

绿色期盼 LEAN TO GREEN

跨国公司应把握中国环保政策变革带来的由市场主导的潜在机遇。

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MULTINATIONALS SHOULD BE CAPITALIZING ON POTENTIAL MARKET-BASED OPPORTUNITIES CREATED BY CHINA'S GREEN POLICY CHANGE,
WRITE **PAUL DAVIES, KIMBERLY LEEFATT AND ANDREW WESTGATE**

近年来,美国和欧洲均已在环境保护政策上采用一系列市场主导措施,以减低对强制性政策的依赖。例子包括英国气候变化税等排污类收费、美国酸雨防治计划的可交易机制,以及碳排放交易系统,如欧盟排放交易体系及加州碳排放限额交易计划。

中国目前仍然广泛采用强制性环境保护政策。监管机

In recent decades, the US and Europe have introduced a variety of market-based incentives as instruments of environmental policy and reduced their reliance on command-and-control-style regulation. Examples include fees on the discharge or emission of pollutants, such as the UK's climate change levy, tradeable credit programmes such as the acid rain programme in the US, and

构会明确列出潜在排污者在执行污染监控措施时，须采用的科技以及应该达至的标准，其中环境影响评估 (EIA) 系统最能体现这种做法。EIA 系统多年来提供单一途径，把符合该系统的污染监控标准加诸于企业。然而，EIA 并没有在政策或商业方面，为排污许可提供有效的基准。中国现正寻求现代化环境治理，因此其环境保护政策也开始偏重于使用金融工具及市场主导措施。

环保法第21及22条

如今，中国的能源消耗量及污染排放量为全球最高，其绿色转型面临巨大挑战。因为意识到强制性措施未能鼓励工业相关企业主动保护环境，中国现正着力透过《环境保护法》重新调整方向。其中，《环境保护法》第 21 条指国家将采取“财政、税收、价格以及政府采购，鼓励和支持环保工业”；第 22 条则着重于透过强制规管改善环境，并写明“企业事业单位和其他生产经营者，在污染物排放符合法定要求的基础上，进一步减少污染物排放的，人民政府应当依法采取财政、税收、价格、政府采购等方面的政策和措施予以鼓励和支持。”

虽然《环境保护法》现阶段只是为日后相关规定细节提供框架，但是当中强调市场主导的规定足以证明，决策者在环境保护法规上的思维有明显的变化。

《环境保护主管部门实施按日连续处罚办法》由生态



carbon-trading programmes including the EU emissions trading system (ETS) and the California cap-and-trade programme.

Until recently, China employed a predominantly command-and-control-style approach to environmental regulation, where regulators specified both the standards that must be achieved and the technology and pollution control strategies to be employed by potential polluters. This approach was exemplified by the environmental impact assessment (EIA) system in China.

For many years, the EIA system provided the only method by which pollution control requirements were imposed on companies, by incorporating the requirements into the EIA. EIAs have not, however, proved an effective basis for permitting discharge, from either a regulatory or a business perspective. As China has sought to modernize its environmental governance, the country has also shifted its environmental policy emphasis and increased its use of fiscal and market tools in environmental governance.

EPL ARTICLES 21 AND 22

China is the largest consumer of energy and producer of pollution, which poses great challenges for its much-desired green transition. Driven by the recognition that command and control measures tend to be reactive and do not incentivize industrial firms to protect the environment, China is redirecting its efforts and employing its powers under the Environmental Protection Law (EPL) to change direction.

In particular, article 21 of the EPL calls for direct incentives for environmental industries in the form of “fiscal assistance, taxation, prices and government procurement to encourage and support the environmental industries”. Article 22 focuses on incentives to improve the environment in excess of mandated requirements, and provides that “governments shall adopt policies and measures in finance, taxation, price, and government procurement, among others, to encourage and support further pollutant discharge reduction by enterprises, public institutions, and other businesses after meeting the statutory requirements for the discharge of pollutants”.

Although the EPL is primarily a framework providing for more detailed requirements, this emphasis on market-based measures represents a marked shift in policymakers’ thinking with regard to environmental compliance.

The Measures for the Implementation of Consecutive Daily Penalties by the Responsible Environmental Protection Departments – issued by the former Ministry of Environmental Protection (now the Ministry of Ecology and Environment, or MEE) shortly after release of the EPL – standardize the implementation of daily penalties imposed against polluters. The measures specifically identify five types of environmental crime relating to illegally discharging pollutants and falsifying monitoring data, but also allow local authorities to increase, as necessary, the types of offences that are punishable by consecutive daily penalties. There is no limit to the number of consecutive daily penalties, which incentivize polluters to address compliance violations quickly.

China is now aggressively developing policies to establish economic incentives for industry and the general public to change their culture of growth at all costs, under which China has prospered but which has also led to massive environmental issues as a result of the nation’s rapid industrialization. By setting goals and

环境部（前身为环境保护部）于发布《环境保护法》之后随即颁布，为针对排污者的每日罚款制定了标准。《处罚办法》具体指出了五种与非法排污和伪造监测数据有关的违法行为，并容许当地政府按实际需要增加《处罚办法》下的罪责类别。按日连续处罚次数不设上限，目的是促使污染制造者及时遵守法规、依法受罚。

中国现正积极制定政策，为企业及公众提供经济诱因，以改变“不惜一切代价只为发展”的文化。这种文化为中国带来经济繁荣，然而工业迅速发展也带来了巨大的环境问题。通过订立目标和表现准则而不是单靠被动的处罚，中国正在迎接市场主导下发展出的更有效的环境保护文化。

土壤污染防治法

2018年8月通过的《土壤污染防治法》成为了中国土地管理和地下水污染治理的里程碑。新法第59条规定土地使用权持有人（所有中国土地只供租赁不予购买）有责任调查潜在的污染源头，以及私下为受影响人士作出补救措施。这些概念旨在促进企业在土地问题上，详细研究及考虑环境问题，以避免可能因污染而引发的责任。因此，市场将承担评估及找出土地污染的责任。

《土壤污染防治法》贯彻“污染者自付”原则，促使企业在作出商业决定、进行投资和并购时，更主动承担潜在的污染责任。其中第三条强调污染制造者有绝对责任承担处理土地污染衍生的费用，以及制定具体方案以修复受污染的土地。污染制造者同时须承担由政府评估调查所产生的费用。如果对污染制造者的身份有任何怀疑，生态环境部在当地的办事处以及其他相关机构（视乎个别事件中土地使用类型）将共同调查事件中土地污染的责任方。

根据第96条，污染制造者有责任对该项污染对个人及财产所造成的损失进行赔偿。如若无法辨认污染制造者身份，土地用户将承担监测污染危机管理和土地污染整制的费用。

值得注意的是，《土壤污染防治法》第73条列明“从事土壤污染风险管控和修复的单位依照法律、行政法规的规定，享受税收优惠”。

将税项优惠应用于恢复环境的理念，与英国的《土地整治税减免方案》（污染土地再生免税方案）相似。商业机构可以透过修复废弃或受污染的土地，申请扣减公司利得税及所产生的资本支出。企业在计算应税利润时最多可获得扣减150%公司税。美国许多州同样通过棕地计划为受污染土地的修复提供税务优惠，企业只须将受污染土地修复至可重新利用土地，即可获得税务减免。这类措施藉税务优惠，可鼓励中国的企业主动发现及修复受污染土地。

此外，《土壤污染防治法》第71条指国家将建立土壤污染防治基金。第72条则提到国家鼓励金融机构加大对土壤污染风险管控和修复项目的信贷投放。根据第72条，政府鼓励财务机构对涉及地权担保交易的土地进行污染状况调查，正如在美国这类融资也需要进行第一阶段调查。《土壤污染防治法》将于2019年1月1日生效。

环保税加强处罚

《环境保护税法》规定了四类受环境保护税法管制的污

染物排放，企业必须达到国家或地方规定的排放标准，否则将面临罚款。此外，企业还必须遵守更严格的环境保护标准，而不再仅仅依赖于 reactive penalties，中国正在拥抱市场工具，以发展一种更有效的环境保护文化。

SOIL POLLUTION PREVENTION AND CONTROL

The recent passage of the Soil Pollution Prevention and Control Law, in August 2018, is a major development in the management of soil and groundwater contamination issues in China. Article 59 of the new law imposes obligations on land-use rights holders – land is leased, not owned, in China – to investigate potential contamination on the occurrence of certain triggers, and provides for private action remedies against responsible parties. These concepts force firms to conduct environmental due diligence on parcels of land, so as to avoid incurring responsibility for potential contamination. Thus, the market will bear much of the burden of identifying and assessing contaminated land.

The Soil Pollution Law implements the “polluter pays” principle, forcing companies to take into account potential liability for pollution in making business decisions, and creating a significant incentive to conduct robust due diligence on new ventures or acquisitions. Article 3 imposes strict liability on the polluter for the cost of addressing soil contamination, as well as the burden of devising a specific plan to restore the polluted land. The polluter is also liable for the investigation and assessment costs incurred by the government. If there are uncertainties about the identity of the polluter, the local branches of MEE and other agencies (depending on the type of land at issue) are directed to jointly investigate responsibility for the contamination.

According to article 96, polluters will be liable to pay damages for the personal or property injuries caused by the contamination. If the identity of the polluter cannot be determined, the land-use rights holder will be liable for the cost of performing pollution risk management and remediation of the polluted soil.

Interestingly, article 73 of the Soil Pollution Law provides that “enterprises engaging in soil pollution risk control and restoration activities shall enjoy tax benefits under the laws and regulations”. Applying tax benefits to environmental restoration is a similar approach to that adopted by the Land Remediation Relief Scheme (or contaminated land tax relief) in the UK, where businesses can claim a deduction in their corporation tax for revenue and capital expenditure incurred through remediation of certain derelict or contaminated pieces of land or buildings. Companies can deduct up to 150% from their corporation tax when calculating taxable profits. Similarly, “brownfields” programmes in many US states provide tax incentives for redevelopment of contaminated land once the land has been remediated to the point that it can be repurposed and reused. Allowing companies in China to realize similar tax benefits will help incentivize them to identify and remediate contamination. Article 71 provides for establishment of a soil pollution prevention and control fund.

Article 72 outlines that the state encourages financial institutions to increase credit availability for soil pollution risk control and restoration projects. Under this article, the state also encourages financial institutions to conduct soil pollution condition investigations when participating in financial transactions involving land rights as security interest, just as Phase I investigations are typically required in connection with such financing in the US. The Soil Pollution Law will come into effect on 1 January 2019.

染物: (1) 大气污染物; (2) 水污染物; (3) 固体废物; 以及 (4) 噪声。值得注意的是, 温室气体 (GHG) 并不在列。《环境保护税法》并不针对间接排放污染物的企业。

《环境保护税法》是中国首项相关法例, 取代了沿用逾 30 年的排污收费制度。虽然排污收费制度也有针对排污征收费用, 新实施的《环境保护税法》则明显增加了就未能支付排污税的处罚。对于遵守旧收费制度的公司而言, 新制度下税率和征税基数与旧制度相似, 因此影响不大。然而, 这可能意味着对排放相关污染物的公司进行更严格的审查。预计将有超过 260,000 间公司由今年 4 月起开始交环保税。因此, 《环境保护税法》是在中国营造公平遵守环境保护条例的关键一步, 有助于企业间缔造守法的文化。

《环境保护税法》第 13 条列明, 纳税人排放应税大气污染物或者水污染物的浓度值低于国家和地方规定的污染物排放标准 30% 的, 减按 75% 征收环境保护税; 纳税人排放应税大气污染物或水污染物的浓度值低于国家和地方规定的污染物排放标准 50% 的, 减按 50% 征收环境保护税。这项优惠税率将减低《环境保护税法》对小型企业因未能投放大量金额加装排污设备的影响。

《环境保护税法》第 24 条明确指出, 各级人民政府应当鼓励纳税人加大环境保护建设投入, 对纳税人用于污染物自动监测设备的投资予以资金和政策支持。

在欧洲, 税收同样被用于遏制环境污染。欧盟财政政策第 2003/96/EC 指令当中就包括对能源产品和电力的税务减免。透过这项条例, 通过热电联产发电的成员国将获得全数或部分应纳税额减免。

关于固体废物的新规定

过去几十年来, 中国都是全球最大回收废物进口国, 每年进口多达 900 万吨塑胶。但是由于一连串的突发事件, 中国在 2018 年 1 月立法禁止 24 类可回收物料进口, 其中包括未分类纸张以及用于制造塑料水瓶的低级聚对苯二甲酸乙二醇酯。

虽然这个突然的转变会令人联想起其一直以来的高压监管, 但由之而来的连环效应迫使许多国家不得不重新调整他们的回收计划, 同时也刺激了中国国内的回收项目。这也反映了人们更清楚地意识到对工业活动迁移到中国而排放的污染。中国的监管机构如果想提升中国经济在价值链上的地位, 应把焦点放在同样是密集排放和污染的回收业。

国家发展和改革委员会发布了一项针对生活垃圾的新规定, 以促进可持续发展。新例规定市政府按垃圾量来评估处理固体废物的费用, 并计划于 2020 年建立一个全面的收费系统收集处理生活垃圾。设立这个系统的目的, 是制定合理的定价机制, 让价格在反映市场供求、资源稀缺、生态价值和损害环境的代价的同时, 让从业者有合理的利润收入。新的定价机制在要求排污者支付费用的同时也可以获取合理的收入。国家发改委同时也鼓励地方政府推行政策, 吸引企业参与分类、减少、回收和处置垃圾。

《固体废物污染环境防治法》于 2013 年开始实施, 最近一次修订于 2016 年, 适用于管制中国的固体废物。国家立法机构在 2017 年对这项法例进行评估, 发现需要革新该项条例以应对中国当前的法制需求。生态环境部在 2018 年 7 月发布了《固体废物污染环境防治法》(修

EPTL PENALTIES SEVERE

The Environmental Protection Tax Law (EPTL) sets out four types of pollutants subject to environmental taxation: (1) atmosphere pollutants; (2) water pollutants; (3) solid waste; and (4) noise. Notably, this list does not include greenhouse gases (GHGs), and the EPTL does not target businesses that discharge pollutants indirectly.

The law is the first of its kind in China and replaces the discharge fee system that has been in place for more than three decades. Although the pollution fee system also attached a cost to the discharge of pollutants, the key difference implemented by the new EPTL is a significant increase in the severity of penalties for failure to pay the required discharge taxes.

For companies already in compliance with the old fee system, this new scheme should not prove significantly different, as the scope for levying, bases and rates is very similar to the fee system. However, the law is likely to mean there is greater scrutiny of companies making the relevant kind of pollutant emissions. Estimates indicate that more than 260,000 companies had to start paying environmental tax from April this year. As such, the EPTL is a significant step in "levelling the playing field" of environmental compliance in China, which is instrumental in creating a culture of compliance among businesses.

Article 13 of the EPTL provides that if a taxpayer's emissions of taxable atmospheric pollutants or water pollutants is less than 30% of the pollutant discharge standards set by provincial and local governments, the tax will be levied at 75% of the specified level. If the taxpayer's emissions are less than 50% of the applicable national and local pollutant discharge standards, the tax will be levied at 50% of the usual rate. This favourable rate will mitigate the impact of the EPTL on smaller businesses, which have less ability to install and operate capital-intensive pollution control equipment.

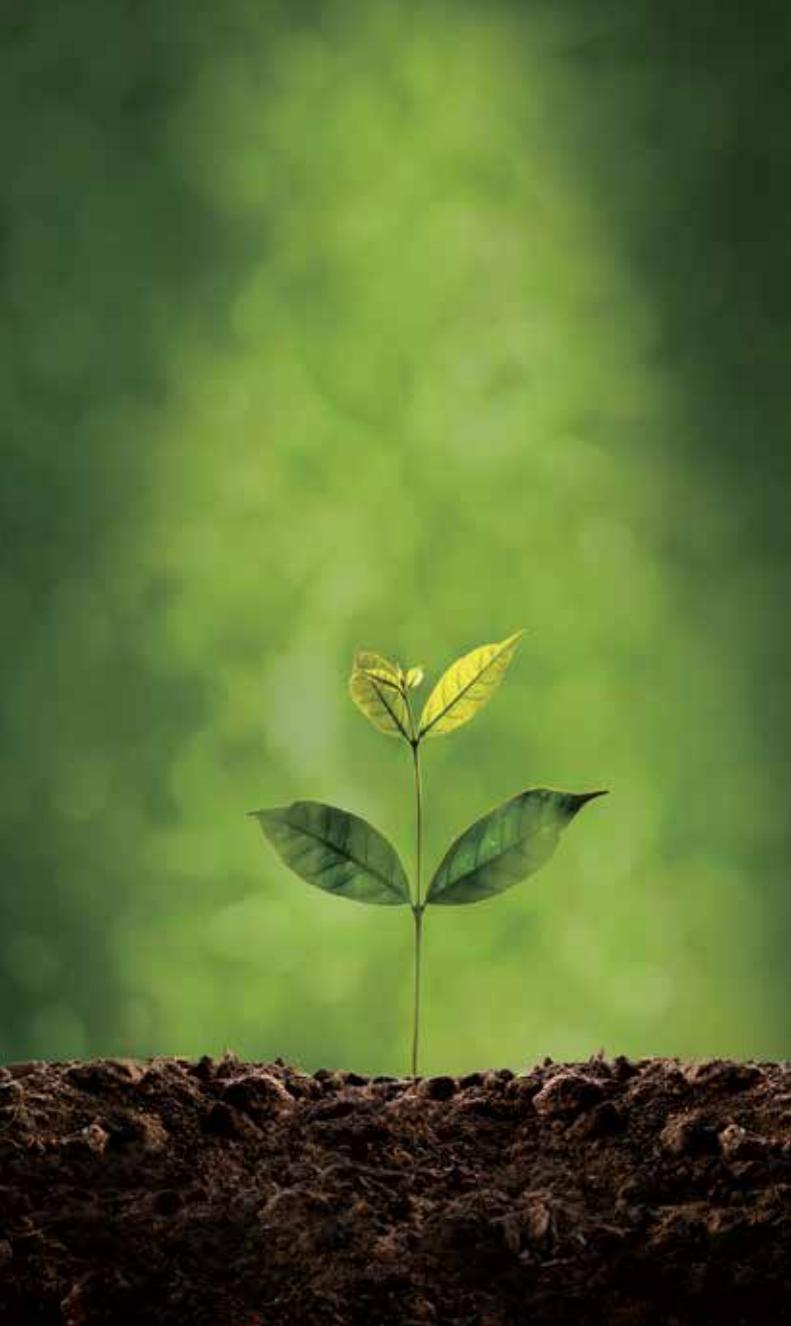
Article 24 of the EPTL stipulates that the government will, at all levels, encourage taxpayers to increase investment in environmental protection construction and provide financial policy support for taxpayers' investment in automatic monitoring equipment.

In Europe, taxation has also been used to curb environmental pollution. For example, the fiscal legislation EU Directive 2003/96/EC contains a provision on the taxation of energy products and electricity. Under this legislation, member states receive total or partial exemptions/reductions of their taxation liability in relation to electricity produced from combined heat and power generation.

NEW PROVISIONS ON SOLID WASTE

For decades, China was the world's largest importer of waste for recycling, importing nearly nine million metric tonnes of plastic a year. But, in a sudden turn of events, China instituted an import ban on 24 types of recycled materials in January 2018, including unsorted paper and low-grade polyethylene terephthalate used in plastic bottles.

While this sudden move is more reminiscent of its command and control history, the ripple effects it has sent across the world have forced countries to reconsider their recycling programmes, and spurred China's own domestic recycling programme. However, it also reflects a growing awareness of the



订草案) (征求意见稿)》，公开征集意见。

该草案在第三条中列明采取相关政策，对固体废物实行充分合理利用及回收固体废物的目标。然而，尽管第三条旨在推动废物回收利用，却没有解决回收废物进口的问题。

事实上，推动充分合理利用废物的重要性，很可能只限于充分利用生活垃圾和继续限制进口。草案第四条表示政府将防治固体废物污染环境，“将固体废物污染环境防治工作纳入国民经济和社会发展规划，并采取有利于固体废物污染环境防治的经济、技术政策和措施”。

草案第 20 条要求产生固体废物的单位，按照《环境保护税法》规定缴纳环境保护税。同时，收集、贮存、运输、利用、处置危险废物的单位，应按照国家有关规定，参加环境污染强制责任保险(草案第 73 条)。这些修改与《环境保护税法》支持的“污染者付费”原则一致，并将为评估与固体废物相关的风险创造市场动机。

碳排放交易系统

中国逐渐转向以市场为导向的环境保护，其中最备受期待的无疑是推出国家碳排放交易系统(ETS)，从而促进减少温室气体排放。2017年12月，中国宣布其官方计划。

“importation” of emissions into China that has resulted from so much industrial activity relocating to the country. As a particularly emissions and pollution-intensive industry, recycling is a logical industry of focus for regulators seeking to move China's economy up the value chain.

The National Development and Reform Commission (NDRC), China's economic planner, has also released a new regulation addressing household garbage to promote sustainable development. The regulation requires municipalities to assess charges for solid waste treatment – largely based on the amount of trash – and to establish a comprehensive charging system for collecting and processing household waste by 2020.

The goal is to create a pricing mechanism that ensures a reasonable profit for those involved while “fully reflect[ing] market supply-demand and scarcity of resources, as well as ecological value and the cost of environmental damage”. The new pricing mechanism initiatives will let polluters pay the cost while ensuring a reasonable profit. Local governments are also encouraged to introduce measures to attract the participation of enterprises to support sorting, reducing, recycling and disposal.

The Law of the People's Republic of China on Solid Waste Pollution Prevention and Control, which was implemented in 2013 and most recently amended in 2016, applies to regulation of solid waste in China. The national legislature undertook an evaluation of this law in 2017 and concluded that it should be updated to better meet China's regulatory needs. In July 2018, the MEE published a Proposal to Amend the Solid Waste Law for public comment.

The proposal sets out in article 3 a goal of adopting to policies to promote “comprehensive utilization” and maximize recycling of solid waste. Note that while recycling of waste is being promoted in article 3, the importation of waste for recycling is not addressed. In fact, the focus on comprehensive utilization likely implies a focus on full utilization of domestic waste and continued restrictions on importation.

Article 4 of the proposal states that the government will prevent and control environmental pollution from solid waste, and will “incorporate it into national economic and social development plans, and take economic and technological policies and measures to achieve environmental protection against solid waste pollution”.

Article 20 of the proposal requires that waste generators pay environmental tax in accordance with the EPTL. Entities that collect, store, move, use or dispose of hazardous waste must take part in a compulsory environmental pollution liability insurance programme (article 73 of the proposal). These changes are consistent with the promotion of the “polluter pays” principle endorsed by the EPL, and will create a market incentive for evaluation and assessment of the risks associated with solid waste.

EMISSIONS TRADING SCHEMES

China's most anticipated shift toward market-oriented environmental protection has been its embrace of a national emissions trading scheme (ETS) to incentivize reductions in GHG emissions. In December 2017, China announced the roll-out of its official plan, which builds on the experience of the initial seven pilot programmes that were introduced in 2013, and expands on those seven regional programs to cover the entire nation.

该计划以最初 2013 年七个试点计划的经验为基础，扩展七个区域计划，务求覆盖全国。计划一经全面实施，中国的 ETS 规模将冠绝全球，处理超过 30 亿吨温室气体排放量（几乎占全球总排放量四分之一），接近欧盟 ETS 的两倍。然而，当该计划于 2017 年底启动时，最初计划的八个主要行业范围——即石油化工、化学品、建筑材料（包括水泥）、钢铁、有色金属（如铝和铜）、纸张、电力及民用航空——均未在列，并缩水至纳入仅模拟交易每年二氧化碳排放当量超过 26,000 吨的电厂。因此，ETS 目前只涵盖 1,700 家公司，远少于最初预计的 6,000 家。中国政府计划在 2020 年开始拍卖排放配额，最终扩大该计划的范围，以包含最初设想的八个行业。

尽管从气候角度而言，延迟实施强制性 ETS 令人遗憾，但计划显示监管机构意识到设计有效的奖励制度以及保持“经济发展稳定和健康发展”的重要性和挑战。逐步引入该计划将允许尚未获纳入的公司有更多时间准备履行其排放的合规义务，并让监管机构有时间微调碳配额市场的监管。然而，监管机构应该更多考虑如何鼓励企业在 ETS 成为其行业强制要求前，采取进一步行动减少排放，而非采用惩罚机制。

除此之外，中国亦提出优先考虑有利营商以及按比例计算的限制，从而减少排放。按比例计算的限制旨在奖励企业减少每单位排放量，而不是强加总体排放上限。该方法符合中国在 2030 年或之前达到“碳排放峰值”的承诺，而不是承诺达到特定目标。最后，进度基准会基于每个工厂采用的发电方法二分化，从而避免了天然气工厂等低碳密集型设施对燃煤竞争对手的影响。

碳排放交易预计最早于 2020 年开始。这段期间，中国必须确定如何定价和分配额度，制定有效的数据收集流程，并制定针对违规行为处罚的指导。国家发改委于 2016 年发布了《碳排放权交易管理暂行办法》，惟最终的交易规则尚未公布。

把握机遇

随着中国转变政策并摆脱政府主导方式，开始采用过去两年半来欧美盛行的市场主导方式，跨国公司将有把握其中持续增加的机遇，包括创造环境效益的优惠税收待遇、更高的透明度，以及通过提高合规性来降低成本的能力。▲

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Once fully implemented, China's ETS will be the largest in the world, covering more than three billion tonnes of GHG emissions, almost a quarter of the global total and close to double the size of the EU ETS. However, when the programme was launched in late 2017, the initially planned scope of eight key industries – petrochemicals, chemicals, building materials (including cement), iron and steel, non-ferrous metals (such as aluminum and copper), paper, electricity and civil aviation – was pared back to a launch covering only electric power plants emitting more than 26,000 tonnes of GHG annually and only simulated trading.

As a result, only 1,700 companies are currently covered by the ETS, down from an initial forecast of 6,000. The central government plans to begin auctioning emissions allowances in 2020, and to eventually expand the scope of the programme to cover the eight industries originally envisioned.

Although the delay in implementing a mandatory ETS is unfortunate from a climate perspective, it does demonstrate that regulators are conscious of the importance and challenge of designing an effective system of incentives and preserving “stable and healthy economic development”. Introducing the programme gradually will allow companies not yet included in the programme more time to prepare for a compliance obligation being imposed on their emissions, and allow regulators time to fine-tune regulation of the carbon allowance market.

However, regulators should consider how to incentivize (and not to punish) further early action by companies to reduce emissions before the ETS becomes mandatory for their industry. China has also suggested a preference for the more business-friendly rate-based limit for curbing emissions.

A rate-based limit seeks to reward firms for producing fewer emissions per unit, rather than imposing an overall emissions cap. The approach is in keeping with China's pledge to hit “peak emissions” at or prior to 2030, rather than committing to a specific target. Finally, progress benchmarks appear to be bifurcated based on the power generation methods employed by each plant, thus avoiding pitting less carbon-intensive facilities like natural gas plants against coal-burning competitors.

Trading is expected to begin in 2020, at the earliest. In the interim, China must determine how to price and allocate credits, develop an effective process for collecting data, and develop guidance for issuing penalties for non-compliance. The NDRC issued tentative Measures for the Administration of Trading of Carbon Emissions Rights in 2016, but a final set of trading rules has not yet been released.

MORE OPPORTUNITIES

As China moves away from the command-and-control approach and adopts market-based instruments that have been popular in the US and Europe for the past quarter of a decade, multinationals will be well placed to capitalize on opportunities that are increasingly available through this shift of policy. These include favourable tax treatment for creating environmental benefits, increased transparency, and the ability to lower costs by improving compliance. ▲