

# Legal Issues on Climate Change and International Trade Law



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Editor

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 Springer

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# Preface

The most challenging issue we are facing today is climate change. Climate change is a multifaceted problem in which political, environmental, economic, and social issues are tightly interlinked. This multifaceted feature of transboundary ecological disasters cannot be resolved by tackling only one of these aspects. Therefore, it is imperative that international society responds to this issue in a coordinated manner that encompasses the various dimensions related to climate change.

Rapid industrialization, free trade, and globalization are often criticized as the major reasons for climate change. International trade has increased since the mid-twentieth century. The growth of international trade has significantly contributed to the substantial increase in greenhouse gas concentration in the atmosphere. In contrast, there are many who argue that a trade regime may facilitate the trade of green goods and services and thus contribute to curbing the fast growth of greenhouse gas emissions.

Together with my team members in the Social Science Korea (SSK) Center for Climate Change and International Law, I have been working to find a way to coordinate a climate change regime with the current international trade regime. As part of this long journey, we hosted the “International Seminar on Climate Change & Energy and International Trade Law” on August 28–29, 2014, to discuss current and future issues related to the WTO and climate change policies, as well as solutions to the problems related to climate change. This book is composed of a collection of those manuscripts presented at the seminar by prestigious experts in international trade law.

This book consists of four parts. The first part, by Gabrielle Marceau, investigates the interface between the trade and climate change regimes. She focuses on the rules of the General Agreement on Tariffs and Trade (GATT) such as national treatment, most-favored-nation treatment, and Article XX exceptions addressing the interaction of these rules with greenhouse gas mitigation policies and measures. In addition to GATT, she also discusses the Agreement on Technical Barriers to Trade (TBT) and some WTO disciplines relevant to climate change policies. Based on a comprehensive survey of interlinkages between these two different regimes,

she emphasizes that a greater degree of international cooperation would allow mitigation policies to be implemented across many countries.

The second part covers legal issues between the WTO and domestic climate change policies in several countries. Soyoung Lee, ZhongXiang Zhang, Mitsuo Matsushita, and Wen-chen Shih have contributed to this part. Soyoung Lee examines the applicability of the WTO regime, in particular the TBT Agreement, to eco-labeling rules in response to climate change by exploring three cases: *US-Clove Cigarettes*, *US-Tuna II*, and *US-COOL*. She points out that the key to a WTO-compatible eco-labeling policy is the establishment of a measure that maintains and protects free competition between imported products and domestic-like products.

ZhongXiang Zhang covers border carbon adjustment (BCA) measures in the form of emissions allowance requirements (EAR) under the proposed emission trading policy in the USA. The EAR can bring about conflicts between the USA and emerging economies, such as China, that do not have strict policies to limit greenhouse gas emissions. This chapter analyzes the implications of proposed EARs and China's response and gives meaningful recommendations to both countries—the USA needs to coordinate its BCA measures with WTO provisions and China needs to effectively respond to the policy.

Mitsuo Matsushita comprehensively discusses the domestic as well as the international effort to reduce greenhouse gases in Japan. The effort includes laws and policies relevant to climate change, an initiative in the private sector to cope with climate change, and the Joint Crediting Mechanism (JCM) and Bilateral Offset Credit Mechanism. He addresses future issues related to Japan's response to climate change in terms of domestic emission markets, compatibility of the emission market with other carbon markets, the risk of presumable subsidies under the JCM, and the applicability of border tax adjustment to JCM projects.

Wen-chen Shih reviews Taiwan's legal and policy framework for climate change mitigation. With an emphasis on economic incentive measures such as emission trading schemes, energy taxes, and the feed-in-tariff, this chapter examines the potential interaction of these tools with the WTO rules.

The third part discusses the future agenda on trade and climate change issues. The first chapter of this part focuses on potential investor-state disputes involving the Republic of Korea's Emission Trading Scheme (KETS). The authors of this chapter, Deok-Young Park and Yonjong Yoon, analyze how carbon emission allowances may qualify as covered investments under those free trade agreements and investment treaties concluded by the Korean government and suggest that this ambivalence provides leeway for foreign investors to invoke those agreements and seek damages pertaining to their allowances under the KETS through an investor-state dispute settlement process.

The following chapter by Luca Rubini provides insights into the need to rethink existing disciplines in light of the current economic, political, and environmental challenges. By focusing on the *Canada-Renewable Energy/FIT* case, he explores the interaction between the WTO and renewable energy subsidies. Rather than simply criticizing adjudicating bodies such as the WTO Dispute Settlement Body

(DSB), he argues that lawmakers should take the lead and clarify the rules in order to avoid adverse legal interpretations.

In the final part, Jaemin Lee is dedicated to provide implications on green subsidies and countervailing duty investigation by exploring the investigation of *Large Residential Washers from the Republic of Korea*. This chapter provides meaningful insights into green subsidies that are provided to eligible technologies relating to the New Growth Engine Industry in Korea. He argues that subsidy norms should be coordinated with international trade regimes.

This book is sponsored by the National Research Foundation of Korea Grant from the Korean government. Above all, it would have been impossible to get this book published without the invaluable contributions of the authors. Furthermore, I am grateful to Professor Taehwa Lee for her effort to successfully host the Seminar, and I also would like to extend my gratitude toward Dr. Hana Kim for all of the tasks she has done for this book. Last but not least, I want to express my sincere appreciation to Springer for allowing this book to come into the world.

Seoul, Republic of Korea  
Late Autumn, 2015

Deok-Young Park





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# Contents

<b>Part I Climate Change Issues Within the WTO</b>	
<b>The Interface Between the Trade Rules and Climate Change Actions . . . .</b>	<b>3</b>
Gabrielle Marceau	
<b>Part II Domestic Climate Change Policies and the WTO</b>	
<b>Compatibility of Eco-Labeling Scheme with WTO and Its Potentially Conflicting Impacts . . . . .</b>	<b>43</b>
Soyoung Lee	
<b>The U.S. Proposed Carbon Tariffs, WTO Scrutiny and China’s Responses . . . . .</b>	<b>67</b>
ZhongXiang Zhang	
<b>Law and Policy in Combating Greenhouse Gases in Japan . . . . .</b>	<b>93</b>
Mitsuo Matsushita	
<b>Taiwan’s Climate Change Mitigation Policies and Their Potential Interaction with the WTO Rules: Focusing on Economic Incentive Measures . . . . .</b>	<b>109</b>
Wen-Chen Shih	
<b>Part III Future Agenda of the Trade for Climate Change Issues</b>	
<b>Making Allowances for Carbon Emission Allowances in Investor-State Disputes: A Case Study of the Republic of Korea . . . . .</b>	<b>133</b>
Deok-Young Park and Yonjong Yoon	
<b>‘The Good, the Bad, and the Ugly.’ Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies . . . . .</b>	<b>153</b>
Luca Rubini	

**Part IV Conclusion**

**Green Subsidies and Countervailing Duty Investigations: Some Implications from Recent Examples of Korea . . . . . 197**  
Jaemin Lee

## Contributors

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**Soyoung Lee** is an attorney at Crouser & Suh PLLC, an international business and immigration law firm with its principal office in Miami, Florida, and associate offices in Boston, Washington, D.C., and Tallahassee. She has been the managing partner of Boston office since 2012. Before joining the legal profession, she was a devoted researcher in the field of international trade law and international legal issues concerning climate change. She has a PhD in international trade law from Yonsei University located in South Korea. Following her PhD degree, she went on to pursue further studies in international trade and business law at Georgetown University. She currently practices exclusively in international business and immigration law and is an active member of the American Bar Association and American Immigration Lawyers Association.

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**Mitsuo Matsushita** is a professor emeritus at Tokyo University and counsel to Nagashima Ohno & Tsunematsu, a leading international law firm in Tokyo. He served on the Appellate Body from 1995 to 2000. Having gained a PhD degree from Tulane University, USA, and a DJur degree from Tokyo University, Professor Matsushita went on to become widely acknowledged as one of the most authoritative Japanese scholars in the field of international economic law. In his academic career, he has held professorships at Sophia University and Tokyo University. He has been a visiting professor at Harvard University, Georgetown University, University of Michigan, Columbia University, and at the College of Europe in Bruges, Belgium. He has written many publications on various aspects of international trade and competition and investment law. Professor Matsushita has been also attached to the Ministry of Finance and the Ministry of International Economics and Trade as a member of various councils dealing with telecommunications, customs and tariffs, export and import transactions, and industrial property. He serves as a member of the Office of the Ombudsman of Trade and Investment, which is part of the Japanese government and deals with market access issues.

**Deok-Young Park** is a professor of international economic law at Yonsei Law School. He served as president of the Korean Society of International Economic Law in 2012 and vice-president of the Korean Society of International Law in 2011. Currently, he is a member of FTA Consulting Committee for the Korean Ministry of Industry, Trade and Energy, and a member of Advisory Committee of Legislation for Korean National Assembly. He is editor-in-chief of *Korean Arbitration Studies*. He is much interested in WTO and World Trade Law, International Investment Law, European Union Law, International Intellectual Property Law, and International Legal Issues on Climate Change.

**Luca Rubini** is reader in International Economic Law at Birmingham Law School. Previously, he was a lecturer at the University of Leicester and before that legal secretary to Sir Francis Jacobs QC, Advocate General at the European Court of Justice in Luxembourg. Luca had held visiting positions in various academic institutions in the UK, USA, Switzerland, and Italy, including King's College London, the Institute of International Economic Law (Georgetown University), the European University Institute, Bocconi University, and the World Trade Institute (University of Berne). He is a fellow of the Centre of European Law and King's College London and a visiting professor at ASERI, the Graduate School of Economics and International Relations of the Catholic University, Milan, and at the World Trade Institute, MILE program. In the 2012–2013 academic year, he was a Robert Schuman Senior Research Fellow at the Global Governance Programme (GGP) of the European University Institute. This prestigious fellowship, which is for “established academics with an international reputation,” is awarded by invitation only.

**Wen-Chen Shih** is a professor of law at the Department of International Business, National Chengchi University in Taiwan since 2010. She has an LLB degree from the National Taiwan University, an LLM degree from the London School of Economic and Political Science, and a PhD degree from the School of Oriental and African Studies. She is currently the commissioner of Taiwan's International Trade Commission (Ministry of Economic Affairs), the Committee Member of Taiwan's Wildlife Conservation Advisory Committee (Council of Agriculture), and the Committee Member of Chinese Taipei Pacific Economic Cooperation Committee (CTPECC). She is also the legal consultant for the "Trade and Environment Task Force" in Taiwan's participation in international economic matters, Bureau of Foreign Trade, Ministry of Economic Affairs. She has published 8 Mandarin and 6 English journal articles/book chapters in international environmental and international trade law, emissions trading, carbon tax, and climate change financial mechanisms between 2010 and 2015. She also published a book entitled *WTO, Climate Change and Energy* (in Mandarin) in 2013.

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