Precedents in Investor State Arbitration

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Abstract

While admittedly there is no rule of stare decisis *(binding precedent) in international law or investor state arbitration, increasing number of tribunals refer to "precedents". This trend has led many to ask if there is a system of binding precedent in investor state arbitration. This paper seeks to answer this question with a qualified affirmation – though there is no strict rule of binding precedent in international investment law, previous decisions do have a limited but powerful precedential value. While previous decisions are not binding, they provide guidance and may influence future tribunals in their decision making. The current regime has some of the characteristics (like timely publication of awards, similarity of applicable law, similar facts and authoritative tribunals) of a common law system required to establish precedents. However, this passing similarity is not sufficient to establish a binding rule of precedent due to the lack of formal power and ad hoc nature of the tribunals, the difference in the wording of investment treaties and the likelihood of inconsistent decisions. Therefore, tribunals use prior decisions as aids to justify their reasoning and not as straightjackets to bind their reasoning.*

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I. INTRODUCTION

Some would say that consistency requires you to be as ignorant today, as you were a year ago.[2] However, in the field of international investment law, and the law in general, consistency may be more a sign of enlightenment than ignorance. Consistent application of precedents provides fairness and equality as like cases are dealt with in a like manner.[3] This paper will look at recent decisions in investor state disputes that have at once sought to establish consistency, through the use of precedents, in contradistinction to those that have through divergent and diametrically opposite decisions added an element of inconsistency. This paper through analysis of the emerging case law seeks to establish that while currently there is no strict rule of binding precedent in international investment law, previous decisions do have a limited but powerful precedential value. Though previous decisions are not binding, they do provide guidance and may influence future tribunals in their decision making.

One of the principal aims of investment treaties has been to provide a stable climate for investments[4] - investment climate matters for the level of productivity, wages, and profit rates, and for the growth rates of output, employment, and capital stock at the firm level.[5] In contrast inconsistent

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2 Attributed to Bernard Berenson. (March 2, 2008) http://www.quotationspage.com/quote/990.html.

3 C. Schreuer and M. Weiniger, *Conversations Across Cases – Is there a doctrine of precedent in Investment Arbitration*, *in* OXFORD HANDBOOK OF INTERNATIONAL LAW 2, 2 (Muchlinski, Ortino, Schreuer eds., 2008).

4 The preamble of the US model BIT reads as follows: "The Government of the United States of America and the Government of [Country] (hereinafter the "Parties")… *Agreeing* that a stable framework for investment will maximize effective utilization of economic resources and improve living standards."

decisions threaten to frustrate the purpose of investment treaties – providing states and investors with a stable climate and confidence regarding their respective rights and obligations.[6] Consistency in decisions, which can be obtained through precedents, would definitely assist in providing stability. The need for consistency and stability is further accentuated with the current rise in flows of capital across borders. According to UNCTAD global FDI flows totaled at $ 1.979 trillion in 2007[7].[8] Flows to developing countries increased by 17% over 2008 to a total of $ 621 billion[9]. There has also been a startling growth in the number of BITS. In 2008 alone 59 new BITS were concluded, bringing the grand total to 2,676.[10] At the same time there has been a dramatic rise in trade agreements with provisions relating to investment. There were 273 such agreements by the end of 2008.[11]

As a consequence of the rise in FDI flows and in the number of investment related agreements, as well as their increasing sophistication and breadth of coverage, it is hardly surprising that there has been a growth in the number of investment related disputes. International Centre for Settlement of Investment Disputes (ICSID) has decided a total of 189 disputes and a further 127 disputes are pending.[12] Many investment disputes are conducted under ad hoc tribunals under different rules, such as UNCITRAL rules, and are not publicized. Therefore the true number of disputes is larger. Further given that the specter of bankruptcy is haunting several countries in Europe, and also may be elsewhere, there is a genuine possibility that may be a slew of new disputes. This imminent threat of new disputes requires an urgent study of the concept of precedents in investor state arbitration.

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5 D. Dollar, M. Hallward-Driemeier, and T. Mengistae *Investment climate and firm performance in developing economies*, 54 ECON. DEV. & CULTURAL CHANGE 1, 27 (2005).

6 G. Egli, *Don't Get Bit: Addressing ICSID's Inconsistent Application of the Most-Favored Nation Clauses to Dispute Resolution Provisions*, 34 PEPP. L. REV. 1045, 1047 (2006-2007).

7 Foreign investment reached new high of $1.5 trillion in 2007, say UN experts - (April 30, 2010) http://www.un.org/apps/news/story.asp?NewsID=25237&Cr=unctad&Cr1=fdi.

8 Investment flows have reduced currently because of the ongoing financial crisis, but are expected to recover by 2011 as per the UNCTAD (New York and Geneva, 2009) - *World Investment Report 2009* xix (2009).

9 *See World Investment Report 2009 (Overview)*, *supra* note 7.

10 *Supra* note 8, at 12.

11 *Supra* note 8, at 12.

12 *See List of ICSID Cases* (June 4, 2010) http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home.

This paper seeks to understand the value, and the role, of precedents in international investment. The paper shall proceed as follows: the second part of the paper will explain the concept of precedent, as it exists in different legal systems. Part three will then look at limitations on the development of precedent in international investment law. Part four will discuss some of the systemic requirements that would be needed to be satisfied by the current investor state arbitration regime to establish precedents. Part five will then analyze recent case law to see if there actually exists a system of precedent in international investment arbitrations. And Part six will conclude.

II. WHAT ARE PRECEDENTS?

A. Common Law

The common law doctrine of *stare decisis* or binding precedent was born from Bracton's first collection of English decisions.[13] Bractons *Note Book* containing the first collection of English decisions gave early impetus to the doctrine.[14] The doctrine, *stare decisiset non quietamovere* – to abide by the precedents and not disturb settled points, embodies the policy of the courts, and the principal, upon which rests the authority of judicial decisions as precedents in subsequent litigations.[15] The concept is applied by common law courts so that once a principle of law has been laid down applying to a certain set of facts, they will adhere to that principal and apply it to all future cases where the facts are substantially the same.[16] Not every opinion or judgment is regarded as binding: in order that an opinion or judgment may have the weight of a precedent two conditions must be fulfilled, 1) it must be an opinion rendered by a properly constituted court and 2) it must be an opinion the formation of which is necessary for a decision of a particular

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13 J. Commission, *Precedent in Investment Treaty Arbitration – A Citation Analysis of Developing Jurisprudence,* 24(2) J. INT'L. ARB. 129, 133 (2007).

14 R. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied,* 31 A.B.A. J. 501, 501 (1945).

15 H. Bh thalack, *The Principal of Stare Decisis*, 34 AM. L. REG. 745, 745 (1886).

16 H. W. Jones, *Dyson Distinguished Lecture – Precedent and Policy in Constitutional Law*, 4 PACE L. REV. 11, 19 1983-1984.

case, in other words it must not be an *obiter dicta*.[17] However the rule of *stare decisis* is not a strict one: Courts can decline to follow their own previous decisions when those precedents are judged to be clearly in error.[18] Lawyers and judges, moreover, regularly display-amazing ingenuity in "distinguishing" unfavorable precedents that otherwise would be "controlling."[19] And even in common law systems, the decisions of courts at the same level in the judicial hierarchy are not binding on each other, but only act as "persuasive precedents"[20]. The purported values promoted by a system of *stare decisis* include stability, certainty and predictability, reliability, equality and uniformity of treatment, and convenience and expediency.[21]

B. Civil Law

The concept of *stare decisis* does not exist in civil law. Most civil law countries relegate case law to the rank of a secondary legal source.[22] However, in civil law systems, although the courts seldom acknowledge this, in practice precedents are recognized as providing strong force and can also be cited as providing further support for decisions that have other legally justifying grounds of the kind that may seem somewhat shaky, but for the assistance provided by the precedents.[23] Thus courts in civil law countries developed the doctrine of *jurisprudence constante* - the doctrine under which the court is a required to take into account past decisions only if there is sufficient uniformity in the previous case law.[24] According to Pierre Dupery:

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17 *Supra* note 13, at 134.

18 C. J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis,* 105(8) Y. L. J. 2031, 2034 (1996)

19 *Ibid.,* at 17.

20 A precedent that is not binding on a court, but that is entitled to respect and careful consideration. For example, if the case was decided in a neighboring jurisdiction, the court might evaluate the earlier court's reasoning without being bound to decide the same way – BLACK'S LAW DICTIONARY, (B. A. Garner *et al*. ed.s, 2004).

21 R. A. Sprecher, *The 1945 Prize-Winning Ross Essay Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A. J. 501, 505-6 (1945).

22 V. Fon and F. Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, INT. REV. L. & ECON., 519, 523 (2006).

23 *Supra* note 13, at 134.

24 *Supra* note 22, at 4.

> "while the rule of precedent is not recognized in French law, the significance of courts decision depends on the level of the jurisdiction. In general, courts tend to have a coherent approach in deciding cases, to avoid discrepancies. Nevertheless nothing prevents a lower court from making a decision that would contradict a decision made by a higher court."[25]

C. International Law

Public international law is based on the Roman civil law of continental Europe rather than on the English common law tradition. Therefore it is understood that there is no system of *stare decisis* or binding precedent in international law.[26]Article 59 of the Statute of the International Court of Justice explicitly provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." Article 38 of the same statute provides that judicial decisions constitute only a subsidiary means of a determination of international law. However, according to Judge Mohamed Shahabudden though there is no rule of precedents binding in international law, it does not mean that there are no precedents and as a matter of fact the Court seeks guidance from previous decisions; "the Court uses its previous decisions in much the same way as that in which a common law court of last resort will treat its own previous decisions."[27]

Thus while there is no rule for binding precedents in international law, the ICJ does look to prior decisions for guidance. Similarly in the WTO there exists a *de facto* precedent.[28] Recently the WTO Appellate Body in *US – Stainless Steel (Mexico)* explained the role of precedent in the WTO system by stating:

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25 P. Dupery, *Do Arbitral Awards Constitute Precedents? Should Commercial Arbitration be Distinguished in this Regard from Arbitration Based on Investment Treaties?*, *in* TOWARDS A UNIFORM INTERNATIONAL ARBITRATION LAW? 251, 255-256 (P. Pinsolle, A. V. Schlaepfer and L. Degos, eds., 2005).

26 C. S. Gibson and C. R. Drahozal, *Iran-United States Claims Tribunal Precedent in Investor-State Arbitration*, 23 J. INT'L. ARB. 521, 525 (2006).

27 M. Shahabudeen, PRECEDENT IN THE WORLD COURT 2-3 (1996).

28 See R. Bhala, *The Myth About Stare Decisis and International Trade Law - Part One of a Trilogy*, 14 (4) AM. U. INT'L L. REV. 845 (1999).

> "Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU implies that in the absence of cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[29]

According to Professor Jackson while there is no *stare decisis* in jurisprudence of the WTO, there is certainly a very powerful precedent effect. Professor Jackson believes that panels or Appellate Body are not required to follow prior cases, except where there have been numerous cases resolving a particular issue and the resolution has been accepted by all Members, then a "practice under Agreement" as defined by the Vienna Convention may have a stronger precedential impact. However, "the "flavor" of the precedent effect in the WTO is still somewhat fluid, and possibly will remain fluid for the time being."[30]

While decisions of international courts and tribunals do not have a formal binding authority under international law, this point does not materially undermine the genuine and effective influence that runs from the broader understanding of precedent – one that does not require binding adherence to the prior decision.[31] Thus, though the principals of international law do not contain a rule for binding precedent, in practice permanent tribunals, such as

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29 *Appellate Body Report: United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, (May 20, 2008), WT/DS344/AB/R at para. 160.

30 J. Jackson, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 177 (2006).

31 *Supra* note 26, at 526.

the ICJ and the WTO panels and Appellate Body have followed a somewhat loosely formed rule of *de facto* precedents.

III. ARGUMENTS AGAINST PRECEDENTS IN INVESTOR STATE ARBITRATION

As stated above there is no rule of binding precedent in international law. However, international courts and tribunals do consider previous decisions to have at least persuasive value, if not considered as binding precedents. However, investment arbitrations, in contradistinction to the ICJ or WTO, are not conducted under the aegis of any permanent courts or tribunals. According to Schreuer:[32]

> "Investment arbitration takes place before *ad hoc* tribunals. Their composition varies from case to case. This makes it considerably more difficult to develop a consistent case law than in a permanent judicial institution such as the International Court of Justice (ICJ), The European Court of Human Rights (ECHR) or The Court of Justice of the European Communities."

Further according Schill investor state arbitration does not incorporate the concept of *stare decisis* because, first some investment treaties explicitly provide for the 'relative nature' of awards and decisions in investor-State disputes.[33] Second the MFN clause in treaties cannot be used to justify following precedents because

> "applying MFN clauses in this way is not possible because they apply only to more favorable treatment granted by the host State and thus require conduct that is attributable to the host State. The award of an arbitral tribunal, by contrast, is not attributable to the host State. MFN clauses, therefore, cannot operate with respect to decisions by international tribunals and produce the effect of establishing a system of precedent."[34]

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32 C.H. Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration,* 3(2) TRANSNAT'L DISP. MGMT. 1 (2006).

33 S. Schill, MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 288 (2009).

34 *Ibid.*, at 290.

Third, and final, the procedural law governing investor-State disputes equally does not furnish a basis for establishing a system of *stare decisis*.[35]

The ad hoc nature of investor state tribunals (like commercial arbitration) along with the variations in treaty wordings and obligations create difficulties in the development of consistent case law, and therefore precedents, in investor state arbitration. Hence, the question of whether there are precedents in international investment law is a complicated and nuanced one.

This section will examine some of the legal and practical difficulties in establishing a system of precedent or something akin to it in investment law. The section first compares international investment arbitration to international commercial arbitration and then sets out the legal norms in various conventions and rules dealing with investment arbitration that could be construed as creating a bar against precedent in investor state arbitration.

A. International Commercial Arbitration and Investor State Arbitration

Much like international commercial arbitration, ad hoc panels conduct investment arbitration. BITS and other investment treaties often provide for the jurisdiction of ICSID or its additional facilities or ad hoc arbitration under UNCITRAL, Stockholm Chamber of Commerce, ICC etc.[36] ICSID, Stockholm Chamber of Commerce or ICC only provide for rules for the conduct of the arbitration, whereas the substantive provisions are contained in investment treaties, general principles of international law and the domestic law of the host country.

In many respects investor state arbitration has much in common with international commercial arbitration. Firstly both involve a claim by private party before a private tribunal. Second, investment arbitrations are many times governed by the same or similar rules as those governing international commercial arbitration.[37] Given these similarities and the lack of a rule of

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35 *Supra* note 33, at 291.

36 *Supra* note 25, at 252.

37 *UNCITRAL Arbitration Rules 1976*, (April 30, 2010) http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html.

precedents in international commercial arbitration[38] it would seem only logical to conclude that the rule is similarly lacking in international investment arbitration.

However, investor state arbitration can be differentiated from international commercial arbitration. According to Harten and Loghlin:[39]

> "it would be a mistake to confuse investment arbitration, pursuant to a treaty, with commercial arbitration. Commercial arbitration originates in an agreement between private parties to arbitrate disputes between themselves in a particular manner, and its authority derives from the autonomy of individuals to order their private affairs as they wish. Investment arbitration, by contrast, originates in the authority of the state to use adjudication to resolve disputes arising from the exercise of public authority. Investment arbitration is constituted by a sovereign act, as opposed to a private act, of the state and this makes investment arbitration more closely analogous to domestic juridical review of the regulatory conduct of the state." (internal citations omitted)

Also unlike awards issued in international commercial arbitrations, awards in investment arbitrations are often made public and publication is the first step towards the formation and use of precedents.[40] Given these important differences it is necessary to study the existence or non-existence of binding precedent in international investment arbitration in isolation from international commercial arbitration.

B. Rules against Precedent

As mentioned above most investor state arbitrations are conducted under the ICSID convention or UNCITRAL rules etc. Article 53 of the ICSID convention states that:

> "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for

38 This is a hotly debated topic and beyond the scope of this paper.

39 G. Van Harten and M. Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17(1) EUR.. J. INT'L. L. 121, 140 (2006).

40 This topic is dealt with on page 13, *infra.*

> in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."

In a similar vein Article 32(2) of the UNICTRAL rules states that "The award shall be made in writing and shall be final and binding on the parties."

Both these rules, which limit the scope of the awards by making them binding only to the parties to the dispute, may be read as excluding the rule of a binding precedent in investor state arbitration. Also nothing in the *travaux preparatories* of the ICSID convention suggests that the doctrine of *stare decisis* should be applied.[41] However according to Gabrielle Kaufman Kohler "this does not appear to be an extremely convincing basis to deny the existence of any form of precedent in this field".[42]

IV. INVESTMENT ARBITRATION DECISIONS – EMERGENCE OF A NEW JURISPRUDENCE?

Despite the limited scope of application of the decisions issued by the tribunals some consider these awards to constitute new investment law jurisprudence.[43] Previous decisions, though, not binding on tribunals because of the absence of the rule of *stare decisis*, "exercise, as a matter of fact, strong extra-legal constraints upon subsequent tribunals."[44]According to Tai-Heng Cheng there are three reasons why precedents may exist in investor state arbitration:

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41 *Supra* note 32, at 11.

42 G. Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture*, 23(3) ARB. INT'L. 357, 368 (2007).

43 "A "consolidating jurisprudence," an "international common law of investor rights," "an investment jurisprudence," or a "common legal opinion or *jurisprudence constante*" — these are just some of the labels that have been given to the burgeoning corpus of precedents emanating from ICSID and other investment treaty tribunals." *Supra note* 12, at 135.

"That a special jurisprudence is developing from the leading awards in the domain of investment arbitration can only be denied by those determined to close their eyes." *See* J. Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law,* 3(5) TRANSNAT'L DISP. MGMT. (2006).

44 *Supra* note 33, at 323.

> "Firstly, arbitrators are often eminent practitioners and scholars. They are steeped in the methods of legal reasoning in domestic and international law, and will tend to apply these methods with which they are most familiar. To the extent that precedent is now a method of legal reasoning embedded in many legal systems, arbitrators will naturally operate within a system of precedent. Second, methods of legal reasoning in domestic legal systems are designed, *inter alia*, to promote the orderly exposition and development of domestic law. Arbitrators are acutely aware that international law should also be developed in an orderly fashion and thus would tend to apply the legal methods that promote such an orderly development of international law. The third reason may be less noble. Arbitrators reap significant reputational benefits among fellow arbitrators, lawyers and the college of international jurists if they render awards that are regarded as well reasoned."[45]

For the development of this jurisprudence, however, a few conditions must be fulfilled. This section will deal with some of the basic requirements needed to be satisfied for establishing a system of precedent and therefore investment law jurisprudence. First there would need to be publication of awards. Second there will need to be some similarity in the facts. Third there would need to be similarity in applicable law, i.e. terms of the treaties and principles of international law. Fourth the tribunal issuing the decision should be reliable and authoritative.

A. Publication of Awards

As stated above the doctrine of *stare decisis* evolved from Bracton's first collection of English decisions. Similarly for there to be an evolution of international investment law jurisprudence there needs to increased publication of awards. According to Fabien Gelinas "the only conceivable way of preventing a body of case law from developing in investment arbitration would be a total ban on publication".[46] ICSID and UNCITRAL rules do not allow for automatic publication of awards. Article 48(5) of the

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45 Tai-Heng Cheng, *Precedent and Control in Investor State Arbitration,* 30 FORDHAM J. INTL. L. 1014, 1045-1046 (2007).

46 *Supra* note 13, at 136.

ICSID convention provides that "the Centre shall not publish the award without the consent of the Parties". Similarly Article 32(5) of the UNCITRAL Arbitration Rules provides that "the award may be made public only with the consent of both parties".

However, regulation 22(1) of ICSID Administrative and Financial regulations provides that:

> "The Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding."

Similarly rule 48(4) of the ICSID Arbitration rules states that "The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal." Thus the ICSID rules do allow for limited transparency.

In reality, however, most awards are now available online. According to Jeffery Commission:[47]

> "Investment treaty awards and decisions are now readily accessible and available from a number of sources, including but not limited to: (i) ICSID reports, and a number of other printed publications around the world, such as International Legal Materials, Journal de Droit International, and ICSID Review—Foreign Investment Law Journal; (ii) the World Bank's ICSID website; (iii) dedicated investment treaty websites such as investment claims, NAFTA claims, investment treaty arbitration, and transnational dispute management; and (iv) online at commercial legal service providers such as Kluwer Arbitration, LEXIS, and Westlaw."

Publication of awards increases awareness of previous holdings amongst the arbitrators and parties to the disputes. Such awareness can help prevent inconsistency between arbitral awards. In fact, as a rule publication of awards contributes to increasing consistency and predictability.[48] Publication of

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47 *Supra* note 13, at 136.

48 C. Knahr and A. Reinisch, *Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise*, 6 THE L. & PRAC. INTL. CT.S &TRIBUNALS 97, 115 (2007).

awards also fosters scholarly debate on many issues that turn out to be controversial in the holdings of the arbitral tribunals.[49] For example this paper refers to opinions of academics on published decisions as well the decisions themselves to reach its conclusions. The work of legal scholars and the decisions themselves, in accordance with Article 38(1)(d) of the Statute of the ICJ, provide at least a subsidiary means of determination of rules of law.[50] Therefore availability of documents contributes to the development of substantive standards of investment law through arbitral practice.[51]

Publication of awards may also be necessary in public interest. A citizen of a state involved in an arbitration proceeding may be interested in the progress of the proceeding because on many occasions they deal with issues of great public importance and any damages or payments made as a consequence of awards issued by the tribunals are paid out of public money. In 2004 there were at least are nine cases being considered in which foreign investors who have been awarded contracts to provide water and sewage services in developing countries have run into conflict with regulatory authorities, and have taken recourse to investor-state arbitration in an effort to resolve their differences.[52] Secrecy in such issues of social and national importance would seem to be against public interest.

Thus publication of awards not only helps in developing a new corpus of jurisprudence but also is necessary for public interest purposes thereby adding a layer of legitimacy to the awards by providing transparency.[53]

B. Similarity of Facts

Applying a precedent entails applying the legal reasoning in a previously decided case to a subsequent case. One of the most important ingredients for

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49 *Id.*

50 Article 38(1)(d) says that "subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

51 *Supra* note 48.

52 *See* L. E. Peterson, *Bilateral Investment and Development Policy Making*, (April 22, 2008) http://www.iisd.org/pdf/2004/trade_bits.pdf .

53 *Supra* note 48, at 110.

a precedent to be applicable in such a manner is that the original decisions must have facts, which are identical or as nearly similar as possible to the pending case. According to Jeffery Commission, "while there is no requirement that the facts be identical, or the later case must be on "all fours" with the prior one, there needs to be sufficient factual similarities between the two cases to support the process of analogical reasoning."[54] In following precedents we should therefore leave the realm of absolute identity.[55] Prior decisions establish a precedent for some different array of facts, ones that contain some points of identity with the facts of the prior decision.[56] In the alternative, dissimilarity of facts may make the ruling of a prior case inapplicable in a subsequent case.

For investor state arbitration tribunals to develop binding precedents not only should the decisions be published, they must also cover a wide variety of fact and commercial circumstances that continue to occur in international business and in relation to foreign investments. Considering the growing number of investor state disputes there is a realistic possibility that many disputes may have identical, similar or overlapping factual issues. For example a considerable number of disputes arising in the wake of the Argentinean financial crisis could be considered to have some overlapping factual circumstance. For example "the state of necessity" defense was raised by Argentina in two disputes arising out of the same factual background, i.e. privatization of gas distribution industry, namely *CMS Gas Vs Argentina*[57] *(CMS Gas)* and *LG & E Vs Argentina*[58] *(LG)*, in connection with obligations under the US-Argentina BIT.[59]

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54 *Supra* note 13, at 531.

55 F. Schauer, *Precedent,* 39 STAN. L. REV. 571, 577 (1986-87).

56 *Ibid*, at 578.

57 CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8 (2007), (Decision on Annulment).

58 LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic, ICSID Case No. ARB/02/1 (2006), (Decision on Liability).

59 However, the tribunals in these two cases reached contradictory conclusions. Whereas the CMS tribunal rejected the "state of necessity" defense, LG & E tribunal concluded that Argentina was indeed in a "state of necessity" and was therefore excused from non-performance of BIT obligations for 18 months.

C. Similarity in Applicable Law

For a decision to function as a precedent not only must it be based on similar facts, it is also of paramount importance that there should be similarity in applicable legal principles. According to Gibson and Drahozal "this is an element which receives most attention when considering limits of a prior precedent"[60]. They further state that if the law in two cases differs significantly in substance, there is a limit to the applicability of one case to another.[61] This makes sense because if the law applicable to cases is different, then the legal rules and principles on which the holdings will be based will vary, and sometimes might be incompatible, and therefore the cases cannot be reconciled.

Looking at different treaties it appears that only a minority of investment treaties make the municipal law of a country the applicable law. In case of the absence of a provision selecting applicable law, the ICSID convention provides that "the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".[62] Similarly Article 33(1) of the UNCITRAL Rules provides that "The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable".

Article 42(1) has been interpreted to mean that in case of absence of a provision selecting applicable law international law is called upon to play a dual role in this case – *i.e.*, to fill in the gaps of the applicable municipal law and amend the relevant contents in case the latter are incompatible with international law.[63] The law, which applies to most of ICSID arbitrations and similar types of arbitrations, is a mixture of public international law, private international law (i.e. international conflict of laws[64]), and municipal law,

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60 *Supra* note 26, at 532.

61 *Supra* note 26, at 532.

62 Article 42(1) of ICSID Convention.

63 A. Giardina, *International Investment Arbitration: Recent Developments as to Applicable Law and Universal Recourse,* 5 THE L. & PRAC. INTL. CT.S &TRIBUNALS 29, 30 (2006).

64 *See* BLACK'S LAW DICTIONARY, *supra* note 20.

with all three types of law relevant to the resolution of particular disputes.[65] Thus international law[66] seems to provide a common thread in investor state arbitrations. According to Gibson and Drahozal investor state arbitral tribunals are required to enquire into municipal law only on rare occasions, thus the possibility of case law, being a limiting factor in the application of a precedent is diminished.[67] Further even if municipal law is invoked, there may be a high degree of similarity in the principles of law, e.g. contracts, applicable in the nations of the world. According to some, recent BIT arbitrations accord a controlling role for international law, by providing the standard by reference to which the legality of the conduct of the host state is to be assessed.[68]

One of the most important sources of law applicable in investment law are the investment treaties themselves. Most BITS contain specific substantive provisions, which are applicable in investor state arbitrations. These provisions enshrine the protections that are sought to be bestowed upon a foreign investment. Although each country has its own model BIT, virtually all BITS treat the same issues and there is a substantial degree of uniformity in the substantive provisions contained in the treaties.[69] Thus, taking into account the vast web of BITS and their overlapping content, according to Schwebel "Customary international law governing the treatment of foreign

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65 T. Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LIEDEN J. INT'L. L. 267, 270 (2001).

66 According to the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the term "international law" as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice. Article 38(1) of the Statute of the ICJ: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

67 *Supra* note 26, at 533.

68 A. Redfern, and M. Hunter, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 19 (2004).

69 J. Salacuse, *Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain, in* ARBITRATION FOREIGN INVESTMENT DISPUTES 53, 61 (N. Horn and S. Kroll eds., 2004) and *supra* note 55, at chapter 11, 23.

investment has been reshaped to embody principles of law found in more than two thousand concordant bilateral investment treaties. With the conclusion of such a cascade of parallel treaties, the international community has ….. fashioned an essentially uniform foreign investment law[70]"[71] However, it must be noted that each BIT has its own peculiar wording and that may affect the true meaning or scope of similar provisions and thus their interpretation.

According to some BITS principles of customary rules of international law are also an important source of law.[72] However, there is a debate as whether some of these principles with respect of investments exist. The legal structure relating to protection of foreign investments in the post war era was seriously lacking because 1) applicable international law failed to take into account contemporary investment practices and address concerns of foreign investors, 2) principles of international law that did exist were vague and subject to varying interpretation, 3) the existing structure has prompted disagreements between developed and developing countries and finally[73] 4) international law did not seem to provide adequate remedies to a disgruntled

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70 S. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L. L. PROC. 27 (2004).

71 For a contrary opinion please refer to M. Sornarajah, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 232 (2004). According to Sornarajah, there would have been no need for international treaties if international law on investment protection had been clear.

72 For e.g. Article 5(1) of the US Model BIT provides, "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security". Similarly article 3(5) of the Netherlands-Czech Republic BIT provides that the countries will treat investments at least as well as required by "obligations under international law existing at present or established hereafter." Agreement on Encouragement of Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, Neth.-Czech Rep.-Slovk., art. 3(5) [hereinafter Netherlands-Czech Republic BIT], (June 6, 2010) http://www.unctad.org/sections/dite/iia/docs/bits/czech_netherlands.pdf. The Canada- Poland BIT provides that investments "shall at all times be accorded fair and equitable treatment in accordance with principles of international law." Agreement Between the Government of Canada and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments, Nov. 14, 1991, Can.-Pol., art. III(1), (June 6, 2010) http://www.unctad.org/sections/dite/iia/docs/bits/canada_poland.pdf.

73 The developing countries challenged the principles of international investment law during the 1970's. They used the United Nations as a platform for question the existence of the international law standards which sought to be imposed by the developed countries. Their position is best exhibited in article 2 of the Charter of rights and duties of states, adopted in 1974, which provided that every state would have sovereign rights to govern its natural and economic resources and could expropriate foreign investors property for a after payment "appropriate compensation" as opposed to "prompt, adequate and effective compensation". Resolutions adopted by the General Assembly 3281 (XXIX). *Charter of Economic Rights and Duties of States,* 12 December 1974 (April 10, 2008) http://www.un-documents.net/a29r3281.htm.

investor against host countries.[74] Further there is uncertainty as to whether principles of customary international law can be used to determine obligations under a BIT. The issue of "state of necessity" arose in the disputes concerning gas distribution in Argentina. In the cases of *CMS Gas* and *LG,* Argentina invoked "state of necessity" defense under Article XI of the US-Argentina BIT.[75] The tribunal in *CMS Gas* rejected Argentina's defense referring to "necessity" under customary international law as expressed in Article 25 in the International Law Commissions Articles on State Responsibility. On the other hand the tribunal in *LG* referred to the express provisions in the BIT and upheld Argentina's defense for a period of 18 months. Thus the two tribunals diverged on the use of customary international law to interpret treaty obligations.

D. Authority of Tribunals

Under common law for a decision to be a precedent, a judge appointed to a properly constituted court must make the decision. Also due to the hierarchy of courts, decisions of a judge in upper echelons are binding on lower ones. In the case of investor state arbitrations these requirements are not satisfied because ad hoc tribunals conduct the arbitrations and there is no hierarchy amongst the tribunals. As a result it would appear that decisions issued by tribunals would not be accepted as binding precedents because they arbitrators lack the authority to bind their peers. However, it will be shown below that the arbitrators do have "*de facto"* ability to establish persuasive precedents.

International arbitral awards can be seen as a source of international law under Article 38(1) d because they can be viewed as the equivalents of judicial decisions or pronouncements of the most highly qualified publicists. According to Jan Paulsson:[76]

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74 J. Salacuse and N. Sullivan, *Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain*, 46(1) HAR. INT'L. L. J. 67, 68-69 (2004).

75 Article XI provides that "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests."

76 J. Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, 3(5) TRANSNAT'L DISP. MGMT. 4-5 (2006).

> "One can hardly fail to remark that among the most frequently appointed members to international investment tribunal panels may be found former Presidents of the International Court of Justice (Guillaume, Schwebel, Bedjaoui), a former President of the WTO Appellate body and member of his country's Supreme Court (Feliciano), a former President of the UN Security Council (Fortier), the rapporteur of the International Law Commission's draft articles on state responsibility (Crawford), and the present and immediate past Presidents of the leading international arbitral institution of the International Court of Arbitration of the International Chamber of Commerce (Briner, Tercier). Indeed, the current President of the International Court of Justice (Higgins) chaired the oft-cited ICSID tribunal which decided the second *Amco v. Indonesia* case. The list could be extended to include numerous scholars and practitioners of international renown, but no more is needed, it seems, to conclude that among the authors of these awards are those who must surely qualify for consideration as "the most highly qualified publicists of the various nations".

As a practical matter there could as be said to be a "bench" of investor state arbitrators.[77] A review of 115 concluded ICSID arbitrations reveals 43 arbitrators accounted for 176 of the possible 361 appointments (49%).[78] Further a review of the 103 pending cases shows that 32 arbitrators accounted for 153 appointments (54%).[79] Thus there is a clearly consistent appointment of experienced and highly qualified arbitrators in ICSID arbitrations. This consistency adds one more layer of legitimacy to the decisions issued by the tribunals.

Given the fact that decisions of arbitral tribunals do, at least, constitute a subsidiary source of international law, coupled with consistency of appointments of high quality arbitrators, the decisions issued by these tribunals do carry some "authoritative value". In sum it can be said, that while the current regime for investor state arbitrations does not, in the strictest sense,

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77 This could also be construed as a negative because this means that there is an exclusive coterie. Formation of such a coterie could act as a challenge to the legitimacy of tribunals.

78 *Supra* note 13, at 138.

79 *Supra* note 13, at 138.

satisfy all the major requirements for making binding precedents, it does satisfy enough of the requirements to make decisions which are at least persuasive.

V. CASE LAW

We have seen above that the tribunals instituted under the current regime of investor state arbitration do have some of the trappings required to issue decisions that could be persuasive precedents in subsequent arbitrations. This section will now look at the views of different arbitral tribunals to see if they view themselves as being bound by previous decisions.

Amco Corp Vs. Republic of Indonesia[80] is the first publicly available decision to use the word "precedent".[81] In those proceedings the tribunal commented on the parties numerous references to and reliance upon the unpublished awards in the Holiday Inns case on the first decision on jurisdiction:

> "To refer to the *Holiday Inns* award—in spite of the same not being a binding precedent in this case—here, this agreement is by no means implied…The tribunal will state again that in spite of superficial resemblances, the facts in the *Holiday Inns* case and in the instant one are largely different, so that the references to *Holiday Inns* are not really relevant, except that as in said case, the arbitrators extended an arbitration clause to parties which had personally executed it; accordingly, it would not seem to be contrary to that precedent(to the extent to which it is a precedent) to apply an arbitration clause."[82]

More recently in the case of *Enron Corporation and Ponderosa Assets, L.P. Vs. Argentine Republic*[83] the tribunal held that "decisions of ICSID or other arbitral tribunals are not a primary source of rules". The same tribunal

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80 Amco v. Indonesia, ICSID Case No. ARB/81/1 (1984), (Decision on Jurisdiction).

81 *Supra* note 13, at 144.

82 *Supra* note 80, para.s 14 and 25.

83 Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3 (Decision on Jurisdiction) at para. 40.

in an ancillary claim held that "the decisions of ICSID tribunals are not binding precedents and that every case must be examined in the light of its own circumstances".[84]

The question of the authority of previous decisions came under strict scrutiny in the cases against Argentina in the wake of the financial crisis. Despite numerous decisions finding jurisdiction, Argentina steadfastly raised similar objections to jurisdiction over and over again.[85] In the decision on jurisdiction in the resubmitted *Vivendi* case Argentina once again raised the question of whether the participation of foreign shareholders in a domestically owned company constituted an investment.[86] The tribunal rejected Argentina's case, and in order to bolster its reasoning added an appendix to its decision in which it listed previous decisions that had dealt with and rejected the same argument. The tribunal observed that similar objections had been raised by Argentina in 18 other cases and had been rejected every time, and that the last tribunal held that "this very objection which Argentina raises in this case has been made numerous times, never, so far as the Tribunal has been aware, with success"[87]

The question of "precedent" was discussed in much depth in the case of *AES Corporation Vs. Argentina*.[88] In this case the claimant pointed out that all the objections raised by Argentina with respect to jurisdiction had been consistently rejected by other tribunals.[89] The tribunal however noted that:

> "There is so far no rule of precedent in general international law; nor is there any within the specific ICSID system for the settlement of disputes between one State party to the Convention and the National of another State Party. This was in particular illustrated by diverging positions respectively taken by two ICSID tribunals

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84 Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3 (2004), (Decision on Jurisdiction - Ancillary Claim) at para. 25.

85 *Supra* note 32, at 12.

86 Compañía de Aguas del Aconquija S.A & Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3 (2001), (Decision on Jurisdiction) at para. 10.

87 *Supra* note 86, at para. 94.

88 AES Corporation v. The Argentine Republic, ICSID Case No. ARB/02/17 (2005), (Decision on Jurisdiction).

89 *Ibid.*, at para.s 17 & 18.

> on issues dealing with the interpretation of arguably similar language in two different BITs. As rightly stated by the Tribunal in SGS v. Philippines, 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."[90]

It should be noted that the tribunal states that there is "so far" no rule of precedent, leaving the door open for future reconsideration of the topic. The Tribunal then referred to the decision in the *Enron* case, which has been mentioned above.[91] The tribunal then pointed out:

> "that each BIT has its own identity; its very terms should consequently be carefully analyzed for determining the exact scope of consent expressed by its two Parties.
>
> This is in particular the case if one considers that striking similarities in the wording of many BITs often dissimulate real differences in the definition of some key concepts, as it may be the case, in particular, for the determination of investments or for the precise definition of rights and obligations for each party."[92]

Thus the tribunal concluded firstly that findings of law made in one case, of the terms of a BIT, are not necessarily relevant in other cases and secondly that Argentina is allowed to raise similar objections in successive arbitrations.[93] However the tribunal went on to conclude:

> An identity of the basis of jurisdiction of these tribunals, even when it meets with very similar if not even identical facts at the origin of the disputes, does not suffice to apply systematically to the present case positions or solutions already adopted in these cases. Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same

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90 *Supra* note 88, at para. 23.

91 *Supra* note 83.

92 *Supra* note 88, at paras. 24 and 25.

93 *Supra* note 88, at para. 26.

> or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.[94]

Thus even though the tribunal rejected the rule of precedent it did not bar the possibility of development of the rule in the future. The tribunal also recognized that while ICSID tribunals are not bound by previous decisions, those decisions may at least "indicate some lines of reasoning of real interest". It is interesting to note in this case, that even when rejecting the rule of precedent the tribunal refers to previous decisions for guidance.[95]

In some cases ICSID tribunals do not make reference to a doctrine or rule of precedents and simply refer to cases and precedents throughout, and do not make any efforts to disguise their outright reliance on previous cases.[96] For example in the *CMS Gas*[97] case the tribunal first refers to the *Lanco Case*[98] and then says that "The task of the Tribunal is again rendered easier by the fact that a number of recent ICSID cases have had to discuss and decide on similar or comparable provisions concerning contracts and the scope of the Treaty."[99]

In some cases, much like the appendix in the aforementioned *Vivendi* case, tribunals have dedicated portions or sections of their decisions, typically a paragraph, labeled "opening considerations", "introductory matters" etc.,

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94 *Supra* note 88, at para. 30.

95 The Tribunal refers to *SGS v. Philippines* and *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* decisions to reach in reaching its conclusion that "in the hearing on jurisdiction held in respect of this dispute, to the effect that the decisions of ICSID tribunals are not binding precedents and that every case must be examined in the light of its own circumstances" - *Supra* note 86, at para. 23.

96 *Supra* note 13, at 146.

97 CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8 (2007) (Decision on Annulment).

98 *Ibid.*, at para. 63.

99 *Supra* note 97, at para. 72.

100 *Supra* note 13, at 147.

to the study of previous decisions.[100] In some of these cases the tribunals accept that while there is no precedent, tribunals still respect prior decisions. Thus the tribunal in *El Paso*[101] held:

> "ICSID arbitral tribunals are established *ad hoc*, from case to case, in the framework of the Washington Convention, and the present Tribunal knows of no provision, either in that Convention or in the BIT, establishing an obligation of *stare decisis.* It is, nonetheless, a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals. The present Tribunal will follow the same line, especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent.[102]

In the case of *Jan De Nul*[103] the tribunal held, "The Tribunal considers that it is not bound by earlier decisions, but will certainly carefully consider such decisions whenever appropriate."[104] Thereafter the tribunal follows *Bayindir Vs. Pakistan*.[105]

There have, however, been cases in which conflicting decisions have passed on identical or similar questions of law or fact. For example the "umbrella clause" has been a source of much debate. Decisions in *SGS Vs. Philippines*[106] and *SGS Vs. Pakistan*[107] are clearly inconsistent. In *SGS Vs. Pakistan* the tribunal opined that the placement of the clause near the end of the Swiss-Pakistan BIT, in the same manner as the Swiss Model BIT, was indicative of an intention on the part of the Contracting Parties not to provide

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101 El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15 (2006), (Decision on Jurisdiction).

102 *Supra* note 100, at para. 39

103 Jan de Nul N.V., Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13 (2006)), (Decision on Jurisdiction).

104 *Ibid.*, at para. 64.

105 *Supra* note 103, at para. 71.

106 SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6 (2004), (Decision on Objections to Jurisdiction).

107 *Id.*

a substantive obligation.[108] The Tribunal considered that had the Contracting Parties intended to create a substantive obligation through the umbrella clause it would logically have been placed alongside the other so-called "first order" obligations.[109] By contrast, the *SGS Vs. Philippines* Tribunal opined that while the placement of the clause may be "entitled to some weight," it did not consider this factor as decisive.[110] In this respect, the Tribunal stated "it is difficult to accept that the same language in other Philippines BITs is legally operative, but that it is legally inoperative in the Swiss-Philippines BIT merely because of its location".[111] According to Gabrielle Kaufman-Kohler:

> "A review of the relevant decisions raises three considerations. First, there would seem to be a significant inconsistency between the two SGS awards. Secondly, there are a number of decisions that adopt a restrictive approach towards umbrella clauses, such as *Salini* v. *Jordan*, *Joy Mining* v. *Egypt*, and more recently the *El Paso* v. *Argentina* and *Pan American* v. *Argentina* decisions, which stated that:
>
> > an umbrella clause cannot transform any contract claim into a treaty claim, as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims.
>
> Thirdly, the analysis reveals that other tribunals, such as the ones in *Eureko* v. *Poland*, *Noble Venture* v. *Romania* and *Siemens* v. *Argentina* have adopted the opposite view and have accepted that the concept of an umbrella clause is usually seen as transforming municipal law obligations into obligations directly recognizable in international law. In sum, the tribunals are divided when it comes to the umbrella clause, and no clear rule has emerged. Some tribunals have noted that their decisions were dependent on the terms of the bilateral investment treaty (BIT) involved. However, this explanation does not provide a satisfactory justification for all of the discrepancies."[112]

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108 *Ibid.*, at para. 169.

109 *Supra* note 107, at para. 170.

110 *Supra* note 106, at para. 125.

111 *Supra* note 106, at para. 124.

112 *Supra* note 42, at 369.

There have also been decisions, which reached contradictory conclusions on the same facts. Recently in a case involving the Czech Republic two independent treaty claims were made by a broadcasting firm (CME) and its major shareholder (Ronald Lauder). Two separate tribunals examined nearly identical issues and yet managed to reach completely contradictory conclusions as whether the Czech Republic had violated its obligations relating to non-discrimination and expropriation.[113] Thus according to well-known Swiss arbitrator Jacque Werner investor state arbitration is at risk of becoming a "legal casino".[114]

These cases highlight very different approaches to precedents by the tribunals. Some tribunals have denied the existence of a rule of precedent, others have followed previous precedents but have not discussed the existence or nonexistence of the rule of precedent, while other have accepted the absence of the rule of precedent and even then discussed and referred to previous decisions in reaching their conclusions and in some cases parties have referred to previous decisions but the tribunals have refused to follow the cited cases due to a lack of rule of precedent. Some cases have even issued completely contradictory decisions on identical points. These various approaches, however, seem to, more or less, present a common theme that even though there is no rule of precedent, previous decisions have been referred (even to question the existence of a rule of precedent) in many cases.

Citation analysis conducted by some seems to support this conclusion. Gibson and Drahozal conducted a study to see how often decisions of the Iran-United States Claims Tribunal have been cited by ICSID tribunals. They concluded that 17 out of 38 (44.7%) of the ICSID decisions on merits cited the Tribunals precedent.[115]According to a study conducted by Jeffery Commission the use of precedents in investor state arbitration under the aegis of ICSID has increased dramatically since 2001.[116] According to him in 2006 ICSID tribunals decisions on jurisdiction contained on an average 11.25

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113 *Supra* note 42, at 27.

114 *See* J. Werner, *Making Investment Arbitration More Certain – A Modest Proposal,* 4(5) J. WORLD INV. 767 (2003).

115 *Supra* note 26, at 540.

116 *Supra* note 13, at 149.

citations of pervious ICSID awards, whereas in the same year ICSID final awards contained 9.3 citations to ICSID awards.[117] Jeffery Commission further shows that non-ICSID tribunals, such as those constituted under UNCITRAL rules, LCIA arbitrations etc., contained on an average 18.43 citations to previous treaty awards and decisions.[118]

VI. CONCLUSION

Precedents allow for the development of the law, but also make development constrained by the past. However, at the same time if the decisions of a tribunal are to be used as precedents in the future they must constrain the present. As one eminent scholar says:

> "An argument from precedent seems at first to look backward. The traditional perspective on precedent, both inside and outside of law, has therefore focused on the use of yesterday's precedents in today's decisions. But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today's decision as a precedent for tomorrow's decision makers. Today is not only yesterday's tomorrow; it is also tomorrow's yesterday. A system of precedent therefore involves the special responsibility accompanying the power to commit the future before we get there."[119]

Such an effect of precedent does not exist in investor state arbitrations. Whereas tribunals are examining precedents, to make reasoned and consistent decisions, they must at the same time remain true to the unique wording of each BIT. As ad hoc tribunals their responsibility lies primarily to the parties appointing them.

In this sense the use of precedents in investor arbitration does not seem to point towards a definitive rule of binding precedent. However, neither does the practice preclude *in toto* the use the precedents. As the tribunal in *AES Corporation* put it – "decisions … with the same or very similar issues may

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117 *Supra* note 13, at 150.

118 *Supra* note 13, at 151.

119 *Supra* note 55, at 572.

at least indicate some lines of reasoning of real interest".[120] Precedents appear to have a limited but powerful precedential value. This approach places responsibility on lawyers and decision makers in investor state arbitrations to review prior cases thoroughly to determine if they sufficiently analogous to facts in hand, and whether such a prior precedent will actually help in the final determination of the proceedings.[121] In the current economic climate with countries tethering on the brink of bankruptcy and the possibility of a slew of new investor-state related disputes, precedents could have a significant bearing on the not only the development of investor-state jurisprudence, but the fate of entire countries.

120 *Supra* note 88.

121 *Supra* note 26, at 544.