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On the Interpretation of Treaties

The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties

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goals that lies behind and figures in a rule therefore takes into account the conflicting nature of the goals and the network of priority relations between them. Goals conflict in different ways, and priority relations may themselves be complex." (pp. 65–66).

59. If the means of interpretation listed in VCLT article 32 can be termed as "supplementary", then naturally for the means listed in article 31 we must be able to use the term PRINCIPAL MEANS. (By the way, even Jacobs has adopted this terminology; see Jacobs, p. 326.) Apart from the fact that the alternative has consequences running counter to the idea of the object and purpose of a treaty as a principal means of interpretation, the alternative is also incompatible with the practice of international courts and tribunals. Judicial bodies often use the object and purpose of a treaty in order to determine its meaning.
60. See p. 212 of this work.
61. Cf. p. 215, n. 58 of this work.
62. Note that when applier uses the object and purpose, it is because the ordinary meaning of the interpreted treaty is either vague or ambiguous – in the former case, the object and purpose is used to make the ordinary meaning more precise; in the latter, the object and purpose is used to determine which of several meanings is to be considered correct and which one is not. In the case of an extreme teleological interpretation, the ordinary meaning is not a limitation. The teleological interpretation reflected in the provisions of VCLT article 31 is a moderated version.
63. I fail to see how the consequence of Bos's and Sur's line of reasoning could be anything else. (See Bos, 1984, p. 153; Sur, p. 228.)
64. See Section 2 of this chapter.
65. I have taken for granted that in international law the three terms – THE PRINCIPLE OF EFFECTIVENESS, UT RES MAGIS VALEAT QUAM PEREAT, andLA RÈGLE D'EFFET UTILE – are all used to stand for the same thing. Thirlway and Amerasinghe use the terms in a slightly different manner. According to Thirlway and Amerasinghe, the principle of effectiveness comprises two rules – by them termed as LA RÈGLE DE EFFET UTILE and LA RÈGLE DE L'EFFICACITÉ. "The first is the rule that all provisions of the treaty or other instrument must be supposed to have been intended to have significance and to be necessary to convey the intended meaning; that an interpretation which reduces some part of the text to the status of a pleonasm, or mere surplussage, is prima facie suspect. The second is the rule that the instrument as a whole, and each of its provisions, must be taken to have been intended to achieve some end, and that an interpretation which would make the text ineffective to achieve the object [and purpose] in view is, again, prima facie suspect." (Thirlway, 1991, p. 44; cf. Amerasinghe, pp. 195–196.) This terminology does not agree with the literature at large, where the terms THE PRINCIPLE OF EFFECTIVENESS, UT RES MAGIS VALEAT QUAM PEREAT, andLA RÈGLE D'EFFET UTILE are used interchangeably, without any noticeable difference in meaning. (See e.g. Pauwelyn, p. 247; White, pp. 332–333; Golsong, p. 154; Sinclair, 1984, p. 118; Verdross and Simma, p. 494; Vitányi, p. 59; Yasseen, pp. 71–74; Haraszti, pp. 166–170; Rest, p. 49; Rousseau, p. 270; Jennings, p. 549; Draft Articles With Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 219, § 6, see especially the reference to *Interpretation of Peace Treaties*, *ICJ Reports*, 1950, p. 229; Berlia, pp. 306–308; Waldock, Third Report on the Law of Treaties, *ILC Yrbk*, 1964, Vol. 2, pp. 60–61, §§ 27–30; Bernhardt, 1963, p. 96; Degan, 1963, p. 102; McNair, 1961, pp. 383–384; Fitzmaurice, 1957, p. 211.) What makes the terminology of Thirlway and Amerasinghe even more peculiar is that they both draw support from an article by Berlia. (See Thirlway, 1991, p. 44, n. 207; Amerasinghe,

p. 195, n. 62.) According to Berlia, however, THE PRINCIPLE OF EFFECTIVENESS and LA RÈGLE D'EFFET UTILE are synonymous. (See Berlia, pp. 306–308.)

66. Third Report on the Law of Treaties, *ILC Yrbk*, 1964, Vol. 2, p. 53.
67. In the name of fairness, it must be added that even Waldock admitted he was very doubtful about his proposal. (See ibid., p. 60, § 27.)
68. See the decision at the ILC's sixteenth session, 766th meeting, *ILC Yrbk*, 1964, Vol. 1, p. 291, § 120.
69. See various members, at the ILC's sixteenth session, 766th meeting, ibid., pp. 288–291, §§69–120. (See especially statements by de Luna, § 73; Chairman (Ago), speaking as member, § 91; Rosenne, § 92; Ruda, §§ 95–96.) Cf. Draft Articles With Commentaries (1964), *ILC Yrbk*, 1964, Vol. 2, p. 201, § 8.
70. See Third Report on the Law of Treaties, ibid., p. 60, § 27.
71. Loc. cit.
72. See various members, at the ILC's sixteenth session, 766th meeting, *ILC Yrbk*, 1964, Vol. 1, pp. 288–291, §§ 69–120. (See especially statements by Verdross, §§ 71, 109; Castrén, § 73; Ruda, § 95; Chairman (Ago), speaking as member, § 102; Lachs, § 110.) Cf. Draft Articles With Commentaries (1964), *ILC Yrbk*, 1964, Vol. 2, p. 201, § 8.
73. See the Chairman's conclusions, at the ILC's sixteenth session, 766th meeting, *ILC Yrbk*, 1964, Vol. 1, p. 291, §§ 119–120. Cf. Draft Articles With Commentaries (1964), *ILC Yrbk*, 1964, Vol. 2, p. 201, § 8.
74. Draft Articles With Commentaries (1964), loc. cit.
75. This is a conclusion apparently shared by other authors. (See e.g. Golsong, p. 153; *Oppenheim's International Law*, p. 1280, n. 25; Villiger, p. 344; Sinclair, 1984, p. 118; Vitányi, p. 60; Yasseen, p. 74; Haraszti, p. 167, n. 39; Elias, 1974, p. 74.)
76. See e.g. Haraszti, p. 170; Rest, p. 47; Fitzmaurice and Vallat, pp. 312–313; Bernhardt, 1963, p. 96; Fitzmaurice, 1957, pp. 222–223; Schwarzenberger, 1957, p. 520; Lauterpacht, 1949, pp. 69–70.
77. See p. 218 of this work.
78. See e.g. Amerasinghe, pp. 195–196; Golsong, p. 154; Thirlway, 1991, p. 47, *Oppenheim's International Law*, pp. 1280–1281; Vitányi, pp. 58–60; Haraszti, pp. 166–170; Elias, 1974, p. 74; Gutiérrez Posse, pp. 229–254; Fitzmaurice, 1971, p. 373; Draft Articles With Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 219, § 6.
79. Fitzmaurice, 1971, p. 373.
80. See e.g. Amerasinghe, pp. 195–198; Thirlway, 1991, pp. 44–48; *Oppenheim's International Law*, pp. 1280–1281; Haraszti, pp. 166–170; Gutiérrez Posse, pp. 229–254; Rest, pp. 47–53; O'Connell, p. 255; Waldock, Third Report on the Law of Treaties, *ILC Yrbk*, 1964, Vol. 2, pp. 60–61, §§ 27–30; Berlia, pp. 306–308; Degan, 1963, pp. 102–106; Fitzmaurice, 1957, pp. 220–223; Fitzmaurice, 1951, pp. 18–20.
81. See Ch. 4, Section 2, of this work.
82. See p. 217 of this work.
83. In addition to the decisions cited in the text, see *AAPL v. Sri Lanka*, *ILR*, Vol. 106, pp. 445–446, § 52; *Artico*, *Publ. ECHR*, Ser. A, Vol. 37, pp. 15–16, §§ 32–33; *Luedicke*, *Belkacem and Koç*, *Publ. ECHR*, Ser. A, Vol. 29, pp. 17–18, § 42; *Namibia*, *ILR*, Vol. 49, p. 25, §§ 66–67; possibly also *Pope & Talbot v. Canada*, *ILR*, Vol. 122, p. 384, §§ 117–118; *US-Shrimp*, § 121; *Bosnia Genocide*, §§ 167–169.
84. *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment of 20 December 1988, *ILR*, Vol. 84, pp. 219ff.
85. See Ch. 4, Section 4, of this work.

86. The text cited is that provided by the court. (See *ILR*, Vol. 84, p. 233, § 20 and p. 243, § 42.)
87. Ibid., p. 244, § 46. (Footnote omitted.)
88. Colozza Case, Judgment of 12 February 1985, *Publ. ECHR*, Ser. A, Vol. 89.
89. Ibid., p. 14, § 27.
90. See p. 238 of this work.
91. Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" (Merits), Judgment of 23 July 1968, *Publ. ECHR*, Ser. A, Vol. 6.
92. Ibid., p. 31, § 3.
93. Ibid., p. 31, §§ 3–4.

CHAPTER 8

USING THE SUPPLEMENTARY MEANS OF INTERPRETATION

The purpose of this chapter is to describe what it means to interpret a treaty using the supplementary means of interpretation, according to the provisions of Vienna Convention article 32. As we know, describing what it means to interpret a treaty using some certain means of interpretation is tantamount to clarifying and putting to words the rule or rules of interpretation, through which the use of this means has to be effectuated.[1] In the literature, and in the practice of international courts and tribunals, as well as in the practice of states, actors refer to the use of supplementary means of interpretation in two fundamentally different ways. First, actors refer to a set of elements, which they allege can be used to supplement the means of interpretation listed in VCLT article 31. Examples include the preparatory work of the interpreted treaty, the circumstances of its conclusion, and treaties *in pari material*. Second, actors refer to a number of rules – referred to interchangeably as norms, principles or maxims – all held to be applicable according to the provisions of VCLT article 32. Examples include the principle of *contra proferentem*, the principle of *ejusdem generis*, and the rule of necessary implication. Given the organisation chosen for this work, these inconsistencies in the usage of language present some genuine challenges.

As I have stated earlier, the starting point for my inquiry into the rules of interpretation laid down in international law is the means of interpretation recognised as acceptable by the Vienna Convention. The reason why I have chosen this mode of organisation is partly definitional. Every single rule of interpretation applicable according to the provisions of VCLT articles 31–32 can also be described as the use of some specific means of interpretation. There is also a practical reason for my choice. Articles 31–32 have been drafted in such a way that normally, we could not possibly clarify and put to words a rule of interpretation before first having established the means of interpretation presupposed by that rule. However, defining the means of interpretation presupposed by a rule of interpretation is never an end in itself. If it so happens that the sources used for this work allow me to determine *immediately* the contents of a series of rules, which are all held to be applicable according to the provisions of VCLT article 32,

then I cannot see the point of also identifying the presupposed means of interpretation. The problem is that an inquiry into the use of supplementary means of interpretation will differ considerably depending upon whether, in the sources exploited for that inquiry, authorities refer to the use of supplementary means simply by pointing out the elements that can be used according to VCLT article 32, or whether they proceed to outline directly the rules of interpretation that can be applied according to that article. To simplify presentation, I have therefore chosen to divide my investigation into two separate chapters. In Chapter 8, I shall describe what it means to interpret a treaty using supplementary means of interpretation, in the sense of the set of elements that can be used to supplement the means of interpretation listed in VCLT article 31. In Chapter 9, I shall describe what it means to interpret a treaty using supplementary means of interpretation, in the sense of the rules of interpretation that can be applied according to VCLT article 32.

"Recourse may be had to supplementary means of interpretation ... 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 is provided in VCLT article 32.

Il peut être fait appel à des moyens complémentaires d'interprétation ... en vue, soit de confirmer le sens résultant de l'application de l'article 31, soit de déterminer le sens lorsque l'interprétation donnée conformément à l'article 31: (a) laisse le sens ambigu ou obscur; ou (b) conduit à un résultat qui est manifestement absurde ou déraisonnable.

Se podrá acudir a medios de interpretación complementarios ... para confirmar el sentido resultante de la aplicación del artículo 31, o para determinar el sentido cuando la interpretación dada de conformidad con el artículo 31: (a) Deje ambiguo o oscuro el sentido; o (b) Conduzca a un resultado manifiestamente absurdo o irrazonable.

One thing is immediately evident from this text. When appliers use the supplementary means of interpretation, the task may be approached in two fundamentally different ways. Supplementary means of interpretation can be used independently of other means of interpretation, or they can be used relative to conventional language, subject to the bounds set by the "ordinary meaning". According to VCLT article 32, the supplementary means of interpretation can be used for the interpretation of a treaty provision only in the following three situations:

(1) Appliers wish to confirm a meaning obtained through the application of article 31.
(2) Appliers wish to determine the meaning of a treaty provision, because interpreting the treaty according to article 31 leaves the meaning ambiguous or obscure.

(3) Appliers wish to determine the meaning of a treaty provision, because interpreting the treaty according to article 31 leads to a result which is manifestly absurd or unreasonable.

In a situation where appliers wish to determine the meaning of a treaty provision, because interpreting the treaty according to article 31 leads to a result which is manifestly absurd or unreasonable, the supplementary means of interpretation are used independently of other means. In a situation where appliers wish to determine the meaning of a treaty provision, because interpreting the treaty according to article 31 leaves the meaning ambiguous or obscure,[2] the supplementary means of interpretation are used either independently of other means or relative to conventional language. The use of supplementary means is independent of other means, when the interpreted treaty provision contains an expression that does not exist in conventional language, making the three primary means of interpretation – conventional language, the context, and the object and purpose of the treaty – altogether useless. The use of supplementary means is relative to conventional language, when one or more of the three primary means can be used, but lead to conflicting results. In a situation where appliers wish to confirm a meaning of a treaty provision obtained through the application of article 31, then once again supplementary means of interpretation are used either independently of other means or relative to conventional language. The use of supplementary means is independent of other means when confirmation concerns the use of conventional language. The use is relative to conventional language when confirmation concerns a use of the context or of the object and purpose.

Hence, if we wish to give a shorthand description of how the supplementary means of interpretation shall be used, it could look like this:

> If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that between the provision and any given supplementary means of interpretation there is a relationship governed by the communicative standard S, then the provision shall be understood as if the relationship conformed to this standard.
>
> If it can be shown that between an interpreted treaty provision and any given supplementary means of interpretation, there is a relationship governed by the communicative standard S, then the provision shall be understood as if the relationship conformed to this standard.

Two questions remain to be answered, in order for the task in this chapter to be considered accomplished:

(1) What is meant by "supplementary means of interpretation"?

(2) What communicative standard or standards shall the parties to a treaty be assumed to have followed when an applier interprets the treaty using "supplementary means of interpretation"?

I shall now give what I consider to be the correct answers to these questions. The chapter is organised so that in Sections 1–6 I begin by answering question (1). In Section 7, I shall then answer question (2).

1 THE MEANING OF "SUPPLEMENTARY MEANS OF INTERPRETATION"

What is meant by "supplementary means of interpretation"? According to the provisions of Vienna Convention article 32, an applier may have recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion". The expression "supplementary means of interpretation" is somewhat perplexing. Obviously, we need to consider as part of the "supplementary means of interpretation" "the preparatory work of the treaty" (Fr. "*[les] travaux préparatoires";* Sp. "*los trabajos preparatorios del tratado")* and "the circumstances of its conclusion" (Fr. "*[les] circonstances dans lesquelles le traité a été conclu";* Sp. "*las circunstancias de su celebración")*. However, it is evident that "the preparatory work of the treaty" and "the circumstances of its conclusion" are not necessarily the only elements that can be used by appliers according to that article. Further elements may be included in the extension of the "supplementary means of interpretation" – this is implied by the expression "including" (Fr. "*et notamment";* Sp. "*en particular")*.[3] Naturally, the expression "supplementary means of interpretation" must be seen to refer back to the contents of customary international law.[4] The problem is to determine exactly the type of reference intended.

There are three possible alternatives. In one sense, "supplementary means of interpretation" can be viewed as a general (and definite) referring expression.[5] Hence, according to a first interpretation alternative, "supplementary means of interpretation" would refer to *a limited number* of those means of interpretation that can be used by appliers, according to the laws of international custom, in a situation where the primary means have proved insufficient. In another sense, "supplementary means of interpretation" can be read as a generic referring expression that refers to the class *supplementary means of interpretation* as such.[6] As we know, when an utterer produces a generic referring expression, in some cases the expression refers to a defined referent, while in other it refers to a referent that remains undefined. Hence, according to a second interpretation alternative,

"supplementary means of interpretation" would refer to all those means of interpretation that can be used by appliers, according to customary international law, in a situation where the primary means have proved insufficient, *given the contents of customary international law at the point in time when the Vienna Convention was established as definite*. According to a third interpretation alternative, "supplementary means of interpretation" would refer to all those means of interpretation that can be used by appliers, according to customary international law, in a situation where the primary means have proved insufficient, *given the contents of customary international law at any given moment*.

The first of the three alternatives may immediately be dismissed. As we have established, the rules of interpretation laid down in VCLT articles 31–33 have a content identical to that of the rules laid down in customary international law.[7] As far as interpretation alternatives 2 and 3 are concerned, the former hardly seems plausible. If we assume that the expression "supplementary means of interpretation" has a defined referent, we must also assume the parties to the Vienna Convention to have operated under the following expectation: during the lifetime of the Vienna Convention, the contents of the class *supplementary means of interpretation* – as defined in customary international law – will not ever change.[8] This assumption is clearly not tenable. In 1969, when the Vienna Convention was established as definite, it was expected that the Convention would remain in force for rather a long time. Considering this, the parties to the Convention must have acted under the assumption that the contents of the then-current class *supplementary means of interpretation* would probably be altered. Moreover, interpretation alternative no. 3 is the one generally embraced in the legal literature.[9] All things considered, I find it difficult to come to a conclusion other than this: "supplementary means of interpretation" refers to all those means of interpretation that can be used by appliers, according to customary international law, in a situation where the primary means have proved insufficient, *given the contents of customary law at any given moment*.

I have chosen to divide my inquiry into the meaning of the "supplementary means of interpretation" as follows. In Section 2, I shall begin by explaining the expression "the preparatory work of the treaty". In Section 3, I shall then explain the expression "the circumstances of its [i.e. the treaty's] conclusion". Lastly, in Sections 4–6, I shall attempt to identify what other supplementary means of interpretation are available to appliers, according to the provisions of VCLT article 32, apart from "the preparatory work of the treaty" and "the circumstances of [the treaty's] conclusion".

2 "THE PREPARATORY WORK OF THE TREATY"

"[T]he preparatory work of the treaty" is an expression not very easily grasped. The main reason for this is the vagueness of the term PREPARATORY WORK (Fr. TRAVAUX PRÉPARATOIRES; Sp. TRABAJOS PREPARATORIOS). The meaning of THE PREPARATORY WORK of a treaty is easy to *exemplify* . Typical examples include the correspondence (letters, notes, memoranda) between two or more negotiating states during the drafting of a treaty; preliminary drafts or proposals for a treaty together with suggested modifications; records of the negotiations held (minutes, summary records, *comptes rendus*); records of international conferences; reports, declarations, statements, and other similar documents used at such conferences; and so forth.[10] The difficult task is to *define* in an all-inclusive manner the concept represented by that term.

Clearly, the meaning of THE PREPARATORY WORK of a treaty is ultimately a result of the particular treaty-making process followed by negotiating states. The problem is that in international law, no general rule can be found stating in more detail the procedure for making a treaty. In principle, negotiating states are free to choose the mode that they consider best suited for their particular task. As a consequence, practice varies considerably.[11] In part, practice varies depending on the number of negotiating states, and on the particular type of issue to be addressed by a treaty. For instance, a bilateral interpretation agreement may be concluded after little more than an exchange of notes,[12] while for the adoption of a multilateral treaty a much more complex procedure is required – especially so when the number of negotiating states is large, and the issue addressed is one of universal importance. Partly, practice varies depending on *when* the treaty is drafted. Today, treaties are often concluded following other treaty-making processes than those typically employed, let us say, a hundred years ago.

With these facts in mind we will more easily grasp the expression "the preparatory work of the treaty". Two conclusions can be drawn. A first conclusion is that the expression "the preparatory work of the treaty" has a referent, which is generically defined. As we know, the rules of interpretation laid down in the Vienna Convention shall be generally applicable – they shall apply regardless of the number of states that are parties to a treaty, and regardless of the subject matter covered. Therefore, if there are variations in practice with regard to the choice of treaty making processes, depending on the number of negotiating states, and on the particular type of issue addressed, I find it hard to believe that the parties to the Vienna Convention acknowledged practice only in part. The more natural conclusion is that practice was acknowledged as a whole. A second conclusion that can be

drawn is that the referent of the expression "the preparatory work of the treaty" does not exist at any one defined point in time. When the Vienna Convention was adopted, the assumption was that it would remain in force for rather a long period of time. If there are variations in practice with regard to the choice of treaty making processes, depending on when the treaty is drafted, I am not willing to believe that "the preparatory work of the treaty" refers only to those treaty-making processes, which were followed when the Convention was adopted. The reasonable conclusion is that the parties to the Convention simply wished to allow negotiating states, by freely choosing the particular treaty making process, to determine themselves what the meaning of "the preparatory work" would be *for their specific treaty*.[13]

All things considered, it seems we have good reason to concur with the following frank observation:

> [P]reparatory work is of an extremely heterogeneous character.[14]

If we would venture to define what is meant by "the preparatory work of the treaty", the definition can only be expressed in the broadest of terms. Tentatively, drawing heavily on the literature, I would like to propose something along the following lines:

> By "the preparatory work of the treaty" we should understand any representation, whether textual or non-textual, produced during the drafting of a treaty.[15]

To make the picture complete, there are indeed authors who express opinions, which in one or more aspects seem to deviate from the definition stated above. Some of these opinions are such that they may be ignored straight away;[16] some are such that I would like to bring into the open and expressly refute them. These latter opinions can be summarised by the following three propositions:

(1) The meaning of "the preparatory work" of a treaty shall be limited to include only such representations that emanate directly from the negotiating states themselves.
(2) In order for a representation to be considered part of "the preparatory work" of a treaty, each and every party which was not itself a negotiating state must have had at least an opportunity to acquaint itself with the contents of the representation; that opportunity must have existed prior to the moment when the party in question expressed its consent to be bound.
(3) The meaning of "the preparatory work" of a treaty shall not be limited to include only such representations that are produced during the drafting of a treaty.

Let us scrutinise each of these propositions. We shall take them in the order they occur.

(1) The meaning of "the preparatory work" of a treaty shall be limited to include only such representations that emanate directly from the negotiating states themselves. Contemporary treaty-making processes often involve individuals or groups of individuals – referred to as *special rapporteurs*, *expert-consultants*, *committees of experts*, and so forth – that do not act in the capacity of states.[17] The task with which these persons are assigned is to provide some kind of expert opinion, possibly in the form of a first draft proposal of a treaty, or – if a draft proposal already exists – in the form of proposed modifications. According to some authors, such expert opinions – although they are undoubtedly produced during the drafting of a treaty – cannot be considered included in the extension of "the preparatory work".[18] I find this interpretation unreasonably restrictive.

To support my opinion, I would like to adduce the object and purpose of the treaty. It is the idea underlying the provisions of VCLT article 32 that by using the preparatory work of a treaty, appliers will have the possibility of coming to a conclusion concerning the legally correct meaning of the provision interpreted. When appliers wish to establish the legally correct meaning of a treaty provision, and for that purpose use the preparatory work of the treaty, they always do so on the basis of a specific communicative assumption. This assumption may be stated as follows: the parties to the treaty expressed themselves in such a way that the provision interpreted logically coheres with the preparatory work of the treaty, insofar and to the extent that, by using the preparatory work of the treaty, good reasons can be provided showing a concordance to exist, between the parties to the treaty, with regard to its norm content.[19] Considering this, "the preparatory work of the treaty" cannot be confined to only those representations, which emanate directly from the negotiating states. Of course, if a representation emanates from an individual acting in the capacity of an expert, and not of a state representative, that representation cannot unreservedly be said to establish a concordance of the treaty parties. Whether or not a representation can be said to establish a concordance depends on the circumstances of each particular case. Take for example the preparatory work of VCLT articles 31–33. Generally speaking, it seems more probable that the 1966 ILC Draft articles establish a concordance, showing what the parties to the Vienna Convention consider to be the norm content of articles 31–33, than the report of that same year submitted by the ILC's special rapporteur, Sir Humphrey Waldock – while the 1966 ILC Draft Articles were referred to the Vienna Diplomatic Conference as "the basic proposal for consideration",[20] the principal purpose of Waldock's report was to serve as a basis for the

commission's own internal work. But such an assessment *in casu* must also be made by appliers when they deal with a representation emanating from the negotiating states themselves. Of the great mass of representations produced by negotiating states while drafting a treaty, not many may subsequently be said to establish a concordance showing what the parties to the treaty consider to be the treaty's norm content. All things considered, strong reasons suggest we should not accept the proposition that a representation produced during the drafting of a treaty shall not be considered part of "the preparatory work", merely because the representation is not an act of a state.

(2) In order for a representation to be considered part of "the preparatory work" of a treaty, each and every party which was not itself a negotiating state must have had at least an opportunity to acquaint itself with the content of the representation; that opportunity must have existed prior to the moment when the party in question expressed its consent to be bound. When a state expresses its consent to be bound by a multilateral treaty, normally that state has not itself participated in all phases of the treaty-making process – take for instance the case of the state, which becomes a party to a treaty by accession.[21] This typically means that there will certainly be representations dating from the drafting process, to which not all of the parties may later be said to have contributed. According to the oft-cited statement of the Permanent Court of International Justice in the *International Commission of the River Oder*, such representations cannot be seen to form part of the preparatory work of the treaty.[22] This statement of the Court has been subsequently criticised,[23] *inter alia* by the International Law Commission. In practical terms, the Commission states in its 1966 Commentary, it does not stand to reason that we should treat a representation as not forming part of the preparatory work of a treaty, just because all treaty parties were not involved in its production – especially so if we consider the many important multilateral treaties that are open to general accession.[24] In addition, it is the opinion of contemporary legal doctrine that the principle expressed by the PCIJ is not reflective of actual state practice, if it ever was.[25] Some authors, however, seem reluctant to follow this idea through to its logical consequence. They claim that if a representation produced during the drafting of a treaty is not to be considered outside the extension of "the preparatory work" of the treaty, although one of the treaty parties was not itself involved in its production, then at least this state, prior to the point in time when it expresses its consent to be bound, must have had a genuine opportunity to acquaint itself with the contents of that representation.[26] This is a position that I personally consider far too restrictive, the main reason being once again the object and purpose of the Vienna Convention.

As observed, when appliers use "the preparatory work" of a treaty to establish the correct meaning of a treaty provision, they do so on the basis of a specific communicative assumption. This assumption may be stated as follows: the parties to the treaty expressed themselves in such a way that the provision interpreted logically coheres with the preparatory work of the treaty, insofar and to the extent that, by using the preparatory work of the treaty, good reasons can be provided showing a concordance to exist, between the parties to the treaty, with regard to its norm content. "[P]arties" means those states, and all those states, which are bound by the treaty at the time of interpretation.[27] In a context like this, it cannot be considered decisive if a representation, which was produced during the drafting of a treaty, was not known to a state at the time it expressed its consent to be bound by that treaty. From a practical point of view, it is certainly not guaranteed that the representation is of use for the process of interpretation, in the sense that on the basis of the representation a conclusion can be drawn with regard to the meaning of the interpreted treaty provision; quite the opposite. If a representation was not available to a state prior to when it expressed its consent to be bound, then clearly this gives us good reason to assume that that state does not concur with the concordance that the representation might otherwise be claimed to establish. But – and this is the point – there might be other circumstance that give reason to assume the opposite. Of course, all possible circumstances with a bearing on the issue must be taken into account, if we are to determine correctly whether the representation in question can really be said to establish a concordance between all treaty parties. All things considered, I find it difficult to accept that a representation produced during the drafting of a treaty should not be considered part of its "preparatory work", for the simple reason that not every party, before it expressed its consent to be bound, had a chance to acquaint itself with the content of said representation.

(3) The meaning of "the preparatory work" of a treaty shall not be limited to include only such representations that are produced during the drafting of a treaty. In addition to the representations produced by negotiating states during the drafting of a treaty, up to the point when the treaty is established as definite, a varying quantity of representations is often produced after that point by states acting unilaterally. Typical examples include reports used by national decision-making bodies when determining whether to ratify a treaty, together with the records and documents generated by the national decision-making process. According to some authors, these representations shall also be considered included in the extension of "the preparatory work" of the ratified treaty, in the sense of VCLT article 32.[28] Several reasons controvert this idea, one being the doctrine at large.[29] What is more, the

idea appears to be in direct conflict with the text of the Vienna Convention, as understood in accordance with conventional language and in light of its object and purpose.

PREPARATORY WORK, TRAVAUX PRÉPARATOIRES, TRABAJOS PREPARATORIOS, according to the everyday meaning of the adjective PREPARATORY, PRÉPARATOIRE, PREPARATORIO, is work performed to make something prepared for a specific purpose. Naturally, in our case *the thing* prepared is the interpreted treaty. It is less clear what the treaty is being prepared *for*. However, if we wish to speak about the preparatory work of a treaty, and by treaty mean *any* treaty, then I can see only two possible interpretation alternatives. According to a first alternative, the treaty is prepared so that it can be established as definite. According to a second alternative, it is prepared so that the negotiating states can express their consent to be bound by the treaty. The latter alternative is in turn open for two different interpretations. Either we consider "the preparatory work" of a treaty to stand for a fully uniform concept: *for each and every party* to a treaty a representation is part of "the preparatory work" of that treaty, if the representation was produced before the point in time when the last party expressed its consent to be bound. Or, we consider "the preparatory work" of a treaty to stand for a relative concept: from the point of view of the parties to a treaty, a representation can at one and the same time be part and not be part of "the preparatory work" of that treaty, depending upon whether the representation was produced before or after the point in time when each respective party expressed its consent to be bound. According to both interpretations, the expression "the preparatory work of the treaty" is seen to have an extension, which is not necessarily constant over time. If, on two different occasions, an international court is given the task of interpreting a multilateral treaty open for general accession, and for that purpose the court uses "the preparatory work" of the treaty, then there is nothing to stop the interpretation process from leading to different results, depending upon the constitution of the preparatory work at each particular moment of interpretation. This can hardly be what the parties to the Vienna Convention wished to achieve. When the International Law Commission criticised the decision of the PCIJ in the *International Commission of the River Oder*, it was precisely with the argument that from a practical point of view, it would be rather peculiar if a representation could be used as part of "the preparatory work" of a treaty during its introductory years of existence, but was then suddenly considered unusable because one of the states that later became a party to the treaty had not itself been engaged in its drafting.[30] All things considered, I cannot arrive at any other conclusion than this: "the preparatory work" of a treaty, in the sense of VCLT article 32, means all those representations produced in the preparation for the establishing of the treaty as definite.[31]

3 "THE CIRCUMSTANCES OF [THE TREATY'S] CONCLUSION"

If earlier "the preparatory work of the treaty" has been called an expression, which is not easily grasped, then quite possibly it is even more difficult to fully grasp "the circumstances of [the treaty's] conclusion". Several things tend to puzzle appliers. First of all, there is the ambiguity inherent in the grammatical construction THE CIRCUMSTANCES OF (Fr. LES CIRCONSTANCES DANS LESQUELLES; Sp. LA CIRCUNSTANCIAS DE). "[T]he circumstances of [the treaty's] conclusion", according to the ordinary meaning of the construction THE CIRCUMSTANCES OF, we shall understand to be *the general conditions under which a treaty was concluded; the states-of-affairs by which the conclusion of a treaty was affected or influenced*. Apparently, in order for a state-of-affairs to be considered part of "the circumstances of [the treaty's] conclusion", that state-of-affairs must be related to the treaty's conclusion in some way or another. However, the nature of this relationship remains to be established. From a purely linguistic point of view, I can think of three alternatives:

(1) It must be the case, that the existence of the state-of-affairs can be dated to a point in time, which at least partially coincides with the existence of the treaty's conclusion.
(2) It must be the case, (i) that the existence of the state-of-affairs can be dated to a point in time, which at least partially coincides with the existence of the treaty's conclusion, and (ii) that the existence of the state-of-affairs at least partly caused the treaty's conclusion.
(3) It must be the case, that the existence of the state-of-affairs at least partly caused the treaty's conclusion.

The first interpretation alternative conflicts with common sense. When appliers use "the circumstances of [the treaty's] conclusion", it is because they wish to establish the legally correct meaning of a treaty provision. But of all those states-of-affairs that exist at the time of a treaty's conclusion, not more than a tiny fraction can ever provide guidance as to what that meaning is. Therefore, categorising a state-of-affairs as part of "the circumstances of [the treaty's] conclusion", merely because that state-of-affairs and the treaty's conclusion wholly or partially co-existed, must be considered an unreasonably broad interpretation. The second interpretation alternative disagrees with the view generally held in the literature. Several authors refer to "the circumstances of [the treaty's] conclusion", both as "the circumstances of the parties at the time the treaty was entered into", "*les circonstances des parties au moment de la conclusion du traité"* – which comprises, among other things, the cause for a treaty –,[32] and as "the historical background of the treaty", *"les origines historiques du traité "*.[33]

Seen from the perspective of interpretation alternative (2), this language is clearly incorrect. THE HISTORICAL BACKGROUND OF THE TREATY, LES ORIGINES HISTORIQUES DU TRAITÉ is a term, which does not primarily denote a state-of-affairs whose existence coincides with the conclusion of the interpreted treaty, but one whose existence precedes this conclusion. All things considered, the only plausible interpretation alternative seems to be the one termed as alternative (3). In other words, in order for a state-of-affairs to be considered part of "the circumstances of [the treaty's] conclusion", the only requirement would be that the existence of the state-of-affairs at least partly was the cause for the conclusion.[34]

Another difficulty appliers are bound to encounter when using "the circumstances of [the treaty's] conclusion" is the expression "conclusion" (Fr. "*conclu";* Sp. "*celebración")*. In the language of international law, THE CONCLUSION OF THE TREATY (Fr. LA CONCLUSION DU TRAITÉ; Sp. LA CELEBRACIÓN DEL TRATADO) is an ambiguous term;[35] and it makes no difference if we limit ourselves to the terminology of the Vienna Convention.[36] In one sense of the term, THE CONCLUSION OF A TREATY can be usedto refer to the point in time when the treaty is established as definite.[37] In another sense it can be used as synonymous with the time interval from when negotiations on a treaty are begun to when the treaty finally enters into force.[38] Further complexity is added by the fact that THE ENTRY INTO FORCE OF A TREATY is in turn a term for which the usage is not consistent. THE ENTRY INTO FORCE OF A TREATY can in some instances be used to stand for *the entry into force of the treaty as such*; in some, it can be used to stand for *the entry into force of the treaty for a state*.[39] All in all, this gives us the following interpretation alternatives:

(1) The "conclusion" of a treaty means the point in time when the treaty was established as definite.
(2) The "conclusion" of a treaty means the time interval from when negotiations on a treaty began to when the treaty finally entered into force for the very first time.
(3) The "conclusion" of a treaty means the time interval from when negotiations on a treaty began to when the treaty finally entered into force for the treaty parties.

Interpretation alternative (3) seems to run counter to the object and purpose of the Vienna Convention. According to this interpretation, the circumstances of a treaty's conclusion is a relative concept – from the point of view of the parties, a state-of-affairs can at one and the same time be part of and not be part of "the circumstances ", depending upon whether that state-of-affairs for each individual party was a cause for the conclusion of the treaty or not. This can hardly be what the parties to the VCLT intended.

Interpretation alternative (2) is a poor match with the context. In VCLT article 32, two examples are provided of what shall be considered included in the "supplementary means of interpretation", namely "the preparatory work of the treaty" and "the circumstances of its conclusion". By "the preparatory work of the treaty" – this was one of the observations made in the Section 2 of this chapter – we understand a set of representations produced before the point in time when the treaty was established as definite.[40] Considering the close pragmatic relationship that holds between "the preparatory work of the treaty" and "the circumstances of its conclusion", it stands to reason that this point in time should also be decisive for the meaning of "the circumstances".[41] Furthermore, this is the interpretation that best agrees with the literature. Authors speak at times of "the circumstances of [a treaty's] conclusion", and at other times of "the historical background against which the treaty has been negotiated",[42] "the political situation prevailing at the time the treaty was negotiated",[43] "*[les] circonstances dans lesquelles l'accord a été negocié",*[44] "*[les] circonstances dans lesquelles ont eu lieu les négociations diplomatiques ayant précédé la conclusion du traité",*[45] without any noticeable semantic distinction. Let me also cite Ambassador Yasseen, who – as we noted earlier – had an uncommonly active role in the formation of the Vienna Convention, first as member of the International Law Commission, and then as chairman of the Vienna Conference's Drafting Committee:

> Il est logique que les circonstances dans lesquelles le traité a été conclu influencent la rédaction du traité.[46]

All things considered, I fail to see how any other interpretation alternative could be considered well-founded than the one termed as alternative (1).

A third problem encountered is the relationship held between "the circumstances of [the treaty's] conclusion" and the system of rules laid down in VCLT articles 31 and 32 considered as a whole. Clearly, *the circumstances of the treaty's conclusion* has an extension, which in some cases borders on the extension of other means of interpretation. Many of the phenomena that are merely close to being defined as the context or the object and purpose of the treaty, and thus cannot be taken into account by appliers using these means of interpretation, can instead be considered at the stage when appliers use "the circumstances of [the treaty's] conclusion". Examples of such phenomena include the cause for the treaty;[47] agreements relating to the treaty, made in connection with the treaty's conclusion, but which are not governed by international law, or which were not made between all treaty parties;[48] and international agreements entered into either before or in connection with the conclusion of the treaty, but which are not governed

by international law, or which are not applicable in the relationship between all treaty parties.[49] The problem is that when "the circumstances of [the treaty's] conclusion" are used for the interpretation of a treaty, together with other means of interpretation, the different means will not only border on each other, but – considering the criteria hitherto established, and these criteria only – will also partially overlap. Much of what we consider to be part of "the context" or "the preparatory work of the treaty" will also be considered part of "the circumstances of [the treaty's] conclusion".[50] If the contents of VCLT articles 31–32 are to be described as a coherent system of rules, then obviously the extension of "the circumstances of [the treaty's] conclusion" must be further delimited. Such a delimitation could be made using the following terms:

> By "the circumstances of [the treaty's] conclusion" we mean any state-of-affairs, whose existence at least partly caused the conclusion of the treaty, unless this state-of-affairs can be considered comprised by "the context" or "the preparatory work" of the treaty.

4 OTHER SUPPLEMENTARY MEANS OF INTERPRETATION: RATIFICATION WORK

In my judgment, three means of interpretation can be used by appliers according to the provisions of VCLT article 32, apart from "the preparatory work of the treaty" and "the circumstances of its conclusion". The first of these means are the representations unilaterally produced by a state when it decides whether to ratify a treaty or not –[51] what we will be terming here as RATIFICATION WORK. Several authors consider ratification work to be an accepted means of interpretation.[52] Clearly, however, ratification work cannot be considered part of any means of interpretation *expressly* recognised as accepted by the Vienna Convention. It does not fit the description set forth in article 31 § 3(b), and hence cannot be considered part of a "subsequent practice", as asserted by professor Haraszti.[53] In order for an act of a state to be considered part of a "subsequent practice", it must be performed "in the application of the treaty".[54] Nor can ratification work be considered part of the preparatory work of a treaty, in the sense of VCLT article 32, as some authors imply.[55] For a representation to be included in the extension of the expression "the preparatory work" of a treaty, it must have been produced during the drafting of said treaty – that is, not after the point in time when the treaty was established as definite.[56] Nevertheless, it is a fact that ratification work often contains information, based on which the applier more fully than otherwise will be able to form an opinion on how the ratified treaty was perceived when adopted. It appears less likely that this

information should not be considered at all in the interpretation process. The question arises: Could ratification work – still under the provisions of VCLT article 32 – possibly be used as a means of interpretation in and of itself? In my judgment, the answer to this question should be in the affirmative. Support for this opinion can be drawn from the practice of international courts and tribunals.[57] To illustrate, I will provide three examples.

My first example is the judgment of the International Court in the *Case Concerning Oil Platforms (Preliminary Objections)*.[58] In October 1987, as well as in April 1988, the USA had attacked and destroyed three oil platforms situated on the Iranian continental shelf of the Persian Gulf, and belonging to a state-owned Iranian oil company. By taking these actions, the Iranian government claimed, the USA had violated the obligations incumbent upon her under international law. Consequently, Iran filed an application with the International Court of Justice requesting a decision to this effect. The question arose as to whether the Court was empowered to hear the case. As a basis for the jurisdiction of the Court, Iran had invoked article XX1, paragraph 2 of the 1955 *Treaty of Amity*, *Economic Relations and Consular Rights*:

> Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.[59]

According to what was alleged, several articles of the 1955 Treaty had been breached by the USA. The US government, for its part, refused to concede that even a single violation of the treaty had taken place.

Among the many provisions that had been violated, according to the allegations of Iran, one was the following, laid down in article I:

> There shall be firm and enduring peace and sincere friendship between the United States ... and Iran.[60]

Article I, maintained the Iranian government, does not merely express a recommendation or desire of the parties; it imposes actual legal obligations, committing the parties to sustaining peaceful and friendly relations. Thus, under the provisions of article I, the parties would have to comply with the minimum requirement of conducting themselves in accordance with the rules of international custom established in the field of peaceful and friendly relations. "This interpretation", the Court summarised, "is said to be required by the context, and to be reinforced by the circumstances in which the Treaty was concluded".[61] In the view of the defendant, the Iranian government read far too much into article I. Article I, the USA contended, did not impose a standard in any legal sense of the word; all it contained was a statement of aspiration.

That interpretation is called for in the context and on account of the "purely commercial and consular" character of the Treaty. It is said to correspond to the common intention of the Parties, and to be confirmed by the circumstances in which the Treaty was concluded and by the practice of the Parties.[62]

The latter interpretation is the one with which the Court concurred:

Article I ... cannot, taken in isolation, be a basis for the jurisdiction of the Court.[63]

Let us reflect upon the reasons provided by the Court to justify its position. The Court starts out by referring to the object and purpose of the 1955 Treaty:

[T]he object and purpose of the Treaty of 1955 was not to regulate peaceful and friendly relations between the two States in a general sense. Consequently, Article I cannot be interpreted as incorporating into the Treaty all of the provisions of international law concerning such relations.[64]

After this, it proceeds by turning its attention to the documents produced by the parties themselves in an attempt to strengthen their respective positions:

[I]t may be thought that, if that Article [Article I that is] 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 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.

A clause of this type was inserted after the end of the Second World War into four of the Treaties of Friendship and Commerce or Economic Relations concluded by the United States, i.e., those concluded with China, Ethiopia and Iran as well as with Oman and Muscat. Indeed, during the negotiation of the Treaty with China, the United States Department of State had indicated, in a memorandum addressed to its embassy in Chongqing, that if such a clause was not customary in treaties of this kind concluded by the United States, its inclusion was nonetheless justified in that case "in view of the close political relations between China and the United States". But, during the discussions in the United States Senate that preceded the ratification of the four Treaties, the clause does not, according to the material submitted to the Court, appear to have been given any particular attention. Only in the message from the Secretary of State whereby he transmitted the Treaty with Ethiopia to the Senate, after referring to the provisions in question, was it pointed out that:

"Such provisions, though not included in recent treaties of friendship, commerce and navigation, are in keeping with the character of such instruments and serve to emphasize the essentially friendly character of the treaty."[65]

Finally, the Court concludes by referring to subsequent practice:

The practice followed by the Parties in regard to the application of the Treaty does not lead to any different conclusions. The United States has never relied upon that Article in proceedings involving Iran and, more particularly, did not invoke that text in the case concerning *United States Diplomatic and Consular Staff in Teheran*. Neither did Iran rely on that Article, for example in the proceedings before this Court in the case concerning the *Aerial Incident of 3 July 1988*.[66]

To my mind, this is a clear example of ratification work being used as a means of interpretation. We shall note that two sets of ratification work are used, for two separate interpretation processes. In a first instance, the documents used are those emanating from the ratification of the American-Iranian treaty of 1955; the treaty interpreted is the one between the USA and Iran. In a second instance, the documents used are those emanating from the ratification of a treaty between the USA and Ethiopia; the treaty interpreted is the one between the USA and Ethiopia, which is then in turn used for the interpretation of the 1955 Treaty between the USA and Iran. Of course, nowhere in the reasoning of the Court is it expressly stated, that ratification work is used as an independent means of interpretation; however, this is the clear implication. The means used is not subsequent practice – this is made clear by the context. Nor is it the preparatory work of the 1955 Treaty – the Court expressly distinguishes between what has occurred "during the negotiations" and what has taken place "during ... the process of ratification".[67] This squares well with what we have stated earlier with regard to the contents of VCLT article 32: none of the means of interpretation expressly recognised as acceptable in article 32 pertain to the time subsequent to the establishing of the treaty as definite.[68] For the very same reason, it can hardly be a purport of the Court that the documents in question shall be considered part of the circumstances of the interpreted treaty's conclusion. It seems that the parties thought they should be considered as such. As a confirmation of their respective interpretations, both parties expressly cite "the circumstances in which the Treaty was concluded".[69] We should note, however, that this is not a terminology used by the Court itself. The conclusion to be drawn is the following: in the view of the Court, ratification work can be considered a means of interpretation in and of itself.

My second example is the judgment of the ICJ in the *ELSI* case – one of the few cases so far decided in Chamber – and the dissenting opinion of Judge Schwebel.[70] In 1987, the United States Government had filed an application with the ICJ requesting it to declare that the USA had an outstanding claim to compensation against Italy. The claim allegedly arose out of Italy's treatment of two American corporations in relation to their ownership of an Italian-registered limited company, *Elettronica Sicula SpA ("ELSI").* As a basis for her claim, the USA had invoked the 1948 Italian-American *Treaty of Friendship*, *Commerce and Navigation*, including a *Supplementary Agreement* of 1951. The American effort was fruitless. The Court found that no breach of the Italian-American agreement had occurred. Thus, the American claim to compensation had to be rejected.

Two judges have chosen to append individual opinions to the decision of the Court, one of them being Judge Oda.[71] In his *separate opinion*, Oda presents a series of propositions that differ from those of the Court in several important aspects. One such proposition is that the Italian-American agreement did not protect the interests of American stockholders in a company conducting business in Italy, when the company had been incorporated according to Italian law.[72] The other judge who chose to deliver an individual opinion is Judge Schwebel. In an elaborate dissenting opinion, Schwebel argues a position completely contrary to that supported by Judge Oda. Schwebel's first move is to attempt to categorise his position as one justified by article 32 of the Vienna Convention:

> In the current case, the Parties attached radically different interpretations to the provisions of the Treaty and its Supplementary Agreement which were at issue between them. It is undeniable that, when their conflicting arguments are matched together, the meaning of some of the Treaty's provisions are ambiguous or obscure; indeed, each of the Parties maintained that the opposing interpretation led to results which, if not manifestly absurd, were unreasonable. Thus, according to the Vienna Convention, this is a case in which recourse to the preparatory work and circumstances of the Treaty's conclusion was eminently in order.
>
> What were the circumstances of the conclusion of the Supplementary Agreement which forms an integral part of the Treaty itself? And what does the Treaty's preparatory work and processes of ratification demonstrate its purpose, or a paramount purpose of the Treaty, to be and what light do these processes shed on the interpretation to be attached to its provisions?[73]

He then cites excerpts from both Italian and American ratification work: "the debate in the [Italian] Chamber of Deputies on ratification of the Supplementary Agreement";[74] "[t]he Report to the Senate of Italy";[75] "[t]he Report of the Secretary of State of the United States which was transmitted to the United States Senate in connection with its advice and consent to ratification of the Supplementary Agreement";[76] "the Report of the Committee on Foreign Affairs and Colonies of the Senate of Italy of 28 May 1949".[77] By the way Judge Schwebel expresses himself, it is evident that in his view, the documents in question can be used according to the provisions of VCLT article 32, as a means of interpretation in and of itself.

My third example is the international award in the *Beagle Channel Arbitration* case.[78] The facts of this case have been stated in this work,[79] and I will not indulge in unnecessary repetition. As we know, Argentina and Chile had expressed different opinions about the meaning to be given to articles II and III of the 1881 *Tratado de Límites*. To support their respective positions, both parties had cited occurrences taking place between the signing of the 1881 treaty and its ratification. Argentina had invoked a speech made by the Argentinean chief negotiator in the National Chamber of Deputies. Chile had invoked a speech made by the Chilean chief negotiator

to his Chamber of Deputies. Both speeches were made partly to present and explain the treaty concluded, and partly to defend certain aspects of the treaty. It is to be noted how these different events are described by the court. The court starts by categorising the speeches as "[c]onfirmatory or corroborative incidents and material";[80] in other words, as supplementary means of interpretation. Furthermore, they have been termed as belonging to "[t]he immediate post-Treaty period".[81] By using this language, it is evident that the court distinguishes between the speeches on the one hand, and on the other hand the occurrences taking place during "the period of the negotiations" – the preparatory work of the treaty is addressed using other terms.[82] For the very same reason, it is equally obvious that, according to the court, the speeches made in the Argentinean and Chilean Chambers of Deputies cannot be considered part of the "subsequent conduct".[83]

This picture must be considered reinforced by the individual opinion delivered by Judge Gros.[84] Gros presents arguments that in some aspects differ from those of the court. His first move is to examine the preparatory work and the circumstances of the interpreted treaty's conclusion:

> The present territorial dispute between the two Parties must be viewed from within the complex of its development at the time – from 1810–1881 – and in particular from that of the very special relations existing between two States that every factor tends to bring together by reason of their common origins, ethical, political and social outlook and habits of thought in the widest sense. What is in question is not an issue of sovereignty *in abstracto* but – after seventy years of effort – of defining a frontier between Argentina and Chile extending over 5,000 kms. On the specific matter of the disputed islands, information concerning the negotiations of 1881 is still inadequate, but those of 1876 are well documented; and in that context there exists a firm proposal, put forward by the Government of the Argentine Republic, described as non-negotiable, and understood as such by the Chilean negotiator (Barros Arana Telegram of 5 July 1876 and Despatch of 10 July 1876, Chilean Annexes 21 and 22). This is of great importance, since Basis 3 of 1876 was carried over to become the text of Article III of 1881. The responsibility for this text, in 1876, was the Argentine Government's; and it is this same text, as also the accompanying circumstances, explanatory incidents of the negotiations, and the way in which the latter developed, together with the official commentaries which were to follow in 1876 and 1881, that constitute the sources for the interpretation of the clause that attributes the disputed islands.[85]

As further confirmation, he then brings into the picture the speeches made in the Argentinean and Chilean Chambers of Deputies:

> It is by taking into account all the aspects of those negotiations in 1876–1881, and the special social context of the international relations between the two States, that the intention of the Parties may be rediscovered in the text of Article III – an intention confirmed by the declarations of the political personalities responsible in the matter of the frontier. It is this whole complex comprising the text, its historical origins, the general political circumstances of the negotiation, and the explanation given by the negotiators and statesmen, which decided me to vote for the Decision of the Court.[86]

All things considered, it seems that, in the opinion of the court, ratification work can be used according to the provisions of VCLT article 32, as a means of interpretation in and of itself.

5 OTHER SUPPLEMENTARY MEANS OF INTERPRETATION: TREATIES *IN PARI MATERIA*

A second means of interpretation that can be used by an applier according to the provisions of VCLT article 32, apart from "the preparatory work of the treaty" and "the circumstances of its conclusion", is treaties *in pari materia*.[87] By a TREATY IN PARI MATERIA we are to understand an instrument, the subject matter of which is identical – at least partly – with the subject matter covered by the treaty interpreted. Of course, such an instrument may sometimes be considered a part of "the context". According to VCLT article 31 § 3(c), when appliers use the context, they shall take into consideration "relevant rules of international law applicable in the relations between the parties". Other times the instrument may be considered a part of "the circumstances of [the interpreted treaty's] conclusion". This is the case, for example, when the interpreted treaty was drafted or designed based on another treaty already in existence.[88] However, many cases remain where an instrument can be categorised as a treaty *in pari materia*, but where it *cannot* be used as already included in one of the means expressly recognised as acceptable by the Vienna Convention. The question is whether in these cases, treaties *in pari materia* may be considered a means of interpretation in and of itself. In my judgment, the answer to this question should be in the affirmative. As support for this opinion, I would like to cite the practice of international courts and tribunals.[89] I will do so with the following three examples.

My first example is once again the judgment of the International Court of Justice in the *Case Concerning Oil Platforms (Preliminary Objections)*.[90] Since the facts of the case have already been reviewed in an earlier section of this chapter,[91] I will not engage in unnecessary repetition. As we know, the USA and Iran were in dispute as to the meaning the 1955 American-Iranian *Treaty of Amity*, *Economic Relations and Consular Rights*, article I:

> There shall be firm and enduring peace and sincere friendship between the United States ... and Iran.[92]

According to Iran, article I imposes actual legal obligations, committing the parties to sustaining peaceful and friendly relations. According to the USA, the article was to be regarded merely as a statement of aspiration. This latter, American interpretation was the one later confirmed by the Court.

In the findings of the Court, the principal ground presented for its understanding of the 1955 Treaty is its object and purpose. However, as additional confirmation, the Court has also invoked the three "Treaties of Friendship and Commerce or Economic Relations", which – on the same occasion as the 1955 Treaty between the USA and Iran – were concluded between the USA and China, Ethiopia, and Oman and Muscat, respectively:

> A clause of this type was inserted after the end of the Second World War into four of the Treaties of Friendship and Commerce or Economic Relations concluded by the United States, i.e., those concluded with China, Ethiopia and Iran as well as with Oman and Muscat. Indeed, during the negotiation of the Treaty with China, the United States Department of State had indicated, in a memorandum addressed to its embassy in Chongqing, that if such a clause was not customary in treaties of this kind concluded by the United States, its inclusion was nonetheless justified in that case "in view of the close political relations between China and the United States". But, during the discussions in the United States Senate that preceded the ratification of the four Treaties, the clause does not, according to the material submitted to the Court, appear to have been given any particular attention. Only in the message from the Secretary of State whereby he transmitted the Treaty with Ethiopia to the Senate, after referring to the provisions in question, was it pointed out that:
>
> "Such provisions, though not included in recent treaties of friendship, commerce and navigation, are in keeping with the character of such instruments and serve to emphasize the essentially friendly character of the treaty."[93]

For the purpose of an interpretation of the 1955 *Treaty of Amity*, *Economic Relations and Consular Rights* between the USA and Iran, these three agreements can without a doubt be considered treaties *in pari materia*. No explanation is given by the Court to indicate that the invoked treaties between the USA and China, Ethiopia, and Oman and Muscat, respectively, are considered part of the preparatory work of the 1955 Treaty or the circumstances of its conclusion. It is apparent that, in the view of the Court, treaties *in pari materia* can be used as a means of interpretation in and of itself.

My second example is the judgment of the ICJ in the *Case Concerning the Arbitral Award of 31 July 1989*.[94] In 1985, Senegal and Guinea-Bissau had concluded a special agreement to resolve certain disagreements concerning the delimitation of their respective maritime boundaries. The origin of the dispute was a boundary agreement concluded in 1960 between Senegal as an autonomous state within the French *Communauté*, and the then-Portuguese province of Guinea.[95] The task of the tribunal was to deliver a decision on the following issues:

> **Article 2**
> The Tribunal is requested to decide in accordance with the norms of international law on the following questions: