

1.1.2 Supplementary means of interpretation – "travaux préparatoires"

It is a generally recognised rule of international law that when interpreting international treaties ancillary use may be made of material relating to their genesis. Under Art. 32 of the Vienna Convention, recourse may be had to supplementary means of interpretation, particularly the preparatory work for a treaty and the circumstances in which it was concluded, in order to confirm the meaning arrived at by application of Art. 31 or to determine the meaning when application of Art. 31(a) leaves the meaning ambiguous or obscure, or (b) produces a meaning which is obviously nonsensical or unreasonable (T 128/82, OJ 1984, 164; see also G 2/07, OJ 2012, 130; G 1/08, OJ 2012, 206, point 4.3 of the Reasons; G 2/12 and G 2/13; T 2320/16, point 1.5.8 of the Reasons).

In G 2/12 and G 2/13 the Enlarged Board stated that the preparatory work ("travaux préparatoires") and the circumstances of the conclusion of the EPC serve only as supplementary sources of evidence to confirm the result of the interpretation or if no reasonable meaning can be determined by applying the general rule of interpretation (Art. 32 Vienna Convention).

According to opinion G 1/18 (OJ 2020, A26), it follows from Art. 32 of the Vienna Convention that the "travaux préparatoires" and the circumstances in which the EPC was concluded are to be taken into consideration to confirm a meaning or to determine the meaning when the initial interpretation according to the ordinary meaning would create ambiguity or lead to an absurd result. In G 1/18, the Enlarged Board also set out the conclusions reached by boards of appeal on the basis of their analysis of the "travaux préparatoires" and held them to be incorrect. Before examining what it considered to be clear from the "travaux préparatoires", it reiterated the key principles, particularly that such preparatory work on international treaties could be used as a supplementary means of interpreting them. In point V.3 of its opinion, the Enlarged Board analysed the legislative history of R. 69(1) EPC 1973 (R. 112 EPC). In point X, it first of all observed that, since the "majority" and "minority" views in the case law both took the "travaux préparatoires" as the basis for their reasoning, it was necessary to look at the draft articles and related discussions in detail and then turned to analysing the preparatory work on Art. 108 EPC.

The Enlarged Board in G 4/19 (OJ 2022, A24) considered that a provision falling under Art. 125 EPC may well cover issues which touch upon substantive matters. This interpretation could be based on the EPC itself, without reference to the preparatory documents (see point 27 of the Reasons). As regards another aspect of the interpretation of Art. 125 EPC (legal basis for a prohibition on double patenting; whether any such principle exists and is generally recognised in the contracting states), the Enlarged Board considered whether recourse could be had to the preparatory documents (see points 43 et seq. and 63 and 76 of the Reasons). On that point, the Enlarged Board did not endorse the opinion that the interpretation of the EPC (in itself) provided a clear answer. On the contrary, there were good reasons, including on the basis of Art. 32 Vienna Convention, for consulting the "travaux préparatoires". The Enlarged Board concluded that the preparatory documents demonstrated with overwhelming certainty that there was a real and effective agreement that the EPO should prohibit double patenting by taking into account principles of procedural law generally recognised in the contracting states, i.e. by