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Travaux *to the EU Treaties: Preparatory Work as a Source of EU Law*

Samuli MIETTINEN and Merita KETTUNEN*
Faculty of Law, University of Helsinki

Abstract
The Court of Justice of the European Union has historically rejected references to preparatory work in the interpretation of EU Treaties. However, the preparatory work for the EURATOM, Maastricht, and Constitutional Treaties have played a role in recent judgments. The 'explanations' to the Charter of Fundamental Rights are expressly approved in the current Treaties. We examine the emerging case law on preparatory work. Reference to the drafters' intent does not necessarily support dynamic interpretation, and may potentially even ossify historical interpretations. Even if the consequence of their introduction is a conservative interpretation, their use raises questions of transparency and democracy, and complicates the already difficult task of interpreting the EU constitution.

Keywords: *travaux préparatoires*, drafting history, sources of law, Treaty interpretation

I. INTRODUCTION

For most of the current era of European integration, the Court of Justice (CJEU) has not admitted preparatory work as evidence of the framers' intent when interpreting Treaties. Even the teleology of 'ever closer union' is firmly rooted in the text of the Treaties in article 1 of the Treaty on European Union. This contrasts with a long trend of reviewing drafting histories of secondary legislation. Earlier literature has suggested that the reluctance to refer to Treaty preparatory work was linked to the secrecy surrounding early negotiations, and to poor public access to the documents. Some at the Court have considered that these concerns are no longer relevant especially to the more recent preparatory work produced by the constitutional conventions which were intended for public consumption. In several recent cases, the Court has reversed its initial opposition to relying on preparatory works to the Treaties. Recent literature has also been more open to the use of the *travaux* and accepts that such references can legitimise the Court's reasoning.

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We examine the extent to which the Court and the Advocates General have relied on preparatory work to interpret the EU Treaties and determine the 'intent' of their framers. Our focus is on the Treaty on European Union, the Treaty on the Functioning of the European Union, their predecessors and the Charter of Fundamental Rights. We then categorise the references and consider how they are used to develop key arguments in those cases. 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. The increased use of historical interpretation may in future even act as a counterweight to teleological interpretation. Nevertheless, extensive reference to *travaux* raises questions of transparency, democracy, and the overall manageability of the Union's primary law that are difficult to answer satisfactorily.

This paper focuses on the constitutional dimension of the use of *travaux préparatoires* rather than the legislative dimension. Although the CJEU and the Advocates General have often relied on the *travaux* in their reasoning concerning the interpretation of the EU secondary legislation, this method is a novelty as regards the EU Treaties. The CJEU had not used the *travaux préparatoires* as a source of law to interpret the Treaties before 2005, when the *EURATOM* judgment was delivered. All of the cases in which *travaux* are used by the Court raise issues of conferral and are thus constitutional significance. First, we briefly consider how preparatory work is used as a source of law in international and EU law in order to illustrate the distinctive approach of EU law on this point. Next, we describe the cases in which the CJEU has relied on the *travaux* of the Treaties as a source of law. Then we build an analytical framework which draws on constitutional legal theory and international law. With this framework we analyse the possible outcomes to which the *travaux* could contribute and which types of outcome the Court's judgments represent. We then extend this analysis to the larger data set which includes the Opinions of the Advocates General and compare those Opinions with the cases in which the CJEU has utilised the *travaux*. In our conclusions we also raise a number of issues which arise from the Court's introduction of *travaux* as a source of law and raise several questions for further research.

II. THE LEGAL CONTEXT OF PREPARATORY WORK IN INTERNATIONAL AND EU LAW

Sources beyond the text of a legal instrument are controversial in many contexts. This is so even for preparatory work which is published. In the UK, reference to Parliamentary debates was taboo until 1993.[1] In other European countries, such as in Sweden and Finland, *travaux* are used routinely even when interpreting the constitution. In

[1] *Pepper v Hart* [1993] AC 593. The judgment has been criticised in the literature on the basis that it breaches the doctrine of separation of powers and that the judgment represents 'intentionalism', that it wrongly emphasises the will of the legislator at the expense of the discretion of those applying the law. The courts seem hesitant to fully endorse these criticisms but nevertheless the use of the Parliamentary debates remains restricted to some extent. See, S Vogenauer, 'A Retreat from *Pepper v Hart*? A Reply to Lord Steyn' (2005) 25 (4) *Oxford Journal of Legal Studies*, 629, especially pp 638–654.

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international law, preparatory works are routinely used to interpret Treaties, and are recognised as a legitimate source for this purpose.[2] However, *travaux* are often incomplete and misleading, and therefore less authentic than other elements. This is one reason why they are supplementary rather than principal means of interpretation under the Vienna Convention on the Law of Treaties (VCLT).[3] For similar reasons, The CJEU has traditionally not approved of references to the EU Treaties' preparatory work.[4]

A. *International law permits reference to travaux*

Reference to the preparatory works of Treaties is expressly foreseen in international law. The VCLT,[5] and particularly articles 31 and 32, govern the interpretation of international treaties. According to Article 31 VCLT,[6] the terms of the treaty should be given their ordinary meaning in context and be interpreted in the light of their object and purpose. The purpose of the treaty can be found from the text, the preamble, and the annexes. Article 32 VCLT[7] provides that the preparatory work of

[2] See eg the case of the SS 'Lotus' (*France v Turkey*) PCIJ Report Series A, no 10, pp 16–17 for an early reference, and in detail R Gardiner, *Treaty Interpretation* (Oxford University Press, 2008), pp 99–108, 303–343; U Linderfalk, *On the Interpretation of Treaties* (Springer, 2007), pp 240–246.

[3] A Aust, *Modern Treaty Law and Practice*, 3rd ed (Cambridge University Press, 2013), p 217, but accepting at p 218 the thesis of SM 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 Skubiszewski* (Kluwer Law International, 1996), p 541.

[4] Opinion of Advocate General Mayras in *Reyners*, C-2/74, EU:C:1974:68, p 666.

[5] UN Treaty Series vol 1155, concluded at Vienna on 23 May 1969, entered into force on 27 January 1980.

[6] 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 connection with the conclusion of the treaty;
   (b) Any instrument which was 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.
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.

[7] 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.

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the treaty can be used as *supplementary* means of interpretation *to confirm* or determine the meaning when an 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 VCLT, the *travaux préparatoires* are given a supporting role in the interpretation of the international treaties.

The actual object of interpretation is nevertheless the text of the treaties. The first step of the interpretation is to intuitively assume the 'ordinary meaning' of the text. Supplementary means of interpretation can then be used to confirm or revise the original hypothesis. The preparatory works can influence the interpretation through four routes: if the meaning of text is left ambiguous (Article 32.a); the interpretation would leave to manifestly absurd or 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.[8]

B. *The* sui generis *nature of EU law*

The VCLT is treated differently in different contexts in EU law. The CJEU has found that the VCLT binds the EU institutions and is part of EU legal order as a rule of customary international law.[9] 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 Treaties. 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) with Union law,[10] and stated that Union law forms its own legal order, whose aims are not just to 'achieve economic integration', but to make 'concrete progress towards European unity'. Thus, Union law operates, according to the Court of Justice, in a different context, because it does not only create rights and obligations between the Contracting Parties. Instead it provides 'transfer of sovereign rights to the intergovernmental institutions which it sets up'.[11]

The Court's interpretation of EU law is based on text, context, and *telos* (purpose), as can be read from the *Van Gend en Loos* judgment.[12] The CJEU has also stated that

[8] JD Mortenson, 'The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?' (2013) 107 (4) *The American Journal of International Law*, 780, especially pp 785–787.

[9] *Gennaro Currà and Others v Bundesrepublik Deutschland*, C-466/11, EU:C:2012:465, para 22. For a more general discussion of the approach of the EU courts to the VCLT see J Odermatt, 'The Use of International Treaty Law by the Court of Justice of the EU' *Cambridge Yearbook of European Legal Studies*, doi:10.1017/cel.2015.5 [first published online August 2015].

[10] *Opinion 1/91 EEA Agreement*, EU:C:1991:490. In this respect the distinction between 'Community' law in the pre-2009 judgments and our term Union law is purely cosmetic.

[11] Ibid, paras 16–20. See also eg *Costa v ENEL*, C-6/64, EU:C:1964:66, postulating primacy from the transfer of sovereign powers.

[12] *Van Gend en Loos v Nederlandse Administratie der Belastingen*, C-26/62, EU:C:1963:1. See also MP Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 (2) *European Journal of Legal Studies*, 4; A Arnull, *The European Union and its Court*

in interpreting EU law concepts one should use 'the generally recognised principles of interpretation, beginning with the *ordinary meaning* to be attributed to those terms in their *context* and in the light of the *objectives* of the Treaty'.[13] Provisions of EU law should also be interpreted in their context and *in the light of the EU law as a whole*.[14] These elements of interpretation seem to be equivalent to those mentioned in the Article 31(1) VCLT, as explained above.

One significant difference has, however, prevailed for most of the EU's constitutional history. Originally, reference to the preparatory work of the Treaties was considered constitutionally problematic in EU law. Article 32 of the VCLT 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':[15] the preparatory work did not exist, or involved only working group-level discussions, therefore rendering reference constitutionally questionable.[16] Nevertheless Anthony Arnull, writing in 2006, expected the CJEU 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'.[17]

C. *Preparatory work and interpretation by the Court of Justice*

There is not much literature on the status of *travaux préparatoires* to the Treaties before the CJEU.[18] The founding Member States of the European Economic Community, decided not to publish their *travaux*.[19] As a consequence,

(F'note continued)
of Justice, 2nd ed (Oxford University Press, 2006); E Paunio and S Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning in EU Law', (2010) 16 (4) *European Law Journal*, 396.

[13] *DM Levin v Staatssecretaris van Justitie*, C-53/81, EU:C:1982:105, para 9 [emphasis added].

[14] CILFIT C-283/81, EU:C:1982:335, para 20.

[15] A Arnull, *The European Union and its Court of Justice* (Oxford University Press, 1999), p 526; see in identical terms the second edition, note 12 above, p 614.

[16] H Kutscher, 'Methods of interpretation as seen by a judge at the Court of Justice' in Reports of a Judicial and Academic Conference (Luxembourg 27–28 September 1976), pp 1–21, cited in A Arnull, note 12 above, fn 46.

[17] See A Arnull, note 12 above, pp 614–615, also at p 615: 'It is likely that this [historical] approach will in future be modified.'

[18] G Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing, 2012), pp 217–219 does not yet note the *travaux* as a present source, rather that it could in the future rely on them. See also A Arnull, note 12 above; PP Craig and G de Burca, *EU Law – Text, Cases and Materials*, 4th ed (Oxford University Press), p 73; K Lenaerts et al, *European Union Law* (Sweet & Maxwell, 2011), p 815, fn 313; JC Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge University Press, 2006), pp 38–55.

[19] J Pratter, 'À la Recherche des Travaux Préparatoires: An Approach to Researching the Drafting History of International Agreements' (2005), http://www.nyulawglobal.org/globalex/Travaux_Preparatoires.htm, point B1 [last accessed 4 July 2015].

the CJEU also refrained from referring to them. In a classic exposition of this point from the mid-1970s, Advocate General Mayras noted in his Opinion in *Reyners*:

> 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'.[20]

Non-publication itself is no longer an issue: since 1994, the works have been available for consultation in the historical archives of the Union, housed at the European University Institute in Florence.

As a rule, the contextual and teleological interpretation methods are the chief methods for enhancing the CJEU's understanding of Treaty texts – and it is the text of the Treaties, but not their preparatory work, which is used.[21] Teleology is in many cases derived from the Treaty text itself: when the text refers to 'ever closer union', an interpretation which facilitates this is only carrying out the literally stated intention of its drafters.[22] Ambiguity also invites teleology: the strong position of the contextual and teleological interpretation is at least sometimes a consequence of multilingualism in the EU.[23] Such ambiguity may also be an intentional outcome of the negotiation process.[24] Sometimes the contextual and teleological methods can even override the natural textual meaning of the treaty provisions.[25]

Despite the 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.[26] These cases are, however, not relevant to the question at hand. One of the cases simply does not refer to the *travaux* of the Treaties.[27] In the other case mentioned in the literature, the reference to the *travaux* is not made by the Court but instead by the

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[20] Opinion of Advocate General Mayras in *Reyners v Belgian State*, C-2/74, EU:C:1974:68, p 666.

[21] Preambular text has of course been used by the court – and this may reflect intent of the drafters – but the preambles do not refer to specific articles but rather the overall teleology of the Treaty system.

[22] See *Opinion 2/13* on the draft agreement to accede to the European Convention on Human Rights, para 167.

[23] On the meaning of words in constitutional interpretation, see also, A Jakab, 'Judicial Reasoning in Constitutional Courts: A European Perspective' (2013) 14 (8) *German Law Journal*, 1215, pp 1231–1233.

[24] A Arnull, see note 12 above, p 612.

[25] *Foto-Frost v Hauptzollamt Lübeck-Ost*, C-314/85, EU:C:1987:452, paras 16–17; A Arnull, see note 12 above, p 613.

[26] *Commission v Belgium*, C-149/79, EU:C:1980:297, p 3890; and *Aristrain v Commission*, T-156/94, EU:T:2004:261, para 40.

[27] *Aristrain v Commission*, T-156/94, EU:T:2004:261, para 40.

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applicant.[28] This is typical of the body of references to *travaux:* either the 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.[29] In some further cases the Court used the *travaux* of the Acts of Accession, but not the founding Treaties.[30] Thus, none of those are in fact references where the Court uses preparatory work to interpret the TFEU, TEU, or their predecessors.

D. *The 'explanations' to the Charter of Fundamental Rights as a special case*

Some drafting documents have already been admitted into the Union's sources of law doctrine, but as express references in the Treaties. The Charter of Fundamental Rights expressly refers to the 'explanations' as a source with which the Charter must be interpreted. Article 52(7) of the Charter states that 'the explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States'. Article 6(1) TEU stipulates that the Charter is to be interpreted 'with due regard to the explanations referred to in the Charter'. The explanations therefore have a special status as a EU legal source amongst other *travaux préparatoires* in that primary law recognises their legal value, unlike the *travaux préparatoires* of the other Treaties.

The story of how the explanations came to be legally binding- and which explanations are legally binding- illustrates why drafting intent is so problematic. The Charter was of course based on an international instrument which already had its own set of explanations. Conventions of the Council of Europe, including the European Convention on Human Rights, always have an explanatory report.[31] Thus, it could be thought that explanations to the Convention could have served as a starting point for those provisions which were modelled on the Charter.

In the proceedings leading to the 2000 Charter, the explanations did not have legal status, and were 'no more than a simple explanatory report approved by the Convention presidium'[32] since, just like typical working group texts, the text was not approved in the proceedings. However, during the Convention which led to the Draft

[28] *Commission v Belgium*, C-149/79 EU:C:1980:297, p. 3890; and *Sison v Council*, T-47/03, EU:T:2007:207, para 97, where Secretariat of the European Convention, (2003) 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 the Dutch arguments.

[29] See eg *SpA Savna v Commission*, C-264/81, EU:C:1984:359, p 3926.

[30] The *travaux* had no influence in cases: *Lithuania v Commission*, T-262/07, EU:T:2012:171, para 42; *Czech Republic v Commission*, T-248/07, EU:T:2012:170, para 42; *Slovakia v Commission*, T-247/07, EU:T:2012:169, para 42; *Poland v Commission*, T-243/07, EU:T:2012:168, para 42; *Estonia v Commission*, T-324/05, EU:T:2009:381, para 109. The *travaux* did have impact in cases: *Poland v Council*, C-273/04, EU:C:2007:622, para 57; *Hansa-Fisch GmbH v Commission*, T-493/93, EU:T:1995:47, paras 35–37.

[31] JP Jacqué, 'The Explanations Relating to the Charter of Fundamental Rights of the European Union' in S Peers et al (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014), p 1715.

[32] Ibid, p 1717, citing Charter 4422/00 Convention 45.

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Constitution, a phrase was inserted into the preamble of the Charter[33] and the text of the Constitution itself[34] which recognised the 2000 explanations and their later version under the 2002–3 Convention. A separate declaration to the draft Treaty[35] was, according to Jean Paul Jacqué, aimed 'to prevent the Explanations being attributed to the authors of the Treaty'.[36] It was, however, not reproduced in the Lisbon Treaty. Instead, Article II-112(7) of the Convention became Article 52(7) of the Charter, reaffirming the use of the Praesidium-drafted 'explanations' as an aid to interpreting the Charter. The later version of the explanations[37] states that they had been updated to take account of redrafting during the Constitutional convention and developments in the other sources which the Charter rights reflect.[38]

The 'explanations' are not, as might be expected, mere explanations. The explanations may in fact not only refer to the sources of rights, but define the right itself.[39] They provide a list of articles which have the same meaning and/or scope as equivalents in the ECHR. They can even be used to interpret the Convention in a way that is difficult to reconcile with its wording.[40] Explanatory works to the Charter of Fundamental Rights now frequently appear in the judgments of the CJEU,[41] and in the Opinions of the Advocates General.

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[33] Charter of Fundamental Rights of the European Union 2012/C 326/02: '… with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention'.

[34] Article II-112: 'The Explanations written as an aid to interpreting the Charter of Fundamental Rights are duly taken into consideration by the courts of the Union and the Member States'.

[35] Declaration 12 to the Draft Treaty Establishing a Constitution for Europe (2004) OJ C/310/1.

[36] See note 31 above, p 1718: the declaration referred to the explanations having been 'prepared under the authority of the Prasesidium … and updated under the responsibility of the Praesidium'.

[37] Explanations Relating to the Charter of Fundamental Rights (2007) OJ C/303/17.

[38] That is not, however, a complete description of the changes. See for example the explanations to Article 53 CFR: The 2007 version omits 'The level of protection afforded by the Charter may not, in any instance, be lower than that guaranteed by the ECHR, with the result that the arrangements for limitations may not fall below the level provided for in the ECHR'.

[39] See note 29 above, p 1719 refers to Articles 14, 17, 33, 47 and 50 of the Charter of Fundamental Rights (CFR).

[40] See *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paras 20–21, where the Article 51 CFR reference to the applicability of the Charter 'only when implementing Union law' is transformed to the much broader Member States acting 'in the scope of Union law'.

[41] *Spasic*, C-129/14, EU:C:2014:586, para 41; *Melchior*, C-647/13, EU:C:2015:54, para 17; *Siragusa*, C-206/13, EU:C:2014:126, para 22; *Pelckmans Turnhout*, C-483/12, EU:C:2014:304, para 19; *Glazel*, C-356/12, EU:C:2014:350, para 74; *RX-II Réexamen Arango Jaramillo and Others v EIB*, C-334/12, EU:C:2013:134, para 42; *Schaible*, C-101/12, EU:C:2013:661, para 25; *Alemo-Herron and Others*, C-426/11, EU:C:2013:521, para 32; *Sky Österreich*, C-283/11, EU:C:2013:28, para 42; *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para 20; *DEB*, C-279/09, EU:C:2010:811, para 39; *Romonta v Commission*, T-614/13, EU:T:2014:835, para 56; *Thesing and Blooming Finance v ECB*, T-590/10, EU:T:2012:635, paras 70–71; *Cerafogli v ECB*, F-43/10, EU:F:2012:184, para 91; *Skareby v Commission*, F-42/10, EU:F:2012:64, para 47; *REV Saintraint v Commission*, F-103/06, EU:F:2011:147; *REV De Buggenoms and Others v Commission*, F-45/06, EU:F:2011:146; *REV Fouwels and Others v Commission*, F-8/05, EU:F:2011:145.

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III. PREPARATORY WORK TO THE TREATIES AND THE CHANGING POSITION OF THE COURT OF JUSTICE

Although *travaux* have not traditionally 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 cases we examine reflect an entirely new line in the Court's jurisprudence. The Court uses preparatory works to buttress arguments that are central to its reasoning.

A. *Military uses of nuclear energy in* EURATOM?

The first of this line of judgments was given in 2005 and concerned whether the military uses of nuclear energy could fall within the scope of the EURATOM Treaty.[42] 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.[43] Then the Court examines the historical background of the Treaty. The *travaux préparatoires* indicated clearly that the member states had differing views on the matter, and that therefore the Treaty could not be seen to be intended to cover military uses of nuclear energy.[44] In the absence of a reference to military use, the difference in view led to the conclusion that no such reference could be implied: 'the Treaty is not applicable to uses of nuclear energy for military purposes'.[45] The reference to the *travaux* was not decisive factor in the argumentation; instead the traditional CJEU paradigm of contextual and teleological (purposive) interpretation gained more importance. 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 *travaux* supported an exhaustive reading of the competence list.

B. *'A sound budgetary policy'*

In the *Pringle* case, the CJEU referred to the *travaux* of the Maastricht Treaty, when it evaluated whether the ESM Treaty was in breach of the 'no bail-out clause' in Article 125 TFEU.[46] Using a textual method to interpret the wording used in Article 125 TFEU, the Court found that the Article is not intended to prohibit all financial assistance to another Member State. Next the Court used a contextual method. The economic policy context of Article 125, in particular articles 122 TFEU and 123 TFEU, led the Court to the same conclusion. Only then did the Court examine the objective of Article 125 TFEU. This was found in the preparatory works of the Maastricht Treaty: '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

[42] *Commission v the UK*, C-61/03, EU:C:2005:210, para 25.

[43] Ibid, paras 27–28.

[44] Ibid, para 29.

[45] Ibid, para 44.

[46] *Pringle*, C-370/12, EU:C:2012:756, para 135.

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found the proposed European Stability Mechanism could be compatible with that article if the conditions 'to such assistance are such as to prompt that Member State to implement a sound budgetary policy.'[47] 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 followed 'that Article 125 TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it'.[48] In this case the *travaux préparatoires* had a decisive role in determining the question at hand, since the preparatory work was used to justify the legality of the ESM mechanism despite the no-bailout provision. Similar reasoning appears in the OMT reference from the Bundesverfassungsgericht, where the Court refers to *Pringle* in its definition of monetary policy and the *travaux* to the Maastricht Treaty for the aims of the Article 123(1) TFEU prohibition on direct credit facilities and direct purchases of Member State debt.[49] The aim discovered in the preparatory work was, as in *Pringle,* 'sound budgetary policy'.[50]

C. *Judicial review of 'regulatory acts'*

The *travaux* to the present Treaties have been examined in the *Inuit Tapiriit Kanatami* appeal.[51] Here, they were 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. In *Inuit*, the CJEU makes a statement of principle on their use: 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 expressly approves reference to preparatory works: the origins of a provision 'may also provide information relevant to its interpretation'.[52] 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'.[53] Thus, regardless of the traditional view that *travaux* to EU Treaties are not relevant to their interpretation,[54]

[47] Ibid, para 137.

[48] Ibid, paras 130–136, 146–147.

[49] *Gauweiler and Others v Deutscher Bundestag*, Case C-62/14, ECLI:EU:C:2015:400, paras 93–102; see also the Opinion of Advocate General Villalón ECLI:EU:C:2015:7, paras 107 and 217, referring to the preparatory work to the Treaty of Maastricht.

[50] *Gauweiler and Others*, ibid, para 100.

[51] *Inuit Tapiriit Kanatami*, C-583/11 P, EU:C:2013:625, para 59, considering the Secretariat of the European Convention: Final report of the discussion circle on the Court of Justice (2003) CONV 636, para 22; and Praesidium of the European Convention, (2003) CONV 743/03, p 20.

[52] *Inuit Tapiriit Kanatami*, ibid, para 50.

[53] Ibid, paras 70–71.

[54] Eg A Arnull, see note 12 and the discussion above.

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it is clear they are relevant and should be reviewed. As Advocate General Kokott explained 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 use of the *travaux* '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'.[55]

IV. AN ANALYTICAL FRAMEWORK: FEATURES OF CONSTITUTIONAL REASONING WITH *TRAVAUX*

Accepting 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).[56] This relates to the kind of constraints that there are in constitutional interpretation, and what kind of role the text, the original meaning and the intent should have as such constraints.[57] This, in turn, relates to the question of 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 – filling in gaps and amending problematic provisions through interpretation.[58]

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*

[55] Opinion of Advocate General Kokott in *Inuit Tapiriit Kanatami*, C-583/11 P, EU:C:2013:21, para 32. PA Van Malleghem and N Baeten, 'Before the Law Stands a Gatekeeper – Or, What is a 'Regulatory Act' in Article 263(4) TFEU? *Inuit Tapiriit Kanatami*' (2014) 51 (4) *Common Market Law Review* 1187, pp 1204–1213.

[56] JM Balkin, 'Framework Originalism and the Living Constitution' (2009) 103 (2) *Northwestern University Law Review* 549, pp 550–551. On the role of the original/framers' intent in interpretation, see eg MH Redish and MB Arnould, 'Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a 'Controlled Activism' Alternative' (2012) 64 (6) *Florida Law Review* 1485; J Raz, 'Intention in Interpretation' in RP George (ed) *The Autonomy of Law: Essays on Legal Positivism* (Oxford Scholarship Online, 1999). On constitutional interpretation in more general, see, for example, J Rubernfeld, 'Legitimacy and Interpretation' and J Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in L Alexander (ed) *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998); RC Post, 'Theories of Constitutional Interpretation' (1990) *Yale Law School, Faculty Scholarship Series*.

[57] See, LB Solum, 'Construction and Constraint: Discussion of Living Originalism' (2013) 7 (1) *Jerusalem Review of Legal Studies* 17.

[58] JM Balkin, see note 56 above, pp 559–560.

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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 (static/ascertaining), or they can also be used to determine a meaning when the text alone leads to an ambiguous interpretation as to the original purpose of the provision is (static/extra value). Dynamic references to the *travaux* can fill gaps or develop the constitution in other ways in order to justify constitutional change. Dynamic references could be used to justify a certain interpretation that pertains to new circumstances that cannot have been seen in advance. Table 1 illustrates the functions that the *travaux* can have in a constitutional interpretative framework.

In the 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; Table 1).

The next section examines cases in which the Advocates General have relied on the *travaux* to the Treaties. After describing the Opinions we apply the above framework to them in order to explain when the Court might choose not to rely on the *travaux* in its argumentation.

V. *TRAVAUX* REFERENCES IN ADVOCATE GENERAL OPINIONS: IDENTIFYING EMERGING TRENDS?

Before the Court of Justice itself recognised *travaux*, the preparatory documents of the Convention and subsequent IGCs had 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.[59] 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. There are other arguments in favour of the outcome, or the interpretation which is used. *Travaux* are not decisive.

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. In one case, the Advocate General added a category of instrument to an international competence of the Union that is recast in the Treaty. In this case an

[59] In the Opinion of Advocate General Colomer in *Beuttenmüller*, C-102/02, EU:C:2003:464, para 12, fn 10 referring modestly to the drafting of the new freedom of movement objectives in the Draft Treaty Establishing a Constitution for Europe (2004) OJ C/310/1, Article 8(2), first indent; Secretariat of the European Convention: Draft Treaty establishing a Constitution for Europe (2003) CONV 820/03; Praesidium of the European Convention (2003) CONV 797/1/03, REV 1 COR 1 Vol 1.

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Table 1. Functions of *travaux* in a constitutional interpretative framework

VCLT definition	**Static** Aims to state the original purpose	**Dynamic** Aims to fill gaps or otherwise construct the Constitution
'… to confirm the meaning'	**Group 1**: ascertaining Trivial references: AG in C-427/12 AG in C-274/11 AG in C-95/12 Ascertaining references: AG in C-274/12 P AG in C-270/12 AG in C-114/12 AG in C-202/11 AG in Opinion 1/13 AG in Opinion 2/13	**Group 3**: (hypothetical)
'… to determine the meaning, when meaning [would otherwise be] ambiguous or obscure, absurd or unreasonable'	**Group 2**: extra value References to clarify ambiguous meanings: C-61/03 (*EURATOM*) C-370/12 (*Pringle*) C-583/11 P (*Inuit*) C-62/14 (*Gauweiler*)	**Group 4**: change References to propose a constitutional construction by interpretation: AG in Joined Cases C-103/12 and C-165/12 (to fill a 'constitutional gap')

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 – a dynamic constitutional construction found exclusively through a reference to the *travaux*.

A. *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,[60] Advocate General Villalon referred to a Convention Working Group document[61] and claimed that the drafters had in mind comparisons of national administrative legal systems when discussing what 'delegated' legislation, now in Article 291 TFEU, should mean.[62] They surely did so, but the document to which he refers makes no mention of this comparison.

[60] Opinion of Advocate General Villalon in *Commission v Parliament and Council*, C-427/12 EU:C:2013:871, para 38, fn 16.

[61] Secretariat of the European Convention: Final report of Working Group IX on Simplification (2002) CONV 424/02, WG IX 13.

[62] See note 60 above, para 38: '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

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In his Opinion on *Enhanced Cooperation for the Unitary Patent*,[63] Advocate General Bot referred to a Praesidium note (so not a final working group report).[64] He used 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'.[65] That the Convention was framed by the Laeken declaration objectives is hardly a legal innovation, and does not contribute to the line of reasoning involving the constitutionality of the proposed system.

In *Commission v Germany*,[66] 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 TFEU. 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, Advocate General Wahl mulled evidence to the contrary. *Travaux* were referred to in this context – as evidence considered, but not sufficient to persuade the Advocate General: AG Wahl acknowledged 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.[67] He did not consider this sufficient to reverse the established discretion of the Commission in bringing proceedings.

B. *The majority support, but do not found, legal propositions*

A large bulk of the references 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 of our highlighted CJEU judgments at earlier stages, whether at first instance *(Inuit)*[68] or the Opinions of the Advocates General before the CJEU (*EURATOM*,[69]

(F'note continued)
inspiration from the normative categories of the 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.''

[63] Opinion of Advocate General Bot in *Spain and Italy v Council (enhanced cooperation)*, C-274/1, EU:C:2012:782, para 43, fn 8.

[64] Praesidium of the European Convention, *Delimitation of Competence Between the European Union and the Member States – Existing System, Problems and Avenues to be Explored* (2002) CONV 47/02.

[65] See note 63 above, para 43.

[66] Opinion of Advocate General Wahl in *Commission v Germany* (second infringement case concerning the German worker representation law), C-95/12, EU:C:2013:333.

[67] Ibid, para 84, fn 60 referring to Secretariat of the European Convention (2003) CONV 636/03, para 28

[68] *Inuit Tapiriit Kanatami,* see note 51 above, para 49.

[69] Opinion of Advocate General Geelhoed in *EURATOM*, C-61/03, EU:C:2004:765, paras 80–82, referring to the travaux of the EURATOM treaty in a similar fashion as the CJEU in its judgment.

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Inuit[70] *Pringle*[71] and *Gauweiler*[72]). The Advocates General tend to draw conservative conclusions, for example to note that since the preparatory works did not show an intent to develop EU competence or the Court's jurisdiction, an extension could not be implied.

In *Telefonica*,[73] Advocate General Kokott attempted to interpret what the Treaty annulment grounds refer to when Article 263 TFEU refers to an act which does not entail implementing measures.[74] Her references to the legislative history of that provision, namely the Court of Justice discussion circle in the Convention,[75] are used to support two points. First, she observed that a German version of the Treaty provision translates as similar to the current French text.[76]

A second reference to the same document is then used to determine 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".'[77]

In the *ESMA Short Selling Rules Opinion*,[78] Advocate General Jääskinen also referred to a Convention Final Working Group document.[79] 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.

In the *Broadcasting Rights Convention Case,*[80] Advocate General Sharpston reviewed both a Working Group document as well as a mandate for an

[70] Opinion of Advocate General Kokott in *Inuit Tapiriit Kanatami*, C-583/11 P, EU:C:2013:21, para 40, using several documents in the drafting history to define 'regulatory act'; para 46, noting the complete absence of counterevidence.

[71] Opinion of Advocate General Kokott in *Pringle*, C-370/12, EU:C:2012:675, paras 128–131.

[72] *Gauweiler and Others*, see note 49 above, para 100.

[73] Opinion of Advocate General Kokott in *Telefónica SA v European Commission*, C-274/12 P, EU:C:2013:204.

[74] Ibid, paras 30–57.

[75] Secretariat of the European Convention (2003) CONV 636/03, para 21.

[76] *Telefónica SA v European Commission*, C-274/12 P, EU:C:2013:852, para 38, fn 17, referring to the Secretariat of the European Convention CONV 636/03.

[77] Ibid.

[78] Opinion of Advocate General Jääskinen in *United Kingdom v Parliament and Council (ESMA)*, C-270/12, EU:C:2013:562, para 75, fn 95.

[79] Secretariat of the European Convention (2002) CONV 424/02, WG IX 13, pp 10–12.

[80] Opinion of Advocate General Sharpston in *Commission v Council*, C-114/12, EU:C:2014:224, para 96, fn 55.

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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.[81] 'If the negotiating history of Article 3(2) TFEU shows anything, it is that there was no intention to depart from the ERTA principle.'[82] Likewise, in his View on Opinion 1/13 *(on the Hague Convention on Civil Aspects of International Child Abduction)*, Advocate General Jääskinen noted that Article 3(2) TFEU was intended to reflect the case law of the Court of Justice concerning when an external competence was also exclusive.[83]

In the *Anton Las* Opinion,[84] Advocate General Jääskinen referred 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'.[85] 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 Article 4(2) TEU – but the Court recognised it as part of the concept in its *Runevic-Vardun and Wardyn* judgment.[86] 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.

Finally, In her View to the Court's Opinion 2/13 *(Draft ECHR Accession Agreement)*, Advocate General Kokott examined the intent of the Constitutional Convention in framing what eventually became the exclusion of the Court's Common Foreign and Security Policy jurisdiction in Article 24(1) TEU and 275 TFEU.[87] The Convention had considered extending the Court's jurisdiction, but

[81] Secretariat of the European Convention, *Final Report of Working Group VII on External Action* (2002) CONV 459/02, WG VII 17 and European Council, *IGC 2007 Mandate* (2007) POLGEN 74, 11218/07, para 18, fn 10 to determine whether Article 3(2) TFEU meant to depart from the ERTA ruling principle.

[82] Opinion of Advocate General Sharpston in *Commission v Council*, C-114/12, EU:C:2014:224, para 96.

[83] Opinion of Advocate General Jääskinen in *Opinion 1/13*, EU:C:2014:2292, para 70, fn 100, citing Secretariat of the European Union, *Final Report on Working Group V* (2002) CONV 375/1/02, WG V 14, REV 1 and Secretariat of the European Convention (2002) CONV 459/02, WG VII 17, paras 4 and 18; and also referring to Opinion of Advocate General Sharpston in *Commission v Council*, C-114/12, EU:C:2014:224.

[84] Opinion of Advocate General Jääskinen in *Las*, C-202/11, EU:C:2012:456, para 59, fn 39.

[85] Secretariat of the European Convention, *Final Report on Working Group V* (2002) CONV 375/1/02, p 12.

[86] *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291, para 86.

[87] Opinion of Advocate General Kokott in *Opinion 2/13*, EU:C:2014:2475, para 90, fn 51.

declined to do so.[88] For Advocate General Kokott, this meant the draft proposal's jurisdiction provisions extended the Court's jurisdiction contrary to the intent of the framers.

C. *Could* travaux *introduce new propositions of law?*

So far, Advocates General have not used *travaux* in a particularly controversial way. They are trivial or support propositions of law but are not solely responsible for founding them. They tend to support conservative readings of pre-existing provisions. Many show that a change was mooted, but not adopted – and that therefore, this change could not be implied by the Court's interpretation. Thus, if anything, *travaux* references can limit the scope for dynamic interpretation. 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.

In *Venezuelan Fisheries*, Advocate General Sharpston examined *inter alia* the effects of the EU's new legal personality on the legal rules which governed its international action.[89] It was suggested that the Union could not make unilateral declarations, but could only enter into bilateral 'international agreements' under Article 218 TFEU. According to Sharpston's reading of the Convention Working Group final report on legal personality,[90] 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 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, eg the ECHR, right to enjoy immunities), as well as to bind the Union internationally.[91]

Thus, although the Treaties did not expressly envisage unilateral declarations, here Advocate General Sharpston would have implied the power in part through a construction based on the Working Group 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.

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[88] Secretariat of the European Convention, *Supplementary Report on the Question of Judicial Control Relating to the Common Foreign and Security Policy* (2003) CONV 689/1/93, paras 5 and 7(c); Praedisium of the European Convention (2003) CONV 734/03.

[89] Opinion of Advocate General Sharpton in Joined Cases C-103/12 and C-65/13, EU:C:2014:334, para 102, fn 61.

[90] Secretariat of the European Convention, *Final Report of Working Group III on Legal Personality* (2002) CONV 305/02, WG III 16.

[91] Ibid, p 6.

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VI. APPLYING THE FRAMEWORK TO ADVOCATE GENERAL OPINIONS

The Opinions can be also be located in the same analytical grid in order to analyse in which circumstances the CJEU has also referred to the *travaux* in its reasoning. References to the *travaux* in the Advocate General Opinions can be categorised in following way:

We can see that the Court refers to the *travaux* only in cases in which such references have brought some added value to the Advocate General's argumentation. The references help determine the meaning of the Treaty provisions in question where other interpretative tools have not provided sufficient clarity. The *travaux* references are used to determine the objective and purpose of the Treaty provisions in question. Viewed from this angle, it is no surprise that the Court's judgments which utilise the *travaux* have not led to dynamic interpretations at least in the sense that the interpretation would change the textual meaning of the Treaty provisions. However, over time, even textual meanings of different concepts can change to respond the new social circumstances.[92]

VII. 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. Nevertheless, use of the *travaux* to Treaties often raises at least three major questions of principle.

The first is whether it is appropriate to refer to preparatory work which has not been published as evidence of drafting intent. Taken to extremes, this raises the prospect of preparatory work which significantly alters the literal meaning of texts being revealed when it suits the institutions. The explanations to the Charter arguably sidestep this issue since the text was published and the Treaties expressly refer to their use. Pre-Convention era preparatory work is more problematic: at the far end of the spectrum, international agreements are often negotiated under more secretive diplomatic arrangements. Regulation 1049/2001 on access to documents, for example, refers to the protection of the Union's public interest in international relations and has been interpreted as protecting various preparatory documents leading to international agreements.[93] Even if public interest has led to the

[92] Eg in the USA, the phrase 'domestic violence' of Article IV of the US Constitution is today used to refer to violence within a household even though originally it referred to riot, rebellions and other harmful violence within the US. See, LB Solum, 'Construction and Constraint: Discussion of Living Originalism' (2013) 7 (1) *Jerusalem Review of Legal Studies* 17, p 21.

[93] D Curtin, 'Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?' (2013) 50 (2) *Common Market Law Review* 423; P Leino, 'Transparency, Participation and EU Institutional Practice: An Inquiry into the Limits of the 'Widest Possible'' (2014) 3 *European University Institute Working Paper Law*, doi:10.2139/ssrn.2416242 [published online 26 March 2014], pp 15–20; V Abazi and M Hillebrandt, 'The Legal Limits to Confidential Negotiations: Recent Case

publication of such documents in some recent cases, this is not yet the norm for international agreements to which the Union is party.[94]

Use of the *travaux* is also linked the question of democratic participation in such rulemaking. To what extent can it be argued that preparatory documents have the same democratic credentials as the final text of the Treaty? The case of the explanations to the Charter illustrate this difficulty well: a text that had not been discussed and the ramifications of which were at best unclear became an interpretative guide with significant legal consequences as illustrated by of its extensive use by the Court. This objection will typically apply to early preparatory work but will also apply to international negotiations where the preparatory work is protected from public scrutiny by the Union's 'access to documents' policy.

Third, if the aim is to clarify or simplify Treaty provisions, the full release of extensive preparatory work may be a cure worse than the disease. It would mean that anyone seeking to understand a Treaty provision must become acquainted with not only its text and the general canons of interpretation but also the full extent of the preparatory documentation. The proper publication of the *travaux* gives the CJEU a better mandate to use them as a source of law, as the *Pringle* and *Inuit* cases demonstrate, but may make the cognitive task of understanding them difficult bordering on the impossible.

A. *Current practice is conservative despite admitting* travaux

The cases above 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. But it is interesting to note that whilst the outcome is conservative, the use of these particular *travaux* overrides many of the historical objections to references to preparatory work: for example, these date from the time period when Advocate General Mayras considered it the intention of the drafters not to refer to them. They also preclude a route which, had the drafters commenced their work today rather than in the distant past of European integration, they may have wished to take. Thus, the reference locks in a restriction and prevents the dynamic future interpretation of the Union's constitutional documents, providing greater pressure for the express revision of the Treaties.

(F'note continued)
Law Developments in Council Transparency: Access Info Europe and In 't Veld' (2015) 5 (3) *Common Market Law Review* 825.

[94] See M Cremona, 'Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (2015) 52 (2) *Common Market Law Review* 351.

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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.[95]

B. *Reference to the intentions of drafters is open to abuse*

Travaux can be used in a conservative way, but their acceptance may equally lead to a dynamic and perhaps even unpredictable approach to interpretation. Koen Lenaerts, the president of the Court which handed down the appeal judgment in *Inuit*, suggested the *travaux* will be increasingly influential as the current Treaty provisions are interpreted.[96] 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.

Soren Schønberg and Karin Frick's 2003 review of *travaux* in secondary legislation[97] noted that the conflicting intentions and statements of co-legislators made it difficult to identify a single coherent intent;[98] that a historical intention could ossify interpretation (consider: 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.

All of these concerns also hold true with respect to *travaux*. 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

[95] See also CF Bergström, '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) 10 (3) *European Constitutional Law Review* 481, pp 496–497.

[96] K Lenaerts and JA Gutierrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) 9 *European University Institute Working Paper Law*, pp 19–24.

[97] S Schønberg. and K Frick, 'Finishing, Refining, Polishing: On the Use of Travaux Préparatoires as an Aid to the Interpretation of Community Legislation' (2003) 28 (2) *European Law Review* 149.

[98] See also N Duxbury, *Elements of Legislation* (Cambridge University Press, 2013), pp 92–119.

views on what is intended. Significant differences of opinion are evident at various stages of the legislative processes.[99] 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?

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.[100] Has the Union exhausted its competence for criminal legislation in Article 83 TFEU, or might similar provisions be founded on other legal bases?[101] 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 it both required an answer so as to ensure the effectiveness of its 'opt-in' and that it *did not know the answer*.[102]

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.[103]

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[99] S Miettinen, 'Onward Transfer under the European Arrest Warrant: Is the EU Moving Towards the Free Movement of Prisoners?' (2013) 3 *New Journal of European Criminal Law* 99, pp 106–113 on EAW preparatory work.

[100] E Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart, 2012); J Öberg, *Limits to EU Powers: A Case Study on Individual Criminal Sanctions for the Enforcement of EU Law* (European University Institute, 2014), doi:10.2870/19296.

[101] On the inconclusiveness of the Convention evidence on drafting, S Miettinen, 'Implied Ancillary Criminal Law Competence after Lisbon' (2013) 3 (2) *European Criminal Law Review* 194. On the difference of EU law paradigm with the choice of legal basis-doctrine and the normative criminal law paradigm, see M Huomo-Kettunen, 'EU Criminal Policy at a Crossroads Between Effectiveness and Traditional Restraints for the Use of Criminal Law' (2014) 5 (3) *New Journal of European Criminal Law* 301, and M Kettunen, *Legitimizing the Use of Transnational Criminal Law – The European Framework* (forthcoming in 2015, University of Helsinki).

[102] UK House of Lords, *The Treaty of Lisbon: An Impact Assessment*, vol 1 (The Stationery Office Ltd, 2008), paras 6.179–6.189, pp 147–149; V Mitsilegas, *EU Criminal Law*, (Hart Publishing, 2009) p 108, fn 267 for reference to *lex specialis*. S Miettinen, *The Europeanization of Criminal Law: Competence and its Control in the Lisbon Era* (University of Helsinki, 2015), p 92.

[103] G Davies, 'Legislative Control of the Court of Justice' (2014) 51 (6) *Common Market Law Review* 1579, p 1606.

C. *Will the use of* travaux *slow the integration process?*

At the other end of the spectrum, it should be considered whether the preparatory work to the Treaties will reveal conservative tendencies that then become, as the declared intent behind the revisions, susceptible to change only through Treaty revision. During the last Treaty revisions, a clear intent behind the grant of IGC mandates themselves was to clarify and delimit the competences of the Union. If taken seriously, this could mean that teleological reasoning, particularly in its dynamic and forward-looking aspects, will receive a counterbalance in the form of conservative historical interpretation supported by the *travaux*. Historical interpretations which rely on these *travaux* can reinforce the constitutional nature of the Treaties. This happens in cases like *EURATOM* when preparatory work shows a particular outcome had been mooted but was not accepted. Whilst it is not desirable that this new line of interpretation would halt the constitutional development of the Union, the use of the *travaux* as an interpretative tool in the cases reviewed above can also lead to the opposite outcome. In *Venezuelan Fisheries* the justification and reasoning behind Treaty change is not invoked by the Court, but the reasoning is adopted and leads to a dynamic outcome as suggested by Advocate General Sharpston.[104]

One interesting question in this respect is how far into the historical *travaux* the Court will be prepared to venture. If, as in *Inuit*, it refers to the *ratio legis* of Treaty reform in the immediate aftermath of that reform, this runs little risk of ossifying a historical but anachronistic approach. However, if the *travaux* to the 1950s Treaty drafts were to be reviewed decades later, as in *EURATOM*, the outcome may not correspond to present or future needs which, whilst controversial at that time, could be more easily justified at the time the interpretation is sought. In *EURATOM*, it can probably not be argued that the Union is ready to harmonise rules on the military uses of atomic energy without Treaty revision. But what, for example, should we think about the continued use of the 1950s public policy exceptions in the free movement context, recognised since the 1970s to be an incomplete list in form and substance? It can hardly be argued that the failure to reform the Treaty derogations to fundamental freedoms demonstrates an acceptance that the environment can never be protected in this way.

VIII. CONCLUSIONS

Some have argued that the *travaux* could contribute further to developing teleological arguments.[105] Some see that recourse to the intent of the drafters adds legitimacy to the Court's argumentation.[106] Thus far the Court itself has used the *travaux préparatoires* in a static manner. It determines the original intention of the

[104] *Parliament and Commission v Council*, C-103/12, EU:C:2014:2400, para 73.

[105] A Kornezov, 'Shaping the New Architecture of the EU System of Judicial Remedies: Comment on *Inuit*' (2014) 2 *European Law Review* 251, pp 257–258.

[106] C Koedooder, 'The *Pringle* Judgment: Economic and/or Monetary Union?' (2013) 37 (1) *Fordham International Law Journal* 111, p 123.

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constitutional legislator in situations in which the text itself would not give satisfactory solution. This differs from the Court's general line of teleological jurisprudence, which is highly dynamic. Although the readings which it has employed are conservative, it has seen fit to refer not only to the most recent Treaty revision, but to *travaux* of the Maastricht and even the EURATOM Treaties.

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 cases in which the Court does follow Advocates General in referring to *travaux,* both the Advocate 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.

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, and when it is appropriate to refer to a historical intent when providing a contemporary interpretation of the Treaties.