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Are Joint Interpretive Agreements Conclusive? The International Law Commission and the Black Box of Authentic Treaty Interpretation

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Treaty parties are sometimes described as the masters of their treaties. What is typically meant by this is that the parties may, by their joint agreement, modify their treaties as they deem fit or terminate them whenever they so desire. But does it also mean that the parties have unlimited discretion when it comes to the joint interpretation of their treaties? For some international lawyers, the response is quite straightforward: “International law says that the parties to a treaty own the treaty and can interpret it. One might say within reason, but one might not question their application of reason as they see fit.”[1]

* Professor of International Law, Geneva Graduate Institute. For a more detailed discussion of this matter, see the following publication from which this text draws: Fuad Zarbiyev ‘A Quiet Revolution in the Making? The Changing State Authority in Treaty Interpretation’ in N. Krisch and E. Yildiz (eds.), The Many Paths of Change in International Law (Oxford University Press, 2023), 291-308.

[1] J. Crawford, ‘A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties’, in G. Nolte (ed.), *Treaties and Subsequent Practice* (Oxford University Press, 2013), 31.

Until very recently this response was something of a black box in the discipline: it was taken for granted (with the help of the destabilizing question "how could it be otherwise?"), it did not seem to call for any demonstration in the form of supporting rules, precedents or other reasons, and it was never challenged seriously. The matter was routinely addressed with a solid conviction of obviousness, as in the following peremptory statement by Lassa Oppenheim: "[i]f [the contracting parties] choose a certain interpretation, no other has any basis. It is only when they disagree that an interpretation based on scientific grounds can ask a hearing."[2]

As Graham Harman pointed out, however, every black box can suffer from two dangers: "too much attention, or too little." [3] A black box that receives too little attention runs the serious risk of being ignored.[4] On the other hand, "gaining too much interest in the form of skepticism and scrutiny" can also be dangerous to a black box, as it can reveal its fragility and threaten its taken-for-granted status.[5] The recent work of the International Law Commission on subsequent agreements and subsequent practice in relation to the interpretation of treaties has subjected the black box of the authority of joint interpretive agreements by the parties to such "skepticism and scrutiny", with the Commission reaching the conclusion that joint interpretive agreements "are not necessarily legally binding."[6]

This paper is an exercise in understanding what made it possible for the Commission, an expert body rarely suspected of revolutionary inclinations, to reach such a radical conclusion. Its argument is that the traditional status of joint interpretive agreements by the parties rested less on rules or precedents than on the social environment surrounding the practice of treaty interpretation. This fragile formal grounding has made the black box of the authority of joint interpretive agreements vulnerable to structural changes in the landscape of treaty interpretation. Beyond the specific case of joint interpretive agreements, this argument is of wider relevance to the assessment of how international law changes over time.

Social Foundations of the Traditional Authority of Joint Interpretive Agreements

It is difficult to account for the authority that joint interpretive agreements enjoyed in classic international law in traditional legal terms. A mainstream international lawyer will indeed have a hard

[2] L. Oppenheim, *International Law: A Treatise* (Longmans, Green, and Company, 1905), 559.
[3] G. Harman, Prince of Networks. Bruno Latour and Metaphysics (Re.Press, 2009), 38.
[4] *Ibid.*
[5] *Ibid*.
[6] Yearbook of the International Law Commission, 2018, Vol. II, Part Two, 24.

time providing a standard explanation – one built around rules or precedents – as to why joint interpretive agreements by the parties should have conclusive effects. The rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties, which dominate treaty interpretation discourse, are notoriously silent in this regard. In its official commentary on the Draft Articles on the Law of Treaties, the International Law Commission pointed out that a subsequent interpretive agreement represented "an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation".[7] However, the Vienna Convention on the Law of Treaties contains no such language. While Article 31 of the Convention specifically mandates that "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" be taken into account, it says nothing about such an agreement being controlling, and it is generally assumed that no hierarchy is implied among the interpretive means listed in the general rule of interpretation set forth in the Convention.[8]

International case law is also of limited help when it comes to the proposition that joint interpretive agreements have conclusive effects. In what passes for the *locus classicus* on the matter, the Permanent Court of International Justice observed 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."[9] But the case is at best of indirect relevance, involving as it did the right of an intergovernmental conference to interpret its previous decision, rather than a joint interpretive agreement by the parties to a treaty. While common understanding and interpretive agreements of the parties have come before the International Court of Justice on several occasions, the Court has also never stated that joint interpretive agreements have conclusive effects.

A quick look at the social environment in which international law has typically operated is, however, enough to understand why joint interpretive agreements by the treaty parties have traditionally been considered to enjoy conclusive authority. To start with, state consent played a central role in classic accounts of the binding force of international law. This is particularly the case with the law of treaties typically described as the bastion of consensualism in international law.[10] The consensualist paradigm

[7] Yearbook of the International Law Commission 1966, vol II, UN Doc. A/6309/Rev.1, p 221.
[8] Ibid, 220.
[9] *Question of Jaworzina (Polish-Czechoslovakian Frontier)*, Advisory Opinion, 6 December 1923, PCIJ Rep Series B, No 8 (1923) 37.
[10] Hubert Thierry, 'L'évolution du Droit International: Cours Général de Droit International Public', in *Collected Courses of the Hague Academy of International Law*, vol 222 (1990) 36. See also, ICSID, *Daimler Financial Services AG v Argentine Republic – Award,* 22 August 2012, ICSID Case No. ARB/05/1, para 168 ('Consent

underpinning the law of treaties justifies the assumption that the very content of a treaty "derives . . . from the consent of the contracting States."[11] In line with this consensualist paradigm, treaty interpretation was seen as a search for the common intention of the parties. Under this paradigm, the parties to the treaty were arguably the best-positioned interpreters of their commitments: how could any third party plausibly pretend to know the common intention of the parties better than the parties themselves?

Another characteristic of the social environment of classic international law is that, historically, states lacked credible competitors as treaty interpreters during a significant period in which international law rarely went beyond interstate transactions and did not know third party adjudicators, much less non-governmental organizations or third party beneficiaries. Treaties were primarily bilateral agreements setting forth specific rights and obligations for the parties – hardly the type of agreements that could encourage the rise of alternative interpreters.

The Changing Landscape of Treaty Interpretation

Several developments have progressively undermined the parties' authority in treaty interpretation. The advent of the treaty interpretation regime of the Vienna Convention on the Law of Treaties is one such development. The underlying premise of treaty interpretation under the Vienna Convention is the assumption that treaty interpretation is not "an investigation *ab initio* into the intentions of the parties" , but an exercise primarily revolving around the text.[12] While the parties can claim to be best positioned to know their intentions, they can claim no privileged position in a regime in which elucidating the meaning of the text is "the starting point and purpose of interpretation."[13]

Another development that has been detrimental to the parties' authority in treaty interpretation is the rise of competing interpreters. Third party adjudicators are among such credible interpreters, as they enjoy significant authority due to their independence, impartiality and / or specialized expertise. Non-

is . . . the cornerstone of all international treaty commitments . . . The primacy of the principle of consent runs through all types of treaty commitments entered into by states.').

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

[12] Yearbook of the International Law Commission 1966, vol II, UN Doc. A/6309/Rev.1, p. 221.

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

governmental organizations can also act as plausible alternative interpreters in some areas of international law, such as international human rights and humanitarian law.[14]

The emergence of treaties with third party beneficiaries has constituted another threat to the parties' authority in treaty interpretation. Prominent examples include human rights treaties and investment protection treaties. The fact that human rights treaties are not limited to interstate bargains is typically relied on to dismiss indicators of state consent in treaty interpretation, such as *travaux préparatoires* or the intention of the parties.[15] The recent practice of the UN human rights treaty bodies of opening up their draft general comments for submissions from all interested parties is another indication that the interpretation of human rights treaties is not regarded as the exclusive business of the parties to those treaties.

The rise of investor-state arbitration has also been a challenge to the parties' authority in treaty interpretation. Claimants, tribunals, experts and practitioners in the field have questioned the conclusive effects of joint interpretive agreements of investment treaties, raising concerns about the due process of justice and the equality of arms.[16]

The International Law Commission and the Discursive Construction of Unsettledness

How did the Commission manage to reopen what many in the discipline would have considered a settled question, namely whether joint interpretive agreements of the treaty parties have conclusive effects? Its most important move in this direction was to establish that the matter was not settled by the Commission during its work on the draft articles on the law of treaties. Remarkably, the

[14] See Heidi Haddad, *The Hidden Hands of Justice: NGOs, Human Rights, and International Courts* (CUP 2018); Theo van Boven, 'The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy Trends in International Law' (1989) 20 CWILJ 207; Linus Mührel, *Saying Authoritatively What International Humanitarian Law Is: On the Interpretations and Law-Ascertainments of the International Committee of the Red Cross* (2019) (PhD thesis on file at the Free University of Berlin, Berlin).

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

[16] See *e.g.*, ICSID, *Mobil Investments Canada INC v Canada*, ICSID Case no ARB/15/6, Award on Jurisdiction and Admissibility, 13 July 2018, para 159; ICSID, *Magyar Farming Company v Hungary*, ICSID Case no ARB/17/27, Award of 13 November 2019, para 222; *HICEE B.V. v The Slovak Republic*, P.C.A. Case no 2009-11, Partial Award, 23 May 2011, para 140; Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179.

Commission noted that even though the interpretations jointly offered in interpretive agreements by the parties were described by the Commission in the 1960s as representing "authentic interpretation[s] . . . which must be read into the treaty for purposes of its interpretation", the Commission "did not go quite as far as saying that such an interpretation is necessarily conclusive in the sense that it overrides all other means of interpretation."[17] According to the Commission, Article 31 of the Vienna Convention on the Law of Treaties confirms this conclusion, because "subsequent agreements and subsequent practice shall . . . only 'be taken into account' in the interpretation of a treaty".[18] It is hard to believe that this is a fair reading of the position of the Commission in the 1960s, but the Commission needed to establish that the conclusive authority of subsequent interpretive agreements had not been recognized by the 1960s Commission in order to be able to safely deny this authority. In line with this tactic, the Commission carefully avoided the phrase "authentic interpretation", which the Commission in the 1960s reserved for the joint interpretation by the parties themselves, preferring to refer to subsequent interpretive agreements as "authentic means of interpretation", another term used by the Commission in the 1960s,[19] and clarifying that subsequent agreements and subsequent practice "are . . . not the only 'authentic means of interpretation'" under Article 31 of the Vienna Convention on the Law of Treaties.[20]

Another remarkable move in the Commission's attempt to establish the unsettledness of the treaty parties' interpretive authority is the Commission's selective use of authorities. The Commentary makes no reference to the advisory opinion of the Permanent Court of International Justice in the *Jaworzina* case, commonly cited as the *locus classicus* in the matter. What appears to be the only monograph dedicated to the interpretation of the treaty by the parties[21] is not mentioned in the Commentary, let alone discussed in the Special Rapporteur's works. The views contradicting the approach promoted by the Special Rapporteur are summarily dismissed as "erroneous" and as merely "the suggestions of some commentators" [22] with the relevant footnote making no reference to highly reputed scholars behind those views (some of whom participated in the preparation of the draft articles on the Law of Treaties within the Commission in the 1960s and in the United Nations Conference on

[17] Yearbook of the International Law Commission, 2018, Vol. II, Part Two, 25.
[18] *Ibid,* 24.
[19] Yearbook of the International Law Commission, 2018, Vol. II, Part Two, 10.
[20] Ibid, 24.
[21] Ioan Voicu, *De l'interprétation authentique des traités internationaux* (Pedone 1968).
[22] Yearbook of the International Law Commission, 2018, Vol. II, Part Two, 24.

the Law of Treaties).[23] The view of the Special Rapporteur is footnoted with citations to authorities that pale in comparison, including to his own Third Report for the Commission's Study Group on Treaties over Time.[24] Finally, why the Commission itself took that allegedly "erroneous" view just a few years back has been conveniently swept under the rug.[25]

It seems highly plausible that the Commission's position was influenced by the rise of treaties with third party beneficiaries. The Special Rapporteur's very first report exposed the view that "the interpretation of treaties which establish rights for other States or actors is less susceptible to 'authentic' interpretation by their parties".[26] The Commission's dedicated attention to pronouncements of expert treaty bodies indicates that the existence of alternative interpreters is also likely to have been a relevant consideration.[27]

Conclusion

In sum, having received too much attention, the black box of the authority of joint interpretive agreements has become fragile. Because joint interpretive agreements have never been formally granted conclusive effects, their authority has become more vulnerable to changes in the landscape of treaty interpretation. Of course, the interpretive authority of the treaty parties cannot be successfully challenged just by any random actor. However, given the authority of the Commission in the international legal order, the blow that it has inflicted on state authority in treaty interpretation has the potential to be consequential.

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

[24] Yearbook of the International Law Commission, 2018, Vol. II, Part Two, 25, in footnote 62.

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

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

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

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