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The Role of Precedent in ISDS

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Abstract

This article examines the role and authority of precedent in investor–state dispute settlement (ISDS). It situates the debate within broader theoretical discussions about precedent in adjudication and explores how investment tribunals have engaged with prior decisions in practice. The analysis highlights the advantages and disadvantages of formalising a rule of precedent as well as the options of such formalisation in the context of the various institutional proposals suggested in the UNCITRAL Working Group III on ISDS reforms. The article argues that, while ISDS already relies extensively on precedent in practice, it does so without a clear legal framework governing how precedent should operate. Accordingly, the central challenge for ISDS reform is not simply whether precedent should play a role, but more fundamentally how to structure and discipline its use so as to balance consistency and predictability with flexibility and state control.

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1. Introduction

The role and authority of judicial precedent lie at the heart of any legal system, including the international one. While a doctrine of *stare decisis* ("to stand by things decided") is not formally recognised in international law, the importance of judicial precedents cannot be exaggerated. International courts and tribunals routinely engage with earlier decisions, cite prior reasoning, and situate their interpretations within an evolving body of jurisprudence. In practice, therefore, precedents play a significant role in shaping the development and application of international law.[1]

At the same time, the role of precedent in international adjudication is inherently complex. Unlike domestic legal systems grounded in hierarchical judicial structures and formal doctrines of binding precedent, international adjudication operates within a decentralised and consent-based legal order. The authority of prior decisions must therefore be understood as emerging from a delicate balance between competing normative considerations. On the one hand, precedent contributes to values such as legal certainty, coherence, equality before the law, and predictability in dispute settlement. On the other hand, excessive reliance on precedent risks constraining the autonomy of adjudicators, limiting doctrinal development, and potentially undermining the foundational principle that the jurisdiction of international tribunals ultimately rests on state consent. Navigating this balance between consistency and flexibility has therefore become one of the defining structural challenges of international adjudication.

These tensions have become particularly salient in the context of investor-State dispute settlement (ISDS). Over the past three decades, the rapid expansion of investment arbitration has generated a large and increasingly dense body of arbitral jurisprudence. At the same time, concerns have emerged regarding the consistency and coherence of that jurisprudence. Critics have pointed to divergent interpretations of key treaty standards, inconsistent approaches to jurisdiction and admissibility, and the absence of mechanisms capable of promoting greater doctrinal convergence. These concerns have played an important role in broader debates about the legitimacy and institutional design of the investment arbitration system.

In the reform discussions conducted under the auspices of UNCITRAL Working Group III (WGIII), 'lack of coherence and consistency' in arbitral decision-making have been identified as one of the core concerns with ISDS[2] and a doctrine of precedent has been referred to as a possible solution in order to address such concern.[3] While in the early stages of the reform process at WGIII,

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[1] Hersch Lauterpacht, *The Development of International Law by the International Court* (Steven & Sons 1958) 13–14: "while not fettered by the rigidity of the formal doctrine of precedent, [the International Court] has, as shown, largely adopted its substance."

[2] UNCITRAL Secretariat, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, Apr. 23 – Apr. 27, 2018), U.N. Doc. A/CN.9/935, para 20 (2018). In justifying its earlier decision to make ISDS reform a topic for the work agenda of UNCITRAL, the Commission referred to the 'absence of consistent jurisprudence' as one of the three core concerns with ISDS. UNCITRAL Secretariat, Report of the United Nations Commission on International Trade Law: Forty-ninth session (Jun. 27 – Jun. 15, 2016), U.N. Doc. A/71/17, para 190 (2016).

[3] Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal

there was a focus on the issue of lack of coherence and consistency, and it inspired scholarly works that comprehensively detailed the nature of this issue, its most prominent manifestations, and when the issue of inconsistency and incoherence reaches a point of intolerability,[4] the issue has since somewhat fallen off the agenda of WGIII.

The aim of this article is to revitalise the issue of the role of precedent in ISDS and contribute to the broader underlying scholarly debate. This is in part because we believe that WGIII will need to address the issue in the near future, but also because the debate about the role of precedent goes beyond ISDS and affects the many courts and tribunals that are currently operating at the international level. For example, one of the perceived reasons for the dispute settlement crisis at the World Trade Organisation (WTO) revolves around the doctrine of precedent as formulated by the WTO Appellate Body. Accordingly, the article seeks to shed some light on the institutional challenges facing contemporary ISDS reform efforts, while at the same time contributing to the broader scholarly debate on precedent in international adjudication.

The article puts forward the following argument: while ISDS already relies extensively on precedent in practice, it does so without a clear legal framework governing how precedent should operate. Accordingly, the central challenge for ISDS reform is not simply whether precedent should play a role, but more fundamentally how to structure and discipline its use so as to balance consistency and predictability with flexibility and state control.

Following this introduction, this article is divided into five parts. Part 2 starts by describing the concept of a doctrine of precedent, particularly by identifying and explaining its constituent components. Part 3 takes an evaluative turn, as it identifies the advantages and disadvantages of doctrines of precedent. Part 4 delves into the topic of precedent in the current version of ISDS, with a particular emphasis on describing what role precedent plays in the present version of the system (ISDS 1.0). Part 5 examines the question of how a doctrine of precedent might operate in the reformed version of ISDS (ISDS 2.0). And Part 6 contains the conclusion.

2. The Concept of a Doctrine of Precedent

What is a doctrine of precedent? It is ultimately an expression of a core idea of natural justice, that, in principle, like should be treated alike; in other words, when a precedent has been set, then it should be subsequently followed. Behind this core idea lie numerous complexities.

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mechanism? Analysis and roadmap', CIDS Research Paper (Geneva 2016) para 22; UNCITRAL Secretariat, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Mar. 17, 2021), U.N. Doc. A/CN.9/1050, para 60 (2021); UNCITRAL Secretariat, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session (Jan. 28, 2020), U.N. Doc. A/CN.9/1004/Add.1, paras 44 & 57 (2020); UNCITRAL Secretariat, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session' (Nov. 6, 2018), U.N. Doc. A/CN.9/964, para 116 (2018); and UNCITRAL Secretariat, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (May 14, 2018) U.N. Doc. A/CN.9/935, para 43 (2018).

[4] Julian Arato and others, 'Lack of Consistency and Coherence in the Interpretation of Legal Issues', Academic Forum on ISDS Concept Paper No. 2019/3 (2019) and Julian Arato, Chester Brown and Federico Ortino, 'Parsing and Managing Inconsistency in ISDS', Academic Forum on ISDS Concept Paper 2020/1 (2020).

2.1. *Potential Precedents*

The first of these is, what can amount to a 'precedent'? Note that the emphasis here is on understanding what *potentially* amounts to a precedent, as there is a separate question whether a putative precedent is a legally recognised precedent,[5] which is a question addressed in Section 2.3 below.

In law, only judicial reasons needed for resolving a case can count as precedents, with these reasons subsequently transforming into rules when they are recognised as precedents.[6] Because of this, precedents are often called 'case law', 'judge-made law', or 'judicial law'. Ideally, they are clearly articulated in case reports, although precedents usually need not meet any formal requirements.[7] Indeed, even implied judicial reasons can become precedents.

Coming to the substantive nature of precedents, the basic point to emphasise is that they have a *legal* character.[8] This legal character of precedents distinguishes them from factual findings. They are determinations on what happened in a case. For example, did a crucial meeting between the investor and a State official take place or not?[9] By contrast, precedents perform certain legal functions in the judge's legal reasoning,[10] which are, one, interpreting a rule, two, recognising a rule as valid, three, determining whether a rule is applicable, and, four, deciding on the operative effect of a rule. An example from investment treaty arbitration can help illustrate these functions.

Take a well-known case, *Philip Morris v Australia*.[11] The arbitral tribunal ruled that the investor's claim was inadmissible on account of the abuse of rights principle. Behind this conclusion lies much legal reasoning. First, the arbitral tribunal recognised the legal validity of the principle of abuse of rights;[12] in other words, it held that this principle is valid law in the law applicable to the dispute.[13] Second, it determined that the abuse of rights principle formed part of the applicable law.[14] Third, according to its interpretation of this principle,[15] it could derive a concrete rule from it: an investor's investment-treaty claim is presumed to be abusive if the investor took ownership

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5 Hafsteinn Dan Kristjánsson, 'Elements of Precedent' in Endicott, Kristjánsson, and Lewis (n 6) 80.

6 This is the 'rule model' conception, which is the convenient conception of precedent, see Grant Lamond, 'Do Precedents Create Rules?' (2005) 11 Legal Theory 1, 5. For an overview of other conceptions, see Larry Alexander, 'Precedent: The What, the Why, and the How' in Endicott, Kristjánsson, and Lewis (n 6) 12–17.

7 Neil Duxbury, *The Nature and Authority of Precedent* (CUP 2008) 59.

8 Geoffrey Marshall, 'Departures from Precedent' in Neil MacCormick and Robert Summers (eds), *Interpreting Precedents: A Comparative Study* (Routledge 1997) 506.

9 The example is inspired by *MTD v Chile*. There, a Chilean official allegedly warned the investor of the legal risks standing in the way of its investment. When those risks materialised, the investor brought an investment-treaty claim against Chile. For the record, the arbitral tribunal cast doubt on whether this meeting took place, see *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004) para 166.

10 This is further explained in Part 2.3.

11 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.

12 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 Dec 2015) para 539.

13 For a critique, see generally Jan Paulsson, *The Unruly Notion of Abuse of Rights* (OUP 2020) (who argues that abuse of rights is not a general principle of law).

14 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 Dec 2015) para 554.

15 For a critique of this interpretation, see Oskar Garibaldi, 'Abuse of Rights in Investment Disputes: A Critical Analysis', (2021) Revista de arbitraje comercial y de inversions 33.

over the investment in question after the dispute, to which such claim relates, became foreseeable.[16] Fourth, it decided that a breach of the abuse of rights principle rendered the investor's claim inadmissible.[17] On this point, there is much inconsistency: some arbitral tribunals have held that they lack jurisdiction on account of a breach of this principle, while others have concluded that the investor's claim becomes inadmissible.[18]

2.2. *Rules on Using Precedents*

Notwithstanding these other decisions, the arbitral tribunal for *Philip Morris v Australia* was free to rule that the abuse of rights principle was relevant to the claim's admissibility—there is no doctrine of precedent in ISDS 1.0. Arbitral tribunals in ISDS 1.0 do, however, follow precedents developed by other arbitral tribunals,[19] but this phenomenon is a matter of practice, not law. And that is what marks out a doctrine of precedent from other systems of precedent: the *obligation* to follow precedents.[20] This obligation is embodied in its core principle: a precedent must be applied in subsequent cases with the same or relevantly similar facts to the case in which the precedent was created. This principle also has a Latin name, *stare decisis* ('stand by things decided').[21]

A doctrine of precedent comprises more than this one principle, however. Other rules are needed on a range of different topics, such as the scope of this principle. The topic of scope concerns which courts are bound to follow the precedents in question. Within a court hierarchy, courts inferior to the precedent-creating court should always be bound; for example, if an apex-level court creates a precedent, then all the courts in the hierarchy below it should be bound to follow it. The major issue is:[22] should a court that has created a precedent be subsequently bound by it? As regards apex-level courts, such as the Supreme Court of the United Kingdom and the Supreme Court of the United States, they do not consider themselves bound by their own precedents.[23]

Even if a court is not bound by its own precedents, this does not mean that it can arbitrarily change them, which brings us to the next topic: changing or revoking precedents. Courts may only change or revoke a precedent if certain criteria are met, such as, one, the precedent is doctrinally incorrect

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16 *Philip Morris v Australia* (n 12) para 585 (note that this presumption can be displaced if the investor proves that the dominant reason for this change of ownership was not to bring an investment-treaty claim).

17 ibid para 588. Confusingly, the arbitral tribunal ruled that because the claim was inadmissible, this entailed that it lacked jurisdiction. This is illogical—jurisdiction and admissibility are two mutually exclusive legal concepts.

18 Hanno Wehland, 'The Application of the Prohibition of Abuse of Process Principle in the Context of Corporate Restructurings Aimed at Obtaining Protection under Investment Treaties: A Critical Review' (2025) Journal of International Arbitration 409, 410. For an overview of the case law, see Jorun Baumgartner, *Treaty Shopping in International Investment Law* (OUP 2016) para. 7.3.1.

19 See further Part 4.

20 Cross and Harris (n **Error! Bookmark not defined.**) 3.

21 Bryan Garner, *Black's Law Dictionary* (11th ed, Thomson Reuters 2019), 'stare decisis'.

22 This is known as the issue of 'horizontal precedent', see Frederick Schauer, 'Precedent' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012) 124.

23 For the Supreme Court of the United Kingdom, see Cross and Harris (n **Error! Bookmark not defined.**) 131 and 135; and for Supreme Court of the United States, see Frederick Schauer, 'Rhetoric and Reality in the Supreme Court' (2018) Supreme Court Review 121, 129 (who notes that the empirical evidence shows that this court does not follow its own precedents).

and, two, overruling would have a minimal disruptive effect.[24] Courts themselves determine whether a precedent meets one of these criteria. Legislatures may also change or revoke precedents.[25] While there is no legislature in the world of international law, this does not mean that a similar rule could not operate there. In international law, case law is not a source of law, but only evidence of the law.[26] Treaties are the most prominent source of obligations in international law.[27] As States are the masters of treaties, this practically means that supreme law-making powers lie with them. With these powers, States can change or revoke precedents.

2.3. *Elements of the Core Principle*

Some would contend that rules on changing or revoking precedents are largely symbolic because of the ease with which the principle of stare decisis can be avoided.[28] It only applies if a subsequent case has the same or relevantly similar facts to the case where the precedent was created.[29] 'Same or relevantly similar facts' cannot be precisely defined—and judges can take advantage of this by concluding, in a particular case, that this criterion has not been met, thereby meaning that they are not bound to follow an existing precedent. A couple of points must be made about this potential.

First, if a judge concludes that he or she is not bound to follow a precedent, that is not the same as changing or revoking it.[30] Rather, in this situation, the judge goes on to create a new precedent, what might be called an exception to the existing precedent.[31] Second, creating exceptions is not necessarily bad. Indeed, exceptions are part of any body of law—rules of general application invariably result in injustice in certain circumstances. The key for a judge is to cogently explain why an exception to the existing precedent is needed.[32] If this practice becomes the norm, then the potential for abuse will be limited, and the development of a rich body of precedents becomes possible.[33]

The other key element in the core principle is 'precedent'. As previously noted,[34] a precedent is case law, but not all case law can qualify as a precedent: only case law that was logically necessary to reach a decision resolving a legal question in the dispute.[35] Various points in this definition are worth fleshing out.

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[24] Lord Burrows, 'Precedent and Overruling in the UK Supreme Court' (Lord Toulson Memorial Lecture 2024, University of Surrey, 20 March 2024) <https://supremecourt.uk/uploads/speech_burrows_240320_4b3048c778.pdf> accessed 14 March 2026.

[25] Cross and Harris (n **Error! Bookmark not defined.**) 173.

[26] James Crawford, *Brownlie's Principles of Public International Law* (9th ed, OUP 2019) 35.

[27] ibid 29.

[28] For an overview of the legal realist critique of the doctrine of precedent, see Brian Leiter, 'Realism About Precedent' in Endicott, Kristjánsson, and Lewis (n 6) 312–19.

[29] Cross and Harris (n **Error! Bookmark not defined.**) 63.

[30] Adam Perry, 'Precedent and Fairness' (2023) 29 Legal Theory 185, 187.

[31] This practice is also sometimes referred to as 'distinguishing' or 'narrowing'.

[32] See Schauer (n **Error! Bookmark not defined.**) 128.

[33] See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) 195–96.

[34] See Part 2.1.

[35] This definition draws from MacCormick's work on precedent, see particularly Neil MacCormick, 'Why Cases Have Rationes and What These Are' in Laurence Goldstein (ed), *Precedent in Law* (OUP 1987) 169–72.

First, as a precedent must be logically necessary to reach a decision, it must be a premise in the reasoning behind that decision. This point harks back to the idea that precedents are reasons (of a legal character), which is why they are often called '*rationes decidendi*', that is, the reasons for deciding. Reasons for deciding must be distinguished from other judicial utterances with legal character that are not logically necessary for the decision in question.[36] They are obiter dicta.[37] As an example, consider a case where the arbitral tribunal rules that it lacks jurisdiction because the investor has not fulfilled the investment-legality requirement, which can be found in the applicable investment treaty. In passing, the arbitral tribunal comments that in the absence of this explicit investment-legality requirement, it still would have reached the same conclusion—this comment is obiter dictum (and indicates that it would have read an implicit investment-legality requirement into the applicable investment treaty).

In this hypothetical case, the relevant decision is that the arbitral tribunal lacks jurisdiction. This decision cannot be a precedent because it merely addresses a fundamental legal question in the case between the investor and the State. This brings us to a second point relating to the core principle of *stare decisis* that needs further clarification: what are the fundamental legal questions in a dispute? These legal questions are outcome-determinative questions in respect of the claim (or any counterclaim). Jurisdiction is one of them, as are admissibility and merits. The decisions on these matters cannot create precedents,[38] but may have other legal ramifications; for example, a decision on the merits might finally settle the dispute between the parties (depending on the scope of the applicable *res judicata* principle). As previously noted, it is the reasons (with a legal character) leading to these decisions that can count as precedents.

2.4. *Concluding Remarks*

A [formal] doctrine of precedent elevates these reasons (of a legal character) to the status of law. This is unusual.[39] While all legal systems develop some system of precedent, only those forming part of the common law family have made the application of precedents obligatory. This obligation does not have to be absolute. As explained above, courts can assume a power to overrule precedents or enrich the case law by allowing them to create exceptions to existing precedents (known as 'distinguishing').

Other legal systems are happy to do with this kind of formalisation, with the result that judges are free to decide whether a precedent should be followed. This begs the question: what are the advantages and disadvantages of each approach?

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[36] Note that there is some scepticism regarding the possibility of cleanly distinguishing between judicial utterances that serve as premises in an argument leading to a legal conclusion and other judicial utterances, see Duxbury (n **Error! Bookmark not defined.**) 69.

[37] See John Bell, 'Precedent' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (OUP 2008) 923.

[38] Duxbury (n **Error! Bookmark not defined.**) 67.

[39] Cross and Harris (n **Error! Bookmark not defined.**) 4.

3. Advantages and Disadvantages of Doctrines of Precedent

3.1. Advantages of a Doctrine of Precedent in ISDS

Some of the most commonly cited advantages raised by states and scholars in support of introducing a binding doctrine of precedent in ISDS are outlined below.

3.1.1. Consistency and Coherence

The most frequently cited reason in favour of a doctrine of precedent is its perceived potential to enhance consistency and coherence in ISDS decision-making.[40] A formal doctrine of precedent that binds adjudicators to past decisions is regarded as a mechanism to address the perceived issue of unjustifiably inconsistent and conflicting decisions, thereby facilitating the development of consistent and coherent case law.[41] Scholars emphasize that "the credibility of the entire dispute resolution system depends on consistency, because a dispute settlement process that produces unpredictable results will lose the confidence of the users in the long term and defeat its own purpose."[42] Consistency is widely regarded as a "fundamental value in any legal system, to be fostered and promoted. Its absence, over time, tends to erode trust and faith in the law (legitimacy), and, in extremis, the system's quality as law (legality)".[43]

3.1.2. Predictability and Efficiency

Introducing a formal doctrine of precedent in ISDS is argued not only to enhance consistency and coherence of decision-making, but, as a consequence, also to improve the predictability of adjudicators' interpretations of treaty provisions, as well as arbitral outcomes and decisions. As famously noted, "stare decisis is usually the wise policy, because, in most matters it is more important that the applicable rule of law be settled than that it be settled right".[44] Proponents contend that more predictable case law in ISDS—providing clearer guidance on the scope of treaty protections and more sharply delineating the respective rights and obligations of stakeholders—

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[40] For an illustration of the problem of inconsistent interpretation of treaty terms by arbitral tribunals, see, for example, Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113 American Journal of International Law 1; and Arato and others (n **Error! Bookmark not defined.**). It has been suggested that the level of consistency required may depend on the types of treaty provisions in question. For example, it has been argued that in the case of "rules of the game" the requirement of consistency has been called more acute and the inconsistency to be more problematic than in the case of "standards" or "norms of conduct" which trade-off predictability for flexibility, see Julian Arato, Chester Brown, and Federico Ortino, 'Parsing and Managing Inconsistency in ISDS' (2020) 21 Journal of World Investment and Trade 336, 342–44.

[41] Martin Jarrett, 'ISDS 2.0: time for a doctrine of precedent?' (2024) 27 Journal of International Economic Law 41, 46; Arato, Brown, and Ortino (n **Error! Bookmark not defined.**) 26–27; Richard Chen, 'Precedent and Dialogue in Investment Treaty Arbitration' (2019) 60 Harvard International Law Journal 47, 60–61; and Anthea Roberts and Zeineb Bouraoui, 'UNCITRAL and ISDS Reforms: Concerns About Consistency, Predictability and Correctness' (EJIL:Talk!, 5 June 2018) <https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-consistency-predictability-and-correctness/>. Proponents of the doctrine of precedent argue that, despite the inherent fragmentation of investment law—comprising over 2,500 bilateral investment treaties and several multilateral treaties—the majority of these agreements feature similarly or identically worded provisions. Promoting systemic jurisprudential coherence, they contend, would be both possible and significantly facilitated by the adoption of a doctrine of precedent.

[42] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture' (2007) 23 Arbitration International 378.

[43] Arato, Brown, and Ortino (n **Error! Bookmark not defined.**) 339.

[44] *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–06 (1932) (Brandeis, J., dissenting).

would enable states and investors to plan their activities with a better understanding of potential legal consequences.[45] This, in turn, is said to generate efficiency gains and reduce costs for all actors engaging with the system.[46] Systemic uncertainty is argued to increase business costs for investors and potentially deter FDI over time—outcomes that run counter to the objectives of investment treaties.[47] In a system where the likely outcomes of similar cases become more predictable and settled issues are less likely to be revisited, investors may be discouraged from pursuing inflated or frivolous claims and may be less inclined to advance weak or repetitive arguments. Increased predictability may also encourage earlier settlements, thereby reducing the need for prolonged litigation. States, too, would benefit from greater stability and predictability, as these would allow them to better anticipate how treaties are likely to be interpreted and to assess more accurately the potential liabilities associated with regulatory choices or actions.[48] An additional source of efficiency would be the time saved by tribunals themselves: when an issue has already been decided, tribunals can more swiftly dismiss repetitive arguments by relying on established precedent, rather than conducting a full, independent re-evaluation of the legal question. A binding doctrine of precedent would thus enhance predictability and, in turn, contribute to greater overall efficiency in the system, resulting in cost savings for all parties involved.

3.1.3. Fairness and Equality

Furthermore, a binding doctrine of precedent in ISDS is viewed as a means of fostering fairness and equality before the law by ensuring that like cases are treated alike, while differing cases are treated differently.[49] It is argued that by applying consistent legal interpretations and principles to similar or identical situations, a doctrine of precedent would reduce the influence of adjudicators' personal biases on the outcome of cases and reinforce the notion of impartiality in justice. Such a development would reinforce the fundamental principle and expectation that everyone is subject to the same legal standards, regardless of individual circumstances or the subjective perspectives of adjudicators, and thereby promote a more equitable and fair ISDS system.

3.1.4. Rule of Law

By promoting consistency and coherence in case law and adjudicative reasoning, a formal doctrine of precedent could also be a means of strengthening the rule of law in the ISDS system.[50] As one scholar has noted, "a rule of law is only a rule of law if it is consistently applied so as to be predictable".[51]

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45 Chen (n 41) 82; and Arato, Brown, and Ortino (n 40) 339-40.

46 Jarrett (n 41) 46–47; and Roberts and Bouraoui (n 41).

47 UNCITRAL Secretariat, Report of UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Sixth Session (Vienna, Oct. 29- Nov. 2, 2018)' U.N. Doc A/CN.9/964 (Nov. 6, 2018), para 30; and Arato and others (n 4) 2.

48 Roberts and Bouraoui (n 41).

49 Jan Paulsson, 'The Role of Precedent in Investment Treaty Arbitration' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2nd ed. 2018) 82; Chen (n 41) 57; and Arato, Brown, and Ortino (n 40) 339.

50 Arato, Brown, and Ortino (n 40) 340; and Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture', (2007) 23 Arbitration International 374, 378.

51 Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture' ibid.

3.1.5. Improved Quality of Decision-Making

A formal doctrine of precedent is also believed to enhance the quality of decision-making in ISDS. Proponents argue that, by drawing on the reasoning and analysis of previous cases, adjudicators would benefit from the collective wisdom of earlier panels, which would lead to greater accuracy and reduce errors in decision-making.[52] Investment treaties often contain vague provisions open to multiple interpretations, and in the absence of an objectively "correct" answer, adjudicators are more likely to reach better outcomes by adhering to the collective wisdom embedded in precedents rather than relying solely on their individual intuitions. While it is acknowledged that collective wisdom may occasionally lead to misguided outcomes, it is contended that the overall development of the law would become more robust and reliable over time under a system of precedent.[53] Moreover, reliance on binding precedent is also argued to improve the quality of decision-making by significantly reducing or even eliminating the impact of adjudicators' personal biases, jurisprudential views and political inclinations on case outcomes. In such a system, adjudication would no longer depend on adjudicators' affinities for particular perspectives or approaches, but would instead be guided by binding precedents, thus reducing the risk of arbitrary, legally erroneous or inconsistent rulings.[54]

3.1.6. Shifting Interpretive Power from Adjudicators to States

In parallel with the decline of adjudicators' biases influencing case outcomes, proponents of a formal doctrine of precedent also argue that such a system could help rebalance interpretive authority in ISDS, shifting it away from adjudicators and toward states. By requiring tribunals to follow prior decisions, precedent narrows the scope for individual adjudicators to innovate or diverge in their interpretations. In this way, precedent is said to safeguard states' intentions as reflected in their treaties by constraining adjudicators' discretion. From this perspective, precedent enables states to exert greater indirect influence over the development and application of investment law, helping to ensure that the system evolves in a manner more consistent with their objectives and priorities.[55] This, however, holds true only to the extent that adjudicators respect state-led amendments and authoritative interpretations of their treaties, rather than disregarding such measures or applying interpretations from older treaties to newly reformed ones—practices that could otherwise undermine state-driven reform efforts within ISDS.[56]

3.1.7. Development of International Investment Law

Furthermore, it is argued that a formal doctrine of precedent would, over time, promote the coherent development of the substantive rules of international investment law. The detailed reasoning in rulings and the establishment of binding precedents would contribute to clearer and more consistent interpretations of standards of protection across investment treaties, enhancing legal clarity and predictability in the investment law system.[57]

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[52] Jarrett (n 41) 47.
[53] Chen (n 41) 59.
[54] Jarrett (n 41) 48; and Roberts and Bouraoui (n 41).
[55] Jarrett (n 41) 44–45.
[56] See Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (OUP 2022).
[57] Chen (n 41) 67; and Pulkit Dhawan, 'Application of Precedents in International Arbitration', (2021) 87 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 550, 562.

3.1.8. Increased Sociological Legitimacy

Finally, a binding doctrine of precedent is regarded as a much-needed solution to bolster the sociological legitimacy of the ISDS system, which in recent years has faced significant criticism, particularly concerning its capacity to adjudicate matters of public interest. A system that is predictable, produces coherent and consistent case law, and delivers accurate, well-reasoned outcomes free from personal biases or arbitrary factors would embody the hallmarks of the rule of law. Such a framework would garner greater legitimacy than the current system and may contribute to the long-term sustainability and credibility of ISDS.[58]

3.2. Disadvantages of a Doctrine of Precedent in ISDS

Besides the numerous advantages that the introduction of a formal doctrine of precedent could bring to ISDS, states and scholars have also highlighted potential drawbacks and disadvantages, particularly if such a system is implemented in an overly rigid manner. Some of the most commonly cited disadvantages raised against the introduction of a binding doctrine of precedent in ISDS are outlined below.

3.2.1. Perpetuating Errors and Incorrect Precedent

One of the primary disadvantages cited against introducing a doctrine of precedent in ISDS is its potential to perpetuate legal errors or unjust outcomes. Critics caution that achieving consistency and coherence through strict adherence to precedent may come at the expense of quality and correctness.[59] Consistency, being value-neutral, is concerned solely with uniformity of outcomes, not their merits. A precedent-based system that compels adjudicators to converge not around the best or most accurate interpretations but around the initial decisions rendered— even when these are poorly reasoned or incorrect—risks entrenching such errors in the system and obstructing the pursuit of justice in future cases.[60] Once an unjust or erroneous precedent becomes entrenched, it can be challenging to correct or overturn it without direct intervention by states. However, state intervention—such as amending or clarifying BIT provisions—is statistically shown to be a costly and infrequent process.[61] As a result, if a binding doctrine of precedent were adopted, it could take a significant amount of time before such "bad law" is overturned or corrected. An empirical study has demonstrated that, on balance, states are more concerned about "consistently incorrect arbitral decisions than inconsistent but correct ones".[62]

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[58] Chen (n 41) 60-61; Arato, Brown, and Ortino (n 40) 340; Irene Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' (2013) 51 Columbia Journal of Transnational Law 418, 455.

[59] As WGIII has cautioned, "seeking to achieve consistency should not be to the detriment of the correctness of decisions, and … predictability and correctness should be the objective rather than uniformity", see UNCITRAL, Report of UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fifth Session (New York, Apr. 23-27 2018) UN Doc No A/CN.9/935 (14 May 2018), para 26 (2018).

[60] Ten Cate (n 58) 421-422, 458; Jarrett (n 41) 45; Roberts and Bouraoui (n 41); Chen (n 41) 71; Arato, Brown, and Ortino (n 40) 336.

[61] Chen (n 41) 69.

[62] Wolfgang Alschner, 'Ensuring Correctness or Promoting Consistency? Tracking Policy Priorities in Investment Arbitration through Large-Scale Citation Analysis' in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration - Empirical Perspectives* (CUP 2022) 232.

3.2.2. Loss of State Control

At the same time, critics caution that the same doctrine of precedent that constrains adjudicators can also limit states' ability to control the interpretation of their treaties and may erode their authority over the content of their international commitments.[63] Once a line of precedent has crystallized, it can become self-reinforcing: tribunals may feel bound to follow established interpretations even when states later express disagreement or clarify their understanding of a provision. In practice, this means that correcting or recalibrating an entrenched interpretation may require formal treaty amendment or coordinated interpretive action among treaty parties—steps that are procedurally burdensome, politically sensitive, and therefore relatively uncommon. In this sense, while precedent may reduce interpretive discretion at the level of individual adjudicators, it can also entrench interpretive outcomes in ways that limit states' flexibility and diminish their ultimate control over the evolution of treaty meaning. The system may thus become less responsive to states' subsequent understandings or policy adjustments communicated through informal means, such as diplomatic correspondence, statements in international fora, or shifts in treaty practice. Over time, this dynamic could lead to a form of "jurisprudential inertia," where tribunals prioritize consistency with prior awards over alignment with states' current intentions or emerging consensus. Scholars have long observed that states have been wary of adjudicators assuming quasi-lawmaking functions in international dispute settlement.[64] In the investment context, this concern is heightened by the often politically sensitive nature of the disputes. Many states remain reluctant to delegate the progressive development of international investment law to a process that mirrors the accumulation of binding precedents typical of common law systems.[65] The adoption of a formal doctrine of precedent in ISDS could therefore deepen these tensions, simultaneously enhancing legal certainty while constraining the adaptive capacity of the system to reflect states' evolving preferences and policy priorities. The ongoing crisis within the World Trade Organization can also be interpreted as a reflection of states' concerns that the dispute settlement body has assumed overly broad lawmaking powers, exceeding the shared understandings among member states regarding the scope and nature of their commitments.[66]

To address this potential loss of control by states several proposals have been put forward. For example, in the context of the UNCITRAL Working Group III discussions, the creation of a joint interpretation mechanism has been suggested to ensure greater consistency and state oversight in the interpretation of treaties.[67] Scholars have proposed establishing a multilateral forum where treaty parties could annually review and discuss adjudicative law and propose changes to existing

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[63] It has been suggested that this potential problem may be more a problem of perception than of reality and that systematic and coherent jurisprudence in fact may be sovereignty-enhancing insofar as it would send states clear signals about the prospective effects of their drafting choices, thereby empowering States to better capture their treaty goals and control misinterpretation risks, see Arato, Brown, and Ortino (n 40)368.

[64] Ten Cate (n 58) 422; Jarrett (n 41) 42; and Niccolò Ridi, ''Mirages of an Intellectual Dreamland'? Ratio, Obiter and the Textualization of International Precedent', (2019) 10 Journal of International Dispute Settlement, 361, 362.

[65] Paulsson (n 49) 85.

[66] Jarrett (n 41) 42; Ridi (n 64) 362; and Chen Yu, 'Advancing Predictability via a Judicialized Investment Court? A Fresh Look Through the Lens of Constructivism' (2022) 13 Journal of International Dispute Settlement 370, 377-378.

[67] See, for example, UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS)' Submission from the Government of Thailand, A/CN.9/WG.III/WP.162, 5 (2019) <https://undocs.org/en/A/CN.9/WG.III/WP.162>.

precedents, with such changes becoming binding law among those parties that agree to them.[68] However, the likelihood of these proposals gaining real traction with states remains uncertain. As mentioned above, empirical data suggests that states are generally reluctant to engage in multilateral efforts to clarify or renegotiate treaties. Moreover, despite states' ability under general public international law and certain investment treaties to issue authentic interpretations of their treaty provisions, they have rarely exercised these mechanisms in practice.[69] Even if this tendency were to change, the fragmented nature of international investment law—with over 2,500 BITs and many multilateral treaties involving differing treaty partners—poses substantial challenges to the coordination of such mechanisms.[70] In fact, the current fragmented system reflects states' lack of a shared understanding regarding the foundational principles and overarching purpose of international investment law, as well as their longstanding reluctance to engage within a unified multilateral framework to harmonize rules.[71]

3.2.3. Limited Adjudicative Freedom and Rigidity of the Law

The rigid adherence to precedent under a doctrine of precedent is also criticized for reducing, or even eliminating, adjudicators' freedom to engage in independent legal reasoning and choose among several plausible interpretations of a given legal text to resolve a legal issue. Critics warn that the introduction of a doctrine of precedent in ISDS could discourage adjudicators from revisiting legal issues or offering new interpretations of the law, and could potentially "freeze" the development of the law, making it less adaptable to evolving societal needs and changing circumstances.[72]

3.2.4. Existing Institutional Limitations

The institutional context in which ISDS operates also gives rise to potential disadvantages of a binding doctrine of precedent. One such concern is the democratic deficit inherent in judicial law-making. Additionally, the selection of adjudicators in a system incorporating a doctrine of precedent is highlighted as presenting further challenges. Beyond ensuring independence, impartiality, expertise, and experience, the process should also account for the need to represent and balance the diverse understandings of international investment law held by states and investors. Other institutional limitations include the fragmentation of international investment law across thousands of treaties and the current lack of a hierarchical or permanent judicial structure. These features raise questions about how a doctrine of precedent could operate consistently in practice and whether tribunals, which often lack continuity and institutional memory, could realistically commit to it.

In summary, it is important to acknowledge that there are no perfect solutions to the perceived challenges of inconsistency in ISDS. Every potential approach is accompanied by practical difficulties and unavoidable trade-offs. Possible solutions are best viewed as "imperfect

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[68] Jarrett (n 41) 50; Wolfgang Alschner, 'Ensuring Correctness or Promoting Consistency? Tracking Policy Priorities in Investment Arbitration through Large-Scale Citation Analysis' in Behn, Fauchald and Langford (n 62) 255.

[69] Yu (n 66).

[70] ibid 390.

[71] Arato and others (n 4) 3; and Yu (n 66) 375, 378.

[72] Dhawan (n 57) 564.

alternatives"[73] varying in their ability to achieve consistency, the trade-offs they entail with other important values, and their practical feasibility.

4. How Precedent Works in ISDS 1.0

How precedent works in the existing ISDS system is both an empirical and a normative question. It is empirical insofar as answering it requires a systematic quantitative or qualitative assessment of how ISDS tribunals deal with precedent in practice. As important, however, is a normative evaluation of what tribunals perceive they were doing when they engage with existing case law. Both strands of research can inform each other to better describe the current legal culture governing the use of precedents in ISDS 1.0. This section therefore 1) summarizes existing findings on empirical studies relating to precedent and 2) relates these insights to the normative debates on the role of precedent in ISDS.

Before embarking on these tasks, two caveats must be issued. First, due to its ad hoc nature, the current ISDS system is characterized by significant diversity and differences across tribunals, including between tribunals assessing the same treaty when it comes to reasoning based on precedent. While this characteristic of the system does not preclude the existence of trends or "herd behavior", it makes it challenging to provide a one-size-fits-all answer to "how precedent works in ISDS 1.0" since, ultimately, each tribunal has to grapple with that question anew. Indeed, that lack of a uniform approach to precedent could be a decisive difference between ISDS 1.0 and ISDS 2.0. Second, empirical studies of precedent typically investigate cross-citations between awards, which, while revealing, are only an imperfect proxy for tracking precedent. Formal citations, on the one hand, are over-inclusive by capturing mere nods to prior decisions that do not engage with the ratio decidendi, and, on the other hand, risk being under-inclusive by failing to account for indirect paraphrasing of principles derived in prior case law. In short, the below summary provides an impression, but not a perfect account of how precedent works in ISDS 1.0.

4.1. Empirical Research on Precedent in ISDS

ISDS tribunals extensively cite and rely on prior ISDS awards. In a 2008 study of close to 100 ICSID awards, Fauchald qualitatively and quantitatively investigated different sources of interpretive reasoning and found that reliance on prior ISDS awards "was by far the most widely used and most important interpretive argument" used to justify tribunals' normative findings.[74] That pattern has held firm.[75] Both party submissions and investment decisions are replete with references to prior ISDS cases.[76] Aside from citing prior ISDS case law, ICJ decisions and, to a

[73] Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 American Journal of International Law 361.

[74] Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals - An Empirical Analysis' (2008) 19 European Journal of International Law 301, 335.

[75] Niccolò Ridi, 'The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication' (2019) 10 Journal of International Dispute Settlement 200.

[76] Damien Charlotin *"Authorities" in International Dispute Settlement: a Data Analysis* [Apollo - University of Cambridge Repository 2020] https://doi.org/10.17863/CAM.59416.

lesser degree, the decisions by other international tribunals, are routinely referred to as precedential authorities.[77]

Two other pervasive trends make this prevalent practice of relying on prior awards in ISDS 1.0 problematic. First, tribunals routinely rely on precedents rendered under investment treaties that are materially different from the investment treaty at issue. Empirical research has found that out of a sample of 4500 citations between ISDS awards, only a minority of tribunals explicitly scrutinize the appropriateness of a given precedent based on whether the underlying applicable law was similar and that around 75 percent connect highly dissimilar treaties.[78] Second, research has shown that tribunals even cite so-called "zombie precedents" – investment arbitration awards that have been annulled or set-aside by domestic courts.[79] Together, these findings suggest that the pervasive reliance on precedent in ISDS 1.0 is based on the latently assumed persuasive authority of prior ISDS awards per se and is not accompanied by a systematic practice of inquiry into the appropriateness of such precedents.

4.2. Normative Discussion of Empirical Findings

Scholars vary in their assessment of these findings depending on whether they emphasize the normative advantages of relying on precedent or caution against the normative downsides of relying on precedent in a fragmented system. On the one hand, the extensive reliance on prior decisions has contributed to the development of a body of case law under ISDS 1.0 that is more cohesive than the diversity of underlying treaties and ad hoc dispute settlement structure would suggest.[80] This cohesion has fallen short of providing consistent jurisprudence given the remaining widespread disagreement across a variety of interpretive issues, but it has structured argumentation, focused disagreements and given direction to normative debates. Put differently, the prominence of precedential reasoning has made ISDS awards more consistent than what one would have expected given the field's structure.

On the other hand, that precedent-induced relative consistency of ISDS 1.0 is viewed by some as problematic. These scholars have cautioned that reliance on precedent contributes to tribunal findings (1) that are consistent, but incorrect,[81] (2) that perpetuate rather than resolve disagreement,[82] and (3) that provide unwanted interpretive continuity at a time when contracting states, through interpretive interventions or new treaty language, seek change.[83] In that latter reading, precedential reasoning is seen as a tool largely outside the direct control of states that

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77 Damien Charlotin, 'The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis' (2017) 20 Journal of International Economic Law 279.

78 Alschner (n 68).

79 Wolfgang Alschner, 'Correctness of Investment Awards: Why Wrong Decisions Don't Die' (2020) 18 The Law & Practice of International Courts and Tribunals 345.

80 Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP 2017).

81 Thomas Schultz, 'Against Consistency in Investment Arbitration' in Zachary Douglas, Joost Pauwelyn, and Jorge Viñuales (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 297–316.

82 Alschner (n 79) 345.

83 Alschner (n 56).

locks in outdated interpretations and, worse, risks rolling back state-driven change as new treaties are read in light of old case law.

These tensions resulting from the pervasive use of precedents in ISDS 1.0 point to the fundamental challenge facing the reformers of the current system: how can one structure and discipline the use of precedent in ways that allow precedent to remain a source of predictability and consistency while accommodating the need for correcting and reforming existing investment treaty law? The architects of ISDS 2.0 need to find pathways to seize the benefits of consistency through precedent while mitigating the dangers of unchecked overreliance on precedent.

5. How Precedent Might Work in ISDS 2.0

For purposes of discussing how precedent might work in ISDS 2.0, we identify three possible future reform scenarios: 1) ad hoc arbitration (existing system), 2) ad hoc arbitration with permanent appellate mechanism (similar to the WTO dispute settlement system), and 3) multilateral permanent investment court (similar to the ICJ). We also assume that the future contracting parties decide to spell out a doctrine of precedent rather than leaving it open to the adjudicative bodies to decide on the role of precedents.

5.1. Precedent in an ISDS System based on Ad Hoc Arbitration

As noted above precedent in the existing system of ad hoc arbitration is characterised principally by a 'horizontal' relationship among arbitral decisions having equal standing and rendered over time. This section addresses the question of how an arbitral tribunal constituted tomorrow to solve a specific investment treaty dispute should treat the decision of another arbitral tribunal rendered in the past addressing similar investment treaty issues.

In line with how most investment treaty tribunals have so far answered this question, two related options are available in case ISDS 2.0 remains based on ad hoc arbitration. First, while not bound by the decision of the earlier tribunal, the second tribunal may consider the earlier decision as relevant or persuasive ('persuasive precedent').[84] A second option would be for the second tribunal, in addition to consider the earlier decision as persuasive, and subject to compelling contrary grounds, "to adopt solutions established in a series of consistent cases" ('*jurisprudence*

[84] See, for example, *EI Paso Energy International Company Claimant v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (27 April 2006) para 39: "ICSID arbitral tribunals are established *ad hoc,* from case to case, in the framework of the Washington Convention, and the present Tribunal knows of no provision, either in that Convention or in the BIT, establishing an obligation of *stare decisis.* It is, nonetheless, a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals. The present Tribunal will follow the same line, especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent." See also the relevance of past GATT panel decisions: "Adopted panel reports are an important part of the GATT acquis ... They create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute." *United States Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body Report, WT/DS58/AB/R, para 108 (Oct. 12, 1998) and *Japan – Taxes on Alcoholic Beverages*, WTO Appellate Body Report, WT/DS8/AB/R, at 15 (Oct. 4, 1996).

constante').[85] In other words, while under the first approach, later tribunals are free to consider earlier decisions as persuasive, according to the second approach, tribunals would be under 'a duty' to follow a *jurisprudence constante*. Contrary to the current system, ISDS 2.0 may opt for an express selection of one or the other option, thus bringing clarity at least with regard to the general approach to precedent.

The 'persuasive precedent' approach would give arbitral tribunals more flexibility with regard to precedents, but it would also reduce predictability, as each tribunal would be free to decide which precedent to rely on. Conversely, the '*jurisprudence constante*' approach would offer greater predictability, at least once a series of consistent body of case law has emerged, although this determination would [likely] be subject to a certain degree of controversy in itself.[86] As with the advantages and disadvantages of adopting a doctrine of precedent noted above, there are valid arguments in favour of either greater flexibility or greater predictability. However, given the concerns expressed by various stakeholders regarding the lack of consistency (and thus predictability) of arbitral decisions in the current ISDS system, formally adopting the *jurisprudence constante* approach would seem to increase the level of predictability of international investment law to some extent. Given the rather minimal restrictions on flexibility in arbitral decision-making (ie., arbitral tribunals would still have full discretion until a series of consistent cases has emerged), it seems unlikely that such formalisation would face staunch opposition.

5.2. Precedent in an ISDS system based on Ad Hoc Arbitration with a Permanent Appellate Mechanism

Precedent in a system based on ad hoc arbitration with a permanent appellate mechanism in charge of reviewing errors of law by arbitral tribunals would be characterised by both 'horizontal and vertical' relationships among decisions by arbitral tribunals (first-tier) and decisions by the appellate mechanism (second-tier) rendered over time. The two sets of horizontal relationships (one among decisions rendered by first-tier arbitral tribunals and one among decisions rendered by the appellate mechanism) will be similar to the one just analysed above and the one which will consider in the next section, respectively. Accordingly, in this section we only focus on the vertical

[85] See, for example, *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, on 21 March 2007, para 67: "The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors toward certainty of the rule of law." See Andrea Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante' in Colin Picker and others (eds) *International Economic Law: The State and Future of the Discipline* (Hart 2008) 266–68.

[86] For example, to what extent can one argue that under current arbitral practice, a respondent host State is *not* able to justify the frustration of an otherwise legitimate expectations on the basis of the host State's right to regulate in the public interest? See Federico Ortino, 'The Public Interest as Part of Legitimate Expectations in Investment Arbitration: Missing in Action?' in Charles Brower and others (eds), *By Peaceful Means: International Adjudication and Arbitration – Essays in Honour of David D. Caron* (OUP 2024).

relationship. In other words, how should a first-tier arbitral tribunal treat a precedent developed in the appellate mechanism?

One option would be to establish a formal doctrine of precedent, or *stare decisis*, whereby first-tier arbitral tribunals are under a duty to follow any relevant prior decisions by the appellate mechanism ('vertical *stare decisis*'). As previously noted,[87] a formal doctrine of precedent is not subject to exceptions.[88] This approach would be different from the duty to follow a *jurisprudence constante*,[89] as vertical *stare decisis* would require a first-tier tribunal to follow even a single decision by the appellate mechanism. In other words, when a formal doctrine of precedent is applicable, the reason for the duty to follow precedent stems from the hierarchical authority of the appellate mechanism, while, when a *jurisprudence constante* develops, the relevant precedent is followed because of the authoritative weight that it has developed over time.

At the opposite end of the spectrum, a second option would be to permit the first-tier tribunal simply to treat relevant appellate precedents as persuasive without any duty to follow such precedents. This option may present serious coordination issues, as first-tier decisions not following previous appellate precedent might presumably be constantly appealed and subsequently reversed by the appellate mechanism. This is what happened in a series of disputes at the WTO when successive panels kept finding 'zeroing', a United States method of calculating damping margins, as WTO compliant despite repeated decisions by the Appellate Body declaring such methodology to violate WTO law. This impasse eventually led the Appellate Body to adopt the formal doctrine of precedent.[90] A subsequent panel, while finding 'persuasive' the earlier panel's stance on zeroing, reluctantly agreed to follow the opposite appellate precedent.[91] Interestingly, the panel voiced its disagreement with the Appellate Body's rationale for imposing a vertical *stare decisis* noting that "we do not consider that the development of binding jurisprudence is a contemplated element to enable the dispute settlement system to provide security and predictability to the multilateral trading system".[92]

5.3. Precedent in an ISDS System based on a Multilateral Permanent Investment Court

Precedent in a system based on a multilateral permanent investment court in charge of resolving investment treaty disputes would be characterised by 'horizontal' relationship among its decisions

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87 See Part **Error! Reference source not found.**.

88 However, one could envisage a slightly more flexible system where the formal doctrine of precedent is subject to the exception where 'cogent reasons' justify even a first-tier tribunal distancing from an appellate precedent. This more flexible approach appears to be the position put forward by the Appellate Body in its seminal decision in *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, para160 (Apr. 30, 2008): "Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." See Crowley and Howse, '*US – Stainless Steel (Mexico)'* (2010) 9 World Trade Review 117.

89 See generally Bjorklund (n 85).

90 See *United States — Final* Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R, paras 160-61 (Apr. 30, 2008).

91 *United States —* Continued Existence and Application of Zeroing Methodology, WT/DS350/R, paras 7.169 and 7.183 (Oct. 1, 2008).

92 *United States — Continued* Existence and Application of Zeroing Methodology, WT/DS350/R, para 7.179 (Oct. 1, 2008).

rendered over time. While a multilateral permanent court may be structured in various ways (including individual chambers and grand chamber, first-tier tribunal and appeal tribunal),[93] this section only focuses on a unitary court similar to the International Court of Justice (ICJ).

One option would be for the court not to treat its previous decisions as binding precedent but rather as persuasive authority. This is the approach followed by the ICJ, although it is true that the Court in practice does attribute a large role to its precedents by regularly referring to its own past judgments and advisory opinions in order to promote consistency and predictability in its jurisprudence. A second option would be to establish a formal doctrine of precedent, whereby past decisions of the multilateral investment court are binding on the court except where cogent reasons exist that would justify departing from such precedents (horizontal *stare decisis*). The cogent reasons exception would be required in order to provide to the court the ability to modify its own previous decisions even if only in exceptional circumstances.

Despite the difference in principle between these two options, in reality such difference may diminish greatly depending on how each is applied in practice. For example, depending on how often the court relies on its precedents as persuasive authority under the first approach and/or on how broad the court defines the concept of 'cogent reasons' to justify departing from its precedents under the second approach, one may actually see little difference between the two above-mentioned options. It should thus be noted here how various features of the dispute settlement system may impact on how the adjudicators will actually apply whatever precedent rule is adopted. These features include, for example, the stated objectives of the dispute settlement system, the specific function attributed to the various adjudicative bodies, the role of any supporting secretariat, and the adjudicators' qualifications, selection and length of appointment. In other words, any precedent rule does not operate in a vacuum, rather it is influenced by the various key features of the entire dispute settlement system. For example, appointing as members of a permanent tribunal a small number of law practitioners, academics or judges for lengthy one-term appointments may likely lead to a stricter doctrine of precedent even if the approach adopted is one treating past decisions as persuasive precedents, only.[94]

6. **Conclusion**

This article has examined the role of precedent in ISDS and the broader implications of precedential reasoning within international adjudication. What our analysis vividly shows is not simply that current ISDS already relies on precedent in practice, but also how any system of precedent exists on a spectrum. At one end, there is a formal doctrine of precedent, where established precedents cannot be revoked in subsequent cases, even if there are good reasons for doing so. Towards the middle, there is a system of precedent where, on account of cogent reasons, a precedent can be overturned, although there is an expectation that this would happen

[93] At the September 2025 session, UNCITRAL WG III agreed for the first instance tribunal and appellate mechanism to be developed as formally separate institutions with separate Statutes, A/CN.9/1238 – Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fifty-second session (Vienna, September 22-26, 2025).

[94] Substantive law aspects will also have an impact on the actual application of any precedent rule; for example, the existence of a multiplicity of applicable investment treaties has the potential to diminish the consistency function of the doctrine of precedent. In other words, diversity in the relevant treaty text may provide adjudicators with greater scope for adopting different interpretations.

infrequently. At the other end of the spectrum, adjudicative freedom reigns supreme and precedents are not so much followed, but more used to bolster the legal point that the particular adjudicator wishes to make in his or her reasoning.

Moreover, the authority of prior decisions cannot be understood in purely formal terms but instead reflects a continuous balancing between competing institutional and normative considerations. Precedent may promote values such as legal certainty, coherence, predictability, and equality before the law. Yet excessive reliance on precedent may also raise concerns about doctrinal rigidity, the autonomy of adjudicators, and the consent-based foundations of international dispute settlement. These tensions are not unique to investment arbitration but arise across international adjudicatory regimes more broadly.

The experience of ISDS illustrates these dynamics particularly clearly. The rapid expansion of investment arbitration has produced a large and increasingly interconnected body of arbitral decisions, while the decentralised structure of the system has generated persistent concerns regarding inconsistency and fragmentation. In response, both scholars and policymakers have increasingly explored whether institutional reforms might provide mechanisms capable of promoting greater coherence in the interpretation and application of investment law. In this context, questions surrounding the role and authority of precedent have assumed particular importance.

Rather than presenting precedent as a binary choice between binding authority and complete doctrinal freedom, the analysis suggests that the real challenge lies in designing institutional arrangements that can manage the use of precedent in a principled and transparent manner. No particular system of precedent is necessarily superior to another: each version has its own strengths and weaknesses. It is for States to look at the strengths and weaknesses of each version, determine, having regard to the nature of underlying system of norms, which strengths they value the most, understand which weaknesses they can tolerate, and make a declaration. Such determination is definitely a complex task, in particular because various features of the overall dispute settlement system, such as its institutional structure and chosen objectives, will have an impact on the way any precedent rule will operate in practice. This is the kind of determination that the participants in UNCITRAL WGIII will have to undertake in order to formulate a system of precedent to address the current lack of coherence and consistency. And it is worth emphasising that if States fail to identify which version they would prefer to see in operation, the matter will be decided by the adjudicators of ISDS 2.0.

The debate about precedent in ISDS therefore raises broader questions about how international adjudicatory institutions can reconcile the need for coherent legal development with the pluralistic and consent-based nature of the international legal order. Viewed from this perspective, discussions surrounding precedent in investment arbitration contribute to a wider reflection on the evolution of international adjudication. As international courts and tribunals continue to generate increasingly complex bodies of jurisprudence, questions concerning the role, authority, and management of precedents are likely to remain central to debates about the legitimacy, effectiveness, and institutional design of international dispute settlement mechanisms. Understanding how precedent operates—and how it might be structured in the future—therefore

represents an important component of the broader scholarly inquiry into the development of international law.