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A Quiet Revolution in the Making? The Changing State Authority in Treaty Interpretation

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1. Introduction

Very few topics in international law have attracted as much attention as treaty interpretation. The theme features prominently in the works of the founding figures of international law,[1] is a standard chapter in textbooks of international law[2] and has been the subject of many codification efforts by various institutions ranging from the Institut de Droit International and the International Law Commission (ILC) to the International Law Association.[3] Recent studies offering a systematic treatment of treaty interpretation or focusing on some specific aspects of the theme show that this remarkable interest is not about to fade.[4] But even a cursory glance at

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[1] See eg Hugo Grotius, 'Book II Chapter 16: The Interpretation of Treaties' in Hugo Grotius (slightly abridged by AC Campbell), *On the Law of War and Peace* (Batoche 2001) 140; Emer Vattel, 'Chapter XVII: Of the Interpretation of Treaties' in Bela Kapossy and Richard Whatmore (eds), *The Law of Nations* (Liberty Fund 2008) 408.

[2] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 364; Patrick Daillier, Mathias Forteau, and Alain Pellet, *Droit International Public* (8th edn, LGDJ 2009) 276; Peter Malanczuk and Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* (8th edn, Routledge 2018) 265; Malcolm Shaw, *International Law* (8th edn, CUP 2017) 706; Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* (3rd edn, Duncker Humblot 2010) 490; Benedetto Conforti, *Diritto Internazionale* (11th edn, Editoriale Scientifica 2018) 114.

[3] *'L'interprétation des traités, Institut de Droit International, Session de Grenade, 11–20 April 1956' Annuaire de l'Institut de Droit International,* vol 46 (1956) 358–59; International Law Commission (ILC), Draft Articles on the Law of Treaties with Commentaries (1966) II Yearbook of the International Law Commission, UN Doc A/6309/Rev.1, 187–274; 'Final Report of the International Law Association Study Group on the Content and Evolution of the Rules of Interpretation' (29 November–13 December 2020) Kyoto.

[4] See Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008); Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2nd edn, Springer 2010); Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris, *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill 2010); Erik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014); Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015); Christian Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (CUP 2016); Irina Buga, *Modification of Treaties by Subsequent Practice* (OUP 2018).

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such a monumental production is sufficient to realize that what has virtually exclusively interested international lawyers is how treaty interpretation should proceed and what rules it should be guided by rather than who the actors that engage in it are, what kind of authority they can plausibly claim, and on what basis their competing claims to authority are resolved.[5] The lesson contained in Bishop Hoadly's famous comment that 'whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law Giver to all intents and purposes, and not the persons who first spoke and wrote them'[6] may have been in the back of the mind of many, but it must have been seen as reinforcing the need for disciplining rules rather than calling for a careful study of how interpretive authority is distributed in the international legal order.

The ambition of this chapter is not to fill this unfortunate gap as such, but rather to reflect on the changing interpretive authority of one category of actors, namely the states. The different contributions to this volume make a strong point that, contrary to what the mainstream legal doctrine and the 'official' legal discourse might lead one to believe, many change processes in international law occur without states acting as drivers. Remarkably, however, even in 'state-empowered' institutions[7] typically highly deferential to states, there have been significant moves away from the state-centred position. This chapter focuses on one example of this, namely the position of the ILC on the interpretive authority of the parties to a treaty. Traditionally, the joint interpretation of a treaty by its parties was seen as the most authoritative interpretation of it. As Lassa Oppenheim stated, '[i]f [the contracting parties] 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.'[8] This proposition was rarely challenged, linked as it was to common sense and 'reason'. But this state of affairs came under serious challenge in the recent work of the ILC on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Commission reaching the conclusion that joint interpretive agreements 'are not necessarily legally binding'.[9] Given the authority of the ILC, this conclusion is likely to be influential.

What this chapter attempts to do is to account for this 'quiet revolution' in the authority of treaty interpretation by the parties themselves. To do so, it moves beyond an actor-focused conception of authority and assesses state authority in treaty interpretation in light of the theory of authority offered by Kim Scheppele and Karol

[5] I am grateful to Phattharaphong Saengkrai for this point.

[6] Cited in John Gray, *The Nature and Sources of Law* (2nd edn, Macmillan 1921) 125.

[7] Sandesh Sivakumaran, 'Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law' (2016) 55 Colombia Journal of Transnational Law 343.

[8] Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green 1905) 559.

[9] See Commentary to Draft conclusion 3, in 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentaries' (2018) II Yearbook of the International Law Commission, pt two, UN Doc A/73/10, 24 (hereafter 'Draft conclusions with commentaries').

Sołtan, which describes the latter as a function of attractiveness in a choice situation. My argument is that while the interpretive authority of the parties to a treaty has long appeared 'attractive' because it was obvious and persuasive, the landscape of the international legal order has progressively changed to give rise to a new social ecology in which treaty interpretation by the parties themselves is no longer seen as 'naturally' dispositive. I then focus on the ILC's work in that new environment and describe the mechanics of the 'quiet revolution' that the Commission initiated by opening the black box of state authority in treaty interpretation. In particular, I show that, for a variety of reasons ranging from lack of capacity for some to opportunistic considerations for others, states largely failed to engage with the Commission's conclusion, acting as collective 'bystanders' to what is likely to become a serious change in the authority regime of treaty interpretation.[10]

2. Assessing the Interpretive Authority of States

Most concepts of authority remain vulnerable to Michel Foucault's famous charge that political philosophy still needs 'to cut off the king's head' in its conceptualization of power relationships.[11] Foucault's point was that political theory had a tendency to analyse power as a matter of prescriptions and prohibitions, accounting for it in terms of some ultimate source, be it the person of the king or other similar alternatives. Despite serious attempts in the recent scholarship dedicated to authority in international affairs to broaden our understanding of authority relations beyond the prescriptions and prohibitions model, most analysts still remain focused on 'authority figures' in the form of persons, offices, and institutions.

Building on the theory of authority offered by Scheppele and Sołtan,[12] this chapter proposes to go beyond the actor-focused conception of authority.[13] According to Scheppele and Sołtan:

> Authority […] is not simply the right of actor A to get actor B to carry out A's will voluntarily. Instead, authority is found when actor B finds compelling particular properties of A, when A may be a person, a solution to a puzzle, or, more generally, any alternative in a choice situation. Authority is constituted not by person A willing a particular state of affairs which is then carried out, but rather by person B being attracted to the state of affairs offered by alternative A and voluntarily choosing that option over others.[14]

[10] See Nico Krisch and Ezgi Yildiz, 'From Drivers to Bystanders: The Varying Roles of States in International Legal Change'. <https://ssrn.com/abstract=4456773> accessed 25 August 2023.

[11] Michel Foucault, *Power: The Essential Works of Foucault 1954–1984* (The New Press 2001) 122.

[12] Kim Scheppele and Karol Sołtan, 'The Authority of Alternatives' (1987) 29 Nomos 169.

[13] ibid.

[14] ibid 170.

In this understanding, obviousness, 'the intuitive appeal of a particular solution for a particular problem',[15] is, for instance, likely to be a powerful basis for authority, considering that an alternative that can claim the advantage of obviousness reduces decision costs, is easier to agree on and more likely to secure an agreement.[16] Likewise, alternatives that can be persuasively justified are likely to look more attractive than others.[17]

Linking authority to attractiveness does not, however, mean that authority relations are a matter of subjective preference. Authority relations obtain precisely when attractiveness of an option is not a matter of personal choices, but have a social grounding in the form of 'a belief system' that supports it.[18] In other words, this understanding is fully in line with the 'triangular model of authority' which involves social practices, authority addressees, and authority in the sense that 'the recognition of authority [emanates] from social practices independent from an individual addressee's attitude'.[19]

As highlighted by Scheppele and Sołtan, the advantage of this approach is that authority is not to be regarded as the exclusive privilege of persons or offices, but can also be associated with 'texts, rituals, types of explanation, justifications, reasons or particular real or ideal social arrangements'.[20] Such an understanding of authority brings to light its fundamentally relative character, since the authority that an alternative can claim in a choice situation is not an on/off matter, but should be seen as 'a function of the strength of its resources'.[21] In other words, '[a]n alternative is not simply authoritative or not authoritative, but rather more or less authoritative depending on the resources which are possessed by that alternative.'[22] By focusing on authority-carrying properties, this conception of authority also makes it unnecessary to inquire whether a person or institution following an authoritative choice is carrying out an authority-holder's will or preferences.[23] Finally, unlike in conventional approaches, authority here is not a matter of unquestioning adherence and leaves ample room for resistance and contestation.[24]

Authority relations in the sense specified above typically intervene where power delineations through traditional formal entitlements or authoritative precedents are lacking. Treaty interpretation is precisely such an area. There is no formal legal instrument specifying the weight to which any interpretation is entitled in the

[15] ibid 178.
[16] ibid 187.
[17] ibid 181.
[18] Peter M Blau, 'Critical Remarks on Weber's Theory of Authority' (1963) 57 American Political Science Review 305, 307.
[19] Nico Krisch, 'Liquid Authority in Global Governance' (2017) 9 International Theory 237, 244.
[20] Scheppele and Sołtan (n 12) 170.
[21] ibid 172–73.
[22] ibid 173.
[23] ibid 170.
[24] For such an understanding of authority, see Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (OUP 2018).

international legal order. As pointed out above, while there are formal rules clarifying how treaty interpretation should proceed and which means can be used in the process, the official regime of treaty interpretation is notoriously silent about the distribution of interpretive authority in international law. Efforts were made to formalize some authority entitlements in treaty interpretation, but they were typically resisted. The ILC's attempts to clarify the legal effects of pronouncements of expert bodies provide a good example. While the Special Rapporteur's early proposal suggested that those pronouncements 'may contribute to the interpretation of [the relevant] treaty',[25] a pushback from governments led the Commission to a less generous view in this regard.[26] The UN Human Rights Committee's early draft of General Comment 33 providing that the views adopted by the Committee in individual cases are legally binding and that they can be framed as subsequent practice of the states parties to the International Covenant on Civil and Political Rights is another example.[27] Several states rejected both views in their comments (with the US specifically describing them as an 'extraordinary assertion of authority'[28]), denying that the Committee had received such a mandate, and the Committee dropped both assertions in the final text of the General Comment.

In the absence of a formal allocation of the interpretive authority, the weight to which any actor's interpretation is entitled in the international legal order is informally grounded. The state authority in treaty interpretation is not an exception in this regard. Despite the large support that it has received in the literature, the proposition that an interpretive agreement by the parties to a treaty has conclusive effect is not set forth in any instrument. It is notably absent in the Vienna Convention on the Law of Treaties, the most authoritative instrument setting forth the rules of treaty interpretation which are consistently described as reflecting customary international law. During its work leading to the Vienna Convention, the ILC made several observations suggesting that the authority of such agreements could not be questioned. For instance, the Commission clarified that a subsequent interpretive agreement represented 'an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation'.[29] However, the Vienna

[25] 'Fourth Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties' (2016) UN Doc A/CN.4/694, 36.

[26] The final conclusion specifies that '[t]he relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty' and that the conclusion 'is without prejudice to the contribution that pronouncements of expert treaty bodies make to the interpretation of the treaties under their mandates'. Draft conclusion 13, 'Draft conclusions with commentaries' (n 9).

[27] HRC, 'Draft General Comment No 33 (Second revised version as of 18 August 2008)' (25 August 2008) UN Doc CCPR/C/GC/33CRP.3.

[28] Observations of the United States of America on the Human Rights Committee's General Comment 33 (22 December 2008) para 1 <https://2009-2017.state.gov/documents/organization/138852.pdf> accessed 15 February 2023.

[29] 'Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session' (1966) II Yearbook of the International Law Commission, UN Doc A/6309/Rev.1, p 221.

Convention itself contains no such language. Also remarkable is the clarification that no hierarchy was implied among the interpretive means listed in the general rule of interpretation set forth in the Convention.[30]

There is also little authoritative support for the conclusive state authority in treaty interpretation in international case law. The advisory opinion of the Permanent Court of International Justice in *Question of Jaworzina* is commonly cited as the *locus classicus* on the matter. While the Court in that case did indeed point out that 'the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it',[31] the context of that statement was not treaty interpretation, but one involving the right of an intergovernmental conference to interpret its previous decision. The International Court of Justice has dealt with the argument of common understanding and interpretive agreements of the parties on several occasions but has never formulated a general statement to the effect that joint interpretive agreements are conclusive.[32]

But despite having no formal or precedential basis, the state authority in treaty interpretation has long enjoyed the advantage of obviousness and persuasiveness in the international legal order[33] for several reasons:

(a) International law has traditionally been state-centric, with the states being considered not just as one group of actors among others in international legal processes, but as 'pivotal' ones around which the entire international legal order allegedly revolved.[34] In this traditional picture, states have been portrayed not just as the addressees of international law, but also as the sole makers of it. In the case of custom, the state's central role is expressed either in the form of tacit or implicit state consent to customary rules or the exclusively state-focused definition of the practice required for the emergence of a customary rule. Even more forcefully, the law of treaties has been considered the bastion of consensualism in international law.[35] Among the

[30] ibid 220.

[31] *Question of Jaworzina (Polish-Czechoslovakian Frontier)* (Advisory Opinion) 6 December 1923, PCIJ Rep Series B No 8 (1923) 37.

[32] The Court pointed out in an advisory opinion that 'parties to treaties are in general free to agree on their interpretation', but the point was made in passing in response to an argument made by analogy with investment treaties in a case involving no issue having to do with the right of the parties to enter into interpretive agreements. *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (Advisory Opinion) [2012] ICJ Rep 10 [43].

[33] So much so that, as Ingo Venzke points out, 'authoritative interpretations' and 'authentic interpretations' (joint treaty interpretations by the parties) have often been used interchangeably; see Ingo Venzke, 'Authoritative Interpretation' in *Max Planck Encyclopaedia of International Procedural Law*, para 2 <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3528.013.3528/law-mpeipro-e3528> accessed 15 February 2023.

[34] Philip Alston, 'The 'Not-a-cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed), *Non-State Actors and Human Rights* (1st edn, OUP 2005) 3. See also Krisch and Yildiz (n 10).

[35] Hubert Thierry, 'L'évolution du droit international: cours général de droit international public' in *Collected Courses of the Hague Academy of International Law*, vol 222 (Brill 1990) 36. See also ICSID,

> implications of the consensualist paradigm which permeates the whole body of the law of treaties is not only the basic threshold proposition that no state can be made a party to a treaty without its consent, but also the assumption that the very content of a treaty 'derives … from the consent of the contracting States'.[36]

To put it in Foucault's words, such an understanding of international law offered 'an epistemological arrangement' that 'welcomed gladly' the view that states are masters of their treaties, making it appear like 'fish in water'.[37] Whether framed as 'patterns of culture',[38] 'the plausibility structure',[39] 'the structure of feeling',[40] or 'the spirit of the age',[41] an epistemological disposition that sees international law as a product of state consent is likely to have rendered state authority in treaty interpretation an obvious alternative.

(b) Another factor underpinning the compelling force of state authority in treaty interpretation has been the lack of plausible alternatives. For a long time, international law was a matter of intercourse among chancelleries, involving no third-party adjudicators, non-governmental organizations, or third-party beneficiaries. The very format of treaties—typically bilateral instruments setting forth specific rights and obligations for the parties—was inimical to the rise of plausible alternatives. Such circumstances are likely to have contributed to the authority of the joint interpretations of treaties by their parties.

(c) The international legal regime of treaty interpretation also reinforced state authority in treaty interpretation. During a considerable part of the history of the discipline, treaty interpretation was presented as a matter of a search for the common intention of the parties. The search for the common intention of the parties was of such paramount importance that it was thought that no technical rule of treaty interpretation should hinder it.[42]

Daimler Financial Services AG v Argentine Republic (Award) 22 August 2012, ICSID Case No ARB/05/1, para 168 ('Consent is … the cornerstone of all international treaty commitments … The primacy of the principle of consent runs through all types of treaty commitments entered into by states').

[36] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Judgment) 11 November 2013 [2013] ICJ Rep 281 [75].

[37] Michel Foucault, *Order of Things: An Archaeology of the Human Sciences* (Routledge 2002) 285.

[38] Ruth Benedict, *Patterns of Culture* (Harcourt 2005) 251.

[39] Peter L Berger and Thomas Luckmann, *The Social Construction of Reality. A Treaties in the Sociology of Knowledge* (Doubleday 1966) 154.

[40] Raymond Williams, *The Long Revolution* (Parthian 2011) 69.

[41] Vaughan Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2001) 220.

[42] Charles C Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (Little, Brown 1922) 69–70; John Westlake, *International Law, Part I: Peace* (CUP 1904) 282.

> Although he did not deny the practical utility of dedicated rules of treaty interpretation, Hersch Lauterpacht similarly recognized the central place of the intention of the parties in his report prepared for the Institut de Droit International, describing that intention as 'the law of the judge', 'a fundamental factor in the matter of treaty interpretation', or 'the primary object of interpretation'.[43]

When the common intention of the parties is seen as a guiding parameter in treaty interpretation, the parties to the treaty can plausibly claim significant authority, as actors best positioned to articulate that intention. What has been described as 'the paradox of knowing better'[44]—a third party pretending to know the common intention of the parties better than the parties themselves—can be plausibly addressed when the parties are in disagreement, but it becomes much harder to resolve when the parties have an interpretive agreement. Indeed, what the *ADF* tribunal observed with respect to interpretations issued by the Free Trade Commission of the North American Free Trade Agreement (NAFTA)—'[n]o more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA is possible'[45]—presumably describes a broader phenomenon of authorial authority, with authorship acting as a powerful mark of interpretive authority.[46]

This non-formal, substantive grounding of state authority in treaty interpretation comes at the cost of vulnerability to changes in relevant dynamics. Several developments in the international legal order have indeed undermined the 'naturalness' of the interpretive authority of states. The evolution of the official regime of treaty interpretation is arguably among such developments. While references to the common intention of the parties are still understandably present in the treaty interpretation discourse, the regime set forth in the Vienna Convention on the Law of Treaties is premised on the assumption that treaty interpretation is not 'an investigation *ab initio* into the intentions of the parties', but an exercise primarily based on the text, the latter being considered as the virtually exclusive medium used by the parties to express those intentions.[47] Arguably, this change in the object of interpretation has important consequences for the authority relations in treaty interpretation. The parties to a treaty may be said to be best positioned to clarify their common intention, but they can claim no such exclusivity when elucidating the

[43] See *Annuaire de l'Institut de Droit International*, vol 43 (1950) Tome I, 423 (author's own translation).

[44] Guy de Lacharrière, *La politique juridique extérieure* (Economica 1983) 172; Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (CUP 2005) 347.

[45] ICSID, *ADF Group Inc v United States of America* (Award) 9 January 2003, ICSID Case No ARB (AF)/00/1, para 177.

[46] The privileged interpretive position of the authors of legal instruments is recognized in the adage *Ejus est interpretari legem cujus est condere*.

[47] 'Reports of the International Law Commission' (n 29) 220.

meaning of the text is considered to be 'the starting point and purpose of interpretation'.[48] In other words, state authority in treaty interpretation is likely to be less compelling in a regime in which the text is regarded as a primary object of treaty interpretation.

Another challenge to state authority in treaty interpretation has come from the rise of alternative interpreters.[49] A particularly prominent competing authority claimant in the international legal order has been third-party adjudicators that I broadly define as including any third party formally empowered to interpret treaties. Considered as transparent, impartial, and independent bodies subject to no force other than 'the force of the better argument',[50] such third parties can command significant authority in settings where those properties are highly valued, because they are largely lacking. This has been traditionally the case with the international legal order in which states have been seen as legally entitled to determine *uti singuli* what their legal rights and obligations are,[51] with impartial accounts of those rights and obligations remaining an exception. In such a system of 'boundless relativism',[52] interpretations offered by independent, neutral, and impartial sites such as international courts and structurally similar monitoring bodies can exert more attraction than 'interest-driven' interpretations advanced by the parties[53] for any actor interested in capitalizing on law's neutralizing and universalizing effects.[54]

In some areas of international law, non-governmental organizations have also arisen as credible alternative interpreters, with human rights and humanitarian law being prominent examples. Human rights non-governmental organizations (NGOs) use the channel of international adjudication to offer their interpretations of human rights treaties[55] and participate in human rights standard-setting.[56] The

[48] 'Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' (1964) II Yearbook of the International Law Commission, UN Doc A/CN.4/172, 56.

[49] On the role of 'alternative authorities' to states, see also Krisch and Yildiz (n 10).

[50] Jürgen Habermas, *The Theory of Communicative Action*, vol 1 (Beacon Press 1984) 25.

[51] Leo Gross, 'States as Organs of International Law and the Problem of Autointerpretation' in George A Lipsky (ed), *Law and Politics in the World Community: Essays on Hans Kelsen's Pure Theory and Related Problems in International Law* (University of California Press 1953) 59; Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982); *Lake Lanoux Arbitration*, 24 ILR 101 (1961) 132; *Air Service Agreement*, 18 RIAA 443.

[52] Paul Reuter, 'Principes de droit international public' (1961) 103 *Recueil des cours* 440.

[53] Bruno Simma, 'Comment' in Rudiger Wolfrum and Volker Roeben (eds), *Developments of International Law in Treaty Making* (Springer 2005) 582.

[54] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 Hastings Law Journal 805, 820.

[55] See Heidi Haddad, *The Hidden Hands of Justice: NGOs, Human Rights, and International Courts* (CUP 2018).

[56] NGOs played an active role in the development of the 'Siracusa Principles' on the derogation and limitation provisions of the International Covenant on Civil and Political Rights in 1984. See Theo van Boven, 'The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy Trends in International Law' (1989) 20 California Western International Law Journal 207. Human Rights NGOs have also been active in submitting comments regarding draft general comments prepared by human rights treaty bodies. See eg 'Comments received

authority of the Pictet Commentaries to the Geneva Conventions authored by the staff members of the International Committee of the Red Cross is widely recognized both in practice and in academic circles.[57] The attractiveness of such alternative interpretations varies depending on the reputation, expertise, and perceived neutrality and impartiality of their authors, but the very fact of their existence undermines the notion that the parties-originated treaty interpretation is the only game in town.

The rise of treaties with third-party beneficiaries is arguably another factor weakening state authority in treaty interpretation. Human rights treaties and investment protection treaties are particularly worth mentioning in this context. Human rights treaties are typically described as being radically different from the interstate reciprocal bargaining model in the sense that obligations under those treaties are not intersubjective obligations among the parties, but 'objective obligations' with respect to all individuals subject to the jurisdiction of the parties.[58] This is sometimes seen as justifying a special regime for denunciation of or succession to such treaties.[59] It is also often relied on to grant lesser deference to indicators of state consent in treaty interpretation such as *travaux préparatoires* or the intention of the parties both in academic discourse and in practice.[60] The recent practice of human rights treaty bodies to open up their draft general comments for submissions from all interested parties is also presumably premised on the assumption that the normative content of human rights treaties is a matter of concern beyond the circle of the parties to those treaties.

State authority in treaty interpretation has been even more forcefully challenged in the context of investor-state arbitration. As is the case in human rights litigation initiated by individuals, only one of the parties in investor-state arbitration

with respect to the draft General Comment on the right of peaceful assembly' <www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx> accessed 15 February 2023.

[57] Linus Mührel, 'Saying Authoritatively What International Humanitarian Law Is: On the Interpretations and Law-Ascertainments of the International Committee of the Red Cross' (PhD thesis on file at the Free University of Berlin 2019).

[58] *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23; *Ireland v United Kingdom*, App no 5310/71, 18 January 1978, para 239; *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75)* (Advisory Opinion) OC-2/28, 24 September 1982, para 29.

[59] UN Aide-Mémoire in connection with North Korea's denunciation of the Covenant, Ref C.N.467.1997.TREATIES-10, 12 November 1997 <https://treaties.un.org/doc/Publication/CN/1997/CN.467.1997-Eng.pdf> accessed 15 February 2023. See also, regarding automatic succession of human rights treaties, Menno Kamminga, 'State Succession in Respect of Human Rights Treaties' (1996) 7 European Journal of International Law 469.

[60] Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (OUP 2017) 66; David Harris and others, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (OUP 2018) 22; George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 European Journal of International Law 509, 520; *Young, James and Webster v The United Kingdom*, App nos 7601/76 and 7806/77, 13 August 1981, para 52; *Sigurdur A. Sigurjónsson v Iceland,* App no 16130/90, 30 June 1993, para 35.

is also a party to the treaty and is in a position to put forward its views not only as a party to the dispute, but also as a party to the treaty. This asymmetrical situation is generally unproblematic, since a unilateral interpretation by one state of its treaty obligations is not treated as being entitled to special weight not only because it is emanating from one party,[61] but also because such an interpretation carries the risk of being self-serving.[62] But it becomes more challenging when the state as a party to the treaty secures an interpretive agreement with the other party to the treaty, especially so when the agreement intervenes during the pendency of the arbitration proceeding, because this possibility is not available to the investor. The issue came under the spotlight in the context of NAFTA when the NAFTA parties issued a document titled 'Notes of Interpretation of Certain Chapter 11 Provisions' in order 'to clarify and reaffirm the meaning of certain of [the] provisions' of Chapter 11 of NAFTA after 'having reviewed the operation of proceedings conducted' by Chapter 11 tribunals, [63] which included some ongoing proceedings in which the proper interpretation of those provisions was at issue. Granting such interpretive agreements a conclusive effect has been described as inconsistent with the due process of justice and the equality of arms by experts and practitioners in the field[64] and has led some tribunals to express a sense of unease.[65] Investors have also voiced concerns about the procedural unfairness entailed by the situation.[66]

3. Anatomy of a Revolution in the Making

The position of the ILC that joint interpretive agreements of the parties to a treaty are not necessarily binding is a very serious challenge to state authority in treaty interpretation given the considerable authority that the Commission enjoys

[61] As stated by the Appellate Body of the WTO: 'The purpose of treaty interpretation under article 31 of the Vienna Convention is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty.' WTO, 'European Communities—Customs Classification of Certain Computer Equipment—Report of the Appellate Body' (5 June 1998) WT/DS62-67-68/AB/R, para 84 (emphasis original).

[62] See, by analogy, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits, Judgment) [2010] ICJ Rep 639 [70] ('where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation').

[63] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' OXIO 553, 31 July 2001.

[64] Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179.

[65] See eg ICSID, *Magyar Farming Company v Hungary* (Award of 13 November 2019) ICSID Case no ARB/17/27, para 222 ('While the Contracting States remain the masters of their treaty, their control is limited by the general principles of legal certainty and *res inter alios acta, aliis nec nocet nec prodest*'); *HICEE BV v The Slovak Republic* (Partial Award) UNCITRAL, PCA Case no 2009-11, para 140.

[66] ICSID, *Mobil Investments Canada INC v Canada* (Award on Jurisdiction and Admissibility) 13 July 2018, ICSID Case no ARB/15/6, para 159.

regarding public international law matters. A close look at the reports prepared by the Special Rapporteur and the final conclusions and accompanying commentaries adopted by the Commission gives some clues as to the anatomy of the Commission's groundbreaking choice.

First of all, the Special Rapporteur engaged in a sustained work that can be characterized as discursive construction of unsettledness of the issue. What helped him considerably is the fact that, as described above, the authority of joint interpretive agreements of the parties is not settled in any formal rule of international law or any authoritative precedent. But the Special Rapporteur also tried to show that the matter was not settled by the Commission in the 1960s. For instance, he endeavoured to establish that, even though in the 1960s the Commission described the interpretations jointly offered in interpretive agreements by the parties as representing 'authentic interpretation[s] … which must be read into the treaty for purposes of its interpretation', the Commission 'did not go quite as far as saying that such an interpretation is necessarily conclusive in the sense that it overrides all other means of interpretation'.[67] According to the Commentary, this conclusion finds support in the structure of Article 31 of the Vienna Convention on the Law of Treaties, which states that 'subsequent agreements and subsequent practice shall … only "be taken into account" in the interpretation of a treaty' and establishes no hierarchy among the means of interpretation listed in that provision.[68] This exceedingly formalistic argument may not strike everyone as a plausible reading of the position of the Commission in the 1960s, but what is important for the purposes of this chapter is that the Commission needed to establish that no conclusive authority had been recognized to subsequent agreements by the Commission in the 1960s in order to be able to deny such authority.[69] In the same spirit, the Commentary contains no reference to the Advisory Opinion of the Permanent Court of International Justice in the *Jaworzina* case.

Another relevant consideration to bear in mind is that state authority in treaty interpretation is very much audience-sensitive and varies depending on 'the values, interests and expectations and cognitive frames' of the actors assessing it.[70] As Nico Krisch and Ezgi Yildiz observe, in many issue-areas, international lawyers do not display the level of cohesion and homogeneity characterizing a 'community'.[71] International legal scholars who have a state-centric conception of

[67] 'Draft conclusions with commentaries' (n 9) 25.

[68] ibid 24.

[69] Interestingly, according to the explanation provided with respect to the ISO environmental management standard 140001:2015, the difference between 'shall consider' and 'shall take into account' is as follows: 'When the standard uses the term consider, it means that it is necessary to think about the topic but it can be excluded. When the standard uses the phrase take into account, the topic must be thought about and cannot be excluded' <www.iso14001expert.com/2015/07/is-there-a-distinction-between-consider-and-take-into-account-in-iso-140012015/> accessed 15 February 2023.

[70] Julia Black, 'Says Who: Liquid Authority and Interpretive Control in Transnational Regulatory Regimes' (2017) 9 International Theory 286, 293.

[71] Krisch and Yildiz (n 10).

international law tend to see states as the owners of their treaties and treat their interpretive power accordingly.[72] We can expect a similar position from legal advisors to governments. Likewise, state authority in treaty interpretation is likely to be more readily recognized by interstate courts and tribunals than by other international courts. Interestingly, a variation can also be observed along the lines of national traditions of international law. For instance, in the French tradition of international law, the authority of the parties in treaty interpretation tends to be commonly taken for granted. These variations can also be observed in the composition of the Commission. For instance, Michael Wood, a former legal advisor to the Foreign Office, and Roman Kolodkin, a former legal advisor to the Russian government, were among the members of the Commission who objected to the Special Rapporteur's position regarding the authority of the joint interpretive agreements by the parties.[73] Coming from the French tradition of international law, Mathias Forteau and Maurice Kamto were among the most vocal opponents of the Special Rapporteur's position.[74] But these objections were relatively limited, which enabled the Special Rapporteur to stick to his position.

Equally relevant is the Commission's politics of the use of authorities. One of the rare monographs dedicated to the interpretation of the treaty by the parties is never mentioned in the Commentary, still less discussed in the Rapporteur's works.[75] The Commentary also dismissed the view contradicting the approach promoted by the Special Rapporteur as 'erroneous' and as merely 'the suggestions of some commentators',[76] with the relevant footnote containing no reference to highly reputed scholars (some of whom participated in the preparation of what became the Vienna Convention on the Law of Treaties within the Commission in the 1960s) and sources defending that view.[77] The Special Rapporteur's view is footnoted with citations to considerably lesser authorities supplemented in an exercise of circularity by a reference to his own Third Report for the Commission's Study Group

[72] See eg James Crawford, 'A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 29, 31:

> [T]he parties to a treaty … own the treaty. It is their treaty. It is not anyone else's treaty… In the context of investment treaty arbitration there is a certain tendency to believe that investors own bilateral investment treaties, not the states parties to them … That is not what international law says. International law says that the parties to a treaty own the treaty and can interpret it. One might say within reason, but one might not question their application of reason as they see fit.

[73] See, respectively, ILC, 'Summary Record of the 3160th meeting' (7 May 2013) UN Doc A/CN.4/3160, 4 and ILC, 'Summary Record of the 3261st meeting' (4 June 2015) UN Doc A/CN.4/SR.3261, 6.

[74] See, respectively, ILC, 'Summary Record of the 3205th meeting' (15 May 2014) UN Doc A/CN.4/SR.3205, 8 and ILC, 'Summary Record of the 3207th meeting' (20 May 2014) UN Doc A/CN.4/SR.3207, 5.

[75] See Ioan Voicu, *De l'interprétation authentique des traités internationaux* (Pedone 1968).

[76] 'Draft conclusions with commentaries' (n 9) 24.

[77] This list includes Manley Hudson, Arnold McNair, Robert Jennings, Arthur Watts, Paul Reuter, Mustafa Yasseen, and reference works such as Rudolf Bernhardt (ed), *Max Planck Encyclopaedia of Public International Law* (1984) or Jean Salmon (ed), *Dictionnaire de droit international public* (Elsevier Science Publishers 2001).

on Treaties over Time.[78] Also lacking is an explanation as to why the Commission itself took that allegedly 'erroneous' view just a few years back.[79]

The primacy of the text in the interpretive philosophy underpinning the Vienna Convention on the Law of Treaties was also mobilized by the Commission in order to relegate subsequent agreements and subsequent practice to a secondary position.[80] It is true that the Commentary insists that Article 31 of the Vienna Convention operates as 'a single integrated rule'.[81] But this did not prevent the Commission from reproducing the rule stated in Article 31, paragraph 1 of the Vienna Convention, according to which '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose', in a separate paragraph before the paragraph referring to subsequent agreements and subsequent practice.[82] The Commentary clarified that:

> [t]he reiteration of article 31, paragraph 1, as a separate paragraph … is intended to ensure the balance in the process of interpretation between an assessment of the terms of the treaty in their context and in the light of its object and purpose, on the one hand, and the considerations regarding subsequent agreements and subsequent practice in the present draft conclusions, on the other.[83]

Another notable aspect of the Commission's work on 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties' is that, while the Commission in the 1960s reserved the phrase 'authentic interpretation' for the interpretation of the treaty by the parties themselves, that expression is carefully avoided in Conclusion 3 dedicated to the general characterization of subsequent agreements and subsequent practice, the latter being described as 'authentic means of interpretation', another terminology used by the Commission in the 1960s.[84] This is a manifest attempt to diminish the importance that subsequent agreements and subsequent practice arguably had for the

[78] 'Draft conclusions with commentaries' (n 9) 25, fn 62.

[79] 'Guide to Practice on Reservations to Treaties with commentaries' (2011) UN Doc A/66/10/Add.1, 81 (stating that '[when the parties] agree on an interpretation, that interpretation prevails and itself takes on the nature of a treaty').

[80] Commentary to Draft conclusion 7, in 'Draft conclusions with commentaries' (n 9) 51–52:

> International courts and tribunals usually begin their reasoning in a given case by determining the 'ordinary meaning' of the terms of the treaty. Subsequent agreements and subsequent practice mostly enter into their reasoning at a later stage when courts ask whether such conduct confirms or modifies the result arrived at by the initial interpretation of the ordinary meaning (or by other means of interpretation.

[81] Commentary to Draft conclusion 2, in 'Draft conclusions with commentaries' (n 9) 20.

[82] ibid para 2.

[83] ibid.

[84] Commentary to Draft conclusion 3, in 'Draft conclusions with commentaries' (n 9) 10.

Commission in the 1960s,[85] with the Commission now highlighting that subsequent agreements and subsequent practice 'are … not the only "authentic means of interpretation" ' under Article 31 of the Vienna Convention.[86]

The Special Rapporteur's work also seems to have been heavily influenced by the rise of treaties with third-party beneficiaries and alternative interpreters. In his very first report, the Special Rapporteur referred to the assertion that 'the interpretation of treaties which establish rights for other States or actors is less susceptible to "authentic" interpretation by their parties'.[87] The examples taken from investment arbitration tend to suggest that the interpretive asymmetry between investors and the state party to the arbitration was a serious consideration in the Special Rapporteur's analysis.[88] The fact that the existence of alternative interpreters may also have been relevant is shown by the Commission's dedicated attention to pronouncements of expert treaty bodies.[89]

The foregoing considerations may explain what made the Commission's position about the legal effects of joint treaty interpretations by the parties possible. But one still needs to figure out how the ILC, whose main interlocutors are states and which normally cares about what is admissible to states,[90] could promote a position that seems to undermine state authority in treaty interpretation. One explanation that could be ventured is that the Commission knew from the beginning that its work on subsequent practice and subsequent agreement was not going to be submitted to an international conference with a view to the conclusion of a multilateral treaty.[91] The possibility for the work products of the Commission to never become a multilateral treaty is recognized in its Statute but has been more prominently used in the recent period. It is not a stretch to imagine that the Commission probably feels that it can take more freedom when its work is not subject to the test of acceptability at an intergovernmental conference.

[85] ibid 25. The Commentary is clear in this regard: 'The Commission has not employed the terms "authentic interpretation" or "authoritative interpretation" in draft conclusion 3 since these concepts are often understood to mean a necessarily conclusive, or binding, agreement between the parties regarding the interpretation of a treaty' (ibid).

[86] ibid 24.

[87] 'First Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (2013) UN Doc A/CN.4/660, 60, fn 75.

[88] ibid 70, paras 88–89; ILC, 'Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (2014) UN Doc A/CN.4/671, 62, paras 150–55.

[89] See Draft conclusion 12 and commentary thereto, in ILC, 'Draft conclusions with commentaries' (n 9). The Special Rapporteur also clarified that when judicial or quasi-judicial bodies existed, they could challenge interpretive agreements and their value. ILC, 'Summary Record of the 3446th meeting' (7 August 2018) UN Doc A/CN.4/SR.3446, 9.

[90] See Bruno Simma, 'The ILC's Work on State Responsibility: Personal Reflections' (*EJIL: Talk!*, 2 August 2021) <www.ejiltalk.org/the-ilcs-work-on-state-responsibility-personal-reflections/> accessed 15 February 2023 (describing the UN member states as the Commission's 'customers').

[91] 'Annex: Treaties over time in particular: subsequent agreement and practice' (2008) II Yearbook of International Law Commission, pt two, 156, para 22 ('The […] goal of the consideration of the topic should be to derive some general conclusions or guidelines from the repertory of practice. Such conclusions or guidelines should not result in a Draft Convention').

It is true that the Commission works closely with the Sixth Committee of the UN General Assembly and submits its drafts to governments for comments and observations.[92] But it is a notorious fact that only a small minority of governments actually engages with the Commission's works. While states could be expected to be more pro-active when issues salient to their interestsare at stake ,[93] for a variety of reasons, a great majority of states do not react to the Commission's drafts even when they are invited and encouraged to do so. Some countries may be unaware of the details of the Commission's work due to the sheer amount of what they are expected to follow.[94] Others experience a severe lack of dedicated personnel or expertise.[95] There are also strategic reasons, having to do with states' unwillingness to tie their hands with public positions.[96] As Sandesh Sivakumaran points out, 'States tend not to want to formulate their position on an issue in the abstract; rather, they prefer to wait for situations in which they have to set out their position, for example, in pleadings before a court.'[97]

Despite the importance of the issue of state authority in treaty interpretation for all states, the Special Rapporteur's position about the legal effects of subsequent agreements and subsequent practice did not fare differently. Very few states engaged with the Special Rapporteur's position and only Greece[98] and Poland[99] objected to it, which enabled the Special Rapporteur to state that 'most States agreed' with the proposition that 'subsequent agreements and subsequent practice of the parties [do not] necessarily possess a conclusive, or legally binding effect'.[100] In other words, we are witnessing here a case of 'collective action incapacity'[101]

[92] For the interaction of the Commission with governments, see Danae Azaria, 'Codification by Interpretation: The International Law Commission as an Interpreter of International Law' (2020) 31 European Journal of International Law 188–89.

[93] Krisch and Yildiz (n 10).

[94] Sivakumaran (n 7) 382 (stating that '[i]nternational lawmaking and law-shaping bodies and processes have proliferated to such an extent that if State officials sought to respond to each and every output a state-empowered entity issued, they might have to spend all day, every day on this task').

[95] ibid 382–83; see also Yves Daudet, 'Rapport général' in *Société française pour le droit international, Colloque d'Aix-en-Provence* (Pedone 1999) 129, 164.

[96] Ramma Pradas Dhokalia, 'Reflections on International Law-Making and its Progressive Development in the Contemporary Era of Transition' in Raghunandan Pathak and Ramma Pradas Dhokalia (eds), *International Law in Transition—Essays in Memory of Judge Nagendra Singh* (Martinus Nijhoff 1992) 203, 226; Azaria (n 92) 191.

[97] Sivakumaran (n 7) 383. A seasoned governmental legal advisor once reported that a colleague from another country who was asked what his government's choice was between the principle of equidistance and equitable principles in the field of maritime delimitation replied that the response depended on which part of the country's costs was at issue. Lacharrière (n 44) 183.

[98] UNGA Sixth Committee, 'Summary Record of the 24th meeting' (31 October 2014) UN Doc A/C.6/69/SR.24, para 89.

[99] UNGA Sixth Committee, 'Summary Record of the 19th meeting' (30 October 2013) UN Doc A/C.6/68/SR.19, para 12.

[100] 'Fifth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur' (2018) UN Doc A/CN.4/715, para 30. The International Court of Justice interpreted the absence of reactions to the works of the International Law Commission as evidence of *opinio iuris*, see *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Judgment) [2012] ICJ Rep 99 [77].

[101] Krisch and Yildiz (n 10).

empowering the Commission 'to fill the void left by the lack of response on the part of States'.[102]

What may have also helped with the Commission's position is that the statement that subsequent agreements and subsequent practice are not necessarily conclusive or legally binding only appeared in the Commentary and not in Conclusions as such. It is true that Conclusion 10 states that a subsequent interpretive 'agreement may, but need not, be legally binding for it to be taken into account'. But, as pointed out by a member of the Commission, this provision has to do with 'the legal nature or form of the agreement, rather than its consequence for legal interpretation'.[103] In other words, the provision makes clear that informal agreements or simple common understanding that may not take the form of a formally binding agreement can also be taken into account in treaty interpretation. However, the Special Rapporteur entertained the confusion between the form and effects of interpretive agreements. For instance, Poland's objection to the proposition that subsequent agreements are not necessarily binding was mentioned in the Fifth Report, but the Special Rapporteur pointed out that the objection would be dealt with in the context of the draft conclusion stating that a subsequent interpretive 'agreement may, but need not, be legally binding for it to be taken into account'.[104] In the same report, the Special Rapporteur even listed some states such as Austria and the UK as supporting his view about the legal weight of interpretive agreements while those states only supported the proposition about the legal nature or form of those agreements.[105]

4. Conclusion

Even though it has not received much attention so far, one of the most remarkable aspects of the recent work of the ILC on subsequent agreements and subsequent practice is its attempt to revisit state authority in treaty interpretation. While the proposition that join interpretive agreements are binding on treaty interpreters tended to be taken for granted, including by the Commission itself in its prior work, the recently adopted Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties deny that such agreements are necessarily binding.

This contribution attempted to account both for the traditional authority of joint interpretive agreements and the approach promoted by the Commission by building on a conceptualization of authority as a function of attractiveness. State

[102] Sivakumaran (n 7) 385.
[103] 'Summary Record of the 3391st meeting' (1 May 2018) UN Doc A/CN.4/SR.3391, 9.
[104] 'Fifth Report on Subsequent Agreements and Subsequent Practice' (n 100) 10.
[105] ibid 10, fn 56.

authority in treaty interpretation has long enjoyed the advantage of obviousness and persuasiveness in the international legal order, given the state-centric nature of international law, the dominance of the intention-focused treaty interpretation model, and the lack of plausible alternatives. But the Commission was able to capitalize on various factors challenging that 'obviousness' in order to open the black box of state authority in treaty interpretation.

In view of the institutional authority of the Commission, its position that the joint interpretation of a treaty offered by its parties is not necessarily binding is very likely to be influential in practice despite the 'soft' form of the Conclusions. As a matter of fact, the Special Rapporteur's explanation as to why interpretive agreements are not necessarily binding under the Vienna Convention has already been used in investment arbitration. [106] What is more remarkable here, however, is that the 'states as drivers of change processes of international law' model is called into question not just as a matter of practice—as reflected in the other contributions to this volume—but also in doctrinal construction in a rather traditional 'law-shaping'[107] institution such as the ILC.

[106] See *Bilcon of Delaware et al v Government of Canada*, PCA Case No 2009-04 (Award on Jurisdiction and Liability) 17 March 2015, para 430; ICSID, *Magyar Farming Company v Hungary* (n 65) para 218.

[107] Sivakumaran (n 7) 382.