

**9th Investment Treaty Forum Public Conference:
The Emerging Jurisprudence of International Investment Law**

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Presentation: Precedent and Control in Investment Treaty Arbitration
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Good morning. When Andrea and Ian kindly invited me to participate in this conference, their task for me seemed straightforward. I was to discuss precedent in domestic law and in international investment treaty disputes. It was only after accepting their invitation that I realized the perils confronting a U.S. academic and practitioner discussing precedent with experts from England, the Continent, and elsewhere. Fortunately, this task is rendered manageable by instructions that I am to hog the floor for only fifteen minutes. I hope you will therefore excuse some generalizations made in the interests of brevity. My task, then, if you will permit a libationary metaphor some hours before noon, is to introduce the policies and principles of precedent as an aperitif to further discussions during this Conference.

I. Principles of Precedent

As we all know, precedent, or *stare decisis*, refers to a doctrine under which a court, when deciding a point of law, generally follows the holding of a prior court on that point if the prior court is superior or equal in the judicial hierarchy.

Of course, some hierarchically equal courts might not follow each other, such as when district courts in New York rule differently on the same issue, or when circuit splits occur among different U.S. federal appellate courts.

However, as a general matter, courts do strive to develop consistent jurisprudence. Even the highest appellate court will generally follow its prior decisions, except in exceptional circumstances. In *Planned Parenthood v. Casey*, the U.S. Supreme Court explained its balancing test in deciding whether to depart from a prior decision. On one hand, it must account for injustices that would be inflicted on those who had relied on a prior rule should it be repudiated. On the other hand, the court must assess whether new circumstances have “robbed the old rule of significant application or justification.”¹ The English House of Lords in their 1966 Practice Statement similarly explained that the law lords would treat former decisions as normally binding, and would only depart from a previous decision when it appeared right to do so.

The judicial practices of non-common law systems also generally support the trend to follow prior decisions. The Advocate General of the European Court of Justice stated in *Merck v. Primecrown Ltd.* that although the E.C.J. is not formally bound by precedent, it should nonetheless follow its previous case law except where there are strong reasons for not doing so. In 1997, a book titled “Interpreting Precedents,” published a study of over 4000 decisions which found that less than a dozen decisions departed from precedent.

II. Policies Underlying Precedent

It is not merely coincidental that courts around the world strive for consistency in their judgments except where circumstances are sufficiently changed to require a new rule of law. There are strong judicial policies in favor of a system of precedent in dispute resolution. To quote Professor Michael Reisman, court decisions are

¹ 505 U.S. 833, 854-55 (1992).

a form of “state-sponsored dispute resolution,”² in which judges play a decisive role in finalizing outcomes. In democratic systems, the continued existence of state-sponsored decision-making depends on its legitimacy with the *demos*. The legitimacy of judicial decision-making, and the community’s perceptions of such legitimacy, depend on the judicial system’s performance.

Precedent supports judicial performance in at least three ways. First, it aids the development of the law by providing a mechanism by which courts may adjust legal rules to accommodate changing needs of the community.

Second, it exerts control over courts and stabilizes the law by requiring judges to generally follow prior decisions and to have legitimate reasons for deviating from them.

Third, it promotes recognition, by which I mean a criteria for distinguishing legitimate and illegitimate decisions. Precedent helps superior courts to assess whether any correction of novel decisions of lower courts is necessary. It assists practitioners in choosing which decisions to invoke. It helps scholars to evaluate judicial decisions and make recommendations to improve the law. Finally, precedent enables the community at large to appraise the propriety of each court decision and the operation of the entire judicial system as a whole.

When a judicial decision has complied with the principles of precedent, that decision may have a constitutive and developmental effect on the law. It may also have a legitimating effect on the law when various actors in the system determine that the system is operating properly in accordance with principles of precedent.

² 1989 Duke L.J. 739, 743.

These three functions of precedent – development, control and recognition – are at least as important in investment treaty arbitrations. As regards development, arbitrations emerge from bilateral or multilateral investment treaties, which establish investment laws among the signatories. International investment law must keep pace with ever-increasing demands of investors and evolving interests of states in regulating matters at the core of their sovereignty. Due to the high costs of treaty negotiations, it is impractical for states to constantly renegotiate their investment treaties. Consequently, responsibility for adapting international investment law to contemporary conditions falls on the shoulders of arbitrators.

Control in investment treaty arbitration is of paramount importance. A key purpose of investment treaties is to create favorable conditions for investment. Stability is one such condition. Control over international investment law and the outcomes of disputes is necessary to promote stability. Further, control is all the more important to ensure that arbitrators make right decisions because arbitral awards are generally subject to annulment on narrow grounds only and not to full appellate review.

Recognition is critical in international investment law and investment treaty arbitration. In contrast to state-sponsored dispute resolution through courts, arbitration is a privately-sponsored system of dispute resolution. Its continued growth and existence depends on the global community believing that it is legitimate. A publicized system of precedent would furnish investors, states, observers, scholars and lawyers with one method to appraise arbitral awards as legitimate.

III. Precedent in Investment Treaty Arbitration

In light of the strong policies favoring a system of precedent in investment treaty arbitration, it might appear curious that, at least as a formal matter, arbitral tribunals are not bound by precedent. But the simple fact of the matter is that arbitral tribunals are not organized in a hierarchy, and so there are no decisions from superior tribunals to follow.

Indeed, there might not formally be a system of precedent at all in international law. Article 38 of the Statute of the International Court of Justice is widely regarded as codifying the customary law on source of international law. It lists judicial decisions as merely a subsidiary way to determine rules of law. The Executive Directors of the World Bank have instructed that Article 42 of the Washington Convention, which permits arbitrators to apply international law, refers to international law “in the sense given to it by Article 38 of the ICJ Statute.” Thus, ICSID tribunals applying international law are only to rely on prior awards as subsidiary, and not necessarily controlling, interpretations of international laws.

What happens in practice, however, is different from formal doctrine. Arbitral tribunals tend to account for prior decisions in a manner similar to courts accounting for prior decisions of hierarchically equal courts. Like the U.S. Supreme Court, tribunals tend to identify prior relevant decisions, and weigh the aggregate costs of departure against the aggregate benefits of fashioning a new rule.

Time constraints preclude a comprehensive trend analysis of arbitral awards in this presentation. However, a cursory survey decisions concerning the fair and equitable treatment standard and umbrella clauses supports at least a credible hypothesis that there is a system of precedent in investment treaty arbitrations.

The fair and equitable treatment standard is found in many investment treaties and has been the subject of frequent arbitration. At first blush, tribunals may appear to have disagreed on the meaning of this standard, suggesting an absence of precedent.

However, three decisions in 2006 that addressed this standard displayed a remarkable consistency in their use of prior decisions. *Saluka*, *Azurix* and *LG&E* all canvassed prior decisions. They concluded that breach of the standard did not require bad faith by the host state by adopting as persuasive prior tribunals' reasoning that legitimate investor expectations should be protected in order to promote investments. They also acknowledged *Genin* as an outlier award appearing to require bad faith in order to breach the standard. *Saluka* and *LG&E* interpreted *Genin* as stating that bad faith was merely one form of breach rather than the *sine qua non* of breach. *Azurix* stated that *Genin* reflected a minority view and elected not to follow it. These strategies are certainly familiar to judges seeking to accommodate a prior inconsistent decision within a system of precedent.

Arbitral tribunals deciding the meanings of umbrella clauses have also reached different decisions, suggesting the absence of precedent. At least five awards, notably *SGS v. Pakistan* among them, took the view that umbrella clauses did not transform contractual breaches into treaty breaches. But another five awards, notably *SGS v. Philippines*, decided that umbrella clauses could transform contractual breaches to treaty breaches.

Although the tribunal in *El Paso* and *Pan American Energy LLC* stated that it was “following . . . important precedents”³ in deciding that the umbrella clause in the U.S.-Argentine BIT did not transform contractual breaches to treaty breaches, it ignored the *CMS* award, which found that the very umbrella clause in question did transform contractual breaches to treaty breaches. I make this observation with some hesitation as I have the highest regard for the arbitrators in *El Paso* and *Pan American*, at least one of whom is in the audience today.

A deeper analysis of the decisions on umbrella clauses, however, reveals that a system of precedent does operate in investment treaty arbitration. Preliminarily, it is worth noting that many of the umbrella clauses were embedded in different BITs, whose interpretation should be governed not by prior awards but by the words of the treaties themselves. Even though there was accordingly no technical need to follow prior awards, the tribunals that faced an apparent split between the *Pakistan* and *Philippines* awards nonetheless behaved like any U.S. federal appeals court confronting a circuit split. They appraised the decisions of opposing sister courts and explained their reasons for favoring one side or the other.

In any event, differences in the awards are less acute than they might appear. The *Philippines* decision and its progeny, while occasionally aggressive in their rhetoric, did not actually extend jurisdiction to adjudicate contractual disputes much beyond the *Pakistan* decision. The *Philippines* tribunal stated it would extend its jurisdiction over contractual breaches only if Philippines courts found that a breach had occurred. The *Eureko* and *CMS* panels found that the respective state’s breaches of umbrella clauses were closely-related to its other BIT breaches. Arguably, it therefore

³ *El Paso*, para. 110, *Pan American*, para. [].

made no practical difference at the jurisdictional stage whether there had been breaches of the umbrella clause or not. *Noble Ventures* explicitly declined to express a view on whether the umbrella clause “perfectly assimilates to breach of the BIT any breach of the host state of any contractual obligation.”⁴

IV. The Future of Precedent in Investment Treaty Arbitration

The foregoing analysis indicates a gap between the rhetorical denial of precedent in investment treaty arbitration and the reality that arbitrators generally seek consistency with prior decisions. It also suggests that the recognition function of precedent in investment treaty arbitration should be strengthened. Through the clarification of how precedent may operate in investment treaty arbitration, our community of arbitrators, practitioners and scholars may refine principles of precedent that mediate between development and control. By publicizing these norms to global communities of host states and investors, we provide them with a method to appraise whether arbitration is functioning properly. We may also thereby bolster their confidence in the system. For these reasons, I applaud BIICL and Oxford University Press for convening this Conference, thank them for inviting me, and happily cede the floor to my fellow panelists.

⁴ *Noble Ventures*, slip op. para. 61.