

## THE *TRAVAUX* OF *TRAVAUX*: IS THE VIENNA CONVENTION HOSTILE TO DRAFTING HISTORY?

*By Julian Davis Mortenson\**

It is often asserted that the Vienna Convention on the Law of Treaties (VCLT) relegates drafting history to a rigidly subsidiary role in treaty interpretation. Many commentators go so far as to suggest that the VCLT entrenches a categorical prejudice against *travaux préparatoires* (*travaux*)—the preparatory work of negotiation, discussions, and drafting that produces a final treaty text. Because of this alleged hostility to history as a source of meaning, the conventional wisdom is that when an interpreter thinks a text is fairly clear and produces results that are not manifestly unreasonable or absurd, she ought to give that *prima facie* reading preclusive effect over anything the *travaux* might suggest to the contrary.<sup>1</sup>

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<sup>1</sup> Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331, *available at* [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf). The main provisions on interpretation are Article 31 and 32:

### *Article 31: General rule of interpretation*

1. 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 its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) 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.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

### *Article 32: Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

This conventional wisdom cannot be reconciled with the agreement actually reached in 1969.<sup>2</sup> Far from adopting a doctrinally restrictive view of drafting history, the Vienna Conference sought to secure its place as a regular, central, and indeed crucial component of treaty interpretation. It is true (and likely a source of modern confusion) that Vienna Conference delegates rejected a U.S. proposal to formulate the rules of treaty interpretation as a totality-of-the-circumstances balancing test. But that had nothing to do with hostility to travaux as such, much less with any desire to impose strict threshold requirements on their use. Rather, the delegates were rejecting Myres McDougal's view of treaty interpretation as an *ab initio* reconstruction of whatever wise interpreters might view as good public policy. They objected to the *purpose* for which New Haven School interpreters wanted to use travaux—not to drafting history as a source of meaning *per se*.

To the contrary, the drafters repeatedly reiterated that any serious effort to understand a treaty should rely on a careful and textually grounded resort to travaux, without embarrassment or apology. They themselves leaned heavily on travaux when debating any legal question that turned on the meaning of an existing treaty. And each time a handful of genuinely anti-travaux delegates attempted to restrict the use of drafting history to cases where the text was ambiguous or absurd, those efforts were roundly rejected. To be clear, the VCLT drafters embraced drafting history with full knowledge of its complications. They were intimately familiar with the standard challenges, including the difficulty of deciding which documents to include, the risk that negotiators would abusively insert self-serving statements, the problems of unequal access to the documentary record, and the inscrutability of some historical materials even when approached with diligence and sensitivity. But lengthy and lively consideration of all these problems did not dissuade the drafters from their decision.

The understanding that emerged was of interpretation as a recursive and inelegant process that would spiral in toward the meaning of a treaty, rather than as a rigidly linear algorithm tied to a particular hierarchical sequence. In any seriously contested case, interpreters were expected automatically to assess the historical evidence about the course of discussions, negotiations, and compromises that resulted in the treaty text—in short, the travaux. The modern view that Article 32 relegated travaux to an inferior position is simply wrong. The VCLT drafters were not hostile to travaux. They meant for treaty interpreters to assess drafting history for what it is worth in each case: no more, but certainly no less.

## I. THE USE OF TRAVAUX: THE MODERN VIEW

### *Hostility in Theory*

The VCLT is widely thought to have entrenched a prejudice against the use of travaux. The doctrinal mechanics of this viewpoint are perhaps best summarized by Georges Abi-Saab,

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

<sup>2</sup> This article draws on published sources and unpublished or microfiche archival material, including minutes from meetings of the Institut de droit international, the International Law Commission, the UN General Assembly in both its plenary and Sixth Committee sessions, and the Vienna Conference itself; internal memorandums and other documents circulated at each of those institutions; and proposed drafts and amendments that were submitted throughout the process.

former president of the WTO Appellate Body. As he explained, Articles 31 and 32 form a

rigid sequence of autonomous or discrete steps, each of which has to be explicitly addressed and ‘exhausted’, before moving on to the next one.

. . . The interpreter has to start with the hard core of the operation, which is the *text* to be interpreted (that is, the words and language of the provision); before moving from the text, if need be . . . , but still by way of internal inference (‘internal’ to the instrument bearing the interpreted text), to *context*, which consists of the structure and the other provisions of the instrument (and related instruments), to the ‘*object and purpose*’ of this instrument, if the object and purpose can be fathomed from its provisions, including its preamble where they are frequently expressly stated.

Only if internal inference fails to clarify the point at issue, would the interpreter resort to ‘external inference’ (that is, look ‘outside’ the interpreted instrument), whether the ‘subsequent practice’ of the parties . . . ; or lastly, the preparatory works and circumstances surrounding the conclusion of the treaty . . . .<sup>3</sup>

The “cornerstone of the Vienna Convention” is thus a “requirement that courts refrain from inquiring into the parties’ actual intentions if the provision to be interpreted is clear on its face.”<sup>4</sup>

In this sense, the relationship between travaux and the other elements of treaty interpretation is “characterized by a distinct hierarchy,” under which travaux are not only “subordinate to the general rule” but actively disfavored.<sup>5</sup> Interpreters face “a presumption that materials evidencing such conduct, statements, or lack thereof cannot inform the meaning of the treaty text. It can be rebutted, but the burden of proof is considerable.”<sup>6</sup>

Mechanically, this presumption against travaux is thought to be effectuated by a set of threshold restrictions that relegate drafting history to a “carefully bounded and contingent

<sup>3</sup> Georges Abi-Saab, *The Appellate Body and Treaty Interpretation*, in TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 99, 104–05 (Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris eds., 2010).

<sup>4</sup> Kenneth J. Vandeveld, *Treaty Interpretation from a Negotiator’s Perspective*, 21 VAND. J. TRANSNAT’L L. 281, 296 (1988) (“hierarchy” of interpretation); see also, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §325 cmt. e (“inhospitality to travaux”); cf. Wintershall Aktiengesellschaft v. Argentina, ICSID Case No. ARB/04/14, Award, para. 86 (Dec. 8, 2008) (quoting testimony of Christoph Schreuer) (“[M]y predecessor in the chair in Vienna, Professor Zemanek used to fail students when they gave the answer that the intention of the parties was significant for the interpretation of treaties.”).

<sup>5</sup> Luigi Sbolci, *Supplementary Means of Interpretation*, in THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 145, 147 (Enzo Cannizzaro ed., 2011); see also, e.g., Yves le Bouthillier, *Article 32: Supplementary Means of Interpretation*, in 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 841, 843 (Olivier Corten & Pierre Klein eds., 2011) (describing the VCLT’s “hierarchical” structure); Jean-Marc Sorel & Valérie Boré Eveno, *Article 31: General Rule of Interpretation*, in 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY, supra, at 804, 817 (“hierarchy” of VCLT “implies that the supplementary means are first and foremost subsidiary”); Oliver Dörr, *Article 32: Supplementary Means of Interpretation*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 571, 571–72 (Oliver Dörr & Kirsten Schmalenbach eds., 2012) (“restrictive design of Art 32”).

<sup>6</sup> Isabelle Van Damme, *Treaty Interpretation and Preparatory Work*, OPINIO JURIS (Mar. 2, 2009), at <http://opiniojuris.org/2009/03/02/treaty-interpretation-and-preparatory-work/>.

role,<sup>7</sup> for use only “where the primary means have proved insufficient”<sup>8</sup>—which is to say, “only . . . when the text cannot, in itself, guide the interpreter.”<sup>9</sup> The practical result of this atmospheric distaste and these mechanical hurdles is that the use of travaux “is meant to be only an exceptional occurrence”<sup>10</sup> and cannot “in any case [be allowed] . . . to hijack the meaning of treaty interpretations as would be established under article 31.”<sup>11</sup> Even commentators who think travaux are an essential part of interpretation typically accept, with regret, that the VCLT concludes otherwise.<sup>12</sup>

### *Inconsistency in Practice*

When black-letter theory bumps into actual legal practice, however, it confronts a puzzle. As Jan Klabbers puts it, the “strange thing” about Articles 31 and 32

is that the one serious limit these rules set, is constantly ignored: I cannot think of a serious lawyer who would not at least have a look at some of the preparatory work to bolster her conclusion or, if necessary, reconsider her conclusion, regardless of whether an interpretation without the preparatory works would lead to ambiguous or absurd results.<sup>13</sup>

This is not to say that the theory never makes a difference: sometimes it does, leading interpreters either to soft-pedal evidence of party intent in favor of a strained “clear” textual meaning<sup>14</sup> or contrariwise to misapply other rules of interpretation in order to permit themselves to respect that intent.<sup>15</sup> But the fact remains that travaux play a more important role in the actual practice of treaty interpretation than the dominant theoretical understanding of the VCLT would suggest.

<sup>7</sup> Mahnouch H. Arsanjani & W. Michael Reisman, *Interpreting Treaties for the Benefit of Third Parties*, 104 AJIL 597, 598 (2010) (criticizing excessive use of travaux).

<sup>8</sup> ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES 239 (2007); see also Ulf Linderfalk, *Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not?*, 54 NETH. INT’L L. REV. 133, 144 (2007) (“[C]larity, in the sense of the Vattelian maxims, means clarity *prima facie* justified.”).

<sup>9</sup> le Bouthillier, *supra* note 5, at 843; see also DAVID J. BEDERMAN, CLASSICAL CANONS: RHETORIC, CLASSICISM AND TREATY INTERPRETATION 315 (2001) (similar); Sorel, *supra* note 5, at 818 (similar).

<sup>10</sup> BEDERMAN, *supra* note 9, at 241 & n.854.

<sup>11</sup> Alexander Orakhelashvili, *The Recent Practice on the Principles of Treaty Interpretation*, in 40 YEARS OF THE VIENNA CONVENTION 117, 151 (Alexander Orakhelashvili & Sarah Williams eds., 2010).

<sup>12</sup> MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 446–47 (2009) (“[A] result arrived at by the use of primary means of Article 31 will always prevail over solutions suggested by the supplementary means.”); Evan Criddle, *The VCLT in U.S. Treaty Interpretation*, 44 VA. J. INT’L L. 431, 440 (2004) (similar); Mark E. Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage?*, in THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION, *supra* note 5, at 105, 113 (similar); Panos Merkouris, ‘Third Party’ Considerations and ‘Corrective Interpretation’ in the Interpretative Use of Travaux Préparatoires:—Is It *Fabrenheit* 451 for Preparatory Work?—, in TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON, *supra* note 3, at 75, 75–77 (similar).

<sup>13</sup> Jan Klabbers, *Interpretation as the Continuation of Politics by Other Means*, OPINIO JURIS (Mar. 2, 2009), at <http://opiniojuris.org/2009/03/02/continuation/>; see also Jan Klabbers, *The Declining Importance of Travaux Préparatoires in Treaty Interpretation*, 2003 NETH. INT’L L. REV. 267, 268, 285 (2003) (similar).

<sup>14</sup> For decisions plausibly presenting this phenomenon, see, for example, *Young v. United Kingdom*, App. Nos. 7601/76 & 7806/77, 44 Eur. Ct. H.R. (ser. A) (1981); *Maritime Delimitation and Territorial Questions (Qatar v. Bahr.)*, 1995 ICJ REP. 4 (Feb. 15); *Territorial Dispute (Libya v. Chad)*, 1994 ICJ REP. 6 (Feb. 3).

<sup>15</sup> For decisions plausibly presenting this phenomenon, see, for example, Panel Report, *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WT/DS285/R (adopted as modified by Appellate Body Report, Apr. 20, 2005); *Litwa v. Poland*, App. No. 26629/95 (Eur. Ct. H.R. Apr. 4, 2000); *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24 (June 12, 2009).

This puzzle is broadly recognized. Purists of the black-letter school deplore the “avid willingness” of lawyers “to seek confirmation of meaning in outside sources” as a “pathology of treaty interpretation.”<sup>16</sup> In the words of one commentator,

courts probably scrutinize the negotiating history whether the text seems clear or not. If the negotiating history supports a court’s first impression, then the court labels the text as clear and can cite the negotiating history as confirming that meaning in accordance with article 32. If the negotiating history disconfirms the court’s first impression, it can disregard it and cite . . . the negotiating history in accordance with article 32. Of course, this procedure is contrary to the law as codified in articles 31 and 32, under which the negotiating history cannot vary the meaning of a clear textual provision.<sup>17</sup>

Commentators who favor the regular use of travaux welcome this practice. But even they typically treat it as a doctrinal puzzle.<sup>18</sup>

In recent years, a desire to resolve the cognitive dissonance has become increasingly apparent. The path was blazed by Stephen Schwebel, then a judge on the International Court of Justice (ICJ), who argued in 1997 that the apparently “hierarchical structure of Articles 31 and 32 of the Vienna Convention . . . is unreal.”<sup>19</sup> In Richard Gardiner’s more recent expansion of that view, the “conditions . . . stated in article 32” are “not so restrictive as they may appear.”<sup>20</sup> Rather, they simply “provide a loose framework from which elements relevant to the particular case need to be selected.”<sup>21</sup> Even Gardiner, however, ultimately concedes the power of the conventional wisdom: “Even in the rather unusual case where preparatory work may be determinative of the correct meaning, this is only because application of the general rule of treaty interpretation, that is all relevant principles in Article 31 of the VCLT, has failed to produce a proper interpretation.”<sup>22</sup>

## II. THE USE OF TRAVAUX: THE VCLT UNDERSTANDING

This article aims to show that the supposed tension between doctrine and practice dissipates if we revise our understanding of Articles 31 and 32 to account for their original meaning. This

<sup>16</sup> BEDERMAN, *supra* note 9, at 246; *see also, e.g.*, Reisman & Arsanjani, *supra* note 7, at 597 (similar).

<sup>17</sup> Vandeveld, *supra* note 4, at 296.

<sup>18</sup> *See, e.g.*, ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 244 (2d ed. 2007) (“This is no doubt how things work in practice[.]”); *id.* at 197; le Bouthillier, *supra* note 5, at 847 (similar); Criddle, *supra* note 12, at 440–42 (similar).

<sup>19</sup> 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 797, 799 (Jerzy Makarczyk ed., 1996); *cf.* Maritime Delimitation and Territorial Questions, *supra* note 14, at 27 (Schwebel, J., dissenting).

<sup>20</sup> RICHARD GARDINER, TREATY INTERPRETATION 10 (2008); *see also* Richard Gardiner, *The Vienna Convention Rules on Treaty Interpretation*, in THE OXFORD GUIDE TO TREATIES 475, 500 (Duncan B. Hollis ed., 2012) (discussing sub rosa judicial practice).

<sup>21</sup> GARDINER, *supra* note 20, at 50; *see also* Gardiner, *supra* note 20, at 488. Others occasionally urge the adoption of a similar approach. *See* AUST, *supra* note 18, at 79 (“Placing undue emphasis on the text, without regard to what the parties intended . . . , is unlikely to produce a satisfactory result.”); JAMES C. HATHAWAY, RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 48–49, 55–58 (2005) (“There has for too long been an anachronistic fixation with literalism . . . .”); PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 74–75 (1989) (similar); Dörr, *supra* note 5, at 571–72 (similar).

<sup>22</sup> GARDINER, *supra* note 20, at 97–98; *see also* Gardiner, *supra* note 20, at 489 (“Thus, only when the general rule fails, or produces a manifestly questionable result, should primacy be given to preparatory work.”).

part presents a summary of the understanding actually adopted by the VCLT drafters. Parts III, IV, and V then describe in chronological sequence how that final understanding emerged. Space does not suffice to offer a complete doctrinal argument for incorporating this history into the interpretation of Articles 31 and 32. But assuming that Schwebel and Gardiner have shown the question to be at least ambiguous, then even the most grudging interpreters would seem forced to consider the VCLT's drafting history as a way to resolve that ambiguity.<sup>23</sup> From that point, the question would be whether a regular and uncontested contrary practice has arisen—not just as a matter of what interpreters say, but of what they do—sufficient to undercut that original understanding. And even then it would be not clear whether subsequent practice would displace the original agreement.<sup>24</sup>

### *Text as the Presumptive Object of Interpretation*

The historical understanding of Articles 31 and 32 cannot be understood without grasping the basic methodological assumption that guided their drafters.<sup>25</sup> It is this: the presumptive object of interpretation is the text of the treaty being interpreted. That simple proposition manages to be at once simple and surprisingly misleading. It means that the thing being interpreted—the ultimate object of analytical attention—is the text itself. The interpreter's primary goal is neither to determine what the original drafters would likely have wanted under present conditions, nor to decide what the evolving understandings of the international community currently require, nor yet to assess the best outcome under any other normative criterion. The interpreter is seeking to read and understand *a text*. Competing considerations may well come into play; indeed, they might even trump the clearest of texts under certain carefully defined circumstances. None of those considerations, however, is the presumptive object of interpretation.

But that only begins to define the proper target. To speak of a text's meaning in the abstract is either incomplete or incoherent. As participant after participant said during the drafting process, it makes no sense to speak of marks on a page as if they possessed inherent substantive content without reference to social context. For the VCLT drafters, the relevant audience for this purpose consisted of the original parties to the treaty—in functional terms, the drafters of its text. On that understanding, the core problem of treaty interpretation was to decipher the meaning of the text as the original parties understood the words they had written.

### *Travaux as the Automatic Complement*

The VCLT method for uncovering that meaning involved something of a paradox: the drafters described it as two distinct processes that would somehow function simultaneously.<sup>26</sup>

<sup>23</sup> We might interpret the VCLT under (1) the modern customary international law of treaty interpretation, (2) the pre-VCLT customary international law of treaty interpretation, or (3) the VCLT framework itself. But that choice should not matter, since all of those frameworks allow the use of travaux to “determine” the meaning of “ambiguous” treaty terms. Under even the most restrictive approach, the “special meaning” and “confirmation” provisions of Articles 31 and 32 seem easily ambiguous enough to permit the use of travaux for this purpose.

<sup>24</sup> See generally Julian Davis Mortenson, *The Uneasy Role of Precedent in Defining Investment*, 28 ICSID REV. 1 (2013) (discussing the VCLT's built-in tension between original understanding and evolving meaning).

<sup>25</sup> See *infra* parts III–V for the historical evidence supporting the propositions asserted in this section.

<sup>26</sup> See *infra* parts III–V for the historical evidence supporting the propositions asserted in this section.

In the first process, the interpreter is meant to hazard a provisional guess about the apparent “ordinary meaning” of the text. That effort takes place not in a social or historical vacuum but in what was called the “crucible” of Article 31. In that crucible, an array of tools is employed to yield a working hypothesis about the meaning of the text. A central element of this conceptually unitary process is that the interpretive object (the text of the treaty) is understood with reference to the ordinary meaning of the terms it employs. But since no meaning can be “ordinary” except in some particularized context, the VCLT embeds that text in a rich interpretive background and, in so doing, conceptually melds the two.

The first process thus requires interpreters to work toward an initial guess at the likeliest meaning by an iterative, spiraling effort to relate the underlying text to the object and purpose of the treaty, to other formal instruments concluded along with the treaty itself, to the background rules of international law, to the subsequent practice of the parties as a “course of dealing”-style body of evidence, and to any extrinsic evidence that a special meaning had been intended for one of the terms. The drafters disclaimed (loudly and at great length) the existence of any hierarchy among these sources of meaning, and asserted instead that they were elements of a unitary process. The result of this interpretation is a well-informed hypothesis about how the parties would most likely have parsed the relevant text and applied it in good faith to the relevant circumstances.

That hypothesis is both informed and tested by the second analytical process, in which interpreters review what the VCLT calls “supplementary means of interpretation.” In this “second” stage—which was actually described by many of the drafters as occurring simultaneously or in a unity with the “first”—the interpreter may often have a working hypothesis about what the treaty text seems most likely to have signified, and may even already have identified evidence in the drafting history of a special meaning. At that point the idea is for her to return more systematically to other evidence that might round out, confirm, or revise the initial hypothesis. Crucially, during this “second” process, interpreters were expected to resort automatically in any contested case to the historical evidence about the course of discussions, negotiations, and compromises that resulted in the treaty text—in short, to the travaux.

The VCLT creates four distinct doctrinal pathways toward this end: ambiguity, absurdity, special meaning, and confirmation. Cumulatively, these pathways permit reliance on travaux every time a treaty is interpreted. Nor do the four pathways limit the importance or weight of drafting history as a source of meaning. Instead, their function is to constrain the *purpose* for which travaux may be used. The structure created by the pathways thus shapes the interpreter’s conceptual framework, focusing her attention on the meaning of text as the presumptive object of any excursion into travaux.

*The ambiguity route: Article 32(a).* The first two routes for incorporating travaux into VCLT analysis are uncontroversial.<sup>27</sup> The “ambiguity route,” described in Article 32(a), arises in cases of prima facie uncertainty. In the event that a treaty provision proves stubbornly “ambiguous or obscure” even after careful study of the text, documentary context, subsequent practice, and

<sup>27</sup> Part of the reason they are so uncontroversial is that they are so salient. The “ambiguity” and “absurdity” routes are each called out in a separate subsection of Article 32. “Confirm,” by contrast, is stuck in the middle of a long paragraph of text in Article 32, and “special meaning” comes at the tail end of a complex and multilayered Article 31.

so on, interpreters should turn back to the travaux for further guidance in resolving the ambiguities—in “determining” the meaning.<sup>28</sup>

*The absurdity route: Article 32(b).* Manifest absurdity, as identified in Article 32(b), is similarly uncontroversial. Sometimes, the VCLT drafters imagined, treaty text might seem to command such an absurd result that it would be hard to believe the drafters meant what they said. In such cases, interpreters should turn to drafting history and figure out what the parties actually meant to say.

*The special meaning route: Article 31(4).* In contrast to the ambiguity and absurdity provisions, the third and fourth pathways offer immediate access to travaux. Neither imposes a threshold condition on the use of drafting history; both are always available to interpreters, every time a treaty is interpreted. The third pathway—the “special meaning route” of Article 31(4)—is straightforward. It requires an interpreter to apply the intended meaning of treaty terms if it is “established” that they were intended to have that meaning—a process that often requires reference to travaux.

*The confirmation route: Article 32, main paragraph.* The fourth pathway—the “confirmation route” from the main paragraph of Article 32—is more complicated. It allows the use of travaux to check and reassess the provisional hypothesis yielded under Article 31. Unsurprisingly, this inquiry usually validates the interpreter’s hypothesis.<sup>29</sup> But not always. Sometimes, a fair and thorough analysis of the travaux will convince an interpreter that the drafters meant to convey something other than what she originally thought. What happens then? There are three possibilities. First, a failure of drafting history to “confirm” the initial hypothesis might reveal a latent ambiguity in the text.<sup>30</sup> At that point, the interpreter recognizes the ambiguity she previously missed and uses the travaux to resolve it. Second, a failure to confirm might demonstrate that the parties intended for the relevant portion of the treaty to be given a special meaning. At that point, the interpreter turns to Article 31(4) and gives effect to the special meaning as that subsection instructs. Third, a failure to confirm might show that the provisional interpretation would produce absurd results in the sense of Article 32(b)—not necessarily absurd in the abstract (if the VCLT rejected anything, it was the idea of interpretation in the abstract) but absurd as measured by the thing that the interpreter now knows the parties were trying to achieve.<sup>31</sup>

Collectively, these four pathways operationalized the VCLT drafters’ expectation that any serious, scrupulous, and responsible interpreter would rely frequently on travaux.

<sup>28</sup> Views varied about how much uncertainty was required. For Hersch Lauterpacht, any disagreement about the meaning of a provision demonstrated its ambiguity. [1952] 1 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 222 (Siena session) (“un moyen légitime et désirable aux fins d’établir l’intention des parties dans tous les cas où, malgré sa clarté apparente, le sens d’un traité prête à controverse”). Some, at the other extreme, seemed ready to deny that ambiguity would ever exist in practice. *E.g.*, United Nations Conference on the Law of the Treaties, 1st Sess., Vienna, Mar. 26–May 24, 1968, Summary Record at 174 (Poland) (Apr. 20, 1968), UN Doc. A/CONF.39/11 (1969) [hereinafter 1968 Vienna Conference Summary Records].

<sup>29</sup> It was frequently said that the best evidence of common intent is generally the text adopted by the parties. This slogan seems to have originated in a letter from Eric Beckett to Hersch Lauterpacht. [1952] 1 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL, *supra* note 28, at 199–201 (“Le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties.”).

<sup>30</sup> Such a failure might occur if a technically possible alternate meaning seemed so textually implausible to the interpreter that she was unwilling to view it as creating an “ambiguity” for the purpose of Article 32(a). It might also happen if the interpreter just missed something.

<sup>31</sup> This third case is the principal instance where treaty text is shown to be the *presumptive*, but not *exclusive*, target of analysis: once in a great while, the travaux may override the text entirely. The VCLT drafters were cautious about



*The Bête Noire*

None of this seems especially radical. Indeed, it may leave us wondering why Articles 31 and 32 stirred up such a fuss. Why, after the Vienna Conference had adopted them, did the committee chair congratulate the delegates with evident satisfaction for having resolved “the most controversial and difficult subject in the whole field of the law of treaties”?<sup>32</sup>

The key to that question—and to grasping the real limits imposed by the VCLT structure—is to understand the *bête noire* of the VCLT drafters. Above all else, the drafters rejected every variety of the theory that judges should act as wise administrators. They rejected the view that interpretation should focus primarily on the drafters’ broad goals or overarching policy concerns. They rejected the idea that interpretation involves a hypothetical “step into the shoes” construction of how the drafters might have handled the particular, unanticipated situation that had arisen. And they especially rejected any claim that interpreters should work to promote wise or just policies that were not themselves the object of agreement.<sup>33</sup>

The VCLT drafters were not slashing at phantoms. More open-ended understandings of interpretation were real; they were serious; and they had long been advocated by some heavyweights of international law. The 1935 Harvard Draft Convention on Treaties, for example, focused on the purpose of the parties at the highest level of generality, as distilled by a free-handed interpreter with broad license to effectuate the treaty’s underlying goals. The commentary embraced this evolutionary policymaking element forthrightly, explaining that the “task of the interpreter is to give a treaty the interpretation which will effectuate the purpose thereof under current conditions.”<sup>34</sup> In more than forty pages of discussion, the commentary never expressed more than half-hearted concern for the actual words of a treaty, instead using “mechanical” textualism as an expositional foil when describing the serious interpreter’s focus on purpose.<sup>35</sup>

In the 1950s, this assertively intentionalist view of interpretation was the subject of extensive discussion at the Institut de droit international (IDI). The most contentious issue by far was the question of *travaux*.<sup>36</sup> Hersch Lauterpacht, the IDI’s first special rapporteur for the project, was understood (not entirely fairly) to be urging treaty interpreters to adopt a policymaking

this use of absurdity. *See, e.g.*, Humphrey Waldock (Special Rapporteur), Third Report on the Law of Treaties, Add. 3, at 15 (“strictly limited”), UN Doc. A/CN.4/167/Add.3 (1964) [hereinafter Waldock’s Third Report, Add. 3].

<sup>32</sup> United Nations Conference on the Law of the Treaties, 2nd Sess., Vienna, Apr. 9–May 22, 1969, Summary Record at 59 (Ago) (May 6, 1969), UN Doc. A/CONF.39/11/Add. 1 (1970) [hereinafter 1969 Vienna Conference Summary Records].

<sup>33</sup> *See, e.g.*, Draft Articles on the Law of Treaties and Commentaries at 20, 49, *in* Reports of the International Law Commission on the Second Part of Its Seventeenth Session and on Its Eighteenth Session, UN GAOR, 21st Sess., Supp. No. 9, at 20, 49, UN Doc. A/6309/Rev.1 (1966) [hereinafter ILC Commentary on Final Draft Articles]; *see also* Waldock’s Third Report, Add. 3, *supra* note 31, at 3–5 (similar).

<sup>34</sup> Harvard Draft Convention on the Law of Treaties, 29 AJIL SUPP. 778, 970 (1935); *see also, e.g., id.* at 937–38 (“the function of interpretation is to discover . . . what [a treaty’s] purpose is and how it may best be effectuated under prevailing circumstances”), 952–53 (similar).

<sup>35</sup> *E.g.*, Harvard Draft Convention on the Law of Treaties, *supra* note 34, at 938 (interpretation “is to be accomplished, not automatically by the mechanical and unvarying application of stereotyped formulae or ‘canons’ to any and every text”), 940–44 (including the presumption of ordinary grammatical effect in a long list of competing canons of construction).

<sup>36</sup> [1952] 1 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL, *supra* note 28, at 198 (“ce qui paraît être l’objet de la principale divergence de vues entre les membres de la Commission, à savoir l’usage des *travaux préparatoires*”). For a good summary of the IDI debates, *see* 1956 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 320–21 (Granada session).

role,<sup>37</sup> using the text of treaties as but one means among many for identifying the broad purposes of the treaty makers.<sup>38</sup> After heated debate, Lauterpacht's proposals were dropped when he resigned to assume a position on the ICJ and was replaced as special rapporteur by Gerald Fitzmaurice, a much stricter textualist.<sup>39</sup> While the resolution finally adopted by IDI remained open to travaux, it was rightly understood to place significantly greater emphasis on the text.

Fitzmaurice's victory at the IDI merely postponed a final reckoning with the Harvard Draft, whose interpretive spirit was brought to full flourish in Myres McDougal's *The Interpretation of Agreements and World Public Order*. For McDougal, the point of interpretation was to effectuate the very broadest subjective purposes of the parties in light of present circumstances, with a healthy dose of regard for what he called the requirements of public order. He loathed the concern for text that had characterized Fitzmaurice's interventions at the IDI. In McDougal's words, it

is the grossest, least defensible exercise of arbitrary formalism to arrogate to one particular set of signs—the text of a document—the role of serving as the exclusive index of the parties' shared expectations. We join with those who condemn textualism of this kind as a violation of the human dignity to choose freely.

McDougal instead advocated what he called a “‘policing,’ or integrative” role for the interpreter, with the “obligation [to] examine the significance of every specific controversy for the entire range of policy purposes sought by the total system to which he is responsible.” If the parties' expectations contradicted “accepted goal values and instrumental specifications of public order,” then “[c]ommunity decision-makers would be remiss if they failed to withhold the sanction of public power from such expectations.”<sup>40</sup>

In one sense, McDougal's work can be seen as a commendably honest attempt to grapple with the realities of legal decision making. But for his contemporaries, it did not take much

<sup>37</sup> See, e.g., *Nouveau projet définitif de résolutions présenté par M. H. Lauterpacht, rapporteur*, in [1954] 1 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 226 (Aix-en-Provence session) (“Dans le cas d'un défaut d'intention réelle chez les parties, il incombe aux organismes internationaux compétents, judiciaires ou arbitraux, de combler les lacunes qui en résultent et de résoudre les divergences conformément aux exigences fondamentales de la plénitude du droit et de la justice internationale et au but du traité.”).

<sup>38</sup> “Le grand principe sur lequel reposait le projet présenté à Sienne était la recherche de l'intention des parties en tant que constituant le but principal de l'interprétation; le texte du traité à interpréter n'était plus qu'un des moyens—un moyen très important, il est vrai—d'y arriver.” 1956 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, *supra* note 36, at 321 (Fitzmaurice). This comment represents a somewhat overdrawn characterization of Lauterpacht's draft, which gave text a more important role than Fitzmaurice admitted. See, e.g., [1952] 1 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, *supra* note 28, at 225 (“L'accord des parties s'étant réalisé sur le texte du traité, il y a lieu de prendre le sens naturel de ce texte comme base du processus d'interprétation.”). That said, there is no question that Lauterpacht viewed travaux as a crucial element in treaty interpretation. See *id.* at 390–402 (Bath session); [1954] 1 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, *supra* note 37, at 207–16. Nor was Lauterpacht alone in that view. Petros Vallindas, for example, levied a notable attack on what he called Gerald Fitzmaurice's radical “Ecole de l'exégèse.” 1956 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, *supra* note 36, at 340.

<sup>39</sup> While conceding that ICJ doctrine was at odds with his approach, Lauterpacht claimed that most of the institute, at least as of 1952, supported his views on interpretation. [1952] 1 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, *supra* note 28, at 205. Fitzmaurice claimed otherwise, and the fact of Fitzmaurice's selection, the fact that Lauterpacht asked the institute to refrain from voting on his own proposal, and the substance of the final IDI draft tend to support his account. 1956 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, *supra* note 36, at 321.

<sup>40</sup> MYRES S. MCDUGAL, HAROLD D. LASSWELL & JAMES C. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE*, at xvii, xix–xx, 41 (1967) (emphasis omitted).

to see him as an exemplar of the aggressive judicial supremacism against which the VCLT settlement was ultimately directed.<sup>41</sup> As we will see, it was a rejection of McDougal's self-assertive school of administrative "interpretation" that, above all else, motivated the VCLT settlement.

Understanding this dynamic is crucial—not only for grasping the limits on interpretation that the VCLT did impose, but for making sense of the arguably contorted mechanism that was ultimately adopted. Why, after all, did the VCLT separate the main provisions on treaty interpretation into two articles and create four separate routes to the consideration of travaux? The answer seems to be a path-dependent function of the gradually evolving course of discussions, which were directed initially at accreting mechanisms designed to suppress McDougalism, and then at relaxing those same mechanisms so as to allow unfettered recourse to travaux for the right purpose. The successive epicycles added by these efforts yielded a relatively baroque interpretive mechanism that cut off the *bête noire* of McDougalism while retaining the regular and unembarrassed resort to travaux described above. That, in any event, is how the drafters talked about what they had done.

### III. THE 1964 ILC MEETING

Part II summarized the substantive architecture of the final VCLT settlement. Parts III, IV, and V now shift to a chronological mode of exposition, explaining the historical process from which that settlement ultimately emerged.

#### *Background: One Treaty to Rule Them All*

In 1949, at the very first session of the International Law Commission (ILC), the members voted to give top priority to the law of treaties as a topic of study.<sup>42</sup> One of the most important efforts ever undertaken by the ILC, this project also proved one of the hardest to resolve.

Treaties were proliferating at a record pace, largely because they could provide greater detail

<sup>41</sup> See, e.g., Gerald Fitzmaurice, *Vae Victis, or Woe to the Negotiators! Your Treaty, or Our "Interpretation" of It?*, 65 AJIL 358 (1971); Richard A. Falk, *On Treaty Interpretation and the New Haven Approach*, 8 VA. J. INT'L L. 343, 344 (1967) ("intellectual confrontation between the ILC and McDougal-Lasswell-Miller"); Shabtai Rosenne, *Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison*, 5 COLUM. J. TRANSNAT'L L. 205, 221 (1966) ("The reasons for [the structure of draft Articles 31 and 32] are very fundamental and can probably be traced to the strong influence of legal positivism . . . and to the great distrust of . . . what is sometimes called 'teleological' interpretation and other extra-textual approaches which at times lead to extravagant conclusions . . .").

<sup>42</sup> 1949 Y.B. INT'L L. COMM'N 58–59; cf. (poignantly) Memoranda by the Secretary-General, Survey of International Law in Relation to the Work of Codification of the International Law Commission, para. 22, UN Doc. A/CN.4/1/Rev.1 (1949) (anticipating "no reason why in two decades or so of such activity the results of the work of the International Law Commission should not cover practically the entire field of international law"). The ILC initially consisted of fifteen experts—the number had grown to twenty-five by the early 1960s—who were intended to be "persons of recognized competence in international law and representing as a whole the chief forms of civilization and the basic legal systems of the world." Establishment of an International Law Commission, GA Res. 174 (II) (Nov. 21, 1947). The experts were elected by the General Assembly from a list of candidates nominated by UN member states. They served the ILC in their private capacities.

and flexibility than the ponderous process of generating customary international law.<sup>43</sup> Some people were so optimistic about the advantages of treaty law that they imagined the rapid approach of a time when “all public international law would have been codified and laid down in one unified statute book.”<sup>44</sup> On these expectations, a treaty to govern the construction, dissolution, and interpretation of this basic building block was rightly understood to be of profound importance. Buoyed by the constant refrain that they were drafting a “constitution” for the international system,<sup>45</sup> international lawyers agreed that the VCLT was “likely to become one of the most significant [treaties] of modern times.”<sup>46</sup>

But things progressed slowly. Between the project’s high stakes, its intellectual complexity, and the competing demands of the organization’s remaining docket, the ILC dithered its way through four successive special rapporteurs, all from the United Kingdom: J. L. Brierly, Hersch Lauterpacht, Gerald Fitzmaurice, and Humphrey Waldock.<sup>47</sup> Each rapporteur submitted report after report on the law of treaties, and the ILC responded time and again by discussing or (more often) ignoring the latest report and then leaving the rapporteur to keep working in isolation. Collectively, the rapporteurs produced seventeen reports, each essentially

<sup>43</sup> See, e.g., Sixth Committee, Summary Record of the 849th Meeting, at 60 (Iraq) (“Treaties had become the source, above all others, of international law, for the international community had undergone many changes and custom could no longer supply the rules of law required by the world . . .”), UN GAOR, 20th Sess., UN Doc. A/C.6/SR.849 (Oct. 13, 1965); Sixth Committee, Summary Record of the 911th Meeting, at 59 (Pakistan) (similar), UN GAOR, 21st Sess., UN Doc. A/C.6/SR.911 (Oct. 17, 1966); Sixth Committee, Summary Record of the 977th Meeting, at 109 (Netherlands) (similar), UN GAOR, 22d Sess., UN Doc. A/C.6/SR.977 (Oct. 20, 1967).

<sup>44</sup> Sixth Committee, Summary Record of the 847th Meeting, at 45 (Netherlands) (“If that stage were reached, the task of international lawyers would merely be to keep abreast of further developments, and no theoretical problems would remain to be solved. It would all be a matter of interpreting treaties and conventions, and the task of interpretation would itself be subject to rules of interpretation such as those contained in part III of the draft articles . . .”), UN GAOR, 20th Sess., UN Doc. A/C.6/SR.847 (Oct. 12, 1965).

<sup>45</sup> E.g., UN GAOR, 21st Sess., 1484th mtg. at 10, UN Doc. A/PV.1484 (Dec. 5, 1966) (Tanzania) (“in effect, . . . the Law of Contract for the entire world.”); Sixth Committee, Summary Record of the 907th Meeting, at 33 (Yugoslavia) (“a new constitutional element”), UN GAOR, 21st Sess., UN Doc. A/C.6/SR.907 (Oct. 11, 1966); Sixth Committee, Summary Record of the 969th Meeting, at 67–68 (France) (“a veritable constitution” or “super-treaty”), UN GAOR, 22d Sess., UN Doc. A/C.6/SR.969 (Oct. 12, 1967); Sixth Committee, Summary Record of the 971st Meeting, at 75 (Uruguay) (“the backbone of public international law . . . a task comparable to the formulation of a civil code and a procedural code in domestic law”), UN GAOR, 22d Sess., UN Doc. A/C.6/SR.971 (Oct. 13, 1967).

<sup>46</sup> 1968 Vienna Conference Summary Records, *supra* note 28, at 289 (New Zealand) (May 3, 1968); see also, e.g., Sixth Committee, Summary Record of the 851st Meeting, at 76 (Ago, ILC chair) (“of the utmost importance”), UN GAOR, 20th Sess., UN Doc. A/C.6/SR.851 (Oct. 14, 1965); Sixth Committee, Summary Record of the 902d Meeting, at 11 (Czechoslovakia) (“the largest and most difficult task [that the ILC] had ever undertaken”), UN GAOR, 21st Sess., UN Doc. A/C.6/SR.902 (Oct. 3, 1966); Sixth Committee, Summary Record of the 976th Meeting, at 102 (Canada) (“a major landmark”), UN GAOR, 22d Sess., UN Doc. A/C.6/SR.976 (Oct. 20, 1967); Sixth Committee, Summary Record of the 979th Meeting, at 117 (Bulgaria) (“fundamental issues of international law which had much broader significance and implications”), 118 (India) (“an outstanding achievement”), UN GAOR, 22d Sess., UN Doc. A/C.6/SR.979 (Oct. 24, 1967); Sixth Committee, Summary Record of the 980th Meeting, at 121 (Dahomey) (“even more important to the international community than the law of contracts was to a national community”), 126 (Cyprus) (“a turning-point in the history of international law”), UN GAOR, 22d Sess., UN Doc. A/C.6/SR.980 (Oct. 25, 1967).

<sup>47</sup> Many observers worried that the doctrine of treaty interpretation might be not only too controversial, but too resistant to rationalization, to be codified. See, e.g., Waldock’s Third Report, Add. 3, *supra* note 31, at 3–9; [1964] 1 Y.B. INT’L L. COMM’N 275–78, UN Doc. A/CN.4/SER.A/1964 (debate evincing broad skepticism about effort to codify treaty rules); Sixth Committee, Summary Record of the 850th Meeting, at 64 (Finland) (similar), UN GAOR, 20th Sess., UN Doc. A/C.6/SR.850 (Oct. 13, 1965). When a draft convention was finally introduced, Waldock thus emphasized that the “first question to be decided by the Commission was whether its draft should contain articles on interpretation at all.” [1964] 1 Y.B. INT’L L. COMM’N, *supra*, at 275.

scrapping his predecessor's work and developing a new approach from scratch.<sup>48</sup> With irritation mounting about the slow pace,<sup>49</sup> it was not until Humphrey Waldock took the yoke in 1960 that the project came out of its holding pattern.

### *The 1964 ILC Draft*

A prominent Oxford academic who later served on the ICJ and the European Court of Human Rights, Waldock was the first of the four rapporteurs to tackle the question of treaty interpretation head on.

*Waldock's first draft.* His first draft established a framework for treaty interpretation from which later versions never really strayed. As Waldock put it, the draft

takes as the basic rule of treaty interpretation the primacy of the text as evidence of the intentions of the parties. It accepts the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point and purpose of interpretation is to elucidate the meaning of the text, not to investigate ab initio the intentions of the parties.<sup>50</sup>

The last two phrases combined the two principles that would dominate treaty debates for the next five years: (1) the adoption of text as the presumptive object of interpretation, and (2) an aversion to McDougal-esque reconstruction of abstract policy goals as applied to new problems in the real world.

Waldock's initial description also signaled an embrace of hierarchy, drawing a firm distinction between drafting history and most other sources of meaning. He described travaux as "subsidiary"<sup>51</sup>—a term that vanished entirely from subsequent drafts—and suggested that "[i]f the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter."<sup>52</sup> The actual text that Waldock proposed was not quite so strict;<sup>53</sup> it provided that "a meaning other than its natural and ordinary meaning may be given to a term if it is

<sup>48</sup> For a largely accurate summary of the tangled ILC history up to this point, see Humphrey Waldock's first report (of six) to the ILC. Humphrey Waldock (Special Rapporteur), First Report on the Law of Treaties, at 4–12, UN Doc. A/CN.4/144 (Mar. 26, 1962); see also Rosenne, *supra* note 41, at 217–18.

<sup>49</sup> *E.g.*, Sixth Committee, Report of the International Law Commission on the Work of Its Fourteenth Session, at 17, UN Doc. A/5287 (Nov. 14, 1962) (in a document by the Sixth Committee on the work of the ILC, noting the ILC's "waste of time" and emphasizing the "need to quicken the Commission's preparatory work" by giving "its special Rapporteurs clear and precise instructions"); [1964] 1 Y.B. INT'L L. COMM'N, *supra* note 47, at 275 (members urging one another to "make their statements brief" and expressing anxiety about the pace of discussion), 286–87 (Amado) (urging less academic caviling), 289–90 (Rosenne) (similar) (July 14, 1964).

<sup>50</sup> Waldock's Third Report, Add. 3, *supra* note 31, at 11.

<sup>51</sup> *Id.* at 18 (a "subsidiary means of interpreting the text").

<sup>52</sup> *Id.* at 13 (quoting Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 ICJ REP. 57 (May 28)); see also *id.* at 14 ("[There are some] cases where either the natural and ordinary meaning of the terms in their context does not give a viable result or for one reason or another the meaning is not clear. In these cases, and in these cases only, it is permissible to fix the meaning of the terms by reference to evidence or indications of the intentions of the parties outside the ordinary sense of their words.").

<sup>53</sup> *Id.* at 7 ("[I]f the textual method of interpretation predominates, none of these approaches is exclusively the correct one, and . . . there is a certain discretionary element also on this point."); see also *id.* at 5–6 ("maxims of interpretation" are "for the most part, principles of logic and good sense valuable only as guides").

established conclusively that the parties employed the term in the treaty with that special meaning.”<sup>54</sup> But the draft imposed a heavy burden on anyone invoking this provision. In contrast to the IDI resolution’s requirement that a special meaning simply be “established,”<sup>55</sup> for example, Waldock required special meaning to be “established *conclusively*”<sup>56</sup> and stressed that “only decisive proof of a special meaning will suffice.”<sup>57</sup>

*Waldock’s second draft.* The initial reactions to Waldock’s draft were mixed. Everyone basically agreed that text should be the presumptive object of interpretation. Beyond that, though, the ILC members’ reactions were splintered and somewhat uncertain. Many seemed to contradict themselves from one comment to the next, and their views shifted in and out of focus as the debate moved forward. Some generalizations are possible—but only with the caveat that positions at this point were surprisingly tentative for such a long-discussed topic.

One group seemed generally positive about the draft, suggesting that it was a reasonable compromise between various points of view, while hoping for a somewhat freer use of travaux.<sup>58</sup> Another group called for a much broader avenue to travaux, suggesting in particular that the first two articles of the draft be combined so as to place travaux on an equal plane with text, context, and object and purpose.<sup>59</sup> A final group, which generally tended to express itself with particular vehemence during these discussions, appeared to feel that the path to travaux had already been paved too broadly.<sup>60</sup> This last group worried about “confusion . . . between authentic interpretation and interpretation reflected in . . . the *travaux*,”<sup>61</sup> feared that travaux might not always reflect the full scope of drafting negotiations,<sup>62</sup> and emphasized that states might even manipulate travaux so as to conceal the true state of affairs from posterity.<sup>63</sup>

Skepticism about travaux appeared to gain some momentum, and the first two days’ discussion came to a close with a proposal by Alfred Verdross, the Austrian member, to prohibit

<sup>54</sup> See [1964] 1 Y.B. INT’L L. COMM’N, *supra* note 47, at 309 (Waldock) (explaining that the sort of “special meaning” he had in mind was that referenced by the Permanent Court of International Justice (PCIJ) in the *Eastern Greenland* case); see also *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 PCIJ (Ser. A/B) No. 53, at 34 (Apr. 5).

<sup>55</sup> 1956 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL, *supra* note 36, at 346–47 (“Toutefois s’il est établi que les termes employés doivent se comprendre dans un autre sens, le sens naturel et ordinaire de ces termes est écarté.”). As rapporteur on the subject for the IDI, Lauterpacht had included a special meaning provision in his proposed draft resolution. See [1954] 1 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL, *supra* note 37, at 225. When Fitzmaurice replaced Waldock as IDI rapporteur, he tried to sharply restrict resort to the provision. See 1956 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL, *supra* note 36, at 337–38 (“Il n’y a lieu de s’écarter du sens naturel et ordinaire des dispositions du traité que s’il est établi que celles-ci doivent se comprendre dans un autre sens.”). Other members resisted, however. See, e.g., *id.* at 342 (Jessup) (“envisagée par [M. Fitzmaurice] d’une façon beaucoup plus restrictive”). Fitzmaurice then backed off, and the IDI adopted a relaxed formulation. *Id.* at 348–49 (vote of 35-0, with 7 abstentions).

<sup>56</sup> Waldock’s Third Report, Add. 3, *supra* note 31, at 16 (emphasis added).

<sup>57</sup> *Id.*

<sup>58</sup> E.g., [1964] 1 Y.B. INT’L L. COMM’N, *supra* note 47, at 275 (Briggs) (July 14, 1964), 282 (Ago) (July 15, 1964), 280 (Ago) (July 14, 1964), 286 (Yasseen) (July 15, 1964).

<sup>59</sup> *Id.* at 276 (July 14, 1964) (Tabibi), 278 (Rosenne) (July 14, 1964), 283–84 (Rosenne) (July 15, 1964).

<sup>60</sup> E.g., *id.* at 281 (de Luna) (July 14, 1964), 285 (de Luna) (July 15, 1964), 277 (Amado) (July 14, 1964), 279 (Bartoš) (July 14, 1964), 287 (Bartoš) (July 15, 1964); *cf. id.* at 279 (Tunkin) (July 14, 1964).

<sup>61</sup> *Id.* at 276 (de Luna) (July 14, 1964).

<sup>62</sup> *Id.* at 287 (Bartoš) (July 15, 1964).

<sup>63</sup> *Id.* (Amado) (July 15, 1964).

the use of travaux unless the meaning seemed either absurd or ambiguous.<sup>64</sup> While reactions to the draft had been mixed, Waldock appears to have understood himself to be charged with redrafting the articles along the lines suggested by Verdross.<sup>65</sup>

Two days later, Waldock came back with a dramatically revised draft. The first and most important change was that he eliminated the “confirm” route to travaux completely.<sup>66</sup> This change left only three routes to travaux: ambiguity, absurdity, and special meaning. But Waldock went further still. In his comments introducing the revised text, he put the special meaning route on the chopping block, noting that it was now the most tentative part of the draft and inviting his colleagues to eliminate it.<sup>67</sup> Had that suggestion been implemented, it would have eliminated two of the four avenues to travaux that exist today, reducing the availability of travaux to “the main cases in which doubt arose as to the meaning of a provision” on its face.<sup>68</sup> The discussion of this fundamental alteration was a turning point in the drafting process.<sup>69</sup>

The first thing that happened was that Mustafa Yasseen, the member from Iraq, spoke out with an urgency that was quite at odds with his typical diplomacy. While Yasseen had earlier voiced mild approval of the general structure of Waldock’s first draft, he now asserted that he “could not accept an article which would impose a chronological order and which would permit reference to preparatory work only after it had been decided that the text was not clear, that decision itself being often influenced by the consultation of the same sources.” “[T]he clearness or ambiguity of a provision was a relative matter,” he explained, and “sometimes one had to refer [to] the preparatory work or look at the circumstances surrounding the conclusion of the treaty in order to determine whether the text was really clear and whether the seeming clarity was not simply a deceptive appearance.”<sup>70</sup>

<sup>64</sup> *Id.* (Verdross) (July 15, 1964) (“[H]e shared Mr. Barto’s misgivings [about travaux]. They might perhaps be allayed by slightly amending the wording of article 71, paragraph 2 [governing the use of travaux]. Under article 70 auxiliary means could be used only in cases of doubt or if the ordinary meaning of a term did not lead to a reasonable interpretation[, a restriction that should be extended to travaux as well.]”).

<sup>65</sup> Waldock later “recalled the instructions he had been given to strike out (a), (b), and (c) of his original draft article 71”—that is, the provisions allowing resort to travaux for the purpose of confirming, determining, and establishing a meaning in certain circumstances—and noted, in particular, that “some members . . . preferred that confirmation should not be mentioned.” *Id.* at 314 (Waldock) (July 17, 1964).

<sup>66</sup> Waldock’s initial discussion of confirmation had been rather perfunctory, and appears to have been included principally to account for claims by some tribunals that they had referred to travaux solely to confirm their textual interpretation. *Id.* at 58 (Waldock) (July 17, 1964).

<sup>67</sup> *Id.* at 309 (Waldock) (July 17, 1964) (“The Commission would also have to decide whether to retain article 72, dealing with terms having special meanings. . . . He personally thought that where a special meaning could be established by special evidence, it was very probable that the meaning would appear in the context of the treaty. In most cases in which a special meaning of a term had been pleaded, the tribunals appeared to have rejected the special meaning.”).

<sup>68</sup> *Id.* (Waldock) (July 17, 1964).

<sup>69</sup> Space does not suffice to discuss another important change that happened at this point: the draft’s promotion of subsequent practice to a position parallel to that of ordinary meaning, context, and object and purpose. Humphrey Waldock (Special Rapporteur), Sixth Report on the Law of Treaties, Add. 6, at 19, UN Doc. A/CN.4/186/Add.6 (1966) [hereinafter Waldock’s Sixth Report, Add. 6]. This shift was generally approved by states, which likewise appreciated its significance. [1966] 1 Y.B. INT’L L. COMM’N, pt. 2, at 184 (Waldock) (June 14, 1966), UN Doc. A/CN.4/SER.A/1966 (1967).

<sup>70</sup> [1964] 1 Y.B. INT’L L. COMM’N, *supra* note 47, at 313 (Yasseen) (July 17, 1964); *see also id.* at 314 (Yasseen) (July 17, 1964) (noting that under Waldock’s revised draft, “[t]here also remained the problem of what should be done if reference to the preparatory work showed that such an interpretation was not clear”).

Note the nature of Yasseen's resistance. Despite agreeing that text was the presumptive target of interpretation,<sup>71</sup> he was adamantly opposed to a mechanistic or hierarchical methodology. In his view, travaux could sometimes even take a dominant role, modifying what a rigidly exegetical approach might otherwise have suggested to an overconfident interpreter. Indeed, Yasseen thought it impossible to evaluate even the putative threshold conditions of ambiguity and absurdity without reference to the travaux. As he said later in the debate, a text simply "could not be deemed clear until its entire dossier had been studied."<sup>72</sup>

The cascade of concessions that followed was dramatic. First, Waldock made a brief, but unequivocal, speech conceding the methodological point: not only could drafting history itself demonstrate the existence of latent ambiguity or absurdity, but "it was sometimes impossible to understand clearly even the objects and purpose of the treaty without such reference" to travaux.<sup>73</sup> He explained almost apologetically that the only reason he had eliminated confirmation and re-weighted the revised draft so strongly toward textualism was that he had mistakenly understood the first round of comments—and in particular Verdross's proposed revision, which had gone unrebutted by others in the room—to require him to do so.<sup>74</sup>

Roberto Ago and Herbert Briggs (members from Italy and the United States, respectively) followed up immediately by offering a suite of new proposals. The first was to restore the "confirmation" avenue to travaux.<sup>75</sup> The second was to specify that the "special meaning" route would be retained.<sup>76</sup> A final adjustment involved revising the syntax of Article 32 so that it emphasized the availability of travaux.<sup>77</sup>

A string of speakers lined up in support of these changes. The first was Waldock himself, rising a second time to agree with Yasseen's critique. As a descriptive matter, Waldock conceded, "it was unrealistic to imagine that the preparatory work was not really consulted by States, organizations, and tribunals whenever they saw fit, before or at any stage of the proceedings, even though they might afterwards pretend that they had not given it much attention." And while it was true that adding back "the reference to confirmation and, *a fortiori*, verification tended to undermine the text of a treaty in the sense that there was an express authorization to interpret it in the light of something else; nevertheless that was what happened in practice."<sup>78</sup> Milan Bartoš, a member from Yugoslavia who had previously expressed

<sup>71</sup> *Id.* at 313 (Yasseen) (July 17, 1964).

<sup>72</sup> *Id.* at 314 (Yasseen) (July 17, 1964).

<sup>73</sup> *Id.* at 313 (Waldock) (July 17, 1964). Given how frequently such use is criticized today, Waldock's embrace of travaux to demonstrate object and purpose is striking.

<sup>74</sup> See *supra* text accompanying note 64.

<sup>75</sup> [1964] 1 Y.B. INT'L L. COMM'N, *supra* note 47, at 313 (Ago) (July 17, 1964) (suggesting that Yasseen's concern be accommodated by providing that "recourse could be had to further means of interpretation, including those serving to confirm the interpretation resulting from the context"); *id.* (Briggs) (July 17, 1964) ("[A]s article [32] dealt with cases in which the meaning of a provision was ambiguous or in doubt, a second paragraph cou[ld] be added to the effect that the same method could be used to confirm a meaning established by a textual approach").

<sup>76</sup> *Id.* (Ago) (July 17, 1964) ("[T]he text [should] provide that recourse could be had to further means of interpretation, including those serving to confirm the interpretation resulting from the context or to establish it, in cases where the interpretation according to article [31] would lead to an obscure meaning.").

<sup>77</sup> *Id.* (Ago) (July 17, 1964) ("[T]he second part of article [32] should come first, so that the text would [start rather than conclude by] provid[ing] that recourse could be had to further means of interpretation").

<sup>78</sup> *Id.* at 314 (Waldock) (July 17, 1964). A continuation of this exchange further clarified the point. Yasseen again observed that "reference to the preparatory work [could itself] show[] that . . . an interpretation [of the text] was



anxiety about the unsophisticated use of preparatory work, then spoke in favor of reinserting the confirmation route.<sup>79</sup> And even the Spaniard Antonio de Luna, who had seemed more skeptical of travaux than anyone else during the discussion of Waldock's first draft, chimed in to add his support.<sup>80</sup>

At this point, the Argentinian member José Maria Ruda spoke up as the sole dissenter. His views—which were rejected unanimously—channeled almost exactly the modern conventional wisdom that this article seeks to debunk: “he opposed the Chairman’s suggestion for reasons which he had stated earlier. If the general rule of article [31] was applied and a clear conclusion was reached there was no need for confirmation. The need for recourse to other methods arose only if the matter was unclear.”<sup>81</sup> The ILC’s attention was thus focused on precisely this point, and the rejection of Ruda’s argument was grounded in a considered and purposeful deliberation.

When Ruda finished speaking, the Israeli member Shabtai Rosenne—who came closest in these debates to advocating something like McDougalism—sought to capitalize on the shifting momentum by urging the elimination of *any* language about the purpose for which supplementary materials could be used.<sup>82</sup> Both Ago and the Soviet member Grigorii Tunkin seemed initially taken by this idea, apparently because it promised to avoid straitjacketing interpreters in unforeseeable ways.<sup>83</sup> But for the rest of the group, Rosenne’s proposal was a bridge too far: admitting travaux simply “for the purpose of interpretation” full stop, as Tunkin then proposed, would lead straight to untethered intentionalism. “To adopt the suggested change,” Waldock said, would be to abandon the “strong predilection for textual interpretation” that the Commission had shown “[t]hroughout” the proceedings. “All were agreed,” he continued, “that the text was not everything and that the preparatory work had its place, but to reduce the passage to ‘Recourse may be had to other means’ would solve nothing and weaken the text.”<sup>84</sup> After de Luna joined the opposition to Rosenne’s proposal,<sup>85</sup> it was dropped without further recorded discussion.

The Commission then voted 13-0-2 to return “confirm” to the text of Article 32 and to reword its language to emphasize the permissibility of travaux.<sup>86</sup> Ruda was the only person to put objections on the record, explaining his decision by emphasizing exactly what he had lost:

not clear,” and Waldock tacitly conceded the point while noting that “the same obscurity might well be found in the preparatory work,” too. *Id.* (Waldock) (July 17, 1964).

<sup>79</sup> *Id.* (Bartoš) (July 17, 1964).

<sup>80</sup> *Id.* at 313 (de Luna) (July 17, 1964) (“supported the Chairman’s suggestion”).

<sup>81</sup> *Id.* at 314 (Ruda) (July 17, 1964).

<sup>82</sup> *Id.* (Rosenne) (July 17, 1964) (“[I]t would be going too far to undertake to say both when recourse could be had to preparatory work and other further means of interpretation and for what purpose. He preferred to deal with the ‘when’ aspect, as there was a large element of fiction in the confirmation doctrine as advanced by many international tribunals.”).

<sup>83</sup> *Id.* (Tunkin) (July 17, 1964) (“[I]t might be wiser to avoid excessive detail and not to indicate the purposes for which the preparatory work should be used. It would be sufficient to state that it could be consulted for the purpose of interpretation.”); *id.* (Ago) (July 17, 1964) (“[I]t would be possible to say, simply ‘in the interpretation of a provision, recourse may be had also to other means . . .’”).

<sup>84</sup> *Id.* (Waldock) (July 17, 1964) (“He thought it would probably suffice to state the basic rule firmly in article [31]”).

<sup>85</sup> *Id.* (de Luna) (July 17, 1964) (“he preferred the present wording”).

<sup>86</sup> *Id.* at 316–17 (July 20, 1964).

“As indicated by the International Court of Justice . . . [and] the ‘consistent practice of the Permanent Court of International Justice,’” he complained, “‘there is no occasion to resort to preparatory work if the text of a Convention is sufficiently clear in itself.’”<sup>87</sup> Ruda’s objection underscored that this new version no longer limited the use of travaux to situations of obscurity or absurdity. Rather, it now allowed precisely the reflective equilibrium between travaux and text that Yasseen had demanded.

Next, the Commission voted 14-0-1 to retain the “special meaning” provision.<sup>88</sup> As with the decision to return “confirmation” to the text, this decision prompted a post-vote response from the sole objector, who spelled out what the vote implied: he “believed that, where the parties wished to give to a term a special meaning, they should say so explicitly in the treaty. It was not sufficient to specify in article 72 that the special meaning should be ‘established conclusively.’”<sup>89</sup> Even the lone opponent thus agreed that the amended draft now allowed interpreters to seek a special meaning in the travaux.

The resulting draft already displayed the basic characteristics of the final text that would emerge from Vienna in 1969. On one hand, ILC members hewed to text as the presumptive object of interpretation, rejecting any suggestion that “[w]hat the parties had intended was more important than what they had actually said in the treaty.”<sup>90</sup> On the other hand, their considered decision to retain the confirmation and special meaning routes reflected a nearly unanimous view that conscientious treaty interpretation had to include “a fairly wide use of travaux.”<sup>91</sup> Perhaps most telling, when the rubber hit the road during debates on unrelated topics, these selfsame ILC members cited travaux without explaining or even apparently noting that they were engaging a potentially disfavored mode of interpretation.<sup>92</sup> There were even moments when a lack of textual clarity was resolved not by revising the legal instrument, but by adding further explanations to the preparatory work.<sup>93</sup>

<sup>87</sup> *Id.* at 317 (Ruda) (July 20, 1964) (quoting Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), *supra* note 52, at 63).

<sup>88</sup> *Id.* at 315 (July 20, 1964).

<sup>89</sup> *Id.* at 318 (Paredes) (July 20, 1964).

<sup>90</sup> *Id.* at 279 (Bartoš) (July 14, 1964) (“In his view the interpretation of a treaty should be based on the general spirit of the treaty. The two concepts—his own and the Special Rapporteur’s—were difficult to reconcile, since there was a question of primacy.”). A final colloquy between Rosenne and Waldock nicely illustrates this point. Rosenne, perhaps still smarting from the rejection of his own proposal, said after the final vote that “he wished to place on record his reservations regarding article [32]; it was normal to have recourse to *travaux préparatoires* for purposes of interpretation.” *Id.* at 317 (Rosenne) (July 17, 1964). Waldock responded by reaffirming what the discussion had already showed: “Under article [32], a fairly wide use of *travaux préparatoires* was permitted.” *Id.* (Waldock) (July 17, 1964). The difference was that the 1964 ILC draft permitted the use of travaux for the presumptive purpose of elucidating the text but not for reconstructing the original policy considerations so as to decide the wisest resolution of some contemporary problem.

<sup>91</sup> *Id.* at 317 (Waldock) (July 20, 1964).

<sup>92</sup> Humphrey Waldock (Special Rapporteur), Third Report on the Law of Treaties, at 66–68, UN Doc. A/CN.4/167 (citing travaux to resolve a question about rights under the Hay-Pauncefote Treaty); *cf.* [1964] 1 Y.B. INT’L L. COMM’N, *supra* note 47, at 234–35 (Waldock) (July 6, 1964) (“In many cases, the intention of the parties to exclude certain territories from the operation of a treaty would result from the *travaux préparatoires* and could be a matter of interpretation.”).

<sup>93</sup> *E.g.*, [1964] 1 Y.B. INT’L L. COMM’N, *supra* note 47, at 238 (Lachs) (July 6, 1964) (suggesting that the commentary clarify the meaning of a draft article), 314 (Waldock) (July 17, 1964) (similar), 255 (Yasseen) (July 9, 1964) (similar); *cf. id.* at 254 (Bartoš) (July 9, 1964) (proposing to transfer “the substance of [a] paragraph . . . to the commentary”), 250 (Lachs) (July 8, 1964) (similar), 255 (Castén) (July 9, 1964) (similar).

In short, despite a commonsense recognition that travaux could be abused or interpreted poorly, the ILC members understood their 1964 draft to eliminate threshold requirements for the consultation of travaux. The reason it specified particular avenues was not to limit the *occasions* on which drafting history could be used, but to limit the *purposes* for which it could be invoked.

*State reactions to the 1964 ILC draft.* When the ILC reported its draft treaty to the Sixth Committee of the General Assembly for review, member states mostly confirmed and approved the ILC settlement. In general, Sixth Committee delegates seemed simultaneously to agree with the ILC's decision to "adopt the text of the treaty as the essential basis for interpretation" and to endorse the ILC's embrace of travaux as an important part of that process.<sup>94</sup> This understanding was reflected both in the way delegates deployed drafting history when debating the scope of obligations under various treaties<sup>95</sup> and in the way they expected that other VCLT provisions would themselves require attention to the travaux of treaties to which they applied.<sup>96</sup>

Of course, more extreme positions also reappeared.<sup>97</sup> In particular, the United States now stepped onto center stage as the main proponent of the untethered "intention ab initio" approach—a role the Americans would occupy for the next four years. In light of its view that "as presently drafted the ordinary meaning rule apparently is given primacy,"<sup>98</sup> the United States made three proposals. First, it urged the ILC to consider "whether the provisions [on interpretation] should be stated as guidelines rather than as rules." Second, it requested the deletion of the "absurdity" and "ambiguity" triggers from Article 32 to make the article less "unduly restrictive with respect to recourse to preparatory work and other means of interpretation." Finally, it suggested eliminating the requirement that a special meaning be proven "conclusively," so that such meaning could be established without any heightened burden of

<sup>94</sup> Reports of the International Law Commission on the Work of Its Sixteenth and Seventeenth Sessions, at 22, UN Doc. A/6090 (Nov. 4, 1965); see also Waldock's Sixth Report, Add. 6, *supra* note 69, at 3 (citing support by Israel, with a caveat that the rule should not lead to "excessive molecularization of the treaty"), 1–7 (citing general sympathy for at least initially treating text as an accurate expression of party intent). For one exception, see Law of Treaties: Comments by Governments on Parts I, II and III of the Draft Articles on the Law of Treaties Drawn Up by the Commission at Its Fourteenth, Fifteenth and Sixteenth Sessions, at 293 (Hungary) (Sept. 1, 1965) (agreeing with spirit of ILC commentary but suggesting that the actual draft text was "rigid" and should be "more flexibl[e]") [hereinafter Comments by Governments], in [1966] 2 Y.B. INT'L L. COMM. 279, UN Doc. A/CN.4.SER.A/1966/Add.1 (1967).

<sup>95</sup> Sixth Committee, Summary Record of the 912th Meeting, at 67 (Australia) (interpreting Article 103 of the UN Charter based on an extended analysis of the travaux of the San Francisco Conference), UN GAOR, 21st Sess., UN Doc. A/C.6/SR.912 (Oct. 18, 1966).

<sup>96</sup> Sixth Committee, Summary Record of the 851st Meeting, at 74 (Austria) (emphasizing the role of drafting history in applying a separate article on treaties concluded in more than one language), UN GAOR, 20th Sess., UN Doc. A/C.6/SR.851 (Oct. 14, 1965); Comments by Governments, *supra* note 94, at 317 (Netherlands) (Feb. 26, 1965) (noting the role of travaux in assessing the existence of party expectations about the termination of a treaty).

<sup>97</sup> Comments by Governments, *supra* note 94, at 361 (Yugoslavia) (Apr. 9, 1966) ("when the text of a treaty is clear and unambiguous, there can be no reference to provisional understandings in the course of negotiations"); Sixth Committee, Summary Record of the 850th Meeting, at 67 (Thailand) (similar), UN GAOR, 20th Sess., UN Doc. A/C.6/SR.850 (Oct. 13, 1965).

<sup>98</sup> Sixth Committee, Summary Record of the 842nd Meeting, at 15 (United States), UN GAOR, UN Doc. A/C.6/SR.842 (Oct. 6, 1965). It is interesting to note that the U.S. member of the ILC had been enthusiastic about Waldock's approach to treaty interpretation. [1964] 1 Y.B. INT'L L. COMM'N, *supra* note 47, at 275 (Briggs) ("strongly supported the approach adopted by the Special Rapporteur," albeit with some reservations about "the use of the word 'natural'" in the description of natural meaning).

proof.<sup>99</sup> While the U.S. proposals received little support from other delegates,<sup>100</sup> they dominated debate for the rest of the drafting process.

#### IV. THE 1966 ILC MEETING

Once the Sixth Committee finished its deliberations and the last of the written government responses had been collected, the ILC met in special session to finalize its proposal.<sup>101</sup> Waldock introduced the topic with a note of some surprise at the generally positive reaction to the articles on treaty interpretation.<sup>102</sup> Despite the Brazilian member's suggestion that they should really just ignore the state responses—"None of the points made in the comments by governments had any cogency"<sup>103</sup>—the ILC members dove into the topic with their characteristic attention to detail. It quickly became clear that Waldock's proposed agenda was largely a reaction to the U.S. response.<sup>104</sup>

##### *Hierarchy of Interpretive Method*

*Hierarchy within Article 31.* The first question was whether the methodological components of Article 31—ordinary meaning, context, object and purpose, other rules of international law, subsequent practice, subsequent agreements, and (crucially for our purposes) the special meaning inquiry—created a cascading hierarchy of authority, such that each element took automatic analytical precedence over the element that followed it.<sup>105</sup> The United States had interpreted the elements that way, and its desire to rephrase the rules as guidelines was aimed at what it saw as this feature of the draft.

Discussion of the U.S. proposal prompted the first instance of a dynamic that quickly became familiar: the United States drastically overestimated the rigidity of the draft rules; the draft's principal supporters patiently explained the United States' error; and then the gathering eventually reaffirmed the drafters' initial approach. Waldock thus responded to the United States' first critique by denying it. With palpable perplexity, he explained that the 1964 draft had been designed precisely to preclude inflexibility or a hierarchical approach:

The Commission was fully conscious in 1964 of the undesirability—if not impossibility—of confining the process of interpretation within rigid rules; and the provisions of

<sup>99</sup> Comments by Governments, *supra* note 94, at 44–45 (United States).

<sup>100</sup> For exceptions, see Sixth Committee, Summary Record of the 845th Meeting, at 38 (Greece) ("there was only one basic rule of interpretation: to ascertain the intention of the parties by every possible means, in every possible way"), UN GAOR, 20th Sess., UN Doc. A/C.6/SR.845 (Oct. 11, 1965); Sixth Committee, Summary Record of the 850th Meeting, at 69 (Kenya) (similar), UN GAOR, 20th Sess., UN Doc. A/C.6/SR.850 (Oct. 13, 1965).

<sup>101</sup> Since ILC membership was scheduled to turn over at the end of 1966, the General Assembly approved an extraordinary ILC session to complete work on the topic. GA Res. 2045 (XX) (Dec. 8, 1965)

<sup>102</sup> Waldock's Sixth Report, Add. 6, *supra* note 69, at 20 ("[H]aving regard to the controversial character of this question, the number of governments which have made comments on it is comparatively small."). It is worth noting that the Turkish delegate to the Sixth Committee had warned against drawing strong conclusions from such governmental silence. Sixth Committee, Summary Record of the 847th Meeting, at 48 (Turkey) ("The reason why Governments sometimes failed to comment on a particular point was not always perhaps that they implicitly approved of it, . . . but simply that they had not had the time to examine it."), UN GAOR, 20th Sess., UN Doc. A/C.6/SR.847 (Oct. 12, 1965)

<sup>103</sup> [1966] 1 Y.B. INT'L L. COMM'N, pt. 2, *supra* note 69, at 184 (Amado) (June 14, 1966).

<sup>104</sup> *Id.* at 185 (Amado) (June 15, 1966) (outlining "the three major questions").

<sup>105</sup> *Cf.* Abi-Saab, *supra* note 3.

articles [31]–[33] when read together, as they must be, do not appear to constitute a code of rules incompatible with the required degree of flexibility.<sup>106</sup>

The debate on this point was not much of a contest. Every member of the ILC who spoke on this issue—even the American Herbert Briggs—agreed with Waldock that the U.S. government was simply wrong. As extensively detailed in the ILC Commentary to the 1964 draft, and as logically entailed in the structure of Article 31 itself, there was no hierarchy of meaning within Article 31. Thus, there were “no watertight compartments, but only subtle distinctions between the phases”;<sup>107</sup> the various components operated as “but two aspects of a single process” that “might have to be listed for purposes of logical presentation, but that did not justify the deduction of a hierarchical order.”<sup>108</sup>

With such overwhelming agreement on this point, the U.S. proposal to “eliminate” hierarchies within Article 31 was not worth much more attention. At the very end of the discussion, Waldock returned to the issue and disposed of it quickly: “Neither in [the 1964] text nor in the one now proposed was there any intention of creating an order in which a series of rules should be successively applied; the Commission’s idea was rather that of a crucible in which all the elements of interpretation would be mixed[.]”<sup>109</sup>

*Hierarchy between Articles 31 and 32.* Like the first question, the second related to fundamental question about hierarchy—this time, between Article 31 and Article 32 as separate structural units. Initially, it seemed unlikely that this second question would require any attention at all. As Waldock’s *Sixth Report on the Law of Treaties* rightly noted, governments “appear[ed] . . . to endorse, in general, the Commission’s view that the elucidation of the meaning of the text should be the starting point of interpretation rather than an investigation *ab initio* into the intentions of the parties.”<sup>110</sup> But discussion was soon raging once more on this fundamental issue, prompted by what seems to have been an innocent suggestion from Briggs to combine Articles 31 and 32 without otherwise changing their wording.

The debate on Briggs’ proposal reestablished the basic integrity of the conceptual relationship between Articles 31 and 32, while simultaneously emphasizing the ILC’s consensus rejection of McDougalism. Senjin Tsuruoka, the member from Japan, began with a lengthy speech urging his colleagues to go even further than Briggs suggested. As Tsuruoka saw it, the provisions should be reformulated as a completely undifferentiated list of considerations. “The

<sup>106</sup> Waldock’s Sixth Report, Add. 6, *supra* note 69, at 8.

<sup>107</sup> [1966] 1 Y.B. INT’L L. COMM’N, pt. 2, *supra* note 69, at 193 (de Luna) (June 16, 1966); *see also id.* at 269 (Briggs) (July 5, 1966) (“no intention of establishing a rigid hierarchy of means of interpretation” in Article 31), 268 (Rosenne) (July 4, 1966) (“the Special Rapporteur had carefully explained that there was no intention of creating a hierarchy of rules of interpretation” in Article 31).

<sup>108</sup> [1966] 1 Y.B. INT’L L. COMM’N, pt. 2, *supra* note 69, at 195 (El-Erian) (June 16, 1966). Even the one member then inclined to support an interpretive hierarchy agreed that the draft text did not create one. *Id.* at 189 (Ago) (June 15, 1966).

<sup>109</sup> [1966] 1 Y.B. INT’L L. COMM’N, pt. 2, *supra* note 69, at 267 (Waldock) (July 4, 1966). Throughout every subsequent iteration of the ILC text, the special rapporteur emphasized that the “unity of the process of interpretation” under the general rule of Article 31 did not “establish any positive hierarchy for the application of the[se] means of interpretation.” Waldock’s Sixth Report, Add. 6, *supra* note 69, at 10; *see also id.* (suggesting that any misunderstanding was “perhaps reminiscent of [similar errors regarding] the so-called sources of international law listed in article 38 of the Statute of the International Court. . . . [N]o matter how general or neutral the formulation, alert minds may see in the arrangement chosen a basis for deducing a hierarchical order for the application of the norms.”).

<sup>110</sup> Waldock’s Sixth Report, Add. 6, *supra* note 69, at 8.

new single article would be entitled ‘Rule of interpretation,’” and the revisions “would leave the parties and international courts the greatest possible freedom to choose the combination of means to be employed.”<sup>111</sup> In response to Tsuruoka’s apparent embrace of untethered intentionalism, the ILC members overwhelmingly endorsed the settlement they already had reached in 1964.

To begin with, virtually every member who spoke reaffirmed that the fundamental object of interpretation was presumptively the text of the treaty. Thus, the framework was oriented “to the text [rather] than to the intention or will of the parties as the source of the legal rule,”<sup>112</sup> such that interpreters would take “as a point of departure the text of the treaty itself rather than the intentions of those responsible for drafting the original text.”<sup>113</sup> Everyone, even those who favored combining the two articles, agreed on this point.<sup>114</sup>

But the group emphasized with equal clarity that travaux played an indispensable role in every such act of interpretation.<sup>115</sup> As Waldock put it in his *Sixth Report*, the principle was to integrate the “primacy of the text” as the object of interpretation “with the frequent and quite normal recourse to *travaux préparatoires*” as a mechanism of targeting and testing that object, “without any too nice regard for the question whether the text itself is clear.” In this way, the rules of interpretation imposed the “necessary directive for interpretation *in good faith* on the basis of the text and the *travaux préparatoires*” without undermining “the cardinal principle of the primacy of the text” as the presumptive target of interpretation.<sup>116</sup> Bartoš likewise noted that, while “he was far from being a fanatical partisan of preparatory work as a means of interpretation and had doubts about its legal value,” he still “recognized that it must be taken into account and sometimes even given a primary role.”<sup>117</sup> Ago’s summary was especially apt:

<sup>111</sup> [1966] 1 Y.B. INT’L L. COMM’N, pt. 2, *supra* note 69, at 196–97, 200 (Tsuruoka) (June 16, 1966). Tsuruoka was not alone in advocating this sort of open-ended intentionalism. The Hungarian delegate to the Sixth Committee likewise embraced the “investigation *ab initio* of the supposed intentions of the parties” as the “object of interpretation.” Sixth Committee, Summary Record of the 978th Meeting, at 113 (Hungary), UN GAOR, 22nd Sess., UN Doc. A/C.6/SR.978 (Oct. 23, 1967).

<sup>112</sup> [1966] 1 Y.B. INT’L L. COMM’N, pt. 2, *supra* note 69, at 197 (Ago); *cf.* Sixth Committee, Summary Record of the 912th Meeting, at 69 (de Luna) (“[The ILC] had opted for the will of the parties expressed objectively in the text rather than for the intention of the parties reconstructed subjectively from the preparatory work.”), UN GAOR, 21st Sess., UN Doc. A/C.6/SR.912 (Oct. 18, 1966).

<sup>113</sup> [1966] 1 Y.B. INT’L L. COMM’N, pt. 2, *supra* note 69, at 190 (Jiménez de Aréchaga) (June 15, 1966).

<sup>114</sup> *Id.* at 203 (Briggs) (June 20, 1966) (“His own conviction that the contents of article [31] should not be separated from those of article [32] did not proceed mainly from substantive considerations: it was largely a question of method of expression and of emphasis. . . . He did not accept . . . [that] the interpreter was seeking the intention of the parties as a subjective element distinct from the text.”), 186 (Rosenne) (June 15, 1966) (“Even though the ordinary meaning might sometimes be ambiguous, it should constitute the starting point of the whole process of interpretation.”), 204 (El-Erian) (June 20, 1966) (“All the members of the Commission agreed that the preparatory work was not an original means of determining the text of a treaty, but merely a means of confirming or elucidating its meaning. The essential principle was the primacy of the text as the authentic expression of the intention of the parties.”).

<sup>115</sup> The only apparent exception was Paul Reuter’s brief gesture to a form of textualism more arid than even Fitzmaurice had contemplated. *Id.* at 188 (Reuter) (June 15, 1966) (“the words were the only thing that counted for the purpose of the interpretation of treaties”).

<sup>116</sup> Waldock’s Sixth Report, Add. 6, *supra* note 69, at 22 (emphasis added). Notably, Waldock rejected Czechoslovakia’s proposal to specify a presumption that the text reflected the parties’ intent, since in his view “the statement of the presumption may tend to raise the question how far the presumption is rebuttable and . . . may slightly tend to increase the rigidity of the rules formulated in the articles.” *Id.* at 9.

<sup>117</sup> [1966] 1 Y.B. INT’L L. COMM’N, pt. 2, *supra* note 69, at 202 (Bartoš) (June 17, 1966) (“There were cases, particularly of bilateral treaties, in which the preparatory work brought to light what was sought by interpretation, for it provided an objective expression of the subjective element of the parties’ intention.”).

The separation of articles [31] and [32] . . . did not in any way imply that the Commission was taking a position in favour of one theory rather than another. In particular, it did not mean that the Commission disapproved of recourse to the history of the conclusion of a treaty, which was often indispensable.<sup>118</sup>

In this vein, there was surprising but unmistakable agreement that Articles 31 and 32 were intertwined halves of a single, unitary whole. Given the ILC's decision to keep the two articles formally separate, encountering this notion so consistently in the written record can frankly seem paradoxical. Recalling the delegates' great *bête noire*, however, helps clarify the issue. Keeping the two separate was, in part, a means of filtering travaux through four discrete doctrinal channels, because *unmoored* reference to travaux was associated with untethered intentionalism along the lines of McDougal's work and the Harvard Draft. But once the interpreter's mindset was appropriately focused on text, rather than *ab initio* reconstructions of wise administrative policy, the use of travaux was tightly integrated into an organic, unitary whole.<sup>119</sup>

Indeed, the members expected the use of travaux to be *de rigueur*. This was clearly true as a descriptive matter. Even Verdross "could agree to the rules on interpretation being split into two separate articles despite the fact that, in practice, interpretation by reference to the context and by reference to the preparatory work was often combined."<sup>120</sup> And they were not merely comfortable with that practice; they actively encouraged it. As the Egyptian member Abdullah El-Erian said, the "whole interpretative process was . . . very intricate; it was accumulative, not consecutive."<sup>121</sup> Once again, surprisingly enthusiastic affirmations of this point came from people who had earlier voiced serious skepticism about travaux. De Luna, for example, said that, "[t]hough it was preferable to set out the Commission's rules of interpretation in two separate articles, they must nevertheless be applied together."<sup>122</sup> And the Brazilian member Gilberto Amado acknowledged that, while he "he had at first been attracted by the argument . . . [that] recourse to preparatory work [was] a second phase of interpretation," he "then . . . had been convinced by the Special Rapporteur's reply, which had shown that the various means of interpretation could be employed simultaneously." Ultimately, he had been convinced that

<sup>118</sup> *Id.* at 205 (Ago) (June 10, 1966). For other examples, see also *id.* at 207 (Amado) (June 20, 1966) ("If the text failed to convey the purpose of the States concerned, if it did not enable States to exercise their authority as States in performing the treaty, then the meaning of the text must be sought by every available scientific means.") and at 203 (Yasseen) (June 20, 1966) ("The Commission had given a certain primacy to the text of the treaty, without excluding the possibility of recourse to further means of interpretation such as the circumstances of the conclusion of the treaty and the preparatory work. . . . [R]ecourse to preparatory work was . . . in order to verify or confirm the apparent meaning of the text, so as to make sure that that meaning was in fact what the parties had intended.").

<sup>119</sup> Whether this language ultimately makes logical sense—with ILC members talking simultaneously about the special "crucible" of Article 31 and about the organic unity of Articles 31 and 32—it was how they described what they had done.

<sup>120</sup> [1966] 1 Y.B. INT'L L. COMM'N, pt. 2, *supra* note 69, at 201 (Verdross) (June 17, 1966) ("[R]ecourse should only be had to the preparatory work in order to verify the result obtained by interpretation of the text or to elucidate the meaning of a provision that was not entirely clear."); see also *id.* (Jiménez de Aréchaga) (June 17, 1966) ("As to the preparatory work, it was not always easy to draw the line between confirming a view previously reached and forming a view, but that depended on the inner mental processes of the interpreter.").

<sup>121</sup> [1966] 1 Y.B. INT'L L. COMM'N, pt. 2, *supra* note 69, at 204 (El-Erian) (June 20, 1966); see also Sixth Committee, Summary Record of the 981st Meeting, at 129 (Tunisia) ("On the important subject of the interpretation of treaties, . . . international law provided no absolute rules but merely a set of flexible guidelines. Articles [31]–[33] might constitute a consensus . . ."), UN GAOR, 22nd Sess., UN Doc. A/C.6/SR.981 (Oct. 25, 1967).

<sup>122</sup> [1966] 1 Y.B. INT'L L. COMM'N, pt. 2, *supra* note 69, at 201 (de Luna) (June 17, 1966).

“there was no hierarchy [between Article 31 and Article 32] and no precedence of one means of interpretation over another.”<sup>123</sup>

Tsuruoka’s quixotic suggestion to strip the purposive limits on the use of travaux thus performed an important service for history. It elicited a resounding consensus from ILC members on the foundation of VCLT interpretation as they understood it: above all else, they meant to preclude using “the intention of the parties rather than the text as the starting point of interpretation.”<sup>124</sup> The solution was expressed, however, “not in terms of a hierarchy, but in the light of legal and logical considerations. . . . [T]he process of interpretation was essentially a simultaneous one, though logic might dictate a certain order of thought.”<sup>125</sup> As Waldock put it, the very title of Article 32 was chosen “in order to avoid the word ‘subsidiary’, which in Article 38 . . . of the Statute of the International Court placed an emphasis on the subordinate character of those means.”<sup>126</sup>

### *Doctrinal Mechanics*

The conceptual centrality of drafting history was amply reflected in their more technical discussion of the four doctrinal pathways to travaux. Here, too, the United States’ reaction to the 1964 draft fed a crucial ILC debate. The United States had observed that

Article [32] may be unduly restrictive with respect to recourse to preparatory work and other means of interpretation. A treaty provision may seem clear on its face but, if a dispute has arisen with respect to its meaning, recourse to other means of interpretation should not be made dependent upon the existence of the conditions specified in (a) [ambiguity] and (b) [absurdity] of that article. It is suggested that in the event of a dispute on interpretation of a treaty provision, recourse to further means of interpretation should be permissible if the rules set forth in article [31] are not sufficient to establish the correct interpretation.<sup>127</sup>

This statement represents a remarkable misreading of the plain text of the 1964 draft, and Waldock responded by once again patiently pointing out what the text actually said.

As he put it, with some understatement, the “content and drafting of article [32] received close consideration in the Commission in 1964 when some differences of opinion appeared among members regarding the precise way in which recourse to *travaux préparatoires* should be related to the textual approach to interpretation.” The result of that discussion, of course, had been to reinsert the confirmation route so that absurdity and ambiguity would *not* be the

<sup>123</sup> *Id.* at 207 (Amado) (June 20, 1966).

<sup>124</sup> Waldock’s Sixth Report, Add. 6, *supra* note 69, at 9.

<sup>125</sup> [1966] 1 Y.B. INT’L L. COMM’N, pt. 2, *supra* note 69, at 206–07 (Waldock) (June 20, 1966).

<sup>126</sup> *Id.* (Waldock) (June 20, 1966). The ILC drafting committee ultimately replaced the word “further” with the word “supplementary” in the title of Article 32 in order to make it sound more easily in the Spanish and French translations (“complementarios” and “complémentaires”). *Cf.* Vienna Convention on the Law of Treaties, *supra* note 1, Art. 32 (official Russian text) (“dopolnitel’nye”). But the ILC members agreed that this change did not suddenly subordinate Article 32. [1966] 1 Y.B. INT’L L. COMM’N, pt. 2, *supra* note 69, at 270 (discussion among Briggs, Waldock, and El-Erian) (July 5, 1966). The ILC Commentary on the final draft articles further emphasized that these terms were interchangeable. ILC Commentary on Final Draft Articles, *supra* note 33, at 51 (referencing “the further (supplementary) means of interpretation mentioned in former article [32]”).

<sup>127</sup> Comments by Governments, *supra* note 94, at 183 (United States); *see also* Waldock’s Sixth Report, Add. 6, *supra* note 69, at 5.



only triggers for travaux.<sup>128</sup> Rather than incorporating the precedent of the ICJ and the Permanent Court of International Justice (PCIJ), this change was meant to reject those courts' dubious professions that resort to travaux was disfavored.<sup>129</sup> The ILC therefore simply dismissed the United States' mistaken belief on this matter.<sup>130</sup>

When it came to the "special meaning" provision, however, Waldock and the ILC actually adopted the United States' liberalizing proposal. The 1964 draft had provided that a special meaning could be implemented only if it was "established conclusively" that the parties had so intended. The United States objected to this qualification as excessively burdensome,<sup>131</sup> and Waldock agreed. "The United States Government proposes the deletion of the word 'conclusively' . . . . The Special Rapporteur feels that this comment is well-founded and that the word should be omitted."<sup>132</sup> The resulting revision substantially liberalized the special meaning provision by reducing the evidentiary standard to the same burden of proof that would apply to any other contested factual question.

As before, ILC members agreed that the special meaning provision allowed the evaluation of travaux without reference to the Article 32 triggers.<sup>133</sup> Indeed, it was largely to emphasize that the special meaning provision added an independent path to travaux that it was consolidated with the rest of the Article 31 "crucible."<sup>134</sup>

<sup>128</sup> Waldock's Sixth Report, Add. 6, *supra* note 69, at 21–22. ("The Commission itself said in paragraph 15 of its [1964] commentary that 'it would be unrealistic and inappropriate to lay down in the draft articles [the official PCIJ and ICJ doctrine] that no recourse whatever may be had to extensive means of interpretation, such as *travaux préparatoires*, until after the application of the rules contained in article [31] has disclosed no clear or reasonable meaning.' Accordingly, the rule which it formulated was carefully balanced so as to allow recourse to *travaux préparatoires* in order to 'verify or confirm the meaning resulting from the application of article [31]' . . . .").

<sup>129</sup> As Waldock recalled, "Some members felt that in practice *travaux préparatoires* play a somewhat more significant role in interpretation than might perhaps appear from a strict reading of certain pronouncements of the International Court." *Id.* at 21. The point here was to emphasize that the ILC draft faithfully reflected the actual practice of ICJ judges. See ILC Commentary on Final Draft Articles, *supra* note 33, at 51 ("accords with the jurisprudence of the International Court").

<sup>130</sup> See section entitled "*The Final ILC Draft*," *infra* notes 151–62 and accompanying text (describing 1966 ILC settlement). The ILC records occasionally reflect comments suggesting that "the" route to travaux is through ambiguity or absurdity. See, e.g., [1966] 1 Y.B. INT'L L. COMM'N, pt. 2, *supra* note 69, at 205 (Ago) (June 10, 1966), 201 (Tunkin) (June 17, 1966), 207 (Waldock) (June 20, 1966). These stray remarks might be quoted out of context to suggest that ambiguity and absurdity were understood to be the *only* routes to travaux. That would not be a fair reading. This error was never made in final written documents, and since it runs so profoundly against the text of the draft, the substantive particulars of the drafting negotiations, and the concessions by even those who opposed travaux, each of these few comments seems best read as shorthand for describing *one* of the ways that travaux might be introduced.

<sup>131</sup> Comments by Governments, *supra* note 94, at 183 (United States) ("The use of the word 'conclusively' . . . may be unnecessary. The word 'established' standing alone is definite and precise. Adding the word 'conclusively' may cause confusion in many cases.").

<sup>132</sup> Waldock's Sixth Report, Add. 6, *supra* note 69, at 23.

<sup>133</sup> [1966] 1 Y.B. INT'L L. COMM'N, pt. 2, *supra* note 69, at 205 (Ago) (June 20, 1966) ("How could it be established that the parties intended a term to have a special meaning, unless recourse was had to the further means of interpretation?"), 206 (Waldock) (June 20, 1966) ("[A] meaning other than the ordinary meaning of a term could often be discovered only in the preparatory work or from the circumstances of the conclusion of a treaty."). This conception of special meaning was further demonstrated by Tsuruoka's later proposal to move the provision in question from Article 31(4) to Article 31(2) "in the interests of clarity." *Id.* at 267 (Tsuruoka) (July 4, 1966). He apparently took for granted that a special meaning could be shown in the travaux, and was anxious to emphasize that it might *also* sometimes appear from the other elements of Article 31.

<sup>134</sup> See, e.g., Waldock's Sixth Report, Add. 6, *supra* note 69, at 23 (successfully urging the ILC to move "special meaning" into Article 31 from a separate article, because the "establishment of a 'special meaning' is not one of the

*Travaux in Action*

The ILC members' embrace of travaux was reflected in their regular and instinctive reliance on drafting history to resolve interpretive disputes and drafting dilemmas, without a hint of debate about the methodological appropriateness of doing so. They certainly turned to travaux when disagreeing about the meaning of other treaties. El-Erian, for example, relied heavily on travaux to support his interpretation of the Convention on the Territorial Sea and the Contiguous Zone.<sup>135</sup> Waldock did the same when discussing rights under the Treaty of Ghent,<sup>136</sup> and Rosenne noted that this approach was standard for the UN Charter as well.<sup>137</sup>

Moreover, the members repeatedly observed that some of the VCLT draft's substantive provisions could not themselves be applied without reference to the relevant travaux. Thus, the ILC Commentary on its final 1966 draft noted that separability of treaty provisions was "necessarily . . . a matter to be established by reference to the subject-matter of the clauses, their relation to the other clauses, to the *travaux préparatoires* and to the circumstances of the conclusion of the treaty."<sup>138</sup> Waldock's *Sixth Report* made much the same observation about the intertemporal problem, explaining that the parties' original intent would govern whether a given term was meant to incorporate an evolving meaning.<sup>139</sup> Ago likewise observed, when discussing the draft provisions on multilingual treaties, that travaux would "inevitably" be relied on to understand the relationship between the various texts.<sup>140</sup> And Rosenne noted a list of other provisions in the ILC draft that "seemed to him to require some examination of the preparatory work for a given treaty if they were to be properly applied."<sup>141</sup>

It was presumably this shared understanding about travaux that caused the ILC members to pay such careful attention to the records they were themselves creating for posterity. Indeed, they debated whether the ILC's preparatory work would be part of the eventual VCLT travaux at all. Yasseen, El-Erian, and Tunkin thought that "the very nature of a convention as an act of will made it essential to take into account all the work which had led to the formation of that will—all the material which the parties had had before them when drafting the final text," which in this case would include the ILC preparatory work.<sup>142</sup> Rosenne, adopting what appeared to be a minority view, "doubted whether the records of the Commission itself could properly be regarded as preparatory work for the conventions concluded by States on the basis of the drafts it had prepared."<sup>143</sup> Even Rosenne, however, expected the ILC Commentary to play a key role in interpreting the eventual VCLT. Thus, he asked that the Commentary describe the negotiations over the relationship between Article 31 and Article 32 in order to

purposes for which article [32] admits recourse to *travaux préparatoires*, and unless the 'special meaning' rule is made part of article [31], means of interpretation necessary to establish a special meaning may appear to be excluded").

<sup>135</sup> [1966] 1 Y.B. INT'L L. COMM'N, pt. 2, *supra* note 69, at 206 (El-Erian) (June 20, 1966).

<sup>136</sup> Waldock's *Sixth Report*, Add. 6, *supra* note 69, at 16.

<sup>137</sup> [1966] 1 Y.B. INT'L L. COMM'N, pt. 2, *supra* note 69, at 200 (Rosenne) (June 17, 1966) (citing use of travaux at the ICJ).

<sup>138</sup> ILC Commentary on Final Draft Articles, *supra* note 33, at 68.

<sup>139</sup> Waldock's *Sixth Report*, Add. 6, *supra* note 69, at 16 (Treaty of Ghent example discussed above).

<sup>140</sup> [1966] 1 Y.B. INT'L L. COMM'N, pt. 2, *supra* note 69, at 210 (Ago) (June 22, 1966).

<sup>141</sup> *Id.* at 200 (Rosenne) (June 17, 1966) (citing fifteen examples).

<sup>142</sup> *Id.* at 205 (Yasseen) (June 20, 1966), 205 (Tunkin) (June 20, 1966), 206 (El-Erian) (June 20, 1966).

<sup>143</sup> *Id.* at 201 (Rosenne) (June 17, 1966).

explain precisely what the understanding on that score had been.<sup>144</sup> Waldock similarly urged that the ILC's final commentary include an explanation of their agreement that the Article 31 "crucible" contained no hierarchical sequence of interpretation.<sup>145</sup>

The ILC members' attention to the importance of the preparatory work they were developing did not go unnoticed. The UN secretary-general compiled not just all the ILC debates and state responses but a 163-page concordance of those materials for the delegates to the Vienna Conference.<sup>146</sup> And later in 1966, the Tanzanian delegate encouraged his Sixth Committee colleagues to "pay special attention to the Commission's commentaries on the draft articles, which, if left in their present form, might be accorded a higher status than that of a supplementary aid to interpretation."<sup>147</sup> In this respect, he joined other participants in conceding the role of travaux while urging his fellow drafters to minimize the occasions on which the travaux would reveal something surprising.<sup>148</sup>

### *The Final ILC Draft*

The final architecture of the 1966 draft was very similar to that of 1964.<sup>149</sup> As before, the starting point and presumptive object of treaty interpretation was the text of the treaty,<sup>150</sup> as subjected to the "crucible" of Article 31.<sup>151</sup> Probably the single most important sentence in the entire VCLT travaux makes exactly this point: "the elucidation of the meaning of the text rather than an investigation ab initio of the supposed intentions of the parties constitutes the

<sup>144</sup> *Id.* at 269 (Rosenne) (July 4, 1966).

<sup>145</sup> *Id.* at 267 (Waldock) (July 4, 1966) ("It was important that that should be made clear in the commentary . . ."). For other examples, see [1966] 1 Y.B. INT'L L. COMM'N, pt. 1, at 13, (Cadieux) (Jan. 5, 1966), 30 (Elias) (Jan. 7, 1966), 31 (de Luna) (Jan. 10, 1966), 37 (Verdross) (Jan. 11, 1966), 79 (Rosenne) (Jan. 19, 1966), 117 (Reuter) (Jan. 26, 1966), UN Doc. A/CN.4/SER.A/1966. At least one member expressed concern that this reliance on the commentary might be risky. *Id.* at 8 (Bartoš) (Jan. 4, 1966). But at other times even he was ready enough to do just that. [1966] 1 Y.B. INT'L L. COMM'N, pt. 2, *supra* note 69, at 36 (Bartoš) (May 11, 1966) (urging that it was "important to explain [the interpretation of one draft article] in the commentary").

<sup>146</sup> UN Secretariat, Guide to the Draft Articles on the Law of Treaties Adopted by the International Law Commission at Its Eighteenth Session (1966), UN Doc. A/C.6/376 (May 11, 1967) (subject matter index to commentary from governments on specific articles); *see also* UN Secretariat, Analytical Compilation of Comments and Observations Made in 1966 and 1967 with Respect to the Final Draft Articles on the Law of Treaties, UN Doc. No. A/CONF.39/5 (Vol. I) & (Vol. II) (Feb. 10, 1968) (organized compilation of excerpted comments from governments on specific articles); Report of the Secretary-General, Comments on the Final Draft Articles on the Law of Treaties Prepared by the International Law Commission, UN Doc. No. A/6827 (Aug. 31, 1967) & Adds. 1 (Sept. 27, 1967) & 2 (Oct. 6, 1967) (compiling all submissions from governments in original form) [hereinafter *Compilation of Comments on Final ILC Draft*].

<sup>147</sup> Sixth Committee, Summary Record of the 912th Meeting, at 70 (Tanzania) ("Some articles were indeed meaningless without the commentary; redrafting might therefore be necessary, although that would lengthen the articles."), UN GAOR, 21st Sess., UN Doc. A/C.6/SR.912 (Oct. 18, 1966).

<sup>148</sup> Comments and Amendments to the Final Draft Articles on the Law of Treaties Submitted in 1968 in Advance of the Conference in Accordance with General Assembly Resolution 2287 (XXII), at 33 (Peru) (Mar. 4, 1968) (similar), UN Doc. A/CONF.39/6 (Mar. 4, 1968).

<sup>149</sup> ILC Commentary on Final Draft Articles, *supra* note 33, at 50–51.

<sup>150</sup> *Id.* at 51 ("[I]t is established—and on this point the Commission was unanimous—that the starting point of interpretation is the meaning of the text . . .").

<sup>151</sup> *Id.* ("All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, . . . the process of interpretation is a unity and . . . the provisions of the article [31] form a single, closely integrated rule. . . . The elements of interpretation in the article have in the nature of things to be arranged in some order. But it was considerations of logic, not any obligatory legal hierarchy, which guided the Commission in arriving at the arrangement proposed in the article.")

object of interpretation.”<sup>152</sup> But there was no methodological objection to the use of travaux per se.<sup>153</sup> Interpreters were simply meant to avoid “giving too large a place to the intentions of the parties as an independent basis of interpretation”—a mistake that would transform the exercise into a McDougalist effort to wisely apply abstract state interests to contemporary political challenges.<sup>154</sup> The ILC Commentary thus made clear that travaux were to function as factual evidence about the meaning of the text<sup>155</sup> and that interpreters were expected to rely on them as a matter of course, without excessive concern for the technicalities of doctrine.<sup>156</sup>

The ILC Commentary underscored each of the four doctrinal avenues to travaux. About the absurdity and ambiguity routes, there was little question and little need for discussion. But the Commentary took care to emphasize the confirmation and special meaning routes on which so much effort had been spent. It left no doubt about the doctrinally crucial role of “confirmation” in the closely interwoven relationship between Article 31 and Article 32:

[T]he provisions of article [32] by no means have the effect of drawing a rigid line between the “supplementary” means of interpretation and the means included in article [31]. The fact that article [32] admits recourse to the supplementary means for the purpose of “confirming” the meaning resulting from the application of article [31] establishes a general link between the two articles and maintains the unity of the process of interpretation.<sup>157</sup>

In this regard, the ILC took particular pains to underscore that “confirmation” entailed a considered departure from the ICJ’s suspicious attitude toward travaux:

There are many dicta in the jurisprudence of international tribunals stating that where the ordinary meaning of the words is clear and makes sense in the context, there is no occasion to have recourse to other means of interpretation. Many of these statements relate to the use of *travaux préparatoires*. . . . Nevertheless, [the ILC] felt that it would be unrealistic and inappropriate to lay down in the draft articles that no recourse whatever may be had to extrinsic means of interpretation, such as *travaux préparatoires*, until after the application of the rules contained in article [31] has disclosed no clear or reasonable meaning. . . .

Accordingly, the Commission decided to specify in article [32] that recourse to further means of interpretation, including preparatory work, is permissible for the purpose of confirming the meaning resulting from the application of article [31] . . . .<sup>158</sup>

As for the special meaning route, the Commentary noted that it had been added because some “members, while not disputing that the technical or special meaning of the term may

<sup>152</sup> *Id.* at 53–54.

<sup>153</sup> Indeed, the ILC refused to include a definition of travaux, for fear that any such definition might exclude vital evidence. *Id.* at 54. The ILC even took the then somewhat controversial position that travaux are admissible against states that did not participate in the drafting process. *Id.* (“A State acceding to a treaty in the drafting of which it did not participate is perfectly entitled to request to see the *travaux préparatoires*, if it wishes, before acceding.”).

<sup>154</sup> *Id.* at 52 (“[T]he starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.”); see also *id.* at 54 (“article [32] does not provide for alternative, autonomous, means of interpretation”).

<sup>155</sup> *Id.* at 52 (describing travaux as “mere evidence” directed at a “question of fact”).

<sup>156</sup> *Id.* at 54 (doubting whether the PCIJ’s purported exclusion of travaux in *Territorial Jurisdiction of the International Commission of the River Oder*, 1929 PCIJ (ser. A) No. 23 (Sept. 10), on doctrinal grounds “reflects the actual practice regarding the use of *travaux préparatoires*”).

<sup>157</sup> *Id.* at 51.

<sup>158</sup> *Id.* at 53–54 (introductory paragraph numbers omitted).

*often* appear from the context, considered that there was a certain utility in laying down a specific rule on the point”—in other words, because the other methods listed in Article 31 would not *always* be able to uncover a given special meaning.<sup>159</sup> The Commentary particularly emphasized the automatic role of this provision, noting that it had been incorporated as an integral part of Article 31, which was “entitled ‘General *rule* of interpretation’ in the singular.”<sup>160</sup> To be sure, the Commentary predicted that it would be “the somewhat exceptional case” for a term to have a “special meaning” that bore no relationship to the *prima facie* interpretation.<sup>161</sup> But that was simply to say that the special meaning route was unlikely to affect most of the millions of terms employed in treaties, on the reasonable assumption that drafters and interpreters generally do a competent job.

It was in this form, with the existence and dimensions of the four routes to *travaux* firmly established, that the draft articles on the law of treaties were passed on to the General Assembly and then to the conference of plenipotentiaries that would attempt to finalize a treaty in Vienna.<sup>162</sup> The ILC’s formal role in drafting the VCLT had finally come to a close, just shy of twenty years after it first took up the subject.

## V. THE VIENNA CONFERENCE OF PLENIPOTENTIARIES

### *The Constitutional Project*

As the Vienna Conference convened in 1968, there was widespread agreement that the project was both profoundly important<sup>163</sup> and worrisomely difficult.<sup>164</sup> With postcolonial and

<sup>159</sup> *Id.* at 51 (emphasis added) (“[T]he burden of proof lies on the party invoking the special meaning of the term.”).

<sup>160</sup> *Id.* at 51.

<sup>161</sup> *Id.* at 53; *cf.* [1966] 1 Y.B. INT’L L. COMM’N, pt. 2, *supra* note 69, at 269 (Jiménez de Aréchaga) (July 5, 1966) (“Paragraph I of the Drafting Committee’s text stated the golden rule of interpretation. Paragraph 4, on the other hand, dealt with a minor point which was of limited application[.]”).

<sup>162</sup> For a good summary of debates on a series of important organizational issues, see ILC Commentary on Final Draft Articles, *supra* note 33, at 38–48. The conference was ultimately held in Vienna during two eight-week sessions, one in 1968 and one in 1969. *See* GA Res. 2287 (XXII) (Dec. 6, 1967); GA Res. 2166 (XXI) (Dec. 5, 1966). The principal drama before the conference centered on the question of attendance by East Germany and other similarly situated states. *See, e.g.*, 1968 Vienna Conference Summary Records, *supra* note 28, at 2–9 (Mar. 26, 1968) (arguments about delegate credentials and the “all states” formula for invitations to the conference); UN GAOR, 21st Sess., 1484th mtg. at 6–13, UN Doc. A/PV.1484 (Dec. 5, 1966) (debate culminating in rejection of “all states” formula).

<sup>163</sup> *E.g.*, 1968 Vienna Conference Summary Records, *supra* note 28, at 1 (UN legal counsel) (Mar. 26, 1968) (“the most important, and might also prove to be the most difficult, of [the six UN codification] conferences”); Sixth Committee, Summary Record of the 908th Meeting, at 40 (United Kingdom) (“There was . . . urgent need to establish conventional rules relating to the law of treaties in general.”), UN GAOR, 21st Sess., UN Doc. A/C.6/SR.908 (Oct. 12, 1966); [1966] 1 Y.B. INT’L L. COMM’N, pt. 2, *supra* note 69, at 191 (Bartoš) (June 15, 1966) (“a topic which was not only vast, complicated and of great importance, but also highly controversial”).

<sup>164</sup> *E.g.*, Sixth Committee, Summary Record of the 974th Meeting, at 93 (Israel) (“the most difficult of the codification conferences undertaken by the United Nations or by any other international organization”), UN GAOR, 22nd Sess., UN Doc. A/C.6/SR.974 (Oct. 18, 1967); Sixth Committee, Summary Record of the 977th Meeting, at 111 (United States) (noting that the VCLT “could be the most far-reaching contribution to the establishment of international law yet achieved; but it could also have an adverse effect on the development of international law and on the maintenance of world peace and security”), UN GAOR, 22nd Sess., UN Doc. A/C.6/SR.977 (Oct. 20, 1967); Sixth Committee, Summary Record of the 904th Meeting, at 20 (Nigeria) (“the most difficult subject that [the ILC] had dealt with so far”), UN GAOR, 21st Sess., UN Doc. A/C.6/SR.904 (Oct. 6, 1966).

Cold War politics swirling, international law was facing a crisis of confidence.<sup>165</sup> International lawyers shared a sense that even attempting to codify the law of treaties was risky. “Its failure,” more than one delegate observed, “would clearly be disastrous” for the future of international law: if simmering disputes about the basic fabric of the system were called to the surface and could not be resolved, everything might begin to unravel.<sup>166</sup> Perhaps because of these anxieties, the conference proceedings regularly ground to a halt in the face of political posturing, procedural antics, and an all-too-familiar bureaucratic instinct for the capillary.<sup>167</sup>

By setting the presumptive baseline, the ILC draft exerted a powerful influence on the proceedings. In part, Vienna delegates seemed to agree that they owed some deference to the ILC members’ efforts.<sup>168</sup> More important than any principled view on institutional settlement, however, may have been the pervasive presence of ILC members as individual delegates. Fourteen ILC members from the cohort that had adopted Waldock’s draft were at the conference. They dominated the formal conference leadership and made outsized contributions to the substantive debate.<sup>169</sup> Special Rapporteur Waldock left a particularly indelible impression. Despite protesting when introduced that he was but “the servant of the Conference” and should “not be thought of as someone who was attending the Conference simply to defend the Commission’s work,” Waldock quickly set the tone for his participation when he immediately followed those disclaimers with a vigorous defense of two drafting choices he had made in the first articles under debate.<sup>170</sup>

### *Debating Articles 31 and 32*

*McDougal’s straw man.* The articles were discussed in numerical order, so it was not until April 19 that Articles 31 and 32 finally came up for discussion. The United States was the first delegation to speak on treaty interpretation. Its views did not come as a surprise: in a 1967

<sup>165</sup> “The birth of the Convention was dramatic and political . . . .” Francis Vallat, *The Vienna Convention on the Law of Treaties, 1969*, 1970 Y.B. OF THE A.A.A., at xi, xvi; *see also, e.g.*, Sixth Committee, Summary Record of the 981st Meeting, at 130 (Tanzania) (discussing “the grave crisis of confidence in international law resulting from the decision of the International Court of Justice on the question of South West Africa”), UN GAOR, 22nd Sess., UN Doc. A/C.6/SR.981 (Oct. 25, 1967).

<sup>166</sup> Sixth Committee, Summary Record of the 904th Meeting, at 19 (Canada) (“Although he did not wish to comment on the political difficulties which might beset the proposed conference, he felt obliged to point out that its failure would clearly be disastrous . . . .”), UN GAOR, 21st Sess., UN Doc. A/C.6/SR.904 (Oct. 6, 1966); Sixth Committee, Summary Record of the 967th Meeting, at 55 (Nigeria) (“Because of the great importance of the subject, . . . [a] failure, like that of the Conference for the Codification of International Law held at The Hague in 1930 . . . , could have a most serious effect on the future development of international law and the conduct of international relations.”), UN GAOR, 22nd Sess., UN Doc. A/C.6/SR.967 (Oct. 11, 1967).

<sup>167</sup> 1968 Vienna Conference Summary Records, *supra* note 28, at 21–35 (endless debates over petty drafting details regarding treaty formalities), 88 (Sweden) (Blix) (Apr. 8, 1968) (observing “that the length of the debate was in inverse proportion to the practical importance of the subject”), 125 (Apr. 11, 1968) (lengthy discussion about conference working procedure, triggered by Afghanistan’s comment that “at the present rate of process there was little chance of getting through [the draft] by 24 May”).

<sup>168</sup> *Id.* at 12–20 (Mar. 28, 1968) (debate over the degree of deference afforded to the ILC draft). There was apparent agreement that the size of the ILC majority on any given issue would affect how much deference was extended to the ILC resolution of that point. *Id.* at 169–70 (Uruguay) (Apr. 4, 1968), 239 (Venezuela) (Apr. 29, 1968), 299 (Chile) (May 6, 1968).

<sup>169</sup> At both sessions of the conference, the delegates elected Roberto Ago to be president of the conference, T. O. Elias to be president of the Committee of the Whole, Eduardo Jiménez de Aréchaga to be rapporteur of the Committee of the Whole, and Mustafa Yasseen to chair the Drafting Committees.

<sup>170</sup> 1968 Vienna Conference Summary Records, *supra* note 28, at 20 (Waldock) (Mar. 28, 1968).

memorandum to the General Assembly, the United States had already made clear its dissatisfaction with the ILC's response to the earlier American critique of the 1964 draft.<sup>171</sup> Possibly more important than any a priori policy commitment, however, was the personal role of the U.S. delegate who took the lead on this question: Myres McDougal.<sup>172</sup>

For McDougal, the timing of the Vienna Conference would be either great good luck or a disaster. His magnum opus on treaty interpretation, setting forth the core principles of what came to be known as the New Haven School, had been published less than a year before—not long after it had become clear that the ILC draft would adopt views completely antithetical to his own.<sup>173</sup> Understandably, the debate on treaty interpretation appears to have been the subject he personally cared most about. In fact, it may have been the only reason he came to Vienna at all. McDougal made precisely two speeches over the course of the 1968 session: a brief technical comment during early discussions about constituent treaties of international organizations<sup>174</sup> and then the cri de coeur on treaty interpretation to which we are about to turn. He then vanishes completely from the record, making no further contributions to the 1968 debates<sup>175</sup> and skipping the 1969 session entirely.<sup>176</sup>

McDougal's speech probably caused more confusion about treaty interpretation than any intervention on the subject before or since. He so badly mischaracterized the ILC draft—and did so with such flair both at the conference itself and thereafter (publishing his prepared text in this *Journal* later that year)<sup>177</sup>—that his description has taken on a totemic power that it does not deserve. In essence, he claimed that the ILC draft created a “preclusionary hierarchy” of sources that was “rigid and restrictive” in its celebration of the bare dictionary meaning of text that would take precedence over every conceivable countervailing factor,<sup>178</sup> and that it “relegated” preparatory work to a “subordinate position” vis-à-vis every other source of meaning.<sup>179</sup>

<sup>171</sup> Note Verbale from the U.S. Permanent Representative [to the United Nations] to the International Law Commission (Oct. 2, 1967) [hereinafter U.S. Note Verbale on 1966 ILC Draft], in *Compilation of Comments on Final ILC Draft*, *supra* note 146, Add. 2, at 5–6. See *supra* text at notes 104–34 for discussion of the United States' similar critique in 1964.

<sup>172</sup> FREDERIC L. KIRGIS, *THE INTERNATIONAL SOCIETY OF INTERNATIONAL LAW'S FIRST CENTURY: 1906–2006*, at 343–44 (2006) (noting that a private 1967 ASIL study panel “became the briefing and planning group for the U.S. delegation to the Vienna Conference” and that McDougal—a “prominent member of the panel”—was charged with the topic of treaty interpretation).

<sup>173</sup> See subsection entitled “The bête noire,” *supra* notes 32–41 and accompanying text, and Myres McDougal, *The International Law Commission's Draft Articles of Interpretation: Textuality Redivivus*, 61 *AJIL* 992 (1967).

<sup>174</sup> 1968 Vienna Conference Summary Records, *supra* note 28, at 43 (McDougal) (Apr. 2, 1968).

<sup>175</sup> Even though the next topic of discussion was Article 33, on the closely related question of interpreting multilingual treaties, McDougal neither introduced the U.S. amendment on that subject nor participated in the ensuing debate. See *id.* at 188–90.

<sup>176</sup> 1969 Vienna Conference Summary Records, *supra* note 32, at 75 (Apr. 5, 1968) (listing members of the U.S. delegation).

<sup>177</sup> Myres McDougal, *Statement of Professor Myres S. McDougal, United States Delegation, to Committee of the Whole, April 19, 1968*, 62 *AJIL* 1021 (1968).

<sup>178</sup> 1968 Vienna Conference Summary Records, *supra* note 28, at 167–68 (United States) (Apr. 19, 1968) (describing “over-rigid and unnecessarily restrictive requirements” that “establish[] a hierarchical distinction between certain primary rules of interpretation described as a ‘general rule of interpretation’ and certain allegedly ‘supplementary’ means of interpretation,” producing a cascade of “rigidities, restrictions and hierarchical distinctions”).

<sup>179</sup> *Id.* (United States) (Apr. 19, 1968); U.S. Note Verbale on 1966 ILC Draft, *supra* note 171, at 5 (decrying the “subordinate position to which ‘preparatory work’ on the treaty ‘and the circumstances of its conclusion’ are

The substance of this attack bears so little relationship either to the text of the ILC draft or to the well-publicized debates about its contents that McDougal's motivation is hard to understand.<sup>180</sup> He may have been locked so tightly into believing that only a rigid textualist could reject his views that he genuinely misunderstood the draft.<sup>181</sup> It is also possible that his intervention was a failed gambit to scare his fellow delegates into rejecting the ILC draft, so that the New Haven *bête noire* could slip back into the fold.<sup>182</sup> (For its part, the Communist party line seems to have been that McDougal's views on interpretation were quintessentially bourgeois in character and inevitably imperialist in effect, given the space his proposal seemed to create for powerful countries to escape international obligations.)<sup>183</sup> Whatever the impetus, his speech brought the clash between McDougalism and the ILC text to a climax.

The 1967 U.S. memorandum had condemned the ILC draft for making ordinary meaning “not a starting point, but the centre point about which all other aspects of the process of interpretation must revolve like satellites.”<sup>184</sup> Now in Vienna, McDougal forcefully advocated for reframing the whole thing around New Haven principles. As the United States had argued in its earlier memorandum, “the essential quest in the application of treaties” was “to search for the real intention of the contracting parties in using the language employed by them”<sup>185</sup>—not their intention as expressly recorded in the text of the treaty, but the large objects they had in mind when negotiating the agreement.<sup>186</sup> While the text might be the “point of departure,” it was not the ultimate “end of the inquiry,” and should be “treated as [but] one important index among many of the common intent of the parties.”<sup>187</sup> As the United States' formal submissions had put it, the object of interpretation was to identify “the effect a particular clause

relegated”); Sixth Committee, Summary Record of the 977th Meeting, at 11 (United States) (similar), UN GAOR, 22nd Sess., UN Doc. A/C.6/SR.977 (Oct. 20, 1967).

<sup>180</sup> To reach this conclusion, McDougal needed not only to dismiss the special meaning avenue to travaux, but to ignore the confirmation route entirely. See 1968 Vienna Conference Summary Records, *supra* note 28, at 167–68 (United States) (Apr. 19, 1968) (arguing that the special meaning avenue was only a “modest concession” both because “the burden of proof lies on the party invoking the special meaning of the term” and because—in McDougal's mistaken belief—the special meaning route was available only after first demonstrating ambiguity or absurdity on the face of the document); *id.* (United States) (Apr. 19, 1968) (omitting mention of confirmation); see also U.S. Note Verbale on 1966 ILC Draft, *supra* note 171, at 5–6 (United States) (ignoring confirmation).

<sup>181</sup> McDougal was not alone in making this error before the text was adopted in Vienna. See, e.g., Richard A. Falk, *supra* note 41, at 343–44 (1967); Surya P. Sharma, *The ILC Draft and Treaty Interpretation with Special Reference to Preparatory Works*, 8 INDIAN J. INT'L L. 367, 386–94 (1968); Georg Schwarzenberger, *Myths and Realities of Treaty Interpretation: Articles 27–29 of the Vienna Draft Convention on the Law of Treaties*, 22 CURRENT LEGAL PROBS. 204, 208 (1969).

<sup>182</sup> The plausibility of this hypothesis is somewhat undercut by McDougal's continuation of his acid critique even after Articles 31 and 32 had been adopted in Vienna. See the remarks by McDougal in the panel “Treaty Interpretation: The Proper Role of an Impartial Tribunal,” 63 ASIL PROC. 131 (1969), in which he criticized the moderate defense of the VCLT offered by his two co-panelists as “exemplif[y]ing . . . all the confusions” that his scholarship sought to dispel. *Id.* at 131. He eventually provoked one co-panelist to “interrupt[]” and note that “his patience was exhausted and that the confusion created by Professor McDougal was much more serious than that ever created by a tribunal.” *Id.* at 136.

<sup>183</sup> A. N. TALALAEV, MEZH DUNARODNYE DOGOVORY V SOVREMENNOM MIRE: VOPROSY PRAVA MEZH DUNARODNYKH DOGOVOROV V SVETE RABOTY VEN. KONF. OON 1968–1969 GG, 141–43 (1973) (arguing that McDougal's proposal would have created “broad opportunities” for imperialist powers to subvert the international rule of law).

<sup>184</sup> U.S. Note Verbale on 1966 ILC Draft, *supra* note 171, at 5.

<sup>185</sup> *Id.* (quoting ARNOLD D. MCNAIR, THE LAW OF TREATIES 175 (1938)).

<sup>186</sup> 1968 Vienna Conference Summary Records, *supra* note 28, at 167–68 (United States) (Apr. 19, 1968).

<sup>187</sup> *Id.* (United States) (Apr. 19, 1968).



in a treaty was intended to produce,”<sup>188</sup> followed by an open-ended determination of how to do so under the circumstances.

McDougal then introduced an amendment to effectuate his vision.<sup>189</sup> The mechanism for doing so was simple: as the United States had explained in its 1967 comment on the final ILC draft, “the artificial separation between articles [31] and [32] should be discarded,” and “[a]ll of the[ir] various elements . . . should be arranged to avoid any fixed hierarchy so that whatever elements of interpretation are of importance in a particular set of circumstances may be given their appropriate weight.”<sup>190</sup> All references to ambiguity, absurdity, confirmation, and special meaning were to be eliminated, along with any internal structure worth describing. All that would be left was a string of undifferentiated interpretive factors. “No fixed hierarchy would be established among the elements of interpretation; the amendment sought to make accessible to interpreters whatever elements might be significant in a particular set of circumstances, including ordinary meaning, subsequent practice and preparatory work, but not excluding others that might also be relevant.”<sup>191</sup> With that, McDougal sat down, and the discussion almost went off the rails.

The next three days of debate focused entirely on the U.S. proposal. At first it seemed that McDougal’s caricature had hit home. A string of states—including many that were not remotely sympathetic to his New Haven vision—expressed anxiety about the ILC draft as he had characterized it.<sup>192</sup> A common theme was opposition to any radically textual approach, which would allow clever interpretive gymnastics to trump the clear intent of the parties.<sup>193</sup> Delegates also extolled the regular and central role of drafting history<sup>194</sup> and urged that its use not be restricted to cases of ambiguity and absurdity.<sup>195</sup> Then, in the midst of all this,

<sup>188</sup> U.S. Note Verbale on 1966 ILC Draft, *supra* note 171, at 5.

<sup>189</sup> United States of America: Amendment to Articles 27 & 28, UN Doc. A/CONF.39/C.1/L.156 (Apr. 10, 1968).

<sup>190</sup> U.S. Note Verbale on 1966 ILC Draft, *supra* note 171, at 6.

<sup>191</sup> 1968 Vienna Conference Summary Records, *supra* note 28, 167–68 (United States) (Apr. 19, 1968).

<sup>192</sup> Ukraine, for example, said that the ILC had “rightly rejected proposals whereby a treaty might be interpreted exclusively in connexion with the intention of the parties” but had then mistakenly “gone to the other extreme in deciding that the interpretation should be based exclusively on the terms of the treaty in their context and in the light of its object and purpose.” *Id.* at 168 (Ukraine) (Apr. 19, 1968); *see also id.* at 174 (Spain) (Apr. 20, 1968) (similar), 169–170 (Uruguay) (Apr. 20, 1968) (similar), 171 (Ceylon) (Apr. 20, 1968) (similar).

<sup>193</sup> Thus Austria said with some asperity that—if McDougal was right—the ILC’s approach would require a belief that “the will of the parties was exhaustively expressed by the text of a treaty and could therefore be ascertained exclusively from it.” *Id.* at 178 (Austria) (Apr. 22, 1968). Switzerland put it a bit more mildly: “it would not always be easy . . . to establish from the text alone the common intention of the parties.” *Id.* at 180 (Switzerland) (Apr. 22, 1968).

<sup>194</sup> *Id.* at 179 (Sweden) (Apr. 22, 1968) (worrying that the ILC might have rejected “the subjective approach whereby the ordinary meaning to be given to the terms of a treaty could be set aside if it was clearly established that there was a conflict between the terms and the proven common intentions of the contracting parties”), 177 (Italy) (Apr. 20, 1968) (“The preparatory work and the circumstances in which a treaty had been concluded should not be regarded as subsidiary means of interpretation.”), 170 (Ghana) (Apr. 19, 1968) (noting that “principles of interpretation . . . were only guidelines [for] . . . ascertaining the intention of the parties for the purpose of applying the terms of a treaty to a particular situation”), 182 (Czechoslovakia) (Apr. 22, 1968) (worrying that Article 31 could be read to contain an internal hierarchy).

<sup>195</sup> Ghana, for example, initially feared that the ILC draft would restrict the use of travaux “for two purposes only”—namely, ambiguity and absurdity. *Id.* at 171 (Ghana) (Apr. 18, 1968); *see also id.* at 173 (Tanzania) (Apr. 20, 1968) (proposing to delete the confirmation, ambiguity, and absurdity routes from Article 32, thus allowing “[r]ecourse without restriction . . . to the preparatory work of the treaty . . . , although primary importance should be given to the meaning derived from the application of article [31]”), 178 (Austria) (Apr. 22, 1968) (suggesting

some genuinely hypertextual conservatives spoke up to *endorse* the ILC draft as described by McDougal, describing the draft articles as though the words “confirm” and “special meaning” did not exist.<sup>196</sup> Things were becoming a muddle.

*The ILC vision triumphant.* There was a point when it must have seemed that chaos would overtake the carefully constructed framework of Articles 31 and 32. But as the anxiety began to run its course, more and more delegates began to point out the obvious: McDougal’s description was an egregious mischaracterization.<sup>197</sup> The turning point seems to have been a major speech by Ian Sinclair, representing the United Kingdom, that opened proceedings on the Monday four days after McDougal’s speech. Sinclair eschewed any diplomatic indirection about the “view of some members” or “possible misapprehension in certain quarters.” He took on the U.S. intervention directly, emphasizing rather presciently that he meant to prevent McDougal’s lengthy speech from warping future application of the VCLT.<sup>198</sup>

The challenge for Sinclair was to explain Articles 31 and 32 as something other than vehicles for a strict hierarchy that disfavored travaux. We are already familiar with his answer. These articles rejected not the use of preparatory work as such, but rather the untethered use of that work by a New Haven interpretivism that called on judges to serve as wise international administrators:<sup>199</sup> “The starting point of interpretation was . . . not an investigation *ab initio* into the intentions of the parties,” and interpreters should not try “to ascertain the common intention of the parties, independently of the text.”<sup>200</sup> As other delegates put it, “international law should avoid the idea of a ‘will of the parties’ floating like a cloud over the *terra firma* of a contractual

that the conference “adopt a flexible text which” would “enhance[e] the role of preparatory work” along the lines of the Tanzania amendment).

<sup>196</sup> *Id.* at 176 (Bulgaria) (Apr. 20, 1968) (“It was only when the general rules set out in article [31] did not make it possible to give a clear and reasonable meaning to a clause in a treaty or to a treaty as a whole that recourse should be had to the supplementary means of interpretation mentioned in article [32]”), 181 (Mexico) (Apr. 22, 1968) (similar), 181 (Nigeria) (Apr. 22, 1968) (similar), 182 (Cuba) (Apr. 22, 1968) (similar).

<sup>197</sup> *Id.* at 179 (Sweden) (Apr. 22, 1968) (“Although article [31] favoured the textual approach while also giving considerable weight to the object and purpose of the treaty, article [32] gave wider scope than the opponents of the draft were prepared to admit for the use of all supplementary means of interpretation, including preparatory work.”), 184 (Waldock) (Apr. 22, 1968) (“[W]ith regard to the use made in practice of preparatory work for purposes of interpretation, the differences of opinion were not very wide.”), 183 (Trinidad) (Apr. 22, 1968) (“The differences between delegations were not as wide as appeared at first sight.”), 175 (France) (Apr. 20, 1968) (“Articles [31] and [32] were a thorny matter, inasmuch as they could be regarded as reflecting the doctrinal conflict between those who advocated giving preference to the letter of a treaty and those who held that the intention of the parties should predominate. The proposed new articles did not seem, however, wholly to justify that way of viewing the matter . . . . Throughout [31 and 32] there was an underlying recognition of the intention of the parties as the foundation for the interpretation of treaties. The authors of the draft had nevertheless believed that the intention should be sought in the first place in the instruments made jointly by the parties, . . . and only thereafter in the more subjective elements . . . .”), 173 (Poland) (Apr. 20, 1968) (“It was true that, in its commentary, the International Law Commission . . . stressed the paramount importance of the text for the interpretation of treaties. Nevertheless, in many of the draft articles, the Commission had shown great concern for the intentions—both explicit and implicit—of the parties. . . . Accordingly, the Commission excluded neither the approach based on the intentions of the parties, nor the functional approach; it merely attributed prime importance to the study of the text.”).

<sup>198</sup> *Id.* at 177 (United Kingdom) (Apr. 22, 1968) (“[H]e wished to analyse some of the arguments advanced by the United States representative . . . when introducing his delegation’s amendment . . . to articles [31] and [32]. A particular reason for subjecting those articles to careful examination was that the statements made in the debate would constitute part of the preparatory work of the forthcoming convention on the law of treaties.”).

<sup>199</sup> The United States was not alone in advocating this view of treaty interpretation. *See id.* at 168 (Vietnam) (Apr. 19, 1968), 172 (Greece) (Apr. 20, 1968); *see also* Republic of Viet-Nam: Amendment to Articles 27 and 28, UN Doc. A/Conf.39/C.1/L.199 (Apr. 17, 1968) (proposing to combine Articles 31 and 32).

<sup>200</sup> 1968 Vienna Conference Summary Records, *supra* note 28, at 177 (United Kingdom) (Apr. 22, 1968) (“That view had been subjected to fierce criticism in the debate on treaty interpretation in the Institute of International

text.”<sup>201</sup> The ILC had therefore “rightly rejected proposals” for “arbitrary interpretation divorced from the text,” “whereby a treaty might be interpreted exclusively in connexion with the intention of the parties.”<sup>202</sup>

What, then, was the affirmative philosophical framework of the VCLT’s provisions on treaty interpretation? As the ILC’s supporters began to repair the confusion stirred up by McDougal, discussion quickly centered on familiar themes from the draft text, the Commentary, and the preparatory work of the ILC.

Everyone agreed, logically enough, that the text was generally good evidence of concrete party intent. Even so, delegates were careful to emphasize that this assumption was only a working one. While a few used more categorical terms,<sup>203</sup> most were notably scrupulous about phrasing it as a mere assumption—likely correct, but requiring verification—that treaty text *typically* achieves the objectives of its drafters.<sup>204</sup> Thus, in the United Kingdom’s pivotal speech opposing McDougal’s proposal, Sinclair reemphasized the ILC refrain: “the starting point of interpretation was the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.”<sup>205</sup> As a result, “the primary goal”—the presumptive object—“of interpretation was to elucidate the meaning of that text in the light of certain defined and relevant factors.”<sup>206</sup>

But this principle just means that you start with the text, not that you finish with it. In a lengthy speech right before the Committee of the Whole voted on Articles 31 and 32, Waldock emphasized that “nothing could have been further from the Commission’s intention than to

Law in the early 1950s and had ultimately been decisively rejected by the Institute. Parts of the United States representative’s statement had seemed to be directed towards reviving the doctrine thus rejected”).

<sup>201</sup> *Id.* at 170 (Uruguay) (Apr. 19, 1968); *see also id.* at 179–80 (Argentina) (Apr. 22, 1968) (“[T]he starting point of interpretation was the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.”), 184 (Waldock) (Apr. 22, 1968) (“In the circumstances, if the door were opened too widely to the use of preparatory work, very real dangers would arise for the integrity of the meaning of the treaty.”).

<sup>202</sup> *Id.* at 168, 175 (USSR) (Apr. 20, 1968).

<sup>203</sup> *Id.* at 182 (Cuba) (Apr. 22, 1968) (“the text of the treaty was the authentic expression of the will of the parties”), 182 (Turkey) (Apr. 22, 1968) (“The text of the treaty had to be regarded as the final expression of the intention of the parties . . .”), 179 (Mongolia) (Apr. 22, 1968) (“[I]nterpretation must be based on the intention common to all the parties as expressed in the text of the treaty itself.”); *cf. id.* at 181 (Mexico) (Apr. 22, 1968) (“the will of the parties as declared in the text represented their authentic intention”), 170 (Uruguay) (Apr. 19, 1968) (“the International Law Commission, which based interpretation on the text of the treaty”).

<sup>204</sup> As Finland put the point, it was surely a “reasonable” working hypothesis to “assume that the draftsmen of a treaty would have exercised care in giving written expression to the intention of the parties.” *Id.* at 182 (Finland) (Apr. 20, 1968); *see also, e.g., id.* at 175 (France) (Apr. 20, 1968) (“The authors of the draft had nevertheless believed that the intention should be sought in the first place in the instruments made jointly by the parties, . . . and only thereafter in the more subjective elements . . .”), 177 (United Kingdom) (Apr. 22, 1968) (“it was wiser and more equitable to assume that the text represented the common intentions of the original authors”), 173 (Poland) (Apr. 20, 1968) (“[T]he intention of the parties was to be gathered, above all, from the text of the treaty.”), 175 (USSR) (Apr. 20, 1968) (“The text of the treaty was the main source of those intentions . . .”), 176 (Bulgaria) (Apr. 20, 1968) (“It was undeniable that the real intention of the parties should be sought in the first place in the text of the treaty . . .”), 180 (Argentina) (Apr. 22, 1968) (“presumption that the text of the treaty was the authentic expression of the intentions of the parties”), 174 (Spain) (Apr. 20, 1968) (noting “the pre-eminence of the text of the treaty as an objective expression of the will of the parties”); *cf. id.* at 181 (Liberia) (Apr. 22, 1968) (“[T]he text was the most authentic expression of that intention and should be given priority.”), 170 (Uruguay) (Apr. 19, 1968) (“The text signed was the only, and the most recent, expression of the common will of the parties.”), 176 (Brazil) (Apr. 20, 1968) (“The meaning of the text or, in other words, the ordinary meaning to be attributed to the terms of a treaty in their context was . . . the starting point for interpretation.”);

<sup>205</sup> *Id.* at 177 (United Kingdom) (Apr. 22, 1968).

<sup>206</sup> *Id.* (United Kingdom) (Apr. 22, 1968).

suggest that words had a ‘dictionary’ or intrinsic meaning in themselves.”<sup>207</sup> Rather, travaux were a crucial and automatic part of any responsible interpretive process. “There had certainly been no intention of discouraging *automatic* recourse to preparatory work for the general understanding of a treaty.”<sup>208</sup> Indeed, Waldock

fully realized that habitual recourse was had to such preparatory work whenever a party had some difficulty. From his experience as a practitioner of international law, he could say that preparatory work played little part so long as there was no problem, but when difficulties arose—and they did so for more than one reason—recourse was had to preparatory work.<sup>209</sup>

As Eduardo Jiménez de Aréchaga put it, Articles 31 and 32 therefore operated as a unified whole: “The separation of the two articles . . . had not presupposed two distinct phases of interpretation; on the contrary, the procedures listed in the two articles would be applied concurrently.”<sup>210</sup>

Sinclair, who along with Waldock had become probably the most vocal defender of the ILC draft, emphasized this point almost as strongly. The ILC draft

established a delicate balance in the value to be attached to preparatory work. Interpreters of treaties usually had recourse to that work to see what guidance it could afford . . . [T]he Commission had undoubtedly not sought to deny the usefulness of preparatory work as a guide, but had simply wished to recognize that the evidentiary value of preparatory work was less than that of the text of the treaty itself.<sup>211</sup>

Interpreters, however, might well have to depart from the “plain language of the convention” if there was some “indication that application of the words of the treaty according to their obvious meaning effected a result inconsistent with the intent or expectations of its signatories.”<sup>212</sup>

To be clear, the delegates’ embrace of travaux was both realistic and judicious. Even the most vigorous supporters of travaux recognized the incompleteness of many records<sup>213</sup> and the inconclusiveness of many arrangements,<sup>214</sup> and even the most optimistic among them knew

<sup>207</sup> *Id.* at 184 (Waldock) (Apr. 22, 1968).

<sup>208</sup> *Id.* (Waldock) (Apr. 22, 1968) (emphasis added).

<sup>209</sup> *Id.* (Waldock) (Apr. 22, 1968) (“no intention to discard recourse to preparatory work”).

<sup>210</sup> *Id.* at 170 (Uruguay) (Apr. 19, 1968).

<sup>211</sup> *Id.* at 177 (United Kingdom) (Apr. 22, 1968).

<sup>212</sup> *Id.* at 178 (United Kingdom) (Apr. 22, 1968) (citing *Maximov v. United States*, 373 U.S. 49 (1963)). Waldock had earlier noted at one point that, “[w]hile he had never underestimated the importance of recourse to the preparatory work for the purpose of verification and confirmation, it was essential to discourage attempts by a party to resort to that means of interpretation in order to dispute the result of an interpretation by the means set out in article [31].” [1966] 1 Y.B. INT’L L. COMM’N, pt. 2, *supra* note 69, at 206 (Waldock) (June 20, 1966). In the context of everything else Waldock said, this remark seems best read as an expression of the broader thrust of the ILC settlement, which certainly aimed “to discourage attempts” to exploit travaux in service of McDougalism.

<sup>213</sup> 1968 Vienna Conference Summary Records at 176 (France) (Apr. 20, 1968) (describing travaux as “unreliable, scattered as they were through incomplete or unilateral documents”), 178 (United Kingdom) (Apr. 20, 1968) (“preparatory work was almost invariably confusing, unequal, and partial”), 176 (Brazil) (Apr. 20, 1968) (“Although the preparatory work must undoubtedly be borne in mind, the utmost caution was necessary. States sometimes concealed their real views on the questions under discussion at conferences or resorted to friendly States to express them. A certain degree of confusion was thereby created, and gave rise to mistrust.”).

<sup>214</sup> *Id.* at 180 (Kenya) (Apr. 22, 1968) (“[T]he records of negotiations leading up to the conclusion of a treaty were often incomplete or inconclusive and some decisions were arrived at informally without being recorded in writing at all.”), 179 (Mongolia) (Apr. 22, 1968) (similar), 174 (Poland) (Apr. 20, 1968) (warning that “in the case of

that interpreters might draw erroneous conclusions if they did not put in the necessary effort.<sup>215</sup> The delegates understood, moreover, that travaux could be intentionally abused, whether in the form of selective history by bad faith advocates<sup>216</sup> or by the insertion of misleading commentary by bad faith negotiators.<sup>217</sup> Even so, they embraced its centrality as an inevitable and essential component of interpretation.

A 1966 speech by Rosenne may best exemplify the delegates' simultaneously open and judicious attitude toward the use of travaux in practice:

He believed that the average practitioner would look at the preparatory work as a matter of routine. It might well be true . . . that the examination [of any particular body of drafting history] could prove quite inconclusive . . . . However, that was not sufficient reason for moving the preparatory work from its normal position among the material which the interpreter should have at his disposal from the outset.<sup>218</sup>

Travaux, in short, were meant to be an automatic part of the integrated interpretive process—but only for whatever they were worth in any particular case, and only for the presumptive purpose of confirming, elaborating, and, if necessary, correcting the apparent meaning of the text.

The delegates' increasingly unequivocal embrace of travaux as a matter of principle was fully reflected in their technical discussion of doctrinal details. Neither the absurdity nor the ambiguity provisions required extended discussion at the Vienna Conference.<sup>219</sup> The other two

agreements of minor importance the historical elements were neither well known nor easily accessible"), 170 (Uruguay) (Apr. 20, 1968) ("[T]here was a complete unreality in the references to the supposed intention. As a matter of experience, it often occurred that the difference between the parties to the treaties arose out of something which the parties had never thought of when the treaty was concluded and that, therefore, they had absolutely no common intention with regard to it. In other cases, the parties might all along have had divergent intentions with regard to the actual question in dispute.").

<sup>215</sup> *Id.* at 180 (Argentina) (Apr. 18, 1968) ("The value of preparatory work was undeniable, . . . but in view of the difficulties of ascertaining intentions before a treaty had been signed, preparatory work should be used with great caution . . . ."), 173 (Tanzania) (Apr. 20, 1968) (noting the wisdom of being "extremely cautious" with "the records of treaty negotiations," which "are in many cases incomplete or misleading").

<sup>216</sup> *Id.* at 170 (Uruguay) (Apr. 20, 1968) (warning that travaux could "furnish[] . . . a *tabula in naufragio*, because there was generally something in the preparatory work that could be found to support almost any contention"); *see also id.* at 170 (Uruguay) (Apr. 20, 1968) ("[I]t was only too easy for a State wishing to evade its obligations to inject an element of uncertainty by referring to preparatory work."), 180 (Argentina) (Apr. 22, 1968) ("if recourse to preparatory work were made too easy, States might invoke preparatory work to prove their arguments in support of any thesis"). Even the most enthusiastic advocates of travaux had long recognized this pitfall. *E.g.*, [1952] 1 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, *supra* note 28, at 208 (Lauterpacht) ("ouvrirait la porte à des abus"); 1968 Vienna Conference Summary Records, *supra* note 28, at 173 (Tanzania) (Apr. 20, 1968) (discussing the need to "be extremely cautious in dealing with preparatory work").

<sup>217</sup> 1968 Vienna Conference Summary Records, *supra* note 28, at 176 (France) (Apr. 20, 1968) ("Care should be taken not to give preference to the ulterior motives of the negotiators over the ideas they had decided to express and formally to record."), 183 (Madagascar) (Apr. 22, 1968) (worrying that "a State could then, at the time of the negotiation of a treaty, purposely lay great stress on a position which was manifestly unacceptable to the other party; at the time of the application of the treaty, it would be open to that party to invoke its initial position as part of the preparatory work and thus, under cover of interpretation, frustrate the application of a clear and unambiguous text"); *cf. id.* at 178 (United Kingdom) (Apr. 20, 1968) ("If preparatory work were to be placed on equal footing with the text of the treaty itself, there would be no end to debate at international conferences.").

<sup>218</sup> [1966] 1 Y.B. INT'L L. COMM'N, pt. 2, *supra* note 69, at 200 (Rosenne) (June 17, 1966).

<sup>219</sup> On this score, Waldock had offered an important clarification of the "rare" instances where absurdity might come into play. Under the ILC text, he said, absurdity could be assessed either with respect to the intrinsic logic of the bare text itself, or with respect to the understanding the parties had actually had when they entered into the treaty. [1966] 1 Y.B. INT'L L. COMM'N, pt. 2, *supra* note 69, at 206 (Waldock) (June 20, 1966) ("He had in mind, for instance, a drafting error which might give, as a matter of language, a perfectly possible interpretation, but one

routes to travaux, however—which together had transformed the relationship between Article 31 and 32 from one of hierarchy and thresholds to one of organic integration and recursive iteration—received much more attention.

Whereas McDougal had ignored the “confirmation” route entirely, supporters of the ILC draft explained that the confirmation provision allowed resort to travaux in every case, opening the door for interpreters to discover ambiguities, absurdities, and special meanings that had not been immediately apparent.<sup>220</sup> As the Portuguese delegate pointed out, even if “the text of a treaty was apparently clear,” it was inevitable that “in seeking confirmation in the preparatory work and other surrounding circumstances a divergent meaning [would sometimes come] to light.” What happened then? Since Article 31 required interpreters to act in “good faith,” it “would appear that in such a case those circumstances should be taken into consideration, although they did not lead to the confirmation of the meaning resulting from the application of article [31].” The consequences of this logic were clear: it “would destroy the hierarchy [purportedly] established between articles [31] and [32].”<sup>221</sup>

Waldock, speaking immediately before the vote on the interpretation articles, reiterated this reading with a direct reference to the ILC’s detailed negotiations on the point. As he explained, “The Commission . . . had fully realized that habitual recourse was had to such preparatory work whenever a party had some difficulty.”<sup>222</sup> What could trigger such “difficulty”? One possibility was the interpretive logic of semantic exegesis itself—thus the ambiguity and absurdity routes of Article 32(a) and (b).<sup>223</sup> But “it was also common,” he pointed out, “for one of the parties to find that the text had proved awkward in application because it had led to results not at first contemplated.” In such cases—that is, when the apparent meaning of the text diverged from the original understanding—“[r]ecourse was then had to preparatory work to try and find arguments for some other meaning for the text of the treaty.” The doctrinal mechanism for doing so was confirmation: “It was important to bear in mind that, under article [32], such supplementary means as preparatory work could be used ‘in order to confirm the meaning resulting from the application of article [31],’” as a route that was independent from “the cases envisaged in sub-paragraphs (a) and (b) of article [32].”<sup>224</sup>

The net result was that by seeking to “confirm” the text, the interpreter might well discover herself convinced that a special meaning existed, that a latent textual ambiguity had become apparent, or that the predicted outcome was manifestly absurd with reference to the original understanding. In such cases, she would be obligated to give the travaux full effect.

That a failed effort to confirm would require the incorporation of travaux as a source of meaning was underscored by the discussion of the special meaning route. As with “confirmation,” McDougal’s dismissive caricature of “special meaning” caused real anxiety for delegates

which was ‘absurd’ in the light of the object of the particular treaty. The phrase ‘in the light of the objects and purposes of the treaty’ [in the draft then being discussed] had been inserted as an objective criterion in order to discourage disingenuous recourse to the notion of an ‘absurd’ interpretation.”)

<sup>220</sup> See part II, *supra* notes 26–31 and accompanying text.

<sup>221</sup> 1968 Vienna Conference Summary Records, *supra* note 28, at 183 (Portugal) (Apr. 22, 1968).

<sup>222</sup> *Id.* at 184 (Waldock) (Apr. 22, 1968).

<sup>223</sup> *Id.* (Waldock) (Apr. 22, 1968).

<sup>224</sup> *Id.* (Waldock) (Apr. 22, 1968). Waldock emphasized again that this had been no accident. The ILC “had given careful consideration to the term ‘confirm’; the use of the term ‘verify’ had also been suggested, a use which would have gone near to bringing preparatory work into the first processes of interpretation, but the Commission had ultimately settled for ‘confirm.’” *Id.* (Waldock) (Apr. 22, 1968).

who thought that route was important. Austria, for example, was seriously worried by the prospect that “the Commission’s wording of article [32]” might be understood to suggest that “preparatory work [c]ould not be considered [to demonstrate a special meaning if] it met none of the requirements stipulated in the article [32].”<sup>225</sup> The ILC records made clear, of course, that no such restriction applied.<sup>226</sup> So Waldock responded to Austria’s anxiety both by suggesting that it would be rare for a special meaning not to be communicated in the text and by confirming that the existence of such “comparatively rare” cases was nonetheless a natural and necessary implication of the special meaning mechanism.<sup>227</sup> Others reiterated the evidentiary function of the special meaning route, emphasizing that its application would sometimes require resort to extrinsic evidence.<sup>228</sup> And the remainder of the discussion underscored that “special meaning” created a separate and autonomous route to travaux.<sup>229</sup>

### *Travaux in Action*

Like the ILC members before them, the Vienna delegates turned instinctively to drafting history whenever the rubber hit the road on a difficult question of international law. The most dramatic example occurred during heated debates about the scope of the prohibition on treaties extracted by coercion. The big question here—in the face of efforts by newly independent and socialist states to shed legacy treaties from the colonial era—was whether to include economic and political coercion in the VCLT definition of force. The UN Charter’s ban on the use of force was, naturally, quite relevant. Throughout the lengthy debates, delegation after delegation relied (sometimes in painstaking detail) on the drafting history of the UN Charter to support their views on this point and others.<sup>230</sup>

Drafting history was also raised as evidence in a range of other debates, from questions about the inherent powers of the Security Council<sup>231</sup> to disputes about other provisions of the draft VCLT itself.<sup>232</sup> And the Vienna delegates were highly attentive to the drafting history they were themselves creating. They repeatedly expressed anxiety about the difficulty of drafting

<sup>225</sup> *Id.* at 179 (Austria) (Apr. 22, 1968) (worrying that “[w]ith the exception of the cases where . . . the technical or special use of a term appeared from the context,” there was no other way to demonstrate a special meaning).

<sup>226</sup> *See, e.g.*, [1966] 2 Y.B. INT’L L. COMM’N, *supra* note 94, at 222 (noting that the “technical or special use of the term normally [but not always] appears from the context”).

<sup>227</sup> 1968 Vienna Conference Summary Records, *supra* note 28, at 184 (Waldock) (Apr. 22, 1968) (“He could not agree with the Austrian representative] . . . that . . . special meaning could only be arrived at by reference to the preparatory work. That type of case was comparatively rare . . .”).

<sup>228</sup> *Id.* at 174 (Poland) (Apr. 20, 1968) (“[A] special meaning might be given to a term, in accordance with the intention of the parties. As that would be an exception to the rule, it would need to be proved.”), 174 (Sierra Leone) (Apr. 20, 1968) (“[P]aragraph (17) of the [ILC] commentary . . . stated that the purpose of paragraph 4 of article [31] was to emphasize that the burden of proof lay on the party invoking the special meaning of the term.”), 177 (United Kingdom) (Apr. 22, 1968) (“The Commission presumably also had in mind the need to differentiate between the ordinary meaning of a treaty provision and any special meaning which might be established in accordance with paragraph 4.”).

<sup>229</sup> *Id.* at 174 (Spain) (Apr. 20, 1968) (“the exceptional circumstances covered by paragraph 4” are the ILC draft’s primary way “to mitigate the severity of article [31]”).

<sup>230</sup> *Id.* at 269, 271 (Australia) (May 2, 1968), 273 (Ecuador) (May 2, 1968), 276 (Uruguay) (May 2, 1968), 285 (Chile) (May 3, 1968), 287 (Ghana) (May 3, 1968), 293 (Afghanistan) (May 3, 1968).

<sup>231</sup> 1969 Vienna Conference Summary Records, *supra* note 32, at 263 (Byelorussian SSR) (Apr. 18, 1969).

<sup>232</sup> *Id.* at 111 (United Kingdom) (May 13, 1969) (discussing ILC travaux on the concept of separability); 1968 Vienna Conference Summary Records, *supra* note 28, at 177 (United Kingdom) (Apr. 22, 1968) (discussing ILC travaux on the concept of ordinary meaning).

and the ease with which perfectly clear intent might be thwarted by an unforeseen drafting infelicity.<sup>233</sup> Partly because of these concerns, they regularly embedded explanations of complicated text in the Vienna meeting records, sometimes even explaining that they meant to clarify things for future interpreters.<sup>234</sup>

### *The Final Resolution*

In the end, the outcome was not close. By the time of the final vote, the U.S. amendment was broadly understood to exemplify the ILC's *bête noire*: a New Haven "reconstruction ab initio" policy approach to treaty interpretation. McDougal's amendment was rejected by an overwhelming margin,<sup>235</sup> and the Committee of the Whole accepted Articles 31 and 32 without further ado.<sup>236</sup> After the Drafting Committee made minor and avowedly nonsubstantive changes to the text for the purpose of simplification and easier translation, the draft articles were left for plenary adoption at the Vienna Conference's 1969 session.<sup>237</sup>

During that session the following year, a bit of unexpected last-minute drama served to underscore the vitality of this settlement. At the plenary meeting, Article 31 was adopted unanimously without serious discussion.<sup>238</sup> When Article 32 was introduced, however, something extraordinary happened. Somewhat half-heartedly, and one imagines even sheepishly, Poland floated the possibility of eliminating the confirmation route—the central organic link between Article 31 and Article 32. "If the meaning of the text was perfectly clear," the Polish delegate suggested, "it stood in no need of further confirmation and the work of the interpreter, in looking for such confirmation, would be juridically superfluous. It would therefore be more logical to delete the reference to 'confirmation' . . . ."<sup>239</sup> Had this amendment been accepted, it would have transformed the VCLT articles on treaty interpretation, bringing them much more in line with the common wisdom of modern international law.

<sup>233</sup> 1968 Vienna Conference Summary Records, *supra* note 28, at 50 (Israel) (Apr. 2, 1968) (anxiety about inadvertently creating an *expressio unius* problem), 218 (Ceylon) (Apr. 26, 1968) (same), 107 (United States) (Apr. 10, 1968) (concern about the difficulty of anticipating all potential reservations to a treaty).

<sup>234</sup> *E.g.*, *id.* at 177 (United Kingdom) (Apr. 22, 1968) (emphasizing need to clarify record regarding articles on interpretation); 1969 Vienna Conference Summary Records, *supra* note 32, at 93 (Afghanistan) (May 12, 1969) (similar, regarding article on coercion); *see also id.* at 57 (Germany) (May 6, 1969) (putting its understanding of Article 31(3)(c) on the record immediately before the final vote), 63 (USSR) (stating, after a ten-minute break for informal discussions, that representatives were "unanimous" in agreeing that the third-party beneficiary provisions would not restrict most-favored-nation rights).

<sup>235</sup> 1968 Vienna Conference Summary Records, *supra* note 28, at 185 (Apr. 22, 1968) ("*The United States amendment . . . (A/CONF.39/C.1/L.156) was rejected by 66 votes to 8, with 10 abstentions.*"). No roll call was taken.

<sup>236</sup> *Id.* (Chair) (Apr. 22, 1968) (noting "that the Committee accepted articles [31] and [32], which could be referred to the Drafting Committee with the drafting amendments already mentioned.>").

<sup>237</sup> *Id.* at 442 (Yasseen) (May 16, 1968) ("The Drafting Committee had added the words 'or the application of its provisions' at the end of paragraph 3(a) . . . . [I]t had brought the English text into line with the French, Russian and Spanish texts by substituting the word 'agreement' for the word 'understanding'. It had rejected the other amendments referred to it."). These edits were discussed at the tail end of the 1968 session, when attention was focused on a bitter conflict about the dispute resolution mechanism. They occasioned no serious discussion. *Cf. id.* at 447 (Greece) (May 17, 1968) (noting later in the proceedings that "some of the draft articles had been approved with undue haste, and insufficient attention had perhaps been paid to the wording of the texts that had been referred to the Drafting Committee"), 478 (United Kingdom) (May 22, 1968) ("very dissatisfied with the way [draft] article 57 [on termination via material breach] had been dealt with, owing to the pressure of time").

<sup>238</sup> 1969 Vienna Conference Summary Records, *supra* note 32, at 57 (May 6, 1969) (tallying vote as 97-0-0 in favor).

<sup>239</sup> *Id.* at 58 (Poland) (May 6, 1969).



While the transcript becomes rather terse at this point, it is hard not to read the record without smiling at the decorous bull rush that ensued. It was surely no accident that Mustafa Yasseen—whose vehement intervention at the ILC had originally saved the confirmation route from deletion—spoke up immediately in his capacity as chair of the Drafting Committee. He did so with typical understatement and indirection: regrettably, he pointed out, this issue was not one that could be delegated to the Drafting Committee. Rather, it “related to a point of substance and affected the balance achieved between the various positions taken on the question of interpretation”—to say the least. President Ago chimed in to say that it would be “most unfortunate” if the confirmation route were deleted. Then the Israeli delegate really upped the ante, observing that he had preferred a diametrically opposed course: the complete “amalgamation of articles [31] and [32].” Since Israel’s proposal “had already been discussed [and rejected] in the International Law Commission, the Committee of the Whole and the Drafting Committee,” he had decided to let it lie as part of the compromise understanding. But this new suggestion, he noted with a hint of procedural menace, “was tantamount to asking for the whole question to be reopened, and he therefore associated his delegation with the President’s suggestion” that Poland abandon its amendment. After Costa Rica chimed in more mildly, noting that “Article [32] should be left in its present form, which appeared to meet with general approval,” the Polish delegate appears to have taken the hint. Withdrawing his suggestion, he barely mustered a defensive smoke screen—“he had merely suggested a possible change, but would not press the point.”<sup>240</sup>

With that, Article 32 was adopted unanimously, by a vote of 101-0-0.<sup>241</sup> And the ILC architecture for treaty interpretation—devised by Waldock, liberalized by Yasseen, further liberalized for the United States, and then defended from McDougal’s assault—was finalized. It was a triumph, at last, of persistence and flexibility. The last word was left to Chairman Ago: “the conference had successfully disposed of the most controversial and difficult subject in the whole field of the law of treaties, the question of the interpretation of treaties.” He could not resist a little pat on his own back: “When the section had first come before the International Law Commission, many had felt that it might be unwise for the Commission to embark on a codification of so difficult a subject. He himself had taken a more optimistic view and was most grateful to the Conference for having proved him right.”<sup>242</sup>

## VI. CONCLUSION

The drafting history of the VCLT tells a story of remarkable consistency from start to finish. The agreement settled on by the drafters had nothing to do with a rigid hierarchy of sources, much less anything remotely resembling hostility or disfavor for travaux as such. Quite the reverse. The doctrinal mechanics of Articles 31 and 32 do require interpreters to start by focusing on text as the presumptive object of interpretation—a crucial methodological achievement that was fought and won when McDougal’s New Haven School intervention was defeated in Vienna. But that is only the beginning of the story. Without knowing at least something about the community for which a text was written, the words might as well be random blots of ink.

<sup>240</sup> *Id.* (Yasseen, Ago, Israel, Costa Rica, Poland) (May 6, 1969).

<sup>241</sup> *Id.* (May 6, 1969).

<sup>242</sup> *Id.* at 59 (Ago) (May 6, 1969).

The problem is to determine what further information is necessary to parse the communicative content that the intended audience would have understood. The VCLT drafters answered that question clearly and consistently: in addition to tools like dictionaries, context, and subsequent practice, interpreters should rely on drafting history in every plausibly contestable case to shed light on the meaning of that text—and in some cases even to override what had initially seemed like its clear import. Far from being disfavored, travaux were expected to be an integral component of interpretation.

So what happened? Without significant exception, international law commentary in the immediate wake of the VCLT either corroborates the settlement described above or is not inconsistent with it.<sup>243</sup> How, then, did we wind up with the *Restatement (Third) of Foreign Relations Law* describing international law's "reluctance" and "inhospitality" toward travaux?<sup>244</sup> Without attempting to resolve the question definitively, two preliminary hypotheses are worth sketching.

It seems clear that McDougal's intervention seriously set back the cause of flexible interpretation. Whether his characterization of the draft was a genuine misunderstanding or a failed gamble, to say that it backfired is an understatement—not immediately, but over the long run, as stories about his intervention at the Vienna Convention filtered through new generations of scholars. A regular feature of the literature is for commentators who entered the field long after Vienna to cite McDougal's characterization of Article 31 and 32 as a rigid hierarchy, and then to suggest that the overwhelming rejection of his "corrective" amendment speaks for itself. While this defense of the conventional wisdom about travaux rests on a serious misunderstanding of the Vienna debate, the mistake is understandable. After all, a number of delegates physically present in Vienna initially responded to McDougal's stem-winder with anxiety that his description of a radically textualist draft might actually be accurate. We have seen how that misunderstanding was corrected over the following week of debates, but it took some doing even with the original authors in the room.

But that is only part of the story. For one thing, if the drafters understood the settlement as it has been described here, why didn't they push back on the misunderstanding as it developed?<sup>245</sup> On this score, it appears that the ICJ may have blunted the message from Vienna: first

<sup>243</sup> For some of the more directly corroborative examples, see, for example, IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 71–72 (1973); G. I. TUNKIN, *MEZHDUNARODNOE PRAVO* 210–11 (1974); Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 *RECUEIL DES COURS* 46–47 (1978); Mustafa Yaseen, *L'interprétation des traités d'après la Convention de Vienne sur le droit des traités*, 151 *RECUEIL DES COURS* 1, 16, 80–82 (1976); Herbert W. Briggs, *The Travaux Préparatoires of the Vienna Convention on the Law of Treaties*, 65 *AJIL* 705, 708–12 (1971); B. N. Mehrish, *Travaux Préparatoires as an Element in the Interpretation of Treaties*, 11 *INDIAN J. INT'L L.* 39, 62, 65, 87–88 (1971); Leo Gross, *Treaty Interpretation: The Proper Role of an International Tribunal*, 63 *ASIL PROC.* 108, 117–22 (1969); R. Y. Jennings, *General Course on Principles of International Law*, 121 *RECUEIL DES COURS* 323, 551–52 (1967) The only squarely contradictory account I have found from this period is a brief treatment in Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 *INT'L & COMP. L.Q.* 318, 326–27 (1969); cf. Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 *AJIL* 495, 518–20 (1970) (predicting that the VCLT's formal "hierarchy" of sources would not prevent regular reliance on travaux).

<sup>244</sup> *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* §325 cmt. e (1987).

<sup>245</sup> It is possible that they did, or at least that the proper understanding of the settlement manifested itself *sub rosa*, in practice. Sbolci, for example, finds that the ICJ relied on the "confirmation" route to travaux much more often after the VCLT was ratified, which is consistent with the central role of "confirm" in the historical settlement. Sbolci, *supra* note 5, at 147.

by adhering to its restrictive pre-VCLT doctrine, and then by acting as though the VCLT had merely ratified that understanding. Despite the VCLT drafters' express rejection of PCIJ and ICJ precedent as a model for their treaty's approach to travaux, the ICJ continued for decades its pre-VCLT practice of "privileging textual interpretation" in the Vattellian sense and of "accord[ing] minimal space for the intention of the parties."<sup>246</sup> Because of the Court's immense influence, this accumulation of precedent—whether referencing only the first subsection of Article 31 or more explicitly suggesting the presumptive irrelevance of travaux—may have significantly influenced the international community's gestalt understanding of the interpretive process.

Whatever happened after the fact, I hope the history uncovered here will set straight our understanding of what happened in Vienna itself. The VCLT text is certainly capable of supporting different interpretive approaches. That was, after all, the point. But the conventional wisdom about the VCLT settlement not only distorts history; it gets it completely backward.

<sup>246</sup> Sorel & Boré Eveno, *supra* note 5, at 829–30; see also GARDINER, *supra* note 20, at 13–16 (noting that no ICJ majority opinion cited the VCLT until 1991); Santiago Torres Bernárdez, *Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties*, in LIBER AMICORUM PROFESSOR IGNAZ SEIDL-HOHENVELDERN 721 (1998) (describing the ICJ's slow, inconsistent, and often inaccurate incorporation of VCLT principles), 731–35 (noting that the ICJ's first explicit discussion of Articles 31 and 32—in 1991—treated them inaccurately as having simply "codified" preexisting ICJ precedent). See generally *Territorial Dispute (Libya/Chad)*, 1994 ICJ REP. 5 (Feb. 3) (focusing solely on Article 31(1)); *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)* 1991 ICJ REP. 53 (Nov. 12) (emphasizing that travaux should be used only in the event of ambiguity or absurdity). For a discussion usefully emphasizing the ICJ's eventual moderation of its attitude toward travaux in practice, see HATHAWAY, *supra* note 21, at 48–68.