WTO与中国外资立法问题研究

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摘　要

改革开放伊始，中国就着手制定外资法，以后，从全国人大到地方政府相继出台了大量法律法规，形成了庞大的外资法体系。这些法律曾经为由封闭走向开放时期的中国吸收外资、利用外资作出了巨大的贡献。但是，在改革开放进行了30多年后的今天，人们发现这部法律不再是良法。中国在入世前后对它进行了一些修改，但是其修改的幅度较小，不尽令人满意。现实情况是，中国的外资法既存在与WTO规则不一致之处，也不利于中国利用外资发展经济、提高综合国力目标的实现。于是，中国该如何在履行WTO义务的同时制定一部适合当今国情的外资法成为了立法的热点问题。

从现有成果来看，国内学者的研究大都集中在对外资的国民待遇问题、激励政策和立法的体例问题上，但是意见不一。学者们缺乏对立法的宏观思路研究，且停留在操作层面的研究居多。国外有关此研究的学者不多，现有研究似乎只关注准入程序和履行要求。所以，这些研究远远不能满足中国外资法修订这一伟大工程的需要。

本文正是建立在中国国情的变化和其所承担的WTO义务这一基础之上，对外资法修改中的一些重大问题从经济法学的角度进行了研究。按照经济法学的理论，外资法是对市场进行国家调节的法律之一，以市场调节为基础。在经济全球化时代，它还要受到国际调节的制约。全文围绕“封闭—开放—入世”这一主线，采用了法理学、比较法学和实案分析的方法，对外资立法的原则、准入的产业政策、投资激励与限制政策以及对外资的国有化问题进行了研究。

在第一章中，作者首先回顾了中国外资立法的历程，肯定了外资法在特定历史阶段上所作的贡献，同时，分析了其不足。然后针对WTO对成员国的要求，指出其差距。在此基础上，介绍了作者对中国外资立法完善问题的基本思路……外资法的调整对象是外国直接投资关系，建立从宪法、外资基本法、外资专门法到地方性法规四个层次的法律体系，实现与公司法的协调，体现市场调节、国家调节和国际调节三元调节机制的作用。

立法原则是外资法律制度安排的规则，是立法中首先需要解决的重要问题。改革开放初期，中国利用外资主要是为了弥补国内资金缺陷，在立法原则上体现了对外资“资本主义”性质的排斥心理，已经不能适应时代的需要。入世后，中国利用外资主要是为了引进竞争主体、活跃市场，要使外资融入中国的经济中，从而使中国的经济得到发展。所以，外资法应当培育竞争体系，营造公平竞争的环境。故中国外资立法应当在兼顾公平与效率这一思想的指导下，坚持四项原则：(1)遵循WTO规则的原则，(2)保护和发展民族经济，(3)保护资源和环境，(4)逐步实行国民待遇。相应地，在立法和法的实施过程中要根据WTO关于投资方面规则的原则制定和实施外资法，提高民族产业的竞争力，规范外资保护资源和环境，让外资逐步享有国民待遇。本文第二章研究的就是此内容。

一般说来，从外资准入的产业政策上可以看出该国的开放程度。在WTO致力于促进贸易自由化的今天，发达国家在谈判中极力要求发展中国家尽可能地开放本国市场。因此，外资准入产业政策成为了外资法上的热点问题。本文第三章从WTO对成员国的要求入手，根据各国的准入实践，分析了中国的开放历史和现实情况，建议中国继续采用渐进式的政策。

中国的外资立法中采取了大量的投资激励与限制措施，在加入

WTO后这些措施是否可以继续采用呢？本文第三章对此进行了分析。从WTO的规定看，它暂时对部分限制和激励措施进行了禁止。在各国的立法中，发达国家一般没有采用这些措施。发展中国家采用过投资措施，但是，现在在逐步减少，其趋势是让外资与内资享有同等待遇。中国在改革开放初期采用这些措施有利于外资的进入，而现在不宜再采用。因为，这种措施的采用不利于公平竞争环境的形成，违背了法律公平的价值目标；从经济学上讲，违背非均衡发展理论；从现实看，不利于中国的经济建设。中国今后应该采取的措施是加强对外资的管理，为外资提供服务。

国有化问题是外资法上的敏感问题之一，它直接关系外国投资的安全与否。本文第五章研究的是中国该如何在外资法上对国有化问题作出规范的内容。WTO有保护外资的精神，但对国有化问题没有直接规定。但是，考虑到WTO规则是一个动态的过程，在近来的谈判中就曾考虑在WTO范围内制定投资法典的问题，所以，也许今后它会对国有化进行规范。从国际条约和各国外资法看，一般都规定有明确的国有化条件和补偿标准。关于国有化的条件，大致为“为公共利益、按法定程序、非歧视并支付适当补偿”，联合国的“适当”补偿标准被各国广泛接受。中国在立法中首先得明确国有化的内涵，宜采用国际通用的国有化条件和及时、充分、有效的补偿标准。

关键词：WTO，国际调节，外资立法

ABSTRACT

From the beginning of the reform and opening, China set about the foreign investment lawmaking, lots of laws and rules were come on gradually from Chinese People's Representitive Conference to local governments, forming a great system of Foreign Investment Law. These laws and rules once contributed great to China to draw on and to make use of foreign investment in the period from closing to opening. However, after 30 years of reform and opening, Foreign Investment Law has not suitable anymore. China made some amendments to it before and after China's joining WTO, but the amendments are small and not satisfactory. The existing instance is that some parts of Chinese Foreign Investment Law don't not only accord with WTO's rules, but vails for China to utilize Foreign Investment Law to develop economy and improve synthetic national power. Thereupon, for China, how to constitute one Foreign Investment Law adapting to the situation of China becomes a hot lawmaking problem.

Looking on the existing achievements, the civil studies mostly centralize on the national treatment, inspiritment policy and lawmaking system, but the opinions are different. Scholars are short of macroscopic train of thought to lawmaking, and most rest on the manipulating lay. The foreign scholars studying this are not many and only pay attention to the admitting procedures and performing requests. Therefore, these studies can't satisfy far the demand of the great project of? China's foreign Investment lawmaking.

On the basis of the change of China's situation and it's assuming WTO's obligation, this article, aiming at some important questions in the amendment of the Foreign Investment Law, carries through study from Economic Law angle. In the light of the Economic Law theory, the Foreign Investment Law is the one of National Regulation, which is based on the Market Regulation. In the economic globlization time, the Foreign Investment Law is still restricted by International Regulation. Perforating the main line of 'Closing - Opening-Joining in WTO', and adopting the methods of Nomology, Comparative Law and cases analysis, the whole article studies on the principle of foreign Investment lawmaking, the admitting industry policy, investment inspiritment and restriction policy, and the nationalization to foreign investment.

In the first chapter, the author, first of all, retrospects the course of China's foreign investment lawmaking, and affirms the Foreign Investment Law's contribution in the special time, meanwhile, analyzes it's deficiency. Afterwards, the author , aiming at WTO's requests to it's members, finds the disparities. On this basis, the author introduces the basic thought-way about perfecting Chinese foreign investment lawmaking— the Foreign Investment Law's regulated object is foreign direct investment law-relationship, setting up one four-layer law system which is from the Constitution, the Basic Foreign Investment Law, the Special Foreign Investment Law to local laws, accordingly realizing the correspondence with the Company Law and representing the function of market regulation, national regulation and international regulation.

Lawmaking principle, which arranging the system of the Foreign Investment Law, is an important problem in need of solution in lawmak-

ing. In the initial stage of the reform and opening, China making use of foreign investment was mainly for the purpose of making up civil capital limitation, as represented the exclusive-mind to the "Capitalism" natrual of foreign capital, however, this lawmaking principle hasn't adapted to the demand of the time. In the following 30 years, this principle hasn't changed all along. After China joining WTO, China utilizing foreign capital is in order to indraught competitor, flour market and blend foreign investment with China's economy so as to develop Chinese economy. Therefore, Foreign Investment Law should foster competition system and build a fair competition circumstance. Hence, foreign capital lawmaking should, under the guidance of justice and efficiency, stick to four-item principle: (1) abide by the principle of WYO rules, (2) defend and develop national economy, (3) protect resource and environment, (4) carry out gradually National Treatment. Correspondently, in the lawmaking and law-applying, we should, according to the principle in investment rules of WTO, constitute and implement Foreign Investment Law, improve national industry's competence, regulate foreign capital-protected source and environment and allow foreign investment take National Treatment by degrees. What the second chapter study is this aspect.

Generally speaking, from the industry policy of foreign capital permission, we can make out a country's opening extent. Today when WTO dedicates to promote commerce freedom, developed countries do their utmost to claim that developing? countries should open their markets as possible as they can. Thereby, the industry policy of foreign capital permission becomes a hot problem of the Foreign Investment Law. The

third chapter, starting with WTO's requests to it's members, according as every country's permission practice, analyzes China's opening history and existing instance, propose that China should adopt gradual policy.

A great deal of measures of investment inspiritment and restriction were adopted in Chinese foreign investment lawmaking. Whether these measures would be still used after joining WTO? This aspect is studied in the third chapter. Part of measures of inspiritment and restriction were forbidden temporarily in WTO rules. Developed countries widely don't adopt these measures. Developing countries ever adopted investment measures, which, however, are reduced gradually now, inclining to allow foreign investment have the same treatment as civil investment. In the initial stage of the reform and opening, China adopted these measures in favor of foreign investment's entry, yet they are not suitable now, inasmuch as the adoption of these measures were not propitious to the formation of fair competition? circumstance, and breach the value of law justice; In economics, the measures disobey the theory of inequality development; From the realism, the measures go against Chinese economic development. For the future, China should strengthen the administration to foreign investment and supply service for it. ??

Nationalization is a sensitive problem in Foreign Investment Law, which connects correctly with the safety of foreign investment. In the fifth chapter, the author puts forward how to standardize nationalization in Foreign Investment Law. WTO represents the spirit of foreign capital protection, but has not direct rules of nationalization. Considering that WTO rule is a dynamic process, we ever considered to establish Investment Code in WTO's confine in lately negotiation, so aftertime, nationa-

lization may be standardized. Generally, defined nationalization conditions and compensation criterions are prescribed in International Treaty and any country's Foreign Investment Law. With regard to nationalization conditions, "for commonality benefit, in term of legal proceedings, indiscrimination and paying advisable compensation", UN's "advisable" compensation criterion has accepted worldwide. China should firstly define the connotation of "nationalization", and also should adopt international-used nationalization conditions and prompt, adequate, effective compensation criterions.

KEY WORDS: WTO, International Regulation, foreign investment lawmaking

目 录

前　言

0.1 问题的提出

改革开放以来，中国采取了吸引外资的政策，并取得了喜人成就。据联合国经济合作与发展组织的统计，至2002年，中国已经成为世界上第一大引资国。[①] 在此之前，中国引进外资的资金总量连续若干年位居世界第二。为了利用外资，中国从改革开放伊始的1979年起相继制定了吸引和规制外资的法律，它们是《中华人民共和国中外合作经营企业法》（以下简称《中外合资经营企业法》）、《中华人民共和国中外合作经营企业法》（以下简称《中外合作经营企业法》）和《中华人民共和国外资企业法》（以下简称《外资企业法》）三部法律及其实施细则，同时还颁发了与之配套的法律法规。除了国家颁布的法律外，各级地方政府或立法部门也制定了有关外资的地方性法规。这些法律的颁布和实施，填补了中国外资立法的空白，使外资领域从此有法可依。这些调整外资的法律，就外资企业的设立到经营管理方面的权利、义务及企业的内外部关系等问题作了详细的规定，如对于外资设立的资本制度、准入的领域、审批程序等作出了规定。同时，对外资企业规定了许多限制或激励措施，前者如最低出资额限制，当地成分要求、外汇平衡要求等，

① 参见《2002年世界投资报告》。

后者如税收、费用、进出口权等方面的优惠。这些措施对于引进、利用外资和保护民族产业曾起了重要的作用。

然而，随着时代的前进，现在中国外资法所依赖的国际国内情况发生了变化。在国内，改革开放初期的中国还处于计划经济时期，国内资金短缺，市场基本上完全由国家计划来调节，市场调节的作用非常微弱或者说没有发挥；而现在国内市场经济体制已经建立，国民经济迅速发展，综合国力大大提高，市场的自发调节作用已经增强。在外部，中国已经作为发展中国家正式加入了世界贸易组织（简称 WTO）。中国国内市场不再是孤立的市场，而是世界市场整体的一部分；中国国内的外资法必须接受 WTO 所确立的国际调节机制的规制，遵守 WTO 的规则、实现其入世承诺是中国的义务。中国的外资法由于沿袭改革开放初期的立法原则和指导思想，在新的形势下，已经显现出了其不合理性，难以胜任今后调节中国外商投资关系的任务。比如，在立法技术上，它体系庞大，层次不清，内部规定不协调，与国内其他法律亦不协调。在存在形式上，存在大量的内部法规。法律法规的不协调以及内部法规的存在导致它的透明度极差，不但影响了其效力，而且不符合 WTO 的透明度原则。在执法方面，地方土政策较为普遍，导致中国外资法在全国没有得到统一执行，外资在全国范围内难以享受到按 WTO 文件所要求的最惠国待遇。在促进中国经济发展的作用上，它忽视对民族产业和中国可持续发展能力的维护，不利于市场主体的平等竞争，从而影响经济的稳健发展。在法律所规制的内容上，中国在制定三部资法时，引进外资的工作尚处于起步阶段，缺乏实践经验，立法存在许多考虑不周的情况，所以对某些问题的规定显得模糊不清或者没有作出规定，如关于国有化的条件缺乏规定，对其补偿标准的规定显得模糊。