PANEL DISCUSSION OF JUDICIAL POWER AND BREXIT

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The Court of Justice has been portrayed, and perceived by many, as a motor of integration and of where the EU is heading, but many in Britain don't wish to go; EU laws don't mean what they say but what the Court says they mean. This perception – a contributing factor to Brexit – is indeed correct.

In this paper I wish to explain that the CJEU's integrationist disposition is not accidental but rooted in the CJEU's distinctive approach to treaty interpretation.

The general rules of treaty interpretation are set out in Articles 31 and 32 of the Vienna Convention on the Laws of Treaties ("VCLT").

Article 31[1] states that treaties must be interpreted in 'good faith', in accordance with the 'ordinary meaning' of the 'terms' or text of the treaty, in their 'context', and in light of the treaty's 'object and purpose'. Article 32[2] adds that courts may have regard to the 'preparatory work of the treaty and the circumstances of its conclusion' as secondary sources of interpretation, to confirm meaning established under the first principle or in case the meaning of the treaty remains unclear or leads to an absurd result.

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[1] Article 31
General rule of interpretation
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

[2] 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.

Art. 31 VCLT emphasises the crucial importance of the ordinary meaning of the treaty text, but it does not prescribe what precise weight courts should attach to either to the context or the objectives of the measures, or whether objectives must be evident from the text, or may be assumed to be implicit. Nor does the VCLT state explicitly that the objectives of a treaty may only be taken into account if the textual meaning is unclear. The imprecision of Art. 31 – no doubt deliberate – thus gives tribunals scope for interpretative manoeuvre. And it is clear that, when applying VCLT rules, some courts are more likely to be guided by the text, whilst others give greater weight to other factors (especially the objective) and favour a more teleological, creative interpretative approach. International tribunals that are associated with the textual approach are the WTO's Appellate Body,[3] or the International Court of Justice (ICJ). By contrast, examples of international tribunals that tend to favour a teleological approach are the Court of Justice of the EU[4] and the European Court of Human Rights.[5]

The Court of Justice itself has summarised its interpretative approach in *Merck v Hauptzollamt Hamburg-Jonas*[6] as follows:

> … in interpreting a provision of [Union] law it is necessary to consider not only its wording, but also the context in which it occurs and the objects of the rules of which it is part.

In theory the Court of Justice is bound by the Vienna Convention, and its summary of its own approach superficially echoes Art. 31. In practice, however, the Court of Justice departs both from the letter and the spirit of the Vienna Convention. Based on detailed case law analysis in my study of the Court of Justice, the CJEU's approach may be summarised as follows.

First, although the Court frequently refers to the wording, the CJEU, compared to many other courts, is relatively more willing to give priority to teleological criteria over linguistic criteria in cases where both types of arguments conflict and a purposive argument favours an integrationist outcome.

Secondly, the Court of Justice rarely, if ever, uses historical arguments.[7]

Thirdly, the Court often implicitly and sometimes explicitly takes account of meta-teleological criteria, i.e. the general integrationist objectives of the EU, and not merely, as it suggests in *Merck*, the explicit 'objects of the rules of which [a legal provision] forms part'.[8] This applies despite the fact that the Court rarely expressly refers to the 'ever closer union' objective and

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[3] See e.g. Georges Abi-Saab "The Appellate Body and Treaty Interpretation," in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Leiden: Martinus Nijhoff) (2010) at 106.

[4] See for instance Koen Lenaerts "Interpretation and the Court of Justice: A Basis for Comparative Reflection," *The International Lawyer*, Vol. 41, No. 4, at 1011–32 (2007).

[5] See e.g. V. Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case-law of the ECtHR: an Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of the Teleology of Human Rights? Between Evolution and Systemic Integration' (2010) 31 *Michigan Journal of International Law* 621-690; Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of IHRL* (OUP, 2013) 739.

[6] Case C-292/82 *Merck v Hauptzollamt Hamburg-Jonas* [1983] ECR-3781at para 12.

[7] Ibid. at 217-219

[8] Case C-292/82 *Merck v Hauptzollamt Hamburg-Jonas* [1983] ECR-3781 at para. 12.

only somewhat more frequently to the 'spirit of the Treaties'.[9] In important cases, however, the idea of ever further integration is almost always implicit, as it is inseparable from the principles of the uniform application of Union law as well as the effectiveness of Union law.[10]

Fourth, as soon as the Court decides with implicit reference to 'ever closer union' or the principles that favour an integrationist solution, that decision effectively becomes a precedent.[11] In referring back to its case law, the Court thus implicitly also relies on meta-teleological considerations and the cumulative weight of previous integrationist decisions. Precedents thus solidify and reinforce the Court's *communautaire* leaning.[12]

Fifth, the Court of Justice operates in an extremely permissive political environment. In domestic legal systems, it is open to the legislator to override court decisions by passing appropriate legislation. Judgments by the Court of Justice, by contrast, can be reversed only by the Court itself or by unanimous treaty amendment by the Member States. In other words, it is as difficult to reverse a Court of Justice judgment as it is to amend the existing Treaties.[13]

Sixth, the Court of Justice interprets the Treaties as living, not historical instruments.[14]

Seventh, in contrast with several other courts applying the VCLT, the Court of Justice does not accept a hierarchy amongst literal, purposive and other criteria.[15] The CJEU does not attach a clear consistent weight to specific criteria. It presents its conclusion as the cumulative result of the variable application of all criteria. The Court's approach to legal reasoning may therefore be described either as a cumulative or variable approach.[16]

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[9] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart Legal Publishing) 2013 at 319-322; Vaughne Miller, House of Commons Library, Briefing Paper Number 07230, 16 November 2015 "Ever Closer Union" in the EU Treaties and Court of Justice case law.

[10] Ibid. at 320-321.

[11] Because many important cases were decided on meta-teleological considerations, understood to include those principles which favour an expansive interpretation of the scope of Union law and of the competences of the EU institutions, the body of precedents itself acquires a *communautaire* or pro-Union flavour. The importance of *de facto* precedents in the Court's argumentation is borne out by the fact that there is hardly any case in which the Court does not refer to at least one previous decision. In both 1999 and 2011 there were more cases in which it cited case law than any classical interpretative argument. (Ibid., at 290-91.)

[12] Moreover, the appeal to previous decisions enhances judicial credibility and lends later decisions the aura of legal objectivity, simply because, in analysing a case, not every relevant previous case is excavated and subjected to legal analysis.

[13] Moreover, the meaning of the Treaties, although not their wording, invariably reflects, and thus evolves, with ongoing Court judgments. The CJEU's decision-making, in turn, then builds not on the treaty text itself but on its own body of interpretative decisions.

[14] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart Legal Publishing), at 317-319.

[15] Ibid. at 280-293, 316-317; K.P.E. Lasok and Timothy Millett, *Judicial Control in the EU* (Richmond: Richmond Law & Tax Ltd) 2004 at 375-391.

[16] There are different understandings of the term 'cumulative approach.' Here it means that the CJEU presents it decisions in terms of the cumulative weight of literal, systemic, teleological and, often, meta-teleological considerations, with the specific weight attached to each criterion varying from one case to the next. For this reason, the author also refers to this approach as 'variable'. See further, G. Beck, *The Legal Reasoning of the Court of Justice of the EU* at 280-293; *Cf.* V. Moreno-Lax, 'Systematising Systemic Integration: "War Refugees", Regime Relations, and a Proposal for a Cumulative Approach to International Commitments' (2014) 12 JICJ 907-929, analysing the interpretative methodology of the CJEU in Case C-285/12 *Diakité* ECLI:EU:C:2014:39 and related case law.

Finally, the Court's variable approach combined with its meta-teleological dimension gives the Court's decision-making its distinctive pro-Union or *communautaire* tendency; its predisposition to resolve legal uncertainty in favour of further integration or the Union's interests.

The Court's *communautaire* predisposition, of course, varies with the importance of the cases. It tends to be irrelevant in most run-of-the-mill cases, which concern the application of more or less clear, detailed and technical provisions.[17] However, the Court's pro-Union default position becomes crucial and often the decisive factor in cases involving major issues of principle, such as constitutional issues or the division of competences between the EU and Member States. In constitutional cases the communautaire tendency inclines the Court to resolve legal uncertainty in favour of meta-teleological objectives, especially the 'ever closer union' objective which, implicitly, is present in many of the Court's most influential decisions.[18]

As a proviso, it should be added, the Court's communautaire predisposition is just that, a tendency, not an inevitable or foregone conclusion. The Court of Justice is, in fact, a politically most astute court exercising high levels of deference to Member States, although not so high that a deferential ruling could adversely affect the integrationist project.

To sum up what I have said: The Court of Justice is, and has never been, an impartial arbiter when it comes to the interests of the member states and the EU. It may at times defer to Member States, yet its interpretative approach is designed to favour integration.

So how may the pro-Union bias of the Court of Justice affect the withdrawal process during the negotiations and beyond? There are several distinct issues

1. **What is the possible judicial role in Brexit itself (viz. challenge to any Art 50 exercise)**

As EU Treaty articles go, Art. 50 TEU is comparatively clear and there is little scope for the CJEU to twist its wording to prevent the UK from triggering it at the time of her choosing. The crucial question with respect to Art. 50, however, is whether a notification to withdraw, once given, can be reversed. Art. 50 is silent on this point, and so the most natural meaning is that it cannot. However, this is a highly politically charged question. I am sure the CJEU will not bloc a legal reversal of the UK's withdrawal if all, or most, Member States agree on the reversal.

As for the CJEU's interpretation of the Treaties, while the UK is still a member of the EU, the UK remains bound by it as it has been so far.

2. **Domestic legislation based on EU law retained after Brexit**

This is a more intractable problem. When the UK finally leaves the EU, the interpretation of EU-based domestic legislation is transferred to the UK courts which have internalised principles and aspects of the CJEU's approach and may continue to have regard to CJEU case law as persuasive judgments. It is up to Parliament to decide if this is a problem. However, the

[17] Examples of these are mostly agriculture, VAT, Customs Union, and Tariff cases. Unsurprisingly, in these areas the Court generally pays close regard to the wording of the applicable provisions, and it is exceptional for the Court to reach a conclusion based on teleological criteria, which are opposed to a literal reading.

[18] The Court in such cases may disregard the *lex specialis* principle and override a more or less specific rule in a particular policy area, which may suggest a less integrationist outcome, in favour of a meta-teleological reading, based not on the 'objects of the rules of which [the rule] forms part' but the general aspirations of the Union Treaties.

effects on the judiciary of the 'EU way' should become less important with time, as UK legislation will gradually build on and partly supersede the residue of EU legislation.

3. Role of the CJEU in dispute settlements under any EU-UK trade deal

Disputes arising under any trade agreement between the EU and UK will require a tribunal. It is obvious that that tribunal should not be the CJEU. However, problems may arise if the UK wishes to retain full access to the single market for goods and services, which is based on the principles of mutual recognition and passporting for financial services. In this case, a separate court may be set up but, if the EEA model is adopted, that court will be bound to follow the case law of the Court of Justice on single market legislation. If a different model along Swiss lines is adopted, the arrangements might be more flexible but the EU is still likely to insist on single market legislation being followed as interpreted by the Court of Justice. This will be a major obstacle in securing any trade deal with the EU which would give the UK single market access.