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EDITORIAL

Norms, Networks, and Markets: Navigating New Frontiers in Transnational Environmental Law

True to its mission, the second issue in volume two of *Transnational Environmental Law* (*TEL*) delves into the many and varied ways in which environmental governance is evolving beyond the state. The articles in this issue explore topics as diverse as: accountability in interpreting European Union (EU) framework norms; the role of third party actors in combatting transnational environmental crime; the rationales for socially responsible investing; the possibilities and pitfalls of using market-based tools to improve biodiversity conservation; and the need to develop a *grundnorm* premised on notions of planetary boundaries for our system of international environmental law. Yet, despite the range of topics and the depth of each of the individual articles, together they reveal an increasingly dominant set of questions in transnational environmental law.

These questions concern the role that the market and market-based mechanisms can and should play in environmental protection and the varied ways in which non-state actors, whether in conjunction with or outside the parameters of the state, influence efforts to further environmental conservation and sustainability efforts. Secondary questions that arise within the context of exploring the influence of markets and non-state actors on environmental protection centre on questions of legitimacy and accountability. All of these inquires, however, are framed by two larger background questions: what is the underlying goal of international environmental law and concomitant systems of transnational environmental governance, and how can we go about creating governance systems that are more unified in their understanding of the baseline objectives and thus more symbiotic in their implementation?

By engaging with questions about international environmental norms, the evolution of regional legal systems, and more overtly transnational governance challenges, this issue reminds us of the value of transnational environmental law as a framing mechanism for exploring the ways in which traditional and novel systems for environmental protection emerge, evolve, and intersect. In a world increasingly characterized by globalization and global environmental problems such as climate change, these intersections have become both more frequent and more intense, making it all the more important to find ways to conceptualize and respond to these challenges. The articles in this issue, in their individual and collective forms,

offer fertile ground for engaging with distinct challenges and for thinking about the broader set of challenges associated with moving forward towards a more sustainable future.

Following the success of the last issue, in which *TEL* featured articles emerging from a conference on 'Global Environmental Risk Governance under Conditions of Scientific Uncertainty',[1] this issue of *TEL* begins with three symposium articles on 'Regulatory and Institutional Frameworks for Markets for Ecosystem Services'. The articles flow from a conference that was organized by the University of Surrey, School of Law (United Kingdom) and the George Washington University Law School (United States) and took place on 6–7 June 2012 at the University of Surrey. The meeting in Surrey brought together a group of scholars to explore the legal and political questions that arise in the context of ecosystem services. As the symposium's convener, Thoko Kaime, explains in his foreword, the primary goal of the event was to:

> enable outcome-oriented interaction between experts, innovators and front-end users of these evolving market models to learn about recent progress, … to explore the strategies that can be adopted to encourage cross-learning between different models for regulatory and institutional frameworks, and how to design new institutional and regulatory mechanisms that can help to preserve ecosystem services.[2]

After framing the development of the concept of ecosystem services and laying out the objective of the symposium, Kaime explores the individual contributions by Colin Reid,[3] Jerneja Penca,[4] and Robert Glicksman and Thoko Kaime.[5] In his insightful overview of these articles, to which we refer readers for greater detail, Kaime highlights how each of the three articles in distinctive ways focuses on the challenges associated with using markets to effectively and ethically protect environmental resources. These pieces highlight in one particular context – ecosystem services – the normative, structural, and procedural challenges inherent in moving beyond the state and beyond traditional governance tools to ensure an outcome that has traditionally been seen as the primary responsibility of state actors. The articles in their individual and collective form tap into questions at the heart of transnational environmental law – questions about the equity, effectiveness, and long-term trajectory of the tools we employ to fill governance gaps when traditional law and policy tools fall short.

The symposium articles, however, also frame many of the issues that form the subjects of subsequent inquiry in this issue. For example, in his introduction to the symposium, Kaime explains that:

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1 O.Perez & R.Snir, 'Global Environmental Risk Governance under Conditions of Scientific Uncertainty: Legal, Political and Social Transformations' (2013) 2(1) *Transnational Environmental Law*, pp. 7–13.

2 T. Kaime, 'Framing the Law and Policy for Ecosystem Services' (2013) 2(2) *Transnational Environmental Law*, pp. 211–6, at 213.

3 C.T. Reid, 'Between Priceless and Worthless: Challenges in Using Market Mechanisms for Conserving Biodiversity' (2013) 2(2) *Transnational Environmental Law*, pp. 217–33.

4 J. Penca, 'Marketing the Market: The Ideology of Market Mechanisms for Biodiversity Conservation' (2013) 2(2) *Transnational Environmental Law*, pp. 235–57.

5 R.L. Glicksman & T. Kaime, 'A Comparative Analysis of Accountability Mechanisms for Ecosystem Services Markets in the United States and the European Union' (2013) 2(2) *Transnational Environmental Law*, pp. 259–83.

> it is essential that academics, policy-makers and other stakeholders develop an understanding and application of the concept of ecosystem services that result in ecologically sound decisions that achieve the goal of sustainability, as opposed to profit maximization being the sole imperative.[6]

Later in this same issue, Benjamin Richardson examines this matter in great depth when he explores the need to reframe the rationale behind sustainably responsible investment to focus on sustainability and a long-term outlook.[7] Equally, in each of the symposium articles, but especially in the Glicksman and Kaime piece, the authors critically analyze our ability to create mechanisms for ensuring the accountability of emergent systems of governance. Questions of accountability permeate each of the free-standing articles in this issue, but are of particular interest in the final article, in which we see Emilia Korkea-aho bring us full circle, to place accountability at the very centre of our assessment process for determining the quality and sustainability of emerging systems of transnational environmental law.[8]

Equally, the symposium's focus on biodiversity conservation and the need to develop new and more effective conservation systems in the face of wavering state and global governance strategies pushes the reader to consider the parameters of the ecosystems in which we are operating. That is, in thinking about how to define the value of an ecosystem service, we need to have some idea about how systems work. Moreover, we need to consider how our rapidly evolving understanding of systemic limits should influence future efforts to define not only market values but also goals and strategies for keeping us within our planetary boundaries.

The concept of planetary boundaries forms a central feature of the first free-standing article in this issue. In their article, 'International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements', Rakhyun Kim and Klaus Bosselmann offer a thought-provoking critique of the perceived absence of a *grundnorm* for international environmental law.[9] Employing an environmental law methodology premised on the idea that law is a control system that can be used to help to achieve ecological stability, Kim and Bosselmann depict international environmental law as a fragmented system lacking internal cohesion. Consequently, the field is characterized by inconsistencies and ineffectiveness, the result of which is continuing patterns of environmental degradation. The authors suggest that humans have become a primary driver of global environmental change and have pushed us into a new geological era, the Anthropocene.

Within the Anthropocene, Kim and Bosselmann assert, the shortcomings of international environmental law become clearer and more urgent. As human influence on the environment becomes more pervasive, so too does the need for a coherent and effective system of international environmental law. Yet, the absence of a unifying goal

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6 N. 2 above, at p. 214.

7 N. 11 below.

8 N. 18 below.

9 R.E. Kim & K. Bosselmann, 'International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements' (2013) 2(2) *Transnational Environmental Law*, pp. 285–309.

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condemns international environmental law to a life of incoherence and ineffectiveness. In order to breathe life into a faltering system, Kim and Bosselmann suggest that we must define an ultimate purpose for international environmental law and that that ultimate purpose must be to protect 'the biophysical preconditions that are essential for long-term sustainable development'.[10]

In calling for recognition of a new *grundnorm* premised on the notion of planetary boundaries, Kim and Bosselmann offer an insightful overview of the development of the concept of planetary boundaries. They then take this concept – with its roots in the physical sciences – and suggest how it can offer a unifying objective for international environmental law. Protecting and restoring planetary boundaries offers a strong candidate for a unifying norm for international environmental law, the authors argue, because it allows us, firstly, to conceptualize the limits of the Earth's life-support system and, secondly, to centre environmental governance systems around the necessity of staying within those limits. Ultimately, Kim and Bosselmann suggest that recognizing the need to protect and restore global ecological integrity as the *grundnorm* of international environmental law would create a normative hierarchy within the field, which would enhance legitimacy, cohesion, and effectiveness.

In an issue predominantly focused on the emergence of transnational environmental networks, the article by Kim and Bosselmann reminds us of the importance of maintaining a strong system of international environmental law at the centre of these emerging governance systems. Equally, it reveals the degree to which international environmental law is losing traction in a world characterized by rapid processes of global environmental change. Amidst this change, this contribution highlights the importance of critically analyzing the tools we have at our disposal to strengthen the core systems.

The state of global affairs also features large in the second article, contributed by Benjamin Richardson. In his piece 'Socially Responsible Investing for Sustainability: Overcoming Its Incomplete and Conflicting Rationales', [11] Richardson uses the global financial crisis as a frame of reference for exploring the burgeoning interest in socially responsible investment (SRI). His departure point is that while SRI offers a mechanism for 'disciplining financial markets',[12] its potential value as a tool for promoting sustainability is constrained by unproductive rationales that bring SRI into conflict with fiduciary law.

Richardson meticulously examines existing rationales for SRI to demonstrate how they are, at best, partial rationales and, at worst, impediments to the growth of SRI. Existing perspectives, he suggests, are limited in a number of ways, ranging from their inability to identify and capture environmental externalities to their failure to provide useable frameworks for making investment decisions. As a result of these failures, not only does SRI lose ground as a valuable concept, but also it is brought into direct

[10] Ibid., at p. 288.

[11] B.J. Richardson, 'Socially Responsible Investing for Sustainability: Overcoming Its Incomplete and Conflicting Rationales' (2013) 2(2) *Transnational Environmental Law*, pp. 311–38.

[12] Ibid., at p. 311.

collision with fiduciary law. This collision makes SRI vulnerable. In order to breathe life into SRI and to allow it to function as a more effective transnational governance mechanism, Richardson offers an alternative rationale for SRI and a set of recommended revisions for fiduciary law.

Richardson's alternative rationale focuses on the need to 'more cogently articulate the symbiotic relationship between the sustainability of the economy and those who invest in it'.[13] The emphasis, thus, is on the value of sustainability and finding ways to modify investor thinking in order to understand the long-term value of protecting and promoting sustainability. To be successful, however, this rationale requires a parallel set of updates to fiduciary law founded on the notion of prudent investing.

Richardson's piece depicts the complexities of harnessing market forces to further environmental protection and offers critical insight into the complex interplay between emerging systems of transnational governance and existing systems of state-based law.

Moving from SRI to transnational environmental crime, Julie Ayling's article, 'Harnessing Third Parties for Transnational Environmental Crime Prevention',[14] takes up the question of how to combat illegal trade in wildlife. Taking as its starting point that law enforcement fails to offer adequate tools for preventing transnational environmental crime (TEC), Ayling draws upon policing studies, criminology and regulatory studies to suggest a whole-of-society approach to preventing TEC. A whole-of-society approach (that is, one wherein state and non-state actors work together) offers a conceptual framework for thinking through ways to harness diverse resources to address a problem where traditional governance responses have failed.

A core focus of much transnational environmental law scholarship is the interplay between state and non-state actors in managing environmental resources. In the context of TEC, the role of non-state actors has long been recognized. Ayling's contribution acknowledges this interplay and the long-standing role of non-state actors, but then pushes the analysis forward by offering a more systematic approach to categorizing and harnessing the capacity of non-state actors. Drawing on routine activity theory, Ayling suggests that third party actors can play the role of the '"handlers" of potential offenders, "guardians" of likely victims and "place managers" or supervisors of crime settings'.[15]

After offering a framework for identifying third party actors, Ayling turns to the issue of coordination – a common theme in scholarship exploring the effectiveness of transnational governance systems. In her contribution, Ayling emphasizes that the proliferation of multiple unconnected actions to achieve an environmental objective – here preventing TEC – creates risks and inefficiencies that can be at least partially alleviated through the involvement of the state. A key step in maximizing transnational efforts, Ayling suggests, is rethinking the coordinating role that the state can play in

[13] Ibid., at p. 332.

[14] J. Ayling, 'Harnessing Third Parties for Transnational Environmental Crime Prevention' (2013) 2(2) *Transnational Environmental Law*, pp. 339–62.

[15] Ibid., at p. 342.

relation to non-state actors and efforts. In key part, Ayling offers a critical analysis of the way in which the state can interact with non-state actors to '"responsibilize" third parties and encourage or command them to be vigilant in their roles'[16] as players in efforts to combat TEC.

Ultimately, Ayling's contribution highlights the ad hoc way in which alternative environmental governance systems are emerging and, in the context of TEC, argues that 'now is the time for states to extend [their] regulatory reach by harnessing third party capacities'.[17]

The final contribution to this issue, 'Laws in Progress? Reconceptualizing Accountability Strategies in the Era of Framework Norms',[18] by Emilia Korkea-aho, offers a sobering account of the ways in which framework norms are operationalized in the EU. Using the EU Chemicals Regulation REACH[19] as her context, Korkea-aho examines how the proliferation of framework norms, or 'laws in progress', has spawned the development of new networks that engage in the rule-making processes that not only operationalize but also, at times, transform the framework norm. Growing reliance on network-based rule-making, Korkea-aho suggests, creates new accountability challenges, particularly for the judiciary.

Korkea-aho begins her article by depicting the ways in which framework norms create new governance challenges. Using REACH, Korkea-aho shows that, even though REACH takes the form of a Regulation, in fact it creates a framework system that requires interpretation and operationalization through subsequent actions. This gives rise to a series of questions, including:

- Who should be given the authority to interpret the Regulation?
- What type of oversight should these actors be subject to?
- What level of public participation and transparency is needed during the interpretive process?
- What is the effect of this interpretation?
- How do subsequent interpretations of the Regulation influence judicial review?

Ultimately, Korkea-aho seeks to demonstrate the importance of networks in EU law and argues that 'contrary to what might be assumed from the limited research in this area, network accountability is not a marginal problem'.[20]

Korkea-aho's specific case study centres on the interpretation of a provision of REACH that created controversy following a high-profile disagreement over its meaning between a handful of EU Member States and the Commission. To frame her

16 Ibid., at p. 349.

17 Ibid., at p. 362.

18 E. Korkea-aho, 'Laws in Progress? Reconceptualizing Accountability Strategies in the Era of Framework Norms' (2013) 2(2) *Transnational Environmental Law*, pp. 363–85.

19 Regulation (EC) No. 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European ECHA, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L 396/1.

20 N. 18 above, at p. 364.

case study, Korkea-aho examines the bodies that REACH creates and designates as responsible for developing interpretive guidance. Her analysis of the ways in which framework norms are interpreted raises fundamental questions about the transparency of the process, the accessibility of the process to public participation, and the effect of the process on subsequent efforts to implement and enforce provisions of the Regulation. While Korkea-aho focuses on how rule-making by networks creates new challenges for the judiciary, the depth of her analysis of the REACH process raises numerous procedural questions that will, no doubt, give rise to subsequent inquiries, especially in relation to the central role played by the Commission during the guidance process.

Korkea-aho's article demonstrates that rule-making by networks has become a core part of the EU governance system. As a result, the judiciary must find ways both to utilize the information that the networks produce and to hold these networks accountable. She argues, however, that despite open questions concerning the process by which networks operate, there are opportunities to use not only the judiciary but also the guidance process itself to ensure self-regulation and internal accountability within the networks. Her article offers a critical review of how accountability issues arise both within and beyond state systems and how modern systems of environmental lawmaking in the EU sit on the boundary between traditional and transnational systems of governance.

The set of articles in this issue offers insight into emerging challenges at every level of governance. The range of topics covered reveals the scope of the challenges facing environmental lawyers and scholars of environmental law. And, yet, the overlap and commonalities between the governance challenges offer a wealth of opportunities for cooperative thinking and action.

As Editors of *TEL*, we hope that these articles will encourage critical thought about the future of systems of transnational environmental law. We look forward to continuing this essential conversation in our next issue.

As *TEL* nears its second anniversary, its Editors and publisher remain ever committed to offering innovative features and exciting new content to our readership. In this context, we now frequently invite our authors to write online follow-up pieces on the *TEL* and Cambridge University Press blogs, to update readers on important developments that have taken place since the publication of their articles in *TEL*. In May 2013, Arie Trouwborst, Richard Caddell and Ed Couzens published the blog, 'Habeas Porpoise: The Strange Case of Morgan the Orca', on the latest judicial appeals regarding the (legal) fate of this rescued whale subsequently retained in captivity,[21] updating their article in *TEL* issue 2(1).[22] In July 2013, Dirk Heyen blogged 'REACH Hardly Reaching into US Chemicals Regulation Reform',[23] following up on the latest US political

[21] Available online at: http://blog.journals.cambridge.org/2013/04/habeas-porpoise-the-strange-case-of-morgan-the-orca.

[22] A. Trouwborst, R. Caddell & E. Couzens, 'To Free or Not to Free? State Obligations and the Rescue and Release of Marine Mammals: A Case Study of "Morgan the Orca"' (2013) 2(1) *Transnational Environmental Law*, pp. 117–44.

[23] Available online at: http://blog.journals.cambridge.org/2013/07/reach-hardly-reaching-into-us-chemicals-regulation-reform.

developments since the publication of his recent article in TEL issue 2(1).[24] Further innovations and new features will be introduced with the coming issues.

TEL is also increasingly active in the online realm, where we are pleased to find a growing following on Twitter,[25] Facebook[26] and now also LinkedIn.[27] We warmly encourage our readers to join us in cyberspace to receive up-to-date notices and to become part of the burgeoning online conversation on the future of (transnational) environmental law and governance.

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24 D.A. Heyen, 'Influence of the EU Chemicals Regulation on the US Policy Reform Debate: Is a "California Effect" within REACH?' (2013) 2(1) *Transnational Environmental Law*, pp. 95–115.

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