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

Edited by Brad Jessup and Kim Rubenstein

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## ENVIRONMENTAL DISCOURSES IN PUBLIC AND INTERNATIONAL LAW

This collection of essays examines the development and application of environmental laws and the relationship between public laws and international law. Notions of good governance, transparency and fairness in decision-making are analysed within the area of the law perceived as having the greatest potential to address today's global environmental concerns. International trends, such as free trade and environmental markets, are also observed to be infiltrating national laws.

Together, the essays illustrate the idea that in the context of environmental problems being dynamic and environmental changes appearing sudden, laws become difficult to design and effect. Typically, they are also devised within a conflicted setting. It is in this changeable and discordant context that environmental discourses such as precaution, justice, risk, equity, security, citizenship and markets contribute to legal responses, present legal opportunities or hinder progress.

BRAD JESSUP teaches and researches at the Australian National University across the disciplines of law and geography.

KIM RUBENSTEIN is the Director of the Centre for International and Public Law at the ANU College of Law and the inaugural Convenor of the ANU Gender Institute at the Australian National University, Canberra.

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## CONNECTING INTERNATIONAL LAW WITH PUBLIC LAW

This series of books flows from workshops bringing public and international lawyers and public and international policy-makers together for interdisciplinary discussion on selected topics and themes. It aims to broaden both public and international laws' understanding of how these two areas intersect. Until now, international and public law have mainly overlapped in discussions on how international law is implemented domestically. This series is unique in consciously bringing together public and international lawyers to consider and engage in each other's scholarship.

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Professor Thomas Pogge, Yale University

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*Environmental Discourses in Public and International Law*, edited by Brad Jessup and Kim Rubenstein

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# ENVIRONMENTAL DISCOURSES IN PUBLIC AND INTERNATIONAL LAW

Edited by  
BRAD JESSUP  
and  
KIM RUBENSTEIN



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perspective the contribution of environmental 'law in action' to EU integration.

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## SERIES EDITORS' PREFACE

The idea for this series began in June 2005, when Kim Rubenstein applied for the position of Professor and Director of the Centre for International and Public Law at the ANU College of Law. The Centre is recognised as the leading Australian academic centre bringing together public lawyers (constitutional and administrative law broadly, but also specific areas of government regulation) and international lawyers from around the world. Established in 1990 with its inaugural director Professor Philip Alston, the impact of the Centre and its work can be seen further at [law.anu.edu.au/cipl/](http://law.anu.edu.au/cipl/).

In discussing with the law faculty ideas for the Centre's direction, Kim raised the concept which underpins this series. Each volume flows from workshops bringing public and international lawyers and public and international policy experts together for interdisciplinary discussion on selected topics and themes. The workshops attract both established scholars and outstanding early scholars. At each of the workshops participants address specific questions and issues developing each other's understandings and knowledge about public and international law and policy and the links between the disciplines as they intersect with the chosen subject. These papers are discussed and reviewed at the workshop collaboratively, then after the workshop the papers are finalised for the final editing phase for the overall manuscript.

The series seeks to broaden understanding of how public law and international law intersect. Until now, international and public law have mainly overlapped in discussions on how international law is implemented domestically. While there is scholarship developing in the area of global administrative law, and some scholars have touched upon the principles relevant to both disciplines, the publications to date contain only a subset of the concept underpinning this series. It is unique in consciously bringing together public and international lawyers to consider and engage in each other's scholarship.

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SERIES EDITORS' PREFACE

Beyond the first topic of sanctions, the other four topics draw from the research themes underpinning the International Alliance of Research Universities (IARU) which is made up of ANU, Berkeley, Cambridge, University of Copenhagen, ETH Zurich, National University of Singapore, Oxford, Peking University, University of Tokyo and Yale. The topics include volumes on Health (Volume 2) Environment (Volume 3), Movement of People (Volume 4) and Security (Volume 5).

The IARU has also supported the funding of participants from the IARU in some instances so that they can attend in person at ANU. This does not preclude non-IARU academics from participating, as will be seen in the rich array of participants in the first three volumes.

After the first successful workshop was complete, Professor Rubenstein contacted Professor Thomas Pogge to co-host the second workshop and in addition to doing that, he has enthusiastically joined with Professor Rubenstein as a joint series editor. His contributions to each volume are an expression of his cosmopolitan outlook, which is a theme engaged with throughout the series.

*Kim Rubenstein  
and  
Thomas Pogge*

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## EDITORS' PREFACE

As explained in the Series Editors' Preface, this series is a result of workshops bringing together public and international lawyers. From the second volume onwards, the topics revolve around the International Association of Research Universities (IARU) thematic research topics. When Kim Rubenstein began thinking about organising the third workshop around the theme of the environment, she was encouraged to contact her ANU colleague Brad Jessup in the Australian Centre for Environmental Law. Brad responded enthusiastically and work began to brainstorm the call for papers.

This third workshop, 'Environmental Discourses in Public and International Law', was inspired by interesting interdisciplinary work on discourse theory which enabled us to bring together a rich array of public and international lawyers with geographers and scientists and political theorists. The workshop explored how dominant environmental thought and action had been placed within public and international law, providing excellent material for the themes the series is exploring.

Our workshop took place on 13–15 August 2009 at the Australian National University. The twenty-one paper presenters and a further fourteen participants, who had read all the papers, enjoyed vigorous discussion, engaging fully with each other and the material. We were delighted that we had participants from five IARU universities: ANU, Cambridge, University of Copenhagen, National University of Singapore and Oxford.

We thank Professor Simon Bronitt, then Director of ANU's National Europe Centre, for providing us with a dynamic venue. We thank James Prest from the ANU College of Law, Tom Baxter from the University of Tasmania, and Laura Nielsen from the University of Copenhagen for presenting stimulating papers at the workshop even though they were unable to contribute to the resulting book. Tim Bonyhady, Stella Chu, Jan Cristofani, John Dryzek, Elinor Jean, Radha Govil, Alison McLennan, Rebecca Monson, Andrew Ross, Erika Techera, Fanny

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Thornton, Petrina Schiavi, Hayley Stephenson and Scott Wyatt participated in discussions and we thank them for their valuable contributions to the workshop.

We are grateful to the IARU universities' support through Cambridge University for Elizabeth Rough's travel to the workshop, Oxford University for Sanja Bogojević and Bettina Lange's travel, the University of Copenhagen for Laura Nielsen's travel, National University of Singapore for Kheng-Lian Koh's travel and the ANU Vice Chancellor's Travel Fund for Jaye Ellis's participation.

The event was ably organised by the ANU College of Law Outreach and Administrative Support Team and in particular Sarah Hull. ANU law student Ali Clare worked with us reviewing the papers on style matters and we thank her and Glenda Waddell from the ANU College of Law for their assistance in putting this volume together. We also thank the sixteen anonymous reviewers whose critiques of the papers strengthened the chapters in this collection.

The staff at Cambridge University Press, especially Finola O'Sullivan, have been enthusiastic in supporting this series and Lynn Aitchison as copy-editor has been excellent.

Finally, we would like to thank our colleagues in the Centre for International and Public Law and the Australian Centre for Environmental Law in the ANU College of Law and our respective families and friends for their support and inspiration in all that we do.

*Brad Jessup  
and  
Kim Rubenstein  
January 2011*