

# 国有资产信托法研究

席月民 • 著



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## 作者简介



席月民，男，1969年4月生，河南省灵宝市人，法学博士，现为中国社会科学院法学研究所副教授，主要研究方向为财税金融法。相继于1991年获得中国政法大学法学学士学位，1999年获得加拿大蒙特利尔大学DESS法律硕士学位，2000年获得中国人民大学法学硕士学位，2005年获得

中国人民大学法学博士学位。曾先后在河南省三门峡市中级人民法院、国家法官学院以及中国工艺美术（集团）公司工作多年。目前，已公开发表专业论文40余篇，主编、参编、合著专业书籍10余部，参加和主持国家社科基金、司法部、教育部、中国社会科学院等国家级和省部级重点课题研究近10项。

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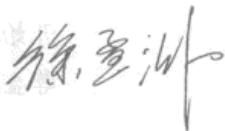
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具；而对于信托公司而言，国有资产信托则是其开发新型信托产品，促进产业发展与信托经营有机结合的一项重要业务。这本《国有资产信托法研究》立足于我国国家所有权行使方式的创新，注重规范研究与实证研究、传统研究与现代研究方法的结合，全面考察并系统论证了国有资产信托法的相关法律专题，内容涵盖了国有资产信托的基本法理、国有资产信托的主体，国有资产信托的客体，国有资产信托的设立、变更与终止，以及国有资产信托的监督与管理等重要问题，并明确提出了科学建构我国国有资产信托法的具体意见和建议。书中的诸多理论观点立意深远，制度设计易于操作，具有相当的前瞻性和务实性，是目前我国这一研究领域一部份量相当厚重的学术专著，对于加强我国国有资产管理 and 金融信托创新具有直接的理论和现实意义。

作者席月民既是我指导的硕士生，也是我的博士生。他长期以来潜心专注于我国国有资产和信托制度的研究工作，积极参与了新《信托公司管理办法》和《企业国有资产法》等立法活动，并在人民法院和中央国有企业中工作多年，具有扎实的法学理论功底和丰富的实践经验。这部专著可以说是他多年来所付心血之结晶，在其付梓出版之际，特作此序以推荐给各位读者朋友，相信本书的出版必将引起学术界和实务界对国有资产信托法问题的热烈讨论，从而进一步促进我国国有经济法律调整机制的完善，推动国有资产管理体制改革和信托业的健康发展。



2008年7月3日于北京世纪城

## 内容摘要

在加快国有资产管理体制改革的新形势下，面对着经过第五次清理整顿后信托业所焕发出来的勃勃生气，合理构建我国国有资产信托法律制度，利用信托方式经营国有资产，是实现国有经济布局与结构调整的重要选择形式，无论在理论上还是在实践上都具有可行性，并对有效防范国有资产的流失，发挥我国国有经济的主导作用具有积极意义。通过国有资产信托，进一步发展我国的信托市场，不但可以促进产业资本和金融资本的结合，而且可以推动国有经济结构和布局的战略性调整，最终实现国有资产的效用以及经济效益与社会效益有机统一，在科学发展观的指导下实现国民经济的可持续发展。

从严格意义上讲,国有资产信托的表述并不严谨,因为在信托的各种分类研究中,很少有人从私有财产、集体财产与国有财产的角度去展开。然而这种分类研究并非没有意义,尤其在我国更是如此。国有资产信托,作为国有资产形态转换能够利用的重要方式,对其展开深入、系统、全面的研究,既是坚持国家所有权行使方式创新与金融创新实现互动的必然要求,又是实现金融信托自由与效率价值的统一和国有资产经济与社会效益的统一之间有机协调的根本途径。

本书包括导言、正文和结语三大部分,其中正文部分共分为以下五章:

第一章“国家所有权的相关法律问题探讨”是本书的基础。该部分首先对我国传统所有权的定义进行了反思,并在此基础上,对国家、国有财产以及国家所有权的概念、特征以及本质进行了深入分析,明确提出在我国,国家所有权是指代表全体人民利益的国家对全民共同占有的财产所享有的包括一系列可分离的权能在内的终极支配权,以此构筑起本书的逻辑起点。然后针对我国民法学界对国家所有权问题的激烈争论,分析如何看待国家所有权的“存废之争”,明确提出对于国家所有权,我们需要做的应该是首先要肯定它的合理性和合法性,继而在理论上不断去创新,去探索国家所有权行使的有效实现方式,而绝不是将之彻底废弃。在如何推进国家所有权行使方式的创新问题上,就创新应坚持的原则、标准以及与金融创新的结合与互动提出了自己的看法。接着分别从政策变迁以及经济体制改革实践入手,深入解读我国新型国有资产管理体制与营运方式,详细论证如何有效保护国家所有权。有效实现国有资产的保值增值,是贯穿于国家所有权行使



方式创新中的核心内容和根本目标。继而通过国有资产不同形态相互转换的意义、转换原则以及法律检讨的论述,分析国有资产流失的途径和原因,指明有效防止国有资产流失是国家所有权行使方式创新与金融创新实现结合与互动中应首先注意的问题。最后,重点论证了国有资产信托的提出及其价值取向。

第二章“国有资产信托的法律原理透视”是本书的重心。该部分首先导入信托的起源,分析信托观念的扩张和衍变,总结和归纳不断变革中的当代信托与信托业的发展特征,论证从作为工具的信托到作为产业的信托的发展与演化,明确提出有法律作基础,有政策作支柱,信托业一定会在我国的经济发展中大放异彩,并在国有资产的管理和运用中找到适度的发展空间。然后深入剖析信托的三大确定性及其基本特征,其中信托的三大确定性包括信托目的确定性、信托财产的确定性以及信托受益人的确定性,提出利用信托方式经营国有资产,是将信托灵活运用的根本体现,国有资产经营信托化是符合我国国情的一种制度创新,对发挥我国国有经济的主导作用具有积极意义,通过对国有资产信托在理论和实践上的可行性分析,重点解析国有资产信托的重要功能以及国有资产信托法律关系,明确提出对国有资产流失的有效防范是国有资产信托的制度功能之所在,该部分内容既是本章的核心也是本书的核心,其中对国有资产信托与契约自由原则的详尽分析是对国有资产信托进行法理解析的铺垫,特别提出在国有资产信托中,国家的自由意志完全可以和信托制度的灵活性充分结合,这种灵活性可以从信托财产范围的广泛性、信托目的的广泛性、信托财产管理和运用方式的广泛性等方面表现出来。最后,集中对国有资产信托与国有资产委托代理制度进行了比较研究,论证

信托与委托代理制度在国有资产经营管理中的作用空间。

第三章“国有资产信托的主体制度细考”对国有资产信托法律关系构成要素之一的主体制度进行了深入考察。该部分从信托当事人与信托关系人概念的辨析入手，首先分析国有资产信托当事人的主体资格，提出在一般场合，在非严格意义上可以使用信托关系人这一概念，但在信托法律关系中，使用信托当事人的概念则要更正式、更准确一些，并强调具有权利能力和行为能力是判断国有资产信托当事人主体资格时必须坚持的法律标准。然后探讨国有资产信托主体的权利义务及其制衡，提出国家既可以设立以自己为受益人的自益信托，也可以设立公益信托。重点提出：建立国有资产信托的委托人资格审查制度是强化对内部人行为的监督制约，避免国有资产被少数人利用信托方式蚕食、侵吞的重要途径；建立受托人选任制度是国有资产信托能否达到委托人设立信托的预期目的，实现国有资产保值增值的关键，换言之，是否选择了合适的受托人是影响国有资产信托经营成败的关键，并在上述两项制度建设方面提出了系统的具体制度设计。最后论证了对国有资产信托的受益人资格应作的必要限制以及国有资产信托受益人欠缺的信托法律后果。

第四章“国有资产信托的信托财产独立性探索”是对国有资产信托法律关系客体的专门研究。该部分首先直接对国有资产信托关系的核心——信托财产的法律含义进行了比较分析，对国有资产信托财产权的法律性质进行了深入辨析，提出信托财产应以财产权为限，信托财产应是受托人因承诺信托而取得的财产；国有资产信托财产权的法律性质与信托财产权的法律性质是一致的，对于信托财产权法律性质的研究，不应囿于传统所有权的观念，

而应象对待公司法人财产权、股东权那样，从法律上明确信托财产权的特征和内涵，使之与其他民事权利相区别，并将其作为一个独立的概念来使用。在此基础上，又研究了国有资产信托财产的范围和种类；然后分析国有资产信托财产独立性的表现及其政治与经济基础，探讨建立国有资产信托财产评估制度的必要性及其法律适用，提出国有资产信托财产评估是国有资产评估的有机组成部分，二者之间是特殊与一般的关系。最后通过对华融不良资产处置优先受益权信托项目进行实证分析，论证了我国信托产品创新的现状及其思考，以及信托实务中国有资产信托产品的设计原则，即灵活性原则、低风险原则以及流动性原则。

第五章“国有资产信托的法律规制探微”则从动态角度探讨了国有资产信托的法律规制问题。该部分首先阐述了国有资产信托行为成立与生效的法律问题，并就我国现行《信托法》的有关规定进行了反思；然后专门探讨国有资产信托合同制度，论述国有资产信托合同的性质和内容、无效国有资产信托合同与国有资产信托合同的法律适用，并在分析信托财产登记制度与国有资产信托合同登记备案制度之间关系的基础上，提出了建立国有资产信托合同登记备案制度的具体架构；再后分析和探讨了国有资产信托变更和终止过程中的法律问题；由于现行税制已成为信托业发展的重要障碍，因此本书又将国有资产信托与信托税制的构建作为一个专题进行探讨，不仅分析税法规制中所存在的障碍，而且分析我国台湾地区信托税改经验对我国信托税制改革的借鉴意义，在此基础上，提出了构建我国信托税制的基本原则以及完善我国信托税制的具体对策；最后，集中探讨了国有资产信托的监管体制问题，内容包括国有资产信托监管体制的现状和未来、监



## Abstract

Under the new situation of accelerating the reform on management system of state assets, facing the trust undertakings which are fresh with full of vigor and vitality after the 5th round of checking up and rectifying, how to design a rational legal system of trusts upon the state-owned assets so as to manage the state-owned assets by means of trusts tools, has become an important option for us to strengthen the readjustment of distribution and structure of the state-owned assets, which is feasible both in theory and in practice and has great significance in preventing the erosion of the state assets and making the state economy play a leading role well in the national

economy. Through the trusts upon the state-owned assets to stimulate the trust market of China, can not only promote the combination of industry capital and finance capital, but also pushing forward the strategic readjustment of the distribution and structure of the state-owned sector of the economy, and finally to spur the effectiveness of the state assets and the full integration of economic benefits and social results, to achieve sustainable development of national economy under the guidance of scientific outlook on development.

In the strict sense, the trusts upon the state-owned assets is not exact in the form of its expression, because there are few people to study trust in its classifications from the angle of distinguishing private property, collective property from state property. However, such study does not mean it can not make any sense at all, especially in today's China. As an important tool to be employed for the transformation of the state-owned assets, to make a deep systematic and detailed research into the trusts upon the state-owned assets is not only a necessity for the upholding of mutual innovation of the exercise of state ownership and finance market but also a fundamental way to coordinate the unity of freedom and efficiency of financial trusts and the unity of economic benefits and social results of the state-owned assets.

This book is made up of three parts, i. e., the preface, the text and the concluding remarks, in which, as the main body the text is divided into the following five chapters:

Chapter I, namely Study on Some Relevant Legal Problems Concerning the State Ownership, is the basis of the whole book. In this

part, the author firstly rethinks the traditional definition of ownership in China, and deeply analyzes the state, the state assets and the concept and features of state ownership as well as its nature. He puts forward that, in China, the state ownership refers to the right of ultimate control including a series of separable powers and functions which the state enjoys on behalf of the interests of all the people of the country over the property possessed by the whole people. Such viewpoint lays a good foundation as the logic beginning of this book. Then the author clarifies how to react and recognize the heated debate based on the abolishment or retainment of state ownership in the field of civil law science, and clearly addresses that what we need to do regard to the state ownership is to affirm its reasonableness and lawfulness and continue to innovate in theory especially to explore the effective means for the exercise of state ownership instead of abolishing it completely. On this question the author presents his points of view from the principles and standards as well as the integrity and mutual influencing with finance market innovation. And then the author interprets the new management system and operation of the state-owned assets from the development of state policies to the practice of economic restructuring, to expound in details that it will be the core and basic target through the whole process of the above mentioned innovation how to protect the state ownership effectively and promote the value of state assets to be maintained or added. Based on the analyses about the significance and principles of the transformation of state-owned assets as well as the criticisms on the legal provisions the author goes on to demonstrate the ways and reasons for the erosion of

state assets and emphasize that to prevent effectively the erosion of state-owned assets is the outstanding problems arising in the mutual innovations of the exercise of state ownership and finance market. Finally the author traces the viewpoint of trusts upon the state-owned assets as well as its orientation in value to lead to the follow-up chapters.

Chapter II, the Incisive Analyses on the Legal Theory of Trusts upon the State-owned Assets, is the heart of this book. In this part, the author firstly introduces the origin of trusts and explains the expansion and evolution of the idea of trusts, and then summarizes to induce the developing features of the modern trusts and trust undertakings which are changing from time to time uninterruptedly, such analyses giving the facts to the development of trusts which is from the trusts as tools to the trusts as social undertakings. In the author's opinion, based on the favorable law and policies, the trust undertakings of China will exert its influence completely in the economic development and will find out the space to extend in the management and administration of state-owned assets. Secondly the author penetrates into the three certainties of trusts as well as its fundamental characteristics, in which the three certainties of trusts are certainty of intention, certainty of subject matter and certainty of objects. The author makes it clear that utilizing the trusts tools to manage the state-owned assets embodies the flexible application of the trusts in China, in other words, establishing the legal systems of trusts upon the state-owned assets is an innovation which is conform to the national conditions of China, to an extent, which will be helpful for the leading role of our state economy. Thirdly, after illustrating the feasibility



ties of the trusts upon the state-owned assets both in theory and in practice, the author pays more attention to the important functions of the state-owned assets trusts as well as its legal relationship. For the author, it is the main function of trusts upon the state-owned assets to prevent effectively the erosion of the state-owned assets. This is not only the core of this chapter but also the heart of the book. Those analyses regarding to the relation between the trusts upon the state-owned assets and the freedom of contract doctrine pave a way for the legal theoretic research of the trusts upon the state-owned assets. As the author says, in the trusts upon the state-owned assets, the state's free will may be fully linked with the flexibility of trusts, and such flexibility can be manifested through the wide-ranging trusts properties and the extensive trusts intentions as well as the multiple management channels of the trusts properties. Finally, the author compares the theory of state-owned assets trusts with the theory of agency by commission over the state-owned assets, and points out the respective functional space for them in the management of state-owned assets in practice.

Chapter III, the Careful Examination on the Subject of Trusts upon the State-owned Assets, explores deeply the subject system which is one of the sectors of legal relationship of the trusts upon the state-owned assets. In this part, the author starts with the distinction of the two concepts of the parties concerned in a trust and the parties interested in a trust, and then emphasizes the qualification of the subject of the parties concerned in a state-owned assets trust. In the author's view, on the informal occasion, we may use the concept of the parties interested in a