

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.

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A. Purpose and Function

Art 32 deals with the use of supplementary means in the process of treaty interpretation and with the relationship of that use to the general rule of interpretation laid down in Art 31. The provision therefore basically determines the circumstances under which such means may be invoked in treaty interpretation, what weight is to be given to them and how they relate to the other rules of interpretation. The core issue is what **information and material outside the text of a treaty** can be brought into the process of interpreting it, and how this is done *lege artis*.¹ In this respect, Art 32 corresponds to Art 31 paras 2 and 3, which also refers to extrinsic material in order to include them into the context of the treaty, whereas here the identified material is given a lesser value as being merely supplementary.

The most commonly used and most controversial of those means is, of course, the **preparatory work** of a treaty, which is commonly referred to in its French version as “*travaux préparatoires*”. The restrictive purpose of Art 32 relates above all to that interpretative *topos*, it is labelled a supplementary means of interpretation in order to ensure that recourse to preparatory work is not used as an alternative,

¹R Gardiner Treaty Interpretation (2008) 302.

autonomous method of interpretation, distinct from the general rule.² The main reason for this general scepticism as to the interpretative value of *travaux* seems to be that they are usually seen as being often incomplete and misleading, thus by their nature less authentic than the other elements of interpretation.³

- 3 The foremost purpose of Art 32 is, therefore, to make clear that preparatory work in principle has nothing but a **supporting role** in treaty interpretation. It is supposed to assume its interpretative function only after the application of the general rule, *ie* after the application of the whole of Art 31. Since the role which preparatory material can play in the process of interpretation marks the essential difference between the textual and the “intentions” approaches to treaty interpretation, the restrictive design of Art 32 characterizes the provision as a further confirmation of the fact that the Vienna rules of interpretation are clearly based on the textual approach (→ Art 31 MN 3 and 38). This supplementary value of preparatory work is usually taken to be **part of the customary law character** of the Vienna rules of interpretation (→ Art 31 MN 6).⁴
- 4 As part of treaty and customary law, the rule laid down in Art 32 is a **dispositive norm**, so that the parties to a given treaty, acting in consent, may opt to decide otherwise and agree that for the interpretation of their treaty the use of preparatory work is, for example, to play a more important role. Such can also be stipulated in a multilateral convention, as is done, for example, in Art 14 para 1 lit d VCLT, which binds the valid treaty consent of a State to an intention “expressed during the negotiation”.

B. Historical Background and Negotiating History

- 5 The restrictive use of *travaux préparatoires* in treaty interpretation has a long history in the practice of international law. One of the most prominent *dicta* in this respect can be found in the *Lotus* judgment of the PCIJ where the Court **established the merely subsidiary value** of the preparatory work by holding that “there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself.”⁵ The ICJ in its early case law explicitly referred to that restrictive approach and adopted it.⁶ The early international jurisprudence further

²*Sinclair* 116.

³*Aust* 244; various reasons are given by *Y Le Bouthillier* in *Corten/Klein* Art 32 MN 32–38. The traditional doctrinal controversy on the use of *travaux préparatoires* is described *eg* by *Mehrish* (1971) 11 *IJIL* 39, 39–57.

⁴*Y Le Bouthillier* in *Corten/Klein* Art 32 MN para 7.

⁵PCIJ SS ‘*Lotus*’ PCIJ Ser A No 10, 16 (1927). To the same effect *cf* *Payment of Certain Serbian Loans Issued in France* PCIJ Ser A No 20, 30 (1929).

⁶*Cf eg* ICJ *Conditions of Admission of a State to the United Nations* (Advisory Opinion) [1948] ICJ Rep 57, 63; *Ambatielos Case (Greece v United Kingdom)* (Preliminary Objections) [1952] ICJ Rep 28, 45; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 159–160.

described the threshold which must be reached before preparatory work can be taken into account. In its opinion on the *Polish Postal Service in Danzig*, the PCIJ held that

“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.*”⁷

Again, that view was adopted by the ICJ, which applied it at a very early stage of its practice to the interpretative use of *travaux préparatoires*.⁸ Nevertheless, the state of the law seemed very unclear in those days, which led an important voice in legal doctrine opining that:

“[i]t is not possible to state any rules of law governing the question whether, and, if so, to what extent international courts and tribunals [...] are entitled to look at ‘preparatory work’ [...]”⁹

The restrictive approach to preparatory work was also very much present in the **work of the ILC** on the law of treaties. Thus, SR *Waldock* pointed out that some caution is needed in the use of *travaux*, because they are simply evidence of the intentions of some of the parties, and their cogency depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning of the terms of the treaty.¹⁰ The provision on preparatory work exposed some difference in approach to treaty interpretation among members of the ILC, especially regarding the precise way in which recourse to *travaux préparatoires* should be related to the textual approach to interpretation.¹¹ In view of those differences and despite critical comments on the part of some governments indicating a preference for allowing a larger role to preparatory work, SR *Waldock* thought the rule he had formulated was carefully balanced in reconciling the principle of the primacy of the text with the frequent and quite normal recourse to *travaux préparatoires* in practice.¹² 6

In its commentary on the **Final Draft**, the ILC itself basically gave two distinct explanations on why the preparatory work should play a less prominent role in treaty interpretation: first, the elements of interpretation contained in the general rule of interpretation (today Art 31) all related to the agreement between the parties at the time when or after it received authentic expression in the text, while this is not the case with preparatory work, which could not therefore, in the view of the Commission’s majority, have the same authentic character as an element of interpretation. Second, the Commission pointed out that the records of treaty 7

⁷PCIJ *Polish Postal Service in Danzig* PCIJ Ser B No 11, 39 (1925) (emphasis added).

⁸ICJ *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, 8.

⁹*McNair* 411.

¹⁰*Waldock* III 58 para 21.

¹¹*Cf Waldock* VI 99 para 20.

¹²*Cf Waldock* VI 99 para 20.

negotiations are in many cases incomplete or misleading, so that considerable discretion should be exercised in determining their value as an element of interpretation.¹³

- 8 The provision on preparatory work was the only part of the rules on interpretation on which there was a substantial debate at the **Vienna Conference** in the first session. The differences arising can in essence be described to have existed between those who asserted the primacy of the text of a treaty as revealing the parties' commitments and those who saw the interpretative quest as primarily investigating the intentions of the parties, with aid in that task being sought from wherever it could be found.¹⁴ In the end, the attempts, especially undertaken by the US delegation, to have the rule on the use of preparatory work and the general rule on interpretation combined in one provision and, thus, put on the same footing¹⁵, failed.

C. Elements of Art 32

I. Supplementary Means of Interpretation

- 9 Art 32 refers as supplementary means of treaty interpretation explicitly to the preparatory work of the treaty and to the circumstances of its conclusion, but at the same time indicates, by using the word "including", that these are meant to be examples, rather than an exclusive list.

1. Preparatory Work of the Treaty

- 10 There is no recognized definition in international law of *travaux préparatoires*, nor is there a clear rule on what kind of material can be taken into account in this respect or how far back in the history of the treaty the interpreter may go to look for guidance. As *Gardiner* puts it, courts and tribunals tend to seize on anything that looks helpful.¹⁶ Since the purpose of the use of preparatory work in this context is to discover the true meaning of what the parties agreed to in their treaty, **several conditions** must be fulfilled before the material in question can be considered *travaux préparatoires*.
- 11 First, only material and processes **that can be objectively assessed** by an interpreter can qualify as preparatory work. They must be part of the outside world, so that people can take cognizance of them. Thus, individual thoughts, plans, recollections and memoirs in principle do not qualify; also, oral statements are difficult to

¹³Final Draft, Commentary to Arts 27 and 28, 220 para 10.

¹⁴*Gardiner* (n 1) 302; *Y Le Bouthillier* in *Corten/Klein* Art 32 MN 2.

¹⁵The debate on the US proposal is summarized *eg* by *Mehrish* (n 3) 58–60 and *Gardiner* (n 1) 303–04.

¹⁶*Gardiner* (n 1) 99–100.

evaluate, as long as they are not written down or cannot be corroborated by other evidence.¹⁷

Thus, preparatory work includes **all documents relevant** to the forthcoming treaty and generated by the negotiating states during the preparation of the treaty up to its conclusion, for example drafts, memoranda, commentaries and other statements and observations by governments transmitted to each other or to a drafting body, diplomatic exchanges between the negotiating parties, negotiation or conference records, minutes of commission and plenary proceedings. Beside the documents themselves, preparatory work includes the **processes** they underwent during the negotiations, *eg* changes in texts under negotiation, but also the refusal to change a text. The course of a discussion or of a diplomatic exchange may be important, as well as individual contributions by negotiators or delegations.¹⁸ **12**

Second, the material considered must be apt to **illuminate a common understanding** of the negotiating parties as to the meaning of the treaty provisions.¹⁹ Thus, the material in question can only qualify as preparatory work proper if it was, at one stage at least, present in the negotiating process and **available to the negotiators** collectively. **13**

This *caveat* applies, above all, to **documents from a unilateral source**, such as statements of individual governments or State representatives outside the treaty negotiations, national legislative documents, explanations given to a legislative body as part of a national ratification process. Those materials can only be taken into account if they were at some point introduced into the negotiation process, at least brought to the knowledge of other participants in the negotiations, and did not remain unilateral hopes, inclinations or opinions. **14**

In the *Oil Platforms* case, the ICJ did admit and consider unilateral documents of the US administration (a memorandum sent by the State Department to the US embassy in China, and a message of the Secretary of State transmitting several treaties to the US Senate for consent to ratification) in order to confirm an interpretation of the bilateral treaty of friendship with Iran which it had found before.²⁰ From the sequence of argument of the Court it can be deduced that it admitted the documents under Art 32,²¹ although it did not explicitly characterize them as preparatory work (which they clearly were not).

¹⁷*Y Le Bouthillier in Corten/Klein* Art 32 MN 28 refers, *eg*, to videotaped sessions of a negotiating committee.

¹⁸For example, the ICJ considered in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 69, the course of the debate in the UN Preparatory Commission. The bilateral exchange between the parties was considered inconclusive in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1995] ICJ Rep 6, para 41.

¹⁹*Cf Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands)*, 27 RIAA 35, para 45 (2005).

²⁰*ICJ Oil Platforms (Iran v United States)* (Preliminary Objection) [1996] ICJ Rep 803, para 29.

²¹*Gardiner* (n 1) 107.

- 15 The question arises then as to whether material can be banned from being considered if it was **not equally available to all parties** to the treaty. In this respect, the PCIJ in the *River Oder* case had followed a very restrictive approach, when it refused to take the record of the conference which prepared the Treaty of Versailles into account as *travaux*, simply because some of the parties to the dispute before the Court had not participated in that conference.²² It is doubtful, however, if that ruling represents the actual practice in regard to multilateral treaties open to accession by States that did not attend the conference at which they were drawn up.²³ A state acceding to a treaty in the drafting of which it did not participate may usually ask to see the *travaux* before acceding. Moreover, the restriction applied by the PCIJ would be practically inconvenient, having regard to the great number of multilateral treaties open generally to accession: accession to and interpretation of those treaties would be made much more difficult, if the preparatory work could only be used as between parties that took part in their drafting. Therefore, the ICJ in its early jurisprudence tacitly rescinded the *River Oder* approach of the PCIJ,²⁴ and the ILC explicitly refused to adopt it.²⁵
- 16 Thus, preparatory work of multilateral treaties may also be considered in disputes on interpretation in which non-negotiating states are involved, as long as the *travaux* are published or unpublished, but accessible.²⁶ This last *caveat*, made by the ILC, **excludes confidential documents** from being used for the purpose of treaty interpretation, which were not accessible to other participants in the negotiations, let alone to acceding states. The question remains, however, if in a given case the test for reliance on the *travaux* tends to be a more formal one, referring to the publication of the material in question, or a substantive one of genuine accessibility, or a combination of both – all three approaches, it is submitted, can be found in practice.²⁷
- 17 The principle that material can only qualify as preparatory work if it was present in the negotiating process, also applies to drafting material and discussion processes in **independent bodies**, such as expert committees or even the ILC itself. In practice, ILC records are on occasion referred to as preparatory work of multilateral conventions that had their origins in the Commission's work.

Thus, in its *Continental Shelf Case* the ICJ referred explicitly to “the records of the International Law Commission and other *travaux préparatoires* of the 1958 Geneva Convention on the Continental Shelf”.²⁸ In later decisions, the Court used ILC material to describe “the genesis of the text” of a provision of the 1958 Convention on the Territorial

²²PCIJ *Territorial Jurisdiction of the International Commission of the River Oder* (Order of 20 August 1929) Ser A No 23, 41, 42.

²³*Waldock* III 58 para 21.

²⁴*Cf S Rosenne* ‘Travaux Préparatoires’ (1963) 12 ICLQ 1378, 1380–1381.

²⁵Final Draft, Commentary to Art 27, 223 para 20.

²⁶*Ibid.* Concurring *Sinclair* 144.

²⁷*Cf Merkouris* ‘Third Party’ Considerations, in *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010), 75, 81–82.

²⁸ICJ *Continental Shelf (Tunisia v Libya)* [1982] ICJ Rep 18, para 41(emphasis added).

Sea and the Contiguous Zone²⁹ and quoted comments of the ILC and its Special Rapporteur as part of the *travaux* of that Convention.³⁰ Similarly, when the Court interprets the rules of the VCLT itself, it refers to ILC documents and to the views expressed in them.³¹

While the liberal use that is made of the ILC material may seem justified by the fact that in essence its work is usually the main substantive source, or at least the predominant inspiration, of the later convention, this can, in a formal sense, only be correct under the head of *travaux préparatoires* insofar as the material had been introduced into the negotiations by the parties or their representatives. Other than that, it would seem that the relevant ILC records, or fact records of equivalent organs, may be taken into account as other “supplementary means” under Art 32.³²

Third, in order to be relevant as *travaux*, the material must directly **relate to the treaty under consideration**, it must be part of its negotiation process and purport to shed light on its substance. In practice, however, interpreters sometimes refer to material leading up to an identical predecessor treaty and even to similar treaties and apply that material as if it were preparatory work to the treaty under consideration.

That is what the ICJ did in the *La Grand* case, when it interpreted Art 41 of its Statute in the light of the drafting history of the identical provision in the PCIJ Statute, which included an earlier bilateral treaty between the United States and Sweden.³³ Also in the various *Legality of Force* cases the Court found it necessary, in order to interpret Art 35 para 2 of its Statute, to examine the drafting history of both the PCIJ and the present Statute.³⁴

It is submitted that material relating to earlier or similar treaties is not *stricto sensu* preparatory work, but may, again, belong to the other supplementary means under Art 32.

The collected material qualifying as preparatory work will necessarily be quite heterogeneous, and its **interpretative value will depend** on its cogency, its accessibility, its direct relevance for the treaty terms at issue, the consistency with other the means of interpretation, but also on the number of parties involved in the evolution of the particular material. Moreover, the more the material actually reflects a growing agreement, even a common intention of the negotiating parties, the higher its interpretative value will be. This may, among others, depend on the moment in time the material comes into existence: documents from the negotiations that were drawn up immediately before the text of the treaty was adopted will

²⁹ICJ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 659, para 280.

³⁰ICJ *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, 3 February 2009, para 134.

³¹*Eg*, in ICJ *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) [1998] ICJ Rep 275, para 31; *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] Rep 1045, para 49.

³²Concurring *Y Le Bouthillier* in *Corten/Klein* Art 32 MN 25.

³³ICJ *LaGrand (Germany v United States)* [2001] ICJ Rep 466, paras 105–107.

³⁴*Eg*, ICJ *Legality of the Use of Force (Serbia and Montenegro v Germany)* (Preliminary Objections) [2004] ICJ Rep 720, paras 101–111.

probably deserve particular attention as being very “close” to the agreement of the parties,³⁵ unless, however, they form part of the latter and are, therefore, to be considered as extrinsic context under Art 31 para 2.

- 20 It becomes evident from the structure of Arts 31 and 32 that preparatory work must be **distinguished from extrinsic context**, which is covered by Art 31 para 2. As pointed out earlier (→ Art 31 MN 64), this distinction is far from easy to draw and probably best made according to whether the material in question was relevant in preparing the text of the treaty (*travaux*) or in underlining the treaty consensus present at the time of conclusion (context). Naturally, only material set out before the adoption or conclusion of the treaty can become part of its preparatory work, but if the time-lag between the material in question receiving the agreement of the parties and the adoption of the text of the treaty itself becomes too small, the material might qualify as extrinsic context under para 2 lit b or c, rather than as *travaux*.

2. Circumstances of Conclusion

- 21 Along with the preparatory work, Art 32 allows the circumstances of the conclusion of a treaty to be taken into account as a supplementary means of interpretation. According to SR *Waldock*, this formula is meant to cover both the contemporary circumstances and the historical context in which the treaty was concluded.³⁶ Thus, reference is made to **factual circumstances** present at the time of conclusion and the historical background of the treaty, which is supposed to have been present in the minds of those who concluded it. Above all, the knowledge of those facts may help to identify the motives of the parties and, thus, the object and purpose of the treaty,³⁷ but the factual background may be relevant beyond that.

In its *Danube* opinion of 1927 the **PCIJ**, being asked to interpret the rules on the competences of the European Commission of the Danube, referred for that purpose to the powers which the Commission has possessed since 1865 and to the fact that before 1921, date of the treaty to be interpreted, the fluvial Danube was not effectively internationalized.³⁸

In the *Asylum* case the **ICJ** referred, when interpreting the Havana Convention of 1928, to “one of the most firmly established traditions of Latin America, namely, non-intervention”, and rejected a certain interpretation put forward because it would come into conflict with that tradition.³⁹

In *Aegean Sea Continental Shelf* the Court had to interpret the Brussels Communiqué concluded between Greece and Turkey and for that purpose considered “what light is thrown on its meaning by the context in which the meeting of 31 May 1975 took place and

³⁵*Y Le Bouthillier* in *Corten/Klein* Art 32 MN 27.

³⁶*Waldock* III 59 para 22.

³⁷This was apparently the reason why the ICJ in *Barcelona Traction* referred to the historical background of Art 37 ICJ Statute, before actually going about to interpret that provision, cf *Barcelona Traction, Light and Power Company, Limited* (Preliminary Objections) [1964] ICJ Rep 6, 31–32.

³⁸*PCIJ Jurisdiction of the European Commission of the Danube* PCIJ Ser B No 14, 57 (1927).

³⁹*ICJ Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, 285–286.

the Communiqué was drawn up.” The Court took note in this regard of an exchange of notes between the two governments and a declaration made before the Turkish parliament.⁴⁰

In *Land, Island and Maritime Frontier Dispute* the ICJ Chamber held that Honduras’ contention that the parties of the Special Agreement under consideration intended to have the legal situation of the maritime area in question settled comprehensively, thus including a maritime delimitation, simply referred to the “circumstances of the conclusion” and was therefore not to be considered.⁴¹ Thus, the Chamber apparently drew a distinction between the intentions of the parties, which may be taken into account as object and purpose of the treaty if they have found adequate expression in the text of the treaty, and the factual situation the parties intended to change through their treaty, which merely falls under the “circumstances” in Art 32.

In its recent *CERD case (Georgia v Russia)* the ICJ seems to have introduced a slightly different category of supplementary material into the process of interpretation: Under the heading of “Travaux préparatoires”, the Court considered the “circumstances in which CERD was elaborated” (rather than concluded) and referred in this respect to the fact that at that time “the idea of submitting to the compulsory settlement of disputes by the Court was not readily acceptable to a number of States” (which, it is submitted is clearly a factual circumstance, rather than a part of the preparatory work).⁴²

The **WTO Appellate Body** referred on several occasions to “circumstances” within the meaning of Art 32. In *EC – Computer Equipment* it considered the classification practice in the European Communities during the Uruguay Round part of “the circumstances of [the] conclusion” of the WTO Agreement and used it in the interpretation.⁴³

In *EC – Chicken Cuts* it offered a much more expanded treatment of the matter and held that “an event, act or instrument may be relevant [...] not only if it has actually influenced a specific aspect of the treaty text in the sense of a relationship of cause and effect; it may also qualify as a ‘circumstance of the conclusion’ when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision.” The relevance of a circumstance for interpretation should, in the view of the Appellate Body, be determined on the basis of objective factors, such as the temporal relation to the conclusion of the treaty, actual knowledge of the parties or mere access to it, its subject matter in relation to the treaty provision and whether or how it influenced the negotiations of the treaty.⁴⁴

Also, the economic, political and social **conditions of the parties**, their adherence to certain groupings or their status, for example, as importing or exporting countries may be taken into account, in order to determine the reality of the situation which the parties wished to regulate through their treaty.⁴⁵ Nature and substance of the treaty will usually determine what circumstances might be

⁴⁰ICJ *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3, paras 100–105.

⁴¹ICJ *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* [1992] ICJ Rep 351, para 376.

⁴²*Application of CERD (Georgia v Russian Federation)* (Preliminary Objections), 1 April 2011, para 147. In sum, this case appears to underline the wide discretion which the interpreter enjoys in using material outside the general rule of interpretation.

⁴³WTO Appellate Body *EC – Customs Classification of Certain Computer Equipment* WT/DS62/AB/R (1998), para 92.

⁴⁴WTO Appellate Body *EC – Customs Classification of Frozen Boneless Chicken Cuts* WT/DS269/AB/R (2005), paras 282–309.

⁴⁵*Sinclair* 141; *MK Yasseen* L’interprétation des traités d’après la convention de Vienne (1976) 151 RdC 1, 90.

considered relevant. Also, legislative acts and court judgments of some of the negotiating States can be part of the historical background of a treaty, thus of the “circumstances” of its conclusion.⁴⁶ As *Villiger* puts it, the “circumstances” in Art 32 include the political, social and cultural factors – the *milieu* – surrounding the conclusion of the treaty.⁴⁷

- 23 Another distinction must be drawn between “circumstances of the conclusion” and agreements or instruments “**made in connexion with the conclusion**” of the treaty, which fall under Art 31 para 2 as extrinsic context. The latter refer to documents that reflect a consensus of the parties on their substance, present at the time of conclusion, and may, therefore, be considered as context of the treaty itself. “Circumstances” on the other hand simply means the factual situation at the time of the conclusion, irrespective of any consensus or substance. However the simple fact that extrinsic agreements or instruments have been made relating to the conclusion of the treaty may be part of that situation and, thus, count as such among the “circumstances”.

3. Other Supplementary Means

- 24 The supplementary means of treaty interpretation are not listed exhaustively in Art 32, as the plain wording of the norm reveals (“including”), even if those most commonly used are expressly mentioned in the text. What supplementary “means” may be considered along with those mentioned in the text has not yet been established conclusively in practice or doctrine. However, in the context of the Vienna rules, “means of interpretation” appears to refer to **material or substantive matters** to be taken into consideration, rather than to general interpretative principles or techniques.⁴⁸ Therefore, when Art 32 allows further “means of interpretation” to be taken in account and confines them *ab initio* to a supplementary role, it cannot be assumed to refer to principles outside the general rule of interpretation. Since the latter is not exclusive in a way that would prohibit those unwritten principles, they may, where the preconditions are fulfilled, be applied as customary rules alongside Art 31 (→ Art 31 MN 33).
- 25 Any material that was not *stricto sensu* part of the negotiating process, but played a role because it covers the substance of the treaty and the negotiators were able to refer to it, can thus be introduced into the process of interpretation as other “supplementary means”. Documents or facts may be considered that are sufficiently closely connected to the preparation of the treaty and have, therefore, in the eyes of the interpreter, a direct bearing on the interpretation. This includes, as pointed out earlier (→ MN 17), documents originating from independent bodies, such as the ILC, and preparatory work on treaties that are identical or similar to the

⁴⁶Cf WTO Appellate Body *EC – Chicken Cuts* (n 44) paras 308–309.

⁴⁷*Villiger* Art 32 MN 4.

⁴⁸*Gardiner* (n 1) 311. Contra *Aust* 248–249; *Villiger* Art 32 MN 5, who also count the “rational techniques of interpretation” not included in the Vienna rules among the “supplementary means”.

one under consideration. Similarly, documents of state or interstate bodies dealing with matters covered by the present treaty may be given a role by the interpreter.

For example, a WTO panel took into account reports of various agriculture committees established over the years by parties to the GATT 1947 and used them as an aid in interpreting provisions of the GATT 1994.⁴⁹

Also, **subsequent practice** which either was not that of parties (but, for example, of international organs), or which does not relate to the application of the treaty or does not establish an agreement of the parties, and therefore does not fall under Art 31 para 3 lit c, may still at times shed some light on the meaning of the treaty and, therefore, also be considered a “supplementary means” of interpretation.⁵⁰

Thus, in *EC – Chicken Cuts*, the WTO Appellate Body explicitly confirmed a panel ruling to the effect that EC customs classifications practice subsequent to the conclusion of the WTO Agreement may be taken into account for interpreting the latter. It continued: “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”.⁵¹

In the end, it seems that it basically **depends on the assessment of the interpreter** whether the material in question can reasonably be thought to assist in establishing the meaning of the treaty under consideration, and if it does, there are scarcely any clear limits to taking it into account under Art 32. **26**

II. Admissible Use of the Supplementary Means

Art 32 allows reference to supplementary means of interpretation, that is, above all, to *travaux préparatoires*, **in a much more liberal manner than it is usually perceived**. Nothing in the rules on interpretation precludes a treaty interpreter *from looking at* the preparatory work in the process of interpretation. What is restricted by the Vienna rules, however, is to actually base a finding on such material at the outset of the process of interpretation, and they do so in order to prevent the agreement of the parties from being replaced by the content of un consummated exchanges of proposals and arguments that preceded the finalization of the treaty.⁵² Thus, preparatory work is designed to determine the meaning of a treaty provision only when certain qualifying conditions are met. And Art 32 contains a procedural restriction in that the interpretative means which are only “supplementary” may not be employed first, but **only after the general rule laid** **27**

⁴⁹WTO Panel *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R (2002), paras 7.35–37.

⁵⁰*Y Le Bouthillier in Corten/Klein Art 32 MN 43–44.*

⁵¹WTO Appellate Body *EC – Chicken Cuts* (n 44) para 305.

⁵²*Gardiner* (n 1) 307.

down in Art 31 has been applied. Other than that, the rule gives the interpreter considerable freedom to make use of supplementary means.

- 28 First, Art 32 stipulates that recourse to those means “**may be had**”, thus in contrast to the mandatory character of the general rule in Art 31, the use of supplementary means is basically left to the discretion of the interpreter.

This discretion was underlined, apparently for reasons of procedural comity, by the ICJ in its recent *CERD case (Georgia v Russia)*, when the Court found that in the light of its conclusion so far it need not resort to supplementary means of interpretation ... to determine the meaning of Article 22 (CERD). However, the Court notes that both Parties have made extensive arguments relating to the *travaux préparatoires*, citing them in support of their respective interpretations ... Given this and the further fact that in other cases, the Court had resorted to the *travaux préparatoires* in order to confirm its reading of the relevant texts ... , the Court considers that in this case a presentation of the Parties’ positions and an examination of the *travaux préparatoires* is warranted.⁵³

However, if the latter decides to use supplementary means, the discretion is limited in two ways: the application of supplementary means must follow that of the general rule of interpretation, and, according to Art 32, it must fall into one of two specific *modi applicandi*, namely a confirmative and a determinative one.

The difference between those *modi*, however, is smaller than one might think. As the WTO Appellate Body pointed out, the elements to be examined under Article 32 are distinct from those to be analyzed under Article 31, but it is the same elements that are examined under Article 32 irrespective of the outcome of the Article 31 analysis. Instead, what may differ, depending on the result of the application of Article 31, is **the weight that will be attributed to the elements** analyzed under Article 32.⁵⁴

1. Confirm the Meaning

- 29 The confirmative mode of applying *travaux préparatoires* in the process of treaty interpretation has a long tradition in international judicial practice⁵⁵ and is well recognized in that practice today.⁵⁶ This tradition carries with it the assumption,

⁵³*Application of CERD* (n 40) para 142.

⁵⁴WTO Appellate Body *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R para 403 (2009).

⁵⁵See *eg* PCIJ *Payment of Certain Serbian Loans Issued in France* PCIJ Ser A No 20, 30 (1929); *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* PCIJ Ser A/B No 50, 380 (1932); ICJ *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 161.

⁵⁶Examples in recent case law can be found, *eg*, in ICJ *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para 55; *Kasikili/Sedudu Island* (n 29) para 46; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)* [2002] ICJ Rep 625, para 53; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 95 and 109; ECtHR *Banković et al v Belgium et al* (GC) App No 52207/99, ECHR 2001-XII, paras 63 and 65.

just as widely accepted, that preparatory work, when it is used as a confirmative means of interpretation, is bound to play a minor role in the process of interpretation and is limited to that role by Art 32 itself, which prescribes the confirmative function.⁵⁷

However, as *Gardiner* rightly points out, investigating preparatory work to see if it does in fact “confirm” a particular meaning arrived at by applying the general rule carries with it the implicit possibility that it does not do so. In that case, the interpreter will have to reconsider its position. Thus, “**confirm**” entails the **option of not confirming** and the possibility of transforming the exercise into one where the preparatory work leads to a revisiting of the application of the general rule to find a permissible interpretation, which is then confirmed. The investigation may also lead to the conclusion that there is an ambiguity that has hitherto gone unnoticed, such that the exploration of the preparatory work is transformed from a potential confirming role to one of determining the meaning.⁵⁸

In this view, it is difficult to imagine situations where preparatory work, or indeed all means covered by Art 32, may not be employed in the process of interpretation.⁵⁹ And it also becomes clear that the confirmative mode of using supplementary means of interpretation possesses in the system of the Vienna rules **de facto a relevance similar to that of the general rule** of interpretation.

Judicial practice knows of **several variants of the confirmative mode** of applying supplementary means of interpretation. Only a small linguistic variation occurs when a court sees an interpretation arrived at as being “reinforced” by an examination of the *travaux préparatoires*.⁶⁰ Another variant is that the court would hold that the preparatory work “does not preclude the conclusion” reached by applying the general rule of interpretation.⁶¹ Similarly, preparatory work is used in practice in order to dismiss the position presented by one party to the dispute.⁶²

2. Determine the Meaning

The determinative mode of applying supplementary means is restricted in Art 32 by **qualifying conditions described by two special scenarios**: the meaning of a treaty

⁵⁷Cf *Sinclair* 141–142: “there can be little doubt that such recourse is permissible in carefully controlled circumstances”.

⁵⁸*Gardiner* (n 1) 309; *Y Le Bouthillier* in *Corten/Klein* Art 32 MN 11–12.

⁵⁹*Villiger* Art 32 MN 11.

⁶⁰For example, ICJ *Legality of the Use of Force* (n 34) para 101.

⁶¹ICJ *LaGrand* (n 33) para 104; very similar ICJ *Application of CERD* (n 40) para 147 *in fine* (possible nevertheless to conclude that the *travaux préparatoires* do not suggest a different conclusion from that at which the Court has arrived through the main method of ordinary meaning interpretation”). A similar approach was taken by the Iran-US Claims Tribunal in *United States, Federal Reserve Bank of New York v Iran, Bank Markazi* Case A 28 (2000) 36 Iran-US Claims Tribunal Reports 5, para 70.

⁶²Cf ICJ *Sovereignty over Pulau Litigan* (n 56) para 58; *Avena and Other Mexican Nationals (Mexico v United States)* [2004] ICJ Rep 12, para 86.

clause remaining ambiguous or obscure, or the result hitherto achieved being absurd or unreasonable. The general perception of this provision, again, suggests that it is therefore only in limited cases that supplementary means can play a decisive role in treaty interpretation.

An apt example for the exercise required by Art 32 is the decision in the *United States – Measures Affecting Gambling* case where the WTO Appellate Body, after investigating the ordinary meaning, context and subsequent developments, concluded that the meaning of the commitments made by the United States are still ambiguous and felt, thus, that it was “required, in this case, to turn to the supplementary means of interpretation provided for in Art 32 of the Vienna Convention.”⁶³

- 34 However, as SR *Waldock* had already pointed out, the rule on the use of *travaux préparatoires* is “inherently flexible, since the question whether the text can be said to be ‘clear’ is in some degree subjective.”⁶⁴ It is regularly in the eye of the interpreter, *ie* subjective, whether, after applying the general rule of interpretation, the meaning of the treaty is clear or ambiguous. Thus, it will **normally be a matter of discretion** to have recourse to the supplementary means and to give them the decisive role in determining the meaning of the treaty clause under consideration. The only requirement, which the interpreter will have to fulfil is to explain that step with the unsatisfactory results of applying the general rule.

A very telling example of that interpretative discretion can be found in the *Chile – Price Band System* case, where the WTO panel simply “considered that the text and context of ‘variable import levy’ and ‘minimum import price’ alone do not enable us to determine the meaning of those terms without ambiguity”, and, without any further explanation, decided to take recourse to supplementary means of interpretation pursuant to Art 32 of the Vienna Convention.⁶⁵

In essence, the **elastic concept of ambiguity** (or, for that purpose, of obscurity) clearly outweighs the – alleged – supplementary character of the interpretative means identified in Art 32, before all of the *travaux préparatoires*.

- 35 Opposed to that, the second limb of the determinative mode provided for in Art 32 plays a far less significant role in practice, because it is activated only where the application of the general rule leads to a “**manifestly absurd or unreasonable**” result. Not only is the threshold set extremely high, especially since the absurdity has to be “manifest”, but the principal criterion to determine that an interpretation is unreasonable will regularly be the object and purpose of the treaty in question, which in turn must have been taken into account in order to reach that interpretation.⁶⁶ A possible case of an unreasonable result is said to be where by applying the general rule an interpretation of a treaty provision is reached that

⁶³WTO Appellate Body *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, para 195 (2005).

⁶⁴*Waldock* VI 99–100, para 20.

⁶⁵WTO Panel *Chile – Price Band System* (note 49), para 7.35.

⁶⁶*Y Le Bouthillier* in *Corten/Klein* Art 32 MN 19 referring to *Corten*.

contradicts another rule contained in the same treaty or otherwise agreed upon by the same parties.⁶⁷

3. Recourse

Art 32 describes the use of supplementary means of interpretation, before all of preparatory work, as the interpreter having “recourse” to them. The wording and structure of the norm would seem to demand that the interpreter makes clear **which of the two modes** contained in lit a and b is being applied. However, judicial practice does not always live up to that expectation.⁶⁸ 36

How exactly that material may be introduced into the process of interpretation and what conclusions may be drawn from it in a given case is not at all clear, and at least the latter point is itself a question of interpretation. There are **no fixed rules on interpreting travaux préparatoires**, but there is some practice. For example, the question quite often arises as to the consequences that may be drawn from the fact that in the process of negotiating an authoritative text, certain passages have been deleted or amendments rejected. 37

In its *Namibia* opinion the ICJ held on that point that “[t]he fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed. There can be many reasons determining rejection or non-approval.”⁶⁹

In *Maritime Delimitation and Territorial Questions* the Court adopted a very similar approach by refusing to adopt a certain reading of an agreed document only because the opposite reading had been abandoned in the negotiations.⁷⁰

A straightforward use of *travaux* would also be to **interpret the scope of application** of a treaty as encompassing an individual case that had explicitly been mentioned in the preparatory phase of that treaty as an example of what the treaty is meant to address. Similarly, any specific interpretation of terms of the treaty recorded during the negotiations will usually lend considerable force to a corresponding interpretation of the treaty.⁷¹ Moreover, the **silence of the preparatory work** may prove to be a significant element in showing that a conclusion at odds with a literal reading of a treaty provision was within a permissible range of interpretations.⁷² In its decision on the *Oil Platform* case, the ICJ referred to the silence of the *travaux*, *ie* to the fact that a certain view had never been expressed 38

⁶⁷Reuter [1966-I] YbILC 195 para 22; *Y Le Bouthillier* in *Corten/Klein* Art 32 MN 19.

⁶⁸Leaving this point open *eg* ICJ *Avena* (n 62) para 86.

⁶⁹ICJ *Namibia* (n 18) para 69.

⁷⁰ICJ *Maritime Delimitation and Territorial Questions (Qatar v Bahrain)* (n 18) para 41; see also the strong dissent by Judge *Schwebel* [1995] ICJ Reports 27, 34–39.

⁷¹*Gardiner* (n 1) 341.

⁷²*Ibid* 335–336.

during the negotiations, and based its rejection of the interpretation put forward by Iran on that.⁷³

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⁷³ICJ *Oil Platforms* (n 20) para 29.