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In Dubio Mitius

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Chapter 12 *In Dubio Mitius*

Panos Merkouris*

§12.01 Introduction

Latin terms have always been an indispensable tool in the arsenal of any ‘user’ of international law, be they a practitioner, a judge, academic or anyone else who dabbles in the mercurial waters of the international legal system. That is not surprising, as the employment of such terms simultaneously serves two functions. First, it pays homage to the Roman roots of many legal systems, since it was the Roman legal system that was the first to approach the study of law both systematically and systemically. Second, and perhaps more pragmatically, it shrouds the relevant notion with a penumbra of authority. If it is in Latin it must be a principle of binding force with a long tradition of use and of great authoritative value.

Interpretation in international law is no stranger to this approach. Principles¹ such as *contra proferentem*, *pari materia*, *in dubio mitius*, *favor debitoris*, *exceptio est strictissimae applicationis*, *semper autem in fide quid senseris non quid dixeris cogitandum*, and many others too numerous to mention find their way in judgments of international courts and tribunals with notable frequency. Although these principles are not mentioned explicitly in the Vienna Convention on the Law of Treaties (VCLT),² that does not automatically imply that they may not form either part of the VCLT interpretation system or of customary international law.³

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1. In this chapter, unless otherwise specified or the context so indicates, I will be using the term ‘principle’ as denoting the great level of abstractness of the notions to which I will be referring. This in no way implies a position regarding their binding nature (at least for *in dubio mitius*), which will be arrived at only at the conclusion of my analysis.

2. Vienna Convention on the Law of Treaties, 22 May 1969, 1155 U.N.T.S. 331 (VCLT).

3. For instance, they may be viewed as ‘supplementary means’ or as ‘relevant rules of international law’, depending on whether they are indeed rules of customary law or not. See Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* 445–446, ¶ 5 (Martinus Nijhoff 2009).

In this chapter the focus will be on the *in dubio mitius* principle, often also referred to as the principle of restrictive interpretation.⁴ First, we will examine the history of that principle. Was it always stated as such from the very start or can we trace it back to other principles of Roman law, which were later transmuted into what we recognize today as *in dubio mitius*? This part of the analysis will focus not only on the origins of the principle in domestic legal systems, but will also trace out its origins in various draft codes on the law of treaties and in the discussions of the *Institut de Droit International* and the International Law Commission (ILC), when they dealt with the issue of interpretation of treaties during the 1950s and 1960s. This historical overview will allow us to clarify the key concepts surrounding the principle, as well as the reasons for its conspicuous absence in the final version of the VCLT text.

However, such an analysis, although a good starting point, can only take us so far. It is for this reason that the kernels found during the historical overview will be put under the microscope and cross-checked with actual judicial practice throughout the ages and from various international courts and tribunals irrespective of their subject-matter jurisdiction. In this manner, trends in the understanding and employment of the *in dubio mitius* principle will be identified, as well as any relevance for the international legal system as a whole, or for a particular area of international law. The analysis will revolve around three key axes:–

- First, the inherent precepts and paradoxes of the notion of *in dubio mitius*.
- Second, whether the *in dubio mitius* principle has any particular relevance or customary status for a specific area of international law, or for specific types of treaties and/or provisions.
- Finally, and on the basis of all the aforementioned, what the place of *in dubio mitius* is in relation to other principles, and more importantly in relation to the interpretative process set out in the VCLT.

All the above considerations will gradually peel off layer-by-layer all uncertainties, until we reach the core issues of whether or not this principle is binding and its apposite place in the interpretative process of the international legal system.

§12.02 Tracing the Roots of *In Dubio Mitius*

[A] Definition

4. However, the term ‘restrictive interpretation’ can sometimes also be used to refer to the result of interpretation, rather than to the *in dubio mitius* principle *eo ipso*.

So what does the *in dubio mitius* principle mean? The definition that is most often used is the one found in *Oppenheim's International Law*:

The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.⁵

In sum, when interpreting a treaty, out of multiple possible interpretations, the one which is least odious and creates the fewest obligations should be preferred. The reason for such an approach is explicitly mentioned in the very first sentence: 'deference to the sovereignty of States'.

This definition has been referred to by a number of international courts and tribunals. For instance, the World Trade Organization Appellate Body (WTO AB) in *EC – Hormones* relied on this quote in applying the *in dubio mitius* principle.⁶ However, its reliance on the above definition 'cherry-picks' to some extent.⁷ In fact, the authors' analysis of the *in dubio mitius* principle in *Oppenheim's International Law* continues and offers valuable insight into its complexities and limits:

However, in applying this principle regard must be had to the fact that the assumption of obligations constitutes the primary purpose of the treaty, and that, in general, the parties must be presumed to have intended the treaty to be

5. Robert Jennings & Arthur Watts, *Oppenheim's International Law, Vol. I, Parts 2–4*, 1278 (9th ed., Longman 1992).

6. *EC – Measures Concerning Meat and Meat Products (EC – Hormones)*, WTO Doc. WT/D526/AB/R; WT/D548/AB/R, ¶ 165, at n.154 (WTO AB, 16 Jan. 1998).

7. On the relevance of this often neglected yet integral part of the definition, especially in the context of the *EC – Hormones* case, see: Stefan Zleptnig, *Non-Economic Objectives in WTO Law Justification Provisions of GATT, GATS, SPS and TBT Agreements* 80–82 (Martinus Nijhoff 2009); Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5(1) J. Int'l Econ. L. 17, 62 (2002); Christophe J. Laourer, *In the Name of Sovereignty? The Battle over in Dubio Mitius Inside and Outside the Courts*, Cornell Law School Inter-University Graduate Student Conference Papers, Paper No. 22 (2009), available at: http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1050&context=lps_clacp (accessed 1 Jun. 2017).

effective. Further, it is usual for courts to interpret strictly exceptions to a principal provision imposing obligations on a state, notwithstanding that the principle *in dubio mitius* might suggest that the exception be given a liberal interpretation.⁸

Consequently, even the very definition given in *Oppenheim's International Law* suggests certain constraints in the application of the principle, such as the counterbalancing effect of *effet utile*, the principle of *exceptio est strictissimae applicationis*⁹ and the supplementary nature of the *in dubio mitius* principle.

[B] Legal Antecedents of the *In Dubio Mitius* Principle

In the present section we will examine the origins of the *in dubio mitius* principle in Roman and Byzantine law. We will then proceed to an examination of pre-VCLT doctrinal approaches to *in dubio mitius*, as evidenced by writings of renowned publicists of the time, as well as attempts at codification of the rules of interpretation of treaties and the discussions that took place in the ambit of the *Institut de Droit International* and the ILC.

Several authors and tribunals have highlighted the connection of *in dubio mitius* with the principle of *favor debitoris*,¹⁰ and noted that in domestic legal systems the *in dubio mitius* principle is an expression of the *in dubio pro reo* principle.¹¹

8. Jennings & Watts, *supra* n.5, at 1278.

9. These principles will be analysed in more detail in other chapters in the present Volume.

10. *Favor debitoris* in turn finds different forms of expression, e.g., *benignius est interpretandum*; *in obscuris quod minimum est sequimur*; *Différend Società Mineraria et Metallurgica di Pertusola – Décision no 95*, Franco-Italian Conciliation Commission (8 Mar. 1951), 12 UNRIAA 179, 195; *Armstrong Cork Company Case – Decision No. 18*, Anglo-Italian Conciliation Commission (22 Oct. 1953), 14 UNRIAA 159, 167; *Naomi Russell, In Her Own Right and As Administratrix and Guardian (USA) v. United Mexican States*, Mexico/USA Special Claims Commission (24 Apr. 1931), 4 UNRIAA 805, 866 (*Naomi Russell* case); *Différend concernant l'interprétation de l'article 79, par. 6, lettre C, du Traité de Paix (Biens italiens en Tunisie – Échange de lettres du 2 février 1951) – Décision no. 136*, Franco-Italian Conciliation Commission (25 Jun. 1952), 13 UNRIAA 389, 397 (*Biens italiens en Tunisie* case); L.A. Podestà Costa, *Manual de derecho interacional público* 197–198 (Buenos Aires 1947); Charles Rousseau, *Principes généraux du droit international public, Tome I*, 678 et seq. (Pedone 1944).

11. *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, Assad Hassan Sabra*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable

Wharton traces the origins of *in dubio mitius* to Roman law and specifically the maxim *in poenalibus causis benignius interpretandum est*.¹² All the above Roman maxims and many more, however, have sprung from *in dubiis benigniora*.¹³ Adolf Berger, an Austrian jurist and specialist in Roman law, in no uncertain terms held the view that ‘[t]he wording of the Latin phrase, *in dubiis benigniora*, ‘doubtless served as a model for the modern [principle of *in dubio pro reo* in criminal law]’.¹⁴

This maxim is found in the last title of *Justinian’s Digest* (50.17), *De diversis regulis iuris antiquae*. Within this title exists the maxim in question: ‘fr. 56: *semper in dubiis benigniora praeferenda sunt*’ (in doubtful matters the more benevolent (benign) solution should always be given preference), which is ‘excerpted from the commentary of Gaius on the praetorian Edict’.¹⁵ As Berger rightly points out, the maxim sounds incomplete, as it fails to address in favour of whom the decision should be more benevolent.¹⁶ Marcellus expressed, in *Justinian’s Digest* (28.4.3 pr.), the same idea, though slightly differently: “*In re dubia benigniorem interpretationem sequi non minus iustius est quam tutius*” (It is not less just than safe to follow in an ambiguous matter the more benign interpretation)’.¹⁷

Despite the same idea being expressed by different jurists in different parts of *Justinian’s Digest*, the *Digest* does not provide any real guidance as to what is meant by *benignior interpretatio*. However, if one considers the context through which this maxim was promulgated, it becomes clear that ‘*benignior interpretatio* was understood as a more humane interpretation (*humanior interpretatio*)’.¹⁸ Berger traces this *benignior/humanior interpretatio* even further back to a rescript addressed by the Emperor Hadrian to the prefect of Egypt, where he used the terms ‘*φιλανθρωπότερον ἐρμηνεύειν*’.¹⁹

Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Special Tribunal For Lebanon – Appeals Chamber, 16 Feb. 2011), Doc. STL-11-01/I/AC/R176bis, ¶ 32.

12. Francis Wharton, *Chapter VIII: Burden of Proof*, in *A Treatise on the Law of Evidence in Criminal Issues* 246, ¶ 340, n.2 (8th ed., Kay & Brother Publishers 1880). This maxim can also be found in *Justinian’s Digest* at: D.50.17.

13. *Différend Società Mineraria et Metallurgica di Pertusola*, *supra* n.10, at 167.

14. Adolf Berger, *In dubiis benigniora*, 9 *Seminar Jurist* 36, 36 (1951).

15. *Ibid.*, p. 37.

16. *Ibid.*, pp. 39–40.

17. *Ibid.*, p. 41.

18. *Ibid.*, pp. 41–42.

19. *Ibid.*, p. 45. This can be translated as ‘to interpret in a manner that is more humane’.

It is interesting that at this proto-stage of *in dubio mitius*, the focal point tends to be the individual, not the State, or in those times the Republic, and the maxim seems to be driven by considerations of equity and fairness. It comes as no surprise that Berger suggests that *in dubiis benigniora* and the notion of *benignitas* were the fountain from which several other maxims sprang, including:²⁰ (i) *Quotiens in actionibus aut in exceptionibus ambigua oratio est, commodissimum est id accipi quo res de qua agitur magis valeat quam pereat;*²¹ (ii) *favorabiliores rei potius quam actores habentur;*²² (iii) *ambigua autem intentio ita accipienda est, ut res salva actori sit;*²³ (iv) *semper in dubiis id agendum est, ut quam tutissimo loco sit res bona fide contracta;*²⁴ (v) *in poenalibus causis benignius interpretandum est;*²⁵ and (vi) *interpretatione legum poenae molliendae sunt potius quam asperandae.*²⁶

It is striking that one maxim found further expression in so many different maxims. Of particular import is the realization that *effet utile* would seem to share a common ancestry with *in dubio mitius*, a fact whose importance is further elevated if we consider that the juxtaposition between these two approaches to interpretation has had a central place in the debate surrounding the usefulness of *in dubio mitius* in international law.²⁷ Of course this juxtaposition may be explained by the fact that *in dubio mitius*, based on the above analysis, seems to have shifted its focus, in international law, from considerations of humanity, to considerations of sovereignty. Nonetheless, the pivot from a common ancestry to a presumed conflict is striking.

20. *Ibid.*, pp. 47–48.

21. *Justinian's Digest*, D.34.5.12 ('Where there is ambiguity in the formulation of an action or a defence, it is most appropriate to accept the sense which validates the legal instrument rather than causing it to lapse'). This is an expression of *effet utile*.

22. *Ibid.*, D.50.17.125 ('defendants [in civil matters] are treated with more benevolence than plaintiffs').

23. *Ibid.*, D.50.17.172.1 ('a claim which is ambiguous should be construed in such a way as to be favorable to the plaintiff'). This is an expression of *pro proferentem*.

24. *Ibid.*, D.34.5.21.1 ('in every instance where doubt arises, it must be considered that the contract was made in good faith to be carried out in the place where it was most convenient, unless it is clear that it has been drawn up contrary to law'). This is an expression of good faith and *effet utile*.

25. *Ibid.*, D.50.17.155.2 ('in criminal cases, the most benevolent construction should be adopted'). This is an antecedent of *in dubio pro reo* in criminal law.

26. *Ibid.*, D.48.19.42 ('by the interpretation of the laws, penalties should rather be mitigated than increased in severity'). This is an antecedent of *in dubio mitius* in its domestic criminal law form.

27. We shall revisit this point *infra* in sections 12.03[B] and 12.07[B][1].

A final point that needs to be raised is that neither Gaius nor Marcellus ‘formulated the principle as an absolute, apodictic command. Both offered it as a line of interpretation to be observed with preference to any other, provided that the situation evokes some doubts (*in dubiis*)’.²⁸ This limitation on the use of restrictive interpretation has, unsurprisingly, survived until today, and is hardwired in the expression of the principle in the form of the introductory ‘*in dubio*’.²⁹

[C] Principle of Domestic Law

In the centuries between the *Justinian Digest* and the emergence of the international legal system, *in dubio mitius* did not fade to obscurity. It functioned as a principle of domestic law, and, although not spared criticism and controversy,³⁰ had both a criminal and a civil aspect, which has been recognized by international tribunals.

On the one hand, in *Prosecutor v. Salim Jamil Ayyas et al.* the Special Tribunal for Lebanon acknowledged the criminal law facet of *in dubio mitius* in domestic legal systems, as well as its connection with *in dubio pro reo*:

The same principle [*favor rei* (i.e., ‘in favour of the accused’)], in its more trial-orientated facet, when it is referred to as the *in dubio pro reo* standard (in case of doubt one should hold for the accused) or *in dubio mitius* (as a principle applying to conviction and sentencing of individuals: in case of doubt one should apply the more lenient penalty), normally guides the trial judge when appraising the evidence and assessing the culpability of the accused or determining the penalty to be inflicted.³¹

28. Berger, *supra* n.14, at 45.

29. Lauterpacht traces this limitation back to Ulpian, who accepted only as the *ultima ratio* the principle *ad id, quod minimum est, redigenda summa est*; Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 Brit. Y.B. Int’l L. 48, 59–60 (1949).

30. --, *Constitutional Law: Canon of Restrictive Interpretation Repudiated*, 23 Ind. L.J. 323, 323–333 (1948).

31. *The Prosecutor v. Salim Jamil Ayyash et al.*, *supra* n.11, at ¶ 32.

In much earlier writings, Wharton had expounded on the manner in which *in dubio mitius* functioned within a domestic criminal legal system. This principle applied to amnesties and pardons,³² to the qualification of reasonable doubt,³³ and to conviction and sentencing.³⁴

On the other hand, the civil law manifestation of *in dubio mitius* was raised in *Binder v. the Czech Republic*:

In this connection, it is necessary to concentrate on two fundamental principles, which are a permanent part of the constitutional order of the Czech Republic and are aimed at protecting those persons or entities towards which state power is exercised. First, the *in dubio mitius* principle creates an obligation for the public authorities, when the legislation is ambiguous, to opt for an interpretation of the law favourable to the individual ... in this context [this means] that in matters of taxation the interpretation of the law which is most favourable to the taxpayer is to be preferred.³⁵

In both examples, what is interesting is not only that the issue of doubt remains critical for the activation of the principle, but also that the focal point of protection is that of the *individual v. the State*.

32. Francis Wharton, *A Treatise on Criminal Pleading and Practice* 361, ¶ 525 (8th ed., Kay & Brother Publishers 1880).

33. Wharton, *supra* n.12, 246, at ¶ 340 (‘[W]henver intent is a necessary constituent of the offence, then a reasonable doubt as to intent requires an acquittal. If there be a logical inconsistency in the views just expressed, such inconsistency must be defended by an appeal to the maxim *in dubio mitius*’).

34. Francis Wharton, *Commentaries on Law: Embracing Chapters on the Nature, the Source and the History of Law: on International Law, Public and Private and on Constitutional and Statutory Law* 764, ¶ 618 (Kay & Brother Publishers 1884) (‘In addition to this we are to apply in all cases of construction the rule *in dubio mitius*. Hence, when it is doubtful whether the statute imposes a penalty, the conclusion, if the question is in equilibrium, must be in the negative; when the question whether a remedy is supplied is in equilibrium, the decision must be in the affirmative’); Francis Wharton & James M. Kerr, *A Treatise on Criminal Law* 197, ¶ 154 (11th ed., Lawyers Co-op. Pub. Co. 1912) (‘[i]n case of doubt, verdict must be taken for lower degree ... The rule in such case is *in dubio mitius*’).

35. *Binder v. The Czech Republic*, UNCITRAL, Final Award (15 Jul. 2011) (Danelius, Creutzig, Gaillard), ¶¶ 157, 396.

[D] *In Dubio Mitius* in the Works of the Most Highly Qualified Publicists Pre-VCLT

Turning our attention to international law, any inquiry into the concept of *in dubio mitius* in doctrinal writings must inexorably look into the *magna opera* of Grotius and Vattel. Although Grotius does not mention *in dubio mitius* in his *De jure belli ac pacis*, his categorization of obligations into ‘favourable’, ‘odious’, ‘mixed’, and ‘median’³⁶ was nonetheless influential in the application and interpretation of *in dubio mitius* in the international arena.³⁷ Despite this, it is not the restrictive interpretation, but rather its opposite, that found its expression in the text of *Chapter 16: On Interpretation of De jure belli ac pacis*: ‘[i]n the things which are not odious, words are to be taken according to the general propriety (*totam proprietatem*) of popular use, and, if there are several senses, according to that which is widest’.³⁸ Similarly, Vattel does not explicitly refer to restrictive interpretation as a principle of interpretation in its own right. He does make a passing reference to the possibility of both extensive and restrictive interpretation, but this is more in the sense of such interpretations being the result of the search for the intention of the parties.³⁹ To make matters even worse, both the title of the section in which that analysis appears, as well as its main focus, are on extensive interpretation.

Despite this, in some of the most significant works on international law of the early twentieth century, the principle is hailed as well-established. For example, Oppenheim, in his treatise on *International Law*, very laconically states that ‘the principle in *dubio mitius* must be applied in interpreting international treaties’.⁴⁰ Guggenheim, for his part, spoke of ‘the supremacy, recognized in international practice, of restrictive as distinguished from extensive interpretation’,⁴¹ and asserted that, although the rule applied only in case of doubt, it was of great

36. Hugo Grotius, *De jure belli ac pacis*, Liber II, Ch. 16, ¶ X (1625).

37. Institut de droit international, *VI. De l’interprétation des traités (Douzième Commission) – Rapport et projet de Résolutions présentés par M. H. Lauterpacht*, 1950(I) *Annuaire de l’Institut de Droit International* 366, 367.

38. Grotius, *supra* n.36, Liber II, Ch. 16, ¶ XII.

39. Emerich de Vattel, *The Law of Nations – Book II: Of a Nation Considered in Its Relations to Others* ¶ 290 (T. & J.W. Johnson & Co.1883).

40. Lassa Oppenheim, *International Law* 584 (2nd ed., Longmans 1912).

41. Paul Guggenheim, *Lehrbuch des Völkerrechts: unter Berücksichtigung der internationalen und schweizerischen Praxis, I*, at 128 (Verlag für Recht und Gesellschaft 1947).

import.⁴² Similar views were also expressed by Hall,⁴³ Wiloughby,⁴⁴ Rousseau,⁴⁵ and Podestà Costa.⁴⁶

That, of course, should not give the false impression that such recognition went unchallenged. The main criticisms regarding the logical fallacies, and the unsubstantiated presumptions of *in dubio mitius*, will be analysed in more detail *infra* in section 12.04. For the time being, it is worth noting some of the concerns raised by two giants of international law, Lauterpacht and de Visscher.

According to Lauterpacht:

the maxim *in dubio mitius* is certainly a well-founded rule of private law, but it is only a *subsidiary means of interpretation*, subject to the dominant principle which says that effect is to be given to the declared will of the parties and that the compact is to be effective rather than ineffective. But among international lawyers ‘restrictive interpretation’ has become almost a catchword, and the attempts to make it a governing consideration in the interpretation of treaties in deference to the principle of sovereignty are very frequent. *It is obvious that neither the science of international law nor international tribunals can, in the long run, act upon such doctrine without seriously jeopardising the work of interpretation.*⁴⁷

De Visscher opted for a different mode of attack:

An interpretation can be conceived as extensive or restrictive only in conjunction with a recognized principle or a degree of normality. When we speak of extensive or restrictive interpretation, it is the result of a process of interpretation that one

42. However, as Lauterpacht rightly points out, all rules of interpretation are premised on the existence of doubt; Lauterpacht, *supra* n.29, at 49.

43. William E. Hall, *A Treatise on International Law* 331 (6th ed., Clarendon Press 1909).

44. Westel W. Willoughby, *Foreign Rights and Interests in China* 34 (Johns Hopkins Press, Rev. and enl. ed. 1927).

45. Rousseau, *supra* n.10, at 678, 686–694; Charles Rousseau, *L'indépendance de l'Etat dans l'ordre international*, 73 *Recueil des Cours* 167, 211 (1948/II).

46. Podestà Costa, *supra* n.10, at 197–198.

47. Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: with Special Reference to International Arbitration* 179–180 (Longmans, Green and Co. Ltd. 1927) (emphasis added).

has in mind. An interpretation that is extensive or restrictive only comes about after the interpreter has convinced himself that the natural meaning of the terms used remains in the background or goes beyond the true intent of the parties. *To speak of extensive or restrictive interpretation as criteria or presumptions* is to anticipate the results of interpretative work and to disregard the dynamic process of any interpretation.⁴⁸

§12.03 *In Dubio Mitius* in the Attempts to Codify the Law of Treaties

[A] Draft Codes

In dubio mitius is largely absent in early attempts to codify the law of treaties. It appears neither in the 1928 Convention on Treaties,⁴⁹ nor in David Dudley Field's Draft Code,⁵⁰ nor in Bluntschli's Draft Code,⁵¹ nor in the 1927 Draft of the International Commission of American Jurists.⁵² It does, however, make an appearance in Fiore's Draft Code.⁵³ What is interesting is that Fiore identifies two major approaches to interpretation, grammatical and logical. In the latter approach, one can find allusions to *semper autem in fide quid senseris non quid dixeris cogitandum*, the *contra proferentem* rule, equity and 'systemic' interpretation.⁵⁴ However, *in dubio mitius* comes immediately afterward in a section entitled 'Broad or Restrictive Interpretation', which in and of itself raises questions as to the place of such interpretation within Fiore's two-pronged, grammatical and logical, interpretation. Leaving these issues aside for the

48. Charles de Visscher, *Problèmes d'interprétation judiciaire en droit international public* 87–88 (Pedone 1963) (author's translation) (emphasis added).

49. James W. Garner (Reporter), *Codification of International Law: Part III – Law of Treaties – Appendix 1: Convention on Treaties*, 29 Am. J. Int'l L. 1205, 1205–1207 (Supp. 1935).

50. *Ibid.*, Appendix 2: *David Dudley Field's Draft Code*, 29 Am. J. Int'l L. 1207, 1207–1208 (Supp. 1935).

51. *Ibid.*, Appendix 3: *Bluntschli's Draft Code*, 29 Am. J. Int'l L. 1208, 1208–1212 (Supp. 1935).

52. *Ibid.*, Appendix 5: *Draft of the International Commission of American Jurists*, 29 Am. J. Int'l L. 1222, 1222–1224 (Supp. 1935).

53. *Ibid.*, Appendix 4: *Fiore's Draft Code*, 29 Am. J. Int'l L. 1212, 1212–1222 (Supp. 1935).

54. *Ibid.*, ¶ 808, ¶ 809, ¶ 811 and ¶ 811, respectively.

moment, *in dubio mitius*' function is outlined in the following manner: '[a]ny provision tending to limit the free exercise of the rights of either of the two contracting parties must be understood in the most restrictive sense, like any other impairment of the liberty of persons under "common" law. Provisions entailing a burden must likewise be understood in a restrictive sense, when the words used do not clearly express what the party has engaged to undertake or do'.⁵⁵

The 1933 document on 'Interpretation of Treaties' adopted by the Seventh International Conference of American States clarifies somewhat the questions left unanswered by Fiore's Draft Code. First, it sets out the non-primacy of *in dubio mitius*, i.e., that the 'rules regarding the restrictive or extensive interpretation of the articles of a treaty can *only be applied when ordinary methods of interpretation have failed*'.⁵⁶ Second, Article 10 states the *in dubio mitius* rule explicitly. And third, Article 11 employs a version of the *in dubio mitius* rule in the context of interpretation of treaties authenticated in multiple languages.

In the Commentary to the Draft Convention on the Law of Treaties, prepared by the Harvard Research in International Law, some references to *in dubio mitius* can be spotted. The Commentary refers to a list of cases – the *S.S. 'Wimbledon'*,⁵⁷ the *Free Zones of Upper Savoy and the District of Gex* cases,⁵⁸ and the Advisory Opinion on *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*⁵⁹ – where the Permanent Court of International Justice (PCIJ):

approved a rule which harkens back to the statements of the classicists to the effect that treaties involving 'odious' promises should be interpreted restrictively. It recognized that if a treaty places limitations upon the freedom of a State to exercise its sovereign rights, that fact alone 'constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a

55. *Ibid.*, ¶ 817.

56. James W. Garner (Reporter), *Codification of International Law: Part III – Law of Treaties – Appendix 7: The Interpretation of Treaties*, 29 Am. J. Int'l L. 1225, Art. 9 (Supp. 1935) (emphasis added).

57. *S.S. 'Wimbledon'*, Judgment (17 Aug. 1923), PCIJ Series A, No. 1, p. 24.

58. *Free Zones of Upper Savoy and the District of Gex*, Judgment (7 Jun. 1932), PCIJ Series A/B, No. 46, p. 167; *Free Zones of Upper Savoy and the District of Gex (second phase)*, Order (6 Dec. 1930), PCIJ Series A, No. 24, p. 12.

59. *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*, Advisory Opinion (21 Nov. 1925), PCIJ Series B, No. 12, p. 25.

limitation' ... And elsewhere the court has admitted as 'sound' the principle that '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'.⁶⁰

Nonetheless, the Commentary agrees with the PCIJ that all the rules of restrictive and extensive interpretation were to apply *only* when the ordinary methods of interpretation had failed, and although the rule was 'sound', nonetheless it had to 'be employed with the greatest caution'.⁶¹

Perhaps because of this, at the end of the day, *in dubio mitius* was left on the cutting room floor, as it does not feature in the Draft Convention's Article 19, which tackled the issue of interpretation of treaties.

[B] The *Institut de Droit International*

Things became more problematic for *in dubio mitius* the more the process of interpretation was being streamlined and the work towards codification of the law of treaties approached fruition in the form of an international treaty. The next body to pick up the mantle of discussing the process of interpretation of international treaties was the *Institut de Droit International*. The *Institut* discussed interpretation during four Sessions (1950 – Bath, 1952 – Siena, 1954 – Aix-en-Provence and 1956 – Grenada).

The debate kicked into gear at the Bath Session with the Report prepared by the *Rapporteur* (Lauterpacht). The *Rapporteur* was extremely critical of the principle *in dubio mitius* on several fronts. First, he objected to the very nature of *in dubio mitius* as a principle of international law. In his words, '[a] maxim often invoked and rarely, if ever, applied has no right to be designated [as a solid rule of interpretation]. It is without foundation unless the notions of sovereignty and presumption of action are taken as the decisive element and the starting point of interpretation'.⁶²

60. James W. Garner (Reporter), *Codification of International Law: Part III – Law of Treaties – Draft Convention on the Law of Treaties*, 29 Am. J. Int'l L. 661, 942 (Supp. 1935).

61. *Ibid.*, p. 943, citing: *Polish Postal Service in Danzig*, Advisory Opinion (16 May 1925), PCIJ Series B, No. 11, p. 39; *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment (10 Sep. 1929), PCIJ Series A, No. 23, p. 26 (*River Oder* case).

62. Institut de droit international 1950(I), *supra* n.37, at 407.

Second, Lauterpacht believed that *in dubio mitius* was part of a long list of maxims that were mutually exclusive and contradictory. Demonstrative of this was the fact that although the PCIJ had referred to the *in dubio mitius* principle, it had also often set it aside, preferring instead to apply an extensive interpretation on the basis of the principle of *effet utile*.⁶³

Furthermore, even in the cases where the PCIJ had referred to the *in dubio mitius* principle, it had also often set limitations to its application. Such limitations came especially in two forms, namely, the clarity of the text, and the requirement that all other methods have already been employed and failed to produce a result.⁶⁴ These limitations had repercussions on the import of the principle in the interpretative process. They meant that *in dubio mitius* was of a supplementary nature.⁶⁵ More importantly:

[b]y declaring that the rules relating to the restrictive interpretation ... can be invoked only when the treaty is not clear, a condition is established which constitutes the result and not the starting point of the process of interpretation. By asserting that these principles of interpretation can only be used in the alternative, when the others have failed, [they] are only of very limited use. Indeed, it is rare, if not excluded, that one cannot obtain the slightest result, however illusory it may be, by means of one or other of the many rules of interpretation.⁶⁶

Finally, Lauterpacht also raised objections as to the relevance, if any, of *in dubio mitius* with respect to jurisdictional clauses,⁶⁷ and as to the transposability and presumptions underlying the

63. *Ibid.*, pp. 371–372, 406. For more detail on the conflict between *in dubio mitius* and *effet utile*, see: *ibid.*, pp. 412–415.

64. Institut de droit international 1950(I), *supra* n.37, at 403–405. On *in dubio mitius* and its limitations, see: *S.S. 'Wimbledon'*, *supra* n.57, at 25; *Exchange of Greek and Turkish Populations*, PCIJ Series B, No. 10, 21 (PCIJ, 21 Feb. 1925); *Jurisdiction of the European Commission of the Danube*, Advisory Opinion (21 Feb. 1925), PCIJ Series B, No. 14, p. 36; *Polish Postal Service in Danzig*, *supra* n.61, at 39; *River Oder* case, *supra* n.61, at 26; *Free Zones of Upper Savoy and the District of Gex*, *supra* n.58, at 167.

65. Institut de droit international 1950(I), *supra* n.37, at 406.

66. *Ibid.*, pp. 371–372. See also *ibid.*, at 405, where Lauterpacht uses as an example the wording used by the PCIJ in the *River Oder* case, *supra* n.61, at 26.

67. Institut de droit international 1950(I), *supra* n.37, at 408–412; For a restrictive interpretation of jurisdictional clauses see: *Free Zones of Upper Savoy and the District of Gex*, *supra* n.58, at 138; *Phosphates in Morocco*, Preliminary Objections, Judgment (14 Jun. 1938),

in dubio mitius principle. Most notable amongst the latter, which Lauterpacht did not hold as self-evident in the least, was the presumption that entering into treaties was a restriction on the freedom and sovereignty of States, and that interpreters should accordingly give preferential treatment to the obligor State to the detriment of the obligee State.⁶⁸

All of the above led the *Rapporteur* to conclude that ‘[i]t appears, therefore, that the time has come to draw the necessary consequences from the inadequacies inherent in the principle of the restrictive interpretation of treaties by virtue of the fact that *it has been paid homage more through its violation rather than its respect*’.⁶⁹

Lauterpacht’s concerns are visible in the proposed resolution, whose relevant passage reads as follows:

3. As international arbitral and judicial case-law demonstrates, the principle of restrictive interpretation in respect of clauses imposing obligations on the contracting parties plays only an *insignificant practical role*; Its well-foundedness in doctrine is highly questionable. There is no reason to make use of it *except in the extreme case where any other means fails to establish the intention of the parties*. In this respect, *there is no difference between the clauses conferring jurisdiction on international tribunals and the other provisions of the treaties*.⁷⁰

Most members of the *Institut*, in their responses to the *Rapporteur*’s report, agreed with him on the limited import of the principle,⁷¹ with one member (Kraus) making the distinction that *in*

PCIJ Series A/B, No. 74, p. 23. For an expansive interpretation (including of declarations) *see: Mavrommatis Palestine Concessions*, Judgment (30 Aug. 1924), PCIJ Series A, No. 2, pp. 15, 34; *Certain German Interests in Polish Upper Silesia*, Preliminary Objections, Judgment (25 Aug. 1925), PCIJ Series A, No. 6, p. 14; *Factory at Chorzów*, Jurisdiction, Judgment (26 Jul. 1927), PCIJ Series A, No. 9, p. 32; *Free Zones of Upper Savoy and the District of Gex (second phase)*, *supra* n.58, at 13; *Mavrommatis Jerusalem Concessions*, Judgment (26 Mar. 1925), PCIJ Series A, No. 5, pp. 27–28; *Rights of Minorities in Upper Silesia (Minority Schools)*, Judgment (26 Apr. 1928), PCIJ Series A, No. 15, p. 24; *Affaire des forêts du Rhodope central (question préalable) (Grèce contre Bulgarie)*, Award (4 Nov. 1931), 3 UNRIAA 1389, 1403.

68. Institut de droit international 1950(I), *supra* n.37, at 403–405.

69. *Ibid.*, pp. 408–412 (emphasis added).

70. *Ibid.*, p. 433 (emphasis added).

71. Gottingen, Beckett & Rousseau in: *ibid.*, pp. 433, 437 and 453 respectively.

dubio mitius is not a rule of interpretation, but rather ‘a rule of proof’,⁷² and another (Beckett) focusing on the ‘mutually contradictory [nature of interpretative maxims, including *in dubio mitius*] and [asserting that] the Institute should deprecate too much value being placed upon them’.⁷³

In the Siena Session, the discussion continued to reveal cracks in the edifice of *in dubio mitius* as a functional rule of interpretation. Several members circled back again to the limited scope of application of *in dubio mitius*. According to the *Rapporteur*, the only scenario where it could apply was when all other methods of interpretation had failed to produce a result, which would ‘almost never occur’.⁷⁴ Fitzmaurice objected to this conclusion, raising the point that restrictive interpretation, and the rules of interpretation in general, are of import not only in the phase of the application of a treaty, but also during its negotiation phase. In his words, ‘[t]he Contracting States usually abide by this principle [i.e., *in dubio mitius*] in the drafting of treaties, and they must be able to count on its application’.⁷⁵

Huber was of the view that, even so, *in dubio mitius* was a somewhat ‘simplistic’ interpretative presumption that, instead of aiming to identify the common will of the parties, aimed to supplant that will with a fictitious one ‘obtained by a schematic, almost mechanical procedure’.⁷⁶

Along similar lines, Rolin suggested that this inability of *in dubio mitius* to identify the actual intention of the parties was evidence of the *subsidiary and not auxiliary* nature of this principle.⁷⁷ The latter would help in achieving the objective of interpretation, i.e., the identification of the

72. *Ibid.*, p. 445.

73. *Ibid.*, p. 437.

74. Institut de droit international, *Troisième Question: De l’interprétation des traités – Rapporteur: M. H. Lauterpacht – Neuvième séance plénière: mercredi 23 avril 1952 (matin)*, 1952(II) Annuaire de l’Institut de Droit International 359, 364. *See also ibid.*, p. 361.

75. Institut de droit international, *Troisième Question: De l’interprétation des traités – Rapporteur: M. H. Lauterpacht – Dixième séance plénière: mercredi 23 avril 1952 (après-midi)*, 1952(II) Annuaire de l’Institut de Droit International 369, 370–371; *see also*: Institut de droit international, *Troisième Question: De l’interprétation des traités – Rapporteur: M. H. Lauterpacht – Première séance de la section de droit international public: vendredi 25 avril 1952 (matin)*, 1952(II) Annuaire de l’Institut de Droit International 383, 395, 398.

76. Institut de droit international, *IV. De l’interprétation des traités (Douzième Commission) – Observations complémentaires et projet définitif de Résolutions – présentés par M. H. Lauterpacht*, 1952(I) Annuaire de l’Institut de Droit International 197, 200.

77. Institut de droit international 1952(II), *supra* n.75, at 395. *See also: ibid.*, pp. 396, 400.

intention of the parties; the former was a safety net in order to allow the interpreter to choose an interpretation irrespective of whether it reflected the intention of the parties or not. Rolin was of the view that this critical nuance should be reflected in the Resolution of the *Institut*.⁷⁸

Another ‘attractor’ (a term used in chaos theory to denote the areas or patterns that a dynamic/chaotic system tends to settle into) was whether the nature of the treaty/provision being interpreted had any bearing on selecting a restrictive or expansive interpretation. Bourquin suggested that such a choice depended not only on the nature of the treaty, but also on its object and purpose and the circumstances of its conclusion.⁷⁹ Guggenheim suggested that for treaties of a bilateral/bilateralizable nature, such as treaties on double taxation, *in dubio mitius* would be the apposite rule, whereas for treaties constituent of international organizations and/or creating obligations of an integral/interdependent nature, such as the UN Charter, *effet utile* would be the preferable principle.⁸⁰ Other members added to the treaties that might be more prone to a restrictive interpretation armistice agreements (de la Pradelle)⁸¹ and treaties that were imposed by one party on the other (Huber),⁸² while the nature of the provision as jurisdictional or substantive in nature was not considered relevant for activation of the *in dubio mitius* principle.⁸³

By this stage it had become readily apparent that the retention of any reference to *in dubio mitius* in the final resolution would cause more harm than benefit. This became crystal-clear during the Grenada Session, where even Fitzmaurice, who had previously advocated in favour of the import of the principle, accepted that there were ‘solid reasons’ for eliminating the reference to restrictive interpretation. In the view of the *Rapporteur*, interpretation should seek to establish the intention of the parties and not expand or reduce it by certain methods of interpretation. A restrictive or expansive interpretation would organically emerge as the result of a cautious interpretation, without the need for mentioning explicitly a rule of restrictive interpretation.⁸⁴

78. *Ibid.*, p. 395.

79. *Ibid.*, pp. 396–397.

80. *Ibid.*, p. 395. *See also* Huber in Institut de droit international 1952(I), *supra* n.76, at 201.

81. Institut de droit international 1952(II), *supra* n.75, at 396.

82. Institut de droit international 1952(I), *supra* n.76, at 201.

83. Institut de droit international 1952(II), *supra* n.74, at 361.

84. Institut de droit international, *Quatrième Question: De l'interprétation des traités – Rapporteur: Sir Gerald Fitzmaurice – Treizième séance plénière: jeudi 19 avril 1956 (après-midi)*, 1956 *Annuaire de l'Institut de Droit International* 337, 339. *See also: ibid.*, pp. 339, 341.

Although de la Pradelle lamented the exclusion of the *in dubio mitius* principle from the final draft,⁸⁵ the new *Rapporteur*, Fitzmaurice, suggested that it was not necessary since the same results could be achieved through a teleological interpretation, and that there was no need for interpretative presumptions of questionable validity.⁸⁶

In the end, the Resolution omitted any reference to the *in dubio mitius* principle.

[C] International Law Commission

The move away from *in dubio mitius* may explain why in the discussions within the ILC there is very little evidence of the concept of restrictive interpretation having been considered.⁸⁷ References to it are scant, far apart and most of the time *en passant*. Those that do exist tend to focus on the subsidiary nature of *in dubio mitius* and the relevance or irrelevance of the nature of a treaty as a deciding factor in the choice of a restrictive or liberal interpretation.⁸⁸ What the *Rapporteur* and the members agreed on was that they ‘rightly refrained from going into detail and had not committed [themselves] on the subject of restrictive and extensive interpretations’,⁸⁹

85. *Ibid.*, p. 345.

86. *Ibid.*

87. In the Vienna Conferences on the Law of Treaties, they are completely non-existent.

88. For instance: ‘Whether, in particular circumstances, some provision of a treaty ought to be interpreted restrictively or the reverse is a matter of the rules of interpretation; but within those limits it is always possible for parties to adopt a reasonable and equitable approach to their duty of carrying out the treaty, so as to give it an adequate effect’ (Sir Gerald Fitzmaurice, *Fourth Report on the Law of Treaties*, UN Doc. A/CN.41120, in 1959(II) Y.B. Int’l L. Comm’n 37, 53–54, ¶ 17); ‘[Mr. El-Erian was of the view that a]ny restrictive interpretation of the Charter should be avoided; it could not be viewed merely as a treaty; it was the supreme law of mankind’ (Int’l L. Comm’n, *743rd Meeting*, 1964(I) Y.B. Int’l L. Comm’n 126, 127, ¶ 18); ‘[de Luna was of the view that it] was difficult to distinguish between treaties laying down rules of conduct for States and those of a contractual type involving an exchange of benefits. The rules being drafted should not become a straitjacket capable of frustrating, for example, the institutional development of international organizations. Obviously, there was a difference between an extensive and a restrictive interpretation of treaties of a contractual type and that of constituent instruments of international organizations’ (International Law Commission, *765th Meeting*, 1964(I) Y.B. Int’l L. Comm’n 275, 276, ¶ 18).

89. International Law Commission, *765th Meeting*, 1964(I) Y.B. Int’l L. Comm’n 275, 276, ¶ 21.

as ‘the terms of the treaty itself’ would determine ‘whether the application of the principle led to a restrictive or to an extensive interpretation’.⁹⁰

In a similar fashion, in the ILC Commentary to the draft Articles on the Law of Treaties, *in dubio mitius* is only briefly touched upon. In the Commentary to Draft Article 70, what is reiterated is that restrictive interpretation may not ‘run counter to the clear meaning of a text’.⁹¹ In the Commentary to Draft Article 72, it is noted that the principle of restrictive interpretation is invoked by parties, but that tribunals do not necessarily apply it,⁹² and that in any event any such interpretation may never go against the intention of the parties.⁹³ Finally, the Commentary to Draft Article 75, which dealt with treaties authenticated in multiple languages, referred to the *Mavrommatis Palestine Concessions* case,⁹⁴ and whether it promoted a restrictive interpretation. The members of the ILC point out that:

the Court does not necessarily appear to have intended by the first sentence of this passage to lay down as a general rule that the more limited interpretation which can be made to harmonize with both texts is the one which must always be adopted. Restrictive interpretation was appropriate in that case. But the question whether in case of ambiguity a restrictive interpretation ought to be adopted is a more general one the answer to which hinges on the nature of the treaty and the particular context in which the ambiguous term occurs, as has clearly been explained in the commentary to article 72. The mere fact that the ambiguity arises from a difference of expression in a plurilingual treaty does not alter the principles by which the presumption should or should not be made in favour of a restrictive interpretation. Accordingly, while the *Mavrommatis* case gives strong

90. International Law Commission, *766th Meeting*, 1964(I) Y.B. Int’l L. Comm’n 282, 288, ¶ 70 (comments by *Rapporteur*, Waldock); similarly: *ibid.*, p. 289, ¶ 86 (comments by de Luna); *ibid.*, pp. 289–290, ¶¶ 91, 104 (comments by Ago); *ibid.*, p. 290, ¶ 105 (comments by Rosenne).

91. 1964(II) Y.B. Int’l L. Comm’n 57, Commentary to Art. 70, ¶ 16; referring to *S.S. ‘Wimbledon’*, *supra* n.57, at 24–25; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (second phase)*, Advisory Opinion (18 Jul. 1950), ICJ Rep. 1950, p. 221, at p. 229.

92. For jurisprudence, see Rousseau, *supra* n.10, at 680–683; Vladimir D. Degan, *L’interprétation des accords en droit international* 103–106 (Nijhoff 1963).

93. 1964(II) Y.B. Int’l L. Comm’n 59–60, Commentary to Art. 72, ¶ 28. We will return in more detail on this point *infra* in section 12.07[B][2].

94. *Mavrommatis Palestine Concessions*, *supra* n.67, at 19.

support to the principle of conciliating, or harmonizing, the texts, it is not thought to call for a general rule laying down a presumption in favour of restrictive interpretation in the case of an ambiguity in plurilingual texts.⁹⁵

That is the totality of the references to *in dubio mitius* in the *travaux préparatoires* of the VCLT. Post-VCLT, *in dubio mitius* has remained in obscurity, having been mentioned *in passim* in the ILC Report on *Diversification of International Law*, where it is referred to in a list of ‘principles of legal process’.⁹⁶

From the above it is evident that *in dubio mitius* did not figure prominently during the discussions surrounding the law of treaties and in particular the process of interpretation. We now turn to case-law.

§12.04 The (II)logical Precepts of *In Dubio Mitius*: A House of Cards

Before we dive into an examination of the relevance of *in dubio mitius* to specific areas of international law and its position *vis à vis* other interpretative rules and the interpretative structure outlined in the VCLT, it would be beneficial to take a step back and look at the possible drivers that may explain the usefulness, or lack of usefulness, of this principle.

[A] Historical Roots

As was shown *supra*, in section 12.02, the domestic legal roots from which the principle of *in dubio mitius* sprang into existence are quite complicated. Not only does the principle have different manifestations both in civil and criminal law, but its application is inextricably linked to

95. 1964(II) Y.B. Int'l L. Comm'n 64–65, Commentary to Art. 75, ¶ 8.

96. Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi*, UN Doc. A/CN.4/L.682, 254 (13 Apr. 2006). The exact same paragraph has been cited in the following documents: United Nations, *Formation and Evidence of Customary International Law: Elements in the Previous Work of the International Law Commission that Could be Particularly Relevant to the Topic – Memorandum by the Secretariat*, UN Doc. A/CN.4/659, Observation 29, n.134 (14 Mar. 2013); Sir Michael Wood, *First Report on Formation and Evidence of Customary International Law*, UN Doc. A/CN.4/663, ¶ 42, at n.93 (17 May 2013).

a number of other legal principles,⁹⁷ creating a maze-like tapestry where the beginning and end of each principle is difficult to identify. Nonetheless, at least with respect to the principles which are credited with being *in dubio mitius*' progenitors, it is easy to see that *in dubio mitius*, in its current form as a principle expressing deference to State sovereignty, goes against the very *raison d' être* of those progenitors. Both *in dubiis benigniora* and *in dubio pro reo* emerged from a need to protect the individual when faced with a situation that did not necessarily otherwise guarantee an equality of arms. However, by applying the *in dubio mitius* principle in modern international law, it is the State and not the individual that ends up being protected.

When we are dealing with treaties that entail non-reciprocal obligations, e.g., human rights or environmental treaties, it is actually the interests of the individual or the general welfare of mankind that are juxtaposed against the rights and freedoms of States. Harkening back to the origins of *in dubio mitius*, any interpretative ambiguity would have to be resolved in favour of the individual. However, application of the *in dubio mitius* principle has the exact opposite result.

The results are not very different with respect to treaties providing for bilateral or bilateralizable obligations. In such cases there are two (or more) equal parties, and yet the normative origins of *in dubio mitius* offer no assistance, as they cannot provide a valid reason to opt in favour of one party to the detriment of the other.⁹⁸ Consequently, the domestic legal roots of the *in dubio mitius* principle not only fail to explain the modern form that this principle has taken in international law, but also seem in some cases to call for an expansive rather than a restrictive interpretation. However, one could argue that *in dubio mitius* has now been transposed to the international legal system and has acquired a life and a normative content of its own, separate from its ideological and normative origins. It is for this reason that we now examine whether *in dubio mitius*, when examined as a self-standing international legal principle, withstands scrutiny.

[B] A State's Unwillingness to Limit Its Sovereignty Versus the Freedom to Limit It

97. These principles include *favor debitoris*, *in dubiis benigniora*, *in dubio pro reo*, *contra proferentem*, etc. For more detail, see sections 12.02[B] and 12.07[B][1].

98. This is a point to which we shall return in more detail *infra* in section 12.04[C].

In discussions on the principle of *in dubio mitius*, a common argument made is that ‘[S]tates entering into a treaty are as a rule *unwilling to limit their sovereignty save in the most express terms*’.⁹⁹ This, however, is not as apparent as is generally assumed. First, *in dubio mitius* creates an interpretative presumption on the basis of sovereignty in favour of the State undertaking an obligation. But in this manner one ends up resorting to the notion of sovereignty on two-levels, both prior to and after a State enters a treaty. The mere fact that States have entered into a given treaty is in and of itself proof that such States have set aside their unwillingness to limit their sovereignty in order to regulate certain issues. As the PCIJ noted in *S.S. ‘Wimbledon’*, ‘[n]o doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty’.¹⁰⁰ Consequently, the unwillingness to restrict one’s own sovereignty is circumvented by entering into a treaty, which of itself is an expression of sovereignty.¹⁰¹

According to Lauterpacht:

[i]n the international sphere there seems to be no justification for [*in dubio mitius*] unless we make the notions of sovereignty and of presumptive freedom of action the decisive considerations and the starting-point of the task of interpretation. There is no warrant for doing that. The purpose of treaties-and of international law in general-is to limit the sovereignty of states in the particular sphere with which they are concerned. Their purpose is to lay down rules regulating conduct by restricting, in that particular sphere, the freedom of action of states. To a large

99. Joseph G. Starke, *An Introduction to International Law* 511 (8th ed., Butterworth-Heinemann 1977) (emphasis added).

100. *S.S. ‘Wimbledon’*, *supra* n.57, at 25.

101. *Difference Concerning the Swedish Motor Ships ‘Kronprins Gustaf Adolf’ and ‘Pacific’ (Sweden v. USA)*, Award (18 Jul. 1932), 2 UNRIAA 1239, 1254. See also similarly *ibid.*, p. 1287; James Crawford, *Sovereignty as a Legal Value*, in *The Cambridge Companion to International Law* 122–123 (J. Crawford, M. Koskeniemi & S. Ranganathan eds, Cambridge University Press 2011); James Crawford, *Treaty and Contract in Investment Arbitration*, 24 *Arb. Int’l* 351, 353 (2008); Lauterpacht, *supra* n.47, at 179–180.

extent treaties have no meaning except when conceived as fulfilling that function.¹⁰²

Furthermore, the principle also ‘does not take into account the benefits which the party bound by the commitment has reaped in consideration of its undertaking. It considers the contractual obligation as implying, *prima facie*, an impairment of freedom. The very reverse may often be the case’.¹⁰³ It is also unclear why *in dubio mitius* in the form of *favor debitoris* should be considered a manifestation of good faith. Shouldn’t the same principle also necessitate that the interpreter consider the possibility that since both the obligee and the obligor negotiated the terms of a treaty, an equally valid argument could be made in the direction of an interpretation not in favour of the obligor but the obligee?¹⁰⁴

[C] The Equilibrium Premise

This brings us to the next logical fallacy of the *in dubio mitius* principle. As described above, the interpretative presumption favours one party over the other. However, such an imbalance goes against the grain of the equilibrium that the parties themselves have managed to achieve after careful deliberation and negotiations, an equilibrium which is reflected in the text of the treaty. The strain between the aforementioned equilibrium and the notion of restrictive interpretation prompted President Lagergren of the Iran – US Claims Tribunal to opine:

that the agreements are premised on maintaining equilibrium between the Parties, and that the so-called rule of ‘restrictive interpretation’ *should not be applied so as to restrict the obligations of one sovereign State to the detriment of the treaty benefit provided to another sovereign State*. The balance found by the Parties in order to resolve their conflicting positions, and embodied in the structure of the agreements themselves, should govern our decision in this case.¹⁰⁵

102. Lauterpacht, *supra* n.29, at 60–61.

103. *Ibid.*, p. 59.

104. *Ibid.*

105. *The Islamic Republic of Iran v. The United States of America*, Case No. A/1, Dissenting Opinion of President Lagergren (30 Jul. 1982), *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 144, at 198 (emphasis added). *See also* *Arbitration regarding the Iron Rhine (‘Ijzeren Rijn’) Railway (Belgium v. the Netherlands)*, Decision (24 May 2005), 27 UNRIAA 35, ¶¶ 54–55 (*Iron Rhine*

McNair was also very critical of the imbalance, between parties that were equal, that *in dubio mitius* was based on. He considered that it was indefensible as a matter of logic: ‘[I]f a so-called rule of interpretation is applied to restrict the obligation of one party, a sovereign State, it reduces the reciprocal benefit or “consideration” due to the other party, also a sovereign State, which seems to me to be absurd’.¹⁰⁶

[D] *In Dubio Mitius* Is Predicated on a Bygone Conception of State Sovereignty

It is evident from the preceding analysis that the notion of State sovereignty is central to the principle of *in dubio mitius*, and therein perhaps lies not only the best explanation of ‘the prominence of the rule of restrictive interpretation in the international sphere’,¹⁰⁷ but also a systemic flaw in the principle. The concept of sovereignty, as any other legal notion, is not static. Instead, conceptions of sovereignty change, adapt and evolve through time.¹⁰⁸ The problem is that the *in dubio mitius* principle clings to a concept of State sovereignty of a bygone era, ‘an age in which treaties were interpreted not by legal tribunals, and not even much by lawyers but by statesmen and diplomats’.¹⁰⁹

arbitration); Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review*, 3(3) J. Int’l Disp. Settlement 577, 582 (2012).

106. Arnold D. McNair, *The Law of Treaties* 366 (Clarendon Press 1961); *see also* Arnold D. McNair, *Equality in International Law*, 26 Mich. L. Rev. 131, 136 (1927); Charles Rousseau, *Droit International Public, Tome I* 273 (5th ed., Dalloz 1970); Eirik Bjorge, *The Evolutionary Interpretation of Treaties* 46 (Oxford University Press 2014).

107. Lauterpacht, *supra* n.29, at 58.

108. ‘There is only one way to a new solution: coexistence and the idea of sovereignty, which flattered and served the sense of power in big states and the desire for independence in small ones, must make way for an efficient and active community of nations’. Max Huber, *On the Place of the Law of Nations in the History of Mankind*, in *Symbolae Verzijl: Présentées au Professeur JHW Verzijl à l’occasion de son LXX-ième anniversaire* 195 (F.M. van Asbeck et al. eds., Martinus Nijhoff 1958). *See also* ‘Sovereignty has historically been a factor greatly overrated in international relations. Among the overraters have been prominent practitioners of international law, dazzled by their status as, or aspiring to be, high officials of their national foreign offices’. Thomas Franck, *Fairness in International Law and Institutions* 3 (Oxford University Press 1998).

109. McNair, *Law of Treaties*, *supra* n.106, at 765. Along similar lines, *see* Lennard, *supra* n.7, at 63–66; José E. Alvarez, *Is Investor-State Arbitration ‘Public’?* 19, n.90 (Institute for

This flaw of *in dubio mitius*, in the form of being out of step with the evolution of international law and the international community in general, was highlighted by the Special Tribunal for Lebanon in the context of the relationship of *in dubio mitius* with the principle of teleological interpretation:

The principle of teleological interpretation, based on the search for the purpose and the object of a rule with a view to bringing to fruition as much as possible the potential of the rule, has overridden the principle *in dubio mitius* (in case of doubt, the more favourable construction should be chosen), a principle that -when applied to the interpretation of treaties and other international rules addressing themselves to States - calls for deference to state sovereignty. The principle *in dubio mitius* is emblematic of the old international community, which consisted only of sovereign states, where individuals did not play any role and there did not yet exist intergovernmental organisations such as the United Nations tasked to safeguard such universal values as peace, human rights, self-determination of peoples and justice. It is indeed no coincidence that, although this canon of interpretation was repeatedly relied upon by the Permanent Court of International Justice in its heyday, it is no longer or only scantily invoked by modern international courts. Today the interests of the world community tend to prevail over those of individual sovereign states; universal values take pride of place restraining reciprocity and bilateralism in international dealings; and the doctrine of human rights has acquired paramountcy throughout the world community.¹¹⁰

International Law and Justice, Working Paper 2016/6 (Global Administrative Law Series), 2016).

110. *The Prosecutor v. Salim Jamil Ayyash et al.*, *supra* n.11, at ¶ 29 (emphasis added and footnotes omitted).

The same tribunal returned to the same point three years later, succinctly summarizing it in a single sentence: ‘the purpose of teleological interpretation is therefore that of *countering parochialism and undue deference to the sovereignty of States*’.¹¹¹

[E] Binding Nature and Scope

Two final issues with respect to *in dubio mitius* need to be raised before we proceed with the remainder of our analysis. First, *in dubio mitius* has two built-in limitations. It is intended to apply: (i) only in case of doubt and (ii) when all other methods of interpretation have failed.¹¹² Satisfying both these requirements would indeed be ‘a rare and improbable contingency’,¹¹³ thus, demonstrating the limited scope and relevance of *in dubio mitius* even if it is accepted in principle. Second, the use of *in dubio mitius* in international law is mainly predicated upon its mere assertion as a general principle of law, without, however, any substantial proof being offered as to its binding nature.¹¹⁴ In order to deconstruct both of the above issues we need to examine the case-law of international courts and tribunals, and it is to this that we turn our attention in the following sections.

§12.05 The Nature of a Treaty as a Factor of (Ir)relevance for *In Dubio Mitius*

In section 12.03[B] we briefly touched upon the issue of whether the nature of a treaty and the obligations contained therein could form a logical anchor point for the relevance of *in dubio mitius* in modern international adjudication. In *IBM World Trade Corp. v. Republic of Ecuador*, for example, the Tribunal seemed to indicate that this might be the case when it expressed the view that ‘[t]he interpretation of international treaties [submits itself to principles such as]

111. *The Prosecutor v. Akhbar Beirut S.A.L., Ibrahim Mohamed Alial Amin*, STL-14-06/PT/CJ, Decision on Motion Challenging Jurisdiction (Special Tribunal for Lebanon – Contempt judge, 6 Nov. 2014), Doc. STL-14-06/PT/CJ F0069/20141106IROO I 293-R001339/EN/dm, ¶ 57 (emphasis added).

112. See, for instance, the *River Oder* case, *supra* n.61, at 26.

113. Lauterpacht, *supra* n.29, at 60.

114. *Ibid.*, p. 58.

restrictive and effective interpretations (*in accordance with the nature of the matters the treaty deals with*)'.¹¹⁵

In this section we delve deeper into the intricacies of this argument. We will address the concept of nature from two angles. First, we will examine whether the old distinction between *traités-lois* and *traités-contrats* ('law-making treaties' and 'contract treaties') still holds water and whether it has any bearing on the application of the *in dubio mitius* principle. Second, we will examine the validity of the hypothesis posited by members of the *Institut de Droit International* that treaties regulating particular areas of law might be more or less amenable to an *in dubio mitius* interpretation. For instance, treaties including bilateral obligations, such as double taxation treaties, treaties imposed by one State on another and armistice agreements were suggested as being potentially more prone to *in dubio mitius* interpretations, whereas for constituent treaties the *effet utile* principle seemed more likely.¹¹⁶ Through this examination we will be able to determine whether for any of these categories of treaties the *in dubio mitius* principle is an acceptable method of interpretation *qua* principle and not *qua* outcome.

[A] *Traités-Lois v. Traités-Contrats*

The seeds of the *traités-lois/traités-contrats* distinction can be traced back to the nineteenth century and the writings of Triepel, who put forward the idea of a *Gemeinwillen*, a collective will with an identity of its own, clearly separable from the sum of the wills of the individual States.¹¹⁷ This *Gemeinwillen* would be directed towards a common purpose and achieved through a common plan, and would find its expression in an 'agreement' (*Vereinbarung*), as the 'treaty' (*Vertrag*) was more apposite to the classical contractual-type agreements between States.¹¹⁸

115. *IBM World Trade Corp. v. Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction and Competence (22 Dec. 2003) (Jijón Letort, Ponce Martínez, Roldós Aguilera), ¶ 44 (emphasis added).

116. Institut de droit international 1952(II), *supra* n.75, at 395–396; Institut de droit international 1952(I), *supra* n.76, at 201; Institut de droit international 1950(I), *supra* n.37, at 374–375.

117. Heinrich Triepel, *Völkerrecht und Landesrecht* 56 (C.L. Hirschfeld 1899).

118. For more detail on the evolution of the dichotomy between law-making treaties and treaties-contracts, see Catherine Brölmann, *Law-Making Treaties: Form and Function in International Law*, 74 *Nordic J. Int'l L.* 383, 383–404 (2005).

This main idea has remained relatively consistent through the ages, although definitions differ depending on the point they want to emphasize. For instance, the Franco-Italian Conciliation Commission proposed that ‘[a] contract treaty is defined as that which gives rise to particular individual legal situations which are special to the Contracting States, whereas a law-making treaty is defined as that which contains general principles, which are the source of general or impersonal competences or obligations’.¹¹⁹

Lauterpacht was aware of this distinction, as well as its underlying hypothesis, i.e., that the rules on the law of treaties had different content depending on the treaty one was dealing with. In order to dispel any such seeds of doctrinal confusion in the context of treaty interpretation, the *Rapporteur* made his views on the matter crystal clear:

It is probable that in this respect, as in others, the most exact view is that there is no difference of character between these two classes of treaties (treaties-laws or normative treaties and other treaties), assuming that they constitute two distinct classes. Both the law-making treaties and the other treaties set forth rules of law, that is, rules of conduct that are legally binding on the parties ... [The opinion that there are different rules of interpretation for each class of treaties] is denied by an abundance of case-law, as well as by imperative considerations of principle ... For these reasons the Institute will undoubtedly attach some importance to trying to reduce to fair proportions the fairly artificial distinction, in this area, between ‘treaties-laws’ and other treaties.¹²⁰

It should come as no surprise then that in the draft Resolution, proposed by Lauterpacht during the Bath Session of the *Institut de droit international*, paragraph 6 mirrors the above comments: ‘There is *no need*, in the field of interpretation, to adopt different methods or principles depending on whether it is a question of “law-making treaties” [*traités-lois*] or of other categories of treaties’.¹²¹

The members of the *Institut* sent their comments on the matter. Kraus was in agreement that there was absolutely no difference with respect to the rules of interpretation that should be

119. *Biens italiens en Tunisie* case, *supra* n.10, at 395.

120. Institut de droit international 1950(I), *supra* n.37, at 374–375.

121. *Ibid.*, p. 434 (emphasis added).

applied between different treaties. In fact, he felt that the rules could be expanded so as to include judicial decisions and, within limits, unilateral acts.¹²² With the exception of Rousseau,¹²³ nobody else objected to the idea expressed in paragraph 6 of the draft Resolution, which seems to indicate that it met with their approval.¹²⁴ However, in the final resolution no mention is made to a possible differentiation between *traités-lois* and *traités-contrats*.¹²⁵

In the ILC, Fitzmaurice, as *Special Rapporteur* on the Law of Treaties, elaborated on these concepts, although it should be noted that this was done not in the context of interpretation but rather mostly with respect to the termination/suspension of treaties. He originally suggested a classification of international obligations in, on the one hand, ‘self-existent’ obligations, and ‘concessionary, reciprocal or interdependent obligations’ on the other hand. The former emerged from treaties whose ‘character ... is such that, neither juridically, nor from the practical point of view, is the obligation of any party dependent on a corresponding performance by the others’, while the latter covered all other treaties.¹²⁶ Later on this dichotomy was changed to treaties of ‘the reciprocating type’ (i.e., *creating bilateral or bilateralizable obligations*) v. *treaties of the ‘not mutually reciprocating type’* (i.e., ‘either (a) of the interdependent type, where a fundamental breach of one of the obligations of the treaty by one party will justify a corresponding nonperformance generally by the other parties, and not merely a non-performance in their relations with the defaulting party; or (b) of the integral type, where the force of the obligation is self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others’).¹²⁷ Irrespective of the doctrinal inconsistencies of this shift, whereas interdependent treaties would seem to fall more under *traités-contrats* under the

122. *Ibid.*, p. 445.

123. Lauterpacht, although agreeing with most of the suggestions of the *Rapporteur*, was hesitant to accept a ‘unitary method of interpretation, irrespective of the legal nature of the treaty in question’. *Ibid.*, p. 453.

124. *Ibid.*, pp. 435–460.

125. The aforementioned Franco-Italian Conciliation Commission had already arrived at this conclusion on two separate occasions. See *Biens italiens en Tunisie* case, *supra* n.10, at 395; *Différend Società Mineraria et Metallurgica di Pertusola*, *supra* n.10, at 193. However, see *contra* the opinion of the French representative in *ibid.*, p. 198.

126. Sir Gerald Fitzmaurice, *Second Report on the Law of Treaties*, UN Doc. A/CN.4/107, in 1957(II) Y.B. Int’l L. Comm’n 18, 54, ¶ 126.

127. *Ibid.*, *Third Report on the Law of Treaties*, UN Doc. A/CN.4/115 and Corr.1, in 1958(II) Y.B. Int’l L. Comm’n 21, 27–28, Art. 18, ¶ 2, and Art. 19.

Second Report and under *traités-lois* in the *Third Report*,¹²⁸ the ILC in the end chose to avoid the issue.¹²⁹ The fact that this distinction did not find its way into the text of Articles 31–33 VCLT, which apply equally to all treaties irrespective of their qualification, speaks volumes and perhaps lends some credence, at least in the context of interpretation, to the Franco-Italian Commission’s *dictum* that ‘[t]he distinction between law-making treaties and treaties-contracts seems to have been reduced to rubble by the most recent doctrine of public international law’.¹³⁰

[B] Servitudes, Peace Treaties and Imposed Treaties

Moving away from the doctrinal distinction between law-making treaties and treaties-contracts, we will now turn our attention to specific categories of treaties which by nature of their subject-matter have sometimes been considered to be either prone or averse to interpretations on the basis of the *in dubio mitius* principle.

A set of treaties considered to fall in the former category¹³¹ includes those establishing servitudes,¹³² peace treaties where the victors impose their will on defeated State(s),¹³³ or the more general category of treaties that have not been negotiated but imposed.¹³⁴ Lauterpacht is

128. For a critical analysis of this shift, and generally the impact of the idea of *traités-lois* in the ILC discussions on the law of treaties, see Brölmann, *supra* n.118, at 387–397.

129. However, kernels can still be seen in some of the drafting choices that found their way into the final text of the VCLT.

130. See *Biens italiens en Tunisie* case, *supra* n.10, at 395 (referring to Balladore Pallieri as stating that the distinction has been ‘universally abandoned’). See also G. Balladore Pallieri, *Diritto internazionale pubblico* 61 (A. Giuffrè 1948). However, it must be noted that the *traités-lois* still seems to sometimes creep into international adjudication and doctrine, especially when arguments relating to an automatic evolutive interpretation of certain types of treaties are raised.

131. This categorization was supported by some of the members of the *Institut de Droit International*; see *supra* section 12.03[B].

132. See, e.g., *S.S. ‘Wimbledon’*, *supra* n.57, Dissenting Opinion by Schücking, at 44 (‘all treaties concerning servitudes must be interpreted restrictively in the sense that the servitude, being an exceptional right resting upon the territory of a foreign State, should limit as little as possible the sovereignty of that State’.); similarly, *ibid.*, Dissenting Opinion by Anzilotti & Huber, at 37.

133. See, e.g., *Différend Società Mineraria et Metallurgica di Pertusola*, *supra* n.10, Opinion of the French representative, Mr Périer de Féral, at 198.

134. *Ibid.*, p. 195 (referring to one of the manifestations of the *in dubio mitius* principle, i.e., *favor debitoris*, and giving a nod to its Roman maxim-roots, *benignius est interpretandum* and *in obscuris quod minimum est sequimur*). See also: *Différend Dame Mossé – Décision no. 144*,

quite critical of such an over-simplification, i.e., that the will of one party is wiped out and therefore that *in dubio mitius* works as a shield protecting the weaker party. According to him, if anything, the more relevant rule with respect to such treaties would most likely be that of *contra proferentem*, and not *in dubio mitius*. In his words, ‘the rule can hardly be regarded either as persuasive or as being of considerable practical application. Treaties, except those imposed by force, are the result of common effort and the product of prolonged negotiations. They do not originate from drafts imposed by one party’.¹³⁵ As for treaties imposed through the use of force, the VCLT and customary international law provide¹³⁶ that the threat or use of force is a ground for the absolute nullity of the treaty in question. In any event, the mechanical application of the *in dubio mitius* principle would be inappropriate:

Undoubtedly, when one is concerned with a treaty of peace which was imposed – rather than discussed and negotiated – by a group of victorious Powers, the principle of safeguarding the greatest possible freedom of the contracting States, as regards the alleviation of too heavy burdens, can best be invoked by means of new negotiations, as was done by the Lovett-Lombardo Agreement, rather than by leaving to the constituted judicial body the task of making a revision of its own through the channels of interpretation.¹³⁷

[C] BITs and Other Treaties Creating Bilateral(-izable) Obligations

Another set of treaties proposed by one of the members of the *Institut*, Guggenheim, as being appropriate for the application of *in dubio mitius* was that of treaties creating bilateral obligations, such as double taxation treaties. The argument has been more recently revamped to refer to the myriad of contemporary bilateral investment treaties (BITs).

Franco-Italian Conciliation Commission (17 Jan. 1953), 13 UNRIAA 486, Opinion of the Italian representative, Mr Sorrentino, at 497.

135. Lauterpacht, *supra* n.29, at 64.

136. See VCLT, Art. 52.

137. *Droutzkoy Case – Decision No. 235*, Italian-United States Conciliation Commission (26 Feb. 1965), 16 UNRIAA 276, 292.

On the face of it, and if one accepts the original premise, i.e., that *in dubio mitius* is the apposite method of interpretation for treaties creating obligations of a bilateral nature,¹³⁸ investment law would appear to be a prime example where *in dubio mitius* should be applicable.¹³⁹ However, in investor-State dispute settlement (ISDS), there are two competing paradigms, those of ‘public’ and ‘private’ law:

Public law proponents ... [propose that their paradigm] means displacing, within ISDS, the concept of equality of arms, a ‘private law’ notion used in commercial arbitration that wrongly assumes that the two litigating parties are subject to equal treatment, with more appropriate ‘public law’ principles such as *in dubio mitius*.¹⁴⁰

But as Alvarez correctly points out:

it is not clear why the principle of equality of arms should be considered, for this purpose, a private law concept that needs to give way to the supposedly public principle of *in dubio mitius*. Except for those who believe that the *Lotus* Principle is still the governing principle of international law, most international lawyers have long cast doubt on *in dubio mitius* as a viable general canon of treaty interpretation.¹⁴¹

138. This is by no means a given, as distinguishing on the basis of bilateralizable obligations is very reminiscent of the *traités-lois vs. traités-contrats* distinction.

139. See, for instance, the arguments made by the United States in *Methanex Corporation v. United States of America*, UNICTRAL, Memorial on Jurisdiction and Admissibility of Respondent – United States of America (13 Nov. 2000), p. 14, available at: <https://www.state.gov/documents/organization/3949.pdf> (accessed 1 Jun. 2017) (in which the United States accepts that *in dubio mitius* no longer applies in inter-State disputes, but nonetheless makes a case for its relevance in investor-State disputes). However, see *contra*: A. v. B., Suisse, Tribunal fédéral, Arrêt 4A 34/2015 (6 Oct. 2015), ¶ 3.5.3.1 (citing Robert Kolb, *Interprétation et création du droit international: Esquisse d'une herméneutique juridique moderne pour le droit international public* 659, at n.841 (Bruylant 2006) and Katrin Meschede, *Die Schutzwirkung von umbrella clauses für Investor-Staat-Verträge* 53 et seq. (Nomos 2014)).

140. Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 Am. J. Int'l L. 45, 55, 64 (2013).

141. Alvarez, *supra* n.109, at 19. See also Roberts, *supra* n.140, at 55.

Irrespective of these considerations, a perusal of the relevant case-law is rather conclusive. The *in dubio mitius* principle does not seem to have a place as an autonomous interpretative principle in ISDS.¹⁴²

[D] Constituent Treaties

Unlike the previous sets of treaties, constituent treaties are often referred to as treaties for which an evolutive/effective/liberal interpretation would be more appropriate,¹⁴³ displacing any recourse to the *in dubio mitius* principle. The author has elsewhere debunked the view, as an unsubstantiated interpretative presumption, that the appropriateness of evolutive interpretation stems from the nature of these treaties and should be carried out automatically. In reality, evolutive interpretation is not a self-standing principle but an outcome that springs forth from a VCLT-guided inquiry into the intention of the parties.¹⁴⁴ However, Brölmann rightly points out that the practice of international courts and tribunals seems to demonstrate that, at least for constituent treaties, ‘*in dubio mitius* plays little role’.¹⁴⁵ Instead, ‘when it comes to constitutive treaties ... interpreters rely on the principle of *effet utile*’.¹⁴⁶

142. See the analysis and case-law referred to *infra* in sections 12.06 and 12.07[A]. Indicatively, I mention here *Continental Casualty Company v. The Argentine Republic*, where the tribunal, while focusing on the bilateral nature of the obligation, nonetheless comes to the conclusion that an effective and not a restrictive interpretation is in order: ‘*an interpretation of a bilateral reciprocal treaty that accommodates the different interests and concerns of the parties in conformity with its terms accords with an effective interpretation of the treaty*’. See *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 Sep. 2008) (Sacerdoti, Veeder, Nader), ¶ 181 (emphasis added).

143. It was used by the members of the *Institut* (see *supra* section 12.03[B]), and remains a doctrinal favorite even today. See, e.g., Catherine Brölmann, *Specialized Rules of Treaty Interpretation: International Organizations* (Amsterdam Law School Legal Studies Research Paper; No. 2012-12).

144. Panos Merkouris, *Article 31(3)(c) and the Principle of Systemic Integration: Normative Shadows in Plato’s Cave* 102 – 162 (Martinus Nijhoff 2015); Panos Merkouris, *(Inter)temporal Considerations in the Interpretative Process of the VCLT: Do Treaties Endure, Perdure, or Exdure?*, 45 Neth. Y.B. Int’l L. 121, 121–156 (2014).

145. Brölmann, *supra* n.143, at 7 and cases cited therein. See also: Juliane Kokott, *States, Sovereign Equality*, in *Max Planck Encyclopedia of Public International Law* ¶ 26 (Rüdiger Wolfrum ed., Oxford University Press 2008), available at www.mpepil.com (accessed 1 Jun. 2017).

146. Brölmann, *supra* n.143, at 7–8.

[E] Human Rights, Humanitarian Law and International Criminal Law Treaties

The irrelevance of *in dubio mitius* for human rights treaties,¹⁴⁷ treaties of a humanitarian character¹⁴⁸ and international criminal law treaties¹⁴⁹ moves along similar lines. The alleged incompatibility between *in dubio mitius* and *effet utile* is more pronounced in the writings and the case-law surrounding the interpretation of these instruments. This has led many to the conclusion that ‘[t]here is therefore no *in dubio mitius* presumptive rule that human rights treaties should be interpreted in such a way as to minimise encroachment on State sovereignty’.¹⁵⁰

Even in Oppenheim’s oft-quoted definition of *in dubio mitius*, the authors acknowledge the inherent limitation of *in dubio mitius* with respect to human rights treaties.¹⁵¹ Any form of protection of individual human rights has as a corollary the restriction of State sovereignty. Consequently, if *in dubio mitius* were applied automatically, at no point would these treaties be

147. See, e.g., *Iron Rhine* arbitration, *supra* n.105, at ¶ 53 (‘Restrictive interpretation thus has particularly little role to play in certain categories of treaties – such as, for example, human rights treaties’). See also *Kummerow, Otto Redler and Co., Fulda, Fischbach, and Friedericy Cases*, German-Venezuelan Commission (1903), 10 UNRIAA 369, 398–399 (*Kummerov et al.* cases); James Hathaway, *The Rights of Refugees under International Law* 73 (Cambridge University Press 2005); Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* 409 (Martinus Nijhoff 2000).

148. Lauterpacht and Bethlehem argue that treaties of a ‘humanitarian character’ do not conform to an *in dubio mitius*-based interpretation, which is at most a maxim relevant to the international law of co-existence. Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* 104 (E. Feller et al. eds, Cambridge University Press 2003).

149. *The Prosecutor v. Salim Jamil Ayyash et al.*, *supra* n.11, at ¶ 29.

150. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, ECtHR App. No. 47848/08, Judgment, Concurring Opinion of Judge Pinto de Albuquerque (17 Jul. 2014), ¶ 8 and n.4 (referring to the following cases as establishing this approach: *Wemhoff v. Germany*, ECtHR App. No. 2122/64, Judgment (27 Jun. 1968), ¶ 8; *Compulsory Membership in an Association prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Inter-American Court of Human Rights, Advisory Opinion OC-5/85 (13 Nov. 1985), Series A No. 5, at ¶ 52; *Baena-Ricardo et al. v. Panama*, Inter-American Court of Human Rights, Judgment on Merits, Reparations and Costs (2 Feb. 2001), Series C No. 72, ¶ 189).

151. Jennings & Watts, *supra* n.5, at 1278.

interpreted broadly or allowed to blossom as the ‘living instruments’ that they are sometimes argued to be.

Bernhard writes:

[*In dubio mitius*] is no longer relevant, it is neither mentioned in the Vienna Convention nor has it ever been invoked in the recent jurisprudence of international courts and tribunals. Treaty obligations are in case of doubt and in principle not to be interpreted in favor of State sovereignty. It is obvious that this conclusion can have considerable consequences for human rights conventions: Every effective protection of individual freedoms restricts State sovereignty, and it is by no means State sovereignty which in case of doubt has priority. Quite to the contrary, the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on the one hand and restrictions on State activities on the other.¹⁵²

§12.06 Jurisdictional Clauses: The (Ir)relevance of the Type of Provision

It has been argued that *in dubio mitius* should be the default rule of interpretation for clauses conferring jurisdiction on an international court or tribunal.¹⁵³ In his report to the *Institut de droit international* during the Bath Session, Lauterpacht had already expressed his serious misgivings as to the appropriateness of this approach.¹⁵⁴ But some case-law in support of it does exist. The

152. Rudolf Bernhardt, *Evolutionary Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 German Y.B. Int'l L. 11, 14 (1999). See also *Khlaifia and Others v. Italy*, ECtHR App. No. 16483/12, Judgment, Partly Dissenting Opinion of Judge Serchides (15 Dec. 2016), ¶ 19.

153. *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award (5 May 2015), ¶ 177. Immediately afterwards, however, the Claimant rejected the invocation of ‘this substantive form of the principle [as being] truly a relic of a bygone age’; *ibid.* It would seem to the present author that the characterization of this facet of the *in dubio mitius* principle as ‘substantive’ is a misnomer. If anything it should be the ‘procedural’ facet, as it deals with jurisdiction and not the substance of specific rights and obligations.

154. Institut de droit international 1950(I), *supra* n.37, at 408–412.

PCIJ in *Free Zones of the Upper Savoy and the District of Gex* applied *in dubio mitius* in finding that ‘every Special Agreement, like every clause conferring jurisdiction upon the Court, must be interpreted strictly’.¹⁵⁵ Other courts have taken similar positions.¹⁵⁶

This approach is based on the purported primacy of State sovereignty and on fortifying the protection of States’ freedom. In essence, the idea, which the PCIJ gave shape to in *Status of Eastern Carelia*¹⁵⁷ and *Factory at Chorzów*,¹⁵⁸ is that States should not be compelled to submit a dispute to any form of international dispute settlement unless they have provided their consent in clear and unambiguous terms. This approach underwent a renaissance of sorts in recent times in investment arbitration, with the tribunal in *Plama v. Bulgaria* holding that ‘it is a well-established principle, both in domestic and international law, that ... an agreement [to jurisdiction] should be clear and unambiguous’.¹⁵⁹ This so-called *Plama* principle was adopted in a string of later investment arbitrations.¹⁶⁰

But the approach has not gone unchallenged. On the contrary, opposition to the *Plama* principle was fiery and frequent. Several investment tribunals criticized the *Plama* principle

155. *Free Zones of Upper Savoy and the District of Gex*, *supra* n.58, at 138–139. See also *Phosphates in Morocco*, *supra* n.67, at 23–24 (in which the PCIJ phrased the issue as a hypothetical, as the French declaration was in its view clear).

156. *Columbian Bonds*, 4 Moore’s International Arbitrations 3614 (United States-Columbian Mixed Commission, 18 May 1866); *Rhine Navigation Commission Case*, Court of Appeal of Karlsruhe (25 Nov. 1931), *reprinted in* 6 Int’l L. Rep. 117, 118; *Grimm v. Islamic Republic of Iran*, Case No. 71 (18 Feb. 1983), *reprinted in* 2 Iran-U.S. Cl. Trib. Rep. 78, 80; *Golpira v. Islamic Republic of Iran*, Case No. 211, Dissenting Opinion of Judge Shafeiei (29 Mar. 1983), *reprinted in* 2 Iran-U.S. Cl. Trib. Rep. 171, 210; *Amoco Iran Oil Company v. Islamic Republic of Iran*, Case No. 55, Dissenting Opinion of Judge Shafeiei (2 Sept. 1983), *reprinted in* 78 Int’l L. Rep. 637, 654; *Iran – United States*, Case No. A/18 (6 Apr. 1984), *reprinted in* 5 Iran-U.S. Cl. Trib. Rep. 251, 287–288.

157. *Status of Eastern Carelia*, Advisory Opinion (23 Jul. 1923), PCIJ Series B, No. 5, p. 27.

158. *Factory at Chorzów*, *supra* n.67, at 32 (‘[the Court will] only affirm its jurisdiction provided that the *force of the arguments militating in favour of it is preponderant*’) (emphasis added).

159. *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005) (Salans, van den Berg, Veeder), ¶¶ 198 et seq.

160. *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 Sep. 2006) (Goode, Allard, Marriott), ¶ 90; *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) (Nariman, Torres Bernárdez, Bernardini), ¶ 167.

heavily as not being ‘an accurate reflection of international law on this matter’.¹⁶¹ In his Separate Opinion in *Renta 4 v. Russia*, Charles Brower wrote that:

whatever validity [the *in dubio mitius* principle] may have had in an earlier era, [it] is patently incompatible with Articles 31 and 32 of the Vienna Convention on the Law of Treaties ... [I]nstruments containing a State’s consent to submit to the jurisdiction of an international court or tribunal are to be interpreted like any other international legal instrument, that is neither restrictively nor liberally, but according to the standards set down in the Vienna Convention.¹⁶²

The fact that sometimes even both disputing parties agree that ‘there is no principle of either extensive or restrictive interpretation of jurisdictional provisions in treaties’ is demonstrative of the push-back against the *Plama* principle and of its internal inconsistencies.¹⁶³ So is the fact that

161. *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award (9 Oct. 2009) (Kaumann-Kohler, Brower, Trapl), ¶ 120.

162. *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections, Separate Opinion of Charles N. Brower (20 Mar. 2009), ¶ 7 (*Quasar de Valores et al. v. Russia*). Along the same lines see: *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006) (Salacuse, Kaufmann-Kohler, Nikken), ¶ 64 (*Suez v. Argentina*); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction (3 Aug. 2006) (Salacuse, Kaufmann-Kohler, Nikken), ¶ 66 (*AWG Group v. Argentina*); *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 Jul. 2013) (Townsend, Lambrou, Boisson de Chazournes), ¶ 22. Generally on the debate on how to interpret jurisdictional clauses in investment arbitration, see August Reinisch, *How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?*, 2(1) J. Int’l Disp. Settlement 115, 115–174 (2011); Chittharanjan F. Amerasinghe, *The Jurisdiction of the International Centre for the Settlement of Investment Disputes*, 19 Indian J. Int’l L. 166, 168 (1979).

163. *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Response to The Republic of El Salvador’s Preliminary Objections (15 Sep. 2010), ¶ 35. See also *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002) (Stephen, Crawford, Schwebel), ¶ 43; *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Rejoinder of The Republic of El Salvador’s Preliminary Objections (15 Oct. 2010), ¶ 13.

even one of the cases often considered as applying the *Plama* principle, i.e., *Berschader and Berschader v. Russia*, nonetheless had this to say about the existence of a principle of restrictive interpretation of jurisdictional clauses:

If [the *Plama* principle] means that ... arbitration agreements should be construed in a manner which is different in principle from that applied to the construction of other agreements, *this Tribunal finds it doubtful whether such a general principle can be said to exist*.¹⁶⁴

In the context of investor-State arbitration, discussion on the proper method of interpreting jurisdictional clauses has been kept alive partly due to a type of clause, specific to investment law and Bilateral Investment Treaties (BITs), known as an ‘umbrella clause’.¹⁶⁵ In discussing one such clause, the *SGS v. Pakistan* tribunal referred explicitly to *in dubio mitius*, stating that ‘[t]he appropriate interpretive approach is the prudential one summed up in the literature as in *dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*’.¹⁶⁶ However, the vast majority of tribunals are far from keen to accept *in dubio mitius* unconditionally as a presumptive rule of interpretation for ‘umbrella clauses’. As one tribunal wrote:

164. *Vladimir Berschader and Moise Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award (Sjövall, Lebedev, Weiler) (21 Apr. 2006), ¶ 177 (emphasis added).

165. On the debate regarding restrictive or expansive interpretation of umbrella clauses, see Christopher Dugan, Don Wallace Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration* 541 et seq. (Oxford University Press 2008); J. Romesh Weeramantry, *Chapter 5: Other Means of Interpretation*, in *Treaty Interpretation in Investment Arbitration* 5, ¶ 5.91 (Oxford University Press 2012); Gus van Harten, *Investment Treaty Arbitration and Public Law* 132 (Oxford University Press 2007); Thomas Wälde, *Interpreting Investment Treaties: Experiences and Examples*, in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* 741 (Christina Binder et al. eds, Oxford University Press 2009).

166. *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 Aug. 2003), ¶ 171 (*SGS v. Pakistan*). Also in favour of an *in dubio mitius* interpretation of ‘umbrella clauses’ was the tribunal in *The Loewen Group, Inc and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, Award (26 Jun. 2003) (Mason, Mikva, Mustill), ¶¶ 160–164. For an analysis of the *Loewen* Award, see Dirk Pulkowski, *The Final Award in Loewen v. United States*, in *The Reasons Requirement in International Investment Arbitration* 291–322 (G.A. Alvarez & M. Reisman eds, Martinus Nijhoff 2008).

reliance by the Tribunal in *SGS v. Pakistan* on the maxim *in dubio mitius* so as effectively to presume that sovereign rights override the rights of a foreign investor could be seen as a reversion to a doctrine that has been displaced by contemporary customary international law, particularly as that law has been reshaped by the conclusion of more than 2000 essentially concordant bilateral investment treaties.¹⁶⁷

In fact, some tribunals have outright rejected the *in dubio mitius* principle, opting for an effective interpretation, not as an autonomous principle but rather as a logical extension of the object and purpose of the BIT in question.¹⁶⁸

But it is not only investment arbitration cases¹⁶⁹ that have rejected the susceptibility of jurisdictional clauses to *in dubio mitius* interpretation. In fact, even the practice of the PCIJ from

167. *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award (19 Aug. 2005) (Fortier, Schwebel, Rajski), ¶ 258, available at: <https://www.italaw.com/documents/Eureko-PartialAwardandDissentingOpinion.pdf> (accessed 1 Jun. 2017). See also *The Loewen Group, Inc and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on hearing of Respondent's objection to competence and jurisdiction (5 Jan. 201) (Mason, Fortier, Mkva), ¶ 51; *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award (7 Aug. 2002) (Rowley, Veeder, Christopher), ¶¶ 103–105, available at: <https://www.italaw.com/sites/default/files/case-documents/ita0518.pdf> (accessed 1 Jun. 2017); *Suez v. Argentina*, *supra* n.162, at ¶¶ 59, 64; *AWG Group v. Argentina*, *supra* n.162, at ¶¶ 60–61, 66.

168. *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 Jan. 2004) (El-Kosheri, Crawford, Crivellaro), ¶ 116; *Eureko B.V. v. Poland*, *supra* n.167, at ¶ 248.

169. *Southern Pacific Properties (Middle East) and Southern Pacific Properties Ltd v. The Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Preliminary Objections to Jurisdiction (14 Apr. 1988) (Jimenez de Arechaga, El Mahdi, Pietrowski), 3 ICSID Rep. 143–144; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999) (Buergethal, Bucher, Bernardini), ¶ 34 (*CSOB v. Slovak Republic*); *Mondev International Ltd v. United States of America*, *supra* n.163, at ¶ 43; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 Aug. 2006) (Oreamuno Blanco, Landy, von Wobeser), ¶ 177; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction (1 Oct. 2007) (Böckstiegel, Berman, Steyn), ¶ 44; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 Aug. 2008) (Kaufmann-Kohler, van den Berg, Gómez-Pinzón), ¶ 130; *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (19 Jun. 2009) (Kessler, Fernández-Armesto, Otero), ¶ 37; *Hochtief AG v. The Argentine Republic*, ICSID Case

the start showed a clear tendency in the opposite direction, of accepting jurisdiction rather than denying it,¹⁷⁰ a trend that was later on emulated in the jurisprudence of its successor as well.¹⁷¹

The following three examples best illustrate that the rejection of the *in dubio mitius* principle, as a special rule of interpretation of jurisdictional clauses, is a common theme that transcends tribunals and time.

In 1931, the arbitral tribunal in *Affaire des forêts du Rhodope central* had this to say about how jurisdictional clauses should be interpreted:

Such a [jurisdictional] clause should be interpreted in the same way as other contractual obligations. If analysis of the text and examination of its purpose show that the reasons in favour of the competence of the Arbitrator are more plausible than those which can be shown to the contrary, the former must be adopted.¹⁷²

No. ARB/07/31, Decision on Jurisdiction, Separate and Dissenting Opinion of J. Christopher Thomas QC (7 Oct. 2011), ¶ 11; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Georges Abi-Saab (28 Oct. 2011), ¶ 16; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 Dec. 2011) (Hanotiau, Reisman, Giardina), ¶ 867; *Daimler Financial Services AG v. The Argentine Republic*, ICSID Case No. ARB/05/1, Award on Jurisdiction, Dissenting Opinion of Charles N. Brower (22 Aug. 2012), ¶¶ 2–3; *Murphy Exploration and Production Company International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Expert Opinion of Professor Steven R. Ratner (15 Mar. 2013), ¶ 35, available at: <https://www.italaw.com/sites/default/files/case-documents/italaw3160.pdf> (accessed 1 Jun. 2017); *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decisions on Jurisdiction (24 Feb. 2014) (Kaufmann-Kohler, Hwang, van den Berg), ¶¶ 151 and 149 respectively; *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award (3 Apr. 2014) (Veeder, Fortier, Stern), ¶ 119.

170. See *supra* n.67 and PCIJ cases cited therein.

171. *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment (9 Apr. 1949), ICJ Reports 1949, p. 4, at p. 26; *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, Separate Opinion of Judge Shahabuddeen (26 Apr. 1988), ICJ Reports 1988, p. 12, at p. 62; *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, Judgment, Separate Opinion of Judge Torres-Bernárdez (11 Sept. 1992), ICJ Reports 1992, p. 351, at p. 728.

172. *Affaire des forêts du Rhodope central*, *supra* n.67, at 1403.

Half a century later, in *Amco Corp. v. Indonesia*, the tribunal expounded on this in a paragraph that has since become the staple point of reference for any investment tribunal that deals with interpreting jurisdictional clauses:

a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties; such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law.¹⁷³

Finally, there could be no better way to conclude this section than by referring to a former president of the ICJ, who very succinctly put a lid on the whole debate in a single paragraph:

It is clear from the jurisprudence of the Permanent Court and of the International Court that *there is no rule that requires a restrictive interpretation of compromissory clauses* ... The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other.¹⁷⁴

§12.07 *In Dubio Mitius*' Proper Place Within the Interpretative Process

[A] Acceptance, Rejection and 'Balanced Approaches': The Oscillation Plane of *In Dubio Mitius*

173. *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (25 Sep. 1983) (Goldman, Rubin, Foighel), ¶ 14(i).

174. *Oil Platforms (Islamic Republic of Iran v. United States)*, Preliminary Objections, Judgment, Separate Opinion of Judge Higgins (12 Dec. 1996), ICJ Reports 1996, p. 803, at ¶ 35 (emphasis added).

The history of the application of the *in dubio mitius* principle in international adjudication is quite a checkered one.¹⁷⁵ Attitudes towards it range across the entire spectrum. Sometimes it is simply mentioned in separate or dissenting opinions of judges¹⁷⁶ or paid lip-service to in judgments that refer to it as a principle of international law but which do not actually apply it.¹⁷⁷

175. Some of that history has already been highlighted in the analysis in the previous sections. For a thorough analysis of the maze-like, widely inconsistent application of various interpretative maxims by investment tribunals, see Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, in *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* 129–152 (Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris eds, Martinus Nijhoff 2010); Reinisch, *supra* n.162, at 165–166; Harten, *supra* n.165, at 132; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* 254 (Cambridge University Press 2007); Wälde, *supra* n.165, at 741; Amerasinghe, *supra* n.162, at 168.

For an analysis of the use of various principles in the WTO, see Mitsuo Matsushita, Thomas Schoenbaum, Petros C. Mavroidis & Michael Hahn, *The World Trade Organization: Law, Practice, and Policy* 47 – 81 (3rd ed., Oxford University Press 2015); Joanna Gomula, *The Heritage of the Permanent Court of International Justice in WTO Jurisprudence*, in *Legacies of the Permanent Court of International Justice* 183 et seq. (Malgosia Fitzmaurice & Christian Tams eds, Martinus Nijhoff 2013). For human rights courts, see Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14(3) Eur. J. Int'l L. 529 (2003). For the ICJ, see Ibrahim F.I. Shihata, *The Power of the International Court of Justice to Determine Its Own Jurisdiction: Compétence de la Compétence* 188–205 (Martinus Nijhoff 1965). Generally, see Luigi Crema, *Disappearance and New Sightings of Restrictive Interpretation(s)*, 21 Eur. J. Int'l L. 681 (2010).

176. *S.S. 'Wimbledon'*, *supra* n.57, Dissenting Opinion by Anzilotti and Huber, at 37 (the 'law of treaties ... knows of no more important principle than the principle of restrictive interpretation of clauses imposing obligations on the parties to it' (emphasis added)). See also *The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan*, Indo-Pakistan Western Boundary Case Tribunal, Conclusions – Dissenting Opinion of Judge Aleš Bebler (19 Feb. 1968), 17 UNRIAA 1, 440; *Iran – United States*, Case No. A/1, *supra* n.105, Separate Opinion of Judges Kashani and Shafeiei, at 213; *Taflan-Met and Others v. Bestuur van de Social Verzekeringsbank and O. Akol v. Bestuur van de Nieuwe Algemene Bedrijfsvereniging*, ECJ Case C-277/94, Opinion of Advocate General La Pergola (26 Mar. 1996), ¶ 10; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, Separate Opinion of Dr Kamral Hossain (21 Dec. 2012), ¶ 25 ('*in dubio mitius* merits serious consideration').

177. *Cases of Dual Nationality – Decision No. 22*, Anglo-Italian Conciliation Commission (8 May 1954), 14 UNRIAA 27, 35–36; *Cession of Vessels and Tugs for Navigation on the Danube (Czechoslovakia, Greece, Rumania, Serb-Croat-Slovene Kingdom v. Germany, Austria, Hungary and Bulgaria)*, Decision (2 Aug. 1921), 1 UNRIAA 97, 105; *Flexi – Van Leasing, Inc. v. Islamic Republic of Iran*, Case No. 36 (15 Dec. 1982), reprinted in 1 Iran-U.S. Cl. Trib. Rep. 455, at 480; *Zenica Company v. Austrian Federal Railways*, Austrian Supreme Court (30 Oct. 1929), reprinted in 5 Int'l L. Rep. 364, 365.

Other times it is the disputing parties that raise it, but the tribunal either remains silent on the matter,¹⁷⁸ or opts for applying the interpretative elements embodied in Articles 31–33 VCLT.¹⁷⁹ Of course, the principle has also occasionally been applied by domestic¹⁸⁰ and international courts and tribunals,¹⁸¹ but the frequency of such applications seems to be on the wane,

178. Statement by Professor de Lapradelle, reproduced in *Competence of the International Labour Organization* (3 Jul. 1922), PCIJ Series C, No. 1, p. 174; Statement by Professor Borel, reproduced in *Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer* (29 Jun. 1926), PCIJ Series C, No. 12, p. 63; *Affaire des forêts du Rhodope central*, supra n.67, at 1400; *Sedco Inc. v. National Iranian Oil Company and The Islamic Republic of Iran*, Case No. 129 (24 Oct. 1985), reprinted in 9 Iran-U.S. Cl. Trib. Rep. 248, at 255; *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty (7 May 2012) (Rowley, Park, Sands), ¶ 4.27; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objection to Jurisdiction (9 Oct. 2012) (Keniper, Fortier, Sands), ¶ 183; *Muhammet Çap and Sehil İnşaat Endustri ve Ticaret Ltd. Sti.v. Turkmenistan*, ICSID Case No. ARB/12/6, Decision on Respondent’s Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty (13 Feb. 2015) (Lew, Boisson de Chazournes, Hanotiau), ¶ 142 (ICSID, 13 Feb. 2015).

179. *Exchange of Greek and Turkish Populations*, supra n.64, at 21; *Polish Postal Service in Danzig*, supra n.61, at 37–39; *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, supra n.59, at 25; *Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer*, Advisory Opinion (23 Jul. 1926), PCIJ Series B, No. 13, p. 22 (*Competence of the ILO*); *Jurisdiction of the European Commission of the Danube*, supra n.64, at 35.

180. *Whittall v. The Administrator of German Property*, England, High Court of Justice (11 Nov. 1932), reprinted in 6 Int’l L. Rep. 345, 346; *Security for Costs (Statelessness) case*, Switzerland, Commercial Court for Zürich (1 Apr. 1954), reprinted in 21 Int’l L. Rep. 303, 303; *Singer Nähmaschinen, A.G. v. Federal Republic of Germany (Reinstatement of Time-Limit)*, Arbitral Commission on Property, Rights and Interests in Germany, Third Chamber (23 Jun. 1959), reprinted in 28 Int’l L. Rep. 583, 586; *Afco and Another v. Commander Israel Defence Force in the West Bank*; *Rafia and Another v. Commander Israel Defence Force in the Gaza Strip and Another*; *Hindi v. Commander Israel Defence Force in the Judea and Samaria Region*, Israel, Supreme Court sitting as the High Court of Justice (10 Apr. 1988), reprinted in 83 Int’l L. Rep. 122, 133–135.

181. *Affaire relative à l’interprétation de l’article 11 du Protocole de Londres du 9 août 1924 (réparations allemandes) (Allemagne contre Commissaire aux revenus gages)* (23 Jun. 1926), 2 UNRIAA 755, 761, and *Affaire des forêts du Rhodope central*, supra n.67, at 1400 (‘universally recognized principle’); *Radio Corporation of America (Radio Corporation of America v. Republic of China)* (1953), 3 UNRIAA 1621, 1627 (‘correct rule, known and recognized in common law as well as in international law’); *SGS v. Pakistan*, supra n.166, at ¶ 171 (‘the appropriate interpretive approach is the prudential one summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*’); *EC – Hormones*, supra n.6, at ¶ 165,

especially following the conclusion of the VCLT. Moreover, even in the case of the tribunals that accept the principle, most would acknowledge that it ‘must be employed *with the greatest caution*’.¹⁸²

Rejections of the principle are on the rise.¹⁸³ Several tribunals have distanced themselves from expounding on rules in favour of restrictive or expansive interpretations, opting rather for a more

at n.154 (‘[*in dubio mitius* is an] interpretative principle ... widely recognized in international law’). However, note that the Appellate Body has qualified this by stating that it is widely recognized as a ‘supplementary means of interpretation’.

Other cases that have applied the *in dubio mitius* principle are *Sambiaggio Case*, Italian-Venezuelan Commission (1903), 10 UNRIAA 499, 521; *Case Heirs of Jean Maninat*, French-Venezuelan Commission (1905), 10 UNRIAA 55, 78; *S.S. ‘Wimbledon’*, *supra* n.57, at 24; *S.S. ‘Lotus’*, Judgment (7 Sept. 1927), PCIJ Series A, No. 10, p. 44; *River Oder* case, *supra* n.61, at 26; *Naomi Russell* case, *supra* n.10, at 869; *Access to, or Anchorage in, the port of Danzig, of Polish War Vessels*, Advisory Opinion (11 Dec. 1931), PCIJ Series A/B, No. 43, p. 142; *Free Zones of Upper Savoy and the District of Gex*, *supra* n.58, at 166–167; *Difference Concerning the Swedish Motor Ships ‘Kronprins Gustaf Adolf’ and ‘Pacific’*, *supra* n.101, at 1254; *Interpretation of the Statute of the Memel Territory*, Judgment (11 Aug. 1932), PCIJ Series A/B, No. 49, pp. 313–314; *Interpretation of the Air Transport Services Agreement between the United States of America and France* (22 Dec. 1963), 16 UNRIAA 5, 58; *Plama Consortium Ltd. v. Republic of Bulgaria*, *supra* n.159, at ¶¶ 204–223; *De Pascale Case – Decision No. MD/1018*, Italian-United States Conciliation Commission (24 Jun. 1961), 16 UNRIAA 229, 234.

The *De Pascale Case* was heavily criticized by the Italian-United States Conciliation Commission in the *Droutzkoy Case* on the basis that the PCIJ jurisprudence relied on did not concern international obligations stemming from an inter-State treaty. *See Droutzkoy Case*, *supra* n.137, at 292.

182. *River Oder* case, *supra* n.61, at 26 (emphasis added).

183. *See, e.g., Lac Lanoux Arbitration (France v. Spain)* (16 Nov. 1957), *reprinted in* 24 Int’l L. Rep. 101, 120 (‘The Tribunal could not recognize such an absolute rule of construction’); *Interpretation of the Air Transport Services Agreement between the United States of America and Italy* (17 Jul. 1965), 16 UNRIAA 75, 94 (‘[*in dubio mitius* is] fairly controversial’); *Iran – United States, Case No. A/1*, *supra* n.105, Dissenting Opinion of President Lagergren, at 198; *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, PCA Case No. 2010-9, Award on Jurisdiction (10 Feb. 2012), ¶ 282 (‘[a]ny general rule of restrictive treaty interpretation is plainly in conflict with the VCLT and customary international law’). *See also The Loewen Group, Inc and Raymond L. Loewen v. United States of America*, *supra* n.167, at ¶ 51; *Mondev International Ltd v. United States of America*, *supra* n.163, at ¶ 43; *United Parcel Service of America, Inc v. Government of Canada*, UNCITRAL, Award on Jurisdiction (22 Nov. 2002) (Keith, Cass, Fortier), ¶ 40; *Eureko v. Poland*, *supra* n.167, at ¶ 258; *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment (13 Jul. 2009), ICJ Reports 2009, p. 213, ¶ 48; *Lao People’s Democratic Republic v. Sanum Investments Limited*, High Court of The Republic of Singapore, Judgment (20 Jan. 2015), [2015] SGHC 15, ¶ 124. Similar views have been expressed in doctrine. *See, e.g., Bernhardt, supra*

balanced approach,¹⁸⁴ i.e., instead of opting for an interpretative presumption in the form of *in dubio mitius* or of liberal interpretation, simply allowing the elements of the VCLT to guide the interpretative process and outcome. In this manner, the restrictive, liberal or neutral interpretation is not part of the interpretative exercise, but rather its outcome. This is, in the author's view, logically and theoretically appropriate.

The rejection of *in dubio mitius* and the plea for a balanced approach to interpretation is often justified on multiple grounds, including:

- the existence of the VCLT and the customary rules of interpretation as a whole;¹⁸⁵

n.152, at 14; Robin Churchill & Geir Ulfstein, *The Disputed Maritime Zones Around Svalbard*, in *Changes in the Arctic Environment and the Law of the Sea* 566 (Myron Nordquist, Thomas H. Heidar & John Norton Moore eds, Martinus Nijhoff 2010); Schill, *supra* n.105, at 581.

184. This is sometimes also referred to as a 'middle ground approach'. See, e.g., *Southern Pacific Properties (Middle East) and Southern Pacific Properties Ltd v. The Arab Republic of Egypt*, *supra* n.169, at 143–144; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, *supra* n.169, at ¶ 130.

Generally on the 'balanced approach' see: *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award (24 Dec. 2007), ¶ 134; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, *supra* n.178, at ¶ 59; *Señor Tza Yap Shum v. The Republic of Peru*, *supra* n.169, at ¶ 37; *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Response to The Republic of El Salvador's Preliminary Objections (15 Sept. 2010), ¶ 35; *Abaclat and Others v. Argentine Republic*, *supra* n.169, Dissenting Opinion of Georges Abi-Saab, at ¶ 16; *Murphy Exploration and Production Company International v. The Republic of Ecuador*, *supra* n.169, Expert Opinion of Professor Steven R. Ratner, at ¶ 35; *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, *supra* n.169, at ¶¶ 151, 149; *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 Mar. 2016) (Heiskanen, Lamm, Sands), ¶ 210.

185. See, e.g., *United States-Iran*, Case No. A17, Concurring Opinion of Brower (13 May 1985), reprinted in 8 Iran-U.S. Cl. Trib. Rep. 189, at 207 ('[t]he Vienna Convention resolved past debates concerning the wisdom of pronouncements by international tribunals that limitations of sovereignty must be strictly construed'); *Ethyl Corporation v. Canada*, UNCITRAL, Award on Jurisdiction (24 Jun. 1998) (Böckstiegel, Brower, Lalonde), ¶ 55, available at: https://www.italaw.com/sites/default/files/case-documents/ita0300_0.pdf (accessed 1 Jun. 2017) ('[t]he erstwhile notion that in case of doubt a limitation of sovereignty must be construed restrictively has long since been displaced by Articles 31 and 32 of the Vienna Convention'); *Mondev International Ltd v. United States of America*, *supra* n.163, at ¶ 43 ('[t]here is no principle of either extensive or restrictive interpretation of jurisdictional provision in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties'); *Iron Rhine* arbitration, *supra* n.105, at ¶ 55 ('[t]his is to be done not by invocation of the principle of restrictive interpretation, but rather by examining – using the normal rules of interpretation identified in Articles 31 and 32 of the

- Article 31(1) of the VCLT, without specifying whether *in toto* or on the basis of a particular element;¹⁸⁶
- the intention of the parties;¹⁸⁷
- the object and purpose of the treaty;¹⁸⁸

Vienna Convention’); *Aguas del Tunari, S.A. v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objection to Jurisdiction (21 Oct. 2005) (Caron, Alvarez, Alberro-Semerena), ¶ 91 (‘the Vienna Convention represents a move away from the canons of interpretation previously common in treaty interpretation and which erroneously persist in various international law decisions today. For example, the Vienna Convention does not mention the canon that treaties are to be construed narrowly, a canon that presumes States cannot have intended to restrict their range of action’); *Quasar de Valores et al. v. Russia*, *supra* n.162, at ¶ 55 (‘Article 31 must be considered with caution and discipline lest it become a palimpsest constantly altered by the projections of subjective suppositions’); *Quasar de Valores et al. v. Russia*, *supra* n.162, Separate Opinion of Charles N. Brower, at ¶ 7 (‘[*in dubio mitius*] is a principle that, whatever validity it may have had in an earlier era, is patently incompatible with Articles 31 and 32 of the Vienna Convention on the Law of Treaties ... [jurisdictional instruments] are to be interpreted like any other international legal instrument, that is neither restrictively nor liberally, but according to the standards set down in the Vienna Convention’). *See also RosInvestCo UK Ltd. v. The Russian Federation*, *supra* n.169, at ¶ 44; *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction (28 Jan. 2008) (Böckstiegel, Bacchus, Low), ¶¶ 111–113, 166; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 Mar. 2011) (Fernández-Armesto, Voss, Paulsson), ¶ 66.

186. *Methanex Corporation v. United States of America*, *supra* n.167, at ¶ 105; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 Jul. 2006) (Rigo Sureda, Martins, Lalone), ¶ 307.

187. *See, e.g., Amco Asia Corporation and Others v. Republic of Indonesia*, *supra* n.173, at ¶ 14(i) (‘a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties’). *See also CSOB v. Slovak Republic*, *supra* n.169, at ¶ 34; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, *supra* n.169, at ¶ 177; *Hochtief AG v. The Argentine Republic*, *supra* n.169, Separate and Dissenting Opinion of J. Christopher Thomas QC, at ¶ 11; *Spyridon Roussalis v. Romania*, *supra* n.169, at ¶ 867.

188. *See, e.g., Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 Aug. 2004) (Rigo Sureda, Brower, Bello Janeiro), ¶ 81 (‘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’). *See also Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award (12 Oct. 2005) (Böckstiegel, Porcasi, Lever), ¶ 52; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006) (Watts, Behrens, Fortier), ¶ 300; *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006) (Sacerdoti, Siqueiros, Brower), ¶ 77; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki (5 Jun. 2007), ¶ 21; *Plama Consortium Limited v. Republic of Bulgaria*, *supra* n.159, at ¶ 167; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 Jan. 2010)

- the title of and preamble to the treaty;¹⁸⁹
- the *travaux préparatoires* and other relevant facts;¹⁹⁰
- the principle of *effet utile*;¹⁹¹ and
- other miscellaneous grounds.¹⁹²

[B] Relationship of *In Dubio Mitius* with Other Interpretative Elements

[1] *In Dubio Mitius and Other Interpretative Maxims*

As has already been shown both in this chapter and in others in the present volume, the *in dubio mitius* maxim does not exist in a vacuum. It is part of a long list of maxims referred to by international courts and tribunals, which sometimes complement and sometimes are in tension with each other. Even Verzijl, who in the *George Pinson* case set out a list of rules of interpretation,¹⁹³ acknowledged this unfortunate reality: ‘In principle they are all correct, but on concrete application they often abrogate each other and frequently appear worthless’.¹⁹⁴

It is often unclear where one maxim stops and another begins. For instance, often the maxim *favor debitoris* – i.e., that when faced with two interpretations, the one most favorable to the party that owes the obligations should be preferred – is sometimes used interchangeably with *in*

(Fernández-Armesto, Voss, Paulsson), ¶ 273; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction (19 Dec. 2012) (Bucher, McLachlan, Martinez-Fraga), ¶ 53.

189. See, e.g., *Siemens AG v. Argentine Republic*, *supra* n.188, at ¶ 81 (‘The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble’).

190. *Vladimir Berschader and Moise Berschader v. The Russian Federation*, *supra* n.164, at ¶ 175; *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction (18 Jul. 2013) (Stern, Thomas, Klein), ¶¶ 382, 384.

191. *Continental Casualty Company v. The Argentine Republic*, *supra* n.142, at ¶ 181. See also *infra* section 12.07[B][1].

192. See, e.g., *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (27 Apr. 2006) (Caflisch, Bernardini, Stern), ¶ 70 (‘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’); *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (27 Jul. 2006) (Caflisch, Stern, van den Berg), ¶ 99.

193. *Georges Pinson (France) v. United Mexican States*, Franco-Mexican Commission (19 Oct. 1928), 5 UNRIAA 327, 422, ¶ 50.

194. See J.P. Fockema Andreae, *An Important Chapter from the History of Legal Interpretation* 75 (A. W. Sijthoff’s Publ’g Co. 1948). Similar concerns have been expressed by members of the *Institut de Droit International*. See *Institut de Droit International 1950(I)*, *supra* n.37, at 371–372, 406, 412–415, 437.

dubio mitius, or at least without any explanation of the selection of one term over the other.¹⁹⁵ This is not surprising, because if the party is a State, then both *favor debitoris* and *in dubio mitius* would have the same content. Of course, one could argue that the *raison d' être* is different, as *favor debitoris* would most likely stem from a notion of *benignitas*, whereas *in dubio mitius* stems from a deference to State sovereignty as a primary rule of the international legal system. However, as was shown in section 12.02[B], *benignitas* was also an ideological foundation of *in dubio mitius*.

Another relative of *in dubio mitius* is the maxim *exceptio est restrictissimae applicationis*, or the principle that exceptions must be interpreted restrictively. This maxim is analysed in more detail in Chapter 15 of this Volume, and so I will restrict myself to highlighting its connections with *in dubio mitius*. One of the main issues is that, instead of referring to the Latin maxim, courts and academics often simply refer to 'restrictive interpretation'. However, as Guggenheim pointed out, the term 'restrictive interpretation' has two meanings: *in dubio mitius* and *exceptio est strictissimae applicationis*. It is for this reason that he requested that the Resolution on treaty interpretation of the *Institut de droit international* offer guidance on and clarification of the matter by providing a working definition and specifying which of the two principles was being referred to on each occasion.¹⁹⁶

Even though this is a fair point, it is easier said than done. That is because the *exceptio est strictissimae appliciationis* principle can in certain circumstances be seen as a logical extension and/or reinforcement of the *in dubio mitius* principle.¹⁹⁷ The normative hierarchy between these two maxims is, moreover, somewhat unclear. If the *exceptio* maxim is a logical extension of *in dubio mitius*, one would not expect conflicting interpretations. However, such a conflict could arise where the exception is to an obligation imposed on the State. In such a scenario, the *exceptio est strictissimae applciationis* principle would require that the exception be interpreted restrictively and that that the obligation therefore be given the more onerous interpretation. In

195. See *supra* n.10 and cases cited therein.

196. Institut de Droit International 1952(II), *supra* n.75, at 395.

197. See *Difference Concerning the Swedish Motor Ships 'Kronprins Gustaf Adolf' and 'Pacific'*, *supra* n.101, at 1287 ('The general rule that limitations imposed by a treaty on the natural liberty of a State are to be strictly interpreted applies with special emphasis to provisions of so exceptional a nature'). See also *S.S. 'Wimbledon'*, *supra* n.57, Dissenting Opinion by Schücking, at 44; Lauterpacht, *supra* n.29, at 60 and notes therein.

contrast, the *in dubio mitius* principle would require that the exception be given a more liberal interpretation so as to limit the infringement on State sovereignty.¹⁹⁸ However, should such a conflict arise, the Franco-Italian Conciliation Commission seems to have suggested that the *exceptio est strictissimae applicationis* should give way to the *in dubio mitius* principle.¹⁹⁹

Similar considerations apply to the *contra proferentem* rule,²⁰⁰ which Lauterpacht acknowledged as related to *in dubio mitius*.²⁰¹ By examining domestic civil codes, he demonstrated that the latter emerges as a presumption of the former, but one which ‘can hardly claim the character of a principle of law of unchallenged generality’.²⁰² This view has been taken up by international tribunals, which have often approached the two concepts as related to one another.²⁰³

But of all the Latin maxims, *in dubio mitius* is most well-known for its allegedly antagonistic/adversarial relationship with *effet utile*.²⁰⁴ Lauterpacht, although starting from the

198. This example, demonstrating the complex permutations between *exceptio est strictissimae applicationis*, *in dubio mitius* and *effet utile*, can be found in Jennings & Watts, *supra* n.5, at 1278.

199. *Biens italiens en Tunisie* case, *supra* n.10, at 397 (‘Among the technical rules of construction of treaties is the maxim “*exceptio est strictissimae applicationis*” ... The maxim is only applicable in case of doubt, and, in this instance, it cannot prevail against the other traditional rule of interpretation [*favor debitoris/in dubio mitius*]’). Whether this is as a matter of principle or due to the particular facts of the case is left unresolved by the Commission.

200. Again, since *contra proferentem* is analysed in Chapter 11, I will merely briefly highlight its relationship with the *in dubio mitius* principle.

201. Institut de droit international 1950(I), *supra* n.37, at 366, 407.

202. Lauterpacht, *supra* n.29, at 56–57.

203. *Sambiaggio Case*, *supra* n.181, at 521; *Iran – United States*, Case No. A/18, *supra* n.156, at 288; *Iran – United States*, Case No. A/1, *supra* n.105, Separate Opinion of Judges Kashani and Shafeiei, at 213–214; *Golpirav. Islamic Republic of Iran*, Case No. 211, *supra* n.156, Dissenting Opinion of Judge Shafeiei, at 210–211. In fact, *contra proferentem* (which was referred to by another Latin term, *obscuritas pacti nocet ei qui opertius loqui potuit*) was seen as reinforcing *in dubio mitius* in cases of treaties establishing servitudes. See S.S. ‘Wimbledon’, *supra* n.57, Dissenting Opinion by Schücking, at 44.

204. See *supra* section 12.05[E]. The members of the *Institut* also raised this point (Institut de droit international 1950(I), *supra* n.37, 412–415), as have a number of tribunals. See, e.g., *Khlaifia and Others v. Italy*, *supra* n.152, Partly Dissenting Opinion of Judge Serchides, at ¶ 19. See also *Kummerov et al.* cases, *supra* n.147, at 398; *Wemhoff v. Germany*, *supra* n.150, at ¶ 8; *Compulsory Membership in an Association prescribed by Law for the Practice of Journalism* *supra* n.150, at ¶ 52; *Baena-Ricardo et al. v. Panama*, *supra* n.150, at ¶ 189; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, *supra* n.150, Concurring Opinion of Judge Pinto de Albuquerque, at ¶ 8; *The Prosecutor v. Salim Jamil Ayyash et al.*, *supra* n.11, at

viewpoint that these two principles are in most cases mutually incompatible, nonetheless acknowledged that conflict is not necessarily a given, and that *effet utile* could function as a counter-balancing force or limit²⁰⁵ to *in dubio mitius* interpretations.²⁰⁶ As tribunals have held, a restrictive interpretation does not *ipso facto* render a provision illusory, meaningless and ineffective.²⁰⁷ Almost four and a half decades ago, Fitzmaurice hit the nail on the head of the dangerous misconception that led many to approach these two maxims as impossible to reconcile with one another. The problem was that *ut res magis valeat quam pereat* was ‘all too frequently misunderstood as denoting that agreements should always be given their *maximum possible* effect, whereas its real object is merely (*‘quam pereat’*) to prevent them failing altogether’.²⁰⁸ Be that as it may, there could still be some truth in Lauterpacht’s conclusion that the set of scenarios in which both these maxims can be reconciled and simultaneously applied is so small that the practical relevance of *in dubio mitius* would be essentially obliterated.²⁰⁹ Moreover, the preference for a balanced interpretation discussed *supra* in section 12.07[A] achieves the same

¶¶ 18, 29 (Submission of the Defence Office); *The Prosecutor v. Akhbar Beirut*, *supra* n.111, at ¶ 57; *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (4 May 2016) (Rigo Sureda, Stern, Gaillard), ¶¶ 111, 147 (Claimants’ arguments); Bernhardt, *supra* n.152, at 14; H. Guttiérrez Posse, *La maxime ut res magis valeat quam pereat (interprétation en fonction de l’effet utile): les interprétations ‘extensives’ et ‘restrictives’*, 23 *Österreichische Zeitschrift für öffentliches Recht* 229, 229–254 (1972).

205. On *effet utile* as a limit to *in dubio mitius*, see *James and Others v. The United Kingdom*, ECtHR, App. No. 8793/79, Concurring Opinion of Judges Bindschedler-Robert, Gölcüklü, Matscher, Pettiti, Russo and Spielmann (21 Feb. 1986); *Telefónica S.A. v. The Argentine Republic*, *supra* n.188, at ¶ 77; Stefan Mayr, *Putting a Leash on the Court of Justice? Preconceptions in National Methodology v Effet Utile as a Meta-Rule*, 5(2) *Eur. J.L. Stud.* 8, 11 (2012–2013).

206. This seems to be suggested in the second leg of *Oppenheim’s* definition of the *in dubio mitius* principle. See Jennings & Watts, *supra* n.5, at 1278.

207. *Sanum Investments Ltd. v. Government of the Lao People’s Democratic Republic*, Court of Appeal of The Republic of Singapore (29 Sep. 2016), [2016] SGCA 57, ¶ 146.

208. G.G. Fitzmaurice, *Vae Victis or Woe to the Negotiators: Your Treaty or Our ‘Interpretation’ of It?*, 65(2) *Am. J. Int’l L.* 358, 373 (1971). As an example of how widespread this misconception is, see *Muñoz-Vargas y Sainz de Vicuña v. Spain*, Communication No. 7/2005, UN Doc. CEDAW/C/39/D/7/2005, Decision on the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Individual opinion by Committee member Mary Shanthi Dairiam (dissenting) (9 Aug. 2007), ¶ 13.9 (‘[b]ecause of its mandate, the Committee on the Elimination of Discrimination against Women, more than any other treaty body, must be broad in its interpretation and recognition of the violations of women’s right to equality’).

209. Lauterpacht, *supra* n.29, at 67.

result, i.e., that of finding a practical equilibrium between *effet utile* and *in dubio mitius*, while simultaneously avoiding the need for doctrinal balancing feats.

[2] In Dubio Mitius and Elements of the VCLT Rules of Interpretation

The relationship of the *in dubio mitius* principle with the elements explicitly mentioned in the VCLT is somewhat clearer than is the VCLT's relationship with other Latin maxims. A variety of courts and tribunals have reaffirmed not only the subsidiary nature of *in dubio mitius*,²¹⁰ but also that certain elements of the VCLT function as limits to the scope of an *in dubio mitius*-based interpretation. Relevant elements of the VCLT include in this regard:

- the ordinary meaning to be given to the terms;²¹¹
- the intention of the parties;²¹²
- the object and purpose of the treaty; and²¹³
- the preparatory work.²¹⁴

210. The term 'subsidiary' is used here not as a synonym of 'supplementary' in Art. 32 of the VCLT, but rather as the ideologically charged notion of 'subsidiary' in the 'subsidiary vs. auxiliary' distinction suggested by Rolin. See Institut de droit international 1952(II), *supra* n.75, at 395.

211. See, e.g., *Wimbledon*, *supra* n.57, at 25 ('[The Court feels] obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted'; *Case Concerning the Competence of the ILO*, *supra* n.178, at 22 ('[t]here may be some force in [an argument based on *in dubio mitius*], but the question in every case must resolve itself into what the terms of the treaty actually mean' (emphasis added)); *Affaire relative à l'interprétation de l'article 11 du Protocole de Londres du 9 août 1924*, *supra* n.181, at 773 ('[t]he fact that this article enshrines a limitation on the exercise of the right of sovereignty imposes the duty to interpret it strictly, but that duty can never cause the article to be denied the meaning which is governed by its formal terms'). See also *Droutzkoy Case*, *supra* n.137, at 292; *Iron Rhine* arbitration, *supra* n.105, at ¶ 52; *Dispute Regarding Navigational and Related Rights*, *supra* n.183, at ¶ 48.

212. *De Pascale Case*, *supra* n.181, at 234; *Naomi Russell case*, *supra* n.10, at 869.

213. See, e.g., *Iron Rhine* arbitration, *supra* n.105, at ¶ 53 ('The principle of restrictive interpretation, whereby treaties are to be interpreted in favour of state sovereignty in case of doubt, is not in fact mentioned in the provisions of the Vienna Convention. The object and purpose of a treaty, taken together with the intentions of the parties, are the prevailing elements for interpretation. Indeed, it has also been noted in the literature that a too rigorous application of the principle of restrictive interpretation might be inconsistent with the primary purpose of the treaty'). See also *Naomi Russell case*, *supra* n.10, at 869; *Spanish National Resident Permit Case*, Federal Republic of Germany, Federal Administrative Court, Case No. I C 35.72 (3 May 1973), 74 Int'l L. Rep. 570, 573; *Telefónica S.A. v. The Argentine Republic*, *supra* n.188, at ¶ 77.

214. As long as it reflects the common intention of the parties. See, e.g., *De Pascale Case*, *supra* n.181, at 234.

Of particular note is the connection between *in dubio mitius* and Article 33 of the VCLT, which has troubled the ILC in the past. It had been proposed that in the case of interpretation of treaties authenticated in multiple languages, the text which created the fewest obligations for the State should be opted for.²¹⁵ The most frequently cited authority for that proposition is the *Mavrommatis Palestine Concessions* case, in which the Court held that, '[w]here two versions possessing equal authority exist one of which appears to have a wider bearing than the other, [the Court] is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties'.²¹⁶

However, a careful reading of the judgment reveals that the PCIJ did not necessarily intend to promote a 'limited interpretation rule' regarding texts authenticated in more than one language.²¹⁷ Instead, the gist of the relevant paragraph seems to suggest a preference for a balanced/harmonizing approach with deference, not to State sovereignty and the 'lowest common denominator', but rather to the common intention of the parties. This approach is supported by international jurisprudence²¹⁸ and doctrine,²¹⁹ and was, of course, the one the ILC opted for in lieu of the *in dubio mitius* principle.²²⁰

215. *Mavrommatis Palestine Concessions*, *supra* n.67, Dissenting Opinion by Moore, at 70; citing also Alphonse Rivier, *Principes du Droit des Gens* 123–125 (Librairie nouvelle de droit et de jurisprudence – Arthur Rousseau 1896); *Air Transport Services Agreement between the United States of America and Italy*, *supra* n.183, Opinion by Mr Riccardo Monaco, at 105, ¶ 7; *Affaire des réparations allemandes selon l'article 260 du Traité de Versailles (Allemagne contre Commission des Réparations)* (3 Sep. 1924), 1 UNRIAA 429, 439.

216. *Mavrommatis Palestine Concessions*, *supra* n.67, at 19.

217. Jean Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals*, 37 *Brit. Y.B. Int'l L.* 74, 76–81 (1961).

218. *Exchange of Greek and Turkish Populations*, *supra* n.64, at 18; *Aspinwal, Executor of G.G. Howlan et al. ('Venezuelan Bond cases') (USA v. Venezuela)*, 4 Moore's International Arbitrations 3616, 3623 (United States-Venezuelan Mixed Commission, 5 Dec. 1885); *Affaire des réparations allemandes selon l'article 260 du Traité de Versailles (Allemagne contre Commission des Réparations)*, *supra* n.215, at 437–439; *Naomi Russell case*, *supra* n.10, at 867; *The Question whether the Re-evaluation of the German Mark in 1961 and 1969 Constitutes a Case for Application of the Clause in Article 2 (e) of Annex I A of the 1953 Agreement on German External Debts (United Kingdom v. Federal Republic of Germany)* (16 May 1980), 19 UNRIAA 67, ¶ 39; *Wemhoff v. Germany*, *supra* n.150, at ¶ 8; *BG Group Plc. v. The Republic of Argentina*, *supra* n.184, at ¶ 134.

219. Hardy, *supra* n.217, at 76–81; Max Sørensen, *Manual of Public International Law* Ch. 4, 4.37 (St. Martin's Press 1968); Villiger, *supra* n.3, at 454–455, ¶ 1; Oliver Dörr, *Article 33:*

[C] The Place of *In Dubio Mitius* in the Edifice of Treaty Interpretation

[1] *In Dubio Mitius as a Primary/Superior Rule of Interpretation?*

It remains to be seen where *in dubio mitius* fits in the modern interpretative structure.

Crawford, having been critical of *in dubio mitius* in earlier works,²²¹ suggests in *Brownlie's Principles of Public International Law* a possible explanation for the principle's persistent appearance in some modern cases. According to him, *in dubio mitius* has two faces, one as an 'aid to interpretation', and another as an 'independent principle'. Whereas the former's use has been gradually and significantly whittled down in international jurisprudence, the second 'may operate in cases concerning regulation of core territorial privileges'.²²² Irrespective of whether the second leg of this hypothesis holds any water, the first leg is one that almost everybody can get behind. According to the overwhelming majority both in doctrine and in case-law, *in dubio mitius* can no longer be considered a primary or superior rule of interpretation, if it ever really was one.

If we recall the discussion in section 12.07[A], this seems like an inescapable conclusion. Thus, the PCIJ applied the principle in *S.S. 'Wimbledon'* and *Free Zones of Upper Savoy and the District of Gex*²²³ (albeit not unconditionally and with caveats in the form of limits (discussed in section 12.07[B][2]), but then took a more nuanced approach in the *River Oder* case.²²⁴ The ICJ, for its part, has not only not applied the principle, but has in fact outright rejected its relevance in modern treaty interpretation.²²⁵ Similarly, in the WTO, whereas the *EC – Hormones* case²²⁶

Interpretation of Treaties Authenticated in Two or More Languages, in *Vienna Convention on the Law of Treaties: A Commentary* 590 ¶ 10 (Oliver Dörr & Kristen Schmalenbach eds, Springer 2012).

220. 1965(II) Y.B. Int'l L. Comm'n 3, 64–65, Commentary to Art. 75, ¶ 8; 1966(I) Y.B. Int'l L. Comm'n 187, 225–226, Commentary to Art. 29, ¶¶ 8–9.

221. Crawford, *Sovereignty*, *supra* n.101, at 122–123; Crawford, *Treaty and Contract*, *supra* n.101, at 353.

222. James Crawford, *Brownlie's Principles of Public International Law* 379 (Oxford University Press 2012).

223. *S.S. 'Wimbledon'*, *supra* n.57, at 24; *Free Zones of Upper Savoy and the District of Gex*, *supra* n.58, at 167.

224. *River Oder* case, *supra* n.61, at 26 (where *in dubio mitius* would apply in a subsidiary fashion, when all other pertinent methods had been exhausted and failed to reveal the intention of the parties).

225. *Dispute Regarding Navigational and Related Rights*, *supra* n.183, at ¶ 48.

breathed new life into the discussion on the relevance of *in dubio mitius* in modern adjudication, the WTO Appellate Body seems to have course-corrected since then. This can be seen, for instance, in *China – Publications and Audiovisual Products*, where the Appellate Body not only held that *in dubio mitius* should apply *only if* both Articles 31 and 32 VCLT have failed to produce a conclusive result, but where it also seemed to doubt whether *in dubio mitius* was of any relevance to WTO dispute settlement as a matter of principle.²²⁷

Dörr concludes that the *in dubio mitius* principle is ‘*not only of little value for treaty interpretation itself, but, above all, does not constitute a rule of customary international law*’.²²⁸ Bernhard, for his part, states that *in dubio mitius* and various other rules of construction ‘still find some support, especially in learned writings, but they can no longer be considered as primary rules of treaty interpretation’. In his view, the *in dubio mitius* principle ‘can no longer be considered valid’.²²⁹ More recently, the tribunal in the *Iron Rhine* arbitration came to a similar conclusion when it found that:

[t]he 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, whereby treaties are to be interpreted in favour of state sovereignty in case of doubt, is not in fact mentioned in the provisions of the Vienna Convention.²³⁰

[2] In Dubio Mitius as Part of the VCLT Rules on Interpretation?

226. *EC – Hormones*, *supra* n.6, at ¶ 165, n.154.

227. *China – Measures Affecting Trading Right and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)*, WTO Doc. WT/DS363/AB/R, ¶ 411 (21 Dec. 2009).

228. Oliver Dörr, *Article 31: General Rule of Interpretation*, in *Vienna Convention on the Law of Treaties: A Commentary* 538–539 ¶ 34 (Oliver Dörr & Kristen Schmalenbach eds, Springer 2012) (emphasis added). In support of this, Dörr refers to: *Iron Rhine* arbitration, *supra* n.105, at ¶ 53; *United States of America, Federal Reserve Bank of New York v. The Islamic Republic of Iran*, Case No. A28 (19 Dec. 2000), *reprinted in* 36 *Iran-U.S. Cl. Trib. Rep.* 5, ¶ 67.

229. Rudolf Bernhardt, *Interpretation in International Law*, in *Encyclopedia of Public International Law* 1419, 1421 (Rudolf Bernhardt ed., Elsevier 1992).

230. *Iron Rhine* arbitration, *supra* n.105, at ¶ 53.

The juxtaposition of *in dubio mitius* with the VCLT is a recurring theme. The tribunal in *Aguas del Tunari, S.A. v. Bolivia*, for instance, held that ‘the Vienna Convention represents a move away from the canons of interpretation [e.g., *in dubio mitius*] previously common in treaty interpretation and which erroneously persist in various international law decisions today’.²³¹ Brower was of the same view in *United States-Iran, Case No. A17* when he opined that the ‘Vienna Convention resolved past debates concerning the wisdom of pronouncements by international tribunals that limitations of sovereignty must be strictly construed’.²³² The adoption and entry into force of the VCLT seems to have displaced, or at the very least severely minimized the importance and usefulness of *in dubio mitius* for interpretative purposes.²³³ In simple terms, ‘the principle in *dubio mitius* does not seem to add much to the actual outcome of interpretation on the basis of Art 31 and 32 VCLT. The interpretative approach set out by the VCLT is comprehensive in itself, mandating a holistic exercise which is already conscious of state sovereignty and the sovereign equality of states’.²³⁴

Others try to find a place for *in dubio mitius* within the VCLT regime. This is usually done by characterizing it as a supplementary means of interpretation and thus falling under Article 32 of the VCLT.²³⁵ In *EC – Hormones*, the WTO Appellate Body said that *in dubio mitius* is an interpretative principle widely recognized in international law but, immediately afterwards qualified its suggestion by stating that the principle is recognized as a ‘supplementary means’ of interpretation.²³⁶ Villiger, in his *Commentary on the 1969 Vienna Convention on the Law of Treaties*, writes:

231. *Aguas del Tunari, S.A. v. Bolivia*, *supra* n.185, at ¶ 91.

232. *United States-Iran*, Case No. A17, *supra* n.185, Concurring Opinion of Brower, at 207.

233. Among all the cases and authors cited in sections 12.07[A] and 12.07[B], *see* especially *The Loewen Group, Inc and Raymond L. Loewen v. United States of America*, *supra* n.167, at ¶ 51; *Methanex Corporation v. United States of America*, *supra* n.167, at ¶ 105; *Ethyl Corporation v. Canada*, *supra* n.185, at ¶ 55; *Iron Rhine* arbitration, *supra* n.105, at ¶ 55; Lennard, *supra* n.7, at 65; Bernhardt, *supra* n.152, at 14.

234. Zleptnig, *supra* n.7, at 82.

235. Villiger, *supra* n.3, at 445–446, ¶ 5; Donald W. Greig, *International Law* 480–481 (2nd ed., Butterworths 1976); Gillian White, *Treaty Interpretation: The Vienna Convention ‘Code’ as Applied by the World Trade Organization Judiciary*, 20 *Austl. Y.B. Int’l L.* 319, 334–335 (1999).

236. *EC – Hormones*, *supra* n.6, ¶ 165, at n.154.

Among other supplementary means included but not listed in Article 32, the following may be mentioned ... *in dubio mitis* [sic] ... Nevertheless, to the extent that these techniques amount to rules of international law, they would have to be considered as part of the General Rule under Article 31, para. 3 (c).²³⁷

Thus, Villiger first suggests that *in dubio mitius* falls within Article 32, which is a valid point considering the open-ended way that article is drafted by employing the word ‘including’. However, he later on characterizes *in dubio mitius* (and other interpretative maxims) as ‘techniques’, which would suggest a non-binding nature, and concludes that if these techniques amount to ‘rules of international law’, they would fall under Article 31(3)(c) of the VCLT. The present author does not dispute this logic, but considering the analysis and evidence that has been provided in this entire chapter, it seems highly unlikely that *in dubio mitius* could be considered a ‘rule’ under Article 31(3)(c).

Yen is slightly more mercurial, suggesting that ‘[*in dubio mitius* should apply] not as an alternative to the VCLT ... but as a complement to the VCLT interpretation rules’.²³⁸ The problem is that it is not clear whether this is advocating: (i) in favour of an Article 32 VCLT inclusion; (ii) that *in dubio mitius* is considered as part of customary international law, with a different content than the VCLT, which nonetheless works in parallel with it; or (iii) that *in dubio mitius* is a non-binding exo-VCLT technique that nonetheless can be applied by international courts and tribunals to complement the VCLT rules. The first possibility falls into the same category of arguments raised above, for instance, by Villiger, and we shall return to it shortly. The second possibility is more problematic, not because it presupposes that the customary rules of interpretation and the VCLT have a different content,²³⁹ but because, as has been shown above, *in dubio mitius* cannot be considered a primary rule of interpretation under customary international law. The most that could arguably be said under customary law is that the principle is a ‘supplementary means’ of interpretation, but then we are essentially back to the

237. Villiger, *supra* n.3, at 445–446, ¶ 5.

238. Trinh Hai Yen, *The Interpretation of Investment Treaties* 148 (Martinus Nijhoff 2014).

239. However, the present author would argue that this seems highly unlikely because Art. 31(3)(c) requires those rules to be taken into account, and thus the VCLT and customary rules on interpretation would be constantly harmonized. The only possibility would be that the VCLT and customary rules were in a state of direct and ‘genuine’ conflict, a scenario theoretically possible but highly improbable and definitely not applicable in the case of *in dubio mitius*.

first scenario. The third way of understanding Yen's statement should be outright rejected, as it would advocate in favour of a 'technique' that is outside the VCLT regime and customary international law, yet that could somehow be applied and complement them. But if that were so, why would or should it be outside the VCLT or customary rules of interpretation in the first place? From the above it seems that the most logical way to read the above quote is as supporting the inclusion of *in dubio mitius* as a supplementary means of interpretation under Article 32.

It is generally accepted that any application of *in dubio mitius* requires two requirements to be met. First, that there is doubt as to the meaning of the provision being interpreted. This is evident from the name of the principle itself, i.e., '*in dubio*', but it is in any event a given since any process of interpretation is premised on the existence of doubt. The second, and perhaps more important, requirement is that all other methods of interpretation have failed to reveal the intention of the parties.²⁴⁰

It is this second element, so integral to the functioning of the *in dubio mitius* principle, that is actually most problematic. First, as has already been mentioned, factors potentially limiting the application of *in dubio mitius* include not only elements in Article 31 of the VCLT, such as text, object and purpose, and intention of the parties, but also those that are included in Article 32 of the VCLT, such as preparatory work, and perhaps *effet utile*.²⁴¹ Thus, when courts say that all other methods of interpretation have failed, this would mean both Articles 31 and 32 elements. However, there is an inherent paradox in this approach, which is reminiscent of Russell's paradox.²⁴² According to this paradox, a group of elements (for instance a group of numbers) is

240. *Polish Postal Service in Danzig*, *supra* n.61, at 39 ('The rules as to a strict or liberal interpretation of treaty stipulations *can be applied only in cases where ordinary methods of interpretation have failed*') (emphasis added); *River Oder* case, *supra* n.61, at 26 ('it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States'); *Biens italiens en Tunisie* case, *supra* n.10, at 397 ('[t]here is, moreover, no reason to make use of the rules of construction [such as the *in dubio mitius* principle] except in the extreme cases when every other means has failed to establish the intention of the parties'). See also *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, *supra* n.59, at 25; *Naomi Russell* case, *supra* n.10, at 869; *Interpretation of the Air Transport Services Agreement between the United States of America and France*, *supra* n.181, at 58; *Golpira v. Islamic Republic of Iran*, Case No. 211, *supra* n.156, Dissenting Opinion of Judge Shafeiei, at 210.

241. See *supra* sections 12.07[B][1] and 12.07[B][2].

242. Russell's Paradox, also known as Russell's antinomy, is named after Bertrand Russell, the famous mathematician, philosopher and logician.

called a set. If we have a set X that contains all sets that do not contain themselves, then does X contain itself? The problem is that any way we try to answer this we reach a logical *circulus inextricabilis* (vicious circle). For instance, if X does not contain itself then it is a set that does not contain itself and it should contain itself. But if X contains itself then it is a set that contains itself and then it should not contain itself. *Ergo*, we reach a paradox.

In our scenario, this translates to the following situation. If *in dubio mitius* falls under Article 32 of the VCLT, then it can be activated only after Article 32 of the VCLT has failed to reveal the intention of the parties.²⁴³ But if that is the case, then that means that *in dubio mitius* has already been used and failed, because it is part of the supplementary means of Article 32. So how can it reveal the intention of the parties, when it has already been used and failed to do exactly that?

A way around this paradox would be to interpret the ‘when all other methods have failed’ requirement as meaning ‘when all other methods except *in dubio mitius*’. But this would mean that *in dubio mitius* should be the absolutely last of the supplementary means that should ever be considered. So even if we accept that *in dubio mitius* falls under Article 32 of the VCLT, due to its inherent structural fallacies it would be of extremely limited scope verging to nothingness.

[3] In Dubio Mitius as an Interpretative Presumption?

Even if *in dubio mitius* does not have a specific normative value, either as customary international law or as part of the VCLT, could it not at least serve as an interpretative presumption?²⁴⁴ Let us leave aside the fact that any interpretative presumption, in order to be of any merit, would by definition have to enjoy some degree of normativity.²⁴⁵ Even with this caveat, international jurisprudence still seems to be dead set against *in dubio mitius* playing such a role. Not only has the *in dubio mitius* maxim been rejected as an interpretative presumption *eo ipso*,²⁴⁶ but the very idea of existence of interpretative presumptions is also objectionable.²⁴⁷

243. This is because recourse to supplementary means is a method of interpretation.

244. This seems to be suggested in *The Oscar Chinn Case*, Judgment (12 Dec. 1934), PCIJ Series A/B, No. 63, p. 84; *Z. G.m.b.H. v. Deutsche Reichsbahn Gesellschaft*, Germany, Supreme Court of the Reich (in Civil Matters) (26 Feb. 1936), reprinted in 8 Int'l L. Rep. 468, 469.

245. This is because otherwise it would be a non-binding statement.

246. See *Methanex Corporation v. United States of America*, *supra* n.167, at ¶ 105 (‘without any one-sided doctrinal advantage built in to their text to disadvantage procedurally [one of the parties]’). See also *Lac Lanoux Arbitration*, *supra* n.183, at 120; *Iron Rhine arbitration*, *supra*

Authors and judges have succinctly put this issue to rest. Crawford, for one, is of the view that ‘the language of treaties is not subject to any particular presumption but will be read so as to give effect to the object and purpose of the treaty in its context’.²⁴⁸ Boisson de Chazournes, for her part, advocates in favour of the approach that interpretation should be based on an ‘*ex ante* neutral approach’.²⁴⁹ These views are backed up by extensive jurisprudence.²⁵⁰ One need only look back at the analysis in section 12.07[A] on tribunals’ preference for a more balanced approach to interpretation to realize that interpretative presumptions nowadays seem to be more bark than bite.

[4] In Dubio Mitius as Outcome of the Interpretative Process

From the previous analysis it has become quite clear that *in dubio mitius* cannot be considered as a primary rule of interpretation, and that at most it may be considered as a supplementary means of Article 32 of the VCLT. However, even that conclusion runs into some logical contradictions, and it would in any event be of an extremely low probative value and practical use.

But if *in dubio mitius* is of such little use, one may wonder why it continues to appear in decisions of international courts and tribunals. Bearing in mind everything that we have discussed so far, and in particular that there is no automaticity in the application of *in dubio*

n.105, at ¶ 54; *Dispute Regarding Navigational and Related Rights*, *supra* n.183, at ¶ 48; *Murphy Exploration and Production Company International v. The Republic of Ecuador*, *supra* n.169, Expert Opinion of Professor Steven R. Ratner, at ¶ 12.

247. *Affaire de la dette publique ottomane (Bulgarie, Irak, Palestine, Trans-Jordanie, Grèce, Italie et Turquie)* (18 Apr. 1925), 1 UNRIAA 529, 549. *See also ibid.*, p. 556.

248. Crawford, *Sovereignty*, *supra* n.101, at 123.

249. *Garanti Koza LLP v. Turkmenistan*, *supra* n.162, Dissenting Opinion of Laurence Boisson de Chazournes, at ¶ 10 (citing also *Daimler Financial Services AG v. The Argentine Republic*, *supra* n.169, at ¶ 171).

250. *See*, in addition to those cases mentioned in section 12.07[A], the following: *Quasar de Valors et al. v. Russia*, *supra* n.162, at ¶ 55 (‘Article 31 must be considered with caution and discipline lest it become a palimpsest constantly altered by the projections of subjective suppositions’) (emphasis added); *Oil Platforms*, *supra* n.174, Separate Opinion of Judge Higgins, at ¶ 35; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, *supra* n.169, at ¶ 177; *Dispute Regarding Navigational and Related Rights*, *supra* n.183, at ¶ 48; *Joseph Charles Lemire v. Ukraine*, *supra* n.185, at ¶ 66; *Lao People’s Democratic Republic v. Sanum Investments Limited*, *supra* n.183, at ¶ 124.

mitius,²⁵¹ the answer is clear. *In dubio mitius* is nowadays referred to and employed not as a self-standing interpretative principle enjoying a particular normative value. On the contrary, *it has been relegated to describing the interpretative outcome rather than being an integral part of the process that leads to that outcome.*

§12.08 Conclusion

The problem with *in dubio mitius*, as well as with some other interpretative maxims, is ‘not only that occasionally they tend to obscure the intention of the parties instead of clarifying it, but that they also sometimes ‘help to cloak with an appearance of orthodoxy and soundness an unwillingness or inability to inquire, in all requisite detail and with all requisite vigour, into all the material factors pointing to the intention, express or implied, of the parties or the legislator’.²⁵²

This chapter has examined the historical roots of *in dubio mitius*, explaining how the focus of the principle was originally quite different. The progenitors of the principle focused on the protection of the individual, not of the State.

We then examined the international law efforts to identify the rules governing the process of interpretation of treaties. The practical value and normative status of *in dubio mitius* were not only highly controversial, but the principle also never really found its way in any of the main codification efforts. This is not surprising, as the principle suffers from a multitude of illogical and contradictory precepts, as shown in section 12.04, and neither the nature of the treaty nor the type of provision under interpretation could offer any *tabula in naufragio*²⁵³ for the *in dubio mitius* principle.

251. See case-law cited in sections 12.05–12.07. See also *Largueche v. Tangredi Fenu*, Italy, Court of Cassation (16 Dec. 1987), reprinted in 101 Int'l L. Rep. 377, 379; *Filleting within the Gulf of St Lawrence ('La Bretagne') between Canada and France* (17 Jul. 1986), 19 UNRIAA 225, ¶ 30; *Delimitation of Maritime Areas between Canada and France* (10 Jun. 1992), 21 UNRIAA 265, ¶ 86; *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/5, Decision on Jurisdiction (27 Apr. 2006) (Oreamuno Blanco, Cameron, Chabaneix), ¶ 92; *Czech Republic v. European Media Ventures*, England and Wales High Court (5 Dec. 2007), 2007 EWHC 2851.

252. Lauterpacht, *supra* n.29, at 84–85.

253. ‘a plank in a shipwreck’.

Finally, we examined international case-law and determined that, although it has oscillated between acceptance of *in dubio mitius* and its rejection on the basis of other maxims, it seems nowadays to be coming to rest in the position of a ‘balanced/middle ground approach’. This approach, in combination with the relationship of *in dubio mitius* with other maxims and the elements of the VCLT, led us to identify the proper place of *in dubio mitius* in the interpretative process. It is not a primary rule of interpretation either under customary international law or the VCLT. It is not an interpretative presumption either. At most it could be considered a supplementary means under Article 32, although that would require some very specific concessions as to when it is allowed to be activated. Consequently, even in that case it would of an extremely limited scope and value.

From the above, it emerged that *in dubio mitius* is not a self-standing interpretative principle, but rather a mere description of the interpretative outcome.

We started the analysis of this chapter with a look to the past. Coming full circle, what better way to close this chapter than by looking back once again in a hopefully not vain attempt to move forward as to what concerns *in dubio mitius*? In the words that Lauterpacht set down in paper almost seven decades ago:

[i]t appears, therefore, that the time has come to draw the necessary consequences from the inadequacies inherent in the principle of the restrictive interpretation of treaties by virtue of the fact that *it has been paid homage more through its violation rather than its respect*.²⁵⁴

254. Institut de droit international 1950(I), *supra* n.37, at 408–412 (emphasis added).