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Comment on 'May preparatory Work be Used to Correct Rather than Confirm the "Clear" Meaning of a Treaty Provision?'
by Maurice Mendelson QC

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In June of this year, in the context of some exchanges on OGEMID about the use of the drafting history of treaties (the *travaux préparatoires* in interpreting them, I posted the following comment.

> I largely agree with Thomas [Wälde]: my erstwhile doctoral supervisor, Sir Humphrey Waldock, did a pretty good job on the whole in his role as Special Rapporteur on the Law of Treaties Convention. Defects are often due to the fact that a camel is a horse designed by a committee. However, there are two aspects of Art. 32 VCLT that I find rather unsatisfactory. (1) T.p. may be used, not only to resolve ambiguities and avoid absurdities, but also to confirm the meaning of the text derived from applying Art. 31 (ordinary meaning in context and in the light of object and purposes). But if the meaning can be derived without ambiguity or absurdity under Art. 31, why look elsewhere for confirmation? And what if the t.p. do NOT confirm that meaning? (2) Art. 32 is meant to be a sort of fallback provision. But in practice, if the t.p. seem to help one party, it will cite them. So the court/tribunal will already have seen them, and perhaps been influenced by them, even if the other side claims with good reason that they are irrelevant because Art. 31 methods provide the answer. In practice, this undermines the subsidiarity of Art. 32.

Judge Schwebel told Thomas and me that he agreed with my comments, and drew our attention to a piece he had written in 1996: "May Preparatory Work be Used to Correct Rather than Confirm the 'Clear' Meaning of a Treaty Provision?" in Jerzy Makarczyk, *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubizcewski*. We then had a further exchange of views, as a result of which Thomas requested Judge Schwebel's consent to re-publish this valuable essay, and the latter suggested that I repeat my comments on it. I have not sought to write a detailed commentary or response, but for what they are worth, here (with a couple of additions) is what I said.

1. Judge Schwebel argues that *travaux préparatoires* can legitimately be used to undermine the interpretation reached by the techniques set out in Article 31 of the VCLT. For the reasons outlined below, I have some doubts about this. However, I would like to begin by offering a possible further point in support of his argument. Judge Schwebel says that the "ordinary" meaning of "confirm" is "to make firmer, to strengthen, to settle ....". E.g. "I confirm that I did say what I was reported to have said"; or "I confirm that this is my signature". Therefore he has to resort to an argumentum *ad absurdum* or a purposive interpretation of Art. 32 (or its *travaux*) to make his case. But there is also a further meaning of "confirm" which he touches on in his list of synonyms but do not develop: "to verify". As well as meaning "to strengthen", both "confirm" and "verify" can also mean "to find out if something is true". "I want to confirm/verify that this is your signature" does not mean "I want to strengthen" but "I want to find out if it is your signature OR NOT". The person doing the confirming/verifying is therefore prepared to revise his prima facie conclusion or impression if further investigation proves it to be incorrect.

2. However, though (unsurprisingly) Judge Schwebel makes a very strong case, I am not sure, with respect, that the interpretation of Article 32 of the Vienna Convention

on the Law of Treaties that he seeks to combat necessarily offends against the principle *ut res magis valeat quam pereat.* It would not totally deprive the first part of Art. 32 of meaning if it were interpreted as permitting the *travaux* to be invoked (only) as a further justification for the interpretation reached by means of the Art. 31 methods. The provision would make it clear that such an invocation, though strictly unnecessary, was not *prohibited*, as the structure of Arts. 31 & 32 might otherwise suggest. (As we know, international tribunals often - perhaps too often - like to bolster a determinative finding with further reasons.)

3. As Judge Schwebel says, given that international tribunals will in practice have seen the *travaux* before they decide on what they think is the plain meaning of the text, those *travaux* will usually colour their view of the correct "textual" meaning without having to use them overtly to "correct" the interpretation according to Article 31. So it is likely to be rare that there is found to be a conflict between the "textual" meaning and the intention of the parties as revealed by the *travaux préparatoires.* (It is in any case unlikely that the "intention of the parties" will be that clear-cut: for instance, the drafting history may reveal of the intentions of some of the drafters, but rarely all.) But if there were a clear conflict, it not obvious that the intention revealed by the *travaux* should prevail. It is true that, as Judge Schwebel suggests, the VCLT represents something of a compromise between the views of those who stressed the intention of the parties (led by Myres McDougal and the US delegation) and those who preferred to focus on the text in its context and in the light of the treaty's object and purpose. However, not a complete compromise. The International Law Commission's commentary on Articles 27 & 28, though phrased tactfully, make it clear enough that the intention was to give primacy to the former (see esp. paragraph 10). At the Vienna Conference, despite a vigorous attempt by the US delegation to put greater emphasis on intention, these draft articles emerged virtually unchanged as Articles 31 and 32 of the VCLT. Note also the retention of the heading of the latter: "*Supplementary* means of interpretation".

4. The case for giving the textual meaning priority over the intention of the parties seems to me to be particularly strong where the treaty is open to those who did not have a hand in drafting it. Over time, many of the multilateral treaties drafted decades ago have come to be acceded to by numerous States who did not even exist when the conventions were drafted. Even if their *travaux* were available to such States (which is not always the case), it is somewhat impractical to expect them to study them before deciding whether to accede. It seems to me, therefore, that if States parties to such conventions put language "out there" whose meaning is reasonably clear when elucidated in accordance with Article 31, the alleged intentions of the drafters should not be allowed to prevail.

5. For these reasons in particular, I would respectfully hesitate before assenting to Judge Schwebel's prescription for resolving a conflict in the hypothetical case he posits. But we both agree, I think, that it is, for practical reasons, a largely theoretical problem, for the reasons he explains at the beginning of his essay.

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