BRILL

THE ITALIAN REVIEW OF INTERNATIONAL AND COMPARATIVE LAW 2 (2022) 370–389

The Italian Review of International and Comparative Law

brill.com/iric

A Role for Precedent in the Determination of the Standard of Review Applicable by Investment Arbitral Tribunals? A Case Study of ECT-based Energy Disputes Against Spain

Niccolò Zugliani
Postdoctoral Research Fellow, University of Milan, Milan, Italy
niccolo.zugliani@unimi.it

Abstract

The present article enquires whether arbitral "precedent" plays any part in the identification of the applicable standard of review by arbitral tribunals. It does so by surveying a selected sample of arbitral awards that displayed a remarkable degree of uniformity and that might have encouraged arbitral tribunals to resort to previous case law when applying a specific standard of review. This sample consists of regulatory disputes initiated against Spain for alleged violations of the fair and equitable standard provided by Article 10(1) of the Energy Charter Treaty. The article initially gives an account of the relevance of the standard of review doctrine and of the role of precedent in international investment arbitration. It then moves to investigate the possibility that previous case law has served as the legal basis for determining the appropriate standard of review in the regulatory disputes against Spain. Based on the analysis of the Spanish cases, the article finally elaborates on the role of precedent in the identification of the applicable standard of review in general terms.

Keywords

precedent – standard of review – fair and equitable treatment – deference – regulatory disputes

1 Introduction

Despite the relevance that the standard of review doctrine has enjoyed in recent years as a tool for correctly balancing the protection of foreign direct investment ("FDI") and the host State's exercise of regulatory autonomy, its application in investment arbitration is still an unsettled issue. The absence of a specific legal basis in international investment agreements ("IIAs") has not stopped part of the legal scholarship from inferring the need for a deferential approach from the standard-type nature of FDI protection, though a certain disagreement must be registered among these scholars as to the specific standard of review that should be applied. So far, the question has not been solved by investment arbitral tribunals, that have not subjected the application of a specific standard to a thorough process of justification, paving the way for criticism and giving ground to voices in support of alternative balancing tools.

While the existence of an uncertain legal basis for the determination of the standard of review is usually overcome by domestic courts in common law jurisdictions through the guidance of judicial precedents, whether investment arbitral tribunals resort to similar tools remains an underexplored issue. Reference to previous case law is not unknown to investment arbitral tribunals, the reasoning of which is often informed by past awards when determining the content of IIAs' substantive obligations. However, to what extent this entails a "precedential" value is not uniformly accepted in legal scholarship.[1]

Though arbitral case law usually appears as a scattered set of cases decided by *ad hoc* tribunals and based on different IIAs, there are instances in which numerous proceedings show remarkable similarities that might encourage arbitral tribunals to resort to previous case law, even when identifying the applicable standard of review. A notable example in this regard can be found in the regulatory disputes initiated against Spain and based, among other things, on alleged violations of the fair and equitable ("FET") standard provided by Article 10(1) of the Energy Charter Treaty ("ECT").[2] In addition to stemming

1 For an example of the different views on the issue, see, e.g., REINISCH, "The Role of Precedent in ICSID Arbitration", in KLAUSEGGER et al. (eds.), *Austrian Yearbook on International Arbitration*, Wien, 2008, p. 508; BUNGENBERG and TITI, "Precedents in International Investmnet Law", in BUNGENBERG et al. (eds.), *International Investment Law*, München, Oxford, Baden-Baden, 2015, p. 1509. The debate will be described in greater detail below: see *infra* Section 3.

2 The provision reads, in the relevant part: "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 [...]". The Energy Charter

from a common legal basis, these cases originated from the same factual circumstances, namely the progressive reduction, starting from year 2010, of the incentive regime for renewable energy producers enacted in 2007 until its complete elimination between 2013 and 2014.[3] As such, they required a balancing exercise between conflicting interests that did not change throughout different cases, namely the economic interest of the investor and the economic sustainability of the energy framework of the State, theoretically entailing a similar degree of deference towards the State's determinations.[4] In other words, they provided a similar subject matter for an evaluation (the standard of review one) highly dependent on it.[5]

The present contribution will test whether investment arbitral tribunals resort to previous case law in the identification of the applicable standard of review and if the role of arbitral "precedent" in the standard of review analysis reflects or differs from the one usually given in treaty interpretation by arbitral tribunals. After describing the main tenets of the standard of review analysis and the role of previous case law in treaty interpretation by arbitral tribunals, it will focus on the awards rendered in the highly homogeneous sample of regulatory disputes against Spain to test whether they offer any indication to this end. What will emerge from the study of this privileged sample will allow for further considerations potentially relevant from a more general point of view.

Treaty, 17 December 1994, entered into force 16 April 1998, Art. 10(1). Over a total sample of 48 proceedings initiated against Spain on the basis of Art.10(1) of the ECT so far, 24 have been decided, while the remaining ones are still pending or have been discontinued. Among the decided cases, 22 were drafted in English and constitute the sample of the current analysis. Source: UNCTAD, *Investment Dispute Settlement Navigator*, Investment Policy Hub, available at: <http://investmentpolicyhub.unctad.org/IIA>.

3 For a brief overview of the evolution of the legal framework, see NOILHAC, "Renewable Energy Investment Cases against Spain and the Quest for Regulatory Consistency", Questions of International Law, 2020, pp. 21–39, available at: <http://www.qil-qdi.org/renewable-energy-investment-cases-against-spain-and-the-quest-for-regulatory-consistency/>.

4 Although proceedings initiated later in time may deal with different specific governmental measures, they consistently build up on the totality of State reforms, covering the measures addressed by prior tribunals. The chosen sample, consisting of 22 cases initiated between 2011 and 2017 and decided between 2016 and 2021, seems then to withstand the criticism of an analysis of contextual – as opposed to subsequent – proceedings. While most of these proceedings run in parallel and might have prevented the thorough analysis of awards rendered only few months earlier, tribunals still resorted to such awards to buttress their reasoning, making it possible to analyse and discuss its relevance. The brief time elapsed between the selected cases, if anything, can be indicative of the initial stage of uncertainty that, under the *jurisprudence constante* model that will be explained below, inevitably occurs in the absence of a long-standing case law on a specific provision.

5 AUBURN, MOFFETT and SHARLAND, *Judicial Review: Principles and Procedures*, Oxford, 2013, p. 388.

2 The Standard of Review in International Investment Arbitration

The emergence of regulatory disputes before investment arbitral tribunals has exposed the inadequacy of the conceptual paradigm that describes investment arbitration as a form of international commercial arbitration,[6] while stressing the need to give due recognition to the State's right to regulate in the public interest.[7] Accordingly, commentators have increasingly abandoned the commercial paradigm and have, in some cases, framed investment arbitration as a form of international judicial review, raising the question of the appropriate level of deference that tribunals should apply when adjudicating the host State's exercise of its regulatory powers.[8]

In municipal contexts, judicial review indicates any form of assessment of the legal validity of governmental action, usually carried out by administrative and constitutional courts.[9] It consists in the exercise of supervisory – rather than appellate – jurisdiction, entrusting the reviewing body with determining the lawfulness of a decision and not with dwelling on the facts of a dispute and its merits.[10] Judicial review constitutes a fundamental part of the system of checks and balances of governmental action, as it ensures the separation of

6 Among those that construe commercial and investment arbitration as identical, see BROWER, BROWER and SHARPE, "The Coming Crisis in the Global Adjudication System", Arbitration International, 2003, p. 415 ff. For a more nuanced approach, see BJORKLUND, "Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working", Hastings Law Journal, 2007–2008, p. 241 ff., p. 251.

7 See, among others, VAN HARTEN, "The Public-Private Distinction in the International Arbitration of Individual Claims against the State", The International and Comparative Law Quarterly, 2007, p. 371 ff., p. 376; VAN HARTEN and LOUGHLIN, "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, 2006, p. 121 ff., pp. 144–145; ORTINO, "The Investment Treaty System as Judicial Review", American Review of International Arbitration, 2012, p. 437 ff., p. 443; CREMA, "Investor Rights and Well-Being: Remarks on the Interpretation of Investment Treaties in Light of Other Rights", in TREVES, SEATZU and TREVISANUT (eds.), *Foreign Investment, International Law and Common Concerns*, London, New York, 2013, p. 50.

8 Among the most relevant voices in support of the applicability of the doctrine in investment arbitration, see HENCKELS, *Proportionality and Deference in Investor-State Arbitration*, Cambridge, 2015; ORTINO, *cit. supra* note 7; SCHILL, "Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review", Journal of International Dispute Settlement, 2012, p. 577 ff. For a voice in support of the margin of appreciation as the relevant standard of review, see BURKE-WHITE and VON STADEN, "The Need for Public Law Standards of Review in Investor-State Arbitrations", in SCHILL (eds.), *International Investment Law and Comparative Public Law*, Oxford, New York, 2010, p. 689 ff.

9 See WOOLF et al., *De Smith's Judicial Review*, 7th ed., London, 2013, p. 9 ff.

10 See AUBURN, MOFFETT and SHARLAND, *cit. supra* note 5, p. 3.

powers through the leeway that a judge grants to the legislator or the regulator.[11] In the international realm, courts and tribunals that are similarly called to balance the State's regulatory power with its international obligations are described as performing international judicial review.[12]

In judicial review, the legal mechanism used to guarantee the separation of powers is the *standard of review*, which defines the intrusiveness of the court's scrutiny into the legislator's or regulator's decision-making process or, from a different perspective, the degree of deference that the reviewing body gives to the actions or decisions under review.[13] In international law, deference has been defined as a "limitation in a court's or tribunal's level of scrutiny concerning decisions taken or determinations made by a [...S]tate institution because the adjudicator respects the reasons for a [S]tate's decision or conduct even if its own assessment was different".[14] Ideally, the relevant standard of review spans from *de novo* review, in which the adjudicator substitutes its decisions to those of the primary decision-maker (no deference), to total reliance on the latter's determinations (full deference, or no review).[15]

In the absence of an explicit legal basis offered by international treaties, deference towards States' regulatory measures is generally derived from the inherent powers of international courts and tribunals when confronted with provisions that entail a degree of legal uncertainty.[16] In these cases, international courts and tribunals have long accepted limitations to their review of

11 BOHANES and LOCKHART, "Standard of Review in WTO Law", in BETHLEHEM et al. (eds.), *The Oxford Handbook of International Trade Law*, Oxford, 2012, p. 378–379.

12 See, among the many, HENCKELS, "Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration", Journal of International Dispute Settlement, 2013, p. 197 ff., p. 199. For a detailed analysis of the inconsistencies of investment arbitral case law, see DIEL-GLIGOR, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration*, Leiden, 2017, pp. 103–332.

13 DAVIS, "A Basic Guide to Standards of Judicial Review", South Dakota Law Review, 1988, p. 469 ff., p. 469; EHLERMANN and LOCKHART, "Standard of Review in WTO Law", Journal of International Economic Law, 2004, p. 491 ff., p. 493.

14 SCHILL, *cit. supra* note 8, p. 582. Among the many, see also VAN HARTEN, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration*, Oxford, 2013, p. 24, defining deference as the tribunal's choice "to adopt a less intensive approach to reviewing a decision due to the complexity of the decision or the relative expertise of the decision-maker".

15 See, among the many, DAVIS, *cit. supra* note 13, p. 471; ORTINO, *cit. supra* note 7, p. 458.

16 SHANY, "Toward a General Margin of Appreciation Doctrine in International Law?", European Journal of International Law, 2005, p. 907 ff., pp. 911, 913. One notable exception is usually identified with Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 12 April 1979, entered into force 1 January 2008, Art.17(6).

the discretionary powers exercised by States and have granted some degree of deference to primary decision-makers.[17]

This notwithstanding, the issue of whether and how to apply deferential standards of review is by no means a settled one. Some courts have developed specific theoretical tools to defer to the State's determinations, such as the margin of appreciation doctrine devised by the European Court of Human Rights.[18] Other adjudicating bodies, such as the dispute-settlement system of the World Trade Organization, have developed instead a non-intrusive standard of review toward discretionary choices made by the national authorities of the member States.[19]

In international investment arbitration, the applicability of a deferential standard of review is often claimed by legal scholars in the presence of standard-type norms, including provisions on FET or indirect expropriation.[20] The issue arises when dealing with questions of interaction between facts and law,[21]

17 See, e.g., COT, "Margin of Appreciation", Max Planck Encyclopaedia of Public International Law, June 2007, available at: https://opil-ouplaw-com.pros1.lib.unimi.it/view/10.1093/law:epil/9780199231690/law-9780199231690-e1438?prd=MPIL, para 1.

18 The technical notion of "margin of appreciation" developed by the jurisprudence of the European Court of Human Rights differs from the general and non-technical notion of margin of appreciation emerged in international jurisdictions. For a clarification of the concept, see ZARRA, "Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v. Uruguay", Revista de Direito Internacional, 2017, p. 95 ff.; CREMA, "Disappearance and New Sightings of Restrictive Interpretation(s)", European Journal of International Law, 2010, p. 681 ff., pp. 695–698. For an analysis on how the non-technical notion of margin of appreciation is applied in the context of the European Union, see ZGLINSKI, "The rise of deference: The margin of appreciation and decentralized judicial review in EU free movement law", Common Market Law Review, 2018, p. 1341 ff. To add further complexity to the debate, some scholars consider the margin of appreciation as a peculiar manifestation of the standard of review. See, e.g., RAGNI, "Standard of Review and the Margin of Appreciation before the International Court of Justice", in GRUSZCZYNSKI and WERNER (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford, 2014, p. 319 ff.; BURKE-WHITE and VON STADEN, "Private Litigation in a Public Sphere: The Standard of Review in Investor-State Arbitrations", Yale Journal of International Law, 2010, p. 283 ff.

19 SHANY, *cit. supra* note 16, p. 928. For an extensive analysis of the standard of review applied by WTO dispute settlement bodies, see OESCH, *Standards of Review in WTO Dispute Resolution*, Oxford, 2003.

20 ORTINO, *cit. supra* note 7, p. 461; SHANY, *cit. supra* note 16, p. 914.

21 It is generally recognized that international tribunals possess greater expertise than domestic authorities on the interpretation of international law and that, when dealing with questions of law, the appropriate standard of review is a near *de novo* one. See, e.g., MOLOO and JACINTO, "Standards of Review and Reviewing Standards: Public

where deference is usually justified on the basis of two main considerations, namely the limited expertise of the reviewing body as opposed to the national decision-maker, and the greater legitimacy and accountability of domestic authorities as opposed to international arbitral tribunals.[22] In the silence of traditional IIA provisions as to the appropriate level of deference towards State measures, scholars have attempted to draw the appropriate guidance on the relevant standard of review either from domestic legal systems through a comparative public law approach or from other forms of international adjudication, such as human rights or trade ones.[23]

Arbitral tribunals have rarely offered a thorough justification of the deferential (or little-deferential) standard of review applied. This notwithstanding, they have at times recalled previous arbitral case law to buttress their legal reasoning when dealing with issues that pertained to restraining their analysis of the host State's determinations (or, in other words, to the application of deference). Although, due to the scattered nature of investment arbitration,

---

Interest Regulation in International Investment Law", in BJORKLUND (eds.), *Yearbook on International Law and Politics 2011–2012*, New York, 2013, p. 539 ff., p. 548; SHANY, *cit. supra* note 16, p. 913; EHLERMANN and LOCKHART, *cit. supra* note 13, p. 497. Other authors frame issues of law and issues of fact by referring to the concepts of nature of review and intensity of review. Even in this case, commentators agree that deference pertains to the intensity of review stage also defined as procedural – or narrow – standard of review. See, to this end, ORTINO, *cit. supra* note 7, p. 461; ORTINO and TABARI, "International Dispute Settlement: The Settlement of Investment Disputes Concerning Natural Resources", in MORGERA and KULOVESI (eds.), *Research Handbook on International Law and Natural Resources*, Cheltenham, Northampton, 2016, p. 496; OESCH, *cit. supra* note 19, p. 14.

22 HENCKELS, *cit. supra* note 8, p. 33; PAINE, "Standard of Review: Investment Arbitration", Max Planck Encyclopedia of Public International Law, January 2018, available at: https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3664.013.3664/law-mpeipro-e3664.

23 In support of public law instruments, see SCHILL, "Report to the Conference: How Much Deference Should Investment Treaty Tribunals Pay to the Regulatory or Judicial Acts of Host States?", in THE INTERNATIONAL BUREAU OF THE PERMANENT COURT OF ARBITRATION, *Flaws and Presumptions: Rethinking Arbitration Law and Practice in a New Arbitral Seat*, Mauritius, 2012, p. 341 ff.; KINGSBURY and SCHILL, "Public Law Concepts to Balance Investor's Rights with State Regulatory Actions in the Public Interest: The Concept of Proportionality", in SCHILL (eds.), *International Investment Law and Comparative Public Law*, Oxford, New York, 2010, p. 75 ff. Warning about the risks of comparing the standard of review in international dispute settlements to those of domestic tribunals is CHEN, "The Standard of Review and the Roles of ICSID Arbitral Tribunals in Investor-State Dispute Settlement", Contemporary Asia Arbitration Journal, 2012, p. 23 ff. For a voice in support of the margin of appreciation doctrine as developed by the European Court of Human Rights ("ECtHR"), see BURKE-WHITE and VON STADEN, *cit. supra* note 18.

arbitral case law has often been dismissed as inconsistent,[24] the latter might not be irrelevant in the determination of the appropriate standard of review. While judicial precedents constitute the basis for the standard of review in common law jurisdictions when legislation does not set out an appropriate one,[25] non-investment related international jurisdictions – formally unbound by a rule of binding precedent – have often heavily resorted to previous case law to make such a determination.[26]

3 Precedent in Investment Arbitration

In a similar fashion to the well-established practice of international law, international investment arbitration is not supported by a rule of binding precedent, or *stare decisis*, akin to the one that operates in common law jurisdictions.[27] In common law systems, courts endowed with the decision over a point of law are called to follow the holdings on the same point of prior hierarchically superior courts, while the highest courts of a specific jurisdiction are cautiously allowed to depart from the settled *ratio decidendi* of their previous judgments.[28] When

24 See, *ex multis*, HENCKELS, "The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration", in GRUSZCZYNSKI and WERNER (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford, 2014, p. 113 ff., p. 127; DIEL-GLIGOR, *cit. supra* note 12.

25 See, e.g., DAVIS, "Standards of Review: Judicial Review of Discretionary Decisionmaking", Journal of Appellate Practice and Process, 2000, p. 47 ff.

26 While in the WTO context, some texts, such as Art. 17(6) of the Anti-Dumping Agreement, specify the standard of review, other agreements (among which the GATT) do not provide a specific legal basis, making case law of WTO dispute settlement bodies heavily resorted to in the determination of the applicable standard of review. See EHLERMANN and LOCKHART, *cit. supra* note 13. Even more so, the genesis of the margin of appreciation doctrine by the ECtHR is entirely jurisprudential. "Most often [... the ECtHR] relies on a precedent based approach, which means it accords the respondent State a certain margin of appreciation because it has already done so in earlier cases on a similar topic", in GERARDS, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights", Human Rights Law Review, 2018, p. 495 ff., p. 503; see, also, BRAUCH, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law", Columbia Journal of European Law, 2004–2005, p. 113 ff.

27 SCHREUER and WEINIGER, "Doctrine of Precedent?", in MUCHLINSKI, ORTINO and SCHREUER (eds.), *The Oxford Handbook of International Investment Law*, Oxford, 2008, p. 1188 ff.; NEWCOMBE and PARADELL, *Law and Practice of Investment Treaties: Standards of Treatment*, Austin, Boston, Chicago, 2009, p. 102.

28 On the role of precedent in the common law, see HARRIS, *Legal Philosophies*, 2nd ed., Oxford, 1997, pp. 170–180. Departure from precedent is cautiously admitted by a

the application of previously articulated rules leads to problematic outcomes, courts are reluctant to abandon the settled jurisprudence, and will normally value the coherence of the system by trying to distinguish the case under scrutiny from previous rulings instead of overruling them.[29]

Investment agreements explicitly exclude that a decision have binding force outside the parties to the dispute and the boundaries of the specific case. Several IIAs follow the blueprint of Article 59 of the Statute of the International Court of Justice ("ICJ"), which has been consistently interpreted as excluding the system of binding precedent.[30] Others replicate the wording of Article 53(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), according to which "[t]he award shall be binding on the parties [...]",[31] equally indicative in the same sense.[32] The same approach is then confirmed by arbitral tribunals

---

jurisdiction's highest court, even in respect of its own previous jurisprudence. For an examination of English case law, see DUXBURY, *The Nature and Authority of Precedent*, Cambridge, 2008, pp. 111–149. A wider margin of departure from its own precedent is generally admitted by the Supreme Court of the United States, see CHENG, "Precedent and Control in Investment Treaty Arbitration", Fordham International Law Journal, 2006, p. 1114 ff., pp. 1017–1121.

29 CHEN, "Precedent and Dialogue in Investment Treaty Arbitration", Harvard International Law Journal, 2019, p. 47 ff., p. 66.

30 Statute of the International Court of Justice, 24 October 1945, entered into force 24 October 1945, Art. 59: "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case". In the words of the Permanent Court of International Justice, later referred to by the ICJ, "the object of Article 59 is simply to prevent legal principles accepted by the Court in a particular case from being binding also upon other States or in other disputes." *Case concerning certain German interests in Polish Upper Silesia* (*Germany v. Poland*), Judgment of 25 May 1926, PCIJ Reports, Series A, No. 7, p. 5 ff., p. 19, later recalled in *Case Concerning the Continental Shelf* (*Libyan Arab Jamahiriya v. Malta*), Judgment of 21 March 1984, ICJ Reports, 1984, p. 3 ff., p. 26. An identical wording to the one employed by Art. 59 of the ICJ Statute is provided by the North American Free Trade Agreement, 17 December 1992, entered into force 1 January 1994 ("NAFTA"), Art. 1136(1), now replicated by the Agreement between the United States of America, the United Mexican States, and Canada, 30 November 2018, entered into force 1 July 2020 ("USMCA"), Art. 14(D)(13)(7). The same text is contained in IIAs based on the U.S. Model Bilateral Investment Treaty (2012), Art. 34(4) and the Canadian Model Foreign Investment Protection Agreement (2004), Art. 45(1).

31 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, entered into force 14 October 1966, Art. 53(1).

32 The absence of a rule of legally binding precedent is finally confirmed by the negotiating history of the latter, which demonstrates that it was never the intention of the Parties to confer a broader effect to such provision. See SCHREUER and MALINTOPPI, *The ICSID Convention: A Commentary*, 2nd ed., Cambridge, 2009; BUNGENBERG and TITI, *cit. supra* note 1, p. 1507.

when specifically confronted with the relevance of arbitral precedent, as they routinely stress that they are not formally bound by earlier decisions.[33] The rule of *stare decisis* is finally excluded by the very architecture of the dispute settlement system set up by IIAs, deprived of continuity in that it consists of *ad hoc* tribunals, often called to interpret different treaty texts, and which fulfil their scope once the proceedings are concluded, in the absence of any hierarchy or secondary rules that mandate tribunals to defer to decisions of any other tribunal.[34]

This notwithstanding, arbitral practice has shown increasing reliance upon the reasoning employed in prior decisions. Despite depicting earlier case law as merely instructive or useful,[35] tribunals often seek prior case law that interpreted the same legal issue (either in support of their reasoning or to highlight the reasons for deviance) not only for efficiency reasons, but also as a way to enhance the legitimacy of the award in the eyes of the parties.[36] Disagreement with previous outcomes rarely leads to open conflict,[37] since tribunals often distinguish the case under scrutiny from earlier decisions, in a similar fashion to what happens in common law adjudication.[38] This behaviour has been labelled by some commentators as a *de facto* practice of precedent, although – in the absence of a hierarchy of courts that mandates deference to judgments rendered by higher courts – such reconstruction leaves untouched the issue of determining which prior case is to be followed as authoritative.[39]

Other scholars have given prominence to the horizontal relationship between arbitral tribunals by resorting to the notion of *jurisprudence constante* developed in civil law traditions, in which equally located courts tend to defer

33 See, among the many, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, para. 67.

34 SCHREUER, "Investment Arbitration", in ROMANO, ALTER and SHANY (eds.), *The Oxford Handbook of International Adjudication*, Oxford, 2014, p. 295 ff., p. 297; NORTON, "The Role of Precedent in the Development of International Investment Law", ICSID Review – Foreign Investment Law Journal, 2018, p. 280 ff., p. 286.

35 See, already, *Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award of 31 March 1986.

36 COMMISSION, "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence", Journal of International Arbitration, 2007, p. 129 ff., p. 158.

37 The textbook example in this regard opposes the interpretation given by the tribunals in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction of 6 August 2003 and in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction of 29 January 2004.

38 REINISCH, *cit. supra* note 1, p. 508.

39 SCHREUER and WEINIGER, *cit. supra* note 27, p. 1196.

to a consistent line of reasoning in the absence of compelling reasons not to do so, even if not formally bound by it.[40] This entails some greater degree of skepticism and debate by the tribunals that are initially faced with interpretations over a point of law, until some consensus is generated. The repeated use of previous cases (as a positive or negative model) by arbitral tribunals is here seen as part of an incremental reasoning that will eventually lead to the formation of a *jurisprudence constante*, fostering predictability and consistency in tribunals' decision-making.[41] This approach is criticised by some on the ground that the aim of consistency ultimately runs counter to the architecture of investment arbitration. Created as a decentralized and *ad hoc* legal system of dispute settlement, investment arbitration is governed by the law chosen by the parties, which does not include previous decisions, unless explicitly provided.[42] However, the latter approach overlooks that arbitral tribunals are inevitably constrained by past decisions once a degree of consistency is reached and they acquire a "collective normative weight". In this sense, according to the majority of scholars, *jurisprudence constante* represents the example that more closely describes the relevance of precedent in investment arbitration.[43]

4 Precedent as Justification for Identifying an "Additive" Standard of Review to the FET?

In the absence of a clear legal basis in Article 10(1) of the ECT as to the correct standard of review, the analysis of the regulatory disputes against Spain will initially investigate the possibility that previous case law serves as the sole legal basis for determining the appropriate standard of review.

This connects to a recurrent issue in the standard of review analysis based on the FET clause, namely that of framing deference as *additive* to the other elements of the standard, as supported by part of the legal scholarship.[44] This

40 NORTON, *cit. supra* note 34, p. 286. See, generally, BJORKLUND, "Investment Treaty Arbitral Decisions as Jurisprudence Constante", in PICKER, BUNN and ARNER (eds.), *International Economic Law: The State and Future of the Discipline*, Oxford, 2008, p. 265.

41 BJORKLUND, *cit. supra* note 40, pp. 272–273; NORTON, *cit. supra* note 34, p. 286.

42 DE BRABANDERE, *Investment Treaty Arbitration as Public International Law*, Cambridge, 2014, pp. 9–99. More generally, see CATE, "The Costs of Consistency: Precedent in Investment Treaty Arbitration", Columbia Journal of Transnational Law, 2012–2013, p. 418 ff.

43 NORTON, *cit. supra* note 34, p. 301.

44 KINGSBURY and SCHILL, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law", NYU School of Law, Public Law Research Paper No. 09-46, 2009, p. 1 ff., p. 37. See, more generally, HENCKELS, *cit. supra* note 8.

approach is opposed by those who locate deference *within* the meaning of FET and who deny the need for any additional level of deference when adopting a correct (i.e. narrow) reading of the FET obligation.[45] Accordingly, by initially focusing on the first approach, the analysis will determine whether previous case law is adopted as the legal basis for an additive level of deference in investment arbitration.

Despite occasionally recalling the existence of a margin of appreciation or some measure of deference to be granted to the State,[46] tribunals have buttressed their statements with previous case law only in a handful of cases. In *Masdar v. Spain*, "the tribunal ha[d] in mind"[47] the *El Paso v. Argentina* award when stating that an acceptable margin of change was to be taken into account by any investor.[48] The *PV v. Spain* tribunal "owe[d] a measure of deference to the Respondent"[49] by "find[ing] confirmation" in the dictum of the *RREEF v. Spain*.[50] In *RWE v. Spain*, the tribunal supported its reasoning by clarifying that its conclusions were not meant "to cut across the principle of deference that [was] reflected in *Perenco* and various other awards".[51] Similarly, the *InfraCapital v. Spain* tribunal considered it appropriate to allow some margin of appreciation with respect to a State's policy choices, and recalled how this was "generally accepted".[52] It is evident how case law was here recalled in support of the approach already employed by the tribunal, without being given any further and founding value and leaving the question of the source of deference untouched. Even the more attentive wording used in *RWE* and *InfraCapital* reflected how the determination was carried out autonomously by the tribunal and how case law was recalled only in support of their conclusion.

---

45 MOLOO and JACINTO, *cit. supra* note 21, pp. 557–561.

46 See, among others, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum of 30 November 2018, para. 242.

47 *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award of 16 May 2018, para. 505.

48 *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 October 2011, para. 402.

49 *The PV Investors v. Spain*, PCA Case No. 2012–14, Final Award of 28 February 2020, para. 626.

50 *ibid.*, footnote 790.

51 *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum of 30 December 2019, para. 534.

52 *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum of 13 September 2021, para. 662. The tribunal then recalled numerous previous awards in support of its statement.

A more piercing role to previous case law seems to be given by tribunals that have identified a *specific* standard of review. This usually took place by recalling the well-known dictum of *S.D. Myers v. Canada*, where the alleged breach of FET was assessed in light of "the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders".[53] With the exception of the tribunal in *BayWa r.e. v. Spain*, which labelled *S.D. Myers* as a "useful summary of the state of play",[54] three tribunals have given weight to the existence of a consistent set of previous awards when referring to the applicable level of deference. The tribunal in *RREEF v. Spain* introduced the *S. D. Myers* dictum as "firmly established in the case law".[55] The *9REN v. Spain* recalled the dictum to explain that "[t]ribunals have been *quite consistent* on the need to balance a State's regulatory autonomy against international obligations freely undertaken".[56] The *Hydro Energy v. Spain* tribunal pointed at the high measure of deference, which was "affirmed in many awards" as a "proposition[…] to be extracted" from earlier case law.[57]

The latter tribunals included the need to recognize a high measure of deference in their reasoning without offering any justification other than previous case law. If the lack of theoretical framework when invoking deference

53 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL Partial Award of 13 November 2000, para. 263. On a substantive note, the reference to S.D. Myers buttresses the additive nature of deference to the FET standard, as the case concerned the interpretation of Art. 1105 of the NAFTA, which offered a different and narrower protection than that provided by Art. 10(1) of the ECT. Art. 1105 of the NAFTA granted investments FET "in accordance with international law" and was linked by the Free Trade Commission to the minimum standard of treatment under customary international law. See NAFTA Free Trade Commission, North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001. If the opposite approach is followed, the "qualified" protection provided by NAFTA would entail a different standard of review than that emerging from the "unqualified" and much-broader formula of the ECT instead. See ORTINO and TABARI, *cit. supra* note 21; SHANY, *cit. supra* note 16, p. 910.

54 *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum of 2 December 2019, para. 459, which recalled the S.D. Myers dictum as replicated by the tribunal in *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award of 2 May 2018, para. 360.

55 Through the *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL Partial Award of 17 March 2006. See *RREEF* case, *cit. supra* note 46, para. 244.

56 *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award of 31 May 2019, para. 254 (emphasis added).

57 *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum of 9 March 2020, para. 582.

is by all means not a novelty in investment arbitration,[58] the authority collectively embodied by numerous previous awards seems to be given a qualified relevance, pointing to the possible formation of a *jurisprudence constante* that might found the application of deference in the analysis of FET. At the moment, this approach can only be labelled as a possible future development, since it was followed by a mere fraction of the sampled cases (three out of 22), leaving the application of deference in the remaining ones ultimately disconnected from previous case law.

5 Precedent in the Identification of the Standard of Review as Part of the Interpretation of FET?

In the absence of unambiguous indications that point to case law as the source of deference when the latter is considered an additive element of the FET standard, the analysis will move on to the second scenario and look at the role of case law when deference is considered an element articulated *within* the meaning of FET.

The identification of the scope of protection of the substantive standard is tightly linked and not always distinguishable from that of the standard of review, so much so that some commentators conflate the two concepts, identifying the standard of review with the set of rights set forth by the investment treaty, designed to "protect investors from regulation or interference by the [S]tate."[59] The standard of review can thus emerge from the interpretation of the applicable treaty text, which determines how the State's action must be reviewed.[60] Among the numerous aspects that could be dealt with in this regard, the analysis will give an account of three elements that are relevant in the standard of review analysis, namely the existence of legitimate expectations as to the stability of the legal framework, the identification of the specific

58 SCHILL, *cit. supra* note 8, p. 579.

59 VAN HARTEN, *Investment Treaty Arbitration and Public Law*, Oxford, 2008, p. 81. This link is recognized, to different extent, by scholars: some consider the standards of review and standards of protection as overlapping or as having closely connected content. See SCHILL, *cit. supra* note 8, p. 582; HENCKELS, "Balancing Investment Protection and Sustainable Development in Investor-State Arbitration: The Role of Deference", in BJORKLUND (ed.), *Yearbook on International Investment Law & Policy 2012–2013*, Oxford, 2014, p. 305 ff., p. 310; ORTINO, *cit. supra* note 7, p. 458.

60 MOLOO and JACINTO, *cit. supra* note 21, p. 552. Among the arbitral tribunals that have followed this approach, see *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL Award of 8 June 2009, para. 617.

expectations enjoyed by investors, and the responsibility threshold for their violation.

In most of the sampled cases, tribunals were called to determine whether legitimate expectations as to the stability of the legal framework could stem from the existing legal framework or required specific representations directly made to the investor instead. This was initially addressed by the tribunal in *Charanne v. Spain*, which "deem[ed] relevant the considerations delivered by other tribunals although taken under other treaties" and concluded that in the absence of specific commitments investors enjoyed no reasonable expectation that the regulatory framework would remain frozen.[61] Although not uniformly followed,[62] the restrictive interpretation adopted by the tribunal in *Charanne* quickly became the benchmark upon which most of the sampled tribunals later based their reasoning, though with different nuances. Tribunals specified that they "agree[d] with" the findings of *Charanne*;[63] that they considered the award to "offer[..] relevant insights";[64] that their interpretation was "consistent" with *Charanne*;[65] or used the findings of *Charanne* to compare their own.[66] More-recent tribunals still followed this approach but highlighted the consistency "with the conclusions reached by most of the tribunals that have considered the matter",[67] or did so by "agree[ing] with the findings of recent ECT tribunals".[68]

---

61 *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award of 21 January 2016, para. 504.

62 Four tribunals adopted the broad interpretation instead. See: *Novenergia II – Energy & Environment* (*SCA*) (*Grand Duchy of Luxembourg*), *SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award of 15 February 2018, para. 666; *9REN* case, *cit. supra* note 56, paras. 295–298; *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award of 31 July 2019, para. 423 (emphasis added); *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award of 6 September 2019, para. 483.

63 *Foresight Luxembourg Solar 1 S.à r.l. et al. v. Kingdom of Spain*, SCC Case No. 2015/150, Final Award of 14 November 2018, para. 365; *RREEF* case, *cit. supra* note 46, para. 321; *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award of 2 August 2019, para. 407; *PV* case, *cit. supra* note 49, para. 603.

64 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award of 4 May 2017, para. 370.

65 *Infrastructure Services Luxembourg S.à r.l. and Energia Termosolar B.V.* (*formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.*) *v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award of 15 June 2018, ICSID Case No. ARB/13/31, para. 556; *RWE* case, *cit. supra* note 51, para. 544.

66 *Novenergia* case, *cit. supra* note 62, para. 688.

67 *BayWa r.e.* case, *cit. supra* note 54, para. 466.

68 *Infracapital* case, *cit. supra* note 52, para. 565.

Less relevant was the use of previous case law when tribunals were called to identify the expectations that investors could legitimately expect. Most tribunals concluded that the investor could expect to receive a reasonable rate of return from the investment, quantifying the concept of reasonable return independently, with a few exceptions. The tribunal in *Foresight* "[u]ltimately [...] arrive[d] at the same conclusion as the *Novenergia v. Spain* tribunal"[69] in limiting the reasonable return to 7%. An identical conclusion was reached in *PV* by recalling the awards in *Stadtwerke v. Spain* and *Jürgen v. Czech Republic* in footnote.[70] These findings were opposed by the tribunal in *RREEF*, which "[could not] concur with the analysis made by the *Novenergia* tribunal",[71] and which concluded that the reasonable return could not go below (roughly) 7% instead. The threshold identified by the *RREEF* tribunal was later used as a parameter by the tribunals in *BayWa r.e.* and *RWE*.[72]

Paramount for the application of a specific standard of review was then the identification of the responsibility threshold provided by the FET clause contained in the ECT. Once again, only in a handful of instances tribunals referred to previous case law when determining such threshold. With the exception of *RWE v. Spain*,[73] the threshold was identified in a radical and/or unexpected change to the legal framework determined by the State's measures. The tribunal in *Foresight* "agreed with the finding[s]"[74] of the *Eiser* and *Charanne* tribunals when it required the new measures to not "fundamentally and abruptly" alter the regulatory framework.[75] The *SolEs* tribunal "align[ed] with the reasoning of other tribunals",[76] among which *Charanne*, *Eiser*, and *Novenergia*, in looking whether the measures had removed "the essential features of the regulatory regime in place" at the time the investment was made.[77] In *Novenergia*, the tribunal quoted the award of *CMS v. Argentina* when it noted that the new regulations "entirely transform[ed] and alter[ed] the legal and business environment

69 *Foresight* case, *cit. supra* note 63, para. 378 (italics added).
70 *PV* case, *cit. supra* note 49, paras. 709–710 (and respective footnotes).
71 *RREEF* case, *cit. supra* note 46, para. 582 (emphasis added).
72 *BayWa r.e.* case, *cit. supra* note 54, para. 514; *RWE* case, *cit. supra* note 51, para. 584 (in footnote).
73 The tribunal required the changes to the legal framework to cause an "individual and excessive burden relative to the policy objective of the [r]espondent", stressing the fact that such interpretation was "consistent with the approach in EDF v Romania and the Electrabel case". *RWE* case, *cit. supra* note 51, para. 598.
74 *Foresight* case, *cit. supra* note 63, para. 366.
75 *ibid.*, paras. 366, 377.
76 *SolEs* case, *cit. supra* note 62, para. 453.
77 *ibid.*, para. 450.

under which the investment was decided and made",[78] an assessment with which the tribunal in *OperaFund* "concur[ed]".[79]

Although reference to previous case law appeared in a greater number of awards, its relevance does not seem to depart from the one accorded to arbitral precedent in treaty interpretation described above in Section 3. Arbitral tribunals often made clear that earlier interpretations would be used as statements that were *informative* or *supportive* of their autonomous findings and resorted to them only in a handful of cases. Only in the identification of the source of legitimate expectations case law seemed to be aggregating around the restrictive interpretation offered by the *Charanne* tribunal in a manner that might point towards the hardening of a *jurisprudence constante* as to an element which is relevant for the standard of review analysis. However, this possibility seemed to be considered only in one of the most-recent awards of the sample, the *BayWa r.e. v. Spain* one, which stressed it consistency with the conclusions reached by most of the prior tribunals.[80]

6 A Converging Standard of Review Emerging from the ECT-Based Energy Disputes Against Spain?

If the role of previous case law seems not be determinant in the identification of the standard of review, a final enquiry can be directed to the approach followed by arbitral tribunals regardless of their outright mention of previous cases. Though this cannot say much about the role of precedent *stricto sensu*, it allows to detect whether the sampled awards are aggregating towards any consistent approach that is relevant for the standard of review.

The majority of tribunals dealt with the State's regulatory measures through the lens of the investor's legitimate expectations. Here, it is possible to notice how arbitral tribunals have condensed the responsibility threshold with the requirement of a radical or unexpected change, abandoning the approach of some of the earlier awards that had adopted a lower responsibility threshold.[81]

78 *Novenergia* case, *cit. supra* note 62, para. 695, quoting *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005, para. 275.

79 *OperaFund* case, *cit. supra* note 62, para. 513.

80 *BayWa r.e.* case, *cit. supra* note 54, para. 466.

81 The *Eiser* tribunal required that the disputed measures be based on objective criteria and moved on to determine that they were not based on scientific studies but on what, in the tribunal's view, emerged to be a non-thorough analysis of the tax framework that investors were subject to. *Eiser* case, *cit. supra* note 64, paras. 405–406. Similarly, the *Infrastructure* tribunal contested the parameters used to calculate the special payment as they were not

Some tribunals have required changes that transformed the legal system dramatically,[82] fundamentally and abruptly,[83] or in its entirety.[84] Others have focused on direct effect of the changes on the investor's expectations, affecting the latter's core features,[85] or changing them in a dramatic,[86] or drastic and radical fashion.[87]

In a few instances, tribunals have then assessed the reasonableness and/or proportionality of the contested measures. The four tribunals that have dealt with reasonableness have followed a deferential approach, determining solely the *rationality* of the measures, namely the existence of an appropriate correlation between the policy objectives pursued by Spain and the disputed measures considering the reasonableness test fulfilled accordingly. This, regardless of the harm that might have come to investors,[88] given that "the matter of choice of policy [was] a question for the authority not the [t]ribunal", as recalled in *InfraCapital v. Spain*.[89]

More tribunals have engaged in the proportionality analysis. With the exception of the *Watkins* case, tribunals have generally avoided questioning the determinations made by the State,[90] highlighting instead that they would "abstain to take any position on the issue of the existence of other or more

based on scientific studies and no identifiable set of criteria was provided to show how to revise the reasonable rate of return every three years. *Infrastructure* case, *cit. supra* note 65, paras. 565–566.

82 *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum of 19 February 2019, para. 442; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles of 12 March 2019, para. 598.

83 *Foresight* case, *cit. supra* note 63, para. 388; *9REN* case, *cit. supra* note 56, para. 302. The NextEra tribunal looked for regulatory changes that "fundamentally and radically" changed the existing regime. See *NextEra* case, *cit. supra* note 82, para. 598. The tribunal in *OperaFund v. Spain* looked for regulation that "clearly and fundamentally changed" the existing regime. See *OperaFund* case, *cit. supra* note 62, para. 513.

84 *Novenergia* case, *cit. supra* note 62.

85 *SolEs* case, *cit. supra* note 62, paras. 446–448, 450.

86 *Cube* case, *cit. supra* note 82, para. 442; *NextEra* case, *cit. supra* note 82, para. 598.

87 *RREEF* case, *cit. supra* note 46, para. 379.

88 *Charanne* case, *cit. supra* note 61, para. 534; *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award of 2 December 2019, para. 321; *PV* case, *cit. supra* note 49, para. 628.

89 *Infracapital* case, *cit. supra* note 52, para. 676.

90 According to the *Watkins* tribunal, the necessity prong of the proportionality analysis was then not satisfied since "there were less intrusive means available to achieve Spain's goal." *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award of 21 January 2020, para. 602.

appropriate possible measures to face this situation",[91] or similar formulations.[92] As to the proportionality analysis, the most contentious issue, namely the proportionality *stricto sensu* of the disputed measures, was addressed in remarkably uniform terms by tribunals, which allowed for reductions (at times substantial) of the investment value that were still compatible with the threshold of reasonable return promised by the Spanish regulator and identified in a return of roughly 7%. While in *PV v. Spain* a disproportionate measure was found when the detrimental effect on the investments was below said threshold,[93] in *RREEF* and *RWE* the tribunals required a "much lower" and "significantly lower return".[94] In the four remaining cases, reductions in return that remained above 7% were considered proportional.[95]

7 Conclusions

The Spanish regulatory disputes show the limited relevance displayed by previous case law even when proceedings offer a notable degree of uniformity. At the moment, case law cannot yet be considered as holding a founding value for the application of deference as an additive element of the FET standard and offers limited support to the identification of the relevant standard of review within the meaning of FET.

However, the analysis seems to suggest that, even when it comes to the standard of review, previous case law might become relevant if it reaches a level of consistency that results in a *jurisprudence constante*. In the restricted

91 *Infrastructure* case, *cit. supra* note 46, para. 468.

92 *BayWa r.e.* case, *cit. supra* note 54, para. 480: according to the tribunal, its role was not "to second guess reasonable measures taken to address the deficit (including measures affecting existing plants), to propose alternative policies that could have been adopted, or to weigh up for itself the competing demands of generators and consumers"; *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability of 17 March 2021, para. 388: "it is not for the Tribunal to second guess reasonable measures taken to address the deficit (including measures affecting existing plants), to propose alternative policies that could have been adopt-ed, or to weigh up for itself the competing demands of generators and consumers". See also *RWE* case, *cit. supra* note 51, para. 567.

93 *PV* case, *cit. supra* note 49, para. 847.

94 *RREEF* case, *cit. supra* note 46, para. 573; *RWE* case, *cit. supra* note 51, para. 587.

95 *RWE* case, *cit. supra* note 88, para. 354; *BayWa r.e.* case, *cit. supra* note 54, paras. 504, 509; *FREIF Eurowind Holdings Ltd. v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award of 8 March 2021, para. 570; *Eurus Energy Holdings* case, *cit. supra* note 92, para. 368; *InfraCapital* case, *cit. supra* note 52, para. 688.

sample of the Spanish cases, this could be appreciated in the words of later tribunals, which acknowledged the existence of a critical mass of previous awards to which they adhered, although without explicitly drawing any legally binding indication from it. This seems even more confirmed when looking at how tribunals required highly similar thresholds or elements pertaining to the standard of review analysis, such as the restrictive interpretation of the source of legitimate expectations, the radical changes required to breach the expectations, the rationality analysis, or the 7% threshold for determining the proportionality *stricto sensu*. The latter requirements cannot be poured into a general discourse over the relevance of previous case law for the determination of the standard of review, although they highlight that previous case law that reaches a sufficient level of uniformity might in fact be capable of displaying a role in guiding treaty interpretation in the standard of review analysis.

While this conclusion reflects the role that previous case law generally displays in investment arbitration and ultimately does not come as a surprise, a more poignant role might then be emerging when considering case law as the sole source of the standard of review, if this will find support in future practice. In the absence of a clear legal basis, and given the incapability (or unwillingness) of tribunals to identify a theoretical justification for deference, some of the later tribunals have bypassed the obstacle by resorting exclusively to the *S.D. Myers* dictum to justify their application of deference as "firmly established in case law". Although this is arguably insufficient to offer a theoretical justification for the standard of review applied by the tribunal, it could open the door for a greater relevance of previous case law in investment arbitration, thus being a possible development that will require attention in the future.