

# Changing treaties, changing jurisprudence? The impact of treaty design differences on precedential reasoning in investment arbitration

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**DRAFT**

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## ABSTRACT

*Investment agreements have changed drastically over time – in particular in recent years. In this contribution, I investigate how that change has impacted one area of investment arbitration practice: the use of precedent. In the absence of a formal rule of precedent, the use of prior arbitral jurisprudence in investment cases is based on the idea that like cases should be decided alike. By definition, treaty design differences can make two cases unlike. So do investment law practitioners consider treaty design differences when relying on precedent? To answer that question I combine two original datasets: (1) a detailed content mapping of investment treaties and (2) a citation network of publicly available investment arbitration decisions. My research shows that investment arbitrators are insufficiently sensitive to treaty design differences when applying precedent. As a result, they risk rolling back state-driven innovation as new treaties are read in light of old case law.*

## I. Introduction

Investment agreements have changed drastically over time. In particular in recent years, states have added new obligations and exceptions to their treaties, clarified existing disciplines and refined the procedure for the resolution of disputes between host states and investors. Whereas these changes are relatively well documented and understood, their impact on the practice of investment arbitration is not. Do changing treaties lead to changes in jurisprudence?

In this contribution, I tackle part of that larger question by investigating how treaty design change has impacted one area of investment arbitration practice: the use of precedent. In the absence of a formal rule of precedent, the use of prior arbitral jurisprudence in investment cases is based on the idea that like cases should be decided alike. By definition, treaty design differences can make two cases unlike. So do investment law practitioners consider these differences when relying on precedent?

To answer that question I combine two original datasets: (1) a detailed content mapping of investment treaties and (2) a citation network of publicly available investment arbitration decisions. My research shows that jurisprudence is only partly

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sensitive to treaty design differences when applying precedent. This is particularly problematic when new treaties are read in light of old case law, as arbitrators in these cases effectively use precedent to roll back state-driven innovation.

This paper is structured in three parts. The first briefly introduces the evolving structure of investment treaties. The second argues that treaty design differences weigh against treating two cases alike for the purpose of precedential reasoning. The third part empirically investigates whether tribunals are sensitive to treaty design differences in their choice of precedent.

## II. Changing investment treaty design

To properly grasp the impact of treaty design change on precedential reasoning we first need to characterize and measure that design change.

### *The evolving structure of the IIA universe*

Investment treaty design has evolved markedly over time. The treaties signed today share a similar set of core provision with the early bilateral investment treaties of the 1960s, but vary on a number of other grounds. First, states have added new obligations to the repertoire of investment protection agreements over time from a prohibition on investment performance requirements, to the liberalization of investment inflows or the commitment not to lower environmental standards to attract investment.<sup>2</sup> Second, new exceptions, reservations and carve-out have been included, in part, to counter-balance new obligations, and, in other part, to resolve policy conflicts between investment protection, on the one hand, and the hosts state's ability to regulate in the public interest, on the other hand.<sup>3</sup> Third, long-standing protective commitments, like the obligation to provide fair and equitable treatment, have been clarified to mitigate their ambiguity through more precise drafting.<sup>4</sup> Fourth, investor-state dispute settlement has undergone drastic changes with some states abandoning arbitration in favor of alternative dispute resolution tools and others refining it or transforming it into a permanent court-like structure.<sup>5</sup> As a result, many of today's investment agreements look very different from those concluded in the 1960s.

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<sup>2</sup> Wolfgang Alschner, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, 5 GOETTINGEN J. INT. LAW 455–486 (2013).

<sup>3</sup> Anne van Aaken, *International investment law between commitment and flexibility: a contract theory analysis*, 12 J. INT. ECON. LAW 507–538 (2009); S. A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT. ECON. LAW 1037–1075 (2010).

<sup>4</sup> Federico Ortino, *Refining the Content and Role of Investment 'Rules' and 'Standards': A New Approach to International Investment Treaty Making*, 28 ICSID REV. 152–168 (2013); Caroline Henckels, *Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP*, 19 J. INT. ECON. LAW 27–50 (2016); Mark S. Manger & Clint Peinhardt, *Learning and the Precision of International Investment Agreements*, 0 INT. INTERACT. 1–21 (2017).

<sup>5</sup> Vivian Gabriel, *The New Brazilian Cooperation and Facilitation Investment Agreement: An Analysis of the Conflict Resolution Mechanism in Light of the Theory of the Shadow of the Law*, 34 CONFL. RESOLUT. Q. 141–161 (2016); Naboth van den Broek & Danielle Morris, *The EU's Proposed*

The evolution of investment treaty design is not a recent phenomenon precipitated through the advent of investment claims. In fact, major waves of treaty design innovation either pre-date the rise of investment arbitration (as in the United States and Canada) or developed independently of it (as in Japan).<sup>6</sup> In turn, several developing states chose to exist the system rather than revise their treaties (such as Bolivia, South Africa and Venezuela). While in recent years the proliferation of investment claims has begun to trigger treaty design responses, including in Europe (where a new investment court system has been proposed to remedy perceived problems with arbitration) and India (where a new model agreement was developed), they have yet to materialize into a widespread treaty practice.<sup>7</sup> In short, treaty design evolution has accompanied the proliferation of investment agreements throughout the development the investment regime, although the rise of investment claims has given it new momentum in recent decades.

### *Measuring treaty design evolution*

Treaties differ in a myriad of ways. Whether a treaty design difference is significant is often only revealed when a dispute emerges and one formulation is pitted against another. A priori, virtually any language variation can become decisive in a given set of circumstances. When considering the evolution in treaty design in a general research context, it is thus useful to look at treaty language differences broadly.

To operationalize treaty design differences as diverging treaty language, I resort to the toolkit of text-as-data analysis and natural language processing.<sup>8</sup> A simple way to model treaty design based on treaty language is through a unigram language model that represents a treaty through the frequency of its words. The number of times a word occurs in each treaty is recorded in a large document-term matrix, in which every row is a treaty and every column is a word. This matrix can then be scaled down using principle component analysis to identify the most important difference running through the treaties in our dataset, i.e. the dimension that explains most of the variation between agreements. Treaties that have almost identical wording will have very similar principal component scores, whereas treaties with very different wording will have markedly different scores.

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*Investment Court and WTO Dispute Settlement: A Comparison and Lessons Learned*, 2 EUR. INVEST. LAW ARBITR. REV. ONLINE 35–89 (2017).

<sup>6</sup> Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality*, 42 YALE J. INT. LAW (2017).

<sup>7</sup> Broek and Morris, *supra* note 5; Prabhash Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38 NORTHWEST. J. INT. LAW BUS. (2017), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1824&context=njilb> (last visited Jan 7, 2018).

<sup>8</sup> Justin Grimmer & Gary King, *General purpose computer-assisted clustering and conceptualization*, 108 PROC. NATL. ACAD. SCI. U. S. A. 2643–2650 (2011).

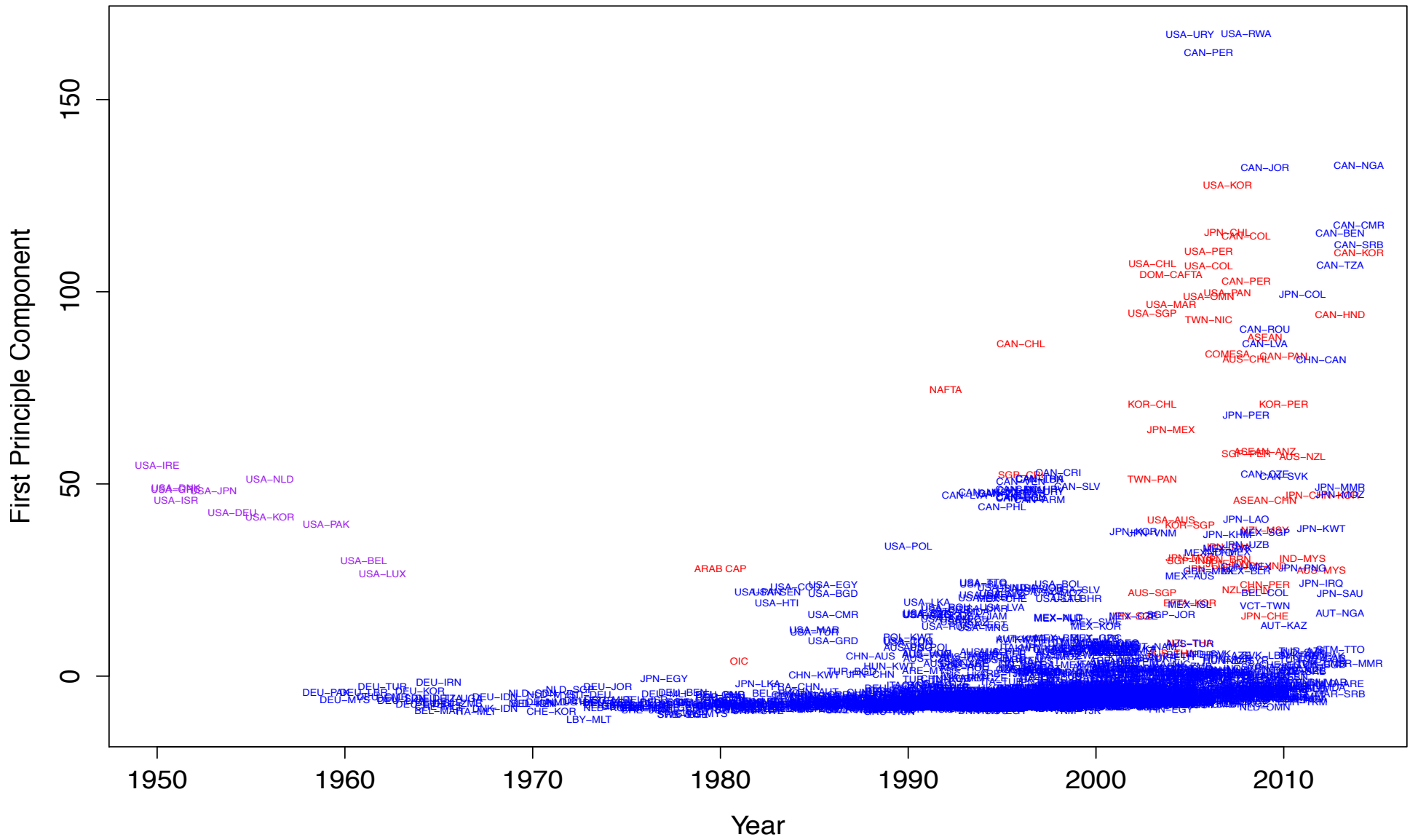
Figure 1 displays this representation of the investment treaty universe based on over 1700 international investment agreements (IIAs) along the time axis.<sup>9</sup> By manually inspecting treaties at opposite ends of the first principal component (PC1) axis, we can characterize the content of the axis. Whereas low PC1 scores regroup short treaties of limited scope and precision, high PC1 scores are associated with long and comprehensive treaties that contain complex obligations and exceptions. Understandably, this crude description may be unsatisfying to many readers. The point here, however, is not to characterize latent treaty design differences in the IIA universe, but merely to suggest that the line drawn through that treaty universe in Figure 1 is meaningful as it usefully separates agreements that a lawyer would consider generally to be of different design (i.e. simple versus complex IIAs).

As explained above, it strongly depends on the context whether these treaty design differences become legally relevant in a given dispute. For instance, two IIAs may be very differently worded in all but one provision and thus clustered apart. But if an arbitration turns on that same provision, the two otherwise distinct treaties may warrant the same interpretive reasoning. The next section will detail why it is nevertheless reasonable to assume that treaties similar in design (and hence closer in PC1 scores) are more likely to give rise to similar interpretation than treaties placed further apart on the PC1 axis.

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<sup>9</sup> It includes Friendship, Commerce and Navigation Treaties (FCN - violet), Bilateral Investment Treaties (BITs - blue) and Free Trade Agreements' investment chapters (red).

Figure 1: Evolution of IIAs (violet: FCNs treaties, blue: BITs, red: FTAs)



### III. Treating like cases alike: Precedent, apples and oranges

In international investment law, arbitral awards do not have a *stare decisis* effect – they are only binding on the parties to the dispute, but not on subsequent tribunals.<sup>10</sup> Legally speaking, tribunals are thus under no obligation to refer to prior awards. Parties and tribunals alike, however, frequently use prior investment law jurisprudence to inform their legal analysis.<sup>11</sup> Underlying the use of prior cases is the age-old idea, grounded in fairness, equity, and morality that like cases should be treated alike.<sup>12</sup> Since earlier decisions are thus used as a source of reasoning (rather than a source of law), they are referred to as “persuasive” precedents.<sup>13</sup>

The reliance on persuasive precedents in investment law is based on an unstated assumption: by saying that a fair and equitable (FET) interpretation under treaty A can inform a FET interpretation under treaty B, arbitral tribunals implicitly assume that treaties A and B are sufficiently alike to draw persuasive inferences. This assumption, however, is open to challenge in an IIA universe characterized by treaty diversity. Unless parties and arbitrators carefully check whether treaty A and B are indeed alike, they risk comparing apples to oranges.

#### *Jurisprudential consistency*

Even though there is no formal obligation of *stare decisis* in international investment law, tribunals often consider themselves to be under an informal or moral duty to follow prior awards. As stated by the Tribunal in *Planet Mining v Indonesia*:

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. Specifically, it deems that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further deems that, subject to the specific provisions of a given treaty and of the circumstances of the actual case, it has a duty to

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<sup>10</sup> See, for instance, *Wintershall v. Argentina*, para. 194. (“*stare decisis* has no application to decisions of ICSID tribunals [...] The award of such tribunal is binding only on the parties to the dispute (Article 53 of the Convention) – not even binding on the State of which the investor is a national. Decisions and Awards of ad hoc ICSID tribunals have no binding precedential effect on successive tribunals, also appointed ad hoc between different parties.”); *Methanex v. United States of America*, para. 141 (“[Prior awards] are not sources of law; and neither can be regarded as authority legally binding upon this Tribunal.”)

<sup>11</sup> For an empirical study showing that tribunals extensively rely on prior awards see O. K. Fauchald, *The Legal Reasoning of ICSID Tribunals - An Empirical Analysis*, 19 EUR. J. INT. LAW 301–364 (2008).

<sup>12</sup> See, for instance, *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010, para. 24.

<sup>13</sup> See *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 55 (“this Tribunal finds it appropriate to consider the reasoning of and conclusions reached by such tribunals, and to assess whether they may be persuasive in the particular circumstances presented in the case before us.”). Similarly, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, para. 47.

contribute to the harmonious development of investment law, with a view to meeting the legitimate expectations of the community of States and investors towards certainty of the rule of law.<sup>14</sup>

There are many virtues in developing a consistent line of jurisprudence. Enhancing predictability through consistent interpretation is an important aspect of the rule of law.<sup>15</sup> Moreover legal certainty makes it easier for states and investors to monitor compliance with international obligations. It thereby helps to prevent non-compliance and facilitates the amicable settlement of disputes where they do arise. In short, the idea of jurisprudential consistency is a desirable one.

At the same time, the fragmented nature of the investment treaty depicted in Figure 1 provides a difficult ground for the emergence of such jurisprudence.<sup>16</sup> As one of the first tribunals toying with the idea of a consistent jurisprudence emphasized

although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State.<sup>17</sup>

Put differently, only where the underlying law makes two cases alike, tribunals should adopt a consistent approach. Hence, striving for jurisprudential consistency is commendable as long as interpreters actively verify the comparability of the underlying law.

#### *Treaty differences affect the persuasiveness of precedent*

In order to determine the persuasiveness of prior case law in a given case, arbitrators have to assess whether its underlying law is similar to the treaty at issue. Evaluating how similar or different two investment treaties are, in turn, is a question of treaty interpretation. Article 31(1) of the VCLT mandates that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the

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<sup>14</sup> *Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014, para. 85 (footnote omitted). See similarly, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case ARB/03/16, Award, 2 October 2006, para. 293 (“cautious reliance on certain principles developed in [prior investment arbitration] cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States.”)

<sup>15</sup> Gabrielle Kaufmann-Kohler, *Is Consistency a Myth?*, 137 in PRECEDENT IN INTERNATIONAL ARBITRATION (Emmanuel Gaillard & Yas Banifatemi eds., 2008); but, see also Thomas Schultz, *Against consistency in investment arbitration*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 297–316 (Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales eds., 2014).

<sup>16</sup> Rudolf Dolzer, *Perspectives for Investment Arbitration: Consistency as a Policy Goal?*, in NEW DIRECTIONS AND EMERGING CHALLENGES IN INTERNATIONAL INVESTMENT LAW AND POLICY (Pierre Sauv e & Roberto Echandi eds., 2012).

<sup>17</sup> *SGS v. Philippines*, para. 97.

treaty in their context and in the light of its object and purpose.” Article 31(1) thus enumerates three possible sources of interpretive differences, (1) ordinary meaning, (2) context, and (3) object and purpose, all of which are implicated as part of the varying design of IIAs.

### 1. Ordinary meaning – Different words, different meanings

First, and most obviously, treaties may differ in the words they use, which leads to interpretational differences that affect the persuasiveness of a precedent. In *Glamis v United States*, for instance, the tribunal had to decide what types of arbitral awards it should consider in giving meaning to the NAFTA minimum standard of treatment contained in Article 1105.<sup>18</sup> The claiming investor had referred to arbitral awards rendered under BITs that contain an autonomous FET obligation – a clause that, in contrast to NAFTA, does not link FET textually to international (customary) law or the international minimum standard of treatment. The claimant argued that customary international law had evolved and that arbitral awards rendered under these autonomous standard BITs reflected current state practice and *opinio juris* with respect to the customary international law minimum standard.<sup>19</sup> The tribunal rejected these arguments drawing a sharp line between the clause they were supposed to apply, which explicitly referred to the minimum standard, and BITs using an autonomous standard which had been interpreted as going beyond customary international law by other tribunals.<sup>20</sup> The tribunal concluded, “that it may look solely to arbitral awards—including BIT awards—that seek to be understood by reference to the customary international law minimum standard of treatment, as opposed to any autonomous standard.”<sup>21</sup> What the tribunal did, in essence, was to ensure that like cases are treated alike.<sup>22</sup> It considered that the cited cases lacked persuasive authority because they differed in their underlying wording from the treaty at hand. Differently put, the tribunal did not want to equate apples and oranges.

### 2. Context – Different structures, different meaning

Even where the same words are used, a different treaty structures can still yield differing interpretations.<sup>23</sup> Hence, a precedent may not be persuasive where the underlying treaty context differs. Such structural differences between treaties are more difficult to spot, since they operate through the interaction of treaty elements.

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<sup>18</sup> *Glamis Gold v. United States of America*.

<sup>19</sup> *Id.* paras. 549-552.

<sup>20</sup> *Id.* para. 609.

<sup>21</sup> *Id.* para. 611.

<sup>22</sup> For another example of a tribunal recognizing design differences see, for instance, *Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008, paras. 212-5.

<sup>23</sup> Bradley J. Condon, *Treaty Structure and Public Interest Regulation in International Economic Law*, 17 J. INT. ECON. LAW 333–353, 342 (2014) (“The structure of a treaty is part of the context.”).



First of all, the meaning and scope of one investment treaty obligation is often a function of the meaning and scope of another investment treaty obligation. Given the vagueness of the ordinary meaning of core investment obligations in older IIAs,<sup>24</sup> arbitral tribunals often resorted to contextual interpretations to delineate the scope of obligations such as FET, FPS or indirect expropriation, yet with differing results. A first line of cases used context to stress the inter-substitutability of investment treaty obligations. For these tribunals, the vague language used in investment treaties suggested that the varying obligations overlapped normatively.<sup>25</sup> The *CMS v Argentina* tribunal, for instance, collapsed the distinction between FET and the obligation prohibiting “arbitrary or discriminatory” conduct finding that “[a]ny measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.”<sup>26</sup> Other tribunals have done the same with regard to FET and full protection and security,<sup>27</sup> or FET and expropriation.<sup>28</sup> A second line of cases used context to infer a hierarchy of treaty provisions. The *El Paso v Argentina* tribunal thus drew a distinction between general obligations such as FET and specific obligations like “full protection and security.”<sup>29</sup> In that mode of reasoning, a tribunal would first assess whether a more precise obligation is violated before falling back on the more general obligation. A third line of case law used context to distinguish rather than conflate the normative ambit of obligations. The tribunal in *Arif v Moldova*, for instance, was “not persuaded by Claimant’s argument that if a State breaches the FET standard, it is ipso facto also in breach of the FPS standard. The standard of FPS is clearly addressed in a separate article in the BIT. The Tribunal therefore finds that FPS is a separate and independent standard to that of FET.”<sup>30</sup> Other tribunals have

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<sup>24</sup> The case law on FET is illustrative on this point. As the *Saluka* tribunal states: “The ‘ordinary meaning’ of the ‘fair and equitable treatment’ standard can only be defined by terms of almost equal vagueness.” *Saluka Investments v. Czech Republic*, para. 297. See, similarly, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010, para. 258; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 504.

<sup>25</sup> Mavluda Sattorova, ‘Investment Treaty Breach as Internationally Proscribed Conduct: Shifting Scope, Evolving Objectives, Recalibrated Remedies’ (2012) 4 *Trade, Law and Development* 315. An indirect expropriation claim, for instance, is routinely framed as a FET claim in the alternative. See, for instance, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000. Moreover, arbitral tribunals often assert that FET also covers discriminatory treatment blurring the boundaries between absolute standards of treatment (like FET) and relative standards of treatment (like national and most favored nation treatment clauses). See, for instance, *Ronald S. Lauder v. Czech Republic*, para. 294. *Lemire v. Ukraine*, *supra* note 24, para. 259.

<sup>26</sup> *CMS v. Argentina*, , para. 290.

<sup>27</sup> *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL Arbitration, Final Award of 1 July 2004, para. 118 (“treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment”). Similarly, *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic [I]*, PCA Case No. 2008-13, Final Award, 7 December 2012, para. 284; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 1 December 2011, para. 321.

<sup>28</sup> *Metalclad v. Mexico*, *supra* note 25, paras. 104, 113.

<sup>29</sup> *El Paso v. Argentina*, ICSID Case No. ARB/03/15, para. 230.

<sup>30</sup> *Mr. Franck Charles Arif v. Moldova*, para. 505. Similarly, see *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 296.

employed similar reasoning to distinguish between FET and expropriation<sup>31</sup> or FET and arbitrariness.<sup>32</sup> This third line of cases seeks to preserve the effectiveness or *effet utile* of individual clauses.<sup>33</sup>

In spite of these inconsistencies, the cases illustrate that context often plays a decisive factor in interpreting treaty obligations. As a result, the addition of new treaty clauses as part of IIA's evolution or the omission of old ones may have an effect on provisions that have been left unchanged. As a corollary, the substantive context in which obligations are placed must be taken into account when assessing the persuasiveness of a given precedent. If FET means something different in treaty A than in treaty B, because of its different contextual environment, case law on that provision under treaty A cannot be blindly accepted as persuasive authority for an assessment of FET under treaty B even if they share an identical wording. Otherwise, an arbitral tribunal would again be comparing apples to oranges.

A second type of contextual interaction affecting the persuasiveness of precedent relates to obligation-exception relations. In a recent study, Condon investigated how different treaty structures under trade and investment rules affect judicial scrutiny of a state's public interest regulation.<sup>34</sup> Trade agreements, generally, rely on exception clauses to balance the competing objectives of trade liberalization with other policy objectives such as the protection of the environment or the promotion of public health. In contrast, balancing under investment treaties is achieved either through exclusions carving out an entire class of measures from the scope of the agreement, e.g. public order clauses, or by interpreting primary investment obligations narrowly so as to account for public policy justifications within the clause itself.<sup>35</sup> Importantly, balancing under exceptions typically excludes balancing under primary obligations. As Condon explains: "the presence of general exceptions that explicitly address public interest regulation makes it inappropriate to address public interest regulation in general scope provisions or specific limitations on the scope of specific obligations, since it would diminish the effect of general exceptions and risk making them redundant, at least to some extent."<sup>36</sup> In the same vein, the WTO Appellate Body made clear that "the fact that, under the GATT 1994, a Member's right to regulate is

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<sup>31</sup> *Nations Energy, Inc. and others v. Republic of Panama*, ICSID Case No. ARB/06/19, Award, 24 November 2010, para. 683; *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 124.

<sup>32</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 162.

<sup>33</sup> Whereas an effectiveness-enhancing interpretation may be controversial, an effectiveness-preserving interpretation "is a perfectly sensible maxim", see Christoph Schreuer, 'Comment', in: Rainer Hofmann, Christian J. Tams (eds), *International Investment Law and General International Law: from Clinical Isolation to Systemic Integration?* (Baden-Baden Nomos 2011), 71-74, at 71. Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT. LAWYER ABA 87, 91 (2005); Christoph Schreuer, *Fair and Equitable Treatment (FET): Interactions with other Standards*, 4 TRANSNATL. DISPUTE MANAG. TDM (2007).

<sup>34</sup> Condon, *supra* note 23.

<sup>35</sup> *Id.* at 335-6.

<sup>36</sup> *Id.* at 342-3.

accommodated under Article XX, weighs heavily against an interpretation of Articles I:1 and III:4 that requires an examination of whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction.”<sup>37</sup>

Primary obligations are thus likely to be interpreted very differently depending on whether or not general exceptions are available. If an exception is present, the protective scope of an obligation is often widened, while its justificatory dimension is narrowed. If an exception is absent, in contrast, all the balancing that would otherwise be accommodated by the secondary rule must be done directly under the primary rule. This arguably narrows the protective scope of the obligation and widens its justificatory dimension. In conclusion, as investment treaties vary in their propensity to include escape clauses, they will also likely vary in the interpretation of primary investment obligations. Jurisprudence derived under treaties without exceptions can thus not simply be transplanted to treaties with exceptions.

### 3. Object and purpose – Different goals, different meaning

Finally, differences in two treaties’ object and purpose can affect interpretation under IIAs. As Pauwelyn and DiMascio suggest, identical language under trade law and under investment law ought to be read very differently given that both fields pursue very different goals.<sup>38</sup> As a consequence, jurisprudence developed in the trade area cannot be blindly transposed to the investment context even if it deals with similarly worded concepts such as non-discrimination.<sup>39</sup> While the evolution of IIAs has not fundamentally altered the object and purpose of investment treaties, i.e. the protection of investment, it has placed that goal within a larger context that more often now contains non-economic policy considerations. The more explicit balancing of investment protection and other public policy values in more recent treaties, often spelled out explicitly in the preambles, could, for instance, affect how vague provisions are interpreted.

In short, differences in treaty design result in differences in interpretation. As interpretation changes based on differences in ordinary meaning, context or object and purpose, interpreters need to carefully scrutinize the similarity of underlying treaties before endorsing a given precedent as persuasive in a case. Otherwise they may treat unlike cases alike.

## **IV. Citation analysis: All IIAs are grey, but NAFTA is special**

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<sup>37</sup> Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014, para. 5.125.

<sup>38</sup> Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT. LAW 48–89 (2008).

<sup>39</sup> *Id.*

The above analysis leads to the empirical question whether investment tribunals take treaty design into account when considering precedent. Differently put, do tribunals only cite from cases that share a similar underlying treaty design? To answer that question, I proceed in three steps. First, I investigate the most defensible use of precedent: the use of case law rendered under the same treaty. Do same-treaty precedents dominate over case law rendered under third agreements? Second, I check citations rendered under agreements with varying treaty design. Do arbitrators, for instance, cite older, shorter and imprecise agreements when interpreting newer, more comprehensive and precise agreements? Finally, I offer two case studies of a particularly egregious use of precedent connecting two agreements that differ drastically in design where arbitrators seemed to have confused apples with oranges.

### *Citation data*

The citation data used for this analysis stems from the Integrated Database on International Economic Law (IDIEL).<sup>40</sup> That database draws from documents downloaded from [www.italaw.com](http://www.italaw.com), a provider of investment arbitration documents, which were converted into machine-readable text files. As part of that process, the footnotes of each document were extracted and citation references to other investment disputes identified. Finally, from those citations only those were retained that stem from treaty-based awards and separate or dissenting opinions to other treaty-based awards and separate or dissenting opinions.

A major caveat in relation to such citation data concerns its interpretation: What does it mean that tribunal A cites tribunal B? For the purpose of this paper, I do not distinguish between a tribunal's own analysis or sections where the tribunal restates arguments of the parties. Furthermore, I do not assess whether a tribunal endorses, rejects or otherwise comments upon a given precedent. These two caveats caution against attributing specific meaning to individual citations. On the aggregate, however, they still contain meaningful information. Since all awards were analyzed in the same manner, systematic differences between them, which can be linked to their underlying treaties, can tell us something about how parties and, more pertinent for our analysis, arbitral tribunals account for treaty design differences in their choice of precedent independently of the specific use to which a citation is put.

### *Reliance on precedent rendered under the same agreement*

The legally most defensible and intuitive way to ensure that only like cases are treated alike is to rely on precedents rendered under the very same agreement. Evidently, not all tribunals share the luxury of applying a treaty that has been interpreted before. Indeed, the field is skewed towards a few treaties that have attracted most disputes:

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<sup>40</sup> Wolfgang Alschner & Aleksander Umov, *Towards an Integrated Database of International Economic Law (IDIEL) Disputes for Text-as-Data Analysis*, CTEI WORK. PAP. (2016), [http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working\\_papers/CTEI-2016-08.pdf](http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI-2016-08.pdf) (last visited Jun 2, 2017).

five treaties account for a quarter of all disputes; another quarter is based on treaties that have been litigated between two and seven times before; a third quarter of disputes are based on a treaty with one prior dispute and the final quarter of disputes are litigated under treaties with no prior disputes (Table 1). The top five litigated treaties are the Energy Charter (70 cases), NAFTA (54 cases), US-Argentina BIT (20), US-Ecuador BIT (15) and the Netherlands-Venezuela BIT (13).

**Table 1: Treaty Basis of Disputes (source: UNCTAD, Nov 2016)**

Quartiles of Disputes	Number of Treaties	Number of prior disputes
1 <sup>st</sup> Quartile	5	69-12
2 <sup>nd</sup> Quartile	47	7-2
3 <sup>rd</sup> Quartile	44	1
4 <sup>th</sup> Quartile	195	0

If we just focus on the five most litigated treaties, two indicators are instructive in how these treaties are placed in the universe of arbitral precedent. First, the share of outward citations from disputes litigated under one of these agreements that refers back to cases also litigated under the same agreement is a measure of how inward looking a precedential network is under a given agreement, i.e. its degree of *active integration* in the precedential network of investment disputes. Conversely, the share of inward citations that come from disputes litigated under the same agreement in relation to all the citations a treaty attracts measures how attractive the treaty is for citations from other treaties, i.e. its degree of *passive integration* in the precedential network of investment disputes.

Legally, if treaty design is the primary determinant of citations, then we should expect that the degree of active and passive integration is roughly similar. This is because like cases are either like or they are not. If a treaty A is very different from B, A should not rely on precedent rendered under B, but nor should B rely on a precedent under A. Table 2 displays the levels of active and passive integration. For the top-ranking BITs our expectation is largely confirmed. The share of non-self-citations in outward citations mirrors the share of non-self-citations in inward citations for these treaties.

**Table 2: Relative Integration of Top Litigated Treaties into the Precedential Network (data: Nov 2016)**

Quartiles of Disputes	Share of Non-Self-citations in its Outward citations (Level of active integration)	Share of Non-Self-citations in its Inward citations (Level of passive integration)
Energy Charter Treaty	84%	65%
NAFTA	27%	77%
Argentina–USA BIT (1991)	69%	90%
Ecuador–USA BIT (1993)	85%	83%
Netherlands–Venez.BIT (1991)	93%	94%

The citation patterns on non-BIT cases are more puzzling however. On the one hand, NAFTA arbitrators rely on other NAFTA decisions in three out of four cases whereas under the listed BITs and the Energy Charter arbitrators most often find inspiration from third treaties. On the other hand, interpreters are relatively reluctant to refer to Energy Charter precedent when litigating non-ECT disputes, yet they keenly look to NAFTA precedent even when applying non-NAFTA law. Legally, this asymmetry is difficult to explain. If treaty design was the major factor explaining citation behavior, the fraction of NAFTA tribunals shying away from applying non-NAFTA precedent should be mirrored by a similar reluctance of non-NAFTA tribunals to apply NAFTA precedent, because either NAFTA and non-NAFTA treaties are similar in design, justifying cross-citations to treat like case alike, or they are not.

There are of course a myriad of other possible explanations for these patterns. Disputes filed under NAFTA in the late 1990s marked the advent of more frequent use of investor-state arbitration; its awards became classics in investment arbitration and conceptually and intellectually shaped the trajectory of the discipline.<sup>41</sup> From that perspective it is not surprising that non-NAFTA tribunals seek guidance from NAFTA awards even when NAFTA tribunals do not do the same. Similarly, there are good reasons why the confined subject-matter of the Energy Charter makes the treaty less attractive as a source of precedent, but does not similarly impede arbitral tribunals constituted under the ECT from drawing guidance from tribunals under other agreements with similarly worded provisions. In short, patterns in citation networks seem to be driven by a range of factors that may include but are not limited to treaty design differences.

#### *Precedent and treaty design differences*

Even though other factors may be at play, the rules of treaty interpretation suggests that treaty design differences should play a key role in determining what precedent is being cited. Tribunals should thus be sensitive to the starkly varying levels of treaty design. Yet, it seems that they are not.

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<sup>41</sup> Alschner, *supra* note 6.

Table 3 records the citation connections between treaties based their treaty design differences along the PC1 axis. “High” indicates PC1 scores above 20, “Medium” stands for those lower than 20 but higher than 10, and “Low” for everything below 10. Whereas most citations connect low-PC1 treaties with other low-PC1 treaties (31%), a non-negligible number of awards based on high-PC1 cases cite awards rendered under low-PC1 treaties (5%). These are the ones that are most worrisome.

**Table 3: Citations by treaty design difference (data: Nov 2016)**

		Target		
		High PC1	Medium PC1	Low PC1
Source	High PCA	11%	4%	5%
	Medium PCA	4%	10%	8%
	Low PCA	11%	17%	31%

These top-down citations are primarily a phenomenon for more high-PC1 BITs rather than FTAs with investment chapters. As shown in Table 4, almost  $\frac{3}{4}$  of all NAFTA citations go to other high-PC1 treaties – in fact they all go to NAFTA. This underscores the special nature of NAFTA. For DOM-CAFTA this number is already lower at around 50%. Finally, for the two high-PC1 BITs in our dataset only 15% and 22% citations go to other high-PC1 treaties and most go to low-PC1 treaties. Even with NAFTA playing in a league of its own, the data suggests that, in the minds of interpreters of high-PC1 treaties, the distinction between treaty design is much less pronounced than the distinction between treaty type (BIT vs FTAs) and/or the special role played by NAFTA.

**Table 4: Outward citations by four highest PC1 treaties (data: Nov 2016)**

		Target		
		High PC1	Medium PC1	Low PC1
Source	NAFTA 1992	73%	12%	15%
	DOM-CAFTA 2004	48%	21%	32%
	CAN-ECU 1996	22%	31%	47%
	CAN-VEN 1996	15%	21%	64%

*Confusing apples with oranges – Recent awards off-track*

The data thus suggests that interpreters treat NAFTA special. When dealing with other more high-PC1 treaties, in particular BITs, however, they engage with prior investment case law on the unstated assumption that these treaties, on the whole, tend to be very similar. Differently put, tribunals have tended to *assume* rather than to check treaty design comparability before considering the persuasive value of a

precedent. Fauchald’s empirical investigation of the reasoning of investment tribunals is illustrative. Prior case law was used to inform treaty interpretation in 92 out of 98 investment arbitration decisions in his sample.<sup>42</sup> In contrast, only a third of the decisions contained some reference to the VCLT rules of interpretation. Fauchald found that “[o]nly in exceptional decisions did tribunals integrate the VCLT into their reasoning beyond general references.”<sup>43</sup> Yet, as shown in the previous section, without recourse to the VCLT’s rules of interpretation and its appreciation of textual differences, it is impossible to properly compare the underlying law to assess the persuasiveness of a given precedent. Unsurprisingly then, he found that tribunals do not generally distinguish between precedents based on their underlying law.<sup>44</sup> At its extreme, the failure to account for treaty design difference in the choice of precedent risks having old case law override the evolving contractual choices states have made in new treaties.

In recent years, more high-PC1 non-NAFTA investment treaties have begun to generate case law. The lesson from them so far is a disheartening one. Arbitrator Cremades once cautioned that “[t]he integrity of this interpretative process [under the VCLT] must not be compromised by the pronouncements of other arbitral tribunals in their interpretation of different treaties in wholly unrelated factual and legal contexts.”<sup>45</sup> This, however, is what we are seeing now. The lack of awareness of treaty differences coupled with a liberal acceptance of prior case law rendered on fundamentally different treaties, risks to override contractual choices in recent treaties. Two awards illustrate this trend.

#### 1) Gold Reserve Inc. v. Venezuela

In late 2009, the Canadian company Gold Reserve brought an investment claim against Venezuela alleging that the revocation of two of its exploration and mining permits violated several provisions of the Canada–Venezuela BIT (1997). In its 2014 award, the tribunal ultimately found that Venezuela had violated its FET obligation, but rejected all other claims, awarding \$713 million in damages.<sup>46</sup>

The Canada–Venezuela BIT is part of a wave of agreements signed by Canada following the conclusion of NAFTA. It ranks among the top 20 treaties in terms of its PC1 score and, as such more closely resembles NAFTA Chapter 11, than

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<sup>42</sup> Fauchald, *supra* note 11 at 335.

<sup>43</sup> *Id.* at 314.

<sup>44</sup> *Id.* at 339. (“due to the inherent institutional and regulatory differences between the ICSID Convention, BITs, and multilateral investment agreements (the NAFTA and the ECT), one could expect differences in how existing case law was used[, t]he only significant difference found was the frequent use of UNCITRAL arbitration under NAFTA”).

<sup>45</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Dissenting Opinion of Mr. Bernardo M. Cremades, 16 August 2007, para. 7.5

<sup>46</sup> *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014.



traditional European BITs. Most importantly for the outcome of the case, its FET clause, similar to NAFTA Article 1105, is linked to “the principles of international law.” A tribunal, closely following the VCLT principles of interpretation, and aware of the impact of textual and contextual differences on the construction of treaty terms, should thus have been sympathetic to NAFTA precedents and more reluctant to consider case law under treaties more dissimilar from the Canada–Venezuela BIT. This, however, was not what the tribunal did.

It started off correctly referring to the fact that the FET clause is textually anchored in the principles of international law, and rightfully stated that in order to “determine these principles the Tribunal must consider the present status of development of public international law in the field of investment protection.”<sup>47</sup> Then, surprisingly, the Tribunal quickly concluded: “public international law principles have evolved since the *Neer* case and ... the standard today is broader than that defined in the *Neer* case on which Respondent relies.”<sup>48</sup> To support its view, the tribunal cited a speech by Judge Schwebel who “authoritatively held”, during “remarks ... at the International Arbitration Club”, that FET has nothing to do with the *Neer* standard.<sup>49</sup> Apart from a cursory reference to a general statement by the *Mondev* tribunal that individual rights under international law have evolved over time, the arbitrators did not engage with the considerable case law under NAFTA Article 1105, and, instead, deemed it appropriate to exclusively consider “a few cases whose factual circumstances appear to be closer to the facts of the present case.”<sup>50</sup> On the one hand, this choice is appropriate since like cases must also be factually alike. On the other hand, by prioritizing factual likeness over legal likeness, the tribunal risked deciding a case not on the applicable law, but on precedent. Put differently, precedent becomes dispositive rather than persuasive. This is arguably the flawed path the tribunal followed.

The tribunal proceeded in its analysis by referencing the *Saluka v Czech Republic* case decided under the Netherlands–Czech Republic BIT (1991). This treaty ranks in the bottom 200 in terms of its PC1 score – the opposite end of the PC1 axis as compared to the Canada–Venezuela BIT – suggesting that both treaties are very different from each other. Indeed, the FET clause in Article 3(1) of the Netherlands–Czech Republic BIT does not contain a reference to international law. Through the *Saluka* precedent and one reference to *Thunderbird v. Mexico* (NAFTA) and to *MTD v Chile* (Chile–Malaysia BIT), the tribunal then introduced the concept of legitimate expectations and transparency as substantive parts of the FET analysis.<sup>51</sup> Not only did the tribunal thereby base its analysis, at least in part, on precedent that should have been ruled inapplicable for lack of legal similarity, but it also failed to engage

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<sup>47</sup> *Id.* para. 567.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* para. 570.

with actually pertinent case law. Transparency and legitimate expectations have proved controversial concepts under the similarly worded NAFTA Article 1105. To support its analysis, for instance, the Tribunal referred to Article XV of the Canada–Venezuela BIT, which mandates transparency through the publication of rules and regulations applicable to investments, to infer the importance of the concept of transparency as part of FET.<sup>52</sup> This very line of reasoning, conflating FET and a separate transparency obligation, had been rejected under NAFTA, first, in the domestic setting-aside proceedings of the *Metalclad* award before the British Columbia Supreme Court,<sup>53</sup> and later in *Feldman, Cargill* and *Merill*.<sup>54</sup> Although the tribunal could, of course, have disagreed with these findings, it should have at least engaged with these pertinent cases. In short, the tribunal committed two errors: it applied unpersuasive precedent and ignored persuasive precedent.

The perhaps most striking feature of the award, however, is the absence of any reference to Annex 10b) of the Canada–Venezuela BIT which states that

Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures: (i) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement, (ii) necessary to protect human, animal or plant life or health, or (iii) relating to the conservation of living or non-living exhaustible natural resources.

Apparently, Venezuela did not raise the provision, even though it argued that the government had cancelled Gold Reserve’s permits on environmental grounds.<sup>55</sup> Equally surprising, however, is the following statement of the tribunal:

The Tribunal acknowledges that a State has a responsibility to preserve the environment and protect local populations living in the area where mining activities are conducted. However, this responsibility does not exempt a State from complying with its commitments to international investors by searching ways and means to satisfy in a balanced way both conditions.<sup>56</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *United Mexican States v. Metalclad Corporation*, ICSID Case No. ARB(AF)/97/1, Reasons for Judgment of the Honourable Mr. Justice Tysoe, 2 May 2001, paras. 68-74.

<sup>54</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 133; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 294 and *Merrill & Ring Forestry L. P. v. Government of Canada*, UNCITRAL, ICSID Administrated, Award, 31 March 2010, para. 231

<sup>55</sup> *Gold Reserve v. Venezuela*, *supra* note 46, para 590.

<sup>56</sup> *Id.* para. 595.

Contrary to the tribunal's assertion, Annex 10 would have exempted Venezuela "from complying with its commitments to international investors" for environmental reasons provided that the necessity test in that clause had been satisfied. While Venezuela's acts might not have met that test, the balancing between environmental objectives and compliance with investment protection obligation should have been done under the Annex. The tribunal, in contrast, considered them as part of the FET discussion. As a result, the case is an example where undue use of precedent trumps a proper assessment of the underlying law and its most closely related jurisprudence.

## 2) *Railroad Development Corp (RDC) v Guatemala*

Another misuse of precedent occurred in the first merits decision under DR-CAFTA rendered in 2012, which concerned an order of the government of Guatemala to cancel a railroad operation concession previously awarded to an American investor.<sup>57</sup> The investor argued that the cancellation order violated DR-CAFTA's national treatment, expropriation, and minimum standard of treatment (MST) clauses. The tribunal dismissed the former two claims for lack of merit, but upheld the latter one.<sup>58</sup>

In its reasoning, the tribunal engaged with prior NAFTA case law in order to elucidate the content of the MST clause in DR-CAFTA Article 10.5. On the one hand, this is commendable. In contrast to the *Gold Reserve* tribunal, the arbitrators in the *RDC* case relied virtually exclusively on case law arising from the textually related NAFTA Article 1105, rather than third BIT case law.<sup>59</sup> On the other hand, the tribunal failed to properly consider remaining differences between the NAFTA and the DR-CAFTA clause. The MST clause in NAFTA, even after the joint interpretation by the FTC discussed, remained ambiguous and led to divergent interpretation in case law. DR-CAFTA, in contrast, contains an additional explanatory Annex 10-B which sheds further light on the scope of the provision:

The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

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<sup>57</sup> *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012.

<sup>58</sup> On the case, see generally, Omar E. García-Bolívar, *Railroad Development Corporation v Republic of Guatemala The First CAFTA Award on the Merits*, 28 ICSID REV. 27-32 (2013).

<sup>59</sup> *Railroad Development Corporation v. Guatemala*, *supra* note 57, at paras. 216-219.

In its non-disputing party submission, the United States explains that clause 10.5 and its Annex

express an intent to guide the interpretation of that Article by the Parties' understanding of customary international law, *i.e.*, the law that develops from the practice and *opinio juris* of States themselves, rather than by interpretations [by arbitral tribunals] of similar but differently worded treaty provisions.<sup>60</sup>

The statement makes unequivocally clear that it does not consider awards rendered under other treaties as authoritatively describing the MST clause under DR–CAFTA.

The tribunal, however, disregarded the direction given in the explanatory Annex. After stating that CIL is in a constant process of development,<sup>61</sup> it found that

[the NAFTA Article 1105 case] *Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment. The Tribunal accordingly adopts the *Waste Management II* articulation of the minimum standard for purposes of this case.<sup>62</sup>

In other words, the tribunal, rather than investigating the “general and consistent practice of States that they follow from a sense of legal obligation” as mandated by the Annex to elucidate the MST, simply substituted the findings by a different tribunal under a different treaty for its own analysis. This was exactly what the submission of the United States had urged the tribunal not to do. Like in *Gold Reserve v Venezuela*, we are thus faced with an abusive use of precedent. The tribunals failed to recognize fundamental distinctions in the underlying treaties and applied an unsuitable precedent rather than the applicable law.

In assessing the persuasive value of a potential precedent, interpreters all too often assume that the underlying treaties are similar in design. This assumption is not warranted given the (growing) diversity in the IIA universe. Rather than assuming similarity, tribunals have to actively verify it.

## **V. Conclusion: Ensuring that precedent does not roll-back design innovation**

In light of a diverse IIA universe, parties and arbitrators have to rethink their use of precedent. They cannot assume that two treaties are similar but have to actively investigate similarities and differences between agreements to ensure that they are

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<sup>60</sup> *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Submission of the United States of America, 31 January 2012, para. 3.

<sup>61</sup> *Railroad Development Corporation v. Guatemala*, *supra* note 57, para. 218.

<sup>62</sup> *Id.* para. 219.

treating like cases alike. Doing otherwise risks overriding the explicit choices states have made in their treaties.

This research has shown that interpreters are currently often not sensitive enough to treaty design differences. Treaty design changes are thus not systematically accompanied by changes in precedential reasoning. Most concerning is that precedent is used – either inadvertently or purposefully – to effectively roll back innovation by deciding disputes under new treaties based on old case law. The only clear exception seems to be NAFTA, which occupies a unique status in the investment arbitration citation network by having given rise to a relatively autonomous body of precedent.

What should arbitrators do differently? Tribunals have to recall arbitrator Pedro Nikken’s piece of advice: “great caution is needed when identifying cases as alike, especially when dealing with factual issues ... and when, moreover, the BITs often contain significant differences despite their similarity.”<sup>63</sup> Tribunals should thus carefully scrutinize the similarity of underlying agreements before accepting a precedent as persuasive.

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<sup>63</sup> *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010, para. 24.