Marc Jacob. ***Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business.*** Cambridge: Cambridge University Press, 2014. Pp. xvi + 339. £65.00. ISBN: 9781107045491.

Valériane König. ***Präzedenzwirkung internationaler Schiedssprüche: Dogmatisch-empirische Analysen zur Handels- und Investitionsschiedsgerichtsbarkeit [The precedential effect of international arbitral awards: Doctrinal and empirical analyses of the Commercial and Investment Arbitration].*** Berlin: Walter de Gruyter, 2013. Pp. xvi + 304. €99.95. ISBN: 9783110334616.

The concept of precedent has not received much attention in international law scholarship to date. International courts and tribunals are usually not formally bound by previous decisions. Nevertheless, there is no denying that precedents play a significant role in the practice of international courts. Courts cite and rely on previous decisions in order to lend their arguments more force. Two recently published studies aim to shed more light on this tension in the use of precedents: while Marc Jacob analyses precedents in the case law of the European Court of Justice, Valériane König examines the precedential effect of decisions in international arbitration. Both books not only analyse the same concept in different contexts, they also have a common methodological point of departure. They rely to a certain extent on an empirical analysis. They construct a database of decisions and draw several quantitative and qualitative inferences from this database. They thus contribute to a laudable trend in international law scholarship towards a greater focus on empirical analyses, even though the extent and the informational value of the quantitative analysis are limited in both cases.

Valériane König points out in her study on the precedential effect of international arbitral awards why arbitral awards are, at least *prima facie*, rather unlikely candidates to function as precedents. The principal task of arbitral tribunals is dispute settlement between private parties, not the progressive development of law. Furthermore, the parties often have a significant interest in confidentiality so that a vast number of arbitral decisions are not published. Nevertheless, arbitral tribunals often decide matters in which the normative predetermination through written norms is rather low. For this reason, precedents may have an important informational value and strengthen the consistency of the case law.

In her empirical analysis, Valériane König looks at two samples. On the one hand, she analyses the precedential value of awards of the International Court of Arbitration (ICC); on the other hand, she looks at ICSID and other arbitral decisions in international investment law. Her main finding is that ICSID tribunals refer more often to previous decisions than ICC tribunals and that ICSID decisions have, in general, a higher precedential value (at 246, 250). In her empirical analysis, König analyses 211 ICC decisions. Her analysis covers all decisions that were published in certain selected journals from 1996 to 2011 (at 128); in turn, she examines all ICSID decisions from 1972 to 2011 that were published and that relate to one of three different legal matters in investment law: the concept of investment, the application of the most-favoured nation clause, and the guarantee of full protection and security (at 160–161). Furthermore, she analyses also individual decisions of other arbitral tribunals, however without specifying the selection criteria. In total, her analysis comprises 86 decisions, of which 76 stem from ICSID procedures (at 161).

Concerning the ICC, she finds 0.77 citations of previous ICC decisions per published decision and at least one citation of a previous ICC decision in 23.7 per cent of the analysed cases (at 129–130). In contrast, there is a higher degree of citations in international investment law. In decisions concerning the concept of investment, on average 6.9 previous ICSID awards were cited per decision. With regard to the most-favoured nation clause, every decision contained on

average 4.7 citations, while there were 3.4 citations relating to the principle of full protection and security (at 8).

In her analysis of the ICC decisions, König has a closer look at two selected areas: first, she analyses awards that deal with the question whether affiliates of a company benefit from an arbitration clause even if they were not included in the arbitration agreement. She finds that the most cited award in this field was the Dow Chemical decision from 1982 (ICC decision 4131), which was cited in seven out of 16 analysed decisions. Nevertheless, she argues that precedents did not play a major role in this field, as Dow Chemical had been cited in fewer than half of the awards (at 142). Furthermore, she adds a qualitative analysis, in which she argues that there was a rather low consistency of arbitral awards with regard to the extent to which groups of companies benefit from arbitration clauses (at 153–156). In the field of international construction law, precedents had, according to the author, even less importance (at 151–152). Only six of 21 decisions cited previous ICC decisions (at 146). However, the author argues that there was a higher consistency in international construction law because of frequent citations of national court decisions as well as the use of standard contracts (at 156–157).

In contrast, König attributes a high degree of consistency to the field of international investment law. She acknowledges that there is no uniform definition of investment (at 197). However, she argues that the existing disagreements only concern details and that they do not have much relevance in practice as most tribunals resort to the test established in the Salini decision (ICSID Case No. ARB/02/13) (at 198–199). Furthermore, the author argues that there is also a high degree of consistency with regard to interpretation of the most-favoured nation clause (at 215–217) and the principle of full protection and security (at 239–241).

In her concluding analysis, König makes out several reasons for the differences in the ICC and the ICSID case law: national law plays a much greater role in ICC decisions than in ICSID decisions. Therefore, ICC tribunals are more inclined to cite decisions of national courts than previous ICC decisions (at 250). At the same time, the ICC is only one player among many in the development of international commercial law, while the ICSID is, in contrast, the central actor with regard to the interpretation of international investment law (at 247). Finally, the higher rate of published decisions of the ICSID also contributes to the higher precedential value of the ICSID case law (at 250).

While the quantification of citations provides some important insights, the reader misses a stronger theoretical basis for the empirical analysis: what is the function of precedents in decisions of international arbitral tribunals? The author assumes that precedents serve the progressive development of the law. However, why should arbitrators have an interest in such a progressive development? Furthermore, it is difficult to evaluate the significance of the number of citations without considering the context. For example, the number of citations necessarily also depends on the available body of case law. A tribunal issuing several hundred decisions per year will usually be able to refer more often to previous decisions than a tribunal that hands down only a few decisions each year. Whether 0.77 citations per case is a lot or not therefore depends on the context. The same number may have a different significance in different constellations.

In contrast, Marc Jacob dedicates more effort to developing a descriptive theory of the use of precedents in his study on *Precedents and Case-based Reasoning in the European Court of Justice.* He develops the thesis that the 'ECJ primarily uses precedents to bolster its legitimacy and acceptance and to fend off outside challenges' (at 7). In his empirical analysis the author relies on all 52 cases that were decided by the Grand Chamber of the ECJ in the year 2010 (at 88). According to the explanation of his research design, the author wants to focus on the justification of decisions through precedents (at 91), on 'where the ECJ [is] heading', and on 'who gains and who loses' (at 92).

While these are interesting questions, the reader learns surprisingly little about them on the following pages. Instead, Marc Jacob provides the reader with an – albeit valuable – analysis

and classification of the types and uses of precedents. He distinguishes four types of precedents: verbatim, general, string, and substantive citations of earlier judgments (at 95). With regard to the use of precedents, he identifies several functions. By far the most common forms of using precedents are stating the law (37.9 per cent), interpreting a provision (26.9 per cent), confirming a conclusion (12.5 per cent), and interpreting a case (4.5 per cent) (at 126).

After the analysis of the positive use of precedents, the author turns to two techniques for avoiding the binding effect of precedents: distinguishing and explicit departing. Distinguishing is a technique that is used quite often by the ECJ. Jacob claims that distinguishing was an instrument to maintain systemic coherence because it allowed courts to develop their jurisprudence and to take new aspects into account without having to depart from previous findings (at 145–154). In contrast, the ECJ rarely explicitly overturns previous judgments. There is not one explicit departure in the sample of the 52 analysed judgments (at 160). Nevertheless, individual instances of explicit departures can be found in the case law of the ECJ. The author identifies several reasons for such departures (at 163–176), and tries to establish factors that justify them. However, he acknowledges that any test that tries to rationalize the departure from precedents 'likely results in a broader cost-benefit-calculus' and can thus not 'completely dispense with [a] decisionist residue' (at 182).

Explaining this practice, Marc Jacob develops the second principal thesis of his book. He argues that 'precedent use is highly context-dependent' and sensitive to the overall institutional set-up (at 183), rather than being guided by a refined theoretical or methodological concept. He then discusses several institutional factors that influence the use of precedents by the ECJ. The 'asymmetry between the court's adjudicatory power and the available correctives' gives the Court confidence to justify its decisions by reference to its own output or to distinguish cases and to depart from earlier decisions (at 183–184). The hybrid character of the ECJ as a constitutional, administrative, and international court induces the Court to take a rather holistic vision of EU law, and thus to use precedents as a means to ensure coherence regardless of the function in which the Court is acting in the concrete case (at 187–188). The lack of dissenting opinions makes it, according to Jacob, 'more difficult to make finer points' and thus increases recurrence to general citations (at 203–204). Furthermore, dissenting opinions can often be the nucleus for future departures so that their lack leads to more formal coherence (at 204). Further factors that resonate in an increased use of general precedents are the Court's 'minimalist' style of reasoning (at 211) and the case load (at 213).

In the final chapter, the author turns to the normativity of ECJ precedents. According to his opinion, the conventional wisdom that the ECJ is not bound by its own previous decisions (at 243) is too simplistic. However, he stops short of arguing that ECJ precedents 'have "strictly" or "technically" binding force' (at 262). Instead, he tries to develop a middle ground by denying the preclusion of departures, but nevertheless attributing some normative or precedential effect to ECJ judgments. One example of such a normativity of precedents is the *acte claire* and *acte éclairé* doctrine that was established in the *CILFIT* judgment of the ECJ (at 263–269). According to this doctrine, national courts whose decisions are final are not required to refer a case to the ECJ if there is either no reasonable doubt about the correct application of EU law or a materially identical matter had been resolved by the ECJ before. According to Jacob, this doctrine necessarily presupposes some normative force of precedents.

Both books provide important insights into the use of precedents in the case law of international arbitral tribunals and the European Court of Justice. Both authors rely on quantitative analyses in their studies, even though the quantitative assessment is limited to a simple counting and classification of citations. While Valériane König uses her quantitative analysis to a significant extent to support her principal thesis, it is only a point of departure for Marc Jacob. The different use of the quantitative data can be explained by the difference in the research questions. Whereas König is primarily interested in the extent of the use of precedents in the case

law of international arbitral tribunals and their value for the progressive development of law, Jacob takes a more holistic approach to the concept of precedent. He develops a solid descriptive theory on the use of precedents by the ECJ and a useful classification of different applications and functions of precedents in the European case law. By far the strongest part of the book is, however, the convincing and measured assessment of the normative force of precedents in the European legal order.

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