

EDITORIAL

The Emergence of New Rights and New Modes of Adjudication in Transnational Environmental Law

1. INTRODUCTION

The year 2015 ended on a euphoric note for many in the environmental law community. The climate negotiations in Paris (France) in late November and December, proceeding in the face of tragic terrorist attacks in that city only weeks before, yielded an historic agreement that may well serve as the international baseline for decades to come.¹ We suspect that some will regard the 21st session of the Conference of the Parties (COP-21) to the United Nations Framework Convention on Climate Change (UNFCCC)² as a belated victory for old-style international law. Yet the final agreement is far from old-style, for the parties relinquished the insistence, so manifestly present at COP-20 in Copenhagen (Denmark), on binding emissions reduction targets and rigorous enforcement mechanisms. What COP-21 has produced instead is scaffolding upon which states must supply nationally determined contributions (NDCs), established in a transparent, multilevel fashion.³ The Paris Agreement thus represents a different and more optimistic way forward, and one that relies deeply on the augmentation of alternative approaches to environmental governance.

Discussions concerning precisely these alternative approaches have filled the pages of this journal during its formative years. On that note, we gratefully pause to recognize that 2016 is *TEL*'s fifth anniversary year. Since its launch *TEL* has published rigorous and challenging pieces on topics ranging from climate change adaptation law and regulatory convergence in nanotechnology governance to the legality of a meat carbon tax.⁴ That *TEL* fills an important niche in environmental

¹ Paris Agreement, Annex to Decision of the CoP to the UNFCCC, Paris (France), 30 Nov–11 Dec. 2015, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 Dec. 2015, available at: <https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>.

² New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <http://unfccc.int>.

³ E. Bursleson, 'Paris Agreement and Consensus to Address Climate Challenge' (2016 forthcoming) *ASIL Insights*.

⁴ See, e.g., J. Peel, L. Godden & R. Keenan, 'Climate Change Law in an Era of Multi-Level Governance' (2012) 1(2) *Transnational Environmental Law*, pp. 245–80; R. Snir, 'Governance by Disclosure: Transnational Convergence in the Field of Nanotechnology' (2013) 2(1) *Transnational Environmental*

governance is confirmed by its rapid absorption into scholarly debate and the impressive quality of submitted materials. We are proud of our efforts, but confident too that *TEL*'s best years lie ahead. As both celebration and continuation of *TEL*'s successes, in May 2015 we published a call for papers to compete for *TEL*'s five-year anniversary scholarship prize and an accompanying public lecture. *TEL* readers can look forward to a special anniversary issue that offers the best of the submitted contributions, including the prizewinning article, in the coming year. The public lecture will be held in Cambridge (United Kingdom) and will be made available online.⁵ The assigned theme for the scholarship competition focuses on that most central of transnational environmental principles: the common but differentiated responsibilities (CBDR) that define public environmental responsibilities in the transnational era.⁶

As environmental scholars we do well to maintain an awareness that high-profile issues and developments, such as climate change and the Paris talks, can so dominate scholarly attention as to crowd out other environmental problems in acute need of careful scrutiny. The law of climate change has been described as 'hot law' because of its tendency to problematize any legal question raised within its context,⁷ but it simultaneously risks leaving other, pressing environmental concerns in the cold. We present in this issue of *TEL* a symposium which showcases one vital but under-explored question, namely, the use of law to mediate our relationship with the animal world and the need for global animal law. Beyond this symposium, the issue features several additional articles which highlight the ever-expanding role of civil society mechanisms and other alternative venues for dispute resolution and environmental governance. We turn firstly to the symposium.

2. A GLOBAL LAW OF ANIMALS?

Before the 20th century, the law of animals was largely the law of private property. The advance of the industrial age, however, made painfully obvious that human activity, left unchecked, could leave the animal kingdom in utter ruin. The animal protection laws of the 1900s, of course, were largely matters of domestic law. In her introduction to this issue's symposium, Anne Peters argues for the prompt development of a genuinely global animal law.⁸ Indeed, Peters frames the issue as a moral imperative. Domestic enactments, for Peters, are important indicators of

Law, pp. 69–94; C. Bähr, 'Greenhouse Gas Taxes on Meat Products: A Legal Perspective' (2015) 4(1) *Transnational Environmental Law*, pp. 153–79.

⁵ Date to be confirmed.

⁶ The principle is formalized in both the Rio Declaration on Environment and Development (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 June 1992, available at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>) and the Kyoto Protocol to the UNFCCC (Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: http://unfccc.int/kyoto_protocol/items/2830.php).

⁷ E. Fisher, 'Environmental Law as "Hot" Law' (2013) 25(3) *Journal of Environmental Law*, pp. 347–58.

⁸ A. Peters, 'Global Animal Law: What It Is and Why We Need It' (2016) 5(1) *Transnational Environmental Law*, pp. 9–23.

increasing sensitivity to animal suffering and species loss, but they remain, in and of themselves, inadequate for the legal protection of non-human animals.⁹

As Katie Sykes suggests later in the symposium,¹⁰ there has surely been an ‘animal turn’, and Peters’ brief survey of existing international legal tools reminds us just how far the law of animal protection has come. The body of treaty and trade law that incorporates concerns over animal welfare is substantial, and no longer focuses simply on the preservation of species but also on the welfare of individual animals.¹¹ These are, for Peters, critical and pioneering developments. Yet, they are ultimately lacking, and Peters identifies six important reasons why animal welfare law requires global action.¹² Her account takes notice not only of extensive globalization, but also of the reality of strategic interaction among trading partners and within the broader community of states. Absent global intervention on behalf of animal welfare, Peters insists, the threat of a ‘race to the bottom’ is substantial. Comprehensive international animal welfare standards, by contrast, would not only provide a ‘benchmark for local, national, and international legislation’, but would also ‘level the playing field’ and prevent evasion of domestic and international law.¹³

Similarly, the articles in the symposium are founded on the conviction that questions of animal law must be addressed at a level beyond the state. Peters’ principal contribution, ‘Liberté, Égalité, Animalité: Human–Animal Comparisons in Law’,¹⁴ forwards an argument based on animal rights. The profound gap between human rights and animal rights is, for Peters, ultimately inconsistent with the ‘intertwinement’ of human–animal discourse in other legal domains. For her part, Katie Sykes attempts to eke out stronger responsibilities on the basis of developments in international trade law,¹⁵ and examines the Trans-Pacific Partnership (TPP) with an eye towards not only its ‘negative’ defence of domestic animal protection, but also its ‘positive’ application in the development and fortification of international initiatives.¹⁶ It is an interesting and suggestive move, for trade and welfare are often juxtaposed in academic thought. Thomas Kelch’s article strikes out in a different direction, in pursuit of an ethical foundation for animal law.¹⁷ This foundation, Kelch contends, must be sufficiently universalistic to overcome the entrenched biases that currently lead us to associate animal cruelty with behaviour perpetrated by remote ‘others’. Although these biases inure us to the cruelties our

⁹ Ibid., pp. 21–22.

¹⁰ K. Sykes, ‘Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection’ (2016) 5(1) *Transnational Environmental Law*, pp. 55–79.

¹¹ Peters, n. 8 above, pp. 13–14.

¹² Ibid., pp. 16–19.

¹³ Ibid., pp. 18–19.

¹⁴ A. Peters, ‘Liberté, Égalité, Animalité : Human–Animal Comparisons in Law’ (2016) 5(1) *Transnational Environmental Law*, pp. 25–53.

¹⁵ Sykes, n. 10 above.

¹⁶ Ibid., p. 68.

¹⁷ T. Kelch, ‘Towards Universal Principles for Global Animal Advocacy’ (2016) 5(1) *Transnational Environmental Law*, pp. 81–111.

own societies inflict, Kelch looks to Feminist Care Theory as both balm and basis for ethical development.

3. EXPANDING RIGHTS AND EXPANDING INSTITUTIONS

If global animal law is to succeed, it will require policy makers around the world to carve new legal ground. In the first of three self-standing articles in this issue, Susana Borràs takes the symposium themes one step further with a similarly ambitious programme of legal reform. Whereas the symposium articles explore the possibility of an expanded legal space for animal rights, Borràs focuses on the more generalized ‘rights of nature’. Like Sykes, however, Borràs avoids an abstract call for innovation and offers instead an approach rooted in recent legal developments.

Borràs’s article, ‘New Transitions from Human Rights to the Environment to the Rights of Nature’,¹⁸ takes as its point of departure the anthropocentrism that typifies conventional environmental enactments. She rightly notes that in most legal systems the activation of legal mechanisms for environmental rehabilitation requires human injury. Even that most expansive concept of international environmental law, the human right to a healthy environment, is predicated not on the well-being of nature in the abstract but of the humans who encounter it. Borràs offers a subtle critique of rights-based approaches, arguing that such approaches embody, rather than overthrow, a metabolic ‘appropriation of nature’ and ‘a relationship of superiority between humans and non-humans’.¹⁹ This relationship, in which environmental values are protected only ‘because of their role in satisfying human needs’, for the author is ‘arguably the ultimate cause of the current ecological crisis’.²⁰

By contrast, an emergent ‘biocentric’ approach to environmental law regards nature as itself a legal subject. The approach is reminiscent of earlier attempts in the environmental movement, imaginative yet ultimately unsuccessful, to mobilize legal instruments on behalf of other forms of life.²¹ Unlike previous efforts, however, the new wave of biocentrism is being adopted in legislative instruments in pockets around the world. Perhaps most notable is the Ecuadorian constitutional amendment in 2008 to present nature as a subject of rights.²² The first judicial enforcement of this revision occurred in 2011 when a provincial court ordered its government to stop a road construction project because it violated ‘the constitutional rights of the Vilcabamba River to exist and to maintain its vital cycles, structure, functions and evolutionary processes’.²³

To readers in the Global North, such language may appear exotic, or even legally inconceivable – but perhaps not for long. Borràs notes that although the attribution

¹⁸ S. Borràs, ‘New Transitions from Human Rights to the Environment to the Rights of Nature’ (2016) 5(1) *Transnational Environmental Law*, pp. 113–43.

¹⁹ *Ibid.*, p. 127.

²⁰ *Ibid.*, pp. 127–8.

²¹ See, e.g., C. Stone, ‘Should Trees Have Standing? Toward Legal Rights for Natural Objects’ (1972) 45(2) *Southern California Law Review*, pp. 450–501.

²² Borràs, n. 18 above, p. 134.

²³ *Ibid.*, p. 139.

of rights to nature emanates most naturally from indigenous cultural worldviews in Latin America, more than two dozen municipalities in the United States (US) have passed ordinances which arguably claim rights for nature. Perhaps such developments foreshadow an even greater role for the rights of nature in Western society.

Belén Olmos Giupponi's article, 'Transnational Environmental Law and Grass-Root Initiatives: The Case of the Latin American Water Tribunal',²⁴ also focuses on Latin America. It presents a fascinating and penetrating examination of the Latin American Water Tribunal (LAWT or Tribunal). Readers will be aware that international concerns about water poverty have been on the increase in recent years largely as a result of advocacy and investigative work by public interest organizations. Giupponi begins by reminding us of the urgencies of the situation: access to clean and affordable water is a serious issue in Latin America, in particular, because of both high levels of pollution and the privatization of water services in the region.²⁵ An apparent abundance of water resources 'does not necessarily translate into access to water',²⁶ because of compromised water supplies and substantial price increases attributable to privatized water delivery.²⁷ Although global activism has led to ever more explicit pronouncements articulating a human right to water, serious obstacles remain in the enforcement of the legal right to water. The remedial mechanisms afforded by traditional environmental law, Giupponi makes clear, operate principally between states and offer no point of access to private actors.²⁸

The LAWT was born in 1998 out of this context. The Tribunal offers complainants an alternative forum, quasi-judicial in its structure and procedure, in which public hearings may be conducted.²⁹ The LAWT's verdicts are not legally binding judgments; they have in some instances been explicitly rejected by formal legal institutions.³⁰ Yet, to focus exclusively on this limitation is to miss the point, according to Giupponi, for the majority of cases brought before the LAWT have 'already been decided by domestic tribunals'.³¹ Giupponi argues that the Tribunal serves important functions nonetheless and that it may, in fact, compensate for shortcomings in both national and international legal systems. By offering verdicts premised upon the Tribunal's carefully cultivated moral authority, and doing so on the basis of rigorous, transparent, and multidisciplinary inquiry, the LAWT builds on and stimulates crucial grassroots support in ways that may penetrate political obstacles. In this respect, the meticulous fairness of the Tribunal's process is its most important asset, insofar as it extends the body's legitimacy. Giupponi concludes that the LAWT is best conceived as a 'mediator forum', which may play a crucial role in

²⁴ B. Olmos Giupponi, 'Transnational Environmental Law and Grass-Root Initiatives: The Case of the Latin American Water Tribunal' (2016) 5(1) *Transnational Environmental Law*, pp. 145–74.

²⁵ *Ibid.*, p. 150.

²⁶ *Ibid.*, p. 149.

²⁷ *Ibid.*, p. 151.

²⁸ *Ibid.*, p. 156.

²⁹ *Ibid.*, pp. 158–60.

³⁰ Giupponi's account of the La Parota Dam project (Mexico) offers a case in point: *ibid.*, pp. 167–9.

³¹ *Ibid.*, p. 160.

disputes over access to water in which the conventional mechanisms of environmental law fail.³²

While the Latin American Water Tribunal must forge its legitimacy inch by inch, other adjudicative bodies are vested with legitimacy from birth. So it is, in a sense, with the National Green Tribunal (NGT) in India. Gitanjali Nain Gill's article, 'Environmental Justice in India: The National Green Tribunal and Expert Members',³³ provides an in-depth and personal portrait of one of the most important and progressive environmental adjudicators in the world. The NGT, founded in 2010, is a creature of statute. The Indian Supreme Court, increasingly concerned about the complexity of the environmental public interest litigation that was appearing on its docket, recommended the creation of a dedicated environmental court, staffed not only by judges but also by subject-matter experts ranging from ecologists to engineers. The Law Commission of India adopted the Court's recommendation and added its own, and shortly thereafter Parliament responded with legislation creating the Tribunal.³⁴

Gill's examination of the NGT centres on the role of scientific experts within a fundamentally adjudicative process. The research presented here relies extensively on over 100 semi-structured interviews conducted by the author with judges, experts, advocates, and others associated with the NGT. With this fine-grained, qualitative approach, Gill explores whether the role of experts in the NGT corresponds with the social scientific literature on the role of experts. The inquiry leverages earlier work by Peter Haas³⁵ and Lorna Schrefler³⁶ and makes particular use of Schrefler's distinction between expertise used for symbolic, instrumental, and strategic purposes. Gill's interview data highlights most obviously the instrumental use of experts: instances in which the use of expertise corresponds with a 'public interest' conception of adjudication. In these instances, experts 'advanc[e] scientific inputs into the decision-making process'.³⁷ Yet, also prominent in Gill's account is the strategic application of scientific knowledge, which presents us with quite a different picture. Rather than straightforwardly serving the public good through superior decision making, the strategic application of expertise sees the NGT assert its expertise in order to expand its own role and place within environmental governance in India.

The article ends on a mixed note. On one hand, Gill's account describes an institutional innovation which has resolved a number of high-profile environmental disputes in a manner that emphasizes well-founded science above political convenience. However, Gill seems to fear that the NGT may be a victim of its own

³² *Ibid.*, pp. 166–7.

³³ G.N. Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' (2016) 5(1) *Transnational Environmental Law*, pp. 175–205.

³⁴ *Ibid.*, p. 185–6.

³⁵ P.M. Haas, 'Ideas, Experts and Governance', in M. Ambrus et al. (eds), *The Role of 'Experts' in International and European Decision-Making Processes: Advisors, Decision Makers or Irrelevant Actors?* (Cambridge University Press, 2014), pp. 19–43.

³⁶ L. Schrefler, 'The Usage of Scientific Knowledge by Independent Regulatory Agencies' (2010) 23(2) *Governance: An International Journal of Policy, Administration, and Institutions*, pp. 309–30.

³⁷ Gill, n. 33 above, p. 195.

success in that its efforts to expand its own jurisdiction have placed it at the centre of a turf war.³⁸ India's Ministry of Environment and Forestry, once a proponent of the concept of an environmental court, has become confrontational, using political tools and budgetary restrictions to contain the NGT's range of action. This development leads Gill to conclude that the NGT's future is uncertain. Her findings resonate far beyond the borders of India, for specialist environmental courts are appearing in other countries as well, and such bodies raise persistent questions as they contend with increasingly complex and contentious issues. As for the role of expert members, Gill's research underscores the fact that technical expertise is seldom deployed apolitically – and, even then, perhaps not for long.

4. THE *TEL* EDITORIAL TEAM

As the field of transnational environmental law continues to grow, so does the *TEL* editorial team. It is with genuine pleasure that we welcome Bruce Huber of Notre Dame Law School (US) to the Editorial Board. Bruce replaces Wil Burns, who stepped down from the Editorial Board at the start of the year. We wish Wil the very best in all his future endeavours. Bruce Huber has been a *TEL* Assistant Editor for nearly two years, and has always done a stellar job in that capacity. We are truly delighted that Bruce was willing and able to join Cinnamon Carlarne, Dan Farber and Jolene Lin on the Editorial Board, and we look forward to many more years of fruitful collaboration. Moreover, it is with equal pleasure that we announce that *TEL*'s excellent Assistant Editorial team of Megan Bowman and Josephine van Zeben is strengthened by two new members: Anna Huggins of Queensland University of Technology (Australia), and Andreas Kotsakis of Oxford Brookes University (United Kingdom). Thus fortified, we look forward to facing the many challenges and great opportunities that the next five years of transnational environmental law – and *Transnational Environmental Law* – will bring.

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³⁸ Ibid., pp. 197–205.