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SPECIAL FOCUS ISSUE

Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)

Makane Moïse Mbengue¹

I. INTRODUCTION

The particularly dynamic branch of public international law known as ‘international investment law’ is essentially, albeit not exclusively, governed by international agreements, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), Energy Charter Treaty (ECT), bilateral investment treaties (BITs), etc. As a consequence, foreign investment tribunals are called upon in every case to interpret and ascertain the meaning of treaty provisions. This raises the question of the rules that should govern this operation. Under public international law, treaties are interpreted in accordance with Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT) which reflect customary international law and are therefore applicable to all the treaties whether the States concerned are parties to the VCLT or not.²

While Article 31 sets out the so-called ‘general rule of interpretation’, Article 32 provides for ‘supplementary means of interpretation’ and reads as follows:

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.

This article is one of the most controversial provisions of the VCLT for it relegates the *travaux préparatoires* and the circumstances of the conclusion of the treaty to a secondary role, while these elements may appear at first glance as crucial in any interpretative effort. The present note aims at better understanding

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² *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Judgment) [2002] ICJ Rep 625, para 37; *Case concerning the Auditing of Accounts (Netherlands v France)*, Award (12 March 2004) (2004) XXV RIAA 267, paras 54–79; *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction (9 November 2004) para 75; *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para 75.

the role played by Article 32 in treaty interpretation in general and in the interpretation of international investment agreements in particular. To do so, it will first try to identify the supplementary means contemplated in Article 32 (Section II) before turning to the place of these supplementary means in the interpretative operation set out by the VCLT (Section III) and the characteristics of their interpretative functions (Section IV).

II. THE SUPPLEMENTARY MEANS CONTEMPLATED IN ARTICLE 32

Before examining the role played by Article 32 in the interpretative scheme of the VCLT, it would be useful first to identify and define the ‘supplementary means of interpretation’ with which it deals. In this respect, it is worth noting from the outset that this article refers explicitly to the preparatory work of the treaty and to the circumstances of its conclusion. However, its wording does not preclude the interpreter from relying on other types of supplementary means of interpretation.

A. *Travaux Préparatoires*

The *travaux préparatoires* are beyond doubt the most important supplementary means of interpretation.³ However, Article 32 VCLT does not include a definition of preparatory work. Indeed, the International Law Commission (ILC), which was tasked with drafting the VCLT, considered that nothing would be gained by trying to define the *travaux préparatoires*, and that doing so might only lead to the possible exclusion of relevant evidence.⁴ Thus, one can assert that the notion of preparatory work referred to in Article 32 is a rather broad and flexible one.

Under international law, the concept of *travaux préparatoires* generally designates all the written documents that were produced in the process leading up to the conclusion of a treaty. Among these documents one can refer to: the successive drafts of the treaty; the negotiation records; the minutes of commission and plenary proceedings; the memoranda and statements of governments and their representatives; the diplomatic exchanges between the parties and the interpretative statements made by the chairman of a drafting committee.⁵

A number of tribunals have relied on evidence falling within the scope of the notion of ‘preparatory work’ for the purpose of interpreting investment agreements. For instance, in *Amco v Indonesia*, the Chairman’s response to a proposal made by the representative of Honduras during the drafting process of Article 52 of the ICSID Convention was taken into account in the clarification of the contours of the authority given by this article to ICSID *ad hoc* annulment committees.⁶ In *Southern Pacific Properties (Middle East) Limited (SPP) v Arab Republic of Egypt*, the Tribunal drew upon a preliminary draft of the ICSID

³ Mark E Villiger, ‘The 1969 Vienna Convention on the Law of Treaties—40 Years after’ (2009) 344 *Collected Courses of The Hague Academy Intl L* 125.

⁴ ‘Report of the Commission to the General Assembly’ ILC YB 1966, vol II, 223 (ILC Report) para 20.

⁵ Mustafa Kamil Yasseen, ‘L’interprétation des traités d’après la Convention de Vienne sur le droit des traités’ (1976) 151 *Collected Courses of The Hague Academy Intl L* 83; Yves Le Bouthillier, ‘Article 32’ in Olivier Corten, Pierre Klein (eds) *Les conventions de Vienne sur le droit des traités. Commentaires article par article* (Bruylant 2006) 1354; Villiger (n 3) 126; Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 218.

⁶ *Amco Asia Corporation v Republic of Indonesia*, ICSID Case No ARB/81/1 (Resubmitted Case) Decision on Jurisdiction (10 May 1988) para 42. Convention on the Settlement of Investment Disputes between States and

Convention and working paper prepared by the International Bank for Reconstruction and Development for the consultative meeting of legal experts.⁷ In *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, the *Ad Hoc* Committee referred to a vote of the Committee of Legal Experts against a proposal which would have allowed the parties to dispense with the requirement of a reasoned award set out in Article 48(3) of the ICSID Convention.⁸ Finally, in *Vivendi Universal v Argentine Republic*, the Tribunal relied on statements of delegations from developing countries to the negotiation of the ICSID Convention in defining the scope of application of Article 25 of the Convention with regard to States' subdivisions and agencies.⁹

Since *travaux préparatoires* refer, as their name implies, to the written material generated during the treaty's preparation phase, it goes without saying that they are limited to the documents that had been produced prior to the conclusion of the treaty or concomitantly with it. The statements and other material issued subsequently, including during the period separating the signature and the ratification of the treaty, do not amount to *travaux préparatoires*.¹⁰

Moreover, the fact that a document may qualify as preparatory work does not necessarily mean that this document will play a role in the interpretation of the treaty concerned. One must distinguish between the identification of the elements that constitute the *travaux préparatoires* of a treaty and the weight to be given to each element in the interpretative process.¹¹ Generally speaking, as Anthony Aust explains, the value of the material under examination depends most importantly on its authenticity, completeness and availability.¹² More specifically, it is possible to assert that the extent of the role played by a preparatory document is linked to its capacity to 'serve the purpose of illuminating a common understanding' of the provision concerned among the parties. This principle was spelt out in the *Iron Rhine* arbitration and provides the interpreter with a useful tool for the assessment of the interpretative value of the *travaux préparatoires*.¹³ For instance, in *Canfor v United States of America*, the Tribunal denied the Claimant's request for production of internal memoranda, notes and communications generated by the Respondent's authorities during the negotiations of the North American Free Trade Agreement (NAFTA) for it considered that these documents 'do not reflect the common intention of the NAFTA Parties in drafting, adopting, or rejecting a particular provision'.¹⁴

As is the case with the content of the *travaux préparatoires*, Article 32 also remains silent on the controversial question of whether the preparatory work of a

Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention) art 52.

⁷ *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Decision on Jurisdiction (27 November 85) paras 219–20.

⁸ *Maritime International Nominees Establishment v Republic of Guinea*, ICSID Case No ARB/84/4, Decision on Annulment (14 December 1989), para 5.10.

⁹ *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) para 52.

¹⁰ Yasseen (n 5) 83.

¹¹ Le Bouthillier (n 5) 1357.

¹² Aust (n 5) 218.

¹³ *Arbitration regarding the Iron Rhine Railway (Belgium/Netherlands)*, Award (24 May 2005) (2005) XXVII RIAA 35, para 48.

¹⁴ *Canfor Corporation v United States of America*, UNCITRAL, Procedural Order No 5 (28 March 2004) para 19.

multilateral convention may be invoked against States which did not participate in the negotiations but which subsequently acceded to the treaty. In the *Territorial Jurisdiction of the International Commission of the River Oder* case, the Permanent Court of International Justice (PCIJ) excluded from its consideration the *travaux préparatoires* of certain provisions of the Treaty of Versailles on the ground that three of the States before the Court had not participated in the conference which prepared the Treaty.¹⁵ However, in its commentary to the Draft Article 28 that became Article 32 of the VCLT, the ILC called into question the position adopted by the PCIJ in the *River Oder* case. It considered, first, that it was doubtful whether the ruling in question reflects the actual practice in the case of multilateral treaties that are open to accession. The ILC also added that the principle behind the ruling does not seem to be as compelling as it might appear from the language of the PCIJ. Moreover, it underlined the fact that a State acceding to a treaty in the drafting of which it did not participate is perfectly entitled to request to see the *travaux préparatoires*, if it wishes, before acceding. Finally, the ILC questioned the practical convenience of the PCIJ's solution having regard to the many important multilateral treaties which are open to accession.¹⁶

In the same vein, a highly qualified legal expert considered that the *River Oder's* judgment was not justified for it disrupts the unity of multilateral treaties. Indeed, this ruling implies that two different methods of interpretation should be employed with regard to the same treaty: the one for States who participated in the *travaux préparatoires* and the other for States who did not participate.¹⁷

Therefore, in light of the considerations mentioned above, it would be fair to contend that, under international law, the *travaux préparatoires* can be invoked against a State party who had not taken part in the negotiation of the multilateral treaty, provided that these *travaux* were published or otherwise available at the time of its accession to the treaty.¹⁸ Indeed, pursuant to the *bona fides* principle, it will not be possible to invoke the *travaux préparatoires* of a treaty against a State who has been prevented, for any reason whatsoever, from consulting them before its accession to the treaty in question.¹⁹

Provided that the foregoing conditions are met, it is thus possible to affirm that investment tribunals are, in principle, allowed to rely on the *travaux préparatoires* of the ICSID Convention and any other multilateral investment agreement in cases where the respondent State or the home State of the investor had not taken part in the negotiation process of the conventions in question.

B. Circumstances of Conclusion

As with the *travaux préparatoires* of the treaty, the circumstances of its conclusion constitute the other supplementary means of interpretation explicitly contemplated in Article 32 of the VCLT.

The circumstances of the conclusion of a treaty should be differentiated from the treaty's context to which the general rule of interpretation embodied in Article

¹⁵ *Territorial Jurisdiction of the International Commission of the River Oder* [1929] PCIJ Series A No 23.

¹⁶ ILC Report (n 4) 223 para 20.

¹⁷ Yasseen (n 5) 89. His view was endorsed by Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 144.

¹⁸ Aust (n 5) 220.

¹⁹ Yasseen (n 5) 90.

31(1) refers. Pursuant to this article, the context of a treaty has a very narrow and specific meaning. It is defined to exclusively include the whole treaty text including its preamble and annexes, any agreement relating to the treaty made between all the parties in connection with the treaty's conclusion, and any instrument made by one or more parties in connection with the treaty's conclusion and accepted by the other parties as an instrument related to the treaty.²⁰

While the treaty's context comprises elements that are intrinsic to the treaty's text or closely linked to it, the circumstances of conclusion bear a rather extrinsic dimension. Indeed, this supplementary means of interpretation refers to the historical background against which the treaty has been negotiated and concluded.²¹ It includes the political, economic, social and cultural factors as well as any other elements or events that led the parties to conclude the treaty in order either to strengthen the *status quo* or to bring about a necessary change in their relations.²² In *Kiliç v Turkmenistan*, the Tribunal took the view that the circumstances of the conclusion of a treaty encompass the process relating to its negotiation, conclusion and signing as well as events leading up to its ratification.²³

However, this does not mean that the elements and events in question must have exercised a direct influence on the conclusion of the treaty in order to be considered as 'circumstances of conclusion' in the sense of Article 32 of the VCLT. In *European Commission (EC)—Chicken Cuts*, the WTO Appellate Body clarified that a 'direct link' to the treaty text or a 'direct influence' on the common intentions of the parties is not necessary for an event, act, or instrument to qualify as a 'circumstance of conclusion' of a treaty under Article 32:

An 'event, act or instrument' may be relevant as supplementary means of interpretation not only if it has actually influenced a specific aspect of the treaty text in the sense of a relationship of cause and effect; it may also qualify as a 'circumstance of the conclusion' when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision ... it should not be misconstrued as introducing a concept that an act, event, or instrument qualifies as a circumstance only when it has influenced the intent of all the parties. Thus, not only 'multilateral' sources, but also 'unilateral' acts, instruments, or statements of individual negotiating parties may be useful in ascertaining 'the reality of the situation which the parties wished to regulate by means of the treaty' and, ultimately, for discerning the common intentions of the parties.²⁴

In fact, as indicated in this passage, the relevance of the circumstances of conclusion depends on their ability to shed some light on the common intentions of the parties.²⁵ In this regard, in the same *EC—Chicken Cuts* case, the Appellate

²⁰ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969; entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(2)(a) and (b).

²¹ Yasseen (n 5) 90; Sinclair (n 17) 141.

²² Yasseen (n 5) 90; Villiger (n 3) 126.

²³ *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Decision on Article VII.2 of the Turkey–Turkmenistan Bilateral Investment Agreement (7 May 2012) para 9.18. See also Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments (signed 2 May 1992, entered into force 13 March 1997) (Turkey–Turkmenistan BIT).

²⁴ WTO, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts—Report of the Appellate Body* (2005) WT/DS286/AB/R, para 289 (*EC—Chicken Cuts*).

²⁵ *ibid.* See also Yasseen (n 5) 90.

Body established a list of ‘objective factors’ that may help determining the degree of relevance of a peculiar circumstance for the purpose of treaty interpretation:

In our view, the relevance of a circumstance for interpretation should be determined on the basis of objective factors, and not subjective intent. We can conceive of a number of objective factors that may be useful in determining the degree of relevance of particular circumstances for interpreting a specific treaty provision. These include the type of event, document, or instrument and its legal nature; temporal relation of the circumstance to the conclusion of the treaty; actual knowledge or mere access to a published act or instrument; subject matter of the document, instrument, or event in relation to the treaty provision to be interpreted; and whether or how it was used or influenced the negotiations of the treaty.²⁶

Among these ‘objective factors’, the subject-matter of the treaty deserves to be underlined.²⁷ Indeed, it goes without saying that the economic situation of the parties and their status as importing or exporting countries may be relevant for the interpretation of a trade agreement while not being of a great help with regard to the elucidation of the meaning of a provision incorporated in a treaty of mutual assistance in criminal matters. Therefore, in the field of international investment agreements, it is especially the economic policy considerations that will be taken into account as ‘circumstances of conclusion’.

Finally, it is worth noting for the sake of completeness that, in examining the circumstances of a treaty’s conclusion, the interpreter may also take into account the individual condition of the parties, notably, their economic, political and social situation, their adherence to a peculiar grouping or alliance or any other individual characteristic that may influence the behaviour of the parties concerned at the international level.²⁸

For example, in *Plama v Bulgaria*, while referring to Article 32 of the VCLT, and more specifically to the circumstances surrounding the conclusion of the Bulgaria–Cyprus BIT, the Tribunal drew upon the political and economical condition of one of the two States parties. It noted that at the time of the conclusion of the BIT in question, ‘Bulgaria was under a communist regime that favoured bilateral investment treaties with limited protections for foreign investors and with very limited dispute resolution provisions.’²⁹ This circumstance was one of the considerations that led the Tribunal to conclude that the scope of the dispute resolution provision of the BIT cannot be extended through the most-favoured-nation (MFN) provision.³⁰

C. Other Supplementary Means

The first limb of Article 32 provides that ‘recourse may be had to supplementary means of interpretation, *including* the preparatory work of the treaty and the circumstances of its conclusion’. It follows that the means mentioned therein and

²⁶ *EC—Chicken Cuts* (n 24) para 291.

²⁷ *Le Bouthillier* (n 5) 1364.

²⁸ *Yasseen* (n 5) 90; *Sinclair* (n 17) 141.

²⁹ *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) para 196. Agreement between the Government of the People’s Republic of Bulgaria and the Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments (signed 12 November 1987, entered into force 18 May 1988) (Bulgaria–Cyprus BIT).

³⁰ *ibid* paras 197, 227.

examined above serve as examples and do not exclude other supplementary means of interpretation.³¹ The non-exhaustiveness of the enumeration embodied in Article 32 is due to the need for providing the interpreter with a certain margin of freedom in the choice of the means that could shed some light on the meaning of the treaty, especially in complicated cases.³²

It has been suggested that among the other supplementary means of interpretation are the classical interpretative principles, usually expressed in Latin maxims, which international law has in common with most domestic legal systems.³³ However, it is not clear whether all these principles fall under the scope of Article 32. Indeed, in its general commentary to Draft Articles 27 and 28 that later became Articles 31 and 32 of the VCLT, the ILC considered that the principle *ut res magis valeat quam pereat*, also known as the *effet utile* or ‘effective interpretation’ principle was implicitly embodied in Article 31(1), which requires that a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to its terms.³⁴ Therefore, it could fairly be assumed that the reliance of the interpreter on rules of logic and good sense such as the *ejusdem generis*, *e contrario*, *per analogiam* or *expressio unius est exclusio alterius* principles, amounts to an application of Article 31 rather than Article 32.³⁵ In fact, these rules are better seen as useful tools for identifying which ordinary meaning is to be given to a term rather than supplementary means.³⁶

On the contrary, the principles that comprise legal presumptions which are proper to international law or shared with other legal systems can be used as supplementary means of interpretation in the sense of Article 32. This is, for instance, the case of the *in dubio mitius* rule, also known as the ‘restrictive principle’.³⁷ According to this principle, ‘if the meaning of a term is ambiguous, that meaning is to be preferred 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’.³⁸ It is true that in the *Navigational and Related Rights Case (Costa Rica v Nicaragua)*, the International Court of Justice (ICJ) seemed to negate the applicability of the *in dubio mitius* principle in the interpretative process:

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 . . .³⁹

³¹ Villiger (n 3) 125. See also *EC—Chicken Cuts* (n 24) para 283: We stress, moreover, that Article 32 does not define exhaustively the supplementary means of interpretation to which an interpreter may have recourse. It states only that they include the preparatory work of the treaty and the circumstances of its conclusion. Thus, an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties.

³² Yasseen (n 5) 79.

³³ Aust (n 5) 220–1.

³⁴ ILC Report (n 4) 219 para 6.

³⁵ Richard K Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 358, 404–5.

³⁶ *ibid.*

³⁷ *ibid.* 405.

³⁸ Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law*, vol 1 (9th edn, Longman 1992) 1278.

³⁹ *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, para 48.

However, by stating that the ‘restrictive principle’ has no ‘*a priori*’ application, the Court seems not to rule out the possibility of resorting to the *in dubio mitius* principle as a supplementary means of interpretation at a later stage, if the application of the general rule embodied in Article 31 proves insufficient or unsatisfactory.⁴⁰

In this respect, it is worth noting that this principle has already been resorted to by investment tribunals. For instance, in *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, the Tribunal considered that the appropriate interpretive approach to the umbrella clause of the Pakistan–Switzerland BIT ‘is the prudential one summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*’.⁴¹ To substantiate this assertion, the Tribunal referred to the World Trade Organization (WTO) Appellate Body Report in the *Hormones* case which clearly stated that ‘the interpretative principle *in dubio mitius* [is] widely recognized by international law as a “supplementary means of interpretation”’.⁴²

Moreover, on several occasions, in order to clarify the meaning of a treaty provision, the ICJ looked at other treaties on the same subject matter, concluded either before or at the same time as that in question, and which embody the same or a similar provision.⁴³ In doing so, the Court has never explicitly indicated that it was relying on supplementary means of interpretation.⁴⁴ However, according to an authoritative author, other treaties on the same subject matter may be considered as supplementary means of interpretation in the sense of Article 32.⁴⁵

In *Kiliç v Turkmenistan*, the investment tribunal relied on another BIT to ascertain the meaning of the dispute settlement provision included in the authentic English version of the Turkey–Turkmenistan BIT. In this case, it was not clear from the wording of the provision concerned whether the recourse to local courts before the institution of international arbitral proceedings was compulsory or merely optional. To overcome this ambiguity, the Tribunal looked at the Turkey–Kazakhstan BIT which had been concluded one day before the Turkey–Turkmenistan BIT and which encompassed a similar dispute settlement clause. The authentic Turkish text of this BIT undisputedly required a prior mandatory recourse to local courts. This fact was among the considerations that led the Tribunal to conclude that the English version of the Turkey–Turkmenistan BIT is to be interpreted as requiring compulsory recourse to local courts.⁴⁶

⁴⁰ Gardiner (n 35) 407.

⁴¹ *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction (6 August 2003) para 171. Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments (signed 11 July 1995, entered into force 6 May 1996) (Pakistan–Switzerland BIT).

⁴² WTO, *European Commission—Measures Concerning Meat and Meat Products (Hormones)—Report of the Appellate Body* (16 January 1998) WT/DS26/AB/R, para 165 fn 154.

⁴³ *Case concerning rights of nationals of the United States of America in Morocco (Judgment)* [1952] ICJ Rep 176, 191; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 169; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, (Advisory Opinion) [1980] ICJ Rep 73, paras 45–6; *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection Judgment) [1996] ICJ Rep 803, paras 29, 47.

⁴⁴ *Le Bouthillier* (n 5) 1367.

⁴⁵ Aust (n 5) 220.

⁴⁶ *Kiliç* (n 23) paras 9.18–9.21; Turkey–Turkmenistan BIT (n 23); Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments (signed 2 May 1992, entered into force 13 March 1997) (Turkey–Kazakhstan BIT).

International investment case law provides several other examples of evidence that may fall within the scope of the “supplementary means” referred to in Article 32 of the VCLT. For instance, on several occasions, investment tribunals relied in their interpretative effort on different types of documents generated by one of the parties to a BIT during the ratification process, that is to say, after the treaty conclusion. In *Fraport v Philippines*, the Tribunal drew upon the preamble of the Philippines’ instrument of ratification in order to clarify the contours of the definition of investment provided for in the Germany–Philippines BIT.⁴⁷ Similarly, in *HICEE BV v Slovakia*, the Tribunal took into account the explanatory notes enclosed by the Dutch government to the text of the Netherlands–Czechoslovakia BIT that was transmitted to the Dutch parliament for approval.⁴⁸ More recently, in the above-mentioned *Kiliç* case, the Tribunal referred to the official Turkish translation of the authentic English version of the Turkey–Turkmenistan BIT that was sent to the Turkish parliament in view of the ratification and published in Turkey’s Official Gazette.⁴⁹

Testimonials and recollections of former negotiators of investment agreements have also played a role in the interpretation of the agreements in question. For example, in *Sempre Energy v Argentina*, the Tribunal stated that ‘the opinion of those who were responsible for the drafting and negotiation of a State’s bilateral treaties [is not] irrelevant, in that it serves, precisely, to establish the original intention’.⁵⁰

Due to the non-exhaustive character of the list of supplementary means incorporated in Article 32, nothing can theoretically prevent the above-mentioned evidence from qualifying as ‘supplementary means of interpretation’ in the sense of the VCLT. However, as with preparatory work, one must distinguish between the possible qualification of a document as a supplementary means of interpretation and the effective weight to be given to this document in the interpretative process. Investment agreements are acts of will which involve at least two States parties. They are the product of shared and common intentions. Nevertheless, the evidence referred to in the foregoing paragraphs have a unilateral character for they were produced by only one party to the treaties concerned. Therefore, these types of documents should only be decisive when they can shed light on the common understanding of the parties with regard to the meaning of the provision to be interpreted.

For example, in *Eureko v Poland*, in support of its interpretation of the Netherlands–Poland BIT, the respondent submitted the recollections of a Polish Foreign Ministry official involved in the negotiation of that treaty. However, the Tribunal considered that these recollections were rebutted by an opinion to the contrary of a Dutch Foreign Ministry official.⁵¹ Similarly, in *Tza Yap Shum v Peru*,

⁴⁷ *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines* ICSID Case No ARB/03/25, Award (16 August 2007) paras 337–43; Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments (signed 18 April 1997, entered into force 1 February 2000) (Germany–Philippines BIT).

⁴⁸ *HICEE BV v Slovak Republic*, PCA Case No 2009-11, Partial Award (29 May 2011) para 126; Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (signed 29 April 1991, entered into force 1 October 1992) (Netherlands–Czechoslovakia BIT).

⁴⁹ *Kiliç* (n 23) para 9.20.

⁵⁰ *Sempre Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Decision on Objections to Jurisdiction (11 May 2005) para 145.

⁵¹ *Eureko BV v Republic of Poland, Ad hoc*, Partial Award (19 August 2005) para 185 fn 17; Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments (signed 7 September 1992, entered into force 1 February 1994) (Netherlands–Poland BIT).

the Tribunal did not consider the testimony of one of the Peruvian negotiators of the China–Peru BIT for it did not constitute a convincing evidence of the contracting parties’ common intention with regard to the scope of the BIT’s MFN provision.⁵²

Finally, BIT models constitute another type of document, peculiar to international investment law, which might serve as supplementary means of interpretation. In *Garanti Koza v Turkmenistan*, the Tribunal stated that:

If the Tribunal found Article 8(2) to be ambiguous or obscure, Article 32 of the Vienna Convention would permit us to consider supplementary means of interpretation, and the model BIT from which the parties evidently derived the text of Article 8(2) would be among the circumstances of [the] conclusion’ of the U.K.–Turkmenistan BIT that could be considered in interpreting that article.⁵³

Indeed, BITs are often based on model treaties. Many States have model BITs which serve as a starting point for negotiations with prospective treaty partners.⁵⁴ Consequently, BITs tend to be largely copied from the model of the States pushing for their negotiation and conclusion.⁵⁵ Therefore, the comparison of the final version of a BIT with the text of the model from which it was derived may provide the interpreter with useful indications on the common intention and understanding of the parties with regard to a peculiar provision of the treaty. For instance, in her dissenting opinion in the above-mentioned *Garanti Koza* case, Laurence Boisson de Chazournes relied on this type of comparison in order to confirm her interpretation of the dispute settlement provision of the UK–Turkmenistan BIT.⁵⁶

It is, however, worth noting that, intriguingly, in the passage of *Garanti Koza* quoted above, the Tribunal considered that the UK model BIT was among the ‘circumstances of the conclusion’ of the UK–Turkmenistan BIT. As explained in Section II.B, and as their name implies, the circumstances of conclusion refer to the background (political, economic, social and cultural) against which the treaty was negotiated as well as the events that lead to its conclusion rather than to specific written documents.⁵⁷ For this reason, it appears more accurate to designate BIT models as autonomous ‘supplementary means of interpretation’. Another plausible possibility would be to consider BIT models as *travaux préparatoires*. Indeed, where it is clearly established that a peculiar model had served as a starting point to the negotiations, this model will amount to a ‘preliminary draft’ of the treaty.

⁵² *Tza Yap Shun v Republic of Peru*, ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence (19 June 2009) para 212; Agreement between the Government of the Republic of Peru and the Government of the People’s Republic of China concerning the Encouragement and Reciprocal Protection of Investments (signed 9 June 1994, entered into force 1 February 1995) (China–Peru BIT).

⁵³ *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Decision on Jurisdiction (3 July 2013) para 36.

⁵⁴ Christoph Schreuer, ‘Diversity and Harmonization of Treaty Interpretation in Investment Arbitration’ (7 February 2006) 8 <http://www.univie.ac.at/intlaw/pdf/cspubl_85.pdf> accessed 8 February 2016.

⁵⁵ Thomas Wälde, ‘Interpreting Investment Treaties’, in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 724, 777.

⁵⁶ *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Dissenting Opinion (3 July 2013) paras 28–30; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments (signed 9 February 1995, entered into force 9 February 1995) (UK–Turkmenistan BIT).

⁵⁷ For a different position regarding the content of the ‘circumstances of conclusion’ referred to in Article 32 VCLT, see *EC—Chicken Cuts* (n 24) para 289 where the Appellate Body seems to suggest that the circumstances of conclusion also include specific acts and instruments.

For the sake of completeness, it should also be mentioned that some more recent BIT models are accompanied by commentaries purporting to clarify the meaning of their provisions. This is for example the case of the Southern African Development Community (SADC) Model BIT Template that was adopted in 2012.⁵⁸ It goes without saying that these types of commentaries will play an important role in the interpretation of the BITs based on the models for which there is a commentary, especially with regard to the provisions that have been copied without any further modification. As a matter of comparison, one could refer to the useful guidance provided by the commentaries appended to the Organisation for Economic Co-operation and Development (OECD) Model Double Taxation Convention on Income and on Capital with regard to the interpretation of bilateral double tax avoidance agreements derived from the aforementioned model.⁵⁹

All the above-mentioned examples show that international law in general and international investment law in particular admit and use a wide-range of 'supplementary means of interpretation'. However, this does not mean that this category contemplated in Article 32 of the VCLT is of an open-ended character. Obviously, some types of evidence do not qualify as 'supplementary means of interpretation' under international law.

In this respect, it is worth noting that in some cases, investment tribunals applied Article 32 in an incorrect manner by extending its scope to elements that cannot be considered as supplementary means of interpretation. For instance, in *Canadian Cattlemen v United States*, the Tribunal took the following view:

Article 32 VCLT permits as *supplementary means* of interpretation, not only preparatory work and circumstances of conclusion of the treaty, but indicates by the word '*including*' that, beyond these two means expressly mentioned, other supplementary means may be applied. Article 38 [paragraph 1.d.] of the Statute of the International Court of Justice provides that judicial decisions are applicable for the interpretation of public international law as 'subsidiary means'. Therefore, they must be understood to be also *supplementary means of interpretation* in the sense of Article 32 VCLT.⁶⁰

This passage merges two provisions which are very different. Pursuant to Article 38 of the Statute of the ICJ, the function of judicial decisions is the 'determination of the rules of law'. It follows that these decisions may help the Court in identifying the content of customary international rules, general principles of law, and other international rules. It goes without saying that this function is distinct from that of supplementary means of interpretation under Article 32, which serve as aids to the interpretation of a specific text. As Michael Reisman once stated with regard to a similar ruling formulated in the *Softwood Lumber Case (United States of America v Canada)*:⁶¹ 'by jumping from 'supplementary' to 'subsidiary'

⁵⁸ Southern African Development Community, 'SADC Model Bilateral Investment Treaty Template with Commentary' (2012) <<http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>> Accessed 8 February 2016.

⁵⁹ Gardiner (n 35) 403 fn 202 with reference to several domestic decisions (USA, Australia and the Netherlands).

⁶⁰ *The Canadian Cattlemen for Fair Trade v United States of America*, UNCITRAL (formerly Consolidated Canadian Claims v United States of America), UNCITRAL, Award on Jurisdiction (28 January 2008) para 50. For a similar ruling, see also *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador*, UNCITRAL, PCA Case No 34877, Interim Award (1 December 2008) paras 49–50.

⁶¹ *Softwood Lumber Case (United States of America v Canada)*, LCIA Case No 7941, Award on Liability (3 March 2008) para 50.

(words which certainly sound similar), the Tribunal grafts something onto the VCLT's canon of rules for interpretation which is not—and should not—be there'.⁶² Therefore one can firmly assert that previous awards or academic writings are not supplementary means of interpretation in the sense of Article 32. In particular, as correctly pointed out by the *Romak* Tribunal, 'arbitral awards remain mere sources of inspiration, comfort or reference to arbitrators'.⁶³

Having identified and defined the supplementary means of Article 32, let's now turn to the examination of the place of these means in the interpretative process set out by the VCLT.

III. THE PLACE OF THE SUPPLEMENTARY MEANS IN THE INTERPRETATIVE OPERATION SET OUT BY THE VCLT

In order to understand and identify the role played in the interpretative operation by the supplementary means of Article 32, one must read this provision in conjunction with Article 31 of the VCLT whose first paragraph provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

Article 31 is entitled 'General rule of interpretation' while Article 32 bears the title 'Supplementary means of interpretation'. The contrast between the words 'rule' and 'means' in the headings suggests that Article 32 is somewhat auxiliary to Article 31 which plays a dominant role in the interpretative process.⁶⁴ Moreover, the use of the adjective 'supplementary' (*complémentaires* in the French version of the treaty) indicates that the means contemplated in Article 32 are not autonomous or alternative means of interpretation.⁶⁵ They are mere supplements to the general rule of Article 31 and cannot operate independently from it.

However, the supplementary means of Article 32 are not only secondary in the interpretative process. Their role is also facultative and contingent.⁶⁶ By stating that 'recourse *may* be had to supplementary means', the provision in question provides the interpreter with a mere option. Its wording must be contrasted with that of Article 31 which uses the compelling verbal auxiliary 'shall' in each of its paragraphs. This comparison suggests that if the application of the general rule embodied in Article 31 is mandatory in any treaty interpretation, the resort to the supplementary means of Article 32 is an unnecessary possibility.

The subsidiary and contingent character of the recourse to supplementary means was an already well-established feature of the law of treaties at the time of the conclusion of the VCLT in 1969. In the famous *Lotus* case of 1927, the PCIJ ruled that 'there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself'.⁶⁷ This position was endorsed by the ICJ

⁶² *United States of America v Canada*, LCIA Case No 81010, Opinion of Michael Reisman with Respect to Selected International Legal Problems in LCIA Case No 7941 (1 May 2009) para 16.

⁶³ *Romak SA (Switzerland) and The Republic of Uzbekistan*, PCA Case No AA280 Award (26 November 2009) paras 170–1.

⁶⁴ *United States of America v Canada*, Opinion of Michael Reisman (n 62) para 8.

⁶⁵ ILC Report (n 4) 223 para 19; Yasseen (n 5) 79.

⁶⁶ *United States of America v Canada*, Opinion of Michael Reisman (n 62) para 11.

⁶⁷ *The Case of the SS Lotus* [1922] PCIJ Series A No 10, 16.

in its 1950 Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*:

The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. *If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.*⁶⁸

For their part, investment tribunals have also acknowledged and respected the secondary and facultative role conferred to supplementary means by Article 32 on many occasions.

For instance, in *Enron v Argentina*, in view of the clarity of the provision related to the definition of the investment, the Tribunal concluded that indirect investments were protected under the Argentina–United States BIT, without the need to further examine supplementary means of interpretation:

In view of the explicit text of the Treaty and its object and purpose, it is not even necessary to resort to supplementary means of interpretation, such as the preparatory work, a step that would be required only in case of insufficient elements of interpretation in connection with the rule laid down in Article 31 of the Convention.⁶⁹

The relegation of the supplementary means to a secondary status in international treaty law is due to many reasons.

As explained by the ILC, the underlying idea behind the hierarchy between the general rule of Article 31 and the supplementary means of Article 32 is based on the view that the text of the treaty ‘must be presumed to be the authentic expression of the intentions of the parties’.⁷⁰ As Max Huber once stated, ‘le texte signé est sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties’.⁷¹ It follows from this presumption that the starting point of any treaty interpretation shall be ‘the elucidation of the meaning of the text’ rather than ‘an investigation *ab initio* into the intentions of the parties’, notably through the recourse to the *travaux préparatoires* or the circumstances of conclusion.⁷²

The ILC’s views on the supremacy of the treaty’s text and the subsidiary role of supplementary means in the interpretative operation were echoed by the Tribunal in *Methanex v United States*:

... pursuant to Article 32, recourse may be had to supplementary means of interpretation only in the limited circumstances there specified. Other than that, the approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than

⁶⁸ *Competence of Assembly regarding admission to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, 8 (emphasis added). However, the clarity of the treaty’s text does not preclude the Court from resorting to supplementary means in order to confirm its interpretation of the provision at issue (see pt III.A below).

⁶⁹ *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction (2 August 2004) para 32; Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (signed 14 November 1991, entered into force 20 October 1994) (Argentina–United States BIT). For a similar ruling, see *Sempra* (n 50) para 142.

⁷⁰ ILC Report (n 4) 220 para 11.

⁷¹ Max Huber, ‘Observations complémentaires’ (1952-I) 44 *Annuaire de l’Institut de droit international* 199.

⁷² ILC Report (n 4) 220 para 11.

wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation.⁷³

The subsidiary character of the supplementary means also stems from the fact that ‘recourse to preparatory work of a treaty must always be undertaken with caution and prudence’.⁷⁴ Indeed, most of the time, the *travaux préparatoires* are either incomplete or unrevealing or even misleading.

As mentioned above, one of the most important components of the preparatory work of a treaty is the records of the negotiations and conferences that lead up to its conclusion. However, more often than not, the most important parts of a negotiation and of the drafting take place informally, during ‘private corridor discussions’, with no agreed record being kept.⁷⁵

Moreover, given that interpreters often consult the preparatory work with the hope of clarifying the meaning of ambiguous and equivocal formulas, it is worth noting that, frequently, the obscurity of a particular text finds its origin in the *travaux préparatoires* themselves.⁷⁶ In order to bring negotiations to a successful conclusion, negotiators usually try to overcome the irreconcilable opinions in presence by adopting vague and tortuous formulations.⁷⁷ In this case, an interpreter looking at the negotiations records will barely find any clear indication as for the meaning and content of the terms concerned.

Furthermore, one must bear in mind that conference and negotiation records are generally a collection of individual opinions, statements and declarations which, taken together, do not always reflect the existence of a common understanding among the parties with regard to the meaning of a certain provision.⁷⁸ In this respect, it would be prudent to add that these individual declarations do not always reflect the true positions of the parties to the treaty. Statements and declarations made at the beginning of the conference may well comprise positions and opinions that have been abandoned at a later stage by the States concerned.⁷⁹

The disparate nature of the *travaux préparatoires* that have just been described implies some risk with regard to the interpretative process. Indeed, the counsels of the parties to a dispute may well draw upon certain declarations and unilateral statements to advocate a position which does not fairly reflect the reality of the shared intentions of the parties to a treaty. This is an additional reason why preparatory work should be given only a secondary role in treaty interpretation.⁸⁰ As Eduardo Jiménez de Aréchaga explained in his general course on public international law at The Hague Academy:

To ... place *travaux préparatoires* on the same level as the ‘context’ of the treaty (as defined in Article 31, paragraph 2, of the Convention) would create the risk that the preparatory work might be utilized by a party in order to advance an interpretation at variance with the text and modifying its meaning. Experience shows that such extrinsic

⁷³ *Methanex Corporation v United States*, UNCITRAL, Preliminary Award on Jurisdiction and Admissibility (7 August 2002) pt II ch B para 22.

⁷⁴ Sinclair (n 17) 142.

⁷⁵ Yasseen (n 5) 85; Sinclair (n 17) 142; Aust (n 5) 218.

⁷⁶ Yasseen (n 5) 85; Sinclair (n 17) 142.

⁷⁷ Sinclair (n 17) 142; Aust (n 5) 219.

⁷⁸ Le Bouthillier (n 5) 1360.

⁷⁹ Yasseen (n 5) 85.

⁸⁰ J Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 107.

materials are sometimes allowed to infiltrate a text with a view to evading clear obligations.⁸¹

The flaws of incompleteness and sparseness which have justified the relegation of the preparatory work to a secondary status in the interpretation of treaties under general public international law do not suggest a different solution in international investment law. Indeed, the same shortcomings characterize the *travaux préparatoires* of international investment agreements though one should note an undeniable difference of degree between three categories of treaties.

The drafting history of the ICSID Convention is documented in detail, readily available and easily accessible.⁸² Consequently, investment tribunals frequently resort to it especially when they are called upon to solve procedural and jurisdictional issues.⁸³

However, by contrast, the negotiating history of BITs is typically not or only poorly documented.⁸⁴ This was underlined by tribunals on many occasions. For instance, in *AAPL v Sri Lanka* and *Wena Hotels v Egypt*, the Tribunals noted the absence and non-availability of *travaux préparatoires* that might assist them in interpreting the BITs at stake.⁸⁵ In the same vein, in *Aguas del Tunari v Bolivia*, the Tribunal considered that the negotiating history of the BIT at issue was too sparse to offer additional insights into the meaning of its provisions.⁸⁶ The scarcity of the preparatory work of BITs finds its origin in the nature of the negotiating process of this peculiar type of agreement. Indeed, as explained above, BITs are generally copied from the model of the State driving the negotiation without much thinking or substantive debate.⁸⁷

Somewhere in-between the ICSID Convention and BITs are multilateral agreements such as the NAFTA and the ECT. In July 2004, the NAFTA Free Trade Commission announced the release of the negotiating history of Chapter Eleven of the NAFTA dealing with investment. However, it is unclear and doubtful whether the available documentation, which consists essentially of the successive drafts circulated among the negotiating parties, covers all existing documents.⁸⁸ Similarly, with regard to the ECT, there is now public access to the consecutive treaty drafts and, in files put together by the ECT Secretariat, to records of discussions. Nevertheless, there is no guarantee that these records are complete.⁸⁹

In view of the foregoing considerations, one can assert that the relegation of the supplementary means of interpretation to a secondary status is particularly relevant in the field of international investment law for it allows investment tribunals to overcome the difficulties induced by the incompleteness of the *travaux*

⁸¹ Eduardo Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159 *Collected Courses of the Hague Academy Intl L* 1, 46–8.

⁸² ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication 1968).

⁸³ Schreuer (n 54) 9, see also the ICSID cases mentioned at nn 6–9.

⁸⁴ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 31.

⁸⁵ *Asian Agricultural Products Ltd v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990) para 51; *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision on Jurisdiction (29 June 1999) s IV-C.

⁸⁶ *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Jurisdiction (21 October 2005) para 274.

⁸⁷ Wälde (n 55) 750 fn 91, 777.

⁸⁸ Dolzer and Schreuer (n 84) 31 fn 21.

⁸⁹ Wälde (n 55) 778 fn 186.

préparatoires of international investment agreements. It is worth noting here that this relegation is also particularly appropriate because it enables the same investment tribunals to overcome another sensitive issue which is proper to investment disputes: the inequality of claimants and respondents with regard to the access to the negotiating history of the treaties at stake. Indeed, while in such disputes the respondent State has full access to the drafting history of the agreements at issue given that it negotiated them, this is not necessarily the case for investors.⁹⁰

It is true that claimants can ask investment tribunals to order respondent States to disclose the preparatory work of an investment agreement if it appears that such documentation exists. However, the outcome of such a request is never guaranteed. For example, while in *Canfor v United States* the Tribunal accepted to issue a disclosure order,⁹¹ in contrast, the *Methanex* Tribunal decided to deny the Claimant's request for the production of preparatory materials.⁹²

In any case, even when a tribunal does oblige the respondent State to produce the *travaux préparatoires* of an investment treaty, there is no guarantee that this State will comply with the tribunal's order or produce all the documentation at its disposal. For instance, in *Pope & Talbot v Canada*, in the merits phase, Canada did not respond to the Tribunal's request for disclosure of preparatory documentation.⁹³ Subsequently, when Canada finally agreed to produce the records of the NAFTA negotiations in the damages phase, the Tribunal noted that 'it is almost certain that the documents provided, which included nothing in explication of the various drafts, are not all that exists'.⁹⁴

In conclusion, it is worth noting that despite the clarity of the interpretative scheme set out by the VCLT, some investment tribunals have refused to recognize the relegation of the supplementary means and more specifically the *travaux préparatoires* to a secondary status. Indeed, in an empirical study published in 2008, Ole Kristian Fauchald pointed out that over the 98 decisions that he investigated, 19 decisions resorted to preparatory work as a starting point for their analysis or as an essential argument.⁹⁵

For example, in *Fedax v Venezuela*, the Tribunal began its interpretation of the expression 'legal dispute' embodied in Article 25(1) of the ICSID Convention by resorting to the drafting history of the Convention:

[t]he Tribunal must first consider whether there is a legal dispute between the parties as required by Article 25 (1) of the Convention. Although the term 'legal dispute' is not defined in the Convention, its drafting history makes abundantly clear that such term refers to conflicts of rights as opposed to mere conflicts of interests ... The discussions held on the drafts leading to this provision also evidence that legal disputes were meant to exclude moral, political, economic or purely commercial claims.⁹⁶

⁹⁰ *Industria Nacional de Alimentos, SA and Indalsa Perú, SA (formerly Empresas Lucchetti, SA and Lucchetti Perú, SA) v Republic of Peru*, ICSID Case No ARB/03/4, Decision on Annulment (Dissenting Opinion of Sir Franklin Berman) (5 September 2007) para 9.

⁹¹ *Canfor* (n 14) para 22.

⁹² *Methanex Corporation v United States*, UNCITRAL, Final Award (3 August 2005) pt II ch H paras 17–25.

⁹³ *Pope & Talbot Inc v Government of Canada*, UNCITRAL, Award in Respect of Damages (31 May 2002) para 40.

⁹⁴ *ibid* para 41.

⁹⁵ Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals—An Empirical Analysis' (2008) 19 EJIL 350.

⁹⁶ *Fedax NV v Republic of Venezuela*, ICSID Case No ARB/96/3(1), Decision on Objections to Jurisdiction (11 July 1997) para 15.

The Tribunal's reasoning in *Fedax* is clearly at odds with Articles 31 and 32 of the VCLT that provide that a treaty shall be first interpreted according to the ordinary meaning of its terms in their context and in light of the treaty's object and purpose, with the recourse to supplementary means only permitted at a later stage.

More recently, in *Malaysian Historical Salvors v Malaysia*, the *ad hoc* Committee stated that:

[c]ourts and tribunals interpreting treaties regularly review the *travaux préparatoires* whenever they are brought to their attention; it is mythological to pretend that they do so only when they first conclude that the term requiring interpretation is ambiguous or obscure.⁹⁷

Consequently, the Committee decided that the Tribunal had manifestly exceeded its powers, partly because 'it failed to take account of the preparatory work of the ICSID Convention and, in particular, reached conclusions not consonant with the *travaux* in key respects'.⁹⁸ The Committee's conclusion is hardly reconcilable with the facultative and contingent character of the supplementary means of Article 32. This is true irrespective of the plausibility of the result of the annulment decision.

IV. THE INTERPRETATIVE FUNCTIONS OF THE SUPPLEMENTARY MEANS

Despite their subordinate and contingent character described above, the supplementary means of Article 32 still play an important role in the interpretative process by performing two possible functions. They can be used to confirm the meaning resulting from the application of the general rule of interpretation or even to determine the meaning of a treaty provision in some controlled situations that will be examined below.

A. Confirmation of the Meaning

In its first limb, Article 32 stipulates that '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'. The wording of this provision suggests that supplementary means can be resorted to in order to corroborate a meaning that is already clear from the application of the general rule of interpretation embodied in Article 31.⁹⁹ In this respect, one may legitimately wonder why the interpreter

⁹⁷ *Malaysian Historical Salvors v Malaysia*, ICSID Case No ARB/05/10, Application for Annulment (16 April 2009) para 57.

⁹⁸ *ibid* para 80.

⁹⁹ See eg WTO, *China—Measures affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products—Report of the Appellate Body* (2009) WT/DS363/AB/R, para 403:

Although the Panel's application of Article 31 of the *Vienna Convention* to 'Sound recording distribution services' led it to a 'preliminary conclusion' as to the meaning of that entry, the Panel nonetheless decided to have recourse to supplementary means of interpretation to confirm that meaning. We note, in this regard, that China's argument on appeal appears to assume that the Panel's analysis under Article 32 of the *Vienna Convention* would necessarily have been different if the Panel had found that the application of Article 31 left the meaning of 'Sound recording distribution services' ambiguous or obscure, and if the Panel had, therefore, resorted to Article 32 to determine, rather than to confirm, the meaning of that term. We do not share this view. The elements to be examined under Article 32 are distinct from those to be analyzed under Article 31, but it is the same elements that are examined under Article 32 irrespective of the outcome of the Article 31 analysis.

would ever resort to supplementary means if the meaning induced by the general rule is already clear. It is for this reason notably that some members of the ILC and some representatives of State parties advocated the non-inclusion of this possibility in the VCLT.¹⁰⁰

However, the reference to the confirmative function of the supplementary means of interpretation was maintained for several reasons. In its commentary to the text of Article 32 of the VCLT, the ILC indicated that in practice, international tribunals as well as States and international organizations have recourse to subsidiary means of interpretation, more especially to *travaux préparatoires*, for the purpose of confirming the meaning that appears to result from a textual and teleological interpretation of the treaty.¹⁰¹ Since the VCLT was conceived as a codification of the customary rules of the law of treaties, the ILC decided, in order to be in line with international practice, to specify that recourse to supplementary means is permissible for the purpose of confirming a meaning resulting from the application of the general rule.¹⁰² Moreover, in judicial proceedings, parties generally heavily rely on the *travaux préparatoires* to make their case. Thus, it appears to be appropriate to allow judges to examine the preparatory work, if only to do justice to the parties and their arguments.¹⁰³ Finally, it has been suggested that when supplementary means confirm the meaning derived from the application of the general rule, they should be mentioned by the judges for the purpose of strengthening the authority of their judgment.¹⁰⁴

Nevertheless, one must always bear in mind that resort to supplementary means in order to confirm the meaning resulting from Article 31 is facultative and contingent, since Article 32 clearly stipulates that ‘recourse *may* be had to supplementary means’. An international tribunal may well ascertain the meaning of a treaty provision without seeking confirmation in preparatory work and other supplementary means of interpretation.

The optional character of the supplementary means’ confirmatory function has been asserted quite explicitly and on many occasions by the ICJ. For instance, in the *Territorial Dispute (Libya/Chad)* case, the Court stated that:

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 the *travaux* to confirm its reading of the text.¹⁰⁵

In the *LaGrand* case, the ICJ interpreted Article 36 of the Vienna Convention on Consular Relations exclusively on the basis of the general rule of interpretation, without seeking confirmation in the *travaux préparatoires*:

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

Instead, what may differ, depending on the results of the application of Article 31, is the weight that will be attributed to the elements analyzed under Article 32.

¹⁰⁰ Le Bouthillier (n 5) 1349 fns 42–3.

¹⁰¹ ILC Report (n 4) 223 paras 18–19.

¹⁰² *ibid* 223 para 19.

¹⁰³ Gardiner (n 35) 365.

¹⁰⁴ Yasseen (n 5) 80.

¹⁰⁵ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgment) [1994] ICJ Rep 6, para 55.

... Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person.¹⁰⁶

The *LaGrand* Judgment is particularly telling because the ICJ stuck to the ordinary meaning of the terms viewed in their context despite the fact that both parties to the dispute (Germany and the USA) had partly based their differing interpretations on an examination of the preparatory work of the convention concerned.¹⁰⁷

The confirmation of the meaning of a treaty provision through the resort to supplementary means can take different forms.

On the one hand, the *travaux préparatoires* can be deemed to confirm an interpretation resulting from the application of the general rule because they provide the interpreter with elements that directly and explicitly support the interpretation in question. For instance, in the *Territorial Dispute (Libya/Chad)* case mentioned above, the ICJ considered that the preparatory work of the 1955 Treaty confirmed its reading that the treaty in question constitutes an agreement that defines the frontiers between the two parties. To reach this conclusion the Court relied on negotiation records that showed that the Libyan Prime Minister and the French Ambassador agreed on the fact that the definition of the frontiers had already been affected.¹⁰⁸

On the other hand, the *travaux préparatoires* can also be deemed to confirm a peculiar meaning if it appears that their content does not contradict the meaning resulting from the application of Article 31. For instance, in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* case, the ICJ concluded its examination of the *travaux préparatoires* of the convention by stating that ‘the *travaux préparatoires* do not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation’.¹⁰⁹ This example shows that the supplementary means need not provide direct and explicit proof in order to confirm a peculiar meaning. This confirmation may as well be indirect and derived from the silence or the non-decisive character of the *travaux préparatoires*.

In this respect, one could refer to the *Camuzzi v Argentina* investment case. In that case, the Tribunal acknowledged that Article 31(1) is the ‘principal means of interpretation’ and held that the Argentina–Belgium–Luxembourg BIT was sufficiently clear with regard to its inclusion of consent to arbitration, ‘making it unnecessary to resort to supplementary means’. However, the Tribunal referred subsequently to the negotiating history of the BIT and stated that this history does not show the existence of a common intent that would contradict the conclusion reached through the application of Article 31.¹¹⁰ The Tribunal’s reasoning is

¹⁰⁶ *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466, para 77.

¹⁰⁷ Gardiner (n 35) 392–3.

¹⁰⁸ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (n 105) paras 55–6.

¹⁰⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections Judgment) [2011] ICJ Rep 70, para 147.

¹¹⁰ *Camuzzi International SA v Argentine Republic*, ICSID Case No ARB/03/02, Decision on Jurisdiction (11 May 2005) paras 133–4; Treaty between the Argentine Republic and the Belgo-Luxembourg Economic Unit on the Promotion and Reciprocal Protection of Investments (signed 28 June 1990, entered into force 20 May 1994) (Argentina–Belgium–Luxembourg BIT).

perfectly in line with the VCLT regime of treaty interpretation according to which the interpreter has the possibility and not the obligation to resort to supplementary means in order to confirm the meaning resulting from the application of the general rule embodied in Article 31.

A former ICJ judge has suggested that the confirmatory function of the supplementary means of interpretation contemplated in Article 32 encompasses the possibility for the interpreter to correct the meaning resulting from the application of Article 31 if it appears that the preparatory work clearly contradicts this meaning and provides for a different interpretation. To support his view, Judge Stephen Schwebel relies on the principles of good faith and *effet utile*.¹¹¹ According to him, 'to confine preparatory work to the place to which a literal interpretation of the term "to confirm" consigns it hardly renders Article 32 effective'.¹¹²

However, Judge Schwebel's view hardly seems tenable. Indeed, the ordinary meaning of the verb 'to confirm', the ILC's commentary mentioned above and the facultative character of Article 32 as opposed to the mandatory nature of Article 31, seem altogether to suggest that the confirmative role of the supplementary means is limited to the corroboration of the meaning already ascertained by the application of the general rule. The interpreter cannot rely on Article 32 to displace the meaning resulting from the application of Article 31.¹¹³ In the very rare cases where the *travaux préparatoires* clearly contradict the ordinary meaning of a provision viewed in its context and in light of the treaty's object and purpose, priority will have to be given to the latter.¹¹⁴

This view seems to be confirmed by the *Vétéran Petroleum Limited v Russia* investment case which constitutes a very interesting example of a dispute where the hierarchical structure of the VCLT rules was scrupulously observed. In this case, the Tribunal had to interpret Article 45 of the Energy Charter Treaty which deals with the provisional application of the Treaty. More specifically, it was called upon by the parties to determine whether a declaration was needed to opt out from provisional application in the case of inconsistency with the domestic legal regime of the State concerned.

Applying Article 31, the Tribunal concluded that:

[t]he ordinary meaning to be given to the terms of Articles 45(1) and 45(2), when read together, demonstrates to the satisfaction of the Tribunal that the declaration which is referred to in Article 45(2) is a declaration which is not necessarily linked to the Limitation Clause of Article 45(1).¹¹⁵

However, the Tribunal acknowledged at the same time 'that the preparatory work of the Treaty could lead to a finding of linkage between Articles 45(1) and 45(2)' and, as a result, suggested that a declaration was required.¹¹⁶

¹¹¹ Stephen Schwebel, 'May Preparatory Work be Used to Correct Rather than Confirm the Clear Meaning of a Treaty Provision?', in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (Brill Nijhoff 1996) 541, 541-7.

¹¹² *ibid* 546.

¹¹³ *United States of America v Canada*, Opinion of Michael Reisman (n 62) para 11.

¹¹⁴ Canal Forgues, 'Remarques sur le recours aux travaux préparatoires dans le contentieux international' (1993) RGDIP 913.

¹¹⁵ *Vétéran Petroleum Limited v The Russian Federation*, UNCITRAL, PCA Case No AA 228, Interim Award in Jurisdiction and Admissibility (30 November 2009) para 264.

¹¹⁶ *ibid* para 266.

Confronted with a situation where the meaning implied by the *travaux préparatoires* contradicts the one resulting from the application of the general rule of interpretation, the Tribunal decided to give priority to the latter on the basis that the conditions set out by Article 32 for triggering the determinative function of the supplementary means were not met:

The Tribunal does not consider that its interpretation of Article 45 resulting from the application of the general rule of interpretation leads to a result which is manifestly absurd or unreasonable. Nor has the Tribunal found that its interpretation of Article 45 according to Article 31 of the VCLT 'leaves the meaning ambiguous or obscure'; quite the contrary. The Tribunal recognizes that, in practice, tribunals and other treaty interpreters may consider the *travaux préparatoires* whenever they are pleaded, whether or not the text is ambiguous or obscure or leads to a manifestly absurd or unreasonable result. But, in the present case, the Tribunal concludes that the plain and ordinary meaning to be given to these two treaty provisions, read together, demonstrates that there is no linkage between them. It is thus the terms of the Treaty as finally adopted that govern.¹¹⁷

In fact, the supplementary means can only play a determinative role in the limited and strictly controlled circumstances that will now be examined.

B. *Determination of the Meaning*

Pursuant to Article 32, 'recourse may be had to supplementary means of interpretation ... 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'.

In the former part (Section III), we contended that supplementary means play a secondary and subordinate role in the interpretative process. This assertion has to be tempered. Indeed, it follows from the text of Article 32 that when the application of the general rule of interpretation 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable', the role of the means in question becomes crucial and decisive. In these two situations it is the supplementary means that ascertain the meaning of the treaty provision.

It is true as explained before that the use of the verbal auxiliary 'may' suggests that the resort to supplementary means is facultative and optional in all the hypotheses contemplated in Article 32. In theory, even when the application of Article 31 leads to an unsatisfactory result, the interpreter will still not be legally compelled to have recourse to supplementary means of interpretation. However, in practice, one may fairly assume that when the interpreter fails to determine the meaning of a treaty provision by applying the general rule of interpretation, he has no other choice but to look at the *travaux préparatoires*, the circumstances surrounding the conclusion of the treaty or other means of interpretation.¹¹⁸ There are therefore situations where the resort to the supplementary means of Article 32 becomes a practical necessity.

In this respect, a few clarifications should be made with regard to the two alternative conditions set out by Article 32 for the determination of the meaning of a treaty on the basis of supplementary means.

¹¹⁷ *ibid* para 268.

¹¹⁸ Le Bouthillier (n 5) 1351 fn 47.

As for the first condition, it is worth noting that Article 32 allows the interpreter to have recourse to supplementary means to determine the meaning ‘when the interpretation according to article 31 leaves the meaning ambiguous or obscure’ and not when the provision concerned is ambiguous and obscure on its face. Indeed, the ambiguity to which Article 32 refers is the ambiguity that remains after the application of the general rule.¹¹⁹ The fact that a term is equivocal or has multiple senses in a dictionary is not enough to trigger the recourse to supplementary means. Before doing so, the interpreter shall try to resolve such ambiguity by looking at the context of the provision, the treaty’s object and purpose, the subsequent practice and agreements of the parties or other relevant rules of international law.¹²⁰

In this regard, the WTO Appellate Body Report in *United States—Measures Affecting Gambling* constitutes a good and telling example of a correct application of Article 32(a). In this case, the Appellate Body had to decide whether the term ‘sporting’ incorporated in the GATS schedule of the USA included gambling services. To do so, it noted first that, of the dictionaries consulted by the Panel, some define ‘sporting’ as being connected to gambling or betting and others do not.¹²¹ However, it was not on this basis that the Appellate Body concluded that there was ambiguity in the sense of Article 32. It is only after investigating the context and possible subsequent agreement that the Appellate Body stated that:

... that 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 and does not answer the question whether the commitment made by the United States in subsector 10.D of its Schedule includes a commitment in respect of gambling and betting services. Accordingly, we are required, in this case, to turn to the supplementary means of interpretation provided for in Article 32 of the Vienna Convention.¹²²

By contrast, the *Kiliç v Turkmenistan* case mentioned earlier constitutes an example in which the resort to supplementary means was premature. As explained above, in this case the Tribunal was called upon to determine whether the second paragraph of the dispute settlement provision at issue (Article VII-2 of the Turkey–Turkmenistan BIT) incorporated a compulsory or an optional prior recourse to the local courts of the host State. To do so, the Tribunal looked first at the wording and grammatical structure of the provision and reached the conclusion that ‘attempting to interpret the relevant English text in accordance with Article 31 of the VCLT leaves its meaning ambiguous or obscure’.¹²³ On this basis, the Tribunal turned to supplementary means of interpretation, notably an official translation of the treaty into Turkish and the text of another BIT concluded by Turkey with Kazakhstan and decided that Article VII-2 imposes a mandatory precondition of resort to local courts before the institution of arbitral proceedings.¹²⁴ The Tribunal’s reasoning in *Kiliç* is not in line with the canons of treaty

¹¹⁹ Gardiner (n 35) 377.

¹²⁰ *ibid.*

¹²¹ WTO, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Report of the Appellate Body* (2005) WT/DS285/AB/R, para 165.

¹²² *ibid.* para 195.

¹²³ *Kiliç* (n 23) paras 9.14–9.17.

¹²⁴ *ibid.* paras 9.18–9.21

interpretation set out in the VCLT because the conclusion with regard to the ambiguity and obscurity of the provision at stake was based solely on its ordinary meaning without any further examination of its context and of the BIT's object and purpose.¹²⁵

Interestingly, Article VII-2 of the Turkey–Turkmenistan BIT was also brought before another investment tribunal in *Muhammet Çap v Turkmenistan*. However, in this case, the Tribunal conducted a proper application of the rules of the VCLT. Indeed, in addition to the analysis of the wording, it envisaged the provision at issue in its context. In this respect, the Tribunal noted that the chapeau of Article VII-2 of the BIT provides for a cooling-off period of six months. Accordingly it considered that this provision shall be construed as encompassing a mere option for it makes little sense from a purely logical point of view to require investors to simultaneously negotiate for six months and go to local courts.¹²⁶ Moreover, the Tribunal added that this reading was more in line with the BIT's object and purpose derived from its preamble.¹²⁷ Therefore, the Tribunal came to the conclusion that Article VII-2 is to be interpreted as offering a mere option to go to local courts.¹²⁸ In view of the clarity of this result, it also noted that the examination of the supplementary means brought before it by the parties was not necessary.¹²⁹ However, for the sake of completeness, the Tribunal carried out this examination and found that the supplementary means in question did not undermine or contradict its conclusions.¹³⁰

To conclude the analysis of the threshold condition of the determinative function of supplementary means of interpretation set out by Article 32, it would be interesting to note that, in an intriguing investment case, supplementary means were resorted to in order to establish the ambiguity of a treaty provision. Indeed, in *HICEE BV v Slovakia*, the Tribunal relied on Dutch explanatory notes to the Netherlands–Slovakia BIT to find that the ordinary meaning of the phrase ‘invested either directly or through an investor of a third state’ was ambiguous:

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*;

¹²⁵ In this sense, see *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award (Separate Opinion of William W Park) (20 May 2013).

¹²⁶ *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd Sti v Turkmenistan*, ICSID Case No ARB/12/6, Decision on Respondent's Objection to Jurisdiction under Article VII(2) of the Turkey–Turkmenistan Bilateral Investment Treaty (13 February 2015) paras 236–40. See also Turkey–Turkmenistan BIT (n 23).

¹²⁷ *ibid* paras 241–6.

¹²⁸ *ibid* para 247.

¹²⁹ *ibid* para 248.

¹³⁰ *ibid* paras 249–71.

their existence does not depend on the skill of counsel in arguing how they should be resolved.¹³¹

The Tribunal's approach is hardly compatible with Article 32. Indeed, this article exclusively refers to the ambiguity that may be left by the application of Article 31. It is this ambiguity that opens the door to the resort to supplementary means. However, the circular construction according to which, one could have recourse to supplementary means in order to establish the ambiguity of the text and thereby rely on this ambiguity to adopt the meaning suggested by the supplementary means in question is a clear distortion of Article 32.

Turning now to the second situation that may trigger the determinative function of the supplementary means, it suffices here to underline the fact that Article 32 sets a particularly high threshold for it requires a 'manifestly' absurd or unreasonable result. Therefore, one can fairly assume that a merely unpleasant or unfair result induced by the application of the general rule will not call for recourse to supplementary means of interpretation.¹³²

It is nevertheless worth noting that, in some cases, investment tribunals have used Article 32(b) to discard and reject a possible interpretation on the basis that it would produce a result that is manifestly absurd or unreasonable.¹³³ In the *Champion Trading Company v Egypt* case, the Tribunal was called upon to interpret Article 25(2)(a) of the ICSID Convention and decided in this regard that 'according to the ordinary meaning of the terms of the Convention (Article 25(2)(a)) dual nationals are excluded from invoking the protection under the Convention against the host country of the investment of which they are also a national.'¹³⁴ However, after this ruling, the Tribunal added 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.¹³⁵

The application of Article 32 envisaged in this passage is incorrect. The function of Article 32(b) is to permit use of supplementary means of interpretation when the result of the application of Article 31 leads to a manifestly absurd or unreasonable result. This function is very different from that of excluding a peculiar meaning.¹³⁶ It is in any case interesting to point out that if the hypothesis contemplated by the Tribunal was verified in the present case, a proper application of Article 32 would have led this tribunal to look at the *travaux préparatoires* of the ICSID Convention, which are crystal clear with regard to the existence of a unanimous intention to explicitly exclude dual nationals.¹³⁷ Therefore, in this

¹³¹ *HICEE BV* (n 48) para 138.

¹³² Gardiner (n 35) 380.

¹³³ *Pope & Talbot Inc v Government of Canada*, UNCITRAL, Award on Merits Phase 2 (10 April 2001) para 118 fn 115; *Ethyl Corporation v Government of Canada*, UNCITRAL, Award on Jurisdiction (24 June 1998) para 85 fn 34.

¹³⁴ *Champion Trading Company v Arab Republic of Egypt*, ICSID Case No ARB/02/9, Decision on Jurisdiction (21 October 2003) 288.

¹³⁵ *ibid.*

¹³⁶ Weeramantry (n 80) 114.

¹³⁷ Gardiner (n 35) 381.

case, a proper application of Article 32 would still confirm the meaning resulting from the application of the general rule of interpretation.¹³⁸

V. CONCLUSION

This note has attempted to expose and clarify the proper construction of Article 32 of the VCLT and its place in the interpretative scheme of the Vienna Convention. It aimed to show that if supplementary means of interpretation are relegated to a secondary status in the law of treaty interpretation, they nevertheless play a decisive role in some controlled situations explicitly contemplated by Article 32. As explained above, this relegation is particularly appropriate in the field of international investment law for it enables investment tribunals to overcome a series of issues induced by the scarcity of preparatory work of investment agreements and the imbalance between host States and investors with regard to access to the negotiating history of the agreements in question. The international investment case law examined in this study gives an enlightening insight into the scope of Article 32 and the different legal problems that may arise from its application. It reveals however that while many investment tribunals apply this article in the correct way, some others resort to supplementary means of interpretation in a way that is inconsistent with the interpretative canons set out in the VCLT. Irrespective of the fairness and appropriateness of the outcomes reached by these tribunals, the latter trend is detrimental to the international investment arbitration system. Indeed, incorrect applications of the VCLT rules of interpretation, notably Article 32, contribute to exacerbate legal insecurity and the risks of conflicts of interpretation, thus undermining the confidence of States and investors in the system.¹³⁹ The proper application of Articles 31 and 32 of the VCLT by investment tribunals is, as a result, profoundly important. However, in order to be effective and to strengthen the coherence of international investment law, this effort must be coupled with systematic recourse to the rules of the VCLT when it comes to treaty interpretation. Unfortunately, this is still far from being the case.¹⁴⁰

¹³⁸ *ibid.*

¹³⁹ Laurence Boisson de Chazournes, 'Rules of Interpretation and Investment Arbitration: *CEMEX v Venezuela*' in Meg Kinnear and others (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015) 13, 23–5.

¹⁴⁰ In his above-mentioned study based on the analysis of a sample of 98 awards, Fauchald found references to VCLT (n 20) arts 31–3 in only 35 of the decisions concerned: Fauchald (n 95) 314. Similarly, in another study drawing upon the examination of 30 randomly chosen decisions, Saldarriaga concluded that two thirds of the awards reviewed expressly cited VCLT (n 20) arts 31 and 32: Andrea Saldarriaga, 'Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement' (2013) 28(1) *ICSID Rev—FILJ* 197, 204.