways of conceiving of and characterizing those harms and, in so doing, to capture entire realms of harm often left unacknowledged by conventional environmental law.

To do this, Kotsakis and Boukli draw considerably on the work of social theorist Felix Guattari, whose concepts of ‘the three ecologies’ and ‘transversality’ provide the philosophical backdrop for the present article.⁴¹ Guattari rejected the partitioning of environmental crises from their human and social connections, which he understood to be ‘multiple’ and ‘indeterminate’.⁴² Capitalism and its material urgencies – of which resource extractivism is the central case for Kotsakis and Boukli – so pervasively establish ‘mentalities, models, and diagrams of conduct’ that subjective experience cannot help but reflect the deterioration that characterizes the extractivist ecology.⁴³

³⁴ Ibid., pp. 56–57.

³⁵ Ibid., pp. 63–64.

³⁶ Ibid., p. 69.

³⁷ Ibid., p. 45.

³⁸ A. Kotsakis & A. Boukli, ‘Transversal Harm, Regulation, and the Tolerance of Oil Disasters’ (2023) 12(1) *Transnational Environmental Law*, pp. 71–94.

³⁹ Ibid., p. 72.

⁴⁰ See, e.g., ‘Do We Tolerate Too Many Traffic Deaths?’, *The New York Times*, 27 May 2010, available at: <https://archive.nytimes.com/roomfordebate.blogs.nytimes.com/2010/05/27/do-we-tolerate-too-many-traffic-deaths>.

⁴¹ See, e.g., F. Guattari, *The Three Ecologies* (Continuum, 1989/2008).

⁴² Kotsakis & Boukli, n. 38 above, p. 91.

⁴³ Ibid., p. 90.

Environmental impacts are thus ‘transversal’ in that they are ‘cross-cutting at the intersection of multiple registers of harmful effects’.⁴⁴

Armed with this conceptual apparatus, the authors dissect the archetypal oil spill of the 21st century: the Deepwater Horizon incident of 2010. Although the magnitude of that disaster defies description, the law succeeded in holding BP accountable. Unlike prior oil spills in the US, civil and criminal processes produced headline-gathering recoveries – an ‘impressive feat of enforcement’.⁴⁵ But that was that; no further law reform occurred. Indeed, there was almost no call for legal change. The system worked, it was supposed, and US law was still regarded as standard setting, despite having allowed a tragedy of epic proportions. Perversely, Deepwater Horizon had the ‘peculiar side effect of both precluding further significant legal reform and enhancing oil disaster tolerance by the US from a broader cultural and social perspective’.⁴⁶ Kotsakis and Boukli find this absurd, perhaps even ‘apt in such a decaying society’.⁴⁷ Only when we grasp the transversality of environmental disaster, they contend, can we see that Deepwater Horizon was not the ‘product of defective or rogue agency of a corporate actor’ but instead of a ‘defective structure’, one caused by a reliance on oil corporations, the effects of which extend ‘into the intangible, unconscious assets of every individual member of society’.⁴⁸

The next article, ‘Towards a Methodology for Specifying States’ Mitigation Obligations in Line with the Equity Principle and Best Available Science’ by Violetta Ritz, turns towards the intractable dynamics of collective action.⁴⁹ One of the most vexing aspects of climate change concerns the allocation of mitigation duties among states. Some leading emitters, notably the US, have expressed reluctance to invest deeply in mitigation efforts without assurances of equal sacrifice from other actors, such as China. The looming question at the heart of Ritz’s analysis is how should the duty to mitigate GHG emissions be allocated among states in the international system? Specifically, Ritz puzzles over ‘what exact level of [GHG] emissions reduction is an individual state required to achieve for it to satisfy its legal obligations?’⁵⁰ Such a determination matters not only in the abstract; it may have immediate and concrete ramifications when states are hauled into court for their alleged failure to satisfy these obligations.⁵¹

⁴⁴ Ibid., p. 88.

⁴⁵ Ibid., p. 80.

⁴⁶ Ibid.

⁴⁷ Ibid., p. 89.

⁴⁸ Ibid., p. 93.

⁴⁹ V. Ritz, ‘Towards a Methodology for Specifying States’ Mitigation Obligations in Line with the Equity Principle and Best Available Science’ (2023) 12(1) *Transnational Environmental Law*, pp. 95–120.

⁵⁰ Ibid., p. 96.

⁵¹ See, e.g., Supreme Court of the Netherlands, *The State of the Netherlands v. Urgenda Foundation*, Judgment, 20 Dec. 2019, ECLI:NL:HR:2018:2007. See also J. van Zeven, ‘Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?’ (2015) 4(2) *Transnational Environmental Law*, pp. 339–57; and B. Mayer, ‘*The State of the Netherlands v. Urgenda Foundation*: Ruling of the Court of Appeal of The Hague (9 October 2018)’ (2019) 8(1) *Transnational Environmental Law*, pp. 167–92.

The question has been answered by international law only in the most general terms. The Paris Agreement provides that a state's climate efforts reflect its 'highest possible ambition' while also taking into account its 'common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.⁵² It is difficult enough to establish global consensus on an overall carbon budget capable of delivering on the Agreement's goal of limiting global average temperature increases to 'well below 2°C above pre-industrial levels'.⁵³ To derive individual state obligations, in line with the principle of equity⁵⁴ and with the 'best available science',⁵⁵ will severely compound the degree of difficulty.

Ritz's contribution digs deeply into the data and calculation used to generate 'meta-equity assessments', in which analysts aggregate the results of individual studies to compute state-level mitigation targets. The platform for such analyses is the Climate Action Tracker,⁵⁶ which purports to compute a 'fair share range' for each country. Ritz demonstrates, however, that the Tracker's methodology is unlikely to withstand scrutiny. One concern, for example, is that 'extreme values' among the underlying data 'are the only ones that matter' in the Tracker's algorithm; values between the extremes are 'disregarded';⁵⁷ equally problematic is that the underlying individual studies cannot be updated as states forge new plans and implement existing ones.⁵⁸ Ultimately, Ritz concludes that a different tool – the Potsdam Real-time Integrated Model for the Probabilistic Assessment of Emission Paths (PRIMAP) – though not publicly accessible, is the 'best available',⁵⁹ but her article will doubtless serve as a critical point of reference for future meta-equity assessments.

3. CRITICAL RE-EXAMINATIONS OF DOCTRINES OF ENVIRONMENTAL LAW

The remaining articles in this issue undertake valuable re-examinations of doctrines central to environmental law and its ability to address intractable environmental problems.

We begin with Daniel Bertram's effort to trace the 'turbulent story' of the principle of intergenerational equity.⁶⁰ The principle has long had appeal among environmental scholars; indeed, many today regard it as normative bedrock. At the same time, its profoundly aspirational quality, and the bewildering difficulties that attend its application, have left it 'void of tangible implications'.⁶¹ Bertram attempts to sidestep philosophical

⁵² Paris Agreement, n. 27 above, Art. 4(3).

⁵³ *Ibid.*, Art. 2(1)(a).

⁵⁴ UNFCCC, n. 8 above, Art. 3(1).

⁵⁵ Paris Agreement, n. 27 above, Arts 4(1) and 14(1).

⁵⁶ Climate Action Tracker, available at: <https://climateactiontracker.org>.

⁵⁷ Ritz, n. 49 above, p. 108.

⁵⁸ *Ibid.*, p. 112.

⁵⁹ *Ibid.*, p. 117.

⁶⁰ D. Bertram, "“For You Will (Still) Be Here Tomorrow”: The Many Lives of Intergenerational Equity" (2023) 12(1) *Transnational Environmental Law*, pp. 121–49, at 123.

⁶¹ *Ibid.*

quandaries by employing an ‘inductive and practical’ approach rather than a purely normative one, using comparative international analysis to shed light on the principle’s possible futures.

In “‘For You Will (Still) Be Here Tomorrow’: The Many Lives of Intergenerational Equity’, Bertram provides an origin story and early history of intergenerational equity. Yet, the heart of his study is a set of ten ‘tales of intergenerationality’⁶² – ten recent cases that reveal patterns of contemporary judicial practice around the world. Most of these cases involve domestic climate litigation and reveal judges attending to thorny but familiar questions about representation (who can litigate on behalf of future generations?) and institutional adequacy (what climate remedies may courts legitimately provide?).

Increasingly, however, courts are navigating beyond weighty preliminaries and reaching central questions about the essential substance of intergenerational rights, whether framed as environmental rights, cultural rights, or children’s rights. As judges explore this terrain, Bertram argues, they will be forced to elaborate who, exactly, are the beneficiaries of intergenerational equity – a question that involves not simply balancing one generation against the next, but also recognizing that any given nation-state, in which a particular climate suit is embedded, is itself ‘a relatively unreliable reference point’ when a distant time horizon is chosen.⁶³ Moreover, there is no reason to imagine that intergenerationality, as a principle, will or should be limited to environmental concerns. Unmoored from its origins in the environmental space, the principle may well require significant adaptation. As Bertram puts it, ‘international law must find new ways to walk its talk in relation to the future’.⁶⁴

In their article, ‘The Latent Potential of Cumulative Effects Concepts in National and International Environmental Impact Assessment Regimes’, Rebecca Nelson and L.M. Shirley conduct an illuminating examination of environmental impact assessment (EIA) regimes, focusing on the concept of cumulative effects.⁶⁵ In its various forms around the world, EIA has proven to be an invaluable tool for decision makers, litigants, and activists, but its usefulness in the future may depend on its ability to address sprawling, slow-moving, and accretive problems like climate change – problems very much unlike the discrete, project-based harms for which EIA was originally designed. Whether EIA can make this leap is the question taken up by Nelson and Shirley.

Cumulative effects analysis, whether mandated by national law or multilateral agreement, spotlights the ‘relatively small, potentially unregulated effects that regular EIA may otherwise disregard’, thereby exposing ‘the true extent of a project’s potential harm’.⁶⁶ Although most national EIA laws include a cumulative effects provision,

⁶² *Ibid.*, p. 131.

⁶³ *Ibid.*, p. 147.

⁶⁴ *Ibid.*, p. 149.

⁶⁵ R. Nelson & L.M. Shirley, ‘The Latent Potential of Cumulative Effects Concepts in National and International Environmental Impact Assessment Regimes’ (2023) 12(1) *Transnational Environmental Law*, pp. 150–74.

⁶⁶ *Ibid.*, p. 152.

‘existing definitions vary, as can their interpretation, even within a single jurisdiction’.⁶⁷ Some jurisdictions employ cumulative effects to perform screening or scoping functions, helping decision makers in determining the appropriate type of environmental assessment (or whether to conduct an assessment at all). Others have a more substantive focus, requiring direct analysis of the cumulative effects of specified projects. In multilateral contexts, cumulative effects provisions are ‘far less detailed and varied’ than in national EIA laws,⁶⁸ emphasizing substantive analysis rather than screening and scoping. Nonetheless, Nelson and Shirley posit that national and international EIA laws are ‘mutually influential’, thanks to their common conceptual apparatus and to the ‘cooperative exchange of best practices’.⁶⁹ The authors conclude by noting a handful of promising avenues for further research into this important corner of EIA law and practice.

One of the multilateral agreements highlighted by Nelson and Shirley is the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement).⁷⁰ This Agreement, ratified by 13 countries and in force from 22 April 2021, is also the focus of the next article in this issue, by Uzuazo Etemire.⁷¹ Etemire’s interest is the Escazú Agreement’s inclusion of a public right to participate in environmental decision making, a right which has long been regarded as a precursor for the achievement of sustainable development objectives. Specifically, Etemire’s article, ‘Public Voices and Environmental Decisions: The Escazú Agreement in Comparative Perspective’, compares the Escazú Agreement with similar provisions in the benchmark Aarhus Convention⁷² and the Bali Guidelines.⁷³

A number of states in Latin America and the Caribbean have made substantial progress in environmental decision making in recent years but, Etemire cautions, ‘the public remains largely excluded’.⁷⁴ This is partly as a result of inadequate implementation of (or non-compliance with) participation laws, but also to deficiencies in those laws as written, which ‘tend to be brief’ and ‘lack substantive quality’.⁷⁵ It is these deficiencies which some hope the Escazú Agreement will repair but, measured against the Aarhus

⁶⁷ Ibid., p. 162.

⁶⁸ Ibid., p. 171.

⁶⁹ Ibid., pp. 171–72.

⁷⁰ Escazú (Costa Rica), 4 Mar. 2018, in force 22 Apr. 2021, available at: <https://www.cepal.org/en/escazuagreement>.

⁷¹ U. Etemire, ‘Public Voices and Environmental Decisions: The Escazú Agreement in Comparative Perspective’ (2023) 12(1) *Transnational Environmental Law*, pp. 175–99.

⁷² UN Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention), Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: <https://unece.org/environment-policy/public-participation/aarhus-convention/text>.

⁷³ UN Environment Programme, ‘Guidelines for the Development of National Legislation on Information, Public Participation and Access to Justice in Environmental Matters’, UN Doc. UNEP/GCSS.XI/11, Decision SS.XI/5, Part A, 26 Feb. 2010, available at: <https://www.unep.org/resources/publication/guidelines-development-national-legislation-access-information-public>.

⁷⁴ Etemire, n. 71 above, p. 182.

⁷⁵ Ibid., pp. 183–84.

Convention and Bali Guidelines, the Agreement falls short in certain respects. Its definition of ‘the public’ is limited to nationals and residents of the relevant state,⁷⁶ and its stipulation regarding the timing of public involvement means that such involvement will ‘not necessarily’ occur ‘before some decisions and agreements have been reached’, which preclude more environmentally protective outcomes.⁷⁷

Nonetheless, in other respects Etemire judges that the Escazú Agreement surpasses the Aarhus Convention and the Bali Guidelines in its sensitivity to local conditions and its allowance for participation from a broader range of non-governmental organizations. Only as patterns of practice emerge under the Escazú Agreement will analysts be able to provide a more thorough judgment regarding its efficacy, but Etemire expresses hope that certain among its provisions ‘can now arguably be added to the body of good practice’ regarding the rights of public participation.⁷⁸

In the final article in this issue, ‘The Glyphosate Saga Continues: “Dissenting” Member States and the European Way Forward’, Giulia Claudia Leonelli⁷⁹ scrutinizes the European Union’s (EU) treatment of glyphosate, a controversial pesticidal substance. In December 2022, the European Commission approved a one-year extension of the chemical’s previous five-year authorization, after the European Food Safety Authority (EFSA) declared that its risk-assessment process would not be completed until at least July 2023.⁸⁰ However, every decision regarding glyphosate thus far has been taken only after extended disagreement among EU Member States, and the path forward is anything but clear: as Leonelli explains, ‘[s]cience can neither confirm nor categorically exclude’ the carcinogenicity of the pesticide.⁸¹

At issue is the ability of Member States to adopt a different national risk threshold from that chosen by EU lawmakers. EU law allows Member States to withhold domestic authorization of specific pesticides notwithstanding their approval by the EU, but ‘structural-regulatory as well as practical constraints come into play’.⁸² For example, Member States are generally obligated to recognize pesticidal authorizations granted by other Member States. Leonelli argues that a challenge by the Brussels-Capital Region (Belgium) to the EU’s authorization of glyphosate, though ultimately ruled inadmissible, would likely have failed on the merits, partly as a result of the ‘absence of conclusive scientific proof of carcinogenicity’.⁸³ Similarly, an Austrian attempt to impose a national ban on the class of all glyphosate-based pesticides ‘was bound to be both incompatible with EU law and unsuccessful’,⁸⁴ and a related effort by

⁷⁶ *Ibid.*, p. 187.

⁷⁷ *Ibid.*, p. 194.

⁷⁸ *Ibid.*, p. 199.

⁷⁹ G.C. Leonelli, ‘The Glyphosate Saga Continues: “Dissenting” Member States and the European Way Forward’ (2023) 12(1) *Transnational Environmental Law*, pp. 200–24.

⁸⁰ Commission Implementing Regulation (EU) 2022/2364 amending Implementing Regulation (EU) No 540/2011 as regards the Extension of the Approval Period of the Active Substance Glyphosate, C/2022/8556 [2022] OJ L 312/99.

⁸¹ Leonelli, n. 79 above, p. 202.

⁸² *Ibid.*, p. 205.

⁸³ *Ibid.*, p. 214.

⁸⁴ *Ibid.*, p. 218.

Luxembourg, though presently intact, may suffer the same fate. In Leonelli's rendering, only France's case-by-case evaluation of glyphosate-based products is consistent with EU law and avoids the blanket overrides that would have been, in effect, the consequence of the prior challenges.⁸⁵

4. CONCLUSION

For preserving the earth isn't a battle too large
to win, but a blessing too large to lose.

This is the most pressing truth:

That Our people have only one planet to call home
and our planet has only one people to call its own.⁸⁶

Environmental battles are indeed 'hard and huge', but they are worth undertaking nonetheless. The stakes are high; the will to persevere must be higher still.

5. TEL BEST ARTICLE PRIZE 2022

The exciting moment has come to announce the winners of the inaugural *TEL* Best Article Prize. As announced a year ago, starting with volume 11 (2022), this prize will be awarded annually to the most innovative and thought-provoking contribution published in *TEL* that year, along with two honourable mentions. The selection of winning papers is made by an annually rotating panel of *TEL* Advisory Board members, based on a selection of contributions from each issue nominated by the *TEL* Editorial Board, to which the selection panel can add up to three 'wildcards' for articles they deem worthy of the prize but that were not previously shortlisted by the Editors. For this inaugural iteration of the prize, the selection panel consisted of former founding co-editor-in-chief Veerle Heyvaert, Doug Kysar and Leonie Reins, for whose efforts we are most grateful.

It is with great pleasure that we announce the winners of the *TEL* Best Article Prize 2022:

- **Emille Boulot and Joshua Sterlin**, for their article 'Steps Towards a Legal Ontological Turn: Proposals for Law's Place beyond the Human'.⁸⁷ This very deep and thoughtful article written by two early-career researchers makes a novel contribution to the literature on the rights of nature. It moves the debate beyond identifying the shortcomings of environmental law to suggest new ways of understanding our relationship with nature. The authors' use of anthropological conceptual tools to better make sense of legal processes is particularly effective.

⁸⁵ *Ibid.*, pp. 218–22.

⁸⁶ Gorman, n. 4 above.

⁸⁷ 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.

In addition to the prize winners, the selection panel awarded two honourable mentions, also to early-career scholars.

- The first honourable mention goes to **Esmeralda Colombo** for her article ‘From Bushfires to Misfires: Climate-related Financial Risk after *McVeigh v. Retail Employees Superannuation Trust*’.⁸⁸ This article, grounded in domestic case law through the McVeigh litigation and settlement, engages with an impressive array of literature from various disciplines and has a clear transnational relevance, shedding an interesting light on the role of transnational soft law in national climate litigation.
- The second honourable mention goes to **Eva Bernet Kempers** for her article ‘Transition rather than Revolution: The Gradual Road towards Animal Legal Personhood through the Legislature’.⁸⁹ This contribution considers pathways towards animal legal personhood. By proposing an incremental approach of growing rights resulting eventually in personhood, it provides an alternative to the judicial, more ad hoc, route of legal reform. The author suggests we abandon the all-or-nothing approach to animal legal personhood advanced by the Animal Rights Pyramid, which situates legal personhood at the bottom of the pyramid as a precondition for all other rights. Key strengths of this piece are its solid engagement with the existing literature and approach to animal rights, but then its willingness to think creatively about the rule of law and the normative and procedural benefits of challenging existing paradigms, and thinking about the possibilities of the rule of law from a fresh perspective.

The authors of the winning article will receive an award of £250 in Cambridge University Press books; the winning article (as well as the two honourable mentions) will be made freely available to read on Cambridge Core, indefinitely, and the authors of the winning article and the two honourable mentions will receive a complimentary one-year journal subscription to *TEL*.

We heartily congratulate our inaugural prize winners, Emille and Joshua, as well as Esmeralda and Eva for their honourable mentions!

With so many strong submissions making their way to *TEL* each year, we very much look forward to the strong competition that the next *TEL* Best Article Prize promises to bring. As always, we are grateful to our community of *TEL* scholars, reviewers and readers for their unflinching attention to transnational environmental problems, and with each new year we recommit ourselves to enabling the rigorous analysis that has characterized the scholarship we publish so proudly.

⁸⁸ E. Colombo, ‘From Bushfires to Misfires: Climate-related Financial Risk after *McVeigh v. Retail Employees Superannuation Trust*’ (2022) 11(1) *Transnational Environmental Law*, pp. 173–99.

⁸⁹ E. Bernet Kempers, ‘Transition rather than Revolution: The Gradual Road towards Animal Legal Personhood through the Legislature’ (2022) 11(3) *Transnational Environmental Law*, pp. 581–602.

6. *TEL* EDITORIAL BOARD ANNOUNCEMENTS

There are several changes to the *TEL* Editorial team to be announced.

Firstly, it is with gratitude that we say goodbye to Anna Huggins, as she steps down from her role as *TEL* Editor, having previously served as Assistant Editor since 2016. Also leaving the *TEL* team are Assistant Editors Alexia Staker (after a five-year tenure) and Eva van der Marel. We are very grateful to Anna, Alexia and Eva for their hard work for *TEL*, and we wish them all the very best with their future endeavours.

At the same time, we are excited to welcome new members to the *TEL* Editorial team. Following a three-year term on the *TEL* Advisory Board, Leonie Reins (Erasmus University Rotterdam, The Netherlands) has joined the Editorial Board. In addition, Annika Frosch (European University Institute, Florence, Italy) has joined the team of Assistant Editors. We extend the warmest of welcomes to Leonie and Annika, and we look forward a fruitful collaboration in the years to come.

Editors-in-Chief

Thijs Etty
Josephine van Zeben

Editors

Cinnamon Carlarne
Leslie-Anne Duvic-Paoli
Bruce Huber
Leonie Reins