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A Fresh Look at the 2005 Commission v. United Kingdom *Judgment in Light of the Euratom Treaty's Drafting History*

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Abstract

This article provides a new example of a 'fresh look at an old case'. It examines the 2005 Commission v. United Kingdom *case in light of a study conducted using the Historical Archives of the European Union. The historical holdings contain many* travaux préparatoires *of the Treaty Establishing the European Atomic Community. These documents can be very useful for reconstructing the drafting history of the founding treaties and developing a historical interpretation of their provisions. In* Commission v. United Kingdom*, the same parties that participated in the negotiation process relied on these* travaux préparatoires*, and the Court of Justice of the European Union itself engaged in a historical interpretation of the provisions at stake. Taking this case as an example, this article delves into questions pertaining to the use of* travaux préparatoires *as a means of interpretation and the respective role of judge and historians in performing the task of shedding light on the original will of the contracting parties and on the historical context in which this will was shaped.*

1 Introduction

Almost 20 years after its publication, the 2005 *Commission v. United Kingdom* judgment is still worth reading today.[1] Although not very well known, it is an important case from a methodological standpoint. More specifically, on this occasion, the Court of Justice of the European Union (CJEU) solved a legal question that raised an interpretative issue on a historically controversial matter, one that was discussed at length

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[1] Case C-61/03, *Commission v. United Kingdom* (EU:C:2005:210).

during the negotiations of the Euratom Treaty.[2] Exceptionally, the Court made a reference to the historical debate that had arisen between the six founding member states around the definition of the Euratom Treaty's scope of application. To do so, the Court analysed, at the request of the parties involved in the 2005 case – the same parties that, at different levels, also participated in the original treaty negotiations[3] – the relevance of some of the preparatory work of the Euratom Treaty.

These references were exceptional considering that the Court, even though it never expressly denied the possibility of referring to the *travaux préparatoires* of the founding treaties, never really used the historical or subjective method of interpretation to interpret European Union (EU) primary law.[4] Indeed, at the beginning of its activity, the Court, in line with its anti-formalist attitude,[5] was used to select on a case-by-case basis the interpretative method that best suited its aim, attaching very limited

[2] Treaty Establishing the European Atomic Energy Community (Euratom Treaty) 1957, 294 UNTS 261. Historians in matters of European integration also discussed the original extent of the Euratom Treaty's field of application and its subsequent capacity to help Europe develop nuclear energy and eventually to prevent the nuclear power aspirations of the member states, providing several and alternative readings. See, e.g., Polach, 'Euratom: Its Background, Issues and Economic Implications', *Oceana Publications* (1964), at 96ff; L. Scheinman, *Atomic Energy Policy in France under the Fourth Republic* (1965), at 185ff; L. Scheinman, *Euratom: Nuclear Integration in Europe* (1967); W. Kohl, *French Nuclear Diplomacy* (1971); Guillen, 'La France et la négociation du traité d'Euratom', 44 *Relations internationales* (1985) 391; D. Howlett, *Euratom and Nuclear Safeguards* (1990), at 97–98; Guillen, 'Europe as a Cure for French Impotence? The Guy Mollet Government and the Negotiations of the Treaties of Rome', in E. Di Nolfo (ed.), *Power in Europe? Great Britain, France, Germany and Italy and the Origins of the EEC 1952–1957* (1992) 505; M. Dumoulin, P. Guillen and M. Vaisse, *L'énergie nucléaire en Europe. Des origines à EURATOM* (1994); Andreini, 'EURATOM: An Instrument to Achieve a Nuclear Deterrent? French Nuclear Independence and European Integration during the Mol Let Government (1956)', 6(1) *Journal of European Integration History* (2000) 109; Cho, 'Euratom: Bridging "Rapprochement" and "Radiance" of France in the Postwar', 20(2) *Journal of International and Area Studies* (2013) 51, at 54–56.

[3] The Euratom Treaty had been negotiated by the same contracting parties of the Treaty Establishing the European Economic Community (Treaty of Rome) 1957, 298 UNTS 3, and it was also signed in Rome on 25 March 1957. Among these was France, which intervened in this proceeding in support of the United Kingdom's (UK) considerations. Of course, the UK was not part of the primary six member states, but it was a member within the Spaak Committee, and it left the negotiation process before the Intergovernmental Conference began. The Commission participated in the negotiations as an observer in its old guise (the '*haute autorité*').

[4] Prior to the *Commission v. United Kingdom* judgment, to my knowledge, the Court of Justice of the European Union (CJEU) had never used the *travaux préparatoires* to interpret the founding treaties. It only once cited the Spaak Report in Joint Case C-90/63 and C-91/63, *Commission v. Luxembourg and Belgium* (EU:C:1964:80), for interpreting Article 12 of the Treaty of Rome, but it did not make any interpretative use of it. In Case C-192/99, *The Queen v. Secretary of State for the Home Department* (EU:C:2001:106), the Court relied extensively on the Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the Definition of the Term Nationals, annexed to the Final Act of the Treaty Concerning the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Communities for Interpreting Art. 18 TEC (1972), at 23–27. Nevertheless, this document is an interpretative declaration made at the moment of the signature of the Treaty on European Union, OJ 2010 C 83/13, and cannot be considered as a *travail préparatoire*. By contrast, the Court has made reference to the *travaux préparatoires* of European Union (EU) secondary law since the very beginning. See Case C-15/60, *Simon v. Court of Justice* (EU:C:1961:11).

[5] See S. Rodin and T. Perišin (eds), *Transformation or Reconstruction of Europe: The Critical Legal Studies Perspective* (2018), at 9 (where the authors refer to 'functionalism formalism').

importance to the subjective, genetic and historical methods[6] and, most of the time, making particular reference to the teleological one.[7] Due to the lack of references to the so-called subjective methods of interpretation in the case law of the CJEU, the EU law literature has also given little attention to the study of these methods[8] and has preferred to focus on the role of the CJEU as an engine of the European integration process from a substantial point of view.[9]

Moreover, in the so-called 'founding period' the CJEU's standpoint towards methods of interpretation was justified on both practical and theoretical grounds. From a practical point of view, the scarcity of references to the subjective method was understandable, above all, in light of the lack of the *travaux préparatoires* for the first European treaties (particularly those of Paris, Rome and Maastricht), which were not available to the general public in line with international practice according to which

6 For this tripartition of the so-called subjective method of interpretation, see Troper, 'Interprétation', in D. Alland and S. Rials (eds), *Dictionnaire de la Culture Juridique* (2003), at 844.

7 Perceived as more dynamic for the integration process in Pescatore, 'Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice. Contribution à la doctrine de l'interprétation téléologique des traités internationaux', 2 *Mélanges en hommage à W.J. Ganshof Van der Meersch* (1972), at 325; Ormand, 'L'interprétation des traités selon leur effet utile', *Revue trimestrielle de droit européen* (1976) 624; Fennelly, 'Legal Interpretation at the European Court of Justice', *Fordham International Law Journal* (1996) 656; Albors Llorens, 'The European Court of Justice, More Than a Teleological Court', 2 *Cambridge Yearbook of European Legal Studies* (1999) 357; N. Brown and F. Jacobs, *The Court of Justice of the European Communities* (2000); G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (2012), at 318–329; Bengoetxea, 'Text and Telos in the European Court of Justice', 11 *European Constitutional Law Review* (2015) 185; Beck, 'Judicial Activism in the Court of Justice of the EU', 36 *University of Queensland Law Journal* (2017) 333; Ingravallo, *L'effetto utile nell'interpretazione del diritto dell'Unione europea* (2017); Arnull, 'The Court of Justice Then, Now and Tomorrow', in M. Derlén and J. Lindholm (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (2018) 1.

8 On this point, see G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (2012), at 52. Special attention to the methodological aspects of the CJEU case law could also be found in Chevallier, 'Methods and Reasoning of the CJUE in Its Interpretation of EC Law', 2 *Common Market Law Review* (1964) 21; A. Bredimas, *Methods of Interpretation and Community Law* (1978); Kutscher, 'Methods of Interpretation as Seen by a Judge at the Court of Justice', *Court of Justice of the European Communities, Reports, Judicial and Academic Conference* (1976); A. Arnull, *The European Union and Its Court of Justice* (1999); Itzcovich, 'The Interpretation of Community Law by the European Court of Justice', 10 *German Law Journal* (2009), at 537, and, more recently, Beck, *Legal Reasoning*, *supra* note 7; Lenaerts and Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', 20 *Columbia Journal of European Law* (2013) 3; K. Lenaerts and J.A. Gutiérrez-Fons, *Les méthodes d'interprétation de la Cour de justice de l'Union européenne* (2020); G. D'Agnone, *L'interpretazione soggettiva nella giurisprudenza della Corte di giustizia* (2020); S. Lattanzi, *I 'travaux préparatoires' del diritto dell'Unione europea: tassonomia, ruolo, funzioni* (2022).

9 Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 *American Journal of International Law* (*AJIL*) (1981) 1; Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) 2515; Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', 26 *Comparative Political Studies* (1994) 510; Mancini and Keeling, 'Democracy and the European Court of Justice', 57 *Modern Law Review* (1994) 175; Alter, 'Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice', 52 *International Organization* (*IO*) (1998) 121; A.S. Sweet and T.L. Brunell, *The Judicial Construction of Europe* (2004); Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: Legal Limits to Judicial Lawmaking', 50 *Common Market Law Review* (2013), at 931–964; T. Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and Its Limits* (2018).

international negotiations must be kept sealed.[10] Furthermore, from a theoretical point of view, during these years the Court was building an autonomous legal order that needed to be kept separate from the will of the contracting parties, and references to a provision's drafting history were not suitable for this purpose. An extensive use of *travaux préparatoires* as instruments that can shed light on the common intention of the parties would have likened the nature of these founding treaties to international agreements; on the one hand, running against the idea of a supranational entity capable of autonomously imposing rights and duties on member states, on the other hand implicitly recalling the well-known interpretative methods of international treaties and, in particular, Articles 31 and 32 of the Vienna Convention on the Law of the Treaties (VCLT). But at that time the Court was carefully avoiding reference to this instrument as it was committed to building up not only an autonomous system but also an equally autonomous set of methods of interpretation.[11]

This background, however, has started to change in recent years, and nowadays the CJEU is intensifying its use of the *travaux préparatoires* and using them to interpret EU primary law.[12] For primary law, one of the main reasons is related to a change in the negotiation method of the founding treaties and, consequently, the wider availability of the *travaux préparatoires* (for example, those documents of the Treaty Establishing a Constitution for Europe, which partially merged into the Treaty of Lisbon, are in part available online).[13] Moreover, those of the oldest treaties can now be consulted at the Historical Archives of the European Union,[14] in Fiesole, Italy, once a period of 30 years

[10] T. Sabel, *Procedure at International Conferences. A Study of the Rule of Procedure at UN and Inter-governmental Conferences* (2006), at 398–407; Groom, 'Conference Diplomacy', in A.F. Cooper, J. Heine and R. Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (2013) 263, at 263ff; E.J. Roncati, 'Diplomacy', in *Max Planck Encyclopedia of Public International Law* (2017); C. Curti-Gialdino, *Diritto diplomatico-consolare internazionale ed europeo* (2020), at 223–224.

[11] Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

[12] Lattanzi, 'L'evoluzione delle tecniche di interpretazione del diritto dell'Unione: tra tendenze passate e sviluppi recenti', 2 *Diritto dell'Unione europea* (2022) 361.

[13] Lenaerts and Gutiérrez-Fons, *Les méthodes*, *supra* note 8, at 53. In its opinion of 17 January 2013 in Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v. Parliament and Council* (EU:C:2013:21), para. 32, Advocate General Juliane Kokott held: 'It must therefore be assumed that the expression "regulatory act" is a sui generis term of EU law, in whose interpretation regard must be had to the objective of the Treaty provision in question, the context in which it is used, and its drafting history. Drafting history in particular has not played a role thus far in the interpretation of primary law, because the "travaux préparatoires" for the founding Treaties were largely not available. However, the practice of using conventions to prepare Treaty amendments, like the practice of publishing the mandates of intergovernmental conferences, has led to a fundamental change in this area. The greater transparency in the preparations for Treaty amendments opens up new possibilities for interpreting the Treaties which should be utilised as 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.' Treaty Establishing a Constitution for Europe 2004, OJ 2004 C 310; Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007, OJ 2007 C 306.

[14] Now the CJEU's historical collection has also been transferred to the HAEU. See Nicola, 'Waiting for the Barbarians: Inside the Archive of the European Court of Justice', in C. Kilpatrick and J. Scott (eds), *New Legal Approaches to Studying the Court of Justice* (2019) 62.

has passed from the date when the document was first created, according to the legislation currently in force.[15]

In this new context, a fresh reading of the *Commission v. United Kingdom* judgment through the lens of the documents contained in the CM3/NEGO holding of the Historical Archives[16] represents an opportunity to analyse the content and capacity of the *travaux préparatoires* to solve specific interpretative issues in the present case as well as in the future.[17] It also gives us the opportunity to reflect more generally on the possible interactions between the role of the judges and one of the historians in reconstructing the drafting history of text that is both legal and historical in nature, as is the case with the Euratom Treaty. Indeed, although historians have already dealt with some of the problems related to the Euratom Treaty's negotiations,[18] an investigation of the historical archives allows us to focus on the official sources that shed light on the common intentions of the parties. These common intentions have surrounded have surrounded national views and allow us to give priority to a communitarian reconstruction.[19]

2 The Facts of the Case and the Interpretative Issues at Stake

In 2004, the Commission brought an action against the United Kingdom (UK) for failing to fulfil its treaty obligations.[20] According to the Commission, the UK had failed to provide the required information under Article 37 of the Euratom Treaty relating to

15 Council Regulation 354/83, OJ 1983 L 43/3, Art. 1, para. 1.

16 This holding, which is called the 'Négotiations du traité instituant la CEE et la CEEA,' contains 418 dossier and 815 microfiches concerning the institutional negotiations of the Rome treaties. These documents were collected by the General Secretary of the Rome Treaties, Christian Calmès, initially only *intuitu personae* and thereafter as an institutional legal entity, and were transferred to the Institutional Archives of the European Union in 1983, under Council Regulation 354/83, OJ 1983 L 43. Some of the *travaux préparatoires* contained therein were collected and have been published in S. Neri and H. Sperl, *Traité instituant la Communauté Européenne de l'Énergie Atomique (EURATOM): travaux préparatoires, déclarations interprétatives des six Gouvernements, documents parlamentaires* (1962).

17 On this point, see also Schütze, '"Re-reading" Dassonville: Meaning and Understanding in the History of European Law', 24 *European Law Journal* (2018) 376, at 406 ('there is also an important – and much more positive – third conclusion for European law and lawyers: the rereading of classic cases cannot be left to historians and sociologists alone. While the historical and sociological work done by – to name just two brilliant colleagues and friends – Morten Rasmussen and Antoine Vauchez is mesmerising, the best way to arrive at an "understanding" of what the European Court as a judicial actor is doing is to analyse the judicial moves that it makes'); Arena, 'From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL', 30 *European Journal of International Law* (*EJIL*) (2019) 1017, at 1017–1037.

18 See note 2 above.

19 See on this point, Bredimas, *supra* note 8.

20 Although formally a separate treaty establishing a community with its own legal personality, the Euratom Treaty was negotiated together with the Treaty of Rome, *supra* note 3, by the same contracting parties, and it shared with the latter, now the EU, the same institutional framework (Art. 106(1)(a) of the Euratom Treaty, *supra* note 2). For this reason, it is also subject to the competence of the CJEU. On these points, see M. Gaudet, *Euratom* (1959), at 148.

its plan for the disposal of radioactive waste.[21] In 1998, the UK had started decommissioning the Jason reactor at the Royal Naval College in Greenwich but did not consider itself under any obligation to provide information to the Commission, which then decided to start an infringement procedure under Article 141 of the Euratom Treaty.[22] In the UK's view, however, Article 37 of the Euratom Treaty was not applicable to waste emanating from a military reactor like the Jason, which was at the time used for research in support of the Ministry of Defence. In its opinion, 'the mission of the European Atomic Energy Community … was to promote the civil and commercial use of nuclear energy, to the exclusion of nuclear energy used for military purposes. In the UK's contention, only certain chapters of the Treaty could be considered to apply to defence activities'.[23] For the Commission, on the other hand, Article 37 was applicable to all ionizing radiation, whatever the source.[24] Therefore, the legal issue at stake concerned the delimitation of the field of application of Article 37 and, more generally, of the Euratom Treaty.

To solve the main issue, the CJEU had to decide whether Article 37 of the Euratom Treaty was only applicable to nuclear facilities used for civil and commercial purposes or also for military purposes. Despite the limited relevance of the Jason reactor, the case raised a historical and legal question of great importance, which constituted one of the most controversial issues in the entire negotiation process of the Euratom Treaty. As Advocate General Geelhoed recalled, this issue had been 'discussed by the founders of the Community in preparing the Treaty',[25] with the consequence that Article 37 needed to be interpreted in 'its systematic and historical context'.[26] Meanwhile, for the Court, it was more appropriate to make reference to the preamble of the Euratom Treaty, strengthening the scope of peace enshrined therein[27] and developing a teleological method of interpretation. The natural outcome of the application of this methodology was a definition of the scope of application of the treaty which excluded military activities. Indeed, in light of its scope, if the project was built in conjunction with the peaceful development of nuclear

[21] This article provides that '[e]ach Member State shall provide the Commission with such general data relating to any plan for the disposal of radioactive waste in whatever form will make it possible to determine whether the implementation of such plan is liable to result in the radioactive contamination of the water, soil or airspace of another Member State. The Commission shall deliver its opinion within six months, after consulting the group of experts referred to in Article 31'.

[22] According to which, '[i]f the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observation. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice'.

[23] Opinion of Advocate General Geelhoed issued on 2 December 2004 in Case C-61/03, *supra* note 1, para. 7.

[24] *Ibid.*, para. 6.

[25] *Ibid.*, para. 80.

[26] *Ibid.*, para. 61.

[27] Case C-61/03, *supra* note 1, para. 26 ('[i]n that regard the signatories of the Treaty, by referring in the preamble thereto to the advancement of the cause of peace, the applications of the nuclear industry contributing to the prosperity of their peoples and the peaceful development of atomic energy, intended to emphasise the non-military character of that Treaty and the supremacy of the aim of promoting the use of nuclear energy for peaceful purposes').

energy, military activities could not have been included in it.[28] This counterfactual and implicit assumption was not denied by the treaty's provisions, which take account of the defence of the member states,[29] given that for the Court their existence could also be explained 'by the fact that the application of certain rules introduced by that Treaty, even if it relates only to civil activities, is nevertheless liable to have an impact on activities and interests within the field of the national defence of the Member States'.[30]

In conclusion, 'the absence in the Treaty of any derogation laying down the detailed rules according to which the Member States would be authorised to rely on and protect those essential interests leads to the conclusion that activities falling within the military sphere are outside the scope of that Treaty'.[31] This was the natural outcome of a restrictive reading of Article 37 of the Euratom Treaty, leading to the conclusion that the obligation to provide information about the sources of radioactive waste only regarded nuclear plants used for civil and commercial activities, but not military reactors. Prior to reaching this conclusion, however, the Court felt the need to justify its approach from a methodological point of view, pointing out that 'the evidence on interpretation to be taken into consideration cannot be limited to the historical background to the drawing up of the Treaty, or to the contents of the unilateral declarations made by the representatives of certain States who took part in the negotiations which led to the signature of that Treaty'.[32] In other words, in the Court's opinion, the historical method could have been used in principle to solve the case since the parties relied on it, but, in this particular case, it was not sufficient for giving a sound interpretation of the provision at issue.

In fact, while 'it is clear from that background and certain declarations mentioned in the *travaux préparatoires* of the Treaty that its possible application to the military uses of nuclear energy was envisaged and discussed by the representatives of the States who took part in those negotiations',[33] 'it is also apparent that they held differing opinions on that issue and that they decided to leave it unresolved'.[34] For this reason, then, the use of the historical method was not considered to be satisfactory, and it was necessary to turn to different methods of interpretation – in particular, the teleological method. But was this methodological construction sound? Was it true, as the CJEU stated, that the final negotiators of the Euratom Treaty left the controversial point unresolved so that the historical method had to be considered insufficient to solve the interpretative issue at stake? This point is of the greatest importance in order to assess the soundness of the CJEU's solution.

[28] This is an *a contrario argument*. See Canale and Tuzet, 'On the Contrary: Inferential Analysis and Ontological Assumptions of the A Contrario Argument', 3 *Bocconi Legal Studies Research Papers* (2007) 31.

[29] Namely, Euratom Treaty, *supra* note 2, Arts 24–28, 84(3).

[30] Case C-61/03, *supra* note 1, para. 32.

[31] *Ibid.*, para. 36.

[32] *Ibid.*, para. 29.

[33] *Ibid.*

[34] *Ibid.*

As is well known, the rules of interpretation of treaties are enshrined in the VCLT. These rules are also generally considered to reflect customary international law.[35] According to some individuals, the main duty of the interpreter in applying these rules is to reconstruct the true will of the contracting parties.[36] Thus, following the VCLT, the interpretation of a treaty should proceed, first, according to the general rule of interpretation enshrined in Article 31[37] and, second, by eventually having recourse to the supplementary means of interpretation, among which the *travaux préparatoires* are also listed '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'.[38] When supplementary means of interpretation shed light on the intentions of the parties, they can legitimately be used to solve interpretative doubts, provided that, as supplementary means, their use is not mandatory. However, when the final text of the treaty is itself unclear or ambiguous, and the *travaux préparatoires* are genuinely able to dispense with the ambiguity, the choice to depart from them and, consequently, to give up any attempt to reconstruct the historical will of the contracting parties should be challenged.

Assessing the soundness of the CJEU's interpretative solution made in the case at hand is extremely complex, particularly in light of the entangled historical context of the Euratom Treaty's negotiations from 1955 to 1957, in which differing interests of the various member states overlapped.[39] An in-depth analysis carried out through the *travaux préparatoires* contained in the CM3/NEGO holding, however, can contribute a

[35] Among others, see R. Gardiner, *Treaty Interpretation* (2017), at 14–16. On this point, see also Sbolci, 'Supplementary Means of Interpretation', in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (2011) 145, at 148 (pointing out that, '[b]ased on a global evaluation of such practice, we can reasonably deduce that the Vienna Convention did not codify well-established rules of general international law on treaty interpretation. On the other hand, it seems reasonable to assume that the consensus reached in Vienna generated the crystallization of a rule in fieri on the hierarchical relationship between the objective and the subjective method of treaty interpretation, a rule to which the ICJ has routinely referred').

[36] R. Ago, *Droit des traités à la lumière de la Convention de Vienne*, 134 *Collected Courses of The Hague Academy of International Law* (1971); Yassen, 'L'interprétation des traités d'après la convention de Vienne sur le droit des traités', 151 *Recueil des Cours de l'Académie de Droit International* (1976) 15.

[37] This allows the interpreter to make recourse to a set of different instruments that are all related to the 'primacy of the text'. Yassen, *supra* note 36.

[38] VCLT, *supra* note 11, Art. 32.

[39] The need to advance the integration process in the nuclear field was shared by all six member states and particularly felt by France because of its dependence on energy sources provided by Middle Eastern countries. However, France rather quickly became opposed to the project considering its interest in developing a nuclear military asset and the national dispute that was raised on this point. See Guillen, *La France*, *supra* note 2, at 391–392; see also Mongin, 'Forces armées et genèse de l'armement nucléaire français', 59 *Relations internationales* (1989) 301. On the other hand, West Germany industrials were opposed to the idea of the common ownership of special fissile materials, and the Belgians were willing to preserve their profitable agreements with the United States. See B. Goldschmidt, *Les rivalités atomiques, 1939–1966* (1967), cited in Deubner, 'The Expansion of West German Capital and the Founding of Euratom', 33 *IO* (1979) 203, at 208; O'Driscoll, 'Missing the Nuclear Boat? British Policy and French Military Nuclear Ambitions during the EURATOM Foundation Negotiations, 1955–56', 9 *Diplomacy and Statecraft* (1998) 135, at 140–141; Helmreich, 'The United States and the Formation of Euratom', *15 Diplomatic History* (1991) 387.

legal perspective that might be also useful in solving the puzzle caused by the historical context that surrounded the negotiations of the treaty.[40] More importantly, this analysis challenges the methodological choice made by the Court by showing that the *travaux préparatoires* of the Euratom Treaty, if reconstructed in full, are able to give specific insight into the extent to which the treaty applied to nuclear military activities eventually carried out by the member states.

3 The Drafting History of the Provisions on Health and Safety

The quotation of the CJEU's decision on the outcome of the negotiation process[41] needs to be contextualized. The references that the Court made to the historical dimension were of two types: one that was negative, which related to the final drafters' lack of intention on the treaty's scope of application, and one that was positive and related to the treaty's allegedly peaceful objective as expressed in the preamble. More specifically, for the Court, on the one hand, '*the representatives of the States* who took part in those negotiations … held differing opinions on that issue and that they decided to leave it unresolved',[42] while, on the other, the '*signatories of the Treaty*, by referring to the preamble thereto to the advancement of the cause of peace, the applications of the nuclear industry contributing to the prosperity of their peoples and the peaceful development of atomic energy, *intended to emphasise the non-military character of that Treaty* and the supremacy of the aim of promoting the use of nuclear energy for peaceful purposes'.[43]

Here, one caveat is needed regarding the intended meaning of the expression 'signatories of the Treaty' and of the reference to the Euratom Treaty's preamble. Indeed, the treaty's preamble was, in many ways, a reproduction of the preliminary study report drafted by the so-called Spaak Committee before the starting date of the proper International Conference.[44] This is why, by making reference to its drafters' will, the Court juxtaposed the will of the signatories of the treaty with the one of the drafters of the Spaak report, despite the fact that the latter was only issued at the very start of the broad negotiation process[45] and its contents in many aspects were overturned during the

[40] The historical issue at stake was, as is usually the case, also addressed in bilateral and informal talks between the countries. On this point, see G. Strozzi, *Il diritto dei trattati* (1999), at 61. However, the *travaux préparatoires* are able to give us a picture of the result of these talks obtained in an institutional and communitarian framework that conveys a shared dimension of the problem, which is considerably more useful in interpreting a multilateral treaty.

[41] Case C-61/03, *supra* note 1, para. 29.

[42] *Ibid.* (emphasis added).

[43] *Ibid.*, para. 26 (emphasis added).

[44] See Intergovernmental Committee on European Integration, 'The Brussels Report on the General Common Market' (called *the Spaak Report*), issued on the 21 of April 1956.

[45] This partially converged into the Euratom Treaty's preamble, which underlined that the treaty was conceived 'to create the conditions necessary for the development of a powerful nuclear industry which will provide extensive energy resources, lead to the modernisation of technical processes and contribute, through its many other applications, to the prosperity of their peoples'.

subsequent Intergovernmental Conference. In other words, the Court dealt with the will of the drafters of the Spaak report as if it was the final will of the signatories. However, as is generally well known, according to the working methods decided in Messina,[46] the six founding members first entrusted a prior technical committee with the task of preparing a preliminary study to give implementation to the Messina resolution. Only once the study was done was a political committee set up to provide a mandate to draft the treaty.[47] The Spaak Committee was the technical committee, and the Intergovernmental Conference was the political one.[48] As such, when the Spaak report was released to the press,[49] the proper negotiation of the Euratom Treaty did not even begin. Only once the report had been approved by the six governments in Venice on 29–30 May 1956 did the proper Intergovernmental Conference begin its work, on 26 June 1956. Consequently, the reference made by the CJEU to the peaceful application of the Euratom Treaty[50] is related to the position of the Spaak Committee and not to the one signatory of the treaty represented in the Intergovernmental Conference, which started its work only once the Spaak report had been released and continued until the end of February 1957.[51]

[46] The Messina conference was held on 1–3 June 1955.

[47] Dumoulin, 'Les travaux du Comité intérimaire pour le Marché commun et Euratom (avril 1957–janvier 1958)', in A. Varsori (ed.), *Inside the European Community. Actors and Policies in the European Integration (1957–1972)* (2006) 23; Dumoulin, 'Les travaux du comité Spaak (juillet 1955–avril 1956)', in E. Serra (ed.), *La relance européenne et les traités de Rome* (1989) 195.

[48] On these differences, see Pescatore, 'Les travaux du groupe juridique dans la négociation des traités de Rome', 34 *Studia Diplomatica* (1981) 159, at 159ff; Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome', 21 *Contemporary European History* (2012) 339, at 356.

[49] This was the only preparatory work of the Rome negotiations formally presented to the press on 21 April 1956.

[50] Case C-61/03, *supra* note 1, para. 29.

[51] The structure of the Intergovernmental Conference mimicked that of the Spaak Committee by providing for a vertical and step-by-step organization. See 'Note sur l'organisation de la conférence destinée à préparer les traités relatifs au marché commun et à Euratom', 30 avril 1956, CM3/NEGO 92, Historical Archives of the European Union (HAEU) ('[e]n dessous des Ministres des Affaires étrangères, qui représentent l'instance supérieure, il devrait y avoir un comité composé des futurs chefs de délégations et présidé par un coordinateur politique, suivant la formule qui a donné de très bons résultats au sein du Comité intergouvernemental. … Il n'y aurait pas de commission permanente d'experts. L'expérience a permis, en effet, de constater que l'existence de plusieurs commissions d'experts rend extrêmement difficile de conserver à la négociation le caractère d'unité politique qui lui est nécessaire. Sur proposition des groupes de rédaction et, chaque fois que ceux-ci doivent aborder un problème qui comporte des implications techniques complexes, les chefs de délégations établiraient des questionnaires et créeraient des comités d'experts ad hoc pour y répondre. … Ce type d'organisation aurait également l'avantage de limiter notablement les dépenses de la conférence, permettant d'établir une structure administrative plus légère et plus souple. … Avec les méthodes habituelles des conférences internationales, c'est-à-dire sans coordinateur et avec la constitution de nombreuses commissions d'experts, il faudra sans doute des mois pour en finir'; unofficial summary translation provided by the author: 'Below the Ministers of Foreign Affairs, who represent the higher political body, there should be a committee composed of the Heads of Delegations which will be chaired by a political coordinator. … There would be no permanent committee of experts. … Experience has shown that the existence of several expert committees makes it extremely difficult to maintain the necessary political unity during the negotiations. On the proposal of the drafting groups … the Heads of Delegations would draw up questionnaires and eventually set up ad hoc expert committees to respond to them'). See also 'Approbation du projèt de procès verbal de la Conférence de Venise' and 'Rapport de M. Spaak sur les travaux du Comité intergouvernemental', Octobre 1956, CM3/NEGO 95, HAEU.

In order to understand how the will of the parties was formed and evolved, a quick reminder of the structure of the conference is needed. Within the Spaak Committee, several commissions were created, one of which was the so-called Commission on Nuclear Energy which was given the task of studying the feasibility of the creation of a nuclear energy common market[52] and was for this reason mostly concerned with the economic aspects of integration,[53] regardless of the peaceful or military source of the nuclear energy.[54] This is why the Commission on Nuclear Energy did not debate the issue of the scope of application of the future treaty. In one of its first methodological statements, it specified that '[l]'énergie nucléaire n'est pas limitée dans ses applications industrielles comme on a tendance à le croire, à certaines industries importantes et peu nombreuses.... L'évolution rapide qui caractérise la recherche et les réalisations atomiques nous oblige à penser que dans l'avenir s'ouvriront des perspectives nouvelles et très variées. Il convient donc, sur le plan d'une action commune européenne, d'envisager les solutions les plus souples, les mieux susceptibles d'adaptation, ce qui n'exclut nullement, là où elle est nécessaire, une intégration économique poussée'.[55]

This same position was taken up by the Spaak Committee, which stated in its final report: 'Les chefs de délégation estiment avoir ainsi répondu à la question qui leur

[52] The mandate of the technical group concerned the following issues to be studied: 'Examen de la situation de droit et de fait concernant l'énergie nucléaire dans les États participants'; 'Détermination des différents domaines relevant des applications industrielles de l'énergie nucléaire'; 'Détermination des possibilités techniques d'action commune'; 'Création de l'organisation commune'. 'Rapport de la Commission de l'Energie nucléaire', 5 November 1955, CM3/NEGO 74, HAEU. See *Spaak Report*, *supra* note 44, at 10, introduction. This was also confirmed in the final report: 'Pour préparer les traités ... les Ministres ont demandé à un groupe expert, réunis sous la direction de délégués nationaux, de dessiner les méthodes par lesquelles les objectifs proposés pourraient être le plus aisément atteint'; summary translation: 'The Ministers asked the expert groups ... to draw up the methods by which the proposed objectives could be most easily achieved').

[53] Even though it believed, like its predecessor, that the progress and development of nuclear energy could only be possible if an exclusively peaceful application of nuclear power was envisaged. 'Commission Euratom', 4 Février 1956, MAE 27 f/56 amd, at 5, CM3/NEGO 32, HAEU ('[c]et effort commun ne saurait se développer dans le climat de confiance nécessaire que si chacun renonce à toute utilisation unilatérale de l'énergie nucléaire à des fins militaires. C'est seulement à cette condition que le libre échange des connaissances pourra être effectivement développé, y compris celles qui sont actuellement acquises par des accords bilatéraux. Dans l'état actuel des ressources de l'Europe, cette concentration de l'effort sur l'utilisation pacifique de l'atome est d'ailleurs indispensable pour éviter de graves retards'; summary translation: 'This joint effort can only develop in that climate of trust which can be created if everyone unilaterally relinquishes all use of nuclear energy for military purposes. Only on this condition can the free exchange of knowledge be effectively developed.... Given the current state of Europe's resources, this concentration of effort on the peaceful use of the atom is essential to avoid serious delays'). From this point of view, the Commission on Nuclear Energy came to the same conclusion as Jean Monnet and the Action Committee. On the influence of which, see Helmreich, *supra* note 39, at 400; Guillen, 'La France', *supra* note 2, at 394. This position had been strongly opposed by France during the final part of the negotiations. See Andreini, *supra* note 2, at 110–116.

[54] A point that was reaffirmed in the final *Spaak Report*, *supra* note 44, Part 2, at 101–102.

[55] 'Rapport de la Commission de l'Énergie nucléaire', Novembre 1955, at 6, CM3/NEGO 74, HAEU (summary translation: 'nuclear energy is not limited in its industrial applications to just a few important sectors. The rapid evolution in atomic research forces us to think that in the future new perspectives will open up. In light of common European action, it is therefore necessary to consider the most flexible and adaptable solutions, which in no way excludes, where necessary, further economic integration').

était posée par la résolution de Messine et qui concernait le développement pacifique de l'énergie atomique. Ils ont estimé que le problème que pose l'éventualité d'une utilisation, par certains États, de l'énergie atomique à des fins militaires présente un caractère politique tel qu'il sort des limites de leur compétence. Ils n'ont pas cru devoir y répondre dans le présent rapport. Cette question revêt des aspects techniques très importants, mais ils croient possible qu'une solution soit élaborée qui maintienne l'efficacité du système qu'ils proposent et dont un des traits essentiels est un contrôle sans fissure'.[56] In other words, in the Spaak Committee's view, it was not within its mandate to resolve the problem of the scope of application of the Euratom Treaty and its related problem of converting nuclear energy to military uses.[57] The Spaak Committee felt obliged only to consider the peaceful application of nuclear energy, which was considered a precondition for enhancing scientific progress in the field.[58]

However, this position was criticized in a meeting of the ministers of foreign affairs that preceded the adoption of the report.[59] Being aware of this dissatisfaction, when the next meeting was about to begin, Paul-Henri Spaak (who was entitled to have a seat in both fora, as foreign minister of Belgium in the meetings of the Intergovernmental Committee set up in Messina and in the Spaak Committee as its president) circulated an informal letter among the members that dealt specifically with the issue of the military application of Euratom.[60] What it proposed was the famous compromise formula

[56] *Spaak Report*, *supra* note 44, Part 2, at 56 (summary translation: 'The Heads of Delegation considered that they had answered the question posed to them by the Messina resolution concerning the peaceful development of atomic energy. They considered that the use of atomic energy for military purposes was of a political nature and that it was beyond the limits of their mandate. They did not think they had to respond to it in this report. This issue affects some important technical aspects, but they believe it is possible to maintain the effectiveness of the system they proposed').

[57] The Spaak Committee considered its mandate limited. See 'Projet de Rapport sous forme de note du Président de la Commission de l'Energie nucléaire', 3 Octobre 1955, MAE/405f/55, CM3/NEGO 70, HAEU ('[l]'objet du présent Rapport est limité: il s'agit, en répondant aux questions formulées par le Comité directeur dans sa directive n° 1, de permettre à celui-ci d'orienter la suite des études de la Commission et de fournir des éléments de base concernant les propositions à soumettre à la prochaine session de la Conférence des Ministres'; summary translation: 'The purpose of this Report is limited to answering the questions raised by the Steering Committee in its Directive n.1 in order to enable it to guide the Commission and to provide basic elements for proposals to be submitted to the next session of the Conference of Ministers. For this reason, it addressed only the technical aspects, setting aside the political ones').

[58] The underlying idea was, again, that the progress and development of nuclear energy could only be possible in a climate of trust. See *supra* notes 53 and 55.

[59] 'Procès verbal de la Reunion des chefs de délégations tenue à Bruxelles', 13–14 Février 1956, MAE 51 f/56 gd, CM3/NEGO 32, HAEU.

[60] 'Note aux Ministeres des Affaires Etrangers', 26 Avril 1956, CM3/NEGO 73, HAEU (in which Paul-Henri Spaak clarified that '[l]es propositions en matière d'énergie nucléaire qui sont contenues dans le rapport des chefs de délégation du Comité intergouvernemental concernent exclusivement, conformément au mandat donné, le développement des applications pacifiques de cette nouvelle forme d'énergie. Au cours de leurs travaux les Chefs de délégations ont constaté qu'une solution efficace à certains problèmes liés au développement des applications pacifiques exige que des dispositions soient prises entre les pays intéressés, sur les conditions dans lesquelles certains d'entre eux pourraient éventuellement procéder à une utilisation militaire de l'énergie atomique. Les chefs de délégation conscients des aspects politiques que comporte cette dernière partie du problème, ont estimé devoir s'abstenir, pour éviter de s'écarter du

according to which each member state had to forego the manufacturing of nuclear weapons for five years, without prejudice to the possibility of submitting a unanimous request for a derogation to the Council of Ministers.[61]

The ministers of the six founding members merely took note of that formula, promising that the discussion would be resumed during the subsequent negotiations.[62] This meeting in Brussels, however, clearly shows that for the ministers the peaceful application of the Euratom Treaty that was envisaged in the Spaak report was only acceptable at the preparatory stage and would need to be updated in the future, following the emergence of a clear political will on this point. At the highest political level, an exclusively peaceful application of Euratom was inconceivable,[63] but at the same time the contracting parties were not able to put that idea clearly down. The only further indication given by the ministers was: 'qu'il importe plutôt de trouver une solution qui n'exclue pas définitivement les utilisations militaires tout en assurant cependant qu'une telle solution ne pourra mettre en péril le système de contrôle qui est reconnu comme étant d'une importance primordiale.'[64] Drawing on these few general indications, the newly created Euratom Group[65] set up at the Intergovernmental Conference level,[66] started to channel its work into drafting provisions on special regimes and derogations for military installations. Focused on specific aspects, it did not directly

mandat qu'ils ont reçu, de présenter des propositions sur l'utilisation militaire de l'énergie atomique. Je crois cependant souhaitable de vous soumettre dès à présent une idée'; summary translation: 'The propositions expressed in the Spaak report concern exclusively, under the given mandate, the development of peaceful applications of nuclear energy. In the course of their work, the Heads of Delegations noted that an effective solution to certain problems related to the development of peaceful applications requires some arrangements to be made between the countries on the conditions under which some of them could develop military applications. The Heads of Delegation, aware of the political nature of this problem, felt that they should refrain from solving it. … However, I think it is now desirable to submit an idea to you here and now').

61 'Suite à la note Euratom, Bruxelles, 18 Février 1956', MAE 48 f/58, at 2–3, CM3/NEGO 32, HAEU.

62 'Projet de procès-verbal de la Conférence des Ministres des Affaires étrangères des États membres de la CECA, Bruxelles, 11 Février 1956', MAE 61f/56, CM3/NEGO 180, HAEU. As pointed out by Bossuat, Christian Pinau, the French minister of foreign affairs, made a reservation on the Spaak formula, see Bossuat, 'Jean Monnet, le Département d'État et l'intégration européenne (1952–1959)', in R. Girault and G. Bossuat (eds), *Europe brisée, Europe retrouvée* (1994) 307, at 329.

63 In particular, due to the French who, during the negotiations, radically changed their position on the issue. See Andreini, *supra* note 2.

64 'Projet de procès-verbal', *supra* note 62 (summary translation: 'It is important to find a solution that does not entirely exclude military uses while at the same time ensuring that such a solution does not jeopardise the system of control'). See also 'Conférence des ministres des Affaires étrangères', Bruxelles, 11-12 Février 1956, CM3/NEGO 10, at 43, HAEU.

65 This was the equivalent of the Commission on Nuclear Energy at the Spaak Committee level. The Intergovernmental Conference was divided into three main groups: one for Euratom, one for the Internal Market and a 'Drafting Group' (informally called the 'Legal Group'). All groups were coordinated by the Intergovernmental Committee (composed of the heads of delegation). Within a specific group, each delegation made a proposal that, having been agreed to within the group, went directly before the Drafting Group or was otherwise submitted to the Committee of Heads of Delegation and then returned to the specific group to finally arrive at the 'Legal Group'. See 'Note sur l'organisation de la conférence destinée à préparer les traités relatifs au marché commun et à Euratom, 30 Avril 1956', CM3/NEGO 92, HAEU.

66 This started working on 29 May 1956 and continued until the summer break of 21 July, and then met again from 4 September of the same year until February 1957.

address the problem of their scope,[67] even though in the very fact of drafting them the cross-sectoral application of Euratom to both military and civil use was already being taken for granted.[68]

In this way, the technical drafting[69] absorbed the general and political problem of the definition of the scope of application of the Euratom Treaty. The drafting started thanks to Mr. Spaak, who pointed out in one of their last meetings: '[Qu'] il faut partir d'une situation de fait: l'Allemagne a renoncé à fabriquer des armes nucléaires, la France n'y a pas renoncé et ne peut y renoncer dans les circonstances présentes. … M. Spaak constate qu'un rapprochement considérable s'est opéré; il ne s'agit plus de savoir s'il doit y avoir ou non utilisation militaire, mais quelle part de cette utilisation doit rester secrète.'[70] In this way, not only was the problem partially solved, but it was

[67] Especially with regard to the property ownership of fissile materials and the limits on the exchange of patents covered by military secrecy. In the two meetings on 3–4 July 1956, the Euratom Group discussed 'des problèmes posés par les applications militaires', and the German delegation stated: 'Compte tenu du fait qu'Euratom a été depuis l'origine considérée comme une institution visant l'utilisation exclusivement pacifique de l'énergie nucléaire, la délégation allemande a posé la question de savoir dans quelles conditions serait assurée l'acquisition des matières fissiles. … Elle a aussi posé le problème des brevets.' 'Réunion du Groupe Euratom, 3–4 Juillet 1956', CM3/NEGO 157, HAEU (summary translation: 'Given that Euratom has since its origin been considered as an institution aimed at the exclusively peaceful use of nuclear energy, the German delegation wanted to know under which conditions the acquisition of fissile material will be ensured. It also posed the problem of patent regulation'). Again, at the meeting on 19 July 1956, 'la délégation allemande se déclare heureuse de voir que le Groupe est d'accord peur que le contrôle s'exerce à la fois sur les applications pacifiques et militaires de l'énergie nucléaire'. 'Réunion du Group Euratom, Sommaire des conclusions, 19 Juillet 1956', CM3/NEGO 159, HAEU (summary translation: 'The German delegation is pleased to see that the Group agrees that control will be exercised over both the peaceful and military applications of nuclear energy'). Lastly, according to the Euratom Group, 'suivant la procédure qui sera fixée dans le traité, les dispositions générales prévues pour la communication des connaissances – brevetées ou non – résultant des recherches de la Communauté de travaux effectués dans les institutions ou entreprises États membres seront les mêmes que ces connaissances aient ou non des implications militaires'. 'Proposition des experts du Groupe de l'Euratom: Paris, 21 Octobre 1956', CM3/NEGO 95, HAEU (summary translation: 'Under the treaty, the general provisions laid down for the communication of knowledge – patented and non-patented – shall be the same whether or not such knowledge has military implications').

[68] This U-turn (compared to the position expressed by the Spaak Committee) was already expressed by Walter Hallstein in the meeting in Venice where he declared: '[L]e Gouvernement fédéral estime qu'il faut prévoir que toute application militaire de l'énergie nucléaire sera soumise aux mêmes règles et contrôles généraux les applications pacifiques.' 'Projet de procès verbal, Venise, 29–30 Mai 1956', CM3/NEGO 93, HAEU (summary translation: 'For the Federal Government, any military application of nuclear energy should be subject to the same general rules and controls as peaceful applications'). And the French government considered it would be necessary to set up 'un contrôle spécial, puisqu'il portera sur les fabrications militaires et il restera à en établir les modalités'. 'Déclaration de M. Faure', 27 Juillet 1956, MAE 208 f/56, CM3/NEGO 105, HAEU (summary translation: 'A special control since it will focus on military manufacturing and it will remain in place to establish its terms and conditions').

[69] Disseminated in the final version of the Euratom Treaty, *supra* note 2, Arts 24–28, 84.

[70] 'Projet de procès verbal de la réunion du 20 e 21 Octobre 1956, Paris, Conférence des Ministres des États membres de la C.E.C.A', MAE 460 f/56, CM3/NEGO 95, HAEU (summary translation: 'It is necessary to start from a factual situation: Germany has relinquished the possibility of manufacturing nuclear weapons, France has not and cannot relinquish this possibility the present circumstances…. Mr Spaak notes that a notable compromise has been reached; now it is no longer a question of whether or not there should be military application, but what part of that application should remain secret').

also partially hidden. Indeed, the signatories of the Euratom Treaty decided not to insert any specific derogation in Chapter 3 of Title II on health and safety and not to expressly determine its field of application, even though its broader application had been implicitly agreed on.

In a note probably delivered by the General Secretariat at the end of the negotiations, we read: 'L'ensemble du Traité à été conçu et rédigé dans cette hypothèse, c'est-à-dire comme devant s'appliquer sans discrimination, aussi bien aux usages militaires qu'aux usages pacifiques. Cette préoccupation a amené à prévoir des dispositions spéciales, par exemple l'art. 9 sur le contrôle de sécurité, les articles du chapitre sur la diffusion des connaissances, consacrés aux connaissances secrètes, les précautions spéciales prévues dans le chapitre de la protection sanitaire en cas d'explosion non contrôlé.'[71] In the same note, it was also questioned whether 'il serait nécessaire d'ajouter au Traité un article disant qu'il s'applique aussi bien aux utilisations militaires qu'aux utilisations pacifiques', but after much reflection the answer was no, given that, according to the Secretariat, 'politiquement au moins il semble qu'il serait préférable d'en faire l'économie'.[72]

Based on the reconstruction made above, we should conclude that the historical and legal controversial issue of the scope of application of the Euratom Treaty had actually been solved by the final signatories of the treaties, but it was done in a peculiar political fashion according to which its delimitation had to remain voluntarily obscure and could not emerge easily from the mere reading of the provisions on health and safety.[73] Thus, its clear delimitation can only be assessed thanks to a deep reconstruction of its drafting history.

4 Using *travaux préparatoires*: When and How

In its judgment, the CJEU did not consider the Euratom Treaty to be applicable to military installations. Following its line of reasoning, what emerges from a methodological standpoint is that the Court took into account the history of the negotiations but did so only to a very limited extent.[74] This solution will now be discussed and also

[71] 'Notes du 1er février 1957 sur les usages militaires éventuels de l'énergie atomique et les propriétés des matières fissiles', CM3/NEGO 187, HAEU (summary translation: 'The whole Treaty was conceived and drafted as having to be applied indiscriminately to both military and peaceful applications. This broad application has led to special provisions, e.g. Article 9 on security supervision, the provisions of the chapter on the dissemination of knowledge, on secrets, and the special precautions provided for in the chapter on health in the event of an uncontrolled explosion').

[72] *Ibid.* (summary translation: 'It might be necessary to add an article to the Treaty stating that it applies to both military and peaceful uses. From a political perspective, however, it is better to avoid it'). This document has also been published by the University of Luxembourg on the CVCE.eu website in the section 'Euratom and France's Military Plans'.

[73] Especially for France, which needed to deal with its '*force de frappe*' both at the supranational and internal level. On this point, see Andreini, *supra* note 2.

[74] By only considering the first stage of negotiations that resulted in the *Spaak Report*, *supra* note 44. In particular, the Court considered that it was clear from the preamble that the Euratom Treaty's signatories 'recognised that nuclear energy … will permit the advancement of *the cause of peace*' and intended 'to cooperate with international organisations concerned with *the peaceful development of atomic energy*'. Case C-61/03, *supra* note 1, paras 2, 26 (emphasis added).

compared to the interpretative model of the VCLT. First, it should be noted that the Court's choice to take into consideration 'other factors'[75] of interpretation was only possible 'in the absence of an express provision excluding activities connected to defence from the scope of the Treaty'.[76] As such, the absence of any express provision on the issue at stake is the precondition necessary for departing from a silent literal meaning and turning to other methods of interpretation – specifically, to the historical method. At first glance, this position is in line with what Articles 31 and 32 of the VCLT provide.

Under the VCLT, the interpreter has to ascertain the objective[77] 'meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties'.[78] By reading Articles 31 and 32 in conjunction,[79] it appears that this task represents a 'process of progressive encirclement where the interpreter starts under the general rule with the ordinary meaning of the terms of the treaty, in their context and in light of the treaty's object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation'.[80] This is a complex operation in which the interpreter is called upon to take into account different elements, composing at the same time the *littera* and the spirit of the treaty text. Only when the application of the general rule leaves the meaning 'ambiguous or obscure' or 'manifestly absurd or unreasonable' is it possible to have recourse to the further means of interpretation, including the preparatory work, quoted in Article 32 of the VCLT.[81]

Second, the examination of the *travaux préparatoires*, which is possible under the condition of the silence of the treaty – tantamount to saying that the objective interpretation under Article 31 of the VCLT has proven insufficient[82] – was of no use in achieving a sound interpretation of the provision because the CJEU considered its content to be substantially irrelevant. Furthemore, an additional analysis of the *travaux*

[75] *Ibid*, para. 28.

[76] *Ibid.*

[77] On the objective and subjective approach to treaty interpretation, see Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference', 18(2) *International and Comparative Law Quarterly* (1969) 318, at 319; Mortenson, 'The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?', 107(4) *AJIL* (2013) 780, at 103.

[78] International Law Commission, Commentary on Final Draft Articles, UN GAOR, 21st Sess., Supp. no. 9, UN Doc. no. A/6309/Rev.1 (1966), at 53–54.

[79] On the relation between the two provisions, see Linderfalk, 'Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not?', 54(1) *Netherlands International Law Review* (2007) 133, at 133; Sbolci, *supra* note 35, at 147.

[80] ICSID, *Aguas del Tunari v. Bolivia*, 21 October 2005, ICSID Case no. ARB/02/03, para. 91, cited in Gardiner, *supra* note 35, at 162.

[81] Or when it is necessary to confirm the meaning resulting from the application of Article 31 of the VCLT, *supra* note 11. On these three options, see Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission', in Cannizzaro, *supra* note 35, at 113.

[82] 'Only if internal inference fails to clarify the point at issue, would the interpreter resort to "external inference" (that is, look "outside" the interpreted instrument)'. Abi-Saab, 'The Appellate Body and Treaty Interpretation', in M. Fitzmaurice, O. Elias and P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010) 97, at 104.

préparatoires was necessary in order to state that the main interpretative problem that the Court needed to solve was left 'unresolved' by the signatories. And that allows the Court to empower itself to engage in a more creative activity that is possible only under the alleged inexistence of a political will on the matter.[83] In this way, in its reasoning, the absence of political will was equated to a *lacuna* in the treaty text that needed to be filled. From the Court's perspective, the shift from a problem of interpreting a given text to one of gap filling was supported by its incomplete historical reconstruction, which erroneously showed the absence of any clear political resolution of the main controversial point.

Third, just as the Advocate General had done, it should also be noted that the CJEU analysed the *travaux préparatoires* at the request of the parties which placed great reliance on them. This approach can be considered to contradict the consideration outlined above about the interpretative method that the Court was supposed to follow: indeed either the historical method is used for an objective reason, such as the inconsistency of the textual method and the resulting persistent ambiguity of the text, or for a subjective reason, such as the attention paid to the arguments raised by the parties involved in the proceeding. This contradiction illustrates the ambiguity of the CJEU's approach *vis-à-vis* the *travaux préparatoires*. This contradiction is strongly influenced by two different purposes that the Court tries to achieve and that sometimes overlap. On the one hand, the Court tries to abide by a specific method of reasoning, similar to the one enshrined in the VCLT.[84] By making reference to a specific method regularly recalled over time the Court can reach a conclusion that takes the form of a logical outcome resulting naturally from a set of given premises. On the other hand, however, the Court's reasoning is influenced by the specificity of the arguments that the parties raise on each occasion.

We believe that these two aims and the different attitudes shown by the CJEU can be reconciled by looking at the role and place of the *travaux préparatoires* in interpretation. As a starting point of this survey, it should be noted that the Court considers *travaux préparatoires* as tools of interpretation only in part. Indeed, for the Court, they are not only a means of interpretation (which are, at times, supplementary as in Article 32 of the VCLT) but also pieces of evidence, submitted by the parties into procedure.[85] In the case at hand, in the Court's own words, 'the guidance' provided by that '*evidence*

[83] On the inertia of the legislator as a justification for engaging in evolutive interpretations, see C. Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (2015), at 183ff.

[84] The CJEU does not make express reference to Articles 31 and 32 of the VCLT, *supra* note 11, but when it establishes the methods of interpretation that should be used to solve an interpretative doubt, their content is the reproduction of the objective methods established in Article 31 of the VCLT, with additional reference to the genetic interpretation. The CJEU, by way of examples, frequently considers that, 'according to settled case-law of the Court, the interpretation of a provision of EU law requires that account be taken not only of its wording and the objectives it pursues, but also of its context and the provisions of EU law as a whole. The origins of a provision of EU law may also provide information relevant to its interpretation'. Case C-370/12, *Pringle* (EU:C:2012:756), para. 135; Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v. Parliament and Council* (EU:C:2013:625), para. 50; Case C-621/18, *Wightman* (EU:C:2018:999), para. 47.

[85] Emphasizing the litigation context.

… [was] not sufficient' to conclude that the drafters of the Euratom Treaty intended to make its provisions applicable to military installations.[86] From this point of view, then, the *travaux préparatoires* were admissible in regard to their nature (and this is why the Court partially analysed them *in abstracto*) but irrelevant in regard to their specific content (and this is why they were not able to provide, *in concreto*, a clear solution for the interpretative doubt at stake).

In this regard, the position of the CJEU is innovative. Moreover, it is in line with the very nature of the *travaux préparatoires*, which are at one and the same time historical sources and pieces of interpretative evidence. As historical sources, their use is free and their purpose is open but, as interpretative evidence, the *travaux préparatoires* are presented to a court or a tribunal in order to construct an interpretation that will favour one party over another, and, in this context, their use needs to be assessed on the basis of criteria of admissibility and relevance.[87] Since they are being used by the Court as pieces of evidence,[88] the Court first considers their admissibility, paying specific attention to their availability by making sure that they are accessible to all parties by virtue of the principle of equality of arms.[89] Second, once their admissibility is confirmed, the Court assesses the relevance of their content. In this context, by referring to their relevance, we refer to their capability of providing specific insights to the Court to enable it to reach a sound interpretation of the provision at issue. From this point of view, the relevance of the *travaux préparatoires* should be assessed in terms of their capacity to reflect the will of the parties. Indeed, in order to be taken into consideration in the interpretation of treaties, they should shed some light on how the signatories' intention was shaped.[90]

By way of example, in the present case the Spaak report was admissible considering the general accessibility granted to it due to its publication in the press, but its

[86] *Ibid.* (emphasis added).

[87] Otherwise, the other interpretative methods and, in particular, the so-called objective methods are normally not subject to a prior eligibility screening. If useful, they are used immediately.

[88] Case C-61/03, *supra* note 1, para. 29 (where a reference is made on '*the evidence* on interpretation' [emphasis added]).

[89] According to CJEU's case law, 'the principle of equality of arms, which is a corollary of the very concept of a fair hearing and the aim of which is to ensure a balance between the parties to proceedings, guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings, implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'. See, among others, Case C-580/12 P, *Guardian Industries v. Commission* (EU:C:2014:2363), para. 31.

[90] See, e.g., 'One can read the Nuclear Tests case almost without noticing that the French unilateral declaration whose binding force was "at issue" related to nuclear weaponry. The case seems obviously to be about consent, unilateral declarations and the sources of law, and only incidentally to have arisen out of conflict about weaponry'. D. Kennedy, *International Legal Structures* (1987), at 251, quoted in Zarbiyev, 'On the Judge Centredness of the International Legal Self', 4 *EJIL* (2021) 1139, at 1162. On the problem of identifying a common intention, see R. Ekins, *The Nature of Legislative Intent* (2013); J. Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (2009); Vogenauer, 'A Retreat from *Pepper v Hart*? A Reply to Lord Steyn', 25 *Oxford Journal of Legal Studies* (2005) 629, at 633.

relevance might have been questioned. In this regard, the report is an expression of a collective will both of the Spaak Committee and the Intergovernmental Committee because of the existence of a specific link that was established between the publication of the report and its approval.[91] However, this link (connecting the technical delegation to the political will) was removed during the negotiations, with the consequence that, despite being the expression of a common will (of the technical delegations), this document in the end was no longer an expression of the final will of the signatories.[92] Similarly, many concerns can be raised about the admissibility of our historical reconstruction and the documents used therein, as with the note of uncertain provenance probably written by the general secretary cited above.

In the use of *travaux préparatoires* in judicial proceedings, much caution is required. The given note was not an institutionalized document produced during the negotiation process or following a specific mandate, and, above all, it was not accessible to the Court.[93] For these reasons, it could not have been used by the Court in its interpretation. Consequently, the Court's engagement in the historical method is possible, but it is often limited by a complex set of pragmatic[94] and theoretical reasons.[95]

5 Conclusion: A Plea for Cooperation between Judges and Historians in Interpretation

Considering the limitations that the CJEU faces when embarking in the historical method, historians could play a role in facilitating the Court's task. For the reasons outlined above, a judge could not have been mandated with a full historical reconstruction of the kind we have made. A Court can not and should not deal with all the treaty's negotiation documents that we have analysed in our research, given the limited time that it has at its disposal, the means available to it and, above all, its specific purpose, which is to solve the case in a limited framework.[96] However, *travaux préparatoires* can be invoked in front of a Court and can be used as interpretative pieces of

[91] The report was indeed 'élaboré sous la responsabilité des Chefs de délégations'. In its preamble, it is also clarified that 'les gouvernements ne sont pas liés.... Les chefs de délégation sont unanimes à recommander aux gouvernements de le prendre pour base dans la négociation des traités'. *Spaak Report*, *supra* note 44, introduction and 'Procès-verbal de la réunion des chefs de délégation, tenue à Bruxelles le 26/10/1955', CM3/NEGO 29, HAEU (summary translation: 'It was drafted under the responsibility of the Heads of Delegations. Governments are not bound by it.... The Heads of Delegation are unanimous in recommending that Governments take it as an outline for the negotiations').

[92] And the same reasoning could apply to the records of meetings of the Nuclear Commission and of the Euratom Group that worked only as preparatory bodies.

[93] According to Kutscher, *supra* note 8, inaccessible *travaux préparatoires* cannot be used by the CJEU.

[94] The accessibility criteria.

[95] The relevance criteria.

[96] On the factual and institutional limitations on judges, see M. Troper, V. Champeil-Desplats and C. Grzegorczyk, *Théorie des contraintes juridiques* (2005).

evidence. As such, they can be reconstructed by both historians and judges.[97] Under closer scrutiny, moreover, the research done by the historian on the treaty's negotiations does not differ that much from that of the judge, at least regarding the object to be analysed – namely, the drafting of its provisions.

In regard to this narrow object of investigation, the use of *travaux préparatoires* by a judge and by a historian is similar, even though it differs with respect to the time that can be spent on the research, which is much more limited in the case of a judge,[98] and with respect to the research method, which, for the historian, is unconditionally free so that he or she can turn to the broad historical context of the negotiations, while the judge is much more limited. Their role also differs certainly from the point of view of the purpose of the investigation since, for the judge, the ascertainment of historical truth is not the aim of his or her activity but only its point of departure.[99] With these differences in mind, however, it should be noted that an analysis conducted by a historian on *travaux préparatoires* might be useful for the judge's subsequent interpretative activity. Moreover, the differences in time and method between the judge and the historian's activities can be mitigated if the *travaux préparatoires* have already been collected and organized. This is the case, for example, in Sergio Neri and Hans Sperl's commentary on the Treaties of Rome and Paris,[100] where the *travaux préparatoires* have been collected and organized under each provision to determine their scope and value. If the Court makes a reference to this commentary, the interpretative instrument used will not be the book in itself but, rather, the *travaux préparatoires* referred to in it.[101] In this way, the *travaux préparatoires* can make some valuable synergy possible between the role of the judge and the role of the historian because their tasks remain separate but still interconnected. Indeed, the framework reconstructed by historians can be formally taken into account by judges in their reasoning, but only in reference to that limited content that is discernible from the *travaux préparatoires* that can, under specific conditions, be considered as admissible (interpretative) evidence.

[97] A formal legal definition does not exist. However, in the international context Hersch Lauterpacht considered *travaux préparatoires* to be 'toutes les manifestations d'opinion, exposés de fait et déclaration d'intention émanant de représentants ou organismes des Parties Contractantes … ne fournissent pas seulement une preuve de l'intention. Ils sont le témoignage des circonstances dans lesquelles le traité a été conclu'. H. Lauterpacht, *Les travaux préparatoires et l'interprétation des traités*, 48 *Collected Courses of The Hague Academy of International Law* (1934), at 779.

[98] A sound historical reconstruction based on several *travaux préparatoires* can take an enormous amount of time and effort. It requires research impossible for a court to carry out in the limited time in which judicial decisions are issued. Moreover, there is no guarantee that this effort will produce a satisfactory result since the historical research can end up with a series of findings that may not have any relevance for the specific case being considered.

[99] Indeed, once the research into the history of the negotiations has been completed, the judge is then called upon to adopt a judgment and solve the issue at hand by 'speaking the law'. For some thoughts and insightful suggestions, which are still relevant today, see P. Calamandrei, *Il giudice e lo storico* (1939), at 105–128.

[100] Neri and Sperl, *supra* note 16. This book can only be found in a few libraries worldwide.

[101] The same could happen in the future with the recent book by M. Steiert and N. Coghlan, *The Charter of Fundamental Rights of the European Union: The 'Travaux Préparatoires' and Selected Documents* (2020).

The added value of this synergy lies in the fact that collected *travaux préparatoires* will occupy only a segment of more general intellectual activity. Indeed, they do not directly provide the solution for the case but can show the direction to be followed in order to arrive at the correct interpretation.[102] At the same time, they can work as constraints, considering that the history of the negotiation process will provide the context of discovery of the interpretation activity.[103] As sources of direction, *travaux préparatoires* will point the judge in the right direction to find the right interpretation; as sources of constraint, they will delimit the territory in which the judge gives his or her interpretation,[104] providing the context within which the Court can carry out its irreducible creative activity.[105] As such, *travaux préparatoires* can be considered to lie halfway between discovery and creation – between a creative and a more self-restrained interpretation.[106]

By way of example, had the *travaux préparatoires* been taken into consideration in this case as a direction, they would have provided a hint that the systemic method was the best one to use to solve the issue. Had they been taken into consideration as a constraint, they would have served to limit the purposive interpretation, given that restricting the field of application of the Euratom Treaty would have produced a more progressive interpretation,[107] which could have ensured a broader protection of the general interests of the Union such as the environment and the protection of the health of the population.[108] Thus, on the one hand, *travaux préparatoires* reduce the Court's autonomy by driving its interpretation, but on the other hand, they contextualize its findings and can provide sound justification for its reasoning.

[102] Similarly, '[l]es travaux préparatoires ne s'imposent pas absolument au juge'. Gérard, 'Le recours aux travaux préparatoires et la volonté du législateur', in M. Van De Kerchove (ed.), *L'interprétation en droit. Approche pluridisciplinaire* (1979) 51, at 91.

[103] From this point of view, *travaux préparatoires* can give an understanding of the factual context in which the interpretative doubt arises.

[104] Gérard, *supra* note 102, at 86 (where he speaks about 'l'histoire comme contrainte qui relativise l'autonomie du juge').

[105] De Forrest, 'Taming a Dragon: Legislative History in Legal Analysis', 39 *University of Dayton Law Review* (2013) 37, at 66 ('[n]ot in a way that would be binding – such as if the information was to come directly from an actual source of law – but in a way that is informative and explanatory. It is in this way that legislative and regulatory history can be employed by legal writers to provide a texture to the law, not a substitute for its content, but as a way of adding depth to the communication of the law's goals').

[106] Interpretation is both a creative and a finding activity, according to F. Modugno, *L'interpretazione giuridica* (2012), at 13–18. On the use of the doctrine of originalism to preserve the rule of law and the legitimacy of the Court, see Conway, *supra* note 8, at 106–108, 245, 272.

[107] In fact, it is not true that the use of the drafting history in interpretation leads to an ossification of the text or to a conservative outcome of the interpretative activity, as is frequently assumed. See, e.g., Miettinen and Kettunen, 'Travaux to the EU Treaties: Preparatory Work as a Source of EU Law', 17 *Cambridge Yearbook of European Legal Studies* (2015) 145, at 146 (*travaux préparatoires* 'reinforce static interpretations of existing provisions. The increased use of historical interpretation may in future even act as a counterweight to teleological interpretation').

[108] While in the CJEU's judgment, it was in the end the actual political interest of the member states involved that was protected. In the same way, see A. Södersten, *Euratom at the Crossroads* (2018), at 164–167.