

《法律汉语——商事篇》是一本具有针对性和专业性的法律汉语教材，适用于对中国商业法律感兴趣的留学生。

教材围绕商务活动中可能涉及的法律、法规加以选材，深入浅出地介绍了中国的法律制度以及涉外投资法、对外贸易法、合同法等相关内容，注重话题的通用性和开放性，力求视野开阔，讨论深入，以帮助学习者扫除专业障碍。同时本教材还注意到专业背景和文化因素的有机结合，力图在新的层次上加深学习者对中国法律乃至中国文化的理解。课后附有扩展性阅读及练习，可帮助学生巩固所学内容。本书的特色在于通过对话体将学生需要掌握的内容娓娓道来，让学生在轻松的氛围中学会与商务活动有关的法律条文，将重点深入学生心中，开放式教学思路跃然纸上。

张泰平 编著

商事篇

法律汉语



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# 前 言

## Foreword

许多年前,在美国华盛顿大学法学院任教的一位同事告诉我,他虽然是法学院的教授,应该大力推行法学教育,但是他认为每年美国法学院的毕业生多如过江之鲫,因此他并不鼓励本科大学生毕业之后申请法学院,换句话说,他为这些法学院毕业生将来的出路感到担忧。尽管如此,他却一再强调:有一种例外的情况,就是将来若是希望在美国和中国的国际商业法上求发展,那么研读中国的对外商务法律将是一大片美好的园地,这片园地不但尚待耕耘,而且前途将是不可限量。不过他又说:要开发这片园地的园丁,还需要一个先决的条件,就是除了精通英文之外,同时也必须精通汉语。当时我正在华盛顿大学担任商学院国际贸易中国组的顾问,并教授《商务汉语》这门课,他的这番话给了我一个很大的启示:需要编写一本有关中国对外商务法律汉语教科书这一类的教材。这本教材的目的不在教授中国对外的商务法律,而是以中国对外商务法律的题材作为这本汉语教科书的主要内容。目前,在美国大学所采用的汉语教科书中,还没有一本汉语教科书涉及对外商务法律这方面的专业题材。

要编写对外商务法律这方面的专业题材,真正的缘起当是七年前吧。那年拙编《国际商务汉语教程》刚由北京大学出版社出版,该教科书的责任编辑吕幼筠女士送给我一本柳宪章新出版的《中华人民共和国合同法》的英文版(*Contract Law of The People's Republic of China*),她鼓励我也编写一本有关中国法律的汉语教科书。吕女士的鼓励更加强了我这一方面的信念。

要写成一本有关中国法律的汉语教科书并不容易。第一,我非法学专家,要把中国的法学词汇融入汉语教科书,必须具有一定的法学知识。我在大学求学时,虽然对中国的法学、法律特感兴趣,选读了许多这方面的课程,但是我毕竟并非法学院出身。第二,中国有关商务法律的条文自1979年中国改革开放后,特别是中国在2001年成为世界贸易组织的成员国之后,为了与国际商务法接轨,凡是有关中国商务法的条文在不断修改、完善之中,因此,采用的资料也必须不断地翻新与修正,同时为了了解中、美两国国际商务发展的趋势和现况,我每天也阅读许多有关这方面的专题报道、法律条文以及报纸杂志上的文章。阅读这类文章使我对中国对外商法

有了进一步认识。

由于这本教科书的读者对象为美国本科大学生和法学院、商学院的研究生,必须具有三年以上的汉语基础,因此在编写期间,我经常设想自己是个法学院的研究生,到中国留学,而且经常憧憬着未来的职业和美景。加上多年在美国大学任教的经验,对美国学生求学、求职的心态,以及他们的生活方式和工作文化有了一些认识,所以在编写期间,我倍感愉快。但是由于自身的工作,每天处理繁忙事务之余,能够抽空编写这本教科书的时间十分有限,时间一年一年地过去了,蹒跚的进展不尽如人意,但是不论如何,终于在2004年的春天初步完成了这本教科书,经过多次的删改、增补等工作,终于在2007年初夏完成定稿。

定稿的完成,在此除了要特别感谢吕幼筠女士当年的建议外,并承蒙外子康达维教授(David R. Knechtges)的鼓励,校读英文稿,他渊博的学识,敬业的精神,宽容的态度,使我内心自然是充满了敬佩与感激。华盛顿大学东亚语文学系博士班学生倪慧玲女士(Erin Brightwell Noose)花了两个月的时间校读我的英文稿,指出中、英文的差错,她认真敬业、一丝不苟的精神也十分让我感动和感谢。此外清华大学法学硕士、中国政法大学法学博士研究生毕经纬先生增添的“单元简介”,扬州大学硕士周晨女士对初稿及单元简介进行的修改工作,本书责任编辑贾鸿杰女士敬业的态度,不厌其烦一遍又一遍地修改稿件,以及华盛顿大学商学院提供的研究经费,使我及时顺利完成英文的校稿工作,在此一并献上最诚挚的谢意。编写的工作烦琐,编写的材料庞杂,内容疏漏、错误的地方,敬请读者不吝指正。

张泰平

2007年8月6日

西雅图

# 人物介绍

## *Introduction*

**Professor Liu Ming** (hereafter 教授) is an internationally renowned law professor who teaches at a law school in Beijing. He received his formal law education in China, and he specializes in international business law. Recently, he spent five years in the United States studying American business law and intellectual property law.

**Jean Chang** (hereafter 张晋) is an American-born Chinese. Her parents came to the United States as graduate students from Taiwan in the 1970s and now own their businesses in New York. Jean graduated from college three years ago with a double major in political science and Asian studies. She also has a master's degree in classical Chinese literature. She is now a first-year law student at a well-known law school in New York City.

**Chris Jones** (hereafter 柯礼思) was born in Paris, and raised and educated in Geneva. He started his Chinese studies in college and has a master's degree in modern Chinese literature. After he received his master's degree, he went to China to travel and study. He studied in Sichuan and Shanghai for three years and became interested in the Chinese legal system. He is now studying in Beijing and plans to go back to Paris to pursue a career in international business law.

(Please note: the three characters in this textbook are purely fictional. If the reader's name happens to be the same as that of one of the characters, it is entirely coincidental.)



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# 第一单元

## 中国司法制度概述

Unit I

An Overview of Chinese Legal System





## 导论

## 中国司法制度及其改革

中国的司法制度应追溯到西周时期<sup>1</sup>，当时周王朝推翻了商朝的暴政统治<sup>2</sup>，提出了“以德配天<sup>4</sup>，明德慎罚<sup>5</sup>”的治国理念，对稳定战后政权起到积极作用。而随着奴隶社会<sup>6</sup>的纷争<sup>7</sup>不断出现，中国古代法家<sup>8</sup>“以法治国<sup>9</sup>”的思想逐渐盛行。春秋战国时期<sup>10</sup>，统治阶级贯彻法家“明法重刑<sup>11</sup>”的主张，运用强有力的法律手段保护旧贵族的特权<sup>12</sup>。秦国的商鞅变法<sup>13</sup>就是法家思想对巩固政权的最富有代表性的一次体现。秦国依靠法律手段推行“富国强兵<sup>14</sup>”的政策<sup>15</sup>，大大提高了秦国的综合实力<sup>16</sup>，实现了中国的统一，开辟<sup>17</sup>了中国封建时代。随后，儒家思想逐渐盛行起来。到了汉朝，法家的思想渐渐被儒家化<sup>18</sup>了。汉武帝以“罢黜百家，独尊儒术<sup>19</sup>”的思想主张，将中国古代法律制度引入了儒家思想体系中，中国古代的“春秋决狱<sup>20</sup>”、“准五服以制罪<sup>21</sup>”等思想就是法律儒家化的最直观<sup>22</sup>体现。总而言之，中国封建时期立法的最大特点是法律儒家化。

中国古代的法律采取“诸法合体，民刑不分<sup>23</sup>”的立法体式，直到清朝末期，民法<sup>24</sup>等部门法律才逐渐从刑法<sup>25</sup>中分离出来。西方思想严重冲击<sup>26</sup>中国传统思想，清政府为了拯救岌岌可危<sup>27</sup>的政权，尝试引入西方资产阶级法律思想指引立法<sup>28</sup>，并邀请了日本法学家参与立法，但是新制定的《大清新刑律》、《大清民律草案》等未来得及正式颁行<sup>29</sup>实施，清政府就被推翻，中国的封建统治就已经结束了。中华民国时期，立法者虽然大量借鉴<sup>30</sup>西方资产阶级的立法模式，拟定了《中华民国宪法》<sup>31</sup>，但是频繁<sup>32</sup>的政府更替<sup>33</sup>，使得这些法律均未能发挥实质性<sup>34</sup>作用。

中华人民共和国成立以后，中国的立法活动才步入正轨<sup>35</sup>。随着社会改革的深化，中国的立法进程不断加快。特别是改革开放<sup>36</sup>以后，中国冲破<sup>37</sup>了传统计划经济<sup>38</sup>的束缚<sup>39</sup>，进入了社会主义市场经济<sup>40</sup>的新纪元<sup>41</sup>。传统的中国经济体制强化<sup>42</sup>政府对经济的控制，忽略<sup>43</sup>市场经济本身的调节作用<sup>44</sup>。这样导致中国的经济法律制度旨在<sup>45</sup>保护政府对经济的掌控<sup>46</sup>，从而很大程度上制约<sup>47</sup>了市场的自由发展。

随着对外贸易的发展，中国再次打开国门，开始对外经济交流和贸易往来。来自世界各国的外商也看到了中国这个有巨大潜力<sup>48</sup>的市场，纷纷涌入<sup>49</sup>中国，经营投资。为了保护涉外贸易<sup>50</sup>中本国企业和在华投资的外商的合法利益<sup>51</sup>，引导他们的经营活动，中国政府积极完善商事立法。新制定的商事法律、法规很大程度上借鉴了资本主义国家的立法规定，并融合了中国社会主义特色<sup>52</sup>，指导新时期经济的全球化<sup>53</sup>发展。

2001年,中国加入了世界贸易组织,成为了WTO的成员国。在5年的过渡期<sup>54</sup>内,中国践行<sup>55</sup>着入世时的承诺<sup>56</sup>,不断丰富、完善商事立法。特别是破产法<sup>57</sup>、知识产权法<sup>58</sup>、公司法<sup>59</sup>等出台,不仅展现了中国日趋完善的立法技术,也为中国对外贸易、外商在华投资提供了法律保障,从而使中国涉外经济发展的前景更加明朗<sup>60</sup>、可观<sup>61</sup>。

## 注释

- 1 追溯(zhuīsù): trace back; date from
- 2 西周时期(Xī Zhōu shíqī): the Western Zhou dynasty (c. 11th century—771 BCE)
- 3 暴政统治(bàozhèng tǒngzhì): despotic rule; tyrannical rule
- 4 以德配天(yǐ dé pèi tiān): using virtue to match Heaven's (virtue)
- 5 明德慎罚(míng dé shèn fá): be clear about virtue and be careful about punishments
- 6 奴隶社会(núli shèhuì): slave society
- 7 纷争(fēnzhēng): dispute
- 8 法家(Fǎjiā): the Legalist School, one of the nine schools of learning in ancient China
- 9 以法治国(yǐ fǎ zhì guó): govern the country with laws
- 10 春秋战国时期(Chūnqiū Zhànguó shíqī): the Spring and Autumn period (770—476 BCE), and the Warring States period (475—221 BCE)
- 11 明法重刑(míng fǎ zhòng xíng): be clear about the law and be severe about punishments
- 12 特权(tèquán): privilege; prerogative
- 13 商鞅变法(Shāng Yāng biànfǎ): Shang Yang's reforms. For more information about Shang Yang, please see Lesson 1, note 1.
- 14 富国强兵(fùguó-qióngbīng): make one's country rich and build up its military might
- 15 政策(zhèngcè): policy
- 16 综合实力(zōnghé shíli): overall power (of a country), overall strength of a country
- 17 开辟(kāipì): start; open up
- 18 儒家化(rújiāhuà): to practice Confucianism; to follow Confucian teachings; Confucianize
- 19 罢黜百家,独尊儒术(bàchù bǎijiā, dú zūn rúshù): proscribed all non-Confucian schools of thought and espoused Confucianism as the orthodox state ideology
- 20 春秋决狱(Chūnqiū Juéyù): using The Spring and Autumn Annals to decide court cases
- 21 准五服以制罪(zhǔn wǔfú yǐ zhì zuì): based on the five degrees of mourning relationship to administer the punishment
- 22 直观(zhíguān): directly perceive
- 23 诸法合体,民刑不分(zhū fǎ hé tǐ, mín xíng bù fēn): various laws are intergrated into one without distinction between civil laws and criminal laws
- 24 民法(mínfǎ): civil law
- 25 刑法(xíngfǎ): criminal law; penal code
- 26 冲击(chōngjī): pound; lash; impact
- 27 岌岌可危(jíjí kěwēi): in imminent danger
- 28 指引立法(zhǐyǐn lìfǎ): guide the (process of) enacting laws



- 29 颁行(bānxíng): issue for enforcement
- 30 借鉴(jièjiàn): use for reference; draw lessons from; to learn a lesson from another person's experience
- 31 《中华民国宪法》(Zhōnghuá Mínguó Xiànfǎ): *the Constitution of the Republic of China*
- 32 频繁(pínfán): frequent; incessant; often
- 33 政府更替(zhèngfǔ gēngtì): government alteration
- 34 实质性(shízhìxìng): substantive; substantial
- 35 步入正轨(bùrù zhèngguǐ): to walk onto the correct path; put on the right track
- 36 改革开放(gǎigé kāifàng): reform and open up (door policy)
- 37 冲破(chōngpò): break through
- 38 计划经济(jìhuà jīngjì): planned economy
- 39 束缚(shùfù): restrain; keep within bounds
- 40 市场经济(shìchǎng jīngjì): market economy
- 41 新纪元(xīn jìyuán): new era; new epoch
- 42 强化(qiánghuà): strengthen; consolidate
- 43 忽略(hūlüè): neglect; overlook; lose sight of
- 44 调节作用(tiáojié zuòyòng): adjusting function
- 45 旨在(zhǐzài): with the purpose of; aiming to
- 46 掌控(zhǎngkòng): under control; have in hand; take into one's hand
- 47 制约(zhìyuē): restrict
- 48 巨大潜力(jùdà qiánli): great potential
- 49 涌入(yǒngrù): pour into; emerge in large numbers
- 50 涉外贸易(shèwài mào yì): foreign trade  
涉外(shèwài): concerning foreign affairs or foreign nationals
- 51 合法权益(héfǎ lìyì): legal right; legitimate right; lawful right
- 52 中国特色社会主义特色(Zhōngguó shèhuìzhǔyì tè sè): characteristics of Chinese socialism
- 53 全球化(quánqiúhuà): globalization; globalize
- 54 过渡期(guòdùqī): transition period
- 55 践行(jiànxíng): carry out; act on
- 56 承诺(chéngnuò): promise to undertake; undertake to do something
- 57 破产法(pòchǎnfǎ): *Law of the People's Republic of China on Enterprise Bankruptcy*
- 58 知识产权法(zhīshíchǎnquánfǎ): *Intellectual Property Law of the People's Republic of China*
- 59 公司法(gōngsīfǎ): *Company Law of the People's Republic of China*
- 60 明朗(mínglǎng): clear; obvious; bright and clear
- 61 可观(kěguān): considerable; impressive; sizable

### Chinese Legal System and Its Reform

Chinese legal system can be traced back to the Western Zhou (c. 11th century—772 BCE) period. When the Zhou regime overthrew the despotic ruling of the Shang State (c. 16th—11th century BCE), the Zhou ruling house also proposed the concept of “matching virtue to that of Heaven, being clear about virtue and being careful about

punishments” as the way to manage state affairs. This proposal had positive affect of stabilizing the political power after the war against the Shang. As the constant struggle and dispute of the slave society intensified, the ancient Chinese Legalist School’s concept of “governing the state by means of law” became more prevalent. During the Spring and Autumn (770—476 BCE) and Warring States period (475—221 BCE), the ruling class carried out the Legalist’s view of “making the laws clear and the punishments severe,” and utilized forceful legal measures to protect the old nobility’s privileges. During the state of Qin (221—207 BCE), Shang Yang’s Reform became the most significant embodiment of Legalist political reform. The Qin State adopted the legal measures of “enriching the state and strengthening the military” to enhance its political power among the various states, and it eventually unified the realm. The so-called “Feudal Era” in China thus began. During the Han dynasty, legalist thought was Confucianized. For example, Emperor Wu (140—88 BCE), applied the theory of “Proscribing all non-Confucian schools of thought and espousing Confucianism as the orthodox state ideology” to introduce ancient Chinese legalism into the ideological system of the Confucian school. Ancient Chinese legal practices such as “using the Spring and Autumn Annals to decide court cases” and “administering punishment based on the five degrees of relationship” are the most direct manifestations of the legal system.

In general, ancient China’s legal structure followed a system of “amalgamating various laws while making no distinction between civil law and criminal law.” It was not until the end of the Qing dynasty (1616—1911) that civil law was separated from criminal law. Since Western thought had great impact on the Chinese traditional way of thinking in the late Qing dynasty, and in an attempt to salvage its political power which was in imminent danger, the Qing court tried to introduce the Western capitalist legal system into China to guide legislative procedures. The Qing court also invited Japanese jurists to participate in the process of enacting the law. However, before the newly enacted *New Criminal Law of the Great Qing* and the *Draft of the Civil Law of the Great Qing* could be put into practice, the Qing dynasty suddenly came to an end. The long history of feudal rule in China finally ended. During the era of the Chinese Republic, drawing on the experience of Western capitalist legislation, legislators began to formulate *the Constitution for the Republic of China*. Once again, because of constant changes in the provisional government, the Constitution was never put into practical use.

Since the founding of the People’s Republic of China, the Chinese legislation was

gradually put on the right track. With the intensification of social reform, the legislative process continued to accelerate. Especially after the liberalization which was put into practice in 1979, the Chinese government, breaking through the constraint of the traditional planned economy, entered a new era of the socialist market economy. In the past, the traditional Chinese economy reinforced the absolute control of the government, and ignored the adjustment function of the market economy. It seemed that the Chinese economic legal system was set up for the purpose of reinforcing government control. Thus it hampered the development of a free market to a certain degree.

Along with the further development of liberalization, China once again opened its doors and began economic exchange and international trade with other countries. Viewing China's tremendous market potential, foreign investors rushed to China to invest in various businesses. In order to protect foreign and domestic investors investments and their legal rights in China, and guide their activities in trade management, the Chinese government at this time devoted its resources to enact a new business law that extensively drew upon the capitalist countries' business law as reference and combined the characteristics of Chinese socialism. The new law will guide China into the new economic era through the development of globalization.

As part of the globalization, China became a member of the World Trade Organization in 2001. During the past five transitional years, the Chinese government has been carrying out the promises China pledged when it became a member of the organization. China also continues to improve and perfect its legislation. When the new laws such as the bankruptcy law, the intellectual property right law and the company law were enacted, this not only indicated that China has gradually perfected its legislative procedures; but also indicated that China is determined to provide legal protection for foreign investors and their investments. With the enactment of these new laws, the prospect of China's international economic development is even brighter and prosperous.





# 第一课

## *Lesson One*

### 中国古代的法家及其司法制度

#### *The Legalists and Legal System of Ancient China*

**教授:**近些年来,学习中国法律变得越来越重要了,特别是2001年12月中国正式成为世界贸易组织的一个成员国之后。

The study of Chinese laws has come to be regarded as increasingly important in recent years, especially after China officially became a member of the World Trade Organization in December 2001.

**张晋:**越来越多的外国学生想跟您学习中国商法吧?他们都懂中文吗?您的学生多半都是来自美国的吗?

Are you getting more and more foreign students who are interested in studying Chinese business law now? Do they all know Chinese? Do most of your students come from the US?

**教授:**是。近几年来,外国学生到中国来学习商法的人数增加了不少。有的懂中文,有的不懂。的确,有不少美国来的学生,但是来自日本、韩国和欧洲国家的学生数量也在增加,另外还有几位来自非洲。

Yes, there's been an increasing number of foreign students coming to China to study business law recent years. Some know Chinese, and some don't. I have quite a few American students, but I'm seeing more and more students from Japan, Korea, Europe, and even a few from Africa.

**柯礼思:**学习中国的法律必须具有丰富的汉语知识,您认为以我们的中文水平是否有足够的学习能力学习中国的法律呢?

Studying Chinese law requires in-depth knowledge of the Chinese language.

Do you think we're qualified to study Chinese law in Chinese?

教授：我知道你们两位普通话都说得很好，那你们会看、会写中文吗？

I know that you both can speak good Mandarin, but can you read and write?

张晋：我有中国古典文学的硕士学位，得到硕士学位以后，我在北京待了一年。去年我在北京大学跟陈教授研读《商君书》<sup>1</sup>和《管子》<sup>2</sup>。

I have a master's degree in classical Chinese literature. I also spent a year in Beijing after I got my MA. When I was at Peking University last year, I studied *The Book of Lord Shang* and *Guanzi* with Professor Chen.

柯礼思：我也读过《商君书》，前年我在四川大学读书的时候，还跟王教授学过中国古代思想史，精读了《韩非子》<sup>3</sup>、《荀子》<sup>4</sup>等著作。中国古代的法家思想特别吸引我。

I've studied *The Book of Lord Shang* too, and when I was studying at Sichuan University two years ago, I studied *Hanfeizi* and *Xunzi* with Professor Wang. I am especially fond of Chinese Legalist Thought.

教授：你们为什么对中国古代的法家思想感兴趣呢？

Why are you interested in Chinese Legalist thought?

张晋：我对中国古代法家的兴趣缘于对现代中国商法和经济发展潜力的关注。很多年以前，我看过一篇文章叫《大中国的出现》<sup>5</sup>。文章给我留下了很深刻的印象。

I am interested in the legalists in ancient China because I pay close attention to modern Chinese business law and the potential of China's economic development. Many years ago, I read an article called *The Emergence of Greater China*, and it really made a deep impression on me.

教授：那篇文章是关于哪方面的？

What was the article about?

张晋：那篇文章提到：21世纪初，中国的国内生产总值<sup>6</sup>将超过欧盟<sup>7</sup>，甚至超过美国。而这些预测绝非凭空推断，都是有一定事实可佐证的。

The article states that it was no exaggeration to assume that early in the 21st

century, the GDP of China would surpass the European Union, or even the United States.

**柯礼思:**我也看过那篇文章。文章说,中国将成为世界上首要贸易国,具有世界上最大的外汇储备<sup>8</sup>,拥有世界上最大的消费市场。

I read that article, too. It also said that China would become the world's leading trader, possess the world's largest foreign exchange reserves, and be the world's largest consumer.

**教授:**原来如此。过去二十多年来国际贸易的迅速成长,大大激活了中国经济,吸引了外国资金的投入。

I see. The rapid growth of international trade over the last 20 years has greatly boosted China's economic activity and foreign capital investment.

**柯礼思:**今天早上我在《纽约时报》<sup>9</sup>看了一篇报道,说中国人购买的手机<sup>10</sup>数量已经超过世界上任何国家了。

I just read a report in the *New York Times* this morning saying that the Chinese have already bought more cell phones than consumers anywhere else in the world.

**张晋:**我也看了这篇文章。文章还说中国人购买的胶卷<sup>11</sup>量比日本人还多,而且中国人在2002年所购买的汽车数量就已经跟德国人购买量相等了。

I read that article, too. It also said that the Chinese bought more film than the Japanese, and that in 2002 they purchased as many automobiles as the Germans.

**柯礼思:**尽管中国在经济方面增长迅速,但是保护外国投资的法律似乎还不够健全。近年来,中国正在逐步制定国际性的商业法律,但是步伐还不够快。

Despite the rapid growth of the Chinese economy, the laws protecting foreign investment still seem far from perfect. Although laws covering international business practices have gradually been established in recent years, the pace has been rather slow.

**教授:**这就是为什么你们会对研究中国商法感兴趣的原因吧?

Is this the reason why you both are interested in studying Chinese business law?



柯礼思：是。但我觉得要研究中国现代的法律，必须要先了解中国古代的法律。教授，中国古代的法律最早可上溯<sup>12</sup>到什么时候？

Yes. However, I feel that if one wants to study modern Chinese law, he or she must first understand ancient Chinese law. Professor, how far back into antiquity can we trace the Chinese legal system?

教授：最早公布的成文法可追溯到春秋战国时期，你们听说过诸子百家<sup>13</sup>没有？

It can be traced back to the Spring and Autumn period (770–476 BC) or the early Warring States period (475–221 BC). Have you ever heard of the “various schools of thought”?

柯礼思：听说过啊。诸子百家有许多了不起的经典著作。比如我刚才提到的韩非子、荀子等人的著作。另外，我还看了一些孟子<sup>14</sup>、庄子<sup>15</sup>、墨子<sup>16</sup>等人的专著。

Yes, I have. The “various schools of thought” produced many great classical writings. As I mentioned that I’ve studied Hanfeizi and Xunzi, and I also have studied a little bit about the philosophical ideas of Mengzi, Zhuangzi, and Mozi.

张晋：我也读过柯礼思提到的这些诸子百家的著作。而且，我认为以韩非子为代表的法家对古代中国的法律制度影响最大。

I also studied those books that Chris just mentioned. I think the Legalists, represented by Hanfeizi, had the greatest influence on the legal system in ancient China.

教授：确实是，在春秋末期、战国初期，法家思想特别盛行。法家学者之间相互交流思想，他们对“以法治民<sup>17</sup>”的必要性进行了一定的阐述。

Indeed, as the Spring and Autumn period passed into the Warring States period, Legalist doctrines increasingly flourished. Legalists exchanged their views and theories, and made numerous speeches on the necessity of having laws in order to govern people.

柯礼思：说到法律的必要性，商鞅是不是说过“臣闻古之明君，错法而民无邪……夫错法而民无邪者，法明而民利之也”？<sup>18</sup>

Speaking of the importance of laws, didn’t Shang Yang once say “I have heard that when the intelligent princes of antiquity established laws, the people were not wicked... Indeed, why people were not wicked, when laws were established,

was because the laws were clear and people profited by them”?

**教授:** 确实是。既然你们两位都读过《商君书》、《管子》和《韩非子》，那你们能不能告诉我一些中国早期的法律制度？

Yes, exactly. Well, since you both have studied *The Book of Lord Shang*, *Guanzi* and *Hanfeizi*, can you tell me a little bit about the early Chinese legal system?

**张晋:** 在我看来，中国古代的法律似乎是一种用来控制人的最重要的工具。我记得商鞅曾说过这样的话：“明主忠臣产于今世，而能领其国者，不可须臾忘于法。”<sup>19</sup>

It seems to me that the law in ancient China was the most important tool for controlling the people. I remember that Shang Yang once said that “an intelligent ruler or a loyal minister is born to this age and wishes to lead his country, then he should not for one moment be forgetful of the law.”

**教授:** 一般来说，中国古代的法律既是惩罚恶人的一种工具，也是鼓励善人的一种手段。所谓：“凡治天下，必因人情。人情者，有好恶，故赏罚可用；赏罚可用则禁令可立而治道具矣。”<sup>20</sup>

Generally speaking, ancient Chinese laws served as a tool to punish the wicked and protect the righteous. It was said: “All ruling of the empire must be done by utilizing human nature. In human nature there are the feelings of like and dislike, and hence rewards and punishments may be employed. When rewards and punishments may be employed, interdicts and commands may be established, and the way of government is completed.”

**柯礼思:** 韩非子曾说过法律的重要性胜过一切书本，他说：“明主治国，无书简<sup>21</sup>之文，以法为教。”<sup>22</sup>

Hanfeizi once remarked that the importance of the law surpassed that of all books or records, saying, “In the state of the intelligent ruler, there is no literature of books and records, but the laws serve as teachings.”

**张晋:** 关于法律的重要性，韩非子也说过一句这样的话：“明主治国，令者，言最贵者也；法者，事最适者也。言无二贵，法不两适，故言行而不轨于法令者必禁。”<sup>23</sup> 换句话说，若是一个人的言行不合乎法律，则必将受到限制。

Regarding the importance of law, Hanfeizi also once said that “In the state of an intelligent ruler, his orders are what are most authoritative in the words of men, and the laws are what are most appropriate to affairs. There cannot be words of two men that are equally authoritative, nor there be two laws that are both the best. Therefore words not in accord with laws and commands must be prohibited.” In other words, if a person’s words and deeds are not in conformity with the law, this person must be restrained.

**张 晋：**韩非子是不是认为人的本性生来就是自私的、邪恶的，因此他相信法律在达官显贵和普通老百姓之间应该是没有什么差别的？

Didn’t Hanfeizi believe that human nature was inherently selfish and evil? Because of this, he believed that laws should not distinguish between nobles and commoners.

**柯礼思：**是，韩非子继承荀子的“性恶说”，认为维持社会秩序的唯一办法就是一国之君必须实施严格的法律，并且严加执行。换句话说，一个好的君主必须以法治国，奖善惩恶<sup>24</sup>。

Yes, Hanfeizi carried on Xunzi’s “theory of human nature being inherently evil”, and believed that the only way to preserve social order was to implement strict laws and enforce those laws rigorously. In other words, a good ruler must govern his state by law, honor the righteous, and punish the wrong.

**教 授：**你们两位说得都对。在春秋时期、战国时期、秦朝以及稍后的时代，法家思想成为封建君王统治的哲学基础和治国准则。

You’re both right. Legalist theories became the philosophical base and governing guidelines for imperial rule during the Spring and Autumn period, and Warring States period, as well as the Qin dynasty, and later eras.

**柯礼思：**谈到治理国家的准则，管仲说过一句话：“故法者天下之至道也，圣君之实用也。”<sup>25</sup>

As to the governing guidelines, Guan Zhong once said, “Therefore law is the highest principle for the empire and of true utility to the Sage ruler.”

**教 授：**是，另外他也说过：“有生法，有守法，有法于法。夫生法者，君也；守法者，臣也；法于法者，民也。君臣上下贵贱皆从法，此谓为大治。”<sup>26</sup>

Yes, exactly. He also said, "There are those who make laws, those who maintain them, and those who model themselves after these laws. The maker of laws is the ruler. The maintainers of the laws are his ministers. Those who take the laws as their models are the people. When ruler and administrator, superior and inferior, noble and humble, all obey the law, this is called having Great Good Government."

**张 晋:** 我认为韩非子和管仲都是中国最伟大的哲学家,他们是为数不多的能够有系统地阐述法学思想的法家代表人物。而商鞅的思想,通过他的变法,对中国的政治思想也产生了深远的影响。

I think Hanfeizi and Guan Zhong were one of the greatest Chinese philosophers, because they were those few philosophers who were able to formulate Legalist thoughts. In addition, Shang Yang's Philosophy, because of his legal reforms, also had a deep and lasting influence on Chinese political thought.



## 注释

- 1 《商君书》(Shāngjūn Shū): *The Book of Lord Shang*, attributed to Gongsun Yang (公孙鞅) or Shang Yang (商鞅, ?—338 BC) of the Warring States period State of Wei, was one of the first Chinese Legalist writings to deal with the concept of “law”. Shang Yang, a Legalist statesman, introduced such legal concepts as the rule of law rather than that of men, as well as new economic measures to the ruler of Qin. For the English translation, see J.J.L. Duyvendak, *The Book of Lord Shang*. (Chicago: The University of Chicago Press, 1928).
- 2 《管子》(Guǎnzǐ): *Master Guan* or *Guanzi*, attributed to Guan Zhong 管仲 (?—645 BC), was the first book to argue that a state’s economic strength would eventually lead to military strength. Guan Zhong was a statesman and served as a minister of the Warring States period State of Qi.
- 3 《韩非子》(Hánfēizǐ): *Master Han Fei* or *Hanfeizi*, attributed to Han Fei (280 BC?—233 or 234 BC), mainly dealt with such issues as laws (fǎ / 法), controlling methods (shù / 术) and tactics (shì / 势). Han Fei was a noted Legalist philosopher from the Warring States period State of Han.
- 4 《荀子》(Xúnzǐ): *Master Xun* or *Xunzi*, attributed to Xun Qing (荀卿)(also known as Xun Kuang (荀况, ?—238 BC), introduced the theory that human nature was essentially evil and that only by learning and practicing Confucian ethics could one achieve good behavior. Xun Qing was from the Warring States period State of Zhao, and was known for his aforementioned theory.
- 5 《大中国的出现》(Dà Zhōngguó de Chūxiàn): See David Shambaugh, *Great China-Introduction: The Emergence of Greater China*, *The China Quarterly*, 136 (December 1993), pp. 653—659.
- 6 国内生产总值(guó nèi shēng chǎn zǒng zhí): gross domestic product, or GDP
- 7 欧盟(Ōuméng): European Union, or EU
- 8 外汇储备(wàihuì chǔbèi): Foreign Exchange Reserves are “external assets that are readily available to and controlled by monetary authorities for direct financing of payment imbalances, for indirectly regulating the magnitudes of such imbalances through intervention in exchange markets to affect the currency exchange rate, and/or for other purposes”. (International Monetary Fund - Glossary).
- 9 《纽约时报》(Niǔyuē Shíbào): *The New York Times*
- 10 手机(shǒujī): cell phone; mobile phone
- 11 胶卷(jiāojiǎn): film, roll of film
- 12 上溯(shàngsù): to trace back
- 13 诸子百家(zhūzǐ bǎijiā): “various masters and a hundred schools” - refers to the “various schools of thought” or the “numerous schools of thinkers” during the period from pre-Qin times to the early years of the Han dynasty.
- 14 孟子(Mèngzǐ): Mencius, or Mengzi, Meng Ke(孟轲)(372—289 BC), assumed that all human nature was inherently good and that therefore every ruler should rule with humanity and righteousness. *Mengzi*, a collection of sayings of Meng Ke, is one of the Confucian text found in the Four Books (Sì shū/四书).
- 15 庄子(Zhuāngzǐ): Master Zhuang or Zhuangzi, Zhuang Zhou (庄周)(369—286 BC), a noted



Legalists philosopher from the Warring States period State of Song. *Zhuangzi* was one of the two most popular Daoist texts (the other is *Laozi* 《老子》) in early Chinese history. However much of the text must have been written after his death, only the first seven chapters are considered to be authentic.

- 16 墨子 (Mòzǐ): Master Mo or Mozi, Mo Di (墨翟, 479—403 BC), a noted Legalists philosopher from the Warring States period State of Lu. He advocated such concepts as “universal love,” “venerating the wise,” “equal rights for everyone’s opinion,” and “politics being profitable for everyone.” *Mozi* is a collection of writings of the Mohist school founded by Modi.
- 17 以法治民 (yǐ fǎ zhì mín): using law(s) to govern people
- 18 See 《商君书·错法·第九》(Shāngjūn Shū, cuòfǎ dì-jiǔ): For the English translation, see Dr. J.J. L. Duyvendak. *Establishing Laws, The Book of Lord Shang*. (Chicago: The University of Chicago Press, 1928), pp. 238–239.
- 19 See 《商君书·慎法第二十五》(Shāngjūn Shū, shènfǎ dì-èrshíwǔ): For the English translation, see: Dr. J.J.L. Duyvendak. *Attention to Law*, p. 324.
- 20 See 《韩非子·八经第四十八》(Hánfēizǐ, bājīng dì-sìshíbā): For the English translation, see Fung Yu-lan, Trans. by Derk Bodde, *A History of Chinese Philosophy*, Vol. I. (Princeton: Princeton University Press, 1952), p. 326.
- 21 书简 (shūjiǎn): books or records
- 22 See 《韩非子·五蠹第四十九》(Hánfēizǐ, wǔdù dì-sìshíjiǔ): For the English translation and quotation, see Fung Yu-lan, p. 323.
- 23 See 《韩非子·问辩第四十一》(Hánfēizǐ, wènbiàn dì-sìshíyī): For the English translation, see Fung Yu-lan, p. 323.
- 24 奖善惩恶 (jiǎngshàn-chéng’è): to praise the right and punish the wrong
- 25 See 《管子·任法第四十三》(Guǎnzǐ, rènǎ fǎ dì-sìshísān): For the English translation, see Fung Yu-lan, p. 322.
- 26 See 《管子·任法第四十三》(Guǎnzǐ, rènǎ fǎ dì-sìshísān): For the English translation, see Fung Yu-lan, p. 322.

## 时文选读

## 简论中国法律的儒家化及其影响

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**【摘要】**在整个中华帝国时代,真正体现法律特点的是法律的儒家化,儒家所提倡的“礼”的精神和“礼”的具体规范,被直接写入法典,与法律融合为一。法律儒家化的过程始于汉代,并在随后的几个世纪中逐渐深化。公元653年,《唐律》的制定、颁布,标志着礼法结合的最终完成。道德习俗(礼)以实在法(法)的形式,具有了正式的法律效力;或者说,实在法(法)作为自然法(礼)的具体化,具有道德规范的作用。

## 中国法律儒家化的进程

## 1. 西汉——中国传统法律儒家化的开端

法律的儒家化始于汉武帝<sup>1</sup>时期,这是中国历史上儒家思想成为主流思想<sup>2</sup>的开端,也正因此,儒家思想在中国历史上影响之大,是其他思想无可比拟<sup>3</sup>的。正是从董仲舒<sup>4</sup>开始,从法律到社会思潮<sup>5</sup>,从人们的社会行为规范<sup>6</sup>到家庭伦理<sup>7</sup>甚至个人行为,儒家的影响无处不在<sup>8</sup>。

董仲舒把孔子的大一统<sup>9</sup>思想和法家的君主集权<sup>10</sup>思想结合在一起,力主<sup>11</sup>加强皇权<sup>12</sup>,主张大一统必须“一统于天子”。而加强大一统的方法,就是用儒家学说统一思想,但董仲舒所鼓吹<sup>13</sup>的“儒术<sup>14</sup>”与先秦的儒术已有明显的差别。它是以儒家经典思想<sup>15</sup>为基础,结合了法家、阴阳家<sup>16</sup>和道家顺应天意<sup>17</sup>、道法自然<sup>18</sup>的思想并将儒家的家庭伦理、理想社会形态纳入<sup>19</sup>了统治思想的范畴<sup>20</sup>,进而在法律上影响了汉律以至历朝历代<sup>21</sup>的立法和人文思想、生活习惯、道德规范,而更使儒家思想法律化、制度化,更加适合封建统治者<sup>22</sup>的需要。

西汉确立的司法准则是春秋决狱。《春秋》本是儒家的一部经书<sup>23</sup>,西汉时期由儒家思想逐步取得统治地位,《春秋》对政治生活、法律制度和法律思想的影响越来越大。董仲舒是专治《春秋》,以阴阳五行<sup>24</sup>解释王道微旨<sup>25</sup>的大儒<sup>26</sup>。他强调“尊尊<sup>27</sup>”和“亲亲<sup>28</sup>”的原则以及“君君<sup>29</sup>、臣臣<sup>30</sup>、父父<sup>31</sup>、子子<sup>32</sup>”的宗法等级制度<sup>33</sup>。《春

秋》的文字简单而隐晦<sup>34</sup>,很便于随意的引申附会<sup>35</sup>,成为封建司法实践的指导原则<sup>36</sup>。因此,用《春秋》的经义<sup>37</sup>解释法律和指导司法实践,很符合封建统治者的需要。

西汉制定的刑法原则是“亲亲得相首匿”<sup>38</sup>。“亲亲得相首匿”是指在直系<sup>39</sup>三代血亲<sup>40</sup>和夫妻之间,除谋反<sup>41</sup>、大逆<sup>42</sup>外,均可互相隐匿犯罪行为<sup>43</sup>,而且减免刑罚<sup>44</sup>。最早提出这一原则的是孔子。他主张“父为子隐,子为父隐”。汉代将儒家思想定为一尊<sup>45</sup>后,亲属相隐便成为汉律中定罪量刑<sup>46</sup>的一项原则。根据这一原则,卑幼首<sup>47</sup>匿尊长,不负刑事责任;尊亲长首匿卑幼,除死罪上请减免外,其他也不负刑事责任<sup>48</sup>。汉宣帝地节四年(前66年)颁布的一道“亲亲得相首匿”的诏令<sup>49</sup>,规定:“自今子首匿父母,妻匿夫,孙匿大父母<sup>50</sup>,皆勿坐<sup>51</sup>。其父母匿子,夫匿妻,大父母匿孙,罪殊死,皆上请<sup>52</sup>廷尉<sup>53</sup>以闻。”这条诏令首次用容许隐匿的形式正面肯定妻、子、孙为夫、父、祖隐在法律上的正当性;间接或部分承认尊亲属为卑亲属隐的“权利”,对于以前“尊为卑隐”的绝对禁止予以一定程度的放宽。这一原则为此后封建法典所继承。

## 2. 三国两晋南北朝——中国传统法律儒家化的发展

儒家有系统地修改法律从曹魏<sup>54</sup>开始,曹魏而后每一新的朝代建立,必制定一套本朝的法律。其法制指导思想,总的发展趋势是沿着汉朝确立的“德主刑辅<sup>55</sup>”思想继续推进法律的儒家化,进一步引礼入律<sup>56</sup>。

曹魏《新律》在汉代《九章律》的基础上又增加了诈伪<sup>57</sup>、断狱<sup>58</sup>等九篇,并调整了法典中与篇目不统一的内容,使法典的内容更丰富,结构更合理。首次将“八议<sup>59</sup>”制度明确写入法典,使封建贵族的等级特权进一步制度化、法律化。

《晋律》<sup>60</sup>的主要特点是进一步纳礼入律,“礼律并重<sup>61</sup>”成为其突出特色。第一次将“五服制<sup>62</sup>”引入法典,这就是所谓“峻礼教之防<sup>63</sup>,准五服以制罪”。

《北齐律》<sup>64</sup>共12篇,949条,是三国两晋南北朝时期立法成就最高,对后代封建法典影响最直接、最深远的一部法典。它集中总结了汉魏晋以来的封建立法经验,使封建法典的体例和内容进一步完善。首次将严重危害封建统治秩序的重大犯罪归纳为“重罪十条”,至隋唐确立为“十恶”,成为封建法典中的一项重要核心制度,直至明清相沿不改<sup>65</sup>。

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## 注释

- 1 汉武帝(Hàn Wǔdì): Emperor Wu (140—88 BC) of the Western Han period (206 BC—25 BC).
- 2 主流思想(zhǔliú sīxiǎng): mainstream philosophy  
主流(zhǔliú): mainstream
- 3 无可比拟(wúkěbǐnǐ): incomparable; unparalleled
- 4 董仲舒(Dǒng Zhòngshū): Dong Zhongshu (179—104 BC), a major philosopher of the Western Han period
- 5 社会思潮(shèhuì sīcháo): social trend of thought; ideological trend
- 6 行为规范(xíngwéi guīfàn): behavioral norm
- 7 家庭伦理(jiāting lúnlǐ): family moral principles; family ethics
- 8 无处不在(wúchùbúzài): omnipresent; ubiquitous
- 9 大一统(dàyītǒng): grand unification (theory)
- 10 君主集权(jūnzǔ jíquán): centralization of monarch's authority; absolute monarchy
- 11 力主(lìzhǔ): strive for; make every effort to promote
- 12 皇权(huángquán): imperial power
- 13 鼓吹(gǔchuī): advocate; propagate; promote
- 14 儒术(rúshù): Confucianism
- 15 经典思想(jīngdiǎn sīxiǎng): classical thought
- 16 阴阳家(Yīnyángjiā): the Yin-Yang School or School of Naturalists during the Warring States period, 475-221 BC
- 17 顺应天意(shùnyìng tiānyì): conform to Heaven's will
- 18 道法自然(dào fǎ zìrán): the Way (dao) follows the natural (course)
- 19 纳入(nàrù): channel (something) into
- 20 范畴(fànchóu): realm; scope range; category
- 21 历朝历代(lìcháo-lìdài): the dynasties in their successive order
- 22 封建统治者(fēngjiàn tǒngzhìzhě): feudal ruler
- 23 经书(jīngshū): Confucian classics
- 24 阴阳五行(yīnyáng wǔxíng): Yin-Yang and the Five Elements (metal, wood, water, fire and earth)
- 25 王道微旨(wángdào wēizhǐ): the way of an enlightened ruler and his deep or abstruse meaning; the deep meaning of the Way of a proper king
- 26 大儒(dàrú): great Confucian scholar
- 27 尊尊(zūn zūn): respect (one's) elders and superiors
- 28 亲亲(qīn qīn): love (one's) family members
- 29 君君(jūn jūn): the ruler behaves like a ruler
- 30 臣臣(chén chén): the subject behaves as a subject should
- 31 父父(fù fù): the father behaves as a father should
- 32 子子(zǐ zǐ): the son behaves as a son should
- 33 宗法等级制度(zōngfǎ děngjí zhìdù): patriarchal clan system
- 34 隐晦(yǐnhuì): obscure; ambiguous
- 35 引申附会(yǐnshēn fùhuì): extend the meaning and draw wrong conclusions by false analogy
- 36 指导原则(zhǐdǎo yuánzé): guiding principle



- 37 经义(jīngyì): the meaning of the Classics
- 38 亲亲得相首匿(qīn qīn dé xiāng shǒu nì): relatives can hide crimes among themselves
- 39 直系(zhíxì): a direct or lineal relation (as opposed to a collateral relation)
- 40 三代血亲(sān dài xuèqīn): blood relations go back three generations
- 41 谋反(móufǎn): conspire against the state; plot a rebellion (revolt)
- 42 大逆(dàni): worst offence
- 43 犯罪行为(fànzùì xíngwéi): criminal act (behavior)
- 44 减免刑罚(jiǎn miǎn xíngfá): mitigate or annul a punishment
- 45 定为一尊(dìng wéi yì zūn): look up to one man as the highest authority
- 46 定罪量刑(dìngzuì liàngxíng): determine the crime and evaluate the punishment
- 47 卑幼首(bēi yòu shǒu): the eldest of the lowly and the young
- 48 刑事责任(xíngshì zérèn): criminal responsibility
- 49 诏令(zhàolìng): imperial edict
- 50 大父母(dàfùmǔ): grandparents
- 51 勿坐(wù zuò): not to be sentenced or punished; not require to share the criminal punishments of another person without being actually guilty oneself
- 52 上请(shàngqǐng): appeal
- 53 廷尉(tíngwèi): commandant of justice
- 54 曹魏(Cáo Wèi): Wei period (220—265) of Cao Pi who was the founding ruler of Wei.
- 55 德主刑辅(dé zhǔ xíng fǔ): (ruling a country, rely ) mainly on virtue while making punishment as secondary
- 56 引礼入律(yǐn lǐ rù lǜ): introduce li (proprieties) into law
- 57 诈伪(zhàwěi): defraud; falsehood; deceit
- 58 断狱(duànyù): try a case in court; close a trial by announcing the verdict
- 59 八议(bāyì): Eight Deliberations
- 60 《晋律》(Jìnlǜ): *Law Code of the Jin* (dynasty, 265—420)
- 61 礼律并重(lǐ lǜ bìngzhòng): propriety (righteousness) and law are equally important (emphasized)
- 62 五服制(wǔfúzhì): five degrees of mourning relationship
- 63 峻礼教之防(jùn lǐjiào zhī fáng): tighten up the Confucian ethical code in order to prevent (people from committing crimes)
- 64 《北齐律》(Běiqílǜ): *Law Code of the Northern Qi* (dynasty, 550—577)
- 65 相沿不改(xiāngyán bù gǎi): pass down from generation to generation without making any changes



## 练习

### 一、解释下列词语

1. 富国强兵
2. 明法重刑
3. 儒家化
4. 凭空推断
5. 诸子百家
6. 家庭伦理
7. 阴阳五行
8. 顺应天意
9. 道法自然
10. 君君
11. 父父
12. 子子

### 二、回答下列问题

1. 中国古代的法律最早可上溯到什么时候?
2. 什么是“以德配天,明德慎罚”的治国理念?为什么这样的治国理念对稳定当时的政权起了积极的作用?
3. 中国古代的法律采取“诸法合体,民刑不分”的立法体制,为什么到了清朝末期民法要从刑法中分离出来?
4. 《春秋》是一本什么样的经书?为什么西汉的司法准则为“春秋决狱”?
5. 为什么法家思想在春秋末期和战国早期的时候特别盛行?

## 第二课

### *Lesson Two*

# 中国法律的沿革和现代商法制度的发源

## *The Evolution of Chinese Law and the Origins of Modern Business Law*

柯礼思：教授，您相信“法律至上”这个西方法律的格言吗？

Professor, do you believe in the Western notion that “the law is above everything”?

教授：柯礼思，你的意思是——

What do you mean by that, Chris?

柯礼思：我的意思是对老百姓而言，法律应当是唯一具有权威性的行为准则，而且也是中央政府和地方政府执法的唯一基准。

I mean that the law should serve as the sole authoritative guideline for the common people and that it should be the only criterion for the central and local governments.

张晋：我同意。这就是我对学习法律感兴趣的原因了——“法律面前，人人平等”。

I agree. That's why I'm interested in studying law: “Before the law, everyone is equal.”

教授：柯礼思，你觉得中国现代的法律是不是主要建立于这个西方观点上呢？

What do you think, Chris? Is modern Chinese law primarily based on this Western concept?

柯礼思：我认为是。中国现代的法律体系源于西方，而且跟中国传统思想有很大的

差别。

I think it is. Modern Chinese law was formulated in accordance with Western law and is quite different from traditional Chinese concepts.

教授：那你们觉得什么是中国传统的法律观点？

What was the traditional Chinese concept of the law?

张晋：是不是主要建立在儒家思想上的道德观点<sup>1</sup>？

Wasn't it predominantly based on the Confucian ideas?

教授：说到中国古代传统的法律思想，我想起两个字来：“礼”与“法”，前者指的是“礼教”，后者则指的是“法律”。

When it comes to understanding the traditional concept of law in ancient China, two words come to my mind right away: “礼” and “法”. The former refers to “propriety”, and the latter means “law”.

柯礼思：“礼”的意思是“礼教”，那么是不是指的是孔子的道德思想或者说是封建的伦理法规<sup>2</sup>？众所周知，孔子的道德思想影响了中国两千多年。

Doesn't “礼” in the sense of “propriety” refer to the “Confucian or feudal code of ethics”? As everyone knows, Confucius' moral and social ideas influenced China for more than two thousand years.

教授：是，除了春秋战国时期，法家思想成为当时的主流外，中国的社会秩序<sup>3</sup>基本上受孔子伦理思想影响。一直到19世纪中叶<sup>4</sup>才发生根本性改变。

Yes, aside from the Spring and Autumn and Warring States period, when legalist thought became the mainstream, China's social order was basically influenced by the Confucian code of ethics. There weren't any major changes in this until the middle of the 19th century.

张晋：在19世纪，西方列强<sup>5</sup>强行<sup>6</sup>打开了中国的门户，清朝的皇帝是不是在那个时候才开始根据西方的司法制度改革中国的法律呢？

Wasn't it not until the Western powers forced China to open its doors in the 19th century that the Qing emperors started to reform the laws in accordance with the Western juridical system?

**教授：**是，清朝法律制度之所以改革，是因为清政府希望能借此收回失之于西方列强的司法主权<sup>7</sup>。

Yes, the reforms to the legal system during the Qing dynasty were prompted by China's desire to recover the judicial sovereignty it had lost to the Western powers.

**柯礼思：**那清朝改革司法制度是为了符合西方的标准吗？

Does this mean that the Qing court reformed the laws and legal system in order to conform to Western standards?

**教授：**在某种程度上可以这么说。但是司法制度直到 20 世纪 20 年代末 30 年代初才建立并逐步完善起来。

In a way, that was the case. But the laws and the legal system were not truly established and perfected until the late 1920s and early 1930s.

**张 晋：**是不是 1927 年国民政府搬到南京以后，才制定<sup>8</sup>并颁布<sup>9</sup>主要的法律，如民法典<sup>10</sup>和刑法典<sup>11</sup>？

Is it true that none of the major civil or criminal codes was enacted or promulgated until after the Nationalist government moved its capital to Nanjing in 1927?

**教授：**是，而且民法和刑法这样的分类模式<sup>12</sup>主要也是援引于西方国家的法律模式。

Yes, this kind of classification pattern which separated the civil and criminal codes, mainly invoked the lines of Western models.

**柯礼思：**您说的“西方模式”指的是美国的模式吗？

When you say “Western pattern,” do you mean American pattern?

**教授：**不是。美国的立法模式影响中国是近年来的事了。那个时候中国法律改革直接或间接地模仿的是欧洲和日本的模式。

No, American mode didn't come into the picture until very recently. The Chinese in those days either directly or indirectly followed European and Japanese models.

柯礼思：他们参照了欧洲哪些模式呢？

Which European models did they imitate?

教授：比方说，民法典参照了德国和瑞士的民法典，而刑法典则主要是参考了波兰于 1932 年制定的刑法典、1931 年日本修改的刑法典、1930 年意大利刑法典以及 1927 年德国刑法典。

For example, the Civil Code was modeled after the German and Swiss Civil Codes, and the Criminal Code primarily used the Polish Criminal Code of 1932, the amended Criminal Code of Japan of 1931, the Italian Criminal Code of 1930, and the German Criminal Code of 1927 as references.

张晋：这样看来，中国的法律主要是参考欧洲国家的模式，而您刚才也提到日本，为什么？

Chinese law was mainly modeled on European law, but you also mentioned Japan. Why you mentioned Japan?

教授：因为从地理位置来看，日本与中国毗邻，但是他们的司法制度要比中国先进很多。早在 19 世纪末期，日本就已经吸收了大量的西方文化，尽管他们依然奉从中国儒家伦理思想。

Because Japan is geographically close to China, but their legal system was many years ahead of China's. In the late 19th century, Japan had already modernized and Westernized, it still followed Chinese Confucian moral principles and precepts.

张晋：对了！我祖父年轻的时候就曾到日本攻读法律，八年之后他返回中国，在一所大学教授法律，他是最早将日本的法律和司法制度引入中国的学者之一，后来他还参加了司法改革运动。

That's right. As a young man, my grandfather went to Japan to study law. When he returned to China eight years later, he taught law at a university. He was one of the first scholars to introduce the Japanese legal system to China. He was later involved in the legal reform movement.

教授：日本的法律对中国的司法制度和司法理论确实产生了很大的影响，特别是对中国台湾。从 1895 年到 1945 年台湾被日本统治，因此当时的司法制度跟传统的中国以及中国大陆地区有很大的不同。



Actually, Japanese law had a great influence on the Chinese legislative system and legal theory, especially in Taiwan. As a result of the Japanese rule from 1895 to 1945, Taiwan's modern legal system is quite different from the one implemented in ancient China and present China's mainland.

**柯礼思:** 我知道日本在殖民统治时期<sup>13</sup>对台湾的司法结构的形成产生了很大的影响,但是现代台湾的司法观点是不是也受西方法律,包括美国在内的影响呢?

I know that Japanese colonial rule had a great influence on the formation of Taiwan's legal structure, but is it true that contemporary juridical concepts in Taiwan have also been influenced by Western law, including that of America?

**教授:** 是,现代日本的法律是从德国引进的,而且最早可上溯到罗马法<sup>14</sup>,因此在某种程度上也具有西方传统的痕迹<sup>15</sup>。

Yes, since modern Japanese law was introduced from Germany and thus can be traced back to the Roman legal tradition, in a way, Taiwan's laws, too, bear traces of Western traditions.

**张晋:** 教授,那从哪方面来看中国法律是受到美国法律的影响呢?

Professor, which aspects of Chinese law have been influenced by American law?

**教授:** 比方说1993年《中华人民共和国公司法》的制定主要是参考了德国的法律,但近年来的修改则引进了英美法的重要条文。还有另外一个很好例子就是海商法<sup>16</sup>,它原来是根据德、法、日和英、美等国的法律制定的,但近年来在法律实践中,则深受美国法律的影响。

*The Company Law of the People's Republic of China*, enacted in 1993, for example, is primarily based on German law, but recent amendments have introduced important features of Anglo-American law. Another good example is the *Maritime Law*, which was originally based on German, French, Japanese, and Anglo-American law, but in the last few years has come to be heavily influenced by American law.

**柯礼思:** 新中国成立后的法律是否有明显的变化呢?

Were there any major changes since the founding of the People's Republic of China?

教授：有，1949年以后，中国的司法制度发生了深刻的改变。

The Chinese legal system has undergone a lot of significant changes since 1949.

张晋：有哪些方面的改变呢？

What are those changes?

教授：比方说吧，1949年2月，中国共产党废除<sup>17</sup>了国民政府建立的六法制度<sup>18</sup>。

For example, in February 1949, the Communist Party abolished the Six Major Laws System established by the Nationalist government.

柯礼思：在建立新法的过程中，中国政府是否参考了俄国的法律呢？

During the process of formulating new laws, did the Chinese government consult the Russian laws?

教授：是。俄国在那个时代应当称之为苏联。不过若是探究<sup>19</sup>苏联法律的历史，其司法结构也保存了古罗马的痕迹。

Oh, yes. Although, in those days, Russia would more properly have been referred to as the Soviet Union. All the same, if you look at Soviet history, the USSR's legal structure preserved traces of the Roman tradition.

柯礼思：那建国后中国的商事法律制度又怎么样呢？

What about Chinese business law after the founding of PRC?

教授：建国初期，中国的确颁布了一些经济法规，但这些法规只适用于计划经济，与中国现代商事制度相距甚远。

During the early stage of the founding of new China, China indeed issued a few economic regulations which were only suitable for planned economies. There is a big gap compared with modern business law.

张晋：自1979年实施改革开放政策以来，为了使中国的经济法实现现代化，中国商事法律制度发生了一定的变化，是吗？

After the implementation of the "Reform and Open Policy" in 1979, I suppose business law changed again in order to modernize the structure of China's economic laws, right?

**教授:** 这是毫无疑问的。1979年7月8日,中国政府制定了《中华人民共和国中外合资经营企业法》<sup>20</sup>,这就是为了管理国外投资而建立新法的第一步。

Undoubtedly, that is the case. On July 8, 1979, the Chinese government established *the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures*. This was the first step to establish a new legal system to better manage foreign investment.

**柯礼思:** 我想这些新法律的制定就是为了保护中国企业界人士以及他们国外合伙人<sup>21</sup>的权益<sup>22</sup>吧?

I assume that the new laws were instituted to protect the rights of Chinese businessmen as well as those of their foreign partners.

**教授:** 是,在过去的十多年内,中国政府大量修改旧条文,并通过新的法律、法规,而这些司法结构以及新颁布的法律大大改善了中国的投资环境。

Yes, the government has passed or amended many new laws and regulations over the past ten years. And the new legal structure and newly issued laws have greatly improved investment environment in China.

**张晋:** 大概两个星期以前,我在《人民日报》上看到一篇有关中国司法制度的文章,上面说,全国人民代表大会<sup>23</sup>下设的法律委员会<sup>24</sup>宣布:具有中国特色社会主义的司法制度已经开始形成了。

About two weeks ago, I read an article in the *People's Daily* about China's legal system. It said that the Law Committee of China's National People's Congress had announced that a socialist legal system with Chinese characteristics had already started to take form.

**教授:** 确实如此。中国在最近已经完成了七项主要的司法项目,而在过去的20年内,全国人民代表大会通过了四百个法律条文和相关司法解释<sup>25</sup>,这些法律文件对指导法律实务起到积极的作用。

That's true. China has completed seven major legal projects recently. Moreover, the Nation People's Congress has passed more than 400 bills and polished the legal interpretations. It not only has a positive effect, but also guides the new law toward a more pragmatic way.

**柯礼思:** 这些新法的颁布以及加入世界贸易组织,使得在投资方面中国很可能成为

最受欢迎的国家之一。

With all of the new laws and its admission to the World Trade Organization, China might very well be one of the most popular countries in the world in which to invest at the moment.



### 注释

- 1 道德观点 (dàodé guāndiǎn): moral ideas; moral perspective
- 2 伦理法规 (lúnlǐ fǎguī): code of ethics; moral principles and rules
- 3 社会秩序 (shèhuì zhìxù): social order; public order
- 4 中叶 (zhōngyè): middle period; the middle decades of a century
- 5 西方列强 (xīfāng lièqiáng): Western powers, generally the Eight-Power Allied Forces, including Great Britain, the United States, Germany, France, Italy, Tsarist Russia, Japan and Austria.
- 6 强行 (qiángháng): to force
- 7 司法主权 (sīfǎ zhǔquán): judicial sovereignty
- 8 制定 (zhìdìng): to enact; to work out (a plan); to lay down (rules)
- 9 颁布 (bānbù): to promulgate; to issue; to publish
- 10 民法典 (mínfǎdiǎn): civil codes
- 11 刑法典 (xíngfǎdiǎn): criminal codes
- 12 模式 (móshì): model; norm
- 13 殖民统治时期 (zhímín tǒngzhì shíqī): period of colonial rule
- 14 罗马法 (luómǎfǎ): Roman law
- 15 痕迹 (hénjì): trace; track

- 16 海商法(hǎishāngfǎ): the law of PRC on Maritime Business  
 17 废除(fèichú): to abolish; to abrogate  
 18 六法制度(Liùfǎ zhìdù): the Six Laws system, refers to the legal omnibus in the Republic of China prior to 1949  
 19 探究(tànjiū): to investigate; to look at carefully  
 20 《中华人民共和国中外合资经营企业法》(Zhōnghuá Rénmín Gònghéguó Zhōngwài Hézī Jīngyíng Qīyèfǎ): *the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures*. It was first adopted in 1979 and revised on April 4, 1990. For more information, see Unit II of this textbook.  
 21 合伙人(héhuǒrén): partner  
 22 权益(quányì): rights and interests  
 23 全国人民代表大会(Quánguó Rénmín Dàibiǎo Dàhuì): the National People's Congress (NPC)  
 24 法律委员会(fǎlù wěiyuánhùi): the Law Committee (of the National People's Congress)  
 25 解释(jiěshì): to interpret; to annotate; interpretation; annotation

## 时文选读

### 法律上<sup>1</sup>、法律中<sup>2</sup>、法律面前<sup>3</sup> 人人平等的定位<sup>4</sup>及其关系论

张庆旭(阜阳师范学院 政法系)

**【摘要】**从空间来看,如果把法律作为器物层面<sup>5</sup>的“形”的话,那么,作为“人人平等”的精神就是形而上<sup>6</sup>,作为法律内容中的“不平等手段”(其价值追求是平等)就是形之中<sup>7</sup>,作为司法原则的“法律面前,人人平等”就是形而下<sup>8</sup>。于是,法律上人人平等、法律中人人平等(实际规定的内容并不平等)、法律面前人人平等的意思是明显不同的,其阶位<sup>9</sup>是依次递减<sup>10</sup>的,这三句话中的“上”、“中”、“面前”三个词的含义是非常明确的,对这三句话也应当从这个意义上正确理解。



新中国第一部宪法已经走过了半个世纪,她是中国法制和法学<sup>11</sup>理论建设的一个标志性<sup>12</sup>的里程碑<sup>13</sup>,其丰富的内涵<sup>14</sup>仍有待我们去思考、去挖掘。在1954年宪法规定了“法律上人人平等”的公民权利,而1982年宪法中与之相应的权利是“法律面前人人平等”。对于“法律上人人平等”和“法律面前人人平等”所包含的内容是否一致的问题,理论界一直有分歧<sup>15</sup>。一部分人认为二者意思是一致的,仅指法律适用上的平等,而不包括立法中<sup>16</sup>的平等;一部分人认为前者不仅指法律适用上的平等,而且包括立法中的平等,后者则仅指司法上<sup>17</sup>的平等,而无立法中的平等;还有一部分人提出了“法律面前人人平等”应当包括立法的平等,并对我国法理学中的立法中不平等的观点进行了批判。很多法理学著作几乎都是从现实层面上<sup>18</sup>论述法的平等,有的甚至仅仅局限于“法律面前人人平等”的范围,这些都不尽全面。近年来出现的身高歧视案<sup>19</sup>、乙肝歧视案<sup>20</sup>、高考歧视案<sup>21</sup>等案件也促使我们必须去探讨,我们到底需要什么样的平等?由此引发了作者对“法律上人人平等”、“法律中(即立法内容中)人人平等”、“法律面前人人平等”三者内涵及其关系的思考,并向各位同仁<sup>22</sup>求教。

### 价值——法律上人人平等:法律之上(自然法意义上)的人人生而平等

要想弄清楚“法律上人人平等”、“法律中(即立法内容中)人人平等”和“法律面前人人平等”三者的内涵及其关系,必须弄清楚其中的关键词<sup>23</sup>“平等”以及法律是如何实现平等的,否则,我们永远只能是就事论事<sup>24</sup>,难得真相。

不平等的社会现状产生了对平等的追求。

在原始社会的漫长历史时期里,社会生产力水平极低,所有社会成员在其氏族群体<sup>25</sup>内部基本上是平等的。此时,他们不可能有所谓“平等”的观念,也不会意识到平等不平等的存在,因为,“他的欲望绝不会超过他的生理上的需要<sup>26</sup>。在宇宙中他所能意识的需要就是食物、异性和休息;他所畏惧的灾难就是疼痛和饥饿”,“不平等在自然状态中几乎是人们感觉不到的,它的影响也几乎是等于零的。”

在原始社会后期,随着社会生产力的发展,个体生产<sup>27</sup>成为可能,并已出现剩余产品。原来的生产占有方式<sup>28</sup>,原来平等、互助合作的社会关系为差别越来越大的财富占有关系所打破。占有财富同不占有财富的人,占有财富较多同占有财富较少的人,自然谈不上平等。“自从一个人需要另一个人帮助时起,自从人们察觉到一个人据有两个人粮食的好处的時候起,平等就消失了、私有制出现了、劳动成为必要、广大的森林就变成了须用人的血汗来灌溉<sup>29</sup>的欣欣向荣<sup>30</sup>的田野;不久便看到奴役<sup>31</sup>和贫困伴随着农作物在田野中萌芽和滋长<sup>32</sup>。”因此,“使人文明起来,而使人类没落<sup>33</sup>下去的东西,在诗人看来是金和银,而在哲学家看来是铁和谷物<sup>34</sup>”。

随着“奴役和贫困伴随着农作物在田野中萌芽和滋长”,被奴役以及贫困景况的日益加剧<sup>35</sup>,人类对被奴役以及贫困的憎恨也就越来越强烈,对不平等的憎恨也

就越来越强烈,对平等的渴求<sup>36</sup>也就油然而生<sup>37</sup>。

(摘自《喀什师范学院学报》2007年3月)

## 注 释

- 1 法律上(fǎlǜ shàng): above the law
- 2 法律中(fǎlǜ zhōng): in the law
- 3 法律面前(fǎlǜ miànqián): in front of the law
- 4 定位(dìngwèi): position; positioning
- 5 器物层面(qìwù céngmiàn): stratum (surface) of an object  
层面(céngmiàn): aspect; level
- 6 形而上(xíng ér shàng): above the form
- 7 形之中(xíng zhī zhōng): within the form
- 8 形而下(xíng ér xià): below the shape
- 9 阶位(jiēwèi): stage; phase
- 10 依次递减(yīcì dìjiǎn): decrease progressively (successively)
- 11 法制和法学(fǎzhì hé fǎxué): legal system and the science (study) of law
- 12 标志性(biāozhìxìng): symbolic
- 13 里程碑(lǐchéngbēi): milestone; milepost
- 14 内涵(nèihán): connotation
- 15 分歧(fēnqí): divergence; difference
- 16 立法中(lǐfǎ zhōng): during the process of legislation
- 17 司法上(sīfǎ shàng): on legislation
- 18 现实层面上(xiànré shí céngmiàn shàng): on the surface of reality
- 19 身高歧视案(shēngāo qíshì'àn): discrimination case concerning (a person's) height
- 20 乙肝歧视案(yǐgān qíshì'àn): hepatitis B discrimination case
- 21 高考歧视案(gāokǎo qíshì'àn): college entrance examination discrimination case
- 22 同仁(tóngrén): colleagues
- 23 关键词(guānjiàncí): key word
- 24 就事论事(jiùshì-lùnshì): confine the discussion to the matter at issue
- 25 氏族群体(shìzú qúntǐ): clan and community
- 26 生理上的需要(shēnglǐ shàng de xūyào): physiological need
- 27 个体生产(gètǐ shēngchǎn): production by an individual
- 28 生产占有方式(shēngchǎn zhànyǒu fāngshì): the foraging mode of production
- 29 灌溉(guàngài): irrigation; irrigate
- 30 欣欣向荣(xīnxīnxiàngróng): flourishing; prospering
- 31 奴役(núyì): enslave
- 32 萌芽和滋长(méngyá hé zīzhǎng): sprouting and growing
- 33 没落(mòluò): decline, wane
- 34 谷物(gǔwù): grain
- 35 日益加剧(rìyì jiājù): increasingly getting worse day by day

36 渴求(kěqiú): crave for; eagerly look forward to

37 油然而生(yóurán'érshēng): well up; (of a feeling) rise of itself; be produced of itself

## 练习

### 一、解释下列词语

1. 法律面前,人人平等
2. “礼”与“法”
3. 众所周知
4. 计划经济
5. 就事论事
6. 依次递减
7. 法制和法学
8. 氏族群体
9. 礼律并重

### 二、回答下列问题

1. 中国现代的民法典是参考了哪些国家的法律模式而制定的?
2. 人类的平等观念是如何形成的?
3. 中国传统的社会秩序基本上是受了孔子伦理思想的影响,为什么到 19 世纪中叶开始发生根本性的改变?
4. “法律上”和“法律中”人人平等到底有什么不同?
5. 自 1979 年中国实施改革开放后,中国的经济法发生了什么样的变化?

## 第三课

### *Lesson Three*

## 入世前后中国法律的改革与发展

### *Legal Reform and Development Before and After China's Accession to WTO*

**教授:**我在前面已经提到,目前中国大部分司法体系,直接或间接引用欧洲或是北美洲的司法体系,不过在基本观念上还是体现着中国自己的法律文化。

As I mentioned earlier, most of the present legal structure of China is derived either directly or indirectly from the European and North American legal systems. However, its basic concepts still reflect China's own legal culture.

**张晋:**我同意。虽然在很大程度上中国法律的结构或框架<sup>1</sup>来自外国,但是中国的法律制度最终还是建立在中国特色的法治文化基础上的。

I agree. Though to a large extent, the structure or framework of Chinese laws has been borrowed from foreign countries, in some ways, Chinese laws are still based on the norms of traditional Chinese legal culture.

**柯礼思:**教授,有人认为中国的法律仅是中国政府行使权力的一种机制<sup>2</sup>,您同意这种说法吗?

Professor, some people say that Chinese laws are merely a mechanism that allows the Chinese government to exercise its authority and power. Do you agree with this view?

**教授:**在过去,中国的法律和法规主要是为国家机器运转服务的,在某种程度上<sup>3</sup>中国司法制度设立的根本目的是为了保护国家的政权,不过这种情况正逐渐改变。

In the past, laws and regulations in China were primarily intended for running

and servicing the apparatus of the nation. In a way, the Chinese legal system was fundamentally set up to protect the State's political power. However, this concept is gradually changing.

**张 晋:** 从 20 世纪 50 年代到 70 年代的中期, 中国依靠法律和法规来改变国家的经济和社会秩序, 以达到国家的改革目的, 这说法正确吗?

Is it true that from the 1950s to the mid-1970s of the 20th century China used laws and regulations to transform the economic and social order to achieve such goals?

**教 授:** 那些都是过去的事了。现代中国司法制度改革的目标就是: 国家遵循<sup>4</sup>法律来治国, 同时所有的公民都遵守、维护国家的宪法和法律, 并且严格依法办事。

That's all in the past. Now the goal of the Chinese legal reform is to run the country in keeping with the laws. All citizens should observe and safeguard the Constitution and the law, and should act in strict accordance with the law.

**柯礼思:** 据我了解, 在过去中国有一种传统观点认为, 一个贤明的政府应该是“人治<sup>5</sup>”而非“法治<sup>6</sup>”。这种传统的看法仍然深植<sup>7</sup>于中国的社会吗?

I understand that in the past according to the traditional Chinese viewpoint, a good government should be based on the “rule of men,” not the “rule of law.” Is this kind of traditional view still deeply rooted in Chinese society?

**张 晋:** 教授, 您认为现代社会的法治优于<sup>8</sup>人治吗? 还有, 中国社会生活中所谓的“关系<sup>9</sup>”在司法实践中仍具有重大的影响吗?

Professor, do you think that nowadays the “rule of law” is preferred over the “rule of men”? Do *guanxi* (relationships) still play a significant role in the implementation of the Chinese legal system?

**教 授:** 非正式的人际关系和正式的组织关系是中国社会两个重要而且不可分割的要素, 两者之间可以取长补短<sup>10</sup>。虽然传统的关系仍然保持其重要性, 但是必须符合法律。换句话说, “关系”是一项非常有价值的资产<sup>11</sup>, 具体的就要看能否利用好这一资源了。

Informal personal relations and formal institutional relations are two important



integral factors of Chinese society. They impact and complement each other. Though traditional *guanxi* retains its important role, it must be conducted under the law. In other words, *guanxi* is an invaluable asset but heavily depends on how one uses it.

**柯礼思:** 中国现在已经正式成为世界贸易组织的一个成员国,在经济全球化的背景下,“关系”或许不再被广泛应用了吧。

Now that China has formally become a member of the WTO, perhaps *guanxi* will no longer be taken advantage of in the global economy.

**教授:** 自从中国加入世界贸易组织后,中国政府已经重新审查法律和法规,并且修正或删除<sup>12</sup>了与世界贸易组织立法不一致的法律法规。

Following China's accession to the WTO, the government reviewed its laws and regulations to amend or abrogate any provisions that were inconsistent with the WTO rules.

**张晋:** 我看中国政府正在努力履行<sup>13</sup>对世界贸易组织的承诺。

I think China is trying hard to honor its WTO obligations and commitments.

**教授:** 是,有些地方为了简化外商在中国投资的程序,甚至废除了许多审核<sup>14</sup>和批准<sup>15</sup>的手续,还摒弃了那些已经不符合国际惯例的传统观点和商业运作方式。

Yes, some local governments have even abolished the review and approval procedures, as well as some traditional concepts and business practices which are no longer in line with international practices in order to simplify and accommodate foreign investment in China.

**柯礼思:** 我听说中国已经完成了“六法<sup>16</sup>”的修订工作,使之完全符合世界贸易组织的规定,那这“六法”是指哪些呢?

I've heard that China has completed the rectification of "six laws" and made them all conform to the rules of the WTO. What are those "six laws"?

**教授:** 和贸易相关的“六法”指的是中外合资经营企业法、中外合作经营企业法<sup>17</sup>、外资企业法<sup>18</sup>、商标法<sup>19</sup>、著作权法<sup>20</sup>以及专利法<sup>21</sup>。

The “six laws” are: *the Law on Chinese-Foreign Equity Joint Ventures, the Law on Chinese-Foreign Contractual Joint Ventures, the Law on Foreign-Capital Enterprises, the Trademark Law, the Copyright Law, and the Patent Law.*

张 晋: 这些新法和旧法有所不同, 您认为这些新法会给中国政府带来新的挑战吗?

Do you think the new laws pose a major challenge to the Chinese government, because the new rules are quite different from the old ones?

教 授: 应该不会。这些新的法律条文是由一些著名的法学专家、学者、律师和法官、检察官等, 共同设计、制定、修改形成的。

Not necessarily. A legal group comprised of renowned specialists, scholars, lawyers, judges and prosecutors worked together to revise and design these new legal provisions.

柯礼思: 有些学者认为, 从 1978 年起, 中国的司法制度可以分成三个阶段。都是哪三个阶段呢, 您可以介绍一下吗?

Some scholars say that the development of the Chinese legal system since 1978 can be divided into three stages. What are those three stages? Professor, could you elaborate?

教 授: 第一段阶段是从 1978 年到 1982 年。在这个阶段, “以法治国”的观念开始形成。

The first stage was from 1978 to 1982. During that time, China started to develop the concept of “ruling the country by law”.

张 晋: 那第二阶段是不是从 1982 年开始到 20 世纪 90 年代早期? 我还记得在那段时间, 新的民法法规和经济法规正在形成和发展。

Did the second stage begin in 1982 and end in the early 1990s? I remember that during that period of time, new civil and economic legislation was being established and developed.

教 授: 是。在此期间, 也就是 1986 年颁布实施了《中华人民共和国民法通则》。到了 1991 年, 国务院发表了第一部有关中国人权的白皮书<sup>22</sup>, 这是中国政府

第一次讨论这个问题。

Yes, during that period, the *Civil Law of People's Republic of China* was promulgated in 1986. And in 1991, the State Council published the first white paper on human rights in China. It was the first time that the Chinese government dealt with this issue.

**柯礼思:** 中国政府将人权问题作为一个国家的内政,排斥外国霸权主义<sup>23</sup>的干涉。

Chinese government treats human rights issues as internal affairs that should not be interfered with by foreign nations' hegemonic acts.

**教授:** 促进和改善人权,是一个长期性的工作和承诺。不过人权白皮书在1991年发表后,中国的司法制度开始进入第三个阶段。这个新纪元以经济改革为中心,在此阶段,有关经济方面的法律改革成为了当时的司法改革重心。

Promoting and improving human rights are long-term tasks and commitments. However, after the white paper on human rights was published in 1991, the Chinese legal system began to enter into the third stage. And this era was marked by legal reforms with regard to economics.

**柯礼思:** 当中国转变成社会主义市场经济,在健全的司法制度下,政府的操作就会更加透明<sup>24</sup>了。

Once China shifts to a socialist market economy with a sound legal structure, the government's operations will be more transparent.

**教授:** 确实是。“以法治国”成为治国的目标具有里程碑的意义。不过,中国人要彻底改变他们的思维方式<sup>25</sup>,还是需要一点时间的。

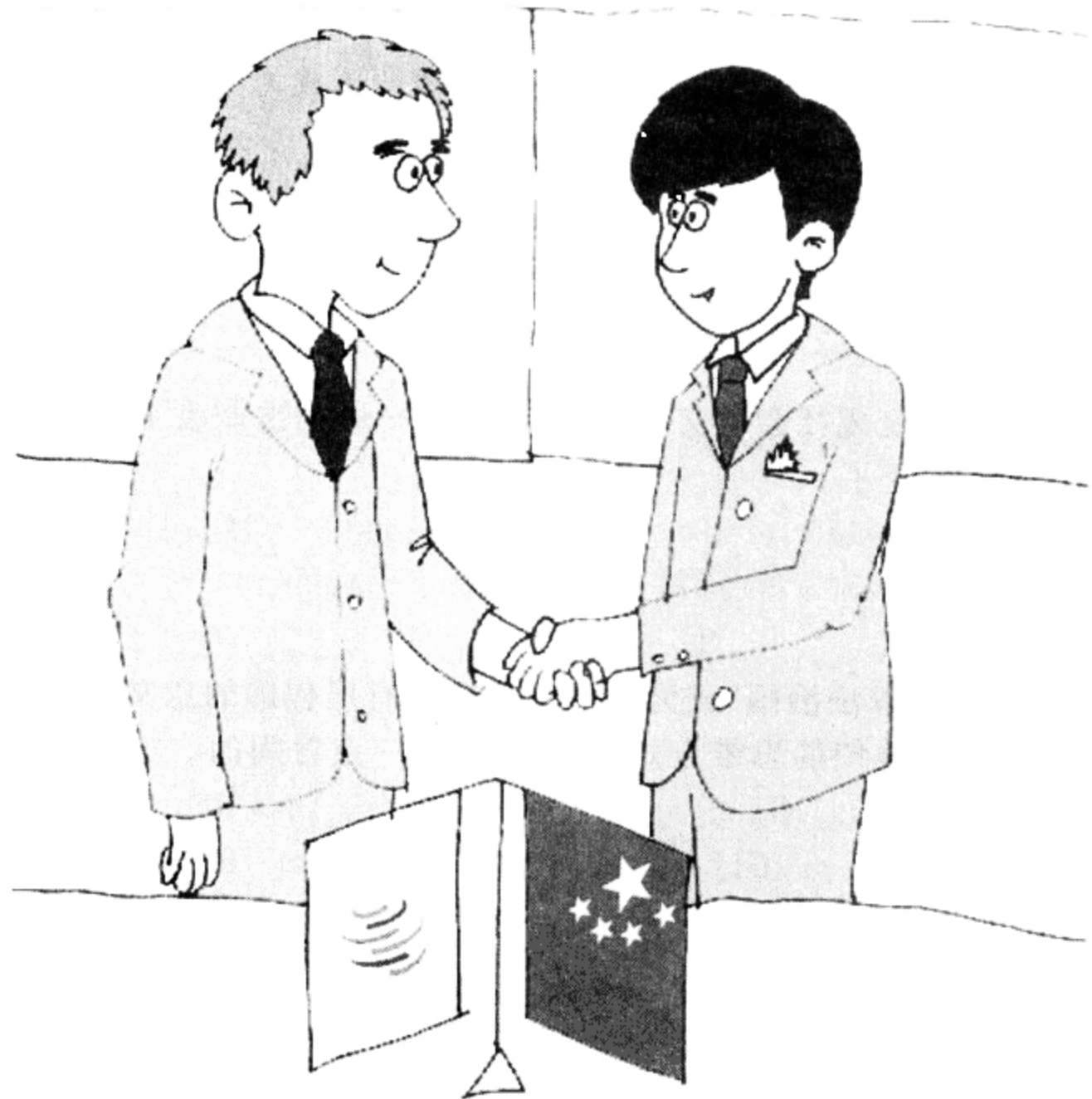
Indeed. It was a significant legal milestone since the goals of the national administration should be based on the legal system. However, it will still take time for people to change how they think.

**张晋:** 一旦人们感受到法律作为工具在经济生活中发挥的作用时,比方说合同法、仲裁法<sup>26</sup>、知识产权法对他们利益的保护时,他们就会很快地改变思维方式。

Once people learn about the benefits of the tools of economic law, such as contracts, arbitration, and intellectual property protection, they should come around pretty quickly.

柯礼思：如何让法律更好地体现出对国家、集体和私有财产等保护的原则，如何让法律既考虑到现代社会特色，同时又为未来的市场化转型留出足够的余地，需要立法者的智慧，而智慧来自于理性的思考和不断的探索。

It takes legislators' wisdom to figure out: how to legally further realize the principles of protecting the state, as well as collective and private properties; and how to take modern society's characteristics into consideration from its legal perspective, and in the meantime how to reserve sufficient space for future market transformation.



## 注 釋

- 1 框架(kuàngjià): frame; framework
- 2 机制(jīzhì): mechanism
- 3 在某种程度上(zài mǒuzhǒng chéngdù shàng): to some (or a certain) extent; to a certain degree; in a way
- 4 遵循(zūnxún): to follow; to adhere to
- 5 人治(rénzhì): rule of men; the concept that a country should be ruled by men
- 6 法治(fǎzhì): rule of law; the opposite of “rule of men”, the concept that a country should be ruled by law
- 7 深植(shēnzhí): deeply rooted
- 8 优于(yōuyú): to be better than; to be preferred over (to)
- 9 关系(guānxi): personal relations; connections, relations; relationship; social network
- 10 取长补短(qǔcháng-bǔduǎn): to complement each other; to facilitate mutual benefits
- 11 资产(zīchǎn): assets; capital
- 12 删除(shānchú): to delete; to cross out
- 13 履行(lǚxíng): to carry out; to fulfil; perform
- 14 审核(shěnhé): to review; to verify; to check; to examine and consider
- 15 批准(pīzhǔn): to approve; approval; to give official approval to or permission for
- 16 六法(Liùfǎ): The six laws which concerning the use of foreign capital and the protection of intellectual property were rectified and revised in December 2001.
- 17 中外合作经营企业法(Zhōngwài Hézuò Jīngyíng Qǐyèfǎ): *the Law on Chinese-Foreign Contractual Joint Ventures*. It was adopted on April 13, 1988. For more information, see Unit II of this textbook.
- 18 外资企业法(wàizī qǐyèfǎ): *the Law on Foreign-Capital Enterprises*. It was first approved on April 12, 1986 and then revised on Oct. 31, 2000.
- 19 商标法(shāngbiāofǎ): *the Trademark Law*. It was first approved by the State Council on Jan. 3, 1988. The Second Revision was approved by the State Council of the People's Republic of China on July 15, 1993.
- 20 著作权法(zhùzuòquánfǎ): *the Copyright Law*. It was approved by the State Council on May 24, 1991 and promulgated by Decree No. 1 of the National Copyright Administration on May 30, 1991.
- 21 专利法(zhuānlǐfǎ): *the Patent Law*. It was adopted on March 12, 1984 and revised on Sept. 4, 1992.
- 22 人权的白皮书(rénquán de báipíshū): the white paper on human rights. According to the 2003 white paper on human rights, the main purpose is: “To help the international community toward a better understanding of the human rights situation in China, we hereby give an overview of the developments in the field of human rights in China.” See The Information Office of the State Council, POC.
- 23 霸权主义(bàquán zhǔyì): Hegemonism; hegemony; hegemonic acts (behavior)
- 24 透明(tòumíng): transparent
- 25 思维方式(sīwéi fāngshì): way of thinking; mode of thinking
- 26 仲裁法(zhòngcáifǎ): *the Law of PRC on Arbitration*



## 时文选读

## WTO法十年与中国“入世”五年的协调发展

林道海(南京财经大学 法学院)

【摘要】WTO法十年以来为全球的多边贸易<sup>2</sup>确立了坚实的法制基础。“入世”以来,中国依据WTO协议改造了其国内法,尤其是涉外经贸法律,以使其与“入世”承诺基本一致。当前,中国法制与WTO法上之义务的差距主要在于司法审查<sup>3</sup>及其经济管理法规的“泛化”<sup>4</sup>。

由权力导向到规则导向的转变在当代国际社会已经是一个有目共睹<sup>5</sup>的基本趋势,这一趋势尤其表现在WTO法的建立和运作过程中。在过去的十年,WTO法为世界各地的多边贸易的自由化,也为经济的全球化和法治化<sup>6</sup>做出了巨大的贡献。与此同时,WTO法也为包括中国在内的世界各国社会生活的全面法治化提供了强大的推动力<sup>7</sup>,并为其奠定<sup>8</sup>了坚实的法制基础,尽管这后一方面目前看起来仅仅是一种间接的影响和作用。中国自2001年成为世界贸易组织的正式成员迄今已逾五年,目前正处在“入世”的后过渡期<sup>9</sup>，“入世”对中国社会生活多方面的影响现在正逐步显现出来。以推进中国社会主义法治国家建设、促进社会生活全面法治化的视角<sup>10</sup>研究WTO法十年以来所取得的成果及其对中国法治进程的深刻影响,在当今这一全球化时代尤为重要。

## WTO法十年的成就

世界贸易组织(World Trade Organization, WTO)系根据1994年4月15日通过的《建立世界贸易组织协议》<sup>11</sup>成立的,于1995年1月1日正式开始运作,迄今已逾十年。在此期间,世贸组织为全球范围内的多边货物贸易<sup>12</sup>、服务贸易<sup>13</sup>以及与贸易有关的知识产权贸易<sup>14</sup>确立了一个明确、高效、完备而坚实<sup>15</sup>的法制基础,一个法律制度的各项基本要素,如组织法、实体法及程序法,其都已完全具备。从全球范围的法治化进程,从对世界各国、尤其是发展中国家法制建设的促动<sup>16</sup>来看,WTO法都取得了举世瞩目<sup>17</sup>的巨大成就,尽管期间也有许多的不尽如人意<sup>18</sup>之处。以下谨

从 WTO 的组织法、程序法、法律渊源及法律责任诸方面对其成就做一简要阐述<sup>19</sup>。

首先,依据 WTO 组织法,WTO 由全体成员实行民主共和的集体治理<sup>20</sup>。部长会议是其最高权力机构,由所有成员的代表组成,每两年举行一次会议,可以对多边贸易协议的所有事务做出决定。总理事会<sup>21</sup>从日常工作,下设争端解决机构<sup>22</sup>和贸易政策审议机构<sup>23</sup>。三级机构有三个理事会<sup>24</sup>(货物贸易、服务贸易和知识产权)、六个委员会<sup>25</sup>以及三个工作组<sup>26</sup>。秘书处<sup>27</sup>是日常办事机构,由部长会议<sup>28</sup>任命的总干事<sup>29</sup>领导。依据 WTO 组织法,WTO 机构通常采用协商一致<sup>30</sup>的方法做出决定,只有在协商一致不可能时才进行投票,投票采取“一国一票制<sup>31</sup>”。显然 WTO 的决策机制<sup>32</sup>既符合国家平等原则,又可以在协商一致的过程中体现各国的谈判能力。这种决策机制体现了现代法治社会的民主共和制的精髓。

其次,从 WTO 实体法的调整范围来看,涵盖<sup>33</sup>了国际货物贸易、服务贸易、知识产权保护和国际直接投资。经济生活的各主要领域都与 WTO 体制有密切关系。WTO 对其成员在这一领域的管制行为进行国际管制,推动其成员做出并履行市场准入承诺<sup>34</sup>,对各国企业的国际和国内商业活动产生实质性影响,为国际和国内商业活动提供稳定性和可预期性<sup>35</sup>,并进而影响各国人民的生活。

第三,WTO 法对于传统国际法的最大发展就在于其有效而公正的争端解决机制或程序法<sup>36</sup>。依据 WTO 争端解决程序法,WTO 争端解决机制成为一个独特的融合政治(或外交)方法与法律(或司法与准司法<sup>37</sup>)方法于一体的司法体制,成为 WTO 体系中具有核心作用的机制。“从许多方面讲,争端解决机制是多边贸易体制的主要支柱,是 WTO 对全球经济稳定做出的最独特的贡献。”这一体制适用于全球世贸成员之间在所有的世贸协议执行过程中发生的争议。

(摘自《南京财经大学学报》2007 年第 1 期)

## 注 释

- 1 入世(rù shì): access to WTO
- 2 多边贸易(duōbiān mào yì): multilateral trade
- 3 司法审查(sī fǎ shěn chá): judicial investigation
- 4 泛化(fàn huà): generalize
- 5 有目共睹(yǒu mù gòng dǔ): be obvious to everyone; known to everyone
- 6 法治化(fǎ zhì huà): legalize
- 7 推动力(tuī dòng lì): driving force
- 8 奠定(diàn dìng): lay (a foundation)
- 9 后过渡期(hòu guò dù qī): post transition period

- 10 视角(shìjiǎo): visual angle; angle of view
- 11 《建立世界贸易组织协议》(Jiànlì Shìjiè Mào yì Zǔzhī Xié yì): this refers to the “Marrakesh Agreements”. Representatives of 124 countries and the European Communities sign the *Marrakesh Agreements* on April 15, 1994 revising the General Agreement on Tariffs and Trade and initiating the World Trade Organization (effective January 1, 1995).
- 12 货物贸易(huòwù mào yì): trade in goods
- 13 服务贸易(fúwù mào yì): trade in services
- 14 知识产权贸易(zhīshì chǎnquán mào yì): trade-related aspects of intellectual property rights
- 15 坚实(jiānshí): solid
- 16 促动(cùdòng): promote and facilitate; impel
- 17 举世瞩目(jǔshìzhǔmù): attract worldwide attention
- 18 不尽如人意(bù jìn rú rényì): not completely as one wishes; not totally satisfactory
- 19 阐述(chǎnshù): elaborate; expound; elucidate
- 20 集体治理(jítǐ zhǐlǐ): collective management
- 21 总理事会(zǒng lǐshìhuì): General Council
- 22 争端解决机构(zhēngduān jiějué jīgòu): General Council meeting as Dispute Settlement Body, Appellate Body Dispute Settlement panels  
争端解决(zhēngduān jiějué): dispute solving
- 23 贸易政策审议机构(mào yì zhèngcè shěnyì jīgòu): General Council Meeting as Trade Policy Review Body
- 24 三个理事会(sān ge lǐshìhuì): Three councils: Council for Trade in Goods, Council for Trade-Related Aspects of Intellectual Property Rights and Council for Trade in Services.
- 25 六个委员会(liù ge wěiyuánhuì): Six Committees: Committees on Trade and Environment; Trade and Development; Regional Trade Agreements; Balance of Payments; Budget, Finance and Administration; and Working Parties on Accession.
- 26 三个工作组(sān ge gōngzòuzǔ): Three Working Groups on: Trade, Debt and Finance Trade and Technology Transfer; Relation between Trade and Investment (interaction between Trade and Competition Policy); and Transparency in Government Procurement.
- 27 秘书处(mìshūchù): The Secretariat
- 28 部长会议(bùzhǎng huìyì): Ministerial Conference
- 29 总干事(zǒnggànshì): Director-General
- 30 协商一致(xiéshāng yízhì): reaching unanimity through negotiation
- 31 一国一票制(yìguóyípiàozhì): one county one vote system
- 32 决策机制(juécè jīzhì): decision-making mechanism
- 33 涵盖(hángài): contain; (comprehensive) coverage
- 34 市场准入承诺(shìchǎng zhǔnrù chéngnuò): commitment on market access
- 35 可预期性(kěyùqīxìng): predictability
- 36 程序法(chéngxùfǎ): procedure law
- 37 准司法(zhǔnsīfǎ): prejudicial

# 练习

## 一、解释下列词语

1. 世界贸易组织
2. 人治
3. 法治
4. 经济的法制化
5. 多边贸易
6. 货物贸易
7. 服务贸易
8. 知识产权贸易
9. 理事会
10. 思维方式
11. 市场准入承诺
12. 决策机制

## 二、回答下列问题

1. 与中国贸易相关的六法包括哪些法律?
2. 知识产权贸易所涵盖的范围包括哪些?
3. 国际之间如果发生贸易争端,应该如何解决?
4. 简述世界贸易组织的组织机构。
5. 简述世界贸易组织近年来所取得的一些重要成就。





# 第二单元

## 中国涉外投资法

Unit II

Chinese Foreign Investment Law



# 導 論

## 涉外投資法概述<sup>1</sup>

自中國實施改革開放政策以來,外商在中國的投資數額急劇攀升<sup>2</sup>。外商投資給中國帶來了更加先進的技術水平和管理水平,擴大了就業<sup>3</sup>,增加了中國的出口總量<sup>4</sup>。同時,對於外商而言,中國給他們提供了充足的自然資源<sup>5</sup>和勞動力資源<sup>6</sup>。他們希望在中國法律的保護下,拓寬<sup>7</sup>在中國的市場,充分利用中國地大物博<sup>8</sup>的優勢<sup>9</sup>,降低生產成本<sup>10</sup>,增強國際競爭力<sup>11</sup>,開拓更廣闊的<sup>12</sup>消費市場<sup>13</sup>,取得高額利潤<sup>14</sup>,從而給本國經濟發展和收支平衡<sup>15</sup>帶來積極的促進作用<sup>16</sup>。

外商在中國的投資一般可以分直接投資<sup>17</sup>和間接投資<sup>18</sup>兩種類型。直接投資指的是投資者將其資產投放到另一個國家,通過直接的生產經營活動<sup>19</sup>而獲取經濟利益<sup>20</sup>的一種投資行為。間接投資是指投資者通過借貸<sup>21</sup>或證券交易<sup>22</sup>的方式將資本投入另一個國家而獲得利益的投資行為。

現在,外商在中國的投資主要以直接投資方式為主。一般通過簽訂<sup>23</sup>國際合作開發<sup>24</sup>、經營協議<sup>25</sup>,或設立國際投資企業<sup>26</sup>的形式,將資本投放到中國。中國根據外商投資設立企業的不同形式分別制定了相關法律。在中國,外商投資企業主要有四種:外商投資股份有限公司<sup>27</sup>、中外合資經營企業<sup>28</sup>、中外合作經營企業<sup>29</sup>、外商獨資企業<sup>30</sup>。這四類企業都是依照中國的法律,經相關行政部門<sup>31</sup>批准後設立的中国企業,所以它們當然成為中國的商事主體<sup>32</sup>,其行為受中國法律保護。除了外商投資股份有限公司適用《中華人民共和國公司法》外,剩下的三類企業分別適用《中華人民共和國中外合資經營企業法》、《中華人民共和國中外合作經營企業法》、《中華人民共和國外資企業法》相關的規定。

中外合資經營企業和中外合作經營企業之間的差別主要有以下幾個方面:第一,中外合資經營企業是中外雙方共同出資,按照股權比例<sup>33</sup>分享利潤、分擔風險<sup>34</sup>及虧損<sup>35</sup>;而中外合作經營企業是一種契約式的合營企業<sup>36</sup>,雙方按照合作合同<sup>37</sup>而不是股權比例確定雙方的權利義務<sup>38</sup>。第二,中外合資經營企業的组织形式為有限責任公司<sup>39</sup>,因而具有中國法人<sup>40</sup>資格;而中外合作經營企業可以在多種組織形式中進行選擇。第三,中外合資經營企業的最高權力機構是董事會<sup>41</sup>,而中外合作經營企業的组织機構和管理方式則靈活多樣<sup>42</sup>,可有多种選擇。另外,外商在合作企業中投資的比例一般比較大,所承擔的風險也比較大。所以《中華人民共和國中外合作經營企業法》21條特別規定,合作期滿之前,外方可以依照合同的約定先行收回投資。

相比之下<sup>43</sup>,外商独资企业虽然有更加独立的经营权、管理权,但是这种企业形式不利于外商尽快<sup>44</sup>熟悉<sup>45</sup>、融入<sup>46</sup>中国市场,使得外商在中国的经营活动尤为被动<sup>47</sup>,大大妨碍<sup>48</sup>其开展正常的经营活动。

在加入 WTO 后,中国取消了三资企业<sup>49</sup>“自行解决外汇收支平衡”的规定;取消了外商投资企业在购买原材料、燃料<sup>50</sup>或其他半成品<sup>51</sup>等物资时优先<sup>52</sup>在中国购买的规定。这些条款的废止<sup>53</sup>,解除了对外商投资企业的诸多限制,有效地保护外商在中国的投资。此外,在 2002 年,国务院<sup>54</sup>颁布了《指导外商投资方向规定》<sup>55</sup>,将投资项目分为四大类:鼓励类<sup>56</sup>、限制类<sup>57</sup>、禁止类<sup>58</sup>、允许类<sup>59</sup>。中国政府对于选择投资农村新技术、农业综合开发<sup>60</sup>和能源、交通、重要原材料工业等的鼓励类投资,给予了相应的<sup>61</sup>优惠政策<sup>62</sup>。这为外商投资指明了方向,提供合理引导。

生产和资本的全球化,对整个世界的经济增长以及国际间分工与合作<sup>63</sup>都有重大的意义。在此背景下,中国的涉外投资法就发挥着鼓励、保护外商投资,疏导资本流向<sup>64</sup>,引导经济发展的重要作用。

## 注 释

- 1 概述(gàishù): outline; introduction; summary
- 2 急剧攀升(jíjù pānshēng): steep rise; sharp increase
- 3 就业(jiùyè): employment
- 4 出口总量(chūkǒu zǒngliàng): total volume of exports
- 5 自然资源(zìrán zīyuán): natural resources
- 6 劳动力资源(láodòngli zīyuán): labor resources
- 7 拓宽(tuòkuān): widen; broaden
- 8 地大物博(dìdà-wùbó): vast territory and abundant resources; vast land and rich natural resources
- 9 优势(yōushi): advantage
- 10 生产成本(shēngchǎn chéngběn): production costs
- 11 竞争力(jìngzhēnglì): competitiveness
- 12 广阔的(guǎngkuò de): broad; vast
- 13 消费市场(xiāofèi shìchǎng): consumer market
- 14 高额利润(gāo'é lìrùn): high profits
- 15 收支平衡(shōu zhī pínghéng): revenues and expenditures are balanced
- 16 积极的促进作用(jíjī de cùjìn zuòyòng): promote a positive effect
- 17 直接投资(zhíjiē tóuzī): direct investment
- 18 间接投资(jiànjiē tóuzī): indirect investment
- 19 生产经营活动(shēngchǎn jīngyíng huódòng): activity of production and management
- 20 经济利益(jīngjì lìyì): economic profit; economic benefit
- 21 借贷(jièdài): borrow, ask for a loan, loan
- 22 证券交易(zhèngquàn jiāoyì): securities trade; trading securities

- 23 签订(qiāndìng): conclude and sign (a contract, treaty, etc.)
- 24 合作开发(hézuò kāifā): collaborate and develop; jointly develop
- 25 经营协议(jīngyíng xiéyì): management and negotiation
- 26 投资企业(tóuzī qīyè): investment enterprises
- 27 外商投资股份公司(wàishāng tóuzī gǔfèn gōngsī): foreign investment (limited) company
- 28 中外合资经营企业(zhōngwài hézī jīngyíng qīyè): Chinese-foreign joint venture enterprise (company)
- 29 中外合作经营企业(zhōngwài hézuò jīngyíng qīyè): Chinese-foreign corporative contractual joint venture enterprise (company)
- 30 外商独资企业(wàishāng dúzī qīyè): foreign investor wholly-owned enterprise (company)
- 31 行政部门(xíngzhèng bùmén): administrative department
- 32 商事主体(shāngshì zhǔtǐ): business entity
- 33 股权比例(gǔquán bǐlì): stockholder share
- 34 分担风险(fēndān fēngxiǎn): share risk
- 35 亏损(kuīsǔn): loss; deficit
- 36 契约式的合营企业(qīyuēshì de héyíng qīyè): contractual joint venture enterprises
- 37 合作合同(hézuò hétóng): contractual (joint venture) contract
- 38 权利义务(quánlì yìwù): rights and obligations
- 39 有限责任公司(yǒuxiàn zérèn gōngsī): limited liability company
- 40 法人(fǎrén): corporation; artificial person
- 41 董事会(dǒngshìhuì): board of directors
- 42 灵活多样(línghuó duōyàng): flexible and versatile; flexible and diversified
- 43 相比之下(xiāngbǐ zhī xià): in contrast with
- 44 尽快(jǐnkuài): as soon as possible
- 45 熟悉(shúxī): familiar with
- 46 融入(róngrù): adjust into (a new environment); integrate into
- 47 被动(bèidòng): be passive
- 48 妨碍(fáng'ài): hold back; stop moving forward
- 49 三资企业(sān zī qīyè): the Three Funds Enterprises
- 50 燃料(ránliào): fuel
- 51 半成品(bànchéngpǐn): semi-manufactured goods; semi-finished product
- 52 优先(yōuxiān): have priority; take precedence
- 53 废止(fèizhǐ): abolish; annul
- 54 国务院(Guówùyuàn): the State Council of PRC
- 55 《指导外商投资方向规定》(Zhǐdǎo Wàishāng Tóuzī Fāngxiàng Guīdìng): *Provisions Guiding Foreign Investment*
- 56 鼓励类(gǔlìlèi): encouragement category
- 57 限制类(xiànzhìlèi): restricted category
- 58 禁止类(jìnzhǐlèi): prohibited category
- 59 允许类(yǔnxǔlèi): permitted category
- 60 农业综合开发(nóngyè zōnghé kāifā): comprehensive development in agriculture
- 61 相应的(xiāngyìng de): corresponding; relevant
- 62 优惠政策(yōuhuì zhèngcè): favorable policy
- 63 分工与合作(fēnggōng yǔ hézuò): share the work and work as a team; perform a task by division of labor; division of labor
- 64 疏导资本流向(shūdǎo zīběn liúxiàng): guide the inflow and outflow of the capital



### An Overall View of Foreign Investment Law

Since China's economic reform and liberalization policy were implemented, foreign investment in China has increased sharply. It has brought China advanced technology and management skills, expanded the job market, and increased exports. In the meantime, from foreign investors' perspective, China's vast consumer market provides them with plentiful natural resources and labor pools. Under the protection of Chinese law, foreign investors can further expand China's market, sufficiently utilize China's rich resources, lower production costs, increase compatibility worldwide, earn high profits, and bring positive effects on economic growth as well as balanced expenses to their home countries.

Foreign investment can be divided into two categories: direct investment and indirect investment. Direct investment refers to investors that invest their assets in a different country. It is a type of investment behavior through which investors gain profits through direct activities of production and management. Indirect investment refers to investors who invest their capital in a foreign country, but the investors receive their earnings by making loans or trading securities.

Nowadays most foreign investment in China is in the form of direct investment. Foreign investors normally invest their assets in China by signing joint development or management agreements, or by setting up international investment enterprises. Based on different types of foreign investment, the Chinese government thus formulates or adjusts relevant rules or regulations in order to fit their needs. There are four main types of foreign enterprises in China: foreign investment limited company, Chinese-foreign joint venture enterprise, Chinese-foreign corporative contractual joint venture enterprise, and foreign investor wholly-owned enterprise. In accord with Chinese law and with the approval of relevant Chinese administrative department, these four types of enterprises have become official business entities in China. Their activities are regulated by Chinese law: the foreign investment limited company follows the *Company Law of the People's Republic of China*, and the other three follow the *Chinese-Foreign Equity Joint Venture Law of the People's Republic of China*, the *Chinese-Foreign Corporative Contractual Joint Venture Law of the People's Republic of China*, and the *Foreign Investor Wholly-Owned Enterprise Law of the People's Republic of China* respectively.

The main differences between a Chinese-foreign joint venture enterprise and a Chinese-foreign corporative contractual joint venture enterprise are: 1. A joint venture

enterprise is jointly invested in by Chinese and foreign investors. They share profits, risks and losses based on their investment shares. And a contractual joint venture enterprise is a type of contractual company: their rights and obligations are based on their contractual agreement, not their investment shares. 2. The organizational structure of a joint venture enterprise is different from that of a contractual joint venture enterprise. The former has limited liabilities and is qualified to function as a corporation in China, while the latter is more flexible as far as its organizational structure is concerned. 3. The highest administrative body of a Chinese-foreign joint venture enterprise is the board of directors, but the organizational structure and management style of a contractual joint venture enterprise are more flexible, and not limited to the board of directors. In addition, foreign investors in a contractual joint venture structure normally have larger shares of the investment, but they also share greater liabilities. According to the *Chinese-Foreign Corporative Contractual Joint Venture Law of the People's Republic of China*, Provision 21, foreign investors are permitted to withdraw their investment before the expiration date according to the agreement made in their contract.

Comparatively speaking, though a foreign investor wholly-owned enterprise enjoys more controlling power, such as making independent decisions on management, etc. it is not recommended. This is because it is not beneficial for foreign investors to try to familiarize themselves with or merge into the Chinese market within a short period of time. Under such special Chinese market conditions, foreign investors' activities in China will become more passive, which will greatly hinder the normal development or growth in their business activities.

Since China became a member of the WTO, the Chinese government abolished such provisions as the Three Funds Enterprises that stipulated "solving on their own the balancing of foreign exchange revenue and expenditure issues," and the stipulation that foreign investors must give priority to Chinese sources in purchasing their raw materials, fuel or other semi-finished products. By abolishing these provisions and removing many restrictions placed upon foreign investors, the Chinese government also provided further protection for foreign investment in China. When the State Council promulgated *Provisions on Guiding Foreign Investment Direction* in 2002, the provisions classified foreign investment into four categories: encouraged, restricted, prohibited, and permitted projects. The Chinese government gives preferential treatment for encouraged projects such as new agricultural technology, comprehensive agricultural development and for energy, transportation and key raw materials industries. These provisions provide clear directions and guidelines for foreign investors.

The globalization of production and capitalization has had a great impact on global economic growth and the division of labor. Under such circumstances, the Chinese foreign investment law has played an important role in encouraging and protecting foreign investment, and guiding the flow of foreign capital and economic growth.

## 第四课

### *Lesson Four*

## 中国涉外投资的现状<sup>1</sup>

### *Current Status of Foreign Investment in China*

张 晋：我刚刚看了外商<sup>2</sup>在中国投资的统计数字<sup>3</sup>，仅仅2003年的第一季，外商的投资就比去年同期增长<sup>4</sup>大约23%，有5309个外资项目获得批准。

I just saw the most recent statistics for foreign investment in China. In the first quarter of 2003 alone, foreign investment increased significantly over the amount for the first quarter of the previous year. The growth rate was about 23 percent, with 5,309 foreign-funded projects approved.

柯礼思：近年来，美国和欧盟在中国的投资比率大幅增长<sup>5</sup>，这是真的吗？

Is it true that in recent years the quantity of the US and EU shares have greatly increased?

教 授：确实是真的，特别是欧盟的一些成员国，如法国和德国，他们已经在汽车零件<sup>6</sup>和汽车制造行业投入了大量的资金。

Yes, that's true. In particular, some EU members, such as France and Germany, have invested large amounts in the auto parts and automotive industries.

张 晋：除了上面提及的国家和地区外，还有没有其他的国家和地区也在中国投下巨额的资金？

Aside from the aforementioned countries and regions mentioned above, are there any other countries or regions that have invested significantly in China?

教授：美国、日本、新加坡和中国台湾是外商直接投资最主要的国家和地区。

The US, Japan, Singapore and China's Taiwan Province are the most important sources of FDI in China.

张晋：那美国在中国大陆的直接投资要比日本多吗？

Do the United States have more FDI in China than Japan?

教授：是，但差距不是很大。以 2000 年为例，美国累计合同总投资额和实际累计总投资额分别占 8.96 和 8.62 个百分点，而日本则分别为 5.74 和 7.98 个百分点。

Yes, but not by much. Again, in the year 2000, US investment accounted for 8.96 percent and 8.62 percent of the total cumulative contractual investment and the total cumulative actual investment, respectively. And Japan was at about 5.74 percent and 7.98 percent, respectively.

张晋：我觉得自从中国成为世界贸易组织的成员国后，中国的投资环境越来越具吸引力，而且也变得更和谐了。

I suppose that China's investment environment has become even more appealing and harmonious since China became a member of the World Trade Organization.

教授：事实上，我认为在中国成为世界贸易组织的成员国之前，国外资金已经大量涌入，这也是中国经济快速增长的结果。

As a matter of fact, I think that the surge of overseas investment, which actually predates China's entry into the World Trade Organization, is primarily a result of China's rapidly growing national economy.

柯礼思：联合国贸易和发展会议<sup>7</sup>在 2003 年就预测，中国从该年起很可能会第一次超过美国，成为世界上最大的外商直接投资的东道国<sup>8</sup>。

The 2003 United Nations Conference on Trade and Development (UNCTAD) predicted that China might for the first time overtake the United States to become the largest foreign direct investment host country in the world since 2003.

教授：事实上，根据世界银行的报告，中国已经取代美国，成为世界上涉外直接投



资最大的受惠国<sup>9</sup>,其总额达 527 亿美元,等于 2002 年其他发展中国家<sup>10</sup> 外商投资总额(1430 亿美元)的 37%。

Actually, according to the World Bank Report, China has already overtaken the US as the world's largest recipient of foreign investment, having taken in US \$52.7 billion. It equals to 37 percent of the total amount, US\$143 billion, which investors invested in developing countries in 2002.

**张 晋:** 外商在美国的直接投资大为减少,这是不是因为美伊战争<sup>11</sup>、国内经济情况的不稳定以及股票市场仍然疲软<sup>12</sup>,降低了人们对商业的信心而造成的?

Is the substantial decrease in FDI flow into the US caused by the war in Iraq, the uncertain economic situation, and the lingering stock market slump, all of which undermine business confidence?

**教 授:** 我想跟上述因素都有关。外商在中国的直接投资增长得较快,还有另外一个原因,就是中国逐渐完善外商投资法以保护外商。

I think it has something to do with each of those factors. Another reason that China's FDI is experiencing faster growth is that more comprehensive foreign investment laws have gradually been established to protect foreign investors.

**张 晋:** 外商在中国的投资主要集中在哪些产业?

What types of industries is FDI in China primarily concentrated in?

**教 授:** 早期的外商直接投资主要来自香港的中小企业,而大部分集中在以出口为主<sup>13</sup>和劳动密集型<sup>14</sup>的工厂制造业<sup>15</sup>。

In earlier times, most FDI came from small and medium-sized enterprises in Hong Kong and was highly concentrated in export-oriented and labor-intensive manufacturing industries.

**柯礼思:** 现在国外的投资多半集中在高科技<sup>16</sup>制造业和服务业<sup>17</sup>,对吗?

I understand that foreign investment nowadays is concentrated more in high-tech manufacturing industries and services, right?

**教 授:** 对,现在越来越多的国外直接投资都集中在资金或是技术密集<sup>18</sup>的部门。

Yes, more and more FDI is now concentrating in capital and technology-intensive sectors.

**张 晋:** 我认为过去十年来中国的基础设施<sup>19</sup>和环境保护政策都大大地改进了,而相关的劳动力和资源优势对国外投资者而言,也变得越来越具吸引力了。  
I think China's infrastructure and environmental protection policy have greatly improved over the past decade, and its relative advantages in terms of labor and resources have become increasingly attractive to foreign investors.

**柯礼思:** 我看总的投资环境还在继续不断地改善,今后外国在中国的投资也会更快增长。

I guess as the general investment environment continues to improve, foreign investment in China will continue to grow from now on.

**教 授:** 我也这么认为。而中国入世的协议更进一步开放了中国销售、服务和经销等行业,使外商能够直接参与了。

I do think so. And the accession agreements for China's entry into the WTO have further opened China's sales, service, and distribution sectors to direct foreign participation.

**柯礼思:** 您的意思是说,凡是对外国制造商的销售、服务和经销等业务的限制都已经取消了吗?

Do you mean that China has phased out all of the restrictions on the sales, service, and distribution operations of foreign manufacturing companies?

**教 授:** 并不是所有的限制都是同一时间取消的,但是自2005年的1月起,所有对外国经销商的限制都已经取消了。另外,中国还会让外国公司参与一些与经销业务有关的附属行业<sup>20</sup>,比方说货运代理服务业、贮存<sup>21</sup>和仓储服务业<sup>22</sup>、包装服务业、快递<sup>23</sup>服务业等。

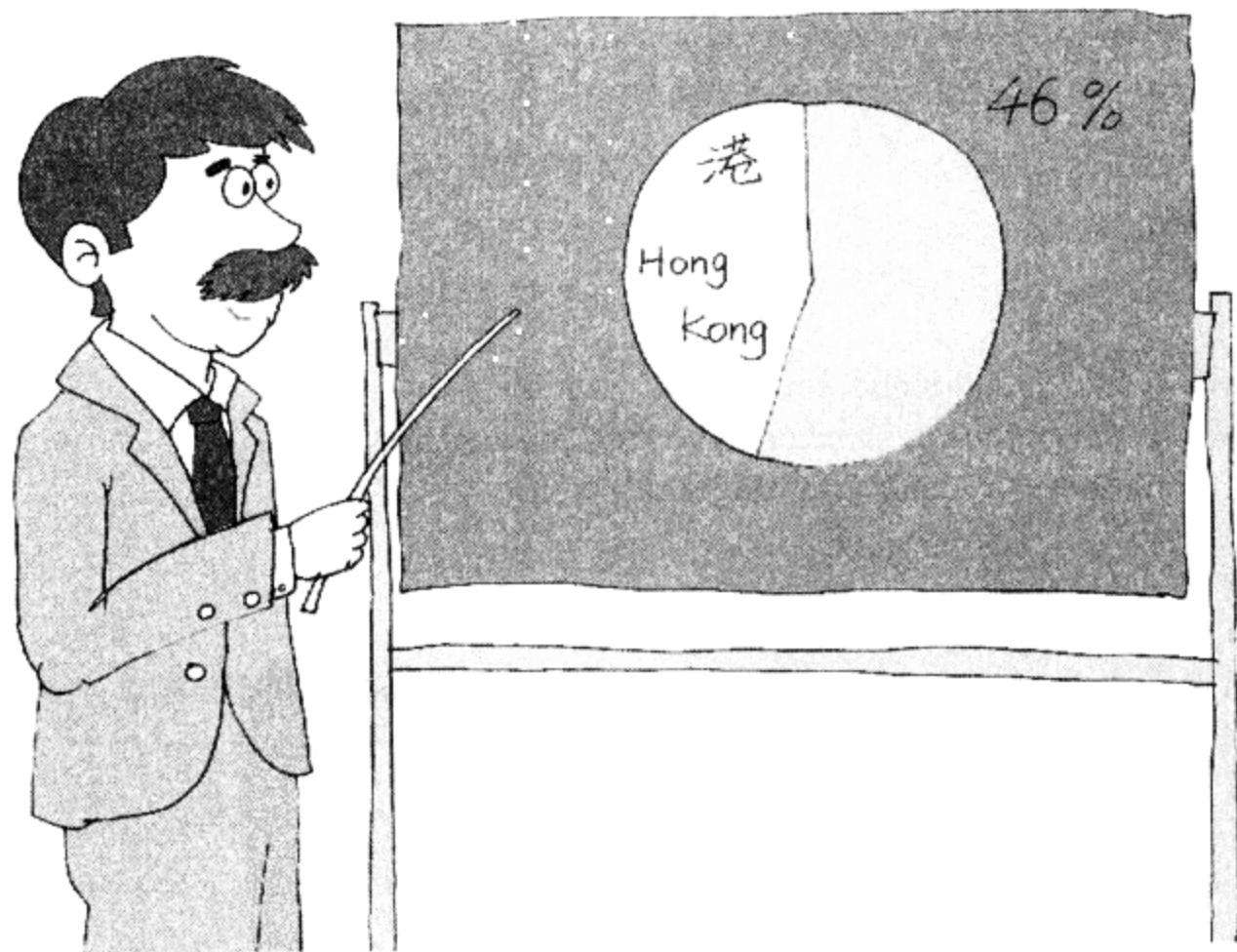
Not all of the restrictions were lifted at once, but all restrictions on foreign distributors have been phased out by January 1, 2005. In addition, China will allow foreign companies to operate a number of ancillary services related to distribution, such as freight forwarding agency services, storage and warehousing services, packaging services, and courier services.

张 晋：在 20 世纪 90 年代初期，有好几家美国公司在中国投入巨资开发中国直销网<sup>24</sup>，但是在 1998 年的 4 月，中国政府为了废除金字塔式的销售网<sup>25</sup>，宣布禁止所有的直销业，现在这项直销禁令取消了吗？

In the early 1990s, several American companies made substantial investments in the development of direct-selling networks in China. But in April 1998, the Chinese government announced a ban on all direct-selling in order to rid the market of pyramid schemes. Has the ban on direct-selling been lifted?

教 授：中国入世的协议书上特别提到这点。现在不再用“直销”这个字眼了，用的是“没有固定地点<sup>26</sup>的批发或零售业”。从 2003 年的 1 月起，直销业和连锁业<sup>27</sup>已被允许在中国运作而不受限制了。

China's WTO accession agreements specifically addressed this issue. Now the term "direct sales" is no longer used, instead, it is replaced by "wholesale or retail trade services away from a fixed location". Direct sales and franchising have been permitted to operate in China without any restrictions since January, 2003.



柯礼思：最近美国加州政府的中国贸易和投资办公室发表了题为《2008年北京奥运会<sup>28</sup>：加州公司的投资机会》的报告，鼓励美国公司到中国去投标<sup>29</sup>。

Recently, the California Office of Trade and Investment in China published a document entitled "2008 Beijing Olympics: Opportunities for California Firms" with its aim to encouraging American companies.

张晋：我听说北京市副市长最近率领了一个代表团到西雅图去给当地的企业介绍2008年奥运会的商机，正如一家报纸报道，“有两百多人挤在一间会议室里聆听未来几年世界最大的销售市场之一”的商机。

I heard that the Vice Mayor of Beijing recently led a delegation to Seattle to brief businesses there on the opportunities offered by the 2008 Summer Olympics. As one newspaper reported, there were "more than 200 people crowded into a meeting room to hear about one of the biggest pots of spending in the world in the next near years."

柯礼思：中国有如此广阔的市场，我看此时此刻我们更加需要学习他们的商事法律了。

With all of the business opportunities in China, we now more than ever need to learn about their business laws.

### 注 释

- 1 现状(xiànzhuàng): status quo; the current situation
- 2 外商(wàishāng): overseas investors, overseas business person
- 3 统计数字(tǒngjì shùzì): statistics; statistical figures
- 4 增长(zēngzhǎng): growth
- 5 大幅增长(dàfú zēngzhǎng): large-scale growth
- 6 汽车零件(qìchē língjiàn): auto parts
- 7 联合国贸易和发展会议(Liánhéguó Màoùyì hé Fāzhǎn Hùiyì): 简称“贸发会议”: The United Nations Conference on Trade and Development, or UNCTAD
- 8 东道国(dōngdàoguó): host nation
- 9 受惠国(shòuhuìguó): beneficiary country; beneficiary
- 10 发展中国家(fāzhǎngzhōng guójiā): developing country
- 11 美伊战争(Měi-Yī Zhànzhēng): US-Iraq War
- 12 疲软(pírǎn): weak; slump
- 13 以出口为主(yǐ chūkǒu wéi zhǔ): having export as its main purpose; export-oriented

- 14 劳动密集型(láodòng mìjìxíng): labor intensive type  
 15 工厂制造业(gōngchǎng zhìzàoyè): manufacturing industries  
 16 高科技(gāokējì): high-tech  
 17 服务业(fúwùyè): service industry  
 18 技术密集(jìshù mìjì): technology-intensive  
 19 基础设施(jīchǔ shèshī): infrastructure  
 20 附属行业(fùshǔ hángyè): ancillary/affiliated/subsidiary industry  
 21 贮存(zhùcún): storage; to keep in storage  
 22 仓储服务业(cāngchǔ fúwùyè): warehousing service industry  
 仓储(cāngchǔ): storage  
 23 快递(kuàidì): express delivery, courier  
 24 直销网(zhíxiāowǎng): direct-selling network  
 25 金字塔式的销售网(jīnzitǎshì de xiāoshòuwǎng): pyramid-style selling network  
 26 固定地点(gùdìng dìdiǎn): fixed location  
 27 连锁业(liánsuǒyè): chain (store) industry  
 28 奥运会(Àoyùnhuì): Olympic Games  
 29 投标(tóubiāo): to enter a bid; bid

## 时文选读

### 外商投资我国服务业:现状与建议

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**【摘要】**20世纪80年代以来,随着全球产业结构调整和国际分工的日益深化,服务业已取代制造业成为对外投资领域的主流。与此相适应,我国服务业吸收的外商直接投资也呈现快速增长的态势。但由于我国服务业发展滞后,服务体系不完善,法律法规不健全,一定程度上制约了我国对服务业外资的吸收和高效利用。文中对我国服务业在利用外商直接投资中出现的问题及其应对策略进行初步的探讨。



20世纪80年代以来,随着全球产业结构调整和国际分工<sup>1</sup>日益深化<sup>2</sup>,服务业已取代制造业成为对外投资领域的主流。我国服务业吸收外商直接投资也呈现快速增长态势。2004年我国服务贸易领域新设立外商投资企业6852家,合同外资金额267.42亿美元,实际使用122.28亿美元,其增幅<sup>3</sup>均高于同年外商直接投资平均水平。外资流入我国服务市场,弥补<sup>4</sup>了我国对服务业投入资金不足,并对我国产业结构调整升级<sup>5</sup>和现代服务业发展意义重大。但由于我国服务业发展滞后<sup>6</sup>,服务体系不完善,法律法规不健全,一定程度上制约了我国服务业对外资的吸收和高效利用。

### 我国服务业吸收外商直接投资的现状

1. 外资总体规模偏小<sup>7</sup>。由于“全球制造中心<sup>8</sup>”的产业定位<sup>9</sup>和我国服务业对外开放水平制约,长期以来,外商在我国直接投资主要集中在第二产业<sup>10</sup>的制造业,服务业所占比重相对偏低<sup>11</sup>。截至2004年,我国服务贸易领域共设立外商投资企业112777家,占同期全国累计<sup>12</sup>新设立外商投资企业总数的22.16%;合同外资金额3266.71亿美元,占同期引资合同总金额的29.8%。而2002年服务业在全球外国直接投资存量中的比重已达到60%,这一比重仍呈不断增长趋势。这说明外商直接投资我国服务业的总体规模偏小,产业结构不合理,对我国产业结构调整升级的推动作用有限。

2. 投资结构不合理。从我国服务业吸收外商直接投资的行业结构看,截至2004年,外商投资最多的是房地产业<sup>13</sup>,占服务业合同利用外资总额59.5%,其次是租赁<sup>14</sup>和商业服务业(11.3%)、批发和零售业(9.59%)、交通运输、仓储和邮政业(8.02%)(见下页表1)。外商对我国服务业投资主要集中于劳动密集型<sup>15</sup>的传统服务部门,而金融<sup>16</sup>、保险<sup>17</sup>、信息和咨询<sup>18</sup>等技术密集型和知识密集型的服务行业投资比重却明显低于世界平均水平,也低于发展中国家平均水平。外资在卫生<sup>19</sup>、体育、文教、科学研究和技术服务等领域的投资比重也很低。这对于我国服务业中的新兴行业发展壮大、行业结构优化升级,未能起到充分的引导和提高作用。

3. 服务管理体制滞后。由于服务业是由一些相关行业组成的产业群,要求一国对其进行整体协调和管理。而目前我国服务业管理体制存在很多缺陷,主要表现为:服务业缺乏统一的协调管理部门,中央和地方有关服务业的政策和规章不统一;服务业各有关部职能部门各自为政<sup>20</sup>,在管理中多头、交叉管理<sup>21</sup>和条块分割<sup>22</sup>;服务业各行业管理部门只局限于管理直属系统,对直属系统实行保护主义<sup>23</sup>,行业垄断现象多有发生;有些地方政府越权<sup>24</sup>审批外商投资项目,一些企业协助外商变相<sup>25</sup>进入我国服务市场,从而造成承诺条件<sup>26</sup>和实际市场开放程度相差很大。另外,在引资政策方面,只注重开放与扩大准入领域,对后续管理<sup>27</sup>、市场规则与产业标准化管理和监督<sup>28</sup>不到位<sup>29</sup>。这些都已成为我国服务业引资<sup>30</sup>中的体制障碍<sup>31</sup>。

表 1 截至<sup>32</sup>2004 年外商直接投资行业结构

行业名称	项目数	比重%	合同外资	比重
总计	508941	100	10966.09	100
第一产业 <sup>33</sup>	14463	2.84	213.07	1.94
第二产业	381701	75	7486.31	68.27
第三产业 <sup>34</sup>	112777	22.16	3266.71	29.79
交通运输、仓储和邮政业	5873	1.15	261.86	2.39
信息传输、计算机服务和软件业	1622	0.32	20.12	0.18
批发和零售	25265	4.96	313.42	2.86
住宿和餐饮业	1174	0.23	21.69	0.2
金融业	91	0.02	14.4	0.13
房地产业	42708	8.39	1943.84	17.73
租赁和商业服务	18099	3.56	369.13	3.37
科学研究、技术服务和地质勘查 <sup>35</sup> 业	4157	0.82	51.66	0.47
水利、环境和公共设施 <sup>36</sup> 管理业	164	0.03	8.22	0.07
居民服务和其他服务业	10584	2.08	168.61	1.54
教育	1541	0.30	27.58	0.25
卫生、社会保障 <sup>37</sup> 和社会福利业	1225	0.24	55.81	0.51
文化、体育和娱乐业	272	0.05	10.13	0.09
公共管理和社会组织	2		0.14	

数据来源:中国投资指南网

(摘自《《价值工程》2007 年第 4 期》)

## 注释

- 1 国际分工(guóji fēngōng): international corporation; labor division
- 2 日益深化(rìyì shēnhuà): deepening day by day; increasingly deepening
- 3 增幅(zēngfú): increase rate
- 4 弥补(míbǔ): fill up (a gap); make up
- 5 升级(shēngjí): upgrade; go up one or more grades
- 6 滞后(zhìhòu): belated; stagnant; fall behind
- 7 偏小(piānxiǎo): on the small side
- 8 全球制造中心(quánqiú zhìzào zhōngxīn): global manufacturing center, here refers China
- 9 产业定位(chǎnyè dìngwèi): industry positioning
- 10 第二产业(dì-èr chǎnyè): secondary industry—mainly refers to light-industry and construction industry
- 11 偏低(piāndī): low

- 12 累计(lěiji): accumulative total; grand total; add up  
 13 房地产业(fángdìchǎnyè): real estate industry  
 14 租赁(zūlìn): lease; rent  
 15 劳动密集型(láodòng mìjìgxíng): labor-intensive type  
 16 金融(jīnróng): finance; banking  
 17 保险(bǎoxiǎn): insurance  
 18 信息和咨询(xìnxī hé zīxún): information and consultation  
 19 卫生(wèishēng): health; hygiene  
 20 各自为政(gèzìwéizhèng): each (office) administers its affairs without any coordination with others; each does things in his/her own way  
 21 多头、交叉管理(duōtóu, jiāochā guǎnlǐ): multi and overlapping management  
 22 条块分割(tiáo kuài fēngē): divided /cut up into pieces, here refers to dispersed management style  
 23 保护主义(bǎohù zhǔyì): protectionism  
 24 越权(yuèquán): exceed (or overstep) one's power or authority  
 25 变相(biànxìàng): in disguised form  
 26 承诺条件(chéngnuò tiáojiàn): the terms and conditions that one has agreed to or committed to  
 27 后续管理(hòuxù guǎnlǐ): follow-up management  
 28 标准化管理和监督(biāozhǔnhuà guǎnlǐ hé jiāndū): standardized management and supervision  
 29 不到位(bú dào wèi): below the standard; unsatisfactory  
 30 引资(yǐnzī): attract investment or capital  
 31 障碍(zhàng'ài): hinder; obstruct; barrier  
 32 截至(jiézhì): up to; up till now  
 33 第一产业(dī-yī chǎnyè): the first industry—mainly refers to agriculture  
 34 第三产业(dī-sān chǎnyè): tertiary industry—mainly refers to transportation, tourism, foods and restaurants, and entertainment industries  
 35 地质勘查(dìzhì kānchá): geological prospecting;  
 36 公共设施(gōnggòng shèshī): public facilities  
 37 社会保障(shèhuì bǎozhàng): social security

## 练习

### 一、解释下列词语

1. 直接投资
2. 间接投资
3. 制造业
4. 服务业
5. 直销网
6. 劳动密集型

7. 保护主义
8. 公共设施
9. 法人资格
10. 第一产业
11. 第二产业
12. 第三产业

## 二、回答下列问题

1. 中外合资经营企业和中外合作经营企业之间有什么差别?
2. 中国政府对哪一类投资给予相应的优惠政策?
3. 国际服务业包括哪些产业?
4. 中国自从成为世界贸易组织的成员国后,为什么投资环境越来越具吸引力?
5. 外商在中国的投资主要集中在哪些产业?





## 第五课

### *Lesson Five*

## 涉外投资的方式和外商直接投资在中国的发展

### *Types of Foreign Investment and the Development of Foreign Direct Investment in China*

柯礼思：经济法所涵盖的内容很广泛，比如说合同法、银行法、商标法、知识产权法、所得税法<sup>1</sup>、国际贸易法、反垄断法<sup>2</sup>和反不正当竞争法<sup>3</sup>、海商法以及消费者权益保障法<sup>4</sup>……还有许多其他的，那我应该从哪儿开始学呢？

I know that business law covers a wide range of areas, such as contract, banking, trademark, intellectual property, tax, international trade, anti-dumping and anti-unfair-competition, maritime, consumer protection, and many others. With so many areas, where should I start my first step?

教授：那你最喜欢的是哪一方面的法律呢？

Well, which field is your favorite?

柯礼思：我也不能确定，去年夏天我学了一些涉外投资法。

I'm not quite sure. I studied a little bit about Chinese foreign investment law last summer.

教授：你呢，张晋？

How about you, Jean?

张晋：我觉得我对涉外投资法也很感兴趣。每一类型的涉外投资企业<sup>5</sup>都有自己的一套法规，但是我知道的很有限。

I'm also interested in foreign investment law. I know that each type of foreign enterprise has its own set of regulations, but I don't know much beyond that.

教授：那先说你们俩谁知道外商投资的种类呢？

First of all, which one of you knows the types of foreign investment?

张晋：我听说中国的涉外投资有直接投资和间接投资两大类，其中又以直接投资为主，对吗，教授？

I hear that there are two types of foreign investment in China: direct investment and indirect investment, with the former one as the mainstream. Is that so, Professor?

教授：对！外商的直接投资，一般简称 FDI，是指一国的公司、企业或个人作为投资者将其资本投放到别的国家，通过实际的生产经营活动获得经济利益的一种行为，而不是通过证券、股票等方式获得利益。

That's right. Foreign direct investment, or FDI for short, usually refers to a company, enterprise or an individual as an investor invest in a foreign country. It is an action that through actual production and management activities to gain economic benefits. It is not through securities, stock, etc. to gain profits.

柯礼思：那么，在中国具体有哪些外商投资方式属于直接投资？

To be more specific, what type of foreign investment can be considered as direct investment in China?

教授：直接投资一般有两种法定形式：一种是通过签订国际合作开发经营协议进行投资；另外一种就是目前较为普遍的通过开办外国投资企业，外商直接参与企业的经营、管理。

There are two legal formats for foreign direct investment: the first one is to sign an international cooperation management agreement; the second way and the more popular way is that the foreign investors can directly participate in operating and managing the enterprises specifically built for foreign investors.

张晋：除了“三资企业”外，与中方合资开采、补偿贸易、承办外方来料加工、来件装配业务、技术转移等都是直接投资的一种形式吧？

Besides "Three Funds Enterprises," are Sino-foreign cooperative exploitation, compensation trade, processing and assembling with materials and parts from foreign suppliers, and technology transfer considered to be direct investment?

**教授:**对。但你们知道“以出口为主的加工和装配投资”与“承办外方来料加工、来件装配”,有没有区别吗?

Yes, but do you know the difference between “export-oriented processing and assembling investment” and “processing and assembling with material and parts from foreign suppliers”?

**柯礼思:**这两者应该是同一类型的投资方式吧?

I suppose both refer to the same type of investment. Isn't it?

**教授:**嗯!这两种方式基本上都是由外方公司提供原料、零件、零组件或是图样,而由中方公司加工原料、装配零件、做成成件,然后再交还给外方以便出口。

Yes, basically both types of investment refer to foreign companies which provide the raw materials, parts, components, or drawings, and a Chinese company processes the raw materials or assembles the parts or components into finished products. The finished products are then returned to the foreign company to be exported.

**张晋:**那外方公司是不是要提供生产设备或建造工厂以满足他们在中国的运作呢?

Does the foreign company have to provide production equipment or build a plant to accommodate its operations in China?

**教授:**这就要看双方的协议了。这些我们在以后学习合同法中会继续探讨。其实外商直接投资,在中国最典型的表现形式是“三资企业”。

It depends on what the two parties agreed to. We will continue our discussion on this subject when we study contract law later. As a matter of fact, the most typical foreign direct investment in China is “Three Funds Enterprises.”

**柯礼思:**“三资企业”是一个企业吗?

Does “Three Funds Enterprises” basically refer to one enterprise?

**教授:**不,三资企业是中外合资经营企业、中外合作经营企业和外商独资企业的合称。

No, “Three Funds Enterprises” refers to Chinese-Foreign equity joint ventures,

Chinese-Foreign contractual joint ventures and Foreign investor wholly-owned enterprises.”

张 晋：嗨，柯礼思，壳牌<sup>6</sup>公司和中国海洋石油总公司<sup>7</sup>刚刚对外宣布他们计划在广东省合办一个中外合资的项目，你看到这篇报告了吗？

Hey, Chris, have you read the report, which says that the Royal Dutch/Shell Group and China National Offshore Oil Corp. just announced that they were planning to undertake a joint venture project in Guangdong Province?

柯礼思：哪一篇报告？你指的是不是那个关于成立中国迄今最大的石化产品生产投资项目的报告？

What report? Are you talking about the largest joint venture investment project in petrochemical production in China up to date?

张 晋：对，就是那个。这是中国近几年来批准的最大的有外商加入的海洋石油<sup>8</sup>和天然气<sup>9</sup>生产项目。

Yes. That's the one. The project, involving a foreign company, is the largest offshore oil and natural gas production project approved by Chinese government in recent years.

柯礼思：那到底有多少公司参与这个项目呢？肯定有至少两家以上公司参与吧？

How many companies are involved in that project anyway? I thought that at least two were involved.

张 晋：事实上，除了我刚才提到的公司外，中国石化集团公司<sup>10</sup>和美国加州的优尼科石油公司<sup>11</sup>也都参与了这个项目。

You're right. Actually, in addition to the companies I just mentioned, the China National Petrochemical Corp. and the US-based Union Oil Company of California, or UNOCAL, are also going to participate in the venture.

柯礼思：既然这是在中国最大的投资项目，那投入的资金到底有多少呢？

If this is the largest joint venture ever made in China, how much is the investment?

张 晋：我不太清楚，那要问问教授了。

I am not sure. Why don't we ask Prof. Liu?

教 授：这数字对我来说好像是个天文数字<sup>12</sup>。据说壳牌公司在开发海洋石油和天然气方面将投下将近 10 亿美元。随着合同的履行，壳牌很可能在未来的五年提高其投资额到 50 亿美元。

To me, the figure sounds astronomical. It's said that Shell Group would invest just under US\$1 billion in tapping off-shore oil and natural gas. Once the contracts and other projects in China have matured, Shell is likely to increase its investment to US\$5 billion over the following five years.

柯礼思：这项巨额<sup>13</sup>投资项目的主要的目的是什么呢？

What's the primary goal of such a gigantic joint venture project?

教 授：他们的目的是很明确的，这四家刚刚在 2003 年 8 月 19 日签订了五项勘探和开发<sup>14</sup>原油<sup>15</sup>的合同，主要目的是加速中国东海石油和天然气的开采。

Apparently, these four companies just signed five prospecting and exploitation contracts on August 19, 2003 with the goal of accelerating the development of oil and gas projects in the East China Sea.

张 晋：这项合资项目最大的受益人<sup>16</sup>是谁呢？

Which company is going to benefit the most from this joint venture?

教 授：我想一定是中国海洋石油总公司<sup>17</sup>。因为有关原油和天然气的勘探、开发、生产、运输甚至销售方面都委托中海油担任独家代理<sup>18</sup>。

I think it must be CNOOC, because that company has been entrusted as the sole agent responsible for the exploration, extraction, production, transportation, and even marketing of the oil and natural gas.

柯礼思：那这四家公司怎么分配他们的投资额呢？

How are the four companies distributing the investment?

张 晋：据说中海油、中石化将按照合同约定分别投资 30%，其余的 40% 则由壳牌和优尼科平均分摊。

It's said that according to the contract, CNOOC and Sinopec will each



contribute 30 percent of the capital, and Shell and UNOCAL will equally split the remaining 40 percent.

**柯礼思:** 那有关收入分配方面,我看这四家公司也会按照各自的投资比例分配吧? 他们的合同期有多少年呢?

I suppose that the four parties will divide up the general revenue in the same ratio, too. How many years are the contracts for?

**张 晋:** 听说他们合同的期限为 30 年,其中包括两个勘探合同和三个开发合同。

I've heard that the contracts, two of which are exploration contracts and three of which are extraction contracts, each have a term of 30 years.

**柯礼思:** 这么看来,这个合资项目包括了四个公司,分布在三大洲的三个国家。两年来,许多跨国公司<sup>19</sup>订立过类似的协议<sup>20</sup>,这跟中国加入世界贸易组织有关吗?

So this joint venture project involves four companies and three countries in three continents. In the past two years, quite a few multinational companies have made similar agreement. I wonder if it has something to do with China's accession to the WTO.

**教 授:** 这是毫无疑问的。这里还有另外一个例证:总部设在德国的西门子科技公司<sup>21</sup>也于 2003 年底宣布在北京、上海和新加坡设立三个研究中心,投资金额为 2.5 亿美元。公司的总裁兼首席执行官<sup>22</sup>就很明确地表示,他们的这项投资是因为中国加入世界贸易组织而引发的。

No question about it. Here's another example: the German-based technology company Siemens AG also announced that it would invest US\$250 million to establish three research centers in Beijing, Shanghai, and Singapore respectively at the end of 2003. And the President and CEO clearly indicated that this investment had been prompted by China's entry into the WTO.

**柯礼思:** 自从成为世界贸易组织的成员国后,中国的广大市场也逐渐地对外开放了。我曾看过一篇文章说,日本的本田<sup>23</sup>和中国的东风汽车公司<sup>24</sup>在武汉建立了一个合资公司。

Since China became a member of the WTO, its vast market has been opening up to overseas investors. I read an article saying that Japan's Honda Motor Co.

Ltd. and China's Dong Feng Motor Co. Ltd. have set up a joint venture in Wuhan.

**张 晋:** 我也看到那篇文章了。上面还指出该合资汽车公司可以生产卡车、轿车<sup>25</sup>、运动型多功能车<sup>26</sup>等各种类别的汽车,是中国第一个具有完整生产线<sup>27</sup>的公司。

I read that article, too. It also said that this company is the first joint venture automotive company in China to have complete production lines, from trucks and sedans to SUVs.

**柯礼思:** 你记得他们的投资总额有多少?

Do you remember how much capital was going to be invested?

**张 晋:** 我记得不是很清楚了,如果我没记错的话,投资总额可能是近 10 亿美元。

I don't remember exactly. If I'm not mistaken, it was in the billions.

**教 授:** 不止 10 亿美元,这是在中国汽车史上投资最大的合资企业。投资总额是 167 亿人民币,相当于 20 亿美元。

This is by far the largest joint venture ever made in China in the history of the Chinese auto industry. The total investment is RMB16.7 billion, or US\$2 billion.

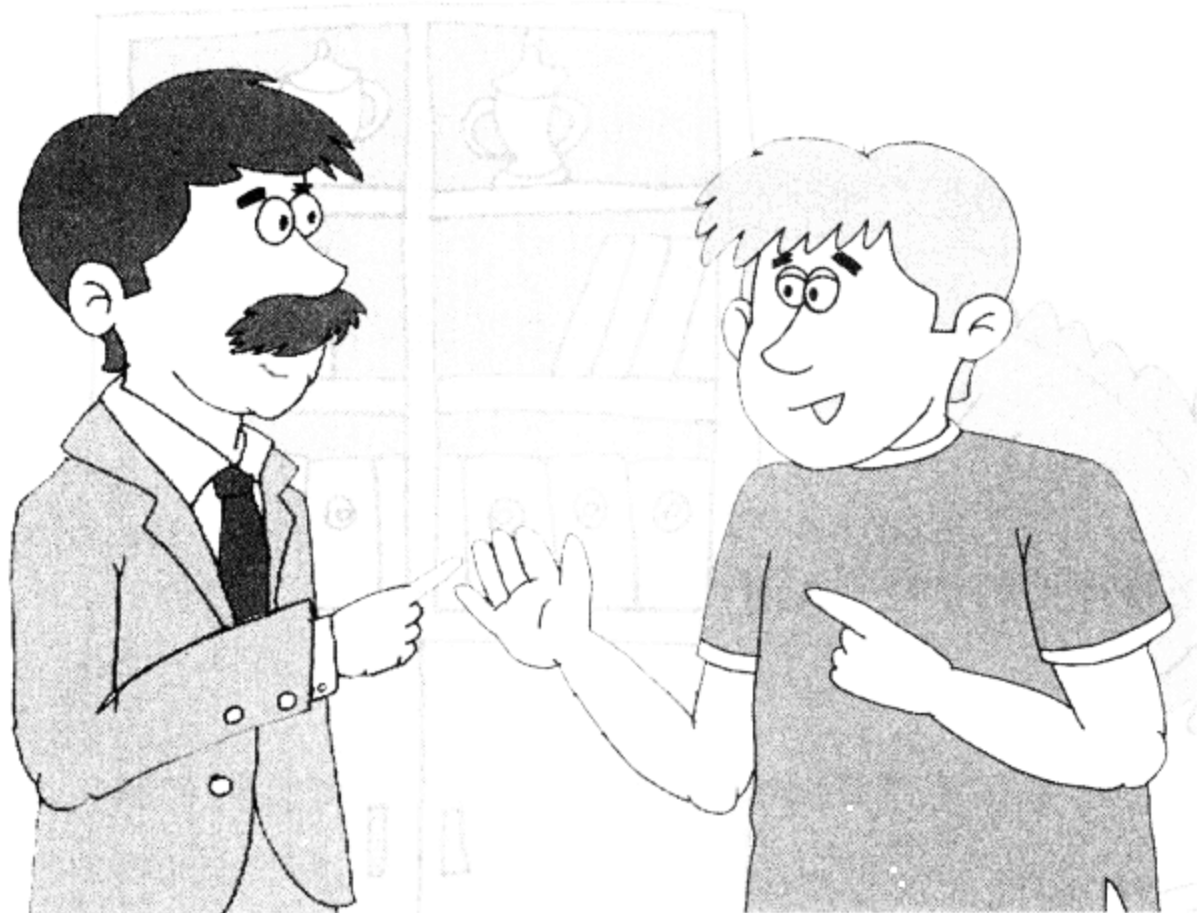
**张 晋:** 那真是一个大数目。似乎越来越多的外国汽车公司都在中国投下巨额的资金,而那些已经进入中国市场的外国汽车公司也纷纷延长与他们中国合作伙伴的合同期限。

That's a lot of money. It seems that more and more foreign auto makers are investing tremendous amounts of capital in China now. And one after the other, those foreign auto companies that have already entered China's market are extending their contracts with their Chinese partners.

**柯礼思:** 说的也是。总部在德国的大众汽车公司<sup>28</sup>和上海的大众汽车公司决定将他们的合作计划从 2009 年延长到 2030 年。

That's true. The German-based Volkswagen and Shanghai Volkswagen Corp. just decided to extend their collaboration from 2009 to 2030.

**教 授:** 中国汽车市场的潜力<sup>29</sup>很大,而且利润也很高。柯礼思,你最喜欢的汽车品牌已在中国设厂。



China's auto market has great potential and could prove to be quite lucrative. Hey, Chris, your favorite auto maker has set up a factory in China too.

**柯礼思:** 我最喜欢的汽车? 您指的是哪一品牌和型号啊?

My favorite auto maker? Which maker and model are you talking about?

**张 晋:** 当然是宝马汽车<sup>30</sup>啦。那不是你最喜欢的车吗? 听说宝马和华晨汽车<sup>31</sup>已经联合设立了一个合资企业。

BMW, of course! Isn't BMW your favorite car? Well, BMW has set up a joint venture with Huachen Auto.

**柯礼思:** 真的吗? 新厂设在哪里? 什么时候开始生产呢?

Really? Where did they set up the new auto plant? When will production begin?

**教 授:** 新厂设在沈阳, 辽宁省的省会。听说 2003 年的下半年就已经开始生产了, 而他们的投资总额到 2005 年的时候已达 4.5 亿欧元。

The new plant is in Shenyang, the capital city of Liaoning province. I heard that production has already begun in the second half of 2003, and the initial investment has already reached €450 million by 2005.

柯礼思：依我看来，不出几年，有能力购买宝马汽车的中国消费者会越来越多了。也许当你我从法学院毕业后，我们都买得起中国制造的宝马汽车了。

I guess that more affordable BMWs will be available to consumers in China in a few years. Perhaps by the time you and I graduate from law school, we'll be able to afford BMWs that were "Made in China".

教授：你知道吗？现在的口号不仅是“中国制造”，而且还是“中国设计”的呢。到时候你就可以选择时尚、流行的“中国设计”加“中国制造”的最新款宝马汽车了。

Haven't you heard? The current slogan isn't just "Made in China," but "Designed in China," too! By that time, you can pick your trendy, fashionable and the new model of BMW not only "Made in China," but "Designed in China" as well.

### 注 释

- 1 所得税法(suǒdeshuifǎ): *income tax law*
- 2 反垄断法(fǎnlǒngduànǎ): *anti-dumping law*
- 3 反不正当竞争法(fǎn-búzhèngdāng jìngzhēngfǎ): *anti-unfair-competition law*
- 4 消费者权益保障法(xiāofèizhě quányì bǎozhàngfǎ): *consumer protection law*
- 5 涉外投资企业(shèwài tóuzī qīyè): *foreign-related investment enterprise*
- 6 壳牌(Qiàopái): *the Royal Dutch/Shell Group*
- 7 中国海洋石油总公司(Zhōngguó Hǎiyáng Shíyóu Zǒnggōngsī): *China National Offshore Oil Corp, or CNOOC*
- 8 海洋石油(hǎiyáng shíyóu): *offshore oil*
- 9 天然气(tiānránqì): *natural gas*
- 10 中国石化集团公司(Zhōngguó Shíhuà Jítuán Gōngsī): *China National Petrochemical Corp, or Sinopec*
- 11 优尼科石油公司(Yōunikē Shíyóu Gōngsī): *Union Oil Company of California, or UNOCAL*
- 12 天文数字(tiānwén shùzì): *astronomical figure; enormous figure*
- 13 巨额(jù'é): *a huge amount; a huge sum*
- 14 勘探和开发(kāntàn hé kāifā): *prospecting and exploitation; to explore and exploit*
- 15 原油(yuányóu): *crude oil*
- 16 受益人(shòuyìrén): *beneficiary*
- 17 中海油(Zhōng-Hǎi-Yóu): *short for China National Offshore Oil Corp*
- 18 独家代理(dújiā dàilǐ): *sole agent*
- 19 跨国公司(kuàguó gōngsī): *multinational company (ies)*
- 20 协议(xiéyì): *agreement*

- 21 西门子科技公司 (Xīménzǐ Kējī Gōngsī): Siemens AG
- 22 首席执行官 (shǒuxí zhíxíngguān): Chief Executive Officer (CEO)
- 23 本田 (Běntián): Honda Motor Co., Ltd
- 24 东风汽车公司 (Dōngfēng Qìchē Gōngsī): Dong Feng Motor Corporation, Ltd
- 25 轿车 (jiàochē): sedan
- 26 运动型多功能车 (yùndòngxíng duōgōngnéng chē): sports utility vehicle (SUV)
- 27 生产线 (shēngchǎnxiàn): production lines
- 28 大众汽车公司 (Dàzhòng Qìchē Gōngsī): Volkswagen
- 29 潜力 (qiánli): potential
- 30 宝马汽车 (Bǎomǎ Qìchē): BMW Automobiles
- 31 华晨汽车 (Huáchén Qìchē): Huachen Auto Corporation

## 时文选读

### FDI与中国对外贸易:推动效应<sup>1</sup>与 替代效应<sup>2</sup>并存

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【摘要】采用描述分析法<sup>3</sup>和回归统计法<sup>4</sup>对 FDI (外商直接投资) 与中国对外贸易关系进行了实证分析<sup>5</sup>, 得出 FDI 对我国外贸总量具有推动效应, 优化<sup>6</sup>了我国对外贸易结构, 同时 FDI 也对国内企业进出口产生了一定的替代或挤出效应<sup>7</sup>的结论; 在此基础上提出若干政策建议。

改革开放以来, 中国的对外贸易以年均 17% 的速度增长, 尤其是出口贸易增长强劲。年出口额由 1980 年的 181.19 亿美元增加到 2004 年的 5934 亿美元, 在短短的 20 余年时间里增加了 30 多倍。随着经济全球化的日益深入和我国经济改革的



深化,我国对外开放程度日益扩大,引进外商直接投资(FDI)逐年增加,据统计,截至2005年2月底,我国累计批准设立外商投资企业51万家,合同外资<sup>8</sup>金额1.1万亿美元,实际利用外资<sup>9</sup>5799亿美元,成为世界第二大东道国。究竟外商直接投资对中国外贸有何影响?二者是否存在着某种必然的联系?是替代关系还是互补<sup>10</sup>关系?如果是替代关系,则外商直接投资的增加就会减弱对外贸易对经济增长的推动作用;如果是互补关系,投资的增加就会促进对外贸易对经济增长的推进作用。但是,理论研究在外商直接投资与对外贸易的关系方面一直没有得出一致的结论。我们认为,有必要弄清楚外商直接投资与我国的对外贸易存在何种关系,这种关系是否长期稳定。本文将对此进行实证分析。

### 相关文献综述

在理论研究方面,Mundel R.A.<sup>11</sup>(1957)(编者:Mundel 当做 Mundell)首先提出外商直接投资(FDI)与国际贸易之间存在替代关系。他通过建立在两个国家、两种产品和两种生产要素基础上的标准国际贸易模型,采用静态分析<sup>12</sup>方法,考查了贸易与投资相互替代的两种极端情况,即禁止性投资如何刺激贸易,以及禁止性贸易如何刺激投资。其研究表明,一种商品可以通过贸易或投资的方式进入他国市场,由于贸易壁垒<sup>13</sup>的存在而产生了投资,认为投资会替代贸易。当两个国家的资源禀赋<sup>14</sup>、技术水平相接近时,这种替代效应尤为明显。Vernon<sup>15</sup>(1996)(编者:当做1966)则从动态角度<sup>16</sup>阐述了FDI对贸易的替代效应。他认为,企业对外直接投资伴随产品生命周期<sup>17</sup>运动而展开,是对企业出口方式的替代。在产品生命周期运动中,由于产品和技术标准化,企业在国外市场便会受到当地企业的竞争压力<sup>18</sup>,这时企业将会考虑用对外直接投资来代替出口,以保护企业在外国的市场。Kojima<sup>19</sup>(1977)(编者:当做1978)提出了FDI与国际贸易之间存在互补效应的小岛清模型。小岛清认为早期的国际直接投资理论忽视了国际分工的原则,他用国际分工将对外贸易和对外直接投资进行统一并得出两者存在互补效应的结论。他指出外商直接投资不单是资本的流动,而是包括资本、技术、经营管理技能等在内的总体性转移。其研究表明,由于FDI可以在投资母国<sup>20</sup>与东道国之间创造互信的贸易机会,从而导致两者之间的贸易具有更大的规模,扩大了国际贸易的规模总量。Markuson<sup>21</sup>(1983)采用非要素比例模型<sup>22</sup>和要素比例模型对要素国际流动<sup>23</sup>与国际商品贸易关系进行分析,认为两国间技术差异、对生产征税、垄断、外部规模经济<sup>24</sup>和要素市场<sup>25</sup>扭曲<sup>26</sup>等因素都会导致彼此要素生产率和要素价格的差异,此时如果贸易要素与非贸易要素呈合作状态,那么国际商品贸易与投资就为互补关系。Neary<sup>27</sup>(1995)运用3×2的特定要素模型,得出贸易与投资关系的不确定性理论<sup>28</sup>,即FDI究竟是替代还是互补,要依赖理论假设<sup>29</sup>和引入的因素。

(中略)

从以上分析可以得出,外商直接投资有力地促进我国对外贸易总额,并进一步优化了我国对外贸易结构;另一方面,外商直接投资对我国内资企业的生产和进出口形成了一定的替代和挤出<sup>30</sup>效应。为此,笔者提出若干政策建议:

1. 实行国内资本的非歧视政策<sup>31</sup>,调整外来资本的“超国民待遇<sup>32</sup>”。在改革开放前期,政府对外商直接投资采取了诸多优惠政策甚至是超国民待遇,事实已经表明这种超国民待遇已经产生了挤出投资的负面影响,容易造成外来企业<sup>33</sup>的垄断<sup>34</sup>和超额利润<sup>35</sup>的产生,不利于公平竞争。而且我国目前政策调整的条件和时机已经具备,社会各界都在呼吁调整政策。因此,必须按国际通行的市场准则,把国内各种性质的经济主体、投资主体放在一个平等的地位上,实行非歧视原则。

2. 合理引导外商直接投资方向,促进产业优化。引进外资应充分考虑其对提升我国产业竞争力和优化产业结构的重要性;同时尽量避免外资对关系国民经济命脉<sup>36</sup>的关键行业的控制。积极开放服务行业的外资引进,随着我国对外开放日渐深入,外资引进的重点应该从传统的生产性领域逐渐转移到具有高附加值<sup>37</sup>的服务性行业,投资的增长速度将超过制造业。银行、保险、证券<sup>38</sup>、电信、商贸、旅游等应该成为新一轮<sup>39</sup>引资的重点所在。

3. 加大科技创新力度,提升本土产品<sup>40</sup>在国际市场的竞争力。一方面要提升我国企业的技术吸引力,扩大外资企业的技术溢出效益<sup>41</sup>;另一方面,要不断提升我国企业的技术创新能力,确立国际品牌<sup>42</sup>的形象,提升本土产品在国际上的竞争能力,充分发挥内资企业在对外贸易中的重要作用。

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## 注释

- 1 推动效应(tuīdòng xiàoyìng): promotional effect
- 2 替代效应(tìdài xiàoyìng): substitutional effect
- 3 描述分析法(miáoshù fēnxīfǎ): descriptive analysis method; method of descriptive analysis
- 4 回归统计法(huíguī tǒngjìfǎ): regression analysis
- 5 实证分析(shízhèng fēnxī): substantial analysis
- 6 优化(yōuhuà): optimize
- 7 挤出效应(jǐchū xiàoyìng): squeeze effect
- 8 合同外资(hétóng wàizī): contractual foreign investment
- 9 实际利用外资(shíjì liyòng wàizī): actually using foreign investment
- 10 互补(hùbǔ): complimentary (relationship)

- 11 Mundell R.A: Robert A. Mundell, International Trade and Factor Mobility, *American Economic Review*, 1957, 47.
- 12 静态分析(jìngtài fēnxī): static analysis
- 13 贸易壁垒(màoyì bìlěi): trade barrier
- 14 资源禀赋(zīyuán bǐngfù): resources or storage
- 15 Vernon: Raymond Vernon, International Investment and International Trade in the Product Cycle, *American Economic Review*, 1957, 47.
- 16 动态角度(dòngtài jiǎodù): dynamic perspective
- 17 产品生命周期(chǎnpǐn shēngmìng zhōuqī): product life cycle
- 18 竞争压力(jìngzhēng yālì): competitive pressure; pressure from competition
- 19 Kojima: Kiyoshi Kojima. Direct Foreign Investment: *A Japanese Model of Multinational Business Operations*. London: Crome Helm, 1978.
- 20 母国(mǔguó): one's own country
- 21 Markuson: James R. Markuson and James R. Melvin, Factor Movements and Commodity Trade as Complements. *Journal of International Economics*, 1983, 13.
- 22 非要素比例模型(fēiyàosù bǐlì móxíng): non-factor ratio model
- 23 国际流动(guójì liúdòng): international mobility
- 24 外部规模经济(wàibù guīmó jīngjì): external economies of scale
- 25 要素市场(yàosù shìchǎng): factor market
- 26 扭曲(niǔqū): distort; distortion
- 27 Neary: J. Peter Neary, 1995. Factor Mobility and International Trade, *Canadian Journal of Economics*, Vol. 28 (sl). pages. 4 -23, November.
- 28 不确定性理论(búquèdìngxìng lǐlùn): uncertainty theory
- 29 理论假设(lǐlùn jiǎshè): theoretical hypothesis
- 30 替代和挤出(tìdài hé jǐchū): substitute and force out
- 31 非歧视政策(fēiqīshì zhèngcè): non-discrimination policy
- 32 超国民待遇(chāo guómín dàiyù): above-citizen treatment: treatment (foreigners) better than its own citizens
- 33 外来企业(wàilái qīyè): foreign enterprise
- 34 垄断(lǒngduàn): monopolize
- 35 超额利润(chāo'é lìrùn): superprofit
- 36 经济命脉(jīngjì mìngmài): economic life-lines
- 37 高附加值(gāofùjiāzhí): high value-added (service industry)
- 38 证券(zhèngquàn): stocks; securities
- 39 新一轮(xīnyilún): new round
- 40 本土产品(běntǔ chǎnpǐn): local product; domestic product
- 41 溢出效益(yìchū xiàoyì): overflow effect
- 42 国际品牌(guójì pǐnpái): international brand; brand name known internationally

## 练习

### 一、解释下列词语

1. 涉外投资
2. 外商直接投资
3. 天文数字
4. 受益人
5. 跨国公司
6. 可行性研究报告
7. 合同外资
8. 实际利用外资
9. 产品生命周期
10. 贸易壁垒
11. 超国民待遇
12. 本土产品
13. 国际品牌

### 二、回答下列问题

1. 在中国哪些外商投资方式属于直接投资?
2. 是什么因素促使德国西门子科技公司决定到中国来投资?
3. 什么是补偿贸易? 什么是“承办外方来料加工、来件装配”? 请举例说明。
4. 简述联合国贸易发展会议的组织和功能。
5. 根据小岛清的理论, 简述对外直接投资对投资母国和东道国两国之间的利益。

## 第六课

### *Lesson Six*

## 涉外投资企业的概述

### *A Brief Introduction to Foreign Investment in China*

柯礼思：教授，我原来以为在中国的合资项目都是偏重于重工业或是高科技方面的企业，但听说服务业也有许多合资企业。

Professor, I used to think that joint venture projects were exclusive to the heavy industry and high-tech sectors in China. I hadn't realized that there were many JV enterprises in service industries, as well.

教授：合资企业包括的范围很广，比方说，美国的高盛公司<sup>1</sup>和中国的商业银行在2003年6月签订了一项备忘录<sup>2</sup>，在中国建立一个合资企业来处理中国不履行合同<sup>3</sup>的资产。

JV enterprises encompass a wide range of industries. For example, America's Goldman Sachs and the Industrial and Commercial Bank of China signed a memorandum back in June 2003 announcing that they were going to establish a joint venture to deal with China's non-performing assets.

张晋：双方已经决定组织结构<sup>4</sup>、注册资金<sup>5</sup>和处理坏账<sup>6</sup>的方式了吗？

Have both parties decided on the organizational structure, registered capital, and bad-loan disposal methods yet?

教授：我不太清楚。我想他们已经商议妥当了。

I'm not sure. I think they have already worked out the agreement.

柯礼思：有关不履行合同的资产除了坏账准备金外，高盛公司还能为中国提供什么样的服务呢？



With regard to China's non-performing assets, aside from the bad debts, how else can Goldman Sachs provide service to China?

**教 授:** 高盛公司已经向中国建议,而且中国方面也同意将把国际上处理资产最好的经营方式带到中国的银行体系中。

Well, Goldman Sachs has already proposed and agreed to bring the best international practices in asset management to the Chinese banking system.

**张 晋:** 中国的银行体系在过去十年来经历了极大的改变,也许革新银行体系最好、最快的方式就是找一个合资的伙伴。教授,中国政府最早颁布实施合资法是在什么时候?

The Chinese banking system has gone through drastic changes over the past decade. Perhaps the best and fastest way to innovate it was to find a foreign joint venture partner. Professor, when did the Chinese government first adopt its joint venture laws?

**教 授:** 《中华人民共和国中外合资经营企业法》最初是在 1979 年 7 月 1 日第五届全国人民代表大会第二次会议通过,而在同年的 7 月 8 日正式颁布实施的。

*The Law of People's Republic of China on Chinese-Foreign Equity Joint Ventures* was first passed at the Second Session of the Fifth National People's Congress on July 1, 1979 and was formally promulgated on July 8, 1979.

**柯礼思:** 在 1979 年以前,中国政府有没有关于这方面的法律?

Before 1979, did the Chinese government have any kinds of laws on foreign investment?

**教 授:** 在 1979 年以前,中国没有任何合资法。在 1979 年制定的《中外合资经营企业法》,主要是满足外国投资的需要。后来有关工商企业的登记、商标的注册和保护以及合同订立等的法律制度直到 1982 年的 8 月才逐渐建立,这也是为进一步满足国外投资者的需要。

Before 1979, China didn't have any laws or regulations on joint ventures. Those laws were established in 1979, chiefly to meet the needs of foreign investment. Later, by August 1982, laws concerning the registration of industrial and commercial enterprises, trademark registration and protection, and contracts had gradually been established. This again, was to further accommodate

the needs of foreign investors.

张 晋：完全适应外国投资者的法律环境的产生也须假以时日<sup>7</sup>。那第一家中外合资公司是什么时候成立的呢？

It takes time to work out a legal environment which is suitable for foreign investors. When was the first Chinese-foreign joint venture company founded?

教 授：新合资法颁布的次年，也就是 1980 年，第一批中外合资企业就已经开始运行了，其中包括中国辛德勒电梯公司、新疆天山羊毛衫厂<sup>8</sup>以及中国航空食品<sup>9</sup>公司。

The first Chinese-foreign equity joint ventures enterprises were set up right after *the Law on Chinese-foreign Equity Joint Ventures* went into effect. The new law was established in 1979, and the following year, 1980, the first Sino-foreign joint ventures had already commenced operations. Among those first companies were China Schindler Elevator Co. Ltd.; Xinjiang Tianshan Wool Textile Co. Ltd. and China Aviation Food Co. Ltd.

柯礼思：确实是很快。在合资法颁布不久，合资企业就开始投入运作了。那合资企业是不是都需要经过政府的批准呢？

That was really fast! The Chinese-foreign equity joint ventures companies were able to start operating not long after *the Law on Chinese-foreign Equity Joint Ventures* was established. Do Chinese-foreign equity joint ventures projects have to be approved by the government?

教 授：是。合资经营企业法的第三条：“合营各方签订的合营协议、合同、章程<sup>10</sup>，应报国家对外经济贸易主管部门审查批准。”

Yes. According to Article 3 of the *Law on Chinese-foreign Equity Joint Ventures*, “The joint venture agreement, contract, and articles of association signed by the parties to the venture shall be submitted to the Foreign Investment Commission of the People’s Republic of China.”

张 晋：中国的对外经济贸易主管部门一般是哪个呢？

Which government agency is in charge of foreign investment in China?

教 授：通常，涉外企业的成立必须经过中国的商务部<sup>11</sup>批准。

The establishment of a foreign investment enterprise is subject to approval by the Ministry of Commerce.

柯礼思：那具体来说，一个涉外企业需要具备什么条件才能被批准呢？

To be more specific, under what terms and conditions will a foreign investment enterprise be approved?

教授：一般来说，批准一个涉外企业须有投资建议书、详细的可行性研究、合资企业同意书和中国成立合法共同体的公司章程法则。

Normally, project approval is granted on the basis of a project proposal, a detailed feasibility study, and copies of the joint ventures agreement and the bylaws of the legal Chinese entity.

张晋：那从项目送审到审批需要多少时间呢？

How long does it take from the time the proposal is submitted to its approval?

教授：那就要看情况了，一般不会超过6个月。基本上审批的相关机关会把申报投资企业的材料作为一个整体来考查，分析、考查其在经济、财务、环境以及社会等方面的影响。如果没有明显的缺陷和漏洞，很快就能获得批准。

It depends. It shouldn't take more than six months. Basically, the approval authorities will examine the investment project as a whole and consider its economic, financial, environmental, and social implications. If everything looks good and there aren't any obvious flaws or oversights, it should be approved pretty quickly.

柯礼思：批准后就能营业吗？

Once a project is approved, can one start to do business right away?

教授：那不是，批准后还要到国家工商行政管理总局<sup>12</sup>登记，领取营业执照后才能正式营业。

I don't think so. It is required to register with the State Administration for Industry and Commerce once a project has been approved. Once the business license is granted, one can start to do business.

张晋：我曾经听过这样的说法：外国公司要进入中国利润丰厚<sup>13</sup>的市场，唯一的办法就是通过合资方式。换句话说，如果在中国不是合资的话，那绝对是

不可能成功的。这是真的吗？

According to one theory I've heard, the only way a foreign company can enter China's lucrative market is through a Chinese-Foreign equity joint venture. In other words, if you aren't in a Chinese-Foreign equity joint venture in China, there's no way you'll be able to succeed. Is that true?

**教授：**很难说吧。合资企业有优点也有缺点<sup>14</sup>。从积极的方面来看，外国合伙人能够带来资金、专利技术、最新的科技和经营的技巧，而中国的合伙人能够提供广阔的市场<sup>15</sup>、廉价的劳动力<sup>16</sup>、畅通的营销渠道<sup>17</sup>和及时的市场信息。

It's hard to say. There are both pros and cons to a Chinese-Foreign equity joint venture. On the plus side, the foreign partner can bring capital, patented know-how, the latest technology, and management skills. While the Chinese partner can provide the vast market, inexpensive labor, smooth distribution channels, and up to date information.

**柯礼思：**这听起来是很理想的。那缺点呢？

That sounds ideal. What are the drawbacks?

**教授：**合资合作的消极方面<sup>18</sup>主要在于：完全不同的经营管理方式不容易招募<sup>19</sup>，也不容易训练出合格的管理人员<sup>20</sup>和工厂的工人，生产出来的产品也很难达到高水平。此外，在合伙人之间有关技术归属以及转让问题也会发生冲突。

On the minus side, you have totally different management styles, difficulty in recruiting and training suitable administrative staff and factory workers; difficulty in achieving high-quality output; and conflicts between partners about technology transfer authority.

**柯礼思：**如果有这么多缺点，那还有必要推广这类合资企业吗？

With these shortcomings, is it still worthwhile to promote joint ventures?

**教授：**我认为还是值得的。一个成功的合资企业不但能给双方带来战略上<sup>21</sup>的利益，正如我上面提到的，而且还能减少一些不必要的误解和冲突。

I think so. Not only can a successful Chinese-Foreign equity joint venture bring both parties the strategic benefits I mentioned earlier, but also can reduce unnecessary misunderstandings and conflicts.

张 晋：我同意。中国的商业文化和法律是错综复杂<sup>22</sup>的。我曾通过一些中国合资企业的报告得知，中国的有关规定并不十分明了清楚<sup>23</sup>，而且有些条文也不完全透明。

I agree. The business culture and laws in China can be complicated. I've read reports about the Chinese-Foreign equity joint ventures in China saying that the regulations and rules governing them were far from transparency.

柯礼思：由于合资企业的劳动者有不同的文化背景，要创造一个和谐的<sup>24</sup>工作环境和有效的<sup>25</sup>工作模式是有困难的。

Creating a harmonious work environment and efficient working model could be difficult, since Chinese-Foreign equity joint ventures bring together work forces with different cultural backgrounds.

教 授：合资企业面临许多困难和障碍，这是事实，但这并不是不能克服的。只要双方以诚相待<sup>26</sup>，愿意消弭<sup>27</sup>彼此的分歧，我认为在中国最好、最有效的投资方式还是建立合资企业。

It's true that Chinese-Foreign equity joint ventures face many difficulties and obstacles, but those problems aren't insurmountable. As long as both parties are sincere and willing to work out their differences, I believe that establishing a Chinese-Foreign equity joint venture is still the best, most efficient way to engage in foreign investment in China.

张 晋：如果外国公司已经决定在中国投资并准备建立合伙关系，那最常用的投资形式是什么？

If a foreign company has decided to invest in China and is preparing to form a Chinese-Foreign equity joint venture partnership, what are the most common investment methods in China?

教 授：在中国最常用的合作形式是：外国公司投入资金、设备，引入<sup>28</sup>新技术、新经营技巧，而作为合资关系的中国合伙人则主要是制定公司章程、办理审批的手续<sup>29</sup>、准备生产资料。

In China, the most common forms of foreign investment are cash, manufacturing equipment, and the introduction of new technology and management skills. The Chinese partner in a Chinese-Foreign equity joint venture mainly handles the government red tape and bureaucracy and prepares means of production.





柯礼思：那对这样的企业，需要特别提醒外商在投资中需要注意些什么呢？

For this type of enterprise, is there anything to which a foreign investor should be reminded to pay specific attention?

教授：我认为要特别要注意外国资金的安排，确保投资项目能够独立维持其在国外的运作，并保证其他投资上的需要。

I think special attention should be paid to the foreign currency arrangements. Make sure that the investment project can independently sustain its foreign operation and investment requirements.

张晋：教授，我有点儿糊涂<sup>30</sup>。“Chinese-foreign joint venture”和“Sino-foreign equity joint venture”的意思一样吗？

Professor, I'm a little bit confused. Is a "Chinese-foreign joint venture" the same thing as a "Sino-foreign equity joint venture"?

教授：一样。有些投资者称“Chinese-foreign joint ventures”为“Sino-foreign equity joint ventures”，但是所指的都是同样的投资方式。当然除了合资企业也有其他不同的方式。你听说过“合作企业”吗？

Yes, some investors refer to "Chinese-foreign joint ventures" as "Sino-foreign equity joint ventures". But basically they are the same. There are other kinds of joint ventures, too. Have you ever heard of a "contractual joint venture" or a "cooperative joint venture"?

柯礼思：听说过。有关“合作企业”的法律是在 1988 年颁布的，目的是鼓励与外国进行经济上的合作与技术上的交流。

I have. The law on Chinese-Foreign Contractual Joint Ventures was established in 1988 to encourage economic cooperation and technological exchange with foreign countries.

教授：在中国建立合作企业的好处之一就是外国投资者不需要在中国成立新公司，只要借用中国合作伙伴的营业执照<sup>31</sup>就可以投入经营了，这很吸引外国投资者。

One of the advantages of setting up a Chinese-Foreign contractual joint venture in China is that the foreign investor doesn't need to set up a new corporation in China. He/She may sign an agreement to use the Chinese partner's business license, which appeals to many foreign investors.

柯礼思：我知道有许多欧洲国家的公司就是用这种合作企业的方式进行土地开发。在这种架构<sup>32</sup>下，土地仍属于中国的合作伙伴，因此不需要支付转移的税金，也就免去了转移税务<sup>33</sup>这一道最烦琐<sup>34</sup>、最复杂的手续。

I know quite a few European companies make use of this type of Chinese-Foreign contractual joint ventures for land and hotel development in China. With this kind of set-up, the land stays in the possession of the Chinese partner, and thus, there aren't any transfer taxes. I hear that transferring taxes is one of the most complicated, convoluted processes ever.

张晋：对这些不同形式的合资企业我还是弄不清楚，让我回去好好准备，希望下星期我再来讨论的时候，就能够对这些合资企业的形式以及相关规定的比较清晰的认识了。

I'm still confused about the different types of joint ventures. I need to further study the material. Perhaps when I come back next week, I'll be clearer about the different types and their respective regulations.

## 注释

1 高盛公司(Gāoshèng Gōngsī): Goldman Sachs, also written as “高胜基金” or “高胜银行”

2 备忘录(bèiwànglù): memorandum; memo

- 3 不履行合同(bù lǚxíng hé tong): non-performing agreement or contract
- 4 组织结构(zǔzhī jiégòu): organizational structure; organization & structure
- 5 注册资金(zhùcè zījīn): registered capital
- 6 坏账(huàizhàng): bad debt
- 7 假以时日(jiǎyǐshí rì): giving (more) time; given time
- 8 羊毛衫厂(yáng máoshān chǎng): woolen textile manufacturing
- 9 航空食品(hángkōng shípǐn): in-flight food; in-flight meals
- 10 章程(zhāngchéng): rules; regulations; constitution
- 11 商务部(Shāngwù Bù): the Ministry of Commerce
- 12 国家工商行政管理总局(Guójiā Gōngshāng Xíngzhèng Guǎnlǐ Zǒngjú): the State Administration for Industry and Commerce, or SAIC
- 13 利润丰厚(lìrùn fēnghòu): profitable; lucrative
- 14 有优点也有缺点(yǒu yōudiǎn yě yǒu quēdiǎn): (it) has pros and cons; (it) has merits and demerits
- 15 广阔的市场(guǎngkuò de shìchǎng): wide market
- 16 廉价的劳动力(liánjià de láodònglì): inexpensive labor; cheap labor
- 17 畅通的营销渠道(chàngōng de yíngxiāo qúdào): smooth distribution channels
- 18 消极方面(xiāojí fāngmiàn): negative side; the minus side
- 19 招募(zhāomù): to recruit; to enlist the services of
- 20 管理人员(guǎnlǐ rényuán): administrative staff; management staff
- 21 战略上(zhàn lüè shàng): strategic; strategically
- 22 错综复杂(cuòzōng fùzá): intricate and complicated; very complicated
- 23 明了清楚(míngliǎo qīngchǔ): understandable and clear
- 24 和谐的(héxié de): harmonious; in harmony
- 25 有效的(yǒuxiào de): efficient; effective
- 26 以诚相待(yǐchéngxiāngdài): to treat each other with sincerity
- 27 消弭(xiāomǐ): to eliminate; to put an end to (something)
- 28 引入(yǐnrù): to introduce from (somewhere); import
- 29 手续(shǒuxù): procedures; formalities; red tape
- 30 糊涂(hútu): confused; bewildered
- 31 营业执照(yíngyè zhízhào): business license
- 32 架构(jiàgòu): set-up; structure; frame
- 33 转移税务(zhuǎnyí shuìwù): transfer tax; tax-transferral
- 34 烦琐(fánsuǒ): overelaborate; loaded down with trivial details

## 时文选读

中国对外直接投资宏观绩效<sup>1</sup>的实证<sup>2</sup>

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【摘要】对外直接投资绩效问题是进一步发展中国对外直接投资、增强中国企业国际竞争力的核心问题<sup>3</sup>。宏观绩效的实证分析表明,无论在长期还是短期内,中国对外直接投资对经济增长和增进出口的作用都没有显著影响。从长期来看,对外直接投资对外汇储备没有显著影响,而对外汇储备的短期影响显著且是负面的<sup>4</sup>。对外直接投资对国内投资没有显著的长期或是短期影响。对外直接投资对FDI流入以及对外直接投资对全要素<sup>5</sup>生产率的影响关系上,两者的长期均衡关系<sup>6</sup>不成立,两者短期因果关系<sup>7</sup>也不明显。中国对外直接投资的宏观绩效是不显著的。

随着世界经济一体化<sup>8</sup>的推进,中国已经不能只依靠本国的资源、资金、技术和市场来谋求<sup>9</sup>自身经济的发展。重视、扶持<sup>10</sup>和发展企业对外直接投资,并通过对外直接投资获取相应的市场效应<sup>11</sup>、资源效应、出口效应、国际收支<sup>12</sup>效应等,以促进经济的长期可持续增长<sup>13</sup>,成为中国新时期发展道路上的理性选择<sup>14</sup>。中国对外直接投资已有二十多年的历史。在这二十多年的发展历程中,中国对外直接投资是否达到了预期的发展目标,企业与国家的利益是否得到实现,以及实现的程度如何?这些都涉及到中国对外直接投资绩效问题,也是在对中国对外直接投资进行研究时面临的核心问题。笔者将考查中国对外直接投资的宏观绩效。由于中国对外直接投资事实上是政府主导型<sup>15</sup>的,对外直接投资的国家利益动机很明显,更体现在国家利益的追求上。因此,重点分析对外直接投资的宏观绩效并不影响我们对中国对外直接投资绩效的总体评价。



### 对外直接投资宏观绩效评价的数据

所有数据收集的时间跨度取 1980—2003 年。中国对外直接投资的统计数据主要来自于《中国对外经济统计年鉴》<sup>16</sup> 和联合国贸易和发展会议 (UNCTAD)《2004 年世界投资报告》<sup>17</sup>。由于 1994 年的数据缺失,所以 1994 年的数据是根据趋势估计的数据。另外,为了使各数据具有可比性<sup>18</sup>,笔者根据相应年份人民币兑美元的汇率,将对外直接投资的数据换做人民币。

表 1 中国对外直接投资宏观绩效评价数据(亿元)

时间 T	中国对 外直接 投资额 DIY(万元)	国内生 产总值 GDP	固定资 产投资 TZ	汇率 EX (100 美元 兑人民 币元)	出口总额	外汇储备	吸引外资 流入 WZ
1980	4 618	4 518	911	149.45	271	-19	4
1981	437	4 862	961	170.51	368	46	5
.	.	.	.	.	.	.	.
.	.	.	.	.	.	.	.
.	.	.	.	.	.	.	.
2002	2 084 149	104 791	43 500	827.70	26 945	23 706	4 366
2003	2 400 330	116 694	55 567	827.70	36 288	33 377	4 429

资料来源:《中国对外经济统计年鉴》和联合国贸易发展会议(UNCTAD)《2004 年世界投资报告》;《2004 年中国统计年鉴》,MF 网站。  
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注释

- 1 宏观绩效(hóngguān jìxiào): macro(economic) results
- 2 实证(shízhèng): substantial evidence; authentic proof
- 3 核心问题(héxīn wèntí): key issues
- 4 负面的(fùmiàn de): negative
- 5 全要素(quán yàosù): entire key elements; entire essential factors
- 6 均衡关系(jūnhéng guānxi): balanced relationship
- 7 因果关系(yīnguǒ guānxi): the relationship of cause and effect; causality
- 8 一体化(yītǐhuà): integration; integrated
- 9 谋求(móuqiú): seek; strive for
- 10 扶持(fúchí): support; back up
- 11 效应(xiàoyìng): effect; result
- 12 国际收支(guójì shōuzhī): international balance sheet
- 13 可持续增长(kěchíxù zēngzhǎng): sustainable growth
- 14 理性选择(lǐxìng xuǎnzé): rational selection; rational choice
- 15 政府主导型(zhèngfǔzhǔdǎoxíng): government guided (investment, industry, etc.)
- 16 《中国对外经济统计年鉴》(Zhōngguó Duìwài Jīngjì Tǒngjì Niánjiàn): *China's Trade and Foreign Economic Statistical Yearbook*
- 17 《2004 年世界投资报告》(èr-líng-líng-sì nián Shìjiè Tóuzī Bàogào): *World Investment Report 2004*
- 18 可比性(kěbǐxìng): comparability

练习

一、解释下列词语

1. 坏账
2. 投资建议书
3. 营业执照
4. 专利技术
5. 世界经济一体化
6. 非歧视政策
7. 国际收支
8. 超额利润
9. 因果关系

## 二、回答下列问题

1. 国际间一般所说的服务业包括哪些行业?
2. 外国公司到中国来投资,为什么一般采取合资的方式投资?
3. 从长期看,对外直接投资对外汇储备有没有什么显著的影响?为什么?
4. 具体来说,一个涉外企业需要具备什么样的条件才能得到中国政府的批准呢?
5. 任何一个中外合资企业都有优点也有缺点,请举例说明有哪些优点和缺点。



## 第七课

### *Lesson Seven*

## 涉外投资企业的种类及其特点

### *Types of Joint Ventures and Their Characteristics*

张 晋：我知道外国要在中国投资，成立合资企业是最好的方式，而所有的合资企业都必须经过商务部授权<sup>1</sup>的地方政府批准才行，但是外国投资的合资企业到底有多少种呢？

I understand that establishing a joint venture is the most common form of foreign investment in China and that all joint ventures must be approved by the local government affiliate of the Ministry of Commerce before the agreement can be finalized. But how many types of foreign-invested joint ventures are there?

教 授：外商的直接投资主要有三种形式：合资企业、合作企业和外商独资企业。这三种企业一般通称“三资企业”。

There are three main types of foreign direct investment: equity joint ventures, contractual joint ventures, and wholly foreign-owned enterprises. These three types are commonly known as the “Three Funds Enterprises”.

张 晋：如果外商的直接投资是以合资企业的方式运行，那么这类合资企业在中国经营的期限是多久呢？

If the foreign direct investment is in the form of an equity joint venture, how long can that enterprise stay in China?

教 授：合资企业一般简称 EJV，通常的期限为五十年，有时还可以延期。有些企业甚至可以无限期地<sup>2</sup>在中国经营。

Equity joint ventures, commonly known as EJVs, normally have 50-year terms, which can sometimes be extended. Certain enterprises may even have an

unrestricted period of operation in China.

**柯礼思:** 我知道合资企业要获得批准共有五个步骤<sup>3</sup>, 第一步必须向商务部或其他指定的单位<sup>4</sup>提出申请, 第二步是有关合资合作的双方必须共同拟制一个可行性的报告书<sup>5</sup>, 并且准备一份合资合作同意书。那其他三个步骤呢? 我现在都不记得了。

I know there are five main steps for having a joint venture project approved. The first step is to submit an application to the Ministry of Commerce or its designated unit. The next step is for all parties involved in the venture to conduct a joint feasibility study and prepare a joint venture agreement. But what are the other three steps? I can't remember them right now.

**张 晋:** 我想下一步就是双方都要向商务部呈递<sup>6</sup>三份合资同意书, 三份都是用外语写的, 还有双方已经签字的合同。

I think the next step is for the parties involved to submit three copies of the joint venture agreement together with three copies in the foreign language and a contract signed by both parties to the Ministry of Commerce.

**教 授:** 是的, 与此同时, 双方还要准备一份董事会的名单, 列明董事长<sup>7</sup>、副董事长和所有的董事<sup>8</sup>的名单。最后一步就是取得国家工商行政管理总局授权的地方政府所颁发的批准证书<sup>9</sup>。

Yes, and in the meantime, both parties must prepare a list of the board of directors, identifying its chairman, vice chairman, and all of the board members. The last step is to obtain a certificate of ratification from the local affiliate of the State Administration for Industry and Commerce (SAIC) of the PRC.

**柯礼思:** 一定得设董事会吗? 董事会是指定的还是经过选举产生的?

Is a board of directors required? Is the board appointed or elected?

**教 授:** 合资合作的同意书中应该注明董事会相关规定, “其人数组成由合营各方协商, 在合同、章程中确定, 并由合营各方委派和撤换”<sup>10</sup>。

A board of directors is required in a joint venture agreement, and it “shall have its size and composition stipulated in the contract and the articles of association after consultation between the parties to the venture; and the directors shall be



appointed and replaced by the parties to the venture."

**柯礼思:** 当合资合作企业开始运作并产生盈利后,外商和他们的中国合伙人如何分配利润呢?

Once a joint venture is set up and has started to operate and generate revenue, how do the Chinese and foreign partners share profits?

**教授:** 这得看情况而定了。如果是合资企业的话,一般利润和风险的分担是按照投资额<sup>11</sup>的比例分配;如果是合作企业的话,那他们在分配利润上或许有所不同,换句话说,合作企业的分配方式比较富有弹性,利润的分配可按照合同的条款进行而不一定是按照投资的比例分配利润。

It depends. In general, profit and risk sharing are both proportionate to investment share if it's an EJV. But the parties to a CJV may agree to distribute their profits differently. In other words, CJVs are more flexible: their profits are distributed according to contractual terms rather than investment share.

**张晋:** 对外国投资者来说,投入资金的比例有没有最低的限制呢?

Is there a minimum capital contribution required of foreign investors?

**教授:** 对合资企业来说,原来的《合资经营企业法》规定,外商的最低投资额必须是注册资金的25%,2003年新修改的法律仍保持这个数字。

For an EJV, the original EJV law stipulated a minimum foreign capital contribution of 25 percent of the registered capital. While the newly revised law of 2003 maintains the same minimum.

**张晋:** 我认为限制越少越好。如果外国投资者最少要投资注册资金总额的25%,那最多可以投资多少呢?

I think the fewer restrictions, the better. If a foreign investor has to invest at least 25 percent of the registered capital, what's the maximum he or she can invest?

**教授:** 以前,如果成立一个合资项目,中国投资的总额低于注册资本的51%,中国政府是不会批准的。但是听说为了履行中国加入WTO时的协议,这项限制在2003年12月11日已被取消了。也就是现行法律对外商投资金额不设上限。

In the past, the Chinese government did not approve any application for establishing an EJV in which the Chinese investment was less than 51 percent. However, in order to comply with China's accession agreement, this restriction was lifted on December 11, 2003. In other words, it no longer imposes a maximum equity percentage on the foreign participant.

**柯礼思:** 除了提供资金, 还有没有其他可作为出资的呢? 比如能源、原料等。

Aside from capital, are there other permissible contributions such as energy and raw materials?

**教授:** 除了资金, 双方还可以设备、生产的原料、建筑物、知识产权和土地使用权<sup>12</sup>等作为出资。

Besides capital, each party may also supply equipment and materials for production, buildings, intellectual property rights, and land use rights.

**张晋:** 据我了解, 合资企业法不如合作企业法来的有弹性。就限制而言, 两者之间主要有哪些不同呢?

I know that EJV terms and regulations aren't as flexible as those for CJVs. As far as restrictions are concerned, what are the major differences between the two?

**教授:** 对合资企业的限制比较多。比如, 合资企业的投资份额不能自由约定, 其经营管理机构也有特殊的要求。此外, 合资企业也不允许雇佣外国的员工。但是新修订的合资企业法, 放宽了这些限定。

There are many more restrictions on EJVs. For example, EJVs investors' shareholdings are non-negotiable; and there are specific requirements for the management and organizational structure. In addition, no foreign labor is allowed. However, the newly revised EJV law does offer some flexibility.

**柯礼思:** 教授, 您能举一个例子说明新修订的法律的变化吗?

Professor, can you give us an example about the new provisions?

**教授:** 比方说, 旧的《合资经营企业法》第九条是: “合营企业生产经营计划, 应报主管部门备案, 并通过经济合同方式执行。”新修订的法律撤销<sup>13</sup>了这项规定。

Here's one example: the former Article read: "The production and operation plans of an equity joint venture shall be filed with the authorities concerned and shall be implemented through business contracts." But now, the newly amended law has repealed that provision.

**张 晋:** 这些改动为在中国开展商业计划的外国投资者提供了更加宽松的投资环境。

This new version certainly offers more flexibility for foreign investors to carry out their business plans in China.

**教 授:** 不仅如此。其他法律也修订了一些条款,来解除对外商投资的限制。例如《外资企业法》的第十八条第三项:“外资企业应当自行解决外汇收支平衡。外资企业的产品经有关主管机关批准在中国市场销售,因而造成企业外汇收支不平衡的,由批准其在中国市场销售的机关负责解决。”现在这些法律条文也被取消了。

That's not all. There are other revisions, too. For example, Provision 3 of Article 18 on *Foreign-Capital Enterprises Law* read: "Enterprises with foreign capital shall manage to balance their own foreign exchange receipts and payments. If, with the approval of the competent authorities, the enterprises market their products in China and consequently experience an imbalance in foreign exchange, said authorities shall help them correct the imbalance." But now, this clause has been repealed.

**柯礼思:** 这是一项很大的进步。在我看来,限制越多,外国的投资者就越不愿意到中国投资。不过从中国政府的角度来看,合资企业是中国比较倾向的投资方式。

That's a huge improvement. It seems that the more restrictions foreign investors face, the less willing they are to invest in China. Yet, from the Chinese government's point of view, EJV's are the preferred form of investment.

**张 晋:** 那合作企业呢? 其限制是不是更少?

How about CJVs? Are there fewer restrictions on them?

**教 授:** 是,合作企业与合资企业有许多不同的地方。比方说,合作企业没有最低投

资额的限制,而且可以提供劳动力、资源和服务等作为投资方式,而不同于资金作为投资的方式。

Yes. CJVs differ from EJVs in many ways. For example, CJVs don't have a minimum foreign investment requirement, and the investment can take other forms, such as labor, resources, and services. In short, it doesn't necessarily have to be in monetary form.

张 晋: 如果中外合资企业已经成立了,但是外方要退股<sup>14</sup>,那该怎么办呢?

What can be done if a Chinese-foreign EJV partnership has already been formed, but the foreign party then decides to withdraw its capital?

教 授: 在过去,合资企业的资方如果在合同有效期间要退股的话,是会受到限制的。但2001年新修订的合资法规定:外商可以通过一定的步骤实现退股。

In the past, there were restrictions if investors in an EJV wanted to withdraw registered capital during the life of the contract. But because of the newly revised EJV laws of 2001, certain steps that can be taken to withdraw the capital.

张 晋: 教授,有哪些步骤呢?

What steps, Professor?

教 授: 有三个步骤,它们分别是:(1)由董事会决定提出终止合作;(2)合资公司依法进行清算<sup>15</sup>;(3)清算后的财产,根据中外双方出资的比例进行分配。

There are three steps as follows: (1) the board of directors proposes to terminate the equity joint venture ahead of schedule; (2) the equity joint venture is then liquidated in accordance with the law; and (3) any remaining assets are allocated among the parties to the equity joint venture in proportion to their respective capital contributions.

柯礼思: 如果是在中外合作企业外商要退股的话呢?

How about withdrawing the registered capital from a CJV?

教 授: 外国资方在合同期间可以自由退股,由于这种合作企业具有一定的弹性和可操作性等优势,所以这种投资形式是最受小型投资企业欢迎的方式。

Foreign investors may withdraw registered capital during the duration of the

contract. Because of such flexibility and the other benefits of CJVs, this form of investment has become the most popular form of small business investment in China.

**张 晋:** 我认为:外商独资企业具有对资本的完全控制权,才应该是外国投资者在中国最普遍的投资方式呀!

I thought that a foreign investor wholly-owned enterprise, was the most popular form of investment among foreign investors, because the foreign company was able to exercise complete control over its operations in China.

**教 授:** 不完全正确。全为外方拥有的企业并不适用于每个人。这类企业主要是为高科技应用或科技的转移而设立的,而且生产的产品主要不是投入中国国内的市场,而是为国外的市场。换句话说,他们的产品主要是针对国外的市场。

Well, yes and no. A foreign investor wholly-owned enterprise isn't for everyone. This type of enterprise is primarily intended for high-tech companies that are involved with technology transfers, and whose products are not intended for China's domestic market, but rather for the foreign market. In other words, their products are export-oriented.

**柯礼思:** 由于这种类型的企业不论是在资金或是专有技术方面都是外国公司所拥有的,那么他们是不是能够完全控制他们的经营运作呢?这类的公司是不是依照本国法律运行,而不需中国法律进行调整呢?

Does this type of enterprise have full control of its management and operations, since the capital and expertise are the sole property of a foreign company? In case of making certain adjustments, can a foreign investor wholly-owned enterprise follow its home country's laws rather than China's?

**教 授:** 不全是。一个完全由外资控制的企业虽然享有企业的全部权力,并享有经营的自主权,但是“合营企业的一切活动应遵守中华人民共和国法律、法规的规定”。<sup>16</sup>

Not really. Yes and no. A foreign investor wholly-owned enterprise has exclusive management control and autonomy in operation. But “all the activities of a joint venture shall comply with the provisions of the laws, decrees, and pertinent regulations of the People's Republic of China”.





**张 晋:** 如果一个完全由外商控制的企业能够在生产和经营方面享有控制权,那岂不是在中国投资的最好方式吗?

If a foreign investor wholly-owned enterprise has exclusive control over management and operations, wouldn't it be the best way to invest in China?

**教 授:** 不见得。首先,中国某些性质的行业还不完全对外资方开放,例如电信、保险、银行和金融等。第二,若有中国的合作伙伴,不但在提供商业信息和人际关系方面有好处,而且也能为外资方提供文化上的支持,使他们在中国的经营更为顺利。

Not necessarily. First of all, certain industries, such as the telecommunications, insurance, banking, and finance industries, are not yet completely open to foreign investors. Secondly, it's beneficial to have a Chinese joint venture partner who can offer business and interpersonal connections, as well as cultural understanding, to foreign investors, making their operations in China run more smoothly.

**柯礼思:** 要使企业成功地经营,企业文化的认知<sup>17</sup>扮演着重要的角色。我认为有中国合作伙伴是很重要的,因为他们知道如何跟中国官方打交道<sup>18</sup>,凡是跟企业设立和审批有关的事宜,他们都能帮着办成。

Cultural understanding plays an important role in successful business management. I think it's important to have Chinese joint venture partners, because they know how to deal with the Chinese bureaucracy and can help their foreign partners with the approval process and other regulatory issues.

教授：确实如此。

Indeed.

张晋：看来，了解中国的三资企业法，结合企业特色，恰当地选择投资方式，对提高经营管理水平，开拓中国市场，获得经济利益大有裨益。

It seems that if one fully understands China's "Three Funds Enterprises law," combines that with the characteristics of Chinese enterprises, and properly selects investment methods, one will receive great financial benefits as far as raising the standard of management and opening up Chinese market are concerned.

### 注 释

- 1 授权(shòuquán): authorized; to authorize
- 2 无限期地(wúxiànqī de): indefinite duration; indefinitely
- 3 步骤(bùzhòu): step; measure
- 4 指定的单位(zhīdìng de dānwèi): designated (work) unit
- 5 可行性的报告书(kěxíngxìng de bàogàoshū): a feasibility study
- 6 呈递(chéngdì): to submit (to a superior)
- 7 董事长(dǒngshìzhǎng): chairman (or president) of the board of directors
- 8 董事(dǒngshì): director; trustee
- 9 批准证书(pīzhǔn zhèngshū): certificate of ratification
- 10 See 《中华人民共和国中外合资经营企业法》(Zhōnghuá Rénmín Gònghéguó Zhōngwài Hézī Jīngyíng Qīyèfǎ): *the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures*, revised, Article 6.
- 11 投资额(tóuzī'é): investment amount
- 12 土地使用权(tǔdì shǐyòngquán): land use rights
- 13 撤销(chèxiāo): to rescind; to annul
- 14 退股(tuì gǔ): to withdraw shares; to withdraw investment in a company
- 15 清算(qīngsuàn): to clear (an account); to settle an account
- 16 See 《中华人民共和国中外合资经营企业法》(Zhōnghuá Rénmín Gònghéguó Zhōngwài Hézī Jīngyíng Qīyèfǎ): *the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures*, see Article 2
- 17 文化的认知(wénhuà de rènzhī): cultural understanding
- 18 打交道(dǎ jiāodào): to make contact with; deal with; interact with

中外合资企业“独资化<sup>1</sup>”的若干法律问题

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【摘要】近些年来,外商在华直接投资中外商独资企业的比重<sup>2</sup>明显提高,并且原有的一些中外合资企业的外国投资者尤其是跨国公司,亦纷纷通过受让<sup>3</sup>中方股权<sup>4</sup>或增资扩股<sup>5</sup>的方式将合资公司转变为外方控股<sup>6</sup>或独资的公司,呈现出一股“独资化”的趋势。合资企业的“独资化”趋势有其深刻的时代背景和内在原因,并将对我国的经济发展产生深远的影响。本文对合资企业“独资化”过程中的增资扩股、股东转让<sup>7</sup>及其审批<sup>8</sup>、股权交割<sup>9</sup>完成的标志以及股权转让协议的法律适用等问题进行探讨,并提出相关立法建议。

从我国改革开放后允许外资进入到20世纪90年代初,成立中外合资企业一直是外资进入的主要方式,在1998年以前合资企业在“三资企业”中始终保持占七成以上份额<sup>10</sup>。但是近年来,中外合资企业数目却增长放缓,2000年外商独资企业的增长首次超过中外合资企业。而且,原有的一些优秀的中外合资企业亦纷纷上演“合资变局<sup>11</sup>”,合资企业的外国投资者通过受让中方股权或增资扩股方式将合资公司转变为控股或独资的公司。在中国加入WTO后,国外一些战略管理咨询公司<sup>12</sup>认为,为了回避冲突<sup>13</sup>,取得更大赢利<sup>14</sup>,外方通过股权转让将企业变为独资,已经是大势所趋<sup>15</sup>。近年来合资企业“独资化”过程中的许多法律问题也凸现<sup>16</sup>了出来,笔者拟从合资企业“独资化”过程中的股权变更及其审批、股权交割完成的标志以及股权转让协议的法律适用等问题进行探讨,并提出相关法律建议,以企求教于大方之家<sup>17</sup>。

## 独资化途径——股权转让

本文所讨论的中外合资企业“独资化”,是指中外合资经营企业、中外合作经营

企业(二者合称“合资企业”)的外方投资者通过不断增资扩大本方股权比例,来取得对合资企业的绝对控股权<sup>18</sup>,继而通过收购中方股份把合资企业变为独资企业,并不包括中方投资者收购外方股份,将合资企业变为内资企业的行为。合资企业“独资化”,无论是通过不断的增资扩股以实现对合资企业的绝对控股,还是一次性收购<sup>19</sup>中方全部股份将合资企业变为独资企业,其实现途径乃是股权变更<sup>20</sup>。

股权变更,这一概念首次出现于1997年5月28日对外贸易经济合作部、国家工商行政管理总局发布的《外商投资企业投资者股权变更的若干规定》(以下简称“股权变更规定”),而在我国现行的有关公司的法律、法规,如《外资企业法》、《中外合资经营企业法》和《中外合作经营企业法》中,都没有“股权”及“股权变更”的概念,而只有“出资或出资额<sup>21</sup>”及“出资或出资额的转让<sup>22</sup>”的概念。譬如,《中外合资经营企业法实施条例》第23条第1款规定:“合营一方如向第三者转让其全部或部分出资额,须经合营他方的同意,并经审批机构批准。”笔者认为,股权转让的表述<sup>23</sup>比出自转让或出资额转让的表述更为准确。其理由如下:

首先,从法理上讲,股东出资组建公司,公司成立后就有了独立的“人格”及“身份<sup>24</sup>”,不依赖于股东而存在;同时,股东完成对公司的出资,在公司成立后,股东就丧失了对这部分出资的特定的财产权利,股东不得抽回出资,并不得对这部分出资进行支配。股东和公司之间形成的是法定的契约关系,股东在丧失对出资特定财产权利的同时,换回的是股东对公司的股权。因此股东转让其在公司中的权利,应当称为股权转让而不是出资转让。故2005年10月27日修订后的《公司法》第3章“有限责任公司股权转让”明确将原《公司法》第35条规定的“出资转让”变更为“股权转让”。

其次,从实践来看,股东对公司的出资最终都是一种量化货币<sup>25</sup>,而这种量化货币是无法用货币购买,从而进行转让的。

再次,公司成立时,股东对公司的出资构成了注册资本<sup>26</sup>,代表了公司的实有财产<sup>27</sup>,但这一财产并非恒产<sup>28</sup>。在公司的存续过程<sup>29</sup>中,它可能因公司经营的盈亏<sup>30</sup>或财产本身的无形损耗<sup>31</sup>而在价值量上发生变动。所以,在公司成立后,股东对公司的出资是无法确定其价格的,既然无法确定股东对公司出资的价格,也就无法按照市场化模式对其进行转让。而股权是有其相应的货币价值的,在公司的资产负债表<sup>32</sup>中,将公司资产减去公司负债,得到的净值资产<sup>33</sup>,就是公司的所有者权益,即股东对公司权益的货币化体现。因此,股东能够进行转让的应是股东对公司的控制权,即股权,而不是股东对公司的出资。

(摘自《成都大学学报》(社会科学版)2007年第2期)

## 注释

- 1 独资化(dúzīhuà): privatize
- 2 比重(bǐzhòng): proportion; ratio
- 3 受让(shòuràng): assign; authorize
- 4 股权(gǔquán): stockownership
- 5 增资扩股(zēng zī kuò gǔ): increase capital and stock shares
- 6 外方控股(wàifāng kònggǔ): a foreign company has controlling interest
- 7 股东转让(gǔdōng zhuǎnràng): a share holder transfers (his/her) shares
- 8 审批(shěnpī): approve; approval
- 9 股权交割(gǔquán jiāogē): deliver stocks
- 10 份额(fèn'é): share; portion
- 11 合资变局(hé zī biànjú): joint venture transformation
- 12 战略管理咨询公司(zhànlüè guǎnlǐ zīxún gōngsī): strategic management and consulting firm (company)
- 13 回避冲突(huíbì chōngtū): avoid conflict
- 14 赢利(yínglì): profit; bonus
- 15 大势所趋(dàshìsuǒqū): according to prevailing tendency; the trend of the times; general trend indicates...
- 16 凸现(tūxiàn): appear; show
- 17 大方之家(dàfāng zhī jiā): learned scholar; expert
- 18 绝对控股权(juéduì kònggǔquán): (have) absolute controlling interest
- 19 一次性收购(yí cì xìng shōugòu): one time purchase
- 20 股权变更(gǔquán biàngēng): transfer stock ownership
- 21 出资或出资额(chūzī huò chūzī'é): capital investment or the amount of investment
- 22 转让(zhuǎnràng): transfer the ownership of
- 23 表述(biǎoshù): state (one's) view
- 24 身份(shēnfèn): status
- 25 量化货币(liàng huà huòbì): measurable currency
- 26 注册资本(zhùcè zīběn): registered capital
- 27 实有财产(shíyǒu cáichǎn): tangible assets
- 28 恒产(héngchǎn): permanent assets
- 29 存续过程(cúnxù guòchéng): the process of continuously operating
- 30 盈亏(yíngkuī): profit and loss
- 31 无形损耗(wú xíng sǔn hào): invisible wear and tear
- 32 资产负债表(zīchǎn fùzhài biǎo): balance sheet
- 33 净值资产(jìngzhí zīchǎn): net assets



# 练习

## 一、解释下列词语

1. 合资合作同意书
2. 注册资本
3. 最低投资额
4. 独资化
5. 增资扩股
6. 股东转让
7. 股权变更
8. 股权交割
9. 量化货币
10. 恒产
11. 盈亏
12. 资产负债表

## 二、回答下列问题

1. 外商的直接投资主要有哪些形式?
2. 一般大型企业公司的董事会是如何产生的?
3. 合资合作的资方可以在合同有效期内退股吗? 有哪些步骤可以实现退股?
4. 自 2000 年来, 外商独资企业的增长首次超过中外合资企业, 为什么呈现这样的趋势呢?
5. 战略管理咨询公司是什么样的公司? 这类的公司能够提供什么服务?



## 第八课

### *Lesson Eight*

## 涉外投资相关法律对外商的保护

### *Foreign Investment Laws and Protecting Foreign Investors*

张 晋：教授，上次您提到，外国投资者到中国投资时，选择中国合作伙伴并签订合同是很重要的，那中国是不是有一套完整的法律和规章<sup>1</sup>来保护外商的投资呢？

Professor, you mentioned last time that it was important for a foreign investor to select a Chinese business partner and sign a contract. Does China have a set of comprehensive laws and regulations to protect foreign investment?

教 授：当然有啊。《中华人民共和国中外合资经营企业法》的第2条就很明确地指出：“中国政府依法保护外国合营者按照经中国政府批准的协议、合同、章程在合营企业的投资、应分得的利润和其他合法权益。”

Certainly. Article 2 of the *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* clearly states that “the Chinese government protects, in accordance with the law, the investments of foreign joint ventures, the profits due them, and their lawful rights and interests in a joint venture, pursuant to the agreement, contract, and articles of association approved by the Chinese government.”

柯礼思：中国最高的立法机关<sup>2</sup>是什么呢？哪一个机关是最高的行政机关<sup>3</sup>？还有，哪一个机关是制定涉外法律法规的最高权威机关<sup>4</sup>？

What is China's highest legislative body, and which organization is the highest administrative organ? Which organization has the highest authority to formulate laws and regulations concerning foreign affairs?

**教授:** 中国最高的立法机关是全国人民代表大会及其常务委员会<sup>5</sup>, 最高行政机关是国务院, 两者都有权制定涉外法律法规。

The National People's Congress and its standing committee make up China's highest legislative body, and the State Council is the highest administrative organ. Both organizations have the highest authority to formulate laws concerning foreign affairs.

**柯礼思:** 我听说中国入世不但能够帮助中国加强法制建设, 而且对外国公司也有好处。因为入世促使中国成为一个更透明、更加可预测的商业环境。

It's said that China's accession to the WTO not only helps China strengthen the rule of law, but also benefits foreign companies, because it fosters a more transparent and predicable business environment in China.

**教授:** 我同意。实行法治绝对能够改善中国的商业环境。政府的有关单位设立一个平台<sup>6</sup>来公布法律和法规, 并公开新法起草<sup>7</sup>的过程, 让相关产业的公众<sup>8</sup>有机会在颁布实行新法之前提出自己的意见。

I agree. Implementing rule of law will definitely help to improve the business environment in China. Now, the relevant administrative unit is setting up an institution to publish laws and regulations, and open up the drafting process. It will also provide an opportunity for the industries concerned to comment on new laws prior to their promulgation.

**张晋:** 除了合资法外, 中国的公司法是否也有相应条款来引导外商投资呢?

Aside from the joint venture laws mentioned earlier, does China have any other corporate or economic laws to regulate foreign investment?

**教授:** 有。

Yes, indeed.

**柯礼思:** 那有没有环境保护法<sup>9</sup>、专利法一类的法律呢?

Are there laws established to protect environment and patent?

**教授:** 都有, 那些领域的法律都已经相当完备了。其他商事制度如销售、服务和经销, 劳动与福利, 技术转让<sup>10</sup>, 安全与质量标准, 税收制度也都在发展完善中。

Yes, the laws in those fields are already pretty well developed and formulated. Other business laws, including those on sales, service and distribution, labor and benefits, technology transfer, safety and quality standards, and the tax system, are also being developed and perfected.

张 晋: 您刚提到税法, 外商投资者在中国也要付税吗? 哪些法律明文规定<sup>11</sup>了这些外国投资商的权利和义务?

You just mentioned taxation, do foreign investors have to pay taxes in China? What kind of law stipulates their rights and obligations?

教 授: 外商在中国也要交税, 这在《中华人民共和国外商投资企业和外国企业所得税法》<sup>12</sup>上规定得很清楚。

Yes, foreign investors have to pay taxes in China, as well. It's clearly stipulated in the *Entrepreneur Income-Tax Law for Sino-Foreign Joint Ventures and Implementation Regulations*.

张 晋: 那有关税务方面有没有什么优惠呢?

Are there any incentives as far as taxes are concerned?

教 授: 在特定的地理区域, 比方说经济特区、沿海开放城市<sup>13</sup>和特别行政区<sup>14</sup>, 都有减税和减费的规定。

In specially designated geographical areas, such as the special economic zones, open coastal cities, and special administrative region, all have reduced taxes and fee structure.

柯礼思: 您说的“减费”是指哪些方面的费用呢?

What are the “reduced taxes” you are referring to?

教 授: 这里的费用主要是指土地使用费、水电费以及通信、运输费用等。

The fees here are mainly land usage fees, electricity and water supply fees, and transport and telecommunication facility fees.

张 晋: 那有没有免征税的企业啊?

Are there any tax or fee exemptions?



**教授:**当然有,凡能带来外汇盈余<sup>15</sup>的企业,或是能够生产新产品或是代替进口产品<sup>16</sup>的科技先进企业<sup>17</sup>,都有可能在免税或减税之列。

Certainly there are. All companies that can bring exchange surpluses or produce import-substituting products, the high-tech companies can enjoy tax reductions or exemptions.

**柯礼思:**涉外投资的企业一旦在中国设立,它们在法律上享有哪些权益呢?如果中国政府决定要收购这个企业,那么这些涉外投资公司能够得到什么样的保护呢?

Once a business entity involved with foreign investment is set up in China, what kind of legal rights does it have? If the Chinese government decides to purchase the company, what kind of protection does the foreign company have?

**教授:**外商投资企业的合法权益受到中国法律的保护。一般来说:“国家对外资企业不实行征收<sup>18</sup>;在特殊情况下,根据社会公共利益的需要,对外资企业可以依照法定程序实行征收,并给予相当的补偿<sup>19</sup>。”

A foreign-funded enterprise's lawful rights and interests are safeguarded by the law of the People's Republic of China. Normally, the State shall not nationalize or requisition any enterprise with foreign capital. Under special circumstances, when public interest requires it, enterprises with foreign capital may be requisitioned in accordance with legal procedure, and appropriate compensation shall be made.

**张晋:**如果征收不合理的费用,那外商公司应怎么办呢?

If unreasonable charges are levied, what can a foreign enterprise do about it?

**教授:**在这种情况下,外商投资企业不但可以拒付<sup>20</sup>,而且还可以向外商投诉调解中心<sup>21</sup>申诉<sup>22</sup>。

Under such circumstances, a foreign-funded company not only may refuse to pay the unreasonable charges, but it can also lodge a complaint with a Mediation Center for Foreign Economic Disputes.

**柯礼思:**外商公司有权利按照他们自己经营企业的方式在中国经营企业<sup>23</sup>吗?

Does a foreign enterprise have the right to conduct business in its own managerial style in China?

**教授:**多半是可以这么做的。事实上,中国政府支持外商投资的企业按照国际惯例<sup>24</sup>,特别是按照先进的<sup>25</sup>科学方法来经营管理企业的。

Pretty much. In fact, the Chinese government supports foreign-funded enterprises' management of businesses according to international practices, especially those carry out with advanced scientific management methods.

**张晋:**外商投资企业可以雇佣中国劳动者吗?

Can a foreign enterprise employ Chinese workers?

**教授:**当然可以。法律很清楚地规定:“外资企业雇用中国职工应当依法<sup>26</sup>签订合同,并在合同中明确规定雇用<sup>27</sup>、解雇<sup>28</sup>、报酬<sup>29</sup>、福利<sup>30</sup>、劳动保护<sup>31</sup>以及劳动保险<sup>32</sup>等事项。”<sup>33</sup>

Definitely. The law clearly stipulates that when employing Chinese workers and staff, an enterprise with foreign capital shall conclude contracts with them according to law, in which matters concerning employment, dismissal, remuneration, welfare benefits, labor protection, and labor insurance shall be clearly prescribed.

**柯礼思:**什么是外商投资委员会<sup>34</sup>?它具有什么功能呢?

What is the Coordinating Committee for Foreign Investment? What are its functions?

**教授:**外商投资委员会是在1994年在国务院领导下成立的,这个委员会的职责是研究、协调<sup>35</sup>、引导外商在中国的投资。

The Coordinating Committee for Foreign Investment was set up under the State Council in 1994. The committee is responsible for studying, coordinating, and guiding foreign investment policies throughout China.

**张晋:**这个委员会能够对外商投资项目做出决定吗?

Can the committee make the final decision about foreign investment projects?

**教授:**这个委员会没有做决定的权力,但是他们可以在全国人大常务委员会的授权下享有一定的权力,如人大常委会授权他们行使的立法权。

The committee does not have formal decision-making right, but its advice can be implemented by the State Council and delegated legislative power.

柯礼思：外资在中国经济的成长和发展中扮演了重要的角色，是不是外资促使中国走向了市场经济？

I know that foreign investment has been playing a major role in China's economic growth and development. Do you think foreign investment is also helping China move toward a market economy?

张 晋：二者是互惠的，外商投资加速了中国经济的发展，同时，我认为中国的经济改革对外商的投资也具有正面的影响<sup>36</sup>。它改善了外商投资环境，促进外商投资企业的发展。

It's mutually beneficial. Foreign investment accelerates economic development in China. I believe that China's economic reforms are also having a positive impact on foreign investment. They offer foreign investors an improved, friendlier investment environment.

柯礼思：我也这么认为。中国的经济改革是什么时候开始的？

I do think so. When did China's economic reform formally take place?

张 晋：应该是 1992 年的夏天。那时，中国确立了社会主义市场经济的改革方向。

I believe it began in the summer of 1992. At that time, China established the policy to direct the country to a socialist market economy.

柯礼思：从地理位置<sup>37</sup>上看，外资分布的情况如何？投资地域是怎么选定的呢？

What is the geographical distribution of foreign investment in China? And how is a locale selected?

教 授：外资大部分集中在东南沿海<sup>38</sup>一带，地域的选择是根据当地基础设施的开发、教育水平的高低及交通运输能力等决定的。

Foreign investment is highly concentrated in the southeastern coastal region, and the selection of a site is basically determined on the development of the local infrastructure, the general level of education, and the capability of transportation.

张 晋：选择地点上有什么限制<sup>39</sup>吗？

Are there any restrictions on selecting a location?

教 授：根据 1996 年的法规，外商只能在上海浦东和深圳特别经济区<sup>40</sup>成立合资

企业外商贸易公司,但是 2003 年新修订的法律取消了地理区域上的限制。Under the 1996 rules, foreign investors could operate equity joint venture foreign trade companies only in the Shanghai Pudong and Shenzhen Special Economic Zones. But the newly revised laws of 2003 have removed all of the restrictions on geographic location.

**柯礼思:** 选择不同地点有什么特别优势吗?

Are there any advantages on selecting locations?

**教授:** 当然。正如刚才提到的,外资大部分集中在中国东南沿海一带,而且中国各省都为吸引外资不遗余力<sup>41</sup>,他们会为各种不同投资方式提供各类环境。

Yes, there are. As just mentioned, most foreign investments are concentrating on southeastern coastal areas. Also, in attracting foreign investments, all provinces in China spare no effort. They provide different types of (working) environment for different types of investment.

**柯礼思:** 那他们选择的地点所在的省政府<sup>42</sup>有权批准投资吗?

Once a location has been determined, does the provincial government have the authority to approve a foreign investment project?

**教授:** 那要看情况而定了:如果超过三千万美元的投资,就需要中央政府批准<sup>43</sup>,也就是商务部及国家发展与改革委员会<sup>44</sup>的批准;如果投资总额超过一亿美元,那就需要国务院的批准了。国务院是批准、管理外资的最高行政机关。

It depends. A Foreign investment project totaling more than US\$30 million requires approval at the central government level, as in that of the Ministry of Commerce and the National Development and Reform Commission. A foreign investment project that is over US\$100 million requires the approval of the State Council, the highest authority for the approval and regulation of foreign investment.

**张晋:** 外资企业可以在中国投资任何产业吗?

Can foreign investors invest in any industry in China?

**教授:** 不一定,中国政府对不同的产业做了区分。有鼓励类、限制类等四个类

别,这些分类主要是结合中国经济、社会、资源等特点指导外商投资。  
Not necessarily. The Chinese government has categorized industries into four groups, such as encouraged groups, restricted groups, etc. These catalogues aim to guide the foreign investment with collaboration of Chinese economy, society, and resources.

柯礼思:那投资哪些产业可以得到优惠待遇呢?

Are there certain industries that receive preferential treatment?

教授:有关能源<sup>45</sup>开发、机械制造,以及电子工业、农业、林业<sup>46</sup>、畜牧业<sup>47</sup>都有不同程度的优惠待遇。

Industries such as energy development, machine manufacturing, electronics, agriculture, forestry and animal husbandry will get preferential treatment in various degrees.

张晋:我记得1986年的法律对出口企业和高科技企业都给予优惠待遇,这是为什么呢?

I recall that the 1986 Provisions granted preferential treatment to export-oriented companies and tech-advanced companies. Why is that?

教授:出口能带来外汇的盈余<sup>48</sup>,而新技术的引入能促进新产业的发展,这对于中国的对外经济发展都能起到积极的作用。

Exports will generate foreign exchange surpluses, and the introduction to new technologies will accelerate the pace of developing new industries. It will also bring positive results as far as China's foreign economic development is concerned.

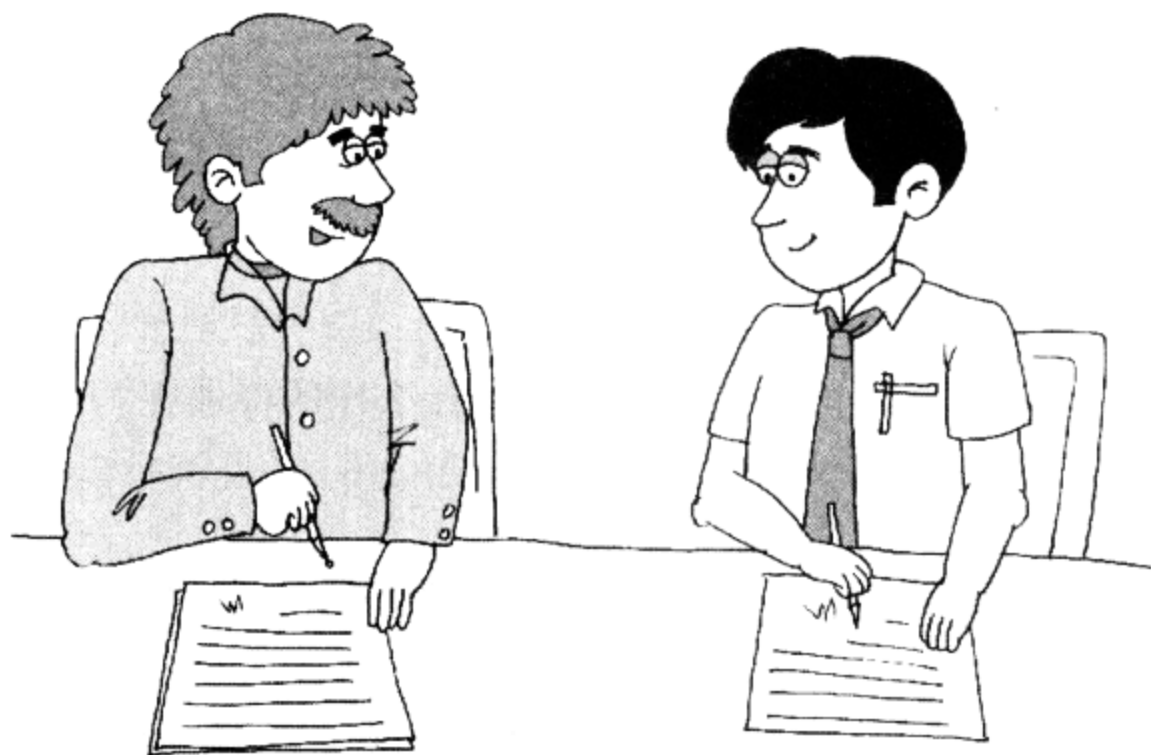
柯礼思:那中国政府限制外商投资的领域又有哪些呢?

For foreign investors, what are the prohibited industries in China?

教授:对于危害<sup>49</sup>国家安全、污染环境<sup>50</sup>、占用较多可耕地<sup>51</sup>或使用中国独有的工艺或科技的领域都做了禁止性规定。

Industries that endanger national security, pollute the environment, occupy a lot of arable land, or use craftsmanship or technology that is unique to China.





张 晋：那么，投资的方式有没有什么改变呢？

Have there been any changes in the forms of investment?

教 授：根据 1996 年的法规，外商仅能用可兑换的<sup>52</sup>外币来投资。但 2003 年的新法规允许外商可以以中国投资者所允许的其他方式参与投资。

Under the 1996 rules, foreign investors could only invest in convertible foreign currency. The new rules of 2003 allow foreign investors to invest in such other forms as are permitted for Chinese investors.

柯礼思：对外资投资法的了解越多，外资企业的生存和发展的机会也越大。

The more a foreign enterprise understands Chinese foreign investment law, the better its chances of survival.

柯礼思：对台商的投资权益，中国大陆有没有特别的法律来保护呢？

Are there special laws or regulations to safeguard the interests of investors from Taiwan?

教 授：当然有。《中华人民共和国外资企业法》等相关文件很清楚地表明：“港澳同胞及台湾同胞在大陆的投资、购置资产、工业产权、投资所得利润和其他合法权益均受国家法律保护，并可依法继承。”

Indeed there are. *The Laws and Regulations of the People's Republic of*

*China on Foreign-Capital Enterprises* and related laws clearly states: "For Compatriots in Hong Kong, Macao, and Taiwan, their investments, real estate, industrial properties, profits from investments, and other lawful rights and interests in the Mainland shall be protected by law, and may be transferred and inherited in accordance with the law."

柯礼思：那港、澳、台商人在中国大陆投资都享受什么样的待遇呢？

What special treatment will investor from Hong Kong, Macao, and Taiwan get?

教授：凡是由港、澳、台同胞投资的企业可以按照外资企业的规定给予相同的优惠待遇。

Yes, enterprises funded by compatriots in Hong Kong, Macao, and Taiwan are given the same preferential treatment as foreign-funded ones.

### 注 释

- 1 规章 (guīzhāng): rules; regulations
- 2 立法机关 (lǐfǎ jīguān): legislative body; legislature
- 3 行政机关 (xíngzhèng jīguān): administrative organ
- 4 权威机关 (quánwēi jīguān): organ of authority; authoritative organization
- 5 常务委员会 (chángwù wěiyuánhui): standing committee
- 6 平台 (píngtái): platform
- 7 起草 (qǐ cǎo): to make a draft; to draft; to draw up
- 8 公众 (gōngzhòng): the public
- 9 环境保护法 (huánjìng bǎohùfǎ): *the Environmental Protection Law*
- 10 技术转让 (jìshù zhuǎnràng): technology transfer
- 11 明文规定 (míngwén guīdìng): to stipulate in explicit terms; to expressly provide
- 12 《中华人民共和国外商投资企业和外国企业所得税法》(Zhōnghuá Rénmín Gònghéguó Wàishāng Tóuzī Qiyè hé Wàiguó Qiyè Suǒdeshuifǎ): *the Entrepreneur Income-Tax Law for Sino-Chinese Joint Ventures and Implementation Regulations*
- 13 沿海开放城市 (yánhǎi kāifàng chéngshì): open coastal cities
- 14 特别行政区 (tèbié xíngzhèngqū): special administrative area (region)
- 15 外汇盈余 (wàihuì yíngyú): foreign exchange surpluses
- 16 代替进口产品 (dàitì jìnkǒu chǎnpǐn): substitute imported goods; replace imports
- 17 科技先进企业 (kējì xiānjìn qǐyè): technology-advanced enterprises
- 18 征收 (zhēngshōu): requisition; to take over for use (by the government); to levy; to impose
- 19 补偿 (bǔcháng): compensation, to compensate; to make up
- 20 拒付 (jùfù): to refuse to pay; dishonor a check

- 21 外商投诉调解中心 (Wàishāng Tóusù Tiáojiě Zhōngxīn): a Mediation Center for Foreign Economic Disputes, the Centers are located in major cities throughout China
- 22 申诉(shēnsù): to appeal; to state (reasons)
- 23 经营企业(jīngyíng qīyè): to operate; operation
- 24 国际惯例(guójì guànlì): international practice
- 25 先进的(xiānjìn de): advanced
- 26 依法(yī fǎ): according to law; in conformity with legal provisions; in accordance with the law
- 27 雇用(gùyòng): to hire; to employ
- 28 解雇(jiěgù): to discharge; to dismiss; to fire
- 29 报酬(bàochóu): reward; remuneration; pay
- 30 福利(fúli): material benefits; welfare
- 31 劳动保护(láodòng bǎohù): labor protection
- 32 劳动保险(láodòng bǎoxiǎn): labor insurance
- 33 See《中华人民共和国外资企业法》(Zhōnghuá Rénmín Gònghéguó Wàizī Qīyèfǎ): *the Foreign-Capital Enterprise Law*, Article 12
- 34 外商投资委员会 (Wàishāng Tóuzī Wěiyuánhui): the Coordinating Committee for Foreign Investment
- 35 协调(xiétiáo): to coordinate; coordination
- 36 正面的影响(zhèngmiàn de yǐngxiǎng): positive influence; positive impact
- 37 地理位置(dìlǐ wèizhi): geographical location or distribution
- 38 东南沿海(dōngnán yánhǎi): southeastern coastal areas or region
- 39 限制(xiànzhì): to place (or impose) restrictions (on); to restrict; to limit
- 40 深圳特别经济区(Shēnzhèn Tèbié Jīngjìqū): Shenzhen Special Economic Zone, China's first Special Economic Zone (SEZ), was set up in August 1980
- 41 不遗余力(bùyíyúli): spare no effort; make every endeavour
- 42 省政府(shěng zhèngfǔ): provincial government
- 43 中央政府级(zhōngyāngzhèngfǔjī): at central government level
- 44 国家发展与改革委员会 (Guójiā Fāzhǎn yǔ Gǎigé Wěiyuánhui): the National Department and Reform Commission
- 45 能源(néngyuán): energy
- 46 林业(línyè): forestry
- 47 畜牧业(xùmùyè): poultry animal husbandry
- 48 盈余(yíngyú): surplus; profit; gain
- 49 危害(wēihài): to endanger; to cause harm; to cause damage
- 50 污染环境(wūrǎn huánjìng): to pollute the environment; to contaminate
- 51 可耕地(kěgēngdì): arable land; cultivable land
- 52 可兑换的(kěduìhuàn de): convertible (currency or money)

## 时文选读

我国实施“国民待遇”亟须<sup>1</sup>解决的三个问题

焦志勇(首都经济贸易大学)

**【摘要】**“国民待遇”是世界贸易组织协议中一项重要原则。在我国,如何贯彻<sup>2</sup>该原则并使之成为我国外商投资法律制度的一项重要原则予以实施,不仅关系到遵守我国政府在加入世界贸易组织时的承诺,同时也关系到完善我国法律制度的重大问题。因此,在世界贸易组织的框架下,贯彻“国民待遇”原则,逐步完善我国法律制度是我们一项重要的任务。但是在如何实施“国民待遇”的问题上,我国仍然还存在一些认识和立法方面的问题亟须解决。

**如何认识外商投资企业待遇的性质问题**

1. 对外商投资企业的待遇问题,目前国内呼声最强的是:“应当取消外商投资企业的‘超国民待遇’,从而对我国外商投资企业实行国民待遇。”笔者认为,这种对外商投资企业享有国民待遇的认识和提法<sup>3</sup>是不正确的。

自19世纪以来,国民待遇是对外国人在东道国本国民事法地位方面实行的法律制度之一。其他主要制度还有最惠国待遇<sup>4</sup>、普通优惠待遇<sup>5</sup>、不歧视待遇<sup>6</sup>等。国民待遇则是指一国给予外国的自然人、法人以本国自然人、法人在经济和民事方面所享有的同等待遇。最早以国内法律形式规定外国人享有平等民事法律地位的法律是1804年的《法国民法典》<sup>7</sup>。该法规定:“外国人,如其本国和法国订有条约允许法国人在其国内享有某些民事权利者,在法国亦享有同样的民事权利。”“外国人经政府许可设立住所于法国者,在其继续居住期间,享有一切民事权利。”应当说,《法国民法典》中上述条款就是关于“国民待遇”观念的最早规定。

自中华人民共和国成立以来,我国逐步采取国民待遇的制度是为了在平等互利的基础上,促进国际经济、社会文化和技术等方面的交流。因此,我国的有关法



律规定一方面要求维护本国法人或者公民在外国的合法权益,同时也主张保护在我国境内守法的外国法人、外国其他组织或者公民。如《中华人民共和国民事诉讼法》第五条规定:“外国人、无国籍人、外国企业和组织在人民法院起诉<sup>8</sup>、应诉<sup>9</sup>,同中华人民共和国公民、法人和其他组织有同等的诉讼权利义务。”再如《中华人民共和国专利法》第十八条规定:“在中国没有经常居所或者经营场所的外国人、外国企业或者外国其他组织在中国申请专利<sup>10</sup>的,依照其所属国同中国签订的协议或者共同参加的国际条约,或者依照互惠原则,根据本法办理。”

从我国参加或缔结的<sup>11</sup>国际条约看,如1984年第六届全国人民代表大会常务委员第八次全体会议正式决定参加人的《保护工业产权巴黎公约》<sup>12</sup>的第二条规定:“给予本同盟成员国<sup>13</sup>国民以国民待遇。”第三条还规定:“同盟国家国民同样的待遇。”

从以上各国和我国及相关的国际条约来看,享有国民待遇的外国人或外国法人的关键是他(它)们具有不同的国籍。这就是外国人或者外国法人或者其他组织享有国民待遇的前提条件<sup>14</sup>。国籍是指一个人作为某一国家的公民而隶属<sup>15</sup>于该国的一种法律上的身份,法人国籍则是法人属于某一特定国家的依据。确定法人国籍的三个标志<sup>16</sup>为:法人住所地,其中又分为管理中心所在地和营业中心所在地两种;法人成立时登记地,即法人成立时登记所在国为法人国籍所属国;法人国籍要看法人由谁来控制,即该法人的资本属于何国、为何国服务。按照这一标志,通常该法人的投资人或主持人的国籍就是该法人的国籍。因此,除条约中规定法人的国籍外,一国有权力来规定在其境内的外国法人的国籍。

2. 我国外商投资企业的国籍依照中国的法律应为中国国籍,作为中国国籍的企业,外商企业不应享有国民待遇。

其一,根据2001年3月15日修改并通过的《中华人民共和国中外合资经营企业法》第一条规定:“中华人民共和国为了扩大国际经济合作和技术交流,允许外国公司、企业和其他经济组织或个人(以下简称外国合营者),按照平等互利的原则,经中国政府批准,在中华人民共和国境内,同中国的公司、企业或其他经济组织(以下简称中国合营者)共同举办合营企业。”

其二,根据2000年10月31日修改并通过的《中华人民共和国中外合作经营企业法》第一条规定:“为了扩大国际经济合作和技术交流,促进外国的企业和其他经济组织或者个人(以下简称外国合作者),按照平等互利的原则,同中华人民共和国的企业或其他经济组织(以下简称中国合作者)在中国境内共同举办中外合作经营企业。”

(摘自《经济与管理研究》2007年第4期)



注释

- 1 亟须(jí xū): urgently need
- 2 贯彻(guànchè): carry out; carry through
- 3 提法(tífǎ): the way something is put; wording
- 4 最惠国待遇(zuìhuìguó dàiyù): most-favored-nation treatment
- 5 普通优惠待遇(pǔtōng yōuhuì dàiyù): ordinary favored treatment
- 6 不歧视待遇(bùqíshì dàiyù): non-discrimination treatment
- 7 《法国民法典》(Fǎguó Mínfǎdiǎn): *French (Citizen) Civil Code*
- 8 起诉(qǐsù): bring a lawsuit against someone
- 9 应诉(yìngsù): answer a lawsuit
- 10 申请专利(shēnqǐng zhuānli): apply for patent
- 11 缔结的(dìjié de): signed
- 12 《保护工业产权巴黎公约》(Bǎohù Gōngyè Chǎnquán Bālí Gōngyuē): *Paris Convention for the Protection of Industrial Property*
- 13 同盟成员国(tóngméng chéngyuánguó): member of the allied nations
- 14 前提条件(qiántí tiáojiàn): prerequisite
- 15 隶属(lǐshǔ): be subordinate to; be under the jurisdiction or command of; to be attached to
- 16 标志(biāozhì): criterion; criteria

练习

一、解释下列词语

1. 颁布新法
2. 环境保护法
3. 专利法
4. 质量标准
5. 权利和义务
6. 经济特区
7. 沿海开放城市
8. 特别行政区
9. 不合理的费用
10. 申诉
11. 自然人、法人

## 二、回答下列问题

1. 中国最高的立法机构是什么?
2. 在中国,目前有哪些是免征税的企业?
3. 在世界贸易组织的框架下,中国应该如何对外商投资企业实施“国民待遇”?
4. 中国政府如何保护外商在中国的投资企业以及他们的合法权益?
5. 外商有权按照他们自己国家经营企业的方式在中国经营企业吗?



# 第三单元

## 中国对外贸易法

Unit III

Foreign Trade Law in China





## 导 论

## 中国对外贸易法

随着经济全球化和贸易自由化的深化<sup>1</sup>,中国对外贸易进入了高速发展时期。特别是在2001年加入世界贸易组织之后,中国的进出口总额急剧攀升。自2002年以来,中国的对外贸易发展连续4年保持20%以上的高速增长。2005年,中国对外贸易达到14221.2亿美元,稳居<sup>2</sup>全球第3位,比上一年度增长23.2%,相当于2001年的2.8倍。其中,出口7620亿美元,增长28.4%;进口6601.2亿美元,增长17.6%。欧盟继续保持中国第一大贸易伙伴<sup>3</sup>地位,中欧双边贸易<sup>4</sup>总额2173.1亿美元,增长22.6%。美国是中国第二大贸易伙伴,中美双边贸易总值达2116.3亿美元,增长24.8%。日本则是中国第三大贸易伙伴,中日双边贸易总值1844.5亿美元,增长9.9%。

中国对外经济贸易的发展,不仅促进了中国经济的腾飞<sup>5</sup>,同时也引起了学习、研究中国对外贸易法律、法规的热潮<sup>6</sup>。1994年《中华人民共和国对外经济贸易法》<sup>7</sup>正式颁布,加入WTO后不久,即在2004年进行了大幅度的修改。中国的对外贸易法调整对象包括货物进出口、技术进出口以及国际服务贸易三大类别。

在中华人民共和国成立之初,中国国务院颁布了《中华人民共和国对外贸易管理暂行条例》<sup>8</sup>以应付当时的小规模的对外贸易。随着改革开放深入,对外贸易在中国经济发展中的作用日渐加大。中国政府开始加快对外贸易法的立法进程<sup>9</sup>。1994年,在新的经济形式下,中国颁布了系统的、专门调整对外贸易的法律——《中华人民共和国对外贸易法》,该法对促进对外贸易的发展、维护对外贸易秩序、保护对外贸易经营者的权益等方面发挥了巨大的作用<sup>10</sup>。2004年,对该法又进行了较大的修订,从原来的8章40条增加至11章70条。这次修订是对1994年《对外贸易法》的补充<sup>11</sup>,也是中国加入WTO以后,根据WTO规则,做出的立法上的调整。修订后的《对外贸易法》专门增加了第五章“与对外贸易有关的知识产权保护”。为涉外公司<sup>12</sup>的知识产权提供更加坚实的保护屏蔽<sup>13</sup>,并首次允许个人以自然人<sup>14</sup>身份享有对外贸易经营权。此次修订还涉及<sup>15</sup>对外贸易经营主体范围,对外货物贸易和技术贸易<sup>16</sup>的外贸经营权<sup>17</sup>、国营贸易<sup>18</sup>和进出口许可<sup>19</sup>等诸多方面。同时,《对外贸易法》中体现的有关WTO的平等原则、非歧视<sup>20</sup>原则、公平贸易原则、透明度<sup>21</sup>原则和WTO权利与义务平衡的原则及国民待遇<sup>22</sup>、最惠国待遇等对于外商的保护起到了非常积极的作用。另外,新修订的对外贸易法规定建立和完善金融机构<sup>23</sup>、设立对外贸易发展基金<sup>24</sup>和风险基金<sup>25</sup>及公共信息<sup>26</sup>服务体系<sup>27</sup>,从更多方面促进外商在我国的对

外贸的发展。

总的来说,随着中国的对外经济贸易在国民经济中的作用的加大,中国对外贸易法的制订也在日趋完善<sup>28</sup>。初步掌握对外贸易法的基本规定,有利于深入了解中国对外贸易制度的现状,充分发掘中国对外贸易的市场潜力<sup>29</sup>,大力发展全球经济<sup>30</sup>。

## 注 释

- 1 深化(shēnhuà): deepen; intensify
- 2 稳居(wěnjū): be firmly placed (on the first place)
- 3 贸易伙伴(màoyì huǒbàn): trade partner
- 4 双边贸易(shuāngbiān màoyì): bilateral trade
- 5 腾飞(téngfēi): (economic) take-off
- 6 热潮(rècháo): upsurge; enthusiasm
- 7 《中华人民共和国对外贸易法》(Zhōnghuá Rénmín Gònghéguó Duiwài Màoyifǎ): *Foreign Trade Law of People's Republic of China*
- 8 《中华人民共和国对外贸易管理暂行条例》(Zhōnghuá Rénmín Gònghéguó Duiwài Màoyì Guǎnlǐ Zàn xíng Tiáolì): *Detailed Rules regarding Provisional Rule of Foreign Trade of People's Republic of China*
- 9 立法进程(lìfǎ jìnchéng): the process of legislation; the process of enacting laws
- 10 发挥了巨大的作用(fāhuīle jùdà de zuòyòng): play an very important role
- 11 补充(bǔchōng): supplement
- 12 涉外公司(shèwài gōngsī): foreign-fund enterprise
- 13 保护屏蔽(bǎohù píngbì): protective screen; provide a protective screen for
- 14 自然人(zìránrén): (legal term) natural person
- 15 涉及(shèjí): involve; relate to
- 16 技术贸易(jìshù màoyì): technology trade
- 17 经营权(jīngyíngquán): managerial authority; power of management
- 18 国营贸易(guóyíng màoyì): state-owned trade; state-operated trade
- 19 进出口许可(jìnchūkǒu xǔkě): permit for import and export
- 20 非歧视(fēiqíshì): non-discrimination
- 21 透明度(tòumíngdù): transparency
- 22 国民待遇(guómín dài yù): treat (someone) as a citizen
- 23 金融机构(jīnróng jīgòu): financial institute; financial institution
- 24 发展基金(fāzhǎn jījīn): development fund
- 25 风险基金(fēngxiǎn jījīn): risk-fund
- 26 公共信息(gōnggòng xīnxi): public information
- 27 服务体系(fúwù tǐxì): service system
- 28 日趋完善(riqū wánshàn): being perfected with each passing day
- 29 市场潜力(shìchǎng qiánli): market potential
- 30 全球经济(quánqiú jīngjì): global economy

## Foreign Trade Law in China

Along with the expansion of economic globalization and free trade, China's foreign trade has entered its highly developed era. Especially when China became a member of the World Trade Organization in 2001, the total volume of imports and exports have increased dramatically. China's foreign trade maintained its 20% increase in four consecutive years since 2002. In 2005, China's total foreign trade reached US\$1422.12 billion, which firmly placed it the third in the world: this was 23.2% increase from the previous year, and the total foreign trade volume was 2.8-fold of that in 2001. To be more specific, in 2005, the exports reached US\$762 billion which was a 28.4% increase from the previous year, and imports reached US\$660.12 billion which was a 17.6% increase over the previous year. The European Union continued to be the largest trading partner of China, and the bilateral trade volume was US\$217.31 billion with a 22.6% increase than the previous year. The United States is the second largest trade partner of China, and the bilateral trade volume was US\$211.63 billion with a 24.8% increase over the previous year. Japan was the third largest trading partner of China, and the bilateral trade volume was US\$184.45, with a 9.9% increase over the previous year.

With the development of China's economic and international trade, China's economy not only soared, it also brought great enthusiasm in learning China's foreign trade law and regulations. *The Foreign Trade Law of People's Republic of China* was formally promulgated in 1994. But with China's accession to the World Trade Organization in 2001, China began extensive revisions in foreign trade law in 2004. The main revisions include three major catalogues: imports and exports of cargo; imports and exports of technology; and international service trade.

When the People's Republic of China was first established, the State Council first issued the *Detailed Rules regarding Provisional Rule of Foreign Trade of People's Republic of China* in order to deal with the small scale foreign trade at that time. With the rapid development of liberalization, foreign trade began to play a major role in China's economic growth. The Chinese government thus began to accelerate the legislative procedure to meet the demand. In 1994, under the form of new economy, the Chinese government promulgated its systematically designed *Foreign Trade Law of People's Republic of China* which specifically deals with foreign trade. Since the implementation of the new law, it has had a great effect in promoting foreign trade, maintaining foreign trade order, and protecting foreign traders' rights. In 2004,

the trade law once again underwent considerable revision: the original law had eight chapters and 40 provisions, and the new law has been expanded to eleven chapters and 70 provisions. The new amendments are the supplements to 1994 trade law, and the new adjustments are mainly based on the WTO's rules and regulations. The newly revised foreign trade law now has a chapter (Chapter Five) which specifically deals with "intellectual property rights related to foreign trade." It provides further solid protection for foreign companies. In this new chapter, the law also allows an individual as a natural person to own management rights in foreign trade. Furthermore, the new revised law also specifies the scope of foreign trade management, foreign management rights for commodity trade and technology trade, and the permit for import and export, etc. In the meantime, the new law also has included WTO regulations such as equality, non-discrimination, and transparency, as well as WTO's regulations concerning equal rights and treating foreign investors' as citizens, and the most-favored-nation treatment, etc. As far as protecting foreign investors are concerned, the new law no doubt has had a positive effect. Furthermore, the regulations for setting up financial institutions, foreign trade development funds, foreign trade risk funds, and the public information service system are also elaborated in the newly revised law. The new law facilitates foreign investors in developing foreign trade in China.

In general, along with the development of foreign trade and its increasing importance in China's economy, the legislation on foreign trade is gradually being perfected day by day. If one can learn the basic regulations of foreign trade law thoroughly, it will help one greatly in understanding China's current trade status, fully discover the great market potential in foreign trade, and further get involved in developing the global economy.

## 第九课

### *Lesson Nine*

## 中国对外贸易的发展

### *The Chinese Perspective on Foreign Trade*

张 晋：我刚在《人民日报》上看了一篇文章，说中国 2007 年 1 月到 4 月的进出口贸易总值<sup>1</sup>已经达到 6357.2 亿美元，比前年上升了 23.6%。

I just read an article in *the People's Daily* said that the total volume of China's imports and exports reached US\$635.72 billion from January to April 2007, up 23.6 percent from the previous year.

柯礼思：真是了不起。我以前还以为中国是个以出口为主的国家呢。教授，有关中国的对外贸易，您有没有最新的统计资料<sup>2</sup>？

That's amazing. I thought that China was an export-oriented country. Professor, do you have latest statistics on China's foreign trade?

教 授：我有一份 2006 年的统计资料，上面说 2006 年中国全年进出口总额达到 17606.9 亿美元，比上年上升 23.8%，而仅出口总额就达 9690.7 亿美元，上升了 27.2%。

I have a copy of 2006 statistics. It says that that the total value of imports and exports reaches US\$1760.69 billion, up 23.8 percent from the previous year. And the value of exports alone has reached US\$969.07 billion, up 27.2 percent from the previous year.

柯礼思：中国对外贸易的增长速度真是难以置信<sup>3</sup>。我觉得自 2001 年加入世界贸易组织后，中国广阔的市场对许多国外贸易商而言，意味着更多、更新的机会。

China's foreign trade growth is really incredible. Since China's accession to the



WTO in 2001, its vast market has meant even more new opportunities for many foreign traders.

**张 晋:** 我同意。对外贸易的发展使中国在经济全球化的进程中扮演了一个更重要的角色。

I agree. Foreign trade is enabling China to play an even more important role in globalizing the world economy.

**教 授:** 不仅如此,中国经济的增长已经是地区和全球经济发展上不可或缺<sup>4</sup>的一部分。

Not only that, China's economic growth is already an integral part of regional and global economic development.

**柯礼思:** 那中国是什么时候开始对外贸易活动的呢? 在古代就有对外贸易了吗?

When did China begin trading with other countries? Did Chinese foreign trade start in ancient times?

**张 晋:** 是不是早在西汉,也就是公元前2世纪的时候中国就开始了对外贸易?

Wasn't China trading with other countries as early as the Western Han dynasty, around the 2nd BC? (206 BC-AD 25)

**教 授:** 确实是。西汉时期,“丝绸之路”首先打开了中国与中亚地区的贸易通道,自此开启了频繁的贸易交往活动。

Indeed. During the Western Han period, the "Silk Road" first opened up the trade route with Central Asia, generating frequent trade contact and activity.

**柯礼思:** 也就是说,在那个时候,中亚是中国对外贸易的中心,对吗?

So Central Asia was the hub of China's foreign trade in those days?

**教 授:** 是。但是在这之后,贸易活动开始扩展到其他地区,比方说,中国的贸易商曾到中东地区,而中国的商船也遍及亚洲的沿海地区,甚至远达非洲海岸。

Yes, but later on, trade also expanded to other regions. For example, Chinese merchants traveled to the Middle East, and Chinese ships traded throughout maritime Asia, even reaching as far as the African coast.

**张 晋:** 据说在明朝和清朝的时候,当时的皇帝曾阻止<sup>5</sup> 中国和外国之间的贸易,主要是因为他们认为中国不需要跟其他国家贸易往来就能自给自足<sup>6</sup>,这是真的吗?

Is it true that trade with foreign countries was discouraged, because Chinese emperors, especially during the Ming (1368-1644) and Qing (1644-1911) dynasties, believed that China could be totally self-sufficient and didn't need to trade with other countries?

**教 授:** 是真的。但是在 19 世纪,西方列强通过与清政府签订不平等条约<sup>7</sup>,迫使中国开放门户<sup>8</sup>,使外国强权<sup>9</sup>能在中国的领土上建立起他们独立<sup>10</sup>的经济基地。

That's true. But in the 19th century, Western powers forced China to open its doors and conclude unequal treaties that enabled foreigners to establish autonomous economic bases in China.

**柯礼思:** 这些不平等条约还存在吗?

Do those unequal treaties still exist?

**教 授:** 这些不平等条约直到 20 世纪末才完全废除。

No, but they were not totally abolished until the end of the 20th century.

**柯礼思:** 中国政府是不是在 1979 年实施改革开放的时候,才恢复对外贸易活动的呢?

I thought China didn't revive foreign trade until the government implemented the policy in 1979.

**教 授:** 其实,中国早在 20 世纪 50 年代,也就是在开始第一个五年计划<sup>11</sup>的时候,就已经从苏联进口植物和机械设备<sup>12</sup>,并以出口农产品的方式偿付<sup>13</sup>进口融资<sup>14</sup>的贷款。

As a matter of fact, as early as the 1950s, just as China was starting to develop its first Five Year Plan (1953-1957), the country imported plants and equipment from the former Soviet Union and exported agricultural products to repay the loans that had financed those imports.

柯礼思：那个时候对外贸易占国内生产总值的百分之几呢？

What percentage of the gross domestic product (GDP) did foreign trade account for at that time?

教授：在 20 世纪五六十年代的时候，对外贸易总值仅占国内生产总值的 2% 左右。对外贸易虽然持续增长，但到 1979 年也仅占 6% 左右。

The total value of foreign trade was only about two percent of the gross national product in 1950s and 1960s. Foreign trade continued to grow, but it only accounted for approximately six percent in 1979.

张 晋：根据报道，由于对外贸易和外国投资，在 21 世纪的前 20 年内，中国将成为世界上第二大的市场，您认为这可能吗？

It's said that China, through foreign trade and foreign investment, will become the world's second largest market within the first 20 years of the 21st century. Do you think that's possible?

柯礼思：我认为这是很可能的。早在 20 世纪 90 年代的初期，中国已经成为电子器材<sup>15</sup>的主要生产国，同时中国也是电子器材中简单半导体产品<sup>16</sup>的最大市场。

I think it's quite possible. In the early 1990s, China had already become a major producer of electronics. Meanwhile, China is the largest market in the world for simple semiconductor products used in electronics.

教授：我也认为这是很可能的。第十届全国人民代表大会已经确立一个目标，也就是在 2020 年的时候，中国的国内生产总值将比 2000 年翻两番。

I think that's very possible, too. The 10th National People's Congress set 2020 as the target date by which China should achieve the goal of doubling 2000 GDP.

柯礼思：中国现在的国内生产总值有多少呢？

What's China's current GDP?

教授：根据中国国家统计局<sup>17</sup>的数据，国内生产总值在 2006 年是 209.4 兆<sup>18</sup>人民币，约合美元 26.8 兆，比 2005 年上升了 10.7 个百分点。

According to the State Statistical Bureau, in 2006, the GDP reached RMB 20.94 trillion, approximately US\$2.68 trillion, up 10.7 percent from 2005.

**柯礼思:** 我认为中国的对外贸易在提升中国的国内生产总值上扮演着重要的角色。但是每次我们提到“中国制造”时,脑海中<sup>19</sup>首先浮现<sup>20</sup>的是廉价而且劣质的产品。

I think China's foreign trade plays an important role in raising China's GDP. But it seems to me that every time we mention "Made in China," the first image that comes to mind is of cheap, low-quality products.

**张 晋:** 我认为这都是过去的事了。现在中国不再是世界上生产加工廉价衣服、家庭用品<sup>21</sup>、玩具或是电子器材的世界工厂了。

I think that's all in the past. Nowadays, China is no longer just the world's factory for inexpensive clothing, household wares, toys, and electronics.

**教 授:** 确实是如此。自从进入 21 世纪以来,中国有生产任何高端<sup>22</sup>产品的能力,从航空组件<sup>23</sup>、汽车零件到最先进的电脑、软件,甚至针对世界市场生产的精密工具<sup>24</sup>。

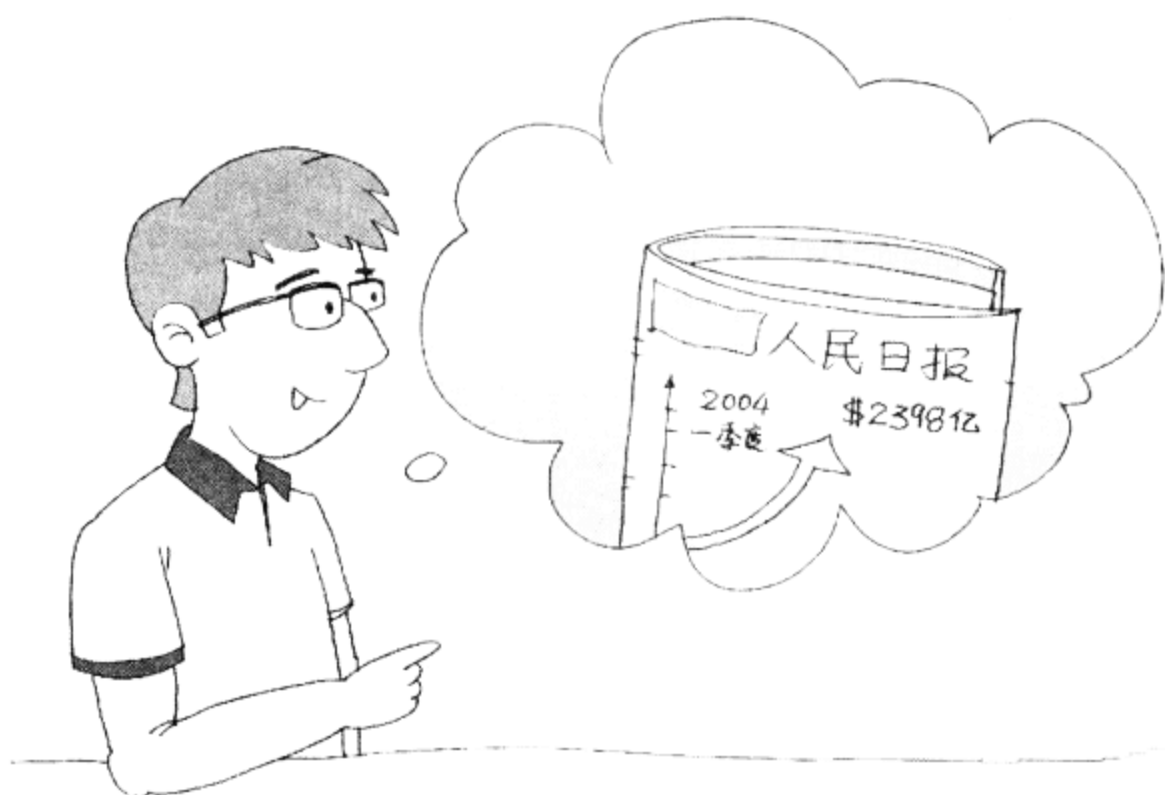
Indeed. Since entering the 21st century, China has been capable of producing all kinds of high-end products, from aviation components and automobile parts, to state-of-the-art computers, software, and even precision tools aimed at the global market.

**张 晋:** 过去十年来,贸易活动增加得如此快速,现在中国是否颁布了一套更详细、更完善的对外贸易法?

With trade activity having increased so much in the past decade, I suppose a set of more detailed and comprehensive foreign trade laws is now in place, right?

**教 授:** 是,在 1994 年 5 月 12 日第八届全国人民代表大会常务委员会第七次会议通过了《对外贸易法》,而在 2004 年 4 月 6 日第十届全国人大常委会第八次会议修订了新的《对外贸易法》。

Yes, a new set of *Foreign Trade Law* was formally passed at the Seventh Session of the Standing Committee of the Eighth National People's Congress on May 12, 1994. And *the Foreign Trade Law* was further revised at the Tenth National People's Congress on April 4, 2004.



柯礼思：那在使用新法之前，中国从事对外贸易的商人根据什么法规呢？

Before these new foreign trade laws were put into practice, what rules and regulations did Chinese foreign traders follow?

教授：那完全又是另外一个话题了。我们下次再讨论吧。

Well, that's a totally different subject. Let's discuss that next time.

### 注释

- 1 进出口贸易总值(jìrchūkǒu mào yì zǒngzhí): total value of imports and exports
- 2 统计资料(tǒngjì zīliào): statistics; statistical data
- 3 难以置信(nányǐzhixin): hard to believe; it is incredible
- 4 不可或缺(bùkěhuòquē): indispensable; to be an integral part of (something)
- 5 阻止(zǔzhǐ): to obstruct; to stop
- 6 自给自足(zìjǐ-zìzú): self-sufficient; self-sufficiency
- 7 不平等条约(bùpíngděng tiáoyuē): unequal treaty
- 8 开放门户(kāifàng ménhù): here refers to the Open Door (policy) - U.S. policy towards China in 1899
- 9 外国强权(wàiguó qiángquán): foreign super powers
- 10 独立(dúlì): to maintain independence and keep the initiative; to act independently and take the



initiative

- 11 第一个五年计划(Dì-yī ge Wǔ Nián Jìhuà): The First Five-Year Plan. China's five-year plans became well-known under Mao Zedong. The first one started in 1953, based on the Soviet plans that began in the 1920s. The current 11th installment runs from 2006 through 2010.
- 12 机械设备(jīxiè shèbèi): mechanical equipment or facility
- 13 偿付(chángfù): to pay back; to repay
- 14 融资(róngzī): getting (business) loans; to circulate funds
- 15 电子器材(diànzǐ qìcái): electronic equipment
- 16 半导体产品(bàndǎotǐ chǎnpǐn): semi-conductor products
- 17 国家统计局(Guójiā Tǒngjì Jú): the State Statistical Bureau, which is directly under the State Council of the People's Republic of China
- 18 兆(zhào): trillion
- 19 脑海中(nǎohǎi zhōng): brain; mind
- 20 浮现(fúxiàn): (the image) that appears in one's mind
- 21 家庭用品(jiāting yòngpǐn): household wares; household appliances
- 22 高端(gāoduān): high-end; high-grade
- 23 航空组件(hángkōng zǔjiàn): aviation component
- 24 精密工具(jīngmì gōngjù): precision tool (instrument)

## 时文选读

### 中国对外贸易发展战略研究

夏哲明(浙江财经学院)

**【摘要】**在经济全球化和加入世贸组织的背景下,提高我国外贸企业的国际竞争力已成为关键。为了最大限度地获得贸易发展的动态利益<sup>1</sup>,更好地通过贸易发展战略来促进产业结构的良性调整,提高贸易商品的国际竞争力,我国应充分利用WTO赋予的各种许可的措施<sup>2</sup>,制定并建立我国面向21世纪的对外贸易发展战略,实现我国从贸易大国向贸易强国的转变。

## 一、引言

经济全球化是指世界各国在全球范围内的经济融合<sup>3</sup>,它是世界生产力发展的结果,其推动力是追求利润、取得竞争优势<sup>4</sup>和谋求经济的发展。20世纪90年代以来,经济全球化的趋势大大加强,导致经济全球化的直接原因是国际直接投资与贸易环境出现了新变化。在21世纪,经济全球化已经成为不可逆转<sup>5</sup>的历史潮流<sup>6</sup>,一个不以人的意志为转移的大趋势。经济全球化可以带来整个世界范围内的经济发展和资源最优配置<sup>7</sup>,这一点对于包括中国在内的广大发展中国家来说具有尤其重要的意义,可以说经济全球化为中国实现经济发展和赶超<sup>8</sup>发达国家提供了前所未有<sup>9</sup>的大好机遇。同时,经济全球化作为无法回避的客观事实,中国只有积极参与才能求得生存和发展。中国加入世贸组织,是实现经济现代化的需要,是建立社会主义市场经济体制的需要,是在更大范围和更深程度参与国际竞争和合作的需要。加入世贸组织后,对外开放的广度和深度将进一步发展,经济全球化对中国经济的影响也会与日俱增。中国将面临新的发展机遇,也将面临国际激烈竞争的严峻挑战<sup>10</sup>。



## 二、WTO 与国际贸易的发展潮流

(一) 国际贸易的历史发展潮流。考查国际贸易的变迁历史,一国对外贸易的产生、发展都是在其国家干预<sup>11</sup>、保护下进行的,国际贸易过去没有、将来也不可能离开国家的干预而存在。那种认为国际贸易是在自由的市场经济中自发产生、发展的观点是没有历史依据的。经济学家卡尔·勃兰尼<sup>12</sup>论证了这一观点。他认为从起源上说,对外贸易具有冒险、勘探、狩猎、掠夺和战争的性质,而非以物易物<sup>13</sup>的市场交换关系。同时对外贸易也绝非意味着双向的<sup>14</sup>和平关系,即使它共有这样的内涵,通常是根据互惠原则建立起来的,而不是市场交换的原则。

(二) WTO 与国际贸易发展。WTO 是一个调整国际经济和贸易关系的国际经济组织。它通过规定各国政府所应承担的主要契约义务<sup>15</sup>,来规范各国对外贸易立法与规章的制定和实施。WTO 大大拓展了多边贸易体制规范的范围,将长期游离于 GATT<sup>16</sup> 规则和纪律之外的主要货物贸易领域——农产品贸易以及纺织品与服

装贸易拉上了自由贸易之路,而且还扩展至贸易服务、知识贸易和与贸易有关的投资措施,并加强了约束能力。无论是赞同或是反对 WTO 者,大都倾向接受 WTO 的角色就是要推动自由贸易。支持者自然认为 WTO 是在促进贸易自由化,是为了打破贸易障碍和建立一套自由和平等的竞争规则。批评者尽管对 WTO 有极大的保留,但在论述的层次上,却往往未能摆脱<sup>17</sup>将 WTO 当做自由贸易推动者的迷惑<sup>18</sup>。实际上,WTO 在本质上只是一套管理国际经济的机制,与实际上实行的国际贸易是否自由无关。而现实中的国际贸易是自由还是保护其关键取决于一些贸易大国的国际贸易行为。历史已经证明,对资本主义国家来说,只有当他们的经济竞争力足以称雄<sup>19</sup>世界以后,才会愿意推行自由贸易的政策,同时大力鼓吹自由贸易的论调。由于各国国家利益的不同,21 世纪国际贸易自由化的路途并不会非常平坦,贸易自由和贸易保护交织在一起是未来国际贸易发展的重要特征。

### 三、我国对外贸易发展战略的重新定位

我国对外贸易发展战略应树立可持续发展战略<sup>20</sup>。1. 这是由我国的基本国情决定的。改革开放以来,中国成为同时期世界经济增长最快的国家之一。我国的国内生产总值(GDP),从 1987 年的 3,588 亿元,增加到 1995 年的 57,733 亿元,这种高速度增长的势头,在未来 15 年中,可望继续保持下去。1979—1993 年,我国的对外贸易发展迅猛,进出口总额年均增长率达到 16.2%。1995 年中国出口总额达 12,350 亿元,增长率达到 23%。在实现经济增长的同时,我国的环境质量日益恶化。而世界范围内的环境保护浪潮<sup>21</sup>已开始影响国际贸易领域,它对国际贸易的发展提出了新的挑战。环境保护问题已成为国际贸易合作中的主要问题之一。国内方面,我国的机电产品、日用品、食品、农机产品、化工产品都面临着国际市场严格的环境标准的检验。如果我国产品不尽快达到国际标准,出口会遇到不可逾越<sup>22</sup>的障碍。由于发达国家工业废弃物<sup>23</sup>处理的成本逐步提高,会利用贸易形式,向发展中国家转移。1996 年发现多起工业垃圾运到我国的事件。另外,我国环保服务业与发达国家相比,无论在服务范围、服务质量、专业技术水平和服务装备方面都有较大的差距,缺少市场竞争机制,法规管理不健全,尚不适应市场经济的要求。

(摘自《科技经济市场》2007 年 3 期)

## 注 释

- 1 动态利益(dòngtài lìyì): dynamic profit; dynamic-profits
- 2 各种许可的措施(gè zhǒng xǔkě de cuòshī): various permissible measures

- 3 经济融合(jīngjì rónghé): economic integration; economic fusion
- 4 竞争优势(jìngzhēng yōushì): favorable competitive (edge); competitive dominant position
- 5 不可逆转(bù kě nìzhuǎn): not reversible
- 6 历史潮流(lìshǐ cháoiliú): historical trend
- 7 最优配置(zuìyōu pèizhì): the most favorable allocation
- 8 赶超(gǎnchāo): catch up with and surpass
- 9 前所未有(qiánsuǒwèiyǒu): never existed before; unprecedented
- 10 严峻挑战(yánjùn tiǎozhàn): sever challenge
- 11 干预(gānyù): interfere; intervene, meddle
- 12 卡尔·勃兰尼(kǎ'ěr Bólání): Karl Polanyi(1886—1964). His major works include *The Great Transformation: The Political and Economic Origins of Our Time* (1944), and *Trade and Markets in the Early Empire* (1957).
- 13 以物易物(yǐ wù yì wù): goods exchange; exchange goods
- 14 双向的(shuāngxiàng de): two-way
- 15 契约义务(qìyuē yìwù): contractual obligations
- 16 GATT: General Agreement on Tariffs and Trade
- 17 摆脱(bǎituō): get rid of; , break away from; free (oneself) of
- 18 迷惑(míhuò): confusion; baffle
- 19 称雄(chēngxióng): claim leadership; occupy a dominating position; hold sway
- 20 可持续发展战略(kěchíxù fāzhǎn zhànlüè): sustainable developmental strategy
- 21 浪潮(làngcháo): tide; wave
- 22 不可逾越(bù kě yúyuè): insurmountable; impassable; insuperable
- 23 工业废弃物(gōngyè fèiqìwù): industrial waste

## 练习

### 一、解释下列词语

1. 风险基金
2. 市场潜力
3. 日趋完善
4. 透明度原则
5. 进口融资
6. 国内生产总值
7. 高端产品
8. 经济融合
9. 以物易物
10. 多边贸易
11. 可持续发展战略

## 12. 工业废弃物

## 二、回答下列问题

1. 中国最早是什么时候开始进行对外贸易的?
2. 为什么对外贸易的发展使中国在经济全球化的进程中扮演了一个重要的角色?
3. 经济全球化是一个无法回避的客观事实,中国要如何积极参与才能求得生存与发展?
4. 中国的环保服务业还有哪些方面需要改进?
5. 简述世界贸易组织与国际贸易发展之间的关系。





# 第十课

## Lesson Ten

### 中国对外贸易法律制度的沿革

#### *The Evolution of China's Foreign Trade*

张 晋：柯礼思，你知道吗？中国目前有 7000 万人从事对外贸易。

Chris, do you realize that 70 million Chinese are currently engaged in foreign trade?

柯礼思：这是不是在开玩笑啊！7000 万？你从哪儿得来的数字？

Are you kidding? 70 million? Where did you get that number?

张 晋：这只是非官方的统计数字。

It's just an unofficial statistic.

柯礼思：你知道中国最近的贸易总额吗？

Do you know the most recent foreign trade statistics?

张 晋：根据中国海关和商务部 2007 年 6 月 7 日的最新统计资料表示：2007 年 1 月到 4 月间，中国的出口较去年同期增长 27.6%，总值达 3495 亿美元，而进口也增长了 19.1%，总值达 4950 亿美元。

According to the latest statistics from Chinese Customs Office and the Ministry of Commerce come out on June 7, 2007, the total value of exports reached US\$349.5 billion, an increase of 27.6% comparing the same period of last year, and the imports surged 19.1% to US\$495 billion.

教 授：根据官方的统计资料预测，到 2020 年，总贸易额将是现在的两倍。

According to official statistics, it is predicted that by the year 2020, the total

foreign trade volume will double.

柯礼思：这真了不起。在过去十年里，中国已经成为了出口大国。教授，您认为这个目标可能实现吗？

That's a really ambitious plan. I know China has grown into an export powerhouse over the past decade, but do you think that goal is achievable, Professor?

教授：我看是可以实现的。对外贸易加速了中国的经济改革和增长，提高了国内的生产力，而且过去的二十年，中国已经累积了大量的外汇储备。

I think it's achievable. Foreign trade has accelerated China's economic reform and growth, increased its domestic productivity, and built up its large foreign exchange reserves over the past two decades.

张晋：如果我没记错的话，中国是世界上外汇储备最大的国家之一。

If I'm not mistaken, China has one of the largest foreign exchange reserves (Forex Reserve) in the world.

教授：中国在这个世界上排名第一，已超过日本。1989年，中国的外汇储备仅有56亿美元，而2006年年底时，已经超过了一万亿美元。

China has surpassed Japan to become the world's largest holder of foreign exchange. In 1989, China had US \$5.6 billion in its foreign exchange reserves, but it had more than US \$1 trillion by the end of 2006.

柯礼思：中国外贸总量增长的确很快。那么在过去这些年，中国对外贸易法也有些新的修订吧？中国早期有哪些对外贸易法呢？

China's foreign trade volume has increased quite rapidly. I guess that China's foreign trade laws have also been updated over the years, right? What are the earlier laws in foreign trade?

教授：1950年，政务院<sup>2</sup>颁布了《对外贸易管理暂行条例》以满足当时的需要。

In 1950, the Government Administration Council adopted the *Interim Regulations on Foreign Trade Management* to meet the needs of the time.

张晋：在那个时候，中国的外贸多半由政府管理吧？

Was foreign trade mainly controlled by the government at that time?

**教授:** 是的,那时候的对外贸易是国营<sup>3</sup>企业的特权,所有的外贸业务都必须经过当时的对外贸易经济合作部<sup>4</sup>(简称外贸部)的批准。

Yes, at that time, only the state-owned enterprises could conduct foreign trade, and all trade should be approved from Chinese Foreign Trade Corporations, or FTCs.

**柯礼思:** 您的意思是说中国的贸易商人过去都不准直接和外商交易,凡是跟对外贸易有关的业务都必须经过外贸部特批?

Do you mean that Chinese traders were not allowed to deal directly with foreigners and all trade-related negotiations had to get the approval from FTCs?

**教授:** 差不多是这样的。

That's pretty much the case.

**柯礼思:** 在 20 世纪五六十年代,哪些国家是中国的主要贸易伙伴?

In the 1950s, or even the 1960s, which countries were Chinese major trading partners?

**教授:** 那个时候,中国的主要贸易伙伴是苏联以及一些东欧国家。

During that time, China's major trading partners were the former Soviet Union and other Eastern European countries.

**张晋:** 后来中国和苏联的关系恶化<sup>5</sup>,那贸易情况又如何呢?

As the Sino-Soviet relationship deteriorated, how was the trade going?

**教授:** 此后中国逐渐开始跟发达国家和地区从事贸易。

China started to trade with developed countries and regions.

**柯礼思:** 中国对外贸易是不是用信用交易<sup>6</sup>或是其他已有的交换形式呢?

Did China use credit transactions and ready exchanges as forms of foreign trade?

**教授:** 在某些情况下是这样的。但是 1979 年实行经济改革和对外开放政策以后,中国的对外贸易开始多元化<sup>7</sup>了。

Yes, in some cases. But since the implementation of the economic reforms and opening-up policy in 1979, China's foreign trade has diversified a great deal.

张 晋：我曾听说过补偿贸易<sup>8</sup>、小额贸易、边境贸易<sup>9</sup>以及地方性贸易。现在的对外贸易还包括这些种类吗？

I've heard of compensation trade, small-deal trade, border trade and local trade. Were these trade forms considered as foreign trade?

教 授：当然包括在内，不过还有其他的种类。对外贸易还包括以佣金<sup>10</sup>为主的贸易、以进口的原料从事加工和组装<sup>11</sup>的贸易、以提供的材料进行加工、出口加工以及租赁贸易<sup>12</sup>等等。

Yes, but there were other kinds, too. Foreign trade also included trade on commission basis, processing and assembling with imported materials, processing with supplied materials, processing for export, and chartering and leasing trade, etc.

张 晋：他们为什么采用这么多不同形式的贸易呢？

Why did they use so many different forms of foreign trade?

教 授：这是因为中国开始开展对外贸易的时候，面临许多障碍和困难。其中主要的一个障碍就是1980年以前中国的货币在世界市场上还不能兑换，为了解决这些困难，中国外贸人士和外商想出了这些具有创造性的贸易形式。

When China first started to promote foreign trade, it faced many obstacles and hurdles. One of the major obstacles was that prior to 1980, by and large, China's currency was not convertible in the world market. In order to work out these difficulties, Chinese and foreign traders had to come up with some creative forms of trade.

柯礼思：那个时候，对外贸易是不是使用外汇券<sup>13</sup>？

In those days, didn't they use the *Waihuijuan* or Foreign Exchange Certificate for foreign trade?

教 授：对呀，1979年后，中国政府才逐渐适应新的外贸环境，一步一步地建立起新的对外贸易法规，同时政府还把过去集中在中央的职权下放<sup>14</sup>到低级政府。



Yes, since 1979, the Chinese government gradually adapted to the new foreign trade environment and step-by-step set up new foreign trade regulations. The government even delegated foreign trade authority that had previously been highly centralized to lower levels of government.

**张 晋:** 您的意思是中国的中央政府分散其权力,而赋予地方政府更大的自主权?

Do you mean that the Chinese central government decentralized the power structure and let local governments make their own decisions?

**教 授:** 是,不过这是一个逐渐转变的过程。刚才提到的不同的贸易方式,存在中外双方判断价值的困难,因此不算很有效。为了能够继续拓展出口业务,一些大的贸易公司成为独立的机构,有的甚至还在海外设立分公司。

Yes, but it was a gradual process. The various forms of trade mentioned earlier were not very effective, because of difficulties in arriving at mutually agreeable valuations. In order to further expand export, some large trading companies became independent entities and even set up branch offices overseas.

**柯礼思:** 就对外贸易而言,他们到底有多少独立性?

How independent were they in terms of foreign trade?

**教 授:** 有些独立自主的贸易公司在对外贸易的过程中,从进口原料到出口成品,几乎能够完全独立运作,甚至有的还能够成为小公司的媒介<sup>15</sup>,带引其从事对外贸易,并且为他们提供一些资金上的支持。

Well, some independent trading companies could wholly operate their line of production, from importing raw materials to exporting finished goods. Some even served as intermediaries for other smaller operations and provided some financing.

**张 晋:** 我曾听说配额制度<sup>16</sup>是中国对外贸易很重要的一环。那所有的出口是不是都必须符合配额呢?

I've heard that the quota system is an important part of China's foreign trade. Are all exports subject to a quota?

**教 授:** 不一定,有些出口的商品,比如某些食品,必须有配额才准许出口。配额的主要目的是为了控制价格,其他如纺织品和成衣类<sup>17</sup>,配额则由外国政府

决定。

Not necessarily, but some are. Chinese quotas, such as those on food items for export, are primarily designed to regulate prices. Quotas for other items, such as those for textiles and garments, are set by foreign governments.

**柯礼思:** 那中国政府是什么时候才建立起一套完整的对外贸易法的?

When did the Chinese government establish a comprehensive foreign trade law?

**教授:** 1988年之后,中国政府为了满足国际贸易的需要,开始修订并完善了一些外贸法规。几年之后,中国再度调整一些外汇的机制,希望能使这个制度不断完善<sup>18</sup>。

After 1988, the Chinese government started to implement and improve some foreign trade regulations to meet the needs of international trade communities. A few years later, they readjusted the foreign exchange mechanism and tried to perfect the system.

**张晋:** 人民币的汇率是不是一直保持不变?

Was the foreign exchange rate always the same?

**教授:** 不是。比方说,1981年的时候,1美元可兑换1.552到1.740的人民币,1993年,1美元可兑换5.78到5.8的人民币。但是1994年1月1日那天,中国人民银行<sup>19</sup>下属的国家外汇管理局<sup>20</sup>统一了双重汇率<sup>21</sup>,也就是官方汇率与市场汇率并轨<sup>22</sup>,而改用单一的、有管理的浮动汇率制度<sup>23</sup>。

Not at all. For example, the exchange rate was US \$1 to RMB1.552 - 1.740 in 1981, and US \$1 could be exchanged for RMB5.78 - 5.8 in 1993. The SAEC, a unit of the PBOC, unified the dual foreign exchange rates and began to set the exchange rate using a managed float system from January 1, 1994.

**张晋:** 为什么采取双重汇率呢? 中国不是一直只有一种货币吗?

Why did they use dual foreign exchange rates? Didn't China always have just one currency?

**教授:** 从1980年到1994年的1月1日,中国基本上有两种货币体系:人民币只在国内通行,而外汇券则适用于外国人或是跟对外贸易有关的领域。

From 1980 till January 1, 1994, China basically had a two-currency system. *Renminbi* (RMB) were exclusively for domestic use, and the convertible currency *Wailuijuan*, or Foreign Exchange Certificate, was used by foreigners or in connection with foreign trade.

柯礼思: 1994年之后,人民币似乎贬值<sup>24</sup>了。

It seems that the RMB devalued after 1994.

教授: 1994年1月1日取消外汇券后,人民币贬值了,其贬值的幅度大约为50%。例如,官方的汇率原为1对5.8,后为8.7,这是那个时候交换市场的主要汇率。

Well, the elimination of the Foreign Exchange Certificate, or FEC, on January 1, 1994 further devalued the currency. The RMB was 50% off. The major exchange rate during the period was US \$1:RMB 5.8-8.7.

张晋: 您刚才提到汇率采取的是一种有管理的浮动汇率制度,那您的意思是汇率是基于市场对外币的供应和需求而发生变化的?

You mentioned a while ago that the exchange rate was based on a managed float system. Do you mean that the exchange rate is based on market supply and demand for foreign currency?

教授: 正是如此。同时,为了能使对外贸易更具有竞争性,中国对某些重要的出口货物采取投标的方式,而且对90%以上的出口货品不再加以控制。

Exactly. To make foreign trade even more competitive, the Chinese government introduced a bidding system for some important export commodities and lifted control of more than 90% of export.

张晋: 我看这些措施对外贸一定会有很多好处的。现行的对外贸易法是什么时候正式实施的?

I'm sure those measures have been very beneficial to foreign trade. When was the current *Foreign Trade Law* officially put into practice?

教授: 正式实施是1994年的7月1日。从那个时候起,中国开始实行统一的对外贸易制度,这不但能保护国内的企业,而且还能保护外国的商业机构。2004年,中国新修订了对外贸易法,极大地提高了法律保障外商和中国涉外商

人的能力。

It was on July 1, 1994. Since then, China has begun to practice a unified foreign trade system that protects foreign business entities as well as domestic enterprises. In 2004, the newly revised *Foreign Trade Law* greatly increased its capability for protecting foreign investors and Chinese businesspersons who engaged in international trade.

柯礼思：中国的对外贸易法符合国际间通行的惯例吗？

Does the *Chinese Foreign Trade Law* conform to common international practices?

教授：当然啦。在那个时候，中国政府已经完成了对出口产品的退税制度改革，而且还开始采取了反倾销<sup>25</sup>、反补贴<sup>26</sup>政策，这些政策都是符合国际贸易的要求的。

Yes. The government at that time also completed the system for tax refunds on exports and began to adopt anti-dumping and anti-subsidy policies in order to meet the demands of international trade communities.



张 晋：依我看，有了这些改革和新法律，中国基本上已经开创了一个符合全球贸易的地区性需求的对外贸易新格局。

I assume that with all these reforms and new laws, China has essentially created a foreign trade framework that complies with the requirements of global trade communities.

### 注 释

- 1 非官方的(fēiguānfāng de): unofficial
- 2 政务院(Zhèngwùyuàn): the Government Administration Council, currently the Bureau of Government Office Administration, directly under the State Council
- 3 国营(guóyíng): state-run; state-operated
- 4 对外贸易经济合作部(Duìwài Mào yì Jīngjì Hézuò Bù): the Ministry of Foreign Trade and Economic Cooperation, or MOFTEC
- 5 关系恶化(guānxi èhuà): the relationship (between two countries) grew worse or deteriorated  
恶化(èhuà): worsen; deteriorate
- 6 信用交易(xìnyòng jiāoyì): credit transaction
- 7 多元化(duōyuánhuà): to diversify; to make varied
- 8 补偿贸易(bǔcháng mào yì): compensation trade
- 9 边境贸易(biānjìng mào yì): border trade
- 10 佣金(yōngjīn): commission; brokerage
- 11 组装(zǔzhuāng): to assemble; to put together
- 12 租赁贸易(zūlìn mào yì): leasing trade
- 13 外汇券(wàihuìquàn): Foreign Exchange Certificate (FEC), issued by Bank of China on March 19, 1980. They are no longer in use now.
- 14 下放(xiàfàng): to assign (a job) to someone else; to delegate
- 15 媒介(méijiè): intermediary; middleman
- 16 配额制度(pèi'é zhìdù): quota system
- 17 成衣类(chéngyīlèi): garment category
- 18 不断完善(búduàn wánshàn): constantly improving
- 19 中国人民银行(Zhōngguó Rénmín Yínháng): People's Bank of China, or PBOC
- 20 国家外汇管理局(Guójiā Wàihui Guǎnlǐ Jú): the State Administration for Exchange Control, or SAEC
- 21 双重汇率(shuāngchóng huìlǜ): dual exchange rates
- 22 并轨(bìng guǐ): to combine (two rates) into one; to unify
- 23 浮动汇率制度(fú dòng huìlǜ zhìdù): floating exchange rate system
- 24 贬值(biǎnzhí): to devalue; to devaluate; to depreciate
- 25 反倾销(fǎnqīngxiāo): anti-dumping
- 26 反补贴(fǎnbǔtiē): anti-subsidy



## 时文选读

### 新时期我国对外贸易发展的挑战 and 对策<sup>1</sup>

张太原(湖南大学 工商管理学院)

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**【摘要】**改革开放二十多年来,中国的对外贸易发展十分迅速。但是,现阶段我国的对外贸易遇到了一些新的挑战,比如:全球经济不平衡、贸易保护主义盛行、人民币汇率制度改革和人民币升值、成本上升压力与产品结构薄弱、宏观调控<sup>2</sup>影响等。为此,新时期我国对外贸易发展策略可调整为将外贸发展放在中国经济发展的整体框架内,从优化经济内部结构入手,调整对外贸易的格局<sup>3</sup>和战略;在改善贸易盈余的同时,加快贸易结构的调整;加快转变对外贸易增长方式,努力实现由外贸大国向外贸强国的转变;对外经济政策宜以改善国内资源配置效率为目标。

过去二十多年来,中国对外贸易增长十分迅速,20世纪80年代初全国年进出口总额不到400亿美元,至2005年全国进出口总额已达14221亿美元,增长了大约三十五倍。与此同时,中国在全球的贸易地位也发生了非常大的变化,1978年是第32位,到2004年中国已是世界上第三大出口国和第三大进口国。2005年中国出口亦稳居世界第三位,占全球出口总额的7.3%。从这些数据来看,中国当前对外贸易的总体形势是好的,贸易总量持续扩大,对外贸易产品结构不断改善,区域多元化<sup>4</sup>的战略也得以推进。但随着中国经济发展进入新的阶段,随着外部经济环境的不断变化,我国的对外贸易也面临着一些新的挑战,需要我们积极关注,积极应对。

#### 新时期我国外贸发展面临的新挑战

##### (一) 全球经济不平衡

进入新世纪以来,全球经济不平衡日益成为各国广泛关注的一个问题,也成为

威胁当前世界经济发展的一个重要因素。所谓全球经济不平衡主要是指美国等发达国家的巨额贸易赤字<sup>5</sup>和一些发展中国家的巨额贸易盈余共存的局面。美国贸易赤字和财政赤字<sup>6</sup>并存是当前全球经济不平衡的一个重要方面。从20世纪80年代以来,美国逐渐开始出现贸易赤字,赤字规模迅速扩大。2005年,美国的贸易赤字达到了创纪录的7167.3亿美元。与此同时,在过去的5年中,美国财政经历了从盈余到赤字的彻底反转,2005年美国财政赤字已经达到了4270亿美元。低储蓄率和超额消费迫使美国债台高筑<sup>7</sup>,美国政府债务已占到了整个债务的65%以上,偿债率<sup>8</sup>已经超过了25%,达到了公认的国际警戒线<sup>9</sup>。

面对贸易和财政的双赤字,美国政府主要是依靠资本流入来弥补赤字,美国政府通过发行美元债券<sup>10</sup>吸引了大量的国外资本流入美国,一方面为财政赤字提供了融资,另一方面通过资本项目的盈余来平衡贸易赤字。但这种政策也引发了对美国依靠资本流入弥补赤字的可持续性的担忧。如果美国双赤字问题久而不决,美国资产的投资性将受到置疑<sup>11</sup>和挑战,投资者继续持有和购买美国金融产品<sup>12</sup>的意愿会降低。这将冲击美国债券市场的价格和收益率<sup>13</sup>,进而影响美国货币政策的实施效果,同时,美国的经济不平衡问题一旦难以为继<sup>14</sup>,将会对全球经济的发展产生极大的负面影响,进而会影响美国对中国产品的需求,影响中国的对外贸易。

另外,美国的双赤字也日益引起美国国会人士和政府的关注,美国政府有可能在未来某一时间把政策的重点转移到调整双赤字问题上。而从现在的迹象<sup>15</sup>看,美国调整双赤字会在两个方面影响中国:首先是推动人民币升值,美元贬值。美国可能会对我国施加持续的压力推动人民币升值,人民币升值将对我国的出口带来不利的影响。其次,美国政府会在贸易政策方面做一些调整,我国将面临更加恶化的



贸易环境和贸易条件。

## (二) 贸易保护盛行

贸易保护主义的盛行加大了我国拓展国际市场的难度,一定程度上导致了我国外贸发展外部环境的恶化。随着中国产品占有国际市场份额的不断扩大,我国企业频繁遭到反倾销、反补贴、各种保障措施以及技术、环境、劳工、知识产权等贸易壁垒的限制。1995年—2005年间,WTO成员向我国发起的反倾销、反补贴、保障措施和特保措施<sup>16</sup>调查达到716件,我国已经连续10年成为遭反倾销调查最多的国家,每年涉案损失高达300亿—400亿美元。发达国家更多倾向于使用技术壁垒,而发展中国家则主要采用反倾销等传统手段。2005年,美国和欧盟对我国纺织品<sup>17</sup>实施的特保措施使我国与发达国家的贸易摩擦<sup>18</sup>达到了高峰。

(摘自《湖北社会科学》2007年第2期)

## 注释

- 1 对策(duìcè): countermeasure; countermove
- 2 宏观调控(hóngguān tiáokòng): macro-adjust and macro-control
- 3 格局(géjú): structure and form; pattern
- 4 区域多元化(qūyù duōyuánhuà): regional diversification
- 5 贸易赤字(màoyì chìzì): trade deficit
- 6 财政赤字(cáizhèng chìzì): financial deficit
- 7 债台高筑(zhàitái gāozhù): be deep (heavily) in debt; be debt-ridden; be up to one's ears in debt
- 8 偿债率(chángzhàilǜ): debt repayment ratio
- 9 警戒线(jǐngjièxiàn): a cordon; security line
- 10 债券(zhàiquàn): bond
- 11 置疑(zhìyí): doubt (used in a negative way)
- 12 金融产品(jīnróng chǎnpǐn): financial products
- 13 收益率(shōuyìlǜ): rate of yield; earning rate
- 14 难以为继(nányǐwéijì): difficult to continue
- 15 迹象(jìxiàng): sign; indication
- 16 特保措施(tèbǎo cuòshī): special protection measures
- 17 纺织品(fǎngzhīpǐn): textile
- 18 贸易摩擦(màoyì móucā): trade friction

# 练习

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## 一、解释下列词语

1. 贸易伙伴
2. 信用交易
3. 补偿贸易
4. 小额贸易
5. 边境贸易
6. 地方性贸易
7. 外汇券
8. 配额制度
9. 浮动汇率制度
10. 贸易赤字
11. 财政赤字
12. 贸易保护主义

## 二、回答下列问题

1. 中国最早是什么时候开始使用外汇券的？为什么？
2. 进行对外贸易时为什么采取配额制度呢？
3. 中国目前采取浮动的外汇制度吗？为什么？
4. 根据世界贸易组织的法则，简述对外贸易反倾销、反补贴的政策。
5. 简述中国目前对外贸易所面临的新挑战。





# 第十一课

## *Lesson Eleven*

### 现行的中国对外贸易法

#### *Current Chinese Foreign Trade Laws*

柯礼思：我知道 1994 年 5 月 12 日第八届全国人民代表大会常务委员会第七次会议正式颁布了《中华人民共和国对外贸易法》，但它是什么时候正式实施的呢？

I understand that the *Foreign Trade Law* was formally adopted at the Seventh Session of the Standing Committee of the Eighth National People's Congress on May 12, 1994. But when was it officially put into practice?

教授：正式实施是同年的 7 月 1 日。不过最新修订的《对外贸易法》是在 2004 年 4 月 6 日举行的第十届全国人民代表大会常务委员会第八次会议上全体一致<sup>1</sup>通过的，并且已经在同年的 7 月 1 日开始正式生效<sup>2</sup>。

It was on July 1 of the same year. But the newly revised *Foreign Trade Law* was passed by a unanimous vote at the Eighth Session of the 10th National People's Congress Standing Committee on April 6, 2004. It took effect on July 1 of the same year.

张晋：为什么 2004 年要修订对外贸易法呢？

Why did they have to revise the *Foreign Trade Law* again in 2004?

教授：很明显，主要是为了履行中国入世的承诺而做的修改。

It's quite obvious that China revised it in order to comply with the commitment for entry into the WTO.

张晋：我想新法一定比旧法更加完善了吧？

I suppose the new law must be more comprehensive than the old ones?



**教授:** 新法涵盖了对外贸易的每一个层面,包括对外贸易经营主体、货物进出口等,还涉及了与对外贸易相关的 IP 保护<sup>3</sup> 等等。

The new law covers almost every aspect in foreign trade, including the regulations on foreign trade dealer, commodities import and export in trade etc., intellectual property.

**柯礼思:** 所以说,对外贸易不仅是货物的进出口?

So foreign trade doesn't just mean the import and export of goods?

**教授:** 当然不是,对外贸易不仅包括货物的进出口,还包括技术进出口<sup>4</sup> 和国际贸易服务<sup>5</sup>。

Certainly not, foreign trade covers the import and export of commodities, technology and also services.

**张晋:** 什么是对外贸易经营者呢? 对外贸易经营者从事对外贸易需要许可证<sup>6</sup> 吗?

What constitutes a foreign trade dealer? Does a foreign trade dealer need a permit to engage in foreign trade?

**教授:** 过去作为一个对外贸易者不但需要许可证,而且还必须具备很多必要的条件。

In the past, a foreign trade dealer not only needed a permit, he/she also had to meet many requirements.

**柯礼思:** 有哪些条件呢? 可以举些例子吗?

What requirements? Could you give us a few examples?

**教授:** 比方说:(1)有自己的名称和组织机构;(2)有明确的对外经营范围;(3)具有其经营对外贸易业务所必需的场所、资金和专业人员;(4)委托<sup>7</sup>他人办理进出口业务达到规定的实绩或者具有必需的进出口货源<sup>8</sup>;(5)法律、行政法规规定的其他条件。<sup>9</sup>但是现在不同了。

For example, (1) having one's own name and organizational structure; (2) having a definite scope of business in foreign trade; (3) having a place of business, financial resources and professional personnel essential to the foreign trade dealings which one intends to engage in; (4) entrusting someone to handle the

required record of import and export effected on ones behalf or having necessary sources of goods for import or export; and (5) other requirements provided in relevant laws and administrative regulations. But now it's quite different.

**张 晋:** 新旧对外贸易法到底有哪些不同呢?

What are the major differences between the old *Foreign Trade Law* and the new one?

**教 授:** 一个主要的不同点就是现在个人可以从事对外贸易活动了,这是过去所不允许的。而且,经过合法登记的对外贸易经营者还可以“从事货物进出口与技术进出口”。<sup>10</sup>

One of the major differences is that individuals now can engage in foreign trade activities. In the past, individuals were not allowed to do so. Moreover, a foreign trade operator who has registered with the relevant government agencies can also import and export both goods and technology.

**张 晋:** 那真好。我看这新修订的法律,对于在中国没有设立贸易公司但是专门从事进出口的外贸商人来说也将获益不少。

That's pretty cool. I imagine the new revisions will also benefit foreign trade operators who deal exclusively with imports and exports but don't have a trading company in China.

**教 授:** 确实是,过去规定:“没有对外贸易经营许可的组织或个人,可以在国内委托对外贸易经营者在其经营范围内代为办理其对外贸易业务。”<sup>11</sup>但是现在不需要了。

Indeed, it was stipulated in the past that “Organizations or individuals without a permit for foreign trade business may entrust foreign trade operators within China to conduct foreign trade business on their behalf within the business scope of the trustees.” But that's no longer necessary.

**柯礼思:** 新法有没有关于知识产权保护的内容?

Does the new law cover intellectual property rights protection?

教授：这个问题问得很好。新的对外贸易法增加了第五章，这第五章就是专门讨论知识产权保护这个问题的。

That's a good question. The new *Foreign Trade Law* added a new chapter which deals exclusively with intellectual property rights protection.

柯礼思：那太好了。国家实行统一的对外贸易制度，依法维护公平、自由的对外贸易秩序，这是值得肯定的。但是在中国，由谁来监管<sup>12</sup>法律的施行呢？

That's really wonderful. I'm sure the *Foreign Trade Law* is uniformly implemented and safeguards a fair and free foreign trade order. Which department will ensure the implementation of the law?

教授：凡是对对外贸易的行政事务，都由国务院来专门管理。

All the administrative stuff will be in charge of the State Council.

张晋：那么一个对外贸易经营者有没有经营自主权<sup>13</sup>？

Does a foreign trade dealer have full freedom in operating his or her businesses?

教授：有。1994年的对外贸易法就已经规定了：“对外贸易经营者依法自主经营、自负盈亏。”<sup>14</sup>

Yes, the 1994 version of the *Foreign Trade Law* clearly states: "Foreign trade operators shall, in accordance with the law, enjoy full autonomy in their management and shall be responsible for their own profits and losses."

张晋：在什么情况下对货物进出口和技术进出口进行限制呢？

Under what circumstances are restrictions imposed on importing and exporting goods and technology?

教授：施加限制可能包括以下的原因：(1)为维护国家安全或者社会公共利益<sup>15</sup>；(2)国内供应短缺<sup>16</sup>或者有效保护可能用竭的<sup>17</sup>国内资源；(3)输往国家或者地区的市场容量<sup>18</sup>有限；(4)为建立或者加快建立国内特定产业<sup>19</sup>；(5)对任何形式的农业、牧业、渔业产品有必要限制进口的；(6)为保障国家国际金融地位<sup>20</sup>和国际收支平衡等等。<sup>21</sup>

Restrictions may be applied for the following reasons: (1) safeguarding national

security or public interest; (2) domestic shortage in supply or effective protection of exhaustible natural resources; (3) (due to) limited market capacity of the importing country or region; (4) establishing or accelerating the establishment of a particular domestic industry; (5) where the restriction on the importing of agricultural, animal husbandry or fishery products in any form is necessary; (6) and maintaining the State's international financial status and the balance of international payments, etc.

**柯礼思:** 有没有完全禁止出口或是进口的项目呢?

Are there any items which it is totally prohibited to import to or export from China?

**教授:** 有,任何危害“国家安全或者社会公共利益”<sup>22</sup>的产品和技术都在禁止之列。

Yes, if a product or technology endangers “national security or public interest”, then the product or technology will be banned.

**柯礼思:** 我看过一些伪造<sup>23</sup>进出口的报道,在国际贸易中,哪一类的活动算是伪造呢?

I've read many news reports and stories about import and export fraud. When it comes to international trade, what kind of activity constitutes fraud?

**教授:** 有好多种。比方伪造、变造进出口货物原产地证明<sup>24</sup>,伪造、变造<sup>25</sup>或者买卖货物原产地证书、进出口许可证<sup>26</sup>,或者骗取国家的出口退税以及违反法律、行政法规规定的其他行为。<sup>27</sup>

Well, there are many kinds: for example, forgery, distortion, or trading of certificates of country of origin and import or export licenses; defrauding the State of refunded tax on exports, and other acts against law and administrative regulations.

**张晋:** 中国是一个以出口为主的国家,最近《纽约时报》的一篇报道提到:“中国将取代墨西哥,成为第二大向美国出口货物的国家。”

I know China is an export-oriented country. A recent article in *The New York Times* said recently that “China [was] expected to supplant Mexico as the



second largest exporter to the United States.”

**柯礼思：**那篇文章还提到中国输往美国的货物 2002 年的增长率为 20%，玩具、运动器材<sup>28</sup>和自行车输出总额高达 148 亿美元，服装和家庭用品总额为 133 亿美元，而电脑及外部设备<sup>29</sup>则高达 132 亿美元。在我看来，中国似乎只在出口而不进口。

I think it also mentioned that China's exports to the United States grew 20 percent in 2002. The total volume of toys, sporting goods, and bicycles was US\$14.8 billion; the apparel and household goods totaled US \$13.3 billion; and the computer accessories and peripherals reached US \$13.2 billion. It seems to me that China only exports and doesn't import.

**教授：**对外贸易是一条双行道<sup>30</sup>，中国不仅鼓励出口，而且还鼓励从国外进口货物。

Foreign trade is a two-way street. China not only encourages exporting, but also encourages importing goods from foreign countries.

**张晋：**中国出口的贸易总额增长得这么快，是不是中国政府采取了某些措施鼓励出口呢？

China's export volume is growing very rapidly. Has the Chinese government adopted certain measures to encourage exporting?

**教授：**我刚才不是说过了吗，中国鼓励进口和出口。过去的几年，“根据对外贸易发展的需要，建立和完善为对外贸易服务的金融机构，设立对外贸易发展基金、风险基金。”<sup>31</sup>

As I just said, China encourages both importing and exporting. Over the years, “the State has established and improved financial institutions for foreign trade and established funds for foreign trade development and risks as the development of foreign trade requires.”

**柯礼思：**所以说中国为了促进对外贸易的发展，提供了很多优惠的条件<sup>32</sup>？

So China offers many incentives in order to promote foreign trade?

**教授：**对，中国政府为了促进对外贸易，确实提供了一些优惠的办法，例如进出口信贷、进出口信用保险、出口退税<sup>33</sup>，而外国的贸易商还可成立或加入进出

口商会。

That's right. For the purpose of promoting foreign trade, the Chinese government offers such incentives as import and export credit, import and export insurance and export tax refund. And foreign traders may establish or join a Chamber of Commerce for Importers and Exporters.

张 晋：对于伪造、变造进出口原产地证明这一类的违法行为，中国政府是如何处理呢？

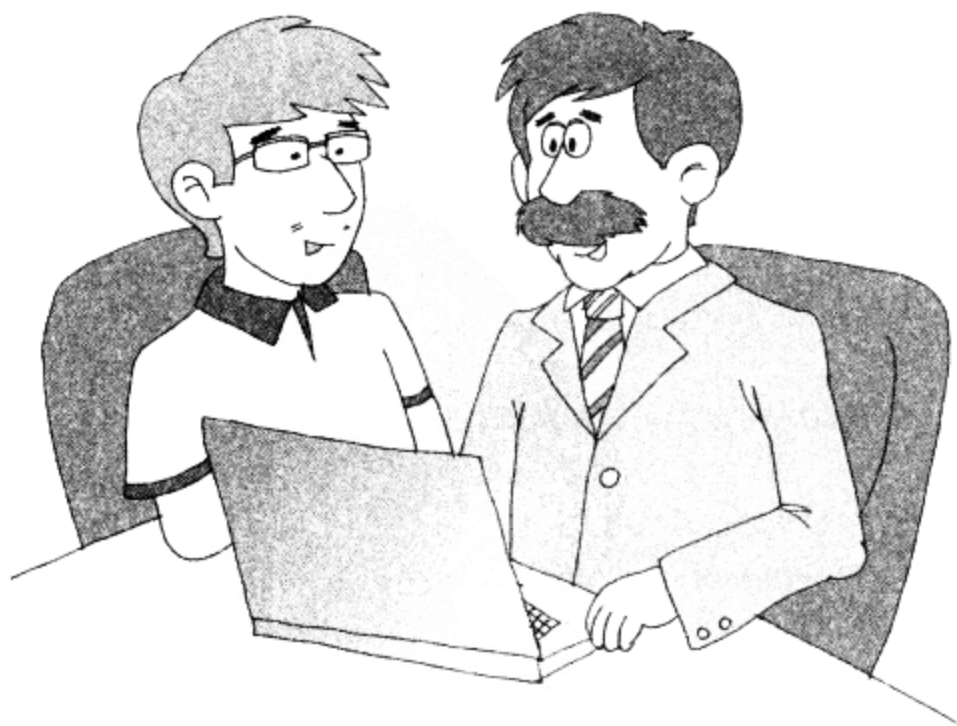
How does the Chinese government deal with certain crimes, such as the forgery or distortion of certificate of country of origin?

教 授：对这类不法行为，一般处以罚款，如果比较严重构成犯罪的就按刑法的规定追究刑事责任。

Such crimes will either be punished by fines, or if the crime is more serious, the perpetrator will be subject to criminal prosecution under *the Criminal Law*.

柯礼思：政府官员若是玩忽职守<sup>34</sup>、徇私舞弊<sup>35</sup>或者滥用职权<sup>36</sup>，也将依法追究<sup>37</sup>刑事责任吗？

How about those government officials who are guilty of neglecting their duties, malpractice, irregularities, or abuse of power? Are they subject to criminal prosecution, as well?



张 晋: 还有那些利用职务上的便利向他人索取<sup>38</sup>财物, 或者收受贿赂<sup>39</sup>的人呢?  
And how about those who take advantage of their jobs to extort property from others or receive bribes?

教 授: 那就要视违法行为情节而定了。如果国家对外贸易工作人员的行为构成犯罪的, 则将依法追究刑事责任, 如果不构成犯罪的, 则可能会给予行政处分<sup>40</sup>。  
It depends. If the behavior of those serving as the State's foreign trade authorities constitutes a criminal offense, they are subject to criminal prosecution pursuant to law; if those offenses do not constitute crimes, then administrative sanctions are levied.

张 晋: 我认为中国新修订的对外贸易法, 不论是对国内从事对外贸易的商人或是外国商人, 都能提供清楚而且透明的法律指导。  
I think China's newly revised foreign trade law will provide clear and transparent guidelines for domestic and foreign traders.

### 注 释

- 1 全体一致 (quántǐ yízhì): unanimous; unanimously
- 2 生效 (shēngxiào): to take effect; to go into effect; to become effective
- 3 IP 保护 (IP bǎohù): intellectual property rights protection
- 4 技术进出口 (jìshù jìnchūkǒu): technology import and export
- 5 国际贸易服务 (guójì mào yì fú wù): international trade services
- 6 许可证 (xǔkězhèng): permit; license
- 7 委托 (wěituō): to entrust; to ask
- 8 货源 (huòyuán): source of goods; supply of goods
- 9 See 《对外贸易法》(Duiwài Mào yì fǎ): *the Foreign Trade Law*, 1994 revised edition, Chapter 2, Article 9. For the English translation, see "Laws and Regulations of the People's Republic of China," compiled by the Bureau of Legislative Affairs of the State Council of the People's Republic of China, published by the China Legal System Publishing House
- 10 See 《对外贸易法》(Duiwài Mào yì fǎ): *the Foreign Trade Law*, 1994 revised edition, Chapter 2, Article 8 & 9
- 11 See 《对外贸易法》(Duiwài Mào yì fǎ): *the Foreign Trade Law*, 1994 revised edition, Chapter 2, Article 13
- 12 监管 (jiānguǎn): to oversee; supervision
- 13 自主权 (zìzhǔquán): autonomy; power to make one's own decisions
- 14 See 《对外贸易法》(Duiwài Mào yì fǎ): *the Foreign Trade Law*, 1994 revised edition, Chapter 2, Article 11

- 15 公共利益(gōnggòng lìyì): public interest
- 16 短缺(duǎnquē): shortage
- 17 可能用竭的(kěnéng yòngjié de): exhaustible; capable of being used up (as in natural resources)
- 18 市场容量(shìchǎng róngliàng): market capacity
- 19 特定产业(tèdìng chǎnyè): a particular (domestic) industry; specially designated industry
- 20 金融地位(jīnróng dìwèi): financial status
- 21 See 《对外贸易法》(Duiwài Màooyifǎ): *the Foreign Trade Law*, 1994 and 2004 editions, Chapter 3, Article 16
- 22 See 《对外贸易法》(Duiwài Màooyifǎ): *the Foreign Trade Law*, 2004 New edition, Chapter 4, Article 26
- 23 伪造(wěizào): to forge; to fabricate; to counterfeit
- 24 原产地证明(yuánchǎndì zhèngmíng): certificate of origin (C/O)
- 25 变造(biànzào): to alter in order to deceive
- 26 进出口许可证(jìnchūkǒu xǔkězhèng): import/export permit
- 27 See 《对外贸易法》(Duiwài Màooyifǎ): *the Foreign Trade Law*, 2004 edition, Chapter 6, Article 34, (1)-(5)
- 28 运动器材(yùndòng qìcái): exercise equipment
- 29 外部设备(wàibù shèbèi): peripheral equipment
- 30 双行道(shuāngxíngdào): two-way street
- 31 See 《对外贸易法》(Duiwài Màooyifǎ): *the Foreign Trade Law*, 2004 edition, Chapter 9, Article 51
- 32 优惠的条件(yōuhuì de tiáojiàn): favorable terms
- 33 See 《对外贸易法》(Duiwài Màooyifǎ): *the Foreign Trade Law*, 2004 edition, Chapter 9, "Promotion of Foreign Trade," Article 53
- 34 玩忽职守(wánhū zhíshǒu): to neglect of duty; to be remiss in one's duty
- 35 徇私舞弊(xúnsī-wǔbì): to do wrong to serve one's friends or relatives
- 36 滥用职权(lànyòng zhíquán): to abuse one's power; to abuse one's authority or position
- 37 依法追究(yīfǎ zhuījiū): to investigate (a case) under the law; to look into (a case) in accordance with the law
- 38 索取(suǒqǔ): to ask for; to demand
- 39 贿赂(huìlù): to bribe; bribery
- 40 行政处分(xíngzhèng chūfèn): disciplinary sanction; administrative disciplinary measure

## 时文选读

# 贸易自由化与贸易保护的均衡博弈<sup>1</sup>

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**【摘要】**中国在改革开放以后贸易保护政策的演进更有其独特的背景和转型国家<sup>2</sup>的特殊性,梳理<sup>3</sup>其演进<sup>4</sup>和变化的路径对未来我国贸易政策的合理性和有效性都可以提供必要的理论支撑<sup>5</sup>。贸易政策是根据本国经济发展的阶段在贸易自由化和贸易保护之间进行理性选择的结果。

中国对外贸易政策和制度的改革是在1984年以后才真正开始的,外贸改革的方向与整个经济体制改革具有同向性<sup>6</sup>,但是其总体进程滞后于国内经济体制的改革。加入WTO后,履行加入承诺和WTO相关义务使得外部压力成为国内贸易政策体系全面改革的主要动力。在此基础上应着重研究在开放前提下借鉴西方贸易保护理论如何更有效地保护国内产业和市场方面的研究。

### 中国贸易政策思想演进的路径

中国贸易政策的制定和迁移<sup>7</sup>体现为贸易改革动力的外部刺激性<sup>8</sup>和外部调试性<sup>9</sup>,贸易政策缺乏持续变革的内生动力<sup>10</sup>。

#### 1. 贸易保护程度逐渐弱化,保护政策形成趋于理性<sup>11</sup>

(1) 保护程度变化:由贸易保护属性<sup>12</sup>强的贸易政策向贸易中性的贸易政策转变。薛荣久教授把中国贸易政策的演变划分为内向型<sup>13</sup>保护政策、开放型保护政策和协调管理<sup>14</sup>政策三个阶段。内向型保护政策的特点是外贸管理体制高度集中,计划成为控制进出口贸易的主要手段,国家专营外贸。开放型保护政策的特点是外贸管理体制逐步放权,指令性计划<sup>15</sup>转变为指导性和市场调节,经济权下放<sup>16</sup>,关税在控制进出口贸易中的作用增强。协调管理贸易的结果是:关税成为中国保护国内市场的重要手段,贸易经营从行政审批制转变为登记制。对中国贸易政策演变几个阶段的划分显示了贸易政策的性质逐渐中立化。





(2) 寻租<sup>17</sup>行为的改变:贸易政策中的寻租行为经历了由逐步激发到逐渐削弱的过程。只要贸易政策中存在潜在收益,各种利益群体<sup>18</sup>就会运用各种手段为自己获得特定的利益,寻求贸易政策租金的行为也就不可避免。中国的贸易改革显示从计划手段转向关税和许可证等市场手段,由于制度漏洞<sup>19</sup>和制度扭曲,改革的初步阶段存在巨大的制度租金和猖獗的<sup>20</sup>寻租活动。由于贸易政策的自由化始兴越来越强,贸易政策中的潜在租金越来越少,这使贸易政策形成过程中的寻租行为受到抑制。从20世纪80年代后期以来,关税和非关税壁垒不断降低,许可证适用范围逐步减少,使寻租活动可能产生的范围逐步缩小。

(3) 贸易政策形成机制的转变:由具有强制性变迁特征转为具有较为明显的公共选择性<sup>21</sup>和典型的诱致性<sup>22</sup>变迁特征。中国贸易政策的演变体现了强制性<sup>23</sup>变迁和诱致性变迁并存的特征:一方面,中央政府认识到贸易政策的改革有利于中国经济的整体利益和长期利益,作为制度变迁的供给者<sup>24</sup>,主动实行强制性的贸易政策形成机制的制度变迁;另一方面,随着在贸易中各种利益集团的形成,为了获取更多的贸易利益,各种利益集团对贸易政策的需求也越加强烈,从而推动政府的制度供给,实施诱致性的制度变迁。随着开放力度的加大和贸易保护的明显降低,国有企业的亏损加大,是贸易政策保护性方向演进的诱致力量。而乡镇企业、私营企业、三资企业等则是贸易自由化政策的主要支持力量。就中国关税政策的变迁来说,既体现为强制性变迁的特点,又具有诱致性变迁的特点。中国关税政策历次变迁都是中国在响应关税政策不均衡引致的获利机会所进行的自发性<sup>25</sup>变迁。然而,中国关税政策历次变迁都是自主性的,都是由中国法令引起的,符合WTO“强制

性”的市场准入规则。

## 2. 贸易政策由计划性向市场化发展,更加符合国际规范

中国贸易制度和管理体制一直朝着市场经济的方向发展,这也与国内经济改革及 WTO 的国际指导原则是一致的。国内的贸易控制,例如贸易计划、国内定价、出口限制<sup>26</sup>、非关税措施<sup>27</sup>、外资壁垒<sup>28</sup>及待遇等,一直在逐步减少,中国贸易政策改革的趋势是管理方法向国际规则的方向发展。

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### 注 释

- 1 均衡博弈(jūnhéng bóyì): equilibrium game
- 2 转型国家(zhuǎnxíng guójiā): a country under transformation
- 3 梳理(shūlǐ): carding; combing; sorting out
- 4 演进(yǎnjìn): evolution; gradual progress
- 5 理论支撑(lǐlùn zhīchēng): theoretical support; supported by (certain) theory
- 6 同向性(tóngxiàngxìng): of the same nature; (has) the same direction
- 7 迁移(qiānyí): here means change
- 8 外部刺激性(wàibù cìjīxìng): external stimulation
- 9 外部调试性(wàibù tiáoshìxìng): external adjustment
- 10 内生动力(nèishēng dònglì): internal motive
- 11 趋于理性(qūyú lǐxìng): lean toward rational (reasoning)
- 12 属性(shǔxìng): attribute; property
- 13 内向型(nèixiàngxíng): internal; an introvert type
- 14 协调管理(xiétiáo guǎnlǐ): coordinating & managing
- 15 指令性计划(zhǐlìngxìng jìhuà): mandatory planning
- 16 经济权下放(jīngjìquán xiàfàng): economic power (authority) transfer to a lower level
- 17 寻租(xúnzū): (寻求贸易政策租金) seek leasing fees from trade policy
- 18 利益群体(lìyì qúntǐ): interest group
- 19 漏洞(lòudòng): loophole; flaw
- 20 猖獗的(chāngjué de): rampant; on the rampage; raging
- 21 公共选择性(gōnggòng xuǎnzéxìng): public selection (choice) - selected by the public
- 22 诱致性(yòuzhìxìng): induced; guided
- 23 强制性(qiángzhìxìng): mandatory; peremptory
- 24 供给者(gōngjǐzhě): provider
- 25 自发性(zìfāxìng): voluntary
- 26 出口限制(chūkǒu xiànzhi): export limit
- 27 非关税措施(fēiguānshuì cuòshī): non-tariff measure(s)
- 28 外资壁垒(wàizī bìlěi): barriers to foreign investment

# 练习

## 一、解释下列词语

1. 许可证
2. 经营自主权
3. 社会公共利益
4. 特定产业
5. 货物原产地证明
6. 出口退税
7. 金融机构
8. 优惠的条件
9. 出口信贷
10. 进出口信用保险
11. 博弈
12. 寻租行为

## 二、回答下列问题

1. 对外贸易除了包括货物的进出口外,还包括哪些方面的贸易?
2. 中国政府为了促进对外贸易的发展,提供了哪些优惠的政策?
3. 简述玩忽职守、徇私舞弊、滥应职权的法律意义。
4. 简述贸易自由化和贸易保护政策的优点和缺点。
5. 国际贸易交易之中,哪一类交易行为是违法行为?请举例说明。



# 第四单元

## 中国合同法

Unit IV

Contract Law in China





## 导论

## 中国合同法

合同是平等主体<sup>1</sup>之间设立、变更、终止<sup>2</sup>民事权利义务<sup>3</sup>关系的协议,是当事人意思自治<sup>4</sup>的直接体现<sup>5</sup>。合同法的出现对维护合同当事人的合法权利,促进合同目的的实现,保护市场经济秩序起了积极作用。合同法的内容非常丰富,涉及到合同的订立、履行到终止的整个过程。

从1949年中华人民共和国成立至1981年《中华人民共和国合同法》颁布以前,中国没有专门的法律规范来调整企业之间的协议,相关的规定只是散见于<sup>6</sup>一些行政性法律文件<sup>7</sup>中。随着改革开放和中国经济贸易的发展,商业实体<sup>8</sup>之间的经济往来日益频繁。为了适应经济形势的发展,中国从1982年到1987年间先后颁布了《中华人民共和国合同法》<sup>9</sup>、《中华人民共和国涉外经济合同法》<sup>11</sup>、《中华人民共和国合同法》<sup>11</sup>三部独立的合同法。这三部法律根据不同的主体和性质分别建立了一套相互独立的合同法律规范<sup>12</sup>。其中,《涉外经济合同法》中较多的引入了国际交易惯例<sup>13</sup>,这对于促进中国对外贸易、深入加强立法全球化建设<sup>14</sup>起到一定的积极作用。但是,三部不同的法律,调整同一种民事法律行为<sup>15</sup>——合同,不仅增加了商业实体在签订协定时选择适用法律的难度,也使得平等民事主体的权利保护不一致、不公平。很多外国商业实体也纷纷反映《涉外经济合同法》使他们的活动受到诸多限制,大大局限<sup>16</sup>了他们的发挥空间<sup>17</sup>,削弱<sup>18</sup>了他们与中国企业的合作能力。

在改变“三足鼎立<sup>19</sup>”局面<sup>20</sup>的呼吁<sup>21</sup>下,合同法终于走向“合而为一<sup>22</sup>”的道路。根据中国全国人大常委会的立法规划,第八届全国人大常委会<sup>23</sup>从1993年10月开始进行《中华人民共和国合同法》的起草工作。1995年11月形成了由全国12所法律院校的立法专家学者提出的建议草案。经过反复的修改,新合同法终于在1999年3月15日通过,并于同年的10月1日实施。原来的三个合同法同时废止。至此,中国进入统一合同法的时代。

新的合同法弱化<sup>24</sup>了行政力量的参与,并大量借鉴《联合国国际货物销售合同公约》<sup>25</sup>和《国家商事合同通则》<sup>26</sup>的内容,使得合同法一诞生就具有浓厚的国际化特色,这对于涉外合同的适用大有裨益<sup>27</sup>。例如中国在加入《联合国国际货物销售合同公约》之初,对公约11条“销售合同无须以书面订立<sup>28</sup>或书面证明,在形式方面也不受任何其他条件的限制。销售合同可以用包括证人<sup>29</sup>在内的任何方法证明”做了保留<sup>30</sup>,而在1999年的合同法取消了对合同必须采用书面形式的限制,承认了

口头协议<sup>31</sup>的效力。这样的修改,提高了订立合同的效率,节约了交易成本,大大促进了双边合作。

总的来说,1999年的《中华人民共和国合同法》是根据目前世界经济发展形势和中国经济现状制定、颁布、实施的具有国际性的法律。由于它在立法上大量借鉴国际公约,使得合同法在调整涉外合同时更加自如<sup>32</sup>。合同法本着平等保护合同主体、尊重当事人意愿自由的原则,限制政府力量的过度干预<sup>33</sup>,同时强化了诚实信用<sup>34</sup>在合同中的作用,为平衡自由与公平,为扩大贸易合作发挥着非常重要的作用。

### 注 释

- 1 平等主体(píngděng zhǔtǐ): equal entity
- 2 终止(zhōngzhǐ): terminate; annul
- 3 民事权利义务(mínshì quánli yìwù): civil rights and obligations
- 4 当事人意思自治(dāngshìrén yìsì zìzhì): self determination of the (wishes of) the person (or party) involved  
当事人(dāngshìrén): the person involved
- 5 直接体现(zhíjiē tǐxiàn): direct reflection; direct embodiment
- 6 散见于(sǎnjiàn yú): to be seen sporadically
- 7 行政性法律文件(xíngzhèngxìng fǎlǜ wénjiàn): legal documentation for administrative (purpose); administrative nature of legal document
- 8 商业实体(shāngyè shítǐ): business entity
- 9 《中华人民共和国合同法》(Zhōnghuá Rénmíng Gònghéguó Jīngjì Hétóngfǎ): *the Law of the People's Republic of China on Economic Contracts*
- 10 《中华人民共和国涉外经济合同法》(Zhōnghuá Rénmíng Gònghéguó Shèwài Jīngjì Hétóngfǎ): *the Law of the People's Republic of China on Foreign-Related Economic Contracts*
- 11 《中华人民共和国合同法》(Zhōnghuá Rénmíng Gònghéguó Jìshù Hétóngfǎ): *the Law of the People's Republic of China on Technology Contracts*
- 12 规范(guīfàn): standard; norm
- 13 国际交易惯例(guójì jiāoyì guànlì): common practices in international trade
- 14 深入加强立法全球化建设(shēnrù jiāqiáng lǐfǎ quánqiúhuà jiànshè): deepen and strengthen the globalization of legal development (construction)
- 15 民事法律行为(mínshì fǎlǜ xíngwéi): civil legal behavior
- 16 局限(júxiàn): confine; limit
- 17 发挥空间(fāhuī kōngjiān): room for developing (an idea, a theme, etc.)
- 18 削弱(xuēruò): weaken, cripple
- 19 三足鼎立(sān zú dǐnglì): stand like the legs of a tripod—developing into a triangular balance of power or situation
- 20 局面(júmiàn): situation; prospect; aspect

- 21 呼吁(hūyù): appeal; call on
- 22 合而为一(hé'érwéiyī): combine (two, three, etc.) into one
- 23 全国人大常委会 (Quánguó Réndà Chángwěihùi): the Standing Committee of the National People's Congress
- 24 弱化(ruòhuà): weaken
- 25 《联合国国际货物销售合同公约》(Liánhéguó Guóji Huòwù Xiāoshòu Hétong Gōngyuē): *The United Nations Convention on Contracts for the International Sales of Goods*
- 26 《国家商事合同通则》(Guójiā Shāngshì Hétong Tōngzé): *Unidroit Principles of International Commercial Contracts*
- 27 大有裨益(dà yǒu bì yì): be of great benefit
- 28 书面订立(shūmiàn dìnglì): conclude (a contract) in writing
- 29 证人(zhèngrén): witness
- 30 做了保留(zuò le bǎoliú): have reservations
- 31 口头协议(kǒutóu xiéyì): oral agreement
- 32 更加自如(gèngjiā zìrú): even more flexible; have more freedom
- 33 过度干预(guòdù gānyù): to interfere excessively; intervene too far
- 34 诚实信用(chéngshí xìnyòng): honesty and credibility

### Contract Law in China

A contract is an agreement between two equal parties in regard to setting up, changing and terminating both parties' civil rights and obligations. It is a direct reflection of the free will of the contract parties. *The Contract Law* is formulated for the purpose of protecting the lawful rights and interests of contract parties, promoting the realization of the goal of the contract, and safeguarding economic market order. The content of the current contract law is comprehensive—it covers the entire process of formulation, performance and termination of a contract.

After the founding of the People's Republic of China in 1949, and before the promulgation of *The Economic Contract Law of the People's Republic of China* in 1981, China did not have specific legal guidelines to regulate contractual agreements among enterprises. Some related provisions were scattered in administrative legal documents. Since the liberalization was implemented and the development of China's trade was further advanced, business entities had far more frequent contacts. In order to meet the requirements of economic development, three independent Contract Laws—the *Law of the People's Republic of China on Economic Contracts*, *Law of the People's Republic of China on Foreign-Related Economic Contracts*, and *Technology Contracts Law of the People's Republic of China* were successively issued from 1982 to

1987. These three contract laws, based on different business entities and the nature of businesses, are independent from each other. Among these three, the *Foreign-Related Economic Contracts* introduced more common practices in international trade into its provisions. It has positive effects as far as promoting China's international trade, expanding and strengthening the globalization of legal development are concerned. However, these three different, independent contract laws have one goal: coordinating civil legal activities in order to reach an agreement of a contract. While two contract parties are negotiating, the process of selecting appropriate contract regulations and rules became even more complicated and difficult for the parties involved. Sometimes it may even cause unequal treatment or unequal protection between two equal contract parties. Thus, many foreign business entities quite often expressed their concerns about the *Law on Foreign-Related Economic Contracts*. They complained that the contractual regulations restricted their activities in China, and thus lessened their ability to work with Chinese enterprises.

Under the call for reforming the three Contract Laws which "stand like the three legs of a tripod," the three laws were finally combined into one. According to the legislative planning of the Eighth Session of the standing Committee of the National People's Congress, the draft of *the Contract Law of the People's Republic of China* began in October 1993. Specialists from twelve law schools from all over China participated in the process of drafting the law, and the proposal was made in November 1995. After several revisions, the new contract law was passed on March 15, 1999, and was put into practice on October 1 of the same year. The original three contract laws were abolished and contract law now is unified.

The new contract law has weakened the administrative power of the Chinese government and widely draws from *The United Nations Convention on Contracts for the International Sales of Goods* and *Principles of International Commercial Contracts*. And the newly revised regulations display strong characteristics of international contract law, which are more suitable and helpful to foreign related contracts. For example, when first signing *The United Nations Convention on Contracts for the International Sales of Goods*, China had reservations about a clause that said "a sales contract does not have to be in the form of a written document or certification, and the format is not limited to certain terms and conditions. A sales contract can use any form, including the witnesses, to be certified." But in 1999, the Chinese government lifted the restrictions that a contract must be in a written form. Such modifications made signing a contract much more efficient: it not only cut costs in



transactions, but greatly improved the contract parties' bi-lateral relationship and cooperation.

In general, *the Law of the People's Republic of China on Contract* has been formulated, promulgated, and implemented according to world economic development trends and China's current economic status. *The Contract Law* is more flexible and more adaptable because the law introduced many international conventions into China. *The Contract Law*, based on the principles of equal protection and respect for the free will of the contract parties, will restrict the government from excessive interference in foreign trade. It also will strengthen the function of good faith, balanced freedom and fairness between two parties, and it will also further expand trade relationships among countries.



## 第十二课

### *Lesson Twelve*

## 中国合同法简介

### *A Brief Introduction to Contract Law*

教授：张晋，你上次是不是提到过对合同法也很感兴趣啊？

Jean, I remember you mentioned that you are interested in contract law?

张晋：是呀，但是我知道的很有限。

Yes, but I don't know much about it.

柯礼思：我知道的也不多。但是我听说这套法律很复杂，不同的商业对象采取不同的商业法规，而且这还要看所交易的对方当事对象是谁，这是真的吗？

I don't know much about it either. But I've heard that this branch of the law is quite difficult and that different rules apply to different business parties, depending on who the parties are. Is this true?

教授：不完全正确。

Yes and no.

张晋：那合同法适用于所有的企业吗？

Does contract law apply to all industries?

教授：不全是。凡跟技术有关的合同都采用另一套法规。

Not really. There are another set of laws to apply to tech-related contract.

柯礼思：听说过去私人之间是不可以订立合同的，这是真的吗？

I heard that individuals were not allowed to enter into contracts in the past. Is this still true?

教授：过去是这样的，但是现在已经不同了。1999年3月15日第九届全国人民代表大会第二次会议通过了中华人民共和国统一的《合同法》。

That is not the case anymore. *The new Contract Law of the People's Republic of China* was passed by the Second Session of the Ninth National People's Congress on March 15, 1999.

张晋：这部法律是什么时候开始实施的？

When did the new law come into effect?

教授：1999年10月1日开始实施。

*The new PRC Contract Law* came into effect on October 1, 1999.

柯礼思：新制定的合同法与以前涉及合同的法律、法规有什么不同？

What are the major differences between the new and the old?

教授：主要的区别在于：中国废除了一些烦琐的条款，而代之以国内外商业团体通用的统一法律条文。

The major differences are: China has eliminated its cumbersome set of contract rules and replaced them with an integrated law which applies to both domestic and foreign business parties.

张晋：那么无论国内和涉外的合同现在都享受相同的待遇<sup>1</sup>吗？

Does that mean that foreign and domestic contracts are now treated equally?

柯礼思：我知道，过去有些国外的投资家和公司因为遭受不平等的待遇而抱怨不休<sup>2</sup>。

I know there was a lot of criticism of the unequal treatment given to foreign investors and companies in the past.

张晋：那么这套新法主要是回应<sup>3</sup>国际间的批评了？

Is this new law a response to international criticism?

教授：可以这么说，新合同法取消了对国内合同和涉外合同的区别对待，而且这部新法还有一些特别的地方。

Yes, the *new Contract Law* has eliminated some differential treatment between domestic and foreign contracts, and there's something special about this new

law too.

张 晋：特别？表现在哪些方面呢？

How special is it?

教 授：因为这部新法是第一批由民法学者和专家共同执笔<sup>4</sup>完成的中国法律之一。而且他们在起草期间，还广泛征求了公众意见。

Well, this new law is among the first Chinese laws written by legal scholars and specialists in civil law. And moreover, the legal specialists also consulted public opinion during the drafting process.

张 晋：那真棒。

That's pretty cool.

柯礼思：那么这部新法不就更保护在中国从事商业活动的外国公司了？

Will the new law better protect foreign companies doing business in China?

张 晋：这套新法或许更能反映出中国目前的市场经济状况吧。

I think the new law also better reflects how the current Chinese market economy is conducted.

教 授：近年来法律虽然日臻完善<sup>5</sup>，但这并不表示新修订的合同法就是完美无缺<sup>6</sup>的。

The law has been getting more and more comprehensive in recent years, but that doesn't mean the newly revised contract law is perfect.

柯礼思：这我了解。但是我想至少现在的这套法律和国际上所接受的合同法原则上是基本一致的。

I see. But I assume that the current law can at least keep consistency with international practices with regard to contract law.

张 晋：我记得中国古代商鞅曾经说过一句话：“利不百，不变法；功不十，不易器。”<sup>7</sup>我相信新修订的合同法必然有许多好处。

I remember that the ancient Chinese Legalist Shang Yang once said, "Unless the advantage be a hundredfold, one should not reform the law; unless the bene-



fit be tenfold, one should not alter an instrument.” I’m sure that the revised contract law has many advantages.

柯礼思：我同意。教授，中国最早的法合同法是什么时候出现的？

I agree. Professor, when was the contract law first established in China?

教授：这可追溯到 1981 年，正值中国国内经济改革开始时期，中国颁布了经济合同法。

It can be traced back to 1981, when *the Economic Contract Law* was promulgated during China’s domestic economic reform.

柯礼思：那么在 1981 年以前，中国政府用什么法规来规范两个公司或当事人双方签订协议呢？

Before 1981, did the Chinese government have any sort of rules or regulations to guide two companies or parties entering into an agreement?

教授：以前并没有什么正式全面的法律。

No, there wasn’t any such formal or comprehensive law prior to that year.

张晋：那么在改革开放以后，中国用什么法律来规范自然人或企业之间的合同关系呢？

Then how did two natural persons or business entities reach an agreement after the reform?

教授：一般来说，过去是由民法通则以及并存的三个合同法来规范的。

Generally speaking, they were guided by *the General Principles of Civil Law* and the concurrent Three Contract Laws.

柯礼思：以民法通则和三个合同法决定合同双方的权利和义务？

So *the General Principles of Civil Law* and the Three Contract Laws determined the rights and obligations of the contracting parties?

教授：确实是。

Yes, indeed.

张 晋：三个合同法是哪三个？

What are the Three Contract Laws?

教 授：三个合同法包括《经济合同法》、《涉外经济合同法》以及《技术合同法》。

The Three Contract Laws are *the Economic Contract Law*, *the Foreign-Related Economic Contract Law*, and *the Technology Contract Law*.

柯礼思：我曾看过这些法律规范，听说这是中国经济改革的成果。

I've read about the new laws. They are the accomplishment of China's economic reforms.

教 授：是，这些法律的制定很大程度上是为了吸引外国的资金，引入外国的技术。

These laws, to a great extent, were established to attract foreign investment and import advanced technology from abroad.

张 晋：那么这就跟技术的转移<sup>8</sup>和运用有关了？

So it had something to do with technology transfer and application?

教 授：是。

Yes.

柯礼思：我曾听人说过，在经济改革初期，虽然有三个合同法并存，外国投资者和其他商业人士还是不太满意中国的投资环境。

I've heard that at the early stage of the economic reforms, foreign investors and businessperson were not very satisfied with the investment environment in China.

教 授：我想其中一个原因就是那个时候的法律并不是深思熟虑<sup>9</sup>后制定的。有些法律迫于当时的需要在仓促之间<sup>10</sup>组合了一些法律后颁布实施，因此还有许多的漏洞。

I think one of the reasons was that at that time, the laws were not well thought-out or constituted. Some laws had been hastily adopted or drawn up in response to immediate needs, and thus there were many loopholes.

柯礼思：听说许多外国的投资者认为在诸多条款的限制之下，他们在中国无法有效地进行商业活动。

It was said that many foreign investors felt that they could not efficiently conduct business in China with so many restrictions and regulations.

教授：过去是那样。我认识一些商业人士，他们甚至用笼中之鸟<sup>11</sup>这样的比喻<sup>12</sup>来形容当时外国人在中国从事商业活动的情况。

That was true. I know some businesspeople even used the metaphor “birds in a cage” to describe foreigners who were doing business in China in those days.

张晋：我想中国实施新的合同法之后，这种情况就完全改变了吧。

I suppose this situation has all changed since the implementation of the new contract law.

教授：是，在20世纪90年代的初期，中国经济与世界经济逐渐融为一体<sup>13</sup>，中国政府为了改善其司法制度，开始采用系统协调、综合治理的方式来改善法律环境。

Yes. While the Chinese economy was gradually integrating into the global economy in the early 1990s, the Chinese government began to enact laws in a more systematic and coordinated way to improve the legal environment.

张晋：那当时合同法的修订有什么特色呢？

Were there any distinguishing features while the contract law was being amended?

教授：1999年的合同法修订是在中国申请加入WTO谈判时期进行的，合同法的起草参考了许多国家的合同法以及国际通行的商事规定。

The Contract Law, revised in 1999, was amended while China was still negotiating its accession to the WTO. Legal experts consulted with many countries' contract laws and international business common practice while they were drafting the contract law.

柯礼思：新合同法颁布后，原先存在的三个合同法效力如何呢？它们依然有效吗？

Since the new contract law was promulgated, what about the original Three Contract laws? Are they still in effect?

**教授:** 自 1999 年新合同法颁布实施后,原先的三部合同法同时废止。

Since the 1999 new contract law was promulgated and took effect, the original Three Contract Laws were terminated simultaneously.

**张晋:** 相比而言,新的合同法有什么特别之处呢?

So comparatively speaking, what are the characteristics of the new contract law?

**教授:** 新法最显著的<sup>14</sup>变化之一就是所有的合同当事人,包括外国合作伙伴在内,都得遵循相同的法律,而且“合同当事人的法律地位平等,一方不得将自己的意志强加给另一方”。

Well, one of the most noticeable changes is that all parties involved, including foreign parties, are to follow the same set of rules, and “contract parties enjoy equal legal standing: neither party may impose its will on the other.”

**张晋:** 那真好。合同法承认口头协议的效力吗?

That's pretty cool. Does the contract law authorize oral agreements?

**教授:** 承认。在新法之下,“当事人订立合同,有书面形式、口头形式和其他形式。”而在过去只承认书面订立合同的效力。

Yes, under the new law, “A contract may be written or oral, as well as in any other form.” In the past, all contracts had to be in written form.

**柯礼思:** 那传真和电子邮件呢? 这些文字记载形式是不是也可以算是书面的形式呢?

What about faxes or emails? Can those documents be considered a form of writing?

**教授:** 可以,根据《合同法》<sup>15</sup>第 11 条,书面形式可以定义为:“合同书、信件和数据电文(包括电报、电传、传真、电子数据交换<sup>16</sup>和电子邮件)等可以有形地表达所载内容的形式。”<sup>17</sup>

Yes, according to Article 11, the definition of written form is “a memorandum of contract, letter, or electronic message (including telegrams, telexes, facsimiles, electronic data exchanges, and electronic mails), etc. which is capable of expressing its contents in a tangible form.”



**张 晋:** 中国的合同立法体现了现代科技特点,真是先进啊!美国的合同法也承认电子邮件为一种书面的方式吗?

Chinese contract law combined with modern technology is really advanced. I wonder if American contract law also recognizes email as a form of writing.

**教 授:** 是,或许你可以以合同法为基础做一个两国法律异同的比较研究。

I think so. Maybe you should find out and make a comparative study of the two countries' laws.

**柯礼思:** 我认为新的合同法对于推进中国的司法制度改革绝对有积极意义。

I think the new contract law is definitely a positive contribution to the development of China's legal system.

**张 晋:** 同时,对外国的投资方而言,新的合同法为他们提供了更加明确化、透明化、公开化的法律氛围,极大提高了交易的安全性、便捷性和经济性。

In the meantime, as far as foreign investors are concerned, the new contract law provides them with a legal environment which has greater certainty, clarity and transparency. It also greatly increased its security, convenience, and economic efficiency in international trade.




 注 释

- 1 待遇(dàiyù): treatment; reception
- 2 抱怨不休(bàoyuàn bùxiū): to complain endlessly; to keep on complaining
- 3 回应(huíyìng): response; to respond; to answer
- 4 执笔(zhíbǐ): to write; to do the actual writing
- 5 日臻完善(rìzhēn wánshàn): getting better and better; approaching perfection
- 6 完美无缺(wánměi wúquē): perfect and intact; immaculate and untarnished
- 7 See 《商君书·变法第一》(Shāngjūn Shū, biànfǎ dì-yī): *Book of Lord Shang*, Chapter I: "Political Reform"
- 8 技术的转移(jìshù de zhuǎnyí): technology transfer; the transfer of technology
- 9 深思熟虑(shēnsī-shúlǚ): ponder; careful consideration; careful deliberations; think and contemplate thoroughly
- 10 仓促之间(cāngcù zhījiān): in a hurry
- 11 笼中之鸟(lóng zhōng zhī niǎo): bird in a cage, describe being restricted and confined, without much freedom
- 12 比喻(bǐyù): metaphor, analogy; figure of speech
- 13 融为一体(róngwéiyītǐ): to integrate; to amalgamate
- 14 显著的(xiǎnzhù de): noticeable; notable; obvious; remarkable
- 15 See 《合同法》(hétongfǎ): see *the Contract Law*, Chapter II, Article 10
- 16 电子数据交换(diànzǐ shùjù jiāohuàn): electronic data exchange
- 17 See 《合同法》(hétongfǎ): see *the Contract Law*, Chapter II, Article 11

## 做好合同签订前的准备工作 预防进出口风险<sup>1</sup>

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**【摘要】**为了尽可能减少国际货物买卖合同履行中的风险,进出口商应在合同签订前就做好各项调查准备工作,既要调查了解对方也要了解自己的履约能力<sup>2</sup>,以便将损失降到最低。

国际货物买卖合同对国际贸易中买卖双方的责任、权利、义务、费用和风险等进行了明确的划分,具有法律效应。但是,随着我国货物进出口贸易不断扩大,贸易纠纷也随之增加。有些纠纷是履行合同的过程中发生的,有些则是外商在订立合同时就设置有陷阱<sup>3</sup>,从而使我方遭受重大的损失。为了尽可能减少损失,我们要在合同签订前就做好各项调查准备工作,既要调查了解对方也要了解自己,以便将风险降到最低。

### 一、签订进口合同前,重视调查卖方的真实身份和履约能力

例如,湖南某包装公司<sup>4</sup>同某港商于某年4月10日签订代理购销合同<sup>5</sup>,购买美国某公司某规格<sup>6</sup>白纸1250吨,每吨7820元,当年8月交货。4月8日和5月12日,该包装公司根据合同约定,按总货款的40%,分两次支付定金<sup>7</sup>390万元给该港商。但该港商并未按照合同约定的时间交货。该包装公司多次交涉未果<sup>8</sup>,遂向该市人民法院起诉,要求该港商返还定金并赔偿相应损失。法院经过调查,发现该港商根本无美国某公司的代理权<sup>9</sup>,其经营的公司濒临破产<sup>10</sup>,390万元定金无法收回。

为了有效地预防此类欺诈事件<sup>11</sup>的发生,我方进口商与外商签订合同之前,需要对对方当事人的相关资信进行详细了解和确认。进口商既可亲自了解,也可以委托国内或国外咨询机构<sup>12</sup>代为了解。若合同签订人为合同的履行主体<sup>13</sup>,则要详细了解当事人是否具备履行合同的能力,并争取合同担保<sup>14</sup>。若合同签订人为代理

人<sup>15</sup>——此类合同在国际贸易是很常见的。则订立此类合同须格外谨慎。1. 要弄清对方的代理身份,一般有两种情况:一是代理人明示<sup>16</sup>代理身份,在大陆法系中称为直接代理<sup>17</sup>(在英美法系中称为显名代理<sup>18</sup>),我国《民法通则》和《合同法》规定了该种代理制度。二是代理人不明示代理身份的,在大陆法系中称为间接代理<sup>19</sup>(在英美法系中称为不公开代理<sup>20</sup>关系)。在国际贸易中,代理人往往基于商业秘密<sup>21</sup>垄断信息<sup>22</sup>或蓄意欺诈<sup>23</sup>的考虑而采取此种代理方式。不论是直接代理还是间接代理,进口商都必须核实并明确代理人身份。2. 我方进口商必须核实代理人的代理权限和代理有限期限。我国《合同法》第48条规定:“行为人没有代理权、超越代理权或者代理权终止后以被代理人名义订立的合同,未经被代理人追认<sup>24</sup>,对被代理人不发生效力,由行为人承担责任。”3. 我方进口商要力争在合同中要求对方明确代理地位及真正委托人的情况并进行相应的担保。

## 二、签订进口合同前,进口方要了解合同标的物<sup>25</sup>条款的真实涵义

例如,某医药进出口公司从A国进口一种抗菌素<sup>26</sup>药品,合同总标的额330万美元。合同约定药品质量以某国国家标准为准。但货到付款后发现药品有异样,于是请商检部门<sup>27</sup>检验。经反复查实,该药品为新药,A国还未制定国家标准,我方收到的只是普通抗菌素药品,其价值仅50多万美元。由于该医药进出口公司失去对外索赔<sup>28</sup>的品质依据,从而造成重大损失。

根据我国《合同法》第12条之规定,买卖双方应当就标的物——商品的质量进行详细约定,包括产地、名称(品牌)、型号、规格、等级、质量标准等。但外商在订立合同时,可能基于某种不良动机<sup>29</sup>,有意模糊<sup>30</sup>商品质量标准,或降低质量标准,设置质量陷阱,我方如不防范<sup>31</sup>,就随时会因质量标准不清遭受经济损失。所以,不论用何种方法描述商品的质量,在正式订立合同前,都应对合同中将要出现的质量条款做详细准确地了解,以掌握其真实情况。

## 三、在签订出口合同前,出口方应对自己的履行能力有个正确估计

从以下案例中可以看到,在签订出口合同前的疏忽大意<sup>32</sup>给出口商自己造成了多大的麻烦。

中国某出口公司与一家埃及的客户谈妥了一笔外商指定的一工厂生产的化工品的出口业务,合同规定20天内装运,价格条件:FOB<sup>33</sup>上海,同时,外商指定一家船公司为承运人<sup>34</sup>。因为成交价格相当不错,该出口公司的业务员毫不犹豫<sup>35</sup>就和买家签下了合同。但之后联系供货厂家,方得知该厂的这一产品目前在国际市场上非常畅销,接到订单已经排到了2个月后,所以根本不可能在20天内交货。该出口公司遂与买家协商,希望延期交货,或者改为其他厂家的产品,客户无法接受,该出口企业只好高价从另外一家外贸公司手上买下一批合同所要求的货物来履约。结



果是,在签合同时,本来预算有利可得,但后来为了履行合同反而亏损了几千美元。

(摘自《商场现代化》2006年12月(上旬刊))

### 注释

- 1 风险(fēngxiǎn): risk
- 2 履约能力(lǚyuē nénglì): ability to carry out a contract
- 3 陷阱(xiànjǐng): pitfall; trap
- 4 包装公司(bāozhuāng gōngsī): packaging company; packing company
- 5 代理购销合同(dàilǐ gòuxiāo hé tong): act as an agent to sign the purchase agreement (contract)
- 6 某规格(mǒu guīgé): certain specification(s)
- 7 定金(dìngjīn): deposit
- 8 交涉未果(jiāoshè wèi guǒ): to negotiate without agreement
- 9 代理权(dàilǐquán): authorize (someone) as the agent
- 10 濒临破产(bīnlín pòchǎn): be on the verge of bankruptcy
- 11 欺诈事件(qīzhà shìjiàn): fraudulent cases  
欺诈(qīzhà): to cheat; to defraud
- 12 咨询机构(zīxún jīgòu): consulting firm  
咨询(zīxún): to consult and inquire

- 13 履行主体(lǚxíng zhǔtǐ): the involving party/body  
 14 合同担保(hétóng dānbǎo): contractual guarantee  
 15 代理人(dàilǐrén): agent  
 16 明示(míngshì): clearly indicate; explicitly instruct  
 17 直接代理(zhíjiē dàilǐ): direct agent  
 18 显名代理(xiǎnmíng dàilǐ): explicit agent  
 19 间接代理(jiànjiē dàilǐ): indirect agent  
 20 不公开代理(bùgōngkāi dàilǐ): non-explicit agent  
 21 商业秘密(shāngyè mìmì): business confidential; business secrets  
 22 垄断信息(lǒngduàn xīnxi): monopolize information  
 23 蓄意欺诈(xùyì qīzhà): deliberately deceiving  
 24 追认(zhuīrèn): subsequently confirm or endorse  
 25 标的物(biāodìwù): targeted object  
 26 抗菌素(kàngjūnsù): antibiotic  
 27 商检部门(shāngjiǎn bùmén): bureau (department) of commodity inspection  
 28 对外索赔(duìwài suǒpéi): file a claim against a foreign (company)  
 29 不良动机(bùliáng dòngjī): harmful motive  
 30 有意模糊(yǒuyì móhu): make (something, contract, etc.) unclear on purpose  
 31 防范(fángfàn): prevent something bad from happening  
 32 疏忽大意(shūhu dàyi): negligent and inattentive; oversight  
 33 FOB: free on board  
 34 承运人(chéngyùnrén): shipper; carrier  
 35 毫不犹豫(háo bù yóuyù): without hesitation

## 练习

### 一、解释下列词语

1. 平等主体
2. 当事人
3. 三足鼎立
4. 共同执笔
5. 日臻完善
6. 完美无缺
7. 技术转移
8. 显名代理
9. 不公开代理
10. 垄断信息



### 11. 蓄意欺诈

#### 二、回答下列问题

1. 简述“利不百，不变法；功不十，不易器”的含义。
2. 简述中国合同法出台的过程及其改革。
3. 简述进出口商在进出口货物或以代理人身份从事国际贸易行为时所可能遇到的一些风险。
4. 进出口商如何在合同签订之前做好应有的准备工作？

# 第十三课

## *Lesson Thirteen*

### 合同的订立

#### *The Formation of a Contract*

张 晋: 教授, 上星期我们讨论了合同法的内容和发展情况, 那么“合同”一词在中国和美国含义相同吗?

Professor, we discussed the development and contents of the contract law a little bit last week: does the word “contract” have the same connotation in China as in America?

教 授: 我认为两者是相似的。在美国, “合同”是法律可以强制实施<sup>1</sup>的诺言<sup>2</sup>, 如果不履行诺言的话, 就可以依法律规定要求对方兑现诺言, 以保障合同的履行。

I believe so. In the US, “contracts” are promises that are enforceable by law. There are legal remedies if contracts were breached in order to ensure carrying out the promises.

柯礼思: 所以“合同”一词基本的意思是两个或两个以上自然人或企业之间的“协议”?

So the definition of “contract” is basically “an agreement” between two persons or business entities?

张 晋: 在中国两个自然人之间也能签订协议吗?

Can two natural persons also enter some sort of “agreement” in China?

教 授: 协议只要满足“平等主体的自然人、法人、其他组织之间”就能签订。<sup>3</sup>

In China, an agreement has to be made between “natural persons, legal per-

sons, or other organizations with equal standing”.

柯礼思：那么签订协议的法律目的是什么呢？

What are the legal purposes of signing an agreement?

教 授：签订一项协议主要是为了“设立、变更、终止民事权利义务关系”。<sup>4</sup>

Entering an agreement is mainly “for the purpose of establishing, altering, or discharging a relationship of civil rights and obligations”.

张 晋：那所谓的平等主体之间的权利义务，包括自然人与其配偶<sup>5</sup>或监护人<sup>6</sup>之间的权利义务关系吗？

As for rights and obligations between equal entities, are natural persons and their spouses or guardians also included?

教 授：不包括，凡是与“婚姻、收养<sup>7</sup>、监护等有关身份关系的协议，适用其他法律的规定”。<sup>8</sup>

It's not included. “An agreement concerning any personal relationship, such as marriage, adoption, guardianship, etc., shall be governed by other applicable law.”

柯礼思：所以合同法主要是调整商业方面的协议？

So the contract law mainly focuses on the negotiation of “business” aspect?

教 授：从某些方面来说是正确的，不过请注意，现在的合同法允许法人签订合同，这在过去的合同法是不允许的。

That's true in a way, but please note that now “legal persons” may enter into contracts, which was not allowed under the previous contract law.

张 晋：依法订立的合同就具有法律约束力<sup>9</sup>吧。在美国，要使合同具有法律约束力，交换的诺言必须要具有充分的考虑条件<sup>10</sup>，那这在中国也一样吗？一般要经过要约<sup>11</sup>、承诺两个过程，双方签订合同之前就要认真考虑合同的主要条款，一旦签约就具有法律约束力。

I assume once a contract is lawfully formed, it's legally binding. In the US, for a contract to be legally binding, the promise exchanged must possess adequate terms for consideration. Is it the same way in China, too? Normally it has to go

through offering and accepting these two processes. Before signing the contract, both parties need to carefully consider the major issues of the contract. Once the contract is signed, it is legally binding.

**教授:** 是。合同一旦订立并生效后,当事人就应当遵循公平原则确定各方的权利和义务。双方不得擅自<sup>12</sup>变更或者解除<sup>13</sup>合同。

Yes, once a contract takes effect, both parties should abide by the principle of good faith in exercising their rights and performing their obligations. Neither party may arbitrarily amend or terminate the contract.

**张晋:** 我想当商主体<sup>14</sup>准备签订一项正式合同时,要写明双方的名称、地址以及订立合同的主要事项吧?

I guess that when two business partners are ready to enter into a formal contract, their names, addresses, and subject matters must be specified in the contract.

**教授:** 是,签订合同时,双方当事人首先会很清楚地表述合同的条款<sup>15</sup>,一般应当包括以下的一些信息:数量、质量、价款或者报酬、合同履行期限<sup>16</sup>、地点和方式、违约责任<sup>17</sup>以及解决争议的方法等。<sup>18</sup>

Yes, when entering into an agreement, both parties will first clearly prescribe the terms of the contract and then should include the following information, as well, including quantity, quality, price or payment, the term of the contract, the location of the contract and the responsibilities for breaching of the contract and finally the resolution for dispute.

**柯礼思:** 当双方签订了一项协议,并对其中所有的条款和条件都达成共识时,为了争取更多的资金,他们可以以同样的合同向其他人提出要约<sup>19</sup>吗?

When two parties have entered into an agreement or contract and worked out all of the terms and conditions, can they then offer the same contract to other parties in order to obtain more working capital?

**教授:** 可以,只要内容明确,一旦受要约人承诺其条款,那么这项合同即受法律的约束。<sup>20</sup>

Yes, as long as the terms are specific and definite. Once the offeree and the offeror "accept" the term, then the contract is legally binding.

张 晋：什么是“承诺”呢？

What is the definition of “acceptance”?

教 授：“承诺”的意思是“受要约人<sup>21</sup>同意要约<sup>22</sup>”。

“Acceptance” is “the offeree’s manifestation of intention to assent to an offer”.

柯礼思：要约可以口头方式表达吗？

Can an offer be made orally?

教 授：可以，如果要约是以对话方式表达，那么受要约人就“应当即时作出承诺，但当事人另有约定的除外”。<sup>23</sup>

Yes, and if an offer is made orally, then: “the acceptance shall be dispatched immediately, unless otherwise agreed by the parties.”

张 晋：要约可以撤回<sup>24</sup>吗？

Can an offer be withdrawn?

教 授：要约可以撤回。“撤回承诺的通知应当在承诺通知到达受要约人之前或者与承诺通知同时到达受要约人。”<sup>25</sup>

Certainly, as long as the “notice of withdrawal reaches the offeree before or at the same time as the offer.”

张 晋：如果受要约人接受要约，那么，他做出承诺的最好方式或者最有效的方式是什么呢？

If one accepts an offer, what is the best or the most effective way to have one keep one’s promise?

教 授：那就要看情况而定了。如果要约是以信件或是电报做的，承诺也可以同样的方式做出。现在许多要约都是以快速通信方式如电话、传真、电子邮件或是其他即刻传输<sup>26</sup>的工具做出的。我在前面已经提过，这些方式都是合同法认可的方式。

It depends. If the offer was made by letter or telegram, the acceptance can take the same form. However, nowadays, many offers are made via some forms of instantaneous communication, such as a telephone call, fax, email, or instant



message. As I mentioned before, these are all acceptable forms for contracts to take.

柯礼思：那是否存在合同成立前就应当履行的义务<sup>27</sup>？

Are there any pre-contract liabilities?

教授：依诚实信用原则，合同法规定了“先合同义务”，即如果一方违背诚实信用的原则给对方造成一定损失的，该方就应承担<sup>28</sup>损害赔偿<sup>29</sup>责任。

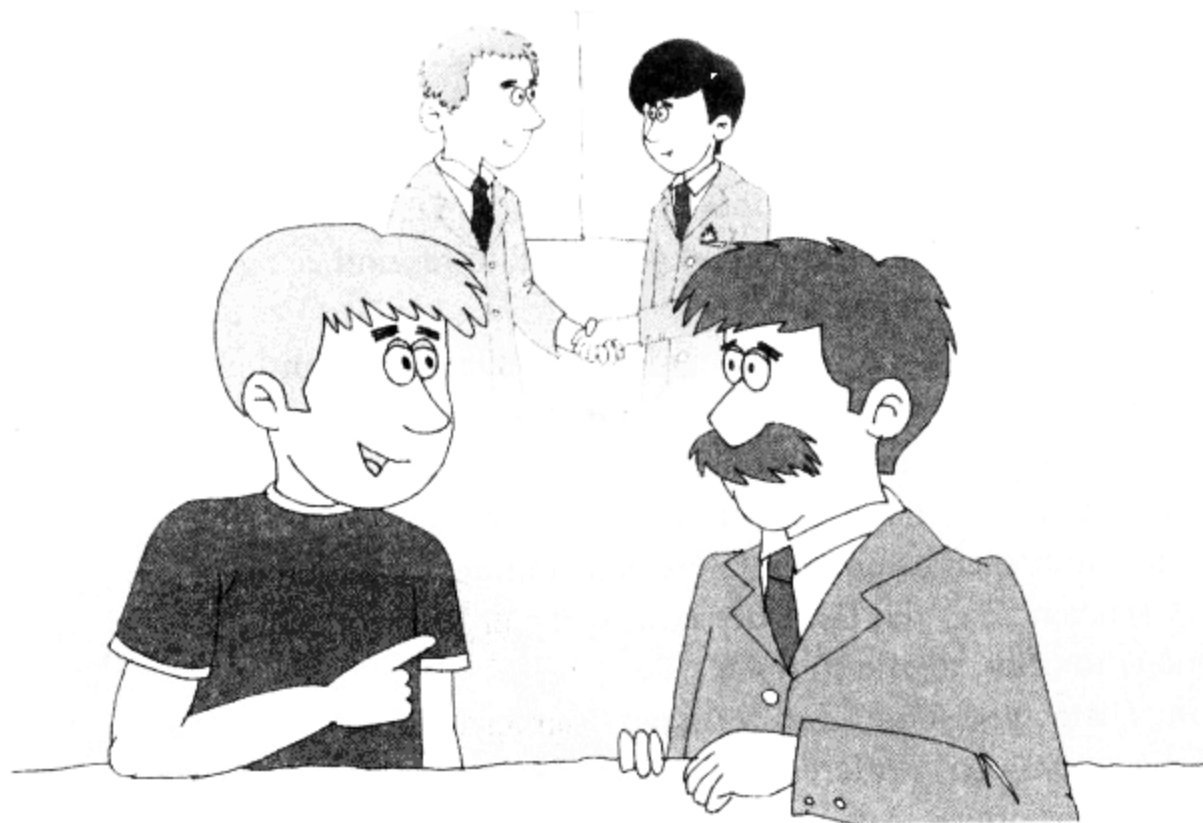
Yes. If one of the parties violates the principle of good faith, that party will be liable for damages.

张晋：具体在什么情况下应负损害赔偿的责任？

Under what other circumstances is a party liable for damages?

教授：比方说一方“假借订立合同，恶意<sup>30</sup>进行磋商<sup>31</sup>”或是“故意隐瞒与订立合同有关的重要事实或者提供虚假情况”。<sup>32</sup>

The party “in bad faith under the pretext of concluding a contract”, or “intentionally concealing a material fact relating to the conclusion of the contract or supplying false information”.



柯礼思：如果甲方在磋商订立合同的过程中故意泄漏<sup>33</sup>或是以不正当方式窃取商业秘密而造成乙方的损失，那么甲方也要负损害赔偿的责任吗？<sup>34</sup>

If Party A disclosed or made improper use of any trade secrets during the course of negotiating a contract and caused losses to Party B, would Party A be liable for damages?

教授：是。为了保护双方利益，在订立合同时，通常都会附上保密条款。

Yes, normally there would be a non-disclosure clause in the contract to protect both parties.

张晋：教授，谢谢您。您的回答帮我消除了很多困惑。

Thanks, Professor. Your answers have cleared up many of my questions.

### 注 释

- 1 强制实施(qiángzhì shíshī): to enforce; to force (someone) to do (something)
- 2 诺言(nuòyán): promise
- 3 See《合同法》(hétongfǎ): *the Contract Law*, Chapter I, Article 2
- 4 See《合同法》(hétongfǎ): *the Contract Law*, Chapter I, Article 2
- 5 配偶(pèi'ǒu): spouse
- 6 监护人(jiānhùrén): guardian
- 7 收养(shōuyǎng): adoption; to adopt
- 8 See《合同法》(hétongfǎ): *the Contract Law*, Chapter I, Article 2
- 9 法律约束力(fǎlǜ yuēshùlì): (legal binding force = ) legally binding
- 10 考虑条件(kǎolǜ tiáojiàn): terms for consideration
- 11 要约(yāoyuē): to offer; to ask; to invite
- 12 擅自(shànzi): to do (something) without proper authorization
- 13 解除(jiěchú): to terminate; to remove; to get rid of; to rescind
- 14 商主体(shāngzhǔtǐ): business entity
- 15 条款(tiáokuǎn): clause (in a formal document); article; provision
- 16 履行期限(lǚxíng qīxiàn): to carry out (a contract or an agreement) within the allotted time; to set a deadline for carrying out (a contract or an agreement)
- 17 违约责任(wéiyuē zérèn): liabilities for breach of contract  
违约(wéi yuē): to breach a contract; to break a contract or agreement
- 18 See《合同法》(hétongfǎ): *the Contract Law*, Chapter II, Article 12
- 19 要约(yāoyuē): to offer; to ask; to invite
- 20 See《合同法》(hétongfǎ): *the Contract Law*, Chapter II, Article 14
- 21 受要约人(shòuyāoyuērén): offeree
- 22 要约(yāoyuē): (an) offer

- 23 See 《合同法》(hétongfǎ): *the Contract Law*, Chapter II, Article 23  
 24 撤回(chèhuí): to withdraw; to recall  
 25 See 《合同法》(hétongfǎ): *the Contract Law*, Chapter II, Article 27  
 26 即刻传输(jíkè chuánshū): instantaneous communication  
 27 履行的义务(lǚxíng de yìwù): assumed obligation in a contract  
 28 承担(chéngdān): to be liable; to undertake (responsibility)  
 29 损害赔偿(sǔnhài péicháng): damage (and) compensation; to be liable for damages  
 30 恶意(èyì): evil intentions; malice  
 31 磋商(cuōshāng): to negotiate  
 32 See 《合同法》(hétongfǎ): *the Contract Law*, Chapter II, Article 42  
 33 泄漏(xièlòu): to disclose; to reveal; to let out  
 34 See 《合同法》(hétongfǎ): *the Contract Law*, Chapter II, Article 43

## 时文选读

### 试论电子签名<sup>1</sup>的法律效力

胡廷松(华侨大学 法学院)

【摘要】我国《电子签名法》用功能等同的立法技术定义电子签名符合国际立法趋势。电子签名的有效性普遍得到立法确认。我国立法还规定了可靠的电子签名法律制度，只有满足一定条件的电子签名，才具有与手写签名<sup>2</sup>同等的效力。电子签名的法律效力只及于法律规定的事项的范围内。

电子签名的概念是随着电子商务<sup>3</sup>法的发展而提出的。我国电子商务经历了自2001年到2003年的寒冬期<sup>4</sup>后，从2003年年中开始复苏<sup>5</sup>和繁荣。2005年4月1日实施的《中华人民共和国电子签名法》<sup>6</sup>是我国第一部真正意义的电子商务法，被誉为我国电子商务发展的里程碑，它从宏观上对电子商务安全起了保障的作用。本文拟结合《电子签名法》的相关规定，对电子签名的概念和法律效力做一探讨，祈望能对电子签名法律制度的深入研究有所助益。

## 一、电子签名的概念

### (一) 立法表述

2001年联合国贸易法律委员会<sup>7</sup>(以下简称贸法会)颁布实施的《电子签名示范法》<sup>8</sup>是国际上关于电子签名的最新也是最重要的立法文件。其中对电子签名做了如下定义:指在数据电文<sup>9</sup>中,以电子形式所含、所附或在逻辑上<sup>10</sup>与数据电文有联系的数据,它可用于鉴别与数据电文相关的签名人和表明签名人认可数据电文所含信息。上述定义使用了“功能等同法<sup>11</sup>”立法技术,将电子签名分为三个层次来定义:1. 关于表现形式:电子形式;2. 关于与数据信息的联系:存在、附着于或者与数据信息有逻辑关系;3. 关于功能与目的:确定签名方与数据信息之间的关系,代表签名方对数据信息的认可。

欧盟《电子签名指令》<sup>12</sup>中如此定义电子签名:以电子形式所附或在逻辑上与其他电子数据相关的数据,作为一种鉴别的方法。这一定义与《示范法》的不同在于这里没有强调签名人对数据的认可。以此定义,任何一种电子鉴别方法都可认为是电子签名,而签名人的认可则需要其他方式来完成,如特定的签名策略。

我国《电子签名法》在起草过程中,对联合国贸法会的《电子商务示范法》和《电子签名示范法》、欧盟的《电子商务指令》和《电子签名指令》、美国的《统一电子交易法》<sup>13</sup>和《国际国内商务电子签名法》<sup>14</sup>以及新加坡、日本、韩国等国家的有关立法进行了比较研究,对国际有关立法进行了借鉴。我国《电子签名法》第2条规定:“本法所称电子签名,是指数据电文中以电子形式所含、所附用于识别签名人身份并表明签名人认可其中内容的数据。”可见,我国《电子签名法》关于电子签名定义也是只指明签名的形式和功能,对实现技术不做任何规定。该定义也反映出,电子签名法律上有两个基本功能,即标识签名人和表示签名人对文件内容的认可。

(中略)

## 二、电子签名的法律效力

确立电子签名的法律效力,关键在于解决两个问题:一是通过立法确认电子签名的合法性、有效性;二是明确满足什么条件的电子签名才是合法的、有效的。在众多的电子签名方法和手段中,并不是所有都是安全有效的,只有满足一定条件的电子签名,才能具有与手写签名或者盖章同等的效力。

### (一) 电子签名的合法性

任何一项技术都不具有被法律自然接受的属性,它可能具有的法律效力只能通过立法途径、司法保护或协议形式得以确认,其中立法的认可是最有效的。电子签名的法律效力已在许多立法中得到明确确认。从国际规则看,联合国《国际复合运输条约》<sup>15</sup>(1980年)、《汉堡规则》<sup>16</sup>(1978年)、《国际贸易术语解释通则》<sup>17</sup>(1990年)、《第五次信用证统一规则》<sup>18</sup>(1993年)、联合国贸法会《电子商务示范法》等均承认电

子签名的效力;各国家或地区立法也基本上都对电子签名的法律效力予以承认。如今电子签名不仅用于商业行为,甚至用于政府行为和居民身份证<sup>19</sup>领域。

(摘自《重庆邮电学院学报》2006年第4期)

## 注 释

- 1 电子签名(diànzǐ qiānmíng): electronic signature; digital signature
- 2 手写签名(shǒuxiě qiānmíng): hand-written (handwritten) signature
- 3 电子商务(diànzǐ shāngwù): electronic commerce; E-commerce
- 4 寒冬期(hándōngqī): severe winter period—metaphor: meaning “nothing has been done during this period”.
- 5 复苏(fùsū): awakening; come back to life
- 6 《中华人民共和国电子签名法》(Zhōnghuá Rénmín Gònghéguó Diànzǐ Qiānmíngfǎ): *Electronic Signatures Law of the People's Republic of China*
- 7 联合国贸易法律委员会(Liánhéguó Màoyì Fǎlǜ Wěiyuánhùi): the United Nations Commission on International Trade Law(UNCITRAL)
- 8 《电子签名示范法》(Diànzǐ Qiānmíng Shìfànfǎ): *Model Law on Electronic Signatures with Guide to Enactment*
- 9 数据电文(shùjù diànwén): text data
- 10 逻辑上(luóji shàng): logically; logical
- 11 功能等同法(gōngnéng dēngtóngfǎ): Function Equivalent code
- 12 《电子签名指令》(Diànzǐ Qiānmíng Zhǐlìng): (EU) *Digital Signature Directive*
- 13 《统一电子交易法》(Tōngyī Diànzǐ Jiāoyifǎ): *Uniform Electronic Transaction Act*
- 14 《国际国内商务电子签名法》(Guójì Guónèi Shāngwù Diànzǐ Qiānmíngfǎ): *Electronic Signatures in Global and National Commerce Act*
- 15 《国际复合运输条约》(Guójì Fùhé Yùnshū Tiáoyuē): *United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980)*
- 16 《汉堡规则》(Hànǎo Guīzé): *Hamburg Rules—United Nations Conventions on the Carriage of Goods by Sea, 1978*
- 17 《国际贸易术语解释通则》(Guójì Màoyì Shùyǔ Jiěshì Tōngzé): here refers to International Chamber of Commerce (ICC) official *Rules for the Interpretation of Trade Terms*
- 18 《第五次信用证统一规则》(Dì-wǔ cì Xìnyòngzhèng Tōngyī Guīzé): UCP 500 1993—*Uniform Customs and Practices for Documentary Credits 1993*
- 19 居民身份证(jūmín shēnfènzhèng): resident ID (identification card)



## 练习

### 一、解释下列词语

1. 法律约束力
2. 要约人
3. 受要约人
4. 承诺
5. 即刻传输工具
6. 故意隐瞒事实
7. 提供虚假情况
8. 保密条款
9. 窃取商业秘密
10. 数据电文
11. 居民身份证

### 二、回答下列问题

1. 当今许多要约都是以快速的通讯方式作出,这些快速的通讯方式包括哪些?
2. 电子签名的概念是如何兴起的?
3. 如何确立电子签名的法律效力?
4. 如何取得电子签名的合法性?
5. 中国政府承认电子签名的法律效力和合法性吗?

## 第十四课

### *Lesson Fourteen*

## 合同的效力<sup>1</sup>、终止以及违约责任

### *Contract: Validity, Termination and Liabilities for Breach*

张 晋：中国自从成为世界贸易组织的成员国后，不论在投资环境或是法律规范方面都发生了相当大的改变，越来越多的外国投资者来到中国进行投资。

China's investment and legal environment have changed considerably since China becoming a member of the WTO. More and more foreign investors are investing in China now.

柯礼思：说的也是。许多世界级大公司，例如波音<sup>2</sup>、通用电气<sup>3</sup>、微软<sup>4</sup>、埃克森美孚<sup>5</sup>、摩托罗拉<sup>6</sup>、丰田<sup>7</sup>、日产<sup>8</sup>、福特<sup>9</sup>、通用汽车<sup>10</sup>和壳牌等，都表示要投数亿美元在中国建立新工厂。

You are right. Many of the world's largest enterprises, for example, Boeing, General Electric, Microsoft, Exxon Mobil, Motorola, Toyota, Nissan, Ford, General Motors, Shell, etc., are pledging billions of dollars toward new factories in China.

张 晋：教授，当外国投资者跟中国的企业订立合同时，合同必须用中文书写吗？

Professor, when a foreign investor or company signs a contract with a Chinese partner, does the contract have to be in Chinese?

教 授：根据中国的合同法第 125 条，我们可以看出合同法允许采用多种文字订立合同。

According to Article 125 of *China's Contract Law*, the contract can be conducted in different languages.

柯礼思：那么以哪一种语言为主呢？中文？英文？或是其他的语言？

Which language is the governing language? Is it Chinese or English? Or is there some other language?

教授：一般来讲，如果合同用两种以上语言书写，那么两种文字具有同样法律效力。但各文本使用词句不一致的，应当根据合同的目的予以解释。

In general, if a contract is written in two languages, either language is equally binding. However, the verbiage of both languages may not be identical, (when it comes to interpreting the contract) it should be interpreted according to the purpose of the contract.

张晋：如果美国的投资者和中国的合作伙伴达成协议并签订了一项合同，该以哪一个国家的法律为主？

If an American investor and his or her Chinese partner have reached an agreement and signed a contract, which country's law is the governing law?

教授：一般当事人可以选择处理纠纷<sup>11</sup>所选用的法律。合同法尊重当事人之间的意思自治。而当双方没有约定时，合同规定适用与合同最密切联系的国家的法律。

In general, parties involved can choose a language as the governing language should a dispute occur. The contract law respects the freedom of choice. If the governing language is not specified in the contract, all parties are subject to the law of the country that has closest relationship with the country parties.

柯礼思：那就是说，当美国的商人与中国法人没有约定选择适用法律的情况下，如果该合同主要履行地在美国，也等于说这个合同最密切联系的国家是美国，那么双方则应该适用美国的相关法律。

Does that mean if an American businessperson and his or her Chinese partner did not specify the governing language in their contract, and the contract is to be carried out in the US, then the country with the closest relationship is the US? And both parties should use US law as the governing law?

教授：基本正确。如果该美国商业实体在中国设立企业，那么情况就不一样了。

Basically you are right. However if a US company has its business entity set up in China, the situation is different.

张 晋：有什么不一样的？

What are differences?

教 授：当一个商业实体在中国设立成为中外合资企业、中外合作企业或者外商独资企业后，它就成为经中国政府批准设立的中国法人。它的行为必须遵循中国的法律制度<sup>12</sup>。

When a business entity is set up in China as a Chinese-Foreign equity joint venture, or a Chinese-Foreign contractual joint venture, or a foreign investor wholly-owned company by foreign investors, it indicates that the business entity has already been approved by the Chinese government and is treated as a Chinese corporation. It is subject to Chinese jurisdiction and must follow Chinese law.

柯礼思：那这类企业签订的所有合同都要适用中国法律吗？

Must all contracts signed by these types of enterprises follow appropriate Chinese law?

教 授：不一定，视情况而定<sup>13</sup>。附属性质的合同<sup>14</sup>，如技术转让合同、注册商标<sup>15</sup>合同和分销<sup>16</sup>合同则不需要完全参照中国的法律。

No, not really. It depends. Ancillary contracts, such as technology transfer contracts, trademark contracts, and distribution contracts, are not required to use Chinese law as the governing law.

张 晋：也就是说，在以上各类合同中，如果合同一方当事人是美国公司，它可以约定用美国的法律作为合同主要依据。如果双方都是中国企业那必须适用中国的合同法。

So that means, all contracts mentioned above, if one business entity of the contract is an American company, should use American law as the governing law. But if both parties are Chinese, then they must follow Chinese contract law.

教 授：对，正是这个意思。

Yes, exactly.

柯礼思：合同是否需要包含有关双方的履行期限和出资比例、盈余分配<sup>17</sup>等条款？

Should a contract include a timetable and provisions for the capital contribution and profit distribution of the parties involved?

教授：需要。如果一项合同牵涉到外国的商业实体，那么这几项要素必须写清楚。

Yes, it's essential to have those elements specified in the contract if the contract involves a foreign business entity.

张晋：合同什么时候开始生效？

When does a contract go into effect?

教授：根据《合同法》第44条规定：“依法成立的合同，自成立时生效。”<sup>18</sup>

According to Article 44 of the *Contract Law*, “A lawfully formed contract becomes effective upon its formation.”

教授：此外：“法律、行政法规规定应当办理批准、登记等手续生效的，依照其规定。”<sup>19</sup>

In addition, “Where the going into effect of a contract is subject to any procedure, such as approval or registration, etc., as required by law or administrative regulations, such provision applies.”

张晋：在哪些情况下合同无效？

Under what circumstances is a contract invalid?

教授：一般来说，有下列情况之一，合同无效：(1)一方以欺诈、胁迫<sup>20</sup>的手段订立合同，损害国家利益；(2)恶意串通<sup>21</sup>，损害国家、集体或者第三人利益；(3)以合法形式掩盖<sup>22</sup>非法目的；(4)损害社会公共利益；(5)违反法律、行政法规的强制性规定。<sup>23</sup>

Generally speaking, a contract is invalid under any of the following circumstances: (1) one party induced conclusion of the contract through fraud or duress, thereby harming the interests of the State; (2) the parties colluded in bad faith, thereby harming the interests of the State, the collective, or a third party; (3) the parties intended to conceal an illegal purpose under the guise of a legitimate transaction; (4) the contract harms public interests; (5) the contract violates a mandatory provision of any law or administrative regulation.



**柯礼思:** 合同履行过程中,如果一方当事人对合同内容产生质疑<sup>24</sup>,那么他可以撤销或是中止<sup>25</sup>合同吗?

If a contracting party raises doubts about the content of the contract, can the contract be cancelled or terminated?

**教授:** 当然可以。在一定情况下,合同的任一方有权向人民法院<sup>26</sup>或是仲裁机构<sup>27</sup>申请更改或撤销合同。

Certainly, under certain circumstances, either party can appeal to the People's Court or an arbitration institution for amendment or cancellation of the contract.

**张晋:** 在哪些情况下可以依法撤销合同呢?

Under what circumstances can a contract be legally cancelled?

**教授:** 通常在下面两种情况:(1)因重大误解订立的;(2)在订立合同时显失公平的。<sup>28</sup>

Normally, in the following two situations: (1) the contract was concluded due to a major misunderstanding; (2) the contract was grossly unconscionable at the time of its conclusion.

**柯礼思:** 撤销合同有时间限制吗?

Is there a time limit on the cancellation of a contract?

**教授:** 有。具有撤销权的当事人“自知道或者应该知道撤销事由之日起”,如果在一年之内没有行使撤销权,那么该方的撤销权便自动消灭。<sup>29</sup>

Yes, if a party fails to exercise its right of cancellation within one year, “commencing on the date when the party knew or should have known the cause for the cancellation”, then the party's cancellation right will be waived.

**张晋:** 如果合同生效后,但是合同并没有约定价款或是履行的地点,那么可以做补充说明<sup>30</sup>吗?

If a contract has taken effect, but if the contract doesn't include price or place of performance, can a supplement be made?



**教 授：**可以，“当事人就质量、价款或者报酬、履行地点等内容没有约定或者约定不明确的”，双方可以签订补充协议。<sup>31</sup>

Yes, “if a term such as quality, price or remuneration, place of fulfillment, etc. was not prescribed or not clearly prescribed”, the parties can make a supplementary agreement.

**柯礼思：**如果双方不能达成补充协议，那他们该怎么办呢？

If the parties fail to reach a supplementary agreement, what should they do?

**教 授：**在那种情况下，他们只好“按照合同有关的条款或者交易习惯确定”了。

Well, in that case, “the terms shall be determined in accordance with the relevant provisions of the contract or customary business practice.”

**张 晋：**如果违约，或是合同的履行未能达到预期的合同目的，那么违约的一方要负什么样的违约责任？

When a contract is breached, or when the performance does not fulfill the prescribed quality requirements, what liability does the breaching party bear?

**教 授：**这要视情况而定。不过，一般而言，受损害方可要求对方“承担修理、更换、重作、退货、减少价款或者报酬等违约责任”<sup>32</sup>。

It depends. But normally, the aggrieved party may require the other party “to

assume liabilities for breach by way of repair, replacement, remaking, acceptance of returned goods, or reduction in price or remuneration, etc.”

**柯礼思:** 如果当事人一方不履行合同义务,或者履行合同义务不符合约定而造成另一方的损失,那么如何计算这些损失的赔偿额呢?

If a party fails to perform, or renders a non-conforming performance and causes damages or losses to the other party, how are the damages calculated?

**教 授:** “损失赔偿额应相当于因违约造成的损失,包括合同履行后可以获得的利益,但不得超过违反合同一方订立合同时预见到或者应该预见到的因违反合同可能造成的损失。”<sup>33</sup>

Well, the damages should be equivalent to the other party's overall losses, including “any benefit that would have been accrued from performance of the contract, provided that the amount does not exceed the likely foreseen or foreseeable loss resulting from breach at the time of the conclusion of the contract.”

**张 晋:** 如果双方都违约呢?

How about if both parties breach the contract?

**教 授:** 如果双方都违约,双方应当各自承担相应的责任。

In the case of a “bilateral breach”, the parties shall assume their respective liabilities accordingly.

**柯礼思:** 中国的合同法恰当地规定了合同双方的权利、义务和相应责任,保护合同当事人自订立合同到履行合同整个过程的全部利益。

Chinese contract law properly stipulates both parties' rights, obligations, and their corresponding responsibilities. The law also provides protection for their interests during the entire process from concluding a contract to carrying out a contract.

**教 授:** 是。经济全球化带来了法律全球化。中国的合同法正是在融合大量国际贸易规范后产生的,是一部具有广泛适用性的新法律。

Yes. Economic globalization also brings legal globalization. Combining comprehensive international trade regulations and practices, Chinese contract law presents a new set of laws which can be widely used.

## 注释

- 1 效力(xiàoli): validity; efficacy; effect
- 2 波音(Bōyīn): the Boeing Company
- 3 通用电气(Tōngyòng Diànlì): General Electric (GE)
- 4 微软(Wēiruǎn): Microsoft Corporation
- 5 埃克森美孚(Āikèsēn Měifú): Exxon Mobil Corporation
- 6 摩托罗拉(Mótuōluólā): Motorola, Inc
- 7 丰田(Fēngtián): Toyota Motor Corporation
- 8 日产(Rìchǎn): Nissan
- 9 福特(Fútè): Ford
- 10 通用汽车(Tōngyòng Qìchē): General Motors Corporation
- 11 纠纷(jiūfēn): dispute
- 12 法律制度(fǎlù zhìdù): legal system
- 13 视情况而定(shì qíngkuàng ér dìng): it depends (take a look at the situation and then decide)
- 14 附属性质的合同(fùshǔ xìngzhì de hétóng): ancillary contract (a contract of an ancillary nature)
- 15 注册商标(zhùcè shāngbiāo): trademark
- 16 分销(fēnxiāo): distribution
- 17 盈余分配(yíngyú fēnpèi): profit distribution
- 18 See 《合同法》(hétongfǎ): *the Contract Law*, adopted and promulgated by the Second Session of the Ninth National People's Congress, March 15, 1999. Translated & compiled by John Jiang & Henry Liu, Chapter III, Article 44, p.12.
- 19 See 《合同法》(hétongfǎ): *ibid*
- 20 胁迫(xié pò): to coerce; to force
- 21 恶意串通(èyì chuàntōng): to collude; to conspire
- 22 掩盖(yǎngài): to cover up; to conceal
- 23 See 《合同法》(hétongfǎ): *the Contract Law*, Chapter III, Article 52, John Jiang & Henry Liu's translation, p.14.
- 24 质疑(zhìyí): raise doubts, query
- 25 中止(zhōngzhǐ): to suspend; to break off
- 26 人民法院(rénmín fǎyuàn): the People's Court (in China)
- 27 仲裁机构(zhòngcái jīgòu): arbitration institution
- 28 See 《合同法》(hétongfǎ): *the Contract Law*, Chapter III, Article 54, John Jiang & Henry Liu's translation, p.15.
- 29 See 《合同法》(hétongfǎ): *the Contract Law*, Chapter III, Article 55.
- 30 补充说明(bǔchōng shuōmíng): supplement; additional remarks
- 31 See 《合同法》(hétongfǎ): *the Contract Law*, Chapter IV, Article 61, John Jiang & Henry Liu's translation, p.17.
- 32 See 《合同法》(hétongfǎ): *the Contract Law*, Chapter VII, Article 111, John Jiang & Henry Liu's translation, p.31.
- 33 See 《合同法》(hétongfǎ): *the Contract Law*, Chapter VII, Article 113, John Jiang & Henry Liu's translation, p.2-33.

## 合同法中诚实信用原则的理论分析

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**【摘要】**诚实信用原则是现代合同法乃至整个民法的一项极为重要的基本原则,为世界各国民事法律所普遍确认。为了正确理解诚实信用原则的精神内涵,准确把握诚实信用原则的地位和作用,合理界定<sup>1</sup>诚实信用原则的适用范围,以对诚实信用原则的内涵分析为切入点<sup>2</sup>,结合中国《合同法》的相关规定,对诚实信用原则在中国合同法中的适用做一探讨,以期有益于人们在经济活动中尤其是合同关系中对这一原则的理解,使诚实信用原则能更加有效地平衡社会利益关系,最大限度地实现社会公平和效益。

诚实信用原则在市场经济条件下,体现为价值与道德的形式,是善良公平道德观念的法律化,是经济伦理<sup>3</sup>的基本规范,也是现代法治社会合同法乃至整个民法的一项极为重要的基本原则。诚实信用原则要求市场经济活动的主体在从事交易活动时,要做到恪守诺言<sup>4</sup>、讲求信用、诚实不欺,在不损害他人利益与社会公共利益的前提下追求个人利益。诚实信用原则从表面上看是道德问题,但实际上是整个经济制度的问题,是与之相适应的法律制度问题。要对诚实信用原则进行法律的制度构建,其内涵分析成为重要的工作。

### 诚实信用原则的内涵分析

法律意义上的诚实信用原则,最初起源于罗马法中的“一般恶意抗辩诉权”,是法官在裁判案件时,寻找当事人真意以做出合理判断的方法。法官从公平正义的理念出发解释、补充当事人之间的合同内容,按交易习惯或一般人的观念来增减双方当事人的权利义务,要求他们不仅承担合同中的约定义务,还要承担合同虽无约定但依交易习惯、一般人的观念,甚至公平正义的理念仍应履行的善意<sup>5</sup>义务。



诚实信用原则是在市场经济活动中形成的道德规则,它反映了市场经济秩序的要求,是保障市场有规则有秩序运行的重要法则。其内涵可以从以下几个方面予以把握:

第一、诚实信用原则是一种价值形态<sup>6</sup>。它表现为当事人、法官、立法者以及特定社会的善意真诚、守信不欺、公平合理的心理状态和价值准则。

第二、诚实信用原则是一种规范形态<sup>7</sup>。它一方面表现为当事人、法官、立法者以及特定社会为确保善意真诚、守信不欺、公平合理地进行民事行为而确立的外在行为规范,并以国家强制力<sup>8</sup>为后盾<sup>9</sup>发挥其规范作用;另一方面表现为当事人自觉认同善意真诚、守信不欺、公平合理地进行民事行为的外在行为规范,并且内在于当事人的心理,以道德力量为后盾发挥其规范作用。

第三、诚实信用原则是一种行为事实形态<sup>10</sup>。它表现为当事人、法官、立法者以及特定社会为维护善意真诚、守信不欺、公平合理的价值判断而实施的一切行为。

第四、诚实信用原则是个人本位思想<sup>11</sup>让位<sup>12</sup>于社会本位思想<sup>13</sup>的生动体现。诚实信用原则以社会本位思想为核心,与公平正义原则、禁止权利滥用<sup>14</sup>原则等共同筑起了市场主体行为的范围,确立市场经济活动中牢固不可动摇的交易道德准则。

第五、诚实信用原则不仅是守法原则,要求行为主体努力按照其要求进行正常的经济活动;更是司法原则,授予法官相当的自由裁量权,要求其按照诚实信用原则的要求裁判个案,填补法律的空白和漏洞,甚至可以排除当事人的意思自治,实现公平正义的理念。

诚实信用原则作为合同法的一项基本原则,同时具有法律调节和道德调节的双重功能,是道德的法律化,也是法律的道德化。梁慧星先生将诚实信用原则的功能归纳为三项。第一,指导当事人行使权力履行义务的功能。即要求当事人在行使权力履行义务时,应兼顾<sup>15</sup>对方当事人利益和社会一般利益,使自己的行为符合诚实商人的标准,在不损害他人利益和社会利益的前提下,追求自己的利益。第二,解释、评价和补充法律行为的功能。即诚实信用原则适用之结果,可创造、变更、消灭、扩张、限制约定之权利义务,已可发生履行拒绝权<sup>16</sup>、解除权<sup>17</sup>及请求返还之拒绝权,更得以之为撤销法律行为或增建给付之依据或成立一般恶意之抗辩。第三,解释和补充法律的功能。由此可以看出,诚实信用原则是经济活动主体的行为指南<sup>18</sup>、立法者的创法准则、司法者的衡平依据<sup>19</sup>。

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## 注 释

- 1 界定(jièdìng): define
- 2 切入点(qiērùdiǎn): point of tangency—the point where (the analysis, conversation) begins
- 3 经济伦理(jīngjì lúnlǐ): economic ethics
- 4 恪守诺言(kèshǒu nuòyán): scrupulously abide by a promise
- 5 善意(shànyì): goodwill; good intention
- 6 价值形态(jiàzhí xíngtài): value formation; value type
- 7 规范形态(guānfàn xíngtài): standard formation; standard type
- 8 强制力(qiángzhìlì): enforce; enforcement
- 9 后盾(hòudùn): backup force; backing
- 10 行为事实形态(xíngwéi shìshí xíngtài): behavioral reality type
- 11 个人本位思想(gèrén běnwèi sīxiǎng): (individual) departmental egoism (thought); individualistic
- 12 让位(ràngwèi): yield to
- 13 社会本位思想(shèhuì běnwèi sīxiǎng): society-based (group-oriented) departmentalism
- 14 权利滥用(quánlì lànòng): abuse (one's) power
- 15 兼顾(jiāngù): give consideration to two or more things
- 16 拒绝权(jùjuéquán): refusal right; the right to refuse
- 17 解除权(jiěchúquán): dismissal right; the right to rescind a contract
- 18 行为指南(xíngwéi zhǐnán): behavioral guidelines
- 19 衡平依据(héngpíng yījù): the basis for fair judgment

## 练习

### 一、解释下列词语

1. 商业实体
2. 履行期限
3. 出资比例
4. 盈余分配
5. 恶意串通
6. 仲裁机构
7. 补充说明
8. 精神内涵

9. 善意义务
10. 善意真诚
11. 守信不欺
12. 个人本位思想

## 二、回答下列问题

1. 在中国只能以中文签订合同吗?
2. 哪一类的合同属于附属性质的合同?
3. 一个有效的合同必须包括哪些基本要素?
4. 依法签订的合同,什么时候开始生效?
5. 在什么情况之下可以依法撤销合同?

# 生词表

## Vocabulary

### A

埃克森美孚	Āikèsēn Měifú	14
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### B

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