Carbon BTA Is Legal And Consistent With The Principle Of CBDR

Yingfeng Long
Law School, Shanghai Lixin University of Accounting and Finance, Shanghai, China
Email Address:longyingfeng@lixin.edu.cn

Keywords: Climate change, Carbon BTA, CBDR

Abstracts: Global climate change is impacting the world from natural environment to political society, sweeping almost the all human society. To counter climate change, the Kyoto Protocol created Cap-And-Trade mechanism. Another counterpart marketing Carbon Emission Reduction mechanism is carbon tax which regarded by scholars as a more effective, simple way to reduce emission. Carbon Tax Border Adjustments (carbon BTA) is the best measure to solve the problems of industry competitiveness degradation and carbon leakage arose from carbon reduction. However,the implementation of carbon BTA under the background of global climate change is a topic full of controversies. Two main academic controversies are：Firstly,it is the legitimacy of carbon BTA, i.e. Whether carbon taxes on physically incorporated inputs and non physically incorporated inputs are adjustable? Secondly, it is the relationship between carbon BTA and the principle of Common But Differentiated Responsibilities (CBDR). This author has used the method of Historical Analysis, method of Comparison, method of Economical Analysis and method of Normative Analysis to do the research on the legitimacy of carbon BTA and the relationship between carbon BTA and CBDR, put forward the points of views that carbon taxes are taxes on energies which are non physically inputs used in production are not only suitable for export border adjustment but also suitable for import border adjustment. The spirit of CBDR should be understood under the background of the purposes of Kyoto Protocol.The purposes of Kyoto Protocol is to restrain the concentration of carbon dioxide in the air to a certain level, whereas Carbon BTA is exactly a measure to control the carbon dioxide emission, so this kind of measure is coincide with the purposes of Kyoto Protocol.

1.Introduction

Border Tax Adjustment (BTA), initially proposed by EU, It's history could be traced to the Treaty of Rome and the integration of EU countries[1]. The EU selected consumption value-added tax to replace turnover taxes which EU countries already had.Follow the selection of principle of consumption value-added tax, the EU countries implement value added taxes at the border, levying taxes on imported products and withdrawing taxes on exported products.At that time and so far, the US didn't have federal level indirect taxes, there was a viewpoint in the business world that American products exported to EU would encounter tax barriers whereas products exported from EU would be exempted from taxes, therefor, EU'S value- added tax system disturbed with trade and disadvantaged the US.The US government strongly demanded initiating Disputes Settlement Procedure to solve the legitimacy of EU's BTA under Article 3 of GATT[1].The Working Panel on BTA of GATT was established in March 1968,and the Report of Working Panel on BTA of GATT was published in December 1970. The Report had made it clear that BTA didn't violate Article 3 of GATT and should not levy anti dumping taxes or anti subsidy taxes as well[2].The Report also made it clear that only taxes directly levied on products are suitable for border adjustment, and taxes not directly levied on products are not suitable for border adjustment.Whereas, there were controversies on the taxes which could be adjusted and taxes which couldn't be adjusted.Furthermore,the Agreement on Subsidy and Counter Measures concluded by the Kyoto Round Negotiation in 1979 limit the scope of taxes suitable for border adjustment in taxes on inputs physically incorporated in production of the exported products.Hereafter,in the Uruguay Round Negotiation 1994, expanded the scope of taxes suitable for export border adjustment to taxes on

Copyright © 2019, the Authors. Published by Atlantis Press.
This is an open access article under the CC BY-NC license (http://creativecommons.org/licenses/by-nc/4.0/).

consumption inputs[3].

Generally, there are two marketing oriented mechanisms of carbon reduction to counter global climate change, one is carbon tax, another is Cap-and-Trade. Not few scholars have thought that, by comparing with Cap-and-Trade, carbon tax is a more effective, more simple carbon reduction mechanism with effect beyond anticipation. But the carrying out of carbon tax will result in the degradation of competitiveness of domestic industries and carbon leakage. Carbon BTA was deemed as the best way to address the competitiveness degradation and carbon leakage, in addition, it would play a leverage function to prompt other countries to adopt corresponding carbon reduction measures. As early as 2000,the EU put forward that they will seek the possibility to carry out BTA if lacking effective international corporation to counter global climate change, so as to having a higher level of environmental protection[4]. In 2009, World Trade Organization and United Nations Environment Programme released the Report of Trade and Climate Change, a great length of the Report discussed carbon BTA[5]. Also in the American Clean Energy and Security Act which was called as Waxman Markey Bill, the carbon BTA was also incorporated in it.

But, the implement of carbon BTA under the background of global climate change is a topic full of controversies academically and politically. Two main academic controversies are: Firstly, the legitimacy of the carbon BTA, i.e. whether taxes on physically incorporated inputs and taxes on non-physically incorporated inputs are suitable for export BTA and import BTA? Secondly, the relationship between carbon BTA and the principle of CBDR.This thesis aim to have a deep discussion on these two main academic controversies.

2.Carbon BTA Is Legal Under The WTO Legal Regime

The Working Panel Report of Border Tax Adjustment of GATT had made it clear that indirect taxes which are taxes levied directly on products i.e. consumption tax, sales tax, turnover tax and value-added tax are suitable for adjustment, direct taxes which are taxes not directly levied on products i.e. social security tax, salary tax and other direct tax are not suitable for adjustment[2]. Carbon tax is a tax on energy levied according to the amount of carbon dioxide emitted. While energy per se as a product, undoubtedly carbon tax is a tax levied on product, belonging to indirect taxes, suitable for BTA. However, while energy being used to produce another products, whether the carbon taxes on energy which is production input are suitable for BTA[6]? Production inputs include physically incorporated inputs and non-physically incorporated inputs, energy is a non-physically incorporated inputs, then, whether the carbon taxes levied on energy which is non-physically incorporated inputs are suitable for BTA? This has become a core and key issue academically and practically.

2.1 Export BTA Of Carbon Taxes Is Legal Under The GATT

Under the 1979 Subsidy Act of GATT, the 1994 Subsidy Act of GATT and corresponding footnotes, there are three degressive concepts, respectively are indirect tax, prior stage indirect tax, cumulative prior stage indirect tax. Indirect taxes refer to taxes on sale, consumption, turnover, value-added, franchise, stamping, assignment, inventory and equipments, border taxes and other taxes except direct taxes and import charges[7].Prior stage indirect tax refer to indirect taxes on commodities or services being directly and indirectly used in production. Cumulative prior stage indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production[7]. Prior stage indirect taxes should be covered by Illustrative List item (g),and cumulative prior stage indirect taxes should be covered by Illustrative List item (h) correspondingly. Carbon tax which is tax on energy should be classified as prior stage indirect tax other than cumulative prior stage indirect tax，because commodities taxed at former stage then being used in following stage of production referred by the term of cumulative prior stage indirect tax are physically incorporated inputs which existing in the export products by a physical status, certainly, the physically incorporated inputs need not being consisted in the final products by a form as same as the original form when entering production[8].Obviously, the energy used in the former stage of

production was consumed by one-time, it could not enter following stage of production by a physical status, in other words, energy really isn't a physically incorporated input referred by the term of cumulative prior stage indirect tax, so, carbon tax should not be classified as cumulative prior stage indirect tax.

Comparing with the 1979 Subsidy Act of GATT, the 1994 Subsidy Act of GATT increased footnote 61:"inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product". This footnote was very important, it made clear that inputs not only include physically incorporated inputs, but also include energy, fuels and oil used in the production process and catalysts. Actually, it had expanded the scope of export BTA, i.e. not only indirect taxes levied on physically incorporated inputs can be export BTA, but also indirect taxes levied on energy, fuels ,oil used and catalysts can be export BTA. This footnote, combined with footnote 58,Illustrative List item (g) and item (h) and footnote 60, giving a comprehensive analysis, it was very clear that cumulative prior stage indirect tax which aimed at physically incorporated inputs was covered by Illustrative List item (h), carbon tax levied on energy which is non-physically incorporated inputs was covered by Illustrative List item (g). Under the stipulation of item (g), all taxes no matter levied on physically incorporated inputs or non-physically incorporated inputs are suitable for export BTA.

2.2 Import BTA OF Carbon Taxes Is Also Legal Under The GATT

For import Carbon BTA, the general points of views are: Article 3.2 of GATT only allow indirect taxes directly or indirectly applied to domestic identical products being adjusted, this means taxes levied on inputs of imported products can be border adjusted, because these taxes are indirect taxes indirectly applied on products[6,p.5]. However, Article 3.2 of GATT didn't make it clear that inputs must be physically incorporated inputs. But Article 2.2 of GATT indicated that only indirect taxes levied on that kind of inputs, namely inputs "from which" not "with the help of which" the imported products or identical domestic products being produced, can be border adjusted，i.e. only indirect taxes levied on physically incorporated inputs of import products can be border adjusted, indirect taxes levied on non-physically incorporated inputs of import products can't be border adjusted. Carbon tax is a indirect tax levied on energy which is non-physically incorporated input,so it can't be import border adjusted[6,P.5].

The author take the points of views that Article 2.2 of GATT could not be one-sided interpreted as only allowing border adjusting on indirect taxes levied on physically incorporated inputs of import products and not allowing border adjusting on indirect taxes levied on non-physically incorporated inputs of import products.The reasons are as follows: Firstly, Article 2.2 distinguished two situations, the first situation points to domestic identical products.It said nothing in this article shall prevent any contracting party from imposing at any time on the importation of any products a charge equivalent to internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the identical domestic product[9].The second situation points to articles from which the imported product has been manufactured or produced in whole or in part[9].It said nothing in this article shall prevent any contracting party from imposing at any time on the importation of any products a charge equivalent to internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of an article from which the imported product has been manufactured or produced in whole or in part[9].Considering under background of export border adjustment, the 1979 Subsidy Act of GATT and the 1994 Subsidy Act of GATT also distinguished two situations through the Illustrative List item(g) and item(h), we could have sufficient reasons to believe, above said first situation of import border adjustment corresponding to the item (g) of export border adjustment, and the second situation corresponding to item (h) of export border adjustment. For the cumulative prior stage indirect taxes under the item (h), only indirect taxes levied on physically incorporated inputs of export products can be export BTA, indirect taxes levied on non-physically incorporated inputs can't be export BTA[10]. Accordingly, the border adjustment on the internal taxes levied on articles from which the imported product has been manufactured or produced in

whole or in part, is a border adjustment of cumulative prior stage indirect taxes levied on physically incorporated inputs.For other indirect taxes other than the cumulative prior stage indirect taxes under the item (g), not only indirect taxes levied on physically incorporated inputs but also indirect taxes levied on non-physically incorporated inputs can be export BTA, accordingly, the import BTA is not limited to indirect taxes levied on physically incorporated inputs, indirect taxes levied on non-physically incorporated inputs also can be import BTA, only if the imposing is consistent with the provisions of paragraph 2 of Article III. Secondly, the above said matchup can be deduced reasonably, because the tax system for a specific country should be coincident and consolidated, this reflected in the BTA, one consolidated mechanism include two harmonized aspects, one is import BTA, the another one is export BTA. This matchup is also consistent with the requirements of the Working Panel Report on BTA of the GATT which stressed that the destination principle of BTA should be applied unified to import and export[2]. Thirdly, the view that the import BTA of indirect taxes other than cumulative prior stage indirect taxes is not limited to indirect taxes levied on physically incorporated inputs, indirect taxes levied on non-physically incorporated inputs also can be import adjusted, can be verified from the long term practices of value added tax border adjustment. The long term practices showed that the value added tax border adjustment had not distinguished physically incorporated inputs and non-physically incorporated inputs, any value added taxes could be import BTA. This practices is totally contradicted with the idea that import BTA limited to indirect taxes levied on physically incorporated inputs.Fourthly, the doing of import BTA limited to indirect taxes levied on physically incorporated inputs will create a trade distortion which will make the import products prioritize over domestic like products, this is not consistent with the purposes of international trade rules which try to fulfill trade neutrality. Fifthly, in the case of the Ozone Depleting Chemicals Tax of WTO[11], the US levied tax on ozone depleting chemicals, at the meantime, carried out import BTA to ozone depleting chemicals. What need to make a special illustration is that the ozone depleting chemicals is not physically incorporated inputs of the import product but non-physically incorporated inputs. However, the doing by the US where import BTA on the non-physically incorporated inputs, have never had challenged under the WTO legal system.

Sum up, carbon tax as a prior stage indirect tax levied on energy which is non-physically incorporated inputs is suitable for import BTA.

3. Carbon BTA Is Consistent With The Spirit Of The Principle Of CBDR

Carbon BTA , as a carbon reduction related measure to counter climate change, has a close relationship with the principle of CBDR. Unfortunately, general points of views regard carbon BTA is against the spirit of the principle of CBDR confirmed by the Kyoto Protocol[12]. Furthermore, regard carbon BTA as ecological imperialism against developing countries. The author take the points that, Firstly we should comb the historical sources, connotation, disputes and new developments under the Durban Platform, then to discuss the relationship between carbon BTA and the principle of CBDR.

3.1 The History Of The Principle Of CBDR Was Rooted With The International Environment Legal Principles And Ideas

The principle of CBDR was rooted with the international environment legal principles and ideas such as Common Concern of Mankind, Common Legacy of Human being and Principle of Fairness of international law[12]. The principle of Common Concern of Mankind required every responsible country engaging in international cooperation to encounter regional environment degradation and cross border or internal resources environment degradation[13]. The principle of Common Legacy was closely related with fairly shared cross border territory interest, such as seabed and subsoil resources. The differentiated responsibilities of CBDR should be traced to general principle of fair ,literally and actually differentiated treatment in international law, especially noticed the special situation of least developed countries[14]. Many scholars traced the earliest expression of CBDR back to the 23rd principle of Stockholm Declaration in 1972[12]. The 23rd principle said: It will be

essential in all cases to consider the systems of values prevailing in each country, and the extent of applicability of standards which are valid for the most advanced countries but which maybe inappropriate and of unwarranted social cost for the developing countries[15]. In 1987,the Montreal Protocol, there were specific stipulations reflecting the requirements of CBDR . This Protocol permitted the developing countries subjected to some conditions to conform to controlled measures in a prolonged way. Later, in 1990,the Amendament of the Protocol, also permitted the developing countries enjoying different treatments in setting up the Multi Lateral Fundation[12]. However, the first clear expression of CBDR was the 7th principle of Rio Declaration on Environment and Development in 1992. The 7th principle said: States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies placed on the global environment and of the technologies and financial resources they command[16]. After Rio Declaration, quotations on CBDR gradually spread, so far, CBDR have become a centric issue in the majority multi lateral environment negotiations[17].

Followed with Rio Declaration, both of the United Nations Framework Convention on Climate Change(UNFCCC) and Kyoto Protocol incorporated CBDR as treaty obligations in relative clauses. UNFCCC Article 3.1stipulated that, The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof[18]. Besides，the obligations in Article 4.1 of UNFCCC was obviously set in accordance with the principle of CBDR, and Article 4.2 only required developed countries to carry out policies and adopt measures to alleviate climate change and notify other parties the relative information about the policies and measures. Article 4.3-4.5 further required developed countries to provide finance aid and technology transfer to developing countries. After UNFCCC, in the Kyoto Protocol, the main obligations set in Article 3 only apply to developed countries. What is more, obligations undertaken by all parties under Article 10 of Kyoto Protocol was obviously preconditioned with CBDR, the same was in the Article 12 about the Clean Development Mechanism which aimed to help developing countries a sustainable development.

The author take the points of views that above said obligations of treaties reflected correctly the two requirements of the principles of CBDR. Firstly, in terms of environment protection, all countries should undertake common responsibilities; Secondly, the responsibilities of each country should be differentiated, should consider different situations, especially the historical responsibilities of environmental degradation of different countries and the different capabilities of different countries to prevent, reduce and control the environmental degradation.

3.2 There Are Some Controversies About The Principle Of CBDR

Following the confirmation and implementation of the principle of CBDR, there were some controversies happened therefore. The controversies mainly concentrated in hereinafter fields: Firstly, the second requirement of CBDR ,i.e. the differentiated responsibilities, was it rooted with different historical responsibilities of environment degradation or rooted with the asymmetric capabilities of different countries to counter environment degradation[17]? The author take the points of views that the differentiated responsibilities referred in CBDR was rooted with the different historical responsibilities of environment degradation of different countries, this was clear and definite. Because the expression of Article 3(1) of UNFCCC include “common but differentiated responsibilities” and “respective capabilities”, the former was corresponding to the different historical responsibilities of environment degradation of different countries, and the latter was corresponding to the the asymmetric capabilities of different countries to counter environment degradation, this was also very clear and definite. Secondly, the ambiguity of the principle of CBDR has leaded to some practical problem of determination, for example, to what extent and which

countries need to be treated differently? To what extent the differentiated treatments need to be restricted temporary? The author have thought these controversies were also hard to be real problems.Because, for which countries need to be treated differently, related treaties have made it very clear by making a list listing countries which should be treated differently.

For example, the UNFCCC distinguished Annex 1 Countries ,Annex 2 Countries and Non-annexed Countries, different types of countries assumed different environmental responsibilities. The Kyoto Protocol also listed in the Annex B the names of countries which needed to assume emission reduction commitment and the respective commitments index. For countries not being listed in Annex B, they would not assume compulsory emission reduction responsibilities for the moment. As to the temporary restriction on the differentiated treatments, indeed, except the element of historical contributions of environment degradation of countries being ascertained, other elements include the future contributions of environment degradation of countries and capabilities to counter environment degradation are changing always. Therefore, there need a mechanism to reflect this changing.Actually, there did have some mechanisms to deal with the changing in relevant clauses, in the UNFCCC, it was through modification of clauses to embody changes, whereas in the Kyoto Protocol it was through automatic evolution of threshold to embody changes.

Thirdly, it was the controversies about the international legal status of CBDR. Scholars almost unanimously agreed that CBDR at least has a status of soft law in international environment legal system. However, not few scholars have thought CBDR has gradually reached a more substantive legal status which appeared by customary international law.General speaking, a legal norm becoming a customary international law must satisfy two conditions, i.e. this was a pervasive, widely applied representative national practice, which was carried out by a way where convinced evidences proved that the pre-existing legal rules have pushed the practices to be compulsory.For the first condition, undoubtedly, the CBDR has successfully been incorporated in many multilateral environment treaties include The Montreal Convention, UNFCCC and the Kyoto Protocol.Besides, CBDR also appeared in several non-binding declarations include The Stockhold Declaration（1972）, The Rio Declaration(1992) and The New Delhi Declaration (2002). As to the second condition, we know, the most powerful country the US, has made a explanatory statement on the Article 7 of the Rio Declaration which the first time clearly stated the principle of CBDR, it said the US will not accept any interpretation of the Article 7,this means the US neither accept or undertake the international responsibilities under the Article 7, nor accept the depletion of the responsibilities of the developing countries under the Article 7.The author has thought that, no matter whether CBDR has become customary international law, when the requirements of CBDR having conversed to obligations of treaties , the parties of treaties should perform corresponding duties. Beyond the obligations of treaties, it is very difficult to claim international legal responsibilities for not carrying out the principle of CBDR.

Fourthly, it was the application of CBDR also lead to some controversies. There was a point that any actions should conform to the principles of UNFCCC, especially conform to the principle of CBDR and Respective Capabilities, should consider the special situations of the least developed countries. The another had thought that CBDR may not be embodied in any actions. To some extent, the differentiated treatments should suffer temporary restrictions.The author deemed that it was reasonable that any actions should conform to the principle of CBDR, because it is hard to imagine that the least developed countries should take as same as the responsibilities of developed countries in the area of global climate change. However, it was up to the stances of developed countries. While the insistency of CBDR becoming a barrier to push forward a effective mechanism and stalemating the situation, stepping back maybe the best choice.In this moment, it is more flexible, more valueable and more practical that the developing countries only stress that international treaty obligations conversed from the principle of CBDR should be strictly observed other than any actions should conform to CBDR.

3.3 The Principle Of CBDR Had New Development Under The Durban Platform

In the seventeenth conference of parties (COP 17) of the UNFCCC held in 2011 at Durban, the

conference made a decision to build up The Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) ,this decision decide to start a working process for a protocol,i.e, another legal instrument or an agreed outcome with legal force under the convention applicable to all parties[19].In this decision, the symbolic wordings of differentiated responsibilities in the area of climate change “fairness” and “ common but differentiated responsibilities” were not mentioned[20].Furthermore, in this decision, the wordings of “developed countries” and “developing countries” were unprecedented not appeared{20,P.509]. Hence, this was naturally misunderstood that the new climate change mechanism under the Durban Platform will not distinguish developed countries, developing countries and common but differentiated responsibilities. The author has thought that no wordings of developing countries and developed countries common but differentiated responsibilities meant some new explanations or implications, but never and ever abandoned the common but differentiated responsibilities between developing countries and developed countries. Because, the text of the decision of the Durban Platform was a product of compromise between developed countries and developing countries, the explanation should combine with the present economical situation.The developed countries have a long term dissatisfaction on the rigid differentiated responsibilities under the Kyoto Protocol. The rigid responsibilities were simply expressed by the wordings that developed countries take responsibilities whereas the developing countries not[20]. It seemed from the developed countries that since the implement of the UNFCCC in 1992, economical and political situations have changed a lot, the common but differentiated responsibilities should be explained by a dynamic concept and organically linked with the changed situations. The EU have thought that in the future agreements the differentiated responsibilities should have a more broader spectrum.However, the India and other developing countries regarded this equaling to modify the UNFCCC. The Durban Plat form subtly solved this impasse by the wordings “the future protocol will be rooted from the UNFCCC”, or in another words “under the convention”, which mean the future protocol will contain the principles of UNFCCC include the principle of CBDR[20]. Secondly, the text of the decision of Durban Platform further used the phrase “applicable to all parties”, this reflected the requirements of some developed countries who insisted that the future system should be applicable to all parties. But, should notice that a document applicable to all parties not mean the document would be applied by a symmetrical manner to all parties. Both UNFCCC and the Kyoto Protocol were applicable to all parties, but there didn’t include symmetric commitments of all parties. The term applicable to all parties has more political meaning than legal meaning. But there was viewpoint regarded that the expression of applicable to all parties was a signal, the future system will develop toward the direction of symmetrical obligations at least in the form or in the nature[21]. Thirdly, the decision under the Durban Platform started a working plan to strengthen reduction target, aimed to secure the possibility of maximum effort of emission reduction of all parties[19]. This working plan applied to all parties instead of developed countries.But, need to notice, the Cancun Agreement urged the developed countries increasing the emission reduction in broad economic area[22], at the meantime, agreed the developing countries adopting nationally appropriate reduction actions in a sustainable way, this reduction could be possible through the support of technology, finance and capability building.In between the process of Durban Meeting, this reduction target working plan was put forward and discussed under the background that the long term cooperation ad hoc working group negotiated with the developed countries the reduction commitments[23].This annoyed the developed countries who had been trying eliminating the paragraphs from the text of the decision of long term cooperation ad hoc working group.The alliance of small island countries , supported by the EU, refused eliminating the reduction targets from the agenda. As a compromise, in the last several hours of the negotiation, the paragraphs of reduction targets were transferred to the decision of the Durban Platform, meanwhile, emission reduction working plan gave up the doing of applying only to developed countries and instead by applicable to all parties.This was exactly the reason why the first time there was no wording of developed and developing countries in the decision reached by parties in the area of climate change.

3.4 Carbon BTA Is Consistent With The Spirit Of The Principle Of CBDR

For the relationships between carbon tax border adjustment and CBDR, sum up, there were four points of view:The first viewpoint, carbon tax border adjustment measures violate the principle of CBDR incorporated in Kyoto Protocol[24].To this point, we think it is open to discussion. The requirements of CBDR can be met through many other arrangements, no need and also difficult to be embodied in the measures of carbon tax border adjustments.Carbon tax border adjustments will not lead to a unreasonable burden distribution between developed countries and developing countries. The impacts of carbon tax border adjustments on trade, manufacture and consumption are neutral. Again, the spirit of the principle of CBDR in Kyoto Protocol should be understood under the background which pushed the appearance of Kyoto Protocol.The aim of Kyoto Protocol was to reach the ultimate objective set in Article 2 of UNFCCC which is to stabilize the greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Whereas, the carbon tax border adjustments being exactly a measure to control the green house gas emission, is in accrodance with the ultimate objective of UNFCCC.The second viewpoint, the unilaterally border adjustments measure implemented by developed countries will transfer the environmental cost from developed countries to developing countries, this kind of unreasonable burden distribution violate the principle of CBDR, because the principle confirmed the different contributions in environment degradation made by developed countries and developing countries and the different capabilities to answer the challenges from environment degradation, correspondingly required the developed countries undertaking more onerous responsibilities to reduce emission. To this point, we also think it is open for discussion. This point preconditioned that developed countries levying carbon taxes and implementing border adjustments to products from developing countries, it ignored the situation that developing countries may also levy carbon taxes and adopt border adjustments.Actually, carbon tax border adjustments under destination principle transfer carbon cost of product from manufacturing place to consumption place,transfer environment cost from export producer to import consumer ,will not lead to a unreasonable environmental cost burden distribution between developed countries and developing countries. The third point, the interpretation on GATT clauses related with import border adjustment which was in accordance with the principle of CBDR should be that only taxes on physically incorporated input are suitable for border adjustment and taxes on non physically incorporated input are not suitable for border adjustment, correspondingly benefit the developing countries[6].This point is also open for discussion.This interpretation preconditioned that the border adjustments points to developing countries which is the countries be adjusted,and the developing countries would oppose the measures of carbon tax border adjustment.Actually this situation doesn’t exist.We know, carbon tax border adjustment measures didn’t point to poor lagged countries but point to irresponsible wealthy developed countries[4].The developing countries would actively support instead of against the measures of carbon tax border adjustments[25]. In addition,followed that interpretation, if the products from developing countries can be exempted from carbon tax border adjustments, the developed countries will resist the measures of carbon tax border adjustments,this will block the actions to counter climate change and violate the final benefits of developing countries.What is more, followed this interpretation, the so called competitive advantages granted to developing countries were doubtful, because the result of carbon tax border adjustment could be offset by many elements such as exchange rate, salary and price[1].The fourth point,any actions to counter climate change should reflect the requirements of CBDR, so did the carbon tax border adjustments.This point was open for discussion too.Because the CBDR have been reflected in many other aspects other than carbon tax border adjustments. Again, the principle of CBDR didn’t get the status of customary international law at present[12],before having the status, the CBDR should only be transferred to treaty obligations to meet the requirements.So far, clauses incorporated with CBDR requirements include Article 3.1, Article 4.1-5 of UNFCCC and Article 10,Article 12 of Kyoto Protocol ,all these clauses were nothing related with carbon tax border adjustments. In legal documents related with carbon tax border adjustments , no requirements to reflect the principle of CBDR as well.

4.Conclusions

Carbon BTA is a effective marketing carbon reduction mechanism to counter climate change, the purpose of the it is to chase a higher level of environmental protection, its implementation is practicable and will not violate the multi lateral trade rules, will conform to the spirits of CBDR. But the implementation caused many controversies.In this day the climate change aggravating, human beings should stress more on the protection of globe environment and the security of globe environment. Under this background, we should fully exert the active functions of carbon BTA to push forward the climate legislation and environment protection. On the other hand, try to weak the negative trade effect. When environment targets conflict with trade effects, environment targets should be prevail over trade effects. Trade realize private interest, whereas environment targets pursue common happiness of human beings. If the legal obstructions to carry out carbon BTA can be effectively wiped off, if the negative attitude towards carbon BTA can be converted to positive attitude, then carbon BTA can be widely carried out in the whole world, the deteriorating tendency of climate change will greatly better off thereon, the biggest beneficiaries will be the broad developing countries.China, as the biggest developing country, blue sky, white cloud,fresh air,clean water and natural food, the dream that human beings and nature get along harmoniously must come true.

References:

[1] Ben Lockwood and John Whalley ,Carbon-motivated Border Tax Adjustments :Old wine in Green Bottles? The World Economy (2010), P815.

[2] GENERAL AGREENMENT ON TARIFFS AND TRADE,REPORT BY THE WORKING PANEL ON BORDER TAX ADJUSTMENTS,L/3464， 20 NOVEMBER 1970,Available at:http://www.WTO.org/gatt_docs/English/SULPDF/90840088.pdf.

[3] Long Yingfen, Challenges To China From Carbon Tax Border Adjustment, China Legal Science,September 2015,VOL.3,NO.5,P69.

[4] Commission of European Communities, Communication from the Commission to the Council and the European Parliament, Bring our Needs and Responsibilities Together--Integrating Environmental Issues with Economic Policy , COM(2000)576 Final.pp.9-10.

[5] World Trade Organization and United Nations Environment Programme, Trade and Climate Change , A Report by the United Nations Environment Programme and the World Trade Organization. 2009.At Part IV.

[6] Christian Pitschas, GATT/WTO Rules For Border Tax Adjustment And The Proposed European Directive Introducing A Tax On Carbon Dioxide Emissions And Energy, Georgia Journal of International and Comparative Law, Winter, 1995, 24 Ga.J.Int'l & Comp L.479.P.4.

[7] AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES, Footnote 58. Available at http://www.wto.org/english/docs-e/legal-e/24-scm.pdf.

[8] AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES, ANNEX II.2.3. Available at http://www.wto.org/english/docs-e/legal-e/24-scm.pdf.

[9] THE GENERAL AGREEMENT ON TARIFFS AND TRADE, Article 2.2(a). Available at http://www.wto.org/english/docs-e/legal-e/gatt47-01-e.htm.

[10] AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES, ANNEX I(h). Available at http://www.wto.org/english/docs-e/legal-e/24-scm.pdf.

[11] Charles E. Mclure, Jr. The GATT-Legality of Border Adjustment for Carbon Taxes and the Cost of Emission Permits: A Riddle , Wrapped in a Mystery Inside an Enigma. II Fla. Tax Rev. 221. At Part III.A.I.C.

[12] Sarah Davidson Ladly (2011), Border Carbon Adjustments , WTO--Law and the Principle of CBDR, Int Environ Agreements (2012) 12:63-84.

[13] Brunnee,J.(2007).Common areas, Common heritage ,and Common Concern. In D.Bodansky, J.Brunnee&E.Hey,The Oxford handbook of international environment Law. Oxford University press.P.566.

[14] Sands P.(2004).Principles of international environment law (2nd ed).Cambridge University press.P.288.

[15] UNEP,Declaration of the United Nations Conference on the Human Environment,Principle 23.21st plenary meeting 16 June1972.Available at :htpp://www.Unep.org/Documents.Multilingual .

[16] Rio Declaration(1992),Principle 7.

[17] Biniaz,S.(2002).Common but differentiated responsibilities, remarks by Susan Biniaz .America Society of International Law Proceedings,96,P.360.

[18] UNITED NATIONS FRAAMEWORK CONVENTION ON CLIMATE CHANGE. Available at:http://unfccc.int/files/essential_background/background_publications_html pdf/application/pdf/conveng/pdf.Article 3(1).

[19] Decision 1/cp.17,Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action.Para.2.Available at http://unfccc/resource/docs/2011/cop17/eng/09a0/pdf page=2.

[20] Lavanya Rajamani,THE DURBAN PLATFORM ENHANCED ACTION AND THE FUTURE OF THE CLIMATE REGIME.International and Comparative Law Quarterly/Volume 61/Issue 02/April 2012,P.507.

[21] Connie Hedegeard,Reaction to UN Climate deal,BBC News science and Environment,11,Dec,2011.Available at http://www.bbc.co.ok/news/science_environment_16129762.

[22] The Cancun Agreements:outcome of the work of the Ad Hoc Working Group on Long—term Cooperate Action under the Convention Decision 1/cp.16.Para 37.Available at http:unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf.

[23] UNITED NATIONS FRAAMEWORK CONVENTION ON CLIMATE CHANGE.Available at:http://unfccc.int/files/essential_background/background_publications_html pdf/application/pdf/conveng/pdf.footnote 53.

[24] China's Ministry of Commerce, China says "Carbon Tariffs" proposals breach WTO rules .Available at http://www.reuters.com/article/2009/07/03/US-China-Climate-idusTRE5620FV20090703.

[25] Bloomberg Energy and Climate Report,U.N. Climate Talks start with Raised Hopes But No Noticeable Shift in Positions.04/29/2013.