AUTHENTIC INTERPRETATIONS AND INTERNATIONAL COURTS: LIKE CALVIN AND HOBBES OR TOM AND JERRY?

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ABSTRACT

The paper focuses, at a legal and theoretical level, on the relationship between international courts and treaty members adopting authentic interpretations. Should this relationship be like that between Calvin and Hobbes: imaginary best friends, albeit with tension and disputes regarding the applicable rules? Or should the relationship be more like that between Tom and Jerry: constantly fighting, trying to outwit each other, and attempting to win the eternal battle as to who is the smartest? To translate these cartoon analogies into concrete legal and theoretical terms, the paper explores the following two questions: First, to what extent are authentic interpretations binding on international tribunals? And, second, are authentic interpretations a useful tool for enhancing the legitimacy of international courts? The paper concludes with a proposition of the ideal relationship between courts and states in relation to authentic interpretations.

TABLE OF CONTENTS

The idea that states can and should influence the jurisprudence of international courts through authentic interpretations has gained popularity in recent years. The first and most important area promoting this idea developed in international investment law, for the judgments of international investment arbitral tribunals were criticized for being incoherent and for not taking into account the views and practices of the state parties, or not doing so sufficiently.[1] Academics

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argue that authentic interpretations are necessary to reduce incoherence and increase predictability,[2] while rebalancing the interests of investors and states' rights in order to preserve the legitimacy and credibility of the investor-state dispute settlement (ISDS) system.[3] In 2011, the United Nations Conference on Trade and Development even issued "Interpretation of IIAs: What States Can Do" urging states to use their interpretative powers to guide the interpretative process of arbitral tribunals.[4] Within the realm of the North American Free Trade Agreement (NAFTA), in 2001, the NAFTA Free Trade Commission, comprised of "cabinet-level representatives of the Parties or their designees,"[5] issued its first binding interpretation for NAFTA Tribunals[6] in accordance with article 1131 paragraph 2 of NAFTA.[7] Recently concluded multilateral investment agreements[8] contain provisions modeled on article 1131 paragraph 2 of NAFTA for common interpretations by the parties that are binding on the Tribunals. A recent example is article 26.1 paragraph 5(e) of the Comprehensive and Economic Trade Agreement (CETA), which states that the CETA Joint Committee, comprising of representatives of the European Union and Canada, may "*adopt interpretations of the provisions of this Agreement, which shall be binding on tribunals established under Section F of Chapter Eight (Resolution of investment disputes between investors and states) and Chapter Twenty-Nine (Dispute Settlement)*."[9] The recently negotiated successor agreement to NAFTA, the United States-Mexico-

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1. Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 179 (2010); *see also* Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals: An Empirical Analysis*, 19 EUR. J. INT'L L. 301, 301–03 (2008), for the empirical analysis.

2. *See, e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1604–05 (2005) (summarizing, as an example, the Federal Trade Commission's interpretation of NAFTA).

3. Margie-Lys Jaime, *Relying upon Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements*, 46 GEO. J. INT'L. L. 261, 261, 264 (2014).

4. U.N. Conference on Trade and Development, *IIA Issue Note: Interpretation of IIAs: What States Can Do*, No. 3, at 15, U.N. Doc. UNCTAD/WEB/DIAE/IA/2011/10 (Dec. 2011).

5. North American Free Trade Agreement, Can.-Mex.-U.S., art. 2001 ¶ 1, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

6. *Notes of Interpretation of Certain Chapter 11 Provisions*, FOREIGN TRADE INFORMATION SYSTEM (July 31, 2001), http://www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp.

7. NAFTA, *supra* note 5, art. 1131§ 2 ("An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.").

8. *E.g.*, Association of Southeast Asian Nations, *ASEAN Comprehensive Investment Agreement*, art. 40, §§ (2)–(3) [hereinafter ASEAN].

9. Comprehensive Economic and Trade Agreement, art. 26.1(5)(e), Canada-EU, Sept. 21, 2017, 1869 U.N.T.S. 401 [hereinafter CETA].

Canada Agreement (USMCA),[10] contains similar provisions to article 1131 paragraph 2 of NAFTA in article 30.2 section 2(f)[11] and article 9 paragraph 2 of Annex 14-D Mexico-United States Investment Disputes.[12]

Until now, this tendency towards authentic interpretation has mainly been confined to international economic law, but it is possible that it will spread to other areas of international law[13]—in particular human rights law. For example, the Danish government's proposed draft of the Copenhagen Declaration in 2018[14] can be seen as an unsuccessful attempt by the Danish government to influence the interpretation of the European Convention on Human Rights (ECHR) through a common interpretative declaration.[15]

This paper will therefore focus, at a legal and theoretical level, on the relationship between international courts and treaty members adopting authentic interpretations. Should this relationship be like that between Calvin and Hobbes: imaginary best friends, albeit with tension and disputes regarding the applicable rules? Or should the relationship be more like that between Tom and Jerry: constantly fighting, trying to outwit each other, and attempting to win the eternal

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10. United States-Mexico-Canada Agreement, Can.-Mex.-U.S., *signed* Nov. 30, 2018, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (not in force) [hereinafter USMCA].

11. *Id.* art. 30.2, §2(f) (stating that the Free Trade Commission, composed of government representatives of each Party at the level of Ministers or their designees, may "issue interpretations of the provisions of this Agreement" and stating in footnote 1 "[f]or greater certainty, interpretations issued by the Commission shall be binding for tribunals and panels established under Chapter 14 (Investment) and Chapter 31 (Dispute Settlement)").

12. *Id.* art. 14.D.9(2) (stating "[a] decision of the Commission on the interpretation of a provision of this Agreement under Article 30.2 (Functions of the Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.").

13. In international literature, the discussion of the effects of authentic interpretations is mainly confined to the specific case of international investment law. *See* Roberts, *supra* note 1, at 179 (proposing, in a groundbreaking article, "an interpretive approach that draws more heavily on an important, but significantly underutilized source: the subsequent practice and agreements of treaty parties," for investment treaties.) *See generally* Andreas Kulick, *Investment Arbitration, Investment Treaty Interpretation, and Democracy*, 4 CAMBRIDGE J. INT'L & COMP. L., 441 (2015).

14. The first draft of the Copenhagen Declaration proposed by Denmark contained interpretative guidelines for the ECtHR on how to apply the principle of margin of appreciation and the principle of subsidiarity. The Danish Chairmanship of the Comm. of Ministers of the Council of Eur., *Draft Copenhagen Declaration*, ¶¶ 22–26 (Feb. 5, 2018), https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf.

15. The Danish approach was not followed in the final declaration, which then only summarized the current case law of the ECtHR, and states that the Conference "appreciates the Court's efforts to ensure that the interpretation of the Convention proceeds in a careful and balanced manner." High Level Conference meeting in Copenhagen, *Copenhagen Declaration,* ¶¶ 28, 30 (Apr. 13, 2018) http://justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/copenhagen_declaration.pdf.

battle as to who is the smartest? To translate these cartoon analogies into concrete legal and theoretical terms, the main questions are: First, to what extent are authentic interpretations binding on international tribunals?[16] And, second, are authentic interpretations a useful tool for enhancing the legitimacy of international courts?[17] This paper will conclude with a proposition of the ideal relationship between courts and states in relation to authentic interpretations.

I. AUTHENTIC INTERPRETATIONS AND INTERNATIONAL COURTS: AN UNCLEAR AND DEVELOPING LEGAL SYSTEM

The legal relationship between authentic interpretation and international courts is still unclear. The crucial and current legal question in contemporary international law contemplates the extent to which authentic interpretations are binding on international courts. In this respect, the following categories of authentic interpretation have to be distinguished.

A. The Categories of Authentic Interpretation

The first category is a relatively new phenomenon in international law and can be called a binding authentic interpretation. A binding authentic interpretation exists if an international treaty explicitly provides that a certain interpretation is binding on a particular treaty-based court. The binding authentic interpretation can be made by a specialized treaty body or directly by the treaty parties themselves.

An example of a specialized treaty body is article 26.2 paragraph 1 of the above-mentioned CETA.[18] A similar provision can be found in article 1131 paragraph 2 of NAFTA.[19] Both bodies have to decide by mutual consent,[20] but the NAFTA Free Trade Commission may also otherwise agree.[21] An example of a binding authentic interpretation made directly by the treaty members can be found in article 40 paragraph 3 of the 2009 ASEAN Comprehensive Investment Agreement.[22] The legal regime for these binding authentic interpretations is uncertain. The main unresolved question is the extent to which international tribunals are bound by such an interpretation.[23]

The second category of authentic interpretation is the non-institutionalized

16. See *infra* Part I.

17. See *infra* Part II.

18. CETA, *supra* note 9, art. 26.2(1).

19. NAFTA, *supra* note 5, art. 1131(2); *see* USMCA, *supra* note 10, ch. 14, annex D, art. 14.D.9(2).

20. *See* CETA, *supra* note 9, art. 26.3 ¶ 3 ("The CETA Joint Committee shall make its decisions and recommendations by mutual consent."); NAFTA, *supra* note 5, art. 2001(4).

21. NAFTA, *supra* note 5, art. 2001(4) ("All decisions of the Commission shall be taken by consensus, except as the Commission may otherwise agree"); *see also* USMCA, *supra* note 10, ch. 30, art. 30(3).

22. ASEAN, *supra* note 8, art. 40(3) ("A joint decision of the Member States, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.").

23. See *infra* Part II.B for an analysis of whether authentic interpretations are a useful tool for enhancing the legitimacy of international courts.

authentic interpretation, which can be called a "mere authentic interpretation." In this case, all parties to a treaty adopt a common interpretation of one or more treaty provisions, in the absence of a specific treaty provision. The legal status of a mere authentic interpretation is determined by article 31 paragraph 3(a) of the Vienna Convention of the Law of Treaties (VCLT), which states that, together with the context, "[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" shall be taken into account.[24] The reason that a mere authentic interpretation must be taken into account is, as the International Law Commission has stated several times,[25] that these agreements are "objective evidence of the understanding of the parties as to the meaning of the treaty."[26] The main problems in this context are: What does this mean for an international court? What is the weight of a mere authentic interpretation in the process of interpretation?

Binding and mere authentic interpretations must be distinguished from another type of common and institutionalized treaty interpretation by the parties, which can be called "authoritative interpretations by treaty parties." Some treaties, such as the ICC Statute or the WTO Agreement, contain provisions stating that a certain majority of the treaty members can adopt a common interpretation. For example, article IX:2 of the WTO Agreement specifies that the Ministerial Conference and the General Council will have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.[27] It provides that such an interpretation can be adopted by a majority of three quarters of the WTO Members.[28] In contrast to authentic interpretations, authoritative interpretations are generally adopted by a majority only.

In cases in which treaties treat authoritative interpretations as non-binding, authoritative interpretations have a similar effect to mere authentic interpretations. An example is article 9 paragraph 1 of the ICC Statute, which states that the authoritative interpretation must *assist* the Court in the interpretation and

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24. Vienna Convention on the Law of Treaties art. 31(3)(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

25. *See, e.g.*, *Rep. of the Int'l Law Comm'n on the Work of Its Sixteenth Session*, 19 U.N. GAOR Supp. at 203, U.N. Doc. A/5809 (1964), *reprinted in* [1964] 2 Y.B. Int'l L. Comm'n 16, U.N. Doc. A/CN.4/SER.A/1964/Add.1 ("[A]n agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.").

26. *See* Georg Nolte (Special Rapporteur on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties), *Fifth Rep. on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, ¶¶ 28–32, U.N. Doc. A/CN.4/715 (Feb. 28, 2018) (indicating that this conclusion also received general support of the states); *see also Rep. of the Int'l Law Comm'n on the Work of Its Seventieth Session*, 73 U.N. GAOR Supp. 10, at 23–24, U.N. Doc. A/73/10 (2018) (showing this approach was already adopted in the ILC Commentary on the draft articles on the law of treaties) [hereinafter *Rep. of the Int'l Law Comm'n*].

27. Marrakesh Agreement Establishing the World Trade Organization, art. IX:2, Apr. 15, 1994, 1867 U.N.T.S. 154.

28. *Id.*

application of articles 6, 7, and 8.[29] If the treaty in question provides that the authoritative interpretation is binding, its effect is, in principle, similar to a binding authentic interpretation, with the exception that different rules might apply if the authoritative interpretation was adopted by majority only. An example may be the WTO Agreement. Even though there is no explicit provision on the binding force of the authoritative interpretation, and also until today no practical relevance, academics like Ehlermann, Ehring, and Gazzini argue that the authoritative interpretation is legally binding.[30]

B. International Courts and Binding Authentic Interpretations

The following section is dedicated to the legal regime governing binding authentic interpretations. It considers whether an international tribunal can examine the formal requirements and the material requirements of a binding authentic interpretation, and how it limits an international tribunal's right to interpret.

1. Formal Requirements

If an international court is faced with a binding authentic interpretation, it has the right to review whether the particular interpretation was adopted in accordance with the formal requirements of the relevant treaty. This right means that the court can, for example, examine whether a particular interpretation was adopted by the competent treaty body. The right derives from the fact that only a certain interpretation—for example, the interpretation of the Joint CETA Committee—has binding force.[31] Therefore, the tribunal must examine whether the interpretation has been given in accordance with the relevant treaty provisions.[32]

2. Material Requirement: The Qualification of the Interpretation

The crucial and disputed question is whether a court has the authority to review whether the adopted interpretation is actually an interpretation, rather than a

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29. Mauro Politi, *Elements of Crime*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 43 (Antonio Cassese et al. eds., 2002); Erkin Gadirov & Roger Clark, *art. 9 ICC*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ¶ 31 (Otto Triffterer & Kai Ambos. eds., 3d ed. 2016).

30. Claus-Dieter Ehlermann & Lothar Ehring, *The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements*, 8 J. INT'L ECON. L., 803, 807–08 (2005); Tarcisio Gazzini, *Can Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the WTO Modify the Rights and Obligations of Members?*, 57 INT'L & COMP. L. Q. 169, 169 (2008); Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/AB/R, at 13 (adopted Oct. 4, 1996) (providing an inconclusive interpretation of Article IX:2 of the WTO).

31. *See, e.g.*, CETA, *supra* note 9, art. 26.1(5)(a) (noting that the Joint CETA Committee has final binding force); NAFTA, *supra* note 5, art. 1131(final authority for interpretation lies with the Commission); USMCA, *supra* note 10, art. 14.D.9 (final authority for interpretation lies with the Commission and is binding on the Tribunal).

32. *C.f.* Pope & Talbot Inc. v. Canada, UNCITRAL, Award in Respect of Damages, ¶ 17 (May 31, 2002); ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award, ¶ 176 (Jan. 9, 2003).

disguised treaty amendment. The famous award in *Pope & Talbot, Inc. v. Canada*, in the realm of NAFTA, was the first arbitral award that had to address the legality of such a binding authentic interpretation.[33] The Arbitral Tribunal held that the court has the authority to examine whether the binding authentic interpretation is an amendment or not.[34] It found that this authority derives from article 1131 paragraph 1 of NAFTA, which requires a tribunal to decide disputes in accordance with NAFTA and the applicable rules of international law.[35] It therefore concluded that "an arbitral tribunal has a duty to consider and decide that question and not simply to accept that whatever the Commission has stated to be an interpretation is one for the purposes of Article 1131(2)."[36] Two later arbitral decisions, *Methanex Corp. v. United States* and *ADF Group Inc. v. United States,* viewed this question differently and generally denied the court's authority to decide this issue.[37] The main argument in *Methanex* was that the parties, as the masters of the treaty, have the authority to amend and interpret a treaty, and can also adopt informal amendments which are binding on a tribunal as long as they do not violate *jus cogens* norms.[38] The *ADF* tribunal adopted a slightly different line of reasoning. First, it emphasized that the NAFTA parties have expressly stated that the Free Trade Commission interpretation is indeed an interpretation and therefore "[n]o more authentic and authoritative source" on what the treaty members intended to adopt is possible.[39] Second, it reasoned that there is a systemic need for binding authentic interpretations to allow the parties to correct perceived interpretative errors and to ensure consistent interpretations amongst multiple *ad hoc* arbitral tribunals.[40] Other arbitral tribunals have expressly left this question open[41] or have

33. *See* Pope, UNCITRAL, Award in Respect of Damages., ¶ 24 ("This Tribunal must therefore consider for itself whether the Commission's action can properly be qualified as an 'interpretation.'").

34. *Id.* ¶ 23.

35. *Id.*

36. *Id.* For a discussion of NAFTA's Notes of Interpretation and the interpretation or amendment controversy, see generally Charles H. II Brower, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT'L L. 347 (2006).

37. Methanex Corporation, a Canadian distributor of methanol, submitted a claim of arbitration in opposition to a Californian ban of a gasoline additive that contains methanol, claiming the ban violated NAFTA. The tribunal dismissed all claims in the Final Award. Methanex Corp. v. United States , UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, pt. 1, ¶¶ 1–2, pt. 2, ch. A, ¶ 4, pt. IV, ch. F, ¶ 5 (Aug. 3, 2005). ADF, a Canadian steel corporation, filed a claim under ICSID Arbitration Rules, arguing that U.S. laws that required federally-funded highway projects to use only domestic steel violated NAFTA. The tribunal dismissed ADF's claims. ADF, Case No. ARB(AF)/00/1, ¶¶ 61–90.

38. Methanex, UNCITRAL, pt. IV, ch. C, ¶¶ 20–24.

39. ADF, Case No. ARB(AF)/00/1, ¶ 177.

40. *Id.*

41. *See, e.g.*, UPS Inc. v. Canada, ICSID Case No. UNCT/02/1, Award on Jurisdiction, ¶ 97 (Nov. 22, 2002) ("We do not address the question of the power of the Tribunal to examine the Interpretation of the Free Trade Commission."); GAMI Investments, Inc. v. Mexico, UNCITRAL, Final Award, ¶ 92 n.14 (Nov. 15, 2004) (recalling GAMI's assertion that it is

simply applied the Interpretative Note of the Free Trade Commission.[42]

This paper will demonstrate that an international tribunal must start with the presumption that a binding authentic interpretation actually constitutes an interpretation and not a disguised treaty amendment. If exceptionally manifest and compelling reasons exist to assume that an authentic interpretation is actually a treaty modification, the international tribunal then has the right to disregard a binding authentic interpretation provided that such a tacit amendment is forbidden by the relevant treaty or violates a *jus cogens* norm.[43] Further, exceptions, albeit very limited, exist if the treaty in question grants rights to non-state parties.[44]

a. Presumption of an Interpretation

It is an old theoretical question whether it is possible to distinguish between the interpretation and modification of a norm, as interpretation is not a mathematical, but rather a creative process.[45] The International Law Commission's famous statement therefore reads, "interpretation of documents is to some extent an art, not an exact science."[46] However, despite the similarities between modification and interpretation, international law clearly distinguishes between amendment and interpretation.[47] Interpretation is the process of specifying and

unnecessary to question whether the Notes of Interpretation are a proper interpretation); *cf.* Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award, ¶ 127 (June 26, 2003) (explaining that the court does not address whether the FTC's interpretation is allowable because claimants did not maintain that argument throughout the proceedings).

42. *See, e.g.*, Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 120–25 (Oct. 11, 2002) (explaining that the tribunal need not decide all of the issues pertaining to the FTC's interpretation, but because NAFTA Article 1105(1) refers to customary international law and FTC interpretations incorporate current international law, it will apply the interpretation in this case); Chemtura Corp. v. Canada, UNCITRAL, Award, ¶ 120 (Aug. 2, 2010) ("It is not disputed that the Tribunal must interpret the scope of Article 1105 in accordance with the FTC Note.").

43. See *infra* Part I.B(2)(b) for a discussion of the limited right to not apply a modification.

44. See *infra* Part I.B(3) for a discussion of limits on rights to non-state parties.

45. *See, e.g.*, Law of Treaties, 29 AM. J. INT'L L. SUP. 653:1228, 946 (1935) ("The process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text, or of searching for and discovering some pre-existing specific intention of the parties with respect to every situation arising under a treaty. . . . In most instances, therefore, interpretation involves *giving* a meaning to a text—not just any meaning which appeals to the interpreter, to be sure, but a meaning which, in the light of the text under consideration and of all the concomitant circumstances of the particular case at hand, appears in his considered judgment to be one which is logical, reasonable, and most likely to accord with and to effectuate the larger general purpose which the parties desired the treaty to serve.").

46. *Rep. of the In'l Law Comm'n on the Work of its Eighteenth Session*, 21 U.N. GAOR Supp. 9 (A/6309/Rev.1) (1966), *reprinted in* [1966] 2 Y.B. Int'l L. Comm'n 218, ¶ 4, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

47. *See, e.g.*, Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. 176, 196 (Aug. 27) (refusing to adopt an interpretation of the Madrid Convention which would, in the courts opinion, amount to an amendment); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 237, ¶ 18 (July 8) ("It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so.").

clarifying the meaning of a provision,[48] whereas amendment indicates that the content of a norm is altered.[49] The differences in these two processes are amplified, in particular, by the legal regime of the VCLT. The VCLT distinguishes between provisions on the legal regime for interpretation (Articles 31–33), on the one hand, and the amendment of a treaty (Articles 39–41) on the other.[50] In addition, nearly every international treaty contains special provisions for the amendment process.[51] The difficult question that remains is how to distinguish between interpretation and modification.[52] The main criteria discussed are the original intent of the parties,[53] the ordinary meaning of the relevant treaty terms,[54] and whether a certain meaning of a particular norm can be arrived at through the application of the VCLT's rules of interpretation.[55] The problem with these criteria is that they are singularly unhelpful if the parties have adopted a binding authentic interpretation.

Original intent is inadequate because the parties, as the masters of the treaty, have the right to change their intent. The International Court of Justice (ICJ) has, for example, stated in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, "the subsequent practice of the parties, within the meaning of Article 31(3)*(b)* of the VCLT, can result in a departure from the original intent on

48. Georg Nolte (Special Rapporteur on Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties), *Second Rep. on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, U.N. Doc A/CN.4/671, ¶ 20 (Mar. 26, 2014); *see also Rep. of the Int'l Law Comm'n on the Work of its Sixty-Third Session*, 66 U.N. GAOR Supp. 10, U.N. Doc. A/66/10, ¶ 1.2 (2011) ("'Interpretative declaration' means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.").

49. *See, e.g.*, VCLT, *supra* note 25, art. 40 (establishing default rules for amending multilateral treaties).

50. *Id.* arts. 31–33, 39–41.

51. *See, e.g.*, United Nations Convention on the Law of the Sea arts. 312–16, Dec. 10, 1982, 1833 U.N.T.S. 397; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 29, Dec. 10, 1984, 1465 U.N.T.S. 85; Treaty on the Non-Proliferation of Nuclear Weapons art. 8, *opened for signature* July 1, 1968, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970).

52. *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 214 (3d ed. 2013) ("The distinction between application and amendment is not always easy to draw.").

53. *See e.g.*, Pope & Talbot Inc. v. Canada, UNCITRAL, Award in Respect of Damages, ¶¶ 43–47 (May 31, 2002).

54. Oliver Dörr, *Article 31. General Rule of Interpretation*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 554 (Oliver Dörr & Kristen Schmalenbach eds., 2012); Rahim Moloo, *When Actions Speak Louder than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation*, 31 BERKELEY J. INT'L L. 39, 84 (2013).

55. *See* Ehlermann & Ehring, *supra* note 30, at 809 ("If the (authoritative) interpretation is inconsistent with the Vienna rules on interpretation, it would be legally incorrect."); s*ee also* Brower, *supra* note 36, at 356 (asserting that interpretations of NAFTA provisions must conform to customary VCLT interpretation rules); *cf.* Roberts*, supra* note 1, at 209–10 n.144 (explaining that the reasonableness of an interpretation should be judged first by the rules of the VCLT, without conclusively defining "reasonable interpretation").

the basis of a tacit agreement between the parties."[56] Moreover, in current international law, finding original intent—if there is any—is not the primary goal of treaty interpretation.[57] The rules of interpretation in international law are not based only on the subjective method,[58] but on a mixed subjective and objective approach.[59] An "ordinary meaning" approach is likewise inadequate. A treaty cannot purely be reduced to its wording for three reasons. First, the wording itself can be quite ambiguous and indeterminate. Second, a strictly objective approach[60] would disregard the fact that, behind the adoption of a treaty, there was a certain regulatory intention of the parties.[61] The wording is related to the intent of the parties. Third, the parties, as the masters of the treaty, can also change the meaning of the wording—if it can be precisely determined at all—to express a current intent[62] or to adapt the wording to their original intent.[63]

With regard to the rules of the VCLT, a dilemma exists because the binding authentic interpretation of the parties is itself a means of interpretation which has to be taken into account in accordance with article 31 paragraph 3(a). Thus, one finds oneself in a circular argument: how can an interpretation suggested by the parties not reasonably be reached by the VCLT's interpretative rules?

Therefore, a different approach is necessary. This alternative approach should

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56. Dispute regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. Rep. 213, 242, ¶ 64 (July 13).

57. For such a subjective approach see e.g. HUGO GROTIUS ON THE LAW OF WAR AND PEACE: STUDENT EDITION 238 n.1 (Stephen C. Neff, 2012) (1625); PAUL GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC 133 (1953).

58. *See* VCLT, *supra* note 25, art. 32 (explaining that preparatory work of the treaty and the circumstances of its conclusion can be used as supplemental means of interpretation when the application of the interpretation methods in Article 31 still leave ambiguity or lead to a manifest absurd or unreasonable result).

59. *See id.* arts. 31–32.

60. *See* Emmerich de Vattel, *Of the Interpretation of Treaties in Nations in Relation to Other States*, *in* THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS, FACSIMILE & TRANSLATION 408 (Charles G. Fenwick trans., 1916) (1758) ("When a deed is worded in clear and precise terms,—when its meaning is evident, and leads to no absurd conclusion,—there can be no reason for refusing to admit the meaning which such deed naturally presents.").

61. *See* Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 48, 83 (1949) ("Words have no absolute meaning in themselves. They are an expression of will.").

62. *See* Dispute regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. Rep. 213, 242, ¶ 64 (July 13) ("On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied."); Nolte, *supra* note 48, ¶ 165 (pointing out that the meaning of treaty provisions can evolve and change with subsequent practice).

63. *See* VCLT, *supra* note 25, art. 31, ¶ 4 ("A special meaning shall be given to a term if it is established that the parties so intended.").

start with a strong presumption that, if the parties assert that they have adopted a binding authentic interpretation, it is actually an interpretation and not a modification. The fundamental reason for this presumption is that the parties have intended it to be an interpretation.[64] The will of the parties that they have adopted an interpretation is a strong indicator that it is merely a clarification of the meaning. The tribunal should therefore assume that the parties have acted in good faith and have indeed adopted an interpretation.[65]

The presumption of an interpretation also corresponds with the CETA members' justification for the binding authentic interpretation in article 26.1 paragraph 5. The Joint Interpretative Instrument on CETA states:

> In order to ensure that Tribunals in all circumstances respect the intent of the Parties as set out in the Agreement, CETA includes provisions that allow Parties to issue binding notes of interpretation. Canada and the European Union and its Member States are committed to using these provisions to avoid and correct any misinterpretation of CETA by Tribunals.[66]

Moreover, this conclusion is supported by the International Law Commission's recent work on subsequent agreements and subsequent practice in relation to the interpretation of treaties. In its draft conclusions adopted in 2018, the International Law Commission states:

> It is presumed that the parties to a treaty by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized.[67]

The International Law Commission justified this conclusion firstly on the basis of the legal uncertainty in current international public law as to whether the parties can amend a treaty informally.[68] Secondly, the Commission relied on the practice of international courts granting treaty parties a very wide scope for the interpretation of a treaty by way of subsequent practice, agreement, or conduct.[69]

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64. *See* Nolte, *supra* note 26, at 18 ("It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it.").

65. *See, e.g.*, ADF Group Inc. v. U.S., ICSID Case No. ARB(AF)/00/1, Award, ¶ 177 (Jan. 9, 2003) ("But whether a document submitted to a Chapter 11 tribunal purports to be an amendatory agreement . . . or an interpretation rendered by the FTC under Article 1131(2), we have the Parties themselves—all the Parties—speaking to the Tribunal. No more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA, is possible.").

66. Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, 2017 O.J. (L11) ¶ 6(e) at 3 (EU).

67. *Rep. of the Int'l Law Comm'n*, *supra* note 26, at 14.

68. *Id.* See *infra* Part I.B(2) for further discussion on amendment procedure.

69. *See, e.g.*, *id.* at 59 ("It is clear, however, that States and international courts are generally prepared to accord parties a rather wide scope for the interpretation of a treaty by way of a subsequent agreement."); Case Concerning Territorial Dispute (Libyan Arab

It is possible to overcome this presumption only in exceptional situations. Such a situation exists if there are serious and blatant indications that the competent treaty body has, or the treaty members themselves have, exceptionally adopted a disguised amendment. Indications of a disguised amendment must be identified through a flexible and individual approach. A flexible approach of this kind has already been suggested by Georg Nolte in his work on subsequent practice within the International Law Commission.[70] He states:

> The most reasonable approach seems to be that the line between interpretation and modification cannot be determined by abstract criteria but must rather be derived, in the first place, from the treaty itself, the character of the specific treaty provision at hand, and the legal context within which the treaty operates, and the specific circumstances of the case.[71]

Such a flexible approach also seems appropriate if one has to distinguish between amendment and interpretation where the parties have adopted a binding authentic interpretation. It is necessary to make an overall assessment.

This paper suggests a two-part test to determine whether the presumption can be overturned. It is first necessary to make an overall assessment and examine whether the relevant treaty or provision is open to further development and establishes a dynamic order,[72] or whether it constitutes a static provision. In the latter case, an authentic interpretation clearly outside the semantic framework of a provision, without indications that the authentic interpretation corresponds to the original intent of the parties, indicates an amendment. If a treaty or the relevant provision can be qualified as open for evolutionary development, an authentic interpretation will be presumed to constitute an interpretation even if it is outside the semantic framework and deviates from the original intent.[73] Indications for an amendment in this situation exist only if the authentic interpretation also manifestly deviates from the main object and purpose of the relevant provision or the treaty itself, constitutes something completely new and unexpected, or both. An example would be an authentic interpretation that states that article 10 paragraph 1, sentence 1 of the ECHR[74] contains a right to free speech for women only.

Jamahiriya/Chad), Judgment, 1994 I.C.J. Rep. 6, ¶ 60 (Feb. 3); Legal Consequences for States of the Continued Presence of South Africa in Namibia (S. W. Afr.) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 22 (June 21). This judgment is also frequently used as a precedent for arguing that the ICJ allows treaty modification by subsequent practice. *See, e.g.*, Sean D. Murphy, *The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties*, *in* TREATIES AND SUBSEQUENT PRACTICE 4 (Georg Nolte ed., 2013).

70. Nolte, *supra* note 48, ¶ 165.

71. *Id.*

72. *See id.* ("In this context an important consideration is how far an evolutive interpretation of the pertinent treaty provisions is possible.").

73. *Contra* Kulick, *supra* note 13, at 456 n.79 ("A tribunal must reject a joint 'interpretation' that is logically impossible and de facto amends the treaty, [i.e.] that is impossible to reconcile with the wording.").

74. The first sentence of Article 10 § 1 ECHR states: "Everyone has the right to freedom of expression." European Convention for the Protection of Human Rights and Fundamental

However, the first part must be modified if the authentic interpretation itself influences the overall structure of the treaty—i.e. an authentic interpretation changes a dynamic order into a static one or vice versa.[75] In order to determine whether an authentic interpretation has such a transformative effect, it is necessary to demonstrate, as just set out above, that the transformation from a dynamic order to a static one (or vice versa) is manifestly not grounded in the wording of the treaty, the original intent of the parties, the object and purpose of the treaty, or the relevant provision itself. However, it is important to bear in mind that the question as to whether a treaty originally established a static or dynamic order must be determined objectively, and not by mere reference to the case law of the tribunal that has interpreted the treaty as dynamic or static. The fact that an authentic interpretation contradicts a decision or established case law of the tribunal, which should be influenced by an authentic interpretation, is not an indicator of whether the authentic interpretation itself is a disguised amendment or not. The reason is that the tribunal's interpretation might simply be incorrect—because it did not correctly apply the customary rules of interpretation contained in VCLT Articles 31 and 32—or the tribunal only adopted one possible and plausible interpretation of the treaty, which can be overruled by another possible and plausible interpretation by the state parties.

The primary characteristic of an authentic interpretation that changes the overall structure of the treaty is that it influences both the content of the treaty itself and the authority of the relevant international tribunal. If the authentic interpretation has the effect of establishing a static order instead of a dynamic one, it generally limits the authority of the tribunal to interpret future cases. An example would be if an authentic interpretation declared that the parties understood the provisions of a human rights treaty as static commitments and not as a "living instrument."[76] If the authentic interpretation changes a static order into a dynamic one, the situation is different—as new and further interpretations are possible in the future. Thereby, the interpretative authority of the tribunal is in principle expanded. Due to this fundamental effect on the interpretative authority of a tribunal, an authentic interpretation that changes the treaty structure itself must be regarded as an amendment.

b. The Limited Right to Not Apply a Disguised Modification

Freedoms art. 10 § 1, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

75. The influence of subsequent practice and agreements for determining whether a treaty is subject to an evolutionary interpretation or not has also been recognized by the International Law Commission in its recent work. It stated: "Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time." *Rep. of the Int'l Law Comm'n*, *supra* note 26, at 14 (2018); *cf.* Dispute regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. Rep. 213, 242, ¶ 64 (July 13) (stating that sometimes at the conclusion of a treaty, parties intend for terms to be capable of evolving).

76. For the categorization of the ECHR as a living instrument, see Tyrer v. United Kingdom, App. No. 5856/72, 26 Eur. Ct. H.R. (ser. A) ¶ 31 (1978).

The next crucial question is whether the international tribunal has the right to not apply a disguised modification. This paper will demonstrate that an international tribunal is entitled and obliged to not apply a disguised modification if it violates a *jus cogens* norm or if the relevant treaty prohibits amendments through binding authentic interpretations.

The first rule is straightforward, but with limited practical relevance, and has its legal basis in customary international law as expressed in Article 53 of the VCLT.[77] An amendment that would violate a *jus cogens* rule would be void and could, therefore, be disregarded by the relevant international tribunal. This was also recognized by the arbitral tribunal in *Methanex*.[78] In all other situations, the authority of a tribunal to disregard a disguised modification depends on the treaty at hand. Does it contain a special rule for binding authentic interpretations that constitute disguised amendments? If not, does it allow tacit treaty amendments?

The first question is whether the treaty at hand contains special rules for disguised amendments through binding authentic interpretations. Some treaties not only provide that a certain interpretation is binding on a tribunal, but also that the relevant award must be "consistent" with the binding authentic interpretation.[79] Such a formulation seems to indicate that the relevant tribunal is not entitled to disregard such an interpretation, even if it constitutes a disguised amendment, as the court decision must in any case be in accordance with the interpretation given.

In the absence of such a provision, one has to inquire whether the treaty prohibits tacit amendments. In general international law, the question of whether the parties have the right to modify a treaty by subsequent agreement or conduct is disputed and not entirely clear. Even though this is argued by a number of academics,[80] there is no clear evidence that every treaty can be amended by tacit agreement. The legal situation can be described as ambiguous. The basic rule in Article 39 of the VCLT states only that "[a] treaty may be amended by agreement between the parties."[81] It is silent on whether an agreement also means tacit consent by way of subsequent interpretation. A rule allowing specifically for an amendment by subsequent practice was discussed during the development of the VCLT, but not adopted.[82] Even though the ICJ gives treaty parties wide discretion

77. *See* VCLT, *supra* note 25, art. 53 (explaining that a treaty is void if it conflicts with a peremptory norm of general international law).

78. Methanex, UNCITRAL, pt. IV, ch. C, ¶¶ 24.

79. *E.g.*, ASEAN, *supra* note 8, art. 40, ¶ 3.

80. *E.g.*, DÖRR, *supra* note 54, ¶ 74; Murphy, *supra* note 69, at 2; Kerstin Odendahl, *Article 39. General Rule Regarding the Amendment of Treaties*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 699, ¶ 11 (Oliver Dörr & Kristen Schmalenbach eds., 2012); MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 436–38, 513 (2009); *see also* Methanex, UNCITRAL, pt. IV, ch. C, ¶ 20 ("Even assuming that the FTC interpretation was a far-reaching substantive change (which the Tribunal believes not to be . . .), Methanex cites no authority for its argument that far-reaching changes in a treaty must be accomplished only by formal amendment rather than by some form of agreement between all of the parties.").

81. VCLT, *supra* note 25, art. 39.

82. Article 38 of the VCLT that was not adopted reads as follows: "A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the

to interpret a treaty by subsequent practice,[83] the ICJ is reluctant to assume that a treaty has indeed been modified by subsequent agreement or practice.[84] The ICJ has never explicitly stated that a treaty can be modified by subsequent practice or agreement.[85] The WTO Appellate Body has even explicitly rejected the idea that article 31 paragraph 3(a) of the VCLT contains a right to modify, as the word "application" does not include the creation of new obligations or their extension.[86] The International Law Commission therefore correctly stated in its recent report in 2018 that, "[t]he possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized."[87] Therefore, each treaty depends on itself to decide whether it can be amended by a tacit agreement. If the treaty at hand allows modifications by tacit agreement, the international tribunal is also bound by any amendment of the treaty and has no right to disregard it. The reason is that the tribunal only has delegated authority that derives from the treaty itself. It is therefore also bound by any valid amendment to a treaty. An example of a treaty allowing tacit modifications through an established practice within the member states is the ECHR.[88] The European Court of Human Rights (ECtHR) has for example decided that the parties have tacitly abrogated the death penalty

parties to modify its provisions." *Draft Articles on the Law of Treaties*, [1966] 2 Y.B. Int'l L. Comm'n 182, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

83. See Case Concerning Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. Rep. 6, ¶ 60 (Feb. 3); Legal Consequences for States of the Continued Presence of South Africa in Namibia (S. W. Afr.) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 22 (June 21).

84. *See* Pulp Mills on the River Uruguay (Arg. v. Uruguay), Judgment, 2010 I.C.J. Rep. 14, ¶ 140 ("The Court therefore considers that the agreement . . . while indeed creating a negotiating body capable of enabling the Parties to pursue the same objective as that laid down in Article 12 of the 1975 Statute, cannot be interpreted as expressing the agreement of the Parties to derogate from other procedural obligations laid down by the Statute."); *see also Rep. of the Int'l Law Comm'n*, *supra* note 26, at 60–61, ¶¶ 27–31 (2018).

85. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (S. W. Afr.) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, 22 (stating that due to a consistent practice in the Security Council abstaining of a permanent member does not signify its objection to a proposal in the framework of art. 27 para. 3 UNC without expressly categorizing this finding as an amendment or an interpretation); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 131, ¶¶ 27–28 ("However, this interpretation of Article 12 has evolved subsequently.").

86. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 391–93, WTO Doc. WT/DS27/AB/RW2/ECU, WTO Doc. WT/DS27/AB/RW/USA (adopted Nov. 26, 2008); *Rep. of the Int'l Law Comm'n*, *supra* note 26, at 62.

87. *Rep. of the Int'l Law Comm'n*, *supra* note 26, at 14.

88. *See* Al-Saadoon v. United Kingdom, App. No. 61498/08, Eur. Ct. H.R. 56 (2010) (agreeing with *Soering* and *Öcalan* that subsequent practices have amended Convention to prohibit the death penalty); Öcalan v. Turkey, App. No. 46221/99, Eur. Ct. H.R. 46–47 (2005) (stating that Article 2 ECHR does no longer allow capital punishment in peacetimes due to subsequent state practice); Soering v. United Kingdom, App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A) 35 (1989) (acknowledging that subsequent state practice could give rise to an amendment of the convention).

exception in article 2 paragraph 1 of the ECHR.[89] If a treaty prohibits tacit agreement by the parties, the relevant tribunal also cannot apply a disguised modification. The same would hold if a majority of the parties gave a binding authentic interpretation and the relevant treaty provided that a tacit amendment could only be made unanimously.

3. Further Limits

The final question is: Are there any further reasons that would allow an international court to disregard a binding authentic interpretation? This question arises with regard to treaties granting rights to non-state parties, such as investment and human rights treaties, because in this instance third parties are affected by the binding interpretation. To answer this question, one must first distinguish between two situations. In the first situation, the binding authentic interpretation is indeed an interpretation and not a disguised amendment. In the second, it is a disguised amendment that is valid because the relevant treaty allows tacit amendment.[90]

In the first situation, further limits in the absence of specialized treaty provisions are hard to imagine. As a rule, neither procedural fairness issues nor legitimate expectations of the parties are at issue for two main reasons. First, an interpretation is only a clarification of the content of a norm[91] and treaty parties have the ongoing right to interpret a treaty. This is also amplified by article 31 paragraphs 3(a) and (b) of the VCLT.[92] Second, binding authentic interpretations are foreseen in the relevant treaty itself so the possibility of an interpretation by the parties is known to the third parties.[93]

An exception might exist if it can be established that the treaty parties misused their right to adopt a binding authentic interpretation only to win a certain case and not to clarify the content of a norm.[94] If the binding authentic

89. Öcalan, 2005-IV Eur. Ct. H.R. at 46–47 ¶ 163.

90. See *supra* Part I(B)(2) for an in-depth exploration of the binding authentic interpretation as a disguised amendment.

91. The principle of non-retroactivity does not apply to interpretations as they are understood as a clarification of the content of a norm. *See* Katharina Berner, *Authentic Interpretation in Public International Law*, 76 HEIDELBERG J. INT'L L. 845, 871 (2016); Gabrielle Kaufmann-Kohler, *Interpretive Powers of the Free Trade Commission and the Rule of Law*, *in* FIFTEEN YEARS OF NAFTA CHAPTER 11 ARBITRATION 175, 192 (Frédéric Bachand & Emmanuel Gaillard eds., 2011); *see also* Pope & Talbot Inc. v. Canada, UNCITRAL, Award in Respect of Damages, ¶¶ 50–51 (May 31, 2002) ("Nevertheless the Tribunal has reached the view that the phrase 'shall be binding' in Art. 1131(2) is better regarded as mandatory than prospective. Viewed in that light, it is incumbent on the Tribunal to assess the impact of the Interpretation upon its prior findings with respect to Art. 1105.").

92. VCLT, *supra* note 25, art. 31, ¶ 3(a)–(b).

93. *See* José E. Alvarez, *Limits of Change by Way of Subsequent Agreements and Practice*, *in* TREATIES AND SUBSEQUENT PRACTICE 123, 131 (Georg Nolte ed., 2013) (noting that investors were aware NAFTA trade ministers could issue interpretations because it was stated in NAFTA article 1131(2)).

94. *See* Franck, *supra* note 2, at 1605 ("In practice, this might mean that Sovereigns could render Interpretive Notes after an opportunity for notice and comment so that they can consider the impact of their decisions; alternatively, it might mean that issuing Interpretive Notes could be subject to review should it amount to an abuse of discretion or an excess of authority.").

interpretation is adopted during a pending dispute, and the treaty parties intentionally adopt an interpretation which they do not believe to be the correct content of the norm, that indicates such misuse. However, a situation like this is hard to imagine in reality, and such bad faith cannot easily be assumed.[95]

In the second situation, one has to determine (a) whether the disguised tacit agreement can be applied only to situations that arose after the amendment came into force, or (b) whether it has retroactive effect. In the case of (a), further limits are hard to imagine, as the treaty parties have the right to amend a treaty. The beneficiary cannot rely on any legitimate expectation that a treaty will remain unchanged in the future. An exceptional right to disregard such an amendment might exist if the state parties misused this right only to win a case, but without the real intention of modifying a treaty in future.

Regarding situation (b), an amendment has retroactive effect if it can be applied to situations that ceased to exist before the amendment entered into force.[96] Such an amendment is generally possible according to the customary law rule in article 28 of the VCLT[97] if the parties intended the agreement to have such an effect.[98] However, such an amendment might be possible to disregard if the treaty has third-party beneficiaries and the retroactive amendment is to the detriment of those beneficiaries. As far as criminal liability is concerned, this limitation derives from the principle *nullum crimen, nulla poena sine lege*, codified in international human rights treaties[99] and also binding as customary law.[100] Outside of criminal

95. *See* Interhandel Case (Switz. v. U.S.), Judgment, 1959 I.C.J. Rep. 34, 111 (Mar. 21) (separate opinion by Hersch Lauterpacht) ("[T]he greatest caution must guide the Court, in the matter of its jurisdiction, in attributing to a sovereign State bad faith, an abuse of a right, or unreasonableness in the fulfilment of its obligations.").

96. According to Article 28 of the VCLT, a treaty that can be applied to an ongoing situation that has started before its entry into force is not regarded as having a retroactive effect. VCLT, *supra* note 25, art. 28. This was also expressly confirmed by the International Law Commission in its Commentary. *Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 Y.B. Int'l L. Comm'n 212, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

97. VILLIGER, *supra* note 80, at 386 ("The rules enshrined in Article 28 appear generally accepted and reflect customary international law."); Frédéric Dopagne, *Article 28: Non-retroactivity of Treaties*, *in* 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 718, 719–20 (Oliver Corten & Pierre Klein eds., 2011); Alexander Proelss, *Article 38: Rules in a Treaty Becoming Binding on Third States through International Custom*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 685, ¶ 5 (Oliver Dörr & Kristen Schmalenbach eds., 2012).

98. Article 28 of the VCLT states: "[U]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." VCLT, *supra* note 25, art. 28.

99. *Nullum crimen, nulla poena sine lege* translates to "no crime or punishment without a law." *See, e.g.*, African Charter on Human and Peoples' Rights art. 7 § 2 June 27, 1981, 1520 U.N.T.S. 217 ("No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed."); Rome Statute of the International Criminal Court art. 22–25, July 17, 1998, 2187 U.N.T.S. 90 ("A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it

law, a limitation derives from the general principle of law: in the absence of compelling reasons, a legal rule should not have negative retrospective effects. In national laws, retroactive laws that have a negative impact on individuals are generally regarded as problematic, and there is a clear tendency to allow national regulations that have negative retrospective effects only if compelling reasons exist.[101]

4. The Right to Interpret

The primary characteristic of the binding authentic interpretation is that the relevant international tribunal is bound by the interpretation and loses its right to interpret the treaty independently. It overrides the special treaty regime in article 31 paragraph 3(a) of the VCLT, which provides that an interpretative agreement shall "only" to be taken into account.[102]

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takes place, a crime within the jurisdiction of the Court."); Arab Charter on Human Rights art. 6, Sept. 15, 1994 ("There shall be no crime or punishment except as provided by law . . . ."); American Convention on Human Rights art. 9, Nov. 22, 1969, 1144 U.N.T.S. 123 ("No one shall be convicted of any act or omission that did not constitute a criminal offense . . . ."); International Covenant on Civil and Political Rights art. 15, Dec. 16, 1966, 999 U.N.T.S. 171 ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence . . . ."); ECHR, *supra* note 74, art. 7 ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law . . . ."); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 11 ¶ 2 (Dec. 10, 1948).

100. See Rule 101 of the rules of customary international humanitarian law identified by an International Committee of the Red Cross (ICRC) study. The rule states: "No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed." *Customary IHL Database: Rule 101. The Principle of Legality*, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule101 (last visited Jan. 26, 2019).

101. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1 (forbidding passage of ex post facto laws); Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (holding that when a new statute has a genuinely retroactive effect, then the statute cannot govern); Case C-167/17, Klohn v. An Bord Pleanála, 2018 E.C.R. 833, ¶ 39 ("It is otherwise—subject to the principle of the non-retroactivity of legal acts—only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application."); Case C-108/81, G.R. Amylum v. Council of the European Communities, 1982 E.C.R. 3107, ¶ 4 (noting that retroactivity can be overcome when the legitimate expectations of concerned parties need to be respected); Case C-98/78, Racke v. Hauptzollamt Mainz, 1979 E.C.R. 69, ¶ 20 ("Although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected."); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-682DC, Dec. 19, 2013, ¶ 14 (Fr.) (quoting CC No. 2012-661DC); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-661DC, Dec. 29, 2012, ¶ 13 (Fr.) (holding that the legislator may modify or repeal earlier texts, but may not infringe on constitutional rights in doing so); Conseil constitutionnel [CC] [Constitutional Court] decision No. 98-404DC, Dec. 18, 1998, ¶ 5 (Fr.) (granting that the non-retroactivity of laws has constitutional value); 95 BVERFGE 64 (¶¶ 86–89) (Ger.) (acknowledging in general that retroactive laws are only admissible, if they are proportionate and do not infringe legitimate expectations).

102. Matthias Herdegen, *Interpretation in International Law*, *in* MAX PLANCK

C. International Courts and Mere Authentic Interpretations

In the absence of a specific treaty provision, state parties can always adopt a mere authentic interpretation. The crucial question is: Does this mean that a mere authentic interpretation is absolutely binding on international courts, and does it have to be treated like a binding authentic interpretation, or do differences exist?

Some authors argue that mere authentic interpretations are absolutely binding.[103] They override the VCLT's rules of interpretation.[104] Authentic interpretations are accorded a special status as they emanate from the parties themselves.[105] Others argue that they only have significant weight, are not absolutely binding,[106] and do not have ultimate authority.[107]

The latter approach can rely on the wording of the VCLT, which expressly states that these interpretative agreements must be taken into account. Moreover, it is supported by state practice. The United States, for example, argued in *Methanex* that a mere authentic interpretation by the state parties had to be taken into account in accordance with article 31 paragraph 3(a) of the VCLT,[108] but was not legally binding as an interpretation by the Free Trade Commission of NAFTA in accordance with article 1131 paragraph 2 of NAFTA.[109]

ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 34–35 (2013). *But see* Methanex, UNCITRAL, pt. IV, ch. C ¶ 21(suggesting that the Federal Trade Commission Note has to be taken into account in accordance with VCLT art. 31(3)(a)).

103. *See e.g.* Berner, *supra* note 91, at 876 (arguing that authentic interpretations are both inherently binding and unlimited); Jean-Pierre Cot, *La Pratique Subséquente des Parties un Traite*, 70 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC [R.G.D.I.P.] 632, 662 (1966) (Fr.); 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1501–02 (2d ed. 1947).

104. ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW § 630 (Robert Jennings & Arthur Watts eds., 9th ed. 2008).

105. *See In re* Jaworzina (Polish-Czechoslovakian Frontier), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 8, at 37 (Dec. 6) ("[T]o observe that it is an established principle 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.").

106. *E.g.*, Rahim Moloo, *When Actions Speak Louder than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation*, 31 BERKELEY J. INT'L L. 39, 75–76 (2013) ("Although subsequent conduct establishing party agreement carries significant weight, it is still thrown in the same crucible with the other interpretation criteria. Therefore, where subsequent conduct leads to an interpretation that deviates from the ordinary meaning, discerned in context and in light of its object and purpose, such an interpretation would be impermissible. However, where more than one interpretation is possible, subsequent party conduct demonstrating party agreement will almost certainly be decisive to disputes arising after the agreement has been established.").

107. *E.g.*, Roberts, *supra* note 1, at 179, 215.

108. Methanex Corp. v. United States, UNCITRAL, Post Hearing Submission of Respondent United States of America, at 2–3 (July 20, 2001) (arguing that Canada and Mexico's agreement with the United States had to be taken into account per Article 31(3)(a) of the VCLT).

109. Methanex Corp. v. United States, UNCITRAL, Rejoinder of Respondent United States of America to Methanex's Reply Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation, at 3 (Dec. 17, 2001).

Moreover, the non-binding nature of mere authentic interpretations has also been confirmed by recent works of the International Law Commission.[110] Georg Nolte, in his fifth report on Subsequent Agreements and Subsequent Practice as Authentic Means of Interpretation, concluded that "[s]ubsequent agreements . . . being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31," and are generally supported by the states.[111] He also found that the value of a subsequent agreement or subsequent practice as a means of interpretation may, among other things, depend on its specificity and clarity.[112] However, a deviation from a mere authentic interpretation by the relevant international tribunal will very seldom be justified.[113] A reason for deviating will exist if the mere authentic interpretation can exceptionally be regarded as violation of a right or a forbidden tacit amendment.[114] The ICJ's reasoning in the Palestinian Wall Case can also be understood this way. In this advisory opinion, the ICJ first stated that the interpretation of article 12 paragraph 1 of the United Nations Charter (UNC) has evolved and then stated—although without giving any further reasons—that the interpretation was in accordance with article 12 paragraph 1 of the UNC itself.[115]

II. LEGITIMACY OF INTERNATIONAL COURTS AND AUTHENTIC INTERPRETATIONS

This section will now turn to the second question in the paper: Do authentic interpretations strengthen or weaken the legitimacy of international courts?

Legitimacy is an enigmatic notion and is difficult to grasp, as it is used with different connotations. A sociological approach to legitimacy focuses on whether

110. *See Rep. of the Int'l Law Comm'n*, *supra* note 26, at 2 (2018) ("Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.").

111. Nolte, *supra* note 26, at 9–10.

112. *Id.* at 23.

113. *See* Bruno Simma, *Doctrinal Aspects, 5 Miscellaneous Thoughts on Subsequent Agreements and Practice*, *in* TREATIES AND SUBSEQUENT PRACTICE 46, 46 (Georg Nolte ed., 2013) ("Subsequent agreements and subsequent practice are, I believe, simply more cogent, more peremptory, than the other means we find concocted in art 31 of the Vienna Convention . . . if there exists—and this is a matter of fact—subsequent practice or a subsequent agreement, there is, *lege artis*, simply no way to get around it. This is it, because the intention of the parties to the treaty will always prevail."). *But see* Dire Tladi, *Is the International Law Commission Elevating Subsequent Agreements and Subsequent Practice?*, EJIL-TALK! (Aug. 30, 2018), https://www.ejiltalk.org/is-the-international-law-commission-elevating-subsequent-agreements-and-subsequent-practice/ (arguing that amending a treaty through interpretation could be dangerous). *See generally* Kulick, *supra* note 13, at 455–56 (explaining when authentic interpretations can have a binding force in the area of international investment law).

114. See *supra* Part II.B(2) and Part II.C.

115. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 27–28 (July 9) ("The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.").

the relevant authority is regarded as appropriate, justified, or worthy of support by the public for reasons beyond fear of sanctions or the hope of personal reward.[116] This approach is grounded in the works of the famous German sociologist Max Weber. Weber argued that every authority seeks to inspire belief in its legitimacy [*Legitimitätsglaube*] in order to foster its continuance.[117] He then distinguished between three pure types of legitimate authority: rational legitimacy, traditional legitimacy, and charismatic legitimacy.[118] In the event that an authority uses rational legitimacy, its orders are followed because the authority is legal and corresponds to a formally-enacted legal rule.[119] In the event that traditional legitimacy is used, the authority is obeyed because traditional authority is respected.[120] In the case of charismatic legitimacy, the orders of a charismatic leader are followed due to his or her personal virtues—for example, his or her exceptional and/or heroic character.[121] This sociological approach can be distinguished from a normative approach to legitimacy.[122] The normative approach asks whether an authority or a tribunal should, due to certain abstract criteria, be regarded as "justified"[123]—that is, it indeed has "the right to rule"[124]—and therefore merits support.[125] Such a normative-legitimacy approach does not limit itself to analyzing whether an international court has acted lawfully, but sets out further criteria. It examines whether a tribunal, or an authority in general, is in accordance with higher abstract principles. However, the relevant higher principles for measuring the worth of international tribunals, and international governance in

116. Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005); *cf.* Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 601 (1999) (indicating that the sociological dimension of the concept of "legitimacy" refers to popular attitudes about authority—"the subjects to whom it is addressed accept it as justified").

117. MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT [ECONOMY AND SOCIETY] 122 (5th ed. 1976) (Ger.).

118. *Id.* at 124.

119. *Id.*

120. *Id.*

121. *Id.*

122. *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990) ("Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.").

123. Rüdiger Wolfrum, *Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations*, *in* LEGITIMACY IN INTERNATIONAL LAW 1, 6 (Rüdiger Wolfrum & Volker Röben eds., 2008); Laurence R. Helfer & Karen J. Alter, *Legitimacy and Lawmaking: A Tale of Three International Courts*, 14 THEORETICAL INQUIRIES IN L. 479, 483 (2013); Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 110 (2009).

124. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF., no. 4, 2006, at 405.

125. Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61, 63–64 (2013). *See also* Bodansky, *supra* note 116, at 64.

general, are currently disputed and subject to discussion. The traditional normative-legitimacy criteria that focused in particular on the source—state consent—and also on the procedural fairness of the proceedings and the outcome[126] have come under scrutiny.

Recently, new theories have developed to cover the evolving role of international courts as well. International tribunals no longer exclusively decide disputes between states[127] with the ultimate goal of preventing wars[128] but also decide disputes between individuals and states, like the ECtHR or arbitral tribunals in investment cases. Moreover, international courts have a judicial law-making function.[129] The decisions of international courts are, in many instances, no longer confined to resolving a single dispute.[130] Thus, they might also have an impact on non-litigants, states, and non-state actors alike.[131] Court decisions are used by the same tribunal to decide similar cases in the future.[132] They are also used and cited by other international[133] and national courts,[134] and referred to by scholars, lawyers, and politicians to advance policy decisions.[135]

Consequently, certain authors, such as Armin von Bodgandy and Ingo Venzke, argue that international courts must live up to basic tenets of democratic theory.[136] Other authors focus on participation rights and higher moral values. Nienke Grossman's legitimacy theory encompasses, for example, the following five points: (1) to be a legitimate court, legal persons whose rights and issues are

126. *See* Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 266 (2012).

127. Philippe Sands, *Reflections on International Judicialization*, 27 EUR. J. INT'L L. 885, 889 (2016).

128. Grossman, *supra* note 125, at 63–64; Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT'L L. 73, 77 (2009).

129. Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 GER. L. J. 979, 980 (2011) [hereinafter von Bogdandy & Venzke, *Beyond Dispute*]; Grossman, *supra* note 125, at 68.

130. *See* von Bogdandy & Venzke, *Beyond Dispute*, *supra* note 129 ("To us, this role of international adjudication beyond the individual dispute is beyond dispute.").

131. Grossman, *supra* note 125, at 68.

132. *See, e.g.*, Mills, *supra* note 84, ¶ 145 (citing for the assertation that all treaty obligations have to be performed in good faith in the cases Nuclear Tests (Australia v. France) (New Zealand v. France)).

133. *See, e.g.*, Stichting Mothers of Srebrenica and Others v. Netherlands, App. No. 65542/12, Eur. H.R. Rep. ¶ 158 (2013) (citing ICJ's judgment in Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)).

134. *See, e.g.*, BVerfG, 2 BvR 1833/12, ¶¶ 31–34, Apr. 18, 2016, http://www.bverfg.de/e/rk20160418_2bvr183312.html (showing how the German Federal Court used ECHR and ECtHR case law to interpret the German Constitution).

135. Grossman, *supra* note 125, at 68.

136. Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EUR. J. INT'L L. 7, 8 (2012) [hereinafter von Bogdandy & Venzke, *In Whose Name?*]; *see also* von Bogdandy & Venzke, *Beyond Dispute*, *supra* note 129, at 983 (arguing that the actions of courts and tribunals must live up to "basic democratic premises").

affected must have the right to present their views; (2) to the extent that international courts participate in international law making, there should be a possibility for those potentially affected to participate; (3) international courts must help states to better comply with core human rights (the situation must be better than without courts); (4) international courts must under no circumstances facilitate the violation of core human rights; and (5) international courts must generally act consistently with the object and purpose of their normative regime.[137]

Given that the purpose of this paper is to focus solely on the legitimacy concerns or benefits of authentic interpretations—namely, whether they strengthen or weaken the legitimacy of international courts—I will commence with the normative-legitimacy criteria that can be affected by authentic interpretations.[138]These include democratic accountability, state consent, and procedural fairness. The pertinent questions are: Are authentic interpretations suitable to diminish the democratic deficit of international courts? What is the significance of authentic interpretations for state consent? Are they a risk to the perceived procedural fairness of international courts, as they might have the ability to undercut the judicial function of a court?

I will then make an overall assessment of the legitimizing effect of authentic interpretations and show that authentic interpretations generally serve to enhance legitimacy if they are made by democratic states. They are less legitimacy-enhancing if they are made by authoritarian states or made between authoritarian and democratic states.[139]

A. Normative Legitimacy Criteria Affected by Authentic Interpretations

1. Democratic Accountability

The first question is whether authentic interpretations can be one of several factors that contribute to the healing of the "democratic deficit"[140] of international courts. Can authentic interpretations, as one variant, as von Bogdandy and Venzke have argued, contribute to the re-politicization of the international sphere and the creation of a stronger political (i.e., legislative) counterpart to international courts?[141]

The general problem of constitutional courts in a democracy is that, on the one hand, they are needed in order to prevent a "tyranny of the majority," to guarantee the Constitution and the rule of law,[142] and to protect minorities. On the

137. Grossman, *supra* note 123, at 104.

138. See *infra* Part II.A(1).

139. See *infra* Part II.A(2).

140. Shany, *supra* note 128, at 89–90.

141. von Bogdandy & Venzke, *In Whose Name?*, *supra* note 136, at 30–31; *cf.* Gazzini, *supra* note 30, at 181 (arguing that authoritative interpretations according to Article IX:2 WTO Agreement are a necessary instrument of checks and balances).

142. See the fundamental article by Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit (The Character and Development of Constitutional Courts*), 5 VVDStrL

other hand, judicial review acts as a "counter majoritarian force" because "it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."[143] This problem also exists in a different form in the international sphere, although international courts generally only exercise forms of weak judicial review, as they do not have the right to annul national laws.[144] The main reason is that international courts are even further removed from the popular will in a given state,[145] and as such are less accountable and less subject to control than national courts.

In the international sphere, there is more room for judicial discretion than on the national level, and there exists an aggravated risk that judges will adopt new and innovative interpretations[146] conforming to their own moral beliefs. The first reason is that there is, in the words of von Bogdandy, a lack of "legislative efficiency" in the international sphere.[147] At the national level, courts are controlled by the legislature. The legislature can—through majority decisions—abolish, amend, or change laws if it does not agree with certain court rulings. The adjudicative bodies have a real political counterpart when applying the law.[148] This democratic control only exists to a limited extent at the international level. The amendment of treaties is generally a difficult, formal process which typically requires the consent of most, if not all, parties.[149] Moreover, state parties tend to use their individual right to denounce an international treaty only as an ultima ratio.[150] Thus, the situation in international courts resembles that of constitutional courts that review the constitutionality of laws, as constitutions can only be amended by special and complicated measures involving significant majorities.[151]

1928, 29.

143. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–17 (2d ed. 1986).

144. *See, e.g.*, ECHR, *supra* note 74, art. 41 ("If the Court finds that there has been a violation of the Convention . . . the Court shall, if necessary, afford just satisfaction to the injured party."); American Convention on Human Rights, *supra* note 99, art. 63 (describing all the remedies for violations of the American Convention, which do not include the right to annul laws).

145. Shany, *supra* note 128, at 89–90.

146. *Cf.* Roberts, *supra* note 1, at 184 (remarking that traditional interpretative gatekeeping factors present in inter-state disputes are absent in transnational dispute resolution, in particular investment arbitration, and may lead to innovative interpretations).

147. *See* Armin von Bogdandy, *Law and Politics in the WTO—Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK Y.B. U.N. L. 609, 623-5 (2001).

148. *See id.* at 624 (remarking that judicial entities benefit from having political counterparts when developing a body of law); *see also* Ehlermann & Ehring, *supra* note 30, at 813 ("An independent (quasi-)judicial system . . . should not be left without a counterweight . . . .").

149. *See, e.g.*, U.N. Charter art. 108, ¶ 1 (stating that amendments of the Charter must be adopted by two-thirds vote of all General Assembly members and ratified by two thirds of the Members of the United Nations, including all permanent members of the Security Council, in accordance with their respective constitutional processes.)..

150. *See* von Bogdandy & Venzke, *In Whose Name?*, *supra* note 136, at 21 (stating that the costs of non-compliance or exiting a treaty may be prohibitively high for state parties).

151. *See, e.g.*, U.S. CONST. art. V (describing the amendment process for the U.S.

In addition, judicial discretion in international law tends to be wider than in national law due to the fact that norms of international law are generally more indeterminate.[152] A pertinent and much-discussed example is the standard of fair and equitable treatment in international investment law.[153] Furthermore, in contrast to national judges, international judges are not included in a national judicial tradition and are not accountable to national public opinion. Therefore, the risk that they will follow their own moral beliefs in applying international law is, in principle, higher than in a national legal system. This structural problem has already been highlighted by Hersch Lauterpacht:

> The powers of any court, national or international, are, in theory, rigidly circumscribed by the duty to apply existing law . . . . There is no means of excluding the operation of that human element. Within the same national group there exist restraints upon the unavoidable power of judges: these are the community of national tradition, the overwhelming sentiment (from which judges are not immune) of national solidarity and of the higher national interest, the corrective and deterrent influence of public opinion, and, in case of a clear abuse of judicial discretion, the relatively speedy operation of political checks and remedies. None of these safeguards exist, to any comparable extent, in the international sphere.[154]

The positive effect of authentic interpretations in this context is that they are able to limit the judicial discretion of international courts. Authentic interpretations prevent an interpretative power shift to international tribunals to the detriment of the treaty members.[155] They can, therefore, indeed be seen as a factor that contributes to the re-politicization of the international sphere and the creation of a stronger political, legislative counterpart.[156] This might be particularly important for those areas of international law where sensitive and controversial political questions are involved. The ECtHR, for example, faced the question of whether the French burka ban was in accordance with the freedom of religion,[157] while an ICSID tribunal in *Vattenfall* has to examine whether German legislation that phased out nuclear power plants was in accordance with the Energy Charter

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Constitution through a proposal by a two-thirds majority vote in Congress or by a convention called for by two-thirds of State legislatures and later ratified through three-fourths of States); GRUNDGESETZ [GG] [BASIC LAW], art. 79 ¶ 2, *translation at* http://www.gesetze-im-internet.de/englisch_gg/index (stating that the Basic Law may be amended by a two-thirds majority vote).

152. Andreas Follesdal, *The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights*, 40 J. SOC. PHIL. 595, 605 (2009). *See also* Wolfrum, *supra* note 123, at 17–18.

153. *See generally* Roberts, *supra* note 1.

154. HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 13 (1945).

155. *Cf.* Roberts, *supra* note 1, at 189–190 (asserting that interpretative power shifts to international investment tribunals in cases with vague treaty stipulations).

156. von Bogdandy & Venzke, *In Whose Name?*, *supra* note 136, at 30–32.

157. S.A.S. v. France, App. No. 43835/11, Eur. Ct. H.R. (2014).

Treaty.[158]

However, authentic interpretations are not a panacea for healing the democratic deficit of international tribunals. In some instances, they may also leave a bitter aftertaste. First, not all states adopting authentic interpretations are democratic states. Second, even if one only focuses on democratic states, authentic interpretations are generally adopted by the executive branch, rather than parliament.[159] Authentic interpretations may, in particular, weaken a domestic democratic and constitutional process if they are, in fact, amendments, or else fall somewhere in the twilight zone between amendment and interpretation, as one could argue in such a situation that an amendment that would normally have needed parliamentary approval should have been adopted. Authentic interpretations thus have the potential to undermine democratic and constitutional processes.[160] A remedy against this deficit would be new constitutional or other national rules that stipulate that certain authentic interpretations also need parliamentary approval. Moreover, there is a possibility that a binding authentic interpretation adopted by a competent treaty body might lead to a national democratic deficit if the treaty is also concluded by a supranational organization, such as the European Union. The possibility becomes greater if other states and the treaty body deciding on the binding authentic interpretation do not include the member states of the supranational organization, but only the supranational organization itself. This is the case for the CETA Joint Committee, which is only comprised of representatives of the European Union and Canada.[161] In this instance, the members of the European Union and their parliaments have no direct influence on the decision of the binding authentic interpretation. The German Federal Court, therefore, decided that the internal process within the European Union must be shaped in such a manner as to secure the approval of Germany while a binding authentic interpretation is adopted.[162]

Thus, authentic interpretations can constitute one piece of the puzzle that is healing the democratic deficit of international law. This effect could be improved by developing new rules that require parliamentary consent to authentic interpretations.

2. State Consent

Authentic interpretations strengthen and revive state consent, the "initial capital of legitimacy" of international courts and tribunals.[163] Authentic interpretations allow a court to apply a particular treaty norm with the certainty

158. See Vattenfall AB v. Fed. Republic of Ger., ICSID Case No. ARB/12/12.

159. *Cf.* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 22, 2001, BVERFGE 104, 151 (Ger.) (discussing the rights of the Bundestag, the German Parliament, to participate in approving the NATO Strategic Concept).

160. Fauchald, *supra* note 1, at 332.

161. CETA, *supra* note 9, art. 26.1, ¶ 1.

162. BVerfGE 143, 65 ¶para. 66 (Ger.).

163. Robert Howse et al., *Introduction*, *in* THE LEGITIMACY OF INTERNATIONAL TRADE COURTS AND TRIBUNALS 5 (Robert Howse et al. eds., 2018).

that its concrete interpretation and application are also directly justified by state consent. If an authentic interpretation exists, the courts can rely on the actual consent of the parties. Thus, in this instance, the problem does not exist that certain court decisions or interpretations of a norm or dynamic structure cannot be linked to original state consent[164] and must in some instances be justified by more fictitious consent.[165]

3. Procedural Fairness

One could ask, however, whether the application of these authentic interpretations can also undermine the judicial authority of international courts, as international judges lose part of their independence or authority to decide disputes, because the state parties are interfering with their authentic interpretation within the relevant dispute settlement system.[166] It might be possible to argue that authentic interpretations have a negative impact on the function of the court as a guarantor of rule-based state behavior.[167] Authentic interpretations might be seen as diminishing their function as trustees that enhance the credibility of state commitments.[168] One could even argue that binding authentic interpretations blur the lines between the function of international courts as independent judicial actors that have to apply the law and the states as law-making actors that have to create the law.

The reliance on authentic interpretations may, therefore, undermine the second traditional approach to the legitimacy of international courts, which focuses on the decision-making process—namely whether it is fair and adequate.[169] This

164. Wolfrum, *supra* note 123, at 20.

165. *Cf.* J.H.H. Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLISCHES RECHT UND VÖLKERRECHT 547, 557 (2004).

166. *Cf.* Alvarez, *supra* note 93, at 126–27 ("Thirdly, I suggest that where a treaty creates a third party beneficiary and a dispute settlement mechanism, as in the case of human rights treaties and probably investment protection agreements such as BITs, the capacity for the state parties to modify their treaty through practice faces additional constraints. If we have some difficulties accepting the premise that, in the case of the NAFTA, an interpretation issued by the three NAFTA parties can formally bind an investor-state arbitration, the reasons for that discomfort are not only because this seems to be an unorthodox way of determining the meaning of custom but because, in issuing that Commission interpretation, the NAFTA parties were undercutting the arbitral mechanism that they anticipated would resolve their interpretative disputes. The NAFTA Commission interpretation seems at odds with the traditional notion that once treaty parties accept arbitration, they should not be permitted to interfere with the *competence de la competence* of the arbitrators. Of course, this is an old issue that has divided international lawyers for some time as it is comparable to the notion, disputed by some judges on the International Court of Justice (ICJ), that states can, through a self-judging clause in a treaty, deny the Court's jurisdiction that it would otherwise have to adjudicate as a treaty dispute.").

167. *See, e.g.*, Shany, *supra* note 126, at 225–26 (discussing how international courts are regarded as symbols of a rule-based international order that is displacing a power-based one).

168. Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 932 (2005).

169. Grossman, *supra* note 125, at 67.

problem is particularly present in disputes between states and non-state actors as, in this situation, the treaty members, rather than the court itself, decide on the content of a right and its application. The individual is left out. The situation is different in a state-state dispute, as an authentic interpretation is generally adopted by all parties. This paper will, therefore, focus on disputes between state(s) and individuals. Such disputes exist in the current international order in the areas of international investment law and human rights law. Regarding these disputes, four different situations must be distinguished.

In the first situation, state parties adopt a binding or mere authentic interpretation unrelated to the case law of the relevant international judicial body. This might happen if the treaty parties would like to clarify a vague or previously-disputed norm. The authentic interpretation is not used to change existing case law of the relevant court. In the second situation, treaty parties adopt a binding or mere authentic interpretation after an individual judgment in order to correct the judgment because they disagree with the reasoning. In the third situation, treaty parties adopt a binding or mere authentic interpretation to overturn settled case law. In the fourth situation, treaty parties adopt a binding or mere authentic interpretation during an ongoing dispute only in order to influence and decide the outcome of proceedings.

In the first situation, the authentic interpretation falls within the original and primary authority of states to enact international treaty norms. It helps to clarify a norm and has no consequences for the independence of the tribunal or the fairness of the proceedings, as the situation is the same as if state parties adopt a legal definition within the treaty itself or interpretative protocols during the conclusion of the treaty. This is true irrespective of whether the authentic interpretation is a binding or mere authentic interpretation. An authentic interpretation at this stage can even help to increase the predictability of a norm.[170]

In the second and third situations, the treaty parties use their power to exercise *ex post facto* control of an international tribunal. The main difference when compared to the first situation is that they act in order to change the case law of an established tribunal. Whether the authentic interpretation will be seen as undue interference with the authority of the tribunal—and thereby diminish its legitimacy—will depend on the situation at hand. Generally, these authentic interpretations will not be seen as a threat to the tribunal's independence, as there is no principle that the decisions of a tribunal—even a human rights tribunal—are valid for all time and cannot be overruled by other competent actors. In the national sphere, court decisions can be overruled by parliamentary decisions or, in the case of a constitutional court, often by a constitutional referendum or other special majorities. Exceptions only exist where a national constitution contains an "eternity clause" that enshrines material limits for constitutional amendments.[171]

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170. Kaufmann-Kohler, *supra* note 91, at 194; *see also* Gazzini, *supra* note 30, at 181 (remarking that authentic interpretations carry great clarifying power). *But see* Fauchald, *supra* note 1, at 332 (marking that interpretative agreements that go against the ordinary meaning of treaty terms may complicate matters).

171. *See, e.g.*, GRUNDGESETZ, *supra* note 151, art. 79, ¶ 3 (limiting the kinds of

At the international level, state parties are the competent actors that have the right to overturn court decisions through authentic interpretations or amendments to a treaty. This is particularly evident where authentic interpretations overturn judgment(s) that were *ultra vires* acts of the relevant tribunal. However, state parties can also overturn an acceptable interpretation by the relevant tribunal to replace it with a different and equally acceptable one, even if individual rights are diminished by an authentic interpretation, since a treaty can have different meanings—which is particularly true for human rights treaties—and the tribunal does not have the exclusive authority to decide on the right's content or meaning. An exception will exist only if there is a frequent use or threat of authentic interpretations to overturn court decisions, so that the tribunal seems to be a mere puppet of the treaty parties. However, due to the very rare use of authentic interpretations, it is hard to imagine that such a situation would ever arise.

In the fourth situation—which is also a rather theoretical one, as it is hard to imagine that the treaty parties will act in such bad faith—the court's independence is directly threatened. The parties use the binding authentic interpretation to decide the issue. In this instance, they directly control the relevant judicial body, and the state parties effectively act as judges. Judicial independence is directly threatened, and the court certainly seems to be a mere puppet of the treaty parties. In this situation, the court takes a legitimacy gamble. The court will contradict its original and continuing basis for legitimacy if it rejects the authentic interpretation, but if it follows, then it might contradict its basis for legitimacy and that the proceedings are fair.

B. Overall Legitimacy Assessment

The previous analysis shows that authentic interpretations foster state consent, are an imperfect possibility of controlling international courts and developing a political counterpart, and can, in exceptional cases, negatively influence the fairness of court proceedings.

Due to this impact, authentic interpretations can be seen as legitimacy-enhancing rather than legitimacy-diminishing, if they are adopted by democratic states and as long as they are not used so extensively that a court appears to be a mockery and a puppet—which, in my mind, is only a purely theoretical possibility, as states generally need unanimity to adopt authentic interpretations. The first reason is that those authentic interpretations can contribute to a control mechanism for international courts and are, therefore, able to contribute to the normative balances in order to live up to basic tenets of democratic theory.[172] Second, they foster state consent. State consent is the basis for the existence of international courts and tribunals and, therefore, constitutes their "initial capital of legitimacy."[173] An international body, in particular an international tribunal, can and should only have the right to rule if states have consented to it. This important

amendments that can be passed to the Basic Law).

172. von Bogdandy & Venzke, *In Whose Name?*, *supra* note 136, at 8.

173. Howse et al., *supra* note 163.

principle of international law continues to be upheld by the ICJ.[174] This is also true for obligations and courts ruling against or in favor of obligations against non-state parties, as in the case of human rights or investment treaties. This is true even though in this case international court decisions affect non-state actors' rights and duties.[175]

The reason is trite. International human rights exist not because of an international constitutional assembly composed of world citizens, but because states, like kings in ancient times, have consented to granting human rights. As Joseph Weiler has aptly described it:

> [I]nternational law deals with humans the way it deals with whales and trees . . . . It is a vision of the individual as an object or, at best, as a consumer of outcomes, but not as an agent of process . . . . The individual in international law seen, structurally, only as an object of rights but not as the source of authority, is not different from women in the pre-emancipation societies, or indeed of slaves in Roman times whose rights recognized—at the grace of others.[176]

This existing structure of international law cannot, and should not, be overridden by the content of human rights treaties, namely that they are constitutional rights from a material standpoint, and that the beneficiaries are human beings. Without the consent of states, there would be no international human rights. Thus, an international court can and should only decide on human rights and their content if there is state consent. In the absence of state consent, there is no right to rule.

In addition, the legitimacy criterion of state consent also guarantees that courts act within the legal system itself and do not overstep their authority. As the court is obliged to be bound by state consent, it must act within the authority and legal constraints conferred on it; otherwise, it is empowering itself and acting *ultra vires*.

Moreover, state consent can also be linked to democratic accountability, where democratic states are concerned. Democratic states, even if they are not perfect, are still the best entities to represent the will of their people as they provide democratic accountability and control of international tribunals. As outlined in more detail above, authentic interpretations can provide a stronger political counterpart to international courts and limit judicial discretion. This potential can be increased through the emergence of new national or international rules requiring that national parliaments participate when authentic interpretations are developed. Democratic states can be distinguished from other representatives of civil society

174. *See, e.g.*, Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 6, 39 ¶ 88 (Feb. 3) (recalling that the Court's jurisdiction is based on the consent of the parties and is confined to the extent accepted by them); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, 2011 I.C.J. Rep. 70, 124 ¶ 131 (Apr. 1) (reiterating that state consent is binding).

175. *See* Grossman, *supra* note 125, at 76–77 (arguing that due to this effect and the fact that international court decisions can affect non-litigating states, state consent is flawed as a legitimacy criterion).

176. Weiler, *supra* note 165, at 558.

at the international level. Non-governmental organizations (NGOs) may fight for a good cause and may also represent certain citizens, but they are not democratically accountable and subject to control. NGOs are not elected and subjected to re-election. NGOs can just as easily follow their own moral and political agenda in the international sphere to enforce ideas that are unable to find support in a national democratic society.

However, this analysis does not apply with the same force if authoritarian states act and adopt authentic interpretations jointly with democratic states in situations when human rights obligations are involved. This is true, even though generally, state consent is an important legitimacy factor[177] even if undemocratic states participate in the process, as international law is a special system based on the sovereign equality of states.[178] But if authoritarian states are involved, state consent does not have the double effect of also fostering democratic accountability. Therefore, authentic interpretations adopted by authoritarian states are less legitimacy-enhancing than authentic interpretations adopted by democratic states. This is also true for authentic interpretations adopted jointly by authoritarian and democratic states, if the relevant treaty grants human rights. The first reason is that the consent given to the authentic interpretation by authoritarian states cannot foster democratic accountability. The second reason is that authentic interpretations adopted jointly by democratic and authoritarian states in the sphere of human rights treaties should be considered with caution, as authoritarian states cannot be regarded as trustworthy actors when human rights are concerned.[179]

III. CONCLUSION: CALVIN AND HOBBES OR TOM AND JERRY?

International courts are still in an experimental phase. Within the framework of investment law, we have turned to a new chapter of recalibrating the interpretative power between states and courts.[180] This battle over interpretative authority between states and courts might also spread to other areas of law, such as human rights law. The question that arises is how states and courts should handle this battle regarding interpretative authority, which, in turn, is also a process of developing the appropriate separation of powers between states and courts in international law.

Should states and courts handle this process like Tom and Jerry or like Calvin

177. *But see* Buchanan & Keohane, *supra* note 124, at 39 (arguing that state consent is not a category of legitimacy, as states that are undemocratic and/or that violate their citizens' human rights are unable to confer or are unworthy of conferring legitimacy).

178. U.N. Charter art. 2, ¶ 1; *see* Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. Rep. 99, ¶ 57 ("[T]he principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order.").

179. The political and theoretical questions that cannot be answered in this article, but that arise out of this discussion, are: should democratic states conclude human rights treaties with dictatorial states, and can dictatorial states act as guardians of human rights at the international level, or is this a betrayal of the idea of human rights itself?

180. *Cf.* Roberts, *supra* note 1, at 179.

and Hobbes? I suggest that they not handle it like Tom and Jerry, who are in a constant battle to prove who is the best and smartest within an anarchic environment. I suggest that they act like Calvin and Hobbes, who, even when fighting, are also searching for a possible truce, a constructive relationship, and, most importantly, are also willing to discuss the rules. A pertinent demonstration of this unfolds in the comic strip where Hobbes asks Calvin: "It's Saturday: What do you want to do?" Calvin answers: "Anything but play an organized sport." Hobbes asks: "Want to play Calvinball?" Calvin says: "YEAH." They start playing. Both wearing a blindfold, Calvin carries a ball, and Hobbes, a flag. Calvin screams: "New rule! New rule! If you don't touch the 30-Yard Base Wicket with the flag, you have to hop on one foot." Hobbes replies: "No sport is less organized than Calvinball."[181]

181. BILL WATTERSON, SCIENTIFIC PROGRESS GOES "BOINK" 101 (1991).