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Barton Legum

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PREFACE

This year's edition of *The Investment Treaty Arbitration Review* boasts a number of new chapters. The result is greater coverage and a resource that is even more useful to practitioners.

As before, this new edition provides an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments in investment treaty arbitration.

Although many useful treatises on investment treaty arbitration have been written, the relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to those developments and the context behind them.

This eighth edition represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
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Chapter 14

THE ROLE OF PRECEDENTS IN INVESTMENT TREATY ARBITRATION

David MacArthur, Aoi Inoue, Masahiro Yano and Morgane Guyonnet[1]

I INTRODUCTION

Fundamental in the construction of some domestic legal systems, the principle of *stare decisis* does not operate in the context of international law. In other words, prior decisions from international tribunals, courts and the like are not strictly treated as sources of law and, therefore, are not binding.

It follows that arbitral tribunals constituted under investment treaties are theoretically not bound by prior arbitral awards. But the reality is that prior investment awards are frequently relied on by parties in their arguments and by tribunals in their awards. In this way, prior awards operate as 'precedents' in investment treaty arbitration, as 'persuasive authorities' typically do in common law[2] or judicial precedents in civil law systems.[3]

This reliance on prior awards as precedents is far more prevalent in investment arbitration than in commercial arbitration.[4] The rationale behind this is threefold:

a First, while commercial awards largely remain confidential, investment arbitration is, owing to its public interest features, subject to greater transparency. For example, in most cases, awards are published.

b Second, despite the existence of hundreds of investment treaties, many of the protection standards benefiting investors (e.g., fair and equitable treatment (FET) or full protection and security) and the dispute resolution clauses contained therein are translated in relatively identical terms. In that way, there is a narrower and more consistent set of claim bases and issues in investment treaty disputes than in commercial matters, which tend to be more diverse by nature.

c Finally, standards of protection stem from public international law rather than domestic legislation. As there is no code or national court jurisprudence to interpret or define the contours of these rights, it may be the natural inclination of tribunals to treat the body of awards issued by other tribunals reviewing similar issues as a guiding legal corpus. In other words, tribunals in investment arbitrations may sometimes be motivated to conform to past precedent as a means of developing norms and predictability in a system that otherwise lacks them.

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2 Chad W Flanders, 'Toward a Theory of Persuasive Authority', *Oklahoma Law Review*, Vol. 62, No. 1, 2009.

3 Shigenori Matsui, 'Constitutional Precedents in Japan: A Comment on the Role of Precedent', *Washington University Law Review*, Vo. 88, No. 6, 2011.

4 But see, e.g., Gary Born, *International Commercial Arbitration*, 3rd edn., Wolters Kluwer, 2020, Section 27.04.

These factors all contribute to the unique system of precedents in investment treaty arbitration; however, the central premise of international arbitration must be borne in mind: the mandate of tribunals is clearly limited to deciding the specific dispute before them.[5] On that basis, tribunals are entirely free to disregard the rulings of prior tribunals that have previously ruled on the same legal questions.[6] A strict view of this mandate might suggest that, in principle, tribunals should not be influenced by wider systemic considerations.[7]

Beyond this friction, it can be observed that the practice of heeding precedents exists in investment treaty arbitration, like case law gradually evolving and changing in common law courts despite the doctrine of *stare decisis*, because of how courts adopt, limit or modify the legal principles when applying precedents. The ramification of awards treated as precedents in investment treaty arbitration similarly depends on the way subsequent tribunals interpret and apply them.

Consequently, the nature and function of arbitral precedents in investment treaty arbitration (or in arbitration in general) is always a subject of debate. In this chapter, this topic is covered by first elaborating on the lack of a formal system of precedents, then exploring the well-established tendency to cite and rely on arbitral precedents and decisions in recent years reflecting on the role of precedents in investment treaty arbitration.

II LACK OF A FORMAL SYSTEM OF PRECEDENTS

Article 38(1)(d) of the Statute of the International Court of Justice provides that the International Court of Justice must apply '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'.[8] This is often taken as support for citing precedents in the context of public international law; however, it would be mistaken to understand this as establishing a principle of *stare decisis* in public international law because the Statute makes clear 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'.[9]

Similarly, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which is a foundational document in the system of investment treaty arbitration, provides no basis for the creation of a body of case law – or any substantive law – in investment treaty arbitration. The Convention, by Article 48(3), requires only that '[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based'.[10] There is no further articulation on what those reasons should be, nor is a failure to apply any legal principle or to follow any particular law a ground for annulment of the award. Article 52(1) of the Convention provides grounds for annulment only if it is shown that:

a the tribunal was not properly constituted;

b the tribunal has manifestly exceeded its powers;

5 See, e.g., Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), Article 53 (stating that the award is binding only on the parties).

6 Irene M Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration', *Columbia Journal of Transnational Law* , Vol. 51, No. 2, 2013, note 87.

7 Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, Oxford University Press, 2018, p. 83.

8 Statute of the International Court of Justice, Article 38(1)(d).

9 ibid., Article 59.

10 ICSID Convention, Article 48(3).

c there was corruption on the part of a member of the tribunal;
d there has been a serious departure from a fundamental rule of procedure; or
e the award has failed to state the reasons on which it is based.[11]

None of these grounds concern the substantive merits of the 'reasons' stated by the tribunal.

Article 53 of the ICSID Convention provides that the award 'shall be binding on the parties' only, which is often read as implying that International Centre for Settlement of Investment Disputes (ICSID) awards have no precedential value in relation to future ICSID awards.[12] Accordingly, the ICSID system does not provide for a formal system of precedents.

Although ICSID is the most prominent regime for investment treaty arbitration, sometimes arbitration occurs outside the ICSID framework. The most notable alternatives are ad hoc arbitration, most often under United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules and institutional arbitration administered by the same institutions as international commercial arbitration.[13] Compared with ICSID arbitration, these alternative regimes are even more fragmented and can be less transparent because they will depend on the varying operation of individual ad hoc tribunals and arbitration institutions across the world.

In 2014, UNCITRAL developed its Rules on Transparency in Treaty-Based Investor-State Arbitration (the UNCITRAL Transparency Rules).[14] Whether wider adoption of these rules will bring changes to this situation remains to be seen.

Aside from the lack of support from the ICSID Convention, the realities of investment treaty arbitration also preclude the establishment of a formal system of *stare decisis* for several reasons:

a First, there is no centralised superior tribunal or appellate court in investment treaty arbitration. For example, although the ICSID Secretariat has the power to conduct limited review on the awards in ICSID arbitrations,[15] the grounds of annulment are limited to procedural issues.

b Second, the arbitrators are not members of a standing body. Like those in private commercial arbitration, they are appointed on a case-by-case basis. Unlike judges, who belong to a judicial institution that may be legally required to follow precedents, arbitrators have no obligation to consider or refer to other arbitral decisions.

c Third, although the attempts to follow precedents contribute to consistency – and, arguably, legitimacy to an extent – a formal system of *stare decisis* would need to address the more subtle questions, such as the vertical hierarchy of the precedents, the scope of the precedential effect of a decision and how and when a subsequent tribunal can override a precedent. These cannot be implemented with certainty, short of a new international treaty. States carefully negotiate their own trade treaties and, although they often incorporate investor protections, including arbitration rights, states may be reluctant to have those treaties subject to a global framework of binding precedent

11 ibid., Article 52.

12 ibid., Article 53. Ten Cate, note 87.

13 e.g., the Energy Charter Treaty, Article 26(4) provides for three.

14 United Nations Commission on International Trade Law, 'Status: UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014)', https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status (accessed 12 May 2023).

15 ICSID Convention, Articles 50 and 52.

arising from a constellation of independent treaty-based disputes and that may evolve in unexpected ways; therefore, any framework treaty for *stare decisis* is likely to suffer from extensive carve-outs and exceptions, and perhaps be unsustainable in the end.

In sum, there is currently no *stare decisis* doctrine in investment treaty arbitration,[16] and it is unlikely that a formal system will come into place without a major overhaul of the current framework of international investment treaty arbitration.

III ACTUAL RELIANCE ON ARBITRAL PRECEDENTS

Despite the lack of a formal system of arbitral precedents, it would be mistaken to believe that arbitral precedents do not have a role or to assume they are unimportant. On the contrary, it is now an accepted reality that the use of arbitral precedents is deeply ingrained in the contemporary practice of investment treaty arbitration.[17] As stated early on by the tribunal in *El Paso v. Argentina*, it is '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'.[18]

One important decision that is frequently commented on in this regard,[19] and that highlights the role of arbitral precedents, is *Burlington Resources Inc v. Ecuador*,[20] in which the members of the tribunal were split on the issue. The majority noted:

> *As stated in the Decision on Jurisdiction, the Tribunal considers that it is not bound by previous decisions. Nevertheless, the majority considers that it must pay due regard to earlier decisions of international courts and tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further 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 the certainty of the rule of law.*[21]

This view is widely shared by arbitrators in the field, but it is not universal given that arbitral tribunals retain broad discretion in interpreting the legal standards applicable to a case. In the same award, one arbitrator dissented, noting that she 'does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend'.[22]

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16 *Burlington Resources Inc. v Ecuador*, ICSID Case No. 08/5, Decision on Liability, 14 December 2012, Paragraph 221. See also Tai-Heng Cheng, 'Precedent and Control in Investment Treaty Arbitration', *Fordham International Law Journal* , Vol. 30, Issue 4, 2006, p. 1016–17.

17 Richard C Chen, 'Precedent and Dialogue in Investment Treaty Arbitration', *Harvard International Law Journal*, Vol. 60, Issue 1, 2019.

18 *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, Paragraph 39.

19 Yannaca-Small, pp. 81–82; Julian Cardenas-Garcia, 'The Era of Petroleum Arbitration Mega Cases', *Houston Journal of International Law*, Vol. 35, No. 3, 2013, note 216.

20 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012.

21 ibid., Paragraphs 187 and 221.

22 ibid.

In a parallel case, *Occidental Petroleum Corp v. Republic of Ecuador*,[23] the dissenting arbitrator in *Burlington Resources* criticised the majority's decision based on a comparison with a precedent ICSID case; however, at the same time, she noted that her 'critique of the majority's position is not based on an error of law or an excess of power, but on a different appreciation of the factual situation, which is at the discretion of the Tribunal'.[24] Consequently, although experienced arbitrators do not all, or do not always, agree on the precise value of precedents in investment treaty arbitrations, in practice, reliance on and consideration of prior arbitral precedents in investment treaty disputes is a well-established, albeit informal, practice.

Some commentators have sought to develop a theoretical framework for how norms and rules evolve with precedents in investment treaty arbitration. Emergence of these norms and rules often revolve around what Professor Jean Ho identified as two 'anchors', or common themes, in arbitral awards. One anchor comprises certain 'core standards of treatment', such as basic concepts in international law for protection law, such as protection of aliens and FET, including basic proportionality and due process concepts, while the other 'anchor' is the substantive legal rules on the protection of alien property based on concepts of expropriation.[25]

In addition, arbitrators may be motivated by an interest in conforming to apparent international standards. Compared with the tribunals in private commercial arbitration, tribunals in investment treaty arbitration may face greater public pressure to produce well-reasoned decisions that are well-situated in the world of investment treaty 'jurisprudence'. The reason for this is that the institution of investment treaty arbitration itself is under constant public scrutiny and criticism as it is sometimes perceived as undermining the sovereign rights of governments to make decisions or of the democratic process.[26] In addition, the arbitrators, unlike judges, are not publicly accountable. Arbitrators, therefore, may feel compelled to present their decisions as consistent with, and supported by, a broader framework of jurisprudence that is known to both states and investors. By doing so, they may be seeking to justify investment treaty arbitration as comporting with the rule of law, striving towards legal certainty in that sense.

To achieve that, decision-making by tribunals must take on law-like features, for which consistency is important. Following precedents in a way that leads to a generally applicable principle can be claimed to advance these goals; therefore, to the extent that precedents are available, it is very difficult for arbitrators to refuse to consider or address them. As a result, requirements to publish awards, or even just the legal reasoning part of awards, such as Article 48(4) of the ICSID Convention or Article 3(1) of the UNCITRAL Transparency Rules, contribute to the formation of an informal system of precedents, even though they do not make the precedents binding.

Accordingly, despite the apparent lack of a *stare decisis* doctrine in investment treaty arbitration, the practice of citation to and recognition of precedents is now established in

23 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Dissenting Opinion, 20 September 2012, Paragraph 7.

24 Cardenas-Garcia, note 216.

25 Jean Ho, *State Responsibility for Breaches of Investment Contracts*, Cambridge University Press, 2018; Yuliya Chernykh, 'Review of Jean Ho, State Responsibility for Breaches of Investment Contracts', *European Journal on International Law* , Vol. 32, Issue 2, 2021, p. 706.

26 Ten Cate, p. 419.

practice and is unlikely to go away. It has become natural for tribunals to view prior arbitral awards as having precedential value, and for parties to form similar views and insist on the applicability of certain streams of precedents in their submissions; it is now difficult to identify any cases in which the tribunal simply refused to even consider precedents.

The current practice is a dialogue between the parties and the tribunal on certain legal aspects where the existence of reliable precedents is being argued; tribunals frequently devote efforts towards analysing, adopting or distinguishing these multiple precedents relied on by the parties.

IV DECISIONS REFLECTING ON THE ROLE OF PRECEDENTS

In its 2020 decision in *RWE v. Kingdom of Spain*,[27] in interpreting the FET standard under Article 10(1) of the Energy Charter Treaty (ECT) prohibiting 'unreasonable or discriminatory measures', the tribunal discussed the threshold in terms of establishing 'unreasonableness' under this provision and noted that the threshold 'is a high one, that is frequently assimilated with arbitrariness'.[28] In support of this view, the tribunal cited *EDF (Services) Ltd. v Romania*[29] and *Electrabel SA v. Hungary*.[30]

The *EDF* case was actually interpreting a different treaty, the bilateral investment treaty (BIT) between the United Kingdom and Romania, but the *RWE* tribunal was apparently persuaded by the detailed articulation of the standard for unreasonable and discriminatory conduct adopted in *EDF*. Nevertheless, the *RWE* tribunal stated that, while 'the Tribunal considers [the proportionality standard in *EDF*] to be appropriate to describe what is required to show unreasonableness within Article 10(1) ECT', it also commented 'that the consideration of whether an act is unreasonable under Article 10(1) may engage an issue of disproportionality' based on the Electrabel tribunal's decision interpreting the same provision of *EDF*.[31]

The fact that a precedent interpreted a different treaty did not prevent the tribunal (in this case, in *RWE*) from considering the precedent as not belonging to the same body of precedents, especially if it is properly supplemented by precedents on the more specific application in the particular case; however, it is interesting to observe that the tribunal readily accepted that the concept of 'unreasonable or discriminatory conduct' engenders a general body of case law applicable to any treaty, in principle.

Another example that sheds light on how investment treaty arbitration tribunals navigate arbitral precedents can be found in *OperaFund Eco-Invest et al. v. Kingdom of Spain*.[32] In dealing with jurisdictional objections, with the respondent arguing that the tribunal was without jurisdiction because the dispute was an 'intra-EU' dispute, the tribunal specifically invited parties to comment on several arbitral precedents concerning the same issue, by asking them to (1) address the application of 'margin of appreciation enjoyed by national regulatory agencies when dealing with public policy determinations' articulated in another

27 *RWE Innogy GmbH and RWE Innogy Aersa SAU v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Award of the Tribunal, 18 December 2020 (*RWE*).

28 ibid., Paragraph 647.

29 *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009.

30 *Electrabel SA v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability 30 November 2012.

31 *RWE*, Paragraph 648.

32 *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, 6 September 2019.

ICSID decision and (2) explain, in a chart, 'the common denominators and main differences of the factual and legal background' between the parties' own case (*OperaFund*) and five arbitral precedents identified during the proceeding.[33] Further, the tribunal invited the parties to submit comments in their post-hearing briefs to another arbitral decision that had been issued in the meantime, namely *Vattenfall v. Germany* in which the 'tribunal correctly found that there was nothing in the ECT to indicate the parties had intended to carve out intra-EU disputes'.[34]

Having considered the parties' comments, the tribunal stated in its award that 'there is no need to "re-invent the wheel" and start a new examination of all the details regarding the intra-EU objection' and that the tribunal 'agrees with all the recent conclusions of other tribunals to the effect that the intra-EU objection is not justified';[35] nevertheless, the tribunal briefly explained the substantive reasons for its decision.[36] The *OperaFund* tribunal has gone to considerable lengths to expound the precise scope and implication of arbitral precedents.

Another elaboration of the role of precedents can be found in the 2021 ICSID decision in *BayWa re Renewable Energy GmbH et al. v. Kingdom of Spain*,[37] in which the tribunal, faced again with a case under the ECT, stated:

> *As a general matter, investment tribunals (like other international tribunals) are not bound by a strict doctrine of precedent, but are charged to make their own appreciations based on the evidence and argument presented to them. On the other hand, in practice tribunals regularly cite previous, publicly available awards and pay careful attention to them. In the Tribunal's view, concordant decisions on the interpretation and application of the ECT are entitled to respect, especially if they rise to the level of a jurisprudence constante. On the other hand, where they diverge, a later tribunal has no choice but to form its own view of the relevant law and its application to the facts. This the Tribunal has done.*[38]

The *BayWa* tribunal's references to 'jurisprudence constante' and 'concordant decisions on the interpretation and application of the ECT', along with the *OperaFund* tribunal's statement that it would not 'reinvent the wheel' in the fact of multiple precedents on the same issue are intriguing because they reflect the typical approach of common law courts towards persuasive authorities. For example, in those courts, where all (or an overwhelming majority of) other courts have reached a certain conclusion, or if prior decisions addressed the exact same statutory language or fact patterns, even if those decisions are not binding, the persuasive weight of those authorities would be viewed as particularly high.[39]

33 ibid., Paragraph 378.

34 ibid., Paragraphs 379 and 381, citing *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12

35 ibid., Paragraph 380.

36 ibid.

37 *BayWa re Renewable Energy GmbH and BayWa re Asset Holding GmbH v. Spain*, ICSID Case No. ARB/15/16, Award of the Tribunal, 25 January 2021.

38 ibid., Paragraph 317.

39 See, e.g., *Giovia v. PHH Mortg Corp*, No. 1:13CV00577 LMB/TCB, 2013 WL 6039039, at *6 (E.D. Va. 13 November 2013), Paragraph 16; UCLA School of Law, 'Legal Research: An Overview: Mandatory v. Persuasive Authority', Hugh & Hazel Darling Law Library, 14 February 2023, https://libguides.law.ucla.edu/c.php?g=686105&p=5160745 (accessed 12 May 2022).

This *jurisprudence constante* with respect to the intra-EU jurisdictional objection persisted for some time through a multitude of awards issued by ECT or BIT-based investment tribunals.[40] This was until the ad hoc ECT-based tribunal in *Green Power v. Spain* dismissed this objection for the first time, giving credit to the corpus of EU law that had developed in parallel in the past decade[41] and that had been heavily invoked by the respondent state.[42] Further to this ruling, the outstanding issue was whether the *Green Power v. Spain* award was to be treated as an isolated ruling, or whether a solid legal shift was meant to operate by way of a single decision in this designated field of investment arbitration.

Taking this theoretical ramification into consideration after unshaken years of *jurisprudence constante*, the ICSID tribunal in *Cavalum v. Spain* dismissed the intra-EU jurisdictional objection raised by Spain, which had relied on EU law in addition to the *Green Power* ruling, thereby showing resistance to divert from the majority opinion (or alternatively confirming that *Green Power* was unique in fact and law).[43]

Even when investment treaty tribunals have expressly refused to follow certain arbitral precedents, it is still an acknowledgment of the perceived pertinence of precedents in arbitration because the precedents would require no distinguishing or explanation for departure from them if they were per se irrelevant.

The system of precedents in investment treaty arbitrations is still evolving, and there are always voices sounding caution. As the tribunal in *Aaron C Berkowitz et al. v. Republic of Costa Rica*[44] stated:

> *The jurisdictional aspects of this case are heavily fact-specific. Although interpretations of law, notably of CAFTA [Central America Free Trade Agreement] Article 10.1.3 and 10.18.1, are necessary, the Tribunal's assessment ultimately turns on appreciations of fact. The Tribunal thus cautions any reading of this Award that would give it wider 'precedential' effects.*[45]

The *Aaron C Berkowitz* tribunal is expressing the view that, even if a subsequent case presents a similar fact pattern, it should not be taken for granted that the jurisdictional determination is the same because each tribunal's 'appreciations' of the facts may be different.

Further, the ICSID Secretariat, in a decision on an application for annulment in *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia*[46] also cautioned against applying precedents mechanically. The issue in this case involved the definition of

40 See, e.g., *Rockhopper Italia SpA, Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection, 26 June 2019.

41 See, e.g., *Slovak Republic v. Achmea BV*, Judgment of the Court (Grand Chamber), 6 March 2018; *République de Moldavie v. Komstroy LLC*, Judgment of the Court (Grand Chamber), 2 September 2021; *Republiken Polen v. PL Holdings Sàrl*, Judgment of the Court (Grand Chamber), 26 October 2021.

42 *Green Power Partners KS and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022.

43 *Cavalum SGPS, SA v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on the Respondent's Request for a Supplementary Decision, 8 March 2023.

44 *Aaron C Berkowitz, Brett E Berkowitz and Trevor B Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2 , Interim Award of the Tribunal (Corrected), 30 May 2017.

45 ibid., Paragraph 166.

46 *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009 (*Malaysian Historical Salvors*).

'investment', for which the award cites certain criteria outlined in *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*,[47] which are 'widely accepted as a starting point of an ICSID Tribunal's analysis on this point'.[48] Citing *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*,[49] the ICSID committee endorsed the view that:

> *There is no basis for a rote, or overly strict, application of the five Salini criteria in every case. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention.*
> . . .
> *Further, the Salini Test itself is problematic if, as some tribunals have found, the 'typical characteristics' of an investment as identified in that decision are elevated into a fixed and inflexible test, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied. This risks the arbitrary exclusion of certain types of transaction from the scope of the Convention. It also leads to a definition that may contradict individual agreements (as here), as well as a developing consensus in parts of the world as to the meaning of 'investment' (as expressed, e.g., in bilateral investment treaties). If very substantial numbers of BITs across the world express the definition of 'investment' more broadly than the Salini Test, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly.*
> . . .
> *[Therefore,] a more flexible and pragmatic approach to the meaning of 'investment' is appropriate, which takes into account the features identified in Salini, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID.*[50]

In sum, it is common for tribunals to take arbitral precedents very seriously and make good, or even extra, efforts to follow precedents, as the tribunal in *OperaFund* did. Tribunals are particularly likely to do so in cases like *OperaFund*, where prior decisions decide the exact, purely legal questions. One argument in favour of consistency is that failure to follow those precedents would categorically deprive aggrieved parties of the forum of investment treaty arbitration in its entirety, where prior tribunals allowed it, resulting in substantial injustice; on the other hand, as the *Aaron C Berkowitz* tribunal and the committee in *Malaysia Historical Salvors* suggested, application of precedents should always be done with caution.

V CONCLUSION

Although there is no formal system of *stare decisis* in investment treaty arbitration, nor is there likely to be any in the foreseeable future, arbitral precedents are central to investment treaty arbitration, and the treatment and interpretation of precedential awards continue to evolve. Although it is possible that the precise attitude or approach to utilising precedents will differ depending on the specific tribunal, it is very unlikely that a tribunal will refuse to consider precedents entirely; on the contrary, because investment treaty arbitrators are often experienced

47 *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4 , Decision on Jurisdiction, 31 July 2001.

48 *Malaysian Historical Salvors*, Paragraph 16.

49 *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008.

50 *Malaysian Historical Salvors*, Paragraph 79.

practitioners or highly accomplished scholars, their professional life and reputation depend on their ability to provide well-reasoned awards, which often turn on their ability to distil and apply workable legal principles while weeding out the chaff from the precedents.

Political or public pressure may also add to the incentives for tribunals to justify decisions that are sometimes seen by critics as working against the democratically elected administrators and legislators or decisions of sovereign states. Further, greater uniformity in treaty drafting, increased access, transparency and ease to conduct research on arbitral precedents have also contributed to the continued expansion and development of precedents in investment agreement arbitration.