

A SLIDING SCALE APPROACH TO *TRAVAUX* IN TREATY INTERPRETATION: THE CASE OF INVESTMENT TREATIES

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ABSTRACT

Materials produced during the negotiation of treaties, commonly called *travaux préparatoires* ('*travaux*'), are given formal significance as a 'supplementary means' of treaty interpretation under article 32 of the Vienna Convention on the Law of Treaties (VCLT). *Travaux* present both risks and opportunities for treaty interpretation, and international adjudicators have differed in how they define the rationale for referring to *travaux*, how they use these materials, and even more fundamentally, what materials they classify as *travaux*. This article proposes a methodology to guide the more structured identification and use of *travaux*. Under the proposed sliding scale approach, treaty interpreters assess the utility of material to the interpretive exercise by reference to its precise qualitative features and the context of interpretation, rather than by categorizing materials as '*travaux*' or not. The article uses the interpretation of investment treaties in investor-state arbitration as a case study to illustrate the proposed approach and its utility. The discussion, including the proposed sliding scale approach, is nonetheless equally relevant for interpreting all manner of treaties.

Keywords: *travaux préparatoires*, treaty interpretation, document production, Vienna Convention on the Law of Treaties, investment arbitration.

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I. INTRODUCTION

Materials produced during the negotiation of treaties, commonly called *travaux préparatoires* (*‘travaux’*), are given formal significance as a ‘supplementary means’ of treaty interpretation under article 32 of the Vienna Convention on the Law of Treaties (VCLT).¹ This provision reflects that such materials can potentially reveal the shared intention of the treaty parties, and thus indicate the scope of treaty party consent.² This article proposes a methodology to guide the more structured identification and use of *travaux* to interpret treaties. It uses the interpretation of investment treaties in investor-state arbitration as a case study to illustrate the proposed approach and its utility. The discussion, including the proposed sliding scale approach, is nonetheless equally relevant for interpreting all manner of treaties. Investment treaties have been selected as the focus of the analysis as they incorporate some unusual aspects which makes the issue of *travaux* particularly salient in this field. This includes, in particular, the ability of private actors to

¹ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

² VCLT, art 32. See also BS Vasani and A Ugale, ‘Travaux Préparatoires and the Legitimacy of Investor-State Arbitration’ in J Kalicki and A Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill-Nijhoff 2015) 150–71. This linkage between *travaux* and state consent was specifically recognized by the Annulment Committee in *Malaysian Historical Salvors SDN BHD v Government of Malaysia*, ICSID Case No ARB/05/10 (Decision on the Application for Annulment, 16 April 2009) [69].

initiate investor-state arbitration. Investment treaties also employ broad terms to stipulate the entities, assets, and range of state actions to which they apply, meaning that the scope of investor-state tribunals' jurisdiction is frequently contested. These features mean that interpretation has long played a central role in the development of investment treaty law.³ In interpreting investment treaties, investment tribunals perform a dual role.⁴ They 'simultaneously act on behalf of the treaty parties in interpreting and developing investment treaty law and on behalf of the disputing parties in arbitrating investor-state disputes'.⁵ In this field interpretation, and therefore also the use of *travaux*, benefits states⁶ and investors⁷ at different times depending upon the context and uses made of the interpretive framework of the VCLT.

How tribunals go about this interpretive exercise is important to how the system develops and to how states, investors, and other stakeholders perceive investment treaty arbitration. References to *travaux* may bolster the legitimacy of investment arbitration by ensuring that tribunals base treaty interpretation on the intended meanings of treaty provisions and by reference to state consent.⁸ Indeed, '[s]uperficial treaty interpretation risks distorting the parties' intentions and unravelling their treaty bargain',⁹ thereby undermining the stability and predictability of investment treaty arbitration. Equally, the misuse of *travaux* can have adverse implications. Disadvantage to the claimant is one key risk traditionally associated with the use of such materials in investor-state arbitration. Non-state claimants are usually not present during treaty negotiations,

³ A Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179, 179, 186; J Kurtz, 'Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law' in Z Douglas, J Pauwelyn and J Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2013) 4.

⁴ Roberts, 'Power and Persuasion in Investment Treaty Interpretation', 179.

⁵ *ibid* 180.

⁶ See, eg, *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26 (Final Award, 2 August 2006).

⁷ See, eg, *Ambiente Ufficio SPA and others (formerly Giordano Alpi and others) v Argentine Republic*, ICSID Case No ARB/08/9 (Decision on Jurisdiction and Admissibility, 8 February 2013); *Orascom TMT Investments SARL v People's Democratic Republic of Algeria*, ICSID Case No ARB/12/35 (Award, 31 May 2017).

⁸ W Burke-White and A von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 Virginia Journal of International Law 308, 340. For an interesting recent discussion of the intersection between legitimacy concerns and the use of *travaux* consistent with the VCLT methodology, see *Daniel W Kappes and Kappes, Cassidy & Associates v Republic of Guatemala*, ICSID Case No ARB/18/43 (Decision on Respondent's Preliminary Objections, 13 March 2020) [153]–[161].

⁹ M Waibel, 'International Investment Law and Treaty Interpretation' in R Hofmann and CJ Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011) 29 (excessive reliance of tribunals on the object and purpose of investment treaties). See also Roberts, 'Power and Persuasion in Investment Treaty Interpretation', 179; M-L Jaime, 'Relying upon Parties' Interpretation in Treaty-based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements' (2014) 46 Georgetown Journal of International Law 261, 291.

and may also face difficulties when seeking access to the negotiating materials held by the treaty parties through document discovery procedures.¹⁰ A clear and defensible approach to treaty interpretation, and to the use of *travaux* in that exercise, is therefore an important factor in appraisals of the legitimacy of investment treaty arbitration. Changes to state treaty negotiating practices mean that there is nowadays a greater likelihood that *travaux* exist, that they are voluminous, and that they are publicly available. More transparent treaty negotiations may have the incidental effect of overcoming the risks of tribunals relying on *travaux* to interpret investment treaties because more transparent negotiations bring greater clarity about the intention of the states parties to the treaty. Nonetheless, changes in state negotiating practices may also introduce or exacerbate other concerns about overreliance on, or misuse of, *travaux* by investment tribunals, such as their incompleteness and inconclusiveness, with the attendant risk of misinterpretation. Against this background, this article considers the risks and opportunities associated with the increasing availability of *travaux* related to investment treaties in investor-state disputes in the future.

While many arbitral tribunals have recognized the binding or guiding force of the VCLT,¹¹ *how* they use *travaux* varies significantly. In particular, they have differed in defining the rationale for referring to *travaux*, when to have recourse to *travaux*, how they use these materials, and even more fundamentally, what materials they classify as *travaux*. This article examines each of these issues to consider the opportunities and risks associated with the use of *travaux* in arbitral interpretations of investment treaties. It argues that the focus should not be on the binary categorization of materials as ‘*travaux*’ or not, but instead upon the utility of a given material to the interpretive exercise by reference to its precise qualitative features and the context of interpretation. Part II illustrates two practical challenges associated with the use of *travaux* in investment treaty disputes to highlight the potential advantages and pitfalls associated with using *travaux*. Part III considers what may constitute *travaux*. Based on an extensive review of arbitral practice, it argues in favour of a sliding scale approach to *travaux*, whereby a treaty

¹⁰ See T Gazzini, *Interpretation of Investment Treaties* (Hart 2016) 257–58, 260. Tribunals have also acknowledged this risk: *Perenco Ecuador Ltd v Republic of Ecuador*, ICSID Case No ARB/08/6 (Decision on Jurisdiction, 30 June 2011) [260]; *Industrial Nacional de Alimentos SA and Indalsa Perú SA v The Republic of Peru*, ICSID Case No ARB/03/4 (Decision on Annulment, 5 September 2007) (Dissenting Opinion of Franklin Berman) [9].

¹¹ *Malaysian Historical Salvors v Government of Malaysia* [56]; *Yukos Universal Limited (Isle of Man) v Russian Federation*, PCA Case No AA 227 (Interim Award on Jurisdiction and Admissibility, 30 November 2009) [260]; *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2 (Award, 11 October 2002) [43]; *Infinito Gold Ltd v Republic of Costa Rica*, ICSID Case No ARB/14/5, (Decision on Jurisdiction, 4 December 2017) [288]; *İçkale İnşaat Limited Şirketi v Turkmenistan*, ICSID Case No ARB/10/24 (Award, 8 March 2016) [195], [198], [203]–[206]; *CC/Devas (Mauritius) Limited, Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v Republic of India*, PCA Case No 2013-09 (Award on Jurisdiction and Merits, 25 July 2016) [231]–[232].

interpreter casts a wide net but differentiates the weight given to materials depending on their propensity to shed light on the joint intention of the states parties to the treaty. Part IV considers how arbitral tribunals have used—and should use—*travaux* by reference to the interpretive framework established by the VCLT. Part V considers how investment tribunals have regulated access to, and use of, *travaux* through their powers to order document production. Part VI concludes.

II. ADVANTAGES AND LIMITATIONS OF *TRAVAUX* IN TREATY INTERPRETATION

Investment tribunals face two practical difficulties in navigating the use of *travaux* to interpret investment treaties. First, there are difficulties associated with ascertaining the existence of *travaux* and regulating their production in arbitral proceedings. Second, tribunals may grapple with difficulties associated with determining the inferences that may be drawn based on *travaux*. The Decision on Jurisdiction of the tribunal in *Churchill Mining* highlights the central role that *travaux* play in the interpretation of investment treaties, as well as these two issues associated with the use of *travaux*.¹² In *Churchill*, the tribunal confronted each of these issues in determining whether the words ‘shall assent’ in article 7(1) of the UK–Indonesia bilateral investment treaty (BIT) constituted a standing offer to arbitrate.¹³ This part introduces these two central issues related to the use of *travaux* in the *Churchill* arbitration, before the subsequent parts of the article unpack them in more detail.

First, the *Churchill* tribunal was confronted with a situation in which there was an apparent inexistence of *travaux*. It noted in this respect that:

[n]either Party has put any *travaux préparatoires* into evidence prior to the hearing ... [u]pon a question from the Tribunal the Parties indicated that they had tried to locate *travaux* of the UK–Indonesia BIT, but had been unsuccessful.¹⁴

The tribunal went on to note, however, that during its deliberations it had become aware of an unpublished award in which Indonesia had filed the *travaux* pertaining to the BIT before another investment treaty tribunal.¹⁵ Subsequently the claimant advised the tribunal that ‘it had engaged in new research and located the relevant materials’.¹⁶

¹² *Churchill Mining and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40 (Decision on Jurisdiction, 24 February 2014).

¹³ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments (signed 27 April 1976, entered into force 24 March 1977) 1074 UNTS 195.

¹⁴ *Churchill Mining v Republic of Indonesia* (Decision on Jurisdiction) [208] (footnotes omitted).

¹⁵ *ibid* [209].

¹⁶ *ibid* [210].

Thereafter, both parties were given the opportunity to comment on those materials. On the basis of those comments and its own analysis, the tribunal concluded that the materials highlighted ‘several crucial elements at odds with Indonesia’s argument’ as to the meaning of the provision at issue.¹⁷ It ultimately held on the basis of its analysis of the located materials that the words ‘shall assent’ were ‘functionally equivalent to “hereby assents”’ and as such constituted advance consent to arbitrate such that the claim was within its jurisdiction.¹⁸ These references underscore the increasingly inter-linked nature of the investment treaty system, such that—even where the parties themselves do not place *travaux* before a tribunal—the tribunal itself may give such materials (or lack thereof) prominence in its interpretation.¹⁹

Second, the *Churchill* tribunal’s references to *travaux* illustrate the difficulties that may be associated with drawing inferences from such materials in practice. Having located the *travaux*, the tribunal noted that one of the three draft texts of the BIT that Indonesia submitted for the negotiation ‘contained a proposal of unconditional advance consent to ICSID arbitration’.²⁰ While the tribunal noted that ‘it is true that the final text does not contain the unequivocal formula of the second draft’, it nonetheless considered that ‘the fact that Indonesia made a proposal of such content demonstrates that it had no difficulty giving English investors unconditional access to ICSID arbitration’.²¹ The tribunal further noted that ‘British negotiators do not appear to have considered the words “shall assent” in the first counter-draft to be a step backwards compared to the British model clause’²² and that British negotiators were ‘indifferent’ to the change in language between Indonesia’s second and third drafts. The tribunal further concluded that, based on the ‘incomplete’ *travaux* submitted from Indonesia, the ‘indifference appear[ed also] to have existed among Indonesia’s negotiators’.²³

One criticism of the jurisdictional outcome in *Churchill*, and the tribunal’s use of the *travaux* to reach it, related to the tribunal’s treatment of ‘indifference’ in the negotiating records as the basis upon which to draw inferences as to the meaning of treaty language. Putting aside whether it is appropriate to draw such inferences (a matter considered in more detail below), the tribunal’s inferences were not consistent throughout its analysis. Thus, the indifference of the British negotiators was of no consequence, whereas the tribunal resolved the indifference of the Indonesian negotiators in favour of increased investor protection, without further justification. Both groups of negotiators seem to have been

¹⁷ *ibid* [225].

¹⁸ *ibid* [230].

¹⁹ On the use of *travaux* by tribunals of their own volition, see further Part IV below.

²⁰ *Churchill Mining v Republic of Indonesia* (Decision on Jurisdiction) 230.

²¹ *ibid*.

²² *ibid* [229].

²³ *ibid*.

indifferent, and the tribunal had no basis on which to resolve the apparent indifference in favour of an advance consent on the part of the host state to arbitration.

Frequently, as in the *Churchill* proceedings, *travaux* will provide direct evidence relevant to determining the existence or scope of a respondent state's consent to jurisdiction.²⁴ However, the combined effect of these two difficulties—associated with identifying *travaux* and drawing inferences from it—can shape (state) perceptions of the legitimacy of arbitral outcomes. This is evident in the reactions to the *Churchill* tribunal's use of *travaux*. A month after the *Churchill* jurisdictional award, in March 2014, Indonesia announced its intention to 'terminate all of its 67 bilateral investment treaties'.²⁵ Commentators speculate that this announcement was linked to the jurisdictional outcome in the *Churchill* proceedings.²⁶ According to the UN Conference on Trade and Development (UNCTAD), by February 2020 Indonesia's termination of at least 30 investment treaties had taken effect.²⁷

These two central issues associated with the use made by the *Churchill* tribunal of *travaux* are only likely to gain importance in the coming years. Increasingly, states are devoting significant resources and time to the negotiation of investment treaties and those negotiations are, to a significant degree, attracting greater public attention and interest than was previously the case. The growing public interest in investment treaties and investor-state dispute settlement has prompted an increasing number of states to make aspects of their investment treaty negotiations open to public view. During the negotiation of the Transatlantic Trade and Investment Partnership (TTIP), for example, both the EU and the US sought to achieve a level of transparency greater than previously provided in this type of negotiation. In 2014, the European Commission undertook to make draft texts of the TTIP publicly available, as well as to publish lists of documents related to that agreement that had been shared between the Commission, Parliament, and Council.²⁸ Similarly, in 2015, the Australian Senate's Foreign Affairs, Defence and Trade References Committee recommended a raft of changes to Australia's treaty-making practices, chief among which was a call for greater transparency in the negotiation of trade and investment treaties.²⁹

²⁴ *ibid* [229].

²⁵ B Bland and S Donnan, 'Indonesia to terminate more than 60 bilateral investment treaties' *Financial Times* (26 March 2014) <www.ft.com/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdco.html#axzz3AnJMaqGu>.

²⁶ *ibid*.

²⁷ UNCTAD, 'Investment Policy Hub: Indonesia' <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/97/indonesia?type=bits>>.

²⁸ European Commission, 'Opening the Windows: Commission Commits to Enhanced Transparency in TTIP' (25 November 2014) <https://ec.europa.eu/commission/presscorner/detail/en/IP_14_2131>.

²⁹ Australian Senate, *Blind Agreement: Reforming Australia's Treaty-Making Process* (Report of the Foreign Affairs, Defence and Trade References Committee, June 2015) 39–57. For further discussion of transparency initiatives in treaty negotiations, see E Shirlow, 'Three Manifestations of

Increased transparency of negotiations has led to a growth in the formality and public accessibility of the materials produced by states that precede the creation of investment treaties. An important corollary of the spotlight under which investment treaty negotiations are being placed is therefore the increased likelihood that states will generate and make publicly available more detailed records than were previously available relating to the drafting process and intentions underlying investment treaties.³⁰ States have, for example, published negotiating records and position papers, invited involvement in negotiations from non-state actors, and sought to make provision for greater parliamentary oversight of treaty negotiations or approval.³¹ This, in turn, may lead to a greater relevance of *travaux* in the interpretation of investment treaties, but at the same time carries a greater risk of misuse of *travaux* and ensuing misinterpretation. These developments do not mean, in particular, that the challenges associated with using *travaux*—including potential incompleteness, inconclusiveness, failure to consider a matter, or silence—will disappear. In some cases, the salience of these challenges may decline, but in others they could increase because even voluminous *travaux* are frequently incomplete, inconclusive, or silent on a given matter. While the more transparent negotiation of investment treaties is intended to assuage concerns at the negotiation phase about the legitimacy of investment treaties and investment treaty arbitration,³² the precise impacts that the growing volume of materials has beyond the negotiation phase is an open question. In particular, there is the possibility for greater transparency in negotiations to generate materials capable of influencing treaty interpretation and, ultimately, the outcomes of individual cases and broader perceptions of investment treaties themselves.³³ In these circumstances, how arbitral tribunals use such materials during treaty interpretation attains crucial significance.

Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures' (2017) 8 *Goettingen Journal of International Law* 73, 75–79.

³⁰ However, the more states rely on models in investment treaty negotiations, the less likely is the production of *travaux*: see A Reinisch, 'The Interpretation of International Investment Agreements' in M Bungenberg and others (eds), *International Investment Law* (CH Beck, Hart, and Nomos 2015) para 63.

³¹ Shirlow, 'Three Manifestations of Transparency in International Investment Law', 77.

³² Global administrative law regards transparency as a central way of addressing accountability problems in global governance: N Krisch and B Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *EJIL* 1; E Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law' (2016) 23 *Constellations* 58. However, transparency also has dark sides: A Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law' in A Bianchi and A Peters (eds), *Transparency in International Law* (CUP 2013).

³³ See, similarly, S Schonberg and K Frick, 'Finishing, Refining, Polishing: On the Use of *Travaux Préparatoires* as an Aid to the Interpretation of Community Legislation' (2003) 28 *European Law Review* 146–71.

III. DEFINING *TRAVAUX*: THE VIENNA CONVENTION'S CONCEPT OF 'PREPARATORY WORK'

Whereas changes in state negotiating practices may assuage concerns about the paucity or incompleteness of *travaux*, it renders the need for tribunals to grapple with the definition of *travaux* more imperative. This part considers the concept of *travaux* in more detail. *Travaux* are given interpretive significance in the scheme of the VCLT as a form of 'supplementary means' of interpretation under article 32. That provision provides that:

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

The VCLT does not define the concept of 'supplementary means' by way of an exclusive list. Instead, it refers to two forms of supplementary means by way of illustration: 'the preparatory work of the treaty and the circumstances of its conclusion'. These two concepts are themselves left undefined. Indeed, in drafting the VCLT, the International Law Commission (ILC) 'decided against including a definition of preparatory work ... as it considered that such a definition might possibly lead to the exclusion of relevant evidence'.³⁴ In principle, the open-ended reference to preparatory work serves to cast a wide net. Whilst the VCLT does not define what is meant by 'preparatory work', Aust indicates that the term was intended to refer to:

successive drafts of the treaty, conference records, explanatory statements of an expert consultant at a codification conference, uncontested interpretative statements by the chairman of a drafting committee and ILC Commentaries.³⁵

Consistent with this view, investment treaty tribunals generally understand *travaux* at least to encompass agreed negotiating texts that have been shared between the parties. At the outer reaches, however, tribunals have also held the term to encompass documents not shared between the parties (for example, one state's record of the negotiations)

³⁴ ILC Ybk 1966/II, 223, para 20.

³⁵ A Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 218. See also R Jennings and A Watts (eds), *Oppenheim's International Law* (9th edn, Longman 1992) vol 1, 1277; Y le Bouthillier, 'Article 32: Supplementary Means of Interpretation' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011) [22]–[28]; J Mortenson, 'The *Travaux* of *Travaux*: Is the Vienna Convention Hostile to Drafting History?' (2013) 107 AJIL 805 (noting discussion in the ILC as to whether the ILC's preparatory work would count as *travaux* for the VCLT).

and have also accepted into evidence witness statements from persons present at the negotiations.

The following paragraphs consider the various categories of materials that investment treaty tribunals have treated as ‘preparatory work’ (*travaux*) with a view to examining the implications of restrictive or expansive definitions of this category of interpretive materials. It then compares the approaches of investment tribunals to English and US judicial approaches to defining *travaux*. Based on this examination of practice under article 32 of the VCLT, the article then proposes a sliding scale approach to *travaux*. Under this approach, interpreters would not exclude the material in its entirety from the category of ‘supplementary means’ of interpretation on the grounds of it not constituting ‘preparatory work’. This would render the question of whether something is categorized as *travaux* as such less relevant. Instead, it would focus on the qualitative utility of a given interpretive source for the interpretation process. As such, whether material formally qualifies as *travaux* is not crucial. Instead, interpreters would recognize differences between the types of materials that might be referred to under article 32 according to their relevance, and adjust the weight to give to materials accordingly. Adopting a sliding scale approach, an interpreter might, for example, give more weight to materials that are capable of manifesting the joint intent of the parties. Conversely, the interpreter would not exclude a unilateral internal document *ex ante* but would give it lesser weight. The advantage of such an approach is that it encompasses as relevant all material created during a treaty negotiation, but would confer most weight to materials demonstrating the common intention of the treaty parties on the basis that those materials will best indicate what a treaty provision was intended to mean.

A. Approaches of investment treaty tribunals to defining travaux

Investment treaty tribunals have tended to regard documents comprising the official negotiating materials of investment treaties as *travaux* for the purposes of treaty interpretation.³⁶ In *Canfor*, the tribunal ordered the production of ‘draft texts ... compiled and distributed during the course of the negotiations’,³⁷ noting that these materials ‘unquestionably form part of the negotiating history ... which may be considered for the purposes of treaty interpretation’.³⁸ The tribunal further considered that those documents that were ‘circulated among, discussed by or relied upon by the negotiating teams or by the drafting teams of the NAFTA

³⁶ See further *Canfor Corporation v United States of America* (Procedural Order No 5, 28 May 2004) [4]; *Yukos v Russian Federation* [227]; *Inceysa v Republic of El Salvador* [192]; *HICEE v Slovakia*, PCA Case No 2009-11 (Partial Award, 23 May 2011).

³⁷ *Canfor v United States of America* [4], [7].

³⁸ *ibid* [18].

Parties may well be pertinent to the issue of the common intention of the NAFTA Parties in suggesting a particular draft and in adopting, or rejecting, a particular provision'.³⁹ As the analysis of the tribunal in *Canfor* indicates, the justification for classifying such materials as *travaux* is that they reflect the common intention of the treaty parties, or otherwise relate to matters within the common knowledge of the treaty parties which factored into the negotiation or drafting of the treaty.

Many tribunals hold that documents produced by one party for its own internal purposes, especially where not shared between the negotiating parties, do not constitute *travaux*.⁴⁰ Investment treaty tribunals have justified this approach on the basis that documents not available to both sides are not capable of evidencing the common intention of the treaty parties.⁴¹ In *Methanex*, the tribunal noted that the claimant had failed to demonstrate why 'negotiating texts, minutes of meetings and memoranda prepared for the NAFTA negotiations' by one party could reliably be used given that they were 'documents which had never been seen or discussed between the three NAFTA Parties'.⁴² Similarly, in *Canfor*, the tribunal noted that 'the internal materials of an individual NAFTA Party established solely for that Party and not communicated to the other Parties during the negotiations of the Agreement do not reflect the common intention of the NAFTA Parties in drafting, adopting, or rejecting a particular provision' and as such could not be relied upon to support a particular interpretation of the relevant provision.⁴³

Importantly, however, several tribunals have expressly *not* followed this course of reasoning and have defined *travaux* to encompass materials comprising the internal negotiating records of one treaty party.⁴⁴ Thus, in *Churchill*, the tribunal noted that the materials submitted to it in response to its request for *travaux* contained documents from the internal archives of one of the treaty parties, including 'internal notes and drafts of British officials and counter-drafts submitted by Indonesia'.⁴⁵ The tribunal accepted that the materials 'contain[ed] no exchanges of notes or similar documents clearly depicting a common understanding' but nevertheless considered that it 'may draw some useful indications

³⁹ *ibid* [20].

⁴⁰ *ibid* [19]. Compare the contention of the claimant that 'preparatory works' had 'a wide ambit and that even unilateral communications could be of relevance to the Tribunal': *ibid* [6].

⁴¹ This resonates with the view that 'preparatory work can normally be invoked and resorted to under Article 32 only when set down in writing and publicly available' and 'one member or some members of the contracting parties were [not] excluded': see Gazzini, *Interpretation of Investment Treaties*, 254, citing *The Question whether the Re-Evaluation of the German Mark in 1961 and 1969 Constitutes a Case for Application of the Clause in Article 2(e) of Annex I A of the 1953 Agreement on German External Debts* (1980) 19 RIAA 67 [34].

⁴² *Methanex Corporation v United States of America* (Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005) Part II, Chapter H [25].

⁴³ *ibid* [19].

⁴⁴ *Generation Ukraine Inc v Ukraine*, ICSID Case No ARB/00/9 (Award, 16 September 2003) [15.3]–[15.6].

⁴⁵ *Churchill Mining v Republic of Indonesia* (Decision on Jurisdiction) [212].

from these materials, both of the intentions of the British negotiators and of Indonesia'.⁴⁶ Similarly, in *Millicom*, the tribunal noted, though rejected, the respondent's position that 'no conclusive significance should be given to [certain] documents since, although certainly linked to the adoption of the *Accord*, this was by one of the parties only'.⁴⁷ The tribunal concluded that '[n]othing prohibits the Arbitral Tribunal from relying on [such materials] in order to confirm how this text was actually understood by one of the Contracting Parties'.⁴⁸

Tribunals also focus upon the timing of a document's creation to determine whether it should be considered a 'preparatory work' within the meaning of article 32 of the VCLT. To this end, tribunals have tended to agree that materials produced *after* the adoption of the treaty or provision at issue, even if of an official nature, do not constitute *travaux*. In *Amco*, for example, the tribunal rejected as irrelevant elements of the drafting history of the ICSID Convention⁴⁹ that related to deliberations *after* the provision at issue 'had already been approved and adopted'.⁵⁰ It noted that votes against a motion to include a particular provision in the ICSID Convention 'cannot therefore necessarily be regarded as importing an objection to the content of the clause proposed, since the delegates voting against the motion may simply have found it redundant in view of [its] prior adoption'.⁵¹

Again, however, other tribunals have adopted a more permissive approach to the use of materials that have been generated *after* a treaty's conclusion. A number of tribunals have, for example, encompassed within the concept of 'preparatory work' evidence in the form of oral or written testimony from persons who attended the treaty negotiations on behalf of one or other of the negotiating parties. The tribunal in *Sempre*, for example, noted that '... the opinion of those who were responsible for the drafting and negotiation of a state's bilateral treaties' was not 'irrelevant' because it served 'precisely, to establish the original intention'.⁵² Some tribunals have imposed greater limitations on the use of witness evidence as a proxy for *travaux*.⁵³ In *Tza Yap*, for example, the tribunal accepted into the record as evidence of the *travaux* testimony on behalf of both the claimant and respondent from persons who had

⁴⁶ *ibid.*

⁴⁷ *Millicom International Operations BV and Sentel GSMSA v Republic of Senegal*, ICSID Case No ARB/08/20 (Decision on Jurisdiction of the Arbitral Tribunal, 16 July 2010) [72].

⁴⁸ *ibid.*

⁴⁹ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

⁵⁰ *Amco v Indonesia (Annulment Decision)* (1986) 89 ILR 514 [33].

⁵¹ *ibid.*

⁵² *Sempre Energy International v The Argentine Republic*, ICSID Case No ARB/02/16 (Decision on Objections to Jurisdiction, 11 May 2005) [145].

⁵³ *Yukos v Russian Federation* [227].

been ‘involved in the negotiation of the BIT’.⁵⁴ The tribunal noted in weighing the probity of such evidence, however, that it was not ‘a convincing manifestation of the common understanding . . . or of the intention of the Contracting Parties’.⁵⁵

The precise experience of a witness in the negotiations may be relevant to determining the probity of their testimony as a supplementary means of interpretation under article 32 of the VCLT. The tribunal in *HICEE*, for example, discounted the relevance of oral evidence related to treaty negotiations on the basis that it had ‘little bearing on the question for decision’ because none of the witnesses ‘was directly involved in the negotiation of the Agreement in question’ and as such could only offer mere ‘*ex post facto* expressions of opinion about what was presumed to have animated the negotiation of a treaty text’.⁵⁶ It decided that, on this basis, the evidence was inadmissible because it did not constitute a supplementary means of interpretation within the meaning of article 32 of the VCLT.⁵⁷ Reasoning to similar effect is found in *İçkale İnşaat*, where the tribunal accepted oral evidence as ‘relevant evidence’ of the *travaux* and recognized that it was helpful in understanding how the respondent-state had prepared for negotiations. It noted, however, that it could not draw any ‘firm conclusions regarding the interpretation’ of the treaty since the witness was not present at the relevant time when the treaty was agreed and signed by the parties.⁵⁸

Finally, a number of tribunals have considered as *travaux* or as supplementary means of interpretation documents prepared by one of the contracting parties to support the implementation or ratification of an investment treaty domestically. The tribunal in *Mondev*, for example, adopted an expansive approach when considering the relevance of such materials, noting that:

[w]hether or not explanations given by a signatory government to its own legislature in the course of ratification or implementation of a treaty can constitute part of the *travaux* . . . for the purposes of its interpretation, they can certainly shed light on the purposes and approaches taken to the treaty, and thus can evidence *opinio juris*.⁵⁹

As examples of such documents, the tribunal cited the Canadian Statement on Implementation of NAFTA.⁶⁰ The tribunal utilized such materials to conclude that the fair and equitable treatment provision (article 1105 NAFTA) was linked to the minimum standard of treatment

⁵⁴ *Tza Yap Shum v La República del Perú*, ICSID Case No ARB/07/6 (Award on Jurisdiction, 19 June 2009) [168] (translation from Spanish).

⁵⁵ *ibid* [212].

⁵⁶ *HICEE v Slovakia* [124].

⁵⁷ *ibid*.

⁵⁸ *İçkale v Turkmenistan* [210].

⁵⁹ *Mondev v United States of America* [111].

⁶⁰ *ibid*.

under customary international law.⁶¹ The tribunal's approach suggests that the formal qualification of materials as *travaux* is not of primary importance, but that in this particular context, the exploration of such material could yield evidence of the *opinio juris* of Canada on the meaning of the international minimum standard of treatment under article 1105 of NAFTA. The tribunal in *Berschader* similarly qualified a ministerial explanatory statement before a national parliament as *travaux*, although the statement was dismissed as irrelevant to the issue under consideration in the particular case.⁶²

Some tribunals have been more restrictive in their analysis of what materials are capable of constituting *travaux*.⁶³ Such characterization has not, however, had a predictable impact upon whether or not non-*travaux* materials will inform treaty interpretation. In *Orascom*, for example, the tribunal relied on the explanatory memorandum submitted by Belgium to its parliament for ratification of the BIT to 'support' its textual interpretation of the definition of 'investor'.⁶⁴ The tribunal acknowledged that the memorandum was 'of course not part of the *travaux préparatoires* as it was not originated during the treaty's preparation phase', but nevertheless relied upon it 'to the extent that it is an additional element that sheds light on the *travaux préparatoires*'.⁶⁵ Gardiner adopts a position similar to that adopted by the *Orascom* tribunal. He stresses that even where such materials are referred to, they should not be used on the basis that they constitute *travaux*.⁶⁶ Gardiner instead adopts a pragmatic approach, recognizing the utility of such materials and anticipating scope for parties and adjudicative bodies to 'skirt[] round the question of whether it forms preparatory work'.⁶⁷ He argues, in particular, that such material ought to be used provided that both parties consent.⁶⁸ Other commentators agree with using domestic ratification material for the purpose of interpretation, but argue that less weight

⁶¹ *ibid* [113].

⁶² J Willems, 'The Settlement of Investor State Disputes and China: New Developments on ICISID Jurisdiction' (2011) 8 South Carolina Journal of International Law and Business 1, 40–41.

⁶³ See, similarly, U Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 244; E Criddle, 'The Vienna Convention on the Law of Treaties in US Treaty Interpretation' (2005) 44 Virginia Journal of International Law 431, 440. For the opposite view, see V Prislán, 'Domestic Explanatory Documents and Treaty Interpretation' (2017) 66 ICLQ 923, 928–29 (noting that 'domestic explanatory materials could shed light on the preparatory works of the treaty (*travaux préparatoires*) or the circumstances of its conclusion'. While 'any material qualifying as preparatory works needs to be of a preparatory character—preparatory in relation to the treaty's text', such constraints 'may arguably not apply in relation to the circumstances of the treaty's conclusion').

⁶⁴ *Orascom v Algeria*, note 339.

⁶⁵ *ibid*.

⁶⁶ RK Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 119.

⁶⁷ *ibid*.

⁶⁸ *ibid*. On this reasoning, Gardiner also endorses the submission of unilateral material as preparatory work relevant to the interpretation of unilateral acts related to a treaty, such as a declaration accepting jurisdiction.

should be accorded to it compared to shared preparatory materials.⁶⁹ Wälde favoured such a cautious approach on the basis that these materials ‘tend to paint a particular innocuous view of the treaty in order not to wake up sleeping wolves during ratification’.⁷⁰ We return to this debate in Section C, below, to argue that attention should not focus on a binary categorization of materials as ‘preparatory work’ (*travaux*) or not, but instead upon the utility of a given material to the interpretive exercise by reference to its precise qualitative features and the context of interpretation.

B. Comparison to domestic approaches

In this section, we introduce and discuss the approaches of English and US courts to the identification of *travaux* for the purposes of interpreting investment treaties. We selected these two jurisdictions as illustrative examples of how national courts in two important jurisdictions use *travaux*.⁷¹ An additional reason for focusing on these two jurisdictions is that British and US investors, as well as British and US arbitrators (some of whom are retired judges), have been major actors in the investment treaty regime.⁷²

The purpose of highlighting domestic interpretive practice is three-fold. First, it underscores that there is variation in how *travaux* are identified, even across domestic systems. The types of negotiating materials that investment tribunals have referred to as *travaux* are similar to the range of materials that English courts have treated as admissible *travaux*.⁷³ US courts, by contrast, have construed the notion of *travaux* more liberally than both investment treaty tribunals and English courts. Out of all three regimes, English courts have been the most restrictive in their recourse to *travaux*. This indicates that approaches to *travaux* in treaty interpretation subsist on a spectrum, providing a useful comparative perspective on the international arbitral cases discussed in this article. Second, these national traditions may in turn affect how investment treaty arbitrators from the US and English legal systems approach treaty interpretation in investment arbitration.⁷⁴ Third and finally, investment

⁶⁹ C McLachlan, L Shore, and M Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017) [7.98].

⁷⁰ TW Wälde, ‘Interpreting Investment Treaties: Experiences and Examples’ in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 778.

⁷¹ Due to space constraints, we could not include other jurisdictions. Treaty interpretation, including the use of *travaux*, vary across jurisdictions: see generally H Aust and G Nolte (eds), *The Interpretation of International Law by Domestic Courts* (OUP 2016).

⁷² As of April 2017, US investors had brought 148 investment arbitrations out of a total of 784, and British investors 67 arbitrations: J Bonnitcha, L Poulsen and M Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017) 27, table 1.2. British and US investors also feature prominently among the most frequently appointed arbitrators: *ibid* 29, table 1.4.

⁷³ *Canfor v United States of America* [20].

⁷⁴ This is a subject for future research.

tribunals may learn from the approaches of domestic courts to treaty interpretation and the use of *travaux*.

The modern approach of the English courts to the use of *travaux* in treaty interpretation under the VCLT was laid down in *Fothergill v Monarch Airlines* by Lord Wilberforce.⁷⁵ The House of Lords was called on to interpret the term ‘damage’ in article 26(2) of the Warsaw Convention, as amended at The Hague in 1955 and as set out in schedule 1 to the Carriage by Air Act 1961. It held that it covered a partial loss of contents of baggage. In his judgment, Lord Wilberforce made use of the Warsaw Convention’s *travaux* and set out a twofold test to determine when *travaux* should be utilized.⁷⁶ First, the materials should be ‘public and accessible’, so that one side is not advantaged by its possession of *travaux* or disadvantaged by its lack thereof and, second, the material should ‘clearly and indisputably point to a definite legislative intention’.⁷⁷ This second part of the test establishes a high threshold. As Lord Steyn explained in *Effort Shipping*, it means that, ‘[o]nly a bull’s-eye counts. Nothing less will do.’⁷⁸

English courts thus adopt a restrictive approach to defining what types of materials might be referred to as aids in treaty interpretation. They also tend to emphasize the ‘general unreliability’ of negotiating history.⁷⁹ For English courts to admit a certain document as *travaux*, it has to be ‘public and accessible’.⁸⁰ To the extent that states fail to release internal negotiating materials, they are unlikely to pass that test and courts could not typically resort to them.⁸¹ However, increasingly, treaty parties are publicly releasing their internal materials. For example, the European Commission unilaterally undertook to release certain of its own internal documents setting out its negotiating positions during the negotiation of the TTIP, and in subsequent negotiations thereafter. These documents detail the Commission’s negotiating approach and the rationale behind key treaty provisions. To the extent that these are ‘public and accessible’ and point to a ‘definite legislative intention’, the English courts would be likely to treat them as relevant *travaux*. English courts nevertheless tend to emphasize the ‘general unreliability’ of the negotiating history.⁸² Prior to the adoption of the VCLT, in *The Beldis*, Scott LJ curiously referred to his *own* experience of being a delegate at the Maritime Conventions to clarify whether the treaties were intended to affect the national laws of procedure and used it to determine the

⁷⁵ *Fothergill v Monarch Airlines* [1981] AC 251.

⁷⁶ *Fothergill v Monarch Airlines* 278.

⁷⁷ *ibid.*

⁷⁸ *Shipping Company Limited v Linden Management SA* [1998] AC 605, 623.

⁷⁹ *R v Secretary of State for the Home Department ex parte Mullen* [2004] UKHL 18 [51], [54] (Lord Steyn).

⁸⁰ *Fothergill v Monarch Airlines* 278 (Lord Wilberforce).

⁸¹ *ibid.*

⁸² *R v Secretary of State for the Home Department* [51], [54] (Lord Steyn).

meaning of the term in that case.⁸³ However, after the adoption of the VCLT, English courts tend to view statements by delegates during negotiations with circumspection, considering their unreliability. As Lord Diplock memorably stated, '[m]achiavellism is not extinct at international conferences'.⁸⁴

While the US Supreme Court has not developed a general test to determine the admissibility of *travaux*, it tends to rely only on official negotiating materials.⁸⁵ It is likely that the passionate disagreements on the legitimacy of using legislative history in interpreting domestic statutes in the US influences how US courts approach the use of *travaux* for interpreting treaties.⁸⁶ In cases like *Air France*, *Volkswagenwerk*, *Eastern Airlines*, and *Sale*, the US Supreme Court referred to the minutes of the negotiating conference in order to determine the intention of the parties.⁸⁷ In *Société Nationale Industrielle Aerospatiale*, a French corporation (SNIA) was being sued for personal injuries resulting from an air crash. SNIA claimed that discovery should take place in France, resisting discovery requests under the Federal Rules of Civil Procedure. The Supreme Court held that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters did not provide such exclusive procedures for obtaining documents, reviewing the preamble and the record of the negotiations that took place at The Hague. Justices Blackmun, Brennan, Marshall, and O'Connor, concurring and dissenting in part, relied on a questionnaire that had been used in the conference to determine whether there were laws or practices in the states parties' jurisdiction which prevented taking voluntary testimony for use in a foreign court without passing through the domestic courts.⁸⁸ While this may have been an unusual sort of document for the Supreme Court to rely on, it was still one that was publicly available.

By contrast, the Supreme Court occasionally also gives weight to the views of individual delegates. In *Sale v Haitian Centers Council*, the majority of the Court, in interpreting the scope of the non-refoulement obligation under article 33 of the Refugee Convention, paid particular attention to the Dutch and Swiss delegates' contention that the

⁸³ *The Beldis* [1936] P 51, 88.

⁸⁴ *Fothergill v Monarch Airlines* 283.

⁸⁵ This brief comparison is limited to the US Supreme Court, rather than federal or state courts generally.

⁸⁶ See, eg, C Sunstein, 'Interpreting Statutes in the Regulatory State' (1989) 103 *Harvard Law Review* 405; JF Manning, 'Textualism as a Nondelegation Doctrine' (1997) 97 *Columbia Law Review* 673; DJ Bederman, 'Revivalist Canons and Treaty Interpretation' (1993–1994) 41 *University of California Law Review* 953; M Abramowicz and T Emerson, 'Citation to Legislative History: Empirical Evidence on Positive Political and Contextual Theories of Judicial Decision Making' (2009) 38 *Journal of Legal Studies* 419; DS Law and D Zaring, 'Law versus Ideology: The Supreme Court and the Use of Legislative History' (2010) 51 *William and Mary Law Review* 1653. Thanks to Reviewer 2 for this point.

⁸⁷ *Air France v Saks* 470 US 392 (1985); *Volkswagenwerk Aktiengesellschaft v Schlunk* 486 US 694 (1988); *Eastern Airlines Inc v Floyd* 499 US 530 (1991).

⁸⁸ *Société Nationale Industrielle Aerospatiale v US* 482 US 522, 558, note 13 (1987): 'Questionnaire on the Taking of Evidence Abroad, with Annexes, Actes et Documents' 9, 10.

obligation only extended to those who were already within the territory of the state. The chair's ruling to place those comments on record was taken by the majority to indicate a general consensus on that position.⁸⁹ Justice Blackmun dissented and criticized the approach of the majority for placing weight on what appeared to be a minority view during the negotiations.⁹⁰ Of note too is the 'great weight' attached by the Supreme Court, as a rule, to the meaning given to a particular treaty term by the US Department of State, which has the responsibility to negotiate and enforce treaties.⁹¹ The English courts, by contrast, have clarified that the views of individual delegates (including those who represent the UK) cannot be relevant in the interpretive exercise.⁹²

There are certain kinds of preparatory documents which investment tribunals have used which the courts of both the US and England have rarely used. The use of witness testimony by some tribunals is an example of such evidence. In *Sempra*, the tribunal considered that the views of those responsible for the drafting and negotiation of a state's bilateral treaties were not irrelevant to the interpretation of the treaty.⁹³ These documents would not pass the *Fothergill* test of publicity and accessibility and, therefore, the English courts would not use them.

C. Identifying 'preparatory work' and 'supplementary means' of interpretation: A proposed schema

Two approaches could be taken to determine the ambit of the concept of 'preparatory work' and/or 'supplementary means' under article 32 of the VCLT. First, it might be said that particular materials fall outside the scope of these concepts *in toto*, and thus outside the means of interpretation envisaged by article 32. Such delineation might occur by reference to the types of materials capable of disclosing the parties' collective intention. Using such a criterion, for instance, it might be said that unilateral internal documents related to a state's negotiating stance are not capable of being considered 'preparatory work' and/or 'supplementary means' under article 32 and so cannot be referred to for the purposes of interpreting a given treaty. The advantage of such an approach is that it results in a clear delineation of materials relevant under article 32 of the VCLT, indicating clearly which materials can play any role in the interpretive process. The disadvantage is that the approach is binary and risks excluding potentially relevant materials from the interpretive process.

⁸⁹ *Sale v Haitian Centers Council* 509 US 155, 185–87 (1993).

⁹⁰ *ibid.* See also IACommHR, *The Haitian Centre of Human Rights v US*, Case 10.675, Report No 51/96 OEA/Ser.L/V/II.95 Doc 7 Rev at 550 (1997).

⁹¹ *Sumitomo Shoji America Inc v Avagliano* 457 US 176, 184 (1982) (Burger CJ).

⁹² *R v Secretary of State for the Home Department* [53] (Lord Steyn).

⁹³ *Sempra v The Argentine Republic*.

A second, better, option for regulating the use of *travaux* is to adopt a sliding scale of relevance by reference to the features of any given material. This approach reflects that the reference in article 32 of the VCLT to ‘preparatory work’ is illustrative only. This makes the concept of ‘supplementary means’ in article 32 potentially open-ended. As the tribunal in *Caratube* noted:

Article 32 VCLT permits recourse, as supplementary means of interpretation, not only to a treaty’s ‘preparatory work’ and the ‘circumstances of its conclusion,’ but indicates by the word ‘including’ that, beyond the two means expressly mentioned, other supplementary means of interpretation may be applied in order to confirm the meaning resulting from the application of Article 31 VCLT ...⁹⁴

This means that treaty interpreters have some discretion to determine what materials may be used as ‘supplementary means’ of interpretation. Tribunals have to this effect encompassed within the scope of this term the comparative treaty practice of the home and host state,⁹⁵ and even case law.⁹⁶ The two illustrative examples provided in article 32 nevertheless indicate the types of materials that might be within its ambit. Accordingly, an important threshold question is how the illustrative list in article 32 should inform the identification of the ‘supplementary means’ relevant to the interpretive exercise.

Tribunals might conclude that a wide range of materials fall within the concept of ‘preparatory work’ or, at least, the broader concept of ‘supplementary means’, but that their relevance in any given case will depend upon their particular features. In *HICEE*, for example, documents that had been prepared to support a domestic ratification process were considered not to fall within the notion of ‘preparatory work’, but were nonetheless considered to be within the ambit of the types of ‘supplementary means’ of interpretation contemplated by article 32. While such material did not constitute a negotiating record, they could thus be taken into consideration in interpreting the treaty at issue. The majority considered that taking a binary approach and rejecting the material:

would not ... be reconcilable with the requirement that a treaty is to be interpreted ‘in good faith’, which the Vienna Convention consciously placed at the very head of the provisions dealing with interpretation. And the Tribunal recalls once more ... that the category of **supplementary materials** that a tribunal is authorized to have recourse to, in order to confirm the meaning

⁹⁴ *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12 (Decision Regarding Claimant’s Application for Provisional Measures, 31 July 2009) [71].

⁹⁵ See, eg, *Deutsche Telekom AG v The Republic of India*, PCA Case No 2014-10 (Interim Award, 13 December 2017) [146] and *Beijing Urban Construction Group Co Ltd v Republic of Yemen*, ICSID Case No ARB/14/30 (Decision on Jurisdiction, 31 May 2017) [54], [93]–[97].

⁹⁶ See, eg, *Agua del Tunari v Republic of Bolivia*, ICSID Case No ARB/02/3 (Decision on Respondent’s Objections to Jurisdiction, 21 October 2005) [266], [275]–[288] and *Anatolie Stati and others v Republic of Kazakhstan*, SCC Case No V 116/2010 (Award, 19 December 2013) [942]–[943].

resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure, is, on the terms of the Convention, not closed. The Tribunal is therefore in no doubt that the Dutch Explanatory Notes, given their terms and content, taken together with the viewpoint adopted in these proceedings by Slovakia, constitute valid [supplementary material](#) which the Tribunal may, and in the circumstances must, take into account in dealing with the question before it.⁹⁷

Under this second approach, interpreters would not exclude the material in its entirety on the grounds of it not constituting ‘preparatory work’ or based on a restrictive view of what constitutes a ‘supplementary means’ of interpretation. Instead, having determined that the materials under article 32 are relatively expansive, interpreters could nonetheless recognize differences between the types of materials that might be referred to under article 32 by adopting a sliding scale of relevance. According to such a scale, an interpreter might, for example, give more weight to materials that are capable of manifesting the joint intent of the parties. While a unilateral internal document might therefore not be excluded *ex ante*, it might nonetheless be given lesser weight than, for instance, a joint report on the negotiations signed by all treaty parties. Such an approach would encompass as relevant all material created during a treaty negotiation, but would confer most weight on materials demonstrating the common intention of the treaty parties.

The second approach fits more closely with the intent behind article 32 of the VCLT. The ‘supplementary’ role of the materials referred to in article 32 was a matter of considerable controversy during the drafting of the VCLT.⁹⁸ The US, in particular, criticized the approach now reflected in article 32. It argued that this division was unduly rigid and overly focussed on the text of the treaty at the expense of its context and object and purpose.⁹⁹ Ultimately, the VCLT drafters characterized a category of materials as a ‘supplementary means’ of interpretation due to their nature. Such materials were considered to be less useful for determining the meaning of treaty provisions than the materials referred to in article 31. As the ILC noted, article 32 materials—and *travaux* in particular—are particularly likely to be incomplete, imbalanced, inaccurate, or unavailable.¹⁰⁰ These features prompted the ILC to relegate these materials to a ‘supplementary’ role in the interpretive scheme of the VCLT. While there is no apparent hierarchical order amongst

⁹⁷ *HICEE v Slovakia* [136].

⁹⁸ Mortenson, ‘Is the Vienna Convention Hostile to Drafting History?’, extensively surveys this controversy.

⁹⁹ ‘Comments of the Government of the United States on the Draft Articles on the Law of Treaties Drawn up by the International Law Commission’ (1968) 62 AJIL 567, 569–70. Mortenson, ‘Is the Vienna Convention Hostile to Drafting History?’, 809–10, underscores that an influential member of the US delegation at the VCLT conference, Myres McDougal, badly mischaracterized the ILC draft, constructing a straw man of the ILC’s allegedly overly rigid approach.

¹⁰⁰ ILC Ybk 1966/II, 220.

supplementary means of interpretation, the structure of the interpretive framework developed in articles 31 and 32 of the VCLT indicate that certain materials may attract more or less weight in the interpretive process than others. This is consistent with Waldock's reflection during the drafting of the VCLT to the effect that supplementary means of interpretation are referred to 'simply [as] evidence to be weighed against any other relevant evidence of the intentions of the parties', and the 'cogency [of which] depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty'.¹⁰¹

The proposed sliding scale approach to *travaux* and 'supplementary means' of interpretation holds risks. A first risk is that it might skew the interpretive exercise, for example by introducing self-serving or biased materials. States may have manipulated *travaux* to obscure the true state of affairs.¹⁰² These risks have typically been considered to be heightened in investor-state proceedings. Absent discovery or disclosure, ordinarily only one of the disputing parties—the host state—has access to *travaux*. In some respects, the greater propensity of states to release negotiating materials as part of broader transparency efforts might assuage this concern, though it does not altogether dissipate this risk. This is because the claimant investor is never a party to the investment treaty, and assertions by the host state as to the *travaux* 'may be incomplete, misleading or even self-serving',¹⁰³ even where those *travaux* are released prior to the filing of an arbitration claim. Furthermore, there is an increased likelihood that the politicization of negotiations of investment treaties will result in the production by states of documents or statements during the negotiations which seek to dispel concerns expressed by domestic populations against certain (potentially justified) interpretations of an investment treaty.

As states unilaterally release more materials related to treaty negotiations, tribunals will need to increasingly grapple with the question of what constitutes *travaux* and what weight to give to various claimed instances of *travaux* in the interpretive process. As Berman noted in his Dissent to the Committee's Decision on Annulment in *Lucchetti*, tribunals referring to these materials must continue to exercise a 'particular duty of caution'.¹⁰⁴ There is, in particular, the risk that those invoking *travaux* cherry pick from the *travaux* with a view to evading obligations

¹⁰¹ H Waldock, 'Third Report on the Law of Treaties', ILC Ybk 1964/II, 58 [21].

¹⁰² ILC Ybk 1964/I, 286 (Amado); Mortenson, 'Is the Vienna Convention Hostile to Drafting History?', 793; Summary Record of the United Nations Conference on the Law of the Treaties (First Session, Vienna, 26 March–24 May 1968) (VCLT Record 1968) 176 (Brazil urges 'utmost caution', as 'states sometimes concealed their real views on the questions under discussion at conferences or resorted to friendly States to express them').

¹⁰³ *Industrial Nacional de Alimentos v The Republic of Peru* (Dissenting Opinion of Franklin Berman) [9].

¹⁰⁴ *ibid.*

in bad faith.¹⁰⁵ Some tribunals have recognized this concern and addressed it. In *Anglia*, the tribunal took note of the claimant's concern that the respondent, after both parties were invited by the tribunal to search for *travaux*, had only filed *travaux* which supported its own position, and declared that it would 'consider the weight and relevance to be given' to the *travaux* filed by the respondent.¹⁰⁶ Care must thus be exercised when using *travaux*—and other supplementary means of interpretation—under article 32. Under our proposed sliding scale, we consider four qualities to be of particular relevance to determining how much weight to give to 'preparatory work' under article 32 of the VCLT. The proposed four criteria link closely to the text of article 32 and its purpose, which envisages the use of supplementary means of interpretation to uncover the treaty parties' intentions.

The first such criterion is a *temporal* one. The materials referred to under article 32 can be contrasted to the materials referred to in articles 31(2) (documents brought into existence *at* the conclusion of the treaty) and 31(3) (documents and agreements brought into existence *after* the conclusion of the treaty) of the VCLT. A temporal factor was recognized by the tribunal in *Amco*, referred to above.¹⁰⁷ There, the tribunal used a temporal factor to determine whether or not material constituted *travaux*. Unlike the *Amco* tribunal's use of the temporal factor, under our sliding scale of relevance approach, the temporal qualities of any given material would not impact the *categorization* of the material but rather the weight to be accorded to it under article 32. That is, the relevance of the material to the interpretive exercise would be adjusted according to the timing of its creation. This would reflect the purpose of considering preparatory work in treaty interpretation, which is referred to in order to uncover the intent of the parties underpinning the treaty's provisions. Arguably, in considering such intent, any material that is created prior to a clause becoming 'definite' should be given particular weight. Material immediately preceding the adoption of the treaty (or specific provision) arguably merits greater attention than that from earlier discussions. Equally, for negotiations stretching over many years, material generated at the beginning of negotiations might be less relevant than that generated as the text took shape. Thus, the requisite temporal connection will vary depending on the type of treaty and the length and sequence of the negotiating process.

The second criterion is *availability*. Several tribunals have adopted approaches that weigh the relevance of *travaux* and *travaux*-type materials by reference to such a factor. In this context, Brower's dissenting opinion in *HICEE* is illuminating. The majority in that case justified its

¹⁰⁵ Mortenson, 'Is the Vienna Convention Hostile to Drafting History?', 816, notes 216 and 217.

¹⁰⁶ *Anglia Auto Accessories Limited v Czech Republic*, SCC Case No 2014/181 (Final Award, 10 March 2017) [72]–[77].

¹⁰⁷ *Amco Asia Corporation v Indonesia*, ICSID Case No ARB/81/1 (Decision on the Application for Annulment of the 1990 Award and the 1990 Supplement Award, 17 December 1992) [33].

use of a set of ‘explanatory notes’—which it considered evinced the underlying intentions of the claimant’s home state when concluding the treaty—by noting that the notes were publicly accessible.¹⁰⁸ In dissent, Brower concluded that he was ‘unable to agree with the Award’s conclusion that its main holding is not “unfair to the investor”’.¹⁰⁹ He reasoned that both parties before the tribunal experienced ‘substantial difficulties . . . in obtaining *any* documents from the Dutch Government [the investor’s state of nationality] regarding the BIT’ and further noted a ‘lack of reference to the Notes on the Dutch Foreign Ministry website’.¹¹⁰ In fact, ‘even if the Notes indeed had been “accessible”’, Brower considered that ‘the ambiguous content of the Notes, over which the experienced counsel and arbitrators in this case have disagreed across hundreds of pages of complex argument’ could have caused the investor to reach a conclusion ‘entirely different’ from that reached in the majority’s award.¹¹¹ For these reasons, Brower concluded that it was ‘inappropriate’ for the award to utilize the view expressed in the Notes as ‘determinative of jurisdiction in this case’.¹¹² Recognizing similar difficulties and the concern about equality of arms between the host state and the investor, UNCTAD has encouraged states to publish *travaux* as a means of ensuring that they are available to investors and also tribunals.¹¹³

The third criterion focusses on *authorship or awareness*, and reflects that the focus under article 32 ought to be predominantly upon *collective* documents. A document will be collective where it has been exchanged between the negotiating parties or is otherwise actually accessible and known to them. The *Canfor* tribunal’s analysis of various documents comprising a treaty’s ‘negotiating history’ is instructive in this regard. Here, again, analysis of such features leads to the application of a sliding scale of relevance. Thus, documents circulated amongst the parties and discussed or relied upon by them will merit more weight under article 32 compared to internal documents not shared between the parties. Instead of dismissing the latter category of documents entirely, however, a tribunal adopting a sliding scale approach would accept them as potentially relevant under article 32 but attribute less weight to such documents compared to those shared between the parties. The *Churchill* tribunal appears to have implicitly recognized the utility of such a sliding scale of relevance by reference to this factor when considering the

¹⁰⁸ *HICEE v Slovakia* [144].

¹⁰⁹ *HICEE v Slovakia* (Dissenting Opinion of Judge Charles N Brower) [33].

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² *ibid* [36].

¹¹³ UNCTAD, ‘Interpretation of IIAs: What States Can Do’ (IIA Issues Note No 3, Doc No UNCTAD/WEB/DIAE/IA/2011/10, December 2011) 12. Cf generally M Donaldson and B Kingsbury, ‘The Adoption of Transparency Policies in Global Governance Institutions: Justifications, Effects, and Implications’ (2013) 9 *Annual Review of Law and Social Science* 119.

utility of materials from the archives of one of the treaty parties. There, the tribunal concluded that:

The British materials contain four folders from the Foreign and Commonwealth Office archives. ... the materials contain no exchanges of notes or similar documents clearly depicting a common understanding. The Tribunal nevertheless believes that *it may draw some useful indications* from these materials, both of the intentions of the British negotiators and of Indonesia. With these considerations in mind, the Tribunal now embarks upon a closer analysis of these *travaux*.¹¹⁴

A similar approach could be used for assessing the weight of materials such as parliamentary records and witness evidence about negotiations.

The third criterion thus focusses on how closely documents reflect the parties' collective efforts in negotiating the treaty, and therefore how capable such documents are of reflecting their common intention or matters within their common knowledge that they factored into the negotiations of the treaty. The third criterion reflects the fact that the nature of unilateral materials is different from shared preparatory material. The former are not intended, in the first instance, to shed light on the shared intention of the treaty parties but rather to convince and persuade sometimes-sceptical parliaments and populations of the desirability of ratification, to record one state's subjective views about, or desires for, the contents of a given treaty, or to give effect to a treaty in domestic law. The tribunal in *HICEE*, for example, adopted a structured approach to determining the weight it should give to internal negotiating records. In that case, the tribunal noted that '[i]t is by no means uncommon for a party ... to support its case by invoking the terms in which the treaty was submitted internally for approval'.¹¹⁵ From such internal materials, however, the tribunal distinguished materials which, while internal, did not set out the interpretation of the host state but rather 'the intentions of its negotiating partner'.¹¹⁶ It further indicated that the weight given to such materials would be greater where they did not comprise 'a bare statement but one backed by reasons'.¹¹⁷ The tribunal also indicated its preference, prior to the use of such materials, for the statements therein to be supported by 'some substantiation or corroboration, if possible'.¹¹⁸ In the absence of such substantiation, it noted that it could only treat the material 'as having an essentially unilateral character not a joint one'.¹¹⁹

¹¹⁴ *Churchill Mining v Republic of Indonesia* (Decision on Jurisdiction) [212] (emphasis added).

¹¹⁵ *HICEE v Slovakia* [127].

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

¹¹⁸ *ibid* [130].

¹¹⁹ *ibid* [132]. Note that the tribunal ultimately determined that the notes 'do not form part of the preparatory work ... since they post-date the completion of the negotiations, and serve to explain what had been agreed between the negotiating States': *ibid*, note 184.

As negotiations of investment treaties become increasingly public, the use of this criterion would enable tribunals to balance the interpretive utility of such documents with their probity. Tribunals have, for instance, typically referred to unilateral ratification materials when there was a dearth of other *travaux*-type materials. Under the sliding scale approach, the growing availability of *travaux* may render such references less important or even superfluous. This is particularly important for modern investment treaty negotiations, where the issue of state ratification is increasingly subject to widespread domestic appraisal and debate. In these circumstances, the adoption of a cautious approach to the use of unilateral ratification materials in treaty interpretation would best balance the potentially one-sided nature of such materials with their potential utility.

The fourth criterion focusses on the *quality* of the document(s). This factor looks to the authenticity, completeness, and coverage of *travaux*. This might also encompass additional qualitative criteria, including analysis of whether the various *travaux* are consistent. In the past, investment treaties were oftentimes mere photo opportunities, with policymakers and negotiators devoting little time or energy to drafting and negotiating the terms of the treaty, much less to keeping records of the limited negotiations that took place.¹²⁰ As such, investment treaty negotiations, especially up to the 2000s, yielded few *travaux*.¹²¹ Pakistan's Attorney General struggled to locate any *travaux* (and even the investment treaty itself) after the country received its first request for an investment treaty arbitration:

But when inquiring with the relevant ministries, [Pakistan's Attorney General] was unable to trace any records of negotiations ever taking place with Switzerland. There were no files or documentation and no indication that the treaty had ever been discussed in Parliament. In fact, no one could find the treaty itself, so Pakistan had to ask Switzerland for a copy through formal channels. For a treaty with such a considerable scope, this was somewhat of a mystery. Yet, the attorney general later learned that this was no exception, as hardly any records existed of Pakistan's past BIT negotiations.¹²²

This shows that, even when *travaux* exist, their use presents challenges for treaty interpreters due to their incompleteness, inconclusiveness, failure to consider a matter, and silence. The practical utility of *travaux* to arbitral tribunals will vary significantly depending on

¹²⁰ LNS Poulsen and E Aisbett, 'When the Claims Hit: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65 *World Politics* 273, 273, 280, 296. See also JW Salacuse, *The Law of Investment Treaties* (OUP 2015) 169–70 (noting that '[f]or various reasons obtaining useful negotiating history to assist in interpreting a treaty can be difficult, if not impossible. The recorded negotiating history and preparatory work may be scant or lost, or contracting states may be unwilling to provide the record to litigants, since such material, once released, may be used against the state that released it').

¹²¹ Reinisch, 'The Interpretation of International Investment Agreements', para 64.

¹²² LNS Poulsen, *Bounded Rationality and Economic Diplomacy* (CUP 2015) xiv–xv.

these factors.¹²³ For treaty interpreters who rely on *travaux*, these four challenges together entail the risk of misinterpretation of the states parties' intention.¹²⁴

First, concerns about the incompleteness of *travaux* are common.¹²⁵ Most records are prepared by one state party, and—to the extent that they exist at all—are either irrelevant or incomplete.¹²⁶ In the *Aguas del Tunari* arbitration, for instance, an arbitral tribunal concluded that the 'sparse negotiating history ... offers little additional insight into the meaning of the aspects of the [bilateral investment treaty] at issue, neither particularly confirming nor contradicting the Tribunal's interpretation'.¹²⁷ For a large number of the some 3000 investment treaties in existence the situation is similar.

Second, *travaux* are frequently inconclusive, undermining their utility.¹²⁸ In *Czech Republic v European Media Ventures*,¹²⁹ for example, an English court acknowledged the state's attempt to rely upon *travaux*-type materials to support its interpretation of an investment treaty, but ultimately rejected the relevance of those materials because they were ambiguous and inconclusive themselves.¹³⁰ It noted that its task was to 'interpret the Treaty, rather than to interpret the supplementary means of interpretation'.¹³¹ In *H&H Enterprises*, Egypt argued that only investments specifically 'accepted' under domestic investment law fell within the scope of the treaty. It cited 'the Submittal Letter of the U.S. Secretary of State' as *travaux* to 'confirm' this submission.¹³² The tribunal rejected Egypt's interpretation, noting that 'the Submittal Letter uses the term "covered" and not "exclusively covered"' to conclude that the investment need not have complied with particular procedures for it to be accepted as a protected investment. Interestingly, the tribunal

¹²³ A Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 218.

¹²⁴ G Fitzmaurice, 'Déliverations: Interprétation Des Traités' (1952) 44-II *Annuaire de l'Institut de Droit International* 373; T Weiler, *The Interpretation of International Investment Law* (Martinus Nijhoff 2013) 45–46; M Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' (1991) 14 *Boston College International and Comparative Law Review* 111, 112–13; Mortenson, 'Is the Vienna Convention Hostile to Drafting History?' 815, note 215 (delegates urging caution about recourse to *travaux* given the risk of erroneous interpretations).

¹²⁵ A concern noted already at the VCLT conference: VCLT Record 1968, 176; Mortenson, 'Is the Vienna Convention Hostile to Drafting History?', note 213 (with further references).

¹²⁶ JRG Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 108.

¹²⁷ *Aguas del Tunari v Republic of Bolivia* (Decision on Respondent's Objections to Jurisdiction) [274]. See also TW Wälde, 'Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues Based on Recent Litigation Experience' in N Horn and S Kröll (eds), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Kluwer 2004) 198 (noting the fragmented and contradictory nature of the *travaux* to the Energy Charter Treaty).

¹²⁸ Mortenson, 'Is the Vienna Convention Hostile to Drafting History?', 815, note 215 (with references to delegate views at the VCLT conference).

¹²⁹ *Czech Republic v European Media Ventures* [2007] EWHC 2851 (Comm).

¹³⁰ *ibid* [30]. See also *Philip Morris Asia Limited v Commonwealth of Australia*, PCA Case No 2012-12 (Award on Jurisdiction and Admissibility, 17 December 2015) [497]–[506].

¹³¹ *Czech Republic v European Media Ventures* [31].

¹³² *H&H Enterprises Investments, Inc v Arab Republic of Egypt*, ICSID Case No ARB/09/15 (Tribunal's Decision on Respondent's Objections to Jurisdiction, 5 June 2012) [52].

appears to have accepted Egypt's view that the Submittal Letter constituted part of the *travaux*.¹³³

Third, even if relatively complete *travaux* to these early investment treaties exist, they may nevertheless be of limited utility to contemporary investment tribunals. Treaty negotiators may fail to anticipate important matters.¹³⁴ *Travaux* may show how the negotiators arrived at the final text, but may also contain misunderstandings and points that the negotiators ultimately discarded.¹³⁵ Crucial decisions adopted may not appear in the record because they have been resolved in private off-the-record meetings.¹³⁶ Investment treaty negotiators may not have expressly addressed or foreseen issues that are central in today's investment disputes.¹³⁷ And so on.

Fourth and finally, *travaux* may be silent on the particular question a tribunal is concerned with. Even the extensive preparatory works of the NAFTA did not assist the tribunal in *Resolute* in its interpretation of the term 'relating to' contained in article 1101.¹³⁸ Its examination of earlier versions of the article and the explanatory statements of both Canada and the US with respect to the same '[did] not provide any explanation' for the meaning of the term.¹³⁹ As a result, the tribunal resorted to other arbitral decisions to guide its interpretation.¹⁴⁰

Despite the potential difficulties associated with interpreting *travaux*, they may nonetheless still offer insights important to the interpretation of a treaty. As Gardiner notes:

Preparatory work is often too diffuse to be helpful at all. Very rarely does it provide a bull's eye. However, it is quite often somewhere in between these extremes, and it can occasionally be quite revealing even where the precise issue was not in the negotiators' minds . . .¹⁴¹

Weighing these indicia of *quality*, the proposed sliding scale would allow the treaty interpreter to harness the benefits of reference to *travaux* whilst assisting them to avoid its attendant challenges. The utilization of

¹³³ *ibid* [53]–[54] (see [52]).

¹³⁴ MO Hudson, *The Permanent Court of International Justice* (Macmillan 1943) 644; E Beckett, 'Observations des Membres de la Commission sur le Rapport de M Lauterpacht' (1950) 43-I *Annuaire de l'Institut de Droit International* 435, 438.

¹³⁵ cf Allott's famous adage that a 'treaty is a disagreement reduced to writing': P Allott, 'The Concept of International Law' (1999) 10 *EJIL* 31, 43.

¹³⁶ G Fitzmaurice, 'Vae Victis or Woe to the Negotiators! Your Treaty or Our "Interpretation" of It?' (1971) 65 *AJIL* 358, 366.

¹³⁷ VCLT Record 1968, 170 (matters the parties had never thought of, or had different intentions all along); J Hepburn and others, 'Investment Law before Arbitration' (2020) 23 *JIEL* 929 (showing that the drafters of early British and German investment treaties rarely foresaw the issues that are at the centre of contemporary investment disputes, such as fair and equitable treatment or the use of MFN clauses).

¹³⁸ *Resolute Forest Products Inc v Government of Canada*, PCA Case No 2016-13 (Decision on Jurisdiction and Admissibility, 30 January 2018).

¹³⁹ *ibid* [223]–[225].

¹⁴⁰ *ibid* [226]–[241].

¹⁴¹ Gardiner, *Treaty Interpretation*, 385.

the proposed sliding scale of relevance to determine the weight to be given to materials that might be referred to as *travaux* is important to both host states and investors, and to the legitimacy (and independence) of the system more generally.¹⁴² In this context, the ways in which tribunals justify having recourse to *travaux* becomes very important. This issue is addressed in the following part.

IV. SOURCE AND LIMITS OF POWER TO UTILIZE *TRAVAUX* IN TREATY INTERPRETATION

The uses that can be made of *travaux* under article 32 illustrate why they are referred to as a ‘supplementary means’ of interpretation within the scheme of the VCLT. The materials referred to in this provision are supplementary in the sense that they may be used only to: (i) ‘confirm’ a meaning reached on the basis of article 31 of the VCLT; (ii) ‘determine’ a meaning in circumstances where the application of article 31 leads to either an ‘ambiguous or obscure result’ (article 32(a)) or a ‘manifestly absurd or unreasonable result’ (article 32(b)); and (iii) to shed light on the states parties’ intention to give special meaning to a term (article 31(4)).¹⁴³ *Travaux* are ‘supplementary’ because their role in the interpretive exercise differs to the role of the materials referred to in article 31 (including agreements or instruments connected with the conclusion of the treaty, and subsequent agreements and subsequent practice). Whereas the previous part considered approaches to determining *what* constitutes *travaux*, this part considers *how* investment tribunals use *travaux* as an aid to interpretation. It distinguishes between an approach conforming to the VCLT methodology, and more expansive or restrictive uses of *travaux* than the VCLT envisages.¹⁴⁴

Our comprehensive review of investor-state jurisprudence shows that tribunals in over 80 investment treaty decisions in the public domain have used *travaux* for varying reasons and to varying extents as an aid to interpret the treaty provisions before them.¹⁴⁵ Furthermore, in many more cases, one (or both) of the parties referred to *travaux* in their

¹⁴² *Industrial Nacional de Alimentos v The Republic of Peru* (Dissenting Opinion of Franklin Berman) [9].

¹⁴³ Mortenson, ‘Is the Vienna Convention Hostile to Drafting History?’, speaks of the four pathways of ambiguity, absurdity, special meaning, and conformation. See also le Bouthillier, ‘Article 32’.

¹⁴⁴ Our analysis builds on and extends Julian Mortenson’s account of the permissibility of *recourse* to *travaux* under article 32 VCLT as a matter of course: Mortenson, ‘Is the Vienna Convention Hostile to Drafting History?’. He challenged the conventional wisdom that the four triggers for recourse to *travaux* are restrictive. By contrast, our focus is on appropriate *use* of *travaux*.

¹⁴⁵ A list of these decisions is on file with the authors. It is likely that additional awards that are confidential refer to *travaux* as well. For a quantitative analysis of arbitral references to *travaux*, see OK Fauchald, ‘The Legal Reasoning of ICSID Tribunals – An Empirical Analysis’ (2008) 19 EJIL 301; Vasani and Ugale, ‘Travaux Préparatoires’, 7.

submissions. Tribunals tend to rely on *travaux* where they are made available to them.¹⁴⁶ This has been particularly evident in the interpretation of the ICSID Convention.¹⁴⁷ Many investment tribunals draw heavily on the *travaux* to the ICSID Convention,¹⁴⁸ an approach made possible because a detailed and accessible *travaux* exists.¹⁴⁹ Even so, the proper interpretation of the *travaux* to the ICSID Convention on a core question—the definition of investment in article 25—has given rise to sustained controversy.¹⁵⁰ While the majority of tribunals cite the VCLT in defining the use that can be made of *travaux*, investment treaty tribunals have in other contexts displayed a ‘cavalier attitude to treaty

¹⁴⁶ See, in respect of the propensity of international courts more generally to refer to *travaux* where it is available, J Wouters and others, *International Law: A European Perspective* (Hart 2019) 105; see also E Canal-Forgues, ‘Remarques sur le recours aux travaux préparatoires dans le contentieux international’ (1993) 97 *Revue Générale de Droit International Public* 901, 935 (noting that *travaux* have become an integral part of interpretation).

¹⁴⁷ Two other areas in investor-state arbitration where *travaux* have played a particularly important role thus far concern the scope of dispute settlement clauses (eg *Tza Yap Shum v Perú*), including the use of MFN clauses to rely on more favourable dispute resolution procedures (eg *ICS Inspection and Control Services Limited (United Kingdom) v The Argentine Republic*, PCA Case No 2010-9 (Award on Jurisdiction, 10 February 2012) [192]–[196], [200]–[203] and *Austrian Airlines v The Slovak Republic* (Final Award, 9 October 2009) [99]–[108] and [131]–[139]), and the interaction between the Energy Charter Treaty and European Union Law (eg *Eskosol SPA in Liquidazione v Italian Republic*, ICSID Case No ARB/15/50 (Decision on Italy’s Request for Immediate Termination and Italy’s Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019) and *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12 (Decision on the Achmea Issue, 31 August 2018) [205]–[206]). We thank Reviewer 1 for this point.

¹⁴⁸ See, eg, *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2 (Award, 31 October 2012) [294] (meaning of ‘investment’ in article 25(1)); *Abaclat and Others (Case formerly known as Giovanna A Beccara and Others) v The Argentine Republic*, ICSID Case No ARB/07/5 (Decision on Jurisdiction and Admissibility, 4 August 2011) (Dissenting Opinion of Georges Abi-Saab) [43]–[47] (meaning of ‘investment’ in article 25(1)); *Blue Bank International and Trust (Barbados) Ltd v Venezuela*, ICSID Case No ARB/12/20 (Separate Opinion of Christer Söderlund, 3 April 2017) [43]–[50] (effective date for denunciation of the ICSID Convention); *Bernard Friedrich Arnd Rüdiger Von Pezold and Others. v Republic of Zimbabwe*, ICSID Case No ARB/10/15 (Award, 28 July 2015) [694] (available remedies in investor-state arbitrations); *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3 (Award, 21 November 2000) [52] (interpretation of articles 25(1) and (3) concerning the scope of ICSID arbitration *ratione personae*); *Fedax v The Republic of Venezuela*, ICSID Case No ARB/96/3 (Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997) [15], [21], [24] (concerning the meaning of ‘legal dispute’ and ‘investment’ under article 25(1)); *Lanco International Inc v The Argentine Republic*, ICSID Case No ARB/97/6 (Preliminary Decision: Jurisdiction of the Arbitral Tribunal, 8 December 1998) [42]–[43], [47] (form of state’s consent to arbitration under article 25(1)); *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No ARB/07/23 (Decision on Provisional Measures, 15 October 2008) [34] (requirements for recommending provisional measures).

¹⁴⁹ R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 31.

¹⁵⁰ Particularly whether there is a requirement that the investment ‘contribute to the host country’s economic development’. Compare JD Mortenson, ‘The Meaning of “Investment”: ICSID’s *Travaux* and the Domain of International Investment Law’ 51 (2010) *Harvard International Law Journal* 257, 280–294 (favouring wide-open jurisdiction) with M Waibel, ‘Opening Pandora’s Box: Sovereign Bonds in International Arbitration’ (2007) 101 *AJIL* 711, 718–32 (favouring outer limits of ‘investment’).

interpretation'.¹⁵¹ As such, care must be taken to look beyond what tribunals *say* they are doing and consider what tribunals are *in fact* doing.¹⁵² As we report in Section A, investment tribunals have, as a rule, faithfully conformed to the VCLT in making use of *travaux*. Only a minority adopt a 'cavalier attitude' to *travaux* (Section B) by adopting broader or narrower approaches to the use of *travaux* in investment treaty arbitration. An expansive use of *travaux* means that a tribunal uses *travaux* as a primary means of interpretation, whereas a restrictive approach arises where a tribunal ignores *travaux* altogether. Sections A and B examine these approaches to the use of *travaux* in more detail, including by illustrating each with examples from arbitral jurisprudence. Section C concludes.

A. Conforming to the Vienna Convention's methodology: The dominant approach of investment tribunals to the use of travaux

Articles 31 and 32 of the VCLT set out an interpretive methodology for treaties. Article 31 requires that treaties 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 light of the treaty's object and purpose. As noted, pursuant to article 32, recourse can also be had to 'supplementary means of interpretation', including 'preparatory works' (ie *travaux*). Whilst recognizing the relevance of such materials to treaty interpretation, the VCLT imposes important limits on the purposes for which *travaux* may be used in interpretation.¹⁵³ Under article 32, such supplementary means may only be invoked where necessary to (a) confirm the ordinary meaning of a treaty provision interpreted under article 31, or shed light on the common intention of the parties to give a treaty term special meaning;¹⁵⁴ (b) determine the meaning of the provision where the meaning derived on the basis of interpretation under article 31 is

¹⁵¹ Waibel, 'International Investment Law and Treaty Interpretation', 29 (excessive reliance on the object and purpose of investment treaties); Kurtz, 'Building Legitimacy Through Interpretation', 23.

¹⁵² M Waibel, 'Uniformity versus Specialization (2): A Uniform Regime of Treaty Interpretation?' in CJ Tams, A Tzanakopoulos and A Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edgar Elgar 2014); AR Sureda, *Investment Treaty Arbitration: Judging under Uncertainty* (CUP 2012) 141 ('[r]eference to the Vienna Convention has become a ritual step before proceeding in ways which may not be congruent with it').

¹⁵³ *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12 (Opinion on the International Legal Interpretation of the Waiver Provision in CAFTA Chapter 10, 22 March 2010) [23].

¹⁵⁴ While the VCLT does not expressly regulate the use of *travaux* to determine special meaning, the permissibility of recourse to *travaux* is implicit in article 31(4)'s reference to the intention of the states parties. Cf Gardiner, *Treaty Interpretation*, 337 ('any consensus on a special meaning recorded in the preparatory work would be admissible if the circumstances in article 32 arose'); Beckett, 'Observations des Membres de la Commission sur le Rapport de M Lauterpacht', 441-42; Mortenson, 'Is the Vienna Convention Hostile to Drafting History?' 786 ('evidence in the drafting history of a special meaning'). However, Israel commented in 1966 that no recourse to *travaux* was permissible to establish special meaning: ILC Ybk 1966/II, 100.

ambiguous or obscure; or (c) determine the meaning of the provision where the meaning derived on the basis of interpretation under article 31 is manifestly absurd or unreasonable.

Under the VCLT, then, *travaux* are given an expressly secondary—albeit still important—role in the interpretive process.¹⁵⁵ In situation (a), where the meaning of the provision is evident from an application of the article 31 methodology of interpretation, the VCLT limits the use of *travaux* to only the confirmation of that meaning.¹⁵⁶ By contrast, in situations (b) and (c), treaty interpreters may use *travaux* to *determine* rather than just *confirm* the meaning of a provision. This broader use of *travaux* is only permissible when one of the triggers specified in article 32 exist.¹⁵⁷ In all three situations treaty interpreters have discretion to decide whether to have recourse to *travaux* ('[r]ecourse may be had'). The following paragraphs examine the use of *travaux* in these different situations.

1. Use of *travaux* to confirm meaning

Many tribunals have used *travaux* pursuant to article 32 VCLT as a means of *confirming* the meaning of terms pursuant to article 32(a) after the treaty has been initially interpreted according to some or all of the sources listed in article 31 VCLT.¹⁵⁸ In *Togo Electricité*, for example, an annulment committee interpreted the term 'manifest' 'in light of the text and context'¹⁵⁹ and subsequently 'confirmed' that interpretation by reference to the *travaux*.¹⁶⁰ Similarly, the *Philip Morris* tribunal noted that '[t]he history of the BIT's negotiation and ratification shows that Uruguay deemed the domestic litigation requirement to be a critical element of the BIT and an important limitation on the consent to international arbitration'.¹⁶¹ On this basis, the tribunal held that 'the intent of Article 10 is confirmed by the *travaux* . . . in view of Uruguay's insistence on the preference for local courts to rule on its international legal

¹⁵⁵ Mortenson, 'Is the Vienna Convention Hostile to Drafting History?', 107. See also TH Yen, *The Interpretation of Investment Treaties* (Brill-Nijhoff 2014) 65 (*travaux* 'do not represent agreement between states parties' and, under the VCLT, there is a 'hierarchy aiming to ensure that supplementary means do not constitute an alternative and autonomous method for interpretation').

¹⁵⁶ *Pac Rim Cayman v El Salvador* [23]; I Uchunova and O Temnikov, 'Toss out the Baby and Put the Water to Bed: On MFN Clauses and the Significance of Treaty Interpretation' (2015) 30 ICSID Review 414, 434.

¹⁵⁷ *ibid.*

¹⁵⁸ *Agua del Tunari v Republic of Bolivia* (Decision on Respondent's Objections to Jurisdiction) [266], [283]; *Togo Electricité et GDF-Suez Energie Services v La République Togolaise*, ICSID Case No ARB/06/07 (Decision on Annulment, 6 September 2011) [45]–[46]; *Philip Morris Brands S.A.R.L. and others v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7 (Decision on Jurisdiction, 2 July 2013); *Millicom v Republic of Senegal* [70]–[72]; *Victor Pey Casado, Foundation Presidente Allende v Republic of Chile*, ICSID Case No ARB/98/2 (Decision, 8 May 2002) [109]; *Infinito Gold v Republic of Costa Rica* [296].

¹⁵⁹ *Togo Electricité v La République Togolaise* [56].

¹⁶⁰ *ibid* [57]. A similar approach was taken to the interpretation of the phrase 'fundamental rule of procedure': *ibid*, note 7.

¹⁶¹ *Philip Morris Brands v Oriental Republic of Uruguay* (Decision on Jurisdiction) 34.

obligations in the first instance'.¹⁶² In *Mobil Investments*, the tribunal, in interpreting the NAFTA terms 'adopted' and 'maintained', expressly noted that it '[did] not need to have regard to supplementary means of interpretation' to *determine* the meaning of the treaty terms.¹⁶³ However, having arrived at an interpretation on the basis of the 'ordinary meaning' of the terms in light of the 'object and purpose' of NAFTA, the tribunal observed that the available supplementary means provided 'strong confirmation' of its interpretation.¹⁶⁴

The analysis of other tribunals arguably also falls within this cluster, despite these tribunals using differing language to indicate that *travaux* was being used to 'confirm' meaning. Some tribunals, for example, referred to *travaux* not to 'confirm' an interpretation reached under article 31, but rather to 'support', 'explain', or 'bolster' that interpretation.¹⁶⁵ The *Yukos* proceedings provide an example of a tribunal 'supporting' its interpretation by reference to *travaux*.¹⁶⁶ The tribunal in that case was required to determine whether the term 'third state' in the Energy Charter Treaty (ECT) referred only to non-contracting parties, or whether it also extended to contracting parties or signatories to the Treaty. The tribunal held that 'third State' referred only to non-contracting parties, citing the terms of the ECT and the context of the relevant provisions, but noting that the *travaux* further 'supported' its interpretation because it 'demonstrate[d] that the term "third state" was substituted for the term "non-Contracting Party"' during the drafting of the ECT.¹⁶⁷ In *Renta 4*, the tribunal sought to 'explain' its interpretation by reference to the *travaux*. The majority in that case noted that its 'textual analysis' of the provision before it was 'sufficient to decide' the matter such that there was 'strictly speaking no need to consider whether extraneous considerations confirm the conclusion'.¹⁶⁸ That notwithstanding, the majority held that it was 'appropriate to explain why it

¹⁶² *ibid* [44].

¹⁶³ *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No ARB(AF)/07/4 (Decision on Liability and Quantum, 22 May 2012) [296].

¹⁶⁴ *ibid*.

¹⁶⁵ *Burlington Resources Inc and Others v Republic of Ecuador*, ICSID Case No ARB/08/5 (Procedural Order No 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009) [62]; *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (Decision on Annulment, 3 July 2002) [69]; *Yukos v Russian Federation*; *Hulley Enterprises Limited (Cyprus) v Russian Federation*, PCA Case No AA 226 (Interim Award on Jurisdiction and Admissibility, 30 November 2009); *Veteran Petroleum Limited (Cyprus) v Russian Federation*, PCA Case No AA 228 (Interim Award on Jurisdiction and Admissibility, 30 November 2009); *Renta 4 SVSA and others v Russian Federation*, SCC Case No 24/2007 (Award on Preliminary Objections, 20 March 2009); *Enron Corporation, Ponderosa Assets LP v Argentine Republic*, ICSID Case No ARB/01/3 (Annulment Decision, 30 July 2010); *Austrian Airlines v The Slovak Republic* [132]; *Orascom v Algeria* [305]–[313].

¹⁶⁶ *Yukos v Russian Federation*.

¹⁶⁷ *ibid* [544].

¹⁶⁸ *Renta 4 v The Russian Federation* [46].

finds that both evidence of the purported intentions of the parties', including negotiating texts, 'validate[d] the arbitrators' conclusion'.¹⁶⁹

Whether or not these lexicological differences reflect substantive differences is debatable.¹⁷⁰ Conceivably, a tribunal 'supporting' its interpretation by recourse to *travaux* could be giving greater weight to that material than a tribunal 'confirming' its interpretation by recourse to those materials. Conversely, a tribunal 'explaining' its interpretation by recourse to the *travaux* has perhaps given less weight to that material as an interpretive aid, seeking only to justify *ex post facto* its interpretation by reference to that material. Even if such differences are at play in arbitral analysis, however, their substantive import appears to be minimal and merely a matter of degree.

These cases nonetheless reveal the ambiguity of the term 'confirm' in article 32 of the VCLT, and raise the question as to the limits of the interpretive utility of *travaux*. Broadly speaking, these tribunals agree on a quasi 'automatic admissibility' of *travaux*.¹⁷¹ This means that *travaux* brought by one or both parties to the tribunal's attention will almost invariably be considered. In *Malaysian Historical Salvors*, for instance, the committee noted that 'courts and tribunals interpreting treaties regularly review the *travaux préparatoires* whenever they are brought to their attention; it is mythological to pretend that they do so only when they first conclude that the term requiring interpretation is ambiguous or obscure'.¹⁷² One important question, however, is what role *travaux* should be given where instead of 'confirming' the article 31 meaning, their use indicates that such interpretation is incorrect. In such a circumstance, does the use of *travaux* to 'confirm' the article 31 meaning indicate that the article 31 meaning should take priority, or can the article 32 materials be used to correct (albeit not 'confirm' in the strict sense) that meaning?¹⁷³ During the drafting of the VCLT, original proposals for what became article 32 used the term 'verify or confirm'. Ultimately, 'verify' was deleted, it being considered that the concept of 'verification' was contained within that of 'confirmation', the latter having the wider meaning.¹⁷⁴ Thus, the concept of 'confirm' in article 32—particularly when read against the requirement to interpret treaties in

¹⁶⁹ *ibid.*

¹⁷⁰ See further DB Hollis, *The Oxford Guide to Treaties* (OUP 2012) 489.

¹⁷¹ MH Arsanjani and WM Reisman, 'Interpreting Treaties for the Benefit of Third Parties: The "Salvors' Doctrine" and the Use of Legislative History in Investment Treaties' (2010) 104 *AJIL* 597, 603.

¹⁷² *Malaysian Historical Salvors v Government of Malaysia* [57]. See also C Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' in M Fitzmaurice, O Elias and P Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff 2012) 137 (noting that the use of *travaux* is determined 'less by their position among the canons of interpretation than by their availability').

¹⁷³ Gardiner, *Treaty Interpretation*, 380 (noting that the practice of courts or tribunals has not resolved this question: 'There are few cases that even come near to producing an interpretation that is entirely clear yet directly contradicted by preparatory work which is itself crystal clear').

¹⁷⁴ VCLT Record 1968, 184 (Waldock).

good faith—indicates that supplementary means may be used to verify whether the article 31 interpretation is correct and, if not, to correct that interpretation by reference to supplementary means of interpretation.¹⁷⁵ Alternatively, in this scenario *travaux* may indicate that the article 31 interpretation is ambiguous or absurd, such as to open the door to (broader) recourse to *travaux* to ‘determine’ meaning in accordance with article 32(b). This latter use of *travaux* is considered in the following section.

2. Use of travaux to determine meaning by reference to an article 32 trigger

Other tribunals justify recourse to *travaux* as a means for *determining* meaning, based on one of the two other triggers for recourse under article 32(b): ambiguity/obscurity or absurdity/unreasonableness.¹⁷⁶ The presence of one of these triggers broadens the use that can be made of *travaux* in the interpretive exercise, moving them from the role of ‘confirming’ meaning to one of ‘determining’ it.¹⁷⁷ Such use of *travaux* is justified on the basis that the primary means of interpretation in article 31 have yielded a result that is ambiguous or obscure, manifestly absurd, or unreasonable.

The ILC itself noted the ambiguity—and subjectivity—inherent in concluding that an interpretation under article 31 yields an ‘ambiguous’ or ‘obscure’ result. Waldock noted that such terms were ‘inherently flexible, since the question whether the text can be said to be ‘clear’ is in some degree subjective’.¹⁷⁸ The implication is that the distinction between the two triggers of ‘confirming meaning’ and determining meaning in cases of ‘ambiguity’ is not clear-cut. However, mere disagreement between states parties or disputing parties about the meaning of a treaty provision is insufficient.¹⁷⁹ It is for tribunals to objectively determine whether the ‘ambiguity’ or ‘obscurity’ trigger is met. With respect to the other trigger, conclusions that an article 31 interpretation have yielded a ‘manifestly absurd or unreasonable’ interpretation are likely to be ‘more demanding’ than a conclusion that the interpretation is ambiguous or obscure.¹⁸⁰ Whether this is the case is again a matter for objective determination by tribunals.

¹⁷⁵ Mortenson, ‘Is the Vienna Convention Hostile to Drafting History?’, 787.

¹⁷⁶ *HICEE v Slovakia*; *Yukos v Russian Federation* [261]–[268]; *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (Decision on the Challenge to the President of the Committee, 3 October 2001); *PSEG Global Inc, North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey*, ICSID Case No ARB/02/5 (Decision on Jurisdiction, 4 June 2004) [136]–[145].

¹⁷⁷ See further Hollis, *The Oxford Guide to Treaties*, 489.

¹⁷⁸ ILC Ybk 1966/II, 99–100, para 20. See also Mortenson, ‘Is the Vienna Convention Hostile to Drafting History?’ 787, note 28 (noting varying views about how much uncertainty was required).

¹⁷⁹ See, contra, H Lauterpacht, ‘De l’Interpretation des Traités’ (1952) 44-I *Annuaire de l’Institut de Droit International* 197, 222.

¹⁸⁰ Gardiner, *Treaty Interpretation*, 380.

In several investment arbitrations, tribunals have held that the ambiguity trigger was present such that reference could permissibly be had to the *travaux* to determine meaning, in line with the VCLT methodology.¹⁸¹ In *Vivendi*, for example, the annulment committee noted that there were ‘indications both ways’, and hence ambiguity, in the text of the ICSID Convention as to whether annulment proceedings constituted ‘arbitration proceedings’.¹⁸² It thus referred to the *travaux* to respond to this ambiguity. Similarly, in *HICEE*, the tribunal concluded that the phrase ‘invested either directly or through an investor of a third State’ had ‘as a matter of ordinary meaning’ two possible meanings, and was therefore ambiguous. It further considered that an article 31 analysis offered ‘virtually nothing by way of authentic guidance as to which of these two ‘ordinary meanings’ is to be preferred’.¹⁸³ As such, it concluded that it was ‘confronted ... with an ambiguity that falls to be resolved by the application of Article 32 of the Vienna Convention’ and turned to consider what comprised *travaux* for the purposes of this analysis.¹⁸⁴ The *HICEE* tribunal noted that the *travaux* themselves pointed to an ambiguity in the text of the treaty, noting:

It may be objected ... that the whole Treaty Interpretation Issue might never have entered anyone’s mind in the first place had it not been for the Dutch Explanatory Notes, in other words that it is not admissible to introduce the Notes in order to give rise to an ambiguity. But the Tribunal is unable to follow so counterfactual a line of argument. The plain fact is that the Explanatory Notes were put in argument before it, with a provenance and a relevance that cannot be gainsaid. Whether the ambiguity in the text would otherwise have occurred to either side in this dispute, or to the Counsel representing it, is a hypothetical issue on which it would not be proper for a tribunal to speculate. Suffice it to say that the Tribunal, having been confronted with the treaty text and by the highly professional argument put before it on both sides, has registered the ambiguity in its ‘ordinary meaning’ and is bound to note that ambiguities exist *a fortiori*; their existence does not depend on the skill of counsel in arguing how they should be resolved.¹⁸⁵

In his dissenting opinion, Brower criticized the majority for having ‘reverse-engineered ambiguity’ by reference to the *travaux*.¹⁸⁶ The majority’s approach in *HICEE*, however, was contemplated by at least some

¹⁸¹ *HICEE v Slovakia; Compañia de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (Decision on the Challenge to the President of the Committee).

¹⁸² *Compañia de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (Decision on the Challenge to the President of the Committee) [7]–[24].

¹⁸³ *HICEE v Slovakia* [116].

¹⁸⁴ *ibid* [117].

¹⁸⁵ *Ibid* [138].

¹⁸⁶ *HICEE v Slovakia* (Dissenting Opinion of Judge Charles N Brower) [38].

members of the ILC during the drafting of what became article 32 of the VCLT. Indeed, Yasseen noted that:

the clearness or ambiguity of a provision was a relative matter; 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. 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.¹⁸⁷

Again, reference to the principle of good faith in interpretation indicates that some weight ought to be given to supplementary means of interpretation in these circumstances.¹⁸⁸

In other cases, tribunals have declined recourse to the *travaux* on the basis that the article 32 triggers were *not* present.¹⁸⁹ In *Champion Trading*, for example, in considering the rules applicable to the assessment of nationality for the purposes of the ICSID Convention, the tribunal noted that '[b]oth Parties have drawn the attention of the Arbitral Tribunal to the '*travaux préparatoires*' for the Convention'.¹⁹⁰ The tribunal considered, however, that the meaning of the terms governing dual nationality in the Convention were 'clear and specific' and therefore interpreted them in accordance with article 31 without recourse to the *travaux*.¹⁹¹

B. Cavalier attitudes towards the use of travaux

Despite the aforementioned flexibility of the VCLT methodology, all tribunals adopting the approaches set out above share in common a structured and systematic approach to the use of *travaux* as a tool of interpretation. In particular, each such tribunal refers to *travaux* only *after* engaging in textual and contextual interpretation under article 31. Such an approach uses the text of the treaty as 'the authentic expression of the intention of the parties', such that '[t]he starting point of all treaty-interpretation is the elucidation of the meaning of the text, not an

¹⁸⁷ ILC Ybk 1964/I, 313, para 56.

¹⁸⁸ See, similarly, the statement by Portugal: 'What would happen if, though the text was apparently clear, in seeking confirmation in the preparatory work and other surrounding circumstances a divergent meaning came to light? It was impossible to be sure in advance that those circumstances would confirm the textual meaning of the treaty. If the emphasis were placed on good faith, it would appear that in such a case those circumstances should be taken into consideration': VCLT Record 1968, 183.

¹⁸⁹ *Yukos v Russian Federation; Champion Trading Company Ameritrade International Inc and Others v Arab Republic of Egypt*, ICSID Case No ARB/02/9 (Decision on Jurisdiction, 21 October 2003).

¹⁹⁰ *Champion Trading Company v Arab Republic of Egypt* [11].

¹⁹¹ *ibid* [16].

independent investigation into the intention of the parties from other sources (such as by reference to the *travaux préparatoires*, or any predilections based on presumed intention).¹⁹² By contrast, tribunals might conceivably adopt more cavalier attitudes to treaty interpretation, including by disregarding the strictures of the VCLT methodology to adopt a more restrictive or expansive approach to the use of *travaux* in treaty interpretation.¹⁹³ While this part details some more expansive approaches to the use of *travaux* in interpretation, this is not, as will be shown, the same as tribunals adopting cavalier attitudes towards interpretation.

1. *The Vienna Convention as a roadmap*

Based on our comprehensive review of investor-state tribunal decisions, we found that tribunals that utilize *travaux* to interpret investment treaties almost invariably say that they are applying the VCLT. The frequent reference to the VCLT to justify recourse to *travaux* is in part due to the customary character of articles 31 and 32 of the VCLT.¹⁹⁴ Indeed, in only a handful of cases of which we are aware did the tribunal *not* cite the VCLT in identifying the use that could be made of *travaux*.¹⁹⁵ Frequently, this is explicable due to a common practice of referring to *travaux* in arbitration under a particular treaty. In the ICSID context, for example, tribunals at times do not expressly invoke the VCLT to structure their recourse to *travaux*.¹⁹⁶ This likely reflects, however, efficiencies in drafting practice, insofar as other ICSID tribunals have examined in greater detail why recourse to particular *travaux* may be warranted under the VCLT. In *SGS v Philippines*, for example, the tribunal noted, without reference to the VCLT, that it did not share the claimant's interpretation of key jurisdictional clauses for three reasons, the first of which was that the interpretation was 'not supported by the *travaux*'.¹⁹⁷ Similarly, in *Fraport*, the tribunal cited *travaux* in

¹⁹² *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14 (Award, 8 December 2008) [78].

¹⁹³ Gazzini, *Interpretation of Investment Treaties*, 247 (noting that '[i]n practice, however, the sequence is not as rigid as it might seem. The interpreter may be tempted to look at the supplementary means before or during the interpretative process under Article 31 VCLT.')

¹⁹⁴ See, eg, *Churchill Mining v Republic of Indonesia* (Decision on Jurisdiction) [95], [147], note 212.

¹⁹⁵ These cases were *Inceysa v Republic of El Salvador* [175], [180]; *Saipem v People's Republic of Bangladesh*, ICSID Case No ARB/05/07 (Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007) [78]; *City Oriente Limited v Republic of Ecuador and Petroecuador*, ICSID Case No ARB/06/21 (Decision on Provisional Measures, 19 November 2007); *Asian Agricultural Products Ltd (AAP) v Republic of Sri Lanka*, ICSID Case No ARB/87/3 (Final Award, 27 June 1990).

¹⁹⁶ See, eg, *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7 (Decision on Annulment, 21 March 2007) [52]; *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6 (Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004); *Fedax v The Republic of Venezuela* [20]–[22]; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25 (Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010); *City Oriente v Republic of Ecuador* [55].

¹⁹⁷ *SGS Société Générale de Surveillance v Republic of the Philippines* [145]–[146].

interpreting the phrase ‘fundamental rule of procedure’ from the ICSID Convention to note that the *travaux* ‘show a consensus that not all rules of procedure contained in the ICSID Arbitration Rules would fall under this concept’.¹⁹⁸ Likewise, without invoking the VCLT, the tribunal in *Saba Fakes* considered a defeated Guatemalan proposal during the negotiations of the ICSID Convention as of ‘particular importance’ in construing the nationality requirement for ICSID jurisdiction.¹⁹⁹ Although these tribunals accorded interpretive significance to *travaux* without expressly citing a methodological basis for doing so, their decisions do not adopt a completely unstructured approach to the use of *travaux*.

2. Different routes, same destination

Several tribunals have inverted the interpretive process to consider *travaux* prior to consideration of the article 31 means of interpretation.²⁰⁰ The tribunal’s interpretation of the term ‘investment’ in *Ambiente Ufficio* demonstrates a particularly recursive approach to the use of *travaux*.²⁰¹ The majority first acknowledged the supplementary nature of *travaux* under the VCLT methodology,²⁰² however it nevertheless noted, ‘[h]aving made this proviso’, that it considered it ‘preferable ... to first turn its attention to the drafting process of the ICSID Convention’ in order to ‘enlighten the background against which the provision was adopted and to prepare the ground for a proper analysis of the term ‘investment’ according to the rules of interpretation enshrined in Art. 31 of the VCLT’.²⁰³ The majority observed that only by proceeding in this manner would it:

be able to assure itself whether, on the one hand, the criteria of interpretation established by Art. 31 of the VCLT lead to a sufficiently clear understanding of the term ‘investment’ in Art. 25 of the ICSID Convention that might subsequently be confirmed by referring to the *travaux préparatoires* or whether, on the other hand, those criteria leave the meaning of the term ‘ambiguous or obscure’ so that refuge is to be taken to the preparatory work and the circumstances of conclusion of the ICSID Convention in order to determine the meaning of the term ‘investment’.²⁰⁴

The tribunal in *Inceysa* went further in reversing the VCLT interpretive process. The tribunal was required to determine whether El Salvador’s consent to ICSID jurisdiction extended to investments that were not

¹⁹⁸ *Fraport v Republic of the Philippines* [186].

¹⁹⁹ *Mr Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20 (Award, 14 July 2010) [63].

²⁰⁰ *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No ARB/98/4 (Summary Minutes of the Session of the Tribunal held in Paris, 25 May 1999); *Fireman’s Fund Insurance Company v Mexico*, ICSID Case No ARB(AF)/02/01 (Decision on the Preliminary Question, 17 July 2003) [63]; *Inceysa v Republic of El Salvador*.

²⁰¹ *Ambiente Ufficio v Argentine Republic* (Decision on Jurisdiction and Admissibility).

²⁰² *ibid* [445].

²⁰³ *ibid* [446].

²⁰⁴ *ibid* [447]. See also Gazzini, *Interpretation of Investment Treaties*, 249.

made in accordance with host state law.²⁰⁵ The tribunal began its interpretation of the lawfulness requirements under the BIT by noting that the *travaux* ‘shed light on the intent’ of the parties to the BIT.²⁰⁶ On the basis of the *travaux*, the tribunal held that ‘without any doubt ... the will of the parties to the BIT was to exclude from the scope of application and protection of the Agreement disputes originating from investments which were not made in accordance with the laws of the host State’.²⁰⁷ It held that text to that effect was not included in the definition of investment because Spain had understood the limitation to be imported through other concepts referred to in the BIT.²⁰⁸ Following this analysis of the *travaux*, the tribunal noted that it still had to look at the BIT’s ‘own terms’;²⁰⁹ the ordinary meaning under article 31. It considered, in this regard, that ‘consistent with what Spain indicated [in the *travaux*], the conditions imposed on investments are specifically established in other provisions of the BIT’.²¹⁰

Other tribunals adopt a broader approach, considering that recourse to *travaux* is justified whenever they might shed light on interpretation. The *El Paso* tribunal, for example, noted that supplementary means of interpretation could, under article 32 VCLT, be used ‘to establish a special meaning’ and to ‘invalidate interpretations obtained by applying the elements listed in Article 31’.²¹¹ On the basis of these, and the other article 32 triggers, the tribunal noted that this meant that ‘in practice it is always possible to have recourse’ to supplementary means of interpretation.²¹² The tribunal in *United Parcel Service* seemingly also implied that recourse could be had to *travaux* wherever that might ‘affect’ the interpretation reached under article 31.²¹³ This broad recourse to *travaux* may be an emanation of article 31’s requirement to interpret a treaty in ‘good faith’. Aust suggests that ‘even when the ordinary meaning appears to be clear, if it is evident from the *travaux* that the ordinary meaning does not represent the intention of the parties, the primary duty in article 31(1) to interpret a treaty in good faith requires a court to “correct” the ordinary meaning’.²¹⁴ Such approaches, therefore, are potentially consistent with the spirit, albeit not the terms, of the VCLT.

²⁰⁵ *Inceysa v Republic of El Salvador*.

²⁰⁶ *ibid* [192].

²⁰⁷ *ibid* [195].

²⁰⁸ *ibid* [196].

²⁰⁹ *ibid* [200].

²¹⁰ *ibid*.

²¹¹ *El Paso Energy International Company v Republic of Argentina*, ICSID Case No ARB/03/15 (Award, 31 October 2011) [606].

²¹² *ibid* [607].

²¹³ *United Parcel Service of America Inc v Government of Canada*, ICSID Case No UNCT/02/1 (Award on Jurisdiction, 22 November 2002) [40].

²¹⁴ Aust, *Modern Treaty Law and Practice*, 218, citing S Schwebel, ‘May Preparatory Work Be Used to Correct Rather than Confirm the “Clear” Meaning of a Treaty Provision?’ in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer 1996) 541–47. A different view is that ‘the interpreter must dismiss the supplementary means conflicting with an otherwise sufficiently clear interpretation based on Article 31’

These approaches to identifying a trigger for recourse to *travaux* under article 32 illustrate the broad discretion that tribunals retain under the VCLT methodology. Indeed, tribunals have at times purported to act within the bounds of the VCLT ‘trigger’ methodology, but have exhibited greater willingness to find ambiguity or unreasonableness in order to justify recourse to *travaux*. The tribunal in *ST-AD*, for example, reached an interpretation on the basis of article 31,²¹⁵ but then went on to consider the *travaux* ‘[f]or the sake of prudence and an abundance of caution ... considering that some might consider that there remains an ambiguity’.²¹⁶ Similarly, the tribunal in *Planet Mining* considered that the ordinary meaning of the relevant provisions was ‘clear for each provision taken separately’ but noted that ‘their interaction ... creates some uncertainty’, and on this basis expressed disappointment that there were no *travaux* available in order to ‘shed a different light on the words’.²¹⁷ Other tribunals have declined recourse to *travaux* due to a lack of ambiguity but nevertheless referred to them to support their interpretation since the parties had made extensive reference to the *travaux* in their pleadings.²¹⁸

These decisions illustrate that treaty interpretation functions as ‘a recursive and inelegant process that [spirals] in toward the meaning of a treaty, rather than as a rigidly linear algorithm tied to a particular hierarchical sequence’.²¹⁹ Despite not following a strict sequence in the application of articles 31 and 32 of the VCLT, such decisions nonetheless do not manifest a particularly cavalier attitude towards the use of *travaux* in treaty interpretation. At the time of the VCLT’s drafting, the methodology established by the separation of articles 31 and 32 was designed to reflect agreement that the text of the treaty ought to have primacy in the interpretive process in the sense that ‘the evidentiary value of preparatory work [is] less than that of the text of the treaty itself’.²²⁰ That notwithstanding, it was recognized that *travaux* could play an important role in indicating the intention behind the text and the scope of what the parties consented to. Article 32 thus recognizes the usefulness of *travaux* as a tool to confirm the meaning derived from the text or otherwise to guide conclusions as to what meaning ought to be

because the result produced by recourse to article 32, in such a situation, ‘undermines—rather than confirms—the meaning attached to the treaty under Article 31’: see Gazzini, *Interpretation of Investment Treaties*, 251.

²¹⁵ *ST-AD GmbH (Germany) v Republic of Bulgaria*, PCA Case No 2011-06 (Award on Jurisdiction, 18 July 2013) [392]–[399].

²¹⁶ *ibid* [401]. For a similar approach, see *Sempra v The Argentine Republic*.

²¹⁷ *Churchill Mining v Republic of Indonesia* (Decision on Jurisdiction) [167], [169].

²¹⁸ *Fabrica De Vidrios Los Andes CA and Owens-Illinois De Venezuela CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/21 (Award, 13 November 2017) [291]–[296]; *Blusun SA, Jean Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No ARB/14/3 (Award, 27 December 2016) [280].

²¹⁹ Mortenson, ‘Is the Vienna Convention Hostile to Drafting History?’ 781.

²²⁰ VCLT Record 1968, 178, para 9 (United Kingdom, Ian Sinclair). See also Mortenson, ‘Is the Vienna Convention Hostile to Drafting History?’, 815.

derived where the text is unclear. The categorization of *travaux* as a ‘supplementary means’ of interpretation was designed to ‘filter’ the use of *travaux*, it being feared that ‘unmoored reference to *travaux*’ might constitute a means for the interpreting body to undermine or misinterpret the outcome of the negotiations as presumptively embodied in the settled text.²²¹ The VCLT endorses the use of *travaux* only ‘once the interpreter’s mindset was appropriately focused on text rather than ab initio reconstructions of wise administrative policy’.²²²

However, this is a fine line. As Koskenniemi underscores, ‘what is “normal” cannot be ascertained independently of taking a stand on whether the expression’s normal sense is the sense it had for the parties or which is reasonable’.²²³ As ILC member Rosenne put it, ‘to state that the *travaux préparatoires* had been used only to confirm an opinion already arrived at on the basis of the text of the treaty was coming close to a legal fiction ... it was particularly difficult to accept the proposition that the *travaux préparatoires* had not actually contributed to form their opinion as to the meaning of a treaty which, nevertheless, they stated to be clear from its text’.²²⁴ The artificiality of separating the interpretive process under articles 31 and 32 of the VCLT is brought into sharp relief by the differing approaches to the use of *travaux* adopted by the majority and dissenting arbitrator in *Ambiente Ufficio*.²²⁵ The majority in that case partly inverted its analysis, considering the *travaux* twice: once prior to considering the text of the treaty, and then a second time after looking at the text. In dissent, Torres Bernárdez sharply criticized the majority’s interpretive methodology as ‘erratic’ and unduly focussed upon the *travaux*.²²⁶ He argued that the majority had ‘privilege[d]’ the *travaux* over the ‘text within its context and in the light of the object and purpose of the Convention’.²²⁷ He perceived this to be a method that was ‘alien to the rules of interpretation of treaties of customary international law codified by the 1969 VCLT’.²²⁸ Specifically, Torres Bernárdez criticized the majority’s ‘early recourse to the *travaux*’ as an attempt to adopt ‘from the outset of the interpretation process’ a concept of ‘investment’ that was as wide as possible.²²⁹ The majority’s approach, however, arguably illustrates a particularly careful, recursive, use of the

²²¹ Mortenson, ‘Is the Vienna Convention Hostile to Drafting History?’, 802. See also ILC Ybk 1966/II, 26.

²²² Mortenson, ‘Is the Vienna Convention Hostile to Drafting History?’, 802.

²²³ M Koskenniemi, *From Apology to Utopia* (CUP 2005) 335.

²²⁴ ILC Ybk 1964/I, 283, para 17. Rosenne’s intuition was partly confirmed in an experiment; see Y Shereshevsky and T Noah, ‘Does Exposure to Preparatory Work Affect Treaty Interpretation? An Experimental Study on International Law Students and Experts’ (2017) 28 EJIL 1287.

²²⁵ *Ambiente Ufficio v Argentine Republic* (Decision on Jurisdiction and Admissibility).

²²⁶ *Ambiente Ufficio v Argentine Republic* (Dissenting Opinion of Santiago Torres Bernardez, 2 May 2013) [328].

²²⁷ *ibid.*

²²⁸ *ibid* [329].

²²⁹ *ibid* [210], [217].

means of interpretation listed in the VCLT. It reflects that the separation between the article 31 and 32 means of interpretation may be particularly blurred in arbitral practice.

Several tribunals have elevated the relevance of *travaux* by drawing inferences from *silence* in the *travaux*.²³⁰ In *Bayview*, for example, the tribunal—in determining whether investors could bring a claim under NAFTA against their home state (where this was also their host state)—noted that the drafters could have provided for such a right but that if ‘NAFTA were intended to have such a significant effect one would expect to find very clear indications of it in the *travaux préparatoires*’.²³¹ As there were no such indications, the tribunal declined to interpret NAFTA in that manner. It cited as additional support for that conclusion that the ‘ordinary meaning of the text of the relevant provisions . . . are concerned with *foreign* investment, not domestic investments’.²³² Similarly in *Yaung Chi Oo*, the claimant argued that a clause in a 1998 agreement amended a 1987 agreement and extended it to ‘a much wider range of cases’. The tribunal rejected this interpretation, noting that there was ‘[n]o doubt the parties to the 1998 Framework Agreement could have done this, but there is no indication from the *travaux préparatoires* of the Agreement or otherwise that this was their intention’.²³³ The tribunals in these cases used silence in favour of host states, in line with the *in dubio mitius* principle.

In other cases, by contrast, investment tribunals have resolved silence in the *travaux* in favour of investors. This includes, notably, decisions in the ICSID context referring to silence in the *travaux* to hold there to be a broad notion of ‘investment’ under article 25, and to permit the bringing of mass claims.²³⁴ This approach is problematic from the perspective of state consent.

Drawing inferences from silence in *travaux* is particularly problematic in cases where the *travaux* are fragmentary and likely incomplete. As such, it is an approach that can only ever be justified if a tribunal is persuaded that the *travaux* are a complete and exhaustive record of the negotiations.²³⁵ The proposed sliding scale of relevance test in Part III may thus assist tribunals to better navigate uses of silence in

²³⁰ *Bayview Irrigation District and Others v Mexico*, ICSID Case No ARB(AF)/05/1 (Award, 19 June 2007); *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar*, ASEAN ID Case No ARB/01/1 (Award, 31 March 2003); *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3 (Award, 4 October 2013) [158]–[186]; *Desert Line Projects LLC v Republic of Yemen*, ICSID Case No ARB/05/17 (Award, 6 February 2008) [109]; *Pope & Talbot Inc v Government of Canada* (Award in Respect of Damages, 31 May 2002) [43].

²³¹ *Bayview v Mexico* [94]–[95].

²³² *ibid* [95].

²³³ *Yaung Chi Oo v Myanmar* [80].

²³⁴ *Abaclat v Argentine Republic*; S Wordsworth, ‘Investment Arbitration: Mass Claims’ (2014) 8 World Arbitration and Mediation Review 331; R Kabra, ‘Jurisdictional Aspects of Multiparty Actions in International Dispute Settlement’ (PhD thesis, University of Cambridge 2019) 135–37.

²³⁵ The English courts have, on some occasions, attached similar significance to silence in the *travaux*: see Part III(B) above.

travaux to draw such inferences. As mentioned above, the drawing of inferences based on silence may also be more or less problematic depending upon the types of inferences being drawn. Silence can be used to draw two types of interferences. First, to infer, as in *Bayview*, that no right or remedy for the investor exists, and second, to infer, as in the case of *Churchill Mining*, the existence of such a right or remedy.²³⁶ Depending on the inference being drawn, the use of silence may be more or less problematic from the point of view of state consent.

C. Conclusions

The predictability of the investment treaty regime depends upon the availability of common rules of interpretation, and the application of these rules by investment arbitrators.²³⁷ At the same time, consideration of *travaux*, especially if such recourse is not in conformity with the VCLT, can undermine predictability.²³⁸ As this part has shown, the majority of tribunals that invoke *travaux* in treaty interpretation refer to the VCLT. They also largely conform to the requirements set out in article 32, namely by using *travaux* to confirm meaning derived from application of the article 31 methodology, or otherwise to derive meaning where the conditions specified in article 32 are met. Our comprehensive jurisprudential review indicates that most, if not all, tribunals faithfully follow the VCLT methodology in their recourse to *travaux*. Our review also indicates that tribunals utilize *travaux* where the parties refer to *travaux* in their submissions or when they are readily available.²³⁹ The first leg of the *Fothergill* tests employed by the English courts suggests that accessibility of *travaux* is a requirement: materials should be 'public and accessible', so that one side is not advantaged by its possession or disadvantaged by its lack thereof. The same approach is appropriate for investment arbitration. It is incumbent on investment treaty tribunals to refine the test for the admissibility of *travaux* through arbitral decisions.

Both factors come back to the question of supply. If there are *travaux* and the parties make them available, tribunals are very likely to use them. By contrast, more restrictive approaches to the use of *travaux* than those envisaged in the VCLT may reflect underlying suspicion as to the utility of *travaux* in the interpretive exercise. Examples of more restrictive approaches have been very rare. Tribunals instead have

²³⁶ See Part II.

²³⁷ *Pac Rim Cayman v El Salvador* [18].

²³⁸ AD McNair, 'Observations de Sir Arnold McNair' (1950) 43-I *Annuaire de l'Institut de Droit International* 448, 450 ('plus on permet le recours aux travaux préparatoires, plus on introduit un élément d'incertitude et plus qu'on relâche les liens obligeant les parties.').; see also Beckett, 'Observations des Membres de la Commission sur le Rapport de M Lauterpacht', 440-44 (recourse to *travaux* injurious to legal certainty because it gives every interpreter a '*tabula in naufragio*'); TH Yen, *The Interpretation of Investment Treaties*, 100.

²³⁹ Dolzer and Schreuer, *Principles of International Investment Law*, 31. See also Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration'.

tended to favour flexible uses of *travaux*. Overall, this part has illustrated the significant leeway that tribunals enjoy and have in fact exercised when determining the role of *travaux*, including within the strictures of the VCLT interpretive methodology. The uses made of *travaux* by investment tribunals indicates the necessity and utility of the sliding scale approach introduced in Part III. Part V picks up on this theme to consider a further way in which tribunals can broaden or narrow the potential role that *travaux* might play in the interpretive process.

V. SEEKING *TRAVAUX* THROUGH DISCOVERY: SCOPE AND LIMITATIONS

A particular challenge for investors with using *travaux* in investment treaty arbitration is that—due to the special nature of such proceedings—their recourse to *travaux* almost always relies upon provision of those materials by the disputing state party to the proceedings or a non-disputing third party.²⁴⁰ This is because investor-state proceedings always involve one party (the claimant) that is not party to the investment treaty and which is therefore at a relative disadvantage in terms of obtaining access to the *travaux* relating to that treaty.²⁴¹ The claimant may therefore apprehend that the state has produced only *travaux* that are advantageous to its position.²⁴² To counterbalance this risk, the claimant might seek to rely either upon assistance from its home state or a third state to access the *travaux*, or otherwise upon the document discovery process to obtain access to the materials from the respondent state. This potentially creates an imbalance between the parties.²⁴³ It is only if such efforts are successful that the admissibility of *travaux* and the uses made from *travaux* in interpretation become live issues.

Vannessa Ventures illustrates the difficulties claimants might face in obtaining access to *travaux*. In that case, the claimant stated that '[w]e have asked Venezuela if there are any *travaux préparatoires* but we have not been given any'.²⁴⁴ Where the respondent does not itself tender evidence of *travaux* or otherwise voluntarily disclose it, arbitral approaches to discovery take centre stage in defining the role that *travaux* might

²⁴⁰ Arsanjani and Reisman, 'Interpreting Treaties for the Benefit of Third Parties' 603–604.

²⁴¹ See also *Industrial Nacional de Alimentos v The Republic of Peru* (Dissenting Opinion of Franklin Berman) [9].

²⁴² See, eg, *Ivan Peter Busta and James Peter Busta v Czech Republic*, SCC Case No V 2015/014 (Final Award, 10 March 2017) [71]–[75].

²⁴³ As a counterbalance however, Wälde notes that reliance on *travaux préparatoires* is most likely to be advantageous for the investor since BITs were negotiated against a conceptual background of 'global economic liberalization': Wälde, 'Interpreting Investment Treaties: Experiences and Examples', 732. C McLachlan, 'Equality of Parties before International Investment Tribunals' (Report to the Institut de Droit International, 9 December 2018) [248]–[262] underscores that equality in the evidentiary process is an important component of party equality.

²⁴⁴ *Vannessa Ventures Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/04/6 (Decision on Jurisdiction, 22 August 2008) [3.2.4].

play in the arbitral proceedings. On the one hand, tribunals must seek to ensure equal access to these materials. They ought to limit document production orders to cover only 'relevant' materials, whilst nevertheless recognizing the difficulty of determining relevance at an early phase of the proceedings. On the other hand, they must balance the use of those materials in the interpretive exercise to ensure that their use is not detrimental to investors on account of their inability to play a role in the negotiations of the applicable investment treaty.²⁴⁵ This part considers how investment tribunals have determined the discoverability of *travaux* and how they have regulated the non-production by parties of *travaux* subject to disclosure orders. It then concludes by highlighting the implications of overly restrictive approaches to determining the 'relevance' of *travaux* in the document production phase.

A. Approaches to determining the discoverability of travaux

Generally, investment tribunals have adopted the rule that *travaux* are discoverable. For example, many NAFTA tribunals have taken facilitative approaches during the document discovery process to assist claimants to access any *travaux* held by the respondent state. In *Canfor*, for example, the US sought to resist the disclosure of *travaux* on the basis that they were not 'relevant' because the 'record before the Tribunal does not support recourse to negotiating texts as a supplementary means of interpretation' as the terms being interpreted were clear on their face.²⁴⁶ The claimant argued, in response, that 'the Respondent's limitation of the materials would be unfair and prejudicial to its ability' to prepare its case.²⁴⁷ The tribunal rejected the US arguments, noting that '[t]o the extent that there is a dispute among the parties to this arbitration on the meaning of certain provisions . . . the parties may find it constructive to discuss, and the Tribunal may find it useful to consider, the negotiating history'.²⁴⁸ The tribunal further noted that:

had the dispute arisen between any of the NAFTA Parties rather than between one of the NAFTA Parties and a private party, the parties to the arbitration would have had equal access to the negotiating history of the Agreement as well as equal opportunity to resort to those documents. In this context, the Tribunal finds it consistent with the principle of equality that the parties to this arbitration are given the same opportunity to present their case, including the opportunity for the private party to access existing documents of the types specified above which are freely available to the government party, irrespective of whether such documents are ultimately conclusive as to any issue in dispute.²⁴⁹

²⁴⁵ Arsanjani and Reisman, 'Interpreting Treaties for the Benefit of Third Parties', 597.

²⁴⁶ *Canfor v United States of America* [12].

²⁴⁷ *ibid.*

²⁴⁸ *ibid* [16].

Tribunals have the power, *proprio motu*, to request the production of *travaux* from the respondent, or otherwise to seek such production from a non-disputing state.²⁵⁰ Article 3.9 of the International Bar Association's Rules on the Taking of Evidence in International Arbitration ('IBA Rules') expressly provides for such requests. Under the IBA Rules—which are often used by tribunals as a guide on evidence-taking²⁵¹—tribunals are themselves empowered to request parties to produce documents and/or to take 'any step that [they] consider ... appropriate to obtain Documents from any person or organisation'.²⁵² In *Orascom Investments*, for example, the tribunal requested Belgium and Luxembourg, through ICSID, to supply *travaux* related to the Belgium–Luxembourg Economic Union–Algeria BIT after Algeria failed to locate them.²⁵³ Similarly, the *İçkale İnşaat* tribunal directed the parties to produce *travaux*.²⁵⁴

Tribunals can address issues associated with unequal access to *travaux* through document production orders. In *Perenco*, for example, the tribunal noted the inequality of arms between the private investor and the host state, observing that '[i]n investor-State arbitration, the private claimant does not speak for its State of nationality nor does it necessarily have access to the State's records relating to the negotiating history of the treaty which it invokes'.²⁵⁵ In light of this, the tribunal remarked that—having received from Ecuador 'some evidence of the Treaty's negotiating history'—it was 'interested in receiving any relevant negotiating history of the Treaty that may be in the possession of Ecuador's counter-party, the French Republic'.²⁵⁶ It invited both parties to 'jointly communicate to the French authorities the Tribunal's interest in receiving any *travaux préparatoires* that may shed light' on the reason for the movement of the terms 'directly or indirectly' within the BIT during its negotiation.²⁵⁷

Broad discoverability of *travaux* might pose practical difficulties for poorer developing states. Developed countries typically benefit from superior archives.²⁵⁸ As such, orders for the production of *travaux* may be particularly burdensome for states with poor archival records or practices. Arbitral practice indicates that no special rules have developed to

²⁴⁹ *ibid* [22].

²⁵⁰ See, for example: *Grand River Enterprises Six Nations Ltd v United States of America* (Decision on Objections to Jurisdiction, 20 July 2006) [35].

²⁵¹ See, eg, *Churchill Mining v Republic of Indonesia* (Procedural Order No 1, 6 December 2012) [15.3].

²⁵² International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (IBA 2010) (IBA Rules) art 9.10.

²⁵³ *Orascom v Algeria* [107]–[108], [112]. See also *Perenco v Republic of Ecuador* [94]–[95], [242].

²⁵⁴ *İçkale v Turkmenistan* [33].

²⁵⁵ *Perenco v Republic of Ecuador* [92].

²⁵⁶ *ibid* [94].

²⁵⁷ *ibid*.

²⁵⁸ RD Kearney and RE Dalton, 'The Treaty on Treaties' (1970) 64 AJIL 495, 520.

regulate production of *travaux* in such circumstances.²⁵⁹ In most cases, the grounds of objection listed in the IBA Rules are applied. Such grounds permit parties to object to the production of documents, including for the reason that there would be an ‘unreasonable burden to produce the requested evidence’ or because of ‘considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling’.²⁶⁰ We have, however, been unable to locate any cases in which arbitral tribunals have considered—let alone upheld—a state’s objection to the production of *travaux* on these, or similar, grounds. As a rule, then, *travaux* are discoverable and respondent states will be required to produce them even if they themselves do not intend to rely upon the *travaux* in the arbitral proceedings.

A minority of tribunals have nevertheless adopted a more restrictive approach to the discovery of *travaux*. In *Methanex*, the tribunal rejected the claimant’s request for disclosure of the *travaux* for two reasons, one of which was that the claimant had ‘not shown to the Tribunal’s satisfaction that recourse ... was appropriate pursuant to Article 32 of the Vienna Convention and therefore meeting the requirements of Articles 3.6 and 9.2(a) of the IBA Rules’.²⁶¹ Under these provisions of the IBA Rules, a party is required to show that the requested documents are relevant to the case and material to its outcome. The tribunal rejected the disclosure request on the basis that the claimant had not explained:

why a satisfactory interpretation [of the provisions at issue] could not be achieved by application of the method prescribed by Article 31 of the Vienna Convention; or why recourse to supplementary means was appropriate pursuant to Article 32 of the Vienna Convention.²⁶²

The *Methanex* tribunal thus considered the question of ‘relevance’ to be tied to whether the materials could be used in treaty interpretation pursuant to article 32 of the VCLT. In this regard, the tribunal noted that:

Whilst the Tribunal acknowledges that *Methanex* does not have sight of the *travaux* and may be in difficulty in specifying precisely how the *travaux* would assist, there should be no difficulty for *Methanex* to assert in respect of each provision why interpretation in accordance with Article 31 of the

²⁵⁹ Poulsen wonders whether arbitrators, if they were to ‘pay attention to ... the political realities of the treaty making process,’ might consider them less as the product of rational political bargaining: Poulsen, *Bounded Rationality and Economic Diplomacy*, 193. However, at least with respect to *travaux*, our comprehensive examination of the practice of *travaux* has failed to reveal that arbitrators are prepared to take these practical realities into account. We thank Reviewer 2 for this point.

²⁶⁰ IBA Rules, art 9.2(c) and (g). See also that under s 12 of the UK’s Freedom of Information Act 2000 there is no right of access to information held by public authorities if compliance with the request is too costly. See generally M Schudson, *The Rise of the Right to Know: Politics and the Culture of Transparency 1945–1975* (Belknap 2015). The IBA Rules may also provide other grounds on which a state could seek to resist disclosure of negotiating records, including for the reason that they are politically sensitive: art 9(f).

²⁶¹ *Methanex v United States of America* [16].

²⁶² *ibid* [19].

Vienna Convention leads to a result that is ambiguous or obscure, or that is manifestly absurd or unreasonable, or that its interpretation in accordance with Article 31 would be confirmed by the *travaux* under Article 32, all of which are the prescribed contingencies for recourse to *travaux*.²⁶³

The tribunal further dismissed any question of this approach being unfair to the claimant, having concluded, through its own interpretation according to article 31, that there was no ‘basis for recourse to the supplementary means of interpretation in the form of the *travaux* under Article 32 of the Vienna Convention’.²⁶⁴ In this respect, it is interesting to note the *Methanex* tribunal’s view that:

[w]here in the course of time there has been a series of decisions on a given provision by international tribunals seized with the task of interpretation; and there has also been an agreement by treaty parties on interpretation, the likelihood of supplementary means of interpretation contemplated by Article 32 of the Vienna Convention being relevant and material [and thus discoverable] must inevitably decline.²⁶⁵

Put differently, in cases where there is a subsequent agreement or practice, for example the NAFTA Note of Interpretation in the instant case, *travaux*, as potential evidence of the original intention of the parties, become less important to the interpretive exercise.²⁶⁶ The *Methanex* tribunal used a high threshold for the discoverability of *travaux*. This approach may yield certain efficiencies for the arbitral proceedings, insofar as it saves the tribunal from having to engage with copious submissions on *travaux* where the ordinary meaning of a provision is clear under article 31 of the VCLT.²⁶⁷

The tribunal in *Philip Morris v Australia* adopted a similar, though somewhat less restrictive, approach.²⁶⁸ In that case, the claimant requested copies of the *travaux* to the BIT, including by seeking the tribunal’s assistance to secure any *travaux* in the possession of its claimed home state (Hong Kong), which was not a party to the proceedings.²⁶⁹ The tribunal took note of this submission, but held that ‘it does not have sufficient information to decide whether the application ... should be granted or not’, and decided to defer the issue until after it had rendered a decision on bifurcation.²⁷⁰ It noted that while it:

²⁶³ *ibid.*

²⁶⁴ *ibid* [20].

²⁶⁵ *Methanex v United States of America* [24].

²⁶⁶ ILC Ybk 1964/I, 276 (de Luna); Mortenson, ‘Is the Vienna Convention Hostile to Drafting History?’, 793.

²⁶⁷ See Gazzini, *Interpretation of Investment Treaties*, 251 (arguing that ‘[t]he interpreter ... may be advised to refrain from having recourse to supplementary means when the meaning of the terms of the treaty, interpreted in accordance with the general rule, is sufficiently clear’).

²⁶⁸ *Philip Morris Asia v Australia*, PCA Case No 2012-12 (Procedural Order No 4 Regarding the Procedure until a Decision on Bifurcation, 26 October 2012).

²⁶⁹ *ibid* [61].

²⁷⁰ *ibid* [70].

appreciate[d] the Claimant's argument that it would need the *travaux* for the elaboration of its Statement of Claim . . . [i]t is not an unusual situation in arbitration that, at the time it submits a statement of claim (or of defence for that matter), a party is not in possession of all the documents it considers relevant to present its case.²⁷¹

The approach of the *Philip Morris* tribunal is particularly well-adapted to balance the conflicting issues associated with the production of *travaux*. On the one hand, it ensures that the tribunal makes decisions about the production of *travaux* only once it is certain that such materials will be necessary as an aid in the interpretive process. On the other, it ensures that the claimant—who ordinarily will have little opportunity to access *travaux* without such discovery orders—will not be disadvantaged in the development of their case.

Related to the discoverability of *travaux* is the question of the powers of tribunals to discipline the non-production of *travaux* once such production has been ordered by the tribunal. Whilst investment treaty tribunals do not have coercive powers and thus cannot compel production, several tribunals have appropriately utilized their discretionary powers to draw adverse inferences or award costs when the respondent failed to produce the requested *travaux*. In *Pope & Talbot*, for example, the tribunal noted that it was 'beyond argument' that the provisions at issue 'contained ambiguities' and that 'in such cases, it is common and proper to turn to the negotiating history of an agreement to see if that might shed some light on the intentions of the signatories'.²⁷² It noted that it had requested Canada to indicate whether *travaux* existed 'that might support' a particular interpretation of the provision 'or otherwise shed light on the matter'.²⁷³ Canada assured the tribunal that no such *travaux* existed.²⁷⁴ Prior to the tribunal rendering its award, however, it came to light that such materials had been produced in other investor- and state-state proceedings, including by Canada itself.²⁷⁵ On the basis of this information, the tribunal requested that Canada produce a 'record of discussions leading up to agreement upon the final text of article 1105 of NAFTA, whether such record consists of negotiating drafts or any other matters'.²⁷⁶ Subsequently, Canada produced 'some 1,500 pages of documents, reflecting over 40 different drafts leading up to the version of Article 1105 that appears in NAFTA'.²⁷⁷ The tribunal noted that 'having the documents would have made its earlier interpretations of article 1105 less difficult and more focused on the issues before it'.²⁷⁸ The

²⁷¹ *ibid* [71].

²⁷² *Pope & Talbot v Canada* (Award in Respect of Damages) [26].

²⁷³ *ibid* [28].

²⁷⁴ *ibid*.

²⁷⁵ *ibid* [34]–[36].

²⁷⁶ *ibid* [37].

²⁷⁷ *ibid* [38].

²⁷⁸ *ibid* [39].

tribunal referred to these factors in making its Award in Respect of Costs, noting that ‘Canada, despite requests by the Investor and by the Tribunal, did not produce any *travaux préparatoires* in relation to the relevant articles of NAFTA, in particular 1105, until virtually the end of the arbitration, having previously asserted they did not exist’.²⁷⁹

B. Implications of restrictive approaches to the discoverability of travaux

Where a tribunal acknowledges the utility of *travaux* to the interpretation of the investment treaty before it, the tribunal needs to ensure that the claimant’s status as a non-party to the investment treaty does not disadvantage it in the presentation of its case. Unjustified restrictions on the discoverability of *travaux* risk rendering the tribunal’s approach inconsistent with the procedural principles of equality and fairness that underpin investor-state arbitration.

This has interesting parallels to an early debate about recourse to *travaux* in a series of early cases before the Permanent Court of International Justice (PCIJ). The Court was hesitant to use *travaux* where one of the disputing parties before it had not been a participant in the negotiations for the treaty at issue. In the PCIJ’s second advisory opinion on the *Competence of the International Labour Organization*, for example, France contested the admissibility of preparatory work on the basis that the terms of the convention were clear, and that parties had signed up to the convention by reference to its terms and may not have participated in the negotiations, so should not be impacted by what was said during the negotiations if it was not consistent with text.²⁸⁰ The Court did not ultimately settle this point, finding instead that the text of the treaty was clear and the *travaux* were consistent with that meaning. The Court returned to the issue in *Territorial Jurisdiction of the International Commission of the River Oder*. Three of the parties had not participated in the work of the conference which prepared the treaty. The Court held that, on this basis, the record of negotiations could not be used to determine, in so far as they are concerned, the meaning of the treaty. As Klabbers notes, such a position reflects a view that

... many treaties were concluded when the world comprised a small number of states. To insist on a significant role for historical interpretation is to deny a voice to roughly three quarters of today’s states, simply for not existing independently at the time of the drafting of a great number of treaties.²⁸¹

²⁷⁹ *Pope & Talbot Inc v Government of Canada* (Award in Respect of Costs, 26 November 2002) [13].

²⁸⁰ *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture* (Advisory Opinion) PCIJ Rep Series B No 2, 41.

²⁸¹ J Klabbers, ‘International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?’ (2003) 50 *Netherlands International Law Review* 267.

The ILC in drafting the VCLT, however, expressly rejected such a position on the basis that any state that wishes to adhere to a treaty can ask for the production of these works. This gives credence to the above discussion of investment tribunals, which have focussed on the capacity of the other disputing party to access the negotiating record, whether or not they were a party to the original negotiations.

Arbitral approaches to the discoverability of *travaux* are likely only to become more important in the future given the increasing documentation accompanying modern treaty negotiations. The sliding scale approach introduced in Part III may assist tribunals to balance the rights and interests of parties to arbitral proceedings related to access to *travaux*. The criterion of accessibility suggested as a component of that approach is likely to be of particular importance to the discoverability of *travaux* in arbitral proceedings. Using the sliding scale test to assess the discoverability of *travaux* has the further attendant advantage of ensuring that the record before the tribunal is as comprehensive but also as reliable as possible, and that any interpretation of the treaty also reflects—as far as possible—the contours of the home state's intentions and consent. It also ensures that treaty interpretation remains balanced and does not unduly favour one of the disputing parties before the arbitral tribunal. As the tribunal in *Churchill Mining* noted, in many cases this broad approach to the discoverability of *travaux* is the only way in which the home state's views as to the 'interpretation of "its" treaty' come before the tribunal.²⁸²

VI. CONCLUSION

To ensure their continued legitimacy, investment treaty tribunals must utilize all means at their disposal to respect and uphold the bargains struck in the investment treaties from which they derive their existence and power. This article has argued that the use of *travaux* in conformity with the VCLT in the interpretation of investment treaty provisions is one important way in which arbitral tribunals can ensure the legitimacy and viability of the investment treaty system. *Travaux* have the potential to offer insights into the intention underlying treaty provisions that are notoriously open-ended.²⁸³ At the same time, however, this article has cautioned that the unstructured use of *travaux*—including circumstances in which tribunals fashion their own ad hoc approaches to the use of *travaux* outside the strictures of the VCLT—could in itself undermine any such potential legitimacy gains. The article has, in particular, highlighted key ways in which the use of *travaux* could destabilize the investment treaty system.

²⁸² *Churchill Mining v Republic of Indonesia* (Decision on Jurisdiction) [140].

²⁸³ *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8 (Annulment) (Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007) [72].

Despite the potential for tribunals to adopt cavalier approaches to the use of *travaux*, an analysis of arbitral decisions indicates that investment tribunals are taking appropriately measured approaches towards invoking and appraising the utility of *travaux* in treaty interpretation. We have, however, also illustrated two key ways in which the use of *travaux* holds the potential to unfairly disadvantage claimants in investor-state proceedings. First, we argued that overbroad and undisciplined characterizations of what constitutes *travaux* have the potential to empower respondent states to submit into evidence self-serving statements and documents that the claimant then has little possibility to rebut. Second, we argued that restrictive approaches to the discovery of *travaux* risk a situation in which only one party to the proceedings before the tribunal has the means available to it to examine and assess the relevance of *travaux*-type materials, and subsequently to deploy those materials in aid of its case.

When examining the interpretation of statutes by English courts, Hersch Lauterpacht concluded that the ‘rejection of the parliamentary history of statutes as a factor in interpretation is an assertion of judicial freedom’.²⁸⁴ The question which then arises in investment arbitration is whether or not the excessive reliance on *travaux* is a throwback to the idea that investment arbitrators are not independent adjudicators, but rather serve states. Excessive reliance on *travaux* can have adverse implications for the rights and interests of non-state actors. When tribunals base their interpretation of the BIT on mere assertions of the respondent state made with regard to the negotiation of the treaty in question, the equality of the disputing parties is put at risk. Given the non-participation of the investor in those negotiations, not requiring further evidence for possibly ‘incomplete, misleading or even self-serving’ statements might accord an undue advantage to the respondent state.²⁸⁵ At the same time, investment tribunals have two sets of partially overlapping masters: the treaty parties and the parties to the dispute. Reliance on the *travaux* in keeping with the VCLT methodology is crucial for interpreting open-ended formulations in investment treaties. Otherwise, tribunals risk undermining the intention of the contracting parties, and might fail to interpret the meaning of these provisions in good faith according to their ordinary meaning in their context and in light of the investment treaty’s object and purpose. Our proposed sliding scale approach holds the potential to further regularize and structure the use of *travaux* in interpreting treaties. Such an approach promises to deliver on the utility of *travaux* in the interpretive exercise whilst avoiding its risks.

²⁸⁴ H Lauterpacht, ‘Some Observations on Preparatory Work in the Interpretation of Treaties’ (1934–1935) 48 *Harvard Law Review* 549, 559.

²⁸⁵ *Industrial Nacional de Alimentos v The Republic of Peru* (Dissenting Opinion of Franklin Berman) [9].