

Commentary
on the 1969 Vienna Convention
on the Law of Treaties

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Article 32

Supplementary means of interpretation

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

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

* * *

Article 32 Moyens complémentaires d'interprétation

Il peut être fait appel à des moyens complémentaires d'interprétation, et notamment aux travaux préparatoires et aux circonstances dans lesquelles le traité a été conclu, en vue, soit de confirmer le sens résultant de l'application de l'article 31, soit de déterminer le sens lorsque l'interprétation donnée conformément à l'article 31:

- a) laisse le sens ambigu ou obscur; ou
- b) conduit à un résultat qui est manifestement absurde ou déraisonnable.

* * *

Artikel 32 Ergänzende Auslegungsmittel

Ergänzende Auslegungsmittel, insbesondere die vorbereitenden Arbeiten und die Umstände des Vertragsabschlusses, können herangezogen werden, um die sich unter Anwendung des Artikels 31 ergebende Bedeutung zu bestätigen oder die Bedeutung zu bestimmen, wenn die Auslegung nach Artikel 31:

- a) die Bedeutung mehrdeutig oder dunkel lässt; oder
- b) zu einem offensichtlich sinnwidrigen oder unvernünftigen Ergebnis führt.

* * *

ILC Draft 1966

Article 28—Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 27, or to determine the meaning when the interpretation according to Article 27:

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

* * *

Materials:

WALDOCK Report III: Article 71 para. 2.
Minutes: YBILC 1964 I 33 ff, 275 ff, 308 ff, 340 f.
ILC Draft 1964: Article 70.
WALDOCK Report VI: Article 70.
Minutes: YBILC 1966 I/2 183 ff, 267 ff, 328 ff, 346 ff.
ILC Draft 1966: Article 28.
Minutes: OR 1968 166 ff, 441 f; OR 1969 Plenary 58.

Vienna Conference Vote: 101:0:0

Selected Literature (in addition to the literature mentioned in *Article 31, q.v.*):

H.W. BRIGGS, The *travaux préparatoires* of the Vienna Convention on the Law of Treaties, AJIL 65 (1971) 705 ff; R. GARDINER, Treaties and Treaty Materials: Role, Relevance and Accessibility, ICLQ 46 (1997) 643 ff; J. KLABBERS, International Legal Histories: The Declining Importance of *travaux préparatoires* in Treaty Interpretation, NILR 50 (2003) 267 ff; Y. LE BOUTHILLIER, Article 32, in: CORTEN/KLEIN (eds.) 1339 ff; N. MEHRISH, *Travaux préparatoires* as an Element in the Interpretation of Treaties, IJIL 11 (1971) 30 ff; 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, Boston College ICLR 14 (1991) 111 ff; M. SASSÖLI, Bedeutung von "*travaux préparatoires*" zu Kodifikationsverträgen für das allgemeine Völkerrecht, ÖZöRVR 41 (1990) 109 ff; St.M. 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 K. SKUBISZEWSKI (1996) 541 ff; also in Svensk Juristtidning 82 (1997) 10, 797 ff.

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A. BACKGROUND

1. Introduction

1 A treaty’s preparatory work (*travaux préparatoires*) and the other means of interpretation mentioned in Article 32 play different roles according to the various methods of interpretation (*Article 31*, N. 1). Thus, the subjective method regularly emphasises the *travaux préparatoires* of a treaty in order to establish the “real” intentions of the drafters. The textual and the contextual methods, concentrating on the written text, have traditionally regarded these means as supplementary. The teleological method, on the other hand, seeks a treaty’s object and purpose in all materials available and does not, therefore, distinguish between primary and secondary means of interpretation. The New Haven Approach equally regards *travaux préparatoires* as a valid source of interpretation among many others.¹

2. History of Article 32

(see *Article 31*, N. 4–5)

¹ On this section, see also Rts, Boston College ICLR 14 (1991) 111 ff.

B. INTERPRETATION OF ARTICLE 32**1. Types of Supplementary Means of Interpretation**

Article 32 refers to **supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.** 2
It follows that the means mentioned therein serve as examples and do not exclude other supplementary means of interpretation.²

The **preparatory work of the treaty** is the most important supplementary 3
means. It includes all documents relevant to a forthcoming treaty and generated by the parties during the treaty's preparation up to its conclusion.³ (Agreements and instruments made in connection with the conclusion of the treaty may fall to be examined under *Article 31, para. 2*, N. 15–19.) These *travaux préparatoires* include memoranda and other statements and observations of governments transmitted to each other or to the drafting body; diplomatic exchanges between the parties; treaty drafts; negotiation records; and minutes of commission and plenary proceedings. The preparatory work of the *Convention* is described in *History of the Convention (q.v.)*.

Article 32 mentions, next, **the circumstances of its conclusion.**⁴ These 4
include the political, social and cultural factors—the *milieu*—surrounding the treaty's conclusion.

Among other supplementary means **included** but not listed in Article 32 5
(N. 2), the following may be mentioned:⁵

- *travaux préparatoires* of an earlier version of the treaty;
- interpretative declarations made by treaty parties which do not qualify as reservations (*Article 2, subpara. 1(d)*, N. 37);
- documents not strictly qualifying as *travaux préparatoires* (N. 4), e.g., a State's internal documents upon preparation of a treaty unknown to other States at the time;⁶
- the rational techniques of interpretation, such as *per analogiam, e contrario, contra proferentem, eiusdem generis, expressio unius est exclusio alterius, lex posterior derogat legi priori, lex specialis derogat legi speciali, in dubio mitis, interpretatio in favorem debitoris*,

² ILC Report 1966, YBILC 1966 II 223, para. 20. On the topic generally, JENNINGS/WATTS N. 633.

³ YASSEEN, RC 151 (1976 III) 84; SUR, L'interprétation 279; the example given by AUST, *Modern Treaty Law* 245 ff.

⁴ WALDOCK Report III, YBILC 1964 II 59, para. 22; YASSEEN, RC 151 (1976 III) 92, para. 11.

⁵ See the ILC Report 1964, YBILC 1964 II 204; the statement by WALDOCK in the ILC, YBILC 1966 I/2 347, para. 173; critically J.-P. COT, *La conduite subséquente des parties à un traité*, RGDIP 70 (1966) 632 ff.

⁶ See the examples mentioned by RIS, *Boston College ICLR* 14 (1991) 111 ff.

etc. (*Article 31*, N. 1). Nevertheless, to the extent that these techniques amount to *rules* of international law, they would have to be considered as part of the General Rule under *Article 31, para. 3 (c) (q.v., N. 24–25; Article 30, N. 1)*;

- agreements and practice among a subgroup of parties to a treaty not falling within the ambit of authentic interpretation in *Article 31, para. 2* and *subparas. 3(a)* and *(b) (q.v., N. 15–23)*;⁷
 - non-authentic translations of the authenticated text (*Article 33, N. 7*).
- 6 These supplementary means of interpretation are by their very nature notoriously heterogeneous, different documents at times even contradicting each other. (Of course, all the treaty parties concerned must have been aware of these supplementary means of interpretation—*e.g.*, the treaty’s *travaux préparatoires*—if they are to be invoked in respect of a treaty’s interpretation.)⁸ They can only serve as means to aid the process of interpretation.⁹ The extent to which they are able to do so will depend on their cogency, in particular on their accessibility;¹⁰ their direct relevance for the treaty terms at issue, the consistency among the means found, the number of parties involved in the evolution of the particular means,¹¹ and the reactions of other parties thereto.

As the ILC stated in its Report of 1966: “[w]hen a possible occasion for [the application of these means] may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to [these means] is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science”.¹²

2. Recourse to Supplementary Means

- 7 According to *Article 32*, **recourse may be had to the supplementary means of interpretation** after employing the means of the General Rule of Interpretation in *Article 31 (q.v., N. 28)*. These means serve as further evidence of, or will shed further light on, the intentions of the parties, and their common understanding regarding the meaning of treaty terms.¹³ The term “supplementary” corresponds with the French term *complémentaire*, rather than implying “subsidiary” means.¹⁴ Three cases are envisaged:

⁷ TORRES BERNÁRDEZ, *Liber amicorum* SEIDL-HOHENFELDERN 726 f.

⁸ SEIDL-HOHENVELDERN/STEIN, *Völkerrecht* N. 358.

⁹ See the ILC Report 1966, YBILC 1966 II 223, para. 19.

¹⁰ *Young Loan Arbitration*, ILR 59 (1980) 544 f, para. 34.

¹¹ See here the ILC Report 1966, YBILC 1966 II 223, para. 20.

¹² YBILC 1966 II 218, para. 4, *mutatis mutandis*, in the context of the usefulness of rational techniques of interpretation at n. 6.

¹³ WALDOCK Report III, YBILC 1964 II 58, para. 21.

¹⁴ See the statements by WALDOCK in the ILC, YBILC 1966 I/2 206, para. 41, and at 270, para. 35.

(i) the supplementary means may be employed **in order to confirm the meaning resulting from the application of Article 31**. Thus, if the means of Article 31 have produced a result, its validity may be established by resorting to the supplementary means in Article 32. 8

GREIG has seen a logical difficulty in this provision: “[o]ne can hardly decide whether preparatory work, or indeed any other ‘supplementary means’, confirms [or even fails to confirm] a particular interpretation unless one has recourse to it first”.¹⁵ However, this apparent *petitio principii* is resolved if it is agreed that Article 32 envisages liberal recourse to the supplementary means (N. 11). Moreover, a result arrived at by the use of primary means of Article 31 will always prevail over solutions suggested by the supplementary means.

(ii) the drafters of the Convention also envisaged the situation where the various means of Article 31 do not lead to a clear result. Here, Article 32 may be resorted to in order **to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure** (*para. [a]*).¹⁶ 9

(iii) recourse may be had to Article 32 in the unlikely event that the “General Rule” in Article 31 **leads to a result which is manifestly absurd or unreasonable** (*para. [b]*). 10

In the light of these conditions, it is difficult to imagine situations where the means of Article 32 may not be employed.¹⁷ In particular, “unclear” meanings are covered by *para. (a)*. In other words, Article 32 permits use of these means in most situations and does not restrict the manner in which they may be employed. The only restriction in Article 32 is that its means may not be invoked first, at the outset of interpretation¹⁸—a not unreasonable proposition if one remembers the pitfalls inherent in the use of these materials (N. 6) which lack the authentic element present in the means of Article 31. Throughout, recourse to the supplementary means in Article 32 is governed by good faith (*Article 31*, N. 8). 11

¹⁵ GREIG, *International Law* 481.

¹⁶ See the ILC Report 1966, YBILC 1966 II 222 f, in particular 223, *para. 19*; the *Commonwealth of Australia et al. v. Tasmania et al. Case of the Australia High Court* (GIBBS C.J.), ILR 68 (1985) 304 (“[i]f there is an ambiguity, the *travaux préparatoires* may help to resolve it”); also in *Australian LJ* 57 (1983) 592 f.

¹⁷ TORRES BERNÁRDEZ, *Liber amicorum* SEIDL-HOHENFELDERN 739; differently SINCLAIR, *Vienna Convention* 142 (“recourse is permissible in carefully controlled circumstances”).

¹⁸ See the *avis de droit* of the Swiss Federal Department for Foreign Affairs, SJIR 35 (1979) 137 ff (“opérations... distinctes dans le temps”).

The ILC materials confirm this interpretation of Article 32. As Sir HUMPHREY WALDOCK pointed out in Vienna, “[t]here had certainly been no intention of discouraging automatic recourse to preparatory work for the general understanding of the treaty”.¹⁹

The Court has routinely referred to the possibility of resorting “[a]s a supplementary measure . . . to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion”.²⁰

C. CONTEXT

1. Relationship to Other Provisions

- 12 The relationship to *Article 31* has been discussed above (N. 7). According to *Article 33, para. 4*, regard may be had, *inter alia*, to Article 32 when attempting to remove a difference of meanings of the different languages. If the difference is then not removed, the object and purpose of the treaty may be resorted to (*q.v.*, N. 10–13).

2. Customary Basis of Article 32

- 13 The conclusions as to the customary nature of Article 31 (*Article 31*, N. 37–39) can be extended to Article 32, namely that a customary rule is equally emerging in respect of the latter provision, not least in view of the unanimous adoption of the provision in Vienna in 1969. A different conclusion may again be drawn in respect of the customary nature of the particular relationship between Articles 32 and 31. The ILC envisaged automatic resort to the supplementary means. In actual fact, States and courts have come to see Article 32 as providing a limited recourse to its means (*Article 31*, N. 30–34).

¹⁹ OR 1968 CoW 184, para. 69; see also his statement in the ILC, YBILC 1966 I/2 201 ff; WALDOCK Report VI, 1966 II 99 f, para. 20 (“frequent and quite normal recourse to *travaux préparatoires*”); the ILC Report 1966, YBILC 1966 II 223 para. 18 (“[i]n practice, international tribunals, as well as States and international organizations, have recourse to subsidiary means of interpretation . . . for the purpose of confirming the meaning that appears to result from an interpretation of the treaty”).

²⁰ *Legality of Use of Force (Serbia and Montenegro v. Belgium) (Preliminary Objections) Case*, ICJ Reports 2004 318, para. 100; *Kasikili/Sedudu Island (Botswana/Namibia) Case, ibid.* 1059, para. 60, with reference to the *Territorial Dispute (Libya/Chad) Case, ibid.* 21 f, para. 41. In the *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) Case, ibid.* 71, para. 53, the Court had recourse to the “circumstances in which the Arbitration Agreement was drawn up”. In the 1985 *Maritime Delimitation (Guinea/Guinea-Bissau) Arbitral Award*, the Court of Arbitration considered that “Article 32 . . . defines, and generally circumscribes, by setting forth conditions, the legal value to be attributed to the preparatory work of a Convention as ‘supplementary means of interpretation’”, ILR 77 (1988) 658, para. 41.

D. PROPOSAL FOR AMENDMENT

RIS has identified various inadequacies in Article 32 and proposes three main amendments:²¹ 14

- (i) use of the *travaux préparatoires* should be made dependent on the request of a party. In fact, this would considerably limit the freedom and scope of the interpreting agency, which today may itself decide if and when recourse to the supplementary means is called for. Parties to proceedings remain free to express their views on the quality of certain supplementary means of interpretation;
- (ii) the Court determines which *travaux préparatoires* may be employed. However, a contradiction transpires here, since no such limitations are suggested in respect of the other supplementary means. In any event, it is difficult to decide in advance and *in abstracto* on the relevance of particular preparatory materials;
- (iii) the *travaux préparatoires* should reasonably be regarded as part of the “context” of the treaty as in *Article 31, para. 2 (q.v., N. 15–19)*. This overlooks the difficulties of primary recourse to such materials (N. 6).

E. APPRECIATION

SCHWEBEL, for whom Article 31 reflects the textual method of interpretation (*q.v., N. 28–34*), has criticised Article 32 as “essentially without purpose”: 15

“the reference to preparatory work is unnecessary; the ordinary meaning stands without it. Why have recourse to that which is merely confirmatory of what is already so plain”.²²

By contrast, this study has argued that the General Rule in *Article 31* embodies various means of interpretation all of which play a (primary) part in the process of interpretation (*Article 31, N. 28–31*); and that *Article 32* permits recourse to the supplementary means in a wide variety of situations (N. 11). As such, Article 32 provides for a valuable complement to the means in Article 31. Article 32 further offers welcome clarification as to the conditions and circumstances of resorting to the *travaux préparatoires* and other supplementary means of interpretation. On the whole, the strength of both provisions is their flexibility. 16

²¹ RIS, Boston College ICLR 14 (1991) 135.

²² Essays SKUBISZEWSKI 545.