

## **Travaux to the Treaties: Treasures or trivia?**

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Draft paper to be presented at the European Union Studies Association conference, Boston, March 5, 2015.

### **Introduction**

For most of the current era of European integration, the Court of Justice has not admitted preparatory work as evidence of the frames' intent when interpreting Treaties. Even the teleology of 'ever closer union', as radical as its application has been, is firmly rooted in the text of the Treaties. Literature suggests this was linked to the secrecy surrounding early negotiations, and poor public access to the documents. Some at the Court have considered that these concerns are no longer relevant to the preparatory work to more recent Treaties. In several recent cases, the Court has reversed its initial opposition to relying on preparatory works to the Treaties. In these judgments, the *travaux préparatoires* have not offered merely superfluous additional arguments. We examine the extent to which the Court and the Advocates General have relied preparatory work to interpret the Treaties and determine the 'intent' of their framers. The references, whilst introducing a new source for legal interpretation, do not result in dynamic constitution-building. Rather, they reinforce static interpretations of existing provisions. Nevertheless, the possibility that this doctrine will develop into a more dynamic one calls for further research on their proper role in the interpretative process. If preparatory works should now routinely be accepted, on which precedents should the Court's rules be modeled?

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## The legal context of preparatory work in international and EU law

### International Law permits reference to *travaux*

Reference to the preparatory works of Treaties is expressly foreseen in international law. The Vienna Convention on the Law of Treaties<sup>3</sup>, particularly articles 31 and 32 set the rules of interpretation of international treaties. According to Article 31 VCLT<sup>4</sup>, the terms of the treaty should be given the ordinary meaning in their context and be interpreted in the light of its object and purpose. The purpose of the treaty can be found from the text, the preamble, and the annexes. Article 32 VCLT<sup>5</sup> contains that the preparatory work of the treaty can be used as *supplementary* means of interpretation *to confirm* or determine the meaning, or when the interpretation according to Article 31 VCLT either leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. In the Vienna Convention, the *travaux préparatoires* are given a supporting role in the interpretation of the international treaties. However, the intent, or the object and purpose as it is put in the Article 31, is given decisive role.

The actual object of interpretation is the text of the treaties. The first step of the interpretation is to intuitively assume the “ordinary meaning” of the text. After this, supplementary means of interpretation can be used to confirm or revise the original hypothesis. The preparatory works can have influence in the interpretation through four routes: if the meaning of text is left ambiguous (article 32.a), the interpretation would leave to manifestly absurd or

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<sup>3</sup> UN Treaty Series vol. 1155, concluded at Vienna on 23 May 1969, entered into force on 27 January 1980.

<sup>4</sup> “Article 31. *General rule of interpretation*. 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

<sup>5</sup> Article 32. *Supplementary means of interpretation*. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 :

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.

unreasonable result (article 32.b), the parties have intended to give a term a special meaning (article 31.4), or merely to confirm the meaning resulting from the application of article 31 (article 32). Through this last mentioned means, the confirmation of textual and contextual interpretation, the *travaux préparatoires* can be relied in every case of interpretation.<sup>6</sup>

### ..but EU law is *sui generis*

The applicability of the VCLT has two dimensions in the EU context. The Court has found that the VCLT binds the EU institutions and is part of EU legal order as a rule of customary international law.<sup>7</sup> This line of case law indicates that the EU institutions need to respect the rules of interpretation stipulated in the VCLT when they are interpreting international treaties. However, the VCLT does not apply to the interpretation of the EU law itself. The CJEU has found that the EU law is not in this respect ordinary international law. In Opinion 1/91 the Court contrasted the agreement establishing a European Economic Area (EEA) to the Union law,<sup>8</sup> and stated that Community law forms a Community legal order, whose aims are not just to “achieve economic integration”, but to make “concrete progress towards European unity”. Thus, Union<sup>9</sup> law operates, according to the Court of Justice, in a different context, because it does not create only rights and obligations between the Contracting Parties. Instead it provides “transfer of sovereign rights to the intergovernmental institutions which it sets up”.<sup>10</sup>

The CJEU’s interpretation of EU law is based on text, context, and *telos* (purpose), as can be read from the *Van Gend en Loos* judgment.<sup>11</sup> The CJEU has also stated that in interpreting EU law concepts one should use “the generally recognized principles of interpretation, beginning with the *ordinary meaning* to be attributed to those terms in their *context* and in the

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<sup>6</sup> Julian Davis Mortenson, ‘The travaux of travaux: Is the Vienna convention hostile to drafting history?’ (The American Journal of International Law, Vol 107, pp. 780–822), especially pp. 785–787.

<sup>7</sup> Case C-466/11 *Gennaro Currà and Others v Bundesrepublik Deutschland* [2012], para. 22.

<sup>8</sup> Opinion 1/91 [1991] ECR I-06079.

<sup>9</sup> in this respect the distinction between ‘Community’ law in the pre-2009 judgments and our term Union law is purely cosmetic.

<sup>10</sup> Opinion 1/91 [1991] ECR I-06079, paras. 16–20. See also f.ex. Case 6/64 *Costa*, postulating primacy from the transfer of sovereign powers.

<sup>11</sup> Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 00001. See also Miguel Poiars Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’, Vol. 1 *European Journal of Legal Studies* No. 2, p. 4, Anthony Arnall, *The European Union and its Court of Justice* (Oxford University Press, Oxford, 2006), pp. 612–613, Elina Paunio and Susanna Lindroos-Hovinneimo, ‘Taking Language Seriously: An Analysis of Linguistic Reasoning in EU Law’, 16 *European Law Journal* 4 (2010), p. 396.

light of the *objectives* of the Treaty”.<sup>12</sup> EU law provisions should also be interpreted in their context and *in the light of the EU law as a whole*.<sup>13</sup> These elements of interpretation seem to be equivalent to those mentioned in the Article 31(1) VCLT, as explained above. So even though the VCLT is not a legal source of interpretation of EU law, similar rules of interpretation than those of the VCLT are recognized by the CJEU and can be used as an inspiration in EU law interpretation.

Originally, reference to the preparatory work of the Treaties was considered constitutionally problematic. Article 32 of the Vienna Convention on the Law of Treaties envisages recourse to preparatory work of a treaty as a supplementary means of confirming an interpretation under Article 31 VCLT or to remove ambiguity of absurdity. This was ‘not a method which in the past commended itself to the Court’.<sup>14</sup> the preparatory work did not exist, or involved only working group-level discussions, therefore rendering reference constitutionally questionable.<sup>15</sup> Nevertheless Arnall, writing in 2006, expected the Court to become more amenable to using *travaux* as aids to interpretation: ‘Increasing pressure for transparency and the development of the internet have now brought many *travaux préparatoires* concerning subsequent amendments to the Treaties themselves into the public domain’.<sup>16</sup>

### ...and the Court of Justice has not often relied on preparatory work.

There is not much literature on the status of *travaux préparatoires* to the Treaties as the court’s source of law and interpretation.<sup>17</sup> This may be because it was categorically excluded

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<sup>12</sup> Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR 01035, para. 9 [emphasis added].

<sup>13</sup> Case C-283/81 *CILFIT* [1982], para. 20.

<sup>14</sup> Arnall 1999 at 526; see in identical terms the second edition, 2006 at 614

<sup>15</sup> Kutscher, ‘Methods of interpretation as seen by a judge at the Court of Justice’ in Reports of a Judicial and Academic Conference held in Luxembourg on 27-28 September 1976, 1-21, cited in Arnall 2006 at fn46.

<sup>16</sup> Arnall, A., *The European Union and its Court of Justice* 2nd edn OUP 2006, 614-615, also at 615: ‘It is likely that this [historical] approach will in future be modified’.

<sup>17</sup> Beck, G., *The Legal Reasoning of the Court of Justice of the EU* (2012, Hart) at 217-19 does not yet note the *Travaux* as a present source, rather that it could in the future rely on them, citing Lasok and Millett *Judicial Control in the EU* 2004 nyr 388-89 at pp 217-218 fn 126 (spans both pp). See also Arnall 2006 614-5; See also Schonberg, S., and Frick, K., ‘Finishing, Refining, Polishing: On the Use of *travaux préparatoires* as an Aid to the Interpretation of Community Legislation (2003) 28 *ELRev* 149 ; Craig and de Burca 4th edn at 73 note the *travaux* to the original treaties were never published; Case 149/79 *Commission v Belgium* at ECR p3890, AG Mayras in 2/74 *Reyners* at ECR p 666; Case 38/69 para 12, 143/83; 273/84; 306/89 paras 8 and 8, C-292/89 *Antonissen*. Case law where some information on secondary legislation was used: p74 fn 225: 136/78 *Auer* at 25-6; 131/86 at 26-27. Kiikeri notes absence of reference to *Travaux* as one of a set of facts which he argues allows a ‘common legal cultural tradition’ to be assumed in the EC context: Kiikeri, Markku, *Comparative Legal Reasoning and European Law* (Kluwer, Dordrecht, 2001) 281, observing at 282 that comparative (national) evidence may be excluded as relevant as such. A handful of cases exist pre-Convention: T-156/94 *Aristrain* at 40, referring to a national report *after* a the ECSC Treaty was signed; C-61/03 *Commission v UK* at 29 (insufficient

by the Court itself. In a classic exposition of this point from the mid-1970s, AG Mayras in the *Reyners* noted:

‘the States, signatories to the Treaty of Rome, have themselves excluded all recourse to the preparatory work and it is very doubtful whether the reservations and declarations, inconsistent as they are, which have been relied upon can be regarded as constituting true preparatory work. Nor can they be held against the new Members of the enlarged [Union] by virtue of Accession. Above all [the Court of Justice itself has] rejected, on several occasions, recourse to such a method of interpretation by asserting the content and finality of the provisions of the Treaty’.<sup>18</sup>

Thus, as main rule, the contextual and teleological interpretation methods are the chief methods for enhancing the Court’s understanding of Treaty texts. Teleology is in many cases derived from the Treaty text itself: when the preambular text refers to ever closer union, an interpretation which facilitates this is as has been pointed out only carrying out the literally stated intention of its drafters. Ambiguity also invites teleology: the strong position of the contextual and teleological interpretation stems at least partly from the problems arising from the multilingualism in the EU.<sup>19</sup> Such ambiguity may also be an intentional outcome of the negotiation process.<sup>20</sup> Sometimes the contextual and teleological methods can even override the natural textual meaning of the treaty provisions.<sup>21</sup>

Despite the historical lack of historical interpretation, there have been some false starts. Literature has referred to two cases in which the Court is argued to have used the *travaux* as a source of law in its historically-oriented teleological interpretation.<sup>22</sup> These cases however, are not relevant in assessing the question at hand since one of the cases simply does not refer to the *travaux* of the Treaties.<sup>23</sup> In the other case mentioned in the literature, the reference to the *travaux* is not made by the Court but instead by the applicant.<sup>24</sup> In several cases either the

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guidance in EURATOM treaty travaux per the Court). Lenaerts, van nuffel et al 2011 at 815 fn 313. Jean-Claude Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge University Press, 2006), pp. 38-55.

<sup>18</sup> Opinion of AG Mayras in *Reyners*, above n 122, at 666.

<sup>19</sup> On the meaning of words in constitutional interpretation, see also, András Jakab, ‘Judicial Reasoning in Constitutional Courts: A European Perspective’ (German Law Journal, Vol. 14, No. 8, 2013, Special Issue: Constitutional Reasoning), p. 1231–1233.

<sup>20</sup> Anthony Arnall, p. 612.

<sup>21</sup> Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987], paras. 16–17; Anthony Arnall, p. 613.

<sup>22</sup> C-149/79 and C-156/94.

<sup>23</sup> Case T-156/94 *Aristrain v Commission* [1999], para. 40. We are grateful to our Colleague Amalia Verdu for discussing this issue with us.

<sup>24</sup> Case C-149/79 *Commission v Belgium* [1980], p. 3890, T-18/10 *Inuit Tapiriit Kanatami* (49, also quoted before the CJ on appeal, citing the cover note of the Praesidium of the Convention (Secretariat of the European

applicant or the defendant has relied on the alleged intention of the constitutional legislator that can be constructed from the preparatory works of the primary law, but the Court has not referred to the *travaux* in its reasoning.<sup>25</sup> In some further cases the Court used the *travaux* of the primary law to interpret it, those concerning the acts concerning the conditions of accession to the Union.<sup>26</sup> None of those are in fact references where the Court uses preparatory work to interpret the TFEU, TEU, or their predecessors.

### **The Court now refers to preparatory work of the Treaties.**

Although *travaux* have not featured in either leading cases or legal literature on the EU Treaties, this position is changing. The Court now refers to the *travaux* of the Treaties. The three cases we examine reflect an entirely new line in the Court's jurisprudence. The Court uses preparatory works to buttress arguments that are central in its reasoning. The three cases in which the Court refers to the *travaux préparatoires* are all fairly recent.

### **Military uses of nuclear energy in EURATOM?**

The first of this line of judgments was given in 2005 and was about whether the military uses of nuclear energy could fall within the scope of the EURATOM Treaty.<sup>27</sup> The Court first noted that articles 1 EA and 2 EA indicate that the Treaty objective is essentially civil and commercial, but that since the treaty provisions did not expressly exclude the military purposes it is essential to interpret the issue taking into account other factors than the text itself.<sup>28</sup> Then the Court stated that taking into account the historical background of the Treaty is not sufficient, but nevertheless the CJEU took into account the *travaux préparatoires* which indicated clearly that the member states had differing views on the matter, and hence the Treaty could not be seen to be intended to cover military uses of nuclear energy.<sup>29</sup> In the absence of a reference to military use, the difference in view led to the conclusion that no

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Convention, CONV 734/03) of 12 May 2003 and T-47/03 at 97, where Doc. CONV 850/03) states at Article III-282(2) that the Council may adopt restrictive measures against natural or legal persons and non-State groups or bodies is recalled as part of NL arguments.

<sup>25</sup> See for example, case C-264/81 SpA Savna v Commission [1984], p. 3926.

<sup>26</sup> Search conducted in French with terms “travaux préparatoires, Acte d’adhésion”, no time limit, documents include judgments, orders, opinion of the Court, decisions published in the ECR, and judgments, orders and decisions not published in the ECR. The travaux had no influence in cases T-262/07, para. 42; T-248/07, para. 42; T-247/07, para. 42; T-243/07, para. 42; T-324/05, para. 109. The travaux had impact in cases C-273/04, para. 57; T-493/93, para. 35-37. See for example cases T-493/93 Hansa-Fisch v Commission [1995], paras. 35–37; C-273/04 Poland v Council [2007], para. 57.

<sup>27</sup> Case C-61/03 Commission v the UK [2005] ECR I-2511, para. 25.

<sup>28</sup> Ibid, paras 27–28.

<sup>29</sup> Ibid, para. 29.

such reference could be implied: “the Treaty is not applicable to uses of nuclear energy for military purposes”.<sup>30</sup> In this case the Court began to build its argumentation starting from the historical interpretation concerning the intent of the Treaty’s drafters. The reference to the *travaux* was not decisive factor in the argumentation; instead the traditional CJEU interpretation paradigm of contextual and teleological (purposive) interpretation of the text gained more weight. The use of *travaux* was conservative and supplementary: it simply precluded implying an outcome that had clearly been the subject of disagreement during drafting.

### **The ‘no bail-out clause’: intended only to ensure fiscal prudence, not prevent all assistance**

In the second case, the *Pringle* case, the CJEU referred to the *travaux* of the Maastricht Treaty, when it evaluated whether “an agreement such as the ESM Treaty is in breach of the ‘no bail-out clause’ in Article 125 TFEU”.<sup>31</sup> First the Court used textual method in interpreting the wording used in Article 125 TFEU, based on which the Court found that the article is not intended to prohibit granting of financial assistance to another Member State. Next the Court used contextual method, by referring to other articles concerning the economic policy, in particular Articles 122 TFEU and 123 TFEU, based on which it made the same conclusion than that based on textual interpretation. Only thirdly the Court examined the objective of the Article 125 TFEU. In order to be able to state the objective, the Court look into the preparatory works of the Maastricht Treaty, according to which “it is apparent...that the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy”. Given this objective, it found the proposed European Stability Mechanism could be incompatible with that article if the conditions “to such assistance are such as to prompt that Member State to implement a sound budgetary policy.”<sup>32</sup> The Court then noted that that since “the ESM and the Member States who participate in it are not liable for the commitments of a Member State which receives stability support and nor do they assume those commitments, within the meaning of Article 125 TFEU” it follows “that Article 125 TFEU does not preclude either the conclusion by the Member States whose currency is

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<sup>30</sup> *ibid.* para. 44.

<sup>31</sup> Case C-370/12 *Thomas Pringle v Ireland* [2012], para. 135.

<sup>32</sup> para. 137.

the euro of an agreement such as the ESM Treaty or their ratification of it”.<sup>33</sup> In this case the *travaux préparatoires* had a decisive role in determining the question at hand, since the nature of the ESM mechanism was mirrored to the objective of the Article 125 TFEU to determine the appropriateness of the ESM mechanism.

### Judicial review for ‘regulatory acts’: what was intended by Treaty Revision?

The present Treaties have been examined in the *Inuit Tapiriit Kanatami* appeal, cited by the Court of Justice in its review of what was intended by the revision of Article 263 TFEU as regards ‘regulatory acts’ subject to review without individual concern.<sup>34</sup> In *Inuit*, the CJEU notes that the interpretation of EU law requires not only taking into account the wording and the objectives of EU law provisions, but also their context within EU law as a whole. It approves reference to preparatory works: the origins of a provision “may also provide information relevant to its interpretation”.<sup>35</sup>

The Court states that the *authors of the Lisbon Treaty did not have intention* to alter “the scope of the conditions of admissibility already laid down in the fourth paragraph of Article 230 EC... it is clear from the *travaux préparatoires* relating to Article III-365(4) of the proposed treaty establishing a Constitution for Europe that the scope of those conditions was not to be altered”.<sup>36</sup>

In this case the Court made an important statement relative to the status of the *travaux* of the Treaties as a means of interpretation. Firstly, and most importantly, the Court explicitly stated in paragraph 50 of the judgment that the origins of a provision may also provide information relevant to the interpretation of EU law, including EU primary law. Although the documents left by its drafters are used in this instance, this evidence could conceivably be something else. Its reference to *Pringle* arguably establishes the pair as a line of cases rather than an anomalous occurrence.

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<sup>33</sup> *ibid*, paras. 130–136, 146–147.

<sup>34</sup> C-583/11 P, judgment of the grand chamber of 3.10.2013, at 59, considering the ‘Secretariat of the European Convention, Final report of the discussion circle on the Court of Justice of 25 March 2003, CONV 636/03, paragraph 22, and Cover note from the Praesidium to the Convention of 12 May 2003, CONV 734/03, p. 20’.

<sup>35</sup> Case C-583/11 P *Inuit Tapiriit Kanatami and Others* [2013], para. 50.

<sup>36</sup> *ibid*, paras. 70–71.

Thus, regardless of the traditional view that *travaux* to EU Treaties are not relevant to their interpretation,<sup>37</sup> it is clear they are relevant and should be reviewed. As AG Kokott explains in her Opinion in *Inuit*, “the practice of using conventions to prepare Treaty amendments” and “of publishing the mandates of intergovernmental conferences” entitle the Court to make greater use of the Treaties’ preparatory works: greater access to the proceedings encourages the *travaux* to be ‘utilised as a supplementary means of interpretation if, as in the present case, the meaning of a provision is still unclear having regard to its wording, the regulatory context and the objectives pursued’.<sup>38</sup>

### **Introducing an analytical framework: features of constitutional reasoning with *travaux***

Opening a new source of law for constitutional interpretation begs the question of what kind of impact such a change might have. Constitutional interpretation can have different outcomes depending on whether the constitution (here EU primary law) is seen as a finished product that can be changed only through amendments (as in skyscraper originalism) or as a framework for governance that can be complemented to fit to the existing circumstances over time where judiciaries can take part in the constitutional construction (framework originalism).<sup>39</sup> This, in turn, relates to the question whether the constitutional interpretation simply ascertains in a static manner that certain line of interpretation corresponds what has been intended, or whether the constitutional interpretation results in the dynamic construction of the constitution by interpretation.<sup>40</sup>

Constitutional interpretation can have static or dynamic effects. Static references to the *travaux* focus on the historical process of the constitution creation and the original purpose that can be found from the *travaux*. Static references to the *travaux* uphold the original constitutional idea behind the constitutional provisions. These references can either simply ascertain an interpretation that can be formed by means of textual interpretation

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<sup>37</sup> eg Arnall 2006 614-5 and the discussion above.

<sup>38</sup> Kokott in *Inuit* at para 32. Van Malleghem, Pieter-Augustijn, and Baeten, Niels, ‘before the law stands a gatekeeper – Or, what is a “regulatory act” in Article 263(4) TFEU? *Inuit Tapiriit Kanatami* (2014) 51 CMLREV 1187-1216 at 1204-1213, noting the historic approach to interpretation as ‘something of a novelty’ at 1204.

<sup>39</sup> Jack M. Balkin, ‘Framework originalism and the living constitution’ (Northwestern University Law Review, Vol, 103, No. 2, 2009), pp. 550–551.

<sup>40</sup> Jack M. Balkin, ‘Framework originalism and the living constitution’ (Northwestern University Law Review, Vol, 103, No. 2, 2009), pp. 559–560.

(static/ascertaining), or they can also be used to determine a meaning when the textual interpretation leaves ambiguity to the interpretation on what the original purpose of the provision is (static/extra value).

Dynamic references to the *travaux* are also possible to filling gaps or constructing the constitution in other ways. Dynamic reference would thus justify constitutional change. For example, dynamic references could be used to justify certain constitutional interpretation in new circumstances that cannot have been seen in advance. In this example, dynamic reference to the *travaux* could justify stretching the reach of a constitutional provision by means of interpretation to cover the new circumstances.

The table below can be drawn to illustrate the functions the *travaux* can have in constitutional interpretative framework by using the rules of interpretation as established in the VCLT in assistance:

|   | STATIC<br>- Aims to state the original purpose | DYNAMIC<br>- Aims to fill gaps or otherwise construct the constitution |
|---|--|--|
| VCLT: "...to confirm the meaning..."  | Group 1: static/ascertaining                   | Group 3: (hypothetical)  |
| VCLT: "...to determine the meaning, when meaning [would otherwise be] ambiguous or obscure, absurd or unreasonable" | Group 2: static/extra value                    | Group 4: dynamic/change  |

In the three CJEU judgments examined here, the Court’s references support a static interpretation: the constitutional framework is reinforced, but not changed. Thus, the Court’s references to *travaux* do not engage in teleology beyond that already found in the relevant treaty provisions. However, in each of these cases, the references bring extra value to the textual interpretation. The references are not made simply to ascertain a fact that could be read from the constitutional text itself. This means that the references the Court makes belong to group 2 (static/extra value).

|   | STATIC<br>- Aims to state the original purpose   | DYNAMIC<br>- Aims to fill gaps or otherwise construct the constitution |
|---|--|--|
| VCLT: “...to confirm the meaning...”  | Group 1: static/ascertaining   | Group 3: (hypothetical)  |
| VCLT: “...to determine the meaning, when meaning [would otherwise be] ambiguous or obscure, absurd or unreasonable” | Group 2: static/extra value<br>C-61/03 (EURATOM)<br>C-370/12 (Pringle)<br>C-583/11 P (Inuit) | Group 4: dynamic/change  |

### **Travaux references in AG opinions: identifying a new trend?**

Before the Court of Justice itself recognised *travaux*, the preparatory documents of the Convention and subsequent IGCs have been cited in a dozen or so documents. In the immediate aftermath of the Convention, Advocates General attempted to introduce *travaux* as material for constitutional interpretation.<sup>41</sup> However, after a false start hobbled by the failure of the Constitutional Treaty, references begin anew after the entry into force of the Lisbon Treaty.

Here, as above, the majority of references tend to support a line of reasoning that does not require the documents. In one category of cases, the references are entirely trivial. In another, they explain changes to the Treaties, and the purpose of those Treaty changes, but still remain static in nature. But arguably some of these references may employ a more dynamic approach: The Advocate General adds a category of instrument to an international competence of the Union that is recast in the Treaty. In this case an argument could perhaps be made that the legal rule is derived not primarily from a textual interpretation of the Treaties but comes in large part as a consequence of a creative and even teleological interpretation of the new text – one whose teleology is found in the *travaux*. In this sense the last opinion we examine aims at a dynamic constitutional construction, an outcome which it reaches by the reference to the *travaux*.

### **Some references are trivial**

First, the mundane. One class of Opinions refers to Working Group documents, but in arguably only the most trivial and superficial ways which do not genuinely contribute to the legal outcome in the opinion. In the *Biocides* case,<sup>42</sup> AG Villalon refers to a Convention Working Group document<sup>43</sup> and claims that the drafters had in mind comparisons of national administrative legal systems when discussing what ‘delegated’ legislation, now in Article 291 TFEU, should mean.<sup>44</sup> They surely did so, but the document to which he refers makes no mention of this comparison.

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<sup>41</sup> In the C-102/02 *Beuttenmüller* Opinion, AG Ruiz-Jarabo Colomer of 16.9.2003 at point 12 fn 10 referring modestly to the drafting of the new freedom of movement objectives in the Treaty, Draft Treaty establishing a Constitution for Europe (Article 8(2), first indent; CONV 820/03, 797/1/03 REV 1.

<sup>42</sup> C-427/12, opinion of AG Villalon 19.12.2013, point 38 fn 16.

<sup>43</sup> Final report of Working Group IX on Simplification of 29 November 2002, CONV 424/02, WG IX 13.

<sup>44</sup> “However *sui generis* the system of Union acts may ultimately have become, as a result of its very nature and its history, (15) in cases where the European Union has sought inspiration from the normative categories of the

In his opinion on enhanced cooperation for the unitary patent,<sup>45</sup> AG Bot refers to a Praesidium note (so not a final working group report).<sup>46</sup> He uses this to support an intention to clarify competences in the Treaty revision: ‘At the European Councils of Nice, in 2000, and Laeken, in 2001, the Member States clearly expressed their desire that the sharing of competence between the Union and the Member States be clarified’.<sup>47</sup> That the Convention was framed by the Laeken declaration objective is hardly a legal innovation.

In C-95/12 Commission v Germany (second infringement case concerning the German worker representation law), it had been claimed that the Commission had not pursued its case against the Member State efficiently, and that this precluded an action under Article 260. In accepting the established position that infringement proceedings do not have to be brought within a particular time, but involve a large amount of discretion, AG Wahl mulled evidence to the contrary. *Travaux* were referred to in this context – as evidence considered, but not sufficient to persuade the AG: AG Wahl acknowledges that the purpose of reforming the infringement systems was inspired also by a need for speedy action also in infringement proceedings brought by the Commission.<sup>48</sup>

### **The majority support, but do not found legal propositions**

A large bulk of the references involve attempts to support legal propositions that are not wholly founded on the preparatory works but which are clearly augmented by them. This is the case for all three of our CJEU judgments at earlier stages, whether at first instance

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Member States, (16) as was no doubt the case here, it is almost natural that they should be looked into, even though there is no guarantee as to the result.”

<sup>45</sup> C-274/11 Spain v Council (enhanced cooperation) Opinion of AG Bot of 11.12.2012 at point 43, fn 8,

<sup>46</sup> Note from the Praesidium of 15 May 2002 on the ‘Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored’ (CONV 47/02)

<sup>47</sup> point 43.

<sup>48</sup> AG Wahl, C-95/12 on 29.5.2013 at point 84 fn60 referring to Secretariat of the European Convention, ‘Final report of the discussion circle on the Court of Justice’, document CONV 636/03, paragraph 28

(Inuit)<sup>49</sup> or the opinions of the Advocates general before the CJEU (EURATOM,<sup>50</sup> Inuit<sup>51</sup> and Pringle<sup>52</sup>).

In *Telefonica*,<sup>53</sup> AG Kokott attempts to interpret what the Treaty annulment grounds refer to when Article 263 TFEU refers to an act which does not entail implementing measures.<sup>54</sup> Her references to the legislative history of that provision, namely the Court of Justice discussion circle in the Convention,<sup>55</sup> are used to support two points. First, she observes that a [prior, but not final?] German version of the Treaty provision translates as similar to the current French text<sup>56</sup>.

A second reference to the same document is then used to divine the ‘intention’ behind the words ‘implementing measures’ in that same revision: why must regulatory measures that can be challenged without individual concern, as ordinary legislative acts, be ones which do not entail implementing measures? The text of the preparatory document provides an express claim: “The addition of ‘implementing measures’ was intended to ensure that the extension of the right to institute proceedings was restricted to cases where an individual ‘must first infringe the law before he can have access to a court’.”<sup>57</sup>

In the ESMA short selling rules opinion,<sup>58</sup> AG Jääskinen also refers to a Convention Final Working Group document.<sup>59</sup> In this case, the reference simply refers to the legislative history and identifies that the distinction came from the working group; it does not seek to claim a specific interpretation based on that document. Subsequent references to literature reflect on points which are also covered in the Working group document, but which is not referred to for additional support.

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<sup>49</sup> T-18/10, ORDER OF THE GENERAL COURT (Seventh Chamber, Extended Composition) 6 September 2011 at 49.

<sup>50</sup> C-61/03 AG Geelhoed at 80-82, referring to the Travaux of the EURATOM treaty in a similar fashion as the CJEU in its judgment.

<sup>51</sup> C-583/11 P Inuit, AG Kokott at 40, using several documents in the drafting history to define ‘regulatory act’; at 46, noting the complete absence of counterevidence.

<sup>52</sup> C-370/12 Pringle, AG Kokott’s view of 26.10.2012 at 128-131.

<sup>53</sup> C-274/12 P *Telefónica SA v European Commission* Opinion of AG Kokott 21 March 2013.

<sup>54</sup> points 30-57.

<sup>55</sup> Secretariat of the European Convention, Final Report of the discussion circle on the Court of Justice of 25 March 2003 (Document CONV 636/03, paragraph 21).

<sup>56</sup> para 38 fn 17, referring to Secretariat of the European Convention, Final Report of the discussion circle on the Court of Justice of 25 March 2003 (Document CONV 636/03, paragraph 21).

<sup>57</sup> AG Kokott, para 40, referring in fn 19, to Secretariat of the European Convention, Final Report of the discussion circle on the Court of Justice, paragraph 21.

<sup>58</sup> C-270/12 UK v EP and Council (ESMA), Opinion of AG Jääskinen of 12.09.2013 at 75 fn 95.

<sup>59</sup> Final report of Working Group IX on Simplification of 29 November 2002, CONV 424/02, WG IX 13, p. 10-12.

In the *Broadcasting Rights Convention Case*,<sup>60</sup> AG Sharpston reviewed both the a Working Group document as well as a mandate for an intergovernmental conference that eventually led to the Lisbon Treaty in order to examine whether the new exclusivity clause in Article 3(2) TFEU intended to depart from the ERTA test for exclusivity from which its language is borrowed.<sup>61</sup> ‘If the negotiating history of Article 3(2) TFEU shows anything, it is that there was no intention to depart from the ERTA principle.’<sup>62</sup>

In the *Anton Las* opinion,<sup>63</sup> AG Jääskinen refers to the origins of the current ‘national identity’ provision in Article 4(2) TEU. A European Convention working group had recommended that the provisions now in TEU on national identity should have been clarified to expressly state that the EU is obliged to respect ‘essential elements of the national identity [which] include... their choices as to language’.<sup>64</sup> Jääskinen’s point is simply that, since the clarification was mooted, ‘[t]he concept of ‘national identity’ therefore concerns the choices made as to the languages used at national or regional level.’ This clarification was not made – language is not currently mentioned in 4(2) TEU – but the Court recognised it as part of the concept in its *Runevič-Vardyn and Wardyn* judgment.<sup>65</sup> However, had the Court followed the Advocate General, it would have not led to an outcome that favoured the language choices of the state: Jääskinen instead compared his enhanced concept of national identity with the concept of linguistic diversity, with the effect that Jääskinen would have denied the possibility of derogating from fundamental freedoms on these (national identity) grounds.

### Could Travaux introduce new propositions of law?

So far, advocates general have not used *travaux* in a particularly controversial way. They support propositions of law or are trivial but are not solely responsible for founding them. However, under one reading, the recent Venezuelan Fisheries case could be considered quite unusual – and one where the *travaux* would have clearly augmented the Treaty text.

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<sup>60</sup> C-114/12, Opinion of AG Sharpston, 3.4.2014 para. 96 fn 55.

<sup>61</sup> reaching for the Final report of Working Group VII on External Action CONV 459/02 (16 December 2002), paragraph 18 and the IGC 2007 Mandate POLGEN 74 (26 June 2007), paragraph 18 and footnote 10 to determine whether 3(2) TFEU meant to depart from the ERTA ruling principle;

<sup>62</sup> Opinion of AG Sharpston, 3.4.2014 para 96 fn 55 reaching for the Final report of Working Group VII on External Action CONV 459/02 (16 December 2002), paragraph 18 and the IGC 2007 Mandate POLGEN 74 (26 June 2007), paragraph 18 and footnote 10 to determine whether 3(2) TFEU meant to depart from the ERTA ruling principle; see also her reference to AG Kokott in C-137/12,

<sup>63</sup> C-202/11 *Las* Opinion of AG Jääskinen of 12.7.2012 at point 59 fn 39

<sup>64</sup> CONV 375/1/02 REV 1 Final report of working group V, p. 12.

<sup>65</sup> Case C-39/09 *Runevič-Vardyn and Wardyn*, paragraph 86.

In *Venezuelan Fisheries*, AG Sharpston examined i.a. the effects of the EU's new legal personality on the legal rules which governed its international action.<sup>66</sup> It was suggested that the Union could not make unilateral declarations, but could only enter into 'international agreements' under Article 218 TFEU. According to Sharpston's reading of the Convention WG final report on legal personality,<sup>67</sup> the reasons for attributing legal personality entitled the Union to also issue unilateral declarations which bound it under international law. By making the Union a subject, it would be

“... be able to avail itself of all means of international action (right to conclude treaties, right of legation, right to submit claims or to act before an international court or judge, right to become a member of an international organisation or become a party to international conventions, e.g. the ECHR, right to enjoy immunities), as well as to bind the Union internationally”

Thus, although the Treaties did not expressly envisage unilateral declarations, here AG Sharpston would have implied the power in part through a construction based on the WG final report's intention to grant the Union full capacity as an international actor. This could be seen as a dynamic reference, since the immediate outcome is to augment the categories of legal instruments with declarations in international law.

### **Applying the framework to AG opinions**

References to the travaux in the AG opinions can be categorized in following way: (next page)

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<sup>66</sup> Joined cases C-103/12 and C-65/13, Opinion of AG Sharpston on 15.05.2014 point 102 fn 61.

<sup>67</sup> Final report of Working Group III on Legal Personality CONV 305/02 (WG III 16) (Brussels, 1 October 2002), paragraph 19.

|   | STATIC<br>- Aims to state the original purpose  | DYNAMIC<br>- Aims to fill gaps or otherwise construct the constitution   |
|---|---|--|
| VCLT: "...to confirm the meaning..."  | <b>Group 1: static/ascertaining</b><br>Trivial references:<br>AG in C-427/12<br>AG in C-274/11<br>AG in C-95/12<br>Ascertaining references:<br>AG in C-274/12 P<br>AG in C-270/12<br>AG in C-114/12<br>AG in C-202/11 | Group 3: (hypothetical)  |
| VCLT: "...to determine the meaning, when meaning [would otherwise be] ambiguous or obscure, absurd or unreasonable" | <b>Group 2: static/extra value</b><br>References to clarify ambiguous meanings:<br>AG in C-61/03 (EURATOM)<br>AG in C-370/12 (Pringle)<br>AG in 583/11 P (Inuit)  | <b>Group 4: dynamic/change</b><br>References to propose a constitutional construction by interpretation:<br>AG in Joined Cases C-103/12 and C-65/13 (to fill a "constitutional gap") |

### Conclusions: on the use and abuse of *travaux*

Even though the older preparatory works of the Treaties might not have been widely reported or published, the *travaux préparatoires* of the more recent Treaty amendments, such as the Constitutional Treaty and the IGC leading to the Lisbon Treaty, are rather well documented. Perhaps the proper publication of the *travaux* gives the CJEU a proper mandate to use them as a source of law, as the *Pringle* and *Inuit Tapiriit Kanatami* cases demonstrate. But do the *travaux préparatoires* really reflect a coherent intention of the drafters? And if not, how far do their use turn legal fiction into fact?

### Current practice is conservative despite admitting *travaux*

The three cases show that preparatory works can now be used, but whilst *Pringle* in particular has raised vocal dissent, this specific aspect – that is, the use of preparatory works to interpret the meaning of a Treaty provision – is less controversial in each. The *EURATOM* interpretation case shows one example of how *travaux* could be used to support cautious or conservative readings of implied powers. There, discussion in the preparatory works showed that military use was not omitted by accident: the possibility of including this in the *EURATOM* Treaty was rejected. That rejection was then confirmed when the Court was pressed to rule on this point. In *Pringle*, it is hardly contested that a key purpose of the no bail-out clause was indeed to ensure prudent macroeconomic governance. Whether that provision should therefore also preclude the ESM is not decisively determined by the *travaux*, but by the court's appreciation of the effects of the ESM on this prudence. In *Inuit*, the *travaux* reference is also limited to confirming the relatively unopposed interpretation of Treaty change: the preparatory works in question clearly illustrate the origins of the distinction between regulatory and legislative acts – one also mooted by the Court's own discussion group at the time of the Constitutional Convention. This is then confirmed by the Court's interpretation of the provision in *Inuit*.<sup>68</sup>

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<sup>68</sup> See also Bergström, C F, 'Defending Restricted Standing for Individuals to Bring Direct Actions Against 'Legislative' Measures: Court of Justice of the European Union Decision of 3 October 2013 in Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v European Parliament and Council*' (2014) *European Constitutional Law Review* 481 at 496-497

### ...but reference to the intentions of drafters is open to abuse

Koen Lenaerts, the president of the Court which handed down *Inuit*, suggests the *travaux* will be increasingly influential as the current Treaty provisions are interpreted.<sup>69</sup> However, some doubts might be raised about the utility of *travaux* references. Many of the criticisms that have been levelled against the use of preparatory work to secondary legislation apply also to the Treaties' preparatory work, and in some cases even more strongly.

Schønberg and Frick's 2003 review of *travaux* in secondary legislation<sup>70</sup> noted that the conflicting intentions and statements of co-legislators made it difficult to identify a single coherent intent; that a historical intention could ossify interpretation (think- what could the founders possibly have said about interstate *electronic* commerce?); and finally, that the drafting of the documents themselves could be so ambiguous as to preclude drawing conclusions as to what was intended.

The question of whose intent matters is especially acute in the context of the Treaties. The input ranging from the Convention working groups, its plenaries, those involved in the legal review of the draft treaties, the intergovernmental conferences leading up to the reconfiguration of the texts in the Lisbon Treaty all offer reasons for questioning claims as to intention. Negotiators involved in the proceedings may, if interviewed, give diametrically opposed views of what was intended by particular Treaty provisions. National parliamentarians approving changes may hold particular views on what is intended. Significant differences of opinion are evident at various stages of the legislative processes.<sup>71</sup> And what weight should be given to the way in which Treaty changes are marketed in the national referenda ? Can we – and should we – also measure what is intended by those readers of the drafts, without whom many changes cannot be ratified? The European union, like all legal systems, has its share of legal fictions. But is it too bold to claim that an intention can be identified in preparatory works? And do only written, contemporaneous documents of particular bodies matter, or should the entirety of the evidence be considered?

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<sup>69</sup> Lenaerts, Koen and Gutierrez-Fons, 'To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice' EUI Working Paper 2013/9, p. 19-24

<sup>70</sup> Schønberg, S. and Frick, K., 'Finishing, Refining, Polishing: On the Use of *travaux* préparatoires as an Aid to the Interpretation of Community Legislation' (2003) 28 *European Law Review* 149.

<sup>71</sup> Miettinen *NJECL* 2013 99-119 at 106-113 on EAW preparatory work.

The clarity of preparatory works may also leave much to be desired, even in the post-Lisbon era. In our primary field of research, a major topic of inquiry is the extent and limits of legislative powers in the field of criminal law. Has the Union exhausted its competence for criminal legislation in Article 83 TFEU, or might similar provisions be founded on other legal bases?<sup>72</sup> This appeared to be a major discussion point during the negotiations. Nevertheless, the whole body of evidence led the UK House of Lords to conclude at the time that a question on which it both required an answer (so as to ensure the effectiveness of its ‘opt-out’) and that it *did not know the answer*.<sup>73</sup>

The mere possibility of referring to the *travaux* also complicates this issue. The EU Treaties in their current form are hardly a glowing example of clarity, either in length or in style. The possibility that these ambiguities might now require clarification in the form of exponentially greater, and less clear, combinations of preparatory works should be additional cause for concern. When will they be instrumental to the outcome, and when will they be ignored? It is tempting to echo Gareth Davies’s very recent conclusion on Court’s approach to legislative change: ‘in situations where the Treaty is involved, which are almost all the ones that matter, the legislature has no capacity to force the law in a certain direction’ since the Court’s interpretative powers are so vast.<sup>74</sup> Growing emphasis on *travaux* will be uncontroversial if they merely confirm the lack of agreement, or an unanimously agreed interpretation. However, the capacity for abuse is immense – especially in the nightmare scenario where even the drafters of the Treaty cannot prevail over the interpretation suggested by a reading of particular preparatory works.

### Could Travaux be used in a dynamic way?

What impact have the Court’s references to the *travaux préparatoires* of the Treaties had so far? Do the references help identify the intention of the constitutional legislators (the Member States as the Masters of the Treaties), or are they a dynamic constitution-building exercise? Thus far the Court itself has used the *travaux préparatoires* in a static manner. It determines

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<sup>72</sup> on the inconclusiveness of the Convention evidence on drafting, Miettinen, Samuli, ‘Implied ancillary criminal law competence after Lisbon’ *European Criminal Law Review* (2013) 3(2) 194-219. On the difference of EU law paradigm with the choice of legal basis-doctrine and the normative criminal law paradigm, see Merita Huomo-Kettunen, ‘EU criminal policy at a crossroads between effectiveness and traditional restraints for the use of criminal law’ *New Journal of European Criminal Law* (2014) Vol. 5, No. 3, pp. 301–326.

<sup>73</sup> HOUSE OF LORDS European Union Committee 10th Report of Session 2007–08 *The Treaty of Lisbon: an impact assessment* Volume I: Report, paras 6.179-6.189 pp-147-149; Mitsilegas *EU Criminal Law* 108 fn 267 for reference to *lex specialis*.

<sup>74</sup> at 1606.

the original intention of the constitutional legislator in situations in which the text itself would not give satisfactory solution. Instead, it looks to the preparatory work which supports a teleological interpretation - the intention of the constitutional legislator which can. This differs from the Court's general line of teleological jurisprudence, which is highly dynamic.

The Court appears reluctant to refer to *travaux* when they provide no added value. When the *travaux* confirm evidence also found elsewhere, they are omitted by the Court of Justice. The Court's *travaux* references also, so far, lead to conservative outcomes. In the three cases in which the Court does follow Advocate Generals in referring to *travaux*, both the Advocates General and the Court use *travaux* in a static way. A particular Treaty interpretation is supported- the text is clarified and this provides added value – but the reference does not propose a construction that is developed exclusively by interpretation.

There is one outlier in this set. In *Venezuelan Fisheries*, AG Sharpston used the preparatory works in a different- arguably dynamic – way. In the approach she adopts, the Union is granted competence to give unilateral declarations: this constitutional construction would have granted the Union a general competence to issue internationally binding unilateral declarations. This goes well beyond the bilateral nature of 'agreements' stipulated in the text of the Treaty. The Court did not follow AG Sharpston's suggestion even though it reaches the same substantive outcome. It simply construed the exchange of positions as an 'agreement' and thus prevented the need to consider powers to issue any purely unilateral declarations.<sup>75</sup>

We conclude that *thus far* the Court has used the *travaux* in a static manner. The Court has not exercised dynamic constitution building based on references to the *travaux*. This does not mean, however, that the Court's new line of interpretation using the *travaux* of the Treaties could not be used in a dynamic manner in the future. Further research is required on when this might be appropriate.

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<sup>75</sup> C-103/12, paragraph 73.