

A Sumbiosis Think Piece

The Role of Precedents in Negotiation

Precedents often influence decisions taken during a negotiation. An interesting article published in the *Negotiation Journal* describes why, when and how precedents have this effect, and how negotiators can use them strategically¹.

Whether an issue is negotiated for the first time or has previously been negotiated can make a significant difference to negotiation process and outcome.

A precedent is a past event or decision that evolves into a rule, standard or guide. To influence the decisions taken in a negotiation, a precedent must however be determined to be relevant to the situation and issues under consideration.

Precedents are more useful in a negotiation than such abstract standards as equity, equality and needs.

Precedents can be good or bad, desirable or dangerous, weak or powerful.

A precedent may also be a decision that is strategically and intentionally *designed* to serve as a rule, standard or guide in making future decisions in similar situations. Negotiators seek precedents consistent with their long-term goals and actively avoid precedents that threatens those goals. They may also attempt to reject a precedent when they can make a compelling argument that it is irrelevant and/or lacks legitimacy.

The parties' relative power will likely affect their ability to effectively impose or reject a precedent and still secure an agreement.

Criteria for establishing or challenging the relevance of precedents:

- time lapse between a precedent and the current circumstances;
- similarity between the previous negotiation and the current one;
- similarity between one of the parties that helped create the precedent and the party advocating for the adoption of the precedent OR the party being asked to adopt the precedent.

Precedents should be carefully considered during the preparation of a negotiation.

« Korea surveyed all of Australia's prior treaties to seek outcomes that Korea preferred. »
(statement from a Korean government official)

« Australia examined and questioned every one of Korea's prior trade treaties »
(statement from an Australian goods negotiator)

« Consciously knowing what you did in the past and understanding the relationship between our past precedents and their current goals and preferences is critical. It is also

critical to be able to respond coherently and consistently to the other side when they identify a deviation between what you did before and what you are proposing now. (...) We need to think ahead and see what could develop. Consistency in the logic of an argument is critical. Changes in the logic of an argument will discredit you and weaken you at the negotiation table. »
 (statement from a senior trade negotiator)

Precedent Dynamics: Preparation Framework

(adapted from the original by the author of the present Think Piece)

	Offensive Goals	Defensive Goals
Party's A Precedents	Prepare the arguments supporting the claim that the decision to be taken in the current case should be based on a precedent that you previously created.	Prepare the arguments justifying why a precedent that you created is not relevant, fair and/or applicable in the current case.
Party's B Precedents	Prepare the arguments supporting the claim that the decision to be taken in the current case should be based on a precedent created previously by the other party.	Prepare the arguments justifying why a precedent created by the other party is not relevant, fair and/or applicable in the current case.

ⁱ Larry Crump and Don Moon, [Precedents in Negotiated Decisions: Korea-Australia Free Trade Agreement Negotiations](#), Negotiation Journal, Volume 33, Number 2, April 2017 (on file)