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EDITORIAL

The Methodologies of Transnational Environmental Law Scholarship

1. INTRODUCTION

Transnational environmental law scholarship employs diverse methodologies to examine and analyze a complex and evolving field. The articles featured in this issue of *Transnational Environmental Law* (*TEL*) cover a wide range of environmental problems, including protection of the marine environment,[1] air pollution,[2] and the energy transition,[3] and evaluate the roles of a variety of actors in environmental governance, including courts,[4] non-governmental organizations (NGOs),[5] and Indigenous and local communities.[6] Despite their apparent diversity, they share significant commonalities related to their methodologies. Collectively, these methodologically sophisticated research designs contribute to a deeper understanding of transnational environmental law and facilitate the development of novel strategies for enhanced sustainability.

It has been argued that environmental law scholarship 'remains somewhat traditional' because, as with most areas of legal scholarship, it is generally based on desk-based research.[7] While the articles in this issue of *TEL* confirm the centrality of desk-based research, they also reveal innovative ways of undertaking such research and evidence a consolidating interest in empirical work. This issue is indeed a striking illustration of the range of lenses and methods used by *TEL* authors. Some articles use new doctrinal concepts to understand existing legal mechanisms and their shortcomings,[8] while others

1 Y. Tanaka, 'Shared State Responsibility for Land-Based Marine Plastic Pollution' (2023) 12(2) *Transnational Environmental Law*, pp. 244–69.

2 S. Alam, L. Nurhidayah & M. Lim, 'Towards a Transnational Approach to Transboundary Haze Pollution: Governing Traditional Farming in Fire-Prone Regions of Indonesia' (2023) 12(2) *Transnational Environmental Law*, pp. 424–50.

3 L. Kaschny, 'Energy Justice and the Principles of Article 194(1) TFEU Governing EU Energy Policy' (2023) 12(2) *Transnational Environmental Law*, pp. 270–94.

4 J.M. Angstadt, 'Can Domestic Environmental Courts Implement International Environmental Law? A Framework for Institutional Analysis' (2023) 12(2) *Transnational Environmental Law*, pp. 318–42; C.M. Kauffman & P.L. Martin, 'How Ecuador's Courts Are Giving Form and Force to Rights of Nature Norms' (2023) 12(2) *Transnational Environmental Law*, pp. 366–95.

5 Y. Xia & Y. Wang, 'An Unlikely Duet: Public-Private Interaction in China's Environmental Public Interest Litigation' (2023) 12(2) *Transnational Environmental Law*, pp. 396–423.

6 Alam, Nurhidayah & Lim, n. 2 above.

7 O. Pedersen, 'The Evolution and Emergence of Environmental Law Scholarship: A Perspective from Three Journals' (2022) 34(3) *Journal of Environmental Law*, pp. 457–76, at 471.

8 Tanaka, n. 1 above.

rely on imaginative scenarios to foresee ways in which the law might, or should, evolve.[9] Some offer an in-depth analysis of a specific case study,[10] while others extract conclusions from large datasets.[11]

The first set of contributions to this issue – by Tanaka,[12] Kaschny,[13] van der Zee,[14] and Angstadt[15] – shares an interest in interdisciplinary research and relies on a selection of concepts, theories and methods found in the broader social sciences. The second set of articles aims to understand 'law-in-action',[16] to apprehend the practice of environmental law and find solutions to enhance its effectiveness. These two sets of contributions, while presented as distinct, share many commonalities. The threads of interdisciplinarity and law-in-action run in parallel in many of the contributions, as theories and concepts from social science disciplines are mobilized to better understand the reality of legal processes and to search for practical solutions. In particular, interdisciplinarity manifests not only in the use of varied sets of literature but also in heavy reliance on social science methods, including empirical methods.[17] These diverse lenses, concepts, and methods all join to render visible processes and realities unaccounted for so far, and to offer new solutions for complex problems of environmental governance.

2. FROM NEW DOCTRINES TO INTERDISCIPLINARY LENSES

In his article 'Shared State Responsibility for Land-Based Marine Plastic Pollution', Yoshifumi Tanaka explores how the doctrine of shared responsibility can shed light on the legal implications of the increasingly pressing problem of marine plastic pollution.[18] In doing so, Tanaka adopts a doctrinal analysis to the discipline of public international law. The doctrine of shared state responsibility has been developed recently by scholars to fill the gap in existing rules of the law of international responsibility that do not capture situations in which several international persons 'contribute together to the indivisible injury of a third party'.[19] Shared responsibility is particularly relevant in

[9] D.J. Jefferson, E. Macpherson & S. Moe, 'Experiments with the Extension of Legal Personality to Ecosystems and Beyond-Human Organisms: Challenges and Opportunities for Company Law' (2023) 12(2) *Transnational Environmental Law*, pp. 343–65.

[10] E. van der Zee, 'Strengthening Environmental Decision Making through Legislation: Insights from Cognitive Science and Behavioural Economics' (2023) 12(2) *Transnational Environmental Law*, pp. 295–317; Alam, Nurhidayah & Lim, n. 2 above.

[11] Angstadt, n. 4 above; Kauffman & Martin, n. 4 above.

[12] Tanaka, n. 1 above.

[13] Kaschny, n. 3 above.

[14] Van der Zee, n. 10 above.

[15] Angstadt, n. 4 above.

[16] V. Heyvaert & T.F.M. Etty, 'Introducing Transnational Environmental Law' (2012) 11(1) *Transnational Environmental Law*, pp. 1–11, at 5.

[17] E. Morgera, L. Parks & M. Schröder, 'Methodological Challenges of Transnational Environmental Law', in V. Heyvaert & L.-A. Duvic-Paoli (eds), *Research Handbook on Transnational Environmental Law* (Edward Elgar, 2020), pp. 48–65.

[18] Tanaka, n. 1 above.

[19] A. Nollkaemper et al., 'Guiding Principles on Shared Responsibility in International Law' (2020) 31(1) *European Journal of International Law*, pp. 15–72.

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the case of marine plastic pollution because plastic waste is being discharged from the territory of multiple states. In turn, all states, including those not directly injured, are entitled to invoke shared state responsibility for such pollution, when considering that the duty to protect and preserve the marine environment is of an *erga omnes* character, that is, owed to the international community as a whole.[20]

Tanaka examines the primary and secondary rules of international law to explain why invoking shared state responsibility for land-based marine plastic pollution might be difficult. He stresses the 'weakness of the global legal framework'[21] deriving from vague as well as non-legally binding norms regarding land-based marine plastic pollution, noting in particular that finding a breach of obligations of a due diligence nature can be complicated.[22] Turning to the rules of state responsibility, Tanaka highlights another set of legal difficulties, notably as a result of the need to establish a causal relationship between the harm and the wrongful conduct, possible restrictions on adjudicative jurisdiction, and difficulties associated with reparation.[23] Tanaka, however, suggests that these difficulties can be partially overcome in three ways: firstly, by elaborating on the contents of the due diligence duty to prevent marine harm; secondly, by strengthening compliance procedures; and thirdly, by adopting a holistic approach that integrates watercourse governance and marine governance.[24]

The next three articles consider insights from other disciplines to fill the blind spots of legal analysis and, in particular, to better evaluate the fairness and effectiveness of law and legal processes. Laura Kaschny's 'Energy Justice and the Principles of Article 194(1) TFEU Governing EU Energy Policy' applies an energy justice lens to European Union (EU) energy policy.[25] She explains that her ultimate aim is to 'bridge the gap between energy justice as a universal concept of social sciences and the legal implications of energy justice'.[26] Her main thesis is that an explicit analysis of how EU energy law integrates objectives of equity, fairness, and sustainability is lacking, which prevents an in-depth evaluation of present and future energy legislation.[27]

According to Kaschny, the energy justice concept offers a critical lens to reflect on the 'societal implications of energy regulation, otherwise often dominated by technological considerations',[28] and can 'guide legislative, judicial, and executive decision making in the energy sector towards more equitable and inclusive energy regulation'.[29] Based on a detailed textual analysis of Article 194(1) of the Treaty on the Functioning of the EU,[30] the author finds that the social elements of energy justice are under-represented in

[20] Tanaka, n. 1 above, p. 246.
[21] Ibid., p. 253.
[22] Ibid., pp. 251, 254.
[23] Ibid., pp. 260–3.
[24] Ibid., pp. 263–8.
[25] Kaschny, n. 3 above.
[26] Ibid., p. 272.
[27] Ibid., p. 274.
[28] Ibid., p. 271.
[29] Ibid., p. 292.
[30] Lisbon (Portugal), 13 Dec. 2007, in force 1 Dec. 2009 [2012] OJ C 326/47.

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comparison with those related to sustainability and market interests.[31] Criteria such as affordability, intra- and intergenerational equity and intersectionality remain lacking, which leads to significant shortcomings in terms of justice. Kaschny's contribution is evidence of the value of employing a social science concept as a frame for in-depth legal analysis to enhance our evaluation of the law and its effects.

Similarly, in her article 'Strengthening Environmental Decision Making through Legislation: Insights from Cognitive Science and Behavioural Economics', Eva van der Zee relies on concepts from social sciences, specifically cognitive science and behavioural economics, to appraise the process of environmental assessment (EA).[32] Van der Zee is concerned that while EAs are presented as 'rationalist' instruments,[33] cognitive and unconscious motivational bias can distort decision-making processes. In her article van der Zee adopts an 'exploratory research design, taking the Netherlands as a case study' to understand how EA legislation incorporates debiasing techniques and assess whether further legislation is needed.[34] To advance her argument, she combines textual data with semi-structured interviews with actors involved in the Dutch EA process to obtain a better understanding of the process.[35]

Van der Zee identifies three debiasing techniques necessary to overcome cognitive and unconscious motivational bias in EAs: expertise, group decision making, and feedback loops. Concluding that such techniques are not sufficiently integrated in the legislation, she offers recommendations on how to strengthen them in EU and Dutch environmental assessment. She recommends that environmental legislation mandate three processes as follows: '(i) an independent foundation to check the EA report for plans and projects; (ii) nominal decision making at all stages of the EA process; and (iii) the communication of a monitoring report to expert groups and consultancy firms'.[36]

The last in this set of contributions, Mike Angstadt's article, 'Can Domestic Environmental Courts Implement International Environmental Law? A Framework for Institutional Analysis', combines insights from environmental law, global environmental politics, and qualitative institutional analysis.[37] Angstadt adopts an interdisciplinary and multi-method approach; his article combines theoretical insights from different disciplines with elaborate desk-based research to identify national-level environmental courts, including through direct outreach to legal practitioners and representatives of United Nations member states to confirm the existence of environmental courts and their mandate.[38]

Angstadt's aim is to understand the conditions under which environmental courts and tribunals support domestic applications of international environmental law (IEL) norms. Combining theoretical frames with empirical data, the author draws a typology reflecting the diversity and heterogeneity of environmental courts. He

[31] Kaschny, n. 3 above, p. 294.
[32] Van der Zee, n. 10 above.
[33] Ibid., p. 296.
[34] Ibid., p. 300.
[35] Ibid., pp. 301–3.
[36] Ibid., p. 316.
[37] Angstadt, n. 4 above.
[38] Ibid., pp. 329–30.

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hypothesizes that 'existing environmental courts with national geographic jurisdiction would be best positioned to interpret and apply IEL norms in decisions'.[39] However, Angstadt is also interested in drawing broader lessons for the study of courts and uses his study to highlight 'how domestic institutional capacity affects international norm circulation and contestation'.[40] He concludes that the contribution of domestic environmental courts to global environmental governance requires further research.

3. FROM UNDERSTANDING LAW-IN-ACTION TO OFFERING RECOMMENDATIONS FOR LEGAL REFORM

The environmental crisis is regularly described as a 'crisis of imagination'[41] and transnational environmental law scholarship is often concerned with proposing new imaginaries to reconceptualize the role of law vis-à-vis environmental harm.[42] However, contributions to this issue also show that, while exciting, these novel proposals do not necessarily translate into more effective environmental laws. To bridge this gap, the last four articles are interested in better understanding the reality of existing law with a view, potentially, to offering suggestions for legal reform.

The first two contributions in this section concentrate on the recognition of rights of nature, a legal phenomenon that has been examined thoroughly in this journal.[43] Both contributions conclude that this recent legal trend evidences the need and appetite for reimagining environmental legal structures. However, they also emphasize that the scholarship so far has remained shy of examining their practical implications.

The article by David Jefferson, Elizabeth Macpherson and Steven Moe, 'Experiments with the Extension of Legal Personality to Ecosystems and Beyond-Human Organisms: Challenges and Opportunities for Company Law', is interested in the future conceptualization of law. It confirms that, as environmental innovations consolidate in legal practice, there is a need to better comprehend their interactions with existing, more traditional legal mechanisms.[44] Their article aims to

[39] Ibid., p. 328.

[40] Ibid., p. 322.

[41] A. Ghosh, *The Great Derangement: Climate Change and the Unthinkable* (University of Chicago Press, 2016).

[42] E.g., 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; B. Hoops, 'What If the Black Forest Owned Itself? A Constitutional Property Law Perspective on Rights of Nature' (2022) 11(3) *Transnational Environmental Law*, pp. 475–500.

[43] 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.J. 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.

[44] Jefferson, Macpherson & Moe, n. 9 above.

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understand the practical implications of the rights of nature movement for the theory of legal personality. Indeed, the authors note their concern about the fact that 'our collective ability to reimagine legal personality has outpaced our capacity to understand the practical implications of these novel imaginaries'.[45] By examining how the expansion of legal personality can affect company law, they hope to 'create new opportunities for synergies to be forged between different human groups to limit environmental harm and to foster sustainable enterprise'.[46] They advocate 'a reimagination of company law that would embrace an ethics of responsibility, reciprocity, and relationality with the human and ecological communities in which companies do business'.[47]

Taking the example of Aotearoa New Zealand, the authors compare and contrast how ecosystems and companies are conceived as legal persons.[48] The comparative exercise offers important lessons for environmental law and also for company law. The analysis shows that the two legal entities, despite having the same legal status, are treated differently: for instance, contrary to the process established for companies, there is no process that would allow a private person to register an ecosystem as a legal person.[49] At the same time, their comparable legal status also highlights important questions, such as how to determine what would constitute the best interests of a particular company or beyond-human organism, 'especially when the interests of these different legal persons diverge'.[50]

The authors identify a set of fascinating questions that remain unexplored regarding the interactions between ecosystems and companies.[51] To study some of these questions they resort to a 'thought experiment designed to illustrate the areas of uncertainty, pragmatic problems, and nascent opportunities and synergies'.[52] Their investigation leads them to identify three main consequences: firstly, the expansion of legal personality may undermine the 'viability of the shareholder primacy notion of corporate best interests';[53] secondly, how human representatives should act in the best interests of the legal person is often undetermined; and, finally, the potential synergies arising from the interactions between ecosystems and corporate entities are still unexplored.[54]

Whereas Jefferson, Macpherson and Moe are interested in the future, the next article seeks to understand the past and present effects of Ecuador's constitutional recognition of the rights of nature since 2008. In 'How Ecuador's Courts Are Giving Form and Force to Rights of Nature Norms',[55] Craig Kauffman and Pamela Martin note that while this constitutional recognition initially was considered to have failed to translate

[45] Ibid., p. 345.
[46] Ibid., p. 347.
[47] Ibid., p. 350.
[48] Ibid., pp. 351–9.
[49] Ibid., p. 352.
[50] Ibid., pp. 351, 354–8.
[51] Ibid., pp. 358–9.
[52] Ibid., pp. 348, 359–62.
[53] Ibid., p. 363.
[54] Ibid., pp. 362–5.
[55] Kauffman & Martin, n. 4 above.

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into legal change,[56] the situation has been evolving. Indeed, the article finds an important role for Ecuadorian courts that are transforming the rights of nature from an abstract concept into specific standards on how to 'implement sustainable development in an integrated and holistic manner that does not sacrifice ecosystem functioning'.[57]

To evaluate the material impact that rights of nature have on the Ecuadorian legal system, the authors' research relies on an original dataset of 55 rights of nature cases decided by Ecuadorian courts between 2009 and 2022, as well as on interviews with judges and stakeholders.[58] Their combination of a thorough textual analysis of the cases with insights from legal practitioners enables Kauffman and Martin to understand how the Constitutional Court is transforming rights of nature into a concrete tool able to balance different public policy priorities for sustainable development. Their textual and empirical analysis allows them to offer important insights into how Ecuadorian judges are acting as norm entrepreneurs by giving rights of nature legal content.[59]

The next article in this section also uses empirical methods to enhance our understanding of legal processes. In 'An Unlikely Duet: Public-Private Interaction in China's Environmental Public Interest Litigation', Ying Xia and Yueduan Wang study collaborations between public and private actors in an environmental context in authoritarian regimes, and more specifically in the interactions between environmental NGOs and procuratorates in China's environmental public interest litigation.[60]

To examine the evolution of public interest litigation, they take 'a relational and process-based approach',[61] which relies on qualitative research to understand the motivations and constraints of NGOs and procuratorates, and their interactions.[62] Their qualitative data consists of 49 semi-structured interviews conducted across China between 2020 and 2022 with procuratorates and employees of environmental NGOs.[63]

On that basis, they find emerging complementarity between Chinese procuratorates and environmental NGOs. Their empirical investigation evidences a strategic division of labour between the two actors, with procuratorates focusing on administrative litigation against governmental agencies and NGOs targeting high-profile defendants. They conclude by explaining this complementarity in the context of China's authoritarian environmentalism, driven both by 'the state's desire to strengthen its political legitimacy by incorporating imperatives such as ecological civilization and law-based governance'[64] and 'the generally shrinking political space for civic activism'.[65]

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[56] 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.

[57] Kauffman & Martin, n. 4 above, p. 367.

[58] Ibid., p. 367.

[59] Ibid., pp. 374–6.

[60] Xia & Wang, n. 5 above.

[61] Ibid., p. 399.

[62] Ibid., p. 399.

[63] Ibid., p. 406.

[64] Ibid., p. 423.

[65] Ibid., p. 423.

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The final article in this issue – by Shawkat Alam, Laely Nurhidayah and Michelle Lim – is 'Towards a Transnational Approach to Transboundary Haze Pollution: Governing Traditional Farming in Fire-Prone Regions of Indonesia'.[66] Similar to other contributors in this issue, these three authors consider that 'a purely doctrinal approach which evaluates existing laws remains insufficient'[67] to understand why environmental degradation continues despite legal responses. In their case they are concerned with how to address transboundary haze pollution and sustainable peatland management in Indonesia in a culturally appropriate way. They advocate decentralizing the analysis to include the perspectives of non-state actors, lamenting that 'the current legal and policy frameworks have not considered meaningfully how to centre Indigenous and local communities and promote more equitable peatland management'.[68] To obtain a full picture, they argue, a transnational environmental law lens is needed, which could offer significant insights to further sustainability practices.[69]

The article adopts a rich research design, including 'an interdisciplinary approach within an overall strategy of triangulation, a methodology that uses multiple methods to view an issue from a range of perspectives to develop a holistic understanding of the phenomenon under investigation'.[70] This involves, inter alia, desk-based analysis of local regulations, national law, regional agreements, and international environmental law, an empirical case study of the most fire-prone regions of Indonesia, and interviews.

The authors conclude that '[t]o address transboundary haze pollution and sustainable peatland management, there needs to be collaboration and cooperation between different stakeholders across multiple governance scales, with divergent interests representing a specific perspective on sustainable peatland management'.[71] Their elaborate research design conducts them to make suggestions for legal reform that includes 'synergy and collaboration from global to local scales and between diverse stakeholders' to better manage sustainable peatland.[72]

4. CONCLUSION

The contributions in this issue of *TEL* speak to the novel and exciting horizons for transnational environmental legal research. The intellectual challenges of transnational environmental legal research are well known[73] and it has been argued that 'environmental law scholarship can only come of age when scholars face the methodological

[66] Alam, Nurhidayah & Lim, n. 2 above.
[67] Ibid., p. 427.
[68] Ibid., p. 426.
[69] Ibid., p. 450.
[70] Ibid., p. 427.
[71] Ibid., p. 443.
[72] Ibid., p. 450.
[73] E. Fisher, 'The Rise of Transnational Environmental Law and the Expertise of Environmental Lawyers' (2012) 1(1) *Transnational Environmental Law*, pp. 43–52.

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challenges of environmental law research head on'.[74] As our authors deploy elaborate lenses and methods to analyze, understand, and assess the place and role of law in governing complex environmental problems, their articles are a vivid illustration of the evolution and growth of transnational environmental legal scholarship.[75]

5. *TEL* EDITORIAL BOARD ANNOUNCEMENTS

We are delighted and grateful to announce that *TEL*'s Impact Factor continues to increase, to 4.3 for 2021-2022 (5-yr Impact Factor 4.1), according to the latest Clarivate Journal Citation Report (JCR). With this score, *TEL*'s position as highest-ranking environmental law journal remains unchanged. In addition, in the general law journals category *TEL* has gone up two places, now ranking 4th overall. These and other strong citation index rankings and usage metrics underline the continued and growing importance of *TEL* within the field. We warmly thank our entire editorial team, and of course our contributors, reviewers and readers for making this continued success possible.

Building on the ongoing success of *TEL*, we are proud that Cambridge University Press has agreed to expand its portfolio on TEL topics with the launch of the *Transnational Environmental Law* Book Series, edited by Thijs Etty and Josephine van Zeben. As with the journal, the *TEL* book series aims to present pathbreaking and innovative studies of the regulation of environmental impacts beyond the state. The series provides an inclusive platform for conceptual innovation in environmental law and governance, highlighting roles of non-state and sub-state actors and their interaction with state actors and international organizations. TEL scholars who would like to submit a proposal or discuss a book idea, are encouraged to have a look at the *TEL* book series website for details and guidelines. We are excited to launch this new book series, which will create an important new dimension to the TEL ecosystem by providing space for longer and more in-depth contributions than the journal can accommodate.

Editors-in-Chief
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Leslie-Anne Duvic-Paoli
Bruce Huber
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[74] E. Fisher, B. Lange, E. Scotford & C. Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21(2) *Journal of Environmental Law*, pp. 213–50.

[75] T.F.M. Etty & V. Heyvaert et al., 'The Maturing of Transnational Environmental Law' (2017) 6(2) *Transnational Environmental Law*, pp. 193–203.

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