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"The Use of Precedents of other International Courts and Tribunals in Investment Treaty Arbitration"

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My role on this panel is to discuss the way in which investment treaty tribunals use precedents of other international courts.

One preliminary observation that might be made is that international courts are increasingly referring to international case law, not only their own previous decisions, but also the jurisprudence of other international courts. This may be due at least in part to the "proliferation" of international courts and tribunals, which has seen the creation of many new international courts over the last ten to fifteen years, and the increase in the volume of international case law. This "proliferation" has given rise to questions about the coherence of international law, and at the heart of this question is the relevance of decisions rendered by one international court for the decisions of other international courts.

As has been noted, there is no doctrine of precedent in international law. But this doesn't mean that previous decisions are not relevant. Under article 38(1)(d) of the ICJ Statute, judicial decisions can be used as a subsidiary means for the determination of the rules of international law.

The relevance of decisions of other international courts will partly depend on whether the international court in question applies the same law, and whether it has the same function. In the context of a comparison of the ICJ and ICSID tribunals, the ICJ applies international law, as defined in article 38 of the ICJ Statute. Under article 42(1) of the ICSID Convention, ICSID tribunals, in the absence of any agreement of the parties, apply the law of the host state of the investment, and international law. This reference to international law has been deemed by the Executive Directors of the World Bank to be the same international law as that applied by the ICJ under article 38 of the ICJ Statute, although allowance is to be made "for the fact that Article 38 was designed to apply to inter-State disputes".

But there are of course many differences between the ICJ and ICSID tribunals. The ICJ is a permanent court, composed of 15 full-time judges elected for terms of nine years (which can be

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2 See, eg, ICJ Statute, art 59; ICSID Convention, art 53(1); SGS v Philippines (Decision on Jurisdiction of 29 January 2004), para 97; and see generally Mohamed Shahabuddeen, Precedent in the World Court (1996).
3 ICJ Statute, art 38(1)(d).
4 ICJ Statute, art 38.
5 ICSID Convention, art 42(1).
renewed), and in contentious matters, only states can appear before it.\(^7\) ICSID tribunals, on the other hand, are constituted on an \textit{ad hoc} basis to decide one dispute, and private parties have standing to bring claims.\(^8\)

But in spite of these differences, international courts essentially do share the same functions, being the settlement of international disputes in accordance with law, and also ensuring the proper administration of international justice.

There is of course an active debate about whether these functions extend to the development of the law,\(^9\) and whether international courts also have the function of taking into account broader public interests.\(^10\) Some international courts might also have more specific functions, such as international criminal tribunals, which make determinations on an individual's liability for the commission of international crimes. But essentially, international courts do share the same basic functions.

In light of this similarity, it should not be surprising that investment treaty tribunals have often referred to the decisions of other international courts for guidance. Recent international case law provides many examples, and it is only possible to refer to a handful of such instances in the short time available today.

First, the ICSID tribunal in \textit{Maffezini v Spain} referred to the decisions of the ICJ in \textit{Rights of Nationals of America in Morocco}, and the \textit{Anglo-Iranian Oil Company} case, and also the award of the Commission of Arbitration in \textit{Ambatielos} when deciding on the scope of the protection offered by the MFN provision in the BIT.\(^11\)

Second, the ICSID tribunal in \textit{Soufraki v United Arab Emirates} referred to the decision of the ICJ in \textit{Nottebohm} when discussing the question of the nationality of the claimant.\(^12\)

Third, the ICSID tribunal in \textit{Tokios Tokeles v Ukraine} referred to the judgment of the ICJ in \textit{Barcelona Traction} as part of its consideration of whether the doctrine of piercing the corporate veil could be applied in that case.\(^13\)

And, as a final example, the ICSID tribunal in \textit{SGS v Philippines} referred to the award of the PCA tribunal in \textit{MOX Plant}, and held that it had the power to suspend proceedings pending the determination of a legal issue by another international court.\(^14\)

\(^7\) Eg, \textit{ICJ Statute}, arts 3, 13, 34(1); \(\text{\textit{ICSID Convention}, art 36.}\)

\(^8\) See especially Sir Hersch Lauterpacht, \textit{The Development of International Law by the International Court} (1958) 6-7: "The development of international law by international tribunals is, in the long run, one of the important conditions of their continued successful functioning and of their jurisdiction."

\(^9\) For this suggestion in the context of domestic courts and tribunals, see, eg, Owen Fiss, "Against Settlement" (1984) 93 \textit{Yale Law Journal} 1073.

\(^{10} \text{Maffezini v Spain (Decision on Jurisdiction of 25 January 2000), paras 43-50.}\)

\(^{11} \text{Soufraki v United Arab Emirates (Decision on Jurisdiction of 7 July 2004), para 45.}\)

\(^{12} \text{Tokios Tokeles v Ukraine (Decision on Jurisdiction of 29 April 2004), paras 53-6, 66.}\)

\(^{13} \text{SGS v Philippines (Decision on Jurisdiction of 29 January 2004), paras 171-2.}\)
So it can be said that ICSID tribunals have found the guidance of other international courts to be of assistance. And this practice of referring to and relying on decisions of other international courts is by no means limited to investment treaty tribunals. This cross-fertilisation of principle can be found in the judgments and awards of many other international courts, which I don't have time to list today.

Yet questions should be asked about whether there are dangers in unthinkingly borrowing precedents from one international court and applying them before another. While international courts have broadly the same functions, there are some differences that arbitrators need to be aware of that might make the use of certain precedents inappropriate.

One example is where the reliance on a precedent from another international court would be inconsistent with the express terms of the tribunal's constitutive instrument. One notable instance in the context of ICSID arbitration relates to the question of the binding power of provisional measures.

The power of ICSID tribunals to grant provisional measures is found in article 47 of the ICSID Convention, which states that tribunals shall have the power to "recommend" provisional measures. The term "recommend" was ultimately included in the final draft of the Convention in place of the verb "prescribe", which had originally been proposed. In his authoritative text on the ICSID Convention, Professor Schreuer writes that:

"The Convention's legislative history shows clearly that a conscious decision was made not to grant the Tribunal the power to order binding provisional measures."

But the ICSID tribunal in Maffezini v Spain found that the "semantic difference" between the word "recommend" and the word "order" was "more apparent than real." The tribunal held that it did not believe that "the parties to the Convention meant to create a substantial difference in the effect of these two words", and that the Tribunal's authority to rule on provisional measures was "no less binding than that of a final award."

The tribunal in Victor Pey Casado v Chile followed the ruling in Maffezini, and in doing so, made express reference to the judgment of the ICJ in LaGrand. In the LaGrand case, the ICJ had, of course, found that provisional measures indicated under the ICJ Statute were binding.

But the question should be asked whether the ICJ's decision in LaGrand is really that relevant in ICSID arbitration, where the two statutes confer different powers. The ICJ Statute confers the power to "indicate" provisional measures, which, in the French version of the ICJ Statute, "must be taken" by the parties. In construing this provision, the ICJ clearly had the scope to find that its provisional measures were binding, in spite of the ambiguity of the verb "to indicate".

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15 ICSID Convention, art 47.
17 Maffezini v Spain (Procedural Order No 2 of 28 October 1999), para 9.
18 Victor Pey Casado and President Allende Foundation v Chile (Decision of 25 September 2001), paras 17-26.
20 ICJ Statute, art 41.
21 For the ICJ's reasoning on this point, see LaGrand, (Judgment of 27 June 2001), paras 92-109.
*ICSID Convention*, on the other hand, only confers the power to "recommend" such measures. Nonetheless, the ICSID tribunal in *Victor Pey Casado* went so far as to state that the issue had, since the ICJ's decision in *LaGrand*, been "resolved".\(^{22}\)

In addition, the inappropriate use of precedents of other international courts can lead to those precedents becoming entrenched by repetition. Recently, in *Tokios Tokeles v Ukraine*, the ICSID tribunal reaffirmed the proposition that provisional measures in ICSID arbitration are binding, where it simply held that:

"It is to be recalled that, according to a well-established principle laid down by the jurisprudence of ICSID tribunals, provisional measures "recommended" by an ICSID tribunal are legally compulsory; they are in effect "ordered" by the tribunal, and the parties are under a legal obligation to comply with them."\(^{23}\)

It is suggested that this is an example where a precedent of the ICJ has been used inappropriately by ICSID tribunals. While there is a general principle of law that parties to international proceedings should not take any steps to prejudice the rights in dispute,\(^{24}\) and while it can be suggested that international courts have inherent powers to grant provisional measures, these principles should yield to the clear terms of a treaty provision, such as that in article 47 of the *ICSID Convention*.

So in summary, I have three points:

Firstly, although there is no doctrine of precedent in international law, this of course does not mean that previous decisions - including decisions of other international courts - are not relevant. Secondly, before referring to precedents of other international courts, investment treaty tribunals need to be aware of the different functions and the different statutes of those international courts. And finally, at the end of the day, the task of the investment treaty tribunal is to settle the dispute in accordance with the relevant law; this involves looking at and construing the terms of the investment treaty in question, together with the *ICSID Convention*, (assuming that the investment treaty tribunal is indeed constituted under the *ICSID Convention*). Investment treaty tribunals should think carefully before doing anything more than that.

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22 *Victor Pey Casado and President Allende Foundation v Chile* (Decision of 25 September 2001), para 17.

23 *Tokios Tokeles v Ukraine* (Procedural Order No 1 of 1 July 2003), para 4.