

Is Past Performance a Guide to Future Performance – Precedent in Treaty Arbitration

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Is this true? (1)

“The decision of the Court has no binding force except between the parties and in respect of that particular case”

Statute of the International Court of Justice, Article 59

Is this true? (2)

“The first part of [ICSID Convention] Art. 53(1) may also be read as excluding the applicability of the principle of binding precedent to successive ICSID cases. Nothing in the Convention’s *travaux préparatoires* suggests that the doctrine of *stare decisis* should be applied to ICSID arbitration”.

The ICSID Convention: A Commentary, Schreuer, page 1082

Is this true? (3)

The Mox Plant case (Ireland v. United Kingdom), para. 51

"the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*".

Has it ever happened?

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We like precedent because ...

- Like cases are treated alike
- Predictability equals fairness
- Litigants know law in advance
- Dissuades litigating bad points

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We don't like precedent because ...

- It reflects a common law legal philosophy
- None of the advantages work in practice
- Leads to excess formalisation and excess costs
- State sovereignty

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AES v. Argentina, April 2005

Claimant objected that Argentina's objections to jurisdiction were similar or identical to arguments raised and rejected by previous tribunals. They were therefore "moot if not even useless" (para. 18).

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AES v. Argentina, April 2005 (2)

- Maintaining the fig leaf
- Argentina could not be prevented from raising its objections again, but ...

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AES v. Argentina, April 2005 (3)

"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 ... precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration".

Paras. 30 and 31

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Let's be honest ... (1)

In discussing fair and equitable treatment standard ...

"The Claimant considers that, as recommended by Jan Paulsson, the Tribunal should examine "the impact of the measure on the reasonable investment backed-expectations of the investor ... The Claimant finds support for this view in *Tecmed* ...".

Azurix v. Argentina, July 2006 para. 341

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Let's be honest ... (2)

Is the Energy Charter Treaty's denial of benefits provision prospective or retrospective?

"... it is a short point of almost first impression".

Plama v. Bulgaria, February 2005, para. 160

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Let's be honest ... (3)

- Good precedents survive and assist
- Bad precedents should not

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SGS v. Philippines, January 2004

“... 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. Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals”.

Para. 97

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Summary

- Academic and practitioner critique plays its part in Darwinian selection
- Tribunals remain sovereign
- Properly used precedent is of assistance
- Avoid tendency to misuse case law or over showcase legal skills

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