Editorial

*Was aber helfen die edelsten Rechte dem, der sie nicht handhaben kann?
(But what do the noblest rights help him who cannot grasp them?)*

*Jacob Grimm (1785-1863)
German Linguist and Writer*

Climate policy is based on the limitation of greenhouse gas (GHG) emissions. Such limitations can be formulated as absolute quantitative targets or as targets relative to variables, such as emissions per unit of gross domestic product, reductions compared to business-as-usual trajectories, a sector's or country's expected economic growth, etc. They can be mandatory or voluntary. When they are mandatory (ie binding by law) they imply a regulation of the air and the atmosphere and with it a limitation of access to a formerly free 'commons'. Regulation can take the form of a command-and-control standard, which prescribes the use of an emission reducing technology combined with upper emission limits, or it can take the form of an incentive-based market instrument that allows the transaction of emission rights.

Under international law, the Kyoto Protocol has provided an example for an instrument that combines absolute, quantitative, mandatory targets with market-based elements of emissions trading; whereas, the recently adopted Paris Agreement favours a voluntary, non-binding approach, while also allowing for a variety of emissions trading formats (including a non-market instrument).

Analogous to international instruments, national and local climate policy instruments also depend on regulating GHG emissions, which are often combined with the right to transact allocated emission rights in the context of complex emission trading systems. These rely on the quantification of emissions, the calculation of emission reductions, and the attribution of either of the two to public or private entities. The Kyoto Protocol and the European Emissions Allowance Trading Scheme showed that emissions trading can also be used across climate policy regimes, linking an international emissions trading instrument with a national (or supra-national) one while creating a hybrid market of tens of thousands of participants.

Ever since the adoption of the first emission trading systems in the last decade of the 20th century, legal scholars have debated over the nature, legal context and limitations of rights to emit.¹ With the increasing complexity of climate policy instruments, different types of such rights proliferated. There are international allocations of GHG quotas to nations and individuals, which belong in the realm of public international law and the realm of domestic law, respectively. There are also hybrid systems: rights associated with emission reductions measured against reference scenarios, which are created at the interface of national public administrative law, national private contract law, and – sometimes – public international law. Each of these trade instruments and formats comes with underlying legal questions of who is legally obliged to reduce emissions and to what degree. At the opposite side of the spectrum, is the discussion of who has the right to benefit from

¹ Robert W Hahn and Gordon L Hester, 'Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program' (1989) 6 Yale Journal on Regulation 109, 142- 43.

payments for emission reductions. The different concepts are debated, more often than not, by drawing more on arguments of economic or social justice than on actual legal rights. When the management of global commons intersects with private property rights, proponents of market-based solutions often clash with those that assign a more managerial role to the State.

Next to the debate over the extent of assigned legal rights, stands the question whether those owning, controlling or simply inhabiting carbon-rich ecosystems are bestowed a natural right to be rewarded for 'ecosystem services' delivered – such as land-based GHG emission removals or emission reductions. Indeed, a guardian right for ecosystems is often discussed in relation to indigenous and forest-dependent peoples as a notion that transcends domestic legal concepts; however, its impact on, or correlation with, climate policy tools – such as emissions trading – remains little understood.

The discussion of what sort of rights, both in policy and law, are associated with climate services stands at the centre of this Special Issue. The compiled articles seek to shed light on the different aspects of emission allowances under compliance markets, verified emission reductions under voluntary markets, and land- and forest-based carbon rights. With this Special Issue we hope to fill a gap in legal literature and further understand the nature and functions of the differing rights to pollute, offset, create and trade with allowances or emission reductions. We aim to go beyond the ambiguous terminology of 'carbon rights' and the often narrow discussions of specific legal or financial emissions trading instruments.

The contributed articles span a range of legal questions associated with rights created through the design and the implementation of climate law instruments. To set the stage, our introductory paper 'Creating, Regulating and Allocating Rights to Offset and Pollute: Carbon Rights in Practice' seeks to dissect the concept of carbon rights in the context of climate policy and law and to distinguish different forms of active and passive rights. We argue for a clear definition of carbon units – allowances and credits, issued against a baseline – in the context of market-based trading systems, while tracing the legal ramifications of introducing emissions trading at the individual level. Evolved emissions trading schemes require not just market stability, but legal stability, which includes the recognition of property rights, the regulator's respect for legitimate expectations and general legal protection (including fair compensation when due).

Andrew Hedges dedicates his analysis to the question of property rights of allocated carbon units. In his article 'Carbon Units as Property: Guidance from Analogous Common Law Cases', Hedges draws on cases decided in common law courts on rights regarding milk quotas, fishing licenses, exploration permits, textile export quotas, renewable energy certificates and – of course – EU emission allowances. He describes the tension resulting from the need of regulators to adjust the reach and context of such rights and the interest of the holder of the unit to eliminate embedded regulatory risk.

The contributions of *Thiago Chagas*, *Martijn Wilder* and *Arjuna Dipley* dive deep into the analysis of national legislation. *Wilder* and *Dipley* describe in their article 'Forest Carbon Rights: Lessons Learned from Australia and New Zealand' the establishment of regulatory frameworks for forest mitigation actions. Based on the lessons learned in these two countries they propose principles to aid policy makers struggling with establishing carbon instruments to successfully achieve their contributions under the Paris Agreement. *Thiago Chagas* analyses the legal concepts framing emission rights in Brazil both in the context of national legislation and with a particular view on leveraging international climate finance. His article 'Legal Aspects of Emission Reductions and Carbon Credits under Evolving Climate Finance Mechanisms in Brazil' provides a detailed analysis of the legal status

of 'emission reductions' in the country with a particular regard for REDD+ and national forest legislation.

Peter Zaman finally evaluates achievements and pitfalls of the EU Emission Trading System (EU ETS) and draws some lessons for future regulators. In 'Learning From The Lessons Of Others: A Guide For Emerging Emissions Trading Markets' he describes the challenges that EU ETS regulators had to overcome in relation to tax fraud, institutional issues and market regulation, among others.

We hope the different articles we have assembled will illuminate the topic at hand and stimulate both future debate and action. When well designed, the allocation of emission rights can serve different functions – to stimulate finance into mitigation projects, to evaluate results-based impact, to provide joint bilateral carbon accounting under the Paris Agreement, to verify under due process and to provide a benefit sharing for local communities and indigenous peoples, to name but a few. Moreover, carbon pricing instruments have shown, albeit not consistently, that they can deliver on these roles in an effective and efficient manner. If our Special Edition assists with rethinking and sharpening the understanding of what triggers the appropriate legal design of any emissions trading scheme, it may prove – to paraphrase Grimm – both helpful and noble.

Charlotte Streck and Moritz von Unger
Guest Editors

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