

Research on Application of General Agreement on Trade in Services in Climate Change Mitigation Policies

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Abstract

The policies combat climate change usually grant different treatments according to the fact whether the Members undertake obligations to reduce emissions. As they may violate the non-discrimination principle, the general exceptions are crucial to determine their GATS-consistency. Based on the gaps found in the current literature and restricted by the scope of research, the objective of this thesis is the application of GATS in climate change mitigation policies. This thesis has two major aims. Firstly, a number of aspects may be highlighted to ensure the predictability of the application of GATS and balance trade and climate change: to strengthen the mutual support between trade and climate change. Secondly, how to cure the inconsistency in the jurisprudence of GATS, to avoid rigid interpretation and seek for update and amendment of rules.

Keywords

Climate Change Mitigation Policies; GATS; application.

1. Introduction

In December 2016, 194 the United Nations Framework Convention on Climate Change members signed The Paris Agreement. The principle of common but differentiated responsibilities of Paris Agreement has changed and places more emphasis on a series of internal difference among developing countries, especially the vulnerability of the least developed countries which at the same time provides a basis for increasing obligations and responsibilities of the developing countries in the future. The Paris Agreement shall be a turning point where countries will take more vigorous measures against the climate change. The Paris Agreement stipulated the principle of “retaining the market mechanism and allowing voluntary emissions trading between parties”, but the Agreement fails to establish an international cooperation mechanism due to the short time. But fortunately, Article 6 of the Agreement has created conditions for establishment of the international market mechanism in the future, as defined in this Agreement “Parties recognize that some Parties choose to pursue voluntary cooperation in the implementation of their nationally determined contributions to allow for higher ambition in their mitigation... Parties shall, where engaging on a voluntary basis in cooperative approaches that involve the use of internationally transferred mitigation outcomes towards nationally determined contributions, promote sustainable development and ensure environmental integrity consistent with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.” Predictably on the next Conferences of the Parties, the international community would actively explore how to establish a voluntary global cooperation mechanism to promote the mutual cooperation between the parties on the emission reduction and sustainable development. After the implementation of the Paris Agreement, China will not only undertake more daunting tasks of emission reduction, but also shall effectively deal with its domestic serious air pollution problems (especially a high incidence of haze in a particular season), and how to rationally response to and actively deal with those problems shall be a grim task of China. After the Third Plenary Session of the 18th CPC Central Committee proposed to deepen the structural reform of ecological civilization from the perspective of institutional improvement, the Fifth Plenary Session

of the 18th CPC Central Committee Clearly raises a claim to strength, innovate and refine the social governance. Under the ideas of “innovation, coordination, green, open and share”, China shall actively take up all the international responsibilities and obligations imposed on her, and actively participate in global climate change negotiations and the global sustainable development agenda. Furthermore, President Xi Jinping made a commitment that China would play an active part in global climate governance in an important speech he delivered in “Join Hands to Establish A Mutually-Beneficial, Cooperative, Fair and Reasonable Governance Mechanism of Climate Change”.

2. Theory of the application of GATS in climate change mitigation policies

2.1 The difference between change mitigation policies under the jurisdiction of GATT and GATS

Climate change mitigation policies relating to trade in services have been increasingly taking in the world to combat climate change. The so called corresponding climate change mitigation policies adopted to mitigate and adapt the climate change, including relative laws, rules and management actions in various countries. The corresponding measures involved here shall mean the trade measures having a potential effect on the service trade that every country takes to mitigate and adapt the climate change. Climate change mitigation policies can be categorized into measures of cost internalization (including internal measures, such as carbon trading and external measures such as border adjustment system), measures of carbon finance (including financial measures and investment support measures) and technical requirements.

Unlike goods trade flows for which data exist because they are taxed, services are not directly observed crossing borders. This characteristic makes it difficult to draw an informative list of environmental services. Trade in services is quite different with trade in goods mainly in three aspects: firstly, it is mainly intangible objects trade; secondly, it is with characteristics such as simultaneity of production, sale and consumption, non-storability and non-transitivity, and heterogeneity of different batches of the subject matter of service trade; third, the service trade is under no customs inspection so that the statistics of trade in service is unable to be embodied in the import-export statistical table of custom and beyond the supervision of custom by tariff measures.

In recent WTO cases, since 2010, disputes involved in climate change mitigation policies and GATT were frequently filed under the WTO dispute settlement mechanism. [1]The research is mainly confined to analyze the compatibility between climate change mitigation policies and GATT. Some scholars analyzed several unresolved issues in WTO law that may affect the WTO-consistency of measures that are likely to be taken to address climate change: how to deal with environmental subsidies under the GATT 1994, the Agreement on SCM Agreement and the Agreement on Agriculture; whether processing and production methods are relevant

to determining the issue of “like products” in GATT Articles I and III; the relationship between GATT Article XX, other WTO Agreements and multilateral environmental

agreements. [2]To be sure, climate change mitigation policies under GATS are also valuable for environment, but the study of the application of GATS in climate change mitigation policies is very limited. Theory problems mentioned above are relatively weak in recent research, which shall be further strengthened and perfected. [3]

2.2 Why climate change mitigation policies could under the jurisdiction of GATS

Many corresponding measures of climate change is closely linked with trade in services, such as carbon trading mechanism could involve commercial services, environmental services and financial services sectors. The supporting industries of the carbon trading mechanism has accumulated a lot of private entities engaged activities involved in the research, development, identification and counsel of the trading unit of the carbon trading, and the management services in the name of emissions has become a new type of service industry that has already been well proved by the emergence and

development of carbon management service divisions and business of United States. In addition, the transaction behaviors under the carbon trading mechanism designed on the purpose of responding the climate change is also closely bound up with trade in services. Under the CDM mechanism, for example, a process of project developing, approval and trading concerned with clean development itself is one kind of typical environmental services. The carbon trading also shows typical characteristics of financial services. The primary and secondary market formed under the carbon trading mechanism and the production and development of the futures market and a mass of derivatives have made a large number of financial institutions involved, such as the brokerage services, the trust services of Banks and financial institutions and other peripheral businesses all fall under the category of financial services in GATS and its Annex On Financial Services. In conclusion, AAUs, ERUs, CERs and other trading unit under the Kyoto mechanisms are all characterized by a kind of intangible assets, which meets the primary characteristic of trades in services. The trading units under the carbon trading mechanism possess characteristics of simultaneity of production, sale and consumption, non-storability, non-transitivity, etc, without a process from storage, transportation, wholesale and retail to consumption like trade in goods. The trade under the carbon mechanism has a feature of heterogeneity, for different CDM trading items, the CERs produced by the CDM mechanism of a wastewater treatment project is totally different from the CERs produced by the CDM mechanism of a coal-bed methane development project in the overall process. Lastly, although the carbon trading mechanism shall be registered by settlement system, it won't be supervised by custom of any country. All of above make the carbon trading mechanism meets all the characteristics of international trade in services. [4] The trade in renewable energy certificates (RECs) which can also be of concern for the GATS and the multilateral regulation of trade in financial services, notably in the case where WTO Members undertook sweeping commitments in financial services which equally apply to trade in RECs.

The United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Paris Agreement, there are lack of compulsory execution and corresponding compliance mechanism. Whether a country to fulfill its obligations under the conventions mainly depends on the interests of the state, which contains two aspects: international power and national will that also led to the gap of performance and compliance between different countries. Article 14 of the United Nations Framework Convention on Climate Change stipulates the dispute settlement procedure and methods to solve the issues between the parties, including negotiation, decision of the international court, arbitration and mediation, etc. The Kyoto Protocol sets up a compliance mechanism to ensure the performance of the parties and to reduce or prevent the non-compliance from occurring. However, the Protocol only raises some very limited principles and requirements for the non-compliance settlement procedure, which is fatal to the whole compliance mechanism. The international climate change commitments that the Kyoto Protocol presents is lacking of a perfect law enforcement mechanism but WTO possesses a integrated regulatory system and a forceful dispute settlement mechanism which may be a tool to facilitate the implementation of the international climate change legal system. For instance, WTO multilateral trading rules are benefit for the development of carbon trading and carbon finance, and WTO dispute settlement mechanism can making up the procedural gaps of CDM for lacking of an appeal body. [5] Therefore, the WTO legal system can provide a predictable, transparent and fair platform for executing the legal system of climate change. At the same time, the issue of trade and environment is also part of the content the ongoing WTO Doha Round negotiating, and members are holding the negotiation on the Environmental Goods Agreement (EGA) and working on cutting or eliminating tariffs and non-tariff barriers of environmental goods and services. [6] Climate change mitigation policies might violate the principles and specific commitments of the Most Favored Nation ("MFN") of GATS, potential WTO disputes may also hinder member nations in front of the issue of climate change. [7] The competition for multilateral interests among great powers has reached a fierce stage with protectionism of "national interests first" spreading. [8] Under such circumstances, International

environmental legal rules and the WTO GATS rules can no longer “perform their duties” separately, the responsive measures to climate change and legal researches into GATS rules therefore, would be conducive to the coordination of climate and trade. [9] This thesis has two major aims. Firstly, A number of aspects may be highlighted to ensure the predictability of the application of GATS and balance trade and climate change: to strengthen the mutual support between trade and climate change. Secondly, how to cure the inconsistency in the jurisprudence of GATS, to avoid rigid interpretation and seek for update and amendment of rules?

3. Identifying unsolved issues of the application of GATS in climate change mitigation policies

3.1 The sector classification of climate change mitigation policies in GATS

GATS services sectors could include a certain climate change mitigation policy related to trade and WTO members are responsible for different obligations in different sectors. This reflects the challenges and difficulties in the service-categorizing systems brought by the development of technologies and climate changes. CDM, for example, includes services such as data collection, planning, assessment and verification that should be subjected to GATS commercial sectors and financial sector. Some contractual members bear MFN and national treatment in commercial service sector, while not bearing MFN and national treatment in financial service sector. Thus the project may find it hard to decide whether a contractual member shall bear MFN and national treatment (two obligations) since CDM project is considered as an entire project. If CDM project is considered as a single service sector, it should be classified as “environmental service” as the object of the mechanism is to mitigate climate changes, i.e., environmental protection. However, services in connection with JI and CDM are not included in any of the four sub-classifications of environmental service. The sub-classifications are sewage treatment service, waste treatment service, sanitation and similar services as well as others. Therefore, what is the appropriate interpretation of “other environmental service”? What impact can the responding measures of climate change in the classification chart of service department in commitments of GATS truly have on the exporters, importers, providers and servicers of the service? What effects does it have on China? [10] There are two main methods to cure the inconsistency in the jurisprudence of GATS: one is the interpretation of provisions and the other is the modification of provisions. The modification of GATS provisions requires a consensus among all contractual members which takes a long time to happen. Therefore, in seeking for breakthroughs, attention can be paid to bilateral or regional levels. As for the obstacles of classifying climate change mitigation policies under GATS services sector, “Consolidated definition method” can be considered as a solution to deal with the problems of definition. Firstly, the core service of climate change mitigation services should be clearly defined, and then the services provided together with the core service or the ones possibly including necessary components of the core service should be put forward. Under “consolidated definition method”, commitments made to the core service shall be extended to any other related services. Besides, the “contemporary literal interpretation method” is also to be considered in dealing with the classification of climate change mitigation services.

3.2 which mode climate change mitigation policies should belong to

There exist shortcomings and problems to be further explained in the classification of GATS “four modes”, and it is hard to define which mode climate change mitigation policies should belong to. CDM allows nations of Appendix I to provide financial assistance to non-Appendix I nations in order to promote clean development and acquire Certified Emission Reductions (CERs) achieved in the projects. It can be treated as “consumption abroad”-in the territory of developing nations to the emission reduction service consumer of any other developed nations. In addition, some scholars, by taking CDM as an example, pointed out that CERs transactions belong to “cross-border supply” under GATS because the location of CDM projects and CERs purchasers belong to nations of Appendix I and nations of non-Appendix I, respectively. [11] Chinese official documents have even

defined carbon-trading issue in foreign exchange as “cross-border supply”. Besides, under CDM, CERs sales from non-Appendix I nations to Appendix I nations help partially realize emission reduction commitments of non-Appendix I nations flexibly and, at the same time, provide financial and technological support to Appendix I nations in coordinative participation of emission reduction. Shall such CERs transaction be regarded as service trade supplied by “commercial presence”? Does CDM belong to “cross-border supply”, “consumption abroad” or “commercial presence”?

3.3 The definition of “service supplied in exercising governmental function”

In the circumstance of Public Private Partnerships, whether or not climate change mitigation policies relating to trade in connection with service trade should be subject to exception of MFN under GATS, i.e., application of GATS is exempted in cases when the service is supplied by exercising governmental functions. The supporting industries of the carbon trading mechanism have accumulated a lot of private entities engaged activities involved in the research, development, identification and counsel of the trading unit of the carbon trading. Some hold the view that carbon trading system is established by international law aiming at facilitating implementation of emission reduction commitments made by all nations. [12] Therefore, carbon trading system under Kyoto Protocol are mainly initiated and participated by governments or governmental institutions. The third party, i.e., the designated operation entity that bears duties of certification, shall review project proposal and any supplementary documents in accordance with Kyoto Protocol and domestic laws or procedures to ensure its conformity with the requirements specified in international rules even if CDM has acquired domestic approval and entered into independent third party certification procedure. Still, the service nature is governmental function which is based on authorization. [13] However, on the other side, some believe that, despite the participation of governments in CDM/JM projects, if being one of the project participators, the governments act on a commercial basis cooperating with host nations or legal entities, with a pure intention: the acquisition of CERs or EURs as their object rather than exercising any governmental functions. If certain classes of public-private partnerships do not suddenly become a form of government procurement, and thus come under specific commitments of environmental services, the said country would have to grant foreign service suppliers the right to bid for government contracts and then treat their offers just like offers from domestic service providers. Whether or not climate change mitigation policies relating to trade in services in connection with service trade apply exception of MFN under GATS, i.e., application of GATS is exempted in case when the service is supplied by exercising governmental functions. [14] In accordance with GATS Art. 1.3 (c), “service supplied in exercising governmental functions” shall satisfy both two requirements: not supplied on a commercial basis and no competition with one or more service suppliers. The interpretation of “commercial” and “competition” defines the scope of such service.

3.4 The application of GATS in climate change mitigation policies from perspective of general exceptions

The measures to combat climate change usually grant different treatments according to the fact whether the members undertake obligations to reduce emissions. As they may violate the non-discrimination principle, the general exceptions are crucial to determine their WTO-consistency. The general exceptions may encounter some serious challenges: exception of exhaustible natural resources is not stipulated in GATS XIV; the necessity test; and the special treatment which is available to developing members under the chapeau. [15]

4. Conclusion

This article puts forwards main problems and thorny issues the application of GATS in climate change mitigation policies encountered. An empirical analysis was carried out by expanding in case studies combined with JI, CDM, “renewable portfolio standard”, trade in emission permits and EU carbon emission trading system. Firstly, what is the appropriate sector classification of climate change mitigation policies in GATS? Secondly, there exist shortcomings and problems to be further

explained in the classification of GATS“four modes”, and it is hard to define which mode climate change mitigation policies should belong to. Thirdly, in the circumstance of Public Private Partnerships, whether or not climate change mitigation policies relating to trade in connection with service trade should be subject to exception of exercising governmental authority. Fourthly, the general exceptions may encounter serious challenges such as the necessity test and the special treatment. There are two main methods in cure the inconsistency in the jurisprudence of GATS: one is the interpretation of provisions and the other is the modification of provisions. The modification of GATS provisions requires a consensus among all contractual members which takes a long time to happen. Therefore, in seeking for breakthroughs, attention can be paid to bilateral or regional levels. When interpreting the GATS applicable to the corresponding measures of climate change, the interpretation of the meaning of the normalized legal texts shall be given priority, according to the rules of interpretation of international treaties, like say, Vienna Convention on the Law of Treaties. Climate change mitigation policies might violate the principles and specific commitments of GATS, potential WTO disputes may also hinder member nations in front of the issue of climate change. The competition for multilateral interests among great powers has reached a fierce stage with protectionism of “national interests first” spreading. Under such circumstances, International environmental legal rules and the WTO GATS rules can no longer “perform their duties” separately, the responsive measures to climate change and legal researches into GATS rules therefore, would be conducive to the coordination of climate and trade. The study of climate change response and GATS rules is of great significance to China's advocating of the special emission-reduction obligations of developing countries and propositions for special and differential treatment, with sufficient considerations of the situation of developing countries in respect of climate change response.

References

- [1] See Jaime de Melo and Mariana. Vijil, “Barriers to Trade in Environmental Goods and Services: How Important Are they? How Much Progress at Reducing Them?”, Ssrn Electronic Journal, April 2014, pp.6-11.
- [2] See B. Condon, “Climate Change and Unsolved Issues in WTO Law”, Journal of International Economic Law, Vol.12, 2009, pp.6-8.
- [3] See Colin Kirkpatrick, “Trade in Environmental Services: the Implications for Developing Countries in the GATS”, Trade and Environment, September 2006, pp.5-10.
- [4] See Panagiotis Delimatsis, “Financial Innovation, Climate Change and the GATS: The Case of Renewable Energy Certificates”, World Trade Review, Vol.8, 2009, pp.1-5.
- [5] See Thomas L. Brewer, “The WTO and the Kyoto Protocol: Interaction Issues”, Prepublication Version of paper in Climate Policy, Vol.3, 2004, pp.3-12.
- [6] See Rene Vossenaar, “Identifying Products with Climate and Development Benefits for an Environmental Goods Agreement”, International Centre for Trade and Sustainable Development, Issue 13, Paper No.19, November 2014, pp.1-10.
- [7] See Ellen Gould, “First, Do No Harm The Doha Round and Climate Change”, Briefing Paper trade and investment series, March 2010, pp.1-3.
- [8] Mark Wu, JE Salzman, “The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy”, Northwestern University Law Review, Vol.108, 2014, pp.401-410.
- [9] See Massimo Geloso Grosso, “Regulatory Principles for Environmental Services and the General Agreement on Trade in Services”, Acta Horticulturae, Vol.75, 2010, pp.8-10.

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- [19] Barbara Fliess , Joy A. Kim, “Non-tariff Barriers Facing Trade in Selected Environmental Goods and Associated Services”, *Journal of World Trade*, Vol.43,2008,pp. 535-542.
- [20] Bernd Hansjürgens, *Emission Trading for Climate Policy: US and European Perspective*, Cambridge University Press, 2010,pp.5-10.
- [21] Matthew, Anuj J. and de Cordoba, Santiago Fernandez , “Green Dilemma about Liberalization of Trade in Environmental Goods”, *Journal of World Trade*, Vol. 43, Issue 2 ,2009,pp.380-385.
- [22] Soledad Aguilar, “Negotiating Liberalization of Goods and Services”, *Environmental Policy and Law*, Vol.40, 2010,pp.55-60.
- [23] Melissa Bollman and Scott D. Hard, “Institutional Rules in Action: A Multi-Level Analysis of Costa Rica's Payments for Environmental Services Programme”, *Carbon & Climate Law Review*, 2011,pp.150-151.
- [24] Zachary Scott Simmons, “Subsidizing Solar: The Case for an Environmental Goods and Services Carve-out from the Global Subsidies Regime”, *Ucla Journal of Environmental Law & Policy*, Vol.32, 2014,pp.423-450.
- [25] Thomas Cottier, Olga Nartova, Sadeq Z. Bigdeli, *International Trade Regulation and the Mitigation of Climate Change: World Trade Forum*, Cambridge University Press, 2009.
- [26] Bernd Hansjürgens, *Emission Trading for Climate Policy: US and European Perspective*, Cambridge University Press, 2010.
- [27] John H. Jackson, William J. Davey, Alan O. Sykes, “International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations”, West Academic Publishing, 2013.
- [28] Panagiotis Delimatsis, “Financial Innovation, Climate Change and the GATS: The Case of Renewable Energy Certificates”, *World Trade Review*, Vol.8, 2009.
- [29] Brake Duncan, Grubb Michael, Windram Craig, “International trade and climate change policies”, Earthscan Publications, 2000.
- [30] Gleen M. Wiser, “The clean development mechanism versus the world trade organization: Can free-market greenhouse gas emissions abatement survive free
- [31]rade?”, *Georgetown International Environmental Law Review*, Vol.1, 1999, No.3.
- [32] B. Condon, “Climate Change and Unsolved Issues in WTO Law”, *Journal of International Economic Law*, Vol.12, 2009.
- [33] Barbara Fliess , Joy A. Kim, “Non-tariff Barriers Facing Trade in Selected Environmental Goods and Associated Services”, *Journal of World Trade*, Vol.43, 2008.
- [34] Marchetti and Roy, “The TiSA initiative: an overview of market access issues”, *Journal of World Trade*, Vol.48, 2013.
- [35] Mark Wu, JE Salzman, “The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy”, *Northwestern University Law Review*, Vol.108, 2014.
- [36] Soledad Aguilar, “Negotiating Liberalization of Goods and Services”, *Environmental Policy and Law*, Vol.40, 2010.
- [37] [12] Jaime de Melo and Mariana Vijil, “The Critical Mass Approach to Achieve a Deal on Green Goods and Services: What is on the Table? How Much to Expect?”, *Environment and Development Economics*, Vol.21, 2016.
- [38] Zachary Scott Simmons, “Subsidizing Solar: The Case for an Environmental Goods and Services Carve-out from the Global Subsidies Regime”, *Ucla Journal of Environmental Law & Policy*, Vol.32, 2014.
- [39] Jaime De Melo and Mariana Vijil, “Barriers to Trade in Environmental Goods and Environmental Services: How Important are They? How Much Progress at Reducing Them?”, *Ssrn Electronic Journal*, January 2014.
- [40] Simon Lester and K. William Watson, “Free Trade in Environmental Goods: The Trade Remedy Problem”, *Social Science Electronic Publishing*, August 2013.
- [41] Mark Wu, “Why Developing Countries Won't Negotiate: The Case of the WTO
- [42] *Environmental Goods Agreement*”, *Social Science Electronic Publishing*, Vol.6, Issue1, 2014.

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- [43] Jaime de Melo and Mariana. Vijil, "Barriers to Trade in Environmental Goods and Services: How Important Are they? How Much Progress at Reducing Them?", *Ssrn Electronic Journal*, April 2014.
- [44] Melissa Bollman and Scott D. Hard, "Institutional Rules in Action: A Multi-Level Analysis of Costa Rica's Payments for Environmental Services Programme", *Carbon & Climate Law Review*, 2011.
- [45] Ellen Gould, "First, Do No Harm The Doha Round and Climate Change", *Briefing Paper trade and investment series*, March 2010.
- [46] Massimo Geloso Grosso, "Regulatory Principles for Environmental Services and the General Agreement on Trade in Services", *Acta Horticulturae*, Vol.75, 2010.
- [47] Colin Kirkpatrick, "Trade in Environmental Services: the Implications for Developing Countries in the GATS", *Trade and Environment*, September 2006.
- [48] Zachary Scott Simmons, "Subsidizing Solar: The Case for an Environmental Goods and Services Carve-out from the Global Subsidies Regime", *Ucla Journal of Environmental Law & Policy*, Vol.32, 2014.
- [49] Matthew, Anuj J. and de Cordoba, Santiago Fernandez, "Green Dilemma about Liberalization of Trade in Environmental Goods", *Journal of World Trade*, Vol. 43, Issue 2, 2009.