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CHINA: ENVIRONMENTAL LAW

When it comes to environmental matters, headlines concerning China mainly refer to heavy pollution and environmental problems amid rapid economic growth following the country's opening up policies. This created a false image of lacking legislative standards and reluctant application thereof, contrasting to the government's recent efforts in improving the overall environmental situation in China (the "war on pollution"). These efforts did not only lead into a rigorous application of existing laws and regulations but also into dynamic legislative activities incorporating environmental matters into more and more fields of law. The PRC's regulatory framework on environmental protection as it stands now is multilayered and composed of general national policies, administrative rules, ministry-level regulations and local laws. Further, detailed action plans and catalogues are laid out in order to ensure environmental protection.

The central piece of legislation, the PRC Environmental Protection Law ("**Environmental Protection Law**") was implemented in 1989 and then continuously amended up to the present times. Specialized environmental protection legislation complements the comprehensive Environmental Protection Law. These specialized pieces of legislation include e.g. the Marine Environmental Protection Law, Water Pollution Prevention and Control Law, Atmosphere Pollution Prevention and Control Law, Solid Waste Pollution Prevention and Control Law, Environmental Noise Pollution Protection and Control Law, Environmental Impact Assessment Law, State Council Decision on Revising the Regulations on Environmental Protection Management for Construction Projects, Administration Measures of Prevention and Control of Environmental Pollution Caused by Electronic Waste, Measures for the Imposition of Consecutive Daily Fines by Competent Environmental Protection Departments ("**Consecutive Daily Fines Measures**"), Measures for the Implementation of Sealing-up and Seizure by Competent Environmental Protection Departments ("**Sealing-up Measures**").

PRC environmental authorities are said to be inclined to subject Foreign Invested Enterprises ("FIEs") to stronger supervision compared to Chinese-domestically invested enterprises. In any event, every enterprise in the PRC is well advised to meet environmental protection standards and to give due consideration to what PRC laws and authorities require because the actual implementation of these laws and imposition of fines and other penalizing measures has been drastically increased and will in all likelihood increase further.

Since the various environmental laws have been adopted and the PRC supervisory authorities have become better organized, FIEs as well as Chinese enterprises have often been cited for environmental violations. The situation can become particularly precarious where violations are made public, which nowadays is almost always the case because of social media publications as well as the PRC government publicizing violations through the Enterprise Social Credit System. Information on violations of environmental laws and regulations are recorded in the Enterprise Social Credit System and made public as most pieces of legislation now contain extensive publication requirements. The aim of such requirements is to engage not only businesses and authorities in the war on pollution, but even individuals and duly registered social organizations (“whistleblowing”). All enterprises including FIEs conducting business in China therefore are well advised to set up internal compliance systems reflecting the following environmental aspects as otherwise the business may be subject to fines and responsible individuals subject to legal liabilities and even detention.

1. Environmental Protection Law

The Environmental Protection Law sets forth the general framework of environmental protection in the PRC. Main aspects of the Environmental Protection Law refer to requirements to set up an environmental protection responsibility system, extensive disclosure requirements and a wide range of penalties in case of non-compliance.

Environmental Protection Responsibility System: Enterprises that discharge pollutants are required to set up an environmental protection responsibility system. Such system requires the appointment of personnel assigned to take care of environmental matters. Enterprises that discharge “key pollutants” shall install and use monitoring equipment, ensure proper operation thereof and internally file all original monitoring records of such key pollutants. Enterprises are required to formulate emergency response plans in the event of environmental emergencies. An emergency response plan shall be submitted to the locally competent PRC Environmental Protection Bureau (“EPB”) and other departments concerned for record-filing. In case of an environmental emergency, the local government departments will evaluate the response to such event based on the emergency response plan and publicize the result of such assessment.

Disclosure Requirements: Chinese legislators require enterprises and local government authorities alike to publicize certain environmental information. “Key pollutant-discharging entities” shall e.g. disclose:

- Name, legal representative, contact and production details of the enterprise
- Principal pollutants
- Discharge treatment for principal pollutants
- Concentration and total volume of discharged pollutants
- Any excess of standards by the actual discharged volume of pollutants
- Construction and operation of pollution control facilities information
- Emergency response plan information

Enterprises other than “key pollutant-discharging entities” are not legally obliged to disclose the aforementioned information, however the State encourages such enterprises to voluntarily disclose any information that is “relevant for the protection of the environment, pollution prevention/control and compliance with environmental social responsibilities”. This information must be disclosed and kept updated on either the enterprise’s own website or a website provided by governmental authorities. The local EPBs issue enterprise lists that qualify as “key pollutant-discharging entities” latest by end of March each year. In compiling such lists, the EPBs consider e.g. the locality’s general environmental capacities, control targets for maximum emission volumes of major pollutants, the type, volume and concentration of discharged pollutants, etc. Many (but not yet all) local governments have set up dedicated websites where information on “key pollutant-discharging entities” is published.

Where an enterprise intends to carry out a construction project with an impact on the environment, an Environmental Impact Assessment shall be carried out and all relevant documents and information provided in the course thereof must be publicized.

Besides the aforementioned disclosure obligations of enterprises, also PRC authorities publish information relating to enterprises, such as information on environmental quality, environmental monitoring, environmental emergencies, environmental administrative licensing, administrative punishments, environmental taxes, etc. Authorities gather such information through on-site inspections of enterprises that discharge pollutants and by requesting enterprises to provide certain information to the authorities.

Consequences of Non-Compliance: Any non-compliance with disclosure requirements is subject to warnings to disclose, administrative penalties and shall be publicized in the Enterprise Social Credit System and EPB lists of violators (“Blacklist”) containing the names of the respective violators and EPB will order the enterprise to duly disclose the required information and/or impose a fine.

In addition to administrative penalties targeting the enterprise, the persons “in charge of environmental matters” and being considered directly responsible or other persons who are directly responsible (e.g. often General Managers fall into such realm) may be subject to detention of between 5 to 15 days. Such detention may be imposed where an enterprise commits any of the following acts which does not constitute a criminal offense:

- Refusal to cease construction without carrying out an Environmental Impact Assessment
- Refusal to cease discharge of pollutants
- Illegal discharge by illegal facilities, manipulation, etc.
- Refusal to cease production or use of prohibited pesticides

Offenses that at the same time constitute a criminal offense shall be subject to criminal liabilities in accordance with the PRC Criminal Law. Further, whoever causes damage due to environmental pollution and ecological damage shall bear tort liability in accordance with the PRC Tort Liability Law.

The Environmental Protection Law grants duly registered social organizations the right to institute public litigation against acts that pollute the environment, cause ecological damage and harm public interests. During the course of such public litigation targeting private entities, further information may be disclosed to the public. Additionally, the law explicitly encourages whistleblowing, granting citizens, legal persons and organizations the right to report to the competent EPB environmental pollution and ecological destruction while EPBs are required to keep the identity of the informants confidential.

EPBs can seize and lock-up facilities of an enterprise discharging pollutants causing serious pollution or likely to cause serious pollution. According to the Sealing-up Measures, an EPB shall seize/lock-up enterprise facilities causing serious pollution that dispose or discharge (i) waste containing infectious disease pathogens, hazardous waste, toxic substances containing heavy metal pollutants or persistent organic pollutants or other harmful substances, (ii) pollutants in grade-1 drinking water source protection areas or natural reserve core areas, (iii) chemical, pharmaceutical, petrochemical, print, dye, electroplating, paper-/leathermaking and other industrial sludge,

(iv) pollutants otherwise in violation of the law. Further, in any case where an enterprise fails to halt production or the discharge of pollutants after the occurrence of an environmental emergency that qualifies as either “large, major or extraordinary” or where an enterprise discharges pollutants in a way that is intended to evade supervision, EPB can seize or lock-up the facilities.

Any case of illegal discharge of pollutants subjects enterprises to (initial) fines that may eventually culminate in daily fines. Such daily fines are imposed until the illegal discharge of pollutants is remedied. Daily fines shall be imposed where (i) an enterprise is (initially) fined for illegal discharge of pollutants, (ii) ordered to rectify the illegal discharge of pollutants, and (iii) notwithstanding such rectification order refuses to make rectification. Daily fines are calculated based on the initial fine and apply as of the second day following the rectification order. The Daily Fines Measures specify that daily fines shall apply in any of the following circumstances of discharge/disposal of pollutants: (i) exceeding national/local discharge standards or exceeding statutory maximum emission volumes, (ii) intending to evade supervision by using underground pipelines, seepage well pits, falsifying monitoring data, improper use of pollution prevention facilities, (iii) prohibited pollutants, (iv) illegal dumping of hazardous waste.

If enterprises discharge pollutants in excess of certain (i) pollutant emission standards or (ii) maximum emission volumes of major pollutants targets, EPBs may restrict production activities, suspend production or even order cessation of business operations and close down the business entirely.

2. Environmental Approvals and Licenses

Environmental regulations define a system of approvals (e.g. prior/during/after the construction phase) and permits (during the production/operation phase) by the EPB and based on Environmental Impact Assessments and other documents/information requested by the competent PRC authorities.

Whoever intends to invest in industrial or residential building construction, power stations, infrastructure projects or alike that will impact the environment must from the onset apply for the statutory environmental approvals (in addition to any other project approvals if/as applicable).

Failure to obtain required approvals represents a violation of the law with the risk of losing/not obtaining the business license, bank financing, land-use rights, utilities access, etc. Further, penalties can be imposed and operations halted until the required approvals are obtained.

Any construction and production project affecting the environment shall undergo an Environmental Impact Assessment as an integral part of the series of construction and other approvals required to approve an investment, construction and enterprise project. The various approval regimes differ locally across China and enterprises are well advised to explore which approvals are required at a particular location early on.

Site Selection: Enterprises shall analyse the type, scope, technology, location and layout of the project in connection with the environmental situation before an investment decision is to be made. When selecting a location, enterprises should avoid areas that have been highly contaminated or that have received special protection (tourist spots and nature/water reserves) as well as urban areas and other areas for which it is known/anticipated that production activities are unwanted.

Project Environmental Assessment: Before other local authorities can approve the project (e.g. construction or other government departments such as NDRC), the EPB will require to be provided with an Environmental Impact Assessment Registration (“EIR”), an Environmental Impact Assessment Form (“EIF”) or an Environmental Impact Assessment Report (“EIA”). These documents refer to the same document item, and which of the aforesaid three documents is required depends on the environmental impact degree of a given project (EIR being the document for projects with the lightest impact, EIAs being required for projects with the most material impact). EIFs and EIAs must be prepared by licensed environmental impact assessment institutions, EIRs can be prepared by the applicant itself.

Where an EIA is required, the EIA must be made public to solicit opinions from experts and the public prior to submission of the EIA to the EPB. EIFs/EIAs must be submitted to preliminary approval authorities in charge of the construction/production project before commencement of construction/production. EPBs shall issue a decision on an EIF within 30 working days and on an EIA within 60 working days, however, such deadlines only commence once the EPB accepted the application which may take considerable time due to feedback by the EPB.

EIRs only require filing with the EPB but not approval and hence projects only requiring an EIR may commence construction prior to EPB filing but must have completed EPB filing before completion of construction and start of production.

EIA, EIF and EIR applications are usually done online though in practice still many EPBs require paper applications as well. For nuclear facilities, confidential projects, cross-provincial projects and projects subject to State Council approval, the EIA must be submitted to the Ministry of Environmental Protection.

EPBs may reject EIA/EIF approval e.g. in the following cases:

- The project type, site selection, layout or scale, etc. fail to comply with environmental or zoning requirements
- The environmental parameters of the region of the project site fail to reach national/local environmental standards and the environmental protection measures fail to satisfy regional environmental quality improvement targets
- The pollution prevention and control measures of the project do not comply with national/local standards or the project has no adequate emergency response plans
- Projects of reconstruction, extension or technical transformation have no effective prevention and control measures in relation to the pollution and environmental damage caused by the initial project
- The EIF/EIA contains false or wrongful information, made mistakes/omissions or is otherwise vague or unreasonable

Failure to submit for and/or obtain EIA/EIF approval prior to carrying out a project may lead to administrative sanctions such as project stops and administrative fines of between 1% to 5% of the total project investment and rectification orders. Persons directly in charge of the project and other directly responsible individuals may be subject to administrative sanctions.

Failure to file an EIR before construction completion and start of production can be fined with up to RMB 50,000 and an order to carry out the filing.

Environmental Protection Facilities: According to the PRC Administrative Regulations on the Environmental Protection of Construction Projects (“Construction Regulations”) an EIA is required to ensure that the basic design of a construction project duly considers environmental protection, environmental emergencies prevention and a budget for environmental protection facilities. Upon completion of projects subject to EIFs/EIAs, the contractor must conduct an inspection and acceptance check of the environmental protection facilities and issue an acceptance report thereof (which usually must be publicized).

Violation of the environmental protection requirements under the Construction Regulations lead to administrative penalties. The competent authorities may request project adjustment within certain time periods and impose fines of between RMB 50,000 to RMB 200,000. If no adjustment is made in time, fine of between RMB 200,000 to RMB one million may be imposed. Where contractors fail to implement countermeasures for environmental emergencies, authorities may request adjustments within certain time periods and impose fines between RMB 200,000 to RMB one million. If no adjustment is made on time, construction and/or operation can be ordered to stop.

Any such violation will also be entered into and published in the Enterprise Social Credit system.

Pollutant Emission License: Prior to emitting any pollutants during operations, enterprises must obtain a pollutant emission license under the “system of total emission volume control of major pollutants”. This system comprises control thresholds for maximum emission volumes of major pollutants defined by the legislators. Enterprises shall meet these control targets in the course of their operations and the control thresholds for maximum emission volume of major pollutants allocated to them. Allocation of control thresholds for maximum emission volumes of pollutants is handled through a license system. Thus, enterprises are required to apply for a pollutant emission license for any pollutant that may be discharged during their operations. Without duly obtained pollutant emission license, any discharge of pollutants is illegal. The pollutant discharge license sets forth the kind of pollutants an enterprise is permitted to discharge, the concentration and the maximum amount. It further provides the pattern and period in which the respective pollutant may be discharged.

While currently different laws and regulations (e.g. the Marine Environmental Protection Law or the Solid Waste Pollution Prevention and Control Law) provide different stipulations for obtaining the pollutant emission licenses for different pollutants, the Ministry of Environmental Protection is aiming to unify the application process by the year 2022. This centralized permission system will be introduced step-by step for different kind of pollutants.

3. Environmental Protection Tax Law

As of 1 January 2018, the Environmental Protection Tax (“EPT”) has replaced the former Pollutant Discharge Fee. EPT is a penalty tax levied on enterprises and other operators that “directly” discharge taxable pollutants into the environment. “Directly” in this context refers to discharges outside the legitimate pollutant treatment facilities. EPT is also levied on enterprises or other polluters who store or otherwise dispose solid waste in violation of mandatory environmental protection standards. The discharge of “taxable pollutants” into legitimate waste treatment facilities is not considered as “directly discharging of taxable pollutants” and thus not subject to EPT (neither is any other legitimate storage/disposal subject to EPT).

Categories of taxable pollutants include air pollutants, water pollutants, solid waste, noise pollutants and the Annexes to the Environmental Tax Law (i.e. the “Taxable Items and Tax Rates of EPT” and “Taxable Pollutants and Their Equivalent Value”) define the taxable items within the different pollutants categories in detail. These Annexes adjust regularly and must be monitored by enterprises to ensure compliance.

EPT Calculation:

| Pollutant | Air & Water | Solid Waste | Noise |
|-----------|--|--|---|
| Formula | <p>Pollution Equivalent Number¹ x EPT Rate</p> <p>¹ calculated by dividing pollutant volume with “pollution equivalent value” (defined in Annex “Taxable Pollutants and Their Equivalent Value”)</p> | <p>Solid Waste Discharge Volume x EPT Rate</p> | <p>EPT levied according to excess decibel standards prescribed by the State</p> |

The EPT Law provides minimum national EPT rates per pollutant category. Provincial governments may adjust these rates in a range of up to ten times the national minimum standard rate (currently Beijing applies the highest tax rates for air pollutants, Guangzhou and Shenzhen apply significantly lower rates).

Taxable pollutants are not generally subject to EPT: For air pollutants only the top three pollutants of each discharge outlet (or those without any discharge outlet) based on the pollution equivalent number are subject to EPT. For water pollutants only the top five pollutants among category-1 pollutants and the top three pollutants of lower categories are subject to EPT (the categories are defined in the Annex "Taxable Pollutants and Their Equivalent Value").

In order to reduce the tax levy for certain industries that are dependent on the discharge of certain pollutants and to generally encourage lower pollution output, the Chinese legislator implemented certain tax exemptions or reductions:

EPT exemption can be applied for

- Taxable pollutants discharged during agricultural production (excluding largescale cultivation) and by motor vehicles, rolling stock, non-road mobile vessels, marine vessels, aircrafts and other mobile sources of pollution
- Legitimate urban and rural centralized sewage treatment plants, centralized domestic garbage disposal fields, provided they do not exceed national and local discharge standards
- Comprehensive use of solid waste by complying with national and local environmental protection standards

EPT reduction can be applied for

- Discharge concentration values of taxable air/water pollutants of at least 30% below national and local pollutant discharge standard: reduced EPT rate of 75%
- Discharge concentration values of taxable air/water pollutants of at least 50% below national and local pollutant discharge standard: reduced EPT rate of 50%

EPT is calculated monthly and declared and paid quarterly to the local tax authority where the taxable pollutants are discharged. Where EPT cannot be calculated and levied based on a fixed term, the tax payment can be declared and paid according to a "pay-per-discharge" method. Information to be filed comprises the categories and quantities of the taxable pollutants discharged, concentration of air/water pollutants and other information required by the authorities on a case by case basis. Such data are compared with the EPB data through an information sharing platform of the EPB, thus creating a tight supervision network for the collection of EPT.

4. Practical Considerations

Enterprises must carefully and continuously evaluate their operations in light of environmental laws and regulations, taking into consideration factors such as industry, location, current and future emission levels, production techniques, condition and state of equipment, energy consumption and ongoing legal changes. It is not enough to apply European standards because Chinese standards are different and partially stricter than European standards.

Enterprises must conduct all required environmental impact assessments, obtain all required approvals and licenses and keep them up to date.

Environmental approval processes can be very time and cost consuming so this shall be factored in during the design and construction phase because start of production may be delayed by failure to comply with mandatory filing and approval requirements.

The familiarity of environmental officials with imported foreign technology varies so enterprise shall seek contact with the local EPB as early as possible and strive for a good rapport with the authorities.

Qualified environmental impact assessment institutions form an important part of environmental assessment and inspection procedures. Their understanding and view of a project, whether it be accepting the performance and effectiveness of the proposed environmental protection equipment or requiring a standard of protection that exceeds legal requirements, will impact the EPBs considerations when contemplating final approval.

Enterprises must set-up internal environmental compliance systems that reflect matters such as environmental accountability (i.e. by designating responsible staff) and the implementation of emergency response plans. Specifically trained staff shall be responsible for pollution discharge monitoring, on-going reporting and maintenance of the plant and its facilities. In particular in Sino-Foreign Joint Venture Enterprises awareness shall be paid to these matters because the expectations and importance thereof may differ between foreign and local shareholders.

Besides internal environmental compliance systems, enterprises can safeguard their interests within their supply chain. In order to avoid any disruption of production and the exposure to legal liabilities, enterprises may consider the following measures: (i) agree with the supplier(s) to implement strict environmental compliance standards either in the supply contract or in a separate agreement with distinct liability clauses (e.g. liquidated damages), (ii) require the supplier(s) to implement the same strict environmental compliance standards either in the supply contract or in a separate

agreement with distinct liability clauses (e.g. liquidated damages) in any of the supplier's subsequent supply contract(s), (iii) require the supplier (and the supplier's supplier) to accept initial and regular external auditing regarding all environmental matters either in the supply contract or in a separate agreement, (iv) establish a network of back-up suppliers where feasible. Lastly, legal environmental protection standards and the standard determined in contracts with suppliers or turnkey contractors with regard to the equipment should not be treated as equivalent. Equipment that exceeds the legal standard will put the project sponsor in a better position vis-à-vis the EPB.

EPT issues (i.e. payable taxes and/or entitlement for tax benefits) should be reflected in the accounting system of the enterprise.

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