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Research on the Interpretation Competition and Normative Path of Fair and Equitable Treatment Clause from the Perspective of International Investment Arbitration

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Abstract. In the context of profound changes in the geopolitical landscape, many sovereign states have begun to resist the broad interpretation of the Fair and Equitable Treatment (FET) clause, in order to safeguard their regulatory measures in the field of climate governance and public policy. At the same time, emerging issues such as artificial intelligence (AI) and digital assets are challenging the traditional definition of investment under international investment law. Whether the host country's regulatory measures violate the reasonable expectations of investors has also generated long-term uncertainty. This paper uses the methods of literature analysis, comparative analysis and inductive analysis to sort out the international investment agreements and related arbitration practices, and analyzes the game of interpretation between national regulatory power and investor protection caused by vague provisions. On this basis, it further investigates how to achieve a reasonable balance between investor protection and national regulatory power through rule coordination. The study reveals that the open-ended formulation of the FET clauses is a structural characteristic of international investment law that adapts to the interests of different legal entities, and it is also an important reason for the long-standing differences in its interpretation. Based on this, this paper proposes a governance path from regional practice to multilateral rule coordination, and establishes a more stable and sustainable balance between rule certainty and interpretation diversity by improving the coordination mechanism.

Keywords: Fair and Equitable Treatment, Treaty interpretation, State regulatory power, Linguistic interpretation

1. Introduction

Although existing studies have examined this issue from the perspectives of treaty texts, arbitration practice, few have explored from a linguistic perspective how the ambiguous and open language in the Fair and Equitable Treatment (FET) clause gives rise to interpretation differences, and how such interpretation differences affect the balance between investor protection and host country's regulatory power [1]. This paper investigates the linguistic mechanisms through which divergent interpretations of FET clauses emerge and, accordingly, develops an analytical framework for their

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analysis. On this basis, representative treaty texts and arbitral awards are selected as samples, through which the linguistic features of relevant clauses, variations in interpretation, and the underlying causes of such interpretive divergences are systematically examined by means of comparative analysis and inductive reasoning. From a theoretical perspective, the normative interpretation of FET clauses has long faced uncertainty. In this regard, different legal actors may have different understandings of the same term, and an analytical framework that can reveal its underlying mechanism is needed [2]. From a practical perspective, moreover, the differences in relevant interpretations may influence the host country's regulatory measures, the results of arbitral awards, and the operation of the ISDS mechanism.

2. The divergences between FET clause texts and arbitral interpretations

2.1. Forms and types of open-textured language in FET clauses

The open-textured language of FET clauses is mainly manifested in three types. Among them, the general formulation establishes an obligation for the host State to accord fair and equitable treatment to investors in broad and abstract terms, while leaving the specific meaning and scope of the standard undefined [3]. For example, the 1982 China-Sweden BIT stipulates that each contracting party shall accord fair and equitable treatment to investments made by investors of the other Contracting Party, but does not further specify the precise content of this standard. By contrast, the limited expression limits the rights and obligations arising from the FET standard by clarifying the scope of application of the FET standard. The 2004 U.S. BIT Model links FET to existing rules of customary international law, limiting the scope of interpretation of arbitral tribunals [4]. Thus, the enumerative expression further determines the obligations contained in FET by listing specific scenarios. For example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA), which constitutes the specific situation of FET violation, is listed to improve the clarity and operability of the content of the clause [5]. Thus, different types of FET clauses have different degrees of language openness and normative clarity, which in turn affects the scope of interpretation of the terms by the arbitral tribunal.

2.2. Formation of interpretive space created by the open-textured language of FET clauses

The interpretation space of the FET clause first comes from the general and valuable language it uses. Words such as "fairness, justice and rationality" have strong evaluation, and their specific meanings will be affected by specific situations and normative contexts, so the scope of application cannot be determined only by words. At the same time, some treaties only regulate that the host country provide fair and impartial treatment to investors, and fail to specify the specific obligations, violations and identification standards contained in the treatment [3]. Therefore, the specific scope of application of the FET clause should be determined in combination with the overall context of the treaty, the facts of the case and the relevant interpretation rules. Investors' reasonable expectations, procedural justice, and whether the host country's regulatory behavior is fair, the treaty text generally does not give a complete answer, leaving room for different interpretations in specific cases [2, 6].

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2.3. Divergent understandings of FET clauses among different interpretive actors

The different interpretations of FET clauses stem from the differences in legal positions and interests among various legal entities, which have affected their understanding of the standard content and its applicable scope [7]. From arbitral tribunal level, because different arbitral tribunals are independent of each other, they will make different judgments on the text of the treaty, the facts of the case and the relevant rules of international law when interpreting the FET clause [2]. In terms of investors' reasonable expectations, different arbitral tribunals apply different standards of determination, which leads to different interpretation results under similar facts [8]. At the national level, capital exporting countries and capital importing countries have different focuses. Capital exporting countries generally pay more attention to the protective effect of FET on overseas investors and the stable, transparent and predictable investment environment, while capital importing countries pay more attention to the impact of FET on their public interests and regulatory policies, in terms of environmental protection, public health, industrial policy and so on. Therefore, the two sides will have different understandings of the scope of FET obligations, the degree of protection that investors reasonably expect, and the legitimacy of host country regulatory measures.

3. Linguistic mechanisms and institutional factors underlying competing interpretations of FET

3.1. The influence of linguistic factors on the construction of legal meaning

The formulation and amendment of legal rules rely on the expression in natural language. Due to the dual characteristics of natural language, namely its diachronic and synchronic nature, the meaning of the same legal concept may change as the historical background and social environment evolve [1]. In legal texts, words serve as tools for conveying normative content, and they usually have a semantic scope and an interpretation boundary [7]. The same word may have different meanings in different contexts, especially for legal terms with strong value and generalization. The specific meanings usually need to be determined by the context. In the FET clause, concepts such as "fairness, justice, and reasonable expectation" have a strong openness. Their specific meanings will change with the background of the times, the facts of the case, and the applicable context. Fairness can be understood as the protection of investors' procedural rights, or it can be understood as whether the regulatory behavior of the host country is consistent, transparent, and non-arbitrary. Therefore, the openness of language provides the possibility for different interpretations of the same text, but it does not mean that all interpretations have the same basis [9]. The specific interpretation needs to be determined in conjunction with the overall context of the treaty, the facts of the case, and relevant legal rules, and is influenced by factors such as the arbitral tribunal's institutional environment and the positions of different legal entities. Thus, language constitutes the conditions for the emergence of interpretive differences, while the specific context and interpretive practice further affect how the language space is concretized.

3.2. The causes of divergent FET interpretations under different legal approaches

Different legal traditions and interpretation concepts will result in different interpretation paths. The legal system with common law tradition usually pays more attention to the role of precedents in the development of rules [9]. The interpretation methods affected by this are more focused on the existing arbitration decisions and the interpretation standards they have formed. Through individual

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cases, the specific connotations of the FET clauses are gradually clarified. Legal systems with a continental legal tradition usually place greater emphasis on written laws and the system of legal provisions, and when interpreting, they place more emphasis on the treaty text and its normative context. Therefore, even in the face of the same or similar treaty wording, different interpretation concepts will also have an impact on the scope of meaning, the existing award and the facts of the specific case, thus forming different interpretation paths [2].

In addition to the legal tradition, different understandings of the relationship between investment protection and regulatory authority of the state also have an impact on the interpretation orientation of FET [6]. Regarding investment protection, some countries place greater emphasis on the stability, predictability and rights protection of investor treatment, while in terms of regulation, some countries attach more importance to public policy goals and the space for policy adjustments. Such differences in focus will be reflected in the specific interpretations of FET obligations, investors' reasonable expectations, and the legitimacy of host country regulatory measures [1].

3.3. Linguistic and institutional factors in competing FET interpretations

The openness of legal language leaves different interpretation space for FET clauses, but the language itself does not necessarily lead to differences in interpretation. After the language space enters specific arbitration practices, it is also influenced by the institutional environment. On the one hand, there has long been a lack of a unified interpretation coordination mechanism in international investment law, and different arbitral tribunals can form different interpretations based on specific cases [10]. On the other hand, different legal traditions and policy orientations have an impact on the understanding of treaty texts, existing judgments, and national regulatory measures by arbitrators. Therefore, language openness leaves room for explaining differences, and institutional factors affect how this space is specifically used, and together they have led to the differentiation of the FET interpretation paths [7, 10]. The governance of FET cannot merely rely on modifying the wording of the clauses to enhance the clarity of the text; it also requires institutional coordination among different interpretive actors.

4. The governance approaches to competing FET interpretations

4.1. The role and limitations of a unified interpretation model

The unified interpretation model is to clarify the normative connotation of FET, reduce the differences in interpretation and improve the consistency of awards. In the current practice, this model is mainly manifested in three ways: linking FET with the minimum standards of customary international law, having the contracting parties determine the meaning of the provisions through joint interpretation, or listing the specific obligations of FET in a closed list [3, 4]. These methods narrow the scope of interpretation from three aspects including applicable standards, configuration of interpretation power and text of clauses [4].

However, the unified interpretation model is also subject to institutional and practical constraints. The differences in interests between contracting states will increase the coordination cost of reaching a unified interpretation, and too uniform rules are difficult to adapt to different national legal systems, economic conditions and public policy requirements. Therefore, unified interpretation can provide a relatively clear criterion for the application of FET. In practice, it is still necessary to coordinate between rule certainty and specific situational adaptability.

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4.2. The impacts and risks of a pluralistic interpretation model

The multiple interpretation model is an important feature in the practice of international investment arbitration. In the face of the problems not clearly stipulated in the treaty, the arbitral tribunal should determine the specific scope of application and gradually form the relevant interpretation standards in the case award. This interpretation method can retain the flexibility of FET application, so that the terms can adapt to different investment environments and regulatory requirements, but it will also be inconsistent due to different arbitral tribunals in fact determination and legal interpretation [2, 6].

Different judgements will increas the difficulty for investors and the host country to prejudge the boundaries of rights and obligations [4]. For the host country, a wider FET interpretation will increase the risk of arbitration in public policy adjustments such as environment and climate. For investors, inconsistent award standards will increase the uncertainty of investment decisions and the cost of dispute resolution. Therefore, multiple interpretations not only have case adaptability, but also bring the problem of rule certainty and consistency of adjudication. Governance should maintain the space of case interpretation, but also need to achieve coordination between different interpretation paths.

4.3. The establishment and improvement of a coordinated interpretation mechanism

The coordinated interpretation mechanism can form a certain consensus on the basic judgment criteria of FET, but it retains different interpretation space [10]. For example, in the context of climate governance, the application of the FET clause may take into account the host country's international obligations in climate governance and assess the legitimacy of relevant regulatory measures in light of its policy objectives, such as emission reduction and energy transition. In terms of relief methods, non-monetary solutions such as clean technology transfer and rectification measures can be explored in accordance with specific circumstances, which complement each other with traditional monetary compensation. This arrangement can not only improve the clarity of FET application standards, but also reduce the conflict between FET interpretation and host country public policy objectives.

In terms of the system, the coordination mechanism can gradually evolve from bilateral practices to regional and multilateral ones. Parties with similar bilateral legal systems and regulatory goals can make more explicit agreements on the scope of application and judgment criteria of FET clauses; as practice accumulates, regional agreements can then coordinate the rules of different countries. The new generation of investment agreements promoted by the EU in recent years has made more specific provisions on FET obligations, by introducing an investment court system to improve the coherence of the dispute settlement process [4]. When regional rules reach a certain consensus, they can be used to coordinate multilateral rules. Thus, the improvement of FET rules can form a coordination model of "basic standards becoming clear and specific applications retaining differences," which enhances the predictability of the rules and also retains the application space in different regulatory contexts.

5. Conclusion

This paper holds that openness and ambiguity are the main grammatical features of the FET clauses, and the specific meaning of this clause varies depending on the treaty context, case facts, and the position of the interpreting party, thus giving rise to different interpretation approaches. The unified interpretation can enhance the clarity of the FET rules and the consistency of their application, but it

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cannot meet the regulatory needs and specific cases of various countries; multiple interpretations retain the flexibility for case-specific application, but they increase the uncertainty in legal application. Therefore, the FET interpretation mechanism can reach a certain degree of consensus on the basic judgment criteria, but it also leaves appropriate interpretation room for specific cases and regulatory scenarios, thereby achieving a balance between rule certainty and case adaptability. However, the language analysis framework adopted is from the field of natural language research. When applied in the field of international investment law, this approach requires further validation through a wider range of legal texts and arbitral practices. This paper mainly analyzes the differences in interpretation from treaty texts and arbitration decisions, and pays less attention to the positions and interaction processes of different countries in the coordination of specific rules. Further studies can explore other investment law provisions that are highly open in nature, such as national security exceptions and necessity. By combining the treaty practices and arbitration decisions of various countries and regions, it can investigate how language factors and institutional factors jointly influence the interpretation and development of international investment rules.

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