JUSTIFYING *Jurisprudence Constante* AS INTERPRETATIVE INSTRUMENT OF INVESTMENT TREATY ARBITRATION

Written by ***Thanapat Chatinakrob***

LLM Student, Queen Mary, University of London; LLM and LLB (Thammasat)

1 Introduction

In general, the parties to any dispute settlement mechanism might predict a tentative outcome from *stare decisis*, which is the principle of precedent in the common law system that the Tribunal stands by its former decisions. However, not every judicial system shares the same notion, especially investment arbitration, such as the International Centre for Settlement of Investment Disputes ("ICSID") tribunal that manifestly refuses such a principle. It draws an attraction on the possibility to apply precedent decisions as an interpretative instrument. This comes to a question on to what extent prior awards have persuasive effect in investment arbitration.

2 The Concept of *Jurisprudence Constante*

Due to the fact that there is no *stare decisis* in investment arbitration, precedent awards might still have a precedential effect in a civil law system, namely *jurisprudence constante*. This section describes the concept of *jurisprudence constante* and its development towards international investment arbitration.

2.1 The Definition of *Jurisprudence Constante*

Jurisprudence Constante illustrates a set of judicial norms because it referred to judicial precedents considered collectively.[1] This concept has been widely applied by tribunals in their

[1] Dolores Bentolila, 'Towards a Doctrine of Jurisprudence in Treaty-Based Investment Arbitration' Universidade de São Paulo <https://edisciplinas.usp.br/mod/resource/view.php?id=193429> accessed 25 December 2017.

perplexing cases. However, there might be some debates on the difference between common law principle of precedent and civil law *jurisprudence constante*.

Regarding common law system, judicial system relies on precedent doctrine which is often referred at higher court when there is no coherence or consistency with prior decisions.[2] In the aspect of investment arbitration, there is no doctrine of precedent as the ICSID Tribunal in the *SGS v Philippines* stated the following:

> … there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal to resolve issues for all later tribunals.[3]

It can be clearly seen from the Tribunal that there is no precedent doctrine in the ICSID Tribunal. However, the Tribunal did not refuse the precedential effect of earlier decisions at all. The Tribunal might take such decisions into consideration whenever appropriate.[4]

While in other international tribunals, the arbitral tribunal counts on the uniformity and coherence of awards. Precedent judicial decisions are supplementary means for interpretation, for example, Article 38 of the Statute of the International Court of Justice ("ICJ") rules judicial decisions under sources of international law as a lawmaking element.[5]

The term "*jurisprudence constante*" is from French civil law regime referring to the influence of other courts' judicial decisions as an accepted interpretation of specific points.[6] Bjorklund points out that this doctrine is applied through the accumulation of a continuing line of cases, rather than the formulation of a case-by-case basis.[7] This implies that considering

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[2] Judith Gill QC, 'Is There a Special Role for Precedent in Investment Arbitration?' (2010) *ICSID Review – Foreign Investment Law Journal* 87, 88.

[3] *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para 97.

[4] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para 76.

[5] Andrea K Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante' (2008) *UC Davis Legal Studies Research Paper Series No. 158* 265, 267.

[6] Mary Garvey Algero, 'The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation' (2005) 65 Louisiana Law Review 755, 789.

[7] Bjorklund (n 5) 273.

facts based on precedent decisions has a two-way effect; although tribunals can maintain their caselines, tribunals would lose their unique discretion that should be achieved depending on each situation or fact.

2.2 The Development of *Jurisprudence Constante*

In the field of international investment arbitration, *jurisprudence constante* serves as two functions: the cross-reference and the harmonisation. Even though tribunals may come up with different outcomes, it is inevitably that the disputing parties to any specific tribunal would consider and research on previous awards to predict the concordance of cases. Parties might refer to some precedent awards when conducting arbitral-related documents. Arbitrators might also work on precedent decisions to interpret complex issues. Kaufmann-Kohler gives an example of interpretation of one measure that might breach the fair and equitable treatment ("FET") standard that it is not a true or false decision.[8] The *jurisprudence constante* in this sense is the cross-reference of precedent that may fulfil gaps of cases.

Another function of the doctrine is cases harmonisation. Even though the tribunal accepts no doctrine of precedent but to maintain the sanctity of awards (*res judicata*), the tribunal considers its previous decisions as a supplementary means to interpretation. For example, in *LG&E v Argentina* case, the Tribunal referred to the interpretation of the FET standard by *CMS v Argentina* case.[9] This is because the fact that both tribunals asked the same experts for their opinions.[10] Thus, the ignorance of *CMS v Argentina* precedent award was unreasonable.

To clarify the role of *jurisprudence constante* in practice, there are some distinguish examples from the ICSID tribunal as follows. In the early stage, the *ad hoc* Committee in *Amco v Indonesia* case approved the non-existence of binding precedent by stating: "neither the decisions of the International Court of Justice in the case of the Award of King of Spain nor the Decision of the *Klöckner ad hoc* Committee are binding on this *ad hoc* Committee."[11] The

[8] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? – The 2006 Freshfields Lecture' (2007) 23(1) *Arbitration International* 357, 371.

[9] *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para 125.

[10] Legal comments were from Dean Ann-Marie Slaughter and Professor José Alvarez.

[11] *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986, para 44.

Committee, however, interpreted that this did not prevent the Committee from sharing the interpretation by *Klöckner ad hoc* Committee.[12] The following cases, including *LETCO v Liberia* case, summarised the same approach that the Tribunal can apply precedents as an element for interpretation.[13] Besides *SGS v Philippines* case as mentioned earlier, *Enron v Argentina* case directly stated the effect of non-binding status of precedents by providing that: "… the decisions of ICSID tribunals are not binding precedents and that every case must be examined in the light of its own circumstances."[14] The Tribunal in following cases applied treaty interpretation in accordance with Article 31 of the 1969 Vienna Convention on the Law of Treaties ("VCLT") to apply the precedents instead.[15]

To conclude, it can be observed from investment tribunals that they accept no doctrine of precedents, however, such a doctrine sheds some lights helping both disputing parties and arbitrators as informal guidelines for interpretation in order to maintain their caselines and the uniformity of specific circumstances in each case.

3 Some Significant Contribution of *Jurisprudence Constante*

The previous section has analysed supporting cases of investment treaty arbitration that did not allow using doctrine of precedents in their cases. However, *jurisprudence constante* can be applied in investment tribunals. This section will then describe the role of *jurisprudence constante* through considering two core investment issues: the definition of a term "investment" and the Fair and Equitable Treatment ("FET") standard.

3.1 Definition of Investment

[12] ibid.

[13] *Liberian Eastern Timber Corporation v Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, 2 *ICSID Reports* 346, 352.

[14] *Enron Corporation and Ponderosa Assets LP v The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), 2 August 2004, para 25. See also *AES Corporation v The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, para 23.

[15] *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Jurisdiction (Dissenting Opinion of Dremades), 16 August 2006, para 7.

According to Article 25(1) of the ICSID Convention, ICSID Tribunal has jurisdiction over any legal dispute arising directly out of an investment but there is no definition of investment provided under any provisions of the ICSID Convention. The definition of investment is known that it relies on parties' agreement. In *Fedax v Venezuela* case, the tribunal found that to characterise a transaction as an investment, there should be (1) a certain duration, (2) a certain regularity of profit and return, (3) the assumption of risk and (4) a substantial commitment and significance for the host States' development.[16] The *Salini v Morroco* case followed the *Fedax*'s caseline, by giving more clear definition of four characteristics of former case and stated the following (1) contribution of money of assets, (2) a certain duration over which the project was to be implemented, (3) an element of risk and (4) a contribution to the host State's economy.[17] It can be seen from both decisions that they share the same notion of what qualifies as an investment. It is impossible that *Salini* tribunal did not determine the *Fedax* interpretation. This might be defined as applying *jurisprudence constante* by investment treaty arbitration.

In *Joy Mining v Egypt* case, the Tribunal defined the term "investment" falling under four requirements, which are (1) a certain duration, (2) a regularity of profit and return, (3) an element of risk and (4) a substantial commitment and that the project should constitute a significant contribution to the host State's development.[18] That is to say, the Tribunal in *Joy Mining* case referred the same requirements of investment from *Salini* case, especially the non-description of what qualifies as a risk under Article 25(1) of ICSID Convention.[19]

Tribunals, after *Joy Mining* case, adopted different requirements as the notion of the investment depending on specific circumstances based on a case-by-case basis. This is why the Tribunal refuses the existence of doctrine of precedents. For example, in *Patrick Mitchell v Congo* case, the *ad hoc* Committee refused the economic development from *Salini* and *Joy*

[16] *Fedax NV v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997, 37 ILM 1378 (1998), para 43.

[17] *Salini Construction SpA and Ltalstrade SpA v The Kingdom of Morroco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, 42 ILM 609 (2003), para 52.

[18] *Joy Mining Machinery Limited v The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, para 56.

[19] Paolo Vargiu, 'Beyond Hallmarks and Formal Requirements: A Jurisprudence Constante on the Notion of Investment in the ICSID Convention' (2009) 10 *Journal of World Investment & Trade* 753, 759.

Mining cases[20] because there was no dispute regarding this issue. However, following cases, including *Bayindir v Pakistan*[21], *Jan de Nul v Egypt*[22], *Saipem v Bangladesh*[23] and *Kardassopoulos v Georgia*[24] accepted the interpretation of investment from *Salini* case.

In sum, the interpretation by Tribunals in cases can be implied that there is no perfect definition of investment even though some Tribunal referred to former decisions based on *jurisprudence constante*. *Salini* case seems to have a model definition for the term "investment", but realising that some cases still rejected definition provided by *Salini* case because circumstances were different. Thus, *jurisprudence constante* might be applied to facts in cases as guidelines for interpretation but not as *stare decisis.*

3.2 Fair and Equitable Treatment Standard

Regarding the FET standard, it is mostly applied in bilateral investment treaties ("BITs") between States to fill gaps from specific standards in order to protect investors.[25] The concept of the FET was initially brought by *Neer (Unites States v Mexico)* case in 1926.[26] After that, *Tecmed v Mexico* and *Waste Management v Mexico* cases were cited in several cases as *jurisprudence constante.*[27] The FET has been developed since then because of the stability of law and business. For example, in *LG&E v Argentina* case, the Tribunal confirmed an emerging

[20] *Patrick Mitchell v The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para 39. See also, *Consortium Groupement LESI v People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005, para 13(iv).

[21] *Bayindir* (n 4) para 130.

[22] *Jan de Nul NV and Dredging International NV v The Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006.

[23] *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para 99.

[24] *Ioannis Kardassopoulos v Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para 116.

[25] Rudolf Dolzer and Christoph Schreuer, *Principle of International Investment Law* (Oxford University Press 2008) 122.

[26] *Neer Case (The United States v Mexico)*, 4 RIAA 60.

[27] *Técninas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 and *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.

standard of FET in international law.[28] In *PSEG v Turkey* case, the Tribunal affirmed that the FET was vigorously violated by 'roller-coaster' effect of the continuing changes in the case.[29]

The concept of FET, that requires no bad faith from *Tecmed v Mexico* case, was applied in several tribunals, including *Azurix v Argentina* and *Siemens v Argentina* cases where Tribunal stated the following: "… does not require bad faith or malicious intention of the recipient State as a necessary element in the failure to treat investment fairly and equitably."[30] Kaufmann-Kohler in her 2006 Freshfields Lecture believed that continuing FET standards influence foreign investor to invest in a host State and leave more rooms for future tribunals to apply these precedents for interpretation.[31]

The legitimate expectation of investor plays an important role as reflected in the FET standard in BITs. In *PSEG v Turkey* case, the Tribunal referred back to *Tecmed v Mexico* Tribunal's conclusion on basic expectations of the foreign investor.[32] Applying *jurisprudence constante* to interpret the FET makes sense because precedent decisions are what the investor expects in investment in a host State. The host State's behaviour for investor protection can be analysed from a State's practice, a BIT and the dispute settlement mechanism where a host State is a party. Consequently, it is possible that Tribunals might apply the FET standard concluded by other Tribunals.

4 Justifying *Jurisprudence Constante* as a Guideline for Interpretation

Even though investment tribunals refused to apply the doctrine of precedent in their cases, such prior decisions still have a persuasive effect towards interpretation of arbitrators. *Jurisprudence constante* seemed to be applied to maintain the coherence an consistency of investment caselines. This section will analyse these possibilities and the binding status of *jurisprudence constante* in investment tribunals.

[28] *LG&E* (n 9) para 125.

[29] *PSEG Global v Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, paras 250 and 255.

[30] *Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para 372 and *Siemens AG v Argentine Republic*, ICSID Case No. ARB/02/08, Award, 6 February, 2007, para 299.

[31] Kaufmann-Kohler (n 8) 373.

[32] *PSEG* (n 29) para 240.

4.1 Coherency and Consistency through Investment Arbitration

There are proper reasons why tribunals prefer to apply prior decisions as *jurisprudence constante* in cases. According to Bentolila, she believes that there are four major reasons why arbitral tribunal imitates others.[33]

First, the precedent awards are good examples of decisions.[34] The process of arbitration is complex, consisting of interpretations of factual and legal claims.[35] However, not every arbitral award reaches the same quality, it is the responsibility of arbitrators to determine and assess the quality of those decisions. Persuasive precedent decisions, which are coherent, credible and fair, have more value than the remaining.[36]

Furthermore, tribunals prefer decisions to be consistent with the past.[37] This is the simplest reason because tribunals want to keep their uniformity of the case flow. In the eyes of parties when they choose tribunals, no party wants to rely its trust on any unstable tribunals. The outcome of case should be at least predicted through caselines even though the result may be different from the past cases because of different circumstances.

Moreover, the parties determine their claims based on precedent awards.[38] In conducting arbitral documents, if facts or legal issues are the same or the dispute based on the same BIT, there is no doubt that parties refer to the interpretation of precedent decisions. For example, regarding the characteristic of the notion of investment, several cases, including *Bayindir v Pakistan, Jan de Nul v Egypt, Saipem v Bangladesh and Kardassopoulos v Georgia* followed the definition in *Salini* case.[39] While the interpretation of the FET standard in *Tecmed v Mexico* and *Waste Management v Mexico* cases was cited in many investment cases, such as *LG&E v Argentina* and *PSEG v Turkey* cases.[40]

[33] Bentolila (n 1) 17-22.

[34] ibid 17.

[35] Tony Cole, 'Authority and Contemporary International Arbitration' (2010) 70 *Louisiana Law Review* 802, 810.

[36] Bentolila (n 1) 18.

[37] ibid.

[38] ibid 21.

[39] *Salini* (n 17) para 52.

[40] *Tecmed* and *Waste Management* (n 27).

Last, it illustrates a consensus or majority.[41] Bentolila points out that consensus is developed from the coherence and consistency of resolutions by tribunals.[42] It is reasonable to follow the decisions on the same facts or legal matters that the previous tribunals decided. However, the value of precedent decisions might be different relying on the forum, arbitrators and type of decisions. For example, in *CMS v Argentina* case, the *ad hoc* Committee determined that the Tribunal had made a manifest error of law.[43] Thus, the value of this award was declined.

Besides these reasons, the coherency and consistency of investment arbitral tribunals also relied on facts and legal matters. Until this point, it does not mean that the Tribunal rejects the use of precedents as supplementary means for interpretation, but the Tribunal refuses to apply precedents for the different hypothesis and unpersuasive precedents. In other words, each case has specific circumstances, even two disputes arising from the same parties, there might be some different small-scale issue that affects the outcome of the decision. Another situation is when it comes to the same issues, but prior decisions were poorly drafted which are inconsistent with the current facts because of changes of circumstances on the same matters. The Tribunal then follows no precedents. Consequently, the coherence and consistency are still applied.

4.2 Status of *Jurisprudence Constante*: No Bound?

It is difficult to identify formal legally binding status of *jurisprudence constante* in international investment arbitration. However, there are possibilities to examine the legitimacy of *jurisprudence constante*. Such influences include the public availability, the arbitrator's moral obligation and references from scholars.[44]

Regarding *the public availability of arbitral decisions*, it leads to the transparency of the outcome of disputes between the parties. Some decisions are confidential because it may affect the internal issues of a State or classified business matters. Public will have no right to access such information, thus relying on this *jurisprudence constante* seems impossible. In other hand,

[41] Bentolila (n 1) 22.

[42] ibid.

[43] *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No ARB/01/8, Decision on Application for Annulment, 25 September 2007, para 130.

[44] Bjorklund (n 5) 274-280.

the openness of decisions will let both arbitrators and disputing parties assess relevant information and if such a decision is persuasive enough, following tribunals might count on that precedent, resulting in *jurisprudence constante*.[45] For example, *Tecmed v Mexico* case was cited in a number of cases when dealing with the FET and investor's legitimate expectation.[46] While *Salini* case was mentioned in several tribunals that have an issue regarding the definition of investment.[47] That is to say, denying the entire concept of *jurisprudence constante*, that has no binding status, might be imprecise. The *jurisprudence constante* in this sense thus has an persuasive effect towards ongoing investment disputes.

Another informal binding status of *jurisprudence constante* can be examined by the arbitrator's moral obligation. Arbitrators cannot ignore what was decided on the same ground in the past. Bjorklund argues that prior decisions create informal pressure for arbitrators in protection their reputability of tribunal and their status as arbitrators in the future.[48] Kaufmann-Kohler also believes that arbitrators have an ethical responsibility to refer prior decisions to strengthen the predictability of decisions.[49] It is then a difficult decision for arbitrators if they prefer to give a decision against precedent caseline because when the decision is published, publicists, scholars and other arbitrators will make comments towards the decision. Following the caseline on the same facts and legal matters then creates the strong bound of *jurisprudence constante* relating to specific legal matters.

Last, the pressure from legal opinions and commentary of eminent publicists also creates the impact towards the unofficial binding status of *jurisprudence constante*. This aspect is the view of third persons. When a Tribunal publishes any decision in connection with the outcome of disputing parties, it is assessed by the public, including arbitral scholars, professors, lawyers and even parties that might have intention to bring the dispute to the tribunal in the future. If arbitrators publish a decision against precedents without persuasive reasons, the future of tribunal might be affected. This outer pressure has an indirect effect because one feature of an arbitration is an alternative dispute settlement which the parties have their own decisions to rely on any arbitration. Paulsson points out that better decisions set standards which enrich a

[45] ibid 275.

[46] *Tecmed* (n 27).

[47] *Salini* (n 17) para 52.

[48] Bjorklund (n 5) 277-278.

[49] Kaufmann-Kohler (n 8) 374.

higher level of coherent quality.[50] This is true because before an arbitral decision can be published, it has to be considered and analysed with all attempts of arbitrators, disputes on the same ground should then follow the interpretation of good precedents.

5 Conclusion

Even though the investment treaty arbitration refuses to apply the doctrine of precedents in its decision, prior awards still have persuasive effects as *jurisprudence constante*. It can be seen from examples of the reference of definition of investment in *Salini* case that was mentioned in several modern tribunals and the FET standard which tribunals cited *Tecmed* and *Waste Management* tribunals. However, *jurisprudence constante* should be applied based on a case-by-case basis depending on circumstances of each case as a guideline for interpretation.

[50] Jan Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law' (2006) 3(5) *Transnational Dispute Management*, 13.