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978-1-107-01942-3 - Environmental Discourses in Public and International Law

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## Introduction

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### Using discourse theory to untangle public and international environmental law

BRAD JESSUP AND KIM RUBENSTEIN

#### 1. Introduction

The world is talking, pondering and strategising about the environment. Ever more of the environment has been identified, publicly contemplated, or designated for despoliation and resource extraction. Remote and 'wild' places like the rugged Australian Kimberley and the far reaches of North America are now subject to advanced plans for fossil fuel extraction. Environmental disasters, including fires, floods, cyclones, earthquakes and tsunamis, and schemes to alleviate or prevent future human suffering from catastrophe, have occupied governmental and organisational attention. Meanwhile, concerns about environmental degradation, and in particular human-induced climate change, dominate Western media<sup>1</sup> and national and international politics,<sup>2</sup> and are connecting communities through conversation and localised action.<sup>3</sup> The nature, breadth and extent of global responses to climate change

<sup>1</sup> Indeed, the reporting of climate change in the media has become a subject of scholarly inquiry. See, e.g., *Yale Forum on Climate Change & the Media*, [www.yaleclimatemediainquiry.org](http://www.yaleclimatemediainquiry.org) (2010) last accessed 22 November 2010.

<sup>2</sup> As well as remaining politically troublesome in the national context (for example, in New Zealand, United States, Canada) climate change remains on the agenda of the G20, and the Group of 8, among other general political fora. See Parliament of Australia, Department of Parliamentary Services, Parliamentary Library, *Background Note: Climate Change Discussions and Negotiations: A Calendar*, 17 July 2009.

<sup>3</sup> See, e.g., Brad Jessup, 'Plural and Hybrid Environmental Values: A Discourse Analysis of the Wind Energy Conflict in Australia and the United Kingdom' (2010) 19 *Environmental Politics* 21. Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press, 2nd edn, 2003) also notes that many grassroots community groups are connected through international networks.

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are also points of contention between the developing and developed worlds.<sup>4</sup>

The discussion, arguments and posturing about the environment have sometimes led to the development of laws or legal institutions to mitigate environmental harm at the international, national or sub-national levels. Pollution control legislation, environmental assessment laws and land reservation laws have spread across public legal systems, particularly since the late 1960s. At the same time, the international community has recognised its responsibility to manage the global environment and has agreed to regulate parts of the environment, especially the atmosphere, oceans, heritage and biological diversity. As environmental economists have become more involved in environmental debates, the world also now aims to protect the environment through ecological commodification.<sup>5</sup>

Whether at the international, national or sub-national level, environmental laws are conventionally understood as based on accepted or agreed legal doctrines and principles<sup>6</sup> or as arising in response to environmental problems.<sup>7</sup> At international law the *Trail Smelter Arbitration*<sup>8</sup> represents the first adaptation of general principles into an environmental context, while the promulgation of the National Environmental Policy Act,<sup>9</sup> creation of the Environmental Protection Agency and the passing of the Clean Air Act in the United States in 1970 are considered an environmental law revolution within the context of a rising global environmental concern.<sup>10</sup> In this regard, the development of environmental laws can be considered an extension of other foundational international and public laws. Across their spectrum, these laws can also be seen as endorsing and implementing theorised environmental

<sup>4</sup> This was evident in the United Nations Framework Convention on Climate Change Conferences of Parties in Bali (COP13) and Copenhagen (COP15). See below Chapter 12 by River Cordes-Holland.

<sup>5</sup> Mark Sagoff, *The Economy of the Earth: Philosophy, Law and the Environment* (Cambridge University Press, 2nd edn, 2008). See also below Chapter 11 by Lee Godden.

<sup>6</sup> See, e.g., Gerard Bates, *Environmental Law in Australia* (Butterworths, Sydney, 1st edn, 1983), which more so than recent editions (for instance, the 6th edn, 2006), particularly emphasises the doctrinal bases for environmental law.

<sup>7</sup> See in particular Richard Lazarus, *The Making of Environmental Law* (University of Chicago Press, 2004), which characterises environmental law as a responsive instrument. Maria Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (Hart Publishing, Oxford and Portland, 2005) also describes the rise of EU environmental law as reacting to social and environmental experiences in the lead-up to the 1970s.

<sup>8</sup> (1938 and 1941) 3 UN Rep. Int. Arb. Awards. <sup>9</sup> 42 USC 4321.

<sup>10</sup> Lazarus, above n. 7.

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principles like polluter pays, the precautionary principle and sustainable development. Additionally, environmental laws can be analysed as responding to concerns including atmospheric pollution, biodiversity loss and land degradation. Insofar as environmental laws are perceived as adoptive or responsive, the conventional view is that international law provides guidance, direction and initiative,<sup>11</sup> while responsibility for the implementation of laws is consigned to national governments.<sup>12</sup> As Hunter *et al.* argue, ‘international environmental law depends for its effectiveness on proper implementation and enforcement at the national level’.<sup>13</sup>

This book, the third in a series connecting public and international law,<sup>14</sup> offers different views about the development and application of environmental laws on two important fronts. First, the chapters in this book position the development of environmental laws as being more complex than a conventional linear, principled or responsive approach. Just as environmental problems can be dynamic and environmental changes appear sudden,<sup>15</sup> laws can be, and often presently are, much more difficult to design and effect in the typically conflicted setting within which they are devised.<sup>16</sup> This is not a novel contribution. Ruhl has argued this point forcefully, critiquing the reducible, linear and predictable treatment of the environment by conventional law, and providing a complex adaptive system analysis to the law.<sup>17</sup> Nevertheless, although there have been efforts to deal with scientific

<sup>11</sup> As noted by Douglas Fisher, *Australian Environmental Law* (Lawbook Co., Sydney, 1st edn, 2003) the judiciary in particular perceive of international law in this way.

<sup>12</sup> Sands, above n. 3, 175 onwards.

<sup>13</sup> David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, New York, 2nd edn, 2002) 469.

<sup>14</sup> The first two volumes are Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press, 2009) and Thomas Pogge, Matthew Rimmer and Kim Rubenstein (eds.), *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010).

<sup>15</sup> Hunter *et al.*, above n. 13, 23–4. Similarly there has been much scholarly discussion of environmental problems being ‘wicked’ following Horst Rittel and Melvin Webber, ‘Dilemmas in a General Theory of Planning’ (1973) 4 *Policy Sciences* 155.

<sup>16</sup> Dave Owen, ‘Law, Environmental Dynamism, Reliability: The Rise and Fall of CALFED’ (2007) *Environmental Law* 1145 illustrates this point using California’s water laws as a case study.

<sup>17</sup> J. B. Ruhl, ‘Thinking of Environmental Law as a Complex Adaptive System: How to Clean Up the Environment by Making a Mess of Environmental Law’ (1997) 4 *Houston Law Review* 101.

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uncertainty in law-making,<sup>18</sup> environmental laws are yet to shift. Invariably, when law-makers and administrators confront environmental complexity, law-making and environmental decision-making become problematic or compromised. This has been particularly evident in domestic efforts for carbon trading laws and in international negotiations over greenhouse gas emissions reduction targets, and can be seen in the legal efforts at biodiversity conservation. For example, the law has not been able to develop beyond the simple approach of species protection and habitat reservation to redress biodiversity loss.<sup>19</sup>

It is in this changeable and discordant setting that environmental discourses contribute to legal responses or present legal opportunities or obstacles. A discourse<sup>20</sup> is 'a shared way of apprehending the world. Embedded in language, it enables those who subscribe to it to interpret bits of information and put them together into coherent stories or accounts'.<sup>21</sup> This book argues that legal-policy decisions are not only driven by scientific discoveries, a new appreciation of theories or principles, the adaptation of legal doctrine, or an overwhelming concern about responding to impending disaster. Rather, especially when environmental problems have no simple solutions, environmental decisions may be made based on shared understandings of the problem or solutions, or motivated by dominant perceptions or interpretations of the law and the environment or influenced by coalitions who coalesce around a particular environmental discourse. While the concept of environmental discourses is more familiar to political scientists than lawyers, it resonates within the public and international law sphere – where legal outcomes are usually drawn from or amount to policy. As Blomley, a geographer and lawyer, articulates, the law has an instrumental or policy nature as well as an ideological or moral imperative.<sup>22</sup>

In this collection each chapter reflects on a story, interpretation or understanding of the environment, and these accounts are analysed as important influences on legal change or resistance to change. For instance, the way communities of nations, advocates, politicians and

<sup>18</sup> Dan Tarlock, 'The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law' (1994) 27 *Loyola of Los Angeles Law Review* 1121.

<sup>19</sup> This is argued by Ruhl, above n. 17.

<sup>20</sup> As explained further below in section 2 of this introductory chapter.

<sup>21</sup> John Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford University Press, 1st edn, 1997) 8.

<sup>22</sup> Nicholas Blomley, 'Law and the Local State: Enforcement in Action' (1988) 13(2) *Transactions of the Institute of British Geographers* 199, 202.

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individuals rationalise the need for a response or reform, or insist upon the maintenance of the status quo, and their success in realising their collective intention is relevant to the contributors' thinking.

The second viewpoint offered by this book, and the series of which it is a part, is that international and public laws are more connected and differently connected than conventionally expressed. Again, the starting point to this insight is that laws are often made and interpreted in a dynamic way, rather than always linearly or hierarchically. The relationship between international law and public domestic law is not simply one of searching for meaning or guidance from international law at the domestic level. Although examples of this relationship are given in this book, there are other synergies and connections that are also presented. International climate change negotiations, for instance, are heavily influenced by domestic policy.<sup>23</sup> They have become a game whereby each nation attempts to incorporate as much of their public policy into international decisions as they can. More importantly, some environmental discourses pervade both systems of law. Connecting and analysing the way they play out in each framework illuminates important lessons. The precautionary principle is one long-standing example.<sup>24</sup> Ellis and FitzGerald, for instance, argue that the principle emerged in both international and public law as a result of 'a combination of behaviour and belief over time'<sup>25</sup> expressed within a 'discourse taking place in international and domestic societies'.<sup>26</sup>

Many of the authors advance the Global Administrative Law Project within the frame of environmental discourses. The Global Administrative Law Project<sup>27</sup> has enriched an engagement with the complex ways in which the international and the public intersect, by recording public law

<sup>23</sup> Shardul Agrawala and Steinar Andresen, 'Indispensability and Indefensibility – The United States in the Climate Treaty Negotiations' (1999) 5(4) *Global Governance* 457.

<sup>24</sup> Timothy O'Riordan and James Cameron (eds.), *Interpreting the Precautionary Principle* (Earthscan, London, 1994).

<sup>25</sup> Jaye Ellis and Alison FitzGerald, 'The Precautionary Principle in International Law: Lessons from Fuller's Internal Morality' (2004) 49(3) *McGill Law Journal* 779, 787.

<sup>26</sup> *Ibid.* 794.

<sup>27</sup> See the full website of the Institute for International Law and Justice, New York University School of Law, *Global Administrative Law Project – Background* at [www.iilj.org/GAL/](http://www.iilj.org/GAL/) last accessed 6 December 2010. The website has an extensive bibliography and links to numerous articles, many of which are referred to in the various chapters throughout this book.

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principles within the international arena. Concepts like justice, fairness, due process and transparency are the domain of public laws, with international laws and decision-making now being critiqued against these benchmarks of administrative law.

In contentious environmental matters the importance, and often absence, of principled governance is stark. Added to this, developments in public laws, in particular with respect to interpreting sustainable development, have contributed to new understandings about the purpose and administration of environmental laws. At both levels of law decision-makers have increasingly wider obligations of inquiry. The test of sustainable development is not only an often uncomfortable balancing of competing interests and directions,<sup>28</sup> but as the notion becomes entrenched in the legal systems it is now a mandatory consideration with many facets. In the jurisdiction of New South Wales in Australia sustainable development is now considered a part of the 'public interest' that must be considered in every decision affecting the environment. However, what this means will be open to interpretation and challenge at every instance.<sup>29</sup> Indeed, what is 'public' in 'public international law' and 'domestic public law' requires more analysis and is fleshed out in this book's focus on the issues through environmental discourses.

Further, this book illustrates how public and international law are fundamentally influenced by other disciplines, particularly environmental philosophy, environmental policy, ecological economics and international relations. Theorising about the value of the environment, and in particular of human interest in the environment, has also been responsible for significant shifts in the law, and discourses that oxygenate environmental issues and opportunities have both transcended and linked public and international laws.

<sup>28</sup> William Adams, *Green Development: Environment and Sustainability in the Third World* (Routledge, London and New York, 2nd edn, 2001).

<sup>29</sup> See, e.g., *Minister for Planning v. Walker* (2008) 161 LGERA 423. At para. [56] Hodgson JA, with whom Campbell JA agreed, stated:

I do suggest that the principles of [ecological sustainable development] are likely to come to be seen as so plainly an element of the public interest, in relation to most if not all decisions, that failure to consider them will become strong evidence of failure to consider the public interest and/or to act bona fide in the exercise of powers granted to the Minister, and thus become capable of avoiding decisions.

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## 2. Environmental discourses

An environmental discourse is a 'social construct'<sup>30</sup> reflecting how people interpret, give meaning to and represent the environment. As Dryzek's oft-quoted definition of an environmental discourse discloses,<sup>31</sup> discourses are embedded in language<sup>32</sup> and they provide a rallying point for people who find the interpretation of the environment within the particular discourse persuasive, convenient or satisfying. In this respect, Hajer has noted that the coalitions that subscribe to an environmental discourse do not necessarily share views and motives; rather, the coalitions are made up of a mix of people each with their own beliefs and agenda.<sup>33</sup> The disparate membership of environmental coalitions is made possible by the fact that discourses are usually condensed into simple, succinct and agreeable storylines. These storylines, along with other clichés, metaphors and catch phrases become ritualised, entrenched in the environmental debate and often infiltrate common language.<sup>34</sup> Using language and stories, coalitions engage in a struggle for discursive hegemony,<sup>35</sup> and in doing so the members often pragmatically adjust their interests and views to satisfy a desired outcome.<sup>36</sup>

Dryzek<sup>37</sup> argues that policy decisions about the environment reflect and respond to particular environmental discourses. Others before him had demonstrated that individual policy shifts could be attributed to dominant discourses. Hajer, for example, argued that the policy responses to acid rain in the United Kingdom and Europe were driven by, and shifted as a result in changes to, environmental discourses.<sup>38</sup> Litfin also analysed the negotiations that led to international laws to minimise damage to the ozone

<sup>30</sup> Maarten Hajer, 'Discourse Coalitions and the Institutionalization of Practice: The Case of Acid Rain in Britain' in Frank Fischer and John Forester (eds.), *The Argumentative Turn in Policy Analysis and Planning* (Duke University Press, Durham, NC, 1993) 43, 45.

<sup>31</sup> Dryzek, above n. 21, 8.

<sup>32</sup> René Kemp, 'Why Not in My Backyard? A Radical Interpretation of Public Opposition to the Deep Disposal of Radioactive Waste in the United Kingdom' (1990) 22 *Environment and Planning A* 1239, 1244, uses the phrase 'vocabularies of motive'.

<sup>33</sup> Maarten Hajer, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* (Clarendon Press, Oxford, 1995).

<sup>34</sup> Hajer, above nn. 30 and 33.

<sup>35</sup> Harriet Bulkeley, 'Discourse Coalitions and the Australian Climate Change Network' (2000) 18 *Environment and Planning C: Government and Policy* 727.

<sup>36</sup> Yvonne Rydin, *Conflict, Consensus and Rationality in Environmental Planning: An Institutional Discourse Approach* (Oxford University Press, 2003); Karen Litfin, *Ozone Discourses: Science and Politics in Global Environmental Cooperation* (Columbia University Press, New York, 1994).

<sup>37</sup> Dryzek, above n. 21. <sup>38</sup> Hajer, above n. 33.



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layer through a discursive framework.<sup>39</sup> More recently, Dryzek has suggested that meta-level environmental discourses, including survivalism, problem solving and sustainability have presence and power in the development of international environmental law.<sup>40</sup> This book extends and illustrates Dryzek's overarching contribution with an exposition of micro-level discourses occurring around specific environmental legal policy issues between public and international law.

The definition given to environmental discourses from non-legal disciplines has resonance within environmental law. In the policy-legal arena it is true that 'a shared way of apprehending the world . . . enables those who subscribe to it to interpret bits of information and put them together into coherent stories or accounts'. This is precisely what judges do. Dryzek also argues that '[e]ach discourse rests on assumptions, judgements, and contentions that provide the basic terms for analysis, debates, agreements, and disagreements'.<sup>41</sup> Environmental laws are promulgated dependent on a series of uncertain or arguable foundations, much like environmental discourses are curated. Further, discourses can be seen as occurring and often colouring parliamentary debates and international law fora. The case theories planned and presented by advocates in courts and tribunals make use of discourses, while community groups opposing development often adopt the tactic of devising and faithfully perpetuating a discourse to consolidate their membership into a sometimes unexpected coalition of disparate actors.<sup>42</sup>

### 3. Traversing jurisdiction

Ellis opens her chapter with the words: 'the environment is everywhere'.<sup>43</sup> This is an important foundation to our thinking about the environment's connection to international and public law, and the feature of the discipline of environmental law that connects international and public law. Because the environment is omnipresent, it cannot be easily confined – let alone to a jurisdiction, a state, or a legal system. Given that environmental issues occur across different scales, the environment lends itself well to regulation by both international and national law. Where the activities of all states impact

<sup>39</sup> Litfin, above n. 36.

<sup>40</sup> John Dryzek, 'Paradigms and Discourses' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007).

<sup>41</sup> Dryzek, above n. 21, 8. <sup>42</sup> Hajer, above n. 33.

<sup>43</sup> See below Chapter 5 by Jaye Ellis, 123.



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on the wider environment, international law is the obvious institution to expound a legal plan. Naturally, local environmental concerns are addressed through national and sub-national laws, and as is widely and commonly understood, national laws usually give effect to international legal agreements. However, there no longer exists a neat division of responsibilities between the individual, state and the community of nations. Whereas in the past waste control and disposal were issues for local legal response, in a global world with wastes shipped far from source to disposal, an occurrence publicised by the environmental justice movement, they are now matters requiring international attention.<sup>44</sup> The dynamism of the atmosphere and the oceans has also meant that air and water pollution, the troubles of the 1970s that public lawyers sought to regulate,<sup>45</sup> are now an international dilemma pursued by climate change and ocean commons discourse coalitions and confronted through a series of international agreements.

Australia also purports to use its principal environmental law to protect places of historic interest that are in foreign lands.<sup>46</sup> Jurisdiction is becoming blurred, and in this instance a nationalistic discourse of 'memory'<sup>47</sup> is emboldening a government to transform legal boundaries. While legal principles or doctrines seldom transcend from public law systems in international law, the proliferation of international courts and tribunals<sup>48</sup> provides greater opportunities to introduce national understandings of environmental problems and laws couched in discursive terms. For instance, as highlighted above, arguments led by states about intergenerational equity, sustainable development and justice will necessarily be influenced by the dominant discourses to which they have been exposed.

<sup>44</sup> David Pellow, *Resisting Global Toxics: Transnational Movements for Environmental Justice* (MIT Press, Cambridge, Mass. and London, 2007).

<sup>45</sup> For instance, through the US Clean Water Act, 42 USC § 7401 (1970) and Federal Water Pollution Control Act, 33 USC § 1251 (1972) of the early 1970s. See Lazarus, above n. 7.

<sup>46</sup> Section 27C(1) of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) provides that:

A person is guilty of an offence if:

- (a) the person takes an action; and
- (b) the action is taken outside the Australian jurisdiction; and
- (c) the action results or will result in a significant impact on the environment in a place; and
- (ca) the place is a Commonwealth Heritage place; and
- (d) the place is outside the Australian jurisdiction.

<sup>47</sup> Joan Beaumont, 'Contested Transnational Heritage: The Demolition of Changi Prison, Singapore' (2009) 15 *International Journal of Heritage Studies* 294.

<sup>48</sup> Ellen Hey, *Reflections on an International Environmental Court* (Kluwer Law International, The Hague, 2002).

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Environmental law is also a conduit for the infiltration of public law principles into international law. Upon the birth of environmental law, lawyers recognised that the greatest foe of environmentalists would be the state. Struggles centred on government action, and the discipline of environmental law drew heavily on administrative law.<sup>49</sup> As Sive reflects, in the United States, ‘the earliest group of important cases were essentially judicial reviews of administrative actions, instituted by environmental advocates’.<sup>50</sup> This largely remains the case. Environmental litigation is most commonly between a community of concerned people and a government. Decision-makers and their governments are challenged on the grounds of unfairness, opaqueness and improper process.

Traditionally, public law, and in particular administrative law in the domestic context, is thought of as either ‘the law relating to the control of government power, the main object of which is to protect individual rights’ or slightly differently as ‘rules which are designed to ensure the administration effectively performs the tasks assigned to it. Yet others see the principal objective . . . as ensuring governmental accountability, and fostering participation by interested parties in the decision-making process.’<sup>51</sup> In a global context where national government activity is becoming privatised or directed by international bargaining and organisations, and with legal recognition of human rights and the rise of a global environmental activism and a global ecological citizenry,<sup>52</sup> the application of principles of public law are being reconsidered much along this line.<sup>53</sup> As Hey explains within the context of the discourse of environmental justice:<sup>54</sup>

<sup>49</sup> David Sive, ‘Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law’ (1970) 70 *Columbia Law Review* 612.

<sup>50</sup> David Sive, ‘The Litigation Process in the Development of Environmental Law’ (1995) 13 *Pace Environmental Law Review* 1, 5.

<sup>51</sup> Paul Craig, *Administrative Law* (Sweet & Maxwell, London, 3rd edn, 1994) 3.

<sup>52</sup> Andrew Dobson, *Citizenship and the Environment* (Oxford University Press, 2003).

<sup>53</sup> Alfred Aman Jr, ‘Globalisation, Democracy and the Need for a New Administrative Law’ in Michael Likosky (ed.), *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Publishers, Leiden, 2005) 271. See also articles in the Global Administrative Law Project, such as David Dyzenhaus, ‘The Rule of (Administrative) Law in International Law’ (2005) 68 *Law and Contemporary Problems* 127; Janet McLean, ‘Divergent Legal Conceptions of the State: Implications for Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 167; and Eyal Benvenisti, ‘The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions’ (2005) 68 *Law and Contemporary Problems* 319.

<sup>54</sup> Hey, above n. 48, 14–15.