

Circumstantial Indicia in Treaty Interpretation

Sanum Investments Ltd v. The Laos People's Democratic Republic

Background

- ▶ 1987: The Joint Declaration on the Question of Macau *
- ▶ 1993: China-Laos Investment Treaty signed and entered into force.
 - ▶ At that time, Macau was under Portuguese Sovereignty
- ▶ 1999: * the Declaration provided for Portuguese administration to officially end on 20 December, 1999. Macau reverted to Chinese Sovereignty, as an special administrative region of Macau
- ▶ 12th August 2012: A Macanese investor in Laos claimed a violation of the China-Laos investment treaty.

Treaty Interpretation

- ▶ The International Law Rule of “Moving Treaty Frontiers” (MTF). *
- ▶ Vienna Convention of the Law of Treaties (VCLT), Article 29
 - ▶ *A treaty applies to the entire territory of a Contracting State unless a different intention appears from the treaty or is otherwise established.*

MTF - Moving Treaty Frontiers

- ▶ The MTF rule automatically transfers a territory from the treaty regime of its predecessor sovereign to that of its successor sovereign.
- ▶ In this case, MTF rule means that automatically a transferred territory (Macau) to a new regime (China) will be under its sovereignty, therefore, its treaty regime.
- ▶ And thus, the China-Laos investment treaty is applicable to Macau.

Art. 29 Exception -- Different intention appears

- ▶ Express wording: The Context of the China-Laos Investment Treaty is silent on this issue.

Article 29 Exception - otherwise established

- ▶ Circumstantial Indicia in Treaty Interpretation:
 - ▶ Circumstantial Evidence of Parties Intent
- 1) 1987 The China-Portugal Joint Declaration on the question of Macau, provided in Clause VII that “the application to the Macau Special Administrative Region of international agreements to which the People’s Republic of China is a party shall be decided by the Central People’s Government in accordance with the circumstances and needs of the Macau Special Administrative Region and after seeking the views of the Macau Special Administrative Region Government.
- 2) The Chinese Embassy in Vientiane issued a confirmation letter, stating that the China-Laos investment treaty does not apply to Macau.

The Critical Date Doctrine

- ▶ Evidence before Critical Date: important
- ▶ Evidence after Critical Date: somehow self-serving.
- ▶ Critical Date: 12 August, 2012 - the date of the Notice of Arbitration
- ▶ Pre-Critical Date: the 1987 Joint Declaration
- ▶ Post-Critical Date: Chinese Embassy's Confirmation Letter.
- ▶ The conventional international practice is more likely to admit the diplomatic letters as evidence of a "subsequent agreement," but accord them a lower probative value.

Result

- ▶ Arbitral Tribunal: The treaty applies to Macau automatically under MTF.
- ▶ Court: the diplomatic letter displaced the MTF rule.
- ▶ Court of Appeal: Affirmed.

what could have been argued

- Article 31 of Vienna Convention on the Law of Treaties (VCLT)

- ▶ Article 31 VCLT: the canonical general rule of interpretation of treaties
 - ▶ Article 31 (1) & (2) identify the considerations that guide the interpretation of a treaty's text and context respectively.
 - ▶ Article 31 (3) directs treaty interpreters to take into account:
 - ▶ Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions
 - ▶ Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation
 - ▶ Any relevant rules of international law applicable in the relations between the parties.

ACQUIESCENCE ARGUMENT

- ▶ According to Article 31(3)(b) “Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”
- ▶ China and Laos arguably acquiesced in the likelihood of Macanese investors invoking the treaty after Macau’s handover
- ▶ Acquiescence may create an estoppel,
 - ▶ Sanum suffers prejudice
 - ▶ In the form of frustration of its expectation to receive the treaty protection
 - ▶ China and Laos may be precluded from objecting to an interpretation of the treaty in which they had acquiesced