

CLIMATE CHANGE LAW: INTERNATIONAL AND NATIONAL APPROACHES



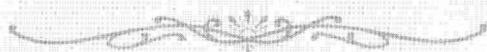
Edited by **He Weidong** and **Peng Feng**



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CLIMATE CHANGE LAW: INTERNATIONAL AND NATIONAL APPROACHES

气候变化法的新发展： 国际法与国家法



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Gu Dejin is associate professor of law, and supervisor of LL.M. programme in School of Law, Sun Yat-sen University. He had been studying in Wuhan University from 1996 to 2006, and got LL.B., LL.M. and J.S.D. degree. His doctoral thesis focuses on Financial Mechanism for Multilateral Environmental Agreements, and supervised by Prof. Wang Xi, one of most senior environmental law scholar in China, and member of Chinese People's Political Consultative Conference. Recently, Gu is flowing negotiation of climate change and financial mechanism under UNFCCC in post-Kyoto era, and engaged in several research projects granted by Department of Education and so on as director.

Jiunn-rong Yeh is Professor of Law at Taiwan University and Director of Policy and Law Center for Environmental Sustainability. He earned his LL.M. and J.S.D. at Yale Law School before joining Taiwan University, where he teaches Environmental Law, Constitutional Law, Administrative Law and regulatory theories. He has substantially involved in many constitutional, legislative and regulatory issues in Taiwan area including drafting of several major legislative bills, such as the Freedom of Information Act, the Administrative Procedural Act, the Superfund Law and the Greenhouse Gases Control Act. He received Award of Excellence in Research from "National Science Council". He has published extensively in English and



in Chinese on a wide range of issues of environmental governance and constitutional change in the context of democratic transition.

Liang Yong is a lecturer of Fudan University School of Law. Currently, she is focusing on researches of international investment law and international trade law, and some researches of international environment law. After a LL.M. in international economic law program at Fudan University School of Law, she has been a research and teaching assistant there. Since 2010, she has made some research on carbon reduction and sustainable development issues. She's hosted one Chinese ministry research program and involved in two Chinese national research programs.

Marion Lemoine is a research and teaching assistant, four year of doctoral thesis at the CERIC, Faculty of Law of Aix-Marseille University. Her Ph.D analysis focus on the Clean Development Mechanism (CDM) of the Kyoto Protocol, and is supervised by Sandrine Maljean-Dubois, Senior Researcher at the French National Centre for Scientific Research-CNRS, Director of the CERIC and Sylvie Thoron, Professor in Economics at Paris XII University. After a LL.M. in public international law, she has been a research assistant at the Ottawa University, Faculty of Civil Law. Since 2008, she has written on the CDM energy and sustainable development issues. She's involved in two French ministry research programs, on the role of emerging States in the climate regime, as well as on REDD (forest) mechanism of the Kyoto protocol.

Peng Feng is an associate research professor in the institute of law of Shanghai Academy of Social Sciences (SASS),she got her Ph.D of environmental law in Wuhan University (jointly with university of La Rochelle in France) in 2007,she is currently doctor candidate of international law in Université Paul Cézanne Aix-Marseille III, France. Her research focuses on environmental law, climate change law and energy law. Her last book is *The Mythos of Codification: a Research on French Environmental Law* (SASS Press, 2010, in Chinese).She is actually in charge of a Chinese National Social Sciences Research Project and involves in several Chinese national, local and international research programs.

Sandrine Maljean-Dubois is a recognized specialist of international environmental law at the international level (CNRS bronze medal 2005), teaching international and European law at the Faculty of Law of Aix-Marseille University. Her research works has been focusing on different legal systems and cross-disciplinary questions on that topic. She has edited several books in international and European environmental law and published numerous articles in this field, especially relating to the protection of biodiversity and biosecurity, climate change and the articulation between international environmental law and WTO law. She has also shown her ability in the research supervision and administration. Deputy Director of the Centre for International and European Research and Studies (CERIC, Aix-en-Provence) during many years, then Director since September 2009, she has a wide experience in long term collective research projects coordination. She has indeed supervised or co-supervised until now 12 projects, with miscellaneous funds (CNRS, State Planning Commission, Ministry of Ecology, Mission droit et justice...). In 2008, the Hague Academy of International Law <<http://www.hagueacademy.nl/>> assigned her to be Director of studies of the French-speaking section of the Center for Studies and Research in International Law and International Relations on the topic of implementation of environmental international law. Her last book is *La diplomatie climatique, Les enjeux d'un régime international du climat* (Pedone, 2010, with the Attorney Matthieu Wemaëre).

Thomas Deleuil is a Ph.D candidate (3rd year) and teaching assistant at the CERIC, Faculty of Law, University of Aix-Marseille. His Ph.D addresses the question of the status of developing countries in multilateral environmental agreements, and is supervised by Marie-Pierre Lanfranchi (Professor). He studied both in the University of Aix-Marseille (France) and the University of Edinburgh (United-Kingdom). Since 2009, he has written on CITES and the protection of biodiversity, on the principle of common but differentiated responsibilities in the climate regime as well as on the ICC and the UN Security Council.

Vanessa Richard is a French National Center for Scientific Research



(CNRS) researcher. She holds a Ph.D in International Law and works at the Centre for International and European Studies and Research (CERIC), a CNRS/Aix-Marseille University joint research unit. Her research fields include international freshwater law, international environmental law and international on-judicial grievance mechanisms. She teaches International freshwater law to graduate students at the Aix-Marseille University Faculty of Law and Political Science.

Wen-chen Chang is an Associate Professor at College of Law, Taiwan University in Taipei. She received her LL.M. and J.S.D. degrees from Yale Law School, and LL.B. and LL.M. degrees from College of Law, Taiwan University. Her primary teaching and research interests include: comparative constitutional law, international human rights, environmental law and administrative law. She received the Wu Ta-Tou Research Award by "National Science Council" in 2010 and the Excellence in Teaching Award by Taiwan University in 2007. She is also a member of the Policy and Law Center for Environmental Sustainability (PLES) at College of Law, Taiwan University.

Wen-chen Shih is a Professor of Law at the Department of International Business at Cheng-chi University in Taipei. She received her LL.B. degree from the Taiwan University. She obtained her post-graduate degree from the University of London: an LL.M. degree from the London School of Economics and Political Science, and a Ph.D from the School of Oriental and African Studies. Her main area of expertise includes: international economic and trade law, international environmental law, and environmental law. She has published Chinese and English articles on legal issues relating to climate change, WTO law, trade and environment, emissions trading, climate finance, biodiversity, etc. She has also published a book in Chinese, *Greening the WTO*, which is a collection of essays on trade and environmental issues. She serves as legal advisor to the Taiwanese government on biodiversity and trade & environment issues. She also works on research projects funded by the "National Science Council" and various governmental agencies such as the Environmental Protection Agency and the Council of Agricultural.

Yao-ming Hsu is an associate professor now in Cheng-chi University in Taipei. He got his LL.B. & LL.M. in Taiwan University, Taipei. Besides, he got another two LL.M. and his Doctor of Law in Université Paul Cézanne Aix-Marseille III, France. Now he mainly focuses his researches on WTO Law, EU Law, Public and Private International Law, International Environmental Law and Bioethics. Besides, he chairs lots of research programs, including the French Bioethics Law, WTO and Legal Interpretation, Climate Change and WTO under the "National Science Council "(Taiwan).

Ye Bo is a postdoctoral research fellow at Shanghai WTO Affairs Consultation Center, and his research topic focused on trade remedy measures in the context of financial crisis, such as carbon tariffs, AD/CVD investigations, etc. His Ph.D thesis focused on legal issues on food safety in international trade, from the perspective of WTO dispute settlement and the European Union. Also, he got two Bachelor's degrees in Law and Economics.

Zhang Zitai is a professor and supervisor of candidates for doctor's degree of Fudan University. He is also serving as the vice president of environmental law academic association of China Law Science Association. He has been devoting the majority of his time to the teaching and study of environmental law. Professor Zhang has published more than 100 academic papers on *China Law Science*, *Cass Journal of Law* and other academic magazines. He boasts more than 10 academic books published by Commercial Press and other publishing houses. Professor Zhang is currently leading his team doing research on the adaptation legislation in the background of climate change, and the legal issues concerning the construction of low carbon city.

Foreword

The impact of global climate change is getting heavier yearly. In international society, the complex of Climate Change is not only the uncertainty of science, but also the governance of it, and the difficult situation of resolving disputes on its governance. People couldn't avoid it or escape from it, but have to confront it bravely and study on it continuously. The more work we put on it, the closer we are probably to find its solution. For science certainty, scientists should make every effort to disclose it; for governance, we have to find out appropriate international legal means and mechanisms for climate change mitigation and climate change adaptation.

In the book, authors of the papers study climate change from legal mechanism in different levels: international level, regional level and national level. The essays illustrate issues of future international climate regime, climate change governance, CBDRs, financial mechanisms, carbon capture and storage liability, carbon emission reduction Regulation, EIA, CDM, climate change, export administration and trade protectionism, China's climate change legal framework system, etc.

In a most readable and significant contribution, **Sandrine Maljean-Dubois and Vanessa Richard** provide a clear insightful analysis of some legal topics on international climate change regime in their "The Drafting of the Future International Climate Regime: From the Copenhagen Accord to the Cancún Accords". In their contribution, they bring to light a compelling argument that the post-2012 climate regime must be ambitious enough to meet the scientists' recommendations. It must also be global and bring together the whole of major GHG emitters including the United States and major developing emitters, while respecting the equity principle set down by the UNFCCC through the common but differentiated responsibilities principle (CBDR principle). They illuminate that negotiation under the Convention remains very important. The



Copenhagen Accord, the Cancún Accords and the Durban Platform have outlined the future climate regime. Its centre of gravity slides from the Protocol towards the Convention, while the top-down approach gives way to a bottom-up approach and constraints to incentives.

In "Emerging Climate Change Law and Changing Governance", **Jiunn-rong Yeh** does an excellent and valuable job of bring together a lot of worth thinking issues that arise in the climate change governance. In his contribution, he reminds that we have to greet the coming of multi-level governance and embrace the necessity of decision-making in high uncertainties, posing a great challenge to the current legal system in dealing with climate change. He regards the mode of governance's capacity to respond to the challenges posed by climate change as a pivotal issue. He points out that current mode of climate change governance has been state-centric and interest-based, coupled with the problem of procedure failure. At present, the real challenge lies in the global and uncertain nature of climate change in the current international public order. He notes that there have been super-national or sub-national efforts moving towards more positive engagements, presenting a daring pace toward multi-level governance despite these built-in fallacies in the international level. He links this innovative governance to the emerging climate change law and global judicial networking as presented by increasing court rulings on climate change. He concludes that whether it requires a change beyond normal incremental adjustments to the current legal system in light of climate challenges remains to be unraveled.

Recurring natural disasters caused by extreme weathers pose serious threats to human lives and properties around the world. The transboundary effects of climate change call for prompt effective transnational governance. In "Transnational Governance Model of Climate Change: Catastrophic Risk, Transnational Regulation and its Implications in International Law", **Yao-ming Hsu** discusses the diversity of the transnational governance models, such as intergovernmental, inter-bureaucratic, nongovernmental, and the transnational organizational style. Finally, he reviews substantially rules, norms, and regulations provided

in international climate law system, discusses potential interactions between international trade law (WTO) and international environmental law.

In "The Principle of Common but Differentiated Responsibilities in the International Regime of Climate Change", **Thomas Deleuil** exploits the system of differentiated obligations induced by the CBDRs principle in the climate regime and the issues raised by its use in a legal framework such as this regime. He points out the CBDRs, being the core of the regime has been and will remain a focal point between developed and developing countries. He indicates that too many difficulties remain either on the definition of the principle, its legal nature, its implementation and even on its recipients. So Thomas concludes that the legal CBDRs principle has no binding effects in practice. It seems clear that the "common but differentiated responsibility principle" is not a direct way to concrete results in terms of implementation of Parties obligations.

Wen-chen Shih's "Financial mechanisms for climate change mitigation and adaptation measures" gives a general overview on climate change financial mechanisms which intends to serve as a basis for future research concerning climate change financial mechanisms. She introduces briefly the three existing climate change financial mechanisms (GEF, CDM, and EU ETS). She examines three important design features of any successful climate change financial mechanisms, i.e. resources generation, resources allocation, and governance structure, as well as key guiding principles for each feature.

In **Chloé Houdy's** "Carbon Capture and Storage Liability Issues in International Law", she tries to draw an inventory of those dedicated to carbon dioxide capture and storage (CCS) in international law and underline the gaps affecting liability issues due to isolated conventional "spheres" without any international special instrument. In view of normative shortcomings affecting conventional regimes in the regulation of CCS activities, **Chloé** thinks general public international law turns out to be the most relevant in case of accident, and international customary rules on responsibility will finally apply, although imperfectly adapted to the legal framing of this technology.



Liang Yong's "Research on the EU Carbon Emission Reduction Regulation on the Aviation Industry: the Resolution in the Post-Kyoto Era" focuses on studying the EU Directive 2008/101/EC. She addresses that the directive is not in compliance with norms and instructions of the existing international environmental law, international civil aviation law or international jus cogens. Given the seriously adverse effects of the directive on the civil aviation industry of China, she suggests that China should submit the dispute to the WTO dispute settlement body or use other international dispute settlement mechanism to resolve.

In response to issues of mitigation and adaptation to climate change, the UNFCCC of 1992 and the Kyoto Protocol of 1997 were adopted. In both of these documents, environmental impact assessment (EIA) was incorporated as one of the key mechanisms to minimize greenhouse gases emissions, a direct cause of climate change. In "Environmental Impacts Assessments in the Age of Climate Change: Some introductory notes", **Wen-chen Chang** focuses on current and emerging domestic and transnational mechanisms for EIA on factors and impacts of climate changes. She put forward that there are uncertainties and challenges when national EIAs attempt at taking climate change factors into consideration. And difficulties persist as greenhouse gases emitted from any particular installation can hardly be viewed as a sole cause for global climate changes. But greenhouse gases flow in a transboundary fashion. She further notes that although small accumulations of greenhouse gases in any specific area cannot account for climate change in the view of a global scale, the accumulation of all of them do require immediate and collaborative actions.

Marion Lemoine in her "The Clean Development Mechanism from the Perspective of the Developing Countries" assesses Clean Development Mechanism's current functioning from a developing country perspective. Realizing the repartition of CDM projects is geographically unequal between regions of the world and among States, she explores some interesting matters. For example, which states really benefit from those investments? Does the CDM contribute to sustainable development

in the host developing countries? Do developing countries effectively benefit from CDM project sustainable development? Does CDM permit technology transfer in developing countries? She makes it clear that only a few emergent States, especially China and India, are the greater recipient of CDM benefits. After some formal analysis, she develops the ideas that the main benefit for developing country hosting CDM project is economic but not sustainable development, and technology transfer is only effective in less industrialized States.

Ye Bo in his "Climate Change, Export Administration and Trade Protectionism under Control" makes a brief description on climate change issues, outlining the practices of U.S., EU. He also probes into the current export administration system of China, and the latest WTO resolution on raw materials. He concludes that WTO dispute settlement will continue playing a strong role, and the trade protectionism will eventually under control.

In "Primary Study on China's Climate Change Legal Framework System", **Zhang Zitai and Tao Lei** study China's Climate Change Legal Framework System *primarily*. They point out that climate change institutional arrangement of the international community has been experiencing the transformation from policy-making to legislation. In light of international and other countries' legislative experience, he suggests that China's climate change legal framework system should consist of One Body and Two Wings. One Body means a comprehensive climate change law, while Two Wings mean the mitigation law and adaptation law. The former Wing includes the legislation on energy conservation and emission reduction, adjusting the industrial structure, developing circular economy, low-carbon economic, etc; and the latter aims to perfect the legislation on natural resources, relevant industries, disaster prevention and reduction, social security, etc.

In "The Impact of the Kyoto Protocol and UNFCCC into the Chinese Law and Consequent Reforms to Fight against Climate Change", **Peng Feng** deems that China has obtained great legislative achievements in fighting against climate change. She notes that there are some problems



in it as well, such as incomplete climate and energy legal system, lack of supporting regulations and difficulties in law implementation. She further notes that China must face its transition to a Low-Carbon Economy and has to seek a new reform breakthrough.

In "Practice and Evolution of Financial Mechanism Combating Climate Change in China", **Gu Dejin and Chen Li** consider that ensuring and improving the efficiency of public investment should be regarded as the core goal of establishing the financial mechanism combating climate change in China. In addition, the authors discuss the institutional defect of financial mechanism and feasible reform in China. They hold that Chinese financial mechanism management is too simple to meet the requirements of finishing independent report, making overall decision, implementing the divisions respectively. And Chinese legislations and regulations provide no specific operational rules.

He Weidong

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