



Some thoughts on precedent in international investment arbitration.

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It is fitting that the area of international investment law which has been chosen for discussion during this session of this Commonwealth Law Conference should involve precedent. We Commonwealth lawyers feel we know a thing or two about precedent. Arguments about whether a particular disposal of a case is or is not permitted in the light of the precedents set by earlier cases will be familiar to most of us. It is, according to a former President of the International Court of Justice from a civilian background, 'an exercise in which Anglo-Saxon lawyers [and I take 'Anglo-Saxon' here to refer to the law, not the lawyer] engage with delectation.'¹ That may be overstating it a little, for in truth even we common lawyers concern ourselves as much with principle as with precedent: Dame Sian Elias showed that convincingly in a paper delivered to this Conference a decade ago.² But it is certainly territory on which most of us feel at home.

A very great deal, perhaps too much, has been written about precedent in international investment arbitration³ and it is not my ambition to attempt either a synthesis or a comprehensive critique.

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1 G Guillaume, 'The Use of Precedent by International Judges and Arbitrators', (2011) 2 *Journal of International Dispute Settlement* 5 at 6.

2 'The Usages of Society and the Fashions of the Times', (2003) 15(1) *Commonwealth Judicial Journal* 5.

3 See, e.g., C Schreuer, 'A Doctrine of Precedent?' in *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at 1188; C McLachlan et al, *International Investment Arbitration: Substantive Principles*, (Oxford University Press, 2007) at 1.48ff; G Sacerdoti, 'Precedent in the Settlement of International Economic Disputes: the WTO and Investment Arbitration Models' in *Contemporary Issues in International Arbitration and Mediation: the Fordham Papers 2010*; Z Douglas, 'Can a Doctrine of Precedent be justified in Investment Treaty Arbitration?' (2010) 25(1) *ICSID Review: Foreign Investment Law Journal* 104; L Reed, 'The "De Facto" Precedent Regime in Investment Arbitration: a Case for Proactive Case Management', *ib.*, 95; J Gill, 'Is There a Special Role for Precedent in Investment Arbitration?' *ib.*, 87; W Weidemaier, 'Toward a Theory of Precedent in Arbitration', (2010) 51 *William and Mary Law Review* 1895; J Paulsson, 'The Role of Precedent in Investment Arbitration' in Yannaca-Small (ed), *Arbitration under International Investment Agreements: a Guide to the Key Issues* (Oxford University Press, 2010); B Daly, 'Comment on the Differing Legal Frameworks of Investment Treaty Arbitration and Commercial Arbitration as seen through Precedent, Annulment and Procedural Rule in van den Berg (ed), *50 Years of the New York Convention* (Kluwer, 2009); T Cheng, 'Precedent and Control in Investment Treaty Arbitration' in Ortino (ed), *Investment Treaty Law: Current Issues* (BIICL, 2009); C Brower, 'The Saga of CMS : res judicata, Precedent and the Legitimacy of ICSID Arbitration' in Binder (ed), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009); R Sureda, 'Precedent in Investment Treaty Arbitration' in *ib.*; C Tai-Heng, 'Precedent and Control in Investment Treaty Arbitration' (2007) 20 *Fordham International Law Journal* 1014; J Commission, 'Precedent in Investment Treaty Arbitration: a Citation Analysis of a Developing Jurisprudence', (2007) 24 *Journal of International Arbitration* 129.



Instead I propose to advance a short argument which may perhaps provoke discussion: that the orderly development of international investment law would benefit from the use of some of the techniques which the common law uses, or at least uses when it works properly, to progress from case to case; and that this would not offend against the principles of construction in international law.

We need to begin by defining what we mean by a system of 'precedent'. The word might be applied to at least three different phenomena.

The first is what one might call strict precedent: the common law method under which, subject to certain exceptions, a judge who finds that a previous decision constitutes a precedent must apply it regardless of whether he or she personally thinks it right or wrong in principle. (We will come back to what we mean by saying that an earlier decision constitutes a precedent). Samuel Johnson seems to have had this variant of precedent in mind when he remarked, at least according to Boswell's *Life*, that 'the more precedents there are, the less occasion is there for law; that is to say, the less occasion is there for investigating principles.'⁴ The judge does not investigate the principle because the law is settled by the precedent.

Nobody suggests that a rule as strict as this exists, or could ever exist, in the field of international investment law, so as positively to oblige an arbitral tribunal seised of one investment claim to 'follow' a decision of an earlier arbitral tribunal seised of another. That such a system does not exist is a matter of observable fact. That it *could never* exist is a consequence, principally, of the fact that international investment law is a species of international law. When one learns about a *domestic* system of law, one goes straight to the sources of that law and finds there what the law is. In a common law system, that means looking at the judge-made common law, at statute, and at that form of judge-made law which consists of the courts explaining what the statute actually means. In a civilian system one looks principally at the relevant codes. On first looking into *international* law, by contrast, one is struck (perhaps initially bewildered) by the subject which heads the syllabus of most treatments of the subject: 'what are the sources of international law?' The answer involves hunting, in various places, for, as Professor Brownlie put it, 'the all-important *evidences* of the existence of

⁴ J Boswell, *Life of Johnson* (ed. Rogers, Oxford University Press, 1980), p468. Johnson, in 1772, was talking about a system of precedent very much in its infancy.



consensus among states concerning particular rules or practices’.⁵ A search for evidence of consensus as to what the law is on a particular question can hardly be concluded by treating another decision on the same question as determinative simply on the ground that it came first. Consistently with this, the Statute of the International Court of Justice famously provides in Article 59 that ‘[t]he decision of the Court has no binding force except between the parties and in respect of that particular case’; and Article 38(1) requires the Court, in deciding disputes ‘in accordance with international law’, to ‘apply ... international conventions; ... international custom, as evidence of a general practice accepted as law; ... the general principles of law recognised by civilised nations’ and, only then, and expressly subject to Article 59, ‘judicial decisions’, which are lumped together with ‘the teachings of the most highly qualified publicists of the various nations’, and only ‘as a subsidiary means for the determination of rules of law.’ Of course, the International Court of Justice is a permanent court with all the authority that its status as such an institution implies. If *it* does not recognise a doctrine of binding precedent, there is little scope for one in a field where the decision-maker is not a court but a panel of three arbitrators, a panel whose existence begins and ends with the particular case.

The second respect in which one can speak of a system of precedent is closely related to the first. It is that a court normally *should* follow an earlier precedent, though may depart from it if appropriate. This is, of course, the practice which, in the United Kingdom, was followed by the House of Lords from 1966⁶ and is now followed by the Supreme Court.

Just as the strict form of the doctrine of precedent has no place in international investment arbitration, nor does this second form. For it, too, would require an arbitral tribunal to regard the meaning of a bilateral investment treaty, a question of international law, as settled—albeit only presumptively—by a single arbitral decision.

Both of these first two versions of precedent are in practice comparatively rare even in the common law. One might from time to time encounter a case in which the doctrine really matters, but much more common is the third phenomenon to which one might apply the name ‘precedent’: that of the settled line of cases. The court does not so much ‘follow’ an authority or authorities (or indeed

⁵ Brownlie, *Principles of Public International Law* (7th ed., Oxford University Press, 2008), p4, emphasis in original.

⁶ *Practice Statement (HL: Judicial Precedent)* [1966] 1 W.L.R. 1234. This has always been the practice of the Judicial Committee of the Privy Council.



consider whether it should or should do so, if that choice is open to it), but instead simply proceeds in accordance with principles of law which are regarded as settled. Cardozo wrote of ‘the power of the beaten track.’⁷ This comes close in practice to the civilian equivalent of the *jurisprudence constante*, a phenomenon one sees repeatedly in the decisions of the European Court of Justice and the European Court of Human Rights, both of which, while formally disavowing anything like a rule of *stare decisis*, frequently ‘recall’ what they have said in the past on the subject under discussion, and proceed to determine the case consistently with that.⁸

A *jurisprudence constante* does, of course, need to be *constante*. But in many respects, when it comes to the field of investment arbitration, it is not. Lord Mustill puts it vividly. There are, he has said,

*‘crippling inconsistencies in the jurisprudence of bilateral investment treaty disputes, now apparently incurable. The books get longer and longer, and so do the awards ... but in the absence of a doctrine of binding precedent there is currently no means of imposing order where it is needed ... the whole area seems to be heading for a thrombosis.’*⁹

The inconsistencies are undeniable. But one should not overlook the fact that there are areas of international investment law where a consensus does indeed prevail. Three examples will have to suffice.

First, and fundamentally (indeed, vitally for the existence of the whole subject), it is generally accepted that when State A promises State B, in a bilateral investment treaty, that it will submit to binding arbitration any dispute about whether it has broken its substantive promises in the treaty—promises, that is, about how it will treat foreign investors—that constitutes not just a promise to State B but a free-standing offer to foreign investors, which may be accepted directly by an aggrieved foreign investor by service of a notice of arbitration.¹⁰ It is by no means obvious that such an analysis has to follow from the text of all investment treaties.¹¹ Yet the chances are surely slim

7 B Cardozo, *The Growth of the Law* (1924), quoted in Elias, *op cit.* at 7.

8 Indeed, the court is sometimes quite explicit in referring to ‘case-law’: see, e.g. *Animal Defenders International v United Kingdom*, ECtHR, Judgment, 22 April 2013 at [108]: ‘It emerges from that case-law that ...’

9 Foreword to T Roe and M Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press, 2011), p. xiii.

10 J Paulsson, ‘Arbitration without Privity’, (1995) 10 ICSID Review – Foreign Investment Law Journal 232.

11 It is true that some, such as the Energy Charter Treaty, make it clear that it should: see Article 26(5)(a),



nowadays that an arbitral tribunal would ever decline jurisdiction on the ground that the offer to arbitrate was no more than a promise to State B.

Secondly, there is a significant measure of agreement, too, when it comes to some of the substantive standards of protection which most investment treaties require a host state to offer to foreign investors. Thus, for example, most investment treaties commit their signatory States to accord 'fair and equitable treatment' to foreign investors. There inconsistencies between different cases, in particular as to whether the 'fair and equitable treatment' standard is no more than a way of codifying the obligation under customary international law to uphold the 'international minimum standard' under customary international law for the treatment of foreign investments.¹² But, whatever the answer to this, it is clear that no arbitral tribunal today, in approaching the question of whether the acts complained of by the claimant were unfair and inequitable, would do so in disregard of the extensive arbitral case law on the subject which is at one in recognising that 'fair and equitable treatment' involves, for example, procedural propriety and due process in a state's dealings with an investor, good faith, and the absence of a coercion and harassment.¹³

Thirdly, there is much which is now settled as regards the whole concept of being an 'investor' (and thus a person entitled to bring a claim under an investment treaty). A claimant which does not offer to prove that it committed resources to the economy of the host state, taking a risk in the expectation of a commercial return, is unlikely to be regarded as an investor. As has been recently noted by an arbitral tribunal, the requirement that at least these elements be present in order to justify a claim to be an investor 'may well encapsulate an emerging synthesis'.¹⁴ Of course, there are controversies about whether there are other elements to a test of whether the claimant is an investor: for example, is it necessary to show that the claimant's investment contributes to the development of the host state's economy? (Plainly not, in my view, but the annulment committee in *Mitchell v Congo* regarded it as essential to do so.¹⁵) There are also decisions which are out of line

spelling out expressly that the host state's offer in the Treaty to arbitrate, and the investor's acceptance of it, together constitute a binding agreement to arbitrate without more.

12 See T Roe and M Happold, *op cit.*, pp 108ff.

13 See R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), pp. 133-47.

14 *Pantechniki SA v Albania*, Award, 28 July 2009, para 36. The formulation is that of Z Douglas in *The International Law of Investment Claims*, (Cambridge University Press, 2009), p. 189ff.

15 Decision on Annulment, 1 November 2006.



with the great majority of cases. Thus in *Petrobart v Kyrgyz Republic*,¹⁶ the claimant simply had a contract to deliver gas condensate to a company in the Kyrgyz Republic. That was enough, in the view of an arbitral tribunal, to make the claimant an ‘investor’ in the energy sector in the Republic and so able to complain under the Energy Charter Treaty when the Kyrgyz authorities interfered with its ability to enforce the contract.

But the fact that one can identify both disputes at the margins of the rule and cases which do not appear to fit in with the great majority of other cases does not in my view mean that the law is not generally settled in this area. To adopt the civilian terminology, when it comes to the meaning of ‘investor’, if one cannot speak of a *jurisprudence constante*, one could perhaps speak of a *jurisprudence assez constante*.

What is a tribunal to do when it notices that the question which it is asked to decide is one which has already been resolved a particular way in a line of earlier decisions? Arbitral tribunals have given two quite distinct answers. The tribunal in *AES Corp v Argentina* said this:

‘even when [a tribunal] meets with very similar if not even identical facts at the origin of the disputes, [it] 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 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.’¹⁷

It has been said that this dictum explains the emergence of what has been called ‘a common law of investment protection’.¹⁸ However, it seems to me that the approach which this passage suggests is quite the opposite. The essential feature of the common law method is that the fact that a particular question has been decided a particular way in the past gives that way of deciding the question a particular weight, irrespective of the weight which that reasoning would otherwise have. A common

¹⁶ Award, 29 March 2005.

¹⁷ Award, 26 April 2005, para 23.

¹⁸ McLachlan, *op cit.*, p18.



law judge who discerns the existence of precedents does not merely treat them as being ‘of real interest’: he or she will, or will usually, follow them even if not, or not wholeheartedly, ‘shar[ing] the views expressed.’ Indeed, the common law judge is not so much looking for ‘views expressed’ in an earlier decision as the reasons for it. An approach which regards past decisions as nothing more than ‘of ... interest’ is not really an approach based on precedent at all.

A contrasting approach was identified by the arbitral tribunal in *Saipem v Bangladesh*:

‘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. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.’¹⁹

This seems to me much closer to providing the basis of a ‘common law of investment protection.’

I move, then, to my proposition that the orderly development of international investment law would benefit from the use of some of the techniques which the common law uses, or at least uses when it works properly, to progress from case to case.²⁰ There are three in particular that I have in mind.

The first is the recognition that precedent is concerned with legal principle, not simply with facts. The purpose of studying the way in which a previous court or tribunal dealt with a particular set of facts is to elucidate the legal principle which was being applied there. As Lord Steyn said in an English negligence case,

‘Both counsel ... at times invited your Lordships to compare the facts of the present case with the facts of other decided cases. That is a sterile exercise. Precedent is a valuable stabilising influence in our legal system. But comparing the facts of and outcomes of cases in this branch of the law is a misuse of the only proper use of precedent, viz., to identify the relevant

¹⁹ Decision on Jurisdiction, 21 March 2007, para 67, footnotes omitted.

²⁰ I do not, of course, claim that these techniques are the exclusive property of the common law.



*rule to apply to the facts as found.*²¹

In the courts in England and Wales there have been some efforts to reduce the extent to which judges are required by the parties to wade through pages and pages of supposed precedent. In the Court of Appeal one is required not to cite more than 10 authorities in total ‘unless the scale of the appeal warrants more extensive citation’.²² The courts in many other common law jurisdictions have grappled with the problem of excessive citation. There are, of course, valid reasons in some cases, especially in a developing area of the law, for extensive citation. It has been rightly said that that often one needs to read a cluster of cases rather than isolated authorities in order to define and apply the rules.²³ But the reminder that the object of the exercise is not to find and cite every case whose facts look at all similar is a useful one.

Secondly, the common law method of reasoning depends, of course, upon careful identification of the *ratio decidendi* of the cases or cases said to constitute the precedent: only that which is *ratio* is capable of having value as a precedent. In the context of international investment arbitration, Paulsson argues, persuasively to my mind, that the discipline of identifying what is ratio and what is not is a worthwhile one.²⁴ As he puts it:

‘... in most cases, the reader of an alleged precedent is most likely to be influenced by the reasons which he understands as decisive with respect to the outcome for which arbitrators have taken personal responsibility ex officio. That is where, one reasonably surmises, they exhibit particular care.’

This view has not met with universal approval. Criticising what he sees as the growing tendency for arbitral tribunals to undertake the exercise of trying to discern what is *ratio* and what is not, Douglas suggests that the status of a particular piece of reasoning as part of the *ratio decidendi* of an earlier decision is not a litmus test for identifying reasoning that is worthy of adoption in a future one.²⁵ For Douglas, it might be, as he puts it, ‘a distraction from the real game in town: the survival of the

21 *Jolly v Sutton BC* [2000] 1 W.L.R. 1082 at 1088.

22 Practice Direction 52, para 15.11(2).

23 R. Munday, ‘Over-Citation: Stemming the Tide’ (2002) 166 *Justice of the Peace* 6.

24 ; J Paulsson, ‘The Role of Precedent in Investment Arbitration’ in Yannaca-Small (ed), *Arbitration under International Investment Agreements: a Guide to the Key Issues* (Oxford University Press, 2010) at 705ff.

25 Z Douglas, ‘Can a Doctrine of Precedent be justified in Investment Treaty Arbitration?’ (2010) 25(1) *ICSID Review: Foreign Investment Law Journal* 104 at 106.



fittest arguments for the purpose.’

Douglas goes on to warn of the dangers of a *jurisprudence constante*. He points out that there have now been 15 to 20 arbitral awards all holding that a shareholder in a company incorporated in a host state is entitled, in his own right, to bring an arbitral claim against the host state complaining of mistreatment of the company. A *jurisprudence constante* might thus be said to have developed, yet nowhere have these cases confronted what Douglas rightly regards as real difficulties with the notion that a shareholder may bring such a claim. In particular, the implication of the cases is that if a company has 10,000 shareholders, each of them can bring his or her own separate international investment claim.²⁶ This issue, he argues, needs to be confronted rather than ignored on the basis of a *jurisprudence constante*. We need, as he puts it,

‘to be concerned about coherency in the development of international investment law and not just consistency between decisions. Too much emphasis on an emerging jurisprudence constante may have the effect of undermining coherency for the sake of consistency.’²⁷

That observation leads to the third respect in which, it seems to me, the common law approach might have some real value in international investment arbitration. It seems to me that the answer to such concerns is not to downplay the importance of precedent but, rather, to focus on the circumstances in which precedent can properly be departed from. As Dame Sian Elias put it in the paper I referred to earlier, ‘judges are not sheep. They must move from the beaten track for good reason.’²⁸

The question of what constitutes a good reason is relatively well developed in the common law. The House of Lords explained in *R v National Insurance Comr, ex p Hudson*²⁹ the limited circumstances in which it might be appropriate not to follow a precedent:

‘... when [the 1966 practice direction, under which the House of Lords decided that it would no longer be bound always to follow its own decisions] was adopted ... there were a comparatively small number of reported decisions of this House which were generally

²⁶ For perhaps the most comprehensive attempt to impose some order on this area, see Z Douglas, *The International Law of Investment Claims*, (Cambridge University Press, 2009) pp.363ff.

²⁷ (2010) 25(1) ICSID Review: Foreign Investment Law Journal 104 at 106.

²⁸ Elias, *op cit*, p.7.

²⁹ [1972] AC 944 at 966 *per* Lord Reid.



thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy and that such decisions should be reconsidered as opportunities arose. But this practice was not to be used to weaken existing certainty in the law.'

It cannot be doubted the United Kingdom's recently-invented Supreme Court thinks the same. The Judicial Committee of the Privy Council has always thought so. The Supreme Court of the United States put the same point more shortly in *Planned Parenthood of Southeastern Pennsylvania v Casey*³⁰:

'a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.'

This principle was strikingly invoked by the dissenting minority in a Privy Council case in 2007³¹. The majority (four of the seven judges who heard the case) voted to overrule an earlier case. The three dissenters would have left it alone, despite the fact that one of their number had himself been one of the judges in the earlier case and had dissented at the time in terms which left no room for doubt that he thought the decision wrong to the point of idiocy.

It seems to me that this approach is no less appropriate in international investment law. There is plainly a need for development of the law based on principle, not just on precedent. But nor should one underrate the need for certainty. The trouble with the Darwinian metaphor—that it is all a question of the survival of the fittest arguments—is that there are some questions on which reasonable people disagree and will continue to disagree. Take, for example, the '*Maffezini*' argument: that when, in an investment treaty, a host state promises to accord 'most favoured nation' status to investors of the counterparty state, that promise may prevent the host state from relying, against a national of the counterparty, on restrictive provisions in the dispute-resolution parts of the treaty, if similar treaties with other states do not contain such restrictions. Several arbitral tribunals have endorsed this suggestion and used it as a means of allowing claims to go

30 (1992) 505 US 833 at 864.

31 *Gibson v Government of the United States of America* [2007] UKPC 52, [2007] 1 W.L.R. 2367, overruling *Cartwright v Superintendent of HM Prison* [2004] UKPC 10, [2004] 1 W.L.R. 902.



forward in breach of the restrictions in the treaties under which the claims were brought.³²

To my mind the argument is obviously a bad one. Distinguished academics have come to the same view³³ and so have some arbitral tribunals. But suppose that over time the great majority of the cases were to come to support the *Maffezini* view of the matter. Would that not be a powerful reason for taking the same view, or at least for not taking a different view without the sort of careful hesitation which a common law court would feel about exercising its power to depart from a precedent?

It does not seem to me that such an approach is in any way inconsistent with the principles of international law. It will be recalled that in trying to discern what the international law is on a particular subject, one is looking ultimately for evidence of agreement among states. In interpreting international investment law, arbitral tribunals are applying international conventions, in fact the first source of law listed in Article 38 of the Statute of the International Court of Justice. They must, of course, do so in accordance with the ordinary meaning of the words in their context and in the light of the objects and purpose of the treaty, as article 31 of the Vienna Convention on the Law of Treaties requires. But in circumstances where similar wording is used over and over again in the great web of bilateral investment treaties, and in particular in circumstances where states continue to reuse similar wording in negotiating and entering into further such treaties, it is not unreasonable to suppose that states accept that particular provisions have the meanings which a significant body of arbitral case law has found them to have.

³² Starting with *Maffezini v Spain*, Award on Jurisdiction, 25 January 2000.

³³ McLachlan, *op cit*, p 254, Douglas, *op cit*, p 344.