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博士学位论文

马来西亚与中国外资法律问题比较研究

Problems in Foreign Investment Law: A Comparative Study of Malaysia and China

罗荣强

指导教师姓名: 曾华群 教授

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内容摘要

本论题分为绪论、本论和结论三大部分。

绪论主要评述中国和马来西亚关于双边投资协定的研究和两国国内外资法的比较研究现状。除了阐明本论题的研究意义之外,笔者也对本论题的一些概念包括"中国"和"外资"等作出界定,并说明本论题研究的目标、基本思路和研究方法,最后点出本研究的难度、创新和不足之处。

本论共分为五章。第一章重点阐述马来西亚与中国(马中)两国外资法产生的不同社会经济与政治历史背景以及两国国内外资法的渊源与框架,也分析了马来西亚政策兼法律双管齐下的特殊外资规范,并对《马来西亚政府与中华人民共和国政府关于相互鼓励与保护投资协定》(简称《马中投资协定》)的效力问题和主要内容进行剖析,为接下来各篇章中的深入探讨奠定基础。

第二章具体对《马中投资协定》中有关外资准入的规定及马中两国调整外资准入的法律和政策,进行深入的探讨。本章着重于探究《马中投资协定》中的外资准入条款与马来西亚国内外资法律政策的衔接问题,并对马中两国国内法律政策中的外资准入审批、领域和条件规定,进行比较分析。除了阐明两国外资法律政策与两国不同的社会经济与政治历史背景之间有着密切的联系之外,也提出了各自的问题所在及可供相互借鉴之处。

第三章的探讨,聚焦于《马中投资协定》中的外资待遇标准和马中两国国内 法的真正外资待遇体现,本章在具体探讨《马中投资协定》中的外资待遇规定的 基础上,论述公正与公平待遇和最惠国待遇条款的适用问题,进而剖析马中两国 国内法的外资投资待遇体现,试图寻求《马中投资协定》与马中两国国内法之间, 在外资待遇问题上的调和一致,也给各项问题提出解决的建议。

第四章具体对《马中投资协定》与马中两国国内法的征收和补偿规定进行探讨。本章首先从双边投资协定的层面,探讨了征收、国有化和间接征收的概念、征收的条件、补偿的标准和补偿额的估算方式,接着对马中两国国内法的相关规定进行比较分析,得出了两国国内法与《马中投资协定》之间的差异与衔接问题,也找出了两国现行国内法的缺失,更发现了马来西亚国内法中存有排除保障有偿

征收、足以抵消《马中投资协定》中有关征收保障的规定;为此,本章提出了调和、填补与修订建议。

第五章对《马中投资协定》中的投资争端解决规定和马中两国国内法的相关规定进行了具体的探讨。除了剖析《马中投资协定》中的各类投资争端解决方式与其成效之外,本章也结合马中两国国内法的相关规定,探究两国国内法对《马中投资协定》的调和与补充作用, 并对马中两国各种争端解决规定的不足,提出了修改建议。

结论除了总结《马中投资协定》与两国外资法的衔接、差异、调和与补充问题之外,也对完善与健全《马中投资协定》和马中两国的外资法提出修改建议,最后提出了未来马中双边投资协定的发展方向。

关键词:外资准入:外资待遇;征收与国有化;投资争端

ABSTRACT

This dissertation is divided into three parts, i.e. Preface, Main Text and Conclusion.

In the Preface, the author reviews primarily the current research status in China and Malaysia on bilateral investment treaty (BIT) and the comparative studies between domestic foreign direct investment (FDI) laws of Malaysia and China. Besides expounding the significance of this research, the author also defines some of the concepts involve such as "China", "Foreign Investment" etc. and illustrates the objectives, mind mapping and modus operandi of this research. Finally, the difficulties, innovatives and deficiencies of this research are also being pointed out.

The Main Text consists of five chapters. Chapter One set forths the different socio-economic, political and historical background in which the domestic FDI laws of Malaysia and China respectively come into being. Besides stating the sources and framework of the domestic FDI laws of the two countries and analyses the peculiar norm of Malaysia in the regulation of FDI by utilising laws and policies, this chapter also analyses the issues of validity and main contents of the Malaysia-China BIT in order to lay the foundations for an in dept studies of the respective topics in the following chapters.

Chapter Two specifically studies the investment admission provisions stipulated in the Malaysia-China BIT and that in the domestic FDI laws and policies of Malaysia and China. The study focuses on the issue of "linking" between the investment admission provisons of the Malaysia-China BIT and the Malaysia domestic FDI laws and policies. Thereafter, the provisions of FDI admission's approval system, approval scopes and approval requirements in Malaysia and China domestic FDI laws and policies respectively are comparatively analysed. While making clear that the domestic FDI laws and policies of the two countries are closely related to their respective socio-economic, political and historical background, this chapter also highlights their respective problems and determines areas capable of mutual reference.

Chapter Three specifically studies the standard of FDI treatment provided in the Malaysia-China BIT and the actual FDI treatment reflected in the domestic FDI laws of the two countries. Upon study the standard of FDI treatment in the Malaysia-China BIT, this chapter discusses the application problems of the Fair and Equitable Treatment standard as well as the Most-Favoured-Nation clauses and thereafter analyses the FDI treatment reflected in the domestic laws of the two countries. Besides seeking for harmonization between the Malaysia-China BIT and the domestic FDI laws of the two countries, ways of settlement of the various problems are also being proposed.

Chapter Four specifically analyses the expropriation and the compensation provisions in the Malaysia-China BIT and that in the domestic FDI laws of the two countries. From the perspective of bilateral investment treaty, this chapter begins with a discussion on the concepts of expropriation, nationalization and indirect expropriation, conditions of expropriation, compensation standard and the quantum of compensation. Then, by comparing Malaysia-China BIT with the domestic laws of the two countries, the author manages to draw and reconcile differences between the Malaysia-China BIT and the domestic FDI laws of the two countries as well as to pin-point the shortcomings of the existing doemestic FDI laws of the two countries. The author also discovers that there are existing provisions in the Malaysia domestic laws which provides for acquisition without compensation and capable of ousting the compensation provisions of the Malaysia-China BIT. With this, this chapter offers suggestions for conciliation and reform.

Chapter Five specifically studies the investment dispute resolution clauses in the Malaysia-China BIT and the related provisions in the domestic laws of the two countries. Besides discusses the various modes and effectiveness of investment dispute resolutions specified in the Malaysia-China BIT, this chapter also probe into areas in the domestic laws of the two countries which are capable of complementation and reconciliation. Finally this chapter comments on the shortcomings of the various modes of dispute resolution and puts forward some amendment proposals.

In the Conclusion, besides concluding the problems of linking, discrepancies, conciliation and complementation between the Malaysia-China BIT and the domestic FDI laws of the two countries, the author also recommends changes to be made in order to perfect and improve the Malaysia-China BIT and the domestic FDI laws of

the two countries. Finally, the author puts forward the possible direction of future development of the Malaysia-China BIT.

Key Words: FDI Admission; FDI Treatment; Expropriation & Nationalization; Investment Dispute



缩略语表

Bilateral Investment Treaty

BIT 双边投资协定

China International Economic and Trade Arbitration Commission

CIETAC 中国国际经济贸易仲裁委员会

Foreign Direct Investment

FDI 外国直接投资

The International Court of Arbitration of International Chamber

ICC of Commerce

国际商会仲裁院

International Centre for Settlement of Investment Disputes ICSID

解决投资争端国际中心

Convention on the Settlement of Investment Disputes between

《ICSID 公约》 States and Nationals of Other States

《解决国家与他国国民间投资争端公约》

Convention Establishing the Multilateral Investment Guarantee

《MIGA 公约》 Agency

《多边投资担保机构公约》

Organisation for Economic Co-operation and Development OECD

经济合作与发展组织

The Arbitration Institute of The Stockholm Chamber of

Commerce

SCC

斯德哥尔摩商会仲裁院

The Agreement on Trade-Related Investment Measures

《TRIMs 协定》 《与贸易有关的投资措施协定》

United Nations Commissions on International Trade Law

UNCITRAL 联合国国际贸易法委员会

United Nations Conference on Trade and Development

UNCTAD

联合国贸易与发展会议

United Nations Centre on Transnational Corporations UNCTC

联合国跨国公司中心

World Trade Organisation
WTO

世界贸易组织

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- ◆ Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic,苏伊士诉阿根廷共和国 (ICSID)
- ◆ Superintendent of Lands & Surveys, Fifth Division, Limbang v. Lim Teck Hoo & Anor, 林邦土地与勘测第五分局局长诉林德浩(马来西亚)

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