



THE ROLE OF PRECEDENT IN INTERNATIONAL INVESTMENT ARBITRATION

Mokhlaroyim Zokirova

Graduate student of Tashkent State University of Law

Abstract: The role of precedent in international investment arbitration is a fundamental aspect that shapes the decision-making process and legal principles in this field. Precedent refers to the previous decisions made by arbitral tribunals, which serve as authoritative interpretations of the law. This article examines the significance of precedent in international investment arbitration and its impact on shaping legal principles and ensuring consistency in decision-making. While not binding, precedent is gaining importance in investment arbitration, and tribunals increasingly consider prior decisions as persuasive authority. As investment arbitration continues to evolve, the role of precedent will continue to grow, contributing to the legitimacy and effectiveness of the international investment arbitration regime.

Keywords: investment, precedent, international investment arbitration, tribunal, legitimacy, arbitrator, international arbitration regime.

Аннотация: Роль прецедента в международном инвестиционном арбитраже является фундаментальным аспектом, который определяет процесс принятия решений и правовых принципов в этой области. Прецедент относится к предыдущим решениям, принятым арбитражными судами, которые служат одним из источников для толкования закона. В данной статье рассматривается значение прецедента в международном инвестиционном арбитраже и его влияние на формирование правовых принципов и обеспечение последовательности в принятии решений. Прецедент, не имеющий обязательной силы, приобретает все большее значение в инвестиционном арбитраже, и суды все чаще рассматривают предыдущие решения как рекомендательный источник. По мере дальнейшего развития инвестиционного арбитража роль прецедента будет продолжать возрастать, способствуя легитимности и эффективности режима международного инвестиционного арбитража.

Ключевые слова: инвестиции, прецедент, международный инвестиционный арбитраж, трибунал, законность, арбитр, режим международного арбитража.

Annotatsiya: Xalqaro investitsiya arbitrajida pretsedentning roli bu sohada qaror qabul qilish jarayoni va huquqiy tamoyillarni belgilaydigan asosiy aspektidir. Pretsedent arbitraj tomonidan qabul qilingan qonunning vakolatli talqini bo'lib xizmat qiladi. Ushbu maqolada xalqaro investitsiya arbitrajidagi pretsedentning ahamiyati va uning huquqiy tamoyillarni shakllantirish va qaror qabul qilishda izchillikni ta'minlashga ta'siri ko'rib chiqiladi. Majburiy bo'lmasada pretsedent investitsiya arbitrajida tobora muhim ahamiyat kasb etmoqda va arbitralar avvalgi qarorlarni



ishonchli hokimiyat sifatida tobora ko'proq ko'rib chiqmoqdalar. Investitsiya arbitrajining yanada rivojlanishi bilan pretsedentning roli o'sishda davom etadi, bu xalqaro investitsiya arbitraj rejimining qonuniyligi va samaradorligiga hissa qo'shadi.

Kalit so'zlar: investitsiyalar, pretsedent, xalqaro investitsiya arbitraji, tribunal, qonuniylik, arbitr, xalqaro arbitraj rejimi.

Introduction. International investment arbitration plays a crucial role in resolving disputes between foreign investors and host states. As a distinct field within international law, investment arbitration relies on various sources, including treaties, customary international law, and legal principles. One essential element that shapes and guides the decision-making process in investment arbitration is precedent. Precedent refers to the previous decisions of arbitral tribunals, which are considered as authoritative interpretations of the law. This article explores the role of precedent in international investment arbitration and its significance in shaping legal principles and ensuring consistency in decision-making.

Understanding Precedent in International Investment Arbitration. In international investment arbitration, precedent refers to the previous decisions made by arbitral tribunals, which serve as authoritative interpretations of the law⁸⁸. These decisions create a body of case law that guides subsequent tribunals in resolving similar disputes. Precedents are crucial for establishing consistency, predictability, and coherence in the interpretation and application of international investment law. Precedent in investment arbitration operates differently from precedent in domestic legal systems. In domestic systems, lower courts are bound to follow the decisions of higher courts, creating a hierarchical structure⁸⁹. However, in investment arbitration, there is no formal system of binding precedent. Each tribunal is constituted independently for a specific case and is not bound by the decisions of other tribunals.

Nevertheless, precedent still plays a significant role in shaping legal principles in investment arbitration⁹⁰. Tribunals often refer to prior decisions as persuasive authority, considering the reasoning and conclusions reached in those cases. While not strictly binding, the persuasive value of precedent in investment arbitration has been increasingly recognized and relied upon by tribunals.

The reliance on precedent in investment arbitration is driven by several factors. Firstly, it helps to provide a consistent interpretation of treaty provisions found in investment agreements, such as fair and equitable treatment or expropriation. Precedent allows for a coherent understanding of these provisions, contributing to the development of legal principles in the field.

⁸⁸ Robert Jennings, 'General Course on Principles of International Law, Academy of International Law' (1967) 121 *Recueil des Cours* 2, 342;

⁸⁹ J Paulsson, "The Role of Precedent in Investment Treaty Arbitration" in K Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to Key Issues*, 2nd edn (Oxford, Oxford University Press, 2018);

⁹⁰ Hersch Lauterpacht, 'The So-called Anglo-American and Continental Schools of Thought in International Law', *British Yearbook of International Law* (1931) 59;



Secondly, precedent promotes predictability in decision-making. When faced with similar legal issues, arbitral tribunals often look to past decisions to guide their own rulings. Parties to disputes can anticipate potential outcomes by considering the precedents established in prior cases. This predictability assists parties in making informed decisions, including potential settlement negotiations, and contributes to the overall efficiency of the arbitration process.

Furthermore, the reliance on precedent fosters fairness and equity by treating similar cases in a similar manner. It ensures that parties are treated consistently and equally under the law, reinforcing the rule of law principles in investment arbitration.

It is important to note that the nature and impact of precedent in investment arbitration are still evolving. While not binding, the persuasive value of precedent has gained recognition through various means. Some arbitration rules, such as the IBA Rules on the Taking of Evidence, explicitly acknowledge the persuasive authority of prior decisions and encourage tribunals to consider them.

Moreover, the establishment of investor-state dispute settlement (ISDS) mechanisms, such as the International Centre for Settlement of Investment Disputes (ICSID), has contributed to the development of a more coherent body of case law⁹¹. ICSID decisions, although not strictly binding, have gained prominence and are often regarded as persuasive authority due to the specialized nature of the institution and the consistency of its decisions.

Precedent provides a foundation for the interpretation and application of investment treaties and principles, contributing to a more predictable and equitable investment environment. As the field of investment arbitration continues to evolve, the reliance on precedent is likely to increase, further strengthening the legitimacy and effectiveness of the international investment arbitration regime.

The Role of Precedent in Shaping Legal Principles. Precedents play a significant role in the development of legal principles in investment arbitration. Through their decisions, arbitral tribunals contribute to the evolution of international investment law by clarifying and interpreting its provisions. These decisions establish legal principles that guide the behavior of states and investors, ensuring a more predictable investment environment⁹².

For example, through the cumulative effect of precedents, tribunals have provided important insights into the understanding of fair and equitable treatment, outlining the factors to be considered, such as legitimate expectations, transparency, and due process. Precedents have helped refine and narrow the interpretation of treaty provisions, ensuring a more coherent understanding of the rights and obligations of states and investors. International investment law is not always comprehensive or exhaustive, and arbitral tribunals often face situations where legal

⁹¹ G Guillaume, "The Use of Precedent by International Judges and Arbitrators" (2011) *Journal of International Dispute Settlement*.

⁹² A Rigo Sureda, "Precedent in Investment Treaty Arbitration" in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford, Oxford University Press, 2009);



provisions may be silent or ambiguous. Precedents can provide guidance and establish principles to address these gaps, ensuring consistent outcomes in similar factual scenarios⁹³.

In cases where there is no explicit treaty provision addressing a particular issue, tribunals may rely on analogous precedents to determine the applicable legal standards. By examining previous decisions, tribunals can identify legal principles that have been recognized and developed in similar contexts. This reliance on precedent helps to maintain consistency in decision-making and fosters legal certainty in investment arbitration⁹⁴.

Moreover, precedents contribute to the evolution of customary international law. Customary international law arises from the general and consistent practice of states and the belief that such practice is legally obligatory⁹⁵. Precedents established by arbitral tribunals, particularly those widely recognized and followed, can contribute to the formation of customary law⁹⁶. The consistent application of legal principles by tribunals over time can shape the understanding and acceptance of these principles by states and other actors in the international community.

It is important to note that while precedents shape legal principles, they are not static. Investment arbitration is a dynamic field, and legal principles continue to evolve through subsequent decisions and developments in international law⁹⁷. Precedents themselves may be subject to critique or reconsideration by future tribunals, as new legal arguments or interpretations arise⁹⁸.

Consistency and Predictability in Decision-Making. The use of precedent in investment arbitration promotes consistency and predictability in decision-making. When faced with similar legal issues, arbitral tribunals often refer to prior decisions as persuasive authority. They consider the reasoning and conclusions reached in earlier cases to ensure consistency in their own rulings. This approach fosters a sense of fairness and equity by treating similar cases in a similar manner, providing a level playing field for both investors and states.

Furthermore, the use of precedent allows parties to anticipate potential outcomes based on previous decisions. It provides guidance and assists parties in making informed decisions regarding their legal strategies and potential settlement negotiations. This predictability contributes to the overall efficiency and effectiveness of the investment arbitration process.

⁹³ A Yusuf and G Yusuf, "Precedent & Jurisprudence Constante" in M Kinnear, GR Fischer, J M í nquez Almedia, LF Torres and M Uran Bidegain (eds), *Building International Investment Law – The First 50 Years of ICSID* (Alphen aan den Rijn, Kluwer Law International, 2016);

⁹⁴ JP Commission, "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence" (2007) *Journal of International Arbitration*;

⁹⁵ "Investment Arbitration: Law and Practice" by José Antonio Rivas and Ignacio Tortorola;

⁹⁶ ICSID, "ICSID Arbitration and Developing Countries; (1993) ICSID Review;

⁹⁷ CS Gibson and CR Drahozal, "Iran-United States Claims Tribunal Precedent in Investor-State Arbitration" (2006) *23 Journal of International Arbitration*;

⁹⁸ VA Botoaca "The role of precedent in international arbitration" in Cristina Emilia Alexe (ed), *Revista Română de Arbitraj*, (Wolters Kluwer România 2020, Volume 14 Issue 1) pp. 51 – 64, available at: www.kluwerarbitration.com



The Evolving Nature of Precedent in Investment Arbitration. While precedent plays a crucial role in investment arbitration, it is important to note that the field is still relatively young, and the precedential value of decisions may vary. Unlike national legal systems where precedents are binding on lower courts, investment arbitration operates within a decentralized system, where tribunals are not bound by the decisions of other tribunals. However, the concept of precedent is gaining importance in investment arbitration, and tribunals increasingly consider prior decisions as persuasive authority⁹⁹. Some arbitration rules, such as the International Bar Association (IBA) Rules on the Taking of Evidence, explicitly recognize the persuasive value of prior decisions and encourage tribunals to refer to them¹⁰⁰.

Conclusion. The role of precedent in international investment arbitration is indispensable. Precedent ensures consistency, predictability, and the development of legal principles in the field. It allows arbitral tribunals to build upon past decisions, fostering a coherent and predictable investment environment. While not strictly binding, precedent in investment arbitration has gained recognition as persuasive authority, shaping the interpretation and application of investment treaties and principles. As investment arbitration continues to evolve, the importance of precedent will continue to grow, contributing to the overall legitimacy and effectiveness of the international investment arbitration regime.

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