1969 Vienna Convention

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.

Bibliography

Aust, A., *Modern Treaty Law and Practice* (2nd edn, Cambridge: Cambridge University Press, 2007)

Canal-Forgues, E., 'Remarques sur le recours aux travaux préparatoires dans le contentieux international', *RGDIP*, 1993, pp 901 ff

Linderfalk, U., *On the Interpretation of Treaties*: *The Modern International Law As Expressed in the 1969 Convention on the Law of Treaties* (Dordrecht: Springer, 2007)

Ris, M., '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 Coll Int'l & Comp LR*, 1991, pp 111 ff

Schwebel, S., '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* (The Hague: Kluwer Law International, 1996), pp 173–81

Vandevelde, K. J., 'Treaty Interpretation from a Negotiator's Perspective', *Transnat'l L*, 1988, pp 281 ff

de Visscher, Ch., *Problèmes d'interprétation judiciaire en droit international public* (Paris: Pedone), 1963

Yasseen, M. K., 'L'interprétation des traités d'après la Convention de Vienne sur le droit des traités', *RCADI*, 1976-III, vol. 151, pp 1–114

The Vienna Conventions on the Law of Treaties: A Commentary. Edited by Olivier Corten and Pierre Klein, Oxford University Press © The several contributors, 2011,
DOI: 10.1093/law/9780199573523.003.0065

A. General characteristics

Purpose and object

1. In addition to the primary means of interpretation found in Article 31, drafters of the Vienna Convention on the Law of Treaties have provided, in Article 32, for the possibility to have recourse to 'supplementary' means. The ILC explained that Article 32 'does not provide for alternative, autonomous means of interpretation but only for means to supplement an interpretation governed by the principles'[1] contained in Article 31. It was only after a long debate opposing two different schools of thought, both in the Commission and during the Diplomatic Conference in Vienna, that the complementary role of certain means, notably preparatory works and circumstances existing at the time of concluding a treaty, was agreed on by the adoption of Articles 31 and 32.

2. On one side, some supported an approach giving primacy to the 'subjective intent' of parties, also commonly called the 'real intent'.[2] Under this approach one has to allow recourse to any means of interpretation able to reveal this intent, and in particular to preparatory works.[3] This point of view was supported by the United States during the Vienna Conference as it moved an amendment that would have eliminated any preference to one interpretative means over another. The interpreter would be free to use all means that could be useful in a given case, whether it be the text, preparatory works, circumstances existing at the time a treaty was concluded, or any other means.[4] However, the vast majority of States voted against this amendment.[5]

[1] Report of the Commission to the General Assembly, *YILC*, 1964, vol. II, p 205, para. 16 and *YILC*, 1966, vol. II, p 223, para. 19; see also M. K. Yasseen, 'L'interprétation des traités d'après la Convention de Vienne sur le droit des traités', *RCADI*, 1976-III, vol. 151, p 79:

Ce sont des moyens véritablement complémentaires: le qualificatif est bien choisi; il souligne que ce ne sont pas des moyens autonomes, mais simplement des moyens destinés à faciliter une interprétation régie par l'article 31: la règle générale d'interprétation.

[2] P. M. Dupuy, *Droit international public* (5th edn, Paris: Dalloz, 2000), p 300.

[3] As mentioned by Special Rapporteur Waldock in his Third Report, *YILC*, 1964, vol. II, p 56, para. 13, this point of view was strongly put forward by Sir Hersch Lauterpacht, in his capacity as Rapporteur on the law of treaties for the Institute of International Law. On the position of Lauterpacht, see also Ch. de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (Paris: Pedone, 1963), who writes, at p 65, that Lauterpacht 'ait assigné pour tâche à l'interprétation moins la recherche du sens du texte que celle des intentions "vraies," au sens subjectif, des Parties, en préconisant notamment un très large recours aux travaux préparatoires'. De Visscher also addresses this issue at p 199 of the same book.

[4] The amendment proposed by the United States would have included in one Article what are today Arts 31 and 32. For the text of this amendment see Official Records, Report of the Committee of the Whole, p 149. The main reason given for this proposal was that a text's 'true' meaning can only be found through an examination of all the elements at the disposal of the interpreter, whether these elements are internal or external to the text. See the remarks by the US representative, Official Records, Report of the Committee of the Whole, 1st session, 31st meeting, pp 167 and 168, paras 41–9. The representative of Vietnam also moved a similar amendment. See the text of this amendment, Official Records, Report of the Committee of the Whole, p 149, and see his remarks, Official Records, Report of the Committee of the Whole, 1st session, 31st meeting, p 168, para. 51. A number of other States also supported the view that an interpreter should be able to refer to all the interpretative means available without having to abide by a specific order. See the remarks by the representatives from Ghana (ibid, 31st meeting, pp 170 and 171, para. 70), Greece (ibid, p 172, para. 9), Italy (ibid, pp 176–7, para. 58), Austria (ibid, 33rd meeting, p 178, para. 13), Switzerland (ibid, p 180, para. 27), Portugal (ibid, p 183, para. 57), and Trinidad and Tobago (ibid, p 183, para. 58).

[5] Seventy States voted against this amendment, 8 for, and 10 abstained. See Official Records, Report of the Committee of the Whole, p 150.

3. The other approach, known as 'objective interpretation' or 'declared intent',[6] takes as its starting point the text of the treaty.[7] Others means only come into play when the text cannot, in itself, guide the interpreter.[8] The ILC recommended to States an approach more in line with this school of thought by giving preference to the text, while compromising somewhat by incorporating in Article 31 a 'context' that includes subsequent agreement and practice and a teleological approach.[9] However, it distinguished clearly between, on one hand, means qualified as 'authentic' (text, declaration, agreement, and States' subsequent practice) that together form the general rule of interpretation in Article 31 and, on the other hand, supplementary means in Article 32. According to the Commission, the interpretative elements of Article 31 'all relate to the agreement between the parties *at the time when or after it received authentic expression in the text*'.[10] It added that 'this is not the case with preparatory work which does not, in consequence, have the same authentic character as an element of interpretation, however valuable it may sometimes be in throwing light on the expression of the agreement of the text'.[11] The drafters of the Convention opted for this approach, confining some elements to a more limited role than others.

Customary law status

4. Before the adoption of the Convention, many authors were of the view that there were no binding rules of interpretation in international law. The interpreter could have recourse to interpretative principles, for the most part borrowed from domestic private

[6] P. M. Dupuy, *supra* n 2.

[7] As explained by I. Sinclair: 'the text of a treaty must be presumed to be the authentic expression of the intentions of the parties…', *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester: Manchester University Press, 1984), p 115.

[8] Within the Institute of International Law this position was successfully defended by Sir Eric Beckett, *AFDI*, 1950, p 438.

[9] See the commentary on Art. 31 in this work. See also A. Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge: Cambridge University Press, 2007), p 235.

[10] Report of the Commission to the General Assembly, 1966, vol. II, p 220, para. 10. See also, among others, the opinion of Amado, *YILC*, 1964, vol. I, 766th meeting, p 287, para. 55 and Tunkin, *YILC*, 1966, vol. I, 870th meeting, p 190, para. 62 and 872nd meeting, p 201, para. 43.

[11] Report of the Commission to the General Assembly, ibid. During the debate within the Commission many members expressed a preference for a less hierarchical approach. See in particular the intervention by Briggs who, noting that some elements included in Art. 31 (agreement regarding the interpretation of the treaty, subsequent practice, rules of international law) are not part of the text of the treaty, was of the view that there was no reason to consider other extrinsic elements to the text as subsidiary means, *YILC*, 1966, vol. I, 870th meeting, p 187, para. 35 and also 873rd meeting, p 203, para. 3. In response to Briggs, Ago argued that the elements inserted in Art. 31 were 'ancillary elements of that text…' while the elements of Art. 32 referred instead to the 'history of the formulation of the text, in other words, the inquiry no longer centered on what the text said, but on how it had been arrived at', *YILC*, 1966, vol. I, 873rd meeting, p 205, para. 23. As underlined even more clearly by Special Rapporteur Waldock, in his capacity as expert at the Vienna Conference to assist States, the interpretative elements in Art. 31 have, contrary to those in Art. 32, an 'authentic and binding character'. For interventions in favour of conferring more importance to preparatory works see Tabibi, *YILC*, 1964, vol. I, 765th meeting, p 276, para. 25 and 1966, vol. I, 871st meeting, p 197, para. 46; Rosenne, *YILC*, 1964, vol. I, 766th meeting, p 283, para. 17 and *YILC*, 1966, vol. I, 872nd meeting, p 200, para. 32; Yasseen, *YILC*, 1964, vol. I, 769th meeting, p 313, para. 56; Briggg, *YILC*, 1966, vol. I, 870th meeting, p 188, para. 37; Tsuruoka, *YILC*, 1966, vol. I, 871st meeting, p 197, para. 41 and 872nd meeting p 200, para. 28; Bartoš, *YILC*, 1964, vol. I, 769th meeting, p 313, para. 61 and *YILC*, 1966, vol. I, 872nd meeting p 202, para. 52. In its report to the General Assembly, the Commission wrote that 'Although a few governments indicated a preference for allowing a larger role to preparatory work…the majority appeared to be in agreement with the Commission's treatment of the matter', *YILC*, 1966, vol. II, p 220, para. 10.

law, to give meaning to a provision. However, none of these principles were by themselves binding.[12] With regard specifically to supplementary means, such as preparatory work, a well-known author wrote in 1961 that it was not possible to formulate a rule of international law on such matters.[13] Others were of the view that there were, at the very least, a limited number of existing rules.[14] The ILC, under the guidance of Waldock, as Special Rapporteur, endorsed this position, stating that it was important to identify and formulate these rules, including those related to the use of supplementary means of interpretation.[15]

5. As noted by the Commission, international tribunals' practice prior to the adoption of the Vienna Convention reveals that the distinction between main and supplementary means has existed for a long time.[16] In this regard, the Permanent Court of International Justice (PCIJ) in the case of the *SS Lotus* was of the view that: 'there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself'.[17] Likewise, in numerous cases and Advisory Opinions preceding the debate on Article 32, the International Court of Justice (ICJ) limited the role of preparatory works to a secondary one. For instance, in its 1948 Advisory Opinion on the *Conditions of Admission of a State to the United Nations,* it stated that:

> The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.[18]

[12] See for instance A. Favre, 'L'interprétation objectiviste des traités internationaux', *ASDI,* 1960, p 97, who writes that:

> On a dit que l'interprétation d'un traité est une opération d'art juridique, plutôt que science, que les règles d'interprétation peuvent seulement avoir le caractère de directives, non de prescriptions impératives. Il paraît certain que ces règles ne sont pas des normes juridiques, puisqu'elles ne sont pas de nature à créer des droits ou à fonder des obligations pour les sujets de droit, mais qu'elles doivent être observées dans la mesure où elles s'imposent comme règles du raisonnement juridique. En tout cas il ne saurait être question d'une application automatique des règles d'interprétation. Ainsi que le dit justement Schwarzenberger, chacune des diverses techniques d'interprétation est un bon serviteur, mais un maître dangereux.

[13] Lord A. McNair, *The Law of Treaties* (Oxford: Oxford University Press, 1961), who writes at p 411:

> It is not possible to state any rules of law governing the question whether, and, if so, to what extent international courts and tribunals (and, not so often nationals courts when dealing with international instruments) are entitled to look at 'preparatory work'…

[14] See eg G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–1954', *BYBIL*, 1957, p 212.

[15] Report of the Commission to the General Assembly, *supra* n 1, p 200, para. 6.

[16] Ibid, pp 204–5, para.1 5.

[17] PCIJ, 1927, Series A, no. 10, p 12. However, at the Vienna Conference, the United States noted that even in this case 'the Permanent Court of International Justice did in fact look at the preparatory work', Official Records, Report of the Committee of the Whole, 1st session, 31st meeting, p 167, para. 43; see also *Interpretation of the Statute of the Memel Territory* (Preliminary Exceptions) in which the PCIJ stated: 'As regards the arguments based on the history of the text, the Court must first of all point out that, as it has constantly held, the preparatory work cannot be adduced to interpret a text which is, in itself, sufficiently clear', PCIJ, 1932, Series A/B, no. 47, p 249; see also *Jurisdiction of the European Commission of the Danube between Galatz and Braia,* PCIJ, 1927, Series B, no. 14, p 28.

[18] *ICJ Reports 1948*, p 63. See also the Advisory Opinion of 1949 on *Competence of the General Assembly for the Admission of a State to the United Nations*, *ICJ Reports 1950*, p 8; and case *Ambatielos*, Preliminary Exception, *ICJ Reports 1952*, p 45.

6. As illustrated in this paragraph, the ICJ can have, as the PCIJ had,[19] recourse to additional interpretative means, frequently preparatory works, to clarify a text considered ambiguous or obscure. Similarly, these two jurisdictions can refer to others means if the ordinary meaning of the text leads to an unreasonable or absurd result.[20] Tribunals have also frequently called on preparatory works to confirm their interpretation.[21] For instance, in its Advisory Opinion on the *Interpretation of the Convention of 1919 Concerning Employment of Women during the Night*, the PCIJ stated that:

> The preparatory work thus confirms the conclusion reached on a study of the text of the Convention that there is no good reason for interpreting Article 3 otherwise than in accordance with the natural meaning of the words.[22]

7. Thus, it appears, from an examination of international tribunals' decisions prior to the adoption of the Convention that Article 32 is largely a codification of the practice existing at the time. In fact, since the adoption of the Convention, the ICJ has stated on many occasions that the rules of interpretation in the Vienna Convention on the Law of Treaties have a customary law status.[23] Various arbitral tribunals have reached a similar conclusion,[24] as well as the Appellate Body of the World Trade Organization[25] and the European Court of Human Rights.[26]

[19] See, among others, the Advisory Opinion on the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, PCIJ, 1933, Series A/B, no. 44, p 33.

[20] See *Polish Postal Service in Danzig*, PCIJ, 1925, Series B, no. 11, p 39: 'It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd'; *Designation of the Workers' Delegate at the Third Session of the International Labour Conference*, PCIJ, 1922, Series B, no. 1, p 22; *Competence of the General Assembly for the Admission of a State to the United Nations*, *supra* n 17.

[21] See E. Canal-Forgues, 'Remarques sur le recours aux travaux préparatoires dans le contentieux international', *RGDIP*, 1993, p 911; A. Aust, *supra* n 9, p 245; see also Rosenne, *YILC*, vol. I, 1964, p 283, para. 17, who notes that in many decisions the ICJ and arbitral tribunals have had recourse to preparatory work to confirm the meaning of a provision. He adds however that, in reality, these preparatory works could have played a role in initially determining the meaning of the provision. On this issue see *infra* n 34.

[22] PCIJ, 1932, Series A/B, no. 50, p 380; see also the *Case concerning the Payment of Various Serbian Loans*, PCIJ, 1929, Series A, no. 20, p 30.

[23] *Legality of Use of Force* (*Serbia and Montenegro v Canada*), 15 December 2004, para. 99, available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=07&case=106&code=yca&p3=4> *Avena and Other Mexican Nationals* (*Mexico v United States of America*), 31 March 2004, para. 83, available at: <http://www.icj-cij.org/docket/files/128/8188.pdf>; *Sovereignty over Pulau Litigan and Pulau Sipadan* (*Indonesia/Malaysia*), 17 December 2002, available at: <http://www.icj-cij.org/docket/files/102/7714.pdf>; *Oil Platforms* (*Islamic Republic of Iran v United States of America*), *ICJ Reports 1996*, p 812, para. 23; *Territorial Dispute* (*Libyan Arab Jamahiriya v Chad*), *ICJ Reports 1994*, pp 21–2, para. 41; *Arbitral Award of July 31 1989* (*Guinea-Bissau v Senegal*), *ICJ Reports 1989*, p 70, para. 48. In his dissenting judgment in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, *ICJ Reports 1995*, p 28, Judge Schwebel notes that the Vienna Convention is accepted by the Court 'as an authoritative codification of international law'. He makes this observation despite the fact that he also notes that the provisions on the interpretation of treaties 'were particularly contested, to some extent in the International Law Commission which composed them, and much more acutely in the United Nations Conference on the Law of Treaties itself'. See also *Certain Matters of Mutual Assistance in Criminal Matters* (*Djibouti v France*), 4 June 2008, para. 153, available at: <http://www.icj-cij.org/docket/files/136/14550.pdf>.

[24] In the *Beagle Channel Arbitration* (*Argentina v Chile*), the tribunal referred to the 'traditional canons of treaty interpretation now enshrined in the *Vienna Convention on the Law of Treaties*', *ILR*, 1979, p 127. Likewise, the majority in the *Young Loan Arbitral Award* stated that 'the Convention properly reflects both the present and the past state of international treaty law since, as regards interpretation at least, it is restricted to the codification of customary law in force', *ILR*, 1980, p 529.

[25] *Japan—Alcoholic Beverages*, WT/DS/8/AB/R, Report of the Appellate Body of the Dispute Settlement Mechanism, 6 October 1996, p 10.

[26] *Golder* case, 21 February 1975, Series A, no. 18, pp 13–14, paras 29–30:

8. The publicists also share the view that the provisions of the Convention dealing with interpretation are customary norms.[27] However, as the content of these provisions are not norms of *jus cogens*, parties to a treaty are free, if they wish, to opt for other rules,[28] conferring, for instance, greater weight than Article 32 does to preparatory works[29] or, on the contrary, rejecting recourse to them for interpretative purposes. However, as mentioned by Ago,[30] it is likely that States would only opt for such alternatives on very rare occasions given the reasonableness of the existing rules.

B. Scope: conditions for resorting to supplementary means

9. As the qualifier 'supplementary' indicates, resort will be made to these means in an already active interpretative process. Their usefulness will depend on the conclusion reached at the outset by the interpreter on the clarity of a given provision: if the meaning of a provision has already been established through the use of means provided for in Article 31, the interpreter can only resort to supplementary means to confirm this meaning; if, however, no acceptable meaning emerged from Article 31, the means in Article 32 can be called upon to play a key role. In the latter case, the interpreter decides to look somewhere other than Article 31 to find the common intention of parties to a treaty.[31]

Confirming the meaning

10. Article 32 provides that an interpreter can refer to supplementary means to confirm the meaning given to a provision. This is the most common application of Article 32 by

The Court is prepared to consider, as do the Government and the Commission, that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties…[which] enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion.

[27] J. Combacau and S. Sur, *Droit international public* (6th edn, Paris: Montchrestien, 2004), p 172: 'Les dispositions de la Convention de Vienne, bien qu'elles ne visent que les traités, sont en l'occurrence coutumières et s'appliquent au processus interprétatif dans son ensemble'. Ian Sinclair, on the basis of the statements by the various international tribunals mentioned *supra*, writes that: 'Accordingly, there is now strong judicial support for the view that the rules of treaty interpretation incorporated in the Convention are declaratory of customary international law', I. Sinclair, *supra* n 7, p 19.

[28] See Ago, *YILC*, 1964, vol. I, 765th meeting, p 280, para. 78; see also Verdross, ibid, p 279, para. 61.

[29] We note, as mentioned by Rosenne, that some Articles of the Vienna Convention will indeed require, by their own wording, recourse to preparatory works in a given treaty. He mentions, eg Art. 14(1)(d), which refers expressly to the intent of parties 'as expressed during the negotiation', *YILC*, 1966, vol. I, 872nd meeting, p 220, para. 30.

[30] *Supra* n 27.

[31] This is supposing that such an intent exists. As E. Beckett writes, *supra* n 8:

On sait par expérience que souvent la divergence qui surgit entre les parties à des traités résulte de quelque chose à quoi les parties n'ont jamais songé lorsque le traité a été conclu et que, par conséquent, elles n'avaient absolument aucune intention commune à ce sujet. Dans d'autres cas, les parties peuvent constamment avoir eu des intentions divergentes sur la question qui fait l'objet du différend. Chacune des parties s'est délibérément abstenue de soulever la question, espérant peut être que si elle se posait, le texte adopté donnerait le résultat souhaité par elle.

The representative from Uruguay at the Vienna Conference shared this view, Official Records, Report of the Committee of the Whole, 1st session, 31th meeting, p 170, para. 64, as did the representative of the United Kingdom, ibid, 33rd meeting, p 177, para. 4. See also K. J. Vandevelde who, in a very interesting article, mentions various scenarios where, at the end of the negotiations, the parties probably do not share a common intention on a provision of a treaty: 'Treaty Interpretation from a Negotiator's Perspective', *Transnat'l L*, 1988, p 281.

tribunals.[32] This is not surprising as an interpreter will want to increase the persuasiveness of his or her analysis by pointing out that preparatory works accord with his or her reasoning.[33]

11. In fact, these means, formally secondary, can in reality have a decisive influence on the interpreter.[34] In this regard, Rosenne comments that, since these means are argued by the parties at the same time as the means provided for in Article 31, it was coming 'close to a legal fiction' to pretend that they could never influence at the outset the meaning given to a provision:

> It was impossible to know by what processes judges reached their decisions and 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 they stated to be clear from its text, but which, nevertheless, as the pleadings in fact showed, was not so.[35]

12. To measure the real impact of preparatory works is not an easy task. What should an interpreter do if, when looking into preparatory works to confirm his or her interpretation, he or she discovers that there is not a concordance, but, indeed, a difference between the ordinary meaning and the meaning found in the preparatory works?[36] One author suggests that, in this situation, the interpreter should opt for the clear meaning arrived at by virtue of Article 31.[37] On the other hand, Judge (as he then was) Schwebel, notes, in a decision where he was dissenting, that this question is left open by Article 32. In his view, preparatory works should not be discarded only because they contradict a text that, on the face of it, appears clear: '[t]he *travaux préparatoires* are no less evidence of the intention of the parties when they contradict as when they confirm the allegedly clear

[32] E. Canal-Forgues, *supra* n 21, pp 910 and 915. See *Legality of Use of Force* (*Serbia and Montenegro v Canada*), *supra* n 23, para. 102; *Sovereignty over Pulau Litigan and Pulau Sipadan* (*Indonesia/Malaysia*), *supra* n 23, para. 53; *Arbitral Award of July 31 1989* (*Guinea-Bissau v Senegal*), *supra* n 23, p 72, para. 54; *Territorial Dispute* (*Libyan Arab Jamahiriya v Chad*), *supra* n 23, p 27, para. 55; *Border and Transborder Armed Actions* (*Nicaragua v Honduras*), *ICJ Reports 1988*, p 85, para. 37; Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories*, 4 July 2004, paras 95 and 109, available at: <http://www.icj-cij.org/docket/files/131/1671.pdf>; in the case *LaGrand* (*Germany v United States of America*), 27 June 2001, para. 104, available at: <http://www.icj-cij.org/docket/files/104/7736>, the Court, having interpreted a provision according to Art. 31, nonetheless added that the relevant preparatory works had not prevented its conclusion. In the case *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, supra* n 23, pp 21–2, paras 40 and 41, the Court examined various elements in the preparatory works to try to confirm its interpretation but found that none were conclusive.

[33] Ch. de Visscher, *supra* n 3, p 117.

[34] E. Canal-Forgues, *supra* n 21, pp 911–12.

[35] See Rosenne, *YILC*, 1964, vol. I, 766th meeting, p 283, para. 17. For a similar view see also de Luna, *YILC*, 1964, vol. I, 766th meeting, p 285, para. 40. However, see Aréchaga, who, while acknowledging this difficulty, was nevertheless of the view that preparatory work should only play a secondary role:

> As for the preparatory work, it was not always easy to draw the line between confirming a view previously reached and forming a view, but that depended on the inner mental processes of the interpreter. However, the distinction was necessary and would reinforce the Commission's 1964 thesis that the terms of a treaty might possess an objective meaning of their own which was independent of the psychological intentions of the authors (*YILC*, 1966, vol. I, 872nd meeting, p 201, para. 41).

[36] See a mention of this scenario in H. Kindred et al, *International Law Chiefly as Interpreted and Applied in Canada* (5th edn, Toronto: Emond Montgomery, 1993), p 103 and D. J. Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell, 1998), p 819.

[37] E. Canal-Forgues, *supra* n 21, p 913.

meaning of the text or context of treaty provisions'.[38] Others are strongly of the view that the interpreter, on the basis of the good faith principle formulated in Article 31, must 'correct' the ordinary meaning.[39] Finally, another author takes a more pragmatic approach, suggesting that if an interpreter prefers a meaning found in preparatory works, he or she will, without acknowledging it, revise his or her analysis in order to adopt the meaning revealed by the preparatory works.[40] Similarly, if he or she prefers the 'ordinary' meaning resulting from Article 31, he or she could intentionally omit to mention preparatory works in his or her decision, even if the parties have expressly based some of their pleadings on these works![41]

13. The possibility of contradictions between the ordinary meaning of a provision and preparatory works is one of the reasons why the Commission considered not providing for recourse to supplementary means to confirm the meaning of a provision.[42] However, it ultimately rejected this approach on the basis that international practice allowed the interpreter to look at other means to support his or her initial interpretation.[43] This question was raised again at the Vienna Conference where some delegations requested, without success, the deletion of the 'confirming function' of the supplementary means.[44]

14. In sum, States agreed on the following compromise: not to place supplementary means of interpretation on an equal footing with the means listed in Article 31, but, nevertheless, permit the interpreter to have recourse to them in cases where he or she would find it useful,[45] even if they understood that, in some instances, an interpreter

[38] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, *supra* n 23, p 39. See also 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* (The Hague: Kluwer Law International, 1996), pp 173–81.

[39] A. Aust, *supra* n 9.

[40] M. K. Yasseen, *supra* n 1, p 80.

[41] This scenario, as well as the one previously mentioned, are discussed in K. J. Vandevelde, *supra* n 31, pp 296–7.

[42] See the doubts expressed by some commissioners, eg Ruda, *YILC*, 1964, vol. I, 766th meeting, p 283, para. 11: 'If the general rule of article 70 was applied and a clear conclusion was reached there was no need for confirmation. The need for recourse to other methods arose only if the matter was unclear'. See also at *YILC*, 1964, vol. I, 769th meeting, p 314, para. 63 as well as Rosenne, *YILC*,1964, vol. I, 769th meeting, p 314, para. 64.

[43] Report of the ILC to the General Assembly, *YILC*, 1964, vol. II, p 175, para. 15 and Report of the ILC to the General Assembly, *YILC*, 1966, vol. II, pp 222–3, para. 18. See also the Third Report of Waldock, 1964, vol. II, p 58, para. 20 and his comments at *YILC*, 1964, vol. I, 767th meeting, p 328, para. 65; see also Ago, *YILC*, 1964, vol. I, 766th meeting, pp 287–8, para. 64. However, the Commission decided not to use the term 'verify' instead of 'confirm' because, as explained by Waldock, this 'would have gone near to bringing preparatory work in the first processes of interpretation', Official Records, Report of the Committee of the Whole, 1st session, 33rd meeting, p 184, para. 69.

[44] See the statement by the representative of Poland, Official Records, Report of the Committee of the Whole, 2nd session, 13th meeting, p 58, para. 68; see also the intervention by the representative of Portugal, Official Records, Report of the Committee of the Whole, 1st session, 33rd meeting, p 183, para. 56 who also mentioned this hypothesis in connection with the circumstances existing at the time of the conclusion of the treaty.

[45] See the Report of the Commission to the General Assembly, *YILC*, 1966, vol. II, p 220, para. 10:

> At the same time, it pointed out that the provisions of Article 28 by no means have the effect of drawing a rigid line between the 'supplementary means' of interpretation and the means included in article 27. The fact that article 28 admits recourse to the supplementary means for the purpose of 'confirming' the meaning resulting from the application of article 27 establishes a general link between the two articles and maintains the unity of the process of interpretation.
>
> This compromise made the task of the Special Rapporteur easier by the time of the Conference when he had to justify the supplementary role of preparatory works to confirm a text. Referring to this function of preparatory

could be tempted to confer more weight to these means than that contemplated in Article 32.[46]

Determining the meaning in cases where the meaning is ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable

15. The possibility for an interpreter to determine the meaning of a provision in a treaty by having recourse to supplementary means is limited to cases where the meaning is ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

The 'ambiguous or obscure' meaning

16. Referring to McNair, Myres McDougal, as representative of the United States at the Vienna Conference, reminded other delegates that: '[words] may be clear to one man and not clear to another, and frequently to one or more judges and not to their colleagues'.[47] Article 32 comes to the rescue of the latter. When an interpreter, using the means of Article 31, is not able to extract a sufficiently clear and precise meaning from a provision, he or she can have recourse to the method found in Article 32.[48]

17. The interpreter may also have recourse to the supplementary means if he or she is confronted with two contradictory interpretations.[49] However, this is not automatically so since, as explained by the Commission, 'when a treaty is open to two interpretations

works, he explained that the Commission certainly did not have the 'intention of discouraging automatic recourse to preparatory work for the general understanding of a treaty', Official Records, Summary Records of the plenary meetings and the Committee of the Whole, 1st session, 33rd meeting, p 184, para. 69.

[46] K. J. Vandevelde, *supra* n 31, p 296, explains this dilemma well:

it is unclear that courts in practice really adhere to international law as codified in articles 31 and 32 of the Vienna Convention. The cornerstone of the Vienna Convention is its requirement that courts refrain from inquiring into the parties' actual intentions if the provision to be interpreted is clear on its face. The Vienna Convention does allow a court to refer to the negotiating history, however, even when the treaty text is clear, in order to confirm its interpretation—a rule that borders on the absurd. If the meaning is clear, a court need not confirm it, and examining the negotiating history serves no point. If a court examines the negotiating history anyway but in fact disconfirms the plain meaning, the court has no basis for following the interpretation that the history reveals. This absurdity is not manifest in practice because courts probably scrutinize the negotiating history whether the text seems clear or not. If the negotiating history supports a court's first impression, then the court labels the text as clear and can cite the negotiating history as confirming that meaning in accordance with article 32. If the negotiating history disconfirms the court's first impression, it can disregard it and cite the negotiating history in accordance with article 32. Of course, this procedure is contrary to the law as codified in articles 31 and 32, under which the negotiating history cannot vary the meaning of a clear textual provision.

See also 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 Coll Int'l & Comp LR*, 1991, p 129.

[47] Official Records, Report of the Committee of the Whole, 1st session, 31st meeting, p 167, para. 41; cf Lord A. McNair, *supra* n 13, p 372.

[48] Article 32 states that the interpreter 'may' have recourse to the supplementary means to determine the meaning. However, it seems that if an interpreter has not been able to find an acceptable meaning through the use of Art. 31, he or she has no other choice but to 'have recourse' to Art. 32.

[49] U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law As Expressed in the 1969 Convention on the Law of Treaties* (Dordrecht: Springer, 2007), p 45:

Saying that the meaning of a treaty is 'ambiguous' is tantamount to saying that the first-order rules of interpretation laid down in international law can be used to support two conflicting interpretation rules. If a meaning is 'obscure,' it means that none of the first-order rules of interpretation laid down in international law are applicable.

one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted'.[50]

18. In practice, one finds very few cases where international tribunals have concluded that the rule of interpretation in Article 31 led to an ambiguous or obscure result.[51]

A result 'manifestly absurd or unreasonable'

19. If the result of an interpretation by virtue of Article 31 is 'manifestly absurd or unreasonable' the interpreter will have recourse to the supplementary means of Article 32.[52] As noted by Corten, the object or purpose of a provision will often be the primary l criteria, although not the only one, to determine if a reading of a text that, in itself, appears reasonable, leads to an unreasonable result.[53] He reminds us that the ICJ, in the case of the *Temple of Preah Vihear* (Preliminary Objections), rejected an interpretation which, although based on the text, led to an absurd or unreasonable result when the purpose of

[50] Report of the Commission to the General Assembly, *YILC*, 1966, vol. II, p 219, para. 6.

[51] See E. Canal-Forgues, *supra* n 21, p 915. This is somewhat surprising as one would expect that a skilled interpreter could find an ambiguity since a term is generally susceptible to having more than one 'ordinary' meaning as noted by Vandevelde, *supra* n 31, pp 287–8; see also A. Aust, *supra* n 9, p 230: 'For multilateral treaties, the greater the number of negotiating States, the greater is the need for imaginative and subtle drafting to satisfy competing interests and concerns. The process inevitably produces some wording that is unclear or ambiguous'. See also R. Sullivan, *Driedger on the Construction of Statutes* (3rd edn, Toronto: Butterworths, 1994), pp 430–1, who observes the same phenomena in legislative interpretation. In the case of *Sovereignty over Pulau Litigan and Pulau Sipadan* (*Indonesia/Malaysia*), *supra* n 23, para. 53, the Court noted the ambiguity of the words 'across the Island of Sebittik'. According to Malaysia, this expression was only meant to delimit the land territory of the island in question while Indonesia was of the view that the intent was to delimit beyond it. However, the Court did not endorse either of these competing interpretations. It limited itself to comment that:

> the word is not devoid of ambiguity and is capable of bearing either of the meanings given to it by the Parties. A line established by treaty may indeed pass 'across' an island and terminate on the shores of such island or continue beyond it.

See also the decision of a Panel of the Dispute Settlement Mechanism of the World Trade Organization (WTO), in the case of *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products,* 3 May 2002, WT/DS207/R, para. 7.35, where it concluded that the text and context for the words 'variable import levy' and 'minimum import price', included in a note to Art. 4.2 of the Agreement on Agriculture,

> do not enable us to determine the meaning of those terms without ambiguity. The determination of their meaning should therefore include an analysis which 'go[es] beyond a purely grammatical or linguistic interpretation.' Pursuant to Article 32 of the Vienna Convention, we will take recourse to supplementary means of interpretation.

Note, however, that the Appellate Body decided subsequently that the panel did not make proper use of Art. 32. See WT/DS207/AB/R, para. 230. The Appellate Body found however an ambiguity in the cases of *United States—Measures Affecting the Cross Border Supply of Gambling and Betting Services*, 7 April 2005, WT/DS285/AB/R, para. 195, stating that the application of the general rule of interpretation found in Art. 31 did not allow it to determine if the expression 'other recreational services' included 'gaming and betting'. It had to have recourse to supplementary means to answer that question.

[52] See U. Linderfalk, *supra* n 49, p 45: 'If a meaning is "absurd or unreasonable," it means that it cannot be rationally defended'.

[53] O. Corten, *L'Utilisation du 'raisonnable' par le juge international* (Brussels: Bruylant, 1997), p 53. See also Waldock, *YILC*, 1966, vol. I, 873rd meeting, p 206, para. 39, who gives as an example 'a drafting error which might give, as a matter of language, a perfectly possible interpretation, but one which was "absurd" in the light of the object of the particular treaty'.

the text was considered.[54] In some cases, the unreasonable character of an interpretation will be revealed by elements other than the purpose. This would be the case, for example, of the interpretation of a rule that would contradict another rule agreed to by the same parties.[55]

20. Given that the interpreter is guided by the object and purpose of the treaty, it is only on rare occasions that he or she would need to resort to supplementary means to find a reasonable meaning.[56] Moreover, the formulation of Article 32 diminishes further its usefulness since it only allows using supplementary means when a result is 'manifestly' absurd or unreasonable. The Commission was of the view that this requirement reflected the practice of international tribunals at the time. It noted that the relatively small number of cases in which tribunals have recognized this exception indicates that they consider it as 'limited to cases where the absurd or unreasonableness of the "ordinary" meaning is manifest'.[57]

C. Supplementary means

21. The drafters of Article 32 did not provide an exhaustive list of supplementary means, as they wanted the interpreter to have wide discretion in determining which means, in each given case, would help to reveal or confirm the meaning of a provision.[58] They identified two means that States and international tribunals have used frequently in the past,[59] preparatory works and the circumstances surrounding the conclusion of a treaty, but did not exclude that the interpreter could refer to other relevant means.

[54] *ICJ Reports 1961*, pp 32 and 33. In that case Thailand had renewed a declaration of acceptance of jurisdiction of the PCIJ, a court that no longer existed at the time of the renewal. Cambodia argued that this declaration was invalid and could not confer jurisdiction to the ICJ. The Court rejected this argument, noting that: 'Thailand, which was fully aware of the non-existence of the former Permanent Court, could have had not other purpose…than to recognize the compulsory jurisdiction of the present Court…' In the case of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, *supra* n 23, p 19, para. 35, the Court had to determine the meaning and scope of the following sentence: 'Once that period has elapsed, the two Parties may submit the matter to the International Court of Justice.' In reaching the conclusion that the segment of the sentence 'Once that period has elapsed' necessarily implied a right by a party to seize the Court on its own, the Court wrote: 'Any other interpretation would encounter serious difficulties; it would deprive the phrase of its effect and could well, moreover, lead to an unreasonable result'. See O. Corten, *supra* n 53.

[55] Reuter, *YILC*, 1966, vol. I, 771st meeting, p 215, para. 22.

[56] Tsuruoka, *YILC*, 1966, vol. I, 872nd meeting, p 200, para. 28; Rosenne, *YILC*, 1966, vol. I, 873rd meeting, p 205, para. 30. Waldock, *supra* n 53, acknowledges that in practice there will be very few cases where the interpretation will lead to a result that is either manifestly absurd or unreasonable but he is of the view that it was nevertheless necessary to provide for this possibility.

[57] Report of the ILC to the General Assembly, *YILC*, 1966, vol. II, p 223, para. 19.

[58] M. K. Yasseen, *supra* n 1, p 79:

Cet article ne donne pas d'énumération exhaustive de ces moyens; il en mentionne les plus importants, les travaux préparatoires et les circonstances dans lesquelles le traité a été conclu. Il nous semble que cette technique s'accommode du rôle secondaire assigné aux moyens complémentaires. Il est utile de donner à l'interprète, dans un cas qui se relève compliqué, une certaine liberté dans le choix des moyens qui pourraient jeter quelque lumière sur le sens du traité.

[59] See Ago, *YILC*, 1966, vol. I, 872nd meeting, p 202, para. 50, who noted that it was desirable to identify expressly preparatory works and the circumstances surrounding the conclusion of a treaty as these are the 'most often used'.

Preparatory works

Their nature

22. As the Commission explained, it did not propose a definition of 'preparatory work' in order to prevent 'the possible exclusion of relevant evidence'.[60] It therefore left the task to States and tribunals to identify in each case the documents that could qualify as such.[61]

23. While it is true that, as observed by Rosenne, what constitutes preparatory work depends 'on the circumstances of each case',[62] there is no doubt that elements that are intrinsic to the negotiating process leading to a treaty will generally be accepted as preparatory work. These elements include the following: official records of the negotiations between the parties;[63] draft texts proposed during the negotiation;[64] statements made by States representatives during the debates;[65] diplomatic exchanges;[66] and interpretations formulated by the president of a drafting committee and not contested.[67] In some cases, the ICJ has also referred to maps used during the negotiations.[68]

24. From the basis of the list *supra*, one could easily conclude that an agreement with regard to a treaty concluded by the parties prior to the conclusion of the treaty in question should also be considered as preparatory work. However, it is possible that this kind of agreement can be considered, in a given case, as part of the context of the treaty, as defined in Article 31. This was the view of the ILC,[69] which interpreted as such the

[60] Report of the ILC to the General Assembly, *YILC*, 1966, vol. II, p 223, para. 20. However, given that the means expressly mentioned in Art. 32 are not meant to be exhaustive, the fears of the Commission are probably exaggerated since the interpreter could consider other relevant evidence as 'other supplementary means'. See *infra*.

[61] As noted by Linderfalk, *supra* n 49, p 241:

> The reasonable conclusion is that the parties to the Convention simply wished to allow negotiating States, by freely choosing the particular making process, to determine themselves what the meaning of 'the preparatory work' would be *for their specific treaty*.

[62] *YILC*, 1966, vol. I, 872nd meeting, p 201, para. 35; see also Linderfalk, *supra* n 49, p 240:

> The problem is that in international law, no general rule can be found stating the procedure for making a treaty. In principle, negotiating States are free to choose the mode that they consider best suited to their particular task.

[63] D. J. Harris, *supra* n 36, p 818; A. Aust, *supra* n 9, p 246.

[64] See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, *supra* n 23, pp 21–2, para. 41, where the Court examined, as preparatory work, two draft texts. See also *Avena and Other Mexican Nationals* (*Mexico v United States of America*), *supra* n 23, para. 86; A. Aust, *supra* n 9.

[65] See the statement by the representative of the United Kingdom, Official Records, Report of the Committee of the Whole, 1st session, 33rd meeting, p 177, para. 2.

[66] See *Sovereignty over Pulau Litigan and Pulau Sipadan* (*Indonesia/Malaysia*), *supra* n 23, para. 54.

[67] I. Sinclair, *supra* n 7, p 130; A. Aust, *supra* n 9, p 246.

[68] See eg *Frontier Dispute* (*Burkina Faso v Republic of Mali*), *ICJ Reports 1986*, p 608, para. 100. In this case the Court studied many documents which it considered as preparatory work, including a 'geographical outline' and maps transmitted by letter-telegram. See also *Sovereignty over Pulau Litigan and Pulau Sipadan* (*Indonesia/Malaysia*), *supra* n 23, para. 54.

[69] Report of the ILC to the General Assembly, *YILC*, 1964, vol. II, p 203, para. 13 and Report of the ILC to the General Assembly, *YILC*, 1966, vol. II, p 221, para. 14. See also the Third Report of Waldock, *YILC*, 1964, vol. II, pp 57–8, para. 19. According to the representative of Uruguay at the Vienna Conference, some elements that are now part of the context were traditionally regarded as preparatory work. As a result of the Vienna Convention, agreements of States with regard to some documents can now be considered as part of the context. Official Records, Report of the Committee of the Whole, 1st session, 32nd meeting, p 170, para. 66.

expression 'in connexion with the conclusion of the treaty' in Article 31(2)(a).[70] Yasseen shared this view as long as the agreement was reached close to the date when the treaty was concluded and it was still in force at that time.[71]

25. Can other elements, not directly originating from States' negotiations, be considered as preparatory work? As Linderfalk points out, the question is very relevant in today's mode of treaty-making:

> Contemporary treaty-making processes often involve individuals or groups of individuals—referred to as *special rapporteurs*, *experts-consultants*, *committee of experts*, and so forth—that do not act in the capacity of States. The task with which these persons are assigned is to provide some kind of expert opinion, possibly in the form of a first draft proposal of a treaty, or—if a draft proposal already exists—in the form of proposed modifications.[72]

The most obvious example of a body of experts involved in the treaty process is the ILC.[73] Some publicists, such as Charles de Visscher, have taken a restrictive approach, refusing to accept that documents not emanating from States can be considered preparatory work. They distinguish between the elements that are part of the diplomatic negotiating history, rightly considered as preparatory work, and others that explain the historical origin of the text.[74] Some members of the Commission rejected this restrictive approach on the basis that one should not ignore the work of commissions of experts when it is obvious that the work in question has had a major influence on the final text of a treaty.[75] Many publicists are also of the view that the work of the Commission can be classified as

[70] Ago had suggested, without success, to add to the text the following words: 'and drawn up before or in connection with its conclusion', *YILC*, 1964, vol. I, 766th meeting, p 284, para. 32. See also the commentary on Art. 31 in this work.

[71] M. K. Yasseen, *supra* n 1, p 37.

[72] U. Linderfalk, *supra* n 49.

[73] D. J. Harris, *supra* n 36, p 818, suggests that, in some cases, the work of independent expert bodies can be considered as preparatory work, in particular those of the ILC and the Human Rights Commission (since replaced by the Human Rights Council). It seems incorrect, however, to qualify this latter Commission as an expert body as it was composed of States representatives. Having said that, one could still ask the question whether the debates and resolutions of this Commission could be considered, in some cases, as preparatory work. The ICJ seems to have answered this question affirmatively in an Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories*, *supra* n 32, para. 109 when, to determine the scope of Art. 2 of the International Covenant on Civil and Political Rights, it relied on a discussion of a preliminary draft of the Covenant in the Human Rights Commission to confirm its interpretation.

[74] Ch. de Visscher, *supra* n 3, p 115.

[75] See Yasseen who, as a member of the Commission, considered as preparatory work: 'all the material which the parties had had before them when drafting the final text'. He adds the following concerning the treaties that resulted from the work of the Commission:

> The text of a convention of the kind in question was adopted by a conference of plenipotentiaries which took the Commission's draft as a basis for discussion. The articles and the accompanying commentaries were discussed at some length and it quite often happened that one of the Commission's articles was adopted as it stood…(*YILC*, 1966, vol. I, 873rd meeting, p 226, para. 25)

See also M. Yasseen, *supra* n 1, p 84. Articles 31 and 32 of the Convention are a case in point as their wording is essentially the one recommended by the Commission. For a different view see Rosenne, *YILC*, 1966, vol. I, 872nd meeting, p 222, para. 35, who raised the two following arguments: 'the first was that the Commission's drafts were rather remote from diplomatic conferences and the second that the members of the Commission did not represent States, but acted in their personal capacities'. For an approach in between those taken by Yasseen and Rosenne, see Tunkin who, while accepting that the work of the Commission can be considered as preparatory work, was of the view that one must first have recourse to the documents produced during the diplomatic conference leading to a treaty since the conference could have decided not to adopt or substantially to modify a project of articles prepared by the Commission, *YILC*, 1966, vol. I, 873rd meeting, p 227, para. 26.

preparatory work.[76] In addition, following the adoption of the Convention, the ICJ has referred to comments by the Commission to interpret some of its provisions[77] as well as the provisions of other treaties.[78] The question remains, however, as to whether the work of other groups of experts can be considered as preparatory work. As long as a clear link is established between the work of an expert group and the final wording agreed in a treaty, it is difficult to see on what basis one could refuse to consider this work as preparatory work while accepting the work by the ILC as such.[79] Assuming that this is the case, it is in any event arguable that one could justify having recourse to this work as 'other supplementary means of interpretation' while quite possibly conferring on it less weight than documents emanating directly from negotiations between States.

26. In some cases the Court has considered as preparatory work documents prepared by States for internal purposes as, for instance, a State's own summary of a treaty negotiation.[80] However, as noted by a publicist, this practice by the Court is debatable since States did not refer directly to these documents during the negotiating process.[81]

27. Moreover, to be considered as preparatory work, a document also had to have been in existence before the adoption of a treaty.[82] Charles de Visscher proposed adding one more component to what constitutes preparatory work. He explained that the interpreter who refers to preparatory works is looking for the common intention of the parties. Consequently, a State's declaration should only be taken into account if other States have acquiesced to it.[83] A broader interpretation, which, it is submitted, is more consistent with practice, is to consider as preparatory work all documents created during the negotiations while conferring more weight to the work that better demonstrates the common intention of the parties.[84] For instance, it is likely that preparatory works that immediately preceded the adoption of a treaty will be given particular attention. In other words, one must distinguish between the elements forming the whole of the

[76] See eg A. Aust, *supra* n 9, p 198; Linderfalk, *supra* n 49, pp 17 and 242–3. Likewise, the representative of the United States at the Vienna Conference seemed to share the view that the ILC debates would be part of the preparatory work of an eventual Convention on the Law of Treaties. Official Records, Report of the Committee of the Whole, 1st session, 31st meeting, p 168, para. 45.

[77] *Kasikili/Sedudu Island* (*Botswana/Namibia*), *ICJ Reports 1999*, p 1075, para. 49. Moreover, in their Individual Opinions, some judges of the ICJ have qualified the work of the ILC as preparatory work. See the Dissenting Opinion of Judge Schwebel in *Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, *supra* n 23, pp 28–9, where he refers to the debates within the Commission as preparatory work to the Vienna Convention on the Law of Treaties; see the Dissenting Opinion of Weeramantry in *Kasikili/Sedudu Island* (*Botswana/Namibia*), *supra* n 23, pp 1159–61, paras 23–5.

[78] See *Territorial and Maritime Dispute* (*Nicaragua v Honduras*), 8 October 2007, para. 280, available at: <http://www.icj-cij.org/docket/files/120/14075.pdf>.

[79] Linderfalk, *supra* n 49, p 17 includes within 'preparatory work' documents produced outside the diplomatic negotiations 'insofar as states can arguably be said to have had the possibility and a reasonable cause to comment upon them'.

[80] *Territorial Dispute* (*Libyan Arab Jamahiriya v Chad*), *supra* n 23, pp 27–8, para. 55. In the case *Border and Transborder Armed Actions* (*Nicaragua v Honduras*), *supra* n 32, pp 86–7, para. 39, the Court mentioned the report on the Conference of Bogota prepared by the delegation of the United States.

[81] M. Ris, *supra* n 46, p 133. This means that these documents are outside the definition of preparatory work documents that are, eg, subsequently part of the States' ratification process. See Linderfalk, *supra* n 49, pp 244–5 and 249. However, this type of document could be qualified as 'other supplementary means' and could be particularly relevant when it contradicts a position put forward by a State which drafted it. See *infra.*

[82] M. K. Yasseen, *supra* n 1, p 83; M. Ris, *supra* n 46, p 112.

[83] Ch. de Visscher, *supra* n 3, p 115.

[84] E. Canal-Forgues, *supra* n 21, p 907.

preparatory work and the weight to be given to each of these elements. A State's declaration during the negotiations can be included among the preparatory work[85] but its influence on the interpretation could be limited. This approach is consistent with the division suggested by Articles 31 and 32. Article 31 takes into account the elements on which the parties agreed. All other elements which are not agreed by the parties but could nevertheless help to understand the intent of the parties fall within the ambit of Article 32.

28. Should it be an additional attribute of preparatory works that they are in writing? While this is normally the case,[86] there is no reason why, in our view, with the advance of technology and the greater transparency in international negotiations, a State should be prevented in the future from submitting as preparatory work the video of a negotiating committee's session.

Their value and opposability

29. It would have been somewhat surprising if there had not been an express mention of preparatory works in Article 32. States could not ignore a means of interpretation that they invoke frequently during disputes on the interpretation of treaties. In practice, these works are the only ones that can explain, although often imperfectly, the evolution of a treaty's provision.[87] In addition, the material form they take lends by itself a certain weight to preparatory works. Like the text of a treaty, and as opposed to other means as, for instance, State practice and the circumstances existing at the time of the conclusion of a treaty, preparatory works are concrete (summaries, series of written proposals, etc.). Their tangible nature probably encourages the interpreter to consider them carefully. It also explains in part the need the interpreter often has to justify his or her decision to discard them.[88]

30. It is interesting to note that, at least in one case,[89] the ICJ has considered the relevant preparatory work not for what it revealed but rather for its silence on a particular issue. As a result, the Court rejected a suggested interpretation of a provision by relying in part on the fact that this interpretation was never put forward during the negotiations. However, the Court must be careful when adopting this approach since, as will be seen *infra*, preparatory work rarely reflects the entire negotiation.

[85] See the representative from France, who, in arguing that preparatory work should play a secondary role, considered some of them as 'unilateral' documents. Official Records, Report of the Committee of the Whole, 1st session, 32nd meeting, pp 175–6, para. 47. See the decisions of the Supreme Court of Canada in the cases *Canada v Ward* [1993] 2 SCR 689 and *Pushpanathan v Canada* [1998] 1 SCR 982, in which the court took into account the statements by States' representatives during the negotiations for the adoption of the 1951 Refugee Convention to interpret some provisions of the Convention.

[86] A. Aust, *supra* n 9, p 246.

[87] See Ago, *YILC*, 1964, vol. I, 766th meeting, p 301, para. 65; R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Harlow: Longman, 1992), p 1277.

[88] Of course, States also expect international tribunals to explain why they are not convinced of the relevance of 'preparatory work' in a given case. See Ch. de Visscher, *supra* n 3, p 117, where he writes:

Un jugement n'est pas la démonstration d'un théorème de géométrie. Sa valeur convaincante en fait tout le prix et, pour y atteindre, il lui faut tenir compte de l'argumentation des plaideurs. La Cour ne peut pas laisser sans réponse une argumentation largement appuyée sur les travaux préparatoires; elle se doit de la rencontrer pour peu qu'elle soit plausible, tant pour achever de former sa conviction personnelle que par égard pour les gouvernements représentés devant elle.

[89] *Oil Platforms* (*Islamic Republic of Iran v United States of America*), *supra* n 23, p 814, para. 29.

31. Many States become parties to multilateral treaties to which they were not present during the negotiating stage. Are the preparatory works opposable to these States? The ILC has expressly rejected the non-participation to the drafting of a treaty as a justification for leaving aside preparatory work. It reasoned, notably, that any State that wishes to adhere to a treaty can ask for the production of these works.[90] Consequently, it did not suggest an exception of this nature in Article 32, stating that the decision of the PCIJ in the *Territorial Jurisdiction of the International Commission of the River Oder* did not reflect State practice. In this case the PCIJ refused to have recourse to preparatory work in which three of the States to the dispute had not participated.[91] Therefore, Article 32 does not allow for different modes of interpretation depending on whether States have or have not participated in the drafting of a treaty.[92] However, it would be unfair, as explained by publicists[93] and as implicitly acknowledged by the Commission,[94] to oppose to a State preparatory works to which it would have been refused access or the existence of which would have been hidden from it.[95]

Why are they supplementary?

32. Many of those in the ILC, as well as in the Vienna Conference, who were opposed to conferring a primary role to preparatory works did so on the basis that they were not often conclusive. They commented that, in the majority of cases, the examination of these works did not shed more light on a controversial provision.[96]

[90] Report of the ILC to the General Assembly, *YILC*, 1964, vol. II, p 205, para. 17. On this issue Rosenne observes that 'With regard to multilateral treaties, his own experience suggests that States subsequently acceding to a treaty did not show any hesitation in making use of the preparatory work done at a conference in which they had not participated', *YILC*, 1966, vol. I, 872nd meeting, pp 200–1, para. 34.

[91] *Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ, Series A, no. 23, p 42.

[92] See M. K. Yasseen, *supra* n 1, p 89. We note that some writers, despite the comment by the ILC, are nevertheless of the view that preparatory works cannot be used against States that were not part of the negotiations. See eg J. Combacau and S. Sur, *supra* n 27, p 177.

[93] M. K. Yasseen, *supra* n 1, pp 89 and 90; E. Canal-Forgues, *supra* n 21, p 906; Linderfalk, *supra* n 49, pp 243–4.

[94] In its report to the General Assembly, the Commission mentions, as supplementary means, preparatory works that, without having been published, were nevertheless accessible. Report of the ILC to the General Assembly, *YILC*, 1966, vol. II, p 223, para. 20.

[95] See, among others, the view of Rosenne that only 'published and available preparatory work…' and not 'other material not made available before the State concerned became a party to the treaty' are opposable: *YILC*, 1966, vol. I, 872nd meeting, p 201, para. 34; see also Castrén, *YILC*, 1964, vol. I, 766th meeting, p 285, para. 34; A. Aust, *supra* n 9, p 247: 'In the case of a multilateral treaty which is open to states which did not take part in its negotiation, the *travaux* can probably be invoked in a dispute to which they are parties, *at least if they have been published or were otherwise available before those states became parties*' (emphasis added). See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, *supra* n 23, p 22, para. 41 in which Qatar argues that a draft text prepared by Saudi Arabia could not be considered as preparatory work on the basis that 'it was never sent the draft in question'. The Court noted Qatar's objection but did not reply as it did not rely on the text in question. In his Dissenting Opinion, Judge Schwebel, who wanted to rely on preparatory work, noted that the works in question were neither secret nor known by only one of the parties: ibid, p 39.

[96] See Rosenne, *YILC*, 1966, vol. I, 872nd meeting, p 200, para. 33, who, while supporting the recourse to preparatory works, notes that in some cases these prove 'quite inconclusive'. See also the representative from Uruguay at the Vienna Conference who observed that 'there was generally something in the preparatory work that could be found to support almost any contention', Official Records, Report of the Committee of the Whole, 1st session, 31st meeting, p 170, para. 64; see a similar statement by the representative of Argentina, ibid, 33rd meeting, p 180, para. 25. See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, ibid, p 21, para. 40, where the Court examined elements of the preparatory works in looking for confirmation of its interpretation. However, it did not find these conclusive. Among the publicists, see E. Canal-Forgues, *supra* n 21, p 912; I. Sinclair, *supra* n 7, p 116: 'If the intentions of the parties, or the object or purpose of a treaty, do not reveal themselves from a careful analysis of the text, it is unlikely that the *travaux préparatoires* will shed a pellucid light upon the matter'. See also A. Aust, *supra* n 9.

33. Prima facie, these works are often a composite of States' individual opinions.[97] The work of the interpreter is to determine whether positions are sufficiently similar to demonstrate a common intention, an exercise which is made more difficult if there is a large number of individual statements.[98] In such a case, the recourse to preparatory works, in particular to interpret a provision that was still controversial at the end of the negotiations, could simply confirm the ambiguity, instead of dissipating it.[99]

34. Moreover, some of these States' declarations could have been ignored by others and could have had no influence on the final text. It could also be that a State's initial intention could have evolved during the negotiations and was no longer the same at the time of adoption of the final text.[100] For instance, a State could have been convinced to abandon its original interpretation of a provision because this would be incompatible with another provision adopted during the negotiations.

35. Sometimes also, last-minute negotiations, early in the morning after a sleepless night, can have an impact on the relevance of much of the anterior preparatory work. Moreover, these last-ditch efforts to conclude a negotiation are often undocumented. As noted by a member of the Commission:

> Such amendments sometimes came near to rendering the text meaningless by adding phrases which were inconsistent with the rest. That was why, if the preparatory work was taken into consideration for the purpose of discovering the origin of the ideas underlying a treaty, and if last-minute amendments—sometimes forgotten and not recorded—were disregarded, there was a risk of losing sight of the meaning which the majority had considered as the 'ordinary meaning', and which had enabled the treaty to be adopted.[101]

36. Other reasons that could diminish the relevance of preparatory works and could even justify discarding them completely in some cases include the following:

[97] See the comment by the representative of France, Official Records, Report of the Committee of the Whole, 1st session, 32nd meeting, pp 175–6, para. 47.

[98] M. K. Yasseen, *supra* n 1, p 85.

[99] See Bartoš, *YILC*, 1964, vol. I, 766th meeting, p 287, para. 57; see Ch. de Visscher, *supra* n 3, p 116 who relies on the *Advisory Opinion on the Interpretation of the Convention of 1919 Concerning Employment of Women during the Night*, *supra* n 22, in which the PCIJ concluded from its examination of preparatory works that: 'As many phrases can be found which tell one way as the other'; see also M. K. Yasseen, *supra* n 1, p 85, who explains as follows the ambiguity in some texts:

> il est à remarquer que l'obscurité du texte trouve souvent son origine dans les travaux préparatoires. D'ailleurs, cette obscurité peut n'être que le résultat d'une situation qui n'a pas été clarifiée ou n'a pu être clarifiée lors des négociations. Le désir, combien justifié, de faire réussir une conférence, d'assurer la majorité requise, aboutit parfois à l'adoption de formules vagues ou ambiguës. Il ne faut surtout pas écarter la possibilité qu'à dessein les parties évitent une certaine précision afin de se ménager à l'avenir une échappatoire commode, pour se dérober à une obligation gênante.

See also A. Aust, *supra* n 9, p 247.

[100] See the comment by the representative of the United Kingdom, Official Records, Report of the Committee of the Whole, 1st session, 33rd meeting, p 178, para. 8; M. K. Yasseen, *supra* n 1; M. Ris, *supra* n 46, p 113.

[101] M. Bartoš, *YILC*, 1966, vol. I, 870th meeting, p 199, paras 95–6; see also his comments in *YILC*, 1964, vol. I, 766th meeting, p 287, para. 57. A. Aust, *supra* n 9, p 246, recalls eg how chaotic the negotiations of Art. 3*bis* of the Chicago Convention 1944 were and, as a result, he is of the view that the wording of the provision is not as clear as it should have been.

- the content of in camera discussions or of informal meetings during which compromises were reached, is not reported;[102]
- the record of States' declarations[103] is an approximation, more or less accurate, of what has been said, depending on the quality of the Rapporteurs;[104]
- only the declarations by States having spoken on a topic (or circulated a written proposal) are reported;[105]
- the focus in some preparatory works is more on the negotiating process than on the content of the discussions.[106]

These considerations are still valid today even if preparatory works are only used as supplementary means.

37. Beyond these considerations linked to the trustworthiness of preparatory work, some additional reasons explain why they were relegated to a secondary role. If they had been placed on an equal footing with the text of a treaty, many States might have been tempted to formulate a position which could one day be accepted by an interpreter rather than focusing solely on the need to conclude an agreement. This could have slowed and complicated the negotiating process.[107] These same States, once the treaty concluded,

[102] See the Report of the ILC to the General Assembly, *YILC*, 1966, vol. II, para. 10 where the Commission mentions the gaps existing in negotiating documents; see also de Luna, *YILC*, 1964, vol. I, 766th meeting, p 285, para. 36; see comments by the representative of France, Official Records, Report of the Committee of the Whole, 1st session, 32nd meeting, pp 175–6, para. 47, of the United Kingdom, *supra* n 9, 33rd meeting, p 178, para. 8, of Kenya, ibid, p 180, para. 29; see also M. K. Yasseen, *supra* n 1, p 85; A. Aust, *supra* n 9, who gives as an example the negotiations during the Third Conference of the United Nations on the Law of the Sea, which lasted from 1973 to 1982. In the case *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, *supra* n 23, p 21, para. 41, the Court noted that the preparatory work 'must be used with caution in the present case, on account of their fragmentary nature'. Note, however, that in their Dissenting Opinions, Judge Schwebel (p 39) and Shahabuddeen (p 58) both considered the preparatory works sufficient.

[103] See the comment by the representative of the United Kingdom, Official Records, Report of the Committee of the Whole, 1st session, 33rd meeting, p 178, para. 8.

[104] M. K. Yasseen, *supra* n 1, p 85. On this issue, A. Aust, *supra* n 9, p 246, writes:

> The summary record of a conference prepared by an independent and skilled secretariat, such as that of the United Nations, will carry more weight than an unagreed record produced by a host state or a participating state. However, even the records of a conference served by an independent and expert secretariat will generally not tell the whole story.

See also I. Brownlie, *Principles of Public International Law* (5th edn, Oxford: Oxford University Press, 1998), p 636: 'In the case of multilateral agreements, the records of conference proceedings, treaty drafts, and so on may be confused or inconclusive'.

[105] See the comment by the representative of the United Kingdom, Official Records, Report of the Committee of the Whole, 1st session, 33rd meeting, p 178, para. 8. For a similar point of view see Amado, *YILC*, 1966, vol. I, 873rd meeting, p 207, para. 45 and at the Vienna Conference in his quality as representative of Brazil, Official Records, Report of the Committee of the Whole, 1st session, 32nd meeting, p 191, para. 53.

[106] J. Combacau and S. Sur, *supra* n 27, p 177; in its Advisory Opinion on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, *ICJ Reports 1989*, p 193, para. 46, the Court stated:

> Nor is there really any guidance in this respect to be found in the *travaux preparatoires* of the General Convention. The Convention was initially drafted and submitted to the General Assembly by the Preparatory Commission set up at San Francisco in June 1945; that initial draft did not contain anything corresponding to the present Article VI. That article was added by the Sub-Commission on Privileges and Immunities established by the Sixth Committee to examine the draft, but the contemporary official records do not make it possible to ascertain the reasons for the addition.

[107] See the statement of the representative of the United Kingdom: 'If preparatory work were to be placed on equal footing with the text of the treaty itself, there would be no end to debate at international conferences': Official Records, Report of the Committee of the Whole, 1st session, 33rd meeting, p 178, para. 8. See also the statement by the representative of Madagascar, ibid, p 183, para. 61.

could have, on the basis of the preparatory work, more easily challenged another State's understanding of the 'ordinary' meaning of a text.[108] This kind of situation would be contrary to the objective pursued by the codification of rules of interpretation which is to facilitate the settlement of disputes between States by getting them to agree on common rules of interpretation[109] and not to increase the frequency of differing interpretations.

38. Moreover, some noted the disadvantage for States that wish to accede to a treaty that they have not negotiated to have to consult in detail the preparatory work in order to understand its meaning without ever being certain of the correctness of their interpretation.[110] The supplementary role given to preparatory work allowed these States, and in particular the newly independent ones, to decide to accede to a treaty on the basis, first and foremost, of the treaty's text.

The circumstances of the treaty's conclusion

39. Encompassing all elements existing at the time of the conclusion of the treaty that can illuminate its meaning, the analysis of these circumstances is, according to some authors, often a more efficient means than preparatory work to uncover what the intention of the parties was with regard to the provisions of a treaty.[111] Independent from the internal development process of a treaty,[112] they do not have the technical connotation of preparatory work. The only reason for relying on circumstances is their relevance for understanding the treaty. In turn, the nature of the treaty will help to determine which circumstances should be taken into account.

40. The criteria of contemporaneity of circumstances opens the door to an examination of elements existing at the time the treaty was concluded[113] to explain its

[108] See the statement of the representative of the United Kingdom explaining that he could not support the US proposal to confer the same value to preparatory work as to the text because such a proposal 'was likely to open the door to a never-ending stream of inquiry for would-be interpreters, and to encourage unnecessary disputes', Official Records, Report of the Committee of the Whole, 1st session, 33rd meeting, p 178, para. 10.

[109] See the statement by the representative of the United Kingdom, ibid; see also the statement by de Luna, *YILC*, 1966, vol. I, 871st meeting, p 194, para. 16.

[110] See the statement by the representative of the United Kingdom, *supra* n 108.

[111] P. M. Dupuy, *supra* n 2, p 300; Bartoš, *YILC*, 1964, vol. I, 766th meeting, p 300, para. 57; see also the statement by the representative of Trinidad and Tobago, Official Records, Report of the Committee of the Whole, 1st session, 33rd meeting, p 183, para. 59. This opinion is not however shared by all the publicists. See, among others, M. K. Yasseen, *supra* n 1, p 92: 'Mais ni la doctrine ni la jurisprudence ne semblent être concluantes en ce qui concerne la valeur de ce procédé et l'importance de son rôle dans le processus interprétatif'. See *Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, *supra* n 23, p 23, para. 42, where the Court found that, in this case, the circumstances did not 'provide any conclusive supplementary elements for the interpretation'.

[112] However, as noted by the commentary on Art. 31 in this work, there is sometimes a fine line between the 'context', as defined in Art. 31, and the circumstances surrounding the conclusion of a treaty. See also Linderfalk, *supra* n 49, pp 248–9:

> Many of the phenomena that are merely closed to being defined as the context or the object and purpose of the treaty, and thus cannot be taken into account by appliers using these means of interpretation, can instead be considered at the stage when appliers use 'the circumstances of [the treaty's conclusion].' Examples of such phenomena include the cause for the treaty; agreements relating to the treaty, made in connection with the treaty's conclusion, but which are not governed by international law, or which are not made by all treaties parties; and international agreements entered into either before or in connection with the conclusion of a treaty, but which are not governed by international law, or which are not applicable in the relationship between all the treaty parties.

[113] This does not mean that this circumstance needs to come into existence at the time of the conclusion of the treaty, but rather that it had to exist at the time. As Linderfalk, *supra* n 49, p 246 notes:

provisions.[114] Was the treaty concluded to react to a new situation, to resolve a long-running dispute, to rebalance a military or economic relationship, to prevent disputes by codifying the law? Depending on the nature of the treaty, the interpreter could examine the political,[115] economical,[116] social, or other situation of the parties at the time of conclusion.[117] He or she will determine in each case which circumstances are relevant and what weight to give to them.

41. In a recent decision, the Appellate Body of the WTO rejected a restrictive interpretation of 'circumstances' as understood by Article 32. In that case the European Communities were arguing that only the circumstances that have directly influenced the text of a treaty as well as the intention of the parties could be considered. According to the Appellate Body, the requirement is simply that a circumstance be relevant which means that it allows discerning 'what the common intentions of the Parties were at the time of conclusion with respect to the treaty or specific provision'.[118] The Body was of the view that the following factors can help to determine which circumstances are relevant:[119] the temporal link between the circumstances and the conclusion of the treaty;[120] the type and the legal nature of the circumstances such as an event, a document, or an instrument; real knowledge as opposed to access to knowledge through an official Act or published

Several authors refer to 'the circumstances of [the treaty's] conclusion', both as 'the circumstances of the Parties at the time [it] was entered into…—which comprises, among other things, the cause of the treaty—and as 'the historical background of the treaty.…'

However, as will be seen, the interpreter could, as part of his or her assessment of the relative relevance of a circumstance, take into account the length of time between a circumstance and the conclusion of a treaty. See *infra*.

[114] eg in the case of the *Aegean Sea Continental Shelf* (*Greece v Turkey*), *ICJ Reports 1978*, p 41, paras 100 ff, where the Court considered the circumstances surrounding the conclusion of the 'Brussels communiqué' to conclude that Greece and Turkey had an obligation to negotiate. The Court took a detailed look at the circumstances, examining various events, notably an exchange of notes between the two governments, a statement made in the Turkish National Assembly and many *notes verbale*. See also *Arbitral Award of July 31 1989* (*Guinea-Bissau v Senegal*), *supra* n 23, p 71, para. 53.

[115] In the case *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, *supra* n 23, p 23, para. 42, the Court noted that the main concern of the parties at the time when the minutes were signed was the Gulf War and not the dispute between Qatar and Bahrain. Therefore, the circumstances existing at the time did not help the Court to confirm the meaning of some provisions. On the contrary, the Court stated that the Gulf War 'could explain why the Parties could not reach agreement on a more explicit text'. See also *Sovereignty over Pulau Litigan and Pulau Sipadan* (*Indonesia/Malaysia*), *supra* n 23, para. 56 where the Court examined the nature of the territorial tensions that existed at the time of the conclusion of the treaty.

[116] See eg the decision of the Appellate Body of the Dispute Settlement Mechanism of the WTO in *European Communities—Customs Classification of Certain Computer Equipment*, 1998, WT/DS/68/AB/R, para. 92, where the Body found that the Panel did not sufficiently take into account the classification practice of the European Communities during the WTO negotiations.

[117] In this regard, Bartoš is of the view that: 'In seeking the meaning of terms, the time at which the text has been drawn up and the atmosphere in which the treaty had been concluded must always be taken into account', *YILC*, 1966, vol. I, 872nd meeting, p 202, para. 53.

[118] *European Communities—Custom Classification of Frozen Boneless Chicken Cuts*, 12 September 2005, WT/DS286/AB/R, para. 289.

[119] Ibid, para. 291.

[120] On this issue, see the Appellate Body, ibid, para. 293, which, borrowing in part from a statement by the Panel in the same case, wrote as follows: 'the further back in time that an event, act or other instrument took place, was enacted or was adopted relative to the conclusion of a treaty', the less relevant it will be for interpreting the treaty in question. See also the decision of the Appellate Body in *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, 30 April 2008, WT/DS286/AB/R, para. 54, where it rejected the relevance of a 1960 Group of Experts Report submitted as 'circumstances', noting, among other things, that the treaty to be interpreted, the Anti-Dumping Agreement, had entered into force long after the report.

instrument;[121] the purpose of a document, instrument, or event in relation to a treaty; and the reference to the circumstances during the negotiation of the treaty and their degree of influence on the negotiation.[122] The Body also added that the circumstances in question are not limited to multilateral actions. An act by only one party can be useful to identify the problem that the parties wanted to address.[123]

Other means

42. Even if some authors seem to assert that the supplementary means only include those expressly mentioned in Article 32 (preparatory work and the circumstances of the treaty's conclusion),[124] the text of Article 32 itself does not incorporate any such limit, as it refers to the means as 'including'[125] those two means expressly mentioned. During the Conference, various representatives noted the open-ended character of Article 32.[126]

43. Among other possible means, the Commission[127] and the publicists[128] have mentioned the subsequent practice of States,[129] to the exclusion, however, of a uniform practice by all States as the latter is part of the general rule of interpretation as provided in Article 31(3)(b).[130]

[121] The Appellate Body writes in *European Communities—Custom Classification of Frozen Boneless Chicken Cuts*, ibid, p 117, para. 297:

As far as an act or instrument originating from an individual party may be considered to be a circumstance under Article 32 for ascertaining the parties' intentions, we consider that the fact that this act or instrument was officially published, and has been publicly available so that any interested party could have acquired knowledge of it, appears to be enough. Of course, proof of actual knowledge will increase the degree of relevance of a circumstance for interpretation.

[122] Ibid, p 114, para. 291. This factor seems to suggest that it will sometimes be difficult to determine if documents or instruments are 'circumstances' or 'preparatory work'. In the case *United States—Measures Affecting the Cross Border Supply of Gambling and Betting Services*, *supra* n 51, para. 196, the Appellate Body used as supplementary means 'guidelines' and a classification of products without specifying whether they were preparatory work or circumstances.

[123] Ibid, p 113, para. 289. In this case the Appellate Body included among the relevant circumstances the classification by custom authorities, the custom legislation of the European Communities, as well as the decisions of the European Court of Justice on the topic.

[124] P. M. Dupuy, *supra* n 2, p 300: 'Ils sont au nombre de deux'.

[125] In French: 'notamment'.

[126] See the comment by the representatives of Sierra Leone, Official Records, Report of the Committee of the Whole, 1st session, 32nd meeting, p 174, para. 28 and of Mexico, ibid, 33rd meeting, p 181, para. 39, who stated as follow: 'Although article 28 did not say so explicitly, it was to be understood that in that case the interpreter could also make use of the rules of logic and dialectics, legal maxims and all his legal, historical and sociological knowledge'. See also in the Commission the comment by Reuter, *YILC*, 1964, vol. I, 872nd meeting, p 223, para. 48. See also the decision of the panel in *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products, supra* n 51, p 143 and, more recently in the decision of the Appellate Body in *European Communities—Custom Classification of Frozen Boneless Chicken Cuts*, *supra* n 121, para. 289.

[127] Report of the ILC to the General Assembly, *YILC*, 1964, vol. II, p 204, para. 13. See also the Sixth Report of Waldock, *YILC*, 1966, vol. II, p 98, para. 18.

[128] M. K. Yasseen, *supra* n 1, pp 52 and 80.

[129] See also *European Communities—Custom Classification of Frozen Boneless Chicken Cuts*, *supra* n 121, para. 305:

In our view, it is possible that documents published, events occurring, or practice followed *subsequent to* the conclusion of the treaty may give an indication of what were, and what were not, the 'common intentions of the parties' *at the time* of the conclusion. The relevance of such documents, events or practice would have to be determined on a case-by-case basis.

[130] Article 31(3)(b) mentions 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. A previous version referred to 'all' the parties. However, the Commission, in its report to the General Assembly, explained that:

44. If the subsequent practice of many States can be considered as a valid means by which to understand the meaning of a provision,[131] what of the practice of a single State? It certainly seems that it would be, *a contrario*, relevant in a case where this practice does not correspond with the interpretation put forward by that State.[132] One also has to distinguish between a practice denounced by other States as opposed to one to which they do not react. Obviously, the former does not demonstrate a common intention.[133] In fact, it is more likely that this practice will give rise to a dispute! However, in the latter, it could be that a common intention could be found in the silence of other States. If so, this practice would not be considered as part of the supplementary means, but rather as a subsequent practice as understood in Article 31(3)(b).[134] There will be cases where it is difficult to determine with any certainty whether other States, by their conduct, have opposed or agreed with a subsequent unilateral practice (eg an act performed as part of the ratification process).[135] In such a case the interpreter could consider what weight, relative to all other factors, it should give to this practice.

45. In some cases, the ICJ has considered other treaties concluded before or around the same time as the treaty to be interpreted.[136] However, the Court has not expressly stated that these treaties are supplementary means.[137]

By omitting the word 'all' the Commission did not intend to change the rule.…It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice. (Report of the ILC to the General Assembly, *YILC*, 1966, vol. II, pp 221–2, para. 15)

[131] See Waldock, who specifies that if the subsequent practice 'did not cover a broad group of parties it would, of course, only serve as an indication, and more evidence would be required in support of the alleged interpretation' , *YILC*, 1964, vol. I, 766th meeting, p 282, para. 3.

[132] *Oil Platforms* (*Islamic Republic of Iran v United States of America*), *supra* n 23, p 815, para. 30.

[133] See Ago, *YILC*, 1964, vol. I, 766th meeting, p 282, para. 5. See also A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000), p 195: 'if a clear difference of opinion between the parties exists, the practice may not be relied upon as a supplementary means of interpretation'.

[134] A. Aust, ibid, p 200: 'If a party has made plain its understanding of the meaning of a provision, and it later applies it in that sense without objection, other parties may not be able to insist on a different interpretation. Article 31 §3, b) might also apply'. However, this question is not entirely free of controversy. Some members of the Commission voiced their concern on this issue. For instance, Tunkin was opposed to a draft of Art. 32 in which an individual practice could be considered a supplementary means as he feared that such wording could advantage a strong State against a weaker one which would hesitate to express itself: *YILC*, 1964, vol. I, 769th meeting, p 314, para. 73.

[135] See Linderfalk, *supra* n 49, p 249: 'it is a fact that ratification work often contains information, based on which the applier more fully than otherwise will be able to form an opinion on how the ratified treaty was perceived when adopted'.

[136] See eg *Oil Platforms* (*Islamic Republic of Iran v United States of America*), *supra* n 23, pp 814 and 819, paras 29 and 47; *Border and Transborder Armed Actions* (*Nicaragua v Honduras*), *supra* n 32, para. 280.

[137] See A. Aust, *supra* n 9, p 248. See also Linderfalk, *supra* n 49, p 255, who notes that 'Other times the instrument may be considered a part of "the circumstances of [the interpreted treaty's] conclusion." This is the case, for example, when the interpreted treaty was drafted or designed based on another treaty already in existence'. However, in the Advisory Opinion *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *ICJ Reports 1980*, p 184, Judge Sette-Camara, in his Individual Opinion, referred to agreements previously concluded to confirm his interpretation as preparatory works:

The 'travaux préparatoires' relating to the wording of Section 37 confirm such an interpretation. The formula of Section 37 is a standard text, which appears in a series of similar treaties, going back to an agreement between the Swiss Federal Council and the International Labour Organisation concerning the latter's legal status in Switzerland adopted and signed on 11 March 1946.

Others may have concluded that it is a relevant 'circumstance'.

46. Finally, apart from the *elements* discussed *supra*, publicists also include among 'supplementary means' a number of *rules of interpretation* mostly deriving from domestic law. One finds among them rules familiar to the legal practitioner, such as *contra proferentem*, *ejusdem generis*, and *expression unius est exclusio alterius.*[138]

47. The fact that Article 32 neither includes a specific and exhaustive list of supplementary means, nor criteria to identify what these 'other means' could be, appears in theory to leave wide discretion to the interpreter to determine the relevant means in a given case. However, in practice, international jurisdictions have, to date, shown considerable restraint. They have mostly favoured recourse to preparatory work and, more generally, have used supplementary means to confirm the interpretation of a provision, and only exceptionally to determine its meaning.

YVES LE BOUTHILLIER*

[138] For a detailed analysis of these rules see Linderfalk, *supra* n 49, ch. 9. See also Aust, *supra* n 9, pp 248–9.

* Professor, Faculty of Law, University of Ottawa, Canada.