Fordham International Law Journal

Volume 30, *Issue* 4 2006 *Article* 3

Precedent and Control in Investment Treaty Arbitration

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Abstract

This Article's thesis is that, although arbitrators in investment treaty arbitration are not formally bound by precedent in the same manner as common-law judges, there is an informal, but powerful, system of precedent that constrains arbitrators to account for prior published awards and to stabilize international investment law. This informal system, however, imperfectly supports the relevant policy goals. It is additionally being tested by an increasing diversity of arbitrators, who are themselves facing pressures from investors and host States to meet conflicting demands. This Article proposes that the structure of investment treaty arbitration can absorb such stresses if: (a) the system of precedent is clarified and publicized to enable the global community to appraise awards and the arbitrators who render them; (b) investors and States exercise care in their selection of arbitrators; and (c) the community of international arbitrators exercises sufficient informal self-regulation and self-selection. This thesis is developed in three Parts. Part I discusses the concept and policies of precedent as it has developed in courts. Part II examines the extent to which these policies apply to investment treaty arbitration, and whether investment treaty arbitration has a system of precedent that promotes the relevant policy goals. Part III makes recommendations to further refine the system of precedent in response to emerging global trends, such as the economic growth of the People's Republic of China and an increasing diversity of arbitrators from both developed and developing States.

ARTICLES

PRECEDENT AND CONTROL IN INVESTMENT TREATY ARBITRATION

*Tai-Heng Cheng**

INTRODUCTION

Exponential increases in global trade and bilateral and multilateral investment treaties over the last half-century have led to a proliferation of arbitrations between investors and host States pursuant to those treaties.[1] Unlike international commercial arbitrations between two private corporations, which are generally confidential,[2] investment treaty arbitrations are subject to lower

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1. *See* U.N. Conference on Trade and Development ("UNCTAD"), *Bilateral Investment Treaties in the Mid-1990s*, at 18-19, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998) [hereinafter UNCTAD *Report*] (describing exponential increase in bilateral investment treaties); *see also* Jan Paulsson, *International Arbitration and the Generation of Legal Norms*, TRANSNAT'L DISP. MGMT., Dec. 2006, at 5 n.3 (noting "prodigious expansion of international commercial arbitration in the past half-century"); Catherine Rogers, *Emerging Dilemmas in International Economic Arbitration: The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 965 (2005) ("With the explosion in international trade and, consequently, trade-related disputes, the field of international arbitrators experienced significant expansion and diversification in the past two decades."); Luke Eric Peterson, *Bilateral Investment Treaties and Development Policy-Making* 1-2, *available at* http://www.iisd.org/pdf/2004/trade_bits.pdf (describing exponential increase in bilateral investment treaties ("BITs")); Presentation by Daniel M. Price & Andrew W. Shoyer, Sidley Austin LLP, *Understanding International Investment and Trade Rules: How Global Companies Use Rules to Open Markets* 8, 20 (July 2006), *available at* http://www.rieti.go.jp/en/events/bbl/06070601.pdf (stating that there were 2,392 BITs in 2004, and describing dramatic increase in investment treaty arbitrations).

2. *See* Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 ARB. INT'L 131, 131 (1999) ("The principle that arbitrations are private and confidential as between the parties would seem to be self-evident."); Dora Gruner, *Accounting for the Public Interest in International Arbitration*, 41 COLUM. J. TRANSNAT'L L. 923, 959 (2003) ("A central rule of most private international arbitrations today is that the proceedings and awards are confidential, unless the parties agree otherwise."); *see also* Int'l Chamber of Commerce, Rules of Arbitration, art. 21(3) (2003) ("Save with the approval of the Arbi-

levels of confidentiality.[3] In many investment treaty arbitrations, parties have either unilaterally published the awards or consented to the administering arbitral institution publishing the awards.[4] With disclosure comes public scrutiny. Because international investment law, i.e., the principles and rules of public international law relevant to foreign investments, is a rapidly developing field, it was inevitable that arbitrators would occasionally render contradictory awards.[5] These conflicts have raised urgent questions about the extent to which awards are bound by a system of precedent, and, more broadly, whether international investment law is stable and predictable. International arbitrators have acknowledged that these issues may influence both the actual legitimacy and the public's perceptions of legitimacy of investment treaty arbitral awards,[6] and—the author suggests—

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tral Tribunal and the parties, persons not involved in the proceedings shall not be admitted.").

3. *See* Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID (W. Bank) Case No. ARB/05/22, Procedural Order No. 3, ¶ 125 (2006) ("There is no provision in the ICSID Arbitration Rules which expressly provides for the confidentiality of pleadings, documents and other information . . . [but the parties] may agree not to do so 'if they feel that publication may exacerbate the dispute[.]'") (citing Rule 30, Note F, 1 ICSID Rep. 93); *see also* Amco Asia Corp. v. Republic of Indonesia, ICSID (W. Bank) Case No. ARB/81/1, Award, ¶ 4, 24 I.L.M. 365, 368 (1985) ("[I]t is right to say that the [ICSID] Convention and the Rules do not prevent the parties from revealing their case"); North American Free Trade Agreement ("NAFTA") Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* § A.1 (July 31, 2001) ("Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration[.]"). *But cf.* U.N. Commission on International Trade Law ("UNCITRAL") Arbitration Rules, art. 32(5) (Apr. 28, 1976) (providing that awards are to be made public only with the consent of both parties).

4. *See, e.g.*, International Centre for Settlement of Investment Disputes ("ICSID"), ICSID Cases, http://www.worldbank.org/icsid/cases/cases.htm (publishing ICSID awards) (last visited Jan. 8, 2007); *see also* U.S. Department of State Website, NAFTA Investor-State Arbitrations, http://www.state.gov/s/l/c3439.htm (last visited Jan. 8, 2007) (publishing NAFTA awards involving the United States).

5. *Compare* Société Générale de Surveillance S.A. v. Republic of Philippines, ICSID (W. Bank) Case No. ARB/02/6, Decision on Objections to Jurisdiction, ¶¶ 126-127 (2004) (holding umbrella clause elevated contractual obligations to international law obligations), *with* Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID (W. Bank) Case No. ARB/01/13, Decision on Jurisdiction, 42 I.L.M. 1290, 1319 (2003) (holding umbrella clause did not elevate contractual obligations to international law obligations).

6. *See* Paulsson, *supra* note 1, at 1 ("[W]hat—if any—is the dignity, or shall we say, legitimacy, of such awards as instruments susceptible of generating international law?"); *see also* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1558-87 (2005); J.C. Thomas Q.C., *Presentation on Umbrella Clauses: Where Do Matters Stand* 2,

international investment law itself. Surprisingly, U.S. law reviews appear to have published only very limited research on precedent in investment treaty arbitration.[7] The purposes of this Article are to begin to fill this lacuna, and to hopefully stimulate productive discussions about precedent in investment treaty arbitration among scholars, arbitrators, and lawyers.

This Article's thesis is that, although arbitrators in investment treaty arbitration are not formally bound by precedent in the same manner as common-law judges, there is an informal, but powerful, system of precedent that constrains arbitrators to account for prior published awards and to stabilize international investment law.[8] This informal system, however, imperfectly supports the relevant policy goals. It is additionally being tested by an increasing diversity of arbitrators, who are themselves facing pressures from investors and host States to meet conflicting demands. This Article proposes that the structure of investment treaty arbitration can absorb such stresses if: (a) the system of precedent is clarified and publicized to enable the global community to appraise awards and the arbitrators who render them; (b) investors and States exercise care in their selection of arbitrators; (c) and the community of international arbitrators exercises sufficient informal self-regulation and self-selection.

This thesis is developed in three Parts. Part I discusses the concept and policies of precedent as it has developed in courts. Part II examines the extent to which these policies apply to investment treaty arbitration, and whether investment treaty arbitration has a system of precedent that promotes the relevant policy goals. Part III makes recommendations to further refine the system of precedent in response to emerging global trends, such as the economic growth of the People's Republic of China and

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2006 Joint ICC-ISCID Colloquium (Washington, D.C.) (on file with author) (noting inconsistencies in awards concerning umbrella clauses).

7. *See* W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 770, 775 (1989) (noting that the annulment of the *Kloeckner* award had a "constitutive dimension" and was "a precedent"); *see also* Alexis C. Brown, *Presumption Meets Reality*, 16 AM. U. INT'L L. REV. 969, 1013 (2001) (asserting that "awards made in important and well-known cases are often published with commentaries, and will naturally serve as precedents.").

8. *See* El Paso Energy Int'l Co. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/03/15, Decision on Jurisdiction, ¶ 82 (2006) (explicitly stating that decision was taken pursuant to "important precedents by Tribunals"); *see also* Pan American Energy LLC v. Argentine Republic, ICSID (W. Bank) Case No. ARB/04/8, ¶ 110 (2006) (explicitly stating the same).

an increasing diversity of arbitrators from both developed and developing States.

I. *THE CONCEPT AND FUNCTIONS OF PRECEDENT*

In order to determine whether investment treaty arbitrations have a system of precedent that sufficiently meets the relevant policy goals, it is first necessary to clarify the concept and functions of precedent within the systems of law in which it exists.

A. *The Concept of Precedent*

Precedent, or *stare decisis*, refers the doctrine under which a court, when deciding a point of law, generally follows a holding of a prior court on that point if that prior court is equal or superior in the judicial hierarchy.[9] Even the highest appellate court will generally follow its prior decisions on a point of law, except in exceptional circumstances.[10] For example, the English House of Lords in their 1966 Practice Statement instructed that the law lords would, "while treating former decisions of this House as normally binding, . . . depart from a previous decision when it appears right to do so."[11]

In the United States, the Supreme Court has held that it may depart from its own decisions if it determines that there exists an alternative legal position that is "intrinsically sounder, and verified by experience,"[12] or where a prior decision was later determined to have been wrongly decided.[13] The U.S. Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,

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9. *See generally* J.W. HARRIS, LEGAL PHILOSOPHIES 168 (1980).

10. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) (Rehnquist, C. J.) ("The doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification'"); Ariz. v. Rumsey, 467 U.S. 203, 212 (1984) ("[A]ny departure from the doctrine of *stare decisis* demands special justification.").

11. House of Lords, Practice Statement, (1966) 1 W.L.R. 1234 (Eng.).

12. *See* Helvering v. Hallock, 309 U.S. 106, 119 (1940).

13. *See* Payne v. Tenn., 501 U.S. 808, 809 (1991) ("[T]his Court has never felt constrained to follow precedent when governing decisions are unworkable or are badly reasoned . . . ."); *see also* Cleveland v. United States, 329 U.S. 14, 28 (1946) (Murphy, J., dissenting) ("*Stare decisis* certainly does not require a court to perpetuate a wrong for which it was responsible[.]"); *see also* Vieth v. Jubelirer, 541 U.S. 267, 305 (2004) ("[T]he claims of *stare decisis* are at their weakest . . . where our mistakes cannot be corrected by Congress.").

described the calculus that a court must undertake before departing from a prior decision:

> [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law . . . . [W]e may ask whether the rule has proven to be intolerable simply in defying practical workability, whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[14]

In short, there appears to be a presumption that even unworkable or outdated rules of law will continue to operate until the costs of operation outweigh the costs of instabilities that will result from changing the rule.

In jurisdictions that may not entirely share in common-law traditions, courts may not, as a formal matter, rely solely on a prior decision to determine a point of law.[15] However, the judicial system may still promote consistency in the law by requiring strong reasons to depart from prior decisions. For example, the Advocate General of the European Court of Justice has stated that, although the Court is not formally bound by a doctrine of precedent, "[i]t is none the less obvious that the Court should, as a matter of practice, follow its previous case-law except where there are strong reasons for not so doing."[16] Whether a jurisdiction follows a common-law tradition or not, there is an apparent tendency to decide disputes consistently with prior judicial decisions, except where new policy considerations strongly require a different result or where the prior decision was wrongly decided.

B. *The Functions of Precedent*

Court decisions are a form of "state-sponsored dispute reso-

14. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854-55 (1992).

15. *See* Merck v. Primecrown, Ltd., Joined Cases C-267/95 & C-268/95, [1996] E.C.R. I-6285, ¶ 139.

16. *Id.* ¶ 142.

lution" in which judges make decisions to finalize outcomes in disputes.[17] In democratic States, the continued existence of any system of State-sponsored decision-making ultimately depends on its legitimacy in the eyes of the public. The legitimacy of judicial decision-making, and the public's perceptions of such legitimacy, depend on the system's performance. Substantive and procedural tests can measure performance. Substantive tests include whether the content of legal rules balance the competing policies at stake, and whether outcomes mediated by judicial dispute resolution provide sufficient values to the interested parties.[18] By comparison, procedural indicia do not directly appraise the content of legal rules or of legal outcomes. Instead, they measure whether the law's processes are functioning properly to guide the evolution of rules and the derivation of outcomes towards desirable ends.

There are numerous procedural indicia, including, for example, due process. In the context of the present inquiry into precedent, three procedural indicia are particularly relevant. The first indicium is *development*, i.e., whether the law has mechanisms that enable it to adjust to the changing needs of the community.

The second indicium, *control*, has two aspects. Regarding the law generally, control refers to mechanisms that prevent wild deviations in the law so that it is sufficiently stable for members of the public to plan their affairs and anticipate the legal consequences of their plans. Regarding judicial decision making specifically, control refers to whether judges make decisions within the scope of their authority and whether the system corrects deviations caused by abuses of power and authority.

The third indicium is *recognition*, i.e., whether the law provides the community with tests to determine if each judicial decision has complied with the accepted methods of reasoning, as well as whether the judicial system is operating properly as a whole. Recognition supports control and development. It enables judges, advocates, and observers to distinguish decisions

17. *See* Reisman, *supra* note 7, at 743.

18. *See generally* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 81-85 (1980) (stating that "values" refer to the basic aspects of each individual's well-being); *see also* Tai-Heng Cheng, *Power and Authority in International Investment Law*, 20 AM. U. INT'L L. REV. 465, 504 (2005) (describing values as "the universe of tangible and intangible benefits, interests and resources.").

that should be accepted as constituting the law from decisions that were improperly decided and which should be marginalized.

Judicial systems contain processes that are designed to improve performance in the three indicia. A comprehensive discussion of the many processes is beyond the scope of this Article, and an illustrative list is proposed in lieu: (1) The selection and appointment or election of judges supports development by promoting the evolution of the law through appropriate judicial decision-making; (2) the mechanism for the removal of judges exerts control over those judges who, through their misconduct, pose a systemic threat to the legitimacy of the entire system; and (3) the clarification by appellate judges of the rules for reversing or upholding lower court decisions enhances recognition because it enables the public to determine which court decisions are legitimate and likely to be binding.

A system of precedent is often embedded alongside these processes to enhance performance in all three procedural indicia. Development and control are, to an extent, competing indicia. In order for the law to support the aspirations of the community in which it operates, it must be stable so that people in their everyday affairs may rely on legal rules and not be penalized for such reliance.[19] However, the law must also be able to adapt to the needs of the community as social conditions change. A system of precedent harmonizes the law's performance regarding development and control. It provides a uniform method through which judges may reach judicial decisions that adjust the law in an evolutionary fashion to avoid triggering dramatic instabilities. Thus, precedent both empowers judges to develop the law and controls the misuse of judicial power.

The control aspect of precedent can be disaggregated into external and internal control processes.[20] Precedent builds into the judicial resolution of every dispute an internal norm limiting the authority of judges to resolve disputes in accordance with the

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19. *Cf.* United States v. Mason, 412 U.S. 391, 399-400 (1973) (stating that "people in their everyday affairs [should] be able to rely on [the court's] decisions and not be needlessly penalized for such reliance."); *Casey*, 505 U.S. at 854-55 ("[W]e recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it.").

20. *See* Reisman, *supra* note 7, at 741 (differentiating between internal and external legal systems of control).

law as previously clarified by prior decisions. It also contains checks external to the decision-making processes of any particular dispute. When a judge unjustifiably deviates from precedent, the system triggers an external checking mechanism. A hierarchically superior court may, on appeal, correct that deviation through a reversal of the lower court's decision. If the highest appellate court departs from precedent without meeting the conditions necessary for deviation,[21] the system permits the court to correct its deviation in a subsequent dispute if the necessity of such correction outweighs the disruption that may result from a reversal of its prior aberrant decision.

Finally, precedent improves recognition.[22] The rules of precedent provide criteria: (1) for judges to appraise whether a prior decision should be upheld, reversed, or applied; (2) for scholars to evaluate judicial decisions and make recommendations to improve the law; (3) for practitioners to determine which decisions to rely on in their advocacy; and, finally, (4) for the public to appraise the propriety of each judicial decision and the operation of the entire judicial system itself. When a judicial decision has complied with the rules of precedent, that decision may have a constitutive and developmental effect on the law, because it binds future disputes and may cause citizens to adjust their actions in reliance on that decision. It may also have a legitimating effect on the law when the various actors in the system determine that the system is operating properly. Conversely, where a judge has deviated from the rules of precedent, actors may reject that judge's claim to constitute the law and anticipate future disputes concerning whether the incorrectly decided points of law should be rectified.

II. *FUNCTIONS AND CONCEPT OF PRECEDENT IN INVESTMENT TREATY ARBITRATION*

A. *Functions*

The three procedural performance indicia of judicial systems are equally, if not more, applicable to the system of invest-

21. *Cf. Casey*, 505 U.S. at 854 ("The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit.").

22. *See generally* H.L.A. HART, THE CONCEPT OF LAW 97-107 (1972) (discussing rules of recognition and legal validity).

ment treaty arbitration.[23]

As the needs of the international community change, international investment law must develop to address those needs. Increases in direct foreign investments globally, the diversification of methods and fields of investment, and the rising sophistication of investors and host states have created new demands on international investment law. If this field of international law could not evolve from its customary origins, it would not be able to provide a comprehensive regulatory framework for global investments that balances the interests of all participants in this global system.

Given the high transaction costs of treaty negotiations, it is not practical for States to constantly renegotiate their investment treaties; but international investment law must keep pace with the expansion of the fields of economic cooperation into novel industries, such as the Internet. It must also continually adjust to the elaboration of domestic regulatory frameworks—which often touch foreign investments—that accompany advances in scientific knowledge, such as the effects of certain chemicals on the environment. Because parties to investment treaties cannot easily renegotiate them, arbitrators in investment treaty disputes must adapt existing international treaties and customs to the novel demands of foreign investors and host States.

Control in international investment law, and its system of investment treaty arbitration, is also of paramount importance. The fundamental goal of international investment law, as expressed in the preambles of countless bilateral investment treaties ("BITs"), is to create favorable conditions for greater investments among States.[24] A key condition favorable to investments is a stable legal framework.[25] Control over the evolution of inter-

23. There could be, of course, other additional indicia, such as "integrity, openness, and efficiency." *See* Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM. J. INT'L L. 250, 261 (1996).

24. *See* UNCTAD *Report*, *supra* note 1, at 30-31 (citing the BIT between Malaysia and the United Arab Emirates and the BIT between Argentina and the Netherlands); Saluka Invs. v. Czech Rep., UNCITRAL Partial Award, ¶ 293 (Mar. 17, 2006), *available at* http://www.pca-cpa.org/ENGLISH/RPC/SAL-CZ%20Partial%20Award%20170306.pdf ("Bilateral investment treaties . . . are designed to promote foreign direct investment as between the Contracting Parties.").

25. *See* UNCTAD *Report*, *supra* note 1, at 2 (noting that "legal protection to foreign investments under international law . . . reduce[s] as much as possible the non-commercial risks facing foreign investors in host countries"); LG&E Energy Corp. v. Argen-

national investment law as well as the outcomes of investment treaty disputes is necessary to promote certainty in investment outcomes and to protect the legitimacy of international investment law in the eyes of investors and host States.

Control in investment treaty arbitrations is also critical to the proper operation of international investment law. To address host States' and investors' skepticism about the impartiality of domestic judicial systems, investment projects are often governed by agreements that provide for a panel of neutral arbitrators to resolve disputes.[26] Indeed, even investment treaties that constitute the international legal framework for investment, such as NAFTA, mandate that disputes regarding the framework itself shall be resolved through arbitration.[27] Thus, arbitration, which is a privately sponsored system of dispute resolution, is increasingly limiting the responsibilities of national courts. To the extent that arbitral tribunals have replaced national courts, arbitral tribunals must perform the control function of the courts.

In some regards, arbitral tribunals have greater control responsibilities than courts. Courts derive their authority from the constitutional structure of the State, which often entrusts the judicial arm of government with elaborating the law for the entire citizenry. By comparison, an arbitral tribunal derives its authority from voluntary requests by disputing parties to finalize outcomes in the dispute.[28] No other participant in the global community has consented to the jurisdiction of the tribunal or delegated to it authority to elaborate the law for the community. Because constituting international investment law exceeds the formal mandate that tribunals obtain from arbitration agreements, arbitrators should render awards with a high degree of circumspection concerning potentially constitutive portions of their awards.

Further, unlike domestic courts, arbitral tribunals do not ex-

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tine Republic, ICSID (W. Bank) Case No. ARB/02/1, Decision on Liability, ¶ 124 (2006) (concluding that the "stability of the legal and business framework" was an "essential element" of the object and purpose of the BIT in question).

26. *See* Thuy Le Tran, *Vietnam: Can An Effective Arbitration System Exist?*, 20 LOY. L.A. INT'L & COMP. L. REV. 361, 363 (1998).

27. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, ch. 11, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

28. *See* Rogers, *supra* note 1, at 990.

ist within hierarchical dispute resolution structures.[29] Whereas an appellate court may correct a wrongly-decided lower court decision, arbitral awards are not generally subject to appellate review by another arbitral tribunal or even by a national court.[30] Granted, national courts may exercise some control by refusing to enforce awards that violate public policy or exceed the scope of the arbitration agreement,[31] and annulment committees may scrutinize awards for grave procedural errors or a manifest excess of powers.[32] However, these limited control mechanisms are far narrower in scope than judicial review.[33] Courts and an-

29. *See* Paulsson, *supra* note 1, at 3 ("[T]ribunals . . . are not part of a hierarchal system.").

30. *See* ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 14, 1966, art. 53(1), 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

31. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 ("Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . The recognition or enforcement of the award would be contrary to the public policy of that country."); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 615, 638 (1985) ("The [Convention on the Recognition and Enforcement of Foreign Arbitral Awards] reserves to each signatory country the right to refuse enforcement of an award where the 'recognition or enforcement of the award would be contrary to the public policy of that country.'"); Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.14 (1974) (noting that the alleged fraud committed by the defendant could have been raised under Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as grounds for refusing to recognize the arbitral award since it would have been contrary to public policy); *see also* Canada International Commercial Arbitration Act, R.S.B.C., ch. 233, § 34(1)(2) (providing that an award may only be annulled if it exceeded the jurisdiction of the tribunal or violated public policy); United Mexican States v. Metalclad Corp., [2001] B.C.S.C. 664, ¶ 67 (Can.) (annulling award because the "Tribunal made decisions on matters beyond the scope of the submission to arbitration").

32. *See* ICSID Convention, *supra* note 30, art. 52(1) (stating limited grounds for annulment); *see also* Mitchell (Patrick) v. Democratic Republic of the Congo, ICSID (W. Bank) Case No. ARB/99/7 (2004) (annulling award); Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID (W. Bank) Case No. ARB/97/3, ¶¶ 95-98 (2002) (partially annulling award); Kloeckner GmbH. v. United Republic of Cameroon, ICSID (W. Bank) Case No. ARB/81/2, (1986) (annulling award); Amco Asia Corp. v. Republic of Indonesia, ICSID (W. Bank) Case No. ARB/81/1, (1986) (annulling award).

33. *See* BRIDAS S.A.I.P.C. et al. v. Turkmenistan, 447 F.3d 441 (5th Cir. 2006) (denying annulment); Occidental Exploration & Prod. Co. v. Republic of Ecuador, [2006] EWCA (Civ) 1116, 2006 EWHC 345 (QB) (Eng.) (denying annulment); Feldman v. Mexico, ICSID (W. Bank) Case No. ARB/99/1 (2005) (denying annulment); Sedelmayer v. Russian Federation, No. T 525-03 (Svea Court of Appeal, June 15, 2005) (Swed.) (denying annulment), *available at* http://www.investmentclaims.com/decisions/37b%20-%20Sedelmayer-Svea-Judgment.ENG1.doc; S.D. Myers, Inc. v. Canada, [2004] F.C. 38 (Fed. Ct.) (Can.) (denying annulment); CDC Group Plc. v. Repub-

nulment committees cannot reverse awards for errors of law. While some aggressive courts have adopted artificial views that a mere error of law is a "manifest error" justifying annulment, and that a tribunal's misapplication of the law exceeded its jurisdiction because it only had jurisdiction to interpret the applicable law correctly,[34] few courts have acted so aggressively. Absent comprehensive external controls through appellate review, controls internal to each investment treaty arbitration become all the more important.

Arbitral tribunals adjudicating investment treaty disputes also have greater control responsibilities than arbitrators in private commercial disputes. To the extent that investment treaty arbitrations are not confidential, their awards may have a constitutive effect on international investment law if third-party observers adjust their strategies in anticipation that future similar disputes will lead to similar outcomes. There is thus a need to avoid deviating dramatically from existing laws and precipitating costly shifts in investment plans. There is also a need to avoid prescribing law that will lead to substantively bad outcomes in investment disputes and other unrelated investment arrangements. By comparison, to the extent that commercial arbitrations are confidential, their awards will not generally have a constitutive effect on commercial transnational law. If third parties cannot discover a confidential arbitral award, they will not adjust their strategies, and the consequences of that award will be limited to the parties to the dispute.

Recognition is critical in international investment law and investment treaty arbitration. In order for arbitrations to support control and development in international investment law, arbitrators need shared procedural methods to distinguish between awards that should be followed and those that were improperly decided and therefore deserve less deference. Inves-

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lic of the Seychelles, ICSID (W. Bank) Case No. ARB/02/14 (2003) (denying annulment); CME Czech Republic B.V. v. Czech Republic, UNCITRAL (2003), *available at* http://www.sccinstitute.com/_upload/shared_files/artikelarkiv/tjeckiska_republiken.pdf (denying annulment); Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID (W. Bank) Case No. ARB/98/4 (2002) (denying annulment).

34. *Compare* ICSID Convention, *supra* note 30, art. 52(1), *with* Metalclad Corp., [2001] B.C.S.C. 664, ¶ 70 (Can.) (annulling award and holding that the "Tribunal made decisions on matters beyond the scope of the submission to arbitration" because it had "misstated the applicable law to include transparency obligations and then it made its decision on the basis of the concept of transparency").

tors and host States need tests to appraise decisions, to anticipate whether these decisions have a constitutive effect on the law, and to determine whether they should adjust their investment strategies accordingly. Because the writings of "the most highly qualified publicists" are a source of international law,[35] leading jurists and next-generation scholars who aspire towards eminence must have some method to guide their appraisal of awards, so that they may responsibly instruct other actors about the significance of each award. Most importantly, because arbitration is a privately-sponsored system, its continued growth and existence depends on the global community believing that it is legitimate.[36] This global community of investors, States, observers, scholars, and lawyers can only appraise the legitimacy of arbitration if the system furnishes tests of recognition.

B. *Formalist Approaches to Precedent*

Under a strict formalist approach to international law, arbitral awards appear to have little precedential value. According to positivists, international law is a system of legal rules with which international actors are required to comply.[37] Tribunals and courts, as actors within this system, are required to determine the applicable rules of international law by reference to rules that identify the sources of law.

Article 38(1) of the Statute of the International Court of Justice (the "ICJ Statute") provides that the sources of international law are:

> (a) international covenants, whether general or particular, establishing rules expressly recognized by the contesting parties;
> (b) international custom, as evidence of a general practice accepted as law;

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35. Statute of International Court of Justice, June 26, 1945, art. 38(1)(d), 59 Stat. 1031, 1060 [hereinafter ICJ Statute].

36. *See* THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 26 (1998) (noting that in a legal system, "legitimacy validates community" and "promote[s] voluntary compliance by those to whom [its norms are] addressed").

37. *See* Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291, 293 (1999) ("Positivism summarizes a range of theories that focus upon describing the law as it is, backed up by effective sanctions, with reference to formal criteria, independently of moral or ethical considerations.").

> (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 the rules of law.[38]

Under the ordinary meaning of these terms,[39] the principle sources of international law are treaties, customary law as determined by widespread State practice and *opinio juris* (a belief in the existence of the rule), and general principles.[40] Judicial decisions and the writings of the most highly qualified publicists are merely "subsidiary means for the determination of rules of law."[41] Indeed, judicial decisions are explicitly subject to the limitation contained in Article 59 of the ICJ Statute that decisions of the International Court of Justice (the "ICJ") have "no binding force except between the parties and in respect of that particular case."[42] It would appear, then, that under Article 38, the resolutions of international disputes do not take precedent over customary law or treaties and do not render *res judicata* the interpretation of customary law and treaties.[43]

Even accepting, for the moment, that international law should be conceived of in positivist terms, there are three formalist responses to the strict interpretation of Article 38, which appears to preclude a system of precedent in investment treaty arbitrations. Each of these responses is imperfect, but at least, collectively, raise a specter of doubt as to the proper interpretation of Article 38.

First, the ICJ Statute, by its own terms, binds only the ICJ.[44] It provides neither that its articles codify the customary law generally applicable to all actors in the international system, nor

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38. ICJ Statute, *supra* note 35, art. 38(1).

39. *See* Vienna Convention on the Law of Treaties, art. 31(1), opened for signature May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention] ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

40. *See* ICJ Statute, *supra* note 35, art. 38(1).

41. *Id.* art. 38(1)(d).

42. *Id.* art. 59.

43. *See* Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 865 (1999).

44. ICJ Statute, *supra* note 35, art. 1.

that it governs arbitral tribunals. This argument is, however, not completely persuasive because positivists regard Article 38 of the ICJ Statute as codifying the customary rules on sources of law.[45] Further, most investment treaty arbitrations are conducted under the auspices of the International Center for the Settlement of Investment Disputes ("ICSID") and the Convention on the Settlement of Investment Disputes Between State and Nationals of Other States of 1965 (the "Washington Convention"). Although Article 42(1) of the Washington Convention provides that arbitrators may apply international law without referring to the ICJ Statute, the Executive Directors of the World Bank have instructed that "international law" under Article 42(1) is to be "understood in the sense given to it by Article 38(1) of the [ICJ Statute]."[46]

Second, Article 38(1) of the ICJ Statute may not be a comprehensive codification of the customary law on sources of law. For example, Article 53 of the Vienna Convention on the Law of Treaties of 1969 ("Vienna Convention") recognizes peremptory norms in international law (*jus cogens*) that are hierarchically superior to even treaties and customary law.[47] In *Barcelona Traction*, the majority judgment, supported by twelve judges, found that *jus cogens* existed as an independent source of law.[48]

This response, however, misses the point. Even though Article 38 may not exhaust the sources of international law, it does explicitly account for judicial decisions and provides that they are merely a subsidiary source of law. Technically speaking, arbitral awards are not judicial decisions, and one could argue that awards may not fall within the ambit of Article 38(1)(d). But, pursuant to Article 31 of the Vienna Convention on the Law of Treaties of 1969 ("Vienna Convention"), Article 38(1)(d) of the ICJ Statute should be interpreted in the context of the object

45. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (6th ed. 2003); MALCOLM SHAW, INTERNATIONAL LAW 66-67 (5th ed. 2004).

46. INT'L BANK FOR RECONSTRUCTION & DEV., REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES ¶ 40 (2006), *available at* http://www.worldbank.org/icsid/basicdoc/CRR_English-final.pdf (last visited Jan. 30, 2007).

47. Vienna Convention, *supra* note 39, art. 53.

48. Barcelona Traction, Light & Power Co. (Belg. v. Spain), [1970] I.C.J. 3, 32 (Feb. 5) (noting that *jus cogens* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person").

and purpose of the ICJ Statute,[49] as revealed, *inter alia*, by the text of the Statute itself.[50] The ICJ Statute is almost completely deferential to State sovereignty. A State is not bound by any decision of the ICJ unless it has consented to the ICJ's jurisdiction.[51] Even with such consent, it is only bound as regards the dispute before the ICJ and no other dispute.[52] Arbitral awards are "the functional equivalent of 'judicial decisions.'"[53] They are rendered only with the consent of the parties to the arbitration. In light of the preeminent position given to sovereignty and the explicit limitations on legal effects on non-parties to consensual dispute resolution, it is unlikely that, under Article 38, awards are meant to be more authoritative than judicial decisions.

Third, the customary law that Article 38 codified in 1945 may have evolved to now give decisions and awards greater standing in the hierarchy of sources. In spite of the plain meaning of Article 38(1)(d), positivists Bruno Simma and Andreas Paulus have conceded that the "importance of [decisions of international tribunals] for the clarification of legal rules nowadays can hardly be overestimated."[54] This evolutionary view of decisions and awards is certainly consistent with the writings of other jurists who have concluded that other aspects of Article 38 have evolved since 1945[55] and that its interpretation should account for "the legal environment at the time an interpretation is called for."[56] This response is, however, mired in circularity. The writings of the most learned jurists on the evolutionary nature of Article 38 can conclusively elevate decisions and awards to primary sources of law only if writings are hierarchically equal or superior to treaties and custom. However, for these writings to be hierarchically equal or superior to treaties and customary

49. Vienna Convention, *supra* note 39, art. 31(1).

50. *Id.* art. 31(2).

51. ICJ Statute, *supra* note 35, art. 36.

52. *See id.* art. 59; *see* Philip V. Tisne, *The ICJ and Municpal Law: The Precedential Effect of the* Avena *and* Lagrand *Decisions in U.S. Courts*, 29 FORDHAM INT'L L.J. 865 (2006) (arguing that ICJ treaty interpretations do not bind U.S. federal courts in domestic litigation).

53. Paulsson, *supra* note 1, at 3.

54. Bruno Simma & Andreas Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 307 (1999).

55. *See* Jonathan Charney, *International Lawmaking—Article 38 of the ICJ Reconsidered*, *in* NEW TRENDS IN INTERNATIONAL LAWMAKING 176 (Jost Delbruck ed., 1997); *see also* Paulsson, *supra* note 1, at 6 ("Article 38 itself has never been immutable").

56. Paulsson, *supra* note 1, at 8.

law (and, specifically, the rules contained in Article 38), Article 38 must be evolutionary. This evolutionary approach is neither explicitly within the ordinary meaning of the terms of Article 38, nor contained in the rules of treaty interpretation in Article 31 of the Vienna Convention.[57]

C. *Precedent in Practice*

The reality is that decision makers in international law, including scholars,[58] arbitrators, judges, and lawyers, rely upon arbitral awards.[59] The elaborate and highly technical arguments necessary to reinterpret Article 38 of the ICJ Statute to resemble reality draw attention to the gulf between rhetoric and reality. The insurmountable task of closing this gap in accordance with codified rules of treaty interpretation indicates that a radical departure from formalism is necessary to fully appreciate how precedent actually operates in investment treaty arbitration.

An alternative—and, in this author's view, more useful—approach to understanding precedent in investment treaty arbitration is to study clusters of awards that address similar points of law. Scholars may determine through these awards how arbitrators actually decide disputes and extrapolate trends in the methods of arbitral decision-making. They can also identify conditions that promote these trends. Then, to the extent that global conditions may be changing, scholars can anticipate pressures on existing trends and propose recommendations to keep trends on their desired course.[60]

Because arbitral tribunals are not organized in a hierarchy, there are no decisions from superior tribunals to follow. But there is a system of precedent in arbitration that accounts for prior decisions in a manner similar to the way in which trial or

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57. Vienna Convention, *supra* note 39, art. 31.

58. *See* BROWNLIE, *supra* note 45, at 19 ("The literature of the law contains frequent reference to the decisions of arbitral tribunals.").

59. *See* Paulsson, *supra* note 1, at 12 ("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 also infra* Parts II.C.(1), (2), (3) (discussing how arbitrators account for prior awards in their decision making).

60. For detailed expositions policy-oriented of this approach to international legal problems, see generally W. Michael Reisman, *The View From the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. PROC. 118 (1992); Harold Lasswell & Myers McDougal, *Jurisprudence in Policy-Oriented Perspective*, 19 U. FLA. L. REV. 486; Siegfried Wiessner & Andrew Willard, *Policy-Oriented Jurisprudence & Human Rights Abuses in Internal Conflict*, 93 AM. J. INT'L L. 316, 317-21 (1999).

appellate courts account for prior decisions of hierarchically equal courts. Like the U.S. Supreme Court's decision-making,[61] investment treaty arbitration tribunals tend to: (1) identify prior relevant decisions; (2) compare the aggregate costs of departure from prior decisions with the aggregate consequences of following prior decisions, taking into account whether the policies underlying those prior decisions remain relevant under contemporary conditions; (3) decide which prior decisions to follow or depart from; and (4) articulate reasons for their decision.[62]

To test this hypothesis, this Article looks to the treatment of two controversial concepts by investment treaty arbitration tribunals: the fair and equitable treatment standard, and umbrella clauses. The fair and equitable treatment standard, broadly speaking, obliges host States to treat foreign investments in an even-handed manner.[63] An umbrella clause in an investment treaty may purport to elevate all contractual obligations between the host State and foreign investor to the level of a treaty obligation.[64] The treatment of these two concepts by investment treaty arbitration tribunals is illustrative because there is a sufficient body of published decisions to examine whether tribunals have applied consistent methods of reasoning to explain these concepts. The manner in which tribunals address prior inconsistent awards reveals how the system of precedent operates in arbitration because some awards have differed in their conceptions of both the fair and equitable treatment standard as well as umbrella clauses.

1. The Fair and Equitable Treatment Standard

The fair and equitable standard undoubtedly forms part of customary investment law.[65] It was first codified in the Havana

61. *See supra*, Part I.A.

62. *Cf.* ICSID Convention, *supra* note 30, art. 52(1)(e) (providing that an award may be annulled for failure "to state the reasons on which it is based").

63. *See generally* Catherine Yannaca-Small, Directorate for Fin. and Enter. Affairs, *Fair and Equitable Treatment Standard in International Investment Law* 25-39 (Org. for Econ. Co-Operation and Dev. ("OECD"), Working Paper No. 2004/3, 2004), http://www.oecd.org/dataoecd/22/53/33776498.pdf (last visited Feb. 20, 2007).

64. *See* Katia Yannaca-Small, Directorate for Fin. and Enter. Affairs, *Interpretation of the Umbrella Clause in Investment Agreements* 22 (OECD, Working Paper No. 2006/3, 2006), http://www.oecd.org/dataoecd/3/20/37579220.pdf (last visited Feb. 20, 2007).

65. *See* OECD, Draft Convention on the Protection of Foreign Property, art. 1 cmt.

Charter of 1948.[66] Today, thousands of BITs and several important multilateral trade-related agreements have codified the fair and equitable treatment standard.[67]

But these agreements have not necessarily explained the fair and equitable treatment standard clearly.[68] Consequently, although many commentators accept that the fair and equitable treatment standard imposes at least a "minimum standard,"[69] they have also observed that "its meaning has not been precisely defined."[70]

At first blush, there might not appear to be a system of precedent because arbitral tribunals have fundamentally disagreed on a definition of the fair and equitable treatment standard. While, for example, the tribunal in *Genin v. Estonia* held that the standard only prohibited a "willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith,"[71] the panel in *Mondev Int'l Ltd. v. United States* held that this low customary minimum standard has risen over time as a result of the State practice of concluding invest-

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(1962), *reprinted in* 2 I.L.M. 241 (1963) (explaining that the fair and equitable treatment standard "forms part of customary law").

66. U.N. CONFERENCE ON TRADE AND EMPLOYMENT, HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION, art. 11(2), U.N. Doc. E/CONF.2/78, U.N. Sales No. 48.II.D.4 (1948).

67. *See, e.g.*, Convention Establishing the Multilateral Investment Guarantee Agency, art. 12(d)(iv), Oct. 11, 1985, 24 I.L.M. 1605; NAFTA, art. 1105; *see also* UNCTAD REPORT, *supra* note 1, at 54 (citing BITs that impose a fair and equitable treatment standard).

68. *See* Azurix Corp. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/01/12 (Award), ¶ 358 (2006) (stating the content of the fair and equitable treatment standard needed clarification); *see also* Yannaca-Small, *supra* note 63, at 1 ("Discussion of this standard has focused mainly on whether the standard of treatment required is measured against the customary international minimum standard, a broader international law standard including . . . treaties . . . , or whether the standard is an autonomous self-contained concept in treaties").

69. OECD, *supra* note 65, art. 1, cmt.

70. *UNCTAD Report*, *supra* note 1, at 53.

71. Genin v. Estonia, ICSID (W. Bank) Case No. ARB/99/2 (Award), ¶ 367 (2001); *see also* UPS v. Canada (Award on Jurisdiction), ¶ 97 (NAFTA/UNCITRAL, Nov. 22, 2002), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/Jurisdiction%20Award.22Nov02.pdf; Azinian v. Mexico, ICSID (W. Bank) Case No. ARB(AF)/97/2, ¶ 92 (1999) (referring to fair and equitable treatment standard as minimum standard in international law); Neer v. United Mexican States (U.S. v. Mex.), 4 R.I.A.A. 60, 61 (U.S.-Mex. Gen. Claims Comm'n 1926) (stating that conduct must be outrageous, egregious and in bad faith to violate the standard).

ment treaties with stronger investment protections.[72] Further confounding the issue, the panel in *Pope & Talbot, Inc. v. Canada* held that the fair and equitable treatment standard imposed a higher standard of fairness than the minimum standard,[73] and the *Azurix Corp. v. Argentine Republic* tribunal went so far as to hold that the fair and equitable treatment standard now protects legitimate investor expectations even in the absence of bad faith or egregious conduct by the host State.[74]

There also appears to be uncertainty about the extent to which the standard permits governments to take regulatory actions in accordance with domestic law. Some tribunals have found that governments did not violate the standard when they took actions in accordance with domestic law, even though those actions reduced the value of foreign investments.[75] Other tribunals, however, have held that government actions would not violate the standard only if the actions were taken for a bona fide public purpose and did not fall short of the investors' legitimate expectations.[76] Indeed, the decisions in *Lauder v. Czech Republic*

72. *See, e.g.*, Mondev Int'l Ltd. v. U.S., ICSID (W. Bank) Case No. ARB(AF)/99/2, ¶ 125 (2002).

73. *See* Pope & Talbot Inc. v. Canada, ¶¶ 110-117 (UNCITRAL/NAFTA, Apr. 10, 2001), *available at* http://naftaclaims.com/Disputes/Canada/Pope/PopeInterimMeritsAward.pdf.

74. *See* Azurix Corp. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/01/12 (Award), ¶ 372 (2006); *see also* CMS Gas Transmission Co., Inc. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/01/8, ¶ 280 (2005) (stating that the standard was "unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question"); Techmed v. Mexico, ICSID (W. Bank) Case No. ARB/00/2 (Award) (2003) (holding that the standard protected legitimate investor expectation); Middle E. Cement v. Egypt, ICSID (W. Bank) Case No. ARB/99/6 (Award), ¶¶ 97, 174 (Apr. 12, 2002) (failing to notify investor of seizure of property was a due process breach that fell below standard); Maffezini v. Spain, ICSID (W. Bank) Case No. ARB/97/7 (2001) (holding that fair and equitable treatment included transparency); S.D. Myers, Inc. v. Canada (Partial Award), ¶¶ 259, 268 (NAFTA/UNCITRAL, Nov. 13, 2000), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcanadapartialaward_final_13-11-00.pdf (indicating that standard included nondiscrimination, and breach of national treatment rule also breached fair and equitable treatment standard); Am. Mfg. & Trading, Inc. v. Zaire, ICSID (W. Bank) Case No. ARB/93/1 (1997) (failing to take every measure to protect and secure foreign investment violated standard).

75. *See, e.g.*, Noble Ventures v. Romania, ICSID (W. Bank) Case No. ARB/01/11 (2005) (holding that bankruptcy proceedings did not violate standard because they were conducted according to national law); *see also* GAMI Invs., Inc. v. United Mexican States (Final Award), ¶ 38(B) (UNCITRAL, Nov. 15, 2004) (dismissing claim because the government could enforce its domestic law).

76. MTD v. Chile, ICSID (W. Bank) Case No. ARB/01/7, ¶¶ 187-188 (2004) (hold-

and *CME v. Czech Republic*, both of which addressed a similar dispute arising under similarly worded fair and equitable treatment provisions in two separate BITs, took opposite positions—the *Lauder* tribunal found that the standard had not been breached while the *CME* tribunal found that a breach of the standard had occurred.[77]

Another substantive issue on which tribunals have disagreed is whether the fair and equitable treatment standard prohibits the host State from discriminating against the investor in comparison to other domestic and foreign investors. The majority of the tribunal in *S.D. Myers v. Canada* held that the fair and equitable treatment standard in Article 1105 of the North American Free Trade Agreement ("NAFTA") included a principle of non-discrimination, which arose out of Article 1102 of NAFTA and independently of customary international law.[78] In *Methanex v. United States*, however, the tribunal held that the fair and equitable treatment treaty standard did not incorporate protections beyond customary law and that "non-discrimination" was not part of the standard.[79]

These apparent differences in how tribunals have explained the fair and equitable treatment standard do not conclusively indicate that there is no system of precedent. Notably, the fair and equitable treatment standard has existed for almost a century, with the first decision rendered in 1927 in the *Neer* case,[80] and

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ing that Chile breached the standard by approving an investment that was against its urban policy); *see also* Vagts, *supra* note 23, at 34-35 (arguing that the standard prohibits "regulatory action without bona fide government purpose . . . designed to make the investor's business unprofitable.").

77. *Compare Lauder v. Czech Republic*, ¶ 314 (UNCITRAL, Sept. 3, 2001) (holding that the standard is a minimum international standard and government actions to enforce domestic law in that dispute did not violate the standard), *with CME v. Czech Republic*, ¶ 647 (UNCITRAL, Mar. 14, 2003) (holding that measures making investment unprofitable, except for bona fide government purposes, violated fair and equitable treatment standard).

78. *S.D. Myers v. Canada*, ¶¶ 266-268 (NAFTA/UNCITRAL, Nov. 13, 2000) (stating that in this dispute, violation of Article 1102 constituted violation of Article 1105); *see also* Waste Mgmt. v. Mexico, ICSID (W. Bank) Case No. ARB(AF)/00/3 (2004) (holding that the standard protects legitimate expectations, prohibits discrimination and requires transparency).

79. *See Methanex v. United States*, ¶¶ 16, 25-26 (NAFTA/UNCITRAL, Aug. 3, 2005). The *Methanex* decision was rendered after the NAFTA Notes of Interpretation were issued, and followed the Notes.

80. *See generally* Neer v. United Mexican States, 4 R.I.A.A. 60 (U.S.-Mex. Gen. Claims Comm'n 1926).

the most recent decision as of this writing rendered on October 3, 2006 in *LG&E Corp. v. Argentina*.[81] Just as the jurisprudence of the U.S. Supreme Court in controversial areas, such as racial segregation,[82] the right to abortion,[83] and laws against sodomy,[84] has evolved dramatically over the last fifty years, international decisions interpreting the fair and equitable treatment standard have changed over the last seventy years.[85]

Moreover, a close examination of the awards rendered in 2006 that address the fair and equitable treatment standard—*Saluka Invs. v. Czech Republic*;[86] *Azurix*;[87] *LG&E Corp.*[88]—indicates that tribunals do in fact operate within the system of precedent proffered by this Article. The three tribunals all concluded that: (1) what was required under the fair and equitable treatment standard was highly fact-specific;[89] (2) the host State needed to provide measures that would ensure business and legal stability

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81. *See, e.g.*, LG&E Corp. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/02/1 (2006).

82. *Compare* Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that all racial classifications imposed by government must be analyzed by a reviewing court under "strict scrutiny"), *with* Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that a statute requiring railroads carrying passengers to provide equal but separate accommodations for white or colored races was not unconstitutional).

83. *Compare* Roe v. Wade, 410 U.S. 113 (1973), *with* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

84. *Compare* Lawrence v. Texas, 539 U.S. 558 (2003) (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional), *with* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that Georgia's sodomy statute did not violate the fundamental rights of homosexuals).

85. *See* Mondev Int'l Ltd. v. United States, ICSID (W. Bank) Case No. ARB(AF)/99/2, ¶ 123 (2002) (explaining that the standard of investment protection has increased since the 1920s); *see also LG&E*, ICSID (W. Bank) Case No. ARB/02/1, ¶ 123 (2006) (explaining that interpretations of the standard "varies with the course of time").

86. *See, e.g.*, Saluka Invs. v. Czech Republic, ¶ 293 (UNCITRAL Mar. 17, 2006), *available at* http://www.pca-cpa.org/ENGLISH/RPC/SAL-CZ%20Partial%20Award%20170306.pdf.

87. *See* Azurix Corp. v. Argentine Rep., ICSID (W. Bank) Case No. ARB/01/12 (Award), ¶ 372 (2006).

88. *See, e.g., LG&E*, ICSID (W. Bank) Case No. ARB/02/1 (2006).

89. *See, e.g., id.* ¶ 123 (stating that interpretation of the standard varies "with the circumstances of each case"); *Saluka Invs.*, ¶ 291 (UNCITRAL Mar. 17, 2006) ("to the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied"); *Azurix*, ICSID (W. Bank) Case No. ARB/01/12, ¶ 377 (2006) (stating that the facts of the dispute had to be "considered together" to determine if the standard had been breached); *see also Mondev*, ICSID (W. Bank) Case No. ARB(AF)/99/2, ¶ 118 (2002)

to attract foreign investments;[90] and (3) bad faith was not a necessary element for breach of the standard.[91]

Each of the three tribunals followed the system of precedent articulated in this Article to reach their substantive conclusions. All three tribunals first canvassed the prior awards that counsel had brought to their attention.[92] The tribunals all concluded that the majority of the awards tended not to protect legitimate investor expectations, including expectations of good faith, due process, and non-discrimination from the host State.[93] Next, the tribunals studied the policy reasons underpinning the articulation of the standard by prior tribunals. They concluded that the policies of promoting investments through a stable legal and business environment that were relevant to the disputes before the prior tribunals remained relevant, especially because these policies were embedded in preambles of the BITs.[94] Based on this calculus, the tribunals decided to follow the view of the majority of prior decisions.[95]

In concluding that bad faith was not a requirement, none of the tribunals ignored *Genin*. All three tribunals acknowledged that prior awards had interpreted *Genin* as importing bad faith into the standard.[96] Like domestic courts that seek to harmonize apparently inconsistent prior decisions by interpreting those decisions narrowly, the *LG&E* and *Saluka Invs.* tribunals inter-

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(stating that "[a] judgment of what is fair and equitable cannot be reached in abstract; it must depend on the facts of the particular case").

90. *LG&E*, ICSID (W. Bank) Case No. ARB/02/1, ¶ 124 (2006); *Azurix*, ICSID (W. Bank) Case No. ARB/01/12, ¶ 372 (2006) (UNCITRAL Mar. 17, 2006); *Saluka Invs.*, ¶ 393 (UNCITRAL Mar. 17, 2006).

91. *LG&E*, ICSID (W. Bank) Case No. ARB/02/1, ¶ 129; *Azurix*, ICSID (W. Bank) Case No. ARB/01/12, ¶ 372; *Saluka Invs.*, ¶ 295 (UNCITRAL Mar. 17, 2006).

92. *See Saluka Invs.*, ¶¶ 286-91 (UNCITRAL Mar. 17, 2006) (noting that Claimant relied on *Mondev, Pope & Talbot, Inc.*, and *Waste Mgmt.*, while Respondent relied on *Genin* and *Neer*, and discussing these awards); *see also Azurix*, ICSID (W. Bank) Case No. ARB/01/12, ¶¶ 365-371 (2006) (discussing awards relied on by parties, namely *Neer, Genin, Mondev, Loewen, Waste Mgmt.*, and *CMS Gas*); *LG&E*, ICSID (W. Bank) Case No. ARB/02/1, ¶¶ 125-29 2006 (noting and discussing recent awards addressing the standard).

93. *See Saluka Invs.*, ¶¶ 300-305; *Azurix*, ICSID (W. Bank) Case No. ARB/01/12, ¶ 372 (2006); *LG&E*, ICSID (W. Bank) Case No. ARB/02/1, ¶ 130.

94. *See Saluka Invs.*, ¶¶ 298-301; *LG&E*, ¶¶ 124-125; *Azurix*, ICSID (W. Bank) Case No. ARB/01/12, ¶ 371-372.

95. *See Azurix*, ICSID (W. Bank) Case No. ARB/01/12, ¶ 372; *Saluka Invs.*, ¶ 309; *LG&E*, ICSID (W. Bank) Case No. ARB/02/1, ¶ 131.

96. *See Azurix*, ICSID (W. Bank) Case No. ARB/01/12, ¶¶ 366-367 (2006); *Saluka Invs.*, ¶¶ 289, 295; *LG&E*, ICSID (W. Bank) Case No. ARB/02/1, ¶ 129 (2006).

preted *Genin* as holding that bad faith was merely one way in which the standard could be breached, but that bad faith was not a necessary requirement for breach.[97] The *Azurix* tribunal took a different approach that is nonetheless familiar to domestic judges: It concluded that to the extent that *Genin* imposed a bad faith requirement for breach, this was a minority view, and the tribunal elected to follow the majority view that bad faith was not required.[98]

In sum, the awards in 2006 concerning the fair and equitable treatment standard support a hypothesis that there is a system of precedent that operates in investment treaty arbitrations. Like domestic courts, tribunals survey the field of prior decisions, select those decisions that are most relevant to the dispute before them, and consider those decisions. While there is no formal procedure for overruling a prior inconsistent decision, arbitral tribunals account for obsolete decisions in a manner similar to the *modus operandi* of hierarchally equal courts. Tribunals might distinguish the prior case or interpret it narrowly, or elect to follow a majority of cases taking an opposite view.

Subsequently, other tribunals can decide which view to follow. Over time, arbitral consensus may develop around a preferred legal standard. If and when this consensus coalesces, the alternative standard that does not fully support the relevant global policies will effectively fall into disuse.

This system of precedent exerts control over poorly decided or archaic decisions, albeit in an evolutionary fashion rather than through the dramatic and immediate breaks from prior decisions that may occur in a domestic system when its Supreme Court overrules a prior decision. Depending on the pace of evolution, scholars and practitioners may initially observe inconsistencies among decisions. But a steady and deliberate process of precedent operates behind the illusion of arbitrary decision-making.

2. Umbrella Clauses

The interpretation of umbrella clauses by arbitral tribunals is another research area that reveals how precedent operates in

97. *See Saluka Invs.*, ¶¶ 289, 295; *LG&E*, ICSID (W. Bank) Case No. ARB/02/1, ¶ 129.

98. *See Azurix*, ICSID (W. Bank) Case No. ARB/01/12, ¶ 372.

investment treaty arbitration. In 1967, the OECD proposed in Article 2 of its draft Convention on the Protection of Foreign Property that a host State should "ensure the observance of undertakings given by it in relation to property of nationals of any other Party [to the Convention]."[99] Since that time, many BITs have included similarly-worded "umbrella clauses" that on the face of their wording, appear to oblige host States to observe, as a matter of treaty obligation, all investment obligations undertaken towards investors from the State of the BIT party.[100] For example, Article X(2) of the Switzerland-Philippines BIT states: "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party."[101] Article 11 of the Switzerland-Pakistan BIT provides: "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."[102]

It is well established that purely contractual breaches are distinct from treaty breaches of BITs.[103] Contractual breaches are governed by the law as determined by the choice of law provisions of the investment contracts, whereas breaches of BITs are governed by treaty and customary law obligations contained in the BITs. However, some investors have claimed that broadly-

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99. OECD, *supra* note 65, art. II (referring to what has come to be known as an "umbrella clause"); *see also* Anthony Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 ARB. INT'L 411, 414-18 (2004).

100. *See* Prosper Weil, *Problèmes Relatifs aux Contacts Passés Entre un Etat et un Particulier*, 28 RECEUIL DES COURS (III) 95, 130 (1969) ("The intervention of the umbrella treaty transforms contractual obligations into international obligations . . . .").

101. *Cited in* Société Générale de Surveillance S.A. v. Republic of Philippines, ICSID (W. Bank) Case No. ARB/02/6 (Decision on Objections to Jurisdiction), ¶ 115 (2004).

102. *Cited in* Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID (W. Bank) Case No. ARB/01/13 (Decision on Jurisdiction), ¶ 163, 42 I.L.M. 1290, 1318 (2003).

103. *See* Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID (W. Bank) Case No. ARB/97/3, ¶¶ 95-98, 101 (2002); CMS Gas Transmission Co., Inc. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/01/8, ¶ 299 (2005) ("commercial disputes arising from breach of contract have been distinguished from disputes arising from the breach of treaty standards and their respective causes of action."); STEPHEN SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 111 (1987) ("so long as it afford remedies in its Courts, a State is only directly responsible, on the international plane, for acts involving breaches of contract, where the breach is not a simple breach").

worded umbrella clauses transform contractual breaches into treaty breaches and obliterate any significant distinction between private contract law and international treaty law.[104]

As of this writing, ten tribunals have considered whether umbrella clauses transform contractual obligations into treaty obligations, such that breaches of investment contracts are also breaches of the BIT.[105] This issue is of great practical importance because it often determines whether an arbitral tribunal convened under the dispute resolution provision of a BIT has, as a result of an umbrella clause in the BIT, jurisdiction over a contractual dispute to determine if the obligation had been breached and, if so, what remedy is appropriate.[106]

The decisions of the ten tribunals that have considered umbrella clauses are inconsistent, suggesting that even if a system of precedent exists, the system is not functioning properly. On the one hand, *SGS v. Pakistan* and four subsequent awards took the view that the umbrella clause in their respective BITs did not transform the purported contractual breaches of the host State into treaty breaches.[107] On the other hand, *SGS v. Philippines* and four other awards took the opposite view that the umbrella clause relevant to their respective disputes could or did transform at least some contractual obligations into treaty obligations (though they differed on the precise scope of this transforma-

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104. *See, e.g.*, El Paso Energy International Co. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/03/15, ¶ 67 (Decision on Jurisdiction 2006) (noting that Claimants had argued that an umbrella clause "transform[s] all contractual undertakings into international law obligations, and accordingly, to turn breaches of the slightest such obligations by the Respondent into breaches of the BIT.").

105. *See generally SGS v. Pakistan*, ICSID (W. Bank) Case No. ARB/01/13, 42 I.L.M. 1290; *SGS v. Philippines*, ICSID (W. Bank) Case No. ARB/02/6; Eureko v. Republic of Poland, Ad Hoc Arb., Aug. 19, 2005; *CMS Gas*, ICSID (W. Bank) Case No. ARB/01/8; Noble Ventures v. Romania, ICSID (W. Bank) Case No. ARB/01/11 (2005); *El Paso Energy Int'l Co.*, ICSID (W. Bank) Case No. ARB/03/15; Pan American Energy LLC v. Argentine Republic, ICSID (W. Bank) Case No. ARB/04/8, (2006); Joy Mining Machinery Ltd. v. Arab Republic of Egypt, ICSID (W. Bank) Case No. ARB/03/11 (2004); Salini Construttori S.p.A. v. Hashemite Kingdom of Jordan, ICSID (W. Bank) Case No. ARB/02/13 (2006); Fedax N.V. v. Republic of Venezuela, ICSID (W. Bank) Case No. ARB/96/3, 37 I.L.M. 1391, 1396, ¶ 29 (1998).

106. *See* Cheng, *supra* note 18, at 473 (noting that umbrella clauses, if effective, shift power from State courts to arbitral tribunals).

107. *SGS v. Pakistan*, ICSID (W. Bank) Case No. ARB/01/13, ¶ 163, 42 I.L.M. 1290, 1318; *Joy Mining Machinery*, ICSID (W. Bank) Case No. ARB/03/11 ¶ 82; *Salini Costruttori S.p.A*, ICSID (W. Bank) Case No. ARB/02/13, ¶ 127; *Pan American Energy LLC*, ICSID (W. Bank) Case No. ARB/04/8, ¶ 110; *El Paso Int'l Co.*, ICSID (W. Bank) Case No. ARB/03/15, ¶ 82.

tion).[108]

Indeed, three of these divergent results—*CMS Gas Transmission Co. v. Argentine Republic*,[109] *El Paso Energy Int'l Co. v. Argentine Republic*[110] and *Pan American Energy LLC v. Argentine Republic*[111]—all concerned the umbrella clause in Article II(2)(c) of the U.S.-Argentina BIT. *CMS Gas Transmission Co.* found that the umbrella clause in the U.S.-Argentina BIT transformed the contractual obligations at issue into treaty obligations,[112] while *El Paso Energy Int'l Co.* and *Pan American Energy LLC* found that it did not.[113] To make matters worse, the tribunals in *El Paso Energy Int'l Co.* and *Pan American Energy LLC* did not address the *CMS Gas Transmission Co.* decision, even though both the *El Paso Energy Int'l Co.* and *Pan American Energy LLC* tribunals stated that their method of legal reasoning involved "following . . . important precedents."[114]

These apparently opposite viewpoints on umbrella clauses may suggest to the casual observer the lack of any system of precedent even more strongly than the diversity of approaches to the fair and equitable treatment standard. Unlike the awards concerning fair and equitable treatment that were rendered over seventy years, all ten awards on umbrella clauses were rendered in a span of eight years, beginning with *Fedax* in 1998 and ending with *Pan American Energy Co. & BP Exploration v. Argentine Republic* in 2006. The temporal compression of the umbrella clause decisions precludes an argument that the different awards merely reflected changing norms as global investment conditions and policies shifted over time.

A deeper analysis of these ten awards, however, reveals that a system of precedent did in fact operate in their determinations of the effect of umbrella clauses. In all ten decisions, the tribu-

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108. *See generally SGS v. Philippines*, ICSID (W. Bank) Case No. ARB/02/6, ¶ 126 (Crivallero dissenting); *CMS Gas*, ICSID (W. Bank) Case No. ARB/01/8, ¶¶ 302-03; Eureko, ¶ 245 (Rajski dissenting); *Noble Ventures*, ICSID (W. Bank) Case No. ARB/01/11, ¶ 52; *Eureko*, Ad Hoc Arb., Aug. 19, 2005 ¶ 245; *Fedax*, ICSID (W. Bank) Case No. ARB/96/3, ¶ 29.

109. *See generally CMS Gas*, ICSID (W. Bank) Case No. ARB/01/8.

110. *See generally El Paso Energy Int'l Co.*, ICSID (W. Bank) Case No. ARB/03/15.

111. *See generally Pan American Energy LLC*, ICSID (W. Bank) Case No. ARB/04/8 (2006).

112. *See CMS Gas*, ICSID (W. Bank) Case No. ARB/01/8, ¶ 303.

113. *See El Paso Energy Int'l Co.*, ICSID (W. Bank) Case No. ARB/03/15, ¶ 112.

114. *Id.* ¶ 110.

nals surveyed a selection of preceding awards that addressed umbrella clauses.[115] They then appraised the legal reasoning and policies underpinning prior decisions, and articulated reasons for following or departing from these decisions. For example, in *SGS v. Philippines*, the tribunal explicitly recognized the four reasons given by the panel in *SGS v. Pakistan* for limiting the effect of the umbrella clause in the *Pakistan* dispute.[116] The *Philippines* tribunal then stated that these reasons were "unconvincing," and proceeded to reach a different decision from the *Pakistan* tribunal.[117] The *Philippines* tribunal found that the umbrella clause in its dispute transformed all contractual breaches into treaty breaches, but that a determination of whether a contractual breach had occurred remained within the exclusive jurisdiction of the host State's domestic courts.[118]

The awards that were rendered after *Pakistan* and *Philippines* also operated within a system of precedent. They did not ignore the contradictions between two *SGS* awards. Instead, they studied the reasons underpinning each of the *SGS* awards, decided whether to accord greater precedential weight to either *Pakistan* or *Philippines*, and explained their reasons for doing so. For example, when the tribunal in *Eureko v. Republic of Poland* adopted the approach taken in *Philippines*, the *Eureko* panel discussed the reasons underpinning both the *Philippines* and *Pakistan* decisions, and explicitly stated that it found the reasoning of the *Pakistan* tribunal to be "less convincing."[119] When the tribunals in *El Paso Int'l Co.* and *Pan American Energy LLC* decided that the umbrella clauses in their disputes did not transform all contractual breaches into treaty violations, they explicitly considered the differing reasons in *SGS v. Pakistan* and *SGS v. Philippines*, as well as the awards that followed the *SGS* awards.[120] *El Paso Int'l Co.*

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115. *See, e.g.*, *Salini Construttori S.p.A., ICSID (W. Bank) Case No. ARB/02/13*, ¶¶ *120-30 (2006) (discussing SGS v. Pakistan* and *SGS v. Philippines*); *Joy Mining Machinery Ltd.*, ICSID (W. Bank) Case No. ARB/03/11 ¶¶ 76-77 (discussing *SGS v. Pakistan*, *SGS v. Philippines*, as well as *CMS Gas*); *Eureko*, Ad Hoc Arb., Aug. 19, 2005 ¶¶ 253-255 (discussing *SGS v. Pakistan*, *SGS v. Philippines*).

116. *See* Société Générale de Surveillance S.A. v. Republic of Philippines, ICSID (W. Bank) Case No. ARB/02/6 (Decision on Objections to Jurisdiction), ¶¶ 121-124 (2004).

117. *Id.* ¶ 125.

118. *Id.* ¶¶ 126-128.

119. *See Eureko*, Ad Hoc Arb., Aug. 19, 2005 ¶ 257.

120. *El Paso Energy Int'l Co.*, ICSID (W. Bank) Case No. ARB/01/8, ¶¶ 77-78; *Pan American Energy LLC*, ICSID (W. Bank) Case No. ARB/03/13, ¶¶ 106-107.

and *Pan American Energy LLC* concluded that the approach in *SGS v. Philippines* was flawed and "renders the whole [investment] Treaty useless."[121] The tribunals accordingly followed instead the precedent set by *SGS v. Pakistan.*[122]

This decision trend indicates that the split in the interpretation of umbrella clauses does not result from any caprice of arbitrators, but, ironically, from tribunals following a system of precedent when faced with two contradictory prior awards. This split, then, is similar to splits in common law systems that occasionally emerge among hierarchally equal courts that confront divergent legal positions of prior sister courts.

It should also be noted that differences between the ten awards are in fact less acute than they appear. As mentioned above, the greatest practical effect of umbrella clauses is jurisdictional. If umbrella clauses are interpreted aggressively, they could expand the jurisdiction of tribunals over contractual obligations that would not otherwise fall within the tribunal's scope of authority. *SGS v. Pakistan* and its progeny clearly limit the jurisdictional effect of umbrella clauses to transform purely contractual breaches to BIT breaches. The *Philippines* decision and its progeny, while occasionally aggressive in their rhetoric, did not in each of their disputes actually extend the tribunal's jurisdiction in any meaningful way over purely contractual disputes. The *Philippines* tribunal stated that it would exercise jurisdiction over contractual breaches if, and only if, the Philippine courts had determined there was a contractual breach.[123] The *Eureko* panel found only that breaches by the Republic of Poland of its other BIT obligations constituted breaches of the umbrella clause of the BIT.[124] *Noble Ventures v. Romania* explicitly stated that it was "unnecessary to express any definitive conclusion as to whether [the umbrella clause] perfectly assimilates to breach of the BIT *any* breach of the host State of *any* contractual obligation . . . ."[125] The *CMS Gas Transmission Co.* tribunal found only that breaches of obligations "closely related to other standards of

121. *Pan American Energy LLC,* ICSID (W. Bank) Case No. ARB/03/13, ¶ 105; *see also El Paso Energy Int'l Co.,* ICSID (W. Bank) Case No. ARB/01/8, ¶¶ 72-73.

122. *El Paso Energy Int'l Co.,* ICSID (W. Bank) Case No. ARB/01/8, ¶ 82; *Pan American Energy LLC,* ICSID (W. Bank) Case No. ARB/03/13, ¶ 110.

123. *See SGS v. Philippines,* ICSID (W. Bank) Case No. ARB/02/6, ¶¶ 126-128.

124. *See Eureko,* Ad Hoc Arb., Aug. 19, 2005 ¶¶ 245, 260.

125. Noble Ventures v. Romania, ICSID (W. Bank) Case No. ARB/01/11, ¶ 61 (2005) (emphasis in original).

protection under the [BIT]," such as alterations to the tariff regime, were BIT breaches under an umbrella clause.[126] It did not state that breaches of pure contractual obligations were BIT breaches. Thus, a close examination of the awards in fact suggests that a system of precedent is operating to control outcomes of awards to be generally consistent with prior awards.

Residual divergences among tribunals considering umbrella clauses may be attributed to differences in the wording of umbrella clauses before the tribunals. As explained in the *Noble Ventures* decision, the reason that the *Pakistan* panel did not find that the umbrella clause transformed contractual obligations to treaty obligations was that the clause stated that Pakistan would merely "guarantee" the observance of commitments, a provision which could refer to nothing more than "the adoption of steps and measures under its own municipal law to safeguard the guarantee."[127] Likewise, *Salini v. Jordan* found that the disputed umbrella clause did not transform contractual obligations because that clause merely referred to "maintain[ing] . . . a legal framework" for investment obligations, and did not address obligations of any other nature.[128] By comparison, the umbrella clause in *Philippines* transformed contractual breaches into treaty breaches in a limited fashion because the clause in question provided that the host State "shall observe any obligation it has assumed."[129] The *Noble Ventures* decision, which addressed a clause that stated that the host State "shall observe any obligation it may have entered into," naturally followed *Philippines* and not *Salini* and *Pakistan*.[130]

The decision trends discussed above concerning fair and equitable treatment and umbrella clauses support a credible hypothesis that, in spite the absence of rules of precedent in invest-

126. CMS Gas Transmission Co., Inc. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/01/8, ¶ 302 (2005).

127. *Noble Ventures*, ICSID (W. Bank) Case No. ARB/01/11, ¶ 58.

128. *Salini*, ICSID (W. Bank) Case No. ARB/02/13, ¶¶ 123, 126.

129. *SGS v. Philippines*, ICSID (W. Bank) Case No. ARB/02/6, ¶¶ 115-118.

130. *Noble Ventures*, ICSID (W. Bank) Case No. ARB/01/11, ¶ 60. *But cf.* El Paso Energy International Co. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/03/15, ¶ 70 (2006) (noting that "some decisions insist on the variations in the drafting [of umbrella clauses] to explain different analyses," but stating that the "Tribunal is not convinced that the clauses analyzed so far really should receive different interpretations."); *see also* Pan American Energy LLC v. Argentine Republic, ICSID (W. Bank) Case No. ARB/04/8, ¶ 99 (2006).

ment treaty arbitration, there is a strong—albeit imperfect and informal—norm of accounting for prior relevant awards and providing reasons for following or departing from those awards. The close examination of only two controversial aspects of international investment law, admittedly, does not provide conclusive proof that this norm of precedent operates in every aspect of investment treaty arbitrations. Such a comprehensive survey would necessarily exceed the space constraints of a law review article. Until such a survey is published in another format, this article's study of some recent awards provides a basis for inducing that there is a system of precedent in investment treaty arbitration.

III. *APPRAISAL*

The system of precedent in investment treaty arbitration satisfactorily, but imperfectly, supports the three functions of precedent previously discussed: development, control, and recognition.[131]

A. *Development*

The evolution of the fair and equitable treatment standard as articulated by arbitration tribunals suggests that the methods of precedent they employ permit customary standards codified in BITs to keep pace with the changing needs of investors and host States. The trends regarding umbrella clauses, spanning only a few years, are too recent to conclusively determine if the development function is operating effectively. However, based on longer trends concerning other areas of investment law, such as the fair and equitable treatment standard, it would be reasonable to anticipate that tribunals will respond to global policies on umbrella clauses and other investor protections as these policies shift.

B. *Control*

Strong internal controls appear to compensate for the lack of external appellate controls on arbitral tribunals. The decision trends concerning the fair and equitable treatment standard and umbrella clauses indicate that arbitrators generally comply with shared methods of legal reasoning that account for prior awards.

131. *See supra* Parts I-II.A.

Although arbitrators—like judges—exercise degrees of appreciation in determining which prior decisions are relevant to disputes before them, the awards studied in Part II demonstrate a fairly thorough canvassing of prior decisions.[132] Admittedly, these degrees of appreciation may occasionally be applied imperfectly, as discussed in Part II.C. But the resulting awards speak for themselves. In spite of the broad discretion exercised by arbitrators, the awards regarding the fair and equitable treatment standard and umbrella clauses have not wildly deviated from each other within short periods of time. Any changes have tended to be evolutionary, and any isolated awards that have ignored shared norms of legal reasoning have found limited support from subsequent tribunals.[133] Such corrections may not be as immediate as an appellate decision overruling a trial decision, but does not necessarily take any longer than the U.S. Supreme Court takes to overturn its prior decisions.

It is also noteworthy that the internal controls exerted by the system of precedent do not operate in isolation. In investment treaty arbitration, other forms of legal reasoning operate in conjunction with precedent. Investment treaty arbitrations often begin and end with the treaty under which the dispute arises. Tribunals generally turn first to the words of the treaty obligations in dispute, and interpret them in accordance with the rules of treaty interpretation contained in Article 31 of the Vienna Convention.[134] Where other tribunals have also examined similar protections, the system of precedent then operates alongside to assist the tribunal in its determinations. Thus, the power of precedent as a control mechanism must be aggregated together with other forms of control arising from shared norms of legal reasoning.

There are at least three practical reasons to believe that the internal control function of precedent will continue to operate effectively. First, arbitrators are often eminent practitioners and

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132. *See supra* Part II.

133. *See* Paulsson, *supra* note 1, at 4 ("In practice, [arbitral decisions] will be subject to the same Darwinian theory: the unfit will perish.").

134. *See, e.g.*, *Eureko*, Ad Hoc Arb., Aug. 19, 2005 ¶¶ 50-52 (interpreting umbrella clause according to the actual words of the clause and in light of the BIT's object and purpose); Azurix Corp. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/01/12 (Award), ¶¶ 359-361 (2006) (explicitly applying rules in treaty interpretation and examining words of the BIT in light of its object and purpose to determine applicable fair and equitable treatment standard).

scholars.[135] 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.[136]

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.[137] In order to promote their marketability, popularity, and suitability for future arbitrations, arbitrators may choose to apply generally accepted legal methods that they anticipate other arbitrators, investors, host States and scholars will consider legitimate and persuasive. One of these legal methods is undoubtedly precedent.[138]

C. *Recognition*

The recognition function of precedent in international arbitration could be strengthened. The analysis of awards in Part II of this Article demonstrates that international arbitrators are undoubtedly familiar with a system of precedent and share norms about operating within this system. However, the lack of any

135. *See* Paulsson, *supra* note 1, at 4-5 (listing eminent arbitrators as exemplars, and noting that "the list [of arbitrators] could be extended to include numerous scholars and practitioners of international renown"); *Rogers*, *supra* note 1, at 958 ("International arbitrators are exceptionally talented individuals. . . . They boast rich and multinational educations from the world's most prestigious universities, and have vast experiences working in the highest echelons of diverse legal systems.").

136. *See* Paulsson, *supra* note 1, at 3 ("it is fundamental to their art [that] international adjudicators themselves rely on other international judgments").

137. *See* Marc Goldstein, *A Career in International Commercial Arbitration*, *in* CAREERS IN INTERNATIONAL LAW 60 (Mark W. Janis & Salli Swartz, eds., 2001) ("Since the careers of international arbitrators depend on their reputations, they want to impress one another, the counsel and parties who appear before them, and the arbitral institutions that appointed them.").

138. *See* Goldstein, *supra* note 137, at 61 (noting "the comprehensiveness of [international arbitrators'] analysis and citation of relevant authority.").

codified set of rules governing precedents and the paucity of scholarship discussing the operation of precedent in international investment law has resulted in less than perfect clarity about the role of precedent in investment treaty arbitration.

This lack of clarity could result in arbitrators, in spite of their good faith efforts, inadvertently departing from shared norms about the constitutive authority of prior decisions. Although there is a consensus among the community of arbitrators that prior awards must be considered, difficult questions remain to be answered. Should awards by eminent jurists have greater precedential value? What are the objective criteria for eminence? Who decides these criteria? Consequently, Jan Paulsson, himself an eminent arbitrator, has conceded that "the influence of international awards and judgments is highly variable."[139] When departures from the system of precedent occur, the control and development aspects of precedent may be compromised.

Additionally, the lack of clarity about the system of precedent limits the ability of observers, including host States and investors, to properly appraise arbitral awards against fixed standards. Without an ability to appraise—and consequently conclude that investment treaty arbitration supports their goals and is fair—participants in investment treaty arbitration may lose confidence in the system. The norms of precedent should be widely communicated to the global investment community so that they may continue to strengthen their belief in the system's legitimacy and continue to utilize private dispute resolution procedures.

D. *Future Trends*

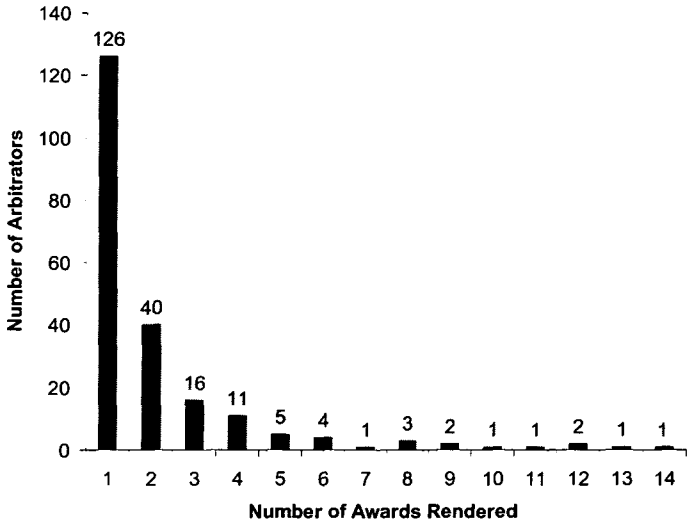
The system of precedent in international investment treaty arbitration may come under pressure in the near future due to the increasing diversity of arbitrators. Historically, there has been remarkable uniformity within the community of arbitrators. Detlev Vagts has described the community of international arbitrators as "an exclusive club in the international arena" whose members "are automatically brought into almost any major dispute . . . ."[140] However, developments in legal education

139. *See* Paulsson, *supra* note 1, at 3.

140. *See* Vagts, *supra* note 23, at 251.

and legal industries around the world in the latter half of the twentieth century have resulted in the emergence of skilled practitioners in many parts of the world eager to gain entry into the "exclusive club."[141] Globalization of investments has resulted in an increased diversity of litigants from around the world, each demanding arbitrators from their regions whom they hope will be sensitive to their concerns.[142] Arbitral institutions, keen to increase the volume and size of arbitrations, are pursuing new arbitration markets, and may therefore seek to include in their list of arbitrators nationals from a more diverse list of countries. These factors have led to increased diversity of arbitrators.[143] Despite the pervasive perception of international arbitrators as a "mafia,"[144] this author's survey of 145 investor-State arbitrations from the last ten years, at Table 1 below, shows that 214 different individuals have served as arbitrators in various phases of the arbitrations, and only twenty-one arbitrators—less than ten percent—have served on five or more panels.[145]

Table 1: Diversity of Arbitration in Investor-State Arbitrations



141. *See* Rogers, *supra* note 1, at 965.

142. *See id.* at 965-66.

143. *See id.* at 965 (discussing "modern pressures [that] forced [international arbitration] to diversify")

144. *See id.* at 967.

145. Sources: Investment Claims Website, www.investmentclaims.com; Investment Treaty Arbitration Website, ita.law.uvic.ca; World Bank Website, www.worldbank.com/icsid (all last visited Feb. 10, 2007).

The trend towards an increasing diversity of arbitrators is likely to continue. For example, as China's economy expands, there will be more foreign investments in China and more Chinese corporations investing in other States. These market forces will likely result in increased arbitrations involving Chinese parties, and correspondingly an increased demand for Chinese arbitrators. On the supply side, as more Chinese law students graduate from top American and English law schools and are trained in elite law firms on both sides of the Atlantic, there will be a ready pool of Chinese lawyers eager to earn the "lavish fees" paid to arbitrators.[146]

With increased diversity, there is some risk of weakening of informal shared norms about appropriate methods of legal reasoning. Professor Catherine Rogers has suggested that as "international arbitrators are less constrained by shared traditions,"[147] they will be "less subject to the informal social controls that operated when the community was still comprised of an elite ingroup."[148] This risk may never come to pass, for it is possible that practitioners and scholars eager to gain entry into arbitration circles may strongly embrace preexisting norms—including norms about legal reasoning—in the hope that they will be accepted by current members of the arbitration community.

However, regardless of whether new entrants challenge or embrace the existing system of precedent, the minimum international response to increased diversity is the same: the system of precedent in investment treaty arbitration must be clearer. Through clarification, participants in the arbitration community can debate, refine, and strengthen the existing system of precedent. As community norms concerning precedent are solidified and more widely shared, they will become more resistant to new or existing arbitrators who desire to depart from these norms. Additionally, in order for a new and diverse group of emerging arbitrators to embrace shared norms about precedent, they need to first know what these norms are. Clarification of these norms is necessary and urgent. The author hopes that this Article has contributed to the clarification of, and debate about, how the system of precedent operates in investment treaty arbitration.

146. *See* Rogers, *supra* note 1, at 966.

147. *Id.*

148. *Id.* at 966-67.