

# *Analysis of the legitimacy of carbon tariffs—from the perspective of Habermas's legitimacy theory*

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**Keywords:** Carbon tariff, Habermas, legitimacy

**Abstract:** The legality of carbon tariffs has been highly controversial since their inception. Habermas's discussion legitimation theory believes that the legitimacy of a rule depends on three requirements: the acceptability of its value, the legality of the rule itself, and intersubjectivity. The existing carbon tariff rules do not meet the above three requirements at the same time, so they are not legal, but they may have legality in the future. When designing a system, it can be permitted if it meets the above requirements.

## **1. Introduction**

"Carbon tariff" refers to the unique carbon dioxide emission tariff levied on the import of energy-intensive products[1]. Its essence is a border adjustment tax. Carbon tariffs are generally proposed under two backgrounds. First, since industrialization, humans have emitted a large amount of carbon dioxide into the nature. At the same time, based on the need for survival, humans have cut down forests on a large scale, which has led to global warming and destroyed the ecological environment. The successive ecological and environmental disasters that have occurred since then have made people feel the threat that environmental damage poses to their own survival. Based on this, countries are cooperating with each other and working together to reduce carbon dioxide emissions and protect the ecological environment. Second, countries have signed a series of environmental protection conventions. Due to historical and other reasons, the emission reduction obligations stipulated in the conventions are lighter for developing countries than for developed countries. Therefore, developed countries consider restrictions from the perspective of maintaining the competitiveness of their own products. Carbon emissions will increase the cost of domestic products and weaken international competitiveness. Therefore, carbon tariffs are levied on other countries to protect the competitiveness of domestic products[2]. Generally speaking, carbon tariffs have two main purposes. One is to prevent carbon leakage and protect the environment. The so-called carbon leakage means that a country's emission reduction measures will cause companies to move to countries that have not taken emission reduction measures, resulting in global carbon emissions not being reduced. That is, increasing carbon emissions elsewhere to offset carbon reductions in the global environmental commons[3]. The other is to ensure fair competition, safeguard national interests, and transfer environmental governance responsibilities and costs[4]. Due to the dual attributes of carbon tariffs, which are beneficial to protecting the environment, they may restrict free trade and harm the interests of developing countries. Therefore, there has been huge controversy over the legality of carbon tariffs since they were

proposed. Many Chinese scholars have questioned the legality of carbon tariffs. Most of the reasons for this negative attitude are that it does not comply with the relevant provisions of GATT. This article analyzes it through Habermas' theory of negotiation legitimation, and agrees that the existing unilateral carbon tariff is not legal under the imposition of it, but under certain conditions, carbon tariffs may have legitimacy.

## 2. Overview of Habermas' theory of deliberative legitimation

Habermas' discussion of legalization theory mainly discusses the issue of why law is legitimate. Discussions on why law is legitimate have been for a long time. The three major legal schools have discussed the legitimacy of law from different angles. The natural law school has discussed the issue of legality from legal perspectives. Discuss it from the perspective of value acceptability, believing that the law should conform to the universal values of mankind, and arguing that there is also a natural law principle on top of man-made law, and man-made law is only based on the principle of natural law. Real law; the school of analytical positive law rejects the question of the need for law outside of legislation, and advocates that all laws enacted by the national legislature with statutory legislative power in accordance with the legislative process stipulated by law are real laws; while the social law school. The school emphasizes the role and influence of law on society, believing that law can have an impact on people's behavior, and it is the real law if it is actually followed by the public, but not vice versa. The natural law school is a normative legality theory, while the latter two legal schools are an empirical legality theory[5]. Habermas believes that the above legality discussions are flawed. Habermas believes that the normative legal research method of the natural law school does not pay attention to the formal requirements for the establishment of the law itself, but focuses on exploring the legal and universal moral foundations. The connection between them has metaphysical characteristics. In addition, it does not realize that in modern society, after disenchantment, law has been separated from the moral system. The legality or validity of law comes from the unity of legal fact and normative validity[6]. It is also unconvincing for the positivist school of law to seek the legitimacy of law without the moral connotation of law. For example, during World War II, was the law widely recognized by the people of Nazi Germany legitimate?

After Habermas pointed out the shortcomings of the above two kinds of legitimacy, he proposed his own reconstructive legitimation approach based on negotiation theory. The so-called reconstructive legitimation approach actually explores the political order and The legal order has the pre-communication and institutional embodiment of legitimacy[5]. Habermas believes that law should be both factual and normative. The validity of the law implies two dimensions, which require both things to be guaranteed at the same time: "on the one hand, the legality of conduct, that is, the average observance of norms enforced by means of sanctions when necessary, and on the other hand, the legitimacy of the rules themselves, which make it possible at all times to observe norms out of respect for the law.[7]" The former is the factual validity of the law, and the latter is the legality normative validity. That is to say, the legitimacy of law comes from two aspects. On the one hand, it is factual validity, that is, the legitimacy of empiricism; its idea originates from the positive law school. This legalization theory believes that there is no need for any substantive external standards, as long as it is formal. The legality that is self-sufficient and self-consistent can enable the legal order to obtain obedience from the recipients and thereby gain legitimacy[8]. On the other hand, it also requires the legitimacy or acceptability of the law itself, that is, the legitimacy of normalism. The source of its thought is the natural law school. This legalization theory believes that the legality of law is not only determined by its form, but also depends on the substantive value contained in the rules[9]. Habermas's discussion legitimation theory includes the two above-mentioned legitimacy theories, but it is more than this. The most important thing is to connect the two above-mentioned

legitimacy theories based on the negotiation process. That is to say, the legitimacy of law is the result of self-legislation between subjects based on communicative rationality. That is, the legitimacy of law also comes from the rules of intersubjectivity and from the communicative rationality of subjects in discussions. Only laws that conform to the procedural paradigm can gain legitimacy[10].

Through the above discussion, the author will discuss the legality of carbon tariffs from the following three aspects. The first is the acceptability of the value contained in carbon tariffs; the second is whether it is in compliance with the legality of WTO rules; and the third is the intersubjectivity of whether legislation is carried out through negotiation procedures.

### **3. Analysis of the Legality of Carbon Tariffs**

#### **3.1 Analysis of the value acceptability of carbon tariffs**

In global governance, the conditions for the operation of a system are different from the domestic situation of a country, and its legitimacy and effectiveness depend on the degree to which countries recognize the substantive legitimacy of the system. If carbon tariffs want to be recognized by all countries, their substantive legitimacy cannot be separated from a certain universal value basis. Only when carbon tariffs have substantial legitimacy and are endorsed by governments and people of all countries on the basis of common values can the effective operation of this system be promoted, so as to achieve the purpose of reducing emissions and protecting the ecological environment. However, under the existing carbon tariff regulations, there are certain contradictions in its substantive legality.

As mentioned earlier, one of the purposes of developed countries setting carbon tariffs is to protect the environment and reduce carbon dioxide emissions in the context of global warming. As far as environmental protection is concerned, all countries have consistent value pursuits, which are reflected in the environmental protection convention jointly signed by all countries. Therefore, it can be said that carbon tariffs have certain substantive legitimacy. With reducing carbon emissions and protecting the global environment becoming the consensus of all countries, the imposition of carbon tariffs will help companies convert environmental costs into products during the production of products, thereby increasing the cost of highly polluting products and reducing their competitiveness. This can reduce Carbon dioxide emissions promote sustainable development of the global economy. [11]

However, the value involved in carbon tariffs does not only include environmental protection, because the implementation of carbon tariffs will have a certain impact on free trade, which is what most developing countries are unwilling to see. Developing countries strive to take into account free trade. And the value pursuit of environmental protection, which in turn leads to a certain impact on the acceptability of the value of environmental protection. When there is a conflict between the value of free trade and the value of environmental protection, if carbon tariffs want to gain substantial legitimacy and be universally accepted by all countries, they must take into account the realization of both value objectives. Under the existing unilateral carbon tariff system, because it is unilaterally implemented by developed countries, it places too much emphasis on environmental protection and lacks consideration of the free trade needs of developing countries, resulting in a lack of substantial legitimacy. The fundamental reason is that the setting of carbon tariffs treats all countries equally and does not distinguish between developed and developing countries with respect to their "common but differentiated responsibilities" for environmental protection. This is also a manifestation of trade protectionism and is certainly not for Developing countries accept it. Since developing countries and developed countries are at different stages of industrialization, countries have greatly different capabilities and technologies for reducing emissions. In addition, with regard to global climate warming, developed countries have emitted most carbon dioxide since industrialization. Therefore, developed countries Countries have unshakable historical responsibility for global warming[1], so it

is unfair to set equal obligations on the basis of inequality.

Under this circumstance, if carbon tariffs want to reshape the basis of substantive legitimacy, they should fully consider developing countries' pursuit of the value of free trade, protect their right to development, and win the recognition of developing countries. Specifically, in the formulation of carbon tariffs, the historical, economic, demographic and social factors of different countries should be considered, the historical responsibility of carbon emissions of developed countries should be fully considered, the right of survival and development of developing countries should be protected, and per capita carbon emissions should be regarded as Tariffs set standards so that environmental protection responsibilities and trade benefits can be fairly distributed between developed and developing countries and recognized by both parties[4].

### **3.2 Analysis of the legality of carbon tariffs**

Carbon tariffs' compliance with existing international rules is another source of legitimacy. Carbon tariffs involve both international environmental protection and international trade rules. However, since its core is under international trade rules, this article's legal analysis is limited to the analysis of GATT rules.

#### **3.2.1 Review of whether carbon tariffs comply with the principle of non-discriminatory treatment**

The principle of non-discriminatory treatment includes the principle of national treatment and the principle of most-favored-nation treatment. In terms of the principle of national treatment, Article 3 of the General Agreement on Tariffs and Trade stipulates that member states should give the products of other member states the same treatment as their own products. Therefore, when judging whether carbon tariffs comply with the principle of national treatment, the core lies in the judgment of the same products. As for the identification of identical products, current cases in international trade mainly rely on characteristics[12]. In the existing carbon tariff regulations, carbon tariffs levied on products are mostly based on the fossil energy consumed in the production process of the product as the basis for tax calculation[2]. However, under the current GATT regulations, it is not allowed to use standards of production processes and production methods that are not related to products to restrict international trade of products[13]. Under the existing carbon tariff regulations, taxing the production process of products constitutes a violation of the principle of national treatment.

Article 3 of GATT stipulates the principle of most-favored-nation treatment. The principle of most-favored-nation treatment requires member countries not to treat the same goods from different countries differently, but should grant the same most-favored-nation treatment. But existing carbon tariffs clearly violate the principle of most-favoured-nation treatment. Even without considering the above mentioned identification of the same product, the manufacturing cost of the same product in each member country is bound to be different due to the different development conditions of each country, so the same carbon tariff on the products of each country without distinction will inevitably violate the principle of most-favoured-nation treatment.[13].

#### **3.2.2 Review of whether carbon tariffs comply with the exceptions and exemptions of GATT Article 20**

Article 20 of the GATT stipulates ten exceptions that allow member states to remain legal even if they violate the principle of non-discrimination. Items (b) and (g) are environmental exceptions. Therefore, even if carbon tariffs violate the principle of non-discrimination, there is still the possibility that they are legal. However, it should be pointed out that if carbon tariffs want to gain legitimacy through environmental exception clauses, in addition to meeting the requirements of

specific environmental exemption clauses, compliance with the requirements of Article 20 Introduction is also a necessary condition for its legitimacy[2].

(1) Review of GATT Article 20(b)

GATT Article 20(b) stipulates: Measures necessary to safeguard human, animal or plant life or health have legitimacy even if they violate the principle of non-discrimination. Judging from the provisions of item (b), if carbon tariffs want to meet the exemption provisions of item (b), they need to meet the "necessity" requirement. To examine whether a measure is necessary, the main thing is to find whether there are other alternative measures that are conducive to the realization of the goal, and the damage caused by the alternative measure cannot be greater than the damage caused by the existing measures[4]. In addition, analysis of existing cases shows that under the trade dispute settlement mechanism, the standard of necessity has evolved from the minimum trade restriction standard to the minor trade restriction standard[14]. In this case, carbon tariffs comply with GATT Article 20(b).

(2) Review of GATT Article 20(g)

Article 20(g) of GATT stipulates: In conjunction with domestic measures to restrict production and consumption, measures relating to the effective protection of potentially depleted natural resources are legitimate even if they violate the principle of non-discrimination. According to this provision, whether carbon tariffs meet the requirements of subparagraph (g) mainly depends on the judgment of whether carbon tariffs are related to the protection of exhaustible natural resources.

As far as this condition is concerned, it specifically includes two requirements. One is that air not polluted by carbon dioxide should be an exhaustible natural resource, and the other is that the protection of air from pollution is the result of the implementation of carbon tariff measures, that is, both should be associated[15]. First of all, there is no big objection in the academic circles that air that is not polluted by carbon dioxide is an exhaustible natural resource. But there is greater disagreement over how carbon tariffs relate to protecting air from pollution. Some scholars believe that the purpose of carbon tariffs is to protect the competitiveness of domestic industries and have minimal effect on protecting the environment, so they do not meet the "relevant" requirements[16]. In addition, some scholars hold the opposite view, saying that carbon tariffs meet the "relevant" requirements[15]. The author believes that when examining whether carbon tariffs meet the requirements of relevance, the overall purpose of the legal rules on carbon tariffs should be comprehensively examined. If the main purpose of the measure is to protect the environment, it can be considered to meet the requirements of relevance. As mentioned above, the introduction requires that if carbon tariff measures want to gain legitimacy through environmental exceptions, in addition to meeting the requirements of the specific provisions, they also need to meet the requirements of the preamble. Specifically, it includes two requirements: that the measures implemented do not constitute arbitrary or unreasonable differential treatment for countries in the same situation, and that they do not create disguised restrictions on international trade.

As far as arbitrary or unreasonable differential treatment is concerned, there are large differences in the academic community's identification of it. The academic community believes that carbon tariffs constitute arbitrary or unreasonable differential treatment. Most of the reasons are that the carbon tariff formulation agency uses its own standards to measure uniformly. Taxing products from other countries does not take into account the differences in emission reduction capabilities and responsibilities between countries. The author believes that this reason is not valid, because it just shows that the carbon tariff-setting organization does not constitute differential treatment of other countries.

As for the requirement not to impose disguised restrictions on international trade, some scholars pointed out that because the products of developing countries cannot meet the carbon emission standards stipulated by the carbon tariff-setting agency in a short period of time, there are disguised

restrictions on international trade[17]. The author believes that this reason is insufficient, because when environmental exceptions are applied, most of them are due to restrictions on international trade, but they are still legal because of the purpose of environmental protection. However, this reason ignores the exemption of environmental protection under the applicable article, and only focuses on the restrictions on international trade. As some scholars have pointed out: when the impact of trade restrictions on trade is less than the positive impact on the environment, the trade restrictions are justified[14].

### **3.3 Analysis of carbon tariff legitimacy based on intersubjectivity**

It can be seen from the above that in Habermas's legalization theory, the emergence of a legal rule cannot be separated from the legislative process of negotiation between subjects. Habermas places law between facts and norms, believes that the principle of negotiation is the source of legitimacy of all norms in the post-metaphysical era, and advocates that the legitimacy of modern law needs to be achieved through the legislative process of negotiation[18]. That is to say, if a legal norm is approved by all members of the legal community through a reasonable and negotiated legislative process, it is legitimate and legitimate. This is reflected in the legislation on carbon tariffs, which is the legitimacy of carbon tariff legislation jointly established by countries through consultation and negotiation under a variable mechanism.

Current carbon tariff legislation is unilateral. For example, there is currently no unified reference standard for carbon emissions in the international community. Carbon tariff-setting agencies often act independently and apply their own standards to the taxes levied on products from other countries. Carbon tariffs ignore the huge economic and technological differences between different countries and set standards unilaterally without negotiation by all affected countries. This violates the requirements of inter-subjectivity and therefore has no legitimacy.

## **4. Legal System Design of Carbon Tariff Legality and Chinese Legal Countermeasures**

### **4.1 Legal system design for carbon tariffs**

From the above, we know that the legitimacy of carbon tariffs needs to meet three conditions at the same time: the acceptability of value, the legality of the rules and the intersubjectivity of the rules. Based on the above three conditions, if carbon tariffs are legal when they are established, they should meet the following requirements.

First, the legislative value basis of carbon tariffs should be based on environmental protection, while taking into account the needs of developing countries for the value of free trade. Because environmental protection is a common value pursuit among all countries, the original intention of carbon tariff design is to protect the environment. Therefore, environmental protection should be the value basis of carbon tariff legislation. Moreover, for developing countries, economic development is their top priority. Therefore, the formulation of carbon tariffs should not ignore the economic development needs of developing countries, otherwise it is difficult for carbon tariffs to be fully recognized by developing countries.

Second, the specific rules for carbon tariffs are consistent with existing international rules. The legitimacy of carbon tariffs is inseparable from the legality of its rules. Most of the existing rules of international law are the result of multi-party negotiations and consultations between countries, and their existence has been recognized by all countries in the world. If carbon tariff legislation conflicts with existing rules of international law, it will inevitably lead to some countries refusing to accept it. Its legality will inevitably be questioned.

Third, it must be adopted within a multilateral framework. All existing environmental protection

conventions were adopted within a multilateral framework. As a global challenge, environmental protection is difficult to achieve with the efforts of one or a few countries alone. Unilateral protection measures will inevitably become self-defeating without the participation of other countries. Therefore, carbon tariffs can only achieve their legislative purpose of protecting the environment if they are passed within a multilateral framework and recognized by all countries.

Fourth, negotiate in good faith. Before the implementation of carbon tariffs, negotiations and consultations should be conducted with all affected countries on the measure to conclude bilateral or multilateral agreements. Due to different interests, countries will inevitably have different positions, and negotiation and consultation are the only way to eliminate differences and achieve consensus. The implementation of carbon tariffs should provide all relevant Member States with the opportunity to negotiate fairly without discrimination. In the context of climate change, countries must make serious efforts to persuade all affected countries to join collective international action before taking unilateral action to adjust carbon limits[19].

Fifth, comply with WTO standards of fairness and due process. An open and transparent carbon price that protects the procedural rights of all concerned Member States is critical to ensuring that carbon prices do not constitute arbitrary and disproportionate discrimination in international trade. The legal system design and legal procedures for carbon pricing measures should be open and transparent, including explanations and remedies for measures decisions[19].

Sixth, it involves flexibility. Since countries around the world are at different stages of development, have different emission reduction capabilities, and have different national conditions, there are still some countries that are still fighting for survival. Therefore, carbon tariff standards cannot be exactly the same for different countries. National conditions of each country should be taken into consideration, and the standard design should be flexible. The United Nations Framework on Climate Change establishes the principle of "common but differentiated responsibilities" for environmental protection and requires that specific rules on carbon tariffs be formulated to treat different countries differently.

## 4.2 Chinese legal countermeasures

As a border adjustment tax set by developed countries in the name of protecting the environment, carbon tariffs will undoubtedly have an impact on free trade, hinder the development of developing countries, and damage the rights and interests of people in developing countries. Therefore, China, as the largest developing country in the world, must respond positively to the formulation of carbon tariffs in order to safeguard the development interests of the Chinese people. Our country can respond from both domestic and international aspects.

At the domestic level, our country should improve our country's environmental protection legal system and establish a legal system for energy conservation and emission reduction; our country can also impose domestic carbon tariffs to promote industrial upgrading, transform development methods, and vigorously develop a low-carbon economy. In the international debate on carbon tariffs. The attitude changes from passive to active.

At the international level, first of all, our country should actively use WTO rules to resolve disputes, strengthen research on WTO rules, and make early preparations for the settlement of future disputes, so that China can take the initiative. Second, as the world's largest carbon emitter, China's commitment to reducing emissions plays an important role in global climate policy. China should actively promote multilateral and regional approaches to reduce carbon emissions, resolutely oppose unilateral trade protectionism, and push Western countries to develop from an uncompromising and one-sided stance to a cooperative and pragmatic stance on climate issues. In addition, our country can also actively participate in environmental negotiations, strive to solve the problem of carbon tariffs

under the multilateral framework of the WTO, and take the initiative in the formulation of rules.

## 5. Conclusion

As mentioned above, from the perspective of Habermas's legitimacy theory, the legitimacy of a rule depends on the acceptability of its value, the legality of the rule itself and the intersubjectivity. However, the existing carbon tariff provisions ignore the protection of the development rights and interests of developing countries in terms of the acceptability of value. In terms of legality, it violates the principle of most-favored-nation treatment and the principle of national treatment in the General Agreement on Tariffs and Trade. In terms of the formulation procedure, it has not gone through the mutual consultation among all affected countries, and the legislation is unilateral, so it does not have legitimacy. But under the present international situation, the implementation of carbon tariff is undoubtedly becoming more and more realistic, so our country should actively take various countermeasures, including laws, to reduce the adverse impact of carbon tariff implementation on our country.

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