Charanne v Spain and Eiser v Spain: Comparative Case Analysis on Legitimate Expectations and Fair and Equitable Standard

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The present Article analyses the two landmark decisions of Charanne v Spain and Eiser v Spain to analyse which arbitral tribunal had legitimate expectations under the Fair and Equitable Treatment Standard (FET) when dealing with sovereign changes in regulation and legislation. The present Article challenges the existing dominant view that both the tribunals gave a same holding but just under different fact patterns. On the contrary it concludes that the content of the FET standard, particularly interpretation of what constitutes legitimate expectation for breach of the FET is contradictory and incoherent as a result of the decisions of both the tribunals. Analysis of both the decisions is relevant for three primary reasons: investors have moved for enforcement of the awards last June and November outside the European Union as the European Commission disagrees with the Eiser Award, Spain considers challenging the award and many countries consider withdrawing from the Energy Charter Treaty.
**Introduction**

Spain adopted Renewable Energy Support Scheme (RESs) to incentivise investment in capital-expensive renewable energy sector in exchange of subsidies to investors.¹ Spain’s experience regarding the RESs illustrates what is termed as ‘Obsolescing bargain cycle and the Price cycle’². The former is when the Host State which had incentivised heavy investments by foreign investors decides to modify an obsolete bargain by removing or reducing the subsidies after the production, consumption and development targets for the sector are achieved.³ The latter is when the Hosts State

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³ Restrepo (n1) 104; Also see: Iuliana-Gabriela Iacob and Ramona-Elisabeta Cirlig, ‘The Energy Charter Treaty and Settlement of
decides to restructure an investments scheme because a sharp decrease in the production costs leads to disproportionate profits for the investors. The Spain’s decision based on such economic cycles may be a justified approach in economics but has to pass the Fair and Equitable Treatment standard (FET standard) under international investment law when dealing with foreign investors.

Thus, such foreign investors filed a number of claims as investor-State arbitration cases to resolve disputes arising under the Energy Charter Treaty, 1994 (ECT). As such, Charanne and Eiser awards have been subject matter of debates. The former was the first decision regarding alterations to economic support programmes in the renewable energy market holding Spain not liable for breach of FET standard, finding ‘no specific commitment’ by Spain directed towards the investor for creation of legitimate expectations that the regulatory environment will not change. The latter was the first decision holding Spain liable

4 Ibid. 
7 Eiser Infrastructure Limited and Energía Solar Luxembourg S.a r.l. v Kingdom of Spain, ICSID Case No. ARB/13/36/2017. 
9 Deyan Dragiev, ‘Legitimate Expectations in Renewable Energy Treaty Arbitrations: The Lessons So Far’ (Kluwer Arbitration
for breach of FET-standard finding ‘total and unreasonable’ change in the regulatory regime not taking into account ‘circumstances of existing investments made in reliance on the prior regime’.  

Majority of the academic analysis on the awards with opposing outcomes justifies or at least mentions that different facts, counsels, and arguments before different tribunals will lead to different outcomes and there is no precedent in investor-state arbitrations under the International Centre for
Settlement of Investment Disputes (ICSID) Convention.\textsuperscript{13} This Article goes beyond such simplistic albeit true justifications and undertakes a comparative analysis of both the tribunals’ reasoning for their respective holdings and impact of the same on the stakeholders.

Part I of the Article attempts a layered comparative analysis of the outcomes by examining similarities and differences in: (i) how both tribunals define the FET standard in international law, particularly legitimate expectation, and (ii) which tool of interpretation is used for defining the FET standard and applied to the facts and (iii) how the meaning of the FET standard is incoherent and contradictory as an outcome of both the awards. Part I concludes that both the awards are not the same holding under different fact patterns as there are points of similarities and differences in construing the FET standard and application to the facts.

Part II examines potential justifications (other than the interpretation of law by the tribunals) for opposite outcomes in both the awards: (i) Similarity in the Charanne Tribunal’s approach and the Eiser Tribunal’s approach on legitimate expectation to the ‘proportionality doctrine’ and the ‘sole-effects doctrine’ of expropriation, respectively and (ii) timing and proximity in the Claimant’s position of reliance on the Host State’s representation.

Part III concludes that: (i) the content of the FET-standard is even more contradictory and incoherent after the Charanne

award and Eiser award, (ii) there is a need to rethink questions on the future behaviour of States, investors, tribunals and the ICSID system being fit for purpose.

I. Comparative Analysis on Law and its Application

FET standard’s content is contentious and depends on the language used in investment treaties.\textsuperscript{14} It has been receiving meaning from Investment Tribunals only from the 2000’s.\textsuperscript{15} There are no two academicians who state the same list of elements for the content of the FET standard.\textsuperscript{16} Some criticise the FET standard for vagueness and others acknowledge that it is a broad principle but its specific elements can be identified through judicial practice.\textsuperscript{17} Some argue it is a standard from customary international law (the content of which is ambiguous)\textsuperscript{18} and some argue it is an autonomous standard of the rule of law in Host States.\textsuperscript{19} Arbitral tribunals/commentators generally agree that transparency, stability, non-discrimination, due process and investors’


\textsuperscript{15} Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (OUP 2008) 159.


\textsuperscript{17} Dolzer and Schreuer (n 15) 161.

\textsuperscript{18} Bonnitcha et al (n 16) 113.

\textsuperscript{19} Dolzer and Schreuer (n 15) 161; Also see: US Model BIT, 2012 and UNCTAD Series on Issues in International Investment Agreements II: Fair and Equitable Treatment, 2012.
legitimate expectations are all key ingredients in defining the FET standard.\textsuperscript{20}

The general nature of the concept of legitimate expectations makes it difficult to draw mechanical conclusions from it\textsuperscript{21} as some interpret it to further the rule of law for investor’s protection\textsuperscript{22} and others as disempowering the State measures in public interest.\textsuperscript{23} The two approaches to origination of legitimate expectation are that it originates: (i) only in specific commitments or (ii) in specific commitments and Host-State’s legislative background.\textsuperscript{24} There exists ‘significant opposition’ to the second approach in the case-law, whereas, the first approach’s application has been inconsistent in the investor-State arbitration jurisprudence.\textsuperscript{25} Furthermore, representations must create legitimate expectations on an objective and subjective basis and not in a vacuum.\textsuperscript{26}

\textsuperscript{20} Felipe M. Téllez, ‘Conditions and Criteria for the Protection of Legitimate Expectations under International Investment Law’ (2012) 27(2) ICSID Review 432 <https://academic.oup.com/icsidreview/article/27/2/432/639346> date accessed; Also see: Simões (n 8) 176, Dolzer and Schreuer (n 15) at 168.


\textsuperscript{22} José E. Alvarez, The Public International Law Regime Governing International Investment (Brill-Nijhoff 2011) 248.


\textsuperscript{24} Restrepo (n 1) 116-117.

\textsuperscript{25} Ibid and Dolzer and Schreuer (n 15) 148.

\textsuperscript{26} Téllez (n 20) 433-34 and Suez and Ors v Argentina, ICSID Case No. ARB/03/17, 127.
the principle of legitimate expectations is inherent in the FET-standard and is in its essence, objective, its application will depend upon the expectations nurtured and fostered by the local laws as they stand specifically at the time of the investment.27

In this backdrop, FET-standard’s content is comparatively analysed with a focus on legitimate expectation as interpreted by the Charanne Tribunal and the Eiser Tribunal, consecutively applied to facts and the actual effect on the FET standard.

**Interpretation using VCLT**

The Eiser Tribunal heavily relied on Article 31 of the Vienna Convention on Law of Treaties (VCLT) to interpret the FET standard by noting that: (i) Article 10(1), ECT must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the ECT in its context and in the light of its object and purpose28 and (iii) hence, as per Article 2, ECT, its purpose is to provide legal framework for long term co-operation and mutual benefit and its precursor, the 1991 European Energy Charter points to legal stability and transparency as its aims.29 However, the Charanne Tribunal did not mention the VCLT in relation to FET standard although it did mention it on other issues.30

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28 Luxembourg v Spain (n 7) 375-383; Also see Article 31(2) of the Vienna Convention on Law of Treaties, 1969 (came in force on 1980).
29 Ibid 378-89.
30 Investments S.a.r.l. v Spain (n 6).
**Stability requirement**

Both the Tribunals identify the ECT as the governing treaty, particularly Article 10(1) ‘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’.  

There is similarity in recognizing the obligation of stability under the ECT yet there is a difference. The Eiser Tribunal examined the issue of stability in depth by analysing ECT’s object and purpose to conclude that Article 10(1)’s obligation to accord fair and equitable treatment ‘necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long term investments’. On the other hand, the Charanne Tribunal limited itself from an in-depth investigation noting that only norms up to 2010 were being challenged by the Claimant and to analyse instability in the regulatory framework would require examination of all regulations passed till date. However, the Charanne Tribunal could have analysed the stability in the regulations up to 2010 and caveated its finding with such limitation.

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31 Investments S.a.r.l. v Spain (n 6) 476 and Luxembourg v Spain (n 7) 374.
32 Investments S.a.r.l. v Spain (n 6) 484 and Luxembourg v Spain (n 7) 382, 383.
33 Luxembourg v Spain (n 7) 382, 383.
34 Investments S.a.r.l. v Spain (n 6) 374, 380.
35 Investments S.a.r.l. v Spain (n 6) 484.
State’s Right to Change the Regime and Specific Commitment

Both the Tribunals acknowledge the State’s reasonable right to change the legal/business/economic framework noting the same has to be predictable, fair/non-arbitrary/non-retroactive, proportional, and in public interest (tariff-deficit in Spain’s case). There is some similarity in noting the creation of legitimate expectations in specific commitments made personally by the State to the investor or an explicit undertaking/specific assurance or a stabilisation clause, at the time of investment.

Some interpret that both the Tribunals rejected the presence of specific commitments and as a consequence the legitimate expectations resulting from such commitments.

The Charanne Tribunal noted that there was no specific commitment to Investors as: (i) the 2008 regulations do not constitute specific commitment by the mere fact that it is for limited investors, moreover, such interpretation will be an excessive limitation on the State’s power to regulate the economy in public interest; (ii) the presentation documents inviting investments did not include any specific language to

36 Investments S.a.r.l. v Spain (n 6) 500-2 and Supra note 7 at 362, 387.
37 Ibid.
38 Investments S.a.r.l. v Spain (n 6) at 488.
39 Luxembourg v Spain (n 7) 362, 366.
40 Restrepo (n 1) 123; Investments S.a.r.l. v Spain (n 6) 490-493, 499; Luxembourg v Spain (n 7) 363.
41 Investments S.a.r.l. v Spain (n 6) 490-93.
reasonably infer that the regulated tariff would remain untouched for the duration of the plants’ lives.\(^{42}\)

On a closer look, it is apparent that the Eiser Tribunal dilutes the requirement of specific commitment in two ways. Firstly, it does not give a clear finding on facts whether Spain made a specific commitment to Eiser or not and only mentions it in its analysis as a statement of law citing case-laws\(^{43}\). Interestingly, while summarising the facts of the case it did note the disagreement on the commitments as binding or being only factual information statements.\(^{44}\) Secondly, it shifts focus by questioning the extent to which the FET standard gives rise to the right to compensation when the State exercises its acknowledged right to regulate\(^{45}\). Thus, its approach is similar to the Charanne Tribunal’s dissent, which notes that the State has the right to regulate and change regulations even if there exists a stabilisation clause, although the investor has to be compensated.\(^{46}\) The Eiser Tribunal couched a strong statement in a subtle manner. The critique remains that such an understanding makes a stabilisation clause redundant.\(^{47}\) Hence, no clarity of finding by the Eiser Tribunal on the issue of Spain making a specific commitment has resulted in an annulment application by Spain before ICSID. One of the grounds urged by Spain is that the Tribunal has failed to state reasons coupled with manifest excess of power as the Tribunal had: (i) held that there was no specific commitment by Spain and (ii) acknowledged its right to amend legislations.\(^{48}\)

\(^{42}\) Ibid at para 497.

\(^{43}\) Luxembourg v Spain (n 7) 362.

\(^{44}\) Luxembourg v Spain (n 7) 125, 126, 134, 347, 360.

\(^{45}\) Ibid.

\(^{46}\) Investments S.a.r.l. v Spain (n 6) 10-11 (Dissent).

\(^{47}\) Restrepo (n 1)124, 125.

\(^{48}\) Power and Baker (n 13).
Essential Features Retained

Some argue that both the awards are ‘complimentary and not contradictory’ as they note that the FET standard includes protection for investors from fundamental change of the regime they relied upon at the time of making the investment.\(^{49}\) The Charanne Tribunal held that the ECT/FET-standard was not breached as the essential feature of Feed-in-Tariff for 26 years was retained\(^{50}\) and the Eiser Tribunal held that the new regulations (particularly 2013 and 2014) ripped off the investors of the subsidy and investment amounting to ‘total’ change in the regime.\(^{51}\)

Non-retroactivity and Non-arbitrary

Both the Tribunals noted non-retroactivity and non-arbitrary nature of regulatory change as an element of the FET standard.\(^{52}\) The Charanne Tribunal noted that: (i) the Claimant’s argument on retroactivity attempts to thwart the acknowledged right of the State to modify the legal and regulatory framework benefitting the Claimant, (ii) the registration was an administrative requirement to sell electricity and not an acquired right to remuneration, and (iii) no principle of international law prohibits a State to take regulatory measures with immediate effect.\(^{53}\) The Eiser Tribunal noted that Spain retroactively applied new regulations with hypothetically developed standards, as ‘one size fits all’ to existing facilities that were previously financed

\(^{49}\) Restrepo (n 1)124-5.

\(^{50}\) Investments S.a.r.l. v Spain (n 6) 518-20.

\(^{51}\) Luxembourg v Spain (n 7) 363, 370, 393.

\(^{52}\) Investments S.a.r.l. v Spain (n 6) paras 546-48; Supra note 7, 414.

\(^{53}\) Ibid.
and constructed on the very different 2007 regulatory regime.\textsuperscript{54} 2014 design choices on plants were imposed to hold the ones adopted in reliance of the 2007 regulations as ‘inefficient and undeserving of subsidy’.\textsuperscript{55}

\textbf{Due Diligence}

Both the Tribunals noted absence of due diligence and investor’s reasonably foreseeable as defences to legitimate expectations.\textsuperscript{56} The Charanne Tribunal found that: (i) the adjustments to the regulatory framework in 2010 were easily foreseeable; (ii) the possibility of modification to the compensation scheme was left open by Spanish law; and (iii) such possibility was reinforced by the Spanish Supreme Court decisions in 2005-06 which are not binding but are relevant factual elements at the time of investment for a reasonable expectation.\textsuperscript{57} The Eiser Tribunal took a different approach to due diligence which diluted the defence of not undertaking due diligence. It stated that the Claimants took the risk after due diligence with the legitimate and reasonable expectation that they would be entitled to fair compensation.\textsuperscript{58} It further stated that the fact that the Spanish Supreme Court (after the investment) upheld the constitutionality of the regulations repealing the 2007 regulations is different from whether ECT obligation has been met.\textsuperscript{59} Deference to the national authorities and courts

\begin{itemize}
\item \textsuperscript{54} Luxembourg v Spain (n 7) 400-08.
\item \textsuperscript{55} Luxembourg v Spain (n 7) 400-414.
\item \textsuperscript{56} Investments S.a.r.l. v Spain (n 6) 505 and Supra note 7 at 371.
\item \textsuperscript{57} Investments S.a.r.l. v Spain (n 6) 505-08.
\item \textsuperscript{58} Luxembourg v Spain (n 7) 371; 364; ADC v Hungary, ICSID Case No. ARB/03/16, 424.
\item \textsuperscript{59} Luxembourg v Spain (n 7) 73.
\end{itemize}
might give more legitimacy to the tribunals' decisions but the Eiser Tribunal and Charanne Tribunal have taken different approaches justifiably because of the timing of the court’s decision being pre or post investment.

Thus, there is similarity in the interpretation of the law, that is the FET standard as both the Tribunals note the following as contents of and aspects related to the FET standard: (i) requirement of stability in the Host State as per Article 10(1) of the ECT. (ii) Acknowledgement of the State’s reasonable right to change the legal, business, economic framework in a predictable, fair, non-arbitrary, non-retroactive and proportional manner in public interest. (iii) Requirement of specific commitment for creation of a legitimate expectation, (iv) Protection from fundamental changes to essential features of the regulatory and legislative regime, and lastly (v) defences of due diligence and reasonable foreseeability by the investor.

However, the points of differences arise in the application of the law and content of FET-standard as: (i) the Charanne-Tribunal withdrew from examining stability of regulations in the Host State and the Eiser Tribunal carries and in-depth examination to find instability. (ii) The Eiser Tribunal emphasized on the Article 31 of the VCLT as a tool of interpretation of the ECT to find stability as an integral content of FET, whereas the Charanne Tribunal did not mention VCLT at all in its analysis on the FET-standard. (iii) The Eiser Tribunal despite noting the requirement for a specific commitment by the State to the investor on stability for creation of legitimate expectation, unlike the Charanne Tribunal did not give a clear finding or application of the same on facts and (iv) the Eiser Tribunal diluted the defence

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60 Restrepo (n 1) 133.
of due-diligence to legitimate expectation by identifying the Claimant’s risk as risk taken with legitimate expectation after conducting due diligence.

Moreover, the aforesaid analysis shows that what prima facie appears as the same holding on different fact patterns primarily because both the Tribunals note similar content of the FET standard, is actually different holdings which is evident from different approaches to: (i) application of the law as well as (ii) the meaning of the similarly identified elements of the FET standard. Thus, in such a manner, the Charanne Tribunal did not find, and the Eiser Tribunal did find legitimate expectations under the FET right when dealing with sovereign changes in regulation and legislation.

II. Potential Influences and Reconciliations

Having established that both tribunals had different approaches on meaning of the similarly identified elements of FET standard, the potential reasons for such different approaches may include influence of: (i) the doctrines of expropriation and (ii) record/evidence on timing of investor’s reliance and Claimant-investor’s proximity to the decision to invest and interaction with the Host State.

The ‘proportionality doctrine’ of expropriation states that ‘the investor’s property is not deemed to be expropriated if the measures were taken for public good, were reasonable and proportional’ and hence, precludes State’s liability.\(^6\) The

influence of the same exists on the question of legitimate expectation as the Charanne Tribunal did not get swayed by allegedly serious impact on the investor’s profitability and found that the essential measure of Feed-in-Tariff for 26 years was in place to meet the trade-deficit. On the other hand, the Eiser Tribunal appears to be influenced by the ‘sole-effects doctrine’ of expropriation i.e. sole focus on economic impact of the state measures as it framed its analysis as how to balancing between the investor’s right to compensation and the State’s acknowledged right to regulate. Arguably, it was swayed by the impact of the loss of the investor of being ripped of its major investment value for reverse engineering to hold breach of legitimate expectations and the FET standard. Interestingly, the Charanne-dissenting award, on this aspect appears not be swayed by the alleged or proven impact of loss to investor as oppose to the Eiser Tribunal, to find legitimate expectation and violation of the FET standard.

Scholars have noted that it seems that some tribunals give awards on the ground of justice, particularly the Eiser Tribunal, as there is no clear application of the criteria of a proportionality test reflecting balancing of diverse interests of consumers, tax payers, national and global economy, environment concerns and the impact on the State’s decision not to take pro-environment measures to avoid the risk of facing high-value claims or adverse decisions. Moreover, the dichotomy of views and standard of reviews in related

62 Investments S.a.r.l. v Spain (n 6) 462, 463.  
63 Investments S.a.r.l. v Spain (n 6) 518-20, 533.  
64 Bonnitcha et al (n 16).  
65 Luxembourg v Spain (n 7) 362/first-line.  
66 Luxembourg v Spain (n 7) 418.  
67 Investments S.a.r.l. v Spain (n 6) 12-13 (Dissent).  
68 Restrepo (n 1)127, 128.
The potential reconciliations include questions such as whether the record/evidence on timing of investor’s reliance and Claimant-investor’s proximity to the decision to invest and interaction with the Host-State are the reasons for different outcomes. Additionally, it is questionable whether if Spain provided more time to investors for compliance, it would make the regime change more reasonable. Another important aspect of the Charanne award concerns the relationship between investors’ expectations, which was of shareholding in 37 photovoltaic plants with lesser evidence on due diligence. In the Eiser case, claimants were direct investors in three major solar plants with extensive evidence of due diligence including correspondence with the State before and during the progress of the investment and restructuring of financing.

Thus, the Charanne-Tribunal’s and Eiser-Tribunal’s approach on legitimate expectation is similar to the ‘proportionality doctrine’ and the ‘sole-effects doctrine’ of expropriation, respectively. Furthermore, the timing of reliance and proximity in the Claimant’s position and degree of reliance recorded in documents are potential justifications for opposite outcomes.

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69 Gumbis and Kaparavicius (n 61) 160-163.
70 Stibbe (n 5).
71 Simões (n 8) 179.
III. Conclusion

The content of FET standard, particularly interpretation of the requirement of legitimate expectation stands even more contradictory and incoherent by the Charanne Tribunal and the Eiser Tribunal. The former examined for legitimate expectation by questioning existence of specific commitments directly to the investor. Despite acknowledging the specific commitment requirement, the latter () examined for legitimate expectation and found its existence in the provisions of the treaty itself and focused on the extent of compensation when the State exercised the acknowledged right to regulate. On a dangerous note for States, the Eiser Tribunal by not specifically and explicitly applying the acknowledged requirement of specific commitment to the facts of the case has in effect strengthened\(^22\) the outlying view that ‘foreign investors have a legitimate expectation of a stable regulatory environment, even absent expectations based on specific commitments\(^3\).

**Behaviour of States**

The UNCTAD 2017 Reports\(^74\) recognize that ‘the wording of specific treaty provisions is a key factor in case outcomes’ and this equally applies to all communications by the State with the investors. Hence, States will place explicit-caveats providing for the alteration of the legislative framework at the time of the initial investments. The States may exhaustively state the elements of the FET standard in

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\(^22\) *Luxembourg v Spain* (n 7) para 381 mentioning *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No. UN3467/2004.

\(^3\) Ibid.

\(^74\) UNCTAD World Investment Report 2017.
treaties as done in Article 9 of the Canada-European Union Comprehensive Economic and Trade Agreement (legitimate expectation is not a free-standing-component)\textsuperscript{75} and may also expand narrow/non-existent ‘carve-outs’\textsuperscript{76} on measures such as subsidy schemes.

Importantly, in February 2018 in \textit{Novenergia v Spain} award\textsuperscript{77}, a broader approach to protect investors than the Eiser Tribunal was adopted to hold Spain liable for breach of FET standard.\textsuperscript{78} Hence, it may not be surprising news that Spain may join the ‘withdrawal-from-the-ECT-club’ with Italy\textsuperscript{79}.

\textbf{Behaviour of Investors}

The aforesaid State measures are unlikely to create the optimal environment for foreign investment.\textsuperscript{80} Investors have the lesson that documentation and recording of the reliance or basis for making an investment and its financing can be a critical piece of evidence for proving for breach of the FET standard.\textsuperscript{81} The European Commission that the investors in Spain did not have legitimate expectations as per EU law may create enforcement problems for the EU

\textsuperscript{75} Bonnitcha et al (n 16) 115.
\textsuperscript{76} Bonnitcha et al (n 16) 117-118.
\textsuperscript{77} Novenergia v Kingdom of Spain, SCC Case No. 063/2015.
\textsuperscript{79} Restrepo (n1) 10472, 80.
\textsuperscript{80} Power and Baker (n 13).
\textsuperscript{81} Power and Baker (n 13).
investors within the EU, hence, investors may opt for enforcement options outside the EU\(^82\), like Eiser.\(^83\)

**Behaviour of Tribunals**

Most FET clauses being ‘short and open-ended formulation provide broad interpretive discretion to investment tribunals’. \(^84\) Inconsistency flowing from lack of binding precedent will allow for a never-ending conflict between the State’s right to regulate and the investor’s protection under international investment agreements.\(^85\)

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\(^84\) Bonnitcha et al (n 16).
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