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DOMESTIC EXPLANATORY DOCUMENTS AND TREATY INTERPRETATION

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Abstract The article discusses the increasing use by international courts and tribunals of domestic explanatory materials—such as various statements, reports, and explanatory memoranda that usually complement the domestic approval of treaties—in the process of treaty interpretation. After examining the types of materials that can be used as interpretative aids in accordance with the general rules on treaty interpretation (Articles 31–32 VCLT), the article scrutinizes the various ways in which domestic explanatory materials have informed the interpretation of treaty provisions in the practice of international adjudicatory bodies. The analysis focuses on the legal grounds on which such materials have been admitted in the interpretative process, the reasons for which resort has been made to them by the adjudicating body, as well as the circumstances in which such documents have been invoked by the litigating parties. The article then discusses certain advantages and disadvantages stemming from the use of domestic explanatory materials in the interpretative process.

Keywords: domestic explanatory materials, treaty interpretation, unilateral evidence in international proceedings, Vienna Convention on the Law of Treaties.

I. INTRODUCTION

Imagine you are an investor intending to acquire shareholder interests in two foreign insurance companies. Before you make the investment, you are told that there is an applicable investment treaty that will provide additional protection to your investment. This treaty applies to investments that are made 'directly or through an investor of a third State'. You then proceed with the acquisition of the two businesses. For practical reasons, you structure your investment through a wholly-owned subsidiary incorporated in the same jurisdiction as the target companies. A few years later, when a dispute arises

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as a result of governmental interference with your insurance business, you commence investment arbitration pursuant to that same investment treaty with a view to obtaining compensation for the losses suffered by the two insurance companies. The arbitral tribunal appointed to hear your case, however, decides that it is without jurisdiction. According to that tribunal, the purported investment does not fall within the ambit of the investment treaty. The tribunal deems that the latter does not provide protection to assets that are held indirectly through local subsidiaries in the host State. Though such a conclusion may not directly follow from the phrase 'directly or through an investor of a third State', the tribunal finds support for it in an explanatory memorandum submitted to the parliament of one of the State parties during the domestic approval of the treaty. But was the tribunal really entitled to rely on that document in interpreting the relevant provision?

The case just sketched is not entirely a hypothetical one. A somewhat similar situation has already arisen in *HICEE B.V. v The Slovak Republic*, an investment arbitration commenced pursuant to the Netherlands–Czech Republic BIT, in which an award was rendered in 2011.[1] In itself, that award might not be of particular interest, were it not for the question of treaty interpretation to which it gives rise: To what extent can domestic explanatory materials—such as various statements, reports, and explanatory memoranda that usually complement the domestic approval of treaties—inform the interpretation of treaty provisions? Recourse to such documents has become commonplace in the interpretative practice of international courts and tribunals. Though they rarely consider themselves debarred from taking them into account in construing contested treaty terms, international adjudicatory bodies have often refrained from taking a clear position as to the legal basis on which recourse to such documents could actually be justified. This may well have to do with the general propensity of adjudicatory bodies to look at any available evidence that could provide an indication as to what the treaty drafters may have had in mind. But from a doctrinal perspective, the question nonetheless arises as to whether this practice accords with the general rules on treaty interpretation, as set out in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT).[2]

The aim of this article is to identify the possible legal basis on which legislative and other domestic explanatory materials can be admitted in the process of treaty interpretation. The matter has not attracted much attention in existing literature on treaty interpretation, at least not in a comprehensive way.[3] To remedy this fact, the article first takes a look at the general rules of treaty

[1] *HICEE B.V. v The Slovak Republic*, UNCITRAL, PCA Case No. 2009–11, Partial Award of 23 May 2011.

[2] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, entered into force on 27 January 1980; 1155 UNTS 331; 8 ILM 679 (1969).

[3] In academic literature, the use of such documents is usually only briefly mentioned (see eg JR Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 132), or discussed in the

interpretation and the types of materials extrinsic to the treaty text that the interpreter is permitted to consult in accordance with these rules (Section II). The article then delves into the interpretative practice of international courts and tribunals. In the first step, it examines how recourse to domestic explanatory materials has (if at all) been formally justified (Section III). In the second step, it seeks to identify and evaluate the practical reasons for which international courts and tribunals have actually had recourse to such documents (Section IV). In the third and last step, it scrutinizes the circumstances in which such documents have been invoked, with a view to establishing the extent to which the admission of such documents has been contingent upon the attitude of the litigating parties (Section V). The article then discusses advantages (Section VI), as well as potential traps (Section VII), that the use of such documents could bring in the treaty interpretation process. Finally, the article assesses whether the domestic status of such documents could be of relevance for their explanatory value (Section VIII), before concluding with some general remarks on the nature of the treaty interpretation process and the role of domestic materials therein (Section IX).

II. A PLACE FOR DOMESTIC EXPLANATORY MEMORANDA IN THE GENERAL RULES ON TREATY INTERPRETATION?

As a preliminary matter, it is helpful to establish whether the general rules of treaty interpretation allow the interpreter to resort to domestic explanatory memoranda for the purpose of construing treaty terms, or at least to determine whether or not those rules prohibit the interpreter from doing so. To this end, the inquiry begins by examining the scope of permissible evidence which, pursuant to Articles 31 and 32 VCLT, may be used at different stages of the treaty interpretation process.

A. The Use of Explanatory Memoranda in the Context of the General Rule on Treaty Interpretation

It soon becomes clear that domestic explanatory documents do not make for an easy fit into any category of extrinsic materials that the interpreter is bound to consider in the application of the 'general rule of interpretation' of Article 31 VCLT. Most tempting perhaps is the possibility of treating them as an 'instrument […] made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty' within the meaning of Article 31(2)(b) VCLT. Of significance in this respect is that 'conclusion' is not a term of art in customary international law, nor it is clearly defined in the Vienna

context of other documents of unilateral origin (see eg R Gardiner, *Treaty Interpretation* (OUP 2008) 106–8).

Convention, in spite of the latter referring to it no less than 23 times.[4] Particularly in the context of Article 31(2)(b) VCLT, the suggestion has been made that conclusion is more appropriately considered in the sense of a process, with the consequence that the provision should be deemed to encompass not only instruments made at the moment of a treaty's signature, but also those made when consent to be bound is expressed.[5] If 'conclusion' is understood in this broader sense, it is certainly possible to treat internal materials prepared in the context of domestic approval procedures as instruments made 'in connection with' a treaty's 'conclusion'.[6] Of further significance in this respect is that Article 31(2)(b) speaks of any instrument made by '*one* or more parties', which at first sight suggests that the material in question can originate from only one of the contracting parties. The greatest obstacle to treating domestic explanatory memoranda as 'instruments' in the sense of this provision, however, comes from the additional requirement that these be also 'accepted by the other parties as an instrument related to the treaty'. This requirement is seldom satisfied in the case of explanatory statements submitted to domestic legislative bodies during the treaty ratification process, or prepared for internal governmental procedures, for these remain largely unknown to the other treaty parties, which therefore cannot be deemed to have accepted them—either expressly, or by necessary implication. Such a reading of Article 31(2)(b) VCLT would seem to accord with its drafting history. Though the Special Rapporteur and some other members of the International Law Commission (ILC) appeared to have different ideas about the 'instruments' that would have to be regarded as part of the treaty for the purposes of interpretation (with the discussion primarily revolving around the admissibility of instruments of ratification), there was agreement that the provision would not embrace documents expressing a unilateral understanding of the meaning of treaty terms that lack corroboration from the other treaty parties.[7] Hence, the prospects for treating

[4] For a study of this issue, see EW Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions' (1988) 59 BYBIL 75.

[5] ibid, 86. See also Gardiner (n 3) 211.

[6] In practice, the time span within which a particular instrument can still be considered as having been made 'in connection with the conclusion of the treaty' can be considerably broad. An interesting example is the Decision of the Member States of the European Union, dated as late as 15 December 2016, containing an interpretative statement in relation to the EU–Ukraine Association Agreement of 21 March 2014, which was still considered to be an instrument within the meaning of art 31(2)(b) VCLT. See European Council, 'Opinion of the Legal Counsel', Brussels (12 December 2016) (OR. en), EUCO 37/16, LIMITE, JUR 602. That interpretative statement was prepared precisely to address concerns expressed during the domestic approval of the Agreement in the Netherlands.

[7] See the deliberations of the ILC on that point during the 769th meeting in 1964; UNYBILC 1964/1, 311–13. In that context, the discussion touched on the kind of unilateral understandings of treaty provisions that are frequently submitted to the US Senate. Shabtai Rosenne considered that a 'purely unilateral interpretative statement of that kind' could not bind the parties and therefore suggested the inclusion of the formula 'accepted by' so as to avoid a reference that might include purely unilateral action (UNYBILC 1964/1, 313, paras 52, 54 (Rosenne)). Special Rapporteur Sir

domestic explanatory memoranda as instruments within the meaning of Article 31(2)(b) VCLT, and thus considering them as part of the context in which the meaning of the treaty terms is determined, are therefore limited.

An alternative would be to attempt to construe domestic explanatory memoranda as agreements which must be taken into account when determining the ordinary meaning: namely, an agreement 'relating to the treaty which was made between all the parties in connection with the conclusion of the treaty' (Article 31(2)(a) VCLT), or a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' (Article 31(3)(a) VCLT). For that purpose, however, the acceptance of such materials on the part of the other contracting parties would also be required; for, only acceptance of what is essentially a unilateral act can legally amount to an 'agreement'.[8] As already noted, this is rarely the case with legislative and other internal materials, which usually remain undisclosed to other treaty parties. Finally, the other alternative is to treat domestic explanatory documents as 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' (Article 31(3)(b) VCLT). Besides the question of whether a domestic document explaining the treaty provisions can properly be considered as practice 'in the application of the treaty'—for, a generic instrument setting out the scope of a treaty's application can hardly amount to the application of the treaty itself—the practice required would need to be such as to establish the agreement of the parties regarding the treaty's interpretation.[9] This would generally be a high threshold to meet.

B. Legislative Documents as Supplementary Means of Interpretation

The fact that Article 31 VCLT permits the interpreter to take into account only materials which the other parties 'accept', or on which the parties 'agree', may frequently prevent legislative and other internal documents from playing a role in the application of the general rule of interpretation. However, there seems to

Humphrey Waldock, on the other hand, thought that such statements would in any event not fall within the remit of the provision, since they would not be germane to the actual conclusion of the treaty (UNYBILC 1964/1, 313, para 53 (Waldock)).

[8] See eg *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) [1999] ICJ Rep 1045, paras 47–79, where the ICJ did not accept that a report prepared by a British colonial officer was able to represent subsequent practice in the application of a boundary treaty in the sense of art 31(3)(b) VCLT, since that document had never been made known to the other treaty party and remained at all times an internal document. For the same reason, it did not accept Botswana's domestic legislative documents relating to the establishment of two national parks.

[9] This is not to say that information provided for in explanatory memoranda could not be relevant to establishing the existence of a tacit agreement. See *Maritime Dispute (Peru v Chile)* (Judgment) [2014] ICJ Rep 3, paras 121–122, where the ICJ considered a 26 July 1954 Message from the Chilean Executive to the Congress for the approval of certain agreements concluded in 1952 with a view to determining whether there was a tacit agreement between Peru and Chile as to their lateral maritime boundary.

be more room for using such materials in the interpretative process in a less direct way—ie as a 'supplementary means' of interpretation within the meaning of Article 32 VCLT.

Taking just content as a relevant criterion, there are certainly situations where domestic explanatory materials could shed light on the preparatory works of the treaty (*travaux préparatoires*) or the circumstances of its conclusion—two of the supplementary means of interpretation expressly mentioned in the Vienna Convention. Indeed, it is not uncommon for various explanatory memoranda to summarize the conduct of negotiations or perhaps to discuss the positions taken by different States during the drafting of the treaty—which is why some commentators have even suggested that unilateral statements made around the time of the treaty's conclusion may provide better insights than the actual preparatory works.[10] Similarly, it is not uncommon for such materials to explain the reasons and motives that led to the conclusion of the treaty and the broader context in which the instrument was negotiated. Yet, the fact that information provided in domestic explanatory materials may indirectly be relevant to the construction of treaty terms does not answer the question whether the interpreter is also justified in taking into account specific explanations concerning the scope and extent of obligations undertaken in the treaty, which are also provided for in the same documents. The next question therefore is whether domestic transmittal statements or explanatory memoranda could itself be treated as 'preparatory works' or one of the 'circumstances' of the treaty's conclusion.

As to the former possibility, some commentators have indeed advanced the argument that domestic explanatory statements may be treated as part of the *travaux préparatoires*.[11] The problem, however, is that any material qualifying as preparatory works, needs to be of a preparatory character—preparatory in relation to the treaty's text. One could certainly think of situations where domestic legislative materials could be of such character—take the example of treaties concluded on the basis of a prototype text (as in the case of many bilateral investment or taxation treaties), where there exist domestic legislative documents relating to that prototype text.[12] In most

[10] See J Klabbers, 'International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?' (2003) 50 NILR 267, 279.

[11] See eg H Lauterpacht, 'Some Observations on Preparatory Work in the Interpretation of Treaties' (1935) 48 HarvLRev 549, 552; or M Ris, 'Treaty Interpretation and ICJ Recourse to *Travaux Préparatoires*: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' (1991) 14 BCIntl&CompLRev 111, 133. For a rejection of such proposition, see MK Yasseen, 'L'interprétation des traités d'après la convention de Vienne sur le droit des traités' (1976-III) 151 RdC 1, 83.

[12] For example, in the recent revision of the US model bilateral investment treaty, the Office of the United States Trade Representative and the US Department of State have sought and received extensive input from Congressional advisory and other relevant committees, even though the revisions to the model BIT in principle do not require Congressional action. See *United States Concludes Review of Model Bilateral Investment Treaty*, available at <https://2009-2017.state.gov/r/pa/prs/ps/2012/04/188198.htm>.

cases, however, explanatory statements made in the process of the domestic approval of the treaty will not be of such a character, as they will post-date the treaty's negotiations. The same constraints may arguably not apply in relation to the circumstances of the treaty's conclusion. As already mentioned above, the exact moment of a treaty's conclusion has been left undefined in the Vienna Convention. If a broad understanding of the term is adopted as in relation to Article 31(2)(b) VCLT, the interpreter could possibly consider a wider range of documents, including those produced during stages subsequent to the treaty's negotiation. The *travaux* of the Vienna Convention provide some support for such proposition, suggesting that the formulation used in Article 32 VCLT was intended to cover 'both the contemporary circumstances and the historical context in which the treaty was concluded'.[13]

In relation to both the *travaux préparatoires* and the circumstances of the treaty's conclusion, however, the question arises whether the materials in question would need to be accepted by, or at least known to the other parties to the treaty. Insofar as preparatory works are concerned, as it is known, the term has deliberately been left undefined by the ILC, so as not to lead to 'the possible exclusion of relevant evidence'.[14] This is perhaps why practice on this issue has not been uniform. On a more restrictive view—as adopted for instance by the Arbitral Tribunal for German External Debts in the *Young* case (1980)—materials may only qualify as preparatory works if they are also accessible and known to the other contracting parties, since only then can they serve as an indication of common intentions of the parties.[15] The International Court of Justice (ICJ), in contrast, has so far had little problem accepting as preparatory works internal governmental memoranda prepared for the purposes of negotiations,[16] or documents reporting on those negotiations,[17] despite such documents never having been disclosed to the other contracting parties. As to the range of materials that could possibly be taken into account as part of the circumstances of the treaty's conclusion, there is less guidance from practice—although one could find precedents suggesting that documents originating from a single contracting party (and perhaps not known to others) could possibly be included in the range of

[13] See H Waldock, 'Third Report on the Law of Treaties', UNYBILC 1964/II, 59, para 22.

[14] ILC, 'Draft Articles on the Law of Treaties', UNYBILC 1966/II, 223, para 20. Many ILC members argued in favour of a broad notion of preparatory works. During deliberations within the ILC, for example, Mustafa Kamil Yasseen took the view that 'the very nature of a convention as an act of will made it essential to take into account all the work which had led to the formation of that will—all the material which the parties had had before them when drafting the final text'. UNYBILC 1966/1, 205, para 25 (Yasseen).

[15] *Judgment in the Case of Belgium, France, Switzerland, the United Kingdom and the United States v the Federal Republic of Germany (Young case)* (Judgment) 16 May 1980, reproduced in (1980) 19 ILM 1357, 1380, para 34.

[16] See *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Judgment) [2002] ICJ Rep 625, para 57.

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

admissible materials.[18] Giving some weight to such precedents, the argument could eventually be made that domestic explanatory memoranda can be admitted into the interpretative process as part of the circumstances of the treaty's conclusion.

Finally, as some have occasionally suggested,[19] there is also the possibility of treating domestic explanatory materials as *other* supplementary means of interpretation. Support for such a proposition could be sought in the text of Article 32 VCLT itself, which—by using the phrase 'including'—suggests that the list of supplementary means of interpretation must not be seen as exhaustive. Indeed, the open-ended character of Article 32 was readily acknowledged during its drafting,[20] and has subsequently been confirmed in doctrine,[21] as well as in practice.[22] Of course, there is no uniform opinion as to what those other supplementary means are supposed to be.[23] But the tendency has been to regard as such any other materials that failed to properly qualify under any of the categories expressly mentioned in Articles 31 and 32 VCLT.[24] The drafting history of the Vienna Convention does not seem to deny the possibility of treating domestic explanatory statements (particularly those concerning the scope and extent of obligations undertaken in the treaty) as a *sui generis* type of supplementary means of interpretation. Admittedly, neither the ILC, nor the States at the Vienna conference in 1969 devoted particular attention to the question whether domestic explanatory statements could have any role to play in the interpretative process.[25] Yet, there is also no indication that the drafters considered this kind of material to

[18] See WTO, *European Communities–Customs Classification of Certain Computer Equipment – Report of the Appellate Body* (22 June 1998) WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para 92, where the past customs classification practice of one of the treaty parties was consulted as part of the circumstances of the conclusion of the WTO Agreement.

[19] See U Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 249–55.

[20] See UNYBILC 1966/I(2), 202, para 50 (Ago).

[21] See eg Yasseen (n 11) 79; ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Nijhoff 2009) 445; Y Le Bouthillier, 'Article 32' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press 2011) 841, 851; L Sbolci, 'Supplementary Means of Interpretation' in E Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (Oxford University Press 2011) 145, 158; Linderfalk (n 19) 239; or O Dörr, 'Article 32, Supplementary Means of Interpretation' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer 2012) 571, 580.

[22] See WTO, *European Commission – Customs Classification of Frozen Boneless Chicken Cuts – Report of the Appellate Body* (12 September 2005) WT/DS269/AB/R and WT/DS286/AB/R, para 283.

[23] Among the means additional to those expressly mentioned in art 32 VCLT, commentators have usually had the tendency to classify the general principles and maxims of interpretation deriving from domestic law (*ejusdem generis, contra proferentem, in dubio mitius* etc), to which reference had often been made in the jurisprudence of international tribunals before the adoption of the VCLT. See R Jennings and A Watts, *Oppenheim's International Law* (9th edn, Longman 1996) 1278–81; and A Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press 2007) 248–9.

[24] See on this Villiger (n 21) 445–6; or Dörr (n 21) 580–1.

[25] The only occasion that the discussion touched upon this kind of materials in the ILC was in connection with the term 'instrument' as used in art 31(2)(b) VCLT. See UNYBILC 1964/1, 313.

be *a priori* excluded from the scope of evidence that could be considered as part of supplementary means of interpretation. If anything, the drafting history suggests that use could essentially be made of any appropriate means for ascertaining the intentions of the parties at the time of the conclusion of the treaty. Specifically, in the Third Report that Sir Humprey Waldock presented to the ILC when drafting the articles on the law of treaties—and which also contained the first set of rules on interpretation that would later, in a streamlined form, eventually become the rules of Article 31 and 32 VCLT—the question of supplementary means of interpretation mostly revolved around the importance to be given to preparatory works. As is well known, Waldock envisaged only a limited and merely supplementary role for the latter, placing the emphasis instead on the text of the treaty, which was presumed to be 'the authentic expression of the intentions of the parties'. Preparatory works, in contrast, were 'simply evidence to be weighed against any other relevant evidence of the intentions of the parties,' their cogency depending on 'the extent to which they furnish proof of the common understanding of the parties as to the meaning attached to the terms of the treaty'.[26] In accordance with this vision, it may thus be possible to consider domestic explanatory memoranda simply as 'any other relevant evidence' of the parties' intentions that can be taken into account in the process of interpretation. Indeed, as the following sections will demonstrate, this has apparently also been the understanding of adjudicatory bodies, which usually have had little objection to resorting to domestic explanatory materials where these were able to furnish evidence as to what might have been the common understanding of the parties.[27]

III. FROM DOCTRINE TO PRACTICE: THE DIFFICULTIES WITH IDENTIFYING THE APPROPRIATE LEGAL BASIS FOR ADMITTING EXPLANATORY MEMORANDA IN THE TREATY INTERPRETATION PROCESS

Though international adjudicatory bodies often rely on information provided in explanatory memoranda of domestic origin, they have generally refrained from commenting on the legal basis under which such documents could be admitted in the interpretative process.

To begin with, the ICJ has never clearly taken a position as to the status of explanatory notes that are usually prepared for domestic purposes in the context

[26] Waldock (n 13) 58, para 21.

[27] The focus of the present analysis is on the interpretative practice subsequent to the adoption of the VCLT. But already prior to that, it was not that exceptional in decisions of domestic courts or mixed commissions to refer to parliamentary documents for the purpose of interpreting treaty clauses. See eg the decision of the Franco-Italian Conciliation Commission in the matter of *Italian Special Capital Levy Duties* (29 August 1949) 18 ILR 406, 410–13; the decision of the US International Claims Commission in the *Howard Claim* (1951–1954) 21 ILR 291, 292–3; or the decision of the Court of Appeal of Saarbrücken in *Ministère Public v Oliger* (13 April 1951) 18 ILR 431, 432.

of the signature or adoption of a treaty. In the *Malaysia/Indonesia (Ligitan and Sipadan)* case (2002), the Court went as far as holding that a map appended to the Explanatory Memorandum presented to the Dutch Parliament in relation to the approval of a 1891 Convention between the Netherlands and Great Britain was not to be treated as an agreement within the meaning of Article 31(2) VCLT, nor did it amount to a subsequent agreement or subsequent practice within the meaning of Article 31(3) VCLT.[28] As to the Explanatory Memorandum itself, which actually happened to contain 'useful information on a certain number of points',[29] the Court stopped short of explaining what was the basis for taking it into account in the process of interpreting the Convention. In other cases, the Court was silent on the basis for admitting such documents in the interpretative process,[30] or else was in a position—due to the specific facts of a case—to pin them down to one of the interpretative materials expressly recognized in Articles 31 and 32 VCLT.[31] The reluctance of the principal international judicial body to take a clearer position concerning the legal basis for admitting such documents into the interpretative process is certainly regrettable, but it is also not surprising given the Court's unsystematic and liberal approach to the treatment of evidence.[32]

In a similar way, international arbitral tribunals have mostly avoided taking a clear stance on the status of such documents. In a great number of cases, the adjudicators referred to such documents in the process of interpretation without explaining on what legal basis resort to those documents was actually warranted.[33] In some cases, their status was apparently considered, but then deliberately left undetermined.[34] In others, the question was avoided

[28] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (n 16) paras 48 and 61, respectively.

[29] ibid, para 46.

[30] *Oil Platforms case (Islamic Republic of Iran v United States of America) (Preliminary Objection)* [1996] ICJ Rep 803, para 29.

[31] See *Fisheries Jurisdiction (United Kingdom v Iceland)* (Jurisdiction) [1973] ICJ Rep 3, para 17; and *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Judgment) [1993] ICJ Rep 38, paras 28–29.

[32] See on this A Riddell and B Plant, *Evidence before the International Court of Justice* (2009) 410–16.

[33] See eg *Dispute between Argentina and Chile concerning the Beagle Channel (Chile/Argentina)*, Award (18 February 1977) XXI UNRIAA 57, paras 112ff; *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges*, Award on the First Question (30 November 1992) 102 ILR 216 and XXIV UNRIAA 1, para 2.1.6; *Ethyl Corporation v The Government of Canada*, UNCITRAL, Award on Jurisdiction of 24 June 1998, para 84; *Methanex Corporation v United States of America*, UNCITRAL, Partial Award of 7 August 2002, paras 97–101, 146; *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award of 16 December 2002, para 181; *Generation Ukraine, Inc. v Ukraine*, ICSID Case No ARB/00/9, Award, 16 September 2003, paras 15.2–15.6; C*MS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Award of 12 May 2005, paras 359–362, 366–369; *Merrill & Ring Forestry L.P. v The Government of Canada*, UNCITRAL, ICSID Administered Case, Award of 31 March 2010, para 191.

[34] See eg *Mondev International Ltd. v United States of America*, ICSID Case No ARB(AF)/99/2, Award (11 October 2002) para 111 ('Whether or not explanations given by a signatory government to its own legislature in the course of ratification or implementation of a treaty can constitute part of the *travaux préparatoires* of the treaty for the purposes of its interpretation,

altogether, as the interpretative issue was capable of resolution without resort having to be made to the document in question.[35] In others, the question was discussed as one concerning the tribunal's powers to determine the probative value of evidence, and not specifically as one concerning the status of the relevant document in relation to the rules on treaty interpretation.[36] In a select few cases, however, the adjudicatory bodies did come up with justifications for the possible legal basis under the rules of treaty interpretation for admitting such explanatory memoranda into the interpretative process. These merit closer consideration.

A. Explanatory Memoranda—State Practice?

In the first place, note should be made of an instance where one such document was perceived as an element of *State practice* and considered in the context of the application of the general rule of treaty interpretation within the meaning of Article 31 VCLT. The only proper example in this category is the award in the *Guinea/Guinea Bissau* maritime boundary arbitration (1985). When seeking to determine whether a 1886 Convention between France and Portugal had established a definite maritime boundary between those States' colonial possessions in that part of Africa, the Tribunal took account—among the many other documents submitted to it by the Parties—of an internal note of the French Ministry of Foreign Affairs, concerning discussion of the ratification of the Convention by the French Parliament, which described the scope of the French possessions acquired by the Convention.[37] The potential relevance of that note was in assisting the Tribunal 'to discover the Parties' thinking subsequent to the conclusion of the Convention',[38] while resort to it was justified because it was 'appropriate' to take into account 'any

they can certainly shed light on the purposes and approaches taken to the treaty'); or *Global Trading Resource Corp. and Globex International, Inc. v Ukraine*, ICSID Case No ARB/09/11, Award of 1 December 2010, para 50 ('Without going into the question of how the letter might properly be categorized within the framework for interpretation given in Articles 31 and 32 of the Vienna Convention on the Law of Treaties').

[35] For an example of the former, see *Pope & Talbot Inc. v The Government of Canada*, UNCITRAL, Award on the Preliminary Motion by the Government of Canada to Dismiss the Claim because it Falls Outside the Scope and Coverage of NAFTA Chapter Eleven 'Measures Relating to Investment' of 26 January 2000, para 29, where the Tribunal refrained from taking a position on the legal status of Canada's Statement on Implementation of NAFTA, which the investor invoked, but Canada objected to. For an example of the latter, see *Vladimir Berschader and Moïse Berschander v The Russian Federation*, SCC Case No 080/2004, Award of 21 April 2006, para 158, where the explanatory statement was found to be contrary to the ordinary meaning.

[36] See *Philippe Gruslin v Malaysia*, ICSID Case No ARB/99/3, Award of 27 November 2000, para 21.5, where reference was made to Rule 34 of the ICSID Arbitration rules to the effect that 'it is for the Tribunal to determine the probative value of the evidence of the underlying factual matrix at the time the IGA [ie the treaty] was made'.

[37] *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau)*, Award, 14 February 1985; XIX UNRIAA 149; 25 ILM 252 (1986), para 61.

[38] ibid, para 68.

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subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' in the sense of Article 31 (3)(b) VCLT.[39] Curiously, the Arbitral Tribunal did not specifically consider whether or how such an internal note could be deemed to have 'established' an agreement of the parties regarding the treaty's interpretation. Granted the ICJ, too, discussed in the *Jan Mayen* case (1993), as part of 'subsequent practice', a statement submitted by the Norwegian Government to the Norwegian Parliament in relation to a treaty's approval.[40] In the context of that case, however, the parliamentary statement concerned another treaty that the same two States had entered into subsequent to the treaty that was the object of interpretation. There was no doubt that the later treaty was capable of being treated as subsequent practice, as it involved the same States. While the Court did not further justify what the legal status of the parliamentary document was, there is no indication in the judgment that the Court had actually considered it as part of that practice. It seems to have simply been treated as material evidence like any other. Indeed, as already noted above, in the *Malaysia/Indonesia (Ligitan and Sipadan)* case (2002), the Court rejected the proposition that a map appended to the parliamentary document in question could be treated as subsequent State practice within the meaning of 31(3) VCLT, precisely because neither the map itself, nor the memorandum were ever officially transmitted by the Dutch Government to the British Government, and the latter never reacted to, or otherwise acted upon it, in spite of the fact that the British diplomatic agent in The Hague appeared to have brought the memorandum to its attention.[41]

B. Explanatory Memoranda—Part of Preparatory Works?

More often than not, adjudicatory bodies have tended to consider domestic explanatory memoranda as part of the *supplementary means of interpretation*. Essentially, three approaches have emerged in practice. The first was to consider such documents as part of a treaty's preparatory work in the broadest sense. In the above-mentioned *Guinea/Guinea Bissau* maritime boundary award, the Arbitral Tribunal considered explanatory memoranda submitted to the French and Portuguese Parliaments in the context of the treaty's domestic ratification procedures under the scope of supplementary means of interpretation in the sense of Article 32 VCLT, even though the Tribunal also noted that they were 'not *stricto sensu* a part of the preparatory work'.[42] As further explained by the Tribunal, those documents were relevant for the purpose of 'reconstituting' the process through which the text of Article I

[39] ibid, para 60.
[40] *Maritime Delimitation in the Area between Greenland and Jan Mayen* (n 31) paras 28–29.
[41] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (n 16) 48 and 61.
[42] *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (n 37) para 70.

of the Convention was drafted.[43] Such an approach was not entirely without precedent. On similar grounds, the International Court of Justice had previously taken into account in the *Fisheries Jurisdiction* case (1973) a governmental memorandum that was submitted to, and discussed in the Parliament of Iceland, in the process of interpreting a 1961 Exchange of Notes between the British and Icelandic Governments.[44] The fact that the memorandum was treated by the ICJ as part of the treaty's negotiating history in that case, however, was not surprising, given that it preceded the conclusion of the Exchange of Notes which itself was also subject to further parliamentary approval. Less compelling, in turn, was the choice by the investment Tribunal in *Aguas del Tunari v Bolivia* (2004) to treat the Explanatory Note submitted to the Dutch Parliament in relation to the domestic approval of the Netherlands–Bolivia BIT as part of that treaty's 'Negotiating History', given that the Tribunal itself recognized that the Note was prepared after the BIT had been negotiated.[45] The Tribunal appraised the Note in the context of its 'Article 32 analysis', to which it had turned in order to 'confirm' its interpretation of the dispute phrase.[46] Apparently, the Note was consulted because of the information it provided on what precisely had been negotiated in the treaty, and may possibly have been seen by the arbitrators as a summary of the *travaux préparatoires.* In the end, however, the Note proved to be of little explanatory value, as the Tribunal concluded that the document offered 'little additional insight into the meaning of the aspects of the BIT at issue, neither particularly confirming nor contradicting the Tribunal's interpretation'.[47]

C. Explanatory Memoranda—Part of the Circumstances of the Treaty's Conclusion?

Another approach has been to consider domestic explanatory memoranda as part of the circumstances of the treaty's conclusion within the meaning of Article 32 VCLT. An example of such an approach can be found in the investment award in *Kılıç v Turkmenistan* (2012). In the circumstances of that case, the application of Article 31 VCLT was found to leave the meaning of the disputed treaty provision in the Turkey–Turkmenistan BIT ambiguous or obscure, and the ICSID Tribunal therefore deemed it appropriate to consider supplementary means of interpretation as permitted under Article 32 VCLT.[48] According to the Tribunal, one such means was to consider the

[43] ibid, paras 73, 76.

[44] *Fisheries Jurisdiction* (n 31) paras 17–18, 20 and 33.

[45] *Aguas del Tunari S.A. v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction of 21 October 2005, paras 271–272.

[46] ibid, para 266.

[47] ibid, para 274.

[48] *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 Treaty of 7 May 2012, para 9.17.

circumstances of the conclusion of the BIT, which in its view included 'the process relating to the negotiation, conclusion and signing of the BIT in Ashgabat on 2 May 1992, *as well as events leading up to its ratification*'.[49] The Tribunal then considered the explanatory memorandum included in a letter from Turkey's Council of Ministers to the Turkish Parliament through which the treaty at issue was submitted for approval, and the official English-Turkish translation of the treaty which was subsequently published in Turkey's Official Gazette.[50] In reaching its conclusion on the interpretative issue, the Tribunal eventually relied on the latter (insofar as the official Turkish translation was found to converge with the authentic Russian version of the BIT and the authentic Turkish text of another BIT entered into by Turkey that employed the same terms), while deciding not to take account of the explanatory memorandum (which pointed to another direction).[51] In the subsequent annulment proceedings, the ICSID Annulment Committee did not further scrutinize whether the Tribunal was correct in treating the domestic documents produced in the domestic ratification process as part of the relevant circumstances, but merely concluded that the supplementary means of interpretation were 'properly used' since the Tribunal had reached the conclusion that the text was ambiguous.[52] A similar approach was seemingly followed in the *Sehil v Turkmenistan* (2015) case, decided by a different ICSID Tribunal, but concerning the interpretation of the same treaty. Just as the arbitrators in *Kılıç*, the *Sehil* Tribunal considered the same official Turkish translation of the text and the Explanatory Note presented to the Turkish Parliament as part of the supplementary means of interpretation[53]—in addition, however, to other Turkish BITs and their accompanying explanatory notes.[54] In contrast to the arbitrators in the *Kılıç* case, the *Sehil* Tribunal did not expressly state that the domestic explanatory memorandum was to be treated as part of the circumstances under which the treaty under interpretation had been concluded, but this seems to follow from the Tribunal's observation that the range of supplementary means of interpretation was 'broad', that Article 32 VCLT specifically mentions the treaty's preparatory work and the circumstances of its conclusion, and that in the circumstances of the case no *travaux préparatoires* in respect of the relevant treaty existed or were at least presented to the Tribunal.[55] Unlike the arbitrators in the *Kılıç* case, the *Sehil* Tribunal did not consider that recourse to those materials was necessary. Yet, since both litigating parties had made extensive arguments based on them, they were nonetheless examined, even if

[49] ibid, para 9.18; emphasis added.
[50] ibid, paras 9.20 and fn 48 to para 9.21.
[51] ibid, para 9.21.
[52] *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Decision on Annulment of 14 July 2015, para 125.
[53] *Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v Turkmenistan*, ICSID Case No ARB/12/6, Decision on Respondent's Objection to Jurisdiction under Article VII(2) (13 February 2015) paras 260–261.
[54] ibid, paras 257, 268.
[55] ibid, para 251.

the Tribunal did hold that they were 'neither necessary' for the conclusions it had reached on the basis of a textual approach, nor that they had the effect of 'undermining' them.[56] Admittedly, though, the treaty's explanatory memorandum actually happened to support the Tribunal's own reading of the contested treaty provision.[57]

D. Explanatory Memoranda—Sui Generis Supplementary Means of Interpretation?

The third approach has been to treat explanatory memoranda—still within the sense of Article 32 VCLT—as a *sui generis* type of supplementary means of treaty interpretation. The foremost authority for such proposition is the award rendered by an investment tribunal in *HICEE v Slovak Republic* (2011), which probably contains the most extensive and elaborate discussion so far concerning the legal basis under which a domestic legislative memorandum can be admitted as evidence in the interpretative process.[58] In the circumstances of that case, one such document—the Explanatory Note submitted to the Dutch Parliament in the process of the domestic approval of the Netherlands–Czech and Slovak Republic BIT—turned out to be determinative for the interpretative question before the investment tribunal—or at least, the majority of the arbitrators sitting on that tribunal considered that to be the case.[59] Having found that the contested treaty provision was on its face capable of bearing two equally plausible meanings, and that neither the context as a whole, nor the object and purpose of the treaty were able to provide any guidance as to which of the two meanings was to be preferred,[60] the Tribunal's majority reverted to the Explanatory Note, which seemed to have the 'most direct and material bearing' on the issue of interpretation, in view of the 'categorically precise terms in which the commentary to the relevant provision of the BIT was cast'.[61] Yet, the majority struggled with the problem that the Explanatory Note did not easily fit within any of the categories of materials specifically mentioned in Articles 31 and 32 VCLT. In the majority's view, the Note could not be treated as a kind of explicit or tacit agreement between the parties within the meaning of sub-paragraphs (a) and (b) of Article 31(3) VCLT, in view of its essentially unilateral character. Nor could the Note be considered to form part of the context for the purpose of interpretation, as provided for under Article 31(2) VCLT, and in particular be considered as 'an instrument which was made by one or more parties in connection with the conclusion of the treaty' within the meaning of sub-paragraph (b) of

[56] ibid, para 248.
[57] ibid, paras 260–261.
[58] *HICEE v Slovakia* (n 1) paras 122–147.
[59] The Dissenting Arbitrator, on its turn, questioned the consistency (from a policy perspective) of the Explanatory Note, as well as its reliability. *HICEE B.V. v The Slovak Republic*, UNCITRAL, PCA Case No 2009–11, Dissenting Opinion of Judge Charles N Brower of 23 May 2011, paras 28–33.
[60] ibid, para 116.
[61] ibid, paras 127 and 129.

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Article 31(2) VCLT, as it was 'inherently unlikely that any such internal document would ever, on its own, qualify for attention under Article 31(2)(b) in the absence of additional circumstances involving its communication by some reasonably formal means to the other contracting party (or parties)'.[62] On the other hand, the majority found it also self-evident that the Note did not form part of the preparatory work (*travaux préparatoires*), since it post-dated the completion of the negotiations, and served to explain what had been agreed between the negotiating States.[63] This notwithstanding, the majority did not consider itself unable to take the Note into account. The arbitrators were adamant in pointing out that the category of admissible supplementary means of interpretation provided for in Article 32 VCLT was not to be considered as closed,[64] and therefore refused to endorse a rigid approach to the matter, recalling

> the repeated reminders woven into the International Law Commission's Commentaries on its Draft Articles that the provisions on treaty interpretation must not be misread as introducing either a rigid, or still less a hierarchical set of rules. As the Commission says, there is in truth only one all-encompassing rule, whose elements should be combined in a logical and coherent way.[65]

The Tribunal's majority was therefore 'in no doubt that the Dutch Explanatory Notes, given their terms and content, taken together with the viewpoint adopted in these proceedings by Slovakia, constitute valid supplementary material which the Tribunal may, and in the circumstances must, take into account in dealing with the question before it.'[66]

Arguably, the *HICEE* award was not entirely without precedent. The Tribunal in *Millicom v Senegal* (2010) seems to have treated the Explanatory Note submitted to the Dutch Parliament concerning the 1979 Netherlands–Senegal BIT in a similar way, after expressly referring to the possibility under Article 32 VCLT of having recourse to supplementary means of interpretation when a textual interpretation leads to a result that is manifestly absurd or unreasonable.[67] Unlike the Claimants in that case, which considered the note as forming part of the treaty's *travaux préparatoires*, the Tribunal did not proceed to characterize the note in any particular way but merely concluded that '[n]othing prohibits' it from relying on it to confirm how the text was 'actually understood' by one of the treaty parties.[68] Though not crucial to determining the meaning of the contested treaty provision as in the *HICEE* case, the Note nonetheless proved useful since it confirmed the *Millicom* Tribunal's conclusions as to the scope of protected investors under

[62] ibid, para 134. [63] ibid, fn 184 to para 135. [64] ibid, paras 117, 121.
[65] ibid, para 135. [66] ibid, para 136.
[67] *Millicom International Operations B.V. and Sentel GSM SA v The Republic of Senegal*, ICSID Case No ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal (16 July 2010) para 70(a). [68] ibid, para 72.

the treaty, which was based on the contextual interpretation of the relevant treaty provisions.[69]

IV. THE ACTUAL USE OF DOMESTIC EXPLANATORY MATERIALS IN THE INTERPRETATIVE PROCESS

To complete the analysis of the practice, it is worth examining more closely how legislative explanatory memoranda have actually been used in those cases where the adjudicatory bodies otherwise remained silent, or else sought to avoid explaining the possible legal basis for the use of such documents in the interpretative process. Considering the uses that such materials have been put in some cases, and the reasons why their use has been rejected in others, it is not difficult to arrive at a conclusion concerning the proper function of such documents in treaty interpretation.

A. Confirmatory Role

In the large majority of cases, legislative documents were resorted to for the purpose of confirming the ordinary meaning that the adjudicatory body had already determined pursuant to the application of the general rule of interpretation as laid down in Article 31 VCLT, or simply with a view to seeking support for the meaning ascertained by different means.

In the interpretative practice of the ICJ, domestic explanatory memoranda have so far played essentially a confirmatory role. In the *Malaysia/Indonesia (Ligitan and Sipadan)* case (2002), the Court considered the information provided in the explanatory memorandum as one of the elements pointing to the conclusion that a 1891 Convention between the Netherlands and Great Britain did not have the effect of establishing an allocation line determining sovereignty over the two islands that were at dispute in that case. As 'the only document relating to the Convention to have been published during the period when the latter was concluded', the memorandum was found to explain some of the approaches that had been taken in the Convention and thus provided 'useful information on a certain number of points'.[70] The Court's reasoning suggests that the document was being treated as if it were a part of the circumstances of the treaty's conclusion, were it not for the fact that the Court did not consider it as an element of the supplementary means of interpretation, but a part of the process of determining the ordinary meaning of the Convention's text.[71] In *Oil Platforms v Iran* (2003), where the issue was one of determining the scope of Article 1 of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of

[69] ibid, para 72(d).
[70] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (n 16) para 46.
[71] ibid, paras 46–52; cf 53–58.

America and Iran, the Court considered documents relating to the approval of that treaty in the US Senate, as well as various documents relating to the ratification of similar treaties of friendship and commerce, which the US had concluded around the same time with China, Ethiopia, and the Sultanate of Oman and Muscat and which contained clauses of the type appearing in the treaty with Iran.[72] Though silent as to legal relevance of those documents, the Court clearly relied on them with a view to providing further support to the conclusions that it had already arrived at by means of a textual and contextual interpretation of that treaty provision.[73]

The Tribunal in the *Beagle Channel* arbitration between Argentina and Chile (1977), in contrast, was much more explicit about the purpose of using various domestic materials in the process of interpreting an 1881 boundary treaty between the two States. While stressing that its substantive conclusions were not based upon those documents, the Tribunal explained that the latter provided 'confirmation or corroboration, directly or indirectly' to the interpretation of the boundary treaty reached by the Tribunal, which it took into account 'without attempting any logical classification' and 'confining itself to those that appear to be specially significant or noteworthy'.[74] Among those materials was a speech given by the Argentina's Foreign Minister and principal negotiator in the National Chamber of Deputies after the signature, which was partly made in order to explain the treaty; the commentaries (*apuntes*) prepared by the same minister with regard to the principal aspects of the treaty, which were sent to Argentina's diplomatic posts abroad after the treaty's ratification; and a speech made by the Chilean Foreign Minister and chief negotiator for Chile following the signature of the Treaty in the Chamber of Deputies.[75] Much harder to explain are the references by the arbitral tribunal in the *Heathrow Airport User Charges* arbitration (1992) to an explanatory note, originally prepared for internal use by the British Government, when interpreting Article 10 of the 1977 UK–US Air Services Agreement.[76] The tribunal explained that the note was one of the facts that 'colored' its approach to the interpretative issue,[77] but did not invoke the note to 'confirm' one particular reading over another. Overall, however, the information in the note did support the Tribunal's construction of the treaty's terms, and thus performed a confirmatory role.[78]

As to the many investment arbitral tribunals that took legislative documents into account, they often did so to confirm conclusions arrived at by other means. In *Mondev v USA* (2002), the Tribunal intentionally refused to take a position on the legal status of several domestic materials that the Respondent invoked in support of its interpretation, but nonetheless referred to them in support of its

[72] *Oil Platforms case* (n 30) para 29.
[73] ibid, paras 27–28.
[74] *Beagle Channel* arbitration (n 33) para 112.
[75] ibid, paras 113–116, 117, 130.
[76] *Heathrow Airport* arbitration (n 33) 72, para 2.1.6.
[77] ibid, 75, para 3.2.
[78] See in particular ibid, 73, para 2.2.5 and 74–76, paras 3.2–3.8.

conclusion that, in adopting provisions for fair and equitable treatment and full protection and security in Article 1105 of the North American Free Trade Agreement (NAFTA), the intention of the contracting parties was to incorporate principles of customary international law, and not to impose an independent treaty standard.[79] This conclusion found corroboration in the Canadian Statement on Implementation of NAFTA, as well as the transmittal statements submitted to the US Senate during the ratification of several US BITs containing language similar to that of NAFTA. In *Mondev*, of course, the proper construction of Article 1105 NAFTA was contested between the litigants. In several investment arbitrations, however, reference was made to domestic explanatory memoranda in support of certain propositions that were relevant to the application of specific treaty provisions, but whose interpretation was not otherwise contested. Such examples can be found in *Ethyl v Canada* (1998), where Canada's Statement on the Implementation of NAFTA was cited by the Tribunal in support of the undisputed proposition that the waiting period imposed by Article 1120 NAFTA was designed to encourage consultations or negotiations prior to resorting to arbitration proceedings;[80] in *Feldman v Mexico* (2002), where the Tribunal referred to the US Statement of Administrative Action concerning NAFTA as a basis for the equally undisputed proposition that the concept of national treatment as embodied in Article 1102 NAFTA was designed to prevent discrimination on the basis of nationality or by reason of nationality;[81] or in *Merrill & Ring Forestry v Canada* (2010), where reference was made to Canada's Statement of Implementation as attesting to Canada's understanding that Article 1105 NAFTA prescribed a minimum standard of treatment under customary law—a proposition which was not contested as such in the circumstances of that case.[82]

B. Determinative of Meaning in the Event of Ambiguity

In a select few cases, domestic explanatory memoranda appear to have played a more direct role in the determination of the actual meaning of treaty provisions. An interesting example—though also an unusual one—is the award in *CMS v Argentina* (2005), where an ICSID Tribunal examined explanatory materials submitted to national legislatures of both contracting parties to the treaty when interpreting various elements of the non-precluded measures clause of the 1991 Argentina–US BIT. The Tribunal looked at the letter of submission of the treaty to Congress in Argentina and at a Congressional Committee Report for the purpose of determining the exact scope of the clause,[83] whereas it relied upon the materials relating to the approval of several comparable investment treaties by the US Congress (though, somewhat

[79] *Mondev v USA* (n 34) paras 111–112.
[80] *Ethyl v Canada* (n 33) para 84.
[81] *Feldman v Mexico* (n 33) para 181.
[82] *Merrill & Ring v Canada* (n 33) para 191.
[83] *CMS v Argentina* (n 33) paras 359–362.

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surprisingly, not on the materials relating to the BIT under interpretation) for the purpose of determining whether the clause was self-judging.[84] On both interpretative issues, the materials proved not to have much explanatory value: none of them directly supported the interpretation eventually adopted by the Tribunal, even though the US congressional materials at least did not clearly support the conclusion professed by the Respondent.[85] What is surprising about the Tribunal's approach, however, is that it seemingly resorted to those documents, not to confirm, but to determine the ordinary meaning of the treaty's provisions, and that it has seemingly done so on the basis of the general rule of interpretation—since it never identified formal reasons justifying resort to supplementary means of interpretation. This, then, is different from the investment award in *Generation Ukraine v Ukraine* (2003), where a Letter of Submittal from the US Department of State, which provided an article-by-article commentary to the applicable 1994 US–Ukraine BIT, was resorted to only after the textual construction of that treaty's denial-of-benefits clause had been found to be ambiguous.[86] In contrast to the wording of the actual clause in the BIT, the Letter was held to be 'crystal clear' and 'unequivocally' supporting the Claimant's position in the case, after which the Tribunal eventually concluded that also the 'textual analysis' of the clause 'seems to favour' the meaning of the provision professed by the Letter.[87]

C. *Reasons for Not Considering Legislative Documents*

Finally, it is worth taking a look at a handful cases where adjudicatory bodies decided to ignore information contained in domestic explanatory memoranda or similar documents, without otherwise determining whether resort to such information would have been admissible as part of the general rule on treaty interpretation, or as a supplementary means of interpretation.

One of the most obvious reason for courts or tribunals not to take account of legislative memoranda and other internal documents is that these contained information that was either not materially relevant, or simply of no additional practical value to the interpretive issue. An example of the latter category is the *Methanex v USA* (2002) award. After examining Canada's Statement of Implementation on which the Claimant relied for the purpose of construing the phrase 'relating to' in Article 1101(1) NAFTA, the Tribunal held that '[o]verall, the status of this succinct, unreasoned commentary by another NAFTA Party carries the argument little further; and it provides no sufficient reason to change the interpretation [based upon the ordinary meaning of the disputed phrase]'.[88] The Tribunal expressed no objections as to the admissibility of that document; it simply found the latter to be inconclusive on the disputed

[84] ibid, paras 366–369.
[85] ibid, paras 363, 369.
[86] *Generation Ukraine v Ukraine* (n 33) para 15.2.
[87] ibid, para 15.6.
[88] *Methanex v USA* (n 33) para 146.

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point: the English version of Statement was found to support the Claimant's interpretation, but the French text was 'at best, neutral'.[89]

Another reason for courts and tribunals to express reservations as to the use of specific domestic explanatory materials was that such materials provided support for interpretations that were clearly not in accordance with the ordinary meaning of contested treaty provisions. One such example is the award in *Gruslin v Malaysia* (2000). The question in that case was whether a portfolio investment such as that of the Claimant was capable of falling under the 1979 Malaysia–Belgium and Luxembourg BIT, which applied solely to investments that were made in an 'approved project'. In interpreting that requirement, the Tribunal was sceptical about drawing inferences from a Memorandum from Malaysia's Ministry of Trade and Industry to the Attorney-General's Chambers that supposedly explained the underlying treaty's policy and which, in the Respondent's view, suggested that the 'approved project' requirement was intended to limit protection to foreign investments to those contributing to Malaysia's manufacturing and industrial capacity.[90] In the view of the Tribunal, it was not appropriate to allow materials extrinsic to the treaty to 'colour' the meaning of a provision which 'by its terms' restricts the treaty's application to investments made in approved projects, without otherwise imposing additional requirements as to the nature of those projects.[91] The Tribunal concluded that if the meaning of the phrase 'is found to be clear', it 'will not reduce its reach by reference to general considerations or assumptions derived from extrinsic sources'.[92]

In a similar way, the Tribunal in *Berschader v Russia* (2006) refused to give effect to an explanatory statement that the Belgian Minister of Foreign Affairs had made before the Belgian Parliament during the ratification of the 1989 USSR–Belgium and Luxembourg BIT to the effect that arbitration under that treaty was accepted in all areas covered by the expropriation clause. Such an inference did not follow from the text of the treaty, which provided for arbitration solely in relation to disputes concerning the amount of compensation. Considering that fact, the Tribunal was of the opinion that the language of the arbitration clause appeared to be 'quite clear' and 'could not possibly lend itself to the interpretation suggested in the explanatory statement'.[93] For similar reasons, the Tribunal in *Globex v Ukraine* (2010) saw no need to rely upon the US Letter of Transmittal to determine whether or not claims arising from purchase and sale contracts fell under the definition of 'investment' in the US–Ukraine BIT.[94] On the face of it, the relevant treaty provision stipulated that claims to money of the type involved in purchase and sale contracts could only fall within the scope of the BIT as a whole if they were 'associated with an investment'. Against this backdrop, the

[89] ibid. [90] *Philippe Gruslin v Malaysia* (n 36) para 17.1. [91] ibid, para 21.4.
[92] ibid, para 21.6. [93] *Berschader v Russia* (n 35) para 158.
[94] *Globex v Ukraine* (n 34) paras 48–49.

Tribunal expressed doubts as to whether the Letter represented 'a necessary item of interpretative material', and without going into the question of that Letter's proper categorization, it did not find that 'it needs to go beyond the text itself of Article I(1)(a) of the BIT'.[95]

In sum, in the interpretative practice of international judicial and arbitral bodies domestic explanatory memoranda have *de facto* performed the function of supplementary means of interpretation: in the large majority of cases, they have been resorted to with a view to confirming or supporting an interpretation based on the ordinary meaning of a treaty provision; only in exceptional circumstances where the ordinary meaning turned out to be ambiguous or obscure have they been determinative of the meaning of the treaty terms; and in no case have these materials been capable of overriding the meaning of treaty provisions that were clear on their face.

V. THE CONTEXT OF INVOCATION— DECISIVE FOR THE ADMISSIBILITY OF EXPLANATORY MEMORANDA IN THE INTERPRETATIVE PROCESS?

Examining the formal justifications that adjudicatory bodies advanced to validate their use of domestic explanatory memoranda in construing treaty terms, or seeking to infer such justifications from the functions that such documents have performed in practice, is admittedly but one way of approaching the question of whether reliance on such documents is actually permissible in the interpretative process. Another way of approaching the question is to examine the context in which the documents have actually been invoked. It can be asked whether the relatively few misgivings that adjudicatory bodies have had about using domestic explanatory memoranda may simply be due to the fact that the disputing parties consented to the use of such documents in the interpretative process.

Such a proposition would certainly appear to have some merit when one looks at various inter-State proceedings where disagreements about the proper construction of treaty terms have arisen between the contracting parties. In practically all such cases, the parties' attitude towards the internal documents in question was such that one could possibly speak of consent to their use in the interpretative process: (1) either express consent, to the extent that the parties explicitly agreed to the use of particular materials; or (2) implied consent, to the extent that this could be construed from the failure of a party to object to the other party's reliance on such materials, from one party's reliance on the opposing party's internal document, or perhaps merely from concomitant practice of both parties. An example falling into the former category is the award in the *Heathrow Airport Charges* arbitration. The document in question was an explanatory note, originally intended for restricted circulation, prepared by a British Government lawyer shortly after the treaty had been drawn up.

[95] ibid, para 50.

Although the note was disclosed by the UK Government only in the course of discovery of documents for the purposes of the arbitration, the Tribunal had no hesitation in relying on it, apparently because the note was subsequently referred to, and made use of, by the US Government in its own submissions to the Tribunal, and neither the UK, nor the US disputed the correctness of the views it expressed.[96] Another example falling in the same category is possibly the ICJ's judgment in the *Malaysia/Indonesia (Ligitan and Sipadan)* case. Malaysia initially contested Indonesia's proposition that a parliamentary explanatory note and map annexed thereto, originating from the Netherlands, could be used in the interpretation of a colonial treaty pursuant to Article 31 (2) or Article 31(3) VCLT.[97] Eventually, however, Malaysia consented to the use of such materials, admitting in the course of the oral pleadings that these '[n] evertheless […] furnish certain elements of appraisal which the Court will wish to evaluate'.[98]

In other inter-State cases, consent to the use of domestic explanatory memoranda could be construed from the conduct of the parties—that is, from the extent to which one treaty party relied on the opposing party's internal documents, suggesting that such reliance possibly evinced a tacit acceptance of such documents forming admissible evidence, or from the extent to which both treaty parties engaged in such practice. In the *Oil Platforms* case, the explanatory documents originated from only one of the litigating States (the US), but the other litigating State (Iran) equally relied on the same documents in advancing its own interpretation of the treaty terms. The concurrent reliance on the same documents evinced some form of agreement that the documents in question could be admitted into the interpretative process, which is probably why the ICJ has had few misgivings about taking them into account. In the *Fisheries Jurisdiction* and *Jan Mayen* cases, in turn, where it was only one of the State contracting parties which was relying on internal documents originating from the other treaty party, consent could be construed from the absence of objections. Indeed, in the latter of the two cases, not only did Norway not object to Denmark's reliance on the particular Norwegian parliamentary memorandum, but itself relied on other Norwegian parliamentary documents in its pleadings before the ICJ (even if not for treaty interpretation issues).[99] In the former case, consent was admittedly in a

[96] *Heathrow Airport* arbitration (n 33) 72, para 2.1.6

[97] See *Counter-Memorial of Indonesia* (2 August 2000) available at <http://www.icj-cij.org/files/case-related/102/8562.pdf> paras 5.31–5.36, and 5.45–5.50; and *Memorial of Malaysia* (2 November 1999) available at <http://www.icj-cij.org/files/case-related/102/8562.pdf> paras 9.21–9.23.

[98] See *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan*, Oral Pleadings (7 June 2002) Verbatim Record, CR 2002/31, para 80; translation by the Court.

[99] See *Reply of the Government of the Kingdom of Denmark* (31 January 1991) available at <http://www.icj-cij.org/files/case-related/78/6621.pdf> para 342; and *Rejoinder of the Government of the Kingdom of Norway* (27 September 1991) available at <http://www.icj-cij.org/files/case-related/78/6619.pdf> paras 195–196, and compare with *Case concerning Maritime*

more attenuated form, given Iceland's refusal to participate in court proceedings. Of course, one may wonder whether Iceland's refusal to object to the UK's reliance on Icelandic parliamentary documents could really be opposable to it—though, in the circumstances of the case, there may have also been other reasons justifying the ICJ's reliance on such documents—a matter to which I will revert in Section VII. Finally, there have also been inter-State cases where consent to the use of domestic explanatory notes could be inferred from the parties' concomitant practice. Namely, in the *Guinea/Guinea-Bissau* and *Beagle Channel* arbitrations, all litigants equally relied on parliamentary memoranda and other domestic explanatory documents in the construction of contested treaty terms, which possibly explains why the respective arbitral tribunals may not have had much reason for refusing to admit such documents in the interpretative process. Though it is difficult to infer from the *Guinea/Guinea-Bissau* award whether either of the parties in that case actually relied on the opposing party's documents, it seems that in the *Beagle Channel* case both parties relied solely on documents originating from their own domestic sources.[100] Thus, even in absence of any cross-reliance, invoking domestic materials can apparently be acceptable where both parties rely on the same type of materials.

In contrast to inter-State cases, a more intricate picture emerges when one examines the circumstances in which domestic explanatory materials have been invoked in the context of investor–State arbitrations. There are certainly cases where the fact that one of the litigants contested a particular document has led to its exclusion from the interpretative process. An example is probably *Pope & Talbot v Canada* (2000), where the tribunal disposed of the interpretative issue without having to rely on Canada's Statement on Implementation relating to the NAFTA (which the investor otherwise invoked to contest the position that Canada had taken in relation to the interpretation of Article 1101 NAFTA), insofar as Canada challenged the admissibility of that document on the ground of its not being 'legally binding in domestic law', or having 'legal effect in international law'.[101] In most of the cases, however, consent of the litigating parties has played a less decisive role in relation to whether or not a particular document could be admitted in the interpretative process. Thus, it most frequently happens that the investor relies on explanatory memoranda originating from its State of nationality (the latter being the State party to the treaty that is not directly involved in the specific dispute). In most such cases, Respondent States seem not to have resisted the investors' reliance on such memoranda.[102] Yet, in cases where

Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway), Oral Pleadings (27 January 1993) Verbatim Record, CR 93/11, at 12.

[100] See *Beagle Channel* arbitration (n 33) paras 113 and 130.

[101] *Pope & Talbot v Canada* (n 35) para 29.

[102] See eg *Feldman v Mexico* (n 33), *Aguas del Tunari v Bolivia* (n 46), *Methanex v USA* (n 33), *Berschader v Russia* (n 35), or *Kiliç v Turkmenistan* (n 49).

respondent States did voice objections to the use of particular domestic documents—such as in *Generation Ukraine v Ukraine*, *Millicom v Senegal*, or *Sehil v Turkmenistan*—the arbitral tribunals nonetheless took the memoranda into account.[103] The consent of the litigants proved no more determinative in cases concerning the converse situations—that is, where the respondent State is the one seeking to rely on explanatory statements originating from the investor's State of nationality, instead of the investor. Here, too, the tribunals' decision as to whether or not reliance on a particular domestic document was warranted did not seem to depend on whether the litigants were in agreement as to the use of the particular document in the interpretative process. In *Globex v Ukraine*, the Tribunal refused to take into account the US Letter of Transmittal relied upon by Ukraine, in spite of the investor expressing no objections to that Letter (and indeed, even itself relying upon the same document), whereas in *HICEE v Slovakia*, the Tribunal did rely on information provided in an explanatory memorandum originating from the Netherlands, despite the investor's strong objections to the use of that document for the purposes of interpretation.

What the awards in *Generation Ukraine*, *Millicom, Sehil* and *HICEE* would seem to suggest, however, is that investment tribunals will have fewer misgivings about using documents of domestic origin in cases where such documents originate from the State party to the treaty and which is not directly involved in the specific dispute. Indeed, conscious of the essentially unilateral character of the domestic explanatory document in question, the Tribunal in *HICEE v Slovakia* attributed weight to the specific context in which the document was invoked. Specifically, it could not discount the fact that, by referring to the Explanatory Note prepared for the purpose of the treaty approval process in the Netherlands, Slovakia was not setting down its own interpretation of the BIT, but recalling the intentions of its treaty partner, as well as the fact that the Note had not been invoked by the treaty party that prepared it, but by the other contracting party to the investment treaty.[104]

Then again, the origins of the materials may not always be decisive, as demonstrated by several other cases where the explanatory documents relied upon had originated from the Respondent State in the proceedings. What mattered in those cases was which of the litigants was placing reliance on such documents. Thus, in *Gruslin v Malaysia*, the misgivings that the Tribunal expressed about the use of internal explanatory documents appeared to be because the document in question was an internal memorandum prepared by Malaysia's Ministry of Trade and Industry, and that the party relying on the document was Malaysia itself. In *Merrill & Ring v Canada*, in

[103] Conversely, in those cases where tribunals refused to give weight to such materials, this was either because the explanatory memorandum was not materially relevant (*Methanex v US* (n 33)), or else contradicted the tribunals' own construction of treaty terms (*Berschader v Russia* (n 35), *Kiliç v Turkmenistan* (n 49)).

[104] *HICEE v Slovakia* (n 1) para 127.

contrast, the Tribunal appears to have had no issues with the fact that the document in question originated from the same State that was also embroiled in the actual dispute, since the investor, too, was the one relying on various explanatory memoranda originating from the Respondent.[105] The same appeared to have been the case in *Ethyl v Canada*, where the way in which Canada's Statement on Implementation of NAFTA was relied upon by the Tribunal suggests that the party invoking it was the investor. In other cases, what seemingly mattered was that the documents relied upon originated from both the investor's home State and the State respondent in the proceedings. In *Mondev v US*, the Tribunal thus relied upon the Canadian Statement on Implementation of NAFTA, as well as the transmittal statements submitted to the US Senate during the ratification of several US investment treaties containing language similar to that of NAFTA, whereas in *CMS v Argentina*, the Tribunal was prepared to consider the letter of submission of the treaty to Congress in Argentina, as well as materials relating to the approval by the US Congress of several investment treaties with similar provisions as the treaty under interpretation.

In sum, one can certainly find support for the proposition that the fairly widespread acceptance on the part of adjudicatory bodies of domestic explanatory materials has often hinged on the litigating parties' attitude towards the use of such materials. This has certainly been the case in most inter-State proceedings, where the parties appeared to have consented, in one way or another, to the use of internal explanatory memoranda in the interpretative process.[106] In investor–State arbitration, in contrast, consent of the litigating parties appeared to have been less decisive, but this may simply be because the investor, though one of the litigants involved in the proceedings, and thus one of the parties involved in the interpretative disagreement in such cases, is not a party to the treaty that is the object of interpretation. This particular aspect of investor–State disputes possibly explains why, on balance, investment tribunals may have had fewer issues with accepting materials originating from the investor's home State, even in the face of objections on the part of the respondent State: the explanatory document did not originate from the investor itself, and the investor had no involvement in its preparation, thus retaining an objective position vis-à-vis the material in question. In the end, however, it is precisely because consent is not always decisive that it is important to identify a formal legal basis on which explanatory documents can be admitted in the interpretative process.

[105] See *Merrill & Ring v Canada* (n 33) paras 63, 74 and 168.

[106] The approach adopted by international adjudicatory bodies in such cases mirrors that of the ICJ which expressed a propensity not to question the probative value of evidence originating from domestic sources where such evidence contained agreed or uncontested facts. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para 227.

VI. ADVANTAGES OF USING EXPLANATORY MEMORANDA AS AN AID TO TREATY INTERPRETATION

There are several specific advantages of using domestic explanatory materials in the treaty interpretation process. Perhaps their most important feature lies in their *contemporaneity* with the treaty text. It is worth recalling that, according to the ILC, the reason why preparatory works did not have the same authentic character as an element of interpretation was that, unlike the text and the other elements of interpretation listed in Article 31 VCLT, such works did not relate to 'the agreement between the parties *at the time when or after it received authentic expression in the text*'.[107] This latter aspect is precisely where domestic legislative and other materials connected with the ratification process—to the extent that they do normally post-date the treaty's negotiations—differ from preparatory works. Whereas preparatory works, by definition, do not yet indicate anything final (and due to their frequent incompleteness, have the potential to be misleading[108]), domestic ratification documents potentially provide extrinsic evidence as to what was *finally* agreed between the contracting parties. For this reason, some commentators have considered them more reliable than preparatory works.[109] And indeed, the same considerations seem to have been the reason for the favourable treatment of such materials by some international adjudicatory bodies.[110]

The contemporaneous nature of such documents also has an additional advantage. Legislative documents produced in the context of a domestic ratification procedure have normally not been prepared with a particular dispute in mind concerning the interpretation of that treaty. In that regard, they are more reliable than, say, affidavits by State officials containing their recollections of the negotiation process, which may have been sworn later for the purposes of litigation.[111] Of course, one cannot discount the possibility that some strategic thinking has been involved in the drafting of such explanatory memoranda and that care may have been taken by the Government officials involved in their preparation to ensure that a particular view or opinion

[107] ILC Draft Articles and Commentary (n 14) 220, para 10; original emphasis.

[108] Some commentators have even gone so far as to claim that ambiguity frequently stems from preparatory works that are equally ambiguous. See I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 142; and B Conforti, *Diritto internazionale* (7th edn, Editoriale Scientifica 2006) 95.

[109] See eg Linderfalk (n 19) 249, considering it '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'.

[110] See eg *Generation Ukraine v Ukraine* (n 33) para 15.6 (referring to the fact that a US Submission Letter reflected 'the official and contemporaneous U.S. interpretation' of the disputed clause); or *Heathrow Airport arbitration* (n 33) 75, para 3.2(b) (mentioning specifically that the document in question was 'the almost contemporary note').

[111] For the same reason, the ICJ for example attaches greater value to affidavits sworn at the time when the relevant facts occurred than affidavits sworn later for purposes of litigation. See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 659 para 244.

expressed in such memoranda will not harm a State's own interests in the event that a dispute emerges in the future.[112] Strategic thinking of this kind may take place when there is ambiguity in certain treaty provisions following the drafting process. The fact remains, however, that it may not always be possible to anticipate which particular interpretation of a treaty provision might eventually harm the State in a future dispute. More often than not, the views expressed in such explanatory memoranda will be sufficiently detached from later events so as to be treated as a reliable and objective representation of what the intention of the treaty drafters was at the time immediately after the treaty's signature.

A further advantage of legislative memoranda is that they constitute instances of States' formal representations. In several States, the production of explanatory memoranda is formally regulated, either by means of statute, long-established constitutional practices, or through official policies.[113] Pursuant to these regulations, the documents are prepared by designated Government officials, are submitted to the legislature pursuant to a formal procedure, are duly recorded in official records, and are perhaps even the subject of extensive discussions in the legislative body. Little doubt will therefore exist as to their origins and consequently there will be little difficulty in attributing them to the State in question for the purpose of

[112] cf Klabbers (n 10) 279, warning that there is always the risk that unilateral statements made at the time of the treaty's ratification process could be self-serving.

[113] In the UK, a consistent practice has developed since 1997 whereby an Explanatory Memorandum explaining the provisions of the treaty is laid before Parliament for every treaty laid under the so-called Ponsonby Rule. With the Constitutional Reform and Governance Act of 2010, the requirement to provide such memoranda obtained a statutory basis. See J Barrett 'The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reforms' (2011) 60 ICLQ 225, 231–2. In Canada, a comprehensive 'Policy on Tabling of Treaties in Parliament' has been in force since 2008, which requires the preparation of an Explanatory Memorandum that is to accompany each treaty that is tabled in the House of Commons. The policy is available at <http://www.treaty-accord.gc.ca/procedures.aspx?lang=eng>. See further TL McDorman, 'The Tabling of International Treaties in the Parliament of Canada: The First Four Years' (2012) 35 DalhousieLJ 357. In the US, it is established practice for the Secretary of State to prepare a Letter of Submittal containing a detailed description and analysis of the treaty, which is then submitted to the Senate by the President. See further US Library of Congress, 'Treaties and other International Agreements: The Role of the United States Senate', <http://www.au.af.mil/au/awc/awcgate/congress/treaties_senate_role.pdf> at 7 and 118. In the Netherlands, the preparation of Explanatory Memoranda is part of established constitutional practice, which is partly regulated in internal policy guidelines prepared by the Ministry of Foreign Affairs. See HHM Sondaal, *De Nederlandse Verdragspraktijk* (TMC Asser 1986) 73–5. In Australia, a specific committee procedure has been in force since 1996, which requires that each treaty is tabled with a 'national interest analysis', a document setting out the proposed treaty action's advantages, legal impacts and financial costs. See J Harrington, 'Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament' (2005) 50 McGillLJ 465, 493–4. The practice of preparing explanatory memoranda explaining the provisions of the treaty being considered for ratification is also present in South Africa (see J Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making' (2006) 55 ICLQ 121, 146–7), and many European States (for examples, see Council of Europe, Committee of Legal Advisers on Public International Law, 'Expression of Consent by States to be Bound by a Treaty: Analytical Report and Country Reports', Strasbourg (23 January 2001) CAHDI (2000) 13 FINAL, 87, 112, 142).

treating them as representations of that State's official views as to the meaning of treaty provisions.[114] Indeed, the official nature of such documents was expressly mentioned in cases such as *Generation Ukraine* and *HICEE* as one of the reasons for giving them weight in the interpretative process.[115] It is also significant that in most States the organs in charge of the preparation of such materials are not the legislative bodies but the ministries in charge of the issue, often under the purview of the ministries of foreign affairs and their legal offices.[116] In practice, the governmental officials involved in the treaty negotiations will frequently also be involved in the preparation of explanatory memoranda. In such cases, it is certainly possible to consider explanatory memoranda as actually reflecting the views of one of the treaty drafters.

Finally, an important advantage of domestic explanatory memoranda is their accessibility. Legislative records—both present and historical—are often publicly available and in the digital age, access to them is even made possible through the internet. Indeed, some States even maintain dedicated websites with links to explanatory materials relating to treaties.[117] Given the ease of access, it is easy to understand why explanatory memoranda are increasingly resorted to for treaty interpretation purposes. Especially in the context of investment disputes, resort to such documents is attractive, given that the preparatory works of investment treaties, if existent,[118] may otherwise be difficult to ascertain by foreign investors who were not involved in the treaty negotiations and may thus be dependent solely on materials that are publicly available.

[114] cf *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 para 65 ('the Court must take account of the manner in which the statements [of high-ranking official political figures] were made public; evidently, it cannot treat them as having the same value irrespective of whether the text is to be found in an official national or international publication, or in a book or newspaper.')

[115] See *Generation Ukraine v Ukraine* (n 33) para 15.6; and *HICEE v Slovakia* (n 1) para 129.

[116] In Canada, the primary responsibility for preparing the Explanatory Memorandum is with the Treaty Section of Department of Foreign Affairs and International Trade; but the latter cooperates closely with other lead departments or divisions. See 'Policy on Tabling of Treaties in Parliament' (n 113) Annex B. In the UK, the memoranda are drafted by the government department which has the main policy interest in the particular treaty, but are cleared through the relevant legal adviser at the FCO. See Harrington (Scrutiny and Approval) (n 113) 129–130.

[117] This is the case for example in Australia, where there is a special website dedicated to Australian Treaty National Interest Analyses, available at <http://www.austlii.edu.au/au/other/dfat/nia/>. The UK used to have a similar site (see <http://webarchive.nationalarchives.gov.uk/20130104161243/http://www.fco.gov.uk/en/publications-and-documents/treaty-command-papers-ems/explanatory-memoranda/>); but the documents are now accessible through the general website containing official governmental publications, available at <https://www.gov.uk/government/publications>. The latter is also the case in the Netherlands, where explanatory memoranda can be accessed through the general website on government-related information, available at <https://zoek.officielebekendmakingen.nl/>.

[118] In the case of many BITs, preparatory works are generally scarce and not well-documented, as clauses are often simply copied from a model treaty text or based on earlier practice. See on this TW Wälde, 'Interpreting Investment Treaties: Experiences and Examples' in C Binder *et al.* (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 724, 777–8.

VII. POSSIBLE OBJECTIONS TO THE USE OF EXPLANATORY STATEMENTS IN THE INTERPRETATIVE PROCESS

This is not to say that the use of domestic explanatory statements in the treaty interpretation process is without problems. The most difficult issue is probably the fact that they originate with only one of the treaty parties and thus carry the risk of not necessarily evincing the *common* understanding of the parties as to the meaning of a particular term, but reflect the understanding of merely *one* of them.[119] There are certainly circumstances where—even in the application of a treaty—the intention of only one of the treaty parties becomes singularly relevant—namely, in the interpretation of treaty reservations,[120] or other types of unilateral acts undertaken within the framework of the treaty.[121] Yet, this is because such instruments, although relating to a treaty, are essentially unilateral acts. The treaty, in contrast, is an 'international agreement' (Article 2(a) VCLT) and thus presupposes that parties have actually agreed on something—in other words, a treaty entails a *meeting of the minds*.[122] What matters, therefore, is the *common* intention of all treaty parties, and not the individual intention of one or more respective parties that is not shared by all the others. In fact, as appositely noted by Judge Schwebel, '[t]o speak of ''the'' intention of ''the parties'' as meaning the diverse intentions of each party would be oxymoronic'.[123]

The possibility of domestic explanatory memoranda providing evidence as to parties' intentions that is partial and not shared by other treaty parties cannot easily be ruled out. Unlike preparatory works, which are the result of States'

[119] Thus, Gardiner (n 3) 106, warns that '[t]he admission of material generated by one of party needs to be carefully approached in the light of the principle that preparatory work should illuminate a common understanding of the agreement, not unilateral hopes and inclinations'.

[120] In interpreting such reservations, international courts have readily considered domestic explanatory and other materials. See eg *Aegean Sea Continental Shelf (Greece v Turkey)* (Jurisdiction) [1978] ICJ Rep 3, paras 63–68; or *Belilos v Switzerland*, ECHR, Case No 20-1986/118/167, Judgment of 29 April 1988, para 48.

[121] Reference can be made here to States' declarations pursuant to art 36(2) of the ICJ Statute. For the purpose of ascertaining the scope of, and eventually reservations to, such declarations, the ICJ has readily considered legislative and other domestic documents. See eg *Anglo-Iranian Oil Co. case (United Kingdom v Iran)* (Preliminary Objection) [1952] ICJ Rep 93, 106–107; or *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction) [1998] ICJ Rep 432, paras 60ff.

[122] On this, see *International Status of South West Africa* (Advisory Opinion)(Separate Opinion of Judge Read) [1950] ICJ Rep 164, at 170; or *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)* (Judgment) [1992] ICJ Rep 351, para 378.

[123] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) (Dissenting opinion of Vice-President Schwebel) [1995] ICJ Rep 27, at 27. Similarly, CG Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points' (1957) 33 BYBIL 203, at 205 notes that 'the aim of giving effect to the intentions of the parties means, and can only mean, their *joint* or *common* intentions'. This is not to deny that the existence of a common understanding among treaty drafters may not be more than a legal fiction. On this, see in particular J Stone, 'Fictional Elements in Treaty Interpretation – A Study in the International Judicial Process' (1953–1955) SydLR 344, 347–50; and DP O'Connell, *International Law* (2nd edn, Stevens 1970) 252. But that problem falls outside the scope of the present inquiry.

interactions in the context of bilateral or multilateral negotiations,[124] the information recorded in domestic materials has never been expressed *externally*, in the international arena, and has consequently not been liable to trigger a reaction by, or find corroboration from, the other treaty parties. On the contrary, legislative and other domestic explanatory materials are essentially *internal* documents, often addressed from one branch of the respective government to another, or sometimes intended solely for use within governmental departments. Thus, they are not necessarily known, and sometimes not even likely to become known by other States. In the absence of corroboration from the other treaty parties, there is the danger that these materials may not necessarily reflect the true understanding of the treaty text by all participating negotiators. As some have furthermore cautioned, domestic explanatory memoranda may actually record an understanding that is intentionally partial and potentially serving domestic political purposes. Such concerns have, for instance, been articulated by Wälde, who took the view that '[u]nilateral declarations may simply record a view of an ambiguous text by one delegation, which is not shared by the others; it may even involve an attempt by a delegation to achieve by unilateral interpretative conduct what they did not obtain by negotiation. Ratification memoranda tend to paint a particular innocuous view of the treaty in order not to wake up sleeping wolves during ratification.'[125] Hence also his advice to use such documents in the interpretative process only with great caution.

The concerns raised by Wälde are certainly valid. But while one should not ignore the domestic political dimension of the treaty approval process, the presumption that explanatory memoranda are made with an intention other than that of providing information regarding the content of the treaty is equally unwarranted. A number of arguments counsel in favour of adopting a less suspicious approach towards such documents. First, explanatory memoranda, particularly when prepared for the purposes of domestic treaty approval procedures, often need to satisfy particular demands as to their content, which means that their authors cannot always draft them as they see fit.[126] Second, in some States, the explanatory memoranda are not prepared solely for legislative purposes (and thus not merely with a view to obtaining the majority of votes necessary for obtaining domestic approval of the treaty), but also with a view to informing the wider public of the treaty's intentions,

[124] It needs to be noted that, in accordance with the views of the ILC, even the cogency of preparatory works depended on 'the extent to which they furnish proof of the *common understanding* of the parties as to the meaning attached to the terms of the treaty.' See Waldock (n 13) para 21; emphasis added.

[125] Wälde (n 118) 778.

[126] See eg Canada's 'Policy on Tabling of Treaties in Parliament' (n 113), which defines in Annex B what an Explanatory Memorandum is to explain and the points it will have to cover; or the UK, 'Treaties and MoUs (Memoranda of Understanding): Guidance on Practice and Procedures (2014)', available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/293976/Treaties_and_MoU_Guidance.pdf>, at 10, which similarly defines the content of a standard explanatory memorandum.

effects, and consequences.[127] In circumstances where it is possible for the interested public, including those with expertise in the matters regulated by the treaty, to scrutinize the contents of explanatory memoranda, it is more difficult to imagine that officials engaged in the preparation of such documents would be deliberately misrepresenting the obligations undertaken in the treaty instrument. Third, in many States, explanatory documents are formally submitted by the ministers responsible for the areas addressed by the treaty, oftentimes in conjunction with the respective ministers of foreign affairs. These documents therefore engage not only the good name of the responsible minister(s), but also their political responsibility. Indeed, the award in the *HICEE v Slovakia* case demonstrates that this particular aspect must not be neglected, as the Tribunal placed emphasis on the fact that the explanatory note was 'a formal, public document that engages the honesty and good faith of the Dutch Minister' and thus it did '… not believe that it is its place to call that into question, even implicitly'.[128] Finally, the credibility of an explanatory document may eventually depend on the quality of the information it provides. Thus in the *HICEE* case, the arbitrators emphasized that the Explanatory Note's commentary relating to the disputed treaty provision was backed by reasons—namely, that it explained that it was Slovakia's predecessor, Czechoslovakia, which insisted on specific limitations as to the scope of protected investors since it did not want to grant transfer rights to sub-subsidiaries; that the Netherlands agreed to such a request because it did not consider the restriction of great practical importance; and that the commentary even provided a solution for avoiding the exclusionary effect of the restriction, which simply entailed that a new company be incorporated directly by the investor and not by an established subsidiary.[129]

The potentially problematic one-sidedness of explanatory memoranda and other documents of that kind has received some attention in practice, especially in the decisions of investment tribunals. These tribunals responded differently to this problem. In some cases, the unilateral origin of the particular document was simply ignored as a relevant circumstance. In *Millicom v Senegal*, for example, the Tribunal held that it was not necessary 'to determine whether, as alleged by the Respondent […], no conclusive significance should be given to such documents since, although certainly linked to the adoption of the *Accord*, this was by one of the parties only', for '[n]othing prohibits the Arbitral Tribunal from relying on them in order to confirm how this text was actually understood by one of the Contracting Parties'.[130] Thus, while acknowledging that the Dutch explanatory note relied on by the investor may not evince the common intention of the treaty parties

[127] Most explicit in this respect is Canada's 'Policy on Tabling of Treaties in Parliament' (n 113), explaining in Annex B that an Explanatory Memorandum 'will ensure that Members of Parliament and the public have sufficient information to assess why Canada should enter into the treaty'.

[128] *HICEE v Slovakia* (n 1) para 129

[129] ibid, para 127.

[130] *Millicom v Senegal* (n 67) para 72.

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(ie, Senegal and the Netherlands), the *Millicom* Tribunal apparently considered the purported intention of only one of the treaty parties to be of no less relevance to the interpretation of the treaty. Similarly dismissive of the problem was the Tribunal in *Generation Ukraine v Ukraine* (2003). Although Ukraine contended that the US Letter of Submittal relied upon by the investor could not be regarded as necessarily reflecting the official interpretation given to the relevant treaty provision by Ukraine itself, the Tribunal merely noted that, though 'certainly a fair and understandable reservation, […] the Respondent did not tender any documents emanating from official Ukrainian sources'.[131]

The Tribunal in *HICEE v Slovakia*, however, was much more wary of the one-sided character of domestic explanatory memoranda. Conscious of the unilateral character of the Dutch Explanatory Note which had been relied upon by Slovakia to support its interpretation of the relevant treaty provisions, the Tribunal initially sought, by means of a procedural order addressed to both treaty parties, to receive some evidence from the records of either the Dutch Ministry of Foreign Affairs or the Ministries of former Czechoslovakia, which could substantiate or corroborate the information provided in the Explanatory Note. None of the responses furnished any additional insights, as a result of which the Tribunal felt the Note had an 'essentially unilateral character'.[132] To compensate for that, the Tribunal's majority—basing itself on the fact that it was not the State from which the Note originated, but the other treaty party that was relying on it—effectually proceeded to construe the Note as evincing the *common* intention of the treaty parties. The Tribunal's majority thus restated what it considered to be an 'essential and quite simple fact':

> that in the process of giving its consent to be bound by the Agreement the Government of the Netherlands expressed itself formally, publicly, and in writing (with reasons) as to what had been intended by the key phrase in Article 1; and that the Government of Slovakia, now appearing before this Tribunal, espouses the same meaning for the provision in question. That this represents a concordance of views between the two Contracting Parties to the treaty obligation in question—albeit in an attenuated form—cannot be denied.[133]

In the majority's view, the fact that this 'concordance of views' had on the one side, not the original Contracting Party (Czechoslovakia) but one of its two successor States (Slovakia), and on the other side a State which is not a party to the arbitral proceedings (the Netherlands), did not alter, nor was capable of altering, the existence of that form of 'agreement'. While the majority felt it necessary to add that the 'concordance of views' was not to be treated as a form of agreement specified in Articles 31 or 32 VCLT, it did not consider that 'these highly pertinent circumstances' ought on that account to be left

[131] *Generation Ukraine v Ukraine* (n 33) para 15.4.
[132] *HICEE v Slovakia* (n 1) para 132.
[133] ibid, para 136.

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out of the interpretative process altogether. For, '[t]o do so would fly in the face of logic and good sense' and '[i]t would not […] be reconcilable with the requirement that a treaty is to be interpreted "'in good faith"'.[134]

The logic adopted by the *HICEE* Tribunal is not without problems. Its most significant flaw is that it discounts the possibility that one treaty party may profess its agreement with the views expressed by the other party solely with a view to support its position in the specific dispute; a risk identified also by the dissenting arbitrator in that case.[135] It is exactly for those reasons that international courts and tribunals have generally been rather reserved about giving effect to *ex post facto*, non-contemporary expressions of drafters' supposed intentions.[136] Particularly in the context of a dispute where the other treaty party is not involved in the actual litigation, greater caution is required in inferring the existence of a 'concordance of views' from disparate representations made at different points in time.[137] In cases where both treaty parties are involved in the actual proceedings, of course, the existence of a 'concordance of views' on the part of the treaty parties may be of greater significance. Indeed, as noted in Section V, in practically all inter-State cases, the parties' consent to the use of explanatory memoranda could easily be construed as resulting in a 'concordance of views' concerning the meaning of treaty terms. In fact, in the *Heathrow Airport User Charges* arbitration, since neither the UK nor the US disputed the correctness of the view expressed in an internal explanatory note prepared by a British Government lawyer, the Tribunal apparently treated that note as if reflecting the *common* intention of the treaty parties. Hence also the Tribunal's explanation that its interpretative approach to some of the issues was 'colored by […] the Parties' intention, as evidenced by […] the almost contemporary note prepared by the British Government lawyer'.[138]

The approach of treating an internal document as evincing the common intention of the parties as a result of the treaty parties' attitude towards it is arguably not the only means to overcome problems stemming from the

[134] ibid.

[135] *HICEE* (Brower) (n 59) para 35.

[136] See eg PCIJ, *Jaworzina* (Advisory Opinion) PCIJ Rep Series B No 8, at 38 ('… it is obvious that the opinion of the authors of a document cannot be endowed with a decisive value when that opinion has been formulated after the drafting of that document and conflicts with the opinion which they expressed at that time'); or ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112, para 27 ('Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a "statement recording a political understanding", and not to an international agreement.').

[137] See in this regard *Telefónica S.A. v The Argentine Republic,* ICSID Case No ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction of 25 May 2006, para 113 ('These positions, expressed separately by Spain and Argentina in those distinct disputes, indicate their views set forth in those litigations for purposes of arguing as respondents therein. Moreover, these statements, individually and separately made by the Contracting States within such litigation, are not directed towards each other: they do not evidence therefore an "agreement", a meeting of their minds or intent ("concours de volonté") as required by the same Art 31.3(b) [VCLT].').

[138] *Heathrow Airport* arbitration (n 33) para 3.2.

one-sided nature of domestic explanatory materials. In some situations, the one-sided nature of a particular document may actually be less of a problem, even in the absence of direct or indirect corroboration from other treaty parties. This is for example the case where litigants other than a contracting party invoke an explanatory note against the same State party from which the note originated; a phenomenon that regularly occurs in the context of investment arbitration, as attested to by the *Ethyl v Canada* (1998) and *Pope & Talbot v Canada* (2000) cases. In such cases, it may still be possible for the non-State litigant to invoke a State's explanatory memorandum by advancing, for example, an argument based on estoppel. Provided that the conditions of estoppel are complied with—ie that the explanatory note is consistent with other representations of that State, and that the investor, by relying on that note, acted to its own detriment or had suffered some prejudice—, it is difficult to see why an international tribunal should not be capable of giving effect to such a plea and thus consider the State party to be precluded from arguing against the position it had previously taken in an official and publicly-available document concerning its treaty obligations.[139] Apart from grounds of estoppel, adjudicatory bodies may furthermore simply be willing to accept documents originating from the same party as a form of admission against interest. This seems to have happened in the *Ethyl* case, where the same Canadian Statement on Implementation was cited by the Tribunal in support of the proposition that the waiting period imposed by Article 1120 NAFTA was designed to encourage consultations or negotiations prior to resorting to arbitration proceedings, and for that reason was also not inclined to adopt a formalistic approach in relation to the Claimant's purported non-compliance with the waiting period in circumstances where such consultations or negotiations did not appear to be possible.[140] Such an approach would generally be in line with that of the ICJ, which habitually attaches greater probative value to evidence from domestic sources or from a State's own officials when these acknowledged facts or conduct are unfavourable to that State.[141] Indeed, as the ICJ observed in its advisory opinion on *South-West Africa* (1950), '[i]nterpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument'.[142]

[139] See in particular *Ceskoslovenska Obchodni Banka, A.S. v The Slovak Republic*, ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999, paras 44–47, where an ICSID Tribunal was prepared to give effect to an estoppel argument made in relation to a position advanced by the respondent State in its Official Gazette, was it not for the fact that the claimant failed to demonstrate that it had relied on that position to its own detriment.

[140] *Ethyl v Canada* (n 33) paras 81–85.

[141] See *Military and Paramilitary Activities in and against Nicaragua* (n 114) para 64; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, paras 78–79; and *Genocide Convention* case (n 106) para 227.

[142] *International Status of South-West Africa* (Advisory Opinion) [1950] ICJ Rep 128, 135–136.

VIII. ADDITIONAL CONSIDERATIONS—THE DOMESTIC LEGAL STATUS OF LEGISLATIVE DOCUMENTS

A final consideration pertaining to the evidentiary value of legislative explanatory memoranda in the interpretative process relates to their domestic legal status. In this respect, the question has arisen as to the relative status of explanatory memoranda vis-à-vis other internal documents, especially in relation to instruments of a more formal nature, such as the laws that are passed for the purposes of the adoption of the treaty in question.

The matter was subject of some consideration in the *Kiliç* arbitration, which was brought against Turkmenistan pursuant to the Turkey–Turkmenistan BIT. One of the questions that arose in the case was what document should be given greater weight in the process of determining whether or not a clause in the applicable treaty imposed mandatory recourse to the local courts before resort could be made to international arbitration: the explanations contained in the Council of Ministers' letter submitted to the Turkish Parliament as part of the treaty's ratification process, or the official English-Turkish translation of the same treaty included in the law by which the treaty was eventually ratified by the Parliament and which was subsequently also published in the Official Gazette. The former apparently described the relevant clause in terms suggesting that recourse to local courts was optional; the latter was more supportive of an interpretation to the effect that such recourse was mandatory. The Tribunal in *Kiliç* eventually decided to rely on the official translation published in the Official Gazette, as this happened to provide further support to the Tribunal's conclusion based on its reading of the authentic Russian text of the treaty and the authentic Turkish text of another treaty employing the same text.[143] The Tribunal explained that it did not 'disregard' the explanatory memorandum; it held however that the memorandum was 'trumped by the subsequent publication in the Official Gazette of the ''official'' Turkish translation of the authentic English version of the BIT in terms which are unquestionably mandatory.'[144] This conclusion appears excessively formalistic, particularly insofar the authentic English version—just as the explanatory memorandum—actually pointed against the conclusion that recourse to the local courts was mandatory.

The matter was subsequently reconsidered in the context of annulment proceedings, where the Claimant argued that the Tribunal had failed to explain why the probative value of the Council of Ministers' Letter was lower than that of the non-authentic and—purportedly—mistranslated version of the treaty text.[145] The Respondent, on its part, defended the Tribunal's conclusion on the ground that the Letter was 'just a unilateral statement', as opposed to the translation of the treaty published in the Official Gazette,

[143] *Kiliç v Turkmenistan* (Decision) (n 49) paras 9.20–9.21.
[144] ibid, fn 48 to para 9.21.
[145] *Kiliç v Turkmenistan* (Annulment) (n 53) para 139.

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which had the status of law in Turkey.[146] The ICSID Annulment Committee eventually adopted the Respondent's argument. After noting that '[a]s a general matter, under the ICSID Arbitration Rules tribunals have ample discretion in the appreciation of the evidence furnished by the parties', the Committee concluded that 'a text published in the Official Gazette of Turkey; unless corrected […] would be the law of the country as against an explanatory document to the parliamentarians' and thus '[t]he Tribunal cannot be blamed for paying due attention to a text that by definition is the law of Turkey'.[147]

Though the Annulment Committee's opinion is sound, it can be questioned whether relying on a document's domestic legal status may not be too formalistic an approach, which may overshadow the question of accuracy of the document in question. Attesting to this is the award in the *Sehil* case, which—as already noted—was rendered against Turkmenistan pursuant to the same investment treaty, but where the contested treaty provision was interpreted in a way diametrically opposed to the interpretation taken in the *Kiliç* case. The *Sehil* Tribunal concluded that recourse to the local courts was optional, based on a reading of the contested provision in its context and in light of the treaty's object and purpose, in both its English and Russian authentic versions of the treaty text.[148] Unlike the Tribunal and Committee in the *Kiliç* case, the *Sehil* Tribunal did not directly engage with arguments as to whether either the explanatory note, or the official Turkish translation published in the Official Gazette, should juridically have greater evidentiary value (despite the Respondent's argument that greater weight should be attributed to the latter precisely because it had, in contrast to the Explanatory Note, the status of law).[149] What mattered to the *Sehil* Tribunal was that the Turkish text, which was not an authentic version, was significantly different from the authentic versions of the treaty text. In particular, the Tribunal found there to be 'notable discrepancies between the English and the Turkish texts, especially additional text that did not appear in the English original', which ended up 'further diminishing the value of the Turkish translation'.[150] The existence of those differences—'in addition' to the contradictions between the Turkish text and the explanatory note—were reason for placing 'little reliance, if any' on the Turkish text of the treaty.[151]

The *Sehil* award suggests that there might not always be cogent reasons for attributing greater value to documents that enjoy a superior formal status under domestic law. A determining factor should be the accuracy of the document in question. To a large extent, this will depend on the amount of scrutiny that the document will have received in the domestic process of treaty approval. In circumstances where, as between two documents, neither has been subject to much debate in the legislative body (or else subject of review by a competent

[146] ibid, para 91. [147] ibid, para 139. [148] *Sehil v Turkmenistan* (n 53) para 247.
[149] ibid, para 151. [150] ibid, para 259. [151] ibid, paras 261–262.

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committee),[152] there is no *a priori* reason for placing greater weight on the one having the status of law. While an explanatory note is typically prepared by governmental officials that had been involved in treaty negotiations, and are thus familiar with the treaty text and the intention of the negotiating parties, the translation of the treaty may often be entrusted to translators that have lesser a familiarity with the treaty text as a product of the negotiations, and which might not necessarily be able to subject the translated text to intensive legal scrutiny. The fact that such a translation may eventually acquire the status of law should not be indicative of its explanatory value. In circumstances, on the other hand, where both types of text will be subject to appropriate scrutiny, there is obviously more reason to treat the text eventually adopted as law as being the more authoritative. But this is not because of its formal legal status, but because the text of such law, prepared later in the domestic process, is more likely to reflect more accurately the position than the explanatory note, prepared earlier in the process. The evidentiary value of the document will therefore depend on the process by which it has been generated.[153]

An altogether different question is whether constitutional considerations pertaining to the internal division of powers between different branches of government have any relevance in determining the evidentiary value of explanatory memoranda. The question has been touched upon in the context of domestic annulment proceedings relating to the *Yukos* arbitrations before the Hague District Court. A central issue in those arbitrations was whether the Russian Federation, as Respondent, was bound to provisionally apply the Energy Charter Treaty in accordance with its Article 45. An UNCITRAL Arbitral Tribunal operating under the auspices of the PCA concluded that it was, because, among other reasons, there were no inconsistencies between the provisional application of the ECT and Russian law, which might otherwise have prevented such provisional application. The Tribunal found confirmation for this conclusion in the Explanatory Note that had been prepared for the Russian Duma when the ECT was submitted for ratification.[154] The Tribunal's awards were subsequently set aside by the Hague District Court, which, exercising its supervisory jurisdiction, arrived at a different conclusion. The Court not only based its decision on an entirely different reading of Article 45 ECT, but it also questioned the evidentiary

[152] In some legal systems—that of the Netherlands being one such example—parliamentary approval can be given tacitly, which will result in the treaty not being subject to much parliamentary discussion. See on this J Klabbers, 'The New Dutch Law on the Approval of Treaties' (1995) 44 ICLQ 629.

[153] cf *Genocide Convention* case (n 106) para 227.

[154] See *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No AA 226; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227; and *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No AA 228, Interim Award on Jurisdiction and Admissibility of 30 November 2009, para 374.

value of the Russian domestic Explanatory Note. The Court was of the opinion that the Arbitral Tribunal

> … insufficiently recognised that this memorandum originated from the executive and was primarily aimed at prompting the Duma, as part of the legislature, to ratify the ECT. Since the ECT was never ratified, the opinion of the executive (the government) cannot be ascribed to the legislature and the government's standpoint therefore does not have independent meaning. This observation alone necessitates an assessment of (the relevance of) the explanatory memorandum from the government with the utmost restraint.[155]

The observation that the standpoint of the executive may not have an independent meaning in the absence of endorsement by the legislative is somewhat far-fetched and requires some contextualization. From the perspective of international law, there is little doubt that the conduct of all organs of government is equally attributable to the State at the international level, regardless of the functions that the organ in question exercises.[156] There is nothing that would prevent the opinion of the government from being attributed to the State in question and in that sense have an 'independent meaning'. The controlling factor in this respect should rather be the *factual relevance* of a particular statement.[157] What matters is not the formal competence of an individual organ, but its epistemic capacity to attest to certain facts that are relevant to the issue in question.[158] Admittedly, the two will often be related (as an organ entrusted with the performance of a specific task will also have the greatest expertise on that task), but not to the point of being mutually interdependent. To return to the example discussed above: it is probably true that the final word on the ECT's inconsistency with the Russian legal order lies with the Russian Duma. But that should not prevent an adjudicatory body from taking the Explanatory Memorandum into account as evidence of the executive's belief that the ECT was consistent with the domestic legal order, to the extent that such belief might explain the position taken by the executive during the treaty's negotiation process and after its conclusion, which in turn may attest to the executive's understanding of the treaty provision in question.

[155] Rechtbank Den Haag, *The Russian Federation v Veteran Petroleum Limited et al.*, Cases C/09/477160 / HA ZA 15-1, C/09/477162 / HA ZA 15-2, and C/09/481619 / HA ZA 15-112, Judgment of 20 April 2016, para 5.60, unofficial English translation available at <https://www.italaw.com/sites/default/files/case-documents/italaw7255.pdf>.

[156] Art 4, 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/83 (2001).

[157] cf *Genocide Convention* case (n 106) para 225, where the Court observed in relation to 'official documents, such as the record of parliamentary bodies' that '[i]n many of these cases the accuracy of the document as a record is not in doubt; rather its significance is'.

[158] In ICJ's treatment of affidavits, a person's capacity to attest to certain facts is an important variable. cf *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (n 111) para 244 ('a statement of a competent governmental official with regard to the boundary lines may have greater weight than sworn statements of a private person').

IX. CONCLUDING OBSERVATIONS

In re-examining the issue of treaty interpretation three decades after the entry into force of the VCLT, Klabbers remarked that, while it would be too far to suggest that 'anything goes' under the provisions of Articles 31 and 32 VCLT, the fact that 'quite a bit goes' would be a fairly accurate synopsis.[159] This remark certainly holds true when it comes to the use of legislative and other domestic explanatory materials in the treaty interpretation process. The frequency with which these are being consulted in practice attests to the fact that the rules of the VCLT are not a straitjacket, but are capable of accommodating interpretative approaches that might not have actually been envisioned by their drafters. This is not to say, however, that their use will turn treaty interpretation into a purely political exercise. The judicial and arbitral practice discussed in this article quite compellingly suggest that the proper role of domestic explanatory materials is that of supplementary means of interpretation in the sense of Article 32 VCLT. In contrast to the mandatory nature of the general rule of interpretation of Article 31 VCLT, the use of 'supplementary means' remains facultative and subject to the conditions specified in Article 32 VCLT. Recourse 'may' thus be had to supplementary means only to (1) *confirm* the meaning resulting from the application of the general rule of interpretation found in Article 31 VCLT, or (2) to *determine* the meaning when the interpretation according to Article 31 VCLT (a) leaves the meaning ambiguous or obscure or (b) leads to a result which is manifestly absurd or unreasonable.[160] Though accommodating their use, the VCLT rules thus nonetheless impose constraints on how domestic explanatory memoranda are to be employed. First, resort to them depends upon the outcome of the application of the general rule of treaty interpretation within the meaning of Article 31 VCLT. And second, as with any other 'supplementary means', the role of such materials remains a subsidiary one, with the consequence that they cannot affect the meaning of a treaty provision when this is sufficiently clear on its face.[161]

[159] J Klabbers, 'Virtuous Interpretation' in M Fitzmaurice, O Elias and P Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 years on* (Nijhoff 2010) 17, 34.

[160] These conditions notwithstanding, recourse to preparatory works has now become so pervasive that commentators have occasionally questioned whether their qualification as mere supplementary means of interpretation was still adequate. See eg Klabbers (n 10) 284.

[161] On the similar question regarding the possibility of preparatory works to be contradicting the ordinary meaning of a treaty provision, see S Schwebel, 'May Preparatory Work Be Used to Correct Rather Than Confirm the 'Clear Meaning' of a Treaty Provision?' in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century – Essays in Honor of Krzysztof Skubiscewski* (Kluwer Law International 1996).