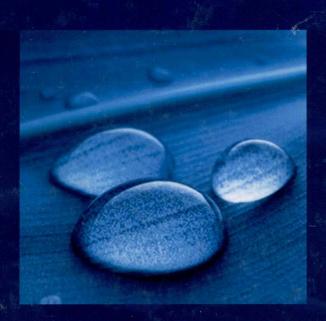


Edited by

Paul Martin • Li Zhiping • Qin Tianbao Anel Du Plessis • Yves Le Bouthillier

Environmental Governance and Sustainability





Environmental Governance and Sustainability

Edited by

Paul Martin

Director, Australian Centre for Agriculture and Law,

University of New England, Australia

Li Zhiping

Law School, Sun Yat-Sen Univer

Qin Tianbao

Professor of Environmental Law and maternational Law and Assistant Dean for International Affiliations, School of Law and Research Institute of Environmental Law (RIEL), Wuhan University, China

Anel Du Plessis

Faculty of Law, North-West University, South Africa

Yves Le Bouthillier

Faculty of Law, University of Ottawa, Canada

THE IUCN ACADEMY OF ENVIRONMENTAL LAW SERIES

Edward Elgar

Cheltenham, UK • Northampton, MA, USA

© The IUCN Academy of Environmental Law 2012

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the publisher.

Published by Edward Elgar Publishing Limited The Lypiatts 15 Lansdown Road Cheltenham Glos GL50 2JA UK

Edward Elgar Publishing, Inc. William Pratt House 9 Dewey Court Northampton Massachusetts 01060 USA

A catalogue record for this book is available from the British Library

Library of Congress Control Number: 2011936420



ISBN 978 1 78100 047 2 (cased)

Typeset by Cambrian Typesetters, Camberley, Surrey Printed and bound by MPG Books Group, UK

Contents

List	t of figures	vii
	t of tables	viii
List	t of contributors	ix
	le of cases	хi
Tab	ole of legislation	xiii
Intr	roduction: the scholarship of environmental governance	xix
PAI	RT I THE ARCHITECTURAL DESIGN OF ENVIRONMENTAL GOVERNANCE	
1	Instruments for environmental governance: what works? <i>Michael G. Faure</i>	3
2	Does (property) diversity beget (landscape) sustainability? <i>John Page and Ann Brower</i>	24
3	Creating next generation rural landscape governance: the challenge for environmental law scholarship Paul Martin, Jacqueline Williams and Amanda Kennedy	46
PAI	RT II GOVERNANCE INNOVATION IN CHINA	
4	Constitutionalism and the environment: the evolution of environmental governance in China's Socialist Market	
	Economy	81
	Kishan Khoday	
5	Toward a more effective environmental criminal law in China	104
	Michael G. Faure and Hao Zhang	
6	A feasible approach to environmental public interest litigation:	
	the people's procuratorate as plaintiff	135
	Mei Hong and Yin Yanjie	
7	Environmental e-governance in China: insights from	
	government-citizen interaction	148
	Oin Tianhao and Wang Huanhuan	

PART III THE INTERSECTION OF ECONOMICS AND SOCIAL JUSTICE AROUND WATER LAWS

8	Global climate disruption and water law reform in the	
	United States	17
	Joseph W. Dellapenna	
9	The legal protection of Ramsar Wetlands: Australian reforms	193
	Alex Gardner	
10	Drinking water security in China: a critical justice issue	218
	Ke Jian	
PAl	RT IV LINKING LOCAL AND INTERNATIONAL LEGAL INNOVATIONS	
11	The quest for a World Environment Organization: reflections on a failing debate as an input for future improvement <i>Nils Goeteyn and Frank Maes</i>	233
12	Human rights law, refugee and migration law, and environmental law: exploring their contributions in the context of 'environmental migration' Michèle Morel	248
13	Climate change: legal impediments to technology transfer <i>Zhou Chen</i>	266
14	Implementing stewardship in Kenyan land use law: the case for a sustainability extension <i>Robert Kibugi</i>	288
Inde	ex	313

Figures

2.1	Map of Hillend Station subdivision	38
3.1	Australia's biodiversity hotspots	50
3.2	Australia's land use	51
3.3	Alternative frameworks for legal scholarship	67
5.1	Relationship between administrative offenses and criminal	
	offenses	114

Tables

2.1	The constructed Sea Ranch mosaic, 1965-81	30
2.2	The transformed Northern Forest mosaic	34
2.3	Transformation of high country landscape measured by parcel	
	size	37
2.4	The most lucrative gross revenues from private land sales	
	post-tenure review	37
2.5	The deconstructed New Zealand high country property	
	mosaic, 1948–98 and continuing	39
3.1	Range of instrumental strategies	53

Table of cases

REGIONAL.

[2005] NSWCA 9 210 **European Court of Human Rights** Pape v Commissioner of Taxation of the Commonwealth of D v United Kingdom (1997) 24 Australia (2009) 238 CLR 1 **EHRR 423** 263 N v United Kingdom (2008) 47 Project Blue Sky Inc v Australian **EHRR 885** 263 Broadcasting Authority (1998) 194 CLR 355 210 **NATIONAL** R v Tang (2009) 237 CLR 1 198 Tasmania v Commonwealth of Australia Australia (1983) 158 CLR 1 198 Alanvale Pty Ltd v Southern Rural Victoria v Commonwealth of Water [2010] Victorian Civil Australia (1996) 187 CLR 416 and Administrative Tribunal 480 212 China Anvil Hill Project Watch Association Inc v Minister for the Guangzhou Environment & Water [2008] Haizhu District People's FCAFC 3 201 Procuratorate v Xinzhongxing Arnold v Minister Administering the Rinse Factory 140, 146 Water Management Act 2000 Hunan (NSW) (2010) 240 CLR 242 Wangcheng County People's 199, 214 Procuratorate v Changsha Crouch v Commissioner for Pingtang Cement Co 140, Railways (Qld) (1985) 159 146 CLR 22 214 **Qingzhen** ICM Agriculture Pty Ltd v AFED v Bureau of Land and Commonwealth of Australia Resources 95 [2009] 240 CLR 140; [2009] Shandong HCA 51 199, 213 Leling People's Procuratorate v Nature Conservation Council of Fan 140, 145 New South Wales Inc v

Minister Administering the

Water Management Act)

Sichuan

Langzhong People's
Procuratorate v Qunfa Bonedust Factory 140, 146

Wuxi

AFED v Jiangyin Port Container Company 95 Xishan District People's Procuratorate v Li Huarong and Liu Shimi 140, 146

Xinyu

Yushui District People's
Procuratorate Xiannu Lake
case 140, 146

New Zealand

NZ Fish & Game Council v Commissioner of Crown Lands [2009] CIV 2008-485-2020 43

United States

Dimmock v City of New London (1968), Connecticut Reports, 157: 9–20, Atlantic Reporter

(2nd series), 245: 569–74 **177**, **190**

Harris v Brooks Arkansas Reports, 225: 436-48, Southwestern Reporter (2nd series), 283: 129-36 **178-9, 190**

Irwin v Phillips (1855), California Reports, 5:140–47 **190** Jennison v Kirk (1878), United

States Reports, 98: 453–62

Kimball v Macpherson 46 Cal. 104 (1873) **42**

Long Beach Land & Water Co. v Richardson 70 Cal. 206 (1886) 42

State ex rel. Cary v Cochran (1940), Nebraska Reports, 138: 163–78 190

Water Use Permit Application by Kukui (Molokai), Inc., In re (2007), Hawai'i Reports 116: 481–510, Pacific Reporter (3rd series), 174: 320–49 **190**

Water Use Permit Applications, In re (2000), Hawai'i Reports 94: 97–198, Pacific Reporter (3rd series), 9: 409–510 **190**

Table of legislation

INTERNATIONAL	Kyoto Protocol 11, 260–61, 264, 267, 271–2, 280, 282–3
Convention on the Elimination of	Art 10 281, 284
All Forms of Discrimination	Art 10(C) 282
against Women (CEDAW)	Art 16 282
250	Ramsar Convention on Wetlands of
Convention on the Rights of the	International Importance
Child (CRC) 250	193–8, 200, 208–209, 214
Convention relating to the Status of	Art 2 195
Refugees 253, 255, 263	Art 3(1) 195
Art 1(a)(2) 253–4, 263	Art 4 195
Copenhagen Accord 260–61, 264	TRIPS Agreement (Agreement on
International Convention on the	Trade-related Aspects of
Protection of the Rights of All	Intellectual Property) 273,
Migrant Workers and Members	283
of Their Families (Migrant	United Nations Convention against
Workers Convention) 259,	Torture and Other Cruel,
263	Inhuman or Degrading
Art 2(1) 259	Treatment or Punishment
International Covenant on Civil and	(UNCAT) 263
Political Rights (ICCPR)	United Nations Convention to
250, 263	Combat Desertification in
Art 1(2) 250	Countries Experiencing
Art 2(1) 263	Serious Drought and/or
Art 6 250	Desertification, Particularly in
Art 7 250	Africa (UNCCD) 260
International Covenant on	Art 10 260
Economic, Social and Cultural	Art 17 260
Rights (ICESCR) 250, 263	Prologue 260
Art 11 250	United Nations Framework
International Labour Organization	Convention on Climate Change
(ILO) Convention on the	(UNFCCC) 260–61, 264,
Rights of Indigenous People	267, 271–2, 278, 283
250	Art 4 281

Art 4(1) 279 Art 4(5) 281, 284 Art 4(7) 281 Art 5 279 Art 11(2)(a) 280 Art 13 282 Universal Declaration of Human Rights (UDHR) REGIONAL Africa Art 2(c) Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) 2009

Convention governing the Specific Aspects of Refugee Problems in Africa of the African Union 1969 253

Art 1(2) 253-4

258

Pact on Security, Stability and Development in the Great Lakes Region 2006

Protocol on the Protection and Assistance to Internally Displaced Persons 2006 (Great Lakes Region) 258

Revised African Convention on the Conservation of Nature and Natural Resources 2003 300-301, 303

Art 20 301

American States

Cartagena Declaration on Refugees of the Organization of American States 1984 253-4 254 Art 3

Council of Europe

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 263

European Union

Directive 2001/55/EC 253, 255 Directive 2003/87/EC 11 Directive 2004/83/EC 253 Art 2(a) 256 255 Art 2(e) 255 Art 4 256 Art 5 256 Art 12 256 Art 15 255

NATIONAL

Australia

China-Australia Migratory Bird Agreement 1988 (CAMBA) 193-5, 208, 214

Commonwealth Constitution 197

s 51(i) 197-8 s 51(ii) 197 s 51(vi) 197 s 51(x) 197 s 51(xx) 197 s 51(xxix) 197 s 51(xxxi) 199 s 51(xxxvii) 197 s 81 197 197 s 83 s 96 197

198-9 s 100 197 s 109

198

s 98

Environment Protection and	s 21 208
Biodiversity Conservation Act	s 21(3)(a), (b) and (c) 208
1999 (Cth)	s 22(1) 208
s 16 200	s 22(3) 208
ss 17-17A 200	s 23 208
s 17B 200	s 24 208
s 20 200	s 28(2) 210
s 20A 200	s 35 210
s 209 200	ss 53ff 208
ss 211ff 200	s 55(2) 208
ss 285-300B 200	ss 68-69 208
ss 326-327 200	s 86A(1) 209, 215
ss 328-336 200	s 86A(1)(b) 209
s 523 194, 200–201, 214	s 86A(2) 194, 209
s 524 201	s 86A(4) 209
Environment Protection and	s 107 212
Biodiversity Conservation	Sch 1 202 , 207 , 215
Regulations 2000 (Cth)	Water Amendment (Non Water
200–201	User Limit) Act 2009 (Vic)
s 3.01 201	211
reg 10.02 201	Water Amendment (Victorian
Sch 6 201	Environmental Water Holder)
Murray-Darling Basin Agreement	Act 2010 (Vic) 205
see Water Act 2007 (Cth), Sch	Water Management Act 2000 (NSW)
1	199
Trade Practices Act 1974	s 46 213
s 51AE 61	s 87AA(3) 213
Water Act 1989 (Vic)	
Pt 3, Div 1C 213	China
s 4A 214	
s 4B 205	Administrative Litigation Law
ss 33-33AAC 205	(ALL) 92
s 48B 215	Administrative Penalty Law 117,
Water Act 2007 (Cth) 203, 206–10	130
Pt 2A 209	Administrative Procedure Law 144
Pt 8 210	art 2 141
s 3(d)(i) 210	Ch 4 143
s 4 208, 215	Administrative Review Law (ARL)
s 4(1) 209	92
s 19 208	China-Australia Migratory Bird
s 20 208	Agreement (CAMBA)
s 20(b) 210	193–5, 208, 214
N 6	,,

Civil Procedure Law 144, 225, 228	art 410 110, 129–30
art 108 141	art 413 130
Ch 5, s 1 143	art 413(1) 108, 129–30
Cleaner Production Promotion Act	art 413(2) 109
165	art 413(3) 129
Constitution 92, 96, 98, 100, 136,	Ch 19, art 339(3) 130
145	Criminal Procedure Rule of the
art 129 136, 144	People's Procuratorates 144
art 130 144	Environmental Impact Assessment
Criminal Law 104–108 , 110–11 ,	(EIA) Law 8, 90–91
113–17, 120–25, 127–30, 219	Environmental Protection Law
Ch 2	(EPL) 86, 89, 106, 112, 117,
art 151(2) 108, 129–30	225
art 151(3) 108	art 6 167
Ch 3	art 41 228
art 151(3) 130	art 43 112
art 228 110, 129–30	Executive Compensation Law 145
s 2 106	General Principles of Civil Law
Ch 5, art 262 110	225
Ch 6	art 5 145
art 337 109, 129–30	art 73 145
art 338 109–10 , 112 , 122–3 ,	art 124 228
126, 129–31	art 134 145
art 339(1) 108, 121, 129–30	Interim Measures on Public
art 339(2) 109, 129–30	Participation in Environmental
art 339(3) 108, 121	Impact Assessment 165
art 340 110, 129–30	Interim Provision of the People's
art 341(1) 110, 129–30	Court and the People's
art 341(2) 112, 129–30	Procuratorate in Beilun District
art 342 109, 129–30	of Ningbo City with regard to
art 343(1) 109, 129–30	Instituting Criminal and
art 343(2) 109, 129–30 art 344 108, 129–30	Subsidiary Civil Action 144
	Interim Rule on Open
	Environmental Information
art 345(1) 109, 129–30	165
art 345(2) 109, 129–30 art 345(3) 129–30	Law on Prevention and Control of
s 5 106	Atmospheric Pollution 119–20
s 6 106, 131	art 56 120 art 60 130
Ch 9 106	Law on Prevention and Control of
art 407 110, 129–30	
art 407 110, 129–30 art 408 109, 129–30	
art +00 109, 129-30	art 62 113-14

Organic Law of the People's
Procuratorates 143
art 5 141, 143
Payment Means of Expense in
Litigation
art 8 144
Regulation on Management of
Information on the World Wide
Web 165
Regulation on Public Participation in
Environmental Protection 91
Regulation on Telecommunication
165
Regulations on Open Government Information 165
Rules for Social Organization 90
State Council Decision Concerning
Environmental Protection 90
Supreme People's Court Various
Regulations Regarding
Evidence for Civil Suits
art 4, s 3 228
Tort Liabilities Law 228
Wild Animal Protection Law 116
art 35(2) 116
France
Code of Civil Procedure
Ch 13 139
Germany
Administrative Courts Act
Art 35 138
Kenya
Agriculture Act 1955 290
ss 48-62 290
Constitution 309
Art 69 307

Forests Act 2005 291–2, 298, 305, 308 s 14(5) 292 s 20 291 s 46 292
New Zealand
Crown Pastoral Lands Act 1998 36 Land Act 1948 35, 39, 43
United States
Bane Bill (California) 42 Clean Air Act (CAA) 10, 139 s 302(a) 145 s 303 145 Clean Water Act (CWA) 139 s 309(a)(1) 145 Coastal Zone Conservation Act (California), Cal. Pub. Res. Code ss 27000 et seq 42 Michigan Environmental Protection Act (MEPA) 139 National Environmental Policy Act 139 Noise Regulation Act 139
Organic Labeling Rule 148 Regulated Riparian Model Water
Code \$1R-1-07 188 \$2R-1-01 186 \$2R-1-02 187 \$2R-1-20 186 \$\$3R-1-01 to 3R-2-05 188
§§4R-1-02 to 4R-1-04 187 §4R-1-08 187 §4R-2-03 187
\$\\$5R-3-01 to 5R-3-03 187 \$\\$5R-4-01 to 5R-5-03 187 \$\\$6R-1-01 186 \$\\$6R-1-02 186
3014-1-02 100

§6R-1-03 **188** §§6R-2-01 to 6R-2-08 186 §6R-3-01 186 §6R-3-02 186 §6R-3-04 186 §6R-3-05 186 §7R-1-01 187 §7R-1-02 187 §§7R-2-01 to 7R-2-04 188 §§7R-3-01 to 7R-3-07 **187** §7R-3-05 188 §9R-1-01 188 §9R-1-02 188 Roadless Area Conservation Rule 148 Solid Waste Control Act 139 Toxic Substances Control Act 139

PART I

The architectural design of environmental governance