EDITORIAL COMMENT

INTERPRETING TREATIES FOR THE BENEFIT OF THIRD PARTIES: THE "*SALVORS*' DOCTRINE" AND THE USE OF LEGISLATIVE HISTORY IN INVESTMENT TREATIES

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In confrontations in particular disputes and especially in cases referred for third-party decision, it is common for one side to seek to overcome the prima facie "ordinary meaning" of a text by recourse to various supplementary means of interpretation. Because international decision processes are nonjury, the common law's elaborate code regulating admissibility of evidence has no analogue in international law; international courts and tribunals tend to allow the introduction of almost any material adduced by the parties but only occasionally to rely on it in their decision. Of late, however, there seems to be an increasing tendency for international investment tribunals to admit and rely on *travaux préparatoires* in their own treaty interpretations. The ultimate ex cathedra endorsement of this trend by an especially distinguished group of jurists, whose imprimatur all but ensures its installation as a rule of international law, appears in a recent decision of an ad hoc committee operating under Article 52 of the ICSID Convention.[1] In *Malaysian Historical Salvors v. Government of Malaysia*, which was decided on April 16, 2009, the ad hoc committee said, "In any event, courts and tribunals interpreting treaties regularly review the *travaux préparatoires* whenever they are brought to their attention; it is mythological to pretend that they do so only when they first conclude that the term requiring interpretation is ambiguous or obscure."[2]

We do not contest the accuracy of the ad hoc committee's summary of trends in what we may call, for convenience, the "*Salvors'* doctrine," that is, the automatic admissibility and review of any *travaux préparatoires* adduced by one or the other of the parties, without requiring a prior assertion, let alone decision, confirming the obscurity of the text or an ineluctably absurd reading resulting from the application of the method prescribed in Article 31 of the Vienna Convention on the Law of Treaties.[3] Nor do we question that *travaux* are being consulted only for the purpose of confirming the reasonable interpretation that the application of

[1] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 UST 1270, 575 UNTS 159.

[2] Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Application for Annulment, para. 57 (Apr. 16, 2009), *at* http://www.worldbank.org/icsid/.

[3] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331 [hereinafter Vienna Convention].

Article 31 has produced.[4] There is, indeed, considerable evidence of court and tribunal practice supporting the conclusion that the carefully bounded and contingent role for *travaux préparatoires* prescribed in the Convention is increasingly honored in the breach in international investment awards and decisions, the most prolific source of jurisprudence in contemporary international law. Once the Article 32 material has been admitted, a tribunal finds itself under some pressure to address it in its decision, lest it be criticized for not having dealt with every matter before it.[5] Each subsequent application serves to reinforce the per se relevance and applicability of preparatory material, successively reaffirming the *Salvors'* doctrine.

We also do not suggest that *travaux préparatoires* may or should always be ignored; that, too, would be inconsistent with the Vienna Convention, though we will argue that the belief that answers to textual obscurity or clear indicators of a proper interpretation can be found in *travaux* is, itself, rather fanciful. We do submit, however, (1) that Article 31 with its conditions for application is the default position of international law and policy and continues to be a cogent method for determining the shared normative universe of the parties to an agreement; and (2) that, no matter how general jurisprudence may have evolved with respect to the use of *travaux*, in treaties for the benefit of third parties[6]—the classic *pacta in favorem tertii*—additional compelling reasons support urging that resort to *travaux préparatoires* should hew faithfully to the very limited contingencies of Vienna Convention Article 32 and not to the *Salvors'* doctrine. Wholly apart from what the Convention requires, we suggest that reasons of economy, fairness, equality of arms, and the stability of expectation, the last a principal objective of investment law, compel such fidelity with respect to international investment treaties.

I.

However much care parties may take to express their commitments with precision and to anticipate the various factual scenarios to which those commitments will relate, the predictability of the application of those commitments depends upon two things: first, upon a commonly accepted canon of interpretation and, second, upon the faithful application of that canon by those called upon to construe the commitments in question, whether they be the parties in the course of performance or decision makers resolving a dispute about that performance. Just as agreements facilitate cooperative behavior by stabilizing expectations about reciprocal rights and duties, so rules of interpretation of those agreements are designed to ensure that those stabilized expectations are respected. The foundational principle, *pacta sunt servanda*, remains unachievable if it is not accompanied by and implemented through agreed modes of interpretation.

International law's canon for interpreting international agreements is codified in the Vienna Convention on the Law of Treaties. Its provisions have become something of a *clause de style*

[4] See, in this regard, Stephen M. Schwebel, *May Preparatory Work Be Used to Correct Rather Than Confirm the "Clear" Meaning of a Treaty Provision? in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 541 (Jerzy Makarczyk ed., 1996).

[5] It appears that the availability and accessibility of *travaux préparatoires*, whenever possible, has been the main encouragement for litigants to cite and quote in support of their positions and for the tribunals to respond to them.

[6] The tribunal in *Amco v. Indonesia* held that "to protect investments is to protect the general interest of development and of developing countries." Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, para. 23 (Sept. 25, 1983), *reprinted in* 23 ILM 351, 369 (1984), 1 ICSID REP. 389, 400 (1993).

in international judgments and arbitral awards: whether routinely and briefly referred to or solemnly reproduced verbatim, they are not always systematically applied. But a failure to apply the rules of interpretation properly may distort the resulting elucidation of the agreement made by the parties and do them an injustice by retroactively changing the legal regime under which they had arranged and managed their affairs.

The Vienna Convention has two major provisions on interpretation. The first, Article 31, bears the title or chapeau "General rule of interpretation"; the second, Article 32, bears the title or chapeau "Supplementary means of interpretation." It is clear from the respective chapeaus and the mandatory character of the word "rule" in Article 31, as opposed to the instrumental character of the word "means" in Article 32, that Article 31 was intended to be dominant, while Article 32 was to be auxiliary or supplemental to it.

Even though Article 31 is a long and complex provision, its chapeau uses the singular "rule," rather than the plural "rules," which imports that its contents are both mandatory *and* integrated. The provision provides that a treaty "shall 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 [the treaty's] object and purpose."[7] The method prescribed here is quite clear and can be summarized in tabular fashion:

(1) A good faith interpretation is to be made of the *ordinary* meaning of the terms of that part of the text in dispute, unless, as the fourth paragraph of Article 31 adds, "it is established" that the parties intended to give a term a "special meaning." Note that the default presumption is "ordinary meaning."

(2) The *universe* of ordinary meanings to which the interpreter is instructed to repair, its "context," is the *text* of the rest of the treaty; other agreements of *all* of the parties relating to the treaty under construction; and "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."[8] The concept of "context" here requires construction of a particular part of a treaty with reference to the rest of that treaty and precludes focusing only on a single word or phrase; that type of refraction would, quite literally, take the interpretive exercise "out of context."[9] The point of emphasis is that for the interpreter who is governed by the canons of the Vienna Convention, context does not have the wide-ranging meaning it has for scholars; for diligent scholars, for whom the world is a vast manifold of interrelated events, everything is context.

(3) Object and purpose are to be used to illuminate the interpretation, but it is the object and purpose as expressed *in the treaty* and not the extratextual subjectivities of the parties, whatever the word "subjectivities" may mean when we deal with complex social creations such as states.

[7] Vienna Convention, *supra* note 3, Art. 31(1).

[8] *Id.*, Art. 31(2).

[9] In its commentary to this provision, the International Law Commission stated:

> Once it is established—and on this point the Commission was unanimous—that the starting point of interpretation is the meaning of the text, logic indicates that 'the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' should be the first element to be mentioned.

Report of the International Law Commission on the Work of Its Eighteenth Session, [1966] 2 Y.B. Int'l L. Comm'n 173, 220, para. 9, UN GAOR, 21st Sess., Supp. No. 9, UN Doc. A/6309/Rev.1 (1966).

(4) Interpreters must take account of any subsequent agreement between the parties regarding interpretation or application of the treaty's provisions.

(5) Interpreters must also take account of any subsequent practice of the parties with respect to the treaty that is indicative of their agreed interpretation of it.

(6) Interpreters must take account of any relevant rule of international law applicable in the relations between the parties.

The Vienna Convention's rule in Article 31 thus focuses, through several different lenses, on the text of the instrument and events that follow rather than precede it, as the critical grist for the interpretive exercise. By the application of the integrated modalities set out in Article 31, the disputed part of the text is to be subjected to a rigorous examination in the context of the entire treaty; even the telos of the instrument is derived from the text.

By contrast to the mandatory methodology of Article 31, the language of Article 32 is facultative and contingent and looks largely to pre-text rather than post-text events. It *permits* recourse to "supplementary means of interpretation, including the preparatory work of the treaty," the *travaux préparatoires*, "and the circumstances of its conclusion" to determine a provision's meaning. But this recourse may be exercised only where Article 31's application (1) "leaves the meaning ambiguous or obscure"; or (2) "leads to a result which is manifestly absurd or unreasonable"; or (3) is undertaken "to confirm the meaning resulting from the application of article 31."[10] Before the *Salvors'* doctrine was enunciated, the International Court of Justice confirmed what we take to be the essential methodology in concise terms: "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur."[11] As an implied corollary to this rule, the Court stated that "[w]here such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it."[12]

Recourse to *travaux* under the third contingency is supposed to be only for the purpose of *confirming* the meaning resulting from the application of Article 31; it is not for the purpose of *displacing* that meaning. Article 32 is thus not only supplementary to Article 31, but also, by contrast to Article 31, essentially contingent on the failure of the application of that provision's methodology, as the Court put it. Decision makers seized with a dispute are first obliged to construe the ordinary meaning of the text by means of the application of all of the steps of Article 31[13] and to resort to supplementary means only if one of the contingencies specified in Article 32 is met. In sum, the methodology of Article 32 kicks in when the integrated method of Article 31 fails, producing an absurd result, or a stubbornly unclear result, and so on.

[10] Vienna Convention, *supra* note 3, Art. 32.

[11] Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1991 ICJ REP. 53, 69, para. 48 (Nov. 12) (quoting Competence of Assembly Regarding Admission to the United Nations, Advisory Opinion, 1950 ICJ REP. 4, 8 (Mar. 3)).

[12] *Id.* at 69–70 (quoting South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, 1962 ICJ REP. 319, 336 (Dec. 21)).

[13] *See* Methanex Corp. v. United States, First Partial Award on Jurisdiction and Admissibility, paras. 19–21 (NAFTA Ch. 11 Arb. Trib. Aug. 7, 2002), *at* http://www.state.gov/s/l/c5818.htm.

As part of its "General rule," Article 31 imposes on interpreters an obligation of good faith. Considering that every power in international law is to be executed in good faith, its reiteration here seems to reflect the appreciation of the perils of anything less than good faith in the performance of interpretation. Whatever the reason for its inclusion, surely the obligation of good faith follows the interpreter into Article 32. The point is especially relevant to the third of the contingencies for bringing Article 32 into operation. Indeed, if the ordinary meaning is clear, one may wonder about the need to refer to the *travaux* for confirming it. If the purpose is "to confirm" the meaning of the text that emerges from an application of the methods prescribed by Article 31, it is not clear what happens if that "ordinary meaning," which is neither ambiguous, obscure, nor absurd, is disconfirmed or put into doubt.[14] Does the ordinary meaning then yield to the meaning emerging from the *travaux*? If the purpose of resorting to *travaux préparatoires* is not to confirm a perfectly reasonable meaning emerging from the application of Article 31, then should not the text that was subjected to an application of Article 31 first have to prove obdurately ambiguous, obscure, or absurd before the interpreter may resort to Article 32? Certainly, it would be bad faith to pretend that a text is ambiguous or obscure so as to open the door to *travaux* and then to rummage about for something to support a litigating position, when the application of the canons of Article 31 would produce an unambiguous interpretation that is neither absurd nor unreasonable.

One can discern in the interrelated and, in part, contingent components of the Vienna Convention's canon both a logic and an inherent morality. The parties have expressed their reciprocal commitment in a set of words. Those words are to be applied in the light of the entire instrument in which they appear; that instrument also reveals the shared objects and purposes of the parties. Only when this exercise fails does one look to events anterior to the redaction of the text. If the exercise did not fail, looking to anterior events essentially creates an alternative text that was *not* accepted by the parties. Of course, application of the Convention's canon does not necessarily produce "the" answer. Different plausible meanings may present themselves and call for the exercise of judgment by the applier; application, after all, is judgment. What matters is that the canon both demarcates the material that the applier exercising judgment should consult and establishes the sequence in which that material is to be consulted.

We emphasize that this is a text-based but not a "textualist" method, in the sense that its objective is less one of determining what went into the process of producing the text and more one of identifying the shared normative universe of the parties. It assumes that the most efficient method for getting at this is by focusing on the text and what transpired after its redaction rather than by treating the text as contingent and focusing on what occurred before its acceptance. Ironically, a system that looks, from the outset, at what transpired before text redaction is actually more textualistic, in the sense of totemizing the text rather than taking it as the means for identifying the shared normative universe of the parties.

There are especially compelling reasons for a primary emphasis on a text-based methodology as the proper international legal mode of treaty interpretation. Where two people make a contract, events anterior to their agreement can plausibly be referred to in determining their intent.

[14] Every legal creation inevitably incorporates the legal-cultural assumptions of its time. In our view, Article 32 of the Vienna Convention reflects some treaty drafting and implementation assumptions that no longer obtain. With the increasing number of treaties that have been drafted in recent decades, and, of them, the large number assigning actionable rights to third parties that did not participate in drafting the treaties, the utility of *travaux préparatoires* may be declining. We propose to take this question up in a later piece.

But when a shifting cast of people representing vast organizations with many different internal and often conflicting interests makes an agreement and when other, equally complex organizations that did not participate in the making of the agreement subsequently adhere to it, the quest for intentions is utterly different. Can one then say that events anterior to the redaction of the text of the agreement are indicative of the normative expectations of the latecomers? When the agreement is designed to induce reliance and good faith investment of values by third parties that took no part in its negotiation, for example in bilateral investment treaties (BITs), is it appropriate to introduce "intentions" of drafters that are not manifest in the agreement itself? The very notion of the "subjective" views of a state involves a personification of a complex social organization to a degree that would make Hegel himself blush; even if the personified state is reduced to a key person, decision makers are always changing. In multilateral treaties, the quest for the "shared" subjectivities of the many states that are involved in any place other than the text of the agreement is a pursuit of the *ignis fatuus*.

II.

Many proponents of unrestricted resort to *travaux préparatoires* assume, curiously, that while the authoritative text may be ambiguous, hence justifying resort to *travaux*, somewhere in the ocean of delegate statements and proposals that have been recorded and from which the authoritative text emerged, one can find not only clear evidence but also the *real* intention of the parties. This is an odd conceit, since most parts of *travaux*, with the possible exception of an agreed commentary, are composed of statements or proposals of only one of the parties or one of their representatives; by contrast, the authoritative text was composed with the participation of all the parties and they, and then their internal ratifiers, explicitly assented to it. T. E. Lawrence, from his experience in bureaucracy, mocked the belief in a precise correlation between this genre of documents and what actually transpired:

> The documents are liars. No man ever yet tried to write down the entire truth of any action in which he has been engaged. All narrative is parti pris. And to prefer an ancient written statement to the guiding of your instinct through the maze of related facts, is to encounter either banality or unreadableness. We know too much, and use too little knowledge.[15]

Yet the assumption that "there's gold in them thar hills" of preparatory material has proven curiously durable. In the drafting of international instruments, every jot and tittle of the texts is worked over obsessively, down to the punctuation itself, which has sometimes proved decisive. Negotiations, on the other hand, involve statements of position that may ultimately prove unsuccessful; statements that are made to set the stage for the next strategic move in the negotiations; statements that are issued just to get them into the record, sometimes only for a domestic constituency, sometimes to placate other departments or factions within governments; trial balloons that are floated to test the reactions of other participants; "non-papers" that purport to clarify issues; heated discussions of matters that are abandoned or superseded; and so on. And when governments are involved, the cast of characters who actually make these statements shifts over the years. It is no great feat to cherry-pick through the records of such extended negotiations, often involving hundreds if not thousands of people over many years, in search of a

[15] Letter from T. E. Lawrence to Lionel Curtis (Dec. 22, 1927), *in* THE LETTERS OF T. E. LAWRENCE 559 (David Garnett ed., 1938). We thank Professor Stephen Tabachnick for helping us find this letter.

floor speech by a delegate or a paragraph in an interim summation, or a statement by one government department to another, that supports a gloss against what is manifest in the text of the treaty.

III.

As regards the majority of instances in which international courts and tribunals have admitted or resorted to *travaux*, the committee in *Malaysian Salvors*, as we said, was correct: they have not done so because of the relevant text's ambiguity or obscurity, or the absurdity of its ordinary meaning. Rather, *travaux* were introduced by one of the parties, in effect, to overcome the ordinary meaning of the relevant text. As for the courts and tribunals on the receiving end of data that might otherwise not be available to them, *travaux* serve, in most cases, not to clarify an ambiguous or obscure text, but to generate alternative texts to the treaty, each enjoying a degree of authority relative to the ratified text, and each, thanks to its automatic admissibility, enabling decision makers virtually to choose between them or even to "mix and match." Both the "freedom" that the development neatly encapsulated in the *Salvors'* doctrine affords to decision makers and the uncertainty it brings to those who rely on treaties are extended by the uncertainty of the boundaries of *travaux*.

Now, insofar as one believes that the function of international tribunals is to "settle" disputes between parties or to engage in "the progressive development of international law," the greater latitude allowed by the generation of alternative authoritative texts constructed through selecting and assembling bits of *travaux,* the consequence of the unqualified admission of *travaux,* is all to the good. (We use the plural "texts" advisedly, as more than one alternative text may be constructed from the materials in the legislative history.) But it should be appreciated that this latitude imports a transformation of international adjudication and arbitration into something many potential litigants may not wish and they may prove less willing to resort to third-party decision on these terms.

There is a moral issue as well. At the time of adoption of a treaty, states express consent to the treaty and not the *travaux*. States and others, including the investors, rely on the text of the treaty and not the *travaux* with regard to their rights and obligations. Giving undue legal weight to the *travaux* as an automatic counterbalance to a treaty with the hope of undermining the treaty will change the rules of the game. If this trend is confirmed, it could well affect the process of negotiating treaties: the states concerned will read into the records as many conflicting caveats as they can possibly imagine just for their potential use in a hypothetical future conflict.

IV.

Malaysian Salvors was an investment case, involving construction of a BIT and the ICSID Convention. In different ways, both are species of *pacta in favorem tertii.* In the context of investment, it is reasonable to expect (indeed, to demand) of investors that they will diligently examine the treaties that govern their investment so as to apprise themselves in advance of the scope of their rights and obligations. But is it reasonable also to expect them to check all the other documents that may be considered as part of the *travaux* of that treaty? Since investors are making investments with the hope of not becoming entangled in disputes, can they be depended on to review the *travaux* of the governing treaty or treaties and check them against

all possible future dispute scenarios and their effect on interpreting any such instruments? In the absence of publicity about such *travaux*, their existence may not even be widely known. Moreover, some *travaux* may not be publicly available or if they are available, they may not be easily accessible.[16] In the case of bilateral investment treaties, even if government bureaucracies maintained copies of the negotiating records, access to them may require special permission. As the number of treaties increases, it becomes ever more burdensome to expect the investors to be in constant search of treaty *travaux,* and then, too, they will have no certainty on how a tribunal may view the *travaux* in interpreting the treaty in a possible future dispute. All this is particularly problematic for small investors that, because of their limited financial resources, will not be in a position to obtain expert legal opinions on such a range of matters.

How, then, should an investment tribunal act when it is presented with a claim that the text is obscure or absurd? To cite only one example, *travaux* may be useful when a particular draft was discussed and clearly rejected.[17] But in circumstances of stubborn ambiguity, either intended by the parties because it was the only text on which they could reach consensus or because they had opted for "constructive ambiguity," or not intended by the parties because they inadvertently overlooked an issue, the application not only of "rules of international law" but also of "general principles of law," to which all members—state and nonstate—of the international community are subject, would appear fairer.

When treaties are designed to induce private parties that did not participate in the negotiations to rely upon their terms and to do specific things, fundamental principles of legality argue, even more, for fidelity to a method based on the text and on those post-text events that are available to the parties and are expressive of their agreement. When treaties are designed to influence the behavior of private entities—one thinks of the almost twenty-seven hundred bilateral investment treaties—will they achieve their purpose if those to whom they are directed believe that the rules of interpretation allow textual meanings to be challenged on the basis of internal documents that either are unavailable to them or, in the case of multilateral treaties, difficult to find?

[16] For example, many of the documents circulated at the European Energy Charter Conference leading to the adoption of the Energy Charter Treaty on December 17, 1994, at Lisbon are not publicly available. The documents are held at the ECT headquarters in Brussels. States parties have access to them, but private parties do not. While these documents were circulated to the participating governments, there is no certainty that all the governments kept copies of them for either their own use or that of their own investors.

[17] *See* RICHARD K. GARDINER, TREATY INTERPRETATION 333–34 (2008) (discussing WTO Panel Report, United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, paras. 7.110–.114, WT/DS177/R, WT/DS178/R (adopted May 16, 2001)).