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Evolving Meaning: The Interpretation of Investment Treaties and Temporal Variations

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International investment law is shaped by key terms such as “investment”, “indirect expropriation”, “national treatment”, “most favored nation”, “fair and equitable treatment”, among others, which are at the heart of most investment treaties. But after 1959, when West Germany and Pakistan signed what is known as the first ever bilateral investment treaty, and, since then, the conclusion of more than three thousand investment treaties, the meaning of these key terms has been exposed to potential temporal variations. This raises the question as to whether the interpreter should look for the meaning of the term at the time of the conclusion of the investment treaty or for the current meaning of the term, at the time of the application of the treaty.

Gerald Fitzmaurice, whose work on the practice of the International Court of Justice inspired the codification of the general rule of treaty interpretation embodied in the Vienna Convention on the Law of Treaties, identified as one of the major principles of treaty interpretation the so-called principle of contemporaneity. According to Fitzmaurice, the principle of contemporaneity entails that “[t]he terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded” (Fitzmaurice, G. G., *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BYIL 203 (1957), at 212).

The principle of contemporaneity is founded on the idea that, if the purpose of treaty interpretation is to reveal the intention of the parties, the text of the treaty, as the main source of the intention of the parties, must be understood in accordance with the meaning the parties intended to give to the terms. Accordingly, the starting-point of the interpretation of a treaty must be based on the meaning its terms had at the time that the treaty was originally concluded.

The principle of contemporaneity finds support in the decision rendered by the International Court of Justice in the *Rights of Nationals of the United States of America in Morocco* case. In determining the meaning of certain terms employed in two treaties concluded between Morocco and the United States in 1787 and in 1836, the International Court of Justice observed that “in construing the provisions of Article 20 — and, in particular, the expression ‘shall have any dispute with each other’ — it is necessary to take into account the meaning of the word ‘dispute’ at the time when the two treaties were concluded” (Judgment of August 27, 1952, ICJ Reports 176 (1952), at 189).

This does not mean, however, that the interpreter is prevented from taking into account temporal variations of the meaning of the terms of a treaty. The question as to whether one should interpret a term of a treaty in accordance with the meaning existing at the time of the conclusion of the treaty, or with its current meaning, is contingent upon the specific wording adopted in the treaty. Generic terms employed in treaties with continuing duration are assumed to be intended to follow temporal variations of their ordinary meaning.

In the case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, interpreting the Covenant of the League of Nations, which was concluded in 1919, the International Court of Justice observed that:

“Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant — ‘the strenuous conditions of the modern world’ and ‘the well-being and development’ of the peoples concerned — were not static, but were by definition evolutionary, as also, therefore, was the concept of the ‘sacred trust’. The parties to the Covenant must consequently be deemed to have accepted them as such.” (Advisory Opinion of June 21, 1971, ICJ Reports 16 (1971), at 31)

Likewise, in the *Aegean Sea Continental Shelf* case, the International Court of Justice concluded that the use of a generic term creates the presumption that such term was employed with the intention to follow temporal variations of its meaning. In this case, the International Court of Justice had to decide whether the expression “the territorial status”, contained in the instrument of accession of Greece to the General Act for the Pacific Settlement of International Disputes of 1928, could be deemed to refer to the rights over the continental shelf. This question arose out of the fact that, at the time that Greece acceded to the General Act in 1931, the concept of continental shelf had not been developed in international law yet. The International Court of Justice noted, however, that:

“Once it is established that the expression ‘the territorial status of Greece’ was used in Greece’s instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.” (Judgment of December 19, 1978, ICJ Reports 3 (1978), at 32)

Similarly, in the *Kasikili/Sedudu Island* case, the International Court of Justice noted that “[i]n order to illuminate meaning of the words agreed upon in 1890, there is nothing that prevents the Court from taking into account the present-day state of scientific knowledge, as reflected in the documentary material submitted to it by the Parties” (Judgment of December 13, 1999, ICJ Reports 1045 (1999), at 1060). And in the case concerning the *Dispute Regarding Navigational and Related Rights*, the International Court of Justice interpreted a term employed in a treaty concluded

in 1858 in accordance with its current meaning and not with the meaning the term had at the time that the treaty was concluded. In this case, the question before the International Court of Justice was whether the term “comercio”, as employed in a treaty concluded by Costa Rica and Nicaragua in 1858, should be interpreted as referring exclusively to commerce of goods or could be deemed to include services providing the transport of persons. The International Court of Justice decided that, once “comercio” was a generic term, used in a treaty entered into for an unlimited duration, it had to be understood in the light of the meaning of the term existing at the time of the application of the treaty. According to the decision:

“It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties’ common intention, which is, by definition, contemporaneous with the treaty’s conclusion. That may lead a court seised of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties’ common intention. The Court has so proceeded in certain cases requiring it to interpret a term whose meaning had evolved since the conclusion of the treaty at issue, and in those cases the Court adhered to the original meaning [...].

This does not however signify that, where a term’s meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.

On the one hand, the subsequent practice of the parties, within the meaning of Article 31 (3)(b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties’ common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.” (Judgment of July 13, 2009, ICJ Reports 213 (2009), at 242)

Referring to the *Aegean Sea Continental Shelf* case, the International Court of Justice noted that the decision given in that case “is founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is ‘of continuing duration’, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning” (*Dispute Regarding Navigational and Related Rights*, at 243. See also *Pulp Mills on the River Uruguay*, Judgment of April 20, 2010, ICJ Reports 14 (2010), at 83.)

The practice of the International Court of Justice allows the conclusion that generic terms employed in investment treaties must be interpreted in accordance with their current meaning, existing at the time of the application of treaty. But whether a term is employed as a generic term will be contingent upon the wording of each investment treaty.

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