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硕 士 学 位 论 文

国际投资条约中公正与公平
待遇标准的新发展

New Developments of Fair and Equitable Treatment

Standard in International Investment Agreements

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内容摘要

公正与公平待遇标准是国际投资条约中普遍采纳的一项投资待遇标准,但是不同的国家和学者对该标准的含义一直存在观点分歧。从北美自由贸易协定(North American Free Trade Agreement, 以下简称 NAFTA)生效后依据 NAFTA 第 11 章提起的仲裁案例开始,该标准成为国际投资条约中最具争议的问题之一。上述仲裁案例直接促使公正与公平待遇标准在晚近有了重大的发展。研究该标准有助于更好地利用国际投资法制为我国的经济发展服务。

本文除引言及结论外共分为四章。

第一章回顾公正与公平待遇标准的历史发展脉络,即该标准的起源及其随后向多边领域及双边领域逐渐推广适用的情况,然后分析不同国家和学者对该标准含义的理论分歧及该标准在国际投资条约中的作用。

第二章研究公正与公平待遇标准在仲裁实践中的适用情形,包括依据 NAFTA 第 11 章规定提起的仲裁案例以及依双边投资条约产生的案例。通过分析若干典型的仲裁案例,归纳出公正与公平待遇标准的核心问题。

第三章分析公正与公平待遇标准晚近的新发展。美国与加拿大吸取 NAFTA 第 11 章仲裁的经验和教训对各自的双边投资条约范本中的相关条款作出重大修改,本文详细分析导致这些修改的更深层次的原因,总结了上述修改的特点,并探讨这些新规定仍然存在的问题。

第四章概述公正与公平待遇在中国签订的投资协定中所处的地位,分析相关规定所存在的问题及中国将面临的潜在风险,探讨中国应采取的应对措施。本文认为,美国和加拿大对条约范本的若干修改以及仲裁实践中的某些策略值得我国借鉴与学习。

关键词: 公正与公平待遇; 国际投资条约

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ABSTRACT

The concept of “fair and equitable treatment” now occupies a position of prominence in International Investment Agreements (IIAs). However, there are always academic differences as to the precise meaning of the term “fair and equitable treatment”. Moreover, after NAFTA became effective, and particularly when many disputes were raised for arbitration according to NAFTA Chapter 11, fair and equitable treatment standard has become one of the most conflicting parts in IIAs. Learning lessons from relevant cases in the arbitral practice, U.S. and Canada has greatly changed the provisions as to fair and equitable treatment standard in their new Modal BIT and FIPA respectively. In the interest of China, it is necessary to study on fair and equitable treatment standard.

This dissertation consists of 4 chapters in addition to Preface and Conclusion.

Chapter 1 reviews the genesis of fair and equitable treatment standard, that is, the origins of the standard and its current use in IIAs. Then the chapter analyses the academic differences on the meaning of the standard, and the role of the standard in IIAs.

Chapter 2 deals with the use of fair and equitable treatment standard in arbitral practice, including its use in both NAFTA Chapter 11 arbitration and BITs arbitration. After analyzing several typical cases, the chapter sums up the issues in application of fair and equitable treatment standard.

Chapter 3 analyses the recent developments of fair and equitable treatment standard. U.S. and Canada have learned lessons from their practice in NAFTA, and made great changes of the provisions as to fair and equitable treatment standard in their new Model BIT and FIPA respectively. The chapter focuses on the underlying reasons for the developments of fair and equitable treatment standard, and then sums up the characteristics of those new provisions. Lastly, the chapter probes into the potential problems of the new provisions as to the standard.

Chapter 4 gives an overview of the provisions as to fair and equitable treatment standard in China’s IIAs. Then the chapter analyses the defects of those provisions and the risks China may be confronted with. Lastly, the chapter sums up revelations to China, which are drawn from the use of the standard in arbitral practice and the new

provisions in U.S. new Model BIT and Canada FIPA.

Key Word: Fair and Equitable Treatment Standard;
International Investment Agreements.

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缩略语表 Abbreviations

BIT	Bilateral Investment Treaty 双边投资条约
FCN	Friendship, Commerce and Navigation 友好通商航海条约
FIPA	Foreign Investment Protection and Promotion Agreement 投资保护与促进协定
FTC	Free Trade Committee 自由贸易委员会
ICC	International Chamber of Commerce 国际商会
IIA	International Investment Agreement 国际投资条约
MIGA	Multilateral Investment Guarantee Agency 多边投资担保机构
NAFTA	North American Free Trade Agreement 北美自由贸易协定
OECD	Organization for Economic Co-operation and Development 经济合作与发展组织
UNCTAD	United Nations Conference on Trade and Development 联合国贸易与发展会议
UNCTC	United Nations Code of Conduct on Transnational Corporations 联合国跨国公司行动守则

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案例表 Table of Cases

Short Title	Full Case Title and Citation
Azinian Case	ICSID Case No. ARB (AF)/97/2. Robert Azinian and others v. United Mexican States, November 1, 1999.
Metalclad Case	ICSID Case No. ARB (AF)/97/1. Metalclad Corporation v. United Mexican States, August 30, 2000.
S.D. Myers Case	ICSID Case. S.D. Myers, Inc. v. Canada, November 12, 2000.
Pope & Talbot Case	ICSID Case. Pope & Talbot v. Canada, April 10, 2001, May 31, 2002.
Mondev Case	ICSID Case No. ARB (AF)/99/2. Mondev International Ltd. v. U.S.A., October 11, 2002.
ADF Case	ICSID Case No. ARB (AF)/00/1. ADF Group Inc. v. U.S.A., January 9, 2003.
Lowen Case	ICSID Case No. ARB (AF)/98/3. Lowen Group Inc. v. U.S.A., June 25, 2003.
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GAMI Case	ICSID Case. GAMI Investments Inc. v. United Mexican States, 15 November, 2004.
Maffezini Case	ICSID Case No. ARB/97/7. Emilio Agustín Maffezini V. The Kingdom of Spain, November 13, 2000.
Genin Case	ICSID Case No. ARB/99/2. Alex Genin, Eastern Credit Limited, Inc. And A.S. Baltoil V. The Republic of Estonia, June 25, 2001.
Middle East Cement Case	ICSID Case No. ARB/99/6. Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, April 12, 2002.
Tecmed Case	ICSID Case No. ARB (AF)/00/2. Tecnicas Medioambientales Tecmed S.A. V. The United Mexican States, May 29, 2003.
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