Kluwer Arbitration Blog

Celebrating 50 Years of the VCLT: Investment Arbitration's Resurrection of the Principle of Contemporaneity as a Trojan Horse for Subjective Treaty Interpretation

Julian Wyatt (Proxenia Legal) · Thursday, December 5th, 2019

The Vienna Convention rules for treaty interpretation (***VCLT***) routinely referred to by all international courts and tribunals are known to be the result of a compromise between different schools of interpretation and therefore notoriously flexible, in my view too flexible for the purposes of modern-day international dispute resolution. Cases are therefore won and lost according to how those rules for interpretation — and the principles and doctrines regarded as lying beneath them — are themselves understood by the particular court or tribunal.

This post argues that investment arbitration understands one such principle, the so-called principle of contemporaneity, differently to other international courts of tribunals and thereby uses a singular interpretative approach — particularly when applying VCLT articles 31 through 33 to the vexed question of whether the benefit provided by a most-favoured nation clause extends to importing a more permissive dispute resolution provision from another treaty (the "MFN-DRP issue").

As promulgated by Sir Gerald Fitzmaurice in 1957, the principle of contemporaneity — or principle of contemporaneous (treaty) interpretation — requires that "[t]he terms of a treaty [are] interpreted according to the meaning which they possessed […] in the light of current linguistic usage, at the time when the treaty was originally concluded". Very soon after being proclaimed, the principle of contemporaneity began to decline, with the countervailing doctrine of evolutionary treaty interpretation becoming increasingly recognised and accepted as the default position on how to interpret treaties through time. For various reasons I have detailed elsewhere, the principle of contemporaneity — while still occasionally applied in the specific context of boundary disputes — essentially fell into disrepute, "evolutionary interpretation" decisions such as the 2005 *Iron Rhine* award and 2009 *Related Rights* judgment appearing to consign it to the dustbin of history.

Yet the world of investment arbitration apparently didn't get the memo and, in recent years, has ushered in a renaissance in the principle of contemporaneity. In what has been termed the "fiercely contested no-man's land" of the MFN-DRP issue, the principle of contemporaneity has been regularly invoked by parties and arbitrators in cases including *ICS v Argentina*, *Daimler v Argentina*, *Philip Morris v Uruguay*, *Kiliç v Turkmenistan*, *Garanti Koza v Turkmenistan*, *Cheque Déjeuner v Hungary* and *Venezuela US v Venezuela*. While these awards and pleadings define the principle of contemporaneity as the general international law authorities do, they appear to *understand* it quite differently; most significantly as reintroducing a strongly subjective element to the process of treaty interpretation and even allowing reference to the preparatory work of a treaty

as an apparently primary — rather than supplementary — means for interpreting it.

It is well known that, with the conclusion of the Vienna Convention in 1969, international law moved away from the *école subjective* previously favoured in many international jurisdictions. The *travaux préparatoires* that had for so long been the focus of interpretative inquiries were relegated behind the text, context and other "objective" interpretative elements to be considered only in exceptional circumstances. Several international lawyers have since taken the triumph of the objective approach over the subjective approach so seriously that they (wrongly) consider any allusion to "intention" to be out-of-place in the context of treaty interpretation. Prof Schreuer has even reported, as a legal expert in *Wintershall v Argentina*, that his predecessor in the chair of international law in Vienna, Karl Zemanek, "used to fail students when they gave the answer that the intention of the parties was significant for the interpretation of treaties".

It is equally clear that general international law does not understand the principle of contemporaneity as endorsing a subjective approach to treaty interpretation or any reference to the *travaux préparatoires*. Since its emergence in the writings of Wolff and Vattel, development in the *Rights of US Nationals in Morocco* case and proclamation as a principle of international law by Fitzmaurice, the principle of contemporaneity has been regarded as useful for fleshing out the *objective meaning* of a treaty term, not the *concrete intentions of the specific parties* who drafted the treaty provision in which that term appears.

In investment arbitration, however, the principle of contemporaneity is consistently invoked to advocate a very different interpretative approach. In the *Daimler* award, the tribunal defined the principle as requiring that "the meaning and scope of the term 'treatment' be ascertained" at the time when Germany and Argentina negotiated their BIT, but then immediately revealed its view that this meaning would best be found in "direct evidence revealing the particular understanding of 'treatment' maintained by Germany and Argentina [at] that date", "for example from the Treaty's drafting history". In replies submitted a matter of months after the *ICS* and *Daimler* awards respectively, the respondent States in the *Philip Morris v Uruguay* and *Kiliç v Turkmenistan* cases seized the opportunity to plead the principle of contemporaneity in a strikingly subjective form. Uruguay notably insisted on what "an examination of contemporaneous sources reveal[ed …] the parties … [to] have intended" and "the subject matter which the two States had in mind when they inserted the clause in their treaty", while Turkmenistan asserted that the principle required the tribunal "to appreciate whether Turkey and Turkmenistan intended the term 'treatment' to cover the BIT's DRPs". When, in the subsequent *Garanti Koza* arbitration, Turkmenistan again advanced the principle of contemporaneity as being centred on what the parties in fact contemplated, the Claimant objected that this undermined the hierarchy in VCLT articles 31 and 32 and the Tribunal found it necessary to remind the parties of the primacy of the text of the treaty in treaty interpretation (the objective approach), in apparent opposition to this emerging subjective form of the principle of contemporaneity.

In later cases, tribunals and parties have referred more heavily to the text of the treaty being interpreted, but still appear to understand the principle of contemporaneity as seeking to determine the particular parties' concrete intentions. In the *Chèque Déjeuner v Hungary* dispute, the parties submitted — and the tribunal referred to — "contemporary evidence of the understanding of the parties at the time of the conclusion" of their treaty, while the *Venezuela US v Venezuela* tribunal's 2016 interim award partially followed the Respondent State's extensive reference to the principle of contemporaneity to draw conclusions about what "the Parties had in mind".

A number of reasons could be offered to explain why investment arbitration seems to have departed from the general international law understanding of the principle of contemporaneity and come to see it as endorsing a subjective interpretative approach.

One might, for example, contend that the MFN-DRP context, being focused on *ratione voluntatis* and consent, is more inherently subjective than the contexts in which the principle has been applied in other international courts and tribunals. Yet ICJ practice (including in the *Rights of US Nationals in Morocco* judgment and controversial opinions of the 1966 *South West Africa* majority) invokes the principle precisely in the context of consent to jurisdiction without understanding it in such a subjective manner and marginalises any attempts, such as Judge de Castro's *Aegean Sea* dissenting opinion, to use the principle more subjectively in this context.

One might also follow the key paragraphs of the *ICS* and *Daimler* awards on the principle of contemporaneity and argue that *bilateral* treaties specifically require a more subjective approach to treaty interpretation. After all, it is clear that the policy basis for the VCLT's selection of the objective approach for the interpretation of treaties at least partially resides in the fact that many parties to large multilateral treaties will not have access to the records of those who drafted them, meaning that a subjective approach would create an asymmetry predominantly in favour of older, developed States. However, just like newly established States who "inherit" treaties from colonial powers, investors who bring claims under BITs are unlikely to have access to the material venerated by subjective interpretation. The non-State-vs-State nature of investment arbitration means that a subjective approach to treaty interpretation only enhances the asymmetry between the parties, cautioning against the use of anything other than an inherently more even-handed objective approach. There may be policy reasons for interpreting bilateral investment treaties more *statically*, but not for interpreting them more *subjectively*.

If we really must speculate as to the source of this divergence, it seems safer to suggest that investment arbitration's understanding of the principle of contemporaneity as authorising a subjective approach to treaty interpretation is in fact a consequence of another of its special features: the involvement of international commercial arbitration practitioners. While all forms of the game of public international law dispute resolution are now played by lawyers, it is only investment disputes that are predominantly argued by practitioners equally or more accustomed to applying domestic laws to the interpretation of contracts, many of which favour a subjective approach. In this light, it is perhaps unsurprising that, in investment arbitration, subjective interpretation has, in the shape of a refashioned principle of contemporaneity, found itself back within the VCLT's quite porous walls around treaty interpretation.

To see our full series of posts celebrating the 50th jubilee anniversary of the Vienna Convention on the Law of Treaties, click here.

The ideas in this blog post are further elaborated in *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution, and Future*, edited by Esmé Shirlow & Kiran Nasir Gore (Kluwer, 2022).

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