

Authentic Interpretation in Public International Law

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Abstract

Authentic interpretations can be found in various legal contexts such as international tax law, international trade law, or international investment law. In any of these contexts, they entail the same doctrinal challenges: Are authentic interpretations of treaty law legally binding? If so, is the binding nature of authentic interpretations in any way limited? And finally, who defines and reviews these limits? This article contributes to resolving these challenges by deconstructing the concept of authentic interpretation. Tracing its historic evolution and diffusion into public international law, it argues that authentic interpretation is law-making in all but name. In the end, any attempt to distinguish between binding and non-binding authentic interpretations may prove to be illusory. The power to adopt authentic interpretations correlates to the contracting parties' treaty-making power. There-

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fore, authentic interpretations are subject to – and solely subject to – those limits that control and restrain the exercise of State sovereignty. This finding raises an even more intricate question that touches upon the bedrocks of the international legal order, namely: Who shall be sovereign enough to control the sovereign?

I. Introduction

When UN Secretary-General *Trygve Lie* invited the International Law Commission (ILC) to include the law of treaties into its agenda for codification and progressive development, he employed an illustrative image to describe the field of treaty interpretation as it stood in 1949. To him, it was a field “overgrown with the weed of technical rules of construction which can be used – and are frequently used – in support of opposing contentions”.¹ The 1969 Vienna Convention on the Law of Treaties successfully eradicated most of this weed by offering a set of concise and legally binding rules of treaty interpretation.²

But as regards authentic interpretation of treaty law, the Convention stimulated the growth of new weed over already existing layers of discrepancies and uncertainties.³ An authentic interpretation traditionally possesses two distinctive features.⁴ Firstly, it emanates from the entity that created the

¹ United Nations General Assembly (UNGA), Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory Work within the Purview of Art. 18, Para. 1, of the International Law Commission – Memorandum Submitted by the Secretary-General, 1949, UN Doc. A/CN.4/1/Rev.1, 52, para. 91.

² Arts. 31 et seq. of the Vienna Convention on the Law of Treaties (signed 22.5.1969, entered into force 27.1.1980), 1155 UNTS 331 (VCLT).

³ For different conceptions of authentic interpretation, see *J. Hardy*, The Interpretation of Plurilingual Treaties by International Courts and Tribunals, BYIL 37 (1961), 72 (108); *I. Voicu*, De l'interprétation authentique des traités internationaux, 1968, 119; *R. Wolfrum/N. Matz*, Conflicts in International Environmental Law, 2003, 140; *A. Orakhelashvili*, The Interpretation of Acts and Rules in Public International Law, 2008, 514; *I. van Damme*, Treaty Interpretation by the WTO Appellate Body, 2009, 26; *M. Benetar*, From Probative Value to Authentic Interpretation: The Legal Effect of Interpretative Declarations, R.B.D.I. 44 (2011), 170 (173), (194); *A. Gourgourinis*, The Distinction between Interpretation and Application of Norms in International Adjudication, Journal of International Dispute Settlement 2 (2011), 31 (35); *O. Dörr*, Art. 31, in: *O. Dörr/K. Schmalenbach*, Vienna Convention on the Law of Treaties, 2012, 532, paras. 20 et seq.; Draft Conclusion 2 and Commentary, in: ILC, Report of the International Law Commission on the Work of Its 65th Session, UN Doc. A/68/10 (2013), 20.

⁴ *A. Orakhelashvili* (note 3), 514. Authentic interpretation needs to be distinguished from the notion of “auto-interpretation”, which refers to unilateral interpretative endeavours by those whom a legal rule addresses, see *L. Gross*, Selected Essays on International Law and Organization, 1984, 182; *M. Benetar* (note 3), 174.

interpreted norm. And secondly, it has the same legal value as the interpreted norm. Authentic interpretations can be found in various contexts such as international tax law, international trade law, or international investment law.⁵ In any of these contexts, they entail the same doctrinal challenges:

Are authentic interpretations of treaty law legally binding? If so, is the binding nature of authentic interpretations in any way limited? And finally, who defines and reviews these limits?

This article contributes to resolving these challenges by deconstructing the concept of authentic interpretation. In a first step, it defines the objective of treaty interpretation and distinguishes different types of law-making (II.). In a second and third step, it critically traces the historic evolution of authentic interpretation and its diffusion into public international law (III. and IV.). In conclusion, it argues that authentic interpretations are subject to – and solely subject to – those limits that control and restrain the exercise of State sovereignty (V.).

II. Treaty Interpretation and the Two Types of Law-Making

To adequately apprehend and address the distinctive features and doctrinal challenges of authentic interpretation, it is indispensable to briefly reflect on three basic questions: First, what is the objective of treaty interpretation? Second, what is subordinate law-making through interpretation?

⁵ E.g. *U. Fastenrath*, Relative Normativity in International Law, *EJIL* 4 (1993), 305 (336); *A. von Bogdandy*, Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship, *Max Planck UNYB* 5 (2001), 609 (628); *G. Sacerdoti*, The Dispute Settlement System of the WTO: Structure and Function in the Perspective of 10 Years, *Law and Practice of International Courts and Tribunals* 5 (2006), 49 (57); *D. Lai*, Interpretation of Double Taxation Agreements in Hong Kong, *HKLJ* 37 (2007), 137 (150); *A. Feldman*, Evolving Treaty Obligations: Proposals for Analyzing Subsequent Practice Derived from WTO Dispute Settlement, *N.Y.U.J. Int'l L. & Pol.* 41 (2009), 655 (661); *A. Roberts*, Power and Persuasion in Investment Treaty Arbitration: The Dual Role of States, *AJIL* 104 (2010), 179 (199); *B. Stern*, Interpretation in International Trade Law, in: *M. Fitzmaurice/O. A. Elias/P. Merkouris*, The Issues of Treaty Interpretation and the Vienna Convention on the Law of Treaties, 2010, 114; *I. van Damme*, Treaty Interpretation by the WTO Appellate Body, *EJIL* 21 (2010), 605 (610); *I. Laird/B. Sabahi/F. Sourgens/N. Birch*, International Investment Law and Arbitration: 2011 in Review, in: *K. Sauvant*, Yearbook on International Investment Law & Policy 2011-2012, 2013, 46; *M. Polzin*, Begrenzte Schiedsgerichte – Absicherung der Demokratie?, in: *Verfassungsblog*, 22.4.2014, <<http://www.verfassungsblog.de>>. This and all further internet sources have been accessed on 30.1.2016.

And third, what is the difference between subordinate law-making and authentic interpretation?

1. The Objective of Treaty Interpretation

To identify the objective of treaty interpretation, it is useful to remember the obvious: Treaties are not concluded by accident.

Instead, treaties are the result of a concordant will of sovereign States or other actors, whose overriding importance is reflected in the basic principle *pacta sunt servanda*. As *James Crawford* succinctly remarked, “it is too often forgotten that the parties to a treaty, that is, the states which are bound by it at the relevant time, own the treaty. It is their treaty. It is not anyone else’s treaty”.⁶ A correct interpretation is not the one which the interpreter personally considers suitable; it is the one that comes closest to implementing the parties’ concordant will. Otherwise, concluding treaties would be utterly pointless.

In conventional language, interpretation means “expounding the meaning of something”.⁷ From a non-legal perspective, one gives a meaning to phenomena like music, paintings, or even facial expressions. In a legal context, one equally interprets various different phenomena such as unilateral statements, oral, or written agreements. Treaty interpretation is solely concerned with determining the meaning of a treaty, i.e. an international agreement concluded between subjects of and governed by international law.⁸ But what is the meaning of a treaty?

The interpretative process – at least under the Vienna Convention – ultimately aims at ascertaining the objectivised intention of the parties.⁹ Arts. 31–33 Vienna Convention on the Law of Treaties (VCLT) – the so-called Vienna rules of interpretation – do not expressly mention the parties’ intention. The commentary accompanying the ILC’s Draft Articles on the Law of Treaties, however, clarifies that these rules were designed to appreciate “the meaning which the parties may have intended to attach to the expressions that they employed in a document”.¹⁰

⁶ *J. Crawford*, A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties, in: G. Nolte, *Treaties and Subsequent Practice*, 2013, 31.

⁷ –, interpret, v, in: OED Online, 12.2015, <<http://www.oed.com>>.

⁸ See Art. 2 para. 1 lit. a VCLT.

⁹ ILC, Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission 18 (1966), Vol. 2, 187 (219).

¹⁰ ILC (note 9), 218. See also *E. Bjorge*, *The Evolutionary Interpretation of Treaties*, 2014, 89.

The cardinal role of the parties' intention has been widely recognised.¹¹ The ILC only recently reiterated that interpretation "must seek to identify the intention of the parties".¹² Furthermore, the Commission explained that "the text must be presumed to be the authentic expression of the intentions of the parties".¹³ In other words, interpretation under the Vienna rules aims at "giving effect to the expressed intention of the parties, that is, their intentions as expressed in the words used by them in the light of the surrounding circumstances".¹⁴

The parties' intention is an objectivised intention of the parties as a whole; properly understood, the parties' intention is a construct.¹⁵ As *Oliver Dörr* notes, "[t]o be ascertained by interpretation is [...] the intention in the sense of the true meaning of the text of the treaty rather than the intention of the parties distinct from it".¹⁶ Similarly, the ILC pointed out that the parties' intention was their intention "as determined through the application of the various means of interpretation"¹⁷ and not "a separately identifiable original will".¹⁸

¹¹ In particular *Case concerning the Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ Reports 2009, 213 (241). See already *H. Grotius*, *De jure belli ac pacis libri tres*, reprint 1995, 409; *E. de Vattel*, *The Law of Nations or the Principles of Natural Law*, reprint 1995, 201. See also *H. Lauterpacht*, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration*, 1927, 187; *G. Fitzmaurice*, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, BYIL 28 (1951), 1 (3); *J. Brierly*, *The Law of Nations – An Introduction to the International Law of Peace*, 5th ed. 1955, 251; *M. K. Yasseen*, *L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités*, RdC 151 (1976) 1 (16); *I. Sinclair*, *The Vienna Convention on the Law of Treaties*, 2nd ed. 1984, 115; *C. McLachlan*, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, ICLQ 54 (2005), 279 (287); *J. Crawford*, *Brownlie's Principles of Public International Law*, 8th ed. 2012, 379.

¹² Commentary on Draft Conclusion 3, in: ILC, Report of the International Law Commission on the Work of its 65th Session, UN Doc A/68/10 (2013), 27.

¹³ ILC (note 9), 220. See also *M. K. Yasseen* (note 11), 25; *P. Reuter*, *Droit international public*, 6th ed. 1983, 145; *J. Crawford* (note 11), 379.

¹⁴ *A. McNair*, *The Law of Treaties*, repr. 2003, 365. See also *O. Dörr* (note 3), 552, para. 3.

¹⁵ *E. Borge* (note 10), 2 et seq. See also *R. Bernhardt*, *Die Auslegung völkerrechtlicher Verträge insbesondere in der neueren Rechtsprechung internationaler Gerichte*, 1963, 34; *M. K. Yasseen* (note 11), 16; *U. Linderfalk*, *On the Interpretation of Treaties – The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, 2007, 32 et seq.; *J. Crawford* (note 11), 379. The parties as a whole are those parties for whom the treaty is in force at the moment when it is being interpreted, see Art. 2 para. 1 lit. g VCLT.

¹⁶ *O. Dörr* (note 3), 552, para. 3.

¹⁷ Commentary on Draft Conclusion 3, in: ILC (note 12), 27.

¹⁸ Commentary on Draft Conclusion 3, in: ILC (note 12), 27.

2. Law-Making Through Interpretation

Authentic interpretation in general public international law is a distinct type of law-making. It is not, however, law-making through interpretation. Depending on one's analytical perspective, one may well say that interpretation makes law.¹⁹ But by overemphasising the necessarily discursive nature of law and hence law-making through interpretation, one easily risks obscuring the distinctive features of authentic interpretation and thus impedes resolving its doctrinal challenges.

Hans Kelsen offers a particularly illustrative explanation of law-making through interpretation. His approach to interpretation is based on two major premises. Firstly, it rests upon the idea of a hierarchical structure ("Stufenbau") of the law. And secondly, it rejects the "fiction that there is always but a single 'correct' interpretation of the norms to be applied to concrete cases".²⁰ Higher-level norms determine the creation of lower-level norms.²¹ This determination is necessarily imperfect and incomplete because

"a norm cannot be binding with respect to every detail of the act putting it into practice. There must always remain a range of discretion, sometimes wider, sometimes narrower, so that the higher-level norm, in relation to the act implementing it (an act of lower-level norm creation or of pure implementation), has simply the character of a frame to be filled in by way of the act."²²

In simple terms, one may add the following observation: Positive law – written or unwritten – inevitably suffers from the inherent imperfections of human language. Treaty law is no exception. The words and phrases that make up a treaty hardly ever carry only one single meaning. Almost every treaty is ambiguous.²³ This is why those who faithfully apply a treaty – consciously or subconsciously – subject the treaty to an interpretative process: To resolve this ambiguity, to determine the treaty's correct meaning at a giv-

¹⁹ See generally *I. Venzke*, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, 2012.

²⁰ *H. Kelsen*, *The Law of the United Nations*, 1950, xvi.

²¹ *H. Kelsen*, *Reine Rechtslehre*, 2nd ed. 1960, 228.

²² *H. Kelsen*, *On the Theory of Interpretation*, *Legal Studies* 10 (1990), 127 (128). As regards legal indeterminacy, see also *H. L. A. Hart*, *The Concept of Law*, 3rd ed. 2012, 124 et seq.

²³ See in particular *H. L. A. Hart* (note 22), 124 f.; see further *H. Lauterpacht*, *Some Observations on Preparatory Work in the Interpretation of Treaties*, *Harv. L. Rev.* 48 (1935), 549, 571.

en moment in time and in a given context, and to ascertain and implement the objectivised intention of the parties.

Instead of focusing on methods or means of interpretation, *Kelsen* highlights the characteristics of different types of interpretation, namely juridico-scientific and authentic ones. Juridico-scientific interpretations, i.e. interpretations by legal scholars, are cognitive acts that merely set out the possible meanings of a legal norm.²⁴ Authentic interpretations are interpretations adopted by law-applying organs such as judges, officials, or legislators.²⁵ Law-applying organs choose one among those possible meanings. Thus, their interpretations are authentic in that they create subordinate law through an act of will.²⁶

3. Subordinate Law-Making and Authentic Interpretation Distinguished

Authentic interpretation in a *Kelsenian* sense is not synonymous with authentic interpretation as traditionally understood in general public international law. In fact, these concepts refer to categorically different phenomena.²⁷ Whereas authentic interpretation in a *Kelsenian* sense means subordinate law-making, authentic interpretation as traditionally understood in general public international law is coordinate law-making.

Subordinate law-making through interpretation and coordinate law-making are not mutually exclusive concepts. Nonetheless, it is important not to confuse them. This is because these concepts relate to different analytical perspectives and points of reference. Assuming that the international legal order consists of ever higher normative strata, every act of apparently coordinate law-making necessarily construes, applies, and executes higher legal norms. Yet, an act of law-making through interpretation can never ascend the hierarchical structure of the law.

In other words, a legal norm may be interpreted by various actors, all of which in some way engage in law-making when construing that norm. But only the actor that once created the interpreted norm is capable of vesting the resultant “interpretation” – the new norm – with an identical legal value. Other actors make law when interpreting that legal norm, too. These other actors, however, do not have the power to vest their interpretations with the

²⁴ *H. Kelsen* (note 21), 352 et seq.

²⁵ *H. Kelsen* (note 22), 127.

²⁶ *H. Kelsen* (note 20), xv et seq.

²⁷ *J. Kammerhofer*, *Uncertainty in International Law*, 2011, 115 et seq.

same legal value as the original norm. For these other actors, the original norm delimits their interpretative activities so that the resultant interpretations are hierarchically subordinate law-making.

International judicial and quasi-judicial bodies such as the International Court of Justice (ICJ), the Iran-United States Claims Tribunal (IUSCT), or the UN Human Rights Committee (HRC) engage in law-making by settling disputes, giving advisory opinions, or publishing general comments. Their competence to do so is a delegated competence. Contracting parties may authorise other actors to construe, apply, and execute their treaty. The resultant interpretations may be viewed as a new source of law. Yet, they remain acts that fill in an existing frame.

Irrespective of whether the resultant interpretations are legally binding – they can still be judged in terms of right and wrong. Their ultimate point of reference remains the treaty’s meaning, the act of delegation, or, more precisely, the objectivised intention of the parties. An authentic interpretation, in contrast, cannot logically be subordinate to the parties’ intention. This is because it emanates from the parties themselves. The parties may effectively terminate, amend, or replace their treaty – the treaty, however, is not the frame to be filled in.

III. A Brief Historical-Comparative Overview

The concept of “authentic interpretation” is not a neologism created by legal doctrine in the 20th century. Instead, its foundations can be traced back to Roman legal principles. These principles became an integral part of canon law and were incorporated into continental European legal systems like the Prussian and post-war German ones.

1. Authentic Interpretation in Roman Law

Roman law formally regarded the authority to interpret the law authentically as a natural part of the *imperialis potestas*. But in practice, the exercise of this authority by the emperor was criticized and challenged.²⁸ To au-

²⁸ *Codex Iustinianus*, Book 1, Title 14, Lex 12. The *Codex* was a collection of constitutions of Roman emperors. An annotated and translated *Codex* is available at <<http://www.uwo.edu>>.

thoritatively remedy this situation, the *Codex Iustinianus* – the first part of the famous *Corpus Iuris Civilis*²⁹ – stipulated:

“We [...] decide that every interpretation of laws by the emperor, whether made on petitions, in judicial tribunals, or in any other manner shall be considered valid and unquestioned. For if at the present time it is conceded only to the emperor to make laws, it should be befitting only the imperial power to interpret them.

For why do the nobles run to us for advice when a doubt arises in lawsuits and they do not trust themselves to give a decision, and why are ambiguities which are apt to be found in laws referred to us, if true interpretation does not proceed from us? Or who will be suitable to solve enigmas and make them plain to all, unless it be he to whom alone is granted the right to make laws? [...]

[T]herefore [...] the emperors will rightly be considered as the sole maker and interpreter of laws.”³⁰

According to the Byzantine emperor *Justinian I.*, on whose behalf the *Corpus Iuris Civilis* had been compiled, the lawmaker himself was the only entity that was authorized to interpret the law. In consequence, he ordered that questions of doubt as regards the correct interpretation of the law had to be submitted to the lawmaker himself for clarification.³¹

Since this obligation proved impracticable, it was soon abolished.³² The emperor’s authority to interpret the law authentically, however, was left untouched.³³ An important characteristic of authentic interpretation under the *Codex Iustinianus* was that it possessed the force of law. Put differently, creation and interpretation of the law were not clearly separated from each other.³⁴ But unlike genuine law-making,³⁵ authentic interpretations not only regulated future affairs but also applied retroactively.³⁶

²⁹ The *Corpus Iuris Civilis* originally consisted of three parts, namely the *Codex*, the *Digesta*, and the *Institutiones*.

³⁰ *Codex Iustinianus*, Book 1, Title 14, Lex 12.

³¹ *Codex Iustinianus*, Book 1, Title 17, Lex 2.

³² B. Droste-Lehnen, *Die authentische Interpretation*, 1990, 39.

³³ B. Droste-Lehnen (note 32), 39.

³⁴ See also I. Voicu (note 3), 75.

³⁵ See *Codex Iustinianus*, Book 1, Title 14, Lex 7.

³⁶ See *Justinian’s Novel 143*, which declares that the authentic interpretation contained therein not only applies to future but also to past events. See also J. Bremer, *Die authentische Interpretation*, *Jahrbuch des gemeinen deutschen Rechts* 2 (1958), 241 (257).

2. Authentic Interpretation in Canon Law

During the Middle Ages, the Roman law concept of authentic interpretation was disseminated into canon law as it offered an attractive option for selectively correcting or adapting the law.³⁷ Today, authentic interpretation forms an integral part of the *Codex Iuris Canonici* (Code of Canon Law; CIC), which is the primary legislative document of the Roman Catholic Church.³⁸ The current *Codex*, the so-called *Johanno-Pauline* Code, was adopted in 1983 to replace the original, so-called *Pio-Benedictine* Code of 1917.

Canon 16 of the 1983 CIC addresses authentic interpretation in a detailed fashion:³⁹

“§ 1 The legislator authentically interprets laws as does the one to whom the same legislator has entrusted the power of authentically interpreting.

§ 2 An authentic interpretation put forth in the form of law has the same force as the law itself and must be promulgated. If it only declares the words of the law which are certain in themselves, it is retroactive; if it restricts or extends the law, or if it explains a doubtful law, it is not retroactive.

§ 3 An interpretation in the form of a judicial sentence or of an administrative act in a particular matter, however, does not have the force of law and only binds the persons for whom and affects the matters for which it was given.”⁴⁰

Canon law distinguishes four types of authentic interpretation. These types are declaratory, restrictive, extensive, and explanatory authentic interpretations. Declaratory interpretations merely affirm an apparently clear meaning. Restrictive, extensive, and explanatory interpretations, in contrast, have the effect of narrowing or broadening the meaning of the law within or beyond what is included in the text, or of specifying the law where its meaning is doubtful. Entailing no change to the law, declaratory authentic interpretations are therefore the only ones that apply retroactively under canon law.

Unlike interpretations adopted by law-applying organs (§ 3), authentic interpretations have the force of law once they are promulgated in the form of law (§§ 1 and 2). Canon 17 of the 1917 CIC only required extensive, restrictive, and explanatory authentic interpretations to be promulgated in the

³⁷ A. Gauthier, *Roman Law and Its Contribution to the Development of Canon Law*, 2nd ed. 1996, 20 et seq.

³⁸ See generally C. M. Polvani, *Authentic Interpretation in Canon Law*, 1999.

³⁹ Under the 1917 CIC, authentic interpretation was dealt with in c. 17.

⁴⁰ For an English translation of the 1983 CIC, see CLSA Publications, *Code of Canon Law: Latin-English Edition*, 2nd ed. 2012.

form of law.⁴¹ The 1983 CIC extended the requirement of promulgation in the form of law to declaratory authentic interpretations. If he wishes to interpret the law in a legally binding fashion – irrespective of whether his interpretation formally changes the law or applies retroactively – the ecclesiastical lawmaker is now expected to express his intention in an unequivocal fashion.⁴²

This formalistic requirement – promulgation in the form of law – raises the question whether authentic interpretation entails any advantage over genuine law-making at all. An ecclesiastical lawmaker may wish to preserve the impression that the law was drafted to apply *in aeternam* although it actually requires adjustments. To reflect such papal infallibility, authentic interpretation may be a politically welcome instrument.⁴³ This “cosmetic” advantage of authentic interpretation, however, only applies to law-making by an infallible pope but not by other ecclesiastical bodies such as conferences of bishops or diocesan bishops.

Moreover, ecclesiastical authentic interpretations regularly fail to indicate whether they are meant to be declaratory.⁴⁴ In consequence, it is often unclear whether a particular interpretation applies retroactively or not. For those whom the law grants rights or upon whom it imposes obligations, an authentic interpretation therefore not only clarifies the law but also constitutes a new source of uncertainty.

3. Authentic Interpretation in Domestic Law

Several continental European legal systems such as the Prussian and post-war German ones similarly borrowed the Roman law concept of authentic interpretation.⁴⁵ In Prussia, authentic interpretation originally reflected in-

⁴¹ See c. 17 of the 1917 CIC. For an English translation of the 1917 CIC, see *E. Peters, The 1917 or Pio-Benedictine Code of Canon Law*, 2001.

⁴² *J. Huels, Official Interpretation of Law*, in: J. Beal/J. Coriden/T. Green, *New Commentary on the Code of Canon Law*, 2000, 72.

⁴³ This is all the more true if one takes into account that canon law authorizes delegating the power of authentic interpretation to other bodies such as the Pontifical Council for the Interpretation of Legislative Texts, see *J. Huels* (note 42), 71. Since 1983, the Pontifical Council has promulgated 28 authentic interpretations on diverse issues such as abortion, the reservation of the homily to priests and deacons, leaving the church for tax reasons, or the right of divorced and remarried people to be admitted to the Eucharistic communion. For the texts of these interpretations, see <<http://www.vatican.va>>.

⁴⁴ *J. Huels* (note 42), 72.

⁴⁵ E.g. § 8 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*; ABGB); Art. 77 of the 1975 Greek Constitution.

tense mistrust towards the judiciary.⁴⁶ This mistrust was not entirely unjustified as the judiciary was far from independent and reliable.⁴⁷ To strengthen uniform application of the law, authentic interpretation also served as a safeguard against erroneous and arbitrary adjudication.⁴⁸

The critical attitude towards the judiciary reached its climax under the reign of *Friedrich the Great*. Upon *Friedrich's* instruction, his great chancellor *Samuel von Cocceji* undertook the first – eventually futile – attempt to unify the law. *Von Cocceji's* efforts culminated in the *Project des Corporis Juris Fridericiani*,⁴⁹ which was provisionally binding on all Prussian courts. The *Project's* preface stipulated:

“No private person, and in particular no professors, shall have occasion to corrupt this law through their own, arbitrary interpretations. In consequence, his Royal Majesty made it a punishable offence for everyone to comment on the whole body of this law or even parts thereof.”⁵⁰

The second attempt at unifying the law, the General State Laws for the Prussian States (*Allgemeines Landrecht für die Preussischen Staaten*; ALR),⁵¹ entered into force in 1794. Section 47 ALR limited judicial interpretative authority in the following terms: “Should the judge consider the meaning of the law ambiguous, he must [...] report his doubts to the Law Commission to await their legal assessment.”⁵² The judiciary only reluctantly submitted cases of ambiguity to the Commission.⁵³ Besides, even the Prussian King was soon concerned that authentic interpretation – being legally binding and applying retroactively – might infringe legal certainty.⁵⁴ Hence, he eventually repealed the judiciary's reporting obligations.⁵⁵

Nonetheless, authentic legislative interpretations have been occasionally used to the present day.⁵⁶ Some commentators and legislatures maintained

⁴⁶ R. Störmer, Auslegungsverbote und authentische Interpretation, in: G.-H. Gornig/U. Kramer/U. Volkman, Staat – Wirtschaft – Gemeinde, 2007, 76.

⁴⁷ B. Droste-Lehnen (note 32), 46.

⁴⁸ B. Droste-Lehnen (note 32), 46.

⁴⁹ S. v. Cocceji, Project des Corporis Juris Fridericiani, 1749.

⁵⁰ S. v. Cocceji (note 49), 12, paras. 28 et seq. (translated by the author).

⁵¹ H. Hattenhauer/G. Bernert, Allgemeines Landrecht für die Preussischen Staaten von 1794, 3rd ed. 1996.

⁵² H. Hattenhauer/G. Bernert (note 51), 58 (translated by the author).

⁵³ B. Droste-Lehnen (note 32), 58.

⁵⁴ W. Löwer, Cessante ratione legis cessat ipsa lex, 1989, 11; R. Störmer (note 46), 84.

⁵⁵ C. Bornhak, Preußische Staats- und Rechtsgeschichte, 1903, 261.

⁵⁶ H. J. F. Schulze-Gävernitz, Das Preussische Staatsrecht auf Grundlage des Deutschen Staatsrechts, 2nd ed. 1890, 50; G. Meyer/G. Anschütz, Lehrbuch des deutschen Staatsrechts, 8th ed. 2005, 555; R. Störmer (note 46), 68; B. Droste-Lehnen (note 32), 14.

that authentic interpretations necessarily applied retroactively as they merely revealed how the law should have always been understood. In fact, it was even argued that authentic interpretations not only governed cases that were not yet pending but also those in which a non-final decision had already been delivered.⁵⁷ Others criticized that authentic interpretations, albeit referred to as “interpretations”, often effectively changed the law so that their retroactive application eventually undermined legal certainty.⁵⁸

The scepticism towards authentic interpretation has persisted until today. It has not been uncommon to refer to authentic interpretations as “acts that are hostile to the judiciary”⁵⁹ or “ethically reprehensible mechanisms”.⁶⁰ The German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) essentially affirmed the German Parliament’s competence to issue declaratory authentic interpretations.⁶¹ Yet, this competence is not absolute since Parliament must not act beyond the constitutional framework. The Court accordingly reserves the right to review authentic interpretations and to decide whether they violate constitutional requirements such as the principle of equality or the rule of law.⁶²

IV. The Diffusion into Public International Law

Despite its controversial nature, the concept of “authentic interpretation” gradually diffused into the realm of public international law. A major turning point for its perception was the adoption of the Vienna Convention in 1969. The following discussion therefore distinguishes between internation-

⁵⁷ H. J. F. Schulze-Gävernitz (note 56), 50; see R. Störmer (note 46), 69.

⁵⁸ H. Schneider, Zur authentischen Interpretation von Gesetzen, in: R. Bernhardt/W. K. Geck/G. Jaenicke/H. Steinberger, Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte, 1983, 851. For further references, see B. Droste-Lehnen (note 32), 130.

⁵⁹ G. Felix, “Staatsethisch ein verwerflicher Vorgang”: Zur Aufgabe der “Gepräge-Rechtssprechung” und ihrer Wiederherstellung durch den Gesetzgeber, in: Handelsblatt, 22.4.1986, 6.

⁶⁰ G. Felix (note 59), 6.

⁶¹ BVerfGE 19, 429 (438); BVerfGE 50, 177 (193).

⁶² BVerfGE 18, 429 (439). See also BVerfGE 30, 367 (389). See also, albeit on authentic interpretations by the Italian and Greek legislatures, the following judgments of the European Court of Human Rights (ECtHR): *Arras and Others v. Italy*, 14.2.2012, Appl. No. 17972/07 (not reported); *Natale and Others v. Italy*, 15.10.2013, Appl. No. 19264/07 (not reported); *Stefanetti and Others v. Italy*, 15.4.2014, Appl. Nos. 21838/10 *et al.* (not reported); *Scoppola v. Italy* (No. 2), 17.9.2009, Appl. No. 10249/03 (not reported); *Smokovitis and Others v. Greece*, 11.4.2002, Appl. No. 46356/99 (not reported).

al jurisprudence and legal doctrine before 1969, the genesis of the Convention's rules on treaty interpretation, and international treaty law since 1969.

1. International Jurisprudence and Legal Doctrine before 1969

International jurisprudence and legal doctrine initially embraced the concept of “authentic interpretation” by drawing upon its Roman law origins. This basis was later replaced by a genuinely international rationale for relying on authentic interpretation.

One of the first post-classical commentators to expressly mention authentic interpretation was *Robert Phillimore*.⁶³ *Phillimore* defined “authentic interpretation” as “the exposition given by the Lawgiver himself”.⁶⁴ In his view, it did not qualify as interpretation strictly speaking. For him, “interpretation” only meant what *Kelsen* would refer to as juridico-scientific interpretation.⁶⁵ Authentic interpretation, in contrast, was a law-creating activity, namely interpretation by concluding a new treaty.⁶⁶ Notably, *Phillimore*'s understanding of authentic interpretation was not derived from international law but inspired by and based on authentic interpretation as envisaged under the *Codex Iustinianus*.⁶⁷

Fifty years later, *Lassa Oppenheim* sought to dissolve authentic interpretation from its Roman law origins by linking it to the international law principle of consent.⁶⁸

“Grotius and the later authorities applied the rules of Roman Law respecting interpretation in general to interpretation of treaties. On the whole, such application is correct in so far as those rules of Roman Law are full of common sense. But it must be emphasised that interpretation of treaties is in the first instance a matter of consent between the contracting parties. If they choose a certain interpretation, no other has any basis. It is only when they disagree that an interpretation based on scientific grounds can ask a hearing.”⁶⁹

⁶³ Although (pre-) classical writers such as *Hugo Grotius*, *Samuel Pufendorf*, or *Emer de Vattel* dealt extensively with matters of treaty interpretation, their treatises were silent on authentic interpretation. See *H. Grotius* (note 11), 409; *S. Pufendorf*, *De jure naturae et gentium libri octo*, reprint 1995, 793; *E. de Vattel* (note 11), 199.

⁶⁴ *R. Phillimore*, *Commentaries upon International Law*, 1855, 72.

⁶⁵ *R. Phillimore* (note 64), 72.

⁶⁶ *R. Phillimore* (note 64), 72.

⁶⁷ *R. Phillimore* (note 64), 72, at note 1 et seq., citing the *Codex Iustinianus*, Book 1, Title 14, Lex 12.

⁶⁸ *L. Oppenheim*, *International Law*, 2nd ed. 1912, 582.

⁶⁹ *L. Oppenheim* (note 68), 583.

Oppenheim distinguished two forms of interpretation by the parties. These two forms were authentic interpretation in the strict sense and informal interpretative conduct. The former occurred when the parties “make an additional new treaty and stipulate therein such interpretation of the previous treaty as they choose”.⁷⁰ The latter occurred when the parties informally agreed upon an interpretation and executed the treaty accordingly.⁷¹ While *Oppenheim* regarded such “informal conduct” as one potentially relevant factor to be taken into account in the interpretative process, he did not attach the same interpretative value to informal conduct as to authentic interpretation.⁷² This distinction was reaffirmed by other commentators.

Ludwik Ehrlich, for instance, referred to authentic interpretations as formal agreements between all contracting parties regarding a treaty’s interpretation.⁷³ In his view, informal conduct was similar to authentic interpretation because it helped to establish how the parties understood a treaty. But lacking an express manifestation of the parties’ intention, informal conduct could not amend the treaty.⁷⁴ To illustrate the similarity between authentic interpretation and informal conduct, *Ehrlich* described the latter as “quasi-authentic interpretation”.⁷⁵ This terminological proximity, however, was not meant to suggest that the legal effects of authentic and quasi-authentic interpretations were identical.

Nonetheless, quasi-authentic interpretation still occupied a central position in *Ehrlich’s* treatise. This was because international jurisprudence had also begun to acknowledge the relevance of both authentic and quasi-authentic interpretation by then. This applies, in particular, to the Permanent Court of International Justice (PCIJ).⁷⁶ In its *Jaworzina* opinion, it affirmed the “established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has

⁷⁰ *L. Oppenheim* (note 68), 583.

⁷¹ *L. Oppenheim* (note 68), 583.

⁷² *L. Oppenheim* (note 68), 582 et seq.

⁷³ *L. Ehrlich*, *L’interprétation des traités*, Hague Y.B. Int’l L. 24 (1928), 5 (36).

⁷⁴ *L. Ehrlich* (note 73), 39, 50 et seq.

⁷⁵ *L. Ehrlich* (note 73), 50.

⁷⁶ E.g. PCIJ, *Question of Jaworzina (Polish-Czechoslovakian Frontier)*, Advisory Opinion of 4.9.1924, Ser. B No. 8, 72; PCIJ, *Polish Postal Service*, Advisory Opinion of 16.5.1925, Ser. B. No. 11, 31; PCIJ, *Art. 3, Para. 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*, Advisory Opinion of 21.11.1925, Ser. B No. 12, 24 et seq.; PCIJ, *Case Concerning the Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, Advisory Opinion of 23.7.1926, Ser. B. No. 13, 19; PCIJ, *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion of 8.12.1927, Ser. B. No. 14, 63; PCIJ, *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, Judgment of 12.7.1929, Ser. A No. 21, 119.

power to modify or suppress it”.⁷⁷ But whereas the Court frequently discussed informal subsequent conduct,⁷⁸ it apparently never identified a genuine authentic interpretation by all contracting parties.

In theory, authentic interpretation still remained legally superior to quasi-authentic interpretation. Regarding the former as legally binding,⁷⁹ the PCIJ generally treated the latter like a supplementary means of interpretation,⁸⁰ i.e. considered it either in case of ambiguity or for confirmatory purposes.⁸¹ But in practice, its frequent references to informal subsequent conduct inevitably diverted academic attention from authentic to quasi-authentic interpretation.

An instructive example of this changed perception is the 1935 Harvard Draft Convention on the Law of Treaties.⁸² Art. 19 lit. a of the Draft reads:

“A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.”

This provision expressly mentions quasi-authentic (“subsequent conduct”) but not authentic interpretation. Its wording suggests that all listed means of interpretation carry equal weight.⁸³ The commentary on Art. 19, however, enhances the status of quasi-authentic interpretation by declaring

⁷⁷ *Question of Jaworzina (Polish-Czechoslovakian Frontier)* (note 76), 37.

⁷⁸ E.g. Art. 3, Para. 2, of the *Treaty of Lausanne (Frontier between Turkey and Iraq)* (note 76), 24 et seq.; *Jurisdiction of the European Commission of the Danube between Galatz and Braïla* (note 76), 63; *Case Concerning the Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* (note 76), 19; *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France* (note 76), 119.

⁷⁹ See *Polish Postal Service* (note 76), 31.

⁸⁰ See Art. 32 VCLT.

⁸¹ E.g. *Case Concerning the Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* (note 76), 39; PCIJ, *Jurisdiction of the Courts of Danzig*, Advisory Opinion of 3.3.1928, Ser. B No. 15, 18. See also *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France* (note 76), 119; *International Status of South-West Africa*, ICJ Reports 1951, 135, where the ICJ reaffirmed that subsequent conduct was not legally binding.

⁸² Reprinted in AJIL Supp. 29 (1935), 657 et seq. The Harvard Draft Convention was taken into consideration by the ILC when preparing the draft articles that became the Vienna Convention on the Law of Treaties, see *J. Brierly*, Report, ILCYB 2 (1950), Vol. 2, 222 (225).

⁸³ See Harvard Law School, Harvard Draft Convention – Comment on Art. 19, AJIL Supp. 29 (1935), 937 (938).

that “in interpreting the treaty, the conduct or action of the parties thereto cannot be ignored”.⁸⁴

Moreover, Art. 19 does not expressly mention authentic interpretation in the strict sense. The commentary justifies this omission by contending that it was “too obvious to need to comment that the same parties which created an instrument by agreement may also, by agreement, place upon it such interpretation as they wish”.⁸⁵ Reaffirming the traditional concept of authentic interpretation, the commentary arguably suggests that authentic interpretation is superior to other types of constructions. But as authentic interpretation is not expressly mentioned in the text of the Harvard Draft itself, the commentary cannot eliminate the impression that the Draft effectively leaves little room for it.⁸⁶

2. The Genesis of the Vienna Rules on Interpretation

Until the adoption of the Vienna Convention in 1969, the contours of authentic interpretation in public international law were relatively clear. In accordance with its Roman law origins, it was understood as a legally binding interpretation by the lawmaker himself. Occasionally, written or unwritten law further specified formal requirements or the application *ratione temporis* of authentic interpretations. Thus, it was tacitly recognized that a lawmaker’s authority to adopt authentic interpretations was not necessarily unlimited.

For the perception of authentic interpretation, the Convention marks a turning point as it created considerable confusion about the effects of authentic interpretation. This shift of perception originates in the genesis of Arts. 31–33 VCLT. Like the entire Convention, these rules go back to draft articles drawn up by the ILC. They strongly bear the imprint of *Sir Humphrey Waldock*, who was the only Special Rapporteur on the law of treaties to tackle the thorny issue of treaty interpretation. *Waldock’s* proposals on treaty interpretation employed the notion of “authentic (means of) interpretation” in two contexts.

⁸⁴ Harvard Law School (note 83), 966.

⁸⁵ Harvard Law School (note 83), 968.

⁸⁶ See also the resolution on treaty interpretation that was adopted by the Institut de Droit International in 1956, reproduced in AIDI 46 (1956), 358 (358) et seq. Quite naturally mentioning informal subsequent conduct as a supplementary means of interpretation, it made no reference to authentic interpretation either.

On the one hand, *Waldock* used it in a broader sense to juxtapose all primary (“authentic”) means of interpretation to supplementary ones. In this respect, he clarified that the *travaux préparatoires* did not constitute authentic means of interpretation because they

“are simply evidence to be weighed against any other relevant evidence of the intentions of the parties, and their cogency depends on the extent to which they furnish proof of the common understanding of the parties as to the meaning attached to the terms of the treaty”.⁸⁷

In the same vein, the ILC later confirmed that “the distinction made in articles 27 and 28 [now arts. 31 and 32] between authentic and supplementary means of interpretation is both justified and desirable”.⁸⁸

On the other hand, *Waldock* employed the notion of “authentic (means of) interpretation” in a narrower sense to describe the interpretative value of and rationale behind subsequent agreements and subsequent practice. *Waldock’s* first draft had not attached equal weight to subsequent practice and (subsequent) interpretative agreements.⁸⁹ Classifying the latter as part of the context, he referred to subsequent interpretative practice as part of the “other means of interpretation”. These “other means of interpretation” correspond to what finally became the supplementary means of interpretation under Art. 32 VCLT. Despite its lower interpretative value, *Waldock* contended that subsequent practice

“when it is consistent and embraces all the parties would appear to be *decisive* of the meaning to be attached to the treaty, at any rate when it indicates that the parties consider the interpretation to be binding upon them. In these cases, subsequent practice as an element of treaty interpretation and as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an *authentic interpretation* established by agreement. Furthermore, if the interpretation adopted by the parties diverges, as sometimes happens, from the natural and ordinary meaning of the terms, there may be a blurring of the line between the interpretation and the amendment of a treaty by subsequent practice.”⁹⁰

This dictum may create the impression that subsequent practice was a subcategory of authentic interpretation alongside interpretative agree-

⁸⁷ *H. Waldock*, Third Report on the Law of Treaties, ILCYB 16 (1964), Vol. 2, 5 (58).

⁸⁸ ILC (note 9), 220 [explanation added].

⁸⁹ *H. Waldock* (note 87), 52.

⁹⁰ *H. Waldock* (note 87), 25 et seq. [emphasis added].

ments.⁹¹ But during discussions in the ILC, *Waldock* corrected this impression. In particular, he cautiously described subsequent practice as “evidence of a sort of authentic interpretation” and submitted that a “concordant subsequent practice accepted by all the States concerned would come close to an authentic interpretation similar to a subsequent agreement on interpretation”.⁹²

Nevertheless, the Commission eventually amended *Waldock*’s first draft to the effect that subsequent interpretative agreements and subsequent practice would be placed on an equal footing and both constitute primary means of interpretation.⁹³ Based on this upgrade, *Waldock* and the Commission consistently referred to subsequent interpretative agreements and subsequent practice alike as authentic elements or means of interpretation.⁹⁴

As regards the effects of these authentic means of interpretation, it is difficult to identify a clear position in *Waldock*’s drafts or in the Commission’s reports. Apparently following up on the traditional understanding of authentic interpretation, they held that “an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.”⁹⁵ In addition, they also referred to subsequent practice as “authoritative evidence” as to a treaty’s interpretation and maintained that such practice was “decisive of the meaning to be attached to the treaty”.⁹⁶

These statements apparently support the conclusion that both subsequent agreements and subsequent practice were meant to be legally binding. But as will be explained below, this conclusion is hardly reconcilable with a contextual interpretation of Art. 31 VCLT and the Convention’s distinction between interpretation and amendment.

⁹¹ See also *H. Waldock*, in: ILC, Summary Record of the 766th Meeting, ILCYB 16 (1964), Vol. 1, 282 (282).

⁹² ILC, Summary Record of the 767th Meeting, ILCYB 16 (1964), Vol. 1, 291 (296) et seq.

⁹³ ILC, Summary Records of the 16th Session of the International Law Commission, ILCYB 16 (1964), Vol. 1, 1 (315) et seq.

⁹⁴ See ILC (note 93), 204; see also *H. Waldock*, Sixth Report on the Law of Treaties, ILCYB 18 (1966), Vol. 2, 51 (98); ILC (note 9), 222 et seq.

⁹⁵ ILC (note 93), 203; ILC (note 9), 221.

⁹⁶ ILC (note 9), 236.

3. International Treaty Law after 1969

Express references to authentic interpretation in international treaty law after 1969 are rare. Several treaties, however, provide for mechanisms that have come to be regarded as examples of authentic interpretation. These examples include subsequent agreements and subsequent practice under Art. 31 para. 3 lits. a and b VCLT, interpretative notes issued by the Free Trade Commission (FTC) under Art. 1131 para. 2 of the North American Free Trade Agreement,⁹⁷ and interpretations adopted under Art. IX para. 2 of the Agreement establishing the World Trade Organization (WTO).⁹⁸

a) The Vienna Convention on the Law of Treaties

The 1969 Vienna Convention on the Law of Treaties extensively governs treaties between States. It not only regulates the conclusion, entry into force, amendment, and the termination of such treaties but also stipulates legally binding rules for treaty interpretation.⁹⁹ One element of these rules are subsequent agreements and subsequent practice pursuant to Art. 31 para. 3 lits. a and b VCLT. Owing to the Convention's drafting history, subsequent agreements and subsequent practice are commonly referred to as authentic means of interpretation.¹⁰⁰

The Convention's drafting history induced several commentators and courts alike to assume that subsequent agreements and subsequent practice were conclusive as to the meaning of the terms of the treaty. In the *Kasikili v. Sedudu Island* case, for instance, the ICJ quoted the ILC's assertion that subsequent interpretative agreements "must be read into the treaty for pur-

⁹⁷ North American Free Trade Agreement between the United States of America, Canada and Mexico (signed 17.12.1992, entered into force 1.1.1993), 32 ILM 289 (NAFTA).

⁹⁸ Marrakesh Agreement establishing the World Trade Organization (signed 15.4.1994, entered into force 1.1.1995), 1867 UNTS 3 (WTO Agreement). See also Art. XXIX lit. a of the Agreement of the International Monetary Fund (signed 22.7.1944, entered into force 27.12.1945), 2 UNTS 39 (IMF Agreement) (as amended); Art. 8.31 para. 3 of the Comprehensive Economic and Trade Agreement between the EU and Canada (consolidated draft text of 26.9.2014, not yet in force); Art. 9.19 para. 3 of the Free Trade Agreement between the EU and Singapore (authentic text of May 2015, not yet in force).

⁹⁹ See Arts. 31 et seq. VCLT.

¹⁰⁰ Draft Conclusion 2, in: ILC, Report of the International Law Commission on the Work of its 65th Session, UN Doc. A/68/10 (2013), 20; A. Feldman (note 5), 661; A. Roberts (note 5), 199.

poses of its interpretation”.¹⁰¹ In even clearer terms, *Eugen Villiger* conceded binding force not only to subsequent agreements but also to subsequent practice:

“Para. 2 and subparas. 3(a) and (b) represent forms of authentic interpretation whereby all parties themselves agree on (or at least accept) the interpretation of treaty terms by means which are extrinsic to the treaty. As a result, the parties’ authentic interpretation of the treaty terms is not only particularly reliable, it is also endowed with binding force. It provides *ex hypothesi* the ‘correct’ interpretation among the parties in that it determines which of the various ordinary meanings shall apply.”¹⁰²

Having initially wondered whether subsequent agreements and subsequent practice might enjoy an “enhanced” status in the interpretative process,¹⁰³ *Georg Nolte*, however, later clarified that subsequent agreements were not necessarily binding.¹⁰⁴ The ILC confirmed the Special Rapporteur’s view by concluding that “[t]he character of subsequent agreements and subsequent practice of the parties under article 31(3)(a) and (b) as ‘authentic means of interpretation’ does not [...] imply that these means necessarily possess a conclusive, or legally binding, effect.”¹⁰⁵ This conclusion apparently contradicts the Convention’s drafting history and the traditional understanding of authentic interpretation.

¹⁰¹ *Kasikili v. Sedudu Island (Botswana v. Namibia)*, ICJ Reports 1999, 1075, paras. 49 et seq., quoting ILC (note 9), 221. See also *M. K. Yasseen* (note 11), 45; *R. Wolftrum/N. Matz* (note 3), 140. More carefully *J. H. H. Weiler/U. Haltern*, *The Autonomy of the Community Legal Order*, *Harv. Int’l L. J.* 37 (1996), 411 (418). See also *G. Schwarzenberger*, *Myths and Realities of Treaty Interpretation*, *Va. J. Int’l L.* 9 (1968), 1 (13).

¹⁰² *M. Villiger*, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 2009, 429. See also *K. Skubiszewski*, *Remarks on the Interpretation of the United Nations Charter*, in: *R. Bernhardt/W. K. Geck/G. Jaenicke/H. Steinberger* (note 58), 896, 898 et seq.; *N. Matz-Lück*, *Harmonization, Systemic Integration, and “Mutual Supportiveness” as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation?*, *Finnish Yearbook of International Law* 17 (2006), 39 (49); *R. Gardiner*, *Treaty Interpretation*, 2010, 32; *M. Villiger*, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The “Crucible” Intended by the International Law Commission*, in: *E. Cannizzaro*, *The Law of Treaties beyond the Vienna Convention*, 2011, 111; *O. Dörr* (note 3), 553 et seq.

¹⁰³ *G. Nolte*, Report 1, in: *G. Nolte* (note 6), 172.

¹⁰⁴ *G. Nolte*, *First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*, UN Doc. A/CN.4/660 (2013), 29.

¹⁰⁵ ILC, *Report of the International Law Commission on the Work of its 65th Session*, UN Doc. A/68/10 (2013), 21. See also *H. Fox*, *Article 31 (3) (a) and (b) of the Vienna Convention and the Kasikili Sedudu Island Case*, in: *M. Fitzmaurice/O. A. Elias/P. Merkouris* (note 5), 61; *A. Chanaki*, *L’adaptation des traités dans le temps*, 2013, 313 et seq.

However, any other view would have been difficult to reconcile with Arts. 31–33 VCLT. As the title of Art. 31 VCLT illustrates, this provision stipulates one general rule of interpretation. Under Art. 31 para. 1 VCLT, all means of interpretation are to be taken into account in a “single combined operation”.¹⁰⁶ In other words, Art. 31 VCLT does not establish a hierarchical relationship between the various primary means of interpretation; it requires, as *Waldock* vividly described it, that all primary means of interpretation are “thrown into the crucible”.¹⁰⁷ Against this background, it is difficult to maintain that subsequent agreements and subsequent practice under Art. 31 para. 3 lits. a and b VCLT were “conclusive”, “decisive”, or even legally binding and thus *a priori* trumped the other primary means of interpretation under Art. 31 VCLT.

The Convention’s drafting history lends another argument against considering subsequent practice as legally binding. Whereas subsequent agreements were only expressly dealt with in their capacity as a means of treaty interpretation, *Waldock* and the Commission originally assigned an additional function to subsequent practice. This additional function was to indicate the parties’ common intention to modify their treaty.¹⁰⁸ Facing criticism that the line between interpretation and informal amendments was hardly distinguishable,¹⁰⁹ *Waldock* repeatedly stressed that this distinction was both possible and necessary so that the draft provision on modification through subsequent practice should be retained.¹¹⁰ Nonetheless, the Vienna Conference eventually deleted the provision on modification through subsequent practice and thus refused to address a type of legally binding practice within the Convention.¹¹¹

¹⁰⁶ ILC (note 9), 219; *R. Gardiner* (note 102), 10.

¹⁰⁷ *H. Waldock* (note 94), 95.

¹⁰⁸ Draft Art. 73 lit. c in *H. Waldock* (note 87), 52 and draft Art. 38 in ILC (note 9), 182.

¹⁰⁹ *H. Waldock* (note 94), 89.

¹¹⁰ *H. Waldock* (note 87), 60; *H. Waldock* (note 94), 89. As regards the difficulty of distinguishing between interpretation and amendment, see *O. Dörr* (note 3), 555.

¹¹¹ UN Conference on the Law of Treaties, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, First session, UN Doc. A/CONF.39/11 (1968), 215. The fact that the Convention does not expressly address modification through subsequent practice does not mean that informal conduct could not exceed the terms of the treaty. But as the Convention only recognizes non-binding subsequent practice, such conduct would not, contrary to some views in jurisprudence, (see in particular *Soering v. United Kingdom*, 7.7.1989, Ser. A No. 161, para. 103; *Öcalan v. Turkey*, 12.5.2005, Reports of Judgments and Decisions ECtHR 2005-IV, paras. 163 et seq.), constitute an informal but legally binding amendment (“modification”) of the treaty. Unless the parties leave no doubt as to their intention to change the meaning of the terms of the treaty, such conduct would rather amount to a violation of the treaty.

The binding nature of subsequent agreements is more difficult to refute. Art. 31 para. 3 lit. a VCLT leaves no doubt as regards the very existence of an agreement between the parties. According to the ILC, agreements within the meaning of Art. 31 para. 3 lit. a VCLT are manifested in a “single common act”.¹¹² But if the parties’ agreement to “interpret” the treaty in a particular way is manifest, if we recall that the lawmaker may not only change the law by postulating an extensive reading, and if we further consider that neither treaties nor amendments must be laid down in writing¹¹³ – how shall interpreters distinguish non-binding interpretative agreements from legally binding instruments that similarly affect the meaning of the terms of the treaty?

The inclusion of subsequent agreements into the general rule of interpretation, the equation of informal subsequent practice with manifest subsequent agreements, and the non-binding nature of the latter confront interpreters with a dilemma. Treating subsequent interpretative agreements as legally non-binding is counter-intuitive and contradicts the traditional understanding of authentic interpretation. Moreover, it imposes upon interpreters the regularly insurmountable task of distinguishing non-binding manifest interpretative agreements that would fall under Art. 31 para. 3 lit. a VCLT from agreements that postulate interpretations in a legally binding fashion.

b) The North American Free Trade Agreement

In the field of international investment law, Art. 1131 para. 2 North American Free Trade Agreement (NAFTA) envisages a special type of authentic interpretation, namely interpretative notes issued by the FTC. The FTC, which is established under Art. 2001 para. 1 NAFTA, comprises cabinet level representatives of the NAFTA parties or their designees. Its mandate to issue interpretative notes is derived from its competency, expressly laid down in Art. 2001 para. 1 NAFTA, to resolve disputes that may arise regarding the interpretation or application of the NAFTA.

FTC notes differ from agreements under Art. 31 para. 3 lit. a VCLT. Pursuant to Art. 1131 para. 2 NAFTA, they are unequivocally legally binding on arbitral tribunals that are established to settle investment disputes under Chapter 11 of the NAFTA. Art. 1131 para. 2 NAFTA solely complements

¹¹² Commentary on Draft Conclusion 4, in: ILC, Report of the International Law Commission on the Work of its 65th Session, UN Doc A/68/10 (2013), 34.

¹¹³ See Arts. 3, 11, and 39 VCLT.

but does not supersede Art. 31 para. 3 lits. a and b VCLT. Hence the NAFTA parties are not precluded from reaching subsequent agreements or generating subsequent practice outside the FTC, which may then be taken into account in accordance with Art. 31 para. 3 lits. a and b VCLT.¹¹⁴

So far, the FTC has activated its interpretative authority only once. On 31.7.2001, it promulgated “Notes of Interpretation of Certain Chapter 11 Provisions”.¹¹⁵ These Notes circumscribe the meaning of Art. 1105 para. 1 NAFTA. This provision obliges each party to accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security. According to the 2001 FTC Notes:

“1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”

This reading of Art. 1105 para. 1 NAFTA has been regarded as an immediate reaction to extensive interpretations of this provision in arbitral jurisprudence.¹¹⁶ The NAFTA parties agreed that the Notes merely sought to

¹¹⁴ See in particular *Canadian Cattlemen for Fair Trade v. United States*, Ad hoc Tribunal (UNCITRAL), Award on Jurisdiction, 28.1.2008, paras. 185 et seq. See also *Methanex Corporation v. United States*, NAFTA Arbitration (UNCITRAL), Final Award on Jurisdiction and Merits, 3.8.2005, Part II Chapter B, para. 19 and Chapter H, paras. 23 et seq. From the perspective of Art. 31 para. 3 lit. a VCLT, this view is not fully convincing. It ignores that this provision does not vest interpretative agreements with binding force. These awards, as well as those mentioned hereinafter, are available at <<http://oxia.ouplaw.com>>.

¹¹⁵ For the text of the 2001 FTC Notes, see <<http://www.international.gc.ca>>.

¹¹⁶ *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30.8.2000, paras. 100 et seq.; *SD Myers Incorporated v. Canada*, Ad Hoc Tribunal (UNCITRAL), First Partial Award and Separate Opinion, 13.11.2000, paras. 224 et seq.; *Pope & Talbot Incorporated v. Canada*, Ad Hoc Tribunal (UNCITRAL), Award on the Merits of Phase 2, 10.4.2001, paras. 110 et seq. For this assessment, see C. Kirkman, Fair and Equitable Treatment: *Methanex v. United States* and the Narrowing Scope of NAFTA Article 1105, L. & Pol’y Int’l Bus. 34 (2002), 343 (389) et seq.; T. Weiler, NAFTA Investment Arbitration and the Growth of International Economic Law, *Business Law International* (2002), 158 (180) et seq.; G. Kaufmann-Kohler, Interpretive Powers of the Free Trade Commission and the Rule of Law, in: E. Gaillard/F. Bachand, Fifteen Years of NAFTA Chapter 11 Arbitration, 2011, 181.

interpret Art. 1105 para. 1 NAFTA.¹¹⁷ Nonetheless, the Notes sparked heated debates on whether they constituted an interpretation or a covert amendment, whether a covert amendment was admissible and binding under Art. 1131 para. 2 NAFTA, and whether tribunals were authorized to review the Notes.¹¹⁸ This debate was fuelled by the delicate fact that the Notes interfered with several ongoing cases. In *Pope & Talbot*, for example, the arbitral tribunal had already found against Canada in the merits phase but had not yet rendered a decision on damages.¹¹⁹

On the whole, the responses to the 2001 FTC Notes in arbitral jurisprudence were therefore mixed. The *Pope & Talbot* tribunal, for instance, regarded them as an illegitimate retroactive amendment.¹²⁰ The *ADF* tribunal, in contrast, held that there could not be a “more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA”.¹²¹ Moreover, the *ADF* tribunal even denied that it was competent to ask whether the FTC Notes merely interpreted or in fact amended Art. 1105 para. 1 NAFTA. In the tribunal’s view, this would “degrade and set at naught the binding and overriding character of FTC interpretations”.¹²²

At this point, it is unnecessary to discuss whether the 2001 FTC Notes do or do not amount to a covert amendment of Art. 1105 para. 1 NAFTA.

¹¹⁷ US – First Submission re: NAFTA FTA Statement on Article 1105 (26.10.2001), US – Second Submission re: FTC Statement on Article 1105 (17.12.2001), Canada – Article 1128 Submission re: NAFTA FTC Statement on Article 1105 (8.2.2002), and Mexico – Article 1128 Submission re: FTC Statement on Article 1105 (11.2.2002) in the case of *Methanex v. United States*, Ad Hoc Tribunal (UNCITRAL).

¹¹⁸ Critically *C. Brower*, *Investor-State Disputes under NAFTA: The Empire Strikes Back*, Colum. J. Transnat’l L. 40 (2001), 43 (56); *C. Brower*, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, Va. J. Int’l L. 46 (2006), 347; *T. Weiler* (note 116), 184. Less critical *C. Thomas*, *A Reply to Professor Brower*, Colum. J. Transnat’l L. 40 (2002), 433 (454); *C. Kirkman* (note 116), 383; *S. Matiation*, *Arbitration with Two Twists: Loewen v. United States and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes*, University of Pennsylvania Journal of International Economic Law 24 (2003), 451 (487) et seq. Leaving the question open, e.g. *W. Park*, *The Specificity of International Arbitration: The Case for FAA Reform*, Vand. J. Transnat’l L. 36 (2003), 1241 (1305).

¹¹⁹ *Pope & Talbot Incorporated v. Canada*, Ad Hoc Tribunal (UNCITRAL), Interim Award, 26.6.2000. In addition, notices of arbitration had been filed in *Mondev International Limited v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11.10.2002; *ADF Group Incorporated v. United States*, ICSID Case No. ARB(AF)/00/1, Award, 9.1.2003; *Waste Management Incorporated v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30.4.2004; *Methanex Corporation v. United States* (note 114).

¹²⁰ *Pope & Talbot Incorporated v. Canada*, Ad Hoc Tribunal (UNCITRAL), Award on Damages, 31.5.2002, paras. 47 et seq.

¹²¹ *ADF Group Incorporated v. United States* (note 119), paras. 177 et seq. See also *Mondev International Limited v. United States* (note 119), paras. 121 et seq.

¹²² *ADF Group Incorporated v. United States* (note 119), paras. 177 et seq.

Still, it is instructive to consider two interrelated threads of argument that have been advanced in this respect. To start with, it has been pointed out that Arts. 1131 para. 2 and 2001 para. 1 NAFTA, according to their express wording, only authorized the FTC to issue interpretative notes.¹²³ How interpretation in a NAFTA context ought to take place is specified in Art. 102 para. 2 NAFTA. This provision requires the NAFTA parties – and hence also the FTC – to interpret the NAFTA in accordance with the applicable rules of international law. These rules are commonly understood to refer to Arts. 31–33 VCLT as a reflection of customary law rules on treaty interpretation.¹²⁴ In consequence, so the argument continues, the FTC was prohibited from postulating interpretations that cannot reasonably be supported by relying on Arts. 31–33 VCLT.¹²⁵

Yet, an untenable interpretation of the NAFTA may also indicate the parties' intention to deviate from the just mentioned requirements. Since States can amend treaties by any means agreed,¹²⁶ such an "interpretation" could constitute an admissible amendment of the NAFTA.¹²⁷ But unless the parties make this intention explicit, this will again be a question to be resolved by way of interpretation. Art. 2202 NAFTA prescribes a particular amendment procedure. While the parties may agree on any modification of or addition to the NAFTA, any modification or addition must be approved in accordance with the applicable legal procedures of each party. When an authentic interpretation fails to clarify that it purports to amend the NAFTA, Art. 2202 NAFTA therefore serves as a strong contextual argument to contest the parties' intention to do so.¹²⁸

Another important question is whether authentic interpretations based on Art. 1131 para. 2 NAFTA apply retroactively or prospectively. According to one commentator, authentic interpretations by the FTC could not

¹²³ C. Brower, Structure, Legitimacy, and NAFTA's Investment Chapter, Vand. J. Transnat'l L. 36 (2003), 37 (80) et seq.

¹²⁴ R. Gardiner (note 102), 12 et seq. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 174, paras. 94 et seq.; *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia v. Malaysia)*, ICJ Reports 2002, 645, paras. 37 et seq. with further references; Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, 4.10.1996, Section D; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), ITLOS Case No. 16 (1.2.2011), para. 57; *Golder v. United Kingdom*, 21.2.1975, Ser. A No. 18, para. 29.

¹²⁵ C. Brower (note 123), 80 et seq.; T. Weiler (note 116), 185.

¹²⁶ See Arts. 11 and 39 VCLT; K. Odendahl, Art. 39, in: O. Dörr/K. Schmalenbach (note 3), 702, paras. 10 et seq.

¹²⁷ See G. Kaufmann-Kohler (note 116), 191.

¹²⁸ T. Weiler (note 116), 185.

apply retroactively because customary international law and Art. 28 VCLT established a “presumption against retroactivity”.¹²⁹ Yet, the principle of non-retroactivity – commonly regarded as a key element of the rule of law¹³⁰ – solely pertains to the creation or, more precisely, to the entry into force of new law.¹³¹ Interpretation of already existing law is not covered by this principle.¹³² If authentic interpretations were perceived as one way of interpreting the law and taken into account as means of interpretation – as part of or in addition to those envisaged by Arts. 31–33 VCLT – it would be difficult to argue that these means do not apply to past, ongoing, and finished events alike.¹³³

c) The Agreement Establishing the World Trade Organization

A final example of authentic interpretation in contemporary treaty law comes from international trade law. The second paragraph of Art. IX WTO, which regulates decision-making within the organization, provides:

“The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.”

Although (or perhaps because) the Ministerial Conference and the General Council have never used their authority to adopt authentic interpretations so far,¹³⁴ this mechanism has been welcomed as “the only possibility to correct a development introduced by the adjudicative organs” of the

¹²⁹ *T. Weiler* (note 116), 183 et seq.

¹³⁰ See generally *B. Tamanaha*, *On the Rule of Law*, 2004; *R. Summers*, *The Principles of the Rule of Law*, *Notre Dame L. Rev.* 74 (1999), 1691; *S. Chesterman*, *Rule of Law*, in: *MPEPIL* 7 (2007).

¹³¹ *K. Odendahl*, Art. 28, in: *O. Dörr/K. Schmalenbach* (note 3), 480, paras. 8 et seq.

¹³² *S. T. Helmersen*, *Evolutionary Treaty Interpretation: Legality, Semantics and Distinctions*, *European Journal of Legal Studies* 6 (2013), 127 (137); see also *G. Kaufmann-Kohler* (note 116), 192.

¹³³ See *G. Haraszti*, *Some Fundamental Problems of the Law of Treaties*, 1973, 45.

¹³⁴ *P. van den Bossche/W. Zdouc*, *Law and Policy of the World Trade Organization*, 3rd ed. 2013, 139 et seq.

WTO.¹³⁵ Authentic interpretations under Art. IX para. 2 WTO Agreement have been depicted as valuable “counterweights” to panel or Appellate Body jurisprudence,¹³⁶ which might help to increase legitimacy of the WTO system because their authors are “democratically more directly legitimized”.¹³⁷ Such characterization of authentic interpretation under Art. IX para. 2 WTO Agreement is remarkable. This is because it reminds of traditional approaches to authentic interpretation that emphasized its corrective function *vis-à-vis* a suspicious judiciary.

Nevertheless, the possible effects of authentic interpretations under Art. IX para. 2 WTO Agreement have been critically discussed in a way that is familiar from the NAFTA context. On the one hand, it is widely agreed that authentic interpretations under Art. IX para. 2 WTO Agreement are legally binding,¹³⁸ on the other, there is disagreement on whether they are binding only for future disputes¹³⁹ or whether they have a limited retroactive effect. Apparently favouring the former view, *Claus-Dieter Ehlermann* and *Lothar Ebring*, for example, contend that

“[i]t might therefore be worthwhile to clarify this issue so as to prevent interference with pending disputes (and resistance from the party fearing a disadvantage for its litigation) by limiting any effect of an authoritative interpretation to other (future) cases. This could be done through a stipulation, in the authoritative interpretation at issue, that the interpretation takes effect only at a future date or possibly also through a stipulation that it does not affect a particular dispute.”¹⁴⁰

However, *Ehlermann* and *Ebring* do not deny that authentic interpretations may affect pending disputes. They merely recommend that this limited retroactivity should expressly be excluded. *Tarzio Gazzini* goes a step further:

“The effects of authoritative interpretations are confined to pending and future disputes. Admitting that they can have retroactive effects, in the sense that a par-

¹³⁵ *A. von Bogdandy* (note 5), 632.

¹³⁶ *C.-D. Ehlermann/L. Ebring*, *The Authoritative Interpretation under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements*, *JIEL* 8 (2005), 803 (813).

¹³⁷ *C.-D. Ehlermann/L. Ebring* (note 136), 813. See also *A. von Bogdandy* (note 5), 632.

¹³⁸ E.g. *C.-D. Ehlermann/L. Ebring* (note 136), 807; *H. Nottage/T. Sebastian*, *Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law*, *JIEL* 9 (2006), 989 (1002); Appellate Body Report, *US – FSC*, WT/DS108/AB/R, 24.2.2000, para. 112; see also Appellate Body Report, *Japan – Alcoholic Beverages II* (note 124), 12.

¹³⁹ *G. Sacerdoti* (note 5), 57.

¹⁴⁰ *C.-D. Ehlermann/L. Ebring* (note 136), 823.

ty to an adjudicated dispute could request the establishment of a new panel ruling on the basis of a subsequent authoritative interpretation, would be at odds with the *res judicata* principle and the independence of adjudicating bodies, and would ultimately undermine the credibility of the whole dispute settlement system.”¹⁴¹

Thus, *Gazzini* openly accepts the limited retroactivity of authentic interpretations under Art. IX para. 2 WTO Agreement that *Ehlermann* and *Ehring* seek to avoid. Moreover, he even considers it necessary to warn against the negative side-effects of authentic interpretations that also affect past events.

Gazzini's reasoning eventually raises the question whether the *res judicata* principle, the independence of adjudicating bodies, and the credibility of dispute settlement are capable of precluding such far-reaching retroactivity. The answer to this question largely depends on the legal weight which the international legal order concedes to these principles and values. The first one, *res judicata*, constitutes a general principle of international law.¹⁴² Judicial independence and a system's credibility, in contrast, are certainly desirable but neither enshrined in customary international law nor amounting to general legal principles.¹⁴³ Instead, their scope will be circumscribed by the respective dispute settlement system itself, i.e. by the governing agreement(s). When the retroactive application of an authentic interpretation is unclear, these principles and values can therefore be taken into account as contextual arguments against retroactivity. But they cannot entirely prohibit the parties to a treaty from agreeing on an authentic interpretation that applies retroactively.

Another important question under Art. IX para. 2 WTO Agreement concerns the relationship between this provision and Art. 31 para. 3 lits. a and b VCLT. Art. IX para. 2 WTO Agreement employs a stricter language than Arts. 1131 para. 2 and 2001 para. 1 NAFTA in that it assigns to the Ministerial Conference and the General Council the “exclusive authority”

¹⁴¹ *T. Gazzini*, Can Authoritative Interpretation under Article IX:2 of the Agreement Establishing the WTO Modify the Rights and Obligations of Members?, ICLQ 57 (2008), 169 (178). More cautiously *J. Pauwelyn*, Conflict of Norms in Public International Law, 2003, 113.

¹⁴² *Interpretation of Judgments Nos. 7 and 8 (Chorzów Factory)*, Judgment of 16.12.1927, Ser. A No. 13, 27 et seq. (diss. op. Judge Anzilotti). See also *A. Reinisch*, The Use and Limits of *Res Iudicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes, Law and Practice of International Courts and Tribunals 3 (2003), 37 (46); *J. Crawford* (note 11), 36, 38 et seq.

¹⁴³ See *K. Oellers-Frahm*, International Courts and Tribunals, Judges and Arbitrators, in: MPEPIL online ed., paras. 24 et seq.

to adopt authentic interpretations. Moreover, Art. IX para. 2 WTO requires a lower quorum than authentic and quasi-authentic interpretations under the VCLT. Whereas Art. 31 para. 3 lits. a and b VCLT is commonly read to require an agreement between all parties, Art. IX para. 2 WTO merely requires a three-fourths majority.

Against this background, the WTO Appellate Body initially held in *Japan – Alcoholic Beverages II* that “the fact that such an ‘exclusive authority’ in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere”.¹⁴⁴ Nine years later, the Appellate Body abandoned this view. In *EC – Chicken Cuts*, it held that

“the existence of Article IX:2 of the *WTO Agreement* is not dispositive for resolving the issue of how to establish the agreement by Members that have not engaged in a practice. We fail to see how the express authorization in the *WTO Agreement* for Members to adopt interpretations of WTO provisions – which requires a three-quarter majority vote and not a unanimous decision – would impinge upon recourse to subsequent practice as a tool of treaty interpretation under Article 31(3)(b) of the *Vienna Convention*.”¹⁴⁵

Similarly, it has been emphasized that the absence of a legally binding authentic interpretation pursuant to Art. IX para. 2 WTO does not necessarily prohibit interpreters from taking into account, alongside other means of interpretation, relevant subsequent agreements or subsequent practice under Art. 31 para. 3 lits. a and b VCLT.¹⁴⁶

Perhaps the most intriguing issue under Art. IX para. 2 WTO Agreement is whether this provision authorizes the Ministerial Conference and the General Council to adopt authentic interpretations that effectively amend the respective treaty.¹⁴⁷ The arguments that have been exchanged on this issue are similar to those under the NAFTA. In particular, it has been noted that Art. X WTO Agreement prescribes a special procedure for treaty amendments, namely the acceptance of the amendment by all or a qualified majority of members through the deposit of an instrument of acceptance.¹⁴⁸ This procedure may indicate that authentic interpretations are not intended

¹⁴⁴ Appellate Body Report, *Japan – Alcoholic Beverages II* (note 124), 12.

¹⁴⁵ Appellate Body Report, *EC – Chicken Cuts*, WT/DS269/AB/R and WTDS286/AB/R, 12.9.2005, para. 273.

¹⁴⁶ R. Molloo, *When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation*, Berkeley J. Int'l L. 31 (2013), 39 (49) et seq.

¹⁴⁷ In the affirmative, J. Pauwelyn (note 141), 112; C.-D. Ehlermann/L. Ehring (note 136), 808 et seq. In the negative, F. Biermann, *The Rising Tide of Green Unilateralism in World Trade Law*, JWT 35 (2001), 421 (436); H. Nottage/T. Sebastian (note 138), 1003.

¹⁴⁸ I. van Damme (note 5), 612.

to amend the treaty unless the parties' intention to do so is evident.¹⁴⁹ In the WTO context, this argument is stronger than in the NAFTA context. This is because Art. IX para. 2 WTO Agreement expressly stipulates that the interpretative power of the Ministerial Conference and the General Council shall not be used in a manner that would undermine the amendment provisions in Art. X WTO Agreement.

V. Conclusion

Authentic interpretation in public international law entails three doctrinal challenges: Are authentic interpretations legally binding? If so, is the binding nature of authentic interpretations in any way limited? And finally, who defines and reviews these limits?

Resolving these challenges begins with exposing the true nature of authentic interpretation: Authentic interpretation is law-making in all but name. This distinct type of law-making rests on a simple premise. The entity that makes the law *a fortiori* has the power to construe it. Furthermore, it can vest its constructions with the same legal value as the original norm. If the law was clear, why reiterate its meaning? In case of doubt – literally and metaphorically – interpretations purport to resolve uncertainties of the law. Thus, interpretations by a law-making entity almost inevitably change the law.

The Vienna Convention only apparently refutes this historically well-established premise. By including subsequent agreements into its general rule of interpretation, the Convention codified the false impression that authentic interpretation was interpretation and not law-making. Simultaneously, it deprived subsequent agreements of their binding force. Thus, the Convention suggests that it was possible – and even necessary – to distinguish between binding and non-binding (i.e. purely interpretative) authentic interpretations.

This distinction, however, eventually proves to be illusory. At the most, it tentatively suggests that authentic interpretations are non-binding. Similarly, a treaty that prescribes particular amendment procedures tentatively suggests that authentic interpretations disregarding these procedures are meant to be purely interpretative. Technically, these presumptions are an intermediate step in determining scope and meaning of an authentic inter-

¹⁴⁹ T. Gazzini (note 141), 176.

pretation in accordance with Art. 31 paras. 1 and 3 lit. c VCLT. But these presumptions are rebuttable.

Parties can derogate from Art. 31 para. 3 lit. a VCLT just as they can derogate from particular amendment procedures. The NAFTA parties most obviously derogated from Art. 31 para. 3 lit. a VCLT by expressly vesting some authentic interpretations with binding force. Similarly, an authentic interpretation may expressly claim binding force despite not following the treaty's amendment procedures. Moreover, neither treaties nor authentic interpretations are adopted accidentally. Why should parties adopt an authentic interpretation if not to mandate – instead of just recommend – a particular interpretation?

Contracting parties cannot be equated with individual interpreters. Individual interpreters such as judicial and quasi-judicial bodies engage in law-making when they construe, apply, and execute a treaty. This law-making, however, is delegated law-making. It is formally subordinate to the act of delegation. Individual interpreters may pursue their own agenda when construing, applying, and executing a treaty. Their competences, however, can be extended and restricted and their interpretative activity can be assessed in terms of right and wrong – in these respects, the ultimate point of reference remains the parties' objectivised intention.

Authentic interpretation is a *contradictio in adiecto* that raises false expectations and creates unjustified fears.¹⁵⁰ In contemporary public international law, it is readily depicted as a tool to obscure and conceal modifications and amendments of treaty law and to undermine and circumvent amendment requirements such as voting procedures, quora, or substantive principles such as non-retroactivity. Expecting that it was possible – and even necessary – to distinguish between binding and purely interpretative authentic interpretations and to limit their binding nature means to put the cart before the horse.

The historic evolution and diffusion of authentic interpretation into public international law demonstrates that authentic interpretations are inherently binding. Furthermore, it demonstrates that the binding nature of authentic interpretations is inherently unlimited. Expecting that it was possible – and even necessary – to distinguish between binding and purely interpretative authentic interpretations and even to limit their binding nature

¹⁵⁰ See J. Kammerhofer, *Scratching an Itch Is Not a Treatment. Instrumentalist Non-Theory Contra Normativist Konsequenz and the Problem of Systemic Integration*, in: P. Hilpold/G. Nolte, *Auslandsinvestitionen – Entwicklung großer Kodifikationen – Fragmentierung des Völkerrechts – Status des Kosovo*, 2008, 177, who convincingly refers to authentic interpretation as a misnomer.

means to equate the international legal order with a hierarchical Western style constitutional state that limits the law-makers competences by recognising higher and unchangeable norms and values.

Such equation is neither unthinkable nor unjustifiable. The invalidating effect of peremptory norms of general international law on deviating treaties as well as the primacy of the United Nations (UN) Charter can be regarded as an emerging constitutionalisation process.¹⁵¹ This constitutionalisation, however, is stuck in an embryonic stage. The contention that sovereign States can – with only few exceptions – make, unmake, and interpret treaties as they see fit can be criticised as unpopular, simplistic, and against the “zeitgeist”. In the alternative, it can be deemed realistic.

Besides, one cannot ignore the wider implications of limiting the admissible scope and effects of authentic interpretations. Recent trends in public international law suggest that States may increasingly utilise authentic interpretations to avoid and counteract unwelcome interpretative developments. The European Commission’s draft investment chapter for the Transatlantic Trade and Investment Partnership (TTIP),¹⁵² for instance, expressly provides for the adoption of authentic interpretations that shall be binding on a first instance and appeal tribunal that decides investment disputes.¹⁵³

Limiting scope and effects of authentic interpretations means to interfere with and succumb to a power struggle between contracting parties and other interpretative agencies. Due to their delegated interpretative authority, these other agencies may seem rather ill-suited to review the admissible scope and effects of authentic interpretations. Disputes about the admissible scope and effects of authentic interpretations are not the same as disputes arising under the treaty. This is because the power to adopt authentic interpretations correlates to the parties’ treaty-making power. Thus, it frames and transcends the individual treaty regime.

One sensible option to alleviate this struggle would be to submit future disputes concerning authentic interpretations to an international court with universal and general jurisdiction like the ICJ.¹⁵⁴ But even if parties, by common agreement, decided to take this option, the underlying question would still remain open: If the power to adopt authentic interpretations and hence the parties’ treaty-making power, which constitutes an essential ele-

¹⁵¹ See Arts. 53, 64, and 71 VCLT; Art. 103 of the Charter of the United Nations (signed 26.6.1945, entered into force 24.10.1945), 1 UNTS XVI.

¹⁵² See <<http://trade.ec.europa.eu>>.

¹⁵³ Art. 13 para. 5 of the chapter on investment, section 3, sub-section 1. See also Art. 8.31 para. 3 of the Comprehensive Economic and Trade Agreement (CETA), <trade.ec.europa.eu>.

¹⁵⁴ See Art. 66 VCLT.

ment of State sovereignty, was limited – then who should ultimately be sovereign enough to control the sovereign?

– The King is dead, long live the King!