

## 8

## Supplementary Means of Interpretation

*Supplementary means of interpretation—preparatory work and circumstances of conclusion—confirming meaning—determining meaning if general rule leaves ambiguity or obscurity, or results in absurdity or unreasonable meaning*

This formulation [the precursor to article 32] seemed to the Commission about as near as it is possible to get to reconciling the principle of the primacy of the text with frequent and quite normal recourse to *travaux préparatoires* without any too nice regard for the question whether the text itself is clear. Moreover, the rule... is inherently flexible, since the question whether the text can be said to be 'clear' is in some degree subjective.<sup>1</sup>

It would hardly be an exaggeration to say that in almost every case involving the interpretation of a treaty one or both of the parties seeks to invoke the preparatory work.<sup>2</sup>

*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.

## 1. Introduction

This chapter covers use of all supplementary means of interpretation. These are supplementary to those in the general rule in article 31. However, their function is not dictated by the label 'supplementary' but by the terms of article 32. In fact their function is not dictated or dictatorial. In contrast to the mandatory formulation of the general rule, supplementary means are ones to which recourse 'may' be had. Conditions are stated in article 32 governing their use, but these are not so

<sup>1</sup> Sir Humphrey Waldock, 'Sixth Report on the Law of Treaties' [1966] *Yearbook of ILC*, vol II, pp 99–100, para 20.

<sup>2</sup> A D McNair, *The Law of Treaties* (Oxford: OUP, 2nd edn, 1961), 412.

restrictive as they may appear. Supplementary means are not listed exhaustively in the Vienna Convention, though those most commonly used are mentioned. The most controversial issues arise over use of preparatory work. The meaning and scope of the term 'preparatory work' have been considered in Chapters 1 and 3 above.<sup>3</sup> The principal remaining issues are when preparatory work may be invoked in treaty interpretation, how it relates to the other Vienna rules, and what weight is to be given to its very varied content.

The Vienna Convention's provision on preparatory work exposed the most significant difference in approach to treaty interpretation among members of the ILC. It was the only part of the Vienna rules on which there was a substantial debate at the Vienna Conference in the first session (1968). These differences in approach can be marked out as a divide between those who asserted the primacy of the text of a treaty as revealing the commitments of the parties and those (principally the US delegation) who saw the interpretative quest as a direct investigation of the intentions of the parties and of their shared expectations, with aid in that task being sought from wherever it could be found. This is to put the opposing camps in the most extreme light. Attaching the labels 'textual' and 'intention seeking' to the different approaches serves mainly to hide the realities and practicalities of treaty interpretation. Once these realities and practicalities are examined, it can be seen that the differences between the two approaches are not as great as they may appear. The core issue is what information and material outside the text of a treaty can be brought into the task of interpreting it and how this is done.

The second key to understanding the provision lies in the distinction between examining or surveying information and material, on the one hand, and using it for a particular purpose, on the other. It is one thing to read the history of a provision, quite another to say that that history is the one element which identifies the correct meaning. The provision of the Vienna Convention appears to draw a firm distinction between using the supplementary means to 'confirm' and to 'determine' the meaning of a treaty provision. The gateway to the former use of supplementary means is that the correct interpretation appears ascertainable by application of the general rule. The prerequisites for using supplementary means to 'determine' the meaning are ambiguity, obscurity, absurdity, or unreasonableness (which must be 'manifest', in the case of the last two possibilities). It will, however, be seen that these clear lines of approach (particularly confirmation) were not intended to be applied too rigidly, nor are they in practice. 'Frequent and quite normal recourse to *travaux préparatoires*' was the thought underlying the ILC's approach, as indicated in the first quotation at the head of this chapter.

There is thus both something of a paradox and an illustration in the interpretation and application of article 32 to preparatory work. Only by giving the provision the most narrow of literal meanings that it could bear does the provision look as limiting as its critics suggest. Yet by taking account of its own preparatory work in the manner that that preparatory work indicates, is it clear that such a

<sup>3</sup> See Chapter 1, section 3.4 and Chapter 3, section 4 above.

limited role is not correctly attributed to it. An expansive meaning of 'confirm' is confirmed by the preparatory work. There is also plenty of evidence that a literal approach to treaty interpretation has not been applied to this element of the Vienna rules, which is a good indicator that an excessively literal approach does not hold sway in treaty interpretation generally.

## 2. History and Preparatory Work

### 2.1 Separating supplementary means from the general rule

Although the first draft of the Vienna rules was somewhat different in its layout and detail from the final text, the way in which the provisions were separated revealed the thought that certain evidence of meaning should only be used to confirm the meaning found by applying the general rule or to establish the meaning in circumstances of ambiguity, uncertainty, etc.<sup>4</sup> However, the separation of the 'general rule' from 'supplementary means' was not so clearly drawn as in the final version of the rules. It was this separation which was the source of controversy at the Vienna Conference and the cause of an unsuccessful attempt by the US delegation to integrate the content of articles 31 and 32 into a single provision. The core of the criticisms made by Professor McDougal (USA) of the draft rules lay in the relationship between these two provisions. Professor McDougal saw the designation 'supplementary' for article 32 as confirming primacy of a purely literal approach. To him this meant that the focus of treaty interpretation was directed to an impossible quest for an ordinary textual meaning. It meant (to him) dismissal of context in the broad sense which he gave the word, with relegation of preparatory work to a limited role, and then only after crossing excessively high hurdles. He foresaw the likely result as a general failure to consider important indicators of the 'shared expectations' of the parties and 'community values'.

Somewhat paradoxically, Professor McDougal's criticisms would only have proved cogent if interpreters had adopted an extremely literal (and rather distorted) reading of the Vienna rules, if they ignored much of the ordinary meaning of their terms, abandoned the content of article 31 beyond its first paragraph, and dismissed the abundant guidance in the ILC's preparatory work as to how the Vienna rules were to provide the launch pad for reaching proper interpretations.<sup>5</sup> Showing that this has not been the result is the role of the section on practice (section 4) of this chapter. However, even at the introductory phase of studying this topic, a reader of the Vienna rules and of the records of the ILC's work (including the contribution of Professor Waldock as Special Rapporteur) can see that the approach is not purely textual, and that *looking at* preparatory work and the circumstances of

<sup>4</sup> See Waldock, 'Third Report' [1964] *Yearbook of ILC*, vol II, p 52, draft articles 70 and 71.

<sup>5</sup> See H W Briggs, 'The *Travaux Préparatoires* of the Vienna Convention on the Law of Treaties' (1971) 65 *AJIL* 705, at 709–10.

a treaty's conclusion is not excluded. Thus, it is difficult to see the 'rigidities and restrictions' which Professor McDougal asserted were common knowledge.<sup>6</sup>

Professor McDougal sought to underline the importance of preparatory work and surrounding circumstances by citing the role of Professor Waldock at the Vienna Conference, describing his presence as 'the best testimony, not always mute' of the impossibility of applying the textuality approach. He noted that reference to Professor Waldock had often been necessary at the Vienna Conference in tribute 'not to his skill in flipping the pages of a dictionary or as a logician, but rather to his very special knowledge of all the circumstances attending the framing of our draft Convention'.<sup>7</sup> Although oratorically engaging, this is not persuasive. The Vienna Conference was not simply engaged in interpretation of a concluded treaty but was continuing the preparatory work of the Vienna Convention begun by the ILC. This demanded a somewhat different perception and approach. It also seems more reasonable to regard reference to Professor Waldock at the Conference for an account of the work of the ILC as something of a proxy for consulting the extensive preparatory work, a short cut to acquiring a fuller version of the thinking behind drafts that had been presented to the ILC. Courts, tribunals, writers, and other interpreters of treaties have, in practice, very much treated the records of the ILC as an aid to looking into that thinking.

At all events, Professor McDougal did not convince the Vienna Conference that reference to preparatory work and surrounding circumstances was an approach to interpretation that should be put on exactly the same footing as the elements of the general rule: for the proposal to combine the articles on interpretation was rejected.<sup>8</sup> Yet the separation of the two articles into general rule and supplementary means has not proved a bar to reference to preparatory work, circumstances of conclusion or other supplementary means. The Vienna rules have generally been taken as allowing liberal reference to preparatory work, even if a decisive role in determining an interpretation is more limited. In addition, where the explanations of a preparatory body are likely to be useful to an interpreter, these are now commonly readily available, if not always in their raw form, then in published commentaries, explanatory reports, and such like.

This is not to say that there are no difficulties with the rules and how they have been applied in some cases.<sup>9</sup> But it is suggested here that the principal difficulty has

<sup>6</sup> Statement of Professor McDougal, US Delegation, to Committee of the Whole, Vienna Conference, 19 April 1968, as reproduced at (1968) 62 AJIL 1021; the summary records set out a somewhat abridged and less colourful version of the statement: UN Conference on the Law of Treaties, Summary Records of First Session (26 March–24 May 1968), 167–8.

<sup>7</sup> McDougal Statement, US Delegation, to Committee of the Whole, Vienna Conference, 19 April 1968, as reproduced at (1968) 62 AJIL 1021, at 1025.

<sup>8</sup> The US proposal for an amendment combining the first two articles of the Vienna rules and placing all the elements on the same footing was rejected by 66 votes to 8, with 10 abstentions, UN Conference on the Law of Treaties, First and Second Sessions (1968 & 1969), Documents of the Vienna Conference (UN, New York, 1971), p 150, para 271(a). For an example of the ICJ treating explanations to a Diplomatic Conference by an ILC Special Rapporteur as an admissible part of the preparatory work, see the *Avena* case considered in section 4.1.2 below.

<sup>9</sup> See, eg, J Klabbers, 'International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?' (2003) L NILR 267 and M Ris, 'Treaty Interpretation and

2. *History and Preparatory Work*

not proved to be the catalogue of limitations suggested by Professor McDougal. Nor is it easy to find evidence that quantities of other useful material revealing the shared expectations of the parties have been excluded from consideration because of application of the Vienna rules. The main difficulty has been over the indication in the Vienna rules that one permissible use of preparatory work is to ‘confirm’ a meaning achieved by application of the general rule. If the preparatory work, so far from confirming that meaning, suggests that that interpretation is wrong, does the interpretation stand (but unconfirmed), or may it be displaced? It will be submitted here that that is not the insuperable problem that it may appear to be on a literal reading of article 32, and that in practice means can be found, compatible with the Vienna rules, for using preparatory work in the way such work was meant to be used. Non-confirming preparatory work could, for example, lead to exploration of a hitherto unnoticed ambiguity in the text and reopen evaluation of the meaning. Such a possibility is considered further below, but in understanding the role of preparatory work it is helpful first to look more closely at Professor McDougal’s criticisms.

Professor McDougal linked the stigma which he saw as being attached to preparatory work by classifying it as ‘supplementary means’ with his perception of undue literalism being required by the general rule. He saw ‘context’ as being defined by reference not to ‘factual circumstances attending the conclusion of the treaty, but to mere verbal texts’.<sup>10</sup> His understanding was that ‘object and purpose’ referred ‘not to the actual common intent of the parties, explicitly rejected as the goal of interpretation, but rather to mere words about “object and purpose” intrinsic to the text’.<sup>11</sup> This view seems to have led him to underestimate the role envisaged by the Vienna rules for circumstances of conclusion of a treaty. The first basis given for his strictures about these perceived rigidities and restrictions was that principles of interpretation had seldom been considered as mandatory rules of law, ‘precluding examination of relevant circumstances’.<sup>12</sup> ‘Precluding examination’ of ‘relevant circumstances’ seems as much to overstate the purport of the scheme of the rules as the suggestion that the combination of the reference to ordinary meaning and the rules on admissibility of preparatory work were being employed in a way ‘to foreclose inquiry’.<sup>13</sup>

ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties’ (1991) 14 *B C Int’l & Comp L Rev* 111; but note that the former does not purport to take stock of the current position in an empirical fashion (at 269) and notes that ‘interpretation consistently takes place with the help of the *travaux préparatoires*, but is rarely based on the *travaux préparatoires* alone’ (at 288), while the latter reviews the case law of the ICJ mainly before it specifically endorsed use of the Vienna rules, suggesting that reference to supplementary means should be as part of the context of a treaty if requested by a party and that the ICJ and UN should have a role in identifying a collecting preparatory work (at 135); and see A I Aust, *Modern Treaty Law and Practice* (Cambridge: CUP, 3rd edn, 2012), 217–20.

<sup>10</sup> McDougal Statement (1968) 62 AJIL 1021.

<sup>11</sup> (1968) 62 AJIL 1012, at 1021–22.

<sup>12</sup> 62 AJIL 1012, at 1022.

<sup>13</sup> 62 AJIL 1012, at 1022; and cf J D Mortenson, ‘The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?’ (2013) 107 AJIL 780, at 810: ‘McDougal’s speech probably caused more confusion about treaty interpretation than any intervention on the subject before or since. He so badly mischaracterized the ILC draft—and did so with such flair...—that his description

An initial reply to these criticisms is to note that by suggesting that ‘context’ should properly mean the ‘factual circumstances attending the conclusion of the treaty’, Professor McDougal was giving ‘context’ a wider meaning than what might be viewed as its primary or ordinary meaning, or at least than its principal dictionary definition.<sup>14</sup> Much more significant, however, is that his criticism does not appear to take account of the reference to ‘the circumstances of its [a treaty’s] conclusion’ receiving explicit mention, along with preparatory work, in article 32. It would be a distinctly odd reading of the term ‘context’ in article 31 that included in it ‘the circumstances of conclusion’, when precisely the same concept is given a specific role as a ‘supplementary means’ elsewhere in the rules.

## 2.2 Ready reference to preparatory work distinguished from basing interpretations on it alone

Underlying Professor McDougal’s criticisms seems to be the notion that a great array of interpretative aids, only admitted in a limited way in article 32, was being excluded by the approach taken in separating the two articles. This was compounded, in the view of Professor McDougal, by the ‘high preclusionary hurdles—designed to foreclose automatic, habitual recourse to such “supplementary means”’<sup>15</sup> This is wholly at odds with the balance envisaged by the ILC between primacy of the text and the ILC’s expectation of ‘frequent and quite normal recourse’ to preparatory work noted at the head of this chapter. The Vienna rules do not impose any hurdle to *looking* at the preparatory work. This is confirmed by looking at the preparatory work in the records of the work of the ILC. In his comments on the first draft of what became the Vienna rules, the Special Rapporteur (Waldock) explained the proposed provision on preparatory work (which did not then bear the epithet ‘supplementary means’, but which did categorize the conditions for use of preparatory work) as being ‘permissive in character’. The aim was to recognize

has taken on a totemic power that it does not deserve. In essence, he claimed that the ILC draft created a “preclusionary hierarchy” of sources that was “rigid and restrictive” in its celebration of the bare dictionary meaning of text that would take precedence over every conceivable countervailing factor, and that it “relegated” preparatory work to a “subordinate position” vis-à-vis every other source of meaning.’ (footnotes omitted).

<sup>14</sup> The *Oxford English Dictionary* gives as the fourth meaning (after three obsolete ones): ‘The whole structure of a connected passage regarded in its bearing upon any of the parts which constitute it; the parts which immediately precede or follow any particular passage or “text” and determine its meaning.’ But of the example given in the OED of ‘context theory’: ‘According to this theory, what a word means depends upon its connection in past experience with some other thing.’ It would be in line with the approach of the Vienna rules, but not that of Professor McDougal, to point out that the first of these two definitions is given as the concrete usage originating some 400 years ago (and in continuing general use), while the latter is last in the list, after transferred and figurative senses, is an ‘attributive and combination’ usage, and was only a little more than 30 years old at the time of the Vienna Conference. Nevertheless, selection of the former as the ordinary use when interpreting the Vienna rules would not fulfil the requirements of those rules without also taking account of the context in the Convention (including the fact of reference to ‘circumstances of conclusion’ being a separate element), subsequent practice, and the preparatory work.

<sup>15</sup> McDougal Statement (1968) 62 AJIL 1021, at 1022.

## 2. History and Preparatory Work

‘the propriety of recourse to extraneous evidence or indications of the intentions of the parties’.<sup>16</sup> Preparatory work was therefore regarded as evidence to be used for specified purposes. He saw no difficulty in using such evidence to determine the meaning of an ambiguous or obscure term, or of a term whose ordinary meaning gave an absurd or unreasonable result. Most revealing were his observations on the distinction between reference to the preparatory work and the actual use made of such work:

There is, however, a difference between examining and basing a finding upon *travaux préparatoires*, and the Court itself has more than once referred to them as confirming an interpretation otherwise arrived at from a study of the text. Moreover, it is the constant practice of States and tribunals to examine any relevant *travaux préparatoires* for such light as they may throw upon the treaty. It would therefore be unrealistic to suggest, even by implication, that there is any actual bar upon mere reference to *travaux préparatoires* whenever the meaning of the terms is clear.<sup>17</sup>

What is clear from this is that the invariable practice was (and still is) to look at the preparatory work when there is a question of treaty interpretation; but actually basing a finding on such material needs to take place in more controlled conditions if the agreement of the parties is not to be replaced by the content of unconsummated exchanges of proposals and arguments that preceded finalization of the treaty. It is difficult to find fault with the Special Rapporteur’s further comment:

Recourse to *travaux préparatoires* as a subsidiary means of interpreting the text, as already indicated, is frequent both in State practice and in cases before international tribunals. Today, it is generally recognized that some caution is needed in the use of *travaux préparatoires* as a means of interpretation. They are not, except in the case mentioned [reference to agreements, instruments, and documents annexed to a treaty or drawn up in connection with its conclusion], an authentic means of interpretation. They are simply evidence to be weighed against any other relevant evidence of the intentions 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 attached to the terms of the treaty. Statements of individual parties during the negotiations are therefore of small value in the absence of evidence that they were assented to by the other parties.<sup>18</sup>

### 2.3 Distinction between use of supplementary means ‘to confirm’ and ‘to determine’ the meaning

These observations of the Special Rapporteur related to the first draft of the rules which differed from what was ultimately agreed, but this does not affect their relevance as indicating the analysis of the established role of preparatory works in treaty interpretation. The role of supplementary means of interpretation, and in

<sup>16</sup> Waldock, ‘Third Report on the Law of Treaties’ [1964] *Yearbook of the ILC*, vol II, p 58, para 20.

<sup>17</sup> [1964] *Yearbook of the ILC*, vol II, p 58, para 20 (footnotes omitted).

<sup>18</sup> [1964] *Yearbook of the ILC*, vol II, p 58, para 21 (footnotes omitted, emphasis in original).

particular preparatory work, was eventually put into two categories differentiated by the functions of 'confirming' and 'determining' meaning. In its commentary on its final version of the draft articles, the ILC noted that the first of these had a further significance in its scheme of rules of interpretation:

The fact that article 28 [now 32] admits recourse to the supplementary means for the purpose of 'confirming' the meaning resulting from the application of article 27 [now 31] establishes a general link between the two articles and maintains the unity of the process of interpretation.<sup>19</sup>

Thus the preparatory work of the Vienna Convention effectively confirms the propriety of examining the preparatory work, without precondition, of any treaty whose interpretation is in issue and sets this in the context of 'the unity of the process of interpretation'.

Recourse to preparatory work is always permissible under the Vienna rules to 'confirm' the meaning reached by application of the general rule in article 31. Where the qualifying conditions (ambiguity or obscurity of meaning, or manifest absurdity or unreasonableness of result) are met for use of preparatory work to 'determine' the meaning, the Vienna rules appear to envisage what is in effect replacement of an unsatisfactory interpretation produced by the general rule with one yielded up by the preparatory work. The two roles for preparatory work appear very different in their significance for interpretation. Although both are presented under the title 'supplementary means of interpretation', 'to determine' the meaning is very much to fulfil a primary role in treaty interpretation, while confirmation is only secondary and supportive.

However, the difference in roles may not be so great in practice as it appears to be. A literal reading of article 32 would result in a very limited role for preparatory work if the qualifying conditions for a determining role are not met. Preparatory work could be invoked to show that a meaning that is already plain, unambiguous, and neither absurd nor unreasonable is indeed the correct one. Other than as a congratulatory acknowledgement of the drafting and inherent clarity of a treaty, that would produce no real result from invoking the preparatory work. Investigating preparatory work to see whether it does in fact 'confirm' a particular meaning carries with it the implicit possibility that it does not do this. What then? The options are either to stick with the meaning achieved by the general rule or investigate the other meaning or meanings which the preparatory work suggests.

The ILC's approach to this provision suggests that the reality is that if the interpreter finds that the preparatory work suggests a meaning which was not the one which would be first choice after applying the general rule, and which would not have immediately struck the interpreter as within the obvious range of interpretative options, the interpreter will have to reconsider the position. It would be absurd to think otherwise. This reality is further exemplified by the present investigation

<sup>19</sup> [1966] *Yearbook of ILC*, vol II, p 220, para 10.

## 2. History and Preparatory Work

of what is meant by 'confirm' a meaning. In the first epigraph to this chapter, the ILC Special Rapporteur's view is given that the formulation of the provision that is now article 32 was to give effect to the Commission's aim of 'reconciling the principle of the primacy of the text... with frequent and quite normal recourse to *travaux préparatoires* without any too nice regard for the question whether the text itself is clear'.<sup>20</sup> An interpreter with that prime piece of preparatory work already in mind would need to interpret 'confirm' in the context of all the Vienna rules and the whole exercise of treaty interpretation.

Despite the apparent clear meaning of 'confirm', the Special Rapporteur's explanation goes on to suggest that the subjectivity in deciding whether a term is 'clear' imports flexibility into the rule. Hence 'confirm' offers the option of not confirming and the possibility of transforming the exercise into one where the preparatory work leads to revisiting the application of the general rule to find a permissible interpretation which is then confirmed. Another possibility is that the investigation may lead to a conclusion that there is a hitherto unperceived ambiguity (or one or more of the other qualifying conditions) such that the exploration of the preparatory work is transformed from a potential confirming role to one of determining the meaning. Treaty interpretation is not working out a simple equation. This is best illustrated by the examples in the section on practice below.

Two further pieces of preparatory work of the Vienna Convention support the case for giving 'confirm' a broad meaning. First, early versions of the text had proposed recourse to further means of interpretation 'to verify or confirm' the meaning ascertained by application of the general rule. In response to suggestions that confirmation was unnecessary if the meaning of a term was clear, the Special Rapporteur (Waldock) noted that it was 'unrealistic to imagine that the preparatory work was not really consulted by States, organizations and tribunals whenever they saw fit, before or at any stage of the proceedings, even though they might afterwards pretend that they had not given it much attention'.<sup>21</sup> However, he recognized that 'the reference to confirmation and, *a fortiori*, verification tended to undermine the text of a treaty in the sense that there was an express authorization to interpret it in the light of something else; nevertheless that was what happened in practice'.<sup>22</sup> This was acknowledgement that consulting the preparatory work had to be accepted as having the potential to modify an attitude formed towards the treaty text. Second, the Special Rapporteur later explained that 'verify' had been deleted because the idea of 'verification' was contained in 'confirmation'.<sup>23</sup> Hence 'confirm' was viewed as having a wider meaning than 'verify', one which could possibly embrace adjustment of an assumption that the meaning was clear.

<sup>20</sup> Sir Humphrey Waldock, 'Sixth Report on the Law of Treaties' [1966] *Yearbook of ILC*, vol II, p 99, para 20.

<sup>21</sup> [1964] *Yearbook of ILC*, vol I, p 314, para 65.

<sup>22</sup> [1964] *Yearbook of ILC*, vol I, p 314, para 65.

<sup>23</sup> [1966] *Yearbook of ILC*, vol I, pt II, p 270, para 34.

### 3. Meaning of ‘Recourse’ and ‘Supplementary’

The opening words of article 32 (‘Recourse may be had to supplementary means of interpretation’) invite particular attention to two terms: the meaning of ‘recourse’ and the scope of ‘supplementary means’.

#### 3.1 ‘Recourse’

Descriptions commonly used for considering the preparatory work are ‘consulting’ or ‘examining’ it. That the Vienna Convention provision uses the term ‘recourse’ has attracted little attention, probably because the circumstances of use of supplementary means of interpretation are addressed as part of the substance of the article. Controversy therefore has surrounded the interpretation of the descriptions of the circumstances, rather than the introductory word. In the light of the differentiation made by the ILC between looking at preparatory work and actually basing an interpretation on it, the term ‘recourse’ is apt to cover making use of the preparatory work (or other supplementary means) for the ends described in the provision, without implying that looking at preparatory work to see if it may assist is proscribed.

Were the Vienna Convention’s interpretative apparatus to be deployed in making an interpretation of ‘recourse’, it would provide a good illustration of some of the elements of the rules. First, dictionary definitions would show that no single ordinary meaning can be isolated but that some meanings fit the context and practice better than others.<sup>24</sup> These meanings must, of course, be read in the context of the more specific directions in the article on how supplementary means are to be used; thus, the division is between use for confirmation and determination of meaning. However, the meanings do not exclude (and may even chime in with) the distinction recorded in the ILC’s work between examining the preparatory work and basing a determination upon it.<sup>25</sup>

#### 3.2 ‘Supplementary’

Any need for interpretation of the term ‘supplementary’ is largely subsumed by the substantive content of article 32, indicating the circumstances in which additional means of interpretation come into play for specified purposes; by practice,

<sup>24</sup> *Oxford English Dictionary* (1989) definitions 3.a and 4.a include the notion of resorting to someone or something for assistance or help, while the obsolete definition 5.a ‘usual or habitual going or resorting to a place’ captures the thought that preparatory work is something to which resort may be usual or habitual. It is also to be noted that the ICJ, in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, faced with possible divergences between the English and French texts of the question that was posed, used ‘recourse to nuclear weapons’ to refer to the threat or use of nuclear weapons, thus suggesting that ‘recourse’ does not necessarily only mean actual use: [1996–I] ICJ Reports 226, at 238, para 20.

<sup>25</sup> See section 2 above.

### 3. Meaning of 'Recourse' and 'Supplementary'

which includes liberal reference to both means specifically mentioned and others whose use is warranted by particular circumstances; and by the practical dynamics of interpretation which are assisted by awareness of the underlying thinking of the ILC and the clarificatory effect of the debate at the Vienna Conference on the amendment proposed by the USA.<sup>26</sup> As with 'recourse', an interpretative exercise, starting with an ordinary meaning for 'supplementary', would reveal some definitional notions at the root 'supplement' which are germane to its use here. That a supplement is something added as 'an enhancement' (in some senses, 'to complete' a work or provide reinforcement), and also 'something added 'to make good a deficiency', embraces (if rather obliquely) the two potential functions of recourse to preparatory work (confirmation and determination of meaning).<sup>27</sup> It may be useful to note that the dictionary definitions do not include any suggestion of 'subordinate'.

The equivalent French phrase in the Vienna Convention may suggest more ready access to further means of interpretation, using the term *des moyens complémentaires*. An English dictionary invites comparison of 'French *supplémentaire* (1790)' with 'supplementary' and 'modern French *compl[é]mentaire*' with 'complementary' as a matter of etymology, which may raise the question of whether there is correct alignment of meaning between the languages. However, the notions of 'completing' or 'perfecting' in the English term 'complementary' do not exclude dealing with 'deficiencies' according to further parts of the definition, while 'supplement' is defined to include 'enhancement' as well as 'make good a deficiency'.<sup>28</sup> The content of article 32 is capable of bearing both the notions of completing and making good. Examination of practice may, therefore, prove the most useful way of ascertaining the meaning and effect of the term 'supplementary'.<sup>29</sup>

### 3.3 Further supplementary means

More difficult is establishing the identity of other supplementary means of interpretation, given that the only immediate contextual clue is the word 'including' which introduces preparatory work and circumstances of conclusion of the treaty.<sup>30</sup> What lies beyond? 'Means of interpretation', when used in the context of the Vienna rules, appears to refer to material or substantive matters to be taken under consideration, rather than general interpretative principles of an analytical kind such as lawyers are accustomed to apply.<sup>31</sup> An example of the latter is the *eiusdem generis* principle. This assists in deciding whether an item is to be regarded

<sup>26</sup> See section 2 above.

<sup>27</sup> *OED* online 2012, definitions 1 and 2.

<sup>28</sup> *OED* online entries.

<sup>29</sup> See section 4 below.

<sup>30</sup> The French text (*notamment aux travaux préparatoires et aux circonstances dans lesquelles le traité a été conclu*) may carry the slightly different, or additional, connotation that the preparatory work and the circumstances of conclusion are the most significant supplementary means.

<sup>31</sup> Cf McNair, *The Law of Treaties*, Chapter XXII, and Aust, *Modern Treaty Law and Practice*, 220–1, listing further maxims and techniques commonly used by lawyers in interpretation.

as included in a list by applying a test of its similarity to items specifically mentioned in the list. Preparatory work and circumstances of conclusion are material elements linked to the particular treaty undergoing interpretation: the *eiusdem generis* principle is not a material element linked in a similar way, but rather a general interpretative principle which may be applicable in approaching particular material.

This distinction between material and general interpretative principles could be of importance, particularly given the somewhat optional character of recourse to supplementary means. Lawyer's techniques, often encapsulated in well-known maxims, could be particularly useful in applying the general rule rather than depending on the accessibility being governed by whether recourse is had to the supplementary means of interpretation. However, the Vienna rules are not exclusionary and article 32 is not so restrictively applied. Thus, even though well-known interpretative devices, such as the *eiusdem generis* principle, *expressio unius exclusio alterius*, or *a contrario* could fall within the ordinary meaning of 'supplementary means', these devices are not rigidly viewed as exclusively within the province of that rule.<sup>32</sup>

### 3.4 Relationship between supplementary means and the general rule

For an interpreter, the initial difference between the general rule and supplementary means is that the elements of the general rule have mandatory application (a treaty 'shall be interpreted in good faith...', 'There shall be taken into account', etc), the word 'shall' being used in treaties to denote obligation. In contrast, the supplementary means of interpretation are available to an interpreter ('Recourse may be had'), but their use is not expressed to be mandatory. This does not mean that supplementary means can be characterized as always *subordinate* to the general rule. Indeed, in the circumstances where the provisions of article 32 of the Vienna Convention envisage use of supplementary means 'to determine' the meaning, they are potentially dominant, albeit only after application of the general rule has left ambiguity, obscurity, etc in the result.

In finding a distinction between the general rule and supplementary means of interpretation to be both justified and desirable, the ILC looked mainly at the role of preparatory work and how it differed in character from the elements of the general rule:

The elements of interpretation in article [now 31] all relate to the agreement between the parties *at the time when or after it received authentic expression in the text*. *Ex hypothesi* this is not the case with preparatory work which does not, in consequence, have the same authentic character as an element of interpretation.<sup>33</sup>

<sup>32</sup> See further section 4.5.4 below.

<sup>33</sup> Commentary on draft articles [1966] *Yearbook of the ILC*, vol. II, p. 220, para (10), emphasis in original.

Noting that records of treaty negotiations can be incomplete or misleading and require particular discretion to determine their interpretative value, the Commission nevertheless pointed out that:

...the provisions of article [now 32] by no means have the effect of drawing a rigid line between the 'supplementary' means of interpretation and the means included in article [31]. The fact that article [32] admits recourse to the supplementary means for the purpose of 'confirming' the meaning resulting from the application of article [31] establishes a general link between the two articles and maintains the unity of the process of interpretation.<sup>34</sup>

The most common understanding of 'confirming' something does inherently link article 32 to article 31, quite apart from the explicit references to article 31 in article 32. Yet the ILC's notion of 'the unity of the process of interpretation', and the general link with the provisions in article 31 which it saw as established by the term 'confirm', are sometimes overlooked or misunderstood.<sup>35</sup> This may in part be due to the way in which article 32 gives such apparent prominence to the determining role of supplementary means by singling out, in separately denoted subparagraphs, the situation where an interpretation according to the general rule leaves the meaning ambiguous or obscure or produces a result which is manifestly absurd or unreasonable.<sup>36</sup> However, as has already been emphasized, the more precisely defined circumstances in which preparatory work may 'determine' meaning must not be taken to eclipse the general acceptability of reading the preparatory work for purposes covered by the term 'confirm' ranging from providing help in understanding provisions of a treaty to working with the general rule to give them meaning. Practice provides many examples of the integration of preparatory work in the process of interpretation thus preserving the unity of the latter which the ILC sought.

#### 4. *Issues and Practice*

This section tracks the two gateways which are established by article 32 and illustrates modalities of use of supplementary means. The first gateway is where application of the general rule has produced what appears to be the correct meaning which may lead to recourse to supplementary means to confirm the meaning. The main issues here are identifying the circumstances in which confirmation is to be sought and the nature of such confirmation. The second gateway is where, after application of the general rule, there remains one or more of ambiguity, obscurity, manifest absurdity, or unreasonableness. This gateway leads to use of supplementary means to determine the meaning.<sup>37</sup> Here the main issues are the nature of

<sup>34</sup> [1966] *Yearbook of the ILC*, vol II, p 220, para 10.

<sup>35</sup> See also sections 2.1 and 2.3 above.

<sup>36</sup> See J D Mortenson, 'The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?' (2013) 107 *AJIL* 780, at 786.

<sup>37</sup> It is wide of the mark to treat these gateways as simply factors affecting the meaning of the terms in question; see, for example, in assessing whether an attempt to secure local remedies was a

the four entry points for this gateway and how, once reached, the supplementary means lead to a determination of the meaning. As a preliminary matter, however, it must be noted that only sometimes do courts and tribunals identify which of these gateways they are using. In other instances their use is not explicit or there is no sign of them being used at all.

#### 4.1 Systematic use of gateways, unsystematic use, and by-passing them

##### 4.1.1 *Explicit reference to the qualifying gateway*

If circumstances arise where supplementary means have to be used to determine the meaning of provisions in a treaty, the qualifying conditions for their use are more likely to be clearly identified than where the rather loose notion of confirming a meaning is being applied. However, as courts and tribunals pay increasing attention to the Vienna rules, they do quite often state that they are using supplementary means (most commonly preparatory work) to confirm a meaning reached by applying the general rule.

For example, explicit reference to the route being followed to consideration of the preparatory work was made in the dispute between Indonesia and Malaysia concerning sovereignty over certain islands.<sup>38</sup> The ICJ had to decide whether a reference in an 1891 Convention to a boundary following a line of latitude continuing eastward across the island of Sebatik should be taken as extending beyond that island to separate out further islands then under Dutch sovereignty from those under British sovereignty.

The Court found that the object and purpose of the 1891 treaty was delimitation of boundaries between Dutch and British possessions within the island of Borneo itself and to resolve the status of the island of Sebatik. It found nothing in the treaty to suggest that the parties had intended to delimit the boundary between their possessions to the east of the islands of Borneo and Sebatik or to attribute sovereignty over any other islands.<sup>39</sup> Having concluded that the treaty provision read in context and in the light of the Convention's object and purpose could not be interpreted as establishing an allocation line determining sovereignty over the islands out to sea to the east of the island of Sebatik, the Court explained that it was not necessary to resort to supplementary means of interpretation to determine

prerequisite to arbitration of an investment dispute, the assertion that: 'As a matter of treaty interpretation, however, [the disputed provision] cannot be construed as an absolute impediment to arbitration. Where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation would lead to the kind of absurd or unreasonable result proscribed by Article 32 of the Vienna Convention ...': *BG Group Plc v Argentina* (UNCITRAL) Final Award of 24 December 2007, at para 147. The Vienna rules make no such proscription but enable a court or tribunal carrying out a proper interpretative exercise to have recourse to supplementary means to determine the meaning in such a situation.

<sup>38</sup> *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Reports 625.

<sup>39</sup> [2002] ICJ Reports 625, at para 51.

the meaning of the treaty but that it would have recourse to such supplementary means in order 'to seek a possible confirmation of its interpretation of the text of the Convention.'<sup>40</sup> In doing this, the Court examined not only the documents which preceded the treaty but also the history of assertions of rights by the British North Borneo Company and others, and the setting up of a joint commission by Great Britain and the Netherlands.

In this case the circumstances leading to the conclusion of the Convention were considered along with the accompanying documents forming the actual preparatory work. Since the only hint of possible extension of the line of latitude eastwards of Sebatik was in a document which had not been passed to the other side, and on a map which did not include the disputed islands, the Court found nothing in the preparatory work or circumstances of conclusion to support the Indonesian case for such an extension.<sup>41</sup> Explicit use of the gateway of confirmation not only led to further substantiation of the meaning derived by application of the general rule, but also enabled the Court to evaluate the submissions of one party as to the intention of the parties to the treaty.

#### 4.1.2 *Reaching the preparatory work informally*

Courts do not always indicate that the application of the general rule has led to a 'clear' meaning which is to be confirmed by reference to the preparatory work or that one of the circumstances is present which could make the preparatory work determinative of the meaning of a term or provision. This may reflect the way litigation works, with the arguments of the parties influencing the elements and shape of a court's judgment, or it may be that use of preparatory work is so much part of lawyers' interpretative apparatus that resort to consideration of it is instinctive rather than formalistic.

Thus, for example, in the *Avena* case<sup>42</sup> the ICJ rehearsed the arguments of the disputing parties over the preparatory work before deciding the meaning of the requirement in article 36 of the Vienna Convention on Consular Relations 1963 (here 'the Consular Convention') that the authorities of a state must inform arrested nationals of other parties 'without delay' of their right to ask for their consul to be informed of their arrest. One issue was whether 'without delay' was a synonym for 'immediately', ie immediately upon arrest. The Court found an accumulation of factors negating acceptance of 'immediately' as the correct meaning. It started its own analysis by noting that the Consular Convention offered no precise meaning through any definition provision, thus implicitly eliminating the possibility of any special meaning being established in application of article 31(4) of the Vienna Convention; but the Court did explicitly state that the terms would therefore have

<sup>40</sup> [2002] ICJ Reports 625, at para 53.

<sup>41</sup> [2002] ICJ Reports 625, paras 56–58. The Court then considered subsequent practice of relevant parties, including publication of maps.

<sup>42</sup> *Case concerning Avena and other Mexican Nationals (Mexico v USA)* [2004] ICJ Reports 12.

to be interpreted applying the customary law rules set out in articles 31 and 32 of the Vienna Convention.<sup>43</sup> The Court observed that such was the variety of terms used in the different language versions of the Consular Convention for ‘without delay’ and ‘immediately’ (in that Convention’s article 14) that recourse to dictionary definitions gave no assistance.<sup>44</sup> This analysis effectively reflected articles 31(1) and 33 of the Vienna Convention.

Since it was clear that neither article 36 of the Consular Convention nor any of its other provisions envisage a consular officer acting in person as the legal representative of the accused or being directly involved in the criminal justice process, the Court found no indication that the object and purpose of the treaty meant that ‘without delay’ was to be understood as ‘immediately upon arrest and before interrogation’.<sup>45</sup> Having thus, in effect, made its initial approach via articles 31(4), 33, and 31(1) of the Vienna Convention, the Court proceeded directly to its own assessment of the preparatory work of the Consular Convention. This revealed various strands. The ILC Special Rapporteur had explained that the Commission had proposed ‘without undue delay’ to allow for special circumstances which might permit information about consular notification not being given at once. There had been no consensus for including a specific time requirement for notification, no proposal to use ‘immediately’, and no suggestion that the time factor was linked in any way to the start of interrogation.<sup>46</sup> There was convergence on deletion of ‘undue’ from the phrase ‘no undue delay’, a deletion which had been proposed to avoid the implication that some delay was permissible. The Court thus concluded that ‘without delay’ was not necessarily to be interpreted as ‘immediately’ upon arrest, although there was nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it was realized that the person was, or probably was, a foreign national.<sup>47</sup>

The most significant points to note in this judgment are: first, the ease with which the Court swept into its consideration of the preparatory work having worked through some of the components of the general rule; second, the Court’s admission to a prominent place in the argument of the recorded use by the diplomatic conference of the Special Rapporteur’s explanations of the ILC’s work; third, the Court’s reference to individual contributions by delegations at the diplomatic conference to give a fair account of the development of the treaty text; and, finally, the Court did not make a clear distinction between use of the preparatory work to confirm a meaning and to establish a meaning (though it had noted irreconcilable variations of dictionary meanings of the terms used in the different languages), but rather used the preparatory work in a cumulative analysis to negate a meaning of ‘immediately’. This seems quite a vivid reassurance that the fears of Professor McDougal over ‘preclusionary hurdles’ preventing use of preparatory work and circumstances of conclusion need not be obstructive in practice.

<sup>43</sup> [2004] ICJ Reports 12, at 48, para 83.

<sup>44</sup> [2004] ICJ Reports 12, at 48, para 84.

<sup>45</sup> [2004] ICJ Reports 12, at 48, para 85.

<sup>46</sup> [2004] ICJ Reports 12, at 48–49, para 86.

<sup>47</sup> [2004] ICJ Reports 12, at 47, para 80, and at 48–49, paras 86–88.

4. *Issues and Practice*4.1.3 *Incidental use of supplementary means*

Reference to preparatory work and circumstances of conclusion of treaties is quite often included in a judgment or award's narrative account of the background. For example, in the *Arrest Warrant* case, three of the ICJ judges who considered the extent of universal jurisdiction of states, gave an account of the development of the concept of universal jurisdiction.<sup>48</sup> They found that states had jurisdiction under certain treaties (such as those concerning torture, hostages, hijacking, etc), jurisdiction which could be described as 'treaty-based broad extraterritorial jurisdiction'. In addition under those treaties the parties had jurisdiction to prosecute an offender found in their territory, jurisdiction which was only 'universal' by loose use of language, being really 'obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere'.<sup>49</sup> In examining the treaties relevant to this conclusion, the Joint Separate Opinion referred to preparatory work of the Conventions to explain their history, interpretation, and intended operation.<sup>50</sup> It can readily be recognized that such reference to supplementary means does not need justifying by use of one of the Vienna rules' gateways. It was simply part of the exposition of the historical development of the law and its analysis.

Incidental reference to preparatory work also occurs from time to time when courts and tribunals refer to accounts, analysis, and conclusions in works by authors having a focus on a particular treaty.<sup>51</sup>

4.1.4 *Admitting preparatory work introduced by parties*

There is an understandable tendency on the part of courts and tribunals to admit into consideration preparatory work which is proffered as such by both, or all, parties to a dispute.<sup>52</sup> Indeed, it is quite difficult to exclude mention of material which is unilaterally submitted even if it does not clearly form part of the preparatory work. Typically, the main presentation of material and argument to international

<sup>48</sup> *Case concerning the Arrest Warrant of 11 April 2000 (Congo v Belgium)*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal [2002] ICJ Reports 63, at 68–72, paras 19–31; the majority judgment did not address this matter; for another example of incidental reference to preparatory work, see *Re Norway's Application (Nos 1 and 2)* [1990] 1 AC 723, at 799, where the House of Lords recounts preparatory work of a Hague Convention showing that no difficulty had arisen in practical application of bilateral agreements on the same subject despite differences among states in their national law over meaning of 'civil and commercial matters'.

<sup>49</sup> *Arrest Warrant* case, Joint Separate Opinion, [2002] ICJ Reports 63, at para 41.

<sup>50</sup> See, eg, [2002] ICJ Reports 63, at paras 27 and 35.

<sup>51</sup> See, eg, references to UNHCR *Handbook* section 4.5.3 below; C H Schreuer, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge: CUP, 2001); and *Polyukhovich v Commonwealth of Australia* (1991) 172 CLR 501 FC 91/026, at para 105.

<sup>52</sup> See, eg, the WTO Appellate Body: 'We observe, as a preliminary matter, that this appeal does not raise the question whether... [two Secretariat documents] constitute "supplementary means of interpretation...". Both participants agree that they do, and we see no reason to disagree.' *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of 7 April 2005, WT/DS285/AB/R, para 196, and for further on this case, see sections 4.3.1 and 4.4.1 below.

courts and tribunals is in writing. Judges or arbitrators may reject material from consideration, or exclude it from their reasoning, but cannot readily prevent it being brought to their notice.

However, even where there is a firm determination by a court or tribunal that recourse to preparatory work is not necessary to reach a proper interpretation, the wide scope offered by article 32 for use of preparatory material to confirm a meaning may combine with a court's inclination to acknowledge the introduction of material by the parties. Thus, for example, in *Georgia v Russia*, the ICJ determined that a provision of the treaty referring to a dispute 'which is not settled by negotiation' set preconditions to bringing a case before the Court. The Court nevertheless considered that, given the extensive arguments of the parties and the Court's previous practice of resorting to the preparatory work to confirm its reading of a provision, a presentation of the parties' positions and an examination of the preparatory work was warranted.<sup>53</sup> In the event, the Court noted that, while no firm inferences could be drawn from the drafting history of the Convention as to whether negotiations or the procedures expressly provided for in the Convention were meant as preconditions for recourse to the Court, it was possible nevertheless to conclude that the materials constituting the preparatory work 'do not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation'.<sup>54</sup> This invites consideration of the role of confirming a meaning and, implicitly, raises the question of how to proceed if the preparatory work does suggest a different conclusion from that achieved by application of the general rule.

## 4.2 Confirming meaning

### 4.2.1 *Confirming a clear meaning*

In using the Vienna rules, the ICJ is sometimes quite explicit that it is using the preparatory work simply to confirm a meaning that is already clear from applying the general rule. For example, in *Territorial Dispute (Libya/Chad)* the ICJ used the general rule to establish that it was clear that in a 1955 treaty, when the parties stated that they recognized frontiers that resulted from instruments listed in an annex to the treaty, they acknowledged that these instruments defined all the frontiers even if demarcation on the ground had been left over to later work in some instances.<sup>55</sup> Accordingly, the Court stated:

The Court considers that it is not necessary to refer to the *travaux préparatoires* to elucidate the content of the 1955 Treaty; but, as in previous cases, it finds it possible by reference to

<sup>53</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, (*Preliminary Objections*), [2011] ICJ Reports 70, at 128–9, paras 142–6, at para 142 listing previous cases in which the practice of examination to confirm a meaning had been followed.

<sup>54</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, (*Preliminary Objections*), at 130, para 147.

<sup>55</sup> [1994] ICJ Reports 6.

the *travaux* to confirm its reading of the text, namely that the Treaty constitutes an agreement between the parties which, inter alia, defines the frontiers.<sup>56</sup>

It may legitimately be asked why, if the meaning was so clear from application of the general rule, was it necessary to consider the preparatory work at all? The general answer is that, as acknowledged by the ILC's Special Rapporteur (Waldock) and many others, in virtually all cases where there is an issue of treaty interpretation, it is the practice to look at the preparatory work even if nothing comes of it. In the particular case, there are some deductions that can be made from reading the Court's account of the preparatory work; but it probably boils down to doing justice to the parties and their arguments, and completing the interpretative exercise. The records showed that in negotiating the 1955 treaty, the Libyan negotiators had wished to leave aside the issues of frontiers but had been persuaded that these should be determined, even in the case of one frontier in a treaty of 1919 which was difficult to apply because of events subsequent to that date. The Libyan leader had nevertheless stated in the 1955 negotiations that the 1919 Agreement was 'acceptable' and that 'implementation' of it was to be left to the 'near future'. The Court found that 'implementation' could only mean 'operations to demarcate the frontier on the ground'.<sup>57</sup> Thus this exploration of the negotiating history showed respect for the fact that there were, possibly, grounds for arguing that something had been left aside at one stage in the negotiation of the treaty, that this warranted examination, but that the intended outcome was clear enough.

The evident influence that preparatory work can exert, even when a court is vigorously asserting that its role is only confirmatory, is well shown in the judgment of the ECtHR in *Bankovic & Others v Belgium & Others*.<sup>58</sup> The Court had to decide whether the parties' commitment to 'secure to everyone within their jurisdiction' respect for rights under the European Convention on Human Rights had extraterritorial reach when NATO forces caused death, injury, and damage in Serbia, which was not a party to the Convention:

Finally, the Court finds clear confirmation of this essentially territorial notion of jurisdiction in the *travaux préparatoires* which demonstrate that the Expert Intergovernmental Committee replaced the words 'all persons residing within their territories' with a reference to persons 'within their jurisdiction' with a view to expanding the Convention's application to others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the Contracting States...

However, the scope of Article 1, at issue in the present case, is determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection... In any event, the extracts from the *travaux préparatoires* detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention which cannot be ignored. The Court would emphasise

<sup>56</sup> [1994] ICJ Reports 6, at 27–28, para 55.

<sup>57</sup> [1994] ICJ Reports 6, at 27–28, para 55.

<sup>58</sup> Application no 52207/99, Decision on Admissibility (2001).

that it is not interpreting Article 1 'solely' in accordance with the *travaux préparatoires* or finding those *travaux* 'decisive'; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court (Article 32 of the Vienna Convention 1969).<sup>59</sup>

The ICJ and other courts and tribunals do not always express in direct or simple terms that they are using preparatory work to confirm a meaning even when using preparatory work in that role. For example, the ICJ has several times phrased its conclusions in terms indicating that it does not view the preparatory work as contradicting an interpretation at which the Court has arrived by other means:

... none of the sources of interpretation referred to in the relevant Articles of the Vienna Convention on the Law of Treaties, including the preparatory work, contradict the conclusions drawn from the terms of Article 41 read in their context and in the light of the object and purpose of the Statute.<sup>60</sup>

The Court concludes from this that ... the text of Article 11 of UNCLOS and the *travaux préparatoires* do not preclude the possibility of interpreting restrictively the concept of harbour works ... so as to avoid or mitigate the problem of excessive length identified by the ILC.<sup>61</sup>

Finding that preparatory work does not 'contradict' a conclusion, 'preclude' the possibility of interpreting a term in a particular way, and does not 'suggest a different conclusion', all indicate a form of confirmation, but give it a formulation which leaves hanging the implicit questions: what would have happened if there had been a contradiction? Could preparatory work preclude an otherwise proper interpretation? This has not been resolved in the practice of courts and tribunals. There are few cases that even come near to producing an interpretation that is entirely clear yet directly contradicted by preparatory work which is itself crystal clear.

#### 4.2.2 *Role of 'confirming' when preparatory work contradicts meaning afforded by application of general rule*

One of the most prominent of recent ICJ cases in which preparatory work was in issue was *Qatar v Bahrain* in 1995.<sup>62</sup> The case shows that whatever the correct evaluation of the relationship between application of the general rule and recourse to preparatory work, any relevant and accessible preparatory work will normally be considered, but its confirmatory role may depend on how the material is to be read. The case inspired consideration of the problem of what the interpreter is to

<sup>59</sup> Application no 52207/99, Decision on Admissibility (2001), at paras 63 and 65.

<sup>60</sup> *LaGrand (Germany v USA)* [2001] ICJ Reports 466, at 506, para 109, and see the ICJ case *Application of the International Convention etc (Georgia v Russian Federation)* (2011), quoted at the end of section 4.1.4 above to the effect that the *travaux* in that case 'do not suggest a different conclusion'.

<sup>61</sup> *Maritime Delimitation in the Black Sea (Romania v Ukraine)* [2009] ICJ Reports 62, at 106, para 134.

<sup>62</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), (Jurisdiction and Admissibility)* [1995] ICJ Reports 6; and see Chapter 5, section 2.4.1 above, for the role of 'good faith' in interpretation in this case.

do if the preparatory work fails to confirm a meaning which emerges from application of the general rule, or if it can be read as tending to contradict that meaning. However, although the difference in approach between the majority and the principal dissent (Judge Schwebel) looks to be over how article 32 of the Vienna Convention applies, it is suggested here that the real difference was over how the preparatory work was to be read and understood. Nevertheless, the case warrants detailed attention as providing occasion for consideration of a difficult issue relating to preparatory work.

The dispute concerned maritime delimitation and territorial claims. A preliminary issue was whether Bahrain had agreed to the ICJ being seised of the case by Qatar individually rather than by joint submission by the two states. Arcane though this matter might appear, it was not merely a point for procedural obstruction. The substantial concern was how to define the extent of the dispute to be considered by the Court, in addition to the important point of legal principle that the Court's jurisdiction is wholly dependent on the consent of the parties in dispute.

For many years the two states had been in dispute over their maritime and territorial claims. Since independence, attempts had been made to resolve these disputes through the good offices of the ruler of Saudi Arabia. In the background was the possibility of reference to the ICJ. What aspects of the differences were to be included, and how the issues were to be formulated, in any agreement to submit the dispute to the Court were the core of the persistent disagreement, rather than the principle of judicial settlement itself. One suggestion in the course of negotiations was that the agreement to submit the case to the Court should have two annexes, one Qatari and the other Bahraini, each state defining in its annex the subjects of dispute it wanted to refer to the Court. This idea was not taken up. That it was suggested, however, shows that great importance was attached to how the dispute was formulated.

The ICJ had previously held that exchanges of letters in 1987 and minutes of discussions in 1990 ('the Doha minutes') amounted to treaties.<sup>63</sup> The issue in the 1995 stage of the case was interpretation of provisions on submission to the ICJ, with a focus on the Arabic word transliterated as 'al-tarafan', a dual usage which Qatar translated as 'the parties' and Bahrain as 'the two parties'.<sup>64</sup> This was in the context of a period ending in May 1991 being reserved to try to reach a settlement through the good offices of the Saudi King. The Doha minutes (in translation) recorded agreement that: 'Once that period has elapsed, the {two} parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula [a definition of the subject and scope of the commitment to jurisdiction], which has been accepted by Qatar, and with the procedures consequent on it.'<sup>65</sup>

<sup>63</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility)* [1994] ICJ Reports 112.

<sup>64</sup> [1994] ICJ Reports 112, para 34.

<sup>65</sup> [1994] ICJ Reports 112, para 30, in the translation used by the Court from the Arabic.

Did the controversial term ‘al-tarafan’ mean each state could individually start proceedings at the ICJ or did they have to be instituted by both together (the common process of submitting a case by special agreement<sup>66</sup>)? Qatar had made a unilateral application to the ICJ. If the agreements actually required Bahrain’s concurrence, Qatar’s application would have been insufficient to establish the Court’s jurisdiction. The point had been closely examined in the negotiations leading to the words used. An early draft had been unambiguous, reading in translation: ‘either of the two parties may submit the matter to the International Court of Justice’. This had been changed at the proposal of Bahrain to the potentially ambiguous expression ‘al-tarafan’. Qatar had accepted that.

The majority of judges (supporting the Court’s finding in favour of the permissibility of unilateral submission) started with the word ‘may’ in the complete phrase. This they found to indicate an option rather than an obligation, and hence suggested that the ordinary meaning of the words in that context was that either could submit the case. This was supported, in the view of the majority, by further contextual analysis. That the possibility of submitting the case was to be suspended until expiry of the stated period of Saudi mediation militated in favour of the possibility of unilateral submission to the Court, as did the reference to the Bahraini formula which in the circumstances left open the only procedural possibility that each party might submit distinct claims in the absence of agreement defining their scope.

The majority of the Court found this meaning so clear from application of the general rule of interpretation that the judges did not consider it necessary to resort to supplementary means of interpretation in order to *determine* the meaning of the Doha Minutes. The Court nevertheless did have recourse to these supplementary means ‘in order to seek a possible confirmation of its interpretation of the text’.<sup>67</sup> It prefaced its consideration of the preparatory work by stating the need for caution on account of its perception that the preparatory work was fragmentary. On what might be thought the crucial change from ‘either of the two parties’ to ‘the {two} parties’ (al-tarafan), the majority said:

The Court is unable to see why the abandonment of a form of words corresponding to the interpretation given by Qatar to the Doha Minutes should imply that they must be interpreted in accordance with Bahrain’s thesis. As a result, it does not consider that the *travaux préparatoires*, in the form in which they have been submitted to it—i.e., limited to the various drafts mentioned above—can provide it with conclusive supplementary elements for the interpretation of the text adopted; whatever may have been the motives of each of the Parties, the Court can only confine itself to the actual terms of the Minutes as the expression of their common intention, and to the interpretation of them which it has already given.<sup>68</sup>

<sup>66</sup> Such joint applications following the special agreement of the parties (‘compromis’) are denoted in the practice of the Court by the names of the parties being separated by ‘/’ rather than the ‘v’ used where a party has unilaterally brought the case without there being a compromis.

<sup>67</sup> [1994] ICJ Reports 112, para 40.

<sup>68</sup> [1994] ICJ Reports 112, para 41.

Nevertheless, it seems difficult when working with English translations of the phrase ‘either of the two parties’ to resist the apparently obvious implication of the deletion of ‘either of’ as removing the possibility of submission by either of them alone. And that was the gist of the dissent of Judge Schwebel.<sup>69</sup> Emphasizing that the central objective of treaty interpretation was finding the intention of the parties, and noting the controversial nature of the Vienna rules in the time leading up to their adoption, Judge Schwebel found that what the text and context of the Doha minutes left so unclear was crystal clear when the minutes were analysed with the assistance of the preparatory work.<sup>70</sup> Thus, he concluded, particularly in the light of the change in wording, that the correct interpretation was that an application to the Court required *joint* submission of the case.

Judge Schwebel noted that in 1987, in a draft for a letter submitting the case to the Court, Qatar provided for ‘preparing the *necessary* Special Agreement in this respect...’.<sup>71</sup> This suggested that Qatar, no less than Bahrain, saw conclusion of a special agreement, that is joint submission, as ‘necessary’. Further:

If the object of the Parties—if their common intention—was to make clear that ‘both Qatar and Bahrain had the right to make a unilateral application to the Court’, the provision that ‘either of the two parties may submit the matter’ would have been left unchanged. That wording achieved that object clearly, simply, and precisely. As it was, that unchanged phraseology authorized either of the two Parties to make unilateral application to the Court. To suggest that the change of that phraseology to ‘the two parties’ rather imports that each of the Parties—because of that change—is entitled to make a unilateral application to the Court is unintelligible.<sup>72</sup>

For present purposes, however, Judge Schwebel’s dissenting opinion is as interesting for his approach as for his conclusion. While he was at pains to reiterate the American objections to the Vienna Convention’s formulation as if it labelled preparatory work a ‘subsidiary’ means, and (in effect) to support McDougal and the New Haven school’s approach to treaty interpretation as being a matter of finding (in paraphrase) the shared intentions of the parties modified by any community values, in fact in his handling of the preparatory work in this case, Judge Schwebel’s approach seems very much in line with what the Vienna rules mandate. He found the term in issue to be ambiguous: ‘The expression in the Doha Minutes of “al-tarafan”, however translated, is quintessentially unclear; as the Court itself acknowledges, it is capable of being construed as meaning jointly or separately.’<sup>73</sup> He therefore reached the proper interpretation by looking at the preparatory work—all precisely as mandated by article 32.

In contrast, the majority had expressly found it unnecessary to resort to the preparatory work to make a *determination* of the correct meaning, but rather sought *confirmation* of the ordinary meaning as they found it to be. This resulted in the rather elliptical conclusion to the effect that the preparatory work could not

<sup>69</sup> [1995] ICJ Reports 27.

<sup>70</sup> [1995] ICJ Reports 27, at 38.

<sup>71</sup> [1995] ICJ Reports 27, at 33.

<sup>72</sup> [1995] ICJ Reports 27, at 34–35.

<sup>73</sup> [1995] ICJ Reports 27, at 37.

provide the Court with conclusive evidence in support of the interpretation which it had reached, but that there was no clear contradiction. This approach seems equally in line with the Vienna rules, perhaps reflecting more faithfully the differentiation between the general rule and supplementary means, even if the Court's assessment of the inconclusive nature of the preparatory work, particularly as regards the change of wording at the crucial point, may be thought to be less in tune with seemingly obvious inferences.<sup>74</sup>

While, therefore, different conclusions were reached, it is not clear that their divergence is attributable to the Vienna rules or to a fault line in them. If the difference in result had to be characterized in terms of approach, it might reasonably be summarized as the majority view giving preference to what those judges saw as a meaning which was clear in its context over unclear preparatory work, while Judge Schwebel gave precedence to what he saw as clear conclusions to be drawn from the preparatory work rather than to a term which was ambiguous and not clarified by its context. However, neither approach fell outside article 32. The majority and Judge Schwebel only really differed as to how to interpret the preparatory work.

Nevertheless, the discussion offered by the two judgments does reveal an apparent difficulty in the Vienna rules. The majority judgment (understandably, given that the issues did not arise for those judges) does not disclose what the position would have been had they found their interpretation to be clearly contradicted by the preparatory work. Perhaps finding this frustrating, Judge Schwebel explored the possibility that the Court in reality discounted the preparatory work because it did not confirm the meaning to which its analysis had led.<sup>75</sup> If that were the position, he found it would be hard to reconcile with interpretation of a treaty in good faith 'which is the cardinal injunction of the Vienna Convention's rule of interpretation. The *travaux préparatoires* are no less evidence of the intention of the Parties when they contradict as when they confirm the allegedly clear meaning of the text or context of treaty provisions.'<sup>76</sup>

Judge Schwebel homed in on this in a contribution to a book, his chapter being titled 'May Preparatory Work be Used to Correct rather than Confirm the "Clear" Meaning of a Treaty Provision?'.<sup>77</sup> This helpfully sets out relevant extracts from

<sup>74</sup> See para 41 of judgment, *ad fin.*

<sup>75</sup> Schwebel, dissenting, [1995] ICJ Reports 27, at 39.

<sup>76</sup> [1995] ICJ Reports 27, at 39.

<sup>77</sup> 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, 1996) 541, republished electronically at <<http://www.transnational-dispute-management.com>>, *Transnational Dispute Management*, vol 2, no 5 (Nov 2005); and for a response, see M H Mendelson, 'Comment on "May Preparatory Work be Used to Correct Rather than Confirm the "Clear" Meaning of a Treaty Provision?"', *Transnational Dispute Management*, vol 2, no 5 (Nov 2005). The problem appears to have been tackled head on (but not with specific reference to the Vienna rules) by the Swiss Federal Supreme Court in *Bosshard Partners Intertrading AG v Sunlight AG* [1980] 3 CMLR 664, at 674–75, para 21: 'If the wording is clear and its meaning, as it appears from the ordinary use of language and the subject and purpose of the treaty, is not patently contrary to sense, a differing interpretation only comes into question if it must be inferred with certainty, from the context or the legislative history of the treaty, that the contracting States had an agreed intention which differs from the wording' (footnote omitted). Since no authority

the preparatory work of the ILC and notes that more extensive use is made of preparatory work in practice, even where it contradicts an apparently plain meaning. Paradoxically perhaps, the problem presents itself in its most acute form only if one adopts a very literal meaning of 'to confirm' in article 32 of the Vienna Convention. If the whole of articles 31 and 32 are deployed in relation to that term, the picture is rather different. Even the ordinary meaning of 'confirm' is not monolithic. In a transitive mood, I may contact someone to confirm a provisional booking which I have made. I am actually going a little further than I had when originally booking because I am making firm something which previously was not. In an interrogative mode, I may telephone an airline or hotel asking them to confirm that they have received my internet booking and payment, and are keeping my reservation. I expect an affirmative response, but lurking is the fear that something may have gone wrong, in which case I will have to think again. Both situations show the comparable potential in the Vienna Convention's usage of 'confirm'.

Judge Schwebel considered that the Vienna Convention could hardly be said to be reflective of customary international law if it did not in fact fairly reflect state practice and judicial precedent:

That practice and precedent demonstrate that preparatory work is often brought to bear on the interpretation of treaties, by the parties to those treaties and by their interpreters, and this whether the *travaux préparatoires* confirm or correct an interpretation otherwise arrived at.<sup>78</sup>

That this reflects the meaning of the Vienna Convention provision is 'confirmed' in the preparatory work in the ILC.<sup>79</sup> However, it does not show exactly what should happen if preparatory work reveals an intended divergence from the ordinary meaning; nor has exploration of the issue thrown up a clear example. *Qatar v Bahrain* did not precisely pose the issue because it could reasonably be argued that there was uncertainty as to meaning in both text and preparatory work.

Perhaps the Vienna Convention's use in article 32 of 'confirm' comes closest to an example of the preparatory work, in combination with practice, contradicting an ordinary meaning, if a very narrow meaning is ascribed to 'confirm'. As well as the ILC's own view at the head of this chapter and the statements of the Special Rapporteur (Waldock) set out above,<sup>80</sup> there were also further observations in the preparatory work which may be taken as providing guidance on this issue. First, Yasseen in the ILC made clear the role he saw for preparatory work in relation to the 'clarity' of a text, stating that:

... the clearness or ambiguity of a provision was a relative matter; sometimes one had to refer [to] the preparatory work or look at the circumstances surrounding the conclusion

or example is given in support of this assertion, it would be difficult to sustain in the face of the Vienna rules.

<sup>78</sup> Schwebel, 'May Preparatory Work be Used to Correct rather than Confirm the "Clear" Meaning of a Treaty Provision?' 547.

<sup>79</sup> See references to records of ILC in sections 2.2 and 2.3 above.

<sup>80</sup> See sections 1 and 2.3 above.

of the treaty in order to determine whether the text was really clear and whether the seeming clarity was not simply a deceptive appearance. He could not accept an article which would impose a chronological order and which would permit reference to preparatory work only after it had been decided that the text was not clear, that decision itself, being often influenced by the consultation of the same sources.<sup>81</sup>

The Special Rapporteur (Waldock) acknowledged this, noting that it was sometimes impossible to understand clearly even the object and purpose of the treaty without such reference.<sup>82</sup> At the Vienna Conference, the issue was addressed head on by the delegate of Portugal:

What would happen if, though the text was apparently clear, in seeking confirmation in the preparatory work and other surrounding circumstances a divergent meaning came to light? It was impossible to be sure in advance that those circumstances would confirm the textual meaning of the treaty. If the emphasis were placed on good faith, it would appear that in such a case those circumstances should be taken into consideration...<sup>83</sup>

The outcome at Vienna was inconclusive save in the sense that the conference endorsed the distinction between the general rule and supplementary means. Analysis without examples is difficult to evaluate; but it is also difficult to find examples of situations in which an unquestionable interpretation ascertained by proper application of the general rule is directly contradicted by a clear indication in preparatory work of the common understanding as to the meaning held by all negotiators. Close, perhaps, are two examples given in Chapter 1, above. The most firmly established meaning of an 'alcoholic' (as one who is addicted to alcohol rather than temporarily drunk) would not in fact have been confirmed by the preparatory work, whereas a broader connotation of drunkenness, which the Court found established from the context, was strongly supported by the preparatory work.<sup>84</sup> Similarly, the place where an arbitral award was 'made' was not necessarily where it was signed but, as shown by the preparatory work, was a reference to the place of arbitration.<sup>85</sup> In both these situations reference to the preparatory work shows that a primary meaning which was, or might have been thought to be, clear was contradicted by the preparatory work. In both cases the correct meaning was not so far removed from ordinary meanings and usage of the words in issue as to preclude the proper meaning being deduced by application of the general rule, the preparatory work giving strong confirmation of this.<sup>86</sup>

<sup>81</sup> [1964] *Yearbook of ILC*, vol I, p 313, para 56.

<sup>82</sup> [1964] *Yearbook of ILC*, vol I, p 313, para 57.

<sup>83</sup> United Nations Conference on the Law of Treaties, Official Records: First Session, p 183, para 56; and see Schwebel, 'May Preparatory Work be Used to Correct rather than Confirm the "Clear" Meaning of a Treaty Provision?', at 544–47.

<sup>84</sup> See *Litwa v Poland* in Chapter 1, section 5.1 above.

<sup>85</sup> See *Hiscox v Outhwaite* considered in Chapter 1, section 5.4 above; and see below. It is to be noted that in *Hiscox v Outhwaite* the higher courts in the UK reached their conclusion without the benefit of the Vienna rules; but the facts are helpful as illustrating how proper use of the Vienna rules in academic analysis of the problem had assisted the court of first instance to a conclusion in line with the eventual legislation that was required to reverse the interpretation given by the higher courts.

<sup>86</sup> Further examples of preparatory work in apparent conflict with an interpretation reached by application of the general rule of interpretation are *Young, James and Webster v UK* (ECtHR)

In any event, a divergent meaning disclosed by the preparatory work would be present in the interpreter's mind throughout any competently conducted interpretative exercise.<sup>87</sup> In such circumstances the unity of the Vienna rules is perhaps of greater significance than the *supplementary* character of the means identified in article 32, the rather elastic concepts of ambiguity, etc allowing for recourse to the preparatory work to determine the meaning in appropriate cases. Hence the real question would be what weight is to be given to the preparatory work. Here courts and tribunals may draw inspiration from Waldock's introductory reflection on the topic to the effect that preparatory work does not provide authentic interpretation but 'simply evidence to be weighed against any other relevant evidence of the intentions of the parties' whose 'cogency depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty.'<sup>88</sup>

#### 4.2.3 Using supplementary means to confirm 'intention'

Although the Vienna rules do not make the search for the intention of the parties a specific aim of treaty interpretation, reference to preparatory work almost inevitably points the thoughts of the interpreter in the direction of seeking the intention of the parties as much as towards the meaning of a term in a text. This was indeed explicitly stated in the explanation given by Waldock in the ILC.<sup>89</sup> Hence it is not surprising to find references to the intentions of the drafters of treaty provisions when preparatory work is being assessed. A good example of this is in the ICJ's Advisory Opinion on the *Wall in Occupied Palestinian Territory*.<sup>90</sup> One issue was whether the Fourth Geneva Convention, 1949, applied in the occupied territory of Palestine. That Convention stated that it applied (inter alia) to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties' (article 2(1)) and to 'all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance' (article 2(2)). Where the wall was in occupied Palestine, an entity whose statehood had not fully crystallized, was application of this provision excluded by the reference to 'territory of a High Contracting Party'? The Court had noted that Switzerland had concluded that, as a depositary of the Geneva Conventions, it was not in a position to decide whether the request in 1989 from the 'Palestine Liberation Movement' [*sic*] in

Application nos 7601/76 and 7806/77, Judgment of 13 August 1981 (considered further in chapter 10, section 5.1 below) and investment arbitrations following *Salini Costruttori SpA v Kingdom of Morocco* ICSID Case No. ARB/00/4 (Decision on Jurisdiction, 16 July 2001) (see further Chapter 10, section 6.2.1 below).

<sup>87</sup> For a realistic approach to the situation where material providing supplementary means of interpretation may itself have been the trigger for finding ambiguity, see *HICEE B.V. v Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011, relevant extract in section 4.3.1 below.

<sup>88</sup> Section 2.2 above. <sup>89</sup> See section 2.2 above.

<sup>90</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Reports 136.

the name of the 'State of Palestine' to accede inter alia to the Fourth Geneva Convention could be considered as an instrument of accession.<sup>91</sup> Hence there remained an issue whether the occupied territory was territory in respect of which the Conventions applied.

Making explicit reference to the Vienna rules, the Court identified two conditions of applicability in article 2(1) of the Fourth Geneva Convention: existence of an armed conflict, and that such conflict was between two contracting parties. It deduced from this that if those two conditions were satisfied, the Convention applied in any territory occupied in the course of the conflict by one of the contracting parties. This was not limited by article 2(2) because the object of that paragraph was not to restrict the scope of application of the Convention, as defined by article 2(1), by excluding territories not falling under the sovereignty of one of the contracting parties. It was directed 'simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable'.<sup>92</sup>

The Court supported this interpretation by stating that it reflected 'the *intention* of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power'.<sup>93</sup> This was shown by contrasting the provision with that of the Hague Regulations of 1907 whose drafters 'were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory', while 'the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories'.<sup>94</sup> In support of the latter proposition the Court referred to article 47 of the Geneva Convention. Although it is correct that article 47 provides rules for protection of persons in occupied territory without reference to such territory being that of a party to the Convention, the main support for assertions about the intentions of the drafters was to be found in the preparatory work. From examination of this, and having recited extracts from the material, the Court concluded that: 'The drafters of the second paragraph of article 2 thus had no intention, when they inserted that paragraph into the Convention, of restricting the latter's scope of application. They were merely seeking to provide for cases of occupation without combat, such as the occupation of Bohemia and Moravia by Germany in 1939'.<sup>95</sup>

This illustration of the use of preparatory work to ascertain the intention of the drafters shows a prominent role for the preparatory work in clarifying the meaning of a text whose literal sense could appear limitative of the application of the Geneva Convention. It should be emphasized, however, that this was only part of a fuller interpretative exercise, making use of other elements of the Vienna rules, including

<sup>91</sup> [2004] ICJ Reports 136, at 173, para 91.

<sup>92</sup> [2004] ICJ Reports 136, at 174, para 95.

<sup>93</sup> [2004] ICJ Reports 136, at 174, para 95 (emphasis added).

<sup>94</sup> [2004] ICJ Reports 136, at 174, para 95.

<sup>95</sup> [2004] ICJ Reports 136, at 174, para 95.

subsequent agreement by states parties to the Fourth Geneva Convention in their approval at a 1999 conference of the interpretation that the Convention applied to the occupied territory under consideration.<sup>96</sup>

#### 4.2.4 Using supplementary means to 'reinforce' an interpretation

The term 'confirm' in article 32 is very loosely interpreted in practice, reference to preparatory work and circumstances of conclusion being made to substantiate an interpretation that is emerging as much as confirming one which is already pretty much clear. An example of this is in the *Legality of Use of Force* cases (2004),<sup>97</sup> where the ICJ interpreted provisions of its Statute in the context of the regime for access to the Court by states not parties to the Statute, including the reference in article 35(2) of the Statute to 'the special provisions contained in treaties in force'. The Court used the general rule to identify possible interpretations of 'treaties in force' and continued:

The first interpretation, according to which Article 35, paragraph 2, refers to treaties in force at the time that the Statute came into force, is in fact reinforced by an examination of the *travaux préparatoires* of the text. Since the Statute of the Permanent Court of International Justice contained substantially the same provision, which was used as a model when the Statute of the present Court was drafted, it will be necessary to examine the drafting history of both Statutes...<sup>98</sup>

It seems fair to observe that how the Court chooses to introduce its consideration of preparatory work is less significant than whether it makes use of such work in some sort of confirmatory role or to determine the meaning where other means leave this unclear. Thus, in introducing the former role, it is difficult to see any distinction between the description above of the preparatory work as 'reinforcing' a possible interpretation and that in another case where the ICJ stated that 'further confirmation' of the Court's reading of a particular provision was to be found in the preparatory work.<sup>99</sup>

<sup>96</sup> See especially [2004] ICJ Reports 136, at 175, para 96. See also the comparable interpretative exercise referring to the intention of the drafters of the International Covenant on Civil and Political Rights, in paras 108–9 of the same advisory opinion. For other explicit references to seeking intention via preparatory work, see: *Pope & Talbot v Canada (Award in respect of Damages)* (NAFTA) (2002) 41 ILM 1347, at 1357, para 26: '... it is common and proper to turn to the negotiating history of an agreement to see if that might shed some light on the intention of the signatories', and *Klökner v Cameroon* (ICSID Ad Hoc Committee on Annulment, 3 May 1985) 114 ILR 152, at 286, paras 118–19: 'The preparatory works of the Convention seem to indicate that the intention was to limit the institution of annulment proceedings.'

<sup>97</sup> *Case concerning Legality of Use of Force (Serbia and Montenegro v Belgium) (Preliminary Objections)* [2004] ICJ Reports 279, and see also other cases by the same Applicant on *Legality of Use of Force (Serbia and Montenegro v Canada, France, Germany, Italy, Netherlands, Portugal, United Kingdom) (Preliminary Objections)* [2004] ICJ Reports where the same wording recurs.

<sup>98</sup> *Case concerning Legality of Use of Force (Serbia and Montenegro v Belgium) (Preliminary Objections)* at para 103.

<sup>99</sup> *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* [1988] ICJ Reports 69, at 85, para 37.

#### 4.2.5 Using preparatory work as general support

Allusion to preparatory work on an apparently incidental basis to support an interpretative argument is quite common. This can be justified as a use of supplementary means to confirm a meaning in a very general sense, or as less respectful of the more structured approach which the separation of the general rule and the supplementary means indicates, if read literally. So for example, in a lengthy note on interpretation of the 1965 Washington Convention's requirements as to nationality, when considering whether these had to be met by a company at the date of entering into a concession agreement or also at the date of making a request for arbitration, an International Centre for Settlement of Investment Disputes (ICSID) arbitral tribunal set out arguments including those based on analysis of the text, views of commentators, and interpretations by previous arbitral tribunals.<sup>100</sup> Following the latter, the tribunal simply noted that 'the *travaux préparatoires* of the Convention support the single requirement, see Documents... Vol. II, 287 etc'.<sup>101</sup>

#### 4.2.6 Reciting and using preparatory work contrasted

The practice of the European Court of Human Rights (ECtHR) in recounting the development of relevant provisions has already been shown.<sup>102</sup> However, that Court makes a definite distinction between stating the record from the preparatory work and deploying that material in an interpretative exercise. This distinction is not always so clearly made. For example, in *US v Kostadinov* the Court of Appeals (Second Circuit) considered the meaning of 'mission' in the Vienna Convention on Diplomatic Relations.<sup>103</sup> Although the Convention defined 'members of the mission' and 'premises of the mission', the term 'mission' was not defined separately. Did the fact that someone had an office in the Bulgarian trade mission in New York entitle them to immunities? The Court set out relevant provisions of the Convention and indicated that those provisions were better understood after examining the groundwork performed by the ILC and the discussions by the delegates to the Vienna Conference which prepared the Convention.<sup>104</sup> The Court used this background to show that the lower court had placed emphasis on the physical aspect of the mission, whereas it could be shown from the preparatory material that a mission in the diplomatic sense consists of a group of people sent by one state to another, not the premises which they occupy in the receiving state. This Court's further use of the preparatory work in its detailed support of this and its analysis of the provisions on immunity together formed the basis for

<sup>100</sup> *Vacuum Salt v Ghana* ICSID Case No ARB/92/1, (1994) 4 ICSID Rep 329, at 337–38, para 29, fn 9.

<sup>101</sup> (1994) 4 ICSID Rep 329, at 337–38, para 29, fn 9.

<sup>102</sup> See, eg, *Litwa v Poland* in Chapter 1, section 5.1 above.

<sup>103</sup> 99 ILR 103, 734 F 2d 905 (1984) (Sup Crt, certiorari denied).

<sup>104</sup> 99 ILR 103, 734 F 2d 905 (1984), at 106 and 907, respectively.

the interpretation denying immunity. While this approach may appear to give a greater role to the preparatory work than the Vienna rules would now warrant, unless a particular effort is made to separate systematically the elements identified by the rules, a narrative with provisions interwoven with preparatory work may make the most coherent presentation of a reasoned interpretation.

### 4.3 Determining meaning

#### 4.3.1 *Qualifying conditions: 'ambiguous or obscure' or 'manifestly absurd or unreasonable'*

Ambiguity or obscurity in the meaning produced by application of the general rule are notions which leave generous scope for resort to supplementary means such as preparatory work. The range of ordinary meanings of a term will often be extensive and the issue giving rise to the investigation of possible interpretations may itself point to the possibility of different meanings. That a word has various dictionary definitions, while raising the ordinary notion of ambiguity, does not necessarily mean that there is ambiguity in the sense of article 32 of the Vienna Convention.<sup>105</sup> The Vienna rules look here to ambiguity that remains after the application of the general rule—that is, after deploying all relevant elements of the whole of article 31, not merely the ambiguity of multiple senses in a dictionary. The context, subsequent agreement, subsequent practice, etc may resolve any such ambiguity without the need for determination by supplementary means.

However, the approach of the ILC was based on the suggestion of Waldock as Special Rapporteur reproduced at the head of this chapter and indicating reconciliation of the principle of the primacy of the text 'with frequent and quite normal recourse to *travaux préparatoires* without any too nice regard for the question whether the text itself is clear'. Waldock suggested that the proposed rule was 'inherently flexible, since the question whether the text can be said to be 'clear' is in some degree subjective'. Nevertheless, it can be dictionary definitions that initially point strongly to ambiguity, and courts and tribunals have not generally analysed too closely what is meant by ambiguity in article 32. Of course dictionaries give many words more than one meaning. 'Ambiguous' itself bears seven meanings of which the one indicated as most common offers multiple choice of somewhat different senses: 'Admitting more than one interpretation, or explanation; of double meaning, or of several possible meanings; equivocal'.<sup>106</sup> The dictionary stage, if it occurs in interpretation, is likely to be at the outset of the interpretative exercise, but that sets the ground for ultimate consideration of preparatory work if the

<sup>105</sup> Cf G G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Points' (1957) 33 BYBIL 203, at 216 suggesting a threshold in relation to ambiguity: 'It is . . . not sufficient in itself that a text is *capable* of bearing more than one meaning. These meanings must be equally valid meanings, or at any rate, even if one may appear more possible and likely than the other, both must attain a reasonable degree of possibility and probability, not only grammatically but as a matter of substance and sense' (original emphasis).

<sup>106</sup> *Oxford English Dictionary*.

general rule provides no clear resolution. Thus, in considering the meaning of ‘without delay’ in the *Avena* case, the ICJ observed that ‘dictionary definitions, in the various languages of the Vienna Convention [on Consular Relations], offer diverse meanings of the term “without delay” (and also of “immediately”). It is therefore necessary to look elsewhere for an understanding of this term’.<sup>107</sup> Taking the view that neither the treaty as normally understood, nor its object and purpose, suggested that ‘without delay’ was to be understood as ‘immediately upon arrest and before interrogation’, the Court wove a number of points from the preparatory work into its argument leading to the conclusion that ‘by application of the usual rules of interpretation’ there was a duty on the arresting authorities to give the required information to an arrested person as soon as it was realized that the person was a foreign national.<sup>108</sup>

In that case the ICJ gave little to indicate the precise role it was affording the preparatory work. Although following a brief account of ordinary meaning and context, the preponderant analysis of the preparatory work suggested that the use of this supplementary means of interpretation went beyond mere confirmation. In contrast, the Appellate Body of the WTO made the process much clearer in *US—Measures Affecting Gambling*. It noted that of the 13 dictionaries consulted by the Panel on the meaning of ‘sporting’, some included gambling in the definition while others did not.<sup>109</sup> Nevertheless, it was not this that led the Appellate Body to conclude that there was ambiguity. It was only after investigating the context and possible subsequent agreement that the conclusion of ambiguity was affirmed, which opened the door to determining the meaning by using supplementary means. Thus the Appellate Body stated specifically: ‘application of the general rule of interpretation set out in Article 31 of the *Vienna Convention* leaves the meaning of “other recreational services (except sporting)” ambiguous... Accordingly, we are required, in this case, to turn to the supplementary means of interpretation provided for in Article 32 of the *Vienna Convention*.’<sup>110</sup>

These cases show what may be described as at least the presence of dictionary-derived ambiguity, leading the way to reasoning drawn from preparatory work. A different situation is where material introduced as supplementary means of interpretation is what suggests that there is ambiguity. In *HICEE v Slovak Republic* an arbitral tribunal considered that Dutch explanatory notes drawn up by one

<sup>107</sup> *Case concerning Avena and other Mexican Nationals (Mexico v USA)* [2004] ICJ Reports 12, at 48, para 84, considered further in section 4.1.2 above.

<sup>108</sup> [2004] ICJ Reports 12, at 48–9, paras 84–88.

<sup>109</sup> *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Appellate Body Report of 7 April 2005, WT/DS285/AB/R, para 165 and fn 193, also noting that: ‘Some of the definitions appear to contradict one another. For instance, the *Shorter Oxford English Dictionary* definition quoted by the Panel defines “sporting” as both “characterized by sportsmanlike conduct”; and “[d]esignating an inferior sportsman or a person interested in sport from purely mercenary motives”’, and see further on this case section 4.4.1 below.

<sup>110</sup> *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Appellate Body Report of 7 April 2005, WT/DS285/AB/R, at para 195.

party to a bilateral investment treaty resolved uncertainty as to whether the term ‘directly’ referred to an investment made only in a company incorporated in the host state but not in a subsidiary of such a company, or whether it meant any company in the host state that was not a subsidiary of a company incorporated in a third state.<sup>111</sup> As to how the ambiguity had been identified, the Tribunal stated:

It may be objected...that the whole Treaty Interpretation Issue might never have entered anyone’s mind in the first place had it not been for the Dutch Explanatory Notes, in other words that it is not admissible to introduce the Notes in order to give rise to an ambiguity. But the Tribunal is unable to follow so counterfactual a line of argument. The plain fact is that the Explanatory Notes were put in argument before it, with a provenance and a relevance that cannot be gainsaid. Whether the ambiguity in the text would otherwise have occurred to either side in this dispute, or to the Counsel representing it, is a hypothetical issue on which it would not be proper for a tribunal to speculate. Suffice it to say that the Tribunal, having been confronted with the treaty text and by the highly professional argument put before it on both sides, has registered the ambiguity in its ‘ordinary meaning’ and is bound to note that ambiguities exist *a fortiori*; their existence does not depend on the skill of counsel in arguing how they should be resolved.<sup>112</sup>

Ambiguity is not, of course, confined to one word having two or more meanings. A text may be ambiguous where provisions read together leave open different possible interpretations. In *Hosaka v United Airlines*, a US Court of Appeals endorsed the proposition that: ‘It is axiomatic that an agreement subject to two or more reasonable interpretations... is ambiguous.’<sup>113</sup> This case (which is considered in more detail below) concerned the 1929 Warsaw Convention which provided a set of uniform rules to be applied in national systems of law in claims against carriers asserting liability for death, injury, loss, or damage during international carriage by air. Article 28 of the Convention provided that:

- (1) [any such claim was to be brought in one of four specified places] ‘at the option of the plaintiff’; and
- (2) ‘questions of procedure shall be governed by the law of the court seised of the case’.

In issue was whether a court in a place selected by the plaintiff from one of the four specified options could decline jurisdiction on the basis that it was not the appropriate court (ie applying the doctrine of ‘*forum non conveniens*’)? If a national system of law characterized application of the doctrine as a procedural matter, did that doctrine or the option exercised by the plaintiff prevail? This might seem an obvious situation in which to apply the principle that general provisions (such as the one on questions of procedure) do not derogate from specific ones. However,

<sup>111</sup> *HICEE B.V. v Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011; for further consideration of this case, see section 4.5.4 below.

<sup>112</sup> *HICEE B.V. v Slovak Republic*, para 138.

<sup>113</sup> 305 F.3d 989 (9th Cir. 2002), at 995, certiorari denied 537 U.S. 1227.

the Court found the text to be ambiguous, affording two possible interpretations, both of which it considered reasonable.<sup>114</sup>

Obscurity is less commonly instanced than ambiguity as the specific gateway to determination from the preparatory work. In practice, courts and tribunals tend to contrast provisions that are ‘clear’ with those that are ‘uncertain’. Thus, for example, the tribunal in *Prosecutor v Dusko Tadić* stated:

... since at least with regard to the issue of discriminatory intent those statements may not be taken to be part of the ‘context’ of the Statute, it may be argued that they comprise a part of the *travaux préparatoires*... Under customary international law, as codified in Article 32 of the Vienna Convention referred to above, the *travaux* constitute a supplementary means of interpretation and may only be resorted to when the text of a treaty or any other international norm-creating instrument is *ambiguous or obscure*. As the wording of Article 5 is clear and does not give rise to uncertainty... there is no need to rely upon those statements.<sup>115</sup>

It is harder to find specific reference to a result of application of the general rule being expressly found to be ‘manifestly absurd or unreasonable’ (article 32(b)).<sup>116</sup> ‘Monstrous’, ‘absurd’, ‘a nonsense or at least a tautology’, and ‘not reasonable’ are some of the terms used to indicate the grounds on which arbitrators have rejected interpretations in case law pre-dating the Vienna Convention.<sup>117</sup> These suggest that these requirements for supplementary means to be determinative are considerably more demanding than an interpretation according to the general rule being merely unpalatable.

Article 32(b) has, however, occasionally been mentioned in a rather different context from being a gateway to use of supplementary means. This is to support rejection of a suggested meaning of a treaty provision on the basis that it would produce a result that is manifestly absurd or unreasonable.<sup>118</sup> Such invocation of

<sup>114</sup> 305 F.3d 989, at 994–6; for the use made of the preparatory work, circumstances of conclusion, and the further approach of the Court in finding that the option of the plaintiff prevailed, see section 4.4.2 below.

<sup>115</sup> [1999] ICTY2 (15 July 1999), 124 ILR61, at 183–84, para 303; note that the statement that supplementary means of interpretation may *only* be resorted to when the text of a treaty is ambiguous or obscure is incomplete: ambiguity is only a precondition for recourse to preparatory work *to determine* meaning, not when *confirming* meaning; and see, similarly risking conveying an incomplete impression, Report of the ILC Sixty-eighth Session, (2013) Supplement No. 10 A/68/1, p 14, Conclusion 1, Commentary, para (3).

<sup>116</sup> Absurdity was explicitly cited as a ground for using supplementary means in *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Appellate Body, Report of 7 April 2005, WT/DS285/AB/R, at para 236, but ambiguity had been found as well: see further section 4.4.1 below; see also *Indonesia—Certain Measures affecting the Automobile Industry*, WTO Panel, Report of 2 July 1998, at paras 5.332 ff, where a WTO Panel used the absurdity of the consequences of one party’s argument as a ground for examining the preparatory work.

<sup>117</sup> See citations and analysis in the *Rhine Chlorides case (Netherlands v France)*, Arbitral Award of 12 March 2004, 144 ILR 259, at 297–99, paras 73–76, considered further in Chapter 1, section 5.2 above.

<sup>118</sup> See, eg, *Pope & Talbot v Canada (Merits Phase 2)* (2000) (NAFTA), 122 ILR 352, at 384, para 118, fn. 115 and *(Award in respect of Damages)* (2002) 41 ILM 1347 at 1350, where the tribunal relied on the argument against an interpretation that it would produce a result which was absurd in the sense of article 32 of the Vienna Convention because another provision in the treaty would apply to produce exactly the result of the interpretation in issue; and in similar vein: *Ethyl Corp v Canada (Jurisdiction)* (NAFTA) (1999) 38 ILM 708, at 728–29, para 85, and 734, fn 34.

this test is not four-square within article 32(b), since there it is a lead-in to using supplementary means of interpretation to *determine* the meaning when application of the general rule produces an unsatisfactory result. However, absurdity of result is sometimes argued as an aid to excluding meanings when identifying the ordinary meaning of a term.

An example of use of the concept of absurdity which could trigger reference to the preparatory work was offered in *Champion Trading Co, J T Wahba & Others v Egypt*.<sup>119</sup> An ICSID tribunal upheld the ordinary meaning of the provision in the 1965 Washington Convention, which excluded dual nationals from invoking protection under the Convention against a host country of the investment when also a national of that country. In doing so the tribunal noted reference made by the respondent to the preparatory work which showed that early drafts allowing protection for dual nationals had been changed by unanimous decision to exclude such protection explicitly. However, while upholding that clear meaning for application in the instant case, the tribunal speculated that:

This Tribunal does not rule out that situations might arise where the exclusion of dual nationals could lead to a result which was manifestly absurd or unreasonable (Vienna Convention, article (32)(b)). One could envisage a situation where a country continues to apply the *jus sanguinis* over many generations. It might for instance be questionable if the third or fourth foreign born generation, which has no ties whatsoever with the country of its forefathers, could still be considered to have, for the purpose of the Convention, the nationality of this state.<sup>120</sup>

It is, however, difficult to see how reliance on article 32 could produce a different interpretation that would avail such potential claimants of remote generations. The preparatory work would still confirm the clear exclusion. It seems more likely that the concept of 'effective nationality' would prove the focus of interpretative development through the application of article 31(3)(c) of the Vienna Convention, a concept which was considered in the present case but which did not avail when the link of nationality was not tenuous and artificially imposed.

#### 4.3.2 *Ambiguous by reference to availability of another word having one of the claimed meanings*

In the example given in Chapter 1 above, in the case of *Hiscox v Outhwaite*<sup>121</sup> one of the central issues was where an arbitral award is 'made' within the meaning of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. When the arbitrator signed an award in Paris, was the award 'made' in France despite all other connections in the arbitration being with England? In the context of execution of legal documents, judgments, and so on, the point at which the award became concluded would commonly be taken as the moment at which it

<sup>119</sup> ICSID Case No ARB/02/9, Decision on Jurisdiction, 21 October 2003.

<sup>120</sup> ICSID Case No ARB/02/9, Decision on Jurisdiction, 21 October 2003, at 288.

<sup>121</sup> [1992] 1 AC 562 and see Chapter 1, section 5.4 above.

was signed. Nevertheless, delivery could fit the bill if that was identifiable as completion of the process. However, even given that possible uncertainty (one which was canvassed in the case), the strong inclination of the judiciary in England was towards viewing signature as the concluding act. Only the judge at first instance pointed out that had the New York Convention used the term ‘signed’, that would have been unambiguous. ‘Made’ was a different word from ‘signed’. Hence he found ambiguity where the other judges did not.<sup>122</sup>

#### 4.4 Modalities of use of supplementary means

##### 4.4.1 *Using and construing preparatory work*

Consistent with the ILC’s aim of stating only those rules of interpretation which have general application, its authorization of ‘recourse’ to supplementary means does not prescribe how that recourse is to be made or how the supplementary means are to be read, other than by reference to the purpose of such recourse as being either to confirm or determine a meaning. Because of the diversity of preparatory work and relevant circumstances it would, in any event, have been a hopeless task to try to include guidance in the Vienna rules. Courts and tribunals, and other interpreters, have to work out for themselves what to make of these supplementary means.

Using supplementary means for confirmation of a meaning may involve no more than recounting the stages of development of a provision. For example, in *Witold Litwa v Poland*<sup>123</sup> the issue was whether the word ‘alcoholics’ necessarily imported the notion of someone suffering addiction or could include those who are merely under the influence of too much alcohol. Having determined by application of the general rule that the latter was the correct meaning, the ECtHR found confirmation in the preparatory work, whose relevant features the Court had set out in the ‘Facts’ section of its judgment. This showed how the concern to allow for domestic measures on drunkenness had become transformed in drafting. The history spoke for itself, but formally its role was only confirmatory.

Rather different was the situation in the WTO Appeal Body’s Report on *US—Measures Affecting Gambling*.<sup>124</sup> The issue was whether gambling came within the US schedule of commitments annexed to the General Agreement on Trade in Services (GATS), which included an entry ‘OTHER RECREATIONAL SERVICES (except sporting)’. This entry remained ambiguous after applying the general rule of interpretation, it being unclear whether ‘sporting’ included gambling. Hence it was necessary to rely on supplementary means to determine the meaning of ‘sporting’. In preparation for adoption of the GATS, the GATT

<sup>122</sup> See Chapter 1, section 5.4.

<sup>123</sup> ECHR App no 26629/95 (judgment of 4 April 2000); see fuller account in Chapter 1, section 5.1 above.

<sup>124</sup> *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Appellate Body Report of 7 April 2005, WT/DS285/AB/R.

Secretariat had circulated 'document W/120' to assist in defining services by providing a 'services sectoral classification list'. The list incorporated references to the 'United Nations' Provisional Central Product Classification' (CPC), which is a very detailed and multi-level classification of goods and services. The Secretariat had also circulated a document known as the '1993 Scheduling Guidelines', designed to assist in determining what should be put in a WTO Member State's annex to the GATS and how entries should be expressed. Classification was to be based on the document W/120 list, with any necessary further refinements of sectoral classifications being achieved by reference to the more detailed taxonomy in the CPC. Although W/120 and the 1993 Guidelines were not agreements on interpretation in the sense of the Vienna general rule, there was no dispute that they were preparatory work and that the USA had indicated that it had used W/120 in preparing its Annex and had sought to follow the 1993 Guidelines.<sup>125</sup> The CPC did not include gambling in its detailed entries for 'sporting services', but did include it in as a separate sub-class of 'other recreational services'. It was clear from this, and reinforced by the scheme of the CPC, that inclusion in one class meant exclusion from any other class, and that the reference in the US Annex to 'sporting' did not include gambling.

This simplified account of the reasoning of the WTO's Appellate Body cannot do full justice to the way in which the analysis of the preparatory work was interwoven with the relevant circumstances, and how account was taken of the context in achieving an interpretation by full application of the Vienna rules. The case does, however, illustrate how interpretation and application of preparatory work may require more than a historical tracing of the development of a provision.

While it is a consistent theme in international and national treaty interpretation that preparatory work is to be used with caution, the consequences for how such work is to be read is less clear. The contrast between an internationalist approach and a nationalist one was given in relation to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards in Chapter 1 above.<sup>126</sup> In courts in the United Kingdom there has been a line of cases referring to the 'bull's eye' approach. This gives the impression that preparatory work is only relevant where it directly addresses and resolves the precise point in issue. The approach was formulated in *Effort Shipping Company Limited v Linden Management*:

Although the text of a convention must be accorded primacy in matters of interpretation, it is well settled that the travaux préparatoires of an international convention may be used as supplementary means of interpretation: compare article 31 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969. Following *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251, I would be quite prepared, in an appropriate case involving truly feasible alternative interpretations of a convention, to allow the evidence contained in the travaux préparatoires to be determinative of the question of construction. But that is only possible where the court is satisfied that the travaux préparatoires clearly and indisputably point to

<sup>125</sup> WT/DS285/AB/R, at paras 196 and 207.

<sup>126</sup> Chapter 1, section 5.4 above.

a definite legal intention: see *Fothergill v. Monarch Airlines Ltd.*, per Lord Wilberforce, at p. 278C. *Only a bull's-eye counts. Nothing less will do.*<sup>127</sup>

It is puzzling that, while mentioning article 31, this statement does not focus on article 32 of the Vienna Convention and the specific roles of preparatory work in either confirming or determining the meaning of a treaty provision. The risk of the bull's eye test is twofold: it subverts the grounds for use of preparatory work and it may lead to a much narrower view of the role of preparatory work than that in the Vienna rules. Although its use in relation to acts of the European Community and EU may not represent a central role in treaty interpretation, repeated reference to it suggests that it may gain a purchase there.<sup>128</sup>

It is certainly the case that caution has always been the touchstone for use of preparatory work in treaty interpretation. It bears repeating in this context that its role is probably best summarised by the ILC's Special Rapporteur (Waldock) as 'simply evidence to be weighed against any other relevant evidence of the intentions of the parties', and pointing out that its cogency depends on the extent to which it furnishes 'proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty'.<sup>129</sup> Were the bull's eye approach to emphasize the particular importance of caution where the preparatory work is fulfilling the 'determinative' role envisaged in the Vienna rules, this could be seen as broadly in line with the idea that the cogency of the preparatory work as evidence of a particular meaning depends on how clearly it shows a common understanding. If the preparatory work is not being used to add weight to other evidence of meaning, it needs to be very strong to stand on its own.

Unfortunately, however, the effect of the bull's eye approach seems more narrowing than that. In the formulation offered above, the bull's eye approach refers to 'determination' of meaning; but because this is not set on the context of article 32 of the Vienna Convention, it remains unclear whether the approach is limited to 'determining' meaning in the sense and circumstances of article 32, or whether it applies to exclude use of preparatory work as confirming an interpretation already indicated by application of the general rule. This could constitute a severe

<sup>127</sup> [1998] AC 605, at 623, per Lord Steyn, emphasis added; the comments which follow are based on a fuller account in R Gardiner, 'The Role of Preparatory Work in Treaty Interpretation', Chapter 5 in A Orakhelashvili and S Williams (eds), *40 Years of the Vienna Convention on the Law of Treaties* (London: BIICL, 2010), 97–104.

<sup>128</sup> See *Re Council Regulation (EEC) 1768/92 and Council Regulation (EC) 1901/2006, re Application No. SPC/GB/95/010 by E I du Pont Nemours & Co for an extension of an SPC* [2009] EWHC 1112, at para 17 where the test, in its application to European Community legislation, was based on its elaboration in *Higgs v R* [2008] EWCA Civ 1324. There the wording in issue was traced back to two treaties; the decision was reversed on appeal but without reference to the account to be taken of preparatory work: [2009] EWCA Civ 966. Other references to the bull's eye test include: *Bayerische Motoren Werke AG v Round & Metal Ltd* [2012] EWHC 2099 (Pat), at paras 61–3; *Fortis Bank S.A./N.V. v Indian Overseas Bank* [2011] EWCA Civ 58, para 51; *Green Lane Products v PMS International Group* [2008] EWCA Civ 358, at para 74 (CA); *Nova Productions v Mazooma Games* [2007] RPC 589, at 603, para 42 (CA); *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, at 45; *Serena Navigation Ltd and Another v Dera Commercial Establishment and Another (The "Limnos")* [2008] 2 Lloyd's Rep. 166, at 168 and 171.

<sup>129</sup> See sections 2.2 and 2.3 above.

limitation. Preparatory work is often too diffuse to be helpful at all. Very rarely does it provide a bull's eye. However, it is quite often somewhere in between these extremes, and it can occasionally be quite revealing even where the precise issue was not in the negotiators' minds, as is shown by the example of *Hiscox v Outhwaite*.<sup>130</sup> It therefore seems unfortunate that courts in the UK are tending to follow *Fothergill* and the bull's eye approach rather than using article 32 of the Vienna Convention itself as the starting point for an approach to the use of preparatory work in treaty interpretation.

Even if the preparatory work can be read as dealing only with part of the issue in dispute, it may have a role. For example, where the European Patent Convention (EPC) described exclusions from patentability, in considering the extent of the exceptions, the Court of Appeal in England asked 'What help can be had from the *travaux préparatoires* to the EPC?', continuing: 'The answer is not a lot.'<sup>131</sup> But, the judgment added, 'one can at least find confirmation that no overarching principle was intended', and '...one other thing emerges—by its absence. There is no indication of any intention as to how the categories should be construed—either restrictively or widely'; and, referring to the categories of exceptions from patentability: 'the categories are disparate with differing policies behind each. There is no reason to suppose there is some common factor (particularly abstractness) linking them. The *travaux préparatoires* at least confirm this.'<sup>132</sup>

#### 4.4.2 Reading preparatory work to show agreement to exclude

The notion of using preparatory work to confirm a meaning established by applying the general rule can lead an interpreter to find the meaning of a term by showing that the course of the negotiations excluded an interpretation that is being put forward. For example, in the WTO *Lamb Meat* case<sup>133</sup> one of the issues which the panel had to decide was what enterprises constituted relevant 'domestic industries' for the purposes of taking into account producers of like products. Were farmers who had reared live lambs in the same industry as importers of fresh, chilled, and frozen lamb meat, or did those who processed and traded in lamb meat constitute the comparable domestic industry? The definition of domestic industries in the relevant treaty included assessment of whether the domestic enterprises were producers of like or directly competitive products or those whose collective output of the like or directly competitive products constituted a major proportion of the total domestic production of those products.<sup>134</sup>

The panel applied the general rule, starting with the proposition that '[t]o us, the ordinary meaning of this phrase is straightforward: the producers of an article

<sup>130</sup> [1992] 1 AC 562, and see the study of this case in Chapter 1, section 5.4 above.

<sup>131</sup> *Aerotel Ltd v Telco Holdings Ltd and others* [2007] 1 All ER 225 at 232, para 11.

<sup>132</sup> [2007] 1 All ER 225 at 232, at paras 11, 12 and at 238, para 38.

<sup>133</sup> *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* WT/DS177/R (2000).

<sup>134</sup> Safeguards Agreement, article 4.1(c).

are those who make *that* article',<sup>135</sup> and proceeded through consideration of context and other relevant interpretative matters. The Panel included consideration of the reasoning of other Panel reports in cases concerning the same wording in comparable agreements. All this led to the conclusion that 'domestic industries' had a narrow interpretation, that is, referring to 'the producers as a whole of the like end-product, i.e., lamb meat in this case'.<sup>136</sup> In approaching the preparatory work for confirmation, the Panel noted that in a Panel Report pre-dating the negotiation of the current Safeguards Agreement, the Panel had found that the only way a wide interpretation of 'domestic industry' could be adopted would be by amending the treaty through negotiation. Hence, when at the Uruguay Round the negotiators came to consider the industry definition, they did so against this background. Since proposals for, and objections to, changing the 'domestic industry' definition were extensively discussed in the Uruguay Round negotiations without any agreement to broaden the industry definition, the exclusion of any wider meaning was effectively confirmed.<sup>137</sup>

However, even where a provision which would have covered precisely the case in point is shown by the preparatory work to have been rejected or deleted in the course of negotiations, that may not demonstrate conclusively that the issue is not covered in some way in the final text.<sup>138</sup> One example of this, already examined above, is *Qatar v Bahrain* (1995) where deletion of a clear provision was considered by the ICJ not to preclude its interpretation of words in the agreement in the very sense whose clearer expression had been rejected.<sup>139</sup>

Extensive consideration of the role in interpretation of rejection of a proposed provision was given by a US Court of Appeals in *Hosaka v United Airlines*, where the Court used the preparatory work in support of an interpretation which it based on the text of the provision read in the light of the object and purpose of the treaty, also finding support in a judicial decision in another state.<sup>140</sup> Only when it had looked at these other elements did the Court pursue consideration of the preparatory work. Thus although the Court was not specifically applying the Vienna Convention, it followed much the same line of approach found there.

In this case the Court had to decide whether the plaintiff's choice from four defined national jurisdictions identified in the 1929 Warsaw Convention on international carriage by air could be set aside on the ground that the chosen one was not appropriate (using the doctrine known as '*forum non conveniens*'). The

<sup>135</sup> *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* WT/DS177/R (2000) at para 7.67 (original emphasis).

<sup>136</sup> WT/DS177/R (2000) at para 7.109. <sup>137</sup> WT/DS177/R (2000) at para 7.110–14.

<sup>138</sup> A good example of a record in preparatory work of an apparently clear exclusion of a proposed right which nevertheless was not determinative of an interpretation issue is in the case of *Young, James and Webster v UK* at the ECtHR, cited and considered below in Chapter 10, section 5.1 below. See also the academic discussion of the interpretative consequences of exclusion of a provision of chemical weapons from the Statute of the International Criminal Court, Rome, 1998 considered below in Chapter 10, section 5.2 below.

<sup>139</sup> See section 4.2.2 above.

<sup>140</sup> 305 F.3d 989 (9th Cir. 2002), certiorari denied 537 U.S. 1227; for details of the treaty provisions in issue and the Court's finding of ambiguity see section 4.3.1 above.

Convention described the selection as ‘at the option of the plaintiff’, but also indicated that ‘questions of procedure shall be governed by the law of the court seized of the case’. The doctrine of *forum non conveniens* was viewed as procedural under the relevant law in the instant case.

The Court looked first to the objectives of the Convention. It noted that the main purpose of the Convention was to achieve uniformity of rules governing claims relating to international carriage by air.<sup>141</sup> It found that the Convention created ‘a self-contained code on jurisdiction’ and harmonized different national views on jurisdiction. Application of the doctrine of *forum non conveniens* would undermine the goal of uniformity. A plaintiff could be denied the right in some countries to sue in one of the four specified forums, but not denied that right in others. It also would subject actions brought under the Convention to a doctrine which had been described in earlier case law as ‘vague and discretionary.’<sup>142</sup> The Court therefore concluded from its analysis of the text: ‘The doctrine of *forum non conveniens* is inconsistent with the Convention’s dual purposes of uniformity and balance.’<sup>143</sup>

The Court found support in the preparatory work for its view that the Convention did not allow invocation of *forum non conveniens*. At the 1929 conference, the British delegation had proposed adding a provision substantially equivalent to the doctrine. The delegation considered this would give the courts ‘more latitude to repress vexatious litigation, as in the case where the ‘forum’ of another country would be naturally indicated as being that where the debates should take place’.<sup>144</sup> Unfortunately, how this proposal was viewed at the conference is not known as the records simply state: ‘The British Delegation did not insist.’<sup>145</sup> The Court in *Hosaka* noted that this left it unclear whether the proposal had been considered and rejected by the delegates or was merely abandoned by the British when other proposals for amending the draft article were accepted; but the Court observed:

That said, the failed British amendment is not irrelevant. That the British delegation proposed an explicit incorporation of the doctrine of *forum non conveniens* strongly suggests that the contracting parties were cognizant of the doctrine and did not understand Article 28(2) as silently incorporating, or acquiescing in, its application. It is even more difficult to construe Article 28(2) as silently incorporating or acquiescing in the application of *forum non conveniens* when one considers the historical context in which the British amendment was offered and, more generally, in which the treaty was drafted and negotiated.<sup>146</sup>

This reading of the preparatory work led the Court of Appeals to consider what is described in article 32 of the Vienna Convention as ‘the circumstances of conclusion’ of a treaty. Having examined the approaches of different legal systems and

<sup>141</sup> 305 F.3d 989 (9th Cir. 2002) at 996.

<sup>142</sup> 305 F.3d 989 (9th Cir. 2002) at 997.

<sup>143</sup> 305 F.3d 989 (9th Cir. 2002) at 997.

<sup>144</sup> Second International Conference on Private Aeronautical Law, 4–12 October 1929, Minutes translated by R. Horner and D Legrez (1975) at 299.

<sup>145</sup> Second International Conference on Private Aeronautical Law, 4–12 October 1929, 169.

<sup>146</sup> 305 F.3d 989 at 998.

traditions at the time of the negotiation of the 1929 Convention, the Court declined to ‘infer from the treaty’s incorporation of local procedural law that the drafters acquiesced in the application of *forum non conveniens*, a concept that was (and is) both alien to and unwelcome by the majority of the contracting parties. *Forum non conveniens*, which permits a Court having jurisdiction to decline it, is a feature of the common law.’<sup>147</sup> The Court saw the Warsaw Convention as drafted by ‘civil law jurists, to whom *forum non conveniens* was an alien concept’ and ‘generally is unknown in legal systems following the continental civil law model’.<sup>148</sup> The Court therefore considered that: ‘In this historical light, it is unreasonable to infer that the “continental jurists,” . . . would have succumbed to the British, common law point of view.’<sup>149</sup> Thus it concluded that:

The more reasonable inference is that the delegates, if they had intended to permit the application of *forum non conveniens*, would have done so explicitly.<sup>150</sup>

It can be seen that this approach allows something of a supporting role for preparatory work which the ‘bull’s eye’ approach of some British courts tends to exclude without apparent regard to the Vienna provisions.<sup>151</sup> The approach of the US Court of Appeals seems more closely in line with the description in article 32 of the Vienna Convention of preparatory work and circumstances of conclusion of the treaty as being generally available to ‘confirm’ the meaning that has been ascertained by application of the general rule in article 31, as contrasted with the more prescriptive circumstances for use of supplementary means to ‘determine’ the meaning.

As a footnote to this case it should be noted that although the decision in *Hosaka* is generally well attuned to the principles of treaty interpretation, it was at odds with an earlier US judicial indication by the Fifth Circuit on the issue of *forum non conveniens* under the same treaty. However, the *Hosaka* court found that the earlier decision had not considered the purposes, drafting history, and post-ratification understanding of the parties, means of construction which had been indicated by the Supreme Court as applicable to treaty interpretation in decisions after the Fifth Circuit’s analysis. As well as studying the preparatory work of the 1929 Warsaw Convention, the Court in *Hosaka* did examine the preparatory work of the 1999 Montreal Convention (designed to replace the 1929 treaty) to see whether there was an indication of subsequent agreement on the interpretation of the Warsaw Convention. It found that: ‘In sum, although *forum non conveniens* was discussed at length in Montreal, the drafting history does not paint a coherent picture of the parties’ understanding of the Warsaw Convention’. However, the Court specifically indicated that its conclusion on the provisions of the Warsaw Convention was not an expression of opinion as to interpretation of the Montreal Convention’s provisions on the same point.<sup>152</sup>

<sup>147</sup> 305 F.3d 989 at 999.

<sup>148</sup> 305 F.3d 989 at 999.

<sup>149</sup> 305 F.3d 989 at 999.

<sup>150</sup> 305 F.3d 989 at 999.

<sup>151</sup> See section 4.4.1 above.

<sup>152</sup> On use of preparatory work to produce a different result in relation to the Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 1999, see *Pierre-Louis v Newvac* 584 F.3d 1052 (US Court of Appeals 11th Cir, 2009), where the Court upheld rejection of

## 4.4.3 Deduction from absence from preparatory work

The mere absence from the preparatory work of reference to an issue, or even discussion of an issue and rejection of inclusion of any provision on the matter, is unlikely to prove dispositive if a difference emerges over interpretation.<sup>153</sup> However, absence of mention of the point may be part of the picture that leads to an interpretation.<sup>154</sup> In this sense practice in use of preparatory work goes beyond the narrow confines of either confirming or determining the meaning. If closer to the former than the latter, consideration of the preparatory work is in some instances treated as more supportive of argument than confirmatory of meaning.

An example arose in the course of the ICSID arbitration *Compañía de Aguas del Aconquija SA & Vivendi Universal v Argentine Republic*.<sup>155</sup> The ICSID Convention includes provisions ensuring that arbitrators and conciliators have the necessary qualities (independence, impartiality, etc). These requirements are implemented by rules of procedure adopted by the ICSID Administrative Council.<sup>156</sup> The Convention also specifies grounds on which parties to arbitration proceedings may seek annulment of an arbitral award (including improper constitution of the tribunal, exceeding powers, corruption, and failure to state reasons). An application for annulment is determined by an ad hoc committee appointed by the Chairman of the Administrative Council. The Convention specifies that various of its articles and chapters apply to such a committee, but this list does not include chapter V on replacement and disqualification of arbitrators and conciliators. However, the rules of procedure make good this omission by applying their implementing rules on these matters to members of an ad hoc committee just as to arbitrators and conciliators.

In the *Compañía de Aguas* case, one party sought to challenge the President of the Committee on the basis that a partner in his law firm had previously acted for

jurisdiction on the ground that a French court in Martinique was the appropriate forum; the French then court rejected jurisdiction on the basis that the plaintiff had opted for the US court and that precluded their jurisdiction under the Montreal Convention, but the US Court of Appeals nevertheless refused to allow the Florida court's decision on *forum non conveniens* to be set aside: *Galbert v West Caribbean Airways* 715 F.3d 1290 (US Court of Appeals, 11th Cir, 2013).

<sup>153</sup> See, eg, *Re Attorney-General and Ward* 104 ILR 222 at 237, where the Canadian Supreme Court, when considering whether state complicity in persecution is a prerequisite to a valid refugee claim under the Refugee Convention, found no evidence in the drafting history suggesting that persecution was linked to state action: 'The omission of a reference to state action does not tell us much, however. The question was apparently never discussed, and the text does not reveal that any link to state action is required.'

<sup>154</sup> See, eg, *European Molecular Biology Laboratory Arbitration (EMBL v Germany)*, Award of 29 June 1990, 105 ILR 1 at 55–56, where the tribunal stated that had there been 'a common intention to grant the Director-General the unrestricted legal status of the "diplomatic agent" [this] would have clearly surfaced during the negotiations. As the parties were not able to present minutes on the framing of the HQA, the question would have had to remain open.' For further consideration of this case, see Chapter 6, section 3.2.

<sup>155</sup> ICSID Case No ARB/97/3, Decision on the Challenge to the President of the Committee in Annulment Proceedings, 3 October 2001.

<sup>156</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 1965, article 6.

one of the disputing parties in an unrelated matter. Could the rules implementing the Convention's chapter on replacement and disqualification of arbitrators and conciliators validly extend to the situation of members of ad hoc committees when the Convention had omitted the chapter from its list of provisions applicable to such committees?

This list was comprehensive and seemed a considered one. Therefore a literal reading produced a clear result that the Convention's rules on disqualification did not apply. Yet, given the importance of the matter, it was difficult not to wonder whether disqualification of committee members must simply have been overlooked. The committee noted that the omitted chapter's provisions were plainly apt for application to ad hoc committees. Such application would also be consistent with the object and purpose of the Convention in producing awards from bodies whose members were independent and impartial. Ad hoc committees had an important function in this regard. The committee noted that 'the *travaux préparatoires* of the Convention do not suggest that there was any particular reason for excluding the application of Chapter V'.<sup>157</sup> No party to the Convention had at the time of the adoption of the arbitration rules suggested any such reason. The rule in question had been adopted unanimously and had been treated by the Administrative Council (on which all states parties were represented) as uncontroversial, nor had there been any objection when revised rules were adopted. Unanimous adoption of the rules, if not an actual agreement on interpretation of the Convention, at least amounted to subsequent practice relevant to its interpretation, a fact which (in combination with the other interpretative points) led the committee to conclude that the rule applying chapter V to disqualification of members of an *ad hoc* committee was consistent with a proper interpretation of the Convention.<sup>158</sup> Thus it can be seen that the silence of the preparatory work was a significant element in showing that a conclusion at odds with a literal reading of a provision was within a permissible range of interpretations when taken with other interpretative elements.

In the *Oil Platforms* case at the ICJ, an interpretative issue arose over article I of the Treaty of Amity, Economic Relations and Consular Rights, 1955, which provided: 'There shall be firm and enduring peace and sincere friendship between the United States...and Iran.'<sup>159</sup> Iran asserted that this did not merely state a recommendation or desire, but imposed actual obligations on the Contracting Parties, requiring them to maintain long-lasting peaceful and friendly relations.<sup>160</sup> Finding, to the contrary, that the provision only fixed 'an objective, in the light of which the other Treaty provisions are to be interpreted and applied', the ICJ stated:

... it may be thought that, if that Article had the scope that Iran gives it, the Parties would have been led to point out its importance during the negotiations or the process of ratification. However, the Court does not have before it any Iranian document in support of this

<sup>157</sup> ICSID Case No ARB/97/3 (2001), para 12.

<sup>158</sup> ICSID Case No ARB/97/3 (2001), paras 9–13.

<sup>159</sup> *Oil Platforms (Iran v USA) (Preliminary Objections)* [1996] ICJ Reports 803.

<sup>160</sup> [1996] ICJ Reports 803 at 812, para 25.

argument. As for the United States documents introduced by the two Parties, they show that at no time did the United States regard Article I as having the meaning now given to it by the Applicant.<sup>161</sup>

#### 4.4.4 Change of word or words during negotiation of treaty

Tribunals approach with caution assertions as to the conclusions to be drawn from a change in wording during the drafting process of a treaty, particularly if there is no record at all of why the change was made. Such changes are, of course, commonly recounted where a judgment or award gives the history of the development of a provision.<sup>162</sup> Where the records are a sparse succession of drafts, courts and tribunals may be reluctant to conclude that a change from the wording proposed by, or favouring, one party to a dispute to the wording espoused by the other party necessarily means that the latter's preferred meaning is correct. This was the position taken by the majority in *Qatar v Bahrain*.<sup>163</sup> Equally, rejection of a change of wording without explanation or consensus on the meaning of retained words may yield no assistance on interpretation.<sup>164</sup>

#### 4.4.5 Exclusion of preparatory work from consideration

One of the concerns over describing the means of interpretation in article 32 as 'supplementary', and over the inclusion of prerequisites for their use to determine (rather than just confirm) the meaning of a treaty provision, was that interpreters would be barred from access to relevant material in preparatory work. The grounds for this fear were open to question. In the *Lotus* case, the PCIJ, having recounted the preparatory work as presented by the French government, had stated that 'there is no occasion to have regard to preparatory work if the text of a convention is

<sup>161</sup> [1996] ICJ Reports 803 at 814, paras 28–29; see also *In The Matter of an Arbitration before a Tribunal constituted in accordance with Article 26 of the Energy Charter Treaty and the 1976 UNCITRAL Arbitration Rules, Hulley Enterprises Limited (Cyprus) v The Russian Federation*, Final Award of 18 July 2014, para 1415 where an arbitral tribunal, having found that the interpretation of the relevant treaty provision according to the general rule of interpretation resulted in a meaning which was not ambiguous, obscure etc, and did not therefore need any other rule of interpretation, nevertheless also found that the preparatory work did not support the limited reading asserted by the Respondent because if a change of wording had been motivated by an intention to limit the scope of the provision, the Tribunal would have expected such a motivation to have been expressed in the record.

<sup>162</sup> See, eg, *LaGrand (Germany v USA)* [2001] ICJ Reports 466, where the ICJ traced the parallel changes in the development of the French and English texts of part of its statute with explanations where these were recorded (see further Chapter 9, sections 4.4, 4.5, and 4.9 below; see also, in like vein, *Litwa v Poland* (ECtHR), considered in Chapter 1, section 5.1 above; and *Casado v Chile* ICSID Case No ARB/98/2, Award of 25 September 2001, where an arbitral tribunal considered the indication in preparatory work of how the term 'prescribe' had ended up as 'recommend', describing such recourse as debatable ('*la methode, discutable, d'interpretation*'), at para 18.

<sup>163</sup> See section 4.2.2 above; see also *Tariffs Applied by Canada to Certain US-origin Agricultural Products* NAFTA Arbitral Panel (Secretariat File No CDA-95–2008-01) Final Report of the Panel 2 December 1996 at para 153.

<sup>164</sup> See, eg, *R v Secretary of State for the Home Department ex parte Mullen* [2004] UKHL 18, [2005] 1 AC 1 at 46, para 52.

sufficiently clear in itself', but then proceeded to examine the preparatory work in some detail.<sup>165</sup> As regards case law of the ICJ, the notion of complete exclusion of the preparatory work in the case of clear meaning had receded by the time of the Vienna Conference in 1968–69. Rosenne had powerfully made the point in the deliberations of the ILC:

It was true that there existed a number of apparently consistent pronouncements by the International Court of Justice and arbitral tribunals to the effect that *travaux préparatoires* had only been used to confirm what had been found to be the clear meaning of the text of a treaty. However, that case law would be much more convincing if from the outset the Court or tribunal had refused to admit consideration of *travaux préparatoires* until it had first established whether or not the text was clear, but in fact, what had happened was that on all those occasions the *travaux préparatoires* had been fully and extensively placed before the Court or arbitral tribunal by one or other of the parties, if not by both. In the circumstances, to state that the *travaux préparatoires* had been used only to confirm an opinion already arrived at on the basis of the text of the treaty was coming close to a legal fiction.<sup>166</sup>

Thus it is difficult to detect substance for the fears that Vienna rules would confirm, or introduce, real limitations on the role of the preparatory work.<sup>167</sup> In practice, preparatory work is admitted in evidence or is within the material proffered by the litigants. Inevitably it comes to the attention of the judges, even if the use they actually make of it should be controlled by the Vienna rules.

A good example of this is the ICJ's *La Grand* case.<sup>168</sup> In interpreting the requirement in the Vienna Convention on Consular Relations that an arrested alien be informed without delay of 'his rights' under the treaty provision 'if he so requests' to have the consul of his nationality informed of the arrest, one question was whether there was a violation of an individual's own rights. For the claimant state (Germany), this could have provided a ground of complaint additional to its allegation that the USA directly violated its rights to have its national informed of their rights. If an individual had the right to be informed that he could ask for the consul to be informed, Germany would have a claim in right of diplomatic protection of one of its nationals if breach of that right went unremedied.

Germany argued that every national of a party to the Consular Convention who entered territory of another party had the right to be appropriately informed if arrested. Germany saw this as the ordinary meaning of the terms of the Consular Convention, which included a reference to informing 'the person concerned' of 'his rights'. The context supported this by indicating that it was for the arrested person to decide whether consular notification was to take place, thus showing that such notification was an individual right of the national concerned. Germany

<sup>165</sup> *Case of the SS 'Lotus' (France v Turkey)* PCIJ (1927), Series A, No 10, pp 16–17.

<sup>166</sup> [1964] *Yearbook of the ILC*, vol I, p 283, para 17.

<sup>167</sup> Cf J Klabbers, 'International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?' (2003) L NILR 267, discussing the ambivalence of lawyers towards preparatory work, and indicating that 'recourse to historical origins is so pervasive that the qualification of *travaux préparatoires* as mere supplementary means of interpretation seems rather inadequate' (at 284).

<sup>168</sup> *LaGrand (Germany v United States of America)* [2001] ICJ Reports 466.

argued that the preparatory work of the Consular Convention supported this interpretation.<sup>169</sup>

The USA based its case against this reading principally on the conceptual argument that the Consular Convention concerned the rights of states to offer consular assistance and that, even if expressed in terms of individuals' rights, treatment due to individuals under the Consular Convention was 'inextricably linked to and derived from the right of the State, acting through its consular officer'. The USA pointed out that the relevant provision started out with an indication that it was included with a view 'to facilitating the exercise of consular functions relating to nationals of the sending State', wording which did not support the notion that the provision gave individual nationals particular rights or treatment in the context of a criminal prosecution.<sup>170</sup> According to the USA, the preparatory work did not reflect a consensus that article 36 was addressing immutable individual rights, as opposed to individual rights derived from those of states.<sup>171</sup>

The Court found that the provision did create individual rights which could be invoked by the state of nationality of the detained person. The Court placed emphasis on the words 'his rights' and on the further provision that the state of nationality was not permitted to exercise its right to provide consular assistance to the detained 'if he expressly opposes such action'.<sup>172</sup> The judgment stated:

The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand (see *Acquisition of Polish Nationality*, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7, p. 20; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, p. 8; *Arbitral Award of 31 July 1989*, Judgment, I.C.J. Reports 1991, pp. 69–70, para. 48; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 25, para. 51).<sup>173</sup>

It can be seen that the Court was fully regaled with the relevant preparatory work, and with the differing interpretations of it, but did not find it necessary or helpful to bring it into its judgment.

#### 4.4.6 *May preparatory work be deployed as context?*

The short answer is that preparatory work clearly does *not* itself fall within the meaning of 'context' given by the Vienna Convention's article 31(2). But this does not entirely exclude the possibility that the preparatory work might contain an element of context so defined, such as the record of an agreement made by all the prospective parties as to the meaning of a term. However, the requirement in article 31(2) that such an agreement be 'made between all the parties in connection

<sup>169</sup> [2001] ICJ Reports 466 at 492–3, para 75.

<sup>170</sup> [2001] ICJ Reports 466 at 493, para 76.

<sup>171</sup> [2001] ICJ Reports 466 at 494, para 76.

<sup>172</sup> [2001] ICJ Reports 466 at 494, paras 77–78.

<sup>173</sup> [2001] ICJ Reports 466 at 494, para 77.

with the conclusion of the treaty' could usually be expected to be met by some connecting factor close to the time of signature, such as a record of the point in the final act of a conference or a reference there to its presence in some particular document within the collective preparatory work.

Any confusion over this may, at least in part, owe its origin to the broader sense of 'context' used by Professor McDougal in his campaign, as part of the USA delegation at the Vienna Conference, against the proposed formulation of the set of articles which became the Vienna rules. To him, 'context' seems to have meant everything pertinent to the negotiation of a treaty. In terms of the Vienna rules that is closer to the idea of 'circumstances of its [the treaty's] conclusion' in article 32. However, it was in fact the USA which, in the *US—Measures Affecting Gambling* case, successfully persuaded the WTO's Appellate Body that a Panel had been wrong in treating two documents which were part of the preparatory work as 'context'.<sup>174</sup> Although generally accepted then and subsequently as useful guidance on classification of services in Annexes to the GATS, those documents did not fit the definition of context in the Vienna rules, in contrast to the Annexes themselves, which did.

The formal significance of this distinction lies in the use to be made of preparatory work as a 'supplementary' means of interpretation. In the *US—Measures Affecting Gambling* the Appellate Body corrected the Panel's classification of the two guidance documents as context. This led the Appellate Body to follow the correct approach in applying the Vienna rules, so that it reached the conclusion by the proper route that there was ambiguity (and absurdity) such as to warrant determining the meaning by recourse to the preparatory work. Although use of the correct route to the interpretation did not in this case ultimately produce a different conclusion on the particular point, proper use of the preparatory work is important for the integrity of the interpretative process, given the regular stress now laid on the applicability of the Vienna rules by courts and tribunals. Nevertheless, it is also important to note that use to confirm or determine meaning does not preclude other reference to the preparatory work, for example where this reveals part of the helpful background, as in *Litwa v Poland* (meaning of 'alcoholics').<sup>175</sup> In the Vienna Convention's terms this may involve combination of use of preparatory work and circumstances of the treaty's conclusion, but this is not a reference to context in the sense in which that term is used in the Vienna rules.

#### 4.4.7 Using preparatory work to identify or confirm object and purpose

Resort may be made to the preparatory work to identify or confirm the object and purpose of a treaty. For example, at the Jurisdiction and Admissibility phase

<sup>174</sup> *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Appellate Body Report of 7 April 2005, WT/DS285/AB/R, paras 169–78 and see further on this case in section 4.4.1 above.

<sup>175</sup> See Chapter 1, section 5.1 above.

of *Nicaragua v Honduras*<sup>176</sup> the ICJ had to determine whether two articles of the Pact of Bogotá provided one combined route to bring a case before the Court (as Honduras argued), or two separate avenues. Finding that it was clear from the text of the treaty that there were two distinct lines of recourse, the Court supported this by reference to the object and purpose as confirmed by the preparatory work:

It is, moreover, quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement. This is also confirmed by the *travaux préparatoires*: the discussion at the meeting of Committee... the delegate of Colombia explained... 'that the principal procedure for the peaceful settlement of disputes of conflicts between the American States had to be judicial procedure before the International Court of Justice'... Honduras's argument would however imply that the commitment... would, in fact, be emptied of all content, if for any reason, the dispute were not subjected to prior conciliation. Such a solution would be clearly contrary to both the object and purpose of the Pact.<sup>177</sup>

Another example is the ICSID arbitration in *Banro American Resources v Congo*.<sup>178</sup> The tribunal considered whether pursuit of diplomatic action in parallel with initiation of arbitration proceeding by, or in respect of, companies of different nationality within a group, where the state of nationality of one company was not a party to the 1965 Washington (ICSID) Convention, vitiated the tribunal's jurisdiction. Against the backdrop of the relationships of the various companies and states, the tribunal considered the objectives of the Washington Convention. Having recounted these objectives in describing features and consequences of the ICSID system, the tribunal stated that:

This objective of taking disputes between host States and foreign private investors out of the political and diplomatic realm in order to submit them to legal settlement mechanisms was emphasized several times during the course of the *travaux préparatoires* of the Washington Convention.<sup>179</sup>

The tribunal supported this statement with quotations from the preparatory work.

#### 4.4.8 Effect of interpretation recorded in preparatory work

Article 31(2) of the Vienna Convention incorporates into the context of a treaty any interpretative agreement made between all its parties and any instrument made by one or more of them if accepted by the other parties. However, in both these situations the rule only applies if the agreement or instrument was made 'in connection with the conclusion of the treaty'. There are, however, instances where negotiating states agree an interpretation while drawing up a provision, or where

<sup>176</sup> *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* [1988] ICJ Reports 69.

<sup>177</sup> [1988] ICJ Reports 69 at 89, para 46.

<sup>178</sup> *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema SARL v Democratic Republic of the Congo* ICSID Case No ARB/98/7, Award of 1 September 2000.

<sup>179</sup> ICSID Case No ARB/98/7, Award of 1 September 2000 at para 16.

one state's interpretation is endorsed at that time by the other negotiating states. If this is only recorded in the preparatory work, without being endorsed in a final act or some other instrument connected with the conclusion of the treaty, is such an interpretation dispositive?

Although the preparatory work is one of the supplementary means of interpretation rather than part of the general rule (which includes article 31(2)), interpretations recorded in the preparatory work are likely to have force proportionate to their clarity of meaning and the comprehensiveness of their endorsement. For example, the meaning of 'return' in the Convention and Protocol on Refugees offers scope for interpretative difficulties given that the Convention defines refugee status in relation to persons outside their country of nationality, does not accord rights of entry into other countries, but does impose obligations on parties not to expel or return refugees to face persecution. In examining the preparatory work to determine whether the USA had an obligation not to turn back boats carrying people who had left Haiti in the hope of entering the USA to seek protection as refugees there, the US Supreme Court found that the negotiating history of what became article 33 included endorsement of a Swiss interpretation of the first draft to the effect that:

... the word 'expulsion' related to a refugee already admitted into a country, whereas the word 'return' (*'refoulement'*) related to a refugee *already within the territory but not yet resident there*.<sup>180</sup>

The Dutch delegation had referred to this at a later stage in the diplomatic conference. He noted that the Swiss interpretation had received support from several delegations at the time it was given and, detecting a possible consensus in its favour, he stated:

In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.

'There being no objection, the PRESIDENT ruled that the interpretation given by the Netherlands representative should be placed on record.'<sup>181</sup>

While the US Supreme Court felt able to draw appropriate conclusions as to the support this gave to the interpretation it derived from the text and context, it noted that the significance of the conference President's comment that the remarks should be placed on record was not entirely clear.<sup>182</sup> However, little value can be derived from the Court's approach. The Court did not apply the Vienna rules. Its use of context was sketchy and it did not consider subsequent practice and

<sup>180</sup> *Sale v Haitian Centers Council* 509 US 155 at 185 (1993) (emphasis in original).

<sup>181</sup> 509 US 155 at 185 (1993) at 186 (inverted commas and emphasis in original); for different views on the extent of the obligation of non-refoulement, see decision of The Inter-American Commission for Human Rights in *The Haitian Centre for Human Rights v United States*, case no 10.675, report no 51/96 (1997) and, on 'non-refoulement' in connection with a range of international legal materials, the ECtHR in *Hirsi Jamaa and Others v Italy* Application no 27765/09, Judgment of 23 February 2012.

<sup>182</sup> See further G S Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford: OUP, 3rd edn, 2007), Chapter 5 and UNHCR, Advisory Opinion on the Extraterritorial Application of

international law obligations which might have been relevant to interpretation, such as the general prohibition on sending individuals to states where they may be tortured or suffer abuse of their human rights.<sup>183</sup>

The structure of the Vienna rules emphasizes the caution with which preparatory work is to be approached. Even if there were ambiguity over the meaning of ‘return’, it would require a strong indication of complete agreement for the preparatory work to determine the meaning. Given that the Vienna Convention gives no firm status even to an interpretative declaration made on conclusion of a treaty, it is difficult to see statements in minutes as records of interpretative agreement unless the complete record is quite clear or the interpretation is in some way directly incorporated into the process of conclusion of the treaty such as by repetition in a Final Act.

#### 4.4.9 Reading preparatory work in combination with other supplementary means

It may not always be clear whether material forms part of the preparatory work or whether it is being considered on the basis of being other supplementary means, such as circumstances of conclusion. If, for example, a provision is based on, but not identical to, terms in another treaty or instrument the explanation of the extent and effect of such ‘borrowing’ may play a clarificatory role. Thus, in *Johnston v Ireland*, a central issue for the ECtHR to determine was whether the right to marry in article 12 of the European Convention included a guarantee of availability of a legal process for dissolution.<sup>184</sup> The preparatory work showed that that article was based on article 16 of the 1948 Universal Declaration of Human Rights, which included for men and women ‘equal rights as to marriage, during marriage and at its dissolution’. In explaining why the draft of what became article 12 was not as extensive as article 16 of the 1948 Declaration, the Rapporteur of the Council of Europe’s Committee on Legal and Administrative Questions, had said:

In mentioning the particular Article [of the Universal Declaration], we have used only that part of the paragraph of the Article which affirms the right to marry and to found a family, but not the subsequent provisions of the Article concerning equal rights after marriage, since we only guarantee the right to marry.<sup>30</sup>

<sup>30</sup> *Travaux Préparatoires*, vol. 1, p. 268.<sup>185</sup>

Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol [2007] *European Human Rights LR* 484.

<sup>183</sup> The dissenting view of Blackmun J relied (in part) on the proposition that oral statements of treaty negotiators are only conditionally admissible: ‘...even the general rule of treaty construction allowing limited resort to *travaux préparatoires* “has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body.” ...’ (509 US at 195, citation omitted). In the light of the conference president’s direction that the interpretation be recorded, it seems difficult to view it as ‘not embodied in any writing’, even though there may be considerable doubts whether the process amounted to endorsement by the conference.

<sup>184</sup> (1987) 9 EHRR 203.

<sup>185</sup> (1987) 9 EHRR 203 at 219, para 52 (square brackets in original).

Accordingly, the Court, having started with the proposition that the words used in article 12 did not on their face include a right to divorce, supplemented that with its view that ‘the travaux préparatoires disclose no intention to include in article 12...any guarantee of a right to have the ties of marriage dissolved by divorce’.<sup>186</sup> Obviously where the preparatory work includes a history explaining how a particular provision developed from an earlier one, this can provide a useful confirmation of a textual interpretation, even if the earlier provision was not an actual draft but a separate legal instrument.

#### 4.5 Circumstances of conclusion and other supplementary means

Given that the supplementary means envisaged by article 32 of the Vienna Convention are not indicated, other than that they include preparatory work and circumstances of conclusion of a treaty, it seems reasonable to take it that they are only limited by the requirement that any such means must be consistent with the Vienna rules unless otherwise agreed in the particular treaty. The host of canons of interpretation formulated over the centuries and the prevalent general maxims of construction commonly used by lawyers are too numerous to attempt to list. However, because the circumstances of conclusion of a treaty are specifically mentioned, this element of treaty interpretation warrants specific consideration, as do certain other means which have assumed prominence or may be encountered in the earlier case law but whose place in the scheme of the Vienna rules is uncertain.

##### 4.5.1 Meaning of ‘circumstances of conclusion’

What is meant by the circumstances of conclusion is not indicated in the Vienna Convention. The circumstances which cause a treaty to be drawn up, affect its content, and attach to its conclusion, are all factors which are in practice taken into account. They overlap or interact with other elements in the Vienna rules, such as the object and purpose of a treaty, instruments which may be made in connection with conclusion of a treaty, and the preparatory work. It is particularly likely that the circumstances of conclusion and the preparatory work will both be considered in the situations envisaged by article 32 of the Vienna Convention. As noted in Chapter 3 above, it is not always clear how far back in the history of a treaty its preparatory work extends. Consequently, it may not always be clear when an interpretative argument moves from considering the circumstances of conclusion of a treaty to its preparatory work. Commonly the two factors are interwoven, circumstances of conclusion receiving incidental references.

An example is in the ICJ’s judgment in the *Case Concerning Legality of Use of Force (Serbia and Montenegro v Belgium) (Jurisdiction)*, where the Court found

<sup>186</sup> (1987) 9 EHRR 203 at 219, para 52.

that Serbia and Montenegro was not a member of the UN and therefore did not have access to the Court under article 35(1) of the Court's Statute.<sup>187</sup> Turning to whether there could be access as a non-member under article 35(2) of the Statute, the Court invoked the Vienna Convention's reference to both preparatory work and circumstances of conclusion when examining the history of article 35(2). One issue was whether the reference there to jurisdiction based on 'treaties in force' meant those in force at the time of entry into force of the Statute or when a particular matter was being referred to the Court. Having found that these words could produce differing meanings, the Court looked at their origins in the predecessor treaty, the Statute of the PCIJ, at its preparatory work, and at practice of the PCIJ.

The Court found that the provision had been included to cover cases contemplated in agreements made in the aftermath of the First World War before the Statute entered into force, but it found the preparatory work for its own Statute less helpful. What little discussion there was of the article was 'provisional and somewhat cursory' and 'took place at a stage in the planning of the future international organization when it was not yet settled whether the Permanent Court would be preserved or replaced by a new court'.<sup>188</sup> The former of these two observations can be seen as a comment on the nature or quality of the evidence provided by the preparatory work, the latter as a relevant circumstance. Among other factors, in reaching its conclusion that the present Statute must be interpreted in the same way as the equivalent in the predecessor instrument, the Court noted that it was possible that no treaties from that time existed with such a provision, none having been brought to its attention, but that that 'circumstance' did not support the alternative interpretation allowing access on the basis of any treaty (being one providing for reference of a dispute to the Court), if in force subsequent to the Statute.<sup>189</sup> Thus the Court alluded to the circumstances of conclusion in conjunction with its analysis of the preparatory work and in relation to the potential effect of the provision in issue, but all in conjunction with analysis of the preparatory work.<sup>190</sup>

Another example is the *Canadian Agricultural Tariffs* arbitration.<sup>191</sup> The USA and Canada entered into a Free Trade Agreement (FTA) in 1988 which allowed some quantitative restrictions on imports of agricultural products. They replaced this with the North American Free Trade Agreement (NAFTA), which preserved several provisions of the FTA and entered into force in January 1994. Both became

<sup>187</sup> [2004] ICJ Reports 279 at 314–15, para 91 and other cases by the same applicant on the same matter.

<sup>188</sup> [2004] ICJ Reports 279 at 323, para 113.

<sup>189</sup> [2004] ICJ Reports 279 at 323, para 113.

<sup>190</sup> See also *Oil Platforms (Preliminary Objection)* [1996] ICJ Reports 803 at paras 24 ff where the parties referred to the circumstances in which the Treaty of Amity, Economic Relations and Consular Rights had been negotiated, though the Court did not single these circumstances out from other factors when examining the history of the treaty and making comparisons with others of a similar kind; see further section 4.4.3 above.

<sup>191</sup> *Tariffs Applied by Canada to Certain US-origin Agricultural Products* NAFTA Arbitral Panel (Secretariat File No CDA-95–2008-01), Final Report of the Panel, 2 December 1996.

parties to the WTO Agreement on Agriculture, which came into force a year later. The central issue in the arbitration was whether tariffs applied by Canada to US agricultural products which exceeded their allotted quota after the NAFTA and WTO agreements came into force breached the NAFTA prohibition on new tariffs. The WTO arrangements envisaged quantitative restrictions being replaced by tariffs. In deciding that the preserved FTA provisions had the effect of bringing into the NAFTA the replacement regime for agricultural non-tariff barriers established under the WTO, the arbitral panel examined the sequence of negotiations of the three treaties and considered statements and documents which did not strictly form part of the preparatory work of the NAFTA. While the panel's conclusion was essentially based on the text of the three treaties, the circumstances of conclusion were taken into account. The panel joined together its examination of the preparatory work and the circumstances of conclusion to justify use of some material whose admissibility might otherwise have been uncertain.<sup>192</sup>

Circumstances of conclusion may also be allied to preparatory work when being used in a purely confirmatory role.<sup>193</sup>

#### 4.5.2 *Comparison with provisions in other treaties or associated material as a circumstance of conclusion*

As has been noted above, courts and tribunals often make comparisons between wording of a treaty in issue and that in other treaties without indicating any basis in the Vienna rules for this. If, however, the comparable treaty provisions were part of a line of treaties in some sense linked such as by subject matter, and even more so if reference was made to them in the preparatory work, they may be treated as part of the history and warrant consideration as part of the circumstances of conclusion.

Even where reference is made to the Vienna rules, attribution to a particular rule may not be conclusive. For example, in the *Chilean Price Band* case, a WTO Panel referred to article 32 of the Vienna Convention in explaining its use of documents pre-dating the treaty which it was interpreting.<sup>194</sup> These documents were not, in its view, strictly part of the preparatory work, but they did shed light on what the negotiators intended to express in using certain terms of art. The Panel justified this on the basis that article 32 refers to the 'circumstances of conclusion of the treaty'. It quoted the observation of Yasseen in the ILC that:

... the very nature of a convention as an act of will made it essential to take into account all the work which had led to the formation of that will—all material which the parties had had before them when drafting the final text.<sup>195</sup>

<sup>192</sup> *Tariffs Applied by Canada...*, Final Report of the Panel, 2 December 1996 at paras 154 and 179.

<sup>193</sup> See, eg, *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Reports 625 at 653–56, paras 53–58.

<sup>194</sup> *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products* WT/DS207/R, 3 May 2002, para 7.35, fn 596.

<sup>195</sup> WT/DS207/R at para 7.35 and fn 536, citing [1966] *Yearbook of the ILC*, vol I, pt II, p 204, para 25, emphasis added by Panel.

The Appellate Body considered that the panel had not correctly applied article 32, though as regards the scope of 'circumstances of conclusion', it noted that the parties had accepted that the material constituted information admissible under the rules of the WTO's Dispute Settlement Mechanism, even though one of them had not accepted that it was admissible as a supplementary means of interpretation.<sup>196</sup>

This left the position unclear but it is perhaps indicative of the rather free-ranging interpretation given to the Vienna rules in that courts and tribunals do make use of interpretative arguments involving comparison of characteristics of different treaties and associated material which may loosely be regarded as part of the circumstances of conclusion of the treaty in issue or which may simply be valuable illustrations when seeking the meaning of a particular provision. Thus, for example, in the *Oil Platforms* case, the ICJ contrasted the types of treaties in which a general proposition affirming enduring peace and friendship is accompanied by procedural measures (explicit reference to certain provisions of the UN Charter, consultation between parties in certain circumstances such as an armed conflict with a third state, etc), and treaties such as the one in issue envisaging quite different matters (trade, consular relations, etc). Such comparison was for the purpose of identification of the object and purpose of the treaty, but seems to base itself on consideration of a wider range of materials which may be thought more aptly the province of supplementary means of interpretation.

#### 4.5.3 *Commentaries, explanatory reports, academic writing, etc*

Commentaries, explanatory reports, and similar documents may be written at the same time as a treaty is being drawn up. Such material may be acknowledged in some way when a treaty is adopted or concluded, or it may be prepared after that stage. The descriptive terms for such materials are not uniformly applied, but the broad distinction is between those which are in some way linked with the preparation, conclusion, or implementation of a treaty and those which are prepared quite separately. The former may come within article 31(2)(a) or they may constitute part of the preparatory work. The latter category (quite separate material) may be admissible under article 31(3)(c) to the extent that it states international law as recognized in article 38 of the Statute of the ICJ. However, the subsidiary status given to such material in the Statute makes for a somewhat uneasy fit within the idea of 'rules of international law applicable in the relations between the parties'. This suggests that this material may be best viewed as within the category of supplementary means of interpretation, depending somewhat on its content.<sup>197</sup>

There are many sets of commentaries by the ILC and other bodies involved in preparatory work of treaties but these remain part of the preparatory work unless

<sup>196</sup> *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, AB-2002-2, (2002) WT/DS207/AB/R at para 230 and fn 206.

<sup>197</sup> See Chapter 7, section 3.2.2 above.

given some enhanced status at conclusion of a treaty. Of those specifically endorsed at the time of conclusion of treaties, prominent examples are the explanatory reports which accompany many of the conventions drawn up within the Council of Europe and those relating to Conventions drawn up by the Hague Conference on Private International Law.<sup>198</sup> An example of explanatory material developed in successive editions after the adoption of a treaty is the 'Handbook' promulgated by the UN High Commissioner for Refugees (UNHCR) in connection with the UN Convention on Refugees.<sup>199</sup> The precise basis for use of such materials is not always made clear.<sup>200</sup> While this may lead to failure to respect the distinction between the general rule and supplementary means of treaty interpretation, guides and commentaries are likely to contain a mixture of analysis of text, references to preparatory work, compilations of practice, etc. Their interpretative role is thus more likely to depend on which of these elements is being used than on their general character as a source of learning. The assumption seems to be that where an issue is covered in a commentary or explanatory report in a way which shows clearly the collective

<sup>198</sup> See Council of Europe Treaty Series (formerly European Treaty Series) at <<http://conventions.coe.int/>>.

<sup>199</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1992. The Handbook has been used in interpretation of the UN Convention on Refugees on several occasions in English and other courts, Lord Bingham noting that it 'is recognised as an important source of guidance on matters to which it relates', *Sepef and Another v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856 at 864; and see *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477 at 490 (House of Lords), citing and quoting the preambular reference to the Handbook in 'Joint Position of the European Union' adopted on 4 March 1996 (OJ 1996 L 63, p 2). However, the Handbook takes account of practice of states and their communications with the UNHCR and may therefore be seen as reflecting subsequent practice or agreed implementation, rather than supplementary means of interpretation; but cf *Chan Yee Kin v Minister for Immigration* 90 ILR 138 (Australia HC, 1989), per Mason CJ at 145: 'I regard the Handbook more as a practical guide for the use of those who are required to determine whether or not a person is a refugee than as a document purporting to interpret the meaning of the relevant parts of the Convention'; *Ward v Attorney General of Canada* [1993] 2 SCR 689 (Supreme Court of Canada) 103 DLR (4th) 1, para 34: 'While not formally binding on signatory states, the Handbook has been endorsed by the states which are members of the Executive Committee of the UNHCR, including Canada, and has been relied upon by the courts of signatory states'; and *Sale v Haitian Centers Council* 509 US 155 (1993) (US Supreme Court) at 182 and 197.

<sup>200</sup> See, eg, *R v Secretary of State for the Home Department, Ex parte Read* [1989] AC 1014 at 1052 where the UK House of Lords referred to the Explanatory Report on the Convention on the Transfer of Sentenced Persons: 'Although it does not purport to be an authoritative interpretation of the Convention, it is available as an aid to construction as part of the "travaux préparatoires" and under article 31 of the Vienna Convention...'; cf *R v Secretary of State for the Home Department ex parte Mullen* [2004] UKHL 18, [2005] 1 AC 1 at 44–45, para 48, per Lord Steyn: 'But the explanatory report has great persuasive value in the process of interpretation. For example, it is a basis on which states sign and ratify the Protocol. Inevitably, state practice will be based on the explanatory report, and in this way it becomes directly relevant to the interpretation of article 14(6): article 31(3)(b) of the Vienna Convention on the Law of Treaties'; Advocate-General Jacobs in *In re Eurofood IFSC Ltd* [2006] Ch 508 at 511 on interpretation of the Regulation successor to the European Union Convention on Insolvency Proceedings stated: 'I consider that the explanatory report on the Convention written by Professor Miguel Virgos and Mr Etienne Schmit ("the Virgos-Schmit report") may provide useful guidance when interpreting the Regulation (... the Virgos-Schmit report "was discussed extensively and agreed to by the expert delegates but, unlike the Convention, was not formally approved by the Council of Ministers. Nevertheless, it will have considerable authority for courts in member states"). (Similarly the Court of Justice has on countless occasions referred to the explanatory reports on the

intention of those who drew up the treaty, this will be recognized as an aid to the correct interpretation.<sup>201</sup> This is also a possible source of guidance where treaties are based on model provisions, such as treaties for the avoidance of double taxation.<sup>202</sup> Where a treaty concerns a subject that is developing, arrangements may be made for continued production of explanatory and interpretative material.<sup>203</sup>

Commentaries written by independent experts may assume a role of almost equal value to those endorsed by the parties.<sup>204</sup> This may result in uncertainties of status as in the case of the 'Explanatory Report on the 1980 Hague Child Abduction Convention', prepared by Elisa Pérez-Vera and published by The Hague Conference on Private International Law (HCCH) in 1982.<sup>205</sup> Professor Pérez-Vera had been Rapporteur of the Commission which prepared the Convention, but her report was drawn up after the Convention's conclusion and frankly acknowledges that 'it is possible that, despite the [Rapporteur's] efforts to remain objective, certain passages reflect a viewpoint which is in part subjective'.<sup>206</sup> It has nevertheless been influential in proceedings concerning child abduction.<sup>207</sup>

Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (principally the Jenard report (OJ 1979 C 59, p 1) and the Schlosser report on the Convention on the Accession of Denmark, Ireland and the United Kingdom to the Brussels Convention (OJ 1979 C 59, p 71)); and *Malachtou v Armefti* 88 ILR 199 at 215 (Cyprus Supreme Court), referring to the European Convention on the Legal Status of Children Born out of Wedlock: 'The Explanatory Report is a supplementary means of interpretation.'

<sup>201</sup> See Lord Steyn, *ex parte Mullen* [2004] UKHL 18, [2005] 1 AC 1.

<sup>202</sup> These may be based on the OECD model to which reference is made in numerous cases, together with commentary; see, eg, *Staatssecretaris van Financiën v X* (Netherlands, Hoge Raad) 5 ITLR 818, paras 3.6 and 3.7 referring to explanatory notes and commentary to tax treaties, and *National Westminster Bank plc v USA* (US Court of Federal Claims) 6 ITLR 292 at 304: 'Both this court and others have recognised that the Organisation for Economic Co-Operation and Development's (OECD's) 1977 Model Double Taxation Convention on Income and on Capital (the model treaty) and the accompanying Explanatory Commentary on Article 7 Concerning the Taxation of Business Profits (the Commentary) serve as a meaningful guide in interpreting treaties that are based on its provisions...'; but cf *Russell v Commissioner of Taxation* (Federal Court of Australia) 13 ITLR 538, *Commissioner of Taxation v SNF (Australia) Pty Ltd* (Federal Court of Australia) [2011] FCAFC 74, and see further F Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications BV, 2004) at 439 ff.

<sup>203</sup> See, eg, International Convention on the Harmonized Commodity Description and Coding System, Brussels, 14 June 1983 [1988] ATS 30, articles 6–7 setting up a committee whose functions include preparing 'Explanatory Notes, Classification Opinions or other advice as guides to the interpretation of the Harmonized System', considered in *Turbon International GmbH v Oberfinanzdirektion Koblenz* (ECJ Case C-250/05) [2006] All ER (D) 384.

<sup>204</sup> See, eg, the 'Commentary on the Refugee Convention, Articles 2–11, 13–37' by Professor Grahl-Madsen (republished by the UNHCR Department of International Protection, October 1997) and references to that work in *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at para 69, *R v Immigration Officer at Prague Airport ex parte European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1 at paras 13, 14, 17, and 70 and *In re B (FC)* (2002), *R v Special Adjudicator ex parte Hoxha* [2005] UKHL 19, [2005] 4 All ER 580 at paras 15 and 68.

<sup>205</sup> *Actes et documents de la Quatorzième session* (1980), HCCH Publications (1982), <<http://www.hcch.net/upload/expl28.pdf>>.

<sup>206</sup> *Actes et documents de la Quatorzième session*, p. 428.

<sup>207</sup> See the many cases logged on the HCCH database (INCADAT) as referring to the Report, and cf *Abbott v Abbott* 130 S.Ct. 1983 at 1995, where the US Supreme Court noted that the Federal Register identified the Pérez-Vera Report as the 'official history' of the Convention and 'a source of

The growing role of explanatory reports received recognition in the context of the Convention on International Interests in Mobile Equipment and its Protocol specific to Aircraft Equipment (2001) where a resolution in the Final Act mandated preparation of an ‘official commentary’ by the Chairman of the Drafting Committee, being ‘CONSCIOUS of the need for an official commentary on these texts as an aid for those called upon to work with these documents and RECOGNISING the increasing use of commentaries of this type in the context of modern, technical commercial law instruments’.<sup>208</sup>

Likewise, academic guides and studies are often used by courts and tribunals to assist them in analysis of text, preparatory work, comparative case law, and argument on controversial issues.<sup>209</sup>

#### 4.5.4 Other supplementary means

There are few references in case law linking material considered in judgments, decisions, and awards to supplementary means other than preparatory work and circumstances of conclusion; but it is clear that these are not the only supplementary means that are admissible, even if it is sometimes difficult to determine whether this or some other category in the Vienna rules is the most appropriate classification.

For example, some have seen maxims as supplementary means of interpretation. The history of treaty interpretation before the Vienna Convention is full of attempts to identify and list rules or ‘canons’ of interpretation, presumptions and ‘maxims’ (often graced with Latin, or in some cases French, expression). Chapter 2 above contains many pointers to the main literature on the subject and thence to much further material. Whether these items are now appropriately considered as other ‘supplementary means’ of interpretation is not clear. Some are better seen as useful adjuncts to the apparatus for identifying which ordinary meaning is to be given a term rather than supplementary means, but it is convenient to consider the present role of canons, presumptions, and maxims here in one place.<sup>210</sup> There is

background on the meaning of the provisions of the Convention’, but found that it, the Court, ‘need not decide whether this Report should be given greater weight than a scholarly commentary’, though it nevertheless pointed out that the Report supported the interpretation which the Court adopted; see Chapter 4, section 4.2.3 above for further consideration of this case.

<sup>208</sup> See R Goode, *Cape Town Convention and Aircraft Protocol Official Commentary* (UNIDROIT, 3rd edn, 2013).

<sup>209</sup> See, eg, *K v Secretary of State for the Home Department* [2007] 1 All ER 671 at 684, where Lord Bingham noted that the consensus in the case law (that for the purposes the UN Convention on Refugees a family group could be a particular social group) was clearly reflected in academic literature which he cited; and see *Attorney General v Zaoui* [2006] 2 LRC 206 (NZ Supreme Court) at 220 ff, where the judgment tracks the Vienna rules, taking in academic and other materials at appropriate stages; see also the endorsement by Lord Steyn of Bossuyt’s ‘Guide to the “travaux préparatoires” of the International Covenant on Civil and Political Rights’ in *R v Secretary of State for the Home Department ex parte Mullen* [2004] UKHL 18, [2005] 1 AC 1; and see *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* ICSID Case No. ARB/12/14 and 12/40 (Decision on Jurisdiction, 24 February 2014) at paras 182–88 on use of ‘doctrinal writings’.

<sup>210</sup> See Aust, *Modern Treaty Law and Practice*, 220–1 where the maxims are considered as supplementary means of interpretation.

no authoritative definition of ‘canons’ of interpretation or construction, ‘presumptions’, or of ‘maxims’ in the specific context of treaty interpretation. Their usage sometimes makes them overlap, and their content and value is indeterminate.

The ILC in its preparatory work on the Vienna rules mostly avoided use of these terms. In its Commentary on the then draft articles to form the Vienna rules the Commission noted that some jurists ‘express reservations as to the obligatory character of certain of the so-called canons of interpretation’, and indicated that it had ‘confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties’.<sup>211</sup> This endorsed the analysis by the ILC’s Special Rapporteur, Sir Humphrey Waldock, who treated the principles and maxims of interpretation then in common use warily. Taking as examples ones frequently referred to in their Latin forms (*‘ut res magis valeat quam pereat, contra proferentem, eiusdem generis, expressio unius est exclusio alterius, generalia specialibus non derogant’*), he characterized these as ‘for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning’, principles whose use was thus ‘discretionary rather than obligatory’.<sup>212</sup> It is clear that the ILC’s approach was to focus its own efforts on stating principles which could stand as rules.

Two categories of canons and maxims may be identified. The first consists of the type instanced by Waldock. These are certainly not excluded by the Vienna rules from use in the interpretative exercise; but, given that the rules are only a framework for treaty interpretation, leaving modalities of their application very much to the interpreter, these common principles of construction may be as useful in application of the general rule as they could be as supplementary means. A second, rather different, category comprises presumptions based on requirements of justice rather than techniques of construction. Examples of the latter category are presumptions of criminal law, such as the principles that a person should not be charged unless the alleged acts constituted a crime identified by law (*nullum crimen sine lege*) and the injunction that where there is doubt to favour the accused (*in dubio pro reo*), which could be relevant to interpreting definitions of international criminal offences.<sup>213</sup>

One interpretative means of particular application in treaty interpretation, and still used by some interpreters, is the ‘restrictive principle’ (*in dubio mitius*).<sup>214</sup> It has been retained in Oppenheim, where examples and analysis are cited:

The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred

<sup>211</sup> [1966] *Yearbook of the ILC*, vol II, p 218–9, paras 1 and 4–5. An early draft considered by the ILC did single out a specific canon or maxim for inclusion as a separate article headed ‘Effective interpretation of the terms: *ut res magis valeat quam pereat*’. This was rejected on several grounds, the chairman stating as a summary: ‘In so far as it stated a logical rule, it was in any case implicit in the earlier provisions... of the draft and there was perhaps no need to state it explicitly’. [1964] *Yearbook of the ILC*, vol I, p 288–91, and conclusion at p 291 para 119.

<sup>212</sup> Waldock, ‘Third Report on the Law of Treaties’ [1964] *Yearbook of the ILC*, vol II, p 54, paras 5–6.

<sup>213</sup> See Chapter 10, section 4.2 below.

<sup>214</sup> On restrictive interpretation see Chapter 2, section 6 above.

which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.<sup>215</sup>

There have, nevertheless, long been grounds for questioning whether the restrictive principle should be applied to treaties which are primarily for the protection of individuals, such as human rights instruments.<sup>216</sup> More generally, however, the whole idea of a restrictive approach as a principle of interpretation has now become open to question in the light of observations by the ICJ in the *Navigational and Related Rights Case (Costa Rica v Nicaragua)*.<sup>217</sup> The Court indicated that it would make its interpretation in terms of customary international law as reflected in the 1969 Vienna Convention.<sup>218</sup> The court preceded its interpretation of a key disputed phrase with an indication that restrictive interpretation is not part of the general rule.

The case concerned the extent of Costa Rica's rights on the section of the San Juan river where the right bank, ie the Costa Rican side, marks the border between Costa Rica and Nicaragua pursuant to an 1858 'Treaty of Limits'. Nicaragua had argued that Costa Rica's right of free navigation for commercial purposes (*con objetos de comercio*) should be interpreted narrowly because it represented a limitation of the 'exclusive *dominium* and *imperium* over the waters of the San Juan river' (ie sovereignty) which was conferred on Nicaragua by article VI of the treaty. The Court was not convinced:

While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e. in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.

A simple reading of Article VI shows that the Parties did not intend to establish any hierarchy as between Nicaragua's sovereignty over the river and Costa Rica's right of free navigation, characterized as 'perpetual', with each of these affirmations counter-balancing the other. Nicaragua's sovereignty is affirmed only to the extent that it does not prejudice the substance of Costa Rica's right of free navigation in its domain, the establishment of which is precisely the point at issue; the right of free navigation, albeit 'perpetual', is granted only on condition that it does not prejudice the key prerogatives of territorial sovereignty.

<sup>215</sup> R Jennings and A Watts (eds), *Oppenheim's International Law*, vol I (London: Longman, 9th edn, 1992), 1278 (footnote omitted); and see, eg, WTO Appellate Body *Report on EC Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R, WT/DS48/AB/R (1998), 64–65, para 70.

<sup>216</sup> See A Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 EJIL 529, where an analysis is made in the light of the Vienna rules.

<sup>217</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Reports 214.

<sup>218</sup> [2009] ICJ Reports 214 at 237, para 47.

4. *Issues and Practice*

There are thus no grounds for supposing, *a priori*, that the words 'libre navegación ... con objetos de comercio' should be given a specially restrictive interpretation, any more than an extensive one.<sup>219</sup>

This firmly negates any idea that a restrictive approach should generally be taken to treaty provisions, even ones which concern matters near to the core of sovereignty such as those affecting territory. However, the indication in the judgment that restrictive interpretation has no '*a priori*' application seems not to rule out the possibility that if the normal process of treaty interpretation in accordance with the Vienna rules leads to a finely balanced outcome, the restrictive approach might still offer an element weighing in favour of the result which least impinges on the sovereignty of a protagonist which is being required to yield some right to another party.

A further approach which is now even more anomalous is the idea that an appeal can be made to the 'spirit' of a treaty. This notion has probably lost any role it once had in treaty interpretation, at least in that form.<sup>220</sup> However, it can be seen that the definition of 'context' in the general rule as including the whole text of a treaty allows account to be taken of the scheme and economy of a treaty; the reference to object and purpose there brings into consideration the aim of the treaty as a whole; and where the circumstances of conclusion come to be considered, these may indicate the motivation and ethos that generated the treaty's terms. Thus, the spirit may be revealed, but rather as inherent in the outcome of a more systematic approach to treaty interpretation.

One case in which 'other' supplementary means were specifically considered concerned reliance on a document which did not fall within any category in the general rule, and was not preparatory work. This was the investment arbitration *HICEE v Slovak Republic*.<sup>221</sup> The case concerned interpretation of a bilateral investment treaty (BIT) between the Netherlands and Czechoslovakia, the Slovak Republic being a party as successor to the latter state. At the preliminary phase the central issue was whether the phrase 'invested either directly or through an investor of a third State' applied to a company incorporated in the respondent state, that company being a subsidiary of another company incorporated there and owned by the foreign claimant (the ultimate holding thus being a 'sub-subsidiary').

<sup>219</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Reports 214 at 237–8, para 48; and cf *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Judgment of 31 March 2014, para 58, where the ICJ, considering in particular the context and the treaty's object and purpose, stated: 'Taking into account the preamble and other relevant provisions of the Convention referred to above, the Court observes that neither a restrictive nor an expansive interpretation of Article VIII [the provision in issue] is justified'.

<sup>220</sup> See references to the spirit of a treaty in *Case of the SS "Wimbledon"* (PCIJ) (1923) Series A, no 1, 23; Advisory Opinion on *Conditions of Admission of a State to Membership in the United Nations* [1948] ICJ Reports 57 at 63; *Interpretation of Peace Treaties* [1950] ICJ Reports 221 at 228–29; *South West Africa (Preliminary Objections)* [1962] ICJ Reports 319 at 336; *AAPL v Sri Lanka* (ICSID) 106 ILR 417 at 445, paras 51–52, *New Zealand Maori Council v AG* (NZ Court of Appeal) 120 ILR 462 at 544; and see J Klabbers, 'On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization' (2005) 74 *Nordic JIL* 405 at 421 ff.

<sup>221</sup> *HICEE B.V. v Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011.

Did ‘directly’ mean any investment was covered which an investor itself held in a state party to the BIT as contrasted with an investment there made through a holding company in a third state; or did ‘directly’ mean that the BIT covered an investor’s subsidiary in the host state but not an investment held more remotely there, that is, as a sub-subsidiary? A contextual argument was derived from the contrast between holding ‘directly’ and through an investor of a third state. In other words ‘directly’ referred to an investment that was not made via a third state, but otherwise imposed no restriction on a chain of subsidiaries. For the majority, the general rule of interpretation did not resolve possible uncertainty. Such uncertainty was supported, or instigated, by a statement in Dutch Explanatory Notes produced from the archives of the respondent state (Slovakia):

Normally, investment protection agreements also cover investments in the host country made by a Dutch company’s subsidiary which is already established in the host country (‘subsidiary’–‘sub-subsidiary’ structure). Czechoslovakia wishes to exclude the ‘sub-subsidiary’ from the scope of this Agreement, because this is in fact a company created by a Czechoslovakian legal entity, and Czechoslovakia does not want to grant, in particular, transfer rights to such company. This restriction can be dealt with by incorporating a new company directly from the Netherlands.<sup>222</sup>

The document containing this statement was not part of the preparatory work as it had been drawn up as part of the Dutch process for approval of the treaty. It could not be viewed as an agreement between the parties at the time of, or subsequent to, the conclusion of the treaty, there being no evidence of agreement by Czechoslovakia. Nor was there any evidence to suggest that the explanatory notes could amount to an instrument made by one party in connection with the conclusion of the treaty and accepted by the other party as related to the treaty since there was no evidence of such acceptance.

The majority view of the tribunal was that the material should nevertheless be taken into account. It considered that the government of the Netherlands had, in the process of giving consent to the treaty, ‘expressed itself formally, publicly, and in writing (with reasons) as to what had been intended by the key phrase’, and the government of Slovakia in the arbitration espoused the same meaning.<sup>223</sup> The Tribunal noted that the material did not fall within categories enumerated in the Vienna rules but that did not mean it should be left out of consideration:

To do so . . . would not . . . be reconcilable with the requirement that a treaty is to be interpreted ‘in good faith’, which the Vienna Convention consciously placed at the very head of the provisions dealing with interpretation. And the Tribunal recalls once more (as set out above) that the category of supplementary materials that a tribunal is authorized to have recourse to, 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 leaves the meaning ambiguous or obscure, is, on the terms of the Convention, not closed. The Tribunal is therefore in no doubt that the Dutch Explanatory Notes, given their terms and content, taken together with the viewpoint adopted in these proceedings by Slovakia, constitute

<sup>222</sup> PCA Case No. 2009-11 (2011) at para 126.

<sup>223</sup> Award para 126.

valid supplementary material which the Tribunal may, and in the circumstances must, take into account in dealing with the question before it.<sup>224</sup>

## 5. Conclusions

The supplementary means of interpretation indicated in the Vienna rules are not an exclusive list. They are 'supplementary' rather than subordinate. There is, however, a differentiation in their roles. When used 'to confirm' meaning they are of a lesser role than the general rule, but when used 'to determine' meaning they are dominant. They may always be considered to help in understanding a treaty and with a view to assessing their availability for one of the roles identified in article 32. Their admissibility in the operative reasoning of an interpretation is differentiated by function—that is, according to whether they are to *confirm* a meaning reached by applying the general rule or to *determine* the meaning of a treaty provision.

In the latter case supplementary means (most commonly preparatory work) may only be used if the result of deploying the general rule leaves the meaning ambiguous or obscure or produces a result which is manifestly absurd or unreasonable. These preconditions do *not* apply to use of preparatory work to confirm the meaning reached by application of the general rule, nor to its use for general understanding of the treaty.

The relationship between the general rule and the supplementary means of interpretation suggests that if preparatory work does not confirm the clear meaning given to a treaty provision by applying the general rule, the preparatory work is not to be taken into account. When applied in practice, however, the small amount of case law touching on this issue suggests that this is not what generally happens and some evaluation of the preparatory work takes place.

Application of the general rule tends in such cases not to produce so clear an outcome that strong evidence in preparatory work, and in the circumstances of conclusion, of a possible different meaning will be ignored. In practice, awareness of the preparatory work may reveal at an early stage the possibility of ambiguity.

Hence the general rule and supplementary means may in extreme cases operate like a see-saw, with the relatively much stronger element carrying preponderant weight. This may usually be justifiable on the basis of the application of the general rule either producing a clearer outcome than that suggested in the preparatory work or producing a result that meets the preconditions set in article 32 for the preparatory work to be determinative. It should not be forgotten, however, that the general rule includes elements in its third paragraph which may lead away from meanings suggested by the preparatory work. The records of preparatory work are commonly inconclusive and are to be approached with considerable caution.

<sup>224</sup> Award para 126, footnote omitted.