

EDITORIAL

We are delighted to launch the second volume of *Transnational Environmental Law* (*TEL*) with a rich collection of pieces embodying a wide range of topics and methodological approaches. While the contributions focus upon specific topics, they also speak more broadly to issues that are pervasive in transnational environmental law: mutual influence between legal systems, multi-level integration, regime fragmentation and overlap, and the breaking down of traditional hierarchies as governance frameworks evolve against a backdrop of uncertainty, contestation and unpredictable change.

In addition to a collection of free-standing articles, this issue of *TEL* offers a new feature: within its covers, readers will find three articles that form part of a mini-symposium on ‘Global Environmental Risk Governance under Conditions of Scientific Uncertainty’. The symposium is introduced by Oren Perez and Reut Snir, the organizers of the conference from which the contributions were drawn, and showcases cutting edge research on the interaction between law and science in a transnational context.

Further new developments are taking place in the digital world: *TEL* is now a proud and active member of the Twitter and Facebook communities. 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.

Returning now to the free-standing contributions in this issue, Dirk Heyen’s article examines the impact of the European Union’s (EU) chemicals regulation (REACH)¹ in the United States (US).² He focuses upon an issue that has been somewhat neglected to date, namely, the response of US industry to the EU’s new, ambitious chemicals regime. Heyen uses David Vogel’s concept of a ‘California Effect’ to explore the US industry response.

Heyen’s contribution demonstrates that certain segments of the US chemicals industry have been profoundly influenced by REACH, even in respect of chemicals that are not destined for the EU market. He points out that Dow Chemicals, which is the

¹ Regulation (EC) No. 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) [2006] OJ L396/1.

² 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.

largest US chemicals manufacturer and which sells over one third of its products on the EU market, has made a commitment to gather REACH data for all chemicals that it produces and to pass this data on to downstream users. Dow's willingness to embrace voluntarily obligations that have their origin in REACH may be indicative of the relatively modest compliance costs currently involved and of the scale of the reputational gains that may be achieved.

Heyen considers that this may be indicative of the fact that REACH compliance costs are not sufficiently high to create a competitive disadvantage for Dow, or that these compliance costs are outweighed by reputational gains.

On the other hand, Heyen shows that REACH has not generated a pure California Effect because US industry has not been spurred by its adoption to lobby for similar legislation in the US.³ The American Chemicals Council has opposed the migration of REACH-like legislation to the US, considering this model to be fundamentally flawed, especially as regards its far-reaching data-gathering obligations. Heyen accepts that this might be explained on ideological grounds with the regulatory model embodied in REACH being considered to be too precautionary or too intrusive. However, he seems to favour a more market-driven explanation for the absence of a California Effect. Put simply, Heyen suggests that the 'business case' in favour of a US son of REACH is not strong enough. Ultimately, when all is said and done, he concludes that REACH should be regarded as a 'policy irritant' in the US but not as a straightforward model for policy reform.

The article by Arie Trouwborst, Richard Caddell and Ed Couzens has all the makings of a future feature film: a worthy successor to *Free Willy!*⁴ It takes as its subject matter the rescue and rehabilitation of 'Morgan the Orca' by the Dutch authorities and the subsequent transfer of this whale to, and its detention in, a zoological facility on the island of Tenerife (Spain). The authors explore the legal framework relating to the question of whether Morgan ought, as a matter of law, to have been released from captivity or not. Drawing upon almost a dozen international and regional instruments, the authors suggest that the regulatory framework is 'slightly permissive and arguably ambiguous',⁵ and that this regulatory framework is in need of clarification. Nonetheless, they are able to conclude that the detention of Morgan is problematic in view of the Netherlands' international legal obligations and its obligations under EU law. At the very least, the Netherlands appears to have failed in its obligation to make 'clear efforts' to return the mammal to sea, even in circumstances when its prospects for survival may have been slim.⁶

³ In Anu Bradford's language, the shifting behaviour of Dow would be viewed as evidence of a *de facto* 'Brussels Effect'. See A. Bradford, 'The Brussels Effect' (2013) 107(1) *Northwestern University Law Review*, pp. 1–67.

⁴ 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. 117–144.

⁵ *Ibid.*, at p. 143.

⁶ *Ibid.*, at p. 144.

Among the many fascinating issues highlighted by the authors of this piece is the role played by the courts. In an action brought by the Orca Coalition, an alliance of non-governmental organizations (NGOs), the Dutch courts were split. In a first interim judgment, the Dutch courts provisionally blocked the transfer of Morgan to Tenerife, attaching great significance to both considerations of international law and to the opinions of experts received. However, a second judgment authorized Morgan's transfer and paid 'scant attention' to international legal instruments and to the viewpoint of the majority of the experts consulted, who considered that Morgan should be released. Interestingly, since the online publication of this article, the Free Morgan Foundation has lodged an appeal against the Amsterdam Court's decision which refused to quash the transfer permit. The authors look forward to keeping you posted online at *TEL*'s website on further chapters in the Morgan saga.⁷

The authors also highlight recent litigation that is not well known outside the US. In an action before the US District Court for the Southern District of California, 'five orca claimants, suing in their own name' (represented by People for the Ethical Treatment of Animals, aka PETA) sought a Declaration that the mammals were being held in captivity in violation of the 13th Amendment to the US Constitution prohibiting slavery and involuntary servitude. While the Court dismissed the case, considering that the 13th Amendment applies only in respect of humans, the authors point out that the case serves as a reminder that 'as our understanding of the emotional and other intelligence and of the social relationships of marine mammals increases, concomitant public pressure will be applied to authorities to secure improvements in their care, if not their liberty'.⁸ It is also a reminder of the symbolic role of law and litigation, a role that is bound to become all the more prominent in a transnational context, characterized by a thinner political sphere and the relative weakness of effective enforcement and compensation mechanisms.

In his article, Till Markus⁹ focuses upon the EU's Maritime Strategy Framework Directive.¹⁰ Adopted in 2008, this Directive requires EU Member States to take the necessary measures to achieve or maintain good environmental status in the marine environment by the year 2020, at the latest. In this, it mirrors the EU's Water Framework Directive, adopted over a decade earlier.¹¹ Markus' article provides a crash course in EU environmental governance, painting a picture in which the EU provides 'a temporal, procedural and substantive framework' for Member State decision-making.¹² He highlights the role that is played by framework directives in EU law and

⁷ Online updates will be available at: <http://journals.cambridge.org/TEL>.

⁸ *Ibid.*, at pp. 141–3.

⁹ T. Markus, 'Changing the Base: Legal Implications of Scientific Criteria and Methodological Standards on what Constitutes Good Marine Environmental Status' (2013) 2(1) *Transnational Environmental Law*, pp. 145–65.

¹⁰ Directive 2008/56/EC establishing a Framework for Community Action in the Field of Marine Environmental Policy [2008] OJ L 164/19.

¹¹ Directive 2000/60/EC establishing a Framework for Community Action in the Field of Water Policy [2000] OJ L 327/1.

¹² N. 9 above, at p. 149.

the importance of the institutional framework for defining how the open-ended objectives laid down in these should be understood and achieved.

Markus examines in detail a recent Commission Decision implementing the EU's Maritime Strategy Framework Directive.¹³ He argues that this Decision – concerning Criteria and Methodological Standards on Good Environmental Status of Marine Waters – has 'enormous social and political consequences' and that it is much more consequential than the standard language of 'implementation' suggests.¹⁴ He argues that this Commission Decision serves to alter values with respect to the marine environment and that, contrary to traditional understandings of hierarchies in EU law, it may be expected that this Decision will influence future primary legislation as well. He suggests that the criteria and methodological standards laid down by the Commission, including the 'blind spots' inherent in this Decision, will 'condition our understanding and modes of thought as well as our knowledge about the environment and, eventually, our approach to environmental law'.¹⁵

Given the political underpinnings and salience of the criteria and methodological standards elaborated in the Commission's Decision, Markus stresses the importance of the institutional framework for arriving at these. Markus is positive in his assessment of many aspects of the decision-making processes involved, and he also highlights the Commission's commitment to iterative decision-making as new knowledge and better understanding unfold. Markus offers a fascinating insight into the range of actors involved in the adoption of this seemingly technical Decision, concluding that 'considerations of acceptability and representativeness did play a role'.¹⁶ Nonetheless, Markus concludes that room for improvement remains. He argues that (i) the Commission should consider making its criteria for the appointment of experts more transparent, and (ii) that the various documents relied upon by decision-makers should be made publicly available with a view to facilitating participation and to ensuring that the value judgments upon which decisions such as this are based are more clearly revealed.

Aline Jaeckel takes as her starting point the fact that the Preamble to the Convention on Biological Diversity (CBD)¹⁷ states that the conservation of biological diversity is a 'common concern of humankind'.¹⁸ Using the interpretative methods laid down in the Vienna Convention on the Law of Treaties (VCLT),¹⁹ she argues that the concept of the common concern of humankind has important implications for managing tensions within and between different treaty regimes. Jaeckel locates her analysis within the framework of general international law, which increasingly

¹³ European Commission Decision 477/2010/EU on Criteria and Methodological Standards on Good Environmental Status of Marine Waters [2010] OJ L 232/14.

¹⁴ N. 9 above, at p. 147.

¹⁵ *Ibid.*, at p. 153.

¹⁶ *Ibid.*, at p. 163.

¹⁷ Rio de Janeiro (Brazil), 5 June 1992, in force 29 Dec. 1993, available at: <http://www.cbd.int/convention/text>.

¹⁸ A. Jaeckel, 'Intellectual Property Rights and the Conservation of Plant Biodiversity as a Common Concern of Humankind' (2013) 2(1) *Transnational Environmental Law*, pp. 167–89.

¹⁹ Vienna (Austria), 23 May 1969, in force 27 Jan. 1980, available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

recognizes the need to redefine sovereignty in a way that allows for common challenges, such as the conservation of biodiversity, to be addressed.

The focus of Jaeckel's analysis is on the World Trade Organization's (WTO) Trade-Related Agreement on Intellectual Property Rights (TRIPS),²⁰ an agreement that she regards as concerned principally with the privatization, through the granting of patents, of plant biodiversity and as providing only limited discretion for states. Despite the existence of various exceptions in TRIPS, she concludes that tension between this Agreement and the conservation of plant biodiversity remains. Jaeckel makes a doctrinal, contextual, and normative case for using the concept of common concern of humankind to limit the availability of intellectual property protection when this is necessary to serve the public interest by contributing to the preservation of plant biodiversity. While Jaeckel argues that the exceptions in TRIPS are currently excessively constrained, she points out that there is room within TRIPS for public interest objectives to be taken into account with the Preamble, for example, stressing the need to balance the availability of private rights and public interest objectives for the benefit of humankind.

Jaeckel concludes her analysis by pointing out that state sovereignty, including its emphasis upon sovereignty over natural resources, was conceived to serve humanitarian ends. She argues that the time is now ripe for state sovereignty to be reconceived in a way that permits it to ensure that the common concerns of humankind are better addressed. The concept of the common concern of humankind – conceived as a fully fledged legal principle, possibly giving rise to obligations of an *erga omnes* nature and combined with the precautionary principle – can, Jaeckel argues, contribute to achieving this goal in a positive way.²¹

The mini-symposium included in this issue, on 'Global Environmental Risk Governance under Conditions of Scientific Uncertainty', has its origins in a workshop convened at Bar Ilan University (Israel) from 2 to 3 May 2012. The three articles by Timothy Meyer,²² Adi Ayal, Ronen Hareuveny and Oren Perez,²³ and Reut Snir,²⁴ are ably introduced by the symposium conveners, Oren Perez and Reut Snir.²⁵ For details on each contribution and their interconnections we refer to the symposium foreword, which follows this Editorial. Taken together, the mini-symposium contributions tackle the theme of the production of knowledge in 'risk disputes' and address many of the dilemmas that were central in leading to the establishment of *TEL*. Perez and Snir

²⁰ Marrakesh (Morocco), 15 Apr. 1994, in force 1 Jan. 1995, available at: http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

²¹ N. 18 above, at p. 189.

²² T. Meyer, 'Epistemic Institutions and Epistemic Cooperation in International Environmental Governance' (2013) 2(1) *Transnational Environmental Law*, pp. 15–44.

²³ A. Ayal, R. Hareuveny & O. Perez, 'Science, Politics and Transnational Regulation: Regulatory Scientific Institutions and the Dilemmas of Hybrid Authority' (2013) 2(1) *Transnational Environmental Law*, pp. 45–68.

²⁴ R. Snir, 'Governance by Disclosure: Transnational Convergence in the Field of Nanotechnology' (2013) 2(1) *Transnational Environmental Law*, pp. 69–94.

²⁵ O. Perez & R. Snir, 'Symposium Foreword: Global Environmental Risk Governance under Conditions of Scientific Uncertainty: Legal, Political and Social Transformations' (2013) 2(1) *Transnational Environmental Law*, pp. 7–13.

capture this well when they talk of a ‘continuing struggle over epistemic authority’ and when they problematize and explore the relationship between science and law.²⁶ The articles included in the mini-symposium effectively exemplify the mission of *TEL*. They are critical in orientation, inter-disciplinary in approach, geographically diverse, empirically grounded and theoretically engaged.

We hope to continue to include mini- and even grand-symposia of this kind in future issues of *TEL*, and relevant proposals are welcomed by the Editors-in-Chief. Needless to say, any contributions to such symposia are subject to the same strict quality control as all other *TEL* contributions, with independent, double-blind peer review being an invariable prerequisite for publication.

As Editors of *TEL*, we have been delighted by the high quality of the contributions we have received in *TEL*’s first year in existence. We look forward in the future to continuing to publish articles of outstanding quality on transnational environmental issues of importance to developed countries and/or to the Global South, and to continue to establish *TEL*’s status as the home for the ever growing intellectual debate on transnational environmental law.

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²⁶ *Ibid.*, at p. 7.