The Neglect and Misapplication of International Rules on Treaty Interpretation in Investment Treaty Arbitrations

The interpretation methods of adjudicators in investment treaty arbitration have attracted much less attention than their conclusions and application of treaty terms to facts in specific disputes. A recent study of UNCTAD on the MFN clause, for example, quotes Article 31 of the Vienna Convention on the Law of Treaties 1969 (VCLT) and emphasizes that the MFN clause “has to be interpreted in the light of general principles of treaty interpretation.” However, it does not discuss the application of international rules on treaty interpretation in the reviewed arbitral awards. Another research on treaty interpretation in investor-state arbitration briefly examines the VCLT rules but does not develop its observation that “[r]eference to the Vienna Convention has become a ritual step before proceeding in ways which may not be congruent with it.”

Only a few researchers have discussed the employment of the means of interpretation by arbitral tribunals, compared to the rich and ever-growing literature on other issues related to international investment law. Schreuer describes the arbitral adoption of such interpretive tools and approaches as the treaty object and purpose, restrictive and effective interpretation, special principles of treaty interpretation, travaux preparatoires, and previous decisions. Another scholar focuses on the role of customary law in interpreting investment treaties.

Faucauld studies the interpretation methods of 98 decisions in 72 ICSID cases in the period between 1 January 1998 and 31 December 2006.
His quantitative examination covers a wide range of issues: the arbitral approaches to customary international law and general principles of law, the choice of objective, subjective, or teleological approaches, restrictive or effective interpretation, the arbitral use of the context, object and purpose, agreements between the parties to the treaty, case law, practice of states and international organizations, preparatory work, legal doctrine and reasonableness. He points out the high number of decisions that resorted to legal doctrine, various forms of case law, and state practice, and the relatively low number of cases that used the context, treaty object and purpose, preparatory work, agreement between parties to treaties, and general principles of law. The author concludes that ICSID tribunals are “dispute-oriented,” rather than “legislator-oriented,” and “tend to follow an approach based in a common law, rather than a civil law, tradition when addressing interpretive issues.”

Romesh Weeramantry evaluates the contribution of international investment arbitrations to the application of international rules on treaty interpretation. The author reviews the arbitral adoption of interpretive tools provided in international law in 258 publicly available awards rendered from 1990 to the end of June 2011. He concludes that the application of the VCLT interpretation rules in these arbitrations “have made a substantial contribution to the international law of treaty interpretation.”

Also empirically investigating arbitral decisions, this book, however, provides a critical review of the methodologies that arbitral tribunals have employed to interpret investment treaties. The statistical results presented in the book, for instance, questioned the accuracy of such general assessment in previous studies as “[t]ribunals almost invariably start by invoking Article 31 of the Vienna Convention on the Law of Treaties (VCLT) when interpreting treaties.” This chapter proves an obvious but never discovered fact: arbitral tribunals have neglected or misapplied the international rules on treaty interpretation.

Chapter 2 analyzes all the published arbitral decisions, including both jurisdictional decisions and final awards, as of 31 December 2012, to achieve a

164 Ibid 357.
165 Ibid.
168 Ibid 216.
169 Christoph Schreuer, supra note 29, 129.