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Substance and Methodology in Standards of Review: Towards a Moderate Approach in Investment Arbitration

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1-Introduction

Adjudicating of the disputes in an international arbitration includes a range of legal and factual observations and reviews. Tribunals initiate with deciding on their scope of review on jurisdictional basics and then on specific standards evaluate cause of action as the basis of the dispute. In investment arbitration, the first and foremost element of this cause of action that triggers the claimant to bring its claim in an international tribunal is a regulatory, executive or judicial action by a state, hosting property of a foreign investor, which claimed to be in "breach of its international obligation". The inquiry into what is meant by "breach of international obligation" seems, on its face, a fairly simple question: identifying the elements that are in conflict with international obligations taken by a state in accordance with international law.¹ It is not a simple question in respect of investment arbitration, even though there are some protection-aimed "standards of conduct" in most bilateral investment treaties (BITs). A standard of conduct, in its broad wording, states how host state should conduct in administration of its sovereign in a manner that consistent with protection of investors' proprietary rights, while for the aim of a just trial the arbitrator needs a set of standards to apply when it reviews the host state's conduct to

determine whether to decide on state's responsibility or grant injunctive relief. In this line a particular "standard of review" signifies, when it should be applied, the manner and process on which the arbitrator, having a look on different legal and factual considerations and based on a coherent and systemized approach, examines the state's, as respondent, actions to find if the relevant set of facts constituting state's measures is in breach of state's obligation with regards to protection of foreign investors. On this basis Substance and methodology in standards of review of state's conduct are essentially different from the issue of attribution and damage as the basic elements for establishment of responsibility. It calls for elements and structure by which the arbitral tribunals examine and evaluate measures performed or non-performance of obligations by the host state.

It is, however, disheartening to find that something so critical and fundamental to the rule of law is easily confused or worse, completely unknown in international investment arbitration. An effective set of standards of review is the hallmark of a healthy and properly functioning judicial system. The benchmark by which the arbitrator analyzes, and ultimately determines an outcome, is crucial to the proper administration of justice. Therefore standards of review must be clearly defined and systematically classified to be effective on a harmonized and coherent manner. Unsurprisingly the methodology of the tribunals in doing this examination may differ based on the characterization of the nature of dispute by the tribunal. There are three suggested themes of conceptualization of breach of international law, beside the autonomous and independent system of investment law, constitute a broad and unlimited scope of discretion for review of host state's actions by arbitral tribunal.

The aim of this article is to review, based on methodological considerations, the standards of review, applicable in international investment arbitration, of measures taken by host state in administration of it sovereign. I discuss the issue in two analytical parts; in first part the article comes through the three current approaches as regularly applied for evaluation of breach of international obligations, it means constitutional regulatory review, contractual framework

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analysis and the tort model methodology and consider why they are even useful in proceeding but inconsistent with the aims and scope of investment arbitration. The second part is devoted to suggest a standardized methodological framework to provide investment arbitrators with a wide range of standards to be applied in relevant disputes on a principle-based discretionary, rather than arbitrary, methodology to ensure rational, predictable and balanced decision.

**Part one-conceptualization and failure of current methodologies**

**Section A-current methodologies in examination of breach of investment obligations**

In most of obligation-based arbitrations, like any litigation, the arbitrator begins proceeding on substantive aspects of the disputes with an essential question; was there any obligation on respondent and, if so, has such obligation been breached. To decide on this issue, it is indispensable for the arbitrator to determine and characterize the cause of action; based thereupon it takes a specific and comprehensible methodology to evaluate if, from both factual and legal standpoint, the obligation has been breached. The elements of these available methodologies vary in substance based on the distinguished legal and practical considerations that demand in each case a coherent system of step by step examination. International investment arbitration, as a new but flourishing phenomenon lacks such methodology to furnish arbitrator with an established system of rules and principles. So there is a wide range of discretion for arbitrator to build up a unique system of methodology for each case by reference to other methodologies as applied in national or international litigations. What methodology is utilized by the arbitrator is not a mere matter of method or mentality of arbitrator in resolving a substantive challenge of the dispute rather what method the reasoning as a means for objective assessment of the matter has come to resemble, could lead the tribunal to a specific and distinguished conclusion.

**I- Constitutional Regulatory Review**
The first kind of a constitutional regulatory review is proportionality review. As a general principle of administrative law, the principle of proportionality requires each decision and measure to be based on a fair assessment and balancing of interests, as well as on a reasonable choice of means.\(^3\) The general test of proportionality is subdivided in three different tests or requirements. To meet the requirement of proportionality, a measure or decision must constitute an effective means to realize the aims pursued by the measure or decision (Test of Effectiveness), there would be no alternative and less intrusive measures available (Test of Necessity) and at last, there should be a reasonable and fair balance struck between the aims pursued and the interests harmed (Test of Proportionality in Strict Sense).\(^4\) As many measures of the host state in investment arbitration could be a regulatory or discretionary measure it seems to be a sound option of methodology. The tribunal shall at the outset take care of the nature and extent of the powers granted to the relevant authorities and to see that whether the regulation claimed to impair interests of the investor in host state is conceivably advancing a legitimate interest. The tribunal weighs, in light of the facts, the benefits of the act against the costs incurred by investor due to infringement of the right, in order to decide which side shall prevail. In doing so the tribunal applies a means/end analysis, focusing both on the ends the government is seeking to advance, and the means by which those ends are advanced. In addressing state measures, the tribunal then asks whether the state has taken the least restrictive measure, rather than the "only means" reasonably available that meets its permissible objective under BIT.

The second type of this methodology is "margin of appreciation" standards of review.\(^5\) If the bounds of a normative or executive power are widely drawn, or if decision-making requires difficult political choices or complex assessments of social and economic factors to be made, it is usually considered that marginal review is appropriate.\(^6\) Under this methodology the tribunal

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\(^4\) Arancibia, Jaime, *Judicial Review of Commercial Regulation*, Oxford University Press (2011) at.197


scrutinizes decisions of national authorities either in an executive or legislative framework with the perception that it is first and foremost for the national authorities, because of their closer proximity to the social realities of the community, to make the initial assessment of the reality of the pressing social need. Hence in examination of the decision-making the tribunal bestows national authorities a certain degree of deference and respect their discretion in performing their sovereign duties. In this evaluation the tribunal doesn’t make a second independent evaluation of what shall be performed in respect of international obligation in certain circumstances but it evaluates the decision made to see if such decision has been made in a rational process and on a reasonable basis having regard the realistic environment of the society in the time. In this regard the tribunal understanding the special and unique nature of international norms as open-ended standards gives a minimum level of flexibility in achievement of specific conclusions by application of optional means in free zone of operation. Although some authors criticize the importation of this methodology for its inherent shortcomings and its systemic underpinnings, this methodology preserves many advantages accompanied with strong policy reasons in investment arbitration in which the application of investment protection standards is inherently or inevitably uncertain and there is a strong demand for a complex balancing of a host State’s right to regulate in the interest of its citizenry and the foreign investor’s right to be free from undue interference with its rights by the State.

The third potential methodology in standard of review derives from a general principle of both national and international law, good faith. Admittedly, good faith as the "reinstatement of the principle pacta sunt servanda" is an extremely lenient standard as it allows states themselves to balance conflicting rights and interests and defers to the state’s own resolution of

7 Forowicz, Magdalena, The Reception of International Law in the European Court of Human Rights, Oxford University Press (2010) at.373
9 Vasani, Sarah, Bowing to the Queen: Rejecting the Margin of Appreciation Doctrine in International Investment Arbitration, Chapter 6, Investment Treaty Arbitration and International Law, Volume 3(2010)
10 Article 13 of 1949 Draft Declaration on the Rights and Duties of States
11 ILC commentary on Draft articles on Responsibility of States for Internationally Wrongful Acts
that balancing, as long as the state’s determination was made in good faith and was reasonable. A good faith standard still requires weighing and balancing irreconcilable interests, but shifts that balancing process to the national government. The review at the international level then focuses not on the balancing process itself, but whether the state in good faith sought to balance those rights and interests.\textsuperscript{12} However it may be rejected as a primary methodology in examination of states' measure and its role may be incidental to supplement the gap in Margin of appreciation methodology. In fact even the state's discretion in ascertaining its necessities of sovereign operation may be deferred it is also the duty of the state, under a good faith review by an international tribunal, that its discretion be a reasonable and justified backed with a rationale to make a balance between the right of individuals and society at whole.

\textbf{II- contractual framework analysis}

An obligation on a host state derived from an international treaty may be understood as a matter of contractual obligation for the aim of reviewing of the measures pleaded to be in breach of that obligation. So, in a unified system of international commercial arbitration, the same method for consideration of breach of contractual obligation may be resorted for concluding if the host state has performed or breached its obligation or not.\textsuperscript{13} In this methodology the tribunal shall a focus on the text of the obligation as incorporated in the relevant treaty and decide if the measure pleaded is in breach of that obligation or not. There is no burden on claimant, but rather it is the obligation of the host state to prove the performance of its obligations or establish with sufficient facts and reasoning that non-performance is excused due to a force majeure environment or by an implied or explicit exemption under the BIT\textsuperscript{14} or due to general principle

\begin{itemize}
\item \textsuperscript{13} UNIDROIT principles of international commercial contracts 2004 (UCP).Art.7.1.1 & The Principles Of European Contract Law 2002 (PEC).Art.8:101
\item \textsuperscript{14} Brown, Chester & Miles, Kate, \textit{Evolution in Investment Treaty Law and Arbitration}, Cambridge University Press (2011) at.554
\end{itemize}
of the law. However the contractual character of the host state by its own doesn’t necessitate, as the case in most BITs, the occurrence of a specific result unless the text of the BIT requires so. So when the claimant plead that the host state doesn’t perform its obligation in respect of the fair and equitable standards, it remains for host state to show that it did its best effort to provide claimant with such a situation, and taken in good faith some specific conducts that subjectively and realistically conceived to be necessary or at least reasonable.

III-Tort model methodology

Tort law is usually understood as a system of personal responsibility and corrective justice. To build this system there are two groups of rules and standards. Breach of rules in most cases, at least from a legal point, enunciates no complexity, but in matter of standard and what constitute a fault there are some degree of obscurity. It is generally pronounced that it is a matter of care as a degree of prudence and caution required of an individual to other properties and rights. Whether the standard has been breached is determined by the tier of facts and is usually phrased in terms of the reasonable person in relevant circumstances. In this regard tort law, and specifically administrative or constitutional tort law, approaches the investment law in deploying the same methodology since the requirements of the standard, built to protect an important and

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15 UCP 7.4.1 & PEC.Art.9:501
essential right, in both are closely dependent on circumstances\textsuperscript{21} whereas they don’t structure nor in legal nature present any distinctive features implying that breach has to involve distinct or specific constitutive elements.\textsuperscript{22}

So what constitute a breach of standard in vast refers to the tribunal considering the prevailing circumstances, nature and form of the relation between the parties and the practice of similar actors in identical state of affairs to deduct the elements of a conforming or anomalous measure. Standard of care requires the individual to take reasonable care to avoid acts or omissions which can be reasonably foreseen that would be likely to injure other persons and standard of protection of investment requires the host state to act transparently in a systemizes and coherent procedure and with respect to due process in all of its judicial and administrative measures. It is not a specific range of actions determined by the law or the BIT but a requirement that develops through the time either by frequently application of the norms by jurisprudence or promotion of the norms by continuous interactions between international actors in a globalized context.

**Section B-the failure of current methodologies in investment arbitration**

Even though any of aforementioned methodologies would be preferable in a limited perspective but investment arbitration as a new and challenging phenomena of international law demands for a consistently applied methodology that both recognizes the competing public interests at stake and works as a moderate means of right-directing in international law. In this regard the function, structure and characteristics of the investment arbitration as an objective-based means of global welfare shall be distinguished and its role in resolving international challenges, instead of gunboat, shall be kept in mind. It belongs to international relations in which the aim is voluntary cooperation of all states in a stable, sound and developing global market of foreign investment. It doesn’t aim to design a line between basic rights of international

\textsuperscript{21} Art 4:102 of European principle of tort law

\textsuperscript{22} Dominice, Christian, *The international responsibility of states for breach of multilateral obligation*, EJIL, 353-363(1999) at.359
actors rather an optional and bona fide adjustment of, rather than restriction on, sovereignty against any arbitrary action of the host state for the benefit of foreign investment. So the restrictive application of a standard of review as proportionality methodology insists is not consistent with the aim and purpose of the state involved in BITs.

For the state any standard that presuppose that its measures in circulation of its administration of the social affairs and in response to national and international conditions must represents the only way for the state to safeguard an essential interest against grave and imminent peril is of no sense. It is true that the states shall balance their benefits of the regulation against the burden on the individual, but there is no reason that justifies that they have only one, somewhat undetermined, choice. In other side margin of appreciation even tries to make a reasonable care of public interest and to respect the host state's discretion in administration of its sovereignty, but it lacks any methodological balancing approach for the aim of investment protection. If the remedy is recognized as the right-directing means on which the contribution and allocation of the resources is dependent, there would be no doubt that strict application of this theory works against the aim of BITs in promotion of foreign investment. Even good faith may works as last resort for examination of state's discretion there is no sign how this broad concept of discretion may be applied for examination of discretion. On this basis now is far from the time that good faith could be applied as an independent methodology for review of the measures taken by the host state.

Contractual methodology is also fails to be an appropriate methodology for standard of review. A short reading of BITs shows the standards envisaged in them are not so specific and distinguished to help more than giving a brief conception of justice as having been brought in common intention of the parties. This broad text of the standards, aimed to cover a broader range of mere clear-cut disposessions or destructions of property, causes a challenging debate on

24 Schill, Stephan W, International Investment Law and Comparative Public Law, Oxford University Press (2010) at.695
requirement of the justice in specific social, political or economic circumstances and
determination of the measures having prevalence over any other potential action by the host
state. Even a distinction between obligation of result and obligation of conduct couldn’t remedy
this failure as even those standard of protection doesn’t stipulate a certain range of conduct that
are required to satisfy the obligation taken by host state. In addition application of rigid and
merely legal concept of force majeure and state of necessity as understood in contract law is not
consistent with the requirement of investment law, particularly since the balancing approach has
no seat in contracts.

For the same last reason tort law methodology is inappropriate in investment arbitration either
in corrective perception or in regulating understanding of tort law. Damage is the focus on tort
and methodology is applied in line with a wider search that who is more appropriate to bear the
damage.\textsuperscript{25} It is more irreconcilable with investment law where in new area of law the tort is
conceived as a means to distribute justice rather than fine the man who has done something
against law. Investment law standards are explained and justified by a much more complex
mixture of policies and norms in comparison with corrective or distributive justice rationales in
tort liability. Regulation comes under discretionary competence of the state decision makers and
tort methodology, even useful, is not a sound one for examination of the discretion, particularly
with the expansion of French doctrine of \textit{égalité devant les charges publiques} that establishes a
right to compensation without any need to show that the State's conduct was wrongful but rather
demonstrating that compensation is required to avoid the imposition of a special and onerous
burden on the claimant.\textsuperscript{26}

\textsuperscript{25} Harlow, Carol, \textit{Understanding Tort Law}, Sweet & Maxwell (2005) at.14
\textsuperscript{26} Harlow, carol, \textit{Francovich and the Problem of the Disobedient State}, 2 E.L.J. (1996) at199
Part two-The suggested autonomous methodology in investment arbitration, a moderate approach

As analyzed even both commercial and public international arbitration interrelate with investment arbitration the application of the same methodologies in investment law is not a true approach. It is in large amount because they are as "false friends" operated on fundamentally different set of standards. Specific characters of the investment law and arbitration having into account methodology as a both law-intensive and fact-intensive instrument demand for a unique, independent and consistent set of standards for examination of the host states' measures that trigger the investors to initiate arbitration in an international tribunal. This is an essential need for justice in investment global society, since when the methods are similar and applied in a consistent manner the substantive results inevitably tend to converge.

Section A-Essential features of investment law standards

I-Policy-based nature of the standards

Standards in investment relations are aimed to regulate the communication between host state and investors and distribute risks and advantages in a balanced but uncertain manner. So for adoption a certain methodology and evaluation of the host state action and its consistency with relevant obligation it is of importance to recognize the nature and essence of this relation. It is a conflation of self-constraint distributive and reciprocal character of contracts in one side and

public interest-tended sovereign-regulator essence of international obligations in other side. Protection is provided by host state with the aim and not in consideration of influencing foreign investment but for an essential issue of promotion of public interests through economic development. It is a policy behind the investment relation that determined through relevant BITs and leaves no space for tribunal to build, like national court\textsuperscript{30}, a policy-making approach and produce socially desirable results. So in application of any methodology this policy-basis of the standards shall be kept in mind even it may require a shift in the mindset and even identity of arbitrators themselves.

\textbf{II-Innate uncertainty, standards v. rules}

Uncertainty is an inherent feature of legal standards that bring about the administration of the law and legal process to vary at the hands of individual tribunals. In other side legal rules usually have an explicit manner of treatment, "if so, then that". There are different reasons to choose between rules and standards.\textsuperscript{31} A standard is less precise about what facts lead to what legal results and thereby, preserving flexibility, provides the law-applier with more discretion both in determining the relevant facts and in applying the law to those facts.\textsuperscript{32} It is interesting that even rules give states greater predictability about the legal requirements to which they will be subject\textsuperscript{33}, the basic norms of international investment law take the form of standards rather than rules.\textsuperscript{34} This fascinating capture of investment law is largely because it thought that the law-applier is the host state with a wide range of options to apply in administration of its sovereign,

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\textsuperscript{31} Schauer, Frederick, \textit{Playing by The Rules: A Philosophical Examination of Rule-based Decision-making In Law And In Life}, Clarendon Press (1993) at.126
\textsuperscript{34} Fuller, Lon L., \textit{The Forms and Limits of Adjudication}, 92 HARV. L. Rev. 353, 393-405 (1978)
\end{flushright}
in variable or unpredictable situation,\textsuperscript{35} to ensure protection of foreign investment in line with public interest. In reality, however, it is the international tribunal that shall determine, as factual law-applier, what the prevailing conditions have required in certain circumstances, and it is uncertain, to a considerable extent, what the law is until the particular cases arise and the tribunal decides.\textsuperscript{36} As a result, when a state agrees to a standard that will be interpreted and applied by tribunals, it gives up control over the content of the law and opens up the possibility of being subjected to legal consequences it did not anticipate.\textsuperscript{37}

\textbf{Section B- an autonomous system of standards of review}

\textbf{I-Respectful for public interest in line with investor expectation}

Traditionally investment arbitral tribunals apply standards of review derived from the private law origins or public international arbitration. However these disputes set two primary values in a direct conflict that are in a different framework in comparison with commercial or public international context.\textsuperscript{38} In one side the ability of the state to pursue it's most basic objectives of providing domestic order, peace, and stability shall be respected and in the other side rights of investors guaranteed by the applicable treaty shall be observed. Standards envisaged in investment treaties do not draw a sharp line between permissible and impermissible conduct and it may cause state as risk-averse or risk-preferring actors to be chilled from engaging in policy desirable activities or be encouraged to abuse their discretion to the detriment of investors. In such a situation it is the duty of the arbitrator to apply an appropriate and flexible methodology and making a balance between contradictory values. It shall give the government a level of discretion in pursuing its essential policies, but limit the discretion when it is ostensibly in

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\textsuperscript{38} Mills, supra, at 476.
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conflict with legitimate expectation of the investor. This is not a judgment to be reached in the abstract and will always depend on the specific circumstances of the particular case.\textsuperscript{39}

the tribunal shall apply the methodology in the manner that standard shall not be under the risk of under- and over-inclusiveness or on a “catch all” basis capable of being invoked in respect of virtually any adverse treatment of an investment. Many investment cases have a direct impact on public schemes and programmes adopted in the public interest by legislatures. The duty of the sovereign to take necessary actions in the event of unexpected threats and crises shall be deferred; obligating them to bear the full costs of harms to investors caused by a response to a crisis prevents their ability to respond to a crisis in the preferred way. Greatest regulatory flexibility in order to react to national or global challenges by means of appropriate state measures is a real and reasonable demand by national states. So the public law nature of state liability deserves more attention in investment arbitration and the methodology shall be restrictively applied to find, merely, if the rationale by the state regulation in consideration of the costs incurred by investor is unreasonable, grossly disproportionate or in some other fashion goes too far.\textsuperscript{40} For this a sound approach is to pronounce a "Clearly Erroneous standard of review" rather than application a de novo review of the state's measures. Under this methodology the measures of the host state are analyzed with a respect to finding of the relevant national authorities for the interpretation and individualization of the investment protection standards. So merely where such finding has been clearly made erroneous in under-discussion condition, the tribunal may declare it as a false decision.\textsuperscript{41}


\textsuperscript{40} See, ICSID, Case No. ARB/02/1, LG&E v Argentine Republic, Award (2006), para. 239; ICSID, Case No. ARB/03/9, Continental Casualty Company/Argentine Republic, Award (2008), para. 213.

\textsuperscript{41} Aguilar, William & Reisman, Michael, \textit{The Reasons Requirement in International Investment Arbitration: Critical Case Studies Guillermo}, BRILL (2008) at.16
This limitation on state sovereignty discretion is because it is unnecessary and indeed improper, to give undue deference to self-judging character of escape clauses simply because of sovereign status of the applier. Adopting such an extreme deferential approach would constitute an abdication of the tribunal’s essential task to scrutinize objectively all the surrounding facts and circumstances and determine whether the State’s regulatory actions are in conformity with or violation of its international legal obligations.\textsuperscript{42} However the standards may be intensified or be lowered considering the circumstances and the rights at stake; more important the investors' rights and higher its value less the sovereign of the host state will be appreciated.\textsuperscript{43}

\textbf{II-The role of compensation in methodology}

From the test of proportionality in decision-making, usually necessity of compensation, when the rights of individuals affected, is manifestly derived. Some author know compensation contradictory to freedom of action and right to regulate by host state under standards of review since it comes at a dissuasive cost of “regulatory chill.”\textsuperscript{44} In fact when the host state remains under the obligation to pay compensation whilst its regulation promotes the environment, is nondiscriminatory, and is in compliance with the minimum standards under customary international law, the standards of review would be of no sense. If the aim of international investment law is a preventive one, this could be true, but if the aim is a supportive and distributive justice, there would be no contradiction between these two. This doesn’t mean that each and all damage incurred by the investor shall be compensated but rather means that when

\begin{itemize}
\item \textsuperscript{43} del Moral, Ignacio de la Rasilla, \textit{The Increasingly Marginal Appreciation of the Margin of Appreciation Doctrine}, German Journal, Vol. 07 No. 06-611(2006) at.625
\item \textsuperscript{44} Markert, Lars, \textit{The Crucial Question of Future investment Treaties: Balancing Investors’ Rights and Regulatory Interests of Host States}, European Yearbook of International Economic Law, International investment Law and EU Law,145-171(2011) at. 152
\end{itemize}
global understanding of justice demands for such compensation, the mere true subjective aim of the host state shall not be a barrier to such compensation.

However the investment law has its own concept of justice that has been developed through globalization and conclusion of more than 2000 BITs. So making a balance between sovereign discretion and investor's financial rights calls for a moving away from the current “all-or-nothing” model for compensation and replacing it with a solution in accordance with the principle of proportionality. This requires taking into consideration the importance of the host state’s regulatory interest and investor's protected rights. The more the host state’s regulation promotes the public interest and the less it impairs the investor or its investment, the lower the compensation payable would be. Conversely, the lesser the effect on the public interest and the greater the impairment of the investor’s interests, the higher the compensation payable.

This is an essential part of the methodology applied since having remedied investor in case of any damage by the state's measures is a separate but an integral part of the host state obligation, its performance in the manner and under the norms and standards shall be reviewed by the tribunal. If the host state is benefited directly and taking financial positive interest from the performed measures, the compensation shall be demonstrative of the benefit acquired, but if the action taken have been performed to prevent a greater risk or damage, failing to take necessary measures would have resulted in greater risk, the host state shall be exempted or at last the compensation shall be of a merely recovery nature not more.

**Conclusion**

Due to the flood of cases against developing countries by foreign investors, and consequent great amount of compensation, many of these countries started to question, criticize and review their investment protection policy. Interestingly, this tendency is not limited to a few Latin

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American states rediscovering the "Calvo Doctrine", it can also be detected in various capital exporting states and has influenced former “pioneers of investment protection”. Intrusive approach by investment arbitration tribunal accompanied with huge financial risk of arbitral awards enunciate in a short perception "Honey is sweet, but the bee stings". The reactions are to some extent the result of lack of any systemized, consistent and coherent methodology in standards of review of state actions by which simultaneously a balance is struck between states’ regulatory interests and investors’ legitimate expectations in having their investment protected from any undermining regulatory or executive action by host state.

There is neither specific rule under ICSID convention nor in BITs to limit or determine the methodology applied by arbitral tribunal addressing the measures of the host state in administration of its sovereign. As discussed in this article this gap leaves the arbitrators with wide latitude in adoption between methodological choices and constructing a framework for standards of review corresponding essential features of investment-law relations. In this regard the obligation to compensate is not a result but an integral part of the host state in executing its obligations concerning protection of foreign investors. To achieve this perception of the investment law there is largely a need for continues and institutionalized arbitrators' engagement in a comprehensive dialogue in an institutionalized context.