

外商投资法律制度顾问丛书

Foreign Investment

Counsel Series

中英文
对照

*Legal Guide to
Foreign Investment
in China*

法律指南

外商在华投资

林华伟 著

中国经济出版社



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作者简介

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简 介

《外商在华投资法律指南》的特点是突出了实务性，总结了作者在美国律师事务所多年从事外商在华投资的实践经验。同时，该书旁征博引了大量现行的法律规定，做到字字有出处，显示了作者深厚的法律功底。在选材上，该书一方面涵盖了外商在华投资法律制度的各个主要方面，以保证该书的全面性。但更重要的是该书包括了许多外商投资法律制度中常见的法律问题和值得探讨的法律规定及实践中的灰色区域和变通做法，从而加强了该书的针对性。该书吸收了最新的立法成果，所引用的资料截至2000年3月颁布的《立法法》。该书系中英文对照。中文部分按照中文习惯写作，英文部分与中文部分对应，但不是单纯的翻译，而是根据英文习惯写作。该书是从事外商在华投资的中外管理人员、律师、公司法律顾问、理论工作者和学生了解并深入研究中国外商投资法律制度的必备读物。

INTRODUCTION

This publication is characterized by its focus on practice, which is drawn from the author's many years of rich experience as a PRC Legal Consultant in an international law firm, and covers all major aspects of foreign investment as well as addressing a number of gray areas in Chinese law frequently encountered by foreign investors. In addition, many statutory provisions are cited as well as the most recent legislation on foreign investment in China (the Legislation Law promulgated in March 2000) in order to provide reliable and updated information. This book is published in both Chinese and English. The Chinese version is written in accordance with the customs of Chinese language, however, the English version is not merely a translation of the Chinese, but rather is written in the style and language of legal English. This publication is an essential tool for investors, managers, lawyers, in-house counsel, scholars and students in better understanding and further researching the foreign investment legal regime in China.

前 言

在美国，有这样一则关于律师的笑话：优秀的律师都应当是独臂，因为这样就不能用一只手说“一方面……”，用另一只手说“另一方面……”。但是作为在中国研究法律问题的一个“特色”，只有从实践和成文法两个角度同时出发，才能准确把握中国法律。我长期在一家国际性律师事务所——美国格杰律师事务所工作，深感有必要从这两个角度对中国的外商投资法律制度进行系统研究。这是我写作本书的主要原因。

在本书的写作过程中，我特别注意突出了实务性，总结了多年的实践经验。同时，还援引了大量现行的法律规定，力求做到字字有出处。实践以成文法规定为基础，是对成文法的贯彻实施。中国实行依法治国。尽管实践与法律规定之间有时存在灰色地带和变通做法，但这些灰色地带和变通做法是相对于成文的法律规定而言。没有成文法规定，也就无所谓灰色地带和变通做法。另外，我在本书中对有争议的问题也进行了理论分析。理论分析与实践操作和法律规定并不冲突，三者相辅相成。对于灰色地带和变通做法，尤其需要做理论分析，以明确实践中各种做法的合法性。

在选材上，本书一方面力求涵盖外商投资法律制度的各个主要方面，以保证本书的全面性。例如，本书讨论了一般人认为不能从事直接经营业务的外国企业常驻代表机构作为投资工具的功能，是同类书中所没有的。另一方面，本书又尽量包括外商投资法律制度中常见的法律问题和值得探讨的法律规定及实践做法，从而加强本书的针对性。例如，本书讨论了外商在华投资的结构问题以及外国企业设计投资结构时应考虑的主要内容和出发点。这在目前世界性的跨国公司并购和重组浪潮中具有重要意

Preface

There is an American joke about lawyers: a good lawyer should have only one hand. If this were the case, the lawyer cannot say “on one hand” with one hand and say “on the other hand” with the other hand. However, as one of the “special characteristics” of studying Chinese law, one can accurately grasp the Chinese law only if taking into account both practice and statutory provisions. I have been working with the international law firm, Graham & James LLP, for six years. I was motivated to write this book because of the need to study Chinese law from both the practical and statutory perspectives.

In the process of writing this book, I have sought to emphasize the practical side by drawing upon my practical experience. In the meantime, this book refers to a large number of the Chinese statutory provisions as I have sought to provide a solid basis for each sentence. Practice is based on statutes. China is governed based on the law. Although there are gray areas and flexibility between practice and statutory provisions, these gray areas and flexibility do not exist if there are no statutory provisions to compare them to. Furthermore, this book analyses disputed issues from the theoretical perspective. Theoretical analysis does not conflict with practice and statutory provisions. They are auxiliary to each other. Gray areas and flexibility especially need theoretical analysis in order to clarify their legality.

In the selection of topics, this book has sought to cover the major aspects of the foreign investment legal system in order to ensure the comprehensiveness of this book. For example, this book discusses the investment functions of both representative offices of foreign enterprises, which are generally believed to be prohibited from engaging in direct operational activities. On the other hand this book has sought to address the frequently occurring legal issues and practice that deserve discussion. For example, this book discusses the structure of foreign investment in

义。值得注意的是本书还讨论了作为外国投资者需要考虑的一些特殊问题，例如，外国公司在华企业在中国与中国政府官员进行不正当交往或者行贿时可能触犯的外国投资者母国有关反海外行贿的法律。这是已出版的同类书中尚未涉及的内容。

本书吸收了最新的立法成果。例如，本书参考了2000年3月颁布的《立法法》，针对中国立法“法出多门”，立法机关众多的现象，对外商投资法律的立法层次和效力进行了系统分析，相信会澄清中国法律的层次和效力给外商投资企业带来的困惑。

本书系中英文对照，中文部分按照中文习惯写作。英文部分与中文部分对应，但不是单纯的翻译，而是根据英文习惯写作。本书的英文部分承蒙 Tabetha Miller 女士校对，在此深表谢意。同时，对本书的责任编辑景快宁的巨大帮助和辛勤劳动以及程淮湘的帮助，在此一并致谢。

随着中国加入世界贸易组织的临近，外商在华投资必将不断增加。希望本书的出版，能借此契机，对介绍、研究中国的外商投资制度起到一定的促进作用，向从事外商投资工作的管理人员、法律工作者和理论工作者提供一份“双臂”而不是“独臂”的帮助。

林华伟

二〇〇〇年四月于北京

China and the major concerns and factors that foreign investors take into account when they design their investment structures. This discussion is of great importance given the current trend of restructuring and M&A. In addition, this book has discussed some special issues. For example, if a Chinese subsidiary of a foreign company bribes a Chinese government official, the law of the home country where the foreign parent company is located might be violated in addition to Chinese law. This is an issue specific to multinational companies. This type of issue is seldom found in other books on foreign investment.

This book has also taken into account the most recent development of foreign investment law in China. For example, this book addresses the phenomenon that China has too many legislative authorities and systematically discusses the effect and levels of Chinese legislation in light of the new Legislation Law promulgated in March 2000. I hope that this book would clarify the confusion experienced by foreign investors as to Chinese legislative authorities and the effect of the different levels of legislation.

This book is written in both English and Chinese. The Chinese part is written pursuant to Chinese writing customs. The English part corresponds to the Chinese part. However, the English part is not a simple translation. The English part is written pursuant to the English writing customs. I wish to thank Ms. Tabetta Miller for her gratuitous and careful proofreading and polishing of the English part of this book. I also would like to thank Ms. Jing Kuaining and Ms. Cheng Huaixiang for their kind help.

After China accedes to the World Trade Organization, foreign investment in China will increase rapidly. I wish that this book would help to promote the introduction and research of the foreign investment legal system of China. I hope that this book will provide a “two-handed” rather than “one-handed” guide to the investors, legal and business professionals, scholars and students.

Lin Huawei

Beijing
April 2000

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