
Disappearance and New Sightings of Restrictive Interpretation(s)

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Abstract

This article looks to the first formulations of 'restrictive interpretation' to identify with precision the content and meaning of this rule. First Vattel affirmed that odious clauses should be interpreted restrictively. Then, under the Permanent Court and the first decades of the ICJ, a restrictive interpretation emerged in favour of state sovereignty. Later, with the approval of the Vienna Convention on the Law of Treaties in 1969, the interpretation favourable to state sovereignty was abandoned in favour of an alleged neutral way of interpreting treaties. However, a new restrictive interpretation (of sovereignty) was established, as an expression of the new values emerging in international law. This interpretation was obtained by means of the application of the Vienna Convention on the Law of Treaties, an explicit argument, and Latin maxims. Through a parallel analysis of jurisdictions which hear claims between private parties and states, such as the Strasbourg and the San José Courts, and the ICSID arbitrations, the article reaches the conclusion that this mode of interpretation reveals some inconsistencies. It concludes, however, that international law already has the means to address these issues.

A peculiar interpretative reasoning is sometimes proposed by one of the parties in its international proceedings, according to which, in cases of doubt, one must prefer the meaning which impairs State sovereignty less. In the *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* Nicaragua maintained:

In a treaty concerning territorial sovereignty, the jurisprudence affirms that limitations to the State's sovereignty, in case of doubt, shall be interpreted narrowly.¹

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¹ *Rejoinder of Nicaragua* (2008), *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Written Pleadings, i, 155, para. 3.97 (see also at 29–37, paras 2.22–2.35, and at 69–71 paras 2.110–2.113), available at: www.icj-cij.org/docket/files/133/15090.pdf. See also *Rejoinder of The Netherlands* (2004), *Iron Rhine Arbitration (Belgium v. The Netherlands)*, available at: www.pca-cpa.org/upload/files/NL%20Rejoinder.pdf. With regard to ICSID arbitrations see C. Schreuer, *ICSID Convention: A Commentary* (2001), at 249.

This interpretative reasoning is traditionally called *restrictive interpretation*, or, more descriptively, *restrictive interpretation in favour of state sovereignty*.² It is almost always rejected by arbitrators or judges who are called upon to decide disputes.³

This reasoning is sometimes referred to by means of Latin maxims, such as *in dubio mitius*, *in dubio pro libertate*, *expressio unius exclusio alterius*.⁴ For instance, Jennings and Watts, in their edition of *Oppenheim's International Law*, labelled this rule under the maxim *in dubio mitius*.⁵ Accordingly, an interpretative result – in this case an interpretation favourable to the freedom of states – is reached in one of two ways: by means of an explicit rule, such as the restrictive interpretation rule, or through the mere enunciation of a Latin phrase.

Today, with few exceptions,⁶ the rule is always rejected in international decisions.⁷ Nonetheless the maxims are still used to found an interpretation.⁸ One of the aims of this article is to go back to the first formulations of a 'restrictive interpretation', and so to identify the exact content of this rule; a second aim is to show how the Latin maxims are (mis)used today and, finally, to call for a better understanding of treaty interpretation, especially of treaties regulating relations between states and private parties.

1 Restrictive Interpretation: Favourable and Odious Clauses

'Restrictive interpretation' is the interpretative choice which restricts the meaning of a text. In an original sense, it is restrictive in favour of the real intentions of the parties,

² L.A. Podesta Costa, *Manual de derecho Internacional público* (2nd edn, 1947), at 197–198; Rousseau, 'L'indépendance de l'Etat dans l'ordre international', *Recueil des Cours* (1948-II) 167, at 211–213; C. Rousseau, *Droit International Public* (1970), i, at 273–275; Bos, 'Theory and Practice of Treaty Interpretation', 27 *Netherlands Int'l L Rev* (1980) 3, at 153–154; I. Brownlie, *Principles of Public International Law* (7th edn, 2008), at 635; M. Díez de Velasco, *Instituciones de Derecho Internacional Público* (13th edn, 2001), i, at 168; C.F. Amerasinghe, *Jurisdiction of International Tribunals* (2003), at 105; D. Carreau, *Droit International* (8th edn, 2004), at 154; T. Scovazzi (ed.), *Corso di diritto internazionale* (2006), ii, at 69; U. Linderfalck, *On the Interpretation of Treaties* (2007), at 280–284.

³ Cf. *infra* sects. 3 and 4.

⁴ Kolb, 'Le maximes juridiques en droit international public: questions historiques et théoriques', 32 *Rev Belge Droit Int* 32 (1999) 407; id., 'La règle résiduelle de liberté en droit international public ("tout ce qui n'est pas interdit est permis")', 34 *Rev Belge Droit Int* (2001) 100; S. Sur, *L'interprétation en droit international public* (1974), at 244.

⁵ R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, 1992), i, at 1278. An analogous maxim, *semper in obscuris quod minimum est sequimur*, was already present in Dig. 50, 17, 9 (Ulpiano), cf. U. Albanese, *Massime, enunciazioni e formule giuridiche latine* (1993), at 677.

⁶ *SGS v. Pakistan*, Jurisdiction (2003), 18 *ICSID Rev – FILJ* (2003) 365–366, at para. 171; *EC – Hormones*, WTO AB Report (1998), para. 165, n. 154. In other WTO reports the Appellate Body (AB) did not consider the *in dubio mitius* interpretation proposed by the respondents: *Korea – Alcohol*, AB Report (1999), at paras 111–124; in *Chile – Price Band*, AB Report (2002) and in *US – Line Pipe Safeguards*, (2002) the maxim *in dubio mitius* was proposed (respectively at para. 110 and para. 20) but the AB avoided having to decide on it. All the WTO AB reports are available at www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm.

⁷ See *infra* at sect. 3.B.

⁸ See *infra* at sect. 5.

as opposed to what is expressed in a text.⁹ It was during the last two centuries that this expression became a value-oriented rule synonymous with interpretation in favour of state sovereignty. In the 17th and 18th centuries treaty interpretation was clearly not a neutral operation. Treaty interpretation was not organized in a set of rules, but it was not oriented in the same direction as in the last century: the interpretation was *restricted* in favour of different values, according to the maxim of the Glossators *odia restringi et favores convenit ampliari*.¹⁰ Grotius,¹¹ Puffendorf, Textor,¹² and Wolff¹³ all included this rule. Vattel gave the more articulated description of it.¹⁴ This author dedicates paragraphs 299 to 309 of the second chapter of his *Droit des Gens* to things favourable and things odious:¹⁵

§301. What tends to the common advantage, and to equality, is favourable; the contrary is odious. . . . §302. What is useful to human society, is favourable; the contrary is odious. . . . §303. Whatever contains a penalty, is odious. . . . §304. Whatever renders a deed void is odious. . . . §305. Whatever tends to change the present state of things is odious; the opposite is favourable. . . . §306. Things of a mixed nature. Finally, there are things which are at once of a favourable or an odious nature, according to the point of view in which they are considered.¹⁶

Then, in the last paragraph of that section, Vattel described how the ‘favourable and odious clauses’ have to be interpreted, that is, respectively, in an extensive and restrictive way.¹⁷ In short, in the time of international law dominated by rationalist natural law what is now called the *restrictive interpretation* was not favourable to sovereignty; rather it was part of a reasoning which allowed for wider synthesis among the values that underlie (and are the aim) of international law. For instance, in Vattel’s list, the common values and the purposes of international law were general utility, human sociality, freedom, the validity of the acts, the stability of a society.

⁹ H. Grotius, *De jure belli ac pacis* (1625), Bk II, ch. XVI, sect. XII; A. Maresca, *Il Diritto dei Trattati* (1971), at 339–344.

¹⁰ ‘It is more convenient to restrict odious clauses, and to enlarge favourable ones’, *Liber sextus Decretalium, De regulis iuris*, Regula 15, reproduced in A. Friedberg (ed.), *Decretalium collectiones*, ii, (1959) 1122; see the further references from the Digest in Kolb, *Le maximes*, *supra* note 4, at 410, n. 19.

¹¹ Grotius, *supra* note 9, Bk II, Ch. XVI, sects. X–XII.

¹² S. Puffendorf, *Elementorum Jurisprudentiae Universalis Libri Duo* (1672), ii, observation IV, at para. 36, reprinted in J.W. Scott (ed.), *15-II The Classics of International Law* (1931), at 272, and *id.*, *De Jure Naturae et Gentium Libri Octo* (1688), v, ch. XII, at paras 12 ff., reprinted in Scott, 17-II (1934), at 806; J.W. Textor, *Synopsis Juris Gentium*, (1680), ch. 23, at paras 30–38, and ch. 24, at para. 19 ff., reprinted in Scott, 6-II (1916), at 247–248, and 262 ff.

¹³ C.F. Wolff, *Ius Gentium Methodo Scientifica Pertractatum* (1764), at paras 420 ff, reprinted in Scott, *supra* note 12, 13-II (1934), at 219 ff.

¹⁴ This author in 1758 in his treaty on *Droit des Gens* massively adapted civil Roman interpretative maxims to international law: Fairman, ‘The Interpretation of Treaties’, 20 *Transactions of the Grotius Society* (1934), at 129–135.

¹⁵ E. Vattel, *Le droit des gens ou principes de la loi naturelle* (1758), Bk II, Ch. XVII, sects. 299–309.

¹⁶ *Ibid.*, sects. 301–306.

¹⁷ Vattel had a great influence on international law. A list of authors referring to Vattel is reported in the ‘Harvard Research on the Law of the Treaties’, 29 *AJIL* (1935, Suppl.) 939.

This comprehensive and wide conception could not withstand the impact of positivism however. Positivism is a catchall for many movements of thought and currents. The more relevant expression of this theory in international law is represented by the dualist voluntarism of Triepel and Anzilotti:¹⁸ their vision of international law was characterized by a strong emphasis on the state, and accordingly, in treaty law, on the moment of the meeting of the states' wills, that is the moment of consent.¹⁹ Under this conception, treaty interpretation evolved into a mere mechanical operation; restrictive interpretation remained a value-oriented rule, but no longer oriented towards principles and purposes common to every state, but towards sovereignties.²⁰ The rule did not change its deep structure (it remained the expression of the value-oriented rule) but rather the actual content, and it became a rough, quick manner of favouring the now unique value, that is the state.²¹

2 The Establishment of the Rule of the Restrictive Interpretation in Favour of State Sovereignty

This rule originated in a not so distant past when the concept of sovereignty was considered the basis both of the internal political organization of a state, and of international law. State sovereignty was the principle and the purpose of international law: '[r]estrictions upon the independence of States cannot therefore be presumed', affirmed the Permanent Court of International Justice in the *Lotus* case.²² Restrictive interpretation was the rule which introduced the pre-eminence of sovereignty into the interpretation of treaties. The Permanent Court referred to this rule in very clear terms in the advisory opinion on the *Treaty of Lausanne* of 1925:

¹⁸ H. Triepel, *Völkerrecht und Landesrecht* (1899); D. Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale* (1902), i. For an overview of positivism in international law see R. Ago, *Scienza giuridica e diritto internazionale* (1950), at 20–46. Positivism had a weaker influence in international law than in internal legal orders: T. Treves, *Diritto internazionale* (2005), at 40; R. Kolb, *Les cours généraux de droit international public de l'Académie de la Haye* (2003), at 21–33.

¹⁹ A. Truyol y Serra, *Doctrines sur le fondement du droit des gens* (ed. R. Kolb, 2007), at 66.

²⁰ Pillet, 'Recherches sur les droits fondamentaux des états dans l'ordre des rapports internationaux et sur la solution des conflits qu'ils font naître', 5 *RGDIP* (1898) 55, and 6 *RGDIP* (1899) 503. A strict parallelism between sovereignty and restrictive interpretation is developed by M. Sorensen, *Les sources du droit international* (1946), at 229 and H. Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', 36 *British Yrbk Int'l L* (1949) 48, at 57–58, and Rousseau, *Droit*, *supra* note 2, at 273.

²¹ Pillet, *supra* note 20, (1898) at 55–89, and (1899) 503–532.

²² *Lotus (France v. Turkey)*, 1927 PCIJ Series A, No. 10, 4, at 18. This renowned dictum is emblematic of an age, and its relevance is not diminished by the fact that in this decision the majority was reached only with the vote of President Anzilotti: in fact, many dissenting opinions evidence that the disagreement did not relate to the content of the concept of sovereignty, but to other legal principles concurrent with it: dissenting opinion of Weiss, at 42–49 (especially at 43–44); Loder disagrees with the majority (at 34) but he describes the same strict construction of the rules affecting state sovereignty (at 35–36); see also the dissenting opinions of Niholm (59–61) and Altamira (96–97). On the PCIJ and treaty interpretation see Hyde, 'The Interpretation of Treaties by the Permanent Court of International Justice', 24 *AJIL* (1930) 1.

If the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted.²³

The same reasoning can be found in many cases decided by the PCIJ,²⁴ such as the *Wimbledon case*²⁵ and *Right of access to the Danzig Harbour*,²⁶ *Free Zones of Upper Savoy and the District of Gex*,²⁷ and *Interpretation of the Statute of Memel*.²⁸ Not only the PCIJ, but also many arbitral awards in that period refer to this rule:²⁹ for example, the *Kronprins Gustaf Adolf (Sweden/USA)* arbitration of 1932 affirmed that 'those provisions, in case of doubt, are to be interpreted in favor of the natural liberty and independence of the Party concerned'.³⁰

Restrictive interpretation was also applied after World War II. The International Court of Justice made use of it in the Advisory Opinion on the *Interpretation of the Peace Treaties*,³¹ and in the *Anglo Iranian Oil Company*,³² *Fisheries (United Kingdom v. Norway)*,³³ *Continental Shelf (Libya-Malta)*,³⁴ and *Nuclear Test* cases (although about unilateral acts).³⁵ In the same period, the same attitude can be found in arbitrations. In the *De Pascale* award of 1961, the tribunal said:

The international legal system is in favor of the freedom of the subjects involved. The principle of interpretation that preserves this freedom harmonizes with the prevailing tendency of international intercourse.³⁶

²³ *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion, 1925 PCIJ Series B, No. 12, 7, at 25.

²⁴ The interpretation of a clause on jurisdiction is less affected by this rule: *Territorial Jurisdiction of the International Commission of the River Oder (Czechoslovak, Denmark, France, United Kingdom, and Sweden v. Germany)*, 1929 PCIJ Series A, No. 23, 5, at 24 and 26. The rule was applied in *Phosphates in Morocco (Italy/France)*, 1938 PCIJ Series A/B, No. 74, 9, at 23.

²⁵ 1923 PCIJ Series A, No. 1, at 24. See also the joint dissenting opinion of Anzilotti and Huber at 37.

²⁶ Advisory Opinion, 1931 PCIJ Series A/B, No. 43, at 142.

²⁷ 'France's sovereignty . . . is to be respected in so far as it is not limited by her international obligations, and . . . by her obligations under the treaties. . . No restriction exceeding these ensuing from those instruments can be imposed on France without her consent': 1932 PCIJ Series A, No. 22, at 166.

²⁸ 'Memel's autonomy only exists within the limits fixed by the Statute and . . . in the absence of provisions to the contrary in the Convention or its annexes, the rights ensuing from the sovereignty of Lithuania must apply': Advisory Opinion, 1932 PCIJ Series A/B, No. 49, 294, at 313–314.

²⁹ *Radio Corporation of America (USA/China)*, 3 UNRIAA (1935) 1632; *Double Nationality (No. 22) (UK v. Italy)*, 14 UNRIAA (1954) 36; *Interpretation of the Peace Treaty 1946 (No. 196) (France v. Italy)*, 13 UNRIAA (1955) 431; *International Administrative Kantoor v. Federal Republic of Germany* (1967), in V. Coussirat-Coustère and P.M. Eisemann, *Repertory of International Jurisprudence* (1991), iii, at 1421.

³⁰ 2 UNRIAA (1932) 1254.

³¹ [1950] ICJ Rep 227.

³² Jurisdiction [1952] ICJ Rep 105.

³³ [1951] ICJ Rep 143.

³⁴ [1984] ICJ Rep 22, at para. 35. On the relevance of state sovereignty in treaty interpretation in the ICJ decisions see M. Koskeniemi, *From Apology to Utopia* (2nd edn, 2006), at 253–254.

³⁵ [1974] ICJ Rep 267. See also the sovereigntist individual opinions of Gros, at 286, and Petřén, at 306. On the contrary, the joint dissenting opinion of Judges Oneyana, Dillard, Jimenez de Aréchaga, and Waldock was much more internationalist, at 365–366, para. 109.

³⁶ 40 ILR (1970) 256.

There are many other examples, as in the *Air Transport Services (France/USA)* award.³⁷ The rule was applied also in few arbitrations between states and private parties, namely in the earliest decisions of the First Chamber of the Iran–USA Claims Tribunal;³⁸ nevertheless, the Tribunal soon ousted this rule, because of the continuous disequilibrium that it introduced in favour of one of the two parties (that is, the state).

3 The Rule Today

A *Disappearance from Theory*

There are at least three characteristics of contemporary international law which contradict this interpretative rule, and which imply its extinction. The first was the changed political perspective. Faced with the totalitarian and authoritarian abuses of the state in the past century, a new substantive international law, and a new jurisdictional framework of supranational tribunals, emerged. Evidence of this change was the progressive affirmation of human rights, the emergence of international criminal law, the setting up of the WTO system, the widespread diffusion of bilateral investment treaties with compulsory arbitration clauses, and the erosion of the immunity of the state and of its representatives, as well as of the domestic jurisdiction of the state. The state was no longer perceived as a value, even divine,³⁹ as it was before, but a power to be limited, as in the more traditional liberal views.

The second is the contextual evolution of international law: its rules and its dispute settlement courts and tribunals were more and more dedicated to regulating not only relations among independent states but also private relations, among private parties as well as between states and private parties.

The third is the approval of the Vienna Convention on the Law of Treaties (VCLT).⁴⁰ Some scholars already in the first half of the past century upheld the non-existence

³⁷ 38 ILR (1969) 182, at 242–243.

³⁸ *USA v. Iran (Case B24)*, 5 Iran–USA Cl Tr Rep (1984) 99. Similarly see *Iranian Customs Admin v. USA*, 5 Iran–USA Cl Tr Rep (1984) 95.

³⁹ The absoluteness arising in recent centuries from the scientist thought declined on the state theory is echoed by H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre* (1920), at 21, n. 1: '[t]he almightiness of God in nature corresponds to the analogous almightiness of the state in the field of law. The theological and the corresponding legal dogma have the same sense. Just as the order of the world appears to the theologian as the will of God, the legal order appears to the legal theologian as the will of the state and this will can have any content whatsoever. Neither from the notion of God nor from nature is there any restriction on the content of this will. The relationship between God and nature offers the same speculative possibilities as the relationship between the state and the law. Perfectly parallel are also the "God–Man" and "state–individual" relationships. The legal "theory" – without being aware of the fact – here runs mostly on already predisposed theological, but often also on mystic-logical patterns of thought' (my translation).

⁴⁰ Vienna Convention on the Law of Treaties, 23 May 1969, entered into force on 27 Jan. 1980, 1155 UNTS 331.

of the sovereignty-oriented restrictive rule.⁴¹ It was during the 1950s that opinions against this rule came together in a harmonized voice. Fitzmaurice did not mention this rule in his influential essay on treaty interpretation published in the *British Yearbook*.⁴² The *Institut du Droit International*, after a quick debate on the topic,⁴³ never envisaged it in its resolutions.⁴⁴ Furthermore Waldock never included this rule in his ILC reports on the law of the treaty.⁴⁵ In addition, no one contested this choice during the debates in the Commission and during the Vienna Conference on the law of treaties. In those debates, all claims for a strict interpretation of a text converged in the textual rule:⁴⁶ an explicit reference to the rule in favour of sovereignty was not necessary. In conclusion, the drafters of the Convention envisaged a set of rules based on the text; accordingly, the set of articles (31–33) dedicated to interpretation does not mention this rule.

B Disappearance from Practice

International decisions confirm the hypothesis envisaged in theory and by the Vienna Convention: the rule of restrictive interpretation in favour of state sovereignty is no longer in force. As far as disputes between states are concerned, a good example is the *Iron Rhine* arbitration, decided in 2005:

The doctrine of restrictive interpretation never had a hierarchical supremacy, but was a technique to ensure a proper balance of the distribution of rights within a treaty system. The principle of restrictive interpretation . . . is not in fact mentioned in the provisions of the Vienna Convention.⁴⁷

A few years later, in 2009, the ICJ pointed to the non-existence of this rule in the decision between Costa Rica and Nicaragua regarding navigational and related rights:

[T]he Court is not convinced . . . that Costa Rica's right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua.⁴⁸

⁴¹ M. Jökl, *De l'interprétation des traités normatifs* (1936), at 99; Ehrlich, 'L'interprétation des traités', *Recueil des Cours* (1928-IV) 3, at 98. Other criticisms were later expressed by A. McNair, *The Law of Treaties* (1961), at 766; V. D. Degan, *L'interprétation des accords en droit international*, (1963), at 107; Bernhardt, 'Interpretation in International Law', in R. Bernhardt, *Encyclopedia of Public International Law*, (1995) ii, at 1416, 1419.

⁴² Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points', 33 *British Yrbk Int'l L* (1957) 203.

⁴³ In 44 *Annuaire Institut de Droit International* (1952) 364; at 396 de La Pradelle expresses concisely the opposite positions on this topic within the Institute.

⁴⁴ The strongest arguments were about the role of the *travaux préparatoires*: see the intervention of Huber, 44 *Annuaire Institut de Droit International* (1952) 199.

⁴⁵ 'Third Report on the Law of Treaties' (Waldock), *Yrbk Int'l Law Commission* (1964), ii, at 5 (Doc. A/CN.4/167 and Add.1-3), and 'Sixth Report on the Law of Treaties', *Yrbk Int'l Law Commission* (1966), ii, at 51 (Doc. A/CN.4/186 and Add.1-7).

⁴⁶ E.g., 'Résolution sur l'interprétation des Traités' (Rapp. Fitzmaurice), 46 *Annuaire Institut de Droit International* (1956), at 358–359.

⁴⁷ *Iron Rhine, arbitration (Belgium v. The Netherlands)* (2005), at para. 53; see also paras 24 and 53–55, available at: <http://pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf> (last visited 14 Dec. 2009).

⁴⁸ *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (2009), at 24, para. 48, available at: <http://www.icj-cij.org/docket/files/133/15321.pdf> (last visited 14 Dec. 2009).

Arbitral tribunals maintained the same attitude in deciding on disputes between states and private parties. For example, the Iran–USA Claims Tribunal emphasized the uselessness of the rule in many decisions, both in the first period of its work⁴⁹ and more recently.⁵⁰ Many ICSID arbitrations faced with this interpretive argument firmly rejected its applicability under current international law.⁵¹ Another private–state jurisdiction, the Strasbourg Court (and at one time the Commission) similarly refused to apply the rule.⁵²

4 New Trend, New Rules

One may maintain that the old rule regarding restrictive interpretation is no longer valid. Nonetheless, considering restrictive interpretation as a contingent expression of the value-oriented interpretation, one may investigate the possible emergence in the last decades of a new expression of this rule, corresponding to new values.⁵³

A Article 31 of the Vienna Convention and the Reference to the Object and Purpose

The first place to investigate is the Vienna Convention on the Law of Treaties, as an expression of contemporary customary international law on treaty interpretation. The reference to the ‘object and purpose’ contained in the first paragraph of Article 31 of the VCLT is interpreted by arbitrators and judges in two ways. According to the first, *object and purpose*, as a part of a single interpretive rule, are a useful measure by which to understand the precise meaning of an expression.⁵⁴ This attitude is common

⁴⁹ *Iran v. USA (A1)*, 1 Iran–USA Cl Tr Rep (1983) 192. Crook, ‘Applicable Law in International Arbitration: The Iran–U.S. Claims Tribunal Experience’, 83 *AJIL* (1989) 278.

⁵⁰ *Federal Reserve Bank of New York v. Iran (A28)* (2000) in A.J. Van den Berg (ed.), 26 *Yrbk Commercial Arb* (2001), at 562, para. 27, and 568, para. 67.

⁵¹ *Siemens v. Argentina*, Jurisdiction (2004), at para. 81. This, and all other ICSID decisions referred to in this article not separately referenced, are available at: <http://ita.law.uvic.ca/documents> (last visited 15 Dec. 2009). As far as jurisdictional clauses are concerned see *Metalpar and Buen Aire v. Argentina*, Jurisdiction (2006), at para. 92: ‘without any doubt, there is no rule that sustains a restrictive interpretation of the arbitration’, *Loewen v. USA*, Jurisdiction, (2001) para. 51. *Aguas del Tunari v. Bolivia*, Decision on Respondent’s Objections to Jurisdiction (2005), at para. 91. See also Schreuer, ‘Diversity and Harmonization of Treaty Interpretation in Investment Arbitration’, 3(2) *Transnational Dispute Management* (2006) 1, at 4; Fauchald, ‘The Legal Reasoning of ICSID Tribunals. An Empirical Analysis’, 19 *EJIL* (2008) 317–319.

⁵² Morrison, ‘Restrictive Interpretation of Sovereignty Limiting Treaties: The Practice of the European Human Rights Convention System’, 19 *Int’l Comp LQ* (1970) 375; see also the third chapter of G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007).

⁵³ In this survey I consider decisions in which customary rules of interpretation are applied. I will not consider those interpretations grounded on specific interpretative treaty rules, such as Art. 5 of the International Covenant on Civil and Political Rights (ICCPR) and Art. 29 of the American Convention on Human Rights.

⁵⁴ ‘Reports of the Commission to the General Assembly’, *Yrbk Int’l Law Commission* (1966), ii, at 220, para. 9.

in the Courts of Strasbourg and San José, which justified it also by referring to the peculiar structure of the European and American conventions on human rights.⁵⁵ As far as investment arbitrations are concerned, ‘an interpretation that looks at the treaty’s object and purpose is particularly popular’.⁵⁶ In the *Siemens* case, for example, an arbitral tribunal strongly stressed the importance of the object and purpose contained in the Vienna Convention, and stressed also its incompatibility with restrictive interpretation:

The Tribunal considers that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention. The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble.⁵⁷

According to the second interpretation, the reference to the *object and purpose* of the Vienna Convention envisages an autonomous, specific rule to be applied when the ordinary meaning of an expression is not clear. For example, in *Noble v. Romania* an ICSID arbitral tribunal said:

The **object and purpose rule** also supports such an interpretation. While it is not *permissible*, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors, here such an interpretation is justified.⁵⁸

B Effective Interpretation – Effet Utile

The same result is reached by means of so-called *effective interpretation*. This interpretive argument is not new: it was also present in international law before the approval of the Vienna Convention. The argument dictates that, as between an absurd meaning and a reasonable one, whoever interprets a treaty has to choose the latter.⁵⁹ However, effective interpretation can also entail the choice among different possible meanings

⁵⁵ App. No. 2122/64, *Wemhoff v. Germany*, ECHR (1968) Series A, No. 7, at 23. The expression ‘European Convention as “law making treaty”’ was later used in only a few other cases however, cf. App. No. 6538/74, *The Sunday Times v. UK*, ECHR (1979) Series A, No. 30, at para. 48; App. Nos 11209, 11234, & 11266/84, and 11386/85, *Brogan and Others v. UK*, Merits, ECHR (1988) Series A, No. 145-B, at para. 59; App. No. 15318/89, *Loizidou v. Turkey*, Preliminary Objections, ECHR (1995), Series A, No. 310, at para. 84; App. No. 44774/98, *Leyla Sahin v. Turkey*, Merits, Great Chamber, ECHR (2005-XI), at para. 141. These and all other ECtHR cases referred to in this article are available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database. See also under the Inter-American Court, *The Effect of Reservations*, Advisory Opinion, IACtHR (1982), Series A, No. 2, available at: [/www.corteidh.or.cr/docs/opiniones/seriea_02_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_02_ing.pdf), at para. 29.

⁵⁶ Schreuer, *supra* note 51, at 3.

⁵⁷ *Siemens v. Argentina*, Jurisdiction (2004), *supra* note 51, at para. 81.

⁵⁸ *Noble v. Romania*, (2005), at para. 52 (bold emphasis added). For reference see *supra* note 51. In investment arbitrations, the object and purpose of a treaty (and an interpretation adverse to the state) are often ascertained by the analysis of the preamble to a treaty. The relevance of the preambles to establishing a teleological interpretation in human rights treaties is stressed by A.A. Cançado Trindade, *El derecho internacional de los derechos humanos en el siglo XXI* (2001), at 25.

⁵⁹ Vattel, *supra* note 15, Bk II, Ch. XVIII, at para. 283; *Free Zones*, 1932 PCIJ Series A, No. 22, at 13; ‘Reports of the Commission to the General Assembly’, *Yrbk Int’l Law Commission* (1966), ii, at 219; R. Kolb, *Interprétation et création du droit international* (2006), at 583: the author distinguishes in *minimal, increased and maximal* effective interpretation.

of the more effective in relation to the object and purpose of a treaty.⁶⁰ The meaning of the effective interpretation rule is thus shifted today towards this object and purpose rule: it is not used in order to prefer a reasonable meaning over an absurd one, but to prefer the *most effective* one in relation to a purpose of the treaty. For example, in the *United States – Sections 301–310* report a WTO Panel stated:

DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would *most effectively* enhance it.⁶¹

C An Explicit Argument

A third way to apply the new interpretative value-oriented argument is by means of explicit reasoning, without any further reference to the Vienna Convention or to the principle of effectiveness. For example in the *Tradex* case, an ICSID Tribunal affirmed:

It would, therefore, seem appropriate to at least take into account, though not as a decisive factor by itself but rather as a confirming factor, that in case of doubt the 1993 Law should rather be interpreted in favour of investor protection and in favour of ICSID jurisdiction in particular.⁶²

Another body charged with adjudicating on disputes between individuals and states, the Inter American Commission, stated:

In relation to the argument made by the Chilean state . . . the Commission observes [that] in case of doubt, the ambiguity should be interpreted in favor of the victims' rights. This principle of *pro-homine*, as the Inter-American Court has stated, is a controlling guideline for interpreting the Convention, and in human rights law in general.⁶³

Analogously, the Inter-American Court, in the *19 Tradesmen* case, said:

the right to due process must be considered in accordance with the object and purpose of the American Convention, which is the effective protection of the human being; in other words, it should be interpreted in favor of the individual,

while the Spanish version even more clearly says '*[e]n el presente caso el derecho a un debido proceso . . . debe hacerse una interpretación pro persona*'.⁶⁴ The *pro homine* or *pro*

⁶⁰ Lauterpacht, *supra* note 20, at 48–85. A. Cassese, *International Law* (2001), at 134; Linderfalck, *supra* note 2, at 219. See also *Baena-Ricardo et al. v. Panama*, Competence, IACtHR (2003), Series C, No. 104, at para. 100.

⁶¹ *United States – Sections 301–310*, (2000), para. 7.75, available at: www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm (emphasis added).

⁶² *Tradex Hellas v. Albania*, Jurisdiction (1996), 14 ICSID Rev. – *FILJ* 1999, at 194.

⁶³ *A.A. Azocar v. Chile*, IACCommHR (1999), Report No. 137/99, Case 11.863, at para. 146, available at: www.cidh.oas.org/annualrep/99eng/Merits/Chile11.863.htm (last visited 15 Dec. 2009). On the Vienna Convention and the *pro homine* principle see the Separate Opinion of García-Ramírez in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, IACtHR (Ser. C), No. 79 (2001), at para. 2.

⁶⁴ *19 Tradesmen v. Colombia*, Merits, Reparations and Costs, IACtHR (2004) Series C, No. 109, at para. 173.

persona principle is a very new Latin maxim,⁶⁵ never used in international law before, and not even mentioned in Roman law.⁶⁶ The interpretation obtained by the application of this principle is similar to that obtained by means of other, traditional Latin maxims, which will be considered in section 5.

D A New Rule

In conclusion, we see a new interpretative attitude emerging: in case of doubt, the interpretation more favourable to the private party must be preferred, and, moreover, in case of doubt the interpretation favourable to international jurisdiction and regulation against national ones must be preferred. It affects both the substantive content of the applicable law, and the level (international or national) entrusted to apply it.

5 New Rule, Old Descriptions

As in the past, the value-oriented interpretations mentioned above are also obtained by means of Latin maxims. The “advantage” of this technique is to lead to an interpretive result presenting it as a necessary one, and without giving reasons for its basis.

A *Ut Res Magis Valeat quam Pereat*

In the *Iron Rhine* arbitration the rule of more effective interpretation was justified by the Latin maxim *ut res magis valeat quam pereat*, which would be better described by a new maxim *ut res magis valeat*:

Of particular importance is the principle of effectiveness: *ut res magis valeat quam pereat*. The relevance of effectiveness is in relation to the object and purpose of a treaty.⁶⁷

The Tribunal places effective interpretation, object and purpose, and the maxim *ut res magis valeat* on the same level, using those terms as synonyms.⁶⁸ In drawing this parallel, the term of reference of the effectiveness is not the redundancy of a possible meaning (the Latin ‘... *quam pereat*’), but the object and purpose of a treaty: the best interpretation is the closest to the object and purpose of a treaty.

⁶⁵ Amaya Villareal, ‘El principio pro homine: interpretación extensiva vs. el consentimiento del estado’, 5 *Int’l L Rev colombiana der. int.* (2005) 337; Pinto, ‘El principio *pro homine*. Criterios de hermenéutica y pautas para la regulación de los derechos humanos’, in C. Abregú and M. Courtis, *La aplicación de los tratados sobre derechos humanos por los tribunales locales* (2nd edn, 1998), at 163. A reference to this principle can be read in some separate opinions of the Inter American Court: see, e.g., *Bámaca-Velásquez v. Guatemala*, Merits, IACtHR (2000) Ser. C, No. 70, Concurring Opinion of García Ramírez, at para. 3.

⁶⁶ Albanese, *supra* note 5, does not mention it. Roman law did not have the residual rule of individual freedom; it codified this idea in a set of maxims and presumptions in order to articulate and to simplify the process: Kolb, *Les maximes*, *supra* note 4, at 105–106.

⁶⁷ *Iron Rhine*, *supra* note 47, at para. 49.

⁶⁸ *James et al.*, Provisional Measures in the Matter of Trinidad and Tobago, IACtHR (1999) Series E, Concurring Opinion of Judge Cançado-Trindade, at paras 12–16, is similar.

B ‘Exceptions to a Right must be Interpreted Narrowly’ or ‘Expressio Unius Exclusio Alterius’

This is not a new interpretative principle; it existed also in past international law.⁶⁹ However, in the old decisions this principle is strictly linked with the primacy of sovereignty (exceptions to the freedom of the states must be interpreted narrowly).⁷⁰ The rule is now used by the European Court of Human Rights about the limitations to the rights enshrined in the convention.⁷¹ An example is the case law relative to Articles 5, 8,⁷² and 10.⁷³ About Article 5 the Strasbourg Court affirmed:

[T]he exceptions permitted by Article 5 par. 1 (art. 5-1) call for a narrow interpretation.⁷⁴

Cançado Trindade, in a concurring opinion, generalized this finding both for the Inter-American and the European Conventions on Human Rights:

[P]ermissible restrictions (limitations and derogations) to the exercise of guaranteed rights [of those Conventions] are to be restrictively interpreted.⁷⁵

It is common to read this rule also in the *General Comments to the International Covenant on Civil and Political Rights*.⁷⁶

The same argument is applied to interpret the agreements for the liberalization of international trade. In the *Canfor Corporation v. USA*, and *Terminal Forest Products Ltd. v. USA* cases, a NAFTA arbitral tribunal held:

Finally, two rules of interpretation may be relevant for the Preliminary Question.... The second concerns the manner in which exceptions in international instruments are to be interpreted. The present Tribunal subscribes to the view . . . ‘that exceptions were to be interpreted narrowly’.⁷⁷

⁶⁹ Dissenting opinion of Judges Basdevant, Winiarski, McNair, and Read to the Advisory Opinion *Admission to the United Nations* [1948] ICJ Rep 86, at para. 10. Bos, *supra* note 2, at 158–160.

⁷⁰ In this sense see *Admission to the United Nations* (Advisory Opinion) [1948] ICJ Rep 62; *ELSI case (United States v. Italy)* [1989] ICJ Rep 15, at 42.

⁷¹ See P. Van Dijk and F. Van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, 1998), at 75–76.

⁷² App. No. 5029/71, *Klass et Al. v. Germany*, ECHR (1978) Series A, No. 28, at 21, para. 42. For reference see *supra* note 55.

⁷³ App. No. 15153/89, *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, ECHR ((Ser. A), No. 302 (1994) 17, at para. 37; *Sunday Times v. UK (I)*, *supra* note 55, at 40; App. No. 8734/79, *Barthold v. UK*, ECHR (1985) Series A, No. 90, at 21; App. No. 13585/88, *The Observer and the Guardian v. UK*, ECHR (1991) Series A, No. 216, at 29. For references see *supra* note 55.

⁷⁴ App. No. 6301/73, *Winterwerp v. Neetherlands*, ECHR (1979) Series A, No. 33, at 16, para. 37; App. No. 7367/76, *Guzzardi v. Italy*, ECHR (1990) Series A, No. 39, at 36, para. 98. For references see *supra* note 55.

⁷⁵ *Caesar v. Trinidad and Tobago*, IACtHR (Ser. C), No. 123 (2005), concurring opinion of Cançado-Trindade, at para. 7. See also Cançado Trindade, *supra* note 58, at 31.

⁷⁶ General Comment No. 22 (Art. 18), Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993, at para. 8; General Comment No. 27 (Art. 12), Doc. CCPR/C/21/Rev.1/Add.9, 2 Nov. 1999, at para. 4; General Comment No. 28 (Art. 3), Doc. CCPR/C/21/Rev.1/Add.10, 29 Mar. 2000, at para. 21; General Comment No. 31, Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, at para. 6. All the General Comments are available at: www2.ohchr.org/english/bodies/hrc/comments.htm.

⁷⁷ *Canfor v. USA* and *Terminal Forest v. USA*, Preliminary Objections (2006), at paras 185–187. For reference see *supra* note 51.

In its Report of 2 December 1996 a Panel established under the GATT affirmed that 'exceptions to obligations to trade liberalization must perforce be viewed with caution'.⁷⁸ All these passages, taken collectively, indicate a new way to conceive the 'general' and the 'special': in the past the 'general' was sovereignty and the 'exceptional' was derived from treaties.⁷⁹ Today the 'general' is the treaty, and the 'exceptional' is exceptions to the rights in the treaty.

This manner of interpreting a treaty can be described also by means of a Latin maxim. In the *Suez-Inter Aguas* case, Argentina proposed an extensive interpretation of the exceptions to the most favoured nation (MFN) clause envisaged by the BIT between Argentina and Spain, according to the maxim *ejusdem generis*. The Tribunal, on the contrary, held:

The Respondent further argues that this Tribunal should apply the principle of *ejusdem generis* in interpreting the Argentina-Spain BIT so as to exclude dispute settlement matters from the scope of the most-favored-nation clause, because the category 'dispute settlement' is not of the same genus as the matters addressed in the clause. The Tribunal finds no basis for applying the *ejusdem generis* principle to arrive at that result.⁸⁰

The Tribunal, without giving any explanation, did not apply the maxim *ejusdem generis* (analogy) but strictly applied the hypothesis envisaged in a list (according to the maxim *expressio unius exclusio alterius* abovementioned) establishing its jurisdiction. Similarly, another ICSID Tribunal in the *Tokio Tokelès* case established its jurisdiction by affirming:

[T]he purpose of Article 1(2)(c) is only to extend the definition of 'investor' to entities established under the law of a third State provided certain conditions are met. Under the well established presumption *expressio unius est exclusio alterius*, the state of incorporation, not the nationality of the controlling shareholders or *siège social*, thus defines 'investors' of Lithuania under Article 1(2)(b) of the BIT.⁸¹

C The Opposite Argument: *Ejusdem Generis* (Analogy)

Nevertheless, when the extensive interpretation of a list would widen the scope of a treaty, the maxim *ejusdem generis* was preferred to that of *expressio unius exclusio alterius*.⁸² In the *Maffezini* case an ICSID arbitral tribunal was again faced with the interpretation of an MFN clause. The question was how one should interpret the list of the cases to which the MFN clause is extended. The arbitrators concluded:

[I]f a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such

⁷⁸ *Canada Tariffs on Certain US Agricultural Products*, CDA-95-2008-01, at para. 122, available at: www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm (last visited 15 Dec. 2009).

⁷⁹ See *supra* note 70.

⁸⁰ *Suez, Aguas de Barcelona and Inter Aguas v. Argentina*, Jurisdiction (2006), at para. 57. For reference see *supra* note 51.

⁸¹ *Tokio Tokelès v. Ukraine*, jurisdiction (2004), at para. 30. For reference see *supra* note 51.

⁸² On the *ejusdem generis* maxim see Linderfalck, *supra* note 2, at 303–310.

provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle.⁸³

However, as in the cases seen in the preceding paragraph, the arbitral tribunal did not explain the reason for the choice of one Latin maxim in lieu of its opposite.

D On the Latin Maxims

The Latin maxims, behind the seeming neutrality of their formulation, are a means of applying a substantive choice and, at the same time, hiding it. By using Latin maxims, he who decides a dispute is not justifying a choice, but simply describing the way an argument is developed. The maxims indicate *how* one should reach a certain result; they do not indicate *why* one should do so. They accomplish implicitly what the value-oriented rule does explicitly. In the past, (i) ‘sovereignty’ and ‘state’, (ii) the restrictive interpretation, and (iii) Latin maxims were (i) concepts, (ii) rules, and (iii) techniques (or, rather, descriptions) used interchangeably, sometimes alone and sometimes at the same time, in order to obtain a decision which was less onerous for a state. The relevant triad has now become (i) international jurisdiction and regulation, (ii) effective interpretation/object and purpose rule/pro private principle, and (iii) Latin maxims.

6 The Emergence of a Short Circuit

A presumption of the past, that in cases of doubt the meaning which impaired state sovereignty the least had to be preferred, is now reversed; in cases of doubt the meaning which impairs state sovereignty the most is to be preferred. Nevertheless, this new rule gives rise to some questions. Even if we grant for the sake of argument that the preference against the state can be accepted in human rights jurisdiction on the basis of equity⁸⁴ in favour of the weak party – the person – as Professor Scovazzi maintains,⁸⁵ it is less clear that the same preference should favour big corporations. Thus, although an interpretation in favour of the private party in one case may be equitable, in the second case the same could be inequitable. This problem emerged in explicit terms in the *Saluka* case:

The ‘object and purpose’ of the Treaty may be discerned from its title and preamble. These read: ‘Agreement on encouragement and reciprocal protection of investments’ . . . The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of *encouraging foreign investment and extending and intensifying the parties’*

⁸³ *Maffezini v. Spain*, Exceptions to Jurisdiction (2000), at para. 56, available at: http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_001.pdf (last visited 15 Dec. 2009). The original is in Spanish.

⁸⁴ On treaty interpretation and equity see G. Schwarzenberger, *A Manual of International Law* (5th edn, 1967), at 493; Bos, *supra* note 2, at 16–20.

⁸⁵ Scovazzi, *supra* note 2, at 60 and 67.

economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments.⁸⁶

In analogous terms in the *El Paso* case an arbitral tribunal interpreted an umbrella clause saying:

This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility *to create an adapted and evolutionary framework for the development of economic activities*, and the necessity to protect foreign investment and its continuing flow.⁸⁷

These decisions raise urgent and concrete questions, and they warn us of the temptation to reduce and oversimplify an interpretation. These decisions call for a wider vision of international law, neither servilely obedient to, and fragmented in, *sovereignities*, nor servilely obedient to, and fragmented in, each *object and purpose*, but open to a more complete and integrated reasoning. However, the quoted proposals refer to criteria ('encouraging foreign investment and extending and intensifying the parties' economic relations'; 'creat[ing] an adapted and evolutionary framework for the development of economic activities') which are difficult to determine, and above all difficult to determine for such a limited institutional body as an arbitral tribunal;⁸⁸ the modern state, in order to deal with these uneasy duties – to encourage investments, to extend parties' relations, to create a framework for development – structured an organic system of check and balances, and opposite powers.⁸⁹ It is arguable that an international tribunal is the best place *systematically* to conduct these operations of synthesis.

7 Some Hints from Strasbourg to Washington

Considering another Court dedicated to adjudicating private–state disputes, the Strasbourg Court, certain useful hints emerge on this issue. In the period between the fall of the interpretative rule favourable to state sovereignty and the rise of the opposite rule, a new argument *favourable* to the state was applied by the Strasbourg Court: the 'margin of appreciation'. A reference to this concept was already made in one of the

⁸⁶ *Saluka v. Czech Republic*, Partial Award (2006), at 64–65, paras 299–300, available at: <http://pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf> (last visited 15 Dec. 2009), emphasis added; *contra* this reasoning see Reed, 'Current Issues in International Investment Treaty Arbitration: Statistics and Inconsistencies', in N. Boschiero and R. Luzzatto (eds.), *I rapporti economici internazionali e l'evoluzione del loro regime giuridico* (2008), at 348.

⁸⁷ *El Paso v. Argentina*, Jurisdiction (2006), at para. 70, emphasis added. For reference see *supra* note 51.

⁸⁸ The complexity of the 'investment' notion in the ICSID convention is analysed in Seatzu, 'La nozione di "investimento internazionale" nella convenzione di Washington del 1965 sulla soluzione delle controversie tra stati e nazionali di altri stati alla luce di una recente giurisprudenza arbitrale', in G. Bongiorno (ed.), *Studi in onore di Carmine Punzi* (2008), ii, at 1393.

⁸⁹ Shany, 'Towards a General Margin of Appreciation Doctrine in International Law?', 16 *EJIL* (2005) 907, at 919–921.

first cases upheld by the Commission, in 1958 in *Cyprus v. UK*.⁹⁰ Its explicit formulation was traceable in another case decided by the Commission, *Lawless v. Ireland*:

This being so, and having regard to the high responsibility which a Government has to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion – a certain margin of appreciation – must be left to the Government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention.⁹¹

The Court also refers to the margin of appreciation.⁹² There is no unique vision of the margin of appreciation: scholars are divided about it, describing it as a doctrine,⁹³ a technique,⁹⁴ or a rhetorical argument;⁹⁵ they criticize it as such, because it is vague, not precise, it does not introduce more predictability,⁹⁶ it is an old concept no longer valid,⁹⁷ or they criticize the use of it by the Strasbourg Court.⁹⁸ On the one hand certain scholars maintain that the margin is one face of a relativistic conception of the human rights system; on the other hand, some others attribute to the margin the function of stopping an imperial and universalistic application of human rights.⁹⁹ Thus, the

⁹⁰ 'The full Commission report on *Cyprus v. UK* was not published, but the Commission did state that, in its opinion, a state government "should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation": Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights', 48 *Int'l Comp LQ* (1999) 639, at n. 3.

⁹¹ App. No. 332/57, *Lawless v. Ireland*, ECHR (1959), Series B, No. 1, at 85, para. 90; see also the declarations of Erim and Sørensen at 93. See also App. Nos 1474, 1677 & 1691/62, 1769 & 1994/63, and 2126/64, *Affaires Linguistiques Belges c. Belgique*, Report of the Commission, 24 June 1965, Series B, No. 3 and 4, at 375 (this report is available at the HUDOC database only in French). For references see *supra* note 55.

⁹² App. No. 5493/72, *Handyside v. UK*, ECHR (1976) Series A, No. 24; App No 8777/79, *Rasmussen v. Denmark*, ECHR (1984) Series A, No. 87, at para. 40 (for references see *supra* note 55); App. No. 22009/93, *Z. v. Finland*, ECHR Rep (1997-1), at para. 99; App. No. 42326/98, *Odièvre v. France*, ECHR Reports (2003-III), at 80, para. 46; App. Nos 46720/99, & 72203 & 72552/01, *Jahn and others v. Germany*, ECHR Reports (2005-VI), at paras. 91, 93, and 113; App. No. 36813/97, *Scordino v. Italy*, Merits and Just Satisfaction, ECHR Reports (2006-V), at 136, para. 188.

⁹³ Sapienza, 'Sul margine d'apprezzamento statale nel sistema della Convenzione europea dei diritti dell'uomo', 74 *Riv. dir. int.* (1991) 571.

⁹⁴ Greer, 'The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights', 17 *Human Rights Files. Council of Europe Publishing* (2000), at 32: according to the author the margin is a technique because it lacks of the necessary coherence to be a doctrine.

⁹⁵ Macdonald, 'The Margin of Appreciation', in R. St. J. McDonald, F. Matscher, and H. Petzold (eds), *The European System for the Protection of Human Rights* (1993), at 83–85: the margin allows the Court not to give reasons for its decisions.

⁹⁶ Hutchinson, *supra* note 90, at 649.

⁹⁷ Caffish and Cañado Trindade, 'Les Conventions américaine et européenne des droits de l'homme et le droit international général', 108 *RGDIP* (2004) 13.

⁹⁸ Letsas, *supra* note 52, at 80–98.

⁹⁹ Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-cold War Era', 54 *Int'l Comp LQ* (2005) 459; Brems, 'The Margin of Appreciation Doctrine of the European Court of Human Rights. Accomodating Diversity within Europe', in D. Forsythe and P. McMahon (eds), *Human Rights and Diversity* (2003), at 96; Mahoney, 'Marvellous Richness of Diversity or Individuals Cultural Relativism?', 19 *Human Rts LRev* (1998) 3; Carozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights', 5 *Notre Dame L Rev* (1998) 1235.

margin is under close scrutiny, but it is very rare to see a debate relating to the interactions between margin of appreciation and treaty interpretation, or, more precisely, on the Vienna Convention on the Law of Treaties.¹⁰⁰

The margin was born and was developed, within the European Convention on Human Rights (ECHR) system. However, it has also been utilized by the Dispute Settlement Body (DSB) of the WTO¹⁰¹ and it has been proposed by scholars as a good description of the law of the sea,¹⁰² and of the whole of international law.¹⁰³ It is curious that so far it has attracted little attention from both scholars and arbitrators as far as international investment law is concerned.¹⁰⁴ However, in some recent cases this expression was employed by an arbitral tribunal. In the *Siemens* award, decided in 2007, an Arbitral Tribunal refused its application:

The Tribunal further observes that Article I of the First Protocol to the European Convention on Human Rights permits a margin of appreciation not found in customary international law or the Treaty.¹⁰⁵

On the other hand, in the *Continental* award, decided in 2008, an ICSID tribunal stated:

[I]n the Tribunal's view, this objective assessment must contain a significant margin of appreciation for the State applying the particular measure¹⁰⁶

employing the expression 'margin of appreciation' in the general way I propose in this section. What is 'the margin'? Many books and articles are dedicated to answering this question.¹⁰⁷ Without entering into the deep analysis of the effective content and

¹⁰⁰ Brief references to the Vienna Convention on Law of the Treaties can be read for example in Letsas, *supra* note 52, at 58; J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009), at 58–59; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008), at 197–207.

¹⁰¹ Cot, 'Margin of appreciation', *Encyclopaedia of Public International Law* (2009), available at: www.mpepil.com/subscriber_article?script= yes&id=/epil/entries/law-9780199231690-e1438&recno=3&author=Cot%20%20Jean-Pierre (last visited 7 Jan. 2010).

¹⁰² Cot, 'The Law of the Sea and the Margin of Appreciation', in T. M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes. Liber Amicorum Thomas A. Mensah* (2007), at 389; the Cot conception of the 'margin' is also expressed in his individual opinion to the *Volga case: Russia v. Australia*, Prompt Release, (2002), at paras 14 ff, available at: www.itlos.org/case_documents/2002/document_en_218.pdf (last visited 7 Jan. 2010).

¹⁰³ Shany, *supra* note 89, at 907 ff.

¹⁰⁴ A theory on the margin of appreciation in investment treaties can be read in Burke-White and Von Staden, 'A Large Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties', 48 *Virginia J Int'l L* (2007) 307, especially at 368–386.

¹⁰⁵ *Siemens v. Argentina*, Award (2007), at para. 354; see also *CMS v. Argentina*, (2005), at paras. 332 ff., both last visited 15 Dec. 2009. For references see *supra* note 51.

¹⁰⁶ *Continental v. Argentina*, Award (2008), at para. 181. For reference see *supra* note 51.

¹⁰⁷ In addition to the works already cited, *supra* at notes 88–103, see Benevisti, 'Margin of Appreciation, Consensus and Universal Standards', 31 *NYU J Int'l L & Pol.* (1999) 843; Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', 97 *AJIL* (2003) 38; Tanzanella, 'Il margine di apprezzamento nella giurisprudenza della Corte di Strasburgo', in M. Cartabia (ed.), *I diritti fondamentali in azione* (2007), at 145.

functioning of the margin in the Strasbourg Court's decisions, 'margin' is literally a space, a space dividing subjects pertaining to different systems. It is not a substantive principle (like sovereignty), but it reflects the tolerance, the space, the degree of freedom between different systems: in other words we can also say that the margin concerns an area common to different legal systems equally competent and responsible to deal with it.

8 Concluding Remarks

An historical survey of the so-called rule of restrictive interpretation in favour of state sovereignty shows us that this expression is a contingent label given to a wider rule, the value-oriented rule. A value-oriented approach to treaty interpretation is not new, but in the past it was explicitly admitted, and not hidden within value-neutral statements.¹⁰⁸ Thus, one of the purposes of this article is to display these values; a second purpose is to shed light on the rhetorical use of the Latin maxims which are used in a way which is supposedly objective, while in reality biased.

Once it is affirmed that interpretation is not a disinterested application of rules, but a legal operation rooted in an historical context, this survey allows us again to comprehend the actual role of treaty interpretation in recent decades, and today. A firmly value-oriented interpretation can be accepted, tolerated, and justified in specifically defined phases in order to aid a new political consensus which encompasses a broader conception of human society, against an old *status quo* which failed to consider an important part of it. During the age of *restrictive interpretation in favour of sovereignty*, international law insisted on a state-centred vision which failed conceptually to retain a residual place in the global order for individuals and international law. After a nationalistic age, an interpretation in favour of international law was desired and welcomed because it was generally perceived as an aid in establishing an international legal order, in breaking through the crusts built around the states by the previous idealistic-hegelian nationalist extremes.¹⁰⁹

We find ourselves now in a pro-international interpretation phase or, better, in a phase of interpretation against the state. This opens two questions.

First, after an idealistic-hegelian world fragmented into sovereignties, we are now in a still idealistic-hegelian world, fragmented into many external *targets* to be reached by means of a treaty. The problem is that these targets, the objects and purposes of the treaties, interpreted according to a maximum standard of the 'promotion argument'

¹⁰⁸ On the non-neutrality of the interpretative reasoning see Koskenniemi, *supra* note 34, at 333–345; R. Kolb, *Réflexions de philosophie du droit international public* (2003), at 385. McDougal, 'International Law, Power, and Policy: a Contemporary Conception', 82 *Recueil des Cours* (1953) 137, at 180–191; Higgins, 'International Trade Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law', 230 *Recueil des Cours* (1991-V) 9, 33.

¹⁰⁹ These can also be said for the ECJ. After Case 26/62, *Van Gend en Loos* [1963] ECR 3, it interpreted Community law in a strongly teleological way: see Picod, 'Le juge communautaire et l'interprétation européenne', in F. Sudre, *L'interprétation de la Convention européenne des droits de l'homme* (1998), at 289.

are mutually exclusive: an international law of separate maximum standards cannot be unified.

Some scholars have proposed a synthesis of these objects and purposes at the international level¹¹⁰ or in the more effective international jurisdiction.¹¹¹ However, these solutions are not easily attainable because of the principle at the very foundation of international law, that is the consensual basis of international jurisdiction.¹¹²

Nevertheless, international law already has the means to address this problem, that is, to abandon the conflicting idealistic-hegelian leverages of the maximum standard, and to leave room for synthesis at the legal level where all the rules acquire concreteness, which is the national one. The unity of the different treaties lies in the daily life of societies, and the precise content of the international rules must be defined in order to allow a margin to the civil societies (and their states) to reconcile the treaties.

The margin of appreciation, although not mentioned in the VCLT, answers the same questions of treaty interpretation, that is to determine the concrete content of a provision. In this operation, when it is very complicated, the margin allows the consideration of a role of the state, although without referring to stiff and problematic principles such as state sovereignty. It is not a new edition of the old restrictive interpretation in favour of sovereignty, although a superficial analysis can lead to this conclusion. Rather, by granting to the state also the room to deal with hard cases, it is an expression of the principle of good faith (Article 31.1 VCLT).

Secondly, this interpretation perseveres in a globalized world without any defined place for intermediate bodies, such as states. Sovereignty is a term which has been under strict scrutiny for a long time.¹¹³ The most questionable aspect of this concept was its absoluteness. However, the fact that in the past an absolute conception of the state allowed it to perpetrate the worst actions cannot imply *per se* the uselessness of the state: the state, as the representative of the national political organization of a people, is also the last seawall between civil society and the waves caused by powerful bad players acting within or above that society. An international law which acknowledges this role of the state can recognize when to interpret in favour of the state (and the civil society represented by it) and when to interpret against the state (and its abuses).

At this point, we come to the ultimate purpose of this article, a call for a wider vision of treaty interpretation – that is, of international law itself. The pleadings of the parties in litigation still seem locked in incompatible patterns: individual rights and sovereignty are still put forward by the parties as valid interpretative concepts *per se*. Both positions are wrong: in an international law increasingly characterized by rules

¹¹⁰ Sands, 'Treaty, Custom and the Cross-fertilization of International Law', 1 *Yale Human Rts & Development, LJ* (1998) 85.

¹¹¹ Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', 13 *EJIL* (2002) 621.

¹¹² Among many see *Genocide Case (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment [2007] ICJ Rep 55, at para. 147.

¹¹³ Koskenniemi, *supra* note 34, at 221, 234–235, and 262–263; Carozza, *supra* note 107, at 63–68; Kelsen already in 1920 stressed the problems emerging in international law from the concurrent presences of different sovereignties: see Rigaux, 'Kelsen et le droit international', 29 *Rev Belge Droit Int* (1996) 383.

dedicated to regulating the relations between a state and its individuals, and by private party–state litigation, to place strong emphasis on the rights of individuals contained in an international agreement or on sovereignty implies necessarily to unbalance an interpretation in favour of one or the other party to a dispute. I aim neither to return to an age of the predominance of sovereignty, nor to persist in irreconcilable global regimes. I would preserve and better describe the complexity of the global legal order. This is possible only according to a subsidiarian view of the relationships between the different layers – or more precisely, *orders* – which compose it (international, of the state, and of society). In a fair international law equal citizenship to international governance, local political organization, and individual and social freedoms must be assured. They may play and interact on the same level. The law acts between them: it must preserve a space of freedom – a margin – where these actors, freely expressing themselves according to their desires, can live together in, and shape, a global, interconnected world.

Accordingly, treaty interpretation must reflect these equal positions and the need for this space, so that who interprets, acting in concrete situations as an independent corrective to possible abuses, and not as a partisan agent of one of the parties, should recognize which actor is better placed to define – in this space – extreme cases.