



武汉大学国际法博士文库

Series of Doctoral Thesis on
International Law
of Wuhan University

论发展权在国际投资 协定中的实现

刘 艳 / 著

非 外 借



WUHAN UNIVERSITY PRESS
武汉大学出版社

武汉大学国际法博士文库

Series of Doctoral Thesis on
International Law
of Wuhan University

论发展权在国际投资 协定中的实现

Research on the Realization of the Right to Development
in International Investment Agreements

刘 艳 / 著



WUHAN UNIVERSITY PRESS
武汉大学出版社

图书在版编目(CIP)数据

论发展权在国际投资协定中的实现/刘艳著. —武汉: 武汉大学出版社, 2016. 11

武汉大学国际法博士文库

ISBN 978-7-307-18745-0

I. 论… II. 刘… III. 国际投资—国际经济法—研究 IV. D996.4

中国版本图书馆 CIP 数据核字(2016)第 238408 号

责任编辑: 林 莉 辛 凯

责任校对: 李孟潇

版式设计: 马 佳

出版发行: 武汉大学出版社 (430072 武昌 珞珈山)

(电子邮件: cbs22@whu.edu.cn 网址: www.wdp.com.cn)

印刷: 虎彩印艺股份有限公司

开本: 720 × 1000 1/16 印张: 19.25 字数: 344 千字 插页: 1

版次: 2016 年 11 月第 1 版 2016 年 11 月第 1 次印刷

ISBN 978-7-307-18745-0 定价: 45.00 元

版权所有, 不得翻印; 凡购我社的图书, 如有质量问题, 请与当地图书销售部门联系调换。

序 言

发展权作为一项发展中国家向国际社会提出的人权，已经发展为一项国际法基本原则。这一原则的内涵包括发展中国家在国际经济交往中有权利要求承担与其能力相适应的义务，发达国家承担较多的义务，在国际贸易和投资法律机制中实行非互惠待遇，从国际经济规则的权利和义务方面具体地实现发展权。国际投资作为推进世界经济发展的引擎之一，在提升发展中国家能力中发挥着积极作用，但是，当前的投资条约体制并未充分反映出发展中国家发展权诉求，尚未建立系统的有益于实现发展权的机制。

国际投资规则正经历着重大的变革与发展，以大型区域协定 TPP 和 TTIP 为引领的新一代贸易投资规则正在发生着重构，影响着世界经济秩序和地缘格局。以国际投资协定为载体的投资规则借此历史契机，从实体规则到投资者——国家争端解决和程序性规则也在进行调整，投资规则逐渐摒弃了原有的偏重投资利益保护的理念，以促进可持续发展投资为目标，在提升对投资利益保护的同时，注重环境、人权和社会利益的平衡保护。然而，将发展权纳入向来强调投资者利益保护的国际投资协定，在理论上存在着诸多难点。例如，在以双边关系为主的投资条约体制中如何纳入特殊和差别待遇？在投资双向流动不对称的情况下，发展权保障所需要的权利让渡成本和负担如何分配？投资仲裁庭在适用法律时，国际法的统一化的高标准如何与国内法的差异化相协调？用何种法律工具为东道国保留必要的发展政策空间？这些问题的探讨是从投资法领域对国际发展法的推进，无疑具有十分重要的意义。

在国际投资规则发生重大变革与重构的历史时刻，如果能从发展中国家的集体权——发展权保障的视角，提出有益的理论 and 规则制定方案，那么，所实现的将不仅是中国在规则制定话语权方面的提升，而且更重要的是，将会极大地推进国际经济秩序向着更加公正合理的方向发展。

呈现在读者面前的《论发展权在国际投资协定中的实现》一书，是作者刘艳在其博士论文基础上修订而成的。该书较为系统地阐述了发展权原则的理论，对国际投资协定中纳入发展权的必要性和总体实现路径作了详尽的

分析，又分别从规则设计和法律解释层面，对投资准入制度、公平公正待遇、征收制度中如何实现发展权作了分析，特别是用利益分析法，对国际投资协定中的诸多需要平衡的利益进行了分类梳理，探究了国家利益、公共利益和发展利益与纷繁复杂的利益之间的内在联系。书中作者对发展权如何适用的很多理论难点所作的探讨，虽然有些方面还不够成熟，但已是难能可贵的了。

作为她的博士生导师，我很高兴看到这一富有创新性的成果出版，并相信本书对我国积极参与国际经贸规则重构，推进可持续发展投资规则的形成与完善具有一定的参考价值。

张庆麟

2016年7月

内 容 提 要

南方国家的崛起对传统的贸易、投资制度的格局提出了调整要求，其调整路径之一是通过修订传统的法律规则体系以反映其发展的利益诉求，因此，国际经济法律体制及其部门法正酝酿着从追求一元化标准的体制向着满足多元化利益诉求的方向变革。在众多诉求中，基于历史旧债和现实的发展差距，发展中国家一直致力于构建公正、合理的国际秩序和规则，以求在国际经济交往中获得快速发展，缩小与发达国家的差距，共享经济一体化的成果。然而，除了个别发展中国家如“金砖五国”获得令人瞩目的发展外，广大发展中国家的发展仍然缓慢，很多国家的生存权和发展权保障仍面临着巨大困难，成为国际人权保障中的薄弱环节。

国际投资作为推进世界经济发展的引擎之一，在提升发展中国家能力中发挥着积极作用，但是，当前的投资条约体制并未充分反映出发展中国家发展权诉求，尚未建立系统的有益于实现发展权的机制。发展权作为一项发展中国家向国际社会提出的人权，已经发展为一项国际法基本原则。这一原则的内涵包括发展中国家在国际经济交往中有权利要求承担与其能力相适应的义务，发达国家承担较多的义务，在国际贸易和投资法律机制中实行非互惠待遇，从国际经济规则的权利和义务方面具体地实现发展权。因此，本书以发展权为切入点，试图将发展权实现的考虑因素纳入追求一元高标准的投资自由化、保护投资者私人利益的投资体制中，并在国际投资协定中设置能够实现发展权原则的规则以及相关的制度安排，将抽象的发展权原则在国际投资实践中予以具体化，以此矫正现有投资条约机制的不平衡，推进国际经济向着和谐共进的方向发展。

除了序言之外，本书主体部分共分六章进行论述。

第一章是发展权原则在国际投资协定中的确立。本章从发展权的法律含义界定切入，论述了发展权的演进、实施障碍、内涵及推进国际经济和谐共进的价值，进而对国际投资协定中的发展权原则进行了界定，由此得出发展权是一项保障个人、国家基本生存和发展的权利，在国际投资协定中发达国家负有国际合作的责任。然而，国际投资协定缺少对发展权实现相关规定，

在规则层面引发了多重法律冲突协调的障碍，在现实中给发展中国家实施投资协定带来了种种困难。因此，国际投资法律体制有必要将发展权实现因素纳入其中，在促进国际资本流动的同时，将发展中国家的发展目标和发展进程融入国际投资法律体制保护的价值之中。

第二章研究发展权原则在国际投资协定中的适用。这一章的论述建立在第一章阐明的发展权赋予发达国家国际合作责任的理论基础上，本章从三个方面进一步提出促进发展权在国际协定中实现的总路径：在国际投资协定中引入差别待遇、为东道国提供发展政策空间，以及在公平公正待遇的解释中对国内治理与国际法标准综合考量。这三个法律机制将协调第一章提及的国际投资协定中的三对法律冲突。这些关系的协调贯穿在如何实现发展权的条款的设计中。此外，本章还简要阐述了投资法律制度中实现发展权需要完善的诸方面。

第三章到第六章分别对投资准入阶段发展权的保障机制、公平公正待遇中的发展权、国际投资条约例外体系中的发展权、国际投资征收制度中的发展权这四个方面的法律问题，围绕第二章提出的差别待遇、发展政策空间，以及国内法国际法综合考虑的问题，进一步从规则的权利、义务的层面来具体实现发展权。

第三章是国际投资准入制度中的发展权，这是考虑到发展中国家承担义务的能力不足，在准入阶段设定的差别性的义务承诺和过渡期制度安排。本章分为两个问题来探析：第一个问题探讨投资准入差别待遇，运用列表清单的方法，依据国家的发展水平和实际需要、东道国享有裁量空间的不同，可以选取不同的方法来控制投资进入的部门、领域，以及在本国投资中所占的比例，即通过控制权给予发展中国家更多的优惠。第二个问题关于履行要求的规制，一项履行要求在经济发展水平不同的国家会产生认识和作用上的差异，在履行要求制度设计中，可以通过三分法对履行要求的内容进行分类，并引入履行要求条款下的发展例外来满足发展中国家对某些外资管制措施的需要。

第四章论述国际投资中公平公正待遇的发展权，是从条约解释和适用此待遇的角度，提出公平公正待遇的认定要考虑发展中国的现实发展水平，投资仲裁应当结合国内法和国际法综合考察国家行为的合法性与合理性。公平公正待遇是衡量国家治理水平的一则标准，此标准内涵的不确定性使国际投资仲裁庭不断提高国家“治理良好”的解释标准，本书不提倡用明确的语言列举公平公正待遇的内容，建议从其适用的角度，将公平公正待遇作为仲裁庭对国家行为进行审查的一项标准，这项标准要对国家行为合法性和合

理性的区分，分别用国内法和国际法最低待遇标准进行判断，在对投资者合理期待的认定中考虑一国的发展阶段和水平，合理地确定最低国际标准的水平，用此种细分的方法控制仲裁庭的任意解释。

第五章研究国际投资协定例外体系中的发展权，这是从协调投资协定承诺的稳定性与国家管理的变动性之冲突角度展开的。不论在发达国家还是在发展中国家，重大利益的冲突与协调都不可避免，而发展中国家在某些利益协调环节由于发展能力不足，更需要予以重视和协助。例外条款这种法律机制为利益协调提供了有益的方法，本书以利益主体为标准，围绕国家主体、社会公众主体、个人主体三分法进行了划分，进而对纷繁复杂的“利益”归类梳理，在此基础上提出了建立由一般例外、国家安全例外和发展例外构成的例外体系，由此来全面协调国际投资协定中的利益冲突。

第六章探讨国际投资征收制度的发展权，这是围绕如何给予发展中国家发展政策空间而展开的。随着国家干预社会事务范围的扩展，正当的国家管理行为被认定为征收的可能性增大，征收条款对征收种类和范围的界定仍然不明晰，现实中，发展中国家发展变革的频繁度超过发达国家，已有征收条款在间接征收的认定虽然排除了安全、健康和环境管理措施，但是这些排除事项仍不能满足发展中国家管理社会事务的需要。本章对国家管理行为展开全面分析，认为有必要将发展中国家基于发展权实现的管理行为也从间接征收中予以排除，增加发展权实现的政策空间。

Abstract

The rise of the South makes requirement of changing the traditional order of world trade and investment, one way is to make adjustment of the traditional legal system to reflect the interests of its national development. Therefore, the international economic law system and its department laws are brewing a revolution from the unified standard system to a system that meets diverse interests of all member states. In light of the history debts and reality of the development gap between developing countries and developed countries, developing countries have committed to building a just and rational international order and rules to realize rapid development in international economic cooperation, narrow the gap with the developed countries, and share the fruits of economic integration. However, in addition to a small group of development countries, such as BRICS who have gained remarkable development, the development of majority of the developing countries are still slow, the right to survival and development of them are still face enormous difficulties, which is vulnerable in the protection of international human rights.

International investment is the engine of economic development of the world, which plays an important role in capacity building for developing countries. However, current international investment legal system does not reflect their development right, and a system which is liable to realize the development right has not been established within IIAs. As a collective right which is claimed from international community, the right to development has become one fundamental principles of international law. The contents of this principle includes: the developing countries have right to undertake obligations within their ability, accordingly, the developed countries shall take more obligations, and implementing non-reciprocity treatment in international trade and investment legal system, realizing the right to development by allocating right and obligations. Therefore, this book is begin with the principle of right to development, trying to incorporate the right to development into international investment legal system, the supreme goal of which is liberalization of

investment and protection of private property. Then make the abstract principles into concrete legal arrangement and rules so that the international economic go towards harmonious and integral.

Besides the preface and conclusion, this book consists of six chapters:

Chapter I explores the establishment of the right to development in international investment agreement. This chapter Begins with the legal definition of the right to development, which include evolution of the right to development, the barrier to its implementation, the connotation and the value of promoting the harmonious development of the international economic, then this section discusses the principle of the right of development in the context of international investment legal regim. It con clues that the right to development could safeguard the basic right of survival and the development of the private person, as well as the sovereign nation, so the developed countries is responsible to cooperate with the developing countries to get the ability to develop in International investment. however, the lack of the related rules on behalf of the right of development in international investment development brings about bittacles of coordinating the conflicts in legal system, as far as the implementation of the international investment treaty in developing countries is concerned, the developing countries and lest developing countries facing great difficulties in implementing the rules at the expense of sacrificing their development. So it is concludes that the international investment legal regime should incorporate the right to development into it, realizing the multifunction and goals of IIAs, which is not only promoting the world capital flow, but also accelerating the development of less developed countries.

Chapter II discuss the application of principle of the right to development in IIAs, The discussion of this chapter established on the bases of the responsibility to cooperate of the developed countries which originated from the right to development. Accordingly, it adresses the general paths of realizing the right to development in international investment agreement including the following three aspects: introducing discriminating treatment in international investment agreements, providing enough policy space for the developing host country, making the comprehensive considerations of the domestic governance and international standard when interpreting rules of justice and equity. The three legal mechanism will give better method to coordinate the three pairs of conflict of laws in international investment treaties which was mentioned in the Chapter I. The three issues run

throughout the perfection of specific treaty rules. At last, this chapter also gives a brief overview of several aspects in realizing right of development in IIAs.

From Chapter III to Chapter VI, respectively, the book is focused on the following four topics: the access mechanism to safeguard the right to development, the exception system, the identifications of expropriation and compensation, and the domestic law considerations in fair and equitable treatment by investment tribunals, all the four topics are developed from the perspective of specific rights and obligations of rules in IIAs in which runs throughout the three key issues raised in chapter II.

Chapter III probes into the right to development rights of international investment access regime. Considering the weak ability of developing countries to assume obligations, every party of IIAs has right to commit different obligations and transition period in access stage. For the regulation of access, there are two important issues to discuss, the first one is the different treatment in investment access by way of list of inventory (positive listings and negative listings) based on the level and the actual needs of developing countries, a country has discretion to control investment from the perspective of sectors, business field and voting power in investment, so that the developing countries got different obligations. The second issue on access is the regulatory of performance requirements. As for one regulatory measure, countries of different level of development will have different attitude, this paper will use trichotomy to sort out the dozens of performance requirements, and proposed development exception in designing this clause so that the use of some of the prohibited regulatory measures could be justified for less developed countries.

Chapter IV discusses the right to development in fair and equitable treatment during international investment arbitration. Considering the real development level of developing countries, the interpretation and application of fair and equitable treatment by the arbitral tribunal should take the domestic law into consideration, and make a comprehensive survey of domestic and international law in judging the legality and rationality of an act of government. In fact, fair and equitable treatment sets up a standard that measure the level of regulation of one state, the uncertainty of this standard gave the chance of improving the regulatory standard to a fairly high level that almost no state could reach. This book does not propose to exemplified the content of fair and equitable treatment in the treaty, but use it as a

standard of reviewing the property of state action, e. i. judging the legality and rationality of an act of government by the tribunal. It is necessary to make distinction of legitimacy and rationality of state acts, measure it by domestic law and international minimum standard respectively. In addition, the identification of reasonable and legitimate expectations of investors should take the development level of one state into consideration. Above all, preventing the arbitrary expanding the discretion of the tribunal by setting proper level of international minimum standard.

Chapter V discusses the right to development into the exceptions system in IIAs, this issue is discussed from the perspective of coordinating the conflict between the stability of treaty commitment and variability of regulatory measures of host state. It is worthy of paying attention to the conflicts and coordination of essential interests both in developed and developing countries, especially for developing countries, they are not able to cope with conflicts and difficulties, so they need aids and ability establishing from developed countries, exception clause provide the helpful legal mechanism to make coordination of sorts of conflicts. This book studies different kinds of essential interests of international investment according to the subjects of interests into national interest, public interest and private interest, this book proposed that IIAs should establishing exception system which constitutes of national security exception, general exception, development exception as well as other specific exceptions. The exception system will play a great important role in coordinate the justifiable conflicts in IIAs.

Chapter VI explores the right to development in international expropriation regime, which is developed from the perspective of reserving development policy space for less developed countries. With the expansion of government intervention in social affairs, the possibility of attribute the legitimate regulatory action to indirect expropriation has greatly increased, however, the present expropriation clause are ambiguous to the scope and sorts of expropriation. In practice, the frequency of social revolution and change in developing countries is much higher than developed countries. At present, it commonly excludes the regulatory measures related to safety, health and the environment from indirect expropriation. As for the developing countries, the exclusion of the three kinds measures actually not enough for their regulatory needs. After a comprehensive and deep analysis of the regulatory

actions of the government, it is found that necessary to exclude the government actions related to the development strategy of the state from indirect expropriation, which will give wide policy space to realize the right to survive and development.

缩 略 语

BIT	Bilateral Investment Treaty
CARICOM	Caribbean Community
UNDRD	Declaration on the Right to Development
ECT	Energy Charter Treaty
EPA	Economic Partnership Agreement
FCT	Friendship, Commerce Treaties
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs & Trade
ICSID	International Centre for Settlement of Investment Disputes
MAI	Multilateral Agreement of Investment
NAFTA	North America Free Trade Agreement
SDT	Special and Differential Treatment
TRIMs	Trade Related investment Measures
TPP	Tans-Pacific Parternership Agreement
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

目 录

内容提要	1
Abstract	1
缩略语	1
绪论	1
一、问题的提出	1
二、国际投资中的发展权议题是对国际发展法的推进	5
三、研究思路与研究方法	8
第一章 发展权原则在国际投资协定中的确立	10
第一节 发展权原则在国际投资协定中的法律含义	10
一、发展权的演进	10
二、发展权在推进国际经济发展中的价值	12
三、发展权的含义界定	18
四、发展权的实施和障碍	24
五、有待纳入国际经贸规则的五大发展权内涵要素	30
六、IIAs 中的发展权的含义界定	33
第二节 国际投资保护中发展权制度安排的必要性	36
一、发展权原则纳入 IIAs 是 FDI 作用机理的客观要求	36
二、发展权原则纳入 IIAs 是其法律关系的内在要求	39
三、发展权原则纳入 IIAs 是发展中国家获得发展补偿的又一阵地	40
四、发展权原则纳入 IIAs 是区域性经贸合作深入开展的关键	41
第三节 IIAs 中发展权原则缺失引发的投资治理困境	42
一、投资自由化的一元高标准与差异化的发展水平不适应	42
二、国家对 IIAs 承诺的稳定性与国家发展政策变化之冲突	45
三、片面保护投资者财产利益与忽略东道国重大利益之冲突	47
本章小结	51

第二章 发展权原则在国际投资协定中的适用	53
第一节 发展权原则在 IIAs 中适用的法理基础	53
一、发展权的整体观需要国际合作	54
二、发展权保障有序发展的价值观需要公平互利	59
三、发展权原则差异中谋求共进的发展观需要非互惠的制度安排	61
第二节 发展权原则在 IIAs 中适用的总路径	72
一、在 IIAs 中对发展中国家实施特殊和差别待遇	72
二、在 IIAs 中为东道国提供发展权政策空间	80
三、在 IIAs 的解释中对国内治理与国际法标准综合考量	86
第三节 发展权原则在投资协定中适用的具体制度安排	89
一、IIAs 投资定义中纳入“促进东道国发展”要件	90
二、IIAs 中增进发展中国家的发展能力的规定	97
三、在 IIAs 中增加旨在扩大发展中国家发展政策空间的规定	98
四、在 IIAs 中对母国和投资者增加提高发展能力的义务性规定	101
本章小结	108
第三章 国际投资准入制度中的发展权	110
第一节 IIAs 准入阶段发展问题概述	110
一、发展中国家的投资准入	110
二、投资准入中可供选择的灵活立法模式	114
第二节 发展中国家对投资准入国民待遇的选择	117
一、外资准入制度中的国民待遇	117
二、IIAs 准入前的国民待遇的适用	119
三、灵活适度地引入准入前国民待遇	124
四、关于发展中国家引入准入前国民待遇的评析	129
第三节 发展权视角下的履行要求条款构建	130
一、IIAs 中履行要求规制分析	131
二、发展权视角下履行要求规制的再审视	137
三、发展权视角下对“履行要求”的分类探析	142
四、“发展例外”在履行要求条款中的嵌入	148
本章小结	151
第四章 国际投资协定中公平公正待遇的发展权	152
第一节 FET 法律问题概述	153