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Jurisprudential Analysis of Precedents Invoked in International Investment Arbitration

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Abstract

With the increase of international investment arbitration cases and the development of arbitration practice, it is more common for arbitral tribunals to invoke precedents to explain the meaning of clauses and make judgments. However, many problems need to be solved in the process of invoking precedents. This paper starts from the jurisprudential analysis of invoking precedent in investment arbitration, analyzes the reasons why it is difficult for the arbitral tribunal to set aside it in practice on the basis of distinguishing the nature of invoking precedent, and then points out the doubts about the legality of the award made by invoking precedent, the intensification of the contradiction between the accuracy and consistency of the award results, and the resulting issues of the will of the respondent State. After analyzing the causes of these problems, the paper proposes to support the arbitral tribunal's act of invoking precedents on the basis of improving the sources of international law, and strengthen the States parties' interference in the interpretation of treaties by various methods, so that precedents can be applied more reasonably in international investment arbitration, and at the same time avoid the adverse effects of its improper application on international investment arbitration.

Keywords: investment arbitration, application of precedent, treaty interpretation

1. Introduction

In recent years, with the vigorous development of international investment activities, the signing of investment treaties between countries and the transnational investment activities of investors from various countries have increased greatly, and the number of investor-host country disputes caused by this has gradually increased. Up to now, there are more than 2,500 bilateral investment treaties and treaties with investment clauses in force around the world, and 1,257 cases of investment disputes have been made public. However, due to the abstract principles of investment treaties and the immaturity of investment arbitration rules, many problems have emerged in the practice of investment arbitration that are worthy of discussion. This paper analyzes the precedents cited by the arbitral tribunal to interpret the terms of investment treaties in international investment arbitration, sorts out the existing problems, and on this basis attempts to put forward the problems that the arbitral tribunal should pay attention to and the methods that can be used in the interpretation of treaties, so as to solve the practical problems arising from the invocation of precedents.

2. The Raising of the Issue

In an investor-host country dispute, the means of dispute settlement available include not only alternative dispute settlement methods such as consultation and mediation, but also local remedies in the host country, diplomatic protection, litigation in foreign courts, international arbitration, etc. (Yu Jingsong, 2018). Since the 1980s, many investment treaties and trade agreements have provided for the mechanism of settling international disputes through arbitration. However, different interpretations of the treaties by the arbitral tribunal may result in very

different or even contradictory rulings. The Vienna Convention on the Law of Treaties (hereinafter referred to as VCLT) stipulates that "a treaty shall be interpreted in good faith according to its terms, in the context and with reference to the ordinary meaning of the object and purpose of the treaty". Other sources of interpretation available include subsequent agreements between States on the interpretation of treaties, rules for the interpretation of treaties established by the parties and any international rules governing the application of international law. In actual cases, the arbitral tribunal interprets the contents of the dispute either by basing its decision on the investment treaty and its series of documents, or by invoking the principles of international law and international custom. In addition, in practice, an increasing number of arbitral tribunals interpret the contents of disputes by invoking the awards made by previous arbitral tribunals, which is not a normative practice for treaty interpretation. Therefore, its legality is worth discussing and the problems existing in the application process need to be regulated.

2.1 Overview of Precedent-Citing by International Investment Arbitral Tribunals

The reference of precedent in international investment arbitration refers to the decision of the investment arbitral tribunal, which takes the previous awards of other arbitral tribunals as the basis for discussion and reference, and then makes its own award. According to Black's Law Dictionary, precedent refers to something of the same type that happened or existed in precedent, or an act or official decision that can be used to support a subsequent act or decision (such as a decided case that forms the basis for a subsequent case with similar facts or issues) (Bryan A. Garner, 2014). Precedent can refer to a decision that is binding on subsequent eligible cases under the common law doctrine of precedent, to a persuasive prior decision, or simply to a decision that precedes a pending case in time (Gabrielle Kaufmann-Kohler, 2007). Therefore, it should be made clear that the "precedent" mentioned herein refers to the award made earlier than the pending case and serves as a model reference for the arbitration of subsequent cases.

In addition to the field of international investment law, it is not uncommon to invoke the provisions and practice of precedent in domestic and international law. In domestic law, both common law and civil law systems have provisions or theories about the legally binding role of precedent or precedents in the adjudication process of cases. In common law systems, courts may establish rules of a general nature through precedents (Song Ke, 2023). There are two types of precedents under the principle of following precedent. One is binding precedent, which is made by a higher court in the same jurisdiction and must be applied to a case of the same type decided by a lower court. The other is persuasive precedent, which refers to decisions made by courts other than the superior court in the same judicial jurisdiction, either by courts at the same level in different judicial jurisdictions or by lower courts. Other courts have no obligation to apply the precedent when deciding similar cases, but only need to make reference to its content. In the civil law system, precedent itself is not law, but judgment (Zhang Naigen, 2018). Although the official legal source of a country does not include precedents, it has formed the concept of "legal stability", which requires the court not to violate the unanimous judgment results established by a series of cases without sufficient contrary reasons. From this, it can be seen that precedent also plays a very important role in the process of adjudicating cases in the courts of the civil law system. In international law, due to the private nature of international commercial arbitration, the decision information of the decided cases cannot be easily obtained. Therefore, precedents are not cited in a large number of cases for decision. However, in the case of international sports arbitration, almost every award made by the arbitral tribunal in recent years has cited at least one precedent. Both the theory and practice of citing precedents above have influenced the practice of the international investment arbitral tribunal in using precedents to decide cases.

In recent years, the number of precedents in international investment arbitration awards has been increasing, and the role they have played has gradually increased. A de facto precedent-following system has been formed. The number of arbitral tribunals using precedents to make decisions in investment arbitration has been increasing. In addition, the range of precedents cited in the award is very wide, from the International Court of Justice to the award of other arbitral tribunals, and even some domestic judicial decisions have appeared in the award of investment arbitration. The earliest case on precedent in international investment law is the case of Amco Asia Apple Company v. Indonesia, in which the term "precedent" is mentioned for the first time and its binding force and effects are analyzed. Since then, the role of precedent in international investment arbitration has gradually increased, and the impact on investment arbitration has also been growing.

Although the de facto precedent-following in investment arbitration is an effective method developed by the arbitral tribunal to resolve investment arbitration cases, many disputes and problems have arisen in practice because the applicable precedent has not yet developed corresponding regulations.

2.2 Problems Arising from the Practice of the International Investment Arbitral Tribunal in Invoking Precedents

2.2.1 The Legality of the Award Made by the Arbitral Tribunal Citing Precedent Is Doubtful

First of all, precedent is not the source of international law and cannot be used as the basis for the award of a

case. According to Article 38, paragraph 1, of the Statute of the International Court of Justice (hereinafter referred to as the Statute), the sources of international law include international treaties, international customs and general principles of law recognized by States. According to this provision, judicial precedent, i.e., precedent, is not one of the manifestations of the sources of international law, but is expressly defined as "supplementary information for the determination of legal principles". Scholars also support the legal status of the jurisprudence defined in the statute. Mr. Wang Tieya believes that the jurisprudence of international law is "supplementary data to determine the legal principles", which can also be said to be the "auxiliary source" of international law (Wang Tieya, 1995). Zeng Lingliang and Rao Guoping believe that auxiliary materials such as international law precedents are "supplementary means to determine the existence or formation of legal rules, which is similar to the evidence of international law" (Zeng lingliang & Rao Guoping, 2005). Therefore, precedents in international investment law are not the source of international law, but only "auxiliary materials" used to discover the source. They do not have the form of international law, nor can they be used to confirm or distinguish the existence and effect of international law norms (Wang huhua, 2017). Therefore, the use of precedent by an investment tribunal as the basis of its award is not in conformity with the provisions of international law.

Second, precedent is not authoritative and binding, and the arbitral tribunal does not need to follow precedent in making decisions in subsequent cases. According to Article 59 of the Statute, the court's decision shall not be binding except on the parties and the case. As scholar Lucy Reed has pointed out, if the rulings of the International Court of Justice, as a permanent court, are binding only on the parties to the dispute, the rulings of the International Investment Tribunal, as a temporary arbitral tribunal formed according to the will of the parties, have no authoritative binding force on other cases (Lucy Reed, 2010). Article 53 (1) of the Convention on the Settlement of Investment Disputes between States and Other States (hereinafter referred to as the ICSID Convention) stipulates that "the award shall be binding on the parties", which excludes the authoritative binding effect of the award of an investment arbitration case made in accordance with this Convention on other parties unrelated to the case. Therefore, precedents in the field of international law should be binding only on the parties to the dispute, and not on other parties not involved in the case. An arbitral tribunal is not obliged to follow precedent, nor is it required to decide a case in accordance with the results of previous arbitral tribunals.

To sum up, precedents are neither in the form of international law nor legally binding in their application, and the arbitral tribunal's extensive use of precedents to adjudicate cases lacks legal basis. Whether the arbitral tribunal's rulings based on precedents are legal and valid and whether the results are fair and reasonable remains to be discussed.

2.2.2 Invoking Precedent Intensifies the Contradiction Between the Accuracy and Consistency of the Award

The consistency of international investment arbitral awards means that the awards made by the investment arbitral tribunal on similar or identical issues are consistent with the results of the resolved cases. Judicial consistency means that the same facts of the case can obtain the same judgment results in the process of law application, which is related to the unity of the legal system and the finality of judicial decisions (Jin Ye, 2020). Accuracy refers to the requirement of fairness and justice in the context of specific cases. One of the purposes of the International Investment Tribunal to invoke precedent in adjudicating cases is to make the award of the pending case more just and accurate. The practice of recognizing and following previous awards in fact maintains the consistency of rulings on the facts of the same case and increases the predictability of the outcome of the case. However, in terms of the factual impact of precedent on the consistency and accuracy of the award results, scholars believe that there are irreconcilable conflicts between the two. lrene M. Tercate points out that attaching importance to consistency in rulings will inevitably lead to a decline in accuracy, trust and transparency, so she advocates abandoning the application of precedent in rulings (Irene M. Ten Cate, 2012). Richard C. Chen, on the other hand, argues that in international investment arbitration, the interpretation of clauses rarely has a single correct result, and when there are only better and worse solutions, the arbitral tribunal will often reach the result by following the collective wisdom rather than its own intuition (Richard C. Chen, 2019). Although the contradictions of accuracy and consistency arising from the use of precedents also exist in the common law system, such contradictions can be alleviated through the judicial system. On the one hand, the use of a precedent case is limited by the level and jurisdiction of the judicial organ making the case, which ensures the decisive status of the decision of a more authoritative court and increases the accuracy of the decision on the basis of the pursuit of consistency. On the other hand, the validity of a precedent will vary with the development and changes of law and society, but the wrong or untimely precedent will be excluded from the scope of application by the error correction mechanism in the judicial system, so as to ensure the accuracy of binding precedent on the whole. On the other hand, the international investment arbitral tribunal is formed temporarily after the occurrence of a case, and its existence is only for the settlement of a specific case. Therefore, there is no hierarchical relationship among the arbitral tribunals, and there is no system capable of screening precedents. The sole judgment criterion of whether to invoke precedents is based on the subjective understanding of the arbitrators, which leads to different precedents that can be invoked. When the arbitrators fail to carefully identify

their contents, it may lead to unreasonable judgment results, and they cannot take into account the accuracy and consistency of the award, which intensifies the contradictions between the two to a large extent.

2.2.3 Precedent May Be Invoked to Make an Award Contrary to the Will of the State Party

The arbitral tribunal's use of precedent to interpret treaties ignores the right of States parties to interpret treaties and may have consequences contrary to the will of States parties. Investment treaties reflect the will of a contracting state, but their contents are not clear and definite. Therefore, the arbitration award should be based on the interpretation of the treaty. As a dispute settlement body, the arbitral tribunal has the right to interpret the treaty from the contracting parties. However, the power of interpretation of the arbitral tribunal varies according to different viewpoints. One view holds that the power of interpretation of the arbitral tribunal is a proxy power obtained based on the authorization of the contracting States, and the exercise of its power is mainly based on the consent of the contracting States. Therefore, the interpretation of the treaty by the arbitral tribunal should be consistent with the will of the contracting States. The second view holds that the relationship between the contracting state and the arbitral tribunal is that of the entrusted and the entrusted. The arbitral tribunal (arbitrator) acquires the status of a fiduciary by virtue of its personal reputation or professional norms, and is thus endowed with the right to make relatively independent decisions based on its professional competence. In this case, the arbitral tribunal (arbitrator) is highly independent and subject to little interference from States parties. As Karen J. Alter said, the trustee is another decision maker whose judgment and authority can be used to challenge the conduct of others, including the client (Karen J. Alter, 2008). The third view also holds that the power of interpretation of the arbitral tribunal comes from the contracting state, but the scope of this right is between the agency and the commission.

In practice, the relationship between the arbitral tribunal and the contracting States is more similar to the relationship between the commission and the trustee, so the arbitral tribunal's interpretation of the treaty is often in conflict with the contracting States. As a contracting state is the subject of natural interpretation of the treaty, when there are disputed clauses in the investment arbitration, the contracting State can make explanations of the disputed clauses through different channels and submit them to the arbitral tribunal. As stipulated in Article 1132 (1) of the North American Free Trade Agreement (NAFTA), the Federal Trade Commission of the United States shall interpret and submit to the arbitral tribunal whether the disputed measures claimed by the host country are within the scope of reservations or exceptions under NAFTA. Article 5 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (hereinafter referred to as the "Rules on Transparency") provides that a contracting party to a treaty that is not a disputing party may submit material to the arbitral tribunal with respect to the interpretation of the treaty. However, in practice, the arbitral tribunal often attaches too much importance to the role of precedent and ignores the interpretation right of the contracting parties to the treaty, and often does not recognize the interpretation materials of the contracting parties. For example, in Merrill & Ring Forestry LP v. Canada, the arbitral Tribunal held that the Free Trade Commission's interpretation was closer to an amendment of a treaty than to an interpretation in the strict sense, and given that its interpretation was not necessarily consistent with the current principles and practices of international law, the Tribunal needs to review that interpretation in the light of current developments in international law. For example, in Adel A Hamadi Al Tamimi v. Sultanate of Oman, the arbitral Tribunal did not attach importance to the interpretation of the minimum standard of treatment made by the government of the United States, the home country of the investor, as a non-party to the dispute, but made its decision on the basis of precedent. In doing so, the arbitral Tribunal did not give due weight to the interpretation of the State party, making it difficult to express its will and possibly producing results contrary to the will of the State party.

3. Analysis of the Causes of Problems Arising from the Invocation of Precedents in International Investment Arbitration

In order to clarify the solutions to the above problems, it is necessary to explore the causes of these problems.

3.1 Sources of International Law

The limited role of sources of international law in investment arbitration is the main reason why arbitral tribunals invoke precedents knowing that they are not binding. First of all, the abstract and principled nature of the content of an investment treaty is the premise for the arbitral tribunal to use precedent to interpret the connotation of the treaty. Although investment treaties were signed after a long period of consultation among international bodies, international investment law is still in the development stage, and many treaties are framework provisions. The substantive investment rules in treaties are usually standards of principle with unclear connotation and extension. If the arbitral tribunal wants to apply them, it needs to make use of its previous awards to interpret them (Sun Nanshen & Li Simin, 2020). Specifically, the provisions of the treaty on fair and equitable treatment, most-favored-nation treatment and umbrella clause are not clear enough, and the arbitral tribunal must explain these contents before they can be applied to the case. For example, regarding the understanding of the content of fairness and justice, whether the arbitral tribunal in Metalclad Corporation v. The United Mexican States has

interpreted the content of transparency as such, And in Tecnicas Medioambientables Tecmed S. A. v. The United Mexican States, whether reasonable expectation was interpreted as its content, enough to see that the treaty itself was unclear, and required the judge to use his judgment and discretion to determine (W. Michael Reisman, 2015). In addition to substantive rules, investment treaties are also very abstract in their expression of purpose. According to the provisions of the VCLT on treaty interpretation, the object and purpose of the treaty play an important role in the interpretation. When the arbitration tribunal cannot judge the content of the treaty according to the provisions of the treaty, the object and purpose of the treaty will play a directional controlling role in the interpretation. However, the preamble of most treaties does not specify the purpose and purpose of the treaty. On the one hand, it provides a prerequisite for the arbitration tribunal to use precedent, and on the other hand, it may cause the award result to deviate from the intention of treaty making. In recent years, some countries have modified the contents of earlier investment treaties, further concretization of abstract substantive law provisions, including exception clauses guaranteeing the proper management rights of the contracting parties and clauses explicitly stipulating the obligations of investors. However, renegotiation and amendment of treaties will cost a lot. Most existing investment treaties still maintain the appearance of the old generation treaties (Liu Sun, 2021). Neither the substantive law, procedural law nor the preamble of the treaty can be used as a direct basis for judgment. Secondly, in the field of international investment, the lack of customary international law and general legal principles is another important reason for the arbitral tribunal to use precedent to decide cases. The formation of customary international law is not easy, and the repeated application of acts by States and the ideological conviction that it is legally binding are indispensable elements. The difficulty of its formation has resulted in a lack of quantity, so that this source has little room to play a role in practice. At the same time, the unwritten characteristics of customary international law lead to its abstract connotation, and the contents contained in customs are not self-evident. The arbitral tribunal's use of abstract customs to interpret abstract treaties will not reduce the difficulty of interpretation, nor will it make the contents of treaties more specific. General legal principles are derived from the provisions of domestic law and constitute a common part of the provisions of various countries. The formation of such a source still needs to be recognized (Wang Huhua, 2015). Due to the difficulty in identifying them, general legal principles are not only rare in number, but are also used less frequently in dispute settlement. Finally, the different treaties are very similar in content and structure. In terms of content, they all cover the definition of protected investment and investors, the treatment of foreign investment, and the guarantee of political risk. In terms of structure, most treaties contain preamble, scope of application, investment access, investment treatment, capital transfer, investment operation, expropriation, compensation and dispute settlement provisions, and even have a certain degree of similarity in wording (Sun Nanshen & Li Simin, 2020).

It is precisely because of the abstract nature of the contents of treaties and the lack and difficulty in applying customary international law and general legal principles that the arbitral tribunal has no source to rely on when deciding cases, and because many different treaties are very similar in content, the arbitral tribunal turns its attention to the results of previous arbitral tribunals on similar issues. In investment arbitral awards, most arbitral tribunals have made it clear that they do not consider precedents to be binding, but they have chosen to apply them anyway for a variety of reasons. Some arbitral tribunals choose to uphold precedent in the absence of special circumstances for the sake of maintaining the stability and predictability of the investment law. For example, in Saipem v. Bangladesh, the arbitral tribunal expressed its opinion on the previous decision of the Dispute Settlement Center before discussing the contents of the dispute in the case. They held that although the court was not bound by the previous decision of the Center. However, unless there are compelling reasons to the contrary, the arbitral tribunal is obliged to adopt the solution established in the previous series of cases, and in addition to being subject to the exact given treaty content and the facts of the case, the arbitral tribunal is obliged to seek to achieve a harmonious development of investment law to ensure stable expectations of the law and investors' awareness of legal certainty. Some arbitral tribunals applied precedents in the analysis process and inferential results of the case because the precedents were convincing and authoritative. For example, in Metalclad v. Mexico, the arbitral tribunal held that the case had the same facts as biloune et al v. Ghana Investment Center et al. Therefore, even though the arbitral tribunal stated that it was not bound by precedent, the reasoning process and results of the case were still applied. Other arbitral tribunals have applied precedent on the basis that the same or similar provisions of the treaty apply in the arbitration, such as in Azurix Corp v. Argentina, where the arbitral Tribunal held that in its decision on the jurisdictive dispute in CMS Gas Transmission Company v. Argentine Republic, the arbitral tribunal interpreted the same or similar terms of the treaty as in the present case and could therefore apply its conclusions here. For either of these reasons, when the sources of international law satisfy the need for investment arbitration, the arbitral tribunal does not need to use precedent to decide cases, and naturally does not need to face questions about the legality of such awards.

3.2 The Investment Arbitral Tribunal

3.2.1 The Investment Arbitral Tribunal Is Independent

The independence of the investment arbitral tribunal is one of the reasons why the award may go against the will of the State party and aggravate the conflict between the consistency and accuracy of the award.

The independence of an investment arbitral tribunal is firstly reflected in the independence of the arbitral tribunals hearing each case. After the emergence of an investment arbitration case, the parties can choose the arbitrators to form the arbitral tribunal according to the arbitration agreement and rules. They are created to serve the arbitration of a specific case and are dissolved at the end of the case. According to the provisions of the ICSID Arbitration Rules, even if the original award is revised or interpreted, the original arbitral tribunal needs to select another arbitrator to form a new arbitral tribunal when the original arbitral tribunal cannot participate in the deliberation, which shows the AD hoc and temporary characteristics of the investment arbitral tribunal. Therefore, there is no permanent arbitral tribunal in the investment arbitration system, and there is no relationship between arbitral tribunals in terms of status. On this basis, different arbitral tribunals decide cases according to different standards of value. Some arbitral tribunals believe that they have the obligation to establish the order of international investment law, so they attach importance to the consistency of their awards. Others believe that they only have the obligation to adjudicate a particular case at the moment, so they only focus on reviewing the accuracy of that particular case. This has, to a certain extent, led to conflicts between the accuracy and consistency of the award results. In addition, the system of the arbitral tribunal makes it very difficult to revise the award of a settled case, and the award after dispute settlement cannot be checked frequently, and its content may not be suitable for reference. According to the experience of case law countries, an important basis for an award to have binding effect on a case is that the contents of the award can be reviewed or have the possibility of being reviewed by the subject of authority from the date of entry into force. In this way, the judicial system can exclude illegal or socially inappropriate precedents and always maintain the consistency of precedents with the legal system and social development process. So that other cases based on it can be legally and reasonably adjudicated. However, all the awarded awards in investment arbitration may be cited as precedents by the new arbitral tribunal on the premise that there may be problems, which further intensifies the contradiction between the accuracy and consistency of the awards.

The independence of the investment arbitral tribunal is also reflected in the independence of the arbitral tribunal from the parties. As an intermediary judge, the arbitral tribunal has the duty of neutral judgment. Although its right to interpret treaties comes from States parties, in practice the arbitral tribunal pays little attention to the opinions of States parties and makes decisions based on the content of precedents. Although this practice is conducive to the neutral adjudication of cases and avoids the interference of the contracting State involved, treaties are the natural manifestation of the will of the contracting state. If the arbitral tribunal relies too much on precedent to adjudicate cases and ignores the interpretation proposed by the contracting state through the due procedure specified in the treaty, it may violate the provisions of the treaty, and may reduce the predictability of the award and damage the interests of the contracting state.

3.2.2 The Arbitral Tribunal Has Too Much Discretion

The excessive discretion of the investment arbitral tribunal in practice leads to another important reason that the award may go against the will of the State party and aggravate the conflict between the consistency and accuracy of the award.

In international investment arbitration, as long as the arbitral tribunal respects the rights of both parties, the scope of the arbitral tribunal's discretion can cover any issue beyond the specific provisions of the arbitration rules and arbitration clauses of the treaty, and its discretion is not small (Cui Qifan, 2022). At present, the construction of many rules in international investment is not perfect, and the law is still in the development stage. Therefore, the arbitral tribunal has excessive discretion, especially in the aspect of legal interpretation. It can interpret international investment agreements and even the domestic laws of contracting states, which exceeds the expectations of contracting States (Cao Xingguo, 2021). If this is not restricted, on the one hand, the arbitral tribunal, which does not know the background of the formulation of the treaty and the original intention of the conclusion of the treaty, will give a narrow interpretation according to its understanding of the case, which will lead to the problems of uncontrollable disputes and unpredictable results (He Yuehan, 2022). On the other hand, the arbitral tribunal has insufficient understanding of the nature of public law in investment disputes, and lacks consideration of the public interests of the host country and consideration of the sovereign state. Therefore, it gives special protection to commercial interests in the way of protecting private property, which results in the limitation of rights and violation of will of the contracting state (Deng Tingting & Qu Dan, 2021).

4. Solutions to Problems Arising from the Invocation of Precedents in International Investment Arbitration

The resolution of the problems exposed to the practice of international investment arbitration should be based on the objective practice of arbitration and the existing system. On the one hand, we should affirm the value of the existing system and its contribution to investment arbitration, but not reject it completely. On the other hand, we

should also recognize the problems existing in the system and modify it with the goal of improving investment arbitration activities to make them more efficient, standardized and fair.

4.1 Precedents Shall Continue to Be Used as the Basis for Investment Arbitration

The practical problems in international investment arbitration and the role of precedent in arbitration require that precedent should continue to be invoked as the basis for arbitral decisions.

In terms of practicality, the number of international investment arbitration cases is on the rise, and the number of urgent cases is large, while the sources of international law available for investment arbitration are very limited, which cannot meet the requirements of the arbitral tribunal to decide cases. Even if countries are actively engaged in the work of promoting the concreteness of the treaty content, the treaty law cannot play a role in the practice of investment arbitration in a short time due to the huge project of treaty amendment or re-signing. In addition, the contents of other sources of international law also need to be enriched through long-term and repeated application, and the status quo of their limited role in investment arbitration cannot be changed in a short time. Therefore, based on the objective problems of investment arbitration, it is necessary for precedent to exist in judgment. In terms of the value created by precedent, although the act of invoking precedent has caused many problems, as a judgment method developed in practice, it does contribute to the efficiency of investment arbitration to a certain extent. Therefore, when the international investment law is still in the development stage, invoking precedent can be regarded as a "economical" means to ensure consistency and accuracy in the judgment results of most cases. However, the current problems are caused by the failure to connect the invoking of precedent with the investment arbitration system.

To sum up, the act of invoking precedent cannot be excluded from the practice of investment arbitration in a short period of time, so how to optimize it and make it play a maximum role is the issue that should be considered.

4.2 The Source of International Law Should Be Used as the Basis for the Interpretation of Arbitration

The source of international law is the main basis for settling international investment disputes. Since the formation of customs and principles takes time to settle, perfecting and applying the content of investment treaties is the main means to solve the problems arising from the invocation of precedents.

On the one hand, the contents of the articles should be specified, and the vague definitions can be clarified at the time of the formulation of the treaty to reduce the possibility of ambiguity in interpretation later. For example, in previous arbitration, investors and host countries often dispute whether an act is an "investment act". Therefore, NAFTA defines "investment" as enterprises, equity securities of enterprises, debt securities of enterprises, loans of enterprises, etc., and stipulates corresponding conditions for several items such as "loans of enterprises", thus reducing the possibility of inconsistency of awards to a certain extent. On the other hand, the purpose and introduction of the treaty should also be "tailored" according to the needs and purposes of different treaties. In the process of treaty formulation, States parties may formulate treaties in accordance with their different values of economic sovereignty, economic development, human rights, environment, investment security, investment freedom and other values, and under the guidance of fair standards, and in accordance with the principles of taking into account coordination, value balancing and maintaining the stability of investment treaties (Lu Yiquan, 2020). In this way, even if the text is not perfect, the general direction of interpretation can be framed according to the purpose to reduce the possibility of interpretation deviation. For example, in recent years, in order to reduce the impact of investment on state management and public interests, some contracting States often add contents such as improving national economic level and protecting health, safety and environment to the preamble of treaties, so as to make the interpretation made by the arbitral tribunal consistent with the purpose of signing the treaties (Jin Ye, 2020).

According to the Vienna Convention on the Law of Treaties, the interpretation of a treaty shall not only refer to the context and purpose of the treaty, but also include other treaty-related data such as instruments signed or accepted by the contracting parties and subsequent interpretation. Therefore, in the face of the treaty that has entered into force, the contracting States do not have to draft a new treaty, but can also improve the relevant contents of the treaty by reaching a subsequent interpretation or making a supplementary agreement, so as to provide a basis for the settlement of disputes arising thereafter. Subsequent interpretation refers to the interpretation of treaties made when problems have already arisen. Compared with the above-mentioned amendment or re-conclusion, it is more targeted and timely, and more conducive to the reference and judgment of the arbitral tribunal.

4.3 Strengthening the Intervention of States Parties in Treaty Interpretation

On the one hand, it is because the arbitral tribunal cannot correctly view the validity of the interpretation of the States parties and thus fails to make effective use of the resulting documents; On the other hand, the arbitral tribunal has too much power because of the State party's easy transfer of its rights. Therefore, the contracting

States can guide the interpretation of the contents of the treaty through three methods: unilateral interpretation by non-parties to the dispute, interpretation by specialized agencies established in accordance with the treaty and interpretation by AD hoc conferences.

First of all, it should be made clear that the arbitral tribunal's clarification of the status of the interpretation of the States parties at the cognitive level is the basis for the correct application of the basis to make an award. As mentioned above, many arbitral tribunals have acted unreasonably in disregarding explanations or declarations already made by States parties. A contracting State is the creator of an investment treaty and has the natural right to interpret the content of the treaty. Although interpretations made in different ways have different legal meanings, the arbitral tribunal should pay attention to them, especially the documents agreed upon by all the States parties. Therefore, in the case of a State party's interpretation, the arbitral tribunal is required not only to give weight to its views, but also to form its award on the basis of those views.

Secondly, at the State party level, it is also necessary to take the initiative in treaty interpretation through different means and exercise its due rights. These include: unilateral interpretation of the contents of the dispute submitted to the arbitral tribunal by non-parties to the dispute, official interpretation by specialized agencies in accordance with the provisions of the treaty, and joint interpretation by States parties through AD hoc conferences. In these ways, the will of States parties can be better conveyed to the arbitral tribunal, the arbitral tribunal's discretion can be balanced, and the interests of States parties can be respected.

The purpose of a unilateral interpretation by a non-disputing State party, which occurs after the arbitration is initiated, is to convey to the arbitral tribunal its views on what is at issue in the case. The non-disputing State party giving the interpretation is usually the home state of the investor, and this has also been the case in the cases that have arisen, such as Adel A Hamadi Al Tamimi v. Sultanate of Oman, where the United States submitted its explanation of the minimum standard of treatment involved in the case to the arbitral Tribunal. However, unilateral interpretation requires the permission of the treaty, and this interpretation is only the expression of a country's views, which will also involve the protection of investors and other interest factors. Therefore, this way only appears as a way to expand the right of speech of the contracting party, and cannot have greater influence in practice. The arbitral tribunal only has the obligation to refer to its views, but does not need to make a decision according to its views. However, the emphasis on unilateral interpretation also has its significance. This way can provide a new perspective and thinking for the arbitral tribunal to decide cases, help the arbitral tribunal to weigh the interests of multiple parties, and is also an indispensable form for States parties to actively express their will.

Another way for States parties to express their will is to interpret the contents of a treaty through a specialized body established by the treaty. A specialized body is established at the time of the conclusion of the treaty to provide a unified interpretation of issues arising in the subsequent operation of the treaty and submit them to the arbitral tribunal. The document produced by this method is the manifestation of the common will of the States parties, and the arbitral tribunal should recognize its content and make an award on this basis, rather than ignoring or even making an award contrary to it. This method can make a unanimous interpretation of the contents of the dispute through a permanent body, and can ensure that the claims have a door, and will not have to go through a lot of trouble to facilitate AD hoc consultations when a dispute arises. However, the disadvantage is that the cost of daily maintenance of the established permanent body is high, and this kind of treaty is born in multilateral treaties, and bilateral treaties are not suitable for the establishment of a special body. In any case, this method is more permanent and the resulting document represents the will of all States parties, so it is more important in the decision of the case. It is not only a collective expression of the will of the States parties, but also limits the discretion of the arbitral tribunal.

The method of making use of an AD hoc meeting to produce an interpretation is a meeting of the States Parties organized by the States Parties after the arbitration has taken place to resolve a specific issue. Since there is no fixed format, it is necessary to convene the States parties after a particular issue has arisen. This method is more commonly used in treaties with a smaller number of States parties. Although this method does not incur costs in maintaining a permanent body, it is clearly impractical to convene the members for discussion in the event of a dispute. Therefore, this method will be used less often because of the complexity of the process, and will not achieve the effect of providing sufficient guidance on issues requiring clarity, and therefore will not limit the powers of the arbitral tribunal. However, for treaties with fewer States parties, this method can maximize the effect of limiting the power of the arbitral tribunal on the basis of limiting the cost, and it is also an option to be considered.

5. Conclusion

The application of precedent in international investment arbitration is the result of weighing practical issues. It is only a practice to meet the needs of realistic dispute settlement when the sources of international law cannot play a useful role, and has no legal basis. Moreover, there is no effective mechanism to regulate its application in

practice, resulting in the conflict between the consistency and accuracy of the award and the problem of going against the will of the contracting parties. The reason lies both in the source of international law and in the arbitral tribunal. In order to maintain the efficiency of international investment arbitration and the fairness of the award, the application of precedent in arbitration should be limited, rather than completely prohibited. To be specific, we can reduce the application of precedent to some extent by improving the contents of the treaty, and strengthen the influence of the will of the State party in the award of the arbitral tribunal through measures taken by the State party, so as to balance the rights of the arbitral tribunal and the State party in the interpretation of the treaty. Only in this way can we make international investment arbitration more equitable, without compromising the efficiency of arbitration, and restore trust in it.

References

Bryan A. Garner, (2014). *Black's Law Dictionary* (10th Ed). St. Paul: Thomson West.

Cui Qifan, (2022). On on-site inspection in international investment arbitration. *Commercial Arbitration & Mediation, 2*, pp. 25-38.

Deng Tingting, Qu dan, (2021). On the changing role of the state in ISDS mechanism. *Journal of Central South University (Social Sciences), 2*, pp. 65-80.

Gabrielle Kaufmann-Kohler, (2007). Arbitral Precedent: Dream Necessity or Excuse? The 2006 Freshfields Lecture. *Arbitration International, 23*(3), pp. 357-378.

He Yuehan, (2020). Research on the "Joint Treaty Party Control" Mechanism of the ISDS. *Studies in Law and Business, 4*, pp. 143-157.

Irene M. Ten Cate, (2012). He Costs of Consistency: Precedent in Investment Treaty Arbitration. *Columbia Journal of Transnational Law*, (51), pp. 418-478.

Jin Ye, (2020). Consistency of treaty interpretation in international investment dispute settlement: practical conflict, value reflection and reform goals. *Global Law Review, 5*, pp. 178-192.

Karen J. Alter, (2008). Agents or Trustees? International Courts in their Political Context. *European Journal of International Relations, 14*(1), pp. 33-63.

Liu Sun, (2021). Using the Treaty Law Convention to Guide and Restrict the Arbitral Tribunal's Power of Treaty Interpretation. *Journal of South China Normal University (Social Science Edition), 1*, pp. 139-208.

Lu Yiquan, (2020). Value Conflict and Integration of the Investment Treaty. *The Journal of Yunnan University Social Sciences Edition, 4*, pp. 125-134.

Lucy Reed, (2010). The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management. *ICSID Review-Foreign Investment Law Journal, 25*(1), pp. 95-103.

Richard C. Chen, (2019). Precedent and Dialogue in Investment Treaty Arbitration. *Harvard International Law Journal, 60*(1), pp. 47-94.

Song Ke, (2023). UNCLOS and the Incorporations of "Other Rules of International Law": An Analysis on the Negotiated Texts of UNCLOS and Case Law. *Chinese Review of International Law, 2*, pp. 18-36.

Sun Nanshen, Li Simin, (2020). On the formation of international investment arbitration precedents and their practical functions. *Jin Ling Law Review, 1*, pp. 3-22.

W. Michael Reisman, (2015). Canute Confronts the Tide: States vs. Tribunals and the Evolution of the Minimum Standard in Customary International Law. *ICSID Review: Foreign Investment Law Journal, 30*(3), pp. 616-634.

Wang Huhua, (2015). *International Public Law* (4th Ed.). Peking University Press.

Wang Huhua, (2017). Definition of sources of international law. *Law Science, 1*, pp. 3-19.

Wang Tieya, (1995). *International law*. Peking: Law press.

Yu Jingsong, (2018). *International investment law*. Peking: Law press.

Zeng Lingliang, Rao Guoping, (2005). *International law*. Peking: Law press.

Zhang Naigen, (2018). Treaty Interpretation of ICSID Arbitrations: Rules and Jurisprudences. *Business and Economic Law Review, 1*, pp. 56-77.