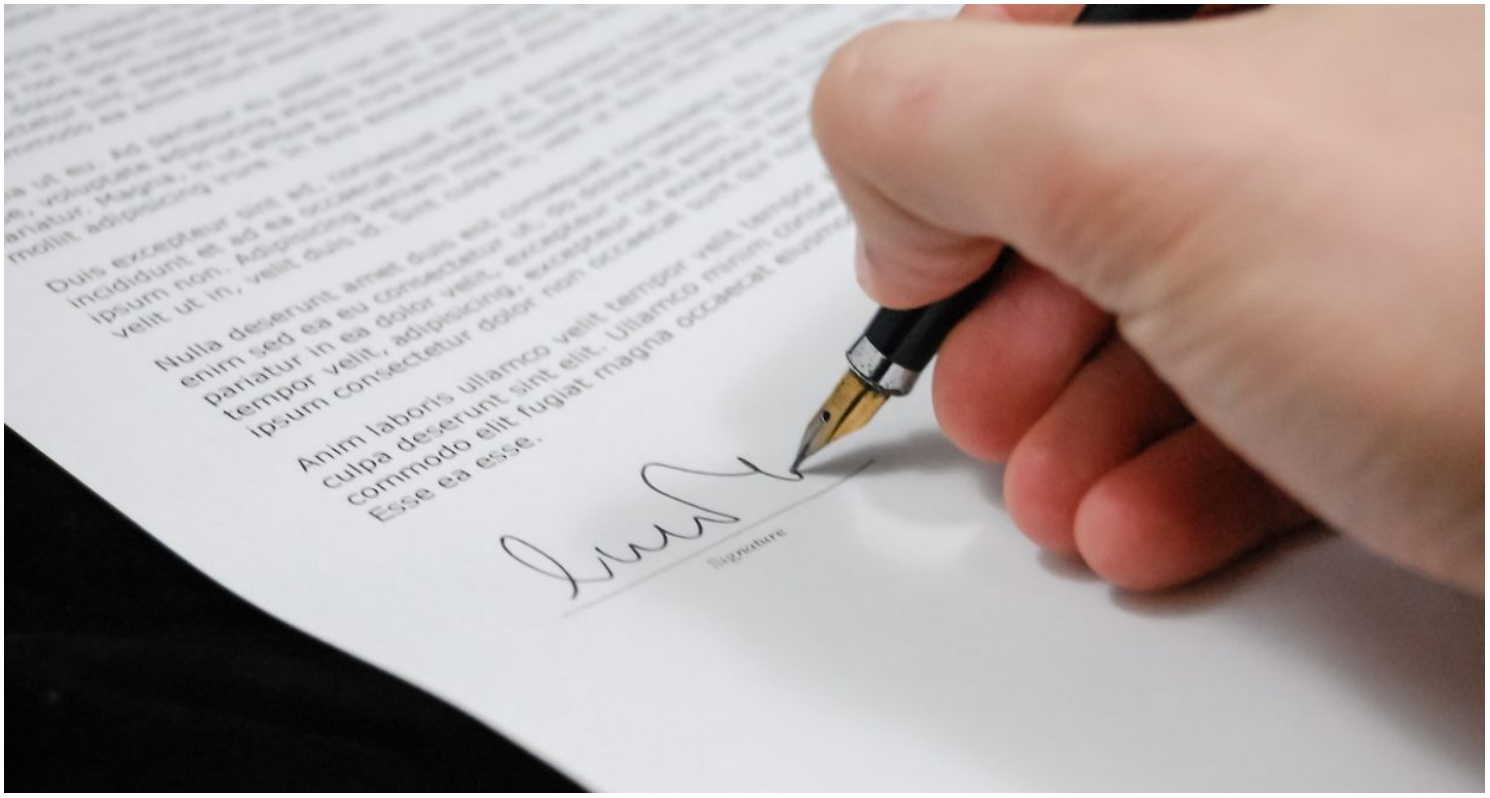
Cambridge Core blog



Significance of travaux preparatoires in interpreting the New York Convention

Ahan Gadkari (https://www.cambridge.org/core/blog/author/ahan-gadkari/)

18 January 2023
Last update: 17/01/23 14:20

1. **Introduction:**

Since international law so often involves the application of treaties, the Vienna Convention on the Law of Treaties (https://www.refworld.org/docid/3ae6b3a10.html) ("**VCLT**") serves as a key instrument governing this process. Of particular interest for many disputes are the rules of treaty interpretation contained in Article 32 of the VCLT focusing on the drafting history. Some commentators (https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/travaux-of-travaux-is-the-vienna-convention-hostile-to-drafting-history/31437C70143D8AF070E071EFFF829040) often go so far as to suggest that the VCLT entrenches a categorical prejudice against *travaux*. However, this piece argues that such assertions are incorrect and that the *travaux preparatoires* plays (as it rightfully should) an important role in the interpretation of international agreements including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**NYC**"). Commentators (https://law-store.wolterskluwer.com/s/product/new-york-convention-in-action/01t0f00000J3ayHAAR) have pointed out that the VCLT is widely used by courts (p. 36). Since most judges seldom if ever employ international law, they often feel uncomfortable when dealing with the VCLT. The inconsistency with which they have applied Articles 31 and 32 of the VCLT demonstrates the need of a uniform approach to

interpreting the NYC. Therefore, this paper argues, judges may depend on primary elements and concentrate on international origins when utilising secondary elements since the NYC is generally passed ad verbatim and statute and treaty interpretation both focus on the language.

An assertion made by opponents to this claim state that customary international law is not enacted through documents like treaties. Instead, it emerges (https://library.oapen.org/handle/20.500.12657/38116) based on State practice and *opinio juris* (p. 215). Yet acts providing evidence of these two constitutive elements are analogous to the *travaux*, as they shed light on the process by which a custom has emerged. The material that can be considered for this purpose is defined in the International Law Commission's draft conclusions (https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf) 6(2) and 10(2) on the identification of customary international law. Evidence that only documents the practice and *opinio juris* of one (or few) States is, of course, insufficient.

2. **Significance of *travaux preparatoires* in practice of international courts and tribunals**

States have frequently relied (https://www.tandfonline.com/doi/abs/10.1080/09615768.2006.11427647?journalCode=rklj20) on preparatory work for the purposes of treaty interpretation (p. 116). This practice is also reflected in Article 19(a) of the Harvard Draft Convention on the Law of Treaties of 1935 (https://legal.un.org/ilc/documentation/english/a_cn4_23.pdf), pursuant to which interpreters ought to consider the historical background of the treaty and *travaux préparatoires*. The written words contained in a treaty always demand explanation (https://www.degruyter.com/document/doi/10.7312/yu--93648/html), and in order to do so scientifically, evidence such as those found in past negotiations must be sought with the objective of ascertaining the true intent of the treaty's authors (p. 166-167).

International courts have likewise relied on the *travaux*, as have arbitral tribunals. In the *Island of Timor Case* (https://pcacases.com/web/sendAttach/641), the tribunal was tasked with interpreting Article 3 of the Netherlands-Portugal Convention, which laid out the procedure for establishing a boundary line between the Dutch and Portuguese possessions on the Island of Timor (p. 8ff). The tribunal did so by closely reviewing the exchanges between the Dutch and Portuguese delegates throughout the Convention's negotiations and basing its judgement on them. In the *Chilean-Peruvian Accounts Case* (https://www.icj-cij.org/public/files/case-related/137/137-20140127-JUD-01-00-EN.pdf), the arbitrator inferred the meaning of Article 2 of the Treaty of Alliance between Chile and Peru, principally from the text but also from the drafting history (¶ 40ff). He provided that the drafting history shed light on the parties' intentions. In *the Lighthouse case* (http://www.worldcourts.com/pcij/eng/decisions/1934.03.17_lighthouses.htm), the Permanent Court of International Justice ("**PCIJ**") was seized with the question of interpreting the words "duly entered into" in the special agreement between Germany and France. The PCIJ ruled that where the context does not suffice to show the precise meaning in which the Parties to the dispute have employed these words in their Special Agreement, the Court, in accordance with its practice, has to consult the documents preparatory to the Special Agreement, in order to satisfy itself as to the true intention of the Parties. From the preceding examination of the cases, it appears that the international forums like the PCA, PCIJ and the ICJ have frequently resorted to *travaux préparatoires* when tasked with interpreting a text whose meaning it deemed ambiguous.

3. **The use of *travaux préparatoires* in interpreting the New York Convention**

If a country has incorporated the NYC into domestic law, judges ought to consider (https://www.livelaw.in/pdf_upload/jeeja-ghosh-v-union-of-india-405231.pdf) the legislation's international roots while delivering their judgement. Second, the court must bear in mind that the VCLT

is a critical component of any international agreement's interpretation. This includes the VCLT's Article 32 and the consultation of *travaux préparatoires*.

In *GE Energy Power* (https://www.supremecourt.gov/opinions/19pdf/18-1048_8ok0.pdf), the Supreme Court of the United States upheld the importance of the drafting history of the NYC and used it to reach a conclusion on the matter. The court remarked that the NYC is a treaty ratified by the United States (US), which makes it a treaty between sovereign powers (p. 7). Thus, the court must consider aid to the interpretation of the treaty, which is the negotiation and drafting history (p. 8). The court then examined the drafting history to determine whether the NYC "establishes a rule of consent that dis- place[s] varying local laws" (p. 8). The drafting history shows that that the drafters sought to impose baseline requirements on contracting states. Instead, the delegates frequently brought up the issue of domestic courts trying to squirm (https://cdn.arbitration-icca.org/s3fs-public/document/media_document/4272_001.pdf) out of enforcing such agreements by adopting a narrow outlook (p. 24-28). The court concluded that nothing in the NYC's drafting history indicated that it was intended to preclude contracting states from using domestic law that allows non-signatories to enforce arbitration agreements in additional circumstances. In *Esab Group* (https://casetext.com/case/esab-grp-inc-v-zurich-ins-plc), the United States Court of Appeals, Fourth Circuit examined the participation of the American delegation in the drafting of the NYC. Through this participation, the court established the limits on the scope of the US's reciprocal and commercial reservation on the application of the NYC (Part I [B] [3]).

In *PASL Wind Solutions* (https://indiankanoon.org/doc/79928496/), the Indian Supreme Court was tasked with deciding whether a foreign award (by a tribunal to which NYC applies) resulting from a dispute between two Indian companies was enforceable. The court reiterated the points made by Chinese, Mexican, Hungarian, and Norwegian delegate during the preparation of Article 1 of the NYC (¶ 17). According to the Chinese delegation, Article I should be premised on the basis of international reciprocity (¶ 17). That is, the arbitral award shall be binding and must be enforced if it's made within the territory of a high contracting party to the NYC, and the individuals involved are subject to the jurisdiction of one of the high contracting parties (to the NYC). The Mexican delegate further said that the text must include a requirement that the arbitral decision be made in a dispute involving parties subject to the jurisdiction of one of the high contracting parties (¶ 17). Additionally, the Hungarian and Norwegian delegations agreed to this proposal (¶ 17). On the basis of this debate the court interpreted the Indian Arbitration Act and then gave its judgement that a foreign award from another NYC State would be binding as long as it does not violate the public policy of India. (¶ 21).

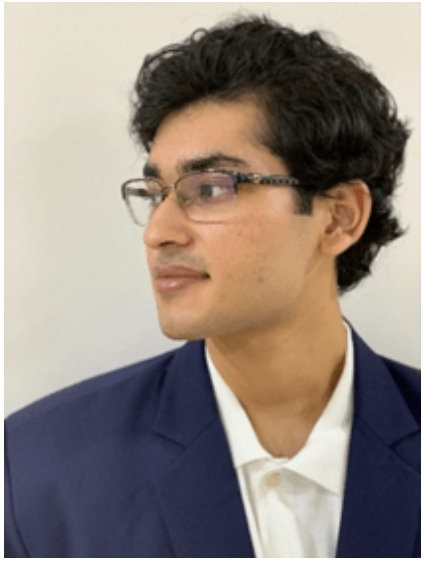
4. **Conclusion**

The recording of *travaux préparatoires* of the NYC is not meaningless scribbling. It is a living and breathing document. The *travaux* conveys the intention of the drafters, which the black letter of the convention cannot articulate. To realise the full potential of international arbitration, the international community must work towards achieving a harmonized interpretation for the NYC. There are two major reasons (http://www.hjil.org/articles/hjil-28-3-graffi.pdf) why harmonisation is required. First, to establish legal stability and predictability throughout all NYC high contracting states. Second, to instil confidence in the parties to arbitration agreements in this process of alternative dispute resolution. To achieve the purpose of harmonization of international law, courts can make greater and more consistent use of the *travaux préparatoires*.

Those who do not explicitly support this view claim that courts will only look into the preparation of the domestic law being used to implement the NYC. For example, in *Lucas Lancaster* (https://law.justia.com/cases/federal/appellate-courts/F3/186/210/569364/), the United States Court of

Appeals for the Second Circuit used the drafting history of the American Arbitration Act to interpret Article II (2) of the NYC. In line with this view, since courts apply enacted legislation rather than the NYC, they naturally depend on the parliamentary history of the national statute rather than the *travaux préparatoires* of the NYC— and hence have no incentive (https://law-store.wolterskluwer.com/s/product/new-york-convention-in-action/01t0f00000J3ayH) to turn to a VCLT-based interpretation (p. 35).

This raises a more serious and disturbing issue: some courts are still not interpreting the NYC in the way its drafters intended. The main intention of the drafters (http://arbitrationblog.kluwerarbitration.com/2016/07/25/interpreting-new-york-convention-vienna-convention-national-perspective-paulsson-snail-diagram-judges-tool/)was to streamline the existing regime under the Geneva Convention on the Execution of Foreign Arbitral Awards signed in 1927 (https://legal.un.org/avl/ha/crefaa/crefaa.html), to make it easier for foreign arbitral awards to be recognised and enforced. However, there still exists a disparity between the courts' and drafters' interpretations. The *travaux préparatoires* provides guidance to the courts to maintain uniformity and aid in achieving the goals set by the drafters of the NYC. Keeping in mind the significance of the *travaux préparatoires* of the NYC, an amendment seems to be called for: the NYC should explicitly mention that the *travaux préparatoires* are to be examined by courts when necessary. However, even without such an amendment the value or significance of the *travaux préparatoires* does not decrease and most states still uphold it. It is essential for to look at recent patterns in domestic jurisprudence and at the causes of the revival of interest in the use of travaux.



Ahan Gadkari is a final year BA LLB Candidate at O.P. Jindal Global University. He serves as a Research Assistant to Dr. Aniruddha Rajput, Member, UN International Law Commission.

Read more on this topic in the *Asian Journal of International Law (https://www.cambridge.org/core/journals/asian-journal-of-international-law)*.

Related posts

(https://www.cambridge.org/core/blog/2022/12/13/asia-and-the-international-financial-institutions/)

Asia and the International Financial Institutions (https://www.cambridge.org/core/blog/2022/12/13/asia-and-the-international-financial-institutions/)

(https://www.cambridge.org/core/blog/2022/12/02/counter-terrorism-international-humanitarian-law-and-an-opportunity-for-india-to-promote-congruence/)

Counter Terrorism, International Humanitarian Law and an Opportunity for India to Promote Congruence (https://www.cambridge.org/core/blog/2022/12/02/counter-terrorism-international-humanitarian-law-and-an-opportunity-for-india-to-promote-congruence/)

(https://www.cambridge.org/core/blog/2022/11/23/harmonious-construction-and-the-international-law-allegory-in-india/)

Harmonious Construction and the International Law Allegory in India (https://www.cambridge.org/core/blog/2022/11/23/harmonious-construction-and-the-international-law-allegory-in-india/)

(https://www.cambridge.org/core/blog/2022/11/17/genocide-or-natiocide/)

Genocide or Natiocide? (https://www.cambridge.org/core/blog/2022/11/17/genocide-or-natiocide/)

(https://www.cambridge.org/core/blog/2022/10/26/fishing-and-fishing-related-activities-a-deadly-mutualism-in-the-iuu-fishing-chain/)

Fishing and Fishing-Related Activities: A Deadly Mutualism in the IUU Fishing Chain (https://www.cambridge.org/core/blog/2022/10/26/fishing-and-fishing-related-activities-a-deadly-mutualism-in-the-iuu-fishing-chain/)

(https://www.cambridge.org/core/blog/2022/10/12/loopholes-in-the-application-of-the-fork-in-the-road-provisions-in-investor-state-dispute-settlement-mechanisms/)

Loopholes in the Application of the “Fork-in-the-Road” Provisions in Investor-State Dispute Settlement Mechanisms (https://www.cambridge.org/core/blog/2022/10/12/loopholes-in-the-application-of-the-fork-in-the-road-provisions-in-investor-state-dispute-settlement-mechanisms/)