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作为一般法律原则的公平与公正待遇  
——国际投资法中公平与公正待遇的性质与含义新  
解

Fair and Equitable Treatment as a  
General Principle of Law

——A New Approach to the Essence of Fair and Equitable  
Treatment

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## 中文摘要

目前，绝大多数双边投资保护协定与多边投资条约中都包含有公平与公正待遇条款。正如著名学者，国际法院大法官希金斯指出的：“给予外国公民和企业公平与公正待遇这类核心条款...，已成为海外投资保护领域内众所周知的法律术语...”<sup>①</sup> 晚近以来，在涉及投资争端的国际仲裁中，几乎每案必涉关于公平与公正待遇的讨论。<sup>②</sup> 然而，仲裁庭做出的解释五花八门，裁判水平参差不齐，至今尚未有较为明确的结论，<sup>③</sup>

国外学者对此问题已有十分密切的关注，系统性的研究成果以及相当丰硕，但尚未对公平与公正待遇的做出具有说服力的解释。在阅读了大量的文献和仲裁庭的判决之后，笔者脑子里呈现着关于公平与公正待遇的种种学说。掩卷遐想，公平与公正待遇貌似纷繁复杂，内容庞杂，但是却也简单。无论是正当程序要求、透明度要求、抑或是期待利益保护与禁止专断，无不告诉我们：在投资者—东道国争端的考察中，裁判者始终考虑的是对于主权者权力的限制和对投资者财产权的保护，而这恰恰就是宪政的要求。<sup>④</sup> 一言以蔽之，双边投资协定旨在通过在条约中订入这样的条款来限制政府权力、保障投资者的财产权利。公平与公正待遇的精神实质就是宪政精神，是宪政理念在国际投资法中的体现。本文试图在考察各国国内法中事关财产保护的宪政原则之基础上，从一般法律原则的角度出发，将公平与公正待遇定性为国际法渊源中的一般法律原则，走一条前人未探索

<sup>①</sup> [Oil Platforms \(Iran v. U.S.\), 1996 I.C.J. 803, 858 \(Dec. 12\)](#) (See Opinion of Judge Higgins).

<sup>②</sup> Rudolf Dolzer, FAIR AND EQUITABLE TREATMENT: A KEY STANDARD IN INVESTMENT TREATIES, 39 Int'l Law. 87, 87.

<sup>③</sup> Kantor, Fair and Equitable Treatment: Echoes of FDR's Court-Packing Plan in the International Law Approach Towards Regulatory Expropriation, *The Law and Practice of International Courts and Tribunals*, (Summer 2006) (forthcoming).

<sup>④</sup> 宪政 (constitution government) 一词可谓蕴含隽永，古今中外有无数的观点，但无不包含这样的看法：“宪政就是意味着对政府施加合法的制约，其核心在于限制政府活动与法治之中……避免专制统治和暴政。”斯蒂芬·L·埃尔金，政论——为美好的社会设计政治制度[M]，上海：三联书店，1997，第27页；国内学者胡锦涛、韩大元认为：“宪政的实质体现着有限政府的制度和理想，在政府与公民的相互关系中，政府权力受到法律或社会规范的约束，以实现人权为基本价值。”参见：胡锦涛、韩大元，中国宪法[M]，北京：法律出版社，2007年第二版，第34页。

的途径，以求抛砖引玉，求得方家指点。

**关键词:**公平与公正待遇、宪政分析、国际法中的一般法律原则

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## **Abstract**

At present, the vast majority of bilateral and multilateral investment treaties contain a fair and equitable treatment provision. As the pointed by Justice Higgins: "*Core provisions such as granting foreign citizens and enterprises the fair and equitable treatment ... has become the well-known legal terms within field of protection of foreign investors ...*" In recent years, in international arbitration cases concerning investment disputes, foreign investors have complained that host countries violated this treatment in almost all cases. Accordingly, many arbitral tribunals have referred and explained fair and equitable treatment in previous. However, the interpretations of the arbitral tribunals are far from unified; there is no clear and definite conclusion on the fair and equitable treatment. Foreign scholars had conducted systematic research with fruitful achievement. However, there is no persuasive explanation regarding the essences of fairness and equitable treatment.

It seems that fair and equitable treatment is very complicate, however, from a different perspective, due process, transparency, protecting of expectations are all telling us, in international arbitration cases concerning investment related disputes, what the adjudicators consider are, on the one hand, how the sovereignty power is restricted, on the other hand, how the property rights of foreign investors are protected. Obviously, this is the spirit of a constitution government. From the position of the author, fair and equitable aims at restricting of government power as well as protecting the property rights of investors, it is the expression of idea of constitution government in international investment law. This dissertation intends to regard fair and equitable treatment as a general principle of law based on a review of domestic constitutional law principles regarding protection of private property rights. As a new approach towards the essences of fair and equitable treatment,

there may be mistakes or wrongful understanding on the issue. The author welcomes remarks and feedbacks from legal experts, professors and other research fellows.

**Key Words:** Fair & Equitable Treatment; Constitutional Analysis, General Principles of Law

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## 缩略语表和案例表 Abbreviations & Table of Cases

表 1： 缩略语表(Abbreviations)

编号	英文缩略语	对应中文
1	Am. J. Int'l L	美国国际法学期刊
2	AM. SOC'Y INT'L L. PROC	美国国际法学会年会通讯
3	Brit. Yb. Int'l L	英国国际法年刊
4	Columb. J. Transnat'l L	哥伦比亚跨国法学期刊
5	F.T.C	北美自由贸易协定贸易委员会
6	Harv. L. Rev	哈佛法律评论
7	ICSID Rev. – Foreign Inv. L. J.	国际投资争端解决中心外国投资法学期刊
8	Int'l & Comp. L. Q.	国际法和比较法季刊
9	J. World Trade Law	国际贸易法学期刊
10	J. World Investment & Trade	国际投资和贸易法学期刊
11	Mich. J. Int'l L.	密歇根国际法学期刊
12	Mich. L. Rev	密歇根法律评论
13	NAFTA	北美自由贸易协定
14	OECD	经济合作和发展组织
15	UCLA L. Rev.	加州大学洛杉矶分校法律评论
16	UNCTAD	联合国贸易与发展委员会
17	U. Pa. J. Int'l Econ. L	宾夕法尼亚大学国际经济法学期刊

**表 2. 案例表(Table of Cases)**

<b>International Court of Justice Cases</b>	
1	Oil Platforms (Iran v. U.S.), 1996 I.C.J. 803.
2	Case Concerning Elettronica Sicula Spa, (ELSI), (United States of America v. Italy), 1989 I.C.J. Rep 76
3	North Sea Continental Shelf Cases ), 1969 ICJ Report 46.
<b>International Arbitration Cases</b>	
1	Neer v. Mexico, Opinion, United States – Mexico General Claims Commission, 15 October 1927.
2	ADF Group, Inc. v. United States, ICSID Case No. ARB(AF)/00/1,2002.
3	Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia, ICSID Case No. ARB/99/2, 2001.
4	American Manufacturing & Trading, Inc. (AMT) (US) v. Republic of Zaire, ICSID case No. ARB/93/1, 1997.
5	CME v. Czech Republic, Case T 8735-01 (Svea Ct. App., Sept. 13, 2001) (Swe.)
6	CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award of May 12, 2005.
7	Eureko B.V v. Republic of Poland, Partial Award, Ad hoc-UNCITRAL Arbitration Rules, IIC 98 (2005), 19 August 2005.
8	International Thunderbird Gaming v. Mexico, UNCITRAL, Final Award, January 26, 2006.
9	Lauder v. Czech Republic, UNCITRAL, Final Award Sept. 3, 2001.
10	Mihalyi v. Sri Lanka, ICSID Case No. ARB/00/2 (Mar. 15, 2002).
11	Metalclad Corporation v. United Mexican States, ICSID case No ARB/AF/97/1, Tribunal Decision August 30, 2000.

12	Mondev International LTD v. United States of America, ICSID Case No. ARB(AF)/99/2, 2002.
13	MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award of May 25.
14	Occidental Exploration and Production Company (OEPC) v. Ecuador, Case No. UN 3467.
15	Pope & Talbot v. Canada, UNCITRAL, Award on the Merits of Phase 2 (Apr. 10, 2001).
16	Saluka Investments BV v. The Czech Republic, UNCITRAL, Partial Award of Mar. 17, 2006.
17	S.D. Myers, Inc. v. Canada, UNCITRAL, Partial Award, (Nov. 13, 2000).
18	Tecnicas Medioambientales Tecmed S. A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003.
19	The Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID case no. ARB(AF)/98/3.
20	Waste Management, Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004, par. 89
<b>Domestic Cases</b>	
1	Council of Civil Service Unions v. Minister for the Civil Service, [1985] 1 AC 374.
2	R v. Sussex County Council, ex parte Reprotech (Pebsham) Ltd[2002] 1 WLR 438
3	Shaughnessy v. United States, 345 US 206, 1953, (Jackson J).
4	United Mexican States v. Metalclad, [2001] B.C.S.C. 664.

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