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论国际投资法中的社会公共利益

厦门大学

博士学位论文

论国际投资法中的社会公共利益

On the Public Interests of Society in  
International Investment Law

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## 内容摘要

在传统国际投资条约与国际投资争端实践中,关于社会公共利益的内容主要是针对资本输入国征收外国私人投资者财产的情形。但是随着国际投资条约与国际投资争端实践的发展,对于社会公共利益的保护逐渐突破征收条款的禁锢,并且对国际投资法律体系有着深远的影响。本文之研究以国际投资条约的社会价值追求为主线,主要从两个方面对社会公共利益进行探讨:一方面从国际投资条约的角度,另一方面从国际投资争端实践的角度,以便较为全面地对国际投资法中涉及的社会公共利益问题进行研究。传统的国际投资条约或者处理国际投资争端的模式已经不适应现代国际投资的发展与演化。所以,无论是国际投资条约还是国际投资争端解决程序都需要完善。

传统的国际投资条约与国际投资争端中关于社会公共利益保护的内容是模糊不清的。但是,随着晚近国际投资条约与国际投资争端仲裁案件中越来越多地出现涉及社会公共利益保护的内容,使社会公共利益成为国际投资条约无法回避的问题,由此也暴露出国际投资条约与国际投资争端解决程序对于社会公共利益保护不足的实践与理论缺陷。本文通过国家与社会关系理论分析现代国际投资法对于社会公共利益保护的缺陷,并提出国际投资法在这方面的完善途径。

本文在研究的整体思路,以“利益”为核心,将社会公共利益作为切入点,通过对社会公共利益概念的阐释,借鉴政治学中国家与社会的理论作为分析现代国际投资法的理论模型,对现代国际投资法的理论基础以及国际投资争端实践进行研究,比较系统全面地论证现代国际投资法中的社会公共利益问题,为现代国际投资法的发展与演变提供理论上的支持和参考。内容涉及国际投资条约中的社会公共利益、国际投资条约与国际投资争端实践中的社会公共利益以及中国的投资条约实践与社会公共利益。本文在研究中借鉴哲学等社会科学以及国内法中相关领域的理论与实践成果,在该领域研究相对薄弱的情况下,对国际投资法体系的嬗变具有积极意义。

**关键词:** 社会公共利益; 国际投资条约; 国际投资争端;  
中国投资条约缔约实践



## ABSTRACT

The content regarding the public interests of society mainly reflected in the expropriation of foreign investors' property of capital importing countries in the traditional practices of international investment treaties and international investment disputes. However, with the development of practices in international investment treaties and international investment disputes, the public interests of society gradually break through imprisonment provisions of expropriation, and have far-reaching impact to the legal system of international investment. Main line of the thesis is pursuit of the social value of international investment treaties, and the discussion of the public interests of society is mainly from two aspects: on the one hand from the perspective of international investment treaties, on the other hand from the perspective of the practices of international investment disputes, in order to research completely on the involving issue of public interests of society in the international investment law. Traditional international investment treaties or the modes of international investment disputes are no longer keep up with the modern development and evolution of international investment. So, both international investment treaties and international investment disputes settlement procedures are needed to be improvement.

The content of protection of public interests of society in traditional international investment treaties and international investment disputes are ambiguous. However, with recent international investment treaties and international investment disputes arbitration arise in cases involving increasingly protection to the public interests of society, so that the public interests of society as an unavoidable issue of international investment legal system, and also exposed defects of practice and theory, which is inadequate protection to the public interests of society in the international investment treaties and the modes of international investment disputes. The thesis analysis the defects of Protection on the public interests of society in modern international investment law through theory of state and society relationship, and propose the way of improvement on the international investment law in this issue.

The overall idea of the thesis, the "interests" as the core, the public interests of society as an entry point, through the interpretation of the concept of public interests of society, drawing on political science in the theory of state and society as the

theoretical model of international investment law, study on the modern theory of international investment law and practices of international investment disputes, a comprehensive demonstration on the issue of public interest of society in the modern system of international investment law, and to provide theoretical support and reference to the development and evolution of international investment law. The study involve the public interests of society in investment treaties, the public interests of society and international investment treaties, the public interests of society and international investment disputes, the public interests of society and the international investment treaties practices of China. The thesis applies philosophy and other social sciences, and related areas of domestic law in the theory and practices in the study at the same time. However, the research in this field and the issue are relatively weak, the study could have certain positive meaning on the evolution of international investment law system.

**Key Words:** Public Interests of Society; International Investment Treaties;  
International Investment Disputes;  
Investment Treaties Practices of China.

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## List of Abbreviations

|                   |  |
|-------------------|--|
| AJIL              | American Journal of International Law  |
| BIT               | Bilateral Investment treaty  |
| ECJ               | European Court of Justice  |
| ECtHR             | European Court of Human Rights   |
| EHRR              | European Human Rights Reports  |
| EJIL              | European Journal of International Law  |
| EU                | European Union   |
| FCN               | Friendship, Commerce and Navigation  |
| FDI               | Foreign Direct Investment  |
| FTA               | Free Trade Agreement   |
| GATS              | General Agreement on Trade in Services   |
| GATT              | General Agreement on Tariffs and Trade   |
| ICC               | International Chamber of Commerce  |
| ICJ               | International Court of Justice   |
| ICJ Rep           | International Court of Justice Reports   |
| ICSID             | International Centre for Settlement of Investment Disputes   |
| ICSID Convention  | Convention on the Settlement of Investment Disputes<br>between States and Nationals of Other States (March 1965) |
| ICSID Review-FILJ | ICSID Review foreign Investment Law Journal  |
| IAs               | International Investment Agreements  |
| IISD              | International Institute of Sustainable Development   |
| IMF               | International Monetary Fund  |
| ITA               | Investment Treaty Arbitration  |
| Iran-US CTR       | Iran-US Claims Tribunal Reports  |
| JIEL              | Journal of International Economic Law  |
| JWIT              | Journal of World Investment & Trade  |
| MAI               | Multilateral Agreement on Investment   |
| MFN               | Most Favoured Nation Treatment   |
| MIGA              | Multilateral Investment Guarantee Agency   |
| NAFTA             | North American Free Trade Agreement  |
| NIEL              | New International Economic Order   |



|          |   |
|----------|---|
| NGO      | Non-Governmental Organization                         |
| OECD     | Organization for Economic Cooperation and Development |
| OIEO     | Old International Economic Order                      |
| OPIC     | Overseas Private Investment Corporation               |
| RTAs     | Regional Trade Agreements                             |
| UNCITRAL | United Nations Commission on International Trade Law  |
| UNCTAD   | United Nations Conference on Trade and Development    |
| WTO      | World Trade Organization                              |

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## 前 言

### 一、选题背景以及意义

关于论文的选题源于一个意外事件，1984年12月3日，位于印度博帕尔地区的联合碳化物公司发生了泄漏事件，对国际法学者而言可能是一件易于忽视的事件。这个事件，表面上看是一起简单的化学物质泄漏事件，但是实质上却是国际投资法相关领域存在重大的结症，也是在20世纪90年代中期国际投资条约能够在世界各国掀起波澜的机缘。本文将从此处谈起，论述国际投资条约中的社会公共利益问题。这个是现代国际投资法所面临的困境：一方面是资本输入国对于本国经济与社会的管理权；另一方面是当国际投资争端出现时对于社会公共利益如何救济的问题。

现代国际投资条约与国际争端实践完全阻碍了这些进程。现代国际投资条约法律制度，与其说国际投资条约是国际法或者国际经济法的一部分，不如说国际投资条约是国内事务的国际化解方式更合适一些。用传统国际法学的观点看待国际投资条约或者处理国际投资争端，似乎已经不能适应现代国际直接投资现实状况的发展与演化。所以，无论是国际投资条约还是国际投资争端解决程序都需要进一步地完善。

关于国际投资条约的发展与变化应当从两个方面阐述：一方面，从国际投资条约的角度；另一方面，从国际投资争端实践的角度。首先，就国际投资条约而言，无论是双边投资条约抑或是自由贸易协定或者区域性贸易协定中有关投资的内容，从形式上看，是关于缔约各方的权利、义务。但是从实质上看，发达国家与发展中国家不平等的政治与经济实力致使这些国际投资协定具有片面性。从而导致发达国家与发展中国家之间的利益冲突。在此基础上的国际投资条约是一种相互对抗的模式；其次，就国际投资争端实践而言，无论是国家与国家还是国家与私人投资者的争端解决模式，更是形成了过于偏袒私人投资者一方利益的模式。

从晚近的一些国际投资争端案例分析，逐渐涉及到一些有关社会公共利益方面的问题。社会公共利益无论是对于发达国家还是发展中国家都具有一定的普适

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