

at the same time brought about a substantial contribution to general international law.

Undoubtedly, the most valuable contribution of this collection is the elaboration by different judges or members of international courts and tribunals in the final Part V on 'Treaty Interpretation in International Law'. The attempt at public judicial dialogue between Appellate Body members and judges of international courts is the first of its kind. Most of the essays do not engage in a comparison of different interpretative practices, but they do provide a remarkable exposé of how each participant approaches treaty interpretation. The contrast in style and presentation of the different judicial philosophies of the Appellate Body, the International Court of Justice, the European Court of Justice, the Court of First Instance, and the International Tribunal on the Law of the Sea is striking. The ease of some judges in explaining their perception of treaty interpretation is remarkable in comparison with the restraint detectable in the exposition of another judge on the same issue. It is not always clear to what extent each of the essays reflects the personal perspective of each of the judges or of the court or tribunal of which they are members, perspectives that may – understandably – not always necessarily correspond and converge. The common understanding is, though, that the meaning and function of principles of treaty interpretation cannot be isolated from the judicial and institutional context in which they are applied. Equally, all these members of various courts and tribunals share the perception that their role is also one of consolidating the discipline of international law itself and of supporting the evolution of international law. The essays in this part support the conclusion that treaty interpretation is inherently context-specific and that a certain margin of inconsistency or divergence in their application is inevitable.

The breadth of issues and the richness of arguments covered in this collection of essays do justice to over a decade of jurisprudence of the WTO dispute settlement system. The collection is intended to help a broad and varied audience understand the impact of the WTO dispute settlement system on the development of international trade law and general international law. The book is the first instalment of a promising series of publications to celebrate the tenth anniversary of the WTO dispute settlement system.

*Isabelle Van Damme\**

Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, 3 volumes, Brussels, Bruylant, 2006, ISBN 2802721828, 3,024 pp., €395.00.  
doi:10.1017/S0922156507004864

It would not be an overstatement to assert that the publication of the first scholarly commentary on the two Vienna Conventions on the law of treaties is a

---

\* Gonville and Caius College, University of Cambridge; iv218@cam.ac.uk.

significant milestone. Aside from the commentary of the International Law Commission adopted on the completion of draft articles of the two conventions,<sup>1</sup> there was no comprehensive scholarly commentary on these two foundational texts of the international legal system, something long lamented by both scholars and practitioners. Such a lack was particularly bewildering, as almost all other significant contemporary conventional instruments had already been subject to a collective commentary by scholars.<sup>2</sup>

Convinced that 37 years after the signature of the Vienna Convention on the law of treaties between states (and 26 years after its entry into force)<sup>3</sup> as well as 20 years after the signature of the Vienna Convention on the law of treaties between international organizations and between states and international organizations,<sup>4</sup> such a lack had to be addressed, Professor Olivier Corten and Professor Pierre Klein, together with the International Law Centre of the Faculty of Law of the Free University of Brussels (ULB), ignited the bold enterprise of collecting the contributions of as many as 80 authors to carve out a joint commentary on these two fundamental conventional instruments. The realization of this wide-ranging project stretched over more than five years and was concluded by a conference held in Brussels in October 2006 on the occasion of the publication of the three-volume commentary by Bruylant publishers.

Since the work is edited by two leading French-speaking international legal scholars, it is not astounding that the commentaries on each of the articles of these two conventions have been mostly written by eminent French, Belgian, and Swiss authors (see in particular A. Pellet, J. Verhoeven, H. Ruiz-Fabri, J.-M. Sorel, J.-P. Cot, J.-M. Thouvenin, J. Salmon, E. Suy, E. David, P. Daillier, M. Cosnard, H. Ascensio, P. Couvreur, N. Levrat, L. Boisson de Chazournes, R. Kolb, C. Dominicé, E. Wyler, and L. Caflisch, to name only a few). It must, however, be stressed that many other distinguished international scholars have contributed to this enterprise (see, among others, B. Simma, P. Sands, M. Shaw, C. Tomuschat, G. Gaya, M. Kohen, P. Kovacs, W. Schabas, M. Bedjaoui, D. Turp, etc.), thereby shrewdly playing down the French–Belgian–Swiss stamp on this work. Klein and Corten deserve some additional praise for venturing to entrust young promising authors (such as F. Dopagne, C. van

1. As regards the articles on the law of treaties concluded between states, see ILC Report, A/5509 (F) (A/18/9), 1963, Ch. II, paras. 9–17; ILC Report, A/5809 (F) (A/19/9), 1964, Ch. II, paras. 12–24; ILC Report, A/6309/Rev.1 (F) (A/21/9), 1966, part I(E), paras. 11–12, and part II, Ch. II, paras. 9–38. As regards the articles on the law of treaties concluded between an international organization and a state or between international organizations, see ILC Report, A/36/10, (F), 1981, Ch. III, paras. 88–129; ILC Report, A/37/10, (F), 1982, Ch. II, paras. 12–63.

2. See, e.g., B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002); J.-P. Cot, A. Pellet, M. Forteau, *La Charte des Nations Unies, commentaire article par article* (2005); S. Joseph, J. Schultz, and M. Castan, *The International Covenant on Civil and Political Rights—Cases, Materials, and Commentary* (2005); E. Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* (1998); A. Alen (ed.), *A Commentary on the United Nations Convention on the Rights of the Child* (2005); M. Weller (ed.), *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities* (2005); C. H. Schreuer, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2001); Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (1985–2004); L.-E. Pettiti (ed.), *La convention européenne des droits de l'homme: commentaire article par article* (1999); V. Constantinesco, J.-P. Jacqué, R. Kovar, and D. Simon, *Traité instituant la CEE. Commentaire article par article* (1992); J. Megret (ed.), *Le droit de la Communauté économique européenne: commentaire du traité et des textes pris pour son application* (1970–90).

3. 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

4. 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, UN Doc. A/Conf. 129/15 (1986).

Assche, A, Langerwall, C. Denis, F. Roch, etc.) with the writing of the commentary on some important provisions. Other contributions include those of confirmed young academics or practitioners, such as P. d'Argent, C. Tams, C. Laly-Chevalier P. Gautier, and N. Angelet, who have long ago won their spurs in international legal scholarship.

As far as the structure of these volumes is concerned, it is appropriate that the 1969 Convention on the law of treaties between states and the 1986 Convention on the law of treaties between states and international organizations and between international organizations be commented on together and side by side. Thanks to the modelling of the 1986 Convention on the blueprint of the 1969 Convention, corresponding provisions of the two texts are examined alongside each other. The reader is thus able to appraise the extent to which the provision of one departs from the corresponding provision of the other and can, accordingly, single out all the peculiarities of each of these two treaty regimes. The commentary of each provision also rests on a well-judged common three-tiered structure. First, an account of the general features of the article concerned is provided (including a study of the object and purpose as well as an analysis of the normative status of the provision concerned). A second part is devoted to the interpretation of the provision. It is followed by a third part grappling with the effects of the provision. The analysis carried out according to this three-tiered structure borrows substantially from the work of the International Law Commission and the *travaux préparatoires* of the Vienna Conventions. But it has also extensively resorted to the subsequent practice of states and international organizations and the relevant case law – what is naturally of paramount importance for appraising the customary status of each provision.<sup>5</sup>

It is not contested that a very large number of provisions of the two Vienna conventions on the law of treaties have turned out to be customary international law. Differences between the two conventions may, however, arise in this regard, as one can probably argue that more rules of the 1969 convention have achieved customary status than those of its sister 1986 convention. Quite apart from the fact that the former preceded the latter by almost twenty years, it can be posited that the slightly different customary status between the rules of each of these two conventions is not utterly alien to the non-justiciability before the International Court of Justice<sup>6</sup>

5. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, 12 October 1984, [1984] ICJ Rep. 246, at 299, para. 1111:

A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas. It is therefore unrewarding, especially in a new and still unconsolidated field like that involving the quite recent extension of the claims of States to areas which were until yesterday zones of the high seas, to look to general international law to provide a readymade set of rules that can be used for solving any delimitation problems that arise. A more useful course is to seek a better formulation of the fundamental norm, on which the Parties were fortunate enough to be agreed, and whose existence in the legal convictions not only of the Parties to the present dispute, but of all States, is apparent from an examination of the realities of international legal relations.

6. See Art. 34 of the Statute of the International Court of Justice.

and other international tribunals<sup>7</sup> of cases whose ‘very subject matter’<sup>8</sup> pertains to the responsibility of international organizations, as this lessens the extent to which the law of treaties between international organizations or between states and international organizations is applied by international judges. This is not to say that customary international law boils down to the arbitrary creation of international judges.<sup>9</sup> However, the practice has demonstrated the sweeping contribution of international courts in the identification, if not the emergence itself, of customary international law which usually remains shrouded in some sort of uncertainty until it is applied by an international judge. Be that as it may, even if these two conventions in their entirety one day reflect customary international law, Corten and Klein’s commentary would remain an enlightening and useful guide through the interpretation and the understanding of the rules governing the law of treaties as treaty law remains an inescapable tool for interpreting corresponding customary international law.<sup>10</sup>

The customary status of a treaty provision is intrinsically – although not exclusively – linked to the extent to which the corresponding rule is applied in practice. In that respect, one cannot help emphasizing that some provisions are being more applied than others. One may refer, for instance, to those provisions related to the interpretation of treaties (Arts. 31 ff.).<sup>11</sup> That does not necessarily mean that the most applied provisions are those which, once adopted,<sup>12</sup> have attracted most attention in the literature. Paradoxically, the fiercest doctrinal controversies pertaining to the law of treaties have mostly revolved around those least applied provisions, as illustrated by Article 53 or 64 of the Conventions relating to invalidity and termination in case of conflict with *jus cogens*.<sup>13</sup>

- 
7. See, however, the proposed amendment of Art. 59 of the European Convention on Human Rights whereby ‘the European Union may accede to this Convention’; Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention CETS No. 194, open to signature since 13 May 2004. On this reform see generally A. Sicilianos, ‘La “réforme de la réforme” du système de protection de la CEDH’, (2003) 49 *Annuaire français de droit international* 611.
  8. *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, Preliminary Question, Judgment, 15 June 1954, [1954] ICJ Rep. 19; *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, [1995] ICJ Rep. 90. See also the recent case concerning the *Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, [1995] ICJ Rep. (not yet published), paras. 198–204.
  9. Kelsen is probably the author who has expressed one of the most radical views on this, portraying customary international law as a mere creation of judges. See H. Kelsen, ‘Théorie du droit international coutumier’, (1939) 1 *Revue internationale de la théorie du droit* 253, at 264, 266. The *Corfu Channel* case is usually referred to as one of the best examples of the extent of the role of judges in the identification of customary international rules. See *Corfu Channel Case (United Kingdom v. Albania)*, Merits, Judgment, 9 April 1949, [1949] ICJ Rep. 4, at 22 and 28.
  10. *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, [1986] ICJ Rep. 14, at 96 ff., paras. 175–182 and 187. See contra the dissenting opinion of Judge Jennings, *ibid.*, at 529–34.
  11. The enormous list of references to Art. 31 in the table of contents of the *International Law Reports* (ILR) is very telling regarding its extensive use in practice.
  12. See the painstaking adoption of what became Art. 31 of the Vienna Convention. On this question see the commentary of J. M. Sorel, pp. 1301–7.
  13. Examples of invalidity for conflict with *jus cogens* are very few and have pre-dated the Vienna Conventions, which is classically mentioned. See the 23 August 1939 German–Soviet Non-aggression Pact, also known as the Molotov–Ribbentrop Pact. Although officially labelled a ‘non-aggression treaty’, the pact included a secret protocol, in which the independent countries of Finland, Estonia, Latvia, Lithuania, Poland, and Romania

The foregoing may not be true as regards the rules pertaining to the reservations to treaties (Arts. 19 ff.), which deserve a few specific remarks here. These rules, and the corresponding provisions of the Vienna conventions, have triggered a dramatic scholarly debate since their inception, while the uncertainty besetting them has not prevented their wide application in practice. Their incompleteness, if not their internal incoherence,<sup>14</sup> has prodded the International Law Commission to return to the topic.<sup>15</sup> Although the 1995 preliminary conclusions on reservations to normative multilateral treaties adopted by the Commission have proved valuable,<sup>16</sup> the final outcome of the work of the Commission on the question of reservations to treaties – in the form of a ‘guide to practice’<sup>17</sup> – will fall short of designing a watertight set of provisions addressing the lingering inconsistencies of the provisions of the Vienna conventions on this point. In the absence of any clear rules on this matter, there is a high probability that the problem caused by the reservations to treaties will not abate in the future. The persisting uncertainties of the legal regime of reservations to treaties will undoubtedly inflate the value of the commentary on the two articles 19 which can be found in this volume, thereby underpinning the idea that the commentary on articles 19 constitutes one of the most important contributions to this collective work. There is no surprise that such a difficult and important task had to be bestowed on a scholar whose mastery of the question of reservations was unchallenged. Thanks to his knowledge, expertise, and acumen, the special rapporteur of the International Law Commission was somewhat inevitably scheduled for that job. However, some readers may wonder whether an author endowed with more hindsight would have been preferable as the views of the special rapporteur are already well known due to his 13 reports on the topic and his grip on the debate well established. Moreover, the reader will not fail to notice that the contribution of Alain Pellet on this point is, by far, the lengthiest and bulkiest of all the commentaries contained in these three volumes. Despite his extensive writing on the topic, the special rapporteur of the International Law Commission has not been deterred from writing 148 pages just for Article 19 of the 1969 Convention.<sup>18</sup> Such lengthiness may be perceived as an indication of the importance, in the eyes of the editors of these volumes, of Article 19 of the 1969 Convention. This surely is

---

were allocated to spheres of interest of the parties. The secret protocol explicitly assumed ‘territorial and political rearrangements’ in the areas of these countries. Subsequently all of them were invaded, occupied, or forced to cede part of their territory to either the Soviet Union or Germany, or both.

14. See J. Klabbers, ‘Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties’, (2000) 69 *Nordic Journal of International Law* 179; J. d’Aspremont, ‘Les réserves aux traités. Observations à la lumière de la Convention-cadre du Conseil de l’Europe pour la protection des minorités nationales’, (2002) 52 *Recueil des travaux de l’Association Henri Capitant* 487.
15. First Report of the Special Rapporteur, Mr Alain Pellet, 47th session of the ILC, 1995, A/CN.4/470 and Corr.1.
16. Official Records of the General Assembly, Fifty-Second Session, Supplement No. 10 (A/52/10), para. 157.
17. It was agreed early on that the form of the results of the study, which should be a guide to practice in respect of reservations, would take the form of draft guidelines with commentaries which would be of assistance to the practice of states and international organizations; these guidelines would, if necessary, be accompanied by model clauses. See the report of the ILC to the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 491. On the drafting of guidelines by the International Law Commission in general, see J. d’Aspremont, ‘Les travaux de la Commission du droit international relatifs aux actes unilatéraux des Etats’, (2005) 109 *Revue générale de droit international public* 163.
18. Cf. the 45 pages devoted to Art. 31 or the 46 pages dedicated to Art. 60.

not far-fetched against the backdrop of the aforementioned lingering complexity of this question and the ongoing work of the International Law Commission. It may well be that the latitude and room granted to such a scholar who had already had sweeping opportunities to express his views on the topic also betray the difficulty Corten and Klein had in reining in such a prolix and influential scholar . . .

The significance of Corten and Klein's volumes eventually stems from the types of rule that are the object of such a commentary. The rules governing international conventions, like the principles governing the international responsibility of states<sup>19</sup> and international organizations,<sup>20</sup> constitute the bulk of what scholars commonly dub the 'secondary rules of international law'.<sup>21</sup> These are those rules that make international law a 'system'. Given the key role played by the secondary rules in the international legal order, and especially the law of treaties, there is little doubt that a commentary on the law of treaties will prove to be an influential tool for scholars, practitioners, and students. This will only be the case, however, as long as the user of this commentary is endowed with a fair command of French. It is worthy of mention that the first commentary of these two essential texts of international law has been written in French. Indeed, at a time when international legal scholarship is overwhelmingly English-speaking, it is remarkable that, on this very essential topic of international law, the lead has been taken by the French-speaking authors, which reminds us of an epoch when French was the single language of international law and of its doctrine. The French-speaking authors demonstrate here that, even if their language has been dwarfed by English in contemporary legal scholarship, they can still shed light on international legal thought. This being said, the influence of the French literature should not be overestimated. For many scholars around the world, the French scholarly writing remains very arcane, if not inaccessible. Although mistakenly, many scholars understand it to be the embodiment of a fusty positivist doctrine that held sway until the middle of the last century.<sup>22</sup> These scholars and practitioners will continue to call for an English-language commentary on the Vienna Conventions. This is one of the reasons why an English-language commentary will no doubt be achieved some day. In the meantime, this French commentary on the Vienna Conventions on the law of treaties will constitute the work of reference on this subject matter.

That the commentary in French on a major international treaty precedes the English one is not unprecedented. Indeed, the first commentary on the UN Charter was written in French before being followed by a commentary in English almost a decade later.<sup>23</sup> Although contingent elements could explain this renewed advance of the

19. See the ILC article on state responsibility for internationally wrongful acts and the commentaries on the draft articles, Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10). See also the annex to General Assembly Resolution 56/83 of 12 December 2001.

20. See generally the reports of the ILC Special Rapporteur, UN Doc. A/CN.4/532, UN Doc. A/CN.4/541, UN Doc. A/CN.4/553, UN Doc. A/CN.4/564.

21. J. Combacau and D. Alland, 'Primary and Secondary Rules in the Law of State Responsibility', (1985) 16 *Netherlands Yearbook of International Law* 81.

22. See generally M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001).

23. See J.-P. Cot and A. Pellet, *La Charte des Nations Unies: Commentaire article par article* (1985). Cf. B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1994).

French-speaking doctrine, the idea that systematic commentaries on legislation are more in line with Continental and civilist traditions is not so far-fetched. The adoption of a rigorous systematic and legalistic approach remains one of the hallmarks of the French-speaking doctrine. This is not to say that French-speaking doctrine is entirely uniform. It is, however, less fragmented than the dominant English-speaking scholarship, probably for reasons both directly and indirectly pertaining to its size. However diverse French-speaking scholarship may ultimately be, there is no doubt that having a French commentary on the text of the Vienna conventions on the law of treaties contributes to the diversity and plurality of international law as a whole, thereby playing down its portrayal as a hegemonic project. For that reason, too, this collective work must be warmly welcomed.

*Jean d'Aspremont\**

---

\* Lecturer in International Law, University of Leiden.