J. Romesh Weeramantry


Treaty interpretation in investment arbitration is governed by international law. It is the case in international law that, subject to peremptory norms, the autonomy of the will of the state is supreme. Indeed, as one of the last century’s leading publicists and authorities on treaty interpretation once put it, the universe of treaties is one in which “la volonté des États est maîtresse souveraine.” In keeping with this approach, Weeramantry in his impressive book on treaty interpretation in investment arbitration takes as his starting point Article 42(1) of the 1965 Convention for the Settlement of Investment Disputes between States and Nationals of Other States (*ICSID Convention*). Article 42(1) provides that: “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.” In the absence of such expressions of the autonomy of the will of the states at issue, however, “the Tribunal shall apply ... such rules of international law as may be applicable.” The application by foreign investment arbitration tribunals of these particular rules of general international law, codified in Articles 31–33 of the Vienna Convention on the Law of Treaties (*VCLT*), is the subject of Weeramantry’s book. Very sensibly, Weeramantry takes the gold standard of Articles 31–33 *VCLT* seriously and bases his account of the *specialist* practice of treaty interpretation within investment arbitration on this *generalist* framework. Weeramantry has a very clear and informed understanding of these rules and explicates them extremely well on the background of meticulous research and a wealth of sources.

In setting out the Vienna rules, Weeramantry skillfully makes the point that what is often called the “textual approach” to treaty interpretation is in fact not an alternative to, but rather an expression of, what is often called the “intentions approach” (pp. 43–44). Some authors have, perhaps inspired by Sir Gerald Fitzmaurice’s 1957 article on the topic, seen treaty interpretation as being a choice between two or three possible approaches—the textual

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2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.
approach, the intentions approach, and (often added only as an afterthought) the teleological approach. It may be that Fitzmaurice’s tripartite distinction was meant to relate to the emphasis that one placed on particular means of interpretation. Nonetheless, leading writers have seen treaty interpretation as being a choice between these three approaches, with the Vienna Convention opting, to their mind, for the textual approach, to the detriment of the two other approaches.\textsuperscript{5}

This was not the view of the International Law Commission, and it thus was \textit{not} the approach taken in the Vienna Convention Articles 31–33, unanimously adopted at the Hofburg Palace at Vienna. Koskenniemi has explained this with admirable clarity:

\begin{quote}
Article 31 of the Vienna Convention is of the nature of a compromise: it refers to virtually all thinkable interpretative methods.\ldots\ The text and the context—together with good faith—shall be decisive. However, this is so, as Waldock (Third Report on the Law of Treaties) points out, because text is the primary evidence of what the parties had subjectively intended, \textit{YILC} 1964/II p. 56. The justification of the (objective) textual approach is (subjective) consensual.\textsuperscript{6}
\end{quote}

This has also been explained by those who took part in the drafting of the Vienna Convention.\textsuperscript{7} Thus Yasseen, in his Hague Lectures on the interpretation of treaties under the rules of the Vienna Convention, stated that “[p]rendre le texte comme point de départ, ce n’est donc pas minimiser l’importance de l’intention des parties, mais procéder à sa découverte, par l’examen de l’instrument par lequel elle s’est exprimée.”\textsuperscript{8} According to another of the leading originators of the Vienna rules, Reuter, the purpose of treaty interpretation is “to ascertain the intention of the parties by reference to the form, the final clauses and especially the object and purpose of the treaty”; in addition to having been manifested, the intentions “must concur to form the object and purpose of the agreement, both


\textsuperscript{6} Martti Koskenniemi, \textit{From Apology to Utopia} (2nd edn., CUP 2005) 334.
