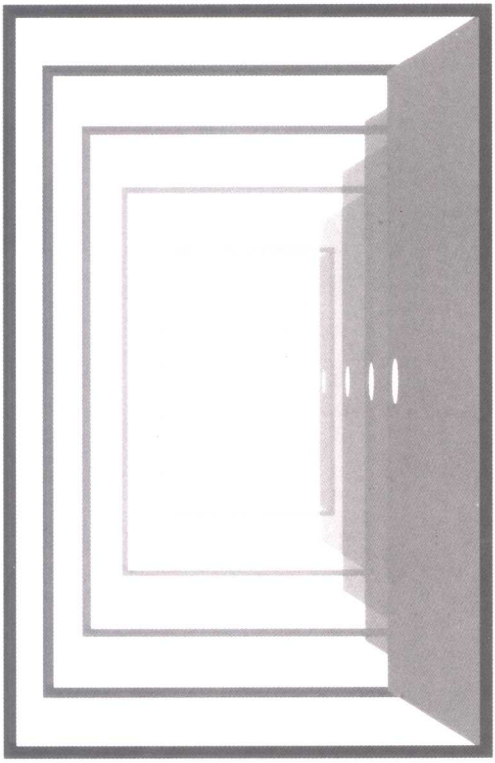
XUN ZHAO XIAO GU DONG DE QUAN YI

# 寻找小股东的权益

马贤明 魏 刚 著



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# 内容摘要

当年轻的中国证券市场在先后经历了“琼民源事件”、“红光事件”、“东方锅炉事件”、“大庆联谊事件”、“国嘉实业事件”、“ST 郑百文事件”、“ST 金曼”、“ST 猴王”、“康赛集团”、“黎明服装”、“通海高科”、“三九医药”、“ST 张家界”、“麦科特”、“东方电子”、“银广夏”等操纵利润、粉饰报表、欺诈上市、大股东侵占上市公司资产的案例后，对股东权益的保护，尤其是小股东权益的保护有了越来越深刻的认识，特别是在一些小股东告状无门的情况下，社会对建立小股东权益机制的呼声越来越高，越来越迫切。

小股东权益受到侵害，也不只是中国独有的现象，在其他国家，包括西方发达国家也同样存在，只是各自的受损程度有所不同而已。小股东权益保护问题，已成为当前学术界研究的一个热点话题，这点在美国体现得特别明显。虽然我国的小股东权益保护问题不尽如人意，但是目前研究这方面问题的学者却寥寥无几。

不管是在中国，还是在其他国家，小股东都属于“弱势群体”，他们在公司治理中的劣势地位往往使其权益很容易受到侵害。作为一种确定公司出资者股东与管理层及其他利益相关方“责权利”的外生性制度安排，公司治理实际上包含有多方面的内容，但长期以来公司治理运动常常将重点放在股东（特别是大股东）与管理层的关系方面，而小股东与大股东和管理层的关系

常常被忽视。在股权结构分散的情况下，这确实是公司治理的核心，但在公司所有权集中程度较高的经济中，股东与管理层的关系只是问题的一个方面，而且常常并非是最主要的方面。实际上，在出资者中由于大股东的持股份额较大，有动力克服监督中的“搭便车”问题，也有能力通过董事会、敌意接管等治理机制来抑制代理成本，维护自身利益。而小股东因其在公司治理结构中所处的弱势地位，不仅要负担管理层机会主义行为带来的代理成本，还可能受到处于控制地位的大股东的侵害，实际上面对着大股东和管理层的双重损害。

这双重损害主要来源于：不称职的管理层的机会主义行为带来的损害，即我们通常所说的代理成本，这种损害是所有股东都要承受的，但由于前述的原因，小股东更显得无能为力。不仅如此，投资者尤其是小股东的权利还经常受到管理层限制，从而使得管理层的机会主义行为更加“肆无忌惮”。另一方面的损害即控股股东对小股东的侵害。在企业理论中通常称其为“掠夺”或“剥夺”，它是指控股大股东利用控制地位通过损害小股东利益增加自身利益的行为，这是大股东强加于小股东身上的不利影响。代理成本与“掠夺”这两种侵害有密切联系。当大股东控制管理层或管理层持有较大份额的股权时，代理成本和掠夺行为常常合二为一。即使大股东不参与管理，为获得大股东的支持，管理层也会做出有利于大股东的交易决策。在这里代理成本直接体现为大股东的“掠夺”。大股东对小股东的“掠夺”是一个普遍性的话题，特别是在公司所有权集中程度较高的国家，大股东的“掠夺”相当常见。

尽管党的十四大明确提出建立社会主义市场经济，发展资本市场，但是，在推进证券市场建设中，仍存在将传统行政化思路运用到新兴证券市场的发展与建设中的现象。我国证券市场从成立之初，就在国家强制性制度变迁的安排下，将证券市场纳入行

政化轨道，资本市场被严重行政化、政府化，政府既是“教练员”，也是“运动员”。

在“政府化”的资本市场中，证券市场呈现管制性低水平均衡的特点，欠发达国家的金融抑制状态在我国新兴市场也有一定程度的表现。从上市公司的选择上，没有制度创新，还是沿用计划经济的行政审批制度。我国证券市场特别是股票市场建立的初衷是作为国有企业改革的尝试，本想是先通过股票市场培育国有企业，然后再通过改革后的国有企业反哺股票市场，但随着国有银行逐步沦为“二财政”，并在不断积累不良贷款和金融风险后，股票市场也转变为解决国有企业的高负债与资金困难问题，降低国有银行体系积累的信用风险的工具，民营企业和大量中小高新技术企业尽管有良好的经营业绩和发展前景，也无法进入证券市场获得其急需的发展资金。

对证券市场长期实行计划性管理，必然造成证券市场内在效率的缺失。在渐进转轨过程中，政府主导型经济体制自然地产生政府主导型融资制度，而资本市场本身是一种高度市场化的产物，由于行政力量作用于市场发展，市场的内在力量与行政的外生力量之间产生一种矛盾与摩擦，引生了巨大的体制摩擦成本。

我们知道，上市公司大多由国有企业改制而来，因此上市公司的缺陷，在很大程度上源于原来国有企业的体制性缺陷。在市场经济转轨过程中，许多企业依然没有核心竞争力。为了战略目的，政府需要对这些企业进行扶持。而且，转轨经济中绝大多数国有企业承担着许多政策性负担，这些负担内生于转轨前的制度中。因为政府对企业的“隐性担保”源于政策性负担，这些负担承袭于计划经济体制，因此政府对源于政策性负担的亏损负有责任，这种现象被亚诺什·科尔内称为“预算软约束”。

我国经济中的许多问题都可以从“预算软约束”找到解释。当前在经济转型期，上市公司虽经企业改制，成为公众上市公

司，但企业的“预算软约束”现象仍然没有得到根本改变。由于国有企业在改制上市时，行政机构作为国有产权的代理人而承担“隐性担保人”的角色，因而一旦上市公司出现问题，面临ST、PT甚至摘牌时，行政机构就不得不出面组织“资产重组”，于是出现“报表重组”、“题材重组”等现象，证券市场优化社会资源的功能几乎无从体现。国有企业内在体制性缺陷转移给上市公司，而上市公司本身就是证券市场运行的重要基石。而在“父爱主义”理念指导下，证券市场在政府干预下难以对绩差上市公司行使“退出”的惩罚权利，从而进一步加剧了投资者的投机心理和内部人的机会主义行为。在这种制度安排下，股市成为低效率的股市，是缺乏理性投资者吸引力的股市，投资者从股市中寻求短期的资本利得变成为其理性的行为选择。

国有企业改制上市以后，大部分上市公司国有股权处于绝对控股地位，“一股独大”现象十分突出，“股权集中程度高”的现象明显。大股东大多为上市公司改制前的上级单位或具有某种关联关系的单位，如母公司或集团公司等，但从上市公司所有权的最终追溯看，绝大多数上市公司的国家股或国有法人股的所有权都是属于国家的，由于所有者的“缺位”，这些大股东只是“国有资产”的代理人，他们被委托行使对上市公司的经营权，这种特殊的“代理—委托”关系构成了我国上市公司特殊的国有控股型公司法人治理结构：国有经济是纽带，上市公司股权结构中国有股“一股独大”，容易形成由代理人组成的内部人控制的法人治理结构。在这种法人治理结构中，作为“国有资产”的代理人，上市公司管理层往往是由大股东或地方政府任命的，他们更愿意服从大股东的利益，或言向大股东负责，而不是向所有股东负责，缺乏完全的独立意识。此外，我国上市公司的控股股东处于一种其他股东无法与之抗衡的地位，它们通常依靠对董事会席位的控制来影响公司决策并保护自己的利益。再加上大多数上市

公司的监事会“形同虚设”，对大股东的行为约束缺乏有效的监督机制，由此产生了一系列侵占和损害小股东权益的现象。与此同时，对“内部人”又缺乏有效的激励机制，企业经营好坏，与他们自身的经济利益没有挂上钩，导致不少上市公司管理层对责任和诚信义务的意识淡薄，甚至在管理与经营上存在过失行为，这样也很容易产生代理人存在“道德风险”和“逆向选择行为”，并导致他们与所有者（股东）之间产生矛盾和利益冲突。正是由于我国上市公司股权结构的特殊性，导致了治理结构的不完善，最终使大股东“剥夺”小股东、内部人侵害小股东权益的现象时有发生。

本书主要从股东结构和公司治理的角度出发，分析当前我国小股东权益保护的现状及导致小股东权益受到侵害的原因，并提出可供参考的政策建议。本书共分 9 章。

第 1 章是引论。在本章中，我们首先分析了本书的研究背景，然后就研究问题进行了深入讨论，第三部分界定了几个重要的概念，第四部分是本书的研究范围，第五部分是研究方法，最后是本书的结构安排和主要结论。

第 2 章是投资者结构、投资者行为及投资理念分析。本章从我国股票投资者的结构和投资行为分析入手，阐述了正是由于我国个人投资者所占比例过高，投资行为不成熟，并且在机构投资者没有得到充分发展的情况下，助长了大股东和内部管理者“掠夺”小股东，并使大股东和内部管理者侵害小股东权益的现象愈演愈烈。

第 3 章是我国小股东权益保护现状。本章首先介绍了海外对小股东权益保护所采取的一些主要措施，然后对我国主要的一些相关法律规定进行分析，最后探讨了上市公司大股东和内部管理者对小股东权益的侵害，并对其原因进行了深入剖析。

第 4 章是制度安排、股权结构与公司治理。在本章中，我们

从欧美和我国证券市场的演进与制度变迁过程来讨论了我国上市公司的“一股独大”的股权结构和不合理的公司治理的形成，最后深入分析当前上市股权结构与公司治理的现状与存在的一些问题。

第5章是股权结构与公司经营绩效。在本章中，我们分析了上市公司股权结构与其经营绩效的相关关系，首先我们回顾了相关的理论研究文献，然后提出了本书的研究假设，接着是模型与变量释义，最后是实证研究结果与分析。

第6章是管理层激励、内部人控制与公司经营绩效。具体安排如下：一是相关文献回顾。二是管理层激励现状。三是研究假设。四是样本、模型和变量解释。五是实证研究结果与分析。六是小结。

第7章是股利分配、大股东控制和现金转移。在本章中，我们运用多元回归模型，分析上市公司大股东如何根据自己的实际情况，选择有利的股利分配方式，从而实现股利分配上“大股东利益的最大化”。

第8章是小股东权益保护与证券市场发展。在本章中，我们首先探讨了股东权益保护的衡量与比较，然后分析了股东保护与证券市场发展的关系，最后讨论了股东保护制度改革对我国证券市场发展的启示。

第9章是如何提高我国小股东权益的保护。在本章中，我们主要从国有股减持、信息披露、规范关联交易和法律制度完善角度阐明了提高我国小股东权益保护可以考虑采用的政策建议。

目前，如何提高作为股市基石的小股东的投资信心，已经成为推动我国证券市场发展的核心问题之一。要彻底恢复市场对上市公司的信任与信心，关键还要看我们如何改进上市公司的股权结构，如何推进对上市公司法人治理结构建设的进程，如何完善

有关法律法规。当然，小股东权益保护机制的形成，是一个复杂的系统工程，我国小股东权益保护机制的形成，并不是一件简单的事情，前面的路还很长。

# ABSTRACT

When the young securities market of China has experienced a lot of cases about earnings manipulation, financial statement dressing, fraud listing and major shareholders occupying assets of firms, such as QiongminYuan Event, Hongguang Event, Eastern Boiler Event, Daqing Lianyi Event, Guojia Event, St Zhengbaiweng Event, St Jinman, ST Monkey King, Kangsan Group, Liming Garment, Tonghai High Tech, 999 Pharmacy, ST Zhangjiajie, Maikete, Eastern Electronics and Xin Guan Xia, understanding of people about shareholders protection, especially minority shareholder protection is more and more profound, and demands of society about the mechanism of minority interests protection are more and more imperative .

Interests of minority shareholder suffered invasion, which is not only a specific event of China, and other counties, including developed ones but also are subject to invasion. The difference between counties is the different degree suffered. Problems of minority shareholder interest protection have been one of hot topic of the current academic, especially in USA. Although problems of China about minority shareholder interest protection is not very satisfying, there is hardly any scholar does such research.

Minority shareholder is puny collective in other counties in spite of China, and their inferior position in corporate governance makes their interest more easily invaded. As an exterior institutional arrangement about the duty, power and interests between shareholders and managers, corporate governance includes a lot of contents. But corporate governance movement usually has considered focus on the relationship between major shareholder and management, and the relationship between minority shareholder and management is often neglected. Under the state of disperse ownership structure, this is the key of corporate governance, but in the economy of high concentrated ownership, the relationship between shareholder and management is just one facet of problems, which is often not important one. In fact, major shareholders have large share among capital suppliers, and they have incentives to conquer problems of free fide problems during supervision, and they have capability to control agency costs and vindicate their interests. However, due to their inferior position in corporate governance, minority shareholder not only undertakes agency costs because of opportunism behavior of management, but also is subject to invasion from major shareholder. Therefore they are subject to two impairments from major shareholder and management.

The two impairments are from the damage because of opportunism behavior of unqualified management on the first place, which is called agency costs, and all shareholders must undertake the costs. However, due to above reasons, minority shareholder is more incapable. On the other place, the impairments are from control shareholder. In the business theory, we often

call it as plunder or expropriation, which is the behavior of control shareholder to use its control position to expropriate minority shareholder. Agency costs and expropriation have close relation. When major shareholder control management or management has large ownership, agency costs and expropriation often change one. Although major shareholder does not join the operation of firms, managers do decisions favorable to major shareholder in order to get support from them. In such state, agency costs directly express as expropriation from major shareholder. The expropriation of minority shareholder from major shareholder is a popular issue, and especially in counties of concentrated ownership, the expropriation is frequent.

Although in the third session of fourteenth conference of CCP, our country clearly put forward to construct social market economy, and develop capital market. But during the construction of securities market, there are a lot of traditional administrative ideas used to development of emerging securities market. At the found of our securities, the authorities put it on the path of traditional administration under arrangement of forceful institutional transition, and capital market is severely administratelized and governmentlized. The government is not only coach, but participants.

In the governmentlized capital market, the securities market appears some characteristics of low level of governance, and the state of restrained finance of developing counties also exists in China. There is no institution innovation in the selection of listed firms, and China also use the old examine and approve system of plan economy. The initial goal of foundation of securities mar-

ket, especially stock market of China is to attempt of reform of SOE. Our government originally wanted to foster stock first, and then support the stock market by reformed SOE. But with stated owned banks changed into the second public financial source, the stock market changed into a tool to solve the problems of high debts and cash difficulties of SOE and to reduce credit risk accumulated by the system of state owned commercial banks. Although a lot of private firms of high-tech small businesses have excellent performance and prospects, they cannot enter the market to raise imperative capital.

The long planning management of securities market must cause the default in the inside efficiency of it. During the process of transitional path, government-oriented economy system naturally produces government-oriented raising system. Because capital market itself is a product of high marketlization, the inside power of market and administrative power from outside will cause conflict and fiction, and lead to large institutional costs of fiction.

As we all know, most of listed companies are from SOE. Thus their limitation results from original institutional defect of SOE. During the transitional process of market economy, a large number of firms have not key competitive power. The authorities need to support these them for the strategic goal. However, most SOE undertake many policy burdens, which resulted from the system before transition. Because potential vouches of government for business are from policy burden resulted from planning economy system, the government should be responsible to loss of policy burden. This phenomenon is called "soft budget

restriction" .

A lot of problems in our economy can be expressed by "soft budget restriction" . During the process of transitional economy, although listed firms are reformed to change into public firms, phenomenon of "soft budget restriction" does not ultimately get change. Because when SOE reformed for public list, as agent of state owned property right, administrative organizations undertake potential warrantor. Therefore, when listed firms appear loss and face ST, PT or delist, administrative organizations have to setup assets reform, and phenomena, such as financial statement reform, topics reform will come out. The function of optimizing social sources of securities hardly embody, and inside defect of SOE will transfer to listed firms, which are important base of securities market. Under the guide of paternal love ideas, the securities market hardly exert penalty right on poor performance listed firms. Under such institutional arrangement, stock market becomes a low efficient market, and loses attraction for investors, and they have to purchase short capital gain, which become the rational behavior selection.

After reform of SOE, stated owned ownership of most listed firms become control position. Therefore, phenomenon of "one shareholder absolute control" becomes very outstanding, and phenomenon of high concentrated ownership also becomes obvious. Most major shareholders are superior units or other associated units, such as parent firm or group firm. But as for the ultimate ownership of listed firms, most national shares or national owned law-person shares of them belong to national owned, which then causes absence of owner. Major shareholders are just

agent of stated owned assets, ant they are trusted to exert operation right of listed firms. The special relationship between principle and agent results in corporate governance structure of state control: state owned economy is ligament, and state owned share of listed firms ownership structure become "one shareholder absolute control", which easily causes lawperson corporate governance of insider control composed by agents. Under such lawperson corporate governance, as agent of state owned assets, managers of listed firms are often appointed by major shareholders or local government, and they are more willing to obey interest of major shareholders, or apparently are responsible to all shareholders, but in fact only for major ones. Furthermore, control shareholders of our listed firms is at a position above other shareholders, and they often affect decision-making of firms and protect their interests through control boards of director, and supervision counsel of most of listed firms are only dressing, which have no restraint on behavior of major shareholders. Therefore, phenomenon of a series of invasion interests of minority shareholders is produced. At the same time, there is no incentive mechanism for insiders. There is no relation between economic interests of managers and performance of firms, which results in indifferent consciousness of managers for accountability and duty of credit, and misstep behavior in the operation of listed firms. As a result, it will cause "moral hazard and adverse selection" of managers, and conflicts between shareholders and them. Not other than specialty of ownership structure of our listed firms results in defect in corporate governance and eventually cause major shareholders to expropriate minority shareholders and bring

about constant occurrence of insider invasion against minority shareholders.

This paper analyzes current state of minority shareholder interests protection and reasons resulting in invasion of minority shareholder interests from point of ownership structure and corporate governance, and put forward some policy suggestions. This paper is divided into ten chapters.

The first chapter is introduction. In this chapter, we firstly analyze research background of this paper, and then discuss deeply research issues. The third part define some important concepts, and the fourth one is research range, and the forth is research methodology, and the last part is structure arrangement of this paper and its main conclusions.

The second chapter is investor structure, behavior of investor and analysis of investment ideas. This chapter expounds more and more phenomena of invasion against interests of minority shareholders from major shareholders and inside management because of the high proportional individual investors, naive investment behavior and insufficient development of institutional investors.

The third chapter is about the current state of protection of minority shareholder interests. This chapter firstly discusses some main procedures by foreign counties and regions, and analyzes some concerning laws and regulation of China, and at last discusses the invasion against minority shareholder from major shareholder and inside management and deeply analyzes its reasons.

The fourth chapter is about institutional arrangement, own-