

# The Asia-Pacific partnership and market-liberal discourse in global climate governance

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## Abstract

*This paper shows how international law scholarship might adopt a constructivist interdisciplinary research design to better engage with the political and social context of legal rules and institutions. In 2005 the Asia-Pacific Partnership was launched by the United States and Australia as a climate change institution outside the UN climate process. Controversially, the Member States claimed the Asia-Pacific Partnership was complementary to the UN climate process. This paper investigates the veracity of this claim by analysing the normative compatibility of the Partnership and the UN climate process. The paper adopts Dryzek's discourse theory to analyse the shared ideas and assumptions underlying both institutions. This analysis indicates that the Asia-Pacific Partnership embodied a deep market-liberal discourse that is in significant tension with the more interventionist and equity-based principles underpinning the UN climate process. This market-liberal discourse is important for understanding recent developments in global climate governance.*

## I. Introduction

From 2007 to 2009 the nations of the world entered into a two-year period of negotiations under the 1992 United Nations Framework Convention on Climate Change (UNFCCC) in an attempt to reach a new global climate agreement to succeed the 1997 Kyoto Protocol to the UNFCCC (Kyoto Protocol).<sup>1</sup> However, the international dialogue on climate change had over the last decade extended well beyond the negotiation process under the UNFCCC. After withdrawing from the Kyoto Protocol in 2001, the United States (US) George W. Bush administration was active in forming and participating in a range of international climate-related agreements outside the UN climate change process. These agreements included bilateral climate change partnerships,<sup>2</sup> multilateral technology partnerships,<sup>3</sup> the 2005 Asia-Pacific Partnership on Clean Development and Climate

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This paper draws upon material from the following: 'The Asia-Pacific Partnership: A Deepened Market Liberal Model for the International Climate Regime?' by Jeffrey McGee and Ros Taplin, in *Environmental Discourses in Public and International Law*, edited by Brad Jessup and Kim Rubenstein. Copyright © 2012 Cambridge University Press. Reprinted with permission.

1 UNFCCC, *United Nations Climate Change Conference in Bali* (2007), online: <[http://unfccc.int/meetings/cop\\_13/items/4049.php](http://unfccc.int/meetings/cop_13/items/4049.php)> (last accessed 4 May 2014).

2 US Department of State, *Bilateral and Regional Climate Partnerships* (2009), online: <<http://2001-2009.state.gov/oes/climate/c22820.htm>> (last accessed 2 May 2014).

3 Methane to Markets Partnership, *Partners* (2009), online: <<http://www.methanetomarkets.org/partners/country/index.htm>> (last accessed 4 May 2014).

(Asia-Pacific Partnership),<sup>4</sup> the G8 Climate process,<sup>5</sup> the 2007 APEC Sydney Declaration<sup>6</sup> and the 2007–08 US Major Economies Process.<sup>7</sup> The Australian government of Prime Minister John Howard followed this strategy of favouring a proliferation of venues for international dialogue on climate change (Lawrence, 2009, pp. 283–287). These non-UN climate initiatives represented a significant fragmentation of the international dialogue on global climate governance (Biermann, Frank, Pattberg and van Asselt, 2009, p. 14; Stephens, 2009, pp. 304–307). At the domestic level in the US and Australia this agnosticism to climate change commitments was also reflected in a stagnation or outright opposition to the development or strengthening of public laws to address climate change.

The US and Australia, at the time both opposed to the Kyoto Protocol, were key actors in engineering this fragmentation of the international dialogue on climate change (Lawrence, 2009, pp. 283–287). It is therefore important to critically examine the claims that these non-UN climate initiatives were designed to act in consort with the UN climate treaties (McGee and Taplin, 2006, p. 173; 2009, p. 11). Notwithstanding the changes of government in the US and Australia in the 2007/08 period, these claims persist, emphasising the continuing relevance of an inquiry as to whether these climate change forums outside the UNFCCC process were supportive or undermining of the UN climate regime. This question is brought into particularly sharp relief by the near collapse in the international climate negotiations at UNFCCC Fifteenth Conference of the Parties (COP) meeting at Copenhagen, Denmark, in December 2009 and the resultant shift to a system of voluntary pledges that now forms the basis of countries' emission reduction commitments until at least 2020.

This paper focuses on the Asia-Pacific Partnership on Clean Development and Climate as one controversial example of this fragmentation in the international dialogue on climate change. Given that the Asia-Pacific Partnership emerged in the shadow of US and Australian opposition to the Kyoto Protocol, it is important to focus on the political as well as legal significance of the partnership (Scott, 2004, p. 4). This paper combines legal analysis and constructivist international relations theory to further understanding of the significance of the Asia-Pacific Partnership. Constructivist theory analyses the ideas and intersubjective meanings that underlie interaction between actors in international affairs, including in the formation of international agreements and institutions. This paper follows the constructivist tradition by adopting Dryzek's (2005, 2007) discourse theory to analyse the shared ideas, assumptions and meanings underlying the Asia-Pacific Partnership. The Partnership is thereby situated within the wider landscape of ideas regarding the architecture for post-Kyoto international climate change negotiations. Dryzek's discourse theory is thereby used to complement the more traditional analysis of the legal policy underlying international climate change institutions.

In this paper, we first outline Dryzek's discourse theory and the concepts of 'market liberalism' and 'market failure' that are deployed later in our analysis (Parts II–IV). Second, we provide a descriptive overview of the formation, structure and activities of the Asia-Pacific Partnership (Part V). Third, we provide an analysis and comparison of the key design principles of both the

4 Asia-Pacific Partnership, *Asia-Pacific Partnership on Clean Development and Climate* (2009), online: <<http://www.asiapacificpartnership.org/>> (last accessed 2 May 2014).

5 Pew Center on Global Climate Change, *Summary of G8 Summit 2005 in Gleneagles Scotland*, online: <[http://www.pewclimate.org/policy\\_center/international\\_policy/summary\\_of\\_g8.cfm](http://www.pewclimate.org/policy_center/international_policy/summary_of_g8.cfm)> (last accessed 2 May 2014).

6 APEC, *Sydney Leaders Declaration on Climate Change, Energy Security and Clean Development* (9 September 2007), online: <[http://www.apec.org/Meeting-Papers/Leaders-Declarations/2007/2007\\_aelm/aelm\\_climatechange.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/2007/2007_aelm/aelm_climatechange.aspx)> (last accessed 2 May 2014).

7 US Department of State, *Major Economies Process on Energy Security and Climate Change*, online: <<http://2001-2009.state.gov/g/oes/climate/mem/index.htm>> (last accessed 4 May 2014).

Asia-Pacific Partnership and UN climate treaties (Part VI). Finally, we use Dryzek's discourse theory to compare the normative structures of the Asia-Pacific Partnership and UN climate treaties and ask whether the Partnership represented a deepened market-liberal discourse in global climate governance (Parts VII–VIII).

Part II therefore outlines Dryzek's discourse theory, as used in analysis later in the paper.

## II. Dryzek's discourse analysis

The subdiscipline of international law has traditionally accepted a doctrinal methodology focusing on the systematic exposition and description of the legal norms in a particular issue area and analysis of the relationship between those norms (Aarnio, 2011, p. 19). However, over recent decades there has been a significant widening of approaches to the analysis of international law that are intended to augment traditional doctrinal approaches (Crawford and Koskeniemi, 2012). Many of these wider approaches to the analysis of international law adopt theories and methodologies from the discipline of international relations (Hafner-Burton, Victor and Lupu, 2012). Constructivism is an approach to international relations research that focuses on how shared ideas or norms in international society influence the behaviour of states (Finnemore, 1996). The constructivist approach to international relations proceeds from two premises: (i) the structures of human association (including international society) are determined primarily by shared ideas rather than material forces; and (ii) the identities and interests of actors are constructed by these shared ideas, rather than being predetermined by nature (Wendt, 1999, p. 3). Discourse theory is a constructivist approach to research that investigates the varying ways actors talk about, understand and give meaning to the world (Jorgenson and Phillips, 2002, p. 1). Discourse theory is generally inspired by the work of Foucault (1972, p. 117), who described discourses as 'relatively rule-bound sets of statements which impose limits on what gives meaning'. Foucault's earlier work typically identified one dominant discourse in a particular time and place that conditioned not just agreement on meaning, but also the terms upon which meaning might be disputed (Dryzek, 2005, p. 22). This perspective provides that individuals are largely unable to 'step back and make comparative assessments and choices across various discourses' (p. 22).

However, more contemporary forms of discourse theory depart from this perspective by adopting a 'more conflictual picture in which different discourses exist side by side or struggle for the right to define truth' (Jorgenson and Phillips, 2002, p. 13). Contemporary discourse theories recognise the ability of actors to reflect upon, and act as advocates for, particular discourses. A key example is Dryzek's discourse theory, which provides international lawyers with a useful lens to look beneath the text of international agreements to explore the shared meanings, ideas and understandings upon which such agreements are structured (Dryzek, 2007, p. 44). Dryzek (2005, p. 9) defines discourse as:

'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. Discourses construct meanings and relationships, helping to define common sense and legitimate knowledge. Each discourse rests on assumptions, judgments, and contentions that provide the basic terms for analysis, debates, agreements, and disagreements.'

For Dryzek, discourses are constraining on actors in the sense that they constitute the dispositions and capacities of actors and are produced and reproduced by subsequent actions and interactions between them (Dryzek, 2005, p. 10). However, discourses are also enabling in that actors may draw on existing dialogues to 'subtly affect the content and weight of discourses' within a given social structure (Dryzek, 2006, p. 24). Discourses are not static, as over time coalitions of actors

emerge with alternate discourses that contest and challenge even hegemonic discourses (p. 8). This contestation leads to change in the discursive field, either through a dialectical merging of competing discourses, or the defeat of a competing discourse.

International law has shown some willingness to employ discourse theory to assist analysis of international legal rules and institutions. For example, Koskenniemi (2005) and Kennedy (1987) adopted forms of post-structuralist discourse theory to ground their seminal general critiques of international legal argumentation. In making a critique of international environmental law, Mickelson (2005, p. 137) used a form of narrative analysis in providing a history of North–South tension and policy choices made in global environmental governance. A recent edited volume by Jessup and Rubenstein (2012) builds on this approach to legal research with several chapters devoted to using discourse analysis in a detailed empirical analysis of substantive bodies of environmental and public law. Bäckstrand and Lövbrand's (2007) discourse analysis of global climate governance has also acted as the foundation for detailed empirical investigation of regional institutions (McGee and Taplin, 2009b) and technology transfer institutions in global climate governance (McGee and Wenta, 2014). Part III introduces the discourse of market liberalism that is referred to later in this paper.

### III. The discourse of market liberalism

Market liberalism or 'neoliberalism' is a political-economic discourse based on principles of deregulation, marketisation and privatisation, where individual choice through market exchange is viewed as a preferred means of governance (Harvey, 2005). The market is viewed as a self-regulating mechanism of governance where state planning, state provision and state intervention in markets is minimised (Gray, 2002, pp. 1–7). The role of the state in market liberalism is essentially limited to building institutions to facilitate the establishment and operation of market activity (Lee and McBride, 2007, p. 6). Market-liberal policy emphasises the need to remove impediments to international trade or capital mobility, and the withdrawal of all regulation that does not have a direct market-facilitating function. International economic policy is therefore most usefully seen to be directed towards creating market-friendly institutions to curtail organised labour, privatise state enterprises and open domestic markets as much as possible to foreign capital and trade (Shaikh, 2004, p. 42). In recent decades, the US has been a strong advocate of the market-liberal approach to international economic policy, in promoting trade and investment liberalisation (Gray, 2002, p. 3; Harvey, 2005, pp. 23–29). While there has been some retreat from market liberalism in international development policy over the last decade, the imprint of market liberalism on shaping the international economic order remains significant (Harvey, 2005, pp. 4–38; Gray, 2009; Rudd, 2009). Despite market-liberal discourse coming under criticism in the immediate wake of the global economic crisis of 2008, it still remains strong in academic and policy circles (Crouch, 2011; Quiggin, 2012; Mirowski, 2014).

From the market-liberal viewpoint, environmental problems are primarily caused by a 'lack of economic growth, poverty and distortions and failures of the market' (Clapp and Dauvergne, 2005, p. 5). Poverty is viewed as a key driver of environmental degradation that should be attacked by liberalising international trade.<sup>8</sup> Distortions in trade and investment markets and lack of secure property rights are viewed as hampering the ability of the market to foster growth and reduce poverty (p. 5). Further trade and investment liberalisation to open and integrate global markets is viewed as the best path to environmental protection (p. 6). Market liberalism also places faith in

8 The environmental Kuznets curve suggests that as per capita income initially increases, the rate of environmental decline will also rise. However, as incomes reach a certain threshold, environmental damage will level off, and then rapidly decline (Clapp and Dauvergne, 2005, pp. 91–92).

the ability of science, technology and human ingenuity to avoid the worst aspects of environmental problems (p. 6). In the event of environmental problems being the result of a failure in market activity, market liberalism prescribes a least interventionist approach by the state (pp. 6–7). This might involve the provision of better information to market participants to assist in market decision-making (Garnaut, 2008, pp. 4–6), and voluntary undertakings to reduce environmentally damaging activity or market-based regulation such as the use of tradeable pollution or resource extraction permits (Clapp and Dauvergne, 2005, p. 7). Strongly interventionist regulation, such as mandatory and non-tradeable restrictions on environmentally damaging activity, is to be avoided. Market liberalism prefers least interventionist regulatory options, such as individual recourse to tort litigation, or voluntary industry codes of conduct. If more interventionist regulation is required, then the creation of tradeable pollution rights is preferred in order to give flexibility and freedom to market participants to decide how they will meet the level of environmental performance imposed.

Okereke observes that the Kyoto Protocol flexibility mechanisms of international emissions trading, Clean Development Mechanism (CDM), and Joint Implementation (JI) are the foundation of an international carbon trading market that places market mechanisms at the centrepiece of international climate policy (Okereke, 2008, pp. 117–121). He argues that these flexibility mechanisms of the Kyoto Protocol, which are designed to create an international market in emission reduction credits, contain a market liberal conception of justice that marginalises developing world equity concerns. In particular, the focus on emission trading and least cost emission reduction tends to marginalise developing world claims regarding developed country responsibility for causing global environmental problems (Bernstein, 2002, p. 3). A focus on private decision-making in emission trading markets also backgrounds developing states' equity concerns regarding the unequal distribution of wealth and imbalance in historic greenhouse gas emissions between developed and developing countries (Okereke, 2008, pp. 176–182). Orienting international climate change policy towards international carbon markets in a search for least-cost emission reduction is compatible with the liberal economic norms that have prevailed in global governance since the early 1980s (Bernstein, 2002, pp. 2–3). However, the focus on international least cost emission reduction through market mechanisms downplays the responsibilities of developed countries in having caused global environmental problems (Okereke, 2008, pp. 176–182).

Part IV explains the connection between market-liberal discourse and the concept of 'market failure' in the mainstream environmental economics literature.

#### IV. The discourse of market failure and climate change

The concept of 'market failure' from the economics literature is important in determining the circumstances in which market-liberal discourse will support regulatory intervention at a national or international level. The UK Treasury's *Stern Review of the Economics of Climate Change* (Stern Review) describes climate change as the 'greatest and widest-ranging market failure ever seen' (UK HM Treasury, 2006). The Australian government's *Garnaut Climate Change Review* adopts a similar premise in stating that the correction of 'market failure is the central task of climate change policy in Australia and the world' (Garnaut, 2008, p. 299). According to this conventional economics literature, climate change is the result of two distinct market failures (Jaffee, Newell and Stavins, 2005, p. 164). First, markets for the production of goods and services 'fail' by not taking into account the full costs of production decisions. This occurs when a part of the cost of production is 'externalised' and hence borne by society, rather than by those involved in the transaction (Jaffee *et al.*, 2005, p. 165). This externality leads to an oversupply of the polluting product, and an increase in the societal level of pollution above that which is optimal (Garnaut, 2008, p. 299). Environmental policy should thus be directed at raising the incentive for producers

to internalise the cost of greenhouse gas emissions. This might be achieved by an environmental tax or emission trading scheme, or by imposing limits on the level of the polluting activity (Jaffee *et al.*, 2005, p. 165). Market liberalism advocates a response to market failure that involves the least restriction in the decision-making of individual producers (Driesen, 2010, pp. 2–3; McGee, 2014, p. 196). Market liberalism therefore favours policies that respond to market failure by creating markets and facilitating individual decision-making, such as the establishment of emissions trading schemes (Driesen, 2010, p. 3).

As background to later analysis on market liberalism in global climate governance, Part V provides a short description and history of the Asia-Pacific Partnership.

## V. Overview of the Asia-Pacific Partnership

The Asia-Pacific Partnership was a US- and Australian-inspired arrangement that was launched in mid 2005. Initially termed the ‘AP6’, the partnership was limited to six member nations: China, India, Japan, South Korea, Australia and the United States. However, in October 2007 Canada was admitted as the seventh member. The Asia-Pacific Partnership brought together an influential group of nations responsible for approximately half of the world’s population, economy and energy use.<sup>9</sup>

The Asia-Pacific Partnership (APP) was a non-binding or ‘soft law’ agreement (Boyle and Chinkin, 2007, p. 212) directed at international co-operation on development, energy, environment and climate change issues.<sup>10</sup> Its Charter indicated that the partnership was directed at ‘international cooperation to facilitate the development, diffusion, deployment, and transfer of existing, emerging and longer term cost-effective, cleaner, more efficient technologies and practices’.<sup>11</sup> It claimed to operate as a ‘unique public-private partnership model to bring together industry stakeholders and government officials to achieve Partnership goals’.<sup>12</sup> The Asia-Pacific Partnership was headed by a Policy and Implementation Committee, comprising three government officials from each of the seven partner countries.<sup>13</sup> The Policy and Implementation Committee set the overall direction of partnership activities and had the role of approving action on specific technology-related projects. There were regular APP Policy and Implementation Committee meetings and Ministerial-level meetings.<sup>14</sup>

The formulation of proposals for projects and their implementation occurred through eight sectoral Task Forces covering the following industries: aluminium, building and appliances, cement, fossil fuel, coal mining, power generation/transmission, renewable energy and steel.<sup>15</sup> The Task Forces were lead by representatives from the governments of the seven APP countries.<sup>16</sup> Developed countries occupied the Chair positions of the eight Task Forces, while the developing

9 Asia-Pacific Partnership, *About the Asia Pacific Partnership on Clean Development and Climate* (2009), online: <<http://www.asiapacificpartnership.org/english/about.aspx>> (last accessed 1 May 2014).

10 US Department of State, *Charter of the Asia Pacific Partnership on Clean Development and Climate* (2007), online: <<http://2001-2009.state.gov/g/oes/rls/or/2006/59162.htm>>, Preamble, 1.

11 *Ibid.*, clause 2.1.1.

12 Asia-Pacific Partnership, *Asia-Pacific Partnership on Clean Development and Climate* (2009), online: <<http://www.asiapacificpartnership.org/>> (last accessed 2 May 2014).

13 Asia-Pacific Partnership, US Department of State, *Charter of the Asia Pacific Partnership on Clean Development and Climate* (2007), online: <<http://2001-2009.state.gov/g/oes/rls/or/2006/59162.htm>>, clause 4.4.

14 Asia-Pacific Partnership, *Asia-Pacific Partnership Meetings and Events* (2009), online: <[http://www.asiapacificpartnership.org/english/meeting\\_events.aspx](http://www.asiapacificpartnership.org/english/meeting_events.aspx)> (last accessed 4 May 2014).

15 *Ibid.*

16 Asia-Pacific Partnership, *Asia-Pacific Partnership Public-Private Sector Task Forces*, online: <[http://www.asiapacificpartnership.org/english/task\\_forces.aspx](http://www.asiapacificpartnership.org/english/task_forces.aspx)> (last accessed 2 May 2014).

countries (China and India) each had two Co-Chair roles.<sup>17</sup> The Task Forces were also open to participation from public research bodies and private business interests but not environmental non-governmental organisations. The Asia-Pacific Partnership Task Forces were designed to meet independently to formulate projects for endorsement by the Policy and Implementation Committee and monitor progress of existing projects.

In 2006, the eight Task Forces formulated initial Action Plans containing a total of over 100 projects that were endorsed for implementation by the Policy and Implementation Committee.<sup>18</sup> Eight of these projects were completed by 2009, mostly those relating to information-gathering and exchange through workshops, conferences and visits.<sup>19</sup> By mid 2009 there were 140 Asia-Pacific Partnership projects in implementation.<sup>20</sup> The US was the only Asia-Pacific Partnership member that publicly released information on the identity of its representatives on the eight Asia-Pacific Partnership task forces. The US had two government and two private-sector representatives sitting on each Task Force. Despite the fact that the private sector was expected to play a key role in implementing Asia-Pacific Partnership projects, there was no publicly available information on the exact level of private-sector participation in Asia-Pacific Partnership Task Force projects.

In October 2006, the Asia-Pacific Partnership provided information on the nature of the initial projects approved by the Policy and Implementation Committee.<sup>21</sup> Across all Task Forces only 5 per cent of the initial projects were devoted to the deployment of technology, demonstration projects or technology-based research.<sup>22</sup> The initial batch of Task Force projects was primarily directed at gathering information about practices within industry sectors, dispersing information about 'best practice' and building expertise and knowledge within target markets to encourage trade in cleaner technologies and practices. The Asia-Pacific Partnership acknowledged that the initial Task Force projects were directed at 'soft' activities. However, it claimed that this reflected:

'both the opportunity to make significant improvements in the use of existing energy and industrial technologies, as well as the need to undertake further analysis and scoping of more ambitious technology projects and opportunities in order to overcome specific market barriers.'<sup>23</sup>

A further seventy projects were approved after 2006 and showed a similar pattern of preference for projects based on information exchange, standard setting and capacity building.<sup>24</sup> The bulk of the Task Force projects were therefore directed at easing informational failures in markets for cleaner technologies and management practices. The level of government funding committed to the Asia-

17 Asia-Pacific Partnership, *Asia-Pacific Partnership- Organisation*, online: <<http://www.asiapacificpartnership.org/english/organization.aspx>> (last accessed 4 May 2014).

18 Asia-Pacific Partnership, *Asia-Pacific Partnership on Clean Development and Climate: Executive Summary of Task Force Action Plans* (2006), online: <[http://www.asiapacificpartnership.org/pdf/resources/ExecutiveSummary%20\\_31%20Oct%2006\\_%20\\_2\\_.pdf](http://www.asiapacificpartnership.org/pdf/resources/ExecutiveSummary%20_31%20Oct%2006_%20_2_.pdf)> (last accessed 4 May 2014).

19 Asia-Pacific Partnership, *Asia-Pacific Partnership Project Roster* (2009), online: <[http://www.asiapacificpartnership.org/english/project\\_roster.aspx](http://www.asiapacificpartnership.org/english/project_roster.aspx)> (last accessed 4 May 2014).

20 Ibid.

21 Asia-Pacific Partnership, *Asia-Pacific Partnership on Clean Development and Climate: Executive Summary of Task Force Action Plans* (2006), online: <[http://www.asiapacificpartnership.org/pdf/resources/ExecutiveSummary%20\\_31%20Oct%2006\\_%20\\_2\\_.pdf](http://www.asiapacificpartnership.org/pdf/resources/ExecutiveSummary%20_31%20Oct%2006_%20_2_.pdf)> at 2 (last accessed 4 May 2014).

22 From analysis of Asia-Pacific Partnership Task Force Action Plans. See Asia-Pacific Partnership, *ibid.*

23 Asia-Pacific Partnership, *Asia Pacific Partnership on Clean Development and Climate Brochure* (2008), online: <[http://www.asiapacificpartnership.org/pdf/brochure/APP\\_Booklet\\_English\\_Aug2008.pdf](http://www.asiapacificpartnership.org/pdf/brochure/APP_Booklet_English_Aug2008.pdf)> at 9 (last accessed 4 May 2014).

24 Ibid.

Pacific Partnership was very modest, with the US providing US\$65 million out of a total of US\$200 million committed by the seven Asia-Pacific Partnership countries (Karlsson-Vinkhuyzen and van Asselt, 2009, p. 200). In 2010, the Asia-Pacific Partnership was dissolved, with the remaining projects transferred to other multilateral technology institutions.<sup>25</sup>

Part VI outlines the key features of the United Nations climate change treaties.

## VI. Key principles of the UN climate treaties

The ultimate objective of the UNFCCC is to stabilise 'greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.<sup>26</sup> This is a non-economic objective regarding the level of climate risk that humanity will accept. However, this non-economic objective is qualified in that the timing of stabilisation of greenhouse gas concentration in the atmosphere must enable 'economic development to proceed in a sustainable manner'.<sup>27</sup> The UNFCCC contains the equity principle of common but differentiated responsibilities in Article 3(1) that is designed to guide burden sharing between developing and developed countries in responding to climate change (Rajamani, 2000, p. 120). The principle of common but differentiated responsibilities creates different obligations for developed and developing nations based on non-economic criteria, such as responsibility for emissions and capacity to respond.<sup>28</sup> Initially, the developed countries have a higher level of emission reduction obligation under the Kyoto Protocol so as to 'lead the way' in emission reduction and protecting sinks in accordance with Article 4(2)(a) of the UNFCCC. This higher level of developed country obligation is also present in Article 4(3) of the UNFCCC, requiring developed countries to provide new and additional finance for developing countries to implement commitments under the treaty, including calculating<sup>29</sup> and reporting their emissions.<sup>30</sup> Article 4(3) of the UNFCCC also requires developed countries to provide new and additional technology transfer to allow developing countries to develop and diffuse lower-emission technologies.<sup>31</sup> The UNFCCC therefore establishes important non-economic principles intended to guide the evolution of the climate regime.

However, there is also significant evidence of protection of economic growth, trade liberalisation and economic efficiency embodied in the UNFCCC. The preamble of the UNFCCC clearly states that the human response to climate change is to be framed to avoid adverse impacts on economic development and sustained economic growth in developing countries.<sup>32</sup> The overriding goal of the UNFCCC of avoiding dangerous climate change is therefore subject to sustainable economic growth (WCED, 1987, pp. 93–96). The developed countries' commitment to adopt national policies and measures to take the lead in reducing emissions is also subject to 'the need to maintain strong and sustainable economic growth'.<sup>33</sup>

25 Asia-Pacific Partnership, *Asia-Pacific Partnership on Clean Development and Climate* (2009), online: <<http://www.asiapacificpartnership.org/>> (last accessed 2 May 2014).

26 *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992 (entered into force 21 March 1994) ('UNFCCC') art. 2.

27 Ibid.

28 Ibid.

29 UNFCCC art. 4(1).

30 UNFCCC arts. 4(1)(b) and 12.

31 UNFCCC art. 4(1)(c).

32 UNFCCC Preamble [21].

33 UNFCCC art. 4(2)(a).



The UNFCCC states that economic efficiency is one of its key principles so that ‘policies and measures to deal with climate change ... be cost-effective so as to ensure global benefits at the lowest possible cost’.<sup>34</sup> The requirement for countries to take precautionary measures to reduce emissions is qualified by the pursuit of economic efficiency in reducing emissions. The UNFCCC also states that the parties will support an open international economic system leading to sustainable economic growth in all countries, but particularly developing countries, to enable the problems of climate change to be addressed.<sup>35</sup> Economic development through trade-induced growth is therefore viewed as a key path to ‘adaptation’ to climate change. The UNFCCC also disavows the use of protectionist or trade-distorting policies in responding to climate change.<sup>36</sup> The UNFCCC is thus couched in language making any emission reduction at a global level contingent on protecting sustained economic growth, economic efficiency and trade liberalisation.

At first glance, the Kyoto Protocol appears to adopt an interventionist approach of setting politically negotiated binding emission reduction targets for developed countries to meet in the period 2008–12.<sup>37</sup> The Protocol is the strongest implementation of the equity-based burden sharing principle of common but differentiated responsibilities agreed in the UNFCCC. However, the Kyoto Protocol also displays significant evidence of pursuing principles of economic efficiency and marketisation. As mentioned previously, the Kyoto Protocol flexibility mechanisms of JI,<sup>38</sup> international emissions trading<sup>39</sup> and the CDM<sup>40</sup> are primarily designed to promote economic efficiency in meeting national targets by allowing developed countries to be credited with emission reductions in other countries that have a lower marginal cost of emissions abatement (Lohmann, 2006, pp. 205–208). The Kyoto Protocol and associated Marrakech Accords<sup>41</sup> are the foundations for the international carbon market in allowing developed countries to be credited with emission reductions occurring outside their borders. However, to do this, the developed countries must purchase emission reduction credits on the international emissions trading market. The price developed countries pay for these emission reduction credits should make carbon intensive forms of production less attractive for future investment (pp. 205–208). The Kyoto Protocol carbon market is therefore a significant marketisation of international climate policy accommodating the developed countries’ preference for pursuing economic efficiency in meeting binding emission reduction targets. The market liberalism of the Kyoto Protocol was a contentious issue in the negotiations leading up to the formation of this agreement in 1997. It was pushed hard by the US, and resisted, initially, by Europe and the developing countries (Okereke, 2008, pp. 138–139).

By way of comparison, Part VII outlines the key features of the Asia-Pacific Partnership.

## VII. Key principles of the Asia-Pacific Partnership

The Kyoto Protocol has market-liberal elements, but these are placed within the setting of the UNFCCC’s overarching principles, which emphasise additional, non-economic values

34 UNFCCC art. 3(3).

35 UNFCCC art. 3(5).

36 UNFCCC art. 3(6).

37 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998 (entered into force 16 February 2005) (‘Kyoto Protocol’) Annex B.

38 Kyoto Protocol art. 4.1.

39 Kyoto Protocol art. 17.

40 Kyoto Protocol art. 12.

41 *Report on the Conference of the Parties on its Seventh Session, held at Marrakech from 29 October to 10 November 2001*, FCCC/CP/2001/13 (21 January 2002).

and priorities going to issues of inter- and intra-generational justice. In comparison, the Asia-Pacific Partnership adhered to market liberalism in a much purer and unalloyed way. The Asia-Pacific Partnership approach to international climate policy is to facilitate trade in cleaner technologies and management practices that have the potential to reduce the partner countries' greenhouse gas intensities (McGee and Taplin, 2006, p. 182). The Task Force projects were primarily directed at remedying informational failures (i.e. lack of information, lack of ability to use information, information asymmetries between states) in international markets for cleaner technologies. This is evidenced by the Task Force activities focusing mostly on information collection about industry conditions, identification of best industry practice, information exchange and capacity building for adoption of cleaner technologies.

As Asia-Pacific Partnership activities were primarily directed at informational failures in technology markets, they failed to follow the UN climate treaties in intervening to establish national emission reduction targets and institutional structures of the carbon market. The Asia-Pacific Partnership abandoned any notion that a regulatory system may need to constrain market-based social relations in order to pursue a collective goal of stabilising greenhouse gas emissions at a safe level. Instead, multinational regulation of climate change arises from facilitation of the dispersed market decisions of individual private-sector actors involved in trade in cleaner technologies. The prime 'intervention' in market activity is to facilitate better informational flows in technology markets.

The Asia-Pacific Partnership failed to follow the UN climate treaties' desire for political agreement on the level of climate change risk to be tolerated and allocation of binding emission reduction targets to achieve this end. The willingness of the Asia-Pacific Partnership to abandon a politically negotiated compromise on the level of climate change risk is evident in the Australian government's economic modelling supporting the initial Asia-Pacific Partnership Ministerial Meeting in 2006 (Fisher et al., 2006). This modelling analysed best-case scenarios for the operation of an Asia-Pacific Partnership-style climate change policy at a global level. The model would allow global greenhouse gas emissions to rise by at least 100 per cent above 2005 levels by 2050 (p. 34). Instead of a global political settlement to define the level of dangerous climate change in Article 2 of the UNFCCC, the Asia-Pacific Partnership model offered a global emission increase which would be solely determined by private decision-making of private actors within markets for cleaner technologies and practices. The law, at the public or international level, is sidelined. The Asia-Pacific Partnership favoured a private interest regulatory approach to international climate policy in which regulation emerged 'from the actions of individuals or groups motivated to maximise their self-interest' (Morgan and Yeung, 2007, p. 43). This private interest regulatory approach of the Asia-Pacific Partnership would allow self-interested decision-making of the Asia-Pacific Partnership Task Force participants to determine the outcome of international climate change policy with no collective global goal for limiting climate change risk. The Asia-Pacific Partnership model sought to shift international climate change policy from a regulatory system based on the pursuit of a global public goal of stabilising greenhouse gas emissions at a safe level (informed by climate science) towards a private interest regulatory system in which outcomes are determined by individualised market decision-making. Any difference in the level of obligation between developed and developing countries (or their corporations) in reducing emissions would arise from commercial bargaining in the implementation of Task Force projects. The Asia-Pacific Partnership provided a private interest approach to regulation that was largely determined by individualised decision-making in a market setting.

Section 7.1 analyses the UN climate treaties and Asia-Pacific Partnership using the five elements of Dryzek's discourse theory.

## 7.1 The Asia-Pacific Partnership: a deepening of market-liberal discourse?

Parts V and VI identified the key features of the UN climate treaties and the Asia-Pacific Partnership and noted some significant inconsistencies. This section takes this analysis further by using discourse analysis to explore the intersubjective meanings and assumptions lying beneath the legal policy principles of the UN climate treaties and Asia-Pacific Partnership. This discourse analysis allows for a deeper and more nuanced understanding of the normative structures of the UN climate treaties and the Asia-Pacific Partnership. This approach situates the Asia-Pacific Partnership within the wider context of political ideas from which it emerged. It also allows for consideration of how discourses are used by actors to contest and shape intersubjective meaning and the possibilities for international and national legal policy design in an area like climate change.

Dryzek's discourse theory provides that discourses are constructed of five elements (Dryzek, 2005, pp. 17–22). The first of these elements is *ontology*. As Dryzek (p. 17) explains: 'different discourses see different things in the world.' The ontology of discourse is reflected in what it sees in the world, that is, the basic entities the existence of which it recognises or denies. The second element is *agents*, that is, the human or non-human actors, individual or collective, which are recognised by the discourse as having the capacity to act, or be acted upon. The third element of a discourse is *motives*, that is, the assumptions that a discourse makes about the reasons agents have for doing things. The fourth element is *natural relationships*, that is, the relationships that are assumed by a discourse to be natural between different entities, whether they are persons, corporations, states or institutions (p. 17). The final element of a discourse is the *metaphors and rhetorical devices* it employs, that is, the concepts and ideas embedded in a discourse used to convince and/or persuade other actors by likening one situation to another. The following analysis adopts the above elements of Dryzek's discourse theory to identify the key discourse instantiated in the Asia-Pacific Partnership.

### 7.1.1 Ontology

The UNFCCC and Kyoto Protocol do not see all states in the international society as the same in responding to climate change. Instead, these UN climate treaties see important distinctions between states based on their contribution to climate change, vulnerability to impacts and capacity to respond. The UNFCCC sees a key distinction between two groups of states in the international effort to respond to climate change. These two groups are 'developed states' (as listed in Annex 1 of the UNFCCC), and all other states that are considered to be 'developing states' (therefore not listed in Annex 1 of the UNFCCC). This key distinction between Annex 1 and non-Annex 1 states is used throughout the UNFCCC to allocate obligations and responsibilities. In comparison, the Asia-Pacific Partnership made no formal distinction between developed and developing countries in terms of the commitments states were expected to take on or the ability of states to participate in partnership activities. The Asia-Pacific Partnership made no reference to the UNFCCC Annex 1 distinction between developed and developing states and therefore viewed all states as formally equal in terms of responsibility for climate change, vulnerability to impacts and capacity to respond. The inability of the APP to see such distinctions between states undermines equity-based claims by developing states that developed states should shoulder a higher burden in reducing emissions and funding adaptation costs.

Another key ontological difference lies in the ability to see a legitimate role for non-governmental organisations (NGOs) in global climate governance. Since its formation in the early 1990s, the UN climate change process has formally recognised, encouraged and provided legitimacy to the participation of NGOs as observers of UNFCCC COP meetings.<sup>42</sup> Despite some recent setbacks, the

42 UNFCCC, *Parties and Observers* (2009), online: <[http://unfccc.int/parties\\_and\\_observers/items/2704.php](http://unfccc.int/parties_and_observers/items/2704.php)> (last accessed 4 May 2014).

registered environmental, research and business NGOs have a well-established record of participation in the UNFCCC COP meetings in providing feedback to state delegations and advice to media organisations (Fisher, 2010). In comparison, environmental and research NGOs did not receive recognition as legitimate participants in the Asia-Pacific Partnership Policy and Implementation Committee or Task Force meetings. The Asia-Pacific Partnership only recognised a very limited list of elite business, public research, international finance bodies and government actors as participants at Policy and Implementation Committee and Task Force meetings. Other interested NGOs were not invited and the relevant meetings were held behind closed doors.

The UN climate process contains a strong recognition of the existence and role of scientific advice in informing deliberations on emission reduction and adaptation. In the late 1980s, the World Meteorological Organisation and UN Environment Program formed the Intergovernmental Panel on Climate Change (IPCC) to provide scientific advice to states on climate change.<sup>43</sup> Over twenty-five years, the IPCC has played a central role in providing five sets of reports to the UN climate negotiation process on climate change science, impacts and mitigation.<sup>44</sup> In comparison, the founding documents of the Asia-Pacific Partnership make no reference to scientific advice received from the IPCC. This failure to engage with the IPCC reports allowed the ambition of emission reduction of the partnership to be more influenced by the short-term political and economic interests of the states involved.

### 7.1.2 Agents

The UN climate change process provides state parties with the primary role of acting to enter global agreements to pursue the global collective goal of limiting climate change to a non-dangerous level. Business, environmental and research NGOs have a more secondary role in lobbying state parties and observing the UN climate change negotiation process. The private sector also has a secondary role in the UN climate process in implementing the carbon market by pursuing profit in projects established under the Joint Implementation and the Clean Development Mechanism of the UNFCCC and Kyoto Protocol.<sup>45</sup> In comparison, the Asia-Pacific Partnership provided agency to states to enter into a regional agreement to facilitate trade in markets for technology and cleaner development. However, the Asia-Pacific Partnership also gave the private sector an equally important role in proposing and implementing Task Force projects through public–private partnerships. The Asia-Pacific Partnership states anticipated that the private sector would be a driving force behind the partnership in proposing, implementing and funding Task Force projects. The Asia-Pacific Partnership also viewed the private sector as having a key role in dissipating the results of the partnership through for-profit transactions in international markets for lower emission technologies.

### 7.1.3 Motives

The UNFCCC / Kyoto Protocol frames states as motivated to co-operate to reach a global political settlement on the level of acceptable climate change risk and arrangements to share the burdens of adjustment in accordance with the equity principle of common but differentiated responsibilities. The private sector has an important but secondary role in the implementation of this political settlement through the anticipated least cost emission abatement of the carbon market. In contrast, the Asia-Pacific Partnership viewed states as primarily interested in regional

43 IPCC, *History* (2014), online: <[http://www.ipcc.ch/organization/organization\\_history.shtml](http://www.ipcc.ch/organization/organization_history.shtml)> (last accessed 4 May 2014).

44 IPCC, *Fifth Assessment Report* (2014), online: <<http://www.ipcc.ch/index.htm>> (last accessed 4 May 2014).

45 One example is the verification role of the private sector under the CDM mechanism; see Lövbrand, Rindeljäll and Nordqvist, 2009, pp. 79–80.

co-operation to facilitate a lessening of informational failures in technology markets and thereby indirectly reducing greenhouse gas emissions and local pollution problems. The Asia-Pacific Partnership failed to view states as pursuing any global political settlement of the level of climate risk or broad issues of distributing the costs of mitigation or adaptation. The level of climate risk that states are prepared to tolerate is simply determined by the success of technology markets in producing lower emitting technologies. The for-profit motives of private-sector actors in technology markets are elevated to the driving force that will determine the reduction of greenhouse gas emissions and the level of risk that will ultimately be tolerated by the international community.

#### 7.1.4 Natural relationships

The UN climate change process and Asia-Pacific Partnership both assume a natural relationship between economic growth, trade liberalisation and the mitigation of greenhouse gas emissions (Bernstein, 2002; McGee and Taplin, 2009a, p. 229). Neither of these institutions raises the question of whether economic growth and trade liberalisation might need to be curtailed in order to avoid dangerous climate change. However, the UN climate process also assumes that states are naturally global citizens prepared to act collectively, based on the scientific advice of the IPCC, to pursue the global common good of avoiding dangerous climate change. The UN climate process also assumes that states are able to look beyond their own individualistic, short-term material interests to recognise the role of equity principles in sharing the burden between states in reducing emissions and funding adaptation to climate change. The UN climate change treaties of the UNFCCC and Kyoto Protocol thus naturalise an assumption about the capacity of states to act collectively, based on scientific advice and equity principles, to avoid and/or manage global environmental problems like climate change. In contrast, the Asia-Pacific Partnership assumed that the natural relationship between states is that of facilitators of individualistic competitive trade relationships in markets for cleaner technologies, with any reduction in greenhouse gas emissions a fortunate by-product of increased trade in such technologies. The Asia-Pacific Partnership is significantly less optimistic regarding the natural relationship that exists between states in responding to climate change. The partnership has significantly less trust in scientific advice and equity principles driving institutions to reduce emissions. Instead, the Asia-Pacific Partnership assumes that the role of states is to facilitate trade in international markets for cleaner technologies, rather than seeking any overarching political settlement on burden sharing for emission reduction.

#### 7.1.5 Key metaphors and rhetorical devices

The UNFCCC / Kyoto Protocol frames climate change as a global problem requiring universal participation in the UN treaty process. The UN climate treaties also emphasise the shared inheritance or commonality of all states' reliance on the atmosphere, and hence the necessity for a global response. The metaphor of the countries of Annex 1 of the UNFCCC 'taking the lead' in mitigating emissions and providing funding for developing country adaptation and treaty compliance is also prominent.<sup>46</sup> In contrast, the rhetoric supporting the Asia-Pacific Partnership characterised the partnership as a practical, results-oriented, bottom-up climate policy at a regional level that tapped into public-private partnerships and the power of the market.<sup>47</sup> The

46 UNFCCC arts. 3(1) and 4(2)(a).

47 For example, see US Department of State (2006), online: <<http://2001-2009.state.gov/g/oes/rls/or/2006/59213.htm>> (last accessed 4 May 2014); Prime Minister of Australia, Address to the Melbourne Press Club, Hyatt Hotel, Melbourne (17 July 2007), online: <<http://pandora.nla.gov.au/pan/10052/20070823-1732/www.pm.gov.au/media/Speech/2007/Speech24445.html>> (last accessed 4 May 2014).

key metaphors used by the UN climate process and the Asia-Pacific Partnership thus reflect the extent to which these institutions favour a political compact between states, or market-led activity, in responding to climate change.

Part VIII discusses the results of the above discourse analysis and what they show about the key ideas underlying the Asia-Pacific Partnership.

## VIII. Deepening market-liberal discourse through the Asia-Pacific Partnership

The US Bush administration and the Australian Howard government were hostile to the binding targets and timetables approach of the Kyoto Protocol, but were key advocates for the Asia-Pacific Partnership. Members of the Howard government in particular were not shy in calling for a more 'free-market' response to climate change. In a key speech on climate policy in 2007, Prime Minister Howard was forthright in criticising attempts at the international regulation of greenhouse gas emissions and advocating for more intensive reliance upon markets as the central human response to climate change:

'The good news is that mankind [sic] has powerful tools for the task ahead, none more so than the spirit of discovery inspired and channeled by rational science and free markets ... The false prophets are those preaching Malthusian pessimism or anti-capitalism. They are the real climate change deniers because they deny rational, realistic and sustainable policy solutions. The moralising tone of utopian internationalism is also not helpful. Institutions will only work and endure if they harness national interests. The world needs less Woodrow Wilson and more Adam Smith to effectively tackle climate change.'<sup>48</sup>

A senior Australian climate change diplomat at that time, Ms Adams, also reinforced this free-market message at the 2007 Asia-Pacific Partnership meeting in New Delhi, claiming the partnership was 'a model which embraces the power of the market, and the innovation of our businesses, researchers and entrepreneurs. After all, we do not need to rethink capitalism to solve climate change, we need to harness it.'<sup>49</sup>

From an Australian perspective, the Howard government's use of this market-liberal discourse to support the Asia-Pacific Partnership was not surprising. Guy Pearse, a past employee of a former Howard government Environment Minister, described a strong market-liberal influence upon the Howard government's approach to public environmental law and policy:

'A neoliberal approach has come to dominate party thinking about environmental issues too. Calls for government intervention to protect the environment are reflexively viewed with suspicion: government intervention should be kept to the bare minimum. Skepticism and denial of the scientific justification for such intervention is almost automatic. From protecting endangered species to controlling greenhouse emissions, anything that might be detrimental to the cost of doing business is viewed as an illegitimate affront to economic freedom.' (Pearse, 2007, p. 133)

48 Prime Minister of Australia, Address to the Melbourne Press Club, Hyatt Hotel, Melbourne (17 July 2007), online: <[http://pandora.nla.gov.au/pan/10052/20070823-1732/www.pm.gov.au/media/Speech/2007/Speech\\_24445.html](http://pandora.nla.gov.au/pan/10052/20070823-1732/www.pm.gov.au/media/Speech/2007/Speech_24445.html)> (last accessed 4 May 2014).

49 Australian Statement to the Second Ministerial Meeting of the Asia-Pacific Partnership and Clean Development (13 October 2007), online: <[http://www.asiapacificpartnership.org/pdf/new\\_delhi/071015\\_Australia%27s%20APP%20Statement\\_final.pdf](http://www.asiapacificpartnership.org/pdf/new_delhi/071015_Australia%27s%20APP%20Statement_final.pdf)> (last accessed 5 May 2014).

According to Pearse, the Howard government's approach to environmental policy was driven by a strong market-liberal, anti-interventionist sentiment that favoured the Asia-Pacific Partnership over the binding international targets of the UN climate treaties (Pearse, 2007, pp. 112–116). The US position on international climate policy under George W. Bush followed a similar path (McGee and Taplin, 2008).

The above comments reflect significant attempts by key Australian climate policy-makers to shape the international policy landscape on climate change through the formation and advocacy of the Asia-Pacific Partnership. This is confirmed by the above discourse analysis that indicates that the Asia-Pacific Partnership sought to instantiate a significant shift in the intersubjective meaning on the human response to climate change. First, the Asia-Pacific Partnership sought to significantly depoliticise international climate change policy by shifting decision-making on climate change risk away from global political forums (such as the UN) towards the operation and outcome of markets for cleaner technologies. Under the Asia-Pacific Partnership, the level of acceptable climate risk to be tolerated is determined by technology markets, rather than scientific advice and then global political compromise. The role of states is reframed, from that of global citizens pursuing a political compromise on a matter of common concern, to facilitators of competitive trade relationships in cleaner technologies. Second, the Asia-Pacific Partnership retreated from the extensive carbon market regulatory structure of the UN climate treaties, instead favouring the development of voluntary information sharing carried out through public–private Task Forces. The Asia-Pacific Partnership avoided engagement with opportunities for states to develop their own national climate change laws to place binding restrictions on emissions. This made the Asia-Pacific Partnership significantly deregulatory when compared to the targets and timetables for emission reduction and carbon market of the UN climate treaties.

Third, the Asia-Pacific Partnership's reframing of climate change, from a global public concern requiring regulatory constraint, to an issue for resolution by private interest in technology markets, marginalised the equity principle of common but differentiated responsibilities that formed the foundation of the UN climate treaties. Fourth, the Asia-Pacific Partnership's focus upon market facilitation appears to have caused a retreat from the UNFCCC / Kyoto Protocol engagement with NGOs in the process of policy-making. The Asia-Pacific Partnership failed to recognise environmental NGOs as legitimate participants at Policy and Implementation Committee and Task Force meetings. Similarly, key information regarding the operations of the Asia-Pacific Partnership, including the identity of members of the sectoral Task Forces, was not made public. The Asia-Pacific Partnership favoured a shift to market facilitating governance by elite state and business actors at odds with more recent trends towards greater transparency, participation and public review of decision-making in international institutions.<sup>50</sup> The Asia-Pacific Partnership therefore instantiated a technology-focused market liberal discourse that promoted technology markets to a central role in global climate change governance.

The UN climate treaties adopted market mechanisms as a means of pursuing least-cost emission reduction. However, the strength of market-liberal discourse within the UN climate regime was constrained by the necessity for overarching political decisions within that system on stabilising emissions at a safe level and equity-based burden sharing between developed and developing states. The Asia-Pacific Partnership instantiated an understanding of the human response to climate change in which market activity is cut loose from these overarching political constraints and, in the guise of technology markets, elevated as the central mechanism of global climate governance. The above application of Dryzek's discourse theory is useful in looking beneath the

<sup>50</sup> For a description of this trend towards a 'global administrative law' of greater transparency, participation and public review, see Krisch and Kingsbury (2006, p. 2).

legal policy principles of the UN climate treaties and Asia-Pacific Partnership to trace this contest over the intersubjective understanding of the possibilities of the human response to climate change.

With the removal of the Howard government in late 2007 and the George W. Bush administration in late 2008 there were some outward signs from Australia and the US of the possibility of a return to engagement with the Kyoto model of binding emission reduction targets for developed countries and the principle of common but differentiated responsibilities.<sup>51</sup> However, during this period Japan openly advocated key elements of the Asia-Pacific Partnership technology-focused market-liberal discourse (greenhouse gas intensity targets and sectoral approaches) in the post-2012 climate negotiations as an alternative to further targets and timetables for reducing greenhouse emissions.<sup>52</sup> Ultimately, the key agreement coming out of the UNFCCC COP 15 meeting, the Copenhagen Accord,<sup>53</sup> contained some significant similarities to the Asia-Pacific Partnership in abandoning binding emission reduction targets in favour of voluntary pledges for emission reduction and a weakening in the application of common but differentiated responsibilities. It therefore appears that the Asia-Pacific Partnership represented an early and significant institutional step in a general strengthening of market-liberal discourse within international climate change negotiations. This strengthened market-liberal discourse will, in contestation with other emerging discourses, continue to shape intersubjective understanding of the possibilities of the human response to climate change and hence the range of policy options considered to be available.<sup>54</sup>

## IX. Conclusion

This paper provides a key example of how international law analysis might better engage with the political context of legal rules by embracing a constructivist social research design that identifies the key ideas and normative claims underlying international treaties and the institutions they found. The analysis shows that the UNFCCC embodies normative tension between the market-liberal principles of promoting economic growth, trade liberalisation and economic efficiency and the equity-based burden sharing principle of common but differentiated responsibilities. The Kyoto Protocol established an international carbon market in pursuit of economic efficiency in responding to climate change. In establishing this carbon market, the Kyoto Protocol also put in place an extensive, interventionist, international regulatory structure of binding emission reduction targets for developed countries. In responding to the market failure of greenhouse gas emissions, the UN climate treaties attempted to walk a mid-path between market-liberal and politically based, public regulatory structures. The goal of the UN climate treaty process of avoiding 'dangerous climate change' is defined and determined by a global political compromise on the amount and distribution of climate change risk. The Kyoto carbon market is indeed a marketisation of environmental policy, but only as a process to implement the politically determined goal of avoiding a certain level of climate risk. Under the UN climate process the

51 See, for example, US Department of State, 'Intervention of the United States: Plenary Session of Ad Hoc Working Group on Long Term Cooperative Action Under the Convention' (29 March 2009), online: <<http://www.state.gov/e/oes/rls/remarks/2009/r20974.htm>> (last accessed 4 May 2014).

52 At the UNFCCC COP 13 meeting in Bali in December 2007, Japan advocated for greenhouse gas intensity targets for both developed and developing countries and sectoral approaches as key elements of any post-2012 global climate agreement; see Vihma (2009, pp. 239–262).

53 UNFCCC, Copenhagen Accord (2009), FCCC/CP/2009/L.7.

54 Dryzek identifies two emerging discourses, first an 'energy security' discourse, and second a 'climate justice' discourse, in Dryzek (2010, pp. 4–5).



market has a secondary and procedural role in pursuing the previously established goals for emission reduction and avoidance of climate risk.

In contrast, the Asia-Pacific Partnership promoted voluntary targets to reduce greenhouse gas intensity and sectoral technology co-operation. The Asia-Pacific Partnership was primarily directed at the correction of market failures with regard to technology product information and the co-ordination of actors in markets for cleaner technologies. Member State activity was largely confined to overcoming informational and co-ordination failures through organising forums for co-operation between actors in technology markets. Legal structures at the international and national level were sidelined. The Asia-Pacific Partnership was deregulatory compared to the UN climate treaties. The binding emission reduction targets and regulatory structures to establish and support the international carbon market were not required under the Asia-Pacific Partnership. The partnership would allow the goals of international climate change policy, in terms of emissions reduction and exposure to the risks of climate change, to be determined simply by the performance of markets for cleaner technologies. The Asia-Pacific Partnership therefore elevated market-based social relations as the key determinant of the level of emission reduction and climate risk that would be tolerated.

The discourse analysis supporting the arguments in this paper shows that the Asia-Pacific Partnership embodied a technology-focused market-liberal discourse, chiefly advocated by the two developed countries who stood outside the Kyoto Protocol, the US and Australia. This is to be distinguished from the more politically interventionist approach taken by the international community in the UNFCCC and Kyoto Protocol. However, the significant shift in design of international climate policy at the 2009 Copenhagen COP15 meeting provides evidence that the Asia-Pacific Partnership market-liberal discourse is strengthening, and conventional regulatory models employed at the international and public law level are under increasing strain. The Asia-Pacific Partnership may trigger an unlikely connection between the spheres of international and public law: a shared abandonment in effectively responding to climate change.

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