Influence of ISDS Clauses upon Host States:
Do They Restrict Host States' Regulatory Power?

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Abstract

本稿の目的は、国際投資法における紛争解決条項が国家の規制権限に与える影響について検討することである。今日の国際投資協定及び二国間投資協定では、外国投資家を保護するために、投資家が直接に投資受入国の条約違反を国際的仲裁機関に訴えることができる条項が盛り込まれている（ISDS 条項）。当該条項に基づく仲裁の事例は増加しており、投資受入国の側からすれば大きなリスクになっており、問題視されている。このことは特に発展途上国において顕著である。

本稿で上述の問題意識から、現行の国際投資協定において国家が環境保護などの目的で規制権限を行使する場合に投資家がどのような形で仲裁を求めているかについて事例を検討した。国際仲裁廷ではこの問題は国際投資協定の解釈・適用を中心に議論されており、投資受入国の規制措置の妥当性については正面から議論していない。しかし近年の事例では新たな傾向も見られており、投資家の保護と国家の規制権限の関係をいかに調整するかという問題が残されている。

Key Words：Regulatory measures, Investor-State Disputes Resolution Clauses, Regulatory Disputes.

I　Introduction

Investor–State Dispute Settlement clauses (hereinafter "ISDS clauses") are legal clauses that are used to settle disputes between investors and states. ISDS clauses are a regular feature in International Investment Agreements (hereinafter "IIAs").[1] The main function of an ISDS clause is the settlement of disputes arising from an investment within the host state.[2] As a result of an ISDS clause, an investor has a right to bring a claim before an international arbitration tribunal when the investor considers that the conduct of the host state is in violation of the bilateral investment treaty, or is such as to cause great damage to the interests of the investor.[3] Most investors' claims concern the protection of minimum standards,[4] fair and equitable treatment, and expropriation.[5] Monetary compensation is one of the most common forms of remedy when the investor's claims are accepted.[6]

The earliest ISDS clauses were seen in the 1960s and 1970s, and the first ISDS clause was agreed within the Bilateral Investment Treaty (hereinafter “BIT”) between Germany and Pakistan in 1959.[7] Before ISDS clauses were incorporated into BITs, disputes concerning foreign investment were submitted either to the International Court of Justice or to *ad hoc* state-to-state arbitration.[8] Traditionally, there were two ways for foreign investors to settle disputes arising out of their investments: through the national courts of the host state,[9] and through the practice of espousal.[10] When an investor could not obtain a just and effective remedy from the national court of the host state, it had to rely on diplomatic protection from its state of nationality,[11] namely an intervention in the dispute by the investor’s home state.[12] When the investor asked for diplomatic protection, the home state espoused the claim against the host state on behalf of its investor. Under customary international law, in order for diplomatic protection to be exercised, it is necessary for the investor to have held the nationality of the home state both at the time the dispute arose and prior to the espousal. It is also necessary that the investor has sought domestic remedies within the host country. It is not compulsory for the home state to exercise diplomatic protection, and this will depend on its diplomatic relationship with the host state.[13] Moreover, the investor cannot expect that the host state will accept the espousal claim of the home state. None of these dispute settlement mechanisms could offer a satisfactory outcome for investors. Therefore, the ISDS clause was established in order to protect investors and to offer them a safe forum for their disputes. The ISDS clause guarantees investors direct access to bring their claim before an international arbitration tribunal. ISDS clauses are now included in many BITs, and they have become an effective recourse for investors during the last two decades. Nowadays, an ISDS clause is a key feature in foreign investors’ investment decisions. They have also been a driving force for host states in attracting foreign direct investment.

Recently, there have been concerns about the function of ISDS clauses, since in many cases they are abused, which has a negative impact upon the host state. The concerns began to emerge with an increase in the number of disputes grounded on the regulatory measures of the host state. The cases concern, for example, measures related to environmental policy in Mexico,[14] the phasing out of nuclear power plants in Germany,[15] privatization policy in Poland,[16] water services policy in Tanzania,[17] monetary policy in Argentina,[18] taxation regulation in Ecuador,[19] and measures in many other areas. ISDS clauses have been a problematic issue for states, mainly because of lack of transparency and costs. As a result of the growth in the number of disputes in which the host state’s sovereign power is challenged, there has been rising concern about the negative impact of ISDS clauses. After the case related to tobacco packaging legislation in Australia,[20] as well as the one related to the Atomic Energy Act in Germany,[21] some states have publicly opposed ISDS clauses. Fears about an ISDS clause have led some states to terminate agreements or to express warnings. For example, Indonesia sent an information letter to the Netherlands in March 2014, which stated that Indonesia was going to terminate the BIT with the Netherlands from July 1, 2015.[22] In October 2012, South Africa withdrew from BITs with Belgium and Luxembourg, Spain, Germany, Switzerland, the Netherlands, and Denmark.[23] In 2014, the Australian Services Union made a strong objection to the inclusion of an ISDS clause in the Korea–Australia Free Trade Agreement.[24]

The present article intends to analyze the impact of ISDS clauses upon the host state's regulatory power. In other words, it aims to answer the question of whether an ISDS clause can restrict the host state's power to put in place regulatory measures for public purposes. In order to answer the question above, the article first observes how international investment law has dealt with the matter, by discussing some typical cases (Chapter II). An examination of the status quo within international investment arbitration makes it clear that international investment arbitrations do not always take into consideration the legitimacy of states' regulatory measures. In Chapter III, we will consider some recent moves by international investment tribunals, and examine how to an equilibrium can be found between states' power to put in place regulatory measures and the protection of investors in the context of an ISDS clause.

II　Regulatory measures by states in international investment law

In this chapter, we shall make some preliminary observations about the relationship between states' power to put in place regulatory measures and the protection of investors, in the context of IIAs and BITs.

The purpose of IIAs is to protect and promote investment within the territory of a host state. IIAs create favorable conditions for foreign investors. Under customary international law, a state has the inherent power to put in place any kind of measure within its territory, including measures for public policy purposes such as public health, safety, and environmental matters. In the context of the protection of foreign investment, it is possible to point to two main issues related to state autonomy. The first concerns the equilibrium between state autonomy and the protection of investors under IIAs and BITs.[25] The second relates to the dispute settlement mechanism. In the next subsection, we will look at the legal basis under which states can put in place regulatory measures, especially in the context of the protection of investments.

II.1.　States' power in relation to regulatory measures under BITs: general observations

In the international investment regime, the equilibrium between the protection of investors and the legislative power of the state has been problematic. The right of states to put in place any regulatory measures is generally accepted under customary international law. This right means that states have the right to adopt rules, to enact laws, and to amend any existing regulations as they deem necessary in any fields within their territories. Aikaterini Titi defines the right to regulate as the "legal right which allows the host state to regulate rules and laws for the withdrawal of the commitments which need to be observed under international investment agreements by the host state without incurring any compensation".[26] According to this, investors cannot expect any compensation when faced by governmental action for the preservation of the public interest. At the same time, the host state needs to ensure, under BITs and IIAs, that its administrative action is conducted in good faith without any discrimination or arbitrariness towards investors.

This does not mean that states are not allowed to take any measures that cause damage to investors. On the contrary, there are some clauses in international investment agreements that protect the right of a state to take regulatory action for public purposes. Such provisions appear in the preamble, or in the provisions for expropriation, or in the clauses relating to the safety of the environment. For example, the preamble to the Australia–China Free Trade Agreement (2015)[27] provides that the two states agree to uphold the right to regulate for public policy purposes and to safeguard public welfare. Another example can be found in Article 4(1) of the Chinese Model BIT (2003).[28] This provides that a signatory state can adopt regulatory measures to expropriate the assets of investors if the state's action is in the public interest. The provisions in Article 1114 of NAFTA[29] and Article 12 of the US Model BIT (2012)[30] specifically recognize the environmental laws of each of the state parties. Article 1114 of NAFTA provides that the adoption of, or maintenance of, or enforcement of, any measures taken because of environmental concerns and domestic health and safety shall not be prevented.[31] Under Article 12(1) and (3) of the US Model BIT 2012, the state parties to the treaty agree to recognize environmental law and policies and to recognize a state party's right to decide on the allocation of resources for enforcement in environmental matters.[32] In the context of trade, states can also rely upon Article XX of the General Agreement on Tariffs and Trade (GATT)[33] and Article XIV of the General Agreement on Trade in Services (GATS) to achieve their regulatory purposes. Under these provisions, states are encouraged to take measures in matters relating to public morals and the protection of human, animal, or plant life or health. These exceptions are also known as non-precluded measures (NPM) or derogation clauses.[34] The obligations under these non-precluded measure provisions should not be construed as derogating from the state's right to legislate for essential security or national security within in its borders.[35] National security could conceivably cover measures relating to the prevention of health epidemics and economic crises.[36]. According to this, it is obvious that states are allowed to take any kind of measure for public purposes such as the security of their citizens. Of course, states are obliged to protect investors and foreign investments under their bilateral or multilateral investment agreements.

Another legal foundation for a state's right to take regulatory measures can be found in the interpretations of investment tribunals. In investment disputes in particular, states' power to take regulatory measures has met with opposition from investors, who have alleged that there have been violations of the right to fair and equitable treatment and the right not to suffer expropriation. It is in this context that tribunals have had to interpret substantive provisions in bilateral or multilateral investment agreements. From a close examination of the cases, it is possible to learn how the issue was dealt with, and to understand the *status quo* of the equilibrium.

In conclusion, it could be said that states are allowed to take regulatory measures even under IIAs. To what extent is the right accepted in the context of investment? The next subsections deal with the question by considering issues related to expropriation and fair and equitable treatment.

II.2. Regulatory measures and expropriation

Expropriation is the act of a state taking foreign assets lying within its territory. In many investment disputes, investors rely on BITs or IIAs and allege that state action amounts to expropriation. Under customary international law, states have a right to expropriate assets, subject to certain conditions. According to the conditions laid down in the case law, in order to make the expropriation legitimate, the act in question must be carried out without discrimination, there must be expedited payment of compensation, and the expropriation must be carried out in accordance with due process of law.[37] This concept is contained in some contemporary treaties such as Article 6(1) of the US Model BIT,[38] Article 1110(1) NAFTA,[39] and Article 13(1) of the Energy Charter Treaty.[40]

There are two kinds of expropriation: direct expropriation and indirect expropriation. Direct expropriation occurs when legal title is taken by the host state,[41] or all the ownership rights in alien property are seized by the host state without compensation.[42] Nowadays, this kind of expropriation is rarely seen.[43] In contrast to direct expropriation, there are many circumstances in which state measures are not directly targeted, on their face, at foreign investment, but their substantive effect is tantamount to expropriation. This is called indirect expropriation. This situation occurs when a state enacts a new law, or amends an existing law, or adopts a measure that might affect the business of the investor. From the viewpoint of the investor, such an act causes interference with the investor's business or deprives it of the potential benefit of its business.

Under customary international law, taking private property is recognized as legitimate, provided its aims are legitimate, it is carried out in a non-discriminatory manner, and there is prompt and adequate compensation. Therefore, in cases where state action is alleged to be expropriation, investment tribunals tend to look at whether the state action in question is carried out in good faith. In the case of *Cia del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica*,[44] the tribunal stated that "No matter how the expropriation is beneficial to the society or for the environmental purposes, the state's obligation to pay compensation remains.[45]

In some cases involving public interest issues, tribunals only consider whether the measure in question could deprive the investor of its interest, without examining the aim of the measure. In their consideration of this issue, tribunals have based their examination on three criteria. These criteria are: (1) whether the investor's rights have been affected, (2) whether the whole business of the investor has been damaged, and (3) whether the value of the investor's business has been significantly diminished.[46]

In the case of *Metalclad Corporation v The United Mexican States*,[47] a US company, Metalclad Corporation, had entered into an agreement to operate a business in the Mexican municipality of Guadalcazar (hereinafter "the Municipality"), located in the Mexican state of San Luis Potosi (hereinafter "SLP"), by purchasing a Mexican company to build a hazardous waste landfill. In order for Metalclad to carry out this business, the government of SLP issued a permit. However, the governor of SLP and the municipality prevented Metalclad from operating the business, because it had no municipal construction permit.[48] After negotiations, Metalclad applied for a permit and continued its operation. Metalclad's permit application was denied and its hazardous waste landfill operation was barred by an injunction.[49] In addition, the governor declared the landfill area to be a protected natural area.[50] Metalclad filed arbitration proceedings against Mexico for a violation of the minimum standard of treatment, and insisted that the measure in question constituted expropriation. The tribunal applied the standards above and held that the ecological preservation decree of the governor had the effect of barring the operation of landfill forever.[51] It held that this action was tantamount to expropriation.[52]

In *Tecnicas Medioambientales Tecmed S.A. v The United Mexican States*,[53] the main issue was whether a regulatory measure of the government deprived the investor of its interest. Tecnicas Medioambientales Tecmed, S.A. (hereinafter "Tecmed") was a Spanish company that was awarded, in an auction for the sale of property and other assets relating to "Cytrar", a controlled landfill of dangerous industrial waste in 1996. In order to run the awarded business, the license to continue the landfill had to be renewed every five years. When Tecmed applied for the renewal of the license, the National Ecology Institute of Mexico (INE) rejected the application.[54] Tecmed filed a claim before the investment arbitration tribunal, and argued that the refusal of the application by the Mexican authorities constituted an expropriation without any compensation.[55] In response to the claimant, Mexico stated that the denial of the application for a license was necessary in a highly regulated sector linked to public interest.[56] It further argued that it was competent to make a decision to renew an expired license and that its conduct did not constitute expropriation.[57] The tribunal held that a state measure constituted a *de facto* expropriation if such measure affected the economic value, enjoyment, or disposition of the assets or rights of the investor.[58] The tribunal further stated that it would not review the background reasons or motives for the measure adopted by the host state in order to determine whether it was legal or legitimate.[59]

The tribunal's line of reasoning changed in the case of *Methanex Corporation v. United States of America*.[60] In this case, unlike the cases above, the tribunal examined the grounds of the measure taken by the host state. In this case, the claimant, Methanex Corporation, was incorporated under the laws of Alberta, Canada. It produced and transported methanol, the main element of MTBE (methyl tertiary-butyl ether).[61] The claimant filed a claim against the United States, which in 1999 had made an order to ban the use of MTBE in California. The claimant insisted that the measure in question amounted to substantive expropriation. The tribunal stated that, in the view of general international law, the regulation had been adopted for a public purpose, without discrimination, and according to the due process of law. Therefore, the action in question could not be expropriation.[62] The tribunal held that California's measure to ban MTBE had a public policy purpose.[63]

In the case of *CMS Gas Transmission Company v. The Republic of Argentina*,[64] the tribunal held that the state action in question did not constitute expropriation because the investor did not lose control of the business. The dispute arose out of economic reform regulations in Argentina. The claimant, CMS Gas Transmission Company (hereinafter "CMS") invested almost USD 175 million in Gas Transportation Company of Transportadora de Gas del Norte (hereinafter "TGN"). It held 30 percent of the shares of TGN. The Argentinian government granted TGN a right to pay its tariffs calculated in US Dollars. In 1991, in the process of economic reform, the Argentinian government issued the Currency Convertibility Law and Decree.[65] Under the new laws, the tariffs would be calculated in dollars and would be adjusted in accordance with the United States Producer Price Rate Index (US PPI).[66] Because of the serious economic crisis, the Argentinian government called for a meeting with the gas companies.[67] During the meeting, the companies agreed to a temporary suspension of the tariff adjustment, with an agreement that the resulting loss in income would be gradually recovered,[68] but the government did not implement the agreement, and TGN's application for an adjustment to the tariff was refused. In 2002, an Emergency Law was promulgated and the 1991 Convertibility Law was abolished, with the adjustment of tariffs according to the US PPI being terminated. The redenomination in peso at a rate of one peso to one dollar, and the devaluation of the peso, had a negative effect on the business of TGN.[69] In the arbitration, the claim was filed by CMS. It claimed that the regulations adopted by the Argentinian government were equivalent to expropriation, and constituted a violation of the fair and equitable treatment clause in the BIT. In response to the claim, the Argentinian government contended that none of the measures amounted to expropriation, because none of them interfered with the claimant's business, including its full control of TGN. The tribunal ruled that Argentina had not breached Article IV(1) of the Treaty, which contained restrictions on expropriation,[70] since the claimant did not lose its control over TGN.

In another award, the tribunal held that measures adopted for the payment of taxes and levies did not constitute expropriation. In this case, *Telenor Mobile Communications A.S. v. The Republic of Hungary*,[71] the claimant claimed that there had been a violation of the fair and equitable treatment clause in the BIT, together with expropriation. The claimant, Telenor Mobile Communications A.S., alleged that a series of measures related to telecommunication service providers in Hungary affected the concession agreement between the parties. The tribunal held that the measures taken by the Hungarian government did not constitute expropriation. It stated that "the exercise of legislative power of state organs that imposed the investors the payment of taxes or other levies does not constitute the expropriation and such payment for taxes and levies by the investor is for securing the concession. To make the allegation of expropriation, the conduct of the state must have a major adverse impact on the economic value of the investment."[72]

From the case analysis above, it is possible to say the following things. First, in order to determine whether a state's regulatory measure is for the purposes of public policy, the investment tribunal tends to examine whether there has been substantive damage to the investment, damage which could include difficulties in running a business in the host state. Second, not all regulatory measures constitute expropriation, which means that there is some room for states to take certain regulatory measures that are compatible with standards for the protection of investments. In the next subsection, we will examine cases related to fair and equitable treatment.

II.3. Regulatory measures and fair and equitable treatment

Fair and equitable treatment is one of the issues that arises in investment disputes between investors and states. The concept of fair and equitable treatment first appeared in Article 11(2)(a)(i) of the 1948 Havana Charter for an International Trade Organization,[73] which never entered into force.[74] After the First World War, this concept became standard in US Treaties on Friendship, Commerce and Navigation (FCN).[75] Nowadays, the standard has been incorporated in IIAs to protect foreign investments. The standard of fair and equitable treatment can be seen in IIAs such as Article 10(1) of the 1994 Energy Charter Treaty,[76] Article 3(1) of the

Chinese Model BIT (2003),[77] and Article 1105(1) of NAFTA.[78] In Article 1105 of NAFTA, this standard stands as a supporting factor to construct the minimum standard of treatment.[79]

In its general meaning, fair and equitable treatment implies that the host state is obliged to treat investors without discrimination, without arbitrariness, and without ambiguity. In the case of *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*,[80] the tribunal stated that the investors expected host state's action to be free from ambiguity in their relation to host state, and that the investors expected the host state to act without arbitrariness in issuing permits[81]. In this case, the issue before the tribunal was whether the refusal by the Mexican government to renew a license was legitimate. In the words of the tribunal, pressure on the investor by the authorities to find another similar site from which to operate its business is not consistent with the requirement for fair and equitable treatment and is objectionable in the view of international law.[82]

The text concerning fair and equitable treatment is very vague. Therefore, in determining whether the host state has violated the standard, tribunals have had to interpret the term by considering certain factors. Denial of justice, legitimate expectation, due process, non-discrimination, and lack of transparency are the typical factors relied upon by tribunals in their decisions. In the case analysis below, we shall focus on the main issues: denial of justice, legitimate expectation, and non-discrimination.

II.3.1. Denial of justice

The concept of denial of justice concerns litigation in the domestic court of the host state, and it is generally understood as resulting from incorrectness or injustice in a judgment given in the host state's domestic court or from a lack of impartiality towards a foreign investor. It can occur in a variety of ways, especially in the refusal of access to the courts and an agreement instead to settle by way of arbitration, in governmental interference and in the failure to execute judgment.[83] The misinterpretation or misapplication of local laws, or the lack of impartiality or bias of lower officials, cannot be recognized as a denial of justice.[84] In the case of *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States*,[85] the tribunal stated that claims can be brought to an international arbitration tribunal on the grounds of the denial of justice if the court concerned has refused to entertain the foreign investors' case.[86] In the case of *Jan de Nul N.V. and Dredging International N.V. v. Egypt*,[87] the tribunal dismissed claims of the denial of justice because the local remedies had not been exhausted. In this case, at the time the request for arbitration was filed the claimant's appeal against the decision of the Ismailia Court was still pending before the local appellate court in Egypt.[88] The tribunal had not received any information about the status of the appeal decision, and there was no evidence that the appellate proceedings were unjust. The tribunal stated that the requirements to obtain the local remedies did not constitute a sufficient reason to bring the claim of a denial of justice and the claim was therefore dismissed.[89]

II.3.2. Legitimate expectation

Legitimate expectation concerns the stability of host state's legal framework. An investor expects, at the time of making the decision to invest in the host state's territory, that the investor's business will be protected in the long term.[90] Claims for violation of legitimate expectation arise when the host state changes the legal framework and this causes a loss of potential benefit to the investor. In the case of *Occidental Exploration and Production Co. v. The Republic of Ecuador*,[91] the Occidental Exploration and Production Company (hereinafter "OEP") provided oil services for Petroecuador, an Ecuadorian state-owned corporation. OEP had a claim for reimbursement for valued added tax (hereinafter "VAT") paid on local acquisitions. In 1999, according to a modified participation contract which was signed between OEP and Petroecuador, OEP became the oil exporter and was entitled to payment according to a participation formula, described as Factor X.[92] OEP applied to the Servicio de Rentas Internas (hereinafter "SRI"), the Ecuadorian tax authority, for a refund of VAT for the period from July 1999 to September 2000. The application was made under a Granting Resolution.[93] In 2001, the SRI issued Resolution 664 and refused all applications for VAT tax credits and reimbursements. In 2002, the SRI abolished the Granting Resolution on the grounds that the credits and reimbursements previously granted were based on a mistaken application of the tax law. In addition, the SRI wanted OEP to return previously paid amounts.[94] OEP, in 2002, filed an arbitration claim against Ecuador, alleging that the Resolution adopted by the SRI was in violation of the obligation to give fair and equitable treatment and to apply the same treatment to OEP as to Ecuadorian nationals, and that its actions amounted to expropriation. The tribunal stated that the stability of the legal and business environment is essential for maintaining fair and equitable treatment as stated under the Preamble of the Treaty.[95] The tax law was inconsistent with the new laws. The tribunal held that Ecuador had breached its treaty obligations.[96]

II.3.3. Non-discrimination

The principle of non-discrimination is one of the elements in determining whether treatment has not been fair and equitable, in breach of a BIT or IIA.[97] Fair and equitable treatment is violated if the conduct of the host country is found to be unfair and discriminatory. Discrimination constitutes another reason for bringing a claim, as part of the concept of fair and equitable treatment. The principle of non-discrimination is one of the basic ways in which foreign investors are protected from the arbitrary action of the host state.[98] Any measures that involve discrimination are contrary to the standard of fair and equitable treatment.[99] Typical discrimination arises out of different treatments based on nationality. If the acts or omissions of a government are unreasonable or without a clear purpose, the behavior also constitutes discrimination.

In the case of *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*,[100] discrimination based on nationality was one of the main issues.

The claimant, CME Media Enterprise B.V., incorporated in the Netherlands, was gwas granted a license for television broadcasting in the Czech Republic. CME owned 99 percent of the shares in Ceska Nezavisla Televizni Spolecnost (hereinafter "CNTS"). The Central European Development Corporation (hereinafter "CEDC"), CET 21 Spol. s r. o (hereinafter CET 21), and the Czech Savings Bank, were the co-founders of CNTS, and they entered into a joint venture for broadcasting services.[101] In 1993, the Media Council of the Czech Republic granted a license to CET 21 to operate a nationwide private television station in the Czech Republic.[102] In 1996 the Media Law was modified. According to the modified law, the license holders could apply for the waiver of license conditions related to non-programming.[103] Most license holders, including CET 21, applied for the waiver. In 1996, the Media Council, CET 21, CNTS and the shareholders of CNTS agreed to change the Memorandum of Association of CNTS and substitute CET 21.[104] In 1999, CET 21 terminated the Service Agreement with CNTS on the grounds that a day-log had not been delivered by CNTS to CET 21.[105] Moreover, CET 21 replaced CNTS as the operator of broadcasting services by other service providers. As a result, CNTS's business was commercially destroyed.[106] CME alleged that CNTS's business was destroyed because of the acts and omissions of the Media Council. CME brought a claim against the Czech Republic for breach of the BIT, and alleged that there had been discrimination. The tribunal stated that "the actions of the Media Council done from 1996 to 1999 were unreasonable and caused the deprivation the investor's exclusive use of the License. It colluded the Claimant's business partner, Czech national, to deprive the Claimant's investment.[107]" It held that the Media Council had discriminated against the foreign investor.[108]

The case analysis in this chapter illustrates the possibility of limiting states' autonomy, especially with respect to international investment agreements, by relying upon ISDS clauses. State regulatory measures might be regarded as violations of BITs if they amount to expropriation or the violation of the obligation of fair and equitable treatment. Does this mean that the state cannot do anything to protect the public interest? In order to answer this question, it is necessary to have a closer look at recent cases that particularly considered this issue.

III Regulatory disputes and ISDS clauses

III.1. Recent cases

As illustrated in the previous chapter, international investment tribunals have dealt with cases concerning measures taken by host states for the public interest, in areas such as health, the environment, and so on. However, it is to be noted that the tribunals were just required to assess whether the measure in question amounted to expropriation and/or violated the requirement of fair and equitable treatment in a BIT. This means that the tribunals did not deal with the issue of the legitimacy of the regulatory measure. In this chapter, we shall touch upon two cases in which the legitimacy of a state's regulatory measures was in dispute. In the first case, the tribunal considered a submission by a third party in order to understand whether the state measure was legitimately in the public interest. The second case alerted host states to the threat of ISDS clauses.

III.1.1. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*

In the case of *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*,[109] a dispute arose out of an investment in a water supply service. Biwater International Limited (hereinafter "Biwater"), a company incorporated under the laws of England and Wales, and HP Gauff Ingenieure GmbH and Co. KG-JBG (hereinafter "Gauff"), a German corporation, acted jointly for the purpose of investment. In 2002, Biwater and Gauff (hereinafter "BGT") incorporated City Water Services Limited (hereinafter "City Water") as an operating company under the laws of Tanzania. In 2003, they entered into a ten-year lease contract with a Tanzanian public corporation, Dar es Salaam Water and Sewage Authority (hereinafter "DAWASA"), to operate water production, transmission and distribution, to operate and maintain the sewage system and to collect revenue from customers. The parties to the lease contract, City Water and DAWASA, were considered to be representatives of the Tanzanian government.[110] In May 2005, the Minister of Water and Livestock Development announced at a televised press conference that the government had terminated the lease contract with the DAWASA. He issued a notice to terminate the contract, stating that City Water had breached its obligations under the lease contract. In addition, the Tanzanian government seized the City Water company's assets and took control of its management.[111] BGT brought a claim against the United Republic of Tanzania, alleging that the action of the Tanzanian government amounted to expropriation, the violation of its obligation to grant fair and equitable treatment, and discriminatory measures, which were a violation of its obligations under the UK–Tanzania BIT. BGT also claimed losses of USD 25 million.[112]

The respondent state contended that BGT owned its shares via City Water, and that BGT had to prove that it had assets with economic value, or property. The respondent state further contended that the claimant had failed to remit the tariff to the lessor, to pay the rental fee, to file the obligatory reports and to carry out City Water's contractual obligations.[113] The Tanzanian government insisted, as a result, that it had not violated any obligations under the BIT. In response to the claims of the parties, the tribunal held that the measures by the Tanzanian government constituted a breach of certain obligations under the BIT: the obligation to give fair and equitable treatment, the non-discrimination obligation, and the obligation to provide full protection for securities.[114] The tribunal reached this conclusion in the light of the following facts: the public announcement by the Minister of the termination of the contract, the withdrawal of the value added tax certificate, the seizure of City Water's assets, and the immediate installation of new managers for DAWASA. In its decision, the tribunal affirmed that the action of the Tanzanian government was an unreasonable disruption of the contract, inconsistent with its obligations under the BIT, and constituted expropriation.[115]

The insufficiency of the water supply in Tanzania had been a big issue since 1991. To settle the problem, the Tanzanian government entered into the ten-year lease contract with the claimant. After the transfer of all the water distribution and water sewerage system obligations from DAWASA to City Water, City Water failed to fulfill its contractual obligations: the submission of reports to DAWASA, and the operation of its business for water distribution and the continuation of the project. During the proceedings before the tribunal, the tribunal permitted non-parties (civil society groups) to participate as *amici curiae*, and received a submission of documents from them. The civil society groups submitted observations in relation to public health, the environment, and development in Tanzania. In their written submission, the civil society groups stated that the claimant had failed to examine the water service operation thoroughly, and that it had caused a decline in the water supply in Dar es Salaam. The submission also stated that the Tanzanian government had terminated the contract to prevent a further deterioration of the water services. In sum, the *amicus curiae* submission emphasized that the state's measure was legitimate. The tribunal stated that the submission of the society groups was useful,[116] but its reasoning in deciding the case depended upon the original legal framework under the standards of international law, and did not touch upon the background of the case.

III.1.2. *Philip Morris Asia Limited v. The Commonwealth of Australia*

In the case of *Philip Morris Asia Limited v. The Commonwealth of Australia*[117] Philip Morris Asia Ltd, which incorporated in accordance with the laws of Hong Kong, (hereinafter "PMA") brought a claim for arbitration under the UNCITRAL Rules against the Australian government because it had promulgated a new law and regulations on tobacco packaging. PMA ran its business under the name of Philip Morris in the Asia Pacific region. It produced cigarette brands and operated in Asia. In this case, PMA alleged that the enactment and enforcement of the Tobacco Plain Packaging Act 2011, together with the Tobacco Plain Packaging Regulation 2011, interfered with its intellectual property rights. The law required all packaging of tobacco products to have a uniform olive-green color and certain health warnings on its surface, with the purpose of increasing the effectiveness of the health warnings.

The claimant argued that the measure in question transformed PMA's branded products and caused substantial damage to the value of PMA's investment in Australia. The claimant relied upon the Hong Kong–Australia BIT and asked the tribunal to declare that there had been a violation of the BIT by Australia. In particular, the claimant requested the tribunal:

(1) to order the Australian government to withdraw the enacted law;

(2) to render an order to compensate PMA in the amount of USD 4,160 million together with interest;

(3) to award the claimant all fees and expense incurred in the arbitration; and

(4) to order other relief as the tribunal deemed fit.[118]

The respondent government replied that the tribunal did not have jurisdiction to determine the case, and stated that the tribunal should declare the case inadmissible and render an award for the fees and expenses incurred. The tribunal, after hearing the allegations and defenses of the parties, decided the question of admissibility on the basis of the three issues below:

(1) whether the claimant's business had been admitted under Australian law;

(2) whether the dispute fell outside the temporal scope as enshrined in the BIT; and

(3) whether the claimant's invocation of the BIT amounted to an abuse of rights.

As to the first issue, the tribunal held that the claimant had failed to show the necessary proof that the claimant had a control over Philip Morris's investment in Australia. The respondent government had contended that the claimant could not be entitled to protection from the BIT because PMA's investment had not been admitted in accordance with the laws of Australia. The claimant argued that its investment had been admitted, and that the Australian government had issued a "no-objection" letter for the investment. The letter stated, according to the claimant, that the Australian government had no objection to PMA's investment. The tribunal assumed that the claimant's investment had been validly admitted since the Australian government's no-objection letter could be presumed to be legally binding.[119]

On the second issue, the respondent argued that the claimant's submission to arbitration was outside the temporal scope of the BIT. According to the respondent, the dispute arose at the time of the announcement of a plan to enact the plain packaging law, in April 2010. At that time, no investment by the claimant had been made. Therefore, the claim did not satisfy the requirement for jurisdiction *ratione temporis*. The tribunal decided that, since the date of the enactment of the Tobacco Plain Packaging Act was November 21, 2011 and the restructuring of the claimant's investment was completed on September 3, 2010, the requirement for jurisdiction *ratione temporis* was met within the BIT.[120]

For the third and last issue, the respondent claimed that the claimant's invocation of the BIT constituted an abuse of rights. The respondent pointed out that there had been a restructuring of the claimant's investment, and that the claimant had restructured its business because it was conscious that there might be a dispute in the future. In sum, the respondent insisted that the claimant should have known the risk of the investment. The claimant did not refute the claim, and just mentioned that the investor had restructured its corporations in order to bring the arbitration claim. The tribunal's findings were that there was abuse because an investor who was not originally under the protection of the treaty restructured its investment in order to fall within the protection of the treaty in the knowledge that a dispute was foreseeable. On September 2, 2009, Philip Morris International (hereinafter PMI) incorporated in accordance with the laws of the united States, PMI had received legal advice from its corporate solicitor about the effect upon Philip Morris's property of the plain packaging legislation in Australia.[121] On April 29, 2010, the Australian government announced its plans in relation to tobacco control.[122] On August 26, 2010, PMI approved a restructuring proposal for the PMI Group, and transferred its Australian subsidiaries to the claimant.[123] In January 2011, the claimant's lawyer notified the Treasurer under the Foreign Acquisitions and Takeovers Act, about the transfer of the Australia subsidiaries to PMA.[124] After that, the claimant received the "no-objection" letter and acquired its shareholding in the Australia companies. On November 21, 2011, the Tobacco Plain Packaging Act was enacted and, on the same date, the claimant sent its notice of arbitration.[125]

After giving the reasons above, the tribunal stated that the claimant had not disclosed tax or other business reasons for the restructuring of the corporation in its evidence in the case. It considered that, at the time of the restructuring of the claimant's business, the possibility of dispute was foreseeable for the Philip Morris group. Therefore, beginning an investor–state arbitration was an abuse of right, because the investor had intentionally changed the structure of its corporation in order to obtain the protection of the BIT, when a dispute was foreseeable. The tribunal concluded that the arbitration was an abuse of right, that the claim was inadmissible, and that the dispute was not within its jurisdiction.[126]

III.2. Side effects of ISDS arbitrations: some issues

The issue of monetary compensation, together with the tribunal's expenses, has also been a concern in investor–state arbitration. Since an ISDS clause deals with investor–state disputes, it is the state that has to pay monetary compensation to an investor if the state's measure is declared to be in violation of an IIA or BIT. In addition, the tribunal's costs, arbitrators' fees, lawyers' fees, and other costs of disputes can cause states to face financial issues. The average cost of a dispute, including compensation, is USD 8 million. In some cases, the costs can rise to more than USD 30 million.[127] For example, in the case of *Metalclad v. Mexico*, Mexico had 45 days to pay USD 17 million including 6 per cent interest.[128] Other charges to be added are the arbitrators' expenses (such as travel expenses), the administration fees of the institution hired by the parties, and the costs incurred for the experts and witnesses.[129] In some cases, even though the respondent state wins the case, the tribunal determines that the costs are to be shared by the parties. In the recent case of *Philip Morris v. Australia*, there was criticism because it was held that Australia should share the costs with the claimant even though Australia defended the case with in-house government lawyers.[130] The Australian government has not disclosed the exact amount.[131] In comparison with developed states, developing states are more vulnerable to disputes, and especially to having to pay huge compensation in the case of violations under BITs. Therefore, developing states will face more risk from the financial aspect of investor–state disputes.

IV. Conclusion

For the safety of foreign investors in the territory of another state, an ISDS clause in an IIA and/or BIT is a reasonable way to protect their investments. An ISDS clause certainly enables investors to bring claims before international investment arbitration tribunals by themselves, without asking for help from their home states. However, the growing number of disputes under ISDS clauses is having a negative impact on host states. When host states enact a new law that may affect foreign investment, investors frequently take advantage of the ISDS clause, alleging a violation under a BIT and/or IIA. This may constitute an obstacle for host states wishing to take measures necessary for public purposes. This negative aspect of ISDS clauses can be worse for developing states, since such states face greater financial pressure in investment disputes. Therefore the threat of the use of an ISDS clause can cause host states to be reluctant to take regulatory measures.

The cases brought before international investment arbitration tribunals do not give an answer about how an ISDS clause can be dealt with in regulatory matters. In some recent cases discussed in chapter III, we can see that a small step has been taken to recognize states' regulatory measures under certain conditions. In order to create a good balance between host states' rights and investors' rights, there should be included the additional provisions that can make the tribunal take into consideration public policy or the background to the regulatory measure in question. An *amicus curiae* should have more chance to participate in the tribunal proceedings in order to inform the tribunal of information that is necessary for a legal determination of the matter.

End Notes

1 United Nations Conference on Trade and Development, *Investor-State Dispute Settlement*, UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2014, p. 13.
2 Two examples are the following:
(1) Article 9(2) of the Chinese Model BIT provides that "If the dispute cannot be settled through negotiations within six months from the date it has been raised by either party to the dispute, it shall be submitted by the choice of the investor: (a) to the competent court of the Contracting Party that is a party to the dispute; (b) to the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965."
(2) Article 9(2) of the German Model Treaty (2008) provides that "If a dispute cannot thus be settled, it shall upon the request of either Contracting State be submitted to an arbitral tribunal."
3 Scott Miller & Gregory N. Hicks, *Investor–State Dispute Settlement, A Reality Check*, Centre For Strategic & International Studies, 2015, p. 1.
4 The minimum standard of treatment is expressly required by Article 1105 of NAFTA. This provision states concisely that "Each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."
5 Expropriation is the worst interference process in the investment regime. When the government of a host state decides to take all the property and assets of an investor who is running a long-term business, without offering any compensation, by issuing a regulation or by enacting legislation using its prerogative authority, the process of expropriation occurs.
6 Miller & Hicks, *supra* note 3, p.1.
7 *Ibid*., p. 5; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, second edition, Oxford University Press, 2012, p. 6.
8 *Ibid*., p. 7.
9 UNCTAD, *supra* note 1, p. 23.
10 *Ibid*.; Christopher F. Dugan, Don Wallace, Jr., Noah D. Rubins & Borzu Sabahi, *Investor–State Arbitration*, Oxford University Press, 2008, p. 27.
11 UNCTAD, *supra* note 1, p. 23.
12 Dugan et al., *supra* note 10, p. 27.
13 Dolzer and Schreuer, *supra* note 7, p. 232.
14 *Metalclad Corporation v. The United Mexican States*, Award, ICSID Case No. ARB(Af)/97/1 (August 30, 2000).
15 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, Award, ICSID Case No. ARB/09/6 (March 11, 2011).
16 *Eureko B.V. v. Republic of Poland*, Partial Award, Ad Hoc UNCITRAL Arbitration (August 19, 2005).
17 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22 (July 24, 2008).
18 *CMS Gas Transmission Company v. The Republic of Argentina*, Award, ICSID Case No. ARB/01/8 (May 12, 2005).
19 *Occidental Exploration and Production Company v. The Republic of Ecuador*, Final Award, London Court of Arbitration Administered Case No. UN 3467 (July 1, 2004).
20 *Philip Morris Asia Limited v The Commonwealth of Australia*, Award on Jurisdiction and Admissibility, PCA Case No 2012-12, UNCITRAL (December 17, 2015).
21 *Vattenfall AB v. Germany*, *supra* note 15.
22 "Indonesia signals intention to terminate more than 60 bilateral investment treaties," at http://www.nortonrosefulbright.com/knowledge/publications/116101/indonesia-signals-intention-to-terminate-more-than-60-bilateral-investment-treaties. (Last accessed on September 16, 2018).
23 *Ibid.*
24 "Protecting Australian democracy means there should be no ISDS provisions in trade agreements," at http://www.asu.asn.au/news/categories/international/140707-no-isds-in-trade-agreements (Last accessed on September 16, 2018).
25 Tarcisio Gazzini, "States and Foreign Investment; A Law of the Treaties Perspective," in Shaheeza Lalani & Rodrigo Polanco Lazo (eds.), *The Role of the State in Investor–State Arbitration*, Brill NV, Leiden, 2015, p. 26.

26 Aikaterini Titi, *The Right to Regulate in International Investment Law*, Nomos Verlagsgesellschaft, Baden-Baden, 2014, p. 33.
27 Australia–China Free Trade Agreement (2015). In the preamble, this reads: "Upholding the rights of their governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare;".
28 Article 4(1) of the Chinese Model BIT (2003) provides that "Neither Contracting Party shall expropriate, nationalize or take other similar measures against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met: (a) for the public interest (b) under domestic legal procedure (c) without discrimination (d) against compensation."
29 North American Free Trade Agreement concluded between Canada, Mexico and the United States of America.
30 Treaty between the Government of the United States of America and the Government of (Country) concerning the encouragement and reciprocal protection of investment.
31 Article 1114 of NAFTA provides that (1) "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. (2) The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures."
32 US Model BIT Article 12(1) provides that "The Parties recognize that their respective environmental laws and policies, and multilateral environmental agreements to which they are both party, play an important role in protecting the environment." Article 12(3) provides that "The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities."
33 Article XX of GATTS and Article XIV of GATS provide that "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals, (b) necessary to protect the human, animal or plant life or health…".
34 Caroline Henckels, *Proportionality and Deference in Investor–State Arbitration; Balancing Investment Protection and Regulatory Autonomy*, Cambridge University Press, 2015, p. 81.
35 David Collins, *An Introduction to International Investment Law*, Cambridge University Press, 2017, p. 284.
36 *Ibid*., p. 286.
37 United Nations Conference on Trade and Development, *Taking of Property*, UNCTAD Series, United Nations, 2000, pp. 12-13.
38 Article 6(1) of the US Model BIT (2012) provides that: "Neither Party may expropriation or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 5 (Minimum Standards of Treatment) (1) through (3)."
39 Article 1110(1) of NAFTA states: "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.
40 Article 13(1) of the Energy Charter Treaty provides that: "Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation except where such expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation."
41 Dolzer and Schreuer, *supra* note 7, p. 101.
42 Dugan et al., *supra* note 10, p. 450.
43 Dolzer and Schreuer, *supra* note 7, p. 101.
44 *Compania del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, Award, ICSID Case No. ARB/96/1 (February 17, 2000).
45 *Ibid*., para. 72.
46 Dugan et al., *supra* note 10, p. 455.
47 *Metalclad v. Mexico*, *supra* note 14.
48 *Ibid*., paras. 28-40.
49 *Ibid*., paras. 42-50.
50 *Ibid*., para. 59.
51 *Ibid.,* paras. 109-111.
52 *Ibid*.
53 *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, Award, ICSID Case NO. ARB(AF)/00/2 (May 29, 2003).
54 *Ibid*., paras. 35-39.
55 *Ibid.,* paras. 40-41.
56 *Ibid*., para. 46-47.

57 *Ibid*.
58 *Ibid*., paras. 115-116.
59 *Ibid.,* para. 120.
60 *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits of the Case, Ad Hoc Tribunal (UNCITRAL) (August 3, 2005).
61 *Ibid*., Part I, Preface, para 1, p.1.
62 *Ibid*, Part IV, Chapter D, para. 7, p. 4.
63 *Ibid*., Part IV, Chapter D, para. 15, p. 7.
64 *CMS v. Argentina*, supra note 18.
65 *Ibid*., paras. 53-61.
66 *Ibid*.
67 *Ibid.*
68 *Ibid.*
69 *Ibid.* paras. 62-66.
70 *Ibid*., para. 264.
71 *Telenor Mobile Communications A.S. v. The Republic of Hungary*, Award, ICSID Case No. ARB/04/15 (September 13, 2006).
72 *Ibid*., para. 64.
73 Article 11(2)(a)(i) provided that "The Organization may, in such collaboration with other inter-governmental organizations as may be appropriate, make recommendations for and promote bilateral or multilateral agreement on measures designed to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another."
74 Dolzer and Schreuer, *supra* note 7, p.131; Organization for Economic Co-Operation and Development, *OECD Working Papers on International Investment*, *Number 2004/03, Fair and Equitable Treatment Standard in International Investment Law*, pp. 3-4.
75 OECD, *supra* note 73, pp. 3-4.
76 Article 10(1) of Energy Charter Treaty provides that: "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make investments in its area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment."
77 Article 3(1) of the Chinese Model BIT provides that "Investments of investors of each Contracting Party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party."
78 Article 1105(1) of NAFTA provides that "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."
79 This minimum standard of treatment includes, as one of the protective standards for investors generated under customary international law, that states are obliged to treat foreign investors fairly and equitably. This article should be read together with the Interpretation of the NAFTA Free Trade Commission, which provides that:
"B. Minimum Standard of Treatment in Accordance with International Law.
1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."
80 *Tecmed v. Mexico*, *supra* note 53.
81 *Ibid*., para. 154.
82 *Ibid*., para. 163.
83 Dugan et al., *supra* note 10, p. 527.
84 United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012, p. 80.
85 *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States*, Award, ICSID Case No. ARB(AF)/97/2 (November 1, 1999).
86 *Ibid*., para. 102.
87 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, Award, ICSID Case No. ARB/04/13 (November 6, 2008).
88 *Ibid*., paras. 255-261, 276.
89 *Ibid*.
90 August Reinisch, *Standards of Investment Protection*, Oxford University Press, 2008, p.124; Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, Oxford University Press, 2008, p. 234.
91 *Occidental Exploration v. Ecuador*, *supra* note 19.
92 *Ibid*., paras. 28-32.

93 *Ibid*.
94 *Ibid.*
95 *Ibid*., paras. 183-191.
96 *Ibid*., para. 196.
97 *Parkerings-Compagniet A.S. v. Republic of Egypt*, Award, ICSID Arbitration Case No. ARB/05/8 (September 11, 2007), para. 280.
98 Dugan et al., *supra* note 10, p. 397.
99 *CMS v. Argentina*, *supra* note 18, para. 290.
100 *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration (Partial Award) (September 13, 2001).
101 *Ibid*., paras. 1-7.
102 *Ibid*., para. 10.
103 *Ibid.*, paras. 15-19.
104 *Ibid*.
105 *Ibid.*
106 *Ibid*.
107 *Ibid.,* paras. 3-25, 612.
108 *Ibid.*
109 *Biwater v. Tanzania*, *supra* note 17.
110 *Ibid*., paras. 7-10.
111 *Ibid*., Procedural Order No. 1 (March 31, 2006), paras. 11-14.
112 *Ibid*., Procedural Order No. 1 (March 31, 2006), paras. 1-14; Award, para. 354.
113 *Ibid*., Award, para. 424.
114 *Ibid*., paras. 500-519, 814.
115 *Ibid*.
116 *Ibid*., para. 392.
117 *Philip Morris Asia v. Australia, supra* note 20.
118 *Ibid*., para. 89.
119 *Ibid*., paras. 521-523.
120 *Ibid*., para. 533.
121 *Ibid.*, para. 556.
122 *Ibid*., para. 557.
123 *Ibid*., para. 560.
124 *Ibid.*, para. 563.
125 *Ibid*., paras. 563-565.
126 *Ibid*., paras. 566-569.
127 David Gaukrodger, Kathryn Gordon, *Investor–State Dispute Settlement; A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, 2012, p.19.
128 *Metalclad v. Mexico*, *supra* note 14, para. 131.
129 United Nations Conference on Trade and Development, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, UNCTAD Series on International Investment Policies for Development, 2010, p. 17.
130 Jarrod Hepburn, "Final award is released in Philip Morris v. Australia case, but crucial costs information is redacted from public view," at https://www.iareporter.com/articles/final-award-is-released-in-philip-morris-v-australia-case-but-crucial-costs-information-is-redacted-from-public-view/ (Last accessed on September 16, 2018); See also Peter Martin, "Australia faces $50m legal bill in cigarette plain packaging fight with Philip Morris," The Sydney Morning Herald, July 28, 2015, at https://www.smh.com.au/politics/federal/australia-faces-50m-legal-bill-in-cigarette-plain-packaging-fight-with-philip-morris-20150728-gim4xo.html (Last accessed on September 16, 2018).
131 *Philip Morris Asia v. Australia, supra* note 20.

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