Previous Decisions in Investment Arbitration

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It is well settled that there is no rule of precedent in investment arbitration and arbitrators are not bound by decisions rendered by previous tribunals. Nevertheless, investment arbitration practice shows that previous decisions are often observed and followed. Disputing parties and arbitrators devote significant attention to previous decisions and on several occasions arbitral tribunals rely on the reasoning of previous decision in order to legitimate their own decisions. In certain cases, arbitrators considered that, even though they are not bound by previous decisions, there is a duty to follow the solution given in previous cases.

The decision rendered in the case of *Saipem S.p.A. v. Bangladesh* is an example of this approach. After stating that it was not bound by previous decisions, the tribunal asserted that the decisions rendered by previous tribunals that constitute "a series of consistent cases" should be followed, unless the tribunal has "compelling contrary grounds" not to do so. As noted in the decision:

> "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 of 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 towards certainty of the rule of law." (Decision on Jurisdiction of March 21, 2007, para. 67)

The tribunal, however, did not attempt to explain from which rule derive the "duty to adopt solutions established in a series of consistent cases" and the "duty to seek to contribute to the harmonious development of investment law"; the tribunal did not clarify whether the duty to follow previous decisions is a legal obligation imposed on arbitral tribunals or whether it is just a compulsion felt by arbitrators.

Professor Gabrielle Kaufmann-Kohler, who served as president of the *Saipem* tribunal and of other tribunals that adopted the same approach towards previous decisions, pointed out that "[i]t may be debatable whether arbitrators have a *legal* obligation to follow precedents – probably not – but it seems well settled that they have a *moral* obligation to follow precedents so as to foster a normative environment that is predictable" (*Arbitral Precedent: Dream, Necessity or Excuse?*, 23 Arb. Int'l 357 (2007), 374). According to Professor Kaufmann-Kohler, "[w]hen arbitrators apply a body of rules that is less developed and is still in the process of being formed, their role with respect to the establishment of predictable rules is much more important. This is so today in sports law and

investment law" (ibid., 375). For Professor Kaufmann-Kohler, the "moral obligation to follow precedents" in investment arbitration arises out of the fact that "rule creation through dispute settlement depends on the need for predictability" (ibid., 375); "more consistency must be the goal" (ibid., 376), given 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" (ibid., 378).

In the case of *Caratube International Oil Company LLP v. Kazakhstan*, however, the arbitral tribunal relied on legal rules in order to confer legal effects on previous decisions. While stating that arbitrators are not bound by previous decisions, the tribunal considered that previous decisions could be applied as supplementary means of interpretation in the sense of Article 32 of the Vienna Convention on the Law of Treaties, to the extent that, according to the tribunal, Article 38(1)(d) of the Statute of the International Court of Justice lists judicial decisions and awards as subsidiary means "for the interpretation of public international law":

> "On the other hand, Article 32 VCLT permits recourse, as supplementary means of interpretation, not only to a treaty's 'preparatory work' and the 'circumstances of its conclusion', but indicates by the word 'including' that, beyond the two means expressly mentioned, other supplementary means of interpretation may be applied in order to confirm the meaning resulting from the application of Article 31 VCLT. Article 38(1)(d) of the Statute of the International Court of Justice provides that judicial decisions and awards are applicable for the interpretation of public international law as 'subsidiary means'. Therefore, these legal materials can also be understood to constitute 'supplementary means of interpretation' in the sense of Article 32 VCLT." (Decision on Provisional Measures of July 31, 2009, para. 73)

Pursuant to Article 31(3)(b) of the Vienna Convention, "[t]here shall be taken into account, together with the context […] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Article 31(3)(b) does not qualify "subsequent practice" as State practice only. For this reason, it is recognized that the practice of organs of international organizations may be taken into account for the purposes of interpreting a treaty provision. However, in order to meet the requirements of Article 31(3)(b), the subsequent acts of an international organization in the application of a treaty must establish "the agreement of the parties regarding its interpretation."

Decisions rendered by arbitral tribunals do not seem to meet such requirement. While arbitrators are vested with the authority conferred on them by the disputing parties to apply and, therefore, to interpret the treaty provisions applicable to the dispute, the States party to the treaty do not participate in the decision-making process and arbitrators do not exercise their adjudicatory function as representatives of the States party to the treaty. The authority of arbitral tribunals is to apply the provisions of the treaty to a particular case and not to give an authoritative and abstract interpretation of its provisions.

Likewise, to the extent that the decisions rendered by arbitral tribunals do not qualify as a source of the intention of the States party to the treaty, they may not be used in the interpretation of the treaty in the sense of Article 32 of the Vienna Convention. Under the general rule of treaty interpretation, the purpose of treaty interpretation is the search for the intention of the parties to the treaty in order to give effect to the consent of the parties to be bound by the treaty.

In addition, under Article 38(1)(d) of the Statute of the International Court of Justice, judicial decisions

are classified “as subsidiary means for the *determination* of rules of law”, but not for the *interpretation* of rules of law. Article 38(1)(d) does not classify judicial decisions as a source of the intention of the parties to a treaty based on which arbitrators may construe the meaning of a treaty provision in accordance with the general rule of treaty interpretation. As a subsidiary means, judicial decisions serve as a secondary source which may be relied on as evidence in order to prove the existence of a rule contained in one of the primary sources of international law (international conventions, international customs and general principles of law).

One must keep in mind that Article 38(1)(d) of the Statute of the International Court of Justice was adopted in 1945, and has the same wording of Article 38(4) of the Statute of the Permanent Court of International Justice, adopted in 1920. In 1920 and in 1945, direct evidence and access to primary sources of international law were very limited, and the applicability of an international custom or of a general principle of law, which are not materialized in a document such as international treaties, would be virtually unworkable unless “judicial decisions and the teachings of the most highly qualified publicists of the various nations” could be relied on as evidence of such international custom or general principle of law.

This does not mean that judicial decisions do not contribute to the development and creation of new rules of international law, such as the decisions rendered by the International Court of Justice. But it goes beyond the limited mandate under which arbitrators exercise their function to confer such role on decisions of individual arbitral tribunals appointed by the disputing parties for the settlement of specific disputes.

In sum, while it is hard to find a legal basis in order to confer legal effects on previous decisions in investment arbitration, nobody will deny their relevance in practice. Disputing parties will always cite and quote previous decisions that support their cases; and arbitral tribunals will always consider previous decisions and rely on those that concur with their reasoning. And as Professor Jan Paulsson notes, “good awards will chase the bad, and set standards which will contribute to a higher level of consistent quality” (*International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, 3(5) TDM (2006), 13).