中国的外国直接投资法律制度研究

王玉梅 著

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内 容 提 要

从1979年颁布《中华人民共和国中外合资经营企业法》开始，中国在外国直接投资立法方面从无到有，已渐成体系，专门研究机构和专业研究人员对外商投资企业法律理论的研究也比较繁荣。然而，对外国直接投资法律的基础理论的研究比较薄弱。现有的外国直接投资法律理论研究成果表现在这样几个方面：外商投资的企业形式；政府对外商投资企业的具体管理制度；投资领域的限制与扩大；税负的增减；外商投资企业形态的研究；外国直接投资法律的比较研究。这些研究成果在内容上一般是以中国现有的外商投资企业的立法为基础进行研究；在方法上，或偏重于经济学的方法，或偏重于投资学的理论，或偏重于比较法学的方法。

本文选题和探讨的动机是，以客观的、法学的、国际化的眼光了解和观察中国的外国资本引入制度，确立在社会主义市场经济条件下中国外国直接投资法的概念，解决中国现行的外商投资企业法中存在的一些问题，研究外国直接投资法律的基本理论，为建立新的中国外国直接投资法律体系和框架提供理论依据。

本文着重从法学的角度，借助法学基础理论、经济法学、民法学、法律经济学、投资学的原理，参考其他国家外国直接投资的立法例，结合中国吸收外国直接投资的理论和实践，对现实的中国外国直接投资法律中的焦点问题作了较为深入、系统的阐释和探讨。

考虑到与中国实际的外国投资立法趋势相配合，本文一方面从

长远目标出发,试图设计中国未来的外国直接投资法律的框架;另一方面则从近期立法要求出发,对完善现行的外商投资企业法的若干问题进行探讨。

第一章为导论,研究有关外国直接投资的基本概念、特征及外国直接投资的形式——外国投资企业。本文首先从概念上突破过去中国只注重外国直接投资的主体因素,忽略资本因素的理论及立法实践,指出中国应该放宽认定外国直接投资的界限,以利于更广泛地吸引外资。其中主要就争议较大的"返投资"问题、外国人控股的外国投资企业再投资设立企业的问题进行了分析,笔者认为,"返投资"因具有主体的涉外因素而应视为外国直接投资,而外国人控股的外国投资企业再投资设立企业,因其具有资本的涉外因素,也应视为外国投资企业。考虑到涉外因素的不同,可以将外国直接投资分为几类,并对不同类别的投资施以不同的政策。此外,对于中国现存的三种外商投资企业形式产生、发展的原因及存在的问题进行了初步的分析,特别是对于独具"中国特色"的合作企业的形成过程提出了自己的见解,为论文进一步解决其中的问题提供基本的依据。

第二章为中国外国直接投资法律概览。在总结中国现有的外商投资企业法的特点的基础上,本文论述了中国现行外国直接投资法律在立法中存在的问题及成因。中国现有的外国直接投资法律无论在理论上还是在立法上均以企业法为核心,与中国现行的内资企业法形成并行的"双轨制"立法,这与外国直接投资法律的一般原理和中国现实的需要都发生冲突,因此笔者提出,应使外国直接投资法律展现其本来面目——以投资法为核心;中国现行的外国直接投资法律缺乏规范化和系统化,普遍存在着行政法规、部门规章与法律相抵触,地方法规、规章与法律、行政法规及部门规章相抵触,对庞杂繁多的外国直接投资的法律、法规及规章缺乏系统化的整理等问题。这些问题的存在使现有外国直接投资法律不能有效地实施,因而在很大程度上抵消了中国在外国直接投资立法上的成就。

第三章为外国直接投资法律与企业法律制度。其中论述了外国

直接投资法律制度与企业法律制度的关系，对外商投资企业在适用《公司法》及《合伙企业法》中的诸多问题进行了理论上的探讨，指出目前在立法中和理论上存在的矛盾和冲突。其中特别对外商投资企业法与《公司法》在公司资本制度、公司减资、股份的转让、公司的组织机构、责任方式、合作企业的资本回收、外商投资的“一人公司”、外商投资的股份有限公司等问题上的不同规定进行了深入的分析，也阐述了非法人型的合作企业的“无法可依”的问题，指出不应以外商投资企业具有“涉外因素”为由，使外商投资企业游离于一般的企业法律形态之外，人为地造成市场经济条件下法律主体的不平等，应尽快结束内、外资企业组织法及外商投资企业不同形式分别立法的状况。在完善中国企业法律制度的前提下，外国直接投资所采用的企业形式，可以由投资者在中国现有的企业法律形态中自由选择，不应该、也不必要存在内外有别的企业法律形态。

第四章为外商投资企业法与合同法律制度。通过对外国直接投资法律中的合同法律制度的有关问题的分析，指出其中存在的与市场经济要求及通行的合同原理的之间的差距。其中重点涉及了几个具体问题：《合资企业实施条例》中关于显失公平合同的处理的规定，有违合同自由原则；《合作企业法实施细则》中有关的合同与章程的关系的规定，不利于对企业债权人利益的保护；《中外合资经营企业合营各方出资的若干规定》中关于守约方对缴付出资的“催告义务”和违约方“自动放弃”权利的规定，从根本上违背了合同的一般原理，不利于保护守约方的利益，对违约方也显得过于严厉，同时也不符合效益原则。尽管这些问题并不是典型的外国直接投资法律问题，但一方面它们存在于现行的外商投资企业法中，需要加以完善；另一方面这些问题的提出和解决，也有助于提示未来的中国的外国直接投资法律构建过程中应注意一些法律的基本原则和理念。

第五章为外国直接投资法律与BOT投资方式。论述了BOT投资方式中的几个重要法律问题，包括特许权协议的法律性质、BOT

项目中资产所有权的归属、BOT方式投资中风险分散途径和政府保证的法律性质等问题。由于BOT投资方式将在中国今后吸引外商投资于基础设施等建设中发挥重要作用，对于相关问题的研究将为今后的立法及实践提供理论依据。

第六章为外国直接投资法律与国际经济和区域经济一体化。论述了外国直接投资法律与国际经济及区域经济一体化的关系，其中特别分析了中国现行的外国直接投资法律与世贸组织、亚太经合组织、双边投资保护协定在国民待遇及透明度要求等方面的差距。本文在总结中国在外国直接投资法律的国际化方面已经做出的努力的基础上，指出了其中尚存的问题及对策。

第七章为外国直接投资法律的功能。笔者运用法律经济学的原理，分析了外国直接投资法律的功能——实现利用外国投资的效益最大化。这是外国直接投资法律的"灵魂"，在研究外国直接投资的法律问题时应该始终抓住这个关键问题。顺着这种思路，笔者分析了外国直接投资优惠措施的取舍、外国直接投资法律对外国投资投向的影响以及如何看待外国投资的垄断等问题，意图为相关立法提供基础性的选择依据。

第八章为未来中国外国直接投资法律体系的构想。其中阐述了笔者对构建中国未来的外国直接投资法律体系的一些设想。笔者认为，建立中国未来的外国直接投资法律体系应特别注意处理好外国直接投资法律中的稳定与发展、国情与公理等关系，同时应顺应当代国际投资与贸易的发展趋势，研究国际投资与国际贸易的协同关系。不注意协调这些关系，简单地就事论事、因时因事立法，就无法从根本上解决现存的法律之间的矛盾和冲突，对上述外国直接投资法律中的合同问题、外国直接投资法律与企业法的关系问题，就不会有科学、合理的认识。本文着重强调，随着中国对外开放程度的不断扩大及吸收外资实践的发展，未来中国的外国直接投资法律体系应从以企业法为核心的体系转变为以投资法为核心的体系，即改"外商投资企业法"为"外国直接投资法"，由该法对外国直接投资的定义、外国

资本准入、外国人投资保障、投资收益的再投资以及鼓励投资措施等基本问题做原则性的规定，再通过行政法规和部门规章将其具体化。

On China's Legal System Governing Foreign Direct Investment

Abstract

Since the promulgation of Law of the People's Republic of China on Chinese - Foreign Equity Joint Ventures in 1979, China has made great progresses in enacting laws governing foreign direct investment, having developed the corresponding legal system from nothing to an entire system. In the mean time, the ad hoc research institutes and law scholars have conducted intense study on the theoretic framework of law on Chinese - foreign equity joint ventures. However, the research work on the basic theory of the law governing foreign direct investment has been so far inadequate. In short, the achievements thus far made in the research on foreign direct investment are mainly reflected in the following aspects: types of foreign - invested enterprises, specific governmental regulations on foreign - invested enterprises, restriction and extension of the fields for foreign investment, increase and decrease in taxes, diverse forms of foreign - invested enterprises, and comparative study of laws on foreign direct investment. In terms of the content, the above mentioned

achievements were generally made on the basis of study of China's current legislations governing foreign – invested enterprises; In terms of the methodologies applied, particular stress has been laid on the economics – related theories, or the theories of investment, or the comparative study methods.

The aim of this paper is to observe China's institutions concerning the introduction of foreign capital from a objective, jurisprudential and international perspective, to clearly define the concept of China's law on foreign direct investment under the conditions of a socialist market economy, to address some issues in connection to China's current legal system governing foreign – invested, to probe into the basic theory of foreign direct investment, and to lay down a theoretical foundation for a new legal system and framework to regulate the foreign direct investment in China.

From the perspective of law and by virtue of the established theories concerning legal principles, economic law, civil law, legal economics, and investment, this paper mainly profoundly and elaborately probes into the key issues existing in China's current legal system governing FDI. In the analysis, the author makes reference to the legislations of other countries on FDI, and also studies the theories on and the practice of attracting foreign direct investment in China.

Considering the need to fit the existing legal system to the actual trend of FDI in China, this paper, from the perspective of the long – term goal, is intended to design the framework of China's future law on foreign direct investment; on the other hand, it addresses a few issues concerning how to ameliorate the existing law on FDI to fit in with the short – term need for more effective laws.

Chapter 1 consists of the introductory remarks about the basic concepts, characteristics and forms of foreign direct investment, that

is, the foreign－invested enterprises. The paper points out that China should relax the limit on the foreign direct investment so as to facilitate the influx of FDI. This is definitely a breakthrough in that in the past China has given emphasis solely on the foreign nationality of the investors while it has neglected the significance of nature of foreign investment. The chapter focuses on the controversial "reinvestment", and particularly the reinvestment of the foreign－invested enterprises which foreign investors own controlling shares. The author holds that "reinvestment" should be regarded as foreign direct investment because it involves foreign elements of subject; however, the enterprises reinvested in by the foreign－invested enterprises controlled by foreign investors should be also classified as foreign－invested enterprises because they involve foreign capital. In consistence with the diverse foreign elements involved, the foreign direct investment can be divided into several different categories, to which different policies should be applied. In addition, the chapter analyses the formation and evolution of the three main types of foreign－invested enterprises in China as well as the existing problems to be addressed. Particularly, the author proposes his own ideas on the formation of the cooperative enterprises that has been viewed as a special form with Chinese characteristics. This analysis provides a foundation for the elaboration on this point in the following chapters.

Chapter 2 is a general survey of China's law on foreign direct investment. By summarizing the characteristics of China's current laws governing foreign－related enterprises, this chapter discusses the problems in the legislation process and the corresponding causes. Both in the academic community and in the judicial practice, China's regulation on foreign direct investment is revolved around the company law, or enterprise law, which has given rise to a so－called "dual

system" which consists of the existing law governing the domestically - invested enterprises and that governing the foreign - invested enterprises. This situation has engendered conflicts with the general principles of law on FDI and with the status quo of FDI in China. For this reason, the author points out that the law on foreign direct investment should revert to its nature - a law system centered on the investment law. Furthermore, The author notes that China's existing law on foreign direct investment hasn't been systematized nor standardized. There exist some general problems ? some administrative regulations and government departmental rules contravene the national laws, and the local statutes and regulations run counter the national law, the administrative regulations and government departmental rules. Moreover, more efforts are called for to systemize the copious laws, regulations and rules governing FDI. These defects in the existing legal system has resulted in that the law governing FDI can not be effectively enforced and thus the achievements in legislation of law on FDI has been counteracted to a large extent.

Chapter 3 probes into the law on foreign direct investment and legal system of enterprise. This chapter expounds the relationship between the legal system of FDI and the legal system of enterprise, and approaches theoretically a number of problems that have been encountered in the application of company law and partnership law. It also points out some contradictions existing in the present theories and legislations. Particularly, in this chapter the author gives a profound analysis of the discrepancies between the Company Law and the Law of Foreign - capital Enterprises in the following respects: capital system of company, reduction of capital, assignment of shares, organizational structure of company, forms of liability, foreign investor's capital recovery of Chinese - foreign cooperative ventures, foreign - invested

one – person company, and joint – stock limited companies invested by foreigners. The author also noted that there is no existing law governing the non – legal person cooperative enterprises. The author proposes that despite the fact that the foreign – invested enterprises involve foreign elements, they should not be excluded from the governance of the law that regulates the general enterprises. The inequality of different legal subjects under the condition of market economy is unfair and man – made. The separate legislative state of different laws respectively governing the domestically funded enterprises and the foreign – invested enterprises should come to an end as soon as possible. Provided that China's legal system of enterprise is perfected, the forms of enterprises with foreign direct investment can be freely decided on by the investors within the current legal forms of enterprises allowed by Chinese law. In this sense, there shouldn't be different legal forms for domestically – funded and foreign – invested enterprises.

Chapter 4 explores the law governing foreign – invested enterprises and the legal system of contract. By analyzing the related problems regarding the legal system of contract reflected in the law governing foreign – invested enterprises, the author points out that there exists a gap between the current legal system and the needs of a market economy as well as the general contractual principle. This chapter emphatically involves the following specific problems: the provisions on handling of obviously unfair contract in Regulations for the Implementation of the Law of the People's Republic of China on Chinese – Foreign Equity Joint Venture violate the principle of freedom of contract; the provisions on the relationship between contract and articles in Rules on the Implementation of the Law of the People's Republic of China on China – Foreign Contractual Joint Ventures are

unfavorable to the protection of the interest of enterprises' creditors; the provisions relating to the interpellation duty for payment of subscribed capital performed by the observant party and on the right of automatic abandonment performed by the defaulting party in Several Provisions Concerning the Investments Made by the Various Parties to Chinese – Foreign Equity Joint Ventures fundamentally violate the general principle of contract, unfavorable to the protection of the observant party's interests and apparently too severe on the defaulting party as well as inconsistent with the need of effectiveness. Although all the above – mentioned problems are not typical to the law on foreign direct investment, they need to be tackled since they do exist in the current law governing FDI; on the other hand, posing and solving all the problems will be conducive to working out some basic principles and notions that should be addressed in the construction of China's future law on FDI.

Chapter 5 touches upon the law on FDI and the BOT investment forms. This chapter discusses a few important legal problems relating to the forms of BOT investment, including the legal nature of franchise agreement, the ownership of BOT projects, the distribution of risk in BOT investment, and the legal nature of governmental guarantee. Since BOT investment will play an important role in attracting foreign investment in infrastructure construction, the study of the related issues will lay a sound foundation for the legislation and judicial practice in the future.

Chapter 6 discusses the law on FDI and the integration of international and regional economy. This chapter explores the relationship between foreign direct investment and international as well as regional economy, especially elaborating on the gap between China's current law on foreign direct investment and the requirements of

national treatment and transparency posed by the World Trade Organization, Asian－Pacific Economic Cooperation Organization, and the various agreements on protection of mutual investment. This chapter summarizes the efforts made by China to fit its legal system governing FDI to the international practice, and thus points out some existing problems and proposes a few countermeasures.

Chapter 7 analyzes the function of the law on foreign direct investment. The author, applying the principle of legal economics, analyzes the function of foreign direct investment － to maximize the effectiveness in utilizing foreign investment, which is the soul of law on foreign direct investment. This is the center that should be revolved around in studying the legal system governing FDI. For this reason, by analyzing such issues as determination of preferential policies on foreign direct investment, influence of law on FDI over the orientation of foreign investments, countermeasures against the monopoly of foreign investment, the author intends to provide a basic criterion for the enactment of related laws.

Chapter 8 presents a proposal on China's future legal system of foreign direct investment, including the author's opinions on this point. In the author's opinion, in establishing China's future legal system of foreign direct investment, particular attention should be given to handle well the relationship between stableness and modification of law, and between the particular conditions of China and the general legal principles on foreign direct investment. Moreover, the new legal system should fit to the current trend of international trade and investment so that the interrelationship between the international trade and the international investment should be studied. If the above mentioned issues are not addressed properly, and if the legislature simply enacts new laws to solve the immediate

problems without a far - sighted plan, the conflicts existing among the current laws will not be outright eliminated, and there will be no scientific and reasonable understanding of the above - stated problems that concern the contractual issues in the law on FDI, and the relationship between the law on FDI and the enterprise law. This paper stresses that, with the increasing deepening of China's opening - up drive and the practice of attracting FDI, China's future legal system of FDI should be centered on the investment law instead of the enterprise law, which means that the Law on Foreign - invested Enterprises should be concerted to the Law on Foreign Direct Investment. This Law on FDI should be applied to provide for the general principles of the definition of FDI, entry of FDI, guarantee for FDI, reinvestment of return on investment, and the incentive measures to stimulate FDI. Furthermore, the competent governmental organs will enact administrative regulations and departmental rules to implement the principles stipulated in the law.

前　言

江泽民总书记在参观1998年11月27日举办的“改革开放二十年以来利用外资成果展”时指出:利用外资为改革开放和社会主义现代化建设服务,是邓小平理论的重要组成部分,是对外开放基本国策的重要内容,是建设有中国特色社会主义经济的伟大实践之一。要进一步扩大对外开放,更多更好地利用外资,促进国民经济持续快速健康发展。

中国从1949年到1979年的30年间,基本上不接受外国私人投资,而主要是靠直接引进技术,特别是靠进口机器和整套工厂设备以及技术援助提高自己的技术水平和发展生产。尽管这种方式对中国的发展也起到了不小的作用,但中国仍在很多领域里技术落后、效率低下。从1979年开始,作为中国对外开放政策的一部分,中国决定吸收外国直接投资。20多年来,中国实际利用外国直接投资2577多亿美元,连续多年成为发展中国家第一位吸收外国直接投资的国家。在全世界范围内,中国在已连续多年成为仅次于美国的世界上第二大外国直接投资东道国后,2002年跃居首位。与对外借款相比,吸收外国直接投资具有不发生债务的优势,因而这种方式越来越受到包括中国在内的发展中国家的欢迎。中国利用外资的结构在1992年发生了根本性的变化,实际利用外国直接投资金额首次超过了对外借款实际使用额。

从国际上看,产生于18世纪的国际直接投资在第二次世界大战