Celebrating 50 years of the VCLT: the legal reasoning of investment arbitration awards: a decision-making perspective on interpretation

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Legal Reasoning: Interpreting and Applying the Law[1)]

When analysing the process of legal decision-making what might first come to mind is the dichotomy between the interpretation and the application of the law. These terms, in some circumstances, may be employed interchangeably due to the strong link that exists between them. Indeed, jurisdictional clauses in investment treaties refer cumulatively to "disputes over the interpretation or application of the treaty" giving the impression of creating a "portmanteau category" [Franklin Berman, 'International Treaties and British Statutes' (2005) 26 StatuteLRev 1, 10.] that may not require the competent tribunal to distinguish the one from the other. However, this distinction is important as it creates two linked but functionally separate spheres.

Interpretation of legal norms is a hermeneutic process through which the meaning of a norm is determined. The concept of "application" can itself be divided into two categories*: stricto sensu* application (application in its narrow context), and *lato sensu* application (application in a broader context which contains both the process of interpretation and the process of application *stricto sensu*). As put by Judge Ehrilich, interpretation is the course of "determining the meaning of a rule" whereas application *stricto sensu* is the method of "determining the consequences which the rule attaches to the occurrence of a given fact". [C*ase concerning the Factory at*

Chorzow, PCIJ, Claim for indemnity-Jurisdiction, (Dissenting opinion of judge Ehrilich) 39.]

In the investment arbitration scene, Sir Franklin Berman, in his dissenting opinion in the ***Lucchetti*** annulment phase, makes reference to the Tribunal's twofold task:

"[…] interpreting the BIT and then applying it; […] whereas treaty interpretation can often be a detached exercise, it is virtually inevitable that treaty application will entail to some extent an assessment of the facts of the particular case and their correlation with the legal rights and obligations in play". (para 15)

However, this traditional distinction between the interpretation and application of the law is not always a straightforward task in practice. In some circumstances, the interpretation may be formed based on how this interpretation will apply to the facts. In other clear-cut cases, the treaty provisions are applied to the facts directly without the need for the determination of the meaning of the provision.

Nevertheless, leaving aside the practical difficulties, the dyadic approach to legal decision-making which marks the separation between the process of interpreting and applying the law can become crucial. As an example, the quality of reasoning may vary based on whether the arbitrators make reference only to the process of applying the law to the facts or whether there is also reference to the legal interpretation process.

The Vienna Convention-Based Interpretative Arguments

The question that arises at this point, is what tools investment arbitrators use in order to interpret the law. The **Vienna Convention on the Law of Treaties** (VCLT) constitutes the main point of reference when decision-makers interpret international treaties. Article 31(1) VCLT provides that international treaties must 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". Treaty interpretation in this context includes the following approaches: the textual approach (ordinary-plain meaning of the text), the contextual approach, the teleological approach, the relevant rules of international law applicable to the parties, and the negotiating history. This process may be followed in practice step-by-step but there is also the view that considers the application of Article 31 as one combined rule rather than a number of directions to be applied in a specific order.

International courts and tribunals resort to the VCLT interpretive principles for diverse reasons. Apart from consisting a source of guidance as they provide the tools for interpreting treaties, they may also serve as a technique that enables the decision-maker to enhance the credibility of the award's reasoning entrenching the legal interpretation process within the long tradition of public international law. These well recognised and universally-adopted rules of interpretation confer to investment arbitration tribunals a place in the long interpretive tradition of international courts and tribunals.

The Precedent-Based Interpretive Arguments

However, the VCLT-based arguments are better described as a means to an end rather than as the end itself. Even though there is no formal doctrine of precedent, practice shows that arbitrators also refer to relevant case law when interpreting the law. Since there is no set rule regarding the form precedent has in investment arbitration, the practice of citing prior awards and decisions by arbitrators has been connected to the civil law doctrine of *'jurisprudence constante'.* In this context, prior decisions have a persuasive authority, meaning that arbitrators can follow prior awards if they are convinced by the strength of the award's reasoning. Persuasive

authority has the potential to persuade without constraining the decision making power of the adjudicator.

Despite Article 53 **ICSID Convention** clearly stating that the award shall be binding only between the parties, arbitration tribunals have relied on prior awards when examining issues such as the clause on Fair and Equitable Treatment (FET) or the obligation of the States to compensate damages. It has become common practice not only for governments and private investors to refer to prior investment awards that figure to favour them, but also for investment tribunals to rely upon awards of other tribunals when interpreting similar provisions of investment treaties.

Investment arbitration tribunals refer to previous awards in order to form their own legal reasoning through following a principle well established in the jurisprudence, to fill in gaps in the treaty as well as to draw analogies and ***a contrario arguments***. A prominent example of the reasons behind a tribunal's reference to case-law can be found in the ***AES Corporation v. The Argentine Republic*** decision on jurisdiction. The Tribunal stated that

"it may consider decisions on jurisdiction dealing with the same or very similar issues [...] in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution". (para 30)

The Tribunal continued by mentioning that another reason for considering precedents, even when the cases had been seised on a basis of another BIT, is that a tribunal "has set a point of law which, in essence, is or will be met in other cases whatever the specificities of each dispute may be". On this basis precedents can be considered as a matter of "comparison" and "inspiration".

Similarly, the ***Enron*** tribunal focused on the "correctness" of the ICSID decisions as a justification for referring to them despite not being "a primary source of rules":

*"The citations of and references to those decisions respond to the fact that the Tribunal in examining the claim and arguments of this case under international law, believes that in essence the conclusions and reasons of those decisions are correct". *(para 40)*

Likewise the ***Chevron*** Tribunal held that it will consider arbitral decisions and the parties' arguments based on these decisions "if they shed any useful light on the issues that arise for decision in this case".

Tribunals refer not only to investment arbitration case law but also to national and international jurisprudence. Equally, legal issues arising in comparative public law regimes such as administrative, constitutional, and international, aim at introducing solutions for arbitral decision-making in investment arbitration whenever there is a gap or need for guidance. Proportionality, for example, is a principle integrated and developed in investment arbitration through the dialogue with international and domestic legal orders and judicial bodies. In the ***Técnicas Medioambientales Tecmed SA*** case, the Tribunal relied on the jurisprudence from the European Court of Human Rights, referring to Article 1 of Protocol 1 in order to draw guidance for the use of the proportionality analysis in determining whether a legitimate regulation turned in fact into indirect expropriation.

The human rights law discipline, as well as any chosen interlocutor, may be a useful source of guidance but what should be kept in mind is that the nature of the rights accorded by each discipline is different. It is still disputable, for example, whether investment treaties accord *erga omnes* substantive rights such as human rights treaties do. Moreover, the investment treaties constitute a type of political risk management tool for the investor and this function should also be taken into account. Another caveat to this cross-referencing practice is that reference to "foreign" jurisprudence should avoid the danger of "faux amis" by selecting carefully the points of reference based on the submissions of the parties and the relevance of the case law.

A Culture of Arbitral Decision-Making

Whether it involves the use of the traditional VCLT interpretive principles or a combination of convention-based principles with cross-citation references, understanding the interpretation practices within a specific legal community is a first step towards the knowledge of the law. Going a step further, the process arbitrators follow to interpret the law becomes not only an issue of legal knowledge but also curves the path towards identifying the culture of arbitral decision making and the way this culture has been shaped through the practice of arbitral tribunals in order to respond to the needs of the arbitration community.