

# Chapter 1

## Introduction

*Auctoritas, non veritas facit legem.\**

### 1.1 Preliminary Reflections upon Interpretative Power

In some ways, concluding a treaty is like dropping a message in a bottle into the sea. Its contracting parties carefully contemplated what they might agree on; they sought to reach genuine compromises or attempted to conceal irreconcilable disagreement. Eventually, they succeeded in agreeing on one particular treaty. In doing so, they granted rights or undertook obligations vis-à-vis each other, or otherwise shaped the international legal order within which they exist.

But irrespective of how much care was laid into the treaty's drafting process, its parties will not have succeeded in creating a perfect agreement. The treaty may, for example, witness developments of a political, social, or scientific nature that were unforeseeable. When establishing the North Atlantic Treaty Organisation (NATO) in 1949,<sup>1</sup> its founding members hardly envisaged the dimension of new threats such as international terrorism, mass influx of refugees, or illicit drug trafficking that emerged after the Cold War. Similarly, in 1929 the parties to the Warsaw Convention<sup>2</sup> only

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\* Thomas Hobbes, *Leviathan, sive De materia, forma, & potestate civitatis ecclesiasticæ et civilis* (2<sup>nd</sup> edn, Typis Joannis Thomsonii 1678) 133.

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<sup>1</sup> North Atlantic Treaty (signed 4 April 1949, entered into force 24 August 1949) 34 UNTS 243 (NATO Treaty).

<sup>2</sup> Convention for the Unification of Certain Rules relating to the International Carriage by Air (signed 12 October 1929, entered into force 13 February 1933) 137 LNTS 11 (Warsaw Convention).

vaguely expected that airplanes would become a means of mass transport one day;<sup>3</sup> or that medical knowledge would allow detecting physical causes for particular psychic injuries. Such cases raise the question whether a treaty is capable of operating in an evolving environment. If its parties cannot agree on amending the treaty and if it is too inflexible for informal adaptation, it may ultimately ‘fall into obsolescence’.<sup>4</sup>

In addition to this general challenge, which becomes increasingly acute once a treaty reaches a certain age, every treaty inevitably suffers from the inherent imperfections of human language. The words and phrases that make up a treaty hardly ever carry only one single meaning. Almost every treaty is ambiguous.<sup>5</sup> To resolve this ambiguity and to determine their correct meaning at a given moment in time and in a given context, treaties are subject to a process called ‘interpretation’.<sup>6</sup> During their lives, treaties are interpreted by different actors such as international courts and tribunals, international governmental and non-governmental organisations (IOs and NGOs), executives and legislatures of the contracting parties, and, last but not least, domestic courts. Applying a treaty without having (consciously or unconsciously) determined its meaning is almost impossible.<sup>7</sup>

Interpreters therefore wield an enormous but often underestimated power. Like someone who receives a message in a bottle, they are called on to decipher the meaning of a document without positively knowing what it has been created for. The outcome of their attempt to do so can be assessed in multiple ways. It can be assessed in terms of convincing or unconvincing, morally right or wrong, or politically suitable or unsuitable. But from a legal perspective, the interpretative outcome should, in the first place, be assessed in terms of correct or incorrect. Treaties are not concluded by accident. They 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.’<sup>8</sup> A ‘correct’ interpretation is not the one which the interpreter personally considers suitable. Instead,

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<sup>3</sup> While the first scheduled airline flight took off in 1914, the commercial aviation industry did not grow significantly until after World War II, see Tom Heppenheimer, *Turbulent Skies—The History of Commercial Aviation* (Wiley & Sons 1995) 1; Isabella Diederiks-Verschoor and Pablo Mendes de Leon, *An Introduction to Air Law* (9th edn, Kluwer 2012) 3.

<sup>4</sup> Georg Nolte, ‘Annex A—Treaties over Time—In Particular: Subsequent Agreement and Practice’ in ILC, ‘Report of the International Law Commission on the Work of its 60th Session’ (5 May–6 June and 7 July–8 August 2008) UN Doc A/63/10, 365.

<sup>5</sup> See in particular Herbert Hart, *The Concept of Law* (3rd edn, OUP 2012) 124 f; see further Sir Hersch Lauterpacht, ‘Some Observations on Preparatory Work in the Interpretation of Treaties’ (1935) 48 HLR 549, 571.

<sup>6</sup> See 1.3.1.2.

<sup>7</sup> Wolfram Karl, *Vertrag und spätere Praxis im Völkerrecht—Zum Einfluss der Praxis auf Inhalt und Bestand völkerrechtlicher Verträge* (repr, Springer 2012) 1, 22.

<sup>8</sup> 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) 31.

a correct interpretation is the one that comes closest to implementing this concordant will. Otherwise, concluding treaties would be utterly pointless.

In contrast to many domestic legal systems, public international law offers legally binding rules that regulate the interpretative process. These rules, which are commonly considered as reflecting customary international law,<sup>9</sup> are laid down in articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT).<sup>10</sup> Article 31 VCLT contains the so-called ‘general rule’ of interpretation.<sup>11</sup> This ‘general rule’ consists of the various elements that are, in a single combined operation,<sup>12</sup> to be taken into account as primary means of interpretation. In particular, article 31(1) VCLT requires that treaties are to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 32 VCLT stipulates supplementary means of interpretation and article 33 VCLT offers rules for the interpretation of treaties that are authenticated in two or more languages.<sup>13</sup>

As part of the general rule, article 31(3) VCLT provides that there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (a), and any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (b). In addition, article 32 VCLT implicitly authorises that recourse may be had to subsequent agreements and subsequent practice that do not meet all criteria of the general rule (‘other’ subsequent agreements and subsequent practice).<sup>14</sup> Formally enjoying the same status as any other primary or supplementary means of interpretation, subsequent agreements and subsequent practice (hereinafter in short referred to as ‘subsequent conduct’)<sup>15</sup> are a peculiarity that has received surprisingly little attention so far. In

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<sup>9</sup> Whereas the customary status of arts 31 and 32 VCLT is widely acknowledged, the customary status of art 33 VCLT is more doubtful. For more details, see 3.2.

<sup>10</sup> Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention; VCLT).

<sup>11</sup> See 3.3.1.

<sup>12</sup> See 3.3.3.

<sup>13</sup> See 3.3.2.

<sup>14</sup> Draft conclusion 1(4) in ILC, ‘Report of the International Law Commission on the Work of its 65<sup>th</sup> Session’ (6 May–7 June and 8 July–9 August 2013) UN Doc A/68/10, 13.

<sup>15</sup> See Georg Nolte, ‘Report 1—Jurisprudence of the International Court of Justice and Arbitral Tribunals of Ad Hoc Jurisdiction relating to Subsequent Agreements and Subsequent Practice’ in id (ed), *Treaties and Subsequent Practice* (OUP 2013) 174. cf also *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112, 122 [28]. The ILC did not expressly endorse this terminology. Nevertheless, it also occasionally used the term ‘subsequent conduct’ as a general category, see eg draft conclusion 4 with commentary in ILC, ‘Report of the International Law Commission on the Work of its 65<sup>th</sup> Session’ (6 May–7 June and 8 July–9 August 2013) UN Doc A/68/10, 34 [11]. Other authors have rejected the generic term ‘subsequent conduct’ as being inappropriate, albeit for different reasons. According to

the academic discourse, they have mostly been perceived as tools to informally adapt treaties to changing conditions. While some commentators focused on the benefits of informal adaptation over formal amendment mechanisms, others highlighted its dangers by evoking the image of ‘treaties set on wheels.’<sup>16</sup> This important but nonetheless one-sided focus has neglected another peculiarity.

Subsequent agreements and subsequent practice open the interpretative process for more actors than only the individual interpreter himself. Via subsequent agreements and subsequent practice, the contracting parties retain considerable influence on their treaty. This actually distinguishes the contracting parties from individual interpreters. The interpreter is merely called on to identify the correct meaning of the terms of the treaty. As this study is going to show, the parties, in contrast, can, through their subsequent conduct, actively influence the treaty’s meaning. Hence it is in fact misleading to compare treaties to messages in a bottle. Sender and recipient of this message regularly do not communicate with each other directly and in real time. Nevertheless, the sender may furnish the latter with hints as to how his message ought to be understood. From this perspective, articles 31 and 32 VCLT do not merely establish another technical rule of interpretation. Instead, they also contain a more principled decision as to how interpretative power shall be distributed and exercised.

The exact scope of this power not only depends on how articles 31 and 32 VCLT are understood in the abstract. It also depends on how interpreters approach them in interpretative reality. This reality most probably deviates from the ‘ideal’ conception of subsequent conduct under the Vienna rules. Are interpreters willing to accept that the contracting parties are the ‘true masters’ of the treaty and retain some interpretative power over its meaning? Do interpreters recognise that the general rule of interpretation evenly vests this power in the parties as a whole? Or do interpreters instead concede to some parties a stronger influence on the treaty’s meaning than to others? Which types of subsequent agreements and subsequent practice are

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Richard Gardiner, *Treaty Interpretation* (2<sup>nd</sup> edn, OUP 2015) 259, the term ‘conduct’ merely denoted *any* behaviour of States. For this reason, ‘subsequent conduct’ could not be used to refer to subsequent practice because the latter implied a certain degree of repetition. As this study does not follow the narrow understanding of ‘practice’ advocated by Gardiner, his reasoning does not mitigate against using the term ‘subsequent conduct’ as suggested. For a broader understanding of ‘practice’, see 4.3.1.1 and draft conclusion 4 with commentary in ILC, ‘Report of the International Law Commission on the Work of its 65<sup>th</sup> Session’ (6 May–7 June and 8 July–9 August 2013) UN Doc A/68/10, 31 f, esp 35 [16]. Karl, *Vertrag und spätere Praxis* (n 7) 112, in contrast, argues that the term ‘subsequent conduct’ implied that it was limited to conduct (or behaviour) of State parties only. Since Karl does not restrict practice under art 31(3)(b) VCLT to State practice, he rejects ‘subsequent conduct’ as a generic term for both subsequent agreements and subsequent practice, too. Agreeing that the term ‘practice’ encompasses the practice of parties and non-party entities alike (see 4.3.1.2), this study, however, submits that the ordinary meaning of the term ‘conduct’ is open to a similarly broad construction.

<sup>16</sup> Georg Ress, ‘Verfassungsrechtliche Auswirkungen der Fortentwicklung völkerrechtlicher Verträge—Überlegungen zum Verhältnis des Grundgesetzes zur Europäischen Wirtschaftsgemeinschaft und zur Europäischen Menschenrechtskonvention’ in Walther Fürst, Roman Herzog, and Dieter Umbach (eds), *Festschrift für Wolfgang Zeidler* (de Gruyter 1987) 1779.

regarded as an admissible exercise of interpretative power under articles 31 and 32 VCLT? And how does this exercise of interpretative power impact on the treaty's meaning?

Interpretative practice that may shed light on questions like these occurs on various occasions. Unlike in the past, a large part of it is now generated at the national level and through the jurisprudence of domestic courts.<sup>17</sup> With its increasing importance, treaty law now also regulates matters that used to be largely governed by domestic law.<sup>18</sup> When domestic courts render a decision, they can no longer exclusively rely on domestic legal rules but increasingly have to apply treaty law and international law rules of treaty interpretation as well.<sup>19</sup> Today, domestic courts generate much interpretative practice. Their jurisprudence promises to vividly reflect the difficulties in applying subsequent agreements and subsequent practice. In an ideal world, interpreters such as domestic courts may be conceived as trustees that faithfully attempt to implement the contracting parties' concordant will. But in reality, they may pursue their very own agenda and—consciously or unconsciously—divert from this will.

As interpreters, domestic courts act in a way that can be described as a 'dédoublement fonctionnel' ('role splitting').<sup>20</sup> Although they are primarily State organs, they also effectively act as international agents. Thus, domestic courts fall between two stools. On the one hand, they are supposed to apply international law rules of treaty interpretation and to maintain neutrality instead of unduly discriminating in favour of or against particular contracting parties. On the other hand, domestic courts are actors created by a particular national legal system. They are probably more familiarised with domestic interpretative rules than with the requirements under articles 31–33 VCLT; their own legal system may impose constitutional impediments for relying on subsequent agreements or subsequent practice; they may simply lack the necessary language skills to be able to identify subsequent agreements or subsequent practice; and they may be influenced by particular cultural or political values and feelings of loyalty towards their own State, which prevent them from giving equal weight to each party's conduct.<sup>21</sup>

<sup>17</sup> See generally Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 AJIL 241.

<sup>18</sup> Francesco Francioni, 'International Law as a Common Language for National Courts' (2001) 36 Tex Int'l LJ 587, 587.

<sup>19</sup> cf Michael Wood's Foreword in Gardiner, *Treaty Interpretation* (n 15) xv.

<sup>20</sup> For his theory of 'dédoublement fonctionnel', see Georges Scelle, 'Le phénomène du dédoublement fonctionnel' in Walter Schätzel (ed), *Rechtsfragen der internationalen Organisation—Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Klostermann 1956) 324 f. Instead of exclusively focusing on domestic courts, Scelle adopts a broader perspective by examining both adjudicative, legislative, and law enforcing functions at the national and international level.

<sup>21</sup> cf Reem Bahdi, 'Truth and Method in the Domestic Application of International Law' (2002) 15 CJLJ 255, 261, who describes the pitfalls of cultural relativism when interpreting international legal instruments; Eyal Benvenisti, 'Judicial Misgivings regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 EJIL 159, 161 f, who criticises that domestic courts tended to protect 'short-term governmental interests.' See further id, 'Comments on the Systemic Vision of National Courts as Part of an International Rule of Law' (2012) 4 JRLS 42, 45.

In the end, the research question that guides this study is about interpretation and power: *based on the jurisprudence of domestic courts, this study aims at finding out how subsequent agreements and subsequent practice within the meaning of articles 31 and 32 VCLT have been applied in interpretative practice.* In other words, it is not asked whether domestic courts faithfully apply articles 31 and 32 VCLT. The latter question is one that lends itself to being answered in the affirmative or in the negative. Still, this question also presupposes a reasonably clear understanding of subsequent agreements and subsequent practice under the Vienna rules. Such understanding, however, still appears to be lacking. By deliberately choosing an open-ended question instead, this study leaves room for the interpretative practice of domestic courts to challenge and shape the perception of these means of interpretation.

## 1.2 Current State of Research

Until recently, subsequent conduct has attracted comparatively little attention. This has changed since the International Law Commission (ILC) decided to include the topic ‘Treaties over Time’ in its long-term programme of work in 2008.<sup>22</sup>

Initially, the ILC approached the topic in the form of a Study Group chaired by Georg Nolte.<sup>23</sup> Based on successive reports prepared by its Chairman, the Study Group considered the jurisprudence of the International Court of Justice (ICJ) and arbitral tribunals of *ad hoc* jurisdiction,<sup>24</sup> jurisprudence under special regimes,<sup>25</sup> and subsequent agreements and subsequent practice of States outside of judicial or quasi-judicial proceedings.<sup>26</sup> In 2012, the ILC changed its working format and appointed Nolte as Special Rapporteur for the topic ‘Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties’.<sup>27</sup>

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<sup>22</sup> ILC, ‘Report of the International Law Commission on the Work of its 60<sup>th</sup> Session’ (5 May–6 June and 7 July–8 August 2008) UN Doc A/63/10, 355 [353]. See also UNGA Res 63/123 (11 December 2008) UN Doc A/RES/63/123. The decision to include the topic in its long-term programme of work originates in a proposal by Georg Nolte, which was contained in an informal working paper and which was later published as Annex A to the Commission’s Report of 2008, see Nolte, ‘Annex A’ (n 4).

<sup>23</sup> ILC, ‘Report of the International Law Commission on the Work of its 61<sup>st</sup> Session’ (4 May–5 June and 6 July–7 August 2009) UN Doc A/64/10, 360 [218]–[19].

<sup>24</sup> Nolte, ‘Report 1—ICJ and Arbitral Tribunals’ (n 15) 169–209.

<sup>25</sup> *id.*, ‘Report 2—Jurisprudence under Special Regimes relating to Subsequent Agreements and Subsequent Practice’ in *id.* (ed), *Treaties and Subsequent Practice* (OUP 2013) 210–306.

<sup>26</sup> *id.*, ‘Report 3—Subsequent Agreements and Subsequent Practice of States outside of Judicial or Quasi-Judicial Proceedings’ in *id.* (ed), *Treaties and Subsequent Practice* (OUP 2013) 307–86.

<sup>27</sup> ILC, ‘Report of the International Law Commission on the Work of its 64<sup>th</sup> Session’ (7 May–1 June and 2 July–3 August 2012) UN Doc A/67/10, 6 [22].

In 2013, the Commission considered Special Rapporteur Nolte's first report<sup>28</sup> and provisionally adopted five draft conclusions with commentaries.<sup>29</sup> These annotated conclusions address the general rule and means of treaty interpretation (draft conclusion 1), subsequent agreements and subsequent practice as authentic means of interpretation (draft conclusion 2), the interpretation of treaty terms as capable of evolving over time (draft conclusion 3), the definition of subsequent agreement and subsequent practice (draft conclusion 4), and the attribution of a treaty related practice to a State (draft conclusion 5).

In 2014, the ILC considered Special Rapporteur Nolte's second report<sup>30</sup> and provisionally adopted five further draft conclusions with commentaries.<sup>31</sup> These annotated conclusions elaborate on the identification of subsequent agreements and subsequent practice (draft conclusion 6), possible effects of subsequent agreements and subsequent practice in interpretation (draft conclusion 7), the weight of subsequent agreements and subsequent practice as a means of interpretation (draft conclusion 8), the agreement of the parties regarding the interpretation of a treaty (draft conclusion 9), and decisions adopted within the framework of a Conference of States Parties (COP) (draft conclusion 10).

In 2015, the ILC considered Special Rapporteur Nolte's third report<sup>32</sup> and provisionally adopted an annotated draft conclusion on subsequent agreements and subsequent practice regarding the interpretation of constituent instruments of international organizations (draft conclusion 11).<sup>33</sup> Having analysed subsequent conduct in great depth, the ILC and its Special Rapporteur have not addressed the interpretative practice of domestic courts until this study was finalised and made available to the Special Rapporteur.

Drawing on this study's findings,<sup>34</sup> the Special Rapporteur published his fourth report in 2016. This report proposed draft conclusions on the pronouncements of expert bodies (draft conclusion 12) and on domestic court decisions (draft conclusion 13). Reaffirming this study's findings, draft conclusion 13 contains recommendations and guidelines for domestic courts.<sup>35</sup> When the ILC considered the report,

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<sup>28</sup> Georg Nolte, 'First Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation' (19 March 2013) UN Doc A/CN.4/660.

<sup>29</sup> ILC, 'Report of the International Law Commission on the Work of its 65<sup>th</sup> Session' (6 May–7 June and 8 July–9 August 2013) UN Doc A/68/10, 12–48.

<sup>30</sup> Georg Nolte, 'Second Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation' (26 March 2014) UN Doc A/CN.4/671.

<sup>31</sup> ILC, 'Report of the International Law Commission on the Work of its 66<sup>th</sup> Session' (5 May–6 June and 7 July–8 August 2014) UN Doc A/69/10, 170–217.

<sup>32</sup> Georg Nolte, 'Third Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (7 April 2015) UN Doc A/CN.4/683.

<sup>33</sup> ILC, 'Report of the International Law Commission on the Work of its 67<sup>th</sup> Session' (4 May–5 June and 6 July–7 August 2015) UN Doc A/70/10, 84–103.

<sup>34</sup> Georg Nolte, 'Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (7 March 2016) UN Doc A/CN.4/694, 37.

<sup>35</sup> *ibid* 43.



it regarded draft conclusion 13 as ‘somewhat unusual’ because it did not simply ‘clarify ... the pertinent rules of interpretation as such’ but made recommendations addressing specific actors.<sup>36</sup> It therefore hesitated to adopt draft conclusion 13 and the Special Rapporteur withdrew his proposal in that regard.<sup>37</sup> At the same time, he urged the Commission to include findings from the report in the commentaries to the draft conclusions to further nuance and improve them.<sup>38</sup>

In scholarly literature, subsequent conduct has only recently begun to increasingly attract attention, too. An instructive early work is a monograph by Wolfram Karl, which was originally published in 1983.<sup>39</sup> This monograph is not primarily concerned with subsequent practice pursuant to articles 31 and 32 VCLT. Instead, it addresses a more general notion of subsequent practice, whose effects are not limited to the interpretation of treaties but also encompass their modification and termination. Although Karl occasionally mentions domestic court cases to illustrate his reasoning, he does not systematically discuss domestic jurisprudence.

Other commentators have focused on important specific aspects of the topic such as subsequent conduct and evolutive interpretation<sup>40</sup> or subsequent conduct and international investment or trade law.<sup>41</sup> Moreover, subsequent conduct is also covered by more general contributions on interpretation such as the treatises by Richard Gardiner<sup>42</sup> and Ulf Linderfalk,<sup>43</sup> or the commentaries on the VCLT that have been published by Oliver Dörr and Kerstin Schmalenbach,<sup>44</sup> Mark Villiger,<sup>45</sup> or

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<sup>36</sup> ILC, ‘Provisional Summary Record of the 3303<sup>rd</sup> Meeting’ (28 June 2016) UN Doc A/CN.4/SR.3303, 13.

<sup>37</sup> cf id, ‘Provisional Summary Record of the 3307<sup>th</sup> Meeting’ UN Doc A/CN.4/SR.3307, 6.

<sup>38</sup> cf *ibid*, 6.

<sup>39</sup> Karl, *Vertrag und spätere Praxis* (n 7). See also generally Rahim Moloo, ‘When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation’ (2013) 31 *Berkeley J Int’l L* 39.

<sup>40</sup> Eg Julian Arato, ‘Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences’ (2010) 9 *Law & Prac Int’l Cts & Tribunals* 443; Rahim Moloo, ‘Changing Times, Changing Obligations? The Interpretation of Treaties over Time’ (2012) 106 *ASIL PROC* 261; id, ‘The Relevance of Subsequent Party Conduct’ (n 39) 51 f.

<sup>41</sup> Eg Anthea Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 *AJIL* 179; Alexander Feldman, ‘Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice Derived from WTO Dispute Settlement’ (2009) 41 *JILP* 655.

<sup>42</sup> Gardiner, *Treaty Interpretation* (n 15).

<sup>43</sup> Ulf Linderfalk, *On the Interpretation of Treaties—The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007).

<sup>44</sup> Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties—A Commentary* (Springer 2012).

<sup>45</sup> Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009).



Olivier Corten and Pierre Klein.<sup>46</sup> Yet, none of these works focuses in greater detail on the interpretative practice of domestic courts.

Instructive initial overviews of subsequent conduct in domestic jurisprudence have been offered by authors such as David Bederman and Evan Criddle,<sup>47</sup> who addressed subsequent agreements and subsequent practice alongside other means of interpretation and based on a defined part of US jurisprudence. Similar works have been published in Germany, Austria, and the UK.<sup>48</sup> But while these surveys examine the interpretative practice of domestic courts, they only touch upon subsequent conduct in passing.

On the whole, a more comprehensive analysis of how subsequent agreements and subsequent practice have been applied in the interpretative practice of domestic courts is therefore still missing. In particular, there has been no attempt to develop a deeper understanding of subsequent agreements and subsequent practice in the light of their historical origins and the Vienna rules of interpretation as a whole and to critically re-examine this understanding against the background of domestic jurisprudence. By filling this gap, this study aims at drawing empirically-informed conclusions not only about a sensible approach to article 31(3)(a) and (b) and article 32 VCLT but also, on a more general level, about the distribution of interpretative power upon which these provisions are founded.

### 1.3 Scope of this Study

Based on the jurisprudence of domestic courts, this study examines how subsequent agreements and subsequent practice within the meaning of articles 31 and 32 VCLT have been applied in interpretative practice. Its scope is therefore limited in several respects.

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<sup>46</sup> Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties—A Commentary* (OUP 2011).

<sup>47</sup> David Bederman, 'Revivalist Canons and Treaty Interpretation' (1993) 41 UCLA L Rev 953; Evan Criddle, 'The Vienna Convention on the Law of Treaties in US Treaty Interpretation' (2003) 44 Va J Int'l L 431.

<sup>48</sup> See in particular Ondolf Rojahn, 'Die Auslegung völkerrechtlicher Verträge in der Entscheidungspraxis des Bundesverwaltungsgerichts' in Rudolf Geiger and Wilfried Fiedler (eds), *Völkerrechtlicher Vertrag und staatliches Recht vor dem Hintergrund zunehmender Verdichtung der internationalen Beziehungen—Symposion vom 28. bis 30. Januar 1999 in Leipzig* (Nomos 2000); Bernd Meyring, *Die Entwicklung zustimmungsbedürftiger völkerrechtlicher Verträge nach ihrem Abschluss und ihre Auswirkungen in der deutschen Rechtsordnung* (Berliner Wissenschafts-Verlag 2001); Christoph Schreuer, 'The Interpretation of Treaties by Domestic Courts' (1971) 45 BYIL 255; Francis Mann, 'The Enforcement of Treaties by English Courts' (1958) 44 Transactions of the Grotius Society 29; Ian Sinclair, 'The Principles of Treaty Interpretation and their Application by the English Courts' (1963) 12 ICLQ 508; Francis Jacobs and Shelley Roberts (eds), *The Effect of Treaties in Domestic Law* (Sweet & Maxwell 1987).

### 1.3.1 Treaty Interpretation

Subsequent agreements and subsequent practice are two of those means of treaty interpretation that are laid down in articles 31–33 VCLT. As such, they are generally considered to reflect customary international law rules of treaty interpretation.<sup>49</sup> In consequence, this study is concerned with the interpretation of a particular source of public international law, namely treaties. Other sources of public or private international law, national law, or private or public law contracts are not considered by this work.

#### 1.3.1.1 Treaties

‘Treaties’ for the purpose of this study are those agreements that satisfy the requirements of article 2(1)(a) VCLT. This provision defines ‘treaties’ as international agreements concluded between States in written form and governed by international law. The term ‘agreement’ refers to any form of a ‘meeting of minds’ between the parties.<sup>50</sup> This ‘meeting of minds’ describes the core idea behind treaties. But article 2(1)(a) VCLT stipulates further requirements. Firstly, the agreement must have been concluded between States.<sup>51</sup> Agreements between IOs or between States and IOs are not covered by the Convention. Secondly, they must have been concluded in writing. This is because written agreements possess a stronger probative value than unwritten ones.<sup>52</sup> Hence, there must be some ‘written record’ of the terms of the agreement.<sup>53</sup> And thirdly, the agreement must be ‘governed by international law’.

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<sup>49</sup> See 3.2.

<sup>50</sup> Villiger, *Commentary on the VCLT* (n 45) 77; see also Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (3<sup>rd</sup> edn, Stevens 1957) vol 1, 491.

<sup>51</sup> Jan Klabbbers, *The Concept of Treaty in International Law* (Kluwer 1996) 47 f. As regards the international law conditions for statehood, see generally James Crawford, ‘State’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012).

<sup>52</sup> Philippe Gautier, ‘Article 2—1969 Vienna Convention’ in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties—A Commentary* (OUP 2011) 38. To explain why the Convention only covers written agreements, Gautier further contends that treaties were commonly concluded in writing anyway. This, however, may be doubted. As the ILC points out, ‘in modern practice international agreements are’ indeed ‘frequently concluded... by less formal instruments.’ See ILC, ‘Draft Articles on the Law of Treaties with Commentaries’ [1966-II] YBILC 187, 189 [7].

<sup>53</sup> Gautier, ‘Article 2’ (n 52) 38. As regards the difficult question when an agreement is governed by international law, which eventually hinges on the intentions of the parties, see Jan Klabbbers, ‘Informal Agreements in International Law: Towards a Theoretical Framework’ (1994) 5 FYBIL 267, 278 f.

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