Kluwer Arbitration Blog

The VCLT Is Not Hostile to Drafting History

Julian Davis Mortenson (University of Michigan Law School) · Monday, July 29th, 2013 · Institute for Transnational Arbitration (ITA), Academic Council

Because international investment law so often involves the application of treaties, the Vienna Convention on the Law of Treaties plays a key role in structuring its application. Of particular interest for many disputes are the rules of treaty interpretation contained in Articles 31, 32, and 33 of the VCLT. In that context, there are some signs of a gathering movement to resist the invocation of drafting history in the adjudication of investment disputes. A recent article criticized the "tendency for international investment tribunals to admit and rely on *travaux préparatoires* in their own treaty interpretations," and at least one dissenting opinion has followed methodological suit in critiquing the majority's holding on similar grounds.

This resistance to *travaux* is in line with a view that has become conventional wisdom for many international lawyers. Indeed, commentators often go so far as to suggest that the VCLT entrenches a categorical prejudice against *travaux*. Because of this alleged hostility to history as a source of meaning, it is frequently said that when an interpreter thinks a text is reasonably clear and produces results that are less than ridiculous, she ought to give that reading preclusive effect over anything the *travaux* might suggest to the contrary.

At least if we take the historical understanding seriously, the conventional wisdom is incorrect. A forthcoming article in the American Journal of International Law shows that, far from adopting a hostile or restrictive view on drafting history, the Vienna Conference secured its role as a regular, serious, and indeed central component of treaty interpretation. Drawing on a rich vein of published, unpublished, and archival material, the article shows that the VCLT drafters repeatedly reiterated that any serious effort to understand a treaty should rely on careful and textually grounded resort to *travaux*, as a matter of course and without embarrassment or apology. The VCLT drafters themselves leaned heavily on *travaux* when debating virtually any legal question that turned on the interpretation of an existing treaty. And every effort to restrict drafting history to cases where the text was ambiguous or absurd was resoundingly rejected.

It is true (and likely a source of confusion after the fact) that Vienna Conference delegates rejected a United States proposal to approach treaty interpretation through a totality-of-the-circumstances balancing test. But that had nothing to do with hostility to *travaux* as such, much less with any desire to impose strict threshold requirements on their use. Rather, the delegates were rejecting Myres McDougal's view of treaty interpretation as an *ab initio* reconstruction of whatever wise interpreters might view as good public policy. This was an objection to the *purpose* for which New Haven School interpreters wanted to use travaux, not to drafting history as a central source of

meaning *per se*.

The understanding of interpretation that emerged was a recursive and messy process that would spiral in toward the meaning of a treaty, rather than a rigidly linear algorithm that was tied to a particular hierarchical sequence. Interpreters were thus expected automatically, in any seriously contested case, to assess the historical evidence about the course of discussions, negotiations, and compromises that resulted in the treaty text—in short, to the *travaux*. The modern view that Article 32 created a residuary location for subsidiary and categorically inferior tools of interpretation is simply wrong.

So what does this mean for investment treaty arbitration? The same thing that it does for other forms of international adjudication. Rather than hoping that hierarchy or formulaic rules can resolve difficult interpretive questions, investment arbitrators ought to assess the relevant drafting history for what it is worth: no more, but certainly no less.

This entry was posted on Monday, July 29th, 2013 at 2:43 pm and is filed under Arbitration, Investment Arbitration, Treaty, Uncategorized, Vienna Convention on the Law of Treaties
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.