

THE STANDARD OF REVIEW AND THE ROLES OF ICSID ARBITRAL TRIBUNALS IN INVESTOR-STATE DISPUTE SETTLEMENT

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ABSTRACT

The International Centre for Settlement of Investment Dispute (ICSID) is one of the important dispute settle mechanisms in the world, which often deals with the exercise of public authority by the host States. Similar to any international institution, the legitimacy and the cooperation of its participants are critical to ICSID's operations. Some friction comes from the factor that the public law characteristics of ICSID investment arbitrations do not comport well with some of the procedures originating from the arbitrations' private law traditions, such as the standard of review adopted by investment arbitration tribunals when reviewing state's exercise of public power. The standard of review is important for ICSID arbitration, since the investors have been increasingly seeking recourse in the context of ICSID arbitration against the public policies of the host states. The degree of rigidity a tribunal adopts when reviewing these cases directly affects the ability of the host states to implement their public policies and to determine whether these types of policies could be adopted in similar situations in the future. In addition, the standard of review the arbitrator adopts will determine the role of ICSID arbitrators vis-à-vis host states' governments with regard to these public policies.

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The notion “standard of review” represents the degree of intensity or of thoroughness of review during the judicial process and addresses the limitations of judicial power. In the context of international law, the standard of review concerns the degree of deference that an international adjudicator should grant to national decision makers. The concept can allocate decision-making power, help utilize the limited resources effectively, and maintain legitimacy in adjudicating policy choices and conflicting values by determining the proper roles of the adjudicator. Nowadays, under the call for abandoning BITs among some advanced countries, it is essential to emphasize the recognition of the appropriate roles of the arbitrators and the proper functions of the BITs by shaping the power of the standard of review. This article reviews the recent development of the standard of review in ICSID arbitrations and argues that the concept should be further developed by the arbitral tribunals.

KEYWORDS: *International Centre for Settlement of Investment Dispute, ICSID, the standard of review, bilateral investment treaty, BIT, non-precluded measures.*