

Research on the Legitimacy of Carbon Emission Rights with Administrative Legal Attributes

Jingwen Weng

Wuhan University Of Technology
Email: 851214144@qq.com

ABSTRACT

The legal attributes of carbon emission rights are the cornerstone of the operation of the carbon trading system. This paper discusses the connotation of carbon emission rights, and sorts out the different legal attributes of carbon emission rights in academic circles. It is proved from the three aspects of legal norms, distribution system and trading process that carbon emission right has the legal attribute of administrative power. This legal attribute is more suitable for the development of my country's carbon trading market and is conducive to the realization of the goal of "carbon neutrality".

Keywords: carbon emission rights, legal attributes, administrative rights.

1. INTRODUCTION

China's current laws do not have clear regulations on "carbon emission rights". Some scholars have discussed from the theoretical level and believe that carbon emission right is the right of the right holder to use and benefit from the environmental capacity based on the self-purification ability of the environment.[1]. From a practical point of view, some scholars believe that the carbon emission right is the right to discharge pollutants into the atmosphere obtained by the pollutant discharge subject through the allocation of relevant environmental departments under the condition of the total limit [2].

1.1 Objects of carbon emission rights

The view that the object of pollution rights is "environmental capacity" has been generally recognized in the academic circles. For the definition of environmental capacity, there are currently two views in the academic world: one view is that environmental capacity is the maximum load of pollutants that an environment can accommodate under the condition that human survival and natural ecology are not damaged [3]; Another point of view is that environmental capacity is the amount of pollutants that an environment can accommodate under specified environmental goals [4]. In my opinion, these two views are not in conflict. As a form of emission right, the object of carbon emission right should also be the environmental capacity, specifically, the atmospheric environmental capacity.

1.2 Legal connotation of carbon emission rights

The national legal source of carbon emission rights comes from the "Kyoto Protocol", which introduced the International Emissions Trading Mechanism (IET) between the contracting parties, the Joint Implementation Mechanism (JI) between the countries, and the countries and developing countries. The Clean Development Mechanism (CDM) aims to reduce the cost of carbon emission reduction in developed countries by purchasing carbon emission rights. Therefore, carbon emission rights are different from ordinary commodities in the market economy. They are special commodities that are endowed with intrinsic value by international law. The state determines the carbon emission quota of each carbon emission subject according to the current economic situation, and the carbon emission subject obtains the right to emit greenhouse gases into the atmosphere by obtaining the permission of the government or the environmental protection department.

1.3 Theoretical basis of carbon emission rights

In 2007, British economist Nicholas Stern wrote in his "Stern Report" that climate change is the most serious market failure the world has ever witnessed. Market failure theory holds that due to monopoly, externality, information asymmetry and in the field of public goods, only relying on the price mechanism to allocate resources cannot achieve efficiency - Pareto optimality, and market failure occurs. The object of carbon emission rights is the

natural environment capacity, which belongs to public goods, and the non-exclusive characteristics of public goods lead to natural externalities in the carbon emission trading market.

The Coase theorem is a way of thinking for the correction of environmental externalities. The theoretical origin of the carbon market also originated from Coase's "property rights theory", which transformed the externality problem into a property rights problem. On this basis, Dales established the concept of "carbon emission trading".

Another way of thinking about the correction of environmental externalities comes from the ideas of the welfare economist Pigou. As early as a hundred years ago, Pigou proposed in his "Welfare Economics": To eliminate market failures, the government should adopt a policy of taxing sectors whose marginal private costs are less than marginal social costs; Sectors with marginal social benefits are subsidized. Pigou's important contribution is to demonstrate that the important economic root of environmental problems is externality. Under the conditions of a market economy, any individual or unit engaged in economic activities is a "rational" "economic man", and the private sector will not spontaneously reduce production or increase costs for pollution control. Therefore, Pigou proposed that the government should properly intervene, forcing the private sector to internalize costs.

2. ACADEMIC DISPUTES ABOUT THE LEGAL ATTRIBUTES OF CARBON EMISSION RIGHTS

At present, there are endless debates on the right attributes of carbon emission rights around the world, and the views are mixed. Common law countries mainly hold the view of property rights and administrative concessions. The real right theory is the mainstream theory of the civil law system, which includes four viewpoints: the quasi-real right theory, the usufructuary right theory, the quasi-usable real right theory and the franchised real right theory. There are two main viewpoints in China regarding the legal attributes of carbon emission rights, the usufruct theory and the special administrative license with asset attributes.

2.1 The public property of carbon emission rights

The public right attributes of carbon emission rights are mainly discussed through environmental rights and administrative rights.

Environmental right is the basic right of the subject of environmental legal relationship to enjoy a healthy and good living environment and rational use of environmental resources. Environmental rights are based

on "human rights", and everyone has the right to carbon emissions. The carbon emissions trading system set in the "Kyoto Protocol" does not deprive anyone of the right to carbon emissions. On the contrary, through this system, environmental resources are rationally utilized, carbon emissions in the atmosphere are controlled within a certain range, and a sustainable and good living environment is provided for the rights holders. Therefore, the carbon emission right is essentially the ultimate goal of protecting the environment and has the attributes of an environmental right.

Scholars who hold the view of administrative concessions believe that the use of administrative concessions to define carbon emission rights can not only reflect the normative basis of relevant legal documents, but also flexibly empower government agencies to effectively deal with the uncertainty of climate change [5]. Judging from the provisions on administrative licensing in the "Administrative Licensing Law of the People's Republic of China", administrative licensing usually has the following characteristics: the implementation subject of administrative licensing is the administrative subject; it is an act based on application; The content of the administrative licensing decision is to allow or not allow the administrative counterpart to engage in specific activities, with or without the corresponding qualifications or qualifications; administrative licensing is a conferring behavior and an essential administrative behavior [6]. The carbon emission right fully conforms to the characteristics of the above-mentioned administrative licensing.

2.2 The private property of carbon emission rights

The private property attributes of carbon emission rights are mainly discussed from two aspects: property rights and real rights, of which real rights are also divided into usufructuary rights and quasi-real rights.

The theory of property rights is based on the theory of economic and environmental property rights. It believes that carbon emission rights are the right to use environmental capacity, and are regulated by laws as private property rights owned by enterprises. The holder has the right to possess, transfer, use and dispose of the property. In fact, carbon emission rights cannot be completely attributed to the private sector, so some scholars put forward the theory of new property theory, which is rooted in the growth of government supply. The rise of government supply and the accompanying legal system has increased the rights of the government, eroded the independence of individuals, and even bought the waiver of citizens' constitutional rights. Therefore, it is necessary to provide the government with this wealth in the form of property rights, with constitutional, substantive and procedural guarantees [7].

The property rights of carbon emission rights are divided into usufructuary rights and quasi-property rights. Scholars who support usufruct believe that the environment belongs to public goods, and the ownership of environmental capacity resources belongs to the state, and the state corrects market failure by controlling the ownership of such environmental capacity resources. The state issues a pollutant discharge permit to the pollutant discharge source, so that the pollutant discharge source enjoys the right to use the environmental capacity, so the discharge right belongs to the usufructuary right in the property right [8]. Scholars who support quasi-property rights believe that the right to discharge is the right of the right holder to use and benefit from the environmental capacity based on the self-purification ability of the environment. As a kind of resource property right, it belongs to the category of quasi-property right in the field of civil law because of its object intangibility, weak possession, public-private compatibility and relative exclusivity.

3. A SPECIFIC DISCUSSION ON THE ADMINISTRATIVE AND LEGAL ATTRIBUTES OF CARBON EMISSION RIGHTS

The author will explain the characteristics of carbon emission rights with administrative and legal attributes from three aspects: legal norms, distribution methods and trading methods of carbon emission rights.

3.1 Reflection of the administrative attributes of carbon emission rights in legislation

Article 33 of the "Interim Regulations on the Management of Carbon Emissions Trading (Draft Revised)" issued by the Ministry of Ecology and Environment of my country on March 30, 2021 stipulates that carbon emission rights refer to carbon emissions within a specified period of time allocated to key emission units. quota. This is relative to Article 26 of the 2019 "Interim Regulations on the Administration of Carbon Emissions Trading (Draft for Comment)", which stipulates that: carbon emission rights refer to the units and individuals participating in carbon emission trading that legally obtain the right to emit greenhouse gases into the atmosphere. right. The definition of carbon emission rights has been revised, and "entitlement" has been changed to "quota". In contrast, the "Interim Regulations (Draft for Comment)" actually prefers that "carbon emission rights" belong to a special financial property rights asset, while the revised "Interim Regulations (Revised Draft)" will "carbon emission rights". "Carbon emission rights" is defined as an administrative license.

The basis can also be found in the provisions of Article 329 of the Civil Code concerning the concession of property rights: the rights to prospecting, mining,

water drawing, and the right to use waters and tidal flats for aquaculture and fishing obtained in accordance with the law are protected by law. Such franchised property rights, which have been clarified by law, are stipulated under the item of usufructuary rights, and have the characteristics of the same usufructuary right and the characteristics of "franchise", that is, a precondition for obtaining state administrative license. Therefore, the author believes that the characteristics of carbon emission rights are in line with the provisions of the "Civil Code" on franchised property rights. The object of carbon emission rights, that is, the environmental capacity belongs to the natural resources owned by the state and is obtained through state allocation (licensing). This is similar to the objects (minerals, waters) involved in prospecting, mining, water extraction, and use of waters, etc. listed in the above clauses, that is, all natural resources; and they all need to go through the "lawfully obtained" administrative license as a pre-procedure. . Therefore, from this perspective, carbon emission rights belong to the category of such concession rights, which also have the attributes of administrative law.

3.2 Reflection of the administrative attributes of carbon emission rights in the distribution system

The acquisition of carbon emission rights is different from general property rights. The acquisition of carbon emission rights originates from the state's initial allocation of carbon emission rights. From a legal point of view, it also conforms to the attributes of the above-mentioned franchise property rights. In fact, administrative licensing is used as a precondition for obtaining carbon emission rights.

Judging from the provisions on the distribution system in the Measures for the Administration of Carbon Emissions Trading (for Trial Implementation), the public nature of carbon emission rights is far stronger than its private nature. First, it is up to the government to determine who to allocate. This means that the government has the right to decide the main body of the carbon emission trading market. Second, the government determines the total amount of carbon emission allowances. This means that the government can decide the value of carbon emission rights, and the government has the right to intervene in the price of carbon emission rights trading. Third, it is up to the government to formulate the distribution method. In the initial stage of the carbon emission trading market, free distribution is the main method, and paid distribution is supplemented, which means that the government's distribution method will have a certain impact on the interests of enterprises. It can be said that all aspects of the carbon emission rights allocation system are affected by the government's public power.

3.3 Reflection of the administrative attributes of carbon emission rights in the trading system

According to the legal provisions on borrowing carbon trading in the "Shanghai Environment and Energy Exchange's Business Rules for Borrowing Carbon Trading (Trial)" promulgated by Shanghai Energy Exchange in June 2015, it can be seen that borrowing carbon trading is based on the market's understanding of the accounting property of carbon emission rights. Innovative carbon financial products designed for the recognition of attributes. The asset attribute of carbon emission right is identified, and the market's recognition of this asset attribute is only generated by the agreement of both parties to the transaction. Obtaining property benefits through trading does not mean that it actually affirms that carbon emission right belongs to property rights.

In December 2019, the Ministry of Finance promulgated the "Interim Regulations on Accounting Treatment of Carbon Emissions Trading", which revised "carbon emission rights" to "carbon emission rights assets", and added the word "asset" after "carbon emission rights". On the one hand, it recognizes the asset attribute of carbon emission rights, but on the other hand, it blurs the definition of the legal nature of "carbon emission rights".

In the operation process of my country's carbon emission trading market, the characteristics of administrative regulation and administrative supervision are very obvious, emphasizing the management function of administrative organs in carbon emission trading activities. First of all, from the perspective of efficiency, if the administrative organs reduce the control of carbon emission rights, the number of tradable carbon emission rights in the market will fluctuate greatly. The role of greenhouse gases is even more difficult to play. Therefore, only by placing carbon emission rights under administrative control can the carbon trading process be open and transparent, improve trading efficiency and stabilize the carbon market. Secondly, from the perspective of fairness, carbon emission rights trading is different from other transactions. The subjects who can participate in carbon emission rights trading are not only large enterprises with high energy consumption and high output with huge space for emission reduction, but also some enterprises that need emission reduction. Small enterprises and individuals who meet the relevant conditions must place carbon emission rights under the strict control of administrative organs under the condition that the financial resources and industry influence of the two parties in the transaction are seriously unequal, so as to avoid the monopoly of powerful industries and enterprises. Maintain transaction security.

4. CONCLUSION

Carbon emission rights trading covers the two major contents of "initial allocation" and "transaction transfer" of carbon emission rights. The carbon emission rights trading market is not a free market formed "spontaneously", but a market "rationally constructed" by the government. This makes carbon emission rights have both public and private rights attributes. Since it can be seen from the legal norms, distribution and trading methods of carbon emission rights that carbon emission rights have the legal attributes of administrative power, the original acquisition and trading transfer of carbon emission rights should be regulated by the government.

REFERENCES

- [1] Haifeng Deng, Li Luo. Equitation Profit System [J]. Science of Law (Journal of Northwest University of Political Science and Law),2007(06):76-83.
- [2] Mingyuan Wang. Discussion on the Right to Material and Development Rights of Carbon Emissions [J]. China Legal Science,2010(06):92-99.
- [3] Jianlin Ju. Talking About the Configuration of Environmental Capacity Resources [I] [J]. Environmental Pollution & Control, 1997 (04): 10-13+39.
- [4] Guiquan Tian. Discussion on the Use of Water Environment Capacity Resources [J]. Shandong Environment, 1994(05): 6-7.
- [5] Hui Wang. Discussion on the Essentials of Carbon Emissions Rights[J]. Law and Social Development, 2017, 23(06): 171-188.
- [6] Songnian Ying. Administrative Licensing Method [M]. Law Press, 2012:4-6
- [7] Qingjun Wang. Sewage Primary Legal Attribute Research[J]. Wuhan University Journal(Philosophy & Social Science),2010,63(05):750-755.
- [8] Jiaxian Zhu. Environmental Financial Law Research[M]. Law Press, 2009:45