

排污权初始分配的 法律调控

On the Initial Allocation of
Emission Rights

王清军 著



中国社会科学出版社

排污权初始分配的 法律调控

On the Initial Allocation of
Emission Rights

王清军 著



中国社会科学出版社

图书在版编目 (CIP) 数据

排污权初始分配的法律调控 / 王清军著. —北京: 中国社会科学出版社, 2011. 12

ISBN 978 - 7 - 5004 - 9911 - 4

I. ①排… II. ①王… III. ①排污 - 费用 - 环境保护法 - 研究 IV. ①D912. 604

中国版本图书馆 CIP 数据核字 (2011) 第 118001 号

责任编辑 官京蕾

责任校对 郭 娟

封面设计 弓禾碧

技术编辑 李 建

出版发行 **中国社会科学出版社**

出版人 赵剑英

社 址 北京鼓楼西大街甲 158 号

邮 编 100720

电 话 010 - 64040843 (编辑) 64058741 (宣传) 64070619 (网站)

010 - 64030272 (批发) 64046282 (团购) 84029450 (零售)

网 址 <http://www.csspw.cn> (中文域名: 中国社科网)

经 销 新华书店

印 刷 北京奥隆印刷厂

装 订 廊坊市广阳区广增装订厂

版 次 2011 年 12 月第 1 版

印 次 2011 年 12 月第 1 次印刷

开 本 880 × 1230 1/32

印 张 9.5

插 页 2

字 数 245 千字

定 价 30.00 元

凡购买中国社会科学出版社图书, 如有质量问题请与本社发行部联系调换

版权所有 侵权必究

中文摘要

严格意义上的排污权交易制度应当包括三个主要过程：排放总量控制、排污权初始分配（排污许可证配额分配）以及排污权交易（买卖交易）。其中，排放总量控制担负着环境保护及创造稀缺市场职责，构成排污权交易制度之必要前提；排污权交易则保障稀缺资源实现优化配置，形成排污权交易制度之逻辑终点；居于中间位置的排污权初始分配则起着承上启下之功能：借助排污权初始分配机制，排放总量被分成若干具体份额，按照既定分配规则赋予不同排污主体，以污染物持续减排为主要目标的排放总量控制机制才得以贯彻落实。通过初始分配机制，形成具有相对排他性、可交易和可测量之排污权，以经济效率为主要价值取向的排污权交易机制才有可能真正启动。对排污权初始分配机制进行专门研究不仅可以指导排污权初始分配的实践工作，而且对于排污权交易制度自身完善也有重要意义。

本书第一部分分析了排污权初始分配机制的基本原理。首先明确排污权及其法律属性。通过回顾排污权物权化理论和实践困境，指出在财产权来源多元化、财产权性质综合化和功能性财产权日益增多的情况下，应跳出以所有权为中心而析出其他权利、须在绝对之物权和相对之债权二元结构中寻找财产权利性质的理论桎梏，以开阔视野和在更广泛领域内探寻排污权法律属性。结合新财产权理论，文章指出从以下几个方面理解排污权法律属性：第一，排污权具有私权和公权的双重属性，受公法和私法调整；

第二，排污权是一种功能性权利，具有促进、引导和激励等诸多功能；第三，排污权保护具有特殊性，排污权初始分配构成权利保护重要内容。其次，对排污权初始分配进行了界定。作为一种行为、一个过程、一类关系的有机总和，排污权初始分配基本构成要素应当是相对固定的，即分配关系主体、分配客体和调整分配关系的具体分配权利（权力）义务规则。排污权初始分配特征包括：行政主导下市场手段和管理手段的有机统一，利益分配和资源配置的有机统一，多种价值取向的有机统一；最后，论文论述了分配法律关系主体理论。指出所谓分配法律关系主体即依法或依照协议参与排污权初始分配过程，享有权利（权力）和承担义务（责任）的法人或法人共同体组织。按照享有权利和承担义务的不同性质，初始分配法律关系主体可以分为分配主体和分配接受主体。在特殊情况下，国家可以作为分配主体，也可能成为接受主体。分配主体就是在分配法律关系中，依法对排放总量按照既定分配规则进行分配，享有权力和承担责任的行政主体或其他依法授权受委托组织。分配接受主体就是依照政策法律规定或依照协议参与排污权初始分配法律关系，基于一定分配规则获得一定排放权份额的排污主体的总称。以分配主体和分配接受主体为主，联结其他利益相关者构成一个分配共同体结构。

本书第二部分论述了排污权初始分配基本规则包括既往占有、当前占有、公平分配等。既往占有亦称历史分配，是基于历史排放量基准或其他基准进行排污权初始分配。种类包括：按照历史排放量分配，按照历史能耗量分配、按照历史排放绩效分配。洛克的劳动财产理论及诺齐克财产持有理论构成了既往占有正当性的主要来源。既往占有在排污权初始分配占据重要地位，但存在着基准年选择困难和一定的道德困境。基于当前或最近排放量或其他基准进行排污权初始分配即当前占有。它包括基于当前实际排放量进行排污权初始分配和基于当前排放绩效进行排污权初始

分配。当前占有的正当性可以从法律规定中找到，也可以从休谟的功利主义和法经济学的效率标准中找到。当前占有有很多优点：减少重新制定分配规则的制度成本；可以带来效率提高；可能产生制度规则的预期效应等。但当前占有形成的禀赋效应造成排污权“惜售心理”，当前占有同人与自然和谐理念也存在矛盾之处。公平分配包括基于机会公平的初始分配、基于结果公平的初始分配及考虑机会与结果公平的多元分配。德沃金的资源平等理论和“拍卖”假设论证了排污权初始分配拍卖规则的正当性。拍卖规则可以分为密封拍卖和公开加价拍卖。拍卖规则保障每个排污主体同等竞价机会，强调排污权初始配置过程中的机会公平同时带来充裕环境治理资金，故成为理论和实务界推崇的主要分配规则。但存在造成排污主体无污染防治计划及加重排污主体额外成本负担等顽疾。基于结果公平的平均主义分配也在温室气体排放权分配中占据一席之地。全球气候变化的不确定性会引起平均主义思潮泛滥。平均主义理论主要包括基于人均排放的“紧缩与趋同”分配规则，“一个标准，两个趋同”分配方案，“人均累积排放”计划等。

本书第三部分对排污权初始分配机制包括主体和具体分配规则的实践状况做了细致描述。本书回顾了美国“酸雨计划”二氧化硫排放权初始分配的公开博弈过程，指出以下几点经验值得借鉴：第一，依法赋予分配主体（EPA）职权能够保障初始分配顺利进行。EPA法定地位和权责是保证排污权初始分配顺利进行必要条件和重要保证；第二，分配接受主体有效厘定和有序扩大。排放接受主体被明确为具有固定源、同质性等属性特征的火电厂，并按照强制和自愿结合思路确定接受主体，有序扩大参与主体数量，保障规模市场效应；第三，建立一种分配规则为主，多种分配规则并存的分配格局。采用何种分配规则或几种规则组合，取决于在支配作用的经济、政治、技术、环境条件以及规则的有机

整合程度。《京都议定书》谈判中，当前占有能够满足当时各国控制温室气体需求，兼顾各国现存或既得利益，能够做到当前利益的最大化满足，且包括了一个更低的管制成本。人均排放量为基础的排放权分配机制可以为发展中国家提供更大的生存和发展空间，易为发展中国家接受。但由于基准年难以确定以及实施操作的具体难度，平均主义最终没有出现在国际法律文件之中。

本书第四部分对完善中国排污权初始分配机制提出思路。回顾了中国排污权交易制度规范性法律文件等，分析了中国排污权初始分配机制存在的种种问题：第一，排污权交易制度缺乏整体主义考量，断片化现象突出。缺乏排放总量控制目标和对排污权初始分配关注不够，旨趣仅停留在“交易”层面。第二，分配主体及其分配权配置存在问题。包括横向权力配置方面的部门利益化和监督权缺失问题，纵向权力配置方面的正式法律渊源虚化，多样化和可操作性差等；第三，排污权初始分配规则存在问题。包括具体分配规则单一问题；定价出售规则所耗成本巨大和随意性问题；拍卖规则功能异化，有沦为资本游戏风险；有偿分配费用名目繁多，名称各异，有加重排污主体负担问题。第四，排放量数据管理规则问题分析。包括缺乏规范的排放数据库管理制度和明确的责任追究制度。最后对中国排污权初始分配机制提出了若干建议：在法律法规完善方面，提出修改完善环境法律法规，明确排污总量控制机制及实施措施；法律授权环境主管部门排污总量初始分配权责；出台国家层面的排污权初始分配规则制度。在初始分配主体分配权配置方面，依寻能源和环境政策一体化思路，依法明确国家环境部在总量控制和初始分配的主导地位，通过联席会议和通报机制协调横向关系；在初始分配接受主体方面，结合同质性、成本差异、技术手段、市场力量等，将强制性和自愿性结合起来，分阶段有计划渐次扩大接受主体范围和数量，在较长一段时间内应在火电行业推广为宜；在分配规则方面，建立

一种分配规则为主，多种规则并存分配格局。本书的最终结论非常简单：各种排污权初始分配规则在立法或实践中都有广泛的运用，但同时都存在一定的局限。每一种规则都有它的优势和不足，在不同的地域行业、技术以及其他条件下，这些优势或者缺陷可能会最大化或者最小化。没有一种分配规则可以证实在所有情况下，考虑到制度的各个层面都优于其他分配规则。排污权初始分配规则的选择，必须满足多项价值目标，最终取决于在某个特定时间和地点起支配作用的制度、经济和技术条件。

Abstract

Strictly speaking, the emission rights system consists of three main process-capping, allocating, and trading. Among them, the capping process takes the responsibility of protecting the environment and creating the market, which constitutes prerequisite of the emission rights system; the trading process guarantees optimal allocation of scarce resources, which forms the logical end of the emission rights system. The initial allocation of emission rights plays a role of connecting the capping process and the trading process: by virtue of the initial allocation mechanism, shares of the cap must be distributed among resource users and potential resource users in the allocation process according to established distribution rules. Through the initial allocation mechanism, the relatively exclusive, measurable and tradable emission rights can be established, and as a result of that, the economic-efficiency-centered market trading mechanism is possible to start. Research on the initial allocation of emission rights mechanism can not only guide the practice of initial allocation of emission rights, but also perfect the emissions trading system itself.

The first part of the dissertation is the preliminary analysis of the basic principle of the initial allocation mechanism. First of all, it is necessary to define the legal nature of the emission rights. By analyzing the plight of transferring the emission rights into the real right, the article

points out that, in the situation of the diverse and integrated property rights, and the ever-increasing functional property, we should jump out of the ideas that ownership is the center of other rights, so that we can find the legal nature of the emission rights limited to the absolute real rights and relative obligation rights. With a reference to theories from “the New Property”, the article points out that the legal nature of emission rights should be analyzed from the following aspects: First, the emission rights has the dual legal nature of private rights and public rights, which should be regulated by both public and private laws; secondly, the emission rights is the functional right, with the function of promotion, guidance and encouragement, and so on; thirdly, the protection for the emission rights has special feature: the nature of emission rights plays a vital role in the initial allocation process. Next, the article analyses the initial allocation mechanism of emission rights. Being a legal act, a legal process and a distribution relationship, the basic elements of the initial allocation mechanism, that is, the distribution of subjects, objects and the allocation rules between different subjects should be relatively fixed. The initial allocation of emission rights includes the following characteristics: integration of market means and management means under the guidance of executive authority; integration of profit allocation and resource allocation and the integration of various value orientations. Finally, the author analyses the theory on legal allocation subjects. The author declares that the subjects refer to legal persons or organization of legal community that take part in the initial allocation process in accordance to the law or agreement, enjoy rights and bear responsibilities. According to the different features of their rights and duties, the subjects in initial allocation process can be subdivided into allocation subjects and acceptance subjects. In some special circum-

stances, the state can be both an allocation subject and an acceptance subject. Allocation subjects refer to those executive bodies or associated agencies that determine the share of allocation according to the agreed allocation rules, enjoy relevant rights and bear duties. Acceptance subjects generally refer to those emission subjects that enjoy a certain amount of emission share according to the laws or regulations. Allocation subjects, acceptance subjects, together with other interest parties, form an allocation community.

The second part of the dissertation discusses the basic rules of initial allocation of emission rights, including Prior possession, Present possession, equitable distribution and others. Prior possession is also known as Prior allocation, and is the initial allocation based on prior emission or other criterion of distribution. The legitimacy of Prior possession is fully supported in Locke's and Nozick's theory. Prior possession plays an important in an initial allocation, but it also faces some difficulties, for example, the choice of the base year, and other moral dilemmas. Present possession is also called grandfathering. It is an initial allocation of emission rights based on present emission, the latest emissions figures or other criteria. Present possession's legitimacy can be found out both from current law, from Hume's utilitarianism and from efficiency of law and economics. Present possession owns many advantages, including: the reduction of system cost for re-establishing allocation rules; bringing about increased efficiency; producing the expected effects of such rules. Nevertheless, the endowment effect caused by the present possession may result in "reluctant-to-sell psychology". From the long-term point of view, this type of allocation also reflects the idea that humans are independent of nature, which conflict with the idea of harmony between man and nature. Equitable distribution includes initial

distribution based on fair opportunities, initial distribution based on fair results and diverse distribution based on the fairness of both opportunity and result. Dworkin's equality theory of resources and the "Auction Suppose" demonstrates the legitimacy of the auction rules in the initial allocation of emission rights. Auction can be divided into sealed-bid auction and ascending auction. Auction rules guarantee equal bidding opportunities for each pollutant, emphasize the fair opportunities on the initial allocation emissions and bring fund for environmental management. Because of these advantages, auction rules have become the major allocation rule in theory and practice. However, auction rules also have some disadvantages; for instance, it may cause the pollutants to stop planning sewage and increase the burden of additional costs for emission subjects. Egalitarian allocation, which focus on fairness of results, also occupies a place in allocation of greenhouse gas. The uncertainty of global climate change causes the proliferation of egalitarian thought. Egalitarian allocation consists of contraction and convergence and so on.

The third part of the dissertation gives a detailed description of the basic rules of the initial distribution. It reviews the allocation process of the open game of the United States "Acid Rain Program", and points out what can be learned from that experience; First, according to law, subjects (EPA) is endowed with the main responsibility to guarantee the smooth progress of the initial distribution. As an executive body, EPA is authorized by the federal government and directly responsible to the president. The legal status and responsibilities is to ensure the necessary conditions for the initial allocation, to express statutory authorization to bring environmental authorities as well as personnel and better equipment; Secondly, acceptance subjects was given an effective definition

and orderly expansion according to the plan. After scientific evidence and public game, acceptance subjects was limited to fixed sources, homogeneous characteristics such as thermal power plants, and in accordance with mandatory and voluntary participation to determine the number, the number of effective protection in the main market effects of scale. The number of trial should not be too many and too complex at first, after certain period of trial, the scale can be gradually expanded; thirdly, there is a major distribution pattern based on one rule and the coexistence of multiple distribution rules. Which distribution rule to apply is up to the dominant role in the economic, political, technological and environmental conditions and the level of organic integration of the rules. In the "Kyoto Protocol", present possession met the needs of greenhouse gases of the participating countries. Furthermore, it took into account the existing interest of different countries, so that it could maximize the current benefits. Moreover, this distribution included a lower control costs. Emissions allocation rights mechanism based on per capita emission provided developing countries with greater survival and development space and so made it easier for them to accept. However, due to the difficulty in determining the base year and the loss of voice for developing countries, egalitarianism failed to appear in international law.

The fourth part of the dissertation supplies some proposals for the initial allocation of emission rights mechanism of China. After reviewing the emission trading system of normative legal documents, the author analyzes the existing problems in the mechanism of China's initial allocation of emission rights: in the first place, the emission system lacks a general consideration, and the phenomenon of fragmentation prevails in China, with the main interest staying on the level of "trading". In the second place, there is problem on allocation subjects and the distri-

bution of its allocation rights, for instance, horizontally, the department's interests and the lack of supervision power; vertically, virtualization of the sources of formal laws; and the low operability caused by various power allocation, etc. . In the third place, there are problems on the initial emission allocation rules, such as homogeneousness of allocation rules, difficulty in harmonizing efficiency, fairness and environmental protection, and the huge cost in fixed-price sale rules; alienation of auction rules, with a high risk of becoming capital game; different names on paid allocation, making it possible to increase the cost for the emission subjects. In the fourth place, there are problems on allocation data management rules, such as the lack of management system for the standard emission database and the lack of clear accountability system. Based on the above analyses, the author put forward the following suggestions: one, in terms of laws and regulations, the author holds that it is necessary to modify the existing laws and regulations to clarify total emission amount control system and implementation measures, to authorize environmental agencies the rights to allocate the initial emission, and to publish the national regulations on initial emission allocation rights. Two, in terms of initial emission allocation subjects, the state should clarify the Environment Bureau's leading role in total emission control and initial allocation on the basis of integration of energy and environment policies; establish joint conference system and reporting system. Three, in terms of acceptance subjects, the state should consider factors such as homogeneousness, cost difference, technological means, market power, etc. . Combine compulsory and voluntary means together, so that it can gradually enlarge the number and scope of acceptance subjects. And for a certain long period of time, it should be mainly popularized in thermal power industry. Four, in terms of alloca-

tion rules, the state should establish a system with one major allocation rule and many other minor allocation rules. Finally, it comes to the viewpoint of the dissertation: the various rules on initial allocation of emission rights are widely applied in legislation or practice, but at the same time, they all possess certain limitations. Every rule has its advantages and disadvantages and in different geographical sectors, technology and other conditions, these advantages or defects of may be maximized or minimized. There is no allocation rule that can be confirmed to be superior to all the other allocation rules when taking into consideration all levels of the system. The choice of the rules for initial allocation of emission rights satisfy a number of value targets, so it ultimately depends on the system, economic and technological conditions functioning the dominant role in a specific time and place.

2010 年度教育部人文社会科学研究一般项目
《排污权初始分配的法律调控》（10YJA820102）成果

内容简介

排污权初始分配是排污权交易制度中最为棘手的问题，对其进行调控有利于制度顺利推行。本书紧紧围绕排污权初始分配“谁来分配”、“分配给谁”、“怎样分配”三个问题，深入分析了分配主体（分配接受主体）和具体分配规则，对完善中国排污权初始分配提出了具体对策。