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The Interpretive Authority of the Expert Treaty Body:

From the Perspective of Interpretive Community

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Content

1. Introduction

1.1 Background

The functional differentiation of the society entails the emergence of self-contained regimes requiring special intellectual knowledge of their participants.[1] Expert treaty bodies (expert bodies), which are established by treaties and consist of those experts who serve in their personal capacity with professional knowledge,[2] play an increasingly important role in treaty affairs that they have been mandated to monitor within specific regimes, especially concerning treaty interpretation.[3] For example, the Commission on the Limits of the Continental Shelf (CLCS) constantly interprets the legal terms in the United Nations Convention on the Law of the Sea from the perspective of science. The United Nations Economic Commission for Europe summarizes the interpretive practices of the Compliance Committee to the Aarhus Convention and provides them to governments for guidance.[4] The Human Rights Committee (HRC) even portrays itself as the "authentic interpreter" of the International Covenant on Civil and Political Rights (ICCPR).[5]

However, expert bodies' interpretations are nevertheless ambiguous in their authority. Although they generally regard their interpretations as legal authority, other international actors may not necessarily concur. For example, some states were opposed to the CLCS having the plein right to interpret treaties.[6] Further, the International Court of Justice finds itself "in no way obliged…to model its own interpretation of the Covenant on that of the Committee."[7] In addition, even though the International Law Commission (ILC) gave high weight to treaty interpretation given expert bodies in its 2018 Draft Conclusions, most states did not accept this report.[8] Those phenomena triggered my interest in dealing with the interpretive

[1] Andreas Fischer-Lescano and Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", (2004) 25 Michigan JIL 999.
[2] *Official Records of the General Assembly, Seventy-first Session*, Supplement No. 10 (A/73/10) 106 (2018 GA Official Records).
[3] The official designation of the forms of expert bodies' interpretation varies, including "views", "recommendations", "comments", "measures", "consequences", conclusions, and etc., depending on the wording of the treaties. This proposal uses a general term "pronouncement", which has been adopted by the International Law Commission (ILC).
[4] UNECE, 'The Aarhus Convention: An implementation Guide' (2nd en, 2014).
[5] Draft General Comment No. 33 (2nd version, 18 August 2008) (CCPR/C/GC/33/CRP.3), paras 12–21.
[6] UK, 'Paper Summarizing the Presentation by the United Kingdom of Great Britain and Northern Ireland to the Commission on the Limits of the Continental Shelf on Points of Legal Interpretation made on 12 April 2010'.
[7] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits Judgment) [2010], ICJ Rep. 639 para. 66.
[8] *Subsequent Agreements and Subsequent Practice in Relation to The Interpretation of Treaties: Comments and*

role of expert bodies in the international legal community, a new player to an old stage.

1.2 Literature Review

Previously, most of the scholars' understandings of the interpretive outputs given by expert bodies were either from a *court-centered* or a *state-centered* perspective. The validities of expert bodies' interpretation end up as (1) means of interpretation embedded in Articles 31 and 32 of the Vienna Convention on the Law of Treaty (VCLT), especially as subsequent agreement, subsequent practice, and supplementary means of interpretation;[9] (2) non-binding authentic interpretation or authentic interpretation;[10] (3) the supplementary source under Article 38(1)(d) of the ICJ;[11] and (4) "soft law" with legal effect.[12]

The reasons are two-fold. On the one hand, as a rule of recognition in international law, "sources" exclude norms that are not listed in Article 38 of the ICJ while simultaneously labeling them as "soft law", which has legal effect. Historically, treaty interpretation by expert bodies is inextricably subject to the "real sources" of international law. On the other hand, current literature focuses more on the doctrines and methods of treaty interpretation than on the actors or the processes involved. Moreover, the competence and authority of treaty interpretation were once thought to belong only to state parties and international courts. This places expert bodies' performance in an ancillary role, under the authority of state parties and international courts. A lack of normative studies about expert bodies' interpretation is evident.

1.3 Object and Purpose

In the first place, this proposal attempts to analyze the autonomous interpretive authority of expert bodies. The authority of such a body should not depend on court approval or state obedience; instead, its composition, functions, and characteristics assure its legitimacy and authority, which offers persuasiveness and has a normative impact on other actors.

Secondly, this paper goes beyond the rules of treaty interpretation. It focuses on the "inter-subjective relationship" of treaty interpreters: expert bodies, states, and judicial bodies, who may interact and compete for the "final words" of treaty interpretation. This proposal examines whether the interpretive practices of expert

Observations Received from Governments (A/CN.4/712) paras 121-144.

[9] *Official Records* 2018 (n 3); Danae Azaria, 'The Legal Significance of Expert Treaty Bodies Pronouncements for the Purpose of the Interpretation of Treaties', (2020) 22 ICLR 33. Sir Niger Rodley, 'The International Court of Justice and Human Rights Treaty Bodies' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (CUP, 2015) 96-105.

[10] Ingo Venzke, 'Authoritative Interpretation' (2018) Amsterdam Law School Legal Studies Research Paper No. 2018-28 <https://ssrn.com/abstract=3264566> accessed 18 June 2022. Orakhelashvili Alexander, 'The Agencies of Interpretation' in Orakhelashvili Alexander(eds), *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 514.

[11] Gor Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice' (2020) 9 TEL 211–238. *Official Records* 2018 (n 3).

[12] Elena Fasoli and Alistair McGlone, 'The Non-Compliance Mechanism Under the Aarhus Convention as "Soft" Enforcement of International Environmental Law: Not So Soft After All!' (2018) 65 NILR 27. Birgit Schlutter, 'Aspect of Human Rights Interpretation by the UN treaty bodies' in Helen Keller and Geir Ulfstein (eds), UN Human Rights Treaty Bodies: Law and Legitimacy (CUP, 2012).

bodies in the international context reallocate the interpretive authorities within the international community in light of "interpretive interaction".

Thirdly, this proposal suggests that when expert bodies carry out their interpretive function, they enter into an "interpretive community" where interpretive interplay among actors persists. As a proposal, it does not embrace all the mechanisms that are brought by this concept on a wholesale basis but hopes to describe the interaction process of expert bodies among multiple interpretive subjects by borrowing this concept and exploring how the interpretive community can discipline the interpretive practices actors and ensure the clarity, stability, and normativity of treaties.

1.4 Structure of the Proposal

Following the introduction, Part 2 discusses the theoretical foundation of "interpretive community" in international law. It explores how the constructivist view of interpretation, with "legal dialogue and participation among interpretive subjects" as its core, regards "expertise" as the core resource of the interpretive community. The third part examines CLCS, environmental compliance committees, and treaty bodies in human rights law. It focuses on how expert bodies interpret treaties in their interactions with national and international adjudicators. The fourth part of the paper begins by describing the origins of expert bodies' interpretative authority, that how expertise, accountability, and democracy are responsible for ensuring their interpretive authority. Afterward, the chapter examines the interaction between expert bodies and other subjects of treaty interpretation (mainly courts and states), along with strategies for exercising expert bodies' interpretive authority while maintaining stability within the interpretive community. Chapter 5 concludes.

2. Moving Beyond Rules and Power: Defining the Interpretive Community

It is unclear from articles 31 and 32 of the VCLT how different interpreters affect the outcome of treaty interpretations, although these rules are intended to be the customary law.[13] To understand the authority of treaty interpretation by expert bodies, we must go beyond rule-centered approaches and recognize that actors other than states and judicial bodies play a significant role in developing treaty meanings. Researchers once devoted much of their attention to the "hard-won" rules of interpretation, and then criticized their inadequacy by exploring the "power discourse" hidden behind. Recently, rules and power have been in balance; that is, while recognizing the importance of the rules, emphasis is also placed on both the interaction between multiple interpreters and the Janus-face role of the interpretive community.

2.1 The Revolution of Treaty Interpretation Theories

2.1.1 Formalism

In 1964, Waldock, the fourth Special Rapporteur of the Law of Treaties of the

[13] *Official Records* 2018 (n 3), conclusion 2.1. See also *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Merits Judgment) [2010] ICJ Rep 46 para 65; *Responsibilities and Obligations of States Sponsoring Persons And Entities With Respect To Activities In The Area* (Advisory Opinion) [2011] ITLOS Rep para 57.

ILC, drafted the rules of treaty interpretation in his third report for the first time.[14] Since then, international law scholars and adjudicators have focused their research for a long time on the understanding and application of the rules of interpretation.[15] The core proposition of Formalism is that the treaty text has an established meaning that the interpreter must discover "as in a hunt for buried treasure" through appropriate rules. [16]

The rule-based formalist view of interpretation assumes the existence of "objectivity". In other words, the "right or wrong" construction of a legal text is not boiled down to the will of interpreters.[17] Instead, meaning is to the text as an object is to space, or an element is to a compound, waiting to be extracted and discovered by someone who knows the correct interpretation method (rules).[18] Moreover, the formalists' early integration of treaty interpretation and judicial practices[19] indicates that "rules" are those used by judges to discover the meanings of legal texts, not to create them.

2.1.2 Criticism

Formalists mainstreamed in the wake of the VCLT, but it revealed problems. First, quis custodiet ipsos custodes? Second, interpreters are volatile. Interpretation is a self-portrait of the interpreter.[20] The interpreters' ineradicable ideological and political leanings may affect the objective correctness if treaty interpretation is viewed as a process of "discovering the correct meaning." [21] Even if one relies on rules of interpretation, selecting the appropriate interpretive tools (ordinary meaning, context, object, purpose, etc.) from the toolbox requires "pre-interpretation", depending on the interpreter's preferences, interests, politics, and ideology.[22] Thus, interpretation is a process of "invitation to choose", and the choice itself is political. [23] Thus, the Criticism emphasizes the role of power, where powerful interpreters advocate their interpretations for political gain, substituting "bias" for "universality", and "personal preferences" for "universal preferences".[24]

On top of digging out the power behind the "object" rules, Criticism sees the plurality of interpreters and on longer sticks interpretation to judicial activities. Even though domestic jurists tend to see courts as authoritative sources of meaning, courts do not play a central role in international law. [25] Instead, influential interpreters

[14] G.G. Fitzmauric, 'Report on the Law of Treaties', (1956) 2 YILC 3.
[15] Daniel Peat and Matthew Windsor, 'Playing the Game of Interpretation on Meaning and Metaphor in International Law' in Andrea Bianchi (eds), *Interpretation in International Law* (OUP 2015). See also Andrea Bianchi, 'Textual Interpretation and International Law Reading: The Myth of Indeterminacy and The Genealogy ff Meaning' in Pieter H. F. Bekker (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (CUP 2010).
[16] Melissa J. Durkee, 'Interpretive Entrepreneurs' (2021) 107 Va L Rev 431, 445.
[17] Owen M. Fiss, 'Objectivity and Interpretation' (1982) 34 SLR 739.
[18] Ibid 744.
[19] Ibid 739 (Trial as Interpretation). René provost, 'Interpretation in International Law as A Transcultural Project' in Andrea Bianchi (eds), *Interpretation in International Law* (OUP 2015) 294.
[20] Jan Klabbers quotes the lines from Shelley's novel Frankenstein: "You are my creator, but I am your master: obey!" Jan Klabbers, *An Introduction to International Institutional Law* (CUP 2019).
[21] Peat and Windsor (n 15) 12.
[22] Durkee (n 16) 448.
[23] Ingo Venzke, *How Interpretation Makes International Law* (OUP 2012) 60.
[24] Ibid 60-61.
[25] Detlev F. Vagts, 'Treaty Interpretation and the New American Ways of Law Reading' (1993) 4 EJIL 472, 483.

struggle and compete for the connotation on the battleground and try every trick to pull the law onto their side.[26] Those who win decide the meaning of the content.[27] In this sense, all law is concealed power concealed, [28] and interpretation is an act of hegemony.[29]

2.1.3 Constructivism

Constructivism sits between plenary power and text. In neither case are the meanings of the legal text framed as snapshots taken during "Verfassungszeit" and therefore await discovery, [30] nor are they interpreted at will by the powerful without regard to their intrinsic logic and value. Instead, constructivism explores how a plurality of interpreters, whose preferences differ, can persuade and compromise on a fixed treaty text and how these interactive processes generate public meanings.[31]

Constructivists embrace interpreter-pluralism. The arenas of treaty interpretations move beyond court places. International bureaucracies (international organizations), NGOs, private actors (transnational corporations), media networks, global trade associations, expert bodies, and independent scholars have carved their places. Constructivism emphasizes their contribution to treaty meaning through communication at various levels, as opposed to the judicially-oriented (amicus curiae) or state-focused (being attributed to the state) perspective. Moreover, constructivists recognize the different interpretative influences of other interpreters. The determining factor is the "interpretive authority".

"Authority" is the term constructivists prefer to use instead of "power". Power indicates hegemony (barrel of a gun), where actors force others to accept their interpretations, disregarding the law's independence and rationality. [32] Unlike Criticism, "authority" means persuasiveness (barrel of a pen), which conceives interpretation as a discourse process among actors who maintain their interests but "induce a belief in the rightness of their position."[33] "interpretive authority" can be derived from the actors' independence and impartiality (e.g., international organizations), expertise and experience (e.g., expert bodies), or their democratic foundations(e.g., non-state actors). The higher the interpreter's interpretive authority, the greater the influence they can exert.

The next question is, who has the highest interpretive authority (or, more precisely, the final words) concerning a given legal context? Like Formalism, Constructivists endorse the "objectivity of interpretation", but the correctness is determined neither by the text itself nor any powerful actor but by the "interpretive

[26] Ingo Venzke, 'Is Interpretation in International Law a Game?' in Andrea Bianchi (eds), *Interpretation in International Law* (OUP 2015) 353, 359.
[27] Carl Schmitt pointed out that, whoever has the real power is able to determine the content of concepts and words. Venzke (n 23) citing C Mouffe, *On the Political* (Routledge 2005) 59.
[28] Fiss (n 17) 741. See also Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration'（2004）17 CRIA 199.
[29] Venzke (n 23) 58.
[30] Ibid 30.
[31] Ibid 224, 263.
[32] L.V. Prott, 'Argumentation in International Law' (1991) 5 *Argumentation* 299.
[33] Venzke (n 23) 86.

community" as a whole. [34] To put in other words, while acknowledging the subjectivity of individual interpreters, the notion of interpretive community emphasizes the community's integral (bounded) objectivity.[35]

2.2 Interpretive Community in International Legal Study

2.2.1 Shared Consciousness

"Interpretive community" was first proposed by literary theorist Stanley Fish.[36] For one thing, he thought both the discovery of the author's intention via the text and the pursuit of utmost objectivity were naive. Readers create the text's meaning and the author's intent through the "act of reading" guided by their own interpretive strategies.[37] Moreover, considering that "two or more readers agree regularly" and that "differences in the career of a single reader occur", Fish suggests that beyond the text and reader, there is an interpretive community that "produce meanings and are responsible for the emergence of formal features". [38]

Readers who adopt the same or similar interpretive strategies constitute the "interpretive community". More precisely, an interpretive community is not made up by

> "a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the **consciousness** of community members…"[39] (emphasis added)

According to Fish, it followed that such community-constituted interpreters together create the "subject", "object," and the "meaning" of interpretation.[40]

The notion of "interpretive community" goes beyond textual ontology, recognizes individual subjectivity, and ensures collective objectivity. In terms of membership, the reader is neither subject to a particular authority nor is he "formally" a member of the community by signing a contract. Instead, it is "natural" that the reader becomes one with the community when they adopt the same interpretive strategy.[41] The only proof of membership is fellowship, the "nod of recognition" from someone in the same community.[42] In terms of stability, Fish claims that interpretive communities in literature do not need external binding rules because the constraints on readers are innate and inherent.[43] This is opposed by other scholars,[44] especially those jurists

[34] Ian Johnstone, 'The power of Interpretive Communities' in Michael Barnett (eds), *Power in Global Governance* (CUP 2005) 185.
[35] Fiss (n 17) 745.
[36] Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (HUP 1980).
[37] Ibid. Interpretive communities are a theoretical concept stemming from reader-response criticism publicized by Stanley Fish.
[38] Ibid 14.
[39] Ibid 2, 14-15.
[40] Ibid.
[41] Zhao Yiheng, 'Criteria of Meaning: Exploring Communities and Interpreting Them' (2015) 23 Cultural Studies 109.
[42] Fish (n 36) 16-20.
[43] For instance, the above mentioned "assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance."
Fish argues that the individual reader is not understood to exist as an independent entity, but as a social structure whose activity is circumscribed by the interpretive community that provides interpretive strategies to the self.
[44] Fiss (n 17). Pierre Schlag, 'Fish v. Zapp, The Case of the Relatively Autonomous Self', (1987) 76 GLJ 36.

who have introduced the "interpretive community" into the legal field.

2.2.2 Disciplining Rules

Stanley Fish's Yale colleague, Owen Fiss, introduced "interpretive community" into the legal field to explore whether a bounded objectivity existed among domestic judges. Fiss accepted the authoritativeness of the interpretive community but argued that interpreting a poem differs from legal materials. Thus, he believes disciplining rules are necessary that "constrain the interpreter and constitute the standards by which the correctness of the interpretation is to be judged".[45] Mainly, disciplining rules include those "specifying the relevance and weight to be assigned to the material (e.g., words, history, intention, consequence)", "defining basic concepts", and "establishing the procedural circumstances".[46] These discipline rules function similarly to language rules, constrain users, provide standards for evaluating their use, and form the language itself.[47]

Johnstone introduced the "interpretive community" into international law.[48] According to him, concluding a treaty indicates parties have implicitly agreed to a "process of intersubjective interpretation".[49] Thus, the disciplining rules require that parties interpret through dialogues based on their common perceptions, perspectives, deliberation, reciprocity, and the shared goal of maintaining the relationship.[50] If states still have an interest in maintaining a reputation for good faith adherence to treaties, they will stick to the disciplining rules of the community.[51] Conversely, suppose a party submits an interpretation that is obviously "wrong" and cannot be reconciled with the "conventions and practices of the interpretative communities". In that case, it will be disqualified from membership. Further, it is symptomatic of a breakdown in the relationship or dissolution of a community when all parties continuously disregard the intersubjective nature of the process.[52]

2.3 Epistemic Network

With the fragmentation of international law, the formation of regimes often goes hand in hand with the emergence of distinct interpretive communities,[53] where episteme and expertise become the basis of common consciousness.[54] Therefore, a group of scholars, led by John Ruggie and Peter Haas, realized the control and circulation of knowledge came to be an essential aspect of power and began to study "episteme" in the international community.

According to Hass, "an epistemic community is a network of professionals with

[45] Fiss (n 17) 744.
[46] Ibid.
[47] Ibid 745.
[48] Ian Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1991) 12 MJIL 371.
[49] Ibid 382.
[50] Ibid 384.
[51] Ibid 390.
[52] Ibid 385.
[53] Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi (eds), *Interpretation in International Law* (OUP 2015) 147, 152.
[54] Andrea Bianchi, 'The International Legal Regulation of the Use of Force: the Politics of Interpretive Method' (2009) 22 LJIL 651. Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (CUP 2008) 220 (the community of experts in the environmental field).

recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area."[55] It is not necessary for epistemic communities to comprise only natural scientists; they may also include social scientists or other professionals with a solid claim to a body of knowledge valued by society as a whole.[56] Members within an epistemic community share "normative and principled beliefs", "causal beliefs", "notions of validity", and "a common policy enterprise", aiming at enhancing human welfare.[57]

The notion of "epistemic community" enriches the "interpretive community" by emphasizing the importance of "knowledge", including causal and principled beliefs, as a core resource and emphasizing the role of professionals within the community. The epistemic community associated with a particular regime develops its own ideas of what constitutes "reasonable" behavior under that regime. The process of acculturation and learning in a regime leads to the development of shared background understandings, preferences, and a common worldview.[58]

Constructivism and its concept of "interpretive community" are essential to understanding the interpretive authority of expert bodies. As a first step, only when interpreter-pluralism has been pursued, and "expertise" has been valued are expert bodies capable of being regarded as the subject of treaty interpretation. Second, shifting from legislators to interpreters, expert bodies' interpretive interaction with other actors can generate meaning and normativity within the interpretive community.

3. The Interpretive Practices of Expert Bodies

Diversity allows for a more representative study. The part discusses the interpretive practices of the Commission on the Limits of the Continental Shelf (CLCS) in the law of the sea, the compliance committees in Multilateral Environmental Agreements (MEAs), and treaty bodies under UN human rights treaties. Those expert bodies work in highly sophisticated "self-contained" regimes with their values, knowledges, rationales, and purposes. The composition of these committees varies. Some are entirely made up of scientists, some require scientists to have legal experience, and some more made up of lawyers. Since this proposal examines how interdisciplinary knowledge (more precisely, expertise other than law) affects legal interpretation, it is not that relevant whether the experts also have a legal background or not.

3.1 The Commission on the Limits of the Continental Shelf

The CLCS is established under article 76 of the United Convention for the Law of the Sea (UNCLOS), consisting of 21 geology, geophysics, or hydrography scientists.[59] The purpose of the CLCS is to assist coastal states by providing recommendations in determining the outer limits of their continental shelf beyond 200

[55] Peter Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 Int Organ 3.
[56] Ibid 16.
[57] Ibid 3.
[58] Waibel (n 53) 153.
[59] United Nations Convention on the Law of the Sea, Annex II (Commission on the Limits of the Continental Shelf), Article 2(1).

nautical miles. The CLCS interprets provisions relating to the continental shelf in two ways: (1) through the Scientific and Technical Guidelines (Guidelines), in which the CLCS provides a general point of view; (2) through the recommendations it makes to each submission.[60]

The Guidelines specify the scientific, technical, and legal terms of the UNCLOS *inter alia* "natural of prolongation", "the 2500-meter isobath", "foot of the continental slope", "ridges", and "sediment thickness". It creates a "test of appurtenance" to examine the nature of the continental shelf's entitlement. The CLCS regards the Guidelines as necessary because

> "[T]he Convention makes use of scientific terms in a legal context which at times departs significantly from accepted scientific definitions and terminology…[and] various terms in the Convention might be left open to several possible and equally acceptable interpretations."[61]

As for interpretations through recommendations, the CLCS contributes, for example, to distinguish the "submarine ridges" from "oceanic ridges" and "submarine elevations" through delineation cases involving Japan, Iceland, and the UK (in regard to Ascension Island).

The CLCS also interprets procedural issues. Article 76(10) of the UNCLOS provides that CLCS's work is "without prejudice to" the "question" of delimitation of the continental shelf. However, the Rules of Procedure[62] adopted by the CLCS not only enhances the "question" to "unresolved land or maritime disputes", but also interprets the meaning of "without prejudice" as "shall not consider and qualify a submission".[63] In practice, if the CLCS faces a submission concerning "disputes", it will defer further consideration until it is next in line as queued in the order.[64]

Other actors may interact with CLCS's interpretations. The submission procedure is similar to a "ping-pong" process in which states and the CLCS narrow their disagreements concerning interpretations.[65] In the 2010 Ascension Island case, the UK vigorously opposed the CLCS's reasoning on "deep ocean floor", "natural prolongation," and its "use of morphology over geology", and thus even submitted a written statement outside of the standard procedure.[66] In this case, the UK also doubted the interpretive right of the CLCS.[67] As for the interaction with judicial bodies, the ITLOS finds in the *Bay of Bengal* that the activities of the court and the CLCS "are complementary to each other to ensure coherent and efficient implementation of the Convention."[68] In this case, when determining whether

[60] Suzette V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment* (Springer 2008) 123.
[61] CLCS, 'Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf', para 1.3 (1999).
[62] CLC, 'Rules of Procedure of the Commission on the Limits of the Continental Shelf' (2008).
[63] Para 5(a) of Annex I to the Rules of Procedure: "In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute."
[64] See, for example, CLCS/80, 13.
[65] Ted L McDorman, 'The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World' (2002) 17 Int'l J Marine & Coastal L 301.
[66] Paper Summarizing (n 6) para. 6.
[67] Ibid para 32.
[68] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Merits Judgment) [2012], ITLOS Rep para 373.

Bangladesh and Myanmar enjoy an overlapping continental shelf entitlement, the ITLOS invoked the "test of appurtenance" from the Guidelines (paras 2.2.6 and 2.2.8) as the criteria.[69] The International Law Association (ILA) has also provided its opinion on the "competence allocation" among states, the CLCS, and courts.[70]

3.2 The Compliance Committees of MEAs

Similar to the CLCS, the compliance committees are non-judicial, consultative, and executive treaty bodies established under environmental agreements. They are entitled to consider, among others, individual cases concerning the parties' compliance with their obligations. Generally, compliance committees consist of ecological science experts, but some require legal expertise.[71] In this part, we will discuss the interpretive practices of compliance committees under the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (Kyoto Protocol), the *Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters* (Aarhus Convention), and the *Convention on Environmental Impact Assessment in a Transboundary Context* (Espoo Convention).

The compliance committee clarifies some vague wordings in the Aarhus Convention. For instance, the meaning of "public authority" having responsibilities or functions in relation to the environment under article 2 includes private entities that are delegated administrative functions related to maintaining and disseminating environmental information by national laws.[72] In considering a case against Norway, the committee elaborated on the meaning of the term "internal communications of public authorities," as referred to in one of the Convention's justifications for refusing a request to obtain environmental information. In particular, the committee noted that while the term is not defined in the Convention, this exception is meant to provide a public authority's officials with the opportunity to exchange views freely. "Accordingly, not every document that is communicated internally can be considered as an ''internal communication''. For instance, factual matters and analysis may be distinguished from policy perspectives or opinions."[73]

The compliance committee of the Kyoto Protocol has interpreted procedural issues several times, such as the "sixteen-month prerequisite of participating in the market mechanism, and the meaning and legal significance of the wording "not to proceed further with the process."[74] It is worth noting that the committee once debated with one state party about the methods of interpretation listed in article 31 of the VCLT. In the case concerning Croatia regarding the calculation of its assigned amount of CO□, Croatia argued that the error made by the committee was primarily caused by "grammatical interpretation" of the provision and that the committee

[69] Ibid 114.
[70] The ILA Committee (Second Report) in International Law Association Report of the Seventy-Two Conference (Toronto 2006) (International Law Association 2006) 215, 228-229. (2006 ILA Report).
[71] See for example, Decision 27/CMP.1, Procedures and mechanisms relating to compliance under the Kyoto Protocol, FCCC/KP/CMP/2005/8/Add.3, para II.6, V.3.
[72] Communication ACCC/C/2004/1(Kazakhstan), ECE/MP.PP/C.1/2005/2/Add.1 para. 17
[73] Communication ACCC/C/2013/93, ECE/MP.PP/C.1/2017/16 para 71.
[74] See Simone Schiele, *Evolution of International Environmental Regimes: The Case of Climate* (CUP 2014) 438-441.

should have used the teleological interpretation instead.[75] The committee (more precisely, the enforcement branch), in its final decision of 26 November 2009, disagreed:

> "Pursuant to Article 31 of the 1969 Vienna Convention on the Law of Treaties and customary international law, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In addressing the questions of implementation before it, the enforcement branch followed this general rule and was not persuaded that it was necessary to follow another method of interpretation.[76]

As for the interaction between compliance and international adjudicators, we may find the hint from the "without prejudice" clauses. Most MEAs (or their Protocols) provide that the non-compliance procedure "shall apply without prejudice to the operation of the settlement of disputes procedure", including the judicial process.[77] The Montreal non-compliance mechanism may include the only legal texts that elaborate on the "without prejudice" clauses concerning the judicial process. Paragraph 13 of the Montreal Protocol non-compliance procedure provides that the Meeting of the Parties may issue an interim call/or recommendations when the dispute settlement procedural is pending. [78] However, it is unknown whether such a recommendation involves treaty interpretation and whether a judicial body must follow it. As suggested by Tullio Treves, when interpreting the substantive rules of the MEAs, a judicial body should not stop at the mere notion of decisions (including interpretation) of a compliance committee but take into account the decisions (including interpretation) of a compliance committee as "normative materials" so that they may affect the decision of the judicial body.[79]

3.3 Expert Bodies Under Human Rights Treaties

There are currently nine core international human rights treaties (and one protocol) under the framework of the UN legal system. Human rights bodies are populated by lawyers and experts with a great deal of legal knowledge. The principal outcomes of human rights bodies are *Concluding Observations* to states reports, *Views* on complaints from states or individuals, and *General Comments* providing "detailed content in a comprehensive and coherent way to the rather generally worded provisions of a human rights treaty."[80]

To take the HRC as an example, it has clarified the following issues of the ICCPR: extra-territorial jurisdiction of the ICCPR (article 2(i)), the applicability of international human rights law in armed conflicted (article 4), freedom of movement (article12(1)), liberty and security of person (article 9), reparation

[75] CC-2009-1-7/Croatia/EB, further written submission from Croatia 6.
[76] CC-2009-1-8/Croatia/EB, Final decision para 3 (a).
[77] For the summary, see Tullio Treves, 'The Settlement of Disputes and Non-Compliance Procedures' in Tullio Treves (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (T.M.C. Asser Press 2009) 505.
[78] The Non-Compliance Procedure of the 1987 Montreal Protocol to the 1985 Vienna Convention on Substances that Deplete the Ozone Layer, paras 13.
[79] Treves (n 77) 508.
[80] Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 VJTL 905.

issues (article 13), ill-treatment of prisoners (article 10(1)).[81] Furthermore, the HRC declares that its *Views* are delivered in a judicial spirit (including the impartiality and independence of committee members) and represent an "authoritative determination."[82]

Many treaty interpretation cases have resulted in human rights bodies continually revoking their previous conclusions or findings. The ICJ described the process as a "case law" system.[83] Further, human rights bodies have used almost all the tools of interpretation provided by Article 31 in their practices, including "literal and contextual interpretation",[84] "object and purpose",[85] and "subsequent practice".[86] However, expert bodies under different human rights treaties have their own preferences: the HRC has increasingly referred to the object and purposes of the ICCPR. At the same time, the CAT appears to stick to a literal and contextual interpretation.[87]

International courts and tribunals highly value human rights bodies' interpretive pronouncements. At least in four cases, the ICJ relied on the RCH and CAT's conclusions.[88] However, a milestone occurred in 2010 when the ICJ, for the first time, outlined its attitudes towards the HRC's interpretation of the law in the *Ahmadou Sadio Diallo* case:

> "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty."[89]

Likewise, as for the interpretations given by the African Commission on Human and Peoples' Rights concerning article 12 of the African Charter, the ICJ found itself "must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created."[90]

States may not always be in tune with human rights bodies on interpretation issues. In 2015, the Chair of the HRC reiterated that "the final arbiter for interpreting

[81] Sir Niger Rodley, 'The International Court of Justice and Human Rights Treaty Bodies' in Mads Andenas and Eirik Bjorge (eds), A Farewell to Fragmentation: Reassertion and Convergence in International Law (CUP, 2015) 96-105.
[82] Draft General Comment No. 33 (n 5).
[83] *Ahmadou Sadio Diallo* (n 7) para 66.
[84] CERD Committee, Durmic v. Serbia and Montenegro, Communication No. 029/2003, 6 March 2006, UN Doc. CERD/C/68/D/29/2003, para. 9.6; CAT Committee, Osmani v. Serbia, Communication No. 261/2005, 8 May 2009, UN Doc. CAT/C/42/D/261/2005, para. 10.8.
[85] HRC, Choi and Yoon v. Republic of Korea, Communication Nos. 1321/2004 and 1322/2004, 23 January 2007, UN Docs. CCPR/C/88/D/1321–1322/2004, para. 8.2. See also CERD Committee, Yilmaz-Dogan v. The Netherlands, Communication No. 1/1984, 10 August 1988, UN Doc. CERD/C/36/D/1/1984, para. 9.4.
[86] HRC, *Judge v. Canada*, Communication No. 829/1998, 5 August 2002, UN Doc. CCPR/C/78/D/829/1998, para. 10.3.
[87] Birgit Schlutter, 'Aspect of Human Rights Interpretation by the UN treaty bodies' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP, 2012)
[88] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136. *Ahmadou Sadio Diallo* (n 7). *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Merits Judgment) [2012] ICJ Rep 422. *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organizationupon a Complaint Filed against the International Fund for Agricultural Development* (Advisory Opinion) [2012] ICJ Rep. 10.
[89] *Ahmadou Sadio Diallo* (n 7) para 66.
[90] Ibid para 67.

the Covenant was the Committee and not individual States."[91] States have consistently rejected such a view. As early as 1995, the US and the UK forcefully dismissed the belief that the HRC had been granted such power.[92] In 2006, Saudi Arabia, faced with inconsistent interpretations given by the CAT, held that Committee had no legislative powers and its decisions had no binding authority and legal value.[93]

National courts' attitudes toward human rights bodies vary like on a sliding scale. In most cases, courts recognized that such pronouncements "deserve to be given considerable weight in determining the meaning of a relevant right and the determination of a violation"[94] However, some domestic courts considered a pronouncement of a human rights body to be authoritative[95] or valueless.[96] As concluded by Van Alebeek and Nollkaemper:

> "National courts seem to generally approach treaty body output in a pick-and-choose manner. If courts are convinced by the interpretation of state obligations found in the treaty body output, they refer to its authoritative status. If not, its non-binding nature is emphasized."[97]

4. The Interpretive Authority of Expert Bodies: Justification and Expression

Expert bodies' interpretive authority should not derive from courts' reliance on nor states' adherence to their pronunciations. If we still recognize that courts and states have discretion or veto power over the interpretations of expert bodies, the latter could only play an auxiliary role. Rather, this proposal is the origin of the normativity of expert bodies' authority, which can be identified as "validity",[98] or a "sense of obligation",[99] the "ability of one actor to use institutional and discursive resources to induce deference from others".[100] Thus, the pronunciations of expert bodies are sufficient normative to demand respect from other interpreters.

Expert bodies' authority should also not be understood as "persuasive authority" in contrast to "mandatory authority". Such a distinction is still considered from the perspective of the "sources of international law" approach, whereby documents that are not listed in article 38 of the ICJ Statute may have legal significance but are not binding.[101] However, let's think of the vertical source system and the state-consent perception of international law. Expert bodies can be conceived as the "bureaucratic and administrative forces organized to manage the self-contained regimes, and to

[91] Human Rights Committee, 'Human Rights Committee discusses the report of Canada' (2015) <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16215&LangID=E. accessed 30 June 2022.
[92] Observations by the United States on General Comment No 24, transmitted by letter date 28 March 1995. UN Doc A/50/40. See also Observations by the United Kingdom on General Comment No 24, transmitted by letter dated 21 July 1995.
[93] Orakhelashvili (n 10) 524.
[94] The ILA Committee in International Law Association Report of the Seventy First Conference (Berlin 2004), (International Law Association 2004) 622, para 175
[95] Including domestic courts from South Africa, Hong Kong, Canada, New Zealand and Netherland.
[96] Including domestic courts from the UK and Japan.
[97] R. Van Alebeek and A. Nollkaemper, 'The Legal Status of Decisions By Human Rights Treaty Bodies In National Law' in H. Keller and L. Grover (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 356.
[98] Hans Kelsen, *Pure Theory of Law* (Berkeley Press 1967) 212.
[99] Venzke (n 23) 6.
[100] Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics*, Ithaca (Cornell UP 2004) 5.
[101] Venzke (n 10). Schauer Frederick, 'Authority and Authorities' (2008) 94 Va L Rev 1931.

regulate the participatory democracy of plural private actors." In this sense, the normativity of expert bodies' interpretive authority is derived from three sources: expertise, administrative rationality (accountability), and democracy.

When the expert bodies carry out its interpretive function, they enter into an "interpretive community" where interpretive interplay among interpreters persists. Interpretive community is a decentralized construction, and no interpreter enjoys the final say of the treaty's meaning. The state, judicial, and expert bodies are the interpretive community's main subjects. They compete, communicate and compromise during the interpretive process to persuade the community to accept their voice. Against the "expert body-state-judicial body" structure, the expert bodies can better express their interpretation authority by sticking to the "not ultra vires, clear, coherent and socio-political context-sensitive" strategies.

Further, interpreters should keep "good faith" from the VCLT in mind when communicating with others. Actors must also consider their reputation, credits, and shared interests. Those who violate disciplining rules would neither be acceptable to the community nor lose the opportunity and platform for communication.

4.1 What Justifies Expert Bodies' Interpretive Authority?

4.1.1 Expertise

If treaty interpretation is a persuasion process, the expert body derives its interpretive authority first and foremost from its expertise. As mentioned earlier, since the fragmentation of international law consolidates the epistemic requirement within self-contained regimes, actors with unique knowledge hold sway over solving problems and accessing social reality.[102] In fact, social action is based on knowledge, worldviews, and causal beliefs. To influence knowledge is to influence the social construction of reality and thus the behavior of actors.[103] Max Weber noted in 1925 that the essence of technocratic participation in governance is "the exercise of authority with knowledge".[104] Experts believe they can and should be valued by society as intellectual think tanks.[105]

Expert bodies hold unique intellectual resources that are unavailable to state officials and law school-trained judges: geomorphology for the CLCS, environmental science for the compliance committees, and social science for the human rights treaty bodies. Further, expertise is especially needed due to scientific uncertainty, such as whether GM foods will have genetic material, pathological alterations, etc.[106] Expert bodies can better provide public goods and authority when confronted with these issues.[107] This also happens in domestic legal systems, while traditional

[102] Ernst B. Haas, *When Knowledge is Power: Three Models of Change in International Organizations* (UC Press 1990).
[103] J G Ruggie, 'International Responses to Technology: Concepts and Trends' (1975) 29 Int Organ 557 -83, 569-70.
[104] Weber, Max. *Wirtschaft Und Gesellschaft* (2nd J.C.B. Mohr, 1925) 226.
[105] Steven Brint, *In an Age of Experts: The Changing Role of Professionals in Politics and Public Life* (PUP 1994).
[106] Mingyuan Wang, 'Environmental Justice in the Context of Scientific Uncertainty On the Safety of Genetically Modified Organisms' (2018) 29 SSIC 58.
[107] *Pulp Mills* (n 13), Joint Dissenting Opinion Judges Al-Khasawneh and Simma, para 3: "Nor is the Court, indeed any court save a specialized one, well-placed, without expert assistance, to consider [scientific

law-interpreting bodies highly defer technocrats' interpretation.[108] When experts are portrayed as technical rulers who possess knowledge without partisan confrontation,[109] the audience is more likely to believe that they are persuaded by the right ideas.[110]

4.1.2 Accountability

Expert bodies are essentially treaty bodies, reflecting the coupling between epistemic and bureaucratic systems. Decentralized experts are more like "private think tanks" and are vulnerable to corruption by plutocratic or political groups.[111] Expert bodies are entitled to prevent states from overreaching their interests in areas of public interest, invalidate states' violations,[112] order non-compliant states to correct their behaviors,[113] or carry out punitive measures.[114] The interaction between expert bodies and states establishes the accountability relationship. Such an institutional design reflects the administrative rationalism that emphasizes the role of the expert with both power and knowledge centralized at the apex in the service of the treaty affairs.[115] From this point of view, the expert bodies, in the performance of their duties, are structured in a "bureaucratic mechanism", motivated by the public interest and goals and by their professional and empirical expertise in solving problems.

The expert bodies' accountability is guaranteed by the composition of the body, participatory opportunities of parties and other subjects, transparent working process, and clearly explained decision-making.[116] To some extent, the practices of the CLCS, compliance committees, and human rights bodies indicate their accountability, although maybe not perfectly.[117] For instance, the members are composed on account of district allocation; the rules of procedure are adopted by or with reference to the opinions of the meeting of the parties; state parties can widely participate in the working process of expert bodies by submitting statements, hearings or even requiring appellate reviews.[118] The

assessment] …"

[108] Cutis A. Bradley, 'Chevron Deference and Foreign Affairs' (2000) 86 Va L Rev 650. Bernatt, Maciej, 'Transatlantic Perspective on Judicial Deference in Administrative Law' (2016) 22 CJEL 275. Denis Lernieux, 'Judicial Deference in Canadian Administrative Law: the Pragmatic and Functional Approach, Pushpanathan v. Canada' (1998) 1 S.C.R. 982' (2002) 54 Admin L Rev 757. Bednar, Nicholas R., and Barbara Marchevsky, 'Deferring to the Rule of Law: A Comparative Look at United States Deference Doctrines', (2017) UMemLRev 1047.

[109] Michael Barnett and Martha Finnemore (n 100) 35.

[110] E B Haas, 'Is there a Hole in the Whole? Knowledge, Technology, Interdependence, and the Construction of International Regimes' (1975) 29 Int Organ 827-876, 858-859.

[111] Wendy Wagner & Rena Steinzor (eds), *Rescuing Science from Politics, Regulation and The Distortion of Scientific Research* (CUP 2006).

[112] Michael Sheng-Ti Gau, 'The Outer Limits of the Continental Shelf Established Not on the Basis of the Recommendations of the CLCS: Japan's Cabi- net Decree No. 302' (2019) 27 PJ 1.

[113] For example, the concluding observations of human rights bodies.

[114] For example, the compliance committee of the Kyoto Protocol is empowered to impose punitive measures.

[115] John S. Dryzek, *The Politics of the Earth: Environmental Discourses* (3rd en OUP 2013) 88-92.

[116] Kingsbury Benedict, et al. 'The Emergence of Global Administrative Law' (2005) 68 Law Contemp. Probl 15, 31-51.

[117] As for the criticism to the accountability of the CLCS, see Anna Cavnar, 'Accountability and the Commission on the Limits of the Continental Shelf: Deciding Who Owns the Ocean Floor' (2009) 42 Cornell ILJ 387, 417-438. As for the accountability of the compliance committees, see John S. Dryzek (n 115).

[118] Kyoto Protocol NCP, Decision 27/CMP.1 on Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, doc. FCCC/KP/CMP/2005/8/Add.3, 30 March 2006.

decisions, including interpretation, are made with sound reasoning. An accountable expert body ensures the correctness and legitimacy of treaty interpretation.

4.1.3 Democratic Participation

The risk of relying on an expertise-based model is that it privileges technocrats over all those whose interests are affected by the interpretation. Technocrats have the incentive and ability to advance their own normative vision of a substantive problem area.[119] As a complement to administrative rationalism, democratic participation seeks decentralized participation involving much cooperation across a plurality of perspectives, including state parties, non-governmental organizations (NGOs), and individuals.[120] A combination of government and governance.

As representatives of transnational civil society, NGOs are extensively involved in environmental and human rights areas. For example, in environmental compliance mechanisms, NGOs are involved in almost all aspects of the compliance process, including institutional design, capacity building, loan and debt assumption, financial support, information provision, enforcement, etc.[121] In addition, most UN human rights bodies can initiate "inquiry procedures" for field visits within one's territory(historically, many resources for information to initiate inquiry procedures have been provided by NGOs)[122] and "individual communications procedures" to hear individual complaints of state violations of human rights treaties". By allowing for decision-making with the full participation of civil society, treaty interpretation by expert bodies can be put on a more democratic foundation.

4.2 The Communication of Expert Bodies' Authority Within the Interpretive Community

When expert bodies interpret treaties, they enter into an interpretive community where interpretive interplay among actors and audience persists. In other words, expert bodies jump into the traditional binary interpretive competition between states and international adjudicators, and the central issue now is the balance and the interaction within the tripartite structure: "self-interpretation", "technocrats-interpretation", and "judicial interpretation." In addition, however, expert bodies can adopt specific interpretative strategies to make their own interpretations more persuasive, thus winning the deference of other interpreters. Further, interpreters are also bounded by the discipling rules for the stability of the community.

4.2.1 The Tripartite Interaction

[119] Michael Waibel (n 53) 160.
[120] M Barnett and L Coleman, 'Designing Police: Interpol and the Study of Change in International Organizations' (2005) 49 Int Stud Q 593. Venzke (n 23) 86.
[121] Astrid Epiney, 'The Role of NGOs in the Process of Ensuring Compliance with MEAs' in Beyerlin, Ulrich/Stoll (eds.), *Ensuring Compliane with Multilateral Environmental Agreements: Academic Analysis and Views from Practice* (Leiden/Boston 2006) 319. Cumming Fionna J, 'The Role of NGOs in Multi-Lateral Environmental Agreement Compliance' (2013) 17 NZJEL 41.
[122] For example, in 2000 the CAT inquiry process into Sri Lanka was initiated based on information provided by five UK-registered NGOs regarding torture, immigration and refugees.

The competition between states and judicial bodies over the "final words" has not seen better days. For one thing, the flourishing of international judicial institutions implies a trend beyond statism, reflecting the 20th-century image of a "rule-based, court-centered" positivist approach toward international law.[123] On the other, since it is the states that implement treaties, they can "self-interpret" treaties or even the findings of courts to safeguard their national interests and policies,[124] such as by way of "unilateral declarations".[125] State parties can also interpret treaties by "conference of parties" in a manner comparable to "treaty modification". Anthea Robert attributes the riddle to the state's dual role as both "treaty parties" and "disputant of judicial proceedings". The best model is proposed to achieve a dynamic balance between the two in different arenas and contexts.

Expert bodies are now involved in binary interactions as newcomers to the interpretive community. The conclusion of a treaty implies the commitment to the process that interpretation should base on a shared understanding of all institutions (states, courts, expert bodies) involved. [126] The engagement of expert bodies provides the community with a stream of "epistemic elements", justified by expertise, accountability, and democratic foundations. In deference to expert bodies,' the interpretation can better achieve the ultimate goals of the self-contained regimes in the community: freedom of trade, equitable use of marine resources, environmental protection, human rights development, etc.

The interpretive community creates a platform for inter-subjective interactions, making each other more capable of "knowing, evaluating, and responding" to the opinions of others.[127] In addition to interacting in the form of "pronouncement", interpreters are able to be involved in each other's reasoning processes. States have at least four opportunities to participate in the CLCL's deliberative process to submit explanations. Findings given by compliance committees are fully discussed and reviewed during the Meeting of State Parties before they are finally circulated. The human rights bodies allow entire debate among states and individuals. According to article 289 of the UNCLOS, "scientific and technical experts" are permitted to be present on the bench. The CLCS has a role in assisting states in understanding the UNCLOS when preparing their submissions. All those "in-process dialogues" can increase the normativity of each actor's interpretation as well as the integrity of the community.

4.2.2 Expert Bodies' Interpretive Strategy

The interpretive community tolerates or even embraces disagreement. The core

[123] Hans Kalsen, *Peace through law* (UNC Press 1944). Anne Orford, 'A Global Rule of Law' in Martin Loughlin and Jens Meierhenrich (eds), *The Cambridge Companion to the Rule of Law* (CUP 2021) 538. Martti Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference' in Yves Daudet (ed.), *Topicality of the 1907 Hague Conference, the Second Peace Conference Hague Conference, the Second Peace Conference* (Brill 2008) 127.

[124] Iain Scobbie, 'Wicked Heresies or Legitimate Perspectives? Theory and International Law' in Malcolm Evans (ed), *International Law (3rd Edition,* OUP 2010) 70.

[125] ILC, 'Conclusions of The International Law Commission Relating To Unilateral Acts Of States' (2006).

[126] Johnstone (n 48) 373.

[127] Anthea Roberts, 'Power And Persuasion In Investment Treaty Interpretation: The Dual Role Of States' (2010) 104 AJIL 195.

of inter-subjective interpretation does not lie in reaching a "complete agreement" but in the process of seeking the most acceptable or convincing in the course of adequate communications. While expertise, accountability, and democracy justify the interpretive authority of expert bodies, they also need strategies to enable the authority within the community.

First, expert bodies should not interpret treaties *ultra vires*. Expert bodies should be limited in their scope of work by certain treaties, even when they are capable of exceeding the tasks they are assigned. For instance, in dealing with Japan's submission, as a prerequisite, the CLCS was asked to decide whether *Okinotori Reef* was an island within the meaning of article 121 of the UNCLOS. The CLCS finally determined "not to take action"[128] even if it had the expertise to do so.

Second, expert bodies should interpret the professional terms as clearly as possible. As shown in Part 3, expert bodies are faced with highly specialized and abstract legal/scientific terms. The standard of clearance requires expert bodies to fully reflect the reasoning process.[129] States may entail "intentional ambiguity" in both the treaty drafting and interpretation stage due to their political goals, such as reaching a consensus as soon as possible. However, such concerns should not be addressed by expert bodies, whose words should be free of politics.

Third, the interpretation delivered by expert bodies should be coherent at the legal reasoning level and the legal system.[130] Coherence in reasoning requires expert bodies to stick to or at least respect their own interpretations in previous cases. Deviating from "precedents" requires good, compelling reasons. Moreover, it also requires expert bodies to adopt similar "means of interpretation" under article 31 of the VCLT on the same issue whenever possible. Coherence in the system indicates that expert bodies should take into account other interpreters' previous reasoning on the same subject to achieve "the necessary clarity and the essential consistency of international law, as well as legal security."[131]

Fourth, expert bodies should be sensitive to social context. Expert bodies are highly accountable institutions with civil societies engaged, so they cannot rely exclusively on legal analysis but take into account the social basis of different cultures, especially non-European or developing countries. For instance, in *Judge v. Canada*, the HRC deviated from its previous findings and interpreted Article 6 of the ICCPR as prohibiting extraditing individuals to states where the death penalty is imposed because it noticed the development of Canada's domestic legal system on this issue.

4.2.3 Stability of the Interpretive Community

All actors maintain the stability of the interpretive community. But it is challenging to ask interpreters to keep "modest" rather than "hegemonic". Besides the

[128] CLCS, 'Statement by the Chairperson, Progress of work in the Commission on the Limits of the Continental Shelf' (CLCS/74, 2012).
[129] It is noteworthy that Sweden (speaking on behalf of the Nordic countries) has pointed out that the reasoning of the human rights treaty bodies often appears to be short and not very methodical. See Georg Nolte, 'Fourth Report' para 55.
[130] Leonor Moral Soriano, 'A Modest Notion of Coherence in Legal Reasoning: A Model for the European Court of Justice', (2003) 16 Ratio Juris 296.
[131] *Ahmadou Sadio Diallo* (n 7) para 66.

discipline rules for expert bodies, other actors in the interpretive community need some basic understanding as well.

First, actors should interpret the treaty in "good faith", which is the fundamental element in article 31 of the VCLT. It requires that (1) treaties cannot be interpreted as meaningless;[132] (2) interpretation needs explicit reasoning;[133](3) interpretation is expected to be coherent in reasoning and system;[134] (4) authority cannot be abused.[135] Second, desiring for reputation influences behaviors. As Henkin summarized, every actor's behavior "depends substantially on its 'credit' - on maintaining the expectation that it will live up to international mores and obligations." [136] As long as those actors continue to desire a reputation for decency and respectability, they are likely to adopt "modest" and "good faith" interpretations to maintain the stable functioning of the community. Finally, there is a common interest. Interpretive competition within the community can be mitigated as long as actors continue to pursue common goals of ensuring human rights, protecting the environment, and exploiting marine resources.[137] Interactions among competing interpretations of treaties are an excellent way to reveal former biases and blind spots in treaty interpretation, as well as allow the most persuasive interpretations to emerge from the discussion [138] only if actors still desire to derive benefits and legitimate expectations from multilateral treaties.

5. Conclusion

The legal consequence of the expert body's interpretation should be illustrated neither from a "court-centered" nor from a "state-centered" perspective. The former stresses their role as means of interpretation regulated by the VCLT, and the latter concentrates on the "soft law" or "subsidiary means" of sources embedded in the ICJ Statute. On the contrary, the expert body has automatic interpretive authority: (1) Expertise. The group of experts possessing particular skills and experiences is the most suitable actor to explain their meaning correctly. (2) Administrative Rationality (accountability). Administrative rationalism locates technocrats at the top of the decision-making system and ensures the accountability of expert institutions in terms of transparency, participation, and whole reasoning. (3) The democratic foundation of internationalism ensures the legitimacy of their power of treaty interpretation.

When the expert body carries out its interpretive function, it enters into an "interpretive community" where interpretive interplay among interpreters persists. Interpretive community is a decentralized construction, and no interpreter enjoys the final say of the treaty's meaning. The state, judicial body and the expert body are the main subjects within the interpretive community. They compete, communicate and

[132] Mark E. Viliger (eds), Commentary on the 1969 Vienna Convention on the Law of Treaties, Nartinus Nijhoff Publishers, 2009, p. 425.
[133] Markus Kotzur, "Good Faith (Bona fide)", Max Planck Encyclopedias of International Law, 2009. <https://eproxy.lib.tsinghua.edu.cn/https/5dTR9IPw9JeHdssIZoLzwlFRSx5nXuondASl9c/view/10.1093/law:epil/9780199231690/law-9780199231690-e1412?rskey= uaBlBg&result=1&prd=MPIL accessed on 24 June 2022.
[134] Viliger (n 132) 426.
[135] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (Preliminary Objections) [2018] ICJ Rep 292.
[136] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edn, Columbia UP 1979) 52.
[137] Johnstone (n 48) 390-410.
[138] Mark Toufayan, 'Human Rights Treaty Interpretation: A PostModern Account of its Claim to "Speciality"' (2005) Center for Hum. Rts. & Global Just Working Paper No. 2 13.

compromise during the interpretive process so as to persuade the community to accept their own voice. Against the "expert body-state-judicial body" structure, the expert body can better express their interpretation authority by sticking to the "not ultra vires, clear, coherent and socio-political context-sensitive" strategies. Further, interpreters should keep "good faith" from the VCLT interpretation in mind when communicating with others. Actors must also consider their reputation, credits, and common interests. Those who violate disciplining rules would neither be acceptable to the community nor lose the opportunity and platform for communication.