## Contents

1 Introduction .......................................................... 1
   1.1 Preliminary Reflections upon Interpretative Power .......... 1
   1.2 Current State of Research ................................... 6
   1.3 Scope of this Study ........................................... 9
       1.3.1 Treaty Interpretation ................................... 10
           1.3.1.1 Treaties ........................................... 10
           1.3.1.2 Interpretation .................................... 11
       1.3.2 Inter-State Level ....................................... 14
           1.3.2.1 Domestic Judiciaries .............................. 14
           1.3.2.2 Accessibility and Reliability of Jurisprudence .. 16
           1.3.2.3 Sample Period .................................... 17
       1.3.3 Intra-State Level ....................................... 17
   1.4 Outline and Methodology ..................................... 19

Part I Subsequent Agreements and Subsequent Practice

2 The Origins of Subsequent Agreements and Subsequent Practice .... 27
   2.1 International Legal Doctrine .................................. 28
       2.1.1 ‘Classical’ Writers ..................................... 28
       2.1.2 ‘Post-Classical’ Writers ................................. 30
       2.1.3 State-Sponsored and Private Codification Efforts ....... 34
       2.1.4 Conclusion ................................................ 40
   2.2 Judicial Settlement of International Disputes ................ 41
       2.2.1 Permanent Court of International Justice ............... 42
       2.2.2 International Court of Justice ........................... 46
       2.2.3 Conclusion ................................................ 52
   2.3 Domestic Jurisprudence ........................................ 53
       2.3.1 Germany .................................................. 53
       2.3.2 Switzerland ............................................... 55
       2.3.3 United States of America ................................. 59
       2.3.4 Conclusion ................................................ 63
3 Subsequent Agreements and Subsequent Practice in Context: The 1969 VCLT ................................................................. 65
  3.1 Genesis of the Vienna Convention and its Rules of Interpretation .. 66
  3.2 The Vienna Rules as a Reflection of Customary Law ............... 75
  3.3 The Vienna Rules of Interpretation ................................. 80
    3.3.1 The General Rule of Interpretation .......................... 82
      3.3.1.1 Ordinary and Special Meaning ........................ 83
      3.3.1.2 Context .................................................. 87
      3.3.1.3 Object and Purpose .................................. 89
    3.3.2 Supplementary Means of Interpretation ..................... 90
    3.3.3 Interpretation as a Single Combined Operation ............ 92

4 Subsequent Agreements and Subsequent Practice under Articles 31 and 32 VCLT .......................................................... 99
  4.1 Relationship between Subsequent Agreements and Subsequent Practice ................................................................. 99
  4.2 Subsequent Agreements under Article 31(3)(a) VCLT ............. 103
    4.2.1 ‘Agreement’ ............................................... 103
      4.2.1.1 Agreement and Treaties .............................. 104
      4.2.1.2 Interpretative Treaties ............................... 105
      4.2.1.3 The Form of Agreement .............................. 105
    4.2.2 ‘Between the Parties’ .................................... 108
      4.2.2.1 Who Are ‘the Parties’? .............................. 108
      4.2.2.2 How Many Parties Are ‘the Parties’? ............... 112
    4.2.3 The Object of the Agreement ................................ 113
      4.2.3.1 Sole Purpose v Unintended Side-Effect ............. 113
      4.2.3.2 Interpretation and Application Distinguished ....... 114
      4.2.3.3 Interpretation and Modification Distinguished .... 116
    4.2.4 ‘Subsequent’ ............................................... 119
  4.3 Subsequent Practice under Article 31(3)(b) VCLT ............... 121
    4.3.1 Objective Components of Subsequent Practice ............... 121
      4.3.1.1 What Constitutes ‘Practice’? ....................... 121
      4.3.1.2 Whose Practice Counts as ‘Practice’? ............. 125
      4.3.1.3 ‘In the Application of the Treaty’ .................. 128
    4.3.2 Subjective Components of Subsequent Practice .............. 129
      4.3.2.1 The Agreement of the Parties ....................... 129
      4.3.2.2 Interpretation and Modification Distinguished .... 131
      4.3.2.3 How to ‘Establish’ the Agreement? ................ 133
  4.4 ‘Other’ Subsequent Conduct under Article 32 VCLT ............... 135
  4.5 Conclusion ..................................................... 137
Part II  The Jurisprudence of Domestic Courts

5  Legal Status and Effects of Subsequent Agreements and Subsequent Practice .............................................. 141
  5.1 The Status of Subsequent Agreements and Subsequent Practice .............................................. 141
     5.1.1 Authentic Means of Interpretation .............................................. 142
         5.1.1.1 The Origins and Re-emergence of ‘Authentic Interpretation’ .............................................. 143
         5.1.1.2 Authentic Interpretation in Domestic Jurisprudence .............................................. 147
     5.1.2 Relative Weight in the Interpretative Process .............................................. 150
  5.2 The Effects of Subsequent Agreements and Subsequent Practice .............................................. 156
     5.2.1 Extensive and Restrictive Interpretation .............................................. 156
         5.2.1.1 Different Concepts of Extensive and Restrictive Interpretation .............................................. 157
         5.2.1.2 Extensive and Restrictive Interpretation in Domestic Jurisprudence .............................................. 158
     5.2.2 Dynamic and Static Interpretation .............................................. 161
         5.2.2.1 Defining and Qualifying Dynamic and Static Interpretation .............................................. 162
         5.2.2.2 Dynamic and Static Interpretation in Domestic Jurisprudence .............................................. 164
  5.3 Conclusion .............................................. 168

6  The Frequency of Subsequent Agreements .............................................. 171
  6.1 The Number of Parties to a Treaty .............................................. 172
  6.2 Solid Evidence of Subsequent Agreements .............................................. 174
  6.3 Constitutional Impediments .............................................. 179
     6.3.1 Negative Impact on Parliamentary Participation Rights .............................................. 179
         6.3.1.1 Parliamentary Participation in Foreign Affairs in Germany .............................................. 180
         6.3.1.2 Different Approaches to the Ratification Requirement .............................................. 182
             6.3.1.2.1 Objective Approach .............................................. 182
             6.3.1.2.2 Mixed Approach .............................................. 186
         6.3.1.3 Parliamentary Participation and Subsequent Practice in Other States .............................................. 190
     6.3.2 Legal Advantages over Other Means of Interpretation .............................................. 193
  6.4 Conclusion .............................................. 196

7  Practice by Non-Party Entities .............................................. 199
  7.1 The Output of Treaty Bodies .............................................. 200
     7.1.1 The Interpretative Value of Treaty Body Output .............................................. 202
     7.1.2 Treaty Body Output in the Jurisprudence of Domestic Courts .............................................. 206
     7.1.3 Evaluation .............................................. 212
7.2 The Office of the UN High Commissioner for Refugees 214
  7.2.1 The Link between the Refugee Convention, the Refugee Protocol, and the UNHCR 214
  7.2.2 UNHCR Publications in Domestic Jurisprudence 217
  7.2.3 Evaluation 224
7.3 The OECD ‘Model Convention on Income and Capital’ 225
  7.3.1 The OECD, its Model Convention, and Related Documents 227
  7.3.2 The OECD Model Convention in Domestic Jurisprudence 232
  7.3.3 Evaluation 237
7.4 Conclusion 239

8 The Notion of ‘Agreement’ 241
  8.1 Agreement and Silence 242
    8.1.1 Eloquent Silence in International Law 243
    8.1.2 How Domestic Courts Interpret Silence or Inaction 246
    8.1.3 Evaluation 253
  8.2 Agreement and Selected Practice 254
    8.2.1 Ascertaining the Parties’ Agreement 255
    8.2.2 The Spectrum of Selectivity 259
      8.2.2.1 Quantitative Selectivity 262
      8.2.2.2 Regional Selectivity 264
      8.2.2.3 Qualitative Selectivity 266
    8.2.3 Selected Practice and Uniform Interpretation 269
    8.2.4 Evaluation 273
  8.3 Conclusion 275

9 Conclusion and Outlook 277
  9.1 Ancient Origins but Undiminished Validity 278
  9.2 Neutral Ingredients for the Crucible 280
  9.3 The True Masters of the Treaty 282
  9.4 Towards Uniform Interpretation? 284

Bibliography 287
Subsequent Agreements and Subsequent Practice in Domestic Courts
Berner, K.
2017, XLV, 300 p. 3 illus., Hardcover
ISBN: 978-3-662-54936-0