Kluwer Arbitration Blog

Interpreting Investment Treaties

Roberto Castro de Figueiredo (Tribe Arbitration and St Mary's University) · Tuesday, October 21st, 2014

One of the recurrent controversial issues in the investment arbitration practice relates to the application of the general rule of treaty interpretation of the Vienna Convention on the Law of Treaties in the interpretation of the provisions of the ICSID Convention and of investment treaties in general.

Thomas Wälde in one of his last writings pointed out that "[t]ribunals often do not practise what they preach; reference to the Vienna Rules is now mandatory, but such reference does not mean the Rules are taken and applied seriously" and "it is difficult to find a tribunal which formally and properly applied the Vienna Rules step by step" (*Interpreting Investment Treaties: Experiences and Examples*, in International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, Oxford University Press, 2009, at 730 and 746). Michael Reisman and Mahnoush Arsanjani note as well that the "provisions [of the Vienna Convention] have become something of a clause de style in international judgments and arbitral awards: whether routinely and briefly referred to or solemnly reproduced verbatim, they are not always systematically applied" (*Interpreting Treaties for the Benefit of Third Parties: The "Salvors Doctrine" and the Use of Legislative History in Investment Treaties*, 104 AJIL 597 (2010), at 598-599).

The misapplication of the general rule of treaty interpretation was also heavily criticized by Jan Paulsson in his dissenting opinion given in the case of *Hrvatska Elektroprivreda d.d. v. Slovenia*, in which Paulsson accused the tribunal of relying on a "commercial logic" in disregard of the general rule of treaty interpretation:

> "As far as I can discern, the majority's Decision proceeds in ignorance of this fundamental and much-discussed constraint on the freedom of international judges and arbitrators to interpret treaties. […]. They seem to ignore that they are allowed to refer only to the context of the terms of the Treaty, i.e. the internal consistency of the text as one whole. This fundamental error, it seems, has freed the majority to impose its vision of commercial reasonableness on the entire history of Krsko NPP. This is not what States submit themselves to when concluding a Treaty. The majority's vision of commercial logic leads them to all manner of reading between the lines of the Treaty and of various more or less related, more or less contemporaneous, and more or less superseded documents. […]." (Dissenting Opinion to the Decision on the Treaty Interpretation Issue of June 12, 2009, at para. 44)

In most cases, the misapplication of the Vienna Convention is related to a misunderstanding of the method established by the general rule of treaty interpretation, in which each element plays a relevant role as a source of the parties' intention.

Article 31(1) of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." This is the so-called *textual approach*, according to which treaty interpretation should be primarily based on the actual terms employed in the treaty as the main source of the parties' intention, which must be assumed to have been employed in their ordinary meaning. The term "context" does not mean that a treaty may be interpreted in accordance with its historical or political context, or the circumstances surrounding its conclusion, but refers to the context of the terms ? not of the treaty ? in order to ensure a consistent interpretation of the treaty as a whole. In addition, the reference to the object and purpose is not an autonomous source of the parties' intention and may not be used to override the text of the treaty. Its use is a second step and contingent upon the ordinary meaning of the terms.

The proper application of the general rule of treaty interpretation is not something theoretical and deprived of practical effects. In the context of the ICSID Convention, one could argue that a decision that asserts or denies the jurisdiction of the Centre over a dispute based on a misapplication of the general rule of treaty interpretation is subject to annulment for manifest excess of power of the tribunal. One could also argue that the decision is subject to annulment on grounds of manifest disregard of the law if the tribunal misapplies the general rule of treaty interpretation in construing the provisions of an investment treaty in deciding the merits of the dispute.

It should be noted that the Vienna Convention is not formally applicable as an international treaty to the ICSID Convention. First, not all Contracting States of the ICSID Convention are parties to the Vienna Convention. Secondly, the ICSID Convention was concluded on March 18, 1965, and entered into force on October 14, 1966; the Vienna Convention was concluded on May 23, 1969, and entered into force on January 27, 1980. This does not mean, however, that the rules of the Vienna Convention are not applicable to the ICSID Convention. Pursuant to Article 4 of the Vienna Convention, "[w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."

The rationale behind the first sentence of Article 4 of the Vienna Convention lies in the idea that several provisions of the Vienna Convention are the outcome of the codification of the rules on the law of treaties existing in customary international law by the International Law Commission ("ILC"). After several years of study, the ILC concluded the final version of its Draft Articles on the Law of Treaties in 1966, which served as the basis for the discussions at the United Nations Conference on the Law of Treaties held in 1968 and 1969 in Vienna.

However, not all provisions of the Vienna Convention are the product of the codification of the existing customary international law, but are included in the category of progressive development of international law. The Vienna Convention, on the other hand, does not indicate which rules are the product of codification or of progressive development, nor do the Draft Articles on the Law of Treaties. When the Draft Articles on the Law of Treaties were submitted by the ILC, it was stated that "[t]he Commission's work on the law of treaties constitutes both codification and progressive

development of international law in the sense in which those concepts are defined in Article 15 of the Commission's Statute, and, as was the case with several previous drafts, it is not practicable to determine into which category each provision falls" (Yearbook of the International Law Commission, 1966, vol. II, at 177).

As regards the rules pertaining to treaty interpretation, it is well settled that Article 31(1) of the Vienna Convention, which states the general rule of treaty interpretation, reflected the existing customary international law. On several occasions the International Court of Justice ("ICJ") recognized that the general rule of treaty interpretation of the Vienna Convention is the product of the codification of the existing customary international law on the law of treaties. For instance, in the *Arbitral Award of 31 July 1989* case, the ICJ observed that the principles of treaty interpretation "are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point" (Judgment of November 12, 1991, ICJ Reports 53 (1991), at 70). In the *Territorial Dispute* case, the general rule of treaty interpretation was applied to a treaty concluded in 1955 ? before the conclusion of the ICSID Convention ? on the basis that it reflected the existing customary international law on the rules of treaty interpretation (see Judgment of February 3, 1994, ICJ Reports 6 (1994), at 21-22).

Accordingly, an ICSID tribunal or *ad hoc* committee may not rely on the fact that not all Contracting States of the ICSID Convention are parties to the Vienna Convention and that the ICSID Convention predates the Vienna Convention in order to avoid the application of the general rule of treaty interpretation. Being the existing customary international law at the time that the ICSID Convention was concluded and entered into force, the general rule of treaty interpretation of the Vienna Convention is as mandatory as any rule of a treaty to which the Contracting States of the ICSID Convention consented to be bound.

This entry was posted on Tuesday, October 21st, 2014 at 7:46 am and is filed under ICSID Arbitration, ICSID Convention, International Court of Justice, Investment, Investment agreements, Investment Arbitration, Investment protection, Investor, Treaty, Treaty Interpretation, 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.