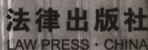


Lu Chengyan

# Research on the Legal System of International Trade in Lawyers' Services



卢成燕 著

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# 国际律师服务贸易 法律制度研究



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## 序

卢成燕同志的《国际律师服务贸易法律制度研究》正式付梓,律师法律制度研究又有可喜成果问世,我感到由衷地高兴,并表示祝贺。

律师制度是国家法律制度的重要组成部分。在一个成熟的法治国家,律师与法官、检察官等司法人员一样,同是法律职业共同体的组成部分,承担着维护法律正确实施,维护社会公平和正义的职责。律师既是当事人的代理人,又是国家政治制度和法律秩序的捍卫者和社会公共利益的维护者。律师服务领域涉及国家政治、经济和社会生活的各个方面,执业可以介入国家立法、司法、行政等活动中。基于这些因素,律师业作为提供法律服务的行业,具有区别于其他诸多服务行业的特点。同时,律师服务作为一种专业服务,又具有服务业的某些共有属性。律师服务反映的是律师和当事人之间建立在自愿、平等、有偿基础上的契约关系。当事人获得律师服务,应支付相应的报酬。律师通过提供优质服务、调整服务价格、开发服务领域等方式参与竞争。因此,律师法律服务也同样具有契约性、有偿性、竞争性等特点。在国际社会中,将律师服务的跨国提供作为贸易问题来处理,便是一个符合逻辑的结果。

律师服务的国际化,是国际交往越来越密切、国际人员流动越来越频繁的结果。国际贸易、投资、金融、技术转让等经

济活动的频繁化,交通、通讯、信息科学技术的突飞猛进,推动了经济全球化的发展。整个地球正在“浓缩”为一个“村落”。国际经济交往的开展,从客观上产生了跨国法律服务的需求,律师服务不再局限于一国领域之内,随着当事人的步伐而走向国际化。律师服务国际化,必然涉及一国对外国律师服务的管理问题。一国对外国律师是否准入、准入的范围、给予的待遇、执业的管理等,往往根据本国的实际需要来决定具体的政策。有的国家,基于本国律师业和对外经济发展的需要,积极推动国际律师服务自由化,而有的国家则出于保护本国律师业的需要,或基于对律师职业性质定位的差异,对外国律师服务的进入持谨慎态度,或者予以排斥。各国对待律师服务自由化的迥异态度,意味着国际律师服务自由化的道路虽然开通,但还不可能一路顺畅。

对国际律师服务的客观要求,以及各国对外国律师服务政策上的差异,要求国际社会对国际律师服务的管理进行协调,形成相应的国际管理规则。这种协调首先在一些区域性国际组织内进行,如欧洲经济共同体、北美自由贸易协定都将律师服务纳入了其规则体系之内。GATT 乌拉圭回合谈判在服务贸易方面形成了协定,WTO 成立后,服务贸易规则成为 WTO 规则的重要组成部分。在 GATT 谈判过程中,有的国家主张将法律服务纳入 WTO 服务贸易规则的调整之下,而有的则明确反对。反对者认为,法律服务应属于政府行使职能所提供的服务,律师的职业特性决定了不能将其服务像商品一样买卖,不能将律师跨国服务问题当做贸易问题进行处理。但是,最终法律服务还是被作为专业服务的一个分部门,涵盖在 WTO 服务贸易规则体系的效力范围之内。国际律师服务也被作为一个贸易问题,纳入到 WTO 贸易自由化轨道。

将国际律师服务作为贸易问题进行规范和调整,带来了一系列的法律理论与实践研究课题。其中最为重要的,是要利用国际服务贸易的原理和规则,围绕国际律师服务贸易的自由化与管制问题,对国际律师服务贸易制度问题开展较为深入和系统的研究。对我国来说,作为 WTO 成员,如何借鉴国外行之有效的制度,根据 WTO 规则的要求和我国律师行业发展的具体实际,不断健全和完善涉外律师服务贸易法律制度,是摆在我们面前的一项重要任务。卢成燕同志长期在司法行政系统工作,十分敏锐地注意到了这个问题,

经潜心研究、对比论证,以发展的观点、前瞻的眼光,撰写出《国际律师服务贸易法律制度研究》。该书着眼于律师服务国际化和国际律师服务贸易自由化,对国际律师服务贸易法律制度的若干基本问题进行了研究;对 WTO 法律服务贸易制度、区域性律师服务贸易法律制度和一些发达国家(地区)的对外律师服务贸易法律制度进行了论述和评析;并对完善中国涉外律师服务贸易法律制度的问题作了较为全面和深入的探讨。该书是一部关于国际律师服务贸易法律制度的专著,填补了我国在该领域研究的空白,具有重要的理论与实践意义。特为序以贺。



最高人民法院副院长、司法部前副部长

2006 年 6 月

## 中文摘要

本书着眼于律师服务贸易国际化和国际律师服务贸易自由化,对国际律师服务贸易法律制度的几个基本问题进行了研究,对 WTO 法律服务贸易制度、区域性律师服务贸易法律制度、与中国经济往来比较密切或在国际律师服务贸易方面具有重要地位的几个国家(地区)的对外律师服务贸易法律制度进行了论述和评析。在此基础上,本书对中国涉外律师服务贸易法律制度的历史、现状与存在的问题进行了深入研究,并对完善中国涉外律师服务贸易法律制度进行了全面探讨。除引言、结语和附录外,全书共分六章。

第一章,律师服务贸易国际化与法律管制。国际贸易、国际投资、国际金融等经济交往的发展,人员、资本跨国流动的频繁化,直接推动了律师服务贸易国际化,经济全球化客观上要求国际律师服务贸易自由化。对国际律师服务贸易的管制,催生了国际律师服务贸易法律制度。国际律师服务贸易法律制度包括国际条约或国际组织建立的律师服务贸易法律制度和各国对外律师服务贸易法律制度两大组成部分。国际律师服务贸易法律制度的基本原则,既包括国家经济主权原则、公平互利原则、国际合作以谋发展原则等国际经济法的基本原则,又包括适应于其自身特点的一些原则:东道国自主管理原则、合作监管原则、非歧视原则和逐步自由化原则。国际律师服务贸易法律制度的基本规范,涵盖了服务提供者的资

质要求、提供服务的组织形式、提供服务的业务范围、服务的地域范围和数量限制、外国律师职业行为规则等内容。

第二章, WTO 法律服务贸易制度。GATT 乌拉圭回合将法律服务也作为贸易问题纳入了谈判历程,在谈判结束时,有 40 多个成员将法律服务列入了《服务贸易总协定》(GATS)具体承诺表。WTO 服务贸易规则适用于法律服务,形成了 WTO 法律服务贸易规则体系。该规则体系涵盖了最惠国待遇、市场准入、国民待遇、国内管理、透明度、承认、逐步自由化、争端解决等内容。尽管在法律服务的市场开放上,同原有的开放水平相比, WTO 没有取得重大进展,且这一规则体系本身还存在着诸多缺陷,但它缔造了一个法律服务贸易自由化的推进和辐射机制,从长远来看,有助于扩大 WTO 成员法律服务市场的对外开放,推动国际律师服务贸易自由化的深入发展。

第三章,区域性律师服务贸易法律制度。对律师服务贸易的国际调整并非发端于世界贸易组织。在 WTO 成立之前,欧盟、北美自由贸易区等区域性国际组织,已经将律师服务纳入了其规范调整的范围。在欧盟,《欧洲经济共同体条约》、《欧洲联盟条约》所规定的人员自由流动、提供服务的自由、设立机构开业的自由,构筑了服务贸易自由化的法律背景;1977 年《律师服务指令》、1988 年《文凭指令》、1998 年《永久执业指令》,在欧盟缔造了相当自由的律师服务贸易制度,律师在成员之间流动的自由度,甚至超过了有的国家内部律师在不同司法区域之间流动的自由度。《北美自由贸易协定》(NAFTA)对法律服务贸易问题进行了专门规定,在律师服务贸易自由化方面取得了较大进展。区域性律师服务贸易自由化体制对 WTO 体制既有积极影响,又有消极影响。积极影响主要体现在:有助于国际律师服务贸易自由化水平的提高;为 WTO 体制提供了有益的补充;为国际律师服务贸易自由化提供了借鉴和启示。消极影响主要体现在:成为许多 WTO 成员规避 GATS 最惠国待遇义务的工具;在一定程度上会弱化 WTO 多边机制的吸引力和多边意义,不利于 WTO 法律服务贸易制度的发展;会扩大 WTO 发达成员和发展中成员律师业发展的差距。

第四章,发达国家(地区)对外律师服务贸易法律制度。本章主要对美国、欧共体及其成员(限于英国、法国、德国和比利时)、日本和中国香港的



外律师服务贸易法律制度,进行了论述和分析。美国是当今世界首屈一指的律师大国,其律师和律师事务所具有强劲的国际竞争力,是法律服务贸易自由化的积极倡导者。美国的国内法律服务市场开放存在明显的不平衡性,纽约等州实行了比较自由开放的政策,但尚有二十多个州一般不允许外国律师及其服务进入。英国在律师服务贸易方面也具有相当强的竞争力,对外国律师及其服务的进入,实行了比较开放的政策。法国对外律师服务贸易制度经历了一个从开放走向封闭的历程,外国律师一般只有通过特别考试成为法国律师后,才能在法国执业。德国对外国律师及其服务的进入比较开放,相对开放的政策事实上促进了德国律师业的发展。比利时的布鲁塞尔是欧盟的首都,也是重要的国际法律服务中心之一,大量的外国律师在布鲁塞尔从事有关欧盟法的服务,但其律师服务市场没有纽约、伦敦等国际城市开放。日本作为经济大国,鉴于本国律师制度的限制,律师业远远落后于美英等国家,其国内律师服务市场比较封闭。中国香港具有完备的对外律师服务贸易法律制度,但对外国律师及其服务的限制较多,总体上看,既不十分开放,也不过分封闭。

第五章,中国涉外律师服务贸易法律制度。对外经济的迅猛发展,刺激了中国对国际法律服务的需求。1992年后,司法部单独或联合有关部门发布了一系列规范性文件或规章,对境外律师入境执业和国内律师海外发展的问题进行了规定。中国的服务贸易“入世”承诺内容涵盖了法律服务。在GATs具体承诺表中,中国对其他WTO成员律师在华执业的组织形式、业务范围、执业资格条件、数量和地域限制等问题进行了列举。“入世”后,国务院《外国律师事务所驻华代表机构管理条例》和司法部发布的《执行规定》,对外国律师在华执业的问题作了全面规定。中国现行涉外律师服务贸易法律制度在法律体系、外国律师管理制度设计、与“入世”承诺内容的一致性等方面,存在一定的问题。中国内地与香港地区、澳门地区之间存在着“一国两制”和WTO成员双重法律关系。为加强三方区域性经济合作,内地分别与香港地区和澳门地区签订了《内地与香港关于建立更紧密经贸关系的安排》和《内地与澳门关于建立更紧密经贸关系的安排》。按照这两个安排,在法律服务方面,中国内地给予香港地区和澳门地区比其他WTO成员更为优惠的待遇。

第六章,完善中国涉外律师服务贸易法律制度之思考。改革和发展中国涉外律师服务贸易法律制度,首要的是在作出决策之前,明确改革和发展需要考虑的各个基本因素,为改革和发展确立一个基本的政策取向,构筑中国涉外律师服务贸易法律制度的框架和具体规范体系。作出决策时要考虑的因素主要有:中国在WTO框架下所享有的权利和应履行的义务、中国律师服务市场对外开放水平、中国对外经济交往与合作的需求、外国律师竞争和国内律师业的竞争力、中国律师业国际发展的需要和对外国律师的有效监管等。在律师服务贸易自由化方面,中国有必要进一步开放市场,同时维持必要的限制。完善中国涉外律师服务贸易法律制度,需要针对其存在的问题,整合法律体系,健全法律规范。

在结语部分,作者对国际律师服务贸易自由化与中国律师业的变革问题作了更深入的思考。经济全球化的发展、WTO等国际经济组织的推动,使国际律师服务贸易自由化成为不可逆转的发展趋势。国际律师服务贸易自由化对中国律师业的影响,不仅涉及涉外律师服务贸易法律制度的层面,而且触及到中国律师制度的深刻变革和律师业的规范发展问题。现代意义上的律师制度,植根于现代法治文化的土壤。坚定不移地推进依法治国,培养中国现代法治文化,是中国律师业规范发展的根本出路。

此外,笔者将有关一些发达国家的律师管理与运行机制的几篇论文附录在后面,以便于读者参阅。

## Abstract

This dissertation starts from the discussion about the internationalization and liberalization of trade in lawyers' services, having researched several basic issues of the legal system of international trade in lawyers' services, the WTO (World Trade Organization) multilateral legal system of international trade in legal services, the regional legal systems of international trade in lawyers' services created by regional economic organizations, and the national legal systems of foreign trade in lawyers' services of certain WTO members which have close economic relationship with China or are important in international trade in legal services. On the basis of the above researches, this dissertation probes into the history, current status and problems of Chinese legal system of foreign trade in lawyers' services, and then proposes ways to reform and develop the system. Apart from the introduction, tag and appendix, this dissertation includes six chapters.

Chapter one probes into the internationalization of trade in lawyers' services and several basic issues of the legal system of international trade in lawyers' services. The development of international trade, investment, finance, among other things, and the frequent movement of personnel and capital, propel the internationalization of trade in lawyers' services. The globalization of economy

needs to liberalize international trade in lawyers' services objectively. The need to regulate the international trade in lawyers' services facilitates the formation of the legal system of international trade in lawyers' services. The legal system of international trade in lawyers' services is a system including national and international rules that regulate the relationship involved in international trade in lawyers' services, being a part of international economic law. The principles of the law of international trade in lawyers' services consist of those of international economic law, including economic sovereignty of countries, equality and mutual benefit, and international cooperation for development, and those conforming to the characteristics of the law of international trade in lawyers' services, including independent regulation by host countries, cooperation for efficient regulation, non-discrimination, and progressive liberalization. The major rules of the law of international trade in lawyers' services are composed of qualification requirements for suppliers of legal services, scope of business, restrictions on geographic areas or quantity of suppliers and services, professional ethics and criteria, and so forth.

Chapter two provides a detailed description and analysis of the WTO rules on trade in legal services. The Uruguay Round negotiation of the General Agreement on Tariffs and Trade (GATT) brought forth the establishment of the World Trade Organization. Trade in services is included in the scope of application of the WTO multilateral trade system, and thus the WTO legal system of trade in services has come into being. Through the GATT Uruguay Round negotiation, more than forty parties listed legal services in the GATs schedules of specific commitments. The WTO multilateral legal system of trade in legal services is composed of most-favored-nation treatment, market admission, national treatment, domestic regulation, transparency, recognition, progressive liberalization, dispute settlement, and other rules. Although the WTO has not made material progress in liberalizing trade in legal services after it was established, and the system of rules on trade in services has many shortcomings in itself, the WTO has established a stimulating and proliferating system for liberalizing trade in legal services.

Chapter three discusses the regional legal system of international trade in lawyers' services. Regulating lawyers' services internationally did not start from the WTO. Before the foundation of the WTO, the European Union, the North American Free Trade Area, among others, have already got involved in regulating international trade in lawyers' services. In the European Union, free movement of workers, free supply of services and free establishment for practice stipulated in the Treaty on Establishing the European Union and the Treaty on Establishing the European Economic Community, form the legal backdrop of the liberalization of trade in services within the regional organization. The Lawyers' Services Directive promulgated in 1977, the Diplomas Directive adopted in 1988, and the Perpetual Establishment and Practice Directive issued in 1998, have created a significantly free policy on trade in lawyers' services among its member countries. Within the European Union the level of freedom enjoyed by lawyers of each member country is even much higher than that enjoyed by lawyers in the United States when they pursue trans-jurisdictional practice within the USA. North American Free Trade Agreement (NAFTA) also specifies the issue of transnational legal services, and has made a stride in liberalizing trade in legal services in the area. Regional legal systems of trade in lawyers' services impose both positive and negative effects on the WTO multilateral legal system. The positive effects include facilitating the improvement of liberalization of trade in lawyers' services, supplementing the WTO multilateral system, and inspiring and encouraging the liberalization of international trade in lawyers' services. The negative aspects include: 1) making it easy for the WTO members to take advantage of the system to avoid undertaking the obligation of most-favored-nation treatment; 2) derogating the attraction and role of the WTO multilateral system in certain degree; and 3) enlarging the gap between the developed members and developing members of the WTO.

Chapter four concentrates on the national legal systems of foreign trade in lawyers' services of certain WTO members which have close economic relationship with China or are important in international trade in legal services, such as the U-

nited States, the European Communities, the United Kingdom, France, Germany, Belgium, Japan and Hongkong. For the reason that the lawyers and law firms of the United States are very competent in international legal services market, the United States is an active proponent of the liberalization of trade in legal services. However, the level of liberalization of trade in lawyers' services is not uniform among its jurisdictions. New York State and some other jurisdictions have been implementing a comparatively liberal policy while there are still more than twenty jurisdictions do not permit foreign lawyers to admit to their territories for practice. The United Kingdom is also competent in legal services sector and has been carrying out an open policy to foreign lawyers. In France, before 1970s foreign lawyers almost could freely enter its territory for legal consultancy, but now foreign lawyers almost may not practice in the country unless transferred to French lawyers. Like the United Kingdom, Germany is implementing a comparatively liberal policy in foreign trade in lawyers' services, and actually its legal services sector benefits from its open policy. Brussels of Belgium is the capital of the European Union, and for that reason a great deal of foreign lawyers enter the city for practicing EU law. Japan is one of the major industrial countries and ranks number two in economy in the world, but its lawyers' services sector is not as strong as its economy because of its legal system of lawyers. By and large, Japan imposes lots of limitations on foreign lawyers' practice in its territory. Hongkong has not listed legal services sector in the GATs schedules of specific commitments, but it implements a policy more liberal than many WTO members who listed it. However, Hongkong imposes more limitations on foreign lawyers than the United Kingdom, Germany, and many jurisdictions of the United States.

Chapter five illustrates the history and current status of Chinese legal system of foreign trade in lawyers' services. International investment, trade, technique transfer, and other international economic activities spurred the demand for international trade in lawyers' services in China in early 1990s. After 1992, the Ministry of Justice and other departments of the State Council promulgated several legal doc-

uments to regulate the practice of foreign lawyers in China. When China entered the WTO, China listed legal services in the GATs schedules of specific commitments. At present, the Regulation on Representative Offices of Foreign Law Firms promulgated by the State Council and the Implementing Decree issued by the Ministry of Justice comprehensively provide for the practice of foreign lawyers in China. The current Chinese legal system of foreign trade in lawyers' services needs to be improved in certain aspects. Chinese mainland, Hongkong and Macao belong to one country while each of them is WTO member. In order to enhance the economic cooperation between the Mainland and Hongkong, and between the Mainland and Macao, Chinese mainland signed closer economic partnership arrangements with them respectively. According to the two arrangements, Chinese mainland gives more favorable treatment in trade in lawyers' services to the two than other WTO members.

Chapter six probes into the future reform and development of Chinese legal system of foreign trade in lawyers' services. Prior to making the decision on how to perfect the current system, the paramount thing is to make clear the elements needed to be taken into account for the reform and development. The elements mainly encompass the rights enjoyed and responsibilities undertaken by China in the WTO multilateral trade system, the current level of liberalization of Chinese legal services market, the demand of foreign economic exchange and cooperation of China, the competition by foreign lawyers and the competence of Chinese lawyers, the need for the development of Chinese lawyers' services sector, the valid and efficient regulation on foreign lawyers' practice, and so forth. It is imperative for China to adopt more liberal policy on foreign lawyers. while still maintaining necessary limitations. Improving the current Chinese legal system of foreign trade in lawyers' services needs to establish a system of rules encompassing admission requirements, forms of organization for practice, scope of business, practice behavior, administration and regulation, legal responsibility, encouragement for overseas development by Chinese lawyers, etc.

In the tag of the dissertation, the author further probes into the liberalization of trade in lawyers' services and the development of Chinese legal profession. The development of economic globalization, together with the facilitation of the WTO and other international organizations, makes the trend of liberalizing international trade in lawyers' services irreversible. The internationalization of trade in lawyers' services has brought about the issues of reforming the whole Chinese legal system of lawyers and developing Chinese legal profession perfectly since plenty of critical problems needed to be resolved in Chinese lawyers' services sector. The modern legal system of lawyers is built on the modern culture of rule of law. The author holds that insisting firmly on rule of law, and planting the modern culture of rule of law in China continuously, are fundamental ways for the improvement of Chinese lawyers' services sector.



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